ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672
10591 SENATE JUDICIARY

- Provisions of SB 37 raise questions about the adequacy of state supervision authorized. It is questionable whether the legislation would meet the requirements of the state action doctrine. Among other things,

  - The bill requires a third-party representative to provide only limited information to the Attorney General to obtain approval to negotiate. The Attorney General must determine whether the third party has complied with the physician market share limits under the bill in order to decide whether the proposed negotiations exceed the authority granted under the chapter, but the third party is not required to provide any of the information necessary to make such a determination.

  - The bill imposes substantial responsibilities on the Attorney General to approve or not approve a proposed negotiated contract, using specific criteria, but provides only a very short time frame (30 days) within which to make that fact-intensive determination. The bill does not require that the parties provide any information to the Attorney General to make such a determination.

  - The regulatory scheme established by the bill contains no mechanism for members of the public, or others affected by the decision, to offer evidence and argument relating to the costs or benefits of the proposed contracts.

*Market Share*

- SB 37 appears to make the concept of market power an important limitation on physicians' ability to collectively negotiate price terms, but these provisions are not based on accepted concepts of market power in a legal or economic sense. Specifically, a 15% market share is not ordinarily presumed to constitute market power.

- The bill's limits on physician group size do not reflect the potential market power (ability to raise prices above competitive levels) of physician groups. This may result in a disproportionately large physician group, or specialty group within a physician group (up to 100% of the physicians in a specialty group in a geographic service area) negotiating with a small health plan (as small as 2-3% market share), resulting in substantial and disproportionate market power by the physicians."

*Boycotts*

- SB 37 prohibits competing physicians from engaging in boycotts relating to the non-price terms and conditions listed in the bill. However, there is no such

prohibition on engaging in boycotts relating to price and price-related terms and conditions.

- SB 37 does not clearly prohibit concerted action, such as a boycott. It only states that such action is not authorized. A boycott or strike by physicians in response to a health plan's refusal to collectively negotiate on price terms would not be prohibited.

*Application of Bill's Provisions*

- The bill is not clear on how these provisions apply to an insurance company based on the use of the term "health benefit plan." By definition, "health benefit plan" does not refer to insurance companies. The bill relies on the definition of health benefit plan in AS 21.54.500(15). This definition incorporates the ERISA (Employment Retirement Income Security Act of 1974) definition of "employee welfare plan," which includes a "plan, fund, or program established or maintained by an employer or by an employee organization . . . for the purpose of providing for its participants or beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits," among other things. Accordingly, the determination under the bill of a health benefit plan's market share will be based on the market share of an individual employer's or employee organization's health benefit plan, not on the market share of the insurance company that may be providing insurance to the plan.

- Another area in which the bill is unclear is whether negotiation with an authorized third party is mandatory for health benefit plans. The language in AS 23.50.020(c)(2) implies that any health benefit plans would be required to negotiate with an authorized third party unless it could prove it died not have substantial market power. However, written testimony submitted to the committee and proposed AS 23.50.020(f)(2), indicated the contrary.

*ERISA Preemption*

- Since the bill applies to "health benefit plans" it raises a federal preemption issue under ERISA. ERISA preempts all state laws that relate to employee benefit plans, which by definition includes "health benefit plans." ERISA regulates the administration of employee health care benefits as well as the structure of the plans.

# CECONSULTING

3998 DIANE ROAD

JUNEAU, ALASKA 99801

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**FACSIMILE TRANSMITTAL SHEET**

TO:SENATOR ROBIN TAYLOR

CC. SENATOR KIM ELTON

FROM: CAROLE S. EDWARDS, RN,BSN

DATE: 2/05/01

| FAX NUMBER | TOTAL NO. OF PAGES INCLUDING COVER: |
|---|---|
| 907-465-3922 | 1 |

MESSAGE: I am a registered nurse living in Juneau. I oppose SB 37. I believe that if this bill is passed it will remove antitrust protections that ANPs (Advanced Nurse Practitioners) and CNMs (Certified Nurse Midwives) need to shield them from discriminatory practices by physicians and employers. Alaskans have the right to choose the health care provider who best meets their needs. This bill will both limit choice and increase costs. In 1998 over 1400 Alaskan chose a CNM to attend the birth of their baby. These women should be able to continue to make this choice. This bill would protect price fixing, drive up health care costs, and let physicians obstruct opportunities for ANPs and CNMs to participate as providers in health benefit plans. Please vote NO on SB 37. Carole S. Edwards, RN

CAROLE S. EDWARDS, RN,BSN

**Letter of Opposition**

# FAX Transmission

TO:
Robin Taylor
Chair, Judiciary Committee

Fax number: (907) 465-3922

From:
Cathy Giessel
12701 Ridgewood Rd
Anchorage, AK 99516

cgiessel@mac.com
(907) 345-5470

Total pages in transmission: 2

Letter of Opposition

February 8, 2001

Robin Taylor, Chair, Judiciary Committee

Mr. Taylor,
I am writing concerning SB 37, which would give broad antitrust immunity to physicians negotiating collectively with insurance companies. I am asking you to **VOTE NO ON SENATE BILL 37.**

I am a nurse practitioner and I would be negatively affected by the enactment of this legislation. This bill would remove antitrust protections which NPs and other non-physician practitioners need to shield them from discriminatory practices undertaken by physicians, employers, and other entities. SB 37 would protect price fixing, drive up health care costs, and let physicians obstruct opportunities for NPs and other non-physician practitioners to participate as providers in health benefit plans.

Nurse practitioners (NPs) provide health care to people all over this state and nation. We provide this care at lower cost than physicians, but of equal quality. A study published in The Journal of the American Medical Association found: "In an ambulatory care situation in which patients were randomly assigned to either nurse practitioners or physicians, and where nurse practitioners had the same authority, responsibilities, productivity and administrative requirements, and patient population as primary care physicians, patients' outcomes were comparable." (JAMA 283 (1), pg 59 - 68; Jan 5, 2000). Needless to say, the American Medical Association did not like the findings of this report. They have made it a priority to limit the scope of practice of NPs and other non-physician practitioners, as evidenced by their efforts to restrict other health care providers.

Nurse practitioners focus on wellness and illness prevention, which ultimately lowers health care costs. We provide a vital service in this state, where many rural clinics are staffed ONLY by non-physician providers. In addition, NPs provide cost effective care. As an example, I work at a nurse practitioner owned and operated clinic. Our fee for an average visit is almost HALF the cost of the same visit at the physician owned urgent care center located around the corner. The health care is of equal quality as the more expensive clinic or physician's office for the most common complaints. If physicians are given preferential treatment in price setting negotiations with insurance companies, our patients with insurance will be forced to pay more for health care from an NP or prohibited from choosing an NP as their health care provider.

Instead of hampering NPs and other non-physician practitioners from providing services to Alaskans, the state legislature should be focusing on how to unencumber them. There is an interesting article in the Harvard Business Review, Sept/Oct 2000 issue, pgs. 102 -112. The title is "Will disruptive innovations cure health care?" and the article speaks to the very issues I am discussing here. You might find it interesting reading as you consider SB 37.

I appreciate your service to Alaska as you serve in the Legislature. Please consider carefully who will benefit from SB 37 and whether this is in the best interest of the Alaskan people. Then I would urge you to VOTE NO ON SB 37.

Respectfully,

Cathy Giessel, MSN, RN, FNP-CS
cgiessel@mac.com
(lifelong Alaska resident; District 18, Precinct 353, Republican Party Committeewoman for 12+ years)

*Alaska Physicians & Surgeons, Inc.*
*4120 Laurel Street, Suite 206*
*Anchorage, Alaska 99508*
*Phone. 907-561-7705 Fax: 907-561-7704*
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February 2, 2001

Senator Robin Taylor
Chairman Senate Judiciary Cc ittee
PO Box 1441
Wrangell, AK 99929

Re: Response to request for additional information on the State Action Doctrine & SB37

Dear Senator Taylor:

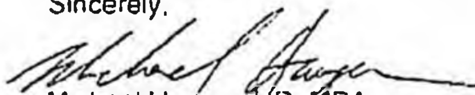
Attached are two legal analyses of the Texas Physician Negotiation Bill written just prior to its passage in 1999. The first, written by Donald Wilcox (general counsel for the Texas Medical Association) we feel clearly outlines the federal case law and reasoning why all states have it within their purview to create exceptions to federal anti-trust law through the State Action Doctrine.

The genera conclusion we drew from Mr. Wilcox's analysis of existing case law, was that the state oversight function required under the State Action Doctrine, while significant and real, was never intended to be so onerous or burdensome, that it effectively made any state action doctrine exception unworkable.

We included the Vinson & Elkins opposing opinion because it is referred to in Mr. Wilcox's analysis.

If you have any question please give me a call at 561-7705.

Sincerely,



Michael Haugen, MD, MBA
Executive Director

**Add'l Information**

PHYSICIANS CARING FOR TEXANS

Texas Medical Association

June 15, 1999

Honorable George W. Bush
Governor, State of Texas
State Capitol
P.O. Box 12428
Austin, TX 78711-2428

Re: Senate Bill 1468 -- An Act Relating to the Regulation of Physician Joint Negotiation

Dear Governor Bush:

I am writing on behalf of the Texas Medical Association ("TMA") and the American Medical Association ("AMA") in consultation with its counsel, Sidley and Austin, to respond to the June 3, 1999, letter to you from Vinson & Elkins – on behalf of an unidentified client – addressing S.B. 1468 (the "Act"). Contrary to the assertions made by Vinson & Elkins, we believe the Act will prove effective in its principal purpose of shielding physicians from the effects of the antitrust laws. We further believe the Act is valid under the Texas Constitution, is consistent with public policy, and will advance the public interest in health care.

The Act will allow meaningful, state supervised joint negotiations by physicians with health plans. New opportunities to enter into genuine, fair working relationships as well as opportunities to repair broken ones will occur. It will enhance the environment for allowing physicians to continue to provide genuine, competent medical treatment to patients in managed care settings.

We urge you to sign S.B. 1468 into law.

**1. The Act Will Shield Physicians from the Antitrust Laws Under the State Action Doctrine.**

As Vinson & Elkins notes, the primary purpose of the Act is to permit physicians to jointly negotiate the terms and conditions of their contracts with health benefit plans, without fear of reprisal under the antitrust laws. As health benefit plans have grown and consolidated, the playing field in the health care arena has shifted dramatically. In communities where a few health benefit plans dominate the market, fair negotiations between physicians and plans are unobtainable absent joint action by physicians. See Art. 29.01. Unfair contractual terms, including unjustified and inequitable reductions in compensation, are not just bad for physicians; they also threaten to decrease both the quality and quantity of health care services provided, which is bad for consumers.

To rectify this situation in communities where warranted, the Act permits physicians to jointly negotiate with health benefit plans. The Act also provides mechanisms for review and approval (or disapproval) of joint physician action by the Attorney General, so as to immunize the joint

... STREET AUSTIN TEXAS 78701-1680 (512) 370-1300 FAX (512) 370-1630

action from the antitrust laws. Contrary to the position taken in the Vinson & Elkins letter, we believe firmly that the Act meets the requirements to shield joint physician action under the state action doctrine.

The state action doctrine shields private conduct if a two-prong test is met: (1) the challenged conduct is the result of a clearly articulated and affirmatively expressed state policy; and (2) the joint action is actively supervised by the state. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). Vinson & Elkins concedes that the "clearly articulated state policy" requirement is met. The only question relates to the "active supervision" requirement.

As a preliminary matter, Vinson & Elkins suggests that satisfaction of the active supervision requirement is "more problematic" in cases such as this where the joint action involves price-setting. To the contrary, most issues that arise under the state action doctrine involve joint price-setting. See, e.g., Federal Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621 (1992); Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985); Midcal, supra; Parker v. Brown, 317 U.S. 341 (1943); see also DFW Metro Line Services v. Southwestern Bell Tel. Co., 988 F.2d 601, 605 (5th Cir. 1993). Indeed, the very purpose for the creation of the state action doctrine was to protect joint activity that is undertaken pursuant to a clearly articulated state policy to supplant or limit competition – including competition on price. Southern Motor Carriers, 471 U.S. at 55-56.

There is thus no distinction between application of the active supervision requirement in cases involving joint price-setting and application of the requirement in cases involving other types of joint action. The fundamental inquiry remains the same. As stated by the U.S. Court of Appeals for the Fifth Circuit, to achieve active state supervision, "state officials must be vested with the power to review particular anti-competitive acts and to disapprove those actions that do not comply with state policy." DFW Metro Line, 988 F.2d at 606, citing Ticor, 504 U.S. at 634-35.

We believe the active supervision requirement is met by the Act here. Specifically, the Act *requires* review and approval by the Attorney General before a joint negotiation may take place between physicians (through a qualified physicians' representative, as defined in the Act) and a health benefit plan. Art. 29.09. The Act also requires subsequent review and approval before a proposed contract between physicians and a health benefit plan may take effect. Id. The Act specifically identifies detailed information that must be provided in a physicians' representative's report, which must be submitted to the Attorney General for consideration prior to negotiation. Art. 29.08. The Attorney General is instructed to review this information and to permit the joint negotiation to take place *only if* he determines that the benefits of the joint negotiation outweigh the disadvantages attributable to a reduction in competition that may result from the joint negotiation. Art. 29.09(b). Similarly, any proposed contract that is a product of an approved joint negotiation must be submitted with a proposed plan of action, for review by the Attorney General under the same standards. Art. 29.08(2), 29.09(b).

Plainly, state supervision under the Act will be active. Joint action by physicians is allowed under the Act only if the Attorney General reviews the joint action and approves it. See DFW

Metro Line, 988 F. at 606. "Rubber stamping" by the Attorney General (Vinson & Elkins letter at 3) is clearly not permitted.

The Act stands in sharp contrast to regimes that have failed the active supervision requirement. In Midcal, for example, a California system for regulating wine prices merely required that the prices be filed with the state. The state did not review and approve the prices at all. 445 U.S. at 105-06. Here, the Act requires active review and approval by the Attorney General before joint negotiations may take place and before a proposed contract may go into effect.

In Ticor, the Supreme Court dealt with "negative option regimes," in which a rate or practice goes into effect unless the state regulatory agency rejects it within a specified time. The Supreme Court held that the negative option regimes at issue in Ticor failed the active supervision requirement because the rate filings were at most checked for mathematical accuracy. Some were unchecked altogether. Ticor, 504 U.S. at 638.

The Act, in contrast, is no negative option regime. A joint negotiation may not take place, and a contract may not be implemented, unless and until the Attorney General reviews and approves them. See North Star Steel Texas, Inc. v. Entergy Gulf States, Inc., 33 F. Supp. 2d 557, 565 (S.D. Tex. 1998) (distinguishing Ticor, the court found that the defendant utility was entitled to state action immunity because the Public Utilities Regulatory Act forbid utilities from providing electrical service or offering a new rate without express permission from the Public Utility Commission).

