MINUTES OF THE
SENATE COMMITTEE ON COMMERCE, LABOR AND ENERGY

Seventy-Seventh Session
March 20, 2013

The Senate Committee on Commerce, Labor and Energy was called to order by Chair Kelvin Atkinson at 2:01 p.m. on Wednesday, March 20, 2013, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Kelvin Atkinson, Chair
Senator Moises (Mo) Denis, Vice Chair
Senator Justin C. Jones
Senator Joyce Woodhouse
Senator Joseph P. Hardy
Senator James A. Settelmeyer
Senator Mark Hutchison

GUEST LEGISLATORS PRESENT:

Senator David Parks, Senatorial District No. 7

STAFF MEMBERS PRESENT:

Marji Paslov Thomas, Policy Analyst
Wynona Majied-Martinez, Committee Secretary

OTHERS PRESENT:

Kelly Ahlander
Barry Gold, Director of Government Relations, AARP Nevada
Barbara Deavers
Bruce Arkell, Nevada Senior Advocates
Nicole Lamboley, Chief Deputy, Office of the Secretary of State
Jeff Hanscom, Direct Selling Association
Jim Wadhams, Nevada Independent Insurance Agents Association

Tom Burns, President, Cragin and Pike Insurance; Nevada Independent Insurance Agencies; Las Vegas Metro Chamber of Commerce
Paul McKenzie, Secretary-Treasurer, Building and Construction Trades Council of Northern Nevada
Bryan Wachter, Retail Association of Nevada
Robert Vogel, Pro Group Management
Len Krick, Nevada Business Brokers Association
Bradley Bottoset, The Liberty Group of Nevada, LLC
Michael Faust
Linda Hentges-Nyman, Nevada Business Brokers Association; First Choice Business Brokers
Ron Quinn
Paul Murad, Real Estate Commission, Real Estate Division, Department of Business and Industry
Diana Foley, Securities Administrator, Office of the Secretary of State

Chair Atkinson:
I open the hearing on Senate Bill (S.B.) 261.

SENATE BILL 261: Revises provisions relating to door-to-door solicitation. (BDR 52-829)

Senator Justin C. Jones (Senatorial District No. 9):
I am here to introduce Senate Bill 261. This measure revises provisions relating to door-to-door solicitations.

The sale of goods or services by legitimate door-to-door solicitors has significant impact on the economy and well-being of Nevada and its local communities. However, unscrupulous practices by persons soliciting donations or selling goods are contrary to good business practices and have caused our citizens to suffer substantial losses because of misrepresentation. Our elderly population is often targeted in these practices, which constitute deceptive and high-pressure sales tactics and high prices for low-quality merchandise. In some cases, the consumer pays for merchandise that is never received.

Some solicitors use fraudulent or intimidating tactics when attempting to sell magazine subscriptions door to door. Frequently, magazine sellers tell consumers they may purchase a subscription and donate it to a charity in lieu of receiving it

themselves, or they tell consumers they work for a charitable organization. This is often a fraudulent sales pitch, and no benefit goes to charity.

Some sellers have serious criminal records and are dangerous. Serious personal and property crimes have been committed by some sellers, particularly against the elderly. Young mothers aiming to protect their children have been so intimidated they have called the police.

Other sellers are at-risk youth or young adults who are recruited or lured into a sales crew by promises of travel and easy money and then find themselves hundreds of miles from home. Due to the financial considerations of working for a sales crew, these individuals are frequently in a situation in which they may be unable to leave the crew because they fear losing the wages the team leader is purportedly holding for them. They may not have the money to pay for a bus or plane ticket home.

The Bureau of Consumer Protection (BCP), located within the Office of the Attorney General, received several complaints last year concerning Kirby Vacuum salespeople who were selling used vacuums as new, primarily to the elderly living in Las Vegas. The BCP also handled several complaints concerning teenage magazine salespersons being transported into our State (Exhibit C). Staff of the office of the Attorney General believe that with the suspension of the Consumer Affairs Division from 2009 to 2013, people do not know where to file complaints regarding door-to-door sales. Staff believe there are a larger number of victims, but they are probably calling local police for help and the complaints are not being forwarded to the Office of the Attorney General.

Therefore, in response to these concerns, I have sponsored S.B. 261. Highlights of the bill are outlined in the Legislative Counsel's Digest on pages 1 and 2 of the bill.

I know that Committee members did receive some letters from the Direct Sales Association and certain of its members. My wife, my mother-in-law, several of my family members and friends participate in direct sales themselves. Never once has any of them gone door to door. Those organizations are about personal and family relationships. While I understand there may be individuals affected by this, I do not think there is any harm to those individuals participating in direct-sales operations that many are familiar with and not multi-level marketing.

Senator Settelmeyer:
What is the penalty if we establish and you violate a do-not knock list? Do they just lose their licenses? What happens?

Senator Jones:
It is a misdemeanor.

Senator Hutchison:
I am a cosponsor on the bill. I think it is an important bill and one that is overdue. When legitimate salespeople are knocking on doors, it is an honest way to make a living. They can register and do it right. Do you think there are enough resources to make sure this is being enforced? They have to conspicuously sport their badges. From a regulatory perspective, that may be tough to enforce.

Senator Jones:
Officials are understaffed at this point. Part of the requirement is to submit a fee that helps to provide sufficient enforcement resources. Even if they do not, at least the process will establish a standard by which someone can have the privilege of going door to door revoked.

Senator Settelmeyer:
We can let the senior population know that salespeople in a legitimate operation will have a badge. That is an easy and helpful identifier.

Senator Hardy:
I heard you cite a disclaimer on churches, nonprofits, Scouts, schools, politicians. Where is that in the bill?

Senator Jones:
It is in section 5, the description of noncommercial solicitation.

Senator Hardy:
What prevents a person trying to make a profit by claiming nonprofit status? What keeps a group that is not nonprofit from using the nonprofit label? What prevents someone from saying, "Get in my van, Kids. This is a nonprofit organization. Go sell my wares." Then, "Is it not wonderful that you are working for a nonprofit organization?" What lets us know that a nonprofit organization is legitimate?

Senator Jones:
The IRS determines whether someone qualifies as a 501(c)(3) entity. If there are entities that are not legitimate nonprofits, that is an IRS issue. In terms of the process the BCP would go through to qualify someone, that information would be provided. If they claim they are a nonprofit and are not, that is something that could be brought up to the BCP.

