

Uniform Fraudulent Transfer Act
“Insider” and Related Definitions (“Affiliate,” “Relative”)
Blacklined to Show Significant Differences from Bankruptcy Code

This blackline was prepared manually, in order to omit stylistic differences and show only differences that may have substantive import. In this blackline the UFTA text is the original and the Bankruptcy Code text is shown as changes to that original. (Of course the Bankruptcy Code was actually drafted first.) Footnotes are editorial comments by Ken Kettering.

SECTION 1. DEFINITIONS. As used in this [Act]:

(1) “Affiliate” means:

(i) a person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities,

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact¹ exercised the power to vote;

(ii) a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities,

(A) as a fiduciary or agent without sole discretionary² power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

~~(iii) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or~~

~~(iv) a person who operates the debtor’s business under a lease or other agreement or controls substantially all of the debtor’s assets.~~

(iii) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(iv) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.³

¹ Section 1(1)(i)(B). Observe that in the UFTA text, the words “in fact” do not appear in 1(1)(i)(B), but they do appear in the parallel provision 1(1)(ii)(B). There is no reason for the difference, and it must have been a typo. It is purely a matter of style which way the difference is conformed. I recommend adding “in fact” in both provisions, as per the Bankruptcy Code. Ohio and Oregon made the conforming change in opposite ways.

² Section 1(1)(ii)(A). Observe that in the UFTA text the word “discretionary” does not appear in 1(ii)(A) but does appear in the parallel provision 1(1)(i)(A). Again, this must be a typo. I recommend using “discretionary” in both provisions, as per the Bankruptcy Code. Hawaii, Ohio, Oregon and Wisconsin do likewise.

³ Sections 1(1)(iii), 1(1) (iv). The differences between the two texts, though considerable, appear to be stylistic in motivation. The UFTA text should be retained..

(7) “Insider” includes:

- (i) if the debtor is an individual,
 - (A) a relative of the debtor or of a general partner of the debtor;
 - (B) a partnership in which the debtor is a general partner;
 - (C) a general partner ~~in a partnership described in clause (B)~~ of the debtor;

or⁴

- (D) a corporation of which the debtor is a director, officer, or person in

control;

- (ii) if the debtor is a corporation,
 - (A) a director of the debtor;
 - (B) an officer of the debtor;
 - (C) a person in control of the debtor;
 - (D) a partnership in which the debtor is a general partner;
 - (E) a general partner ~~in a partnership described in clause (D)~~; of the

debtor; or

- (F) a relative of a general partner, director, officer, or person in control of

the debtor;

- (iii) if the debtor is a partnership,
 - (A) a general partner in the debtor;
 - (B) a relative of a general partner in, a general partner of, or a person in

control of the debtor;

- (C) another partnership in which the debtor is a general partner;
- (D) a general partner ~~in a partnership described in clause (C)~~; of the

debtor; or

- (E) a person in control of the debtor;

[Bankruptcy Code inserts additional paragraph applicable “if the debtor is a municipality.” There is no need to add that to the UFTA definition.]

- (iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and
- (v) a managing agent of the debtor.

* * *

(11) “Relative” means an individual related by affinity or consanguinity within the third degree as determined by the common law, ~~a spouse, or an individual related to a spouse within the third degree as so determined, and includes~~ or an individual in an a step or adoptive relationship within the third degree.⁵

[End]

⁴ Sections 1(7)(i)(C), 1(7)(ii)(E), 1(7)(iii)(D). The Official Comment explains why the UFTA drafters changed the language of the Bankruptcy Code definition in these provisions. The UFTA text should be retained.

⁵ Section 1(11). The Official Comment explains that the drafters of the UFTA deleted the Bankruptcy Code’s reference to “affinity” and replaced it with the reference to “a spouse, or an individual related to a spouse, [etc.]” because of doubt whether the common law actually defines “affinity within the third degree.” Fine. The Bankruptcy Code’s reference to “step” relationships as well as “adoptive” relationships does seem substantive, but the UFTA text seems to me adequate without the inclusion of “step” relationships. As a result, no change so the UFTA language is desirable.

1 **Uniform Fraudulent Transfer Act (Clean 1984 Text)**
2 **“Insider” and Related Definitions (“Affiliate”, “Relative”); “Corporation”, “Partnership”**

3
4 **SECTION 1. DEFINITIONS.** As used in this [Act]:

5 (1) “Affiliate” means:

6 (i) a person who directly or indirectly owns, controls, or holds with power to vote,
7 20 percent or more of the outstanding voting securities of the debtor, other than a person who
8 holds the securities,

9 (A) as a fiduciary or agent without sole discretionary power to vote the
10 securities; or

11 (B) solely to secure a debt, if the person has not exercised the power to
12 vote;

13 (ii) a corporation 20 percent or more of whose outstanding voting securities are
14 directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person
15 who directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the
16 outstanding voting securities of the debtor, other than a person who holds the securities,

17 (A) as a fiduciary or agent without sole power to vote the securities; or

18 (B) solely to secure a debt, if the person has not in fact exercised the
19 power to vote;

20 (iii) a person whose business is operated by the debtor under a lease or other
21 agreement, or a person substantially all of whose assets are controlled by the debtor; or

22 (iv) a person who operates the debtor’s business under a lease or other agreement
23 or controls substantially all of the debtor’s assets.

