

SENATE FINANCE COMMITTEE  
SECOND SPECIAL SESSION  
July 9, 2019  
1:33 p.m.

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CALL TO ORDER

Co-Chair Stedman called the Senate Finance Committee meeting to order at 1:33 p.m.

MEMBERS PRESENT

Senator Natasha von Imhof, Co-Chair  
Senator Bert Stedman, Co-Chair  
Senator Click Bishop  
Senator Lyman Hoffman  
Senator Donny Olson  
Senator Bill Wielechowski

MEMBERS ABSENT

Senator Peter Micciche  
Senator Mike Shower  
Senator David Wilson

ALSO PRESENT

Megan Wallace, Director, Legislative Legal Services, Alaska State Legislature; Kris Curtis, Legislative Auditor, Alaska Division of Legislative Audit; Senator Cathy Giessel; Senator Chris Birch; Representative Sara Hannan.

SUMMARY

LEGISLATIVE AUDIT: CONSTITUTIONAL BUDGET RESERVE and REVERSE SWEEP

Co-Chair Stedman relayed that the committee would continue to discuss the Constitutional Budget Reserve (CBR) and the reverse sweep. He explained that at the end of every fiscal year there were some accounts that were zeroed out, and the money was moved to the CBR if there was a debt to it. Any appropriations out of the accounts the following day would find that the accounts were empty or severely restricted. Earlier in the day, the committee had heard from the

Legislative Finance Division (LFD) on the subject of the reverse sweep and some of the state's account balances.

Co-Chair Stedman continued his remarks. He shared that the committee would hear from the director of Legislative Legal Services (LLS), as well as the Legislative Auditor.

^LEGISLATIVE AUDIT: CONSTITUTIONAL BUDGET RESERVE and REVERSE SWEEP

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MEGAN WALLACE, DIRECTOR, LEGISLATIVE LEGAL SERVICES, ALASKA STATE LEGISLATURE, discussed the presentation, "Sweep and Reverse Sweep" (copy on file). She looked at slide 2, "Constitutional Budget Reserve Fund Article IX, Section 17 of the Alaska Constitution":

Passed by the 16th Alaska State Legislature, HCS CSSSSJR 5 (FIN) am H (1990), as an amendment to the state constitution.

Approved by the voters 11/06/90 with 124,280 votes for, and 63,307 against the amendment.

Ms. Wallace planned on discussing legislative history, including a few Alaska Supreme Court decisions, which explained how to interpret and carry out the sweep and reverse sweep if appropriated each year.

Ms. Wallace highlighted slide 3, "Article IX, Section 17(a) of the Alaska Constitution":

(a) There is established as a separate fund in the State treasury the budget reserve fund. Except for money deposited into the permanent fund under Section 15 of this article, all money received by the State after July 1, 1990, as a result of the termination, through settlement or otherwise, of an administrative proceeding or of litigation in a State or federal court involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses, or involving taxes imposed on mineral income, production, or property, shall be deposited in the budget reserve fund. Money in the budget reserve fund shall be invested so as to yield competitive market rates to

the fund. Income of the fund shall be retained in the fund. Section 7 of this article does not apply to deposits made to the fund under this subsection. Money may be appropriated from the fund only as authorized under (b) or (c) of this section.

This subsection establishes the fund.

Ms. Wallace addressed slide 4, "Article IX, Section 17(b) of the Alaska Constitution":

(b) If the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year, an appropriation may be made from the budget reserve fund. However, the amount appropriated from the fund under this subsection may not exceed the amount necessary, when added to other funds available for appropriation, to provide for total appropriations equal to the amount of appropriations made in the previous calendar year for the previous fiscal year.

This subsection allows for an appropriation from the CBRF by a simple majority vote if the amount available for appropriation is less than the amount appropriated for the previous fiscal year.

Ms. Wallace explained that in instances of a budget deficit, the provision would allow the legislature to access the CBR with a simple majority vote if the amount available for appropriation was less than the amount appropriated for the previous fiscal year. She stated that the key element to the provision was the amount available for appropriation. She referenced the Alaska Supreme Court decision in *Hickel v. Cooper* [a 1994 case which arose out of a legislative attempt to define terms pertaining appropriation], which established that the Earnings Reserve Account (ERA) was to be considered part of what was available for appropriation. The legislature had not been able to access the CBR with a simple majority vote because the balance of the ERA was too large to permit access under the provision.

Ms. Wallace looked at slide 5, "Article IX, Section 17(c) of the Alaska Constitution":

(c) An appropriation from the budget reserve fund may be made for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature.

