

Chapter 128

1993 EDITION

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GUARDIANS, CONSERVATORS, POWERS OF ATTORNEY; TRUSTS

UNIFORM TRUSTEES' POWERS ACT

128.003 Short title. ORS 128.003 to 128.045 may be cited as the "Uniform Trustees' Powers Act." [1977 c.614 §10]

128.005 Definitions for ORS 128.003 to 128.051 and 128.065. As used in ORS 128.003 to 128.051 and 128.065:

(1) "Trust" means an express trust created by a trust instrument, including a will, whereby a trustee has the duty to administer a trust asset for the benefit of a named or otherwise described income or principal beneficiary, or both; "trust" does not include a resulting or constructive trust, a business trust which provides for certificates to be issued to the beneficiary, an investment trust, a voting trust, a security instrument, a trust created by the judgment or decree of a court, a liquidation trust, or a trust for the primary purpose of paying dividends, interests, interest coupons, salaries, wages, pensions or profits, or employee benefits of any kind, an instrument wherein a person is nominee or escrowee for another, a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration.

(2) "Trustee" means an original, added, or successor trustee and includes the state, or any agency thereof, when it is acting as the trustee of a trust as defined in this section. [1977 c.614 §1]

128.007 Powers of trustee conferred by trust or by law. (1) The trustee has all powers conferred upon the trustee by the provisions of ORS 128.003 to 128.051 and 128.065 except as is otherwise provided by statute. However, the trust instrument may confer powers in addition to those conferred under ORS 128.003 to 128.051 and 128.065 or, by specific reference, prohibit the exercise of any power conferred under ORS 128.003 to 128.051 and 128.065.

(2) An instrument which is not a trust under ORS 128.005 (1) may incorporate any part of ORS 128.003 to 128.051 and 128.065 by reference. [1977 c.614 §2]

128.009 Powers of trustee. (1) From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent person would perform for the purposes of the trust including but not limited to the powers specified in subsection (3) of this section.

(2) In the exercise of powers including the powers granted by ORS 128.003 to 128.051 and 128.065, a trustee has a duty to act with due regard to obligation as a fiduciary.

(3) A trustee has the power, subject to subsections (1) and (2) of this section:

(a) To collect, hold, and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made;

(b) To receive additions to the assets of the trust;

(c) To continue or participate in the operation of any business or other enterprise, and to effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

(d) To acquire an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided interest;

(e) To invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;

(f) To deposit trust funds in a bank, including a bank operated by the trustee when adequately secured;

(g) To acquire or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon a trust asset or any interest therein; and to encumber, mortgage, or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;

(h) To make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(i) To subdivide, develop, or dedicate land to public use; or to make or obtain the vacation of plats and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration;

(j) To enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the trust;

(k) To enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(L) To grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset;

(m) To vote a security, in person or by general or limited proxy;

(n) To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

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(o) To sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(p) To hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the stock so held;

(q) To insure the assets of the trust against damage or loss, and the trustee against liability with respect to third persons;

(r) To borrow money to be repaid from trust assets or otherwise; to advance money for the protection of the trust, and for all expenses, losses, and liability sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary;

(s) To pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible;

(t) To pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration, and protection of the trust;

(u) To allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(v) To pay any sum distributable to a beneficiary under legal disability, without liability to the trustee, by paying the sum to the beneficiary or by paying the sum for the use of the beneficiary to any person having custody of the beneficiary under legal disability or to any person who, or corporation which, shall be furnishing maintenance, support or education to the beneficiary who is under legal disability;

(w) To effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation;

(x) To employ persons, including attorneys, auditors, investment advisors, or agents to advise or assist the trustee in the performance of administrative duties; to act without independent investigation upon their recommendations;

(y) To apply for and qualify all or any part of the property in the trust estate for special governmental programs, tax or otherwise, which may benefit the trust estate or any of the beneficiaries thereof;

(z) To prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of duties;

(aa) To execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee; and

(bb) To resign as trustee, if:

(A) The trustee obtains the approval of a court of competent jurisdiction for the resignation; or

(B) The resignation of the trustee is expressly authorized by the trust instrument, the trust instrument provides for the appointment of a successor trustee and the successor trustee agrees to serve.

(4) Subject to subsections (1) and (2) of this section, if at any time the trustee has determined that, in relation to the costs of administration thereof, the continuance of the trust pursuant to its existing terms, will defeat or substantially impair the accomplishment of the purposes of the trust, the trustee may, in its sole discretion, terminate the trust and distribute the trust property, including principal and undistributed income, to the beneficiaries in a manner which conforms as nearly as possible to the intention of the trustor. The trustee may enter into such an agreement or make such other provisions that it deems necessary or appropriate to protect the interests of the beneficiaries and to carry out the intent and purpose of the trust. The existence of spendthrift or similar protective provisions in the trust shall not make this section inapplicable. A trustee may not terminate a trust under this section if the trustee is a beneficiary of the trust or has a duty of support for the beneficiary of the trust. Any termination of a trust under this section requires notice of the termination to current income beneficiaries and ascertainable remainder beneficiaries. If a charity is a current or remainder beneficiary, notice of the termination must be given to the Attorney General. [1977 c.614 §3; 1981 c.915 §1; 1989 c.73 §1; 1993 c.228 §1]

128.010 [Renumbered 128.055]

128.015 Transfer or delegation of trustee's office. Unless otherwise provided in the trust instrument, while continuing to act as a trustee, the trustee shall not transfer the office of the trustee to another or delegate the entire administration of the trust to a cotrustee or another. [1977 c.614 §4; 1993 c.228 §2]

128.020 [Amended by 1969 c.267 §1; renumbered 128.057]

128.021 Power of court to relieve trustee from restrictions on trustee's power. ORS 128.003 to 128.051 and 128.065 do not affect the power of a court of competent jurisdiction for cause shown and upon petition of the trustee or affected beneficiary and upon appropriate notice to the affected parties to relieve a trustee from any restrictions on the power of the trustee that would otherwise be placed upon the trustee by the trust or by ORS 128.003 to 128.051 and 128.065. [1977 c.614 §5]

128.025 [1969 c.267 §3; renumbered 128.061]

128.026 Powers of joint trustees; liability. (1) Any power vested in three or more trustees may be exercised by a majority, but a trustee who has not joined in exercising a power is not liable to the beneficiaries or to others for the consequences of the exercise; and a dissenting trustee is not liable for the consequences of an act in which the dissenting trustee joins at the direction of the majority of the trustees, if the dissenting trustee expressed dissent in writing to any of the cotrustees at or before the time of the joinder.

(2) If two or more trustees are appointed to perform a trust, and if any of them is unable or refuses to accept the appointment, or, having accepted, ceases to be a trustee, the surviving or remaining trustees shall perform the trust and succeed to all the powers, duties, and discretionary authority given to the trustees jointly.

(3) This section does not excuse a cotrustee from liability for failure either to participate in the administration of the trust or to attempt to prevent a breach of trust. [1977 c.614 §6]

128.030 [Amended by 1977 c.614 §13; renumbered 128.065]

128.031 Protection of third persons dealing with trustee. With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust powers and their proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding the powers of the trustee or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers the trustee purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee. [1977 c.614 §7]

128.035 Application of ORS 128.003 to 128.051. Except as specifically provided in the trust, the provisions of ORS 128.003 to 128.051 and 128.065 apply to any trust established before or after October 4, 1977, and to any trust asset acquired by the trustee before or after October 4, 1977. [1977 c.614 §8]

128.040 [Repealed by 1977 c.614 §14]

128.041 Uniformity of interpretation. ORS 128.003 to 128.051 and 128.065 shall be construed to effectuate its general purpose to make uniform the law of those states which enact it. [1977 c.614 §9]

128.045 Severability. If any provision of ORS 128.005 to 128.051 and 128.065 or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of ORS 128.005 to 128.051 and 128.065 which can be given effect without the invalid provision or application, and to this end the provisions of ORS 128.005 to 128.051 and 128.065 are severable. [1977 c.614 §11]

128.047 Authority of trustee to enter into partnership agreement or to acquire interest in partnership. Unless expressly prohibited by the trust instrument under which a trustee serves or by order of a court having jurisdiction over the trust, a trustee may enter into a partnership agreement with others or accept the assignment of or otherwise acquire, hold and dispose of an interest in a partnership, and in so doing may become either a general or a limited partner. In any such case, as to creditors of or claimants against the partnership and as to the other members of the partnership, the liability, if any, of the fiduciary for the debts and other liabilities of the partnership, whether ex contractu, ex delicto or otherwise, shall be limited to the assets of the trust, or so much thereof as may be necessary to discharge the debts and liabilities, but no personal liabilities shall attach to the trustee or to the beneficial owners of the assets of the trust. This section does not exonerate a trustee from liability for negligence or other wrongdoing. [1993 c.226 §3]

Note: 128.047 was added to and made a part of 128.003 to 128.051 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

128.050 [Repealed by 1977 c.614 §14]

128.051 Judicial review of certain acts of trustee; remedy for payment of excessive compensation. On petition of an interested person, after notice to all interested persons, the propriety of employment of any person by a trustee including any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compen-

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sation determined by the trustee for the trustee's own services, may be reviewed by the court. Any person who has received excessive compensation from a trust for services rendered may be ordered to make appropriate refunds. [1977 c.614 §12]

DUTIES OF TRUSTEES AND FIDUCIARIES GENERALLY

128.055 Accountability for faithful execution of trust. All trustees residing or transacting business in Oregon are accountable for the faithful execution of the trust imposed upon them, according to the terms of the trust. [Formerly 128.010]

128.057 Investments by fiduciaries; standard of prudent person. (1) In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard, a fiduciary is authorized to acquire and retain every kind of property, real, personal or mixed, and every kind of investment, specifically including, but not by way of limitation, bonds, debentures, and other corporate or government obligations, preferred or common stocks, interests in common trust funds, securities of any open-end or closed-end management type investment company or investment trust, and, subject to subsection (3) of this section, contracts of life insurance, which persons of prudence, discretion and intelligence acquire or retain for their own account.

(2) "Contracts of life insurance," as used in this section, means contracts of life insurance as defined by ORS 731.170 and issued by authorized insurers as defined by ORS 731.066.

(3) A fiduciary shall not invest more than 25 percent of the fiduciary property in such contracts of life insurance unless the fiduciary has express authority from the trustor to do so. [Amended by 1969 c.267 §1; formerly 128.020; 1979 c.382 §1]

128.060 [Amended by 1973 c.827 §19; repealed by 1977 c.614 §14]

128.061 [1969 c.267 §3; formerly 128.025; repealed by 1979 c.382 §2]

128.065 Deviation from instrument as to fiduciary's duties and powers not authorized. Nothing contained in this section and ORS 128.057 authorizes any departure

from, or variation of, the express terms or limitations set forth in any will, agreement, court order or other instrument creating or defining the fiduciary's duties and powers, but the terms "legal investment" or "authorized investment" or words of similar import, as used in any such instrument, shall mean any investment which is permitted by the terms of ORS 128.057. [Formerly 128.030]

128.070 [Repealed by 1973 c.506 §46]

128.075 [1973 c.367 §16; renumbered 128.595]

128.080 [Amended by 1973 c.177 §2; repealed by 1973 c.506 §46]

128.085 Limitations on trustee's administration of "private foundation" trust. Notwithstanding any provision to the contrary in the governing instrument or any law of this state, the trustee of a trust which is a "private foundation" as defined in section 509 of the Internal Revenue Code of 1954 (including nonexempt charitable trusts as defined in section 4947 (a) (1) of the Internal Revenue Code of 1954) shall not engage in any act of self dealing as defined in section 4941 (d) of the Internal Revenue Code of 1954; shall distribute its income and, when necessary, amounts from principal at such time and in such manner as not to subject the trust to the taxes on failure to distribute income imposed by section 4942 of the Internal Revenue Code of 1954; shall not retain any excess business holdings as defined in section 4943 (c) of the Internal Revenue Code of 1954; shall not make any investments in such manner as to subject the trust to the taxes on investments which jeopardize charitable purpose imposed by section 4944 of the Internal Revenue Code of 1954; and shall not make any taxable expenditures as defined in section 4945 (d) of the Internal Revenue Code of 1954. [1971 c.197 §1]

128.090 Limitations on trustee's administration of "split-interest" trust. (1) Notwithstanding any provision to the contrary in the governing instrument or any law of this state, the trustee of a trust which is a "split-interest trust" as defined in section 4947 (a) (2) of the Internal Revenue Code of 1954, shall not engage in any act of self dealing as defined in section 4941 (d) of the Internal Revenue Code of 1954; shall not retain any excess business holdings as defined in section 4943 (c) of the Internal Revenue Code of 1954, unless the trust is one exempted from the requirements of section 4943 by section 4947 (b) (3) of the Internal Revenue Code of 1954; shall not make any investment in such manner as to subject the trust to the taxes on investments which jeopardize charitable purpose imposed by section 4944 of the Internal Revenue Code of 1954, unless the trust is one exempted from the requirements of section 4944 by section

4947 (b) (3) of the Internal Revenue Code of 1954; and shall not make any taxable expenditures as defined in section 4945 (d) of the Internal Revenue Code of 1954.