Vinson & Elkins suggests that the Act may nevertheless fail the active supervision requirement because the Act does not "appear" to require the Attorney General to evaluate the specifics of any agreements on fees between physicians and a health benefit plan. (Vinson & Elkins letter at 2.) The Act, in fact, specifically contemplates that the Attorney General will review proposed fees in any proposed contracts, as part of his determination of whether the likely benefits of the proposed contract outweigh the disadvantages attributable to a reduction in competition that may result from the proposed contract. Art. 29.09(b).

Moreover, contrary to Vinson & Elkins' suggestion, the active supervision requirement does not compel ongoing review and re-review of approved contracts. The ratemaking regimes that the Supreme Court sustained in Southern Motor Carriers did not involve such ongoing supervision. Rather, the government conceded that active supervision existed by virtue of the review that occurred each time a new rate was proposed. See Southern Motor Carriers, 471 U.S. at 66; United States v. Southern Motor Carriers Rate Conf., Inc., 467 F. Supp. 471, 476-77 (N.D. Ga. 1977). In fact, active supervision was deemed to exist even though the relationship between the motor carriers and the state regulatory commissions was "friendly to intimate." Id. at 477.

Even if ongoing supervision were required, that will happen under the Act. Contracts between physicians and health benefit plans generally run one to three years in length. As a result, physicians' representatives will be returning to the Attorney General for authority to negotiate

contracts and for approval of proposed contracts on a regular basis. Contracts will thus be reviewed and re-reviewed by the Attorney General on an ongoing basis.

Vinson & Elkins also seems to suggest that the Attorney General will not carry out the active supervision called for under the Act because he will have to "dedicate significant resources" to do so. (Vinson & Elkins letter at 3.) But the Attorney General has expressed his support for the Act and his intention to carry out his responsibilities under it. In addition, the Act specifically creates a source of "resources" to permit its implementation. See Art. 29.13 (authorizing the Attorney General to set fees to be paid by physicians' representatives in amounts reasonable and necessary to cover the costs incurred in administering the Act).

Finally, Vinson & Elkins argues that the Act does not provide certainty for physicians to assure them that joint negotiations with health benefit plans will garner state action immunity. We candidly admit that absolute certainty is unattainable, unless and until a court challenge were to occur. Nevertheless, we are confident that, based on legal precedent, the Act satisfies the state action doctrine, and that a court would find such. (We also would suggest that under Vinson & Elkins' theory, no beneficial economic regulatory regime involving interaction between state and private actors would ever be enacted for fear of "after-the-fact evaluation.")

**2. The Act Is Valid Under the Texas Constitution.**

One of the greatest benefits of legislative delegation is that it places responsibility in the hands of those individuals who are best equipped to deal with such tasks. Requiring the Texas Legislature to define what constitutes a "substantial market power" or exactly when the 10% limitation on the size of the collective bargaining unit should be raised or lowered would not only place an undue burden on the legislature but would also create static guidelines for dealing with a dynamic and volatile marketplace. In an effort to address the ever-changing health care marketplace and apply the law in an equitable manner, the drafters of the Act have delegated rule-making authority to the well versed office of the Attorney General. In its letter to the Governor, Vinson and Elkins chooses to examine but one decision out of a body of case law regarding legislative delegation to assert that the language of the Act violates the separation of powers as set out by the Texas Constitution. However, a comprehensive examination of the applicable authorities reveals the position held by the State of Texas that legislative delegation, including the language of the Act, is constitutional.

The Texas Supreme Court in Dallas v. Higginbotham, 143 S.W.2d 79 (Tex. 1940) created six categories of acceptable legislative delegation. One of these categories includes cases where the legislature delegates authority because it is more practical and efficient to do so than to promulgate rules and guidelines in furtherance of the applicable laws. The court held in Higginbotham, as long as a legislative delegation fit one of the six categories and there were sufficient standards in place to guide the agency or body to whom the delegation was made, the delegation would be considered constitutional.

In a time when mergers, buyouts and new acronyms are sprouting up weekly, if not daily, and the bankruptcy code is a way of life, defining what particularly constitutes a "substantial market power" via legislation is a virtual impossibility. Thus, it is more practical and efficient to leave such analysis to office of the Attorney General than to require the Texas Legislature to more specifically define the issues of the Act (Vinson & Elkins letter at 4). As such, the language of the Act falls within one of the Constitutional exceptions laid out in Higginbotham.

Post Higginbotham, Jordan v. State Board of Insurance, 334 S.W.2d 278 (Tex. 1960) delineated "sufficient standards to guide the delegate in its functioning" as the paramount criteria for determining the constitutionality of legislative delegation. Consistent with Higginbotham and subsequent judicial decisions, Jordan also advocates a broad interpretation of what may constitute a "sufficient standard." So long as *the idea to be conveyed is reasonably clear* in the phrasing used in a statute which delegates legislative authority, the statute will pass constitutional muster. Jordan, 334 S.W.2d at 510. The court in Jordan, quoting from Professor Davis' "Administrative Law Treatise", lists some of the terms of art which the Supreme Court of the United States has held as sufficient. These include:

"Just and reasonable"
"Public interest"
"Unreasonable obstruction"
"Reciprocally unequal and unreasonable"
"Public convenience, interest or necessity"
"Tea of inferior quality"
"Unfair methods of competition"
"Reasonable variations"

Following the lead of Jordan, "substantial market power" and the other terms of art contained in the Act satisfy the requirements for the constitutionality of legislative delegation. A body of law which addresses the meaning of "substantial market power" and "geographic region" currently exists and could be utilized by the Attorney General in interpreting and promulgating guidelines for the Act.

Rather than looking at the "big picture" regarding legislative delegation, Vinson and Elkins has focused on a single case which makes the greatest attempt at limiting the ability of the legislature to delegate its power. Vinson and Elkins uses the split decision in Texas Antiquties to raise the issue of "vagueness" relative to the legislative delegation of the bill and how the Attorney General is to carry out the provisions of the Act. However, the holding in Texas Antiquities is inconsistent with subsequent applicable case law regarding legislative delegation and, in fact, the court in Texas Antiquities balks at overturning the then existing case law. Texas Antiquities, 554 S.W.2d at 928. The more encompassing analysis of cases prior to and following *Texas Antiquities* contained herein yields the conclusion that indeed, the Act is constitutional.

Consistently, the Legislature has been given great latitude in the delegation of its power. State v. Texas Mun. Power Agency, 565 SW2d 258 (Tx. Ct. App. 1978), Railroad Comm'n v. Lone Star Gas Co., 844 S.W.2d 679 (Tex. 1992) and Edgewood Indep. School Dist. v. Meno, 917 S.W.2d 717 (Tex. 1992), all advocate empowerment regarding legislative delegations and the accompanying standards for guiding the promulgation of rules and regulations. "Such standards may be broad… [when] conditions must be considered which cannot be conveniently investigated by the legislature." State v. Texas Mun. Power Agency, 565 S.W.2d at 273. "It is utterly impossible for the Legislature to meet the demands of every detail in the enactment of laws relating to the production of oil and gas." Corselius v. Harrell, 186 S.W.2d 961, 964 (Tex. 1945).

The languege of the Act easily falls within what is accepted under Texas law and does not violate the Texas Constitution. Legislative delegation allows the legislature to focus on policy and principles while allowing specially equipped agencies to promulgate rules and regulations in furtherance of the goals of the legislature and the public. By placing the implementation of the Act in the experienced hands of the Attorney General, the drafters have not only ensured that the Physician Negotiation Bill will reach its full potential but also relieved the legislation of a burden with which it is not prepared to deal.

**3. The Act Is Consistent with Public Policy and Advances the Public Interest in Health Care.**

Contrary to Vinson & Elkins' assertions, the Act is consistent with public policy and advances the public interest in health care. First, the Act does not give physicians permission to collectively boycott health benefit plans or to "coerce" plans to accede to their terms. Such conduct is expressly prohibited by the Act. Art. 29.10. In addition, health benefit plans remain free to reject joint negotiations and proposed contracts. Art. 29.08(3). Thus, if a health benefit plan and a group of physicians fail to reach mutually agreeable terms, the physicians are then obligated to individually determine whether to accept or reject proposed contracts from health benefit plans.

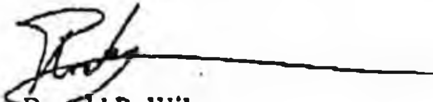
Second, Vinson & Elkins' criticism of the 10 percent threshold in the Act is meritless. See Art. 29.09(b). Vinson & Elkins suggests that groups of physicians comprising less than 10 percent of all physicians in a geographic service area may be able to wield market power over health benefit plans. The Act, however, expressly authorizes the Attorney General to limit the amount of physicians in a joint negotiating group to less than 10 percent if such circumstances arise. Id. Acknowledging this fact, Vinson & Elkins nevertheless complains that the Act provides no criteria to guide the Attorney General in making the determination. But the Attorney General's office is well-versed in antitrust law, and the criteria for defining geographic markets and identifying market power are well-defined in state and federal court antitrust decisions. There is no need to regurgitate these principles in the Act.

Third, the statutory safeguards against improper collusive behavior on the part of physicians are clear and transparent. Vinson & Elkins simply ignores them. The Attorney General will play an active role in supervising joint negotiations by physicians with health benefit plans. Art. 29.09. In addition, the Act clearly outlaws concerted refusals to deal. Art. 29.10.

Finally, in enacting S.B. 1468, Texas will not be "a beacon state for ... anti-competitive and unconstitutional legislation." (Vinson & Elkins letter at 5.) Rather, Texas will be a beacon state for restoring competitive balance in health care markets where state intervention is genuinely needed. The current "health plan take all" system threatens to chase physicians out of the practice of medicine, to discourage our young from embarking on medical careers, and to decrease the quality and quantity of health care services available to the citizens of the State of Texas – which in turn will lead to higher prices for medical care. The Act is good for physicians, it is good for consumers, and it is good for health plans that are genuinely interested in ensuring that quality, affordable health care services continue to be available throughout this State.

We urge you to sign into law S.B. 1468.

Very truly yours,



Donald P. Wilcox
General Counsel

Vinson & Elkins

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June 3, 1999

Honorable George W. Bush
Governor, State of Texas
State Capitol
P. O. Box 12428
Austin, Texas 78711-2428

Re: Senate Bill 1468 - An Act Relating to the Regulation of Physician Joint Negotiations

Dear Governor Bush:

A client has requested that this Firm review and analyze Senate Bill No. 1468 (the "Act"). As will be set forth in greater detail below, we believe that this Act may prove to be ineffective to achieve its principal purpose of shielding doctors from the effects of the antitrust laws, may violate the Texas Constitution, and may have results contrary to public policy. Thus, we urge that you veto SB 1468.

A. The Act

As passed by the Legislature, the Act authorizes competing physicians in a "service area of a health benefit plan" to meet and communicate for the purpose of jointly negotiating certain non-price terms and conditions of contracts with health benefit plans subject to certain conditions. In addition, competing physicians also can meet, communicate and jointly negotiate with a health benefit plan concerning price-related terms when the Attorney General has determined that the plan has substantial market power and when the price-related terms and conditions have already affected or threaten to adversely affect the quality and availability of patient care. Actual negotiations with a plan must be conducted by a "physicians' representative" who must make an initial filing with the Attorney General concerning joint negotiations and file a copy of any proposed agreement reached for approval by the Attorney General. The Attorney General is required to approve a request to enter into joint negotiations or a proposed contract if the Attorney General determines "that the applicants have demonstrated the likely benefits resulting from the joint negotiation or the proposed contract outweigh the disadvantages attributable to a reduction in competition that may result from the joint negotiation or proposed contract." Although joint negotiation is generally limited to no more than 10% of the physicians in the health benefit plan's defined geographic service area, a higher percentage of physicians may participate in cases "where in conformance with the other provisions of this subsection conditions support the approval of a greater or lesser percentage."

B. **State Action Doctrine**

The ostensible purpose of the Act is to allow physicians to jointly negotiate the terms and conditions of their contracts with health benefit plans without fear of possible liability under the antitrust laws. In order for such collective private activity to be shielded from the antitrust laws, the Act must satisfy the state action doctrine under *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); and *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992). Under this doctrine, private action is immune from antitrust liability if:

(1) the challenged action is the result of a clearly articulated and affirmatively expressed state policy to supplant competition; and

(2) the action is actively supervised by the state itself.

*Midcal*, 445 U.S. at 105.

Although the Act may satisfy the first requirement of the state action doctrine, satisfaction of the second prong of the doctrine is much more problematic, particularly when the issue to be jointly negotiated involves price. The United States Supreme Court has stated on more than one occasion that no antitrust offense is more pernicious than price fixing. Accordingly, the Court has strictly construed the active supervision requirement because of the gravity of a price-fixing offense.

Any active supervision by the State of Texas under the Act falls to the Attorney General. Such supervision, however, is limited to approval or disapproval of the initiation of joint negotiations and of any contract that may result from such negotiations. The Act does not appear to require the Attorney General to take steps to determine the specifics of any jointly negotiated physician fees, such as reviewing empirical data to determine the reasonableness of the fees.

Further, the Act does not provide for any continuing jurisdiction of the Attorney General to monitor the performance of the contract, to require changes in the contract as competitive conditions may change, or to entertain challenges to the contract by any aggrieved party. This type of static "supervision" appears to fall short of the type of active supervision required under the state action doctrine. *See Midcal*, 445 U.S. at 105-06 (challenged private program was not immune because, in part, state did not monitor market conditions or engage in any "pointed reexamination" of the program); *North Carolina ex rel. Edmisten v. P.I.A. Asheville*, 740 F2d 274 (4th Cir. 1984). See *also DFW Metro Line Services v. Southwestern Bell Telephone Corp.*, 988 F.2d 601, 605-06 (5th Cir. 1993) (court discusses substantial ongoing supervision by state agency in applying *Midcal*); *North*

*Star Steel Texas, Inc. v. Entergy Gulf States*, 33 F. Supp. 2d 557, 564-67 (S.D. Tex. 1998) (same); *Destec Energy, Inc. v. Southern California Gas Co.*, 5 F. Supp. 3d. 433, 454-58 (S.D. Tex. 1997) (same).

Moreover, even if the state action doctrine were not to require continuing jurisdiction by the Attorney General over jointly negotiated contracts, it is clear that active supervision requires a determination that the State "has exercised sufficient independent judgment and control so the details . . . have been established as a product of deliberate state intervention, not simply by agreement among private parties." *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 634-35 (1992). Active state supervision, therefore, is not satisfied by the "rubber stamping" of decisions made by private actors. In order to satisfy this standard, the Attorney General would have to dedicate significant resources to determine whether the proposed jointly negotiated contracts should be approved. Such a burden would be exacerbated by the fact that health service areas are generally local and market conditions within them would vary greatly.

Most important for the State of Texas is that the absence of the requisite level of state involvement under the Act may not shield physicians from the effects of antitrust laws. If challenged, the party claiming the immunity must show that the state, in fact, undertook the necessary steps to actively supervise the process for the immunity to apply. Private physicians may not know until after their participation in activities that violate antitrust laws whether the state's supervision was "active" enough. Such an after-the-fact evaluation of a state's exercise of its supervisory powers is extremely dangerous for private parties who have no control over whether the degree of scrutiny that their filings may receive will meet the active supervision requirement.

