

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672  
7552 SENATE LABOR & COMMERCE

Senator Jim Duncan  
Alaska State Senate  
Juneau, Alaska

April 2, 1991

Dear Senator Duncan:

As you know, I was Director of Corrections in the Hammond administration when the original prison industries bill was passed. The bill was very carefully devised, and carefully examined by the Legislature.

I am very much concerned about the provision of SB 184 which would delete the "state use" provision. The results would cripple Alaska Correctional Industries seriously. It would hurt more Alaska businesses than it would help and would cause more business dollars to go out of state.

It would deprive the correctional system of one of its most useful means of rehabilitation.

I strongly urge you to delete that last line in the bill, or pull the bill back while you look more carefully at its implications.

I am accustomed to seeing you on the right side of issues where the public interest is concerned, but such would not be the case in this instance, if this bill goes forward.

If you are at all inclined to go along with my request, and would like to discuss it with me before tomorrow's hearing before Labor and Commerce, please call me tonight or in the morning at 586-5793.

Sincerely,

Charles Campbell  
3020 Douglas Highway  
Juneau, Alaska 99801

cc: Senator Drue Pearce

# NFIB Alaska

National Federation of  
Independent Business

POSITION PAPER

OF

NATIONAL FEDERATION OF INDEPENDENT BUSINESS  
NFIB/ALASKA

ON

SB 184

AN ACT RELATING TO CORRECTIONAL INDUSTRIES

State Office  
9159 Skywood Lane  
Juneau, AK 99801  
(907) 789-1278



The Guardian of  
Small Business

## COMMENTS ON SB 184

Chairman, members of the Committee, my name is Resa Jerrel, and I represent the National Federation of Independent Business - NFIB/Alaska.

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. We then share the results of our poll with the legislature and administration. There is not enough space on the annual poll to place every possible issue to our membership. Therefore, we also use the three previous years ballot results as guidance on issues. I have attached a copy of the results of our 1988 and 1991 NFIB/Alaska question regarding unfair competition from state government.

Currently the Department of Corrections, Correctional Industries Program, is in the Agriculture, Butcher, Office Furniture, Office Panels/Systems, Metal Products, Auto Body Repair, Garment Making and Laundry Businesses. This puts them in direct competition with small businesses.

Present law requires State agencies to purchase products and services from the Corrections Industries Program. This bypasses the competitive bidding process. This puts small businesses at a distinct disadvantage if they now do or want to do business with the State.

The prisons have an unfair advantage with a "captive" labor pool, publicly funded buildings, no property taxes or other taxes. Small business owner know that labor cost, building cost, insurance cost, property taxes, inventory taxes and other taxes play major roles in the cost of marketing their product or service.

NFIB/Alaska supports SB 184. It will help prevent the prisons from competing unfairly with small business. It will deny the Correction Industries Program much of the preferential treatment is now receives from state agencies and require them to hold public hearings before expanding its commercial operations.

Stopping the problem with the Prison Industries Program does not eliminate competition from other state or local agencies whose commercial activities range from Printing and Gift Shops to Day Care and Video Outlets -- but it is certainly a giant step in the right direction of protecting small business from the growing invasion of state competition.

Thank you for the opportunity to comment on this very importantly issue. If you have any questions, I will be happy to try and answer them.

The following is the result of the 1988 NFIB/Alaska ballot question regarding unfair competition:

Should legislation be enacted to restrict the commercial activities of government entities so they are not permitted to compete with existing private enterprises?

Yes 78%

No 12%

Undecided 10%

More recently, the following is the result of the 1991 NFIB/A ballot question on this issue:

Should the legislature establish a Private Enterprise Preservation Task force in order to study and recommend legislation to limit competition with private business by state and local government?

Yes 67%

No 23.1%

Undecided 9.9%

# MFIB Alaska NEWS



FOR IMMEDIATE RELEASE:  
March 15, 1991

FFI, CONTACT: Resa Jerrel  
(907) 789-4278

## NFIB LAUDS BILL TO CONFINE PRISON INDUSTRIES

JUNEAU--The head of Alaska's largest small-business advocacy group today urged legislators to "strike a blow against unfair competition from the government" by passing a bill that would severely restrict the state's Correctional Industries Program.

Resa Jerrel, director of the 5,250-member Alaska chapter of the National Federation of Independent Business, said government competition with the private sector is "a red-flag issue for many small-business owners. They deeply resent losing business to commercial government operations that use subsidies provided by their own tax dollars to compete against them."

Jerrel's comments were made in support of SB 184, a bill introduced Monday by Sen. Jim Duncan (D-Juneau). The bill would require the Correctional Industries Commission (CIC) to hold public hearings before expanding its commercial operations and deny the prison industries program much of the preferential treatment it now receives from state agencies.

Current law requires state agencies to buy products and services from the prisons unless the CIC certifies it cannot do so on a commercially competitive basis. Agencies also are required to help the CIC develop new products to meet their future needs. SB 184 would remove these requirements.

Jerrel called the Department of Corrections "a commercial giant," with wide-ranging enterprises. "Currently, the Department of Corrections is in the butcher business, the office furniture business, the agriculture business, the auto body repair business and the laundry business," Jerrel said. "Each of these enterprises puts them in direct competition with small, private firms. Who knows what new business venture they'll launch?"

Jerrel said all taxpayers lose when public agencies sell goods and services readily available from the private sector. Noting that CIC pays no taxes on its sales, inventory or property, Jerrel said taxpayers could reap the dual benefit of higher local tax revenues and lower state government spending by barring government agencies from commercial activities.

"Every tax dollar spent by the government to subsidize unfair competition from the Correctional Industries Program is one less dollar available to the government to provide needed services only it can perform," Jerrel said.

The small-business advocate acknowledged that SB 184 would not eliminate competition from other state and local agencies whose commercial activities range from printing and gift shops to video stores and pharmacies. However, she praised the bill as "a huge step in the right direction."

Small-business owners are increasingly alarmed over the growing roll of state spending in Alaska's economy, Jerrel said. A study by the Institute of Social and Economic Research, a research organization at the University of Alaska, found that state spending accounts for nearly half (46 percent) of all economic activity in Southeast Alaska.

# NFIB Alaska

National Federation of  
Independent Business

March 6, 1991

The Honorable Jim Duncan  
Alaska State Senate  
Pouch 9  
Juneau, Alaska 99811

Dear Senator Duncan:

I have reviewed the latest draft bill relating to the problem with the Correctional Industries Program. The goal was to ensure the Program has no negative impact on private enterprise and in my opinion the bill solves that particular problem. Stopping the problem with the Prison Industries Program does not solve all of the on going State competition. However, this bill certainly is a big step in the right direction of protecting small business from the invasion of state competition. NFIB/Alaska will be supportive of this legislation.


I would encourage you to proceed with the introduction of this legislation. I will alert our members about the bill and issue a press release shortly after a bill number is assigned.

I would like to thank you for allowing your staff the time to meet with myself and others regarding the Correctional Industries Program problem. I also want to thank you for the opportunity to comment on the latest draft.

If you have any questions please do not hesitate to contact me. I look forward to working with you on this issues of importance to the small business members of NFIB/Alaska.

Sincerely,

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

  
Resa Jerrel  
NFIB/Alaska  
State Director



The Guardian of  
Small Business

# NFIB Alaska

National Federation of  
Independent Business

February 13, 1991

The Honorable Jim Duncan  
Alaska State Senate  
Pouch V  
Juneau, Alaska 99811

Dear Senator Duncan:

Thank you for the opportunity to comment on your draft bill proposing changes in the Correctional Industries Program.

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 is the result of the 1988 NFIB/Alaska ballot question regarding unfair competition:

Should legislation be enacted to restrict the commercial activities of government entities so they are not permitted to compete with existing private enterprises?

Yes 78%            No 12%            Undecided 10%

More recently, the following is the result of the 1991 NFIB/Alaska ballot question on this issue:

Should the legislature establish a Private Enterprise Preservation Task force in order to study and recommend legislation to limit competition with private business by state and local government?

Yes 67%            No 23.1%            Undecided 9.9%

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

We commend you for your draft legislation to ensure there will be no negative impact on private enterprise by the Correctional Industries Program. This draft legislation is certainly a step in the right direction. NFIB/Alaska would encourage you to broaden the scope of the legislation. Small businesses in Alaska face competition from state and local government agencies in a wide variety of commercial activities. Many small business such as printing firms, gift shops, videotape outlets, day-care centers, service stations, laboratories, medical care providers, pharmacies, architecture and engineering firms face unfair competition from state and local government.



The Guardian of  
Small Business

Senator Duncan  
February 13, 1991  
Page: 2

Enclosed is a copy of the Model State Unfair Competition Bill  
by the Business Coalition for Fair Competition, Arizona and  
Colorado laws and several articles on the issue.

If you have any questions please do not hesitate to contact  
me. I look forward to working with you on this and other issues  
of importance to the small business members of NFIB/Alaska.

Sincerely,



Resa Jerrel  
NFIB/Alaska  
State Director

Enclosures

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*The*  
MODEL STATE UNFAIR COMPETITION BILL  
*Annotated*

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Published by  
BUSINESS COALITION FOR FAIR COMPETITION

NOTE: The text of the model bill is in **boldface**. Annotations are in standard typeface and follow the sections of the bill they explain.

# **CORRECTION**

**THIS DOCUMENT  
HAS BEEN REPHOTOGRAPHED  
TO ASSURE LEGIBILITY**

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*The*  
MODEL STATE UNFAIR COMPETITION BILL  
*Annotated*

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Published by  
BUSINESS COALITION FOR FAIR COMPETITION

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NOTE: The text of the model bill is in boldface. Annotations are in standard typeface and follow the sections of the bill they explain.

## Foreword

*By Theresa Stanion  
Director of State Activities, BCFC  
(Director, Government Relations  
International Communications Industries Association)*

On behalf of the Business Coalition for Fair Competition, I am pleased to present this annotated version of the BCFC Model State Unfair Competition Bill to assist state legislators, their aides and the general public in improving the environment for private business development. It is our intention that the provisions of the proposed model bill will provide helpful guidelines to government agencies and nonprofit organizations in conducting their activities in harmony and cooperation with the private sector.

We tried to make the model bill as comprehensive as possible and to cover as many problems as our members identified. At the same time, we recognize that individual states will wish to modify the bill to suit their particular situations. Some states, for example, may want to regulate only the activities of government agencies, or universities or nonprofit organizations, or cover particular categories of abuses. Almost certainly, the membership and appointment provisions relating to the Private Enterprise Review Commission will be modified to reflect differing political exigencies in the various states. Also, the language of the bill may need to be modified to conform with state statutes or state constitutional provisions.

BCFC will consider the bill successful to the extent that it furthers the goal of stemming unfair competition. The degree to which we succeed is now largely in the hands of the BCFC membership and those who have been injured by unfair competition. It is up to us, as a coalition, and individually, to bring the bill to the attention of state legislators and local civic and business groups. It is even more important that associations and individual members work with others to draw public attention to the economic consequences of unfair competition and build political consensus for the remedies provided in the bill. The amount of support members generate will largely determine whether unfair competition legislation is enacted.

## MODEL STATE UNFAIR COMPETITION BILL

The model bill was put together by a special working group of the Business Coalition for Fair Competition at its Third Annual Conference in Washington D.C. in March 1990. This Model State Unfair Competition Bill was drafted in response to the requests of our membership and state legislators who have asked for assistance in curbing the commercial activities of government agencies and nonprofit organizations. The draft presented to the working group was based on existing laws and proposed legislation in the states of Arizona, Iowa, Colorado and Georgia. I had the privilege of chairing that group and would like to express my appreciation and thanks to all who participated and contributed their information and ideas.

Special thanks are due to John Venator, Executive Vice President of ABCD: The Microcomputer Industry Association; John Hawks, Director, Industry and Government Relations, National Tour Association; Linda High, Assistant Director, State Legislative Affairs, American Society of Travel Agents; David Wm. West, West and Bliss, P.A.; and Bert Fridlin, State Director, NFIB Georgia, who gave most generously of their time and expertise to advise me and assist in organizing, drafting, and reviewing materials. A special thanks also to Helen Grayson of the International Communications Industries Association (ICIA) staff for her dedicated work in annotating the bill and writing the introduction.

My office at the International Communications Industries Association (ICIA) stands ready to respond to inquiries and to provide additional assistance when needed. Do not hesitate to write us at 3150 Spring Street, Fairfax, VA 22031-2399, or you can reach us by calling 703/273-7200 (Fax: 703/278-8082).

# MODEL STATE UNFAIR COMPETITION BILL

## Introduction

This booklet contains an annotated version of the Model State Unfair Competition Bill, prepared by the Business Coalition for Fair Competition to address the issue of unfair competition. It seeks to inform public debate and to assist state legislators, business representatives and others to enjoin public sector and nonprofit organizations against abuse of their competitive position.

The first objective of the model bill is *prevention*. The bill prohibits all public sector organizations from providing goods and services that can be provided by private business, except as expressly provided in the bill or in other laws. Designed for adoption at the state level, it would also bind all subordinate jurisdictions, including counties, municipalities, and special purpose public districts, authorities and corporations such as school districts and port authorities.

The model bill's second objective is *accountability*. Where tax exempt entities (either government units or nonprofits) engage in activities of a commercial character, they must provide full cost accounting and disclosure, including estimates of tax revenues foregone, to inform public debate and policymaking.

The third objective is *remedy*. The bill creates a Private Enterprise Review Commission with broad powers to regulate all of the commercial activities of government entities and nonprofit organizations, to order them ceased, and, in cases of non-compliance, to go to court to enforce its decisions and take steps to have tax exempt status revoked. However, except for a mandatory, fast-track complaint procedure, intended to relieve small business of undue burden, it does not prescribe specific acts or methods.

This approach is premised on the expectation that most state agencies and nonprofits will voluntarily comply with the law. It also recognizes that states may need to add to or specify powers to make the bill consistent with existing laws and that some states may wish to take more vigorous action than others to root out unfair competition.

## MODEL STATE UNFAIR COMPETITION BILL

### Background

In recent years, there has been sharp growth in commercial competition between nonprofit organizations and private enterprise. Many Americans dismiss government and nonprofit commercial activity as trivial, if not actually beneficial to the general public. Neither is true. The economic cost of this competition is to reduce tax revenues, inhibit business growth, and injure or drive competing private enterprises out of business. In sum, it is "unfair competition." This bill is intended to uphold the public interest by regulating the commercial activities of government units and nonprofits by confining them to legitimate governmental, public service and charitable functions, and prohibiting abuse.

There are several reasons why unfair competition thrives. An important one is the ability to offer below market prices. It is axiomatic that private enterprise prices must reflect the full costs of doing business. These costs include such items as capital expenditures, overhead, and taxes as well as direct costs. By contrast, state and nonprofit organizations often market goods and services on an incremental cost basis -- or less.

Since they are not necessarily motivated by a need to earn profits (and some may even prefer to operate at a loss), public sector enterprises and nonprofits need not allocate the full costs of their commercial activities. The parent organization may simply choose to absorb overhead and capital budget items. As a result, the organization itself may not even know what the true costs of performing a given activity are. In such cases, the implications are clear: costs cannot be used for purposes of internal decision-making, much less communicated to the taxpaying public or charitable donors for approval.

Tax privileged status is another important factor in the ability of public enterprises and nonprofits to price below market. Public sector enterprises are not required to pay taxes. Nonprofits, which enjoy tax exemption for specified purposes, may use this privilege to move into the commercial marketplace by offering prices that reflect a sharply reduced tax liability, if not the full exemption. These tax privileges have the

## MODEL STATE UNFAIR COMPETITION BILL

effect of shifting a portion of the cost burden of the activity to the taxpaying public without informed consent, while eroding the tax base. Again, the extent of revenue foregone is usually unknown, undisclosed for public debate, and not factored into policy decisions.

Not all commercial activities performed by public sector organizations or nonprofits serve the public interest. Using their power to dominate captive markets, such publicly operated enterprises as university sales outlets and prison industries often seek to expand the range of goods and services they offer. This squeezes out or forestalls entry by private sector vendors and can stifle innovations in both marketing and product development.

Nonprofits can use similar advantages -- including a quasi monopoly position in some cases -- to their own benefit in the marketplace. In addition, they frequently can use the advantage of reputation to profitable effect by trading on public assumption of a lofty purpose. This "halo effect" can enable such nonprofits as hospitals to trade on their reputation to earn large profits on related equipment and services (e.g., hearing aids) in direct competition with private enterprise. In some cases, they actually charge the public more than private business for identical products.

Over the years, these anticompetitive practices have adversely affected private enterprise in such diverse fields as communications, computers, computer software and educational technology, pharmaceuticals and medical devices and equipment, day care, physical fitness centers, tourism, and professional services. These businesses are made up predominantly of small, locally based firms who discovered they had little legal protection against unfair competition. In 1983, trade associations representing this membership founded the Business Coalition for Fair Competition (BCFC).