(2) This section shall not apply with respect to:

(a) Any amounts payable under the terms of a trust to income beneficiaries, unless a deduction was allowed under section 170 (f) (2) (B), section 2055 (e) (2) (B), or section 2522 (c) (2) (B) of the Internal Revenue Code of 1954;

(b) Any amounts in trust other than amounts for which a deduction was allowed under section 170, section 545 (b) (2), section 556 (b) (2), section 642 (c), section 2055, section 2106 (a) (2) or section 2522 of the Internal Revenue Code of 1954, if such other amounts are segregated from amounts for which no deduction was allowable; or

(c) Any amounts transferred in trust before May 27, 1969. [1971 c.197 §2]

128.095 Trustee may amend governing instrument of "private foundation" or "split-interest" trust with prior consent of Attorney General and benefited organizations. The trustee of a trust which is a private foundation to which ORS 128.085 applies or a split-interest trust to which ORS 128.090 applies may, with the prior consent of the Attorney General, amend the terms of the governing instrument to the extent necessary (1) to assure conformity of the governing instrument with the requirements for exemption from the taxes imposed by sections 4941 to 4945 of the Internal Revenue Code of 1954, including amendments which broaden, extend, reduce or limit the charitable purposes for which the trust is administered, or (2) to terminate the status of the trust as a private foundation in a manner described in section 507 (b) (1) of the Internal Revenue Code of 1954. Prior to giving consent, the Attorney General shall determine that the proposed amendments are necessary or appropriate to achieve the charitable purposes of the trust. If the trust is for the exclusive benefit of one or more charitable organizations, the trustee shall also obtain the prior consent of such organizations prior to amending the terms of the governing instrument in the manner set forth in this section. [1971 c.197 §3]

128.100 Authority of fiduciary to deposit securities in clearing corporation.

(1) Notwithstanding any other provision of law, any fiduciary holding securities in a fiduciary capacity, any bank or trust company holding securities as a custodian or managing agent, and any bank or trust company holding securities as custodian for a fiduciary is authorized to deposit or arrange

for the deposit of the securities in a clearing corporation as defined in ORS 78.1020. When the securities are deposited, certificates representing securities of the same class of the same issuer may be merged and held in bulk in the name of the nominee of the clearing corporation with any other securities of the same class deposited in the clearing corporation by any person regardless of the ownership of the securities, and certificates of small denomination may be merged into one or more certificates of larger denomination. The records of the fiduciary and the records of the bank or trust company acting as custodian, as managing agent or as custodian for a fiduciary shall at all times show the name of the party for whose account the securities are deposited. Ownership of, and other interests in, the securities may be transferred by bookkeeping entry on the books of the clearing corporation without physical delivery of certificates representing the securities. A bank or trust company depositing securities pursuant to this section shall be subject to the rules and regulations as, in the case of state-chartered institutions, the Department of Consumer and Business Services and, in the case of national banking associations, the Comptroller of the Currency may from time to time issue. A bank or a trust company acting as custodian for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities deposited by the bank or trust company in the clearing corporation for the account of the fiduciary. A fiduciary shall, on demand by any party to a judicial proceeding for the settlement of the fiduciary's account or on demand by the attorney for the party, certify in writing to the party the securities deposited by the fiduciary in the clearing corporation for its account as the fiduciary.

(2) This section shall apply to any fiduciary holding securities in a fiduciary capacity, and to any bank or trust company holding securities as a custodian, managing agent or custodian for a fiduciary, acting on October 5, 1973, or who thereafter may act regardless of the date of the agreement, instrument or court order by which it is appointed and regardless of whether or not the fiduciary, custodian, managing agent or custodian for a fiduciary owns capital stock of the clearing corporation. [1973 c.365 §§1,2; 1985 c.676 §59; 1985 c.762 §177]

128.102 Personal liability of trustee arising out of contracts and possession or control of real property. (1) A trustee is not personally liable on contracts properly entered into in the trustee's disclosed fiduciary capacity in the course of administration of the trust estate unless the trustee expressly agrees to be personally liable or unless the trustee fails to reveal the

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fiduciary capacity and identify the trust estate in the contract.

(2) A trustee is not personally liable for obligations arising from possession or control of property of the trust estate or for torts committed in the course of administration of the trust estate unless the trustee is personally at fault.

(3) Claims based upon contracts, obligations and torts of the types described in subsections (1) and (2) of this section may be allowed against the estate whether or not the trustee is personally liable therefor.

(4) The question of liability as between the trust estate and the individual trustee may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

(5) A trust agreement shall not absolve a trustee of liability to the trust estate or beneficiaries for breach of fiduciary duty or for any tort for which the trustee is personally at fault. [1993 c.226 §5]

Note: Section 6, chapter 226, Oregon Laws 1993, provides:

Sec. 6. The requirement in section 5 (1) of this Act [128.102 (1)] that the trustee reveal the fiduciary capacity and identify the trust estate in a contract shall apply only to contracts entered into on or after the effective date of this Act [November 4, 1993]. [1993 c.226 §6]

128.110 [Amended by 1979 c.284 §108; repealed by 1981 c.66 §8]

PROCEEDINGS AND AGREEMENTS RELATING TO TRUST ADMINISTRATION

(Proceedings to Modify Trust Administration)

128.115 Definitions for ORS 128.125 to 128.185. As used in ORS 128.125 to 128.185, "trust" and "trustee" have the meanings set forth in ORS 128.005. [1981 c.66 §1]

128.120 [Repealed by 1981 c.66 §8]

128.125 Authority of beneficiary to require trustee to prepare accounting of trust income, expenditures and assets; equitable remedy for failure by trustee to perform. (1) As used in this section, "beneficiary" means any vested income or remainder beneficiary of a trust, determined as of the date the request described in this section is received by the trustee, or the guardian or conservator of such beneficiary or the personal representative of a deceased beneficiary.

(2) A beneficiary may request in writing that the trustee of a trust for the benefit of the beneficiary prepare either or both of the following:

(a) An itemized statement of receipts and disbursements of income and principal of the

trust during the 12-month period ending on the last day of the month preceding the month in which the request is received by the trustee, or if longer, for the entire period since the last such statement prepared by the trustee.

(b) An itemized statement of all property held by the trustee as of the date the request is received by the trustee.

(3) If no statement described in subsection (2) of this section has previously been prepared by the trustee for a period ending within the 12-month period described in subsection (2)(a) of this section, the trustee shall prepare the requested statement and mail or deliver a written copy thereof to the requesting beneficiary. If such a statement has previously been prepared by the trustee for a period ending within the 12-month period described in subsection (2)(a) of this section, the trustee shall mail or deliver a written copy of the prepared statement to the requesting beneficiary.

(4) Subsections (2) and (3) of this section do not prevent a trustee from preparing and providing beneficiaries with more frequent statements of receipts and disbursements and of property held by the trustee.

(5) If a trustee fails within a reasonable time to provide a requested statement as provided in subsection (3) of this section, the requesting beneficiary may petition a court with jurisdiction to grant equitable remedies in any county where trust assets are located or where the trustee resides to require the trustee to provide the statement. Upon notice to the trustee, and upon such hearing or opportunity to object as the court shall require, the court may order the trustee to provide the statement. The procedure, pleading and notice requirements for the proceeding shall be the same as provided in ORS 111.205 to 111.235 for petition to a probate court by a party interested in the estate of a decedent, and the court shall have all of the powers of the probate court in such proceedings in the probate court. [1981 c.66 §2]

128.130 [Amended by 1979 c. 284 §109; repealed by 1981 c.66 §8]

128.135 Authority of beneficiary to obtain equitable remedies to modify administration of trust; effect of proceeding; authority of court. (1) As used in this section, ORS 128.145 and 128.155, "beneficiary" means any vested or contingent beneficiary of a trust, determined as of the date of the petition, or the guardian or conservator of such beneficiary or the personal representative of a deceased beneficiary.

(2) Any beneficiary of a trust or the trustee thereof may petition the circuit court in any county where trust assets are located

or where the trustee resides for the purpose of any of the following:

(a) Requiring, reviewing or approving an accounting of a trustee of the trust.

(b) Accepting a resignation of the trustee or appointing a successor trustee or an additional trustee.

(c) Obtaining authority, approval or instructions on any matter concerning the interpretation of the trust or the administration, settlement or distribution of the trust estate.

(d) Making any modification of the trust that the parties could make by agreement under the provisions of ORS 128.177.

(3) Except as otherwise provided in this section, the procedure, pleading and notice requirements for a proceeding under this section shall be the same as provided in ORS 111.205 to 111.235 for petition to a probate court by a party interested in the estate of a decedent, and the court shall have all of the powers of the probate court in such proceedings in the probate court.

(4) Upon the filing of a petition under subsection (2) of this section, the petitioner shall cause notice of the petition to be given, prior to the time for filing objections or court hearing specified in the notice, to all living beneficiaries and the currently acting trustee, other than the petitioner, in the manner and within the times provided in ORS 111.215. Any beneficiary whose name, identity or existence is unknown to the petitioner may be given notice as provided in ORS 111.215 (1)(c).

(5) When petitioned to review or approve an accounting of a trustee, the court shall determine the correctness of the account and the validity and propriety of all actions of the trustee set forth therein, including the purchase, retention or disposition of any property or funds of the trust.

(6) The court, by its order or judgment, may give directions, instructions, authority or approval, or make appointments, as appear to it to be most beneficial to all beneficiaries of the trust. The court may approve or disapprove an accounting or any part thereof and may surcharge the trustee for losses, if any, caused by negligent or willful breaches of trust. Any order or judgment entered in a proceeding under this section is final, conclusive and binding upon all beneficiaries notified of the proceeding, including all incompetent, unborn and unascertained beneficiaries of the trust, subject only to the right of appeal as provided in ORS 128.165.

(7) Every unborn or unascertainable beneficiary shall be bound by any action taken by the court for or against any living benefi-

ciary of the same class or whose interests are similar to the interests of the unborn or unascertainable beneficiary.

(8) The court, by a provision in an order or judgment entered in a proceeding under this section, may retain jurisdiction over all the parties and over all the trust assets, and may from time to time, upon application under ORS 128.145, make such further orders or judgments regarding the purposes set forth in subsection (2) of this section as appear to be for the best interest of the beneficiaries. [1981 c.66 §3; 1993 c.222 §6]

128.140 [Repealed by 1981 c.66 §8]

128.145 Authority of party to proceeding under ORS 128.135 to obtain other modification of trust administration; adding parties. (1) Any person who is a party to a proceeding under ORS 128.135 may from time to time apply to the court for additional accountings, appointments, authority, approval or instructions. For that purpose the person shall file a petition setting forth the facts showing the need or desirability of the additional accountings, appointments, authority, approval or instructions. All the allegations of the original and subsequent petitions and all other proceedings, including previous orders or judgments up to and including the time of filing the new petition, shall constitute a part of the new petition without being realleged therein, it being sufficient to set forth therein by reference the filing of the previous petitions and the entering of the previous orders or judgments. Jurisdiction over all the other parties to enter additional orders or judgments shall be obtained in the same manner provided for obtaining jurisdiction in the original proceeding.

(2) After a petition is filed under subsection (1) of this section, the proceedings shall be the same as the proceedings in the original proceeding under ORS 128.135.

(3) Any beneficiary who is born, or whose interest becomes apparent after the original petition is filed under ORS 128.135, and who would have been a necessary party to receive notice thereof if then living, or if the interest had then been apparent, shall, if living at the time of a subsequent application for accounting, appointment, authority, approval or instructions, be made a party to the subsequent proceeding by order of the court, upon application by the beneficiary or any party to the subsequent proceeding, and thereafter is entitled to all the rights of the other parties to the subsequent proceeding. [1981 c.66 §4]

128.150 [Repealed by 1981 c.66 §8]

128.155 Security for proceedings under ORS 128.135 or 128.145. A beneficiary who

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petitions a court under ORS 128.135 or 128.145 shall file with the petition an irrevocable letter of credit issued by a commercial bank, as defined in ORS 706.055, or an undertaking with one or more sureties to the effect that the beneficiary will pay all costs, disbursements and reasonable attorney fees that may be ordered against the beneficiary in the proceeding. If the beneficiary is unsuccessful in the proceeding and the court finds that the beneficiary filed the petition in bad faith, or that the petition was frivolous, the court may tax the costs and disbursements of the proceeding, including any appeal therein, and reasonable attorney fees against the unsuccessful beneficiary and the letter of credit issuer or the surety on the undertaking. If the beneficiary is successful, the court may tax the costs and disbursements of the proceeding, including any appeal therein, and reasonable attorney fees against the trust estate or the trustee individually. [1981 c.66 §5; 1991 c.331 §42]

128.160 [Repealed by 1981 c.66 §8]

128.165 Appeal of orders or judgments entered pursuant to ORS 128.135 or 128.145. Appeals from orders or judgments entered under ORS 128.135 or 128.145 shall be taken in the same manner as from issues determined by any court of record with general jurisdiction. [1981 c.66 §6]

128.170 [Repealed by 1981 c.66 §8]

128.175 Remedies under ORS 128.135 or 128.145 cumulative. The remedies provided by ORS 128.135 and 128.145 are cumulative and do not limit or abrogate any inherent power of a court with jurisdiction to grant equitable remedies, or in any manner limit any lawful power, express or implied, conferred upon the trustee by the instrument creating the trust. [1981 c.66 §7]

(Agreements Relating to Trust Administration)

128.177 Certain agreements relating to trusts authorized; persons required to sign agreement. (1) The persons specified in subsection (2) of this section may by written instrument enter into an agreement with respect to:

(a) Determining classes of creditors, beneficiaries, heirs, next of kin or other persons;

(b) Resolving disputes arising out of the administration or distribution of the trust, including disputes over the construction of the language of the trust or construction of the language of other writings that affect the trust;

(c) Granting to the trustee necessary or desirable powers not granted in the trust instrument or otherwise provided by law, to the extent that those powers are not incon-

sistent with the express provisions or purposes of the trust;

(d) Modifying the trust instrument, including extending or reducing the period of the trust's operation, if the modification is not inconsistent with any dominant purpose or objective of the trust; or

(e) Any other matter that can be the subject of a petition under ORS 128.135 or the subject of an amendment under ORS 128.095.

(2) An agreement under this section is not effective unless it has been signed by all of the following persons:

(a) The trustor or grantor, if living;

(b) All persons who have a beneficial interest in the subject of the agreement;

(c) Any acting trustee for the trust; and

(d) The Attorney General, if the trust is a charitable trust subject to the enforcement or supervisory powers of the state or the Attorney General under the provisions of ORS 128.610 to 128.750. [1993 c.222 §2]

128.179 Petition to appoint special representative; authority of special representative to enter into agreements relating to trust; qualifications; compensation. (1) A trustee, or any person who has a beneficial interest in the subject of an agreement proposed under ORS 128.177, may petition the court for the appointment of a special representative to represent a person whose signature is required under the terms of ORS 128.177 (2) if:

(a) The person for whom a special representative is to be appointed is a minor, is incompetent or is not yet born or ascertained; or

(b) The identity or address of the person for whom a special representative is to be appointed cannot be determined.

