STATE OF MINNESOTA
IN COURT OF APPEALS
NO. C4-91-904

Investment Company Institute

Appellant,

v.

Michael Hatch, in his capacity
as Commissioner of Commerce,
and the State of Minnesota,

Respondents.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The State's opposition brief confirms that the judgment of the District Court must be reversed. The State agrees that Due Process does not permit license fees assessed against securities sold in Minnesota grossly to exceed the costs of regulation. Brief of Respondents Commissioner of Commerce and the State of Minnesota ("State Brief") at 15. The State also admits that Equal Protection does not permit the imposition of higher license fees upon one subclass of securities than on another subclass unless one is more expensive to regulate than the other. Id. at 15-16. Finally, the State does not dispute that 1(b) imposes a fee upon redeemable securities that grossly exceeds the costs of regulating those securities, and that the fee charged for registration of redeemable securities grossly exceeds the fee charged for registration of non-redeemable securities even though the costs of regulating these two subclasses of securities is the same. In effect, the State agrees that, as a license fee, 1(b) violates both Due Process and Equal Protection.

The State seeks to avoid the impact of these dispositive admissions by asserting that 1(b) actually imposes upon redeemable securities both a license fee and a tax. Id. at 7-11. This assertion has no foundation in reality, as the State's opposition brief again confirms. The State does not contest that the principal draftsman of the Minnesota Securities Act of 1973, S.F. No. 746, of which 1(b) is a part, was the Commissioner of the

Securities and Real Estate Division of the Department of Commerce, Edward J. Driscoll. According to Commissioner Driscoll, the fees imposed by 1(b) were designed to be "revenue neutral," and not to raise revenue in excess of regulatory costs. Affidavit of Edward J. Driscoll, Sept. 25, 1990 ("Driscoll Affidavit") at 2, Appellant's Appendix ("A.A.") 33. The State further does not deny that, from 1976 until the present day, the Commerce Department has regularly treated 1(b) fees as "fixed charges for a service or regulatory function provided to individuals or organizations, which are not provided to the entire general public, and [which] are explicitly or implicitly designed to recover costs -- not to produce income exceeding costs." Minnesota Department of Finance 1988 Fee Report at i, A.A. 88. (Emphasis supplied). In short, the State admits that the agency which drafted 1(b) and which has administered 1(b) for almost 20 years considers the notion that 1(b) was intended to impose a tax upon redeemable securities to be what it plainly is -- pure fiction.

The legislative process through which 1(b) was enacted confirms that the legislature intended 1(b) to be what the Commissioner of Securities drafted 1(b) to accomplish and what the Commerce Department has interpreted 1(b) to do. As the State again does not contest, the bill that became the 1973 Securities Act originated in the Senate, State Brief at 12-13, despite the constitutional requirement that bills for raising revenue must originate in the House of Representatives. The State also admits

that neither the text nor the title of that bill makes any reference to taxation or to raising revenue, id. at 13-14, despite the constitutional requirement that the subject of legislation be stated in its title. And, the State does not deny that the bill that became the 1973 Act never was referred to the tax committees of either the House or the Senate. This undisputed history conclusively confirms that the House and Senate legislators who voted to approve the bill in 1973 intended to enact regulatory legislation containing a revenue-neutral license fee provision. It refutes any assertion that they actually thought that, contrary to every objective indication, they were voting to impose a tax upon Minnesota residents who buy redeemable securities in order to raise revenue for the General Treasury.

Since 1973, the legislature has done nothing to transform 1(b) from a license fee into a tax. In 1981, the legislature enacted a department bill, again drafted by the Commissioner of Securities, that amended certain language in 1(b) to clear up confusion concerning the fees for registration of redeemable securities. The text and title of this bill made no reference to taxation or the raising of revenue, and the bill was never referred to the tax committees of either the Senate or the House. As the District Court found, and as the State now admits, in 1981 "[n]o substantive amendments or changes in registration fees were made." Slip opinion, Investment Company Institute v. Hatch, No. C8-87-494109 ("Slip Op.") at 6, A.A. 70; see State Brief at 10.

Since 1981, the legislature has made no changes to 1(b) at all. In short, the fees imposed by 1(b) remain today what they were when enacted in 1973 and what they have been all along - license fees designed to recover regulatory costs.