Senator Hardy:
All of those exemptions I listed and probably some others that I did not list are outside the purview of the bill.

Kelly Ahlander:
Senate Bill 261 needs to be passed. I am in favor of it.

I support having safe communities and safe neighborhoods. I have four children, and I fully support Senator Jones in this legislation. I like knowing these people have fingerprints on file and receive permits and identification badges. If I were to look through my peephole and see a badge, I would be a lot more apt to be open and friendly. I hope the Committee will support this bill.

Barry Gold (Director of Government Relations, AARP Nevada):
I have submitted my testimony in support of S.B. 261 (Exhibit D), and I will read it.

Older adults are often the victims of home repair scams or other types of fraud and abuse from door-to-door salespeople.

Barbara Deavers:
I am one of the 309,000 AARP members. I am on the do not call list for good reason, and I think this bill's time has come. Our senior population is growing. A lot of us will be single women. We have no real protection against this situation. I will ask that the BCP broadcast a list to all the organizations and agencies that work with seniors. That would be a wonderful idea.

A registration form would clarify the organization's cause and mission. I think the registration is supposed to take place every 2 years. When the BCP sends out the expiration notice, they could also send a form saying that registration could be extended.

Bruce Arkell (Nevada Senior Advocates):
Senate Bill 261 is great. We support it in general. I have a couple of minor changes, however, that strengthen it. The first has to do with the noncommercial groups that are excluded from the requirements. That is fine. If, however, I post a sign on my property that says I do not want any solicitation, that should be recognized by commercial as well as noncommercial groups. This would eliminate politicians, church groups and others. Since I have taken the effort to post a sign, it should be acknowledged.

The other concern has to do with section 20, which is like the do not call or do not contact list. I have decided I do not want anyone at my house and that could become public information. I am concerned that it might then be posted on a public Website. I am not sure that is necessary. It is important that solicitors understand but the general public does not need to know that I do not want people soliciting on my property. This is a necessary piece of legislation. It is important that citizens be protected.

Senator Settelmeyer:
Occasionally, when I do telephone town halls, I call individuals and they call back to say they are on the National Do Not Call list. It is not the political call list, but the commercial business Do Not Call list. I am curious whether that would be an issue because if you do not include everyone, you get to a situation where you think you have signed the Do Not Knock list. I am paraphrasing the concept of the Do Not Call list, and then an eager politician or representative of a religious organization comes to your door and you feel you have the right to call the cops. When police do not show up and charge the person with a misdemeanor, you see that as a reason to include everyone because of the confusion.

Mr. Arkell:
Senator Settelmeyer, that is the idea. The exceptions are there, but you have a provision that allows me to post a sign that says No Solicitation. I had one posted on my house that came out of an old mine. It was a big yellow one that said, "No Trespassing, Get Shot on Sight." This was in the middle of a subdivision, and my wife finally made me take it down. That, however, discouraged people. I did not want anybody to come to my door. If I have posted a sign that says I do not want anybody there, I do not want anybody to show up.

Senator Settelmeyer:
While knocking on doors during my last election cycle, I saw something interesting. I would go to a door with a sign that said, "No Solicitation," and when I started to walk away, people who knew me would say, "Settelmeyer, why are you leaving? I want to talk politics."

If I said anything about the sign, they would comment that it did not apply to me. It was meant to apply to religious groups and door-to-door salespeople. In my communities, it is rare for somebody to go door to door. I understand that in Clark County, it is more common.

Mr. Arkell:
The solution is for you to take politicians out of the bill. You are identified as one of the groups that is a noncommercial enterprise. If you are not in it, you are not covered by it. The intent was not to keep politicians from my door. If, however, I post a sign, I do not want anybody beating on my door. I do not want anybody there. That is what this is about. It makes it clear for everybody. Keeping that list off the Internet is also important.

Chair Atkinson:
I want to call to the Committee's attention section 19, page 9, starting at line 10, which says it is unlawful:

> For a permit holder, permitted solicitor, or person engaging in door-to-door noncommercial solicitation to enter or remain upon any public or private premises if a "No Solicitation" or "No Trespassing" sign is posted at or near each entrance to the premises.

Even a politician going to a door with a sign that says "No Trespassing" is taking a chance.

Senator Hardy:
I had the same kind of feeling about the Do Not Call list. I sometimes wonder, having gone door to door in this political world. I get the impression that people who have a No Solicitation sign probably have a higher incidence of nobody being home; their houses being vacant or not wanting anybody to know. Also, if I put some do not call list out on the Web, I wonder if I have created a target for people's homes, to be violated.

Mr. Arkell:
That would be the reason for not publishing that list. This happened in one city back East where a newspaper obtained a list of all the concealed carry weapons permits and published all the names and addresses. This certainly is not in that same category, but the effect is similar. All of a sudden, that person is identified and becomes a target.

Senator Hardy:
Do we actually have evidence that has happened or is it just you and me thinking this up?

Mr. Arkell:
We have not done anything like this before. The publication of the list is the issue. Solicitors need to know so they do not go beat on your doors, but I do not think the general public needs to know who is on that list. That is personal.

Nicole Lamboley (Chief Deputy, Office of the Secretary of State):
We are neutral on S.B. 261, but we are responding to some of the Committee members' questions regarding nonprofit organizations. Under State law, there is a requirement that nonprofit entities register with the Office of the Secretary of State's (SOS), so we could work with the BCP to make sure each entity is licensed through the SOS as a nonprofit registered entity. You can also register as a nonprofit entity and not be a charitable organization. We have legislation before the Assembly now that would deal with the solicitation of charitable contributions as well as noncharitable contributions. We could easily work with that and make sure nonprofit entities are registered to address some of the concerns and make sure they are legitimate organizations within the State.

Senator Hardy:
Do Boy Scouts or Girl Scouts register as a troop, or a pack or a region? How do they register as a nonprofit so they do not get arrested and charged with a misdemeanor and spend the rest of their lives in juvenile hall?