(2) A single special representative may be appointed under the provisions of this section to represent the interests of more than one person, or to represent the interests of a class of persons, if the interests of the persons represented by the special representative do not conflict.

(3) A special representative appointed under this section has authority to enter into and sign an agreement proposed under the provisions of ORS 128.177. The signature of the special representative binds:

(a) The persons represented by the special representative, as specified in the order of appointment; and

(b) Unborn or unascertainable persons who are of the same class as the person or persons represented by the special representative or who have interests in the trust that

are similar to the interests of the person or persons represented by the special representative.

(4) A person appointed as special representative under this section must be an attorney admitted to the practice of law in this state or a person with special skill or training in the administration of trusts. A special representative may not have an interest in the trust that is the subject of an agreement under ORS 128.177, and may not be related to a personal representative with an interest in the trust, or to a trustee, beneficiary or other person with an interest in the trust.

(5) A special representative appointed under this section is entitled to reasonable compensation for services. Compensation shall be paid from the principal of the trust that is attributable to those beneficiaries who are represented.

(6) A special representative appointed under this section shall be discharged from any further responsibility with respect to the trust upon the execution of an agreement under ORS 128.177 or at such other time as may be ordered by the court. [1993 c.222 §3]

128.180 [Repealed by 1981 c.66 §8]

128.181 Filing of agreement or memorandum with circuit court; notice of filing; service. (1) A trustee, or any other person interested in a trust, may file an agreement entered into under ORS 128.177, or a memorandum summarizing the provisions of the agreement, with the circuit court for any county where trust assets are located or where the trustee administers the trust in this state.

(2) After collecting the fee provided for in ORS 128.185 (1)(a), the clerk shall enter the agreement or memorandum of record in the office of the clerk.

(3) The person filing an agreement or memorandum under this section must serve a notice of the filing and a copy of the agreement or memorandum on each person interested in the trust whose address is known within five days after the filing. Service may be made personally, or by registered or certified mail, return receipt requested. The notice of filing shall be substantially in the following form:

CAPTION OF CASE	NOTICE OF FILING OF AGREEMENT OR MEMORANDUM OF AGREEMENT
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You are hereby notified that the attached document was filed by the undersigned in the above entitled court on the ____ day of _____, _____. Unless you file objections to the agreement within 120 days after that date, the agreement will be approved and

will be binding on all persons interested in the trust.

If you file objections within the 120-day period, the court will fix a time and place for a hearing. At least 10 days before the date of that hearing, you must serve a copy of your objections and give notice of the time and place of the hearing to all persons interested in the trust. See ORS 128.125 to 128.185.

Signature

(4) Proof of mailing of the notices required under this section must be made with the court. Proof of service may be made by a certificate of service in the form provided by ORCP 7 F, by a signed acceptance of service or a return receipt from the postal authorities. [1993 c.222 §4]

128.183 Objections to agreement; hearing; approval by court. (1) If no objections are filed with the court within 120 days after the filing of the agreement or memorandum under the provisions of ORS 128.181, the agreement is effective and binding on all persons interested in the trust.

(2) If objections are filed with the court within 120 days after the filing of an agreement or memorandum pursuant to the provisions of ORS 128.181, the clerk of the court shall collect the fee provided in ORS 128.185 (1)(b). Upon the filing of objections, the court shall fix a time and place for a hearing. The person filing the objections shall serve a copy of the objections on all persons interested in the trust and give notice to those persons of the time and place fixed by the court for a hearing. Service must be made at least 10 days before the date set by the court for the hearing. Service of the objections shall be made personally or by registered or certified mail, return receipt requested.

(3) Proof of mailing of objections must be made with the court. Proof of service may be made by a certificate of service in the form provided by ORCP 7 F, by a signed acceptance of service or by a return receipt from the postal authorities.

(4) The court shall approve an agreement entered into under ORS 128.177 after a hearing upon objections filed under this section unless:

(a) The agreement does not reflect the signatures of all persons required by ORS 128.177 (2);

(b) The agreement is not authorized by ORS 128.177 (1); or

(c) Approval of the agreement would not be equitable.

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(5) An agreement approved by the court after a hearing is binding on all persons interested in the trust.

(6) Persons interested in the trust may waive the notice required under ORS 128.181. If all persons interested in the trust waive the notice, the agreement is effective and binding on all persons interested in the trust upon filing of the agreement or memorandum with the court. [1993 c.222 §5]

128.185. Fees. (1) The clerk of the circuit court shall collect in advance:

(a) A fee of \$65 for the filing of an agreement or memorandum of agreement under ORS 128.181; and

(b) A fee of \$32.50 for the filing of objections under ORS 128.183.

(2) In addition to the filing fees provided for in this section, the clerk shall charge and collect in proceedings under ORS 128.177 to 128.183 all additional fees authorized by law for civil actions, suits or proceedings in circuit court.

(3) A paper or pleading shall not be considered filed unless the fee required by this section is paid. Filing fees may not be refunded to any party. [1993 c.222 §7]

128.190 [Repealed by 1981 c.66 §8]

128.200 [Repealed by 1981 c.66 §8]

128.210 [Repealed by 1981 c.66 §8]

128.220 [Repealed by 1981 c.66 §8]

128.230 [Repealed by 1981 c.66 §8]

128.240 [Repealed by 1981 c.66 §8]

128.250 [Amended by 1979 c.284 §110; repealed by 1981 c.66 §8]

128.260 [Amended by 1979 c.284 §111; repealed by 1981 c.66 §8]

128.270 [Repealed by 1981 c.66 §8]

UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

128.310 Short title. ORS 128.310 to 128.355 may be cited as the "Uniform Management of Institutional Funds Act." [1975 c.707 §11]

128.315 Definitions for ORS 128.310 to 128.355. As used in ORS 128.310 to 128.355:

(1) "Institution" means an incorporated or unincorporated nonpublic organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes.

(2) "Institutional fund" means a fund held by an institution for its exclusive use, benefit or purposes, but does not include (a) a fund held for an institution by a trustee that is not an institution or (b) a fund in which a beneficiary that is not an institution has an interest, other than possible rights

that could arise upon violation or failure of the purposes of the fund.

(3) "Endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument.

(4) "Governing board" means the body responsible for the management of an institution or of an institutional fund.

(5) "Historic dollar value" means the aggregate fair value in dollars of (a) an endowment fund at the time it became an endowment fund, (b) each subsequent donation to the fund at the time it is made and (c) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the institution is conclusive.

(6) "Gift instrument" means a will, deed, grant, conveyance, agreement, memorandum, writing or other governing document (including the terms of any institutional solicitations from which an institutional fund resulted) under which property is transferred to or held by an institution as an institutional fund. [1975 c.707 §2]

128.320 Amount of expenditure for uses and purposes of fund. The governing board may appropriate for expenditure for the uses and purposes for which an endowment fund is established so much of the net appreciation, realized and unrealized, in the fair value of the assets of an endowment fund over the historic dollar value of the fund as is prudent under the standard established by ORS 128.340. This section does not limit the authority of the governing board to expend funds as permitted under other law, the terms of the applicable gift instrument, or the charger of the institution. [1975 c.707 §3]

128.325 When ORS 128.320 not applicable; limit on implying net appreciation restriction. ORS 128.320 does not apply if the applicable gift instrument indicates the donor's intention that net appreciation shall not be expended. A restriction upon the expenditure of net appreciation may not be implied from a designation of a gift as an endowment, or from a direction or authorization in the applicable gift instrument to use only "income," "interest," "dividends," or "rents, issues or profits," or "to preserve the principal intact," or a direction which contains other words of similar import. This rule of construction applies to gift instruments executed or in effect before or after September 13, 1975. [1975 c.707 §4]

128.330 Power of governing board to invest and retain property of fund. In ad-

dition to an investment otherwise authorized by law or by the applicable gift instrument, and without restriction to investments a fiduciary may make, the governing board, subject to any specific limitations set forth in the applicable gift instrument or in the applicable law other than law relating to investments by a fiduciary, may:

(1) Invest and reinvest an institutional fund in any real or personal property deemed advisable by the governing board, whether or not it produces a current return, including mortgages, stocks, bonds, debentures and other securities of profit or nonprofit corporations, shares in or obligations of associations, partnerships or individuals and obligations of any government or subdivision or instrumentality thereof;

(2) Retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable;

(3) Include all or any part of an institutional fund in any pooled or common fund maintained by the institution; and

(4) Invest all or any part of an institutional fund in any other pooled or common fund available for investment, including shares or interests in regulated investment companies, mutual funds, common trust funds, investment partnerships, real estate investment trusts or similar organizations in which funds are commingled and investment determinations are made by persons other than the governing board. [1975 c.707 §5]

128.335 Authority of governing board to delegate power. The governing board may:

(1) Delegate to its committees, officers or employees of the institution or the fund or agents, including investment counsel, the authority to act in place of the board in investment and reinvestment of institutional funds;

(2) Contract with independent investment advisors, investment counsel or managers, banks or trust companies, so to act; and

(3) Authorize the payment of compensation for investment advisory or management services. [1975 c.707 §6]

128.340 Standard of care for investment and delegation of duties. In the administration of the powers to appropriate appreciation, to make and retain investments and to delegate investment management of institutional funds, members of a governing board shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision. In so doing they shall consider long and short term needs of the institution in carrying out its education, religious,

charitable or other eleemosynary purposes, its present and anticipated financial requirements, expected total return on its investments, price level trends and general economic conditions. [1975 c.707 §7]

128.345 Release of restriction on fund with consent of donor by application to court; notice to Attorney General; limit on extent of release. (1) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

(2) If written consent of the donor cannot be obtained by reason of the death, disability, unavailability or impossibility of identification of the donor, the governing board may apply in the name of the institution to the appropriate circuit court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The Attorney General shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund.

(3) A release under this section may not allow a fund to be used for purposes other than educational, religious, charitable or other eleemosynary purposes of the institution affected.

(4) This section does not limit the application of the doctrine of cy pres. [1975 c.707 §8]

128.350 Uniformity of interpretation. ORS 128.310 to 128.355 shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of ORS 128.310 to 128.355 among those states which enact it. [1975 c.707 §10]

128.355 Severability. If any provision of ORS 128.310 to 128.355 or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of ORS 128.310 to 128.355 which can be given effect without the invalid provision or application, and to this end the provisions of ORS 128.310 to 128.355 are declared severable. [1975 c.707 §9]

PREARRANGED FUNERAL PLANS AS TRUSTS

128.400 Definitions for ORS 128.400 to 128.440. As used in ORS 128.400 to 128.440

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and 128.991 unless the context requires otherwise:

(1) "Beneficiary" means the person, if known, who is to receive the funeral and cemetery merchandise, funeral and cemetery services or completed interment, entombment or cremation spaces.

(2) "Certified person" means any person holding a certificate of registration or who is registered under ORS 692.285 to sell or offer for sale prearrangement sales contracts or preconstruction sales contracts.

(3) "Delivery" occurs when:

(a) Physical possession of the funeral and cemetery merchandise is transferred to the purchaser;

(b) Title to the funeral and cemetery merchandise has been transferred to the purchaser, has been paid for, and is in the possession of the seller, who has placed it, until needed, for storage on the seller's premises; or

(c) The merchandise has been identified for the purchaser or the beneficiary and held by the manufacturer for future delivery.

(4) "Depository" means a bank, savings and loan association, credit union or trust company authorized to do business in this state where accounts are insured by an agency of the Federal Government.

(5) "Funeral and cemetery merchandise" includes nonperishable items of personal property customarily sold by funeral service establishments, cemeteries, crematoriums and monument companies, including, but not limited to, caskets, burial vaults, memorials, markers and foundations, but shall not include rights of interment or entombment in a cemetery section, lawn crypt section, mausoleum or columbarium that is in existence at the time of initial payment on the contract.

(6) "Funeral and cemetery services" includes all services customarily performed:

(a) By a funeral service practitioner, embalmer, funeral service establishment, cemetery or crematorium licensed under ORS chapter 692;

(b) In conjunction with an interment, entombment or cremation; and

(c) In conjunction with the sale, installation or erection of a memorial, marker, monument or foundation.

(7) "Guaranteed contract" means a written preconstruction sales contract or prearrangement sales contract that guarantees the beneficiary the specific undeveloped space or spaces or funeral and cemetery merchandise or funeral and cemetery services contained in the contract and under which no charges

other than the sales price contained in the contract shall be required upon delivery or performance of the funeral and cemetery services.

(8) "Nonguaranteed contract" means a written preconstruction sales contract or prearrangement sales contract that guarantees the beneficiary the specific undeveloped space or spaces or funeral and cemetery merchandise or funeral and cemetery services contained in the contract and under which additional charges other than the sales price contained in the contract may be required at the time of delivery or performance of the funeral and cemetery services.

(9) "Person" means any funeral service establishment, embalmer, funeral service practitioner, cemetery, crematorium, monument company, corporation, partnership, joint venture, business trust, voluntary organization or any other form of entity.

(10) "Preconstruction sales" or "preconstruction sales contract" means any sale made to a purchaser, which has as its purpose the furnishing of undeveloped interment, entombment or cremation spaces and where the sale terms require payment or payments to be made at a currently determinable time.

(11) "Prearrangement sales" or "prearrangement sales contract" means any sale, excluding the sale and contemporaneous or subsequent assignment of a life insurance policy or an annuity contract, made to a purchaser, that has as its purpose the furnishing of funeral and cemetery merchandise or funeral and cemetery services in connection with the final disposition or commemoration of the memory of a dead human body, for use at a time determinable by the death of the person or persons whose body or bodies are to be disposed and where the sale terms require payment or payments to be made at a currently determinable time.

(12) "Purchaser" means a beneficiary or a person acting on behalf of a beneficiary who enters into a prearrangement sales contract or a preconstruction sales contract with a certified person under which any payment or payments made under the contract are required to be deposited in trust under ORS 128.423.

(13) "Sales price" means the gross amount paid by a purchaser for a prearrangement sales contract or preconstruction sales contract, excluding sales taxes, credit life insurance premiums and finance charges.

