

SENATE BILL NO. 321
INTRODUCED BY J. BRUEGGEMAN

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR THE CREATION AND FUNCTIONS OF BUSINESS AND INDUSTRIAL DEVELOPMENT CORPORATIONS."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 61] may be cited as the "Business and Industrial Development Corporation Act".

NEW SECTION. **Section 2. Definitions.** In [sections 1 through 61], unless the context requires otherwise, the following definitions apply:

(1) "Affiliate", if used with respect to a nonnatural person, means a person who controls the nonnatural person, who is controlled by the nonnatural person, or who is controlled by a person who also controls the nonnatural person.

(2) "Associate", if used with respect to a licensee, means:

(a) a controlling person, director, or officer of the licensee;

(b) a director, officer, or partner of a person referred to in subsection (2)(a);

(c) a person who controls, is controlled by, or is under common control with a person referred to in subsection (2)(a), directly or indirectly through an intermediary;

(d) a close relative of a person referred to in subsection (2)(a);

(e) a person of which a person referred to in subsections (2)(a) through (2)(d) is a director or officer; or

(f) a person in which a person referred to in subsections (2)(a) through (2)(d) or a combination of the persons acting in concert owns or controls, directly or indirectly, a 20% or greater equity interest.

(3) "BIDCO" means a corporation that is licensed under [sections 1 through 61] to provide financial and management assistance to businesses.

(4) "Business" means a person who transacts or proposes to transact business on a regular and continual basis.

(5) "Close relative" means a parent, child, sibling, or spouse or a relative of the same degree through marriage.

(6) (a) "Control", if used with respect to a specific person, means the power to direct or cause the direction of, directly or indirectly through an intermediary, the management and policies of the person, through the ownership of voting interests, by contract other than a commercial contract for goods or nonmanagement services or by other means.

(b) A natural person is not considered to control another person solely because the natural person is a director, officer, or employee of the other person;

(c) A person is rebuttably presumed to control a corporation if the person directly or indirectly owns of record, holds beneficially with power to vote, or holds proxies with discretionary authority to vote 20% or more of the then-outstanding voting securities issued by a corporation.

(7) "Controlling person", if used with respect to a specific person, means a person who controls the specific person, directly or indirectly, through an intermediary.

(8) "Corporate name" means the name of a corporation in its articles of incorporation.

(9) "Department" means the department of commerce, provided for in 2-15-1801.

(10) "Hold control" means to directly or indirectly own, of record or beneficially, 50% or more of a business's outstanding voting equity interests.

(11) "Insolvent" means not paying debts in the ordinary course of business, not paying debts as they become due, or liabilities exceeding assets.

(12) "Interests of the licensee" includes the interests of the shareholders of the licensee.

(13) "License" means a license issued under [sections 1 through 61].

(14) "Licensee" means a corporation that is licensed under [sections 1 through 61].

(15) "Officer" means:

(a) with respect to a corporation:

(i) a person appointed or designated as an officer of the corporation by or under applicable law or the corporation's articles of incorporation or bylaws; or

(ii) a person who performs with respect to the corporation the functions usually performed by an officer of a corporation; or

(b) with respect to a specific person other than a natural person or a corporation, a person who performs for the specific person the functions usually performed by an officer of a corporation for a corporation.

(16) "Order" means an approval, consent, authorization, exemption, denial, prohibition, or requirement applicable to a specific case and issued by the department, including a license condition and an agreement made by a person with the department under [sections 1 through 61].

(17) (a) "Person" means an individual, partnership, corporation, association, limited partnership, limited liability company, governmental subdivision, agency, or public or private organization of any character.

(b) When used with respect to acquiring control of or controlling a specific person, the term includes a combination of two or more persons acting in concert.

(18) "Principal shareholder" means a person who owns, directly or indirectly, of record or beneficially, securities representing 10% or more of the outstanding voting securities of a corporation.

(19) "Subject person" means:

(a) a controlling person, subsidiary, or affiliate of a licensee;

(b) a director, officer, or employee of a licensee or of a controlling person, subsidiary, or affiliate of a licensee;

(c) another person who participates in the conduct of the business of a licensee; or

(d) if used with respect to a licensee, a company or business of which the licensee holds control under [sections 23 through 25].

NEW SECTION. Section 3. Purposes. The purposes of [sections 1 through 61] are to:

(1) promote economic development by encouraging the formation of one or more BIDCOs to help meet the financing assistance and management assistance needs of businesses in the state;

(2) establish a system of licensing, regulation, and enforcement to enable a BIDCO to satisfy the eligibility requirements for participating in programs that further the purposes of the BIDCO;

(3) encourage capital sources to invest in and lend money to BIDCOs by providing for BIDCOs a system of licensing, regulation, and enforcement designed to prevent fraud, conflict of interest, and mismanagement and to promote competent management, accurate recordkeeping, and appropriate communication with shareholders; and

(4) safeguard the general reputation of BIDCOs in order to increase the confidence of prospective equity investors in and prospective debt sources for BIDCOs.

NEW SECTION. Section 4. Administration -- rules -- orders -- declaratory rulings -- judicial review.

(1) The department shall administer [sections 1 through 61]. The department may issue orders and may adopt rules that, in the opinion of the department, are necessary to execute, enforce, and achieve the purposes of [sections 1 through 61].

(2) When the department issues an order or license under [sections 1 through 61], the department may

impose conditions that the department determines are necessary to carry out the purposes of [sections 1 through 61].

(3) The department may provide to an interested person a declaratory ruling on a provision of [sections 1 through 61].

