

2/8/10

PROPOSED

REGS:

EXECUTIVE

BR.ETHICS/

OIL & GAS

TAX CREDIT

ALASKA STATE LEGISLATURE

Interim:

600 E. Railroad Avenue
Wasilla, Alaska 99654
Phone: 373-1842
Fax: (907) 373-4729



Session:

State Capitol Building
Juneau, Alaska 99801-1182
Phone: (907) 465-4899
Fax: (907) 465-3818

ADMINISTRATIVE REGULATION REVIEW COMMITTEE

COMMITTEE SCHEDULE

MONDAY FEBRUARY 8, 2010 3-5:00 P.M. ROOM 17

- + Joint Senate and House Committee Meeting**
- +* (9 AAC 52) Proposed Regulations Relating to Executive Branch Ethics
Public Testimony to be Taken.**
- +* (15 AAC 55.280 – 15 AAC 55. 811) Proposed Regulations Relating to Oil
and Gas Tax Credit and Heating Value of Gas Public Testimony to be
Taken.
Executive Session**

- + Teleconference**
- * First Public Hearing**
- = Previously Heard Bill**

E-Mail: John_Davies@legis.state.ak.us

ALASKA STATE LEGISLATURE

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ADMINISTRATIVE REGULATION REVIEW COMMITTEE

AGENDA

For

**ARRC meeting Monday, February 8, 2010
Capitol Rm.17, 3-5:00 P.M.**

- I. Call to Order by Chairman.
- II. Roll Call and Introduction of Members.
- III. Opening remarks by the Chairman.
- IV. (9 AC 52) Proposed Regulations Relating to Executive Branch Ethics, Presentation by Judy Bockmon, Assistant Attorney General, Department of Law, and thereafter; Public Testimony.
- V. (15 AAC 55.280 – 15 AAC 55.811) Proposed Regulations Relating to Oil and Gas Tax Credit and Heating Value of Gas. Presentation by Commissioner Patrick Galvin or Deputy Commissioner Marcia Davis and John Larson, Audit Master, and thereafter; Public Testimony.
- VI. Close Public Testimony.
- VII. Executive Session.

*This hearing will be teleconferenced.

E-Mail: John_Davies@legis.state.ak.us

John Davies

From: John Davies
Sent: Tuesday, February 09, 2010 1:03 PM
To: 'Andree McLeod'
Cc: Rep. Wes Keller
Subject: RE: Votes???

Dear Andree McLeod,

Thank you for your email.

By way of background, as you may know, the regulation review statute that the Committee operates under (Powers AS24.20.460) empowers the Committee to "as appropriate, to either introduce a bill annulling the regulation or exercise the committee's power to suspend the effectiveness of the regulation in accordance with AS24.20.445."(when not in Session)

The Committee, after exercising its due diligence review, did not find sufficient grounds to propose a bill annulling either of the regulations reviewed yesterday.

Thank you for your participation in yesterday's meeting, and for being an informed and engaged citizen.

Very Truly Yours,

John Davies
Committee Aide

From: Andree McLeod [mailto:andree@andree.us]
Sent: Tuesday, February 09, 2010 12:17 AM
To: John Davies
Subject: Votes???

Hi John
Did the committee vote on the Ethics regs?
What were the votes? I can't find it on BASIS.
Is that it? Is it final?
Andrée McLeod

John Davies

From: John Davies
Sent: Monday, February 01, 2010 3:53 PM
To: Bonnie Gruening; Christopher Birdsall; Kimberly Clark; Josh Applebee; Christina Apathy; Jim Pound
Subject: Notice of February 8, 2010 ARRC Meeting
Attachments: ARRC Schedule 2-8.docx

February 1, 2010

Dear Fellow Staff,

Attached to this email you will find the committee schedule notice for the first ARRC meeting to be held Monday, February 8, 2010, at 3 P.M. in room 17.

The House Speaker has brought to the committee's attention the two proposed regulations listed on the schedule (Executive Branch Ethics and Oil and Gas Credit). Public testimony will be taken on these two proposed regulations thereafter the committee will go into executive session in order to discuss with its attorney the 20 memos received during the interim concerning potential problem regulations. If you have any questions about specific memos feel free to give me a call.

Regards,

John Davies
Committee Aide

John Davies

From: Rep. Wes Keller
Sent: Wednesday, January 13, 2010 9:07 AM
To: Andree McLeod
Cc: John Davies
Subject: RE: Message to Wes from Andree re: proposed regulations changes to AEBEA

Good morning Andree, As you might guess, things are really stacking up just b4 I leave... I will look these over carefully and get John (my Chief of Staff and Reg Review Committee Aid) to review them--- then I will better understand your explanation of concerns. I had seen the notice of the proposed regulations and had heard mention of them on the news, but I have not looked at them in detail yet. We can communicate via telephone, but I will be distracted now gettng moved to Juneau. If you give me a call early next week, I will keep this on my radar screen. (Juneau office is 465-2186)

Rep Keller

From: Andree McLeod [andree@andree.us]
Sent: Wednesday, January 13, 2010 8:38 AM
To: Rep. Wes Keller
Subject: Message to Wes from Andree re: proposed regulations changes to AEBEA

Hi Wes.

These changes to the Alaska Executive Branch Ethics Act are what I would like to speak to you about When will your committee have a hearing on these proposed changes?

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF LAW
<http://www.law.state.ak.us/pdf/ethics/ProposedChanges.pdf>

Andrée
907.561.8595

John Davies

From: Rep. Wes Keller
Sent: Wednesday, January 13, 2010 9:14 AM
To: John Davies
Subject: assignment

Hi John, I just copied you on a response to Andree McLeod regarding the Administration Ethics regulation changes. If you remember, she is the one who filed countless complaints against the Governor and effectively demonstrated the need for some regulation changes. I want to listen carefully to what she is saying and respond definitively and will need your help to do that. It is difficult for me to believe that Admin would try to get away with anything when this is in the spotlight, but we need to understand exactly what they are doing. Give me a call if you have questions on this... I need to be able to respond to Andree next Tuesday.

Thanks, Wes

John Davies

From: John Davies
Sent: Wednesday, January 20, 2010 2:36 PM
To: 'andree@andree.us'
Cc: Rep. Wes Keller; Jim Pound
Subject: Proposed regulation changes to AEBEA

January 20, 2010

Dear Andree McLeod,

Representative Keller has asked me to respond to your email about your concerns reference the AEBEA.

The public vetting of the changes to the regulations is taking place at this time. You may comment on the proposed regulation changes, including the potential costs to private persons of complying with the proposed changes, by submitting written comments to Assistant Attorney General Judy Bockmon at the Department of Law, 1031 W. 4th Avenue, Anchorage, Alaska 99501 or by email to judy.bockmon@alaska.gov. Your comments must be received no later than 4:30 p.m. on January 22, 2010.

No hearing is presently anticipated by the Administrative Regulation Review Committee "ARRC" concerning the AEBEA.

The ARRC does not routinely hold hearings concerning proposed administrative regulations unless it is brought to the committee's attention by a standing committee or the ARRC's attorney that a regulation fails standards. Normally for a proposed regulation to garner review it would either be considered illegal; unconstitutional; outside statutory authority; inconsistent with statute; or inconsistent with legislative intent.

The ARRC's attorney reviews proposed regulations to determine if they comply with the standards for review, and jurisdictional standing committee(s) receive notice of the proposed changes. The standing committee may notice the ARRC if it has a concern about a proposed regulation.

At this time the ARRC has not received notice from either a standing committee or the ARRC attorney that the AEBEA fails any of the standards for review.

Therefore I encourage you to make your comments in the present ongoing public vetting process to the above named Assistant Attorney General.

Thank you for being an informed and concerned citizen. I hope that this email answered your question. If you have further need for information please feel free to contact our office at any time.

Very Truly Yours,

John Davies
Chief of Staff to
Rep Wes Keller

- (8) 9 AAC 52.135 is a proposed new section to provide guidance to designated ethics supervisors when review of an ethics disclosure reveals a violation of the Act.
- (9) 9 AAC 52.140 is proposed to be changed to clarify that the attorney general may separately address multiple alleged violations stated in one complaint.

You may comment on the proposed regulation changes, including the potential costs to private persons of complying with the proposed changes, by submitting written comments to Assistant Attorney General Judy Bockmon at the Department of Law, 1031 W. 4th Avenue, Ste. 200, Anchorage, Alaska 99501 or by email to judy.bockmon@alaska.gov. The comments must be received no later than 4:30 p.m. on January 22, 2010.

Oral or written comments also may be submitted at a hearing to be held on January 6, 2010, in the Fifth Floor Conference Room, Department of Law, 1031 W. 4th Avenue, Anchorage, Alaska. The hearing will be held from 10:00 a.m. to 12:00 p.m. and might be extended to accommodate those present before 10:00 a.m. who did not have an opportunity to comment.

If you are a person with a disability who needs a special accommodation in order to participate in this process, please contact Kamie Willis at (907) 269-5100 at least seven days before the special accommodation is needed to ensure that any necessary accommodations can be provided.

For a copy of the proposed regulation changes, contact Kamie Willis at the Department of Law, 1031 W. 4th Avenue, Ste. 200, Anchorage, Alaska or (907) 269-5100 or go to www.law.state.ak.us/doclibrary/ethics.html.

After the public comment period ends, the Department of Law will either adopt these or other provisions dealing with the same subject, without further notice, or decide to take no action on them. The language of the final regulations may be different from that of the proposed regulations. **YOU SHOULD COMMENT DURING THE TIME ALLOWED IF YOUR INTERESTS COULD BE AFFECTED.**

Statutory Authority: AS 39.52.950

Statutes Being Implemented, Interpreted, or Made Specific: AS 39.52.110 - 39.52.140; AS 39.52.210; AS 39.52.220; AS 39.52.260; AS 39.52.310; AS 39.52.410; AS 39.52.420; AS 39.52.950; AS 39.52.960

Fiscal Information: The proposed regulation changes are not expected to require an increased appropriation.

DATE: December 5, 2009

/s/

Daniel S. Sullivan
Attorney General
Department of Law

ADDITIONAL REGULATIONS NOTICE INFORMATION
(AS 44.62.190(d))

1. Adopting agency: Department of Law
2. General subject of regulation: Changes to Alaska Executive Branch Ethics Act Regulations
3. Citation of regulation: 9 AAC 52.035 - 9 AAC 52.070; 9 AAC 52.130; 9 AAC 52.135; 9 AAC 52.140; 9 AAC 52.990
4. Reason for the proposed action:
 - compliance with federal law
 - compliance with new or changed state statute
 - compliance with court order
 - development of program standards
 - other: (please list) _____
5. RDU/component affected: Civil Division/Opinions, Appeals, and Ethics

6. Cost of implementation to the state agency and available funding (in thousands of dollars):

	Initial Year FY 2010	Subsequent Years
Operating Cost	\$ 0	\$ 0
Capital Cost	\$ 0	\$ 0
Federal receipts	\$ 0	\$ 0
General fund match	\$ 0	\$ 0
General fund	\$ 0	\$ 0
General fund/ program receipts	\$ 0	\$ 0
General fund/ mental health	\$ 0	\$ 0
Other funds (specify)	\$ 0	\$ 0

7. The name of the contact person for the regulations:

Name Judy Bockmon
Title Assistant Attorney General
Address 1031 W. 4th Ave. Suite 200
Anchorage, AK 99501
Telephone 907-269-5100
E-mail address judy.bockmon@alaska.gov

8. The origin of the proposed action:

- staff of state agency
- federal government
- general public
- petition for regulation change
- other (please list): Request from Department of Administration

9. Date: December 7, 2009

Prepared by: _____ /s/ _____
[signature]

Name (typed) Judy Bockmon
Title (typed) Assistant Attorney General
Telephone: 907-269-5100

9 AAC 52 is amended by adding a new section to read:

9 AAC 52.035. Personal gain. For purposes of AS 39.52.120(a), gain is personal gain if it is

- (1) a benefit to the public officer's personal interest or financial interest; or
- (2) actual or anticipated gain, benefit, profit, or compensation to the public officer or the officer's immediate family member. (Eff. __/__/__, Register __)

Authority: AS 39.52.120 AS 39.52.950

9 AAC 52.040(c) is amended by adding a new paragraph to read:

(3) accepting money to reimburse the public officer for expenses incurred for professional legal services to defend against a complaint brought under AS 39.52.310 - 39.52.390, approving money to reimburse another public officer for those expenses, entering into an agreement to pay those expenses on behalf of another public officer, or authorizing payment to secure those professional legal services on behalf of another public officer, if

(A) the public officer to be reimbursed, or on whose behalf payment is to be made, is exonerated of a violation of the Ethics Act or other law for which reimbursement or payment is to be made, or agrees to repay the money or payment if the public officer is not exonerated of the violation;

(B) the complaint concerns conduct that occurred during the public officer's employment or service as a public officer;

(C) the expenses reimbursed or paid are reasonable; and

(D) the reimbursement or payment is made by a state agency that has money appropriated that may be lawfully used for the purpose of paying the expenses.

9 AAC 52.040 is amended by adding a new subsection to read:

(d) For purposes of (c)(3) of this section,

(1) exoneration of a violation of the Ethics Act

(A) occurs when an allegation in a complaint brought against a public officer under AS 39.52.310 - 39.52.390 is

(i) dismissed under AS 39.52.310(d), 39.52.320, or 39.52.370(d);

(ii) resolved with only preventive action recommended under

AS 39.52.330 to avoid a potential violation; or

(iii) dismissed after appeal under AS 39.52.370(f); and

(B) does not include the dismissal or resolution of an allegation in a complaint when corrective action is required under AS 39.52.330;

(2) expenses are reasonable if they were necessarily incurred to defend against an allegation in a complaint brought under AS 39.52.310 - 39.52.390; those expenses may

(A) include attorney's fees and fees incurred for professional legal services customarily performed by an attorney but delegated to and performed by an investigator, paralegal, or law clerk; and

(B) be apportioned by alleged violation if a complaint alleges more than one violation, but only if the public officer provides clear documentation that the expenses paid or to be reimbursed were limited to the alleged violation for which the public officer is exonerated; and

(3) payment or reimbursement under this section may be made to or on behalf of a current or former public officer. (Eff. 4/24/94, Register 130; am __/__/__, Register __)

Authority: AS 39.52.120 AS 39.52.950

9 AAC 52 is amended by adding a new section to read:

9 AAC 52.045. Transportation of family members of governor and lieutenant governor. (a) The use or authorization of use of state money or other state resources for transportation of a family member of the governor or lieutenant governor does not violate AS 39.52.120(a) or (b)(3) if transportation is provided to an event at which the family member's presence benefits the state. The presence of a family member of the governor or lieutenant governor benefits the state if the family member's presence

(1) is required for state business; or

(2) has a public purpose related to the governor's or lieutenant governor's official duties, including

(A) attending a state-sponsored event that the family of the governor or lieutenant governor customarily attends;

(B) attending an event at which the family member serves as an official representative of the state; and

(C) accompanying, as an invited guest, the governor or lieutenant governor to an event related to issues important to the state when the family member's attendance is appropriate for the event, such as youth or family related events.