(14) "Trust" means an express trust created under ORS 128.423 whereby a trustee has the duty to administer the amounts specified under ORS 128.423 received under a prearrangement sales contract or a pre-

construction sales contract for the benefit of the purchaser of a prearrangement sales contract or preconstruction sales contract.

(15) "Trustee" means the certified person who sold the prearrangement sales contract or preconstruction sales contract or any depository or successor trustee appointed by the original trustee as successor trustee under ORS 128.423.

(16) "Undeveloped interment, entombment or cremation spaces" or "undeveloped spaces" means any space to be used for the reception of human remains that is not completely constructed or developed at the time of initial payment. [1987 c.813 §3]

Note: ORS 128.400 to 128.407 and 128.421 to 128.440 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 128 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

128.405 Purpose. It is the purpose of ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285 to assure funds for performance to those purchasers who contract through prearrangement sales contracts for the purchase of funeral and cemetery merchandise and funeral and cemetery services, and through preconstruction sales contracts for undeveloped interment, entombment or cremation spaces. It is also the purpose of ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285 to provide for the certification of persons selling or offering for sale prearrangement sales contracts and preconstruction sales contracts, the creation and administration of prearrangement sales contract trust funds, the disbursement and allocation of trust funds upon the certified person's performance of its contractual obligations and to provide protection for the purchaser upon the certified person's default. [1987 c.813 §1]

Note: See note under 128.400.

128.407 Persons to whom ORS 128.400 to 128.440 apply. Except as provided in this section, ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285 apply to all persons who sell or offer for sale prearrangement sales contracts or preconstruction sales contracts. ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285 do not apply to:

(1) Agreements to sell or sales made by endowment care cemeteries under ORS 128.412; or

(2) Any nonprofit memorial society charging less than a \$100 membership fee. [1987 c.813 §2]

Note: See note under 128.400.

128.410 [1953 c.639 §1; 1955 c.524 §1; 1959 c.691 §1; 1965 c.611 §14; 1967 c.359 §681; 1979 c.661 §1; repealed by 1987 c.813 §17]

128.412 Exceptions to ORS 128.400 to 128.440. The provisions of ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285 shall not include:

(1) Agreements to sell or sales of graves, crypts or niches where such graves, crypts or niches are in existence at the time of the sale or agreement to sell and are located in an endowment care cemetery as defined in ORS 97.810.

(2) Agreements to sell or sales of crypts or niches where such crypts or niches are not in existence at the time of the sale or agreement to sell and are to be located in an endowment care cemetery; provided that:

(a) Thirty-five percent of the sales price of such crypts or niches is deposited in accordance with the provisions of ORS 128.415; or

(b) Such endowment care cemetery deposits a bond with a corporate surety authorized to do business in this state, or an irrevocable letter of credit issued by a commercial bank as defined in ORS 706.005. The bond or letter of credit shall be in the amount of \$25,000.

(3) Agreements to sell or sales of burial vaults or markers for installation in an endowment care cemetery; provided that:

(a) Sixty-six and two-thirds percent of the sale price of such vaults or markers is deposited in accordance with the provisions of ORS 128.415;

(b) Such endowment care cemetery is at the time of the sale or agreement to sell and for not less than 24 months before such sale or agreement has been in continuous operation as an endowment care cemetery and has assumed the obligation to supply and install the vault or marker and maintain it as part of its endowment care program; and

(c) Such endowment care cemetery deposits:

(A) A bond with the Secretary of State in the amount of \$10,000 with a corporate or personal surety. Such personal surety shall submit a sworn financial statement as of the date of the bond and annually thereafter as long as the bond is in effect to insure the availability of the total amount of the sale price when required; or

(B) An irrevocable letter of credit with the Secretary of State in the amount of \$10,000, issued by a commercial bank as defined in ORS 706.005. [1959 c.691 §2; 1967 c.359 §682; 1985 c.207 §23; 1987 c.813 §11; 1991 c.331 §43]

128.414 Salesperson for endowment care cemeteries required to be registered; background check; refusal to issue and revocation. (1) It is unlawful for any salesperson to engage in sales made by endow-

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ment care cemeteries under ORS 128.412 unless the salesperson is registered with the State Mortuary and Cemetery Board. The board by rule shall establish procedures for issuing and renewing registrations required by this subsection, establish standards for determining whether a registration should be issued and set a registration and renewal fee.

(2) The State Mortuary and Cemetery Board may conduct a background check of any salesperson applying for registration under subsection (1) of this section. The background check may include information solicited from the Department of State Police. After consideration of information obtained from any background check and any other information in its possession, the State Mortuary and Cemetery Board shall determine whether to register the salesperson. A salesperson shall be registered at the business location of the salesperson's employer. The registration shall be retained by the salesperson's employer. Upon termination of the salesperson's employment with that employer, the employer shall return the registration to the State Mortuary and Cemetery Board. Upon receiving a salesperson registration under this subsection from an employer, the State Mortuary and Cemetery Board shall solicit information from the employer regarding the salesperson. Information received from the employer shall be considered by the State Mortuary and Cemetery Board if the salesperson applies for registration at a later date under this section or ORS 692.285.

(3) The State Mortuary and Cemetery Board may revoke or refuse to issue or renew the registration of a salesperson described in subsection (1) of this section upon a determination that the applicant or holder has not complied with the provisions of this section or ORS 128.412 or any rules adopted thereunder. When the board proposes to take such action, the person affected by the action shall be accorded notice and an opportunity for hearing as provided by ORS 183.310 to 183.550. [1993 c.467 §3]

Note: 128.414 was added to and made a part of 128.400 to 128.440 by legislative action; however, see note under 128.400.

128.415 Deposit of trust funds made by endowment care cemeteries. (1) This section applies to trust deposits required to be made by endowment care cemeteries under ORS 128.412.

(2) As used in this section, "common trust account" means trust funds received by a trustee from two or more trustors.

(3) All such trust funds shall be deposited by the trustee with a financial institution in the State of Oregon carrying deposit insurance, within 15 days after receipt thereof. A

trust fund shall be held in a separate account in the name of the depositor followed by the words "trustee of funeral plan trust," in trust for the person for whom such prearranged funeral plan is made, or in a common trust account in the name of the depositor followed by the words "trustee of funeral plan trusts," in trust for each person for whom such prearranged funeral plan is made, until a trust fund is released under any of the following conditions:

(a) Upon presentation of proof of the death of such person, the financial institution shall release such trust fund to the trustee.

(b) Upon presentation of the written request of the trustor of a revocable trust, the financial institution shall release such trust fund as directed in such request.

(c) Upon presentation of proof of the death, dissolution, insolvency or merger with another of the trustee of a revocable trust, the financial institution shall release such trust fund to the trustor.

(d) Upon presentation of proof of the death, dissolution, insolvency or merger with another of the trustee of an irrevocable trust, the financial institution shall continue to hold such trust fund subject to the funeral plan trust, and upon appointment of a successor trustee by the trustor, the trustor's legal representative, the Secretary of State or a court of competent jurisdiction, the financial institution shall release such trust fund to the successor trustee only as provided in paragraph (a) of this subsection.

(4) If trust funds are held in a common trust account under subsection (3) of this section, the trustee shall maintain records showing the trustor and beneficiary of each individual trust fund in the account and the allocation to each individual trust fund of interest earned by the account.

(5) The trustee may appoint a successor depository. The original depository shall only release the trust funds to the successor depository except as described in subsections (1) to (4) of this section.

(6) The financial institution shall in no way be responsible for the fulfillment of any prearranged funeral plan, excepting only such financial institution shall release a trust fund as provided in this section.

(7) The Secretary of State may appoint a successor trustee upon a determination that the trustee has ceased to provide the kinds of services and things which the seller of the prearranged funeral plan agreed to provide, that the trustor or the trustor's legal representative cannot be readily identified or contacted and that the appointment of a successor trustee is appropriate in order to

protect the interests of the trust beneficiaries. Financial institutions holding deposits of such trust funds shall change their records to reflect such appointment of a successor trustee upon receipt of written notice of the appointment from the Secretary of State. Where the Secretary of State proposes to take such action under this subsection, the trustee being replaced shall be accorded notice and an opportunity for hearing as provided in ORS 183.310 to 183.550. [1953 c.639 §2; 1955 c.524 §2; 1959 c.691 §3; 1981 c.484 §1; 1985 c.207 §24; 1987 c.214 §1; 1987 c.813 §12; 1989 c.171 §14]

Note: Section 16, chapter 813, Oregon Laws 1987, provides:

Sec. 16. Notwithstanding the repeal of ORS 128.410 by section 17 of this Act and the amendments to ORS 128.415 by section 12 of this Act, ORS 128.410 and ORS 128.415 (1985 Replacement Part) shall continue to apply to any prearranged funeral plan entered into prior to the effective date of this Act [September 27, 1987]. [1987 c.813 §16]

128.420 [1981 c.719 §9a; 1983 c.810 §26; 1987 c.158 §18b; repealed by 1987 c.813 §17]

128.421 Prearrangement or preconstruction sales contracts; contents; delivery. (1) Four copies of a written sales contract shall be executed for each prearrangement sales contract or preconstruction sales contract sold by a certified person. A copy of the completed contract shall be given to:

- (a) The purchaser;
- (b) The certified person who sold the contract;
- (c) The Secretary of State; and
- (d) The trust depository.

(2) Upon receiving a trust deposit under ORS 128.423, the depository shall sign a copy of the contract received under subsection (1) of this section and return the contract to the purchaser.

(3) Each completed contract shall:

- (a) Comply with the plain language standards described in ORS 180.545 (1);
- (b) Be numbered and identify the purchaser and certified person who sold the contract;
- (c) Specify whether the contract is a guaranteed contract or a nonguaranteed contract;
- (d) Specify the specific funeral and cemetery merchandise, funeral and cemetery services or undeveloped interment, entombment or cremation spaces included and not included in the contract; and
- (e) If a guaranteed contract, disclose that the certified person may retain 10 percent of the sales price.

(4) Notwithstanding ORS 128.425 (8), in the case of a prearrangement sales contract,

if at the time of completion of the contract, the beneficiary of the contract is a recipient of public assistance or reasonably anticipates becoming a recipient of public assistance, the contract may provide that the contract is irrevocable. The contract may provide for an election by the beneficiary, or by the purchaser on behalf of the beneficiary, to make the contract thereafter irrevocable if after the contract is entered into, the beneficiary becomes eligible or seeks to become eligible for public assistance. [1987 c.813 §4; 1989 c.1048 §3]

Note: See note under 128.400.

128.423 Prearrangement and preconstruction trust fund deposits. (1) Upon receiving anything of value under a prearrangement sales contract or preconstruction sales contract, the certified person who sold the contract shall be the trustee and shall deposit the following amounts into one or more trust funds maintained pursuant to ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285:

(a) Ninety percent of the amount received in payment of a guaranteed prearrangement sales contract or guaranteed preconstruction sales contract. The remaining 10 percent shall be paid to the certified person who sold the contract; or

(b) One hundred percent of the amount received in payment of a nonguaranteed prearrangement sales contract or nonguaranteed preconstruction sales contract.

(2) All trust deposits required by ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285 shall be made within five business days of their receipt.

(3) Trust deposits required under ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285 shall be placed in a depository as defined in ORS 128.400. The trust deposits shall be maintained in a depository, except that the trustee of a prearrangement sales contract may invest the trust funds in a manner that is, in the opinion of the trustee, reasonable and prudent under the circumstances, provided that all investments are certificates of deposit, U.S. Treasuries, issues of U.S. government agencies, guaranteed investment contracts or banker's acceptances, and provided that all investments shall be placed in the custody of the depository in which the trust funds were originally deposited or any other depository that may qualify under ORS 128.400 to 128.440. Prearrangement sales contract trust fund and preconstruction sales contract trust fund accounts shall be in the name of the certified person who sold the contract under ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285.

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(4) Funds deposited in the trust fund account shall be identified in the records of the trustee by the name of the purchaser and beneficiary and adequate records shall be maintained to allocate all earnings to each prearrangement sales contract or preconstruction sales contract. Nothing shall prevent the trustee from commingling the deposits in any such trust fund account for purposes of managing and investing the funds. A common trust fund account shall be identified by the name of the trustee.

(5) When a prearrangement sales contract or preconstruction sales contract includes rights of interment, entombment or cremation, funeral or cemetery merchandise or funeral or cemetery services, the application of payments received under the contract shall be clearly provided in the contract.

(6) Any person engaging in prearrangement sales or preconstruction sales who enters into a combination sale which involves the sale of items subject to trust and any item not subject to trust shall be prohibited from increasing the sales price of those items not subject to trust with the purpose of allocating a lesser sales price to items which require a trust deposit.

(7) A trustee may appoint a successor depository. The original depository shall only release the trust funds deposited under ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285 to the successor depository as described in ORS 128.425 and 128.430 or upon presentation of the written request of the purchaser.

(8) An original trustee may appoint a successor trustee that is a depository as defined in ORS 128.400.

(9) The trust fund accounts shall be a single purpose fund. In the event of the certified person's bankruptcy, the funds shall not be available to any creditor as assets of the certified person, but shall be distributed to the purchasers or managed for their benefit by the trustee in bankruptcy, receiver or assignee.

(10)(a) If the original trustee is licensed under ORS chapter 692 and voluntarily surrenders the license to the State Mortuary and Cemetery Board, the original trustee shall transfer responsibility as trustee under this section to a successor trustee who holds a certificate of registration or is registered under ORS 692.285.

(b) If the original trustee is not licensed under ORS chapter 692, upon presentation of proof of the death, dissolution, insolvency or merger with another trustee of the original trustee, the depository shall release the prearrangement trust fund deposits or preconstruction

trust fund deposits to the purchaser.

(c) If the original trustee is licensed under ORS chapter 692, upon proof of the death, insolvency or involuntary surrender of the license of the original trustee, the depository shall release the prearrangement trust fund deposits or preconstruction trust fund deposits to the purchaser.

(11) The purchaser or beneficiary of a prearrangement sales contract or preconstruction sales contract may be named cotrustee with the certified person with the written consent of the purchaser or beneficiary.

(12) As used in this section, "common trust fund account" means trust funds received by a trustee from two or more purchasers. [1987 c.813 §5; 1989 c.1048 §1]

Note: See note under 128.400.