(4) A final order, decision, license, or other official act of the department under [sections 1 through 61] is subject to judicial review by a district court.

NEW SECTION. Section 5. Application procedure. When applying for a license, an applicant shall provide the information required by the department in the form required by the department. The information must include:

- (1) information on the directors, officers, and controlling persons of the applicant;
- (2) the applicant's business plan, including at least 10 years of detailed financial projections, and other relevant information; and
- (3) any additional information considered relevant by the department.

NEW SECTION. Section 6. Requisite net worth. (1) In order to receive a license, an applicant shall demonstrate to the satisfaction of the department that the applicant has raised sufficient capital so that:

- (a) the net worth of the BIDCO is expected to be adequate, in the context of its business plan, to support the BIDCO's management team and to achieve an appropriate spreading of the risk involved in the BIDCO's provisions of financing assistance; and
- (b) the BIDCO has a reasonable promise of being a viable, ongoing BIDCO, satisfying the basic objectives of its business plan and achieving long-term financial success.

(2) The department may not establish a minimum net worth for a BIDCO under this section of less than \$1.5 million.

NEW SECTION. Section 7. Criteria for directors, officers, and controlling persons. (1) A license may be issued only if the department determines that each director, officer, and controlling person of the applicant is:

- (a) of good character and sound financial standing;
- (b) competent to perform the director's, officer's, or controlling person's functions for the applicant; and
- (c) when considered collectively with the other directors, officers, and controlling persons, adequate to

manage the business of the applicant as a BIDCO.

(2) The department may determine that a director, officer, or controlling person of an applicant is not of good character. Bases that the department may use to make that determination include proof that the director, officer, or controlling person or a director or officer of a controlling person has:

(a) had an administrative sanction imposed under the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801 through 3812, for an offense under 15 U.S.C. 645; or

(b) been convicted of or plead guilty or nolo contendere to a crime involving fraud or dishonesty, including a conviction for an offense under 15 U.S.C. 645.

NEW SECTION. Section 8. Determination of likelihood of future noncompliance. The department may determine that it is not reasonable to believe that an applicant would comply with [sections 1 through 61] if licensed. Bases that the department may use to make that determination include proof that the applicant has been convicted of a crime involving fraud or dishonesty, including a conviction based on a guilty plea or plea of nolo contendere.

NEW SECTION. Section 9. Denial of application. If the department denies a license, the department shall provide the applicant with a written statement explaining the reasons for the denial.

NEW SECTION. Section 10. License -- display -- transfer or assignment -- surrender. (1) A licensee shall post the license in a conspicuous place in the licensee's principal office.

(2) A licensee may not transfer or assign its license.

(3) Upon approval by a two-thirds vote of its board of directors and after complying with subsections (4) and (5), a licensee may apply to the department to have the department accept the surrender of the licensee's license. If the department determines that the requirements of subsections (4) and (5) have been satisfied, the department shall approve the application unless the department determines that the purpose of the application is to evade a current or prospective action by the department under [sections 41 through 53].

(4) Not less than 60 days before filing an application under subsection (3), a licensee shall notify all of its shareholders and creditors of its intention to file the application. Each creditor must be notified of the right to comment to the department. Each shareholder must be notified of the right to file with the licensee an objection to the proposed surrender of the license within the 60-day period and must be advised that, if the shareholder files an objection, the shareholder may also send a copy of the objection to the department.

(5) If shareholders representing 20% of the outstanding voting securities of the licensee file an objection with the licensee, the licensee may not proceed with the application unless the application is approved by a vote of shareholders representing two-thirds of the outstanding voting securities of the licensee.

NEW SECTION. Section 11. Corporate name and representation of status. (1) The corporate name of a licensee must include the word "BIDCO" or "Bidco" and must be distinguishable on the records of the department from the name of any other organized entity and from a reserved or registered name. A licensee may not transact business under a name other than its corporate name.

(2) Before being issued a license, a corporation that proposes to apply for a license or that applies for a license may perform, under a name that indicates that the corporation is a corporation licensed under [sections 1 through 61], the acts necessary to apply for and obtain a license and otherwise prepare to begin business as a licensee. The corporation may not represent that it is a licensee until after the license has been obtained.

NEW SECTION. Section 12. Misrepresentation. (1) Except as otherwise provided in [section 11], a person transacting business in the state who is not a licensee may not knowingly use a name or title that indicates that the person is a BIDCO or otherwise represent that the person is a BIDCO or a licensee.

(2) A licensee may not knowingly misrepresent the meaning or effect of its license.

NEW SECTION. Section 13. Board of directors. (1) The board of directors of a licensee must have at least seven directors.

(2) The board of directors shall hold at least one meeting each calendar quarter.

NEW SECTION. Section 14. Notice of officer and director changes. Within 30 days after each of the following events, the licensee shall notify the department in writing of the event and provide any additional information that the department requires:

- (1) the death, resignation, or removal of a director or officer;
- (2) the election of a director; or
- (3) the appointment of an officer.

NEW SECTION. Section 15. Dividends. (1) A licensee may not pay or obligate itself to pay a cash dividend or dividend in kind to the licensee's shareholders unless the payment is consistent with a dividend policy

that has been adopted by the licensee and approved by the department.

(2) When approving dividend policies under this section, the department shall consider the special characteristics of BIDCOs and the diverse range of dividend policies that are potentially appropriate for a BIDCO, without allowing the licensee to engage in unsafe or unsound acts that could threaten the viability of the licensee as an ongoing BIDCO by eroding its capital base.