(b) For purposes of AS 39.52.120(a) and (b)(3) and (a) of this section, transportation of a family member to attend a political or campaign event held for partisan political purposes does not benefit the state.

(c) For purposes of AS 39.52.120(a) and (b)(3), the use or authorization of use of state money or other state resources for transportation of a family member that does not benefit the state is presumed insignificant if the governor or lieutenant governor pays the state the cost of the family member's transportation. Except for transportation by state aircraft for partisan political purposes under AS 39.52.120(f), the agency that authorized or paid for the travel shall determine the cost of the transportation based on either

- (1) the actual fare paid; or
- (2) the fare for an equivalent commercial flight, if the travel was by state aircraft.

(d) In this section,

- (1) "child" has the meaning given in AS 39.52.960;
- (2) "family member" means a spouse or minor child of the governor or lieutenant

governor;

- (3) "for partisan political purposes" has the meaning given in

AS 39.52.120(b)(6). (Eff. ___/___/___, Register ___)

Authority: AS 39.52.120 AS 39.52.950

9 AAC 52.050 is repealed and readopted to read:

9 AAC 52.050. Use of state time, property, equipment, or other facilities. (a) Unless the attorney general has issued a general opinion against the use or advised the public officer against the use, a public officer who uses state time, property, equipment, or other facilities to benefit the officer, an immediate family member of the officer, the officer's personal or financial interest, or another person does not violate AS 39.52.120(a) or (b)(3) if the officer's designated supervisor determines that the use is insignificant.

(b) For purposes of determining whether a public officer has violated AS 39.52.120(a) or (b)(3), the use of a state cellular telephone to benefit the officer, an immediate family member of the officer, the officer's personal or financial interest, or another person is presumed insignificant if

(1) the cellular telephone service plan provides, for a set monthly fee, an allowance of usable minutes or an unlimited number of usable minutes;

(2) the use does not exceed

(A) the greater of 30 minutes or five percent of the allowed minutes under the applicable service plan per month, for a plan that provides an allowance of usable minutes;

(B) the greater of 30 minutes or five percent of the total minutes used in a month under the applicable service plan, for a plan that provides an unlimited number of usable minutes; and

(3) the public officer reimburses the state in full for use that results in a separate charge; charges for minutes exceeding an allowance of usable minutes are presumed to have been incurred to benefit the officer, an immediate family member of the officer, the officer's personal or financial interest, or another person.

(c) For purposes of determining whether a public officer has violated AS 39.52.120(a) or (b)(3), the use of a portable state computer to benefit the officer, an immediate family member of the officer, the officer's personal or financial interest, or another person is presumed insignificant if the use

(1) is for electronic mail communications, Internet access, or entertainment;

(2) does not occur during duty hours; and

(3) occurs at no cost to the state.

(d) For purposes of determining whether a public officer has violated AS 39.52.120(a) or (b)(3), the use of a state personal digital assistant to benefit the officer, an immediate family member of the officer, the officer's personal or financial interest, or another person is presumed insignificant if, when the device is used as a

(1) cellular telephone, the use complies with (b) of this section;

(2) computer, the use complies with (c) of this section.

(e) Nothing in this section exempts a public officer from compliance with other state requirements applicable to state computing and information technology resources. (Eff. 4/24/94, Register 130; __/__/__, Register ____)

Authority: AS 39.52.110 AS 39.52.120 AS 39.52.950

9 AAC 52.060 is amended by adding a new subsection to read:

(c) An offer to a state agency by a person or governmental agency other than the state to pay or reimburse travel expenses for one or more public officers to carry out official responsibilities does not result in a gift to the individual traveling public officer within the meaning of AS 39.52.130 if an authorized supervising public officer approves acceptance of the offer in advance. An approving public officer may not participate in that travel without advance approval of acceptance of the offer by the head of the agency. In this subsection, "travel expenses" means the costs of transportation, lodging, or meals comparable to what the state would pay for travel expenses for the traveling public officer to carry out the associated official responsibilities. (Eff. 4/24/94, Register 130; am __/__/__, Register ____)

Authority: AS 39.52.130 AS 39.52.950

9 AAC 52.070 is amended to read:

9 AAC 52.070. Information disseminated to the public. (a) For purposes of AS 39.52.140, information has been disseminated to the public if it has been **distributed to the public** [PUBLISHED] through

- (1)** a newspaper **or other printed** publication;
- (2)** broadcast media;
- (3)** a press release;
- (4)** a newsletter;
- (5)** a legal notice;
- (6)** a nonconfidential court filing;
- (7)** a published report;
- (8)** **an agency's website;**
- (9)** **posting on the Alaska Online Public Notice System established under AS 44.62.175;**
- (10)** a public speech; or
- (11)** public testimony before the legislature [, A BOARD,] or **an agency** [A

COMMISSION].

(b) Information that is available to the public but that has not been **distributed** [PUBLISHED] as described in (a) of this section has not been disseminated to the public. (Eff.

4/24/94, Register 130; am ___/___/___, Register ___)

Authority: AS 39.52.140 AS 39.52.950

9 AAC 52.130(a) is amended to read:

(a) A designated supervisor shall submit the quarterly report described in AS 39.52.260 during the 30 [45] days following the end of each calendar quarter.

(Eff. 4/24/94, Register 130; am ___/___/___, Register ___)

Authority: AS 39.52.260 AS 39.52.950

9 AAC 52 is amended by adding a new section to read:

9 AAC 52.135. Designated supervisor's determination of violation. If, upon review of an ethics disclosure, a designated supervisor determines that a violation of AS 39.52.110 - 39.52.190 may have or has occurred, the designated supervisor shall

(1) in the case of a public employee, refer the matter for investigation and appropriate disciplinary action in accordance with AS 39.52.420 and, following any disciplinary action, to the attorney general for review under AS 39.52.310, unless the significance of the identified violation warrants immediate review by the attorney general; and

(2) in the case of a board or commission member, refer the matter to the attorney general for review under AS 39.52.310. (Eff. ___/___/___, Register ___)

Authority: AS 39.52.210 AS 39.52.310 AS 39.52.950
AS 39.52.220 AS 39.52.420

9 AAC 52.140 is amended by adding a new subsection to read:

(e) If a complaint against a public officer alleges more than one violation of the Ethics Act, the attorney general may take action under AS 39.52.310, 39.52.320, 39.52.330, and

Register __, _____ 2010

LAW

39.52.350 regarding each alleged violation separately. (Eff. 4/24/94, Register 130;

am __/__/__, Register __)

Authority: AS 39.52.310 AS 39.52.330 AS 39.52.950

AS 39.52.320 AS 39.52.350

9 AAC 52.990(b)(6) is repealed:

(6) repealed __/__/__;

(Eff. 4/24/94, Register 130; am __/__/__, Register __)

Authority: AS 39.52.120 AS 39.52.410 AS 39.52.960

[AS 39.52.120(a)] AS 39.52.950

John Davies

From: Rep. Wes Keller
Sent: Wednesday, January 20, 2010 12:55 PM
To: John Davies
Subject: FW: Message to Wes from Andree re: proposed regulations changes to AEBEA

Hi John, Feel free to respond in the context we talked about. There is no reason to have a hearing on the regulation change that I can see. You might point out that any standing committee can take this up if she wants to press the issue. (AS 24.05.182)

Thanks
Wes

-----Original Message-----

From: Andree McLeod [mailto:andree@andree.us]
Sent: Wednesday, January 20, 2010 11:58 AM
To: Rep. Wes Keller
Subject: FW: Message to Wes from Andree re: proposed regulations changes to AEBEA

Hello.

You mentioned to contact you this week about my concerns re: the proposed regulation changes to the AK Executive Branch Ethics Act (AEBEA) that will be in front of your Admin Reg Review committee.
I received a response from the Dept. of Law person charged with the AEBEA and she wasn't able to answer one very important consequence of the changes.

Will you schedule a committee hearing on these AEBEA changes in order to allow members of the public to apprise the Admin Reg Review committee members on the impending changes?

Thank you.
Andrée McLeod
561-8595

-----Original Message-----

From: Andree McLeod [mailto:andree@andree.us]
Sent: Wednesday, January 13, 2010 9:16 AM
To: 'Rep. Wes Keller'
Subject: RE: Message to Wes from Andree re: proposed regulations changes to AEBEA

Excellent Wes.

I am also awaiting for clarification on a couple of the changes. By the next time we speak, I hope to convince you that a proper public legislative vetting of the changes to the regulations should occur; as the impact of a couple of these changes to AK's ethics laws tend to water down and weaken the Legislature's initial intent re: the Alaska Executive Branch Ethics Act.
Thank you for your time and consideration.
Stay safe and Bon Voyage to Juneau!
Andrée

-----Original Message-----

From: Rep. Wes Keller [mailto:Representative_Wes_Keller@legis.state.ak.us]
Sent: Wednesday, January 13, 2010 9:07 AM
To: Andree McLeod

Cc: John Davies

Subject: RE: Message to Wes from Andree re: proposed regulations changes to AEBEA

Good morning Andree, As you might guess, things are really stacking up just b4 I leave... I will look these over carefully and get John (my Chief of Staff and Reg Review Committee Aid) to review them--- then I will better understand your explanation of concerns. I had seen the notice of the proposed regulations and had heard mention of them on the news, but I have not looked at them in detail yet. We can communicate via telephone, but I will be distracted now gettng moved to Juneau. If you give me a call early next week, I will keep this on my radar screen. (Juneau office is 465-2186)

Rep Keller

From: Andree McLeod [andree@andree.us]

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To: Rep. Wes Keller

Subject: Message to Wes from Andree re: proposed regulations changes to AEBEA

Hi Wes.

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When will your committee have a hearing on these proposed changes?

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF LAW

<http://www.law.state.ak.us/pdf/ethics/ProposedChanges.pdf>

Andrée

907.561.8595

NOTICE OF PROPOSED CHANGES IN THE
REGULATIONS OF THE DEPARTMENT OF LAW

The Department of Law proposes to adopt regulation changes in Title 9 of the Alaska Administrative Code, dealing with the Alaska Executive Branch Ethics Act, (AS 39.52), including the following:

- (1) 9 AAC 52.035 is a proposed new section to be added to establish the standards for the term "personal gain" as used in AS 39.52.120(a) to conform to statutes and to add clarifying language. The existing definition of "personal gain" at 9 AAC 52.990(b)(6) would be repealed.
- (2) 9 AAC 52.040 is proposed to be changed by adding new provisions establishing standards for the conditions when the acceptance or approval of state money to pay on behalf of, or reimburse a public officer for, expenses incurred for professional legal services to defend against a complaint brought under the Alaska Executive Branch Ethics Act (AS 39.52) may occur, including when the public officer is exonerated of any violation of the Act.
- (3) 9 AAC 52.045 is a proposed new section to be added to establish standards for determining when the use or authorization of state money or other state resources for transportation of family members of the governor or lieutenant governor does not result in personal gain or unwarranted benefits under the Act.
- (4) 9 AAC 52.050 is proposed to be changed to recognize that misuse of state resources may result in personal gain to a public officer or another person as well as benefit to an officer's personal interests or financial interests as those terms are defined in the Act. The regulation is also proposed to be changed to include standards for determining when a public officer's incidental use of state equipment, such as cell phones, personal digital assistants, and portable computers, is presumed insignificant.
- (5) 9 AAC 52.060 is proposed to be changed to clarify the application of AS 39.52.130, addressing gifts to a public officer. 9 AAC 52.060(b) currently permits agency heads to determine that a gift of travel received by an employee traveling on state business is a gift to the state, not a personal gift to the employee. The proposed amendment would clarify that the individual employee does not have to submit a disclosure for pre-approved state travel relating to offers by others made in advance to pay travel expenses of a state employee to facilitate state business.
- (6) 9 AAC 52.070 is proposed to be changed to update the description of information considered to be publicly disseminated for purposes of AS 39.52.140. That provision prohibits public officers from using information acquired during their jobs for personal benefit, unless it has been publicly disseminated. The proposed regulation change would, among other matters, establish that information posted for public consumption on a state website has been publicly disseminated.
- (7) 9 AAC 52.130(a) is proposed to be changed to change the deadline for ethics supervisors to submit quarterly reports to the attorney general from 45 to 30 days following the end of the quarter. The change would permit more timely review of the matters addressed by designated ethics supervisors during the quarter and earlier preparation of the public summary and report to the Personnel Board.

**Submitting a Comment to
The Joint Administrative Regulation Review Committee**

The Administrative Regulation Review Committee hears from Alaskans who have been affected by regulations. We also hear from those with concerns about proposed regulations. Your comments become part of the public process. Thank you.