Ms. Lamboley:
It would depend on their corporate charter. They are national organizations, so they would be qualified in the State as a foreign nonprofit entity. Each entity is different. We address those on an as-needed basis. I think they would be under noncommercial solicitation. We address that in our solicitation requirements. If

you are purchasing a good, it is not a charitable contribution; it is actually the purchase of a good.

Jeff Hanscom (Direct Selling Association):
I am here on behalf of the Direct Selling Association (DSA) and would like to voice strong opposition to S.B. 261. We are the national trade association that represents more than 180 companies that sell their products and services, typically through personal presentation and demonstration, usually in the home and sometimes door to door. These companies involve more than 15 million American direct sellers and include some of the nation's most well-known brands. Although the public policy objectives of S.B. 261 are sound, unfortunately it could have, as written, serious and negative impacts on many of the 162,000 Nevadans, the majority of whom are women, who depend on direct selling to supplement their household incomes. In our statement (Exhibit E), we respectfully ask that S.B. 261 be held in Committee and the Legislature work with the industry to craft legislation addressing our common objectives while protecting legitimate direct sellers, who could easily be exempted by referencing existing exemptions in Nevada unemployment compensation statutes.

Senator Settelmeyer:
Do any other states in addition to Ohio and Michigan have a statewide Do Not Knock list?

Senator Jones:
Delaware recently enacted legislation, although it is a little different. Many local jurisdictions have it. A lot of the language in S.B. 261 came from Colorado Springs, which has had some of these provisions for many years. I will have to determine if there has been additional legislation. I will speak with the National Conference of State Legislatures to see if additional legislation has been introduced in other states.

Senator Hardy:
As I read section 19, page 9, the bill applies to churches, scouting, schools, politicians and everybody who has the desire to go door to door. They cannot do so if there is a sign on the door, near the door or on the street.

Senator Jones:
I would be happy to discuss Senate Bill 261 with members of the Committee, including Mr. Arkell and Mr. Hanscom and some who have raised concerns. I can

see both sides of the decision to knock on a door, solicitation sign or not, and would not like to be accused of a misdemeanor if I knocked on a door when I did not see the signs. That is something we can discuss and see how it would affect a Girl Scout, or a politician or a missionary. I had asked Mr. Hanscom previously to provide me with the numbers of direct sellers from the 160,000 who do door-to-door sales. I believe the number will turn out to be pretty low.

Chair Atkinson:
We will close the hearing on S.B. 261 and open the hearing on S.B. 253.

SENATE BILL 253: Revises certain provisions relating to insurance (BDR 53-1056)

Senator Mark Hutchison (Senatorial District No. 6):
Senate Bill 253 makes changes relating to membership in an association of self-insured employers.

The law calls for a member of a self-insured employees group to give the group 120 days' notice before exiting the group and finding an alternative means for securing workers' compensation insurance coverage. Because there are varying dynamics in the insurance marketplace, third-party carriers typically do not issue and hold price quotes for 120 days in advance of an expiration notice. Therefore, I have sponsored S.B. 253.

Senate Bill 253 does two things. It reduces the notice period from 120 days to 30 days and it requires a statement that the withdrawing member will become insured by a private carrier. This information is in lieu of requiring a statement that the withdrawing member already has become insured.

Jim Wadhams (Nevada Independent Insurance Agents Association):
I have submitted a letter (Exhibit F) signed by 13 agents supporting passage of S.B. 253. The self-insured groups were started in the State in the early 1990s. They are groups of employers that have to meet certain financial responsibilities to be certified by the State. They do not buy insurance; they are insurers of each other. They share their risk for workers' compensation.

The simplest element is on page 3, line 23 in the existing law: "A member of an association may terminate his or her membership at any time."

Senator Hutchison was making the point that the original intent of S.B. 253 was only to shorten the notice period from 120 days to 30 days in which the member has to communicate his desire to terminate membership. It seems a little incongruous that I can terminate at any time and yet must give a 120-day notice that I might do that.

The other reason we requested 30 days is the insurance industry, where insurance would be purchased typically, will not give a quote that will last more than 30 days. In other words, you have to reprice it after 30 days. The quote would become stale.

These groups have to enter into contracts because they agree to stand behind each other's responsibilities. Departing members tend to leave responsibilities behind. That will be covered by existing contracts. Even if I were to terminate, whatever responsibility has built up during that period would be resolved after the termination and should not preclude me from procuring insurance elsewhere.

Advocates want to be sure there are no gaps in coverage. Employers who choose to terminate the self-insured group will have insurance. It is not that they have an intention to terminate; rather, they must be insured.

There are a couple other points to consider. Page 4, lines 16-28 of S.B. 253, says that both the administrator of the Division of Industrial Relations (DIR) and the Commissioner of Insurance have to be notified about terminating members. Under *Nevada Revised Statute* (NRS) 616D.110, the administrator of the DIR has the power to terminate operations of any employer that has a gap in coverage. The responsibility to maintain insurance is still incumbent upon the employer. We are asking to shorten the notice period so employers can make rational contemporaneous business decisions.

Senator Hardy:
Are employers terminating when their employees have active claims? If the workers' compensation injury happened before submitting the intent to leave or before leaving, would the party still be covered under the prior contract? How does that work?

Mr. Wadhams:
Senator Hardy, I would defer to the Division of Insurance that reviews those contracts. They may have some variations. My understanding is that there would

be claims-made policies. When a notice of termination happens, whatever claims exist would be resolved at that point.

Senator Hardy:
If a claim is going to be made, but an insurer makes sure that it is not made until after the insured organization has terminated, is there no longer the responsibility to cover the claim that was made when covering the worker's compensation?

Mr. Wadhams:
Under the existing self-insured group contract, that would be an obligation of employers who were active and under the contract.

Senator Hardy:
Does that include the employer who terminated?

Mr. Wadhams:
That includes the one that got out. Absolutely.

Tom Burns (President, Cragin and Pike Insurance; Nevada Independent Insurance Agencies; Las Vegas Metro Chamber of Commerce):
We support passage of S.B. 253. I want to clarify Mr. Wadhams' response to Senator Hardy's question. A workers' compensation policy is an occurrence policy. The time of the occurrence determines when the coverage falls.

Senate Bill 253 proposes to provide the consumer a chance to make a choice on behalf of his or her company and employees. Under the existing method, employers are held constructively captive because they are unable to get other insurance quotations. The preponderance of those who sign up for self-insured groups do not know they are signing up for life and would never be able to get out.