C. **The Texas Constitution**

In addition to questions concerning the efficacy of the Act in shielding private actors from antitrust liability, the Act suffers from infirmity under the Texas Constitution.

Article II, section 1 of the Texas Constitution provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power, properly attached either of the others, except in the instances herein expressly permitted.

This principle of separation of powers has been held to allow the delegation of legislative power in implementing legislation only when reasonable guidelines have been

provided for proper implementation of the legislative scheme. *See Edgewood ISD v. Meno*, 917 S.W.2d 717, 741 (Tex. 1995); *Railroad Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992). In the present case, the Legislature has provided insufficient direction to the Attorney General for the exercise of the authority delegated to him under this Act.

Among the issues that appear to be accorded to the Attorney General for determination are the following:

a. deciding which terms and conditions subject to negotiation are non-fee or fee-related;

b. determining under what circumstances the 10% limitation on the size of the collective bargaining unit should be raised or lowered;

c. determining whether the likely benefits of each proposed joint negotiation outweigh the prospective disadvantages;

d. determining whether the likely benefits of each proposed contract outweigh the prospective disadvantages;

e. determining whether a plan has substantial market power; and

f. determining the deficiencies and specific remedial measures for each rejected filing.

The Act itself, however, provides very little legislative guidance as to how any of these matters are to be determined by the Attorney General. The "Findings and Purposes" set forth in the Act are no more than boilerplate and the "Definitions" are few and provide no enlightenment on these issues. Most importantly, the Findings and Purposes clause under Article 29.01 of the Act provides that in some instances health plans dominate the market *to such a degree* that fair negotiations between physicians and the plan are unobtainable. The Act does not, however, clearly articulate and affirmatively express as state policy what constitutes market domination by a health plan that would make collective negotiation by physicians necessary to effect state policy. Under these circumstances, the Act violates the Texas Constitution as an improper delegation of authority. *See Texas Antiquities Commission v. Dallas County Community College District*, 554 S.W.2d 924, 928 (Tex. 1977).

D. Public Policy

In addition to the problems set forth above, the Act raises serious public policy concerns that should militate against its approval.

First, although the Act purports not to authorize physicians to throat retaliatory joint action such as a boycott or strike, or to jointly coordinate any "cessation, reduction, or limitation of health care service", the purpose of the bill clearly is to allow competing physicians to collectively refuse to deal with a health plan if the health plan does not accede to the physicians' joint demands. An inescapable result of such concerted refusal to deal would be to coerce health plans in many cases to agree to the physicians' terms and conditions, including higher fees, which would lead to higher premiums or higher co-insurance and deductible amounts.

Second, although the Act limits joint negotiations generally to no more than 10% of physicians in a health benefit plan's defined geographic service area, the Act ignores that a jointly negotiating group of physicians may constitute less than 10% of the total number of physicians throughout the entire geographic service area (such as a county or multi-county area), but may be able to exercise significant market power in a geographic submarket (such as a city or town). In addition, the Act ignores the prospect that every group of specialists that is a necessary component of a health plan's provider network (e.g., surgeons, neurologists, anesthesiologists, cardiologists, dermatologists, endocrinologists, otolaryngologists, radiologists, urologists, ophthalmologists) may effectively form a monopoly in a particular community as long as the group does not comprise more than 10% of the total number of physicians in a geographic service area. In this situation, it is unlikely that a particular specialty within a defined geographic service area would exceed 10% of the total number of physicians, but nevertheless could exercise significant market power within their specialty. Although the Attorney General apparently is granted the power to condition approval upon participation by a greater or lesser percentage of doctors, as set forth above, there are no statutory criteria set forth to guide the Attorney General in that determination.

Third, competition is the fundamental premise of our economic system. The statutory "safeguards" against improperly collusive behavior on the part of competing physicians are woefully inadequate. The Act is a large step toward eliminating competition among physicians in the State of Texas.

Texas should not be a beacon state for this kind of anti-competitive and unconstitutional legislation.

Please veto SB 1468.

Respectfully submitted,

Vinson & Elkins L.L.P.

COPY

Blue Cross
of Washington and Alaska

An Independent Licensee of the Blue Cross and Blue Shield Association

# ALASKA PARTICIPATING PHYSICIAN AGREEMENT

This is an agreement between Blue Cross of Washington and Alaska (hereafter "BCWA") and [redacted] hereafter "the Physician").

## I. BCWA AGREES:

A. To list the Physician as a participating physician on informational materials and encourage enrollees to use the services of participating physicians.

B. To remit timely payments directly to the Physician for medically necessary covered services rendered to enrollees. Payment will be the BCWA allowable amount for such services, less any applicable enrollee deductible, copayment or coinsurance amount. BCWA will have no obligation to pay claims that are received more than 365 days after the date services are rendered.

✓ C. To pay claims consistent with BCWA utilization standards and determination of medical necessity.

## II. THE PHYSICIAN AGREES:

A. To provide professional services to enrollees on the same basis as such services are provided to patients who are not enrollees, and be solely responsible for the quality of services rendered.

B. To bill BCWA directly for covered services provided to enrollees, in a manner acceptable to BCWA and in the amount of his/her usual fee.

C. To accept BCWA's allowable amount as payment in full and not bill the enrollee, except for: 1) applicable deductibles, copayments and coinsurance; and 2) services that are not covered by the subscriber's contract with BCWA, and not to seek payment from enrollees for the provision of services which would have been covered services but which BCWA has deemed not to have been medically necessary unless the enrollee understood prior to services that they would not be covered and agreed in writing to assume financial responsibility therefore. The Physician's charge to the enrollee for deductibles, copayments or coinsurance in combination with BCWA's payment will not exceed BCWA's allowable charge. In no event, including but not limited to nonpayment by BCWA, BCWA insolvency or breach of the Agreement, shall the Physician bill the enrollee any sum in addition to those listed above, or have any recourse against the enrollee for services provided pursuant to this Agreement. This is understood to be for the benefit of the enrollee.

✓ D. To cooperate with BCWA utilization management programs.

E. To allow BCWA to review and duplicate any data and other records maintained with respect to enrollees or this Agreement in accordance with patient release forms maintained by the physician. These activities will be allowed upon reasonable notice during regular business hours. The Physician will allow BCWA continued access to these records for eighteen months after the termination of the Agreement.

Add'l Information

F. To refund monies to BCWA if it is determined that payment was based upon erroneous or incomplete information, or if benefits were misapplied.

G. To maintain such policies of general comprehensive liability and malpractice insurance as may be appropriate to insure against any claims in connection with the acts or omissions of the Physician and his/her employees pursuant to this Agreement. Upon request, the Physician will submit to BCWA evidence of insurance in a form acceptable to BCWA. The Physician will also promptly notify BCWA of any revocation, suspension, limitation, or other termination of any such policy, and any disciplinary proceedings or relevant legal actions brought against the Physician, including but not limited to malpractice.

III. BOTH AGREE:

A. To take all reasonable precautions to prevent the unauthorized disclosure of any information obtained pursuant to this Agreement.

B. To abide by rules and procedures issued by BCWA from time to time. Such rules will be binding equally upon BCWA and the Physician.

C. To maintain in good standing all licenses required by law and submit evidence of licensure to the other party upon request. BCWA and the Physician will also promptly notify one another of any action against the party's licenses, any changes in business address, or any legal or governmental action, other problem, or situation that might impair the party's ability to carry out the party's responsibilities under this Agreement.

D. This Agreement will be construed in accordance with the procedural and substantive laws of the State of Alaska.

E. The provisions of this Agreement will apply to services provided to enrollees covered by BCWA, including those covered under programs of other Blue Cross and Blue Shield Plans which have a reciprocal agreement directly with BCWA or through the Blue Cross and Blue Shield Association. In addition, this Agreement will apply to enrollees or members of BCWA subsidiaries and affiliates where their subscriber/member agreements and administrative rules allow.

✓ F. Neither of the parties nor any of their respective employees will be construed to be the agent, employee or representative of the other for any purpose, or liable for any acts or omission of the other, except BCWA will be the administrative agent of the Physician for the limited purpose of paying the Physician for covered services provided to enrollees.

G. Neither party will assign this Agreement without the written consent of the other party, except that if BCWA merges or consolidates with another entity, this Agreement will remain in full force and effect.

H. Neither party will use the other party's name, symbols, trademarks or service marks without the prior written consent of that party, except as provided in Part I. A. of this Agreement.

✓ I. Except as otherwise provided herein, BCWA may amend this Agreement at any time effective upon thirty (30) days advance written notice to the Physician. The amendment will be binding upon the Physician unless BCWA is otherwise notified by the Physician within this period.

J. Both parties will resolve any differences regarding payment and medical necessity as follows:

1. The Physician and BCWA will communicate directly in an effort to mutually resolve the dispute.

2. If the Physician and BCWA still cannot resolve the dispute after submitting to review, the dispute will be settled by arbitration before the American Arbitration Association in accordance with its rules and regulations.

K. The Physician hereby expressly acknowledges its understanding that this Agreement constitutes a Contract between the Physician and Blue Cross of Washington and Alaska (BCWA), that BCWA is an independent corporation operating under a license from the Blue Cross and Blue Shield Association, an association of independent Blue Cross and Blue Shield Plans, (the "Association"), permitting BCWA to use the Blue Cross Service Mark in the States of Washington and Alaska and the Blue Shield Service Mark in the Counties of Chelan and Douglas of the State of Washington and for the State of Alaska, and that BCWA is not contracting as an agent of the Association. The Physician further acknowledges and agrees that it has not entered into this Agreement/Contract based upon representations by any person other than BCWA and that no person, entity or organization other than BCWA shall be held accountable or liable to the Physician for any of BCWA's obligations to the Physician created under this Agreement/Contract. This paragraph shall not create any additional obligations whatsoever on the part of BCWA other than those obligations created under other provisions of this Agreement/Contract.

IV. TERM AND TERMINATION:

A. This Agreement will take effect on the date countersigned by BCWA and will remain in effect until terminated as provided below.

B. This Agreement may be terminated without cause by either party upon thirty (30) days written notice.

C. This Agreement may be terminated by either party effective upon written notice if the other party fails to comply with any of the provisions of this Agreement.

D. If this Agreement is terminated, its provisions will continue in effect with respect to:

1. Payments accrued to the Physician prior to termination.

2. The Physician's agreement not to seek compensation from enrollees for covered services or services determined not to be medically necessary which are provided prior to termination.

3. Completion of treatment of enrollees receiving care at the time this Agreement terminates. However, if the Physician terminates this Agreement, termination shall not be effective as to any subscriber agreement in force on the date of the termination until the termination of the subscriber agreement or the next anniversary of the subscriber, whichever date is earlier.

E. If the Agreement is terminated, the Physician will inform all enrollees that seek his/her services.

**Blue Cross of Washington and Alaska**

*By:*

*Type or Print Name*

*Title*

PO Box 327
*Address*

Seattle, Washington 98111-0327
*City, State ZIP Code*

*Month/Day/Year*

**Physician**

*Signature of Physician*

*Type or Print Name*

*IRS/Social Security Number*

*Address*

*City, State ZIP Code*

*Month/Day/Year*

Alaska State Medical Association
September 4, 1998

# Participating Physician Agreements in Alaska

**A Topic-by-Topic Comparison of the AMA model agreement with those from Blue Cross of Washington and Alaska**

Prepared for the Alaska State Medical Association by the law firm of Biss & Holmes

Copies of the AMA model physician agreement are available to ASMA members upon request.

Please note: This comparison is not intended as legal advice and is not a substitute for direct consultation with an attorney. Physicians are encouraged to consult with their own legal counsel and other advisors regarding the specific terms of participating agreements.

## Definitions

**AMA Model Form**

Contains an extensive definition section to aid in understanding and interpreting the agreement. Medically necessary standard is based on reasonably prudent physician standard vs common approach of determination by plan medical director.

**BCWA**

This agreement does not have a separate definition section. Among the significant terms used in the Agreement which are not defined but have been defined by the AMA are: Claim. Copayment. Covered Services. Emergency condition. Enrollees. Medically Necessary. Utilization Review.

Specifically, no payment is to be made to the physician unless the services are medically necessary, but that term is never defined by the Agreement.

## Delivery of Services

**AMA Model Form**

Contemplates a separate schedule for each plan covered by the Agreement listing covered services. Plan provides that if description of covered services is materially lacking, plan must pay physician for each service performed for benefit of Enrollee. List of covered services must be attached before physician signs agreement. Requires plan to be bound by its verification of eligibility and/or coverage. Makes plan responsible for care rendered to those claiming to be Enrollees if the physician is unable to verify eligibility after following plan procedure. Provides that revisions or amendments will not be enforceable unless they have been provided to the physician.

**Blue Cross**

Allows for physicians to bill the plan for medically necessary covered services. Covered services are not defined in or attached to the agreement, the same apparently being whatever BCWA decides they are at any given time. There is no provision that covered service be defined in advance or that physicians receive advance written notice of any changes in covered services (nor a provision telling physicians how to determine what is a covered service).

In addition, the physician is obligated to provide services to those covered by other Blue Cross and Blue Shield Plans a well as their subsidiaries and affiliates, none of which is described. Even if it were possible for the physician to obtain a copy of BCWA's list of covered services, it may be almost impossible for the physician to obtain information on what is a covered service under the other affiliated plans. Company is not bound by its verification of eligibility. Allows plan to recapture payments to physicians if it misapplied its benefits.

## Compensation

AMA Model Form

Requires that the compensation schedule be attached and made a part of the Agreement. A separate schedule must be attached for each affiliated plan which is covered under the agreement. It must specify the manner of payment. It addresses the manner in which copayments are to be collected and addresses coordination of benefits. The agreement requires payment within forty-five (45) days of receipt of the submission of a claim or notification to the physician of the need for more information within that time period and payment within thirty (30) days of receipt of the missing information. Requires payment of interest for delay beyond terms of agreement.

Blue Cross

No compensation schedule attached to the Agreement. Allows the compensation schedule to be set from time to time in the sole discretion of the company. Company can set new fees and rates unilaterally, at any time, at its discretion. There is no necessity that the fee schedule be set in advance or that physicians receive advance written notice of any changes in allowed amounts. (See AS 21.87.140(c)(1) requiring the physician to be compensated for services in accordance with the terms to be contained in the agreement or attached to and made a part of the agreement.) Requires submission of claims within 365 days of service. States that disputes regarding payment and medical necessity will be mutually resolved or submitted to arbitration before the American Arbitration Association. The term "medically necessary" is not defined. Presumably this is whatever the company's medical director says is medically necessary. (The AMA defines it as what a reasonably prudent physician would deem necessary for the diagnosis or treatment of illness or injury.) Disagreements over medical necessity, apparently even those requiring emergency treatment, are to be mutually discussed, then must go through an expensive and time consuming arbitration process.