Since its founding, BCFC has worked to educate the public, state legislatures and the Congress about unfair competition and the need for constructive solutions. It has also worked extensively with businesses and legislators around the country on specific unfair competition issues and found a widespread and growing incidence of similar problems. The Coalition proposes the Model State Unfair Competition Bill as a constructive and practical solution.



## MODEL STATE UNFAIR COMPETITION BILL

### Section 1. Legislative Declaration.

The Legislature hereby finds and declares that the growth of private enterprise is essential to the health, welfare and prosperity of the people of the state of \_\_\_\_\_, and that government and public institutions of higher education compete with the private sector when those institutions provide certain goods and services to the public. Recognizing this problem, it is the intent of the Legislature and the purpose of this Act to provide additional economic opportunities to private industry and to regulate competition by government agencies and public institutions of higher education. The legislature intends that, with limited exceptions, if government agencies and public institutions of higher education engage in sales of goods or services at retail, such sales shall not be for less than the costs that would be borne by persons making similar sales in the private sector.

It is the further intent of the Legislature that issues and complaints regarding competition between government, public institutions of higher education, and nonprofit organizations and the private sector be addressed through a Private Enterprise Review Commission, which Commission shall be created in this Act.

The scope of Section 1 is broad. It establishes the intent of the legislature to regulate all of the commercial activities of government and other public sector organizations and identifies the principal means -- the Private Enterprise Review Commission -- by which regulation will be conducted. Its basic purpose is to provide additional opportunities to business as a means of promoting economic development while expanding the tax base. To this end, it sets forth three guiding principles for regulation, as follows: (1) Public and nonprofit organizations are not permitted to engage in commerce in competition with private enterprise. (2) Any exceptions to allow public and nonprofit commercial activity are to be *specified*. (3) Any authorized retail sales of goods or services to the general public by government organizations or universities must be priced to reflect the full costs that would be borne by a private enterprise engaged in similar activity.

In cases of dispute, the burden of proof that any given commercial activity is permitted under the bill is to rest with the public sector or nonprofit entity conducting it. Further, this regulation is to be all-inclusive, covering all types of commercial activity -- existing as well as new -- at all levels of government and by any type of government-operated organization.

## MODEL STATE UNFAIR COMPETITION BILL

### Section 2. Definitions.

As used in this article, unless the context otherwise requires:

(1) "Commercial activity" means performing services or providing goods which can normally be obtained from private enterprise.

This definition recognizes that governments and nonprofits may engage in certain fee-for-service activities as part of their legitimate functions, e.g., public safety, education and transportation, and excludes them from the scope of the bill. For example, governments may operate hospitals, bus services, garbage and waste disposal services, etc. And, as part of their public safety function, police may charge a fee to monitor commercial security devices; public health departments may charge for inspection services, etc., providing commercial competition is not present.

It is important to note that the kinds of services that are "normally" commercially available may vary from state to state or community to community. For example, instituting low cost public trash disposal services in a community where private trash haulers were well established might be unfair competition, while continuing a traditional government service in another community might not be.

(2) "Commission" means the Private Enterprise Review Commission.

This definition both clarifies that it is the Private Enterprise Review Commission, and not some other commission or agency, that has the duties and powers designated in the bill and permits a shorter term to be used.

(3) "Institution of higher education" means a government-supported college, university, or community college.

This clarifies that publicly supported colleges and universities are among the public sector institutions prohibited from engaging in commercially competitive activities.

## MODEL STATE UNFAIR COMPETITION BILL

(4) "Invited guests" means persons who enter onto a campus of an institution of higher education for an educational, research, or public service activity and not primarily to purchase or receive goods and services not related to the educational, research, or public service activity.

This definition is intended to recognize a category of persons who may require limited access to university subsidized products and services while they are on campus for a legitimate academic or other public purpose. Students, faculty and staff would have fuller access to such facilities, while the general public should not be allowed any access, or only incidental purchases of specialty items. Universities could easily control access through coded or photo identification cards.

(5) "Private enterprise" means an individual, firm, partnership, joint venture, corporation, association, or any other legal entity engaging in the manufacturing, processing, sale, offering for sale, rental, leasing, delivery, dispensing, distributing, or advertising of goods or services for profit.

This is a standard definition designed to protect all private sector enterprises, in any form of ownership, engaged in any legal type of commercial activity from public sector competition.

(6) "Public service" means an activity normally and generally associated with colleges and universities and other educational institutions in this state, a purpose or significant result of which is not to engage in competition with private enterprise.

This language is intended to pave the way for the specific exemption from coverage by the bill of public service activities normally carried on by an academic institution in furtherance of its purposes, e.g., textbook sales, sales of student newspapers, provision of food and lodging, etc. to students.

(7) "Government agency" means a department, office, division, authority, Commission, institution, board, or other agency of government, or any other governmental unit existing in the state or any other creation of the state, regardless of whether funds are appropriated to such agency.

## MODEL STATE UNFAIR COMPETITION BILL

Definition 7 broadens the scope of the bill to cover any commercial activity conducted by any type of public agency (board, commission, academic institution, etc.) existing at any level of government (state, county and municipal, etc.).

**(8) "Nonprofit organization" means an organization, other than a government agency, which has been defined as nonprofit under state law.**

This expands the scope of the law to cover not-for-profit institutions that may be privately operated, such as hospitals, schools and charities.

**(9) "Student" is a person seeking a degree or a certificate from an institution of higher education.**

The purpose of this limitation is to restrict the numbers of people with full access to school bookstores, student housing, food services and other publicly subsidized price benefits intended to facilitate attendance at school.

**(10) "Uniform accounting standards" means an accounting method which allows government agencies and institutions of higher education to identify the true and total cost of supplying goods and services in the same manner as private enterprise would identify true and total costs, including, but not limited to, the following:**

- (a) Labor expenses, including direct wage and salary costs, training costs, overtime, and supervisory overhead;**
- (b) Total employee fringe benefits and other personnel expenses;**
- (c) Operating costs including vehicle maintenance and repair, marketing, advertising and other sales expenses, office expenses, billing, and insurance expenses;**
- (d) Real estate and equipment costs, debt service costs and a proportionate amount of other agency overhead and capital expenses including vehicle depreciation and depreciation of other fixed assets such as buildings and equipment;**
- (e) Contract management costs;**
- (f) The imputed tax impact of the activity if such entity were required to pay federal, state and local taxes; and**
- (g) Any other cost particular to the business or industry supplying the goods or services.**

## MODEL STATE UNFAIR COMPETITION BILL

The purpose of Definition 10 and its subsections is to ensure that the pricing policies of public sector agencies and academic institutions include all of the costs that a private enterprise would bear if engaged in the commercial activity. It is intended to preclude pricing based on less than inventory cost, only on inventory cost, or on inventory cost plus minimal markup (e.g., the wages of the salesperson or other clearly identifiable marginal costs). Subsections define the most common costs the bill requires public agencies to include in their cost calculations. Also covered are costs that may be related to a specific type of activity but which are not enumerated in the bill.

The labor definition requires that both direct and indirect labor costs be allocated proportionately between the commercially competitive activity (e.g., university sales of sweatshirts) and other activities. For example, it is not enough simply to add the wages of persons directly engaged in sweatshirt sales to the cost of the sweatshirts, but the wages of supervisors, laborers engaged in unloading or stocking goods, and university officials who may authorize purchases, make payment or oversee the finances of the operation, and any others whose activities facilitate the sales must be properly allocated to the activity.

In addition, fringe benefits (e.g., employer share of FICA, health insurance, etc.) for all of the employees designated under the preceding labor definition must also be allocated to the commercially competitive activity. The agency or institution may not "pick up" the cost of such benefits without allocating them.

Similarly, the cost of any property or service used to facilitate commercially competitive retail sales must be properly allocated to it. This includes the full actual costs of publicly owned or leased vehicles, buildings and equipment, as determined in accordance with standard accounting practices with respect to capitalization, depreciation, expensing, commercial rates of interest, etc. When retail operations are conducted under contract, the public agency or school must allocate the full cost of contract administration to such operations. If actual costs are not incurred or accurate cost records maintained, it may be necessary to construct them.

## MODEL STATE UNFAIR COMPETITION BILL

Finally, and most important, is the requirement that Federal, state and local taxes must be imputed to the cost of any commercially competitive operation conducted by a public sector agency or university. The object is to require an increase in prices by the amount that would be needed to cover taxes if they were applicable.

In cases of challenge, this requirement that taxes be imputed would also carry the benefit of informing policymakers and the public about the extent of revenues foregone. While at the national level, there are procedures to ensure that legislative and executive branch decisionmakers have information on the costs of tax benefits, they are less common at the state level. Public awareness about the tax consequences of exemption is generally low.

**(11) "Competitive impact statement" means a cost analysis using uniform accounting standards accepted by private enterprise to determine the total cost of the commercial activity. The cost analysis shall include a comparison of the impact of the commercial activity on state and local tax revenues. The private enterprise cost figures in the cost analysis shall be determined by obtaining one or more bids for performing or providing the commercial activity.**

The purpose of the competitive impact statement is to provide a standard by which the commercial activity of a public sector enterprise or university can be judged. Essentially, it is to consist of the sum of all the public sector commercial activity's direct and indirect costs (including those enumerated in Subsection 10, above), compared with those solicited from private industry. The solicitation process has a second purpose, namely, to establish whether the goods or services in question can feasibly be provided by the private sector.

## MODEL STATE UNFAIR COMPETITION BILL

### Section 3. Government Competition with Private Enterprise Prohibited -- Exceptions.

(1) It is the general policy of the state of \_\_\_\_\_ that a government agency shall not start or carry on any commercial activity to provide goods or services for its own use, the use of other government agencies, or for public use if such goods or services can be procured from private enterprise through ordinary business channels.

This section sets state policy with respect to three important issues. First, it declares a general prohibition against the conduct of all commercial activities by public sector organizations when private sector supply is adequate. Second, it clarifies that this prohibition encompasses both new and existing activities. Third, it emphasizes that the prohibition is not conditioned according to who the end user or ultimate beneficiary is -- whether the general public, a sister public agency or the supplying agency itself.

(2) A government agency, unless expressly and specifically authorized by law, shall not engage in any commercial activity including, but not limited to, the manufacturing, processing, managing, sale, offering for sale, rental, leasing, delivering, dispensing, distributing, or advertising, in whole or in part, of any goods or services to or for other government agencies or the public which are also offered by private enterprise.

This paragraph establishes the actual prohibition against public sector commercial activity and enumerates the kinds of commercial activity that are prohibited or regulated by the bill. It is clearly intended to encompass the entire production and marketing chain, and in this enumeration, it comports directly with the definition of activities reserved to the private sector in Section 2 (5). It also mentions the first of the limited number of *specified* exceptions to the general prohibition on government commercial activity set forth in Paragraph 1, above, by exempting from coverage any such activity that is specifically authorized by law.

(3) A government agency is authorized to perform or provide a commercial activity when:

(a) The activity is specifically authorized by statute; or

(b) No private enterprise source is capable of providing the needed goods or services. In any such case, the efforts made to solicit such sources shall be documented to the Commission and made available to the public upon request; or

## MODEL STATE UNFAIR COMPETITION BILL

- (c) Use of a private enterprise source would cause unacceptable delay or disruption of an essential program. In any such case, a written explanation submitted to the Commission and approved by the agency head shall show the specific impact on the agency program in terms of cost and performance. Urgency alone shall not be an adequate reason for in-house operation of a commercial activity. Temporary disruption resulting from conversion to contract shall not be a sufficient reason for such operation of a commercial activity. If such commercial activity has ever been performed by contract, an explanation of how the present circumstances differ shall be documented. These decisions and documents shall be made available to the public upon request; or
- (d) The activity is inherently related to the state's defense; or
- (e) The agency can provide or is providing goods or services to government agencies or institutions of higher education on a continuing basis at a lower total cost than if such goods or services were obtained from private enterprise as determined by cost comparisons as outlined in the competitive impact statement relating to the specific good or service.

This paragraph provides all of the *specific* exceptions to the general prohibition against commercial activity by the public sector contained in Paragraph 2, above, and establishes certain specific conditions required for these exceptions, e.g., documentation and procedural requirements. These requirements place the burden of proof on the public sector organization seeking to conduct a commercial activity that it meets the conditions of the exception provided, and generally requires public disclosure of the supporting documentation.

There are only five *specified* exceptions. The first is for those commercial activities specifically authorized to a public sector organization in a law or ordinance. This recognizes the authority of the state or lower government unit to make specific exceptions or to supersede the provisions of the general prohibition of public sector production, supply or procurement of goods and services as matters of public policy. In such cases, the law making process itself should shed sufficient light on proposals to permit informed decision about the public interest.

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The second *specified* exception would permit public sector organizations to produce and supply goods and services that are not available from private sector sources, if it can be documented that efforts were made to solicit bids and failed. The public sector organization is required to furnish the proof in such cases and make its documentation available for public review upon request. This is intended to prevent public sector organizations from merely assuming that comparable supply is not available or conducting solicitations in such a way as to be prejudicial against commercial supply.

The third *specified* exception is to allow a compelling public interest to override the general prohibition, subject to authorization by the Private Enterprise Review Commission and provided the need is appropriately documented. Examples might include continuation of a public sector activity to meet a court-imposed deadline or statutory mandate, or for temporary relief pending full commercialization or privatization or resolution of difficulties in contracting. The two key points are that it is the Commission, not the agency, which will adjudicate the validity of the claim and that delay alone is not deemed to be sufficient cause for authorization.

The fourth *specified* exception recognizes the duty of the state to protect its citizens as an overriding function of government. It exempts such activities as police protection, firefighting and national guard from the coverage of the law. The intent is to allow government to determine how it may best perform these responsibilities and not constrain the public safety agencies in the efficient performance of their duties. At the same time, there is nothing in the bill that would preclude privatization of certain activities, e.g., prison construction and management or specialized firefighting services if a jurisdiction should choose to procure them from private enterprise.

The final *specified* exception is for lower cost. When, after full costing, public agencies find and can document that they can produce goods or services at lower cost than the private sector, they may supply their own needs and those of other agencies and academic institutions. They may not, however, sell to the general public.

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(4) If a government agency is authorized by law to engage in a commercial activity, the government agency shall set a fee or charge a price for that activity which shall include the true and total cost related to engaging in the activity by such government agency, including, but not limited to:

- (a) The fair market value of the activity, and
- (b) The direct and indirect costs incurred in engaging in the activity determined by utilization of uniform accounting standards.

This section requires that any goods or services allowed by law to be provided by government to the public shall be priced fairly, i.e., in accordance with commercial practice, based on full costs. The costs to be reflected should include all true material, labor and overhead costs, including financing. When the costs are mixed, they should be allocated appropriately. The final price cannot be lower than that charged by the private sector for the same goods or services taking into account both quantity and quality.

(5) If a government agency continues to engage in a commercial activity or proposes to begin engaging in a commercial activity, the government agency shall:

- (a) Prepare a competitive impact statement to be submitted to the Commission, and
- (b) Prepare a detailed request for proposal which will be widely disseminated within segments of private enterprise which normally engage in the commercial activity in order to obtain firm bids or proposals for the activity requested. A reasonable time frame approved by the Commission shall be given to private enterprise to submit bids or proposals, including time to obtain firm supply commitments. Bids received from the request for proposal shall be used in the preparation of the competitive impact statement.

This paragraph requires that governmental units receive authorization from the Private Enterprise Review Commission for all commercial activities, whether new or existing. In both cases, they must supply the Commission with a competitive impact statement, as defined in Section 2 (11), that shows all costs. They must also solicit bids from the private sector to supply the goods or services in question and show results in the impact statement.

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(6) Government agencies shall adopt and implement procedures to monitor government agency compliance with this chapter.

Government agencies are required to develop internal procedures to assure compliance with the provisions of the bill. The purpose, over time, is to provide for self-policing and to lighten the burden on the Private Enterprise Review Commission.

(7) Institutions of higher education shall not, unless specifically authorized by statute:

(a) Engage in commercial activities for students, faculty, staff, and invited guests, or the general public that can be procured from private enterprise through ordinary business channels, unless, as determined by the Commission, the commercial activity:

(i) Necessitates the participation of students as a required part of an educational program in order to obtain a degree or certificate; or

(ii) Is a recognized and integral part of a teaching, educational, or research program leading to a degree or certificate; or

(iii) Consists of on-campus activities including:

(I) Food service; or

(II) Student housing; or

(III) Sponsoring cultural, and athletic events; or

(IV) Providing facilities for recreation to students, faculty and staff; or

(V) Sales of course books and course related supplies, excluding electronic equipment or devices and peripherals and software; or

(VI) Sale of a limited and reasonable quantity of personal items bearing the institution's insignia, which shall be incidental to the sales of textbooks and other items permitted in Item V, above.

