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STEVE COWPER
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 15, 1988

The Honorable Jan Faiks
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Faiks:

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.

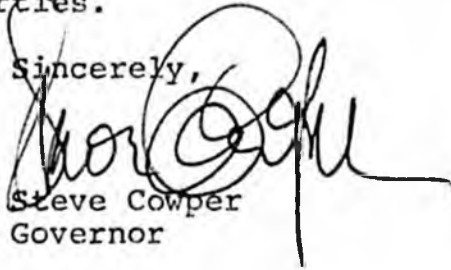
Such a trust, holding general partnership interests and any other related assets considered appropriate by the board, would be created by a trust instrument that names the board as trustees of that trust and names the Alaska Permanent Fund Corporation itself as the the exclusive beneficiary of the trust. 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", written over the typed name and title.

Steve Cowper
Governor

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: _____

Bill Version: _____
Publish Date: _____

Revision Date: _____

Agency Affected: Revenue

Title: Delegation of responsibilities of APFC Board of Trustees; relating to liability

BRU: Alaska Permanent Fund Corporation

Sponsor: of APFC, board, employees.

Components: _____

Requestor: By Rules Committee by Request of Governor

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-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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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

ANALYSIS : (Attach a separate page if necessary) Fund Corporation's budget with this legislation.

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: *Mark C. Don*
Agency: Alaska Permanent Fund Corporation (Dept. of Revenue)

Date: 12/29/87

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