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Article 3 deals with the single most difficult issue facing lawyers who use the limited partnership form of organization: the powers and potential liabilities of limited partners. Section 303 lists a number of activities in which a limited partner may engage without being held to have so significantly participated in the control of the business that he ~~assumes~~ acquires the liability of a general partner. Moreover, it goes on to confine the liability of a limited partner who merely ~~steps over the line of participation~~ participates in control to situations in which persons who actually know of that participation in control are misled thereby to their detriment into reasonably believing the limited partner to be a general partner. ~~General liability for partnership debts is imposed now on those limited partners who are, in effect, "silent general partners". With that exception, the provisions of the new Act that impose liability on a limited partner who has somehow permitted third parties to be misled to their detriment as to the limited partner's true status confine that liability to those who have actually been misled. This "detrimental reliance" test, together with an expansion of the "laundry list" of specific activities in which limited partners may participate without incurring liability, are among the principal innovations in the 1985 Act.~~

The provisions relating to general partners are collected in Article 4. It differs little from the corresponding article in the 1976 Act, except that some of the 1976 Act's references to the certificate of limited partnership have been changed to refer instead to the partnership agreement. This is in recognition of the principle that the limited partnership agreement, not the certificate of limited partnership, is the primary constitutive, organizational and governing document of a limited partnership. Article 5, dealing with finance, ~~and~~ differs in some important respects from Article 5 of the 1976 Act, which itself made ~~some~~ some important changes from the ~~prior uniform law~~ 1916 Act. The 1976 Act explicitly permitted contributions to the partnership to be made in the form of the contribution of services and promises to contribute cash, property or services, ~~are now explicitly permitted as contributions.~~ and provided that those who failed to perform promised services ~~are~~ were required, in the absence of an agreement to the contrary, to pay the value of the services as stated in the certificate of limited partnership. These important innovations of the 1976 Act are retained in substance in the 1985 Act. However, the 1985 Act substitutes the partnership agreement and the records of the limited partnership for the certificate of limited partnership as the place such agreements are to be set out and such information is to be kept.

Article 6 of the 1976 Act, dealing with distributions and with the withdrawal of partners from the partnership, made a number of changes from the ~~prior uniform law~~ ~~are made in Article 6, 1916 Act, dealing with distributions from and the withdrawal of partners from the partnership.~~ For example, Section 608 created a statute of limitations ~~on~~ applicable to the right of a limited partnership to recover all or part of a contribution that had been returned to a limited partner, whether to satisfy creditors or otherwise. The 1985 Act retains these features of the 1976 Act without substantive change.

In both the 1976 and the 1935 Acts, ~~the~~ assignability of partnership interests is dealt with in considerable detail in Article 7, and ~~the~~ provisions relating to dissolution appear in Article 8, ~~which, among other things, imposes~~ Article 8 of the 1976 Act established a new standard for seeking judicial dissolution of a limited partnership, which standard is carried forward into the 1985 Act.

Article 9 of the 1976 and 1985 Acts deals with ~~one~~ one of the thorniest questions for those who operate limited partnerships in more than one state, ~~has been~~ i.e., the status of the partnership in a state other than the state of its organization. Neither ~~existing~~ case law under the 1916 Act nor administrative practice ~~makes~~ it clear which state's law governed the partnership or whether, in that other state, the limited partners continued to possess their limited liability, ~~and which law governs the partnership.~~ Article 9 of the 1976 Act dealt with this problem by providing for registration of foreign limited partnerships and specifying choice-of-law rules. Article 9 of the 1985 Act retains all of those basic provisions and innovations of the 1976 Act.

Finally, Article 10 of the ~~new~~ 1976 Act represented another significant innovation, by authorizing derivative actions to be brought by limited partners. The 1916 Act failed to address this entire concept. Article 10 of the 1935 Act clarifies certain provisions of the 1976 Act but does not make any substantive changes in the corresponding provisions of the 1976 Act.

Finally, Article 11 sets out a number of miscellaneous provisions, not the least of which are those dealing with the application of the new statute to limited partnerships in existence at the time of its enactment. Those provisions in the 1976 Act were expanded upon by the 1985 Act to give greater deference to the possible expectations, some of which may have constitutionally protected status, of partners in such limited partnerships concerning the continuing applicability to their partnerships of the law in effect when they were organized.

LIMITED PARTNERSHIP ACT

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ARTICLE 1
GENERAL PROVISIONS

§ 101. Definitions

As used in this [Act], unless the context otherwise requires:

- (1) "Certificate of limited partnership" means the certificate referred to in Section 201, and the certificate as amended or restated.
- (2) "Contribution" means any cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services, which a partner contributes to a limited partnership in his capacity as a partner.
- (3) "Event of withdrawal of a general partner" means an event that causes a person to cease to be a general partner as provided in Section 402.
- (4) "Foreign limited partnership" means a partnership formed under the laws of any State state other than this State and having as partners one or more general partners and one or more limited partners.
- (5) "General partner" means a person who has been admitted to a limited partnership as a general partner in accordance with the partnership agreement and named in the certificate of limited partnership as a general partner.
- (6) "Limited partner" means a person who has been admitted to a limited partnership as a limited partner in accordance with the partnership agreement ~~and named in the certificate of limited partnership as a limited partner.~~
- (7) "Limited partnership" and "domestic limited partnership" mean a partnership formed by two or more persons under the laws of this State and having one or more general partners and one or more limited partners.
- (8) "Partner" means a limited or general partner.
- (9) "Partnership agreement" means any valid agreement, written or oral, of the partners as to the affairs of a limited partnership and the conduct of its business.
- (10) "Partnership interest" means a partner's share of the profits and losses of a limited partnership and the right to receive distributions of partnership assets.
- (11) "Person" means a natural person, partnership, limited partnership (domestic or foreign), trust, estate, association, or corporation.
- (12) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

COMMENT

The definitions in this section clarify a number of uncertainties in the law existing law prior to the 1976 Act, and also make certain changes in such prior law. The 1985 Act makes very few additional changes in Section 101.

Contribution: this definition makes it clear that a present contribution of services and a promise to make a future payment of cash, contribution of property or performance of services are permissible forms for a contribution. Section 502 of the 1985 Act provides that a limited partner's promise to make a contribution is enforceable only when set out in a writing signed by the limited partner. (This result is not dissimilar from that under the 1976 Act, which required all promises of future contributions to be described in the certificate of limited partnership, which was to be signed by, among others, the partners making such promises.) Accordingly, the present property or services contributed presently or promised to be contributed in the future must be accorded a value in the partnership agreement or the partnership records required to be kept pursuant to Section 105. ~~certificate of limited partnership (Section 201(5))~~ and, in the case of a promise, that value may

determine the liability of a partner who fails to honor his agreement (Section 502). Section 3 of the ~~prior uniform law~~ 1916 Act did not permit a limited partner's contribution to be in the form of services, although that inhibition did not apply to general partners.

Foreign limited partnership: the Act only deals with foreign limited partnerships formed under the laws of another "State" of the United States (see subdivision 12 of Section 101), and any adopting State that desires to deal by statute with the status of entities formed under the laws of foreign countries must make appropriate changes throughout the Act. The exclusion of such entities from the Act was not intended to suggest that their "limited partners" should not be accorded limited liability by the courts of a State adopting the Act. That question would be resolved by the choice-of-law rules of the forum State.

General partner: this definition recognizes the separate functions of the partnership agreement and the certificate of limited partnership. The partnership agreement establishes the basic grant of management power to the persons named as general partners; but because of the passive role played by the limited partners, the separate, formal step of ~~embodying memorializing~~ that grant of power in the certificate of limited partnership has been preserved to emphasize its importance and to provide notice of the identity of the partnership's general partners to persons dealing with the partnership.

Limited partner: ~~as in~~ unlike the ~~case of~~ definition of general partners, this definition provides for admission of limited partners through the partnership agreement and ~~solemnization in the certificate of limited partnership. In addition, the definition makes it clear that being named in the certificate of limited partnership is a prerequisite to limited partner status. Failure to file does not, however, mean that the participant is a general partner or that he has general liability. See Sections 202(c) and 203 alone and does not require identification of any limited partner in the certificate of limited partnership (Section 201). Under the 1916 and the 1976 Acts, being named as a limited partner in the certificate of limited partnership was a statutory requirement and, in most if not all cases, probably also a prerequisite to limited partner status. By eliminating the requirement that the certificate of limited partnership contain the name, address, and capital contribution of each limited partner, the 1985 Act, all but eliminates any risk that a person intended to be a limited partner may be exposed to liability as a general partner as a result of the inadvertent omission of any of that information from the certificate of limited partnership, and also dispenses with the need to amend the certificate of limited partnership upon the admission or withdrawal of, transfer of an interest by, or change in the address or capital contribution of, any limited partner.~~

Partnership agreement: the ~~prior uniform law~~ 1916 Act did not refer to the partnership agreement, assuming that all important matters affecting limited partners would be set forth in the certificate of limited partnership. Under modern practice, however, it has been common for the partners to enter into a comprehensive partnership agreement, only part of which was required to be included or summarized in the certificate of limited partnership. As reflected in Section 201 of the 1985 Act, the certificate of limited partnership is confined principally to matters respecting the partnership itself and the addition and withdrawal identity of general partners, and of capital, and other important issues are left to the partnership agreement. ~~Most of the information formerly provided by, but no longer required to be included in, the certificate of limited partnership is now required to be kept in the partnership records (Section 105).~~

Partnership interest: this definition ~~is now~~ first appeared in the 1976 Act and is intended to define what it is that is transferred when a partnership interest is assigned.

§ 102. Name

The name of each limited partnership as set forth in its certificate of limited partnership:

- (1) shall contain without abbreviation the words "limited partnership";
- (2) may not contain the name of a limited partner unless (i) it is also the name of a general partner or the corporate name of a corporate general partner, or (ii) the business of the limited partnership had been carried on under that name before the admission of that limited partner;
- (3) ~~may not contain any word or phrase indicating or implying that it is organized other than for a purpose stated in its certificate of limited partnership;~~

(4) (3) may not be the same as, or deceptively similar to, the name of any corporation or limited partnership organized under the laws of this State or licensed or registered as a foreign corporation or limited partnership in this State; and

(5) (4) may not contain the following words [here insert prohibited words].

COMMENT

Subdivision (2) of Section 102 has been carried over from Section 5 of the ~~prior uniform law~~ 1916 Act with certain editorial changes. The remainder of Section 102 ~~is new~~ first appeared in the 1976 Act and primarily reflects the intention to integrate the registration of limited partnership names with that of corporate names. Accordingly, Section 201 provides for central, ~~state-wide~~ state-wide filing of certificates of limited partnership, and subdivisions (3), and (4) and (5) of Section 102 contain standards to be applied by the filing officer in determining whether the certificate should be filed. Subdivision (1) requires that the proper name of a limited partnership contain the words "limited partnership" in full. Subdivision (3) of the 1976 Act has been deleted, to reflect the deletion from Section 201 of any requirement that the certificate of limited partnership describe the partnership's purposes or the character of its business.

§ 103. Reservation of Name

(a) The exclusive right to the use of a name may be reserved by:

(1) any person intending to organize a limited partnership under this [Act] and to adopt that name;

(2) any domestic limited partnership or any foreign limited partnership registered in this State which, in either case, intends to adopt that name;

(3) any foreign limited partnership intending to register in this State and adopt that name; and

(4) any person intending to organize a foreign limited partnership and intending to have it register in this State and adopt that name.

(b) The reservation shall be made by filing with the Secretary of State an application, executed by the applicant, to reserve a specified name. If the Secretary of State finds that the name is available for use by a domestic or foreign limited partnership, he (or she) shall reserve the name for the exclusive use of the applicant for a period of 120 days. Once having so reserved a name, the same applicant may not again reserve the same name until more than 60 days after the expiration of the last 120-day period for which that applicant reserved that name. The right to the exclusive use of a reserved name may be transferred to any other person by filing in the office of the Secretary of State a notice of the transfer, executed by the applicant for whom the name was reserved and specifying the name and address of the transferee.

COMMENT

Section 103 ~~is new~~ first appeared in the 1976 Act. The ~~prior uniform law~~ 1916 Act did not provide for registration of names.

§ 104. Specified Office and Agent

Each limited partnership shall continuously maintain in this State:

(1) an office, which may but need not be a place of its business in this State, at which shall be kept the records required by Section 105 to be maintained; and

(2) an agent for service of process on the limited partnership, which agent must be an individual resident of this State, a domestic corporation, or a foreign corporation authorized to do business in this State.

COMMENT

Section 104 is now first appeared in the 1976 Act. It requires that a limited partnership have certain minimum contacts with its State of organization, i.e., an office at which the constitutive documents and basic financial information is kept and an agent for service of process.

§ 105. Records to be Kept

(a) Each limited partnership shall keep at the office referred to in Section 104(1) the following:

- (1) a current list of the full name and last known business address of each partner ~~set forth, separately identifying the general partners (in alphabetical order) and the limited partners (in alphabetical order);~~
- (2) a copy of the certificate of limited partnership and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate has been executed;
- (3) copies of the limited partnership's federal, state and local income tax returns and reports, if any, for the three most recent years, ~~and;~~
- (4) copies of any then effective written partnership agreements and of any financial statements of the limited partnership for the three most recent years; ~~and~~
- (5) unless contained in a written partnership agreement, a writing setting out:
 - (i) the amount of cash and a description and statement of the agreed value of the other property or services contributed by each partner and which each partner has agreed to contribute;
 - (ii) the times at which or events on the happening of which any additional contributions agreed to be made by each partner are to be made;
 - (iii) any right of a partner to receive, or of a general partner to make, distributions to a partner which include a return of all or any part of the partner's contribution;
 - ~~and~~
 - (iv) any events upon the happening of which the limited partnership is to be dissolved and its affairs wound up.

(b) ~~These records~~ Records kept under this section are subject to inspection and copying at the reasonable request and at the expense of any partner during ordinary business hours.

COMMENT

Section 105 is now first appeared in the 1976 Act. In view of the passive nature of the limited partner's position, it has been widely felt that limited partners are entitled to access to certain basic documents and information, including the certificate of limited partnership ~~and, any partnership agreement and a writing setting out certain important matters which, under the 1916 and 1976 Acts, were required to be set out in the certificate of limited partnership.~~ In view of the great diversity among limited partnerships, it was thought inappropriate to require a standard form of financial report, and Section 105 does no more than require retention of tax returns and any other financial statements that are prepared. The names and addresses of the general partners are made available to the general public in the certificate of limited partnership.

§ 106. Nature of Business

A limited partnership may carry on any business that a partnership without limited partners may carry on except [here designate prohibited activities].

COMMENT

Section 106 is identical to Section 3 of the ~~prior uniform law, 1916 Act.~~ Many states require that certain regulated industries, such as banking, may be carried on only by entities organized pursuant to special statutes, and it is contemplated that the prohibited activities would be confined to the matters covered by those statutes.

§ 107. Business Transactions of Partner with Partnership

Except as provided in the partnership agreement, a partner may lend money to and transact other business with the limited partnership and, subject to other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner.

COMMENT

Section 107 makes a number of important changes in Section 13 of the ~~prior uniform law~~, 1916 Act. Section 13, in effect, created a special fraudulent conveyance provision applicable to the making of secured loans by limited partners and the repayment by limited partnerships of loans from limited partners. Section 107 leaves that question to a State's general fraudulent conveyance statute. In addition, Section 107 eliminates the prohibition in ~~former~~ Section 13 against a general partner's ~~as opposed to a limited partner~~ sharing pro rata with general creditors in the case of an unsecured loan. Of course, other doctrines developed under bankruptcy and insolvency laws may require the subordination of loans by partners under appropriate circumstances.

ARTICLE 2

FORMATION; CERTIFICATE OF LIMITED PARTNERSHIP

§ 201. Certificate of Limited Partnership

(a) In order to form a limited partnership, ~~two or more persons must execute a~~ certificate of limited partnership. ~~The certificate shall be~~ must be executed and filed in the office of the Secretary of State, ~~and~~ The certificate shall set forth:

- (1) the name of the limited partnership;
- ~~(2) the general character of its business;~~
- (3) ~~(2)~~ the address of the office and the name and address of the agent for service of process required to be maintained by Section 104;
- (4) ~~(3)~~ the name and the business address of each general partner (specifying ~~separately the general partners and limited partners;~~
- ~~(5) the amount of cash and a description and statement of the agreed value of the other property or services contributed by each partner and which each partner has agreed to contribute in the future;~~
- ~~(6) the times at which or events on the happening of which any additional contributions agreed to be made by each partner are to be made;~~
- ~~(7) any power of a limited partner to grant the right to become a limited partner to an assignee of any part of his partnership interest, and the terms and conditions of the power;~~
- ~~(8) if agreed upon, the time at which or the events on the happening of which a partner may terminate his membership in the limited partnership and the amount of, or the method of determining, the distribution to which he may be entitled respecting his partnership interest, and the terms and conditions of the termination and distribution;~~
- ~~(9) any right of a partner to receive distributions of property, including cash from the limited partnership;~~
- ~~(10) any right of a partner to receive, or of a general partner to make, distributions to a partner which include a return of all or any part of the partner's contribution;~~
- ~~(11) any time at which or events upon the happening of which the limited partnership is to be dissolved and its affairs wound up;~~
- ~~(12) any right of the remaining general partners to continue the business on the happening of an event of withdrawal of a general partner; and~~
- (4) the latest date upon which the limited partnership is to dissolve; and
- ~~(13) (5)~~ any other matters the general partners determine to include therein.

