

Notice of Declaratory Statement

**DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION**

**Florida Real Estate Commission**

NOTICE IS HEREBY GIVEN THAT the Florida Real Estate Commission has issued an order disposing of the petition for declaratory statement filed by Management Planning, Inc. on April 02, 2008. The following is a summary of the agency's disposition of the petition:

The Commission considered the Petition at its meeting held on October 14, 2008. The Commission's Order, filed December 2, 2008, granted the Petition for Declaratory Statement and declared that MPI does not qualify as a "broker" as defined in Section 475.01(1), Florida Statutes, if it conducts valuation studies of businesses and their assets in conjunction with estate and gift tax valuations and corporate valuation activities and does not appraise real estate but relies instead on licensed appraisers to do so and does not in any capacity act as a business broker or participate in or procure the sale of real estate.

A copy of the Order Disposing of the Petition for Declaratory Statement may be obtained by contacting: Lori Crawford, Deputy Clerk, Division of Real Estate, 400 West Robinson Street, Suite N801, Orlando, FL 32801.

## Notice of Declaratory Statement

### **DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION**

#### **Florida Real Estate Commission**

NOTICE IS HEREBY GIVEN THAT The Florida Real Estate Commission has received the petition for declaratory statement from Management Planning, Inc. The petition seeks the agency's opinion as to the applicability of Section 475.01(1)(a), F.S., as it applies to the petitioner.

The petition requests the Commission to issue a declaratory statement regarding the applicability of Section 475.01(1)(a), F.S., which defines real estate "broker" and whether that definition applies to MPI if MPI solely provides valuation services in conjunction with corporate valuations and estate and gift tax matters but does not value real estate.

A copy of the Petition for Declaratory Statement may be obtained by contacting: Lori Crawford, Deputy Clerk, Division of Real Estate, 400 West Robinson Street, Suite N801, Orlando, FL 32801.

DS 2008-022

STATE OF FLORIDA  
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
FLORIDA REAL ESTATE COMMISSION

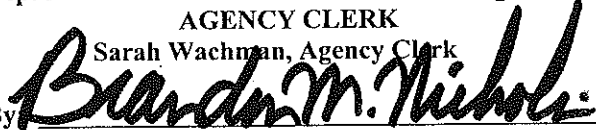
In re: **Petition for Declaratory Statement**  
**By Management Planning, Inc.**

Final Order No. BPR-2008-10342 Date: 12-2-08  
FILED

Department of Business and Professional Regulation  
AGENCY CLERK

Sarah Wachman, Agency Clerk

By



**FINAL ORDER GRANTING PETITION FOR DECLARATORY STATEMENT**

Management Planning, Inc. ("MPI") filed a petition for declaratory statement and accompanying memorandum of law on April 2, 2008. Notice of receipt of the petition was published in the Florida Administrative Weekly on July 11, 2008. The petition was considered by the Commission at its meeting in Ft. Lauderdale Beach, Florida on October 14, 2008.

By its petition, MPI seeks the Commission's opinion regarding the scope and applicability of Section 475.01(1)(a), Florida Statutes, which defines real estate "broker," and whether that definition applies to MPI if MPI solely provides valuation services in conjunction with corporate valuations and estate and gift tax matters but does not value real estate. MPI posed the following specific question for which it seeks a declaratory statement:

Does MPI qualify as a "broker" as defined in Section 475.01(1), Florida Statutes, if it conducts valuation studies of businesses and their assets in conjunction with estate and gift tax valuations and corporate valuation activities (e.g., purchase price allocations, fairness and solvency opinions, Sarbanes-Oxley compliance, recapitalization and restructuring of corporations, intangible assets and good will, bankruptcy, and executive stock ownership plans) and does not appraise real estate but relies instead on licensed appraisers to do so and does not in any capacity act as a business broker or participate in or procure the sale of real estate?

## Findings of Fact

1. MPI is a full service business valuation firm that provides primarily private and public companies with valuation studies to be used by them in a wide variety of settings: stockholder, corporate and partnership interests' planning; intangible asset and intellectual property valuation, purchase price allocation, estate and gift tax negotiations; Sarbanes-Oxley compliance; mergers and acquisitions, fairness opinions, initial public offerings, resolving dissenting stockholder and partner disputes; litigation; buy/sell agreements; recapitalizations, executive stock option plans and employee stock ownership plans; and reorganizations and bankruptcy.

