JIM JONES
ATTORNEY GENERAL

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

TELEPHONE
(208) 334-2400

ATTORNEY GENERAL OPINION NO. 86-1

TO: Mrs. Delores Crow
Idaho State Representative
203 11th Avenue South Extension
Nampa, Idaho 83651

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Is it constitutionally permissible to restrict the use of the word "accountant" and other labels or titles to individuals who have been certified and licensed by the Idaho State Board of Accountancy, as required by Idaho Code § 54-201, et seq.?

CONCLUSION:

Yes. It is constitutional under the first and fourteenth amendments of the United States Constitution and under article I, §§ 1, 9, 13 of the Idaho State Constitution. The state in exercise of its police powers may regulate the profession of accounting as set forth in I.C. § 54-201 et seq., and require licensing of "certified public accountants" and "public accountants" as defined in that chapter. The state may also restrict the use of the term "accountant" or other labels or terms to those who are licensed by the State Board of Accountancy.

ANALYSIS:

I. Statutory Authority

Title 54, chapter 2 of the Idaho Code, known as The Accountancy Act, regulates the profession of accounting and creates the Idaho State Board of Accountancy and the Public Accountant's Advisory Committee. It creates a two-tier licensing system for "certified public accountants" and "public accountants." By definition, all members of these classes must

hold a valid, unrevoked and unsuspended certificate and/or license under this chapter. I.C. § 54-206. The profession of "public accountant" is a "dying class," meaning that since July 1, 1977, with limited exceptions that have now expired, the class of licensed public accountant has been closed to new applicants. I.C. § 54-214.

The section that directly concerns the question presented is § 54-218. Subsections (1) and (2) restrict the use of the terms "certified public accountant" and "public accountant" to licensed persons. Subsection (3) states:

> No person, partnership or corporation shall assume or use the title or designation "certified accountant," "chartered accountant," "enrolled accountant," "licensed accountant," "registered accountant," "accredited accountant," "accountant," "auditor" or other title or designation or any of the abbreviations "CA," "EA," "RA," or "LA," or similar abbreviations likely to be confused with "certified public accountant" or "public accountant";. . .

Thus, the Idaho Legislature has restricted to licensed persons the use of titles containing the word "accountant" or "auditor," as well as the use of these words themselves. There shall be no profession of unlicensed accountants in the state, with the exceptions noted in subsection (3), to be discussed later.

Subsection (4) similarly provides that only a licensed person may render opinions or perform attestation as an accountant or auditor.

Similar restrictions regarding the titles and functions of accountants have existed for nearly 70 years. The Idaho State Board of Accountancy was established in 1917 to issue certificates to practice as a certified public accountant "and no other person shall be permitted to assume and use such title, or to use any words, letters or figures to indicate that the person using the same is a certified public accountant." 1917 Idaho Session Laws, ch. 126, § 3. Similar language was retained in the law until a new chapter was enacted in 1974 stating that no person shall assume or use the titles of "certified public accountant," or "public accountant" or the letters "C.P.A." in connection with his name or business in this state without holding a valid, unrevoked and unsuspended certificate issued or recognized by the board. 1974 Idaho Session Laws, ch. 263, § 54-218. In 1976, when the licensing of "public accountants" was

written into the law as a dying class, the more specific and restrictive use-of-title language that we have today was added to § 54-218 (3).

Idaho is not unique in its regulatory scheme. Accountancy laws governing the licensing of professional accountants have been enacted in all fifty states, the District of Columbia, Guam, Puerto Rico and the United States Virgin Islands. Certified public accountants (CPAs) are licensed in all states. Forty-seven (47) states, as well as the District of Columbia, Guam, Puerto Rico and the United States Virgin Islands, have regulatory accountancy laws that restrict to licensees the use of the titles "Certified Public Accountant," "Public Accountant," and other similar titles, and that regulate the performance of specific professional accounting services. Digest of State Accountancy Laws and State Board Regulations, 1985, published jointly by the American Institute of Certified Public Accountants, Inc. and the National Association of State Boards of Accountancy.

