SUGGESTED STATE LEGISLATION.

1988 Volume 47

The Council of State Governments

Developed by the Committee on Suggested State Legislation

The Council of State Governments
Lexington, Kentucky
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Foreword

The Council of State Governments is pleased to publish this 47th volume of *Suggested State Legislation*, the latest in a long and valued series of compilations of draft legislation on topics of current interest and importance to the states. The draft legislation found in this volume represents thousands of hours of work by legislators and legislative staff across the country — both in the states of origin of the bills, and in the Council’s Committee on Suggested State Legislation.

These draft items were selected from hundreds of submissions, and most are based on existing state statutes. Neither the Council nor the Committee seeks to influence the enactment of state legislation; throughout the years, however, both have found that the experiences of one state may prove beneficial to others. It is in this spirit that these proposals are presented.

May 1988
Lexington, Kentucky

Carl W. Stenberg
Executive Director
The Council of State Governments

This volume represents the culmination of Louisiana Senator Thomas A. Casey’s service to CSG as Chairman of the SSL Committee — a position he held for a decade. The Council of State Governments and the members of the SSL Committee express their affection and their gratitude for his many years of outstanding service.
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Introduction

Since 1941, The Council of State Governments (CSG) has published an annual volume of draft legislation on topics of major governmental interest.

This marks the 47th compilation of *Suggested State Legislation*, with the items in this volume representing the culmination of a year-long process in which more than 350 pieces of legislation were reviewed by the members of CSG’s national standing Committee on Suggested State Legislation (SSL).

SSL Committee members represent all regions of the country and many of the major functional areas of state government. Members are selected by their respective states and include legislators, legislative staff, lieutenant governors, attorneys general, secretaries of state, comptrollers, interstate cooperation officials, and ex officio representatives of various organizations serving governmental interests. Organizations of state officials provided secretariat services by CSG also designate members to the Committee.

The SSL Committee chairman and vice chairman are appointed by the national chairman of the Council for two-year terms beginning in the even-numbered years. The chairman of the SSL Committee is selected from its state legislator members, while the vice chairman is chosen from among the legislative staff members serving on the Committee.

Although most of the draft acts published in *Suggested State Legislation* are referred to the Committee directly from the states, the Committee considers legislation submitted from any source. “Statements” or “Notes,” in lieu of full text, appear in the volume when the legislation itself is approved by the Committee, but the length of the draft act preclude its publication in whole, when the text of a “model” bill is readily available elsewhere, or when the complexity of the draft act and its tie in to existing state statutes preclude its publication in *Suggested State Legislation* draft form.

Although the procedures used may vary depending on the issues addressed and the specific needs of the Committee, over the course of a year there are usually three meetings for the examination and analysis of legislative proposals. For this 1988 volume, members of the SSL Subcommittee on Scope and Agenda met to screen and recommend legislation to the full Committee on two separate occasions — in December 1986 in Orlando, Florida, and in March 1987 in Salt Lake City, Utah. At the SSL annual meeting in New York City in July 1987, the full Committee examined the proposals referred by the Scope and Agenda Subcommittee and selected the items that appear in this volume.

The largest group of items selected for inclusion in this volume cover the realm of insurance regulation. These bills resulted from the efforts of a special SSL Task Force on *Suggested State Insurance Legislation* chaired by New York State Insurance Superintendent James P. Corcoran. Mr. Corcoran’s leadership of this task force — and support from his staff, especially Sandra Siegel and Milton L. Freedman — resulted in the comprehensive insurance regulation draft legislation presented in this volume (see pages 73-191).

Although issues are considered by the Committee and published as suggested legislation, neither The Council of State Governments nor its Committee on Suggested State Legislation are in the position of advocating their enactment. The proposals in this volume are offered as an aid to state officials interested in drafting legislation in a specific area, and should be considered as sugges-
tions with respect to the problems posed against the backdrop of existing state policies, practices and statutory and constitutional requirements. Revisions in the statutory language, section headings, numbering, and other modifications may be necessary in order to conform to local practices. Decisions must be made regarding optional sections and provisions.

State officials are urged to submit suggestions for draft legislation which they believe may be of interest to other states. For additional information regarding the Suggested State Legislation Program and Committee, contact the Division of Policy Analysis Services, The Council of State Governments, Iron Works Pike, P.O. Box 11910, Lexington, Kentucky 40578, (606) 252-2291.
State Flood Hazard Area Regulation Act

The following two model acts developed by the National Association of State Flood Plain Managers, Inc. for the Federal Emergency Management Agency, regulate flood hazard areas to minimize hazards to life and property. The acts designate a single state agency as the central authority within the state for the regulation of floodplains, and for the collection and maintenance of information relating to the existence and hazards of flood areas within the state. The agency is to collect reasonable fees from permit applicants to defer the costs involved in administering the program. The agency is charged with inspecting and investigating all conditions relating to the obstruction or development of floodplains, address nonconforming uses within the state with a program which will result in the gradual phaseout of such uses, develop flood emergency plans, assist local and state agencies in floodplain management, and issue and enforce regulations under the act.

The heart of this legislation is the prohibition of any new development in regulated floodplain areas without a permit issued by the state agency. Regulated development includes both public and private projects, and applies to both new uses and changes in current use. The agency may issue a permit only if it determines that the development will not result in an adverse effect upon the flood hazards present in the particular location. Permits may be granted contingent upon floodproofing measures, while variances from issued regulations may be allowed only after application, public hearing, and a determination of unnecessary hardship. Such variances may not be granted solely on the basis of economic gain or loss. Enforcement sanctions under the act include injunctions, fines, removal of nonconforming improvements, and incarceration.

The first alternative creates a mechanism whereby the affected local governments may assume the principal responsibility for administration of the act in their areas. If this alternative is adopted, the legislation should be utilized in its entirety, with a unique portion of this particular alternative added to provide for the optional takeover of regulatory authority by local government jurisdictions. These additional provisions include authority for the state agency to provide technical assistance to local governments administering the act and provisions allowing a local government to submit ordinances and maps to the agency for approval of local administration of the act. The agency shall approve local administration if it determines that the locality has the resources and capabilities to administer the program. If approved, the local government may then administer the floodplain regulations promulgated by the state agency, and may collect the fees resulting to defer the cost of the program. Under this alternative, local permits are granted instead of state permits, while enforcement actions may be taken at either the state or local levels. Variance requirements are essentially the same as under total state regulation, with the exception that the variance consideration is before the local zoning system. The state agency is to receive copies of all permits and
notices of hearings and appeals, and shall conduct periodic inspections
to determine the effectiveness of the local government administration
of the act. Delegation to the local government may be withdrawn by
the state agency for failure to properly administer or enforce the regula-
tions, if, after notice, the failure is not corrected. Enforcement by local
governments is limited to public nuisance remedies.

The second alternative vests the chosen state agency (natural
resources or otherwise) with overall responsibility and authority for
floodplain hazard regulation, but the agency authority does not or-
dinarily include any routine responsibility for the actual administra-
tion of the regulatory or permitting process. Under this approach, the
state acts as the coordinator, provider of technical assistance and data,
and the ultimate enforcer if local regulation is not pursued. Local
governments ordinarily are responsible under this approach for the
actual administration of the program, issuance of permits, and enforce-
ment. The state agency is to provide minimum standards, promulgated
by administrative rule, for implementation of the overall statute. The
agency may then review local floodplain ordinances and amendments
adopted to conform with the minimum state standards. Upon approval
of local floodplain ordinance by the state agency, the local government
may then begin to administer the regulatory program within its
jurisdictional area. Variances, enforcement, and other provisions of the
legislation are essentially as set forth in the other alternative act.

Suggested Legislation

[ALTERNATIVE I]

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the [state] Flood
2 Hazard Area Regulation Act.

1 Section 2. [Definitions.] As used in this act:
2 (1) "Agency" or "Department" means the [natural resources agency].
3 (2) "Amendment" means any change to the official floodway lines,
4 water surface profiles, floodplain zoning maps or text of the floodplain
5 zoning ordinance.
6 (5) "Barrier beach" means a narrow low-lying strip of land generally
7 consisting of beaches and dunes extending roughly parallel to the trend
8 of the coast and separated from the mainland by a narrow body of fresh,
9 brackish or saline water or a marsh system.
10 (6) "Coastal high hazard area" (e.g. V-zone) means a coastal area of
11 special flood hazard that is inundated by the tidal regulatory flood (100
12 yr.) that has additional hazard due to velocity caused by wave action.
13 (3) "Development" means any man-made change to improved or
14 unimproved real estate, including but not limited to the construction
15 of buildings, structures or accessory structures, or the construction of

2
additions or substantial improvements to buildings, structures or accessory structures, the placement of mobile homes; mining, dredging, filling, grading, paving, excavation or drilling operations; and the deposition or extraction of materials.

(4) "Equal degree of hydraulic encroachment" means taking into account the effect of any encroachment into the floodway. It is computed by assuming an equal degree of hydraulic encroachment on the opposite side of a river or stream for a significant hydraulic reach, in order to compute the effect of the encroachment upon hydraulic conveyance. This computation assures that property owners up, down or across the river or stream will have the same rights of hydraulic encroachment.

(Also see: Hydraulic reach and floodway lines.)

(5) "Equal degree of hydrologic encroachment" means taking into account the effect of any development on the storage capacity of a floodplain area, particularly upstream from urban areas. It is analyzed assuming an equal loss of flood storage for all property owners and subdivided lots in the storage area of a floodplain on both sides of a river or stream for the involved storage area.

(6) "Erosion" means the wearing away of land by the action of natural forces; (on a beach or dune, the carrying away of sediment by wave action, tidal currents, littoral currents or by deflation.)

(7) "Flood" means a general or temporary condition of partial or complete inundation of normally dry land areas caused by the overflow or rise of river, ocean, streams or lakes, or the unusual and rapid accumulation or runoff of surface waters from any source.

(8) "Flood fringe" means that portion of the floodplain outside of the floodway (and/or coastal high hazard zone), which is covered by floodwaters during the regulatory flood.

(9) "Floodplain" is the land which has been or may be covered by flood waters, or is surrounded by flood water and inaccessible, during the occurrence of the regulatory flood. The riverine floodplain includes the floodway and the flood fringe.

(10) "Floodplain management" means the analysis and integration of the entire range of measures that can be used to prevent, reduce, or mitigate flood damage in a given location, and that can protect and preserve the natural, environmental, historical, and cultural values of the floodplain.

(11) "Flood profile" is a graph or a longitudinal profile line showing the relationship of the water surface elevation of a flood event to locations of land surface elevations along a stream or river.

(12) "Floodproofing" means the modification of structures, their sites and building contents and water and sanitary facilities to keep water out or reduce the effects of water entry.

(13) "Flood protection elevation" means an elevation which shall correspond to the elevation of the 1 percent chance flood (100 yr.), plus any
increased flood elevation due to floodway encroachment, plus [ ] feet of freeboard.

(14) "Floodway" is the channel of the river or stream and those portions of the floodplain adjoining the channel required to discharge and store the floodwater or flood flows associated with the regulatory flood.

(15) "Freeboard" represents a factor of safety usually expressed in terms of a certain amount of feet above a calculated flood level. Freeboard compensates for the many unknown factors that contribute to flood heights greater than the height calculated. These unknown factors include, but are not limited to, ice jams, debris accumulation, wave action, obstruction of bridge openings and floodways, the effects of urbanization on the hydrology of the watershed, loss of flood storage areas due to development and the sedimentation of a river or stream bed.

("Freeboard" is the additional height of a shore protection structure above design high water level to prevent overflow. Also, at a given time, the vertical distance between water level and the top of the structure.)

("Groin" is a structure built (usually perpendicular to the shoreline) to trap littoral drift or retard erosion of the shore.)

("Jetty" in open sea coasts is a structure extending into a body of water, and designed to prevent shoaling of a channel by littoral materials, and to direct and confine the stream or tidal flow. Jetties are built at the mouth of a river or tidal inlet to help deepen and stabilize the channel.)

("Littoral drift" means the sedimentary material moved along beaches under the influence of waves and currents.)

("Littoral transport" is the movement of littoral drift along beaches by waves or currents, including movement parallel (longshore transport) and perpendicular (on-off shore transport) to the shore.)

(16) "Local government" in the context of this act means any county, city or village (or other political subdivision having adequate planning and zoning authority to regulate land use).

("Metastable" means a relatively unstable, transient, but significant state or condition of a physical system such as unconsolidated sediment. Metastable landforms include beaches, dunes and barrier beaches in the coastal zone.)

(17) "Mitigation" means any action that is taken which will reduce the impact, damage or cost of the next flood which occurs.

(18) "Person" means any individual, group of individuals, corporation, partnership, association, political subdivision, public or private agency in the state.

(19) "Regulatory flood" (or regional or base flood) is a flood determined to be representative of large floods known to have generally occurred in [state] which may be expected to occur on a particular stream because of like physical characteristics. The regulatory flood is based upon a statistical analysis of stream flow records available for the watershed or an analysis of rainfall and runoff characteristics in the watershed. In inland areas the flood frequency of the regulatory flood
is once in every one hundred years; this means that in any given year
there is a 1 percent chance that a regulatory flood may occur or be
exceeded.

[( ) “Shore protection structures” include the following:
(i) “Seawall” - A structure separating land and water areas (usually
parallel to the shoreline) designed to prevent erosion and other damage
due to wave action;
(ii) “Bulkhead” - A structure or partition to retain or prevent sliding
of the land. A secondary purpose is to protect the upland against
damage from wave action.]
[( ) “Uncementated” means those sediments which remain loosely
aggregated and have not been cemented or compressed into solid rock;
includes sand, gravel, cobbles or shingles.]
(20) “Unnecessary hardship” means a unique and extreme inability
to conform to the provisions of this ordinance due to special conditions
affecting a particular property which were not self-created and are not
solely related to economic gain or loss. Unnecessary hardship is pres-
et only where, in the absence of a variance, no feasible use can be
made of the property.
(21) “Variance” means an authorization granted by the [board of ap-
peals] to construct, alter or use a structure in a manner which is in-
consistent with the dimensional standards contained in a local
ordinance.

COMMENT: Definitions pertaining to coastal shores have been bracketed
and may be added to text where appropriate.

The terms hydraulic and hydrologic (paragraphs 4 and 5) can simply
be defined as follows. “Hydraulic” means the movement of water through
a channel and its adjacent floodplain, and “hydrologic” means the storage
of water within the floodplain based on volume. When hydraulic en-
croachment is involved, water tends to back up causing higher flood levels
upstream and when hydrologic encroachment occurs, the storage capacity
is reduced causing water to move more quickly through the watershed
causing higher flood elevations downstream.

A state should select freeboard (paragraph 15) which is adequate to
protect against the problems it experiences, e.g., ice jams, etc. Many states
use one or two feet.

Only those local units of government (paragraph 16) that have ade-
quate staff and resources should be included. For these reasons, it is
recommended that townships usually not be included.

(Paragraph 19) During a typical 30-year mortgage period, the regulatory
flood has a 26 percent chance of occurring or being exceeded. By com-
parison, that same structure has only a 17 percent chance of being dam-
ged by fire.

A variance (paragraph 21) may not be used to permit a use of property
otherwise prohibited by an ordinance. Unnecessary hardship must be
demonstrated by the applicant/property owner before a variance can be
granted.
Section 3. [Duties and Powers.]
(a) The [natural resources agency] shall have the authority and it shall be its duty to:

(1) Coordinate floodplain management activities of local, state and federal agencies.
(2) Be the lead state agency to receive federal funds for accomplishing floodplain management activities.
(3) Distribute information and conduct educational activities that will aid the public and other units of government to comply with the requirements of this act; provide technical assistance for better understanding of flood processes and for management of uses in the floodplain to accomplish the purposes of this act.
(4) Regulate all floodplains, whether mapped or unmapped.
(5) Administer the floodplain regulation program including, but not limited to:
   (i) Establish technical standards for the delineation and mapping of floodplains, floodways [and coastal high hazard areas] taking into account existing and anticipated development.
   (ii) Conduct and/or coordinate engineering studies to determine the vertical and horizontal limits of floodplains, floodways [and coastal high hazard areas].
   (iii) Issue and deny permits, and establish standards to evaluate permits.
   (iv) Require the submittal of information the [agency] deems necessary for complete permit applications from applicants, persons and other state agencies.
(6) Serve as the repository for all flood data within this state.
(7) Inspect and investigate all conditions relating to the obstruction or development of floodplains; the [agency] or its duly appointed representative shall have the right to enter at all reasonable times in or upon any private or public land for the purposes of inspection and investigation.
(8) Collect reasonable fees from applicants for the cost of administering the program.
(9) Assist local governments and other state agencies to develop comprehensive floodplain management programs.
(10) Develop programs that address nonconforming uses and structures within the state's floodplains which will result in the gradual phase out of those nonconforming uses and the gradual conversion of nonconforming structures to floodproofed or flood protected structures through a program of relocation and/or floodproofing.
(11) Mark the floodplains of the state to show elevations reached by historic flood(s) so that property owners may be aware of the potential for flooding on any given property.
(12) Develop programs/procedures to acquire structures in flood prone areas that will result in an ultimate reduction in cost to the taxpayers and to preserve or restore the natural values of floodplain resources.
(13) Develop data and promulgate minimum regulations that will
account for the effects of urbanization that lead to increased runoff, increased flood elevations [and increased coastal erosion] which threaten existing and future development.

(14) Work in cooperation with federal, state or local agencies in the development of flood warning systems, evacuation plans, and flood emergency preparedness plans for the purpose of reducing damages and the threat to life and property.

(15) Promulgate rules and regulations to implement this act.

(16) Enforce the provisions of this act including the rules and regulations duly promulgated.

(17) Accomplish all other activities that are necessary and lawful in order to meet the purposes of this act.

(b) The [agency] shall provide technical assistance to all local units of government through engineering assistance, model or ordinances, data collection, evaluation of permits, training, monitoring of local administration and enforcement and other activities relating to the purposes of this act.

COMMENT: A state may want to only regulate mapped floodplains.

(Paragraph 8) Rules should establish that the cost of surveys and engineering analyses to determine flood elevations and impacts of proposed development shall be borne by the developer.

(Paragraph 9) A state may wish to add floodproofing standards in statewide building codes or require that all subdivision plats display flood elevations, floodway lines [coastal high hazard boundaries] and require that subdivisions in urban areas have detention basins to prevent runoff from being "increased" above pre-development conditions during a flood. Further, this could include planning and implementation of flood hazard mitigation programs.

(Paragraph 12) States considering the adoption of acquisition programs should review the existing acquisition programs in place in other states.

(Paragraph 13) This general subject is commonly referred to as "stormwater management" and is becoming increasingly popular for use by local or regional governments in rapidly urbanizing areas to prevent increased flood damages.

Section 4. [Regulation of the Floodplain.]

(a) No person shall undertake any regulated development noted herein on the floodplain, or in an area where the development will have an impact upon flood elevations and velocities in the floodplain, without a permit from the [agency]. Regulated development includes both public and private works, subdivisions and alterations to nonconforming uses and structures. Also, any new use or change in use of any structure, land or water which is extended, converted or structurally altered and any development as defined in this statute shall not commence without full compliance with the terms of this statute and other applicable regulations. The [agency] may issue a permit only if it finds that the
regulated development will not obstruct floodflows and result in any
increase in the flood elevation [or modify littoral transport or result
in any increase in coastal erosion] and will not significantly affect the
storage or flood control value of the floodplains and shall not cause
an adverse increase in flood velocities. Such development shall not
cause an impact upon upstream, downstream or abutting property
owners and shall not pose a hazard to human life, health or property
in the event of a flood.

Any structure which is designed for human habitation, associated
with high flood damage potential or not associated with open space
use or injurious to human, plant, animal or aquatic life is prohibited
[in coastal high hazard areas and] in floodways.

( ) Development in coastal dunes and on barrier beaches will be
regulated to protect to the standing wave height plus calculated wave
heights and will protect the structures through appropriate setbacks
and elevation).

Any development is prohibited in the floodway [and coastal high
hazard zone] which, acting alone or in combination with existing or
future similar activities will cause any increase in the regulatory flood
elevation [or increase in coastal erosion] or will affect existing drainage
courses or facilities [and littoral transport patterns].

Calculations for analyzing increases in flood heights due to obstruc-
tions or loss of storage [or erosion due to shoreline protection struc-
tures of coastal high hazard areas] will take into account equal degree
of encroachment within a hydraulic or hydrologic reach of the river
or stream [and within an appropriate longitudinal reach of a coastal
high hazard area].

An increase up to [1.0] foot may be permitted, but only if amendments
are made to floodplain maps and ordinances and approved by the [agen-
cy], and appropriate written legal arrangements are made with all af-
lected property owners for any increased flood elevations, [coastal ero-
sion, and adverse littoral transport patterns] on those properties.

Permits shall be granted only if they do not cause a threat to life,
health or property, are in the public interest and result in properly
floodproofed development. Where floodproofing measures are required,
they shall be designed to withstand the flood pressures, depths,
velocities, uplift and impact forces, and other factors associated with
the regional flood, to assure protection to the flood protection eleva-
tion. In addition, all flood proofing measures shall provide anchorage
of structures to foundations to resist flotation and lateral movement,
and shall insure that the structural walls and floors are watertight
(i.e., completely dry without human intervention during flooding) to
the flood protection elevation.

Structures in floodplain [and coastal hazard areas] shall be protected
to the regulatory flood elevation with an additional freeboard to the
flood protection elevation as defined herein.

(b) Any deviation from the standards of this regulation for which a
permit has been denied, may be allowed only upon written request for
a variance submitted to the [agency], after a public hearing and the
issuance of a variance by the [agency], which may authorize in specific
cases such variance from the terms of these regulations as will be
contrary to the public interest where, owing to special conditions af-
flicting a particular property, a literal enforcement of the provisions
of this ordinance would result in unnecessary hardship. A variance:
(1) Shall be consistent with the spirit and purpose of these
regulations.
(2) Shall not permit a lower degree of flood protection than the flood
protection elevation.
(3) Shall not be granted because of conditions that are common to
a group of adjacent lots or premises.
(4) Shall not be granted unless it is shown that the variance will
not be contrary to the public interest and will not be damaging to the
rights of other persons or property values in the area.
(5) Shall not be granted for actions which require an amendment
to the floodplain map(s).
(6) Shall not have the effect of granting or increasing a use of prop-
erty which is prohibited in a particular zoning district.
(7) Shall not be granted solely on the basis of economic gain or loss.
(8) Shall not be granted for a self-created hardship.
When a variance is granted the applicant shall be notified in writing,
by the agency, that increased flood insurance premiums may result.
A copy of this notification shall be maintained with the variance ap-
peal record.
(c) An applicant, the local unit of government or aggrieved property
owner(s) may appeal a decision by the [agency] under this act. Judicial
review of the decision may be sought in accordance with the terms of
the [state administrative procedures act]. Notwithstanding the provi-
sions of said act, petitions for judicial review may be filed in the [ap-
propriate court] within [30] days after notification of the decision by
the [agency].
The following procedures shall be used by the [agency] in hearing
disputes concerning the district boundaries shown on the official
floodplain zoning map:
(1) Where a floodplain district boundary is established, the regional
flood elevations or profiles for the point in question shall be the govern-
ing factor in locating the district boundary. If no regional flood eleva-
tions or profiles are available, other available evidence may be
examined.
(2) In all cases, the person contesting the location of the district
boundary shall be given a reasonable opportunity to present arguments
and technical evidence to the [agency]. Where it is determined that
the district boundary is incorrectly mapped, the [agency] shall amend
the map.

COMMENT: (Line 35) See definitions of “Equal degree of hydraulic en-
croachment” and “Equal degree of hydrologic encroachment.”
Written legal arrangements (Line 41) may take various forms (e.g.,
flooding easement, purchase of development rights, etc.) depending
upon the state's enabling statutes. It may be necessary to require that such arrangements are recorded on the deed of certain properties.

(Paragraph (b)) In order for any variance to be granted, the agency must determine if unnecessary hardship has been demonstrated sufficiently to warrant a permit to be issued which is inconsistent with the dimensional standards contained within the regulation. For example, where a lot is too small to place adequate fill around the structure without crossing the property line.

Section 5. [Enforcement Sanctions.]
(1) Violation of this act or the terms of any permit issued hereunder is hereby declared to be a public nuisance and may be abated or enjoined by [appropriate court] at the petition of any person or state agency.
(2) The [court] may authorize the [agency] to remove a violation at the expense of the owner or to require the owner to directly remove or modify the structure or development to comply with the regulations herein.
(3) Violations of this act or the terms of any permit issued under this act are also punishable by [fine/forfeiture] of not less than [___] dollars nor more than [___] dollars or by a sentence of not less than [ten] days to no more than [one] year in jail. Each day of the violation is a separate offense.
(4) The violations herein may be abated or enjoined through the citation procedure authorized in the [appropriate state statutes].
(5) Regulated development constructed or maintained in violation of any local floodplain ordinance adopted or approved under this section is hereby declared to be a public nuisance and the creation thereof may be enjoined and the maintenance thereof may be abated by action of the state, any local unit of government of the state or any citizen thereof.

COMMENT: The classification of a violation as civil/criminal, misdemeanor/ felony, etc., should be carefully determined in each state to result in the best institutional enforcement strategy.

Section 6. [Delegation to Local Units of Government.]
(a) A local government may submit local floodplain ordinances and adequate maps showing the appropriate floodplain limits to the [agency] for approval. The [agency] shall approve the ordinance if it determines that the locality has the resources, expertise and capabilities to administer such a program and had indicated the intention to administer in accordance with the provisions of this chapter and the general guidelines contained in rules adopted by the [department] pertaining to floodplain regulations. If approved, the [agency] shall delegate to the appropriate local government administration and enforcement of the floodplain regulations and the authority to collect reasonable fees from applicants. The local government will then regulate all activities noted in this act in the floodway, floodplain [and coastal high hazard areas]. State floodplain permits shall not be
required for development which is locally permitted and conforms to
the requirements of the locally approved floodplain ordinance. Enforce-
ment actions can be taken by either the state or local government.
(b) Any deviation from the standards of the floodplain zoning or-
dinance, for which a permit has been denied by the [zoning ad-
ministrator], may be allowed only upon written request for a variance
submitted to the [zoning administrator], public hearing, and issuance
of a variance by [zoning appeals board]. The [board] may authorize in
specific cases such variance from the terms of the ordinance as will
not be contrary to the public interest where, owing to special condi-
tions affecting a particular property, floodplain zoning ordinance, a
literal enforcement of the provisions of the ordinance would result in
unnecessary hardship. A variance:
(1) Shall be consistent with the spirit and purpose of the floodplain
zoning ordinance.
(2) Shall not permit a lower degree of flood protection than the flood
protection elevation.
(3) Shall not be granted for a use that is common to a group of ad-
jacent lots or premises.
(4) Shall not be granted unless it is shown that the variance will
not be contrary to the public interest or damaging to the rights of other
persons or property values in the area.
(5) Shall not be granted for actions which require an amendment
to the floodplain zoning district or map.
(6) Shall not have the effect of granting or increasing a use of prop-
erty which is prohibited in a particular zoning district.
(7) Shall not be granted solely on the basis of economic gain or loss.
(8) Shall not be granted for a self-created hardship.
(c) An applicant, the state, an aggrieved property owner or local unit
of government may appeal the decision of the [local zoning official] to
the [zoning appeals board] within [30] days after notification of a deci-
sion. The decision of the [zoning appeals board] may be appealed to
the [appropriate court] within [30] days of notification of a decision.
The following procedures shall be used by the [zoning appeals board]
in hearing disputes concerning the district boundaries shown on the
official floodplain zoning map:
(1) Where a floodplain district boundary is established, the regional
flood elevations or profiles for the point in question shall be the gover-
ning factor in locating the district boundary. If no regional flood eleva-
tions or profiles are available, other available evidence may be
examined.
(2) In all cases, the person contesting the location of the district
boundary shall be given a reasonable opportunity to present arguments
and technical evidence to the [zoning appeals board] Where it is deter-
mined that the district boundary is incorrectly mapped, the [zoning
appeals board] shall inform the zoning committee to petition the gover-
ning body for a map amendment.
(d) Amendments to the floodplain map and/or ordinance must be ap-
proved by the [agency] before such amendments are effective.
(e) The local government shall furnish the [agency] with a copy of all permits and notices of public hearings for appeals, variances and amendments under a delegation program. The [agency] may waive this requirement for copies of permits in its entirety or by category of structural works.

(f) In cooperation with local governmental units, the [agency] shall conduct, whenever possible, periodic inspections to determine the effectiveness of local floodplain management programs, including an evaluation of the enforcement and compliance with local floodplain management ordinances.

If the [agency], after a public hearing, determines that the local government is not properly administering or enforcing its floodplain ordinance, the [agency] shall notify said local government and if corrective action is not taken within a reasonable time, not to exceed 90 days, the [agency] shall withdraw the delegation. After such withdrawal the state [agency] shall then be responsible for administering floodplain regulations within the boundaries of said local government.

COMMENT: This scenario assumes local units of government already have, or will adopt, as part of this floodplain ordinance, the appropriate administrative framework (zoning committees, Board of Appeals, etc.) to administer zoning ordinances.

(Subsection (b)(3)) In such a case, the zoning ordinance would have to be amended through proper procedures.

In order for any variance to be granted, the board of adjustment/appeal must determine if unnecessary hardship has been demonstrated sufficiently to warrant a permit to be issued which is inconsistent with the dimensional standards contained within the ordinance. For example, where a lot is too small to place adequate fill around the structure without crossing the property line.

Section 7. [Severability.] [Insert severability clause.]

Section 8. [Repealer.] [Insert repealer clause.]

Section 9. [Effective Date.] [Insert effective date.]

[ALTERNATIVE II]

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the [state] Flood Hazard Area Regulation Act.

Section 2. [Definitions.] As used in this act:

(1) “Agency” or “Department” means [the natural resources agency].

(2) “Amendment” means any change to the official floodway lines,
water surface profiles, floodplain zoning maps or text of the floodplain zoning ordinance.

(1) "Barrier beach" means a narrow low-lying strip of land generally consisting of beaches and dunes extending roughly parallel to the trend of the coast and separated from the mainland by a narrow body of fresh, brackish or saline water or a marsh system.

(2) "Coastal high hazard area" (e.g. V-zone) is a coastal area of special flood hazard that is inundated by the tidal regulatory (100 yr.) flood that has additional hazard due to velocity caused by wave action.

(3) "Development" means any man-made change to improved or unimproved real estate, including but not limited to the construction of buildings, structures or accessory structures, or the construction of additions or substantial improvements to buildings; the placement of mobile homes; mining, dredging, filling, grading, paving, excavation or drilling operations; and the deposition or extraction of materials.

(4) "Dune" means any natural hill, mound or ridge of unconsolidated sediment landward of a beach deposited by wind action or storm overwash; also sediment deposited by artificial means and serving the purpose of storm damage prevention or flood control.

(4) "Equal degree of hydraulic encroachment" means taking into account the effect of any encroachment into the floodway. It is computed by assuming an equal degree of hydraulic encroachment on the opposite side of a river or stream for a significant hydraulic reach, in order to compute the effect of the encroachment upon hydraulic conveyance. This computation assures that property owners up, down or across the river or stream will have the same rights of hydraulic encroachment. (Also see: Hydraulic reach and floodway lines.)

(5) "Equal degree of hydrologic encroachment" means taking into account the effect of any development on the storage capacity of a floodplain area, particularly upstream from urban areas. It is analyzed assuming an equal loss of flood storage for all property owners and subdivided lots in the storage area of a floodplain on both sides of a river or stream for the involved storage area.

(6) "Erosion" means the wearing away of land by the action of natural forces; [on a beach or dune, the carrying away of sediment by wave action, tidal currents, littoral currents or by deflation.]

(7) "Flood" means a general or temporary condition of partial or complete inundation of normally dry land areas caused by the overflow or rise of river, ocean, streams or lakes, or the unusual and rapid accumulation or runoff of surface waters from any source.

(8) "Flood fringe" means that portion of the floodplain outside of the floodway [and/or coastal high hazard zone], which is covered by floodwaters during the regulatory flood.

(9) "Floodplain" means the land which has been or may be covered by flood waters, or is surrounded by flood water and inaccessible, during the occurrence of the regulatory flood. The riverine floodplain includes the floodway and the flood fringe.

(10) "Floodplain management" is the analysis and integration of the entire range of measures that can be used to prevent, reduce or mitigate
flood damage in a given location, and that can protect and preserve
the natural, environmental, historical, and cultural values of the
floodplain.

(11) "Flood profile" means a graph or a longitudinal profile line show-
ing the relationship of the water surface elevation of a flood event to
locations of land surface elevations along a stream or river.

(12) "Floodproofing" means the modifications of structures, their sites
and building contents and water and sanitary facilities to keep water
out or reduce the effects of water entry.

(13) "Flood protection elevation" means an elevation which shall cor-
respond to the elevation of the 1 percent chance flood (100 yr.), plus
any increased flood elevation due to floodway encroachment, plus [ ]
feet of freeboard.

(14) "Floodway" means the channel of the river or stream and those
portions of the floodplain adjoining the channel required to discharge
and store the floodwater or flood flows associated with the regulatory
flood.

(15) "Freeboard" represents a factor of safety usually expressed in
terms of a certain amount of feet above a calculated flood level.
Freeboard compensates for the many unknown factors that contribute
to flood heights greater than the height calculated. These unknown
factors include, but are not limited to, ice jams, debris accumulation,
wave action, obstruction of bridge openings and floodways, the effects
of urbanization on the hydrology of the watershed, loss of flood storage
areas due to development and the sedimentation of a river or stream
bed.

(16) "Freeboard" is the additional height of a shore protection struc-
ture above design high water level to prevent overflow. Also, at a given
time, the vertical distance between water level and the top of the
structure.]

(17) "Grain" is a structure built (usually perpendicular to the shoreline)
to trap littoral drift or retard erosion of the shore.

(18) "Jetty" in open sea coasts, is a structure extending into a body of water,
and designed to prevent shoaling of a channel by littoral materials, and
to direct and confine the stream or tidal flow. Jetties are built at the mouth
of a river or tidal inlet to help deepen and stabilize the channel.

(19) "Littoral drift" means the sedimentary material moved along
beaches under the influence of waves and currents.

(20) "Littoral transport" is the movement of littoral drift along beaches
by waves or currents, including movement parallel (longshore
transport) and perpendicular (offshore transport) to the shore.

(21) "Local government" in the context of this act means any coun-
ty, city or village (or other political subdivision having adequate plan-
ing and zoning authority to regulate land use).

(22) "Metastable" means a relatively unstable, transient, but signifi-
cant state or condition of a physical system such as unconsolidated sedi-
ment. Metastable landforms include beaches, dunes and barrier
beaches in the coastal zone.

(23) "Mitigation" means any action that is taken which will reduce
the impact, damage or cost of the next flood which occurs.

(18) "Person" means any individual, group of individuals, corporation, partnership, association, political subdivision, public or private agency in the state.

(19) "Regulatory flood" (or regional or base flood) is a flood determined to be representative of large floods known to have generally occurred in [state] which may be expected to occur on a particular stream because of like physical characteristics. The regulatory flood is based upon a statistical analysis of stream flow records available for the watershed or an analysis of rainfall and runoff characteristics in the watershed. In inland areas the flood frequency of the regulatory flood is once in every one hundred years; this means that in any given year there is a 1 percent chance that a regulatory flood may occur or be exceeded.

(i) "Shore protection structures" include the following:

(ii) "Seawall" - A structure separating land and water areas (usually parallel to the shoreline) designed to prevent erosion and other damage due to wave action.

"Bulkhead" - A structure or partition to retain or prevent sliding of the land. A secondary purpose is to protect the upland against damage from wave action.

"Unconsolidated" means those sediments which remain loosely aggregated and have not been cemented or compressed into solid rock; includes sand, gravel, cobbles or shingles.

(20) "Unnecessary hardship" means a unique and extreme inability to conform to the provisions of this ordinance due to special conditions affecting a particular property which were not self-created and are not solely related to economic gain or loss. Unnecessary hardship is present only where, in the absence of a variance, no feasible use can be made of the property.

(21) "Variance" means an authorization granted by the [board of appeals] to construct, alter or use a structure in a manner which is inconsistent with the dimensional standards contained in a local ordinance.

COMMENT: The terms hydraulic and hydrologic (paragraphs 4 and 5) are defined as follows: "hydraulic" means the movement of water through a channel and its adjacent floodplain, and "hydrologic" means the storage of water within the floodplain based on volume. When hydraulic encroachment is involved, water tends to back up causing higher flood levels upstream and when hydrologic encroachment occurs, the storage capacity is reduced causing water to move more quickly through the watershed resulting in higher flood elevations downstream.

(Paragraph 15) A state should select freeboard which is adequate to protect against the problems it experiences, e.g. ice jams, etc. many states use one or two feet.

(Paragraph 16) Only those local units of government that have adequate staff and resources should be included. For those reasons, it is recommended that townships usually not be included.

(Paragraph 19) During a typical 30-year mortgage period, the
regulatory flood has a 26 percent chance of occurring or being exceeded. By comparison, that same structure has only a 17 percent chance of being damaged by fire.

A variance (paragraph 21) may not be used to permit a use of property otherwise prohibited by an ordinance. Unnecessary hardship must be demonstrated by the applicant/property owner before a variance can be granted.

Section 3. [Duties and Powers.] The [natural resources agency] shall have the authority and it shall be its duty to:

(1) Coordinate floodplain management activities of local, state and federal agencies.

(2) Be the lead state agency to receive federal funds for accomplishing floodplain management activities.

(3) Distribute information and conduct educational activities that will aid the public and other units of government to comply with the requirements of this act; provide technical assistance for better understanding of flood processes and management of uses in the floodplain to accomplish the purposes of this act.

(4) Provide all flood prone local units of government with technical data and maps adequate to support reasonable floodplain regulations and flood hazard mitigation programs. Maps shall delineate the floodplain of the regulatory flood, and where information is available, the floodway and floodfringe portions of the regulatory floodplain [in coastal areas, projected flood elevations, including anticipated wave heights in the coastal high hazard areas shall be provided to the local units of government]. The [agency] shall review, certify and approve this data and any data developed by other sources as reasonable and accurate.

(5) Prepare and promulgate by rule minimum standards for local floodplain regulations to implement this act. Such minimum standards shall be designed to protect human life, health and property and to preserve the capacity of the floodplain to discharge and store the waters of the regulatory flood [and to preserve natural littoral transport patterns and dune configurations.] Such minimum standards may vary between urban and rural areas and shall account for anticipated development within the watershed in urban areas.

(6) Review and approve all local floodplain ordinances and amendments adopted to meet the minimum standards herein and duly promulgated rules of the [agency]. The [agency] shall specify in writing its reasons for disapproval of ordinances or amendments which fail to meet the minimum standards to the [agency's] satisfaction. Where the existing ordinances such as zoning, building codes, land use regulations or subdivision ordinances meet the minimum standards to the [agency's] satisfaction, the [agency] may approve these ordinances as adequate floodplain regulations under this statute.

(7) Provide technical assistance to all local units of government through engineering assistance, model ordinances, data collection,
collection, evaluation of permits, training, monitoring of local administration and enforcement and other activities relating to the purposes of this act.

(8) In cooperation with local governmental units, conduct, whenever possible, periodic inspections to determine the effectiveness of local floodplain management programs, including an evaluation of the enforcement of and compliance with local floodplain management ordinances.

If the agency, after a public hearing, determines that the local government is not properly administering or enforcing its floodplain ordinance, the agency shall direct appropriate administration. If corrective action is not taken within a reasonable time, not to exceed [90] days, the agency shall administer the ordinance for the local unit of government and charge the cost of all such administration to the local government. In addition, the cost of the enforcement hearing and adequacy determination shall be charged to the local government.

(9) Administer the floodplain management program including, but not limited to:

(i) Establish technical standards for the delineation and mapping of floodplains, floodways [and coastal hazard areas] taking into account existing and anticipated development.

(ii) Conduct and/or coordinate engineering studies to determine the vertical and horizontal limits of floodplains, floodways [and coastal high hazard areas].

(10) Serve as the repository for all flood data within this state.

(11) Inspect and investigate all conditions relating to the obstruction or development of floodplains; the agency or its duly appointed representative shall have the right to enter at all reasonable times in or upon any private or public land for the purposes of inspection and investigation.

(12) Assist local governments and other state agencies to develop comprehensive floodplain management programs.

(13) Develop programs that address nonconforming uses and structures within the state’s floodplains which will result in the gradual phase out of those nonconforming uses and the gradual conversion of nonconforming structures to floodproofed or flood protected structures through a program of relocation and/or floodproofing.

(14) Mark the floodplains of the state to show elevations reached by historic flood(s) so property owners may be aware of the potential for flooding on any given property.

(15) Develop programs/procedures to acquire structures in flood prone areas that will result in an ultimate reduction in cost to the taxpayers and to preserve or restore the natural values of floodplain resources.

(16) Develop data and promulgate minimum regulations that will account for the effects of urbanization that lead to increased runoff, increased flood elevations [and increased coastal erosion] which threaten existing and future development.

(17) Work in cooperation with federal, state or local agencies in the
development of flood warning systems, evacuation plans and flood
emergency preparedness plans for the purpose of reducing damages
and the threat to life and property.
(18) Enforce the provisions of this act including the rules and regula-
tions duly promulgated.
(19) Accomplish all other activities that are necessary and lawful in
order to meet the purposes of this act.

COMMENT: A state may prefer to shorten the list of agency powers by
substituting some of the preceding with the paragraph below:
[The [agency] is authorized to develop information and data and to
distribute it on flooding and the various techniques of floodplain manage-
ment. The [agency] may also assist local units of government in the
development of a comprehensive flood damage reduction program in-
cluding but not limited to programs for the gradual elimination of non-
conforming uses and upgrading of nonconforming structures, programs
for dealing with impacts of urbanization on hydrology and hydraulics,
signing floodplains, acquisition and relocation, flood warning, pre- and
post-flood hazard mitigation programs, including assessment of the im-
 pact of proposed emergency protection measures, floodproofing, multi-
objective planning, regulation and implementation.]
When this alternative is used the following powers can be deleted:
(paragraphs 12, 13, 14, 15, 16, & 17).
(Paragraph (6)) This scenario assumes local units of government already
have, or will adopt, as part of this floodplain ordinance, the appropriate
administrative framework (zoning committees, Board of Appeals, etc.)
to administer zoning ordinances.
(Paragraph (12)) A state may wish to add floodproofing standards in
statewide building codes or to require all subdivision plats display flood
elevations, floodway lines [and coastal high hazard boundaries for V-
zones] and require that subdivisions in urban areas have detention basins
to prevent runoff from being “increased” above predevelopment condi-
tions during a flood. Further, this could include planning and implementa-
tion of flood hazard mitigation programs.
(Paragraph (15)) States considering the adoption of acquisition programs
should review the existing acquisition programs in place in other states — see the section of these model statutes entitled “innovative and/or incen-
tive programs to reduce flood damages.”
(Paragraph (16)) This general subject is commonly referred to as “storm-
water management” and is becoming increasingly popular for use by local
or regional governments in rapidly urbanizing areas to prevent increased
flood damages.

1 Section 4. [Local Governments to Adopt Floodplain Zoning
2 Ordinances.]
3 (a) Within [6] months after notification from the [agency] that ade-
4 quate mapping and data are available to identify the floodplains, each

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local government shall adopt a floodplain map and ordinance which
meets or exceeds the minimum standards of this act and of the rules
established by the [agency]. The local government has responsibility
and authority to regulate all mapped and unmapped floodplains within
their jurisdiction. Nothing in this act shall prohibit a local government
from adopting more restrictive standards than those contained in the
minimum state regulations.

After data are available and before adoption of local regulations, the
[agency], in order to prevent increased flood elevations and protect ex-
isting structures and property rights, may order the local government
to declare a moratorium on any development in the identified floodplain
until adequate regulations are locally adopted and approved by the
[agency]. The local government shall, within [3] months of the above
date, submit an appropriate draft ordinance and adequate floodplain
map to the [agency] for approval. If the [agency] determines that the
local government has the resources, expertise and capability to ad-
minister such a program and has indicated its intention to administer
the program in accordance with the provisions of this chapter and the
guidelines contained in rules adopted by the [agency] pertaining to
floodplain regulations, it shall, within [30] days of receipt of the or-
dinance give preliminary approval, or disapproval with identified defi-
ciencies, to the ordinance and map for that local government. Upon
completion of the approval process and within the remainder of the
[6] month process, the local government shall adopt and/or amend the
ordinance and map and thereafter regulate the floodplain areas within
their jurisdiction. Such regulations will be administered in accordance
with the provisions provided herein and approved in the local or-
dinance. No ordinance or amendment shall become effective until ap-
proval by the [agency]. The local government shall have the power to
collect reasonable fees from applicants for the cost of administering
the program.

(b) Any deviation from the standards of the floodplain zoning or-
dinance, for which a permit has been denied by the [zoning ad-
ministrator], may be allowed only upon written request for a variance
submitted to the [zoning administrator], public hearing, and issuance
of a variance by the [zoning appeals board]. The [zoning appeals board]
may authorize in specific cases such variance from the terms of the
ordinance as will not be contrary to the public interest where, owing
to special conditions affecting a particular property, a literal enforce-
ment of the provisions of the ordinance would result in unnecessary
hardship. A variance:

(1) Shall be consistent with the spirit and purpose of the floodplain
zoning ordinance.

(2) Shall not permit a lower degree of flood protection than the flood
protection elevation.

(3) Shall not be granted for a use that is common to a group of ad-
jacent lots or premises.

(4) Shall not be granted unless it is shown that the variance will
not be contrary to the public interest or damaging to the rights of other
persons or property values in the area.
(5) Shall not be granted for actions which require an amendment
to the floodplain zoning ordinance.
(6) Shall not have the effect of granting or increasing a use of prop-
erty which is prohibited in a particular zoning district.
(7) Shall not be granted solely on the basis of economic gain or loss.
(8) Shall not be granted for a self-created hardship.
(e) An applicant, the state, an aggrieved property owner or local unit
of government may appeal the decision of the [local zoning official] to
the [zoning appeals board] within [30] days of notification of a deci-
sion. The decision of the [zoning appeals board] may be appealed to
the [appropriate court] within [30] days of notification of a decision.
The following procedures shall be used by the [zoning appeals board]
in hearing disputes concerning the district boundaries shown on the
official floodplain zoning map:
(1) Where a floodplain district boundary is established, the regional
flood elevations or profiles for the point in question shall be the gover-
ning factor in locating the district boundary. If no regional flood eleva-
tions or profiles are available, other available evidence may be ex-
amined.
(2) In all cases, the person contesting the location of the district
boundary shall be given a reasonable opportunity to present arguments
and technical evidence to the [zoning appeals board]. Where it is deter-
mined that the district boundary is incorrectly mapped, the [zoning
appeals board] shall inform the [zoning committee] to petition the gover-
n ing body for a map amendment.
(d) Amendments to the floodplain map or ordinance must be approved
by the [agency] before such amendments are effective.
(e) Copies of all local permits, public hearing notices and decisions
on appeals, variances and amendments shall be sent to the [agency]
which shall have the authority to appeal any such decision as a full
party. The [agency] may waive the requirement for copies of permits
in its entirety or by category of structural works.

COMMENT: (Paragraph (a)) A moratorium may be necessary to prevent
significant adverse impacts on other property owners due to a planned
or actual development which would encroach into the floodplain and
cause an increase in flood elevations, velocities or coastal erosion rates.
The time deadlines presented here are only suggested; it is likely that
other state statutes define the ordinances adoption procedures for local
units of government. The time deadlines used in the floodplain act should
be consistent with those in other enabling authority.
If a local unit of government is found to be incapable of adminis-
tering an ordinance, the state and locals should seek alternatives, such as:
cooperative agreements with other units of government, simple ordi-


(Paragraph (b)(3)) In such a case, the zoning ordinance would have to be amended through proper procedures.

In order for any variance to be granted, the board of adjustment/appeal, must determine if unnecessary hardship has been demonstrated sufficiently to warrant a permit to be issued which is inconsistent with the dimensional standards contained within the ordinance. For example, where a lot is too small to place adequate fill around the structure without crossing the property line.

Section 5. [Enforcement Sanctions.]

(1) Every regulated development constructed or maintained in violation of any local floodplain ordinance adopted or approved under this section is hereby declared to be a public nuisance and the creation thereof may be enjoined and the maintenance thereof may be abated by action of the state, any local unit of government of the state or any citizen thereof.

(2) A violation of an approved local floodplain ordinance is also a violation of this act and may be punished by a fine of not less than [   ] dollars or no more than [   ] dollars or a sentence of not less than [   ] days or no more than [   ] days in jail. Each day of violation is a separate offense.

COMMENT: The classification of a violation as civil/criminal, misdemeanor/felony, etc., should be carefully determined in each state to result in the best institutional enforcement strategy.

Section 6. [Severability.] [Insert severability clause.]

Section 7. [Repealer.] [Insert repealer clause.]

Section 8. [Effective Date.] [Insert effective date.]
State Fishing Enhancement Act
(Statement)

This legislation, based on existing Louisiana law, is designed to promote and facilitate the establishment and maintenance of artificial reefs in offshore waters. It further provides for the jurisdiction and cooperation of various state agencies in the implementation of plans and programs developed pursuant to this legislation. The act requires that artificial reefs in waters covered by the legislation be sited, constructed, and subsequently maintained in a manner which shall enhance and conserve fishing resources, minimize conflicts among competing uses, and facilitate access and utilization by the fishing industry. The artificial reef development program is created to enhance the artificial reef potential in the state. Related state agencies are designated to participate in the reef program. The state department of wildlife and fish is designated to administer the act, and is granted responsibility to plan and review permit applications, hold hearings, develop technical data, coordinate with the other relevant state agencies, and generally oversee the implementation of this legislation. A "reef fund" consisting of grants and gifts is created, which may be used solely for the operation of the programs under the act. A statewide artificial reef plan is mandated, which must include specific roles for all relevant governmental bodies, criteria for permitting and siting reefs, designation of priority reef development areas, and provisions and criteria for managing the program and specific artificial reefs as well. Provisions for coordination with federal agencies in the acquisition of necessary federal permits are included, and the state is specifically allowed to serve as the permitting authority within its jurisdiction consistent with federal law.

Because of its reliance on existing state programs, the State Fishing Enhancement Act is not published here in Suggested State Legislation draft form. Interested readers should direct requests for copies to the state of Louisiana, asking for House Bill No. 1111 from the 1986 Regular Session.
Statewide Source Separation and Recycling Act (Statement)

This legislation, based on New Jersey law, mandates statewide source separation and recycling of solid waste in order to decrease the flow of solid waste to sanitary landfill facilities, aid in the conservation and recovery of valuable resources, conserve energy in the manufacturing process, and increase the supply of reusable raw materials for the state's industries. The recycling of reusable waste materials will reduce substantially the required capacity of proposed resource recovery facilities and contribute to their overall combustion efficiency, thereby resulting in significant cost savings in the planning, construction, and operation of these resource recovery facilities. The act mandates the source separation of marketable waste materials on a statewide basis so that reusable materials may be returned to the economic mainstream in the form of raw materials or products rather than be disposed of at the state's overburdened landfills, and further declares that the recycling of marketable materials by every municipality in the state, and the development of public and private sector recycling activities on an orderly and incremental basis, will further demonstrate the state's long term commitment to an effective and coherent solid waste management strategy. The New Jersey law is the nation's most comprehensive mandatory recycling program.

Because of its length and its tie in to existing state statutes, the Statewide Source Separation and Recycling Act cannot be published in its entirety here. Interested readers should direct requests for copies to the state of New Jersey, asking for Senate Bill No. 1478/Assembly Bill No. 1781 approved during the 1986 session.
Animal Fighting and Baiting Act

This act, based on South Carolina law, is an attempt to eliminate the use of animals in fights between animals or between animals and humans for the purpose of show or spectacle. Acts in violation of the legislation are defined as felonies, and punishment is specified accordingly. Violations of the act include owning an animal for fighting purposes, participating in such fights, permitting the use of an owned facility for animal fighting purposes, or acquiring the rights to use property or a facility for such purposes. Mere attendance at such events is made a misdemeanor. Animals held for such uses are to be seized under the act, and maintained or disposed of in a humane manner. Exemptions include hunting in accordance with existing laws, using animals for the working of livestock, use of trained guard dogs, and the training of such dogs.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Animal Fighting and Baiting Act.

Section 2. [Definitions.] As used in this act:

1. “Animal” means any live vertebrate creature, domestic or wild.
2. “Fighting” means an attack with violence by an animal against another animal or a human.
3. “Baiting” means to provoke or to harass an animal with one or more animals with the purpose of training an animal for, or to cause an animal to engage in, fights with or among other animals or between animals and humans.
4. “Person” means every natural person or individual and any firm, partnership, association, or corporation.

Section 3. [Animal Fighting and Baiting - Felony.]

(a) Any person who:
1. owns an animal for the purpose of fighting or baiting;
2. is a party to or causes any fighting or baiting of any animal;
3. purchases, rents, leases, or otherwise acquires or obtains the use of any structure, facility, or location for the purpose of fighting or baiting any animal; or
4. knowingly allows or permits or makes available any structure, facility, or location to be used for the purpose of fighting or baiting any animal is guilty of a felony and upon conviction must be punished by a fine of [five thousand] dollars or imprisoned for [five] years or both.

(b) Any person who:
1. is present at any structure, facility, or location where preparations are being made for the purpose of fighting or baiting any animal
Animal Fighting and Baiting Act

with knowledge that those preparations are being made; or
(2) is present at any structure, facility, or location with knowledge
that fighting or baiting of any animal is taking place or is about to
take place there is guilty of a misdemeanor and upon conviction for
a first offense must be punished by a fine of [five hundred] dollars or
imprisonment for [six] months, or both, and for a second offense by a
fine of [one thousand] dollars or imprisonment for [one] year, or both.
Any person convicted of a third or subsequent offense is guilty of a
felony and must be punished by a fine of [five thousand] dollars or im-
prisonment for [five] years, or both.

Section 4. [Animals to be Seized.] Whenever an indictment is returned
charging a violation of any provision of this act, or if an indictment
is waived, the court shall order the animal or animals involved seized
and held until final disposition of the charges and shall provide for
the appropriate and humane care or disposition of the animal or
animals. The provisions of this section may not be construed as a limita-
tion on the authority under law to seize any animal as evidence at the
time of an arrest. If any animal seized pursuant to the provisions of
this section or otherwise seized in accordance with law is unable to
survive humanely the final disposition of the charges, in the opinion
of the court, the court may order the termination of the animal’s life.
Upon the conviction of the person charged, or upon a plea of guilty
or of nolo contendere, any animal involved, whose life has not been
terminated, becomes the property of the state and the court shall order
a humane disposition of the animal.

Section 5. [Applicability of Provisions.]
(a) The provisions of section 3(a) do not apply to any person:
(1) using any animal to pursue or take wildlife or to participate
in hunting in accordance with the game and wildlife laws of this state
and regulations of the [state wildlife and marine resources department];
(2) using any animal to work livestock for agricultural purposes;
(3) properly training or using dogs for law enforcement purposes
or protection of persons and private property.
(b) The provisions of this act do not apply to game fowl.

Section 6. [Crime Added to List of Felonies.]
(a) The crime in section 3(a) relating to owning an animal for the
purpose of fighting or baiting, being a party to or causing any fighting
or baiting of any animal, purchasing, renting, leasing, or otherwise
acquiring or obtaining the use of any structure, facility, or location
for the purpose of fighting or baiting any animal, or knowingly allow-
ing or permitting or making available any structure, or facility, or loca-
tion to be used for the purpose of fighting or baiting any animal is added
to the list of crimes classified as felonies [insert appropriate reference
to state law].
(b) The crime in section 3(b) relating to a third or subsequent convic-
tion of being present at a location with knowledge that preparations
are being made for animal fighting or baiting or being present at a
location with knowledge that animal fighting or baiting is taking place
or about to take place is added to the list of crimes classified as felonies
[insert appropriate reference to state law].

Section 7. [Provisions are Cumulative.] The provisions of this act are
cumulative and not in lieu of any other provision of law.

Section 8. [Exemptions.] This act shall not apply to dogs used for the
purpose of hunting or for dogs used in field trials more commonly
known as “water races,” “treeing contests,” “coon-on-a-log,” “bear-
buying,” or “fox-pen-trials.” Such “fox-pen-trials” must be approved
by permit for field trials by [state wildlife and marine resources
department].

Section 9. [Severability.] [Insert severability clause.]

Section 10. [Repealer.] [Insert repealer clause.]

Section 11. [Effective Date.] [Insert effective date.]
Handicapped Individuals Rental Discrimination Act

This act, based on Wisconsin law, expands protections by specifically prohibiting rental discrimination within a state against any individual with impaired vision, hearing, or mobility because that individual is assisted by an animal trained to provide assistance to him or her. Eviction because of such assistance, and increased rent or other payments for such a reason is also prohibited. These protections are made contingent upon the renter showing to the lessor credentials issued by a recognized school certified to train animals for such purposes, and upon the renter accepting responsibility for sanitation with respect to the animal, and for any damage caused by it. The Committee on Suggested State Legislation chose to include this measure because it felt that states may wish to expand their antidiscrimination provisions.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Handicapped Individuals Rental Discrimination Act.

Section 2. [Animals Assisting the Handicapped.]
(a) If an individual’s vision, hearing or mobility is impaired, it is discrimination on the basis of handicap for any person to refuse to rent to the individual, cause the eviction of the individual from rental housing or require extra compensation from or engage in the harassment of the individual because he or she keeps an animal specially trained to lead or assist individuals with impaired vision, hearing or mobility if both of the following apply:
(1) Upon request, the individual shows to the lessor credentials issued by a school recognized by the department as accredited to train animals for individuals with impaired vision, hearing or mobility.
(2) The individual accepts liability for sanitation with respect to, and damage to the premises caused by, the animal.
(b) Subsection (a) does not apply in the case of an owner-occupied dwelling if the owner or a member of his or her immediate family occupying the dwelling possesses and, upon request, presents to the individual a certificate signed by a physician which states that the owner or family member is allergic to the type of animal the individual possesses.

Section 3. [Severability.] [Insert severability clause.]

Section 4. [Repealer.] [Insert repealer clause.]

Section 5. [Effective Date.] [Insert effective date.]
Uniform Statutory Rule Against Perpetuities Act (Note)

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has drafted a uniform statutory rule against perpetuities. This note explains the legislation, which may be obtained from NCCUSL in Chicago.

In American property law, rights to possession, use and/or consumption of property exist in, or run with, time. The limitations or extent of rights depend upon time. All the rights that one may have — full ownership or fee simple ownership (of real property) — mean all the rights that a person may have for infinite time. But it follows that rights may be owned or held for less than an infinite amount of time. And so we have such interest in property as “estates for years” and “life estates.” With such property interests, there is a remainder interest which occupies the time after the “estate for years” or the “life estates” terminate. These interests are called “remainder interests,” and they are interests in property that can arise only at a time in the future. Hence, they are called “future interests.”

Future interests become even more complicated because they may be “vested” or “nonvested” interests. A “vested” future interest belongs to someone now — immediately — even though the person to whom it belongs may not come into actual possession of the property for years. A “nonvested” interest belongs to no one until some event in the future determines who actually takes it. For example, James may, by deed, give Smith an estate for life in specific real estate, while giving the remainder to all of Smith’s children alive at the time Smith dies. This remainder cannot vest until Smith dies, because it cannot be determined how many children might be born to Smith (or adopted by Smith) and how many might be alive when he dies, until his actual death. The remainder will vest only when he dies and the life estate terminates.

Nonvested future interests have been a part of American property law, as an inheritance from English common law, since the time of the original thirteen colonies. But the common law has, also, established limitations upon nonvested future interests. The principal limitation is expressed in terms of time, and the policy to be served is simple — the law does not favor nonvested future interests that cannot vest, or will not vest, within a cognizable time period. The classic expression of this limitation is called the “Rule Against Perpetuities.” The accepted common-law formulation of the Rule is as follows:

“No [nonvested property] interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.”

The common-law Rule appears simple, but it has evolved into a kind of conundrum in its application. Improperly drafted deeds, trusts, instruments, and wills can result in invalid future interests. These are frequently interests that should not be extinguished, and people are injured
as a result.

There are two fundamental problems with common-law Rule that lead to such harsh results. The Rule depends upon possible, not actual, events. Any hypothetical violation of the Rule, no matter how improbable, extinguishes otherwise legitimate interests. It is, also, an all-or-nothing kind of Rule. If one member of a class of possible takers of a future interest potentially takes a vested interest beyond the prescribed time, the interests of all members of the class fail. The Rule Against Perpetuities challenges those who draft property documents. A slight inadvertence can have a very drastic and harsh effect.

Nobody questions the fundamental policy. Perpetual nonvested interests should not be permitted. The problem is to serve this fundamental policy while eliminating the harsh effects of the common-law Rule. This is the role the Uniform Statutory Rule Against Perpetuities is designed to play.

The common-law Rule has a validating and invalidating function. Those interests that meet the prescribed time period are absolutely invalid and unassailable. The Uniform Statutory Rule Against Perpetuities principally affects the invalidating side of the common-law Rule. If a future interest must vest within the prescribed period of a life in being plus 21 years (the common-law formula), it is a valid interest under the Uniform Statutory Rule. But, if it violates the Rule in some hypothetical sense, the Uniform Statutory Rule does not, absolutely, extinguish an interest.

The Uniform Statutory Rule adopts what has become known as the “wait-and-see” approach. This is the principal reform of the common-law Rule. Rather than invalidating future interests, based on hypothetical possibilities, the Uniform Statutory Rule provides a period of time within which an interest can actually vest. If it does, it is saved. If it does not, then it is invalid. We wait and see, in other words, if an interest will, in fact, vest.

The basic statement of the Rule in the Uniform Statutory Rule is as follows:

“A nonvested property interest is invalid unless:
(1) when the interest is created, it is certain to vest or to terminate within the lifetime of an individual then alive or within 21 years after the death of that individual; or
(2) the interest either vests or terminates within 90 years after its creation.”

The initial part of the Rule restates the common law and validates interests that meet the basic test. The second part of the Uniform Statutory Rule deals with invalidation. It sets a period of time, 90 years, within which actual vesting validates an interest. Invalidation can occur only if the future interest has not vested 90 years after its creation. We “wait and see” 90 years.

Why a fixed number of years? It is the simplest and least capricious way to measure time. Why 90 years? To give ample time, within the lifetimes involved in measuring these interests, for a nonvested future interest to vest. Ninety years represent an estimate of the actual time most
extended future interests will take, at the outside, to vest. If they do not vest, 90 years is a sufficient time to justify invalidating such interests.

Powers of appointment are given separate treatment in the statement of the basic Rule in Section 1. A “power of appointment” leaves to another person the opportunity to designate who takes nonvested future interests. They are traditionally subject to the “Rule Against Perpetuities.” The Uniform Statutory Rule deals with them separately from other property interests because of particular distinctions made between general and non-general powers, testamentary and non-testamentary powers. But the Rule is fundamentally the same. If a delegation of a power vests within the common-law time for vesting, it is absolutely valid. Otherwise, “wait and see,” the 90 year period, applies to the question of invalidity.

Beyond the “wait-and-see” approach to invalidity, the Uniform Statutory Rule gives invalid future interests a second chance. Section 3 permits a court to reform an invalid interest or power of appointment “in the manner that most closely approximates the transferor’s manifested plan of distribution . . .” The court can reform interests by vesting them within 90 years of their creation. So, even if 90 years pass and there is no vesting of an interest, the appropriate court can save it from extinction.

The remainder of the Uniform Statutory Rule copes with issues inherent in the basic application of the “Rule Against Perpetuities.” Section 2 settles questions of the creation of nonvested property interests because the Rule begins to run at the time an interest is created. And there are some kinds of interests to which the Rule should not apply. These are the subject of Section 4. An example is a fiduciary’s power relating to the administration or management of assets. Fiduciary powers are technically nonvested in character, but are no threat to the ultimate determination of property ownership. It would, therefore be inappropriate to apply the Rule against fiduciary powers.

The Uniform Statutory Rule Against Perpetuities eliminates the onerous burdens of the common-law Rule without disturbing the basic policy which the common-law Rule evolved to serve.
Uniform Commercial Code Lease Act
(Note)

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has drafted a new Article 2 to the Uniform Commercial Code dealing with leases. This note explains the legislation, which may be obtained from NCCUSL in Chicago.

About $150 billion of goods ranging from tuna boats to automobiles are leased every year in the United States. A lease occurs when a lessor transfers property to a lessee while retaining actual title of the property. The lessee enjoys the possession and use of the property for an authorized time period and pays the lessor for that possession and use. At the end of the fixed lease term, the right to possession and use reverts to the lessor. This traditional or “true lease” of personal property is traditionally called a “bailment for hire.”

The genius of American property concepts is their adaptability. The “lease” has been adapted to other ends than a transfer of mere use and possession of property from lessor to lessee. Leasing is a common method for, in fact, financing what at its end point is the sale of the goods leased. It is as a financing mechanism that leasing has so dramatically grown in the marketplace. It combines tax advantages and reduced costs in such a way as to encourage its use in a wide range of commercial contexts.

But, if there is genius in the adaptability of property law concepts such as “lease,” there are also problems. The widespread use of leasing, particularly to finance the purchase of goods, strains its own underpinnings in the law.

Historically, we have thought of financed purchase transactions as conditional sales. As sales, such transactions fall under the Uniform Commercial Code (UCC) — particularly Articles 2 and 9. But a leasing transaction, even though it seems identical to a conditional sale, is not clearly subject to the UCC. The rights and remedies of lessor and lessee, therefore, are not well- or uniformly defined, and courts have characterized these transactions differently from jurisdiction to jurisdiction. Many troubling issues have been extensively and confusingly litigated.

The Uniform Commercial Code, Article 2A - Leases, gives leasing transactions an appropriate underpinning in the law. Because of the broad similarities between lease and sales transactions, that underpinning is largely derived from the sales article of the UCC - Article 2. Hence, the new Article is Article 2A, indicating its relationship to Article 2.

The Uniform Commercial Code, Article 2A - Leases, governs the creation and execution of a leasing contract. If there is a default on the contract, it governs the remedies. There are five parts to UCC, Article 2A. The parts are: General Provisions; Formation and Construction of a Lease Contract; Effect of a Lease Contract; Performance of Lease Contract: Repudiated, Substituted, and Excused; and Default.
GENERAL PROVISIONS

The General Provisions include the large, general definitions section and general rules pertaining to the construction of leasing contracts, including conflict of law provisions, choice of forum rules, and interpretation of remedies. Most of these provisions are drawn from Article 2 of the UCC. Of particular note is Section 2A-107, which permits waiver of provisions in UCC, Article 2A, or variation of them by agreement of parties. Obligations of “good faith,” diligence, reasonableness and care cannot be disclaimed by agreement, however. Section 2A-108 proscribes “ unconscionable contracts.”

There are some definitions that should be highlighted. UCC, Article 2A, distinguishes between “true leases” and “finance leases.” All leases of personal property are subject to UCC, Article 2A. But the character of the lessor changes, depending upon whether the lease is a “true lease” or a “finance lease.” In the latter, the lessor is more like a lender than a supplier of goods, and that makes a difference with respect to key provisions of UCC, Article 2A, such as the warranty provisions. The definition of “finance lease” in Section 2A-103 (1) (g) makes that important distinction. A “finance lease” occurs when the lessor is not a manufacturer or supplier of the goods leased, and possesses the goods leased only for the purpose of leasing them. In a finance lease, the lessor, also, has a copy of a contract evidencing lessor’s purchase of the goods, or promise to purchase, as a condition for an effective lease contract.

UCC, Article 2A, creates an entity in Section 2A-103 (1) (o) called the “lessee in the ordinary course of business.” The definition parallels the “buyer in the ordinary course of business” in UCC 1-201 (9). Both take property free of prior encumbrances, under the appropriate conditions, and are essential to commercial enterprise.

UCC, Article 2A, also defines “supplier” as “a person from whom a lessor buys or leases goods to be leased under a finance lease.” This definition is important because goods in a “finance lease” must come from another source than a lessor. This definition is also important for the operation of crucial provisions of UCC, Article 2A, such as the warranty provisions.

FORMATION AND CONSTRUCTION OF A LEASE CONTRACT

Much of Part 2 on formation of a leasing contract deals with standard essentials, such as statute of frauds requirements and abolition of seals. An agreement can be created exactly as any other kind of agreement — “made in any manner sufficient to show agreement.” Offer and acceptance, firm offer, and course of performance are covered very much as UCC, Article 2, generally covers these issues for sales contracts.

Key provisions are the warranty provisions. Warranties may be express or implied. An express warranty arises from any affirmation of fact, description of goods, sample, or model that is a basis for the bargain.

In a sale transaction, the UCC provides warranties of title and
against infringement by any claims of another person. There are similar warranties in UCC, Article 2A, although title is not protected, since title remains in the lessor. But the lessor does warrant the lessee's enjoyment of the leasehold interest against "a claim to or interest in the goods that arose from an act or omission of the lessor." This warranty applies to all lease contracts. Infringement, however, is not warranted against in finance leases, and this warranty only binds a merchant-lessee, who deals regularly in goods of the kind.

Implied warranties are of two kinds, merchantability and fitness for a particular purpose. Both kinds of implied warranty are directly derived from UCC, Article 2. The warranty of merchantability operates between merchants, and assures the resalability of goods. The fitness warranty presumes a purpose and reliance upon the lessor to supply goods fit for the purpose. Both kinds of implied warranties can be excluded or modified by agreement.

Implied warranties do not, however, apply to finance leases. Remember that the lessor in a finance lease is more like a lender than a supplier. Therefore, UCC, Article 2A, passes the implied warranties of the supplier-seller to the lessor-buyer to the lessee. The lessor warrants nothing, directly.

EFFECT OF A LEASE CONTRACT

A lease contract is effective much as any other contract is. The terms of the agreement control as between lessor and lessee. But what of a transfer of lease rights to another person? What about creditor's rights? Part 3 establishes key third party rights.

Generally, a lessee's rights under a lease contract or the residual rights of a lessor are freely transferable, unless the contract prohibits the transfer or unless transfer risks the other party's contract rights. An assignment, so-called, of lease rights is treated as any transfer is, and is presumed to transfer both rights and obligations, unless otherwise specified in the agreement. If a subsequent lease is entered, when there is an existing lease, the subsequent lease is subject to the prior lease. However, a subsequent "lessee in the ordinary course of business," who deals with a lessor who is a merchant dealing in goods of the kind leased and to whom the goods are entrusted under the prior lease, will take goods free of the prior, existing lease contract.

Another third party issue dealt with in Part 3 of UCC, Article 2A, is lien priorities. Here, UCC, Article 2A, becomes analogous to provisions in UCC, Article 9. A statutory materialmen's lien has priority over any interest in a lease contract, unless other law sets a different priority. Otherwise, lessees' creditors take subject to the lease contract. Lessors' creditors with prior interests to those arising under a lease contract, generally, take priority over interests arising under the contract. However, a "lessee in the ordinary course of business" takes free of any prior perfected security interests, unless the lessee has specific knowledge of their existence. A prior interest of a lessee takes priority over a subsequent interest of a lessor's creditor. But there are special instances in which a creditor of a lessor has priority over a lessee's
interests, even though the lease interest is prior in time. Included are instances in which depriving the creditor of possession of the collateral would be fraudulent to the creditor “under any statute or rule of law.”

