

See: Commission Minutes  
3/19/70, p. 26, Vol. IX, Tape #50

Minutes of Subcommittee on  
Grading and Sentencing  
4/5/70, p. 55, Vol. X, Tape #57

CRIMINAL LAW REVISION COMMISSION  
311 Capitol Building  
Salem, Oregon

ARTICLE 19 . BUSINESS AND COMMERCIAL FRAUDS

Preliminary Draft No. 2; January 1970

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Subcommittee No. 1

ARTICLE 19. BUSINESS AND COMMERCIAL FRAUDS

Preliminary Draft No. 2; January 1970

Section 1. Business and commercial frauds; definitions. As used in this Article, unless the context requires otherwise:

Existing  
Law

ORS  
41.680  
41.690

(1) "Benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary.

(2) "Business records" mean any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activities.

(3) "Enterprise" means any private entity of one or more persons, corporate or otherwise, engaged in business, commercial, professional, charitable, political, industrial or organized fraternal activity.

(4) "Financial institution" means a bank, insurance company, credit union, savings and loan association, investment trust or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment.

(5) "Pecuniary benefit" means any benefit in the form of money, property, commercial interests or economic gain.

(6) "Property" means any article, substance or thing of value, including, but not limited to, money, tangible and intangible personal property, real property, choses-in-action, evidence of debt or of contract.

COMMENTARY - BUSINESS AND COMMERCIAL FRAUDS; DEFINITIONS

A. Summary

The definition of "benefit" is a restatement of that used in the Article on Perjury and Related Offenses.

"Business records" includes all records maintained incident to a business enterprise. It is intended to include written material prepared for use or distribution outside the normal recordation system, e.g., stock offer prospectus, reports of business activities.

"Enterprise" includes virtually every type of private organized activity for which permanent records are maintained. It does not include any form of governmental instrumentality.

"Financial institution" includes every kind of organization that deals in the acceptance or management of money, savings or other collective investments.

The definition of "property" is identical to that used in the Theft Article.

B. Derivation

Reference was made to New York Revised Penal Law section 175.00 and Michigan Revised Criminal Code section 4125 (2) and (3).

C. Relationship to Existing Law

As used in this context the definitions are new to Oregon law.

ORS 41.680: Defines the term "business" as including "every kind of business, profession, occupation, calling or operating of institutions, whether carried on for profit or not."

ORS 41.690: Admissibility of business records. "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

Section 2. Falsifying business records. A person commits the crime of falsifying business records if, with intent to defraud, he:

(1) Makes or causes a false entry in the business records of an enterprise; or

(2) Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or

(3) Fails to make a true entry in the business records of an enterprise in violation of a known duty imposed upon him by law or by the nature of his position; or

(4) Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

Existing  
Law

ORS

165.235

165.250

165.255

165.655

165.660

165.665

708.705

708.710

COMMENTARY - FALSIFYING BUSINESS RECORDS

A. Summary

This section makes punishable falsifying, destroying or otherwise impairing business records.

Current legislation is moving toward the extension of criminal sanctions in this field. New York Revised Penal Law sections 175.05 and 175.10 and Michigan Revised Criminal Code section 4125 deal with this type of falsification. The New York provisions include public records, which under our proposed code will be treated under section \_\_\_\_\_, Tampering with public records.

The problem presented by applying the law of forgery to falsification of private and public records is well stated by the annotator in 41 ALR 231:

"While...there is irreconcilable conflict in the authorities...the better view, and that supported by the majority opinion, is that under the common law and under statutes defining forgery in the substantial language of the common law definitions, the genuine making of an instrument for the purpose of defrauding does not constitute the crime of forgery...under the rule stated...defendants in prosecutions for forgery have been held not guilty of the crime charged:

"...where defendant foreman falsely entered upon a genuine time roll of employees' time when the employees had not worked, for the purpose of defrauding the employer. DeRose v. People, 64 Colo 332, 171 Pac 359 (1918).

"...where a county clerk, having authority to attest county warrants signed by another county officer and issue them, was charged with attesting and issuing such a warrant in favor of a firm for money not due, with the intent of defrauding the county. Goucher v. State of Neb., 204 NW 967 (1925).

"...where defendant, a merchant, entered upon his books of account a charge against a customer for an article never purchased. State v. Young, 46 NH 266, 88 Am Dec 212 (1865)."

The modern trend has been therefore to make the falsification of private and public records a distinct substantive offense. It is recognized, of course, that the basic elements of forgery law are inextricably involved in such statutes.

In reviewing the legislative response to falsification of business records, Burdick comments:

"Statutes have been passed in some states making it forgery to make, with intent to defraud, false entries in account-books. Some of these statutes relate to entries in account-books of corporations doing business for pecuniary profit...whereby, by such entries, 'any pecuniary obligation, claim or credit is, or purports to be, created, increased, diminished, discharged or in any matter affected.' (Calif Penal Code, Section 471). See also Kan Gen Stats (1935 c 21 Sec. 617, 618, and Mo. Stats Ann. (1929) Sec. 4192.)

"The statute of another state may apply to any corporation and a statute may declare one guilty of forgery who, with intent to defraud, or to conceal any larceny or misappropriation, makes a false entry of any material particular in any account book pertaining to the business of a corporation, association, public office or officer, partnership, or individual." 2 Burdick, Law of Crime, s. 661 (1946).

The Model Penal Code commentary (Tent. Draft # 11, p. 98 (1960)). makes this observation in support of the rationale behind such legislation:

"In a highly organized society like ours where accuracy of corporate and other records is nearly as important as accuracy of public records, the need for deterring tampering with such records seems reasonably clear, and there is no occasion to distinguish in this regard between corporate records and those of a church, union or club."

It should be noted that it is not the intention of the proposed section to preserve the integrity of business records. Instead, the prohibition is directed at conduct preliminary to the commission of a fraud, in that it requires "intent to defraud."

#### B. Derivation

The basis of the proposed section is Michigan Revised Criminal Code section 4125 and New York Revised Penal Law sections 175.00 and 175.05.

#### C. Relationship to Existing Law

There are a number of Oregon statutes that deal with falsification of business and commercial records:

ORS 165.235: Issuing a false invoice, bill of lading or estimate of property.

ORS 165.250: Destruction or falsification of corporate records.

ORS 165.255: Officer or agent of savings and loan association distributing false material.

ORS 165.655: Issuing receipt where no goods are received.

ORS 165.660: Issuing receipt containing false statements.

ORS 165.665: Fraudulently issuing duplicate or additional receipts.

ORS 708.705: False statements in report or book entry by bank.

ORS 708.710: False or omitted book entry by bank.

There are no Oregon cases dealing directly with falsification of private business records. The reported cases in this area concern themselves primarily with forgery offenses.

In that connection it is essential to distinguish between a false instrument and false statements in an instrument. No amount of misstatement of fact and no amount of fraud will make a false instrument out of what purports to be the very instrument which it is in fact and in law. As stated by Perkins:

"If a man fraudulently executes a deed to real estate with a covenant that it is free and clear of encumbrances, this is a genuine deed even if the grantor knows that the land is subject to a heavy mortgage. It is a genuine deed with a false covenant. This is a case of the false making of a writing with intent to defraud, but it will not support a conviction of forgery because for this purpose it would be necessary to show that the deed itself was false. Typical instances of writings which are falsely made with intent to defraud but are not forgery because they are genuine writings with false statements rather than false writings, are (1) a 'padded' time roll issued by the one authorized to issue it, (2) a warehouse receipt fraudulently issued by a warehouse which did not have the grain purportedly represented thereby, (3) a check wrongfully drawn on a bank in which the drawer has no funds, or insufficient funds, or (4) a false entry made in one's own account book." Perkins, Criminal Law 296 (1957).

Section 3. Commercial bribery. A person commits the crime of commercial bribery if he offers, confers or agrees to confer any pecuniary benefit upon an employe, agent or fiduciary with the intent that the latter violate a duty of fidelity owed to his employer, principal or beneficiary.

Existing  
Law

ORS  
165.515  
708.715

Section 4. Receiving a commercial bribe. A person commits the crime of receiving a commercial bribe if while an employe, agent or fiduciary he solicits, accepts or agrees to accept any pecuniary benefit with the intent that he violate a duty of fidelity owed to his employer, principal or beneficiary.

COMMENTARY - COMMERCIAL BRIBERY; RECEIVING A COMMERCIAL BRIBE

A. Summary

Various other sections in the proposed code deal with bribery of public officials and sports bribery. All of these provisions are designed to serve the public interest by discouraging corrupt influences. Quite apart from official or quasi-official action, bribery may also be used as an instrument in undermining the integrity of business and commercial affairs.

Sections 3 and 4 are founded on the principle that recognized relations in our society involving special trust should be secure from the corrupting influence of bribery. Admittedly, criminal sanctions cannot solve all the problems inherent in commercial bribery. There are means of securing special favor that are beyond the scope of such legislation. A "disk jockey" with an undisclosed personal interest in a particular recording is as subject to conflict of interest as one who accepts a



gratuity from an independent source. Until standards applicable to this type of conduct have become fully crystallized, such commercial practices may best be enforced through private employer discipline and other civil remedies.

The crime of commercial bribery is separated into two distinct offenses: the crime of giving a bribe and the crime of receiving. This is consistent with the other bribery sections and avoids the problem of corroboration of an accomplice's testimony. Both sections require the same culpability elements: (1) A person acting in a particular capacity, whereby, (2) a pecuniary benefit is solicited or accepted, (3) with the intent, (4) that a known duty of fidelity be violated.

The term "fidelity" is used in its ordinary dictionary meaning: "Careful observance of duty, or discharge of obligations, esp. loyalty. Faithfulness to that to which one is bound by pledge or duty." (Webster's New Collegiate Dictionary (1961)).