While self-insured groups provide a viable alternative in the workers' compensation market, there will be times when going to a third party would be a better opportunity. We believe they ought to have a choice. Taking a page from Mr. Wadhams' anticipated objections or opposition, there is some thought that employers would leave quickly. However, if the price and the product are the best price and product, that consumer will stay with that product. It is an opportunity for them to look at alternatives. This bill does not put any additional burden or financial regulation on the self-insured groups. Additionally, it is possible to argue

that there could be a run on the bank. If the product is being priced appropriately at the time it is sold, and reserves are being adequately kept and managed, the self-insureds should be fine if someone exited the group and went on to another opportunity.

Paul McKenzie (Secretary-Treasurer, Building and Construction Trades Council of Northern Nevada):
We could support this legislation if the language were changed to make it clear that an employer must have insurance in place before leaving the group so there was no opportunity for a lapse in coverage. The idea that the DIR and the Department of Business and Industry with their current staffing levels would be able to catch that lapse before somebody got injured is probably not going to happen on every occasion. We are going to have a guy fall through the gap, and that could easily be repaired by fixing the language.

Bryan Wachter (Retail Association of Nevada):
Members of the Retail Association belong to the largest self-insured group in Nevada and one of the largest in the Country. Everyone who joins our group understands that becoming self-insured is different from buying an insurance product, which is what you do when you receive workers' compensation from a for-profit insurance company. Self-insured group members become stakeholders with other members and are jointly and severally liable for all claims under the group. That is the difference between becoming self-insured and buying an insurance product. When you buy a product, you pay annually with an annual issue. When you become self-insured, it is indefinite until you decide to withdraw.

Because of this fiduciary duty, requirements to join or leave a self-insured group are big decisions. They require more notice than just canceling an insurance policy or product. While it is true that these businesses are still liable for claims while self-insured, the groups operate with the requirement that they have to remain solvent. There is a monetary bond among the members when they join. They, then, are liable. Their businesses are at risk, their personal livelihood is at risk and they are liable.

Allowing businesses to treat being self-insured the same as buying an insurance policy leads to issues that threaten the solvency and ongoing planning for other stakeholders. While they are liable for claims, they have a requirement for long-term planning. They have to know how many members they have, how many employees they have, where financial assets are located and what amount

of insurance is needed to go forward. Those requirements comprise a more stringent mechanism than just joining, buying or canceling a program.

It is possible to leave the group. It happens. The idea that our members are forced to make lifetime commitments or are forbidden to buy additional insurance products is simply not true. We operate what we consider a well-run self-insured group. We do have members who choose to leave for a variety of reasons. They give their 120-day notices. The number is not large, maybe 12 a year. We also have folks who give a 120-day notice and then decide after looking around that they want to stay and rescind their notice.

The requirements provide the needed distinction between those who buy a product and those who choose to become self-insured. Members of self-insured groups are aware of the difference. Every meeting or conversation our administrators have with members underscores the difference between becoming self-insured and buying an insurance product. I have an issue with the idea that our members do not know what they are signing up for or that our businesses are not capable of reading contracts or making those decisions. We do not operate under the assumption that our businesses do things without fully recognizing their consequences. They are smart people. They run businesses. They employ Nevadans. To suggest that they enter into contracts they do not fully understand does not give our members enough credit.

We also have concerns in S.B. 253 with the "will become" language versus the "have to become." There is coverage. All employees deserve to be covered, and the State has to have the ability to understand and underscore that coverage ability.

Robert Vogel (Pro Group Management):
Pro Group manages five self-insured groups in the State, covering more than 2,400 employers with about 3,000 locations and 60,000 employees. Contrary to the statement that our employers unknowingly sign up for something they can never get out of is absolutely untrue. Each signs a statement acknowledging the 120-day requirement. At the law's beginnings in 1993 and 1995, the 120 days was inserted, making sure employers knew up front about that provision. They understand the distinction between the commercial policy they buy for a specified period of time, 1 year, versus becoming self-insured, which is indefinite, until they choose to leave. We have two different scenarios. Employers know what

they are buying into and what they are joining, with all the restrictions and clarifications.

Senator Hutchison:
The law provides that self-insured group members can leave at any time. We just are talking here about notice. How much notice do you have to give? It is 120 days. Thirty days makes more sense based on the realities of the marketplace and how long a quote lasts.

Chair Atkinson:
We will now close the hearing for S.B. 253 and open the hearing for S.B. 128.

SENATE BILL 128: Exempts certain persons from the licensing requirements for broker-dealers. (BDR 7-444)

Senator David Parks (Senatorial District No. 7):
Senate Bill 128 addresses the licensing requirement for broker-dealers, otherwise known as business brokers. They are sometimes also called intermediaries. Business brokers assist buyers and sellers of privately held businesses with the buying and selling process. It often happens that a seller wants to sell in one sale not only his real property, his assets, but also the business that he owns. A buyer-broker is one who assists the individual in that activity and performs a wide variety of services, including estimating the value of the business and helping to advertise the sale. Sometimes businesses are also sold with the request that the sale not be widely identified. The rules for real estate brokers are established by the Real Estate Division, Department of Business and Industry. We have a problem with the real estate broker who has certain requirements to follow but seeks to sell property that includes assets and equity.

I was pulled into one of those situations a few years ago. I quickly realized I needed to take a step back from the deal before getting involved. I needed to discuss it with my broker because I am only a salesperson. He confirmed I faced certain limitations.

Len Krick (Nevada Business Brokers Association):
I am representing both myself as a licensed business broker and also the Nevada Business Brokers Association, of which I am vice chairman and cofounder. We support S.B. 128.

My successful business brokerage practice in Las Vegas has assisted hundreds of business owners to maximize their exits. For 13 years, I and other business brokers sometimes faced the situation that S.B. 128 seeks to remedy. I have submitted the proposed bill and several documents related to the problem and its solution (Exhibit G).

In addressing the sale, we identify the tangible and intangible assets of a business, entering into a listing agreement for those assets without selling the equity or having a stock sales listing agreement—at least, I have never seen one. Brokers value, market and package those assets, find a buyer and manage the negotiations.