Goods that become fixtures present priority problems when leased. Fixtures are defined as goods “so related to particular real estate that an interest in them arises under real estate law.” Who has priority between the lessor and those holding the real estate interests? Generally, if goods are leased and become fixtures, the lessor with prior interest in them has priority over those with the real estate interests — if the lessor perfects his or her prior interest with a fixture filing under Article 9 of the UCC. A fixture filing is made by placing an appropriate financing statement in the real estate records. There are instances in which a lessor can retain an interest against the real estate holder without filing, but a fixture filing will generally be essential.

“Accessions” also present a special problem. An “accession” occurs when leased goods “are installed in or affixed to other goods.” Any existing rights in a lease contract are superior to any rights in the whole in which leased goods become accessions after the lease contract is entered. If the lease contract arises at the time goods become accessions or after, earlier interests in the whole have priority. If someone purchases the whole after a lease contract, rights under the lease contract take priority over the purchaser’s rights. However, a “buyer in the ordinary course of business,” or a prior creditor who makes advances without knowledge of the lease contract, takes priority over a lessor or lessee, even though the lease contract precedes the purchase or advance in time.

PERFORMANCE OF A LEASE CONTRACT

Part 4 of UCC, Article 2A, deals with performance and repudiation of a contract, within substituted performance and with excused performance. Of course, performance of a lease contract is the primary obligation. If performance is to be impaired, however, UCC, Article 2A, gives contracting parties the latitude to minimize losses. Much of Part 4, again, is derived from UCC, Article 2.

For example, a party to a lease contract who has reasonable grounds for insecurity as to the performance of the other party, may demand written assurance of performance. Until written assurance is provided, the demanding party may suspend his or her performance. If assurance is not given in a reasonable time, the contract may be treated as repudiated.

Anticipatory repudiation of a contract by one party (repudiation before performance is due) gives options to the other party — to wait for repudiation to be retracted or to treat the contract as in default. A repudiating party can retract repudiation at any time up to the time of performance, unless the other party has cancelled the contract.

When performance is impaired without the fault of either party, because of such events as failure of an agreed means of transport, a commercially reasonable substitute must be accepted. There are instances in which performance may be excused — “if performance as
agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the lease contract was made." The lessor must notify the lessee (and the supplier if there is a finance lease) of delay or non-delivery. These are examples of the options open to contracting parties.

DEFAULT
Upon default, UCC Article 2A, provides remedies in Part 4. These include damages and equitable remedies, such as specific performance. UCC, Article 2A, permits cover. That is, a party may seek goods from another source to limit losses. Mitigation of damages is encouraged. The general measure of any damages is actual loss.

LEASE TRANSACTIONS AS SECURED TRANSACTIONS
The last issue of importance addressed in UCC, Article 2A, is not in UCC, Article 2A, itself, but in an added appendix. The appendix consists of a crucial amendment to Section 1-201 (37) of the UCC, which defines the term "security interest." If a lease involves a "security interest," it is subject to Article 9 of the UCC. A lease involves a security interest, dependent upon four alternative factors or characteristics. If the term of the lease is equal or greater than the remaining economic life of the goods; if there is a renewal option for no additional consideration or nominal consideration; if there is mandatory renewal or the lessee becomes owner at the end of the lease term; or if the lessee has the option to purchase at the end of the lease term for no additional consideration or nominal consideration, or any combination of these factors, the lease would tend to be treated as creating a security interest and would be subject to Article 9.

CONCLUSION
The Uniform Commercial Code, Article 2A - Leases, is comprehensive, dealing with every phase of leasing transactions. It draws a great share of its concepts from Article 2 of the UCC, but is adapted to the peculiarities of the leasing form. It is an important advance in commercial law.
Uniform Dormant Mineral Interests Act (Note)

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has drafted comprehensive legislation governing dormant mineral interests. This note summarizes the legislation, which may be obtained from NCCUSL in Chicago.

Ownership of real estate means ownership of interests and rights in an actual piece of geography. But the law is more concerned with the interests and rights than it is with the geography, and must always be thought of in terms of rights and interests as opposed to boundaries. The term "fee simple" denotes ownership of all the rights and interests the law permits anyone to have. But rights and interests from mineral in real estate can be divided in a number of ways. A common division involves a separation of surface interests from mineral interests. That is, the same geography, the same bounded and described piece of land, may be subject to the surface interest of one person and the mineral interest of another person.

Such division of interests is common in the United States. Railroads in the West, for example, commonly sold land grants, while reserving mineral interests in the land sold. The surface owner uses the surface of the land for whatever purpose he desires — homes, ranches, farms, commercial, or industrial structures, whatever suits the time and place. But the surface owner cannot explore for, or take any minerals from, the land-oil, gas, coal, iron ore. These remain in the ownership of the railroad. The railroad gets the benefit of the mineral interests, which can be pursued even though the surface interests are disrupted.

This kind of mineral interest is called a "severance" in the language of property law and lawyers. It is a fee simple interest — all the rights and interests the owner can have under the law. It runs perpetually, and cannot be extinguished or merged with the surface interest unless the owner of the mineral interest volunteers to merge it with the surface interest by sale, gift or inheritance.

What happens if mineral interests (severances) continue over generations beyond the initial grant? Sometimes their owners are lost. (Railroads do not generally fall into this category.) People die, corporations are extinguished, and successors can’t be traced. But a "severance" can’t be extinguished. A fee simple interest never dies, even if all its owners have died or disappeared.

The result is a cloud on the title of the surface owner that assures full value for the land will never be realized. If there are valuable minerals to be removed, nobody can, because the owner is unknown. Leases, therefore, for exploration and taking minerals can’t be established. What is needed is a statutory remedy that performs two tasks: (1) provides clear indicia of uses and events that maintain mineral interests, and, (2) provides a procedure to terminate mineral interests that are, in fact, dormant.
The Uniform Dormant Mineral Interests Act (UDMIA) provides the remedy that is needed. It, initially, defines a dormant mineral estate — in terms of time, of use, and of legal notice.

First time - dormancy is dependent upon the passage of time during which a mineral interest is not used. No exploration for minerals or taking of them takes place. For 20 years after mineral interests are severed, there can be no dormancy. But, after that, the issue of dormancy can arise.

What is use? Use includes "production, geophysical exploration, exploratory or developmental drilling, mining, exploitation, development, or other active mineral operations . . ." No mineral interest can be considered dormant if any of these activities have taken place within a prior 20 years.

There are legal uses, so defined, as well, that are not related to actual use of a mineral interest in specific land. Paying taxes on mineral interests is one of them. Recordation of an instrument in the land records pertaining to a mineral interest is another. Anything recorded that "creates, reserves, or otherwise evidence a claim" will do. Recordation of a judgment specifically referring to a mineral interest is, also, a defined use that keeps the interest from becoming dormant.

Section 5 of UDMIA provides for preservation of a mineral interest even beyond these uses. A mineral interest may be preserved simply by recording a "notice of intent to preserve" on the property records. This is effective for 20 years, even if no other defined "use" otherwise preserves the interest. Owners who watch over their mineral interests have a simple means for preserving them.

If a mineral interest passes 20 years without a "use" or recordation of a "notice of intent to preserve," it may be terminated and merged with the surface interest by the surface owner or owners in a judicial proceeding. The action is treated as any action to quiet title is treated, with the same notice requirements.

If an owner of a mineral interest turns up during the pendency of such an action, a late "notice of intent to preserve" may be filed as a condition for dismissal of the action. The owner of the mineral interest has to reimburse the surface owner for his or her litigation costs. If a mineral interest is dormant for more than 40 years, however, such a late filing is not permitted.

If UDMIA is enacted, it applies to all mineral interests, no matter when created. However, no dormant mineral interest can be terminated and merged with the surface interest for at least two years after the passage of the Act. This moratorium permits owners of mineral interests to assert their rights, even though they have been de facto dormant.

UDMIA will remedy the difficulties presented by archaic severances. States that adopt it will ease problems of land ownership for their residents.
Delinquent Real Property Tax Notification Act

This act, based on New York law, establishes a mechanism to help avoid a tax sale of residential real property by providing for third party notification of delinquent taxes for senior citizens and disabled homeowners. The act allows senior citizens and disabled homeowners to request that duplicate tax bills and tax delinquency notices be sent to designated third parties.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Delinquent Real Property Tax Notification Act.

Section 2. [Definitions.] As used in this act:

(1) "Eligible taxpayer" means a senior citizen or disabled owner-occupant of residential real property consisting of no more than [three] family dwelling units.

(2) "Disabled" means

(i) a physical or mental impairment, including, but not limited to, those of neurological, emotional or sensory origins, which substantially limits one or more of such person's major life activities;

(ii) a record of such an impairment; or

(iii) is regarded as having such an impairment as certified by a licensed physician of this state.

(3) "Enforcing officer" means the officer responsible to enforce the collection of unpaid real property taxes.

(4) "Senior citizen" means a person who is [sixty-five] years of age or older as of the last date on which an application pursuant to this section may be made.

Section 3. [Third Party Notification of Real Property Tax for Elderly and Disabled Property Owners.] The [collecting officer] shall further enclose with each such statement a notice that any taxpayer who owns residential real property consisting of no more than [three] family dwelling units and who is age [sixty-five] or over or who is disabled is eligible for a third party notification procedure if desired. Such notice shall state that any eligible taxpayer wishing to participate in such procedure must designate an adult third party to receive notification, that the designated third party must consent to such notification, where the appropriate application form may be obtained, and that an application form must be filed with the collecting officer of the appropriate municipal corporation no later than a specific date, which date shall be no earlier than [sixty] days prior to the levy of taxes by such mun-
Section 4. [Duplicate Tax Statements for Elderly and Disabled Property Owners.]

(a) An eligible taxpayer may request a duplicate tax statement and a duplicate copy of any statement relative to unpaid real property taxes which are required by this act or any special act, local law, charter or administrative code to be sent to an adult third party. Such request shall be made on a form prescribed by the state board and shall be submitted to the collecting officer of the municipal corporation in which the eligible taxpayer resides no later than [sixty] days prior to the levy of taxes. Such form shall provide a section whereby the designated third party shall authorize consent to such designation. Such request for a duplicate tax statement and a duplicate copy of any statement relative to unpaid real property taxes shall be effective upon receipt by the collecting officer.

(b) The collecting officer shall maintain a list of all eligible property owners residing in such municipal corporation who have requested duplicate tax statements and a duplicative copy of any statement relative to unpaid real property taxes. The collecting officer shall forward a copy of the eligible taxpayer's request to the enforcing officer of such municipal corporation, who shall maintain a list of such eligible taxpayers for the purposes of complying with provisions of this section.

(c) A duplicate tax statement shall be sent by the collecting officer to the third party designated by an eligible taxpayer at the same time and in the same manner as the statement of taxes is given to the eligible taxpayer. Such duplicate tax statement shall carry the following legend, either imprinted thereon or on an enclosure:

"Duplicate Tax Statement. This statement is sent to you at the request of the property owner shown on the statement in the expectation that you will help the property owner avoid late payment of the enclosed tax bill, although you are under no legal obligation to do so. Your cooperation and assistance are greatly appreciated."

(d) A duplicate copy of any statement relative to unpaid taxes required by this act or any special act, local law, charter or administrative code shall be mailed to the third party designated by the eligible taxpayer at the same time and in the same form as the statement of unpaid taxes is given to the eligible taxpayer. Such duplicate copy of such statement shall carry the following legend, either imprinted thereon or on an enclosure:

"Duplicate Delinquency Statement. This statement is sent to you at the request of the property owner shown on the statement in the expectation that you will help the property owner to make payment"
of the delinquent taxes indicated on the enclosed notice of delinquency, although you are under no legal obligation to do so. Your cooperation and assistance are greatly appreciated."
Special User Housing Rehabilitation Program Act

This act, based on California law, provides for the establishment of a special user housing rehabilitation program that includes residential hotels, as defined, for any low or very low income households within the program. The act specifies that the only moneys which may be used for the purpose of making loans for the acquisition and rehabilitation of residential hotels or for related administrative expenses are those moneys allocated from the rental housing construction fund.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Special User Housing Rehabilitation Program Act.

Section 2. [Definitions.] As used in this act:
(1) "Department" means [department of housing and community development].
(2) "Deferred-payment loan" means a loan for acquisition and rehabilitation of a rental housing development which:
   (i) has a term of not more than [30] years, but which shall not in any event exceed the useful life of the rental housing development for which such loan is made, as determined by the [department], whichever is less; and
   (ii) is repaid in a single payment upon refinancing of such development at the end of the term of the loan. Such loans shall bear interest at the rate of [3] percent per annum on the unpaid principal balance, provided however, that the [department] may reduce or eliminate interest payments on a loan for any year or alternatively defer interest payments until the deferred-payment loan is repaid, if in the exercise of sound discretion, the [department] determines such action is necessary to provide affordable rents to households of very low and low income.
(3) "Rental housing development" means a residential structure or structures containing [five] or more rental dwelling units for the elderly or handicapped, provided that each unit is equipped with a kitchen and bathroom, or a structure or structures intended for use as a group home by [five] or more handicapped individuals or a residential hotel for any low or very low income household. "Residential hotel" shall have the same meaning as used in [insert appropriate reference to state statute] but, for purposes of this act, there shall be an additional requirement that a majority of the guestrooms in the hotel be residential hotels units. A "residential hotel unit" means a room used or intended to be used as a primary residential unit by a person or persons, which is subject to the provisions of [insert appropriate reference to state statute],
but which does not have either a self-containing kitchen or bathroom, or both.

(4) "Sponsor" means any individual, joint venture, partnership, limited partnership, trust, corporation, cooperative, local public entity, duly constituted governing body of an Indian reservation or rancheria, or other legal entity, or any combination thereof, certified by the [department] as qualified to own, manage, and rehabilitate a rental housing development. A sponsor may be organized for profit or limited profit or be nonprofit.

Section 3. [Special User Housing Rehabilitation Program-establishment.]

(a) The [department] shall establish a special user housing rehabilitation program under which it may make deferred-payment loans to sponsors for the rehabilitation or the acquisition and rehabilitation of rental housing developments to be occupied by eligible households of very low and low income. The [department] may make such loans in an amount necessary to acquire and rehabilitate a rental housing development and to provide affordable rents, when considered in conjunction with other financing on or assistance to such development, for eligible households of very low and low income for the term of the regulatory agreement pursuant to subsection (d). In no event, may the amount of the loan exceed [90] percent of the combined amount of the fair market value of the rental housing development and the cost of rehabilitation work to be undertaken. However, with respect to a nonprofit sponsor or local public entity, the [department] may loan up to [100] percent of such combined amount.

(b) In making a loan pursuant to this subsection, the [department] may disburse funds in a manner and in accordance with a schedule which ensures the economic feasibility of the rental housing development and the completion of the rehabilitation work and which protects the interests of the state.

(c) Prior to making a loan commitment pursuant to this subsection, the [department] shall do all of the following:

(1) inspect the rental housing development to be assisted pursuant to this section to determine the economic feasibility of rehabilitating such development;

(2) approve a plan submitted by the sponsor which includes a plan for occupancy of the development, a description of the nature and costs of rehabilitation to be undertaken, and projections as to rental levels in such development.

(d) Prior to disbursement of any funds pursuant to this subsection, the [department] shall enter into a regulatory agreement with the sponsor which provides for the limitation on profits in the operation of the rental housing development. When the sponsor is not a nonprofit sponsor or a local public entity, the regulatory agreement with the sponsor shall limit the distribution of the sponsor's earnings to an annual amount no greater than [8] percent of the sponsor's actual investment (excluding unaccrued liabilities of the sponsor) in the rental housing development.
The regulatory agreement shall also set standards for tenant selection
to ensure occupancy by eligible households of very low and low income
for the terms of such agreement, govern the terms of occupancy agree-
ments, and contain other provisions necessary to carry out the purposes
of this section. Upon recordation of the agreement in the [office of the
county recorder] in the county in which the real property subject to such
agreement is located, the agreement shall be binding upon the sponsor
and successors in interest for the original term of the loan, as determined
by the [department], but for a period of not more than 1301 years.
(e) The [department] shall fix and alter, from time to time, a schedule
of rents on each development as may be necessary to provide residents
of the rental housing development with affordable rents, to the extent
consistent with the financial integrity of such development. No spon-
sor shall increase the rent on any unit without the prior permission of
the [department] which shall be given only if the sponsor affirmatively
demonstrates that such increase is required to defray necessary operat-
ing costs or to avoid jeopardizing the fiscal integrity of the housing
development. However, in the event that the [department] does not act
upon a request for a rent increase within [60] days from documented
receipt of the request, such increase shall be deemed approved.
(f) The [department] may annually inspect rental housing develop-
ments assisted pursuant to this section to ensure compliance with the
terms of the regulatory agreement and may require such audits, finan-
cial statements, and other documents as are necessary to ensure com-
pliance with the terms of the regulatory agreement and to ensure occu-
cupancy by eligible households of very low and low income.
(g) With respect to rental housing developments rehabilitated pur-
suant to this section:

(1) the [department] shall make payments and shall provide advisory
assistance to persons and families permanently displaced as a result of
such rehabilitation;

(2) the [department] shall provide affordable temporary housing to
eligible households of very low and low income who reside in a rental
housing development prior to rehabilitation or acquisition and rehabili-
tation of such housing development, who are required to move during
the period of rehabilitation, and who occupy a unit in such development
upon completion of rehabilitation. Such temporary housing shall be pro-
vided until units in the rental housing development are available for oc-
ccupancy by such households;

(3) moneys which may be used for the purpose of making loans for
the acquisition and rehabilitation of residential hotels or for related ad-
ministrative expenses are those moneys allocated from the rental hous-
ing construction fund;

(4) eligible households of very low and low income displaced as a
result of rehabilitation pursuant to this act shall be accorded first prior-
ty in occupying units in the rental housing development, from which
they were displaced, subsequent to rehabilitation.

COMMENT: Existing law in California continuously appropriated funds con-
Suggested State Legislation

tained in the rental housing construction fund to the department for specified purposes.

This act instead, provides that moneys from the fund utilized by the California Housing Finance Agency for development costs which were repaid to the agency or disencumbered between June 30, 1982, and June 30, 1983, and any additional funds and interest which are available for encumbrance on June 30, 1983, would be utilized to carry out various programs, as specified. It also allocates an amount not to exceed $4 million from the fund on and after July 1, 1983, among various programs, as specified.

1 Section 4. [Severability.] [Insert severability clause.]

1 Section 5. [Repealer.] [Insert repealer clause.]

1 Section 6. [Effective Date.] [Insert effective date.]
Aid Recipient Employment Incentive Act

The purpose of this act, based on Washington law, is to encourage employers to hire recipients of unemployment insurance benefits and public assistance. Under this act, the state department of employment security is encouraged to utilize “first source contracts” with employers looking to locate or expand within the state. A first source contract is defined as an agreement by an employer to screen applicants from a pool of qualified individuals submitted by the department, and to consider hiring from the pool. The department is authorized to offer specific financial incentives to employers who sign such contracts, including providing an employer with on-the-job training and payment of up to 50 percent of the employees’ wages during the first ten weeks of employment. A 90 day probationary hiring and training period may be used, during which the trainee may continue to receive unemployment insurance or public assistance.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Aid Recipient Employment Incentive Act.

1 Section 2. [Definitions.] As used in this act:
2 (1) “Department” means the [employment security department].
3 (2) “First source contract” means an agreement by an employer to screen applicants from a pool of qualified individuals, if any, submitted to the employer by the [department] and to consider hiring from that pool.

1 Section 3. [First Source Contracts.] The [department] shall encourage the use of first source contracts with employers looking to locate or expand in the state. The [department] shall make every effort to guarantee easy access by employers to qualified workers. The [department head] may delegate duties under this act to a local organization.

1 Section 4. [Financial Incentives.] The [department] may provide specific financial incentives to employers who sign first source agreements if state funds are appropriated or if federal funds are made available for that purpose. The incentives may include but shall not be limited to providing an employer with up to [fifty] percent of a trainee’s wages during the first [ten] weeks of employment and on-the-job training.

1 Section 5. [Training Period.] An employer and a prospective employee
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to be hired from the pool may agree to a [thirty-day] training period,
at the end of which time the employer shall make a decision whether
to hire the individual. The individual may continue to draw unemploy-
ment or public assistance, or both during the [thirty-day] training
period. The funds in Section 4 of this act shall be available during the
[thirty-day] training period.

Section 6. [Severability.] [Insert severability clause.]

Section 7. [Repealer.] [Insert repealer clause.]

Section 8. [Effective Date.] [Insert effective date.]
Community Economic Development Support Act (Statement)

This act, based on New York law, creates a division for community economic development support within the department of commerce. This division would administer and coordinate state and local economic development support programs, support regional and local economic development entities, and provide for specific focus on distressed areas and opportunity zones. The powers and duties of the newly created division are set out. Criteria are established for determining economically distressed areas.

A community economic development advisory board in the division consisting of 15 regional and local representatives appointed by the governor and the heads of the major state economic development agencies is established. A local capacity building challenge grants program designed to provide grants and contracts for services from the fund on a competitive basis is established. The program consists of the enterprise and small business development program, the business retention program, the main street revitalization program, and the rural revitalization program. The act also creates a certified cities economic self-help program to assist public officials and private leaders in small communities in the economic development planning process, with education, training, and technical assistance provided by the state.

Because of its reliance on existing state programs, the Community Economic Development Act is not published here in Suggested State Legislation draft form. Interested readers should direct requests for copies to the state of New York, asking for Assembly Bill No. 10668 from the 1986 session.
Money Laundering Act (Statement)

This act, based on California law, imposes a state-mandated local program by making it a criminal offense to knowingly conduct or attempt to conduct a financial transaction (1) through a financial institution with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of criminal activity, or (2) in property derived from criminal activity, as defined. The offense would be punishable as prescribed either as a felony or misdemeanor. Upon conviction, the property or money which was the subject of, or is traceable to, the financial transaction would be forfeited, as specified, or if the property or money is unavailable, as specified, other property of the defendant up to the value of the tainted property or money would be forfeited.

Defined financial institutions are required to maintain records of defined monetary instrument transactions over $10,000 or, with respect to an individual customer or account, totaling more than $10,000 in a 24-hour period or $25,000 in a five-day period. This act requires these transactions to be reported to the state department of justice as prescribed in regulations of the department, however, an exemption may be granted, as specified. Reports received by the department are not required to be disclosed as public records, but the department is required to analyze the reports and report possible violations to the appropriate criminal justice, tax, or regulatory agency. The department also is authorized to supply the reports to specified public agencies and to otherwise make use of the reports for any purpose consistent with the bill. The act exempts reporting financial institutions from liability for loss or damage resulting from compliance with the act or any governmental use of reports.

Because of its length, the Money Laundering Act cannot be published in its entirety here. Interested readers should direct requests for copies to the state of California, asking for Senate Bill No. 1470, from 1986.
Shareholders Protection Act

This act, based on New Jersey law, regulates corporate takeovers through encouraging any person, before acquiring voting stock of a resident corporation equal to 10 percent or more of the voting rights in that corporation, to seek in advance the approval of the board of directors of that corporation for any contemplated future business combination between that person and the corporation, or approval for the purchase of the stock. The act does not prohibit acquisition without consultation or approval, but without advance approval, no person acquiring such 10 percent or greater share of voting rights may engage in any business combination with the corporation for a period of five years from the time of the acquisition of the stock. Even after expiration of five years, business combinations remain restricted to those for which approval of two thirds of the voting stock is obtained, or those in which all holders of stock in the corporation receive at least the highest price per share which was paid by the person seeking the combination for his stock. This legislation applies automatically to corporations whose stock is publicly traded and may, at the option of the corporation, apply to privately held corporations as well.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the [state] Shareholders Protection Act.

1 Section 2. [Definitions.] As used in this act:
2 (1) “Affiliate” means a person that directly, or indirectly through
3 one or more intermediaries, controls, or is controlled by, or is under
4 common control with, a specified person.
5 (2) “Announcement date,” when used in reference to any business
6 combination, means the date of the first public announcement of the
7 final, definitive proposal for that business combination.
8 (3) “Associate,” when used to indicate a relationship with any per
9 son, means
10 (i) any corporation or organization of which that person is an of-
11 ficer or partner or is, directly or indirectly, the beneficial owner of [10%]
12 or more of any class of voting stock.
13 (ii) any trust or other estate in which that person has a substan-
14 tial beneficial interest or as to which that person serves as trustee or
15 in a similar fiduciary capacity, or
16 (iii) any relative or spouse of that person, or any relative of that
17 spouse, who has the same home as that person.
18 (4) “Beneficial owner,” when used with respect to any stock, means
19 a person:
20 (i) that, individually or with or through any of its affiliates or
associates, beneficially owns that stock, directly or indirectly;
(ii) that, individually or with or through any of its affiliates or associates, has
(A) the right to acquire that stock (whether that right is exercisable immediately or only after the passage of time), pursuant to any agreement, arrangement or understanding (whether or not in writing), or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise; provided, however, that a person shall not be deemed the beneficial owner of stock tendered pursuant to a tender or exchange offer made by that person or any of that person's affiliates or associates until that tendered stock is accepted for purchase or exchange; or
(R) the right to vote that stock pursuant to any agreement, arrangement or understanding (whether or not in writing); provided, however, that a person shall not be deemed the beneficial owner of any stock under this subparagraph if the agreement, arrangement or understanding to vote that stock arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the [Exchange Act] and is not then reportable on a [Schedule 13D under the Exchange Act (or any comparable or successor report)]; or
(iii) that has any agreement, arrangement or understanding (whether or not in writing), for the purpose of acquiring, holding, voting (except voting pursuant to a revocable proxy or consent as described in paragraph (4)(ii)(B)), or disposing of that stock with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, that stock.

(5) "Business combination," when used in reference to any resident domestic corporation and any interested stockholder of that resident domestic corporation, means:
(i) any merger or consolidation of that resident domestic corporation or any subsidiary of that resident domestic corporation with
(A) that interested stockholder or
(B) any other corporation (whether or not it is an interested stockholder of that resident domestic corporation) which is, or after a merger or consolidation would be, an affiliate or associate of that interested stockholder;
(ii) any sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions) to or with that interested stockholder or any affiliate or associate of that interested stockholder of assets of that resident domestic corporation or any subsidiary of that resident domestic corporation
(A) having an aggregate market value equal to [10%] or more of the aggregate market value of all the assets, determined on a consolidated basis, of that resident domestic corporation,
(B) having an aggregate market value equal to [10%] or more of the aggregate market value of all the outstanding stock of that resident domestic corporation, or
(C) representing [10%] or more of the earning power or income,
determined on a consolidated basis, of that resident domestic

(iii) the issuance or transfer by that resident domestic corporation

or any subsidiary of that resident domestic corporation (in one trans-

action or a series or transactions) of any stock of that resident domestic

corporation or any subsidiary of that resident domestic corporation

which has an aggregate market value equal to $5% or more of the ag-

gregate market value of all the outstanding stock of that resident

domestic corporation to that interested stockholder or any affiliate or

associate of that interested stockholder, except pursuant to the exer-

cise of warrants or rights to purchase stock offered, or a dividend, or

distribution paid or made, pro rata to all stockholders of that resident
domestic corporation;

(iv) the adoption of any plan or proposal for the liquidation or
dissolution of that resident domestic corporation proposed by, on behalf

of or pursuant to any agreement, arrangement or understanding

(whether or not in writing) with, that interested stockholder or any

affiliate or associate of that interested stockholder;

(v) any reclassification of securities (including, without limitation,

any stock split, stock dividend, or other distribution of stock in respect

of stock, or any reverse stock split), or recapitalization of that resident
domestic corporation, or any other merger or consolidation of that resi-
dent domestic corporation with any subsidiary of the resident domestic

corporation or any other transaction (whether or not with, or into, or

otherwise involving that interested stockholder), proposed by, on behalf

of or pursuant to any agreement, arrangement or understanding

(whether or not in writing) with, that interested stockholder, or any

affiliate or associate of that interested stockholder which has the ef-

fect, directly or indirectly, of increasing the proportionate share of the

outstanding shares of any class or series of stock or securities conver-
tible into voting stock of that resident domestic corporation or any sub-

sidiary of that resident domestic corporation which is directly or in-
directly owned by that interested stockholder, or any affiliate or

associate of that interested stockholder except as a result of immaterial

changes due to fractional share adjustments; or

(vi) any receipt by that interested stockholder or any affiliate or

associate of that interested stockholder of the benefit, directly or in-
directly (except proportionately as a stockholder of that resident

domestic corporation) of any loans, advances, guarantees, pledges or

other financial assistance or any tax credits or other tax advantages

provided by or through that corporation.

(6) "Common stock" means any stock other than preferred stock.

(7) "Consummation date," with respect to any business combination,

means the date of consummation of that business combination.

(8) "Control," including the terms "controlling," "controlled by" and

"under common control with," means the possession, directly or in-
directly, of the power to direct or cause the direction of the manage-
ment and policies of a person, whether through the ownership of voting

stock, by contract, or otherwise. A person's beneficial ownership of
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[10%] or more of the voting power of a corporation's outstanding voting stock shall create a presumption that that person has control of that corporation. Notwithstanding the foregoing in this subsection, a person shall not be deemed to have control of a corporation if that person holds voting power, in good faith and not for the purpose or circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group have control of that corporation.

48 Stat 881, (15 U.S.C. 78a et seq.) as the same has been or hereafter may be amended from time to time.

(10) "Interested stockholder," when used in reference to any resident domestic corporation, means any person (other than that resident domestic corporation or any subsidiary of that resident domestic corporation or a bank holding company as defined in the "Bank Holding Company Act of 1956," 70 Stat. 133, (12 U.S.C. 1841 et seq.) as amended, or any subsidiary of a bank holding company) that:

(i) is the beneficial owner, directly or indirectly, of [10%] or more of the voting power of the outstanding voting stock of that resident domestic corporation; or

(ii) is an affiliate or associate of that resident domestic corporation and at any time within the [five-year] period immediately prior to the date in question was the beneficial owner, directly or indirectly, of [10%] or more of the voting power of the then outstanding stock of that resident domestic corporation. For the purpose of determining whether a person is an interested stockholder pursuant to this paragraph, the number of shares of voting stock of that resident domestic corporation deemed to be outstanding shall include shares deemed to be beneficially owned by the person through application of paragraph (4) but shall not include any other unissued shares of voting stock of that resident domestic corporation which may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options or otherwise.

(11) "Market value," when used in reference to property of any resident domestic corporation, means:

(i) in the case of stock, the highest closing sale price during the [30-day] period immediately preceding the date in question of a share of that stock on the composite tape for New York Stock Exchange-listed stocks, or, if that stock is not quoted on that composite tape or if that stock is not listed on that exchange, on the principal United States securities exchange registered under the Exchange Act on which that stock is listed, or, if that stock is not listed on any such exchange, the highest closing bid quotation with respect to a share of that stock during the [30-day] period preceding the date in question on the National Association of Securities Dealers, Inc. Automated Quotations System, or any system then in use, or if no such quotations are available, the fair market value on the date in question of a share of that resident domestic stock as determined by the board of directors of that corporation in good faith; and
(ii) in the case of property other than cash or stock, the fair market value of that property on the date in question as determined by the board of directors of that resident domestic corporation in good faith.

(12) "Preferred stock" means any class or series of stock of a resident domestic corporation which under the bylaws or certificate of incorporation of that resident domestic corporation is entitled to receive payment of dividends prior to any payment of dividends on some other class or series of stock, or is entitled in the event of any voluntary liquidation, dissolution or winding up of the resident domestic corporation to receive payment or distribution of a preferential amount before any payments or distributions are received by some other class or series of stock.

(13) "Resident domestic corporation" means an issuer of voting stock which is organized under the laws of this state and, as of the stock acquisition date in question, has its principal executive offices and significant business operations located in this state.

(14) "Stock" means:

(i) any stock or similar security, any certificate of interest, any participation in any profit sharing agreement, any voting trust certificate, or any certificate of deposit for stock; and

(ii) any security convertible, with or without consideration, into stock, or any warrant, call or other option or privilege of buying stock without being bound to do so, or any other security carrying any right to acquire, subscribe to or purchase stock.

(15) "Stock acquisition date," with respect to any person and any resident domestic corporation, means the date that that person first becomes an interested stockholder of that resident domestic corporation.

(16) "Subsidiary" of any resident domestic corporation means any other corporation of which voting stock having a majority of the votes entitled to be cast is owned, directly or indirectly, by that resident domestic corporation.

(17) "Voting stock" means shares of capital stock of a corporation entitled to vote generally in the election of directors.

Section 3. [Restrictions on Business Combination.] Notwithstanding anything to the contrary contained in this act (except Section 5 of this act), no resident domestic corporation shall engage in any business combination with any interested stockholder of that resident domestic corporation for a period of five years following that interested stockholder's stock acquisition date unless that business combination is approved by the board of directors of that resident domestic corporation prior to that interested stockholder's stock acquisition date.

Section 4. [Requirements for Business Combination.] In addition to the restriction contained in Section 3 of this act, and except as provided in Section 5 of this act, no resident domestic corporation shall engage at any time in any business combination with any interested stockholder of that resident domestic corporation other than a business
combination specified in any one of paragraphs (1), (2) or (3) of this
section;

(1) A business combination approved by the board of directors of that
resident domestic corporation prior to that interested stockholder's
stock acquisition date.

(2) A business combination approved by the affirmative vote of the
holders of [two-thirds] of the voting stock not beneficially owned by
that interested stockholder at a meeting called for such purpose.

(3) A business combination that meets all of the following conditions:

(i) the aggregate amount of the cash and the market value, as of
the consummation date, of consideration other than cash to be receiv-
ed per share by holders of outstanding shares of common stock of that
resident domestic corporation in that business combination is at least
equal to the higher of the following:

(A) the highest per share price (including any brokerage commis-
sions, transfer taxes and soliciting dealers' fees) paid by that interested
stockholder for any shares of common stock of the same class or series
acquired by it within the [five-year] period immediately prior to the
announcement date with respect to that business combination, or
within the [five-year] period immediately prior to, or in, the transac-
tion in which that interested stockholder became an interested
stockholder, whichever is higher; plus, in either case, interest com-
pounded annually from the earliest date on which that highest per
share acquisition price was paid through the consummation date at
the rate for one-year United States Treasury obligations from time to
time in effect; less the aggregate amount of any cash dividends paid
and the market value of any dividends paid other than in cash, per
share of common stock since that earliest date, up to the amount of
that interest; and

(B) the market value per share of common stock on the announce-
ment date with respect to that business combination or on that in-
terested stockholder's stock acquisition date, whichever is higher; plus
interest compounded annually from that date through the consumma-
tion date at the rate for one-year United States Treasury obligations
from time to time in effect; less the aggregate amount of any cash
dividends paid, and the market value of any dividends paid other than
in cash, per share of common stock since that date, up to the amount
of that interest;

(ii) the aggregate amount of the cash and the market value as of
the consummation date of consideration other than cash to be receiv-
ed per share by holders of outstanding shares of any class or series
of stock, other than common stock, of that resident domestic corpora-
tion is at least equal to the highest of the following (whether or not
that interested stockholder has previously acquired any shares of that
class or series of stock):

(A) the highest per share price (including any brokerage commis-
sions, transfer taxes and soliciting dealers' fees) paid by that interested
stockholder for any shares of that class or series of stock acquired by
it within the [five-year] period immediately prior to the announcement

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date with respect to that business combination, or within the [five-year] period immediately prior to, or in, the transaction in which that interested stockholder became an interested stockholder, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which that highest per share acquisition price was paid through the consummation date at the rate for one-year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of that class or series of stock since that earliest date, up to the amount of that interest;

(B) the highest preferential amount per share to which the holders of shares of that class or series of stock are entitled in the event of any liquidation, dissolution or winding up of that resident domestic corporation, plus the aggregate amount of any dividends declared or due as to which those holders are entitled prior to payment of dividends on some other class or series of stock (unless the aggregate amount of those dividends is included in that preferential amount); and

(C) the market value per share of that class or series of stock on the announcement date with respect to that business combination or on that interested stockholder’s stock acquisition date, whichever is higher; plus interest compounded annually from that date through the consummation date at the rate for one-year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of that class or series of stock since that date, up to the amount of that interest;

(iii) the consideration to be received by holders of a particular class or series of outstanding stock (including common stock) of that resident domestic corporation in that business combination is in cash or in the same form as the interested stockholder has used to acquire the largest number of shares of that class or series of stock previously acquired by it;

(iv) the holders of all outstanding shares of stock of that resident domestic corporation not beneficially owned by that interested stockholder immediately prior to the consummation of that business combination are entitled to receive in that business combination cash or other consideration for those shares in compliance with sub-paragraphs (i), (ii) and (iii); and

(v) after that interested stockholder’s stock acquisition date and prior to the consummation date with respect to that business combination, that interested stockholder has not become the beneficial owner of any additional shares of stock of that resident domestic corporation except:

(A) as part of the transaction which resulted in that interested stockholder becoming an interested stockholder;

(B) by virtue of proportionate stock splits, stock dividends or other distributions of stock in respect of stock not constituting a business combination under section (2)(x)(v);

(C) through a business combination meeting all of the conditions
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or subparagraph (iii) and this paragraph; or

(III) through purchase by that interested stockholder at any price
which, if that price had been paid in an otherwise permissible business
combination, the announcement date and consummation date of which
were the date of that purchase, would have satisfied the requirements
of subparagraphs (i), (ii) and (iii).

Section 5. [Exemptions.]
(a) Unless the certificate of incorporation provides otherwise, the pro-
visions of this act shall not apply to any business combination of a resi-
dent domestic corporation with an interested stockholder if the resi-
dent domestic corporation did not have a class of voting stock registered
or traded on a national securities exchange or registered with the
Securities and Exchange Commission pursuant to section 12(g) of the
stockholder's stock acquisition date.

(b) Unless the certificate of incorporation provides otherwise, the pro-
visions of this act shall not apply to any business combination with
an interested stockholder who was an interested stockholder prior to
the effective date of this act unless subsequent thereto that interested
stockholder increased his or its interested stockholder's proportion of
the voting power of the resident domestic corporation's outstanding
voting stock to a proportion in excess of the proportion of voting power
that interested stockholder held prior to the effective date of this act.

(c) The provisions of this act shall not apply to any business com-
bination of a resident domestic corporation with an interested
stockholder of that corporation which became an interested stockholder
on or after [insert date].

(d) The provisions of this act shall not apply to any business com-
bination of a resident domestic corporation with an interested
stockholder of that corporation which became an interested stockholder
inadvertently, if such interested stockholder

(1) as soon as practicable divests itself or himself of a sufficient
amount of the voting stock of that resident domestic corporation so that
he or it no longer is the beneficial owner, directly or indirectly, of [10%]
or more of the voting power of the outstanding voting stock of that
corporation, or a subsidiary of that resident domestic corporation, and

(2) would not at any time within the [five-year] period preceding
the announcement date with respect to that business combination have
been an interested stockholder but for that inadvertent acquisition.

(e) The provisions of this act shall not apply to any business com-
bination of a resident domestic corporation [subject to regulation, in
whole or in part, pursuant to] which is a "bank holding company" as
defined in the "Bank Holding Company Act of 1956," 70 Stat. 133,
(12 U.S.C. 1841 et seq.) as amended, or a subsidiary of the bank holding
company with an interested stockholder of that resident domestic
corporation.

Section 6. [Economic Impact Study.] The [insert appropriate state

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Section 7. [Severability.] [Insert severability clause]

Section 8. [Repealer.] [Insert repealer clause.]

Section 9. [Effective Date] [Insert effective date]
Recreational Water Contact Facility Act

This act, based on Washington law, is designed to address problems associated with the proliferation of such recreational water contact facilities as wave pools, hot tubs, water slides, and spas. Under the act, the state department of health is authorized to adopt rules under the state's administrative procedure act setting safety, sanitation, and water quality standards for such facilities. Local health officials are required to develop joint plans of operation with relevant state officials outlining the duties of the local jurisdiction and the rules adopted by the state department of health, to establish and collect fees sufficient to cover regulatory and inspection costs, and to enforce the rules adopted under this legislation. Civil penalties and injunctions are provided for enforcement. An advisory committee on such facilities is established to review and draft proposed rules, provide technical assistance, and provide recommendations for the settlement of grievances. Permits for operation and liability insurance are also required under the act for the operation of such recreational water contact facilities.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act shall be known as the Recreational Water Contact Facility Act.

Section 2. [Definitions.] As used in this act, unless the context otherwise requires:

1. "Recreational water contact facility" means an artificial water contact facility with design and operational features that provide patron recreational activity which is different from that associated with a conventional swimming pool and purposefully involves immersion of the body partially or totally in the water, including but not limited to, water slides, wave pools, and water amusement lagoons which bring water in contact with patrons.

2. "Local health officer" means the [health officer of the city, county, or city-county department or district or a representative authorized by the local health officer].

3. "Secretary" means the [secretary of the state social and health services department].

4. "Person" means an individual, firm, partnership, co-partnership, corporation, company, association, club, government entity, or organization of any kind.

5. "Department" means the [state department of social and health services].
Recreational Water Contact Facility Act

(6) "Board" means the [state board of health].

Section 3. [Authority to Regulate.]
(a) The [board] shall adopt rules under the [state administrative procedures act], setting safety, sanitation, and water quality standards for recreational water contact facilities. The rules shall include but not be limited to requirements for design; operation; injury and illness reports; biological and chemical contamination standards; water quality monitoring; inspection; permit application and issuance; fees sufficient to cover the costs incurred by the [department] for the administration and enforcement of this act; and enforcement procedures.
(b) In adopting rules under subsection (a) of this section regarding the operation or design of a recreational water contact facility, the [board] shall review and consider any recommendations made by the [recreational water contact facility advisory committee].

Section 4. [Establishment of Advisory Committee Powers and Duties.]
(a) A [recreational water contact facility advisory committee] is established and shall be appointed by the [board] which shall consist of the following members:
(1) a representative of the [board];
(2) a private operator of a recreational water contact facility;
(3) a public operator of a recreational water contact facility;
(4) a representative from the [department of social and health services];
(5) a representative of the [county health departments];
(6) a representative from those who engage in the construction or design of recreational water contact facilities; and
(7) a representative from those who engage in the manufacturing or design of goods or services for recreational water contact facilities.
(b) The [advisory committee] shall have the following powers and duties:
(1) to assist in reviewing and drafting proposed rules regarding the design or operation of any recreational water contact facility which recommendations shall be transmitted to the [board];
(2) to provide technical assistance regarding the review of new products, equipment and procedures, and periodic program review; and
(3) to provide recommendations upon request in the settlement of grievances.
(c) The [committee] may appoint subcommittees as it deems necessary.

Section 5. [Administration of Rules.] The [secretary] shall enforce the rules adopted under this act. The [secretary] may develop joint plans of responsibility with any local health jurisdiction to administer this act.

Section 6. [Establishment and Collection of Fees.]
(a) Local health officers may establish and collect fees sufficient to cover their costs incurred in carrying out their duties and the rules adopted under this act.
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(b) The [department] may establish and collect fees sufficient to cover its costs incurred in carrying out its duties under this act. The fees shall be deposited in the state general fund.

(c) A person shall not be required to submit fees at both the state and local levels.

Section 7. [Permit Requirement for Modification.] A permit is required for any modification to or construction of any recreational water contact facility after the effective date of this act. The plans and specifications for the modification or construction shall be submitted to the applicable local authority or the [department] as applicable, but a person shall not be required to submit plans at both the state and local levels or apply for both a state and local permit. The plans shall be reviewed and may be approved or rejected or modifications or conditions imposed consistent with this act as the public health or safety may require, and a permit shall be issued or denied.

Section 8. [Operating Permit Requirement, Display.] An operating permit from the [department] or local health officer, as applicable, is required for each recreational water contact facility operated in this state. The permit shall be renewed annually. The permit shall be conspicuously displayed at the recreational water contact facility.

Section 9. [Liability.] Nothing in this act or the rules adopted under this act creates or forms the basis for any liability:

(1) on the part of the state and local health jurisdiction, or their officers, employees, or agents, for any injury or damage resulting from the failure of the owner or operator of recreational water contact facilities to comply with this act or the rules adopted under this act; or

(2) by reason or in consequence of any act or omission in connection with the implementation or enforcement of this act or the rules adopted under this act on the part of the state and local health jurisdictions, or by their officers, employees, or agents.

All actions of local health officers and the [secretary] shall be deemed an exercise of the state’s police power.

Section 10. [Reporting of Injury, Illness or Death.] Any person operating a recreational water contact facility shall report to the local health officer or the [department] any serious injury, communicable disease, or death occurring at or caused by the recreational water contact facility.

Section 11. [Penalties.] County, city, or town legislative authorities and the [secretary] as applicable, may establish civil penalties for a violation of this act or the rules adopted under this act not to exceed [five hundred] dollars. Each day upon which a violation occurs constitutes a separate violation. A person violating this act may be enjoined from continuing the violation.
Section 12. [Judicial Review.]
(a) Any person aggrieved by an order or action of the [department] may request a hearing under the [state administrative procedure act]. Notice shall be provided by the [department] as required under [insert appropriate reference].
(b) Any person aggrieved by an order or action of a local health officer may request a hearing which shall be held consistent with the local health jurisdiction’s administrative appeals process. Notice shall be provided by the local health jurisdiction consistent with its due process requirements.

Section 13. [Grandfather of Existing Local Restrictions.] The provisions of this act shall not affect local health ordinances existing as of the effective date of this act which regulate water contact facilities.

Section 14. [Insurance Requirement.]
(a) A recreational water contact facility shall not be operated within the state unless the owner or operator has purchased insurance in an amount not less than [one hundred thousand] dollars against liability for bodily injury to or death of one or more persons in any one accident arising out of the use of the recreational water contact facility.
(b) The [board] may require a recreational water contact facility to purchase insurance in addition to the amount required in subsection (a).

Section 15. [Severability.] [Insert severability clause.]

Section 16. [Repealer.] [Insert repealer clause.]

Section 17. [Effective Date.] [Insert effective date.]
Utility Holding Company Regulation Act (Statement)

This act, based on Wisconsin law, recognizes the desirability of public utilities within the state becoming subsidiaries of public utility holding companies for the purpose of overall diversification of the public utility enterprise. This legislation expresses the policy that such diversification is in the interest of the citizens of the state, but must be overseen and regulated by the state in order to insure that the utilities and their holding companies operate in such a manner as to continue to guarantee reliable and efficient utility service to their customers. Accordingly, the act allows the formation of such holding companies with prior approval of the public service commission. Approval will require the provision of full disclosure of the persons and enterprises involved, and the purposes, property, income, and assets of the enterprise. Approval shall also require public hearing on the application. Under the act, no person may take, hold or acquire, directly or indirectly, more than 10 percent of the outstanding voting securities of a holding company unless the commission has determined that the acquisition is in the best interests of the customers of the utility and the citizens of the state. If the commission finds that the capital of any holding company will be impaired by the payment of any dividend, the commission may suspend or limit such payment. Public utilities themselves are limited by the act in the degree to which they can transfer their assets, as loans or otherwise, to elements of the overall holding company which are not utilities. Confidential public utility information may not be shared with the remainder of the holding company, and the holding company itself may not be operated in a manner to impair the integrity of the utility as a business entity. Holding company systems are forbidden by the act to divest themselves of utilities without prior approval of the commission. Holding companies violating the act are liable for treble damages.

Because of its length, the Utility Holding Company Regulation Act cannot be published in its entirety here. Interested readers should direct requests for copies to the state of Wisconsin, asking for Senate Bill No. 14, 1985 Wisconsin Act 79, from the September 1985 special session.
Buyers’ Club Regulation Act

This legislation, based on Tennessee law, regulates buyers’ clubs, organizations formed to benefit members through the cooperative purchase of services or merchandise. The act affords members certain rights and protections against fraud and overreaching. Members are afforded the right to cancel their membership within three days after joining, and the club is required to prominently include in its written agreement notice of the buyer’s right to terminate the agreement. All contracts between such clubs and their members must also provide that any merchandise ordered must be delivered within six weeks after order, or the member shall be entitled upon request to cancellation of the order and refund of any payment made to date. Contracts under the act are limited to a period of no more than 18 months, and such agreements may not contain an automatic renewal clause. Buyers’ clubs in which the members do not pay more than $50 to the club over the life of the agreement are exempted from the act, as are clubs which do not receive prepayment on goods ordered. Failure to disclose to a member in advance of membership that goods are ordered only through catalogs with no opportunity to inspect samples is made a violation of the act, as is the failure to notify that the membership contract will be disavowed to a third party if that is indeed the case. Policies regarding warranties of goods must also be disclosed in advance, and required down payments on orders must be specified. Violation of the act is declared to be a deceptive trade practice, subject to specified penalties.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Buyers’ Club Regulation Act.

Section 2. [Definitions.] As used in this act:

1. "Business day" means any day other than Saturday, Sunday, or legal holiday.
2. "Buyer" or "member" means any status by which any natural person is entitled to any of the benefits of a discount buying organization.
3. "Buying service," "buying club," or "club" means any person, corporation, partnership, unincorporated association or other business enterprise operating for profit within the state, the primary purpose of which is to provide benefits to members from the cooperative purchase of services or merchandise.
4. "Contract" means any oral or written agreement by which one becomes a member of a club.
5. "Division" means the [consumer affairs division].
“Prepayment” means any payment greater than [fifty] dollars for service, merchandise or membership made before the service is rendered. Money received by a club from a financial institution upon assignment of a contract shall be considered prepayment when and to the extent the member is required to make prepayments to the financial institution pursuant to the contract.

Section 3. [Cancellation of Membership.]
(a) Any person who has elected to become a member of a club may cancel such membership by giving written notice any time before [midnight of the third] business day following the date on which membership was attained, subject to the provisions in Section 4. Such cancellation shall be without liability on the part of the member and shall entitle the member to a refund of the entire consideration paid for the contract.
(b) Notice of cancellation must be in writing and delivered personally or by mail. If given by mail, the notice is effective upon deposit in a mailbox, properly addressed and postage paid. Notice of cancellation need not take a particular form and is sufficient if it indicates, by any form of written expression, the intention of the member not to be bound by the contract. If delivered personally, the notice is to be accepted by any agent or employee of the club, and a receipt for the notice must be given by that agent or employee to the person cancelling.
(c) The entitled refund shall be delivered to the member within [fourteen] days after notice of cancellation is given.
(d) Rights of cancellation may not be waived or otherwise surrendered.
(e) Cancellation shall not relieve the member from paying for any merchandise or services purchased or ordered prior to the date of cancellation.

Section 4. [Contracts-Notice of Cancellation.]
(a) A fully completed copy of every contract shall be delivered to the member at the time the contract is signed. Every contract shall constitute the entire agreement between seller and member, shall be in writing, shall be signed by the member, shall designate the date on which the member signed the contract and shall state, clearly and conspicuously in boldface type of a minimum size of [fourteen] points, in immediate proximity to the space reserved for the signature of the buyer, the following:

“MEMBER’S RIGHT TO CANCEL”

If you wish to cancel this contract, you may cancel by delivering or mailing a written notice to the company. Certified mail would provide greater protection than first-class mail, but is not necessary. If you deliver the notice personally, you are entitled to a receipt. Your notice must make known that you do not wish to be bound by the contract. If the notice is delivered or mailed before [midnight] of the [third] business day after you sign this contract, you are entitled to a refund
of the entire consideration paid for the contract. The notice must be
delivered or mailed to [insert name and mailing address of company].
If you cancel, the club is required to return, within [fourteen] days of
the date on which you give notice of cancellation, any payments you
have made."

(b) Until the buying club has complied with this section, the member
may cancel the contract by notifying the buying club, in any manner
and by any means, of his intention to cancel and is then entitled to
a refund of the entire consideration paid for the contract.

Section 5. [Contracts-Nondelivery of Goods-Savings Claims.]
(a) Every contract shall provide that if any goods, except furniture
or custom manufactured goods, ordered by the member from the buy-
ing club, are not delivered to the member or available for pickup by
the member at the location where the order was placed within [six]
weeks from the date the member placed an order for such goods, then
any payment by the member for such goods in advance of delivery shall,
upon the member’s request, be fully refunded, unless a predetermined
delivery date has been furnished to the member in writing at the time
he or she ordered such goods and the goods are delivered to the member
or available for pickup by that date. Every contract must disclose that
delivery dates for furniture or custom manufactured goods cannot be
predicted, if such is the case.
(b) Every contract shall provide that all savings claims made by the
buying club are based on price comparisons with retailers doing
business in the trade area in which the claims are made if the same
or comparable items are offered for sale in the trade area and with
prices at which the merchandise is actually sold or offered for sale.
(c) Any contract which does not comply with subsections (a) and (b)
shall be void and unenforceable.

Section 6. [Duration of Contracts.] No contract shall be valid for a
term longer than [eighteen] months from the date upon which the con-
tact is signed. However, a club may allow a member to convert his
contract into a contract for a period longer than [eighteen] months after
the member has been a member of the club for a period of at least [six]
months. The duration of the contract shall be clearly and conspicuously
disclosed in the contract in boldface type of a minimum size of [four-
ten] points. No contract shall contain an automatic renewal clause;
provided, however, that such an agreement may provide for the buyer
to exercise a renewal.

Section 7. [Exemptions.] This part shall not apply to:
(1) Any buyers club in which the total consideration paid by each buyer
in any manner whatsoever when the contract for discount buying services
does not exceed [fifty] dollars over the expected life of the contract;
(2) Any buyers club in which persons receive discount buyer services
6 incidentally as part of a package of services provided to or available
7 to such individual on account of his membership in such organization,
8 which is not organized for the profit of any person or corporation or
9 which does not have as one of its primary purposes or business the
10 provision of discount buying services; and
11 (3) Any buyers club which files with the [director] of the [division
12 of consumer affairs] a declaration, executed under penalty of perjury
13 by the owner or manager of such club, stating that the club does not
14 require, or in the ordinary course of business, receive prepayment.

Section 8.[Required Disclosures Unfair or Deceptive Trade Practicecs.]
(a) It shall be unlawful for any buying club to fail to disclose to a
prospective member in writing, prior to the sale of any contract for
discount buying services:
(1) That goods or services can only be bought through catalogs with
no opportunity to inspect samples if such is the case;
(2) The buyers club's policies regarding warranties or guarantees
on goods ordered, return of ordered goods by buyers, procedures for
Cancellation of merchandise orders by the buyer, and refunds of deposits
for the cancellation of orders;
(3) Any charges, such as estimated freight costs, handling fees,
credit life or disability insurance, supplicrs' and buyers clubs' markup,
and other costs incidental to the purchase of goods through the buyers
club and which are to be paid by the buyer;
(4) A list of the categories of merchandise which are available to
buyers from cooperative suppliers. If the list includes savings claims
based on reference prices, the reference prices must be those at which
the same or comparable goods are offered or sold in the trade area;
(5) Advice that the contract for discount buying service or inciden-
tal retail installments contracts will be transferred, sold or assigned
to a third party if such practice is to be used by the buyers club; and
(6) The percentage of the purchase price required as a downpay-
ment on merchandise orders of any nature. This prohibition applies
in all cases where rebates are offered, regardless of whether such prom-
ised rebates are contingent upon the seller's ability to enroll the refer-
red persons into the buyers club.
(b) It shall be an unfair or deceptive trade practice for a buying club to:
(1) Represent that it is affiliated with any other buyers club
organization or showroom unless an affiliation in fact exists and unless
the prospective buyer would be legally entitled to services from the
allegedly affiliated organization as a result of being a buyer of the sub-
ject buyers club. If such an affiliation is claimed by the representative
of the buyers club, written proof of such a binding legal right must
be given the prospective buyer, including a description of the services
available from the affiliated club, before the signing of any contract
for discount buying services or application;
(2) Represent that the prospective buyer will be entitled to a par-
ticular benefit unless that benefit is currently available from the buyers
club on a regular basis;
(3) Offer any gifts or consideration of any nature to a prospective buyer as a solicitation for such persons to attend a buyers club sales presentation or to sign a membership application or a contract for discount buying services where the club fails to honor or deliver the gift or consideration in accordance with the terms of its promise;

(4) Represent or suggest in any manner that it offers its buyers the lowest prices, excluding freight and service charges, available on all categories of merchandise handled by the club, unless such is true; or

(5) Represent that merchandise is available to the buyer from any particular supplier unless such is true at the time the representation is made. Reference to unavailable suppliers or manufacturers may be made only for purposes of allowing prospective buyers to compare merchandise costs against those manufacturers which are available through the club. No buyers club may represent to a prospective buyer, unless it is true, that the club can purchase any item of merchandise at supplier's cost if the buyer provides the club with the necessary model number for the item.

Section 9. [Requirements Nonwaivable.] Any waiver by the member of the provisions of this part shall be deemed contrary to public policy and shall be void and unenforceable.

Section 10. [Violations of Part.] A violation of this part shall be construed to constitute an unfair or deceptive act of practice affecting the conduct of any trade or commerce and subject to [insert penalties].

Section 11. [Severability.] [Insert severability clause.]

Section 12. [Repealer.] [Insert repealer clause.]

Section 13. [Effective Date.] [Insert effective date.]
Health Insurance Pool Act (Statement)

This act, based on Tennessee law, provides a mechanism to insure the availability of comprehensive health insurance to persons unable to obtain such insurance coverage on either an individual or group basis directly under any health plan. It creates a non-profit health insurance pool, consisting of all health insurers operating within the state. The pool, through its representative board of directors, is to adopt a plan of operation which shall provide for the equitable sharing by the members of the pool of any losses sustained by the operations of the pool. The plan shall also establish procedures for the assessment of sums against members of the pool to provide for claims paid under the plan and for necessary administrative expenses. The board shall also be responsible for issuing policies of insurance and for setting the relevant rates for such policies. The pool may not insure a policy to any person who already has or could obtain equivalent coverage from a usual source. Persons receiving Medicaid are also not eligible for pool coverage. The level of benefits to be provided under pool policies is specified by the act, along with the size of the permissible deductible. Policy makers are cautioned, however, that other financing forms are available.

Because of its length, the Health Insurance Pool Act cannot be published in its entirety here. Interested readers should direct requests for copies to the state of Tennessee, asking for House Bill No. 1778, Chapter No. 870, from the 1986 session.
Travel Promotion Regulation Act

This act, based on California law, regulates travel promoters and their activities. Travel promotions can result in significant financial losses for consumers through consumer payments for tours, tickets, etc., for which the consumer never receives the trip or merchandise for which he has paid. Travel services may also often be arranged through wholesalers, who may then sell the services to the public through retailers who claim that only the wholesaler is a "travel promoter" subject to whatever regulations may already exist in a particular state. Accordingly, this legislation clarifies the definition of "travel promoter" to include those retail sellers who actually deal with the public. The act further requires delivery of tickets within 24 hours following payment of more than 10 percent of the purchase price by the consumer. Finally, it requires that credit card payments go directly into the trust account of promoters to prevent them from being subject to seizure by the promoter's creditors. This legislation assumes existing state regulation of the travel promotion industry.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Travel Promotion Regulation Act.

Section 2. [Definitions.] As used in this act: "Travel promoter" means a person who sells, provides, furnishes, contracts for, arranges, or advertises that he or she can or may arrange, or has arranged, wholesale or retail air or sea transportation either separately or in conjunction with other services. Travel promoter does not include:

1. (1) an air carrier;
2. (2) an ocean carrier;
3. (3) an officially appointed agent of the air carrier or ocean carrier which provides the transportation and where the transportation is offered or sold pursuant to the agency appointment; or
4. (4) any person or organization acting as a certified motor club.

Section 3. [Prohibition on Advertising.] A travel promoter shall not advertise that air or sea transportation is or may be available unless he or she has, prior to the advertisement, contracted for the transportation advertised with the air carrier or sea carrier.

Section 4. [Depositing Funds into Trust Account.]

(a) A travel promoter shall deposit [90] percent of all sums received, including, but not limited to, those made by cash, credit card, or any other method of payment, for air or sea transportation or any other services or goods offered by the travel promoter in conjunction with
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that transportation directly into a trust account in a federally insured
bank or savings and loan association.
(b) The trust required by this section shall be created and maintain-
ed for the benefit of the persons paying money to the travel promoter.
The travel promoter shall not in any manner encumber the corpus of
such account and shall not withdraw money therefrom except:
(1) in partial or full payment for the goods or services contracted
for by the passengers to the carrier or person providing the other goods
or services offered by the travel promoter; or
(2) to make the refunds as required by this article or provided for
by written contract between the travel promoter and passengers. This
section shall not prevent the withdrawal from that account of any in-
terest earned and credited to the trust account for the sole benefit of
the travel promoter after all goods and services have been provided
as contracted for or the withdrawal at that time of any other sums or
deposit in that account.
(c) In lieu of that trust account, an adequate bond shall be maintain-
ed by the travel promoter. A copy of that bond shall be filed with the
[secretary of state] prior to the advertisement of air or sea transporta-
tion, or both, by the travel promoter.

Section 5. [Issuance of Tickets, Vouchers, etc.]
(a) Upon payment in full by the passenger for air or sea transporta-
tion and any related services with a credit card or with cash, the travel
promoter shall issue and deliver the ticket or voucher to the passenger
or his or her designated agent within [48] hours.
(b) Upon payment in full by the passenger for air or sea transporta-
tion and any related services with a check, the travel promoter shall
issue and deliver the ticket or voucher to the passenger or his or her
designated agent within [48] hours of the earlier of the following:
(1) the time the passenger's payment is credited to the travel pro-
moter's account;
(2) the expiration of the maximum hold period specified in [insert
appropriate state statute].
(c) Tickets, vouchers, or receipts shall be deemed to have been de-
divered if they have been turned over to an independent third-party
delivery service or the United States Postal Service for regular delivery.
(d) Where the travel promoter is unable to issue tickets or vouchers
upon payment as set forth in subsections (a), (b), (c), and (d), the travel
promoter may comply with this section by either:
(1) forwarding to the air or sea carrier, or provider of related ser-
dvices the portion of the sum paid by the passenger which is required
by the air or sea carrier or provider of related services from the travel
promoter in order to provide the transportation or services purchased
by that passenger. The travel promoter may not offset or reduce the
amount forwarded by any amounts due or claimed in connection with
any other transaction; or
(2) by complying with the provisions of [statutes pertaining to writ-
ten statements upon receipt of money or consideration and regulation

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of cancellation of transportation and misrepresentation of departure
or arrivals deemed cancellation] and sections 4(a), 4(b), 4(c), or de-
positing directly into a trust account in a federally insured bank or
savings and loan association the portion of the amount paid by the
passenger which is required by the air or sea carrier or provider of
related services from the travel promoter in order to provide the trans-
portation or services purchased by the passenger.

The travel promoter may not offset or reduce the amount deposited
by any amount due or claimed in connection with any other transaction.

(e) The trust required by this section shall be created and maintai-
ned for the benefit of the persons paying money to the travel promoter.
The travel promoter shall not, in any manner, encumber the corpus
of such account and shall not, withdraw money therefrom except:

(1) in partial or full payment for goods or services contracted for
by the passenger to the carrier or person providing the other goods
or services offered by the travel promoter; or

(2) to make the refunds as required by this section. This section
shall not prevent the withdrawal from that account of any interest
earned and credited to the trust account for the sole benefit of the travel
promoter.

(f) There is no violation of this section if:

(1) compliance with this section was rendered impossible as a direct
result of an unforeseen condition beyond the travel promoter’s control;
and

(2) the travel promoter complied with this section or made restitution
to the passenger within [30] days after receiving the passenger’s
payment.

A travel promoter has the burden of producing evidence to establish
this exception in a criminal action, and the burden of proof to establish
this exception in a civil action.

(g) For purposes of this section only, “travel promoter” includes an
officially appointed agent of an air carrier or ocean carrier, but does
not include:

(1) any person or organization licensed by [state] to sell travelers
checks;

(2) any person or organization certified by [state] as a motor club.

(h) For purposes of this section, “48 hours” means two business days.

Section 6. Section 5 of this act does not create any duties other than
those expressed in Section 5 and does not affect any duties establish-
ed by any other statutory law or by decisional law.

Section 7. [Severability.] [Insert severability clause.]

Section 8. [Repealer.] [Insert repealer clause.]

Section 9. [Effective Date.] [Insert effective date.]
Videotape Rental Future Services Contract Act (Statement)

This legislation, approved by the Wisconsin legislature in 1986, extends the Wisconsin laws governing future service contracts to certain videotape rental contracts. Under the provisions of the act, all future service contracts on videotape rentals shall be in writing and for a stated number of months. Contractors may not request or receive more than 12 months of unearned customer fees in prepayment from a customer. Future service contracts may not contain a renewal clause, or provide that the customer has an option to enter into a subsequent contract at a stated price.

Future service contracts shall provide that assignees, purchasers, or other transfers of the rights of the contractor are subject to all claims and defenses of the customer against the contractor arising out of the future service contract. Customers have the right to cancel within the first three months of a future service contract or within three days of delivery of the customer's first purchase of goods or rental of videotapes costing more than $25. Unearned customer fees must be refunded promptly upon cancellation. Cancellations must be made in writing and the act provides that the cancellation shall be deemed to be made when mailed or hand delivered to the contractor. Written notice of the right to cancel shall be provided, by the contractor, at or before the time of execution of the contract.

A copy of the Wisconsin act may be obtained from the Legislative Reference Bureau, Madison, Wisconsin 53702; (608) 266-0341.
Flexible Rate Limitations For Problem Insurance Markets Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

States have varied in the degree and type of control they have exercised over property/casualty rating laws under which rates do not have to be approved by the commissioner of insurance prior to their use. Competitive rates, however, have been determined largely by market forces which do not necessarily produce reasonable rates. Competitive rates, over time, may produce wide swings in pricing. Legislation that provides and promotes stability and predictability of rates is, therefore, desirable. A return to full prior approval, however, would be a waste of regulatory resources in certain circumstances and counterproductive since overly restricted rate levels can result in insurance unavailability.

The middle ground, a flexible rating system (such as New York’s) proposed in this act is a novel blending of prior approval and competitive rating concepts. It would permit insurers to raise or lower their rates without the prior approval of the commissioner as long as these changes move within applicable flexibility bands determined by the commissioner. Even if a change falls within such a flexibility band, the insurer would continue to be required to provide support for its chosen rate levels. Changes beyond the bands would be permitted with the prior approval of the commissioner, if the insurer can demonstrate satisfactorily that the proposed increase or decrease would not result in excessive, inadequate, unfairly discriminatory, or otherwise reasonable rates. A 30-day deemer provision is contained in the act, which deemer commences 30 days after the commissioner receives sufficient information to determine whether the filing meets the requirements of the insurance law. The burden of proof in any dispute over a rate or rating plan rests with the insurer. The flexible rating system would apply to those lines or classifications where the commissioner determined that competition could not be relied upon to maintain rate stability.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Flexible Rate Limitations for Problem Insurance Markets Act.

1 Section 2. [Definitions.] As used in this act:
2 (1) “Market” means a line, subline or classification (other than a classification delineated by geographic location) of property/casualty
Suggested State Legislation

4 insurance risks whose coverages are not subject to prior approval [insert appropriate description, including particular coverages or rates to which flexible rating would not apply.]
7 (2) "Rate" means charge per unit of exposure (whether such rate is manually generated or based upon judgment) for a particular market.

COMMENT: The term "commissioner" has been bracketed throughout this bill as a generic term for the commissioner of insurance of a state.

1 Section 3. [Power to Regulate Rate Increase and Decrease.] The [commissioner] shall by regulation establish annual limitations upon rate level increases or decreases which may take effect without prior approval with respect to a market. The regulation shall be designed to restore and promote stability in such markets. Upon a determination made that, as to a particular market, competition is either sufficient to assure that rates will not be excessive or that such market is conducted in a manner not resulting in inadequate rates, not destructive of competition or detrimental to the solvency of insurers, the [commissioner] shall exempt such market from the limitations set forth in such regulation. The [commissioner] upon a determination that annual limitations are necessary to restore and promote stability in such a market, shall thereafter withdraw or modify such exemption. The [commissioner] shall, whenever he deems it appropriate, hold a hearing on a record and at which representatives of consumers and other interested parties may participate, for the purpose of determining, on the basis of findings of fact and conclusions, whether an exemption (or withdrawal or modification thereof) of any market is appropriate.

The initial hearing for such purpose shall be held within [sixty] days of the effective date of this act, and the [commissioner] shall act expeditiously in determining whether to exempt any market.

1 Section 4. [Factors to be Considered on Establishing Rate Limitations.] Limitations established or modified pursuant to Section 3 may vary by market and, in establishing or modifying such limitations, the [commissioner] may consider such factors as: the extent and nature of competition; size and significance of the coverage; level and range of rates and rate changes among insurers; investment and underwriting experience of insurers; reinsurance availability; extent of consumer complaints to the [insurance department] extent of denials and restrictions of coverage; volume of cancellations and nonrenewals; or changing conditions in the economic, judicial and social environment.

1 Section 5. [Effective Dates of Rate Changes, Burden of Proof on Insurer.] (a) Notwithstanding any other provisions of [insert reference to applicable rating provisions of insurance law], in any market governed by such regulation and not exempted by the [commissioner] pursuant to this act, filings that produce rate level changes within the limitations specified in such regulation shall become effective without prior
Flexible Rate Limitations Act

approval as provided in [insert cross-reference to prior approval provisions of insurance law]. Filings which produce rate level changes beyond such limitations shall not become effective until approved by the [commissioner], except that filings shall be deemed approved unless disapproved by the [commissioner] within [thirty] days, which the [commissioner] may with cause extend an additional [thirty] days.

(b) In any proceeding, hearing or action arising from a determination made by the [commissioner] made pursuant to this act, with respect to a rate or rating plan of an insurer, such insurer shall have the burden of justifying the rate or rating plan in question.

Section 6. [Authority to Regulate Ratings Plans.] The [commissioner] shall by regulation establish reasonable standards for rating plans including experience rating plans, schedule rating plans, individual risk premium modification plans and expense reduction plans designed to modify rates in the development of premiums for individual risks insured in a property/casualty market. Such standards shall permit recognition of expected differences in loss or expense characteristics, and shall be designed so that such plans are reasonable and equitable in their application, and are not unfairly discriminatory, violative of public policy or otherwise contrary to the best interests of the people of this state. Such standards shall not prevent the development of new or innovative rating methods which otherwise comply with [insert reference to rating provisions of insurance law]. Such rating plans shall be filed or refiled by insurers in compliance with the regulation. The [commissioner] shall review such plans, and may without a hearing disapprove a plan that does not comply with the regulation. The regulation shall establish maximum debits and credits that may result from the application of a rating plan, shall encourage loss control, safety programs and other methods of risk management, and shall require insurers to maintain documentation of the basis for the debits or credits applied under any plan. Once it has been filed and approved, use of the rating plan shall become mandatory and such plan shall be applied uniformly for eligible risks in a manner that is not unfairly discriminatory.