II. 14th Amendment: Due Process and Equal Protection

The question addressed in this opinion deals mainly with the constitutional limits upon the state's authority to license and thereby to regulate certain professions, including accounting. This authority is grounded in the police power, which is the intrinsic power of the state to protect the health, safety and general welfare of its people. Jones v. State Board of Medicine, 97 Idaho 859, 868, 555 P.2d 399 (1976) cert. denied 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 123 (1977); Comprehensive Accounting Service Co. v. Maryland State Board of Public Accountancy, 284 Md. 474, 397 A.2d 1019 (1979); Heller v. Abess, 134 Fla. 610, 184 So. 122 (1938); Montejano v. Rayner, 33 F.Supp. 435 (Dist. Id. 1939); Dent v. West Virginia, 129 U.S. 114, 122, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889).

There have been no cases in Idaho interpreting § 54-218 or other sections of the Accountancy Act, but the Idaho Supreme Court has upheld similar professional licensing requirements in the field of medicine when challenged by persons in the field of naturopathy, an unlicensed occupation. State v. Kellogg, 102 Idaho 628, 636 P.2d 750 (1981); State v. Kellogg, 98 Idaho 541, 568 P.2d 514 (1977); State v. Maxfield, 98 Idaho 356, 564 P.2d 968 (1977).

Under the fourteenth amendment of the United States Constitution, and art. I, §§ 1 and 13 of the Idaho Constitution, challenges to police power regulations such as those found in The Accountancy Act may be made on a number of bases.

Challenges may be made that such regulations interfere with the liberty and property interests protected by the due process clauses of both constitutions and that a classification established by the regulation violates the equal protection clause of the U.S. Constitution. The standard to measure a violation under any of these constitutional grounds is the same: the law or rule complained of need only bear a rational relationship to a legitimate legislative purpose. Bint v. Creative Forest Products, 108 Idaho 116, 697 P.2d 818 (1985). Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981); Nebbia v. New York, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940 (1934).

The rational relation standard of review receives near unanimous acceptance today. Cases from the 1920's that allowed the unlicensed use of the term "accountant," and found its restriction unconstitutional on due process and equal protection grounds, reflected the courts' interventionist views of that era. See, State v. Riedell, 109 Okla. 35, 233 P. 684 (1924); Frazer v. Shelton, 320 Ill. 253, 150 N.E. 696 (1926).

The views of the 1920's changed direction in the 1934 U.S. Supreme Court case of Nebbia, supra, which espoused the rational relation standard. See also, Williamson v. Lee Optical, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Under this standard, courts have routinely upheld the constitutionality of statutes regulating accountants against challenges that such statutes violate fourteenth amendment rights to due process and equal protection. Texas State Board of Public Accountancy v. Fulcher, 515 S.W.2d 950 (Tex. Civ. App. 1974); Comprehensive Accounting Service, supra. It is our opinion that a challenge to the Idaho accountancy statute on similar grounds would likewise be dismissed as lacking in merit.

III. First Amendment and Commercial Speech:

This opinion also addresses the issue of a possible constitutional violation of free speech under the first amendment of the United States Constitution and art. 1, § 9, of the Idaho Constitution. While there is little doubt that The Accountancy Act, § 54-201 et seq., is constitutional on due process and equal protection grounds, the question is closer when the Act is tested for violation of free speech because the standard of review is different than in the due process/equal protection areas.

Protection of commercial speech is a recent development in constitutional jurisprudence. In Central Hudson Gas v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341

(1980), the United States Supreme Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." The cornerstone of commercial speech is the dissemination of information. The ability to hold oneself out and advertise in an occupational area such as accounting meets this definition. Such speech enjoys protection under the first amendment of the United States Constitution. See, Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 765, 96 S.Ct. 1817, 1827, 48 L.Ed.2d 346 (1976).