(3) The department may at any time withdraw a previous approval of a dividend policy if the department determines that the withdrawal is necessary to prevent unsafe or unsound acts.

NEW SECTION. Section 16. Stock buyback. A licensee may not buy back or obligate itself to buy back a share of equity interest from a shareholder without the prior approval of the department.

NEW SECTION. Section 17. Offices. (1) A licensee shall maintain at least one office in this state.

(2) A licensee may not maintain an office outside this state.

(3) The location of each office of a licensee must be reasonably accessible to the public.

(4) A licensee shall post in a conspicuous place at each of the licensee's offices a sign that bears the corporate name of the licensee.

(5) If a licensee establishes, relocates, or closes an office, the licensee shall give the department written notice within 30 days of the event.

NEW SECTION. Section 18. Business of licensee -- general powers. (1) A licensee may not engage in a business other than providing financing assistance and management assistance to businesses.

(2) In addition to the other powers provided by [sections 1 through 61] and the powers conferred on the licensee by the laws under which it is incorporated that are not inconsistent with [sections 1 through 61], a licensee may:

(a) borrow money and otherwise incur indebtedness for the licensee's purposes, including the issuing of corporate bonds, debentures, notes, and other evidence of indebtedness. A licensee's indebtedness may be secured or unsecured and may involve equity features, including provisions for conversion to stock and warrants to purchase stock.

(b) make contracts;

(c) incur and pay necessary and incidental operating expenses;

(d) purchase, receive, hold, lease, acquire, sell, convey, mortgage, pledge, or otherwise acquire or

dispose of real or personal property and the rights and privileges that are incidental and appurtenant to the transactions if the real or personal property is for the licensee's use in operating the licensee's business or if the real or personal property is acquired by the licensee from time to time in satisfaction of debts or the enforcement of obligations;

(e) make donations for charitable, educational, research, or similar purposes;

(f) provide financing assistance and management assistance to businesses and establish the terms and conditions of the assistance;

(g) implement a reasonable and prudent policy for conserving and investing the licensee's money before the money is used to provide financing assistance to businesses or to pay the expenses of the licensee; and

(h) exercise the incidental powers that are necessary, convenient, or reasonably related to providing financing assistance and management assistance to businesses.

NEW SECTION. Section 19. Financing assistance allowed -- forms, terms, conditions. (1) The financing assistance that a licensee may provide includes:

(a) loans;

(b) purchase of debt instruments;

(c) straight equity investments including the purchase of common stock or preferred stock;

(d) debt with equity features, including warrants to purchase stock, convertible debentures, or receipt of a percentage of net income or sales;

(e) royalty-based financing;

(f) debt guarantees; and

(g) property leasing.

(2) A licensee may determine the form, terms, and conditions for the financing assistance that it will provide.

NEW SECTION. Section 20. Participation in government programs. (1) A licensee may participate in a federal, state, or local government program for which the licensee is eligible and that has as the program's function the provision or facilitation of financing assistance or management assistance to businesses.

(2) If a licensee participates in a program referred to in subsection (1), the licensee shall comply with the requirements of the program.

NEW SECTION. Section 21. Scope of management assistance. When providing management assistance, a licensee may provide management advice, management services, technical advice, and technical services.

NEW SECTION. Section 22. Limitation to purposes of business. Financing assistance and management assistance provided by a licensee to a business may be only for the business purposes of the business.

NEW SECTION. Section 23. Control of other businesses. (1) A licensee may not hold control of another business except as provided under [sections 24 and 25].

(2) In this section, "licensee" includes the licensee in concert with a director, officer, controlling person, or affiliate of the licensee.

NEW SECTION. Section 24. Control of assisted business. (1) A licensee that has provided financing assistance to a business may acquire and hold control of the business to the extent that it becomes necessary to protect the licensee's interest as a creditor of or investor in the business.

(2) Unless the department approves a longer period, a licensee holding control of a business under this section shall divest itself of the control as soon as practicable or within 5 years after acquiring the interest, whichever is sooner.

(3) Within 30 days after a licensee exercises its authority to acquire and hold control of a business under this section, the licensee shall notify the department of the action. The notification must include the reasons why it is necessary for the licensee to acquire and hold control of the business and the length of time the licensee anticipates that it may be necessary to hold control of the business.

NEW SECTION. Section 25. Control of business providing financing assistance and management assistance or other businesses. (1) With the approval of the department, a licensee may acquire and hold control of another business that is engaged only in the business of providing financing assistance and management assistance to businesses.

(2) With the approval of the department, a licensee may acquire and hold control of a business not otherwise allowed under [sections 23 and 24] and this section.

(3) The department may not approve an application under subsection (2) unless the department

determines that:

(a) the acquisition and control will not cause the amount of the licensee's investments in businesses covered by this section to exceed 15% of the assets of the licensee; and

(b) in the department's judgment the approval will promote the purposes of [sections 1 through 61].

(4) An approval under subsection (2) may not be for a period of more than 3 years unless the department determines that a longer period is necessary and consistent with the purposes of [sections 1 through 61].

NEW SECTION. Section 26. Business practice standards and reserve. (1) A licensee shall transact its business in a safe and sound manner and shall maintain itself in a safe and sound condition.

(2) Subject to subsection (3), in determining whether a licensee is transacting business in a safe and sound manner, the department may not consider the risk of providing financing assistance to a business, unless the department determines that the risk is great enough to demonstrate gross mismanagement when compared with the return that can be realistically expected.