This subsection allows for any appropriation from the CBRF with a supermajority vote.

Ms. Wallace noted that the reverse sweep, which caused a lot of confusion, was actually just an appropriation under Article IX, Section 17(c).

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Ms. Wallace highlighted slide 6, "Article IX, Section 17(d) of the Alaska Constitution":

(d) 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.

This subsection is known as the "sweep" provision. The sweep automatically occurs; no vote is required.

Ms. Wallace informed that the CBR was set up as a fund that the legislature could borrow from, and the provision provided that at the end of each fiscal year the money available for appropriation in the General Fund (GF) was swept back to the CBR. The sweep occurred every year. Prior to FY 20, the legislature had appropriated a "reverse sweep," sending the funds back to the accounts that they originated from.

Senator Wielechowski thought the ERA was not swept into the CBR.

Ms. Wallace replied in the affirmative. She noted that in the Hickel v. Cowper case, the Alaska Supreme Court articulated that the requirement for the sweep was that the funds be in the General Fund and be available for appropriation. Because the ERA was an account in the Permanent Fund, the courts stated that the funds were not subject to the sweep.

Senator Wielechowski thought the court had said that the funds had been already appropriated by the legislature for dividends and inflation proofing. He thought everything outside of inflation proofing and dividends was available for appropriation. He thought it was an important distinction.

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Ms. Wallace stated that in the Hickel v. Cowper case, the Supreme Court specifically stated (when it was discussing the provisions in Section 17(d)):

"Available amounts outside the General Fund such as the ERA need not be deposited in the budget reserve. This additional limitation has no effect on funds which exist within the General Fund."

Ms. Wallace discussed slide 7, "The 'Reverse Sweep':"

The "reverse sweep" is an appropriation from the CBRF that returns swept funds back to the original sub fund or account. The "reverse sweep" is an appropriation under art. IX, sec. 17(c), and requires a 3/4 vote to pass.

Standard "reverse sweep" appropriation language reads:

Deposits in the budget reserve fund (art. IX, sec. 17, Constitution of the State of Alaska) for fiscal year 2019 that are made from subfunds and accounts other than the operating general fund (state accounting system fund number 1004) by operation of art. IX, sec. 17(d), Constitution of the State of Alaska, to repay appropriations from the budget reserve fund are appropriated from the budget reserve fund to the subfunds and accounts from which those funds were transferred.

Ms. Wallace noted that the legislature considered the language as part of the capital budget, but the provision did not have enough votes to be successful. As of yet, the legislature had not approved a reverse sweep for FY 20.

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Ms. Wallace addressed slide 8, "Hickel v. Cowper, 874 P.2d 922 (1994) What is "available for appropriation"?"

In summary, the "amount available for appropriation" within the meaning of article IX, section 17 of the Alaska Constitution includes all monies over which the legislature has retained the power to appropriate and which require further appropriation before expenditure. In addition, all amounts actually appropriated, whether or not they would have been considered available prior to appropriation, are available within the meaning of section 17. Illiquid assets, such as land and unexploited natural resources, are not available so long as they remain illiquid. For these reasons, trust receipts are available for appropriation, as are funds like the Railbelt energy fund and the educational facilities maintenance and construction fund, which are not available for expenditure without additional appropriations. In contrast, the oil and hazardous substance release response fund is not counted as available because the entire balance of the fund may be expended at any time without further legislative action. The availability of funds not specifically discussed in this opinion must be determined in accordance with this opinion. Finally, the permanent fund earnings reserve account must be counted as available for appropriation, because appropriations may be made from it and it is not subject to expenditure without legislative action.

Ms. Wallace detailed that the legislature had passed a few provisions intended to implement the sweep. The provisions were found in AS 37.10.420. She recounted that former Governor Steve Cowper had challenged the constitutionality of the enacted provisions. At the time, Governor Wally Hickel defended the provisions. The Hickel v. Cowper case extensively considered what was meant to be available for appropriation under Article IX Section 17(b). The court had found that the majority of the statutory provisions enacted by the legislature were unconstitutional because they did not include enough funds within the definition of "available for appropriation."

Ms. Wallace continued to discuss slide 8. She stated that the slide showed a quote that summarized the analysis of

the court. The bulk of the analysis in the court's opinion (with respect to what it meant to be "available for appropriation") was the simple access provision. Later in the opinion, the Alaska Supreme Court specifically noted there was no reason to give any different meaning to the term "available for appropriation" in subsection (b) than it was in subsection (d). The term had the same meaning throughout the section.