Requires physician to refund monies to company if company determines that payment was based upon erroneous or incomplete information or if it misapplied benefits.

The physician must bill in a manner acceptable to BCWA, which is undefined in the contract. Requires company to pay claims in a timely fashion without defining what is timely or requiring interest to be paid on those claims not paid in a timely fashion. There is no discussion of how copayments or coinsurance are to be handled. The physician agrees to accept the BCWA payment as payment in full and not to otherwise bill the Enrollee except for deductibles, copayments, coinsurance, non covered services or covered services not deemed medically necessary if the patient agreed in writing before the treatment.

## Physician Duties

**AMA Model Form**

Requires the physician to be licensed, in good standing and not to discriminate. It requires the physician to comply with the policies and procedures established by the plan to the extent the physician has received notice of the same. Requires policies and procedures to be attached to the contract, not to be changed without thirty days written notice to the physician and prohibits company from modifying policies and procedures in a way which would have a material effect on the contract without written consent of the physician. The physician agrees to advise Enrollees of the company grievance procedures. Contains a provision that nothing in the Agreement should be construed to force any physician to take any action inconsistent with his/her professional judgment in providing care to a patient.

**Blue Cross**

Requires physicians to provide services to Enrollees on same basis as services are provided to patients who are not Enrollees. This could be construed as an attempt to require the physician to charge no more that (s)he does to any other non-governmental payor for similar services. Requires physician to cooperate with BCWA utilization management programs, which are undefined. Does not provide for any appeal process concerning utilization management decisions. The physician must abide by BCWA's policies and procedures which are undefined and may be modified by the company at its sole discretion. Does not contain a provision stating physician need not take any action inconsistent with professional judgment in providing care to the patient.

## Company Obligations

**AMA Model Form**

The company should list each payor and plan and update them promptly to reflect additions or deletions. Company shall notify physician of all policies, procedures, rules, regulations that it considers material to performance of Agreement as well as amendments. Thirty day notice of any changes. No modifications allowed in a manner that would have a material adverse effect on contract without physician approval. Provides a right and a mechanism to appeal any Utilization Review or Quality Management decision by the company that is ultimately decided not by the company in its sole discretion but by independent peers. Decisions are rendered within thirty (30) days except for those utilization review decisions related to emergency care, which shall be heard more quickly. Requires the company to establish and maintain systems to process and resolve grievances by physicians towards the company. Requires the company and not physicians to explain details of health plan policies to patients. Requires the company to provide the physician with quarterly financial statements accurately depicting the financial condition of the company.

**Blue Cross**

There is no list of payors or plans, only a reference that other Blue Cross and Blue Shield plans with reciprocal agreements are included. See above description under Physician duties. The physician must abide by BCWA's policies and procedures which are undefined and may be modified by the company at its sole discretion even if they should have a materially adverse effect on the contract. There is no definition of utilization review, no mechanism for expedited decision concerning emergency medical care and no mechanism of determination by independent peers. The questions appear to be subject to arbitration pursuant to the rules of the American Arbitration Association. No grievance procedure is spelled out. No discussion of who is required to explain plan details to patients.

## Records/Confidentiality

**AMA Model Form**

Gives each party right to access to and right to examine records of the other which relate to any Covered Services or payments provided under this Agreement. Requires company to obtain from the Enrollee a consent for the release of medical information narrowly tailored

to accomplish the purpose necessary. Company agrees not to release such information to other parties without written consent of the patient. Costs associated with this are paid by the company. Insures that only medical records and precise schedules of compensation are confidential. Within strict limits it allows the company to prepare and disclose to a third party a report of the physician's quality data relating to utilization and Enrollee satisfaction surveys, but does not allow for disclosure of identity of individual physicians. The report must be provided to the physician for review at least 30 days before it is given to a third party.

**Blue Cross**

Allows BCWA to review and duplicate any data or records maintained by the physician with respect to an Enrollee for a period of eighteen (18) months after termination of the Agreement. Does not require company to pay for copies. Appears to make physician responsible for obtaining release from patient and paying for copies of records. Does not give physician right of access to company records pertaining to covered services or claims. Contains a vague provision requiring company and physician to take all reasonable precautions to prevent unauthorized disclosure of any information obtained pursuant to Agreement. Does not give physicians right to review quality assurance data, utilization surveys, etc.

## Insurance

**AMA Model Form**

Requires the physician to maintain E&O insurance.

**Blue Cross**

Requires the physician to maintain E&O insurance. Fails to disclose what is an appropriate amount of E&O insurance.

## Term and Termination

**AMA Model Form**

Agreement runs until terminated except that covered services and compensation schedules are to be renegotiated annually and renewed or rejected individually. Ninety (90) days written notice of any proposed change is required. In the event parties cannot agree on

new schedules either may terminate the contract. Contract can be terminated for cause, otherwise either party may cancel by giving four month (120 days) notice. When the contract is terminated by either party a reason for such termination must be stated in writing. This provides assistance to physicians who fear they are being unfairly discriminated against or punished for violation of some "gag" rule. It also insures that there is no mistake of fact which was relied upon when the other party decided to terminate.

Dispute resolution procedures are available to either party in event of a termination. If company is in financial difficulty the agreement may be terminated. Agreement may be terminated by either party for "cause", but only after giving the other party written notice of the deficiency and thirty days to cure the deficiency. Company remains liable to pay for covered services then being rendered until the episode of illness is complete.

**Blue Cross**

Can be terminated by either party on thirty (30) days written notice. Can be terminated immediately by either party upon written notice for failure to comply with any of the provisions of the Agreement. Payments then accrued to the physician will be made. Physician agrees that regardless of termination (s)he will continue to treat any Enrollee until the termination of that Enrollee's agreement or the next anniversary of the subscriber, whichever is earlier. This really means that the physician can be forced to continue providing services for one year or more after (s)he has given notice of termination. (This last provision appears mandated, as to Blue Cross, by AS 21.87.140(c)(3).) Physician is required to notify enrollees seeking services that agreement has been terminated. There is no opportunity to cure any alleged breach of the agreement. No reasons for termination are necessary. Company does not remain liable to pay for services related to an ongoing episode of illness.

## Dispute Resolutions

**AMA Model Form**

Provides for an initial meeting within seven (7) days by parties with decision making authority followed by Mediation within thirty days (30) with each party to bear its proportionate share of costs. If unsuccessful this is followed by binding arbitration held in the state where services were performed and conducted according to procedures of the Health Lawyers Association of America Alternative Dispute Resolution Project. Also provides for appeal of quality assurance and utilization review decisions. See Company's Obligations discussed above.

### Blue Cross

Only disputes regarding payment and medical necessity are part of the process. First step is for physician and company to communicate directly in attempt to mutually resolve dispute. Second step is for arbitration before American Arbitration Association. No time limits are set for the procedures, nor is there a provision for who bears the costs or where the procedures should take place. Does not provided a right or mechanism to appeal any Utilization Review or Quality Management decision by the company to independent peers and there is no provision to review decisions related to emergency medical care, which should be heard more quickly. There is no grievance procedure.

## Amendments/Miscellaneous

### AMA Model Form

The Agreement cannot be assigned to an unrelated entity, by either party, without prior written consent of other party. No one except for enrollees has any third party rights under the agreement. The agreement may not be modified without express written approval of both parties. Requires notice to other party of legal matters instituted against either party relating to the Agreement or services provided under the agreement.

### Blue Cross

It is possible that this agreement has been filed with and approved by the Director of the Division of Insurance (See AS 21.87.140(d).) The agreement allows the company to set the fee schedules, policies and procedures and covered services at its discretion. The company may amend the Agreement at any time with thirty (30) days written notice to the physician. The amendment becomes binding upon the physician unless BCWA is otherwise notified by the physician within this period. Neither party can assign this Agreement without the written consent of the other except that it allows BCWA to merge or consolidate with another entity. States that Agreement is interpreted according to Alaska law but does not say that any arbitration, mediation, litigation, etc. must take place in Alaska.

SB

60

# FISCAL NOTE

**STATE OF ALASKA**
**2001 LEGISLATIVE SESSION**

Fiscal Note Number:
Bill Version: CSSB 60 (JUD)
() Publish Date:

Revision Date/Time (Note if correction):
Title: Agricultural Facilities and Operations
Sponsor: Sen. GREEN
Requester: S JUD

Dept. Affected: Natural Resources
BRU: Minerals, Land & Water Dev.
Component: Land Sales & Muni Ent
Component Number: 2456

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| Personal Services | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Travel | | | | | | |
| Contractual | | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL EXPENDITURES | | | | | | |
| CHANGE IN REVENUES ( ) | | | | | | |

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| 1153 Land Disposal Income Fund | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

**Estimate of any current year (FY2001) cost:** None

**Check this box if funding for this bill is included in the Governor's FY2002 budget proposal: [ ]**

POSITIONS

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

**ANALYSIS:** *(Attach a separate page if necessary)*

The CS removes the requirement to disclose agriculture facilities when selling State land.

Prepared by: Bob Loeffler — Phone 269-8600
Division: Mining, Land and Water — Date/Time 28-Mar-01
Approved by: Pat Pourchot — Date 29-Mar-01
Agency: Natural Resources

For distribution information, call the Governor's Legislative Office

(Rev 11/2000 OMB)

# ALASKA STATE LEGISLATURE

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*Session:*
State Capitol
Juneau, Alaska 99801-1182
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SENATOR LYDA GREEN
SENATE DISTRICT N

# Sponsor Statement
## CS for SB 60 ( )
## "The Right-to-Farm Bill"

The Right-to-Farm bill would add protection to existing agriculture operations and put new property buyers on notice if the property they are acquiring is within one mile of a farm or agricultural operation. This also protects the new property owners through full disclosure that should ensure they are not unpleasantly surprised by farm activities after buying property close to an agricultural facility.

The Right-to-Farm bill seeks to protect and enhance Alaska's agricultural sector. With the export of potatoes and carrots from Alaska, and the increasing local demand for fresh vegetables, hay, barley, milk, pork and beef, we can see agriculture "taking root and growing" in many diverse locations across the state. Yet, as the state's population grows and urban areas expand, we see a corresponding need to protect our interest in agriculture.

Many farmers have already had some experience with an encroachment on their right to farm. As urbanization swallows up farming areas, oftentimes the newcomers don't like the smells of agriculture – or the chemicals – or the sounds – or the animals. People who move to the country need to know what they are getting into. And it appears that other areas of the nation – where urban sprawl is creating a bigger problem than we have experienced yet in Alaska – are taking action to protect existing agricultural operations and avoid unnecessary lawsuits.

The Right-to-Farm bill takes the innovative approach of coupling a farmer's grandfathered right to continue his agricultural activities to the filing and maintaining of a farm conservation plan with the U.S.D.A. Soil and Water Conservation Service. Expansion of operations or other changes to the conservation plan would not necessarily be grandfathered in regard to existing rights of surrounding property owners.

Alaska has the opportunity to place protections in statute now – both for the farmers and the new property buyers – so that future agricultural operations will be able to continue providing Alaskan products while protecting the agricultural way of life.

Senator_Lyda_Green@legis.state.ak.us

# ALASKA STATE LEGISLATURE

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SENATOR LYDA GREEN
SENATE DISTRICT N

# Sectional Analysis
## Proposed CS for SB 60 (version "C")

Sec. 1 – amends current AS 09.45.235 [Actions Relating to Real Property] to protect agricultural facilities and agricultural operations from becoming "private nuisances" due to changing land uses in the area surrounding an existing agricultural operation. This section also clarifies the time at which an agricultural operation began and thus gained protection by the section. The CS deletes a requirement that the operation has to have been going for more than three years to gain protection. Finally, this section ties the protection to the fact that the operator has a valid farm conservation plan on file with the local soil and water conservation district.

Sec. 2 – adds "illegal" conduct of agricultural operations to the list of acts that are not covered by the protection afforded in AS 09.45.235(a).

Sec. 3 – amends the definition section of AS 09.45.235 to separate "agricultural facility" from "agricultural operation," and provide further definitions of activities that fall under each of those headings.

Sec. 4 – amends AS 34.70 [Disclosures in Residential Real Property Transfers] to require that a disclosure statement, accompanying the transfer of real property, contain a provision that notifies transferees (buyers) of the real estate that they are responsible to determine if there is an agricultural facility or operation in the vicinity of the property they are buying.

Sec. 5 – applies the disclosure requirements of Sec. 4 to real estate contracts on property within one mile of an agricultural facility or operation. The CS changes "real property" to "residential or recreational property."

SB

66

# FISCAL NOTE

**STATE OF ALASKA**
**2001 LEGISLATIVE SESSION**

Fiscal Note Number: 1
Bill Version: SB 66
(S) Publish Date: 2/5/01

Revision Date/Time (Note if correction): 1/26/2001 3:28PM
Title: Gramm-Leach-Bliley Act Changes to Banking Statutes
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: DCED
BRU: Banking, Securities, & Corps
Component: Banking, Securities, & Corps
Component Number: 1233

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL EXPENDITURES | | | | | | |
| CHANGE IN REVENUES ( ) | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

**FUND SOURCE** (Thousands of Dollars)

| FUND SOURCE | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| 1156 RSS | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

**Estimate of any current year (FY2001) cost:** 0.0

**POSITIONS**

| POSITIONS | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

**ANALYSIS:** *(Attach a separate page if necessary)*

This bill amends the banking code to conform with federal law changes in the Gramm-Leach-Bliley Act (GLBA) to provide for Financial Holding Companies and increased ability of banks to provide related financial services. The bill also includes industry-requested changes such as publishing information electronically. Also, the bill allows the department to react faster to federal law changes and industry requests to maintain parity and competition between national and state-chartered depository institutions. No negative fiscal impact of this bill is expected.

Prepared by: Franklin T. Elder, Division Director — Phone 465-2521
Division: Banking, Securities, and Corporations — Date/Time 1/26/2001 3:28PM
Approved by: Commissioner Deborah B. Sedwick — Date 1/26/2001
Agency: Department of Community & Economic Development

For distribution information, call the Governor's Legislative Office

(Rev 11/2000 OMB)



COMMITTEE COPY

FISCAL NOTE(S)

TONY KNOWLES
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governor@gov.state.ak.us

# STATE OF ALASKA
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HB 66

February 2, 2001

The Honorable Rick Halford
President of the Senate
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear President Halford:

This bill I transmit today allows state financial institutions to compete on equal terms with their federal counterparts by removing current restraints on the state's financial industry. These changes are encouraged under the federal Gramm-Leach-Bliley Act which permits the combining of banking institutions with insurance and securities businesses. Previous federal law prohibited this practice.

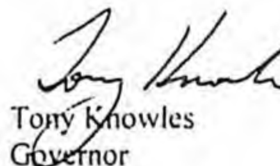
This bill allows the Department of Community and Economic Development to grant state banks those powers enjoyed by national banks in a simplified, efficient process.

The bill is patterned after federal law, but offers greater protection to depositor and consumer financial records. The state would use the more stringent practice of asking depositors and consumers to choose to allow specific disclosure of their records. Conversely, federal law and many other states allow disclosure unless the depositor or consumer specifically requests confidentiality.