(b) Enter competitive bidding for a commercial activity rendering any goods or services unless, as determined by the Commission, the activity is performed by students and is a recognized and integral part of a teaching, educational, or research program leading to a degree or certificate from the institution of higher

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education rendering the goods or services. Any such bid shall fairly and fully include all direct and indirect costs utilizing uniform accounting standards unless the funding source provides for or requires all bidders to use a specific procedure or formula for allocating costs; or

(c) Engage in commercial activities for or through another government agency including an intergovernmental agency agreement; or

(d) Provide for the disposal by sale of services, products, and by-products which are part of research or instruction conducted by students and faculty of the institution of higher education and leading to a student degree or certificate unless the sale is an integral part of the particular research project or instructional program or there is no other practical way of disposing of the services, products, or by-products as determined by the Commission, and if the services, products, or by-products are sold at their market value utilizing uniform accounting standards.

(8) In determining whether the provision of a good or service is directly related to teaching, educational or research programs leading to a degree or certificate, the following criteria shall be considered:

(a) Whether the provision of the good or service is necessary for the student to pursue a degree or certificate or for faculty or staff to engage in research or teaching;

(b) Whether the good or service is a specialty good or service not generally available to the public;

(c) Whether the price charged for the good or service reflects the direct and indirect costs and overhead costs of providing such good or service and the price in the private marketplace;

(d) Whether measures have been taken to ensure that the provision of goods or services pursuant to this subsection is only for students, faculty or staff and not the general public.

Paragraphs 7 and 8 subject public universities and community colleges and agencies under their control to the provisions of the bill. They also recognize the special character and needs of academic and research institutions as contributory to the larger public interest in providing for the basic physical, recreational and educational needs of students pursuing degrees. In recognition of these special needs, a limited number of exceptions are *specified*.

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The exceptions permit the schools to carry on such normal campus based activities as student food, housing and recreational services, sponsorship of athletic and cultural events, and sales of textbooks, academic supplies and specialty items, provided they ensure that any subsidized sales are confined to students, faculty, and staff. It is important to note that university retail outlets are authorized to sell only those categories of items *specified*. No others, e.g., computers and software, small refrigerators, non-specialty apparel, furniture, etc. may be sold, whether or not at full cost pricing.

Any other commercial type activities on the part of a publicly supported school or university (e.g., operation of a dairy or a guest house) must meet the criteria set forth in the Paragraph 8. The underlying concept of this paragraph is that universities and their contractors should not be permitted to use the advantages of a captive clientele, low wage work force, exemption from tax liability, and idle or underutilized capacity in publicly funded buildings, laboratories, equipment and administrative services to the detriment of tax-paying private enterprise and the public at large. Nothing in these paragraphs would preclude public service activities of universities in providing non-commercial or reduced rate services to those in need.

The tests and criteria provided in Paragraph 8 are intended to assist the schools and the Private Enterprise Review Commission to determine when and under what conditions a commercial type activity, that would otherwise be prohibited, may be authorized by the Commission when it is part of a degree or certificate program. (This paragraph does not apply to the usual on-campus student needs and services described in Paragraph 7 (a) (III).

The bill lists four criteria for purposes of guidance. Not all will necessarily apply in each case. The first, however, is clearly mandatory: all commercial activities must meet the test of being an integral part of a degree or certificate program. Following that, they will be increasingly acceptable to the extent that they do not offer goods or services in adequate supply from private business, that prices reflect market value based on full costing, and that sales are restricted to the university community.

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### Section 4. Nonprofit Competition with Private Enterprise Prohibited -- Exceptions.

(1) It is the general policy of the state of \_\_\_\_\_ that a nonprofit organization as defined in Section 1 of this title, shall not start or carry on any commercial activity in competition with for-profit businesses in the state unless the commercial activity of the nonprofit organization pays all the taxes and fees that are applicable to a corresponding for-profit business.

(2) A nonprofit organization is authorized to perform or provide a commercial activity when:

(a) The activity is specifically authorized by statute; or

(b) The activity is not regularly carried on; or

(c) No private enterprise source is capable of providing the needed goods or services and the Commission has determined that it is in the public interest for the nonprofit to provide such goods or services. In any such case, the efforts made to solicit such sources shall be documented to the Commission and made available to the public upon request.

(3) If a nonprofit organization is authorized by law to engage in a commercial activity, the nonprofit shall set a fee or charge a price for that activity which shall include the true and total cost related to engaging in the activity by such nonprofit organization, including, but not limited to:

(a) The fair market value of the activity, and

(b) The direct and indirect costs incurred in engaging in the activity determined by utilization of uniform accounting standards.

(4) If a nonprofit organization continues to engage in a commercial activity or proposes to begin engaging in a commercial activity, the nonprofit organization shall:

(a) Prepare a competitive impact statement to be submitted to the Commission, and

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(b) Prepare a detailed request for proposal which will be widely disseminated within segments of private enterprise which normally engage in the commercial activity in order to obtain firm bids or proposals for the activity requested. A reasonable time frame approved by the Commission shall be given to private enterprise to submit bids or proposals, including time to obtain financial supply commitments. Bids received from the request for proposal shall be used in the preparation of the competitive impact statement.

(5) Nonprofit organizations which engage in commercial activities shall adopt and implement procedures to monitor their compliance with this chapter.

Section 4 subjects nonprofits and agencies or subsidiaries under their control to the provisions of the bill. Although it does not directly prohibit commercial activity by nonprofits, it limits such activity to four *specific* cases. These are activities specifically authorized in law, those found by the Private Enterprise Review Commission to be directly related to the organization's exempt purpose (e.g., fundraising items); activities not regularly carried on (e.g., disposal of unneeded items); and those found by the Commission either to be in the public interest or not available from private sources. Any commercial sales must reflect full cost pricing. In the case of nonprofits, it is clearly the intent of the bill that such full costs shall include any applicable taxes.

To qualify for an exception to the full costing rule, certain tests, conditions and procedures are also *specified*. In the main, these tests and procedures are similar to those applicable to government agencies and the burden of proof of compliance is with the nonprofit. The nonprofit must analyze costs and benefits through a comparative impact statement, solicit bids to show whether the goods are available from the private sector, etc. Again, like universities and public agencies, nonprofits conducting commercial type activities are subject to regulation by the Private Enterprise Review Commission to ensure compliance with the law.

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### Section 5. Private Enterprise Review Commission -- Members, Terms, Duties.

- (1) There is created the Private Enterprise Review Commission for the purpose of reviewing and making determinations concerning state statutes, state regulations, and practices of state agencies, institutions of higher education or nonprofit organizations relating to activities being or proposed to be engaged in by government agencies, institutions of higher education or nonprofit organizations which may be affected by this Act and to enforce the provisions of this Act against violations.
- (2) The Commission shall determine final uniform accounting standards to be used for cost analysis in this Act in at least as strict a form as the definition of uniform accounting standards in this Act.
- (3) The Commission shall develop procedures to:
  - (a) Regulate competition by government agencies and ensure compliance with this Act;
  - (b) Regulate competition by institutions of higher education and the use of facilities of institutions of higher education by students, faculty, staff, invited guests, and the general public and ensure compliance with this Act; provided that the Commission shall develop, after consultation with governing boards of institutions of higher education and recognized small business organizations, guidelines for the provision of goods and services to students, faculty, and staff of institutions of higher education and to the invited guests of such students, faculty, and staff;
  - (c) Regulate competition by nonprofit organizations and ensure compliance with this Act;
  - (d) Promptly hear and resolve complaints lodged under this section.
- (4) The Commission shall report its activities, determinations, and any proposed legislation to the Governor and members of the Legislature not later than December first of each year.
- (5) The Commission shall consist of nine members including:
  - (a) Six members from private enterprise who are owners or officers of small businesses; the Governor, Speaker of the House and President of the Senate shall each appoint two members; and
  - (b) One member who shall be a chief executive or administrative officer of a government agency, who shall be appointed by the Governor; and
  - (c) One member who shall be appointed from an institution of higher education by the State Board of Regents; and

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(d) One member from the State Legislature who shall be appointed by the Speaker of the House.

(e) The chairperson of the Commission shall be appointed by the Governor from the members representing private enterprise.

(6) All initial appointments to the Commission shall be made by no later than \_\_\_\_\_, 1990. Terms of office for all members of the Commission shall be two years and members may be reappointed up to an additional four terms. Each member who is a state agency employee shall remain on the Commission until the end of his term of office, but only so long as he remains a state agency employee. A vacancy on the Commission shall be filled within 60 days of the date the vacancy occurred in the same manner as the original appointment. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall hold office for the remainder of such term. Each member shall continue in office until his successor is appointed and qualified.

(7) Five members of the Commission shall constitute a quorum. No action shall be taken by the Commission without the concurrence of at least three members.

(8) The Commission shall adopt, and may amend or rescind, such internal management rules, subject to the \_\_\_\_\_ Administrative Procedure Act, as are necessary to govern its proceedings. Members of the Commission shall serve without compensation but shall receive the same reimbursement for actual travel expenses and per diem for official Commission meetings as members of the Legislature receive for legislative interim committees.

(9) Any person who believes that a government agency, institution of higher education or nonprofit organization has violated any provision of this Act may file a written complaint with the Commission stating the grounds for such complaint. Upon receipt of such complaint:

(a) The Commission shall immediately transmit a copy of such complaint to the head of the government agency, institution of higher education or nonprofit organization which is the subject of the alleged violation;

(b) The head of the government agency, institution of higher education or nonprofit organization named in the complaint shall respond to the Commission in writing within 30 days after receipt of a complaint. The government agency, institution of higher education or nonprofit organization shall either admit or deny the allegations made in the complaint and it shall indicate whether remedial action will be taken;

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(c) Within 30 days after receipt of the institution's response, the Commission shall hold a public hearing on the complaint where all parties are afforded an opportunity to present evidence unless the remedial action agreed to be taken by the government agency, institution of higher education or nonprofit organization is acceptable to the complainant and the Commission. The Commission shall determine whether the government agency, institution of higher education or nonprofit organization is authorized to engage in the commercial activity or is in violation of the provisions of this chapter.

(i) If a government agency or institution of higher education is found to be in violation of this Act, the Commission shall take the necessary steps to terminate the commercial activity and require, if appropriate, the government agency or institution of higher education to implement a contract with the private sector for such activity;

(ii) If a nonprofit organization is found to be in violation of this Act, such organization will be required to terminate the activity; in the case where such organization continues to engage in the commercial activity, the Commission shall take the necessary steps to seek the revocation of the tax exempt status of such organization;

(iii) Notwithstanding the above, any nonprofit organization found to be in violation of this Act shall be ineligible to participate in government contracts.

(d) Within 30 days after the public hearing, the Commission shall issue a report of its findings to the complainant and the government agency, institution of higher education or nonprofit organization.

(e) If the government agency or institution of higher education or nonprofit organization's commercial activity is to be terminated, the action shall take place within three months of the Commission's report or under a schedule set by the Commission.

Section 5 contains the bill's regulatory and procedural provisions. Based on an intent to create a special instrumentality whose sole concern is the issue of unfair competition, it establishes a Private Enterprise Review Commission. It vests the Commission with broad regulatory authority, including powers to initiate review, take action in response to complaints, hold hearings, make findings, and impose remedies. The Commission is to submit an annual report to the Governor describing its activities, determinations and legislative proposals.

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Also, the Commission is to consist primarily of appointed business members with special expertise on the subject and a stake in the outcome of deliberations rather than a civil service office in the state's executive or judiciary branch. The fundamental principle of this formulation is that only a special body will provide the expertise and devote the attention needed to implement the law fully. Adding implementation of this bill to the burden of an existing commission with other responsibilities would be a substantially less effective way to attack the problems.

Since small business is the segment most directly at risk from nonprofit competition, six of the nine members of the Commission are to represent small business and the Governor is to appoint the chairman from this group. To ensure broad representation, appointment power is diversified, so that the Governor has responsibility for appointing two of the business members and the presiding officers of the state assembly and senate may appoint two each. Of the remaining three, the Governor may appoint the head of a state agency to represent official interests. The State Board of Regents may appoint a member to represent higher education interests. The final member is to be a legislator appointed by the Speaker of the Assembly to provide guidance on matters of legislative intent and concern and to act as a conduit between the Commission and legislature. The business members are to serve without compensation for two-year terms.

The powers of the Commission are extensive: It may establish and revise internal procedures, receive complaints, hold hearings, and order government agencies and publicly supported universities and colleges to desist from commercially competitive activities and, if appropriate, to implement contracts with a private sector enterprise to supply the goods or services at issue. In the case of nonprofits, it may also order an activity to be terminated and, in cases of violation, may seek revocation of the tax exempt status of the organization.

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In addition, the section sets forth procedure to be followed in complaint cases. The object is to ensure prompt resolution and prevent administrative delay by imposing a tight timetable for notification, response and hearings. The Commission, on receipt of a written complaint is to "immediately" transmit a copy to the relevant agency, publicly supported institution or nonprofit. That organization must respond to the Commission within 30 days. Unless the organization admits fault and undertakes remedial action, the Commission must institute hearings at which all parties may present evidence. After hearings are held, the Commission must decide the case and report to the Governor within 30 days.

### Section 6. Cease and Desist Orders.

If the government agency, institution of higher education or nonprofit organization fails to comply with the Commission's order, the Commission may file action in \_\_\_\_\_ Court of the state of \_\_\_\_\_ to restrain and enjoin the government agency, institution of higher education or nonprofit organization from engaging in the activity.

### Section 7. Civil Right of Action.

A private enterprise that suffers economic loss as a result of a government agency, institution of higher education or a nonprofit organization violating this Act may bring a civil action in the superior court where the private enterprise is located for appropriate injunctive relief or damages, or both. Any damages awarded in a cause of action brought pursuant to this Act shall be assessed against the specific government agency, institution of higher education and specifically assessed against its budget, or nonprofit organization which violated this Act. A private enterprise shall not have standing to seek injunctive relief or damages or to challenge violations of this Act in the courts of this State until the private enterprise has first made a complaint to the Commission and has received the decision of the Commission.

Sections 6 and 7 contain additional enforcement measures. They provide a basis for court action in cases of violation of the legislation. First, the Commission is empowered to go to court in cases of non-compliance to seek injunctions, including "cease and desist" orders to enforce its decisions. Second, private enterprises who have incurred economic loss from the commercial activity of public or nonprofit organizations in violation of this legislation are assured the right to file civil suit to obtain remedy, both in the form of monetary damages and injunction.

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### Section 8. Support Staff.

The Department of \_\_\_\_\_ is the designated government agency to provide staff support to the Commission. The state auditor shall provide performance audit and cost analysis to the Commission. The Commission may also utilize the State Legislative Research Office.

### Section 9. Appropriation.

The sum of \$ \_\_\_\_\_ is appropriated for the work of the Commission.

Sections 8 and 9 are additional implementation sections of the bill. To avoid costly duplication of public services and provide needed support staff, as well as the benefit of independent judgment and expertise, Section 8 makes provision for the Commission to obtain such services from designated state offices. The most important of these -- and clearly provided for in the bill -- is access to the services and views of the state auditor general for determinations concerning the application of accounting principles and other matters relating to full costing. Section 9 provides for appropriations but does not designate a sum, in light of state to state variations as to case load, time of adoption and other factors.

### Section 10. Severability.

If any clause, sentence, paragraph or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence or paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered; and any contract valid under and satisfying the remaining clauses, sentences, paragraphs, or parts of this Act shall be valid and enforceable in the courts of this State.

### Section 11. Effective Date.

This law shall become effective on \_\_\_\_\_.

### Section 12. Integration with Other Law.

All laws and parts of laws in conflict with this Act are repealed.

These sections are standard. They provide for insertion of the date on which the law will become effective, its integration with existing law and the continued validity of all provisions of the bill that are not specifically held invalid by a competent court.

# Government Competition with Private Enterprise in the States

By  
The National Federation of Independent Business

**P**rivate enterprise, particularly small business, has long been concerned with the encroachment of government into areas of commercial and industrial activity which, under a free enterprise environment, are assumed to lie within the purview of the private sector.

Although virtually all goods and services required by government are available from the private sector, state governments increasingly compete with private firms in a broad range of commercial and industrial pursuits. Most of these goods and services can be produced more efficiently in the private sector.

The National Federation of Independent Business (NFIB) seeks the adoption of legislation in the states prohibiting state agencies from offering goods and services to the public when such goods and services are also offered by private enterprise, unless clearly and specifically authorized by law (certain agencies, of course, might be exempt). Public colleges and universities should be covered by the legislation, with clear guidelines outlining the public service mission of a public university in terms of education and research, as opposed to other

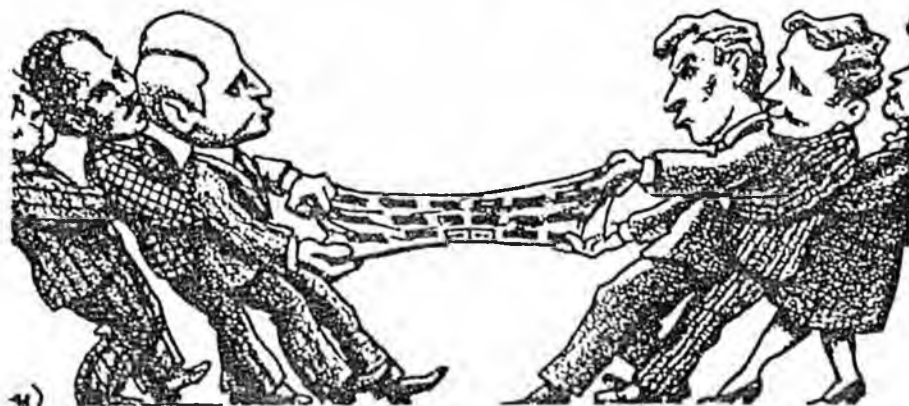
university activities (e.g. the operation of department stores) which go beyond the bounds of public service.