New York Revised Penal Law sections 180.00 and 180.05 and Michigan Revised Criminal Code sections 4201 and 4205 differ from the proposed section in a number of respects.

Both the New York and Michigan statutes include the term "without the consent of his employer or principal" in referring to the prohibited conduct of the employe or agent. By incorporating the term, "violate a duty of fidelity," contained in Model Penal Code section 224.8 (1), into the proposed section, the subcommittee believed that it was clear that the conduct was nonconsensual in respect to the person to whom the duty is owed. This rationale is supported by Barger v. Taylor, 30 Or 228, 42 P 615, 47 P 618 (1895), which held:

"The presumption is that an agency comprehends the doing of only lawful things, and the law will always assume that an illegal act...was done without the principal's authority or consent."

#### B. Derivation

The proposed section is a composite of the statutory form and language found in Model Penal Code section 224.8, Michigan Revised Criminal Code sections 4201 and 4205, and New York Revised Penal Law sections 180.00 and 180.05.

C. Relationship to Existing Law

ORS 708.715: Receiving illegal compensation; bank and trust co. officers and employes.

ORS 165.515: Prohibits bribery of telegraphic agents, employes or operators to induce them to disclose content of messages.

Except for these statutes Oregon has no criminal provisions dealing with commercial bribery. Existing bribery statutes are directed at corruption of public officials.

Perkins comments on one type of commercial bribery:

"One type of such fraud has been for a wholesaler, or his representative, by gift or promise to the agent or employee of a retailer, to induce such agent or employee to keep in mind the interest of the wholesaler rather than that of his employer. Bribery of purchasing agents...is incompatible with commercial honor. A bonus or commission secretly given is nothing short of a bribe to betray one's employer. It is also frowned upon as a corrupt and unfair trade practice. Hence there is a tendency in the direction of including such misconduct in the crime of bribery, and punishing it accordingly -- although perhaps only as a misdemeanor." (Perkins, Criminal Law 400 (1957)).

The rationale for legislation prohibiting commercial bribery is stated in American Distilling Co. v. Wisconsin Liquor Co., 104 F2d 582 (7th Cir 1939):

"The vice of conduct labeled 'commercial bribery,' as related to unfair trade practices, is the advantage which one competitor secures over his fellow competitors by his secret and corrupt dealings with employees or agents of prospective purchasers."

The duty imposed by the relationships covered in the proposed section is widely recognized in the law of agency. Hughes v. Helzer, 182 Or 205, 182 P2d 537 (1947), reiterated the rule:

"An agent has the duty to act solely for the benefit of his principal in all matters connected with the agency and this duty applies to gratuitous as well as paid agents."

Legislation covering commercial bribery was extensively reviewed in 108 U Pa Law Rev 848 (1960) in an article titled "Control of Nongovernmental Corruption by Criminal Legislation":

"Thirteen states have statutes which make it a crime to corrupt any agent or employee of another. (See Conn. Gen.Rev.Stat. 53-226, 20-231 1958) In addition to statutes of this general type, there are seventeen states which have statutes making it a crime to bribe a particular type of employee, notably agents or employees in charge of purchasing or hiring. (See N.J. Rev. Stat. 2A: 91-1, 93-8, 93-9, 32:23-21 1951) Other common categories are telegraph and telephone personnel and common carrier personnel...probably the most important federal legislation in the field is the section on the Federal Trade Commission Act which authorizes the FTC 'to prevent...unfair methods of competition in commerce.'

"It has long been established that commercial bribery is such an unfair method of competition. However, the statute is not a criminal one, and the FTC is limited in enforcing its policies to the use of cease and desist orders ...The most salient feature of the cases in this area is that they are very few in number and most of those which are to be found are civil rather than criminal. The New York statutes have been broadest in scope and more widely enforced than any others. Almost without exception the cases have arisen under the New York statute.

"In 1915, a purchasing agent of R. H. Macy was indicted for accepting \$10 in connection with a purchase of sponges. (See People v. Davis, 33 N.Y. Crim 460, 160 N.Y. Supp. 769, Ct. Spec. Sess. 1915) Defendant attacked the statute as unconstitutional on the grounds that the [statute] (1) singles out purchasing agents for special treatment, (2) curtails their freedom to contract, and (3) is not necessary to protect the welfare of the community.

"The court rejected all three assertions of unconstitutionality: (1) no violation of equal protection was found because the statute 'affects alike all persons similarly situated,' (2) constitutional freedom of contract may be limited by police power, and (3) as to the propriety of the exercise of the police power in this situation, the court said: 'Without such a statute, under the fierce competition of modern life, purchasing agents...can be lured all too readily into service of hopelessly conflicting interests...sound public policy, commercial honor, and the good faith of trusted...employees imperatively demand some such measure in the written law.' "

In State v. Landecker, 100 NJL 195, 126 A 408, affd. 103 NJL 716, 137 A 919 (1924), defendant was charged with having corruptly offered and paid to a chemical company employee \$100 with the intent to have him procure secret manufacturing formulas from his employer. Affirming his conviction, the court held that it was immaterial whether the briber succeeded in his purpose, since it was the intent to use the bribe for the purpose of influencing the employe in his relation to the employer that was improper, and that it made no difference if the employer was not injured.

Section 5. Sports bribery; definitions. As used in sections 6, 7 and 8, unless the context requires otherwise:

(1) "Sports contest" means any professional or amateur sport or athletic game or contest viewed by the public.

(2) "Sports official" means any person who acts in sports contests as an umpire, referee, judge or sports contest official.

(3) "Sports participant" means any person who directly or indirectly participates in sports contests as a player, contestant, team member, coach, manager, trainer, or any other person directly associated with a player, contestant or team member.

COMMENTARY - SPORTS BRIBERY; DEFINITIONS

A. Summary

The definitions of these three terms are designed to insure brevity and precision in the statutes dealing with sports bribery.

B. Derivation

The model for the definitions is New York Revised Penal Law section 180.35.

C. Relationship to Existing Law

The definitions are new to Oregon law. Due to a complete lack of reported cases in Oregon involving the sports bribery statutes the language used in the existing law has never been judicially construed.

Section 6. Sports bribery. A person commits the crime of sports bribery if he:

(1) Offers, confers or agrees to confer any pecuniary benefit upon a sports participant with intent to influence him not to give his best effort in a sports contest; or

(2) Offers, confers or agrees to confer any pecuniary benefit upon a sports official with intent to influence him to improperly perform his duties.

Existing  
Law

ORS

167.720

167.725

167.730

167.735

462.420

462.430

462.440

462.450

462.990

Section 7. Sports bribe receiving. A person commits the crime of sports bribe receiving if:

(1) As a sports participant he solicits, accepts, or agrees to accept any pecuniary benefit from another person with the intent that he will thereby be influenced not to give his best effort in a sports contest; or

(2) As a sports official he solicits, accepts, or agrees to accept any pecuniary benefit from another person with the intent that he will improperly perform his duties.

Section 8. Tampering with a sports contest. A person commits the crime of tampering with a sports contest if, with intent to influence its outcome, he tampers with any sports participant, sports official, or with any animal, equipment or other thing involved in the operation of a sports contest contrary to the rules and usages governing such contest.

COMMENTARY - SPORTS BRIBERY; SPORTS BRIBE RECEIVING; TAMPERING  
WITH A SPORTS CONTEST

A. Summary

Section 6 concerns itself with the bribe giver. Subsection (1) prohibits offering, giving or agreeing to give a pecuniary benefit to a sports participant with the intent that the athlete not give his best effort in a sports contest. "Pecuniary benefit" is defined in section 1 to include any kind of economic gain or advantage. The mens rea requirement is focused here, as it is in all the bribery sections, on the wrongful intent of the actor; it is not necessary to show a bilateral agreement or understanding. Subsection (2) prohibits the same conduct in relation to a sports official. The culpability factor here is an intent to influence the official to improperly perform his duties. It should be noted that since the wrongful intent of the actor is the gravamen of the offense, it is immaterial whether the sports participant or sports official was in fact influenced.

Section 7 contains the same elements as found in section 6, except that it relates to bribe receiving.

Section 8 was not approved in subcommittee. The subcommittee recommended that it be incorporated into Preliminary Draft No. 2 for consideration by the full Commission. The section prohibits "tampering" with any sports participant, official, animal or equipment with the intent of wrongfully influencing the outcome of a sports contest. The conduct engaged in must be "contrary to the rules and usages governing such [sports] contest."

B. Derivation

The proposed sections are derived from Michigan Revised Criminal Code sections 4211, 4212 and 4215, and New York Revised Penal Law sections 180.40, 180.45 and 180.50.

C. Relationship to Existing Law

Oregon now has four statutes governing bribery of participants in athletic contests and bribery of athletic coaches and officials. (ORS 167.720-167.735).

In addition, five statutes in ORS chapter 462, Racing, punish the unlawful administration of stimulating or depressive drugs to racehorses.

ORS 167.720: Bribing participant in athletic contest.

ORS 167.725: Acceptance of bribe by athlete.

ORS 167.730: Bribery of athletic coaches and officials.

ORS 167.735: Acceptance of bribe by coach or official.

ORS 462.420: Stimulating or depressing racing animal with drugs or unauthorized device.

ORS 462.430: Attempt to affect race result by unlawfully stimulating or depressing participating animal.

ORS 462.440: Entering unlawfully stimulated or depressed animal in race within 48 hours of administration of drug.

ORS 462.450: Regulation of possession, transportation or use of local anesthetics or barbituric acid preparation or derivations within racing enclosure.

ORS 462.990: Penalty provisions for violation of ORS chapter 462. Designated a felony with imprisonment in the Oregon State Penitentiary for not more than two years, or by fine of \$5,000, or both.