As with other forms of speech, however, commercial speech may justifiably be regulated or even suppressed in certain situations. In fact, the protections afforded commercial speech are somewhat less than other forms of speech. Zauderer v. Office of Disciplinary Counsel, 53 LW 4587 (No. 83-2166, May 28, 1985); Bolger v. Young Drug Products Corp., 463 U.S. 60-65, 103 S.Ct. 2875, 2879, 77 L.Ed.2d 469 (1983); Metromedia, Inc. v. San Diego, 453 U.S. 490, 506, 101 S.Ct. 2882, 2892, 69 L.Ed.2d 800 (1981), Central Hudson, supra at 562-63.

In determining the validity of government restrictions on commercial speech, a four-part test was enunciated in Central Hudson, supra:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve the interest. 447 U.S. at 566, 100 S.Ct. at 2351.

Because Idaho has no commercial speech cases to guide us, we will apply the test laid out in Central Hudson, look at other statements of the United States Supreme Court and see what other sources have said on the issue.

The first inquiry mandated by Central Hudson is whether the commercial speech in question is misleading, i.e., whether use of the title "accountant" by unlicensed persons would mislead the public.

Idaho has a two-tier licensing system for "certified public accountants" and "public accountants." It is not difficult to

imagine that the public could be misled if persons who were unlicensed could use the most basic term of the profession of accounting, i.e. "accountant." Even a sophisticated person likely does not know what functions the state allows only a licensed accountant to perform. As the law presently stands, one may be assured that if a person holds himself an "accountant" the person has been licensed by the state and has thus met certain educational and examination requirements. Third parties relying on financial compilations, reviews and audits also have this assurance. Thus, the Idaho law protects the public from confusing or misleading representations.

Assuming, however, that the use of the term "accountant" by unlicensed persons is not misleading or deceptive, do the Idaho Accountancy Act restrictions, § 54-201 et seq., falter on one or more of Central Hudson's remaining grounds of analysis? Is the governmental interest substantial and does it directly advance the interest asserted? On these two grounds, the answers appear to be "yes."

Clearly, the governmental interest at stake is "substantial," as required by the second test in Central Hudson. The financial harm that incompetent or unscrupulous practitioners may inflict upon the general public was expressed by Arizona's Office of Auditor General, in an August 1979 report to the Arizona Legislature at p. 33:

> The critical nature of the financial audit stems from the reliance others place on its accuracy and completeness and the independence of the auditor. Audited financial statements are a primary means of communicating financial information to those outside an entity. . . . Persons outside the organization rely on audited financial statements to be accurate, complete and factual.
>
> Audited financial statements are intended to provide information that is useful in making business and economic decisions. Individuals, enterprises, markets and governments in making decisions use audited financial statement information to evaluate various alternatives and assess the expected returns, costs and risks.

Just as clearly, the third part of the Central Hudson test is met, i.e., the government's regulation of the title "accountant" directly advances the governmental interest asserted. By prohibiting the use of the title "accountant" or

similar titles by those who are not "certified public accountants" or "public accountants," the legislature protects the public from the confusion and uncertainty that results when an unlicensed person uses terms that may lead one to believe such person possesses the skills and qualifications of the licensed person. The legislature in its statement of legislative intent in § 54-202 said this legislation was necessary "to the end that the public shall be properly protected against unprofessional, improper, unauthorized and unqualified practice as a certified public accountant or public accountant. . . ."

The legislature saw that today's business climate is becoming increasingly complex. Such a situation increases the public interest in the reliability and credibility of those with whom the public must deal, and just as importantly, with those upon whose information the public must rely. When the information is important, and the confusion from use of like terms is subject to misunderstanding, the tight restriction of professional titles by the state is reasonable. The licensing requirement thus directly advances a substantial governmental interest.