2. Examples of the valuation services provided by MPI include: (i) providing a "fairness opinion" as to corporate stock value provided in connection with a tender offer for minority interest stock of a privately held barge and shipping company; (ii) conducting valuation of closely held company in conjunction with transfer of ownership to heirs or business associates; (iii) valuation of Klondike novelty ice cream business and its underlying intangible assets, including its brand name and trademarks for allocation of purchase price; (iv) providing a solvency opinion in conjunction with a valuation of Loral Corp.'s Mexican satellite communications affiliate and its underlying assets for debt refinancing purposes; (v) valuation of nonvoting stock in company for gift tax purposes; (vi) conducting valuation of stock in closely held companies in conjunction with preparation of "buy-sell" agreements; and (vii) providing a "fairness opinion" as to stock value rendered in connection with redemption of Employee Stock Ownership Plan shares.

3. MPI's valuations of corporations and their assets are highly specialized, often involving the standards of valuation used by the Financial Accounting Standards Board

("FASB") and the IRS. In all of these valuations, MPI never acts in any capacity act as a "business broker." It does not arrange or broker any type of "transaction," does not participate in or procure the sale of real estate, and it does not appraise real estate unless its personnel is, in fact, a licensed and qualified real estate appraiser. If real estate must be valued as a part of an overall corporate valuation, then MPI or its client employs a licensed real estate appraiser to conduct that appraisal.

#### Conclusions of Law

4. The Commission is authorized to issue this declaratory statement by Section 120.565, Florida Statutes.

5. MPI has standing to seek the requested declaratory statement.

6. Section 475.01(1)(a), Florida Statutes, provides in part:

"Broker" means a person who, for another, and for a compensation . . . appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that she or he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another . . . or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does or is calculated to, result in a sale, exchange, or leasing thereof, and who receives . . . any compensation . . . thereof. . . . Where the term "appraise" or "appraising" appears in the definition of the term broker, it specifically excludes those appraisal services which must be performed only by a state-licensed or state-certified appraiser . . .

Section 475.01(1)(a), Florida Statutes.

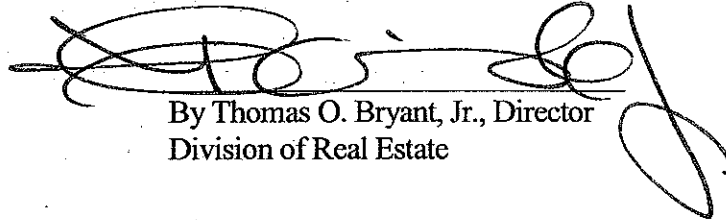
7. For the reasons set forth in MPI's memorandum of law, the Commission declares

that

MPI does not qualify as a "broker" as defined in Section 475.01(1), Florida Statutes, if it conducts valuation studies of businesses and their assets in conjunction with estate and gift tax valuations and corporate valuation activities (e.g., purchase price allocations, fairness and solvency opinions, Sarbanes-Oxley compliance, recapitalization and restructuring of corporations, intangible assets and good will, bankruptcy, and executive stock ownership plans) and does not appraise real estate but relies instead on licensed appraisers to do so and does not in any capacity act as a business broker or participate in or procure the sale of real estate

DONE AND ORDERED this 18 day of November 2008.

For Florida Real Estate Commission



By Thomas O. Bryant, Jr., Director  
Division of Real Estate

**NOTICE OF RIGHT TO JUDICIAL REVIEW**

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68 FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Lawrence E. Sellers Jr., Holland & Knight LLP, Post Office Drawer 810, Tallahassee, FL 32012-0810, and Tom Barnhart, Senior Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-0150, all on this 2<sup>nd</sup> day of December, 2008.

Brandon M. Nichols

STATE OF FLORIDA  
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
FLORIDA REAL ESTATE COMMISSION

**FILED**  
Department of Business and Professional Regulation  
DEPUTY CLERK

In re: **Petition for Declaratory Statement  
Before the Florida Real Estate Commission**

CLERK *Brandon M. Nichols*  
DATE 4-3-2008

**Management Planning, Inc.,  
Petitioner.**

**DS 2008-022**

**PETITION FOR DECLARATORY STATEMENT  
BEFORE THE FLORIDA REAL ESTATE COMMISSION**

Pursuant to s. 120.565, F. S., and Rule 28-105.002, F.A.C., Petitioner Management Planning, Inc. (herein "MPI" or "Petitioner") requests that the Florida Real Estate Commission ("herein "FREC") issue a declaratory statement regarding the applicability of certain statutory provisions, rules or orders over which it has authority. In support thereof, Petitioner states:

Identification of Petitioner

1. The name, address, telephone number and facsimile number of MPI's corporate headquarters are:

Management Planning, Inc.  
101 Poor Farm Road  
Princeton, New Jersey 08540  
(609) 924-4200  
(609) 924-4573 Fax

Additionally, MPI maintains a regional office in Florida:

Management Planning, Inc.  
5401 Kirkman Road, Suite 319  
Orlando, Florida 32819  
(407) 599-0060  
(407) 641-8778 Fax

RECEIVED  
APR 03 2008  
DBPR Agency Clerk



Identification of Petitioner's Representative

2. The name, address, telephone number and facsimile number of the Petitioner's attorney are set forth below.

A. Brian Albritton  
Holland & Knight LLP  
100 N. Tampa Street, Suite 4100  
Tampa, FL 33602  
813-227-6406 • 813-229-0134 Fax

Statutory Provisions and Agency Rules  
on which the Declaratory Statement is Sought

3. Petitioner seeks FREC's opinion regarding the scope and applicability of Florida Statute § 475.01(1)(a)(2007)<sup>1</sup> which defines real estate "broker" and whether that definition applies to MPI if MPI solely provides valuation services in conjunction with corporate valuations and estate and gift tax matters but *does not* value real estate. Section 475.01(1)(a) found in Part I ("Real Estate Brokers, Sales Associates, and Schools") of Chapter 475 provides in part:

"Broker" means a person who, for another, and for a compensation . . . *appraises*, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of *business enterprises or business opportunities* or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that she or he is engaged in the *business of appraising*, auctioning, buying, selling, exchanging, leasing, or renting *business enterprises or business opportunities* or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another . . . or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does or is calculated to, result in a sale, exchange, or leasing thereof, and who receives . . . any compensation . . . thereof. . . . Where the term "appraise" or "appraising" appears in the definition of the term broker, it specifically excludes those appraisal services which must be performed only by a state-licensed or state-certified appraiser . . . (emphasis added). A copy of the statute is attached hereto as Exhibit 1.

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<sup>1</sup> Unless otherwise noted, all references to statutes are to Florida Statutes (2007).

As shown herein, the vague italicized terms above in § 475.01(1)(a) create uncertainty as whether they apply to companies, such as MPI, that provide corporate valuation services as such valuations of stock, purchase price allocations, good will impairment studies, and valuation of intellectual property and other intangible assets but which do not engage in any type of brokerage activity or perform an appraisal of real estate.

Description of How the Statutes and Rules  
May Substantially Affect the Petitioner

4. MPI is a full service business valuation firm that provides primarily private and public companies with valuation studies to be used by them in a wide variety of settings: stockholder, corporate and partnership interests' planning; intangible asset and intellectual property valuation, purchase price allocation, estate and gift tax negotiations; Sarbanes-Oxley compliance; mergers and acquisitions, fairness opinions, initial public offerings, resolving dissenting stockholder and partner disputes; litigation; buy/sell agreements; recapitalizations, executive stock option plans and employee stock ownership plans; and reorganizations and bankruptcy.

5. Example of the valuation services provided by MPI include: (i) providing a "fairness opinion" as to corporate stock value provided in connection with a tender offer for minority interest stock of a privately held barge and shipping company; (ii) conducting valuation of closely held company in conjunction with transfer of ownership to heirs or business associates; (iii) valuation of Klondike novelty ice cream business and its underlying intangible assets, including its brand name and trademarks for allocation of purchase price; (iv) providing a solvency opinion in conjunction with a valuation of Loral Corp.'s Mexican satellite communications affiliate and its underlying assets for debt refinancing purposes; (v) valuation

of nonvoting stock in company for gift tax purposes; (vi) conducting valuation of stock in closely held companies in conjunction with preparation of "buy-sell" agreements; and (vii) providing a "fairness opinion" as to stock value rendered in connection with redemption of Employee Stock Ownership Plan shares. See additional description of MPI's valuation services in Exhibit G attached to the Petitioner's Memorandum in Support of Petition for Declaratory Statement.