The statutes in ORS chapter 167 on sports bribery would be repealed by the proposed sections. There are no reported appellate cases in Oregon involving sports bribery. The test of accomplice corroboration as it applies to bribery has been enunciated by the court:

"ORS 136.550, Text of accomplice corroboration. A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by other evidence that tends to connect the defendant with the commission of the crime. The corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission."

The application of this statute to accomplice testimony in bribery cases was stated by the court in State v. Coffey, 157 Or 457, 72 P2d 35 (1937):



"A person is not an 'accomplice' within the statute requiring an accomplice's testimony be corroborated to sustain a conviction unless such person can be indicted and punished under the same statute which is being invoked against defendant...A person who bribed a police officer was not an 'accomplice' whose testimony was required to be corroborated in prosecution of sergeant under statute making it a crime for executive officers to receive any thing intended to influence them in discharge of their duties, since bribe giver could not be indicted and punished under same statute employed against sergeant." Accord, State v. McCowan, 203 Or 551, 280 P2d, 976 (1955).

The social factors giving impetus to legislation in this area is stated by the court in Commonwealth v. Friedman, 193 Pa Super 640, 165 A2d 678:

"...recent rash of bribery sweeping professional sports of baseball, football, basketball and boxing, as well as amateur sports, has resulted in intensified effort on part of legislatures and law enforcement agencies to prevent and eradicate this crime. Because of very nature of the crime itself, its secrecy and its attempt to corrupt integrity of national sports, sincerity and motive of accuser become an integral part of the crime itself and relevant toward the establishment of criminal intent of the accused."

49 ALR 2d 1234 discusses the problem of accomplice testimony as it relates to the corroboration rule:

"It is the rule that, as in other crimes, the testimony of an accomplice in a prosecution for bribery is admissible, and should be weighed by the same rules as those by which the testimony of other witnesses is weighed--that is, by considering the connection of the accomplice with the crime and with the defendant, his interest in the case, his appearance on the witness stand, the reasonableness of his testimony, and its consistency with the other facts proved in the case."

The proposed sections on sports bribery do not depart from the substantive coverage presently in effect. The term "with the intent, understanding or agreement that [the participant, contestant or player] shall not use his best effort," is replaced with "intent to influence him not to give his best effort."

Section 9. Defrauding secured creditors. (1) A person commits the crime of defrauding secured creditors if he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with intent to hinder enforcement of that interest.

(2) "Security interest" means an interest in personal property or fixtures as defined in ORS 71.2010.

Existing Law
ORS
Ch. 79
Ch. 76
Ch. 95
165.220
165.675
165.680
29.52
41.360 (39)

#### COMMENTARY - DEFRAUDING SECURED CREDITORS

##### A. Summary

The proposed section is applicable to both the typical secured consumer sale situation and those transactions involving business enterprises. The growing problem in the latter field is discussed in 70 Com. L J 5 (1965):

"There are many kinds and types of business frauds... the more publicized failures in which there are elements of fraud have involved secured creditors--those who receive either inventory or accounts receivable as security for advances of money...in [this] situation the opportunity for fraud exists on a broad scale...there are as many 'gimmicks' to deceive creditors as there are fertile minds which either by design or circumstances turn to fraud as a way of business life...exposure by full investigation and insistence upon full recourse against all defrauders is...the answer."

Under the definition of "owner" in the proposed theft draft, a debtor cannot commit theft against his creditor by disposing of property subject to a security interest, since the creditor's right to possession is not superior to that of the debtor. This section is designed to reach that type of misconduct.

Statutes imposing a criminal penalty for debtors who wrongfully dispose of property subject to an outstanding security interest are common among the states. The legislative trend in the field is towards imposition of misdemeanor penalties for interference in the enforcement of valid security interests.

Some states have gone beyond such coverage to penalize a debtor who removes, sells, conceals or otherwise disposes of his own unencumbered property, with intent to defraud, hinder or delay his creditors. (See Cal Penal Code 154,531). Other states provide felony penalties for the act of removing encumbered property from the county or selling the property without consent of the secured creditor. (See Wisc Stat Ann 943.25 (1918)).

It would seem the better view to limit application of the criminal law to those intentional acts whereby the debtor resists enforcement of a security interest. In accord with this reasoning the proposed section makes the intentional interference with enforcement of the lien the gravamen of the offense. The rationale supporting this limitation is well stated by the Model Penal Code Commentary to Tentative Draft No. 11, pp. 98, 99 (1960):

"Although there is need for some penal legislation in this area, we believe that many current laws go too far when they provide felony penalties for acts such as removing encumbered property from the county or selling the property without consent of the secured creditor...The offense is classified as a misdemeanor regardless of the amount involved...[this is] justified because offenders against this section are less dangerously deviated from social norms than are outright thieves who take property to which they have no claim. Moreover, sellers can guard against this kind of fraud by caution in extending credit...If the legislature wishes to single out unusual transactions [involving disposition of a debtor's unencumbered property to defraud creditors], e.g., bulk sales, sales below cost, this should probably be done in appropriate regulatory codes where the diversity of business practices can be reflected, rather than in the penal code."

The reference to "security interest" in subsection (2) incorporates the Uniform Commercial Code concept of that term.

#### B. Derivation

The proposed section is derived from Model Penal Code section 224.10. Michigan Revised Criminal Code section 4130 is an exact duplicate.

C. Relationship to Existing Law

There are a number of interrelated Oregon statutes that deal with the law of secured transactions and fraudulent conveyances.

ORS chapter 79: Secured transactions, contains the Uniform Commercial Code provisions on perfecting valid security interests in personal property.

ORS chapter 76: Bulk transfers, applies to the transfer of goods in bulk outside the ordinary course of business.

ORS chapter 95: Fraudulent conveyances, deals with property conveyed with an intent to defraud purchasers and creditors.

ORS 95.060: Voids all assignments of goods, chattels or things in action in trust as against creditors of the transferrer.

ORS 95.070: Makes void every conveyance, transfer or device made with intent to defraud, hinder or delay creditors.

ORS 165.220: Provides a felony penalty for the false representation of ownership of land and the execution of a conveyance thereof with intent to defraud anyone.

ORS 165.675: Prohibits warehouseman from delivering goods in his possession where a negotiable receipt covering the same goods is outstanding. A misdemeanor.

ORS 165.680: Prohibits the deposit of goods subject to a lien or mortgage in return for a negotiable receipt which is afterwards negotiated for value, with intent to deceive. A misdemeanor.

ORS 29.520: Provides for civil arrest:

"(c) In an action to recover the possession of personal property unjustly detained, when the property or any part thereof has been concealed, removed or disposed of...with intent to deprive the [creditor] of the benefit thereof.

"(d) When the defendant has been guilty of fraud in contracting the debt or incurring the obligation....

"(e) When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors."

ORS 41.360 (39): Provides that a disputable presumption of fraud against creditors is raised by the sale or assignment of secured property unaccompanied by immediate delivery or actual change of possession.

The penal sanctions in section 9 apply to property subject to a security interest as defined by ORS chapter 79. It would not cover transactions giving rise to statutory liens, judgment creditors or unsecured claims. ORS chapters 26-40 and 86-90 provide adequate remedies in these areas. Section 10 infra covers defrauding judgment creditors.

Section 10. Defrauding judgment creditors. A  
person commits the crime of defrauding judgment  
creditors if he:

Existing  
Law

ORS  
Chapter 2  
95.070

(1) Removes his property from a county with  
intent to prevent it being levied upon by execution; or

(2) Secretes, assigns, conveys or otherwise disposes of his property  
with intent to defraud a judgment creditor.

COMMENTARY - DEFRAUDING JUDGMENT CREDITORS

A. Summary

Under ORS 79.1040 (8), rights represented by a judgment are excluded from the provisions of the Uniform Commercial Code. This exempts a judgment debtor who secretes or disposes of property to avoid levy by execution from coverage under section 9, Defrauding secured creditors. The crime of fraud in insolvency, section 12, would also not apply unless the debtor acted with knowledge of an impending bankruptcy or receivership proceeding.

The proposed section is intended to reach those situations where levy of execution is intentionally evaded by the removal or disposition of that property lawfully subject to attachment.

B. Derivation

The proposed section is taken from Michigan Revised Criminal Code section 4135.

C. Relationship to Existing Law

ORS 95.070: Declares void every conveyance, transfer or device made with the intent to hinder, delay or defraud creditors of their lawful suits...damages...decree of judgment.

ORS chapter 23: Provides for the enforcement of judgments and decrees.

ORS 23.710 and 23.720: Establish the procedure for bringing a judgment debtor before the court to be examined about his property.

ORS 23.730: Grants the court authority to issue an order restraining disposal of a debtor's property.

ORS 23.740: Provides for civil arrest of a judgment creditor who refuses to apply his property to such judgment.

Wright v. Wimberly, 94 Or 1, 184 P 740 (1919), defined "judgment":

"The final determination of an action at law by a court in Oregon is called a judgment while that of a suit in equity is denominated a decree."

Seed v. Jennings, 47 Or 464, 83 P 872 (1905), discusses the circumstances giving rise to a fraudulent conveyance:

"In order to set aside a fraudulent conveyance a person must have an unsatisfied judgment as against the transferor or a lien on his property created by an attachment."

Bays v. Brown, 160 Or 594, 86 P2d 951 (1939), commented on the species of evidence required to show fraudulent intent:

"Circumstantial evidence is normally used to establish the presence of a fraudulent intent, since direct proof is not available."

Evans v. Trude, 193 Or 648, 240 P2d 940 (1952), discusses the badges of fraud applied in inferring fraudulent conveyances:

"The badges of fraud are clearly apparent where ... (8) the transfer so completely depleted the assets of the debtor that his creditor was hindered or delayed in recovering any part of his judgment."