Full Name: _____

Telephone: _____

Address: _____

Email: _____

What industry or public interest do you represent? _____

What department has promulgated the regulation(s) of concern? _____

What Alaska Administrative Codes (AAC) are in question, if known? _____

Comments: (use more pages if necessary)

Attachments (documents, if any, to support your statements)

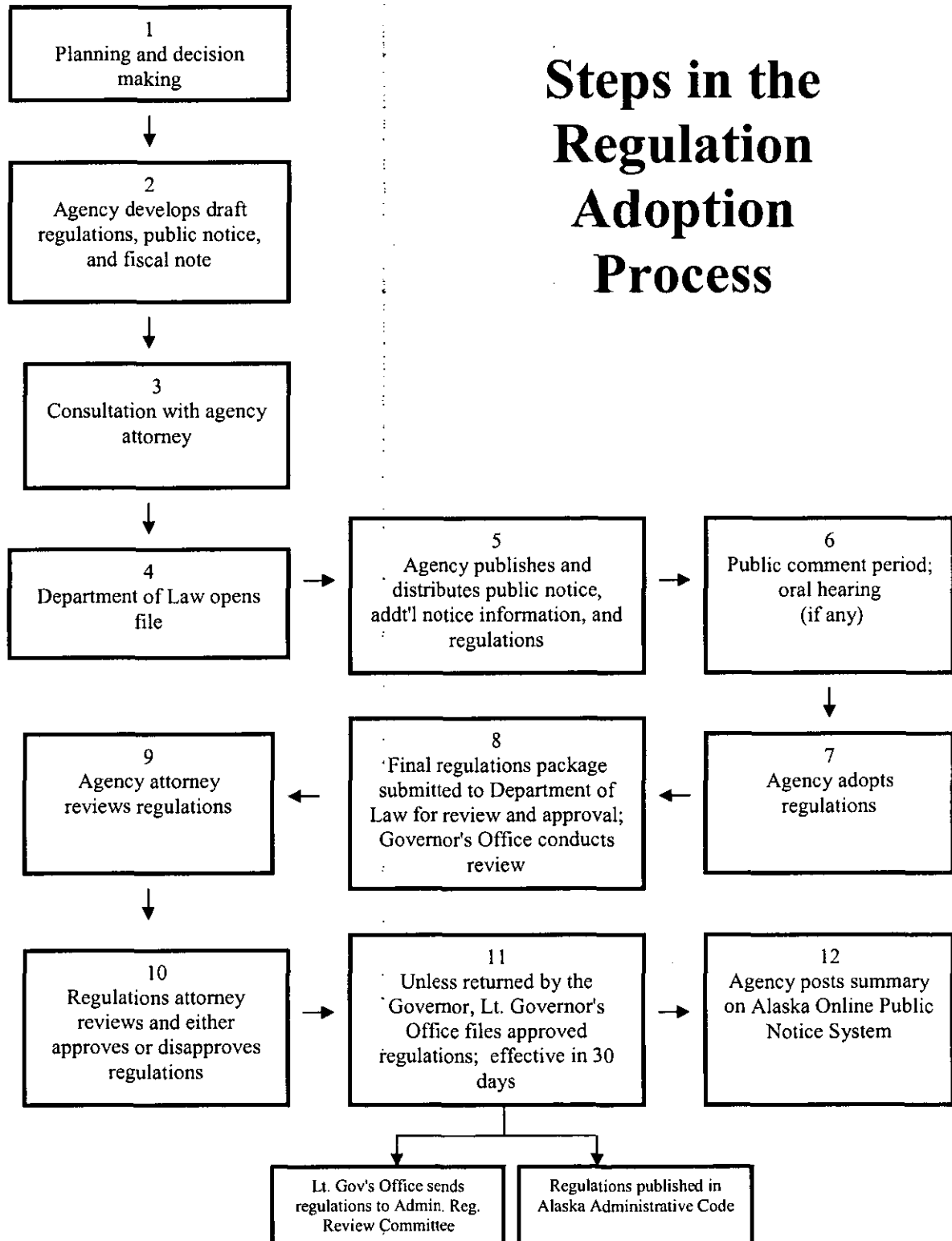
I would like to be contacted personally to follow up on my comments.

I have already submitted similar comments to the department promulgating these regulations during their public comment period.

Please FAX: 1 (907) 269-0249 Telephone: (907) 269-0250

EMAIL: arrc@legis.state.ak.us

Steps in the Regulation Adoption Process



Alaska Legislature

Administrative Regulation Review Committee

[Administrative Procedures Act](#)

[Reports](#)

[Regulatory Process](#)

[Submitting Comments](#)

Joint Committee for Administrative Regulation Review

Authority - The Administrative Regulation Review Committee is established as a permanent interim committee of the legislature. The establishment of the committee recognizes the need for prompt legislative review of administrative regulations filed by the lieutenant governor.

Powers - The Administrative Regulation Review Committee has the power to hold public hearings; to examine all administrative regulations, including proposed regulations, amendments, and orders of repeal, to determine if they properly implement legislative intent and to provide comments on them to the governor and state agencies; to promote needed revision or repeal of regulations that have been adopted by state departments and agencies and, when the committee determines a regulation should be repealed or amended, to introduce a bill that would enact a statute that would supersede or nullify the regulation.

Review - The review of administrative regulations shall evaluate the legality and constitutionality of the regulation; whether the state agency has statutory authority to adopt the regulation that implements, interprets, makes specific, or otherwise carry out a statute; and whether the proposed regulation is consistent with applicable statutes.

Members - The Administrative Regulation Review Committee is composed of three members of the House appointed by the Speaker of the House, and three members of the Senate appointed by the President of the Senate. The membership from each house shall include at least one member from each of the two major political parties. Members serve for the duration of the legislature during which they are appointed.

ARRC Members for 26th Alaska Legislature

Representative Wes Keller, Chair

Senator Donald Olson, Vice Chair

Senator Albert Kookesh

Senator Kevin Meyer

Representative Carl Gatto

Representative David Guttenberg

Meetings - The Administrative Regulation Review Committee may meet during the sessions of the legislature and during the interim between sessions at such times and places in the state as the chairman may determine.

Staff - Jim Pound, Administrative Regulation Review Committee Aide, Staff
to Representative Wes Keller, Chair

Contact Information

Representative Wes Keller

[Representative Wes Keller@legis.state.ak.us](mailto:Representative_Wes_Keller@legis.state.ak.us)

Jim Pound, Committee Aide

[Jim Pound@legis.state.ak.us](mailto:Jim_Pound@legis.state.ak.us)

ARRC@legis.state.ak.us

[Senator Donald Olson@legis.state.ak.us](mailto:Senator_Donald_Olson@legis.state.ak.us)

[Senator Albert Kookesh@legis.state.ak.us](mailto:Senator_Albert_Kookesh@legis.state.ak.us)

[Senator Kevin Meyer@legis.state.ak.us](mailto:Senator_Kevin_Meyer@legis.state.ak.us)

[Rep Carl Gatto@legis.state.ak.us](mailto:Rep_Carl_Gatto@legis.state.ak.us)

[Rep David Guttenberg@legis.state.ak.us](mailto:Rep_David_Guttenberg@legis.state.ak.us)

Alaska State Capitol, Room 125
Juneau , Alaska 99801
Phone: (907) 465-2995
Toll Free: (800) 365-2995
Fax: (907) 465-6592

Alaska Legislature

Administrative Regulation Review Committee

Reports

These reports are for the purpose of providing a quick read on newly proposed regulations and newly adopted regulations to spark interested parties to take a closer look. They are not comprehensive, nor do they offer commentary except as provided by the agency promulgating the regulation.

For complete information regarding proposed and newly adopted regulations, please go to the State of Alaska website: www.state.ak.us. Click on *Public Notices legal, bids*. Then click *By Dept*. Then look under each department heading for postings of *Notices of Proposed Regulations or Adopted Regulations - Text or Summary of Text*.

For questions regarding these reports, or if you would like to be sent future copies of it, please contact Committee Aide Jim Pound at Jim_Pound@legis.state.ak.us.

Newly Proposed Regulations

[Report # 1 January 25, 2005](#)

[Report # 2 February 11, 2005](#)

[Report #3 March 24, 2005](#)

[Report #4 May 4, 2005](#)

[Report #5 June 8, 2005](#)

[Report #6 July 27, 2005](#)

[Report #7 October 7, 2005](#)

[Report #8 December 5, 2005](#)

[Report #9 March 31, 2006](#)

Committee Minutes

[February 2, 2005](#)

[March 3, 2005](#)

April 20, 2005

News Releases

February 9, 2005 - Regulation Review Committee Hears Food Code Concerns at First Meeting

March 1, 2005 - Committee to Hear Concerns of Assisted Living Home Operators

April 12, 2005 - Committee to Hold Meeting on Food Codes

Newly Adopted Regulations

[As available]

Other Reports

[As available]

Contact Information

Representative Wes Keller

Representative Wes Keller@legis.state.ak.us

Jim Pound, Committee Aide

Jim_Pound@legis.state.ak.us

Alaska State Capitol, Room 125

Juneau , Alaska 99801
Phone: (907) 465-2995
Toll Free: (800) 365-2995
Fax: (907) 465-6592

Correct

John Davies

From: John Davies
Sent: Tuesday, February 02, 2010 12:13 PM
To: 'andree@andree.us'
Cc: Rep. Wes Keller
Subject: ARRC Meeting scheduled for 2/8/10
Attachments: ARRC Schedule 2-8.docx

Dear Andree McLeod,

Representative Keller has asked me to personally notify you that an ARRC meeting has been scheduled for Monday, February 8, 2010 at 3pm in room 17 of the State Capitol to among other business, receive public comment such as yours on the proposed executive ethics regulations. I am attaching a schedule for your review. Public comment may be given at your local LIO in the event that you are not able to attend in Juneau. If you have any questions please feel free to either email me or give me a call at 465-4899.

Very Truly Yours,

John Davies
Committee Aide

John Davies

From: Rep. Wes Keller
Sent: Saturday, January 30, 2010 10:02 AM
To: Andree McLeod; Sen. Donny Olson; Sen. Albert Kookesh; Sen. Kevin Meyer; Rep. David Guttenberg; Rep. Carl Gatto
Cc: John Davies
Subject: RE: Request for ARRC public review RE: Proposed regulation changes to AEBEA
Attachments: image001.gif

Andree, Thank you for your request and opinion. I am confident that the ARRC members are giving it consideration and will give me feedback as they see fit.

Sincerely,
Rep Wes Keller, ARRC Chair

From: Andrée McLeod [andree@andree.us]
Sent: Thursday, January 28, 2010 2:06 PM
To: Rep. Wes Keller; Sen. Donny Olson; Sen. Albert Kookesh; Sen. Kevin Meyer; Rep. David Guttenberg; Rep. Carl Gatto
Subject: Request for ARRC public review RE: Proposed regulation changes to AEBEA

To Representative Keller and members of the Administrative Regulation Review Committee:

This is another request for the Administrative Regulation Review Committee to have a public hearing re: the proposed changes to the Alaska Executive Branch Ethics Act (AEBEA). Your COS states that 'normally for a proposed regulation to garner review it would either be considered... or inconsistent with legislative intent.' **I submit that a couple of the changes weaken the AEBEA to the point where they do not support the legislative intent and objective of the AEBEA as they provide more safeguards towards public officials while they endanger and exact a high cost on the public's right to know, and their right to address and redress their public officials for wrongdoings and misconduct.**

How will the public know how ARRC members stand on the proposed changes if you don't meet publicly to review these changes? Will these proposed changes become official by default without the ARRC hearing from concerned members of the public? Are you relying on the Department of Law to provide a full and complete record re: the proposed changes?

For the ARRC to not have a public hearing on these proposed changes underline an unspoken truth that there is practically no distinction between the legislative and executive branches in Alaska re: the AEBEA and its continued dysfunctional operation.

Not having a public hearing undermines the people's right to appeal to their elected officials that there is something terribly wrong in the executive branch's ethics complaint process.

It would be quite a disappointment for the ARRC to consider and sign off on these proposed regulations without hearing from the public. What follows are my comments submitted to the Department of Law. (Note that proposed change (5) re: unclaimed gratuities to public officials is still not fully understood by the Department of Law.)

Please schedule an ARRC public hearing for the intent of publicly airing out these proposed changes to the AEBEA.

Sincerely,

Andrée McLeod

Here are the comments I submitted to the Department of Law:

✓ I object to the proposed regulations #2 and #5 of the because they violate the legislators' intent of the Alaska Executive Branch Ethics Act (AEBEA) and do not serve the public interests, but rather, only serve to protect and defend the interests of public officials.

(2) 9 AAC 52.040 is proposed to be changed by adding new provisions establishing standards for the conditions when the acceptance or approval of state money to pay on behalf of, or reimburse a public officer for, expenses incurred for professional legal services to defend against a complaint brought under the Alaska Executive Branch Ethics Act (AS 39.52) may occur, including when the public officer is exonerated of any violation of the Act.

The AEBEA states that: (7) compliance with a code of ethics is an individual responsibility; thus all who serve the state have a solemn responsibility to avoid improper conduct and prevent improper behavior by colleagues and subordinates. That individual responsibility includes the individual's choice to seek legal council, thereby; they alone should be responsible for expenses incurred by their choice. Secondly, these past 15 months or so have shown, beyond a shadow of any doubt, that there is an inherent and systemic breach in the way and manner ethics complaints are processed, and summarily dismissed. **The biased and subjective manner in which the Department of Law deals with ethics complaints is one that must be drastically changed before any state funds are appropriated to cover legal expenses of public officials who conduct themselves unethically. Instead, they are protected and defended by a flawed and corrupt complaint process where the person(s) investigating the misconduct of other public officials is situated within the chain of command of their bosses and their bosses' bosses. The reports that dismiss every complaint I have filed are the best examples that illustrate the dysfunctions that occur when "the Fox Watches the Hen House".**

(5) 9 AAC 52.060 is proposed to be changed to clarify the application of AS 39.52.130, addressing gifts to a public officer. 9 AAC 52.060(b) currently permits agency heads to determine that a gift of travel received by an employee traveling on state business is a gift to the state, not a personal gift to the employee. The proposed amendment would clarify that the individual employee does not have to submit a disclosure for pre-approved state travel relating to offers by others made in advance to pay travel expenses of a state employee to facilitate state business.

I asked Ms. Bockmon on Jan 19, 2010: "The important question I have is: Had this regulation (5) been in place already...would it have meant that Kris Perry would NOT have had to claim as gifts all those gifts of travel, lodging, and meals she claimed from the McCain and Chambliss campaigns?" **Her answer was, "I can't answer the question."**

I submit by example: Kris Perry claimed over \$15,000 in gifts for travel, lodging, etc. from the McCain and Chambliss campaigns while she "facilitated state business" and traveled from one end of the country to the other on the very partisan very political Republican vice-presidential campaign trail. Were this regulation in place...the public would NEVER have known the extent of those gratuities that were offered and excepted by this governor's staffer. **Keeping these kinds of gifts a secret and under the cloak of secrecy is unacceptable, does not serve the Alaskan public's better interests, and totally violates the intent and objectives of the Alaska Executive Branch Ethics Act, AND, the Alaska Public Official Financial Disclosure Act.**

These changes happen to come along at the same time a governor decided to pursue interests other than being governor. The premise of most of my complaints is found within the many conflicts of interests that resulted because of Sarah Palin's extra curricular activities that had absolutely nothing to do with her role as governor. These changes to the AEBEA regulations do nothing to better define, refine, avoid and resolve those conflicts of interests.