6. As can be gleaned from these examples, MPI's valuations of corporations and their assets are highly specialized, often involving the standards of valuation used by the Financial Accounting Standards Board ("FASB") and the IRS. Yet, in all of these valuations, MPI never acts in any capacity act as a "business broker." It does not arrange or broker any type of "transaction," does not participate in or procure the sale of real estate, and it does not appraise real estate unless its personnel is, in fact, a licensed and qualified real estate appraiser. If real estate must be valued as a part of an overall corporate valuation, then MPI or its client employ a licensed real estate appraiser to conduct that appraisal.


7. As seen above, the mischief of § 475.01(1)(a) for a company such as MPI can be observed in the statute's italicized terms wherein a broker is defined to include anyone who: "*appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities.*" Given the statute's use of these italicized terms, "*appraises . . . business enterprises,*" MPI is in doubt as to the application and requirements of Chapter 475 and it requests confirmation that Chapter 475 does not apply to it since MPI does not broker or appraise real estate or broker the sale of businesses. Accordingly, MPI poses the following question for which it seeks a declaratory statement:

**Does MPI qualify as a "broker" as defined in Florida Statute § 475.01(1) if it conducts valuation studies of businesses and their assets in conjunction with estate and gift tax valuations and corporate valuation activities (e.g., purchase price allocations, fairness and solvency opinions, Sarbanes-Oxley compliance, recapitalization and restructuring of corporations, intangible assets and good will, bankruptcy, and executive stock ownership plans) and *does not* appraise real estate but relies instead on licensed appraisers to do so and *does not* in any capacity act as a business broker or participate in or procure the sale of real estate?**

8. In the accompanying memorandum, MPI demonstrates why the law governing statutory interpretation, the clear legislative history of § 475.01(1)(a), and FREC's own practices compel the conclusion that § 475.01(1)(a) does not apply to MPI. The answer to the question above, therefore, is clearly, "no, MPI does not qualify as a broker."

9. Thus, MPI respectfully requests that FREC should declare that § 475.01(1)(a) does not apply to MPI's corporate valuation activities described above.

Respectfully submitted this 2<sup>nd</sup> day of April, 2008.



A. Brian Albritton  
Florida Bar No. 777773  
HOLLAND & KNIGHT LLP  
100 N. Tampa Street, Suite 4100  
Tampa, FL 33602  
813-227-8500 • 813-229-0134 Fax  
Attorneys for Petitioner MPI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by UPS

on April 2<sup>nd</sup>, 2008 to:

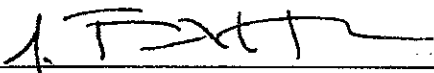
Agency Clerk's Office  
The Department of Business  
and Professional Regulation  
1940 N. Monroe Street  
Tallahassee, FL 32399

VIA EMAIL

Thomas L. Barnhart, Esq.  
Assistant Attorney General and  
Counsel to Florida Real Estate Commission  
Office of the Attorney General  
400 S Monroe St # PL-01  
Tallahassee, Florida 32399-6536

VIA EMAIL

James P. Harwood, Esq.  
Chief Attorney  
Florida Real Estate Commission  
400 W. Robinson Street, Suite N801  
Orlando, FL 32801

  
\_\_\_\_\_  
Attorney

Select Year: 2007 

## The 2007 Florida Statutes

Title XXXII  
REGULATION OF PROFESSIONS  
AND OCCUPATIONS

Chapter 475  
REAL ESTATE BROKERS, SALES  
ASSOCIATES, SCHOOLS, AND  
APPRAISERS

View Entire  
Chapter

### 475.01 Definitions.--

(1) As used in this part:

(a) "Broker" means a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that she or he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who advertise rental property information or lists. A broker renders a professional service and is a professional within the meaning of s. 95.11(4)(a). Where the term "appraise" or "appraising" appears in the definition of the term "broker," it specifically excludes those appraisal services which must be performed only by a state-licensed or state-certified appraiser, and those appraisal services which may be performed by a registered trainee appraiser as defined in part II. The term "broker" also includes any person who is a general partner, officer, or director of a partnership or corporation which acts as a broker. The term "broker" also includes any person or entity who undertakes to list or sell one or more timeshare periods per year in one or more timeshare plans on behalf of any number of persons, except as provided in ss. 475.011 and 721.20.

(b) "Broker associate" means a person who is qualified to be issued a license as a broker but who operates as a sales associate in the employ of another.

(c) "Commission" means the Florida Real Estate Commission.

(d) "Customer" means a member of the public who is or may be a buyer or seller of real property and may or may not be represented by a real estate licensee in an authorized brokerage relationship.