For valid reasons, the sale may become only equity instead of an asset. Many businesses have valuable contracts that will not inure to the buyer unless he or she purchases the stock, equity and securities of the business. Continuity of contracts—such as employment agreements, vendor relations agreements or C corporation arrangements which could pose double taxation situations—are to be avoided. Accountants tell buyers or sellers a transaction may need to be a stock sale. Most of the time, buyers and sellers get together without the brokers and decide how to structure a transaction. Meanwhile, an offer on the table may involve only the assets. The prospective buyer has done due diligence regarding the business.

Between the purchase agreement and the closing, whether before or after opening escrow, when the parties decide to change the structure of the deal to include a stock sale, the business broker is in violation of federal and state securities law because the broker's fingerprints are all over this deal. The broker who negotiated the sale cannot later retract the sale by claiming to be just a consultant. A listing agreement is in place. Instead of driving the bus, the broker is a rider inadvertently engaged in a felony leading to a criminal indictment. The broker's license is for real estate, not the sale of securities.

This is not theoretical. It happens to all brokers. We cannot predict when it will happen or why, but we will share some case studies in this hearing.

When this first happened, in conjunction with a national task force to which I belong, I devised a form that addresses this in line with the Federal Securities and Exchange Commission (SEC) letter. The form is the "Securities Sale Acknowledgment, Notification and Disclaimer" Exhibit G, pages 8 through 11. No

parties have refused to sign this. Even public companies have signed it. The form basically says that you knew this was an asset sale and you turned it into a securities transaction. You will not seek to defeat the commission because you changed it.

The form is compliant with the SEC Rule 14a-8 no-action letter. This procedure on which brokers hang their hats says that in accordance with the SEC letter, I did not do certain things and I did certain other things. If this form did not lay out the SEC rules, the parties would not sign it. Brokers always get this form as soon as we find that buyers and sellers are going to change the deal. The problem is that it might be early on; it might be a letter of intent from a private equity group, which says the group wants to buy the stock. Then we are notified early in the deal. On the other hand, notification might not occur. It might be that we come to the closing table, and the documents do not look familiar. The attorneys and other professionals have taken it away from us and have done their own thing. That is fine, but we never know. It could be the day before closing. It is not as if we would have a lot of advance notice.

The SEC said that if the form is signed and the checklist completed each time showing compliance, then the broker is not at fault. That helps me but not everyone else. The task force looked at what was available. Obviously, the SEC no-action letter was available, and South Dakota had passed an exemption for business brokers. We crafted the proposed bill that is in front of you. It is based word-for-word on the law in South Dakota.

A lot of things have happened since that bill was crafted by Sherwood N. Cook, the former Deputy Secretary of State for this State's securities division. We collaborated with Secretary of State Ross Miller, his deputy and Real Estate Division officials. The task force listened to their concerns. One concern is that S.B. 128 does not mimic the no-action letter closely enough. We re-crafted our bill completely to be in 100 percent compliance with the federal no-action letter. Additionally, the concerns brought up by Securities Administrator Diana Foley in her presentation which are perfectly valid, were incorporated in our document of acknowledgment.

Senator Settelmeyer:
Are we going to require everyone who deals in these types of trades to have a license, or is it just real estate licensees who will be required to get this new license?

Mr. Krick:
We are one of only 17 states in which a person who is a real estate broker, broker-salesperson or salesperson must have the license. Also, the person must demonstrate minimum proficiency in business brokerage by obtaining a business brokerage permit. Those people can represent either side: buyer's, or seller's or dual agency's. No one else can do that in this State. It only applies to Nevada business brokers. No, we are not saying they have to get a securities license. We are trying to exempt them from having to obtain a securities license under specific circumstances.

Senator Settelmeyer:
Let us say a stockbroker doing one of these transactions for a business is going to sell the business, and creates a stock trade and has an SEC license. Will the stockbroker also be required to get this license as well? Is it only to be applied to a real estate person?

Mr. Krick:
The only time both a real estate license and business broker permit are required is when selling the assets of the business and there is an element of real property involved. A lease-hold interest or actual, physically improved or unimproved real property would be part of that kind of transaction. That triggers the licensing requirement. If somebody is doing a private placement, bits and pieces or whole companies, a securities license is needed. I cannot. I have to sell the whole company, and it has to start out as an asset sale. If it converts, it happens involuntarily.

If I am a stock broker and selling stock, that is fine. I cannot sell Joe Blow's hardware store.

Senator Settelmeyer:
Or 50 percent of it? I am looking at this from a business perspective.

Mr. Krick:
It is impossible to sell their business, because there is no market for that kind of owner-operated business. It is too small for the securities brokers. The problem is that it is a no-man's land. We are going to have testimony about an actual case that just happened where the person just shut the business and put 25 people out of work.

Senator Settelmeyer:
I appreciate the concept of S.B. 128 in that regard. I want to make sure everyone is on a level playing field. I want to be sure anyone who does this particular job has to get the license. I do not want the requirement to apply only to real estate people. If someone sells 10, 20, 50 or 80 percent of the business, that person should have this trigger and everybody would be on an equal footing. That is my concern. We will talk a little more about it off-line.

Mr. Krick:
Item 10 of our proposed bill is in addition to the SEC no-action-letter portion of this proposed amendment. It addresses all the concerns of Secretary of State Miller and Ms. Foley and for protecting the public. The first thing to do is to use the checklist to be in compliance with NRS 90. All parties must sign the checklist and the broker sends it in with the $125 administrative fee. Meanwhile, officials are going to match this with the other paperwork. The applicant has to maintain the arrangement until he or she is no longer working on the deal. If there are questions, an investigation can take place.

Then, every Nevada business broker permittee has to pay for and complete a special continuing education course prescribed by the securities division. The course lets the broker know what he or she must do and what cannot be done. There are a lot of legal parts to S.B. 128. Candidates must pass an exam demonstrating their understanding. They cannot say they did not understand the law. Our item 11 was controversial in our own organization. We can live with the end result which is maximum transaction value of $2 million.

A $2 million business might be one that makes $550,000 or $600,000 cash flow a year. We are not talking about huge businesses. They are small, relative to the universe of businesses.