Judgments are normally enforced by execution, attachment and garnishment proceedings. The proposed section is designed to encourage stricter compliance with debtor obligations arising from valid judgments.

Section 11. Receiving deposits in a failing financial institution. (1) A person commits the crime of receiving deposits in a failing financial institution if as an officer, manager or other person participating in the direction of a financial institution, he knowingly receives or permits the receipt of a deposit or other investment, knowing the institution to be insolvent.

(2) A financial institution is insolvent within the meaning of this section when the sound value of its assets is insufficient to pay its liabilities.

<u>Existing Law</u>
ORS
711.405
711.415
711.990 (1)
707.720
708.110
708.650
711.420

COMMENTARY - RECEIVING DEPOSITS IN A FAILING FINANCIAL INSTITUTION

A. Summary

Section 11 is designed to protect the innocent depositor whose money or property is received for deposit by officials with knowledge of their institution's precarious financial stability.

The culpability element of deception is not required. The section does require that the officer, manager or other person participating in the direction of the financial institution "knowingly" receive or permit the deposit, and that at the time of such knowing receipt he knows that the institution is insolvent.

The term "financial institution", as defined in section 1 of this Article, includes all the various types of institutions which now accept savings and investment deposits.



The history and underlying rationale of this type of legislation is discussed in Wharton, Crim. Law, ss. 1163, 1166 (1957):

"At common law it is not an offense for a private banker, or the officers or agents of a bank, to receive deposits, even though they know that the bank is insolvent. Statutes have now been enacted in most states making it a crime to receive deposits into a bank after it is known that the bank is insolvent. These statutes vary in form and effect, but three elements are necessary to the offense: (1) the receipt of a deposit; (2) insolvency of the bank at the time the deposit was received, and (3) knowledge of the insolvency. Under these statutes, although the official receiving the deposit may have no interest whatever in the bank and although he may receive no personal benefit from the deposit, still he is made criminally liable if at the time he had knowledge of the bank's insolvency...Statutes penalizing the acceptance of deposits when the bank is insolvent are constitutional...[but] a state does not have lawful power to enact penal laws rendering officers of banks organized and operating under the laws of the United States criminally liable for receiving deposits in such bank while the bank is insolvent.

"The purpose of statutes making it an offense to receive deposits when a bank is insolvent is to save the public from being induced to deposit money with a bank upon implied assurances of responsibility and wealth essential to the banking business which do not in fact exist, and it seems unnecessary to criminal liability under such statute that an actual or express representation of solvency be made. The mere fact that the bank continues to function and to receive deposits is in itself a representation of the ability to engage in banking and the existence of a state of solvency." (Footnotes omitted).

Subsection (2) defines the term "insolvent" as used in subsection (1). The definition is derived from ORS 711.405 of the Oregon Banking Code, which establishes the conditions whereby a bank or trust company shall be deemed insolvent.

The varying positions taken by statutes in defining circumstances determinative of insolvency are discussed in 1. Mitchie, Banks and Banking, s. 224 (1956):

"Statutes defining the conditions when a bank shall be deemed insolvent...there are two doctrines upon this subject. According to one line of decisions, a bank is insolvent within the purview of a statute forbidding the receipt of deposits after knowledge of insolvency when there is a present inability to pay depositors as banks usually do, and meet all liabilities as they become due in the ordinary course of business. Under this view the words 'insolvency' and 'failing circumstances' are synonymous.

"According to the other line of decisions, the terms 'unsafe', 'insolvent', 'in failing circumstances', etc., do not mean insolvent in the limited sense of inability to pay depositors and creditors in the ordinary course of business, but insolvent in the broad sense of a deficiency of cash and assets convertible into cash within a reasonable time to pay liabilities."

The proposed section adopts the bankruptcy concept of "liabilities exceed assets." It is submitted that no unreasonable burden is imposed by this definition of insolvency. Receipt of deposits by a financial institution under these circumstances would now violate the regulatory prohibitions of the Oregon Banking Code. This view affords the unwary depositor increased protection in that it discourages receipt of deposits before the financial institution becomes hopelessly insolvent.

#### B. Derivation

Subsection (1) is derived from Michigan Revised Criminal Code section 4150 and Illinois Revised Criminal Code section 17-1 (b), both of which were taken from Model Penal Code section 224.12.

Subsection (2) was taken from ORS 711.405.

#### C. Relationship to Existing Law

There are a number of regulatory statutes applicable to the conduct of officers, directors and owners of financial institutions.

ORS 711.415: Receiving deposits while insolvent. No owner, director or officer of any bank or trust company shall receive or permit to be received any deposit, knowing such bank or trust company to be insolvent.

ORS 711.405: States when a bank or trust company shall be deemed insolvent.

ORS 711.990 (1): Provides that violation of ORS 711.415 is a felony and is punishable by a maximum \$5,000 fine or five years in prison, or both.

ORS 707.720: Prohibits a violation of law or omission of duty by an officer or director of a bank or trust company. ORS 707.990 (2) provides a misdemeanor penalty for such violation.

ORS 708.110: Provides the procedure for determining a deficiency in bank and trust company reserves and the insolvency proceedings that may be instituted if the institution fails to make good such reserve.

ORS 708.650: States that suspension or restriction of a bank or trust company's liability payments by order of the Banking Division shall not be deemed an act of insolvency by a bank or trust company, nor raise such a presumption thereof.

Brown v. Siemens, 117 Or 583, 245 P 510 (1926), was an action for damages allegedly sustained by false representations of a bank's solvency. The plaintiff was induced by a bank president to leave a sizeable amount of cash on deposit at a bank that failed ten days later. The bank president had assured the plaintiff of the bank's solvency with knowledge of its failing circumstances. In discussing the liability of the bank president for civil damages the court quoted with approval 14 ACJ 181, s. 1959:

"The directors or officers of a corporation are liable for the fraudulent acts and representations to persons who are injured thereby. They are no more immune for their false representations made with intent to deceive, and which result in a loss to one who relied thereon, than any other individual. The fact that they are acting for the benefit of the corporation and that they did not personally receive the fruits of the transaction, or that the company is nominally the contracting party, does not relieve them from liability." (Accord, Hill v. Tualatin Academy, 61 Or 190, 200, 121 P 901 (1912)).

The Oregon Supreme Court has commented on the varying definitions of the term "insolvency."

In Sabin v. Columbia Fuel Company, 25 Or 15, 34 P 692 (1893), the court stated:

"The term 'insolvency' as used in bankrupt and insolvency proceedings denotes the inability of a party to pay his debts as they become due in the ordinary course of business, but for general purposes the popular meaning of the word is preferable, viz., the insufficiency of the entire property of an individual or corporation to pay his or its debts."

Wiggins Co. v. McMinnville Motor Car Co., 111 Or 12, 225 P 314 (1924), held that:

"The mere fact that a corporation is unable to pay its debts upon a particular day does not constitute insolvency. If this were true there is probably not a bank nor any large business interest solvent, in the sense that it would be able to pay its debts if they were all demanded on the same day, or in the same week, or the same month."

The Oregon court has thus recognized the personal liability of officers of financial institutions for the knowing misrepresentation of solvency, and has recognized the validity of the "liabilities in excess of assets" test for insolvency.

Section 12. Fraud in insolvency. (1) A person commits the crime of fraud in insolvency if, with intent to defraud any creditor and knowing that a proceeding for the appointment of an administrator or a composition agreement or other arrangement for the benefit of creditors has been or is about to be instituted, he:

(a) Destroys, removes, conceals, encumbers, transfers, conveys or otherwise disposes of any part of or any interest in the debtor's estate; or

(b) Obtains any substantial part of or interest in the debtor's estate; or

(c) Presents to any creditor or administrator a writing or record relating to the debtor's estate, not otherwise within the coverage of Article \_\_\_\_\_, knowing it contains a false material statement; or

(d) Misrepresents or fails or refuses to disclose to the administrator the existence, amount or location of any part of or any interest in the debtor's estate, or any other information which he is legally required to furnish to such administrator.

(2) "Administrator", as used in this section, means an assignee or trustee for the benefit of creditors, a conservator, a liquidator, a receiver or any other person entitled to administer property for the benefit of creditors.

Existing  
Law

ORS  
711.410  
711.420  
711.990 (2)

COMMENTARY - FRAUD IN INSOLVENCY

A. Summary

Sections 10 and 11 of this Article deal with intentional interference with the enforcement rights of secured and judgment creditors. They have been designed to discourage similar conduct prejudicial to the rights of unsecured creditors.

There is current legislation making it criminal to fraudulently dispose of unsecured assets in anticipation of insolvency proceedings. (See Mich Rev Crim Code 4140; NY Rev Penal Law 185.00; 18 USC 152).

Some states provide punishment for a debtor who conceals, sells or otherwise disposes of assets with intent to defraud his creditors regardless of present or prospective insolvency. (See Okla Stat Ann c. 63, 1590 (1958); Wis Stat Ann 943.39 (2) (1958)).

A Massachusetts statute makes criminal the disposition of any money other than for minimal family necessities, after knowledge of impending insolvency proceedings. (See Mass Ann Laws, c. 216, 136 (1955)).

The proposed section is more conservative than some of these statutes since other proposed theft statutes make securing credit or goods upon a false representation of intent to pay punishable.

Subsections (1) (a) through (d) all require:

(1) The intent to defraud a creditor; and

(2) Knowledge either that:

(a) Proceedings for the appointment of an administrator have begun or are about to begin; or that

(b) A composition or other arrangement for the benefit of creditors has been made or is about to be made.

Paragraph (a) parallels the language of section 10 relating to secured creditors.

Paragraph (c) protects an administrator from intentionally false information not reached by the Article on Perjury and Related Offenses.