(b) A limited partnership is formed at the time of the filing of the certificate of limited partnership in the office of the Secretary of State or at any later time specified in the certificate of limited partnership if, in either case, there has been substantial compliance with the requirements of this section.

COMMENT

~~The 1985 Act requires far fewer matters required to be set forth in the certificate of limited partnership are not different in kind from those than did required by Section 2 of the prior uniform law 1916 Act and Section 201 of the 1976 Act. Although certain additions and deletions have been made and the description has been revised to conform with the rest of the Act. This is in recognition of the fact that the partnership agreement, not the certificate of limited partnership, has become the authoritative and comprehensive document for most limited partnerships, and that creditors and potential creditors of the partnership do and should refer to the partnership agreement and to other information furnished to them directly by the partnership and by others, not to the certificate of limited partnership. In general, the certificate is intended to serve two functions: first, to place creditors on notice of the facts concerning the capital and finances of the partnership and other matters of concern the rules regarding additional contributions to and withdrawal from the partnership; second, to clearly delineate the time at which persons become general partners and limited partners. Subparagraph (b), which is based upon the prior uniform law, 1916 Act, has been retained to make it clear that existence of the limited partnership depends only upon compliance with this section. Its continued existence is not dependent upon compliance with other provisions of this Act.~~

§ 202. Amendment to Certificate

(a) A certificate of limited partnership is amended by filing a certificate of amendment thereto in the office of the Secretary of State. The certificate shall set forth:

- (1) the name of the limited partnership;
- (2) the date of filing the certificate; and
- (3) the amendment to the certificate.

(b) Within 30 days after the happening of any of the following events, an amendment to a certificate of limited partnership reflecting the occurrence of the event or events shall be filed:

- ~~(1) a change in the amount or character of the contribution of any partner, or in any partner's obligation to make a contribution;~~
- (2) (1) the admission of a new general partner;
- (3) (2) the withdrawal of a general partner; or
- (4) (3) the continuation of the business under Section 801 after an event of withdrawal of a general partner.

(c) A general partner who becomes aware that any statement in a certificate of limited partnership was false when made or that any arrangements or other facts described have changed, making the certificate inaccurate in any respect, shall promptly amend the certificate, ~~but an amendment to show a change of address of a limited partner need be filed only once every 12 months.~~

(d) A certificate of limited partnership may be amended at any time for any other proper purpose the general partners determine.

(e) No person has any liability because an amendment to a certificate of limited partnership has not been filed to reflect the occurrence of any event referred to in subsection (b) of this ~~Section~~ section if the amendment is filed within the 30-day period specified in subsection (b).

(f) A restated certificate of limited partnership may be executed and filed in the same manner as a certificate of amendment.

COMMENT

Section 202 ~~makes of the 1976 Act made~~ substantial changes in Section 24 of the ~~prior uniform law 1916 Act~~. Further changes in this section are made by the 1985 Act. Paragraph (b) lists the basic events—the addition or withdrawal of ~~partners or capital or capital obligations~~ a general partner—that are so central to the function of the certificate of limited partnership that they require prompt amendment. With the elimination of the requirement that the certificate of limited partnership include the names of all limited partners and the amount and character of all capital contributions, the requirement of the 1916 and 1976 Acts that the certificate be amended upon the admission or withdrawal of limited partners or on any change in the partnership capital must also be eliminated. This change should greatly reduce the frequency and complexity of amendments to the certificate of limited partnership. Paragraph (c) makes it clear, as it was not clear under ~~subdivision (2)(g) of former Section 24~~ 24(2)(g) of the 1916 Act, that the certificate of limited partnership is intended to be an accurate description of the facts to which it relates at all times and does not speak merely as of the date it is executed.

Paragraph (e) provides a "safe harbor" against claims of creditors or others who assert that they have been misled by the failure to amend the certificate of limited partnership to reflect changes in any of the important facts referred to in paragraph (b); if the certificate of limited partnership is amended within 30 days of the occurrence of the event, no creditor or other person can recover for damages sustained during the interim. Additional protection is afforded by the provisions of Section 304. The elimination of the requirement that the certificate of limited partnership identify all limited partners and their respective capital contributions may have rendered paragraph (e) an obsolete and unnecessary vestige. The principal, if not the sole, purpose of paragraph (e) in the 1976 Act was to protect limited partners newly admitted to a partnership from being held liable as general partners when an amendment to the certificate identifying them as limited partners and describing their contributions was not filed contemporaneously with their admission to the partnership. Such liability cannot arise under the 1985 Act because such information is not required to be stated in the certificate. Nevertheless, the 1985 Act retains paragraph (e) because it is protective of partners, shielding them from liability to the extent its provisions apply, and does not create or impose any liability.

Paragraph (f) is added in the 1985 Act to provide explicit statutory recognition of the common practice of restating an amended certificate of limited partnership. While a limited partnership seeking to amend its certificate of limited partnership may do so by recording a restated certificate which incorporates the amendment, that is by no means the only purpose or function of a restated certificate, which may be filed for the sole purpose of restating in a single integrated instrument all the provisions of a limited partnership's certificate of limited partnership which are then in effect.

§ 203. Cancellation of Certificate

A certificate of limited partnership shall be cancelled upon the dissolution and the commencement of winding up of the partnership or at any other time there are no limited partners. A certificate of cancellation shall be filed in the office of the Secretary of State and set forth:

- (1) the name of the limited partnership;
- (2) the date of filing of its certificate of limited partnership;
- (3) the reason for filing the certificate of cancellation;
- (4) the effective date (which shall be a date certain) of cancellation if it is not to be effective upon the filing of the certificate; and
- (5) any other information the general partners filing the certificate determine.

COMMENT

Section 203 changes Section 24 of the ~~prior uniform law 1916 Act~~ by making it clear that the certificate of cancellation should be filed upon the commencement of winding up of the limited partnership. Section 24 provided for cancellation "when the partnership is dissolved".

§ 204. Execution of Certificates

(a) Each certificate required by this Article to be filed in the office of the Secretary of State shall be executed in the following manner:

- (1) an original certificate of limited partnership must be signed by all general partners named therein;
- (2) a certificate of amendment must be signed by at least one general partner and by each other general partner designated in the certificate as a new general partner or whose contribution is described as having been increased; and
- (3) a certificate of cancellation must be signed by all general partners;

(b) Any person may sign a certificate by an attorney-in-fact, but a power of attorney to sign a certificate relating to the admission or increased contribution, of a general partner must specifically describe the admission or increase.

(c) The execution of a certificate by a general partner constitutes an affirmation under the penalties of perjury that the facts stated therein are true.

COMMENT

Section 204 collects in one place the formal requirements for the execution of certificates which were set forth in Sections 2 and 25 of the prior uniform law 1916 Act. Those sections required that each certificate be signed by all partners and there developed an unnecessarily cumbersome practice of having each limited partner sign power of attorney to authorize the general partners to execute certificates of amendment on their behalf. The 1976 Act, while simplifying the execution requirements, nevertheless required that an original certificate of limited partnership be signed by all partners and a certificate of amendment by all new partners being admitted to the limited partnership. However the certificate of limited partnership is no longer required to include the name or capital contribution of any limited partner. Therefore, while the 1985 Act still requires all general partners to sign the original certificate of limited partnership, no limited partner is required to sign any certificate. Section 204 insures that each partner must sign a certificate when he becomes a partner or when the certificates reflect any increase in his obligation to make contributions. Certificates of amendment are required to be signed by only one general partner, and all general partners must sign certificates of cancellation. Section 204 prohibits blanket powers of attorney for the execution of certificates in many cases, since those conditions under which a partner is required to sign have been narrowed to circumstances of special importance to that partner. The former requirement in the 1916 Act that all certificates be sworn to was deleted in the 1976 and 1985 Acts as potentially an unfair trap for the unwary (see, e.g., Wisniewski v. Johnson, 223 Va. 141, 286 S.E.2d 223 [1982]); in its place, paragraph (c) now provides, as a matter of law, that the execution of a certificate by a general partner subjects him to the penalties of perjury for inaccuracies in the certificate. has been confined to statements by the general partners, recognizing that the limited partner's role is a limited one.

§ 205. ~~Amendment or Cancellation~~ Execution by Judicial Act

If a person required by Section 204 to execute a any certificate of amendment or cancellation fails or refuses to do so, any other partner, and any assignee of a partnership interest, person who is adversely affected by the failure or refusal, may petition the [designate the appropriate court] to direct the amendment or cancellation execution of the certificate. If the court finds that the amendment or cancellation is proper it is proper for the certificate to be executed and that any person so designated has failed or refused to execute the certificate, it shall order the Secretary of State to record an appropriate certificate of amendment or cancellation.

COMMENT

Section 205 of the 1976 Act changed subdivisions (3) and (4) of Section 25 of the 1916 Act prior uniform law by confining the persons who have standing to seek judicial intervention to partners and to those assignees who were ~~are~~ adversely affected by the failure or refusal of the appropriate persons to file a certificate of amendment or cancellation. Section 205 of the 1985 Act reverses that

restriction, and provides that any person adversely affected by a failure or refusal to file any certificate (not only a certificate of cancellation or amendment) has standing to seek judicial intervention.

§ 206. Filing in Office of Secretary of State

(a) Two signed copies of the certificate of limited partnership and of any certificates of amendment or cancellation (or of any judicial decree of amendment or cancellation) shall be delivered to the Secretary of State. A person who executes a certificate as an agent or fiduciary need not exhibit evidence of his [or her] authority as a prerequisite to filing. Unless the Secretary of State finds that any certificate does not conform to law, upon receipt of all filing fees required by law he [or she] shall:

- (1) endorse on each duplicate original the word "Filed" and the day, month, and year of the filing thereof;
- (2) file one duplicate original in his [or her] office; and
- (3) return the other duplicate original to the person who filed it or his [or her] representative.

(b) Upon the filing of a certificate of amendment (or judicial decree of amendment) in the office of the Secretary of State, the certificate of limited partnership shall be amended as set forth therein, and upon the effective date of a certificate of cancellation (or a judicial decree thereof), the certificate of limited partnership is cancelled.

COMMENT

Section 206 ~~is new~~ first appeared in the 1976 Act. In addition to providing mechanics for the central filing system, the second sentence of this section does away with the requirement, formerly imposed by some local filing officers, that persons who have executed certificates under a power of attorney exhibit executed copies of the power of attorney itself. Paragraph (b) changes subdivision (5) of Section 25 of the ~~prior uniform law~~ 1916 Act by providing that certificates of cancellation are effective upon their effective date under Section 203.

§ 207. Liability for False Statement in Certificate

If any certificate of limited partnership or certificate of amendment or cancellation contains a false statement, one who suffers loss by reliance on the statement may recover damages for the loss from:

- (1) any person who executes the certificate, or causes another to execute it on his behalf, and knew, and any general partner who knew or should have known, the statement to be false at the time the certificate was executed; and
- (2) any general partner who thereafter knows or should have known that any arrangement or other fact described in the certificate has changed, making the statement inaccurate in any respect within a sufficient time before the statement was relied upon reasonably to have enabled that general partner to cancel or amend the certificate, or to file a petition for its cancellation or amendment under Section 205.

COMMENT

Section 207 changes Section 6 of the ~~prior uniform law~~ 1916 Act by providing explicitly for the liability of persons who sign a certificate as agent under a power of attorney and by confining the obligation to amend a certificate of limited partnership in light of future events to general partners.

§ 208. Scope of Notice

The fact that a certificate of limited partnership is on file in the office of the Secretary of State is notice that the partnership is a limited partnership and the persons designated therein as limited general partners are limited general partners, but it is not notice of any other fact.

COMMENT

Section 208 ~~is now~~ first appeared in the 1976 Act, and referred to the certificate's providing constructive notice of the status as limited partners of those so identified therein. The 1985 Act's deletion of any requirement that the certificate name limited partners requires that Section 208 be modified accordingly.

By stating that the filing of a certificate of limited partnership only results in notice of the general limited liability of the general limited partners, it Section 208 obviates the concern that third parties may be held to have notice of special provisions set forth in the certificate. While this section is designed to preserve by implication the limited liability of limited partners, the ~~now~~ implicit protection provided is not intended to change any liability of a limited partner which may be created by his action or inaction under the law of estoppel, agency, fraud or the like.

§ 209. Delivery of Certificates to Limited Partners

Upon the return by the Secretary of State pursuant to Section 206 of a certificate marked "Filed," the general partners shall promptly deliver or mail a copy of the certificate of limited partnership and each certificate of amendment or cancellation to each limited partner unless the partnership agreement provides otherwise.

COMMENT

This section ~~is now~~ first appeared in the 1976 Act.

ARTICLE 3

LIMITED PARTNERS

§ 301. Admission of Additional Limited Partners

(a) A person becomes a limited partner:

(1) at the time the limited partnership is formed; or

(2) at any later time specified in the records of the limited partnership for becoming a limited partner.

~~(a)~~(b) After the filing of a limited partnership's original certificate of limited partnership, a person may be admitted as an additional limited partner:

(1) in the case of a person acquiring a partnership interest directly from the limited partnership, upon compliance with the partnership agreement or, if the partnership agreement does not so provide, upon the written consent of all partners; and

(2) in the case of an assignee of a partnership interest of a partner who has the power, as provided in Section 704, to grant the assignee the right to become a limited partner, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power.

~~(b) In each case under subsection (a), the person acquiring the partnership interest becomes a limited partner only upon amendment of the certificate of limited partnership reflecting that fact.~~

COMMENT

Section 301(a) is new; no counterpart was found in the 1916 or 1976 Acts. This section imposes on the partnership an obligation to maintain in its records the date each limited partner becomes a limited partner. Under the 1976 Act, one could not become a limited partner until an appropriate certificate reflecting his status as such was filed with the Secretary of State. Because the 1985 Act eliminates the need to name limited partners in the certificate of limited partnership, an alternative mechanism had to be established to evidence the fact and date of a limited partner's admission. The partnership records required to be maintained under Section 105 now serve that function, subject to the limitation that no person may become a limited partner before the partnership is formed (Section 201(6)).

Subdivision (1) of Section ~~301(a)~~ 301(b) adds to Section 8 of the ~~prior uniform law 1916 Act~~ an explicit recognition of the fact that unanimous consent of all partners is required for admission of new limited partners unless the partnership agreement provides otherwise. Subdivision (2) is derived from Section 19 of the ~~prior uniform law 1916 Act~~ but abandons the former terminology of "substituted limited partner."

§ 302. Voting

Subject to Section 303, the partnership agreement may grant to all or a specified group of the limited partners the right to vote (on a per capita or other basis) upon any matter.

COMMENT

Section 302 ~~is new~~, first appeared in the 1976 Act, and must be read together with subdivision (b)(5)(6) of Section 303. Although the ~~prior uniform law 1916 Act~~ did not speak specifically of the voting powers of limited partners, it ~~was~~ is not uncommon for partnership agreements to grant such powers to limited partners. Section 302 is designed only to make it clear that the partnership agreement may grant such power to limited partners. If such powers are granted to limited partners beyond the "safe harbor" of subdivision (6) or (8) of Section 303(b)(5), a court may (but of course need not) hold that, under the circumstances, the limited partners have participated in "control of the business" within the meaning of Section 303(a). Section 303(c) ~~simply means~~ makes clear that the exercise of powers beyond the ambit of Section 303(b) is not ipso facto to be taken as taking part in the control of the business.

§ 303. Liability to Third Parties

(a) Except as provided in subsection (d), a limited partner is not liable for the obligations of a limited partnership unless he [or she] is also a general partner or, in addition to the exercise of his [or her] rights and powers as a limited partner, he [or she] ~~takes part~~ participates in the control of the business. However, if the limited partner's participation ~~partner participates~~ in the control of the business is not substantially the same as the exercise of the powers of a general partner, he [or she] is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner.

(b) A limited partner does not participate in the control of the business within the meaning of subsection (a) solely by doing one or more of the following:

(1) being a contractor for or an agent or employee of the limited partnership or of a general partner or being an officer, director, or shareholder of a general partner that is a corporation;

(2) consulting with and advising a general partner with respect to the business of the limited partnership;

(3) acting as surety for the limited partnership or guaranteeing or assuming one or more specific obligations of the limited partnership;

(4) approving or disapproving an amendment to the partnership agreement taking any action required or permitted by law to bring or pursue a derivative action in the right of the limited partnership; or

~~(5) voting on one or more of the following matters:~~

(5) requesting or attending a meeting of partners;

(6) proposing, approving, or disapproving, by voting or otherwise, one or more of the following matters:

(i) the dissolution and winding up of the limited partnership;

(ii) the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership other than in the ordinary course of its business;

- (iii) the incurrence of indebtedness by the limited partnership other than in the ordinary course of its business;
- (iv) a change in the nature of the business; or
- (v) the admission or removal of a general partner;
- (vi) the admission or removal of a limited partner;
- (vii) a transaction involving an actual or potential conflict of interest between a general partner and the limited partnership or the limited partners;
- (viii) an amendment to the partnership agreement or certificate of limited partnership; or
- (ix) matters related to the business of the limited partnership not otherwise enumerated in this subsection (b), which the partnership agreement states in writing may be subject to the approval or disapproval of limited partners;
- (7) winding up the limited partnership pursuant to Section 803; or
- (8) exercising any right or power permitted to limited partners under this [Act] and not specifically enumerated in this subsection (b).