## The Intellectual Foundation of Privatization

A solid intellectual foundation has been laid in opposition to government competition with private enterprise in the literature of what has come to be known as privatization of the public sector (or sometimes referred to as "contracting out"). Both phrases connote the private production of public services which heretofore had been produced by governmental entities.

Two books on the subject, *Better*

*Government at Half the Price: Private Production of Public Services* and *Privatizing the Public Sector: How to Shrink Government*, have aroused considerable attention and debate.<sup>1</sup> Both works decry the enormous growth of government and governmental inefficiencies and outline strategies for reducing government growth and increasing the role of the private sector in the provision of public goods and services. Generally speaking, the authors seek to promote the privatization of the public sector through such avenues as: 1) government withdrawal in certain service areas and a return to voluntary action or reliance on private market activities; 2) contracting out public services to



the private sector and the use of vouchers in the place of direct government services; 3) greater use of user fees; and 4) a breakup of public monopolies and an introduction of competition in the provision of public services.

The Local Government Center of the Reason Foundation of Santa Barbara, California is one of the leading proponents of privatization in the United States.<sup>2</sup> Its monthly newsletter, entitled "Fiscal Watchdog," has provided numerous examples of privatization in action, including stories on contracting out for police and fire protection, garbage collection and sewage disposal. It also monitors the more exotic forms of privatization, such as the privatization of public streets. A 1982 paper issued by the Foundation ("Promoting Privatization") is a useful document for those interested in the concept.

Another organization heavily involved in the push for privatization is the Institute for Private Sector Public Services.<sup>3</sup> Through its newsletter, "PS/PS", the Institute provides valuable information on government efforts to improve efficiency and reduce costs through contracting with private enterprise for the delivery of public services.

The Local Government Center of the Taxpayers' Foundation has produced a massive report which can serve as a handbook for state and local officials who wish to pursue the privatization concept in their respective states and local communities.<sup>4</sup>

The Urban Institute has produced two useful studies on the subject that deserve attention as well: "Private Provision of Public Services: An Overview" (1978) and "Alternative Service Delivery Approaches Involving Increased Use of the Private Sector."<sup>5</sup>

Finally, for those who wish to examine the case *against* privatization and contracting out, journalist John D. Hanrahan's 1977 monograph should be consulted.<sup>6</sup> Hanrahan's work, published by the American Federation of State, County and Municipal Employees (AFSCME) labels contracting out a new form of political patronage which has become "a major source of government corruption, financial waste and inefficiency." The book consists primarily of a compilation of incidents relating to political corruption, bribery and

kickbacks involving government contracts.

## Government Studies Detail the Extent of Government Competition With Private Enterprise

There is no question that government competes with the private sector on a vast scale. A recent study by the General Accounting Office (GAO) indicates that "an estimated 400,000 Federal employees are currently operating over 11,000 commercial or industrial activities at an estimated cost approaching \$19 billion annually."<sup>7</sup> In other words, nearly one of every four employees of the Executive Branch civilian work force is currently engaged in activities which are clearly not of a policy, decision making or managerial nature—in direct competition with employees performing essentially the same activities in the private, for-profit sector. The GAO study points out, for example, that cost comparisons recently completed by the Department of Defense "show that more than half of its commercial activities could be obtained more economically by contract."<sup>8</sup>

The growth of state and local government, fueled in large part by federal grants and revenue sharing, is a matter of great concern to small business, for this growth is accompanied by a concomitant increase in government competition. During the period 1953-1970, state and local government employment grew from 8.6% to 14% of total non-farm payrolls. While much of the increase can be attributed to education employment, non-educational state and local government employment also grew much faster than similar employment in the private sector—a 79% rate for government as compared to a 33% private sector rate.<sup>9</sup> Clearly state and local government competition with small business is on the rise.

So dramatic is the problem that a recent task force of the U.S. Small Business Administration (SBA) concluded that "the preference for the private sector, which is so consistent with our national history and practice, has suffered so much decline for no satisfactory reason."<sup>10</sup> The SBA has estimated that if seven types of goods and services now costing the

federal government \$19 billion were contracted out to the private sector, a savings of \$3 billion could be realized.

The need for greater use of the private sector in producing public services was further bolstered during congressional hearings conducted in 1981 by the Subcommittee on Advocacy and the Future of Small Business of the U.S. Senate Committee on Small Business. The Committee report consists of 564 pages of testimony, detailing case after case of unwise and inefficient government competition with private enterprise.<sup>11</sup>

## The Federal Response to the Problem of Government Competition

In 1952, President Eisenhower championed the principle of government reliance on the for-profit private sector for goods and services needed by the government, the basic message being that no Federal project would be undertaken by government employees which the private, for-profit sector could effect. Formal adoption of the principle as Federal policy was achieved in the Bureau of the Budget (BOB) Bulletin No. 55-4, issued in January 1955, which included the following statement:

It is the general policy of the Administration that the Federal Government will not start or carry on any commercial activity to provide a service or produce for its own use if such produce or service can be procured from private enterprise through ordinary business channels.<sup>12</sup>

BOB Bulletin No. 55-4 is remarkable in its categorical commitment to reliance on private enterprise. In fact, the Bulletin went on to state that cost comparisons were not to be a factor except in such instances where a product or service could not be purchased on a competitive basis or at a reasonable price. What is most interesting are the three reasons cited for discounting consideration of government vs. private sector costs. First, government costs are by nature not comparable with business costs since, for example, the government pays no taxes. Secondly, government bookkeeping procedures are different from business accounting practices, making comparisons difficult and mis-

leading. Most important, justification of commercial activity on the part of government on a cost basis "runs counter to the concept that *Government ordinarily has no right to compete in a private enterprise economy.*"<sup>13</sup>

From this clear, simple statement of distinction between the proper role of the government (to govern) vis-a-vis the proper role of private enterprise (to conduct business), the Executive branch has modified by gradual stages over the ensuing years its policy of absolute reliance on the private, for-profit sector for goods and services required by the Federal government, ultimately reaching the point where, in 1979, the revision of the Office of Management and Budget (OMB) Circular A-76—the centerpiece of procurement policy—included language that clearly gave precedence to cost-effectiveness over reliance on the private sector, and further, negated any distinction between private, for-profit businesses and non-profit entities in terms of preference in awarding Federal contracts.

Despite these changes, the essential policy remains that the government should not compete with its citizens.

## Examples of Government Competition at the State Level

Certain examples of state government competition with the private sector result from conscious and deliberate decisions by the legislative or executive branches of state government. In these cases the state has decided that it is in the public interest to provide taxpayers with subsidized services (assisting the unemployed in locating jobs) or that the investment necessary to provide an adequate level of service is too large for the private sector to bear alone (state parks, for example).

In other cases there has probably been a rather unconscious encroachment of the public sector upon the private.

Regardless of the nature of the decisions leading to government competition with private enterprise, however, it is time for state governments to begin to review the division of responsibility between the public and private sector. Only after such a care-

ful review can the states and their localities make rational decisions about service areas which should be relinquished to the private sector. Listed below are some of the major areas of state and local government competition which legislators might consider in their deliberations on this issue.

- State parks, campgrounds, marinas, amusement facilities
- Prison industries
- Unemployment and job services
- Day care centers
- University research and laboratory work
- Optometric and hearing aid services
- Audio-visual products and services
- Automatic data processing
- Printing, binding and reproduction
- Public works construction
- Maintenance of equipment
- Security services
- Health services
- Janitorial and laundry services
- Surveying, architectural and engineering services
- Transportation
- University book and department stores
- Insurance and bonding
- Lodging facilities
- Legal services
- Speech and language pathology services
- Alcohol and drug treatment
- Publications

This is not an exhaustive list, of course, but it does tend to put the government competition question into somewhat better perspective.

## Government Competition Legislation at the State Level: The Arizona Model

Arizona became the first state in the nation to address the government competition issue through comprehensive legislation with the passage of House Bill 2148 in 1981. This legislation, codified as Chapter 321, prohibits state agencies from offering to the public goods and services which are also offered by private enterprise, unless clearly authorized by law (exempted are state parks, prisons, the office of Tourism, *Arizona Highways* Magazine, the Department of Public Safety, colleges and universities, agency printing and information disbursement, and the construction, maintenance and operation of state transportation facilities).

The law does, however, prohibit colleges and universities from competing with private enterprise unless such competition offers "a valuable educational or research experience for students as a part of their education or fulfills the public service mission..." of the school (exempted from this provision are the Arizona Health Services Center, free medical services or equipment to indigents and public service radio and television stations).

The Arizona legislation also established a Private Enterprise Review Commission to examine existing statutes and state agency regulations and practices which may be affected by the new legislation, as well as the costs of authorized programs to determine if it would be in the public interest to contract these out to the private sector.

Other major provisions of the Arizona law include: 1) a prohibition against any activity by the Department of Economic Security (job service) not prescribed by federal law, including the advertising of specific job openings; 2) a requirement that governmental entities charge sales taxes on goods sold; 3) exemption of all university-required textbooks from the sales tax; 4) performance of force account work by regular employees; and 5) elimination of statutory language which limited certain government contracts to nonprofit organizations only.

## Status of Government Competition Legislation in the States

Although Arizona is the only state to have adopted comprehensive government competition legislation, six other states have considered significant legislation in this area (Hawaii, Kentucky, Ohio, Oregon, Washington, and Wisconsin). Georgia and Indiana have proposed the creation of interim legislative study commissions to explore the problems posed by government competition and make recommendations to the legislature.

## Conclusion

The National Federation of Independent Business (NFIB) bases its support for government competition legislation on two fundamental be-

liefs: 1) contracting out is simply a good business practice, since it affords the most effective and efficient method of providing state government needed goods and services; and 2) the government's legitimate sphere of operation is to govern, not to engage or commercial or industrial enterprise. State government should not compete with its citizens through in-house production of any goods and services which are readily available at reasonable prices in the for-profit private sector.



NFIB's concern over the issue of contracting out versus in-house production does not arise solely from abstract philosophical considerations, but from personal experience as well. NFIB members can cite case after case of unfair competition by state government agencies, resulting in large part from the lack of a sound, consistent and fully implemented policy for procuring public sector goods and services from the private sector.

In the debate over government competition, the question of cost comparisons between in-house production and contracting out inevitably arises. Certainly, state government desires to obtain its goods and services at reasonable prices—the taxpayers should demand no less. It is important to keep in mind, however, that government production costs and private sector production costs are not strictly comparable. For example, state governments do not have to bear the tax, licensing and regulatory burden imposed on the private sector. Also to be taken into account is the fact that many public employee pension plans are not fully

funded, and thus represent a future tax liability often not taken into account in private sector-public sector cost comparisons. Finally, it can also be argued that justification of commercial activity on the part of government on a cost basis "runs counter to the concept that the Government ordinarily has no right to compete in a private enterprise economy."<sup>14</sup>

Another issue which must be confronted in the competition debate is the question of the potential for fraud and abuse within the procurement process. This certainly is not an issue which suddenly burst upon the scene with the advent of government competition legislation. Still, there is no doubt that unscrupulous practices in government procurement have existed in the past and continue to exist. Corruption in government procurement is not a valid argument for limiting contracting out: instead a more sensible approach is open, competitive bidding on government contracts. After all, corruption can only exist if unethical public employees are able to connive with unethical business persons. As Bennett and Johnson have pointed out, it is the job of the *public* employee to monitor the procurement process and draw a distinction between legitimate and illegitimate contracts.

Clearly, the private sector could not waste money on useless contracts if the contracts were not given by bureaucrats in the first place. It is not the private firm that solicits contract proposals; it is the bureaucrat. It is not the private firm that reviews contract proposals; it is the bureaucrat. It is not the private firm that awards the contract; it is the bureaucrat. It is not the private firm that monitors the work performed once a contract is awarded; it is the bureaucrat. The message cannot be overemphasized: *the source of contract waste is the public sector, not the private sector.*<sup>15</sup>

NFIB believes that government competition with private enterprise engenders serious concern about the proper role and function of government in a free enterprise economy, and that reliance on the for-profit private sector for the provision of public goods and services makes good sense—both philosophically and economically.

In-house production of goods and services translates into lost income for small business. Lost income means lost tax revenues for state gov-

ernment, both from business itself and from the employees the business would have hired to perform the additional work generated by government contracts.

Further, reliance on the private sector would result in significant cost savings to state governments, based on the inescapable conclusion that the private sector is significantly more efficient in delivering needed goods and services than is the public sector.

## ENDNOTES

1. See James T. Bennett and Manuel H. Johnson, *Better Government at Half the Price: Private Production of Public Services* (Ottawa, IL: Caroline House Publishers, Inc., 1981) and E.S. Savas, *How to Shrink Government: Privatizing the Public Sector* (Chatham, NJ: Chatham House Publishers, Inc., 1982).

2. For further information on the privatization activities of the Reason Foundation contact: The Reason Foundation, 1018 Garden Street, Santa Barbara, California 93101.

3. For further information on the privatization activities of the Institute contact: Institute for Private Sector Public Services, P.O. Box 464, Grants Pass, Oregon 97526.

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6. John D. Hanrahan, *Government for Sale: Contracting Out the New Patronage* (Washington: American Federation of State, County and Municipal Employees, 1977).

7. U.S. General Accounting Office, *Civil Servants and Contract Employees: Who Should Do What for the Federal Government?* FPC D-81-43 (Washington: Comptroller General of the United States, June 19, 1981), p. 15.

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10. U.S. Small Business Administration, *Government Competition: A Threat to Small Business* (Washington: U.S. Government Printing Office, 1980), p. ix.

11. U.S. Senate Committee on Small Business, *Government Competition With Small Business* (Washington: U.S. Government Printing Office, 1981).

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# Association TRENDS

THE NATIONAL WEEKLY NEWSPAPER FOR ASSOCIATION EXECUTIVES AND SUPPLIERS — ESTABLISHED 1972 — PUBLISHED EVERY FRIDAY — \$2 PER COPY

## BCFC proposes model bill

### 31 assns committed to eliminating unfair non-profit competition

Claiming rapid growth and expansion of commercial activities by nonprofits and government agencies, the Business Coalition for Fair Competition, a group of 31 small business assns, has published a model bill prohibiting commercial activities that compete unfairly with small businesses.

The purpose of the bill, according to Theresa Stanion, director of state activities for the Coalition, is to promote the growth of private enterprise and provide helpful guidelines to government agencies and nonprofits in conducting their activities in cooperation with the private sector. "Our expectation is that this model bill will not only be of direct assistance to state legislators and small business people who have requested help from the Coalition, but that the model bill will open up public debate on this issue. Informed public understanding is essential to solving the problem and getting legislation passed."

People don't realize that there is a price to be paid when government agencies and nonprofits, which are tax-exempt, compete with private business. This commercial activity erodes the tax base, costs jobs and stifles business and innovation," Stanion said.

The proposed legislation would prohibit government agencies, publicly supported institutions of higher learning and nonprofits from providing the goods or services that can be obtained from private enterprise, except as expressly authorized by law. Proposals for exemptions must be justified through an economic impact statement showing full costs, including tax revenues foregone. The bill also creates a private enterprise review committee with broad powers to investigate practices, make findings and enforce compliance.

BCFC expects to support introduction of this model bill in several states in the upcoming legislative session, according to James Lovell, chairman of BCFC.

Members of the coalition include: ABCD: the Microcomputer Industry Assn, American Assn of Nurserymen, American Bus Assn, American Consulting Engineers Assn, American Council of Independent Laboratories, American Orthotic & Prosthetic Assn, American Society of Travel Agents, American Veterinary Medical Assn, Assn of Data Processing Service Organizations, Assn of Indoor Recreational Facilities of VA, Assn of Physical Fitness Centers, Assn of Telemessaging Services Int, Business & Assns for a Strong Economy, Health Industry Distributors Assn, Intl Communications Industries Assn, IRSA - Assn of Quality Clubs, Multi-Housing Laundry Assn, Natl Assn of Chain Drug Stores, Natl Assn of Medical Equipment Suppliers, Natl Assn of Retail Druggists, Natl Federation of Independent Business, Natl Hearing Aid Society, Natl Office Products Assn, Natl Small Business United, Natl Tour Assn, Professional Services Council, Small Business Legislative Council, Specialty Advertising Assn, Textile Rental Service Assn, United Bus Owners Assn, US Chamber of Commerce.

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America's  
Small Business  
Magazine

March  
April  
1991

**IB OWNERS ARE BEING SQUEEZED BY  
GOVERNMENT-SPONSORED COMPETITION**

# Government INC.

By Hazel Bradford

**I**magine what it would be like to run your business with next to nothing in overhead expenses, pay your workers 15 cents to \$1.30 per hour *tops* (no benefits) and have first refusal rights — no bidding necessary — on all federal contracts.