Section 12 covers both the individual debtor and the business entity faced with insolvency proceedings. There is a current demand for broad penal legislation in the field of business and commercial bankruptcy frauds. The growing problem in the area is discussed in 71 Com L J 383 (1966):

"The newest and fastest growing business is the 'planned bankruptcy.' In essence, the planned bankruptcy is a merchandising swindle based on the abuse of credit, either legitimately or fraudulently established. We in the Department of Justice have been aware of this developing area of commercial fraud for some time...this scheme consists of (1) over-purchase of inventory on credit, (2) sales or other disposition of the merchandise thus obtained, (3) concealment of the proceeds, (4) non-payment of creditor and finally, (5) the filing of involuntary petition in bankruptcy. We refer to this as a 'planned bankruptcy' since at the very inception of the scheme, the operators make elaborate plans for the hiring of attorneys and formulate various explanations to be used to describe why assets are not on hand when creditors file the involuntary bankruptcy petition." (Article based upon an address delivered by Shelton Davidson, Asst. U.S. Atty., Dept. of Justice, at the 36th annual meeting of the 17th Reg. Dist. of the Comm. Law League of America, Mar. 14, 1966, Chicago, Ill.).

The applicability of the federal bankruptcy code to this problem is discussed in 4 Remington on Bankruptcy, s. 1646 (1957):

"Clause (d) of paragraph (2) of Section 67 (d) of the Bankruptcy Act nullified transfers and obligations within a year of bankruptcy made or incurred with actual intent to hinder, delay, or defraud creditors. The pertinent language of the statute is that every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating proceedings under the Act by or against him is 'fraudulent'...(d) as to then existing and future creditors, if made or incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors...it is not sufficient to establish intent to hinder or delay creditors. Intent to 'defraud' them must also appear." (See Doehler v. Real Estate Bd. of N. Y. Bldg. Co., 150 Misc 733, 270 NYS 386.

B. Derivation

The language and structure of the section was derived from New York Revised Penal Law section 185.00 and Michigan Revised Criminal Code section 4140. The basic model for these two statutes is Model Penal Code section 224.11.

C. Relationship to Existing Law

This section is new to Oregon law.

Fraud prior to or during insolvency proceedings has essentially been a concern of federal bankruptcy law, e.g., provisions voiding preferential and fraudulent transfers of the debtor's assets. Three statutes in ORS chapter 711 of the Oregon Banking Code have some relevancy to the problem:

ORS 711.410: Nullifies all transfers of assets by a bank or trust company after commission of an act of insolvency or in contemplation of insolvency.

ORS 711.420: Prohibits officers or directors of a bank or trust company from participation in fraudulent insolvency.

ORS 711.990 (2): Provides a misdemeanor penalty for violation of ORS 711.420.

Two Oregon cases have discussed the test of insolvency and the admissibility of testimony given during insolvency proceedings in criminal trials.

Patterson v. Baker Grocery Co., 73 Or 433, 144 P 673 (1914), discussing the test of insolvency, quoted with approval, 1 Loveland, Bankruptcy, (4th ed) p. 303:

"In estimating the probable worth of a debtor, in order to ascertain whether or not he is insolvent, all his property that is salable or may be converted into money should be taken into consideration, including property that is excepted from execution under state law."

In State v. Frasier, 94 Or 90, 94 Or 108, 184 P 848 (1919), the court, in a petition for rehearing proceeding, commented on the bankruptcy rule making inadmissible in criminal actions testimony received from a debtor in the course of bankruptcy proceedings:



"Section 7 of ch. 3 of Bankruptcy Act of 1898, 30 U.S.Stats. 548, [directs that a bankrupt shall] submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceedings."

The court held that this section, providing that no testimony given by a bankrupt shall be offered against him in any criminal proceeding, does not apply to the language and acts of a bankrupt who in the course of his examination upon the witness stand commits a fresh crime, such as perjury or the uttering of a forged instrument.

Section 13. Misapplication of entrusted property.

(1) A person commits the crime of misapplication of entrusted property if, with knowledge that the misapplication is unlawful and that it involves a substantial risk of loss or detriment to the owner or beneficiary of such property, he intentionally misapplies or disposes of property that has been entrusted to him as a fiduciary or that is property of the government or a financial institution.

(2) As used in this section:

(a) "Fiduciary" means a trustee, guardian, executor, administrator, receiver or any other person acting in a fiduciary capacity as agent or employe of an organization which is a fiduciary.

(b) "Misapplies" means dealing with property contrary to law or governmental regulation governing the custody or disposition of that property; governmental regulation includes administrative and judicial rules and orders as well as statutes and ordinances.

Existing  
Law

ORS

162.630

162.640

162.650

162.660

162.680

162.690

165.025

165.030

165.035

165.040

707.720

707.990 (2)

726.270

293.265

180.370

8.130

462.260

423.070

156.650

251.610

292.316

279.722

297.120

126.225

126.250

127.060

128.410

128.415

128.990

128.020

Ch. 708

709

716

722

723

724

725

733

COMMENTARY - MISAPPLICATION OF ENTRUSTED PROPERTY

A. Summary

The mens rea requirements of section 13 include (1) knowledge that the conduct or action is contrary to the legally established rules governing care of entrusted property, and (2) knowledge that such conduct or action involves a substantial risk of loss or detriment to the actual owner or beneficiary of the property, and (3) an intentional misapplication or disposition of that property.

The section is intended to reach recklessness in the handling of certain kinds of property by those acting in a fiduciary capacity, e.g., fiduciaries of governmental and financial institutions, trustees, administrators, executors, attorneys at law. This type of nonfraudulent misdealing with property is distinguished from theft by the moral quality of the conduct. Misdemeanor sanctions in this area would be sufficient to deter persons acting in a fiduciary capacity from wrongful dealing with property involving no gain or advantage to the actor or to third persons in whom he is interested.

To the extent that state regulatory statutes govern banking, insurance, trust companies and investment funds, a knowing violation of such law may reasonably be subject to criminal sanction.

The meaning of the terms "property" and "financial institution" as defined in section 1 of this Article are applicable to this section.

The definitions of "fiduciary" and "misapplies" in subsection (2) are self-explanatory.

B. Derivation

The section is derived from Michigan Revised Criminal Code section 4155 which was modeled after Model Penal Code section 224.13.

C. Relationship to Existing Law

There are a number of Oregon statutes covering the conversion and misapplication of property by certain specified persons. These crimes are designated embezzlement:

ORS 165.025: Trustee converting subject matter of trust to his own use or use of third party.

ORS 165.030: Agent, attorney, broker, banker, employe or merchant converting entrusted property.

ORS 165.035: Bank and trust company official or employe who embezzles, abstracts or wilfully misapplies entrusted property.

ORS 165.040: Embezzling funds of savings and loan association by officer, director, employe or agent who embezzles, abstracts or misapplies property.

All of these provisions require in intent to deceive, injure or defraud.

Numerous other provisions impose a standard of legal duty in connection with the care and disposition of entrusted property:

ORS 707.720: Violations of law or omission of duty by bank, trust company officer or director.

ORS 707.990 (2): Provides misdemeanor penalty for violation.

ORS chapter 708: Regulation of Bank and Trust Companies generally.

ORS chapter 709: Regulation of Trust Business.

ORS chapter 716: Mutual Savings Banks.

ORS chapter 722: Loan Associations.

ORS chapter 723: Credit Unions.

ORS chapter 724: Industrial Loan Companies.

ORS chapter 725: Small Loan Companies.

ORS chapter 733: Accounting and Investments of Insurance Companies.

ORS 726.270: Prohibits the conversion or disposition of unredeemed pledge by pawnbroker for specified period of time.

ORS 293.265: Receiving, handling and disbursing state funds.

ORS 180.370: Turning over to State Public Welfare Commission monies received by Welfare Recovery Division.

ORS 8.130: Paying over to State Treasurer charges collected by Clerk of Supreme Court.

ORS 462.260: Monies paid to Racing Commission to be deposited in a bank.

ORS 423.070: Funds received under Western Interstate Corrections Compact.

ORS 156.650: Disposition of fines and forfeited bail in criminal actions in district court.

ORS 251.610: Election recount deposits.

ORS 292.316: Certain state officers required to pay fees and commissions into treasury.

ORS 279.722: Disposition of bid deposits.

ORS 297.120: Investigating loss of public funds or property involving a public officer.

ORS 126.225: General functions of guardians of estate.

ORS 126.250: Investments by guardian.

ORS 127.060: Duties and powers of trustee conserving property of missing persons.

ORS 128.410 and 128.415: Payments made under prearranged funeral plans as trust funds and their required deposit.

ORS 128.990: Misdemeanor penalty for violation of ORS 128.410 and 128.415.

ORS 128.020: Investments by fiduciaries; "prudent man rule."

Some of the persons covered by these provisions would not be acting in a fiduciary capacity as defined in this section. Public servants who misapply property entrusted to them in their official capacity would be covered by the section on official misconduct if an intent to benefit themselves or to harm another was present. There are a number of other Oregon statutes pertinent to this class of persons:

ORS 162.630: Disposal by treasurer of money in his custody.

ORS 162.640: Making profit out of public funds.

ORS 162.650: Unlawful use of funds by State Treasurer.

ORS 162.660: Multnomah County Treasurer making profit from county funds.

ORS 162.680: Making profit out of money in hands of port commissioner.

ORS 162.690: Making profit from funds in hands of school clerk.

The conduct reached by this section must be clearly distinguished from the fraudulent misapplication of entrusted property. The deviations from fiducial duty contemplated by this section involve the reckless or grossly negligent management of entrusted property. It does not include the culpability element of intent to deceive, injure or defraud.