The fourth and final question under the Central Hudson test of the analysis is the issue of whether the regulation is more extensive than necessary to serve the interest of the state. In looking at § 54-218(3), it is important to note that the statute does not completely forbid the use of the term "accountant." It provides these exceptions:

> . . .provided, that the provisions of this subsection shall not prohibit any officer, employer, partner or principal of any organization from using the designations accountant or auditor in reference to any wording designating the position, title or office which he holds in said organization nor shall the provisions of this subsection prohibit the use of the designations accountant or auditor by any public official or public employee in reference to his public position, title or office.

The exceptions are not insignificant. This part of § 54-218(3) allows the use of the term "accountant" by unlicensed persons working for any private organization or in any public position. These are two areas in which little confusion would arise. Similarly, a person is free to advertise and to hold himself out in such unregulated occupations as bookkeeping and tax

preparation. It is only the holding out of oneself as an "accountant" that requires a license under Idaho law.

It is our opinion, therefore, that the regulation of commercial speech by The Accountancy Act is constitutional under the four-part test of Central Hudson. The use of the term "accountant" by unlicensed persons is likely to mislead the public. The government has a substantial interest in protecting the public from such misleading representation. Requiring that persons who hold themselves out to the public as "accountants" be licensed is a direct and reasonable means of attaining this goal. Idaho's regulatory scheme is not more extensive than is necessary to serve its valid purposes.

Only two cases have been found that address the question of whether use of the term "accountant" by unlicensed persons is protected commercial speech under the first amendment.

In Comprehensive Accounting Service, supra, the Maryland Supreme Court found a ban on the use of the word "accountant" by unlicensed persons to be unconstitutional. Comprehensive Accounting Service was part of a nationwide network of 150 franchisees serving 15,000 clients throughout the country. It advertised that it would "undertake all the bookkeeping, accounting, systems work, and permanent records for taxes for the business. . . ." (emphasis in original). 397 A.2d at 1021. It maintained it could provide essential accounting services to smaller businesses at reasonable prices using specialized, mass-production methods that allowed it to furnish monthly financial statements and a tax preparation service. Comprehensive did not represent that it conducted "audits" or "examinations," nor did it furnish written certificates or opinions concerning the correctness of financial statements, schedules, reports or exhibits which it prepared.

Maryland's statute was not a model of clarity. It forbade the unlicensed use of the terms "accountant" or "auditor" but it failed to define public accounting. The court also stated that the statute provided language of exception which said that nothing in the statute should be construed to prohibit any person from:

> Offering or rendering to the public bookkeeping and tax services, including devising and installing systems, recording and presentation of financial information or data, preparing financial statements, schedules, reports and exhibits, or similar services;. . .Id. at 1020.

The court said that this exception in the statute allowing persons to perform certain functions could not be reconciled with a ban on advertising the fact that they performed those services:

> Thus § 15(e) expressly authorizes an uncertified accountant to perform accounting services to the public, while at the same time § 14(e) prohibits him from describing those services to the public as accounting, or holding himself out to the public as an accountant. Id. at 1023.

Idaho does not have a statute with language of exception comparable to the Maryland statute.

The court in Comprehensive stated that even though commercial speech which is misleading or deceptive may be restrained, the legislature cannot choose the most drastic remedy of complete suppression of the use of certain words in order to prevent public confusion and deception. Id. at 1026-1027, citing Beneficial Corporation v. F.T.C., 542 F.2d 611 (3d Cir. 1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed. 2d 377 (1977). The court said:

> As there has been no showing by the state that a compelling need underlies the enactment of § 14(e), that provision violates Comprehensive's first amendment free speech rights. (Emphasis added.)

In reaching this conclusion, the Maryland court did not have the benefit of the standards laid down in Central Hudson, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). In that case, the United States Supreme Court stated that the governmental interest must be "substantial." The Supreme Court did not require a showing by the state of a "compelling need" in order to regulate in the commercial speech area.