The AG and his staff's time would be better spent on finding ways to make the ethics complaint process free from the biases inherent in the system currently in place...and strengthen the statutes, policies, procedures, and protocols in place to address the chaos that ensues when a governor chooses to put their personal and political interests before the interests of the public when they make deals with other Outside interests and abandon the Office of the Governor and its constitutional duties. These regulation changes above merely weaken the AEBEA and its intent...and should be thrown out. Time would be better spent to find ways to better enforce the good ethics laws already in place.

From: John Davies [mailto:John_Davies@legis.state.ak.us]
Sent: Wednesday, January 20, 2010 2:36 PM
To: andree@andree.us
Cc: Rep. Wes Keller; Jim Pound
Subject: Proposed regulation changes to AEBEA

January 20, 2010

Dear Andree McLeod,

Representative Keller has asked me to respond to your email about your concerns reference the AEBEA.

The public vetting of the changes to the regulations is taking place at this time. You may comment on the proposed regulation changes, including the potential costs to private persons of complying with the proposed changes, by submitting written comments to Assistant Attorney General Judy Bockmon at the Department of Law, 1031 W. 4th Avenue, Anchorage, Alaska 99501 or by email to judy.bockmon@alaska.gov. Your comments must be received no later than 4:30 p.m. on January 22, 2010.

No hearing is presently anticipated by the Administrative Regulation Review Committee "ARRC" concerning the AEBEA.

The ARRC does not routinely hold hearings concerning proposed administrative regulations unless it is brought to the committee's attention by a standing committee or the ARRC's attorney that a regulation fails standards. Normally for a proposed regulation to garner review it would either be considered illegal; unconstitutional; outside statutory authority; inconsistent with statute; or inconsistent with legislative intent.

The ARRC's attorney reviews proposed regulations to determine if they comply with the standards for review, and jurisdictional standing committee(s) receive notice of the proposed changes. The standing committee may notice the ARRC if it has a concern about a proposed regulation.

At this time the ARRC has not received notice from either a standing committee or the ARRC attorney that the AEBEA fails any of the standards for review.

Therefore I encourage you to make your comments in the present ongoing public vetting process to the above named Assistant Attorney General.

Thank you for being an informed and concerned citizen. I hope that this email answered your question. If you have further need for information please feel free to contact our office at any time.

Very Truly Yours,

John Davies
Chief of Staff to
Rep Wes Keller

John Davies

From: Will Vandergriff
Sent: Saturday, February 06, 2010 2:36 PM
To: Rep. Wes Keller; Jim Ellis; John Davies
Cc: Dani Carlson
Subject: new language - draft arrc advisory

Here's the change then, addressing Rep. Keller's concern. Please let me know if this will suffice. Regards, W

FOR IMMEDIATE RELEASE

MEDIA ADVISORY

ACES TAX REGULATION, EXEC. ETHICS HEARING SET FOR MONDAY
Chair Keller looks to admin. for details on proposed tax reg, ethics changes

Saturday, February 6, 2010, Juneau, Alaska – Joint Administrative Regulatory Review Committee Chair Wes Keller, R-Wasilla, today announced the committee will hold a hearing with the state Dept. of Revenue and administration to discuss the implementation of the proposed Alaska's Clear & Equitable Share, or ACES, oil tax regulation. The committee is focusing its review to proposed regulations concerning credits and the heating value of gas. The state Dept. of Law will also brief the committee on proposed regulatory changes to the Executive Branch Ethics Act.

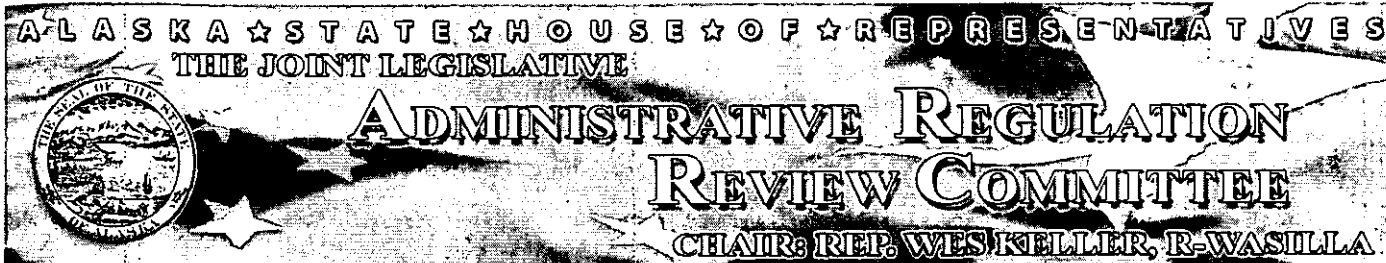
The hearing is scheduled for Monday, Feb. 8 at 3:00 p.m. in Capitol Room 17.

WHO: Joint Admin. Reg. Review Committee
WHAT: Proposed ACES and Exec. Ethics regulatory changes hearing
WHEN: Monday, Feb. 8 – 3:00 p.m.
WHERE: Beltz Committee Room
Capitol Room 17

#

To contact Rep. Keller, please call 907-465-2186.

Will Vandergriff
House Majority Press Secretary
Office of the Speaker - Alaska State Legislature
907.269.0167 direct
907.317.9755 cell
will_vandergriff@legis.state.ak.us
housemajority.org
mobile.housemajority.org
twitter.com/houmaj



PRESS RELEASE

FOR IMMEDIATE RELEASE

ADMINISTRATIVE REGULATION REVIEW HOLDS FIRST MEETING OF 2010 LEGISLATIVE SESSION

Executive Branch Ethics, Oil & Gas reviewed by joint committee

Tuesday, February 09, 2010, Juneau, Alaska – The Alaska State Legislature’s Joint Administrative Regulation Review Committee held its first meeting of the 2010 Legislative Session on Monday. The committee reviewed portions of the Executive Branch Ethics Act, and statutes on lease expenditures pertaining to the tax structure set out by the Alaska’s Clear and Equitable Share Act, or ACES.

Testimony was gathered from the Department of Law and the public regarding family travel, and on the payment of legal fees for state officers cleared of ethical wrongdoing after an investigation. The Department of Revenue testified on the topic of regulations dealing with adjustments to lease expenditures for companies conducting oil and gas exploration in the state.

“We did not find sufficient grounds to recommend to the Legislature that a law be passed to veto any of the regulations reviewed,” Committee Chair Wes Keller, R-Wasilla. “The meeting was a good example of the committee exercising its due diligence regarding regulatory oversight.”

The Administrative Regulation Review Committee plans on holding at least two more meetings during the 2010 Legislative Session for further review of other regulations.

###

For more information, please call Rep. Keller’s office at 907-465-2186.

John Davies

From: John Davies
Sent: Tuesday, February 09, 2010 2:38 PM
To: 'janet_ogan@legis.state.ak.us'; Kimberly Clark; Josh Applebee; Christina Apathy; Christopher Birdsall; Bonnie Gruening
Cc: Rep. Wes Keller
Subject: ARRC Press Release
Attachments: ARRC February Press Release.doc

Dear Fellow Staffers,

Attached to this email is the press release sent to House Majority Press, Will and Dani, for distribution to the press. I am providing this release to you so your boss will know and be aware of what has been made public. So in the event that he gets a question from the press or the public he will be in the know as to the official position regarding yesterday's meeting. Please provide your boss with a copy. Thanks. If you have any questions feel free to give me a call.

Regards,

John Davies
Committee Aide

ALASKA STATE LEGISLATURE

Interim:
600 E. Railroad Avenue
Wasilla, Alaska 99654
Phone: 373-1842
Fax: (907) 373-4729



Session:
State Capitol Building
Juneau, Alaska 99801-1182
Phone: (907) 465-4899
Fax: (907) 465-3818

ADMINISTRATIVE REGULATION REVIEW COMMITTEE

PRESS RELEASE

THE JOINT ADMINISTRATIVE REVIEW COMMITTEE HOLDS ITS FIRST MEETING OF THE 2010 LEGISLATIVE SESSION.

On Monday, February 8th, the Joint Administrative Regulation Review Committee held its first meeting of the 2010 Legislative Session. The Committee reviewed portions of the Executive Ethics Regulations dealing with family travel and payment of legal fees for exonerated state officers, as well as the Oil and Gas Regulations dealing with adjustments to lease expenditures. Testimony from the Department of Law, Department of Revenue as well as from members of the public satisfied the Committee that there were no grounds at this time to overturn the reviewed regulations. The Chairman, Representative Wes Keller said, "Today's review meeting was a good example of the Committee exercising its due diligence regarding regulatory oversight. We did not find sufficient grounds to recommend to the Legislature that a law be passed to veto any of the regulations reviewed today." The Committee plans on holding at least two additional meetings during this Legislative Session for further review of other regulations.

E-Mail: John_Davies@legis.state.ak.us

Alaska State Legislature House of Representatives



Representative David Guttenberg PRESS RELEASE • February 22, 2009

<http://guttenberg.akdemocrats.org> • Contact: Amy Hundertmark, Aide • amy.hundertmark@legis.state.ak.us

Phone: 465-4457 • Fax: 465-3519 • Room #418 Capitol Bldg. Juneau, AK 99801 • House District 8

REP. GUTTENBERG ADDRESSES OFFICIAL TRAVEL State Should Pay For Executives, Not Their Families

JUNEAU – Alaska Representative David Guttenberg (D-Fairbanks) has introduced a bill to require the Alaska governor and lieutenant governor to reimburse the state for costs for family members who accompany them on official business.

“It’s reasonable to want to travel with your family, but the state shouldn’t be footing the bill for the family to tag along. Past events have shown how the language in the Alaska Executive Branch Ethics Act is ambiguous, and I believe that Alaskans want clearer rules,” Guttenberg said. “This bill offers clear statutory language in defining acceptable, legitimate state expenses.”

House Bill 353 amends the Alaska Executive Branch Ethics Act to require the governor or lieutenant governor to reimburse the state when their children, spouses, or other family members are transported with them on state-sponsored travel.

“Now is the time to address this problem so there will be no further controversies about executive branch travel,” Guttenberg said.

The bill awaits hearings in the House State Affairs and Judiciary committees.

For further information, contact Representative Guttenberg or Amy Hundertmark at (907) 465-4457.

###

Alaska debates ethics rules raised during Palin's tenure

Lisa Demer
Anchorage Daily News

JUNEAU — A legislative committee on Monday took up ethics issues that erupted during the Palin administration, but it's not clear whether the panel intends to take any action.

Attorney General Dan Sullivan has proposed state rules establishing when it's appropriate for the state to pay for the travel of family members of the governor or lieutenant governor. Another proposal sets out when the state should pay legal bills for state officials defending against ethics complaints.

Former Gov. Sarah Palin was hit with numerous ethics complaints during her 2 1/2 years in office. She said she quit in part because of what she called frivolous ethics complaints and personal legal bills amounting to an estimated \$600,000.

Most of the ethics complaints against Palin were dismissed. But she settled one by reimbursing the state more than \$8,000 for her children's air travel.

Some parts of the package Sullivan is proposing go beyond the Palin-era controversies. For instance, another proposed rule change would do away with a requirement for state officials to disclose as gifts any travel for state business paid by others. But they still would have to file travel reports, which would be public.

Sullivan is trying to make the changes through new state regulations, which don't need legislative approval.

Oversight comes from the joint House-Senate Administrative Regulation Review Committee, which examines regulations to make sure they are allowed under state law.

The panel agreed to hold a public hearing on the ethics measures after being pushed by Palin critic Andree McLeod. House leaders also requested it, said state Rep. Wes Keller, R-Wasilla, who is the committee chairman.

Under the proposed rules, the state could cover the costs of defending a public official against ethics complaints if the official were exonerated, Assistant Attorney General Judy Bockmon told the committee.

Travel would be covered if the presence of a family member is required for state business or has a public purpose. The proposal says that would include a state-sponsored event that the family of the governor or lieutenant governor usually attends, or an event in which the family member is representing the state.

State Rep. David Guttenberg, D-Fairbanks, asked Bockmon whether state law gives any guidance on paying for family travel.

It doesn't, she said.

In that case, why try to decide when it's appropriate -- maybe it shouldn't be permitted at all, Guttenberg responded.

That's up to the Legislature, Bockmon said. There might be value to the state for the family to attend. It depends on the nature of the event.

State Rep. Carl Gatto, R-Palmer, said it might just save worry and time for a governor with young children to bring them along.

McLeod, who filed a number of ethics complaints against Palin and her staff, urged the committee to reject the changes.

"Are these changes valid? Do they improve the standards of public service? Do they promote the faith and confidence of the people in this state in their public officers? I submit that they do not," McLeod told the legislative committee.

McLeod said private citizens with questions about whether a public official has crossed a legal or ethical line can't get ethics opinions the way state employees can. So the public has no recourse except filing complaints to get answers, she said.

The Executive Branch Ethics Act is important, and the attorney general shouldn't be trying to change the law, another Palin critic, Zane Henning, told the committee. The Legislature should make any needed changes, he said.

"I object to the entire process that is being pushed through here," Henning said.

The ethics law needs reform, but not in the way the attorney general wants, Henning said. Elected officials, not the governor-appointed Personnel Board, should oversee ethics complaints against state officials, he said.

Both of his complaints against Palin were dismissed. One involved an interview about the vice presidential campaign that she gave to Fox News in her state office; the other concerned the fact she collected state expense payments while living in her own home in Wasilla.

Henning's concerns about the Personnel Board seemed to resonate with legislators.

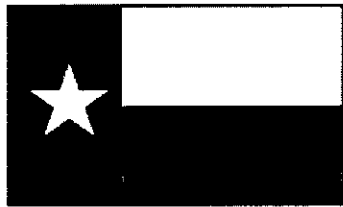
"I'm just wondering is there maybe too close of a relationship there," state Sen. Kevin Meyer, R-Anchorage, asked during the hearing.

Bockmon told the committee an independent counsel investigates ethics complaints against the governor, lieutenant governor or attorney general in an effort to separate the Personnel Board from those high-level officials.

The committee can't halt the regulations from taking effect during the annual legislative session, but can express disapproval and propose new laws to override any objectionable regulations.

The Department of Law has solicited public comment and held a hearing on the ethics changes, Bockmon said. The period for comment has ended and the department must now decide what to do. It could adopt the provisions as is or with minor changes, or let the matter drop with no action.

The committee hasn't yet decided how to proceed, Keller said.