Section 7. [Review of Filings.] The [commissioner] shall review all rates filed within the [twelve] month period preceding the effective date of the regulation promulgated pursuant to Section 3, and shall, on a selective basis, review rates established prior to such period, including rates not manually rated, to determine whether they comply with the applicable standards prescribed by this act for purposes of the annual limitations established or modified pursuant to Section 3. In establishing priorities for such selective review, the [commissioner] shall give consideration to markets which have been subject to the largest rate changes in the [twelve] month period prior to the effective date of such regulation and markets affecting the greatest number of risks; the [commissioner] shall, to the extent material, also give consideration to the fullest extent possible review markets not manually rated, for
the purpose of determining whether a manual rate is appropriate and
shall, upon a determination of appropriateness, require that a manual
rate be developed for such market. If the [commissioner] determines
that the reviewed rate pursuant to the mandatory or selective review
specified by this section does not comply with the applicable standards
prescribed by [insert references to rating provisions of insurance law],
the insurer shall be afforded an opportunity to be heard and shall file
in accordance with such determination prospective rates applicable to
new and renewal policies. Except as to the procedures set forth in this
section, nothing contained in this section shall be construed to alter,
limit, modify, enlarge or abrogate any right of any insurer or any power
or authority of the [commissioner] under any other provision of the in-
surance law.

Section 8. [Grandfather of Existing Rates.] For purposes of the an-
nual limitations established pursuant to Section 3, the rates on file
as of the effective date of the regulation promulgated pursuant to Sec-
tion 3 shall be treated as if they had been in effect for the [twelve]
month period prior to such effective date.

Section 9. [Severability.] [Insert severability clause.]

Section 10. [Repealer.] [Insert repealer clause.]

Section 11. [Effective Date.] [Insert effective date.]
Limitations On Cancellation and Non-Renewal of Personal Insurance Policies Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

Personal insurance policies provide for essential coverage of automobiles, residences and personal property, as well as for liability arising out of the ownership or use of the foregoing. These insurance coverages must be maintained to satisfy contractual requirements of lenders and, in the case of automobiles, coverage is compulsory in some states. Continuity of coverage should be statutorily protected by legislation which balances the rights of insureds with the need for insurers to cancel or non-renew risks which do not meet their minimal underwriting standards.

These goals would be accomplished by providing, in the case of automobile insurance, that insurers could, after providing one year of coverage, non-renew between an appropriate percentage of their risks under a formula which would prevent geographical discrimination (New York adopted 2 percent, a percentage which has not proven disruptive to the market). The non-renewal restrictions would apply after a policy had been in effect for 60 days. They would be inapplicable to situations in which the insured had failed to pay the premium, obtained the policy or filed a claim which evidenced fraud or misrepresentation, or had a license (or the license of a customary operator) suspended or revoked.

For other personal coverages, after the policy was in effect for 60 days it could not be cancelled or non-renewed during a three-year "required policy period," except for non-payment of premium, enumerated hazards and situations which would greatly increase the risk, or a determination that continuation of the policy would violate or place the insurer in violation of the insurance law.

During the 45 to 60 day period prior to the end of the three-year “required policy period,” insurers are given the opportunity to notify their insureds of intention not to renew coverage. Failing this, insureds are granted a new three-year required policy period. Insurers may also offer to conditionally renew policies at the end of a required policy period based upon changes in limits or coverages or offer another policy form providing equivalent coverage.

Insurers would also be permitted to cancel policies if the insurance commissioner determined that continuation of their present premium volume would be hazardous to the interest of policyholders, creditors or the public.
Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Limitations on Cancellation and Non-Renewal of Personal Insurance Policies Act.

Section 2. [Definitions.] As used in this act:

(1) "Covered Policy" means a contract of insurance, referred to in this act as "automobile insurance," issued or issued for delivery in this state, on a risk located or resident in this state, insuring against losses or liabilities arising out of the ownership, operation, or use of a motor vehicle, predominantly used for non-business purposes, when a natural person is the named insured under the policy of automobile insurance.

(2) "Covered Policy" also means a contract of insurance, referred to in this act as "personal lines insurance," other than a contract of insurance defined in paragraph (1) hereof, issued or issued for delivery in this state, on a risk located or resident in this state, insuring any of the following contingencies:

(i) loss of or damage to real property used predominantly for residential purposes and which consists of not more than [four] dwelling units, other than hotels and motels;

(ii) loss of or damage to personal property in which natural persons have an insurable interest, except personal property used in the conduct of a business; and

(iii) other liabilities for loss of, damage to, or injury to persons or property, not arising from the conduct of a business, when a natural person is the named insured under the policy.

(3) A contract which insures any of the foregoing contingencies described in paragraph (1) or (2) hereof as well as other contingencies shall be a covered policy if that portion of the annual premium attributable to such foregoing contingencies exceeds that portion attributable to other contingencies.

(4) A "Covered Policy" shall not include a policy issued pursuant to any plan established under [insert reference to assigned risk plan, joint underwriting association, etc.]

(5) "Renewal" or "To Renew" means the issuance and delivery by an insurer, at the end of the policy period, of a policy superseding a policy previously issued and delivered by the same insurer, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term; provided, however, that any policy with a policy period or term of less than one year shall, for the purpose of this act, be considered as if written for a policy period or term of one year, or any policy with no fixed expiration date, shall, for the purpose of this act, be considered as if written for successive policy periods or terms of one year.

(6) With respect to personal lines insurance, "Required Policy Period" means a period of three years from the date as of which a covered policy is first issued or is voluntarily renewed.
(7) With respect to automobile insurance, "Required Policy Period" means a period of [one year] from the date as of which a covered policy becomes effective after first issuance or voluntary renewal.

(8) With respect to automobile insurance, "Voluntary Renewal" means the renewal of a covered policy which has completed the required policy period pursuant to this act.

(9) "Nonpayment of Premium" means the failure of the named insured to discharge any obligation in connection with the payment of premiums on a policy of insurance or any installment of such premium, whether the premium is payable directly to the insurer or its agent, or indirectly under any premium finance plan or extension of credit. Payment to the insurer, or to an agent or broker authorized to receive such payment, shall be timely, if made within [fifteen] days after mailing to the insured of a notice of cancellation for nonpayment of premium.

(10) "Administrative Suspension" means a temporary suspension of a driver's license pending a hearing, prosecution or investigation or an indefinite suspension of a driver's license because of the failure of the person suspended to perform an act, which suspension will be terminated by the performance of the act by the person suspended.

Section 3. [Cancellation of Policy During Initial 60-day Period.] During the first [sixty] days a covered policy is in effect, no notice of cancellation shall be issued or be effective unless it states or is accompanied by a statement of the specific reason or reasons for such cancellation.

Section 4. [Cancellation of Policy — General Provisions.] After a covered policy has been in effect for [sixty] days, or upon the effective date if the policy is a renewal, no notice of cancellation shall be issued to become effective unless required pursuant to a program approved by the [commissioner of insurance] as necessary because a continuation of the present premium volume would be hazardous to the interests of policyholders of the insurer, its creditors or the public, or unless it is based on one or more of the following:

(1) With respect to automobile insurance policies:
   (i) nonpayment of premium;
   (ii) suspension or revocation during the required policy period of the driver's license of the named insured or any other person who customarily operates an automobile insured under the policy, other than one or more administrative suspensions arising from the same incident which has or have been terminated prior to the effective date of cancellation; or
   (iii) discovery of fraud or material misrepresentation in obtaining the policy or in the presentation of a claim thereunder.

(2) With respect to personal lines insurance policies:
   (i) nonpayment of premium;
   (ii) conviction of a crime arising out of acts increasing the hazard insured against;

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(iii) discovery of fraud or material misrepresentation in obtaining the policy or in the presentation of a claim thereunder;
(iv) discovery of willful or reckless acts or omissions increasing the hazard insured against;
(v) physical changes in the property insured occurring after issuance or last annual anniversary date of the policy which result in the property becoming uninsurable in accordance with the insurer's objective, uniformly applied underwriting standards in effect at the time the policy was issued or last voluntarily renewed; or
(vi) a determination by the [commissioner] that the continuation of the policy would violate or would place the insurer in violation of the [insurance law].

(3) The provisions of this section shall apply to each and every coverage or limit afforded under the policy.

Section 5. [Right of Policy Renewal and Cancellation; Substitution of Approved Policy.]
(a) Unless the insurer, at least [forty-five] but not more than [sixty] days in advance of the end of the policy period, mails or delivers to the named insured, at the address shown in the policy, a written notice of its intention not to renew a covered policy, or to condition its renewal upon change of limits or elimination of any coverages, the named insured shall be entitled to renew the policy upon timely payment of the premium billed to the insured for the renewal. The specific reason or reasons for nonrenewal or conditioned renewal shall be stated in or shall accompany the notice. This section shall not apply when the named insured, an agent or broker authorized by the named insured, or an insurer of the named insured, has mailed or delivered written notice to the insurer that the policy has been replaced or is no longer desired.
(b) If an insurer has the right to cancel a policy it may, in lieu of cancellation, condition continuation of such policy upon change of limits or elimination of any coverage not required by law, if written notice of such intention is mailed or delivered to the insured at the address shown in the policy at least [twenty] days prior to the effective date of such action.
(c) At its discretion, the insurer may, in lieu of renewing the policy in the form as last issued, substitute at the annual renewal date another approved policy form which contains as least substantially equivalent value in the aggregate of benefits, as determined by the [commissioner]. Notice of intention to substitute a different policy form on a renewal shall be made in the same manner as is prescribed in subsection (a) for a conditioned renewal but with respect to automobile insurance policies shall not be subject to the percentage limitations contained in Section 7 of this act applicable to a conditioned renewal. Notice of intention to substitute a different policy form shall be accompanied by a full and clear comparison of the differences between the policy form as last issued and the substitute policy form.

Section 6. [Personal Lines Insurance Policies.] With respect to per-
sonal lines insurance policies, no notice of nonrenewal or conditional
renewal of a covered policy shall be issued to become effective during
the required policy period unless it is based upon a ground for which
the policy could have been cancelled.

Section 7. [Automobile Insurance Policies.]
(a) With respect to automobile insurance policies, the total number
(rounded to the nearest whole number) of notices of intention not to
renew a covered policy, and of notices of intention to condition renewal
upon reduction of limits or elimination of any coverages, which an in-
surer may issue shall be limited for each calendar year so that the total
number of automobiles covered under policies subject to such notices
of intention shall not exceed [state should insert appropriate per-
centage] of the total number of automobiles insured under covered policies
of the insurer in force at last year end in each such insurer's rating
territory in use in this state which have completed their required policy
period under this act. However, the insurer may non-renew or condi-
tionally renew one automobile in any such insurer's rating territory
in use in this state, if the applicable percentage limitation results in
less than one automobile. Cancellations made pursuant to Section 3
or 4 of this act shall be independent of and in addition to the number
of notices of intention not to renew or to condition renewal upon reduc-
tion of limits or elimination of any coverages not required by law, per-
mitted under this section.
(b) For every [two] newly insured automobiles which the insurer
voluntarily writes in each such territory, such insurer shall be per-
mitted to non-renew or conditionally renew [one] additional automobile
in that territory in excess of the [two] percent limit established in
subsection (a) subject to a fair and nondiscriminatory formula developed
by the [commissioner] which shall consider the number of automobiles
written less cancellations initiated by the insurer within the first [sixty]
days of the policy period.
(c) The [commissioner] shall revoke the rights of any insurer or group
of insurers under subsection (b) upon a determination, after a public
hearing, that such an insurer or group of insurers has utilized such
rights to the detriment of any class or group of classes within a rating
territory.

Section 8. [Property/Casualty Insurance Companies Organized to Pro-
vide Policies to Members of an Organization.] Notwithstanding any
of the provisions and limitations of this act, any property/casualty in-
surance company organized for the sole and exclusive purpose of pro-
viding insurance policies to members of an organization, and providing
such insurance policies on risks in [insert state name], may refuse to
renew automobile liability policies of persons who fail to meet the re-
quirements contained in the by-laws of such company prohibiting the
sale of policies to non-members of the organization, provided that such
company shall continue to participate in any [insert appropriate refer-
ence to assigned risk plan, joint underwriting association, etc.]
Section 9. [Proof of Notice.] Proof of mailing of a notice of cancellation, reduction of limits, substitution of policy form, elimination of coverages, conditioned renewal or of intention not to renew, or proof of the mailing of the reasons therefor, to the named insured at the address shown in the policy, shall be sufficient proof of the giving of notice and the giving of reasons required by this act.

Section 10. [Prohibition or Discrimination Based on Age.] No insurer shall refuse to issue or renew a covered policy solely on the ground of the advanced age of the applicant or insured.

Section 11. [Regulatory Authority.] The [commissioner] may, after public hearing, promulgate rules and regulations implementing and coordinating the provisions of this act and [insert appropriate reference to assigned risk plan, joint underwriting association, etc.]

Section 12. [Oversight & Reporting Requirements.] The [commissioner] shall monitor the operation of this act. Every insurer subject to the provisions of this act shall file in the office of the [commissioner] periodic reports in such form as the [commissioner] may prescribe.

Section 13. [Sovereignty.] [Insert sovereignty clause.]

Section 14. [Repealer.] [Insert repealer clause.]

Section 15. [Effective Date.] [Insert effective date.]
Limitations on Cancellation and Non-Renewal of Commercial Insurance Policies Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

Commercial risk insurance, professional liability insurance and public entity insurance are essential coverages. They are coverages which must be maintained to satisfy the contractual requirements of lenders, customers and clients and, in the case of motor vehicle insurance, coverage which is compulsory in some states. Public entity insurance, except for the very largest public entities which may substantially self-insure, is necessary to protect residents against the potential of catastrophic losses. Continuity of coverage should be statutorily protected by legislation which balances the rights of insureds with the need for insurers to cancel or non-renew risks which do not meet their minimal underwriting standards.

These goals would be accomplished by providing limited grounds for insurers to cancel coverages based upon valid underwriting criteria; providing adequate notice of intention to cancel or non-renew; restricting an insurer’s right to increase premium rates during the policy period; providing for automatic renewal unless notice of intention not to renew is timely sent; providing loss information to insureds to permit intelligent shopping for the most advantageous coverage; prohibiting mass non-renewal without commissioner approval of a plan for orderly withdrawal; and by otherwise establishing specific rules for particular coverage to meet their special needs.

The resultant act provides a balanced approach which protects business, professions and public entities against arbitrary cancellations and market disruptions while also protecting insurers against unacceptable risks.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Limitations on Cancellation and Non-Renewal of Commercial Insurance Policies Act.

1 Section 2. [Definitions.] As used in this act:
2 (1) “Covered Policy” means a policy of commercial risk insurance, professional liability insurance or public entity insurance.
4 (2) “Required Policy Period” means a period of [one year] from the date as of which a covered policy is first issued or renewed.
6 (3) “Nonpayment of Premiums” means the failure of the named in-
sured to discharge any obligation in connection with the payment of
premiums on a policy of insurance or any installment of such premium,
whether the premium is payable directly to the insurer or its agent,
or indirectly under any premium finance plan or extension of credit.
Payment to the insurer, or to an agent or broker authorized to receive
such payment, shall be timely for the purpose of this section if made
within [fifteen] days after the mailing of a notice of
cancellation for nonpayment of premium.

(4) “Renewal” or “To Renew” means the issuance or offer to issue
by an insurer of a policy superseding a policy previously issued and
delivered by the same insurer, or another insurer within the same
group or under common management, or the issuance or delivery of
a certificate of notice extending the term of a policy beyond its policy
period or term; provided, however, that any policy with a policy period
or term of less than [one year] shall, for the purpose of this section,
be considered as if written for a policy period or term of [one year],
and any policy with no fixed expiration date or with a policy period
or term of more than [one year] shall, for the purpose of this section,
be considered as if written for successive policy periods or terms of [one
year].

(5) “Administrative Suspension” means a temporary suspension of
a driver’s license pending a hearing, prosecution or investigation, or
an indefinite suspension of a driver’s license because of the failure of
the person suspended to perform an act, which suspension will be ter-
minated by the performance of the act by the person suspended.

(6) “Excess Liability Policy” means a policy of commercial risk, public
entity or professional liability insurance, including a commercial um-
brella policy, when written over:
(i) [one] or more underlying liability policies that in the aggregate
provide primary or intermediate coverage of at least [five hundred thou-
sand] dollars; or
(ii) a self-insured liability retention of at least [five hundred thou-
sand] dollars.

(7) “Hyper Limits Excess Liability Policy” means an excess liability
policy of commercial risk, public entity or professional liability insur-
ance, including a commercial umbrella policy, when written over:
(i) [one] or more underlying liability policies that in the aggregate
provide primary or intermediate coverage of at least [five million]
dollars; or
(ii) a self-insured liability retention of at least [five million] dollars.

(8) “Jumbo Risk” means a business entity that generates gross
revenues exceeding [one hundred million] dollars annually and that
develops an annual liability premium for the policy of at least [five
hundred thousand] dollars, but such term shall not include any public
entity or not-for-profit corporation.

(9) “Renewal Date” means the date specified in a condition renewal
notice, renewal certificate or in the renewal policy itself, for coverage
under a renewal policy to take effect.
Section 3. [Initial Coverage Cancellation Restriction.] During the first
[sixty] days a covered policy is initially in effect, except for the bases
for cancellation set forth in subsections 4(a), 4(b), or 4(c) of this act,
no cancellation shall become effective until [twenty] days after writ-
ten notice is mailed to the first-named insured at the mailing address
shown in the policy and to such insured’s authorized agent or broker.

Section 4. [Cancellation Restriction — General.] After a covered policy
has been in effect for [sixty] days, or upon the effective date if such
policy is a renewal, no notice of cancellation shall become effective until
[fifteen] days after written notice is mailed or delivered and such can-
cellation is based on one or more of the following:

(I) With respect to covered policies:

(i) nonpayment of premium;

(ii) conviction of a crime arising out of acts increasing the hazard
    insured against;

(iii) discovery of fraud or material misrepresentation in the obtain-
     ing of the policy or in the presentation of a claim thereunder;

(iv) after issuance of the policy or after the last renewal date,
     discovery of an act or omission (including failure to comply with loss
     control recommendations that were a condition for issuance or renewal
     of the policy), or a violation of any policy condition, that substantially
     and materially increases the hazard insured against, and which oc-
     curred subsequent to inception of the current policy period;

(v) material physical change in the property insured, occurring after
     issuance or last annual renewal anniversary date of the policy, which
     results in the property becoming uninsurable in accordance with the
     insurer’s objective, uniformly applied underwriting standards in ef-
     fect at the time the policy was issued or last renewed; or material
     change in the nature or extent of the risk, occurring after issuance
     or last annual renewal anniversary date of the policy, which causes
     the risk of loss to be substantially and materially increased beyond
     that contemplated at the time the policy was issued or last renewed;

(vi) a determination by the [commissioner] that continuation of the
     present premium volume of the insurer would jeopardize that insurer’s
     solvency or be hazardous to the interests of policyholders of the insurer,
     its creditors or the public;

(vii) a determination by the [commissioner] that the continuation
     of the policy would violate, or would place the insurer in violation of,
     any provision of the [insurance law];

(viii) where the insurer has reason to believe, in good faith and with
       sufficient cause, that there is a probable risk or danger that the in-
       sured will destroy or permit to be destroyed, the insured property for
       the purpose of collecting the insurance proceeds, provided, however,
       that:

       (A) a notice of cancellation on this ground shall inform the in-
           sured in plain language that the insured must act within [ten] days
           if review by the [commissioner] of the ground for cancellation is desired
           pursuant to subparagraph (viii)(C);
(B) notice of cancellation on this ground shall be provided simultaneously by the insurer to the [commissioner]; and

(C) upon written request of the insured made to the [commissioner] within [ten] days from the insured's receipt of notice of cancellation on this ground, the [commissioner] shall undertake a review of the ground for cancellation to determine whether or not the insurer has satisfied the criteria for cancellation specified in this subparagraph; if after such review the [commissioner] finds no sufficient cause for cancellation on this ground, the notice of cancellation on this ground shall be deemed null and void.

(ix) a determination by the [commissioner] that continuation of the policy following loss of, or change in, all or part of one or more of the insurer's contracts of reinsurance providing reinsurance protection for the policy would jeopardize the insurer's solvency or be hazardous to the interests of the policyholders of the insurer, its creditors or the public, where the insurer has made diligent efforts to obtain alternative reinsurance.

(2) With respect to that portion of a covered policy providing motor vehicle coverage, in addition to the bases for cancellation set forth in paragraph (1), suspension or revocation during the required policy period of the driver's license of any person who continues to operate a motor vehicle insured under the policy, other than [one] or more administrative suspensions arising from the same incident which has or have been terminated prior to the effective date of cancellation.

(3) With respect to professional liability insurance policies, in addition to the bases for cancellation set forth in paragraph (1), revocation or suspension of the insured's license to practice his profession or, if the insured is a hospital, it no longer possesses a valid operating certificate under [insert reference to appropriate statute].

(4) With respect to an excess liability policy, in addition to the bases for cancellation set forth in paragraph (1):

(i) material deterioration in the financial condition of one or more insurers, insuring one or more of the underlying policies providing primary or intermediate coverage, based upon information obtained from a financial rating organization or other source satisfactory to the [commissioner];

(ii) material deterioration in the financial condition of the insured, with a self-insured retention of at least [five hundred thousand] dollars, based upon information obtained from a financial rating organization or other source satisfactory to the [commissioner];

(iii) material change in limits, type or scope of coverage, or exclusions in [one] or more of the underlying policies primary or intermediate coverage; or

(iv) cancellation or nonrenewal of [one] or more of the underlying policies providing primary or intermediate coverage, where such policies are not replaced without lapse and without material deterioration with respect to the financial condition of the insurer providing the replacement coverage, based upon information obtained from a financial rating organization or other source satisfactory to the [com-
missioner].

(5) Written notice of cancellation in accordance with this section shall be mailed or delivered to the named insured, at the address shown on the policy, and to the insured's authorized agent or broker.

Section 5. [Prohibition — Premiums, Term.]

(a) After a covered policy has been in effect for [sixty] days, or on and after the effective date if such policy is a renewal, no premium increase for the term of the policy shall be made to become effective unless due to audit or retrospective rating adjustment or due to and commensurate with insured value added, subsequent to issuance or the last annual renewal anniversary date, pursuant to the policy, at the insured's request or, in lieu of cancellation, where such increase is based upon [one] or more of the grounds for cancellation set forth in subsections 4(1)(iv), 4(1(v) or 4(4).

(b) No covered policy which provides for a policy term of less than [one] year may be issued, or issued for delivery, in this state, except:

(1) a policy issued to an insured for a seasonal purpose;
(2) a policy issued to cover a particular project that will be performed in less than [one] year;
(3) with the insured's written consent, a new policy where the specific term is made to coincide with the term of an insured's already existing policy with the same or an affiliated insurer or, in the case of an excess liability policy, with different insurers;
(4) a policy whose expiration date is mandated by statute or a state agency rule or regulation;
(5) a commercial motor vehicle policy, except where such policy insures a vehicle with a gross weight of [ten thousand] pounds or more, a vehicle for public livery as defined in [insert reference to appropriate motor vehicle law], or a vehicle used as a school bus defined in [insert reference to appropriate motor vehicle law];
(6) a group property/casualty insurance policy issued to coincide with the term of policies issued for the group, in accordance with additional standards for cancellation, nonrenewal or conditional renewal of such group policies set forth in regulations that may be promulgated by the [commissioner]; or
(7) with the insured's consent, a policy pursuant to an authorized safety group or mass merchandising program issued to coincide with the term of other policies in the program for dividend or other purposes, in accordance with additional standards for cancellation, nonrenewal or conditional renewal of such safety group or mass merchandising program policies set forth in regulations that may be promulgated by the [commissioner].

Section 6. [Renewal of Policies.]

(a) A covered policy shall remain in full force and effect pursuant to the same terms, conditions and rates unless written notice is mailed or delivered by the insurer to the named insured, at the address shown on the policy, and to such insured's authorized agent or broker,
indicating the insurer's intention:
(1) not to renew such policy; or
(2) to condition its renewal upon change of limits, change in type
of coverage, reduction of coverage, increased deductible or addition of
exclusion, or upon increased premiums in excess of [twenty] percent
(exclusive of any premium increase generated pursuant to Section 5
or as a result of experience rating or loss rating) except that with
respect to an excess liability policy, the insurer may also, consistent
with regulations promulgated by the [commissioner], condition its
renewal upon requirements relating to the underlying coverage, in
which event the conditional renewal notice shall be treated as an ef-
effective notice of nonrenewal if such requirements are not satisfied as
of the expiration date of the policy; or
(3) that the policy will not be renewed or will not be renewed upon
the same terms, conditions or rates; such alternative renewal notice
must be mailed or delivered within the time frames specified in subsec-
tion (c) and shall advise the insured that a second notice shall be mail-
ed or delivered at a later date prior to the expiration date of the policy,
indicating the insurer's intention as specified in subsection (a)(1) or
subsection (a)(2) and that coverage shall continue on the same terms,
conditions and rates as the expiring policy, until the later of the ex-
piration date or [sixty] days after the second notice is mailed or
delivered; such alternative renewal notice also shall advise the insured
of the availability of loss information pursuant to Section 8 and, upon
request, the insurer shall furnish such loss information within [twen-
ty] days consistent with the provisions of such section.
(b) A nonrenewal notice as specified in subsection (a)(1) and a condi-
tional renewal notice as specified in subsection (a)(2) and the second
notice described in subsection (a)(3) shall contain the specific reason
or reasons for nonrenewal or condition renewal, set forth the amount
of the premium increase (or, where such amount cannot reasonably
be determined as of the time the notice is provided, a reasonable
estimate of the premium increase based upon the information available
to the insurer at that time), and describe in plain and concise terms
the nature of any other proposed changes specified in subsection (a).
The [commissioner] shall by regulation specify the permissible range,
method (including delivery of a renewal certificate or the policy itself),
and circumstances (including policies subject to facultative reinsurance)
by which an insurer may indicate the amount of premium increase
or any other aspect of nonrenewal, conditional renewal or alternative
renewal notices.
(c) The notice required by subsection (a) shall be mailed or delivered
at least [sixty] but not more than [one hundred twenty] days in advance
of the end of the required policy period, except that for an excess liabili-
ty policy or a policy issued to a jumbo risk, the notice shall be mailed
or delivered at least [thirty], but not more than [six hundred twenty]
days, in advance of the end of the required policy period.
(d) Subsections (a), (b) and (c) shall not apply when the named insured,
an agent or broker authorized by the named insured, or another in-
surer of the named insured has mailed or delivered written notice that
the policy has been replaced or is no longer desired.

(e) (1) If the insurer employs an alternative renewal notice as
authorized by subsection (a)(3), the insurer shall provide coverage on
the same terms, conditions, and rates as the expiring policy, until the
later of the expiration date or [sixty] days after the mailing or delivery
of the second notice described in such subsection, except to the extent
that the insured sooner obtains replacement coverage or elects to cancel
sooner.

(2) In the event that an incomplete or late nonrenewal notice is
provided by the insurer prior to the expiration date of the policy,
coverage shall remain in effect, at the same terms and conditions of
the expiring policy and at the lower of the current rates or the prior
period’s rates, until [sixty] days after such notice is mailed or delivered,
except to the extent that the insured sooner obtains replacement
coverage or elects to cancel sooner.

(3) In the event that an incomplete or late conditional renewal
notice is provided by the insurer, coverage shall remain in effect until
[sixty] days from the date such notice is mailed or delivered. If, during
such period, the insured accepts the renewal, the terms, conditions and
rates set forth in the conditional renewal notice shall take effect on
the renewal date. If the insured does not elect to accept the renewal,
coverage shall remain in effect during such period at the same terms,
conditions and rates of the expiring policy unless the insured, before
the expiration of such period, either obtains replacement coverage or
elects to cancel.

(4) (i) In the event that notice of the insurer’s intention not to renew
a policy is not provided by the insurer prior to the expiration date,
coverage shall remain in effect on the same terms and conditions of
the expiring policy for another required policy period, and at the rates
in effect at the time of expiration, unless the insured during the addi-
tional required policy period obtains replacement coverage or elects
to cancel, the insured must be provided with up to [sixty] days of
coverage from the date of the late nonrenewal notice at the same rates
and conditions of the expired policy.

(ii) Every nonrenewal or conditional renewal notice shall advise
the insured of the insured’s rights to coverage, the duration thereof,
and of the availability of loss information consistent with the provi-
sions of Section 8 of this act.

(f) Subsection (e) of this section shall not create a new annual ag-
gregate liability limit (if any) for the covered policy, except in accord-
dance with regulations promulgated by the [commissioner].

(g) No insurer may issue blanket or mass nonrenewal notices for any
line, subline, class or subclass of business, except upon submission to
the [commissioner], at least [ninety] days in advance of mailing or
delivery of such notices, of a plan for orderly withdrawal describing
the proposed nonrenewals and designed to minimize market disruption.

Section 7. [Exceptions.]
Suggested State Legislation

(a) If an insurer provides the notice described in subsections 6(a), 6(b), and 6(c) and thereafter the insurer extends the policy for [ninety] days or less, an additional notice of nonrenewal is not required with respect to the extension.

(b) Notwithstanding subsections 2(b) and 2(d), Section 6 shall not apply but Sections 2, 3 and 4 of this act shall apply to cover a particular project that will be performed in less than [one] year.

Section 8. [Disclosure of Loss Information.]

(a) Upon written request by the first-named insured, the insurer shall mail or deliver the following loss information covering a period of years specified by the [commissioner] by regulation or the period of time coverage has been provided by the insurer, whichever is less, to the first-named insured or such insured's authorized agent or broker within [twenty] days of mailing or delivery of such insured's request:

(1) Information on closed claims, including date and description of occurrence, and any payments;

(2) Information on open claims, including date and description of occurrence, and amounts of any payments; and

(3) Information on notice of any occurrences, including date and description of occurrence.

(b) The insurer may charge a reasonable fee as determined by the [commissioner] only for such information provided upon the first-named insured's request, but not for such information (even in the absence of a request thereof) required to be provided.

(c) The [commissioner] may by regulation specify loss information that insurers or insured's authorized agent or broker, automatically provide in the event of cancellation, nonrenewal or conditional renewal. The [commissioner] may by regulation also specify the circumstances under which such information shall be provided and the consequences in the event the insurer or insured fails to provide such information.

Section 9. [Cancellations.] Every notice of cancellation issued pursuant to this act shall specify the grounds for cancellation and shall contain where applicable a reference to the pertinent subsection or paragraph of Section 4 of this act. Every notice of nonrenewal issued pursuant to this act shall set forth or be accompanied by the reason for nonrenewal, and any stated reason shall be valid and effective unless such reason violated the insurance law or any other state or federal law. Every notice of cancellation, nonrenewal or conditional renewal issued pursuant to this act shall also provide or be accompanied by a statement advising the first-named insured and such insured's authorized agent or broker of the availability of loss information pursuant to Section 8 of this act.

Section 10. [Covered Policies.]

(a) This act shall apply to any policy issued or issued for delivery in this state covering risks with multi-state locations, where the insured is principally headquartered in this state or where the policy
provides that this act is to govern the policy in regard to such locations.
(b) This act shall not apply to policies issued pursuant to a plan
established [insert reference to assigned risk plan, joint underwriting
association, etc.], fidelity or surety policies, policies providing workers'
compensation or employers' liability coverage, policies of principally
marine or inland marine insurance as such insurance is defined by
[insert appropriate reference to insurance law], reinsurance contracts,
policies written on an excess line basis, or policies subject to [insert
any other appropriate exceptions], and Section 6 of this act shall not
apply to hyper limits excess liability policies.

Section 11. [More Favorable Terms, Rights of Insurer to Lawfully
Reconcile or Suspend Policy.] Nothing in this act shall be construed to
prohibit an insurer from providing terms more favorable to an insured
or other party in interest with regard to cancellation or nonrenewal;
nor shall anything herein be construed to limit the grounds for which
an insurer may lawfully rescind or suspend a policy or decline to pay
a claim under a policy.

Section 12. [Grandfather Clause.] The provisions of Sections 6 and
9 shall not apply to a policy the term of which expires during the period
commencing with the effective date of this act and ending on the [six-
tieth] day after such effective date.

Section 13. [Severability.] [Insert severability clause.]

Section 14. [Repealer.] [Insert repealer clause.]

Section 15. [Effective Date.] [Insert effective date.]
Authority to Activate Joint Underwriting Association Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

Most states, in response to the fire insurance availability crisis of the late 1960s, established pools or underwriting associations to provide fire insurance and related coverages to those persons—many of them living in the then strife-torn inner cities—who were unable to procure needed protection in the voluntary market. These "Fair Plans" were highly effective both in providing required coverages and in calming public anxiety caused by the social unrest of the times. The recent liability crisis has demonstrated that virtually any needed property/casualty coverage desired by consumers may, with but little warning, shrink or dry up entirely. In an effort to restore the availability of such coverages, the insurance commissioner may be granted the standby authority to expand the powers of the Joint Underwriting Association to write these coverages as the need arises.

This act would grant the commissioner such standby authority to activate the association upon a determination, after a hearing, that it is necessary due to the unavailability of coverage in a particular property/casualty insurance voluntary market. If such meaningful coverage subsequently becomes readily available in the voluntary marketplace, the commissioner is also empowered to direct that the association suspend writing such business. The directors of the association are required to prepare a plan of operation for the activated coverages, subject to the approval of the commissioner. The act permits the commissioner to activate the association for certain excess or umbrella coverages. An optional exclusion is provided for those states wishing to exempt certain kinds of property/casualty insurance from the provisions of the act (e.g., automobile coverages already available through an assigned risk plan).

The act would attach to existing insurance law provisions establishing a Joint Underwriting Association or Fair Plan. An alternative version of the act is also provided for states which have no such Fair Plan or which choose to establish a separate association for other than fire and extended coverage insurance.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Authority to Activate Joint Underwriting Association Act.

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COMMENT: This act is intended to be made a subsidiary part of those sections of the insurance law establishing a joint underwriting association to write fire insurance and related coverages, whose provisions as to procedures and operations would continue to apply to the additional lines and coverages described below, except as modified herein.

Section 2. [Definition.] "Market," as used in this act, means a line, subline or classification (but not including a classification delineated by geographic location) of property/casualty insurance, other than [insert reference to lines or sublines for which some form of residual market coverage already exists in the insurance law, or that otherwise should be excluded from the provisions of this act].

Section 3. [Additional Powers of the Association.]

(a) The [association] shall begin, or resume after any suspension, its insurance underwriting operations for any market only after the [commissioner of insurance] has determined after a hearing on a record that it is necessary, due to unavailability of meaningful coverage in a particular voluntary market, to activate the [association] to write coverage for such market. In making a determination of necessity pursuant to this section, the [commissioner of insurance] may consider such factors as: the extent and nature of competition; size and significance of the coverage; availability of adequate limits of coverage; efficacy of any market assistance program administered by the [commissioner]; reinsurance availability; extent of consumer complaints to the insurance department; extent of denials and restrictions of coverage; volume of cancellations and nonrenewals; or changing conditions in the economic, judicial and social environment. If, after activating the [association] in regard to a particular market, the [commissioner] determines that ready availability of meaningful coverage in such voluntary market has been restored, the [association] shall thereupon suspend its underwriting in regard to such market.

(b) The [directors] of the [association], after consultation with the [commissioner], shall forthwith prepare a plan of operation, subject to approval by the [commissioner] who shall act expeditiously thereon, and the directors shall take all other necessary steps on and after the effective date of this act to prepare for prompt implementation of the [association's] powers in the event that any market is activated by the [commissioner] pursuant to this act. The directors of the [association] may, on their own initiative or at the request of the [commissioner] amend the plan subject to the approval of the [commissioner]. The [commissioner] may direct that the plan of operation, or amendments to such plan, shall include specified limits of coverage for particular markets activated.

(c) Upon activation by the [commissioner] of any market pursuant to this act, all insurers (excluding assessment cooperative fire insurers) authorized to write and engaged in writing on a direct basis within this state any line or subline of property/casualty insurance not excluded from the definition of a market pursuant to this act shall par-
Suggested State Legislation

37 participate as members in the [association]. Every such insurer shall be
38 and remain a member of the [association] as a condition of its authori-
39 ty to continue to transact such insurance in this state. The [commissioner] may by regulation provide for credits to insurers that volun-
40 tarily provide a market for those risks that the [commissioner] deter-
41 mines to be extremely difficult to place in the voluntary market.
42 (d) The association shall, with respect to any market activated by
43 the [commissioner] pursuant to this act, issue policies in accordance
44 with the association’s plan of operation, and shall maintain separate
45 accounts and records for premiums, losses, expenses and investment
46 income attributable to such insurance. Assessments of insurers for ex-
47 penses and any losses of the [association] in connection with such in-
48 surance shall be based on each insurer’s net direct premiums at-
49 tributable to the lines and sublines of property/casualty insurance not
50 excluded from the definition of a market pursuant to this act. Rates
51 shall be based upon loss and expense experience of the risks insured
52 by the association pursuant to this act and shall be on an actuaria-
53 lly sound basis, calculated to be self-supporting at the lowest possible rates
54 consistent with the maintenance of solvency of the [association] and
55 of reasonable reserves, surplus and expenses, including commissions.
56 (e) The [commissioner] may also activate the association for purposes
57 of providing excess or umbrella coverages in connection with a market.
58 (f) Hazards that the [commissioner] determines are uninsurable shall
59 be excluded from coverages which the [association] is required to
60 furnish.

1 Section 4. [Severability.] [Insert severability clause.]

1 Section 5. [Repealer.] [Insert repealer clause.]

1 Section 6. [Effective Date.] [Insert effective date.]

[Alternative II]

ALTERNATIVE VERSION OF THE ACT, for states with no existing
Joint Underwriting Association or Fair Plan, and for states desiring
to establish an independent joint underwriting association for lines
of insurance other than fire and extended coverage.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Authority to
2 Activate Joint Underwriting Association Act.

1 Section 2. [Definitions.] As used in this act:
2 (a) “Association” means the joint underwriting association established
by this act.
(b) “Plan of Operation” or “Plan” means the plan of operation complying with Section 3 of this act.
(c) "Net Direct Premiums" means gross direct premiums written in this state for insurance coverages other than [insert reference to lines or sublines that are excluded from the provisions of this act], less return premiums or the unused or unabsorbed portions of premium deposits.
(d) “Market” means a line, subline or classification (but not including a classification delineated by geographic location) of property/casualty insurance, other than [insert reference to lines or sublines for which some form of residual market coverage already exists in the insurance law, or that otherwise should be excluded from the provisions of this act].

Section 3. [Joint Underwriting Association ]
(a) A joint underwriting association known as the [insert name of state] Property/Casualty Insurance Underwriting Association is established, consisting of all insurers authorized to write and engaged in writing within this state, on a direct basis, property/casualty insurance, but excluding assessment cooperative fire companies transacting business pursuant to [insert reference to appropriate section of insurance law].
(b) The association shall be governed by a board of [thirteen] directors, [ten] of whom shall be elected annually by cumulative voting by the members of the association, whose votes in such election shall be weighted in accordance with each member’s net direct premiums written during the preceding calendar year. The remaining [three] directors shall be appointed annually by the [commissioner] and be duly licensed insurance agents or brokers representative of broad segments of the public obtaining insurance through the association.
(c) The association shall, pursuant to the provisions of this act and the plan of operation, have the power on behalf of its members:
   (i) to cause policies of insurance to be issued to applicants;
   (ii) to assume reinsurance from its members; and
   (iii) to cede reinsurance.
(d) The association shall adhere to a plan of operation, consistent with the provisions of this act, approved by the [commissioner] after consultation with affected individuals and organizations. The plan shall provide for economical, fair and non-discriminatory administration and prompt and efficient provision of property/casualty insurance. It shall contain other matters including, but not limited to, provision for necessary facilities, management of the association, assessment of members to defray losses and expenses, commission arrangements, reasonable and objective underwriting standards, acceptance and cession of reinsurance, and procedures for determining amounts of insurance to be provided by the association.

COMMENT: Optional: Such amounts shall not be in excess of [insert appropriate dollar limitation].
Section 4. [Additional Powers of the Association.]
(a) The association shall begin, or resume after any suspension, its insurance underwriting operations for any market only after the [commissioner] has determined after a hearing on a record that it is necessary, due to unavailability of meaningful coverage in a particular voluntary market, to activate the association to write coverage for such market. In making a determination of necessity pursuant to this section, the [commissioner] may consider such factors as: the extent and nature of competition; size and significance of the coverage; availability of adequate limits of coverage; efficacy of any market assistance program administered by the [commissioner]; reinsurance availability; extent of consumer complaints to the insurance department; extent of denials and restrictions of coverage; volume of cancellations and nonrenewals; or changing conditions in the economic, judicial and social environment. If, after activating the association in regard to a particular market, the [commissioner] determines that ready availability of meaningful coverage in such voluntary market has been restored, the association shall thereupon suspend its underwriting in regard to such market.
(b) The [commissioner] may direct that the plan of operation, or amendments to such plan, shall include specified limits of coverage for particular markets activated.
(c) Upon activation by the [commissioner] of any market pursuant to this act, all insurers (excluding assessment cooperative fire insurers) authorized to write and engaged in writing on a direct basis within this state any line or subline of property/casualty insurance not excluded from the definition of a market pursuant to this act shall participate as members in the association. Every such insurer shall be and remain a member of the association as a condition of its authority to continue to transact such insurance in this state. The [commissioner] may by regulation provide for credits to insurers that voluntarily provide a market for those risks that the [commissioner] determines to be extremely difficult to place in the voluntary market.
(d) The association shall, with respect to any market activated by the [commissioner] pursuant to this act, issue policies in accordance with the association's plan of operation, and shall maintain separate accounts and records for premiums, losses, expenses and investment income attributable to such insurance. Assessments of insurers for expenses and any losses of the association in connection with such insurance shall be based on each insurer's net direct premiums attributable to the lines and sublines of property/casualty insurance not excluded from the definition of a market pursuant to this act. Rates shall be based upon loss and expense experience of the risks insured by the association pursuant to this act and shall be on an actuarially sound basis, calculated to be self-supporting at the lowest possible rates.
consistent with the maintenance of solvency of the association and of
reasonable reserves, surplus and expenses, including commissions.
(e) The [commissioner] may also activate the association for purposes
of providing excess or umbrella coverages in connection with a market.
(f) Hazards that the [commissioner] determines are uninsurable shall
be excluded from coverages which the association is required to furnish.

Section 5. [Procedures.]
(a) Any person who has made a diligent effort in the normal insurance
market to procure from an authorized insurer property/casualty in-
surance coverage not excluded from the definition of market pursuant
to this act, is entitled to apply to the association for such coverage.
Such application may be made on behalf of an applicant by a broker
or agent authorized by the applicant.
(b) If the association determines that
(1) the risk is eligible for insurance in accordance with the plan, and
(2) there is no unpaid, uncontested premium due from the appli-
cant for prior insurance on the risk (as shown by the insured having
failed to make written objection to charges within [thirty] days after
billing), the association, upon receipt of the premium or portion
prescribed in the plan, shall cause an appropriate policy of insurance
to be issued for a term of [one] year.
(c) Any member may cede insurance to the association as provided
in the plan.

Section 6. [Rates, Rating Plans, Rules and Statistics.] The rates,
rating plans, rating rules and statistics applicable to the insurance
written by the association shall be subject to the relevant provisions
of [insert reference to prior approval rating provisions of the insurance
law].

Section 7. [Appeals.] Any applicant to the association and any per-
son insured pursuant to this article, or their representatives, or any
affected insurer, may appeal to the [commissioner] within [thirty] days
after any ruling, action or decision by or on behalf of the association,
with respect to those items the plan of operation defines as appealable
matters.

Section 8. [Availability of Reports; Immunity.]
(a) Reports of inspection performed by or on behalf of the association
shall be available to members of the association, applicants and the
[commissioner.]
(b) No liability or cause of action shall exist against the association
or its agents or employees, an insurer or the [commissioner] or their
authorized representatives for any statement made in good faith by
them in any reports or communications concerning risks insured or
to be insured by the association or at any related administrative
hearings.
Suggested State Legislation

Section 9. [Annual Statement.]
(a) The association shall annually file a statement in the office of the [commissioner] on or before the [first day of March]. Such statement shall be in a form approved by and contain information required by the [commissioner] with respect to its transactions, condition, operations and affairs during the preceding year.
(b) The [commissioner] may at any time require the association to furnish additional information which the [commissioner] considers to be material in evaluating the scope, operation and experience of the association.

Section 10. [Examinations.] The [commissioner] may, in accordance with [insert appropriate reference to insurance law], make an examination into the affairs of the association whenever the [commissioner] deems it expedient. The expenses of every such examination shall be borne and paid by the association in the manner prescribed by [insert appropriate reference to insurance law].

Section 11. [Severability.] [Insert severability clause.]

Section 12. [Repealer.] [Insert repealer clause.]

Section 13. [Effective Date.] [Insert effective date.]
Municipal Reciprocal Insurer Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

One method of alleviating the problem of unavailability of insurance for governmental entities is to allow such entities to join together and engage in the exchange of contracts of insurance through statewide municipal reciprocal insurers. A reciprocal is created by a group of participants known as subscribers who, under a common name and through an attorney-in-fact, engage in the business of insuring one another. As contracts of insurance are exchanged among subscribers on a reciprocal basis, each insured is also an insurer.

Management of a reciprocal insurer is through an advisory committee, which is charged with ultimate power and responsibility in the management and control of the insurer’s affairs, including prescribing the powers, duties and compensation of the attorney-in-fact. The attorney-in-fact (which, by appropriate legislation, may be a not-for-profit corporation) is empowered to act on behalf of the subscribers and is responsible for all functions required in the conduct of the business. The attorney-in-fact maintains a separate account for each subscriber and the account is credited with the subscriber’s share of the reciprocal insurer’s performance, including any future earnings.

The organization and operating requirements for a reciprocal insurer are included in the insurance laws of a number of states. This act assumes that the law of the particular state contains such statutory provisions which establish an underlying framework for the formation of reciprocal insurers. Due to the special features of a reciprocal whose membership is limited to public entities, this act requires such reciprocal to establish a risk management program and equitable risk classifications, and requires every subscriber to participate in the insurer’s risk management program to identify and reduce risks by implementation of loss control, safety programs and other methods of risk management. The act also authorizes the commissioner of insurance to promulgate additional standards (for example, in order to facilitate the reciprocal’s organization, assure fair access for municipalities, safeguard its financial soundness, and the continuance of a viable organization) and requires compliance with any such additional standards.

In some states, the language of the insurance law dealing with reciprocal insurers may be broad enough to permit the formation of municipal reciprocal insurers without the enactment of special legislation.

Suggested Legislation

(Title, enacting clause, etc.)
Section 1. [Short Title.] This act may be cited as the Municipal Reciprocal Insurer Act.

Section 2. [Participants in Reciprocal Insurer.] [Twenty-five] or more counties, towns, cities, villages, district corporations, or school districts and boards of cooperative educational services, each having the qualifications of subscribers as prescribed in the [insurance law], may organize statewide municipal reciprocal insurers to provide any [one] or more of the basic kinds of insurance set forth in [insert reference to appropriate property/casualty coverages], except workers’ compensation and employers’ liability, fidelity and surety, credit and marine and inland marine, and [insert any other appropriate references to kinds of insurance]. Such a reciprocal insurer shall be called a “municipal reciprocal insurer” and shall be subject to all the provisions of the insurance law applicable to a reciprocal insurer, except where the context otherwise requires.

COMMENT: Optional, for use if required by structure of insurance law of the enacting state.

Section 3. [General Requirements for Municipal Reciprocal Insurers.] A municipal reciprocal insurer shall:
(1) comply with all applicable provisions of the insurance law relating to reciprocal insurers;
(2) comply with such additional standards as the [commissioner of insurance] may by regulation prescribe;
(3) not refuse to issue, renew or cancel a policy for any eligible insurable risk based solely on geographical location;
(4) not refuse to write coverages afforded by such insurer for any eligible risk in accordance with standards of insurability filed with and approved by the [commissioner of insurance]; and
(5) establish and promote a risk management program among subscribers to identify and reduce risks by implementation of loss control, safety programs and other methods of risk management.

Section 4. [Subscriber’s Agreement.] (a) Every municipal subscriber’s agreement shall contain a provision specifying the powers and duties of the [advisory committee], which shall include the power and duty to regulate the compensation, powers and duties of the attorney-in-fact, if not specifically provided in the subscriber’s agreement, and shall also include the power to make regulations for the effective control and custody of the funds and investments of the reciprocal insurer. In addition, the [advisory committee] of a municipal reciprocal insurer shall establish procedures to prevent any conflicts of interest between the attorney-in-fact and such insurer. Such procedures shall be submitted to and approved by the [commissioner of insurance], who shall also approve the attorney-in-fact for a municipal reciprocal insurer.
(b) In the case of a municipal reciprocal insurer, such agreement shall

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include procedures to:

(1) establish and promote loss control, safety programs and other
methods of risk management;

(2) establish equitable risk classifications; and

(3) establish uniform recordkeeping and reporting procedures.

c) Every subscriber to a municipal reciprocal insurer shall agree to
participate in a risk management program established by the attorney-
in-fact. The attorney-in-fact of each insurer shall, with the approval
of the advisory committee, establish, promote and manage a risk man-
agement program among the subscribers. Each program shall include
identifying and reducing risks through the implementation of loss con-
trol, safety programs and other methods of risk management. The
attorney-in-fact may enter into contracts with any person, firm, or cor-
poration for services necessary to perform and administer the risk
management program or to perform or administer other functions
deemed necessary by the advisory committee and approved by the [com-
missioner of insurance]. A subscriber may enter into contracts with
any person, firm or corporation for services necessary to perform and
administer any function which that subscriber shall deem necessary.

Section 5. [Guaranty Fund Protection; Assessability.]

(a) A municipal reciprocal insurer shall be subject to the provisions
of [refer to appropriate provisions of insurance law relating to state
guaranty fund]. The original subscribers and the attorney-in-fact of
a municipal reciprocal insurer shall execute a declaration that the
reciprocal insurer and the contracts of insurance it issues will be sub-
ject to the provisions of [refer to appropriate provisions of insurance
law relating to guaranty fund protection]. Said declaration shall be
irrevocable.

(b) A municipal reciprocal insurer may not issue non-assessable
policies or agreements.

Section 6. [Severability.] [Insert severability clause.]

Section 7. [Repealer.] [Insert repealer clause.]

Section 8. [Effective Date.] [Insert effective date.]
Limitation on Holdings of Non-Investment Grade Obligations Act

*This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.*

Non-investment grade bonds have not been a permitted investment for insurers, except in minimal amounts, until recently. The historical record for these types of investments is insufficient to project their expected behavior through various economic cycles. This is particularly true since some non-investment grade bonds, referred to as high yield "junk bonds," are currently being used as vehicles for acquisitions, leveraged buyouts and other deals not contemplated in the past. A downturn in economic conditions could adversely affect insurers having a high concentration of these investments. Accordingly, a limitation on the amount of non-investment grade bonds that a domestic insurer may purchase is both prudent and necessary.

While non-investment grade bonds may have a place in a well-diversified portfolio, the special risks associated with these investments require a close degree of management supervision even when they are held within an aggregate limit. This act will limit the amount that insurers may hold in such bonds but will still permit all domestic insurers to invest a substantial portion (up to 20 percent) of their admitted assets in non-investment grade bonds.

This act may be made applicable to either life insurers, property/casualty insurers or both. Some state insurance departments (e.g., New York) have the authority to impose these limitations by promulgating regulations under existing statutes.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Limitation on Holdings of Non-Investment Grade Obligations Act.

2 Section 2. [Definitions.] As used in this Act:

3 (1) "Non-Investment Grade Obligations" means obligations which, at the time of acquisition are not investment grade.

4 (2) "Investment Grade" means that the obligation has been determined to be in one of the top four generic lettered rating classifications by a securities rating agency acceptable to the [commissioner of insurance], or that the obligation has been identified in writing by such a rating agency to be of investment grade quality or that the obligation has been determined to be investment grade (as indicated by a
Section 3. [Limitation.]
(a) The board of directors of any domestic [insert life, property/casualty or life and property/casualty] insurance company which acquires or invests in, directly or indirectly, non-investment grade obligations of any institution shall adopt a written plan for the making of such investments. Such plan, in addition to guidelines with respect to the quality of the issues invested in, shall contain diversification standards including but not limited to standards for issuer, industry, duration, liquidity and geographic location.
(b) Directors and officers of corporations shall perform their duties in making investments in good faith and with the degree of care that an ordinarily prudent individual in a like position would use under similar circumstances.
(c) Without the prior approval of the [commissioner], no domestic [insert life, property/casualty or life and property/casualty] insurer shall acquire, directly or indirectly, any non-investment grade obligation if the aggregate amount of all non-investment grade obligations, after such proposed acquisition, that is then held by the domestic [insert life, property/casualty or life and property/casualty] insurer would exceed [twenty] percent of its admitted assets. In determining whether or not to grant approval to an insurer to acquire in excess of [twenty] percent, the [commissioner], in addition to other requirements of law relating to such acquisitions or investments, statutory or otherwise, shall review the standard of care practiced by the insurer’s of directors and officers in making such investments or acquisitions.

Section 4. [Severability.] [Insert severability clause.]

Section 5. [Repealcr.] [Insert repealcr clause.]

Section 6. [Effective Date.] [Insert effective date.]
Limitation on Business Transacted with Producer Controlled-Insurer Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

Insurance brokers have a statutory and fiduciary responsibility to deal with their customers in good faith. When a broker controls an insurance company, which also owes a fiduciary duty to its policyholders to deal with them in good faith, an inherent conflict of interest exists. The broker cannot serve the best interests of both the insurer and the customer.

There is also a conflict of interest problem involved when a broker places business produced by that broker with a controlled insurer, since the broker may be tempted to use the controlled insurer as a loss leader. Brokers collect commissions regardless of the profitability of the business produced. Any resulting insolvency could occur many years later and would have to be borne by other insurers through security fund payouts and assessments and later by the insurance buying public through higher premiums imposed to recoup the assessments. New York litigation against Frank B. Hall Companies alleges the foregoing scenario.

This act would proscribe a broker's placing any business with the controlled insurer. The definition of presumptive control is the traditional 10 percent or more used in other definitions of control found in insurance laws (e.g., Model Insurance Holding Company System Regulatory Act). In addition, control may be determined by other criteria, including the power to direct the management of the insurer.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Limitation on Business Transacted with Producer-Controlled Insurer Act.

Section 2. [Definition.] As used in this act "Control" or "Controlled" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person.

Section 3. [Conflict of Interest Prohibitions.] No broker which has control of an insurer may directly or indirectly place any direct business with such controlled insurer. Control shall be presumed to exist if any
person, directly or indirectly, owns controls, holds with the power to
vote, or holds proxies representing, [ten] percent or more of the voting
securities of any other person. This presumption may be rebutted by
a showing acceptable to the [commissioner] that control does not exist
in fact. The [commissioner] may determine, after providing an oppor-
tunity to be heard and after making specific findings of fact to support
such determination, that control exists in fact, notwithstanding the
absence of a presumption to that effect.

Section 4. [Severability.] [Insert severability clause.]

Section 5. [Repealer.] [Insert repealer clause.]

Section 6. [Effective Date.] [Insert effective date.]
Financial Guaranty Insurance Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

Financial guaranty insurance is a new type of coverage which has grown at a phenomenal rate. Financial guaranty insurance, also known as "credit enhancement," is a coverage which guaranties the payment of principal and interest of any debt obligation. The types of obligations that could be insured under this act include municipal and corporate bonds, limited partnership obligations, pass-through securities and consumer debt. Although it was a relatively minor line of business 10 years ago, financial guaranty insurance has, in recent years, become a significant marketing factor for the financial community. Financial guaranty insurance is currently subject to rules applicable to property/casualty insurance generally but it is a unique kind of coverage requiring specialized treatment. Property/casualty insurance is based on the law of large numbers—a large group of homogeneous risks joined together to create a pool of money to pay for the losses of a few. The number of losses incurred is generally frequent and severity in relation to surplus is relatively low. In contrast, under financial guaranty insurance, a single loss, e.g., the failure of a bond issuer to meet its obligations, could result in a potentially catastrophic financial loss to the insurer that is obligated to the insured bondholders. It is therefore necessary that the insurance law define and appropriately regulate this line of business. Under current law, financial guaranty insurance is not a defined kind of business, and is generally treated as surety business, which prevents implementation of necessary regulation.

This act defines "financial guaranty insurance" as a separate kind of insurance and authorizes the formation and licensing of financial guaranty insurance corporations which would essentially be monoline insurers, but would also be permitted to write surety, residual value and certain types of credit insurance. The act specifies the types of obligations for which financial guaranties may be written by a financial guaranty insurance corporation which would include municipal and corporate bonds and prohibits the writing of guarantees for non specified obligations (unless substantially similar) without further enabling legislation.

A regulatory framework is established which includes realistic capital and reserve requirements, prudent aggregate and single risk limitations and appropriate reinsurance requirements. In addition, the act provides that financial guaranty insurance, surety insurance, residual value insurance and certain types of credit insurance will not be covered by the state guaranty funds. This act is adapted from a model bill adopted by the National Association of Insurance Commissioners in December, 1986. A comprehensive bill memorandum accompanied the model bill.
Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Financial Guaranty Insurance Act.

COMMENT: This legislation is intended to amend the state's insurance law to establish a new article on guaranty insurance.

Section 2. [Definitions.] As used in this article:

(1) "Financial Guaranty Insurance" means a surety bond, insurance policy or, when issued by an insurer, an indemnity contract and any guaranty similar to the foregoing types, under which loss is payable, upon proof of occurrence of financial loss to an insured claimant, obligee, or indemnitee, as a result of any of the following events:

(i) failure of any obligor on any debt instrument or other monetary obligation (including common or preferred stock guaranteed under a surety bond, insurance policy or indemnity contract) to pay when due principal, interest, premium, dividend or purchase price of or on such instrument or obligation, when such failure is the result of a financial default or insolvency, regardless of whether such obligation is incurred directly or as guarantor by or on behalf of another obligor that has also defaulted;

(ii) changes in the levels of interest rates, whether short or long term, or the differential in interest rates between various markets or products;

(iii) changes in the rate of exchange of currency;

(iv) inconvertibility of one currency into another for any reason, or inability to withdraw funds held in a foreign country resulting from restrictions imposed by a governmental authority;

(v) changes in the value of specific assets or commodities, financial or commodity indices or price levels in general; or

(vi) other events which the [commissioner] determines are substantially similar to any of the foregoing.

(2) Notwithstanding paragraph (1), "Financial Guaranty Insurance" shall not include:

(i) insurance of any loss resulting from any event described in paragraph (1), if the loss is payable only upon the occurrence of any of the following, as specified in a surety bond, insurance policy or indemnity contract:

(A) a fortuitous physical event;

(B) a failure of or deficiency in the operation of equipment; or

(C) an inability to extract or recover a natural resource;

(ii) an individual or schedule public official bond;

(iii) any contract bond, including bid, payment or maintenance bond, or a performance bond where the bond is guaranteeing the execution of any contract other than a contract of indebtedness or other

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monetary obligation;
(iv) any court bond required in connection with judicial, probate,
bankruptcy or equity proceedings, including waiver, probate, open
estate and life tenant bond;
(v) any bond running to the federal, state, county, municipal govern-
ment, or other political subdivision, as a condition precedent to grant-
ing of a license to engage in a particular business or of a permit to
exercise a particular privilege;
(vi) any loss security bond or utility payment indemnity bond run-
ing to a governmental unit, railroad or charitable organization;
(vii) any lease, purchase and sale or concessionaire surety bond;
(viii) credit unemployment insurance, meaning insurance on a debt-
or in connection with a specific loan or other credit transaction, to pro-
vide payments to a creditor in the event of unemployment of the deb-
tor for the installments or other periodic payments becoming due while
a debtor is unemployed;

COMMENT: To be used by states which do not authorize credit unemploy-
ment insurance as a separate line of business but do permit this line to
be written.

(ix) credit insurance, meaning insurance indemnifying manufac-
turers, merchants or educational institutions extending credit against
loss or damage resulting from nonpayment of debts owed to them for
goods or services provided in the normal course of their business;
(x) guarantied investment contracts issued by life insurance com-
panies which provide that the life insurer itself will make specified
payments in exchange for specific premiums or contributions;
(xi) residual value insurance authorized by [insert reference to ap-
propriate section of law];
(xii) mortgage guaranty insurance authorized by [insert reference
to appropriate section of law];
(xiii) indemnity contracts or similar guaranties, to the extent that
they are not otherwise limited or proscribed by this chapter, in which
a life insurer:
(A) guaranties its obligations or indebtedness or the obligations
or indebtedness of a subsidiary (as defined in [insert reference to ap-
propriate section of law]), other than a financial guaranty insurance
corporation, provided that to the extent that any such obligations or
indebtedness are backed by specific assets, such assets must at all times
be owned by the insurer or the subsidiary; and in the case of the guaran-
ty of the obligations or indebtedness of the subsidiary that are not back-
ed by specific assets of the life insurer, such guaranty terminates once
the subsidiary ceases to be a subsidiary; or
(B) guaranties obligations or indebtedness (including the obliga-
tion to substitute assets where appropriate) with respect to specific
assets acquired by a life insurer in the course of normal investment
activities and not for the purpose of resale with credit enhancement,
or guaranties obligations or indebtedness acquired by its subsidiary,
provided that the assets acquired pursuant to subparagraph (B) have
been acquired by a special purpose entity, whose sole purpose is to ac-
quire specific assets of the life insurer or the subsidiary and issue
securities or participation certificates backed by such assets; or sold
to an independent third party; or guaranties obligations or in-
debtioness of an employee or agent of the life insurer; or
(xiv) any other form of insurance covering risks which the [com-
missioner] determines to be substantially similar to any of the
foregoing.
(3) “Affiliate” means a person which, directly or indirectly, owns at
least [ten] but less than [twenty-five] percent of the financial guaran-
ty insurance corporation or which is at least [ten] percent but less than
[twenty-five] percent, directly or indirectly, owned by a financial
guaranty insurance corporation.
(4) “Average Annual Debt Service” means the amount of insured un-
paid principal and interest on an obligation multiplied by the number
of such insured obligations (assuming that each obligation represents
a $1,000 par value), divided by the amount equal to the aggregate life
of all such obligations. This definition, expressed as a formula in regard
to bonds, is as follows:

\[
\text{Average Annual Debt Service} = \frac{\text{Total Debt Service} \times \text{Number of Bonds}}{\text{Bond Years}}
\]

\[
\text{Total Debt Service} = \frac{\text{Insured Unpaid Principal} + \text{Interest}}{1,000}
\]

\[
\text{Number of Bonds} = \frac{\text{Total Insurer Principal}}{1,000}
\]

\[
\text{Bond Years} = \frac{\text{Number of Bonds} \times \text{Term in Years}}{1,000}
\]

(5) “Collateral” means cash or the market value of investment grade
securities, other than securities evidencing an interest in the project
or projects financed with the proceeds of the insured obligations, in
an amount not to exceed the principal amount of the insured obliga-
tion; if
(i) deposited with the corporation; or
(ii) held in trust by a trustee acceptable to the [commissioner] for
the benefit of the corporation; or
(iii) held in trust, pursuant to the bond indenture, by a trustee ac-
ceptable to the [commissioner], for the benefit of bondholders in the
form of sinking funds or other reserves which may be used solely for
the payment of debt service.
(6) “Contingency Reserve” means an additional liability reserve
established to protect policyholders against the effects of adverse
economic cycles or other unforeseen circumstances.
(7) “Financial Guaranty Insurance Corporation” means an insurer
licensed to transact the business of financial guaranty insurance in
this state.
(8) “Governmental Unit” means a state, territory, or possession of
the United States of America, the District of Columbia, a province of
Canada, a municipality, or a political subdivision of any of the foregoing, or any public agency or instrumentality thereof.

(9) "Guaranties of Consumer Debt Obligations" means insurance policies indemnifying regulated financial institutions against loss or damage resulting from non-payment of debts owed to them for extensions of credit to individuals for non-business purposes provided in the normal course of their business. Policies providing such coverage shall contain a provision that all liability terminates upon sale or transfer of the underlying obligation to any transferee which is not an insured of the financial guaranty insurance corporation under a similar policy.

(10) "Industrial Development Bond" means any security, or other instrument under which a payment obligation is created, issued by or on behalf of a governmental unit to finance a project serving a private industrial, commercial or manufacturing purpose and not payable or guaranteed by a governmental unit.

(11) "Investment Grade" means that the obligation has been determined to be in one of the top four generic lettered rating classifications by a securities rating agency acceptable to the [commissioner], that the obligation has been identified in writing by such a rating agency as an insurable risk deemed to be of investment grade quality, or that the obligation has been determined to be investment grade (as indicated by a "yes" rating) by the Securities Valuation Office of the National Association of Insurance Commissioners.

(12) "Municipal Obligation Bond" means any security, or other instrument, including a state lease but not a lease of any other governmental entity, under which a payment obligation is created, issued by or on behalf of a governmental unit to finance a project serving a substantial public purpose.

(i) payable from tax revenues, but not tax allocations, within the jurisdiction of such governmental unit; or

(ii) payable or guaranteed by the United States of America or any agency, department or instrumentality thereof, or by a state housing agency; or

(iii) payable from rates or charges (but not tolls) levied or collected in respect to a non-nuclear utility project, public transportation facility (other than an airport facility) or public higher education facility; or

(iv) with respect to lease obligations, payable from future appropriations.

(13) "Reinsurance" means cessions qualifying for credit under Section 5 of this article.

(14) "Security" or "Secured" means:

(i) a deposit at least equal to the full amount of the principal of the insured obligation; or

(ii) collateral, as defined by paragraph (5), at least equal to the full amount of the principal of the insured obligation, or the scheduled cash flow from which is equal to or greater than the scheduled debt service on the insured obligation and is due prior to the date when the scheduled debt service is payable; or

(iii) property; provided the corporation has possession of evidence...
of the right, title or authority to claim or foreclose thereon or other-
wise dispose of such property for value, the scheduled cash flow from
which, or market value thereof, is at least equal to the scheduled debt
service on the insured obligation and is due prior to the date when
the scheduled debt service is payable.

(15) "Special Revenue Bond" means any security, or other instru-
ment under which a payment obligation is created, issued by or on
behalf of a governmental unit to finance a project serving a substan-
tial public purpose and not payable from the sources enumerated in
paragraph (12) in connection with the payment of municipal obliga-
tion bonds.

(16) "Total Liability" of a financial guaranty insurance corporation
means the aggregate amount of insured unpaid principal, interest and
other monetary payments, if any, of guarantied obligations insured
or assumed, less reinsurance and less collateral.

COMMENT: The term "commissioner" has been used and bracketed
throughout this bill as a generic term for the commissioner of insurance
of a state or for any other appropriate state official who would be vested
with the responsibilities for carrying out the provisions of this act.

Section 3. [Organization; Financial Requirements.]

(a) A financial guaranty insurance corporation may be organized and
licensed in the manner prescribed in [insert reference to applicable
state statute law], except as modified by the following provisions:

(1) A corporation organized for the purpose of transacting finan-
cial guaranty insurance may, subject to all the provisions of this
chapter applicable thereto, be licensed to transact the following addi-
tional kinds of insurance:

(i) residual value insurance, as authorized by [insert reference
to applicable state law],

(ii) surety insurance, as authorized by [insert reference to ap-
licable state law],

(iii) credit insurance, as authorized by [insert reference to ap-
licable state law];

(2) A corporation may only assume those lines of insurance for
which it is licensed to write direct business;

(3) Prior to the issuance of a license, a corporation shall submit for
the approval of the [commissioner] a plan of operation detailing the
types and projected diversification of guaranties that will be issued,
the underwriting procedures that will be followed, managerial over-
sight methods, investment policies, and such other matters as may be
prescribed by the [commissioner];

(4) A financial guaranty corporation shall be subject to all of the
provisions of this chapter applicable to property/casualty insurers to
the extent that such provisions are not inconsistent with the provi-
sions of this act; and

(5) A financial guaranty insurance corporation’s investments in any
one entity insured by that corporation shall not exceed [one] percent
of its admitted assets at last year-end.
(b) A financial guaranty corporation shall not transact business
unless:
(1) It has paid-in capital of at least [ten million] dollars and paid-in
surplus of at least [forty million] dollars, and shall at all times
thereafter maintain a minimum surplus to policyholders of [thirty-five
million] dollars;
(2) It establishes a contingency reserve, net of reinsurance, as
follows:
(i) the contributions to the reserve shall be calculated by applying
the following percentages to the net principal written each calen-
dar year of guaranties of:
(A) municipal obligation bonds, [0.8] percent;
(B) special revenue bonds, [1.2] percent;
(C) industrial development bonds, [1.6] percent;
(D) secured investment grade obligations, [1.6] percent;
(E) investment grade obligations not secured, [2.5] percent; and
(F) all other obligations guarantied, [3.0] percent;
(ii) quarterly additions to the reserve for subparagraphs (i) (A),
(B), and (i) (C) above shall be equal to the greater of [1/80th] of the
amounts derived by applying the appropriate contribution specified
in subparagraph (i) or [fifty] percent of the quarterly earned premiums
on such guaranties and shall be maintained for a period of [twenty]
years; and
(iii) quarterly additions to the reserve for subparagraphs (i) (D),
(E), and (i) (F) above shall be equal to the greater of [1/40th] of the
amounts derived by applying the appropriate contribution specified
in subparagraph (i) or [fifty] percent of the quarterly earned premiums
on such guaranties and shall be maintained for a period of [ten] years;
(iv) the reserve may be released thereafter in the same manner,
except that a part of the reserve may be released proportional to the
reduction in net total liabilities resulting from reinsurance and the
reinsurer shall, on the effective date of the reinsurance, establish a
reserve in an amount equal to the amount released; and
(v) withdrawals from the contingency reserve, to the extent of any
excess, may be made from the earliest contributions to such reserve
remaining therein:
(A) with the approval of the [commissioner], in any year in
which the actual incurred losses exceed [thirty-five] percent of earned
premiums, or
(B) upon [thirty] days prior notice to the [commissioner], pro-
vided that the contingency reserve has been in existence for [forty
quarters], for reserves subject to subparagraph (ii), upon demonstration
that the amount carried is excessive in relation to the corpora-
tion's outstanding obligations;
(3) In addition to the contingency reserve, the case basis method
or other method as may be prescribed by the [commissioner] shall be
Financial Guaranty Insurance Act

used to determine loss reserves, in a manner consistent with [insert
reference to state law] which shall include a reserve for claims reported
and unpaid net of collateral. A deduction from loss reserves shall be
allowed for the time value of money by application of a discount rate
equal to the average rate of return on the admitted assets of the in-
surer as of the date of the computation of any such reserve. The dis-
count rate shall be adjusted at the end of each calendar year; and

(4) It shall maintain an unearned premium reserve, net of rein-
surance, computed on the monthly pro rata basis, where such premiums
are paid on an installment basis. All other such premiums paid shall
be earned proportionately with the expiration of exposure, or by such
other method as the [commissioner] may prescribe or approve.

Section 4. [Limitations.]

(a) Financial guaranty insurance may be transacted in this state only
by a corporation licensed for such purpose.