Black's Law Dic (4th Ed 1951), defines the term "misapplication":

"Improper, illegal, wrongful, or corrupt use or application of funds, property, etc."

Ferguson v. State, 80 Tex Cr R 383, 189 SW 271, construed a statute similar in import to the present Oregon embezzlement statutes:

"Under statute declaring guilty of a felony an officer or clerk of a state bank who 'embezzles, abstracts, or wilfully misapplies' its funds, 'embezzle' refers to acts done for the benefit of the actor as against the bank, 'misapply' covers acts having no relation to pecuniary profit or advantage to the doers, while 'abstracts' means only to take and withdraw from the possession and control of the bank; and while 'embezzlement' may include the offenses of abstraction and wilful misapplication, either of these offenses may be committed without embezzlement."

A recent Oregon case construed the mens rea requirements of the Oregon embezzlement statutes:

State v. Hanna, 224 Or 588, 356 P2d 1046 (1960), held that criminal intent is necessary to make out the crime of embezzlement by bailee, mortgagor or purchaser under a conditional sales contract. (ORS 165.010). The court quoted Perkins, Criminal Law 817 (1957):

"This intent, while perhaps not strictly an intent to steal, is an intent to deprive the owner of his property and is for practical purposes the counterpart of the animus ferandi required for larceny. Hence the unauthorized retention of the property of another under a bona-fide claim of right is not embezzlement even if the error is one of law."

The court went on to say:

"The crime of conversion of public funds (ORS 165.015) has been generally regarded as not requiring proof of a specific intent to defraud. As explained by Perkins, Criminal Law, pp. 247-249 (1957), this offense is considered to be a special type of crime designed to hold public officers strictly accountable for the conversion of public funds, even though they may not embezzle or fraudulently convert the property."

Marshall v. Frazier, 159 Or 491, 80 P2d 42, 81 P2d 132 (1938), discusses the fiduciary duty of a trustee:

"If a trustee acts within his power, good faith is a defense to a charge of mistake in judgment, and, if the trust provision gives the trustee wide powers of investment, he may exercise his sound discretion within those limits, and his actions are not to be tested by considerations of 'hindsight' judgment. Discretion to a trustee does not mean arbitrary or unlimited or absolute discretion, but a reasonable one, and trustee must use judgment and prudence, and, if no limits are placed on his discretion, must nevertheless invest funds according to approved rules for trust investments.

"Good faith alone will not protect a trustee, but he must also exercise diligence, prudence and absolute fidelity, as respects investments."

Section 14. Issuing a false financial statement.

A person commits the crime of issuing a false financial statement if, with intent to defraud, he:

(1) Knowingly makes or utters a written statement which purports to describe the financial condition or ability to pay of himself or some other person and which is inaccurate in some material respect; or

(2) Represents in writing that a written statement purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to that person's current financial condition or ability to pay, knowing the statement to be materially inaccurate in that respect.

Existing Law
ORS
165.615
165.620
165.625
59.135
708.705
708.710
708.990

COMMENTARY - ISSUING A FALSE FINANCIAL STATEMENT

A. Summary

This section covers the preparation or issuance of a false financial report, or the certification of such a report. The mens rea requirement is knowledge that the written statements are false coupled with an intent to defraud. Culpability attaches to issuance of the false statement with the specified intent, regardless of the success or failure of the fraudulent purpose. If property, as defined by the Article on Theft, is actually obtained, the crime of theft by deception will have been committed.

Subsection (1) applies to the primary source of the fraudulent statement. Subsection (2) extends beyond the original source of the misstatement to reach the person who either (1) affirms it because of his position, e.g., accountant or auditor, or (2) employs the misstatement for his own fraudulent purposes.



While both subsections require an intent to defraud, the benefit need not flow to the defendant. The term "defraud" is used in its ordinary dictionary sense, "to deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice." (Black's Law Dic (4th ed 1951)).

The requirement that the misstatement be "material" is intended to exempt minor inaccuracies not inducing the element of reliance.

B. Derivation

With minor changes the section is a composite of Michigan Revised Criminal Code section 4145 and New York Revised Penal Law section 175.45.

C. Relationship to Existing Law

Existing statutes:

ORS 165.615: False statements as to financial condition or ability to pay.

ORS 165.620: Procuring benefit upon false statement concerning financial condition.

ORS 165.625: Publication of false statement concerning liabilities or assets of company.

ORS 59.135: Prohibits fraud and deceit with respect to securities or the security business. Subsection (2) refers to untrue statements of material fact.

ORS 708.705: States, "No officer, director, owner or employe of any bank or trust company in this state shall... (5) make any entry upon the books or records of such bank or trust company with intent to deceive or conceal the true condition thereof."

ORS 708.710: Is also directed to banks and trust companies, and prohibits false and omitted entries as to the business affairs or condition of such institutions in books, reports and statements.

ORS 708.990 (6): Provides a felony penalty for violation of ORS 708.705 and 708.710.

A federal case held that, "Fraudulent representations as to the financial responsibility of another for the purpose of procuring him credit are actionable, though containing no statement as to the amount of credit it is safe to extend." Nevada Bank of S. F. v. Portland National Bank, 59 F 338 (cc Or 1893).

ORS 165.615 was discussed in State v. Bosch, 139 Or 150, 7 P2d 554 (1932). The court reviewed the legislative history of the statute:

"OC 14-335 (now ORS 165.615) was enacted by the legislature at its 1921 session, being 'An act relating to false statements in writing to obtain credit...any person who shall knowingly make...any false statement in writing, with intent that it shall be relied upon, respecting the financial condition, or means or ability to pay of himself...for the purpose of procuring... the making of a loan or credit, the extension of credit...shall be guilty of a misdemeanor.' Section (3) of the act makes it a misdemeanor for any person to make, in writing, a false statement to the effect that any former statement so made was and still is a correct statement, for the purpose of procuring credit or other benefits."

The lower court was reversed on other grounds.

The proposed section is not a departure from existing Oregon law. The present statutes relating to securities and bank and trust companies should probably be retained as they are designed to provide increased protection in areas that demand a high degree of public confidence.

Section 15. Obtaining execution of documents by deception. A person commits the crime of obtaining execution of documents by deception if, with intent to defraud or injure another or to acquire a substantial benefit, he obtains by means of fraud, deceit or subterfuge the execution of a written instrument affecting or purporting to affect the pecuniary interest of any person.

COMMENTARY - OBTAINING EXECUTION OF DOCUMENTS BY DECEPTION

A. Summary

This section is designed to complement coverage provided in other provisions relating to theft by deception and fraudulently obtaining a signature. It avoids the problems involved in the "property" concept inherent in the theft provisions. The same approach was used in drafting the section on fraudulently obtaining a signature in the Forgery Article. Some written instruments whose execution is obtained by deception may not properly be classified as "property" within the theft definition, even though they indirectly represent a pecuniary interest, e.g., fishing and hunting license, motor vehicle registration. The basic forgery provisions would not be applicable since the written instrument would legitimately be what it purported to be.

The section does not cover obtaining execution of documents by threats and intimidation. This type of misconduct is expected to be reached by a general criminal coercion section.

The scope of the section is broad enough to include the execution of releases, wills, leases, trust agreements, licenses, election certificates, extension of time for obligation payments and other similar written instruments that involve a pecuniary interest.

Existing  
Law

ORS  
165.605  
165.680  
288.991  
462.195  
471.143  
481.150  
482.610  
671.440  
677.080  
321.730  
497.230  
571.125  
746.100  
671.090  
672.200  
673.170  
675.070  
677.200  
678.085  
679.170  
682.110  
683.140  
684.100  
685.110  
687.081  
688.120  
689.410  
690.220  
691.130  
692.180  
693.090  
694.135  
695.070  
696.300  
698.560

The Perjury Article prohibits making unsworn written falsifications to a public servant in obtaining a pecuniary benefit. Section 15 extends that prohibition to the private sector by prohibiting all fraudulent means of obtaining written instruments or documents that represent a pecuniary interest.

B. Derivation

The proposed section, with substantial changes, is derived from Model Penal Code section 224.14.

C. Relationship to Existing Law

There are numerous Oregon statutes dealing with fraud, deception and misrepresentation in applying for and obtaining various types of documents.

The majority of these provisions are regulatory in nature with misdemeanor penalties attached.

ORS 165.680: Fraud of depositor in obtaining and negotiating receipt for goods to which he has no title. Misdemeanor.

ORS 288.991: Wilful false written representation in support of application for payment or reissuance of lost, mutilated or destroyed evidence of indebtedness. Felony - 5 years, \$10,000 fine maximum.

ORS 462.195: False statement as to age to obtain mutual wagering ticket or receipt. Misdemeanor.

ORS 471.143: False information or statement in application for OLCC identity card. Misdemeanor.

ORS 165.605: Falsely representing age to secure right, benefit or privilege.

ORS 481.150: False statement or representation in application for registration or certificate of title to motor vehicle. Felony - 10 years, \$1,000 fine.

ORS 482.610 (5): Fraud in securing motor vehicle operator or chauffeur's license. Misdemeanor.

ORS 671.440: Obtaining registration or permit as landscape architect by fraud or material misrepresentation. Misdemeanor.

ORS 677.080: Knowing false statement or representation of fact, or concealment of material fact, in obtaining physician's license. Misdemeanor.

ORS 321.730: False statement or report in application for classification and certification of forest lands. \$500 fine, 3 months jail term.

ORS 497.230: False statement of residence in applying for game commission licenses. Misdemeanor.

ORS 571.125 (2): Suspension, revocation or refusal of nurserymen license for fraud, deception or misrepresentation in procurement of license. \$500 fine.

ORS 746.100: False or fraudulent statements or representations in insurance applications or transactions.

