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SENATE COMMERCE AND LABOR COMMITTEE

HEARING ON SB 310

“Revises provisions governing the
regulation of Trust Companies. (BDR 55-778)”

APRIL 6, 2009, 8:30 A.M.

TESTIMONY OF JOHN P.C. DUNCAN

- Madame Chair and members of the Committee, my name is John Duncan, principal of the Chicago-based law firm, Duncan Associates. I founded my current law firm nine years ago after practicing law for 26 years at larger law firms, including five years as head of a worldwide banking and investment practice. (A copy of my biography is attached to my written testimony.) Thank you for this opportunity to testify regarding SB 310.
- I urge you to approve SB 310 but with two amendments that I am proposing and submitting in writing at this hearing.
- In my testimony I propose to focus on a single question:

Can Nevada not only remain but become an even more attractive state for trust companies and family trusts, and the good jobs associated with them, while at the same time providing superior protection to the assets and financial health of their clients and trusts?
- **In my opinion, the clear answer to this question is “Yes.”**

Allow me to elaborate:

- If Nevada enacts SB 310 as well as SB 365, also before your Committee, with some limited changes to the former to prevent some significant unintended adverse consequences:
 - **Nevada will remain hospitable to providers of fiduciary services to family trusts through legitimate, well-managed and sound trust institutions.**
 - **At the same time, the Financial Institutions Division will be equipped with all the tools necessary to effectively supervise existing Nevada trust companies and deny licenses to companies that do not meet traditional trust company standards, such as**
 - **adequate capital,**
 - **experienced, skilled managements,**
 - **management integrity, and**
 - **business plans that both protect client assets and are likely to succeed financially.**

Personal Experience with Nevada and Other States' Trust Company Laws

- I have reached these conclusions based on experiences acquired over 25 years of working as counsel to trust institutions and as the draftsman of dozens of trust company laws and regulations, including:
 - (1) drafting state trust company and trust laws across the country, including trust company laws for Illinois, North Carolina, South Dakota, Tennessee, Texas, New Hampshire and

Wyoming as well as a model trust company act for the Conference of State Bank Supervisors (consisting of all of the state banking regulators);

- (2) working with major as well as smaller economic players in the national fiduciary services market place, including forming and representing over 50 state and federally regulated trust companies and trust departments;
 - (3) forming 7 of the 11 current “family trust companies” licensed by Nevada, with 3 additional family trust company license applications pending;
 - (4) representing two of Nevada’s larger retail trust companies, with an application pending for another; and
 - (5) assisting in the drafting of both SB 310 and SB 365.
- Over the past 25 years, I have had the opportunity to witness first hand the rapid development of the national fiduciary services marketplace and worked with its leading private players and state and federal regulators.

Observations on the National Fiduciary Services Marketplace

- I have seen progressive changes in state laws similar to what is being proposed here attract large and small trust institutions and families needing trusts to the state, bringing with them good, high-paying, clean jobs.
- Nevada stands uniquely positioned geographically as one of a very few states that can compete effectively for the new jobs in this economic marketplace.

- Nevada owes its favorable position to its tax system, its location near the major cities of the West and Southwest, easy accessibility by air to all the major cities of the rest of the country, and the hard work Nevada has already done to update its trust and trust company laws.

Personal Experience Working on Drafts of SB 310 and SB 365

- I also base my favorable conclusions on my familiarity with these particular bills as a draftsman and in working with two teams of dedicated Nevada draftspeople—business people, legislators, regulators and legal counsel—seeking to make Nevada an even more attractive location for family trusts and legitimate, safe and sound trust companies to serve them.
- These bills would bring Nevada to the forefront in one of the two areas of state law that are critical to attract this business—trust company laws. This is not accomplished through lax regulation; it is accomplished through smart, focused and efficient regulation.
- As for the high quality trust laws that are also critical for Nevada to have a more prominent position among those states that seek to be Meccas for the fiduciary services business, such as Delaware, New Hampshire, South Dakota, Alaska, Florida and Wyoming, past Nevada legislation combined with currently proposed new legislation, if adopted, should maintain and enhance Nevada's current solid position.
- It is important to emphasize that everyone benefits from good trust laws. This includes not only wealthy families but also every Nevada citizen who

may need to establish a trust for any reason or amount. Trusts are an important option for all families hoping to use their assets to fund their retirements and meet the future needs of their children. The amendments being proposed in this legislature to Nevada's trust and trust company laws will help those families do so in the manner best suited to their unique situations.

The Need for Further Amendments of SB 310.