The bill also clarifies and updates existing statutes, partly in response to discussions with the financial industry. For example, the bill allows state banks to publish their financial reports in electronic form or in a local newspaper, and simplifies the procedure by which state banks obtain authority to install off-premises automated teller machines. The bill also removes the statutory limitation on the interest rate and fees state banks may charge on credit cards and grants credit unions the authority to issue credit cards. These provisions will keep Alaska banks competitive with out-of-state banks.

As a means of modernizing Alaska's financial institutions, I urge your prompt and favorable action on this measure.

Sincerely,



Tony Knowles
Governor

**Sponsor**
**Statement/Sectional**

**Subject:** SB 66 and the fake Opt Out option
**Date:** Tue, 03 Apr 2001 15:14:42 -0700
**From:** akpirg <akpirg@akpirg.org>
**To:** Senator_Robin_Taylor@legis.state.ak.us

P. Put in packet of Jud Com. when Bill is up for hearing, RT

April 3, 2001
To: Senator Robin Taylor and
Members of the Judiciary Committee
From: Steve Conn, Alaska Public Interest Research Group
Subject: Testimony on SB-66

In pending legislation regarding behavior of banks and insurance companies, the issue of whether consumers should be required to "opt out" of information shared within the bank's institutional family or with other third parties or whether state law should require an explicit "opt in" by the consumer has been addressed in hearings where there was no consumer advocate present.

Pleased be advised that every consumer group, including AkPIRG, believes that opt-ins should be required and that opt-out is often no choice at all. This information sharing relates directly to privacy and a heightened potential for information theft.

Notices to consumers to "opt out" are extremely obscure. I can provide you by fax with the notice I received from Key Bank. I challenge you to find the mechanism provided to "opt-out." For your further edification, I suggest that you or one of your staff use that option and discover how the consumer is dealt with by Key Bank. If you do, you will have strong evidence that opt-out choices are so obscured that they are rarely exercised. An "opt-in" right protects consumers.

During the recent speculative frenzy, important barriers between federally insured banking and stock brokers and insurance firms were pulled down. Most consumers do not realize this. This places a special burden on
Financial institutions to do more than pass information about clients to other
Corporate family members in order to sell risky financial products. Consumers who want this help or information should ask for it. No burden should be placed on them to opt out of aggressive campaigns for their hard earned money- especially in today's dangerous economy.

**INFORMATION STATEMENT**

KENNETH P. EGGERS, P.C.
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April 5, 2001

VIA FACSIMILE: 907-465-3922
Original Via Regular US Mail

The Honorable Senator Robin Taylor
Chair, Judiciary Committee
State Capitol, Room 30
Juneau, AK 99801-1182

VIA FACSIMILE: 907-465-4979
Original Via Regular US Mail

The Honorable Senator Randy Phillips
Chair, Labor & Commerce Committee
State Capitol, Room 103
Juneau, AK 99801-1182

Re: SB 66, Financial Institutions; Bank Disclosure of Customer Records in Response to Clerk-Issued Subpoenas

Dear Senators Taylor and Phillips:

With SB 66, the legislature, at the request of the Governor, is advancing legislation to reinforce the confidentiality of bank records in Alaska. The latest version of the bill that I have seen, a draft of CSSB 66 prepared by Legal Services of the Legislative Affairs Agency, transmitted to Senator Phillips on March 29, 2001, has apparently been referred out of the Labor and Commerce Committee to the Judiciary Committee. I therefore write to both of you.

The latest version of the bill leaves unresolved the issue of whether financial institutions must disclose bank records if they receive a subpoena issued in civil litigation by the clerk of court, if the subpoena is not accompanied by a court order directing disclosure. While the latest version of the bill appears to make an attempt to resolve this issue, it does not accomplish the goal. As attorneys for banks, we are often asked to advise our clients on the proper course of action when the bank is served with clerk-issued subpoenas, and we believe the desired result must be clarified.

The bill should make it clear that financial institutions should only disclose bank records if a court has first considered the issue, and ordered the financial institution to disclose the records. Otherwise, banks will have to comply with clerk-issued subpoenas even when

they are not accompanied by court orders, unless they go to the trouble and expense of engaging counsel to seek a protective order in civil litigation in which the banks are not stakeholders.

That banks will have to comply unless they seek a protective order results from language in the latest version of SB 66 and operation of Rule 26 (c) of the Alaska Rules of Civil Procedure. If the language of SB 66 is not clear, Civil Rule 26 places the burden of seeking protection from disclosure on the party upon whom the subpoena is served, in this case on the financial institution who receives the clerk-issued subpoena not accompanied by a court order. Even though the financial institution is not a stakeholder in the litigation, under Civil Rule 26 it must engage counsel to seek an order protecting the records from disclosure, and it must frequently do so on very short notice, since civil litigation subpoenas most often set the date for production within a week to ten days after service of the subpoena. This is unfair to the bank.

The section of CSSB 66 that leaves the issue unresolved is Sec 06.01.028 (a) (2). This subsection declares that a financial institution's customer records, and the information in the records, are confidential, and may not be disclosed "except when, and only to the extent that, the disclosure is ... required by federal or state statute or regulation or by an order directed to the financial institution and issued by a court or administrative agency having jurisdiction of the financial institution[.]"

Subpoenas are routinely issued by the clerk of court in civil litigation without judicial oversight (under Alaska Civil Rule 45). The language of subsection (a) (2) requiring a court order appears to be an attempt to accomplish the goal of requiring court supervision before disclosure is allowed. But the other language of subsection (a) (2), requiring disclosure when "required by federal or state statute", will force disclosure in response to clerk-issued subpoenas because compliance with clerk issued subpoenas is "required by state statute".

This issue was considered by the US District Court for the District of Alaska, in the context of a criminal grand jury subpoena, in the case, In Re Grand Jury Subpoena 41 F. Supp. 2d 1026 (D. Alaska 1999). The court in this case suggested that the legislature "overlooked the significance" of sub-section (2) of present Sec 06.01.028, which mandates disclosure if "disclosure is required by federal or state statute or regulation". The court held that, even though sub-section (1) of the statute did not require compliance with a clerk-issued subpoena not accompanied by a court order, sub-section (2) did, because compliance with a subpoena "is required by federal or state statute or regulation". Id., at page 1031.

CSSB 66 should make it clear that financial institutions should not disclose financial records in response to a clerk-issued civil subpoena, unless disclosure is mandated by an accompanying court order. To accomplish this result, CSSB 66 should definitively state that

financial institutions can ignore clerk-issued subpoenas that are not accompanied by a court order.

The remedy is simple. An additional subsection should be added to Sec. 06.01.028 that provides:

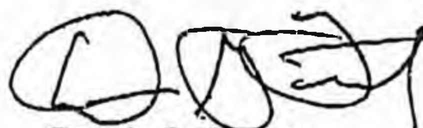
> Notwithstanding other provisions of law, a financial institution, and its employees and agents, are not obligated to comply with a subpoena issued in civil litigation directing disclosure of financial records or information of a depositor or customer, unless the disclosure is authorized in writing by the depositor or customer, or the subpoena is accompanied by an order of the court directing the financial institution to disclose financial records or information of the depositor or customer.

By making it clear that financial institutions need not honor subpoenas unless they are accompanied by court order, the law will, appropriately, place the onus on the third party seeking another person's bank records to ask the court's permission to gain access to them, and the person whose records are sought will have the opportunity to argue to the court against disclosure if the records are not relevant to the litigation. The bank will not be put to the unfair burden of having to seek an order protecting the records from disclosure each time it receives a civil subpoena. The party seeking records will also understand what is required to get at another persons bank records, they will have to ask the court for an appropriate order and demonstrate the relevance of the documents sought to the pending litigation, before disclosure will be ordered.

Thanks for your consideration of this important issue. I urge you to clearly address this issue in SB 66. Please call if you have any questions.

Very Truly Yours,

GROH EGGERS, LLC



Dennis G. Fenerty

cc: Theresa L. Bannister – Via Fax: 907-465-2029
Legislative Counsel
Division of Legal and Research Services
Legislative Affairs Agency

Michael J. Burns
District President

KeyBank
P.O. Box 100420
Anchorage, AK 99510

April 13, 2001

Senator Robin Taylor, Chairman
Senate Judiciary Committee
Alaska State Legislature
State Capital (MS 3100)
Juneau, AK 99801-1182

Re: SB 66

Dear Senator Taylor:

I appreciated the opportunity to meet with you in Juneau recently. SB66, which at the time was in the Labor & Commerce Committee, is now in your jurisdiction. We support SB66 as passed by Labor & Commerce. Our most important asset is the relationship we have with our customers. These relationships are the only real value that our company has. Any activity that we might undertake that would undermine that trust would be foolhardy. The continued trust and confidence of our customers is paramount.

We are very comfortable in supporting provisions that would allow our customers to "opt out" of information-sharing, both with our corporate affiliates and third parties. It is not just our commitment to perpetuating this trust relationship, but there also exists a substantial body of Federal law that would protect privacy.

- Gramm-Leach-Bliley Financial Modernization Act
  Provisions of this Act provide significant, effective protection for personal privacy. The new law permits a financial institution to transfer any "non-public personal information" to non-affiliated third parties so long as the institution "clearly and conspicuously" provides consumers with notice about its policies and practices for disclosing personal information, and an opportunity to "opt out" of such transfers. The law further requires financial institutions to inform customers of their policies toward sharing information among affiliates, but it wisely imposes no restrictions on such information-sharing. SB 66, as presented by the Administration, would require customers to "opt in" to both of these practices, a clearly unworkable standard. Federal laws in this area, in addition to Gramm-Leach, are as follows:

- Fair Credit Reporting Act
  Prohibits financial service companies from sharing third-party, credit-related information about consumers with affiliates without first providing consumers with "clear and conspicuous notice" and an opportunity to "opt out" of the information-sharing.

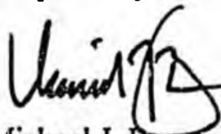
- Electronic Funds Transfer Act
  Requires that financial institutions notify their customers about circumstances, under which those institutions, in the ordinary course of business, will disclose information about customer accounts to any other party, including affiliates.

- The Federal Trade Commission Act
  Prohibits "unfair and deceptive practices in or affecting commerce" – including failing to abide by a stated privacy policy or other activities that violate privacy promises, contracts, and disclosures – by any business, specifically including banks.

We feel very strongly that we do not need more government regulations, concerning management of our most prized asset - the trust of our customer.

Thank you for your consideration of this complex and easily misconstrued issue.

Respectfully,



Michael J. Burns
President

MJB:ss

RECEIVED
APR ⁻9 2001
Ans'd............

April 4, 2001

Senator Robin Taylor
Chairman
Senate Judiciary Committee
State Capitol, Room 30
Juneau, Alaska 99801-1182

Re: SB 66

Dear Chairman Taylor:

We would like to provide your committee with comments regarding Senate Bill 66. We appreciate the fact that SB 66 was introduced to "ensure there are no conflicts in the state banking code with GLBA" (Gramm-Leach-Bliley Act.) A second reason for the bill is listed as, "to ensure that state banks are given comparable powers to the powers granted national banks as a result of the implementation of GLBA."

We were concerned that the contents of one section, proposed section 06.01.028 "Depositor and customer records confidential," posed conflicts between the state banking code and GLBA, and did not grant us comparable powers to national banks. Since that time, the Labor and Commerce Committee passed a substitute bill that incorporated language that aligns this bill with the federal legislation in GLBA. This removed the two standards of privacy – one for state banks and one for national banks.

The privacy and confidentiality of our customers' personal information has always been of great concern to us at Northrim and to all Alaskan banks. Not only do we have strict federal laws and regulations already in place to regulate privacy, but we also recognize that keeping our customers' information confidential provides them with the great "Customer First Service" that they expect from us. The Federal Regulations already in place, which affect privacy in various ways, are Children's Online Privacy Protection Act, Electronic Funds Transfer Act, Fair Credit Reporting Act, Right to Financial Privacy Act, Telemarketing and Consumer Fraud and Abuse Prevention Act of 1991, Telephone Consumer Protection Act of 1991, and Gramm-Leach-Bliley Act. In addition, the federal banking regulators have issued final guidelines regarding Customer Data Security Standards that we must comply with by 7/1/2001. It becomes difficult and complicated when our state laws are not consistent with the federal laws with which we are already required to comply. It is also inefficient and burdensome to maintain bank policies and procedures for the state that conflict with the standards set by the federal regulators.

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We hope that you will take all of these things into consideration when reviewing the Labor and Commerce Committee's substitute bill, which aligns state law with the requirements of GLBA. We feel that the standards set forth in GLBA are beneficial to financial institutions and consumers alike because they provide the financial industry with the flexibility to provide customers with additional beneficial information without added, costly regulations.

Sincerely,

Marc Langland
President and CEO

SB

81

# Alaska State Legislature

SENATOR
GENE THERRIAULT
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Senate

While in session
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Senate District Q

**Senate Bill 81** **"An Act relating to the nonademption of property transfers; and providing for an effective date."**

**Sponsor:** **Senator Gene Therriault**

## Sponsor Statement

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Senate Bill 81 corrects a section of law that was enacted by the Twenty-first Legislature regarding the rules of construction applicable to wills and other governing instruments.

Section 1 of House Bill 275, signed into law in July of 2000, changed a rule of construction that outlines what happens when a request in a will cannot be carried out. Section 2 of House Bill 275 was meant to take the same rule of construction being applied to wills and apply it to revocable trusts, which are commonly used as will substitutes. The language as adopted, however, was not correctly modified to apply to trusts and still refers to terms used in the drafting of wills. This bill clarifies the wording of AS 13.12.712 to apply it to revocable trusts.

**Sponsor Statement/Sectional**

Email: Se ate.ak.us

# STATE OF ALASKA

**DEPARTMENT OF LAW**

*OFFICE OF THE ATTORNEY GENERAL*

*TONY KNOWLES, GOVERNOR*

*1031 WEST 4TH AVENUE, SUITE 200*
*ANCHORAGE, ALASKA 99501-5903*
*PHONE: (907)269-5100*
*FAX: (907)276-8554*

February 14, 2001

Honorable Gene Therriault
Alaska State Senate
State Capitol
Juneau, Alaska 99801-1182

Re: SB 81

Dear Senator Therriault:

You have asked for a letter from the Department of Law regarding SB 81. SB 81 amends AS 13.12.712 to correct a problem discovered during the last legislative session when this particular statute was created. In particular, existing sections (b), (d) and (e) of AS 13.13.712 make no sense within the context of a trust. SB 81 appears to amend AS 13.13.712 to properly reflect the purpose for the entire statute, namely the nonademption of specific transfers in trusts.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Mary Ellen Beardsley
Mary Ellen Beardsley
Assistant Attorney General

MEB/

cc: Chrystal Smith, AGO, Juneau
Deborah Behr, AGO, Juneau
Shari Kochman, Office of the Governor

Requested
Information

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Alaska State Legislature

Senate

While in session
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Senate District Q

**CSSS House Bill 275 (JUD)**

**Sponsor: Representative Gene Therriault**

**Sponsor Statement**

---

House Bill 275 further refines the Uniform Probate Code to continue enhancing the estate planning climate in the State of Alaska. By a nearly unanimous vote in both the House and Senate, in 1996 the Twentieth State Legislature passed a major overhaul of the laws that had governed decedent's estates, guardianships, transfers and trusts since 1972. The changes, based on the 1990 version of the national Uniform Probate Code, as subsequently amended in 1991 and 1993, were made to adapt our laws to the increasing complexity of family structure and investment alternatives that have developed in recent decades. House Bill 275 proposes further revisions to clarify ambiguities, simplify the probate procedure, and minimize tax consequences.