The following statutes relate to fraudulent and deceptive practices in obtaining professional licenses and certificates. Some provide criminal penalties, while others refer to the suspension, revocation or refusal to issue or renew such instruments.

ORS 671.090: Architect's certificate.

ORS 672.200: Professional engineers

ORS 673.170: Accountants.

ORS 675.070: Psychologists.

ORS 677.200: Physicians.

ORS 678.085: Nurses. Misdemeanor penalty (ORS 678.990).

ORS 679.170: Dentists.

ORS 682.110: Podiatrists.

ORS 683.140: Optometrists.

ORS 684.100: Chiropractors.

ORS 685.110: Naturopaths.

ORS 687.081: Masseurs

ORS 688.120: Physical therapists. Misdemeanor (ORS 688.990).

ORS 689.410: Pharmacists.

ORS 690.220: Barbers. Misdemeanor (ORS 690.990).

ORS 691.130: Cosmetic therapists.

ORS 692.180 (n): Funeral directors and embalmers.

ORS 693.090 (a): Plumbers.

ORS 694.135 (2): Hearing aid dealers.

ORS 695.070 (b): Watch and clock makers.

ORS 696.300: Real estate brokers.

ORS 698.560: Auctioneers.

State v. Tauscher, 221 Or 1, 360 P2d 764 (1961), discusses the property concept as it relates to the crimes of larceny, embezzlement and false pretenses:

"Since...the crime of false pretenses is analogous to the crime of larceny, these cases support our conclusion that only property which is tangible and capable of being possessed may be the subject of larceny under ORS 164.310...embezzlement under ORS 165.005 [and false pretenses under ORS 165.205]."

Fraud, deceit, deception or misrepresentation of a material fact employed in obtaining execution of a document embodying a pecuniary interest would not be perjury unless given under oath; it would not constitute an unsworn falsification unless given in writing to a public servant; it would not be forgery since the document would be authentic; and, it would not be theft by deception unless the document or pecuniary interest contained therein fell clearly within the theft concept of "property."

This section attempts to focus on certain culpable misconduct while avoiding collision with those legal distinctions.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

**Section 224.4. Tampering with Records.**

A person commits a misdemeanor if, knowing that he has no privilege to do so, he falsifies, destroys, removes or conceals any writing or record, with purpose to deceive or injure anyone or to conceal any wrongdoing.

**Section 224.8. Commercial Bribery and Breach of Duty to Act Disinterestedly.**

(1) A person commits a misdemeanor if he solicits, accepts or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as:

- (a) agent or employee of another;
- (b) trustee, guardian, or other fiduciary;
- (c) lawyer, physician, accountant, appraiser, or other professional adviser or informant;
- (d) officer, director, partner, manager or other participant in the direction of the affairs of an incorporated or unincorporated association; or
- (e) arbitrator or other purportedly disinterested adjudicator or referee.

(2) A person who holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities or services commits a misdemeanor if he solicits, accepts or agrees to accept any benefit to influence his selection, appraisal or criticism.

(3) A person commits a misdemeanor if he confers, or offers or agrees to confer, any benefit the acceptance of which would be criminal under this Section.

**Section 224.9. Rigging Publicly Exhibited Contest.**

(1) A person commits a misdemeanor if, with purpose to prevent a publicly exhibited contest from being conducted in accordance with the rules and usages purporting to govern it, he:

(a) confers or offers or agrees to confer any benefit upon, or threatens any injury to a participant, official or other person associated with the contest or exhibition; or

(b) tampers with any person, animal or thing.

(2) Soliciting or Accepting Benefit for Rigging. A person commits a misdemeanor if he knowingly solicits, accepts or agrees to accept any benefit the giving of which would be criminal under Subsection (1).

(3) Participation in Rigged Contest. A person commits a misdemeanor if he knowingly engages in, sponsors, produces, judges, or otherwise participates in a publicly exhibited contest knowing that the contest is not being conducted in compliance with the rules and usages purporting to govern it, by reason of conduct which would be criminal under this Section.

**Section 224.10. Defrauding Secured Creditors.**

A person commits a misdemeanor if he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with purpose to hinder enforcement of that interest.

**Section 224.11. Fraud in Insolvency.**

A person commits a misdemeanor if, knowing that proceedings have been or are about to be instituted for the appointment of a receiver or other person entitled to administer property for the benefit of creditors, or that any other composition or liquidation for the benefit of creditors has been or is about to be made, he:

(a) destroys, removes, conceals, encumbers, transfers, or otherwise deals with any property with purpose to defeat or obstruct the claim of any creditor, or otherwise to obstruct the operation of any law relating to administration of property for the benefit of creditors; or



(b) knowingly falsifies any writing or record relating to the property; or

(c) knowingly misrepresents or refuses to disclose to a receiver or other person entitled to administer property for the benefit of creditors, the existence, amount or location of the property, or any other information which the actor could be legally required to furnish in relation to such administration.

**Section 224.12. Receiving Deposits in a Failing Financial Institution.**

An officer, manager or other person directing or participating in the direction of a financial institution commits a misdemeanor if he receives or permits the receipt of a deposit, premium payment or other investment in the institution knowing that:

(1) due to financial difficulties the institution is about to suspend operations or go into receivership or reorganization; and

(2) the person making the deposit or other payment is unaware of the precarious situation of the institution.

**Section 224.13. Misapplication of Entrusted Property and Property of Government or Financial Institution.**

A person commits an offense if he applies or disposes of property that has been entrusted to him as a fiduciary, or property of the government or of a financial institution, in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted. The offense is a misdemeanor if the amount involved exceeds \$50; otherwise it is a petty misdemeanor. "Fiduciary" includes trustee, guardian, executor, administrator, receiver and any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary.

**Section 224.14. Securing Execution of Documents by Deception.**

A person commits a misdemeanor if by deception he causes another to execute any instrument affecting or likely to affect the pecuniary interest of any person.

TEXT OF ILLINOIS CRIMINAL CODE OF 1961

**§ 17-1. Deceptive Practices**

A person commits a deceptive practice when:

(a) He causes another, by deception or threat to execute a document disposing of property or a document by which a pecuniary obligation is incurred, or

(b) Being an officer, manager or other person participating in the direction of a financial institution, he knowingly receives or permits the receipt of a deposit or other investment, knowing that the institution is insolvent, or

(c) He knowingly makes or directs another to make a false or deceptive statement addressed to the public for the purpose of promoting the sale of property or services, or

(d) With intent to obtain control over property or to pay for property, labor or services of another, he issues or delivers a check or other order upon a real or fictitious depository for the payment of money, knowing that it will not be paid by the depository. Failure to have sufficient funds or credit with the depository when the check or other order is issued or delivered is prima facie evidence that the offender knows that it will not be paid by the depository.

**Financial Institution.**

A financial institution means a bank, insurance company, credit union, savings and loan association, investment trust or other depository of money or medium of savings or collective investment.

**Penalty.**

A person convicted of deceptive practices shall be fined not to exceed \$500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. 1961, July 28, Laws 1961, p. 1983, § 17-1.

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TEXT OF NEW YORK REVISED PENAL LAW

**§ 165.00 Misapplication of property**

1. A person is guilty of misapplication of property when, knowingly possessing personal property of another pursuant to an agreement that the same will be returned to the owner at a future time, he loans, leases, pledges, pawns or otherwise encumbers such property without the consent of the owner thereof in such manner as to create a risk that the owner will not be able to recover it or will suffer pecuniary loss.

2. In any prosecution under this section, it is a defense that, at the time the prosecution was commenced, (a) the defendant had recovered possession of the property, unencumbered as a result of the unlawful disposition, and (b) the owner had suffered no material economic loss as a result of the unlawful disposition.

Misapplication of property is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 175.00 Falsifying business records; definitions of terms**

The following definitions are applicable to sections 175.05 and 175.10:

1. "Enterprise" means any entity of one or more persons, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, eleemosynary, social, political or governmental activity.

2. "Business record" means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 175.05 Falsifying business records in the second degree**

A person is guilty of falsifying business records in the second degree when, with intent to defraud, he:

1. Makes or causes a false entry in the business records of an enterprise; or

2. Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or

3. Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or

4. Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

Falsifying business records in the second degree is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 175.45 Issuing a false financial statement**

A person is guilty of issuing a false financial statement when, with intent to defraud:

1. He knowingly makes or utters a written instrument which purports to describe the financial condition or ability to pay of some person and which is inaccurate in some material respect; or
2. He represents in writing that a written instrument purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to such person's current financial condition or ability to pay, whereas he knows it is materially inaccurate in that respect.

Issuing a false financial statement is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 180.00 Commercial bribing**

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

Commercial bribing is a class B misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 180.05 Commercial bribe receiving**

An employee, agent or fiduciary is guilty of commercial bribe receiving when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs.

Commercial bribe receiving is a class B misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 180.35 Sports bribery; definitions of terms**

As used in this article:

1. "Sports contest" means any professional or amateur sport or athletic game or contest viewed by the public.
2. "Sports participant" means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.
3. "Sports official" means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 180.40 Sports bribing**

A person is guilty of sports bribing when he:

1. Confers, or offers or agrees to confer, any benefit upon a sports participant with intent to influence him not to give his best efforts in a sports contest; or
2. Confers, or offers or agrees to confer, any benefit upon a sports official with intent to influence him to perform his duties improperly.

Sports bribing is a class D felony. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 180.45 Sports bribe receiving**

A person is guilty of sports bribe receiving when:

1. Being a sports participant, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that he will thereby be influenced not to give his best efforts in a sports contest; or
2. Being a sports official, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that he will perform his duties improperly.

