

HB

365

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y - STATE CAPITOL  
JUNEAU, ALASKA 99811  
907-465-3800

LEGISLATIVE AFFAIRS AGENCY  
LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

*House Judiciary:*

*3-8-88*

Introduced: 1/15/88  
Referred: State Affairs,  
Judiciary and Finance

*Philosophy; Accountability*

go00018h

*Reason for Bill 99<sup>th</sup> philosophical*

1 IN THE HOUSE

BY THE RULES COMMITTEE BY  
REQUEST OF THE GOVERNOR

2

HOUSE BILL NO. 365

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6

For an Act entitled: "An Act relating to delegation of responsibilities of  
7 the Alaska Permanent Fund Corporation Board of Trust-  
8 ees; relating to liability of the Alaska Permanent  
9 Fund Corporation, its board and its employees; and  
10 providing for an effective date."

11

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

12

\* Section 1. AS 37.13 is amended by adding new sections to read:

13

Sec. 37.13.105. ALLOCATION AND DELEGATION OF RESPONSIBILITIES;

14

LIABILITY. (a) The board may allocate its duties among the members  
15 of the board and may delegate to employees of the corporation any of  
16 the board's responsibilities with respect to the corporation.

17

(b) ~~If~~ the board allocates its responsibilities among its mem-  
18 bers or delegates responsibilities to the corporation's employees, and  
19 if the allocation or delegation meets the standard set in AS  
20 37.13.120(a), then no member of the board is responsible for duties

21

allocated to another member of the board, or delegated to a corpo-  
22 ration employee, except to the extent that the board member

23

(1) participates knowingly in, or knowingly undertakes to  
24 conceal, an act or omission of the other member or of the employee,  
25 knowing that the act or omission is a breach of the member's duties  
26 under this chapter;

27

(2) by his or her failure to comply with AS 37.13.120(a) in  
28 the administration of that member's specific responsibilities, enables  
29 the other member or the employee to commit a breach of duties; or

*Cold liability:  
Bill tracks ERISA*

*Magnard: Believes there is  
implied ability to delegate.*

1                   (3) has knowledge of a breach of duties by the other member  
2 or an employee, unless he or she makes reasonable efforts under the  
3 circumstances to remedy the breach.

4                   (c) The board may enter into one or more contracts with one or  
5 more investment managers, to invest part or all of the assets of the  
6 Alaska permanent fund. To the extent that the board enters into such  
7 a contract in a manner that meets the standard set in AS 37.13.120(a).  
8 the board is not liable for an act or omission of an investment manag-  
9 er in carrying out its investment responsibilities, nor is the board  
10 under an obligation to invest or otherwise manage assets of the Alaska  
11 permanent fund which are subject to the management of such an invest-  
12 ment manager.

13                   (d) For purposes of (c) of this section, "investment manager"  
14 means an entity

15                   (1) that has the power to manage, acquire, or dispose of  
16 assets such as those of the Alaska permanent fund; and

17                   (2) that is

18                   (A) registered as an investment adviser under 15  
19 U.S.C. 80b-1 -- 80b-21 (Investment Advisers Act of 1940);

20                   (B) a bank, as defined in 15 U.S.C. 80b-1 -- 80b-21  
21 (Investment Advisers Act of 1940);

22                   (C) an insurance company qualified to perform services  
23 described in (1) of this subsection under the laws of more than  
24 one state; or

25                   (D) a manager of institutional funds which has had at  
26 least five years of experience in the management of real estate  
27 investment of institutional investors.

28                   (e) The state shall defend and indemnify the board, and any of  
29 its employees to whom responsibility has been delegated, against

HE 365

*could delete*

HB0365A

*Indemnity  
of trustees*

*Allows use of subtrust for real estate deals.*

1 liability arising from acts or omissions of the board or such an  
2 employee, to the extent that the act or omission is not the result of  
3 gross negligence, intentional or reckless disregard of duties, or  
4 fraud.

5 Sec. 37.13.125. LIMITED LIABILITY TRUST. (a) The board may  
6 create, by written instrument, one or more trusts to hold assets of  
7 the corporation. The written trust instrument must provide

8 (1) that the trustees of the trust are the board;

9 (2) that, subject to (4) of this subsection, the trustees  
10 have the same rights and duties, as trustees, as the board has;

11 (3) that the corporation is the sole beneficiary of the  
12 trust, and may at any time

13 (A) revoke the trust,

14 (B) cause the trust's income or corpus, or both, to be  
15 distributed to the corporation upon demand by the corporation,

16 (C) dismiss the trust's investment adviser following  
17 reasonable notice, and

18 (D) sell its interest in the trust to any organization  
19 permitted under 26 U.S.C. 501(c)(25) (Internal Revenue Code, as  
20 amended as of 1986) to own such an interest;

21 (4) that the trust is organized for the exclusive purposes  
22 of

23 (A) holding general or limited partnership interests  
24 in partnerships owning, primarily, real estate investments,

25 (B) acquiring real property and holding title to, and  
26 collecting income from, the property, and

27 (C) remitting to the corporation the entire income,  
28 less expenses, from those interests or that property; and

29 (5) other provisions that the board considers necessary or

1           advisable to carry out the purposes of this chapter.