At base, the State's contention that 1(b) imposes a tax upon redeemable securities ignores the constitutional scheme. Under our system of government, legislation can be enacted only through bicameral legislative consideration and approval and through presentment to the Chief Executive for signature or veto. The requirement of bicameral action is designed to ensure that legislation is not enacted unless and until there has been an "opportunity for full study and debate in separate settings." INS v. Chadha, 462 U.S. 919, 951 (1983). The title requirement of the Minnesota Constitution in turn is designed to ensure that this bicameral setting "secure[s] to every distinct measure of legislation a separate consideration and decision, dependent solely upon its individual merits * * *." Wass v. Anderson, 312 Minn. 394, 398, 252 N.W.2d 131, 135 (1977) (quoting State v. Cassidy, 22 Minn. 312, 322 (1875)). The decision to provide the Governor with a limited power to nullify proposed legislation is designed to act as a check on "whatever propensity a particular [session of the legislature] might have to enact oppressive, improvident, or ill-considered measures." Chadha, 462 U.S. at 947-48.

The only legislation that has passed through this "single, finely wrought and exhaustively considered, procedure," Id. at 951, is legislation designed to impose a pure license fee. As a result, neither the legislature nor the Governor has even considered funding the general operations of the State by imposing a tax upon their constituents who invest in redeemable securities. Yet, under our system, the extraordinary act of imposing taxes can only happen through the conscious and politically responsible act of the bodies to which this awesome power is committed.

Contrary to the State's contention, it is of no moment that, because 1(b) has been functioning in such a spectacularly unconstitutional fashion in recent years, the effect of enforcing Due Process and Equal Protection in this case may be to impede the State from collecting projected 1991 revenue for the General Treasury. State Brief at 2. The fact that 1(b) has become a runaway license fee that generates significant revenue grants no license to transform 1(b) into a tax. Courts may not "wish a new interpretation into a law or give it new application" merely to accommodate changed circumstances or to suit fiscal convenience. Tyson v. United States, 285 F.2d 19, 22 (10th Cir. 1960).

1(b) is a runaway license fee that violates Due Process and Equal Protection. It should, therefore, be declared null and void.

ARGUMENT

I. THE LEGISLATURE DID NOT INTEND 1(b) TO IMPOSE A TAX

A. The Issue

The State asserts that it is irrelevant whether 1(b) was enacted pursuant to the police power or the taxing power so long as the State possesses both powers. State Brief at 6-7. This is simply wrong. The Minnesota Supreme Court has explicitly held that in determining the legality of a fee it is "vital to determine which power [was] exercised in making the levy." Ramaley v. City of St. Paul, 226 Minn. 406, 408, 33 N.W.2d 19, 21 (1948).

Contrary to the State's contention that the limitation applies only where the authority imposing the fee lacks taxing power or where there is a statutory limit on license fees, State Brief at 6-7, this "vital" inquiry is required even where the authority possesses both the police power and the taxing power and "[r]egardless of any fixed ceiling for license fees" established by statute. Ramaley, 33 N.W.2d at 21. In these circumstances, the inquiry remains essential for at least two reasons. First, the Constitutions of both Minnesota and the United States impose special restrictions upon the legislature's exercise of the taxing power, such as the fundamental requirement that tax legislation originate in the House of Representatives. See pp. 7-9, infra. Second, the nature of the power which the legislature exercised in enacting statutory language is critical to determining what the

legislature intended the words it used to mean. See National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 341-344 (1974).

In short, the issue in this case is not whether the State has taxing power (which it of course does). Nor is the question whether the State, subject to the constraints imposed by the Constitutions of Minnesota and the United States, could use both its police power and its taxing power to establish a hybrid license fee/tax (which it of course could). The issue is whether the legislature, in enacting 1(b), merely exercised the police power to establish a pure license fee or whether it also exercised the taxing power to create a hybrid license fee/tax.

B. The 1973 Act

1. Origination Clause

The lynchpin of the State's case both in this Court and in the Court below has been that 1(b) is not subject to the limitations which Due Process imposes on license fees because 1(b) is not merely a license fee but also a tax that "raises revenue under [the State's] taxing power." State Brief at 6. However, if the legislature had exercised the taxing power in enacting 1(b), Minn. Const. Art. IV, § 18 would have required that the bill containing 1(b) originate in the House of Representatives. Indeed, the State fails to cite a single case in which a statute enacted pursuant to the taxing power was held to fall outside the scope of the Origination Clause. The fact that the 1973 bill

containing 1(b) originated in the Senate demonstrates conclusively that the 1973 legislature did not intend to exercise the taxing power or to impose a tax on redeemable securities.