(3) The department may:

(a) if the amount of the financing assistance is unduly large in relation to the total assets or the total shareholder equity of the licensee, determine that a licensee's financing assistance to a single business or group of affiliated businesses violates subsection (1) or constitutes an unsafe or unsound act;

(b) require that a licensee maintain a reserve in the amount of anticipated losses;

(c) require that a licensee have in effect a written financing assistance policy approved by the licensee's board of directors, including credit evaluation and other matters. The department may not require that a licensee adopt a financing assistance policy that contains standards that prevent the licensee from exercising needed flexibility in evaluating and structuring financing assistance to businesses on an individual basis.

NEW SECTION. Section 27. Disclosure of potential conflict of interest -- terms and conditions -- examples. (1) A person shall disclose a potential conflict of interest that occurs in a transaction in the financing documents of the transaction or, if the transaction does not involve financing assistance, in another appropriate document if the person:

(a) participates in a decision of a licensee relating to the transaction; and

(b) knows of a potential conflict of interest involving the transaction.

(2) If a licensee provides financing assistance to a business or engages in another business transaction and if the assistance or transaction involves a potential conflict of interest, the terms and conditions under which

the licensee provides the assistance or engages in the transaction may not be less favorable to the licensee than the terms and conditions that would be required by the licensee in the ordinary course of business if the assistance or transaction did not involve a potential conflict of interest.

(3) Licensee transactions that involve a potential conflict of interest include:

(a) providing financing assistance to a principal shareholder of the licensee, to a person controlled by a principal shareholder of the licensee, or to a director, officer, partner, relative, controlling person, or affiliate of a principal shareholder of the licensee;

(b) providing financing assistance to a business to which one or more of the following provides or plans to provide contemporaneous financing assistance:

(i) a principal shareholder of the licensee;

(ii) a director, officer, partner, relative, controlling person, or affiliate of a principal shareholder of a licensee;

(iii) an affiliate of a principal shareholder of a licensee; or

(iv) a person controlled by a principal shareholder of the licensee;

(c) providing financing assistance to a business that has or is expected to have a substantial business relationship with another business that has a director, officer, or controlling person who is also:

(i) a director, officer, or controlling person of the licensee; or

(ii) the spouse of a director, officer, or controlling person of the licensee;

(d) providing financing assistance to a business if the business or a director, officer, or controlling person of the business contemporaneously has lent or will lend money to an associate of the licensee;

(e) providing financing assistance for the purchase of property of an associate or principal shareholder of the licensee;

(f) selling or otherwise transferring an asset of the licensee to an associate or principal shareholder of the licensee.

(4) In this section, "relative" means a parent, child, sibling, spouse, grandparent, grandchild, nephew, niece, aunt, or uncle or a relative of the same degree through marriage.

NEW SECTION. Section 28. Acquiring control of licensee -- application -- determination. (1) A person may not acquire control of a licensee without the prior approval of the department.

(2) The department shall approve an application to acquire control of a licensee if the department determines that:

(a) the applicant and the directors and officers of the applicant are of good character and sound financial standing;

(b) it is reasonable to believe that the applicant will comply with [sections 1 through 61]; and

(c) the plans, if any, of the applicant to make a major change in the business, corporate structure, or management of the licensee are not detrimental to the safety and soundness of the licensee.

(3) If, after notice and a hearing, the department determines that the criteria for approval in subsection (2) have not been satisfied, the department shall deny the application.

(4) When the department is reviewing an application under this section, the department may determine that:

(a) an applicant or a director or officer of an applicant is not of good character if the person has been convicted of a crime involving fraud or dishonesty, including a conviction based on a guilty plea or plea of nolo contendere;

(b) an applicant's plan to make a major change in the management of a licensee is detrimental to the safety and soundness of the licensee if the plan provides for a person to become a director or officer of the licensee and the person has been convicted of a crime involving fraud or dishonesty, including a conviction based on a guilty plea or plea of nolo contendere.

(5) The conditions described in subsection (4) are not the only conditions upon which the department may determine that an applicant or a director or an officer of an applicant is not of good character or that an applicant's plan to make a major change in the management of a licensee is detrimental to the safety and soundness of the licensee.

NEW SECTION. Section 29. Merger -- purchase -- sale. (1) A licensee may not merge with another corporation unless the merger is approved by the department, and, if the licensee is not the surviving corporation, the surviving corporation is a licensee.

(2) A licensee may not purchase all or substantially all of the business of another person unless the purchase is approved by the department.

(3) A licensee may not sell all or substantially all of the licensee's business or of the business of an office of the licensee to another person unless the purchaser is a licensee and the sale is approved by the department.

(4) The department may not approve a merger, purchase, or sale under this section unless the department determines that:

(a) the merger, purchase, or sale will be safe and sound with respect to the acquiring licensee;

(b) upon consummation of the merger, purchase, or sale, it is reasonable to believe that the acquiring licensee will comply with [sections 1 through 61];

(c) the merger, purchase, or sale will not have a major detrimental effect on competition in the providing of financial assistance or management assistance to businesses or, if there will be a detrimental effect, the merger, purchase, or sale is necessary in the interests of the safety and soundness of a party to the merger, purchase, or sale or is otherwise, on balance, in the public interest.

NEW SECTION. Section 30. Investigations -- powers -- failure to comply or testify. (1) The department may make public or private investigations inside or outside the state that the department considers necessary to determine whether to approve an application for a license, to determine whether a person has violated or is about to violate [sections 1 through 61], to aid in the enforcement of [sections 1 through 61], or to aid in issuing an order or adopting a rule under [sections 1 through 61].