(c) The enumeration in subsection (b) does not mean that the possession or exercise of any other powers by a limited partner constitutes participation by him [or her] in the business of the limited partnership.

(d) A limited partner who knowingly permits his [or her] name to be used in the name of the limited partnership, except under circumstances permitted by Section 102(2), is liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner.

COMMENT

Section 303 makes several important changes in Section 7 of the prior uniform law 1916 Act. The first sentence of Section 303(a) carries over the basic text from former Section 7—whether the limited partner “takes part in the control of the business”—in order to insure that judicial decisions under the prior uniform law remain applicable to the extent not expressly changed. It differs from the text of Section 7 of the 1916 Act in that it speaks of participating (rather than taking part) in the control of the business; this was done for the sake of consistency with the second sentence of Section 303(a), not to change the meaning of the text. It is intended that judicial decisions interpreting the phrase “takes part in the control of the business” under the prior uniform law will remain applicable to the extent that a different result is not called for by other provisions of Section 303 and other provisions of the Act. The second sentence of Section 303(a) reflects a wholly new concept. Because in the 1976 Act that has been further modified in the 1985 Act. It was adopted partly because of the difficulty of determining when the “control” line has been overstepped, it was thought it unfair to impose general partner’s liability on a limited partner except to the extent that a third party had knowledge of his participation in control of the business. On the other hand, in order to avoid permitting a limited partner to exercise all of the powers of a general partner while avoiding any direct dealings with third parties, the “is not substantially the same as” test was introduced but also (and more important) because of a determination that it is not sound public policy to hold a limited partner who is not also a general partner liable for the obligations of the partnership except to persons who have done business with the limited partnership reasonably believing, based on the limited partner’s conduct, that he is a general partner. Paragraph (b) is intended to provide a “safe harbor” by enumerating certain activities which a limited partner may carry on for the partnership without being deemed to have taken part in control of the business. This “safe harbor” list has been expanded beyond that set out in the 1976 Act to reflect case law and statutory developments and more clearly to assure that limited partners are not subjected to general liability where such liability is inappropriate. Paragraph (d) is derived from Section 5 of the prior uniform law 1916 Act, but adds as a condition to the limited partner’s liability the ~~fact~~ requirement that a limited partner must have knowingly permitted his name to be used in the name of the limited partnership.

§ 304. Person Erroneously Believing Himself [or Herself] Limited Partner

(a) Except as provided in subsection (b), a person who makes a contribution to a business enterprise and erroneously but in good faith believes that he [or she] has become

a limited partner in the enterprise is not a general partner in the enterprise and is not bound by its obligations by reason of making the contribution, receiving distributions from the enterprise, or exercising any rights of a limited partner, if, on ascertaining the mistake, he [or she]:

(1) causes an appropriate certificate of limited partnership or a certificate of amendment to be executed and filed; or

(2) withdraws from future equity participation in the enterprise by executing and filing in the office of the Secretary of State a certificate declaring withdrawal under this section.

(b) A person who makes a contribution of the kind described in subsection (a) is liable as a general partner to any third party who transacts business with the enterprise (i) before the person withdraws and an appropriate certificate is filed to show withdrawal, or (ii) before an appropriate certificate is filed to show ~~his status as a limited partner and, in the case of an amendment, after expiration of the 30-day period for filing an amendment relating to the person as a limited partner under Section 302~~ that he [or she] is not a general partner, but in either case only if the third party actually believed in good faith that the person was a general partner at the time of the transaction.

COMMENT

Section 304 is derived from Section 11 of the ~~prior uniform law, 1916 Act~~. The "good faith" requirement has been added in the first sentence of Section 304(a). The provisions of subdivision (2) of Section 304(a) are intended to clarify an ambiguity in the prior law by providing that a person who chooses to withdraw from the enterprise in order to protect himself from liability is not required to renounce any of his then current interest in the enterprise so long as he has no further participation as an equity participant. Paragraph (b) preserves the liability of the equity participant prior to withdrawal ~~and after the time for appropriate amendment in the case of a limited partnership~~ by such person from the limited partnership or amendment to the certificate demonstrating that such person is not a general partner to any third party who has transacted business with the person believing in good faith that he was a general partner.

Evidence strongly suggests that Section 11 of the 1916 Act and Section 304 of the 1976 Act were rarely used, and one might expect that Section 304 of the 1985 Act may never have to be used. Section 11 of the 1916 Act and Section 304 of the 1976 Act could have been used by a person who invested in a limited partnership believing he would be a limited partner but who was not identified as a limited partner in the certificate of limited partnership. However, because the 1985 Act does not require limited partners to be named in the certificate, the only situation to which Section 304 would now appear to be applicable is one in which a person intending to be a limited partner was erroneously identified as a general partner in the certificate.

§ 305. Information

Each limited partner has the right to:

(1) inspect and copy any of the partnership records required to be maintained by Section 105; and

(2) obtain from the general partners from time to time upon reasonable demand (i) true and full information regarding the state of the business and financial condition of the limited partnership, (ii) promptly after becoming available, a copy of the limited partnership's federal, state, and local income tax returns for each year, and (iii) other information regarding the affairs of the limited partnership as is just and reasonable.

COMMENT

Section 305 changes and restates the rights of limited partners to information about the partnership formerly provided by Section 10 of the ~~prior uniform law, 1916 Act~~. Its importance has increased as a result of the 1985 Act's substituting the records of the partnership for the certificate of limited partnership as the place where certain categories of information are to be kept.

Section 305, which should be read together with Section 105(b), provides a mechanism for limited partners to obtain information about the partnership useful to them in making decisions concerning the partnership and their investments in it. Its purpose is not to provide a mechanism for competitors of the partnership or others having interests or agendas adverse to the partnership's to subvert the partnership's business. It is assumed that courts will protect limited partnerships from abuses and attempts to misuse Section 305 for improper purposes.

ARTICLE 4

GENERAL PARTNERS

§ 401. Admission of Additional General Partners

After the filing of a limited partnership's original certificate of limited partnership, additional general partners may be admitted only as provided in writing in the partnership agreement or, if the partnership agreement does not provide in writing for the admission of additional general partners, with the specific written consent of each partner all partners.

COMMENT

Section 401 is derived from, but represents a significant departure from, Section 9(1)(e) of the prior uniform law 1916 Act and Section 401 of the 1976 Act, which required, ~~and carries over the unavailable requirements that all limited partners must consent~~ as a condition to the admission of an additional general partner, that all limited partners consent and that such consent ~~must~~ specifically identify the general partner involved. Section 401 of the 1985 Act provides that the written partnership agreement determines the procedure for authorizing the admission of additional general partners, and that the written consent of all partners is required only when the partnership agreement fails to address the question.

§ 402. Events of Withdrawal

Except as approved by the specific written consent of all partners at the time, a person ceases to be a general partner of a limited partnership upon the happening of any of the following events:

- (1) the general partner withdraws from the limited partnership as provided in Section 602;
- (2) the general partner ceases to be a member of the limited partnership as provided in Section 702;
- (3) the general partner is removed as a general partner in accordance with the partnership agreement;
- (4) unless otherwise provided in writing in the ~~certificate of limited partnership agreement~~, the general partner: (i) makes an assignment for the benefit of creditors; (ii) files a voluntary petition in bankruptcy; (iii) is adjudicated a bankrupt or insolvent; (iv) files a petition or answer seeking for himself [or herself] any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against him [or her] in any proceeding of this nature; or (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his [or her] properties;
- (5) unless otherwise provided in writing in the ~~certificate of limited partnership agreement~~, [120] days after the commencement of any proceeding against the general partner

seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed, or if within [90] days after the appointment without his [or her] consent or acquiescence of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his [or her] properties, the appointment is not vacated or stayed or within [90] days after the expiration of any such stay, the appointment is not vacated:

(6) in the case of a general partner who is a natural person,

(i) his [or her] death; or

(ii) the entry of an order by a court of competent jurisdiction adjudicating him [or her] incompetent to manage his [or her] person or his [or her] estate;

(7) in the case of a general partner who is acting as a general partner by virtue of being a trustee of a trust, the termination of the trust (but not merely the substitution of a new trustee);

(8) in the case of a general partner that is a separate partnership, the dissolution and commencement of winding up of the separate partnership;

(9) in the case of a general partner that is a corporation, the filing of a certificate of dissolution, or its equivalent, for the corporation or the revocation of its charter; or

(10) in the case of an estate, the distribution by the fiduciary of the estate's entire interest in the partnership.

COMMENT

Section 402 expands considerably the provisions of Section 20 of the ~~prior uniform law~~ 1916 Act, which provided for dissolution in the event of the retirement, death or insanity of a general partner. Subdivisions (1), (2) and (3) recognize that the general partner's agency relationship is terminable at will, although it may result in a breach of the partnership agreement giving rise to an action for damages. Subdivisions (4) and (5) reflect a judgment that, unless the limited partners agree otherwise, they ought to have the power to rid themselves of a general partner who is in such dire financial straits that he is the subject of proceedings under the National Bankruptcy Act Code or a similar provision of law. Subdivisions (6) through (10) simply elaborate on the notion of death in the case of a general partner who is not a natural person. ~~Of course, the addition of the words "and in the partnership agreement" was not intended to suggest that liabilities to third parties could be affected by provisions in the partnership agreement. Subdivisions (4) and (5) differ from their counterparts in the 1976 Act, reflecting the policy underlying the 1985 revision of Section 201, that the partnership agreement, not the certificate of limited partnership, is the appropriate document for setting out most provisions relating to the respective powers, rights and obligations of the partners inter se. Although the partnership agreement need not be written, the 1985 Act provides that, to protect the partners from fraud, these and certain other particularly significant provisions must be set out in a written partnership agreement to be effective for the purposes described in the Act.~~

§ 403. General Powers and Liabilities

(a) Except as provided in this [Act] or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners.

(b) Except as provided in this [Act], a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners. Except as provided in this [Act] or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners.

COMMENT

Section 403 is derived from Section 9(1) of the ~~prior uniform law~~, 1916 Act.

§ 404. Contributions by General Partner

A general partner of a limited partnership may make contributions to the partnership and share in the profits and losses of, and in distributions from, the limited partnership as a general partner. A general partner also may make contributions to and share in profits, losses, and distributions as a limited partner. A person who is both a general partner and a limited partner has the rights and powers, and is subject to the restrictions and liabilities, of a general partner and, except as provided in the partnership agreement, also has the powers, and is subject to the restrictions, of a limited partner to the extent of his [or her] participation in the partnership as a limited partner.

COMMENT

Section 404 is derived from Section 12 of the ~~prior uniform law~~ 1916 Act and makes clear that the partnership agreement may provide that a general partner who is also a limited partner may exercise all of the powers of a limited partner.

§ 405. Voting

The partnership agreement may grant to all or certain identified general partners the right to vote (on a per capita or any other basis), separately or with all or any class of the limited partners, on any matter.

COMMENT

Section 405 ~~is new~~ first appeared in the 1976 Act and is intended to make it clear that the Act does not require that the limited partners have any right to vote on matters as a separate class.

ARTICLE 5

FINANCE

§ 501. Form of Contribution

The contribution of a partner may be in cash, property, or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services.

COMMENT

As noted in the comment to Section 101, the explicit permission to make contributions of services expands Section 4 of the ~~prior uniform law~~, 1916 Act.

§ 502. Liability for Contribution

(a) A promise by a limited partner to contribute to the limited partnership is not enforceable unless set out in a writing signed by the limited partner.

~~(a)(b)~~ Except as provided in the ~~certificate of limited partnership agreement~~, a partner is obligated to the limited partnership to perform any enforceable promise to contribute cash or property or to perform services, even if he [or she] is unable to perform because of death, disability, or any other reason. If a partner does not make the required contribution of property or services, he [or she] is obligated at the option of the limited partnership to contribute cash equal to that portion of the value, as stated in the ~~certificate of limited partnership records~~ required to be kept pursuant to Section 105, of the stated contribution which has not been made.

~~(a)(c)~~ Unless otherwise provided in the partnership agreement, the obligation of a partner to make a contribution or return money or other property paid or distributed in violation of this [Act] may be compromised only by consent of all partners. Notwith-

standing the compromise, a creditor of a limited partnership who extends credit, or whose claim arises, otherwise acts in reliance on that obligation after the filing of the certificate of limited partnership or an amendment thereto partner signs a writing which, in either case, reflects the obligation, and before the amendment or cancellation thereof to reflect the compromise, may enforce the original obligation.

COMMENT

Section 502(a) is new: it has no counterpart in the 1916 or 1976 Act. Because, unlike the prior uniform acts, the 1985 Act does not require that promises to contribute cash, property, or services be described in the limited partnership certificate, to protect against fraud it requires instead that such important promises be in a signed writing.

Although Section 17(1) of the ~~prior uniform law~~ 1916 Act required a partner to fulfill his promise to make contributions, the addition of contributions in the form of a promise to render services means that a partner who is unable to perform those services because of death or disability as well as because of an intentional default is required to pay the cash value of the services unless the certificate of limited partnership partnership agreement provides otherwise.

Subdivision ~~(b)~~ (c) is derived from, but expands upon, Section 17(3) of the ~~prior uniform law~~ 1916 Act.

§ 503. Sharing of Profits and Losses

The profits and losses of a limited partnership shall be allocated among the partners, and among classes of partners, in the manner provided in writing in the partnership agreement. If the partnership agreement does not so provide in writing, profits and losses shall be allocated on the basis of the value, as stated in the certificate of limited partnership records required to be kept pursuant to Section 105, of the contributions made by each partner to the extent they have been received by the partnership and have not been returned.

COMMENT

Section 503 ~~is now~~ first appeared in the 1976 Act. The ~~prior uniform law~~ 1916 Act did not provide ~~for~~ the basis on which partners would share profits and losses in the absence of agreement. The 1985 Act differs from its counterpart in the 1976 Act by requiring that, to be effective, the partnership agreement provisions concerning allocation of profits and losses be in writing, and by its reference to records required to be kept pursuant to Section 105, the latter reflecting the 1985 changes in Section 201.

§ 504. Sharing of Distributions

Distributions of cash or other assets of a limited partnership shall be allocated among the partners and among classes of partners in the manner provided in writing in the partnership agreement. If the partnership agreement does not so provide in writing, distributions shall be made on the basis of the value, as stated in the certificate of limited partnership records required to be kept pursuant to Section 105, of the contributions made by each partner to the extent they have been received by the partnership and have not been returned.

COMMENT

Section 504 ~~is now~~ first appeared in the 1976 Act. The ~~prior uniform law~~ 1916 Act did not provide ~~for~~ the basis on which partners would share distributions in the absence of agreement. Section 504 also differs from its counterpart in the 1976 Act by requiring that, to be effective, the partnership agreement provisions concerning allocation of distributions be in writing, and in its reference to records required to be kept pursuant to Section 105, the latter reflecting the 1985 changes in Section 201. This section also recognizes that partners may choose to share in distributions on a different basis than ~~different~~ from that on which they share in profits and losses.

ARTICLE 6

DISTRIBUTIONS AND WITHDRAWAL

§ 601. Interim Distributions

Except as provided in this Article, a partner is entitled to receive distributions from a limited partnership before his [or her] withdrawal from the limited partnership and before the dissolution and winding up thereof:

(1) to the extent and at the times or upon the happening of the events specified in the partnership agreement; ~~and~~

~~(2) if any distribution constitutes a return of any part of his contribution under Section 608(c), to the extent and at the times or upon the happening of the events specified in the certificate of limited partnership.~~

COMMENT

Section 601 is ~~new~~ first appeared in the 1976 Act. The 1976 Act provisions have been modified to reflect the 1985 changes made in Section 201.

§ 602. Withdrawal of General Partner

A general partner may withdraw from a limited partnership at any time by giving written notice to the other partners, but if the withdrawal violates the partnership agreement, the limited partnership may recover from the withdrawing general partner damages for breach of the partnership agreement and offset the damages against the amount otherwise distributable to him [or her].

COMMENT

Section 602 is ~~new~~ first appeared in the 1976 Act, but is generally derived from Section 38 of the Uniform Partnership Act.

§ 603. Withdrawal of Limited Partner

A limited partner may withdraw from a limited partnership at the time or upon the happening of events specified ~~in the certificate of limited partnership and in accordance with~~ in writing in the partnership agreement. If the ~~certificate agreement~~ agreement does not specify in writing the time or the events upon the happening of which a limited partner may withdraw or a definite time for the dissolution and winding up of the limited partnership, a limited partner may withdraw upon not less than six months' prior written notice to each general partner at his [other] address on the books of the limited partnership at its office in this State.