(b) Financial guaranty insurance shall be written only to insure timely
payment of contractual obligations, including principal and interest,
of:

(1) municipal obligation bonds;
(2) special revenue bonds;
(3) industrial development bonds;
(4) corporate obligations;
(5) limited partnership obligations;
(6) pass through securities, other than those secured by mortgages
on real property which are insurable by a mortgage guaranty insurer;
(7) installment purchase agreements executed as a condition of sale;
(8) consumer debt obligations, and
(9) any other debt instrument or monetary obligation that the com-
misssioner determines to be substantially similar to any of the foregoing.

(c) A corporation may only issue a financial guaranty insurance policy
to a policyholder who discloses in any prospectus or advertisement that
makes mention of the financial guaranty that such insurance is not
covered by the guaranty fund specified in [insert reference to state law].

(d) At least [95] percent of a corporation’s outstanding total liability
on the kinds of obligations enumerated in subsection (b) shall be in-
vestment grade.

(c) The corporation must at all times maintain capital, surplus and
contingency reserve in the aggregate no less than the sum of:

(1) [0.2857] percent of the total liabilities outstanding under guaran-
ties of municipal obligation bonds; and
(2) [0.5714] percent of the total liabilities outstanding under guaran-
ties of special revenue bonds; and
(3) [1.0] percent of the total liabilities outstanding under guaran-
ties of:

(i) industrial development bonds; and
(ii) secured obligations issued by entities which had an invest-
ment grade rating independent of the security pledged; and
(iii) secured obligations which were given an investment grade

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rating as a result of the security pledged, provided, however, that if
the security is property, it is not property financed with the proceeds
of the insured obligations; provided that,
(iv) if the amount of security required by subparagraph (ii) or (iii)
is not maintained, that proportion of the obligation insured which is
not so secured shall be subject to the aggregate limits specified in
paragraph (4); and
(4) [4.0] percent of the total liabilities outstanding under guaran-
ties of any other obligations of investment grade, and consumer debt
obligations; and
(5) [10.0] percent of the total liabilities outstanding under guaran-
ties of other obligations not of investment grade, other than consumer
debt obligations; and
(6) surplus determined by the [commissioner] to be adequate to sup-
port the writing of residual value insurance, surety insurance and
credit insurance, if the corporation has elected to transact such kinds
of insurance pursuant to section 3(a).
(f) A financial guaranty insurance corporation doing business in this
state shall limit its exposure to loss, net of collateral and reinsurance,
as follows:
(1) For municipal obligation bonds and special revenue bonds:
(i) the insured average annual debt service with respect to any
one entity and backed by a single revenue source may not exceed [ten]
percent of the aggregate of the corporation’s capital, surplus and con-
tingency reserve; and
(ii) the insured unpaid principal issued by a single entity and
backed by a single revenue source may not exceed [fifty] percent of the
aggregate of the corporation’s capital, surplus and contingency reserve;
(2) For all other financial guaranties, the insured unpaid principal
for any one entity may not exceed [ten] percent of the aggregate of the
corporation’s capital, surplus and contingency reserve.
(g) If a corporation’s exposure to loss shall at any time exceed the
limitations prescribed by subsection (e), it shall cease transacting any
new business until its exposure to loss no longer exceeds said
limitations.
(h) Notwithstanding the provisions of this article, an insurer writing,
but which is not licensed to write, financial guaranty insurance in this
state, shall be subject to all the provisions, except for sections 3 (a) and
3 (b) (1) and:
(1) May continue to write financial guaranties of the type authorized
by subsection (b):
(i) for a period not to exceed [two] years from the effective date
of this article, provided that within [six] months of the effective date
of this article, application shall be made to the [commissioner] to
organize a financial guaranty insurance corporation, controlled by or
under common control with such insurer, which financial guaranty
insurance corporation, once licensed, shall immediately assume all of
the financial guaranty insurance in force on the books of the insurer
which was written on or after the effective date of this act; or,
(ii) for a period not to exceed [twelve] months from the effective date of this act, in the case of an insurer transacting only financial guaranty insurance prior to the effective date of this act and which has complied with all of the requirements for licensing as a financial guaranty insurer under Section 3, provided that it makes application to amend its current license to that of a financial guaranty insurance corporation within [sixty] days of the effective date of this act.

(2) Which does not make application for a financial guaranty insurance corporation pursuant to paragraph (1), shall cease writing any new financial guaranty insurance business within [six] months of the effective date of this act. Such insurer:

(i) may reinsure its net in force business with a licensed financial guaranty insurance corporation, or

(ii) may, subject to the prior approval of its domiciliary [commissioner], reinsure all or part of its net in force business in accordance with the requirements of section 6(a) (2) except that sections 6(a) (2) (ii), (iv), (vi) and (viii) thereof shall not be applicable. The assuming insurer shall maintain reserves for such reinsured business in the manner applicable to the ceding insurer under paragraph 3; or

(iii) may thereafter continue the risks then in force and, with [thirty] days prior written notice to its domiciliary commissioner, write new financial guaranty policies provided the writing of such policies is reasonably prudent to mitigate either the amount of or possibility of loss in connection with business written prior to the effective date of this act. Provided, however, that an insurer must receive the prior approval of its domiciliary [commissioner] before writing any new financial guaranty insurance policies that would have the effect of increasing its risk of loss.

[Alternative I]

[For states which currently have municipal bond insurance in effect subparagraph (3) should read as follows:]

(3) Shall, for all guaranties in force prior to the effective date of this article, including those which fall under the definition of financial guaranty insurance contained in section 2(1), be subject to the reserve requirements applicable for general obligation municipal bond guaranties in effect prior to the effective date of this act. To the extent that the insurer's contingency reserves maintained as of the effective date of this act are less than those required for municipal bond guaranties, the insurer shall have [three] years to bring its reserves into compliance, except that a part of the reserve may be released proportional to the reduction in net total liabilities resulting from reinsurance, provided that the reinsurer shall, on the effective date of the reinsurance, establish a reserve in an amount equal to the amount released and, in addition, a part of the reserve may be released with the approval of the [commissioner] upon demonstration that the amount carried is
excessive in relation to the corporation's outstanding obligations; and

[Alternative II]

(For states which do not currently have municipal bond insurance in effect subparagraph (3) should read as follows:]

(3) Shall, for all guaranties in force prior to the effective date of this act including those which fall under the definition of financial guaranty insurance contained section 2(1), maintain a special reserve which shall consist of allocations of sums representing [fifty] percent of the earned premiums on financial guaranty insurance policies. Allocations to such reserve made during each calendar year shall be maintained for a period of at least [240] months, except that withdrawals may be made by the insurer in any year in which the actual paid losses on the said type of policy exceed [35] percent of the earned premiums thereon, but no such releases shall be made without the prior written approval of the [commissioner]. Provided that the contingency reserve has been in existence for at least [120] months, the insurer may apply to the [commissioner] for a release of a reasonable percentage of the reserve upon a demonstration that the amount carried is excessive in relation to the insurer’s obligation on financial guaranty insurance policies; and

(4) Shall be subject to the reserve requirements applicable to financial guaranty insurance corporations, for business written on and after the effective date of this article.

Section 5. [Filing of Policy Forms and Rates]

(a) Policy forms and any amendments thereto shall be filed with the [commissioner] within [thirty] days of their use by the insurer. Every such policy shall provide that there shall be no acceleration of payments due under the guarantied obligations except at the option of the corporation. The [commissioner] may prescribe additional minimum policy provisions determined by the [commissioner] to be necessary or appropriate to protect policyholders, claimants, obligees or indemnitees.

(b) Rates shall not be excessive, inadequate, unfairly discriminatory, destructive of competition or detrimental to the solvency of the insurer. Criteria and guidelines utilized by insurers in establishing rating categories and ranges of rates to be utilized shall be filed with the [commissioner] for information prior to their use by the insurer.

(c) All such filings shall be available for public inspection at the [insurance department].

COMMENT: (Section 5(b)). If this standard is contained in the state's insurance law a section reference may be substituted.

Section 6. [Reinsurance.]

(a) For financial guaranty insurance which takes effect on or after the effective date of this article, a financial guaranty insurance corporation shall receive credit for reinsurance in accordance with the provisions of this chapter applicable to property and casualty insurers.
as an asset or as a reduction from liabilities provided that such reinsurance is subject to an agreement that for its stated term and with respect to any financial guaranty insurance in force, the reinsurance agreement may only be terminated or amended at the request of the ceding company or at the discretion of the [commissioner] acting as rehabilitator, liquidator or receiver of the ceding or assuming company and that such reinsurance:

(1) Placed with another financial guaranty insurance corporation licensed under this article or an insurer writing only financial guaranty insurance as is or would be permitted by this article; or

(2) Placed with another type of insurer licensed to write surety insurance, if such insurer:

(i) has and maintains surplus to policyholder's of at least [thirty five] million dollars;

(ii) establishes and maintains the reserves required in Section 3 of this act, except that if the reinsurance agreement is not pro rata the contribution to the contingency reserve shall be equal to [50] percent of the quarterly earned reinsurance premium;

(iii) complies with the provisions of section 4(e) and 4(g) except that its maximum aggregate assumed total liability shall be [one half] that permitted for a financial guaranty insurance corporation;

(iv) complies with the provisions of section 4(f);

(v) is not a parent, another subsidiary of the parent of the financial guaranty insurance corporation, or a subsidiary of the financial guaranty insurance corporation. Direct or indirect ownership interest of [25] percent or more shall be deemed a parent/subsidiary relationship;

(vi) is an affiliate of the financial guaranty insurance corporation, such affiliate shall not assume a percentage of the corporation's total liability in excess of its equity interest in the corporation; and

(vii) assumes, together with all other reinsurers subject to this paragraph, less than [50] percent of the total liability remaining after deducting any reinsurance placed with another financial guaranty insurance corporation; and

(3) If placed with an unauthorized or unaccredited reinsurer which otherwise meets the provisions of the opening paragraph, subsections (a)(1) or (2)(i), (2)(v), (2)(vi), and (2)(vii), in an amount not exceeding the liabilities carried by the ceding insurer for amounts withheld under a reinsurance treaty with such reinsurer or amounts deposited by such reinsurer as security for the payment of obligations under the treaty, if such funds or deposit are held subject to withdrawal by, and under the control of the ceding insurer.

(b) In determining whether the corporation meets the limitations imposed by section 4(e), in addition to credit for other types of qualifying reinsurance, the corporation's aggregate risk may be reduced to the extent of the limit for aggregate excess reinsurance but, in no event, in an amount greater than the amount of the aggregate risk which will become due during the unexpired term of such reinsurance agreement in excess of the corporation's retention pursuant to such reinsur-
Suggested State Legislation

1 Insurance agreement.

1 Section 7. [Severability.] [Insert severability clause.]

1 Section 8. [Repealer.] [Insert repealer clause.]

1 Section 9. [Effective Date.] [Insert effective date.]

COMMENT: To be added by states which do not now specifically authorize residual value insurance as a separate kind of insurance. The Insurance Law is amended by adding thereto a new subsection as follows:

( ) “Residual Value Insurance” meaning insurance issued in connection with a lease or contract which sets forth a specific termination value at the end of the term of the lease or contract for the property covered by such lease or contract; and which insures against loss of economic value of tangible personal property or real property or improvements thereto except loss due to physical damage to property, provided, however, that no insurance may be written as residual value insurance if it may be written as financial guaranty insurance by a financial guaranty insurance corporation pursuant to article [insert reference].

To be added to section of insurance law which authorizes specified kinds of insurance. The [Insurance Law] is amended by adding thereto a new subsection as follows:

( ) “Financial Guaranty Insurance” meaning the kind of insurance specified in [insert reference].

For those states which have a separate definition of “Surety Insurance” add to the end of the definition:

“Provided, however, that no insurance may be written as surety insurance if it falls within the definition of financial guaranty insurance as set forth in section 2(1);”

For those states which combine fidelity and surety authority in a single definition a clean up provision is necessary to define them separately. Suggested simplified language follows:

( ) “Fidelity Insurance,” means:

(i) Guaranteeing the fidelity of persons holding positions of public or private trust; and indemnifying banks, thrifts, brokers and other financial institutions against loss of money, securities, negotiable instruments, other specified valuable papers and tangible items of personal property caused by larceny, misplacement, destruction or other stated perils including loss while being transported in an armored motor vehicle or by messenger; and insurance for loss caused by the forgery of signatures on, or alteration of, specified documents and valuable papers; and

(ii) Insurance against losses that financial institutions become legally obligated to pay by reason of loss of customers' property from safe deposit boxes.

( ) “Surety Insurance” means.

(i) A contract bond; including a bid, payment or maintenance bond,
Financial Guaranty Insurance Act

or a performance bond where the bond is guarantying the execution of any contract other than a contract of indebtedness or other monetary obligation; and

(ii) An indemnity bond for the benefit of a public body, railroad or charitable organization; a lost security or utility payment bond;

(iii) Becoming surety on, or guaranteeing the performance of, any lawful contract, not specifically provided for in this paragraph, where the bond is guarantying the execution of any contract other than a contract of indebtedness or other monetary obligation, except:

(A) mortgage guaranty insurance, which may only be written by an insurer authorized to write such insurance pursuant to [insert appropriate reference to statute], or

(B) financial guaranty insurance as defined by section 2(1), or

(C) any insurance contract except as authorized pursuant to [insert reference to section authorizing reinsurance business], and

(iv) Becoming surety on, or guaranteeing the performance of, bonds and undertakings required or permitted in all judicial proceedings or otherwise by law allowed, including surety bonds accepted by states and municipal authorities in lieu of deposits as security for the performance of insurance contracts.
Insurance Holding Company
System Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

The independent operation and financial stability of insurers can be and have been infringed when insurers are wholly owned or effectively controlled by non-insurance parents who may treat the financial integrity of their insurers as secondary to their interests. Although diversification, broadened activities, improved earnings, ability to compete in financial markets and ready access to capital are all desirable goals, the financial stability of the insurance company should always be the primary consideration of those who have control of the company.

The recent Baldwin-United debacle was a case in which the non-insurance parent lost sight of its obligations and looted its insurance subsidiaries by appropriating (or "upstreaming") the subsidiaries' cash in return for questionable paper of the parent and other subsidiaries. The insurers were viewed as pools of capital there for the taking.

This act, which was adapted from the revised National Association of Insurance Commissioners' Model Holding Company System Act, is intended to preserve the financial integrity of controlled insurers by providing authority to the commissioner to review and disapprove improper holding company transactions and by prescribing rules and procedures for permitted transactions. The act contains extensive provisions (particularly in Section 4.1) which proscribe anti-competitive behavior and monopolistic practices. With allegations at the federal level that states are not entitled to McCarran-Ferguson preemption because they have not adequately regulated the business, this act is most timely.

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Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Insurance Holding Company System Act.

Section 2. [Definitions.] As used in this act, unless the context shall otherwise require:

1 (1) "Affiliate" of, or person "Affiliated" with a specific person means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

2 (2) "Commissioner" means the [insurance commissioner], his deputies, or the [insurance department], as appropriate.
Section 3. [Subsidiaries of Insurers.]
(a) Authorization. Any domestic insurer, either by itself or in cooperation with one or more persons, may organize or acquire one or more subsidiaries engaged in the following kinds of business:

(1) Any kind of insurance business authorized by the jurisdiction in which it is incorporated;

(2) Acting as an insurance broker or as an insurance agent for its parent or for any of its parent's insurer subsidiaries;
COMMENT: This bill neither expressly authorizes noninsurance subsidiaries nor restricts subsidiaries to insurance-related activities. It is believed that this is a policy decision which should be made by each individual state.

(3) Investing, reinvesting or trading in securities for its own account, that of its parent, any subsidiary of its parent, or any affiliate or subsidiary;

(4) Management of any investment company subject to or registered pursuant to the Investment Company Act of 1940, as amended, including related sales and services;

(5) Acting as a broker-dealer subject to or registered pursuant to the Securities Exchange Act of 1934, as amended;

(6) Rendering investment advice to governments, government agencies, corporations or other organizations or groups;

(7) Rendering other services related to the operations of an insurance business including, but not limited to, actuarial, loss prevention, safety engineering, data processing, accounting, claims, appraisal and collection services;

(8) Ownership and management of assets which the parent corporation could itself own or manage;

(9) Acting as administrative agent for a governmental instrumentality which is performing an insurance function;

(10) Financing of insurance premiums, agents and other forms of consumer financing;

(11) Any other business activity determined by the commissioner to be reasonably ancillary to an insurance business; and

(12) Owning a corporation or corporations engaged or organized to engage exclusively in one or more of the businesses specified in this section.

(b) Additional Investment Authority. In addition to investments in common stock, preferred stock, debt obligations and other securities permitted under all other sections of the insurance law, a domestic insurer may also:

(1) Invest in common stock, preferred stock, debt obligations, and other securities of [one] or more subsidiaries, amounts which do not exceed the lesser of [ten] percent of such insurer's assets or [fifty] percent of such insurer's surplus as regards policyholders, provided that after such investments, the insurer's surplus as regards policyholders will be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs. In calculating the amount of such investments, investments in domestic or foreign insurance subsidiaries shall be excluded, and there shall be included:

(i) total net monics or other consideration expended and obligations assumed in the acquisition or formation of a subsidiary, including all organizational expenses and contributions to capital and surplus of such subsidiary whether or not represented by the purchase of capital stock or issuance of other securities, and

(ii) all amounts expended in acquiring additional common stock,
preferred stock, debt obligations, and other securities and all contribu-
tions to the capital or surplus, of a subsidiary subsequent to its acquisi-
tion or formation;

(2) Invest any amount in common stock, preferred stock, debt obliga-
tions and other securities of one or more subsidiaries engaged or
organized to engage exclusively in the ownership and management
of assets authorized as investments for the insurer, provided that each
such subsidiary agrees to limit its investments in any asset so that
such investments will not cause the amount of the total investment
of the insurer to exceed any of the investment limitations specified in
paragraph (1) or in [insert appropriate reference to the insurance law]
applicable to the insurer. For the purpose of this paragraph, "the total
investment of the insurer" shall include:

(i) any direct investment by the insurer in an asset, and
(ii) the insurer's proportionate share of any investment in an asset

by any subsidiary of the insurer, which shall be calculated by multiply-
ing the amount of the subsidiary's investment by the percentage of

the ownership of such subsidiary;

(3) With the approval of the [commissioner], invest any greater
amount in common stock, preferred stock, debt obligations, or other
securities of one or more subsidiaries, provided that after such invest-
ment the insurer's surplus as regards policyholders will be reasonable
in relation to the insurer's outstanding liabilities and adequate to its
financial needs.

(c) Exemption from Investment Restrictions. Investments in common
stock, preferred stock, debt obligations or other securities of sub-
sidiaries made pursuant to subsection (b) shall not be subject to any
of the otherwise applicable restrictions or prohibitions contained in
this [chapter] applicable to such investments of insurers (except the
following: _____________.)

COMMENT: Optional in those states having certain special qualitative
limitations such as prohibitions on investments in stock of mining com-
panies, which the state may wish to retain as a matter of public policy.

(d) Qualification of Investment: When Determined. Whether any in-
vestment pursuant to subsection (b) meets the applicable requirements
thereof is to be determined before such investment is made, by
calculating the applicable investment limitations as though the invest-
ment had already been made, taking into account the then outstand-
ing principal balance on all previous investments in debt obligations,
and the value of all previous investments in equity securities as of the
day they were made, net of any return of capital invested, not including
dividends.

(e) Cessation of Control. If any insurer ceases to control a subsidiary,
it shall dispose of any investment therein made pursuant to this sec-
tion within [three] years from the time of the cessation of control or
within such further time as the [commissioner] may prescribe, unless
at any time after such investment shall have been made, such invest-
ment shall have met the requirements for investment under any other
section of the insurance law, and the insurer has notified the [com-
missioner] thereof.

Section 4. [Acquisition of Control or Merger with Domestic Insurer.]
(a) Filing Requirements. No person other than the issuer shall make
a tender offer for or a request or invitation for tenders of, or enter into
any agreement to exchange securities or, seek to acquire, or acquire,
in the open market or otherwise, any voting security of a domestic in-
surer if, after the consummation thereof, such person would, directly
or indirectly (or by conversion or by exercise of any right to acquire)
be in control of such insurer, and no person shall enter into an agree-
ment to merge with or otherwise to acquire control of a domestic in-
surer or any person controlling a domestic insurer unless, at the time
any such offer, request, or invitation is made or any such agreement
is entered into, or prior to the acquisition of such securities if no offer
or agreement is involved, such person has filed with the [commissioner]
and has sent to such insurer, a statement containing the information
required by this section and such offer, request, invitation, agreement
or acquisition has been approved by the [commissioner] in the man-
nner hereinafter prescribed.

(1) For purposes of this section:

(i) “domestic insurer” shall include any person controlling a
domestic insurer unless such person as determined by the [commis-
sioner] is either directly or through its affiliates primarily engaged in
business other than the business of insurance. However, such person
shall file a pre-acquisition notification with the [commissioner] con-
taining the information set forth in section 4.1(c)(1) [thirty] days prior
to the proposed effective date of the acquisition. Failure to file is sub-
ject to section 4.1(e)(3).

(ii) “Person” shall not include any securities broker holding, in
the usual and customary brokers function, less than [twenty] percent
of the voting securities of an insurance company or of any person which
controls an insurance company.

(b) Content of Statement. The statement to be filed with the [com-
missioner] hereunder shall be made under oath or affirmation and shall
contain the following information:

(1) The name and address of each person by whom or on whose
behalf the merger or other acquisition of control referred to in subsec-
tion (a) is to be effected (hereinafter called “acquiring party”), and

(i) if such person is an individual, his principal occupation and
all offices and positions held during the past [five] years, and any con-
vi ction of crimes other than minor traffic violations during the past
[ten] years;

(ii) if such person is not an individual, a report of the nature of
its business operations during the past [five] years or for such lesser
period as such person and any predecessors thereof shall have been
in existence; an informative description of the business intended to be
done by such person and such person’s subsidiaries; and a list of all
individuals who are or who have been selected to become directors or
executive officers of such person, or who perform or will perform func-
tions appropriate to such positions. Such list shall include for each such
individual the information required by subparagraph (i).

(2) The source, nature and amount of the consideration used or to
be used in effecting the merger or other acquisition of control, a descrip-
tion of any transaction wherein funds were or are to be obtained for
any such purpose (including any pledge of the insurer’s stock, or the
stock of any of its subsidiaries or controlling affiliates), and the iden-
tity of persons furnishing such consideration, provided, however, that
where a source of such consideration is a loan made in the lender’s
ordinary course of business, the identity of the lender shall remain con-
fidential, if the person filing such statement so requests.

(3) Fully audited financial information as to the earnings and finan-
cial condition of each acquiring party for the preceding [five] fiscal years
of each such acquiring party (or for such lesser period as such acquiring
party and any predecessors thereof shall have been in existence),
and similar unaudited information as of a date not earlier than [nin-
ty] days prior to the filing of the statement.

(4) Any plans or proposals which each acquiring party may have
to liquidate such insurer, to sell its assets or merge or consolidate it
with any person, or to make any other material change in its business
or corporate structure or management.

(5) The number of shares of any security referred to in subsection
(a) which each acquiring party proposes to acquire, and the terms of
the offer, request, invitation, agreement, or acquisition referred to in
subsection (a), and a statement as to the method by which the fairness
of the proposal was arrived at.

(6) The amount of each class of any security referred to in subsec-
tion (a) which is beneficially owned or concerning which there is a right
to acquire beneficial ownership by each acquiring party.

(7) A full description of any contracts, arrangements or understand-
ings with respect to any security referred to in subsection (a) in which
any acquiring party is involved, including but not limited to transfer
of any of the securities, joint venture, loans or option arrangements,
puts or calls, guarantees of loans, guarantees against loss or guarantees
of profits, division of losses or profits, or the giving or withholding of
proxies. Such description shall identify the persons with whom such
contracts, arrangements or understandings have been entered into.

(8) A description of the purchase of any security referred to in
subsection (a) during the [twelve] calendar months preceding the fil-
ing of the statement, by any acquiring party, including the dates of
purchase, names of the purchasers, and consideration paid or agreed
to be paid therefore.

(9) A description of any recommendations to purchase any securi-
ty referred to in subsection (a) made during the [twelve] calendar
months preceding the filing of the statement, by any acquiring party,
or by anyone based upon interviews or at the suggestion of such ac-
quiring party.
(10) Copies of all tender offers for, requests, or invitations for
tenders of, exchange offers for, and agreements to acquire or exchange
any securities referred to in subsection (a), and (if distributed) of addi-
tional soliciting material relating thereto.

(11) The term of any agreement, contract or understanding made
with or proposed to be made with any broker-dealer as to solicitation
of securities referred to in subsection (a) for tender, and the amount
of any fees, commissions or other compensation to be paid to broker-
dealers with regard thereto.

(12) Such additional information as the [commissioner] may by rule
or regulation prescribe as necessary or appropriate for the protection
of policyholders of the insurer or in the public interest.

If the person required to file the statement referred to in subsection
(a) is a partnership, limited partnership, syndicate or other group, the
[commissioner] may require that the information called for by para-
graphs (1) through (12) shall be given with respect to each partner of
such partnership or limited partnership, each member of such syndicate
or group, and each person who controls such partner or member. If any
such partner, member or person is a corporation, or the person required
to file the statement referred to in subsection (a) is a corporation, the
commissioner may require that the information called for by para-
graphs (1) through (12) shall be given with respect to such corporation,
each officer and director of such corporation, and each person who is
directly or indirectly the beneficial owner of more than [ten] percent
of the outstanding voting securities of such corporation.

If any material change occurs in the facts set forth in the statement
filed with the [commissioner] and sent to such insurer pursuant to this
section, an amendment setting forth such change, together with copies
of all documents and other material relevant to such change, shall be
filed with the [commissioner] and sent to such insurer within [two
business days after the person learns of such change.

(c) Alternative Filing Materials. If any offer, request, invitation,
agreement or acquisition referred to in subsection (a) is proposed to
be made by means of a registration statement under the Securities Act
of 1933 or in circumstances requiring the disclosure of similar infor-
mation under the Securities Exchange Act of 1934, or under a state
law requiring similar registration or disclosure, the person required
to file the statement referred to in subsection (a) may utilize such
documents in furnishing the information called for by that statement.

(d) Approved by [commissioner]: Hearings.

(1) The [commissioner] shall approve any merger or other acquisi-
tion of control referred to in subsection (a) unless, after a public hear-
ing thereon, he finds that:

(i) After the change of control, the domestic insurer referred to
in subsection (a) would not be able to satisfy the requirements for the
issuance of a license to write the line or lines of insurance for which
it is presently licensed;

(ii) The effect of the merger or other acquisition of control would
be substantially to lessen competition in insurance in this state or tend
to create a monopoly therein. In applying the competitive standard in this paragraph:

(A) the informational requirements of section 4.1(c)(1) and the standards of section 4.1(d)(2) shall apply;

(B) the merger or other acquisition shall not be disapproved if the [commissioner] finds that any of the situations meeting the criteria provided by section 4.1(d)(3) exist; and

(C) the [commissioner] may condition the approval of the merger or other acquisition on the removal of the basis of disapproval within a specified period of time;

(iii) The financial condition of any acquiring party is such as might jeopardize the financial stability of the insurer, or prejudice the interest of its policyholders;

(iv) The plans or proposals which the acquiring party has to liquidate the insurer, sell its assets or consolidate or merge it with any person, or to make any other material change in its business or corporate structure or management, are unfair and unreasonable to policyholders of the insurer and not in the public interest.

(v) The competence, experience and integrity of those persons who would control the operation of the insurer are such that it would not be in the interest of policyholders of the insurer and of the public to permit the merger or other acquisition of control; or

(vi) The acquisition is likely to be hazardous or prejudicial to the insurance buying public.

(2) The public hearing referred to in paragraph (1) shall be held within [thirty] days after the statement required by subsection (a) is filed, and at least [twenty] days notice thereof shall be given by the [commissioner] to the person filing the statement. Not less than [seven] days notice of such public hearing shall be given by the person filing the statement to the insurer and to such other persons as may be designated by the [commissioner]. The [commissioner] shall make a determination within [thirty] days after the conclusion of such hearing. At such hearing, the person filing the statement, the insurer, any person to whom notice of hearing was sent, and any other person whose interest may be affected thereby shall have the right to present evidence, examine and cross examine witnesses, and offer oral and written arguments and in connection therewith shall be entitled to conduct discovery proceedings in the same manner as is presently allowed in the [insert court] of this state. All discovery proceedings shall be concluded not later than [three] days prior to the commencement of the public hearing.

(3) The [commissioner] may retain at the acquiring person's expense any attorneys, actuaries, accountants and other experts not otherwise a part of the [commissioner's] staff as may be reasonably necessary to assist the [commissioner] in reviewing the proposed acquisition of control.

(e) Exemptions. The provisions of this section shall not apply to:

(1) Any transaction which is subject to the provisions of [insert applicable sections] of the laws of this state, dealing with the merger or
consolidation of [two or more] insurers.

(2) Any offer, request, invitation, agreement or acquisition which the [commissioner] by order shall exempt therefrom as (i) not having been made or entered into for the purpose and not having the effect of changing or influencing the control of a domestic insurer, or (ii) as otherwise not comprehended within the purposes of this section.

(f) Violations. The following shall be violations of this section:

(1) The failure to file any statement, amendment, or other material required to be filed pursuant to subsection (a) or (b); or

(2) The effectuation or any attempt to effectuate an acquisition of control of, or merger with, a domestic insurer unless the [commissioner] has given his approval thereto.

(g) Jurisdiction, Consent to Service of Process. The courts of this state are hereby vested with jurisdiction over every person not resident, domiciled or authorized to do business in this state who files a statement with the [commissioner] under this section, and overall actions involving such person arising out of violations of this section, and each such person shall be deemed to have performed acts equivalent to and constituting an appointment by such a person of the [commissioner] to be his true and lawful attorney upon whom may be served all lawful process in any action, suit or proceeding arising out of violations of this section. Copies of all such lawful process shall be served on the [commissioner] and transmitted by registered or certified mail by the [commissioner] to such person at his last known address.

COMMENT: (subsection (e)(1)) Optional for use in those states where existing law adequately governs standards and procedures for the merger or consolidation of two or more insurers.

Section 4.1 [Acquisitions Involving Insurers Not Otherwise Covered.]

(a) Definitions. The following definitions shall apply for the purpose of this section only:

(1) “Acquisition” means any agreement or activity the consummation of which results in a person acquiring directly or indirectly the control of another person, and includes but is not limited to the acquisition of voting securities, the acquisition of assets, bulk reinsurance and mergers.

(2) “Involved Insurer” means an insurer which either acquires or is acquired, is affiliated with an acquirer or acquired or is the result of a merger.

(b) Scope.

(1) Except as exempted in paragraph (2), this section applies to any acquisition in which there is a change in control of an insurer authorized to do business in this state.

(2) This section shall not apply to the following:

(i) an acquisition subject to approval or disapproval by the [commissioner] pursuant to Section 4;

(ii) a purchase of securities solely for investment purposes so long as such securities are not used by voting or otherwise to cause the
substantial lessening of competition in any insurance market in this
state. If a purchase of securities results in a presumption of control
under section 2(3), it is not solely for investment purposes unless the
commissioner of the insurer's state of domicile accepts a disclaimer
of control or affirmatively finds that control does not exist and such
disclaimer action or affirmative finding is communicated by the
domiciliary commissioner to the commissioner of this state;
(iii) the acquisition of a person by another person when both per-
sons are neither directly, not through affiliates, primarily engaged in
the business of insurance, if pre-acquisition notification is filed with
the commissioner in accordance with subsection 4.1(c)(1)[thirty] days
prior to the proposed effective date of the acquisition. However, such
pre-acquisition notification is not required for exclusion from this sec-
tion if the acquisition would otherwise be excluded from this section
by any other subparagraph of section 4.1(b)(2);
(iv) the acquisition of already affiliated persons;
(v) an acquisition if, as an immediate result of the acquisition,
(A) in no market would the combined market share of the in-
volved insurers exceed [five] percent of the total market,
(B) there would be no increase in any market share, or
(C) in no market would
(1) the combined market share of the involved insurers exceed
[twelve] percent of the total market and
(2) the market share increases by more than [two] percent of
the total market. For the purpose of this subparagraph (2)(V), a market
means direct written insurance premium in this state for a line of
business as contained in the annual statement required to be filed by
insurers licensed to do business in this state;
(vi) an acquisition for which pre-acquisition notification would
be required pursuant to this section due solely to the resulting effect
on the ocean marine insurance line of business;
(vii) an acquisition of an insurer whose domiciliary commissioner
affirmatively finds that such insurer is in failing condition; there is
a lack of feasible alternative to improving such condition; the public
benefits of improving such insurer’s condition through the acquisition
exceed the public benefits that would arise from not lessening com-
petition; and such findings are communicated by the domiciliary com-
missoner to the commissioner of this state.
(c) Pre-acquisition Notification: Waiting Period. An acquisition
covered by subsection 4.1(b) may be subject to an order pursuant to
subsection 4.1(e) unless the acquiring person files a pre-acquisition
notification and the waiting period has expired. The acquired person
can file a pre-acquisition notification. The commissioner shall give
confidential treatment to information submitted under this subsection
in the same manner as provided in Section 8.
(1) The pre-acquisition notification shall be in such form and con-
tain such information as prescribed by the National Association of In-
surance Commissioners relating to those markets which, under sec-
tion 4.1(b)(2)(v), cause the acquisition not to be exempted from the pro-
visions of this section. The [commissioner] may require such additional
material and information as he deems necessary to determine whether
the proposed acquisition, if consummated, would violate the com-
petitive standard of subsection 4.1(d) The required information may
include an opinion of an economist as to the competitive impact of the
acquisition in this state accompanied by a summary of the education
and experience of such person indicating his or her ability to render
an informed opinion.

(2) The waiting period required shall begin on the date of receipt
of the [commissioner] of a pre-acquisition notification and shall end
on the earlier of the (thirtieth) day after the date of such receipt, or
termination of the waiting period by the [commissioner]. Prior to the
end of the waiting period, the [commissioner] on a one-time basis may
require the submission of additional needed information relevant to
the proposed acquisition, in which event the waiting period shall end
on the earlier of the [thirtieth] day after receipt of such additional in-
formation by the [commissioner] or termination of the waiting period
by the [commissioner].

(d) Competitive Standard.

(1) The [commissioner] may enter an order under section 4.1(e)(1)
with respect to an acquisition if there is substantial evidence that the
effect of the acquisition may be substantially to lessen competition in
any line of insurance in this state or tend to create a monopoly therein
or if the insurer fails to file adequate information in compliance with
subsection 4.1(c).

(2) In determining whether a proposed acquisition would violate
the competitive standard of paragraph (1), the [commissioner] shall con-
sider the following:

(i) any acquisition covered under subsection 4.1(b) involving [two]
or more insurers competing in the same market is prima facie evidence
of violation of the competitive standards

(A) if the market is highly concentrated and the involved in-
surers possess the following shares of the market:

<table>
<thead>
<tr>
<th>Insurer A</th>
<th>Insurer B</th>
</tr>
</thead>
<tbody>
<tr>
<td>4%</td>
<td>4% or more</td>
</tr>
<tr>
<td>10%</td>
<td>2% or more</td>
</tr>
<tr>
<td>15%</td>
<td>1% or more</td>
</tr>
</tbody>
</table>

(B) or, if the market in not highly concentrated and the involved
insurers possess the following share of the market:

<table>
<thead>
<tr>
<th>Insurer A</th>
<th>Insurer B</th>
</tr>
</thead>
<tbody>
<tr>
<td>5%</td>
<td>5% or more</td>
</tr>
<tr>
<td>10%</td>
<td>4% or more</td>
</tr>
<tr>
<td>15%</td>
<td>3% or more</td>
</tr>
<tr>
<td>19%</td>
<td>1% or more</td>
</tr>
</tbody>
</table>

A highly concentrated market is one in which the share of the four
largest insurers is [seventy-five] percent or more of the market. Percentages not shown in the tables are interpolated proportionately to the percentages that are shown. If more than [two] insurers are involved, exceeding the total of the two columns in the table is prima facie evidence of violation of the competitive standard in paragraph (1). For the purpose of this subparagraph, the insurer with the largest share of the market shall be deemed to be Insurer A.

(ii) there is a significant trend toward increased concentration when the aggregate market share of any grouping of the largest insurers in the market, from the [two] largest to the [eight] largest, has increased by [seven] percent or more of the market over a period of time extending from any base year [fivel to ten] years prior to the acquisition up to the time of the acquisition. Any acquisition or merger covered under subsection 4.1(b) involving [two] or more insurers competing in the same market is prima facie evidence of violation of the competitive standard in paragraph (1) if:

(A) there is a significant trend toward increased concentration in the market,

(B) one of the insurers involved is one of the Insurers in a grouping of such large insurers showing the requisite increase in the market share, and

(C) another involved insurer's market is [two] percent or more.

(iii) for the purposes of subsection 4.1(d)(2):

(A) The term "insurer" includes any company or group of companies under common management, ownership or control;

(B) The term "market" means the relevant product and geographical markets. In determining the relevant product and geographical markets, the [commissioner] shall give due consideration to, among other things, the definitions of guidelines, if any, promulgated by the National Association of Insurance Commissioners and to information, if any, submitted by parties to the acquisition. In the absence of sufficient information to the contrary, the relevant product market is assumed to be the direct written insurance premium for a line of business, such line being that used in the annual statement required to be filed by insurers doing business in this state, and the relevant geographical market is assumed to be this state.

(C) the burden of showing prima facie evidence of violation of the competitive standard rests upon the [commissioner].

(iv) even though an acquisition is not prima facie violative of the competitive standard under subparagraphs (2)(i) and (2)(ii), the [commissioner] may establish the requisite anticompetitive effect based upon other substantial evidence. Even though an acquisition is prima facie violative of the competitive standard under subparagraphs (2)(i) and 2(ii), a party may establish the absence of the requisite anticompetitive effect based upon other substantial evidence. Relevant factors in making a determination under this paragraph include, but are not limited to, the following: market shares, volatility of ranking of market leaders, number of competitors, concentration, trend of concentration in the industry, and ease of entry and exit into the market.
(3) An order may not be entered under section 4.1(e)(1) if:

(i) the acquisition will yield substantial economies of scale or economies in resource utilization that cannot be feasibly achieved in any other way, and the public benefits which would arise from such economies exceed the public benefits which would arise from not lessening competition; or

(ii) the acquisition will substantially increase the availability of insurance, and the public benefits of such increase exceed the public benefits which would arise from not lessening competition.

(e) Orders and Penalties.

(1) (i) if an acquisition violates the standards of this section, the commissioner may enter an order

(A) requiring an involved insurer to cease and desist from doing business in this state with respect to the line or lines of insurance involved in the violation, or

(B) denying the application of an acquired or acquiring insurer for a license to do business in this state.

(ii) such an order shall not be entered unless (a) there is a hearing, (b) notice of such hearing is issued prior to the end of the waiting period and not less than [fifteen] days prior to the hearing, and (c) the hearing is concluded and the order is issued no later than [sixty] days after the end of the waiting period. Every order shall be accompanied by a written decision of the commissioner setting forth his findings of fact and conclusions of law.

(iii) an order entered under this paragraph shall not become final earlier than [thirty] days after it is issued, during which time the involved insurer may submit a plan to remedy the anticompetitive impact of the acquisition within a reasonable time. Based upon such plan or other information, the commissioner shall specify the conditions, if any, under the time period during which the aspects of the acquisition causing a violation of the standards of this section would be remedied and the order vacated or modified.

(iv) an order pursuant to this paragraph shall not apply if the acquisition is not consummated.

(2) Any person who violates a cease and desist order of the commissioner under paragraph (1) and while such order is in effect, may after notice and hearing and upon order of the commissioner, be subject at the discretion of the commissioner to any one or more of the following:

(i) a monetary penalty of not more than [10,000] dollars for every day of violation and/or

(ii) suspension or revocation of such person’s license.

(3) Any insurer or other person who fails to make any filing required by this section and who also fails to demonstrate a good faith effort to comply with any such filing requirement, shall be subject to a fine of not more than [50,000] dollars.

(f) Inapplicable Provisions. Sections 10(b), 10(c) and 12 do not apply to acquisitions covered under section 4.1(b)
Section 5. [Registration of Insurers.]

(a) Registration. Every insurer which is authorized to do business
in this state and which is a member of an insurance holding company
system shall register with the [commissioner], except a foreign insurer
subject to registration requirements and standards adopted by statute
or regulation in the jurisdiction of its domicile which are substantial-
ly similar to those contained in:

(1) Section 5,
(2) Section 6(a)(1), 6(b), 6(d); and
(3) Either 6(a)(2) or a provision such as the following: Each
registered insurer shall keep current the information required to be
disclosed in its registration statement by reporting all material changes
or additions within [fifteen] days after the end of the month in which
it learns of each such change or addition.

Any insurer which is subject to registration under this section shall
register within [fifteen] days after it becomes subject to registration,
and annually thereafter by [date] of each year for the previous calen-
dar year, unless the [commissioner] for good cause shown extends the
time for registration, and then within such extended time. The [com-
mmissioner] may require any insurer authorized to do business in the
state which is a member of a holding company system, and which is
not subject to registration under this section, to furnish a copy of the
registration statement, the summary specified in section 5(c) or other
information filed by such insurance company with the insurance
regulatory authority of domiciliary jurisdiction.

(b) Information and Form Required. Every insurer subject to registra-
tion shall file the registration statement on a form prescribed by the
National Association of Insurance Commissioners, which shall contain
the following current information:

(1) The capital structure, general financial condition, ownership
and management of the insurer and any person controlling the insurer;
(2) The identity and relationship of every member of the insurance
holding company system;
(3) The following agreements in force, and transactions currently
outstanding or which have occurred during the last calendar year be-
tween such insurer and its affiliates:
   (i) loans other investments, or purchases, sales or exchanges of
   securities of the affiliates by the insurer or of the insurer by its
   affiliates;
   (ii) purchases, sales or exchange or assets;
   (iii) transactions not in the ordinary course of business;
   (iv) guarantees or undertakings for the benefit of an affiliate
   which result in an actual contingent exposure of the insurer's assets
to liability, other than insurance contracts entered into in the ordinary
course of the insurer's business;
   (v) all management agreements, service contracts and all cost-
sharing arrangements;
   (vi) reinsurance agreements;
   (vii) dividends and other distributions to shareholders; and
(viii) consolidated tax allocation agreements;
(4) Any pledge of the insurer's stock, including stock of any subsidiary or controlling affiliate, for a loan made to any member of the insurance holding company system;
(5) Other matters concerning transactions between registered insurers and any affiliates as may be included from time to time in any registration forms adopted or approved by the [commissioner].
(c) Summary of Registration Statement. All registration statements shall contain a summary outlining all items in the current registration statement representing changes from the prior registration statement.
(d) Materiality. No information need be disclosed on the registration statement filed pursuant to section 5(h) if such information is not material for the purposes of this section. Unless the [commissioner] by rule, regulation or order provides otherwise; sales, purchases, exchanges, loans or extensions of credit, investments, or guarantees involving [one-half of one] percent or less of an insurer's admitted assets as of the [31st day of] December next preceding shall not be deemed material for purposes of this section.
(e) Reporting of Dividends to Shareholders. Subject to section 5(b), each registered insurer shall report to the [commissioner] all dividends and other distributions to shareholders within [fifteen] business days following the declaration thereof.
(f) Information of Insurers. Any person within an insurance holding company system subject to registration shall be required to provide complete and accurate information to an insurer, where such information is reasonably necessary to enable the insurer to comply with the provisions of this act.
(g) Termination of Registration. The [commissioner] shall terminate the registration of any insurer which demonstrates that it no longer is a member of an insurance holding company system.
(h) Consolidated Filing. The [commissioner] may require or allow [two] or more affiliated insurers subject to registration hereunder to file a consolidated registration statement.
(i) Alternative Registration. The [commissioner] may allow an insurer which is authorized to do business in this state and which is part of an insurance holding company system to register on behalf of any affiliated insurer which is required to register under subsection (a) and to file all information and material required to be filed under this section.
(j) Exemptions. The provisions of this section shall not apply to any insurer, information or transaction if and to the extent that the [commissioner] by rule, regulation or order shall exempt the same from the provisions of this section.
(k) Disclaimer. Any person may file with the [commissioner] a disclaimer of affiliation with any authorized insurer or such a disclaimer may be filed by such insurer or any member of an insurance holding company system. The disclaimer shall fully disclose all material relationships and bases for affiliation between such person and such in-
surer as well as the basis for disclaiming such affiliation. After a

disclaimer has been filed, the insurer shall be relieved of any duty to

register or report under this section which may arise out of the insurer's

relationship with such person unless and until the [commissioner]

disallows such a disclaimer. The [commissioner] shall disallow such

a disclaimer only after furnishing all parties in interest with notice

and opportunity to be heard and after making specific findings of fact

and opportunity to be heard and after making specific findings of fact

to support such disallowance.

(1) Violations. The failure to file a registration statement or any sum-

mary of the registration statement thereto required by this section

within the time specified for such filing shall be a violation of this

section.

Section 6. [Standards and Management of an Insurer Within a Hold-
ing Company System.]

(a) Transactions Within a Holding Company System.

(1) Transactions within a holding company system to which an in-
surer subject to registration is a party shall be subject to the following

standards:

(i) the terms shall be fair and reasonable;

(ii) charges or fees for services performed shall be reasonable;

(iii) expenses incurred and payment received shall be allocated

to the insurer in conformity with customary insurance accounting prac-
tices consistently applied;

(iv) the books, accounts and records of each party to all such trans-

actions shall be so maintained as to clearly and accurately disclose

the nature and details of the transactions including such accounting

information as is necessary to support the reasonableness of the charges

or fees to the respective parties; and

(v) the insurer's surplus as regards policyholders following any

dividends or distributions to shareholder affiliates shall be reasonable

in relation to the insurer's outstanding liabilities and adequate to its

financial needs.

(2) The following transactions involving a domestic insurer and any

person in its holding company system may not be entered into unless

the insurer has notified the [commissioner] in writing of its intention
to enter into such transaction at least [thirty] days prior thereto, or

such shorter period as the [commissioner] may permit, and the [com-
missoner] has not disapproved it within such period:

(i) sales, purchases, exchanges, loans or extensions of credit,
guarantees, or investments provided such transactions are equal to
or exceed:

(A) with respect to nonlife insurers, the lesser of [three] per-
cent of the insurer's admitted assets or [twenty-five] percent of surplus

as regards policyholders;

(B) with respect to life insurers, [three] percent of the insurer's
admitted assets; each as of the [31st] day of [December] next preceding;
(ii) loans or extensions of credit to any person who is not an af-
filiate, where the insurer makes such loans or extensions of credit with
the agreement or understanding that the proceeds of such transactions, in whole or in substantial part, are to be used to make loans or extensions of credit to, to purchase assets of, or to make investments in, any affiliate of the insurer making such loans or extensions of credit provided such transactions are equal to or exceed:

(A) with respect to nonlife insurers, the lesser of [three] percent of the insurer's admitted assets or [twenty five] percent of surplus as regards policyholders;

(B) with respect to life insurers, [three] percent of the insurer's admitted assets: each as of the [31st] day of [December] next preceding;

(iii) reinsurance agreements or modifications thereto in which the reinsurance premium or a change in the insurer's liabilities equals or exceeds [five] percent of the insurer's surplus as regards policyholders, as of the [31st] day of [December] next preceding, including those agreements which may require as consideration the transfer of assets from an insurer to a non-affiliate, if an agreement or understanding exists between the Insurer and non-affiliate, that any portion of such assets will be transferred to one or more affiliates of the insurer;

(iv) all management agreements, service contracts and all cost-sharing arrangements; and

(v) any material transactions, specified by regulation, which the commissioner determines may adversely affect the interests of the insurer's policyholders.

Nothing herein contained shall be deemed to authorize or permit any transactions which, in the case of an insurer not a member of the same holding company system, would be otherwise contrary to law.

(3) A domestic insurer may not enter into transactions which are part of a plan or series of like transactions with persons within the holding company system if the purpose of those separate transactions is to avoid the statutory threshold amount and thus avoid the review that would occur otherwise. If the commissioner determines that such separate transactions were entered into over any [twelve] month period for such purpose, he may exercise his authority under Section 11.

(4) The commissioner, in reviewing transactions pursuant to subsection (a)(2), shall consider whether the transactions comply with the standards set forth in subsection (a)(1) and whether they may adversely affect the interests of policyholders.

(5) The commissioner shall be notified within [thirty] days of any investment of the domestic insurer in any one corporation if the total investment in such corporation by the insurance holding company system exceeds [ten] percent of such corporation's voting securities.

(b) Dividends and other Distributions. No domestic insurer shall pay any extraordinary dividend or make any other extraordinary distribution to its shareholders until:

(1) [Thirty] days after the commissioner has received notice of the declaration thereof and has not within such period disapproved such payment, or

(2) The commissioner shall have approved such payment within such [thirty] day period.

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For purposes of this section, an extraordinary dividend or distribution includes any dividend or distribution of cash or other property, whose fair market value together with that of other dividends or distributions made within the preceding [twelve] months exceed the lesser of

(1) [Ten] percent of such insurer's surplus as regards policyholders as of the [31st] day of [December] next preceding, or
(2) The net gain from operations of such insurer, if such insurer is a life insurer, or the net income, if such insurer is not a life insurer, not including realized capital gains, for the [twelve] month period ending the [31st] day of [December] next preceding, but shall not include pro rata distributions of any class of the insurer's own securities.

In determining whether a dividend or distribution is extraordinary, an insurer other than a life insurer may carry forward net income from the previous [two] calendar years that has not already been paid out as dividends. This carry-forward shall be computed by taking the net income from the [second] and [third] preceding calendar years, not including realized capital gains, less dividends paid in the [second] and immediate preceding calendar years.

Notwithstanding any other provision of law, an insurer may declare an extraordinary dividend or distribution which is conditional upon the [commissioner's] approval thereof, and such a declaration shall confer no rights upon shareholders until

(1) the [commissioner] has approved the payment of such a dividend or distribution or
(2) the [commissioner] has not disapproved such payment within the [thirty] day period referred to above.

(c) Management of Domestic Insurers Subject To Registration.

(1) Notwithstanding the control of a domestic insurer by any person, the officers and directors of the insurer shall not thereby be relieved of any obligation or liability to which they would otherwise be subject by law, and the insurer shall be managed so as to assure its separate operating identity consistent with this act, article or chapter.

(2) Nothing herein shall preclude a domestic insurer from having or sharing a common management or cooperative or joint use of personnel, property or services with one or more other persons under arrangements meeting the standards of section 6(a)(3).

(3) Not less than [one-third] of the directors of a domestic insurer, and not less than [one-third] of the members of each committee of the board of directors of any domestic insurer shall be persons who are not officers or employees of such insurer or of any entity controlling, controlled by, or under common control with such insurer and who are not beneficial owners of a controlling interest in the voting stock of such insurer or any such entity. At least [one] such person[s] must be included in any quorum for the transaction of business at any meeting of the board of directors or any committee thereof.

(4) The board of directors of a domestic insurer shall establish [one] or more committees comprised solely of directors who are not officers or employees of the insurer or of any entity controlling, controlled by,
or under common control with the insurer and who are not beneficial
owners of a controlling interest in the voting stock of the insurer or
any such entity. Such committee or committees shall have responsibili-
ity for recommending the selection of independent certified public ac-
countants, reviewing the insurer's financial condition, the scope and
results of the independent audit and any internal audit, nominating
candidates for director for election by shareholders or policyholders,
evaluating the performance of officers deemed to be principal officers
of the insurer and recommending to the board of directors the selec-
tion and compensation of the principal officers.

(5) The provisions of subsections (c)(3) and (c)(4) shall not apply to
a domestic insurer if the person controlling such insurer is an insurer
having a board of directors and committees thereof that meet the re-
quirements of subsections (c)(3) and (c)(4).

COMMENT: Drafting note: The preceding subsection (c) entitled "Management
of Domestic Insurers Subject to Registration" is optional and to be adopted according to the needs of the individual jurisdiction.

(d) Adequacy of Surplus. For purposes of this act, in determining
whether an insurer's surplus as regards policyholders is reasonable
in relation to the insurer's outstanding liabilities and adequate to its
financial needs, the following factors, among others, shall be con-
sidered:

(1) The size of the insurer as measured by its assets, capital and
surplus, reserves, premium writings, insurance in force and other ap-
propriate criteria;
(2) The extent to which the insurer's business is diversified among
the several lines of insurance;
(3) The number and size of risks insured in each line of business;
(4) The extent of the geographical dispersion of the insurer's in-
sured risks;
(5) The nature and extent of the insurer's reinsurance program;
(6) The quality, diversification and liquidity of the insurer's invest-
ment portfolio;
(7) The recent past and projected future trend in the size of the in-
surer's investment portfolio;
(8) The surplus as regards policyholders maintained by other com-
parable insurers;
(9) The adequacy of the insurer's reserves; and
(10) The quality and liquidity of investments in affiliates. The [com-
misioner] may treat any such investment as a disallowed asset for
purposes of determining the adequacy of surplus as regards policy-
holders whenever in his judgment such investment so warrants.

Section 7. [Examination.]
(a) Power of Commissioner. Subject to the limitation contained in this
section and in addition to the powers which the [commissioner] has
under [insert applicable sections of state law] relating to the examina-

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tion of insurers, the [commissioner] shall also have the power to order
any insurer registered under Section 5 to produce such records, books,
or other information papers in the possession of the insurer or its af-
filiates as are reasonably necessary to ascertain the financial condi-
tion of such insurer or to determine compliance with [insert appropriate
reference to state law]. In the event such insurer fails to comply with
such order, the [commissioner] shall have the power to examine such
affiliates to obtain such information.

(b) Use of Consultants. The [commissioner] may retain at the
registered insurer’s expense such attorneys, actuaries, accountants and
other experts not otherwise a part of the [commissioner’s] staff as shall
be reasonably necessary to assist in the conduct of the examination
under subsection (a). Any persons so retained shall be under the direc-
tion and control of the [commissioner] and shall act in a purely advisory
capacity.

(c) Expenses. Each registered insurer producing for examination
records, books and papers pursuant to subsection (a) shall be liable for
and shall pay the expense of such examination in accordance with [in-
sert appropriate reference to state law].

Section 8. [Confidential Treatment.] All information, documents and
copies thereof obtained by or disclosed to the [commissioner] or any
other person in the course of an examination or investigation made
pursuant to Section 7 and all information reported pursuant to Sec-
tion 5 and Section 6, shall be given confidential treatment and shall
not be subject to subpoena and shall not be made public by the [com-
mmissioner], the National Association of Insurance Commissioners, or
any other person, except to insurance departments of other states,
without the prior written consent of the insurer to which it pertains
unless the [commissioner], after giving the insurer and its affiliates
who would be affected thereby, notice and opportunity to be heard,
determines that the interest of policyholders, shareholders or the public
will be served by the publication thereof, in which event he may publish
all or any part thereof in such manner as he may deem appropriate.

Section 9. [Rules and Regulations.] The [commissioner] may, upon
notice and opportunity for all interested persons to be heard, issue such
rules, regulations and orders as shall be necessary to carry out the pro-
visions of this act.

Section 10. [Injunctions, Prohibitions Against Voting Securities, Sc-
questration of Voting Securities.]

(a) Injunctions. Whenever it appears to the [commissioner] that any
insurer or any director, officer, employee or agent thereof has com-
teed or is about to commit a violation of this act or of any rule, regula-
tion or order issued by the [commissioner] hereunder, the [commis-
sioner] may apply to the [insert appropriate court] for the county in
which the principal officer of the insurer is located or if such insurer

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has no such office in this state then to the [insert appropriate court]
for [insert county] for an order enjoining such insurer or such director,
officer, employee or agent thereof from violating or continuing to
violate this article or any such rule, regulation or order, and for such
other equitable relief as the nature of the case and the interest of the
insurer’s policyholders, creditors and shareholders or the public may
require.

(b) Voting of Securities, When Prohibited. No security which is the
subject of any agreement or arrangement regarding acquisition, or
which is acquired or to be acquired, in contravention of the provisions
of this act or of any rule, regulation or order issued by the [commissioner]
hereunder may be voted at any shareholder’s meeting, or may
be counted for quorum purposes, and any action of shareholders re-
quiring the affirmative vote of a percentage of shares may be taken
as though such securities were not issued and outstanding; but no ac-
tion taken at any such meeting shall be invalidated by the voting of
such securities, unless the action would materially affect control of the
insurer or unless the courts of this state have so ordered. If an insurer
or the [commissioner] has reason to believe that any security of the
insurer has been or is about to be acquired in contravention of the pro-
visions of this act or of any rule, regulation or order issued by the [com-
missioner] hereunder, the insurer or the [commissioner] may apply to
the [insert appropriate court] for the county in which the insurer has
its principal place of business to enjoin any offer, request, invitation,
agreement or acquisition made in contravention of Section 4 or any
rule, regulation or order issued by the [commissioner] thereunder to
enjoin the voting of any security so acquired, to void any vote of such
security already cast at any meeting of shareholders and for such other
equitable relief as the nature of the case and the interest of the in-
insurer’s policyholders, creditor and shareholders or the public may
require.

(c) Sequestration of Voting Securities. In any case where a person
has acquired or is proposing to acquire any voting securities in viola-
tion of this act or any rule, regulation or order issued by the [com-
missioner] hereunder, the [insert appropriate court] for [insert county] or
the [insert appropriate court] for the county in which the insurer has
its principal place of business may, on such notice as the court deems
appropriate, upon the application of the insurer or the [commissioner]
seize or sequester any voting securities of the insurer owned directly
or indirectly by such person, and issue such order with respect thereto
as may be appropriate to effectuate the provisions of this act.

Notwithstanding any other provisions of law, for the purposes of this
act, the sites of the ownership of the securities of domestic insurers
shall be deemed to be in this state.

Section 11. [Sanctions.]
(a) Any insurer failing, without just cause, to file any registration
statement as required in this act shall be required, after notice and
hearing, to pay a penalty of [ ] dollars for [each day’s] delay, to be
recovered by the [commissioner] and the penalty so recovered shall be paid into the [general revenue fund] of this state. The maximum penalty under this section is [ ] dollars. The [commissioner] may reduce the penalty if the insurer demonstrates to the [commissioner] that the imposition of the penalty would constitute a financial hardship to the insurer.

(b) Every director or officer of an insurance holding company system who knowingly violates, participates in, or assents to, or who knowingly shall permit any of the officers or agents of the insurer to engage in transactions or make investments which have not been properly reported or submitted pursuant to section 6(a), 6(a), or which violate this act, shall pay, in their individual capacity, a civil forfeiture of not more than [ ] dollars per violation, after notice and hearing before the [commissioner]. In determining the amount of the civil forfeiture, the [commissioner] shall take into account the appropriateness of the forfeiture with respect to the gravity of the violation, the history of previous violations, and such other matters as justice may require.

(c) Whenever it appears to the [commissioner] that any insurer subject to this act or any director, officer, employee or agent thereof has engaged in any transaction or entered into a contract which is subject to Section 6 of this act and which would not have been approved had such approval been requested, the [commissioner] may order the insurer to cease and desist immediately any further activity under that contract. After notice and hearing the [commissioner] may also order the insurer to void any such contracts and restore the status quo if such action is in the best interest of the policyholders, creditors or the public.

(d) Whenever it appears to the [commissioner] that any insurer or any director, officer, employee or agent thereof has committed a willful violation of this act, the [commissioner] may cause criminal proceedings to be instituted by the [insert appropriate court] for the county in which the principal office of the insurer is located or if such insurer has no such office in this State, then by the [insert appropriate court] for [insert county] against such insurer or the responsible director, officer, employee or agent thereof. Any insurer who willfully violates this act may be fined not more than [ ] dollars. Any individual who willfully violates this act may be fined in his/her individual capacity not more than [ ] dollars or, be imprisoned for not more than [one to three] years or both.

(e) Any officer, director, or employee of an insurance holding company system who willfully and knowingly subscribes to or makes or causes to be made any false statements or false reports or false filings with the intent to deceive the [commissioner] in the performance of his duties under this act, upon conviction thereof, shall be imprisoned for not more than [ ] to [ ] years or fined [ ] dollars or both. Any fines imposed shall be paid by the office, director, or employee in his/her individual capacity.

Section 12. [Receivership.] Whenever it appears to the [commissioner]
Section 13. [Recovery.]

(a) If an order for liquidation or rehabilitation of a domestic insurer has been entered, the receiver appointed under such order shall have a right to recover on behalf of the insurer, (i) from any parent corporation or holding company or person or affiliate who otherwise controlled the insurer, the amount of distributions (other than distributions or shares of the same class of stock) paid by the insurer on its capital stock, or (ii) any payment in the form of a bonus, termination settlement or extraordinary lump sum salary adjustment made by the insurer or its subsidiary(a) to a director, officer or employee, where the distribution or payment pursuant to (i) or (ii) is made at any time during the [one] year preceding the petition for liquidation, conservation or rehabilitation, as the case may be, subject to the limitations of subsections (b), (c), and (d).

(b) No such distribution shall be recoverable if the parent or affiliate shows that when paid such distribution was lawful and reasonable, and that the insurer did not know and could not reasonably have known that such distribution might adversely affect the ability of the insurer to fulfill its contractual obligations.

(c) Any person who was a parent corporation or holding company or a person who otherwise controlled the insurer or affiliate at the time such distributions were paid shall be liable up to the amount of distributions of payments under subsection (a) such person received. Any person who otherwise controlled the insurer at the time such distributions were paid shall be liable up to the amount he would have received if they had been paid immediately. If [two or more] persons are liable with respect to the same distributions, they shall be jointly and severally liable.

(d) The maximum amount recoverable under this subsection shall be the amount needed in excess of all other available assets of the impaired or insolvent insurer to pay the contractual obligations of the impaired or insolvent insurer and to reimburse any guaranty funds.

(e) To the extent that any person liable under subsection (c) is insolvent or otherwise fails to pay claims due from it pursuant to subsection (c), its parent corporation or holding company or person who otherwise controlled it at the time the distribution was paid, shall be jointly and severally liable for any resulting deficiency in the amount recovered from such parent corporations or holding company or person who otherwise controlled it.

Section 14. [Revocation, Suspension, or Nonrenewal of Insurer's
License.] Whenever it appears to the [commissioner] that any person has committed a violation of this act which makes the continued operation of an insurer contrary to the interests of policyholders or the public, the [commissioner] may, after giving notice and an opportunity to be heard, determine to suspend, revoke or refuse to renew such insurer’s license or authority to do business in this state for such period as he finds is required for the protection of policyholders or the public. Any such determination shall be accompanied by specific findings of fact and conclusions of law.

Section 15. [Judicial Review, Mandamus.]
(a) Any person aggrieved by any act, determination, rule, regulation or order, or any other action of the [commissioner] pursuant to this act may appeal therefrom to the [insert appropriate court] for [insert county]. The court shall conduct its review without a jury and by trial de novo, except that if all parties, including the [commissioner], so stipulate, the review shall be confined to the record. Portions of the record may be introduced by stipulation into evidence in a trial de novo as to those parties so stipulated.
(b) The filing of an appeal pursuant to this section shall stay the application of any such rule, regulation, order or other action of the [commissioner] to the appealing party unless the court, after giving such party notice and an opportunity to be heard, determines that such a stay would be detrimental to the interest of policyholders, shareholders, creditors or the public.
(c) Any person aggrieved by any failure of the [commissioner] to act or make a determination required by this act may petition the [insert appropriate court] for a writ in the nature of a mandamus or a peremptory mandamus directing the [commissioner] to act or make such determination forthwith.

Section 16. [Conflict with Other Laws.] All laws and parts of laws of this state inconsistent with this act are hereby superseded with respect to matters covered by this act.

Section 17. [Severability.] [Insert severability clause.]

Section 18. [Repealer.] [Insert repealer clause.]

Section 19. [Effective Date.] [Insert effective date.]
Requirement for Independent Loss Reserve Certification Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

The reliability of annual statements is dependent upon the accuracy of the values contained therein. Loss and loss adjustment expense reserves are a major component (approximately two-thirds) of an insurer's total liabilities and include various projections and estimates of the ultimate cost of incurred losses, both reported and unreported.

Many insurers have, on their own initiative or by direction of their commissioner of insurance, substantially increased their reserves in recent years when it was determined that earlier estimates were unrealistic and unduly optimistic. On the other hand, many insurers have "improved" the appearance of their balance sheets by discounting reserves, often compounding their action by utilizing unrealistically high interest rate assumptions. Insurers have been subjected to liquidation when their real financial condition was determined to be hopeless. Regulators are concerned that the inadequate reserves may have been established by employees who were under management pressure to make the company's condition look better than it was.

This act would require that an "independent" (not an employee of the insurer) qualified loss reserve specialist provide an opinion as to adequacy of loss and loss adjustment expense reserves. The independent specialist would be a member of the Casualty Actuarial Society or a person determined by the commissioner of insurance to have the requisite knowledge and experience to render the opinion. Such independent specialists are less likely to be subject to the pressures of insurer's management, and regulators should be able to place greater reliance upon the validity of the certified statements. Some states may have the authority to accomplish the purposes of this act by promulgating regulations under existing statutes.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Requirement for Independent Loss Reserve Certification Act.

Section 2. [Definitions.] As used in this act:

(1) "Qualified Independent Loss Reserve Specialist" means a person who is not an employee, principal or direct or indirect owner of the insurer and is a member of the Casualty Actuarial Society or such other person approved by the [commissioner of insurance] as qualified by virtue of knowledge and experience, to render an opinion on the adequacy
of loss and loss adjustment expense reserves;
(2) "Loss Reserve Certification" means the certified opinion of a
qualified independent loss reserve specialist relating to the adequacy
of an insurer's loss and loss adjustment expense reserves.

Section 3. [Requirement to File Annual Statement.] The board of
directors of every property and casualty insurer that is required to file
an annual statement with the [commissioner] on [March 1] of each year
for the calendar year immediately preceding, shall engage a qualified
independent loss reserve specialist, who shall render a loss reserve cer-
tification of the loss and loss adjustment expense reserves reported by
the insurer in such filed annual statement. Such loss reserve certifica-
tion shall, on or before [May 1] of the same year, be submitted by the
qualified independent loss reserve specialist directly to the board of
directors of the insurer and to the [commissioner].

Section 4. [Severability.] [Insert severability clause.]

Section 5. [Repealer.] [Insert repealer clause.]

Section 6. [Effective Date.] [Insert effective date.]
Seizure of Impaired Insurers Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

In most states, when it is determined by a commissioner of insurance that an insurer’s continued operation is hazardous to itself, its creditors, its policyholders or to the people of the state, the state applies to the court for an order appointing its commissioner as receiver, rehabilitator or liquidator. Such a procedure is appropriate in most cases, but in some situations the delay between application and the commissioner’s assuming control of the insurer’s assets permits persons in control of the insurer to strip those assets, especially if an insurer contests the commissioner’s determination through lengthy procedural and substantive litigation.

This act adopts the concept utilized in a number of states (e.g., California, Louisiana and Missouri) of authorizing the commissioner to apply forthwith to the court for an order empowering the immediate seizure of an insurer’s assets, books, records and real and personal property. The insurer would be enjoined from transacting further business or disposing of its property until further order of the court.

An application for seizure would be used in limited instances, such as:

— the insurer’s refusal to submit books, records and accounts to inspection by the commissioner;

— significant impairment of capital or reserves, as determined by the commissioner, coupled with refusal to observe an order to correct deficiencies or cease doing business;

— evidence that without consent of the commissioner an attempt is being made to transfer or to substantially transfer the insurer’s property or business or to consolidate or reinsure substantially all of the insurer’s property or business;

— a finding by the commissioner, after examination of the insurer’s condition, that any further transaction of business would create an imminent hazard to policyholders, creditors or the public;

— a finding by the commissioner that an official of the insurer has embezzled, sequestered or otherwise wrongfully diverted substantial assets.

Under certain limited circumstances, where any delay is likely to result in the disappearance or diffusion of an insurer’s assets, the commissioner would be empowered to summarily seize the insurers assets. Under such circumstances, within two business days the commissioner would be required to apply to the court for an order as described above.

Where the commissioner has the luxury of time, and potential misappropriation of the insurer’s assets is not an issue, summary seizure would not be utilized. It is unlikely that a commissioner would act under such a law without a high degree of certainty as to the insurer’s condition. Thus, the act, by permitting the insurer its day in court only after the commissioner is in control of and safeguarding its assets, would provide the regulator with a method of minimizing losses which
ultimately may have to be borne by state guaranty funds. Finally, anyone violating the provisions of this act would be personally liable for any losses which result because of such activities.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Seizure of Impaired Insurers Act.

Section 2. [Scope of Provisions.] The provisions of this act shall apply to all persons subject to examination by the [commissioner of insurance], or purporting to do an insurance business in this state, or in the process of organization with intent to do such business therein, or for whom the [commissioner's] authorization is required for the trans- action of business, or whose authorization to do an insurance business has been revoked or suspended.

Section 3. [Order of Conservation: Duration.]
(a) The [insert name of highest court of original jurisdiction] of the county in which is located the principal office in this state of a person subject to this act shall, upon the filing by the [commissioner] of a verified application showing any of the hereinafter enumerated conditions to exist, issue its order vesting title to all of the assets of such person, wheresoever situated, in the [commissioner] or his successor in office, in his official capacity as such. Such order shall also direct the [commissioner] forthwith to take possession of all of its books, records, property, real and personal, and assets, and to conduct, as conservator, the business of said person, or so much thereof as to the [commissioner] may, seem appropriate. Further, such order shall enjoin said person, and its officers, directors, agents, servants, and employees from the transaction of its business or disposition of its property until the further order of said court. The enumerated conditions are:

(1) That such person has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the [commissioner] or the [commissioner's] deputy or examiner;

(2) That such person has neglected or refused to observe an order of the [commissioner] to make good within the time prescribed by law any deficiency in its capital if it is a stock corporation, or in its reserve if it is a mutual insurer;

(3) That such person, without first obtaining the consent in writing of the [commissioner], has transferred, or attempted to transfer to any other person, substantially its entire property or business, or, without such consent, has entered into any transaction the effect of which is to merge, consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person;
Suggested State Legislation

(4) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders or creditors, or to the public;

(5) That such person has violated its charter or any law of the state;

(6) That any officer of such person refuses to be examined under oath, concerning its affairs;

(7) That any officer or attorney in fact of such person has embez-
zled, sequestered, or wrongfully diverted any of the assets of such person;

(8) That a domestic insurer does not comply with the requirements for the issuance to it of a certificate of authority, or that its certificate of authority has been revoked;

(9) That the last report of examination of any person to whom the provisions of this act shows such person to be insolvent within the meaning of [refer to provisions of insurance law applicable to, e.g., life insurer, property/casualty insurer]; or

(10) That the interests of creditors, policyholders or the public are likely to be endangered by the continued transaction of business.

(b) Said order shall continue in force and effect until, on the application of either the [commissioner] or of such person, it shall, after a full hearing, appear to said court that the ground for said order directing the [commissioner] to take title and possession does not exist or has been removed and that said person can properly resume title and possession of its property and the conduct of its business.

(c) All hearings in conservation proceedings may be held privately in chambers, and shall be held privately on request of any officer of the person proceeded against.