Ms. Wallace noted that all funds that the legislature retained the power to appropriate, that required further appropriation, would be subject to the sweep. It notes that illiquid assets did not have to be swept. While funds that require further appropriations were swept, those that did not (such as the Oil and Hazardous Substance Release Response Fund) were not subject to the sweep because the funds could be appropriated without legislative action until there was no balance. The Supreme Court noted that the ERA must be counted as available for appropriation. While the Alaska Supreme Court identified certain funds that were and were not available for appropriation, the Supreme Court said that if there were funds not discussed in the opinion, the question of whether they were available for appropriation must be determined in accordance with the opinion.

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Co-Chair von Imhof thought that "amount available for appropriation" meant whether the money could be swept from sub-funds into the SBR. She wanted to define the word appropriation.

Ms. Wallace clarified that the quote gave guidance on how the legislature determined which funds were available for appropriation.

Co-Chair von Imhof reiterated that her question was about the verb "appropriate," which she thought meant moving money from one account to another.

Ms. Wallace replied in the affirmative. She stated that the test was to determine whether or not funds were available for appropriation by the legislature. Whether the funds qualified to be calculated depended upon the analysis of whether the funds could be expended without further appropriation.

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Co-Chair von Imhof referenced Senator Bishop's comments about sources of revenue in some funds that may have been deposits made by private citizens. She thought what triggered monies to be available by appropriation did not necessarily sound like the source of income, but rather whether the legislature had appropriating powers over the money. She thought the question was if an account source was private money (donations, matching funds by other organizations) and whether it could be swept.

Ms. Wallace answered in the negative. She stated the monies that were available for appropriation would come with restrictions. If a fund consisted of private donations, there were certain taxes or federal receipts that had restrictions on how the funds could be used, and the funds could not be expended without recognition of the restrictions. The decision had not explored the nuances of how to determine how private donations and other special monies would be swept. She thought the matter was more of an accounting determination. She thought the legislative auditor could address how comingled funds could be swept or not.

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Senator Wielechowski addressed what funds were available for appropriation and quoted a sentence from the Hickel v. Cowper ruling:

"Money in the ERA never passes through the General Fund and is never appropriated as such by the legislature. A percentage of the money in the ERA is automatically transferred to the Dividend Fund at the end of each fiscal year. After that transfer has been made an additional amount is transferred from the ERA to the principal in order to offset the effects of inflation."

Senator Wielechowski stated that his interpretation of the ruling was that the money for the dividend and inflation proofing had already been appropriated by the legislature and was not subject to the sweep. He thought it seemed that the court had effectively stated that the entire ERA was

part of the GF; so, the whole ERA needed to get swept every year. He was curious about Ms. Wallace's opinion.

Ms. Wallace stated that when the court was considering the sweep provision while giving guidance for *Hickel v. Cowper*, it specifically stated that the ERA wouldn't be subject to the sweep because it was not in the General Fund. She referenced the *Wielechowski v. State* case [a 2017 case to effectively set aside the governor's veto a portion of the appropriation of funds for PFD distributions in 2016]. She pointed out that that in the *Wielechowski v. State* case, the Supreme Court acknowledged that it was mistaken (in the *Hickel v. Cowper* case) in terms of the legislature having appropriated from the dividend.

Ms. Wallace discussed slide 9, "*Hickel v. Cowper*, 874 P.2d 922 (1994) What is subject to the sweep?":

We see no reason to give "available for appropriation" a different meaning in subsection (d) than we did in subsection (b). We recognize, however, that the payback provision in section 17(d) is limited to only those funds which are "available for appropriation" and "in the general fund." Thus, available amounts outside the general fund, such as the earnings reserve account, need not be deposited in the budget reserve. This additional limitation has no effect on funds which exist within the general fund.

Ms. Wallace noted that the slide showed the quote she had been referring to. The opinion stated that when considering the payback provision, it was limited to the funds available for appropriation and in the General Fund. The Alaska Supreme Court had emphasized that when the legislature was determining what should and should not be swept; not only do the funds have to be available for appropriation, but also had to be in the GF.

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Ms. Wallace looked at slide 10, "*Wielechowski v. State*, 403 P.3d 1141 (2017)":

Our decision today reinforces our holding in *Hickel* that the earnings reserve "is available for appropriation."

Co-Chair von Imhof looked at slide 9, and thought Ms. Wallace was asserting that other funds such as the Higher Education Fund were sub-accounts of the GF.