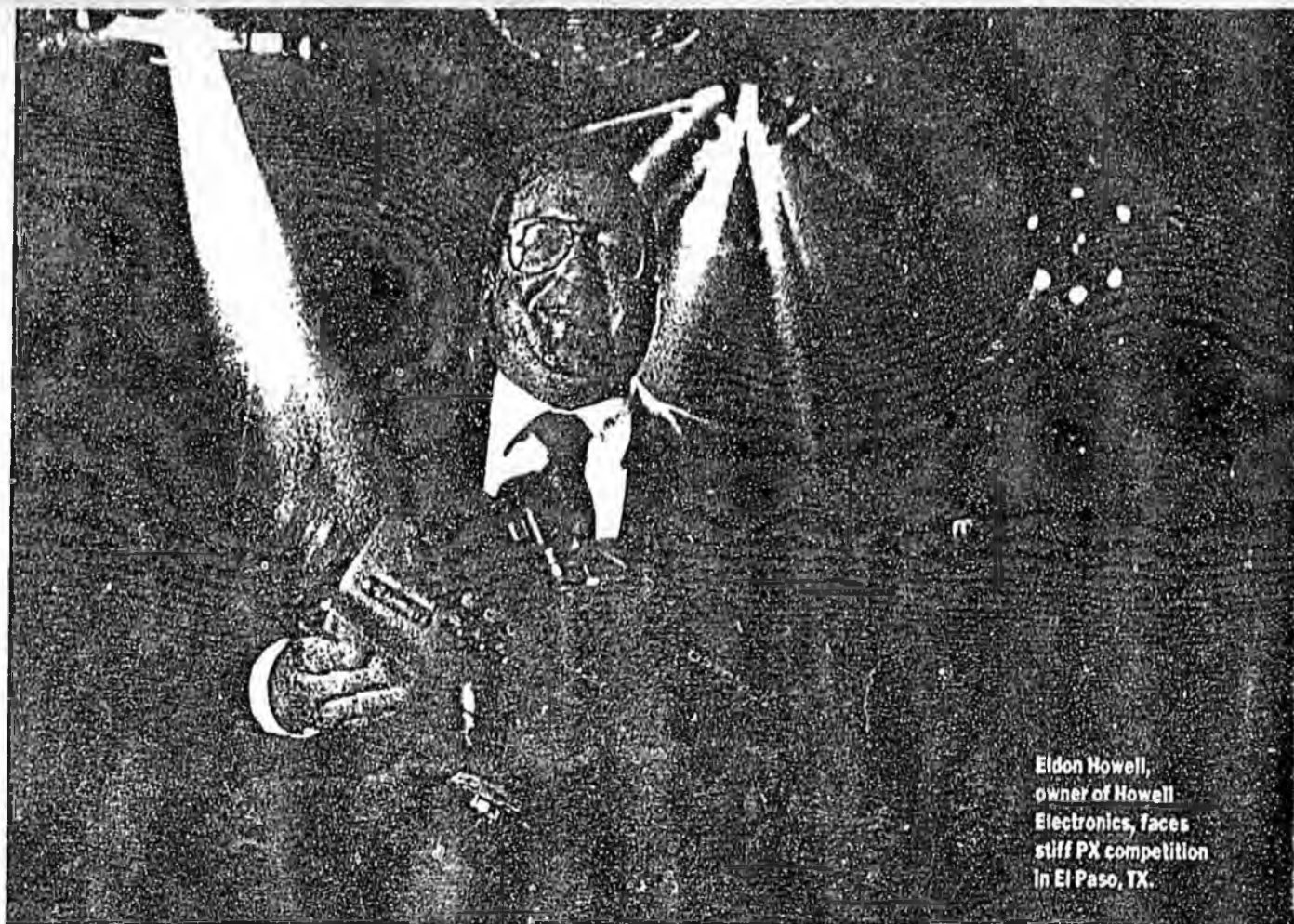
OSHA and EPA rules? Forget 'em. They don't apply to you. Nor does your biggest customer require that you meet any particular quality standards or delivery deadlines. You pay no taxes and can borrow money at below market rates to expand your facilities. Oh yes — and your business is supported by tax dollars too.

Sound good? Now consider what it would be like to face such a business as a competitor. Increasing numbers of small businesses are up against just such competition from Federal Prison Industries, Inc. (FPI), also known as Unicor. The Justice Department runs this government-owned corporation with the goal of putting prisoners to work. An honorable goal, sure. But hard to swallow if you're the one forced to compete with a "captive" labor force.

IB owners coast to coast have lost sales or been driven under by FPI. Others are digging in to fight. Thomas Raftery, owner of Thomas W. Raftery, Inc., a Hartford, CT, drapery maker, is a fighter. He is taking on Federal Prison Industries, which now makes some 250 different products in 72 factories but has made its largest inroads in draperies and furniture, where there is strong government demand.

Although Congress specifically mandates that Uncle Sam buy its drapes from small companies, FPI has grabbed 38 percent of government sales, says Raftery. "We appreciate that (prisoners) have to do something, but here's the government competing against me for business set aside by Congress for small companies," Raftery says. Similar complaints are lodged by the furniture, footwear and apparel industries.

Raftery's company has lost millions of dollars and has eliminated numerous jobs largely due to FPI competition, he says. He has put off retirement and worries about his remaining employees.



Eldon Howell,  
owner of Howell  
Electronics, faces  
stiff PX competition  
in El Paso, TX.

FPI assistant director Rick Seiter disagrees with Raftery's market share figure, estimating it at half that amount. Seiter says that Federal Prison Industries routinely grants waivers to let contracts go to the private sector. A new policy also requires FPI to conduct market studies before starting new product lines, Seiter says.

Congress last fall ordered FPI to launch a nine-month study on market impact, industry by industry, and to assess FPI's operating rules overall. The critics are waiting. "We have high hopes for this market survey," says Larry Allen, executive director of the Coalition for Government Procurement. "Nobody wants to see them put out of business. We just want them to stop putting us out of business."

Members of the National Federation of Independent Business (NFIB) continue to have "huge problems" with government competition, says Leslie Aubin, who tracks this issue for NFIB. Aubin says that NFIB hopes to leverage the FPI market study, due later this year, into new Congressional hearings and eventual limits on FPI activity.

But FPI also has strong supporters, for one compelling reason. "Work is the most critical program we have in managing overcrowded prisons," says Seiter. Plus it saves taxpayers' money. In fact, Seiter argues, FPI puts money *into* the community. FPI estimates that for every \$1 in sales it makes, 78

cents goes directly back into the private sector for supplies, services and equipment, while another 21 cents goes to civilian and inmate wages. The remaining one-cent profit is spent on construction, which enriches private contractors and saves taxes.

FPI officials insist they play fair. According to the Federal Procurement Center, FPI's annual sales of \$350 million represent a tiny amount of competition to small business which collectively sells \$45 billion in goods and services to the federal government. "It's such a little drop, and there are a lot of elsewhere for them to go," says Seiter.

That's probably little solace to employees of companies like Plastoid Corp. of Hamburg, NJ, which closed its doors last year. In a letter signed by 20 Plastoid employees with service ranging from four to 44 years, workers blamed FPI for ultimately forcing the company over the edge.

What's more, says Bingham Kennedy, an attorney who represents small businesses in unfair competition cases, "FPI's dramatic growth of recent years is expected to continue, partly because the number of inmates is expected to increase sharply." FPI already employs over 13,000 inmates, says Kennedy, of the firm Wickwire, Gavin in Vienna, VA.

IB owners claim that FPI's sales force uses pressure tactics to get contracts even when prices are higher. According to Kennedy, even though FPI often waives its

exclusive right to federal business, "in some cases its prices still exceed commercial prices by a wide margin. For example, a contractor who provides draperies to the Navy in Norfolk, VA, for \$18 per pair was forced out by FPI, which offered the same item for \$26.

"Similarly," notes Kennedy, "FPI has ignored congressional direction not to pursue service contracts (such as printing)...FPI not only profits from printing contracts directly, it also is using them as justification for entry into related fields such as envelope manufacturing."

Well, at least prisoners are learning a trade to use later, right? Not so, says Kennedy. "A recent survey by a furniture industry trade association indicated that very few released federal convicts had found employment in that industry despite FPI's extensive activity in the field. Curiously, FPI itself has no figures concerning the employment of its alumni upon graduation."

And if federal prisons aren't competition enough, most state prison industries are also mandated to be the first supplier for state-supported agencies. A few states also allow prisons to be low cost competitors in the private sector as well.

#### **MILITARY RETAILERS**

Government competes unfairly with small business in other ways as well, the military post exchange (PX) being perhaps the

most visible example. PXs function like in-house department stores for military personnel — active, reserve and retired — and their dependents. They charge no sales tax and buy their goods in huge quantities at equally huge discounts.

In the past, PXs mainly sold small items like toiletries and underwear. Now their shelves bristle with such items as stereos and computers. A retail "chain" serving five million military personnel *plus* dependents has tremendous buying power and does serious damage to private enterprise, argues Eldon Howell, president of Howell Electronics in El Paso, TX. Howell's store has suffered since the local base PX in El Paso started offering stereo equipment.

By far the largest PX network is the Army & Air Force Exchange Service (AAFES), which in fiscal 1989 had more than \$6.8 billion in sales, 79 percent of that in retail merchandise. Bill Philbin, president of Carthage Auto Parts, Inc. in Carthage, NY, knows all too well how AAFES has grown. Philbin expanded the business he and his brother own to handle military customers. But the Fort Drum PX cut a separate deal for auto parts with Philbin's own distributor which now runs an outlet on base. The distributor was apologetic, claiming it was a "central office" decision. "It's just not right," says Philbin.

PXs must seek Congressional approval to expand their product lines, but it is basically a pro forma exercise. "The concept of the PX should be to provide basic necessities to people who don't make a lot of money. They keep raising the thresholds way too high," complains Howell.

PXs are non-appropriated programs, meaning that they are not at the mercy of Capitol Hill budget politics. In fact, the tighter budget climate makes the PX system all the more attractive to lawmakers because PXs pay their own way, including civilian salaries and new facilities. Proponents argue that PXs actually save taxpayers money by paying for military social services such as child care centers. "We're under great pressure to reduce the Pentagon budget, and PXs do a tremendous amount of offsetting taxpayer liability," says Steve Rosetti, aide to the House Armed Services panel which oversees PXs.

Meanwhile, IB owners shoulder the burden. Virginia Baker and her husband own a small TV and appliance store in Homestead, FL, that was in business long before the nearby Air Force base started selling televisions. When the PX geared up to push TV sales last year, it hurt. When they started offering free delivery, "it got really bad," says Baker. To add insult to injury, customers now bring PX-purchased sets to the Bakers for repairs.

At the state and local government level, matters are just as bad. States now compete

in everything from liquor stores to recreational facilities.

#### HIGHER EDUCATION INC.

Like prisons and the military, universities enjoy special status and can sometimes be formidable competition to IB owners.

On Maryland's Eastern Shore, for example, some members of the Wicomico County Motel, Hotel Association are trying to convince state officials to curb such activity. These local businesses have watched their catering sales erode ever since nearby Salisbury State University started using its food service and dorm facilities for catering and rooming operations a few years ago. Local restaurateurs complain that the operations, which are unrelated to the school's curriculum, now make the university one of the region's largest "high-end" caterers.

The issue is sensitive because local merchants appreciate the cultural and economic benefits of having the university around. "It's a great school," says Alex Bubas, whose company A&S Food Service has three local restaurant and catering facilities, and whose son attends the college. "We support them with donations and our tax dollars every day. But we feel that they have been rather zealous in their efforts to get business."

Bubas and his colleagues argue that the school should not be in the food business at all because the state Board of Regents has issued guidelines — albeit vague ones — that

are supposed to limit universities' commercial ventures that aren't curriculum-related.

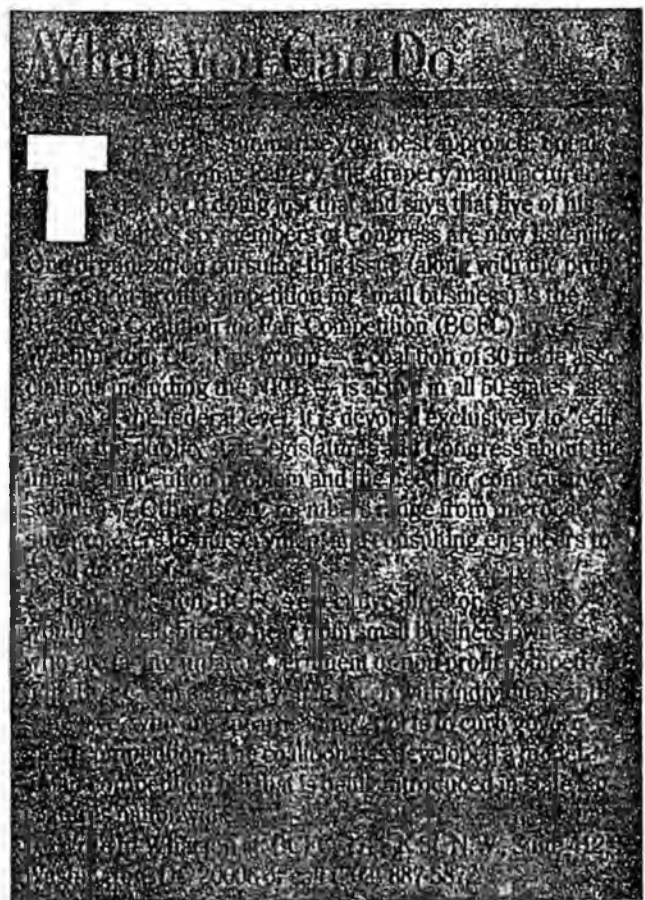
"It's not sour grapes, and we're not trying to deprive them of anything they are entitled to," says Bubas. "We're just trying to get them to follow the guidelines."

An informal survey by the Maryland Hotel and Motel Association found other state chapters, including those in Georgia and Michigan, waging similar battles. Some states have responded. Iowa's Board of Regents, for example, says that its educational institutions "shall not engage in competition with private enterprise." In Arkansas, local businesses "reminded" colleges they were using tax dollars and came up with a policy that state-supported schools could not solicit business if a private operation was available. Small business lobbying in Arizona and North Carolina led to legislation too.

In this age of tight budgets and growing prison populations, the arguments for curbing government competition to small business appear to be falling on deaf ears. Lawmakers have so far shown little appetite for the issue. "Small business has made its case," says one Capitol Hill aide. "But the Congressional leadership just doesn't seem to be spurred by it."

Looks like a kick with some sharper spurs may be needed. **IB**

*Hazel Bradford, a Washington, DC-based freelance writer, is a frequent contributor to IB.*



DUNCAN

**Wetlands issue — All Wet**

Once again we see the overkill mentality of one of our bureaucracies in action ... *the monkey-wrenching of the Lemon Creek middle school project*. Calling the land proposed for the new school "wetlands" is akin to saying Mount Juneau is a swamp. When the Feds came out with their "no-net-loss" of wetlands for the entire U.S. of A., few people understood the deep ramifications that policy would have on Alaska. For instance, certain grasses that grow in typical wetlands such as the Mendenhall flats, help classify those lands as wetlands. If they are found to be growing in a muskeg on a hillside, the government can use that information to classify the land a "wetland" and ... *voila!* No development, period. Using this formula, you can kiss off virtually any project you'd like to see built in the future.

You know, we as a nation are determined, it seems, *to regulate ourselves into a complete standstill*. We are racing towards becoming a third world power by making it so damn difficult to accomplish anything in the name of protecting the environment. We need to take a good look at the direction we've taken in recent years. If you don't believe it, just ask someone who has dealt with getting a development permitted by all the governmental agencies that are involved. I seriously doubt if any developer would be able to build a Golden Gate Bridge in today's atmosphere of governmental regulation.

**Prison Industries**

Current Alaska law requires all state agencies to purchase products and services from the Department of Correction's *Correction Industries Program (CIP)*, bypassing the competitive bidding process. The program is presently involved in the agricultural, butchering, office furniture, office panel systems, metal products, auto body repair, garment making and laundry business fields. We who are involved in small private businesses are feeling increasingly more threatened by this unfair direct governmental competition. In the first place, the prison's CIP *uses publicly funded buildings and facilities with no property or other taxes*. The CIP doesn't have to concern itself with high labor costs (they have a "captive" labor pool), insurance costs, inventory taxes or marketing programs. As stated earlier, state law requires *all state agencies to purchase their products or services*. Such a deal.

Senator Duncan has introduced SB184 that will deny the CIP much of the preferential treatment it's been enjoying from the state agencies and will also require the Correctional Industries Commission to hold public hearings before expanding its commercial operations. I would ask that those of you who have concerns about this

current CIP law, let your legislators know. I wrote to Senator Hudson and to Representatives Ulmer and Hudson about my concerns and support for SB184 ... *won't you?* We who are in small business in Alaska find it hard enough without *our own tax dollars competing against us*.

