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Constitutional Budget Reserve Sweep and Effective Date Overview

House Finance Committee
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Legislative Legal Services

CBR Sweep Mechanism

The CBR sweep provision was established in Article IX, Section 17 of the Alaska Constitution:

(d) Repayment requirement – “If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law.”

Reverse Sweep

- The “reverse sweep” is an appropriation from the CBR that returns swept funds back to the original subfund or account. The “reverse sweep” is an appropriation under art. IX, sec. 17(c), and requires a 3/4 vote to pass.
- The sweep is effective at the end of a fiscal year (June 30) and the reverse sweep is effective on the first day of the following fiscal year (July 1).

How the Sweep Works

- The Department of Administration's Division of Finance (DOF) accountants calculate the sweep while preparing the Annual Comprehensive Financial Report (ACFR). The sweep represents unreserved, undesignated fund balances of the general fund subfunds.
- DOF accountants calculate the sweep in September as the ACFR is prepared yet the amount of the sweep is posted in the financial records as of the end of the fiscal year (June 30th).
- After the ACFR is prepared (historically by the end of October), the ACFR is audited by the legislative auditor. The sweep amount is adjusted as necessary.

Statute Implementing Sweep Was Found Unconstitutional

- AS 37.10.420 was intended to implement the sweep.
- The Supreme Court in *Hickel v. Cowper* found this statute unconstitutional in 1994.
- Since then, the executive branch has had to implement the sweep without statutory guidance. The list of sweepable funds has been driven by legal interpretations of *Hickel v. Cowper*.
- The legislature could pass a new statute that attempts to define which funds are sweepable, but absent this or a court case the administration's interpretation is operative.

Hickel v. Cowper

874 P.2d 922 (Alaska 1994)

- To determine whether a fund is sweepable under art. IX, sec. 17(d), the two-part test is whether the fund is: (1) "in the general fund" *and* (2) "available for appropriation."
- Hickel addressed the phrase "available for appropriation" and held that funds which may be used to pay state expenditures without further legislative action – or further legislative appropriation -- are *not* available for appropriation and thus not sweepable. On the other hand, funds that require further appropriation are considered "available for appropriation" and are sweepable.

Recent Changes in Interpretation and Resulting Litigation

- In 2019, relying on an Attorney General opinion, the administration expanded the scope of the sweep to include additional funds.
- Most significantly, the sweep was expanded to include the Power Cost Equalization (PCE) Fund and the Higher Education Investment Fund.
- Litigation followed.

AFN v. Dunleavy,

3AN-21-06737CI (August 11, 2021).

- The Alaska Federation of Natives brought a lawsuit against the administration challenging the sweepability of the PCE Fund.
- On August 11, 2021, a Superior Court ruled in favor of the plaintiffs, finding that PCE should *not* be subject to the sweep because the PCE fund is a separate fund outside the general fund.
- The court noted that the legislature has also created other "separate funds" and listed those other funds in footnote 77 of the opinion. It was there that the court noted that the legislature established the statutory budget reserve fund in AS 37.05.540(a) "as a separate fund in the state treasury." Based on this notation, our office has advised that the statutory budget reserve fund would also likely be considered outside the general fund and not subject to the sweep.
- The case was *not* appealed to the Alaska Supreme Court.

Short v. Dunleavy,

520 P.3d 142 (Alaska 2022).

- After the PCE decision and a failed 2021 sweep, the Attorney General wrote a memorandum stating that money already appropriated from the Higher Education Investment Fund (HEIF) for fiscal year 2022 could likely be spent despite the appropriation having an effective date occurring after the sweep, but maintained the position that the HEIF's remaining corpus was subject to the sweep.
- A group of students then sued the governor alleging that the Higher Education Investment Fund (HEIF) was not sweepable. Legislative Council filed an amicus brief supporting the students' position.
- The Alaska Supreme Court determined that the HEIF was sweepable. The Court held that the HEIF was “available for appropriation” under the *Cowper* test, particularly focusing on the fact that the monies in the HEIF, by statute, must be further appropriated to be spent.
- In 2022, the legislature amended AS 37.14.750(a) to establish the HEIF “as a separate fund in the state treasury.” ch. 15, SLA 2022.
 - At the time of the *Short* litigation, the HEIF was established “in the general fund.”

Scoop vs. Sweep

- After the failed 2021 sweep, the Attorney General advised it was legally defensible to not sweep the FY 22 funds appropriated in the budget that had passed but not yet taken effect, and the governor ordered that those FY 22 appropriations not be swept.
 - It was from here that the concept of “scooping” the funds before they are swept was born.
- In the *Short v. Dunleavy* litigation, the superior court held that the HEIF was available for appropriation and sweepable, but that the FY 22 appropriations made from the HEIF should not be swept, even though those appropriations had not yet taken effect at the time of the sweep. The superior court reasoned that “the money is no longer available for appropriation because the money can now be expended without further legislative action.” This decision was ultimately affirmed by the Alaska Supreme Court, although the Court did not specifically analyze the “scoop” portion of the superior court’s opinion.

Special Effective Dates

- Art. II, sec. 18, of the Alaska Constitution provides “Laws passed by the legislature become effective ninety days after enactment. The legislature may, by concurrence of two-thirds of the membership of each house, provide for another effective date.”
 - Enactment occurs when the governor signs the bills or allows the bill to become law without signature. *See* AS 01.10.070, and art. II, sec. 17, Constitution of the State of Alaska.

Retroactivity Clause

- A retroactive clause does not amount to a special effective date.
- A retroactivity provision may be adopted by majority vote rather than the two-thirds vote required for effective dates. *ARCO Alaska, Inc. v. State*, 824 P.2d 708 (Alaska 1992).

Failure of Effective Dates and Resulting Litigation

- Historically, the Attorney General has advised that “A strict interpretation of the absence of an effective date would imply that no money may be expended under the appropriations made in this bill until 90 days after you sign the bill. However, it would be irresponsible to disrupt state government functions to await the constitutionally specified effective date.” 1989 Inf. Op. Att’y Gen. (May 25, 883-89-0076).
- However, in 2021, the Attorney General filed suit against the Legislative Affairs Agency, alleging that LAA improperly advised employees that it would “likely” be the legislature’s position that “the retroactivity clause enables the work of the Legislature to continue.” The Attorney General’s suit was dismissed by the superior court on grounds that the action was prohibited under art. III, sec. 16 of the Alaska Constitution. The case is under appeal and awaiting final decision from the Alaska Supreme Court. (*Taylor v. LAA*, S-18292).
- To avoid litigation and uncertainty, the legislature should adopt special effective dates on appropriation bills.

Questions?

Contact Information

Megan A. Wallace

Chief Counsel

Legislative Legal Services

LAA.Legal@akleg.gov

(907) 465- 2450