In attempting to avoid the impact of the foregoing, the State makes a concession that is fatal to its case. The State asserts that the 1973 Act was not subject to the Origination Clause because 1(b) was not intended to "levy taxes in the strict sense of the word" but to accomplish "other purposes." State Brief at 12. As a result, the State concludes, that even though 1(b) "may incidentally create revenue," it does not bring the Origination Clause into play. Id.

ICI agrees. The "other purpose" to which the State refers is the "purpose of Subd. 1(b) * * * to regulate securities." Id. Pursuant to the police power, the State indeed may regulate securities and impose a license fee designed to recover its regulatory costs. That license fee need not be calibrated to recover precisely the cost of regulation and not a penny more. Consistent with Due Process, a license fee may generate "incidental revenue," Crescent Oil Co. v. City of Minneapolis, 177 Minn. 539, 225 N.W.2d 904, 905 (1929), meaning revenue that is not in "substantial excess" of regulatory costs. See United States v. Munoz-Flores, ___ U.S. ___, 110 S. Ct. 1964, 1973 (1990).

But 1(b) is not generating "incidental" revenue. It is generating revenue that grossly and disproportionately exceeds the

costs of regulation. As a result, since 1(b) is not a tax "in the strict sense of the word" -- a revenue measure enacted pursuant to the taxing power and in accordance with the Origination Clause -- 1(b) is, as ICI contends, a runaway license fee that violates Due Process.

2. Title

The title of the 1973 Act, "An act relating to securities; repealing Minnesota Statutes 1971, Chapter 80," gave the legislators no hint that anything in the bill was intended to impose a tax. Because of the constitutional requirement that the subject of bills must be expressed in their title, if the 1973 Act had been intended to impose a tax for the purpose of raising general revenues, as well as a license fee to cover the costs of regulating securities, the legislature would have given some notice of this intent in the Act's title. In fact, the Minnesota legislature specifically mentioned taxes in 58 bills enacted at the 1973 session. Indeed, the Act immediately following the Securities Act in the Session Laws of the State of Minnesota 1973 refers to taxation in its title.[1/]

1/ See Laws of Minnesota for 1973 at 1021. Appellant's Supplemental Appendix ("A.S.A") 1. ("An act relating to taxation; sales and use tax; amending Minnesota Statutes 1971, Section 297A.25, Subdivision 1"). The same is true in 1981. See Laws of Minnesota for 1981 at 447. A.A. 39. ("An act relating to local government; regulating the tax levy of the joint recreation and park board of the City of Hibbing and Independent School District 701; amending Laws 1971, Chapter 573, Section 2").

In order to justify the absence of any reference to taxes in the title of the 1973 Act, the State asserts that the reference to "securities" in the title is sufficient to indicate that the 1973 Act "encompassed the regulation of securities through various means, including both fee and revenue raising methods." State Brief at 14. Taxation, however, is not a means of regulating securities. Cf. United States v. Norton, 91 U.S. 566, 567-68 (1876). It is, in the words of the State, a means of raising general revenues "to be expended for a public purpose" and "spent in the public interest." State Brief at 6. Accord United States v. La Franca, 282 U.S. 568, 572 (1931); United States v. Maryland, 471 F. Supp. 1030, 1036 (D. Md. 1979).[2/]

3. Enacted Language

As ICI has demonstrated, the Anglo-American tradition of government, as well as the Constitutions of Minnesota and the United States, consider acts of taxation to constitute extraordinary exercises of legislative power. See Appellant's

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2/ The State faults ICI for failing to complain about the lack of any mention of fees in the bill titles. State Brief at p. 14, n.8. Fees are, however, an integral part of the regulatory scheme. General revenue measures are not. The State also mischaracterizes ICI's position when it attacks ICI for raising for the first time on an appeal the issue of whether 1(b) violated Art. IV, § 17 of the Minnesota Constitution. Id. at 13 and n.6. ICI does not claim, as the State asserts, that "the enactment of § 80A.28 violates the single subject provision in the Minnesota Constitution." Id. at 13. Rather, ICI relies upon Art. IV, § 17 of the Minnesota Constitution to support its contention that 1(b) was not intended to be a tax measure.