The case of Fulcher v. Texas State Board of Public Accountancy, 571 S.W.2d 366 (Tex. Civ. App. 1978), upheld the constitutionality of the Texas statute. The court addressed the issue of whether Fulcher, an unlicensed person, had violated the Texas statutes by representing himself as providing "accounting" services on the door to his office and in announcements sent concerning his new office; on his card, letterhead and envelopes; and on his tax form covers. The Texas statutes required both a license for the person and the registration of his or her office(s) to practice public accounting and only a person who did both, "may hold himself out to the public as an

'accountant' or 'auditor' or combination of said terms." Id. at 369.

The Texas court said that the statutes evidenced a legislative intent to prevent any unlicensed person from holding himself out as having expert knowledge and that Fulcher did so hold himself out. It said such conduct was misleading and remained subject to restraint under Bates v. State Board of Arizona, 433 U.S. 350, 383, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). In accord with the Fulcher decision, although not on constitutional grounds, is People v. Hill, 66 Cal.App.3d 324, 136 Cal. Rptr. 30 (1977).

A Nebraska Attorney General Opinion, No. 339, December 12, 1980, found the Nebraska statute requiring an affirmative disclosure of the fact that an accountant is not licensed to be constitutional. Regarding a total ban of the use of the terms, the opinion said:

> We believe it could be effectively argued that the unrestricted use of the titles "Accountant" or "Auditor" by an unlicensed person could in fact cause confusion which would be detrimental to the public and therefore the state regulation of those terms is rationally related to a legitimate state interest. Since the "speech" at issue here is "commercial," it is subject to "reasonable regulation that serves a legitimate public interest." Bigelow v. Virginia, 421 U.S. 809 at 825-826.

In the professional field of engineering, the restriction of the terms "engineer" or "engineering" in a business or trade name has likewise been upheld. See McWhorter v. State Board of Registration, 359 So.2d 769 (Ala. 1978). A recent American Law Reports annotation on this topic, analogous to ours, said:

> Laws of the type dealt with in this annotation have been challenged on a variety of constitutional grounds, generally without success. It has been argued that these laws, by prohibiting a business from referring to itself by a certain name, violate the participants' freedom of speech; but, while recent decisions of the United States Supreme Court have extended First Amendment protection to so-called "commercial speech," it has been pointed out that the court reaffirmed the validity of laws

prohibiting commercial speech that is false or misleading. 13 A.L.R.4th 676 at 677 (1982).

In summary, the use of the term "accountant" and other restrictions of title found in The Accountant Act directly advance the state's substantial interest in protecting the public from misleading advertising. The unrestricted use of such terms can be deceptive and misleading. We stress, however, that the question before us is not presented in a factual context. We have not been presented with a scenario that makes a case, in the context of the Idaho statute, that the regulation of the unlicensed use of the term "accountant" is not misleading or that it is more extensive than necessary to serve the state's interest in protecting the public. Hence, although it is a close question, we believe the legislature's judgment in restricting this and other terms is constitutional when tested by the standard of review applicable to commercial speech under the first amendment of the United States Constitution and art. I, § 9, of the Idaho Constitution.

The regulation of the use of titles is common throughout title 54 of the Idaho Code which includes the professional and occupational licensing statutes. Without a license, one may not in Idaho call oneself a "social worker," Idaho Code § 54-3214(2); a "medical physician" or "medical doctor," Idaho Code § 54-1804(3); a "dentist," Idaho Code § 54-903; a "nurse," Idaho Code § 54-1401, or an "engineer," Idaho Code § 54-1202 and 54-1212. One must note too that in judging the constitutionality of a statute, a presumption of constitutionality attaches in favor of the statute. Berry v. Koehler, 84 Idaho 170, 177, 369 P.2d 1010 (1962); State v. Hanson, 81 Idaho 403, 410, 342 P.2d 706 (1959).