Texas for Sarah Palin

Tuesday, February 9, 2010

**Call to Action: Serial Bogus Ethics Filers Give Testimony on Ethics?
- by Special Guest Contributor Adrienne Ross**

*

During the tenure of Governor Palin, a whirlwind of ethics complaints blew into the state of Alaska. Both Andree McLeod and Zane Henning were responsible for filing bogus complaints against her. These were an affront to tax paying Alaskans and illustrated a complete disregard for the ethics system.

It would only stand to reason now that the state Legislature would take a good look at the system, hear from those who can give insight into how it can be improved, and follow through. Obviously, it would make sense to talk to the administration that has been so adversely affected by those seeking to abuse the ethic rules. Instead, in their hearings, they actually chose to receive testimony from Andree McLeod and Zane Henning, chief

abusers of the system.

Lisa Demer of the ADN reports:

A legislative committee on Monday took up ethics issues that erupted during the Palin administration, but it's not clear whether the panel intends to take any action.

Attorney General Dan Sullivan has proposed state rules establishing when it's appropriate for the state to pay for the travel of family members of the governor or lieutenant governor. Another proposal sets out when the state should pay legal bills for state officials defending against ethics complaints.

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[...]

Oversight comes from the joint House-Senate Administrative Regulation Review Committee, which examines regulations to make sure they are allowed under state law.

The panel agreed to hold a public hearing on the ethics measures after being pushed by Palin critic Andree McLeod. House leaders also requested it, said state Rep. Wes Keller, R-Wasilla, who is the committee chairman.

Under the proposed rules, the state could cover the costs of defending a public official against ethics complaints if the official were exonerated, Assistant Attorney General Judy Bockmon told the committee.

[...]

McLeod, who filed a number of ethics complaints against Palin and her staff, urged the committee to reject the changes.

[...]

The Executive Branch Ethics Act is important, and the attorney general shouldn't be trying to change the law, another Palin critic, Zane Henning, told the committee. The Legislature should make any needed changes, he said.

[...]

The Department of Law has solicited public comment and held a hearing on the ethics changes, Bockmon said. The period for comment has ended and the department must now decide what to do. It could adopt the provisions as is or with minor changes, or let the matter drop with no action.

The committee hasn't yet decided how to proceed, Keller said.
Read the full article [here](#).

So Andree McLeod and Zane Henning, serial complainants who cost the state thousands of tax payer dollars while they played out their hellish vendetta against Governor Palin, somehow are credible sources of information? These two Palin anklebiters, whose complaints were thrown out one after another, are taken seriously, but the legislature doesn't want to hear from the administration itself regarding how these ethics abuses can be solved? What sense does that make?

Clearly, these two can't spot a real ethics violation if it smacked them in the face, so how does their one-sided testimony equate to anything remotely helpful in bringing about true ethics reform? And why can't the legislators see what is so apparent? Allowing these two characters to have a say in ethics rules is like allowing children to decide their own punishment. Don't tell me the legislators don't recognize this. They make it hard to take them or these hearings seriously. It seems, instead, to be more of the same Juneau dog and pony show.

Perhaps legislators' approach has something to do with the fact that their own ethics laws protect them from frivolous complaints. Perhaps it's due to the fact that if a complaint is leaked to the public in the legislative branch it is automatically dismissed. No wonder Jay Ramras, chair of House Judiciary, could so flippantly **scold** Governor Palin for wearing an Arctic Cat coat on a cold Alaska day though he ran multiple ads for his Pike's Lodge while serving in the legislature and running for lieutenant governor.

Could it not be argued that this was a political use of airtime? Could these ads not be deemed an improper in-kind contribution? Yet when the absurd Arctic Cat ethics complaint was filed, he chastised the governor for wearing a winter coat on a winter day! The hypocrisy is glaring.

We can look the other way, or we can implore legislators to do the right thing. They need to take up this issue, and we need to let them know how we feel about it. Governor Palin made the selfless decision to resign because she could no longer allow the politics of personal destruction being waged against her to continually cost the state thousands of dollars. And will legislators do nothing? Indeed, something needs to be done, and by "something" I don't mean simply hearing one-sided testimony from the anklebiters themselves.

Governor Palin fought against business as usual in the state of Alaska. Failure to act in the best interests of the state she served is unacceptable. The boneheaded decision to hear testimony on ethics from unethical boneheads makes no sense at all.

I urge you all to call and/or email these legislators and respectfully insist that they take action. Your voice does matter. I've included the contact information for you. (All phone numbers: 907 area code)

* Chair: Rep. Wes Keller - Representative_Wes_Keller@legis.state.ak.us, 465-2186

* Vice-Chair: Sen. Donald Olson - Senator_Donald_Olson@legis.state.ak.us, 465-3707

* Rep. Carl Gatto - Representative_Carl_Gatto@legis.state.ak.us, 465-3743

* Rep David Guttenberg - Representative_David_Guttenberg@legis.state.ak.us, 465-4457

* Sen. Albert Kookeesh - Senator_Albert_Kookeesh@legis.state.ak.us, 465-3473

* Sen. Kevin Meyer - Senator_Kevin_Meyer@legis.state.ak.us, 465-4945

* Senate Pres.: Sen. Gary Stevens - Senator_Gary_Stevens@legis.state.ak.us, 465-4925

* Speaker of the House: Rep. Mike Chenault Representative_Mike_Chenault@legis.state.ak.us, 465-3779

Monday, February 08, 2010

Executive Session Decision Questioned



I went to the Joint Committee on Administrative Regulation Review because they were going to talk about (9 AAC 52) Proposed Regulations Relating to Executive Branch Ethics. They also covered Regulations Relating to Oil and Gas Tax. [AAC = Alaska Administrative Code.]

There's a lot that happened in both of these, but what I'd like to spotlight here happened at the end of the meeting. Or, to be more precise, when they went into Executive Session. As everyone was leaving, Lisa Demer, a reporter for the *Anchorage Daily News* came rushing in. I know Lisa from when I blogged the political corruption trials in Anchorage. She did spot-on reports that summarized the day's events managing to get in all the key points - at least as I saw them - in the strict space limits and deadline pressure she had. I ran into her yesterday; she'd just arrived to cover for the ADN for three weeks, replacing Sean Cockerham.

She rushed right up to the chair of the committee (I found out later, she'd been in the Press Room, across the hall, watching the hearing on the tv monitor) and introduced herself as the new ADN reporter and then politely, but firmly, asked why the meeting was going into executive session. The

chair, Rep. Wes Keller, who I thought had run the meeting with a nice balance of good humor and respect, clearly wasn't expecting this challenge to the decision to go into executive session and from what I heard, didn't really give a very substantive response. Lisa had her little tape recording going, so she has the exact exchange somewhere.

[Photo: Reporter Lisa Demer asking Chair Rep. Wes Keller why the meeting was going into executive session. Rep. David Guttenberg looks on.]



I was impressed. It hadn't occurred to me to question why they were going into executive session. In any case, I checked with someone afterward about the basis for going into executive session. The Uniform Rules*, specifically Rule 22 Open and Executive Sessions, says:

(a) All meetings of a legislative body are open to all legislators, whether or not they are members of the particular legislative body that is meeting, and to the general public except as provided in (b) of this rule.

(b) A legislative body may call an executive session at which members of the general public may be excluded for the following reasons:

(1) discussion of matters, the immediate knowledge of which would adversely affect the finances of a government unit;

(2) discussion of subjects that tend to prejudice the reputation and character of a person;

(3) discussion of a matter that may, by law, be required to be confidential;
(4) discussion of a matter the public knowledge of which would adversely affect the security of the state or nation, or adversely affect the security of a governmental unit or agency.

(c) When a legislative body desires to call an executive session in accordance with (b) of this rule, the body shall first convene as a public meeting and the question of holding an executive session shall be determined by a majority vote of the members present.

(d) The provisions of this rule may not be interpreted as permitting the exclusion of a legislator from an executive session, whether or not the legislator is a member of the body that is meeting. A legislator not a member of the body holding an executive session shall, however, be subject to the same rules of confidentiality and decorum as pertain to regular members of the body. [Emphasis added]



So, are any of these reasons for executive session applicable to today's meeting?

(1) discussion of matters, the immediate knowledge of which would adversely affect the finances of a government unit;

It's hard to imagine this was the case. They were, as I understand it, going to talk about regulations for implementing ACES. They had already gotten testimony from Marcia Davis (I didn't catch her title at the meeting, but there is a Marcia Davis listed as Deputy Commissioner for the Department of Revenue, which would be completely appropriate to what she was reporting on) with a lot of detail. This doesn't seem a likely reason.

(2) discussion of subjects that tend to prejudice the reputation and character of a person;

There was nothing to indicate they were going to talk about a person or that the discussion might prejudice someone's reputation. Also not likely.

(3) discussion of a matter that may, by law, be required to be confidential; Possibly, but there was nothing to indicate this, and no law that would require it was cited.

(4) discussion of a matter the public knowledge of which would adversely affect the security of the state or nation, or adversely affect the security of a governmental unit or agency.

I know that our national security is connected in some ways to oil, but this hardly seems a possible reason.

None of these seems a likely reason, but if one was, it would seem to me that the Chair should know which it is and should have been able to cite the reason directly in response to Lisa Demer's question.

One more issue is raised by reading these rules.

(c) When a legislative body desires to call an executive session in accordance with (b) of this rule, **the body shall first convene as a public meeting and the question of holding an executive session shall be determined by a majority vote of the members present.**

[Emphasis added]

The executive session was preceded by a public meeting, but there was no vote. There wasn't even a discussion of whether they should go into executive session.

Now, my contact also suggested another possible reason for an Executive Session, since they were discussing proposed regulations.

AS 24.20.100. Research and Drafting Services For Legislators.

Members of the legislature may utilize the research and bill drafting services of the Legislative Affairs Agency. Requests by members of the legislature are confidential. Staff services for members of the legislature shall be accomplished subject only to the priority of assignments determined by the council.

I know that legislators can request the Legislative Affairs Agency to do research and to draft bills and I

understand that their requests are confidential unless they sign off to allowing them to be public. But this was not about drafting legislation or about research. This was about setting up the regulations to implement the new laws affecting Oil and Gas Taxes.

There may well be a good reason for going into executive session, but if there was, it clearly wasn't on the tip of the Chair's tongue when he was asked why it was happening. Since the Uniform Rules specifically state that meetings should be open to the public unless certain exceptions occur, it seems reasonable that the Chair should be able to specifically identify the reason. There aren't that many. And the rules call for a vote before going into executive session.

I would note that the Legislative Council also went into Executive Session last week, and I don't recall any discussion or vote about that decision. And in both cases, the Executive Session was actually part of the printed agenda.



Here's Lisa in the ADN spot in the press room during the Executive Session.

TUESDAY, FEBRUARY 9, 2010

Call to Action; Serial Bogus Ethics Filers Give Testimony on Ethics?

During the tenure of Governor Palin, a whirlwind of ethics complaints blew into the state of Alaska. Both Andree McLeod and Zane Henning were responsible for filing bogus complaints against her. These were an affront to tax paying Alaskans and illustrated a complete disregard for the ethics system.

It would only stand to reason now that the state Legislature would take a good look at the system, hear from those who can give insight into how it can be improved, and follow through. Obviously, it would make sense to talk to the administration that has been so adversely affected by those seeking to abuse the ethic rules. Instead, in their hearings, they actually chose to receive testimony from Andree McLeod and Zane Henning, chief abusers of the system.

Lisa Demer of the ADN reports:

A legislative committee on Monday took up ethics issues that erupted during the Palin administration, but it's not clear whether the panel intends to take any action.

Attorney General Dan Sullivan has proposed state rules establishing when it's appropriate for the state to pay for the travel of family members of the governor or lieutenant governor. Another proposal sets out when the state should pay legal bills for state officials defending against ethics complaints.

Former Gov. Sarah Palin was hit with numerous ethics complaints during her 2 1/2 years in office. She said she quit in part because of what she called frivolous ethics complaints and personal legal bills amounting to an estimated \$600,000.

Most of the ethics complaints against Palin were dismissed. But she settled one by reimbursing the state more than \$8,000 for her children's air travel.

[...]

Oversight comes from the joint House-Senate Administrative Regulation Review Committee, which examines regulations to make sure they are allowed under state law.

The panel agreed to hold a public hearing on the ethics measures after being pushed by Palin critic Andree McLeod. House leaders also requested it, said state Rep. Wes Keller, R-Wasilla, who is the committee chairman.

Under the proposed rules, the state could cover the costs of defending a public official against ethics complaints if the official were exonerated, Assistant Attorney General Judy Bockmon told the committee.

[...]

McLeod, who filed a number of ethics complaints against Palin and her staff, urged the committee to reject the changes.

[...]

The Executive Branch Ethics Act is important, and the attorney general shouldn't be trying to change the law, another Palin critic, Zane Henning, told the committee. The Legislature should make any needed changes, he said.

[...]

The Department of Law has solicited public comment and held a hearing on the ethics changes, Bockmon said. The period for comment has ended and the department must now decide what to do. It could adopt the provisions as is or with minor changes, or let the matter drop with no action.

The committee hasn't yet decided how to proceed, Keller said.

Read the full article [here](#).

So Andree McLeod and Zane Henning, serial complainants who cost the state thousands of tax payer dollars while they played out their hellish vendetta against Governor Palin, somehow are credible sources of information? These two Palin anklebiters, whose complaints were thrown out one after another, are taken seriously, but the legislature doesn't want to hear from the administration itself regarding how these ethics abuses can be solved? What sense does that make?

Clearly, these two can't spot a real ethics violation if it smacked them in the face, so how does their one-sided testimony equate to anything remotely helpful in bringing about true ethics reform? And why can't the legislators see what is so apparent? Allowing these two characters to have a say in ethics rules is like allowing children to decide their own punishment. Don't tell me the legislators don't recognize this. They make it hard to take them or these hearings seriously. It seems, instead, to be more of the same Juneau dog and pony show.

Perhaps legislators' approach has something to do with the fact that their own ethics laws protect them from frivolous complaints. Perhaps it's due to the fact that if a complaint is leaked to the public in the legislative branch it is automatically dismissed. No wonder Jay Ramras, chair of House Judiciary, could so flippantly scold Governor Palin for wearing an Arctic Cat coat on a cold Alaska day though he ran multiple ads for his Pike's Lodge while serving in the legislature and running for

lieutenant governor. Could it not be argued that this was a political use of airtime? Could these ads not be deemed an improper in-kind contribution? Yet when the absurd Arctic Cat ethics complaint was filed, he chastised the governor for wearing a winter coat on a winter day! The hypocrisy is glaring.