Brief, Investment Company Institute v. Hatch, No. C4-91-904 ("ICI Brief") at 10-13. They "confer upon taxing officers authority to take from the subject his property." Dumas v. Bryan, 207 P. 720, 722 (Idaho 1922). As a result, courts will not construe a statute as imposing a tax unless the statute does so clearly, expressly, and unambiguously. 82 C.J.S. Statutes § 396, at 956. A "[t]ax cannot be imposed without clear and express language for that purpose." National Amusement Co. v. Wisconsin Dep't of Tax'n, 163 N.W.2d 625, 628 (Wis. 1969). Any doubt or uncertainty as to the imposition of the tax must be resolved in favor of the taxpayer. "[T]he express purpose [to tax] must be so clear that no reasonable mind should conclude the intent was otherwise." Cook v. Southwest Hotels, Inc., 209 S.W.2d 469, 471 (1948).

1(b) describes its exactions as a "fee." A fee is "a charge fixed by law for services of public officers or for use of a privilege under control of government." Black's Law Dictionary 533 (5th ed. 1979). Accord National Cable Television Ass'n, Inc., 415 U.S. at 340-41. 1(b) was enacted in 1973 as part of the Securities Act. As ICI demonstrated in its opening brief, see ICI Brief at 14-15, the entire Securities Act is an "exercise of the police power." State v. Gopher Tire & Rubber Co., 146 Minn. 52, 55, 177 N.W. 937, 938 (1920); Accord Boyum v. Massachusetts Investors Trust, 215 Minn. 485, 487-88, 10 N.W.2d 379, 381 (1943); In the Matter of Registration of DiVall Insured Income Properties 2 Ltd. Partnership, 445 N.W.2d 856, 859 (Minn. App. 1989); Caucus

Distributors, Inc. v. Commissioner of Commerce, 422 N.W.2d 264, 268 (Minn. App. 1988) cert. denied, 488 U.S. 1006 (1989). A "fee" enacted as part of a regulatory statute is treated as a regulatory rather than a revenue-raising measure. Beckendorff v. Harris-Galveston Coastal Subsidence Dist., 558 S.W.2d 75, 80 (Tex. Civ. App. 1977), aff'd, 563 S.W.2d 239 (Tex. 1978). The State offers no refutation.

The Securities Act establishes numerous other "fees."[3/] The State does not contend that any of these other "fees" are hybrid license fees/taxes. Indeed, the State explicitly admits that in 1973 the legislature intended the registration "fee" for non-redeemable securities established by Minn. Stat. 80A.28, Subd. 1(a) to be merely a police power license fee not a hybrid license fee/tax. See Brief at 8. When the same word is used more than once in the same section, there is a strong presumption that it was used in the same sense. See, e.g., Commissioner v. Estate of Ridgway, 291 F.2d 257 (3d Cir. 1961). If the 1(a) "fee" for non-redeemable securities is a pure police power license fee, so is the 1(b) "fee" for redeemable securities.

3/ Licenses of broker-dealers, agents, and investment advisers (Minn. Stat. 80A.28, Subd. 2); amendments to existing licenses or registrations (Id., Subd. 3); filing of annual reports (Id., Subd. 4); exceptions (Id., Subd. 5); recission offers (Id., Subd. 6); written opinions (Id., Subd. 7); excess sales (Id., Subd. 7a).

The State's only response to these many indications of legislative intent to make 1(b) a pure license fee is that absence of a cap on the 1(b) fee suggests that the legislature intended to collect amounts greatly in excess of costs of regulation as a general revenue measure. This argument, however, reads the act of the legislature in 1973 against a factual background that did not develop until the mid-1980s. In 1973, mutual fund sales were still far too small for anyone to even consider that uncapped fees on their shares might lead to revenues significantly in excess of costs of registration. See ICI Brief at 7-8. As the draftsman of the 1973 securities legislation has testified, the 1(b) fee structure was designed simply to recover costs and to be "revenue neutral." See Driscoll Affidavit at 2, A.A. 33.