From the above analysis, we believe that if challenged, title 54, chapter 2, containing § 54-201 et seq., particularly § 54-218, would be found to be constitutional under both the Idaho and the United States Constitutions.

AUTORITIES CONSIDERED:

1. Constitutions:

U.S. Constitution amend, I and XIV, §1
Idaho Constitution art. I, §§ 1, 9, 13

2. Statutes:

Idaho Code § 54-202
Idaho Code § 54-206
Idaho Code § 54-214
Idaho Code § 54-218
Idaho Code § 54-3214(2)
Idaho Code § 54-1804(3)
Idaho Code § 54-903
Idaho Code § 54-1401
Idaho Code § 54-1202
Idaho Code § 54-1212

3. Idaho Cases:

Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976) cert. denied 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 123 (1977)

Montejano v. Rayner, 33 F.Supp. 435 (Dist. Id. (1939)

State v. Kellogg, 98 Idaho 541, 568 P.2d 514 (1977)

State v. Kellogg, 102 Idaho 628, 636 P.2d 750 (1981)

State v. Maxfield, 98 Idaho 356, 564 P.2d 968 (1977)

Bint v. Creative Forest Products, 108 Idaho 116, 697 P.2d 818 (1985)

Berry v. Koehler, 84 Idaho 170, 369 P.2d 1010 (1962)

State v. Hanson, 81 Idaho 403, 342 P.2d 706 (1959)

4. Cases Cited from Other Jurisdictions:

Dent v. West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889)

Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981)

Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934)

Williamson v. Lee Optical, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955)

Central Hudson Gas v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)

Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)

Zauderer v. Office of Disciplinary Counsel, 53 LW 4587 (No. 83-2166, May 28, 1985)

Bolger v. Young Drug Products Corp., 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983)

Metromedia Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981)

Beneficial Corp. v. F.T.C., 542 F.2d 611 (3d Cir. 1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977)

Bates v. State Board of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)

Bigelow v. Virginia, 421 U.S. 809 at 825-826

Comprehensive Accounting Service v. Maryland State Board of Public Accountancy, 284 Md. 474, 397 A.2d 1019 (1979)

Heller v. Abess, 134 Fla. 610, 184 So. 122 (1938)

Texas State Board of Public Accountancy v. Fulcher, 515 S.W.2d 950 (Tex. Civ. App. 1974)

Fulcher v. Texas State Board of Public Accountancy, 571 S.W.2d 366 (Tex. Civ. App. 1978)

People v. Hill, 66 Cal. App.3d 324, 136 Cal. Rptr. 30 (1977)

McWhorter v. State Board of Registration, 359 So.2d 769 (Ala. 1978)

State v. Riedell, 109 Okla. 35, 233 P. 684 (1924)

Frazer v. Shelton, 320 Ill. 253, 150 N.E. 696 (1926)

4. Other Authorities:

Nebraska Attorney General's Opinion, No. 339 (December 12, 1980)

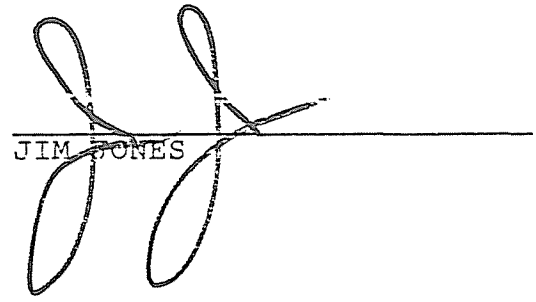
13 American Law Reports 4th 676 (1982)

Digest of State Accountancy Laws and State Board Regulations, 1985

Arizona Office of Auditor General, 1977

DATED this 24th day of January, 1986.

ATTORNEY GENERAL
State of Idaho



JIM JONES

ANALYSIS BY:

JOHN J. McMAHON
Chief Deputy Attorney General

BARBARA ROBERTS
Intern