We can look the other way, or we can implore legislators to do the right thing. They need to take up this issue, and we need to let them know how we feel about it. Governor Palin made the selfless decision to resign because she could no longer allow the politics of personal destruction being waged against her to continually cost the state thousands of dollars. And will legislators do nothing? Indeed, something needs to be done, and by "something" I don't mean simply hearing one-sided testimony from the anklebiters themselves.

Governor Palin fought against business as usual in the state of Alaska. Failure to act in the best interests of the state she served is unacceptable. The boneheaded decision to hear testimony on ethics from unethical boneheads makes no sense at all.

I urge you all to call and/or email these legislators and respectfully insist that they take action. Your voice *does* matter. I've included the contact information for you. (All phone numbers: 907 area code)

- * Chair: Rep. Wes Keller - Representative_Wes_Keller@legis.state.ak.us, 465-2186
- * Vice-Chair: Sen. Donald Olson - Senator_Donald_Olson@legis.state.ak.us, 465-3707
- * Rep. Carl Gatto - Representative_Carl_Gatto@legis.state.ak.us, 465-3743
- * Rep David Guttenberg - Representative_David_Guttenberg@legis.state.ak.us, 465-4457
- * Sen. Albert Kookeesh - Senator_Albert_Kookesh@legis.state.ak.us, 465-3473
- * Sen. Kevin Meyer - Senator_Kevin_Meyer@legis.state.ak.us, 465-4945
- * Senate Pres.: Sen. Gary Stevens - Senator_Gary_Stevens@legis.state.ak.us, 465-4925
- * Speaker of the House: Rep. Mike Chenault
Representative_Mike_Chenault@legis.state.ak.us, 465-3779

John Davies

From: Bockmon, Julia B (LAW) [judy.bockmon@alaska.gov]
Sent: Wednesday, February 03, 2010 10:49 AM
To: John Davies
Cc: Ford, Michael F (LAW); Behr, Deborah E (LAW)
Subject: Materials for Joint Committee on Administrative Regulations
Attachments: Petumenos 2 24 09 Ltr.pdf; AG OP Electronic Equipment 8 21 08.pdf; AG OP Aug 5 09.pdf

John:

Attached please find the following documents that provide background for three of the proposed regulations:

9 AAC 52.040(c) (attorney fees payments):

August 5, 2009 Attorney General Opinion Letter; pages 10-18

9 AAC 52.045(governor/ lt. governor family travel):

2/24/09 Letter from Independent Counsel T. Petumenos

9 AAC 52.050(b) – (e)(insignificant personal use of state electronic equipment):

August 21, 2008 Opinion Letter to Commissioner Kreitzer

Judy Bockmon
Assistant Attorney General
Opinions, Appeals & Ethics
Department of Law
907-269-5216

SEAN PARNELL, GOVERNOR

DEPARTMENT OF LAW
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August 5, 2009

Mike Nizich
Chief of Staff, Office of the Governor
550 West 7th Avenue, Suite 1700
Anchorage, AK 99501

Re: Analysis and Recommendations Concerning the Alaska
Executive Branch Ethics Act

Dear Mr. Nizich,

We provide this legal analysis in response to questions about how to best implement the Alaska Executive Branch Ethics Act's goals to encourage high moral and ethical conduct and to improve public service, with a particular focus on (1) effective ways in which to minimize the disruptive effects of breaches of confidentiality, and (2) whether and how the state may defend public officers charged with ethics violations.

I. Summary

These are important issues for the state. They require consideration of laws that promote ethical conduct for public officials, the balance between First Amendment rights and a fair process for those accused of ethics violations, and holding public officials accountable while also encouraging qualified citizens to serve in state government. Because these issues have broader implications for public policy, I am issuing this analysis and advice as an attorney general's opinion.

Our analysis, conclusions, and recommendations fall into two categories. First, the confidentiality of the Ethics Act investigative process can be better protected in the future. As drafted, the Act provides an unnecessary opportunity

for a complainant to publicize a confidential report at a sensitive stage of the process. In addition, it imposes no consequences for citizens who abuse the Act by filing frequent, frivolous complaints, or filing complaints in bad faith. With statutory amendments, the ethics procedures can be changed in a manner that protects both the public interest in holding public officials accountable and the integrity of the process. We do not, however, recommend amendments that would impose sanctions for a citizen's disclosure of an ethics complaint that he or she has filed.

Second, the state has a well-established general policy of either defending or reimbursing executive and judicial branch officials for their legal defense when they are accused of inappropriate conduct or wrongdoing. Underlying this general policy is the legal presumption that state officers carry out their duties ethically and responsibly and therefore should be defended by the state against allegations to the contrary. Reimbursing the reasonable expenses that exonerated public officers incur in successfully defending against ethics complaints is consistent with this policy and balances the state's interests in discouraging misconduct by public officers and encouraging public service.

Drawing on previous legal advice we have provided, we conclude that executive branch agencies have authority to pay or reimburse the legal expenses public officers incur in defending against ethics complaints, if four conditions are met: (1) the public officers are exonerated of violations of the Ethics Act or other wrongdoing; (2) the officers acted within the course and scope of their offices or employment; (3) the expenses incurred are reasonable; and (4) appropriate sources of funds are available to the agencies to pay the expenses. Where those four conditions exist, reimbursing officers for those expenses clearly serves a public purpose and the public interest.

II. Background – the Ethics Act Process

Under the Ethics Act, anyone—including the attorney general or a member of the public—may file a complaint against a public officer.¹ For most ethics complaints, the attorney general is responsible for investigating the allegations and,

¹ AS 39.52.310. "Public officers" include executive branch employees and officers, members of state boards and commissions, and state trustees. AS 39.52.960(20) and (21).

if appropriate, prosecuting the accused.² However, for ethics complaints against the governor, lieutenant governor, or attorney general, the attorney general is recused from involvement in the proceedings and the personnel board appoints independent counsel to act in place of the attorney general.³ The attorney general is also charged with adopting regulations "necessary to interpret and implement" the Ethics Act.⁴

An Ethics Act investigation often results in the dismissal or settlement of the complaint. When it does not, the attorney general or independent counsel issues a public accusation against the subject officer, followed by an evidentiary hearing before the personnel board to determine whether a violation occurred and what remedies are appropriate.⁵ In that hearing, the attorney general or independent counsel prosecutes the ethics charges against the public officer.⁶

A public officer accused of ethics violations is not required to have a lawyer represent him in ethics proceedings. But even a public officer who is confident he acted properly may decide that he does not want to handle the ethics complaint procedures on his own – especially given that the potential penalties include substantial fines, removal from office, or discharge from state employment.⁷ A wrongly accused public officer might worry that, without a lawyer representing him in the process, the attorney general or independent counsel might misconstrue the officer's actions or misinterpret the Ethics Act. An accused public officer might also want a lawyer's advice on how to respond to media inquiries about an ethics complaint if the complaint prematurely becomes public knowledge.

² AS 39.52.310 – 39.52.390.

³ AS 39.52.310(c).

⁴ AS 39.52.950.

⁵ AS 39.52.350 – 39.52.370.

⁶ AS 39.52.360(c).

⁷ See AS 39.52.410 – 39.52.460.

The Ethics Act designates as confidential an ethics complaint and all other documents and information regarding an ethics investigation unless (1) the accused waives confidentiality in writing or (2) the attorney general or independent counsel initiates formal proceedings by issuing a public accusation.⁸ The Act also provides other ways in which confidential information from the proceedings can be made public.⁹

III. Preventing Breaches of Confidentiality

Despite the Ethics Act's confidentiality provisions, over the past several months complaints against public officers regularly have been provided to the news media. In addition, a confidential recommendation by the personnel board's independent counsel recently was disclosed to the press, undermining the process by which ethics complaints are resolved. The Ethics Act does not grant the state authority to punish citizens who violate the confidentiality requirement, however, nor would that be advisable in many circumstances.¹⁰ We conclude that the appropriate manner to prevent disclosure of information that may be harmful to the process of ethics investigations and the subject of the complaint is to improve protections to the process and to implement safeguards to prevent abuse of the Ethics Act.

A. The State Can Take Steps to Protect the Integrity of the Process of Resolving an Ethics Act Complaint

Confidentiality is important to the process of investigating and resolving an ethics complaint. The investigation may involve sensitive information about personnel matters that should be protected from the public eye. Further,

⁸ AS 39.52.340(a), (c).

⁹ See, e.g., AS 39.52.335(c), (f)-(h).

¹⁰ The confidentiality provision is enforceable against state officers who are part of the process of evaluating, investigating, and deciding Ethics Act complaints. See, e.g., *Dixon v. Kirkpatrick*, 553 F.3d 1294, 1306 (10th Cir. 2009) (holding that disclosure by a clerical employee of information about an ongoing investigation by state veterinary board was a constitutionally sufficient basis for dismissal).

publicizing information may interfere with the investigator's ability to find witnesses willing to cooperate, invite retaliation, threaten the independence of the investigation, and prejudice the right of the subject to a fair process. The public does not have a right to access information about the evidence or course of an investigation as it proceeds.¹¹

The state can protect its interest in the integrity of Ethics Act investigations by creating "careful internal procedures to protect the confidentiality of [the] proceedings."¹² Thus we recommend improving Ethics Act procedures to prevent a breach of confidentiality that could prejudice the subject of a complaint and interfere with the state's ability to judiciously resolve ethics matters.

For example, the Ethics Act provides that when the attorney general finds probable cause to believe that a past action has violated, or an anticipated action would violate the Ethics Act, but determines that a hearing is unwarranted, he recommends corrective or preventive action in a confidential report. The Ethics Act currently requires the attorney general to provide copies of this confidential report to both the complainant and the accused officer. The accused officer who receives a report of recommended action from the attorney general may want to negotiate an alternative corrective action or settlement with the state. In this situation, giving the recommendations to the complainant is unnecessary. The complainant has no role in negotiations and should not be permitted to interfere

¹¹ The right of access to information is far narrower than the free speech right to publish information once it is received. See *First Amendment Coal. v. Judicial Inquiry and Review Bd.*, 784 F.2d 467, 472 (3rd Cir. 1986) ("[T]he right of publication is the broader of the two, and in most instances, publication may not be constitutionally prohibited even though access to the particular information may properly be denied.") (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

¹² *Providence Journal Co. v. Newton*, 723 F. Supp. 846, 857 (D.R.I. 1989) (citing *Landmark Comm'ns, Inc. v. Virginia*, 435 U.S. 829 (1978); see also *R.M. v. Supreme Court of N.J.*, 883 A.2d 369, 380 (N.J. 2005) (holding that state's interest in enabling disciplinary authorities to make a full and fair investigation can be more narrowly met by the use of subpoenas and the imposition of criminal sanctions for witness tampering, destruction of evidence, and attempts to unduly pressure officials).

with or undermine discussions by publishing the report. This would compromise the proceedings at a critical stage. The complainant can be informed of the disposition of the case when the matter is resolved, corrective action is taken under AS 39.52.330, or an accusation is filed under AS 39.52.350. Thus, we recommend the Ethics Act be amended to eliminate the requirement that the attorney general serve the complainant with his predispositional recommendations, and to delay notification to the complainant until the matter is concluded.

B. The State Can Take Steps to Prevent Abuse of the Ethics Act

The Ethics Act process also could be changed to prevent another potential harm—abuse of the process. Some Alaskans have argued that the Ethics Act has been used inappropriately in some circumstances to politically damage the subject of the complaint.¹³ This opinion does not examine or decide whether or to what extent citizens may have abused the Ethics Act process in the past. We focus instead on statutory changes that could provide a disincentive to abuse the Act in the future.

Our first suggested addition to the Ethics Act is a provision that is simple and commonly used in other jurisdictions. We recommend giving the personnel board authority to order reimbursement of fees and costs from a person who has filed a complaint in bad faith. The reimbursement could extend both to the subject of the complaint, for attorney's fees and costs of defending against the accusation, and to the state, for its actual costs associated with processing and investigating the complaint. The precise standard for ordering reimbursement is a policy decision beyond the scope of this opinion, but as a general matter the standard should not discourage speech protected by the First Amendment. A brief analysis of different standards used by other states follows.

Some state codes make knowingly false complaints subject to both reimbursement orders and criminal prosecution.¹⁴ Others have similar provisions

¹³ See, e.g., "Our View: Abuse of Ethics Complaints Turns Good Law Into Bad Politics," Anchorage Daily News, May 3, 2009.

¹⁴ See, e.g., Ala. Code § 36-25-27(a)(4) ("Any person who knowingly makes or transmits a false report or complaint pursuant to this chapter shall, upon conviction, be guilty of a Class A misdemeanor and shall be liable for the actual legal expenses incurred by the respondent against whom the false report or

but without criminal penalties, whereby reimbursement is warranted when the complainant knew that he or she was falsely alleging misconduct or providing false information.¹⁵ In still other states, a less rigorous standard applies. Missouri law provides, for example, that “[a]ny person who submits a frivolous complaint shall be liable for actual and compensatory damages to the alleged violator for holding the alleged violator before the public in a false light.”¹⁶ The same statute defines “frivolous” to mean “a complaint clearly lacking any basis in fact or law.” An even looser standard would be to assess the subject’s attorney’s fees against the complainant whenever a subject is found not to have violated the Ethics Act, regardless of the complainant’s knowledge or intent. We have found no state that applies such a standard, however, most likely because it would discourage most ethics complaints and undermine an important element of ethics laws.

We also recommend consideration of another safeguard to discourage habitual complaint filers who use the Ethics Act process to harass executive branch employees. Statutory amendments could provide authority to the personnel board to decline to process further complaints filed by a person who has abused the Act in this way. Again, the precise parameters of this authority would be a policy

complaint was filed.”); *see also* 5 Ill. Comp. Stat. 430/50-5(d) (“Any person who intentionally makes a false report alleging a violation of any provision of this Act to an ethics commission, an inspector general, the State Police, a State’s Attorney, the Attorney General, or any other law enforcement official is guilty of a Class A misdemeanor.”).

¹⁵ In West Virginia, for example, a person who files an ethics complaint in good faith “is immune from any civil liability that otherwise might result,” but a person who is found, by clear and convincing evidence, to have filed a complaint knowing that material statements are untrue can be ordered to reimburse both the subject and the ethics commission for costs and fees. W. Va. Code § 6B-2-4(u)(1)-(2); *see also* Fla. Stat. § 112.317(7) (giving ethics commission authority to require reimbursement of costs and fees “[i]n any case in which the commission determines that a person has filed a complaint against a public officer or employee with a malicious intent to injure the reputation of such officer or employee ... with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation of this part.”).