C. 1981 Clarification Of The Language

1. Bill Enacted By The Legislature

In its opening brief, ICI demonstrated that, in 1981, the two houses of the Minnesota legislature approved and presented to the Governor for his signature amendments to the registration fee provisions which were designed merely to clarify the existing language of the statute and which were not intended to alter its purpose or meaning. See ICI Brief at 17-19. The State now agrees that "the 1981 amendment to Subd. 1(b) does not substantially change the statute." State Brief at 10. This concession itself disposes of any contention that, while the 1973 Act was a police power license fee, the 1981 amendment to 1(b) somehow transformed 1(b) into a hybrid license fee/tax.

The legislative process through which the Minnesota Security Act Amendments of 1981, H.F. No. 634, were enacted confirms that the legislature did not intend to change the statute or to transform 1(b) into a hybrid license fee/tax. Neither the text nor the title of the 1981 bill makes any reference to taxation or to raising revenue. The legislature did not it send to the Tax Committees. See First Engrossment H.F. No. 634, A.S.A. 2. Nor did the legislature give it anything approaching the attention one would expect to be given to a bill imposing a tax. There was no debate in either house, and the bill was passed unanimously by both houses. See Journal of the House, 1981, pp. 950-51; Journal of the Senate, 1981, pp. 1767-68, A.S.A. 3-6. In short, following the enactment of the 1981 legislation, 1(b) was no different than 1(b) as drafted by the Securities Commissioner in 1973, as enacted by the legislature in 1973, and as interpreted by the Commerce Department since 1976 -- it remained a police power license fee.

2. 1981 Subcommittee Sessions

Unable to identify anything in the 1981 legislation that transformed 1(b) from a pure license fee into a hybrid license fee/tax, the State seeks refuge in hearings conducted by the House Subcommittee on Economic Development on the 1981 amendments. In these hearings, Securities Commissioner Brophy presented and testified concerning the "department bill" which ultimately became the 1981 legislation. See March 19 Transcript at 1, A.A. 40.

Commissioner Brophy related that the bill contained amendments to the Securities Act. She explained that the "purpose" of the Securities Act, of which 1(b) is a part, "in its entirety is a consumer protection statute." Id. Concerning the bill's amendments to 1(b), Commissioner Brophy testified that "[t]his language is clarifying the existing fees -- it does not change the fees but simply straightens the language in a way so that it is more clear what fees are actually being charged." March 19 Transcript at 9, A.A. 48; See March 24 Transcript at 3, A.A. 53. Both Commissioner Brophy and Subcommittee members expressed the view that the Department Bill was "noncontroversial," and that "there has been no known opposition to it." March 19 Transcript at 2, A.A. 41.

Following Commissioner Brophy's presentation, the Subcommittee voted to approve the Department Bill. March 24 Transcript at 14, A.A. 64. In so doing, the Subcommittee voted to reject certain amendments proposed by Representative Osthoff to the Department Bill which would have changed the substance of its fee provisions. See ICI Brief at 20, n.5. During discussions of these proposed amendments, Commissioner Brophy noted that "there is a question in very unusual circumstances as to whether our fees from redeemable securities have become too high" and related that 1(b) fees were expected to generate revenues in excess of costs of nearly $1 million in 1981. See March 24 Transcript at 10 and 5, A.A. 60 and 55.

According to the State, Commissioner Brophy's testimony and the Subcommittee's approval of the Department Bill demonstrate that, in enacting the 1981 amendments, "the legislature" as a whole intended to exercise the taxing power and to transform 1(b) from a pure license fee into a hybrid license fee/tax. State Brief at 9-10. This argument, however, simply cannot be squared with Commissioner Brophy's testimony or with the actions of the Subcommittee, much less with those of the entire legislature.[4/]

The record is devoid of evidence that Commissioner Brophy told anyone that the amendments to 1(b) contained in the Department Bill imposed a tax or called for the exercise of the taxing power. To the contrary, the record of the hearings reflects that she told the Subcommittee that the amendments involved solely non-substantive changes to "a consumer protection statute." See p. 15, supra.