(d) In conservation proceedings and judicial reviews thereof, all records of the person, other documents, and all insurance department files and court records and papers, so far as they pertain to and are a part of the record of the conservation proceedings, shall be and re-
main confidential except as is necessary to obtain compliance there-
with, unless and until the court, after hearing arguments in chambers from the [commissioner] and the person, shall decide otherwise, or unless the person requests that the matter be made public.

(e) Immediately after seizure pursuant to this act the [commissioner] shall notify the insurance commissioners of the states and territories in which the person is doing business of such seizure.

Section 4. [Summary Seizure.]

(a) Whenever it appears to the [commissioner] that any of the condi-
tions set forth in Section 3 exist and that irreparable loss and injury to the property and business of a person specified in Section 2 has occurred or may occur unless the [commissioner] so acts immediately, the [commissioner], without notice and before applying to the court for any order, shall issue an order of summary seizure and forthwith take possession of the property, business, books, records and accounts of such person, and of the offices and premises occupied by it for the transac-
tion of its business, and retain possession subject to the order of the
court. Any person having possession of and refusing to deliver any of
the books, records or assets of a person against whom such a summary
seizure order has been issued by the [commissioner], shall be guilty
of [insert category of felony] and punishable by a fine not exceeding
one hundred thousand dollars or imprisonment not exceeding [five]
years, or both such fine and imprisonment.

(b) Whenever the [commissioner] issues a summary seizure order as
provided in subsection (a), it shall, on the demand of the [commissioner],
be the duty of the sheriff of any county of this state, and of the police
department of any municipal corporation therein, to furnish the [com-
missioner] with such deputies, patrolmen or officers as may be
necessary to assist in making and enforcing any such seizure.

(c) Within [two] business days after issuance of an order of summary
seizure, the [commissioner] shall institute a court proceeding as pro-
vided for in Section 3, and thereafter shall proceed in accordance with
the provisions of this act.

Section 5. [Affect of Seizure on Existing Contracts.] A court order
issued pursuant to Section 3 of this act or a summary seizure order
issued pursuant to Section 4 of this act shall not constitute an an-
ticipatory breach of any contract of the person seized.

Section 6. [Personal Liability.] In the event that any person subject
to the provisions of this act shall knowingly violate any valid order
of the [commissioner] issued under the provisions of this act and, as
a result of such violation, the net worth of the insurer shall be reduced
or the insurer shall suffer loss it would not otherwise have suffered,
said person shall become personally liable to the insurer for the amount
of any such reduction or loss. The [commissioner] is authorized to bring
an action on behalf of the insurer in the [insert appropriate court] to
recover the amount of the reduction or loss together with any costs.

Section 7. [Severability.] [Insert severability clause.]

Section 8. [Repealer.] [Insert repealer clause]

Section 9. [Effective Date.] [Insert effective date.]
Unfair Claim Settlement Practices Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

Purchasers of insurance are entitled to receive fair treatment when they file claims under their policies. Claimants are similarly entitled to fair treatment when they file claims they believe are covered by insurance. This act is intended to be a bill of rights for insureds and claimants by prohibiting specified unfair claim settlement practices and by providing that the commission of such unfair practices with such frequency as to indicate a business practice will subject an insurer to monetary penalties. Although the number of complaints filed with the insurance department against an insurer will not be determinative of an insurer's violation of the act, the insurer's complaint level will be admissible at a hearing, as will be the complaint experience of comparable insurers.

The act does not require that the unfair practices be performed by the insurer with such frequency as to constitute a "general business practice," but only a frequency sufficient to constitute a "business practice." The act thus permits the commissioner of insurance to deal with unfair practices which, although serious and repeated, were nevertheless not widespread enough to rise to the level of a general business practice.

Suggested Legislation

(Title, enacting clause, etc.)

1. Section 1. [Short Title.] This act may be cited as the Unfair Claim Settlement Practices Act.

2. Section 2. [Unfair Claim Settlement Practices Defined.] No insurer doing business in this state shall engage in unfair claim settlement practices. Any of the following acts by an insurer if committed without just cause and performed with such frequency as to indicate a business practice, shall constitute unfair claim settlement practices:
   1. knowingly misrepresenting to claimants pertinent facts or policy provisions related to coverages at issue;
   2. failing to acknowledge with reasonable promptness pertinent communications as to claims arising under its policies;
   3. failing to adopt and implement reasonable standards for prompt investigation of claims arising under its policies;
   4. not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear. After receiving a properly executed proof
of loss, the insurer shall advise the claimant of acceptance or denial
of the claim within [thirty] days; or
(5) compelling policyholders to institute suits to recover amounts due
under the insurer's policies by offering substantially less than the
amounts ultimately recovered in the suits brought by them.

Section 3. [Admissible Evidence.] Evidence as to numbers and types
of complaints to the [insurance department] against an insurer and
as to the [department's] complaint experience with other insurers
writing similar lines of insurance shall be admissible as evidence in
any administrative or judicial proceeding under this act or [insert
reference to unfair methods of competition and unfair and deceptive
acts and practices act of insurance law], but no insurer shall be deemed
in violation of this act solely by reason of the numbers and types
of such complaints.

Section 4. [Penalties.] If it is found, after notice and an opportunity
to be heard, that an insurer has violated this act, the [commissioner]
shall reduce his findings to writing and shall issue and cause to be
served upon the insurer charged with the violation a copy of such find-
ings. Each instance of noncompliance with Section 2 of this act may
be treated as a separate violation of this act for purposes of ordering
a monetary penalty pursuant to [insert appropriate reference to sec-
tion in insurance law]. A violation of this act shall not be a misde-
meanor [optional: nor create an additional, if any, private cause of
action].

Section 8. [Severability.] [Insert severability clause.]

Section 9. [Repealer.] [Insert repealer clause.]

Section 10. [Effective Date.] [Insert effective date.]
Risk Retention Groups and Purchasing Groups Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

The federal Liability Risk Retention Act of 1986 (Public Law 99-563) (RRA) broadens the federal Product Liability Risk Retention Act of 1981 (Public Law 97-45), to permit risk retention groups to provide, and purchasing groups to obtain, most kinds of commercial liability insurance (limited until now to product liability and completed operations coverages) for their members through such vehicles. The RRA largely preempts state legislative and regulatory action in connection with risk retention groups and, to a lesser extent, in connection with purchasing groups, even where comprehensive state action has addressed liability insurance availability and affordability problems. Pursuant to RRA, a risk retention group, once chartered and licensed in a single state, may do liability insurance business in all states, notwithstanding most of the laws of the non-chartering states.

Despite the limitations imposed by Congress in RRA, the states are allowed to assert certain powers to regulate the formation and/ or operation of risk retention and purchasing groups, to the extent permitted and not preempted by Congress. For example, the law would make risk retention groups subject to such consumer protections as unfair claims settlement practices acts and prohibitions against deceptive, false or fraudulent acts or practices.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Risk Retention Groups and Purchasing Groups Act.

1 Section 2. [Definitions.] As used in this act:

1 (1) "Commissioner" (director, superintendent) means the insurance commissioner (director, superintendent) of this state or the commissioner, director or superintendent of insurance in any other state.

1 (2) "Completed Operations Liability" means liability arising out of the installation, maintenance, or repair of any product at a site which is not owned or controlled by

1 (i) any person who performs that work, or

1 (ii) any person who hires an independent contractor to perform that work, but shall include liability for activities which are completed or abandoned before the date of the occurrence giving rise to the liability.

1 (3) "Domicile," for purposes of determining the state in which a purchasing group is domiciled, means

1 (i) for a corporation, the state in which the purchasing group is incorporated, and

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Risk Retention and Purchasing Groups Act

(i) for an unincorporated entity, the state of its principal place
of business.

(4) "Hazardous financial condition" means that, based on its present
or reasonably anticipated financial condition, a risk retention group,
although not yet financially impaired or insolvent, is unlikely to be able
(i) to meet obligations to policyholders with respect to known claims
and reasonably anticipated claims, or
(ii) to pay other obligations in the normal course of business.

(5) "Insurance" means primary insurance, excess insurance, rein-
surance, surplus lines insurance, and any other arrangement for shift-
ing and distributing risk which is determined to be insurance under
the laws of this state.

COMMENT: Definition of "insurance" from RRA 1986 section 2(a)(1).

(6) "Liability"

(i) means legal liability for damages (including costs of defense, legal
costs and fees, and other claims expenses) because of injuries to other
persons, damage to their property, or other damage or loss to such other
persons resulting from or arising out of
(A) any business (whether profit or nonprofit), trade, product, ser-
vice (including professional services), premises, or operations, or
(B) any activity of any state or local government, or any agency
or political subdivision thereof, and

COMMENT: State liability. A state may specify acceptable means for
managing the liability of the state or its local governments, or any agen-
cy or political subdivision thereof, by including or excluding insurance
coverage obtained from an admitted insurance company, an excess lines
company, a risk retention group, or any other source; or through a broker,
agent, purchasing group, or any other person. Similarly, a state may
specify acceptable means of demonstrating financial responsibility as a
condition for obtaining a license or permit to undertake specified ac-
tivities pursuant to section 6(d), RRA 1986.

(ii) does not include personal risk liability and an employer’s liabil-
ity with respect to its employees other than legal liability under the
Federal Employers’ Liability Act (45 U.S.C. 51 et seq.).

(7) "Personal Risk Liability" means liability for damages because
of injury to any person, damage to property, or other loss or damage
resulting from any personal, familial, or household responsibilities or
activities, rather than from responsibilities or activities referred to in
paragraph (6).

(8) "Plan of Operation or Feasibility Study" means an analysis which
presents the expected activities and results of a risk retention group
including, at a minimum
(i) information sufficient to verify that its members are engaged
in businesses or activities similar or related with respect to the liability
to which such members are exposed by virtue of any related, similar,
or common business, trade, product, services, premises or operations
(ii) for each state in which it intends to operate, the coverages, deductibles, coverage limits, rates, and rating classification systems for each line of insurance the group intends to offer
(iii) historical and expected loss experience of the proposed members and national experience of similar exposures to the extent that this experience is reasonably available
(iv) pro forma financial statements and projections;
(v) appropriate opinions by a qualified, independent casualty actuary, including a determination of minimum premium or participation levels required to commence operations and to prevent a hazardous financial condition
(vi) identification of management, underwriting and claims procedures, marketing methods, managerial oversight methods, investment policies and reinsurance agreements
(vii) identification of each state in which the risk retention group has obtained, or sought to obtain, a charter and license, and a description of its status in each such state, and
(viii) such other matters as may be prescribed by the commissioner of the state in which the risk retention group is chartered for liability insurance companies authorized by the insurance laws of that state.

(9) “Product Liability” means liability for damages because of any personal injury, death, emotional harm, consequential economic damage, or property damage (including damages resulting from the loss of use of property) arising out of the manufacture, design, importation, distribution, packaging, labeling, lease, or sale of a product, but does not include the liability of any person for those damages if the product involved was in the possession of such a person when the incident giving rise to the claim occurred.

COMMENT: The definition of “product liability” is identical to that contained in Product Liability RRA 1981, section 2(a)(3), for a “grandfathered” risk retention group.

(10) “Purchasing Group” means any group which
(i) has as one of its purposes the purchase of liability insurance on a group basis
(ii) purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in subparagraph (iii)
(iii) is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations and
(iv) is domiciled in any state.

COMMENT: The Product Liability RRA 1981 contained a very loose definition of “purchasing group.” RRA 1986 offers a more restrictive definition of those groups that can qualify as “purchasing groups.” A purchasing group must only offer liability insurance to its group members, and
the insurance must cover their similar or related liability exposure. Further, the group members must have businesses or activities that are similar or related with respect to the liability to which group members are exposed. Finally, the purchasing group must be domiciled in one of the states of the United States, i.e., it cannot be domiciled offshore.

(11) "Risk Retention Group" means any corporation or other limited liability association
(i) whose primary activity consists of assuming and spreading all, or any portion, of the liability exposure of its group members,
(ii) which is organized for the primary purpose of conducting the activity described under subparagraph (i),
(iii) which
(A) is chartered and licensed as a liability insurance company and authorized to engage in the business of insurance under the laws of any state, or
(B) before January 1, 1985, was chartered or licensed and authorized to engage in the business of insurance under the laws of Bermuda or the Cayman Islands and, before such date, had certified to the [insurance commissioner] of at least one state that it satisfied the capitalization requirements of such state, except that any such group shall be considered to be a risk retention group only if it has been engaged in business continuously since such date and only for the purpose of continuing to provide insurance to cover product liability or completed operations liability (as such terms were defined in the Product Liability Risk Retention Act of 1981 before the date of the enactment of the Liability Risk Retention Act of 1986),
(iv) which does not exclude any person from membership in the group solely to provide for members of such a group a competitive advantage over such a person,
(v) which
(A) has as its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group, or
(B) has as its sole owner an organization which has as its members only persons who comprise the membership of the risk retention group, and its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group,
(vi) whose members are engaged in businesses or activities similar or related with respect to the liability of which such members are exposed by virtue of any related, similar, or common business trade, product, services, premises, or operations,
(vii) whose activities do not include the provision of insurance other than
(A) liability insurance for assuming and spreading all or any portion of the liability of its group members, and
(B) reinsurance with respect to the liability of any other risk retention group (or any members of such other group) which is engaged in businesses or activities so that such group or member meets the
requirement described in subparagraph (vi) from membership in the
risk retention group which provides such reinsurance, and
(viii) the name of which includes the phrase “Risk Retention Group.”

COMMENT: RRA 1986 changes the definition of “Risk Retention Group”
by further restricting the permissible membership and its activities. A risk
retention group must be chartered and licensed as a liability insurance
company and authorized to engage in the business of insurance under
the laws of one of the fifty states unless it qualifies under the “grand-
father” provision of subparagraph (11)(iii)(B). In that event, it may only
continue to provide product liability or completed operation coverage.
Each of the members of the group must have an “ownership interest”
in the group. In addition, all owners must be provided insurance by the
group. One purpose of this requirement is to prevent participation by
third parties which may not be interested in the specific insurance prob-
lems of group members but merely may be interested in making a profit.
The single exception to this requirement is when the sole member and
sole owner of the organization is an entity consisting of persons, each
of whom is a member of the risk retention group and is provided insurance
by the group.

The members “who are also the owners” are required to be engaged
in business or activities “similar or related with respect to the liability
to which they are exposed by virtue of any related, similar, or common
business, trade, product, services, premises or operation.” This restric-
tion is for the purpose of requiring substantial identity among the
members (who are also the owners and insureds) in regard to the nature
of the risks faced.

A risk retention group may not provide insurance other than liability
insurance. Further, it can only provide reinsurance to another risk reten-
tion group if all of that group’s members would qualify for membership
in the risk retention group offering the reinsurance. This provision was
designed to restrict a risk retention group to only reinsuring its own risks
or the similar risks of similarly situated business. For example, a risk reten-
tion group whose membership consists of grocery store owners, could
not reinsure a risk retention group whose membership consists of hazar-
dous waste transporters.

The risk retention group must be chartered and licensed as a liability
insurance company and authorized to engage in the business of insurance
under the laws of one of the fifty states unless it qualifies under the
“grandfather” provisions of subparagraph (11)(iii)(B).

(12) “State” means any state of the United States or the District of
Columbia.

Section 3. [Risk Retention Groups Chartered in this State.]
(a) A risk retention group shall, pursuant to the provisions of [insert
appropriate reference to insurance law], be chartered and licensed to
write only liability insurance pursuant to this act, and, except as pro-
vided elsewhere in this act, must comply with all of the laws, rules,
regulations and requirements applicable to such insurers chartered
and licensed in this state and with Section 4 of this act to the extent
such requirements are not a limitation on laws, rules, regulations or
requirements of this state.
(b) Before it may offer insurance in any state, each risk retention
group shall also submit for approval to the [insurance commissioner]
of this state a plan of operation or feasibility study. The risk retention
group shall submit an appropriate revision in the event of any subse-
quent material change in any item of the plan of operation or feasibility
study, within [ten] days of any such change. The group shall not offer
any additional kinds of liability insurance, in this state or in any other
state, until a revision of such plan or study is approved by the
[commissioner].
(c) At the time of filing its application for charter, the risk retention
group shall provide to the [commissioner] in summary form the follow-
ing information: the identity of the initial members of the group, the
identity of those individuals who organized the group or who will pro-
vide administrative services or otherwise influence or control the ac-
tivities of the group, the amount and nature of initial capitalization,
the coverages to be afforded, and the states in which the group intends
to operate. Upon receipt of this information, the [commissioner] shall
forward such information to the National Association of Insurance
Commissioners. Providing notification to the National Association of
Insurance Commissioners is in addition to and shall not be sufficient
to satisfy the requirements of Section 4 or any other sections of this act.

COMMENT: RRA 1986 allows for the chartering state to apply the full
range of its insurance laws to a risk retention group wishing to charter
in that state, except for requiring participation in the guaranty fund. The
language of this section is derived from Product Liability RRA 1981 sec-
tion 3(a)(1) (which was not amended by RRA '86 as it relates to this
issue). The function of the office of the National Association of Insurance
Commissioners shall be solely to provide administrative services for its
member states and territories. Although RRA '86 specifically requires
that the phrase "Risk Retention Group" be included in the name, the
chartering state is not precluded from prohibiting the use of deceptive
or misleading words, designations or phrases in the name. Further, a state
may require a risk retention group it charters and licenses to locate books
and records or administrative functions within that state to the same ex-
tent it imposes those requirements on its domestic insurers.

Section 4. [Risk Retention Groups Not Chartered in this State.]
(a) Risk retention groups chartered and licensed in states other than
this state and seeking to do business as a risk retention group in this
state shall comply with the laws of this state.

COMMENT: RRA of 1986 exempts a risk retention group from any state
law regarding its operation in a state in which it is not domiciled except
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those laws referred to in RRA 1986. The state of domicile, however, retains under that section the full authority to regulate the formation and operation of the group.

However, if a risk retention group fails to qualify under the definitional requirement of RRA 1986, it will not benefit from this exemption from state law. The commissioner, therefore, would be authorized to apply any of the laws that may be preempted by RRA 1986 because the group will not qualify from the preemption.

(b) Before offering insurance in this state, a risk retention group shall submit to the [commissioner]:

(1) a statement identifying the state or states in which the risk retention group is chartered and licensed as a liability insurance company, charter date, its principle place of business, and such other information, including information on its membership, as the [commissioner] of this state may require to verify that the risk retention group is qualified under section 2(11) of this act;

COMMENT: The commissioner may need to take appropriate action in order to preserve the confidentiality of any proprietary or other confidential information, such as lists identifying the specific members of the group and their location.

(2) a copy of its plan of operations or feasibility study and revisions of such plan or study submitted to the state in which the risk retention group is chartered and licensed, provided, however, that the provision relating to the submission of a plan of operation or feasibility study shall not apply with respect to any line or classification of liability insurance which

(i) was defined in the Product Liability Risk Retention Act of 1981 before October 27, 1986, and

(ii) was offered before such date by any risk retention group which had been chartered and operating for not less than [three] years before such date;

(3) a copy of any revision to its plan of operation or feasibility study required by section 3(b) of this act at the same time that such revision is submitted to the [commissioner] of its chartering state;

COMMENT: The plan of operations or feasibility study required under this provision is that submitted to and accepted by the chartering state.

(4) a statement of registration, for which a filing fee shall be determined by the [commissioner], which designates the [commissioner] as its agent for the purpose of receiving service of legal documents or process.

(c) Before offering insurance in this state, a risk retention group shall submit to the [commissioner]:

(1) a copy of the group's financial statement submitted to the state in which the risk retention group is chartered and licensed which shall
be certified by an independent public accountant and contain a state-
ment of opinion on loss and loss adjustment expense reserves made
by a member of the American Academy of Actuaries or a qualified loss
reserve specialist (under criteria established by the National Associa-
tion of Insurance Commissioners);
(2) a copy of each examination of the risk retention group as cer-
tified by the [commissioner] or public official conducting the examina-
tion;
(3) upon request, a copy of any audit information or document per-
taining to any outside audit performed with respect to the risk reten-
tion group; and
(4) such information as may be required to verify its continuing
qualification as a risk retention group under section (2)(11).

COMMENT: RRA 1986 also added the opportunity for a state to require
that a risk retention group submit a notice of operations and financial
condition. The purpose of this provision is to require a risk retention
group to give the commissioner of any state in which it intends to operate ade-
quate notice of its intended activity and financial condition so that the
commissioner can take appropriate action if the possibility of a poten-
tial insolvency or commercial abuse exists.

(d) Each risk retention group shall be liable for the payment of
premium taxes and taxes on premiums of direct business for risks resi-
dent or located within this state, and shall report to the [commissioner]
the net premiums written for risks resident or located within this state.
Such risk retention group shall be subject to taxation, and any ap-
licable fines and penalties related thereto, on the same basis as a
foreign admitted insurer.
(e) To the extent licensed agents or brokers are utilized pursuant to
Section 12 of this act, they shall report to the [commissioner] the
premiums for direct business for risks resident or located within the
state which such licensees have placed with or on behalf of a risk reten-
tion group not chartered in this state.
(f) To the extent that insurance agents or brokers are utilized pur-
suant to Section 12 of this act, such agent or broker shall keep a com-
plete and separate record of all policies procured from each such risk
retention group, which record shall be open to examination by the [com-
missioner], as provided in [insert appropriate reference to insurance
law]. These records shall, for each policy and each kind of insurance
provided thereunder, include the following:

(1) the limit of liability;
(2) the time period covered;
(3) the effective date;
(4) the name of the risk retention group which issued the policy;
(5) the gross premium charged; and
(6) the amount of return premiums, if any.

COMMENT: KRA 1986 does not specify which premium tax rate will be
applied. The NAIC has recommended applying the rate for foreign admitted insurers; some states, however, may apply the surplus lines rate.

(g) Any risk retention group, its agents and representatives shall comply with the [Unfair Claims Settlement Practices Act of this state — insert reference to insurance law].

COMMENT: The provisions regarding the liability of risk retention groups to state taxation, compliance with the unfair claims settlement practices law, and registration and designation of the commissioner as agent for the purpose of service of process were included in the Product Liability RRA 1981 and continued in RRA 1986.

(b) Any risk retention group shall comply with the laws of this state [insert reference to insurance law] regarding deceptive, false, or fraudulent acts or practices. However, if the [commissioner] seeks an injunction regarding such conduct, the injunction must be obtained from a court of competent jurisdiction.

COMMENT: The provision regarding compliance with state laws regarding deceptive, false, or fraudulent practices was added by RRA 1986. The chartering state retains all of its authority to deal with an unfair trade practice under all its laws generally, including its insurance law. However, the 1986 act preempts those portions of non-chartering states’ Unfair Trade Practices Acts contained in their insurance laws that relate to methods of competition and acts or practices that are unfair, if such methods, acts, or practices are not also deceptive. Nonetheless, state antitrust and state unfair practice laws which apply to commerce generally are applicable and are not preempted by the federal law.

(i) Any risk retention group must submit to an examination by the [commissioner] to determine its financial condition if the [commissioner] of the jurisdiction in which the group is chartered and licensed has not initiated an examination or does not initiate an examination within [60] days after a request by the [commissioner] of this state. Any such examination shall be coordinated to avoid unjustified repetition and conducted in an expeditious manner and in accordance with the National Association of Insurance Commissioner’s Examiner Handbook.

COMMENT: A provision regarding submission to examination by the nondomiciliary state was included in the Product Liability RRA of 1981. However, it was modified to eliminate the requirement that the commissioner had “reason to believe” the risk retention group was in a financially impaired condition. This deletion gives the commissioner greater latitude in requiring the group to submit to an examination.

(j) Every application form for insurance from a risk retention group and every policy (on its front and declaration page) issued by a risk
retention group shall contain in 10 point type the following notice:

**NOTICE**

This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your state. State insurance insolvency guaranty funds are not available for your risk retention group.

**COMMENT:** A provision regarding the notice to purchasers concerning the limitation of regulatory oversight of risk retention groups and the lack of insolvency guaranty fund protection was added by RRA 1986. The purpose is to allow the states to require minimal disclosure to consumers.

(k) The following acts by a risk retention group are hereby prohibited:

(1) the solicitation or sale of insurance by a risk retention group to any person who is not eligible for membership in such group; and

(2) the solicitation or sale of insurance by, or operation of, a risk retention group that is in hazardous financial condition or financially impaired.

**COMMENT:** The provision regarding the prohibition of solicitation or sale of insurance by the risk retention group to any person who is not eligible for membership or by a group that is in hazardous financial condition or financially impaired was included in RRA 1986 for the purpose of enhancing state regulatory authority. These provisions have not been included in state insurance codes due to the limitations on the coverages permissible offered under the Product Liability RRA 1981. This provision is not intended to limit those acts against which a commissioner can take action but rather to expand those acts by identifying acts that would not have been violations of the law prior to the passage of RRA 1986.

(l) No risk retention group shall be allowed to do business in this state if an insurance company is directly or indirectly a member or owner of such risk retention group, other than in the case of a risk retention group all of whose members are insurance companies.

**COMMENT:** The prohibition on ownership by an insurance company of a risk retention group was added by RRA 1986 for the purpose of limiting the involvement of fully regulated insurance companies in risk retention groups. The states should also amend the appropriate licensing law applying to authorized insurers to include a similar prohibition. The Congress believed that this was a method to avoid the possibility that fully regulated companies would choose the Risk Retention Act as a vehicle to avoid full regulation.

(m) The terms of any insurance policy issued by any risk retention group shall not provide, or be construed to provide, coverage prohibited generally by statute of this state or declared unlawful by the highest court of this state whose law applies to such policy.
COMMENT: The provision regarding prohibited coverages was added by RRA 1986 for the purpose of enabling a state to regulate the coverages that could be offered within its borders. The Congress believed that this was a matter of public policy to determined by each state.

(n) A risk retention group not chartered in this state and doing business in this state shall comply with a lawful order issued in a voluntary dissolution proceeding or in a delinquency proceeding commenced by a state [insurance commissioner] if there has been a finding of financial impairment after an examination under section 4(i) of this act.

(o) A risk retention group that violates any provision of this act will be subject to fines and penalties, including revocation of its right to do business in this state, applicable to licensed insurers generally.

(p) In addition to complying with the requirements of this section, any risk retention group operating in this state prior to enactment of this act shall, within [30] days after the effective date of this act, comply with the provisions of subsection (b).

COMMENT: A risk retention group which qualifies under the grandfather provision contained in section (2)(11)(iii)(B) from subsection above, so long as it only offers product liability or completed operations coverage.

Section 5. [Compulsory Associations.]

(a) No risk retention group shall be required or permitted to join or contribute financially to any insurance insolvency guaranty fund, or similar mechanism, in this state, nor shall any risk retention group, or its insureds or claimants against its insureds, receive any benefit from any such fund for claims arising under the insurance policies issued by such risk retention group.

(b) When a purchasing group obtains insurance covering its members' risks from an insurer not authorized in this state or a risk retention group, no such risks, wherever resident or located, shall be covered by any insurance guaranty fund or similar mechanism in this state.

(c) When a purchasing group obtains insurance covering its members' risks from an authorized insurer, only risks resident or located in this state shall be covered by the state guaranty fund subject to [insert appropriate reference to insurance code].

[(d) (Optional) Notwithstanding section [insert appropriate reference to Joint Underwriter Association provisions], the [commissioner] may require or exempt a risk retention group from participation in any mechanism established or authorized under the law of this state for the equitable apportionment among insurers of liability insurance losses and expenses incurred on policies written through such mechanism, and such risk retention groups shall submit sufficient information to the [commissioner] to enable the [commissioner] to apportion on a nondiscriminatory basis the risk retention group's proportionate share of such losses and expenses.]

COMMENT: Product Liability RRA section 3(a)(2) specifically exempts risk
retention groups from participation in the state guaranty fund. Section 3(a)(1)(c) of RRA 1986 permits a state to require that a risk retention group participate in JUA’s or similar mechanisms on a nondiscriminatory basis. In making such a determination, each state should take into account the different considerations which are applicable to JUA’s and to assignments under assigned risk plans, respectively, as well as to the impact on the financial condition of risk retention groups.

Section 6. [Countersignatures not Required.] A policy of insurance issued to a risk retention group or any member of that group shall not be required to be countersigned as otherwise provided in [insert appropriate reference to insurance law].

COMMENT: Product Liability RRA section 3(a)(3) preempts the states from requiring policies to be countersigned by resident agents or brokers. This section is optional depending on states’ existing countersignature laws.

Section 7. [Purchasing Groups - Exemption from Certain Laws.] A purchasing group and its insurer or insurers shall be subject to all applicable laws of this state, except that a purchasing group and its insurer or insurers shall be exempt, in regard to liability insurance for the purchasing group, from any law that would:

1. (1) prohibit the establishment of a purchasing group;
2. (2) make it unlawful for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its members, advantages based on their loss and expense experience not afforded to other persons with respect to rates, policy forms, coverages or other matters;
3. (3) prohibit a purchasing group or its members from purchasing insurance on a group basis described in paragraph (2) of this section;
4. (4) prohibit a purchasing group from obtaining insurance on a group basis because the group has not been in existence for a minimum period of time or because any member has not belonged to the group for a minimum period of time;
5. (5) require that a purchasing group must have a minimum number of members, common ownership or affiliation, or certain legal form;
6. (6) require that a certain percentage of a purchasing group must obtain insurance on a group basis;
7. (7) otherwise discriminate against a purchasing group or any of its members; or
8. (8) require that any insurance policy issued to a purchasing group or any of its members be countersigned by an insurance agent or broker residing in this state.

COMMENT: RRA 1986 establishes that the scope of the exemption from state law for risk retention groups is greater than that for purchasing groups. RRA 1986 in Section 3 states that a risk retention group is exempt from the laws of non-chartering states and then specifies those powers which are retained by those states. In regard to purchasing groups,
however, Section 4 of RRA 1986 specifically lists those laws from which a purchasing group is exempt and which are in the nature of prohibiting or otherwise discriminating against purchasing groups. Therefore, a state can apply all other provisions of its laws to purchasing groups and persons dealing with purchasing groups. As noted in regard to risk retention groups, if a purchasing group does not meet any of the criteria specified to define it as a purchasing group, it does not benefit from any federal preemption of state law and all state laws apply.

Section 8. [Notice and Registration Requirements of Purchasing Groups.]

(a) A purchasing group which intends to do business in this state shall, prior to doing business, furnish notice to the [commissioner] which shall:

(1) identify the state in which the group is domiciled;
(2) identify all other states in which the group intends to do business;
(3) specify the lines and classifications of liability insurance which the purchasing group intends to purchase;
(4) identify the insurance company or companies from which the group intends to purchase its insurance and the domicile of such company;
(5) specify the method by which, and the person or persons, if any, through whom insurance will be offered to its members whose risks are resident or located in this state;
(6) identify the principal place of business of the group; and
(7) provide such other information as may be required by the [commissioner] to verify that the purchasing group is qualified under section 2(10) of this act.

(b) A purchasing group shall, within [ten] days, notify the [commissioner] of any changes in any of the items set forth in subsection (a).

COMMENT: The notice provisions regarding purchasing groups are designed to require that purchasing groups provide adequate information to the commissioner so that an evaluation can be made as to whether a purchasing group is (a) bona fide and (b) is likely to operate in a manner and to purchase insurance coverage that is consistent with the laws of the state.

(c) The purchasing group shall register with and designate the [commissioner] (or other appropriate authority) as its agent solely for the purpose of receiving service of legal documents or process, for which a filing fee shall be determined by the [commissioner] except that such requirements shall not apply in the case of a purchasing group which only purchases insurance that was authorized under the federal Products Liability Risk Retention Act of 1981, and:

(1) which in any state of the United States
(i) was domiciled before April 1, 1986, and
(ii) is domiciled on and after October 27, 1986;
(2) which
   (i) before October 27, 1986 purchased insurance from an insurance
   carrier licensed in any state; and
   (ii) since October 27, 1986, purchased its insurance from an in-
   surance carrier licensed in any state, or
   (3) which was a purchasing group under the requirements of the
   (d) Each purchasing group that is required to give notice pursuant
   to subsection (a) shall also furnish such information as may be required
   by the [commissioner] to:
      (1) verify that the entity qualifies as a purchasing group;
      (2) determine where the purchasing group is located; and
      (3) determine appropriate tax treatment.
   (e) Any purchasing group which was doing business in this state prior
   to the enactment of this act shall, within [thirty] days after the effec-
   tive date of this act, furnish notice to the [commissioner] pursuant to
   the provisions of subsection (a) and furnish such information as may
   be required pursuant or subsections (b) and (c) of this section.

COMMENT: The provision regarding registering with and designating the
commissioner as legal agent is designed to allow the commissioner to
take prompt legal action against the purchasing group by facilitating
proper legal service process. The purchasing groups “grandfathered out”
of this registration requirement are only those that were prior to April
1986, and continue to be, domiciled in one of the United States, that pur-
chase insurance only from U.S. carriers, that qualified as a purchasing
group under the Product Liability Risk Retention Act of 1981, and that
do not currently purchase insurance other than that authorized under
the Product Liability RRA 1981.

Section 9. [Restrictions on Insurance Purchased by Purchasing
Groups.] (a) A purchasing group may not purchase insurance from a risk reten-
tion group that is not chartered in a state or from an insurer not ad-
mitted in the state in which the purchasing group is located, unless
the purchase is effected through a licensed agent or broker acting pur-
suant to the surplus lines laws and regulations of such state.

COMMENT: Although section 4(f) of RRA was one of the most signifi-
cant provisions dealing with regulation of insurance purchased by pur-
chasing groups, the term “located” was not defined in the federal act.

(b) A purchasing group which obtains liability insurance from an insur-
er not admitted in this state or a risk retention group shall inform
each of the members of such group which have a risk resident or located
in this state that such risk is not protected by an insurance insolu-
cency guaranty fund in this state, and that such risk retention group or
such insurer may not be subject to all insurance laws and regulations
of this state.
COMMENT: This provision, with respect to non-admitted insurers, applies only if a state requires this notice to policyholders in the state with respect to other insurers not covered by insurance insolvency guaranty funds.

(c) No purchasing group may purchase insurance providing for a deductible or self-insured retention applicable to the group as a whole; however, coverage may provide for a deductible or self-insured retention applicable to individual members.

(d) Purchases of insurance by purchasing groups are subject to the same standards regarding aggregate limits which are applicable to all purchases of group insurance.

COMMENT: A state may prescribe limitations with respect to aggregate limits to all purchases of group insurance, as long as such limitations are not applied in a manner which discriminates against purchasing groups.

Section 10. [Purchasing Group Taxation.] Premium taxes and taxes on premiums paid for coverage of risks resident or located in this state by a purchasing group or any members of the purchasing group shall be:

1. imposed at the same rate and subject to the same interest, fines and penalties as that applicable to premium taxes and taxes on premiums paid for similar coverage from a similar insurance source by other insureds; and

2. Paid first by such insurance source, and if not by such source by the agent or broker for the purchasing group, and if not by such agent or broker then by the purchasing group, and if not by such purchasing group then by each of its members.

COMMENT: The term “insurance source” refers to admitted, licensed and authorized carriers on the one hand and non-admitted, surplus line carriers on the other. The enacting states may wish to include applicable taxing provisions of its code.

Section 11. [Administrative and Procedural Authority Regarding Risk Retention Groups and Purchasing Groups.] The [commissioner] is authorized to make use of any of the powers established under the [insert reference to insurance law] of this state to enforce the laws of this state, not specifically preempted by the Risk Retention Act of 1986, including the [commissioner’s] administrative authority to investigate, issue subpoenas, conduct dispositions and hearings, issue orders, impose penalties and seek injunctive relief. With regard to any investigation, administrative proceedings, or litigation, the [commissioner] can rely on the procedural laws of this state. The injunctive authority of the [commissioner], in regard to risk retention groups, is restricted by the requirement that any injunction be issued by a court of competent jurisdiction.

COMMENT: This provision regarding the administrative and procedural
Risk Retention and Purchasing Groups Act

authority retained by the states under sections 3(f) and 4(g) of RRA 1986 is designed to permit the commissioner to investigate for potential hazardous financial condition or market conduct abuses and to take appropriate action where necessary. It clarifies that no federal preemption takes place regarding the procedural and administrative authority of the commissioner.

However, RRA 1986 requires that any injunction sought by the commissioner must be obtained from a court of competent jurisdiction (see RRA 1986 section 3(a)(7)(C), section 3(e), and section 3(f)). However, this restriction on the injunctive authority of the commissioner does not carry over to any action that the commissioner may take under its state administrative procedural law regarding purchasing groups. Section 4 of RRA 1986, which addresses the limited preemption from state law provided to purchasing groups, does not refer to any restriction of the commissioner’s injunctive authority. More specifically, the “savings clause” regarding state authority, RRA section 4(g), makes no mention of such requirement.

Section 12. [Duty of Agents or Brokers to Obtain License.]
(a) No person, firm, association or corporation shall act or aid in any manner in soliciting, negotiating or procuring liability insurance in this state from a risk retention group unless such person, firm, association or corporation is licensed as an insurance agent or broker in accordance with [insert appropriate reference to insurance law].
(b) No person, firm, association or corporation shall act or aid in any manner in soliciting, negotiating or procuring liability insurance in this state for a purchasing group from an authorized insurer or a risk retention group chartered in a state unless such person, firm, association or corporation is licensed as an insurance agent or broker in accordance with [insert appropriate reference to insurance law].
(c) No person, firm, association or corporation shall act or aid in any manner in soliciting, negotiating or procuring liability insurance coverage in this state for any member of a purchasing group under a purchasing group’s policy unless such person, firm, association or corporation is licensed as an insurance agent or broker in accordance with [insert appropriate reference to insurance law].
(d) No person, firm, association or corporation shall act or aid in any manner in soliciting, negotiating or procuring liability insurance from an insurer not authorized to do business in this state on behalf of a purchasing group located in this state unless such person, firm, association or corporation is licensed as a surplus lines agent or excess line broker in accordance with [insert appropriate reference to insurance law].

COMMENT: RRA 1986 does not preempt state law with respect to licensing and regulation of agents and brokers, with the exception of the elimination of the residence requirement and of countersignature laws, as provided in subsection (e) of this section, and sections 6 and 7(b) of this act.

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(e) For purposes of acting as an agent or broker for a risk retention group or purchasing group pursuant to subsections (a) through (d), the requirement of residence in this state shall not apply.

(f) Every person, firm, association, or corporation licensed pursuant to the provisions of [insert appropriate references to insurance law], on business placed with risk retention groups or written through a purchasing group, shall inform each prospective insured of the provisions of the notice required by section 4(j) in the case of a risk retention group and section 9(b) of this act in the case of a purchasing group.

Section 13. [Binding Effect of Orders Issued in U.S. District Court.] An order issued by any district court of the United States enjoining a risk retention group from soliciting or selling insurance, or operating in any state (or in all states or in any territory or possession of the United States) upon a finding that such a group is in hazardous financial or financially impaired condition shall be enforceable in the courts of the state.

Section 14. [Rules and Regulations.] The [commissioner] may establish and from time to time amend such rules relating to risk retention groups as may be necessary or desirable to carry out the provisions of the act.

Section 15. [Severability.] [Insert severability clause.]

Section 16. [Repealer.] [Insert repealer clause.]

Section 17. [Effective Date.] [Insert effective date.]
Fair Rates for Credit Insurance Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

The Federal Truth in Lending Act has addressed a number of abuses by creditors intended to discourage claims and thereby increase their profits, such as false representation that insurance is required as a condition of a loan and failure to disclose that the creditor has purchased credit insurance coverage.

Rates charged for group credit insurance are not subject to federal jurisdiction. Because group policies are generally experience rated, higher rates produce greater dividends for the creditor, who is also the policyholder and who does not pass any of the windfall to the borrower. In the absence of rate limitations, creditors will thus look to the insurer with the highest rates ("reverse competition") and then pass along these rates (often with additional loadings) to the borrowers.

The act establishes rates intended to achieve minimum loss ratios, which would ensure reasonable rates for credit coverages, and empowers the commissioner to revise those rates by regulation when appropriate.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Fair Rates for Credit Insurance Act.

Section 2. [Premiums.]

(a) No insurer shall issue any credit life insurance policy for which the premium rate exceeds the Prima Facie rates prescribed in subsection (b) or those contained in the schedules of such insurer as are then on file with the (commissioner). Schedules of premium rates may be revised from time to time. An insurer shall file such revised schedules with the (commissioner) at least [thirty] days prior to their use and if such rates are in excess of the Prima Facie rates, such insurer shall also file a certification that such rates are actuarially justified.

(b) The following rates will be considered to be the Prima Facie rates:

(i) In the case of single premium business rates based on a monthly outstanding balance, a rate of [$.70 per $100] of insured indebtedness and calculated by the formula:

\[
SP = \frac{(n+1)}{2} \cdot \frac{\left(1 + .03 \cdot n\right)}{(24)}
\]
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<th>Term In Months</th>
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(ii) For coverage remaining level for “n” months:

\[ SP = \frac{r \times n}{1 + .04 \times n} \]

where: \( n = \text{Term of Loan in months}; \)

\( r = \text{Monthly Outstanding Balance Rate Per $100}; \)

\( SP = \text{Single Premium Rate Per $100 Of Insured Indebtedness}; \)

\( * = \text{means multiplication} \)

Rates in excess of these may be used if it is demonstrated by the insurer to the satisfaction of the [commissioner] that they can be expected
to produce at least a [65] percent loss ratio. The loss ratio shall be the
expected claims divided by the expected earned premiums where the
earned premiums are calculated as the sum of the net written
premiums (written premiums less refunds) and the change in the
unearned premium reserve.
(2) In the case of monthly outstanding balance premiums, a rate
of [80.075 per $100] of insured indebtedness. A rate in excess of this
may be used if it is demonstrated to the satisfaction of the [commissioner] that such rate can be expected to produce at least a [60] per-
cent loss ratio.
(c) Notwithstanding anything to the contrary, in order to achieve the
expected loss ratio, the [commissioner] may mandate lower Prima Facie
rates for new insured indebtedness, may grant upward rate deviations
and mandate a reduction of premiums for new insured indebtedness
for different creditors covered by a given insurer, based on actual credi-
table experience.

Section 3. [Refunds.]
(a) Each individual policy, or group certificate shall provide that in
the event of termination of the insurance prior to the scheduled matur-
ity date of the indebtedness, any refund of an amount paid by the de-

tor for insurance shall be paid or credited promptly to the person en-
titled thereto; provided, however, that the [commissioner] shall
prescribe a minimum refund, and no refund which would be less than
such minimum need be made. The formula to be used in computing
such refund shall be filed with and approved by the [commissioner].
(b) Approvable methods of computing refunds shall include:
(1) applying the ratio of the sum of the scheduled remaining
outstanding balances and the sum of original scheduled balances to
the single premium charge. For coverage decreasing in equal monthly
amount this will produce the method commonly referred to as the “Rule
of ’8.’” For level coverage this produces the pro rata method; or
(2) calculating the refund as the single premium charge for the
scheduled outstanding balance and the scheduled remaining term.

Section 4. [Required Policy Provisions.] A policy shall provide that:
(1) If a creditor requires a debtor to make any payment for credit
life insurance and an individual policy or group certificate of insurance
is not issued, the creditor shall immediately give written notice to such
decltor and shall promptly make an appropriate credit to the account;
and
(2) The amount charged to a debtor for any credit life insurance shall
not exceed the premiums charged by the insurer, as computed at the
time the charge to the debtor is determined.

COMMENT: Optional Provision: Where a state prohibits payments for
insurance by the debtor in connection with credit transactions, the follow-
ing may be included:
Nothing in this Act shall be construed to authorize any payments for

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insurance now prohibited under any statute, or rule thereunder, governing credit transactions.

1 Section 5. [Severability.] [Insert severability clause.]

1 Section 6. [Repealer.] [Insert repealer clause.]

1 Section 7. [Effective Date.] [Insert effective date.]
Collision Damage Waiver
Insurance Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

Persons renting or leasing cars are often faced with the difficult choice of deciding whether to assume the risk of a substantial deductible (which recently has been as high as the full value of the car), in which case they may incur substantial personal costs should the rental vehicle be damaged. Their alternative is to purchase a collision damage waiver which frees them from this potential responsibility but at a daily additional cost which has been continually escalating. There are now instances where the waiver exceeds the cost of the rental itself. It has become clear from attempts by the various states to negotiate with the car rental companies that the rates charged for collision damage waivers bear little relation to the losses incurred. Generally, the charge for the least expensive and the most expensive car are the same.

This act declares that collision waivers are a form of insurance the charges for which should be governed by the same standards as other insurance rates, namely that they shall not be excessive, inadequate or unfairly discriminatory or otherwise unreasonable. Car rental companies selling collision damage waivers would be licensed by their state insurance departments and required to file collision damage waiver agreements and the rates applicable to such agreements with the commissioner, who could disapprove them during the 30 days prior to their effective dates. Car rental companies would be required to provide notification to their customers of the cost of the collision damage waiver and that its purchase is optional.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Collision Damage Waiver Insurance Act.

1 Section 2. [Definitions.] As used in this act:
2 (1) “Collision Damage Waiver” means any contract or contractual provision, whether separate from or a part of a motor vehicle rental agreement, whereby the lessor agrees, for a charge, to waive any and all claims against the lessee for any damages to the rental motor vehicle during the term of the rental agreement.
3 (2) “Lessor” means any person or organization in the business of providing rental motor vehicles to the public.
Suggested State Legislation

(3) "Lessee" means any person or organization obtaining the use of a rental motor vehicle from a lessor under the terms of a rental agreement.

(4) "Rental Agreement" means any written agreement setting forth the terms and conditions governing the use of the rental motor vehicle by the lessee.

(5) "Rental Motor Vehicle" means a private passenger type vehicle or commercial type vehicle which, upon execution of a rental agreement, is made available to a lessee for its use.

Section 3. [Scope.] This act shall apply to all persons in the business of leasing rental motor vehicles from locations in this state under any agreement which impose upon the lessee an obligation to pay for any damages caused to the leased vehicle. The provisions of this act shall not apply where the lessor does not differentiate in its charges based upon the obligation of the lessee or absence thereof to pay for any damages caused to the leased vehicle. The provisions of this act apply solely to the collision damage waiver portion of the rental agreement, the sale of which for the purposes of this act shall constitute doing an insurance business.

Section 4. [License Required; Application; Fee.] (a) No lessor shall issue or offer to issue a collision damage waiver in this state until a license has been granted by the [commissioner] as provided in this act. Application for a license shall be made in writing, in a form prescribed by the [commissioner], and shall be accompanied by an application fee of [one hundred] dollars.

(b) A lessor of rental motor vehicles with one or more locations within the state shall not be required to obtain more than one license.

Section 5. [Expiration and Renewal of License.] Each license issued in accordance with this act shall be renewable [annually] on the [license anniversary date]. No such renewal license shall be issued unless and until the lessor has paid the renewal fee of [one hundred] dollars.

Section 6. [Collision Damage Waiver; Form Filing Requirements.] (a) No lessor shall deliver or issue for delivery in this state a rental motor vehicle agreement containing a collision damage waiver unless such agreement is filed with the [commissioner] at least [thirty] days prior to its effective date and the [commissioner] has not disapproved the collision damage waiver portion of such agreement within such thirty days.

(b) No collision damage waiver shall be approved unless:
(1) It is written in simple and readable English, uses words with common meanings and is understandable;
(2) The terms of the collision damage waiver are prominently displayed including, but not limited to, any conditions and/or exclusions applicable to the collision damage waiver. The collision damage waiver may exclude the following:
(i) damages caused intentionally by the lessee or as a result of the lessee's willful or wanton misconduct;
(ii) driving while intoxicated or under the influence of any drug, or the combined influence of alcohol and any drug; and
(iii) damages caused while engaging in any race or speed contest;
(3) All restrictions, conditions or provisions in or endorsed on a collision damage waiver shall be printed in type no smaller than [ten] point type, or be legibly written in pen and ink or typewritten in or on such agreement; but nothing contained in this section shall relate or apply to photographic copies of applications or parts thereof, attached to or made part of such agreement;
(4) The collision damage waiver includes a statement of the total charge for the period in question; and
(5) The agreement containing the collision damage waiver displays the following notice on the face of the agreement, set apart and in boldface type no smaller than [ten] point type:

NOTICE: This contract offers, for an additional charge, a collision damage waiver to cover your responsibility for damage to the vehicle. Without the collision damage waiver, you may be responsible to pay the first $[ ] of any loss to vehicle. Before deciding whether to purchase the collision damage waiver, you may wish to determine whether your own automobile insurance affords you coverage for damage to the rental vehicle and the amount of the deductible under your own insurance coverage. The purchase of this collision damage waiver is not mandatory and may be declined.

Section 7. (Collision Damage Waiver: Rate Filing Requirements.)
(a) Every lessor licensed pursuant to this act shall file with the [commissioner] all rates and supplementary rate information and all charges and amendments thereof made by it for use in this state [thirty] days prior to their effective date. Each such filing shall be accompanied by the information upon which the lessor supports the filing.
(b) The rates filed pursuant to this Section shall not be excessive, inadequate or unfairly discriminatory or otherwise unreasonable, and shall be in compliance with the standards set forth in [insert reference to applicable rating provisions of insurance law], to the extent that such standards are not inconsistent with this act. All rates shall be made in accordance with the following provisions:
(1) Due consideration shall be given to past and prospective collision loss experience within and outside the particular locale;
(2) Consideration may be given to past and prospective collision loss experience of the private insurance industry for the locale;
(3) Expenses may include marginal expenses of the lessor attributable to the sale and direct administration of the collision damage waiver component, as well as reasonable overhead expenses;
(4) Reasonable overhead expenses shall be the total overhead for
the covered location multiplied by the ratio of collision damage waiver 
revenues to the total revenue for the location. The cost of the vehicles 
to be rented shall not be considered an overhead expense.
(c) No lessor shall make or issue a collision damage waiver except 
in accordance with the filings which are in effect for such lessor. No 
lessor or any officer, employee, or other representative thereof shall 
charge or receive any fee, compensation or consideration for the colli-
sion damage waiver which is not included in the rate in effect for such 
lessor.

Section 8. [Unfair Trade Practices.] The [commissioner] may order 
any lessor licensed pursuant to this act, or its officials and representa-
tives, to cease and desist from engaging in the following unfair trade 
practices:
(1) The making of any false or misleading statement, either orally 
or in writing, in connection with the sale, offer to sell, or advertise-
ment of a collision damage waiver;
(2) The omission of any material statement in connection with the 
sale, offer to sell, or advertisement of a collision damage waiver, which 
under the circumstances should have been made in order to make the 
statements that were made not misleading;
(3) The making of any statement that the purchase of a collision 
damage waiver is mandatory;
(4) The failure to provide proper disclosure that the purchase of a 
collision damage waiver may be duplicative of the lessee's automobile 
insurance contract.

Section 9. [Application of Insurance Laws.] Except as otherwise 
specifically provided in this act, none of the other provisions of the [Ins-
surance law] shall apply to collision damage waivers. None of the pro-
visions of this act shall apply to the issuance of collision insurance 
underwritten by an insurer authorized to transact property and casual-
ty business in this state. No lessor to whom this act applies shall be 
compelled to join or contribute financially to nor have access to any 
plan, pool, association or guaranty or insolvency fund in this state.

Section 10. [Injunctions.] The [commissioner] shall have the jurisdic-
tion and powers of a court of equity to issue temporary and perma-
nent injunctions restraining violations or attempted violations of this 
act.

Section 11. [Penalties.] Any lessor found by the [commissioner], after 
notice and hearing, to have violated or attempted to violate any provi-
sion of this act, may be ordered to pay a penalty. The issuance, proc-
curement or negotiation of a single collision damage waiver shall be 
deemed a separate violation. A penalty not to exceed [five hundred] 
dollars may be imposed for each violation of this act, provided that 
the penalty imposed for a series of violations shall be no less than [five 
hundred] dollars and no more than [ten thousand] dollars. An addi-
tional penalty, not to exceed [two thousand five hundred] dollars, may
be imposed for each violation in which the [commissioner] finds that
there was a knowing violation of this act. The [commissioner] shall
have the right to suspend or revoke or refuse to renew the license of
any lessor for violation of any of the provisions of this act.

Section 12. [Severability.] [Insert severability clause.]
Section 13. [Repealer.] [Insert repealer clause.]
Section 14. [Effective Date.] [Insert effective date.]
Prohibition of Anti-Competitive Behavior Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

Under the provisions of the federal McCarran-Ferguson Act (Public Law 15), insurers are largely exempted from the provisions of the various anti-trust statutes (Sherman Act, Clayton Act, Federal Trade Commission Act), to the extent that insurers' activities are regulated by the several states. Over the years, many states have been increasingly relying upon competition (or competitive rating) as the most effective force to maintain rates at reasonable levels. In view of the recent attempts to repeal McCarran-Ferguson, states may want to strengthen their regulatory powers over anti-competitive or monopolistic behavior.

This act would proscribe various forms of behavior by insurers and rate advisory organizations (or bureaus), the effect of which would be to lessen or weaken competition and thus have a detrimental effect on insurance rates. It would, however, permit insurers and their rate advisory organizations to exchange statistical information, so long as no insurer was bound to use such information in determining its own appropriate rates.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Prohibition of Anti-Competitive Behavior Act.

Section 2. [Definition.] "Rate Service Organization" means a person or any other entity which makes or files rates as permitted by [insert reference to appropriate rating provisions of the insurance law], or which assists insurers in rate making or filing by collecting, compiling and furnishing loss or expense statistics, or by recommending rates or rate information, or which inspects risks, tests appliances, formulates rules or establishes standards, as such activities relate to rate making or to administration of rates. It shall include a person or entity which prepares and files policy forms and endorsements on behalf of insurers. It shall not include a joint underwriting association under [insert appropriate reference] or any employee of an insurer, or in the case of insurers under common control or management an employee of any such insurer or their manager, nor shall it include actuaries, certified public accountants, attorneys or other professionals who in their respective vocations may advise insurers on rate questions.
Section 3. [Prohibitions.]
(a) No insurer or rate service organization shall monopolize or attempt to monopolize, in any territory, the business of insurance or any kind, subdivision or class thereof.
(b) No insurer or rate service organization shall agree with any other insurer or rate service organization to charge or adhere to any rate, although insurers and rate service organizations may continue to exchange statistical information.
(c) No insurer or rate service organization shall make any agreement with any other insurer, rate service organization or other person to restrain trade.
(d) No insurer or rate service organization shall make any agreement with any other insurer, rate service organization or other person the effect of which may be substantially to lessen competition in any territory or in any kind, subdivision or class of insurance.
(e) No insurer may acquire or retain any capital stock or assets of, or have any common management with, any other insurer or insurers, if the effect of such acquisition, retention or common management may be substantially to lessen competition in any territory or in any kind, subdivision or class of insurance.
(f) No insurer or rate service organization shall make any agreement with any other insurer or rate service organization to refuse to deal with any person in connection with the sale of insurance.
(g) No rate service organization or member or subscriber thereof shall interfere with the right of any insurer to make its rates independently of such rate service organization or to charge rates different from the rates made by such rate service organization.
(h) No member of or subscriber to a rate service organization shall refuse to do business with, or prohibit or prevent the payment of commissions to, any licensed agent or broker on the ground that such agent or broker does business with an insurer which makes its rates, or any portion thereof, independently of such rate service organization.
(i) Nothing contained in this article shall be construed as requiring any insurer to become a member of or a subscriber to any rate service organization, or as preventing any insurer, while a member of or subscriber to a rate service organization, from making its own rates for any kind, subdivision or class of insurance, for which it does not elect to authorize the rate service organization to act on its behalf.
(j) Any insurer which is a member of or subscriber to a rate service organization may make its own rates for any kind, subdivision or class of insurance. No rate service organization shall have authority to act on behalf of any insurer which is a member of or subscriber to such rate service organization except as authorized in writing by such member or subscriber, which authority may be supplemented, modified or revoked, in whole or in part, at any time by such member or subscriber at its option.
(k) No rate service organization shall have or adopt any rule or exact any agreement, or formulate or engage in any program, the effect of which would be to require any member, subscriber or other insurer
to utilize some or all of its rating services, or to adhere to its rates, 

rating plans, rating systems, underwriting rules, or policy forms, or 

to prevent any insurer from acting independently.

Section 4. [*Penalties, Civil Action.*]

(a) Any rate made in violation of Section 3 hereof shall be disappro- 

ved by the [commissioner] pursuant to [insert reference to applicable 

rating provisions of the insurance law] and each violator shall be sub- 

ject to the penalties of [insert appropriate fining provisions of the in- 

surance law].

(b) The [commissioner], through the attorney general, and any per- 

son who suffers an injury to business or property by reason of anything 

forbidden in Section 3 hereof, may maintain an action to enjoin any 

violation of such section.

(c) Any person who suffers an injury to business or property by reason 

of anything forbidden in Section 3 hereof may maintain an action and 

shall recover [threelfold] the damages sustained by such person.

[(d) Optional: Nothing in this act shall be construed as applying to 

or prohibiting cooperative action authorized and regulated under [in- 

sert appropriate reference to rating provisions of the insurance law].

Nor shall this act apply to kinds of insurance or insurance activities 

the rates for which are subject to prior approval pursuant to [insert 

reference to prior approval provisions of the insurance law].]

Section 5. [*Severability.*] [Insert severability clause.]

Section 6. [*Repealer.*] [Insert repealer clause.]

Section 7. [*Effective Date.*] [Insert effective date.]
Duties of Excess Lines Brokers Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

Excess lines brokers, for coverage which cannot be secured from authorized (licensed) insurance companies, place insurance risks with unauthorized insurers. These unauthorized insurers are unregulated by the state in which the risks are located. Thus, the state cannot intervene or assist in a dispute with an unauthorized insurer on behalf of a policyholder or any claimant under the insurer's policy. In many instances, the policyholder's interest is limited to securing an insurance certificate needed to remain in business. Insurance regulators, on the other hand, have an obligation to protect the interests of the public. Today, regulators' only control over the insuring of excess lines business is through the excess lines broker's license.

This act puts responsibility on the excess lines broker to place insurance that cannot be placed with authorized insurers with responsible and financially solid unauthorized companies. Such a broker must exercise due diligence by first making valid attempts to place the coverage in the authorized market and, failing that, by placing it with an unauthorized carrier that has been determined by the broker to meet financial and managerial requirements as set forth in the act.

Some state insurance departments have the authority to impose some or all of these requirements by promulgating regulations under their existing statutes.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Duties of Excess Lines Brokers Act.

1 Section 2. [Definitions.] As used in this act:
2 (1) "Unauthorized Insurer" means an alien insurer, as defined in [insert appropriate reference to insurance law], not licensed in this state;
3 a foreign insurer, as defined in [insert appropriate reference to insurance law] not licensed in this state; underwriters at Lloyd's; or any other entity doing an insurance business in this state without a license.
4 (2) "Excess Lines Broker" [or "Surplus Lines Agent" or "Surplus Lines Broker," depending upon state law] means a person licensed pursuant to [insert appropriate reference to insurance law].
5 (3) "Commissioner" means the [insurance commissioner] of this state or the [commissioner of insurance] in any other state or foreign country;

1 Section 3. [Requirements for Unauthorized Insurers Doing Business in this State.]
2 (a) An excess lines broker may not place insurance on a risk located in this state with an unauthorized insurer unless such insurer:
3 (1) Complies in substance with the standards for determining
Suggested State Legislation

6 solvency for an authorized insurer of like character;
7 (2) Has surplus to policyholders adequate to support its writings,
8 that is reasonable in relation to its outstanding liabilities, and in no
9 event is less than:
10 (i) in the case of an insurance exchange created by the laws of
11 any state, for each individual syndicate not less than [$3,000,000,] and
12 in the aggregate, for all syndicates, not less than [$50,000,000];
13 (ii) in the case of an alien insurer, [insert appropriate amount]; or
14 (iii) in the case of entities other than those subject to sub-
15 paragraph (i) and (ii), the greater of [insert appropriate dollar amount]
16 or the minimum amount required of an insurer licensed to transact
17 such business at such insurer’s domicile in the United States;

COMMENT: Most state insurance departments have minimum capital re-
quirements for licensing new companies in excess of the statutory
minimum since statutes quickly become outdated. For example, New York
currently requires at least $10,000,000 for multiline insurers. The amount
inserted above should be that which a state believes would be prudent
to require of unlicensed insurers doing surplus lines business in its state.

18 (3) Maintains a trust fund, located and maintained in one or more
19 banks, which are authorized to do business in this state or which are
20 members of the Federal Reserve System, pursuant to a trust agree-
21 ment acceptable to the [commissioner], for the exclusive protection of
22 all policyholders, and beneficiaries of policies and the public covering
23 risks located in this state or any other state in which such insurer does
24 business on an unauthorized basis. The fund shall be in the form of
cash, investment grade securities, or letters of credit acceptable to the
26 [commissioner], in the following amounts:
27 (i) in the case of a foreign insurer, not less than [$750,000];
28 (ii) in the case of an insurance exchange, not less than
29 [$10,000,000];
30 (iii) in the case of underwriters at Lloyd’s, an aggregate sum of
31 not less than [$50,000,000] for the payment of the obligations of each
32 member; or
33 (iv) in the case of an alien insurer, not less than [$1,500,000];
34 (4) In the case of an alien insurer, appears on the list of alien in-
35 surers maintained by the National Association of Insurance Commiss-
36 ioners’ Non-Admitted Insurers Information Office, which requirement
37 the [commissioner] may waive this requirement upon a determination
38 that it is not necessary to safeguard the interests of the policyholders,
39 beneficiaries of policies or the public;
40 (5) Demonstrates to the satisfaction of the excess lines broker that
41 its claims practices are satisfactory and that such insurer is trust-
42 worthy and competently managed;
43 (6) Is not owned or financially controlled by a foreign government,
44 or by a political subdivision thereof, or by any agency of any such
45 government or subdivision;
46 (7) Files a report annually, for the preceding calendar year, on or
before [March 15th] on a form prescribed by the [commissioner], pro-
viding for each policy issued on a risk located in this state, at least
the following information:
(i) the policy number;
(ii) the gross original premium charged;
(iii) the effective date of coverage and policy term;
(iv) the kinds of insurance provided and, for each kind, the amount
of insurance provided;
(v) the name and address of the insured; and
(vi) the name and address of the excess lines broker; and
(8) Authorizes the excess lines broker that delivers its policy to a
risk located in this state to receive on its behalf any premium due on
such policy.
(b) An insurer that meets all other requirements of this act and was
writing business in this state prior to the effective date of this act shall,
no later than [insert date], comply with subsection (a) (3).

Section 4. [Duties of Excess Lines Broker.]
(a) Every excess lines broker:
(1) Shall use due care in selecting the unauthorized insurer from
whom policies are procured;
(2) Shall not place coverage with an unauthorized insurer that is
not authorized by its domiciliary jurisdiction to write the kind of in-
surance sought to be placed; and
(3) Shall in no event place business with an unauthorized insurer
that does not qualify under Section 3.
(b) Prior to placing business with an unauthorized insurer, an ex-
cess lines broker shall obtain the following documents from such
insurer:
(1) A copy of its most recent financial statement submitted to the
state or foreign country in which the unauthorized insurer is dom-
ciled, which shall be certified by an independent public accountant and
contain a statement of opinion on loss and loss adjustment expense
reserves made by a member of the American Academy of Actuaries
or a qualified loss reserve specialist (under criteria established by the
National Association of Insurance Commissioners);
(2) A copy of the latest report on examination certified by the [com-
missioner] or public official conducting the examination;
(3) A certification from such insurer's domiciliary commissioner
stating the length of time that the insurer has been licensed in that
jurisdiction to write the kind of insurance sought to be placed; and
(4) An executed copy of the trust agreement required by section
3(a)(3) indicating the amount and the nature of the funds maintained.
(c) In the case of an unauthorized alien insurer, an excess lines broker
may, in lieu of the financial statement or report on examination re-
quired pursuant to subsection (b)(1) and (b)(2) accept alternative reliable
equivalent financial and other information, provided, however, that
the prospective insured is so notified.
(d) When any insurance policy is procured from an unauthorized in-

surer, the excess lines broker and the insured shall subscribe and af-
firm as true under the penalties of perjury, affidavits, on a form ac-
ceptable to the [commissioner], setting forth facts showing that:

(1) Such insured and such broker were unable after diligent efforts

to procure, from [three] authorized insurers, not affiliated with each
other or members of the same holding company system, [insert ap-
propriate reference to insurance law], each authorized to write and
writing coverages of the kind requested;

(2) The full amount of insurance requested by the insured; and

(3) The amount of insurance procured from such unauthorized in-
surer is only the excess over the amount procurable from authorized
insurers.

(e) The excess lines broker shall be excused from affirming that a
diligent effort was made to procure the coverage from such authorized
insurers if such broker's affidavit is accompanied by the affidavit of
another broker involved in the placement, affirming as true under the
penalties of perjury that, after diligent effort by the affirming broker,
the required insurance could not be procured from such authorized
insurers.

(f) The [commissioner], after a hearing, may determine that another
number of such declinations required by subsection (d)(1) is appropriate
in regard to particular coverages.

(g) All affidavits required by subsections (d), (e), and (f) shall be filed
with the [commissioner] no later than [thirty] days after placement of
coverage.

(h) Prior to placement of coverage the insured shall be advised in
writing that:

(1) The unauthorized insurer is not licensed in this state and is not
subject to its supervision; and

(2) In the event of the insolvency of the unauthorized insurer, its
liabilities will not be covered by [insert appropriate reference to the
state guaranty fund].

(i) An excess lines broker may not place business with an unau-
thorized insurer, unless the policy issued by such insurer contains on its
front and declaration pages, in (10 point) type, the following notice:

THIS POLICY IS ISSUED BY AN INSURER THAT IS NOT
LICENSED IN THIS STATE, IS NOT SUBJECT TO ITS SUPERVI-
SION AND, IS NOT PROTECTED BY ANY STATE GUARANTY
FUND IN THE EVENT OF THE INSURER'S INSOLVENCY OF THE
INSURER.

(j) If the unauthorized insurer may only write a kind of insurance
in jurisdictions other than its domiciliary jurisdiction, all policies pro-
viding such kind of insurance on a risk located in this state shall con-
tain the following additional sentence in the notice required by subsec-
tion (i) of this section:

THE INSURER IS NOT AUTHORIZED TO WRITE THE
COVERAGE PROVIDED BY THIS POLICY ON RISKS LOCATED
IN ITS DOMICILIARY JURISDICTION.

(k) If a policy placed with an unauthorized insurer contains assess-
ment provisions, the broker shall notify the insured to this effect. Each
policy so issued and delivered by the excess lines broker shall contain
a clear statement describing the liability of the policyholder for the
payment of the policyholder's proportionate share of any deficiency or
impairment as provided by law within the limit provided by the policy,
and shall bear across its front a statement clearly showing that the
policy is an assessment policy and that the policyholder may be sub-
ject to an assessment as set forth in the body of the policy.
(1) An excess lines broker shall keep a complete and separate record
of all policies procured from each unauthorized insurer, for a period
of no less than [five] years after policy expiration, which record shall
be open to examination by the [commissioner], as provided in [insert
appropriate reference to insurance law]. These records shall, for each
policy and each kind of insurance provided thereunder, include the
following:
(1) the amount of insurance provided;
(2) the time period covered;
(3) the effective date;
(4) the name and address of the insurer(s) which issued the policy;
(5) the name and address of the insured;
(6) a copy of the affidavit filed with the [commissioner];
(7) proof of declinations;
(8) the gross premium charged; and
(9) the amount of return premiums, if any.
(m) An excess lines broker, which receives actual or constructive
notice that an unauthorized insurer with whom the broker has placed
business may no longer qualify under Section 3 of this Act, shall cease
placing business with such insurer and shall promptly notify the [com-
missioner] and each insured, and advise each such insured whether,
in the excess lines broker's judgment, replacement of coverage is
warranted.

Section 5. [Taxation.]
(a) Each excess lines broker shall annually, on or before [March 15th]
execute and file in duplicate a premium tax statement, on a form
prescribed by the [commissioner], and pay to the [commissioner] a sum
equal to [insert premium tax rate] of the total gross premium charged
the insured, where the risk is located in whole or in part in this state,
less the amount of such premium returned to such insured and less
payments actually made by the excess lines broker or insured to other
jurisdictions in connection with any part of the risk located outside
this state.
(b) No excess lines broker shall file an affidavit or pay any premium
tax in connection with an insurance policy issued by an unauthorized
insurer as an accommodation for anyone not licensed as an excess lines
broker in this state unless such licensed broker has actually placed
the policy with such insurer in accordance with all applicable provi-
sions of this act.
Section 6. [Illegal Coverage.]
(a) If a risk, whether individual or group, is not eligible for placement with an authorized insurer, no excess lines broker shall place such risk with an unauthorized insurer.
(b) If the coverage requested is of a kind or in a form not permitted to be written by an authorized insurer, no excess lines broker shall place coverage of that kind or in such form with an unauthorized insurer.
(c) If an authorized insurer has cancelled or declined to renew insurance on a risk, an excess lines broker may place such risk with an unauthorized insurer that is affiliated with the authorized insurer or member of the same holding company system as defined by [insert appropriate reference to insurance law], only if the rates charged and the forms used by the unauthorized insurer conform to the requirements of the insurance law.

Section 7. [Service and Disbursement Charges.]
(a) An excess lines broker shall not receive or collect from an insured, in connection with placement of coverage with any unauthorized insurer, any sum in addition to the premiums fixed therefor by such insurer or insurers, unless, in accordance with [insert appropriate reference to insurance law], the excess lines broker obtains a written memorandum, signed by the insured, specifying the amount and purpose of such compensation.
(b) This section shall not affect the right of an excess lines broker to deduct, from the amount of any premium payable to an unauthorized insurer, reasonable commissions payable to the broker by such insurer.

Section 8. [Consent to Service of Process.] No excess lines broker shall place coverage with any unauthorized insurer, unless every such insurer stipulates in each insurance policy it issues that the [commissioner] may, on behalf of such insurer, accept lawful process in any action, suit or proceeding instituted in this state by or on behalf of an insured or beneficiary against such insurer arising out of such insurance policy.

Section 9. [Severability.] [Insert severability clause.]

Section 10. [Repealer.] [Insert repealer clause.]

Section 11. [Effective Date.] [Insert effective date.]
Prohibited Dread Disease Insurance Coverages Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

Insurance is the source of payment for most people’s health care. Good health care is encouraged by an insurance mechanism which helps consumers make informed choices as to the best coverage available to meet their needs and those of their families. The insurance industry should have incentives to provide new forms of coverage and new ways of reducing health care costs. However, such innovations should provide health care benefits of real economic value, and should not be mere merchandising devices. Health insurance policies marketed merely to produce superficial differences or to play upon people’s fears of particular diseases (e.g., cancer) do not meaningfully expand consumer choice, and will leave the policyholder unprotected against other serious illnesses that may arise. Such limited policies also serve to confuse and waste dollars which could otherwise be applied to more cost-effective coverages. “Dread disease” policies, because of their exclusions and narrow focus, tend to promote disputes concerning whether the symptoms being treated arose from the covered dread disease.

This act would prohibit the sale of dread disease insurance, unless there are also substantial underlying coverages which meet the state guidelines established by regulation — for meaningful hospital and medical policies.