128.425 Distributions from prearrangement trust fund deposits. (1) A depository shall make no distributions from prearrangement sales contract trust deposits except as provided in this section.

(2) The principal of a trust created pursuant to a prearrangement sales contract shall be paid to the certified person who sold the contract if the certified person who sold the contract certifies by sworn affidavit to the depository that the purchaser or the beneficiary named in the prearrangement sales contract has deceased and that certified person has delivered all merchandise and performed all services required under the prearrangement sales contract.

(3) The principal of a trust created pursuant to a prearrangement sales contract shall be paid to the purchaser if the original trustee is no longer qualified to serve as trustee under ORS 128.423 (10).

(4) Upon receiving a sworn affidavit from the certified person who sold the contract that funeral and cemetery merchandise under the contract has been delivered, the depository shall pay to the certified person from the prearrangement sales contract trust fund an amount equal to the sales price of the merchandise delivered.

(5) Upon the final payment to the certified person of the principal in trust under subsection (2) of this section, the undistributed earnings of the trust shall be paid to:

(a) The certified person who sold the contract if the contract is a guaranteed contract; or

(b) The contract purchaser, or the purchaser's estate, if the contract is a nonguaranteed contract.

(6) The depository may rely upon the certifications and affidavits made to it under the provisions of ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285, and shall not be liable to any person for such reliance.

(7) If for any reason a certified person who sold the prearrangement sales contract has refused to comply, or cannot or does not comply with the terms of the prearrangement sales contract within a reasonable time after the certified person is required to do so, the purchaser or heirs or assigns or duly authorized representative of the purchaser or the beneficiary shall have the right to a refund in the amount equal to the sales price paid for undelivered merchandise and unperformed services plus undistributed earnings amounts held in trust attributable to such contract, within 30 days of the filing of a sworn affidavit with the certified person who sold the contract and the depository setting forth the existence of the contract and the fact of breach. A copy of this affidavit shall be filed with the Secretary of State. In the event a certified person who has sold a prearrangement sales contract is prevented from performing by strike, shortage of materials, civil disorder, natural disaster or any like occurrence beyond the control of the certified person, the certified person's time for performance shall be extended by the length of such delay.

(8) At any time prior to the death of the beneficiary of a prearrangement sales contract, the purchaser of the prearrangement sales contract may cancel the contract and shall be entitled to a 100 percent refund of the entire amount paid on the contract including undistributed earnings attributable to such amount, but excluding any amount paid for merchandise already delivered, which amount shall be retained by the certified person who sold the contract as liquidated damages.

(9) Notwithstanding ORS 128.423 (4) and subsection (5) of this section, in the case of a guaranteed contract only, upon receiving a sworn affidavit from the trustee stating that qualifying expenses, taxes or fees have been incurred, a depository shall allow a trustee to pay from earnings of trust fund deposits any expenses, accounting fees, taxes, depository fees, investment manager fees and other fees as may be necessary to enable the trustee to comply with the reporting required by ORS 128.400 to 128.440, and to perform other services for the trust as may be authorized by ORS 128.400 to 128.440. Any payment of expenses or fees from earnings of a trust fund deposit under this subsection shall not:

(a) Exceed an amount equal to 25 percent per calendar year of the earnings of the trust fund deposit in the calendar year;

(b) Include the payment of any fee to the trustee in consideration for services rendered as trustee; or

(c) Reduce, diminish or in any other way lessen the value of the trust fund deposit so that the services or merchandise provided for under the contract are reduced, diminished or in any other way lessened. [1987 c.813 §6; 1989 c.1048 §2]

Note: See note under 128.400.

128.430 Distributions from preconstruction trust fund deposits. (1) A depository shall make no distributions from preconstruction sales contract trust deposits except as provided in this section.

(2) The construction or development of undeveloped interment, entombment or cremation spaces shall be commenced on the phase of construction or development, or the section or sections of spaces in which sales are made within five years of the date of the first sale. The certified person who sold the preconstruction sales contract shall give written notice including a description of the project to the Secretary of State no later than 30 days after the first sale. Once commenced, construction or development shall be pursued diligently to completion. The first phase of construction must be completed within seven years of the first sale. If construction or development is not commenced or completed within the times specified, any contract purchaser may surrender and cancel the contract and upon cancellation shall be entitled to a refund of the actual amounts paid toward the purchase price. However, any delay caused by strike, shortage of materials, civil disorder, natural disaster or any like occurrence beyond the control of the certified person shall extend the time of such completion by the length of such delay.

(3) Except as otherwise authorized by this section, every certified person selling undeveloped spaces shall provide facilities for temporary interment or entombment or for cremation for purchasers or beneficiaries of contracts who die prior to completion of the space. Such temporary facilities shall be constructed of permanent materials, and, insofar as practical, be landscaped and groomed to the extent customary in that community. The heirs, assigns or personal representative of a purchaser or beneficiary shall not be required to accept temporary underground interment space where undeveloped space contracted for was an aboveground entombment or cremation space. In the event that temporary facilities as described in this subsection are not made

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available upon the death of a purchaser or beneficiary, the heirs, assigns or personal representative is entitled to a refund of the entire sales price paid plus undistributed interest attributable to such amount while in trust.

(4) If the certified person who sold the preconstruction sales contract delivers a completed space acceptable to the heirs, assigns or personal representative of a purchaser or beneficiary, other than a temporary facility, in lieu of the undeveloped space purchased, the certified person shall provide the depository with a delivery certificate and all sums deposited under the preconstruction sales contract shall be paid to the certified person.

(5) During the construction or development of interment, entombment or cremation spaces, upon receiving the sworn certification by the certified person who sold the preconstruction sales contract and the contractor, the depository shall disburse from the trust fund the amount equivalent to the cost of performed labor or delivered materials as certified. A person who executes and delivers a completion certificate with actual knowledge of a falsity contained therein shall be considered in violation of ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285.

(6) Upon completion of the phase of construction or development, section or sections of the project as certified to the depository by the certified person and the contractor, the trust requirements shall terminate and all funds held in the preconstruction sales contract trust fund attributable to the completed phase, section or sections shall be paid to the certified person who sold the preconstruction sales contract.

(7) Upon the payment to a certified person of preconstruction sales contract trust funds under subsection (4) or (6) of this section, the undistributed income of the trust shall be paid to:

(a) The certified person who sold the contract if the contract is a guaranteed contract; or

(b) The contract purchaser, or the purchaser's estate, if the contract is a nonguaranteed contract.

(8) If the preconstruction sales contract purchaser defaults in making payments under an installment preconstruction sales contract, and default continues for at least 30 days after the purchaser has received written notice of default, the certified person who sold the contract may cancel the contract and withdraw from the trust fund the entire balance of the defaulting purchaser's

account as liquidating damages. Upon certification of the default, the depository shall deliver the balance to the certified person. The depository may rely on the certification and affidavits made to it under the provisions of ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285 and shall not be liable to any person for such reliance.

(9) This section and the trust fund requirements in ORS 128.423 shall not apply to the sale of undeveloped spaces if there has been any such sale in the same phase of construction or development or the section or sections of the project prior to September 27, 1987. [1987 c.813 §7]

Note: See note under 128.400.

128.435 Funeral and Cemetery Consumer Protection Fund. (1) Every prearrangement sales contract or preconstruction sales contract seller shall pay to the Secretary of State a \$5 fee for each prearrangement sales contract or preconstruction sales contract entered into, to be paid into a special income earning fund in the State Treasury, separate from the General Fund, known as the Funeral and Cemetery Consumer Protection Fund. The fees shall be remitted to the Secretary of State semiannually within 30 days after the end of June and December for all contracts that have been entered into during the six-month period.

(2) Except as provided in this section, the fund shall be used solely for the purpose of providing restitution to purchasers who have suffered pecuniary loss arising out of prearrangement sales contracts or preconstruction sales contracts. The fund may be used for payment of actual administrative expenses incurred in administering the fund. All moneys in the Funeral and Cemetery Consumer Protection Fund are appropriated continuously to the Secretary of State for the payment of restitution under this section and the payment of expenses incurred in performing the duties and functions of the Secretary of State required under ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285.

(3) The Secretary of State shall administer the fund and shall adopt rules governing the payment of restitution from the fund.

(4) Payments for restitution shall be made only upon order of the Secretary of State where the secretary determines that the obligation is noncollectible from the certified person. Restitution shall not exceed the amount of the sales price paid plus interest at the statutory rate.

(5) The fund shall not be applied toward any restitution for losses on a prearrangement sales contract or preconstruction sales contract entered into prior to the effective

date of ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285.

(6) The fund shall not be allocated for any purpose other than that specified in ORS 128.400 to 128.440, 128.990, 128.991, 692.180 and 692.285.

(7) If the Secretary of State proposes to deny an application for restitution from the fund, the secretary shall accord an opportunity for a hearing as provided in ORS 183.310 to 183.550.

(8) Notwithstanding any other provision of this section, the payment of restitution from the fund shall be a matter of grace and not of right and no purchaser shall have vested rights in the fund as a beneficiary or otherwise.

(9) The status of the fund shall be reviewed annually by the Secretary of State. If the review determines that the fund together with all accumulated income earned on the fund is sufficient to cover costs of potential claims against the fund and that the total number of outstanding claims filed against the fund is less than 10 percent of the fund's current balance, then payments to the fund shall be adjusted accordingly at the discretion of the Secretary of State. [1987 c.813 §8]

Note: See note under 128.400.

128.440 Advertising and marketing prohibitions. (1) No person or individual shall engage in unsolicited door to door or telephone advertising and marketing of prearrangement sales contracts or preconstruction sales contracts. The costs of advertising and marketing shall not be paid from trust funds.

(2) Advertising and marketing a prearrangement sales contract or a preconstruction sales contract by a funeral service practitioner, embalmer or funeral service establishment licensed under ORS chapter 692 does not constitute a violation of ORS 692.180 (1)(b). [1987 c.813 §8a]

Note: See note under 128.400.

TRUSTS FOR DEATH BENEFITS

128.460 Definitions for ORS 128.460 to 128.500. As used in ORS 128.460 to 128.500:

(1) The words "death benefits" shall mean death benefits of any kind, including, but not limited to, proceeds of life insurance policies, payments under annuity or endowment contracts, and funds payable in connection with pension, retirement, stock bonus or profit-sharing plans, or any trust or trusts administered in connection therewith;

(2) The word "designator" shall mean the person entitled to designate the beneficiary

of such death benefits upon the death of the person; and

(3) The word "obligor" shall mean the insurer or other person obligated to pay such death benefits. [1971 c.182 §1]

128.470 Creation of death benefits trust; trust without corpus valid. A trustee may be named as beneficiary of any death benefits and such death benefits shall be paid to such trustee and be held and disposed of by the trustee as provided in a trust agreement made by the designator during the lifetime of the designator. It shall not be necessary to the validity of any such trust agreement or declaration of trust that it have a trust corpus other than the right of the trustee to receive such death benefits as beneficiary. [1971 c.182 §2]

128.480 Creation of death benefits trust by will; disposition of death benefits upon probate of will. A trustee named by will may be designated as beneficiary of death benefits, if the designation is made in accordance with the provisions of the policy, contract, plan, trust or other governing instrument. Upon probate of the will, the death benefits shall be payable to the trustee to be held and disposed of under the term of the designator's last will in the same manner as other testamentary trusts are administered; but if no qualified trustee claims the death benefits within one year after the death of the designator or if satisfactory evidence is furnished within such one-year period showing that no trustee can qualify, to receive such death benefits, payment thereof may be made, unless the designator has otherwise provided, by the obligor to the personal representative of the designator or to those thereafter entitled, and the obligor shall be discharged from liability. [1971 c.182 §3]

128.490 Death benefits received by trustee not subject to additional inheritance or estate taxes. The death benefits received by the trustee shall not be subject to the debts of the designator or to inheritance or estate taxes to any greater extent than if such death benefits were payable to the beneficiaries named in the trust and not to the estate of the designator. [1971 c.182 §4]

128.500 Commingling with other trust assets. Death benefits so held in trust may be commingled with any other assets which may properly become a part of such trust. [1971 c.182 §5]

EMPLOYEES' TRUSTS

128.510 Definitions for ORS 128.520. As used in ORS 128.520, "employees' trust" means a trust of real or personal property forming part of a pension, profit sharing,

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stock bonus, annuity, disability or death benefit plan of an employer or group of employers for the benefit of the employees of the employer or group of employers, to which contributions are made by such employers or employees, or both, for the purpose of distributing income or principal, or both, to such employees or the beneficiaries of such employees. [1955 c.586 §1]

128.520 Employees' trust may be in perpetuity; accumulation of income. An employees' trust may be permitted to accumulate for such time as may be necessary to accomplish the purpose for which it is created, and is not invalid as violating any rule of law against perpetuities or the suspension of the power of alienation of title to property. The income from any property held in an employees' trust may continue in perpetuity or in accordance with the terms of such trust, and the plan of which such trust forms a part, for such time as may be necessary to accomplish the purpose for which such trust is created. [1955 c.586 §2]

BUSINESS TRUSTS

128.560 "Business trust" described. A "business trust" is any association, including a real estate investment trust, engaged in or operating a business under a written trust agreement or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares, other than a trust engaged solely in exercising the voting rights pertaining to corporate shares or other securities in accordance with the terms of a written instrument. [1971 c.491 §1]

128.565 Business trust permitted. A business trust is permitted as a recognized form of association for the conduct of business within the State of Oregon. [1971 c.491 §2]

128.570 Business trusts and trustees not subject to bank and trust company regulations. Neither a business trust nor the trustees of such trust are subject to the provisions of ORS chapters 706, 707, 708 and 709. [1971 c.491 §3]

128.575 Creation of business trust; filing with Office of Secretary of State required; fees. (1) Any business trust desiring to do business in this state shall first submit to the Office of Secretary of State two copies of the trust instrument creating such trust and any subsequent amendments thereto and an original and one true copy of a document setting forth:

(a) The assumed business name, if any;

(b) The names and addresses of its trustees;

(c) The street address of the business trust's registered office in this state and the name of the registered agent who shall be amenable to service of process at the address;

(d) A mailing address to which the Secretary of State may mail notices; and

(e) Any additional identifying information that the Secretary of State by rule may require.