Now to bitch about something without offering an alternative isn't old Rip's style. (You probably were waiting for that one weren't you?) *I believe vocational training to be necessary for the prison system*. If we can train someone in prison to be a competent worker in some field for when he or she gets back out in society, great. I understand and endorse this concept and I don't fault those within the system who are charged with implementing it. I think the fault lies in the *level* of production the CIP is involved in. Rather than say, manufacturing furniture and then retailing it directly to a customer, why not act like a true manufacturer in the real marketplace? That is, why not make the product available at wholesale prices to the retailer already in business? That way the CIP accomplishes its goals of training inmates for a career and local businesses don't have to deal with unfair state-sponsored competition. It's not an original idea, but one I subscribe to.

**Star Bug**

If you have a bug on page 25 of your last week's *Info* (March 16-22 issue), come into Commercial Art and collect your gift certificates. If you are a winner, come into Commercial Art in the Emporium Mall and pick up gift certificates for the following prizes: A free burger, pasta or chicken dinner at Mike's, a 12 pack of Pepsi from Alpac Corp., a free pass to one of Gross-Alaska theaters, one complimentary breakfast from the Fiddlehead, two free movie rentals from "On the Go Video," a cap with the famous Red Dog logo on it from the Red Dog Saloon, a dish of ice cream at the Cookhouse, a free AA, C, D or 9V battery a month for a year from Radio Shack - Vintage Park and a free small container of Jerry's Crab Dip from Jerry's Meats In Shop 'n Kart. Last week our lucky winner was Fayma Robinson.

Well gang, that's about it for this week ... except we at *Info-Juno* and *Commercial Art* would like to welcome home Lance Corporal Matt Cole fresh from the Persian Gulf. We bet your folks, Debi and George Cole, are darn happy to have you back. Thanks for a job well done.





# Aftermath

*Twisters' victims sort through wreckage*

See page 11

## SPORTS

Arriola, Klein win  
inaugural race

See page 6

# Native leader dies

*Chief Isaac dead at 93*

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# Ketchikan Daily News

Vol. 56 No. 070, (UPS 293-940), 12 Pages

Ketchikan, Alaska, Monday, March 25, 1991

50 Cents

# They don't make license plates

By JUNE ALLEN  
For the Daily News

In spite of widely held beliefs, prison inmates in Alaska's correctional institutions don't make vehicle license plates. That particular manufacturing enterprise is jobbed out through a vendor in Anchorage and the plates made by private enterprise in Oregon.

But what some of Alaska's prison inmates really do, through the Department of Corrections (DOC) Alaska Correctional Industries (ACI) program, is work in one of the program's eight commercial operations throughout the state.

Those operations include a commercial laundry, a metals plant, a farm

*But Alaska inmates make many other products  
- to the dismay of some in private enterprise*

and greenhouse venture, an auto-body repair shop, a meat and sausage company, a garment-linens shop and two furniture plants, one of which is gearing up to manufacture office systems furniture.

Reaching \$2 million

The employment of inmates is escalating as the operations grow. Their annual revenue sales are reaching the

\$2 million mark.

Therein lies the rub. Private enterprise in some of those business lines in Alaska are beginning to complain. The 5,250-member Alaska chapter of the National Federation of Independent Business (NFIB), through its Juneau office, is urging legislators to "strike a blow against unfair competition from the government" by passing a bill that would restrict the state's Correctional

Industries program.

Senate Bill 184 was introduced March 11 by state Sen. Jim Duncan of Juneau. It would require the Correctional Industries Commission to hold public hearings before expanding any of its commercial operations, and deny the prison industries program some of what the NFIB calls "preferential treatment now received from state agencies."

A red-flag issue

Resa Jerrel, director of the Alaska NFIB chapter, says government competition in the private sector is a "red-flag issue for many small business owners. They deeply resent losing business to commercial government operations that use subsidies provided by their own tax dollars to compete against them."

An ACI report to the Legislature

dated March 15, 1991, confirms that the products and services produced by Alaska Correctional Industries are available to departments and divisions of local, state and federal government; school districts; non-profit organizations, and approved designated wholesalers.

The prison laundry in Juneau, for example, does work for the state ferry system, the Lemon Creek jail, the Johnson Youth facility, the Juneau Recovery Unit and the Shrine of St. Teresa.

The Cleary Decision

Corrections' involvement in these commercial industries is in part due to

See 'Inmates at work,' page 2

# Industries span state system

Operations of the Alaska Correctional Industries Program, information provided by Alaska Correctional Industries, (ACI) are:

## Lemon Creek Correctional Center

The Juneau commercial laundry operation works for the Alaska Marine Highway System, the Lemon Creek facility, the Johnson Youth facilities, the Juneau Recovery Unit and the Shrine of St. Teresa.

Approximately 97 percent of this operation's receipts are from the ferry system, which formerly had its laundry done in Seattle or Prince Rupert.

Total FY90 gross sales were \$270,531, up from 89's \$243,789.

There are two production managers and 29 inmate staff.

## Wildwood Correctional Center

The Wildwood Kenai Fabrication Plant came on line in 1986 and had its first large production order in 1987, turning out metal cell furniture for the new Spring Creek Correctional Center at Seward. Originally to be placed with a firm in California, the order was diverted to Kenai.

Steel was bought from local vendors, the finished product was trucked to the site by local vendors, and the local economy reaped an additional \$150,000 of purchases that would otherwise have gone to California businesses. In 1990 the shop produced \$60,000 in fish incubator (Kotoi) boxes for the Department of Fish & Game, which in previous years had been awarded to out-of-state vendors.

The shop attained \$145,677 in gross sales in 1990, the F&G order bringing its total far above the 1989 \$68,536 figure.

The Wildwood Kenai Furniture Plant began limited operations in 1986 and came fully on line in 1987, with sales to State of Alaska agencies successful. There are no wholesale sales to the private sector, but several inquiries from private vendors have sparked an analysis of the possibility of this development.

The plant's standard line includes institutional couches, chairs and end tables, data tables, conference tables, dorm furniture and bookcases. In 1991 the center received approval to develop a line of office papers systems furniture. The original oak furniture endeavor will be transferred to the new furniture facility in Seward.

Gross sales for FY90: \$455,319; \$343,636 expended, with 73.5 percent of total expenditures through Alaska vendors. Staffing includes one production manager and 34 inmate staff.

## Seward Furniture Plant

The Seward Furniture Plant became operational in FY91. It will manufacture the program's line of oak furniture previously produced at the Kenai plant. It has two production managers and an inmate staff of 24.

## Palmer Correctional Center

The Palmer farm operation was instituted in 1984 and additional acreage has been prepared to increase harvest size. The farm sells potatoes and vegetables to Southcentral correctional facilities and other state institutions, plus flowers to Anchorage's International Airport for state beautification projects.

The potato crop in FY90 reached 330 tons. Sales volume was \$66,753. The industry has one production manager and 10 inmate staff.

## Palmer Auto-Body Repair

The Palmer auto shop began operations in 1984 with the purchase of new equipment to allow the shop to do all the repair on state vehicles, primarily in the Southcentral region. It is presently working with the Department of Transportation to investigate the possibility of repair of highway equipment.

Gross sales for FY90 were \$71,130. One production manager oversees six inmate staff members.

## Meat and Sausage Company

The Mt. McKinley Meat and Sausage Company in Palmer works in conjunction with the Palmer Correctional Center. Acquired through government agencies from a private sector operation that went broke, the Corrections' sausage company lost money in FY87-90 but is now improving its goal toward becoming self-sufficient.

Increased market demands for reindeer sausage and the plant's ability to sell to wholesale private sector entities increase the plant's FY91 prospects.

The plant has two production managers and an inmate staff of 28.

## Fairbanks Garment Operation

The Fairbanks Garment/Flat Goods operation began in FY91, providing flat goods and garments to the Department of Corrections only. Any expansion will be subject to review. It presently produces all inmate clothing and flat goods for institutional use. All capital expenditures to open the new industry were financed through revenues from other correctional industries programs.

Year-to-date FY91 sales in January attained a level of \$41,929. One production manager and 15 inmates work there.

The Correctional Industries Program operates under Chapter 32, Sec.33 of the Alaska Statutes as approved by the Legislature in 1982.

# Inmates at work

Continued from page 1

provisions of the Cleary Decision, that 10-year-old law which requires the Department of Corrections not only to provide certain standards of health, space and activities to inmates, but, as wards of the state during their incarceration, to provide them opportunity for training of some kind to enable them to make a living when they are released from prison.

The general Alaska state philosophy on prison reform was initiated a long time ago by the late Tom Murton, the controversial first director of DOC shortly after Statehood became a fact in 1959. He was a firm believer in prison reform, and in rehabilitation versus simple lock-'em-up-and-forget-'em. His influence is still felt.

The state official in charge of the ACI program, Wally Roman, sees the industries program as more than a mandate. He sees the prison industries' training as a genuine effort to cut down on recidivism. National figures on released prisoners who soon return to incarceration are abysmal, and any program that cuts positively into this statistical disappointment can be considered a success of sorts.

## Prison involvement

Roman, general manager of ACI, reports that 160 inmates among the state prisons' population of 2,804 statewide (to date) are employed in one or another fields of the various corrections' industries. It amounts, at most times, to about 6 percent of the prison population.

They make, from 85 cents to \$1.25 an hour, Roman says. Some of those earnings, depending on the criminal and the crime, goes to restitution for violent crimes, or to civil case obligations or to child support.

An inmate whose prison income is not being funneled off into other obligations can make as much as \$200 a month. This provides him with cigarette and treat funds as well as "gate money" for eventual release, enough to provide rent requirements and time to find a job with newly acquired training.

Office furniture ferment

The present private sector ferment growing against the competition from prison industries began in Juneau - that city of many, many government offices - from business people in the office products and office furniture lines, some with branches in other cities as well, including Ketchikan.

Apparently nothing has been heard, as yet, from private sector laundries, greenhouses and sausage makers in competition with ACI industries, or from private print shops, daycares or other private enterprises which in one way or another compete with the state's own in-house operations.

The office furniture businesses' immediate concern is Alaska Corrections Industries' plans to expand from simple oak and upholstered pieces into the office systems' field, to make those more sophisticated divider-panel-shelf-desk items now popular in offices.

(The oak for the furniture, incidentally, is from a Ketchikan vendor, Native-owned Klukwan Forest Products Inc., which was the RFP low bidder to supply the wood, which doesn't grow in Alaska.)

#### Ketchikan's pilot program

Concern about Correction's activities in an area 'outside' the eight listed ACI industries has also surfaced among some of Ketchikan's pharmacists. The Department of Corrections pharmacy in Anchorage, which orders and provides medications for prison inmates, last year began offering its services and medications to the Ketchikan Pioneers Home.

Ketchikan was chosen as a pilot program for this new Corrections' service last year, the stated reason being that the Pioneers Homes in the more populous cities had contracts with large drugstores such as Carr's

and Fred Meyers to offer pharmaceuticals in volume at greatly reduced costs to Pioneer Home residents. Ketchikan did not, its pharmacies being small and home-owned.

In a February 28, 1991, letter to an inquiring District 1 Sen. Lloyd Jones, Barbara Bathony, director of the Division of Pioneers' Benefits, wrote that the Ketchikan Home bought medications for destitute residents through a reimbursible service agreement between the Department of Corrections and the Pioneers Homes' Department of Administration under the Procurement Code titled "Intergovernmental Relations," Title 36, sections 700 to 790.

Her letter adds, "...the cost of medications for destitute residents is absorbed by the State, therefore, the Pioneers' Homes have the same financial obligation to their destitute residents as the Department of Corrections has for their inmates."

#### Pioneers as inmates?

(Destitute Pioneer Homes' residents, while wards of the state, are not prison inmates and there is no clarification in this communication of whether or not Pioneers Home residents fall under the prison reform provisions of the Cleary Decision, as she seems to suggest.)

Director Bathony admits in the letter that in August of 1990, two or three Ketchikan residents not included in the destitute category received their medication from the Department of Corrections pharmacy, but notes that is no longer the case.

Roselyn Reeder, manager of the Ketchikan Pioneers Home, said she learned March 19 that orders from the Anchorage DOC pharmacy were no longer being filled. No one in the Jun-

eau offices of the various agencies was willing to be quoted as to why the pilot program apparently has taken a nose dive.

The pharmacists' baseline concern was, "Is the state now going into the pharmacy business?" State employees, and there are a great many of them, already are able through their state employee perk program, to buy pharmaceuticals through out-of-state vendors.

#### 'Keep money in Alaska'

With the in-house ACI program, however - excluding the issue of pharmaceuticals which is out of his purview - general manager Roman explained his viewpoint on the industries' program.

"We're trying to keep money in Alaska," he said. "I understand the office furniture business owners' concerns. But we want the office furniture money to remain in Alaska, through an Alaska manufacturing source - in this case through Corrections Industries - not solely through orders placed through a Los Angeles manufacturer or some other supplier down south."

In fiscal year 1990, the Correctional Industries Program generated approximately \$2 million in gross sales; \$1,629,286 was expended to attain this level of sales, with \$1,352,907 - or 83 percent of the total - being purchased from 262 Alaska vendors.

"The program," Roman said, "has continued to maximize the dollars spent and recycled within Alaska's economy through generation of our Alaska-manufactured products."

The program, says Roman, is managed so that it will be as self-supporting

as possible, by generating profit from sales to offset the cost of incarceration and rehabilitation.

#### Those license plates?

And why don't Alaska prisoners make Alaska license plates? There are, comparatively, so few license plates needed in Alaska, the cost of tooling up for such a venture would be so prohibitive and the time frame to make them so short - maybe three weeks - that it is not a practical venture for this state.

That's the way it is, Roman indicates. Make it viable, make it make sense, and make it in Alaska, if possible.

#### Not everyone agrees.

The corrections industry program comes up Monday for the first of routine sunset hearings, with Health, Education and Social Services. Rep. Cheri Davis is a member of that hearing committee. The next is with Labor and Commerce, of which Rep. Robin Taylor is a member.

If approved through the legislative sunset hearing process, the industry program will continue through July 1, 1995.

\*\*\*\*\*  
\*  
\* DELIVER TO: LIOCROG  
\*  
\*  
\* ORIGINAL  
\* SENT: 04/03/91 TIME: 17:35  
\* FROM: LTCCMAT  
\* SUBJECT: 108PL SLAB #2 4/3/91  
\* PRINT DATE: 04/03/91 TIME: 17:35  
\*  
\*\*\*\*\*

SUBJECT LINE TO READ: TC NO, ; PL/FS; SHORT SUBJECT; DATE

T/C NO: 91-03-108  
DATE: 4/3/91  
SPONSOR: S L&C  
SUBJECT: CORRECTIONAL INDUSTRY, EMS, MED IND, LABOR  
SITE: MAT-SU LIO  
MODERATOR: CHARLOTTE

PARTICIPANT LIST # 2

\*\*\*\*\*  
TO TESTIFY RE 184 (AND SB 227 IF AVAILABLE):

3 ROBERT THOM

\*\*\*\*\*

TESTIFY: 1 LEFT  
UNABLE:  
OBSERVING:  
TOTAL:

START TIME: 3:35 END TIME

Anchorage  
update

```

*****
*
* DELIVER TO: LIOCROG
*
* ORIGINAL
* SENT: 04/03/91 TIME: 15:51
* FROM: LIOCMIL
* SUBJECT: 91-03-108; PL#2, (S)L&C; 4/3
* PRINT DATE: 04/03/91 TIME: 15:51
*
*****

```

SUBJECT LINE TO READ: TC NO.; PL FS; SHORT SUBJECT; DATE

```

T/C NO: 91-03-108
DATE: 4/3
SPONSOR: (S) LABOR AND COMMERCE
SUBJECT: SB 184
MODERATOR: JUDY
SITE: ANCHORAGE

```

PARTICIPANT LIST

\*\*\*\*\*

TO TESTIFY

NAMES/REPRESENTING	ADDRESS	PHONE	BILL NO.
1. ANNA BELL STEVENS	2906 W 30 #6	99517 279-1124	SB 184
2. ERNIE HALL	144 E POTTER	99518 562-2257	SB 184
3. RON ARLINGTON/CAPITAL OFFICE ANC		562-4341	SB 184

4. LEWIS QUINN/CAPITAL OFFICE ANC		562-4341	SB 184
5. DON RAPP			SB 95
6.			

\*\*\*\*\*

TO OBSERVE:

NAME/ REPRESENTING	ADDRESS	PHONE	BILL NO.
1. MARY PIERCE/MICA	4009 OLD SEWARD #203	563-3414	SB 212
2. ANNE WILLIAMS/MUNI ANC		343-4467	SB 95
3. JIM UDILHOVEN	11401 OLIVE	344-1577	SB 95
4.			
5.			