The provisions of this act may be promulgated by regulation in those states with sufficiently broad legislative authority.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Prohibited Dread Disease Insurance Coverages Act.

2 Section 2. [Prohibition, Authority to Promulgate Regulations.] No health insurance policy issued in this state may provide benefits for specified diseases, or for procedures or treatments unique to specified diseases, unless the policy also provides insurance coverage which at least meets the definition of basic hospital insurance, basic medical insurance or disability income insurance, as promulgated in a regulation issued by the [commissioner of insurance].

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Suggested State Legislation

1 Section 3. [Severability.] [Insert severability clause.]
1 Section 4. [Repealer.] [Insert repealer clause.]
1 Section 5. [Effective Date.] [Insert effective date.]
Insurance Frauds Prevention Act

This draft legislation resulted from the efforts of a special SSL Task Force on Suggested State Insurance Legislation chaired by New York State Insurance Superintendent James P. Corcoran.

The commission of insurance fraud increases the cost of insurance, the cost of doing business, the cost of products purchased and sold and the cost of law enforcement.

This act is intended to deter the commission of insurance fraud and assist in its detection with respect to any claim under an insurance policy. These goals would be furthered by providing that claimants who make knowingly false or fraudulent insurance claims (and any persons who assist in the commission of these acts) would be guilty of a felony punishable by up to five years imprisonment and up to $5,000 in fines, or both, for each offense.

In order to encourage insurers and their investigative agents in pursuing activities which may be fraudulent, they are granted immunity from libel, slander and other tort liability for the furnishing, in good faith, of any information to law enforcement officials, insurance departments and the National Association of Insurance Commissioners. Insurance department employees are given a similar immunity to protect them from potential harassment.

All claims forms would contain a notice warning that the filing of fraudulent claims shall constitute a felony.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Insurance Frauds Prevention Act.

1 Section 2. [Definition.] As used in this act:

2 (1) “Fraudulent Insurance Act” means an act committed by any person who, knowingly and with intent to defraud, presents, causes to be presented, or prepares with knowledge or belief that it will be presented to or by an insurer, purported insurer, broker, or any agent thereof, any written statement as part of, or in support of, an application for the issuance of, or the rating of an insurance policy for commercial insurance, or a claim for payment or other benefit pursuant to an insurance policy for commercial or personal insurance which that person knows to contain materially false information concerning any fact material thereto, or conceals, for the purpose of misleading, information concerning any fact material thereto.

2 (2) “Statement” means, but is not limited to, any notice, statement, proof of loss, bill of lading, receipt for payment, invoice, account,
Section 3. [Scope.] Any person, with the intent to injure, defraud, or
deceive any insurance company, is guilty of a felony and shall be sub-
jected to a term of imprisonment not to exceed [five] years, or a fine
not to exceed [$5,000] or both, on each count, who:
(1) Presents or causes to be presented to any insurer, any written
or oral statement including computer-generated documents as part of,
or in support of, a claim for payment or other benefit pursuant to an
insurance policy, knowing that such statement contains any false, in-
complete, or misleading information concerning any fact or thing
material to such claim; or
(2) Assists, abets, solicits, or conspires with another to prepare or
make any written or oral statement that is intended to be presented
to any insurance company in connection with, or in support of, any
claim for payment or other benefit pursuant to an insurance policy,
knowing that such statement contains any false, incomplete, or
misleading information concerning any fact or thing material to such
claim.

Section 4. [Warning on Policy Label.] All claims forms shall contain
a statement that clearly states in substance the following: "Any per-
son who knowingly, and with intent to injure, defraud, or deceive any
insurance company, files a statement of claim containing any false,
incomplete, or misleading information is guilty of a felony." The lack
of such a statement shall not constitute a defense against prosecution
under this section.

Section 5. [Immunity from Liability.] (a) In the absence of fraud or bad faith, no person subject to the pro-
visions of the [insurance law], or the employees or agents of such per-
son, shall be subject to civil liability (for libel, slander or any other
relevant tort cause of action by virtue of filing reports, without malice,
or furnishing other information, without malice, required by this act
or required by the [commissioner of insurance] under the authority
granted in this act), and no civil cause of action of any nature shall
arise against such person for:
(1) any information relating to suspected fraudulent insurance acts
furnished to or received from law enforcement officials, their agents
and employees;
(2) any information relating to suspected fraudulent insurance acts
furnished to or received from other persons subject to the provisions
of the [insurance law]; or
(3) any such information furnished in reports to the [insurance
department] or for furnishing any of the foregoing information to the
National Association of Insurance Commissioners.
(b) Neither the [commissioner of insurance] or any employee of the
[insurance department], (acting without malice) in the absence of fraud
or bad faith, shall be subject to civil liability (for libel, slander or any
other relevant tort) and no civil cause of action of any nature shall
arise against such person by virtue of the publication of any report
or bulletin related to the official activities of the [insurance depart-
ment] performed pursuant to this act. Nothing herein is intended to
abrogate or modify in any way any common law or statutory privilege
or immunity heretofore enjoyed by any person.

Section 6. [Severability.] [Insert severability clause.]

Section 7. [Repealer.] [Insert repealer clause.]

Section 8. [Effective Date.] [Insert effective date.]
Agricultural Linked Deposit Act
(Statement)

This act, based on an Ohio law developed by the state treasurer, enables the state treasurer to fund an agricultural linked deposit program by using up to $100 million of the investment portfolio for purchases of below-market-rate certificates of deposit (CDs) from state financial institutions and separately negotiated, variable-rate debentures of the Federal Farm Credit Bank (FFCB). In both cases, all of the funds are specifically tied to below-market-rate farm loans. Eligible lenders (state banks and production credit associations) submit packaged farm loans ($100,000 maximum per farm), which are individually evaluated by the treasury staff on the basis of specific agricultural criteria. Once approved, the placement of CDs and FFCB debentures is matched with the approved loan packages. The present borrowing rate of each farm is reduced by up to four percentage points, and the interest rate on the CDs and FFCB debentures are reduced by the same amount. Eligible participants include agricultural businesses headquartered in the state with land or facilities for agricultural purposes maintained exclusively in the state, which are organized for profit.

Because of its length, the Agricultural Linked Deposit Act cannot be published in its entirety here. Interested readers should direct requests for copies to the state of Ohio, asking for Amended House Bill No. 344, from the 1985 session.
Finanically Distressed Municipality Act (Statement)

This act addresses municipal financial distress. The state department of community affairs is given primary responsibility for identifying and assisting municipalities deemed to be distressed. To do so, municipalities are required to file an annual “Survey of the Financial Condition.” Ten criteria, of which only one indicator is needed for the department to begin a review, are then applied to determine whether a municipality is in a state of distress. A review by the department determines the level of distress of a particular municipality.

Those municipalities deemed to be in distress are assigned a distressed municipality coordinator who is ultimately responsible for preparation of a fiscal plan to address the municipality’s financial problems. The plan must be published within 90 days of the coordinator’s appointment for review by the municipality, creditors, and the public. The governing body may adopt the plan, ask for a revision of the plan, or adopt an optional plan. Penalties are set forth for failing to file the “Survey” or for failing to adopt a plan.

The legislation also grants distressed municipalities the power to petition the court of common pleas to exceed their tax limits on both the real estate and earned income taxes if they have adopted a financial plan. Any increase in earned income tax is not subject to sharing with the coterminous school district. The court of common pleas of each county is given power to hear the above request of a distressed municipality. Any granted increased taxing powers of the municipality are terminated when the fiscal plan ceases.

If a municipality files for bankruptcy, a distressed municipality coordinator is automatically assigned to the municipality if none was previously assigned. Procedures are set forth concerning a fiscal plan for municipalities that have filed bankruptcy. The legislation also addresses the consolidation or merger of economically nonviable municipalities.

This act is based on legislation passed by the Pennsylvania General Assembly on July 2, 1987 and signed into law on July 10, 1987 by the governor as Act 47 of 1987. This proposal is not the final version which became Act 47. Subsequent to introduction, the Financially Distressed Municipality Act was amended several times, with the most substantive amendment being the inclusion of a grant and no-interest loan program for municipalities which are declared distressed. Because of its length, the act cannot be published in its entirety here. More detailed information on Act 47 may be obtained by contacting: Pennsylvania Local Government Commission, Room 633, Main Capitol Bldg., Senate Post Office, Harrisburg, PA 17120-0030 (tel. 717-787-7680).
State Aviation Development Act
(Statement)

This act, based on Pennsylvania legislation, creates the aviation code and defines several pertinent aviation terms. The aviation restricted account is created to be controlled by the state treasury. Funds held in the account will come from excise taxes on the use of fuel in aircraft engines, fees for the use of state planes by various agencies, funds collected as fines, fees and forfeitures relating to aviation, proceeds from the sale of state-owned airports or property thereon, and any other related source. The funds in the account are to be used according to their source and dispensed for specific uses, such as local real estate tax reimbursements, aviation program funding, and for the purchase, construction, reconstruction, operation and maintenance of state-owned airports. All rules and regulations shall conform with federal law. Powers are limited.

Ownership of airspace is established and penalties are set for violations, as well as any damage that results from the operation of aircraft in the state; restrictions to the obstruction of aircraft are regulated. Airport zoning is regulated by establishing the power to regulate such zoning, the relationship to other zoning, the procedures for adoption of such zoning, a system for permits and variances, a provision for administrative appeals, and judicial review.

An aviation development loan program is established with procedures for application, denial of application, terms for loans, and enforcement of the loan agreement. Authority to issue bonds for aviation is provided and the legislation covers sale of bonds, refunding bonds, disposition and use of proceeds, registration of bonds, redemption of bonds, and the expenses of preparation, issue and sale of bonds.

Because of its length, the State Aviation Development Act cannot be published in its entirety here. Interested readers should direct requests for copies to the commonwealth of Pennsylvania, asking for PL. 837, No. 164.
Intercity High Speed Passenger Rail Service Act (Statement)

This act, based on an Ohio law, creates a state high speed rail authority and requires it to prepare a plan for the construction and operation of an intercity high speed rail system in the state; removes the authority of the division of rail transportation development in the department of transportation to regulate intercity passenger rail service, transferring that authority to this new agency; authorizes this agency to appropriate real property to implement intercity passenger rail service; authorizes the making of loans and issuance of revenue bonds to effect such implementation; authorizes any township, county, or municipal corporation to levy a voted property tax for the purpose of acquiring, rehabilitating, or developing intercity passenger rail service or property used for such rail service; and permits the agency to give priority in the development of rail service to projects located within the boundaries of local governments that have approved such a tax.

Because of its length, the Intercity High Speed Passenger Rail Service Act cannot be published in its entirety here. Interested readers should direct requests for copies to the state of Ohio, asking for Amended Substitute Senate Bill No. 289, from 1986.
Motorcycle Rider Education Act

This model act developed by the Motorcycle Industries Council, Inc., establishes standards for and administration of the motorcycle rider education program which includes rider training courses and instructor training. The program may be expanded to include public awareness, alcohol and drug effects, driver improvement for motorcyclists, licensing improvement, program promotion or other motorcycle safety programs. Motorcycle operator's license applicants may be exempted from the licensing skills test if they present proof of successful completion of a rider training course. The bill also provides for the possibility of a reduction in insurance premiums for qualified licensed motorcycle operators.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Motorcycle Rider Education Act.

Section 2. [Definitions.] As used in this act:

(1) "Chief Instructor" means a licensed motorcycle operator who meets the standards established by the [department] to qualify to train and oversee instructors for the motorcycle rider education program.

(2) "Director" means the [director of the department of public safety].

(3) "Department" means the [department of public safety].

(4) "Motorcycle Rider Safety Fund" means the restricted receipts account created in Section 5 to be applied toward the cost of administering the motorcycle rider education program.

(5) "Motorcycle Rider Education Program" means the motorcycle training and information disbursement plan created in Section 3.

(6) "Program Coordinator" means the person designated by the [director] to plan, organize, and administer the motorcycle rider education program as provided in section 3(b).

(7) "Rider Training Course" means a motorcycle rider education curriculum and delivery system approved by the [department] as meeting standards designed to develop and instill the knowledge, attitudes, habits, and skills necessary for the safe operation of a motorcycle.

(8) "Training Specialist" means the person designated by the [director] to fulfill the obligations stated in section 3(c).

Section 3. [Motorcycle Rider Education Program.]

(a) The [department] shall establish standards for and shall administer the motorcycle rider education program. The program shall include, but is not limited to, rider training courses and instructor training. The [department] may expand the program to include public awareness, alcohol and drug effects, driver improvement for motor-
cyclists, licensing improvement, program promotion or other motorcycle safety programs.

(b) The [director] shall appoint a program coordinator who shall oversee and direct the program by setting program and funding guidelines, and conduct an annual evaluation.

(c) The [director] may also appoint one or more training specialists who shall assist in establishing rider training courses throughout the state, support and implement program and funding guidelines and supervise instructors and other personnel as necessary. The training specialist may be a trained chief instructor.

(d) Rider training courses shall be open to all residents of the state who either hold a current valid driver’s license for any classification or who are eligible for a motorcycle learner’s permit.

(e) An adequate number of rider training courses shall be provided to meet the reasonably anticipated needs of all persons in the state who are eligible and who desire to participate in the program. The [department] shall issue certificates of completion in the manner and form prescribed by the [director] to persons who satisfactorily complete the requirements of the course. Program delivery may be phased in over a reasonable period of time.

(f) The [department] may enter into contracts with either public or private institutions for technical assistance in conducting rider training courses, if the course is administered and taught by a trained motorcycle rider instructor as established in Section 4. If necessary, an organization conducting a rider training course may charge a reasonable tuition fee. The [department] shall determine the largest tuition fee a private organization may charge.

(g) The [department] shall adopt rules and regulations which are necessary to carry out the provisions of the motorcycle rider education program.

Section 4. [Instructor Requirements and Training.]

(a) The [department] shall establish standards for an approved motorcycle rider education instructor preparation course. Successful completion of the course shall require the participant to demonstrate knowledge of the course material, knowledge of safe motorcycle operating practices, and the necessary aptitude for instructing students.

(b) The [department] shall establish minimum requirements for the qualification of a rider education instructor. The minimum requirements shall include, but not be limited to, the following:

1. The instructor must have a high school diploma or its equivalent;
2. The instructor must be at least [18] years of age and must hold a valid motorcycle operator’s license or endorsement;
3. The instructor must have at least [two] years of recent motorcycle riding experience;
4. The instructor’s driver license must not have been suspended or revoked at any time during the preceding [two] years;
5. The instructor must not have any convictions for driving under the influence of alcohol or drugs during the preceding [five] years;
Suggested State Legislation

(6) Instructors who are licensed in other states must furnish cert-
tified copies of their driving records to the [division of motor vehicles].
An applicant shall not be eligible for instructor status until his driv-
ing record for the preceding [five] years is furnished; and.
(7) The instructor must have an approved instructor certificate
which may be a state or [Motorcycle Safety Foundation certificate], and
the instructor must be registered as a currently active instructor.

Section 5. [Motorcycle Rider Safety Fund.]
(a) The motorcycle rider safety fund is established in the state
treasury and appropriated on a continual basis to the [department]
which shall administer the monies. Money in the fund shall only be
used for administration of the motorcycle rider education program and
expenses relating to the program including but not limited to: instruc-
tor training, licensing improvement, alcohol and drug education, public
awareness, a driver improvement program for motorcyclists, technical
assistance, program promotion, and other motorcycle safety programs.
Funds may also be used for reimbursement of organizations with course
sites. The [department] shall establish standards for disbursement of
funds.
(b) [Two] dollars of the annual registration fee for each registered
motorcycle shall be credited to the fund as established in subsection (a).
(c) [One] dollar of the application fee for a motorcycle operator
learner's permit shall be credited to the fund as established in subsec-
tion (a).
(d) [One] dollar of the fee for each original motorcycle operator's
license or endorsement and for each renewal shall be credited to the
fund as established in subsection (a).

Section 6. [Advisory Committee.] The [director] shall by regulation
establish a motorcycle rider education program advisory committee
to assist in the development of the motorcycle rider education program.
The committee shall also monitor the program upon its implementation
and report to the [director] as necessary with recommendations in-
cluding, but not limited to, the administration, application, and
substance of the program. The committee shall consist of [five] members
appointed by the [director]. The committee shall meet at the call of
the [director]. Members serve without compensation for their services,
but may be reimbursed for their travel expenses.

Section 7. [Insurance Discount.] The [insurance commissioner] may
fix and establish premium charges for admitted insurers so as to pro-
vide a [10%] reduction in premium rates for motorcycle liability ins-
urance to qualified licensed motorcycle operators who provide proof
of successful completion of a state approved rider training course.

Section 8. [Licensing Skills Test Exemption.] The [director] may ex-
empt applicants for a motorcycle operator's license or endorsement from
the licensing skills test if they present proof of successful completion
Motorcycle Rider Education Act

4 of a rider training course that includes a similar test of skills that is
5 approved by the [department] and licensing officials.

1 Section 9. [Registration and Permit Fees.]
2 (a) An additional fee of [two] dollars for each certificate of registra-
3 tion for a motorcycle as defined in [insert appropriate reference to state
4 law] and each renewal of registration shall be assessed and collected
5 by the [registrar].
6 (b) An additional fee of [one] dollar for each application for a motor-
7 cycle operator learner’s permit shall be assessed and collected by the
8 [registrar].
9 (c) An additional fee of [one] dollar for each original motorcycle
10 operator’s license or endorsement and for each renewal shall be assess-
11 ed and collected by the [registrar].

1 Section 10. [Severability.] [Insert severability clause.]

1 Section 11. [Repealer.] [Insert repealer clause.]

1 Section 12. [Effective Date.] [Insert effective date.]
Statewide Voter Registration and Outreach Act

This act, based on Minnesota law, establishes a statewide voter registration program, linking the counties to the secretary of state’s office. The act permits election day registration, registration through the use of a portion of a driver’s license application, or registration through forms used in state tax material. Registration by a voter moving to a new county triggers a change in the statewide system, and monthly reporting of deaths to county officials serves as a further check on the information in the system. State agencies and their contractors have an affirmative obligation to provide voter registration services on a nonpartisan basis.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Statewide Voter Registration and Outreach Act.

Section 2. [Establishment.] The [secretary of state] shall develop and implement a statewide computerized voter registration system to facilitate voter registration and to provide a central data base containing voter registration information from around the state. The system must be accessible to the [county auditor] of each county in the state.

Section 3. [Rules.] The [secretary of state] shall make permanent and emergency rules necessary to administer the system required in Section 2. The rules must at least:

1. Provide for voters to submit their registration to any [county auditor], the [secretary of state], or the [department of public safety];
2. Provide for the establishment and maintenance of a central data base for all voter registration information;
3. Provide procedures for entering data into a central data base;
4. Provide for interaction with the computerized driver’s license records of the [department of public safety];
5. Allow the offices of all [county auditors] and the [secretary of state] to add, modify, and delete information from the system to provide for accurate and up-to-date records;
6. Allow the offices of all [county auditors] and the [secretary of state’s] office to have access to the central data base for review and search capabilities;
7. Provide security and protection of all information in the central data base and monitor the central data base to ensure unauthorized entry is not allowed;
8. Provide a system for each county to identify the precinct to which
a voter should be assigned for voting purposes;

(9) Prescribe a procedure for phasing in or converting existing computerized records to the statewide voter registration database; and

(10) Prescribe a procedure for the return of completed voter registration forms from the [department of public safety] to the [secretary of state] or the [county auditor].

Section 4. [Permanent Registration System.] A permanent system of voter registration by county is established, with the county systems linked together by a centralized statewide system. The [county auditor] shall be chief registrar of voters and the chief custodian of the official registration records in each county. The [secretary of state] is responsible for maintaining the centralized system.

Section 5. [Registration.] An individual may register to vote:

(1) At any time before the [20th] day preceding any election as provided in Section 6, in counties where preregistration is allowed; or

(2) On the day of an election as provided in [insert appropriate reference to state law pertaining to registration on or before election day];

(3) When submitting an absentee ballot, by enclosing a completed registration card as provided in [insert appropriate reference to state election law];

(4) By submitting a registration card received in a state income tax form or booklet to the [secretary of state's] office; or

(5) By filling out the voter registration part of a driver’s license application.

Section 6. [Prior to Election Day.] At any time except during the [20] days immediately preceding any election, an eligible voter or any individual who will be an eligible voter at the time of the next election may register to vote in the precinct in which the voter maintains residence by completing a registration card and submitting it in person or by mail to the [county auditor] of that county, by completing the voter registration part of a driver's license application, or by submitting in person or by mail a registration card received in a state income tax form or booklet or elsewhere to the [secretary of state's] office. A registration card that is received no later than [5:00 p.m.] on the [21st] day preceding any election shall be accepted. An improperly addressed or delivered registration card shall be forwarded within [two] working days after receipt to the [county auditor] of the county where the voter maintains residence.

Section 7. [Change of Registration.] Any [county auditor] who receives a registration card indicating that an individual was previously registered in a different county in [state] shall notify the [county auditor] of that county on a form prescribed by the [secretary of state]. A [county auditor] receiving a registration card indicating that a voter was previously registered in a different precinct in the same county or
receiving a notification form as provided in this Section or [insert reference to appropriate state election law], shall delete that individual's name from the registration lists and, remove the duplicate voter registration card, if any, and the original voter registration cards from the files, and change the registration information in the data base of the central registration system. Any [county auditor] who receives a registration card or notification requiring a change of registration records under this subdivision shall also check the duplicate registration card or file from the precinct of prior residence to determine whether the individual voted in that precinct in the most recent election.

Section 8. [Registration Files.] The original registration file and the duplicate registration file shall be the record of registered voters. The original and duplicate registration files and the terminal providing access to the central registration system shall be kept in the office of the [county auditor] or in the office of a public official to whom the [county auditor] has delegated the responsibility of keeping either file. The files shall not be removed except that the duplicate file shall be delivered as provided in [insert reference to appropriate state election law], to the duly authorized election judges for use on election day.

Section 9. [Entry of Registration Information.] Upon receiving a registration card properly completed and submitted in accordance with [insert reference to appropriate state election law], the [county auditor] shall enter in the appropriate registration files and in the central registration system the registration card or the information contained on it. Upon receiving a completed registration card or form, the [secretary of state] may electronically transmit the information on the card or form to the appropriate [county auditor] as soon as possible for review by the [county auditor] before final entry into the central registration system. The [secretary of state] shall mail the registration card or form to the [county auditor] for placement in the appropriate files.

Section 10. [Local Registrar of Vital Statistics, Report Deaths to County Auditor.] The local registrar of vital statistics in each county or municipality shall report monthly to the [county auditor] the name and address of each individual 18 years of age or older who has died while maintaining residence in that county or municipality since the last previous report. Upon receipt of the report, the [county auditor] shall remove from the files the original and duplicate registration cards of the voters reported to be deceased and make the appropriate changes in the data base of the central registration system.

Section 11. [Driver's License and Identification Card Applications.] The [department of public safety] shall change its applications for an original, duplicate, or change of address driver's license or identification card so that the forms may also serve as voter registration cards. The forms must contain spaces for the information required in [insert
reference to state law pertaining to registration cards], and applicable
rules of the [secretary of state.] Applicants for driver's licenses or iden-
tification cards must be asked if they want to register to vote at the
same time. A copy of each application containing a completed voter
registration must be sent to the [county auditor] of the county in which
the voter maintains residence or to the [secretary of state] as soon as
possible. The computerized driver's license record information relating
to name, address, date of birth, driver's license number, county, town,
and city must be made available for access by the [secretary of state]
and interaction with the statewide voter registration system.

Section 12. [Duties of State Agencies.] The [commissioner] or chief
administrative officer of each state agency or community-based public
agency or nonprofit corporation that contracts with the state agency
to carry out obligations of the state agency shall provide voter registra-
tion services for employees and the public. A person may complete a
voter registration application or apply to change a voter registration
name or address if the person has the proper qualifications on the date
of application. Nonpartisan voter registration assistance, including
routinely asking members of the public served by the agency whether
they would like to register to vote and, if necessary, assisting them
in preparing the registration forms must be part of the job of ap-
propriate agency employees.

Section 13. [Uniform Procedures for Counties.] The [secretary of state]
shall assist local election officers by devising uniform forms and pro-
cedures. The [secretary of state] shall provide uniform rules for coun-
ties maintaining voter registration records on data processing systems
so that the systems are compatible with a uniform system of electronic
data maintenance and the central computerized voter registration
system. The [secretary of state] shall supervise the development and
use of the system to insure that it conforms to applicable laws and rules.

Section 14. [Voter Registration Form.] The [tax commissioner] shall
insert securely in each individual income tax return form or instruc-
tion booklet a voter registration form, returnable to the [secretary of
state], designed according to rules adopted by the [secretary of state.]

Section 15. [Severability.] [Insert severability clause.]

Section 16. [Repealer.] [Insert repealer clause.]

Section 17. [Effective Date.] [Insert effective date.]
State Juvenile Pretrial Diversion Programs Act

This act, based on South Carolina legislation, establishes a statewide system of juvenile pretrial diversion programs in each county of the state, to include such components as juvenile arbitration, law education, restitution, community service, and juvenile service contracts. Prior to a juvenile petition being heard by the court, juveniles may request under this act that they be allowed to participate in a juvenile pretrial diversion program. If the request is accepted by the appropriate prosecutor, the proceedings against the juvenile are suspended for his participation in the program. Juveniles charged with serious offenses are not eligible for the program. Criteria for participation in the program by a juvenile are established, including a determination that the juvenile poses no threat to the community, and that the interests of the juvenile and the state can be better served through the program. Provision is made for victims of juvenile offenders to comment on participation in the program by the juvenile prior to approval being granted. Juveniles accepted into the diversion program must sign an agreement waiving rights to a speedy trial while enrolled in the program, waiving the tolling of any applicable statutes of limitations, and agreeing to the conditions and requirements of the program itself. The agreement must be signed by at least one parent of the juvenile, and may remain in effect no longer than six months. Restitution, community service, and other requirements of the agreement must be completed within six months after signing. After six months have elapsed from successful completion of the program, charges against the juvenile may be expunged from court records.

Suggested Legislation

(Title, enacting clause, etc.)

1  Section 1. [Short Title.] This act may be cited as the Juvenile Pretrial
2  Diversion Act.

1  Section 2. [Definitions.] As used in this act:
2  (1) “Nondelinquent Disposition” means the dismissal of criminal
3  charges, or a juvenile petition alleging criminal or status offenses, or
4  both, without prejudice to the state to reinstate delinquency pro-
5  ceedings at a later time upon the motion of the [circuit solicitor].
6  (2) “Juvenile” means a person who is less than [seventeen] years of
7  age at the time a criminal or status offense is committed.
8  (3) “Petition” means the legal pleading issued by the [office of the
9  circuit solicitor] which institutes a formal proceeding in the [family]
10  court against a juvenile.
11  (4) “Complaint” means an allegation made by a law enforcement
agency, public official, or a private citizen regarding a status or
criminal offense allegedly committed by a juvenile.

Section 3. [Establishment of Juvenile Pretrial Diversion Programs.] The [department of youth services] shall promote a statewide system
of juvenile pretrial diversion programs. Juvenile pretrial diversion pro-
gams must be established in every county in the state by either the
[circuit solicitor] or by the [department of youth services]. Juvenile
pretrial diversion programs may include, but are not limited to,
juvenile arbitration, law education, restitution, community service, and
juvenile performance contracts.
Each [circuit solicitor] shall retain all of his discretionary power and
authority granted to him by the Constitution and the laws of this state.
Whether a juvenile pretrial diversion program is administered by the
[circuit solicitor] or the [department of youth services], matters of prose-
cutorial discretion are subject to the approval and oversight of the [cir-
cuit solicitor].

Section 4. [Request to Participate.] At any time after the filing of
a complaint with the [department of youth services] and prior to a
juvenile petition being heard by the court, a juvenile may request that
he be allowed to participate in a juvenile pretrial diversion program.
If accepted into the pretrial diversion program by the [circuit solicitor],
the proceedings against the juvenile must be suspended. Except for
that information considered confidential under Section 11 when con-
sidering a juvenile's request to be admitted into a pretrial diversion
program, the [department of youth services] shall furnish to the [cir-
cuit solicitor], if requested, all pertinent information regarding the
juvenile and the offense.

Section 5. [Exceptions to Participation.] A juvenile may not be con-
sidered for participation in a pretrial diversion program if he is charg-
ed with committing murder, voluntary manslaughter, armed robbery,
criminal sexual conduct, assault with intent to commit criminal sexual
conduct, burglary, arson, kidnaping, or assault and battery with
intent to kill. However, this section does not apply if the [circuit solicitor] finds that elements of the crime do not fit the initial charge.

Section 6. [Intervention.] Intervention is appropriate if:
(1) there is a substantial likelihood that justice will be served if the
juvenile is placed in a pretrial diversion program;
(2) it is determined that the needs of the juvenile and the state can
better be met outside of the traditional juvenile justice process;
(3) it is apparent that the juvenile poses no threat to the community;
(4) it appears that the juvenile is unlikely to be involved in further
criminal activities;
(5) the juvenile, in cases where it is required, is likely to respond
quickly to rehabilitative treatment;
(6) the juvenile has no significant history of prior delinquency or
criminal activity.

Section 7. [Comment on Participation.] Prior to a juvenile being admitted into a pretrial diversion program the victim, if any, of the crime for which the juvenile is charged and the law enforcement agency employing the arresting officer must be asked to comment on whether the juvenile should be allowed to enter the program. The recommendations of the victim and the law enforcement agency must be considered when the decision is made concerning admitting a juvenile into a pretrial diversion program.

Section 8. [Agreement.]
(a) A juvenile who is accepted into a pretrial diversion program shall sign an agreement agreeing to:
(1) waive his right to a speedy trial while enrolled in the program;
(2) waive the tolling, while in the program, of any periods of limitation established by statute or by rule of court;
(3) the conditions and requirements of the pretrial diversion program.
(b) The agreement must be signed by the juvenile and by at least one of his parents or his guardian. If an agreement concerning the terms and conditions to be imposed upon the juvenile is not reached within a reasonable time, the [circuit solicitor] must be so notified and he may elect to proceed with the prosecution of the charges against the juvenile. An agreement may remain in effect for no longer than [six] months.

Section 9. [Restitution.] If restitution is made a requirement for the successful completion of a pretrial diversion program, the amount to be paid must be determined based upon an agreement between the pretrial diversion program staff and the juvenile. A specified period of time for payment of the restitution, not to exceed [six] months, must also be agreed upon. If an agreement between the juvenile and the pretrial diversion program staff is not reached, the [circuit solicitor] shall decide the appropriate amount to be paid and the time period, not to exceed [six] months, in which it is to be paid. The amount of restitution agreed upon or found to be appropriate by the [circuit solicitor] may not exceed [five hundred] dollars for each juvenile in any case. Unless otherwise directed by the [circuit solicitor], upon good cause being shown, when there exists more than one juvenile involved in a crime, restitution must be equally divided among the juveniles. In appropriate cases, the pretrial diversion program staff may request that a victim submit documentation of his loss. In lieu of restitution, the circuit solicitor may authorize the juvenile to participate in a specified number of hours of community service work. Community service work must be monitored by the pretrial diversion program staff.

Section 10. [Restitution Payments-Procedures.] In all cases where
monetary restitution is to be made by the juvenile to the victim of the
crime, payment must be made to, handled by, and disbursed to the vic-
tim by the [clerk of the court in the county] where the juvenile par-
ticipates in the pretrial diversion program. The [clerk of court] is
responsible for maintaining adequate records concerning the payment
of restitution. The pretrial diversion program staff is responsible for
monitoring the restitution payments made by juveniles and for report-
ing nonpayment to the [circuit solicitor]. Juvenile restitution records
maintained by the [clerk of court] may not be opened for public inspec-
tion but must be made available to the pretrial diversion program staff
for monitoring purposes.

Section 11. [Records Relating to Participation in Juvenile Pretrial
Diversion Program Prohibited as Evidence in Criminal Trial, Excep-
tions.] Records relating to participation in a juvenile pretrial diver-
sion program or information obtained through the pretrial diversion
program is not admissible as evidence in subsequent criminal or civil
proceedings. Communications between the staff of the pretrial diver-
sion program and the juvenile are confidential and shall remain as
privileged communications unless the court determines that a legiti-
mate interest or reason exists which compels the disclosure of the com-
munications. In no case may an admission of guilt be required of a
juvenile as a condition of acceptance or of successful completion of a
pretrial diversion program.

Section 12. [Written Report on Juveniles Accepted into Programs,
Confidentiality.] In all cases where a juvenile is accepted for pretrial
diversion, a written report must be made and retained on file in the
county office where the juvenile participates in the juvenile pretrial
diversion program. A written report must also be made to and retain-
ed by the central office of the [department of youth services] so that
an accurate record can be maintained concerning a juvenile's participa-
tion. Identifiable information on juveniles who have participated in
pretrial diversion programs may not under any circumstances be
released as public knowledge. Identifiable information on specific
juveniles is also confidential and may only be released upon approval
by the court to persons demonstrating a legitimate interest in obtain-
ing this information.

Section 13. [Disposition of Criminal Charges; Records.] Within [forty-
eight] hours after notification of the successful completion of a juvenile
pretrial diversion program, the [circuit solicitor] shall effect a nondelin-
quent disposition of the charges pending against the juvenile. After
the expiration of [six] months from the date of the juvenile’s successful
completion of the pretrial intervention program, and if the juvenile
has not been charged with any subsequent criminal or status offenses
during that period, the juvenile may apply to the court for an order
destroying all official records relating to his being taken into custody
and the subsequent charges filed, and, as a result thereof, no evidence
of the records regarding the charges may be retained by any law enforcement agency or other municipal, county, subdivision, or state agency except as otherwise provided in Section 12. The effect of this order is to restore the juvenile to the legal status he occupied before he was taken into custody. No person as to whom this order has been entered may be held thereafter under any provision of law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge the charges in response to any inquiry made of him for any purpose.

Section 14. [Violation of Conditions of Program.] If a juvenile violates the conditions or requirements of the pretrial diversion program, the [circuit solicitor] must be notified of the violation. If a decision is made by the [circuit solicitor] to dismiss the juvenile from the program, the [circuit solicitor] may elect to proceed with the prosecution of the pending charges.

Section 15. [Severability.] [Insert severability clause.]

Section 16. [Repcaclor.] [Insert repcaclor clause.]

Section 17. [Effective Date.] [Insert effective date.]
Victims of Crime (Note)

Proposed legislation on victims rights has been developed by a task force of the National Association of Attorneys General and the American Bar Association with funding provided by the Office of Justice Programs of the U.S. Department of Justice. The model legislation provided is a result of the work of the President's Task Force on Victims of Crime. The package consists of ten different model statutes directed at as many different aspects of the problems encountered by criminal victims. The models include legislation making victim/counselor communications privileged in nature; an act requiring that sentencing courts consider a victim impact statement prior to sentencing a defendant; open parole hearings allowing for statements by victims and their representatives; expanded use of hearsay in preliminary proceedings to avoid the necessity for victims to testify in such preliminary proceedings; legislation providing for victim and witness address confidentiality; an act extending the statutes of limitations for crimes against children; statutory provision for expanded competency rules for child witnesses; bail reform and sentencing reform legislation; and legislation allowing employers access to sex offense criminal history record information.

Additional information is available from the Office of Justice Programs and its National Victims Resources Center, P.O. Box 6000, Rockville, MD 20850, (301) 251-5519.
State Children’s Trust Fund Act

This act, based on Louisiana law, establishes a children’s trust fund to combat child abuse and neglect. Funding consists of appropriate state funds, income tax checkoff donations, and an increase in fees for birth certificate records. The fund is administered by a board within the department of health and human resources consisting of members appointed by the governor to represent a variety of governmental and private entities interested in child abuse and neglect. The board is to adopt and revise the comprehensive state plan for the prevention of child abuse and neglect, designate child abuse and neglect planning districts, award grants from the fund, monitor and evaluate services and programs for the prevention of child abuse and neglect, and prepare an annual report on the board’s activities and recommendations.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Children’s Trust Fund Act.

1 Section 2. [Definitions.] As used in this act, except where the context clearly indicates otherwise:
3 (1) “Child Abuse Prevention” means services and programs designed to prevent the occurrence or recurrence of child abuse and neglect as defined in [insert appropriate reference to state statute]. Except for those provided in this act and except for the purpose of planning and coordination pursuant to the provisions of this act, the services and programs of the [department of health and human resources] which are mandated by state law or which are required for receipt of federal funds shall not be subject to the provisions of this act.
5 (2) “Primary Prevention” means programs and services designed to promote the general welfare of children and families.
7 (3) “Secondary Prevention” means the identification of children who are in circumstances where there is a high risk that abuse will occur and assistance is necessary and appropriate to prevent abuse and neglect from occurring.
9 (4) “Tertiary Prevention” means those services provided after abuse or neglect has occurred which are designed to prevent the recurrence of abuse or neglect.
11 (5) “Department” means the [department of health and human resources].
13 (6) “Director” means the [director of the office of children’s trust fund].
15 (7) “District” means each local children’s trust fund coordination area established pursuant to the provisions of Section 4.
17 (8) “District Task Force” means the local children’s trust fund coordination body established as provided in Section 8.
Section 3. [Creation of the [state] Children’s Trust Fund.]
(a) There is hereby established a special fund in the state treasury to be known as the [state] Children’s Trust Fund, consisting of monies provided by the legislature and monies received from any other sources and funds derived from fees as provided in subsection (b). The legislature shall make yearly appropriations to the fund for the purposes set forth in this act to the extent that state funds are available.
(b) In addition to the fees collected for issuance of a certified copy of an original birth record, the office of preventive and public health services shall collect an additional fee of [two] dollars upon the filing of each request. The office of preventive and public health services shall remit the total amount of such additional fees to the state treasurer on a monthly basis, in accordance with rules and regulations of the state treasurer.
(c) All such additional fees collected as provided in subsection (b) shall be paid into the state treasury and shall be credited to the [state] Children’s Trust Fund, an amount equal to the total amount of the additional birth certificate fees paid into the treasury.
(d) The monies in the fund shall be used solely for programs designed to prevent the physical and sexual abuse of and gross neglect of children. Disbursement of the amount appropriated each year shall be made as determined by the [board].
(e) The [board] shall determine the eligibility of programs to receive funding, and the administration of the fund shall be exercised by the [office of management and finance of the department of health and human resources] in accordance with the directives of the [board] and the provisions of Section 9.

COMMENT: Under the original Louisiana statute, additional fees were paid into the state’s Board Security and Redemption Fund. After a sufficient amount was allocated from that fund to pay all obligations secured with the full faith and credit of the state which would become due during the fiscal year, and prior to placing remaining funds into the general fund, the treasurer would deduct funding for the Children’s Trust Fund.

Section 4. [State Children’s Trust Fund Board; Created; Membership.]
(a) There is hereby established the [state] children’s trust fund board within the [department of health and human resources].
(b) The [state] children’s trust fund board shall be composed of [sixteen] members as follows:
1. The [secretary] of the [department of health and human resources], or his designee.
2. The [assistant secretary] of the [office of human development]
Suggested State Legislation

9 of the department of health and human resources.
10 (3) The [chairman] of the [governor’s coordinating council on
11 children and youth].
12 (4) A representative of each of the following, appointed by the
13 governor:
14 (a) The [department of education].
15 (b) The religious community.
16 (c) The [office of juvenile services of the department of public safe-
17 ty and corrections].
18 (d) The university community.
19 (5) One member appointed by the governor from each of [nine] lists
20 of [three] names, one such list to be submitted by each of the following:
21 (i) Children advocacy group.
22 (ii) The state medical society.
23 (iii) The [juvenile and family court judges].
24 (iv) The state bar association.
25 (v) The [state] chapter of the [National Association of Social
26 Workers].
27 (vi) The [state] chamber of commerce.
28 (vii) The [education group].
30 (ix) The [state] chapter of the National Association for the Ad-
31 vancement of Colored People.
32 (6) In making his appointments, the governor shall provide for
33 geographic representation of all areas of the state and for representa-
34 tion of minority groups.
35 (c) The terms of office of appointed members of the [board] shall be
36 [four] years, except that the governor shall appoint the original mem-
37 bers as follows: [seven] members for a term of [four] years and [six] mem-
38 bers for a term of [two] years. A vacancy shall be filled by appointment
39 for the remainder of the unexpired term.
40 (d) The [board] shall meet and organize immediately after appoint-
41 ment of the members and shall elect from its membership a chairman
42 and such other officers as it deems necessary whose duties shall be
43 those customarily exercised by such officers. The [director] of the off-
44 ice shall serve as secretary of the [board]. The [board] shall adopt rules
45 for the transaction of its business and shall keep a record of its resolu-
46 tions, transactions, findings, and determinations. [Eight] members
47 shall constitute a quorum. Members shall serve without compensation
48 but shall be reimbursed for travel expenses incurred in attendance at
49 meetings of the [board].
50 (e) The [board] shall meet at least [once] in each [quarter] of the fiscal
51 year, and as often thereafter as shall be deemed necessary by the
52 chairman.
53 (f) The domicile of the [board] shall be [insert place].
54 (g) The [board] shall:
55 (1) Determine the policies of the [office].
56 (2) Promulgate rules and regulations for the [board] and the [of-
57 fice], and implement their programs.

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(3) Adopt and revise the comprehensive state plan for prevention of child abuse and neglect, as provided in Section 7.
(4) Designate child abuse and neglect prevention planning districts which shall be identical to existing regional planning districts of the department.
(5) Award grants from the fund for child abuse and neglect prevention programs as provided in Section 9.
(6) Prepare and submit an annual report to the legislature and to the governor [sixty] days prior to each regular legislative session.
(7) Adopt guidelines by rule for the establishment of district children's trust fund task forces, as provided in Section 8.
(8) Adopt the budget request for the [office] and the [board] and submit it to the [office of management and finance], the [executive budget office], and the [joint legislative committee on the budget].

Section 5. [Office of Children's Trust Fund; Powers and Duties.]
(a) The [office of children’s trust fund] is created in the [department of health and human resources].
(b) The [office] shall:
(1) Prepare a comprehensive state plan for prevention of child abuse and neglect and revise the plan, for adoption by the board as provided in Section 7.
(2) Implement the comprehensive state plan adopted by the [board].
(3) Recommend guidelines for adoption by the [board] for the establishment of district children's trust fund task forces as provided in Section 8.
(4) Review and evaluate grant proposals for funding from the fund and make recommendations to the [board] as provided in Section 9.
(5) Coordinate the preparation and implementation of the district children’s trust fund plans.
(6) Monitor, evaluate, and review the development and quality of services and programs for the prevention of child abuse and neglect.
(7) Prepare the annual report of the [board], for its approval.
(8) Formulate and recommend rules and regulations for promulgation by the [board].
(9) Provide technical assistance to district task forces upon request.

Section 6. [Office of Children’s Trust Fund; Director; Duties; Staff; Support Services.]
(a) The [board], with the approval of the [secretary of the department], shall appoint a [director] for the office.
(b) The [director] shall:
(1) Prepare the annual budget request of the [board] and the [office] for adoption by the [board].
(2) Act as agent for the [board] in the performance of its duties and subject to its direction and serve as secretary of the [board].

Section 7. [Comprehensive State Plan for Prevention of Child Abuse and Neglect.]
Suggested State Legislation

(a) The [board] shall review and adopt the comprehensive state plan and any revision thereof, prior to transmittal of the plan as provided in this section.

(b) On or before [date], the [board] shall transmit the comprehensive state plan for the prevention of child abuse and neglect to the governor, the [president of the senate], and the [speaker of the house of representatives].

(c) The plan shall include but not be limited to the following:

(1) A summary of each regional plan and an analysis of service and program needs.

(2) Specific proposals for plan implementation, including efficient use of staff, funds, and resources on the state level and improvement in the coordination and integration of state goals, activities, and funds for the prevention of child abuse and neglect.

(d) The [office] shall prepare the comprehensive state plan for adoption by the [board]. The [board] shall by rule establish procedures for preparation and adoption of the plan which shall include submission of district plans. In preparing the plan, the [office] shall:

(1) Provide adequate opportunity for appropriate local private and public agencies and groups and private citizens to participate in the development of the state plan at the local level. Appropriate local groups shall include community mental health centers, district attorneys' offices, courts having juvenile docket responsibility, school boards, private or public programs with recognized expertise in working with families at risk of child abuse and neglect, voluntary self-help abuse prevention and treatment programs, day care centers, law enforcement, and private or public programs with expertise in maternal and infant health care.

(2) Incorporate the district plans and information provided by district task forces and public and private agencies into the comprehensive state plan.

(e) The [office] and the [board] shall review the state plan at least biennially and the [board] shall adopt any needed revision.

(f) The [department of health and human resources], the [department of public safety and corrections], and the [department of education] shall participate and cooperate in the development and implementation of the state plan at the state and local levels.

Section 8. [District Children's Trust Fund Task Forces; Composition; District Plan.]

(a) The [board] shall appoint district children's trust fund task forces in accordance with the guidelines recommended by the [office] and established by [board] rule.

(b) Such guidelines shall require that each district task force shall include a representative of the [department] from the district appointed by the [department secretary], and representatives of local health departments, local school districts, courts, district attorneys, private children's trust fund services and programs within the district, and private individuals selected from a list of nominees submitted by the
district-coordinator. The members of each district task force shall be
appointed to serve for [two-year] terms and may be reappointed.

(c) Prior to [date], the [board], with the assistance of the [office], shall
select and appoint a coordinator for each district task force and shall
appoint successors for said coordinators if vacancies should occur. After
[date], each district task force shall elect a coordinator from among its
membership. The elected coordinators shall serve [two-year] terms and
may be reelected.

(d) Each district children’s trust fund task force shall prepare and
implement a district plan for the prevention of child abuse and neglect
within its district as provided in this act.

(e) Each district task force shall develop a written statement clearly
identifying its operating procedures, purposes, overall responsibilities,
and methods of meeting those responsibilities.

(f) The district plan shall include but not be limited to:

(1) Documentation of the magnitude of the problem of child abuse
including sexual abuse, physical abuse, emotional abuse, neglect, and
medical cases of failure-to-thrive in its geographic area.

(2) A description of programs currently serving abused and
neglected children and their families and child abuse and neglect
prevention programs, including information on impact of programs,
cost effectiveness and sources of funding, and information on impact
of programs.

(3) A continuum of programs and services which would be necessary
for a comprehensive approach to prevention and a brief description of
such programs and services.

(4) A description, documentation, and priority ranking of primary,
secondary, and tertiary prevention service, and program needs based
upon the continuum.

(5) A plan for steps to be taken in meeting identified needs, in-
cluding the coordination and integration of services to avoid un-
necessary duplication and costs, and alternative funding strategies for
meeting needs through the reallocation of existing resources, utiliza-
tion of volunteers, contracting with local universities, and local govern-
ment or private agency funding.

(6) A description of barriers to the accomplishment of a comprehen-
sive approach to child abuse and neglect prevention.

(7) Recommendations for any necessary changes that can be ac-
complished administratively or which may require legislative action.

(g) Prior to [date], each district task force shall submit the district
child abuse and neglect prevention plan required by this section to the
[office of children’s trust fund] for review and for incorporation into
the comprehensive state plan.

(h) The [department], through the [office], shall provide staff support
to the district task forces and the [office] shall provide technical
assistance to such task forces upon request.

Section 9. [Funding of Children’s Trust Fund Programs.]

(a) The [board] in its annual budget request, shall identify the amount
of funds necessary for the implementation of this act.

(b) Monies appropriated or otherwise made available to the [board] or the [office] to implement the provisions of this act shall be disbursed as follows:

(1) The [office] shall develop and the [board] shall adopt a formula for the distribution of funds for public and private programs and services for the prevention of child abuse and neglect which shall provide for the allocation of funds to each district based upon the percentage of the total state reported cases of abuse and neglect reported in the district and the percentage of the total state population under the age of [eighteen] years and upon the service and program needs of the district as identified in the district plan, and after [date], the comprehensive state plan.

(2) After [date], the allocation of any funds available to each district shall be contingent upon the completion of the district plan required by Section 8 and the acceptance of the plan as complete by the [office].

(3) Any funds which are not utilized within a district shall be reallocated to the remaining districts in accordance with the formula required by paragraph (1).

(4) Ten percent of the amount appropriated to the [board] and the [office] shall be used for administrative costs.

(c) Appropriations made for distributions by the [board] for programs and services shall be deposited in the fund and shall be disbursed by the [office of management and finance] in accordance with directives of the [board].

(d) The [office of children’s trust fund] shall develop and publish requests for proposals for grants to be funded from the [state] children’s trust fund for child abuse prevention priorities.

(1) After [date], these priorities shall be based upon information contained in the district plans and after [date], shall also be based upon the comprehensive state plan.

(2) A priority ranking shall be made based upon the extent to which a proposal meets identified needs, criteria for cost effectiveness, an evaluation component providing outcome data, and a determination that the proposal provides a mechanism for coordinating and integrating preventive services with other services deemed necessary for working effectively with families who are at risk of child abuse or neglect. Priority shall be given to primary and secondary prevention programs and services.

(3) Each district children’s trust fund task force shall review the proposals submitted to the [office] within its district and shall forward a copy of a report of such review together with any recommendations to the [office] prior to the awarding of grants or contracts pursuant to each request for proposals.

(e) The [office] shall review and evaluate all proposals submitted for grants for children’s trust fund programs and services. Upon completion of such review and evaluation, the [office] shall make final recommendations to the [board] as to which proposals should be funded pursuant to the provisions of this act.
(f) On or before [date], the [board] shall transfer to the [office] the administration of all existing grants or contracts which have been awarded by the [board] pursuant to appropriations made to the [board] for funding grants or contracts for children's trust fund programs. The [office] shall administer such existing grants or contracts in accordance with policies and conditions pursuant to which such grants or contracts were let, the provisions of any contracts related thereto, and [board] policies.

(g) On and after [date], all budget requests submitted by any public agency to the legislature for funding of programs related to child abuse and neglect prevention shall conform to the comprehensive state plan and any subsequent revision of the plan adopted pursuant to the provisions of this act. The services and programs of the [department of health and human resources] which are mandated by state law or which are required for the receipt of federal funds with regard to deprived, destitute, or homeless children shall not be subject to the provisions of this subsection.
Uniform Criminal History Records Act
(Note)

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has drafted legislation designed to systematize certain state law enforcement records. A note explaining this act follows; further information may be obtained from NCCUSL in Chicago.

"Criminal History Records Information" or CHRI causes particular difficulty in the administration of the criminal justice system of every state. Because of the importance of such information to law enforcement agencies, and because law enforcement agencies tend to be numerous and local in nature, the trend in every state is to centralize recordkeeping. Information from every agency in a state becomes available to all of them. The police department in one city has available to it information that is created in other cities and towns — information that would not be available easily and readily without a central source for that information. The centralization of such records may be the most significant development in law enforcement in our time.

Computers have accelerated the revolution. They have made collection of such information easier and faster, and they make access to it easier. It is common for police stations and now, even patrol cars to have ready access to kinds of CHRI.

At the same time, fundamental law pertaining to centralized records and CHRI has not kept pace. The responsibilities of the collecting agency, its rule-making powers, what it collects, and who may have access to CHRI once it is collected, are all issues not well addressed in the law. Protection of individuals about whom information is stored becomes a primary policy issue. The law must act as a kind of traffic agent for CHRI, clearly authorizing access to those who need it and who should have it and cutting off access that jeopardizes individual rights, otherwise.

The Uniform Criminal History Records Act (UCHRA) aims to meet the critical need. It provides fundamental law to govern CHRI in any state that adopts it.

Section 2 of UCHRA requires a "central repository" which "shall collect and maintain, as criminal history records, the information required to be reported to it by this [Act]." The central repository has rule-making powers to determine who will report information to it, the exact nature of the information to be reported, and how it will be reported. UCHRA can be used to establish a central repository, if one is not in existence, but can be used to clarify the authority of an existing repository system, as well (and probably will mostly be used for this purpose).

Key to the clear concepts UCHRA seeks to establish are certain definitions. What exactly is to be collected and maintained? "Criminal history records" is defined in section 1(3) as a "record . . . of reportable events." "Reportable events" is defined in section 1(5) as "occu-
rences concerning an individual arrested for or charged with a criminal offense. "Petty and traffic offenses" are excluded, as are intelligence or purely investigative records. The focus is on specific records of arrest, filing of criminal charges, sentencing and incarceration. The central repository may, by rule, even more specifically enumerate what are "reportable events."

UCHRA, section 1(4), defines "criminal law enforcement agency," subject to the reporting requirements. Such an agency must have primary criminal justice responsibilities. Any police department, sheriff's office, or correctional agency would, generally, fit the definition. These are the agencies that must report to the central repository. They report their arrests, prosecutions, and incarcerations.

Once reported and filed in the central repository, the next issue is access or disclosure. The same criminal law enforcement agencies that are required to report are the agencies in need of the records kept. In section 5 (a(1)) of UCHRA, they have access to CHRI for their "functions as criminal law enforcement agencies or for use in hiring or retaining . . . employees." Courts and the governor's office have access for their particular criminal justice functions, and CHRI is subject to disclosure upon a valid subpoena. There can be interstate disclosure to any other state has adopted UCHRA.

Any citizen can obtain certain kinds of CHRI under Section 6 of UCHRA. Sealed and expunged information may not be disclosed. Conviction records may be disclosed. Other "reportable events" may be disclosed only if they have occurred within one year of the request. A citizen requesting such information must be able to identify the person about whom information is sought, very specifically. Any confusion as to the exact "record subject" (person whose records are held) means that no record will be disclosed.

Section 7 of UCHRA governs an individual's access to his or her own records. The "central repository shall disclose" not only the records, themselves, but the record of disclosure to other persons. Section 11 provides a "record subject" with a procedure for correcting errors found in his or her own records.

Section 9 provides for research access with the proviso that a researcher must agree to safeguard the confidentiality of individual records.

UCHRA contains basic procedures for requesting information from a central repository. It clearly designates what are prohibited disclosures. Section 13 provides sanctions for violations of UCHRA. A requester may bring an action to compel disclosure that UCHRA permits. If there is disclosure that is not authorized, there may be damages for injury and possible criminal action against anyone making such disclosure.

UCHRA provides comprehensive, fundamental law for CHRI.
Uniform Rules of Evidence Act (Amendments)

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has promulgated amendments to the Uniform Rules of Evidence. An explanation of the changes follows; further information may be obtained from NCCUSL in Chicago.

In 1986, eight amendments to the Uniform Rules of Evidence (1974) were adopted by the Uniform Law Commissioners. The amendments serve three purposes. First, they add to the Uniform Rules some provisions that are included in the Federal Rules. It should be remembered that the Uniform Rules and the Federal Rules are very nearly identical. The 1974 Uniform Rules and the Federal Rules were drafted at the same time and were intended to establish uniformity between federal and state courts. There were some original differences, however, and the Federal Rules were amended between 1974 and 1986. The 1986 amendments to the Uniform Rules bring the Uniform Rules closer to the Federal Rules.

Second, there have been decisions under the Federal Rules, and these cases have made amendments necessary to the Uniform Rules.

Third, some general policy changes seemed necessary because of new developments in the law, and some of the amendments meet these developments.

Only eight amendments have been promulgated in total, suggesting that the integrity and utility of both the Uniform Rules and the Federal Rules remain. The amendments are as follows:

(1) Rule 412. Sexual Behavior. This new Section responds to policy developments at the state and federal level since 1974. It is patterned after Fed. R. Civ. P. 412, and it is a specific rule applicable in "sexual offense" criminal actions. Rule 412 generally restricts admission of evidence regarding a victim's prior sexual behavior in such a criminal action. This rule is popularly called the "Rape Shield" rule.

(2) Rule 502. Lawyer-Client Privilege. In Upjohn v. United States, 449 U.S. 383 (1981), the U.S. Supreme Court rejected the so-called "control group" test for determining the breadth of the lawyer-client privilege. Rule 502 (a)(2) is amended accordingly. The amendment makes it clear that the defined representative of a client includes anyone who receives a confidential communication in the scope of employment for the client, "for the purpose of effecting legal representation for the client." A broader definition of "representative" is the result of this amendment.

(3) Rule 504. Husband-Wife Privilege. In Trammel v. United States, 445 U.S. 40 (1980), the U.S. Supreme Court limited the husband-wife privilege in criminal cases. The accused is not entitled to the privilege — it can belong only to the spouse. Rule 504 (b) now reflects that holding. In addition, amendments to Rule 504 more clearly specify what a confidential communication is, and more clearly specify what the
exceptions are than the original rule did.

(4) Rule 616. Bias of Witness. This new Rule permits evidence of a witness' bias, prejudice, or interest to be introduced to attack the witness' credibility. The Rule is intended to eliminate confusion about the introduction of such evidence. It codifies United States v. Abel, U.S., 105 S. Ct. 465, 83 L.Ed.2d 450 (1984).

(5) Rule 801(d)(1). Definitions. A new category of non-hearsay statement is defined - "(iii) one of identification of a person made shortly after perceiving him [or her]." This addition conforms the rule to Fed. R. Civ. P. 801(d)(1)(c).

(6) Rule 803. Hearsay Exceptions; Availability of Declarant Material. The hearsay exception pertaining to public records and reports is amended to make police investigative reports and factual findings resulting from special investigations exceptions to hearsay "when offered by an accused in a criminal case." This means that these kinds of reports offered by accused persons would be admissible as evidence. There are no other substantive amendments to Section 803. The Uniform Rule comes into closer uniformity with the comparable Federal Rule with this amendment.

(7) Rule 807. Child Victims or Witnesses. This is a wholly new Section, and it deals with hearsay statements of a minor under 12 years of age describing sexual acts or acts of physical violence to another person, when such statements are recorded by audio-visual means. The recorded statements are not hearsay and may be admitted under strict criteria to guarantee the credibility of the recorded statements.

Rule 807 also makes provision for taking a minor's deposition and recording it by audio-visual means, if direct testimony of the minor about sexual acts or acts of physical violence would cause the minor severe emotional or psychological distress. The deposition is admissible under strict criteria to assure the credibility of its taking.

(8) Rule 902(11). Self-Authentication. Authenticity of records admitted as evidence is the general subject of Rule 902. New 902 (11) adds a category of certified record, either domestic or foreign, that may be admitted without "extrinsic evidence of authenticity." Certification of authenticity must be executed by the custodian of the records. A certification is a declaration under oath subject to the penalty of perjury for domestic records or a declaration signed in a foreign country that would subject the maker to a criminal penalty, if falsely made. A chain of certifications is necessary for foreign records. The amendment picks up provisions within the Comprehensive Crime Control Act.

These are the only amendments offered to the Uniform Rules of Evidence (1974) in 1986. They improve the utility of these rules, already widely accepted in many states.
Missing Children Record Flagging Act

This act, based on an Illinois law, implements a mechanism to aid in the location of missing children through a "flagging" system to mark their birth and school records and alert authorities if such records are requested. The act further requires that when a student is enrolled in a particular elementary or secondary school for the first time, that school shall require a certified copy of the student’s identity or other proof of identity and age within 30 days. Provision is also made for the communication of information concerning missing children among state and local law enforcement authorities and state and local registrars of vital records and schools.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Missing Children Record Flagging Act.

Section 2. [Definitions.] As used in this act, unless the context requires otherwise:
(1) "Custodian" means the [state registrar of vital records], local registrars of vital records appointed by the [state registrar] and county clerks.
(2) "Department" means the [department of state police].
(3) "Missing person" means a person [17] years old or younger reported to any law enforcement authority as abducted, lost or a runaway.
(4) "Registrar" means the [state registrar of vital records].

Section 3. [Department Duties.] Upon receipt of a report of a missing person, the [department] shall notify the [registrar] of the disappearance and shall provide the [registrar] with information concerning the identity of the missing person.

If the [department] has reason to believe that a missing person has been enrolled in a specific [state] elementary or secondary school, it shall notify the last such known school as to the disappearance.

Upon learning of the recovery of a missing person, the [department] shall so notify the [registrar] and any school previously informed of the person’s disappearance.

The [department] shall by rule determine the manner and form of notices and information required by this act.

Section 4. [Registrar Duties.] Upon notification by the [department] that a person born in this state is missing, the registrar shall flag the birth certificate record of that person in such a manner that whenever a copy of the birth certificate or information regarding the birth record
is requested, the [registrar] shall be alerted to the fact that the certificate is that of a missing person. The [registrar] shall also notify other custodians to likewise flag their records. Upon notification by the [department] that the missing person has been recovered, the [registrar] shall remove the flag from the person’s birth certificate record and shall notify any other previously notified custodian to remove the flag from its record.

Section 5. [Custodian Duties.]
(a) In response to any inquiry, a custodian shall not provide a copy of a birth certificate or information concerning the birth record of any person whose record is flagged pursuant to Section 4 except as approved by the [department].
(b) When a copy of the birth certificate of a person whose record has been flagged is requested in person, the custodian’s personnel accepting the request shall immediately notify his supervisor. The person making the request shall complete a form supplying his name, address, telephone number, social security number and relationship to the missing person and the name, address and birth date of the missing person. The driver’s license of the person making the request, if available, shall be photocopied and returned to him. He shall be informed that a copy of the certificate shall be mailed to him. The custodian’s personnel shall note the physical description of the person making the request, and, upon the latter’s departure from the custodian’s office, his supervisor shall immediately notify the local law enforcement authority as to the request and the information obtained pursuant to this subsection. The custodian shall retain the form completed by the person making the request.
(c) When a copy of the birth certificate of a person whose record has been flagged is requested in writing, the custodian’s personnel receiving the request shall immediately notify his supervisor. The supervisor shall immediately notify the local law enforcement authority as to the request and shall provide a copy of the written request. The custodian shall retain the original written request.

Section 6. [School Duties.]
(a) Upon notification by the [department] of a person’s disappearance, a school in which the person is currently or was previously enrolled shall flag the record of that person in such a manner that whenever a copy of, or information regarding the record is requested, the school shall be alerted to the fact that the record is that of a missing person. The school shall immediately report to the local law enforcement authority any request concerning flagged records or knowledge as to the whereabouts of any missing person. Upon notification by the [department] that the missing person has been recovered, the school shall remove the flag from the person’s record.
(b) Upon enrollment of a student for the first time in a particular elementary or secondary school, that school shall notify in writing the person enrolling the student that within [30] days he must provide
either (1) a certified copy of the student’s birth certificate or (2) other
reliable proof of the student’s identity and age and an affidavit explain-
ing the inability to produce a copy of the birth certificate.
Upon the failure of a person enrolling a student to comply with this
subsection, the school shall notify that person in writing that, unless
he complies within [10] days, the case shall be referred to the local law
enforcement authority for investigation. If compliance is not obtained
within that [10] day period, the school shall so refer the case.
The school shall immediately report to the local law enforcement
authority any affidavit received pursuant to this subsection which ap-
pears inaccurate or suspicious in form or content.
(c) Within [14] days after enrolling a transfer student, the elemen-
tary or secondary school shall request directly from the student’s
previous school a certified copy of his record. The requesting school
shall exercise due diligence in obtaining the copy of the record re-
quested. Any elementary or secondary school requested to forward a
copy of a transferring student’s record to the new school shall comply
unless the record has been flagged pursuant to subsection (a), in which
case the copy shall not be forwarded and the requested school shall
notify the local law enforcement authority of the request.

Section 7. [Local Law Enforcement Duties.] Any local law enforce-
ment authority notified pursuant to this act of the request for the birth
certificate or school record of or other information concerning a miss-
ing person shall immediately notify the [department] of such request
and shall investigate the request.

Section 8. [Home Rule.] This act shall constitute the exercise of the
state’s exclusive jurisdiction and shall preempt the jurisdiction of any
home rule unit.

Section 9. [Severability.] [Insert severability clause.]

Section 10. [Repealer.] [Insert repealer clause.]

Section 11. [Effective Date.] [Insert effective date.]
Welfare Reform Act (Statement)

This act, based on Connecticut law, makes numerous changes in state-administered welfare programs. It increases in welfare benefits (to the maximum of 5 percent per year) to increases in the Consumer Price Index for urban consumers, establishes job training programs for certain types of welfare recipients, and encourages private employers to establish their own job training programs for such recipients. The act also sets up a program to use bank information to cross-match recipient and depositor social security numbers to identify those who may be engaged in welfare fraud. Photo identification cards are mandated under the act for AFDC recipients who receive checks and for heads of households receiving food stamps. The act creates a pilot program providing transportation for Medicaid patients on a competitive bidding basis. The employment programs emphasize recipients who have received aid for 10 years or more, and consist of a voluntary pilot program which includes support services such as day care and transportation.

Because of its complexity and its tie to existing state statutes, the Welfare Reform Act is not be published here in Suggested State Legislation draft form. Interested readers should direct requests for copies to the state of Connecticut, asking for P.A. 85-505.
Family Independence Act (Statement)

This act, based on Washington law, offers a fundamentally new approach to improving the opportunity for low-income families and their children to escape the burden of long-term poverty and dependence. The family independence program is a plan for completely replacing the current welfare program for families, Aid to Families with Dependent Children (AFDC). Under the program, a new set of policies will be applied to new applicants for welfare. Some families will receive cash assistance at 100 percent of the state’s benchmark standard; others have applicants who are potentially able to work and will be helped to obtain employment. Education and training assistance will be provided. The program will be voluntary and will contain an incentive payment structure to encourage those who are able to work. Child care and medical care will be provided without cost to those who are involved in education, training or employment.

The federal government will continue to be a full partner in financing the costs of the program. Due process rights are protected. The program may be cancelled on six months’ notice by either the state or federal government. The federal government has yet to approve the use of federal funds as specified in the act.

Because of its length, the Family Independence Act cannot be published in its entirety here. Interested readers should direct requests for copies to the state of Washington, asking for Second Substitute House Bill No. 448 from the 1987 regular session.
Latch-Key Program Act

This act, based on a 1985 Indiana law, provides for a pilot childcare program for children aged five through 14 years that operates before or after the school day, or both, and during periods when school is not in session. It also provides for a program that operates during periods when school is in session for students who are enrolled in half-day kindergarten programs. The act allows each school corporation to provide classrooms, other space, or both, in a school for use by a not-for-profit organization that is operating a school-age childcare program before or after the school day.

In 1987, a permanent “latch key” program, with a permanent funding base, was adopted in the state of Indiana, and a number of changes were made in the legislation. Unlike the 1985 pilot program provisions, the new legislation uncapped the number of programs that could be approved in any county. The 1987 legislation also dropped the requirement that applicants be licensed, but still required applicants to comply with eight standards. The program established in 1987 will be up for sunset review in 1992.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Latch-Key Program Act.

Section 2. [Definitions.] As used in this act:

1. (1) “Applicant” means a school corporation or a not-for-profit organization that applies to the [board] through the [social services fiscal office] for a grant from the fund for the purpose of establishing and operating a school age childcare program or for the purpose of maintaining an existing school age childcare program.

2. (2) “Board” refers to the [interdepartmental board for the coordination of human services programs].

3. (3) “Contribution” includes providing a facility, personnel, transportation, or supplies that will be used in operating a program.

4. (4) “Facility” means a school or other building in which a school age childcare program is operated.

5. (5) “Fund” refers to the school age childcare project fund.

6. (6) “School age childcare program” means a program operated by a school corporation or a not-for-profit organization that offers care to children between the ages of [five] and [14] years for the period of time before or after the school day, or both, during periods when school is not in session, and during periods when school is in session for students who are enrolled in a half-day kindergarten program.

7. (7) “School corporation” has the meaning set forth in [insert reference to appropriate state statute].
Suggested State Legislation

Section 3. [Childcare Project Fund-establishment.]
(a) There is established the school age childcare project fund. The purpose of the fund is to provide a source from which state grants can be made to school corporations or not-for-profit organizations that wish to establish and operate school age childcare programs in [state]. The fund shall be administered by the [board].
(b) The expenses of administering the fund shall be paid from money in the fund.
(c) Money in the fund on [date], does not revert to the state general fund. Money in the fund on [date], reverts to the state general fund.

Section 4. [Applicant Demonstration of Ability.] The [board] may approve a grant from the fund to an applicant if the applicant demonstrates to the [board] that it can:
(1) provide a physical environment that is safe and appropriate to the various age levels of the children to be served;
(2) meet licensing standards required under [insert reference to appropriate state statute] (an applicant that is a [school corporation] is exempt from meeting this requirement);
(3) if necessary, provide transportation to and from a school or schools to the facility operated by the applicant;
(4) provide program activities that are appropriate to the various age levels of the children to be served and that meet the developmental needs of each child;
(5) provide efficient and effective program administration;
(6) provide a staff that meets standards set by the [board] under Section 10 of this act;
(7) provide for nutritional needs of children enrolled in the program;
(8) provide emergency health services to children served by the program; and
(9) operate a school age childcare program in accordance with the cost and expense standards set by the [board] under Section 10 of this act.

Section 5. [Program Enrollment Priorities.]
(a) The [board] may not approve a grant from the fund to an applicant unless the applicant agrees to adopt the following program enrollment priorities:
(1) first priority must be given to children who are referred to a program by the local child protection service agency. Within this priority, children in families with the lowest gross monthly income compared to other children in this priority level must be enrolled first;
(2) second priority must be given to children in [kindergarten and grades 1 through 3] and their siblings, if their families need school age childcare services because of:
   (i) enrollment of a child’s legal custodian in vocational training under a degree program,
   (ii) employment of a child’s legal custodian, or
   (iii) physical or mental incapacitation of a child’s legal custodian;
(3) third priority must be given to children in grades [4 through 9],...
Latch-Key Program Act

if their families need school age childcare services because of:

(i) enrollment of a child's legal custodian in vocational training
under a degree program,
(ii) employment of a child's legal custodian, or
(iii) physical or mental incapacitation of a child's legal custodian.
(b) The [board] may not approve a grant from the fund to an applicant
unless the applicant agrees to adopt fee schedules based upon a sliding
income scale set by the [board] under Section 10 of this act.

Section 6. [Grant Application.] An applicant wishing to apply for a
grant from the fund must apply to the [social services fiscal office] in the
manner prescribed by the [board] under Section 10 of this act.

Section 7. [Reapplication.] An applicant that receives a grant in the
first year of the administration of the fund and wishes to receive a grant
in the second year must reapply to the [social services fiscal office] in
the manner prescribed by the [board] under Section 10 of this act.

Section 8. [Grant Amounts.] The [board] may make grants from the
fund to approved applicants for the establishment and maintenance of
a school age childcare program. The amount of each grant awarded by
the [board] must be an amount that is not more than [nine] times the
monetary value of the approved applicants' contribution. The amount
granted by the [board] for use by any single program may not exceed
[27,000] dollars.

Section 9. [Limit on Grant Approval.] The [board] may not approve a
grant from the fund for more than [three] applicants per county.

Section 10. [Rule Adoption.] Before [date], the [board] shall adopt rules
under [insert appropriate reference to state statute] necessary to carry
out this act, including rules specifying:
(1) standards for the hiring of staff for a school age childcare program;
(2) cost and expense standards for the establishment and operation of
a school age childcare program within a school and within a facility other
than a school;
(3) a sliding fee scale for use by school age childcare programs that are
operating under a grant from the fund;
(4) minimum staff to child ratios for a school age childcare program;
(5) physical space requirements for a school age childcare program, in-
cluding indoor and outdoor space;
(6) nutrition requirements for a school age childcare program;
(7) standards for the provision of emergency health services in a school
age childcare program;
(8) application guidelines and deadlines; and
(9) a method for establishing priority of applicants.