(2) The filing described in subsection (1) of this section shall be accompanied by the applicable filing fee.

(3) If the Secretary of State finds that the document contains the required information, the Secretary of State, when all fees have been paid, shall file the trust instrument and document and so notify the sender.

(4) If a business trust amends its trust instrument it shall submit for filing a copy of any such amendment to the Office of Secretary of State. [1971 c.491 §4; 1973 c.367 §12; 1985 c.351 §21; 1985 c.728 §81a; 1987 c.94 §128]

128.580 Business trusts subject to certain corporate laws. Any business trust shall be subject to such provisions of law, now or hereafter enacted, with respect to domestic and foreign corporations, respectively, as relate to the issuance of securities, filing of required statements or reports, service of process, general grants of power to act, right to sue and be sued, limitation of individual liability of shareholders and rights to acquire, mortgage, sell, lease, operate and otherwise to deal in real and personal property. Except as otherwise provided in its trust agreement or declaration of trust, or any amendments thereto, any business trust shall also be subject to the other provisions of ORS chapter 60 and other rights and duties existing under the common law and statutes of this state applicable to domestic and foreign corporations. Title to any real or personal property may be held in the name of the trust, one or more of the trustees or any other person as nominee. [1971 c.491 §5; 1973 c.367 §13; 1979 c.208 §6; 1987 c.94 §99]

128.585 Personal liability of trustees, shareholders or beneficiaries of business trust. The trustees, shareholders or beneficiaries of a business trust shall not, as such, be personally liable for any obligations of such business trust arising after June 25, 1971. Persons becoming trustees, shareholders or beneficiaries after June 25, 1971, shall not be personally liable, as such, for obligations of the business trust existing on June 25, 1971. [1971 c.491 §6; 1973 c.367 §14]

128.590 Filing of trust instrument as conclusive evidence of compliance with laws; exception. For purposes of ORS 128.585, filing of the trust instrument by the

Secretary of State shall be conclusive evidence that all conditions precedent required to be performed by the business trust have been complied with and that the business trust is authorized to do business in this state, except as against this state in a proceeding to cancel or revoke the filing for violations of the provisions of ORS 128.580. [1971 c.491 §7; 1985 c.728 §82]

128.595 Business trusts reports required; due date; content; notice of requirement; effect of failure to file. (1) Each business trust by the anniversary date shall file a report with the Secretary of State accompanied by the annual fee.

(2) The report shall contain the following:

(a) Either a statement that there have been no changes in the trust instrument creating the trust or a statement that all amendments are on file with the Secretary of State;

(b) The names and addresses of its trustees;

(c) The street address of the registered office in this state and the name of the trust's registered agent at that office;

(d) A mailing address to which the Secretary of State may mail notices;

(e) The category of the classification code as established by rule of the Secretary of State most closely designating the primary business activity of the business trust;

(f) The federal employer identification number of the trust; and

(g) Any additional identifying information that the Secretary of State by rule may require.

(3) The Secretary of State shall mail the report form to any address shown for the business trust in the current records of the Office of the Secretary of State. The failure of the business trust to receive the report form from the Secretary of State shall not relieve the business trust of its duty to deliver a report as required by this section.

(4) If the Secretary of State finds the report conforms to the requirements of this section, the Secretary of State shall file the report.

(5) If the Secretary of State finds that the report does not conform to the requirements of this section, the Secretary of State shall return the report to the business trust. The business trust shall correct the annual report and return it to the Secretary of State within 45 days after the Secretary of State returns the report.

(6) If no report is filed by the reporting date or if no corrected report is filed within

the 45-day period, the Secretary of State shall send to the business trust a final notice advising that no report has been filed and it is, therefore, assumed that the business trust is no longer active unless a report is filed within 45 days after the mailing of such final notice.

(7) Not less than 45 days after the date of mailing of the final notice provided for by subsection (6) of this section, the Secretary of State may assume and note on the records of the Secretary of State that the business trust is inactive. The business trust may later give notice of its active status by filing the required report, paying all annual fees due and the reinstatement fee. The Secretary of State shall then remove the notation of the inactive status. However, if the name is not distinguishable on the records of the Office of Secretary of State from the name of another business trust, or a limited partnership or corporate name, including any reserved name or registered corporate name or assumed business name of active record, the business trust must change its name. [Formerly 128.075; 1983 c.717 §29; 1985 c.351 §22; 1985 c.728 §82b; 1987 c.94 §130; 1987 c.843 §18; 1993 c.190 §17]

128.600 Fees. (1) The Secretary of State shall collect the following fees for the documents delivered for filing:

<u>Document</u>	<u>Fee</u>
(a) Trust instrument creating a business trust domiciled in the State of Oregon	\$ 40
(b) Trust instrument creating a business trust domiciled outside the State of Oregon	\$ 440
(c) Annual report of a business trust domiciled in the State of Oregon	\$ 20
(d) Annual report of a business trust domiciled outside the State of Oregon	\$ 220
(e) Application of a business trust domiciled in the State of Oregon for reinstatement	\$ 30
(f) Application of a business trust domiciled outside the State of Oregon for reinstatement	\$ 50
(g) Application for a reserved name	\$ 10
(h) Application for a certificate of existence or authorization	\$ 10
(i) Amendment to trust instrument	\$ 10
(j) Restated trust instrument	\$ 10
(k) Mergers and share exchanges	\$ 10
(L) Cancellations and withdrawals	\$ 10
(m) Change of registered agent or office	\$ 10
(n) Registered agent resignations	\$ 10

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(2) The Secretary of State shall collect a fee of \$20 each time process is served on the Secretary of State under this chapter.

(3) The Secretary of State by rule may establish fees, in addition to those provided for in subsections (1) and (2) of this section, for:

(a) Copying any public record maintained by the Office of Secretary of State and relating to a domestic or foreign business trust, and for certifying the copy.

(b) Certifying to facts of record, other than a certificate of existence, pursuant to this chapter and ORS 60.027. [1987 c.94 §129; 1991 c.132 §14]

CHARITABLE TRUST AND CORPORATION ACT

128.610 Short title. ORS 128.610 to 128.750 may be cited as the Charitable Trust and Corporation Act. [1963 c.583 §1; 1971 c.589 §1; 1981 c.593 §1; 1985 c.729 §25; 1985 c.730 §4]

128.620 Definitions for ORS 128.610 to 128.750. As used in ORS 128.610 to 128.750:

(1) "Charitable corporation" means any nonprofit corporation organized under the laws of this state for charitable or eleemosynary purposes and any similar foreign corporation doing business or holding property in this state for such purposes. The mere making of grants or donations to institutions or beneficiaries within the State of Oregon, or the investigation of applicants for such grants or donations, shall not constitute doing business in this state. However, the solicitation of funds for charitable purposes in this state shall constitute doing business therein.

(2) "Trustee" means:

(a) Any individual, group of individuals, corporation or other legal entity holding property in trust pursuant to any charitable trust;

(b) Any corporation which has accepted property to be used for a particular charitable corporate purpose as distinguished from the general purposes of the corporation; and

(c) A corporation formed for the administration of a charitable trust, pursuant to the directions of the settlor or at the instance of the trustee.

(3) "Charitable purpose" means any purpose to promote the well-being of the public at large, or for the benefit of an indefinite number of persons, including but not limited to educational, literary, or scientific purposes, or for the prevention of cruelty to children or animals, or for the benefit of religion, rehabilitation services, public recre-

ation, civic improvement, or services which lessen the burdens of government.

(4) "Religious organization" means any organized church or group organized for the purpose of divine worship, religious teaching, or other directly ancillary purposes. [1963 c.583 §§3,4; 1971 c.589 §2; 1981 c.593 §2; 1985 c.730 §5; 1989 c.334 §1]

128.630 Application of ORS 128.610 to 128.750. (1) ORS 128.610 to 128.750 apply to all charitable corporations and trustees holding property for charitable purposes over which the state or the Attorney General has enforcement or supervisory powers.

(2) ORS 128.610 to 128.750 shall apply regardless of any contrary provisions of any instrument. [1963 c.583 §§2,14; 1971 c.589 §3; 1981 c.593 §3; 1985 c.729 §27; 1985 c.730 §6]

128.640 Exemptions from application of ORS 128.610 to 128.750. (1) ORS 128.610 to 128.750 do not apply to the United States, any state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or to any of their agencies or governmental subdivisions.

(2) ORS 128.650 to 128.670 and 128.720 do not apply to:

(a) Any religious corporation sole or other religious corporation or organization which holds property for religious purposes, or to any officer, director or trustee thereof who holds property for like purposes;

(b) A cemetery corporation regulated under ORS 65.855 to 65.875;

(c) A trustee that holds property for charitable purposes in the event that the sole beneficiary of a charitable remainder trust serves as trustee; or

(d) A child-caring agency regulated under ORS 418.215 to 418.265. [1963 c.583 §5; 1971 c.589 §4; 1981 c.593 §4; 1985 c.730 §7; 1989 c.334 §2]

128.650 Register of charitable corporations and trustees; authority of Attorney General to maintain register. The Attorney General shall establish and maintain a register of charitable corporations and trustees subject to ORS 128.610 to 128.750 and of the particular trust or other relationship under which they hold property for charitable purposes and, to that end, may conduct whatever investigation is necessary, and shall obtain from public records, court officers, taxing authorities, trustees, and other sources, whatever information, copies of instruments, reports and records are needed for the establishment and maintenance of the register. [1963 c.583 §6; 1971 c.589 §5; 1981 c.593 §5; 1985 c.729 §29; 1985 c.730 §8]

128.660 Filing of articles of incorporation or other instrument with Attorney General. Every charitable corporation and

trustee subject to ORS 128.610 to 128.750 who has received property for charitable purposes shall file with the Attorney General, upon receiving possession or control of such property, a copy of the articles of incorporation, trust agreement or other instrument providing for title, powers or duties. [1963 c.583 §7; 1971 c.589 §6; 1981 c.593 §6]

128.670 Filing of reports; fees; authority of Attorney General relating to reports; civil penalty. (1) Except as otherwise provided, every charitable corporation and trustee subject to ORS 128.610 to 128.750 shall, in addition to filing copies of the instruments previously required, file with the Attorney General periodic written reports setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by the corporation or trustee.

(2) The Attorney General may classify trusts and other relationships concerning property held for a charitable purpose as to purpose, nature of assets, duration of the trust or other relationship, amount of assets, amounts to be devoted to charitable purposes, nature of trustee, or otherwise, and may establish different rules for the different classes as to time and nature of the reports required to the ends that:

(a) The Attorney General shall receive reasonably current, periodic reports as to all charitable trusts or other relationships of a similar nature, which will enable the Attorney General to ascertain whether they are being properly administered; and

(b) Periodic reports shall not unreasonably add to the expense of the administration of charitable trusts and similar relationships.

(3) The Attorney General may suspend the filing of reports as to a particular charitable trust or relationship for a reasonable, specifically designated time after the Attorney General has filed in the register of charitable trusts a written statement that the interests of the beneficiaries will not be prejudiced thereby and that periodic reports are not required for proper supervision by the Attorney General's office.

(4) A copy of an account filed by the trustee in any court having jurisdiction of the trust or other relationship, if the account substantially complies with the rules of the Attorney General, may be filed as a report required by this section.

(5) The first report for a trust or similar relationship hereafter established, unless the filing thereof is suspended as provided in subsection (3) of this section, shall be filed not later than four months and 15 days following the close of the first calendar or fiscal year in which any part of the income or

principal is authorized or required to be applied to a charitable purpose. Subsequent annual reports shall be submitted not later than four months and 15 days following the close of each calendar or fiscal year adopted by the charitable corporation or trustee.

(6) The Attorney General shall make rules as to the time for filing reports, the contents thereof, and the manner of executing and filing them. The Attorney General may make additional rules and amend existing rules as necessary for the proper administration of the Charitable Trust and Corporation Act.

(7) Each charitable corporation, trustee, or other charitable organization filing a report required by this section shall pay to the Department of Justice, with such report, a fee based in part on the total amount of its income and receipts during the time covered by the report and in part on its fund balance at the close of the calendar or fiscal year adopted by the charitable corporation or trustee:

(a) The fee based on income and receipts shall be as follows:

(A) \$10, if it received no income and receipts during the time covered by the report or if it received less than \$25,000;

(B) \$25, if \$25,000 or more but less than \$50,000;

(C) \$45, if \$50,000 or more but less than \$100,000;

(D) \$75, if \$100,000 or more but less than \$250,000;

(E) \$100, if \$250,000 or more but less than \$500,000;

(F) \$135, if \$500,000 or more but less than \$750,000;

(G) \$170, if \$750,000 or more but less than \$1 million; or

(H) \$200, if \$1 million or more.

(b) The fee based on the fund balance shall be one-hundredth of one percent of the fund balance. The fee shall be rounded off to whole dollars; amounts under 50 cents shall be dropped and amounts from 50 cents to 99 cents shall be increased to the next dollar. The fee shall allow for the following exceptions:

(A) Any amount of a fund balance over and above \$10 million shall not be subject to the fund balance fee.

(B) No fee shall be due under this paragraph if the fund balance is less than \$50,000.

(C) With respect to foreign organizations, only the fund balance of assets held in Oregon shall be subject to the fee due under this paragraph.

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(D) The fee shall not apply to fixed assets held for use in the operation of a charitable organization.

(8)(a) If the fee prescribed by subsection (7) of this section is not paid when due or if the charitable corporation or trustee fails to file a report by the date due, a penalty charge of an additional \$20 shall be paid to the Department of Justice.

(b) The Attorney General may at any time after a fee or report is delinquent give written notice by certified mail to the charitable corporation, trustee or other charitable organization of the delinquency, requiring it to correct the delinquency and informing it of the Attorney General's authority to impose an additional penalty if it fails to do so within a specified number of days thereafter, but not less than 10. Thereafter, unless the fee, including the penalty charge prescribed by paragraph (a) of this subsection, or the report, or both, are filed within the specified number of days, the Attorney General may impose an additional penalty, not exceeding the greater of \$300 or twice the fee prescribed by subsection (7) of this section which is due with the delinquent report, in the manner provided by ORS 183.090. In any judicial review of the order of the Attorney General, the order shall be reversed or modified only if the court finds that the Attorney General lacked authority to impose the penalty or the amount of the penalty imposed was unconscionable in the circumstances.