4/ Both houses of the Minnesota legislature have adopted rules expressly stating that the recordings of committee meetings should not be used to establish legislative intent. Permanent Rules of the House, Rule 6.6(g) and Permanent Rules of the Senate, Rule 65. Although the Supreme Court of Minnesota has interpreted these rules to be expressions of legislative desire rather than legally binding prohibitions, it has warned that "statements made in committee discussion * * * are to be treated with caution." In re Handle with Care, Inc. v. Department of Human Services, 406 N.W.2d 518, 522 (Minn. 1987). Accord 2A Singer, Sutherland Statutory Construction, § 48.13, at 329, (4th ed. 1984) ("[I]t is impossible to determine with certainty what construction was put upon an act by the members of the legislative body that passed it by resorting to the speeches of the individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other"). As demonstrated below, the State's argument in this case demonstrates the wisdom of the Legislature's rules and of the Minnesota Supreme Court's admonition.

In addition, Subcommittee members were told nothing from which they could infer that they supposedly were being asked to exercise the taxing power or to impose a tax in making these non-substantive changes. For example, Commissioner Brophy never told Subcommittee members that 1(b) was operating regularly and routinely to impose excessive fees upon individual registrations of redeemable securities. To the contrary, Commissioner Brophy said that the "very unusual circumstances" that raised a question "as to whether our fees from redeemable securities have become too high" were "few and far between." March 24 Transcript at 10, A.A. 60.

Commissioner Brophy also did not inform the Subcommittee that 1(b) was operating regularly and routinely to generate any revenue in excess of costs. Indeed, the record is devoid of evidence that 1(b) ever generated revenue in excess of costs in any year prior to 1981.[5/]

Commissioner Brophy also did not tell Subcommittee members that the Securities Department expected the projected 1981 discrepancy between 1(b) revenues and expenditures to continue or increase. To the contrary, she expressly told the Subcommittee

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5/ For example, in 1980, investment companies and unit investment trusts sold only $519 million worth of redeemable securities in Minnesota. Minnesota Commerce Department 1980 Annual Report at 11, A.S.A. 8. At a rate of one-twentieth of one percent, these sales would give rise to fees of approximately $259,500. The 1980 budget of the Securities Division was $916,000. Id.

members that redeemable securities were "unusually popular ones at the present time." March 24 Transcript at 5, A.A. 55.[6/]

Finally, Commissioner Brophy did not tell Subcommittee members that the Securities or Commerce Departments considered the unusual projected 1981 surplus to involve anything more than the incidental revenue that police power license fees permissibly may generate. She most certainly did not tell the Subcommittee, as the State now essentially contends, that the projected 1981 surplus destroyed the integrity of 1(b) as a license fee so that the State was obliged either to lower the fees immediately or tranform 1(b) into a hybrid license fee/tax. Indeed, given the situation surrounding the 1981 surplus, nothing suggested that conclusion. See State v. Bartles Oil Co., 132 Minn. 138, 142-143, 155 N.W. 1035, 1037 (1916).

In short, the most that can be said of these hearings is that the Subcommittee approved, at the Department's request, a bill containing nonsubstantive "noncontroversial amendments" to an existing "consumer protection statute." March 19 Transcript at 2, A.A. 41. It simply strains the record to the breaking point to contend that the Subcommittee's actions somehow reflect a

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6/ As ICI demonstrated in the court below, in 1981 the growth of redeemable securities sales was of very recent origin. ICI Brief 7-8. Just three years earlier, nationwide sales of money market mutual funds were only $30 billion. In 1980, however, they jumped to $232 billion and in 1981 they skyrocketed to $452 billion. 1982 Mutual Fund Fact Book at 74.

conscious and affirmative determination to jettison 1(b) as a pure license fee and to exercise the taxing power in order to transform 1(b) into a vehicle for imposing taxes upon Minnesota residents who buy redeemable securities. But, even if it could somehow be inferred that this is what the Subcommittee intended to do, the State has identified no basis for inferring that this is what the legislature as a whole had in mind.[7/]

In truth, the only actions taken by the legislature as a whole in 1981 establish just the opposite. What the legislature as a whole actually did was to enact a Department Bill which merely clarified the 1(b) fee schedule established in the 1973 legislation and which made "no substantive changes or amendments" to the statute. Slip op. at 6, A.A. 70. "'It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed.'" Muniz v. Hoffman, 422 U.S. 454, 470 (1975) (citation omitted). The legislature expressed no such intent here.