(2) For the purposes of an investigation, examination, or other proceeding under [sections 1 through 61], the department may administer oaths and affirmations, subpoena witnesses, compel the attendance of witnesses, take evidence, and require the production of books, papers, correspondence, memoranda, agreements, and other documents or records that the department considers relevant or material to the proceeding.

(3) If a person fails to comply with a subpoena issued by the department under [sections 1 through 61] or to testify with respect to a matter covered by [sections 1 through 61], the district court may issue an order requiring the attendance of the person and the giving of testimony or production of evidence.

NEW SECTION. Section 31. Fees. (1) A fee for filing an application with the department must be paid at the time the application is filed with the department and is not refundable. A person shall pay the department:

(a) \$2,500 for filing an application for a license;

(b) \$1,250 for filing an application for approval to acquire control of a licensee;

(c) \$1,250 for filing an application for approval for a merger, purchase, or sale under [section 29]. If two or more applications relating to the same merger, purchase, or sale are filed, the fee for filing each application is the figure resulting from dividing \$1,250 by the number of the applications.

(2) A licensee shall pay \$2,500 each calendar year at a time established by the department.

(3) The department shall establish a fee for the examination of a licensee or an affiliate or subsidiary of a licensee. The fee must be paid within 30 days after receiving a statement from the department. A fee established under this subsection must include:

(a) the proportionate part of the salaries and cost of employee benefits of the examiners while conducting the examination and while preparing the examination report; and

(b) the transportation costs and per diem costs of each examiner while away from the examiner's place of employment.

NEW SECTION. Section 32. Records and report requirements. (1) A licensee shall make and keep books, accounts, and other records in the form and manner, at the place, and for the period of time that the department establishes.

(2) A licensee, an affiliate of a licensee, and a subsidiary of a licensee shall file with the department the reports that the department requires. A report must be in the form and contain the information that the department requires.

(3) The department may require, by order, that a licensee include an asset on the licensee's books and records at a valuation that represents the current value of the asset.

(4) Not later than 90 days after the close of the calendar year, or a longer period if established by the department, a licensee shall file with the department an audit report containing:

(a) financial statements, including a balance sheet, statement of income or loss, statement of changes in capital accounts, and statement of changes in financial position for or as of the end of the calendar year, prepared with an audit by an independent certified public accountant in accordance with generally accepted accounting principles;

(b) a report, certificate, or opinion of the independent certified public accountant who performs the audit, stating that the financial statements were prepared in accordance with generally accepted accounting principles; and

(c) other information that the department may require.

NEW SECTION. Section 33. Records kept by others. (1) If a person other than a licensee makes or keeps all or part of the books, accounts, or other records of the licensee, [sections 1 through 61] apply to the person with respect to the books, accounts, and other records to the same extent as if the person were the licensee.

(2) If a person other than an affiliate or subsidiary of a licensee makes or keeps all or part of the books, accounts, or other records of the affiliate or subsidiary, [sections 1 through 61] apply to the person with respect to the books, accounts, and other records to the same extent as if the person were the affiliate or subsidiary.

(3) If the department considers it expedient, the department may require a licensee to obtain the approval of the department before permitting another person to make or keep all or part of the books, accounts, or other records of the licensee.

NEW SECTION. Section 34. Information on economic development effect. Each year, the department shall publish and provide to the legislature information on the effect of [sections 1 through 61] on promoting economic development in the state. The information must include aggregate statistics on:

(1) the number and dollar amount of the financing assistance made by licensees to businesses. The amounts must be organized into broad categories based on the types of industry involved. The North American Industry Classification System Manual may be used for the categories.

(2) the number and dollar amount of the financing assistance made by licensees to minority-owned businesses and to businesses owned by women; and

(3) estimates of the number of jobs created or retained.

NEW SECTION. Section 35. Examination of licensees and subsidiaries. (1) The department may at any time examine a licensee or an affiliate or subsidiary of a licensee. Licensure under [sections 1 through 61] constitutes implied consent to examination by the department.

(2) The department shall examine a licensee at least once during each calendar year.

(3) At the department's request, the following persons shall provide to the department the books, accounts, and records of a licensee or a licensee's affiliate or subsidiary and shall otherwise facilitate the department's examination of the licensee to the fullest extent possible:

(a) a director, officer, or employee of a licensee being examined by the department;

(b) a director, officer, or employee of an affiliate or subsidiary of a licensee being examined by the department;

(c) a person having custody of the books, accounts, or records of a licensee being examined by the department;

(d) a person having custody of the books, accounts, or records of an affiliate or subsidiary of a licensee being examined by the department.

(4) The department may retain a certified public accountant, attorney, appraiser, or other person to assist the department in the examination of a licensee or an affiliate or subsidiary of a licensee if the department determines that the assistance is necessary. Within 10 days after receipt of a statement from the department,

the licensee being examined shall pay the fees of a person retained by the department under this subsection.

NEW SECTION. Section 36. Inspection or copying refusal. A person having custody of all or part of the books, accounts, or other records of a licensee may not knowingly refuse to allow the department, upon request, to inspect or make copies of the records.

NEW SECTION. Section 37. Restrictions on financing assistance. (1) A licensee may not directly or indirectly provide financing assistance to an associate of the licensee.

(2) A licensee may not directly or indirectly provide financing assistance to discharge or to free money for use in discharging part or all of an obligation to an associate of the licensee. This subsection does not apply to a transaction of an associate of a licensee in the normal course of the associate's business involving a line of credit or financing assistance with a term of not more than 5 years.