Much of the language is derived from statutes of other states and reflects a consensus of ideas agreed upon by Alaskan estate planning lawyers who have met informally over the last two years to discuss possible improvements.

**Section 1**

This section changes a very limited rule of construction contained in the 1993 Uniform Probate Code enacted by the Legislature in 1996.

"Nonademption of specific devises" pertains to the rules that apply when a person creating a trust or will (the decedent) designates that a specific person (specific devisee) is to receive a specific gift (specific devise), and the request is unable to be carried out, because, for example, the decedent lost or sold the gift. The question is whether, when a decedent designates a specific gift, the decedent means to give specifically *that gift* or whether the decedent would want the person to receive the *value* of the gift in the absence of the gift. Section 1 of HB 275 deals with the specific instance of nonademption when a decedent has sold the specific devise prior to the decedent's death and is still owed money for the property. Under current law, if the property were sold and the decedent received full payment before death, the payment would be distributed equally between all parties because the identity of the property, and thus its designation as a specific devise, is presumed to have been lost. If, however, the property were sold and the decedent did not receive full payment before death, the payment received after death and any promissory note would go to the specific devisee. Under HB 275 the payment received after the decedent's death and any promissory note

would not go to the specific devisee. Instead, the payment and any promissory note would be treated in the same manner as all other property that the decedent owned, and would be distributed equally among the beneficiaries. The rationale for the change is that the question of who ultimately receives the proceeds should not depend on whether the decedent received full or partial payment before death.

For example, Susan Smith provides in her will that her son David Smith is to receive the family farm and the remaining property in her estate is to be divided equally between David and his brothers and sisters. In this case, the family farm is the specific devise. Under current law, if Mrs. Smith sold the farm prior to her death and received cash for the transaction, at her death the money would be included in the estate and shared equally between all the children. If, however, Mrs. Smith sold the farm and received a seller-financed note because the buyer was unable to obtain sufficient third-party financing, when Mrs. Smith dies, David would receive the balance of the promissory note owed to Mrs. Smith, to the exclusion of his brothers and sisters. These sections change that result and would treat the promissory note in the same manner as all other property Mrs. Smith might own. The promissory note would be shared equally by all the children. As this is only a rule of construction that controls in the absence of other language, if Mrs. Smith really wants the balance of the promissory note to go to David to the exclusion of the other children, she could state this in her will or trust.

Section 2, 13.12.712 makes the rules of construction under 13.12.606 applicable to trusts.

Section 2, 13.12.720

This section relates to the new family-owned business deduction of Internal Revenue Code section 2057. Section 2057 provides an additional estate tax deduction for the owners of family businesses. This provision follows a similar statute found in Michigan law. It is meant to provide a correct tax result by having this deduction taken into account under a provision that defines the credit shelter trust so the deduction will not be wasted on a marital bequest. It is an important provision, especially in Alaska where so many businesses are family owned.

Section 3

This section would change the amount of interest that is paid on a pecuniary devise, and would usually allow more time for the trust or will to be settled before interest begins accruing.

A pecuniary devise is a gift of a monetary amount, whether given outright or placed in trust for the beneficiary. Our present statute states interest must be paid on a pecuniary devise and begin one year after the appointment of a personal representative. Interest is set at the legal rate, which is presently 10.5%. This is unrealistically high and does not take into account that interest rates fluctuate. It can also shortchange other heirs. For instance, Mrs. Smith leaves $100,000 in trust for the benefit of her grandchild and leaves the rest of her estate in equal shares to her children. If a federal estate tax return is required, and taxes must be paid, the $100,000 cannot be distributed to the grandchild until the personal representative has received a closing letter from the IRS. Typically it might be 2-3 years after a decedent's death before the closing letter is received. Under present law the interest payment made to the grandchild will come out of the children's share of the estate, for no other reason than that federal bureaucracy makes it impossible for the estate to be distributed

within a year. This section changes the interest rate from 10.5 % to a variable rate taken verbatim from AS 45.45.010(b) and commonly referred to as the discount borrowing rate.

In addition, an adverse generation-skipping transfer tax can result if appropriate interest as defined by state law isn't paid in a timely manner. The principle consequence is that a trust that might otherwise be shielded from generation-skipping transfer tax may now be subjected to it. HB 275 changes the time at which interest begins to accrue from one year after a personal representative is appointed to two years after the decedent dies. This amendment allows the administrator more time to fund pecuniary bequests when the estate may still be in the process of being audited by federal tax authorities, which in turn gives the personal representative more time to settle the estate.

Our present statute comes from Uniform Probate Code Provision promulgated in 1963. Many states, such as Washington, do not require the payment of interest on pecuniary devises.

**Section 4**

This section also pertains to interest on a pecuniary devise. It adds a new section stating that no interest must be paid on a pecuniary marital bequest, but that a pro-rata portion of the income earned by the estate must be credited to the pecuniary marital bequest from the date of death. The provision requiring the payment of income comes from a similar provision found in Virginia law. This provision assures Alaskans that a trust established for the benefit of a spouse will meet the "all the income" requirement established by Internal Revenue Code sections 2056(b) and 2523(f), which is required of trusts qualifying for the marital deduction.

Although this section eliminates the requirement that any interest be paid on a pecuniary marital bequest, this section nonetheless meets the appropriate interest requirement set forth in the generation-skipping transfer tax regulations. Lastly, it should be noted that, under recently promulgated federal regulations governing the allocation of estate and trust income to separate shares, the payment of interest would not only increase the amount that must be paid to a pecuniary marital bequest, (a result one generally wants to avoid because more property will ultimately be subjected to estate tax), but unnecessarily creates taxable income for the family with no corresponding deduction to the estate.

**Section 5**

This section gives the personal representative more discretion over how to distribute the residuary estate assets to heirs, as long as it is "in the best interests of the distributees." For example, it would allow the personal representative to make non pro-rata distributions of assets. This means if an estate consists of two assets of equal value and there are two heirs, the personal representative could distribute one asset entirely to one heir and the other asset entirely to the other heir instead of having to make a distribution of ½ of each asset to each heir. This section allows the personal representative to use this method of funding even though the authority for doing so might be absent in the will or trust. As a result better tax planning is possible. This section follows North Carolina legislation.

## Section 6

This adds a new section to Chapter 36, Trust Administration. AS 13.36.153 is meant to provide a beneficial interpretation to a document that would otherwise produce a negative tax consequence in the limited circumstances addressed by this section. To achieve this, it limits distributions by a person who is not an independent trustee, (for example, a person who is both a trustee and beneficiary), by requiring an "ascertainable standard" relating to maintenance and support.

As an example, presume the settlor of a trust wants to benefit his spouse. He wants to name his spouse as trustee and also wants to give his spouse as many rights to the trust assets as possible without having the trust assets included in his spouse's gross estate for federal estate purposes. Internal Revenue Service regulations state that, in her position as trustee, the spouse can possess the right to distribute principal, provided that right is "limited by an ascertainable standard." The regulations state an ascertainable standard will be found if the spouse is given the power to use principal for her "support in reasonable comfort." However, the regulations also provide that a right to use principal for "her comfort, welfare, or happiness" is not limited by the requisite standard. While most people would think there is no meaningful difference between "support in reasonable comfort" and "comfort, welfare, or happiness," the use of the latter phrase would create the unwanted consequence of having the trust principal included in the spouse's estate for federal estate tax purposes. Section 6 prevents inadvertently triggering this horrendous tax result by providing that, unless specifically stated in the trust document, the spouse would only have the right to distribute principal to herself in a manner limited to an ascertainable standard.

This section also provides that principal and income can not be used to discharge an individual legal obligation of certain trustees who are not independent trustees.

Furthermore, these provisions would apply to a trustee who is related or subordinate to the person who has the right to remove and replace a trustee. Were it not for these provisions an unintended and harmful tax result would occur. This section is taken principally from Colorado law.

## Section 7

In order to make favorable marital deduction and generation-skipping tax elections, it is necessary to be able to split a single trust into two trusts. The beneficial interests in each trust remain the same, the only difference is that the two trusts will be administered separately. This section provides that, under certain conditions, a trustee may divide a trust into two or more separate trusts as long as the resulting trusts are substantially identical in terms to the existing trust. This provision will allow a trustee to make favorable tax elections whether it relates to the marital deduction or to an allocation of generation-skipping transfer tax exemption. Trust instruments drafted subsequent to the changes in tax law that necessitate the ability of a trustee to divide trusts most likely include a provision stating the trustee can divide a trust. However, this provision might not exist in a trust created before or shortly after the change in the tax law. This section assists individuals affected by trusts lacking this provision. Typically the trustee making these elections will be the surviving spouse, who will also be named as the lifetime income beneficiary of the trust. Because the surviving spouse is also a beneficiary, she may benefit personally from the election. Subsection (a) states nonetheless a trustee can split the trust to make tax elections even though the trustee, in the trustee's dual status of beneficiary, might personally benefit from the election.

This section follows Washington legislation.

**Section 8**

This section states that certain asset distribution provisions applicable to the administration of a probated estate also apply to the administration of a revocable trust following the death of the settlor of the trust. The provisions that apply are: AS 13.16.540, Distribution; order in which assets appropriated; abatement. AS 13.16.545, Right of retainer. AS 13.16.550, Interest on general pecuniary devise. AS 13.16.560, Distribution in kind; valuation; method; and AS 13.38.030(a), a provision pertaining to when an income beneficiary becomes entitled to the income from a trust.

**Section 9**

This section relates back to Sections 6 and 7. Section 9 describes those individuals who for some unforeseen reason might want to elect out of these sections. While it can be fairly stated no one aware of the tax implications of electing out would do so, this section nonetheless defines who the "parties in interest" would be if a decision to opt out is made.

**Section 10**

This section provides that in those trusts where the spouse is entitled to all the income earned by a trust paid no less frequently than annually, and a marital deduction is claimed for the trust, the spouse has the power to require the trustee to make the trust assets produce income. This simple provision is a required statement in all trusts intending to qualify for the marital deduction. This section provides the required language for those trusts lacking this provision.

**Section 11**

This section ends the confusion over the ability to transfer real property to or from a trust in the name of the trust, whether or not the trustee is actually named on the deed. In addition, this section provides protection for good faith purchasers who purchase property held in the name of a trust.

SB

82

# FISCAL NOTE

**STATE OF ALASKA**
**2001 LEGISLATIVE SESSION**

Fiscal Note Number: 1
Bill Version: CSSB 82(STA)
(S) Publish Date: 3/7/01

Revision Date/Time (Note if correction):
Title: 2001 Revisor's Bill
Sponsor: Rls/Legislative Council
Requester: Senate State Affairs

Dept. Affected:
BRU:
Component:
Component Number:

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL EXPENDITURES | | | | | | |
| CHANGE IN REVENUES ( ) | | | | | | |

FUND SOURCE (Thousands of Dollars)

| FUND SOURCE | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type) | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

**Estimate of any current year (FY2001) cost:** 0.0

POSITIONS

| POSITIONS | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

**ANALYSIS:** *(Attach a separate page if necessary)*

Prepared by: SENATE STATE AFFAIRS COMMITTEE
Phone 465-4522

Senator: /s/ SENATOR THERRIAULT
Committee Chair
Date 2/20/01



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# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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Juneau, Alaska 99801-1182
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**MEMORANDUM** March 7, 2001

SUBJECT: CSSB 82(STA) (2001 Revisor's Bill)

TO: Senator Robin Taylor, Chair
Senate Judiciary Committee

FROM: Pamela L. Finley
Revisor of Statutes

The following is a sectional analysis of CSSB 82(STA), the 2001 revisor's bill. The bill is prepared under AS 01.05.036, which provides, in part, that the revisor of statutes

> ... shall prepare for submission to the legislature legislation for the correction or removal of the deficiencies, conflicts, or obsolete provisions, or to otherwise improve the form or substance of any portion of the statute law of this state.

To assist the reader in understanding the bill, I have summarized the contents by listing sections that have similar purposes or effects.

Sections that delete, repeal, or update obsolete provisions: Section 24 repeals provisions that have become obsolete through other legislative action .

Sections that correct errors or oversights: Sections 1 - 4, 6 - 9, 11 - 15, and 17 - 23 correct errors or oversights.

Sections that improve the form or substance of the law: Sections 5, 10, and 16 propose amendments to improve the form or substance of the statutory law of Alaska.

## SECTIONAL ANALYSIS

Section 1 corrects an erroneous cross-reference in AS 06.05.005(a)(3). The statute currently referenced (AS 06.05.345) concerns the articles of incorporation, whereas AS 06.05.344 addresses approvals of state banks.

Section 2 changes the definition of "minor" in AS 13.06.050(29) (the Uniform Probate Code) from those persons 19 years of age and older to those persons 18 years of age and older. The uniform act indicates that states adopting it should insert the age of majority in the definition of "minor". When AS 13.06.050 was enacted in 1972, the age of

majority was 19. However, the age of majority (established in AS 25.20.010) was changed in 1977 from 19 years to 18 years of age. At that time, the definition of "minor" in AS 13.06.050 should also have been amended but was not. This bill section makes that change.

Section 3 corrects an error in a spanned reference exempting aquatic farms and hatcheries from certain other statutes relating to fisheries. Chapter 145, SLA 1988 enacted AS 16.40.100 - 16.40.199, which authorize and regulate aquatic farms and hatcheries. That same act enacted AS 16.05.930(g), which exempted activities authorized by a permit under AS 16.40.100 or 16.40.120 from AS 16.05.330 - 16.05.720. (AS 16.05.330-16.05.430 concern sport fishing and hunting and AS 16.05.440 - 16.05.720 concern commercial fishing.) However, in another 1988 act, AS 16.05.720 was repealed and replaced by AS 16.05.722 and 16.05.723, which meant that the end of the spanned reference in AS 16.05.930(g) became incorrect. The 1993 revisor's bill (sec. 5, ch. 6, SLA 1993) corrected this error by substituting "AS 16.05.723" for "AS 16.05.720". Unfortunately, sec. 5, ch. 6, SLA 1993 also changed the beginning of the spanned reference from "AS 16.05.330" to "AS 16.05.440". In all likelihood, this error was caused by duplicating the amendment in sec. 3, ch. 6, SLA 1993, which amendment correctly began with "AS 16.05.440" and also changed "AS 16.05.720" to "AS 16.05.723". At any rate, the sectional analysis of the 1993 revisor's bill makes it clear that the only change intended was the change from "AS 16.05.720" to "AS 16.05.723". To return the text to the language as enacted, this bill section reinstates "AS 16.05.330" at the beginning of the spanned reference in AS 16.05.930(g). For reasons explained in the attached memo of George Utermohle, this amendment should not have any practical effect on fish and game licensing.