We had to have some sort of exemption, perhaps $2 million, excluding the fair-market value of any real estate included in the company's assets. We are excluding real property unless the Nevada business broker first obtains a waiver from the administrator of the securities division. This is similar to all the waivers that Ms. Foley does right now. When a waiver is requested, she reviews the merits of it. Anything larger than a $2 million deal requires her approval.

Senator Hutchison:
Tell me if this is what you are doing with this bill. You are a business broker. If someone comes to you and wants to sell a business, you start off with a sale of tangible assets, equipment and building, plus intangible assets such as the good will of a going concern. The seller receives advice from a tax advisor who says if this is made as a stock deal, a bunch of money would be saved because of being taxed on capital gains. Then a broker says that he or she is not a securities seller and not licensed in the securities industry and cannot sell stock. It is a violation of federal law.

Mr. Krick:
That actually happens after the offer.

Senator Hutchison:
If this situation surfaces but is not anticipated as happening, it is out of our control. Brokers just want to be exempted from having to be licensed as securities brokers because this is not done all the time. This is so complex because the federal government requires a lot of things in their hold harmless letter, or their SEC letter, and the SOS also requires a list of things to be exempted from the securities licensing obligation. This bill is so long because it must comply with the federal and state exemption requirements and would be limited to deals involving $2 million or less, excluding real estate unless the broker gets a waiver. Is that about right?

Mr. Krick:
That is right. Ms. Foley's solution is for us all to acquire Series 63 securities seller licenses and become agents of the issuer. In your packet, Exhibit G, pages 13 through 14, show three reasons that cannot be the solution. It is impossible to cooperate with anybody who procures the buyer. We cannot comply with NRS 645 which requires the broker to work in the best interest of the client at all times and at the same time comply with securities law. It is not practical to get all 280-odd business brokers tied into Series 63, get them to pay the Financial Industry Regulatory Authority fee and to take the courses in case an opportunity occurs.

Bradley Bottoset (The Liberty Group of Nevada, LLC):
This is a very real problem. We find the buyer who converts the deal from what started as an asset transaction into a stock transaction. It is an uncomfortable position to be in because brokers are looking out for the best interests of the

clients, both buyers and sellers. If through advice from their attorneys, the deals start to move in that direction, it goes out of the brokers' hands, and suddenly they find themselves in violation of some SEC ruling or Nevada statute.

I have a real situation. It is confidential, but I have a client who has been in business for 25 years. He spoke to me about selling his business. We talked about how we do business which would be an asset listing. He brought up the fact that he had already spoken to his accountant who suggested he might want to do the transaction as a stock sale. I immediately backed off and said I could not help him. Where does this gentleman turn? Will he go to a stockbroker? Absolutely not. They are not set up to do it. My business card says that I am a business broker not a stockbroker. Brokering businesses is what I do.

Michael Faust:
I support Senate Bill 128. I want to make the point about just how easy it is for this conversion to occur. Recently, I dealt with a transaction that was not large. It concerned a man who owned a couple of auto repair businesses. They were franchise stores and worth roughly $500,000 apiece. I had a potential out-of-state buyer. Although he was a qualified buyer, he was not so familiar with that type of business, so he was interested in having the seller stay on for a short time, about 18-36 months. To give the seller incentive to make the business do as well as possible, the buyer offered the seller 20 percent of the company. All of a sudden, I had a stock sale on my hands. Certainly, there are benefits to both parties, but I was in a bad situation. I was already in trouble once the deal turned into a stock sale. It is difficult when you first start talking with sellers and it is nearly impossible to determine which way the deal is going to go. I can make it clear when I first sit down to take the listing that I am a broker-dealer, and I am brokering the assets, and you will keep your corporation. If the buyer prefers to have his or her own corporation, the buyer will have to start the corporation. If the business is capital-intensive, tax issues may be involved, in which case I have to advise the parties to seek advice from tax experts or legal counsel. If the buyer comes back later and determines it is to his or her benefit to do a stock sale, there is nothing I can do. I have lost a commission. I have to walk away from it.

When we sell businesses that involve financing, it commonly is financed by the seller. It is possible that the debt the seller carries constitutes a debt that could be considered equity. In the strictest sense, it could be considered a stock sale. It is common in our business.

A good segment of the marketplace is served by business brokers. Mergers and acquisitions specialists would have no interest in it. The people in that business with whom I have had personal relationships have pointed out to me that it is the up-front work on an SEC-related transaction that can be months long. They commonly charge monthly fees to sellers to do the up-front work required by the SEC, whereas the type and size of sellers with whom I deal would have a hard time processing that fee at $10,000 per month, just to see if it can be sold. The financials and ongoing fees can be expensive. The people either would be "underserved" or not served. Business brokers fill that void.

Over my career, I have worked in responsible positions at large corporations. I like to do my business in a professional way. These are situations in which I can find myself halfway through a transaction and then learn I am already in violation of SEC laws and subject to felony prosecution. When the buyer and seller decide to draw up a stock sale, they put me and my family in jeopardy. I hope you will support this bill.

Senator Settelmeyer:
Do all business brokers have real estate licenses? Does everyone who is a business salesman have a business license?

Mr. Faust:
To my understanding, anyone who works as a licensed business broker has to have a real estate license, either broker-salesperson or salesperson. In addition, a Nevada business broker's permit is required. Businesses that have no relation to real estate can be sold if there is no lease involved and no sale of real property. Then the business broker permit or license is not required.

Linda Hentges-Nyman (Nevada Business Brokers Association; First Choice Business Brokers):
We ask for your support of S.B. 128. The purpose of the bill is to clarify an exemption for business brokers so that when an asset sale undergoes conversion, the brokers are not inadvertently in violation of a law. For business brokers, such conversions are exceptions to the rule.

We are not asking to become unlicensed broker-dealers. Our clients deal with mainstream businesses, such as dry cleaners and restaurants. We list and market the business as an asset sale—furniture, fixtures, equipment, goodwill and inventory. We get prospective buyers to come and we complete an asset

purchase agreement wherein all parties agree on the terms. During the time between agreeing to terms and closure, the time when the buyer and seller conduct their due diligence, either party might bring in their accountants to look over what they are doing or to give them advice. That is the time when we might find a transaction morphing into something we never intended it to be.