(c) The Attorney General may grant an extension of time for a reasonable period for filing a report upon written application filed by or on behalf of the charitable corporation or trustee stating the reason that additional time should be allowed for filing the report beyond the ordinary due date. If the request is submitted on or prior to the due date for filing the report, the \$20 penalty charge will not be due unless the report and fee are thereafter not filed within the extended period granted for filing the report, or, if the request is denied, within 10 days after the denial is received by the corporation.

(9) All fees and penalties received by the Department of Justice under subsections (7) and (8) of this section shall be paid over to the State Treasurer monthly for deposit in the Department of Justice Operating Account created under the provisions of ORS 180.180. Amounts deposited pursuant to this subsection are continuously appropriated to the Attorney General to pay the expenses of the Department of Justice in administering the Charitable Trust and Corporation Act and the Charitable Solicitations Act as established in ORS 128.610 to 128.750 and 128.801 to 128.898. [1963 c.583 §8; 1971 c.589 §7; 1973

c.506 §40; 1973 c.775 §4; 1975 c.388 §5; 1981 c.593 §7; 1985 c.730 §9; 1991 c.734 §7]

128.680 Investigatory authority of Attorney General. The Attorney General may investigate transactions and relationships of corporations and trustees subject to ORS 128.610 to 128.750 for the purpose of ascertaining whether or not the purposes of the corporation or trust are being carried out in accordance with the terms and provisions of the articles of incorporation or other instrument, whether a person or organization has engaged in a violation of the Charitable Trust and Corporation Act, ORS 128.610 to 128.750 or whether such a person or organization has breached a fiduciary duty arising under the common law. The Attorney General may require any agent, trustee, fiduciary, beneficiary, institution, association or corporation, or other person to appear, at a named time and place, in the county designated by the Attorney General, where the person resides or is found, to give information under oath and to produce books, memoranda, papers, documents of title, and evidence of assets, liabilities, receipts or disbursements in the possession or control of the person ordered to appear. [1963 c.583 §10; 1971 c.589 §8; 1981 c.593 §9; 1985 c.729 §30; 1985 c.730 §11]

128.690 Order for attendance by Attorney General; effect. When the Attorney General requires the attendance of any person, as provided in ORS 128.680, the Attorney General shall issue an order setting forth the time when and the place where attendance is required and shall cause the same to be delivered to or sent by registered or certified mail to the person at least 14 days before the date fixed for attendance. Such order shall have the same force and effect as a subpoena and, upon application of the Attorney General, obedience to the order may be enforced by any court having jurisdiction of charitable trusts in the county where the trust may be in existence or administered or the person receiving it resides or is found, in the same manner as though the notice were a subpoena. The court, after hearing, for cause, and upon application of any person aggrieved by the order, shall have the right to alter, amend, revise, suspend or postpone all or any part of its provisions. [1963 c.583 §11]

128.700 [1963 c.583 §12; repealed by 1973 c.794 §34]

128.710 Enforcement; jurisdiction of court. (1) The Attorney General may institute appropriate proceedings to secure compliance with ORS 128.610 to 128.750 and to invoke the jurisdiction of the court. Willful failure to comply with an order of any court having jurisdiction of charitable trusts requiring an accounting by a charitable corporation or trustee shall constitute grounds for

removal of the officers of such charitable corporation or of such trustee and the appointment by the court of successor officers or trustee. The powers and duties of the Attorney General provided in ORS 128.610 to 128.750 are in addition to existing powers and duties.

(2) Nothing in ORS 128.610 to 128.750 shall impair or restrict the jurisdiction of any court with respect to any of the matters covered by it, except that no court shall have jurisdiction to modify or terminate any trust of property for charitable purposes unless the Attorney General is a party to the proceedings. [1963 c.583 §13; 1971 c.589 §9; 1981 c.593 §10; 1985 c.729 §31; 1985 c.730 §12]

128.720 Copies of certain documents and notice to be provided Attorney General. Every person who offers for probate any instrument which establishes a testamentary trust of property for charitable purposes or who records in any county any inter vivos transfer of property for charitable purposes shall furnish a copy of such document to the Attorney General. Upon filing the final account and petition for decree of distribution of any estate through which a residuary testamentary trust for charitable purposes is established, the personal representative shall mail a copy thereof, and a copy of the notice fixing the time for filing objections thereto, to the Attorney General not less than 20 days before the time fixed in the notice. The custodian of the records of a court having jurisdiction of probate matters or of charitable trusts shall furnish such copies of papers, records and files of the office of the custodian relating to the subject of ORS 128.610 to 128.750 as the Attorney General requires. [1963 c.583 §15; 1971 c.589 §10]

128.730 List of certain claims for exemptions from taxation to be provided Attorney General. Every officer, agency, board or commission of this state, receiving applications for exemption from taxation of any corporation, charitable trust or similar relationship in which the corporation or trustee is subject to ORS 128.610 to 128.750 shall annually file with the Attorney General a list of all applications received during the year. [1963 c.583 §16; 1971 c.589 §11]

128.735 Attorney fees in action to enforce fiduciary or other duty. (1) In any suit or action against a charitable corporation or trustee or any other charitable organization to enforce any fiduciary or other duty arising under ORS 128.610 to 128.750 or to enforce any fiduciary duty arising under the common law, the court in its discretion may award the prevailing party reasonable attorney fees at trial and on appeal and, as part of costs and disbursements, reasonable

investigative expenses and reasonable expert witness fees.

(2) If the Attorney General prevails, the attorney fees, costs and disbursements of the Attorney General may, in the discretion of the court, be a judgment against the responsible officers of the charitable corporation or trustee of a charitable trust, or may be paid out of the corpus of the trust. [1985 c.730 §2]

128.740 [1963 c.583 §17; 1971 c.589 §12; repealed by 1975 c.388 §8]

128.750 Uniformity of interpretation. The Charitable Trust and Corporation Act, ORS 128.610 to 128.750, shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it. [1963 c.583 §19; 1981 c.593 §11; 1985 c.730 §14]

CHARITABLE SOLICITATIONS ACT

128.801 Definitions for ORS 128.801 to 128.898. As used in ORS 128.801 to 128.898:

(1) "Charitable purpose" means any purpose to promote the well-being of the public at large, or for the benefit of an indefinite number of persons, including but not limited to educational, literary or scientific purposes, or for the prevention of cruelty to children or animals, or for the benefit of religion, rehabilitation services, public recreation, civic improvement or services which lessen the burdens of government.

(2) "Commercial fund raising solicitation" means the solicitation of funds for nonprofit beneficiaries, whether named or unspecified, through the sale of goods or services, whether the goods or services are delivered to a purchaser or donated to third parties, and where the solicitation is conducted by a commercial fund raising firm or commercial coventurer. If donors receive substantial items or other benefits in return for contributions, such a solicitation of funds is not a commercial fund raising solicitation if the items or benefits received are considered premiums and do not affect the deductibility of the contributions for federal income tax purposes. A solicitation is conducted by a commercial fund raising firm or commercial coventurer if the soliciting agents are under the direction and control of a commercial fund raising firm or commercial coventurer; the fact that the solicitors are paid by the beneficiary is of no consequence.

(3) "Commercial coventurer" means any sole proprietorship, partnership, corporation or any other legal entity, organized for profit or formed as a nonprofit mutual benefit corporation, who is regularly and primarily engaged in trade or commerce in this state other than in conjunction with the raising of funds for nonprofit purposes and who con-

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ducts commercial fund raising solicitations on an infrequent basis.

(4) "Commercial fund raising firm" means any sole proprietorship, partnership, corporation or any other legal entity, organized for profit or formed as a nonprofit mutual benefit corporation, who, for compensation or other consideration regularly conducts commercial fund raising solicitations.

(5) "Professional fund raising firm" means any sole proprietorship, partnership, corporation or any other legal entity, organized for profit or as a nonprofit mutual benefit corporation, who, for compensation or other consideration, manages or conducts the solicitation of funds, not including commercial fund raising solicitations, on behalf of any nonprofit organization.

(6)(a) "Solicitation" means any oral or written request for a contribution, including the solicitor's offer or attempt to sell any property, rights, services or other thing, in connection with which:

(A) The name of any nonprofit organization is used as an inducement for making the contribution or consummating the sale; or

(B) Any statement is made which implies that the whole or any part of the contribution or proceeds from the sale will be donated to any nonprofit organization.

(b) "Solicitation" does not include the making of any request or appeal on behalf of a candidate, political committee or measure as defined in ORS 260.005, unless the appeal states or implies that contributions will be used, in whole or in part, for a charitable purpose or includes a representation that a ticket to an event may be donated by a contributor to the solicitors for use by another. [1985 c.729 §3; 1991 c.532 §1]

128.802 Registration of professional fund raising firms required; application; fee; annual renewal. (1) No person shall act as a professional fund raising firm with respect to the solicitation of funds in this state on behalf of any nonprofit organization unless the professional fund raising firm is registered with the Attorney General.

(2) Applications for registration or reregistration shall be in writing, under oath, on a form prescribed by the Attorney General and shall be accompanied by a fee in the amount of \$250.

(3) The application shall contain such information as the Attorney General shall require and which is consistent with ORS 128.801 to 128.898, including:

(a) The address of the principal place of business of the applicant and any local addresses if the principal place of business is not located in the state.

(b) The form of the applicant's organization.

(c) The names and personal addresses of all principals of the organization, including all officers and all persons who own a 10 percent or more interest in the organization.

(4) Each registration is valid for one year and may be renewed for additional one-year periods upon application to the Attorney General and payment of the registration fee.

(5) The Attorney General shall be notified in writing of any change in the information contained in the application within seven days after the change occurs. [1991 c.532 §17]

128.804 Fund raising notice; contents.

(1) Prior to each solicitation campaign to be conducted in this state, where the services of a professional fund raising firm are employed, the firm shall file a completed fund raising notice on forms prescribed by the Attorney General. A copy of the written fund raising plan, described in ORS 128.807 and a copy of the written disclosure, when required by ORS 128.809, shall be attached to the notice.

(2) The fund raising notice shall be in writing, under oath, and shall include a description of the solicitation campaign, the projected starting date of the campaign, a description of the role of the firm, the bank account number and location where the solicited funds will be deposited, including the name of the organization or organizations that control the account and the address and telephone number of the headquarters for each campaign if different than the principal place of business identified on the firm's registration form, as well as the person in charge of each such location. If the solicitation is being conducted by agents of the firm, the notice shall include a provision affirming that the solicitation material has been approved by the nonprofit beneficiary. [1991 c.532 §18]

~~128.805~~ [1971 c.589 §14; 1981 c.593 §12; repealed by 1985 c.729 §1; 1985 c.730 §15]

~~128.806~~ [1985 c.729 §4; repealed by 1991 c.532 §26]

128.807 Required submission of financial plan to nonprofit beneficiary. (1) A professional fund raising firm shall not participate in a solicitation campaign in this state without first submitting a written financial plan to the nonprofit beneficiary. A nonprofit organization, utilizing the services of a professional fund raising firm, shall not solicit in this state unless it has obtained such a written financial plan from the firm. The written financial plan shall provide a good faith projection of the total expenses and revenue for each solicitation campaign

contemplated by the agreement with the nonprofit beneficiary.

(2) In the case of solicitation campaigns which are directed at targeted individual donors, such as in telemarketing or direct mail solicitations, the plan shall specify whether each campaign is directed toward new donor acquisitions, individual donor renewals or some combination thereof. [1991 c.532 §19]

128.809 Required disclosure of agency by solicitors. No person shall engage in an in-person solicitation as an agent of a professional fund raising firm, including a face-to-face or telephone solicitation, unless it is disclosed orally in the course of the solicitation but prior to asking for a commitment for a contribution from the solicitee, and in writing to any solicitee that makes a pledge to be delivered within 10 days of the date of the pledge that the solicitor is operating under the direction and control of a named professional fund raising firm. [1991 c.532 §20]

128.810 [1959 c.599 §1; repealed by 1967 c.359 §704]

128.811 [1985 c.729 §5; repealed by 1991 c.532 §26]

128.812 Required submission of financial report after campaign. Within 90 days after a solicitation campaign has been completed, unless funds are to be collected by the nonprofit beneficiary, the professional fund raising firm shall file with the Attorney General a financial report for the campaign, including gross receipts and all expenditures incurred in the solicitation campaign. The report shall be completed on a form prescribed by the Attorney General. The report shall be signed by an official of the professional fund raising firm and an official from each beneficiary and they shall certify, under oath, that it is true to the best of their knowledge. A similar interim financial report shall be filed one year after the start of the solicitation campaign in the case of a solicitation campaign still in progress on that date. [1991 c.532 §21]

128.813 [1975 c.388 §2; repealed by 1985 c.729 §1; 1985 c.730 §15]

128.814 Presumption of breach of fiduciary duty by officer or director of nonprofit beneficiary. (1) There shall be a rebuttable presumption of a breach of fiduciary duty if an officer or director of a nonprofit beneficiary enters into an agreement with a professional fund raising firm:

(a) For a duration to exceed two years unless the nonprofit beneficiary has obtained written proposals from at least two other professional fund raising firms; or

(b) Where one of the stated or implied purposes of the solicitation campaign is to acquire an identified list of donors for use as a donor base for future solicitations by the nonprofit beneficiary, unless the nonprofit

beneficiary has exclusive rights to the ownership and use of the list of donors.

(2) It shall be presumed that such donor list acquisition is a purpose of the campaign unless the agreement specifies otherwise.

(3) This section shall not prohibit a professional fund raising firm from retaining a security interest in a list for the limited purpose of recovering amounts owed to it pursuant to the terms of the contract. [1991 c.532 §22]

128.815 [1971 c.589 §14a; 1981 c.593 §13; repealed by 1985 c.729 §1; 1985 c.730 §15]

128.816 [1985 c.729 §6; repealed by 1991 c.532 §26]

128.820 [1959 c.599 §§2,3,4,5; 1967 c.359 §125; renumbered 731.704]

128.821 Registration of commercial fund raising firms required; application; renewal; notice of change in information.

(1) No person shall engage in solicitations for contributions for or on behalf of a commercial fund raising firm unless the commercial fund raising firm is registered with the Attorney General.