2           (b) The board is empowered to transfer assets of the corporation  
3           it deems appropriate and which the trust is authorized to hold, to a  
4           trust created under (a) of this section.

5           (c) The provisions of AS 37.13.120 apply to the investment and  
6           management of assets of a trust created under (a) of this section.

7           (d) The exemption granted by AS 37.13.180 applies to a trust  
8           created under (a) of this section.

9           (e) Third parties shall look solely to the property of a trust  
10          created under (a) of this section for satisfaction of claims arising  
11          in connection with the affairs of that trust, including claims arising  
12          out of or in connection with assets transferred to that trust by the  
13          corporation. The corporation, as the beneficiary of a trust created  
14          under (a) of this section, is not subject to personal liability to a  
15          third party in connection with the property or affairs of such a  
16          trust, except that the corporation might be liable to a third party in  
17          an amount up to the value of any trust assets distributed to it after  
18          a liability of the trust arose, to the extent that trust assets are  
19          insufficient to satisfy the trust's liability. No trustee or employee  
20          of a trust created under (a) of this section is subject to personal  
21          liability, and the state shall defend and indemnify the board and its  
22          employees against liability, for an action or omission of the trustees  
23          or the employees to the extent that the acts or omissions are not the  
24          result of gross negligence, intentional or reckless disregard of  
25          duties, or fraud. A written instrument creating an obligation of a  
26          trust created under (a) of this section must provide that the obliga-  
27          tions under that instrument are not personally binding upon, nor may a  
28          person resort to, the property of the corporation or the trustees,  
29          officers, employees, and agents of the trust, but that the trust

1           property or a specific portion of it only is bound and a person shall  
2           look solely to that trust property for satisfaction of claims of any  
3           nature arising in connection with the affairs of that trust.

4           \* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

January 15, 1988

The Honorable Ben Grussendorf  
Speaker of the House  
Alaska State Legislature  
P.O. Box V  
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the delegation of authority from the Board of Trustees of the Alaska Permanent Fund Corporation (board) to the employees and outside advisors of the corporation, and limiting the liability of the fund, its board, and employees.

Section 1 of the bill adds proposed AS 37.13.105, concerning delegation of the board's duties and limiting liability. The proposed statute (1) clarifies that the board may allocate its responsibilities among its members and may delegate any of its responsibilities to the corporation's employees; (2) specifically authorizes the board to contract with one or more investment managers for investment of the fund's assets, and defines "investment manager"; (3) relieves the board from liability with respect to assets for which investment authority has been prudently delegated; and (4) clarifies the degree of indemnity provided to the board and its employees in performing their official duties.

Although I believe that the board already has implied authority or coverage regarding some of these matters, there are arguments that could lead a court to conclude otherwise. Therefore, this bill provides specific statutory authorization and clarification to protect both the board and its employees from untoward liability that could otherwise arise even if actions taken are prudent and appropriate under the circumstances.

In an opinion dated September 13, 1982, the Department of Law discussed board delegation of decision-making to an employee or investment manager. That opinion stated that, given the statutory scheme under which the board is compensated, by honorarium, only for those days spent dealing directly with board work, it is "obviously implied" that the board would delegate to its employees, or to investment managers retained under contract, substantial responsibility

for day-to-day decisions. The opinion further stated that the board may so delegate as much authority as is consistent with the prudence displayed by similarly situated institutional investors.

Notwithstanding this opinion, however, there is no express statutory language that permits allocation or delegation of final investment decisions or even lesser matters. Express statutory authorization is desirable, particularly in light of (1) the consistently applied common law rule that such delegations are not usually permitted; (2) the fact that other institutional investors that allow such delegations almost uniformly do so under express authorizations; and (3) the fact that the reasoning of the opinion would not support the delegation of authority to subcommittees of the board (as has sometimes occurred in the past).

Current AS 37.13.120(f) permits the board to enter into "all contracts necessary, convenient or desirable" for the purposes of the corporation. While the state would argue that this is clear support for the board's authority to contract with professional investment managers for investment services, the board is not relieved of liability for the subsequent investment decisions of those investment managers -- even if the choice of a particular manager was prudent. Under 29 U.S.C. 1105(d), a provision of the federal Employee Retirement Income Security Act (ERISA), a fiduciary is expressly absolved of liability if investment responsibility is delegated to a professional investment manager, and such a provision is desirable here. Additionally, the language of AS 37.13.120(f) would not cover allocation of duties among board members or delegation of responsibilities to corporation employees.