As a broker in an office, what am I supposed to tell an agent at that point? Walk away from the transaction? The agent has spent 6, 8, 10, 12 months on this deal and now has to throw up his or her hands and walk away? That is not necessarily in the best interest of the broker or the client. We are licensees and know we have to act in the client's best interest. Conversion from an asset sale to a securities sale puts us in a difficult position. Senate Bill 128 can fix this for us. We urge passage of this bill.

Ron Quinn:
The best thing that ever happened for business brokers was the permit. I support S.B. 128. I am not a business broker or a stock salesperson; nor do I work for the county or the State. I am an escrow transaction specialist. I deal with these types of transactions regularly. I have been doing this for about a dozen years.

I used to have people come into my office who were simply real estate salespeople who specialized in selling residential real estate. They would show up in my office and try to sell a business with a residential sales agreement.

Of the thousands of transactions that I have done, I am talking about the exception rather than the rule. It is probable that less than 3 percent of the transactions I do will actually convert to a stock sale transaction. Often, as has been said already, this occurs during the closing process, and quite frankly, it can occur within days of the scheduled closing.

I am here in support of S.B. 128. I see it as being appropriate for specialists in the business industry to be able to continue in their specialty and not have to deal with laws that have the potential to affect their income and their ability to represent properly the parties who engage them.

Senator Hutchison:
Having been involved in these transactions where you are not a business broker, are you aware of any situations where a business broker has known from the beginning that a sale was going to be a securities deal, and cloaked it in the robe

of an asset purchase and then feigned surprise at the end? Or has it been your experience that this is something that has migrated into a securities deal when initially it was an asset sale?

Mr. Quinn:
I have never seen conversion or interpreted brokers' management of a converted sale as being a ruse. Conversion frequently happens long after due diligence. It frequently happens at some point when the parties realize they need to preserve contracts or have been advised by tax accountants to make it a stock sale. They may consider conversion if they are a C corporation when there are tax benefits attached to their deal.

Preserving contracts has been an issue but it has always been dealt with way down the line. It is often shortly before the closing that suddenly you hear, "I was talking to my accountant or to my attorney, and we decided we need to do it this way." Then, we have to transition into this type of transaction.

Paul Murad (Nevada Real Estate Commission, Real Estate Division, Department of Business and Industry):
I am testifying on behalf of the Real Estate Commission in support of S.B. 128 (Exhibit H). We found testimony factually compelling and the legal reasoning sound during a hearing with about a dozen business brokers.

Senator Settelmeyer:
You met on March 8, and you indicate that you currently support S.B. 128 as presented. Did you have advance knowledge of the amendment? Or are you working off the old one?

Mr. Murad:
What we received on March 8 was presented to us prior to the proposed amendment. We have not had a chance to meet. This was an open hearing either in person or by phone.

Senator Hutchison:
Are you aware of any government bodies waiting for this? This is a long bill and I know the reasons, but do we have any views of the SEC or the federal government or the SOS saying "this works for us," and if all these provisions are followed, it would work?

Mr. Murad:
There is a South Dakota law on this. The language was patterned after that and combined with an SEC letter.

Senator Settelmeyer:
Have you been in communication with any Nevada government body like the SOS?

Mr. Murad:
Yes, I reached out to the SOS. I was asked by the other commissioners to prepare the statement and to speak on its behalf. Just a few days ago, I had a meeting with Ms. Foley at the SOS, and we discussed our positions. I wanted to hear her perspective and their concerns. We tried to set up a postponement to this hearing so we could have an opportunity for both sides to discuss the issue.

Senator Hardy:
What I am hearing is that it is expensive and difficult to do a stock sale. Will S.B. 128 allow a prospective use of this exemption to have a business broker become a stockbroker and thus bypass the stock sale in that way? Or is this limited to just the "Oh, no. I'm caught between a rock and a hard place"?

Mr. Krick:
It is a narrow and specific exemption. It does not create a new class of people who can sell stock. It starts out with an asset sale. A broker cannot even suggest to the parties that they should switch processes. If the broker finds out that they are going to do it, he or she has to back off from the deal. Certain things have to happen, such as getting them to sign this acknowledgment agreement. I have been using this agreement for many years now. I have never not gotten it signed. It says, if the parties on their own change this to a stock sale, they will sign this acknowledgment. You will compel the buyer to sign it as well. This is how you cover yourself.

Diana Foley (Securities Administration, Office of the Secretary of State):
I am speaking in opposition to S.B. 128. The SOS has submitted a document that explains our position (Exhibit I). The securities division is responsible for the enforcement of Nevada's Blue Sky Laws, specifically, the regulation of securities and the professionals who sell them. The main responsibility of our office is to license the broker-dealers and the sales agents and investment advisors to the extent the State is able, we register the securities. We regulate the State

exemptions from registration. We also have two units of investigators who look into civil and criminal complaints.

The securities division's responsibilities are found in NRS chapters 90 and 91. Chapter 91 deals with commodities and, of course, S.B. 128 only seeks to amend NRS chapter 90. The business-broker permit for real estate professionals was not created or passed with the idea that it would be an alternative to securities licensing. If you look at hearings from 2005 for the amendments to NRS 645, you will see it was represented as a limited permit which was only required by individuals who sell real estate, and on occasion, sell the building and tangible assets with the real estate. If you look at NRS 645, you will find that it defines a business as "tangible assets and goodwill." That is important in this discussion because there is no specific permit that allows business brokers to sell intangible assets. The securities division would only be concerned with those intangibles that might be securities.

We continue to have concerns about limiting this exemption so that it is used to protect the permit holder who gets caught up in the transaction that is not foreseeable or intended. We remain willing to discuss this matter, but thus far we do not have language that addresses our concerns.

Senator Atkinson:
Have you seen the amendment?

Ms. Foley:
I received it about an hour ago as we began our testimony, so I have not had an opportunity to review it.

Senator Atkinson:
I thought I understood that the amendment addressed your concerns.

Ms. Foley:
Among the issues we are discussing with real estate brokers is our suggestion that the better approach might be to provide a limited type of license. Among the reasons for the suggestion is that they would be allowed to take the Series 63 test. They then would understand all the ramifications for violating the securities laws, and they could properly provide advice to the seller and the broker. I know that Mr. Krick has voiced some concerns about the agent of the

issuer license. We have not had the opportunity to discuss some of those. That is still potentially viable.