¹⁶ Mo. Ann. Stat. § 105.957 (4).

matter. One model is the provision for "Multiple complaints by a single complainant" in the Rules for Judicial Council and Judicial Disability, which govern the United States Court of Appeals for the Ninth Circuit. These rules provide that a complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints.¹⁷ The rule allows the complainant an opportunity to demonstrate why the judicial council should not limit the complainant's right to file further complaints, and gives the council authority to prohibit, restrict, or impose conditions on the complainant's future use of the procedure.¹⁸

We believe that these recommendations for changes to the Ethics Act maintain an appropriate balance between protecting the integrity of the process and encouraging responsible use of the Act to expose and correct unethical conduct. As discussed further below, we do not suggest any changes that might inhibit public discussion, debate, or criticism of the government.

C. The State Should Not Discourage Public Discourse on Government Actions

Creating safeguards to keep Ethics Act investigations confidential is categorically different than restricting citizens from speaking out about government conduct. Because public dialogue about government actions is speech at the core of the First Amendment, we do not recommend imposing sanctions on a citizen for disclosing information about an ethics complaint he or she has filed. Speech by a citizen charging government officials with breach of a code of official conduct is political speech accorded First Amendment protection. The United States Supreme Court has adhered to the bedrock principle that expression on public issues rests "on the highest rung of the hierarchy of First Amendment values,"¹⁹ and thus that "debate on public issues should be uninhibited, robust, and

¹⁷ U. S. Ct. of App. 9th Cir. Jud Miscon, Rule 10(a) (2008).

¹⁸ *Id.* West Virginia's ethics act contains a similar provision, *see* W. Va. Code § 6B-2-4(u)(2)(C) ("[T]he commission may decline to process any further complaints by the complainant, the initiator of the investigation, or the informant.").

¹⁹ *Carey v. Brown*, 447 U.S. 455, 467 (1979).

wide-open.”²⁰ The Supreme Court has also made clear that protected political speech goes far beyond intellectual argument about political theory; it includes vigorous debate about the qualifications and official conduct of public officials.²¹ Open discussion of official conduct is accorded the broadest protection available in our political system despite the fact “that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.”²²

Alaska’s Ethics Act does not inhibit this type of debate, because it does not impose penalties on individuals who are not engaged in the investigative or decision-making process. As we have considered ways to protect the confidentiality of the ethics investigations, we have been mindful that penalizing public discourse about the actions of government officials might threaten First Amendment rights. Courts have consistently found that confidentiality provisions applicable to ethics complaints restrict the content of speech.²³ Because they

²⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); see also *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”).

²¹ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. at 268 (citing with approval *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (“public men, are, as it were, public property” and “discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled”)).

²² *Id.* at 270.

²³ “As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.” *Turner Broad., Inc. v. FCC*, 512 U.S. 622, 643 (1994). Cases finding the confidentiality provisions of ethics laws to impose content-based restrictions include *Lind v. Grimmer*, 30 F.3d 1115, 1118 (9th Cir. 1994) (holding unconstitutional the confidentiality provision applicable to investigations conducted by Hawaii’s campaign spending commission); *Baugh v. Judicial Inquiry and Review Comm’n*, 907 F.2d 440, 444 (4th Cir. 1990) (finding that confidentiality requirement of Hawaii’s Judicial Inquiry and Review Commission was not content-neutral and remanding for further analysis under strict scrutiny); *Doe v. State of Florida Judicial Qualifications Comm’n*, 748 F. Supp. 1520, 1525 (S.D.

govern the content of speech, these restrictions will survive scrutiny only if narrowly drawn and necessary to serve a compelling state interest.²⁴ Courts generally have rejected states' interests in ethics code confidentiality provisions as insufficient to justify restrictions on citizens' speech.²⁵

IV. As a General Policy, the State Either Defends or Reimburses Public Officers for Their Legal Expenses When They are Accused of Inappropriate Conduct or Wrongdoing

The state routinely defends public officers against claims of inappropriate conduct or wrongdoing. For example, unless engaged in willful misconduct or gross negligence, the state defends public officers against claims that they violated others' constitutional rights while acting within the course and scope of their official duties.²⁶ Similarly, the Department of Law offers in-house legal

Fla. 1990) (invalidating confidentiality provision of Florida Constitution, applicable to complaints against judges); *Providence Journal Co. v. Newton*, 723 F. Supp. at 853 (invalidating confidentiality provision of Rhode Island Ethics Commission); *Doe v. Gonzalez*, 723 F. Supp. 690 (S.D. Fla. 1988) (finding confidentiality provision of Florida State Ethics Commission unconstitutional); *In re Warner*, ___ So.3d ___, 2009 WL 1025823 at *9 (La. 2009) (invalidating confidentiality requirement in attorney disciplinary proceedings).

²⁴ *Boos v. Barry*, 485 U.S. 312, 321 (1988).

²⁵ See *Lind v. Grimmer*, 30 F.3d at 1119-20; *Stilp v. Contino*, ___ F. Supp.2d ___, 2009 WL 1842087 at *6-11 (M.D. Pa. 2009); *Providence Journal Co. v. Newton*, 723 F. Supp. at 856-57; *S.D. v. Supreme Court of Florida*, 723 F. Supp. 690, 693-94 (S.D. Fla. 1988); *In re Warner*, 2009 WL 1025823 at *22-27; *R.M. v. Supreme Court of New Jersey*, 883 A.2d 369, 377-78 (N.J. 2005); *Doe v. Doe*, 127 S.W.3d 728, 736 (Tenn. 2004); *Petition of Brooks*, 678 A.2d 140, 144-45 (N.H. 1996).

²⁶ See, e.g., *Prentzel v. State, Dep't of Pub. Safety*, 169 P.3d 573, 577 (Alaska 2007). The Department of Law recently—and successfully—defended three Alaska State Troopers against claims under 42 U.S.C. § 1983, which provides, in part, that “[c]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

representation to its attorneys when complaints of professional misconduct are filed against them with the Alaska Bar Association.²⁷ The Department of Law represents its attorneys so long as the allegations of misconduct arise in the course and scope of their official duties and the attorneys did not engage in willful misconduct or gross negligence.²⁸

In some cases, when the Department of Law does not defend public officers against claims of inappropriate conduct, the state will instead reimburse them for the legal expenses they incur in successfully defending themselves. For example, if a Department of Law attorney hires private counsel to defend against professional misconduct claims before the Alaska Bar Association, the department may reimburse the attorney for costs and fees incurred if the attorney successfully defends against the claims and the claims arise out of the course and scope of the attorney's work with the department.²⁹ The state also reimburses Alaska judges and judicial officers for legal expenses they incur in disciplinary proceedings before the Alaska Commission on Judicial Conduct.³⁰ This commission serves a function for the judicial branch that is analogous to the personnel board's function for the executive branch under the Ethics Act.

be liable to the party injured in an action at law." This statute therefore authorizes a person to bring a civil action for a public official's putative violation of the person's constitutional rights. The department also is defending former Governor Palin in a § 1983 action involving a clerical error in the Governor's Office that resulted in the failure to issue a proclamation.

²⁷ Memorandum from Attorney General Bruce Botelho at 2 (Nov. 8, 2002) (announcing the department's policy on reimbursement and defense of employees).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Letter of Agreement between the State of Alaska, Dep't of Admin., Div. of Risk Mgmt. and the Alaska Ct. Sys. at 2 (undated). The state also has agreed to reimburse state employees for legal defense of allegations of wrongdoing in occupational licensing investigations before the Board of Psychologists and the State Medical Board, if the employees are exonerated.

More generally, the Department of Law was recently asked whether a state agency may reimburse a public officer for legal expenses incurred in defending against a complaint that the officer violated the professional code of conduct covering his duties and responsibilities. We concluded that the agency could reimburse such legal expenses if: (1) a decision exonerates the officer of any violations of the law or any wrongdoing; (2) the officer acted within the course and scope of his office or employment; (3) the attorney's fees are reasonable; and (4) an appropriate source of funds is available for that purpose.³¹

As these examples show, the state adheres to a general policy of either defending or reimbursing public officers for their legal expenses when they are accused of inappropriate conduct or wrongdoing, particularly when such accusations are unfounded. Underlying this general policy is the legal presumption that state officers carry out their duties ethically and responsibly,³² and therefore should be defended by the state against allegations to the contrary.

V. May the State May Defend or Cover the Legal Expenses of Public Officers in Ethics Proceedings

Despite this widespread practice of defending or reimbursing public officials when accused of wrongdoing, the state apparently has never defended or covered the legal expenses of an accused officer in an Ethics Act proceeding. Alaska

³¹ Confidential Letter from Acting Attorney General Richard Svobodny (May 4, 2009).

³² See, e.g., *AT & T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007) (“[a]dministrative agency personnel are presumed to be honest”); *Earth Resources Co. v. State, Dep’t of Revenue*, 665 P.2d 960, 962 n.1 (Alaska 1983) (“agency personnel and procedures are presumed to be honest and impartial”).

statutes are silent on this issue with regard to ethics proceedings.³³ But existing law provides ample authority and guidance for covering these legal expenses without the need for statutory changes.

A. A Public Purpose is Critical

The state may not spend public money for public officers' defense in ethics matters unless doing so serves a public purpose and appropriations exist for the expenditures.³⁴ Defending officers accused of ethics violations or covering their legal expenses when they are exonerated clearly has a public purpose: citizens may be reluctant to serve in state government—or be inhibited in performing their

³³ We concluded in an informal 1994 opinion that defense or indemnification of public officers for expenses or penalties incurred in ethics proceedings was unavailable in part because a complaint under the Ethics Act is not a suit for money damages. 1994 Inf. Op. Att'y Gen. at 2 (June 3; 663-94-0289). To the extent that the informal 1994 opinion emphasizes that public officers are not legally entitled to defense and indemnification of fines levied against them in ethics proceedings, the reasoning of this informal opinion is sound, particularly for public officers found guilty of wrongdoing. To the extent that the opinion suggests that the state may not pay the legal expenses of exonerated public officers, it is inconsistent with the state's practice in other contexts and with the public interest. While ethics proceedings are not suits for money damages, ethics allegations usually arise out of public officers' performance of their official duties, and penalties for violating the Ethics Act may include monetary fines. *See* AS 39.52.440 – 39.52.450. Moreover, the potential damage to a public officer's reputation is a cost to the individual, and recent experience demonstrates that public officers may incur substantial legal expenses even with regard to meritless ethics complaints.

³⁴ *See* Alaska Const. art. IX, § 6 (“No . . . appropriation of public money [shall be] made, or public property transferred, . . . except for a public purpose.”); Alaska Const. art. IX, § 13 (“No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law.”); *see also* AS 37.07.080(d) (“A state agency may not increase the salaries of its employees . . . or expend money or incur obligations except in accordance with law and [a] properly approved operations plan.”).

official duties—if they must bear the cost of defending themselves against unfounded ethics charges related to their state duties.³⁵ Indeed, the Ethics Act itself underscores the importance of ensuring that the Act not only encourages “high moral and ethical standards among public officers in the executive branch,” but also “improve[s] standards of public service.”³⁶ Public service should not subject public officers, who are assumed by law to be acting ethically, to personal financial liabilities when ethics proceedings confirm that they acted appropriately. Therefore, in examining whether the state may defend or pay the legal expenses for public officers in ethics proceedings, the critical question is whether there is an approach that ensures that a public purpose is advanced while at the same time encouraging compliance with the Ethics Act by public officers. This question is examined in more detail below.

B. A Policy of Payment or Reimbursement After Exoneration Would Best Balance the Public Interest in Encouraging Public Service and Compliance with the Ethics Act

A policy allowing payment of legal expenses of exonerated public officers who hire private lawyers to defend them against ethics complaints would promote and “improve standards of public service”³⁷ while encouraging compliance with the Ethics Act. The public purpose for paying legal expenses is clearest for those

³⁵ See, e.g., *Snowden v. Anne Arundel County*, 456 A.2d 380, 385 (Md. 1983) (upholding an ordinance allowing reimbursement of fees and recognizing that reimbursement serves the public interest in encouraging the recruitment and retention of high-risk officers, maintaining morale, and providing necessary protection to those whose line of work exposes them to the financial burdens of defending baseless criminal charges); *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 916-17 (Fla. 1990) (holding that Florida common law requires publicly paid legal representation for public officials defending against litigation arising from their performance of official duties while serving a public purpose; the requirement’s purpose “is to avoid the chilling effect that a denial of representation might have on public officials in performing their duties properly and diligently”) (citing *Nuzum v. Valdes*, 407 So. 2d 277 (Fla. Dist. Ct. App. 1981)).

³⁶ AS 39.52.010 (a)(1) and (a)(2)(B).

³⁷ AS 39.52.010(a)(2)(B).

who are exonerated.³⁸ As noted above, the reimbursement of legal fees for those who are exonerated in ethics matters also is consistent with the state's general practice in other contexts. Those situations, all of which concern professional ethics codes, involve issues very similar to Ethics Act matters. Such an approach also appears to be the common practice among the majority of state governments in the country.³⁹

The recent advice we provided to an executive branch agency on reimbursement of legal expenses in code-of-conduct proceedings offers an appropriate model for payment of legal expenses in Ethics Act matters. Based on that model, public officers may have expenses they incur in defending against ethics complaints covered if

(1) the officers are exonerated of any violation of the Ethics Act or other wrongdoing; (2) the officers acted within the course and scope of their offices or employment; (3) the expenses incurred were reasonable; and (4) there are appropriate sources of funds to pay the expenses.⁴⁰ As we stated in that opinion, "these conditions ensure that the spending will serve a public purpose."⁴¹

Although agencies could wait and reimburse public officers for their legal expenses once the ethics complaints against them are resolved, allowing state

³⁸ See *Snowden*, 456 A.2d at 385.

³⁹ See Letter from James McPherson, Executive Director of the National Association of Attorneys General 2 (July 31, 2009) ("In conclusion, the reimbursement for reasonable attorney's fees and costs incurred by state officials during the course of an investigation or adjudication of alleged ethics violations where those allegations were found unsubstantiated or unfounded appears to be a common practice among a majority of the states. Such common practice, while not specifically provided by any state statutory or regulatory scheme, is premised upon a broad interpretation of risk management programs, formal ethics programs, or sound public policy protecting state officials from frivolous lawsuits which could discourage citizens from engaging in public service or seeking elected office.").