Ms. Wallace agreed that the Higher Education Fund was part of the General Fund but thought the PCE Fund was more difficult to analyze. The PCE Fund was an account in the Energy Authority, and there was no court decision about whether the PCE Fund was sweepable. In another footnote from *Hickel v. Cowper*, the Alaska Supreme Court looked at the receipts of the Alaska Housing Finance Corporation (AHFC) and the Alaska Industrial Development and Export Authority (AIDEA) when considering what was available for appropriation. The court had stated that only those funds that had been appropriated and made its way to the General Fund from the public corporations would be considered available for appropriation.

Ms. Wallace continued to address Co-Chair von Imhof's question. She stated there was an open question as to whether the funds that sat in accounts of public corporations were in the General Fund and subject to the sweep. She had not seen additional legal analysis on the issue from the administration.

Senator Wielechowski asked if there was a definition of the General Fund in statute or in case law.

Ms. Wallace deferred to Ms. Curtis.

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KRIS CURTIS, LEGISLATIVE AUDITOR, ALASKA DIVISION OF LEGISLATIVE AUDIT, stated that the constitution mandated that available funds be swept to repay the CBR. She stated that according to the Supreme Court, the determination of whether a fund could be swept depended upon whether the funds balance could be spent without further appropriation. A fund that could be spent without further appropriation was considered non-sweepable; and a fund that could not be spent without further appropriation was considered sweepable.

Ms. Curtis highlighted slide 11, "Sec. 37.10.420. Sweep and 'available for appropriation' defined":

(b) If the amount appropriated from the budget reserve fund has not been repaid under art. IX, sec. 17(d), Constitution of the State of Alaska, the Department of Administration shall transfer to the budget reserve fund the amount of money comprising the unreserved, undesignated general fund balance to be carried forward as of June 30 of the fiscal year, or as much of it as is necessary to complete the repayment. The transfer shall be made on or before December 16 of the following fiscal year.

(c) In this section, "unrestricted revenue accruing to the general fund" or "unreserved, undesignated general fund balance carried forward" is money not restricted by law to a specific use that accrues to the general fund according to accepted principles of governmental or fund accounting adopted for the state accounting system established under AS 37.05.150 in effect on July 1, 1990.

Ms. Curtis informed that the determination of the amount available to be swept was an accounting process. The DOA Division of Finance accountants were responsible for calculating the sweep as part of preparing the state's financial statements, which were referred to the Comprehensive Annual Financial Report (CAFR). The CAFR must be prepared in accordance with generally accepted accounting principles and must be audited by the legislative auditor in accordance with generally accepted auditing standards.

Ms. Curtis looked at slide 12, "What is the General Fund?"

- The general fund is the State's primary operating fund.
- It accounts for all public monies and revenues coming into the State treasury not specifically authorized by statute to be placed in another fund.
- There are several accounts and funds created by law that are considered a part of the general fund. These are treated as subfunds of the general fund and are reported as part of the general fund.

Ms. Curtis stated that generally accepted accounting principals defined the General Fund in the same manner. The General Fund was the fund that accounted for activity that was not required to be accounted for in some other fund and

was residual. She noted that sub funds were accounted for separately in the accounting system but were reported as part of the general fund in the financial statements.

Co-Chair von Imhof asked for some definitions and a list of sub funds.

Ms. Curtis knew that for FY 18 there were 79 sub funds that had available balances in them. She stated she would discuss the sub funds later in the presentation.

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Senator Wielechowski asked if Ms. Curtis did not consider the ERA to be part of the General Fund.

Ms. Curtis stated that the ERA was not a sub fund of the General Fund, and it was maintained by the Permanent Fund.

Senator Wielechowski asked for Ms. Curtis to define General Fund.

Ms. Curtis defined the General Fund as the fund that accounted for all the activity that was not required to be accounted for in some other fund by law. Because of the prohibition of dedicating revenue, there had been a proliferation of sub accounts that were created as funds within the general fund that tracked a specific activity. She reiterated that there were many sub funds of the General Fund.

Co-Chair von Imhof believed that the ERA was established by the constitution separately by law and was defined specifically. She thought the ERA was established as a separate account.

Ms. Curtis had not researched the ERA and could not comment. She knew that the court had stated the ERA was not part of the General Fund.

Senator Wielechowski thought the court's statement had been reversed and thought all the income from the Permanent Fund went into the General Fund unless provided by law. He thought there was a likelihood that the ERA was part of the General Fund and subject to being swept into the CBR. He thought Alaskans would be shocked and concerned if the ERA

was swept and there was no money for dividends or government.

Ms. Curtis addressed slide 13, "How the Sweep Works":

- Department of Administration, Division of Finance accountants calculate the sweep while preparing the Comprehensive Annual Financial Report (CAFR). The sweep represents unreserved, undesignated fund balance of the general fund subfunds.
- Division of Finance accountants calculate the sweep in September as the CAFR 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 CAFR is prepared (historically by the end of October), the CAFR is audited by the legislative auditor. The sweep amount is adjusted as necessary.