NEW SECTION. Section 38. Contemporaneous financing assistance. (1) If the terms on which a licensee provides financing assistance to a business are less favorable to the licensee than the terms on which an associate of the licensee provides financing assistance to the business, the licensee may not directly or indirectly provide the assistance to the business within 1 year before or after the associate provides assistance.

(2) If the financing assistance provided by the licensee's associate is of a different kind from the financing assistance provided by the licensee, the burden is on the licensee to prove that the terms on which the licensee provided the financing assistance were at least as favorable to the licensee as the terms on which the associate provided the assistance.

(3) This section does not apply:

- (a) if the associate is a controlling person of the licensee and is also the only shareholder of the licensee;
- (b) if the associate is an affiliate or subsidiary of the licensee; or
- (c) to a transaction of an associate of a licensee in the normal course of the associate's business involving either a line of credit or financing assistance with a term of not more than 5 years.

NEW SECTION. Section 39. Compensation of associate. (1) An associate of a licensee may not directly or indirectly receive from a person to whom the licensee provides financing assistance:

- (a) compensation in connection with the providing of the financing assistance; or
- (b) other things of value for procuring, influencing, or attempting to procure or influence the licensee's

action with respect to providing the financing assistance.

(2) This section does not apply to the receipt of fees by an associate of a licensee for bona fide services performed by the associate if:

(a) the associate, with the consent and knowledge of the person to whom the financing assistance is provided, is designated by the licensee to perform the services;

(b) the services are appropriate and necessary under the circumstances;

(c) the fees for the services are approved as reasonable by the licensee; and

(d) the fees for the services are collected by the licensee, and the licensee pays the associate.

NEW SECTION. Section 40. Exemptions. (1) If the department finds that the exemption is in the public interest and that the regulation of the person or transaction is not necessary for the purposes of [sections 1 through 61], the department may exempt a person or transaction from [sections 37 through 39] for the purposes of a particular transaction.

(2) The exemption may be unconditional or upon specified terms and conditions and for specified periods.

NEW SECTION. Section 41. Injunction and enforced compliance -- appointment of receiver or conservator. If in the opinion of the department a person has violated [sections 1 through 61] or if there is reasonable cause to believe that a person is about to violate [sections 1 through 61], the department may bring an action in district court to enjoin the violation or to enforce compliance with [sections 1 through 61]. Upon a proper showing, a restraining order, preliminary or permanent injunction, or writ of mandamus must be granted and a receiver or a conservator may be appointed for the defendant or the defendant's assets.

NEW SECTION. Section 42. Cease and desist orders for unlicensed persons. If the department finds that a person has violated or that there is reasonable cause to believe that the person is about to violate [section 11(2) or 12(1)], the department may order the person to cease and desist from the violation unless and until the person is issued a license under [sections 1 through 61].

NEW SECTION. Section 43. Cease and desist orders for violations by licensees or subject persons. (1) After notice and a hearing, the department may order a licensee or subject person to cease and desist from an action if the department determines that the licensee or subject person:

(a) has violated or is violating or that there is reasonable cause to believe that the licensee or subject

person is about to violate [sections 1 through 61]; or

(b) has engaged in or that there is a reasonable cause to believe that the licensee or subject person is about to engage in an unsafe or unsound act with respect to the business of the licensee.

(2) An order issued under subsection (1) may require the licensee or subject person to take affirmative action to correct a condition resulting from the action.

NEW SECTION. Section 44. Other cease and desist orders. If the department determines that a factor set out in [section 43] is true with respect to a licensee or subject person of a licensee and that the action or violation is likely to cause the insolvency or substantial dissipation of the assets or earnings of the licensee, is likely to seriously weaken the condition of the licensee, or is likely to otherwise seriously prejudice the interests of the licensee before the completion of proceedings conducted under [section 43], the department may order the licensee or subject person to cease and desist from the action or violation. The order may require the licensee or subject person to take affirmative action to correct a condition resulting from the action or violation.

NEW SECTION. Section 45. Removal and suspension orders for certain acts. (1) The department may issue an order removing a subject person of a licensee from office with the licensee and prohibiting the subject person from further participation in any manner in the conduct of the business of the licensee if the department determines after notice and a hearing that:

(a) the person has violated [sections 1 through 61] or another applicable law, has engaged in an unsafe or unsound act with respect to the business of the licensee, or has engaged in an act that constitutes a breach of the person's fiduciary duty;

(b) the act, violation, or breach of fiduciary duty has caused or is likely to cause substantial financial loss or other damage to the licensee or has seriously prejudiced or is likely to seriously prejudice the interest of the licensee or the person has received financial gain by reason of the act, violation, or breach of fiduciary duty; and

(c) the act, violation, or breach of fiduciary duty involves dishonesty on the part of the person, demonstrates the person's gross negligence with respect to the business of the licensee, or demonstrates the person's wilful disregard for the safety and soundness of the licensee.

(2) The department may issue an order removing a subject person of the licensee from office with the licensee and prohibiting the subject person from further participation in any manner in the conduct of the business of the licensee except with the prior consent of the department if, after notice and a hearing, the department determines that, by engaging or participating in an act with respect to a financial or other business institution that

resulted in substantial financial loss or other damage, the subject person of a licensee demonstrated:

(a) dishonesty or a wilful or continuing disregard for the safety and soundness of the financial or other business institution; and

(b) unfitness to continue as a subject person of the licensee or to participate in conducting the business of the licensee.