Sports bribe receiving is a class E felony. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 180.50 Tampering with a sports contest**

A person is guilty of tampering with a sports contest when, with intent to influence the outcome of a sports contest, he tampers with any sports participant, sports official or with any animal or equipment or other thing involved in the conduct or operation of a sports contest in a manner contrary to the rules and usages purporting to govern such a contest.

Tampering with a sports contest is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 185.00 Fraud in insolvency**

1. As used in this section, "administrator" means an assignee or trustee for the benefit of creditors, a liquidator, a receiver or any other person entitled to administer property for the benefit of creditors.

2. A person is guilty of fraud in insolvency when, with intent to defraud any creditor and knowing that proceedings have been or are about to be instituted for the appointment of an administrator, or knowing that a composition agreement or other arrangement for the benefit of creditors has been or is about to be made, he

(a) conveys, transfers, removes, conceals, destroys, encumbers or otherwise disposes of any part of or any interest in the debtor's estate; or

(b) obtains any substantial part of or interest in the debtor's estate; or

(c) presents to any creditor or to the administrator any writing or record relating to the debtor's estate knowing the same to contain a false material statement; or

(d) misrepresents or fails or refuses to disclose to the administrator the existence, amount or location of any part of or any interest in the debtor's estate, or any other information which he is legally required to furnish to such administrator.

Fraud in insolvency is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 185.05 Fraud involving a security interest**

A person is guilty of fraud involving a security interest when, having executed a security agreement creating a security interest in personal property securing a monetary obligation owed to a secured party, and:

1. Having under the security agreement both the right of sale or other disposition of the property and the duty to account to the secured party for the proceeds of disposition, he sells or otherwise disposes of the property and wrongfully fails to account to the secured party for the proceeds of disposition; or

2. Having under the security agreement no right of sale or other disposition of the property, he knowingly secretes, withholds or disposes of such property in violation of the security agreement.

Fraud involving a security interest is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 185.10 Fraudulent disposition of mortgaged property**

A person is guilty of fraudulent disposition of mortgaged property when, having theretofore executed a mortgage of real or personal property or any instrument intended to operate as such, he sells, assigns, exchanges, secretes, injures, destroys or otherwise disposes of any part of the property, upon which the mortgage or other instrument is at the time a lien, with intent thereby to defraud the mortgagee or a purchaser thereof.

Fraudulent disposition of mortgaged property is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 185.15 Fraudulent disposition of property subject to a conditional sale contract**

A person is guilty of fraudulent disposition of property subject to a conditional sale contract when, prior to the performance of the condition of a conditional sale contract and being the buyer or any legal successor in interest of the buyer, he sells, assigns, mortgages, exchanges, secretes, injures, destroys or otherwise disposes of the goods subject to the conditional sale contract under claim of full ownership, with intent thereby to defraud another.

Fraudulent disposition of property subject to a conditional sale contract is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

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TEXT OF MICHIGAN REVISED CRIMINAL CODE

**[Falsifying Business Records]**

Sec. 4125. (1) A person commits the crime of falsifying business records if, with intent to defraud, he:

(a) Makes or causes a false entry in the business records of an enterprise; or

(b) Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise, or

(c) Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law other than for the convenience of the government or by the nature of his position; or

(d) Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

(2) "Enterprise" means any entity of one or more persons, corporate or otherwise, engaged in business, commercial, professional, industrial, eleemosynary or social activity.

(3) "Business record" means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity.

(4) Falsifying business records is a Class A misdemeanor.

**[Defrauding Secured Creditors]**

Sec. 4130. (1) A person commits the crime of defrauding secured creditors if he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with intent to hinder enforcement of that interest.

(2) "Security interest" means an interest in personal property or fixtures as defined in Section 1201(37) of the Uniform Commercial Code [C.L.1948 § 440.1201(37)].

(3) Defrauding secured creditors is a Class B misdemeanor.

**[Defrauding Judgment Creditors]**

Sec. 4135. (1) A person commits the crime of defrauding judgment creditors if he:

(a) Removes his property from a county with intent to prevent it being levied upon by an execution; or

(b) Secretes, assigns, conveys or otherwise disposes of his property with intent to defraud a judgment creditor or to prevent that property from being made liable for the payment of his debts.

(2) Defrauding judgment creditors is a Class B misdemeanor.



**[Fraud in Insolvency]**

Sec. 4140. (1) A person commits the crime of fraud in insolvency if, with intent to defraud a creditor and with knowledge either that proceedings have been or are about to be instituted for the appointment of an administrator or that a composition agreement or other arrangement for the benefit of creditors has been or is about to be made, he:

(a) Conveys, transfers, removes, conceals, destroys, encumbers or otherwise disposes of any part of or any interest in the debtor's estate; or

(b) Presents to any creditor or to the administrator any writing or record relating to the debtor's estate, not otherwise within the coverage of sections 4905, 4906 or 4935, knowing that it contains a false material statement; or

(c) Misrepresents or fails or refuses to disclose to the administrator, under circumstances not amounting to a violation of section 4720, the existence, amount or location of any part of or any interest in the debtor's estate, or any other information that he is legally required to furnish to the administrator.

(2) "Administrator" means an assignee or trustee for the benefit of creditors, a conservator, a liquidator, a receiver or any other person entitled to administer property for the benefit of creditors.

(3) Fraud in insolvency is a Class B misdemeanor.

**[Issuing a False Financial Statement]**

Sec. 4145. (1) A person commits the crime of issuing a false financial statement if, with intent to defraud, he:

(a) Knowingly makes or utters a written instrument which purports to describe the financial condition or ability to pay of himself or some other person and which is inaccurate in some material respect; or

(b) Represents in writing that a written instrument purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to that person's current financial condition or ability to pay, knowing the instrument to be materially inaccurate in that respect.

(2) Issuing a false financial statement is a Class A misdemeanor.

**[Receiving Deposits in a Failing Financial Institution]**

Sec. 4150. (1) A person commits the crime of receiving deposits in a failing financial institution if, as an officer, manager or other person participating in the direction of a financial institution, he knowingly receives or permits the receipt of a deposit or other investment, knowing that the institution is insolvent.

(2) A financial institution is insolvent within the meaning of this section when from any cause it is unable to pay its obligations in the ordinary or usual course of business.

(3) Receiving deposits in a failing financial institution is a Class A misdemeanor.

**[Misapplication of Property]**

Sec. 4155. (1) A person commits the crime of misapplication of property if, with knowledge that he is misapplying and that the misapplication involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted, he misapplies or disposes of property that has been entrusted to him as a fiduciary or that is property of the government or a financial institution.

(2) "Fiduciary" includes a trustee, guardian, executor, administrator, receiver or any other person acting in a fiduciary capacity, or any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary.

(3) To "misapply" means to deal with the property contrary to law or governmental regulation of the custody or disposition of that property; governmental regulation includes administrative and judicial rules and orders as well as statutes and ordinances.

(4) Misapplication of property is a Class A misdemeanor.

**[Commercial Bribery]**

Sec. 4201. (1) A person commits the crime of commercial bribery if he:

(a) Confers, or agrees or offers to confer any benefit upon any employee or agent without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs; or

(b) Confers, or agrees or offers to confer any benefit upon any fiduciary without the consent of the latter's beneficiary, with intent to influence him to act or conduct himself contrary to his fiduciary obligation.

(2) Commercial bribery is a Class A misdemeanor.

**[Receiving a Commercial Bribe]**

Sec. 4205. (1) A person commits the crime of receiving a commercial bribe if:

(a) As an employee or agent, and without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that that benefit will influence his conduct in relation to his employer's or principal's affairs; or

(b) As a hiring agent or an official or employee in charge of employment, he solicits, accepts or agrees to accept any benefit from another person upon agreement or understanding that someone shall be hired, retained in employment or discharged or suspended from employment; or

(c) As a fiduciary, and without the consent of his beneficiary, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that that benefit will influence his conduct in his fiduciary capacity.

(2) Subparagraph (1) (b) does not apply to any person conducting a private employment agency licensed and operating under the laws of Michigan.

(3) Receiving a commercial bribe is a Class A misdemeanor.

**[Sports Bribery: Definition of Terms]**

Sec. 4210. The following definitions apply to sections 4211 through 4220:

(1) "Sports contest" means any professional or amateur sport, athletic game or contest, or race or contest involving machines, persons or animals, viewed by the public.

(2) "Sports participant" means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

(3) "Sports official" means any person who acts or expects to act in a sports contest as an umpire, referee or judge, or otherwise to officiate at a sports contest.

**[Sports Bribery]**

Sec. 4211. (1) A person commits the crime of sports bribery if he:

(a) Confers, or offers or agrees to confer any benefit upon a sports participant with intent to influence him not to give his best efforts in a sports contest; or

(b) Confers, or offers or agrees to confer any benefit upon a sports official with intent to influence him to perform his duties improperly.

(2) Sports bribery is a Class C felony.

**[Receiving a Sports Bribe]**

Sec. 4212. (1) A person commits the crime of receiving a sports bribe if:

(a) Being a sports participant, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that he will thereby be influenced not to give his best efforts in a sports contest; or

(b) Being a sports official, he solicits, accepts, or agrees to accept any benefit from another person upon an agreement or understanding that he will perform his duties improperly.

(2) Receiving a sports bribe is a Class C felony.

**[Tampering With a Sports Contest]**

Sec. 4215. (1) A person commits the crime of tampering with a sports contest if, with intent to influence the outcome of a sports contest, he:

(a) Tampers with any sports participant or sports official, or with any animal, equipment, or other thing involved in the conduct or operation of a sports contest, in a manner contrary to

the rules and usages purporting to govern the sports contest in question; or

(b) Substitutes a sports participant, animal, equipment, or other thing involved in the conduct or operation of a sports contest, for the genuine person, animal, or thing.

(2) Tampering with a sports contest is a Class A misdemeanor.

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