\*\*\*\*\*

BACK UP NUMBER: 561-1199  
 EMAIL ADDRESS: LIOCMIL

MATSU

\*\*\*\*\*  
\*  
\* DELIVER TO: LIOCROG \*  
\*  
\* ORIGINAL \*  
\* SENT: 04/03/91 TIME: 15:47 \*  
\* FROM: LTCCMAT \*  
\* SUBJECT: 108PL SLAB CORCTNL AND EMS 4/3 \*  
\* PRINT DATE: 04/03/91 TIME: 15:47 \*  
\*  
\*\*\*\*\*

SUBJECT LINE TO READ: TC NO., PL/FS, SHORT SUBJECT, DATE

T/C NO: 91-03-108  
DATE: 4/3/91  
SPONSOR: S L&C  
SUBJECT: CORRECTIONAL INDUSTRY, EMS, MED IND, LABOR  
SITE: MAT-SU LIO  
MODERATOR: ~~XXXXXXXXXX~~

PARTICIPANT LIST # 1

\*\*\*\*\*

- TO TESTIFY RE 184 (AND SB 227 IF AVAILABLE):  
1 JON OLSEN  
2 HENRY DE CLERCQ  
  
3 ROBERT THOM

\*\*\*\*\*

TO TESTIFY RE 208 EMS WORKERS CONF:  
ROSE IDA HENDRICKS

\*\*\*\*\*

OBSERVING:  
1 ED KERN

\*\*\*\*\*

TESTIFY: 4  
UNABLE:  
OBSERVING: 1  
TOTAL: 5

START TIME 3:35 END TIME

\* \* \* \* \*  
\* ORIGINAL \*  
\* SENT: 04/03/91 TIME: 15:30 \*  
\* FROM: LIOCDJT \*  
\* SUBJECT: 91-03-108; PL1; SL&C; 4/3/ \*  
\* PRINT DATE: 04/03/91 TIME: 15:30 \*  
\* \* \* \* \*  
\*\*\*\*\*

TC NO: 91-03-108  
DATE: APRIL 3, 1991  
SPONSOR: SENATE LABOR AND COMMERCE  
SUBJECT: MULTIPLE BILLS  
MODERATOR: TAMMY  
SITE: DELTA JUNCTION

PARTICIPANT LIST

TO TESTIFY: 1. SCOTT MILLER, AK FARMERS AND STOCK GROWERS, BILL NO. SB 184

*July Fountain Jarmy*

DELTA CHAPTER

S B

186

# Alaska State Legislature

Senator Drue Pearce, Chair  
Senator Virginia Collins, Vice Chair  
Senator Dick Eliason  
Senator Rick Halford  
Senator Jay Kerttula



## SENATE LABOR AND COMMERCE COMMITTEE

WHILE IN JUNEAU  
P.O. BOX V  
JUNEAU, ALASKA 99811  
(907) 465-3844

3111 C STREET, SUITE 150  
ANCHORAGE, ALASKA 99504  
(907) 561-2018

TO: ALL SENATORS  
FROM: Senator Pearce *DP*  
DATE: March 8, 1991  
RE: Cosponsorship - Felony convictions and charitable gaming activities.

Public perception of gaming activity in the state has significant impact on its success or failure. Ironically, current law allows an individual who was convicted of a felony to be a licensee, permittee or employee of a permittee or a licensee, to sponsor and conduct charitable gaming five years after conviction for such a crime. Yet, individuals convicted of a crime involving theft or dishonesty or a violation of a municipal, state or federal gambling law are prohibited from involvement with charitable gaming for life.

The public, and I agree, view this as an inconsistency in law and as potentially damaging to allow convicted felons to participate in charitable gaming. Senator Zharoff recognized this inconsistency when he introduced Senate Bill 4, "An Act establishing the Alaska Gaming Commission." Section 1 (c)(1) of that legislation prohibits convicted felons from serving on the Alaska Gaming Commission.

The attached draft legislation prohibits felons from being involved as a licensee, permittee or employee in charitable gaming activity.

I encourage you to cosponsor this important legislation.

This legislation will be read across March 11th.

DP:rrm

March 22, 1991

Drue -

Re: SB 186

In testimony the other day the question was asked whether an employer can ask an employee/applicant whether they have been convicted as a felony as a condition of employment.

I spoke with John Giguine. He said that in the gaming industry, such a question is appropriate.

*Red*

*Elzsoy  
Let Collins  
Hartford know.*



TELECOPY COVER SHEET

SENATOR DRUE PEARCE'S OFFICE

VOICE (907) 465-4993 FAX (907) 463-5352

To: JIM FISK Fax: 486-7099

Attn: \_\_\_\_\_ Phone: \_\_\_\_\_

Transmitted by: ROD MOURANT Date: 3/18/91

Re: SB 186

Comments: PER YOUR REQUEST, HERE IS

COPY OF SEN. PEARCE'S LEGISLATION.

ALSO, I MADE ARRANGEMENTS FOR

KODIAK TO BE ON-LINE FOR THE

TELECONFERENCE.

Number of Pages: 2 Including Cover Sheet.



March 16, 1991

Drue -

Re: SB 186

I got a call from Desiree Humphrey who works for the Times in Anchorage. She was investigating your motivation for introducing the felony bill.

She asked if it was connected to some audit taking place involving a convicted felon. I told her that I know of no connection with any investigation and read to her the memo you had sent out requesting co-sponsors. I faxed it to her also. She also asked my opinion on why SB4 was introduced by Senator Zharoff. I gave her Tom Panamaroff's name and number and told her to call him.

Tom

J

It's tied to  
simulcast. ....  
I believe we  
slb particularly  
careful.

# WORK ORDER REQUEST FORM

# W.O. [17] LS-0906

KEYWORDS: GAMBLING ASSIGNED: Gaguine

\_\_\_\_\_  
\_\_\_\_\_

REQUEST FOR: New Bill TAKEN BY: Gaguine

SUBJECT: Gaming Permit Suspension/Revocation

REQUESTED FOR: SEN PEARCE BY: Rod Mourant PHONE: 465-4993

DELIVER TO: Sen. Pearce, Attn: Rod Mourant, Cap 101

INSTRUCTIONS: Five year limit lifted from AS 05.15.060(6), .122(c), and .140(c), and any other felony references.

OBTAIN

SPECIAL DRAFTING INSTRUCTIONS ATTACHED [ ]  
AUTHORIZED TO CONFER WITH \_\_\_\_\_

RETURN \_\_\_\_\_  
\_\_\_\_\_ TO REQUESTOR

APPROVED:  X  DIRECTOR, LEGAL SERVICES

REVIEWED \_\_\_\_\_

IN 03/01/91 DUE \_\_\_\_\_

TYPED: Draft \_\_\_\_\_ Date \_\_\_\_\_

Final \_\_\_\_\_ Date \_\_\_\_\_

PROOFED \_\_\_\_\_ DELIVERED \_\_\_\_\_

SPECIAL INSTRUCTIONS to TYPING/PROOFING

\_\_\_\_\_  
\_\_\_\_\_

Request for DRAFT

**SENATE BILL NO.**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**SEVENTEENTH LEGISLATURE - FIRST SESSION**

**BY SENATOR PEARCE**

**Introduced:**

**Referred:**

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act preventing persons with felony convictions older than five years from being  
2 involved in charitable gaming activities."

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 \* Section 1. AS 05.15.060 is amended to read:

5           Sec. 05.15.060. REGULATIONS. The department shall adopt regulations under the  
6 Administrative Procedure Act (AS 44.62) necessary to carry out this chapter covering, but not  
7 limited to,

8                   (1) the issuance, renewal, and revocation of permits and licenses;

9                   (2) a method of ascertaining net proceeds, the determination of items of expense  
10 that may be incurred or paid, and the limitation of the amount of the items of expense to prevent  
11 the proceeds from the activity permitted from being diverted to noncharitable, noneducational,  
12 nonreligious, or profit-making organizations, individuals, or groups;

13                   (3) the immediate revocation of pennits and licenses authorized under this chapter  
14 if this chapter or regulations adopted under it are violated;

1 (4) the requiring of detailed, sworn, financial reports of operations from permittees  
2 and licensees including detailed statements of receipts and payments;

3 (5) the investigation of permittees, licensees, and their employees, including the  
4 fingerprinting of those permittees, licensees, and employees whom the commissioner considers  
5 it advisable to fingerprint;

6 (6) exclusion from participation as a permittee, licensee, or employee of a  
7 permittee or licensee, of a person convicted of [, IN PRISON FOR, OR ON PAROLE FOR] a  
8 felony, [WITHIN THE PRECEDING FIVE YEARS, OR CONVICTED OF] a crime involving  
9 theft or dishonesty, or [OF] a violation of a municipal, state, or federal gambling law;

10 (7) the method and manner of conducting authorized activities and awarding of  
11 prizes or awards [,] and the equipment that may be used;

12 (8) the number of activities that may be held, operated, or conducted under a  
13 permit during a specified period; however, the department may not allow more than 14 bingo  
14 sessions a month and 35 bingo games a session to be conducted under a permit;

15 (9) a method of accounting for receipts and disbursements by operators, including  
16 the keeping of records and requirements for the deposit of all receipts in a bank;

17 (10) the disposition of funds in possession of a permittee or a person,  
18 municipality, or qualified organization that possesses an operator's license at the time a permit  
19 or a license is surrendered, revoked, or invalidated;

20 (11) restrictions on the participation by employees of the Department of Fish and  
21 Game in salmon classics;

22 (12) other matters the commissioner considers necessary to carry out this chapter  
23 or protect the best interest of the public.

24 \* Sec. 2. AS 05.15.122(c) is amended to read:

25 (c) The department may not issue an operator's license to an applicant if the applicant  
26 or a person employed by the applicant, in a managerial or supervisory capacity, has been  
27 convicted of [, IN PRISON FOR, OR ON PAROLE FOR] a felony, [WITHIN THE  
28 PRECEDING FIVE YEARS, OR CONVICTED OF] a crime involving theft or dishonesty, or  
29 [OF] a violation of a municipal, state, or federal gambling law.

30 \* Sec. 3. AS 05.15.122(d) is amended to read:

31 (d) A licensee may not employ a person in a managerial or supervisory capacity if the

1 person has been convicted of [, IN PRISON FOR, OR ON PAROLE FOR] a felony, [WITHIN  
2 THE PRECEDING FIVE YEARS, OR CONVICTED OF] a crime involving theft or dishonesty,  
3 or [OF] a violation of a municipal, state, or federal gambling law.

4 \* Sec. 4. AS 05.15.140(b) is amended to read:

5 (b) In an application for a permit, a municipality or qualified organization shall disclose  
6 the name and address of each person responsible for the operation of the activity and whether  
7 any person named

8 (1) has been convicted of [, IN PRISON FOR, OR ON PAROLE FOR] a felony,  
9 [WITHIN THE PRECEDING FIVE YEARS, OR CONVICTED OF] a crime involving theft or  
10 dishonesty, or [OF] a violation of a municipal, state, or federal gambling law; or

11 (2) has a prohibited financial interest, as defined in regulations adopted by the  
12 commissioner, in the operation of the activity.

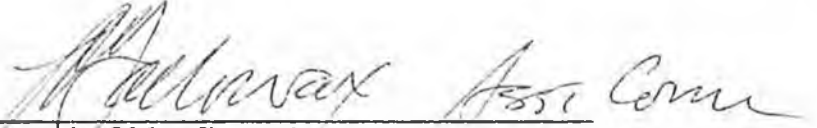
13 \* Sec. 5. AS 05.15.140(c) is amended to read:

14 (c) The commissioner may not issue a permit for an activity operated by a person who  
15 has been convicted of [, IN PRISON FOR, OR ON PAROLE FOR] a felony, [WITHIN THE  
16 PRECEDING FIVE YEARS, OR CONVICTED OF] a crime involving theft or dishonesty, or [OF] a  
17 violation of a municipal, state, or federal gambling law.

SB 186: "An Act preventing persons with felony convictions older than five years from being involved in charitable gaming."

The Department of Commerce and Economic Development feels that, more than any other proposed legislation, this issue needs to be addressed. The department fully supports passage of Senate Bill 186.

Should this bill not pass into law this session, the department will support any other comprehensive legislation that addresses this issue.



Glenn A. Olds, Commissioner

Date: 3/18/91

S B

187

SENATE COMMITTEE REPORT  
FIRST COMMITTEE OF REFERRAL

DATE: 3/11/91

FURTHER: Judiciary

Date of 5-Day Notice: 4-4-91  
(in accordance with Uniform Rule 23)

DATE TURNED  
INTO OFFICE: \_\_\_\_\_

L&C Committee considered SB 187

Disclosure of certain facts in real property transactions.

and recommended:

- replace with \_\_\_\_\_ CS \_\_\_\_\_  same title
- attached amendment(s)  new title
- \_\_\_\_\_ letter of intent adopted
- do pass
- do not pass
- no recommendation
- individual recommendations
- further referral to \_\_\_\_\_

ATTACHES NEW FISCAL NOTE(S):

Department(s)/Date:

Department(s)/Date:

fiscal note(s) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

zero fiscal note(s) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

appropriation-no fiscal note

Governor's bill w/fiscal note

SIGNING DO PASS:

[Signature]  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

OTHER RECOMMENDATIONS:

[Signature]  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

[Signature]  
Chair: Signature and Recommendation

FISCAL NOTE

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

BILL NO. SB 187

Revision Date: \_\_\_\_\_ Department Affected: Commerce & Economic Dev.  
 Title: An Act relating to the disclosure of certain facts in real property transactions BRU: Occupational Licensing  
 Component: Administration  
 Sponsor: Senate Labor & Commerce  
 Requestor: Senate Labor & Commerce COMPONENT SERIAL NO. 

0	3	5	6
---	---	---	---

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
---------	---	---	---	---	---	---

REVENUE	0	0	0	0	0	0
---------	---	---	---	---	---	---

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary.) The bill releases liability of an owner, the owner's agent, and the agent of the transferee with an interest in real property, from disclosing certain facts in real property transactions. Although the bill affects real estate licensees, the bill does not impact the licensing of real estate agents.

Prepared By: Jennifer Strickler, Administrative Officer Phone: 465-2144  
 Division: Occupational Licensing Date: 3/22/91  
 Approved by Commissioner: Glenn A. Olds *[Signature]* Asst. Comm.  
 Agency: Department of Commerce & Economic Development Date: 3-22-91

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

# Alaska State Legislature

Senator Drue Pearce, Chair  
Senator Virginia Collins, Vice Chair  
Senator Dick Eliason  
Senator Rick Halford  
Senator Jay Kerttula



WHILE IN JUNEAU  
P.O. BOX V  
JUNEAU, ALASKA 99811  
(907) 465-3844

3111 C STREET, SUITE 150  
ANCHORAGE, ALASKA 99504  
(907) 561-2018

## SENATE LABOR AND COMMERCE COMMITTEE

TO: Members of the Labor & Commerce Committee

FROM: Senator Drue Pearce

DATE: April 8, 1994

RE: Introduction of Psychologically Impacted Properties  
Bill (SB-187).

Senate Bill 187 was requested by the Alaska Association of Realtors in an effort to bring state law into compliance with federal law.

Currently, under federal law, if a seller or his agent directly or inadvertently discloses that a previous inhabitant of a property had AIDS he is in violation of the Federal Fair Housing Act of 1968 Amendment. The federal law's intent is to protect handicapped individuals from unfair housing discrimination.

Under Alaska state tort law, if a seller or his agent does not disclose "material" facts that affect the value of the property under negotiation, he can be sued for the difference in perceived value. A "material" fact is broadly defined by state courts to mean anything that affects the price a reasonable consumer is willing to pay for a product or service.

Senate Bill 187 will make the following three facts "immaterial".

- 1) The fact that a death occurred on the property more than three years from the date the buyer offers to buy or rent the property.
- 2) The manner in which the death occurred.
- 3) The fact that a former occupant had AIDS or an AIDS related virus.

MAR 18 1991



REALTOR®

ALASKA ASSOCIATION OF REALTORS, INC.  
741 Sesame Street, Suite 100 • Anchorage, Alaska 99503  
Telephone 907-563-7133

March 13, 1991

Senator Drue Pearce  
Alaska State Legislature  
P.O. Box V  
Juneau, AK 99811  
Telefax 463-5352

Re. S.B. 187

Dear Senator Pearce:

The Alaska Association of REALTORS® is writing in support of S.B. 187, "an act relating to the disclosure of certain facts in real property transactions."

This short bill, if enacted, would serve to clarify the duties and responsibilities of real property owners and real estate agents with regard to disclosure of certain facts surrounding so-called "psychologically impacted" properties.

Currently, fourteen other states have this type of legislation in place. The Alaska Association of REALTORS® supports S.B. 187 and urges the legislature to act on passage of this bill.

Sincerely,

Dea Turner  
Executive Vice President





ALASKA ASSOCIATION OF REALTORS, INC.  
741 Sesame Street, Suite 100 • Anchorage, Alaska 99503  
Telephone 907-583-7133

DATE: March 18, 1991  
TO: Senator Drue Pearce  
FROM: Dea Turner *D.*  
Executive Vice President  
SUBJECT: S.B. 187

In response to your request for an analysis of the proposed legislation, the Alaska Association of REALTORS® offers the following.