COMMENT

Section 603 is derived from Section 16(4) of the ~~prior uniform law~~ 1916 Act. The 1976 Act provision has been modified to reflect the 1985 changes made in Section 201. This section additionally reflects the policy determination, also embodied in certain other sections of the 1985 Act, that to avoid fraud, agreements concerning certain matters of substantial importance to the partners will be enforceable only if in writing. If the partnership agreement does provide, in writing, whether a limited partner may withdraw and, if he may, when and on what terms and conditions, those provisions will control.

§ 604. Distribution Upon Withdrawal

Except as provided in this Article, upon withdrawal any withdrawing partner is entitled to receive any distribution to which he [or she] is entitled under the partnership agreement and, if not otherwise provided in the agreement, he [or she] is entitled to receive, within a reasonable time after withdrawal, the fair value of his [or her] interest in the limited partnership as of the date of withdrawal based upon his [or her] right to share in distributions from the limited partnership.

COMMENT

Section 604 is now first appeared in the 1976 Act. It fixes the distributive share of a withdrawing partner in the absence of an agreement among the partners.

§ 605. Distribution in Kind

Except as provided in writing in the certificate of limited partnership agreement, a partner, regardless of the nature of his [or her] contribution, has no right to demand and receive any distribution from a limited partnership in any form other than cash. Except as provided in writing in the partnership agreement, a partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed to him [or her] exceeds a percentage of that asset which is equal to the percentage in which he [or she] shares in distributions from the limited partnership.

COMMENT

The first sentence of Section 605 is derived from Section 16(3) of the ~~prior uniform law~~, 1916 Act; it also differs from its counterpart in the 1976 Act, reflecting the 1985 changes made in Section 201. The second sentence first appeared in the 1976 Act, ~~is now~~, and is intended to protect a limited partner (and the remaining partners) against a distribution in kind of more than his share of particular assets.

§ 606. Right to Distribution

At the time a partner becomes entitled to receive a distribution, he [or she] has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution.

COMMENT

Section 606 is now first appeared in the 1976 Act, and is intended to make it clear that the right of a partner to receive a distribution, as between the partners, is not subject to the equity risks of the enterprise. On the other hand, since partners entitled to distributions have creditor status, there did not seem to be a need for the extraordinary remedy of Section 16(4)(a) of the ~~prior uniform law~~, 1916 Act, which granted a limited partner the right to seek dissolution of the partnership if he was unsuccessful in demanding the return of his contribution. It is more appropriate for the partner to simply sue as an ordinary creditor and obtain a judgment.

§ 607. Limitations on Distribution

A partner may not receive a distribution from a limited partnership to the extent that, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests, exceed the fair value of the partnership assets.

COMMENT

Section 607 is derived from Section 16(1)(a) of the ~~prior uniform law~~, 1916 Act.

§ 608. Liability Upon Return of Contribution

(a) If a partner has received the return of any part of his [or her] contribution without violation of the partnership agreement or this [Act], he [or she] is liable to the limited partnership for a period of one year thereafter for the amount of the returned contribution, but only to the extent necessary to discharge the limited partnership's liabilities to creditors who extended credit to the limited partnership during the period the contribution was held by the partnership.

(b) If a partner has received the return of any part of his [or her] contribution in violation of the partnership agreement or this [Act], he [or she] is liable to the limited partnership for a period of six years thereafter for the amount of the contribution wrongfully returned.

(c) A partner receives a return of his [or her] contribution to the extent that a distribution to him [or her] reduces his [or her] share of the fair value of the net assets of the limited partnership below the value, as set forth in the ~~certificate of limited partnership records required to be kept pursuant to Section 105~~, of his contribution which has not been distributed to him [or her].

COMMENT

Paragraph (a) is derived from Section 17(4) of the ~~prior uniform law 1916 Act~~, but the one year statute of limitations has been added. Paragraph (b) is derived from Section 17(2)(b) of the ~~prior uniform law 1916 Act~~ but, again, a statute of limitations has been added.

Paragraph (c) ~~is new~~ first appeared in the 1976 Act. The provisions of former Section 17(2) that referred to the partner holding as "trustee" any money or specific property wrongfully returned to him have been eliminated. Paragraph (c) in the 1985 Act also differs from its counterpart in the 1976 Act to reflect the 1985 changes made in Sections 105 and 201.

ARTICLE 7

ASSIGNMENT OF PARTNERSHIP INTERESTS

§ 701. Nature of Partnership Interest

A partnership interest is personal property.

COMMENT

This section is derived from Section 18 of the ~~prior uniform law 1916 Act~~.

§ 702. Assignment of Partnership Interest

Except as provided in the partnership agreement, a partnership interest is assignable in whole or in part. An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights of a partner. An assignment entitles the assignee to receive, to the extent assigned, only the distribution to which the assignor would be entitled. Except as provided in the partnership agreement, a partner ceases to be a partner upon assignment of all his [or her] partnership interest.

COMMENT

Section 19(1) of the ~~prior uniform law 1916 Act~~ provided simply that "a limited partner's interest is assignable", raising a question whether any limitations on the right of assignment were permitted. While the first sentence of Section 702 recognizes that the power to assign may be restricted in the partnership agreement, there was no intention to affect in any way the usual rules regarding restraints on alienation of personal property. The second and third sentences of Section 702 are derived from Section 19(3) of the ~~prior uniform law 1916 Act~~. The last sentence ~~is new~~ first appeared in the 1976 Act.

§ 703. Rights of Creditor

On application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest. This [Act] does not deprive any partner of the benefit of any exemption laws applicable to his [or her] partnership interest.

COMMENT

Section 703 is derived from Section 22 of the ~~prior uniform law~~ 1916 Act but has not carried over some provisions that were thought to be superfluous. For example, references in Section 22(1) to specific remedies have been omitted, as has a prohibition in Section 22(2) against discharge of the lien with partnership property. Ordinary rules governing the remedies available to a creditor and the fiduciary obligations of general partners will determine those matters.

§ 704. Right of Assignee to Become Limited Partner

(a) An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if and to the extent that (1) (i) the assignor gives the assignee that right in accordance with authority described in the ~~certificate of limited partnership agreement~~, or (2) (ii) all other partners consent.

(b) An assignee who has become a limited partner has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a limited partner under the partnership agreement and this [Act]. An assignee who becomes a limited partner also is liable for the obligations of his [or her] assignor to make and return contributions as provided in ~~Article~~ Articles 5 and 6. However, the assignee is not obligated for liabilities unknown to the assignee at the time he [or she] became a limited partner ~~and which could not be ascertained from the certificate of limited partnership~~.

(c) If an assignee of a partnership interest becomes a limited partner, the assignor is not released from his [or her] liability to the limited partnership under Sections 207 and 502.

COMMENT

Section 704 is derived from Section 19 of the ~~prior uniform law~~, 1916 Act, but paragraph (b) defines more narrowly than Section 19 the obligations of the assignor that are automatically assumed by the assignee. Section 704 of the 1985 Act also differs from the 1976 Act to reflect the 1985 changes made in Section 201.

§ 705. Power of Estate of Deceased or Incompetent Partner

If a partner who is an individual dies or a court of competent jurisdiction adjudges him [or her] to be incompetent to manage his [or her] person or his [or her] property, the partner's executor, administrator, guardian, conservator, or other legal representative may exercise all of the partner's rights for the purpose of settling his [or her] estate or administering his [or her] property, including any power the partner had to give an assignee the right to become a limited partner. If a partner is a corporation, trust, or other entity and is dissolved or terminated, the powers of that partner may be exercised by its legal representative or successor.

COMMENT

Section 705 is derived from Section 21(1) of the ~~prior uniform law~~, 1916 Act. Former Section 21(2), making a deceased limited partner's estate liable for his liabilities as a limited partner was deleted as superfluous, with no intention of changing the liability of the estate.

ARTICLE 8
DISSOLUTION

§ 801. Nonjudicial Dissolution

A limited partnership is dissolved and its affairs shall be wound up upon the happening of the first to occur of the following:

- (1) at the time specified in the certificate of limited partnership;
- (2) ~~or~~ upon the happening of events specified in writing in the ~~certificate of limited partnership agreement~~;
- (2)(3) written consent of all partners;
- (3)(4) an event of withdrawal of a general partner unless at the time there is at least one other general partner and the ~~certificate of limited partnership agreement permits~~ written provisions of the partnership agreement permit the business of the limited partnership to be carried on by the remaining general partner and that partner does so, but the limited partnership is not dissolved and is not required to be wound up by reason of any event of withdrawal, if, within 90 days after the withdrawal, all partners agree in writing to continue the business of the limited partnership and to the appointment of one or more additional general partners if necessary or desired; or
- (4)(5) entry of a decree of judicial dissolution under Section 802.

COMMENT

Section 801 merely collects in one place all of the events causing dissolution. Paragraph (3) is derived from Sections 9(1)(g) and 20 of the ~~prior uniform law~~, 1916 Act, but adds the 90-day grace period. Section 801 also differs from its counterpart in the 1976 Act to reflect the 1985 changes made in Section 201.

§ 802. Judicial Dissolution

On application by or for a partner the [designate the appropriate court] court may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

COMMENT

Section 802 ~~is now~~ first appeared in the 1976 Act.

§ 803. Winding Up

Except as provided in the partnership agreement, the general partners who have not wrongfully dissolved a limited partnership or, if none, the limited partners, may wind up the limited partnership's affairs; but the [designate the appropriate court] court may wind up the limited partnership's affairs upon application of any partner, his [or her] legal representative, or assignee.

COMMENT

Section 803 ~~is now~~ first appeared in the 1976 Act, and is derived in part from Section 37 of the Uniform ~~General~~ Partnership Act.

§ 804. Distribution of Assets

Upon the winding up of a limited partnership, the assets shall be distributed as follows:

- (1) to creditors, including partners who are creditors, to the extent permitted by law, in

satisfaction of liabilities of the limited partnership other than liabilities for distributions to partners under Section 601 or 604;

(2) except as provided in the partnership agreement, to partners and former partners in satisfaction of liabilities for distributions under Section 601 or 604; and

(3) except as provided in the partnership agreement, to partners first for the return of their contributions and secondly respecting their partnership interests, in the proportions in which the partners share in distributions.

COMMENT

Section 804 revises Section 23 of the ~~prior uniform law~~ 1916 Act by providing that (1) to the extent partners are also creditors, other than in respect of their interests in the partnership, they share with other creditors, (2) once the partnership's obligation to make a distribution accrues, it must be paid before any other distributions of an "equity" nature are made, and (3) general and limited partners rank on the same level except as otherwise provided in the partnership agreement.

ARTICLE 9

FOREIGN LIMITED PARTNERSHIPS

§ 901. Law Governing

Subject to the Constitution of this State, (i) the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners, and (ii) a foreign limited partnership may not be denied registration by reason of any difference between those laws and the laws of this State.

COMMENT

Section 901 ~~is new~~ first appeared in the 1976 Act.

§ 902. Registration

Before transacting business in this State, a foreign limited partnership shall register with the Secretary of State. In order to register, a foreign limited partnership shall submit to the Secretary of State, in duplicate, an application for registration as a foreign limited partnership, signed and sworn to by a general partner and setting forth:

(1) the name of the foreign limited partnership and, if different, the name under which it proposes to register and transact business in this State;

(2) the ~~state~~ State and date of its formation;

~~(3) the general character of the business it proposes to transact in this State;~~

(4) (3) the name and address of any agent for service of process on the foreign limited partnership whom the foreign limited partnership elects to appoint: the agent must be an individual resident of this ~~state~~ State, a domestic corporation, or a foreign corporation having a place of business in, and authorized to do business in, this State;

~~(5) (4) a statement that the Secretary of State is appointed the agent of the foreign limited partnership for service of process if no agent has been appointed under paragraph (4) (3) or, if appointed, the agent's authority has been revoked or if the agent cannot be found or served with the exercise of reasonable diligence;~~

(6) (5) the address of the office required to be maintained in the ~~State~~ state of its organization by the laws of that ~~State~~ state or, if not so required, of the principal office of the foreign limited partnership; and

~~(7) if the certificate of limited partnership filed in the foreign limited partnership's state of organization is not required to include the names and business addresses of the partners, a list of the names and addresses.~~

(6) the name and business address of each general partner; and

(7) the address of the office at which is kept a list of the names and addresses of the limited partners and their capital contributions, together with an undertaking by the foreign limited partnership to keep those records until the foreign limited partnership's registration in this State is cancelled or withdrawn.

COMMENT

Section 902 ~~is now~~ first appeared in the 1976 Act. It was thought that requiring a full copy of the certificate of limited partnership and all amendments thereto to be filed in each state in which the partnership does business would impose an unreasonable burden on interstate limited partnerships and that the information ~~on file was~~ Section 902 required to be filed would be sufficient to tell interested persons where they could write to obtain copies of those basic documents. Subdivision (3) of the 1976 Act has been omitted, and subdivisions (6) and (7) differ from their counterparts in the 1976 Act to conform these provisions relating to the registration of foreign limited partnerships to the corresponding changes made by the Act in the provisions relating to domestic limited partnerships. The requirement that an application for registration be sworn to by a general partner is simply intended to produce the same result as is provided for in Section 204(c) with respect to certificates of domestic limited partnerships: the acceptance and endorsement by the Secretary of State (or equivalent authority) of an application which was not sworn by a general partner should be deemed a mere technical and insubstantial shortcoming, and should not result in the limited partners being subjected to general liability for the obligations of the foreign limited partnership (See Section 907(c)).

§ 903. Issuance of Registration

(a) If the Secretary of State finds that an application for registration conforms to law and all requisite fees have been paid, he [or she] shall:

- (1) endorse on the application the word "Filed", and the month, day, and year of the filing thereof;
- (2) file in his [or her] office a duplicate original of the application; and
- (3) issue a certificate of registration to transact business in this State.

(b) The certificate of registration, together with a duplicate original of the application, shall be returned to the person who filed the application or his [or her] representative.

COMMENT

Section 903 first appeared in the 1976 Act.

§ 904. Name

A foreign limited partnership may register with the Secretary of State under any name, whether or not it is the name under which it is registered in its state of organization, that includes without abbreviation the words "limited partnership" and that could be registered by a domestic limited partnership.

COMMENT

Section 904 ~~is now~~ first appeared in the 1976 Act.

§ 905. Changes and Amendments

If any statement in the application for registration of a foreign limited partnership was false when made or any arrangements or other facts described have changed, making the application inaccurate in any respect, the foreign limited partnership shall promptly file in

the office of the Secretary of State a certificate, signed and sworn to by a general partner, correcting such statement.

COMMENT

Section 905 is new, first appeared in the 1976 Act. It corresponds to the provisions of Section 202(c) relating to domestic limited partnerships.

§ 906. Cancellation of Registration

A foreign limited partnership may cancel its registration by filing with the Secretary of State a certificate of cancellation signed and sworn to by a general partner. A cancellation does not terminate the authority of the Secretary of State to accept service of process on the foreign limited partnership with respect to [claims for relief] [causes of action] arising out of the transactions of business in this State.

COMMENT

Section 906 is new, first appeared in the 1976 Act.

§ 907. Transaction of Business Without Registration

(a) A foreign limited partnership transacting business in this State may not maintain any action, suit, or proceeding in any court of this State until it has registered in this State.

(b) The failure of a foreign limited partnership to register in this State does not impair the validity of any contract or act of the foreign limited partnership or prevent the foreign limited partnership from defending any action, suit, or proceeding in any court of this State.

(c) A limited partner of a foreign limited partnership is not liable as a general partner of the foreign limited partnership solely by reason of having transacted business in this State without registration.

(d) A foreign limited partnership, by transacting business in this State without registration, appoints the Secretary of State as its agent for service of process with respect to [claims for relief] [causes of action] arising out of the transaction of business in this State.

COMMENT

Section 907 is new, first appeared in the 1976 Act.

§ 908. Action by [Appropriate Official]

The [designate the appropriate official] may bring an action to restrain a foreign limited partnership from transacting business in this State in violation of this Article.

COMMENT

Section 908 is new, first appeared in the 1976 Act.

ARTICLE 10

DERIVATIVE ACTIONS

§ 1001. Right of Action

A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the

action or if an effort to cause those general partners to bring the action is not likely to succeed.

COMMENT

Section 1001 ~~is new~~, first appeared in the 1976 Act.

§ 1002. Proper Plaintiff

In a derivative action, the plaintiff must be a partner at the time of bringing the action and (i) must have been a partner at the time of the transaction of which he (or she) complains or (ii) his (or her) status as a partner ~~had~~ must have devolved upon him (or her) by operation of law or pursuant to the terms of the partnership agreement from a person who was a partner at the time of the transaction.

COMMENT

Section 1002 ~~is new~~, first appeared in the 1976 Act.

§ 1003. Pleading

In a derivative action, the complaint shall set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort.

COMMENT

Section 1003 ~~is new~~, first appeared in the 1976 Act.