- Since mid-year 2008, the two groups of private citizens and public servants I mentioned earlier have worked diligently to improve Nevada trust company law. I have been impressed with the commitment and dedication that these professionals have brought to their task.
- However, some of the current provisions of SB 310, in their current forms, require additional work and discussion to assure they will further—rather than impede—the goal of maintaining and enhancing Nevada as one of the most attractive trust company and trust law states in the nation.
- I have prepared and am submitting amendments to SB 310 to achieve these purposes and look forward to working with the other draftspeople to further refine these proposals as this Committee reviews the bill in more detail.
- The first amendment, of Section 8 of SB 310 (sub-section 2), would make sure that quality trust companies,
 - currently licensed by Nevada or proposing to become so,

- meeting every applicable current and proposed standard of Chapter 669 for Nevada trust companies, and
 - also meeting every standard for an interstate trust company office imposed by the host state,
- can remain or become licensed in Nevada.

- In other words, such companies would not be driven from Nevada or barred from being licensed here just because they could not or chose not to also meet the full-blown chartering standards of that other state. But this is what current SB 310 would require; doubtlessly not an intended consequence of the draftspeople.

In my view Nevada should decide what the standards should be for its trust companies with interstate offices and not condition interstate activity on the happenstance of another state's charter standards.

- The second amendment, of Section 2 of the bill, would adopt the same definitions for "family trust company" and for "family member" that are proposed in SB 365 (and add definitions of certain terms used in those definitions). It of course does not make sense for the two bills, if both enacted as I recommend, to have conflicting definitions.

Moreover, most single family trust companies in the nation of which I have knowledge (and we have formed one-half or more of the regulated ones over the past ten years), would not qualify as "family trust companies" with the definition of family member used in SB 310. This includes the seven "family trust companies" we represent that are now licensed by Nevada and at least two of the three for which we

have applications pending. All would be forced to be licensed as “retail trust companies”.

I understand that another amendment, to both sections 2 and 5 of SB 310 is being proposed by Keith Lee on behalf of Sutton Place Limited. This alternative proposal accomplishes the aims of our amendment to section 2, and we also would support the amendment to section 5.

Conclusion: SB 310, with the Proposed Amendments, Will Maintain and Enhance Nevada’s Position as a Leader in the National Fiduciary Services Marketplace.

- For all the reasons I have mentioned, I am able to conclude that if Nevada adopts SB 310 with the limited amendments I have alluded to, it will have one of the best statutes in the nation governing trust companies, from both vantage points of flexibility and efficiency and of protection of trust companies and the trusts and clients they serve.
- I am certain, based on my experience in this area, that Nevada would thereby send a clear signal—and, indeed, a strong invitation—to large and small players in this industry that they *must* seriously consider Nevada when deciding where to locate their facilities, their services, their good jobs.
- Because of the enhanced regulatory tools provided by SB 310, it will also send a clear signal that companies without adequate capital, experienced,

skilled managements, integrity and business plans that protect client assets and are likely to succeed financially, “need not apply.”

- All of this, if the proposed amendments are adopted, will be possible without shuttering or driving away current, well-run, capable and honest Nevada trust companies or preventing new, quality institutions that meet all of the foregoing high standards from being licensed.

I would be happy to answer any questions.

JOHN P.C. DUNCAN BIOGRAPHY

John Duncan founded the Chicago law firm Duncan Associates Attorneys and Counselors, P.C. in 2000 to concentrate on the representation of private, boutique, and traditional trust firms, family offices, and other wealth management organizations. His expertise includes designing and implementing trans-generational governance and succession structures and family office risk-management programs. Over the past 12 years, he has helped form more than half of the regulated Private Trust Companies chartered in the United States during that period.



John drafted a model trust company act that has been adopted in nearly half of the states. Most recently, his firm served as principal counsel for the drafting of New Hampshire's new trust statutes, establishing it as a very attractive state for trusts and private trust companies. The amendments included immunity for trustees from certain asset concentration decisions, authority to create dynasty purpose trusts, and the most detailed provisions in the nation addressing the relationships among trustees and other trust participants, such as co-trustees, trust advisors and trust protectors.

John is a graduate of Yale University (B.A. *cum laude* 1971) and The University of Chicago Law School (J.D. 1974). Prior to forming Duncan Associates, John headed the banking and investment practice of the international law firm Jones Day. He is a member of the Banking Law Committee of the American Bar Association (Co-chairman, ABA Financial Privacy Task Force, 1998–2001; Chairman, Securities Activities of Banks Subcommittee, 1995–98) and past chairman of the Financial Institutions Committee of the Chicago Bar Association (1985–86).

He is a regular contributor to *Trust and Estates* magazine and other professional publications and frequent speaker at legal and wealth management conferences, including the Heckerling Institute on Estate Planning, Chicago Estate Planning Council, Institutional Investor's Integrated Wealth Management Forum, and the Notre Dame Estate Planning and Tax Institute.