Ms. Curtis relayed that when the audit was conducted, the audit was adjusted for errors in the sweep calculation itself or in part of the financial statements that impact the sweep. The last thing that auditors did was to prepare the final adjustment to the sweep amount.

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Ms. Curtis highlighted slide 14, "How the FY 18 Sweep Worked":

- At Fiscal year-end (FYE) 18 there were 71 general fund subfunds (excluding the CBRF) with a fund balance.
- Of the 71 individual subfunds at FYE 18 -
  - 32 were deemed sweepable, meaning the remaining fund balance cannot be spent without further appropriation.
    - All but one of the 32 sweepable funds, Aviation Fuel Tax Account, had a remaining undesignated, unreserved fund balance available for the sweep calculation.

- o A total \$202,684,000 fund balance of the sweepable funds was reported as nonspendable or committed, meaning that, although the funds were sweepable, portions of the funds' balances were not available for sweep.

- 39 were deemed non-sweepable as the remaining fund balance can be spent without further appropriation.

- o The \$880,313,000 fund balance total of the non-sweepable funds was reported as either nonspendable, restricted or committed.

Ms. Curtis referenced Co-Chair von Imhof's remarks pertaining to certain restrictions on fund balances by different provisions for donations or encumbrances.

Co-Chair Stedman asked if sweepable and non-sweepable funds were the same from year to year, or if the decision had to be made each year. He asked how much political influence went into the calculations.

Ms. Curtis stated that the analysis of the funds was extensive when the court decision came out. The Division of Legislative Audit had conferred with the Department of Law and LFD as to how the funds should be classified. Every new fund was reviewed, and the possibility of changes to other funds was considered.

Co-Chair Stedman asked about when it was possible to know if a new fund was subject to the sweep or not.

Ms. Curtis stated that the division went through the analysis in the months of September and October and looked at new funds before statements were available.

Co-Chair Stedman asked if Ms. Curtis had been asked to do any new reviews on funds that had not swept before the current year.

Ms. Curtis answered in the negative and asked where such a request would come from. She asked if Co-Chair Stedman was thinking the request would come from the executive branch.

Co-Chair Stedman answered in the affirmative and stated he was thinking about the PCE Fund or the education endowment.

Ms. Curtis stated that the division had not been asked to review the funds.

Senator Hoffman asked what category the PCE fell in when the division determined what funds were subject to the sweep in FY 18.

Ms. Curtis stated that the PCE Fund was part of AEA, which was audited by outside auditors and was outside the scope of the review. She noted that the PCE Fund was not listed in the following list of funds. She noted that the PCE Fund had not always belonged in AEA, and had been moved there. The division believed the fund was sweepable.

Senator Hoffman asked why the PCE Fund was moved to AEA.

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Ms. Curtis conjectured that the PCE Fund was moved to AEA so that it was not considered within the General Fund.

Senator Hoffman thought that because the PCE Fund was part of AEA, it should have some protection if the list did not have the PCE Fund as a sweepable item. He stated that when reviewing legislation, he did not recall there was going to be judgement made by a specific governor as to what would be subject to the sweep and what would not. He opined that if the list from FY 18 did not list the PCE Fund as a sweepable item, it should be so for FY 19 as well and not left to the discretion of whomever was governor. He stressed that the discretion was not granted when the CBR was created. He wondered why the FY 19 list would be different if the law had not changed.

Ms. Curtis shared that LAW had a firm stance over the years that the PCE Fund was not sweepable.

Senator Hoffman asked how many governors had made the determination.

Ms. Curtis had to check records. She relayed that the division did not always confer with LAW and had stopped asking the question of whether the PCE Fund was subject to the sweep. She continued that the question about whether the PCE Fund was subject to the sweep had been asked routinely through FY 10, and there were records through

that time that the executive branch had the position that the PCE Fund was not sweepable.

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Ms. Curtis discussed slide 15, "How the FY 18 Sweep Worked (Continued)":

- FYE 18 sweep balance totaled \$431,688,000 (rounded to thousands) from 31 subfunds.
- FYE 18 sweep posted to the financial records as of June 30, 2018.
- FYE 18 sweep was reversed by Chapter 17, SLA 18, Section 29 (a) and effective as of July 1, 2018. This means that the amounts swept were returned to the funds effective the first day of FY 19.