7/ In this case, as in Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978), there is no indication that any other body in either the House or the Senate was aware of "what transpired" in the Subcommittee. Nor may such awareness be presumed. To the contrary, it is well-established that "[i]t is improper to presume general congressional acquiescence" in the statements, actions or interpretations of a single committee of a single house. SEC v. Sloan, 436 U.S. 103, 121 (1978). Simply stated, the "[Sub]committee's purposes cannot be imputed to [the legislature] as a whole * * *." International Brotherhood of Elec. Workers, Local Union No. 474 v. N.L.R.B., 814 F.2d 697, 718 (D.C. Cir. 1987).

D. 1985 Failure To Act On Amendments

The next time any body of the legislature turned to the subject of securities registration fees was in 1985. By that time, it was clear that a permanent and gross imbalance existed between the fees collected under 1(b) and the costs of regulating redeemable securities. Total fees being received for registration of redeemable securities had risen to $2,700,000 a year. Transcript of Meeting of Financial Institution and Insurance Committee, March 20, 1985 ("March 20 Transcript") at 3, A.A. 74. Under these circumstances, Representative McKasy proposed a bill which would have increased the percentage rate for registration of redeemable securities from 1/20th of 1 percent to 1/15th of 1 percent and would have capped the maximum fee at $1,500. Id.

Representative McKasy stated that the $2,700,000 of registration fees vastly exceeded the cost of regulation, id. at 2, A.A. 73, and reminded the Committee that the 1(b) fee "was never intended to be revenue raising" but rather was intended "to cover administrative costs and expenses." Id. at 3, A.A. 74. Representative Knickerbocker confirmed that "the fees are only supposed to cover the costs of service * * *." He stated that "if they are using this as a revenue raising measure, the department is in error." Id. at 5, A.A. 76. Because it was clear by 1985 that there was a serious and permanent imbalance between 1(b) fees and costs so that revenues being generated pursuant to 1(b) could

no longer be considered incidental, both the Commissioner of Finance, Gordon Donhowe, and the Commissioner of Commerce, Michael Hatch, also supported capping 1(b) fees at $1,500. See Donhowe to McKasy, April 24, 1985, A.A. 113; Hatch to Solon and McKasy, April 22, 1985, A.A. 114. Their letters supporting the proposal proceeded from the premise that 1(b) imposed a license fee rather than a tax and that, therefore, the fee should be capped so as not to be grossly out of line with the costs of regulation. A bill capping 1(b) fees at $1,500 was unanimously approved by the Committee. March 20 Transcript at 7, A.A. 78. A similar bill also was approved by the Senate Economic Development and Commerce Committee. March 21 and March 26 Transcript at 18, Respondent's Appendix at 30.

For reasons undisclosed in the record, however, neither bill ever made it to the floor of either house. The State seizes upon this fact to urge that the 1985 session of the legislature actually approved of 1(b) as a revenue measure. State Brief at 10-11. But, the only action taken by any part of the legislature -- committee approval of the amendment -- shows that those members of the legislature who did act viewed 1(b) as a license fee provision which should be capped to ensure that fees did not greatly exceed costs.

Moreover, the failure of the legislature as a whole to consider or act on the committee's recommendation for unknown reasons cannot be considered legislative approval of a hybrid

license fee/tax. The legislature acts only by approving legislation and presenting it to the Governor. No inference is to be drawn from its failure to act. As the Supreme Court has taught, "[t]o explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities." Helvering v. Hallock, 309 U.S. 106, 119-20 (1940). "The search for significance in the silence of Congress is too often the pursuit of a mirage." Scripps-Howard Radio v. FCC, 316 U.S. 4, 12 (1942). See, Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988); American Trucking Assocs., Inc. v. Atchison, T. & S. F. R. Co., 387 U.S. 397, 416-18 (1967); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 384, n.11; Community Hospital Linen Services, Inc. v. Commissioner of Taxation, 309 Minn. 447, 245 N.W.2d 190, 196 (1976).