(e) "Department" means the Department of Business and Professional Regulation.

(f) "Fiduciary" means a broker in a relationship of trust and confidence between that broker as agent and the seller or buyer as principal. The duties of the broker as a fiduciary are loyalty, confidentiality, obedience, full disclosure, and accounting and the duty to use skill, care, and diligence.

(g) "Involuntarily inactive status" means the licensure status that results when a license is not renewed at the end of the license period prescribed by the department.

(h) "Principal" means the party with whom a real estate licensee has entered into a single agent

Exhibit "1"

relationship.

(i) "Real property" or "real estate" means any interest or estate in land and any interest in business enterprises or business opportunities, including any assignment, leasehold, subleasehold, or mineral right; however, the term does not include any cemetery lot or right of burial in any cemetery; nor does the term include the renting of a mobile home lot or recreational vehicle lot in a mobile home park or travel park.

(j) "Sales associate" means a person who performs any act specified in the definition of "broker," but who performs such act under the direction, control, or management of another person. A sales associate renders a professional service and is a professional within the meaning of s. 95.11(4)(a).

(k) "Single agent" means a broker who represents, as a fiduciary, either the buyer or seller but not both in the same transaction.

(l) "Transaction broker" means a broker who provides limited representation to a buyer, a seller, or both, in a real estate transaction, but does not represent either in a fiduciary capacity or as a single agent. In a transaction broker relationship, a buyer or seller is not responsible for the acts of a licensee. Additionally, the parties to a real estate transaction are giving up their rights to the undivided loyalty of a licensee. This aspect of limited representation allows a licensee to facilitate a real estate transaction by assisting both the buyer and the seller, but a licensee will not work to represent one party to the detriment of the other party when acting as a transaction broker to both parties.

(m) "Voluntarily inactive status" means the licensure status that results when a licensee has applied to the department to be placed on inactive status and has paid the fee prescribed by rule.

(2) The terms "employ," "employment," "employer," and "employee," when used in this chapter and in rules adopted pursuant thereto to describe the relationship between a broker and a sales associate, include an independent contractor relationship when such relationship is intended by and established between a broker and a sales associate. The existence of such relationship shall not relieve either the broker or the sales associate of her or his duties, obligations, or responsibilities under this chapter.

(3) Wherever the word "operate" or "operating" as a broker, broker associate, or sales associate appears in this chapter; in any order, rule, or regulation of the commission; in any pleading, indictment, or information under this chapter; in any court action or proceeding; or in any order or judgment of a court, it shall be deemed to mean the commission of one or more acts described in this chapter as constituting or defining a broker, broker associate, or sales associate, not including, however, any of the exceptions stated therein. A single such act is sufficient to bring a person within the meaning of this chapter, and each act, if prohibited herein, constitutes a separate offense.

(4) A broker acting as a trustee of a trust created under chapter 689 is subject to the provisions of this chapter unless the trustee is a bank, state or federal association, or trust company possessing trust powers as defined in s. 658.12(23).

History.--s. 1, ch. 12223, 1927; CGL 4062; s. 1, ch. 29983, 1955; s. 1, ch. 59-199; s. 1, ch. 59-197; s. 1, ch. 59-438; ss. 30, 35, ch. 69-106; s. 1, ch. 75-112; s. 7, ch. 75-184; s. 3, ch. 76-168; s. 1, ch. 77-239; s. 1, ch. 77-355; s. 1, ch. 77-457; s. 1, ch. 78-215; s. 1, ch. 78-366; ss. 2, 42, 43, ch. 79-239; ss. 2, 3, 5, ch. 80-405; ss. 2, 3, ch. 81-318; ss. 5, 38, ch. 82-1; ss. 18, 45, ch. 82-179; ss. 1, 28, 30, ch. 88-20; s. 1, ch. 89-368; s. 10, ch. 90-228; s. 10, ch. 90-341; s. 13, ch. 90-345; ss. 2, 10, ch. 91-89; s. 1, ch. 91-289; s. 4, ch. 91-429; s. 2, ch. 93-261; s. 134, ch. 94-119; s. 159, ch. 94-218; s. 1, ch. 94-337; s. 1, ch. 97-42; s. 361, ch. 97-103; s. 1, ch. 98-250; s. 1, ch. 99-384; s. 1, ch. 2002-233; ss. 1, 22, ch. 2003-164; s. 78, ch. 2004-5.

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