(3) The department may immediately issue an order suspending a subject person of a licensee from the person's office with the licensee and prohibiting the subject person from further participation in any manner in the conduct of the business of the licensee except with the consent of the department if the department determines that:

(a) the factors in subsection (1) or (2) are true with respect to the person; and

(b) an immediate order is necessary to protect the interests of the licensee or the public.

(4) In this section, when used with respect to a licensee, "office" means the position of director, officer, or employee of the licensee or of an affiliate or subsidiary of the licensee.

NEW SECTION. Section 46. Removal and suspension orders in cases of indictment or conviction.

(1) If the department determines that a subject person of a licensee has been indicted by a grand jury or has been bound over for trial by a court for a crime involving dishonesty or breach of trust and that the continuation of the person as a subject person of the licensee may threaten the interests of the licensee or may threaten to impair public confidence in the licensee, the department may issue an order suspending the person from the person's office with the licensee and prohibiting the person from further participation in any manner in the conduct of the business of the licensee until the person's charge has been disposed of.

(2) If the department determines that a subject person or former subject person of a licensee to whom an order was issued under subsection (1) or another subject person of a licensee has been convicted of a crime involving dishonesty or breach of trust and that the continuation or resumption of the person as a subject person of the licensee may threaten the interests of the licensee, the department may issue an order suspending or removing the person from the person's office with the licensee and prohibiting the person from further participation in any manner in the conduct of the business of the licensee except with the prior consent of the department.

(3) The failure to convict a subject person who is charged with a crime involving dishonesty or breach of trust does not prevent the department from issuing an order to the person under another provision of [sections 1 through 61].

(4) In this section, "office" has the meaning provided in [section 45].

NEW SECTION. Section 47. Hearings on orders -- rescision and modification. (1) Within 30 days after an order is issued under [section 42, 44, 45(3), or 46], the licensee or subject person of a licensee to whom the order is directed may file with the department an application for a hearing on the order.

(2) If the department fails to begin a hearing within 15 business days after the application is filed or within a longer period to which the licensee or subject person consents, the order must be considered rescinded.

(3) After the hearing, the department shall affirm, modify, or rescind the order.

(4) A person to whom an order is issued under this section may apply to the department to modify or rescind the order. The department may not modify or rescind the order unless the department determines that it is in the public interest to do so and that it is reasonable to believe that the person will comply with [sections 1 through 61].

(5) The right of a licensee or subject person to whom an order is issued under [section 42, 44, 45(3), or 46] to an interlocutory review of the order is not affected by the failure of the licensee or subject person to apply to the department for a hearing on the order issued under this section.

NEW SECTION. Section 48. Disclosure to shareholders. If the department determines that the results of a department communication or order addressed to the licensee or to a subject person of the licensee should be disclosed to the licensee's shareholders, the department may require the licensee to make the disclosure in the form and manner determined by the department.

NEW SECTION. Section 49. Meetings of directors and shareholders called by department. (1) If the department considers it expedient, the department may call a meeting of the board of directors or of the shareholders of a licensee.

(2) The department shall send notification of the time, place, and purpose of the meeting not less than 5 days before the meeting to each director for a directors' meeting or to each shareholder for a shareholders' meeting, either by personal service or by certified mail sent to the person's last-known address as shown in the records of the department.

(3) The licensee shall pay the notice and meeting expenses for a meeting of directors or shareholders called under this section.

NEW SECTION. Section 50. Orders restricting additional financial assistance. (1) The department may issue an order directing a licensee to refrain from providing additional financing assistance to businesses

if, in the opinion of the department, the order is necessary to protect the interests of the licensee or the public and if, after notice and a hearing, the department determines that:

(a) the licensee or a controlling person, subsidiary affiliate of the licensee has violated [sections 1 through 61] or another applicable law;

(b) the licensee is conducting the licensee's business in an unsafe and unsound manner;

(c) the licensee is in a condition that makes it unsafe or unsound for the licensee to transact business;

(d) the licensee has ceased to transact business as a BIDCO;

(e) the licensee is insolvent;

(f) the licensee has suspended payment of the licensee's obligations, has made an assignment for the benefit of the licensee's creditors, or has admitted in writing the licensee's inability to pay the licensee's debts as the debts become due;

(g) the licensee has applied for an adjudication of bankruptcy, reorganization, arrangement, or other relief under a bankruptcy, reorganization, insolvency, or moratorium law, an involuntary petition in bankruptcy against the person has not been dismissed in 90 days, or a person has applied for the relief under the law against a licensee and the relief has been granted or the licensee has by an affirmative act approved of or consented to the action; or

(h) a fact or condition exists that would have been grounds for denying the licensee a license if the fact or condition had existed when the licensee applied for the license.

(2) If the department determines that a factor in subsection (1) is true with respect to a licensee and that it is necessary for the protection of the interests of the licensee or the public that the department immediately prevent the licensee from providing additional financing assistance to businesses, the department may issue the order without a hearing.

(3) If the department consents, a licensee that has been the subject of an order under subsection (1) or (2) may resume providing financing assistance to businesses under the conditions that the department prescribes.

(4) A person to whom an order is issued under subsection (1) or (2) may apply to the department to modify or rescind the order. The department may not grant the application unless the department determines that it is in the interest of the public to do so and that it is reasonable to believe that the person will comply with [sections 1 through 61].

NEW SECTION. Section 51. Taking possession of licensee. (1) If the department finds that a factor

in [section 50] is true with respect to a licensee and that it is necessary for the protection of the interests of the licensee or of the public, the department may take immediate possession of the property and business of the licensee and appoint a conservator for the licensee.