Section 4 corrects an error in ch. 67, SLA 1992 by substituting "fee paid by the client" for "fee paid the client" in AS 21.27.560(a). A fee paid the client would be an illegal rebate. This correction was requested by the Department of Law.

Section 5 expands a spanned reference in AS 21.42.500 so that more sections can be easily added to AS 21.42 in the future. It also has the effect of supplying a definition of "health care insurer" and "health care insurance plan" for AS 21.42.400, which was added last year.

Section 6 amends AS 21.54.160(4)(A) to give the correct term as used in federal law and to correct a typographical error in the reference to the federal citation.

Section 7 corrects a cross-reference to federal law in AS 21.56.050(d)(3). Currently the statute refers to a federal law (42 U.S.C. 300) that governs grants for family planning services. The federal law that defines and sets requirements for health maintenance organizations is 42 U.S.C. 300e and therefore AS 21.56.050(d)(3) is amended to reference 42 U.S.C. 300e. This amendment corrects an error in ch. 39, SLA 1993.

# CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

Central Microfilm Services
Departement of Education & Early Development
State of Alaska

majority was 19. However, the age of majority (established in AS 25.20.010) was changed in 1977 from 19 years to 18 years of age. At that time, the definition of "minor" in AS 13.06.050 should also have been amended but was not. This bill section makes that change.

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Section 8 amends AS 23.40.215(c) to conform to the change made to AS 23.40.215(b) by ch. 15, SLA 2000. Before the 2000 amendment, subsection (b) provided for submission to, and approval or disapproval by, the legislature of the monetary terms of a collective bargaining agreement subject to the Public Employees' Retirement Act. Subsection (c) exempted agreements between school districts or REAAs and their employees from the requirement of legislative approval. Chapter 15, SLA 2000 deleted the "approval" provision from subsection (b) and amended the submission provision. However, chapter 15, SLA 2000 did not amend subsection (c), which still exempts the agreements of school districts and REAAs from "approval by the legislature." Since subsection (b) no longer requires legislative approval, subsection (c) doesn't make much sense. Based on the assumption that subsection (c) was intended to exempt school districts and REAAs from subsection (b)'s submission and approval provisions, this bill section amends subsection (c) to refer to submission to the legislature rather than approval by the legislature.

Section 9 corrects a cross-reference in AS 24.45.041(a)(7). There is no definition of "spousal equivalent" in AS 39.50.030(g); the definition of "spousal equivalent" that applies to AS 39.50.030(g) is found in AS 39.50.200(a), and so the cross-reference is changed accordingly. This corrects an error in ch. 74, SLA 1998.

Section 10 changes "section" to "subsection" in AS 38.04.900(c) in order to make the language more accurate. The term "interested person" appears only in subsection (c).

Section 11 changes "section" to "subsection" in the last sentence of AS 38.05.810(i). The last sentence authorizes sales for less than appraised market value. Because the title of the law that enacted subsection (i)---ch. 97, SLA 1992---referred to port authorities rather than land disposals in general, the last sentence of subsection (i) could legally apply only to the port authority provisions of subsection (i). This amendment makes that clear by correcting the error in ch. 97, SLA 1992.

Section 12 amends AS 38.05.821(a) to give the full proper citation in a reference to a federal law.

Sections 13 and 14 correct an error in the Alaska Coordinate System of 1927. As originally enacted, AS 38.20.060(10) did not contain the "as" that these amendments delete. In ch. 152, SLA 1984, when AS 38.20.060(10) was amended and duplicate language was added as (b)(10), the "as" appeared, although it was not shown as being inserted as new language. These two bill sections correct that typographical error by deleting the "as" that was erroneously added in 1984.

Section 15 corrects an error in AS 38.35.120(a)(1) as amended by ch. 56, SLA 2000. Before amendment by ch. 56, AS 38.35.120(a)(1) consisted of three parts. First it required certain lessees to assume the duties of a common carrier; secondly it provided a limited exemption from the common carrier provision; and thirdly it required the lessee to refrain from unjust or unreasonable discrimination and to take the oil or natural gas

that the Regulatory Commission of Alaska shall find to be reasonable in the lessee's performance of its duties as a common carrier. Chapter 56 added another limited exemption from the common carrier provision, but it was inserted at the end, so that the prohibition against unreasonable discrimination as a common carrier ended up in the paragraph providing the exception from the common carrier provision. This bill section moves the language so that the two exceptions from the common carrier provision are next to each other.

Section 16 defines "commissioner" as the commissioner of natural resources and defines "director" as the director of the division of lands for the purposes of AS 38.95.075 and 38.95.080, which relate to trapping cabin permits. Although the division of lands is currently administering these statutes, the statutes themselves to not contain applicable definitions of the terms "commissioner" and "director". This bill section supplies those definitions.

Section 17 amends the last sentence of AS 40.15.050 so that the verb ("are") agrees with the subject ("streets, alleys, or thoroughfares"). The verb was correct in the 1953 enactment, but incorrect in the 1962 codification. The other changes are purely editorial.

Section 18 changes a reference to the "division of land and water management" to the "division of lands," which is the correct name under AS 38.05.005.

Section 19 corrects a typographical error in ch. 34, SLA 1990 in the definition of "riparian area" in AS 41.17 (commonly known as the Forest Practices Act). Without this amendment, a literal reading of the term "riparian" (which commonly means "pertaining to the bank of a river") would include the river itself as well as shores or banks of rivers that were not necessarily fish water bodies. The amendment in this bill section makes the definition consistent with other related provisions of the Forest Practices Act, especially AS 41.17.118 and 41.17.119. Although the error is found in the original Governor's bill, the references in the Governor's transmittal letter to protection of "fish streams" and "streamside areas" also suggest that "or" should have been "of". See 1989 House Journal 1476 (May 3, 1989).

Section 20 corrects a minor grammatical error in AS 43.40.100(4), which is the definition of "user" in the motor fuel tax statutes. The word "either" is removed because it should be used only when "one of two" is intended, and there are three possible ways of being a "user" under AS 43.40.100(4).

Section 21 corrects an inaccurate cross-reference in AS 44.81.245(9). The equitable permit owner's right to nominate a person to assume the loan is established by AS 44.81.250(c), not AS 44.81.245. This corrects an error in ch. 34, SLA 1996.

Section 22 corrects an error in a cross-reference in AS 44.85.320(a) (Alaska Municipal Bond Bank Authority) by changing "appointed under this section" to "appointed under AS 44.85.310". AS 44.85.310, not AS 44.85.320, authorizes appointment of a trustee.

This error occurred in a floor amendment to HB 75 (which became ch. 79, SLA 1975) in which a section was deleted and following sections renumbered, but internal references to sections were not conformed. In addition, paragraph (6) is amended so that it fits the structure of the introductory language.

Section 23 corrects an error in ch. 113, SLA 2000, last year's Uniform Commercial Code revision. The amendment removes a reference to "(c) of this section" from AS 45.29.702(b). There is no "(c) of this section". What was subsection (c) in the model act became a temporary law section---section 34, ch. 113, SLA 2000. (It provides that the Act does not affect actions, cases, or proceedings commenced before the effective date of the Act.) Section 25 makes this correction effective July 1, 2001 because that is the effective date of AS 45.29.702.

Section 24 repeals AS 08.20.180(b), which provides for four-year renewals of a chiropractor's license. This corrects an omission in ch. 94, SLA 1987, which amended AS 08.01.100(a) to require biennial renewals for licenses covered by AS 08.01. Chapter 94, SLA 1987 made conforming amendments in many statutes, but omitted AS 08.20.180(b). The regulation covering these licenses (12 AAC 02.150) specifies biennial renewals, so this repeal should not affect existing practice. This section also repeals AS 14.43.310(b)(2), AS 18.65.250, AS 39.50.200(b)(17), and AS 44.19.110 - 44.19.122, all of which relate to the Governor's Commission on the Administration of Justice. This commission was established as a conduit of federal money and an entity to administer local efforts under Title I of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. However, the underlying federal provisions were omitted in the 1984 general revision enacted in P.L. 98-473, 98 Stat. 2077, and therefore no longer exist. (See explanatory note following 42 U.S.C.S. 3711.) The Department of Law requested that AS 44.19.110 - 44.19.122 be repealed since the commission no longer exists. AS 18.65.250 is repealed because it authorizes receipt of money from the commission and neither the money nor the commission exists. AS 14.43.310(b)(2) is repealed because it establishes an advisory committee for awarding the Carroll L. "Butch" Swartz Memorial Scholarship, the advisory committee to consist of three members of the defunct commission. (Although the Department of Law indicated that the Carroll L. "Butch" Swartz Memorial Scholarship has not been funded, other references to that scholarship are left in the statutes since future funding is always possible; only the advisory committee is repealed.) A copy of the statutes to be repealed is attached.

Section 25 makes section 23 effective July 1, 2001, the effective date of AS 45.29.702.

Section 26 gives the rest of the act an immediate effective date.

## TEXT OF REPEALED STATUTES

AS 08.20.180(b):

(b) License renewal fees are due every four years.

AS 14.43.310(b)(2):

(2) three members of the Governor's Commission on the Administration of Justice selected annually by the commission from among its membership, for the Carroll L. "Butch" Swartz memorial scholarship;

AS 18.65.250:

Sec. 18.65.250. Financial assistance.

(a) The Governor's Commission on the Administration of Justice has the authority to assist political subdivisions and police departments in meeting the costs involved by extending financial assistance for travel, per diem, tuition, and other costs.

(b) Only those political subdivisions and police departments complying with AS 18.65.130 - 18.65.290 are eligible for financial assistance authorized under AS 44.19.116. This subsection applies only to those funds made available for providing minimum police standards.

AS 39.50.200(b)(17):

(17) Governor's Commission on the Administration of Justice (AS 44.19.110);

AS 44.19.110:

Sec. 44.19.110. Establishment of the commission. The Governor's Commission on the Administration of Justice is established in the Office of the Governor.

AS 44.19.112:

Sec. 44.19.112. Membership of the commission. The commission is composed of 13 members, to include the following: the attorney general, the commissioner of public safety, the commissioner of health and social services, the chief justice of the supreme court, the public defender, one member from each house of the legislature, four other residents of the state chosen by the governor so as to give reasonable geographic and urban-rural balance, including representation from the major ethnic groups of the state, from units of local government and from other groups concerned with the administration of justice in the state, and two other residents of the state representing citizens and professional and community organizations related to delinquency prevention. Members serve at the pleasure of the governor.

AS 44.19.114:

Sec. 44.19.114. Compensation and per diem. Members of the commission receive no salary for their service on the commission but are entitled to per diem and travel expenses authorized by law for boards and commissions.

AS 44.19.116:

Sec. 44.19.116. Grants and other aid. The commission may apply for, receive and utilize grants, gifts, and other funds and aids for the execution of its programs. Grants, gifts, and other funds may be received from the federal government and from other public and private sources.

AS 44.19.118:

Sec. 44.19.118. Commission as state planning agency. The commission shall act as the state planning agency under the Federal Omnibus Crime Control and Safe Streets Act of 1968, as amended, and the Juvenile Justice and Delinquency Prevention Act of 1974, as amended.

AS 44.19.120:

Sec. 44.19.120. Duties of state planning agency.

(a) As the state planning agency, the commission has the responsibility of coordinating and planning in Alaska, the federal, state, and local efforts under Title I of the Omnibus Crime Control and Safe Streets Act of 1968, as amended.

(b) The commission is authorized to investigate state and local needs and seek funding for

(1) development of more effective crime prevention programs and techniques;

(2) development of programs to aid the courts in the field of criminal adjudication;

(3) development of programs to rehabilitate offenders and prevent recidivism.

(c) The commission shall assist the planning and coordination of criminal justice personnel in the Departments of Law, Health and Social Services, and Public Safety, the public defender's office, and other appropriate agencies in a manner which projects the necessary and advisable allocation, utilization, qualifications, and coordination of criminal justice personnel at the state and local level.

(d) In order to facilitate interagency communication and cooperation, the commission shall hold interagency conferences for the discussion and planning of law enforcement, crime prevention, criminal adjudication, and offender rehabilitation programs and personnel for the Departments of Law, Health and Social Services, and Public Safety, the public defender's office, and the court.

AS 44.19.122:

Sec. 44.19.122. Staffing.

(a) The attorney general may, with the approval of the governor, select a director for the execution of the program entrusted to the commission by AS 44.19.116 - 44.19.120.

(b) The director may employ personnel necessary to carry out functions assigned by this chapter. Notwithstanding any other provisions of law, personnel appointed under this section, with the exception of the director, are members of the classified service as set out in AS 39.25.100.

**MEMORANDUM** November 21, 2000

**SUBJECT:** Aquatic Farming Triennial License

**TO:** Pamela Finley
Revisor of Statutes

**FROM:** George Utermohle
Legislative Counsel

You have asked whether a person who operates an aquatic farm or hatchery under AS 16.40.100 - 16.40.199 is subject to the aquatic farming triennial license under AS 16.05.340(a)(14).

The answer to your question appears to be no.

A person may not operate an aquatic farm or hatchery for shellfish or aquatic plants or obtain stock for an aquatic farm or hatchery without first obtaining the appropriate permit issued under AS 16.40.100 or 16.40.120, respectively, by the commissioner of fish and game.

AS 16.05.340(a)(14) establishes an aquatic farming triennial license.[1] The fee for the license is $400. On its face, the triennial aquatic farming license seems applicable to anyone engaged in aquatic farming. However, there is no statutory requirement that a person who has an aquatic farm or hatchery permit under AS 16.40.100 - 16.40.199 must obtain the aquatic farming triennial license.

AS 16.05.340(a) establishes numerous licenses, permits, and tags, and sets out fees for those licenses, permits, and tags. Except for a few notable exceptions[2], AS 16.05.340(a) does not impose a requirement that a person must obtain any of those licenses, tags, or permits. There is no provision in AS 16.05.340(a) that requires a person to obtain the aquatic farming triennial license. Unless there is a separate requirement for an aquatic farming triennial license outside of AS 16.05.340(a), a person should not be required to obtain the license.

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[1] AS 16.05.340(a)(14) states:
(14) Aquatic farming triennial license.......... 400

[2] AS 16.05.340(a) does contain requirements that a person must obtain big game tags, waterfowl conservation tags, and anadromous king salmon tags before taking certain big game, waterfowl, and anadromous king salmon.