Ms. Curtis addressed slide 16, "FYE 18 Sweep Balance by General Fund Subfund," which listed all the funds that were swept and the amounts that were swept in FY 18, which totaled just over \$431 million.

Ms. Curtis looked at slide 17, "FYE 18 General Fund Subfund - Non Sweepable," which showed over \$880 million in funds that were not swept.

Co-Chair Stedman asked when Ms. Curtis would become aware if there was any change in the definitions between sub funds that were subject to the sweep or not.

Ms. Curtis stated that if the division became aware of an issue by any means, it would inquire into the matter. Immediately when staff began to work on the CAFR project, the division would reach out to see what funds were intended to be swept and if the division was in agreement.

Co-Chair Stedman asked what would happen if the division was not in agreement.

Ms. Curtis stated that the accountants would ask for an audit adjustment posting, without which there would be a misstatement in the financial statements, which would be an issue in the General Fund. The misstatement would have to do with Footnote 2 to the financial statements, which described the CBR borrowing and the sweep and the repaying.

Depending up on the amount, the misstatement had the potential to be a material misstatement, which would lead to a qualified opinion.

Co-Chair Stedman asked Ms. Curtis to provide an explanation of a qualified opinion in common language.

Ms. Curtis stated that an auditor provided an opinion on financial statements as to whether the statements were free from material misstatement; which was the purpose of an audit. She disclosed that she wrote the report. The opinion was included in the CAFR each year and was relied upon by various stakeholders such as debt-rating agencies, underwriters, and the public as to whether they could depend upon the financial statements.

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Co-Chair Stedman asked about the SBR, which was one of the state's two primary savings accounts and was subject to the sweep. If the committee appropriated money out of the account, it would be immediately recognizable if there was no reverse sweep and there was a fund shortage.

Ms. Curtis noted that the list on slide 17 was non-sweepable funds. She used the example of the Higher Education Fund.

Co-Chair Stedman discussed the use of the Higher Education Fund. He asked how the legislature would know if the definition was changed and the fund was considered subject to the sweep.

Ms. Curtis replied that if funds were swept, the monies were not available as of July 1. If the executive branch knew it was sweeping the funds and there were no available monies, immediate notification of anyone with contact with the appropriation should be notified. She referenced statute that stated that DOA must certify that there was a valid appropriation and that there was a fund balance before expenditure can happen. If the executive branch knew there was money in the fund, there should be no obligation to the fund.

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Co-Chair Stedman asked that if DOA knew a fund would be swept because of a change in policy, when and how would notification be provided to the legislature.

Ms. Curtis replied that currently the legislature should know that there was no reverse sweep for the funds swept in FY 18. If the executive branch was going to expand the funds that were swept, it needed to communicate it to the legislature and all agencies immediately.

Co-Chair Stedman asked when the legislature would be informed.

Ms. Curtis opined that there should be an immediate alert as to a change in funds that were subject to sweep.

Co-Chair Stedman asked who the executive branch would notify.

Ms. Curtis cited statute that dictated that DOA must certify there was an available balance in a fund before an expenditure could happen. She emphasized that DOA should know the information and should communicate.

Co-Chair Stedman was concerned that the committee know about potential reclassification of funds well in advance of closing out budgets. He thought Ms. Curtis' earlier comments indicated she had not heard of any reclassification of sub-funds.

Ms. Curtis thought Co-Chair Stedman had valid concerns and had heard rumors on the subject. She had observed the administration re-interpreting law and would not be surprised if there was re-classification of sub-funds.

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Senator Hoffman asked if the legislature would be in a position to file an injunction to stop a sweep from happening after a re-classification of sub-funds. He asked about legal avenues to ensure adherence to past practice; he did not think the decision should be an arbitrary one made by the executive branch.

Ms. Wallace stated that the Senate Finance Committee and other legislative committees had the ability to request that the administration come to the table and provide the

answers asked of the auditor. The legislature held subpoena power and could compel the administration to produce the records regardless of the accounting timeframe of whenever financial statements were prepared or reports were available. By operation of the constitution, the sweep occurred on June 30.

Ms. Wallace continued to explain that as appropriators, the legislature should be notified immediately if there had been change in policy with regard to sweepable and non-sweepable funds. The more drastic options of filing litigation or injunctive relief would be a decision that was up to the legislature, and the remedy may be available if the legislature received information that previously non-sweepable funds had been re-classified. Not only may the legislature be the appropriate body to file the challenge, but it could also come from outside entities that were equally interested in the change in policy.