24 * * *

25 (7) “Insider” includes:

- 1 (i) if the debtor is an individual,
- 2 (A) a relative of the debtor or of a general partner of the debtor;
- 3 (B) a partnership in which the debtor is a general partner;
- 4 (C) a general partner in a partnership described in clause (B); or
- 5 (D) a corporation of which the debtor is a director, officer, or person in
- 6 control;
- 7 (ii) if the debtor is a corporation,
- 8 (A) a director of the debtor;
- 9 (B) an officer of the debtor;
- 10 (C) a person in control of the debtor;
- 11 (D) a partnership in which the debtor is a general partner;
- 12 (E) a general partner in a partnership described in clause (D); or
- 13 (F) a relative of a general partner, director, officer, or person in control of
- 14 the debtor;
- 15 (iii) if the debtor is a partnership,
- 16 (A) a general partner in the debtor;
- 17 (B) a relative of a general partner in, a general partner of, or a person in
- 18 control of the debtor;
- 19 (C) another partnership in which the debtor is a general partner;
- 20 (D) a general partner in a partnership described in clause (C); or
- 21 (E) a person in control of the debtor;
- 22 (iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and
- 23 (v) a managing agent of the debtor.

1 * * *

2 (11) “Relative” means an individual related by consanguinity within the third degree as
3 determined by the common law, a spouse, or an individual related to a spouse within the third
4 degree as so determined, and includes an individual in an adoptive relationship within the third
5 degree.

6

7 **“Corporation”; “Partnership”**

8 *Note: The UFTA does not define “corporation” or “partnership”.*

9

10 **Official Comments to definitions of “Affiliate,” “Insider” and “Relative” (Blacklined per**
11 **Annual Meeting Draft)**

12

13 (1) The definition of “affiliate” is derived from Bankruptcy Code § 101(2) (1984). ~~of the~~
14 ~~Bankruptcy Code.~~

15

16 ~~(7)~~ (8) The definition of “insider” is derived from Bankruptcy Code § 101(28) (1984).
17 ~~of the Bankruptcy Code.~~ The definition has been restricted in clauses (i)(C), (ii)(E), and (iii)(D)
18 to make clear that a partner is not an insider of an individual, corporation, or partnership if any of
19 these latter three persons is only a limited partner. The definition of “insider” in the Bankruptcy
20 Code does not purport to make a limited partner an insider of the partners or of the partnership
21 with which the limited partner is associated, but it is susceptible of a contrary interpretation and
22 one which would extend unduly the scope of the defined relationship when the limited partner is
23 not a person in control of the partnership. The definition of “insider” in this Act also differs
24 from the definition in the Bankruptcy Code in omitting the reference in ~~11 U.S.C.~~ § 101(28)(D)
25 to an elected official or relative of such an official as an insider of a municipality. As in the
26 Bankruptcy Code (see ~~11 U.S.C.~~ § 102(3)), the word “includes” is not limiting, however. Thus,
27 a court may find a person living with an individual for an extended time in the same household
28 or as a permanent companion to have the kind of close relationship intended to be covered by the
29 term “insider.” Likewise, a trust may be found to be an insider of a beneficiary.

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32 ~~(11)~~ (14) The definition of “relative” is derived from Bankruptcy Code § 101(37) (1984)
33 ~~of the Bankruptcy Code~~ but is explicit in its references to the spouse of a debtor in view of
34 uncertainty as to whether the common law determines degrees of relationship by affinity.

35

36

[End]

Bankruptcy Code (Clean Text)
“Insider” and Related Definitions (“Affiliate”, “Relative”); “Corporation”

§ 101. Definitions.

In this title the following definitions shall apply:

(2) The term “affiliate” means—

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

* * *

(31) The term “insider” includes—

(A) if the debtor is an individual—

- (i) relative of the debtor or of a general partner of the debtor;
- (ii) partnership in which the debtor is a general partner;
- (iii) general partner of the debtor; or
- (iv) corporation of which the debtor is a director, officer, or person in

control;

(B) if the debtor is a corporation—

- (i) director of the debtor;
- (ii) officer of the debtor;
- (iii) person in control of the debtor;
- (iv) partnership in which the debtor is a general partner;
- (v) general partner of the debtor; or
- (vi) relative of a general partner, director, officer, or person in control of

the debtor;

(C) if the debtor is a partnership—

- (i) general partner in the debtor;
- (ii) relative of a general partner in, general partner of, or person in

control of the debtor;

- (iii) partnership in which the debtor is a general partner;
- (iv) general partner of the debtor; or
- (v) person in control of the debtor;

(D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;

(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and

(F) managing agent of the debtor.

* * *

(45) The term “relative” means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree.

* * *

“Corporation”; “Partnership”

Note: The Bankruptcy Code does not define “partnership.” It defines “corporation” as follows:

(9) The term “corporation”—

(A) includes—

(i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses.

(ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association;

(iii) joint-stock company;

(iv) unincorporated company or association; or

(v) business trust; but

(B) does not include limited partnership.

[End]