(2) Applications for registration or reregistration shall be in writing, under oath, on a form prescribed by the Attorney General and shall be accompanied by a fee in the amount of \$250.

(3) The application shall contain such information as the Attorney General shall require and which is consistent with ORS 128.801 to 128.898, including:

(a) The address of the principal place of business of the applicant and any local addresses if the principal place of business is not located in the state.

(b) The form of the applicant's organization.

(c) The names and personal addresses of all principals of the organization, including all officers and all persons who own a 10 percent or more interest in the organization.

(4) Each registration is valid for one year and may be renewed for additional one-year periods upon application to the Attorney General and payment of the registration fee.

(5) The Attorney General shall be notified in writing of any change in the information contained in the application within seven days after the change occurs. [1985 c.729 §7; 1991 c.532 §2]

128.823 Designation of amount to be paid to beneficiaries; manner of specification; minimum amount payable. (1) No person shall engage in commercial fund raising solicitations unless there is a designated amount to be paid to nonprofit beneficiaries. Where the nonprofit beneficiary is identified in the solicitation campaign, the amount shall be specified in a contract or letter of

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agreement with such a beneficiary. The amount shall be specified in terms of:

(a) An amount per unit of the goods or services to be purchased;

(b) A specified percentage of the gross funds solicited; or

(c) A good faith estimate of the gross funds solicited.

(2) Nonprofit beneficiaries shall receive no less than 90 percent of the designated estimate under paragraph (c) of subsection (1) of this section. Any designated amount shall exclude any amount which the nonprofit beneficiary is to pay as expenses of the solicitation campaign, such as all costs of the goods or services sold or cost of fund raising events staged. [1991 c.532 §5]

128.824 Disclosures required in commercial fund raising solicitations. (1) All commercial fund raising solicitations shall include a clear and conspicuous disclosure of the identity of the commercial fund raising firm or commercial coventurer.

(a) In the case of a vending machine, it shall be disclosed on the device that the machine is owned and operated by the commercial fund raising firm or commercial coventurer.

(b) In the case of an in-person solicitation, including a face-to-face or telephone solicitation, it shall be disclosed orally in the course of the solicitation but prior to asking for a commitment for a contribution from the solicitee, and in writing to any solicitee that makes a pledge to be delivered within 10 days of the date of the pledge that the solicitor is operating under the direction and control of a named commercial fund raising firm or commercial coventurer.

(c) In the case of a solicitation by advertisement or mass distribution, including posters, leaflets, automatic dialing machines, publications and audio or video broadcasts, it shall be disclosed in the body of the solicitation material that the product or service is marketed by a named commercial fund raising firm or commercial coventurer.

(2) All commercial fund raising solicitations shall include a clear and conspicuous disclosure of the amount of the solicited funds to be paid to the nonprofit beneficiary as provided in ORS 128.823.

(a) In the case of a vending machine, the disclosure shall be on the device.

(b) In the case of an in-person solicitation, including a face-to-face or telephone solicitation, the disclosure shall be in the form of a written statement to any solicitee who makes a pledge, to be delivered within 10 days of the date of the pledge.

(c) In the case of a solicitation by advertisement or mass distribution, the disclosure shall be in the body of the solicitation material. [1991 c.532 §6]

128.825 [1971 c.589 §15; repealed by 1985 c.729 §1; 1985 c.730 §15]

128.826 Commercial fund raising contracts and notice; filing. (1) At least 10 days prior to the commencement of each commercial fund raising solicitation campaign, a commercial fund raising firm shall file with the Attorney General a completed fund raising notice on forms prescribed by the Attorney General. A copy of the contract or letter of agreement with any beneficiary and a copy of the disclosure material required by ORS 128.824 shall be attached to the notice.

(2) The fund raising notice shall be in writing, under oath, and shall include a description of the fund raising event or campaign, the projected starting and ending dates of the campaign, the bank account number and location where the solicited funds will be deposited, including the name of the organization or organizations that control the account, and the address and telephone number of the headquarters for each commercial solicitation campaign if different than the principal place of business identified on the commercial fund raising firm's registration form as well as the person in charge of each such location. The notice shall include a provision affirming that the disclosure material described in subsection (1) of this section has been affirmed by all beneficiaries. [1985 c.729 §8; 1991 c.532 §3]

128.830 [1959 c.599 §7; 1967 c.359 §126; renumbered 731.708]

128.831 [1985 c.729 §9; repealed by 1991 c.532 §26]

128.835 [1971 c.589 §16; 1981 c.593 §14; repealed by 1985 c.729 §1; 1985 c.730 §15]

128.836 [1985 c.729 §10; repealed by 1991 c.532 §26]

128.840 [1959 c.599 §6; repealed by 1967 c.359 §704]

128.841 Commercial fund raising firm financial reports; contents; filing. Within 90 days after a commercial fund raising solicitation campaign has been completed, the commercial fund raising firm shall file with the Attorney General a financial report for the campaign, including gross receipts and all expenditures incurred in the solicitation campaign. The report shall be completed on a form prescribed by the Attorney General. The report shall be signed by an official of the commercial fund raising firm and an official from each beneficiary and they shall certify, under oath, that it is true to the best of their knowledge. A similar interim financial report shall be filed one year after the start of the solicitation campaign in the case of a solicitation campaign still in progress on that date. [1985 c.729 §11; 1991 c.532 §7]

128.845 [1971 c.589 §17; 1981 c.593 §15; repealed by 1985 c.729 §1; 1985 c.730 §15]

128.846 Maintenance of records by commercial fund raising firm. (1) A commercial fund raising firm shall maintain for a period of not less than three years from the completion of each fund raising campaign, the following records:

(a) The name and address of each contributor and the date and amount of the contribution, if the preceding is known to the commercial fund raising firm.

(b) The name and address of each paid solicitor and the dates and amount of compensation paid to each such solicitor.

(c) Records of all fund raising expenses incurred in the course of the fund raising campaign.

(2) If the commercial fund raising firm sells tickets to an event and represents that tickets will be donated for use by another, the commercial fund raising firm shall also maintain, for the same period as specified in subsection (1) of this section, the following records:

(a) The name and address of those contributors donating tickets and the number of tickets donated by each contributor; and

(b) The name and address of all organizations receiving donated tickets, including the number of tickets received by each organization.

(3) All records described in this section shall be available for inspection by the Attorney General upon request. [1985 c.729 §12; 1991 c.532 §8]

128.848 Accountings required of commercial coventurer. A commercial coventurer shall keep a final accounting for each commercial fund raising solicitation that it conducts for a period of three years following the completion of the campaign. A commercial coventurer shall provide such an accounting for each commercial fund raising solicitation it conducts not later than 20 days after it is requested by the Attorney General or any nonprofit beneficiary. [1991 c.532 §16]

128.850 [1959 c.599 §8; 1967 c.359 §128; renumbered 731.716]

128.851 [1985 c.729 §13; repealed by 1991 c.532 §26]

128.855 [1975 c.388 §3; 1977 c.467 §1; repealed by 1985 c.729 §1; 1985 c.730 §15]

128.856 Written consent by beneficiary to use of name. No person, other than volunteers or employees under the direction and control of a nonprofit beneficiary, shall represent that any part of the contributions received will be given or donated to any named nonprofit beneficiary unless such organization has consented in writing to the use of

its name, prior to the solicitation. The written consent shall be signed by an officer, director or trustee of the organization. [1985 c.729 §14; 1991 c.532 §9]

128.860 [1959 c.599 §11; 1967 c.359 §129; renumbered 731.720]

128.861 Written consent required for representations about use of tickets. A commercial fund raising firm shall not represent, in the course of its solicitation activities, that tickets to events will be donated for use by another unless it has complied with the following requirements:

(1) The commercial fund raising firm shall obtain commitments, in writing, from beneficiaries stating that they will accept donated tickets and specifying the number of tickets they are willing to accept;

(2) The commercial fund raising firm shall solicit and accept no more contributions of donated tickets than the number of ticket commitments it has received from beneficiaries; and

(3) A ticket commitment alone, as described in this section, shall not constitute written consent to use the organization's name as described in ORS 128.856. [1985 c.729 §15; 1991 c.532 §10]

128.865 [1975 c.388 §4; 1981 c.897 §37; repealed by 1985 c.729 §1; 1985 c.730 §15]

128.866 Injunction by Attorney General. The Attorney General may obtain an injunction against solicitation of contributions until:

(1) The charitable organization, beneficiary, professional fund raising firm or commercial fund raising firm has complied with all registration and reporting requirements of the Charitable Solicitations Act and ORS 128.610 to 128.750; or

(2) Breaches of fiduciary duties as described in ORS 128.814 have been corrected and the officers and directors responsible for the breaches have been removed. [1985 c.729 §17; 1991 c.532 §11]

128.870 [1959 c.599 §12; repealed by 1967 c.359 §704]

128.871 Denial or revocation of registration. Subject to ORS 183.310 to 183.550, the Attorney General may deny registration or revoke any registration issued pursuant to ORS 128.802 or 128.821 for a period not to exceed five years, if the Attorney General finds:

(1) A material misrepresentation or false statement to be in the application for registration or any other statement filed with the Attorney General as provided in ORS 128.801 to 128.898 and 128.995.

(2) Any material violation of ORS 128.801 to 128.898 or the rules adopted by the Attor-

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ney General pursuant to ORS 128.801 to 128.898 and 128.995. [1985 c.729 §23; 1991 c.532 §12]

128.876 Rules on filing, reports, registration and administration. The Attorney General shall make rules as to the filing and execution of reports and registration statements required by ORS 128.610 to 128.650, 128.680, 128.710, 128.801 to 128.990, 128.995 and 646.608 and to the contents thereof. The Attorney General may make additional rules and amend existing rules as necessary for the proper administration of the Charitable Solicitations Act. [1985 c.729 §18]

128.880 [1959 c.599 §9; 1967 c.359 §130; renumbered 731.724]

128.881 Deposit of fees and penalties; use. All fees and penalties received by the Department of Justice under ORS 128.802 and 128.821 shall be paid over to the State Treasurer monthly for deposit in the Department of Justice Operating Account created under the provisions of ORS 180.180. Amounts deposited pursuant to this section are continuously appropriated to the Attorney General to pay the expenses of the Department of Justice in administering the Charitable Trust and Corporation Act as established in ORS 128.610 and the Charitable Solicitations Act. [1985 c.729 §20; 1991 c.532 §13]

128.886 False or misleading representations prohibited. (1) No person shall make any false or misleading representations in the course of any solicitation of contributions.

(2) A representation may be any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact.

(3) No person shall have a cause of action under ORS 646.638 for an alleged violation of any provision of this section if the alleged false or misleading representation is made by a volunteer of an organization which is exempt from federal taxation under section 501(c) of the Internal Revenue Code of 1954, as amended, and the alleged false or misleading representation is not made at the direction of paid personnel. [1985 c.729 §16; 1989 c.913 §2; 1991 c.532 §14]

128.890 [1959 c.599 §10; repealed by 1967 c.359 §704]

128.891 Prohibited representations; written notice. (1) No solicitation for contributions shall in any way use the fact or requirement of registration, or any filing of any report pursuant to the Charitable Solicitations Act or ORS 128.610 to 128.750, with the intent to cause or in a manner tending to cause any person to believe that such solicitation, the manner in which it is conducted, its purposes, any use to which the proceeds will be applied, or the person or organization conducting it have been or will

be in any way indorsed, sanctioned or approved by the Attorney General or any other governmental agency or office.

(2) Any written or oral statement made in connection with a solicitation of contributions that the person or organization conducting the solicitation is registered or has filed, will file or is required to file any report with the Attorney General, or any statement of similar import, shall be immediately followed by a statement of equal prominence that such registration or report in no way constitutes or implies any indorsement, sanction or approval of the solicitation, its purposes, the manner in which it is conducted or the person or organization conducting it, by the Attorney General or any other governmental agency or officer. [1985 c.729 §19]

128.896 [1985 c.730 §13; 1991 c.734 §8; renumbered 128.899 in 1991]

128.898 Short title. ORS 128.801 to 128.898 and 128.995 may be cited as the Charitable Solicitations Act. [1985 c.729 §2]

CIVIL PENALTIES

128.899 Civil penalties for violation of ORS 128.610 to 128.750. (1) The responsible officers or trustees of a corporation or trust which fails to register or file a report required by ORS 128.610 to 128.750 or the Charitable Trust and Corporation Act may be assessed a civil penalty not to exceed \$1,000 by the Attorney General.

(2) Civil penalties under this section shall be imposed as provided in ORS 183.090.

(3) All penalties recovered under this section shall be credited to the Department of Justice Operating Account as described in ORS 128.670 (9). [Formerly 128.896]

CRIMINAL PENALTIES

128.990 Penalties for ORS 128.415. Violation of any of the provisions of ORS 128.415 is punishable, upon conviction, by a fine not exceeding \$1,000, or imprisonment in the county jail not exceeding one year, or both. [1959 c.639 §3; subsections (2), (3), (4) enacted as 1971 c.589 §18; 1975 c.388 §7; 1981 c.593 §16; 1985 c.729 §21; 1987 c.813 §13]

128.991 Penalties for ORS 128.414, 128.423 or 692.285. Any certified person violating ORS 128.414, 128.423 or 692.285 (1), (2) or (3) is guilty of a Class C misdemeanor. [1987 c.813 §9; 1993 c.467 §4]

128.992 Penalties for ORS 128.610 to 128.750. Filing or assisting in preparing or filing a statement or report required by the Charitable Trust and Corporation Act, ORS 128.610 to 128.750, that is false or fraudulent is a Class A misdemeanor. [1985 c.730 §3]

128.995 Penalties for ORS 128.801 to 128.898. Violation of ORS 128.802, 128.821 or filing or assisting in preparing or filing a statement or report required by ORS 128.801 to 128.898 that is false or fraudulent is a Class A misdemeanor. [1985 c.729 §24; 1991 c.532 §23]

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