§ 1004. Expenses

If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct him (or her) to remit to the limited partnership the remainder of those proceeds received by him (or her).

COMMENT

Section 1004 ~~is new~~, first appeared in the 1976 Act.

ARTICLE 11

MISCELLANEOUS

§ 1101. Construction and Application

This [Act] shall be so applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

COMMENT

Because the principles set out in Sections 28(1) and 29 of the 1916 Act have become so universally established, it was felt that the 1976 and 1985 Acts need not contain express provisions to the same effect. However, it is intended that the principles enunciated in those provisions of the 1916 Act also apply to this Act.

§ 1102. Short Title

This [Act] may be cited as the Uniform Limited Partnership Act.

§ 1103. Severability

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

§ 1104. Effective Date, Extended Effective Date and Repeal

Except as set forth below, the effective date of this [Act] is ____ and the following acts [list ~~prior~~ existing limited partnership acts] are hereby repealed:

(1) The existing provisions for execution and filing of certificates of limited partnerships and amendments thereunder and cancellations thereof continue in effect until [specify time required to create central filing system], the extended effective date, and Sections 102, 103, 104, 105, 201, 202, 203, 204 and 206 are not effective until the extended effective date.

(2) Section 402, specifying the conditions under which a general partner ceases to be a member of a limited partnership, is not effective until the extended effective date, and the applicable provisions of existing law continue to govern until the extended effective date.

(3) Sections 501, 502 and 608 apply only to contributions and distributions made after the effective date of this [Act].

(4) Section 704 applies only to assignments made after the effective date of this [Act].

(5) Article 9, dealing with registration of foreign limited partnerships, is not effective until the extended effective date.

(6) Unless otherwise agreed by the partners, the applicable provisions of existing law governing allocation of profits and losses (rather than the provisions of Section 503), distributions to a withdrawing partner (rather than the provisions of Section 604), and distributions of assets upon the winding up of a limited partnership (rather than the provisions of Section 804) govern limited partnerships formed before the effective date of this [Act].

COMMENT

Subdivisions (6) and (7) did not appear in Section 1104 of the 1976 Act. They are included in the 1985 Act to ensure that the application of the Act to limited partnerships formed and existing before the Act becomes effective would not violate constitutional prohibitions against the impairment of contracts.

§ 1105. Rules for Cases Not Provided for in This [Act]

In any case not provided for in this [Act] the provisions of the Uniform Partnership Act govern.

COMMENT

The result provided for in Section 1105 would obtain even in its absence in a jurisdiction which had adopted the Uniform Partnership Act, by operation of Section 6 of that act.

§ 1106. Savings Clause

The repeal of any statutory provision by this [Act] does not impair, or otherwise affect, the organization or the continued existence of a limited partnership existing at the effective date of this [Act], nor does the repeal of any existing statutory provision by this [Act] impair any contract or affect any right accrued before the effective date of this [Act].

COMMENT

Section 1106 did not appear in the 1976 Act. It is included in the 1985 Act to ensure that the application of the Act to limited partnerships formed and existing before the Act becomes effective would not violate constitutional prohibitions against the impairment of contracts.

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 1, 1993

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 3/02/93

The LABOR AND COMMERCE Committee considered:

HB 112

HOUSE BILL NO. 112

UNIFORM LIMITED PARTNERSHIP ACT UPDATE

"An Act relating to limited partnerships; and providing for an effective date."

RECOMMENDATIONS. [] the same title
 be replaced with _____ [] a new title

[] have attached amendments(s)

do pass

[] do not pass

[] no recommendations

[] individual recommendations

[] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) _____

APPROVES PREVIOUS: (Dept/Date) _____

[] fiscal impact _____

[] fiscal note(s) _____

zero fiscal note Commerce, Law

[] zero fiscal note(s) _____

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Brian Porter</i>	✓				
<i>J. Sutton</i>	✓				
<i>Glenn Hudd</i>	✓				
<i>W.K. Williams</i>	✓				
<i>Gregory...</i>	✓				
<i>Bill Hudd</i>	✓				

Bill Hudd
 CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 112

Revision Date: February 9, 1993
Title: "An Act relating to limited partnerships;
and providing for an effective date."
Sponsor: Representative Moses
Requestor: House Rules Committee

Department Affected: Law
BRU: Legal Services
Component: Operations
COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

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

REVENUE						
FUND SOURCE:						

FUNDING:

1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see attached analysis.

Prepared by: Richard I. Peques, Director
Division: Administrative Services Division
Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law

Phone: 465-3672
Date: February 9, 1993
Date: February 9, 1993

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FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 112

ANALYSIS: (continued)

This bill repeals, reenacts, and amends a good part of the state's Limited Partnership Act, AS 32.10, which was first adopted in 1992. The bill deals with transactions between private parties, and it will not have a fiscal impact for the Department of Law.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 112

Revision Date: _____

Department Affected: Commerce and Economic Development

Title: An Act relating to limited partnerships

BRU: Banking, Securities and Corporations

Component: _____

Sponsor: Rep Moses

Requestor: _____

COMPONENT SERIAL NO. 1233

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

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

REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING:

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year (FY 93) impact: 0

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Willis F. Kirkpatrick, Director

Phone: 465-2521

Division: Banking, Securities and Corporations

Date: _____

Approved by Commissioner: Paul Fuhs

Agency: Commerce and Economic Development

Date: 2-8-93

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HB

13

(11)

Date Referred: March 5, 1993

FURTHER REFERRALS:

Finance

Date of Committee Action: 3-19-93

The JUDICIARY Committee considered:

HB 113

HOUSE BILL NO. 113

CHARITABLE & TELEPHONIC SOLICITING/SALES

"An Act regulating the solicitation of contributions by charitable organizations and paid solicitors and the solicitation of sales by telephonic means; and amending Alaska Rules of Civil Procedure 79 and 82."

RECOMMENDATIONS:

be replaced with CS HB113 (JUD)

the same title
 a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact _____

fiscal note(s) _____

zero fiscal note LAW ~~2-12-93~~

zero fiscal note(s) LAW 2-12-93

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Brian S. Porter	✓	Jim Nordlund		✓	
Gail Phillips	✓				
Gannette Jones	✓				
Bob [unclear]	✓				
[unclear]	✓				

Brian S. Porter
CHAIRMAN'S SIGNATURE

MEMORANDUM

State of Alaska

Department of Law

TO: Judy Mathis
Legislative Aide
Representative Larson's Office

DATE: February 25, 1993

FILE NO.:

TEL. NO.: 269-5206

SUBJECT: HB 113

FROM:


Jim Forbes

Fair Business Practices Section

I have attached the fax I received from Dan Barry of the Securities Industry Association. Mr. Barry wrote earlier to request that the exemption in AS 45.63.080 be written to exclude securities brokers in the sale of their services, in addition to the sale of their securities. I have no objection to his proposal, because I do not think it contradicts the intent of the bill. His proposed language is appropriate, in my opinion, and I think the resulting exemption should read as follows:

AS 45.63.080 Exemptions. This chapter does not apply to a sale or attempted sale

(1) of a security regulated under AS 45.55 or a security that is exempted by AS 45.55.140 from regulation under AS 45.55, or by a person registered with the United States Securities and Exchange Commission, when acting within the scope of his or her license.

Let me know if you have any questions about this.

enc.

cc: (w/o enclosures)
Charlie Cole
Bruce Botelho
Deborah Behr
Kris Lethin, Legislative Liaison
Daniel J. Barry

----- SYSM INBASKET MESSAGE REVIEW -----

ENTER COMMAND ==>

SCREEN 3.1

USER ID: LHSCJLM

09:31 - Mon, Feb 08, 1993

TO: LHSCJLM - Mathis, Judy

MESSAGE ID: 330140

FROM: WPFCJBF - Forbes, Jim

DATE SENT: 02/08/93

SUBJECT: HB 113 Crim Div amendments PRIORITY: 000

TIME SENT: 09:29

Class A misdemeanor.

Margot Knuth, who made these suggested changes (with advice and counsel of Dean Guaneli) believes that they will strengthen the bill by making the criminal penalties less vulnerable to a legal attack on the ground that the conduct is described too vaguely. Also, they believe that downgrading some of the conduct in the telemarketing part to misdemeanor status is appropriate. After due consideration, I agree with them. Let me know if more is needed, or if you need this info in a different format. As I mentioned, I will be speaking to the Association of Not for Profit Corporations this Wednesday, and to the National Society of Fund Raising Executives on February 25. I will be out on a deposition trip next week. Let me know when the committee hearings will be. We (Investigator Jerry Williams and I) have a multi media presentation to make to any interested committee which includes

CMMDS:Up Down Ans TRa Rlght Read DEFer FILE Bfil View EDit PUT Print DELete

----- SYSM INBASKET MESSAGE REVIEW -----

ENTER COMMAND ==>

SCREEN 3.1

USER ID: LHSCJLM

09:30 - Mon, Feb 08, 1993

TO: LHSCJLM - Mathis, Judy

MESSAGE ID: 330140

FROM: WPFCJBF - Forbes, Jim

DATE SENT: 02/08/93

SUBJECT: HB 113 Crim Div amendments PRIORITY: 000

TIME SENT: 09:29

the taped confession of a reformed fund raising scam artist (in which he talks about the need for this kind of legislation), and some info on victims of telemarketing scams (mostly elderly people) that might be good to get into the legislative record. We can present it by teleconference if necessary, but I think it would be more effective in person. Thanks again for all your help. You can get messages to me while I am out of town by leaving them on my voice mail -- 269 5206. Talk to you soon. Jim

Sent to: LHSCJLM - Mathis, Judy (to)

* * * END OF MESSAGE * * *

CMMDS:Up Down Ans TRa RIght Read DEfer FILE Bfil View EDit PUT Print DElete

8-LS0344E
Bannister
3/18/93

CS FOR HOUSE BILL NO. 113(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE LARSON

A BILL

FOR AN ACT ENTITLED

1 "An Act regulating the solicitation of contributions by charitable organizations and
2 paid solicitors and the solicitation of sales by telephonic means; and amending
3 Alaska Rules of Civil Procedure 79 and 82."

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

5 * Section 1. AS 45 is amended by adding a new chapter to read:

6 **CHAPTER 63. TELEPHONIC SOLICITATIONS.**

7 Sec. 45.63.010. REGISTRATION. (a) A person may not sell or attempt to
8 sell property or services by telephonic means if the person makes substantially the
9 same offer on substantially the same terms to two or more persons, unless the
10 telephonic seller is registered with the Department of Law at least 30 days before the
11 solicitation campaign.

12 (b) To register under (a) of this section, a person shall file with the department

13 (1) a notice of intent to engage in a solicitation campaign; a separate
14 notice of intent shall be filed for each solicitation campaign;

1 (2) an irrevocable consent appointing the department the person's agent
2 for the receipt of service of process in a court action or other proceeding against the
3 person, or the successor in interest of the person, for a violation of this chapter; and

4 (3) a signed statement that the person has read and will comply with
5 this chapter and the regulations adopted under this chapter.

6 (c) Registration under (b) of this section is not complete until the telephonic
7 seller receives an acknowledgement from the department that the seller has complied
8 with (b) of this section.

9 (d) The notice of intent must be on a form provided and established by the
10 department by regulation. The notice of intent must include detailed information about
11 the nature of the solicitation campaign and the identity and business practices of the
12 telephonic seller, including information on the employees, agents, and officers
13 affiliated with the telephonic seller. The notice of intent must disclose criminal
14 convictions, civil judgments, orders, consent decrees, or administrative determinations
15 involving allegations of unfair or deceptive business practices by the telephonic seller.

16 (e) A person may not provide false information in a notice of intent.

17 Sec. 45.63.020. WRITTEN CONTRACT REQUIRED. Until a telephonic
18 seller receives from a buyer a signed, written contract for the purchase, the telephonic
19 seller may not solicit payment for the purchase, charge a credit card account for the
20 purchase, negotiate a check or other commercial instrument intended for payment of
21 the purchase, or accept a cash payment for the purchase. The written contract must
22 notify the buyer of the rights of the buyer under AS 45.63.030(a) and disclose the
23 information required by the department by regulation.

24 Sec. 45.63.030. CANCELLATION OR REPLACEMENT. (a)
25 Notwithstanding AS 45.01 - AS 45.09, a telephonic seller shall give the buyer a
26 refund, credit, or replacement, at the option of the buyer, if

27 (1) the property or services purchased are defective, not as represented,
28 or not received as promised by the seller;

29 (2) within seven days after receiving the purchased property, the buyer
30 returns the purchased property and makes a written request for the refund, credit, or
31 replacement; or

1 (3) within seven days after paying for the purchased services and before
2 the services are provided, the buyer makes a written request for the refund or credit.

3 (b) A return or request is timely under (a) of this section if the return or
4 request is made in person within the seven days or if the return or request is mailed,
5 properly addressed and postmarked, postage prepaid, within the seven days.

6 (c) Notwithstanding AS 45.01 - AS 45.09, a purchase of property from a
7 telephonic seller becomes final seven days after receipt of the property, unless the
8 buyer requests a refund, credit, or replacement under (a) of this section, or the
9 telephonic seller fails to obtain the contract required by AS 45.63.020.

10 (d) A purchase of services from a telephonic seller becomes final seven days
11 after receipt of the contract required by AS 45.63.020, unless the buyer requests a
12 refund or credit under (a) of this section.

13 Sec. 45.63.040. PROHIBITED REPRESENTATIONS. (a) Unless the
14 telephonic seller is asked for the information by the buyer, the seller may not state or
15 imply that the seller has a license, consent, or other form of permission from the state.

16 (b) A telephonic seller may not state or imply that

17 (1) the seller is complying with state law; or

18 (2) the seller's compliance with the laws of this state or a municipality
19 constitutes approval or endorsement by the state or municipality.

20 Sec. 45.63.050. WAIVER PROHIBITED AND VOID. A telephonic seller
21 may not request or obtain from a buyer a waiver of the rights of the buyer under this
22 chapter. A waiver of the rights of a buyer under this chapter is void.

23 Sec. 45.63.060. CRIMINAL PENALTIES. (a) A person who sells or attempts
24 to sell property or services by telephonic means by making substantially the same offer
25 on substantially the same terms to two or more persons without complying with the
26 registration requirements of AS 45.63.010, or who solicits, or receives, payment for
27 a purchase before receiving the written contract required by AS 45.63.020 is guilty of
28 a class C felony.

29 (b) A person who violates AS 45.63.030 - 45.63.050 is guilty of a class A
30 misdemeanor.

31 Sec. 45.63.070. REMEDIES NOT EXCLUSIVE. The remedies in this chapter

1 are in addition to other remedies available to a buyer or the department.

2 Sec. 45.63.080. EXEMPTIONS. This chapter does not apply to a sale or
3 attempted sale

4 (1) of a security regulated under AS 45.55 or a security that is
5 exempted by AS 45.55.140 from regulation under AS 45.55;

6 (2) by a person registered with the United States Securities and
7 Exchange Commission when acting within the scope of the person's Securities and
8 Exchange Commission license;

9 (3) by an issuer, or a subsidiary of an issuer, of a class of securities
10 that is

11 (A) subject to 15 U.S.C. 78a - 78lll (Securities Exchange Act
12 of 1934); and

13 (B) either registered under 15 U.S.C. 78a - 78lll (Securities
14 Exchange Act of 1934) or exempt from registration under 15 U.S.C.
15 78l(g)(2)(A) - (C) or (E) - (H);

16 (4) by a real estate broker, associate real estate broker, or real estate
17 salesman licensed under AS 08.88 and acting in a capacity covered by the license;

18 (5) by a person who has a certificate of registration under AS 08.18 to
19 operate as a contractor and is acting in a capacity covered by the certificate of
20 registration;

21 (6) by an embalmer or funeral director licensed under AS 08.42 and
22 acting in a capacity covered by the license;

23 (7) by an insurance agent, general agent, broker, solicitor, or adjuster
24 licensed under AS 21.27 and acting in a capacity covered by the license;

25 (8) by a person who is primarily soliciting the sale of a subscription to,
26 or advertising in, a newspaper of general circulation;

27 (9) by a charitable organization or paid solicitor if the organization or
28 solicitor is registered to make charitable solicitations under AS 45.68 and is acting in
29 a capacity that is covered by the registration;

30 (10) by a person who is primarily soliciting the sale of a magazine,
31 periodical, sound recording, book, or membership in a book or record club

1 (A) where the club provides the buyer with a form that the
2 buyer may use to instruct the club not to ship the offered merchandise; and

3 (B) that is regulated by the Federal Trade Commission as a
4 negative option plan under 16 CFR 425;

5 (11) of services provided by a cable television system operating under
6 a franchise issued by a municipality;

7 (12) by a person who is soliciting for a business, or for an affiliate of
8 a business, that is regulated by the Alaska Public Utilities Commission;

9 (13) by a person whose solicitation is solely for telephone answering
10 services provided by the person or the person's employer;

11 (14) of property from a mail order catalog that is published on a
12 regular, periodic basis and that describes or pictures the items for sale and prominently
13 provides the specific price of each item;

14 (15) by a supervised financial institution or the parent, subsidiary, or
15 affiliate of a supervised financial institution; in this paragraph, "supervised financial
16 institution" means a commercial bank, savings bank, mutual savings bank, trust
17 company, savings and loan association, credit union, industrial loan company, personal
18 property broker, consumer finance lender, commercial finance lender, or other financial
19 institution if the financial institution is subject to regulation by this state or the United
20 States.