Another concern is individuals who say they are not trying to sell securities. We do not want to create an exemption that allows a person to sell securities regularly and participate in this business without being licensed. A person who is licensed as a sales representative should be able to recognize the security, advise the client and make sure the sale of the security is exempt from registration and the parties are protected.

Additionally, our final concern is that the frequency of this exemption might be employed by unscrupulous individuals. As Mr. Krick pointed out, they have changed the exemption to comply more accurately with the no-action letter. I would like to have an opportunity to look at it and talk to Mr. Krick. We are also concerned that we would want to have limitations on somebody's use of the exemption if they were barred, for instance, from this industry. We would not want an individual to go into business brokering and utilize this exemption. We would want some additional restrictions that would allow us to refuse to have a particular business broker utilize the exemption.

Business broker representatives came to the securities division in August. At that time, we expressed concerns about the breadth of their exemption and suggested there be a limited or different license for business brokers in the securities industry so they are protected and knowledgeable. Some of the concerns that have been raised today do not exist.

Senator Hutchison:
In your summary, you cited *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985), in which the U.S. Supreme Court said that if 100 percent of a business' stock were sold, fraud protections of the law would kick in and full protections would be afforded the parties. Are you concerned about the constitutionality of the law as it is written, if in fact there are business brokers who sell a business even though it might migrate from an asset to a securities sale where 100 percent of the securities are sold and there is not a licensed security professional?

Ms. Foley:
I am not sure about your question. I am not concerned about the possibility of a constitutional violation if there is an exemption, based on *Landreth*. One of the

problems of the original bill was that they in no way identified there are other protections for the individuals involved. The securities fraud is still going to apply regardless of whether there is an exemption.

Senator Settelmeyer:
Why do you cite the *Landreth* case in your written testimony?

Ms. Foley:
These buyers should not be involved in securities. They are private placements and are represented by attorneys. I noted the *Landreth* case because there was a sale-of-business doctrine that existed in certain jurisdictions prior to *Landreth*. If you sold 100 percent of the business, it would not be considered a security. In the *Landreth* decision, the U.S. Supreme Court specifically said no. Just because 100 percent of the business was sold, if there is a sale of stock, regardless of whether there is passive income, the parties still deserve the protection of securities laws. On a different note, even though we may have an exemption under securities laws for the licensing of individuals, if it were to be passed, they would not necessarily have the exemption at the federal level.

Senator Hardy:
I hear you saying that you are willing to work something out so brokers will feel like they are not going to go to jail, lose their livelihoods, their homes, or their licenses with a "limited license." That begs a new question.

If the SEC has not approved this, will it approve a limited Series 63 securities license test that will allow, as you say, advice to the buyer and seller? Will they come raise the caveat that there would be limitations to the degree of being barred from the securities industry? We do not want someone using this on a regular basis. Do you see enough wiggle room to get this done so we protect the business broker and still allow something without some egregious hoop that maybe even the SEC will not clear up?

Ms. Foley:
We regularly license agents of the issuers, and they are not licensed by the SEC. We license individuals to represent an issuer. The concern in the past was that when we license the sales representative of an issuer, generally that representative is allowed to represent one issuer at a time. I conveyed to the individuals who are interested in this exemption that we would broaden and alter that agent's license to make it specific to business brokers. It would allow them

to represent more than one issuer at a time. We might want to have a limit, though, if they are actively involved in the sale of securities or if they are in mergers and acquisitions and locating investors and capital formation. We want those people to be licensed and not have a limited license. But if these are just individuals who on occasion are involved in the sale of securities, we could accommodate them with an agent's license.

It is important to note that with the exemption being offered, those agents would take the required Series 63 exam and pay $125. They basically would meet the requirements as far as the fee and taking the test for that license.

Senator Hardy:
Are you saying that you see the light of day in allowing the business broker not to go to jail or feel he or she is between a rock and a hard place?

Ms. Foley:
I am glad S.B. 128 was brought forward. This issue needed to be addressed. One problem that occurs is when an individual believes that by obtaining a business broker permit, he or she is allowed to sell securities. We want to make sure that is not happening, and I do not get the impression that is the intent. Brokers want to sell tangible assets and goodwill. That is what the business broker permit allows them to do. Also, brokers want to be protected if someone else changes the sale. If it is not happening on a regular basis and we can limit the exemption, that is a potential. But it still is not going to protect the buyer and seller in that transaction because the business broker will take a hands-off approach. The broker will say, okay when it converts to the sale of the security, we will no longer advise because we are not licensed to do that.

Senator Hardy:
Does the SEC still not approve of what we are trying to do, even if we use all the fencing and make sure everyone has their Series 63 test? Are we trying to do something that cannot be done? Are you hopeful that with testimony and sincerity we could actually work this out?

Ms. Foley:
I am absolutely hopeful we can work this out.

Senator Parks:
We have people who are regulated under NRS 645. When it comes to the regulation of NRS 90, those people cannot function without violating one chapter or another. It would be hopeful if parties could get together and bring back a proposed legislation.

Senator Atkinson:
I understand S.B. 128 is an attempt to address Ms. Foley's concerns, but I am not sure it does that. It seems obvious to me that her comments reflected the earlier language in the bill. Ms. Foley should have the opportunity to review the bill as it now appears. The parties need more discussion to bring options to the Committee for a work session.

We now close the hearing on S.B. 128. The meeting is adjourned at 4:22 p.m.

RESPECTFULLY SUBMITTED:

_____
Wynona Majied-Martinez,
Committee Secretary

APPROVED BY:

_____
Senator Kelvin Atkinson, Chair

DATE: _____

EXHIBITS				
Bill	**Exhibit**		**Witness / Agency**	**Description**
	A	1		Agenda
	B	10		Attendance Roster
S.B. 261	C	2	Senator Justin C. Jones	Office of the Attorney General – Consumer Memo
S.B. 261	D	1	Barry Gold	Comments, AARP
S.B. 261	E	2	Jeff Hanscom	Direct Selling Association Letter
S.B. 253	F	1	Jim Wadhams	Letter, L.P. Insurance Services, Inc.
S.B. 128	G	23	Len Krick	Presentation Materials, Nevada Business Brokers Association
S.B. 128	H	1	Paul Murad	Comments
S.B. 128	I	8	Diane Foley	Written Testimony