Under AS 16.05.330(a)(3)[3] a person who is engaged in the farming of fish, fur, or game must have the appropriate license in the person's actual possession, unless an exemption is permitted under AS 16.05. This provision would apparently require a person who operates an aquatic farm for purposes of farming fish to have the appropriate licenses or tags. The terms "aquatic farming" and "fish farming" are largely synonymous in referring to the cultivation of aquatic life for human uses, except that "aquatic farming" is probably broader in that it may encompass farming of aquatic plants in addition to farming of fish. Absent a more specific provision in statute, the requirement that a person must possess a fish farming license in order to engage in fish farming is probably satisfied by obtaining an aquatic farming triennial license.

If it were not for the definition of "fish or game farming" under AS 16.05.940(15)[4], a person who operates an aquatic farm or hatchery for shellfish would probably have to obtain the aquatic farming triennial license in order to satisfy the requirement of AS 16.05.330(a)(3). However, for purposes of AS 16.05.330(a), "fish" does not include shellfish as defined under AS 16.40.199. Thus a person who operates an aquatic farm or hatchery for shellfish is not subject to the license requirement of AS 16.05.330 and is not required to obtain a separate license, such as the aquatic farming triennial license under AS 16.05.340(a)(14), in order to engage in aquatic farming of shellfish.

Similarly, there is apparently no requirement that an aquatic farmer engaged in farming aquatic plants is required to obtain the aquatic farming triennial license. The requirement under AS 16.05.330(a)(3) that a person engaged in fish farming must possess the appropriate license does not apply because fish farming does not include farming of aquatic plants.

AS 16.05.330(a) apparently applies only to a fish farmer engaged in the farming of finfish (i.e., fish other than shellfish as defined under AS 16.40.199). A finfish farmer

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[3] AS 16.05.330(a)(3) states:

> (a) Except as otherwise permitted in this chapter, without having the appropriate license or tag in actual possession a person may not engage in
>
> . . .
>
> (3) the farming of fish, fur, or game; or
>
> . . .

[4] AS 16.05.940(15) states (emphasis added):

> (15) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means having the fish or game under positive control, as in a pen, pond, or an area of land or water that is completely enclosed by a generally escape-proof barrier; **in this paragraph, "fish" does not include shellfish, as defined in AS 16.40.199;**

could obtain the aquatic farming triennial license under AS 16.05.340(a)(14) in order to satisfy the licensing requirement imposed by AS 16.05.330(a)(3).

In 1988, when the legislature authorized aquatic farming under AS 16.40, the legislature took steps to assure that persons engaged in aquatic farming were not subject to licensing under AS 16.05.330(a) or 16.05.340(a). First, the legislature granted an exemption from several provisions of AS 16.05 to persons engaged in aquatic farming under AS 16.40. Among the statutes made inapplicable to aquatic farms authorized under AS 16.40 were AS 16.05.330 and 16.05.340. See, sec. 8, ch. 145, SLA 1988 which enacted AS 16.05.930(g).[5] Second, the legislature amended the definition of "fish or game farming" under AS 16.05.940 to exclude shellfish as defined under AS 16.40.199. See, sec. 9, ch. 145, SLA 1988.

The only reason that there is now any question whether an aquatic farmer must obtain an aquatic farming triennial license is due to actions taken by the legislature in 1990 and 1993. The first legislative action amended AS 16.05.340(a)(14) to convert the fish farming biennial license into the aquatic farming triennial license. See, sec. 10, ch. 211, SLA 1990. When AS 16.05.340(a)(14) was amended in 1990, aquatic farms under AS 16.40 were exempt from the renamed license because of the exemption granted to aquatic farms and hatcheries by AS 16.05.930(g).[6] See, footnote 5, for the 1990 text of AS 16.05.930(g). The aquatic farming triennial license under AS 16.05.340(a)(14) and the fish farming license requirement under AS 16.05.330(a)(3) were two provisions expressly made inapplicable to persons who held aquatic farm or hatchery permits under AS 16.40. Also in 1990, the definition of "fish or game farming" (applicable to AS 16.05) excluded shellfish from the definition of "fish" and the fish farming licenses requirement under AS 16.05.330(a)(3) was inapplicable to farming of aquatic plants.

If the legislature had intended the new aquatic farming triennial license to apply to persons who held aquatic farm and hatchery permits under AS 16.40 in 1990, the legislature would have to (1) amend the exemption granted to aquatic farms under AS 16.05.930(g), (2) amend the definition of "fish or game farming" under AS 16.05.940(15) to include shellfish as defined under AS 16.40.199, and (3) amend the

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[5] In 1990, AS 16.05.930(g) stated:

> (g) AS 16.05.330 - 16.05.720 do not apply to an activity authorized by a permit issued under AS 16.40.100 or 16.40.120, or to a person or vessel employed in an activity authorized by a permit issued under AS 16.40.100 or 16.40.120.

[6] The amendment of the biennial fish farming license into the triennial aquatic farming license in 1990 is a virtual nullity. At that time the triennial aquatic license was not applicable to aquatic farming of shellfish and aquatic plants due to AS 16.05.930(g) and other provisions. Also, the license was not applicable to aquatic farming of finfish because earlier during that session of the legislature, the legislature had enacted a permanent ban on finfish farming. AS 16.40.210; Ch. 91, SLA 1990.

licensing requirement under AS 16.05.330(a)(3) to include aquatic plants. The legislature did none of these things, thus I must conclude that in 1990 the aquatic farming triennial license was not intended to apply to aquatic farms and hatcheries subject to AS 16.40.

The second action taken by the legislature complicates the issue of whether operators of aquatic farms and hatcheries must obtain an aquatic farming triennial license but does not change my conclusion. In 1993, as part of the Revisor's Bill for that year, the legislature adopted an amendment to AS 16.05.930(g) that had the effect of eliminating the exemption from AS 16.05.330 - 16.05.430 originally granted to aquatic farmers in 1988.[7] Sec. 5, ch. 6, SLA 1993. The amendment made aquatic farmers subject to applicable provisions of AS 16.05.330 - 16.05.430. However, as discussed above, there are no provisions of AS 16.05.330 - 16.05.430 that make the fish farming requirement of AS 16.05.330(a)(3) or the aquatic farming triennial license under AS 16.05.340(a)(14) applicable to aquatic farms and hatcheries under AS 16.40. More than the elimination of the exemption from AS 16.05.330 - 16.05.430 is necessary to subject aquatic farms and hatcheries to the aquatic farming triennial license. AS 16.05.330(a) and 16.05.940(15) would also have to be amended in the manner described above.[8] The legislature has not made these additional changes.

**It is my conclusion that an aquatic farming activity authorized by a permit issued under AS 16.40 is not subject to the aquatic farming triennial license and that a**

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[7] AS 16.05.930(g) currently reads:

> (g) AS 16.05.440 - 16.05.723 do not apply to an activity authorized by a permit issued under AS 16.40.100 or 16.40.120, or to a person or vessel employed in an activity authorized by a permit issued under AS 16.40.100 or 16.40.120.

[8] There is a possibility that the elimination of the exemption from AS 16.05.330 - 16.05.430 that was originally contained in AS 16.05.930(g) may have been a mistake. First of all, the Revisor's Bill is intended to cure technical errors and oversights in the statutes that cannot be fixed editorially and require legislative action to fix. The Revisor's Bill is not intended to address policy issues such as whether aquatic farms should be exempt from the licensing provisions of AS 16.05.330 - 16.05.430. The Sectional Analysis of the bill prepared by the Revisor of Statutes stated that AS 16.05.930(g) was amended to "correct internal references that should have been changed when AS 16.05.720 was repealed and AS 16.05.722 and 16.05.723 were added by ch. 46, SLA 1988." House Journal Supplement, No. 4, Alaska State Legislature, February 17, 1993, page 2. This explanation for the change to AS 16.05.930(g) does not make any mention of making a substantive change to the exemption granted by that subsection. Instead it refers only to a technical change made necessary by a wholly unrelated amendment to provisions related to penalties for commercial fishing violations. Thus the elimination of the exemption from the licensing provisions of AS 16.05.330 - 16.05.430 that was granted to aquatic farms and hatcheries under AS 16.05.930(g) may have been an unintended typographical or editorial error.

**person cannot be required to obtain an aquatic farming triennial license for an activity covered by a permit issued under AS 16.40.100 - 16.40.199.**

It may be useful to amend AS 16.05.930(g) to provide that AS 16.05.330 - 16.05.430 do not apply to activities authorized under AS 16.40.100 - 16.40.199 so that in the future the exemption is clear without having to resort to interpretation of several different statutes to determine whether aquatic farms and hatcheries under AS 16.40 are required to obtain the aquatic farming triennial license.

If I may be of further assistance, please advise.

PF:glc
01-227.glc

SB

84

# FISCAL NOTE

**STATE OF ALASKA**
**2001 LEGISLATIVE SESSION**

Fiscal Note Number:
Bill Version: SB84
() Publish Date:

Revision Date/Time (Note if correction): 02/14/2001 12:25p.m.
Title: Public Utility Joint Action Agencies
Sponsor: Senator Taylor
Requester: Senate Judiciary

Dept. Affected: DCED
BRU: RCA
Component: RCA
Component Number: 2417

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL EXPENDITURES | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CHANGE IN REVENUES ( ) | | | | | | |

FUND SOURCE (Thousands of Dollars)

| FUND SOURCE | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type) | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

**Estimate of any current year (FY2001) cost:** 0.0

**Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:** [ ]

**POSITIONS**

| POSITIONS | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

**ANALYSIS:** *(Attach a separate page if necessary)*

This proposed legislation will not cause any increase to the agency's budget.

Prepared by: G. Nanette Thompson
Division: Chair, RCA
Phone: 907-269-6222
Date/Time: 02/14/2001 12:25p.m.

Approved by: Commissioner Deborah B. Sedwick
Agency: Department of Community & Economic Development
Date: 2/14/2001

For distribution information, call the Governor's Legislative Office

(Rev 2/7/2001 OMB)

# FISCAL NOTE

**STATE OF ALASKA**
**2001 LEGISLATIVE SESSION**

Fiscal Note Number:
Bill Version: SB 84
() Publish Date:

Revision Date/Time (Note if correction): 2/16/2001 5:09PM
Title: Public Utility Joint Action Agencies
Sponsor: Senator Taylor
Requester: Senate Judiciary

Dept. Affected: DCED
BRU: AIDEA
Component: AEA O & M
Component Number: 1948

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL EXPENDITURES | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CHANGE IN REVENUES ( ) | | | | | | |

**FUND SOURCE** (Thousands of Dollars)

| FUND SOURCE | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type) | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.C | 0.0 | 0.0 | 0.0 |

**Estimate of any current year (FY2001) cost:** 0.0

**Check this box (X) if funding for this bill is included in the Gove nor's FY 2002 budget proposal:** [ ]

**POSITIONS**

| POSITIONS | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

**ANALYSIS:** *(Attach a separate page if necessary)*

The bill provides amendments to 2000 legislation that authorized the sale of the Four Dam Pool projects. In its current form, the bill attempts to provide that a joint action agency formed under AS 42.45.310 will be both a political subdivision and an entity whose liability is limited to the assets and revenues of a joint action agency. AEA is working to finalize the sale of the Four Dam Pool projects to the operating utilities and communities. AEA is concerned that in its current form the legislation is too far reaching and may create uncertainty and potential problems and conflicts related to financial responsibilities, duties of a public/private entity and delegation of unlimited municipal powers.

Prepared by: Robert Poe, Jr. Phone 907-269-3000
Division: Executive Director, AIDEA & AEA Date/Time 2/16/01 5:09 PM
Approved by: Commissioner Deborah B. Sedwick Date 2/16/2001
Agency: Department of Community & Economic Development

For distribution information, call the Governor's Legislative Office

(Rov 2/7/2001 OMB)

SB

85

# FISCAL NOTE

**STATE OF ALASKA**
**2001 LEGISLATIVE SESSION**

Fiscal Note Number:
Bill Version: SB 85
() Publish Date:

Revision Date/Time (Note if correction):
Title: "An Act relating to failure to report a crime."
Sponsor: Senator Cowdery
Requester: Senate Judiciary Committee

Dept. Affected: Law
BRU: Criminal Division; Civil Division
Component: 1st, 2nd, 3rd Judicial Districts; Human Services
Component No.: 2198-99;2279;08

## Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL EXPENDITURES | | | | | | |
| CHANGE IN REVENUES ( ) | | | | | | |

**FUND SOURCE** (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type) | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

**Estimate of any current year (FY2001) cost:** 0.0

**Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:** [ ]

**POSITIONS**

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

**ANALYSIS:** *(Attach a separate page if necessary)*

SB 85 creates a new class C felony crime for failure to report a violent crime under certain circumstances.

The Department of Law anticipates that passage of this legislation could make some trials more difficult to prosecute because critical witnesses will claim privilege against incrimination if they did not previously report the crime. The actual number of new cases that might result from this bill, however, is anticipated to be small, and the department anticipates no fiscal impact.

Prepared by: Joan M. Kasson — Phone 465-5370
Division: Attorney General's Office — Date/Time 3/20/01 10:48 AM
Approved by: Kathryn Daughhetee for Bruce M. Botelho, Attorney General — Date 3/20/01
Agency: Department of Law

# FISCAL NOTE

**STATE OF ALASKA**
**2001 LEGISLATIVE SESSION**

Fiscal Note Number:
Bill Version: SB 85
() Publish Date:

Revision Date/Time (Note if correction):
Title: "An act relating to failure to report a violent crime..."
Sponsor: Senator Cowdery
Requester: (S) Judiciary

Dept. Affected: Administration
BRU: Legal & Advocacy Services
Component: Public Defender Agency
Component Number: 1631

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| **TOTAL OPERATING** | * | * | * | * | * | * |
| **CAPITAL EXPENDITURES** | | | | | | |
| **CHANGE IN REVENUES (     )** | | | | | | |

**FUND SOURCE** (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type) | | | | | | |
| **TOTAL** | * | * | * | * | * | * |

**Estimate of any current year (FY2001) cost:** 0.0

**Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:** [ ]

**POSITIONS**

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

**ANALYSIS:** *(Attach a separate page if necessary)*

See Page 2 for Analysis.

Prepared by: Barbara Brink, Director
Division: Public Defender Agency
Phone 334-4400
Date/Time 03/16/01

Approved by: Jim Duncan, Commissioner
Agency: Department of Administration
Date 3/16/01

For distribution information, call the Governor's Legislative Office

SB 85 – Fiscal Note Narrative

This bill would make it a crime to fail to report an actual or attempted murder, kidnapping, sexual assault, assault causing serious physical injury, or robbery. Under the bill, a person would have to be informed by another that the other person committed the crime or have witnessed the crime. There are affirmative defenses, including a defense that allows someone not to report the crime if there is a substantial risk of physical injury.

The Public Defender Agency will have some fiscal impact if this bill is passed. Public Defender attorneys would undoubtedly be appointed by the courts to represent people accused of this crime. In some of these cases, there may be complex challenges based on the constitutional rights of privacy and protection against self-incrimination.

However, it is impossible to predict how many cases will be prosecuted. Therefore, an indeterminate fiscal note is being submitted.