Therefore, proposed AS 37.13.105(a) and (b) make clear that the board may allocate its responsibilities among its members and may delegate any of its responsibilities to its employees. Proposed AS 37.13.105(c) expressly permits the board to contract with one or more "investment managers" for investment of the permanent fund, and relieves the board of liability with respect to assets for which investment responsibility is so delegated, as long as the delegation was done in a prudent manner. Proposed AS 37.15.105(d) provides a definition of "investment manager," with the language in subparagraphs (2)(A) -- (C) of that subsection being taken from the parallel provisions of ERISA. Subparagraph (d)(2)(D) adds a category for real estate investment managers which is not included in ERISA but which is appropriate for permanent fund investments.

Finally, subsection (e) of proposed AS 37.13.105 clarifies the degree of indemnity provided to the board and its employees in performing their official duties. AS 09.50.250 immunizes the state against suit based upon an agency's or employee's exercise or failure to exercise discretionary functions or duties, whether or not the discretion involved is abused. The Department of Law stated in an opinion dated December 2, 1982, that the immunity for discretionary acts probably covers most decisions of the board; it is state policy to defend and indemnify officers or employees against personal liability.

Nonetheless, the opinion pointed out that there is no statutory provision relating to indemnity, and suggested that enactment of a statute stating the scope of indemnity would be helpful. Furthermore, in several cases in recent years the Alaska Supreme Court has held that only decisions that rise to the level of planning or policy formulation fall within the discretionary acts exception, while decisions made at the operational or ministerial level will not be shielded from liability. E.g., Japan Air Lines Co., Ltd. v. State, 628 P.2d 934 (Alaska 1981); Carlson v. State, 598 P.2d 969 (Alaska 1979); Adams v. State, 555 P.2d 235 (Alaska 1976); State v. Abbott, 498 P.2d 712 (Alaska 1972). This doctrine leaves a great deal of room for successful lawsuits attempting to impose liability for decisions that, with hindsight, might appear ill-advised. For example, in Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska 1986), the Alaska Supreme Court held that decisions by the counselors and parole officers in formulating a particular individual's parole plan, in deciding on the type of special conditions to impose, and in deciding on whether to inform persons in the community and potential future victims of possible crimes about the character of the parolee, were "ministerial," rather than protected "discretionary" acts.

Consequently, an argument might be made under present law that while the decision to delegate investment responsibility to the staff or to a yet-to-be selected investment manager is a discretionary act and thus immune from suit, the actual choices of the investment manager and of investments themselves are "operational," and thus not immune. This narrow application of the distinction between "discretionary" and "ministerial" acts renders the present immunity statute (AS 09.50.250) practically meaningless; yet it is an increasingly plausible outcome under recent court reasoning. Thus, express protection for the board and its employees against liability should be extended.

The bill proposes another new section, AS 37.13.125, to authorize the board to create one or more limited liability trusts. The Alaska Permanent Fund Corporation has a substantial, diversified investment portfolio, which includes a variety of investments in real estate. Some of these investments have taken the form of general partnership interests in partnerships owning and operating various kinds of real estate. Because of the liability that can attach to general partners in such circumstances, it has become desirable to provide a means by which assets of the Alaska Permanent Fund Corporation other than general partnership interests are insulated from any such liability that may accrue through ownership of general partnership interests. The purpose of the proposed statute is to expressly allow creation of a separate legal entity, a trust, that would afford the Alaska Permanent Fund Corporation the same protection against liability that a corporation affords a shareholder.

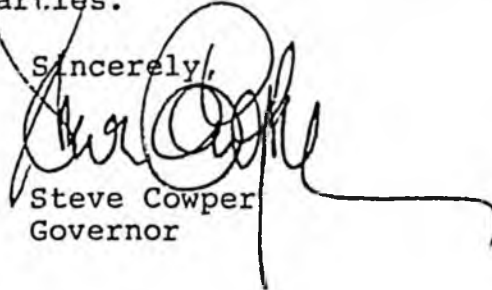
Such a trust, holding general partnership interests and any other related assets considered appropriate by the board, would be created by a trust instrument that names the board as trustees of that trust and names the Alaska Permanent Fund Corporation itself as the the exclusive beneficiary of the trust. The corporation would at all times have the unfettered ability (1) to withdraw the corpus and income from such a trust, (2) to revoke the trust, (3) to dismiss the trust's investment advisor after reasonable notice, and (4) to terminate its interest in the trust by selling its interest to any organization permitted to own such a trust under 26 U.S.C. 501(c)(25) (Internal Revenue Code, as amended as of 1986).