Section 11. [Severability.] [Insert severability clause.]
Suggested State Legislation

1 Section 12. [Repealer] [Insert repealer clause.]

1 Section 13. [Effective Date] [Insert effective date.]
Mandatory Protective Behavior Instruction Act

Instruction in protective behaviors is required under this act, based on Wisconsin law, for pupils in each public school grade from kindergarten through grade 5. In addition, the act requires the department of education, in conjunction with the department of health and human services, to develop and conduct training programs in protective behaviors for school and county employees and to provide technical assistance to schools on the development of protective behavior programs.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Mandatory Protective Behavior Instruction Act.

Section 2. [Assistance to Schools for Protective Behaviors Programs.]

(a) The purpose of this section is to enable and encourage public and private schools to develop protective behaviors programs and anti-offender behavior programs designed to assist minors and their parents or guardians in recognizing, avoiding, preventing and halting physically or psychologically intrusive or abusive situations that may be harmful to minors.

(b) The [department of public instruction] in conjunction with the [department of health and social services], and after consulting with established organizations providing services with a focus on children of risk, shall:

(1) develop and conduct protective behaviors training programs for the professional staff of public and private schools and counties. The training programs shall include information on how to assist a minor and his or her parent or guardian in recognizing, avoiding, preventing and halting physically or psychologically intrusive or abusive situations that may be harmful to the minor, including child abuse, sexual abuse and child enticement. The training programs shall emphasize how to help minors to develop positive psychological, emotional, and problem-solving responses to such situations and avoid relying on negative, fearful or solely reactive methods of dealing with such situations. The training programs shall also include information on the detection, by other minors, their parents or guardians and school staff, of conditions that indicate that a minor is being or has been subjected to such situations; the proper action to take when there is reason to believe that a minor is being or has been subjected to such situations; and the coordination of school protective behaviors programs and activities with programs and activities of other state and local agencies.
persons other than the professional staff of public and private schools
and counties may attend the training programs. The [department] may
charge such persons a fee sufficient to cover the increased costs of
materials, but not personnel cost, to the [department] of their participa-
tion in the programs. The [department] may not deny any resident of
[state] the opportunity to participate in a program if the person is
unable to pay any fee;
(2) provide consultation and technical assistance to public and
private schools for the development and implementation of protective
behaviors programs and the coordination of those programs with pro-
grams of other state and local agencies.

Section 3. [Require School Boards to Provide Instruction.] Each school
board shall provide an instructional program designed to give pupils
knowledge of effective means by which pupils may recognize, avoid,
prevent and halt physically or psychologically intrusive or abusive
situations which may be harmful to pupils, including child abuse, sex-
ual abuse and child enticement. Instruction shall be designed to help
pupils develop positive psychological, emotional and problem-solving
responses to such situations and avoid relying on negative, fearful or
solely reactive methods of dealing with such situations. Instruction
shall include information on available school and community prevent-
tion and intervention assistance or services and shall be provided to
pupils in elementary schools.

Section 4. [Severability.] [Insert severability clause.]

Section 5. [Repealer.] [Insert repealer clause.]

Section 6. [Effective Date.] [Insert effective date.]
State Baccalaureate Education System Trust

This legislation, based on Michigan’s “Best” program, creates a baccalaureate education system trust, prescribing the powers and duties of the trust and its board of directors. The law provides for advance tuition payment contracts; establishes an advance tuition payment fund; provides for the fund’s administration; and provides for remedies.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the [state] Education Trust Act.

Section 2. [Definitions.] As used in this act, except where the context clearly requires otherwise:

(1) “Advance tuition payment contract” means a contract entered into by the trust and a purchaser pursuant to Section 4 to provide for the higher education of a qualified beneficiary.

(2) “Board” means the [board of directors] of the [state] education trust described in Section 8.

(3) “Fund” means the advance tuition payment fund created in Section 7.

(4) “Purchaser” means a person who makes or is obligated to make advance tuition payments pursuant to an advance tuition payment contract.

(5) “Qualified beneficiary” means any resident of this state.

(6) “State institution of higher education” means a college or university [insert appropriate statutory reference.]

(7) “Trust” means the [state] education trust created in Section 3.

(8) “Tuition” means the quarter or semester charges imposed to attend a state institution of higher education and all mandatory fees required as a condition of enrollment as determined by the [board].

(9) “Weighted average tuition cost of state institutions of higher education” means the tuition cost arrived at by adding the products of the annual undergraduate tuition cost at each state institution of higher education and its total number of undergraduate fiscal year equated students, and then dividing the gross total of this cumulation by the total number of undergraduate fiscal year equated students attending state institutions of higher education.

Section 3. [Establishment of Education Trust, Board of Directors.]

(1) There is created a public body corporate and politic to be known as the [state] education trust. The trust shall be within the [treasury department], but shall exercise its prescribed statutory powers, duties,
and functions independently of the head of that [department].

(2) The purposes, powers, and duties of the [state] education trust are
vested in and shall be exercised by a [board of directors].

Section 4. [Advance Tuition Payment Contracts.]

(a) The trust, on behalf of itself and the state, may contract with a
purchaser for the advance payment of tuition by the purchaser for a
qualified beneficiary to attend any of the state institutions of higher
education to which the qualified beneficiary is admitted, without fur-
ther tuition cost to the qualified beneficiary. In addition, an advance
tuition payment contract shall set forth in a clear, understandable man-
ner all of the following:

(1) The amount of the payment or payments required from the pur-
chaser on behalf of the qualified beneficiary.

(2) The terms and conditions for making the payment, including,
but not limited to, the date or dates upon which the payment, or por-
tions of the payment, shall be due.

(3) Provisions for late payment charges and for default.

(4) The name and age of the qualified beneficiary under the con-
tract. The purchaser, with the approval of and on conditions determined
by the trust, may subsequently substitute another person for the
qualified beneficiary originally named.

(5) The number of credit hours covered by the contract.

(6) The name of the person entitled to terminate the contract, which,
as provided by the contract, may be the purchaser, the qualified bene-
ficiary, or a person to act on behalf of the purchaser or qualified
beneficiary, or any combination of these persons.

(7) The terms and conditions under which the contract may be ter-
minated and the amount of the refund, if any, to which the person ter-
minating the contract, or specifically the purchaser or designated
qualified beneficiary if the contract so provides, shall be entitled upon
termination.

(8) The assumption of a contractual obligation by the trust to the
qualified beneficiary on its own behalf and on behalf of the state to
provide for credit hours of higher education, not to exceed the credit
hours required for the granting of a baccalaureate degree, at any state
institution of higher education to which the qualified beneficiary is
admitted. The advance tuition payment contract shall provide for the
credit hours of higher education that a qualified beneficiary may
receive under the contract if the qualified beneficiary is not entitled
to in-state tuition rates.

(9) The period of time from the beginning to the end of which the
qualified beneficiary may receive the benefits under the contract.

(10) All other rights and obligations of the purchaser and the trust.

(11) Other terms, conditions, and provisions as the trust considers
in its sole discretion to be necessary or appropriate.

(b) The form of any advance tuition payment contract to be entered
into by the trust shall first be approved by the [state administrative
board]
(c) The trust shall make any arrangements that are necessary or appropriate with state institutions of higher education in order to fulfill its obligations under advance tuition payment contracts, which arrangements may include, but need not be limited to, the payment by the trust of the then actual in-state tuition cost on behalf of a qualified beneficiary to the state institution of higher education.

(d) An advance tuition payment contract shall provide that the trust provide for the qualified beneficiary to attend a community or junior college in this state before entering a state institution of higher education if the beneficiary so chooses and that the contract may be terminated pursuant to Section 6 after completing the requirements for a degree at the community or junior college in this state or before entering the state institution of higher education.

(e) An advance tuition payment contract may provide that, if after a number of years specified in the contract the contract has not been terminated or the qualified beneficiary's rights under the contract have not been exercised, the trust, after making a reasonable effort to locate the purchaser and qualified beneficiary or the agent of either, shall retain the amounts otherwise payable and the rights of the qualified beneficiary, the purchaser, or the agent of either shall be considered terminated.

Section 5. [Contract Plans.]

(a) At a minimum, the trust shall offer advance tuition payment contracts of the two types set forth in subsections (b) and (c), to be known as Plan A and Plan B, respectively.

(b) Under Plan A:

(1) A payment or series of payments shall be required from the purchaser on behalf of a qualified beneficiary.

(2) If an advance tuition payment contract is terminated before a qualified beneficiary earns a high school diploma or reaches the age of majority, or pursuant to section 6(a)(4), the trust shall refund the face amount of the payment or payments in accordance with the terms of the contract, less any administrative fee specified in the contract, but shall not refund any investment income attributable to the payments.

(3) Except as provided in paragraph (4), the trust shall provide for the qualified beneficiary to attend a state institution of higher education at which the qualified beneficiary attends for the number of credit hours required by the institution for the awarding of a baccalaureate degree. Without further tuition cost to the qualified beneficiary, except as provided in section 4(a) for a qualified beneficiary who is not entitled to in-state tuition rates.

(4) As an alternative to paragraph (3), the trust shall provide for the qualified beneficiary to attend a state institution of higher education at which the qualified beneficiary attends for a fixed number of credit hours, as permitted by the trust, less than the total number of credit hours required by the institution for the awarding of a baccalaureate degree, without further tuition cost to the qualified bene-
Suggested State Legislation

28 9 for that fixed number of credit hours, except as provided in sec-
29 tion 4(a) for a qualified beneficiary who is not entitled to in-state tui-
30 tion rates.
31   (c) Under Plan B:
32      (1) A payment or series of payments shall be required on behalf
33 of a qualified beneficiary.
34      (2) If an advance tuition payment contract is terminated before a
35 qualified beneficiary earns a high school diploma or reaches the age
36 of majority, or pursuant to section 6(a)(4), the trust shall refund the
37 face amount of the payment or payments in accordance with the terms
38 of the contract, less any administrative fee specified in the contract,
39 together with all or a specified portion of accrued investment income
40 attributable to the payment or payments as may be agreed to in the
41 contract.
42      (3) Except as provided in paragraph (4), the trust shall provide for
43 the qualified beneficiary to attend a state institution of higher educa-
44 tion at which the qualified beneficiary attends for the number of credit
45 hours required by the institution for the awarding of a baccalaureate
46 degree, without further tuition cost to the qualified beneficiary, ex-
47 cept as provided in section 4(a) for a qualified beneficiary who is not
48 entitled to in-state tuition rates.
49      (4) As an alternative to paragraph (3), the trust shall provide for
50 the qualified beneficiary to attend a state institution of higher educa-
51 tion at which the qualified beneficiary attends for a fixed number of
52 credit hours, as permitted by the trust, less than the total number of
53 credit required by the institution for the awarding of a baccalaureate
54 degree, without further tuition cost to the qualified beneficiary for that
55 fixed number credit hours, except as provided in section 4(a) for a
56 qualified beneficiary who is not entitled to in-state tuition rates.
57      (d) Contracts required to be so offered by this section may require
58 that payment or payments from a purchaser, on behalf of a qualified
59 beneficiary who may attend a state institution of higher education in
60 less than four years after the date the contract is entered into by the
61 purchaser, be based upon attendance at a certain state institution of
62 higher education or at that state institution of higher education with
63 the highest prevailing tuition cost for the number of credit hours
64 covered by the contract.
65      (e) Contracts required to be offered by this section shall be offered
66 with two alternatives. One alternative shall offer advance tuition pay-
67 ment contracts that provide the credit hours of higher education
68 necessary for the granting of a baccalaureate degree at any of the state
69 institutions of higher education. The second alternative shall provide
70 that the number of credit hours of higher education a qualified
71 beneficiary may receive under the contract will be reduced to a percent-
72 age of the credit hours required for the granting of a baccalaureate
73 degree at a state institution of higher education, as specified in the
74 contract, if the qualified beneficiary enrolls in a state institution of
75 higher education imposing at the time the qualified beneficiary enrolls
76 an annual tuition rate that is greater than [105] percent of the weighted
average annual tuition rate of all state institutions of higher education. This subsection shall not preclude a state institution of higher education at which a qualified beneficiary is entitled to receive less than the minimum number of credit hours required for the granting of a baccalaureate degree from providing that qualified beneficiary, without further tuition charges, the additional credit hours necessary to receive a baccalaureate degree.

(f) If a beneficiary of an advance tuition payment contract with either an alternative one or alternative two designation, as described in subsection (e), attends a community or junior college for two years at the in-district tuition rate, that beneficiary then may attend any state institution of higher education at no additional tuition cost and receive the number of credit hours necessary for the awarding of a baccalaureate degree.

Section 6. [Termination of Contracts.]
(a) An advance tuition payment contract shall authorize a termination of the contract when any one of the following occurs:
(1) The qualified beneficiary dies.
(2) The qualified beneficiary is not admitted to a state institution of higher education after making proper application.
(3) The qualified beneficiary certifies to the trust that he or she has decided to attend and has been accepted by a state independent, degree-granting institution of postsecondary education recognized by the state board of education or, after he or she has a high school diploma or has reached the age of majority, he or she has decided not to attend a state institution of higher education and requests, in writing, before [July 15] of the year in which the qualified beneficiary desires to terminate the contract, that the advance tuition payment contract be terminated.
(4) Other circumstances, determined by the trust and set forth in the advance tuition payment contract, occur.
(b) Except as provided in section 5(b)(2) and (c)(2), an advance tuition payment contract shall provide for a refund pursuant to this section to a person to whom the refund is payable under the contract upon termination of the contract. If the qualified beneficiary has a high school diploma or has reached the age of majority, and attends an institution of higher education, the amount of a refund, except as provided in subsection (d), shall be the lesser of the average tuition cost of all state institutions of higher education on the date of termination of the contract, or the face amount of the payment or payments and any accrued investment income attributable to the payment or payments, if he or she is covered by alternative one, as described in section 5(e), or the lowest tuition cost of all state institutions of higher education on the date of termination of the contract if he or she is covered by alternative two or does not attend an institution of higher education. The amount of a refund shall be reduced by an appropriate percentage if the purchaser entered into an advance tuition payment contract that provided for a fixed number of credit hours less than the
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35 total number of credit hours required by a state institution of higher
36 education for the awarding of a baccalaureate degree, by the amount
37 transferred to a community or junior college on behalf of a qualified
38 beneficiary when the contract is terminated as provided in section 4(d).
39 and by the amount transferred to a state institution of higher educa-
40 tion on behalf of a qualified beneficiary. Termination of a contract and
41 the right to receive a refund shall not be authorized under the con-
42 tract if the qualified beneficiary has completed more than [one-half]
43 of the credit hours required by the state institution of higher educa-
44 tion for the awarding of a baccalaureate degree. However, this provi-
45 sion shall not affect the termination and refund rights of a graduate
46 of a community or junior college. Pursuant to this subsection and ex-
47 cept as provided by subsection (c), the trust shall make refund payments
48 in equal installments over [four] years and not later than [August 15]
49 of the year due.
50 (c) An advance tuition payment contract shall authorize a person,
51 who is entitled under the advance tuition payment contract to ter-
52 minate the contract, to direct payment of the refund to an independ-
53 ent degree-granting college or university located in this state or to
54 a community or junior college located in this state. If directed to make
55 payments pursuant to this subsection, the trust shall transfer to the
56 designated institution an amount equal to the tuition due for the
57 qualified beneficiary, but the trust shall not transfer a cumulative
58 amount greater than the refund to which the person is entitled. If the
59 refund exceeds the total amount of transfers directed to the designated
60 institution, the excess shall be returned to the person to whom the re-
61 fund is otherwise payable.
62 (d) Notwithstanding any other section of this act, the amount of a
63 refund paid upon termination of the advance tuition payment contract
64 by a person who directs the trust pursuant to subsection (c) to transfer
65 the refund to an independent degree-granting college or university
66 located in this state shall not be less than the prevailing weighted
67 average tuition cost of state institutions of higher education for the
68 number of credit hours covered by the contract on the date of termina-
69 tion. In calculating the amount of a refund for an advance payment
70 contract containing the restrictions provided by section (5Xe), the
71 prevailing weighted average tuition cost shall be based upon only those
72 state institutions of higher education at which the qualified beneficiary
73 could have received sufficient credit hours for a baccalaureate degree.

Section 7. [Advance Tuition Payment Funds Establishment.]
1 (a) There is created under the jurisdiction and control of the [board]
2 an advance tuition payment fund. Payments received by the trust from
3 purchasers on behalf of qualified beneficiaries or from any other source,
4 public or private, shall be placed in the fund. The fund may be divided
5 into separate accounts.
6 (b) Assets of the trust shall not be considered state money [insert ap-
7 propriate references to statutes].
8 (c) Unless otherwise provided by resolution of the [board], assets of
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the trust shall be expended in the following order of priority:

(1) To make payments to state institutions of higher education on
behalf of qualified beneficiaries.

(2) To make refunds upon termination of an advance tuition pay-
ment contract.

(3) To pay the costs of administration and organization of the trust
and the fund.

(d) Assets of the trust may be invested in any instrument, obliga-
tion, security, or property considered appropriate by the trust and may
be pooled for investment purposes with investments of the state, in-
cluding, but not limited to, state pension funds, on such terms and con-
ditions as are agreeable to the trust.

Section 8. [Board of Directors — Appointments, General Operations.]

(a) The [board] shall consist of the [state treasurer], and [eight] other
members with knowledge, skill, and experience in the academic, busi-
ness, or financial field, who shall be appointed by the governor, by
and with the advice and consent of the senate. Not more than [two]
of the [eight] appointed members of the board shall be, during their
term of office on the [board], either officials, appointees, or employees
of this state. Of the [six] remaining members appointed by the gover-
ror, [one] shall be appointed from [one] or more nominees of the [speaker
of the house of representatives], [one] shall be appointed from [one] or
more nominees of the [majority leader of the senate], [one] shall be a
president of a state institution of higher education who shall be ap-
pointed from nominees of the [president’s council of state colleges and
universities], [one] shall be a president of a community or junior col-
lege who shall be appointed from nominees of the [state community
college association], and [one] shall represent the interests of indepen-
dent degree-granting colleges and universities located in this state.

(Six) of the [eight] appointed members shall serve for fixed terms. Of
the [six] such members first appointed, [two] shall be appointed for a
term that expires [date], [two] shall be appointed for a term that ex-
pires [date], and [two] shall be appointed for a term that expires [date].
Upon completion of each fixed term, a member shall be appointed for
a term of [three] years. A member shall serve until a successor is ap-
pointed, and a vacancy shall be filled for the balance of the unexpired
term in the same manner as the original appointment. The chief ex-
ecutive officer or director of any state department, who is a designated
member of or an appointee to the [board], may appoint a deputy to serve
as a voting member of the [board] in the absence of the chief executive
officer or director. The governor shall designate one member of the
[board] to serve as its chairperson. The governor shall appoint [two]
members of the [board] to serve at the pleasure of the governor, [one]
of whom shall be designated by the governor as the [president and chief
executive officer] of the trust and one of whom shall be designated by
the governor as the [vice-president of the trust].

(b) Members of the [board], other than the [president] and [vice-

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without compensation, but shall receive reasonable reimbursement for actual and necessary expenses.
(c) The [board] may delegate to its [president], [vice-president], or others such functions and authority as the [board] considers necessary or appropriate. These functions may include, but are not limited to, the oversight and supervision of employees of the trust.
(d) A majority of the members of the [board] serving shall constitute a quorum for the transaction of business at a meeting of the [board], or the exercise of a power or function of the trust, notwithstanding the existence of one or more vacancies. Voting upon action taken by the [board] shall be conducted by majority vote of the members present in person at a meeting of the [board], and, if authorized by the bylaws of the [board] and when a quorum is present in person at the meeting, by use of amplified telephonic equipment. The [board] shall meet at the call of the chair and as may be provided in the bylaws of the trust. Meetings of the [board] may be held anywhere within the state.
(e) The business which the [board] may perform shall be conducted at a public meeting of the [board] held in compliance with the [state open meetings act]. Public notice of the time, date, and place of the meeting shall be given in the manner required by [insert appropriate reference to state law].
(f) A writing prepared, owned, used, in the possession of, or retained by the [board] in the performance of an official function shall be made available to the public in compliance with the [state freedom of information act].

Section 9. [Board of Directors — Powers.] In powers granted by other provisions of this act, the [board] shall have the powers necessary or convenient to carry out and effectuate the purposes, objectives, and provisions of this act, the purposes and objectives of the trust, and the powers delegated by other laws or executive orders, including, but not limited to, the power to:
(1) Invest any money of the trust, at the [board’s] discretion, in any instruments, obligations, securities, or property determined proper by the [board], and name and use depositories for its money.
(2) Pay money to state institutions of higher education from the trust.
(3) Impose reasonable residency requirements for qualified beneficiaries.
(4) Impose reasonable limits on the number of participants in the trust.
(5) Segregate contributions and payments to the trust into various accounts and funds.
(6) Contract for goods and services and engage personnel as is necessary and engage the services of private consultants, actuaries, managers, legal counsel, and auditors for rendering professional, management, and technical assistance and advice, payable out of any money of the trust.
(7) Solicit and accept gifts, grants, loans, and other aids from any person or the federal, state, or a local government or any agency of
the federal, state, or a local government, or to participate in any other
way in any federal, state, or local government program.
(8) Charge, impose, and collect administrative fees and charges in
connection with any transaction and provide for reasonable penalties,
including default, for delinquent payment of fees or charges or for fraud.
(9) Procure insurance against any loss in connection with the trust's
property, assets, or activities.
(10) Sue and be sued; to have a seal and alter the same at pleasure;
to have perpetual succession; to make, execute, and deliver contracts,
conveyances, and other instruments necessary or convenient to the ex-
cercise of its powers; and to make and amend bylaws.
(11) Enter into contracts on behalf of the state.
(12) Administer the funds of the trust.
(13) Indemnify or procure insurance indemnifying any member of
the [board] from personal loss or accountability from liability resulting
from a member's action or inaction as a member of the [board], in-
cluding, but not limited to, liability asserted by a person on any bonds
or notes of the authority.
(14) Impose reasonable time limits on use of the tuition benefits pro-
vided by the trust, if the limits are made a part of the contract.
(15) Define the terms and conditions under which money may be
withdrawn from the trust, including, but not limited to, reasonable
charges and fees for any such withdrawal, if the terms and conditions
are made a part of the contract.
(16) Provide for receiving contributions in lump sums or periodic
sums.
(17) Establish policies, procedures, and eligibility criteria to imple-
ment this act.
(18) Enter into arrangements with state institutions of higher educa-
ation for the trust to offer on behalf of the institution advance tuition
payment contracts under which the state institution of higher educa-
tion will be contractually obligated to provide a beneficiary under the
contract with credit hours of higher education in addition to those re-
quired for a baccalaureate degree.

Section 10. [Annual Audit and Reporting.] The [board] shall annual-
ly prepare or cause to be prepared an accounting of the trust and shall
transmit a copy of the accounting to the governor, [the majority leader
of the senate, the speaker of the house of representatives, and the
respective minority leaders of the senate and house of representatives].
The [board] shall also make available the accounting of the trust to
the purchasers of the trust. The accounts of the [board] shall be sub-
ject to annual audits by the state [auditor general] or a certified public
accountant appointed by the [auditor general].

Section 11. [Actuary.] (a) The trust shall be administered in a manner reasonably designed
to be actuarially sound such that the assets of the trust will be suffi-
cient to defray the obligations of the trust.
(b) In the accounting of the trust made pursuant to Section 10, the
trust [board] shall annually evaluate and cause to be evaluated by a
nationally recognized actuary the actuarial soundness of the trust and
determine the additional assets needed, if any, to defray the obliga-
tions of the trust. If there are not funds sufficient to ensure the ac-
tuarial soundness of the trust as determined by the nationally recog-
nized actuary, the trust shall adjust payments of subsequent purchasers
to ensure its actuarial soundness. If there are insufficient numbers of
new purchasers to ensure the actuarial soundness of a plan of the trust,
the available assets of the trust attributable to the plan shall be im-
mediately prorated among the then existing contracts, and these shares
shall be applied, at the option of the person to whom the refund is
payable or would be payable under the contract upon termination of
the contract, either towards the purposes of the contract for a qualified
beneficiary or disbursed to the person to whom the refund is payable
or would be payable under the contract upon termination of the
contract.

(c) An advance tuition payment contract shall not be entered by the
trust until the internal revenue service has issued a favorable ruling
or opinion that the purchaser of the advance tuition payment contract
will not be considered actually or constructively to be in receipt of in-
come. If an unfavorable ruling or opinion with regard to this issue is
rendered by the internal revenue service, the [board] shall present a
report to the legislature outlining recommendations for the modifica-
tion and continuance of the program including a recommendation of
whether the trust may offer contracts on behalf of itself to provide for
the advance purchase of incremental portions of the number of credit
hours necessary for a baccalaureate degree.

(d) Before entering into advance tuition payment contracts with pur-
chasers, the state shall solicit answers to appropriate ruling requests
from the securities and exchange commission regarding the applica-
tion of federal security laws to the trust. No contracts shall be entered
without the authority making known the status of the request.

Section 12. [Court-Jurisdiction.] State institutions of higher education,
purchasers, and qualified beneficiaries may enforce this act and any con-
tract entered into pursuant to this act in the [insert appropriate court].

Section 13. [Tax Exemption of Trust.] The property of the trust and
its income and operation shall be exempt from all taxation by this state
or any of its political subdivisions.

Section 14. [Authority to Contract Services.] The trust, in its discre-
tion may contract with others, public or private, for the provision of
all or a portion of the services necessary for the management and opera-
tion of the trust. The trust shall also endeavor to work with private
sector investment managers, state institutions of higher education, and
independent degree-granting colleges and universities in this state to
study the feasibility of instituting programs between these parties that
insure full tuition payment upon purchase of a prepayment plan. The
trust shall evaluate the feasibility and actuarial soundness of a prepay-
ment plan exclusively for community and junior colleges. The [board]
shall submit a report to the legislature before [date] regarding its suc-
cess at instituting programs between private sector investment man-
agers, state institutions of higher education, and independent degree-
granting colleges and universities of the state that insure full tuition
prepayment plans.

Section 15. [Limitation on Use of Trust Funds.] The assets of the trust
shall be preserved, invested, and expended solely pursuant to and for
the purposes set forth in this act and shall not be loaned or otherwise
transferred or used by the state for any purpose other than the pur-
poses of this act. This section shall not be construed to prohibit the
trust from investing in, by purchase or otherwise, bonds, notes, or other
obligations of the state, an agency of the state, or an instrumentality
of the state.

Section 16. [Admittance into Higher Education Institutions.] Nothing
in this act or in an advance tuition payment contract entered into pursu-
ant to this act shall be construed as promise or guarantee by the
trust or the state that a person will be admitted to a state institu-
tion of higher education or to a particular state institution of higher edu-
cation, or will be allowed to continue to attend a state institution of higher
education after having been admitted, or will be graduated from a state
institution of higher education.

Section 17. [Exemption from Uniform Securities Act.] An advance
tuition payment contract shall be exempt from the [uniform securities
act]. An advance tuition payment contract may not be sold or other-
wise transferred by the purchaser or qualified beneficiary without the
prior approval of the trust.

Section 18. [Tax Deductions.] Pursuant to [insert appropriate
reference to state tax law], the purchaser may deduct from taxable in-
come the following payments made by the purchaser in the tax year:
(1) The amount of payment made under an advance tuition payment
contract.
(2) The amount of payment made under a contract with a private
sector investment manager that meets all of the following criteria:
(i) The contract is certified and approved by the [board] to provide
equivalent benefits and rights to purchasers and beneficiaries as an
advance tuition payment contract.
(ii) The contract applies only for a state institution of higher educa-
tions or a community or junior college.
(iii) The contract provides for enrollment by the contract’s qualified
beneficiary in not less than [four] years after the date on which the
contract is entered into.
(iv) The contract is entered into either:
17   (A) After the purchaser has had his or her offer to enter into an
18   advance tuition payment contract rejected by the [board], if the [board]
19   determines that the trust cannot accept an unlimited number of
20   enrollees upon an actuarially sound basis.
21   (B) After the [board] determines that the trust can accept an
22   unlimited number of enrollees upon an actuarially sound basis.

1   Section 19. [Severability.] [Insert severability clause.]
1   Section 20. [Repealer.] [Insert repealer clause.]
1   Section 21. [Effective Date.] [Insert effective date.]
Schools for the Future Act

This act, based on Washington law, establishes a six-year pilot project that will provide authority and funding for selected school projects to request to operate without regard to certain state rules and regulations; demonstrate how schools can be restructured to foster creativity, professionalism and initiative in improving the learning and teaching climate to enhance the performance of students; provide professional staff in such schools with 10 additional days for program planning and development; establish a school board for the twenty-first century, co-chaired by the governor and the superintendent of public instruction, to review and select the pilot schools, and to monitor the program; establish accountability systems for each school project to evaluate progress that is being made, and to establish the framework for transferring such experience to other schools. The legislation allows public and independent universities and colleges to develop a new two-year professional graduate school curriculum leading to a Master in Teaching degree; directs the higher education coordinating board, the state board of education and the office of the superintendent of public instruction to cooperate in the planning and development of a professional teacher preparation degree program; and includes the following components in the professional teacher preparation program: a baccalaureate degree in the humanities, arts or sciences as a prerequisite for entrance into the master in teaching program; a graduate level curriculum; a one year's paid internship under the supervision of mentor teachers and principals; and a required collaborative intern selection and supervision process between the school districts and schools of education.

The act also includes development of an enhanced principal selection and preparation program, including a release time internship, which would emphasize increased opportunities for exercising professional judgment at the school level, and development of undergraduate and graduate scholarship and work study programs to attract qualified candidates to the teaching profession, with an emphasis on minority students.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Schools for the Future Act.

Section 2. [Schools for Twenty-First Century Pilot Program-Establishment.]

(a) A school for the twenty-first century pilot program is established to foster change in the state common school system. The program will enable educators and parents of selected schools or school districts to
Suggested State Legislation

restructure certain school operations and to develop model school programs which will improve student performance. The program shall include an evaluation of the projects and be accountable for student progress. The purpose of the program is to determine whether increasing local decision-making authority will produce more effective learning.

(b) The legislature intends to encourage educational creativity, professionalism, and initiative by:

(1) providing schools an opportunity to develop new methods and procedures, through the temporary waiver of certain state statutes or administrative rules; and

(2) providing selected public schools or school districts with the technology, services, and staff essential to enhance learning.

Section 3. [Selection of Projects.] The [state board of education], with the assistance of the [superintendent of public instruction], shall develop a process for schools or school districts to apply to participate in the schools for the twenty-first century pilot program. The [board] shall review and select projects for grant awards, and monitor and evaluate the schools for the twenty-first century pilot program. The [board] shall develop criteria to evaluate the need for the waivers of state statutes or administrative rules as identified under Section 10. The [state board] shall cooperate with the [governor's] task force on schools for the twenty-first century.

Section 4. [Task Force on Schools for the Twenty-First Century Establishment.] (a) The [governor] shall appoint a task force on schools for the twenty-first century. The task force shall assist and cooperate with the [state board of education] in the development of the process, and review and selection of projects under Section 3 of this act. The [state board] is directed, in developing the criteria for waivers, to take into consideration concerns and recommendations of the task force.

(b) The task force of [ten] people shall be appointed by the [governor]. Appointed members who are not legislators shall be reimbursed for travel expenses under [insert reference to appropriate state law]. Appointed members who are members of the legislature shall be reimbursed for travel expenses under [insert reference to appropriate state law]. Members of the task force shall serve for a period of [six] years.

Section 5. [Projects Approved by State Board of Education.] The process, review, and selection of projects to be developed in Section 3 of this act shall be approved by the [state board of education]. The [governor's] task force on schools for the twenty-first century shall recommend projects for approval to the [state board of education].

Section 6. [Pilot Project Applications.] Initial applications to participate in the schools for the twenty-first century pilot program shall be submitted by the school district [board of directors] to the [state board of education] not later than [insert date]. Subject to available funding,
additional applications may be submitted for [board] consideration by [insert date] of subsequent years. Each application shall contain a proposed plan which:

1. enumerates specific activities to be carried out as part of the pilot school(s) project;
2. commits all parties to work cooperatively during the term of the pilot project;
3. includes provisions for certificated school staff, and classified school employees whose primary duties are the daily educational instruction of students, to be employed on supplemental contracts with additional compensation for a minimum of [ten] additional days beyond the general state funded school year allocations, and staff development time as provided by legislative appropriation, and district resources, when appropriate, may be used to fund the employment of staff beyond the [ten] additional days for the purposes of the pilot project;
4. includes budget plans for the project and additional anticipated sources of funding, including private grants and contributions, if any;
5. identifies the technical resources desired, the potential costs of those resources, and the institutions of higher education, educational service districts, or consultants available to provide such services;
6. identifies the evaluation and accountability processes to be used to measure school-wide student and project performance, and identifies a model which provides the basis for a staff incentive pay system. Implementation of the staff incentive pay system is not required;
7. justifies each request for waiver of specific state statutes or administrative rules during the first [two] years of the project;
8. includes a written statement that school directors and administrators are willing to exempt the pilot school(s) from specifically identified local rules, as needed;
9. includes a written statement that the school directors and the local bargaining agents will modify those portions of their local agreements as applicable for the pilot school(s) project; and
10. includes written statements of support from the district’s [board of directors], the district [superintendent], the principal and staff of the building requesting to become a pilot school; and statements of support, willingness to participate, or concerns from any interested parent, business, or community organization.

Section 7. [Selection Criteria] The [board] and the task force in reviewing project proposals, shall, subject to money being appropriated by the legislature for this purpose, select:

1. not more than [twenty-one] projects during each biennium for the schools for the twenty-first century pilot program;
2. at least [one] entire school district if the application is consistent with the requirements under Sections 3 and 6 of this act;
3. projects which reflect a balance among elementary, [junior high or middle schools], and high schools. They should also reflect, as much as possible, a balance among geographical areas and school characteristics and sizes.
Section 8. [Administration of Grants.]
(a) The [superintendent of public instruction] shall administer Sections 3 through 15 of this act and is authorized to award grant funding, subject to money being appropriated by the legislature for this purpose for pilot projects selected by the [state board of education] and the task force under Section 7 of this act.
(b) The [superintendent of public instruction] shall distribute the initial award grants by [date]. The initial schools for the twenty-first century pilot projects shall commence with the [date] school year.
(c) The twenty-first century pilot school projects may be conducted for up to [six] years, if funds are so provided. Subject to [state board] approval and continued state funding, pilot projects initially funded for [two] years may be extended for a total period not to exceed [six] years. Future funding shall be conditioned on a positive evaluation of the project.

Section 9. [Superintendent of Public Instruction May Accept Gifts, Grants or Contributions.] The [superintendent of public instruction] may accept, receive, and administer for the purposes of Sections 3 through 15 of this act such gifts, grants and contributions as may be provided from public and private sources for the purposes of Sections 3 through 15 of this act.

Section 10. [Authority to Grant Waivers.] The [state board of education], where appropriate, or the [superintendent of public instruction], where appropriate, is authorized to grant waivers to pilot project districts from the provisions of statutes or administrative rules relating to: the length of the school year; teacher contact hour requirements; program hour offerings; student to teacher ratios; salary aid compliance requirements; the commingling of funds appropriated by the legislature on a categorical basis for such programs as, but not limited to, highly capable students, transitional bilingual instruction, and learning assistance; and other administrative rules which in the opinion of the [state board of education] or the opinion of the [superintendent of public instruction] may need to be waived in order to implement a pilot project proposal.

Section 11. [Specific Rules shall not be Waived.] State rules dealing with public health, safety, and civil rights, including accessibility by the handicapped, shall not be waived. A school district may request the [state board of education] or the [superintendent of public instruction] to ask the United States Department of Education or other federal agencies to waive certain federal regulations necessary to fully implement the proposed pilot project.

Section 12. [Linkage Between Participating School Boards and Colleges and Universities.] The [board] shall ensure that successful applicant school districts will be afforded resource and special support assistance, as specified in legislative appropriations, in undertaking
schools for the twenty-first century pilot program activities. The [board]
shall develop a process that coordinates and facilitates linkages among
participating school districts and colleges and universities. Staff from
schools or districts selected to participate in the schools for the twenty-
first century pilot program shall be given priority consideration for
participation in state sponsored staff development programs and sum-
mer institutes.

Section 13. [Adoption of Rules to Implement Duties.]
(a) The [state board of education] may adopt rules under [state ad-
ministrative procedure act] necessary to implement its duties under
Sections 3 through 15 of this act.
(b) The [superintendent of public instruction] may adopt rules under
[state administrative procedure act] necessary to implement the
[superintendent's] duties under Sections 3 through 15 of this act.

Section 14. [Annual Reports.]
(a) The [state board of education] shall report to the legislature on
the progress of the schools for the twenty-first century pilot program
by [date] of each odd-numbered year, including a recommendation on
the number of additional pilot schools which should be authorized and
funded. The first report shall be submitted by [date].
(b) Each school district selected to participate in the schools for the
twenty-first century pilot project shall submit an annual report to the
[state board of education] on the progress of the pilot project as a con-
dition of receipt of continued funding.

Section 15. [Dissemination of Information.] The [superintendent of
public instruction], through the [state clearinghouse for education in-
formation], shall collect and disseminate to all school districts and other
interested parties information about the schools for the twenty-first
century pilot projects.

Section 16. [Teacher-Internship Program.] The [state board of educa-
tion] shall develop standards for teacher internship programs. The
[state board of education] shall consult with institutions of higher
education offering teacher preparation programs and other groups or
organizations having an interest in teacher preparation issues as it
develops the standards including provisions for requiring cooperative
agreements between public or private institutions of higher education
and schools or school districts. The [state board of education] shall
establish internship program requirements for initial and professional
teacher certification and coordinate these requirements with the begin-
ing teacher assistance program. The [state board of education] shall
also consider providing for stipends for candidates interning at public
schools and the appropriate length of the internship. The standards
shall be adopted no later than [date].

Section 17. [Development of Post-Baccalaureate Professional Teacher

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Preparation Programs.

(a) The [state board of education] and the [higher education coordinating board] shall work cooperatively to develop the standards for the implementation of a post-baccalaureate professional teacher preparation program that results in the acquisition of a masters degree in teaching. The program shall:

(1) build upon the program of courses required for teacher certification;

(2) provide for the application of academic theory to classroom practice; and

(3) require an internship which meets the standards established in Section 16 of this act.

(b) In developing the standards under subsection (a), the [state board of education] shall consult with institutions of higher education offering teacher preparation programs, the [higher education coordinating board], and other groups or organizations having an interest in teacher preparation issues.

Section 18. [Requirements for Certification.]

(a) The [state board of education] shall implement rules providing that all individuals qualifying for an initial teaching certificate after [date], shall possess a baccalaureate degree in the arts, sciences, and/or humanities and have fulfilled the requirement for teacher certification provided by [insert reference to appropriate state law].

(b) The initial certificate shall be valid for [two] years.

(c) Certificate holders may renew the certificate for a [three] year period by providing proof of acceptance and enrollment in an approved masters degree program. A second renewal, for a period of [two] years, may be granted upon recommendation of the degree-granting institution and if the certificate holder can demonstrate substantial progress toward the completion of the masters degree and that the degree will be completed within the [two] year extension period. Under no circumstances may an initial certificate be valid for a period of more than [seven] years.

Section 19. [Masters Degree Required for Continuing Certification.]

The [state board of education] shall implement rules providing that all teachers performing instructional duties and acquiring professional level certificate status after [date], shall possess, as a requirement of continuing status, a masters degree in the arts, sciences, and/or humanities, or a masters degree in teaching as provided for by Section 17. The degree program shall include a teaching internship which meets the standards set forth in Section 16 and 17.

Section 20. [Authority to Develop Minimum Standards for Persons Receiving Certification from Non-Education Fields.] The [state board of education] shall review and develop standards which address the minimum professional educational requirements necessary for initial certification for persons entering education from other fields.
Section 21. [Grandfather of Certain Applicants.] When certification requirements are changed and the effective date for the application of new requirements results in an applicant who has completed the requirements for certification having less time to file and qualify than under the old standard for certification, the applicant shall be allowed to apply and qualify under the old requirements so long as the applicant completes the application process timelines under the old requirements. This section shall apply to all applicants who completed course work for a continuing certificate prior to [date].

Section 22. [Report to Legislature on Requirements for Principals and Other Educational Staff Associates.] The [state board of education] shall review the requirements of preparation programs for school principals and educational staff associates. The results of this review shall be reported to the legislature on or before [date], and shall address:

(1) the appropriateness of existing preparation standards as they relate to the needs of persons fulfilling the role of principal or any one of the educational staff associate roles;
(2) procedures for selection of persons to attend principal preparation programs;
(3) procedures for recruitment and selection of principal candidates who reflect the racial, ethnic, and gender composition of the school population; and
(4) provisions for an internship program for principal candidates, the provision of release time equivalent to not less than one academic semester from normal duties for the interns, and the establishment of mentor principals and supervision by faculty from a public or independent institution of higher education.

Section 23. [Report to Legislature on the Development of a National Assessment and Teacher Certification Process.] The [state board of education] shall monitor the development of studies for establishing a national teacher assessment and certification process and advise the legislature on the applicability of a national teacher assessment and certification process for this state and report to the legislature by [date].

Section 24. [Report to Legislature on Conforming Amendments to the Interstate Agreement on Qualifications of Educational Personnel.] The [state board of education] and the office of the [superintendent of public instruction] shall review the provisions of the interstate agreement on qualifications of educational personnel under [insert reference to existing state law], and advise the governor and the legislature on which interstate reciprocity provisions will require amendment to be consistent with Sections 15 through 20 of this act by [date].

Section 25. [Technical Assistance.] The [superintendent of public instruction] shall provide technical assistance to the [state board of education] in the conduct of the activities described in Sections 16 through 20 of this act.
Suggested State Legislation

Section 26. [Recommended Legislation.] The [higher education coordinating board] and the [state board of education] shall develop recommended legislation for programs to enhance the master in teaching degree program and report to the legislature by [date]. Recommendations for programs to be implemented beginning with the [insert year] school year shall include but not be limited to:

(1) graduate scholarships for master in teaching degree candidates, especially minorities, the disadvantaged, and the needy;
(2) undergraduate work study programs for persons intending to enter a master in teaching program to provide services in the common schools.

Section 27. [Faculty Exchange and other Cooperative Programs]

The state’s public and private institutions of higher education offering teacher preparation programs and school districts are encouraged to explore ways to facilitate faculty exchanges, and other cooperative arrangements, to generate increased awareness and understanding by higher education faculty of the common school teaching experience and increased awareness and understanding by common school faculty of the teacher preparation programs.

Section 28. [Competency Test Required for Admittance into a Professional Teacher Preparation Program.]

(a) No person may be admitted to a professional teacher preparation program within [state] without first demonstrating that he or she is competent in the basic skills required for oral and written communication and computation.

(b) For persons applying for the [insert year] school year and thereafter, if standardized tests approved by the [state board of education] are used to determine competency, a passing grade shall be not less than the median score for all students taking that test who were admitted in the prior school year to that institution of higher education.

(c) The [state board of education] shall adopt rules to implement this section. The rules shall provide for equivalent scores on comparable portions of other standardized tests.

Section 29. [Uniform State Exit Examination for Teacher Certification Candidates.] The [state board of education] shall adopt a uniform state exit examination for teacher certification candidates to be administered at the end of the teacher preparation program. Commencing [date], teacher certification candidates completing a teacher preparation program shall be required to pass an exit examination before being granted an initial certificate. The examination shall test knowledge and competence in subjects including, but not limited to, instructional skills, classroom management, and student behavior and development. The examination shall consist primarily of essay questions. The [state board of education] shall adopt such rules as may be necessary to implement this section.
Section 30. [Report to Legislature on Universal Teacher Candidate Subject Matter Examination.] The [state board of education] shall, no later than [date], recommend to the legislature whether all teacher candidates should be required to pass a written subject matter examination. Before making its recommendations, the [board] shall administer sample endorsement subject matter examinations to a sample number of teacher candidates who qualify to receive endorsements on the basis of other criteria. A limited number of endorsement areas shall be selected for sample testing. The results of such tests shall be made available to the legislature.

Section 31. [In-Service Training Programs.]
(a) The [superintendent of public instruction] is hereby empowered to administer funds now or hereafter appropriated for the conduct of in-service training programs for public school certificated and classified personnel and to supervise the conduct of such programs. The [superintendent of public instruction] shall adopt rules that provide for the allocation of such funds to public school district or educational service district applicants on such conditions and for such training programs as he or she deems to be in the best interest of the public school system; provided, that each district requesting such funds shall have:
(1) conducted a district needs assessment, including plans developed at the building level, to be reviewed and updated at least every [two] years, of certificated and classified personnel to determine identified strengths and weakness of personnel that would be strengthened by such in-service training program;
(2) demonstrated that the plans are consistent with the goals of basic education;
(3) established an in-service training task force and demonstrated to the [superintendent of public instruction] that the task force has participated in identifying in-service training needs and goals; and
(4) demonstrated to the [superintendent of public instruction] its intention to implement the recommendations of the needs assessment and thereafter the progress it has made in providing in-service training as identified in the needs assessment.
(b) The task force required by this section shall be composed of representatives from the ranks of administrators, building principals, teachers, classified and support personnel employed by the applicant school district or educational service district, from the public, and from an institution(s) of higher education, in such numbers as shall be established by the school district [board of directors] or educational service district [board of directors].

Section 32. [Task Force on State Reporting Requirements.] The [superintendent of public instruction] shall appoint a temporary task force to:
(1) survey or otherwise identify state and local district requirements on teachers to complete various forms;
(2) recommend to school districts ways in which local reporting re-
Suggested State Legislation

7 requirements might be combined and streamlined; and
8 (3) develop ways in which state reporting requirements might be com-
9 bined and streamlined.

1 Section 33. [Information Dissemination.]
2 (a) The [superintendent of public instruction], through the [state clear-
3 inghouse for education information, resources, and research], shall col-
4 lect and disseminate to all school districts and other interested par-
5 ticipants, information about:
6 (1) existing school or school district model programs designed to
7 enhance students' personal confidence and contribute to increased stu-
8 dent performance; and
9 (2) school organizational systems, including the "home room" con-
10 cept, which tend to provide the structure and time necessary for
11 students and teachers to recognize and appreciate their respective
12 individuality.
13 (b) Teachers are encouraged to utilize the resources of the office of
14 the [superintendent of public instruction], including the [clearinghouse],
15 to acquire information about the relationship between personal con-
16 fidence and student development and performance.

1 Section 34. [Studies on Personnel and Student Performance.]
2 (a) Further academic research on the relationship of personal con-
3 fidence to school performance and on factors which can influence stu-
4 dent self-confidence, including class size, is critical to improving the
5 learning environment. The state's public and private institutions of
6 higher education and the [state institute for public policy] are encourag-
7 ed to support or undertake research on issues concerning the relation-
8 ship between personal confidence and student achievement.
9 (b) Kindergarten through 12th grade and higher education person-
10 nel are encouraged to apply for funds under [insert reference to any
11 appropriate state grant program], to support projects demonstrating
12 the relationship between improved self-confidence and student
13 performance.

1 Section 35. [Severability.] [Insert severability clause.]

1 Section 36. [Repealer.] [Insert repealer clause.]

1 Section 37. [Effective Date.] [Insert effective date.]
Emergency Medical Services
Regulation and Licensing Act
(Statement)

This act, based on Tennessee law, creates an emergency medical services board consisting of gubernatorial appointees representing a cross-section of groups interested in public health care and emergency medical services in the state. The board is granted the authority and responsibility to approve schools, establish and prescribe courses, and establish and prescribe the curricula and minimum standards for training required to prepare persons for certification under the act. Regulations are to be issued by the board governing the issuance of licenses and certificates, with various categories of licenses, permits, and certificates authorized. The board is also made the disciplinary authority for the revocation or suspension of licenses and permits issued by it. The department of health and environment is authorized to act under the regulations issued by the board to issue permits and licenses, conduct inspections, collect fees, and initiate disciplinary actions. The provision of emergency medical services within the state is forbidden except in accordance with authorization under the regulations of the board. Duties of emergency medical services personnel are specified, along with prohibited acts and fees for licensure and certification.

Because of its length, the Emergency Medical Services Regulation and Licensing Act cannot be published in its entirety here. Interested readers should direct requests for copies to the state of Tennessee, asking for Acts 1983, Ch. 440, Sec. 2.
Human Embryos Act

This act, based on Louisiana law, defines an in vitro fertilized human ovum as a human embryo with certain rights which associate to its status as a biological human being. The embryo is defined as being no person’s property, and provides that in the event of a dispute involving such an embryo, the dispute shall be resolved in the best interest of the in vitro fertilized ovum. The act further provides that only facilities meeting specified standards of appropriate medical societies may be allowed to conduct the in vitro fertilization of a human ovum within the state. Viable in vitro human ovums may not be intentionally destroyed under the act, and shall be made available for adoptive implantation if the patients renounce their rights for such implantation. No inheritance rights attach to the embryo until it develops into an unborn child which is actually born in a live birth.

Suggested Legislation

(Title, enacting clause, etc.)

1. Section 1. [Short Title.] This act may be cited as the Human Embryos Act.

2. Section 2. [Definition.] A “human embryo” means an in vitro fertilized human ovum, with certain rights granted by law, composed of one or more living human cells and human genetic material so unified and organized that it will develop in utero into an unborn child.

3. Section 3. [Uses of Human Embryo Fertilized In Vitro.] The use of a human ovum fertilized in vitro is solely for the support and contribution of the complete development of human in utero implantation. No in vitro fertilized human ovum will be farmed or cultured solely for research purposes or any other purposes. The sale of a human ovum, fertilized human ovum, or human embryo is expressly prohibited.

4. Section 4. [Capacity.] An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law.

5. Section 5. [Legal Status.] As a juridical person, the in vitro fertilized human ovum shall be given an identification by the medical facility for use within the medical facility which entitles such ovum to sue or be sued. The confidentiality of the in vitro fertilization patient shall be maintained.

6. Section 6. [Separate Entity.] An in vitro fertilized human ovum as a juridical person is recognized as a separate entity apart from the
Section 7. [Ownership.] An in vitro fertilized human ovum is a biologica human being which is not the property of the physician which acts as an agent of fertilization, or the facility which employs him or the donors of the sperm and ovum. If the in vitro fertilization patients express their identity, then their rights as parents as provided under [insert reference to appropriate state law] will be preserved. If the in vitro fertilization patients fail to express their identity, the physician shall be deemed to be temporary guardian of the in vitro fertilized human ovum until adoptive implantation can occur. A [insert court of proper jurisdiction] may appoint a curator, upon motion of the in vitro fertilization patients, their heirs, or physicians who caused in vitro fertilization to be performed, to protect the in vitro fertilized human ovum’s rights.

Section 8. [Responsibility.] Any physician or medical facility who causes in vitro fertilization of a human ovum in vitro will be directly responsible for the in vitro safekeeping of the fertilized ovum.

Section 9. [Qualifications.] Only medical facilities meeting the standards of the American Fertility Society and the American College of Obstetricians and Gynecologists and directed by a medical doctor licensed to practice medicine in this state and possessing specialized training and skill in in vitro fertilization also in conformity with the standards established by the American Fertility Society or the American College of Obstetricians and Gynecologists shall cause the in vitro fertilization of a human ovum to occur. No person shall engage in the in vitro fertilization procedures unless qualified as provided in this section.

Section 10. [Destruction.] A viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other person or through the actions of any other such person. An in vitro fertilized human ovum that fails to develop further over a [thirty-six] hour period except when the embryo is in a state of cryopreservation, is considered non-viable and is not considered a juridical person.

Section 11. [Duties of Donors.] An in vitro fertilized human ovum is a juridical person which cannot be owned by the in vitro fertilization patients who owe it a high duty of care and prudent administration. If the in vitro fertilization patients renounce, by notarial act, their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation in accordance with written procedures of the facility where it is housed or stored. The in vitro fertilization patients may renounce their parental rights in favor of another married couple, but only if the other couple is willing and able to receive the in vitro fertilized ovum. No compensation
shall be paid or received by either couple to renounce parental rights. Constructive fulfillment of the statutory provisions for adoption in this state shall occur when a married couple executes a notarial act of adoption of the in vitro fertilized ovum and birth occurs.

Section 12. (Judicial Standard.) In disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to be in the best interest of the in vitro fertilized ovum.

Section 13. (Liability.) Strict liability or liability of any kind including actions relating to succession rights and inheritance shall not be applicable to any physician, hospital, in vitro fertilization clinic, or their agent who acts in good faith in the screening, collection, conservation, preparation, transfer, or cryopreservation of the human ovum fertilized in vitro for transfer to the human uterus. Any immunity granted by this section is applicable only to an action brought on behalf of the in vitro fertilized human ovum as a juridical person.

Section 14. (Inheritance Rights.) Inheritance rights will not flow to the in vitro fertilized ovum as a juridical person, unless the in vitro fertilized ovum develops into an unborn child that is born in a live birth, or at any other time when rights attach to an unborn child in accordance with law. As a juridical person, the embryo or child born as a result of in vitro fertilization and in vitro fertilized ovum donation to another couple does not retain its inheritance rights from the in vitro fertilization patients.

Section 15. (Severability.) [Insert severability clause.]

Section 16. (Repealer.) [Insert repealer clause.]

Section 17. (Effective Date.) [Insert effective date.]
Health Care Provider Records Access Act (Statement)

This act, based on New York law, requires health care facilities and licensed health care practitioners to permit patients to inspect and obtain copies of documents concerning their care and treatment. The act establishes procedures for the denial of such records based on certain criteria.

Because of its reliance on and reference to existing state statutes, the Health Care Provider Records Access Act is not be published here in Suggested State Legislation draft form. Interested readers should direct requests for copies to the state of New York, asking for Senate Bill No. 9346, from the 1986 session.
Emergency Medical Services Organization Act (Statement)

The purpose of this act, based on Maine law, is to promote and provide for a comprehensive and effective emergency medical services system to ensure optimum patient care. A central agency is designated to be responsible for the coordination and integration of all state activities concerning emergency medical services and the overall planning, evaluation and regulation of emergency medical services systems. The act is intended to promote the public health, safety and welfare by providing for the creation of a statewide medical services system with standards for all providers of emergency medical services. This legislation was the result of a long-term legislative program review.

Because of its length, the Emergency Medical Services Act cannot be published in its entirety here. Interested readers should direct requests for copies to the state of Maine, asking for Ch. 730, from 1986.
Non-Spousal Artificial Insemination Act

This act, based on Ohio law, specifies rules and procedures governing non-spousal artificial inseinations of women who intend personally to raise children so conceived, and the paternity consequences of such inseinations.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Non-Spousal Artificial Insemination Act.

Section 2. [Definitions.] As used in this act.

(1) "Artificial insemination" means the introduction of semen into the vagina, cervical canal, or uterus through instruments or other artificial means.

(2) "Donor" means a man who supplies semen for a non-spousal artificial insemination.

(3) "Non-spousal artificial insemination" means an artificial insemination of a woman with the semen of a man who is not her husband.

(4) "Physician" means a person who is licensed pursuant to [insert appropriate reference to state code] to practice medicine or surgery or osteopathic medicine or surgery in this state.

(5) "Recipient" means a woman who has been artificially inseminated with the semen of a donor.

Section 3. [Physician Control and Supervision.] A non-spousal artificial insemination shall be performed by a physician or a person who is under the supervision and control of a physician. Supervision requires the availability of a physician for consultation and direction, but does not necessarily require the personal presence of the physician who is providing the supervision.

Section 4. [Donor Medical Examination and Tests.] In a non-spousal artificial insemination, fresh or frozen semen may be used, provided that the requirements of subsections (1) and (2) of this section are satisfied.

(1) A physician or person under the supervision and control of a physician may use fresh semen for purposes of a non-spousal artificial insemination, only if within one year prior to the supplying of the semen, a complete medical history of the donor, including, but not limited to, any available genetic history of the donor, was obtained by a physician, the donor had a physical examination by a physician, and the
donor was tested for blood type and RH factor.

(2) A physician or person under the supervision and control of a physician may use frozen semen for purposes of a non-spousal artificial insemination only if all the following apply:

(i) The requirements set forth in subsection (1) of this section are satisfied;

(ii) In conjunction with the supplying of the semen, the semen or blood of the donor was the subject of laboratory studies that the physician involved in the non-spousal artificial insemination considers appropriate. The laboratory studies may include, but are not limited to, venereal disease research laboratories, karotyping, GC culture, cytomegalo, hepatitis, kem-zyme, tay-sachs, sickle-cell, ureaplasma, HLV-III, and chlamydia.

(iii) The physician involved in the non-spousal artificial insemination determines that the results of the laboratory studies are acceptable results.

Section 5. [Written Consent Requirement.] The non-spousal artificial insemination of a married woman may occur only if both she and her husband sign a written consent to the artificial insemination as described in Section 6.

Section 6. [Requirements of Physician.]

(a) Prior to a non-spousal artificial insemination, the physician associated with it shall do the following:

(1) Obtain the written consent of the recipient on a form that the physician shall provide. The written consent shall contain all of the following:

(i) the name and address of the recipient and, if married, her husband;

(ii) the name of the physician;

(iii) the proposed location of the performance of the artificial insemination;

(iv) a statement that the recipient and, if married, her husband consent to the artificial insemination;

(v) if desired, a statement that the recipient and, if married, her husband consent to more than one artificial insemination if necessary;

(vi) a statement that the donor shall not be advised by the physician or another person performing the artificial insemination as to the identity of the recipient or, if married, her husband, and that the recipient and, if married, her husband shall not be advised by the physician or another person performing the artificial insemination as to the identity of the donor;

(vii) a statement that the physician is to obtain necessary semen from a donor and, subject to any agreed upon provision as described in subsection (1)(xiv), that the recipient and, if married, her husband shall rely upon the judgment and discretion of the physician in this regard;

(viii) a statement that the recipient and, if married, her husband
understand that the physician cannot be responsible for the physical
or mental characteristics of any child resulting from the artificial
insemination;
(i) a statement that there is no guarantee that the recipient will
become pregnant as a result of the artificial insemination;
(x) a statement that the artificial insemination shall occur in com-
pliance with the provisions of this act.
(xi) a brief summary of the paternity consequences of the artificial
insemination as set forth in Section 8.
(xii) the signature of the recipient and, if married, her husband;
(xiii) if agreed to, a statement that the artificial insemination will
be performed by a person who is under the supervision and control of
the physician;
(xiv) any other provision that the physician, the recipient, and,
if married, her husband agree to include.
(2) Upon request, provide the recipient and, if married, her hus-
band with the following information to the extent the physician has
knowledge of it:
(i) the medical history of the donor, including, but not limited to,
any available genetic history of the donor and persons related to him
by consanguinity, the blood type of the donor, and whether he has an
RH factor;
(ii) the race, eye and hair color, age, height, and weight of the
donor;
(iii) the educational attainment and talents of the donor;
(iv) the religious background of the donor;
(v) any other information that the donor has indicated may be
disclosed.
(b) After each non-spousal artificial insemination of a woman, the
physician associated with it shall note the date of the artificial in-
semination in his records pertaining to the woman and the artificial
insemination, and retain this information as provided in Section 7.

Section 7. [Access to Information.]
(a) The physician who is associated with a non-spousal artificial in-
semination shall place the written consent obtained pursuant to sec-
section 6(a)(1) of the revised code, information provided to the recipient
and, if married, her husband pursuant to section 6(a)(2), other infor-
mation concerning the donor that he possesses, and other matters con-
cerning the artificial insemination in a file that shall bear the name
of the recipient. This file shall be retained by the physician in his of-
fice separate from any regular medical chart of the recipient, and shall
be confidential, except as provided in subsections (b) and (c). This file
is not a public record under [insert reference to state public records
access law].
(b) The written consent form and information provided to the recip-
ient and, if married, her husband pursuant to section (6)(a)(2) shall
be open to inspection only until the child born as the result of the non-
spousal artificial insemination is [twenty-one] years of age, and only
to the recipient or, if married, her husband upon request to the
physician.
(c) Information pertaining to the donor that was not provided to the
recipient and, if married, her husband pursuant to section 6(a)(2), and
that the physician possesses shall be kept in the file pertaining to the
non-spousal artificial insemination for at least [five] years from the
date of the artificial insemination. At the expiration of this period, the
physician may destroy such information or retain it in the file.
The physician shall not make this information available for inspec-
tion by any person during the [five-year] period or, if the physician re-
tains the information after the expiration of that period, at any other
time, unless the following apply:
(1) A child is born as a result of the artificial insemination, an ac-
tion is filed by the recipient, her husband if she is married, or a guar-
dian of the child in the [insert reference to appropriate court] of the
county in which the office of the physician is located, the child is not
[twenty-one] years of age or older, and the court pursuant to subsec-
tion (c)(2) issues an order authorizing the inspection of specified types
of information by the recipient, husband, or guardian;
(2) Prior to issuing an order authorizing an inspection of informa-
tion, the court shall determine, by clear and convincing evidence, that
the information that the recipient, husband, or guardian wishes to in-
spect is necessary for or helpful in the medical treatment of the child
born as a result of the artificial insemination, and shall determine
which types of information in the file are germane to the medical treat-
ment and are to be made available for inspection by the recipient, hus-
band, or guardian in that regard. An order only shall authorize the
inspection of information germane to the medical treatment of the child.

Section 8. [Parental Rights.]
(a) If a married woman is the subject of a non-spousal artificial in-
semination and if her husband consented to the artificial insemina-
tion, the husband shall be treated in law and regarded as the natural
father of a child conceived as a result of the artificial insemination,
and a child so conceived shall be treated in law and regarded as the
natural child of the husband.
(b) If a woman is the subject of a non-spousal artificial insemination,
the donor shall not be treated in law or regarded as the natural father
of a child conceived as a result of the artificial insemination, and a
child so conceived shall not be treated in law or regarded as the natural
child of the donor.

Section 9. [Failure of Physicians to Comply With Requirements of
this Act.] The failure of a physician or person under the supervision
and control of a physician to comply with the applicable requirements
of Sections 2 through 8 shall not affect the legal status, rights, or obliga-
tions of a child conceived as a result of a non-spousal artificial insemina-
tion, a recipient, a husband who consented to the non-spousal artificial
insemination of his wife, or the donor. If a recipient who is married
and her husband make a good faith effort to execute a written consent
that is in compliance with Section 6 relative to a non-spousal artificial
insemination, the failure of the written consent to so comply shall not
affect the paternity consequences set forth in section 8(a).

Section 10. [Severability.] [Insert severability clause.]

Section 11. [Repealer.] [Insert repealer clause.]

Section 12. [Effective Date.] [Insert effective date.]
State Underwater Antiquities Act

This act, based on South Carolina law, claims for the state title to all bottomlands of navigable waters within the state extending to three miles from the ocean shore and including inland streams and lakes. The act designates custodians for state archaeological and paleontological materials and authorizes the custodians to promulgate regulations to carry out their duties under the act. Surveys of bottomlands are required prior to any proposed activity involving the disturbance of the bottomlands for other than archaeological purposes; licenses are required for activity which may destroy or displace archaeological or paleontological sites. Any person desiring to recover any item of value from such bottomlands shall obtain a license prior to commencement of operations. Licenses are of three types: hobby licenses, search licenses, and salvage licenses. Submerged antiquities are declared to be the property of the state, but equity or title to or in them may be transferred to the licensee according to the terms of his license. The licensee’s share may not be less than 50 percent, with the state retaining the remainder. Objects salvaged or found may not be disposed of until released by the agency designated under the act. Items taken in violation of the law are subject to seizure, and violators subject to penalties including civil fines and seizure of equipment and items recovered, and criminal misdemeanor penalties. All state and local law enforcement officers and officers of the agency designated to administer the act may at any time inspect the license of persons engaged in recovery activities and may examine all work and articles recovered. Records of the agency concerning sites and work performed shall not be deemed open records under the disclosure statutes. Commercial fishermen are exempted from the provisions of the act. Sites determined to be of primary importance may be declared off-limits to recovery.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the [state] Underwater Antiquities Act.

Section 2. [Definitions.] As used in this act, unless the context otherwise requires:

1. "Operations" means the disturbance or removal of any submerged antiquities that lie within any navigable waters of the state.

2. "Navigable waters" means those waters which are now navigable, or have been navigable at any time, or are capable of being rendered navigable by the removal of accidental obstructions, by rafts of lumber or timber, or by small pleasure or sport fishing boats. Navigability is determined by the [state water resources agency].

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(3) "Submerged antiquities" means any and all objects of archaeological or paleontological association and which have remained unclaimed for more than [fifty] years and which are located at or below mean low water. The term includes archaeological material which includes but is not limited to sunken vessels and all things in them and individual assemblages of historic or prehistoric artifacts. The term "paleontological materials" includes but is not limited to fossils and other paleontological material, both plant and animal, such as molds, casts, bones, and teeth.

(4) "Employment contract" means a contract or agreement between the principal party of the license and others who purport to be supplied and equipped to perform the actual exploration or salvage.

(5) "Data recording techniques" means but is not limited to:
(i) plan or sketch drawings of the objects in situ before disturbance or recovery and photographs of the objects whenever visibility permits;
(ii) sketches or plan drawings of large submerged antiquities, such as sunken vessels, in detail showing positions of decks, bottoms, holds, superstructures, stern, bow, cargo, and other features and their relationships to each other;
(iii) narrative or pictorial descriptions of the surroundings including any adjacent objects, depth of water, nature of bottoms such as quantity of mud, and depth to which the objects are sunk in the mud;
(iv) photographs of all objects immediately after recovery;
(v) records of what part of the sunken vessel or area of salvage each recovered object came from and further data recording techniques as may be required.

(6) "License" means that a person licensed has been given a right to perform recovery operations outlined in this act. It is not proof that a person is qualified to skin or scuba dive.

Section 3. [Description of States Nautical Boundaries.] The title to all bottomlands of navigable waters within the state, including those of natural rivers flowing along the bottoms of privately-owned lakes, and submerged lands within the territorial boundaries of the state as measured seaward three nautical miles from mean low water and declared to be within the territorial sea as stated or depicted on the most recently authorized and appropriately marked offshore nautical charts of the National Oceanic Service, and to all submerged antiquities therein, is declared to be in the state of [state].

Section 4. [Archaeological and Paleontological Custodians.]
(a) The custodian of archaeological materials is the [state agency]. The custodian of paleontological materials is the [state agency]. The [agency] may promulgate regulations necessary to carry out its duties under this act.

(b) The custodian of any other things of value not provided for in Section 2 is the [state budget agency] which may promulgate regulations necessary for this purpose.
Section 5. [Survey.]
(a) Prior to any proposed activity involving the disturbance of the
bottomlands of navigable waters for other than archaeological pur-
poses, and except as noted elsewhere in this act, a survey must be con-
ducted and a report is required to determine:
(1) the existence of archaeological and paleontological sites, or both,
artifacts, deposits, and other similar objects;
(2) the scientific or public importance of the sites or objects;
(3) the impact on these known or other unknown underwater anti-
quities which may be found only during construction.
(b) No license for the proposed activity is required after submission
of the survey report and once a permit is obtained from the appropriate
state agency.

Section 6. [License Requirement.]
(a) Any person desiring to conduct operations pursuant to this act
in the course of which submerged archaeological and paleontological
sites may be removed, displaced, or destroyed shall make application
to the [state agency] for a license to conduct the operations. If the [agen-
cy] after consultation with [other appropriate state agency] on paleo-
tological matters finds that the granting of the license is in the best
interest of the state, it may grant it for a period of time and under
conditions as the [agency] considers to be in the best interest of the
state.
(b) No license is required of [agencies] which may conduct any opera-
tions provided for by this act and all items recovered by them belong
to the state.
(c) Any person desiring to recover anything of value other than
submerged antiquities shall obtain a license from the [agency] under
terms and conditions it may require.

Section 7. [License.]
(a) No operation provided for in this act may be conducted by any
person, partnership, or any other entity that has not first been granted
an appropriate license from the [state agency], except as otherwise noted.
(b) Each licensee shall determine what federal and state regulations
pertain to the activities under the license and comply fully with all
of the regulations.
(c) Licenses are of three types: hobby licenses, search licenses, and
salvage licenses. Restrictive licenses may be granted to persons under
the age of [sixteen] who may exercise the privileges of the license only
when accompanied by the holder of a nonrestrictive license.
(d) Each application for a license must be filed with the [state agen-
cy] in writing on an application form to be provided by it. The [state
agency] may request additional information, documentation, or refer-
ences from any applicant for a license or from any licensee at any time.
(e) Upon application and payment of an additional fee, any license
under which the work has been diligently prosecuted and faithfully
adhered to may be renewed at the discretion of the [state agency] if it is
found to be in the best interest of the state.

(f) All submerged antiquities are the property of the state. Submerged antiquities, or equity in them, recovered under a license may be granted to the licensee as stated in his license and the title to and ownership of the granted antiquities, or equity in them, must be transferred to the licensee.

Any division of antiquities recovered under a hobby, search, or salvage license must be on a percentage basis, in value or in kind, with the [state agency] acting as the arbiter of the division in the best interest of the state and the licensee's share may not be less than [fifty] percent.

(g) No objects recovered under the authority of any type of license may be disposed of by gift, sale, discard, or in any other way until a division has been made and the object has been properly released by the [state agency].

(i) Any objects that have been or are submerged antiquities as defined in this act that have been recovered, taken, collected, or otherwise disturbed, contrary to the terms of a license, or without a license, may be seized wherever found and at any time by any [state] law enforcement officer, according to the terms set forth in Section 16.

(i) Any [state agency] archaeologist or other designated and authorized member of the staff of the [agency], or [law enforcement division of the state marine & wildlife department], or any other state and local law enforcement officer may, at any time, examine the license of any person, partnership, or other entity claiming privileges under this act and may fully examine all work done under the license and may apprehend or cause to be arrested any person suspected of being in violation of any part of this act and may seize or cause to be seized any antiquities in the possession of the person that have been recovered as a result of the suspected violation.

(j) The [agency] may seek information, consultation, or advice on any aspect of the granting or supervision of a license or on any other aspect of the provisions of this act and may act upon that information, advice, or consultation in the best interest of the state.

(k) Any licensee shall fully comply with all normal safety regulations governing activities exercised under the privileges of his license and the state is not liable or responsible for any accident, injury, or any other harm sustained by any person or loss, damage, or any other harm to any equipment in any way connected or associated with the operation of the license.

(l) A licensee is not permitted to recover underwater antiquities selectively. The licensee shall not select only salable objects to recover nor only one kind of objects but shall recover all objects located including broken objects, fragments of objects, prehistoric objects, and other antiquities in his search area. If some objects are too large to recover, the licensee shall describe those objects that were not recovered.

(m) No one shall use underwater explosives or other grossly destructive devices in any aspect of an operation except where written permission has been obtained from the [agency] and an [agency] staff member is on the site. A grossly destructive device must be determined
by the [agency]. Requests for permission to use explosives or other grossly destructive devices must be limited to a specific reason on a specific date and explosives or other grossly destructive devices may be used only after the [agency] determines that all available scientific information has been retrieved.