Co-Chair Stedman confirmed that he had no intention of submitting subpoenas to the Office of Management and Budget to explain to the committee if funds were being reclassified as sweepable. He thought there should be a more open system, and the legislature should be notified in order to look at other funding mechanisms. He stressed that OMB had been invited to come speak to the committee and would not be subpoenaed. He stated that reclassification of non-sweepable funds was of concern, particularly the Higher Education Fund and the PCE Fund, because of the significant financial impact to the state.

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Senator Hoffman asked how OMB had responded to the committee's invitation.

Co-Chair Stedman replied that he had hoped that OMB would be there later in the afternoon, but the office had scheduling issues. He hoped that OMB would be in committee as soon as it could accommodate a meeting, but he had no intention of slowing down the budgetary process.

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Co-Chair Stedman apologized for the interruption and reminded that there were many moving parts in the budget. He explained that the committee had been discussing non-sweepable funds, which were listed on slide 17. He continued that the legislature had been progressing in putting a budget document together with the assumption that the non-sweepable funds were still non-sweepable absent any formal notification. He revisited the topic of notifications of fund classification changes. He asked Ms. Curtis if she could recall a fund being reclassified as sweepable, and what process of notification she would expect.

Ms. Curtis did not recall any funds that had been reclassified as sweepable. She had looked through permanent files in the agency and had not seen any indication of reclassification.

Co-Chair Stedman thought rumors had been swirling for the past month regarding reclassification of funds. He thought there was a high likelihood of one or more of the funds being reclassified, and asked Ms. Curtis to notify the committee so as to make a historical note.

Senator Wielechowski asked if Ms. Curtis was aware of any notices provided to her or the public in general as to whether any of the funds on slide 17 would be swept.

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Ms. Curtis was not aware of any notices from the executive branch.

Co-Chair Stedman thought there may be a forthcoming public release of information, which would be a surprise to members. He was concerned about advance notification of any possible fund reclassification so the committee could take rectifying action to ensure what the legislature could fund what it had decided to fund. He emphasized that the legislature was the appropriating body and could not do its work if it was not in session.

Senator Hoffman recalled that Ms. Curtis had testified that any such notification should be immediate before any reclassification of funds took place.

Ms. Curtis stated that it was her opinion.

Senator Hoffman asked for Ms. Wallace's opinion.

Ms. Wallace relayed that there was nothing by law that dictated a timeframe for notification but concurred that as a matter of practice that notification to the appropriating body should be immediate.

Senator Hoffman asked who could institute (on behalf of the legislature) the action to stop the fund reclassification once the notification was given.

Ms. Wallace stated that the initiation of action would be a policy decision for the members of the legislature to determine by committee or the whole body.

Co-Chair Stedman asked Senator Hoffman to repeat his question.

Senator Hoffman asked hypothetically who would be able to take action to exercise the rights of the legislature (as mentioned by Ms. Wallace) if the Higher Education Fund was reclassified as sweepable. He thought Ms. Wallace had stated that the committee or the legislature as a whole could take action.

Ms. Wallace stated that there was a multitude of ways the reclassification could be challenged; whether it was a member or a committee that voted to proceed. She stated there were broad-standing rules in the state and any member of the public or citizen taxpayer could challenge a change in policy decision.

Senator Hoffman asked if the same entities would have the authority to stop the outright transfer of funds through injunctive relief.

Ms. Wallace informed that injunctive relief was another kind of relief that was sought from the court; and whatever plaintiff were to potentially initiate litigation with respect to the reclassification would likely seek relief, otherwise the decision would be under the courts' review and not be timely enough to remedy the impacts of not having the funds available in the current fiscal year.

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Senator Hoffman thought there were several members that had expressed concern during Senate floor session earlier in the day regarding the Higher Education Fund and the PCE Fund. He emphasized the importance of the two funds and thought it was crucial that the legislature could verify that there had to be notification of any reclassification as soon as possible. He had heard that the administration did not plan on informing of any fund reclassifications until mid-August, which he felt was unacceptable.

Co-Chair Stedman asked about the mid-August timeline as referenced by Senator Hoffman, and if it had to do with an accounting process.

Ms. Curtis relayed that the August timeline had to do with the end of the reappropriation period. After the end of the fiscal year on June 30, the state had two months to pay bills as invoices came in from the previous fiscal year, and code the expenditures for the previous fiscal year. She thought the process should have no bearing on whether a fund would be swept, but that it did have bearing on how much would be swept.

Co-Chair Stedman asked the decision to sweep a fund that had been historically been non-sweepable could be made in August and backtracked.

Ms. Curtis stated that the decision to sweep a fund or not had no bearing on the calendar.

Co-Chair Stedman asked if a reclassification of funds would have to be made before the end of the fiscal year.