The trust instrument would permit investment of trust assets in such general partnership interests, and otherwise limit the trust to the exclusive purpose of acquiring such partnership interests or other real property, and holding title to and collecting income from the property. The trust must remit the entire amount of such income (less expense) to the Alaska Permanent Fund Corporation.

Under the laws of Alaska, only the trust assets would stand behind obligations of the trust. Neither the trustees, nor the Alaska Permanent Fund Corporation as the trust beneficiary, would be liable for any obligations of the trust, except that the Alaska Permanent Fund Corporation could be

liable for an amount up to the value of any trust assets distributed to it after a liability of the trust arose, to the extent that trust assets are insufficient to satisfy the trust's liability to third parties.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Cowper", with a long horizontal flourish extending to the right.

Steve Cowper  
Governor

STATE OF ALASKA 1988 LEGISLATIVE SESSION  
FISCAL NOTE

REQUEST: \_\_\_\_\_

Bill Version: HB 365  
Publish Date: HOUSE 1/15/88

Revision Date: \_\_\_\_\_  
Title: Delegation of responsibilities of APFC Board of Trustees; relating to liability  
Sponsor: of APFC, board, employees.  
Requestor: By Rules Committee by Request of Governor

Agency Affected: Revenue  
BRU: Alaska Permanent Fund Corporation  
Components: \_\_\_\_\_

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

There is no fiscal impact on the Alaska Permanent Fund Corporation's budget with this legislation.

ANALYSIS : (Attach a separate page if necessary) This bill consists of technical amendments to the Alaska Permanent Fund statute. The amendments add new sections which authorize the delegation of the board's authority to corporation employees and investment managers; provides liability protection; authorizes creation of subtrusts to prevent jeopardizing the Fund's assets.

Prepared by: David A. Rose, Executive Director Phone: 465-2047  
Division: Alaska Permanent Fund Corporation Date: 12/29/87

Approved by Commissioner: [Signature] Date: 12/29/87  
Agency: Alaska Permanent Fund Corporation (Dept. of Revenue)

- Distribution (by preparer):
- Legislative Finance
  - Legislative Sponsor
  - Requestor
  - Office of Management and Budget
  - Impacted Agency(ies)
  - Senate Secretary

# HOUSE COMMITTEE REPORT

(7)

Date referred: 1/15/88

FURTHER REFERRALS: Judiciary  
Finance

DATE: 2/8/88

The State Affairs Committee has considered HB 365

"An Act relating to delegation of responsibilities of the Alaska Permanent Fund Corporation Board of Trustees; relating to liability of the Alaska Permanent Fund Corporation, its board, and its employees; and providing for an effective date."

**RECOMMENDS:**

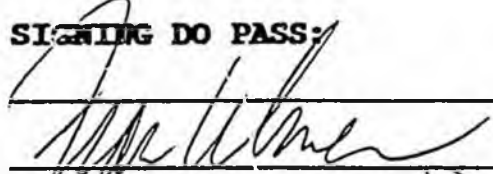
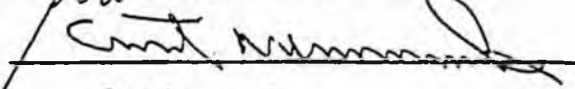
- replace with \_\_\_\_\_  the same title
- attached amendment(s)  a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the \_\_\_\_\_ Committee

**ADOPTS:**  \_\_\_\_\_ letter of intent

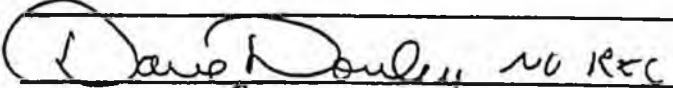
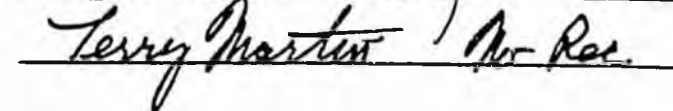
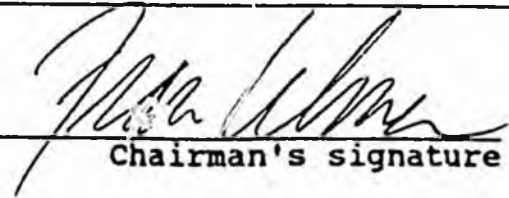
**ATTACHES NEW FISCAL NOTE(S):**

- fiscal impact  same as previous fiscal note published 1-15-88
- zero fiscal note
- zero with analysis  same as previous zero fiscal note published 1-15-88

**SIGNING DO PASS:**

  
 \_\_\_\_\_  
  
 \_\_\_\_\_  
 Cliff Darden  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**SIGNING OTHER RECOMMENDATIONS:**

 NO REC  
 \_\_\_\_\_  
 No Rec.  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
  
 \_\_\_\_\_  
 Chairman's signature