21 (16) by an insurer or the parent, subsidiary, or affiliate of an insurer;

22 (17) by a person who solicits a sale by a contact by telephonic means
23 without intending to complete the sales presentation during the contact, who does not
24 complete the sales presentation during the contact, and who only completes the sales
25 presentation at a later meeting in person, unless at the later meeting the solicitor
26 attempts to collect payment for property or services delivered before the later meeting.

27 Sec. 45.63.090. REGULATIONS. The department shall adopt regulations
28 under AS 44.62 (Administrative Procedure Act) to implement this chapter.

29 Sec. 45.63.100. DEFINITIONS. In this chapter,

30 (1) "buyer" means a person who buys from or is solicited by a
31 telephonic seller;

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(2) "department" means the Department of Law;

(3) "notice of intent" means the notice of intent required by AS 45.63.010 to engage in a solicitation campaign;

(4) "solicitation campaign" means a sale or attempt to sell property or services by telephonic means by making substantially the same offer on substantially the same terms to two or more persons;

(5) "telephonic means" means a telephone or another method using telephone lines, and includes a facsimile machine and electronic communication between electronic computing devices; "telephonic means" includes a letter, postcard, notice, or other written communication advising, requesting, motivating, or otherwise encouraging a person to contact a seller by telephonic means;

(6) "telephonic seller" means a person who is required to be registered under AS 45.63.010.

* Sec. 2. AS 45 is amended by adding a new chapter to read:

CHAPTER 68. CHARITABLE SOLICITATIONS.

Sec. 45.68.010. REGISTRATION. (a) A charitable organization may not solicit contributions of money or other property unless the charitable organization is registered with the Department of Law.

(b) A person may not solicit contributions of money or other property for a charitable organization for compensation unless the person is registered with the department.

(c) To register under this section, a charitable organization or paid solicitor shall file with the department

(1) a registration statement on a form provided and established by the department by regulation; and

(2) in the case of a paid solicitor, a bond in the amount and under the conditions established by the department by regulation.

(d) Registration under this section expires on September 1 of each year. To renew a registration, a charitable organization or paid solicitor shall file with the department a registration renewal statement established by the department by regulation and, in the case of a paid solicitor, evidence that a bond that satisfies (c)(2) of this

1 section will be in effect for the renewal period.

2 (e) A person who is required to register under this section shall report to the
3 department a material change in the information provided in the registration statement
4 or registration renewal statement filed under this section. The person shall report the
5 change within seven days after the change occurs.

6 Sec. 45.68.020. CONTRACT REQUIRED. (a) A paid solicitor may not
7 solicit contributions on behalf of a charitable organization unless the paid solicitor
8 executes a written contract with the charitable organization that clearly states the
9 respective obligations of the paid solicitor and the charitable organization, including

10 (1) a statement of the method to be used to calculate the compensation
11 of the paid solicitor; the statement must include a reasonable estimate of the expenses,
12 including the estimated compensation of the paid solicitor, to be incurred, directly or
13 indirectly, by the charitable organization in connection with the solicitation;

14 (2) a statement of the charitable purpose to be described in the
15 solicitation; and

16 (3) the percentage of the gross contributions that the charitable
17 organization is to receive.

18 (b) A copy of the contract required by (a) of this section shall be filed with
19 the department.

20 Sec. 45.68.030. DISCLOSURES. Except as provided by AS 45.68.040, before
21 soliciting a contribution, a paid solicitor shall clearly and conspicuously disclose the
22 following information to the person being solicited:

23 (1) the true name of the individual making the solicitation;

24 (2) the true name of the charitable organization for whom the
25 solicitation is being made;

26 (3) the true name of the paid solicitor;

27 (4) the true name of the person who is employing and compensating
28 the individual making the solicitation if the individual is employed for compensation
29 to make the solicitation;

30 (5) whether the individual making the solicitation is being paid for
31 making the solicitation or is an unpaid volunteer;

1 (6) the name and physical address of the principal headquarters of the
2 charitable organization for whom the solicitation is being made;

3 (7) a description of how and where the charitable contributions raised
4 by the paid solicitor are to be utilized for the charitable purpose; and

5 (8) that a financial statement of the charitable organization for whom
6 the solicitation is being made and a copy of the contract required under AS 45.68.020
7 will be provided upon request.

8 Sec. 45.68.040. CONFIRMATION OF PLEDGE. A paid solicitor who makes
9 a solicitation by mail, radio, or television, shall mail written confirmation of a
10 contribution pledge to the contributor within five days after the pledge is received.
11 The confirmation must include a clear and conspicuous disclosure of the information
12 identified in AS 45.68.030.

13 Sec. 45.68.050. UNLAWFUL PRACTICES. During a solicitation for a
14 charitable organization, a person may not

15 (1) use a deceptive act, including an act described in AS 45.50.471;

16 (2) without first being authorized in writing by the person, represent
17 or imply that a contribution is for or on behalf of a person, or use an emblem, device,
18 or printed matter belonging to or associated with the person;

19 (3) use a name, symbol, or statement so closely related or similar to
20 a name, symbol, or statement used by another charitable organization that the use may
21 confuse or mislead a person solicited for a contribution;

22 (4) use or exploit the fact of registration under this chapter to suggest
23 or imply that the registration constitutes an endorsement or approval by the state; or

24 (5) represent directly or by implication that a charitable organization
25 will receive from the contributions raised by a paid solicitor a greater percentage of
26 a contribution than allowed under the contract executed under AS 45.68.020.

27 Sec. 45.68.060. PUBLIC RECORDS. The registration statement, registration
28 renewal statement, contracts, and other documents required to be filed with the
29 department under this chapter are public records available for inspection and copying
30 under AS 09.25.110 - 09.25.220.

31 Sec. 45.68.070. RETENTION AND INSPECTION OF FISCAL RECORDS.

1 A charitable organization that is required to be registered under this chapter or that is
2 exempted from this chapter by AS 45.68.120 and a paid solicitor that is required to be
3 registered under this chapter or that is exempted from this chapter by AS 45.68.120
4 shall maintain the records required by this chapter for a period of five years in a form
5 that permits the department to make a complete audit of solicitations by the charitable
6 organization or paid solicitor.

7 Sec. 45.68.080. SUBSTITUTED SERVICE. (a) A charitable organization or
8 paid solicitor that is required to be registered under this chapter and that either has its
9 principal place of business outside of the state or is organized under the laws of
10 another state is considered to have irrevocably appointed the department as its agent
11 for the service of a summons, subpoena, or other process directed to the charitable
12 organization or paid solicitor, or to a director, officer, partner, or principal of the
13 charitable organization or paid solicitor in an action or other proceeding brought under
14 this chapter.

15 (b) Service under (a) of this section is complete if the department immediately
16 sends notice of the service and a copy of the process to the charitable organization,
17 paid solicitor, or other person to whom it is directed by registered mail, return receipt
18 requested, to the last address known to the department of the charitable organization
19 or paid solicitor.

20 Sec. 45.68.090. PRIVATE ENFORCEMENT. (a) A charitable organization
21 that suffers damages as a result of a violation of this chapter by another charitable
22 organization or by a paid solicitor may bring a civil action against the violator.

23 (b) A person who makes a contribution to a charitable organization or to a
24 paid solicitor that violates this chapter may bring a civil action against the violator.

25 (c) In an action under (a) or (b) of this section, a court may
26 (1) award damages for the violation;
27 (2) enjoin future violations;
28 (3) provide other relief that the court determines is necessary to restore
29 to the person damaged real or personal property that was acquired by the violator by
30 means of the violation;

31 (4) require the violator, under appropriate circumstances, to pay the full

1 attorney fees and costs incurred by the charitable organization or other person bringing
2 the action.

3 (d) A charitable organization or other person who brings an action under this
4 section shall serve a copy of the complaint on the department when the action is filed,
5 and, upon entry of an order or judgment in the action, shall mail a copy of the order
6 or judgment to the department.

7 Sec. 45.68.100. CRIMINAL PENALTY. A person who solicits contributions
8 for a charitable organization for compensation without complying with the registration
9 requirements of AS 45.68.010 is guilty of a class A misdemeanor.

10 Sec. 45.68.110. REMEDIES NOT EXCLUSIVE. The remedies in this chapter
11 are in addition to other remedies available to a person or the department for a violation
12 of this chapter.

13 Sec. 45.68.120. EXEMPTIONS FROM REGISTRATION REQUIREMENT.

14 (a) Registration is not required under AS 45.68.010 for

15 (1) a church or religious organization that is exempt from filing a
16 federal annual information return under 26 U.S.C. 6033(a)(2)(A);

17 (2) a candidate for national, state, or local office, and a political party
18 or other committee or group if the candidate, party, committee, or group is required
19 to file financial information with the Alaska Public Offices Commission under
20 AS 15.13 or with the Federal Election Commission under 2 U.S.C. 431 - 456 (Federal
21 Election Campaign Act);

22 (3) a charitable organization that does not intend to raise or receive
23 contributions, excluding government grants, in excess of \$5,000 during a fiscal year
24 of the charitable organization, or that does not intend to receive contributions from
25 more than 10 persons during a fiscal year of the charitable organization if, in either
26 situation,

27 (A) all of the organization's functions, including solicitation, are
28 performed by persons who are not paid for their services; and

29 (B) an officer or member of the organization is not paid or does
30 not otherwise receive all or a part of the assets or income of the charitable
31 organization;

1 (4) a person or municipality who has a permit under AS 05.15.100.

2 (b) A person who qualifies for an exemption under (a)(3) of this section shall
3 maintain for five years the records necessary to prove that the organization qualifies
4 for the exemption.

5 (c) Notwithstanding (a)(3) of this section, if a charitable organization actually
6 raises or receives more than \$5,000 in contributions during a fiscal year of the
7 charitable organization or receives contributions from more than 10 persons during the
8 same fiscal year, the charitable organization shall, within 30 days after the earlier
9 event, register with the department under AS 45.68.010.

10 Sec. 45.68.130. REGULATIONS. The department shall adopt regulations
11 under AS 44.62 (Administrative Procedure Act) to implement this chapter.

12 Sec. 45.68.900. DEFINITIONS. In this chapter,

13 (1) "charitable organization" means a nonprofit organization that

14 (A) is operated for the relief of poverty, distress, or other
15 condition of public concern in the state; or

16 (B) the Internal Revenue Service determines to be a tax exempt
17 organization under 26 U.S.C. 501(c)(3) (Internal Revenue Code);

18 (2) "contributions" means contributions of money or other property;

19 (3) "department" means the Department of Law;

20 (4) "paid solicitor" means a person who is required to be registered
21 under AS 45.68.010(b), and includes a person who is employed, procured, or engaged,
22 directly or indirectly, by a paid solicitor to solicit, if the person is compensated; "paid
23 solicitor" does not include

24 (A) an attorney licensed to practice law in this or another state,
25 an investment counselor, an insurance company, or a supervised financial
26 institution, to the extent the attorney, investment counselor, insurance company,
27 or supervised financial institution advises the person on whether to make a
28 contribution; or

29 (B) a bona fide salaried officer, employee, or volunteer of a
30 charitable organization;

31 (5) "solicit" means to request, directly or indirectly, and includes

1 (A) an oral or written request;

2 (B) a request made by an announcement to the news media or
3 by radio, television, telephone, telegraph, telefax machine, or other transmission
4 of images or information;

5 (C) a request made in a handbill or other written advertisement
6 that is distributed or posted;

7 (D) the sale of, or attempt to sell, a membership, an
8 advertisement, advertising space, or a tangible item by making a request for
9 financial support for a charitable organization or purpose, by using or referring
10 to the name of a charitable organization as a reason for making the request, or
11 by making a statement that all or part of the sale proceeds will be used for a
12 charitable purpose or benefit a charitable organization;

13 (6) "supervised financial institution" means a commercial bank, savings
14 bank, mutual savings bank, trust company, savings and loan association, credit union,
15 industrial loan company, personal property broker, consumer finance lender,
16 commercial finance lender, or other financial institution if the financial institution is
17 subject to regulation by this state or the United States.

18 * Sec. 3. AS 45.50.471(b) is amended by adding new paragraphs to read:

19 (33) violating AS 45.63 (telephonic solicitations);

20 (34) violating AS 45.68 (charitable solicitations).

21 * Sec. 4. AMENDMENT OF COURT RULES. AS 45.68.090, enacted by sec. 2 of this
22 Act, amends

23 (1) Alaska Rule of Civil Procedure 79 by requiring the court to award full
24 costs where appropriate in certain actions under AS 45.68.090;

25 (2) Alaska Rule of Civil Procedure 82 by requiring the court to award full
26 attorney fees where appropriate in certain actions under AS 45.68.090.



ALASKA DIVISION, INC.

Nels Anderson, M.D.
President

Jan Young, R.N.
Chairman of the Board

Roland Gower, M.D.
Chairman, Executive Committee

Barbara Kenney
Secretary

Brent Ulmer
Treasurer

March 1993

Diana Kuhns
Executive Vice President

House of Representatives
Attn: Ron Larson
State Capitol, Room #502
Juneau, Alaska 99801-1182

Dear Representative Larson,

This letter is to inform you that on February 7, 1993, the Board of Directors of the American Cancer Society voted, with unanimous approval, to fully support House Bill #113.

Sincerely,

A handwritten signature in cursive script, appearing to read "Nels Anderson".

Nels Anderson, M.D.
President
American Cancer Society,
Alaska Division, Inc.

HB 113 - Fact Sheet

Description of Bill

This bill would regulate solicitation for telephonic sales and charitable fund raising.

Section I: Regulation of Telemarketers

Purpose: to curtail high-pressure telephone sales.

Scenario: typical scam involves promise to consumer that (s)he has won a fabulous prize, seller uses high-pressure tactics to force consumer to make a quick decision to agree to purchase a high priced product, lest the opportunity to win the prize be lost. Victims of these scams are frequently elderly, once they agree to a sale they become the target of numerous telemarketers because their names are added to a "suckers list" which is sold for substantial sums of money to other telemarketers.

Remedy proposed by bill:

- 1..... Requires registration of telemarketers, who they are, their histories, and physical location. The state has no effective means of forcing individuals, who conduct sales by telephonic means across state lines, to identify themselves.
- 2..... Mandates telemarketer from taking the customer's money 'til agreement is reduced to written contract. This will put high-pressure telemarketers on more of an equal footing with local, established merchants who are accountable to their customers after the sale.
- 3..... Provides criminal penalties for violators. Criminal penalties at the felony level are necessary, fraudulent telemarketing operators build costs of defending civil suits into their profit structures. Misdemeanor penalties would not be adequate because they do not permit extradition, fraudulent telemarketing operators virtually always work across state lines. Considering the degree of theft observed in this area felony treatment is appropriate to the offense.

Exemptions:

The bill provides 16 exempt categories for sales operations which have not been perceived as a fraud problem. Those legitimate sellers not exempt will have no difficulty complying with the requirements of the bill.

Section II: Regulation of Charitable Solicitations

Purpose: Alaska is one of the few states without some form of charitable solicitation regulation.

Operation of the Section: Requires all non-exempt organizations to file a registration document with the Attorney General.

Disclosures: Paid solicitors required by bill to disclose identifying information; who is calling, who is represented, charitable purpose served. Upon request, paid solicitor required to provide financial statement of charitable organization and terms of the contract.

Mail and Broadcast Solicitations: Paid solicitors required by bill to send donor written confirmation of any pledge received, disclosure of identity of person making solicitation, charitable organization whose behalf solicitation is being made, purpose for which funds will be used.

Unlawful Practices: Bill prohibits use of any deceptive statement in the course of a solicitation.

Records: Bill provides registration statements, written contracts, other documents filed with Attorney General as public record. Charitable organizations required to maintain records for 3 years in form permitting them audit.

Enforcement and Penalties: Violations can be enforced privately by charitable organization, or by person making contribution to solicitor who violates law, also by Attorney General.

Exemptions: Church or religious organizations, political candidates, organizations that do not raise more than \$5,000 in contributions in a given year, charitable gaming operators licensed under AS 05.15.100

Regulations: Bill gives the Department of Law authority to adopt regulations to implement it.

Section III: Relation to consumer Protection Law

Violation of either Section I or II of bill would constitute a violation of the Consumer Protection Act.

Section IV: Full Costs and Attorney's Fees

By providing litigation under Sec. II could result in award of full costs & attorney's fees, bill conflicts with Civil Rules 79 & 82. Sec. 4 of bill resolves conflict by specifically providing that Rules 79 & 82 be amended to the extent provided in the bill.