(2) The department may appoint as conservator one of the employees of the division of banking and financial institutions of the department of administration or another competent and disinterested person. The division of banking and financial institutions must be reimbursed out of the assets of the conservatorship for all money expended by the division in connection with the conservatorship. Upon the approval of the department, the expenses of the conservatorship paid for by the division must be paid out of the assets of the licensee. Payment of the expenses of the division of banking and financial institutions takes priority over other payments from the assets and must be fully paid before a final distribution is made.

(3) Under the direction of the department, the conservator shall take possession of the books, records, and assets of the licensee and shall take other action that is necessary to conserve the assets of the licensee or to ensure payment of obligations of the licensee pending further disposition of the licensee's business.

(4) At an appropriate time, the department may terminate the conservatorship and permit the licensee to resume the transaction of the licensee's business subject to the terms, conditions, restrictions, and limitations that the department prescribes.

NEW SECTION. Section 52. Receivership. (1) The department may apply to the district court for the appointment of a receiver for a licensee if the department determines that the licensee should be liquidated because:

(a) the licensee is insolvent;

(b) the licensee has suspended payment of the licensee's obligations, has made an assignment for the benefit of the licensee's creditors, or has admitted in writing the licensee's inability to pay the licensee's debts as the debts become due;

(c) the licensee has applied for an adjudication of bankruptcy, reorganization, arrangement, or other relief under a bankruptcy, reorganization, insolvency, or moratorium law;

(d) a person has applied for the relief described under subsection (1)(c) against a licensee and the licensee has by an affirmative act approved of or consented to the action or the relief has been granted; or

(e) the licensee is in a condition that makes it unsafe or unsound for the licensee to transact business.

(2) If a receiver is appointed under subsection (1), the receiver shall liquidate the property and business of the licensee.

NEW SECTION. Section 53. Civil penalty. (1) If after notice and a hearing the department finds that a person has violated [sections 1 through 61], the department may order the person to pay to the department a civil penalty in an amount that the department specifies. The civil penalty may not exceed \$1,000 for each violation or, in the case of a continuing violation, \$1,000 for each day that the violation continues.

(2) This section does not apply to an act committed or omitted in good faith in conformity with an order, regulation, declaratory ruling, or written interpretative opinion of the department even if the order, regulation, declaratory ruling, or written interpretative opinion is later amended, rescinded, or repealed, or determined by judicial or other authority to be invalid.

(3) The provisions of subsection (1) are in addition to and not alternative to the other provisions of [sections 1 through 61] that authorize the department to issue orders or to take other action because of a violation of [sections 1 through 61].

NEW SECTION. Section 54. Application of administrative procedure act to proceedings. A proceeding under [section 53] is subject to Title 2, chapter 4, part 6. Except as otherwise provided in [sections 1 through 61], other proceedings and actions under this chapter are exempt from Title 2, chapter 4, part 6.

NEW SECTION. Section 55. Appeals. A final order of an administrative proceeding under [sections 42 through 46, 50, 51 or 53] may be appealed to the district court.

NEW SECTION. Section 56. Application of law under which licensee incorporated. Except as otherwise provided in this section, the provisions of the law under which a licensee is incorporated apply to the licensee. If a provision of the licensee's incorporating law conflicts with a provision of [sections 1 through 61], [sections 1 through 61] control.

NEW SECTION. Section 57. Associates. (1) For purposes of [sections 27 and 37 through 39], a person who is an associate within 6 months before or after a licensee provides financing assistance must be considered to be an associate as of the date the licensee provides the assistance.

(2) If a licensee, in order to protect the licensee's interests, designates a person to serve as a director of, officer of, or in a management capacity of a business to which the licensee provides financial assistance, the person may not, on that account, be considered to be an associate under [sections 27 and 37 through 39]. This subsection does not apply if the person has, directly or indirectly, another financial interest in the business or if

the person, at any time before the licensee provides the financing assistance, served as a director of, officer of, or in another capacity in the management of the business for a period of 30 days or more.

NEW SECTION. **Section 58. Other licenses.** A corporation that is licensed under [sections 1 through 61] may apply for and be issued a license under another law of the state, the federal government, or another state unless the transaction of business by the corporation as a licensee under the other license would violate [sections 1 through 61] or would be contrary to the purposes of [sections 1 through 61].

NEW SECTION. **Section 59. Exemption.** A licensee is not subject to the provisions of Title 32.

NEW SECTION. **Section 60. Authority of department.** The provisions of [sections 1 through 61] relating to conflicts of interest do not limit the authority of the department to determine that an act involves a conflict of interest and is therefore an unsafe or unsound act.

NEW SECTION. **Section 61. Confidentiality.** (1) The director and other employees of the department may not disclose information acquired by them in the discharge of their duties under [sections 1 through 61] except to the extent that disclosure of the information is required by law, other than the public records provisions of Title 2, chapter 6, or is required by court order.

(2) Notwithstanding subsection (1), the department may disclose information that is confidential under subsection (1) if the department determines that disclosure of the information is necessary to promote the public interest. This subsection does not authorize the disclosure of information acquired by the department in the course of an examination of a licensee.

(3) A BIDCO may provide to a current or prospective creditor or shareholder of the BIDCO a copy of an examination report on the BIDCO made by the department under [sections 1 through 61].

NEW SECTION. **Section 62. Codification instruction.** [Sections 1 through 61] are intended to be codified as an integral part of Title 35, and the provisions of Title 35 apply to [sections 1 through 61].

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