(n) The [agency] by its designated agent may inspect and be present at any operations or storage facilities for the recovered antiquities, for which a license has been granted, but only when a representative of the licensee is present, but the underwater site may be visited at any time by a designated agent of the [agency] present.

(o) All licenses are required to comply with all reasonable requests or directives of the [agency] or its designated agent with respect to the operations authorized by the licenses.

(p) All archaeological records of the [agency] pertaining to underwater sites, including but not limited to actual locations of archaeological sites or mandatory reports from licensed divers concerning locations of archaeological finds and objects recovered, are not open records under the provisions of the [state freedom of information act]. These records may only be opened when the [state archaeologist] considers that it is in the best interest of the state to allow access to the records upon good cause shown by the persons petitioning to open the records.

(q) Commercially licensed fishermen and shrimpers who in the normal and legal course of fishing and shrimping drag nets and other apparatus from their boats are exempt from the provisions of the act.

(r) No license for the disturbance or removal of any submerged antiquities which, in the opinion of the [agency], are of primary scientific or historical value may be granted. In certain cases, and under the authority of the [state archaeologist office], sites determined to be of primary scientific or historical value may be placed off limits to the recovery of submerged antiquities, until such time as they have been properly investigated by the [agency] or its designated agents.

Section 8. [Hobby License.]
(a) A hobby license may be granted to an applicant for temporary, intermittent noncommercial search and salvage operations of a recreational nature requiring minimal equipment, training, and experience. This nonexclusive statewide license may be granted for [one] year.
(b) There are two categories of hobby licenses, individual and instructional. Individual licenses may be granted to individuals or husbands and wives, and accompanying children [fifteen] years of age and under. The license fee is [five] dollars for state residents and [ten] dollars for nonresidents. Instructional licenses may be granted to a skin and scuba diving instructor or organized training facility where the recovery of submerged antiquities may occur incidental to instruction. This license may be in effect only during sessions of instruction. The license fee is [twenty-five] dollars for state resident instructors or facilities and [fifty] dollars for nonresident instructors or facilities.
(c) Hobby license holders shall not exercise the privileges of their licenses in waters for which a search or salvage license is granted.
(d) The recovery of submerged antiquities under a hobby license is limited to recreational, small scale, noncommercial hobby activities, and all powered mechanical dredging and lifting devices of any sort are prohibited under a hobby license.

(e) Every holder of a hobby license shall submit a written [monthly] report of his activities including a listing of all recovered objects and descriptions of the places from which they were recovered to the [agency] no later than the [tenth] of the following [month]. All objects recovered during any calendar month will be made available to the [agency] for inspection, study, research, and photography during that [month] or no later than [sixty] days from the receipt of the [monthly] report. If the [agency] does not contact the licensee by the end of the [sixty] days, title to the objects recovered and listed on his [monthly] report reverts to the licensee.

Section 9. [License for Search or Salvage Operations.]

(a) Licenses for search operations or salvage operations may be granted by the [agency] to persons, partnerships, or other entities that are, in its opinion, of reputable character, qualified to conduct the work, financially able, and adequately equipped to carry out the operations proposed.

(b) The [agency] shall limit search and salvage licenses, insofar as is practical, to persons, partnerships, or other entities who conduct the work themselves. The licensee remains solely answerable to the [agency] for the conduct of the operations and the proper accounting of antiquities located or recovered under the terms of the license.

(c) No license for the disturbance or removal of any submerged antiquities which may be preserved in situ under the protection of the state and remain as objects of interest may be granted.

(d) No license for the disturbance or removal of any submerged antiquities which are, in the opinion of the [agency], a part of any archaeological or paleontological site on land where the [agency] may conduct research, may be granted except in relation to and as part of that research.

(e) No applicant may be granted a license for an area larger than he can reasonably be expected to fully and adequately investigate.

(f) The [agency] may approve and disapprove employment contracts of search or salvage license holders and may cancel any license if the license does not retain full responsibility for the actual operation conducted under the license. No search or salvage license, or any part may be assigned or sublet.

(g) Application for search or salvage licenses must be accompanied by a definite and specific plan of operation, including plans for preservation and storage of antiquities, proposed starting date, and the length of time proposed to be devoted to the work.

(h) The application must be accompanied by a sketch map, location map, and other pictorial description of the site or area where work is to be done, of sufficient detail and definition as to be clearly and accurately located on a standard map or chart. A representative of the
[agency], accompanied by the applicant, may visit the proposed site
or area to determine the license area boundaries.

(i) The application must include the name and address of the appli-
cant, the names of the persons to be in immediate charge of the work,
the names and addresses of all persons who shall participate in the
work, or who are otherwise connected with the work. The application
must be accompanied by a listing of the experience, training, and
background of responsibility of all participants in the work. Additional
personnel may be hired upon approval of the [agency] or its authoriz-
ed representative. Any change in personnel must be reported im-
mediately to the [agency] with the accompanying information required
by this section.

(j) The applicant shall list all equipment to be used in the work or
that is available for use. Additional equipment may be authorized after
issuance of the license upon approval of the [agency] or its authorized
representative. The applicant shall submit a statement of the financial
support for the work. Should there be proposed changes in the
financial support, the [agency] must be notified immediately. Changes
in financial support or deviation from the plan of operation may result
in revocation of the license.

(k) Each applicant shall furnish a list of all vessels expected to be
used under the license, including a full description, the name, and
registration number of the vessel. The use of additional vessels may
be authorized, after issuance of the license, upon approval of the [agenc-
y] or its authorized representative.

(l) No applicant may be granted more than [two] licenses to be in ef-
effect at the same time, and a single applicant is limited to [one] license
if practicable.

(m) The [agency] shall limit the number of licenses granted under
this section to the number that may be properly supervised and ad-
ministered by the authorized agents of the [agency]. The nature and
extent of the supervision must be determined by the [agency].

(n) Each licensee may be required to properly mark and protect
against encroachment by others and all sites and areas for which the
license is granted, and the state is not responsible for the marking or
protection except as the [agency] may determine to be incidental to
the administration of this act.

(o) There must be a person at all times designated by and acting for
the licensee aboard any vessel or present at any phase of the opera-
tion who is responsible for the work and who is familiar with the law,
stipulations, and directives concerning the work and who is responsi-
ble for compliance with them in order to insure the preservation of
archaeological and paleontological data.

(p) As a means of preserving the historic and scientific values of the
submerged antiquities each licensee shall exercise all data recording
techniques of which he is capable within the framework of his opera-
tion. The licensee shall not disturb or remove submerged antiquities
without making as much of a record of the in situ positions and loca-
tions as is possible.
(q) Failure to begin work under the terms of a license within the first [third] of the life of the license, failure to diligently prosecute the work after it has begun, or to faithfully comply with any of the provisions of the license or of the directives concerning the work is reason for revocation of the license. Any license may be revoked for cause.

Section 10. [Search License.]

(a) A search license is an exclusive license that may be granted to an applicant for the purpose of conducting underwater search operations that may involve the disturbance of state-owned bottomlands, except that done by hand under a hobby license, during the process of subbottom testing only. The disturbance or removal of submerged antiquities may be allowed only for evaluation and interpretation of the proposed sites.

(b) Search licenses may be for a period not to exceed [three] months.

(c) Search licenses may be issued for a specific area which may consist of [one] or more search units. A search unit may not be larger than [one nautical mile] on a side. A fee of [fifty] dollars a search unit must be paid for resident licensees; for nonresident licensees a fee of [one hundred] dollars must be paid. All search units issued under [one] license must be contiguous and no more than [nine] search units may be issued under [one] license.

The [agency] shall limit the number of search units to a number that can be adequately surveyed within the scope and time frame of the project.

(d) A written report of activities including a listing of all antiquities and other objects recovered and a diagram, chart, or other description of all submerged antiquities and other objects, sites located, and other required information must be made to the [agency] at times noted on the license.

(e) Within [sixty] days of the receipt of the report, all objects recovered under the authority of the license must, upon demand, be made available to the [agency] for its inspection. Upon inspection, the [agency] shall grant to the licensee his portion of the objects either immediately or after a reasonable period of time for study, research, and photography of the objects, not to exceed [sixty] days from the date of the inspection.

Section 11. [Salvage License.]

(a) The salvage license is an exclusive license that may be granted to an applicant for the purpose of conducting a well-planned, continuing, underwater salvage operation with experienced personnel, and adequate financial support. The salvage license must be for a specific site and may be granted for a period of time not to exceed [one] year. A fee of [two hundred fifty] dollars must be paid for each license for resident licensees, and a fee of [five hundred dollars] for nonresident licenses must be paid.

(b) A written report of all activities carried out under the authority of this license both on surface and underwater must be made to the
Section 12. [Enforcement.] All other state and local law enforcement agencies shall assist the [appropriate agencies], and the licensee in the enforcement of the provisions of this article.

Section 13. [Suspension of License Hearing.]
(a) The [agency] may suspend or revoke a license issued by them for just cause after the licensee has been given at least [twenty] days' notice in writing of the charges against him and is granted a hearing by the issuing authority. The issuing authority may administer oaths and subpoena the attendance of witnesses and all other necessary parties and the production of relevant books and papers.
(b) Any licensee who is not satisfied with the decision of the hearing may appeal under the provisions of the [administrative procedures act].

Section 14. [Violation, Punishment.]
(a) Any person violating the provisions of this act regarding the operations or procedures of a hobby license is guilty of a misdemeanor and upon conviction must be punished by a fine not to exceed [ten thousand] dollars or imprisonment not to exceed [two] years.

Section 15. [Antiquities Found in Water Craft or Vehicle of Unlicensed Person.] Any submerged antiquities found in any watercraft or vehicle occupied by persons unlicensed as required by this act constitute prima facie evidence of violation of this act.

Section 16. [Seizure & Forfeiture.]
(a) The following articles are subject to seizure and forfeiture:
(1) all articles or objects of any kind which are of archaeological or paleontological value as described in section 2(3), "submerged antiquities," which are unlawfully held;
(2) all conveyances, including vehicles, aircraft, vessels, motors, and trailers, which as used or intended for use in violation of this act;
(3) all equipment including diving gear, air compressors, lift bags, electronic equipment, and other devices which are used or intended for use in the violation of this act;
(4) all monies or other things of value furnished in payment for or exchanged unlawfully for recovered articles described in section 2(3), "submerged antiquities."
(b) Any property subject to forfeiture under commissioned law en-
forcement officer or employee of the [agency] upon process issued by
a court of the state of [state], except that seizure may occur without
process when:
(1) the seizure is incident to an arrest or a search under a search
warrant;
(2) the property subject to seizure has been the subject of a prior
judgment in favor of the state of [state];
(c) In the event of a seizure pursuant to subsection (b), proceedings
must be promptly instituted as follows: within [five] days of seizure,
written notice of a hearing must be given to all owners of record,
lienholders, or person from whom seizure of the subject article was
made, and the hearing must subsequently be held before the [insert
appropriate court] with jurisdiction over the place of seizure.
If the article subject to forfeiture is described by subsection (a)(1),
the burden is upon the state to show the article is as described
in and to show the place from which it was removed. Upon proof by
the state, there is created a presumption of entitlement and owner-
ship in the state, which any claimant must disprove by clear and con-
vincing evidence.
If the article subject to seizure is described by subsection (a)(3) or (4),
the burden is upon the state to make a showing that the article was
used or was intended to be used in the violation of this act.
Any innocent owner or lienholder may effect return of the seized ar-
ticle if he demonstrates to the court by a preponderance of the evidence
that he did not have knowledge of the use of or intention to use the
seized article in any means violative of the act.
(d) Following forfeiture to the state, the [insert appropriate court] may
order:
(1) the property to be sold at public sale and proceeds, subject to
the approval of the [agency], to be given to the [agency]; or
(2) possession and title of property to be given to the [agency] for
its use.

Section 17. [Use of Monies and Funds Obtained Pursuant to this Act.]
Subject to the approval of the [budget agency], any funds, appropriated
or otherwise, monies, and properties received by the [agency] pursuant
to this act may be used by it for continuing its duties and to further
the enforcement and provisions of this act.

Section 18. [Severability.] [Insert severability clause.]

Section 19. [Repealer.] [Insert repealer clause.]

Section 20. [Effective Date.] [Insert effective date.]
Celebrity Rights Act

This act, based on California law, prohibits the use of another’s name, photograph, or likeness for advertising purposes or purposes of solicitation of purchases without the consent of the person or the person’s parent or guardian, and extends the provisions to the use of another’s voice or signature. The minimum fine is increased, and the act would provide for the recovery of profits from the unauthorized use, of punitive damages, and of attorney’s fees.

Existing case law has held that the right to prohibit commercial exploitation of a person’s name, photograph, or likeness does not generally survive that person’s death. This act offers a provision setting forth the statutory right to recover damages for the unauthorized commercial use of a deceased personality’s name, voice, signature, photograph, or likeness, similar to the above-mentioned provision, and would specify that right is a property right which is transferable, and, if not transferred, exercisable after a person’s death by the person’s wife, children, or parents. The act requires a person claiming the right to register the claim with the secretary of state and provides that a successor-in-interest to the rights of a deceased personality may not recover damages for a use that occurs before registration. It also provides that no action could be brought to recover damages for a use occurring after 50 years from the death of the person.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Celebrity Rights Act.

Section 2. [Prohibition on the Unauthorized Use of Deceased Personality’s Name, Voice, Signature, Photograph or Likeness; Property Right Transferred.]

(a) Any person who uses a deceased personality’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subsection (c), shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of [seven hundred fifty] dollars or the actual damages suffered by the injured party or parties, as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing these profits, the injured party or parties shall be required to present
proof only of the gross revenue attributable to the use and the person
who violated the section is required to prove his or her deductible ex-
penses. Punitive damages may also be awarded to the injured party
or parties. The prevailing party or parties in any action under this sec-
tion shall also be entitled to attorneys' fees and costs.

(b) The rights recognized under this section are property rights, freely
transferable, in whole or in part, by contract or by means of trust or
testamentary documents, whether the transfer occurs before the death
of the deceased personality, by the deceased personality or his or her
transferees, or, after the death of the deceased personality, by the per-
son or persons in whom such rights vest under this section or the
transferees of that person or persons.

(c) The consent required by this section shall be exercisable by the
person or persons to whom such right of consent (or portion thereof)
has been transferred in accordance with subsection (b), or if no such
transfer has occurred, then by the person or persons to whom such right
of consent (or portion thereof) has passed in accordance with subsec-
tion (d).

(d) Subject to subsection (b) and (c), after the death of any person,
the rights under this section shall belong to the following person or
persons and may be exercised, on behalf of and for the benefit of all
of those persons, by those persons who, in the aggregate, are entitled
to more than a [one-half] interest in such rights:

(1) The entire interest in those rights belong to the surviving spouse
of the deceased personality unless there are any surviving children
or grandchildren of the deceased personality, in which case [one-half]
of the entire interest in those rights belong to the surviving spouse.

(2) The entire interest in those rights belong to the surviving
children of the deceased personality and to the surviving children of
any dead child of the deceased personality unless the deceased per-
sonality has a surviving spouse, in which case the ownership of a [one-
half] interest in rights is divided among the surviving children and
grandchildren.

(3) If there is no surviving spouse, and no surviving children or
grandchildren, then the entire interest in those rights belong to the
surviving parent or parents of the deceased personality.

(4) The rights of the deceased personality's children and grand-
children are in all cases divided among them and exercisable on a per
stirpes basis according to the number of the deceased personality's
children represented; the share of the children of a dead child of a
dead personality can be exercised only by the action of a majority
of them. For the purposes of this section, "per stirpes" is defined as
it is defined in [insert appropriate reference to state code].

(e) If any deceased personality does not transfer his or her rights
under this section by contract, or by means of a trust or testamentary
document, and there are no surviving persons as described in subsec-
tion (d), then the rights set forth in subsection (a) shall terminate.

(f) (1) A successor in interest to the rights of a deceased personality
under this section or a license thereof may not recover damages for
a use prohibited by this section that occurs before the successor-in-
interest or licensee registers a claim of the rights under paragraph (2).
(2) Any person claiming to be a successor-in-interest to the rights
of a deceased personality under this section or a licensee thereof may
register that claim with the [secretary of state] on a form prescribed
by the [secretary of state] and upon payment of a fee of [ten] dollars.
The form shall be verified and shall include the name and date of death
of the deceased personality, the name and address of the claimant, the
basis of the claim, and the rights claimed.
(3) Upon receipt and after filing of any document under this sec-
tion, the [secretary of state] may microfilm or reproduce by other tech-
niques any of the filings or documents and destroy the original filing
or document. The microfilm or other reproduction of any document
under the provision of this section shall be admissible in any court of
law. The microfilm or other reproduction of any document may be
destroyed by the [secretary of state] [50] years after the death of the
personality named therein.
(4) Claims registered under this subsection shall be public records.
(g) No action shall be brought under this section by reason of any
use of a deceased personality's name, voice, signature, photograph, or
likeness occurring after the expiration of [50] years from the death of
the deceased personality.
(h) As used in this section, "deceased personality" means any natural
person whose name, voice, signature, photograph, or likeness has com-
mmercial value at the time of his or her death, whether of not during
the lifetime of that natural person the person used his or her name,
voice, signature, photograph, or likeness on or in products, merchan-
dise or goods, or for purposes of advertising or selling, or solicitation
of purchase of, products, merchandise, goods or service. A "deceased
personality" shall include, without limitation, any such natural per-
son who has died within [50] years prior to [date].
(i) As used in this section, "photograph" means any photograph or
photographic reproduction, still or moving, or any videotape or live
television transmission, of any person, such that the deceased personal-
ity is readily identifiable. A deceased personality shall be deemed to
be readily identifiable from a photograph when one who views the
photograph with the naked eye can reasonably determine who the per-
son depicted in the photograph is.
(j) For purposes of this section, a use of a name, voice, signature,
photograph, or likeness in connection with any news, public affairs,
or sports broadcast or account, or any political campaign, shall not con-
stitute a use for which consent is required under subsection (a).
(k) The use of a name, voice, signature, photograph, or likeness in
a commercial medium shall not constitute a use for which consent is
required under subsection (a) solely because the material containing
such use is commercially sponsored or contains paid advertising. Rather
it shall be a question of fact whether or not the use of the deceased
personality's name, voice, signature, photograph, or likeness was so
directly connected with the commercial sponsorship or with the paid
advertising as to constitute a use for which consent is required under subsection (a).

(i) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that such owners or employees had knowledge of the unauthorized use of the deceased personality’s name, voice, signature, photograph, or likeness as prohibited by this section.

(m) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

(n) This section shall not apply to the use of a deceased personality’s name, voice, signature, photograph, or likeness, in any of the following instances:

(1) A play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4).

(2) Material that is of political or newsworthy value.

(3) Single and original works of fine art.

(4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3).

Section 3. [Penalty for Unauthorized Use of Another Person’s Name, Voice, Signature, Photograph, or Likeness.]

(a) Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products merchandise, goods or services, without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of [seven hundred fifty dollars] or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney’s fees and costs.

(b) As used in this section, “photograph” means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.
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(1) A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.

(2) If the photograph includes more than one person so identifiable, then the person or persons complaining of the use shall be represented as individuals rather than solely as members of a definable group represented in the photograph. A definable group includes, but is not limited to, the following examples: a crowd at any sporting event, a crowd in any street or public building, the audience at any theatrical or stage production, a glee club, or a baseball team.

(3) A person or persons shall be considered to be represented as members of a definable group if they are represented as members of a definable group if they are represented in the photograph solely as a result of being present at the time the photograph was taken and have not been singled out as individuals in any manner.

(c) Where a photograph or likeness of an employee of the person using the photograph or likeness appearing in the advertisement or other publication prepared by or in behalf of the user is only incidental, and not essential, to the purpose of the publication in which it appears, there shall arise a rebuttable presumption affecting the burden of producing evidence that the failure to obtain the consent of the employee was not a knowing use of the employee's photograph or likeness.

(d) For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subsection (a).

(e) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subsection (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subsection (a).

(f) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards and transit ads, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that such owners or employees had knowledge of the unauthorized use of the person's name, voice, signature, photograph, or likeness as prohibited by this section.

(g) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

1 Section 4. [Severability.] [Insert severability clause.]

1 Section 5. [Repealer.] [Insert repealer clause.]
Section 6. [Effective Date.] [Insert effective date.]
State Grain Insurance Act (Statement)

The purpose of this act, based on Illinois law, is to promote the state’s welfare by improving the economic stability of agriculture through the establishment of a grain insurance fund in order to protect grain producers in the event of the financial failure of a grain dealer or grain warehouseman and to ensure the existence of an adequate fund so that grain producers and claimants may be compensated for losses occasioned by the failure of a grain dealer or grain warehouseman. The act creates a grain insurance corporation and specifies its powers. Fees are set and procedures for license revocation for non-compliance are established. The act applies to dealers and warehousemen, fund investment limits are set, liability for underfunding is placed on the state legislature, and procedures for compensation of financial losses are established. The act establishes the duties of the director of agriculture, and the department of agriculture. The department has the authority to promulgate and adopt rules and regulations consistent with this act.

This legislation was drafted by the Illinois Office of the Attorney General. Attorney General Neil F. Hartigan has prepared a law review article about this act: “The Illinois Grain Insurance Act: Deserved and Cost-Efficient Protection for Rural Communities,” *Journal of Agricultural Taxation and Law* 2, 1985. Drafters are encouraged to consult this material.

Because of its reliance on and reference to existing state statutes, the State Grain Insurance Act is not published here in *Suggested State Legislation* draft form. Interested readers should direct requests for copies to the state of Illinois, asking for Ill. Rev. Stat. 1985, ch. 114, pars. 701-712.
Charitable Funds Solicitation Act

This act, based on Connecticut law enacted after a lengthy study, establishes a scheme for regulation of charitable solicitations. The act requires paid solicitors to disclose that they are paid, and the percentage of contributions which will be received by the charitable institution. For-profit businesses which conduct charitable promotions must make the same disclosure, while arrangements entered into by such businesses and by paid solicitors are subject to wide filing and disclosure requirements with the department of consumer protection.

Suggested Legislation

(Title, enacting clause, etc.)

1. Section 1. [Short Title.] This act may be cited as the Charitable Funds Solicitation Act.

2. Section 2. [Definitions.] As used in this act:

1. (1) “Charitable organization” means any person who is or holds himself out to be established for any benevolent, educational, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental conservation, civic or eleemosynary purpose, or for the benefit of law enforcement officers, firefighters or other persons who protect the public safety.

2. (2) “Person” means an individual, corporation, association, partnership, trust, foundation or any other entity however styled.

3. (3) “Solicit” and “solicitation” mean any request directly or indirectly for money, credit, property, financial assistance or other thing of any kind or value on the plea or representation that such money, credit, property, financial assistance or other thing of any kind or value is to be used for a charitable purpose or benefit a charitable organization. “Solicit” and “solicitation” shall include, but shall not be limited to, the following methods of requesting or securing such money, credit, property, financial assistance or other thing of value: (i) Any oral or written request; (ii) any announcement to the press, over the radio or television or by telephone or telegraph concerning an appeal or campaign by or for any charitable organization or purpose; (iii) the distribution, circulation, posting or publishing of any handbill, written advertisement or other publication; (iv) the sale of, offer or attempt to sell, any advertisement, advertising space, book, card, tag, coupon, device, magazine, membership, merchandise, subscription, flower, ticket, candy, cookies or other tangible item in connection with an appeal made for any charitable organization or purpose, or where the name of any charitable organization is used or referred to in any such appeal as an inducement or reason for making such sale, or when or where in connection with any such sale, any statement is made that the whole or any part of the proceeds from any such sale is to be used for any
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charitable purpose or benefit any charitable organization. A solicita-
tion shall be deemed to have taken place whether or not the person
making the same receives any contribution.

(4) "Charitable purpose" means any benevolent, educational, philan-
thropic, humane, scientific, patriotic, social welfare or advocacy, public
health, environmental conservation, civic or eleemosynary objective.

(5) "Contribution" means the grant, promise or pledge of money,
credit, property, financial assistance or other thing of any kind or value
in response to a solicitation. "Contribution" shall not include bona fide
fees, dues or assessments paid by members, provided membership is
not conferred solely as consideration for making a contribution in
response to a solicitation.

(6) "Fund raising counsel" means a person who for compensation
plans, manages, advises or consults with respect to the solicitation in
this state of contributions by a charitable organization, but who does
not solicit contributions and who does not directly or indirectly employ,
procure or engage any person compensated to solicit contribution. A
bona fide nontemporary salaried officer or employee of a charitable
organization shall not be deemed to be a fund raising counsel.

(7) "Paid solicitor" means a person who for compensation, other than
any non-monetary gift of nominal value awarded to a volunteer solicitor
as an incentive or token of appreciation, performs for a charitable
organization any service in connection with which contributions are
solicited by such person or by any person he directly or indirectly
employs, procures or engages to solicit for such compensation. A bona
fide nontemporary salaried officer or employee of a charitable organiza-
tion shall not be deemed to be a paid solicitor.

(8) "Commercial coventurer" means a person who for profit is regular-
ly and primarily engaged in trade or commerce in this state other than
in connection with the raising of funds for charitable organizations or
purposes and who conducts a charitable sales promotion.

(9) "Charitable sales promotion" means an advertising or sales cam-
paign, conducted by a commercial coventurer, which represents that
the purchase or use of goods or services offered by the commercial
coventurer are to benefit a charitable organization or purpose.

(10) "Department" means the [department of consumer protection].

(11) "Commissioner" means the [commissioner of consumer protec-
tion].

(12) "Membership" means that which entitles a person to the privi-
leges, professional standing, honors or other direct benefit of the or-
ganization and the rights to vote, elect officers and hold office in the
organization.

(13) "Parent organization" means that part of a charitable organiza-
tion which supervises and exercises control over the solicitation and
expenditure activities of one or more chapters, branches or affiliates.

(14) "Gross revenue" means income of any kind from all sources, in-
cluding all amounts received as the result of any solicitation by a paid
solicitor.
Section 3. [Registration of Charitable Organizations.] Every charitable organization not exempted by Section 5 of this act shall register with the [department] prior to conducting any solicitation or prior to having any solicitation conducted on its behalf by others. Application for registration shall be made on forms prescribed by the [department] and shall include payment of a fee of [twenty] dollars. [Two] authorized officers of the organization shall sign the registration form and shall certify that the statements therein are true and correct to the best of their knowledge. A chapter, branch or affiliate in this state of a registered parent organization shall not be required to register provided the principal office of the parent organization is located in this state and provided the parent organization files a consolidated annual report for itself and its chapter, branch or affiliate.

Section 4. [Annual Reports.]
(a) Every charitable organization required to register pursuant to Section 3 of this act shall annually file with the [department] a report for its most recently completed fiscal year, which report shall include a financial statement and such other information as the [commissioner] may require. Such charitable organization shall file such report not more than [five] months following the close of its fiscal year, which report shall be accompanied by a fee of [twenty-five] dollars and shall be signed by [two] authorized officers of the organization, one of whom shall be the chief fiscal officer of the organization. Such officers shall certify that such report is true and correct to the best of their knowledge. The [commissioner] shall prescribe the form of the report and may prescribe standards for its completion. The [commissioner] may accept, under such conditions as he may prescribe, a copy or duplicate original of financial statements, reports or returns filed by the charitable organization with the Internal Revenue Service or another state having requirements similar to the provisions of this act.
(b) A charitable organization with gross revenue in excess of [one hundred thousand] dollars in the year covered by the report shall include with its financial statement an audit report of a certified public accountant. For purposes of this section, gross revenue shall not include grants or fees from government agencies.
(c) The [commissioner] may, upon written request and for good cause shown, grant an extension of time, not to exceed [three] months, for the filing of such report.
(d) An additional late filing fee of [twenty-five] dollars shall accompany any report which is not filed in a timely manner.
(e) Every charitable organization required to file an annual report and every charitable organization subject to the provisions of Section 5(6) of this act shall keep true fiscal records which shall be available to the [department] for inspection upon request. Such organization shall retain such records for no less than [three] years after the end of the fiscal year to which they relate.

Section 5. [Exempt Charitable Organizations.] The following chari-
table organizations shall not be subject to the provisions of Sections
3 and 4 of this act provided each such organization shall submit such
information as the [department] may require to substantiate an ex-
ception under this section:
(1) Any duly organized religious corporation, institution or society;
(2) Any parent-teacher association or educational institution, the cur-
ricula of which in whole or in part are registered or approved by any
state or the United States either directly or by acceptance of accredita-
tion by an accrediting body;
(3) Any nonprofit hospital licensed in accordance with the provisions
of [insert reference to appropriate state law] or any similar provision
of the laws of any other state;
(4) Any governmental unit or instrumentality of any state or the
United States;
(5) Any person who solicits solely for the benefit of organizations
described in paragraphs (1) to (4), inclusive, of this section; and
(6) Any charitable organization which normally receives less than
twenty-five thousand dollars in contributions annually, provided such
organization does not compensate any person primarily to conduct
solicitations.

Section 6. [Fund Raising Counsel.]
(a) Each contract between a charitable organization and a fund rais-
ing counsel shall be in writing and shall be filed by the fund raising
counsel with the [department] at least [fifteen] days prior to perfor-
man ce by the fund raising counsel of any material services pursuant
to such contract. The contract shall contain such information as will
enable the [department] to identify the services the fund raising counsel
is to provide as to the manner of his compensation.
(b) A fund raising counsel who at any time has custody or control
of contributions from a solicitation shall register with the [department].
Applications for registration or renewal of a registration as a fund rais-
ing counsel shall be in writing, under oath, in the form prescribed by
the [department] and shall be accompanied by a fee in the amount of
one hundred dollars. Each application shall contain such information
as the [department] shall require. Each registration shall be valid for
one year and may be renewed for additional [one-year] periods upon
application and payment of the fee. An applicant for registration or
for a renewal of registration as a fund raising counsel shall, at the time
of making such application, file with and have approved by the [depart-
ment] a bond, in which the applicant shall be the principal obligor in
the sum of [twenty thousand] dollars, with one or more responsible
sureties whose liability in the aggregate as such sureties shall be no
less than such sum. The fund raising counsel shall maintain the bond
in effect as long as the registration is in effect. The bond shall run to
the state and to any person who may have a cause of action against
the principal obligor of the bond for any liabilities resulting from the
obligor's conduct of any activities subject to this act or arising out of
a violation of this act or any regulation adopted pursuant to this act.
Charitable Funds Solicitation Act

Any such fund raising counsel shall account to the charitable organization with whom it has contracted for any income received and expenses paid no later than [ninety] days after a solicitation campaign has been completed, and in the case of a solicitation campaign lasting more than [one] year, on the anniversary of the commencement of such campaign. Such accounting shall be in writing, shall be retained by the charitable organization for [three] years and shall be available to the [department] upon request.

Section 7. [Paid Solicitor.]

(a) No person shall act as a paid solicitor unless he has first registered with the [department]. Applications for registration and for the renewal of a registration shall be in writing, under oath, in the form prescribed by the [department] and shall be accompanied by a fee in the amount of [one hundred] dollars. The application shall contain such information as the [department] shall require. Each registration shall be valid for [one] year and may be renewed for additional [one-year] periods upon application and payment of the fee.

(b) An applicant for registration or for a renewal of registration as a paid solicitor shall, at the time of making such application, file with and have approved by the [department] a bond, in which the applicant shall be the principal obligor in the sum of [twenty thousand] dollars, with one or more responsible sureties whose liability in the aggregate as such sureties shall be no less than such sum. The paid solicitor shall maintain the bond in effect as long as the registration is in effect. The bond shall run to the state and to any person who may have a cause of action against the principal obligor of the bond for any liabilities resulting from the obligor’s conduct of any activities subject to this act or arising out of a violation of this act or any regulation adopted pursuant to this act.

(c) No less than [twenty] days prior to the commencement of each solicitation campaign, a paid solicitor shall file with the [department] a copy of the contract described in subsection (d) and shall file a completed solicitation notice on forms prescribed by the [department]. A solicitation notice shall be in writing and under oath, and shall include a description of the solicitation event or campaign, the location and telephone number from which the solicitation is to be conducted, the names and residence addresses of all employees, agents or other persons however styled who are to solicit during such campaign and the account number and location of all bank accounts where receipts from such campaign are to be deposited. Copies of campaign solicitation literature, including the text of any solicitation to be made orally, shall be attached to the solicitation notice. The charitable organization on whose behalf the paid solicitor is acting shall certify that the solicitation notice and accompanying material are true and complete.

(d) A contract between a paid solicitor and a charitable organization shall be in writing, shall clearly state the respective obligations of the paid solicitor and the charitable organization and shall state the minimum amount which the charitable organization shall receive as a re-
sult of the solicitation campaign, which minimum amount shall be
stated as a percentage of the gross revenue. Such minimum amount
shall not include any amount which the charitable organization is to
pay as expenses of the solicitation campaign.
(e) A paid solicitor shall, prior to orally requesting a contribution,
and at the same time at which a written request for a contribution
is made, clearly and conspicuously disclose at the point of solicitation
his name as on file with the [department], the fact that he is a paid
solicitor and the percentage of the gross revenue which the charitable
organization shall receive as identified in subsection (d).
(f) A paid solicitor shall, in the case of a solicitation campaign con-
ducted orally, whether by telephone or otherwise, send a written con-
firmation to each person who has pledged to contribute, no more than
[five] days after such person has been solicited, which confirmation
shall include a clear and conspicuous disclosure of the information re-
quired by subsection (e).
(g) A paid solicitor shall not represent that any part of the contribu-
tions received will be given or donated to any charitable organization
unless such organization has consented in writing to the use of its
name, prior to the solicitation. Such written consent shall be signed
by [two] authorized officers, directors or trustees of the charitable
organization.
(h) No paid solicitor shall represent that tickets to an event are to
be donated for use by another, unless the paid solicitor has first ob-
tained a commitment, in writing, from a charitable organization stating
that it will accept donated tickets and specifying the number of tickets
which it is willing to accept and provided no more contributions for
donated tickets shall be solicited than the number of ticket commit-
ments received from the charitable organization.
(i) A paid solicitor shall require any person he directly or indirectly
employs, procures or engages to solicit to comply with the provisions
of subsections (e) to (h), inclusive.
(j) A paid solicitor shall file a financial report for the campaign with
the [department] no more than [ninety] days after a solicitation cam-
paign has been completed, and on the anniversary of the commence-
ment of any solicitation campaign which lasts more than [one] year.
The financial report shall include gross revenue and an itemization
of all expenditures incurred. The report shall be completed on a form
prescribed by the [department]. An authorized official of the paid
solicitor and [two] authorized officials of the charitable organization
shall sign such report and they shall certify, under oath, that such
report is true and complete to the best of their knowledge.
(k) A paid solicitor shall maintain during each solicitation campaign
and for not less than [three] years after the completion of each such
campaign the following records, which shall be available to the [depart-
ment] for inspection upon request: (1) The name and address of each
contributor and the date and amount of the contribution, provided the
[department] shall not disclose this information except to the extent
necessary for investigative or law enforcement purposes; (2) the name
and residence of each employee, agent or other person involved in the solicitation; and (5) records of all income received and expenses incurred in the course of the solicitation campaign.

1. If a paid solicitor sells tickets to an event and represents that tickets will be donated for use by another, the paid solicitor shall maintain, for not less than [three] years after the completion of such event, the following records, which shall be available to the [department] for inspection upon request: (1) The name and address of contributors donating tickets and the number of tickets donated by each contributor; and (2) the name and address of all organizations receiving donated tickets for use by others, including the number of tickets received by each organization.

2. All funds collected by the paid solicitor shall be deposited in a bank account. The bank account shall be in the name of the charitable organization with whom the paid solicitor has contracted and the charitable organization shall have sole or joint control of the account.

3. Any material change in any information filed with the [department] pursuant to this section shall be reported in writing by the paid solicitor to the [department] not more than [seven] days after such change occurs.

4. No person may act as a paid solicitor if such person, any officer or director thereof, any person with a controlling interest therein, or any person the paid solicitor employs, engages or procures to solicit for compensation, has been convicted by a court of any state or the United States of any felony, or of any misdemeanor involving dishonesty or arising from the conduct of a solicitation for a charitable organization or purpose. Any denial, suspension or revocation of the registration of a paid solicitor based on a violation of this subsection shall be made in accordance with the provisions of [insert appropriate reference] of the general statutes.

Section 8. [Commercial Coverturer.]

(a) Every charitable organization which agrees to permit a charitable sales promotion to be conducted in its behalf, shall obtain a written agreement from the commercial coverturer and file a copy of such agreement with the [department] not less than [ten] days prior to the commencement of the charitable sales promotion within this state. An authorized representative of the charitable organization and the commercial coverturer shall sign such agreement and the terms of such agreement shall include the following: (1) the goods or services to be offered to the public; (2) the geographic areas where, and the starting and final date when, such offering is to be made; (3) the manner in which the name of the charitable organization is to be used, including any representation to be made to the public as to the amount or percent per unit of goods or services purchased or used that is to benefit the charitable organization; (4) a provision for a final accounting on a per unit basis to be given by the commercial coverturer to the charitable organization and the date when it is to be made; and (5) the date when and the manner in which the benefit is to be conferred
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19 on the charitable organization.
20 (b) A commercial cooperator shall keep the final accounting for each
21 charitable sales promotion for [three] years after the final accounting
22 date and such accounting shall be available to the [department] upon
23 request.
24 (c) A commercial cooperator shall disclose in each advertisement for
25 a charitable sales promotion the amount per unit of goods or services
26 purchased or used that is to benefit the charitable organization or pur-
27 pose. Such amount may be expressed as a dollar amount or as a percen-
28 tage of the value of the goods or services purchased or used.

1 Section 9. [Violations.] It shall be a violation of this act for: (1) any
2 person to misrepresent the purpose or beneficiary of a solicitation; (2)
3 any person to misrepresent the purpose or nature of a charitable
4 organization; (3) any charitable organization to engage in any finan-
5 cial transaction which is not related to the accomplishment of its
6 charitable purpose, or which jeopardizes or interferes with the ability
7 of the charitable organization to accomplish its charitable purpose; (4)
8 any charitable organization to expend an unreasonable amount of
9 money for solicitation or management; (5) any person to use or exploit
10 the fact of registration so as to lead the public to believe that such
11 registration constitutes an endorsement or approval by the state; (6)
12 any person to misrepresent that any other person sponsors or endorses
13 a solicitation; (7) any person to use the name of a charitable organiza-
14 tion, or to display any emblem, device or printed matter belonging to
15 or associated with a charitable organization without the express writ-
16 ten permission of the charitable organization; (8) any charitable
17 organization to use the name which is the same as or confusingly
18 similar to the name of another charitable organization unless the latter
19 organization shall consent in writing to its use; (9) any person to
20 make any false or misleading statement on any document required by
21 this act; (10) any person to fail to comply with the requirements of Sec-
22 tions 3 to 8, inclusive, of this act; (11) any charitable organization to
23 use the services of an unregistered fund raising counsel or paid solicitor;
24 (12) any fund raising counsel or paid solicitor to perform any services
25 on behalf of an unregistered charitable organization.

1 Section 10. [Power to Investigate, Subpoena.]
2 (a) The [department], on its own motion or on complaint of any per-
3 son, may conduct an investigation to determine whether any person
4 has violated or is about to violate any provision of this act.
5 (b) The [commissioner] or his authorized representative may subpoena
6 documentary material relating to any matter under investigation, issue
7 subpoenas to any person involved in or who may have knowledge of
8 any matter under investigation, administer an oath or affirmation to
9 any person and conduct hearings on any matter under investigation.
10 (c) If any person fails to obey any subpoena issued by the [commiss-
11 oner] or his authorized representative pursuant to this section, the
12 [commissioner] may, after notice, apply to the [insert appropriate court],
after a hearing thereon, may issue an order requiring such person to
obey such subpoena or any part thereof, together with such other relief
as may be appropriate. Any disobedience of any order entered under
this section by any court shall be punished as a contempt thereof.

Section 11. [Grandfather.] [Insert appropriate grandfather clause for
currently registered organizations, fund raising counselor or paid
solicitor.]

Section 12. [Authority to Regulate.] The [commissioner] may adopt
regulations in accordance with [insert reference to appropriate section
of state law].

Section 13. [Additional Power of Commissioner and Attorney
General.]
(a) The [commissioner] may deny, suspend or revoke the registration
of any charitable organization, fund raising counsel or paid solicitor
which has violated any provision of this act. The [commissioner] may
accept a written assurance of compliance when he determines that a
violation of this act is not material and that the public interest would
not be served by a denial, suspension or revocation of such registration.
(b) The [attorney general], at the request of the [commissioner], may
apply to the [insert appropriate court] for, and the [court] may grant,
a temporary injunction or a permanent injunction to restrain viola-
tions of this act, the appointment of a receiver, an order of restitution,
an accounting and such other relief as may be appropriate to ensure
the due application of charitable funds. Proceedings thereon shall be
brought in the name of the state.
(c) Any person who violates any provision of this act shall be fined
not more than [one thousand] dollars or imprisoned not more than [one]
year, or both.

Section 14. [Severability.] [Insert severability clause.]

Section 15. [Repealer.] [Insert repealer clause.]

Section 16. [Effective Date.] [Insert effective date.]
Credit, Charge Card, and Retail Installment Account Disclosure Acts

These acts, based on California law, require specified application forms and written solicitations for defined credit cards and charge cards to contain disclosures respecting interest and fees. Several exceptions are set forth.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Credit Card Disclosure Act.

Section 2. [Definitions.] As used in this act: "Regulation Z" means any rule, regulation or interpretation promulgated by the Board of Governors of the Federal Reserve System ("Board") under the Federal Truth in Lending Act, as amended, and any interpretation or approval issued by an official or employee of the Federal Reserve System duly authorized by the Board and the Federal Truth in Lending Act, as amended, to issue such interpretations or approvals.

Section 3. [Credit Card Disclosures.]

(a) Any application form or preapproved written solicitation for an open-end credit card account to be used for personal, family, or household purposes which is mailed on or after [date] to a consumer residing in this state by or on behalf of a creditor, whether or not the creditor is located in this state, other than an application form or solicitation included in a magazine, newspaper, or other publication distributed by someone other than the creditor, shall contain or be accompanied by either of the following disclosures:

(1) A disclosure of each of the following, if applicable:

(i) Any periodic rate or rates that may be applied to the account, expressed as an annual percentage rate or rates. If the account is subject to a variable rate, the creditor may instead either disclose the rate as of a specific date and indicate that the rate may vary, or identify the index and any amount or percentage added to, or subtracted from, that index and used to determine the rate. For purposes of this section, that amount or percentage shall be referred to as the "spread."

(ii) Any membership or participation fee that may be imposed for availability of a credit card account, expressed as an annualized amount.

(iii) Any per transaction fee that may be imposed on purchases, expressed as an amount or as a percentage of the transaction, as applicable.

(iv) If the creditor provides a period during which the consumer
may repay the full balance reflected on a billing statement which is attributable to purchases of goods or services from the creditor or from merchants participating in the credit card plan, without the imposition of additional finance charges, the creditor shall either disclose the number of days of that period, calculated from the closing date of the prior billing cycle to the date designated in the billing statement sent to the consumer as the date by which that payment must be received to avoid additional finance charges, or describe the manner in which the period is calculated. For purposes of this section, the period shall be referred to as the "free period" or "free-ride period." If the creditor does not provide such a period for purchases, the disclosure shall so indicate.

(2) A disclosure that satisfies the initial disclosure statement requirements of Regulation Z.

(b) A creditor need not present the disclosures required by subsection (a)(1) in chart form or use any specific terminology, except as expressly provided in this section. The following chart shall not be construed in any way as a standard by which to determine whether a creditor who elects not to use such a chart has provided the required disclosures in a manner which satisfies subsection (a)(1). However, disclosures shall be conclusively presumed to satisfy the requirements of subsection (a)(1) if a chart with captions substantially as follows is completed with the applicable terms offered by the creditor, or if the creditor presents the applicable terms in tabular, list, or narrative format using terminology substantially similar to the captions included in the following chart:

| ANNUALIZED VARIABLE MEMBERSHIP |
|-----------------------------|------------------------|
| ANNUAL RATE INDEX OR        |
| PERCENTAGE AND SPREAD       |
| RATE (1)                    |
| (2) FEE                      |
| TRANSACTION FEE             |
| FREE-RISE PERIOD (3)        |

(1) For fixed interest rates. If variable rate, creditor may elect to disclose a rate as of a specified date and indicate that the rate may vary.

(2) For variable interest rates. If fixed rate, creditor may eliminate the column, leave the column blank, or indicate "No" or "None" or "Does not apply."

(3) For example, "30 days" or "Yes, if full payment is received by next billing date" or "Yes, if full new balance is paid by due date."

(c) For purposes of this section, "Regulation Z" has the meaning attributed to it under this act, and all of the terms used in this section have the same meaning as attributed to them in federal Regulation Z (12 C.F.R. Sec. 226.1 et seq.). For the purposes of this section, "open-
end credit card account” does not include an account accessed by any device that may be used to obtain credit pursuant to an electronic fund transfer, but only if such credit is obtained under an agreement between a consumer and a financial institution to extend credit when the consumer’s asset account is overdrawn or to maintain a specified minimum balance in the consumer’s asset account.

(d) Nothing in this section shall be deemed or construed to prohibit a creditor from disclosing additional terms, conditions, or information, whether or not relating to the disclosures required under this section, in conjunction with the disclosures required by this section.

(e) If a creditor is required under federal law to make any disclosure of the terms applicable to a credit card account in connection with application forms or solicitations, the creditor shall be deemed to have complied with the requirements of subsection (a)(1) with respect to those application forms or solicitations if the creditor complies with the federal disclosure requirement. For example, in lieu of complying with the requirements of subsection (a)(1), a creditor has the option of disclosing the specific terms required to be disclosed in an advertisement under Regulation Z, if the application forms or solicitations constitute advertisements in which specific terms must be disclosed under Regulation Z.

(f) If for any reason the requirements of this section do not apply equally to creditors located in this state and creditors not located in this state, then the requirements applicable to creditors located in this state shall automatically be reduced to the extent necessary to establish equal requirements for both categories of creditors, until it is otherwise determined by a court of law in a proceeding to which the creditor located in this state is a party.

(g) All application forms for an open-end credit card account distributed in this state on or after [date], other than by mail, shall contain a statement in substantially the following form: “If you wish to receive disclosure of the terms of this credit card, pursuant to the Credit Card Disclosure Act, check here and return to the address on this application.”

A box shall be printed in or next to this statement for placement of such a checkmark.

However, this subsection does not apply if the application contains the disclosures provided for in this title.

(h) This act does not apply to any application form or written advertisement or an open-end credit card account where the credit to be extended will be secured by a lien on real or personal property or both real and personal property.

(i) This act does not apply to any person who is subject to [insert appropriate cite for Retail Installment Account Disclosure Act].

Suggested Legislation

(Title, enacting clause, etc.)
Section 1. [Short Title.] This act may be cited as the Charge Card Disclosure Act.

Section 2. [Definitions.] As used in this act:
(1) "Charge card" means any card, plate, or other credit device pursuant to which the charge card issuer extends credit to the charge cardholder, primarily for personal, family, or household purposes where (i) the credit extended does not subject the charge cardholder to a finance charge and (ii) the charge cardholder cannot automatically access credit that is repayable in installments.
(2) "Charge card issuer" means the person to whom a charge card is issued.
(3) "Charge card issuer" means any person that issues a charge card or that person's agent with respect to the card.
(4) "Regulation Z" means any rule, regulation or interpretation promulgated by the Board of Governors of the Federal Reserve System ("Board") under the Federal Truth in Lending Act, as amended, and any interpretation or approval issued by an official or employee of the Federal Reserve System duly authorized by the Board and the Federal Truth in Lending Act, as amended, to issue such interpretations or approvals.

Section 3. [Charge Card Disclosures.]
(a) On and after [date] issuers of charge cards shall clearly and conspicuously disclose in any charge card application form or preapproved written solicitation for a charge card mailed to a consumer who resides in this state to apply for a charge card, whether or not the charge card issuer is located in this state, other than an application form or solicitation included in a magazine, newspaper, or other publication distributed by someone other than the charge card issuer, the following information:
(1) Any fee or charge assessed for or which may be assessed for the issuance or renewal of the charge card, expressed as an annualized amount. The fee or charge required to be disclosed pursuant to this paragraph shall be denominated as an "annual fee."
(2) The charge card does not permit the charge cardholder to defer payment of charges incurred by the use of the charge card upon receipt of a periodic statement of charges from the charge card issuer.
(3) Any fee that may be assessed for an extension of credit to a charge cardholder where the extension of credit is made by the charge card issuer, and is not a credit sale and where the charge cardholder receives the extension of credit in the form of cash or where the charge cardholder obtains the extension of credit through the use of a preprinted check, draft, or similar credit device provided by the charge card issuer to obtain an extension of credit. This fee shall be denominated as a "cash advance fee" in the disclosure required by this paragraph.
(b) A charge card issuer shall be conclusively presumed to have complied with the disclosure requirements of subsection (a) if the table set
Suggested State Legislation

out in section 3(b) of [insert appropriate cite for Credit Card Disclosure Act] is completed with the applicable terms offered by the charge card issuer in a clear and conspicuous manner and the completed table in section 3(b) of [insert appropriate cite for Credit Card Disclosure Act] is then provided to the person invited to apply for the charge card as a part of or in material which accompanies the charge card application or written advertisement which invites a person to apply for a charge card.

The charge card issuer shall include as part of table set out in section 3(b) of [insert appropriate cite for Credit Card Disclosure Act] the following sentences in the boxes or in a footnote outside of the boxes that relate to the interest rate disclosure: “This is a charge card which does not permit the charge cardholder to pay for purchases made using this charge card in installments. All charges made by a person to whom the charge card is issued are due and payable upon the receipt of a periodic statement of charges by the charge cardholder.”

The inclusion or exclusion of an expiration date with table set out in section 3(b) of [insert appropriate cite for Credit Card Disclosure Act] or the use of footnotes in the boxes of the table to set out the information required to be disclosed by this section outside of the boxes of the table set out in section 3(b) of [insert appropriate cite for Credit Card Disclosure Act] shall not affect the conclusive presumption of compliance pursuant to this subsection. If a charge card issuer does not offer or require one of the selected attributes of credit cards in the table set out in section 3(b) of [insert appropriate cite for Credit Card Disclosure Act] the charge card issuer shall employ the phrase in the appropriate box or in the appropriate footnote “Not offered” or “Not required” or a substantially similar phrase without losing the conclusive presumption of compliance with the requirements of subsection (a). If one of the selected attributes of charge cards required to be disclosed pursuant to subsection (a) is not applicable to the charge card issuer, the charge card issuer may employ in the appropriate box or in the appropriate footnote outside of the box in the table set out in section 3(b) of [insert appropriate cite for Credit Card Disclosure Act] the phrase “Not applicable” or a substantially similar phrase without losing the conclusive presumption of compliance with the requirements of subsection (a).

(c) Nothing in this section shall be deemed or construed to prohibit a charge card issuer from disclosing additional terms, conditions, or information, whether or not relating to the disclosures required under this section by subsection (a) or in connection with the disclosure provided in subsection (b), in conjunction with the disclosures required by this section.

(d) If the charge card issuer offers to the charge cardholder any program or service under which the charge cardholder may elect to access open end credit, the charge card issuer shall provide to the charge cardholder, before the charge cardholder has the right to access that credit, the initial disclosure statement required by Regulation Z.

(e) All charge card application forms distributed in this state on or
after [date], other than by mail, shall contain a statement in substantially the following form:

"If you wish to receive disclosure of the terms of this credit card, pursuant to the Charge Card Disclosure Act, check here and return to the address on this application."

A box shall be printed in or next to this statement for placing such a checkmark.

However, this subsection does not apply if the application contains the disclosures provided for in this act.

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Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the Retail Installment Account Disclosure Act.

Section 2. [Definitions.] As used in this act: “Regulation Z” means any rule, regulation or interpretation promulgated by the Board of Governors of the Federal Reserve System (“Board”) under the Federal Truth in Lending Act, as amended, and any interpretation or approval issued by an official or employee of the Federal Reserve System duly authorized by the Board and the Federal Truth in Lending Act, as amended, to issue such interpretations or approvals.

Section 3. [Retail Installment Account Disclosure.]

(a) Any application form or preapproved written solicitation for a credit card issued in connection with a retail installment account which is mailed on or after [date], to a retail buyer residing in this state by or on behalf of a retail seller, whether or not the retail seller is located in this state, other than an application form or solicitation included in a magazine, newspaper, or other publication distributed by someone other than the retail seller, shall contain or be accompanied by either of the following disclosures:

(1) A disclosure of each of the following, if applicable:

(i) Any periodic rate or rates that will be used to determine the finance charge imposed on the balance due under the terms of a retail installment account, expressed as an annual percentage rate or rates.

(ii) Any membership or participation fee that will be imposed for availability of a retail installment account in connection with which a credit card is issued expressed as an annualized amount.

(iii) If the retail seller provides a period during which the retail buyer may repay the full balance reflected on a billing statement which is attributable to purchases of goods or services from the retail seller without the imposition of additional finance charges, the retail seller shall either disclose the minimum number of days of that period, calculated from the closing date of the prior billing cycle to the date designated in the billing statement sent to the retail buyer as the date
by which that payment must be received to avoid additional finance
charges, or describe the manner in which the period is calculated. For
purposes of this section, the period shall be referred to as the “free
period” or “free-ride period.” If the retail seller does not provide such
a period for purchases, the disclosure shall so indicate.

(2) A disclosure that satisfies the initial disclosure statement re-
quirements of federal Regulation Z (12 C.F.R. 226.8).

(b) In the event that an unsolicited application form is mailed or other-
wise delivered to retail buyers in more than one state, the requirements
of subsection (a) shall be satisfied if on the application form or the
soliciting material there is a notice that credit terms may vary from
state to state and which provides either the disclosures required by
subsection (a) or an address or phone number for the customer to use
to obtain the disclosure. The notice shall be in boldface type no smaller
than the largest type used in the narrative portion, excluding head-
lines, of the material soliciting the application. Any person responding
to the notice shall be given the disclosures required by subsection (a).

(c) A retail seller need not present the disclosures required by subsec-
tion (a)(1) in chart form or use any specific terminology, except as ex-
pressly provided in this section. The following chart shall not be con-
strued in any way as a standard by which to determine whether a retail
seller who elects not to use the chart has provided the required dis-
closures in a manner which satisfies subsection (a)(1). However, dis-
closures shall be conclusively presumed to satisfy the requirements
of subsection (a)(1) if a chart with captions substantially as follows is
completed with the applicable terms offered by the retail seller, or if
the retail seller presents the applicable terms in tabular, list, or nar-
rative format using terminology substantially similar to the captions
included in the following chart:

THE FOLLOWING INFORMATION IS PROVIDED PURSUANT
TO THE
RETAIL INSTALLMENT ACCOUNT DISCLOSURE ACT
CREDIT CARD TERMS VARY AMONG RETAIL SELLERS —
SELECTED TERMS FOR PURCHASES UNDER THIS RETAIL
INSTALLMENT ACCOUNT ARE SET OUT BELOW

PERIODIC

RATES
( as APRs)
ANNUAL FEES FREE-RIE
PERIOD

(d) For purpose of this section, “Regulation Z” has the meaning
attributed to it under this act, and all of the terms used in this section
have the same meaning as attributed to them in federal Regulation
Z (12 C.F.R. Sec. 226.1 et seq.).

(e) Nothing in this section shall be deemed or construed to prohibit
a retail seller from disclosing additional terms, conditions, or
information, whether or not relating to the disclosures required under
this section, in conjunction with the disclosures required by this section.

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Notwithstanding section 3(g) of [insert appropriate cite for Credit Card Disclosure Act] a retail seller that complies with the requirements of Section 3 of [insert appropriate cite for Credit Card Disclosure Act] shall be deemed to have complied with the requirements of this section.

(f) If a retail seller is required under federal law to make any disclosure of the terms applicable to a retail installment account in connection with application forms or solicitations, the retail seller shall be deemed to have complied with the requirements of subsection (a)(1) with respect to those application forms or solicitations if the retail seller complies with the federal disclosure requirement.

(g) If the disclosure required by this section does not otherwise appear on an application form or an accompanying retail installment agreement distributed in this state on or after [date], other than by mail, the application form shall include a statement in substantially the following form:

"If you wish to receive disclosure of the terms of this retail installment account, pursuant to the Retail Installment Account Disclosure Act, check here and return to the address on this form."

A box shall be printed in or next to this statement for placing such a checkmark.

(h) This act does not apply to (1) any application form or preapproved written solicitation for a retail installment account credit card where the credit to be extended will be secured by a lien on real or personal property, or both real and personal property, (2) any application form or written solicitation which invites a person or persons to apply for a retail installment account credit card and which is included as part of a catalog which is sent to one or more persons by a creditor in order to facilitate a credit sale of goods offered in the catalog, (3) any advertisement which does not invite, directly or indirectly, an application for a retail installment account credit card, and (4) any application form or written advertisement included in a magazine, newspaper, or other publication distributed in more than one state by someone other than the creditor.

Section 4. [Encourage Simplification of Comparisons.] In construing the terms of this act, this act shall be construed reasonably for the purpose of encouraging simplified comparison of the selected attributes of credit cards and retail installment accounts disclosed pursuant to [insert appropriate cite for Credit Card Disclosure Act] and Section 3 of this act and shall not be construed in an overly technical manner.

Section 5. [Expiration Dates of Solicitations.] The terms of any solicitation for an application for an open-end credit card account which does not include a specific expiration date or a statement that the terms are subject to change shall be deemed to be superseded by the terms of a subsequent solicitation for such an account by the creditor or retail seller if the recipient of the earlier solicitation has not yet applied for the account, whether or not that person has actual knowledge of that change in terms.
Suggested State Legislation

1 Section 6. [Severability.] [Insert severability clause.]
1 Section 7. [Repealer.] [Insert repealer clause.]
1 Section 8. [Effective Date.] [Insert effective date.]
New Motor Vehicle Warranties
(Statement)

This item, approved by the Committee on Suggested State Legislation, is based upon originally-introduced legislation which was subsequently enacted in a different form in the state of Washington. It provides for increased and improved communication between the car dealer and manufacturer and establishes the duties of each. The legislation ensures that the consumer is made aware of his or her rights under this act and is not refused information, documents, or service. It clarifies the application of the concept of "reasonable number of attempts" to a range of circumstances and problems that constitute a defective vehicle. A new vehicle warranty provides for statutory procedures that include a full refund or replacement vehicle in certain cases, empowers the attorney general to enforce the act, imposes penalties for certain violations, and provides for arbitration proceedings in various locations. The manufacturer is prevented from selling defective vehicles to unsuspecting second purchasers without certain disclosures or restrictions.

Because of its length, the New Motor Vehicle Warranties legislation is not published in its entirety here. Interested readers should direct requests for copies to the state of Washington, asking for Senate Bill No. 5502, from the 1987 session.
Grey Market Goods Warranty Disclosure Act

This act, based on California law, relates to "grey market goods," consumer goods bearing a trademark and normally accompanied by an express written warranty, which are imported into the United States through channels other than the manufacturer's authorized U.S. distributor and which are not accompanied by the manufacturer's express written warranty valid in the U.S. The act requires retail sellers of grey market products to post a conspicuous sign on or at the product's display and affix to the product or package a conspicuous ticket, label, or tag disclosing deficiencies in the product. Similar disclosures are required in advertisements of grey market goods.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the Grey Market Goods Warranty Disclosure Act.

2 (1) "Grey market goods" means consumer goods bearing a trademark and normally accompanied by an express written warranty valid in the United States of America which are imported into the United States through channels other than the manufacturer's authorized United States distributor and which are not accompanied by the manufacturer's express written warranty valid in the United States.

3 (2) "Sale" includes a lease of more than [four] months.

4 Section 2. [Definitions.] As used in this act:

5 (1) "Passing off goods or services as those of another;

6 (2) Misrepresenting the source, sponsorship, approval, or certification of goods or services;

7 (3) Misrepresenting the affiliation, connection, or association with, or certification by, another;

8 (4) Using deceptive representations or designations of geographic origin in connection with goods or services;

9 (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have;

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(6) Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand;

(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) Disparaging the goods, services, or business of another by false or misleading representation of fact;

(9) Advertising goods or services with intent not to sell them as advertised;

(10) Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity;

(11) Advertising furniture without clearly indicating that it is unassembled if such is the case;

(12) Advertising the price of unassembled furniture without clearly indicating the assembled price of such furniture if the same furniture is available assembled from the seller;

(13) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions;

(14) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

(15) Representing that a part, replacement, or repair service is needed when it is not;

(16) Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not;

(17) Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction;

(18) Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer;

(19) Inserting an unconscionable provision in the contract;

(20) Advertising that a product is being offered at a specific price plus a specific percentage of that price unless (1) the total price is set forth in the advertisement, which may include, but is not limited to, shelf tags, displays, and media advertising, in a size larger than any other price in that advertisement, and (2) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product. This subdivision shall not apply to in-store advertising by businesses which are open only to members or cooperative organizations organized pursuant to [the state corporation code] where more than 50 percent of purchases are made at the specific price set forth in the advertisement;

Section 4. [Retail Sellers; Disclosures; Signs; Tickets, Labels or Tags.]

(a) Every retail seller who offers grey market goods for sale shall post
a conspicuous sign at the product’s point of display and affix to the
product or its package a conspicuous ticket, label, or tag disclosing any
or all of the following, whichever is applicable:
(1) The item is not covered by a manufacturer’s express written
warranty valid in the United States (however, any implied warranty
provided by law still exists);
(2) The item is not compatible with United States electrical
currents;
(3) The item is not compatible with United States broadcast
frequencies;
(4) Replacement parts are not available through the manufacturer’s
United States distributors;
(5) Compatible accessories are not available through the manufac-
turer’s United States distributors;
(6) The item is not accompanied by instructions in English;
(7) The item is not eligible for a manufacturer’s rebate;
(8) Any other incompatibility or nonconformity with relevant do-
mestic standards known to the seller.
(b) The disclosure described in paragraph (1) of subdivision (a) shall
not be required to be made by a retail seller with respect to grey market
goods that are accompanied by an express written warranty provided
by the retail seller, provided that each of the following conditions is
satisfied:
(1) The protections and other benefits that are provided to the buyer
by the express written warranty provided by the retail seller are equal
to or better than the protections and other benefits that are provided
to buyers in the United States of America by the manufacturer’s ex-
press written warranty that normally accompanies the goods;
(2) The express written warranty conforms to the requirements of
the [insert reference to state warranty law];
(3) The retail seller has posted a conspicuous sign at the product’s
point of sale or display, or has affixed to the product or its package
a conspicuous ticket, label, or tag that informs prospective buyers that
copies of all of the warranties applicable to the products offered for
sale by the retail seller are available to prospective buyers for inspec-
tion upon request;
(4) The retail seller has complied with the provisions on presale
availability of written warranties set forth in the regulations of the
Federal Trade Commission adopted pursuant to the federal Magnuson-
Moss Warranty-Federal Trade Commission Improvement Act (see 15
U.S.C.A. Sec. 2302(b)(1)(A) and 16 C.F.R. 702.1 et seq.);
(c) Nothing in subdivision (b) shall affect the obligations of a retail
seller to make the disclosures, if any, required by any other paragraph
of subdivision (a).

Section 5. [Retail Dealers; Disclosures in Advertisements.] Every
retail dealer who offers for sale grey market goods shall be required
to disclose in any advertisement of those goods the disclosures required
by Section 4. The disclosure shall be made in a type of conspicuous size.
Section 6. [Equivalent Language.] In making the disclosures prescribed by this act, the retail seller may use reasonably equivalent language if necessary or appropriate to achieve a clearer, or more accurate, disclosure.

Section 7. [Construction with Other Laws.] Nothing in this act shall be construed to authorize any sale of goods which is specifically prohibited by a federal or state statute or regulation or a local ordinance or regulation, or to relieve the seller of any responsibility for bringing the goods into compliance with any applicable federal or state statute or regulation or local ordinance or regulation.

Section 8. [Retail Sellers; Violations; Liability to Buyer.] Any retail seller who violates this act shall be liable to the buyer who returns the product for a refund, or credit on credit purchases, if the product purchased has not been used in a manner inconsistent with any printed instructions provided by the seller.

Section 9. [Violations; Unfair Competition; Grounds for Rescission.] Any violation of this act constitutes unfair competition [insert reference to Business and Professions Code], grounds for rescission, and an unfair method of competition or deceptive practice under Section 3 of this act.

Section 10. [Severability.] [Insert severability clause.]

Section 11. [Repealer.] [Insert repealer clause.]

Section 12. [Effective Date.] [Insert effective date.]
Style Manual

Style is the custom or plan followed in typographic arrangement or display. This means that style is arbitrary. The style used in *Suggested State Legislation* produces an internally consistent publication, expressing ideas concisely and clearly. A sample act follows the discussion below.

*Introductory Matter*

The first item in a draft proposal is its name. This is to be followed with a brief description stating why such an act is necessary, summarizing the contents of the act, and the person or group which drafted the act.

Next is the title, enacting clause, etc. This should not be expanded since there is diversity among the states as to what must be contained in these elements.

*Standardized Sections*

Section 1 is the “Short Title” and states how the act may be cited, and Section 2 concerns itself with definitions, if necessary.

At the end of the act there are usually three sections: “Severability” (if needed), “Repealer,” and “Effective Date.”

*Form*

Every line of the act is numbered. The line numbers begin anew with each section. Every section has a title, in brackets, which pinpoints the subject of the section.

One significant item which has many variations is the enumeration of paragraphs within a section. If there is only one subsection to a section, it runs into the section heading and is not enumerated. If there are two or more subsections, each subsection begins on a new line and is enumerated. The enumerations for subsections, in order, are (a), (b), (c), etc., while the enumerations for paragraphs within a subsection, in order, are (1), (i), and (A).

Often it is necessary in draft legislation to indicate a state alternative to the name of an agency, the number of members on a committee, punishment for an offense, etc. In these cases brackets are used instead of parentheses.

To avoid an abundance of capitalization, which can prove distracting, most words are lower cased. For example, “director,” “commissioner” and “agency” are not capitalized.

“Comment” sections are used instead of footnotes.
Sample Act
Criminal Rehabilitation Research Act

This draft act enables a state to facilitate research, including controlled experiments, in criminal sentencing and rehabilitation methods in order to determine the most effective and humane means of deterring crime and rehabilitating delinquent and criminal offenders.

The criminal justice system neither deters nor rehabilitates as effectively as possible. Sentencing and treatment decisions continue to be handicapped by lack of scientific experience. New treatment programs are developed haphazardly, if at all, and their relative effectiveness is rarely evaluated. The results are wasted lives, needless public expenditures, and increased crime. Dissatisfaction with existing correctional institutions has increased and the demand for reform has intensified, but reform to be meaningful must be based on facts.

This draft legislation was developed by the Criminal Sentencing Project of Yale Legislative Services. A comprehensive report on Criminal Rehabilitation, including a detailed commentary to the suggested legislation, can be obtained from Yale Legislative Services, Yale Law School, New Haven, Connecticut 06520.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short Title.] This act may be cited as the [state] Criminal Rehabilitation Research Act.

Section 2. [Definitions.] As used in this act:

(1) "Commission" means the [rehabilitation research commission].

(2) "Commissioner" means a member of the [rehabilitation research commission].

(3) "Offender" means a person adjudicated delinquent or convicted of a criminal offense under the laws and ordinances of the state and its political subdivisions.

Section 4. [Rehabilitation Research Commission.]

(a) A [rehabilitation research commission] is established to review, approve, and facilitate research directed at the rehabilitation of delinquent and criminal offenders and to disseminate the results of that research to correctional officials and other interested individuals and agencies.

(b) The commission shall consist of [10] members appointed by the governor [with the advice and consent of the senate].

COMMENT: It is suggested that some commission members be ex-offenders.
Cumulative Index, 1969-1988

The following cumulative index covers volumes of *Suggested State Legislation* since 1969 and includes the legislation through this current edition. This index uses extensive subject headings, subheadings, and cross references ("see" and "see also" entries). Draft legislation is listed by title under appropriate subjects. Individual bills are often included under several headings, if they cover more than one topic. Specific entries are of two kinds:

1. Titles of bills (as they appeared in SSL volumes with the word "Act" omitted in most cases), followed by the year of the volume in parentheses and the page numbers. To find the text of a draft bill, you should consult the volume for the specific year listed.

2. References are also provided to parts of draft bills, by subject. These references do not list the full title of the draft bill, but cite only the year and the page numbers. All entries under subject headings are listed in the order in which they were published. An index to volumes before 1969 may be found in Volume 43 (1984).

Abortion, see health care
Academic records, see records management
Acid rain, see conservation and the environment
Adoption, see domestic relations
Aged
  banking: Lifeline Banking, (1986) 143-44
  crimes against the elderly: (1977) 94-110
  employment: (1969) C-12
    177-92; Protection for Tenants in Condominium Conversion, (1985) 35-42; (1986)
    40-41; Delinquent Real Property Tax Notification, (1988) 38-40
transportation: School Bus Service for the Elderly, (1983) 95
see also: state and local government—public pensions

Agriculture
farm credit: Family Farm Credit, (1978) 53-59; Agricultural Linked Deposit (Statement), (1966) 192
pest control: State Pest Control Laws (statement), (1969) C-6; Model Pesticide Use and

seed: Seed Law Revision, (1970) 170-82

see also: conservation and the environment; labor—migrant workers

Air pollution, see conservation and the environment

Alcohol, see drugs and alcohol; consumer protection

Apportionment, see elections—reapportionment

Art, see business and commerce—copyright; culture, the arts and recreation

Asbestos, see hazardous material and waste

Assistance for handicapped, see handicapped persons

Atomic energy, see nuclear energy

Attorneys general, see criminal justice and corrections

Auditors, see public finance and taxation—accounting and auditors

Automobiles, see transportation

Ballot, see election


guaranteed loans: (1970) 66-72, 84-91; (1965) 55-59


postal savings: Model Escheat of Postal Savings System Accounts, (1972) 106-08


see also: consumer protection, insurance

Bilingual education, see education

Birth certificates, see domestic relations—adoption; records management

Blood donors, see health care

Boats and boating, see transportation

Bonds and notes, see public finance and taxation

Budgets, see public finance and taxation

Building codes, see housing, land and property

Buildings, see housing, land and property; culture, the arts and recreation—historic preservation

Burial sites: Desecration of Burial Sites, (1985) 101-03

Business and commerce


advertisements: Celebrity Rights, (1988) 276-81

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Motor vehicles: Automotive Repair Dealer Registration, (1971) 97-103


see also: banks and financial institutions; consumer protection—motor vehicles; economic development; exports; licensing; transportation—motor vehicles

Campaign finance, see elections; ethics

Carnival amusement rides, see culture, the arts and recreation

Carpooling, see transportation—ridesharing

Cemeteries, see burial sites

Charitable organizations


Child abuse, see crime and criminals

Child visitation, see crime and criminals


Clinics, see health care—hospitals and clinics

Colleges, see education—universities and colleges

Commerce, see business and commerce

Commercial development, see business and commerce; growth management—commercial development

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