II. THIS COURT SHOULD DEFER TO THE LONG-STANDING ADMINISTRATIVE INTERPRETATION OF 1(b)

In interpreting statutes, courts give "great weight" to the interpretation of the agency charged with administering the statute. See, e.g., Krumm v. R. A. Nadeau Co., 276 N.W. 2d 641, 644 (Minn. 1979); Knopp v. Gutterman, 102 N.W.2d 689, 695 (Minn. 1960). Even greater weight is attributed to agency interpretations which are long standing. See, e.g., Minnesota Power & Light Co. v. Personal Property Tax, Taxing Dist., 289 Minn. 64, 70, 182 N.W.2d 685, 689 (1970); United States v. American Trucking Ass'n, 310 U.S. 534, 549 (1940) (Deference to

agency interpretation heightened where "interpretations involved contemporaneous construction of a statute by men charged with the responsibility of setting its machinery in motion"). Special deference is also owed when the agency is not only charged with administering the statute, but participated in developing the provision. See United States v. Vogel Fertilizer Co., 455 U.S. 16, 31 (1982); Miller v. Youakim, 440 U.S. 125, 144 (1979); Certified Color Mfrs. Ass'n. v. Mathews, 543 F.2d 284, 294 (D.C. Cir. 1976).

In this case, there is an unbroken interpretation of 1(b) as a pure license fee provision by both the Commerce Department and the Commissioner of Securities from 1973 to the present day. Indeed, the Commerce Department, notwithstanding the pendency of this litigation, has continued to identify 1(b) fees as pure license fees -- "fixed charges for a service or regulatory function provided to individuals or organizations, which are not provided to the entire general public, and [which] are explicitly and implicitly designed to cover costs -- not to produce income exceeding costs." See 1988 Fee Report at i, 138, A.A. 88, 91.[8/] This long-standing administrative interpretation of 1(b) exposes the State's contention that 1(b) imposes a hybrid license

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8/ Although the Fee Reports are published by the Department of Finance, the Commerce Department is responsible for identifying those fees collected by the Commerce Department that should be included in the Report because they meet the definition given above. See 1988 Fee Report at i, A.A. 88.

fee/tax for what it is -- a fiction developed solely by litigation counsel in an effort to defend the constitutionality of 1(b).[9/]

9/ The State raises several procedural arguments that warrant only brief mention. Despite the State's objections, see State Brief at 2, n.2, this Court may properly take judicial notice of the background facts ICI has quoted in its opening brief and in this brief from the Mutual Fund Fact Books and from the Minnesota Commerce Department Reports. Those facts fall into the category of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Minnesota Rules of Evidence 201(b)(2). Courts regularly take judicial notice of facts similar to those ICI has brought to this Court's attention. See, e.g., Central-Penn Nat. Bank of Philadelphia v. Portner, 201 F.2d 607 (3rd Cir. 1952) (trading price of publicly traded stock); Transorient Navigators Co., S.A. v. M/S Southwind, 788 F.2d 288 (5th Cir. 1986) (prevailing interest rates); Mainline Inv. Corp. v. Gaines, 407 F. Supp. 423 (N.D. Tex. 1976) (economic events taking place in the oil industry). The Court also may properly take judicial notice of the legislative history materials cited by ICI. See Orr v. Sutton, 119 Minn. 193, 137 N.W. 973, 975 (1912). The 1989 Committee comments on the Minnesota Rules of Evidence specifically note that "the Committee was in agreement with the promulgators of the Federal Rules of Evidence in not limiting judicial notice of legislative facts."

The State's challenge to Mr. Driscoll's Affidavit is equally unfounded. The cases cited by the State object to statements made by individual members of the legislature about what the legislature as a whole intended to do because the statements are incapable of verification. Those cases are inapposite here. Mr. Driscoll's affidavit does not purport to testify about the intent of members of the legislature. Rather, it relates that, as principal draftsman of the 1973 Act, Mr. Driscoll designed 1(b) to be revenue neutral and only to recover regulatory costs. In addition, Mr. Driscoll's affidavit is not only capable of verification but is actually confirmed by the longstanding interpretation of the Securities and Commerce Departments that 1(b) imposes a pure license fee.

CONCLUSION

For the reasons stated above, the judgment of the District Court should be reversed and 1(b) should be declared null and void.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that two copies of the foregoing Appellant's Reply Brief, together with two copies of Appellant's Supplemental Appendix and Its Index were served this 29th day of July 1991 on Deborah J. Kohler, Special Assistant Attorney General, by placing them in the United States mails in a wrapper addressed to her at 110 Bremer Tower, Seventh Place & Minnesota Street, St. Paul, Minnesota 55101 with first-class Express Mail postage affixed.

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