Conclusion: Sec. I is largely patterned after existing statutes in OR and FL, there is belief that increase in telemarketing fraud in AK may be result, in part, of successful implementation of regs in other states. Sec. II balances between legitimate sales operations and society's need to regulate illegitimate scams without interfering unduly in legitimate sales operations. Sec. II is largely patterned after MI statute with certain provisions borrowed from CA and HI. Sec. II balances between noninterference with legitimate

ALASKA PACIFIC UNIVERSITY

Vice President
University Relations

M E M O R A N D U M

TO: The Honorable Ronald Larson

FROM: Albert J. Alvarez, Vice President, University
Relations

DATE: March 5, 1993

SUBJECT: House Bill No. 113

I am writing in support of HB 113 which you have introduced to the Eighteenth Legislature of the State of Alaska.

As a fund raising professional for over 15 years, and in my capacity as the Chairman of the Association for Healthcare Philanthropy, I have followed the work done in other states regarding the registration, regulation and enforcement of telemarketing and charitable solicitations. The bill you have proposed takes the best of what has been learned in other parts of the country and should, once enacted, create an environment friendly to legitimate charitable solicitations, and unfriendly to fraudulent scams.

Jim Forbes, in his recent presentation to the Alaska Chapter of the National Society of Fund Raising Executives, stated that you will be looking for public input regarding the registration form for charities and other information in the near future. This recognition of the assistance those of us in the fund raising profession may provide you is appreciated.

The one suggestion I would like to make is that the language "paid solicitor" be changed to "contract solicitor". This will make a more clear distinction between those of us who are paid staff of legitimate charitable institutions and agencies, and those whose services are purchased for project work.

You and Assistant Attorney General Jim Forbes are to be commended for the good work represented by HB 113. As the former President, and member of the Alaska Chapter of the National Society of Fund Raising Executives, I stand ready to assist you in whatever way necessary to get this bill passed.

AJA:EAW:hws

Alaska State Legislature

Session Address:
STATE CAPITOL BUILDING
ROOM 502
JUNEAU, ALASKA 99801-1182
(907) 465-3878
FAX (907) 465-2293



Interim Address:
P.O. BOX 53
PALMER, ALASKA 99645
(907) 746-1048 - Palmer
(907) 746-3560 - FAX
(907) 376-8628 - Wasilla

Representative Ronald L. Larson
District 27

MEMORANDUM

TO: Representative Brian Porter, Chairman
House Judiciary Committee

FROM: Representative Ron Larson *RL*

DATE: March 5 1993

RE: Request for a hearing - HB113

I respectfully request that HB113, An Act regulating the solicitation of contributions by charitable organizations and paid solicitors and the solicitation of sales by telephonic means, be scheduled for a hearing in the Judiciary Committee. This bill passed out of the Labor & Commerce Committee on March 4, with a unanimous Do Pass.

There has been a dramatic increase in fraudulent activity in this area. This bill will regulate telemarketers and Charitable Organizations who solicit donations by telephone. These scam artists have caused the loss of millions of dollars each year in Alaska--money that might otherwise circulate among legitimate businesses in the local economy. Many of these victims are elderly or reside in native villages and once a solicitor has been successful in ripping these people off, their name is often sold to other solicitors.

These types of regulations are already in place in other states, it is time for Alaska to take the steps needed in regulating this type of activity. Attached you will a fiscal note, position paper, two section by section analyses, a letter of support and newspaper articles pertinent to the issue.



REQUEST FOR SCHEDULING

Alaska State Legislature

Session Address:
STATE CAPITOL BUILDING
ROOM 502
JUNEAU, ALASKA 99801-1182
(907) 465-3878
FAX (907) 465-2293



Interim Address:
P.O. BOX 53
PALMER, ALASKA 99645
(907) 748-1048 - Palmer
(907) 748-3580 - FAX
(907) 378-8628 - Wasilla

Representative Ronald L. Larson
District 27

POSITION PAPER HB 113

I have introduced HB113 in an effort to regulate telemarketers and Charitable Organizations who solicit donations by telephone. There has been a dramatic increase in fraudulent activity in this area. It has been brought to my attention that these scam artists have caused the loss of millions of dollars each year in Alaska -- money that would otherwise circulate among legitimate businesses in the local economy. Many of these victims are elderly or reside in native villages and once a solicitor has been successful in ripping these people off, their name is often sold to other solicitors, in order to continue the practice.

I would hope with regulations in place, the public, would have a renewed trust, again, in giving to legitimate charitable organizations, and that the immediate distrust when that telephone rings would be replaced with a confidence that a person is giving to a regulated charity, and indeed that their hard earned money is going to that organization and its charitable needs.

A mandated "cooling off period" prohibits the telemarketer from taking the customer's money until the agreement is reduced to a written contract. This will avoid hasty credit card transactions over the phone, without the consumer having the time to consider the donation.

These types of regulations are already in place in other states, it is time for Alaska to take the steps needed in regulating this type of activity.



DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

February 3, 1993

SUBJECT: Sectional summary of HB 113

TO: Representative Ron Larson
Attn: Judy

FROM: Theresa L. Bannister *TB*
Legislative Counsel

You have requested a sectional summary of the above described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 of the bill adds a new chapter regulating telephonic solicitations.

Section 45.63.010 requires a person selling property or services by telephonic means to register with the Department of Law before the solicitation campaign, if the person makes substantially the same offer on substantially the same terms to two or more persons. Establishes certain procedures and information requirements for registration. Prohibits the seller from giving false information in the notice of intent to engage in the solicitation campaign.

Section 45.63.020 requires a telephonic seller to obtain from the buyer a signed, written contract before finalizing a purchase payment. Requires the contract to notify the buyer of the buyer's cancellation and replacement rights under sec. 45.63.030.

Section 45.63.030 provides the buyer with certain cancellation and replacement rights. Establishes when the sale becomes final.

Section 45.63.040 prohibits the seller from making certain representations to the buyer.

Section 45.63.050 prohibits a waiver of the buyer's rights under the chapter. Makes a waiver void.

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Section 45.63.060 establishes a criminal penalty for violating the chapter.

Section 45.63.070 declares that the remedies in the chapter are in addition to other remedies that may be available to the buyer or the department.

Section 45.63.080 exempts certain sellers and types of sales from the chapter.

Section 45.63.090 directs the department to adopt regulations to implement the chapter.

Section 45.63.100 defines certain terms for the chapter.

Section 2 of the bill adds a new chapter regulating charitable solicitations.

Section 45.68.010 prohibits a charitable organization from soliciting contributions unless it is registered with the Department of Law. Prohibits a paid solicitor from soliciting contributions for a charitable organization unless the paid solicitor is registered with the department. Establishes the registration procedure. Establishes the duration and renewal of the registration. Requires that a material change in the information provided in the initial or renewal registration statements to be reported to the department within seven days after the change.

Section 45.68.020 prohibits a paid solicitor seller from soliciting contributions for a charitable organization without having a written contract with the organization. Indicates what the contract is to contain and requires a copy to be filed with the department.

Section 45.68.030 requires a paid solicitor to make certain disclosures to the person being solicited.

Section 45.68.040 requires a paid solicitor who makes mail, radio, or television solicitations to mail written confirmation of contribution pledges to the contributors within a certain time. Requires the confirmation to include the disclosures required by sec. 45.68.030.

Section 45.68.050 identifies certain practices that a person may not engage in when soliciting for a charitable organization.

Section 45.68.060 establishes that the documents required to be filed with the department under the chapter are public records.

Section 45.68.070 requires a charitable organization and a paid solicitor who are either subject to or exempted from the chapter under sec. 45.68.120 to maintain the records required by the chapter for three years.

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Section 45.68.080 establishes that charitable organizations and paid solicitors who have certain out-of-state connections and who are required to be registered under the chapter are considered to have appointed the department their agent for service of process in a proceeding under the chapter. Requires the department to deliver notice of the service and a copy of the process to the appropriate person in order to complete the service.

Section 45.68.090 authorizes a charitable organization that suffers damages because of a violation of the chapter by another charitable organization or a paid solicitor to bring a civil action against the violator. Authorizes a contributor to bring a civil action against a charitable organization or paid solicitor who violates the chapter. Indicates the type of relief that the court may provide. Requires the complainant to serve a copy of the complaint on the department and to mail a copy of an order or judgment in the action to the department.

Section 45.68.100 establishes a criminal penalty for violating the registration requirements of the chapter.

Section 45.68.110 declares that the chapter's remedies are in addition to other available remedies.

Section 45.68.120 exempts certain persons from the registration requirement. Requires exempt persons to maintain certain records relating to the exemption.

Section 45.68.130 directs the department to adopt regulations to implement the chapter.

Section 45.68.900 defines certain terms for the chapter.

Section 3 of the bill adds violations of the two new chapters to the list of unlawful trade practices prohibited by the Unfair Trade Practices and Consumer Protection Act (AS 45.50.471 - 45.50.561).

Section 4 of the bill describes how certain court rules are changed by the bill.

If I may be of further assistance, please advise.

TLB:pl
93-063.plm

MEMORANDUM

State of Alaska Department of Law

TO: Honorable Ron Larson
State of Alaska
House of Representatives

DATE: January 29, 1993

FILE NO:

TEL NO: 269-5206

SUBJECT: House bill regulating
telephonic and charitable
solicitations

FROM: 
James Forbes
Assistant Attorney General
Fair Business Practices Section

Description of Bill

This bill would regulate solicitations for telephonic sales and charitable fund raising; areas which are, for the most part, unregulated. State consumer protection investigators have noticed a dramatic increase in fraudulent activity in this area. Most states have adopted legislation dealing with charitable solicitation fraud and telemarketing scams, but Alaska lags behind. As a result, scam artists are increasingly avoiding those states, and are concentrating their activities on unregulated states, such as Alaska. We believe that they cause the loss of millions of dollars each year in Alaska -- money which would otherwise circulate among legitimate businesses in the local economy. Many of the victims are elderly or reside in native villages, and we have documented cases where individual victims have lost substantial amounts of money -- in the tens of thousands of dollars.

Section 1: Regulation of Telemarketers

Purpose: This section is designed to curtail a rampant form of fraud which typically involves a high pressure sales pitch by telephone. The caller is almost invariably an out-of-state "boiler room" operator with minimal ties to any one locality, and with the ability to quickly close up shop, change identity, and re-open at another location.

The typical scam involves a promise to the consumer that (s)he has won a fabulous prize, usually including a new car, and all that is necessary to get the new car (or other fabulous prize) is that the consumer agree to purchase products (frequently vitamins or skin care products) for a high price, usually in the \$500 to \$750 range. The seller utilizes high pressure tactics

Post-It [®] brand fax transmittal memo 7671		# of pages	6
To	Judy	From	Jim Forbes
Co.		Co.	
Dept.		Phone #	269 5206
Fax #		Fax #	

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designed to force the consumer to make a quick decision to agree to the purchase, lest the opportunity to win the fabulous prize be lost. The consumer is usually required to make payment on the spot, either by authorizing a credit card charge over the telephone or, more recently, by writing out a check which is picked up within minutes by a courier, such as Federal Express, dispatched by the telemarketer. The consumer is promised that (s)he will receive the valuable prize after several weeks. By the time the consumer realizes that the prize is not forthcoming, the telemarketer has frequently moved on to a new location, with a new identity.

State investigators have observed that the victims of these scams are frequently elderly, and once they agree to a sale by one telemarketer, they become the target of numerous telemarketers because their names are added to a "suckers list" which is sold for substantial sums of money to other telemarketers.

Remedy proposed by bill: Section 1 of the bill attacks the above-described problem in three important ways:

(1) It requires registration of telemarketers, including detailed information about exactly who they are, their histories, and the physical location from which they are operating;

(2) It mandates a "cooling off period" by prohibiting the telemarketer from taking the customer's money until the agreement is reduced to a written contract; and

(3) It provides criminal penalties for violators.

The registration and identification requirements will allow the state to pinpoint the individuals who are operating high pressure telephonic sales, and determine whether they have prior criminal histories or significant other past problems dealing with sales fraud, making closer scrutiny appropriate. The state currently has no effective means of forcing individuals, who conduct sales by telephonic means across state lines, to identify themselves. Businesses operating within Alaska are required to obtain a state business license, but interstate telemarketers routinely fail to comply with this requirement -- and they are the operators the state has the most need to supervise.

The written contract requirement will put an end to the "high pressure" tactic which is so successful in separating consumers from their money when the promise of a valuable prize is involved. Consumers who have acquiesced to high pressure sales techniques frequently wish to cancel the sale after they have had time to calmly reflect on the transaction. But when they have already authorized a credit card sale by telephone, or a courier

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has already picked up their payment, revocation of the sale is not always possible. The written contract requirement will put high pressure telemarketers on more of an equal footing with local, established merchants who are, on a day-to-day basis, accountable to their customers after the sale.

Criminal penalties at the felony level are necessary if the regulations are to be taken seriously by the telemarketers. In our experience, and in discussions with our counterparts in other states, we find that fraudulent telemarketing operators build the cost of defending civil suits into their profit structures, and are not the least bit deterred by the threat of civil litigation by state attorneys general. Misdemeanor penalties would not be adequate because they do not permit extradition, and fraudulent telemarketing operators virtually always work across state lines. Elevating the penalty to the felony level is, therefore, necessary in order to provide a credible deterrent to those who are otherwise disposed to violate the law. Considering the degree of theft we have observed in this area, and the vulnerability of many of the victims, felony treatment is appropriate to the offense.

Exemptions: This bill is noteworthy for the types of transactions not covered. The bill provides a total of 16 exempt categories. These categories exempt sales operations which we have not perceived as presenting a fraud problem. Most legitimate enterprises are exempt by the express language of the bill, but those legitimate sellers that are not exempt will have no difficulty complying with the requirements of the bill.

Section II: Regulation of Charitable Solicitations

Purpose: Alaska is one of the few states without some form of charitable solicitation regulation. Investigators for the Fair Business Practices Section have uncovered numerous recent examples of scam artists collecting money from the public by posing as charitable organizations. We believe this problem to be doubly pernicious because these scam artists divert the limited amount of money available for charitable giving from legitimate charities to their own pockets; and they poison the atmosphere for charitable giving by making members of the public cynical about donating money to charity. We believe that this bill will adequately address those problems.

Operation of the Section: Section II of the bill requires all non-exempt organizations to file a registration document with the Attorney General. In the case of a paid solicitor (an organization under contract with a charitable organization to raise money) a bond must also be filed. Organizations are required to re-register each year in September.

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The registration statement will be on a form provided by the Attorney general, in accordance with regulations to be adopted under the bill. There will be no registration fee.

The bill requires that paid solicitors enter into a written contract with the charitable organization on whose behalf the solicitations are made. The contract must clearly spell out the respective obligations of the parties, including the method for calculating the compensation of the paid solicitor. A copy of that contract must be filed with the Attorney General.

Disclosures: Paid solicitors are required by the bill to disclose identifying information to the person solicited so that (s)he will have a clear picture of who it is that is calling, who it is that they represent, and what charitable purpose is served by the organization. Upon request, a paid solicitor is required to provide a financial statement of the charitable organization and the terms of the contract under which the solicitor is paid.

Mail and Broadcast Solicitations: Paid solicitors who raise money by means of mail, radio, or television are required by the bill to send the donor written confirmation of any pledge that is received, including disclosure of the identity of the person making the solicitation, the charitable organization on whose behalf the solicitation is being made, and the purpose for which the funds will be used.

Unlawful Practices: The bill prohibits the use of any deceptive statements in the course of a solicitation. State investigators have discovered that, particularly in the case of telephonic solicitations by phony or "sound alike" charities, deceptive or false information is frequently disseminated.

Records: The bill provides that the registration statements, written contracts, and other documents filed with the Attorney General are public records. Charitable organizations are also required to maintain their records for a period of three years in a form that permits them to be audited.

Enforcement and Penalties: Violations of this law can be enforced privately by either the charitable organization which sustains damages as a result of another organization or solicitor's violation of the section, or by a person who makes a charitable contribution to a solicitor who violates the law. It can also be enforced by the Attorney General. The bill provides a powerful private remedy in that it permits the court to: issue an injunction against further violations; award damages for the violation; and require the violator to pay 100% of the attorney's fees and costs incurred by the aggrieved party. In the case of a

Honorable Ron Larson

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willful violation, treble damages can be awarded under the Consumer Protection Act. The bill also provides a criminal misdemeanor penalty for nonexempt persons or organizations who fail to file the necessary registration papers.

Exemptions: The following are exempt from registration under this bill: church or religious organizations; political candidates; organizations that do not raise more than \$5,000 in contributions in a given year; and charitable gaming operators licensed under AS 05.15.100. The term "paid solicitor" under the bill does not apply to an individual who counsels a person or institution on whether to make a contribution, nor does it include a salaried officer, employee, or volunteer of a charitable organization.

Regulations: The bill gives the Department of Law authority to adopt regulations to implement it.

Section III: Relation to Consumer Protection Law

Violation of either Section I or Section II of this bill would constitute a violation of the Consumer Protection Act, AS 45.50.471(b). Under this section, both the Attorney General and private individuals would have authority to enforce provisions of the law with the mechanisms available under the Consumer Protection Act. These mechanisms include injunctive relief, and treble damages in the case of a "willful" violation.