Ms. Curtis stated that the decision to reclassify funds as sweepable at any time; however, if one was trying to get legal analysis to support the opinion early summer might be the timeline.

Co-Chair Stedman asked if the executive branch could make the decision to reclassify funds after the end of the fiscal year.

Ms. Curtis stated that reclassification could be done after the fact if there was a reverse sweep in place. If a reverse sweep did not happen, then there would be a trigger to inform of the decision to reclassify funds.

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Co-Chair Stedman pondered the issue of no reverse sweep due to lack of a three-quarters vote. He wondered if a decision to reclassify funds for political purposes could be made after the end of the fiscal year.

Ms. Curtis thought any decision could be made for political reasons and clarified she would not weigh in on such a decision.

Senator Wielechowski used the example of the University Scholarship Fund. He assumed the funds would be distributed in the following six weeks. He supposed the governor had deemed the funds were sweepable and wondered if the students would have to pay the money back.

Ms. Curtis stated that only unreserved undesignated funds could be swept. If the funds were already expended, one could not retrieve the funds.

Senator Wielechowski thought the executive branch's argument for sweeping the funds would be that the constitution required the funds to be swept and that the funds were unconstitutionally paid out to the students, therefore there would be a required payback.

Ms. Curtis stated that the amounts unreserved and undesignated as of June 30 were swept.

Co-Chair Stedman thought the administration would be notified not to put out any new grants.

Ms. Curtis noted that the sweep was not of money that had been paid out, but rather money that would be paid out in the future.

Co-Chair Stedman thought a sweep would stop new funds from going out on July 1.

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Co-Chair von Imhof noted that the legislature was in the middle of a five-day window for a veto override. She did not think there was an opportunity for consideration of a reverse sweep because it was immediate. She thought it

appeared that sweepable fund would be swept as well as some non-sweepable funds that would leave holes and unfunded programs in the state budget. She questioned whether the legislature could muster a three-quarter vote at any point to force a reverse sweep after the five-day period. She questioned what the legislature's options would be after five days.

Ms. Wallace stated that the veto override consideration was separate from the sweep issues being discussed. The legislature could pass a reverse sweep in an appropriation bill with the approval of three-quarters of each body. The legislature could make the appropriation retroactive to July 1, 2019; and the state would see relatively no impact from the sweep. If the legislature acted expeditiously, the act would occur before even the accounting sweep on paper would occur. If the legislature did not pass a reverse sweep in an appropriation bill, and there were funds that were reclassified as sweepable, at that point the legislature or a member of the public or interested organization would need to make a decision on whether the grounds articulated by the administration were justifiable or needed challenge and court intervention.

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Senator Bishop looked at slide 16 and commented on the seriousness of the issue. He wondered how he could execute his mission between three divisions if there was no reverse sweep. He thought the issue needed to be rectified.

Ms. Curtis highlighted slide 18, "Final Sweep Take-Aways":

- The first sweep occurred for FYE 1995.
- All amounts borrowed from the CBRF were repaid by the end of FY 10. The general fund did not borrow from the CBRF from FY 11 through FY 14. Borrowing commenced for FY 15 and the sweep resumed for FYE 16. The sweep was reversed every year until FY 20.
- The reverse sweep was not approved for FY 20. This means that all funds swept as of June 30, 2019 will remain in the CBRF. As of July 1, 2019 those funds will have no balance available for appropriation.

- According to AS 37.05.170, payment may not be made and obligations may not be incurred against a fund unless the Department of Administration certifies that its records disclose that there is a sufficient unencumbered balance available in the fund. The sweep, in effect, creates a zero available balance in these funds as of July 1, 2019.

Senator Hoffman asked if the legislature could take action and give LLS the authority to file an injunction if the legislature was notified in August that any items that were not sweepable were deemed sweepable by the administration.

Ms. Wallace stated that her office would undertake litigation at the direction of Legislative Council. The legislature, while in session, would need to make a decision whether or not to pursue litigation in the interim. There were certain committees that had the power to sue on behalf of the legislature, including Legislative Council and Legislative Budget and Audit. The way the legislature was to proceed would be determined by the time of year.

Senator Hoffman thought Ms. Wallace had expressed that the legislature would have to depend upon the chair of Legislative Council to file suit after the legislature adjourned.

Ms. Wallace stated that Senator Gary Stevens, as chair of Legislative Council, could consider the suit; as well as the chair of the Legislative Budget and Audit Committee. She clarified that LLS would need direction from Legislative Council to undertake litigation.

#  
ADJOURNMENT  
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The meeting was adjourned at 3:15 p.m.