Enactment of S.B. 187 serves several important functions. First, it provides protection to an owner's interest in real property in that it limits the stigma that may be attached to a particular property through the acts of the former owner, or by events that may have occurred on the property. Acts or occurrences are not "material facts" that should have any bearing on establishing the value of a property. Likewise, the value of a property should not be indefinitely affected by an act or occurrence that may have taken place years previously. In short, this bill protects an owner's ability to receive fair market value for the property at time of sale or rental.

Secondly, S.B. 187 protects both an owner and his agent or representative from inadvertent violation of the Fair Housing Act of 1968 amendment, which establishes certain groups of people that are protected from discrimination. One of these groups is handicapped individuals, which includes victims of AIDS.

On May 9, 1990, HUD's General Counsel, Frank Keating, made the following statement in a letter to the National Association of REALTORS®: "We agree that unsolicited statements made by a real estate broker or agent that a current or previous occupant of the property has AIDS would violate



Senator Drue Pearce

March 18, 1991

Page 2

the (Federal Fair Housing Act). A broker's unsolicited statements to a prospective buyer or renter would indicate a discriminatory preference or limitation based on handicap." In this same letter, Mr. Keating went on to say that if asked whether an occupant has AIDS, a broker should decline to respond.

Finally, this bill reiterates for real estate agents as seller's/owner's representatives their fiduciary obligation to protect the client's confidences and not to disclose anything that would harm the client.

At the present time the following states have adopted similar legislation: Nevada, Connecticut, California, Rhode Island, Georgia, Oklahoma, Oregon, South Carolina, North Carolina, Florida, Hawaii, Texas, Illinois, and New Jersey.

We hope this clarifies for you the positive effect this legislation would have.

## Director's Report

### Between a Rock and a Hard Place

by Mary Bettis, The Bettis Co.

A new area of disclosure issues is emerging — psychologically impacted (or stigmatized) property — which involves disclosure of facts not associated with the real estate itself, but rather facts about the owner or occupant of the property.

#### REALTORS FIND THEMSELVES BETWEEN A ROCK . . .

Would you as a REALTOR disclose to a potential buyer or tenant that occupants of a residence have or had AIDS? Would you disclose the fact that the property was the site of a homicide, other felony, or a suicide? What is your responsibility to seek such personal information about the seller or previous tenant? Might it be considered a material factor?

#### . . . AND A HARD PLACE

If you were to disclose such psychological factors, would you be guilty of discrimination, or of invasion of privacy? By merely bringing up the matter in your disclosure, would you create or keep alive a stigmatized — feelings that adversely affect the value of the property? Would you violate your responsibility to your owner/client?

My partners and I discovered first hand the adverse effect of keeping a stigma alive. Three years ago, a woman and her two children were murdered in an apartment building which we own. Everyone, tenants and neighbors as well as ourselves, were determined to cooperate with the police investigation in any way possible. The apartment was sealed and the area cordoned off.

There was a prolonged investigation and notoriety. Tenants moved and were difficult to replace. Finally, when a relative of the victims was apprehended, tried, and convicted for the crime, and the victims' apartment was made new from the wallboard out, we thought we could put the matter behind us.

But soon after the conviction, the victims' husband and father called the new tenants living in the apartment. He told them his wife and children had been murdered there, and wondered if he could come over and look around one last time before leaving town. The tenants gave their moving notice that day.

On advice of counsel, we have since disclosed the matter to every prospective tenant. In doing so, we feel we needlessly keep alive the psychologically chilling effect, sabotage our efforts to create a pleasant environment, and adversely affect the value of our property.

#### IS DISCLOSURE REQUIRED . . . ?

Much of the concern with the question of disclosure began with *Reed v. King*, 145 Cal. App. 3rd 261 Rprt. 130 (1983), a California court case, regarding the sale of a home in which a woman and her four children had been murdered 10 years prior to the sale. Neither the

seller or his agent informed the purchaser that the murder had taken place. Both the seller and agent represented that the house was in good condition and fit for an elderly lady living alone. After the purchaser moved in, she was informed by the neighbors that no one had been interested in purchasing the property because of the stigma following the murders. The buyer sued alleging the property was worth less because of the murders. The trial court dismissed the case. But on appeal, the court held that a vendor of real property has a duty to disclose to the purchaser facts materially affecting the value of the property when the facts are known only to the vendor and are not readily detectable by the purchaser.

This case was the first to find a cause of action for the failure to disclose a stigma attached to a residential property. The same line of reasoning could be used for failure to disclose the stigma that might attach to a residence as a result of habitation by an AIDS victim.

The *Reed v. King* case was cited in a civil action involving the sale of a home in California. In *Roberts v. Heramb*, slip op. no. 5943942, the purchaser sued to rescind a purchase agreement and recover a \$10,000 escrow deposit when she learned of the death of one of the sellers of hepatitis and the illness of the other seller with pneumonia. The purchaser suspected that at least one of the sellers had AIDS. The case was settled out of court. It has no value as precedent. But it did show that a complaint could be filed based on an allegation that the seller failed to disclose the habitation of an AIDS victim in a residence for sale.

#### OR IS DISCLOSURE PROHIBITED . . . ?

In response to the problem, California enacted legislation which provides that no cause of action shall arise against a seller of real property, or his agent, for a failure to disclose deaths which occurred on the property more than 3 years prior to sale. The California statute also provides immunity for failure to disclose that a prior occupant had, or was suspected to have, AIDS.

The Federal Fair Housing Act of 1968 amendments, effective March 12, 1989, include the handicapped as a new protected class. Real estate agents and brokers are prohibited from discriminating against the handicapped (which can include persons with AIDS) in the sale or rental of real property. Although the legislation does not directly address the issue of whether a real estate licensee can, without being specifically questioned by a potential buyer, disclose that an occupant of a property for sale had or was suspected to have AIDS, such a disclosure could be considered a discriminatory action which is clearly prohibited by the Federal Fair Housing

Act. However, neither the Act nor the regulations, makes clear a licensee's course of action if directly asked by a potential buyer whether the property has been the home of an AIDS victim.

In response to the problem, The National Association of Realtors adopted a policy and model legislation. Anita Bates and her committee go to work seeing a sponsor to introduce a bill in Juneau this session. The text of the policy and model legislation follows:

### NATIONAL ASSOCIATION OF REALTORS® POLICY

#### Psychologically Impacted Properties

The NATIONAL ASSOCIATION OF REALTORS® encourages states to adopt legislation to declare that all psychological impacts or stigmas which are associated with real property are not material facts and need not be disclosed to a potential purchaser or lessee. (1989 Statement of Policy, page 14)

### NATIONAL ASSOCIATION OF REALTORS® ACTIVITY

In addition to the policy statement, the NATIONAL ASSOCIATION OF REALTORS® has provided each state REALTOR® Association with the following model legislative language on Psychologically Impacted Property:


The following language is proposed to be drafted into bill form appropriate to the legislative style of the state to amend the real estate license law.

Sections \_\_\_\_\_ of Chapter \_\_\_\_\_ of the laws of the State of \_\_\_\_\_ the Real Estate Licensure Act of (19\_\_\_\_), are hereby amended to read as follows:

- (1) Section \_\_\_\_\_: The fact or suspicion that a property might be or is psychologically impacted, such impact being the result of facts or suspicious, including but not limited to:
  - (a) that an occupant of real property is, or was at any time suspected to be, infected or has been infected with Human Immuno-deficiency Virus or diagnosed with Acquired Immune Deficiency Syndrome, or any other disease which has been determined by medical evidence to be highly-unlikely to be transmitted through the occupancy of a dwelling place; or
  - (b) that the property was, or was at any time suspected to have been, the site of a homicide, or other felony or a suicide; is not a material fact that must be disclosed in a real estate transaction.
  
- (2) Section \_\_\_\_\_: No cause of action shall arise against an owner of real estate or his or her agent for the failure to disclose to the transferee that the transferred property was psychologically impacted as defined in Section \_\_\_\_\_ of this Chapter.

*(The National Association of Realtors provided the background information for this article.)*

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# For The Record . . .



Vol. 1

Fall 1990

## HUD Says AIDS Disclosure Can Violate Title VIII

by Robert D. Butters, Deputy General Counsel

One of the most perplexing issues confronting real estate brokers and their legal counsel is the relationship between the recent changes to Title VIII contained in the Federal Fair Housing Act Amendments of 1988 and state tort law. Nowhere is this ambiguity more acute than over the question of when, if ever, a real estate broker may disclose that an owner or occupant of a dwelling has, or recently died from, AIDS or an AIDS related illness. The issue arises from a direct confrontation between two well established public policies. The first is the policy of non-discrimination against persons with handicaps reflected in the recent Title VIII amendments. A second, and arguably conflicting, public policy is reflected in the evolving common law of misrepresentation, and the broad consumer protection statutes adopted by many states prohibiting acts or omissions that are, or can be, misleading or deceptive. The key issue in most misrepresentation or consumer fraud cases is whether the alleged statement or omission was "material." A "material" fact in turn is broadly defined to mean anything that bears upon the price a reasonable consumer is willing to pay for a product or service.

Broadly construing the "materiality" concept, a creditable argument can be made that a property owner's AIDS condition is material given the fear, albeit irrational, held by some persons that AIDS can be transmitted by casual contact notwithstanding the overwhelming scientific evidence to the contrary, and also the social stigma attached to homosexuality and intravenous drug use through which AIDS is known to be communicated. The argument that an owner's AIDS condition is a material fact is also bolstered by decisions such as *Reed v. King*, 145 Cal. App. 3d 261, 193 Cal. Rptr. 130 (1983), which held that a murder occurring on the premises

several years earlier could be a material fact if the plaintiff could prove a loss of market value attributed to the property's stigma.

Given the conflict between the competing public policies of non-discrimination against AIDS victims in the provision of real estate related services, and prohibiting the withholding of material facts from consumers about products and services for sale, the National Association sought an opinion in January of 1990 from the General Counsel of the Department of Housing and Urban Development concerning whether, and under what circumstances, the federal fair housing laws prohibit a real estate broker from disclosing

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that a homeowner, or someone in the owner's household has, or died from, AIDS. On May 9, 1990, HUD's General Counsel, Frank Keating, responded to the National Association's inquiry. In that response, Mr. Keating made the following unambiguous statement:

*"... we agree that unsolicited statements made by a real estate broker or agent that a current or previous occupant of the property has AIDS would violate the [federal Fair Housing Act]. A broker's unsolicited statements to a prospective buyer or renter would indicate a discriminatory preference or limitation based on handicap."*

This portion of Mr. Keating's response is consistent with the position the National Association took in its January, 1990 inquiry letter. In the National Association's view, an unsolicited reference by a real estate broker to the handicapped status of an occupant of a dwelling could be construed as a notice or statement that the property should be avoided because of the occupant's handicap and, therefore, violate Section 804(c) of Title VIII. It is also possible that such a reference could be construed as an attempt to steer a prospect away from a dwelling based upon handicap in violation of Section 804(a).

HUD's position that unsolicited disclosure of an occupant's AIDS condition violates the federal fair housing laws is strong persuasive authority for the proposition that the federal fair housing laws preempt any interpretation of state statutory or common law that might impose an affirmative duty upon a real estate broker to investi-

gate and disclose whether an occupant of a dwelling has AIDS on the ground that AIDS is a "material" fact in a real estate transaction.

---

*"... if a broker is asked whether an occupant has AIDS they should decline to respond."*

---

Consequently, real estate brokers should be counseled that they do not have any duty to investigate whether an occupant has AIDS and, indeed, should scrupulously avoid making any inquiries that are likely to elicit this information. Likewise, if a real estate broker unavoidably learns that an occupant has AIDS, the broker does not have any affirmative duty to disclose that information while marketing the property. Hence, the obligations regarding an occupant's AIDS condition are no different than obligations regarding an occupant's race or religion. Clearly a broker does not have any duty to discover an occupant's religion, or disclose that fact, if known, to prospective buyers.

Uncertainty still remains, however, concerning the broker's liability under the federal fair housing laws for responding truthfully and objectively to a buyer's direct inquiry concerning whether a dwelling occupant has AIDS. In his letter, Mr. Keating offers his advice that if a broker is asked whether an occupant has AIDS they should decline to respond.

This is sound advice for a variety of reasons not directly related to liability under the fair housing laws. Brokers who list property for sale or rent owe

fiduciary duties to owners under the common law of agency. These fiduciary duties include a duty to safeguard a client's confidences and secrets. An occupant's AIDS condition certainly could be reasonably construed to be information protected from disclosure without the client's prior consent. A person's private medical history also could be construed as information sufficiently personal to justify an invasion of privacy claim if disclosed without prior consent. For these reasons, the National Association agrees that brokers should not disclose a seller's AIDS condition, even if asked by a potential buyer. The National Association's advice to brokers who unavoidably learn of an occupant's AIDS condition, and who are subsequently asked an unsolicited question by a prospective buyer about that condition, is to respond by advising the buyer that the broker's company has a policy of not addressing that subject one way or the other. If the buyer believes this information is relevant to their purchasing decision they must pursue that investigation on their own.

#### Attention EOs!

Please help us keep our State and Board Legal Counsel records accurate and ensure timely delivery of NAR correspondence to your legal counsel. If your board or state association is presently retaining legal counsel, please complete the enclosed form giving us your counsel's name, firm name, mailing address, telephone number and board represented to Kim Johnson, Office of the General Counsel, NATIONAL ASSOCIATION OF REALTORS®, 430 N. Michigan Avenue, Chicago, IL 60611. Thank!

### AIDS Legislation

Several states have passed legislation on disclosure of AIDS and other stigmas such as murders, suicides and ghosts. Most of the statutes provide that the particular stigmas are not material facts, and there is no cause of action against the owner or real estate agent for failing to disclose this information.

### STATE RECAP

NV - AIDS and other stigmas  
 CT - AIDS and other stigmas  
 CA - AIDS and other stigmas  
 RI - AIDS and other stigmas  
 GA - AIDS and other stigmas  
 OK - AIDS and other stigmas  
 OR - AIDS and other stigmas  
 SC - AIDS and other stigmas  
 NC - AIDS and other stigmas  
 FL - AIDS only  
 HI - AIDS only  
 TX - AIDS only  
 IL - AIDS only  
 NJ - AIDS only (Real Estate Commission Advisory Opinion)

*Note: Consult statute or regulation for specific information on the real estate agent's duties and obligations.*

Please direct questions and information to Holly Heckathorne, Associate Counsel, Office of the General Counsel, NATIONAL ASSOCIATION OF REALTORS®, 430 North Michigan Avenue, Chicago, Illinois 60611.

The National Association's concern, therefore, is not with the substance of HUD's advice regarding the proper response to a buyer's direct question about an occupant's AIDS condition, but rather HUD's rationale for its advice. In his May letter, Mr. Keating stated that a real estate broker "may run afoul of the Act by aiding a buyer or renter in steering clear of properties owned or occupied by people with AIDS." Mr. Keating further stated that once a broker is aware that a buyer harbors a preference not to live in or around a home occupied by an AIDS victim, the broker may not cooperate with the buyer by identifying properties to pursue or avoid.

This rationale implicitly adopts the view that any reference to the protected status of a person living in or around a dwelling violates Title VIII, even if the information is truthful and provided only in response to a direct unsolicited question from a buyer. This construction of Title VIII reflects an assumption that Title VIII limits a broker's ability to cooperate with a buyer who is exercising his or her own freedom of choice in housing — a right supposedly guaranteed by Title VIII.

One will not find any provision in Title VIII, or its legislative history, that suggests that the Act contains any limitation upon a homeseeker's freedom to choose where he or she will live. To be sure, an owner's freedom to sell or rent to whomever they choose is directly restrained by Title VIII, and any broker who cooperates with an owner to discriminate against a homeseeker unquestionably violates Title VIII. But cooperation with a homeseeker is not equally constrained. So

long as a homeseeker's freedom of choice is not limited by an owner, broker, property manager or any other person providing real estate related services, a homeseeker is free to choose where to live, even if that choice is based upon criteria an owner is expressly forbidden to employ in choosing to whom to sell or rent. Therefore, if a homeseeker is free to make a housing choice based upon criteria otherwise foreclosed to an owner, a real estate broker who provides truthful information, upon request, to a homeseeker to allow him or her to exercise their freedom of choice cannot violate the Act. By analogy, one cannot commit a crime by aiding and abetting an otherwise lawful act. "Aiding and abetting" is a crime only if the underlying act is also a crime.

In conclusion, the weight of authority supports the view that an occupant's AIDS condition, is a fact that a real estate broker does not have any duty to discover, or if known, to disclose to any prospective buyer. These are also facts that need not, and should not, be disclosed even if the broker is asked a direct question by a homeseeker. What still remains unclear is whether this course of conduct is dictated by concerns about protecting the occupant's right to privacy in areas not material to a real estate transaction, or by an interpretation of Title VIII that imposes liability upon a broker for assisting a homeseeker who has freely and unilaterally chosen to take racial, ethnic, or handicap considerations into account in selecting a dwelling. ■