Section IV: Full Costs and Attorney's Fees

By providing that litigation under Section II of the bill could result in an award of full costs and attorney's fees, the bill conflicts with Civil Rules 79 and 82. Section 4 of the bill resolves the conflict by specifically providing that Rules 79 and 82 be amended to the extent provided in the bill. Section 4 requires, therefore, passage by a two-third vote of the Legislature.

Conclusion

Section I of the bill dealing with telemarketing is largely patterned after existing statutes in Oregon and Florida. The Oregon and Florida laws have reportedly been helpful in deterring telemarketing fraud. In fact, we believe that the current increase in telemarketing fraud in Alaska may be the result, at least in part, of the successful implementation of regulations in other states. Telemarketers who find inhospitable conditions in other states due to effective legislation are probably turning their attention to states like Alaska which do not

Honorable Ron Larson

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have similar legislation. Law enforcement officers in other states who have executed search warrants on telemarketer "boiler rooms" report that they have seen signs on the walls reminding the sales agents not to make solicitation calls in certain states, due to the anticipated level of law enforcement.

We believe that Section I of the bill strikes the appropriate balance between legitimate sales operations and society's need to regulate illegitimate scam operations. We believe that Section I of the bill does so without interfering unduly in legitimate sales operations.

Section II of the bill is largely patterned after the Michigan charitable solicitation statute, with certain provisions borrowed from California and Hawaii. We believe that Section II strikes the appropriate balance between noninterference with legitimate charitable organizations' fund raising efforts and society's need to deal with scam artists who steal money that otherwise might be donated to legitimate charities. We anticipate that legitimate charitable organizations will support this bill.

JF:bev

cc: Attorney General Charlie Cole
Deputy Attorney General Bruce Botelho
Regulations Attorney Deborah Behr
Legislative Liaison Kris Lethin

National Society of Fund Raising Executives

Alaska Chapter
P.O. Box 230611
Anchorage, AK 99523-0611

VIA FAX

February 25, 1993

The Honorable Ron Larson
House of Representatives
State of Alaska
Juneau, Alaska

Dear Representative Larson:

The Alaska Chapter of the National Society of Fund Raising Executives is supportive of your efforts at curbing abuses in charitable solicitation in Alaska. Thank you for your sponsorship of HB #113.

Fraudulent charitable solicitation obviously hurts those individuals who unknowingly contribute to non-existent causes, but there is also a heavy impact on legitimate Alaska charities. To the extent that these scams are successful, they harm non-profits in two ways.

First, they take away monies which may very well have been contributed to real Alaska non-profits. Those funds are no longer available, obviously, to help the myriad Alaska non-profit organizations helping make this a better state in which to live.

The second impact is that, rightly or wrongly, fraudulent solicitation places a cloud of suspicion on all charitable solicitation, legitimate or otherwise. While the vast majority of Alaska's non-profits provide identified, needed services in a very efficient manner, they are able to do so only because of generous charitable support from citizens throughout the state. Yet in many cases these scams only serve to reinforce the all-too-common generalization that all fund raising is somehow tainted, and we do believe there is a direct impact on contributions as a result.

The National Society of Fund Raising Executives Alaska Chapter is one of several hundred NSFRE chapters nationwide. Nationally there are over 13,000 members; we have 32 in the Alaska Chapter, representing non-profits from Juneau, Fairbanks and Anchorage.

LETTER OF SUPPORT

The Honorable Ron Larson
February 25, 1993
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At our monthly luncheon meeting on February 24, we had the pleasure of listening to Assistant Attorney General Jim Forbes explain the background and specifics of HB #113. During that meeting the membership formally agreed to work with you in support of the bill.

Please let me know what additional help you may need. I would be happy to testify in person on behalf of HB #113, representing the many fund raising professionals in Alaska who feel this bill is necessary.

Sincerely,



Vincent J. Walker
Alaska Chapter President

President,
Providence Health Care
Foundation

vjw/ab

7)
Date Referred: February 1, 1993

FURTHER REFERRALS:

Finance

Date of Committee Action: 3/04/93

The LABOR AND COMMERCE Committee considered:

HB 113

HOUSE BILL NO. 113

CHARITABLE & TELEPHONIC SOLICITING/SALES

An Act regulating the solicitation of contributions by charitable organizations and paid solicitors and the solicitation of sales by telephonic means; and amending Alaska Rules of Civil Procedure 79 and 82."

RECOMMENDATIONS: the same title
be replaced with _____ a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): _____ (Dept)

APPROVES PREVIOUS: _____ (Dept/Date)

fiscal impact _____

fiscal note(s) _____

zero fiscal note LAW 2/12/93

zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Brian J. Porter</i>	<input checked="" type="checkbox"/>				
<i>Joe Sittler</i>	<input checked="" type="checkbox"/>				
<i>Edwin Hester</i>	<input checked="" type="checkbox"/>				
<i>Gregory J. ...</i>	<input checked="" type="checkbox"/>				
<i>Bill Hudson</i>	<input checked="" type="checkbox"/>				

Bill Hudson
CHAIRMAN'S SIGNATURE

REGULATE CHARITY PROMOTERS

Squeeze out the con artists

WHILE THE Legislature struggles with budget cuts needed to keep Alaska's burgeoning bureaucracy from out-bloating itself, it may strike some as preposterous to even consider yet one more rule or regulation.

But when it comes to those fly-by-night charity promoters who take advantage of Alaskans' good will and generosity, and then disappear with the take, it's time to regulate.

Alaska, according to the Fair Business Practices Section of the Department of Law, is one of the few states that doesn't strongly regulate charity promoters and non-profits.

This was brought home last Christmas season when a group set out to raise money for presents for needy children. The group hired a promoter who, indeed, raised money for the cause. In fact, \$24,000 was donated. Of that hefty sum, only \$1,400 — or about 6 percent — actually reached the children.

In other words, well-meaning people donated 94 percent of their money to the promoter.

REP. RON LARSON, D-Palmer, drafted legislation in February that would have addressed this situation. It was circulated and discussed, but never introduced.

The proposed legislation would require registration of most charitable organizations involved in telephone, mail or any other kinds of charity solicitation. It would require audit information made public and bonding for promoters.

The need to regulate promoters takes on added importance as government and corporate funding sources dry up during the current economic crunch. Non-profit agencies that serve the needy depend more and more on the largesse of the public — people who answer a knock at the door or a telephone ring and give a dollar or two.

Those dollars mount up for the unscrupulous promoters who take advantage of Alaskans' unselfish impulse to share what they have.

This legislation should go to the top of the list during the 1992-93 session. Until then, check out those who solicit money — even if they say they're representing well-known organizations. And choose charities that give most of the money to the needy, not to promoters and their administrative costs.

Bill targets phone scams

Law requires written contracts, cooling-off period

By IAN MADER

The Associated Press

Telephone scam artists would face prison terms under a House bill aimed at combatting what officials say is rampant telephone fraud in Alaska.

There are no statistics available on how much money Alaskans lose to telephone fraud, but Assistant Attorney General Jim Forbes said it may be costing millions of dollars a year.

Typically, scam victims are told they have won a prize that they can claim after making an expensive credit-card purchase, Forbes said. Either the prize never shows up; or

it is worth much less than expected. No Alaska criminal laws deal with such activity, and civil lawsuits are difficult to pursue because the companies usually operate from the Lower 48 states. Scam outfits periodically change their names and move their operations to avoid lawsuits and prosecution, Forbes said.

House Bill 113, introduced by Rep. Ron Larson, D-Palmer, would require companies that solicit by mail and telephone in Alaska to file with the attorney general detailed information on their location and history.

Please see Page D-6, PHONE

Anchorage Daily News Thursday, February 11, 1993

PHONE SCAMS: State says it's multimillion-dollar problem

Continued from Page D-1

The bill would prohibit companies from taking any customer's money without a written contract. That would give customers a "cooling off" period after the high-pressure telephone pitches, Forbes said.

Criminal charges are needed because scam artists consider defending against civil lawsuits a routine part of their expenses, Forbes

said. The bill would allow suspects to be extradited from other states.

Forbes said tougher laws in other states are forcing more scam artists to focus on Alaska. One 89-year-old woman in the Matanuska-Susitna area gave more than \$35,000 in recent months to various fraudulent outfits from the West Coast, Forbes said.

Rick Gilmore of the Better Business Bureau of Alas-

ka said his office gets about 1,200 calls a month from residents complaining about such scams.

"This is the biggest problem we have in the state of Alaska, because of our geographic location," Gilmore said. "So many people order things through catalogs and telephones, that we're very susceptible to telephone and mail solicitations."

The bill also requires companies that collect money for

charities to file information with the state and prohibits them from misrepresenting their cause.

"It should cut down an awful lot of the unscrupulous actions that people have complained about," Rep. Bill Hudson, R-Juneau, said Tuesday.

Anti-crime bills are expected to receive favorable consideration this year by the Republican-led majorities in the Legislature.

2/24/93

They're at it again: Telemarketers target Alaska

By ANNABEL LUND

The JUNEAU EMPIRE

The attorney general's consumer protection office and Alaska Better Business Bureau are warning residents - particularly the elderly - to listen carefully to sales pitches from telemarketing companies canvassing the state for business.

Two elderly Juneau residents were contacted recently by out-of-state firms and both later called the Juneau police for help. There is little that can be done.

Ingrid Dull, 80, sent International Marketing of Las Vegas \$398 to

win what they said would be a cash prize. But instead she received a small box of pens and Frisbees with an anti-drug message written on them, according to Juneau Police Lt. Steve Kalwara.

Barry Walden, a customer services representative with International Marketing, told the Empire his company never guaranteed which award Dull would receive.

"It was her choice to do it, to help her community fight drugs. If that's what she wanted to do, what can we say?" Walden said.

He said International Marketing of Las Vegas was not connect-

ed in any way to International Marketing of Phoenix, Ariz., which also sells items with anti-drug messages.

That company was recently shut down by the Arizona attorney general's office after the company allegedly took \$525 from an 80-year-old Soldotna woman and promised to send her an anti-drug kit for her community, according to Jerry Williams, an attorney general's office investigator. The kit turned out to be a handful of bumper stickers, he said.

The woman sent a check for \$3,000 more at the company's re-

quest, but authorities managed to put a stop on it and Soldotna police are assisting Arizona authorities with their case against the firm, Williams said.

Dull was also contacted by Worldwide Marketing of San Diego, which said she would be eligible for several prizes, including \$25,000 in cash and vacation trips to Hawaii or Mexico, if she would send them \$399. She did, and received a small box of cosmetics, Kalwara said.

Nicole Miles of Worldwide Marketing in San Diego told the Empire the company would not return

Dull's money, but that the shampoo, conditioner and lotion was worth \$400.

Miles said Dull must have misunderstood if she thought she was going to get a \$25,000 prize. "We said she was eligible. Eligible: That's the key word."

Miles said her company, and other telemarketing firms like hers, make their phone calls from lists of people who respond to other promotions and contests.

Art Krows, president of Main Line America, a telemarketing firm from Las Vegas, said his
Please see Scams, back page

Scams...

Continued from Page 1

company is legitimate and the complaint filed against him Tuesday by 83-year-old Jan Woodring of the Juneau Pioneers' Home was "because she obviously didn't listen to what we said. She only heard what she wanted to hear." Woodring told police she was called Monday evening by a company identifying itself as Main Line America. She said company spokesman Robert Chesmore told her she had won \$20,000 worth of prizes that she could collect as soon as she sent them \$2,100, Federal Express.

"They said the \$2,100 was supposed to take care of costs associated with the award. I turned it down and they called me again. They really have pressure tactics. They make you feel guilty," Woodring told the Empire.

Krows said Woodring was guaranteed one of several awards: a 1993 Saturn, a Chevy S-10 pickup, a certified lithograph by Adolph Shering valued at \$2,500, or a 41-inch TV. Krows said Woodring's \$2,100 would have purchased either cleaning supplies or a security system that Main Line America markets.

Woodring laughed when told what Krows had said. "That's not what they said. I live in the pioneers' home, why would I want \$2,100 worth of cleaning supplies? That doesn't make sense."

Krows said his industry provides a service. "There are some people who sit by their phone all night and dial all these 800 numbers because these people are so lonely. It's a true but pathetic fact. We brighten their day.

"Why does telemarketing work? Telemarketing is based on greed, the greed of the American people. People want to get something for nothing but there is no free lunch. We're not con men, we're just plain human beings selling to people who buy because of greed," Krows said.

Woodring disagreed. "I'm not greedy. I'm not lonely. It's not just a matter of being elderly. But I have had a series of mini-strokes. I don't need this harassment, this stress."

Dora Conway of the Las Vegas Better Business Bureau said Main Line America had been in business since March 1992 and had recently signed a voluntary compliance agreement with the state of Oregon, agreeing not to engage directly or indirectly in solicitation there and to pay restitution to any Oregonian requesting it.

"Did I go to Alaska and put a gun to (Woodring's) head and tell her to send a check? No. She does it of her own free will," Krows said.

Another Las Vegas telemarketing company apparently targeting Alaska's elderly calls itself Corporate Bank Services. Last week, a 73-year-old Anchorage woman sent \$1,225 to the company by Federal Express, according to Williams. The telemarketer said the money would be used to pay taxes she owed for a \$50,000 prize the company claimed she would receive the next day. She hasn't heard from them since.

"This company has a long history of scams. They move into a motel one day and they're gone the next. It appears to be a structured criminal operation," Williams said.

Conway said Corporate Bank Services had gone out of business months ago but some unscrupulous people may be using its name when they call out-of-state residents.

Rick Gilmore, president of the Anchorage-based Alaska Better Business Bureau, said, "Ripping off the elderly seems to be the fashionable thing to do. People should know that when they are called by any of these companies, they should first invest a couple of dollars in a long-distance phone call to the Better Business Bureau because we can tell consumers whether companies are legitimate or not."

Assistant Attorney General Jim Forbes, who works on consumer protection issues for the state, said telemarketing is almost completely unregulated in Alaska and fraudulent schemes cost Alaskans millions of dollars each year. Many of the victims are elderly or live in Native villages, he said.

Meanwhile, Rep. Ron Larson, D-Palmer, is sponsoring legislation this session that would regulate telemarketers, mandate a cooling-off period by requiring a written contract, and make it a felony to violate the law. The bill, which would also govern solicitations by charitable groups, is patterned after laws in Oregon and Florida.

Forbes said one reason Alaskans are targeted by so many out-of-state telemarketers is because "of the successful implementation of regulations in other states. Telemarketers who find inhospitable conditions in other states ... are turning their attention to states like Alaska which do not have similar legislation."

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 113

Revision Date: February 12, 1993
Title: "...regulating the solicitation of charitable contributions...solicitation of sales by telephonic means..."
Sponsor: Representative Larson
Requestor: Representative Larson

Department Affected: Law
BRU: Legal Services
Component: Fair Business Practices
COMPONENT SERIAL NO. 1823

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING:

1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see attached analysis.

Prepared by: Richard I. Pegues, Director
Division: Administrative Services Division
Approved by Commissioner: Richard I. Pegues/FBI
Agency: Department of Law

Phone: 465-3672
Date: February 12, 1993
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FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 113

ANALYSIS: (continued)

This bill would amend Title 45 by adding regulatory provisions to address abuses in charitable fundraising and telemarketing solicitations.

Under this bill, non-exempt charities would be required to:

1. File registration papers with the attorney general identifying the party making the charitable solicitation, and describing the charitable purpose to be served with the proceeds;
2. Execute written contracts with any paid fundraisers establishing the method of payment for the paid fundraiser, including the amount of any contingent fee; and
3. Provide certain information to donors.

Non-exempt telemarketers would be required to:

1. Register with the attorney general; and
2. Execute written contracts with customers as a condition of closing any sales. This provision creates an enforceable "cooling off period" that is currently lacking in these high pressure sales situations.

The bill provides criminal penalties for charitable solicitors who refuse to honor the consumer's right to revoke a deal, or who take the consumer's money without observing the cooling off period under the written contract provision.

This bill is an attempt to solve the related problems presented by high pressure charity fundraisers who make misrepresentations regarding their fundraising purposes; and telephone sales artists who use high pressure tactics to sell merchandise at greatly inflated prices with false promises of extravagant prizes, and other illusory inducements.

Because there is no regulatory scheme now in effect, the Department of Law cannot say with certainty how much additional staff time will be required to meet the paperwork generated by this bill. But we estimate that the initial year's filings will not greatly exceed 250 charities, and 100 telemarketers.

The staff time needed to file the registration documents will be partially offset by a time savings in the investigation sphere, because the files will contain data that significantly reduces investigative effort in cases involving charitable fundraisers and telemarketers. Both types of cases currently involve significant investigative time spent identifying the people and organizations involved. Of course, to the extent that the bill deters illegal conduct, it will result in additional reductions of investigative time, due to the reduction in law violations requiring investigation. Investigators will be free to devote resources to those other pressing matters needing their attention which currently go unaddressed because of reduced funding.

In the event that the time estimates are inaccurate, the Department of Law may need to return with a request for additional funding in the future. Until such time, however, this bill does not require an increased appropriation.