⁴⁰ Confidential Letter from Acting Attorney General Richard Svobodny, *supra* n.31.

⁴¹ *Id.*

officers the option of having their legal expenses paid as they are incurred helps serve the public interest of not discouraging public service. Logistically, reimbursement may be simpler. But if public officers must shoulder the financial burden of legal expenses while they await resolution of unfounded complaints against them, qualified individuals may be reluctant to accept positions in state service and public officers may be inhibited in carrying out their duties. Public officers must agree, however, to repay any amounts they receive if they are not exonerated.⁴²

The Alaska Supreme Court has not addressed the issue of reimbursement, but other court decisions suggest that this approach strikes an appropriate balance between the public's interest in encouraging individuals to accept positions in state

⁴² Pursuant to AS 39.52.950, the Department of Law will soon promulgate regulations addressing procedures for payment of expenses incurred in Ethics Act proceedings.

service and its interest in holding public officials accountable and discouraging misconduct under the Ethics Act.⁴³

C. Conflict of Interest Issues Prevent the Department of Law from Directly Representing State Officials in Ethics Act Proceedings

Another possible approach would be to have the Department of Law defend public officers against ethics complaints. As noted above, the Department of Law regularly defends public officials when they are accused of wrongdoing under federal civil rights statutes. However, having the Department of Law directly defend public officers against ethics complaints could present conflict-of-interest

⁴³ See, e.g., *Guenzel-Handlos v. County of Lancaster*, 655 N.W.2d 384, 389-90 (Neb. 2003) (concluding that, absent specific legislative authorization, public bodies are not obligated to pay attorney's fees their officials incur in successfully defending against criminal charges arising out of performance of their official duties); *Triplett v. Town of Oxford*, 791 N.E.2d 310, 315-16 (Mass. 2003) (same); *Hart v. County of Sagadahoc*, 609 A.2d 282, 283-84 (Me. 1992) (concluding that the common law permits, but does not require, a public body to pay fees its officials incur in those circumstances); *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 916-17 (Fla. 1990) (recognizing a common law duty of a governmental body to pay attorney's fees that its officials incur in defending against litigation arising out of performance of their official duties while serving a public purpose); *Chavez v. City of Tampa*, 560 So.2d 1214, 1214-19 (Fla. Dist. Ct. App. 1990) (holding that, where a city council member received advice from the city attorney that voting on a matter involving her personal interest would be a conflict of interest but nonetheless voted on that matter to break a tie vote, she was not entitled by statute or common law to reimbursement of the legal expenses she incurred in successfully defending against related charges before the state ethics commission); *Ellison v. Reid*, 397 So. 2d 352, 354 (Fla. Dist. Ct. App. 1981) (upholding the use of public funds to pay attorney's fees that a county appraiser incurred in successfully defending against charges of official misconduct before the state ethics commission); *Bd. of Chosen Freeholders of Burlington v. Conda*, 396 A.2d 613, 615, 620 (N.J. Super. Ct. Law Div. 1978) (holding that a county had neither the duty nor the authority to reimburse a county surrogate for legal fees incurred in defending against disciplinary proceedings before an advisory committee on judicial conduct, where the proceedings led to censure of the surrogate as a judicial officer).

challenges because of the attorney general's role in interpreting, enforcing, and prosecuting violations of the Ethics Act. If the Department of Law directly defended public officers in Ethics Act proceedings, the result would be that—for ethics complaints against most public officers—the defense counsel and the lawyer investigating and prosecuting the complaint would be in the same department and be supervised by the same attorney general and, perhaps the same deputy attorney general. In essence, the attorney general, through attorneys in the Department of Law, would be both prosecuting and defending against the ethics complaints. That could not only create an appearance of impropriety, but could also prejudice the interests of the accused officers and diminish the officers' confidence in the representation they receive. It could also create difficulties under the Alaska Rules of Professional Conduct because of the conflicting obligations of the state attorneys and their supervisors.⁴⁴

Those conflict difficulties would not exist if the Department of Law represented only the governor, lieutenant governor, and attorney general against ethics complaints, because the attorney general is recused from investigating and prosecuting complaints against those three officers.⁴⁵ But Department of Law representation of even those three officers would still raise significant concerns.⁴⁶

⁴⁴ See Alaska R. Prof'l Conduct 1.7, 1.10 (providing that a lawyer should generally not represent a client if the representation of that client will be directly adverse to another client of that lawyer or the lawyer's firm). *But see* Alaska R. Prof'l Conduct 1.7 cmt. ("government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party.").

⁴⁵ AS 39.52.310(c).

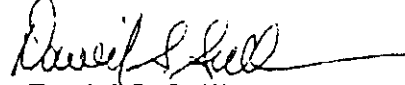
⁴⁶ As a general rule, the Ethics Act makes clear that the attorney general has no role in the investigation and prosecution of an ethics complaint against the governor, lieutenant governor, or attorney general. In all other situations involving the Ethics Act, the role of the attorney general and Department of Law is to interpret, implement, and enforce the Act, with the goal of promoting the Act's purposes. But if the Department of Law were defending an individual officer against an ethics complaint, the goal would be different: to defend that officer zealously, regardless of the implications for the long-term implementation of the Ethics Act. For example, zealous representation of an accused officer might involve asserting that a provision of the Ethics Act is unconstitutional—an

Mike Nizich, Chief of Staff
A.G. file no. AN2009102807

August 5, 2009
Page 19

Please contact me if we can be of further assistance with this matter.

Sincerely,



Daniel S. Sullivan
Attorney General

assertion that the Department of Law would likely resist in carrying out its general responsibility to implement and enforce the Ethics Act. Defending individual officers against ethics complaints would therefore create an unacceptable conflict between the Department of Law's duty to provide them zealous representation and its general duty to promote the purposes of the Ethics Act in interpreting, implementing, and enforcing the Act.

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VIRGINIA BAR
ALL OTHERS ALASKA BAR

February 24, 2009

RECEIVED

FEB 25 2009

Executive AGO Juneau

Via Email and First Class Mail

Richard Svobodny, Acting Attorney General
P.O. Box 110300
Juneau, AK 99811
richard.svobodny@alaska.gov

Re: In re Ethics Complaint of October 24, 2008
Our File No. 506,751.3

Dear Mr. Svobodny:

I have been appointed Independent Counsel by the Alaska Personnel Board in connection with a complaint filed against Governor Palin under the Alaska Executive Ethics Act regarding travel by the Governor's children at State expense. After conducting legal research and an investigation into the facts of the matter, the Governor and the Personnel Board, through Independent Counsel, have entered into a Settlement Agreement which I have enclosed and which is to be released to the public. I write to you because the Department of Law has jurisdiction over the promulgation of regulations under the Alaska Executive Ethics Act.

I have come to the conclusion, and the Governor concurs, that the Ethics Act, and its clarifying regulations, gives insufficient guidance to an independent counsel, or a governor's office, as to what state reimbursed travel is appropriate for members of the first family. As a result, we have agreed in the settlement agreement to refer this matter to the Department of Law, in the public interest, so that more specific guidance and clarification be provided to this and future governors whose families may be called upon to travel on behalf of the State.

I have also come to the conclusion that the process of promulgating regulations is a far better way to address this issue than litigation following the filing of an adversarial accusation under these circumstances. The regulatory process provides for public comment and input as to what is an appropriate use of state funds for first family travel whereas litigation of the matter directly under the Act does not. The Governor's Office, in turn, is looking for more of a bright line set of rules to follow in scheduling travel that is simpler to apply than the current regulations.

Richard Svobodny, Acting Attorney General
February 24, 2009
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The operative statute is AS 39.52.120 which prohibits a state official from using state resources to obtain a personal benefit. A personal benefit conferred upon an official's immediate family, such as travel at State expense, is clearly covered by the Act's definition of personal benefit. An ambiguity arises, however, in AS 39.52.120(a) which provides that the benefit that is conferred must be an "unwarranted" benefit. The statute does not provide further definition. The Governor's Office has historically responded to numerous requests for what it terms "protocol" trips at which the Governor appears at events to lend the State's support and backing to such matters as a charitable organizations, business ventures benefiting the State or for the attendance at professional conferences where policy is discussed. Often the first family is invited to attend such events, but those making the invitation are almost always not offering to pay for the travel. The issue raised, therefore, is when is first family travel sufficiently in the State's interest ("warranted") to support the expenditure of public funds.

There are two regulations that address what is to be considered an unwarranted benefit. Section (a) of 9 AAC 52.040 provides that an unwarranted benefit is one that is conferred as a "deviation from normal procedures for the award of a benefit..." if the deviation is based upon an "improper motivation." In turn 9 AAC 52.990 provides that an "improper motivation" is one that is not related to the "best interests of the State." But 9 AAC 52.540(b) states, somewhat mystifyingly, that in considering whether the benefit is unwarranted, it does not matter whether the ultimate result is determined to be in the best interest of the State.

In addition to the fact that the regulations can be read to be internally inconsistent, there is the additional problem is that there is no real established procedure against which to measure first family travel. The complaint currently before the Personnel Board could be read to challenge travel by the Governor's children with respect to over 40 such trips. Our investigation reveals that there was no precedent against which to measure whether the procedures employed by the Governor's Office were or were not a deviation from "normal" procedures. Governor Murkowski had no minor children but announced a policy of travelling with his spouse on all gubernatorial trips because his spouse was his advisor. This was never challenged under the Act. Governor Knowles generally did not charge the State for travel for minor children, although staff at the Governor's office reports that family would travel on the state plane from time to time when the Governor travelled on it, a practice that was addressed after Governor Knowles left office in an opinion by the Attorney General in 2004 which suggests that this practice would not be in compliance with the Ethics Act, at least unless there was State business directly involving the passengers that caused the trip to be taken. Prior to the Knowles administration, the Ethics Act was not in existence.

The Settlement Agreement that was reached between the Personnel Board and the Governor refers the matter of first family travel to the Department of Law for regulatory clarification so that some further guidance, other than the "motivation" of the Governor, on a trip by trip basis, can be used to guide the decision makers. The Governor has agreed, retroactively, to reimburse the State for any ongoing or future travel should a clarification or standard set by a new regulation require it whether the travel preceded the new regulation or not. In the interim,

BIRCH HORTON, BITTNER AND CHEROT
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Richard Svobodny, Acting Attorney General
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the standard used in the Settlement Agreement will guide the travel decisions by the Governor's Office.

It has been my endeavor to not only resolve this complaint, but attempt to recommend that a process be put into place that would make it unnecessary for gubernatorial related travel to become the subject of future request for scrutiny under the Ethics Act by making the standards clearer and easier for the Governor's Office to apply. Thank you for your consideration of this matter.

Very truly yours,

BIRCH HORTON BITTNER AND CHEROT



Timothy J. Petumenos
Independent Counsel

Cc: Thomas Van Flein, Counsel to Governor Palin (via email)
Alaska Personnel Board (via email)

BEFORE THE ALASKA PERSONNEL BOARD

In Re October 24, 2008 Ethics Complaint

SETTLEMENT AGREEMENT

This settlement agreement is entered into between Governor Sarah Palin ("Governor") and the Alaska Personnel Board through its Independent Counsel ("Independent Counsel"). This settlement resolves the above described Complaint. The Complaint alleges that certain travel for Governor Palin's children was taken at State expense and in violation of the Alaska Executive Branch Ethics Act, AS 39.52.120(a) and (b)(3). The trips that are the subject of this Settlement Agreement are those described in Exhibit A. Exhibit A is specifically incorporated into the terms of this settlement agreement.

WHEREAS the parties agree that there is presently little statutory or regulatory guidance under the Alaska Executive Branch Ethics Act to determine the ethical standards for travel by the Governor's immediate family (referred to as Protocol Travel)¹ and, more specifically, to determine the circumstances under which (i) State reimbursement for travel by the Governor's children is ethically prohibited and (ii) when the Governor must reimburse the state for travel by her children on state transportation equipment;

WHEREAS the parties understand that AS 39.52.120(a)'s prohibition on unwarranted benefits or treatment is the most pertinent provision addressing

¹ As used herein, "Protocol Travel" is travel involving the First Family to events, ceremonies and other public appearances attended by the Governor.

travel by the Governor's immediate family as described in Exhibit A, that such provision is further defined by regulation, but that such regulation does not provide sufficiently clear standards for determining when travel as described in Exhibit A constitutes an unwarranted State reimbursed travel and therefore an ethical violation;

WHEREAS Independent Counsel has interpreted the Alaska Executive Branch Ethics Act, in the absence of specific regulation on the topic of first family travel, to require that state reimbursed travel for the first family should not occur at State expense unless the presence of the First Family serves an important state interest and that some of the travel raised by the Complaint does not meet this standard;

WHEREAS the Governor maintains that she adhered to Protocol Travel standards historically allowed to prior administrations, abided by the recommendations of state personnel, and has done nothing to violate the Act, but further agrees that written Protocol Travel guidelines would benefit her administration and all future administrations;

WHEREAS, as to the existing Complaint, the Governor wants to exceed minimum legal standards, and therefore wishes to respect and adhere to the determination made by Independent Counsel and does not wish to contest the standard being applied or the application of this standard to the Complaint in the interest of the State and the public;

WHEREAS the parties have agreed to mutually address and resolve the issues raised by the Complaint voluntarily, cooperatively and in the best interests of the State;

IT IS AGREED THAT:

1. The Governor shall reimburse the State within 120 days for payments for travel made as described in Exhibit A.

2. No other trips that could be the subject of the Complaint, through to the date of this agreement require reimbursement.

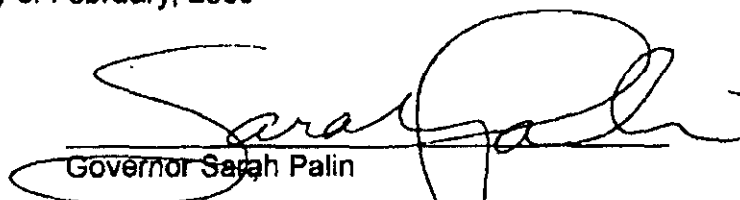
3. Independent Counsel shall refer this matter to the Department of Law for the purpose of promulgating additional regulations to clarify Protocol Travel by addressing more clearly what constitutes Protocol Travel that is warranted under the Alaska Executive Branch Ethics Act and therefore subject to State reimbursement. The Governor agrees to reimburse the State for any trip billed to the State for her children that are submitted in the future that does not comply with the regulation or regulations that are later promulgated.

4. It is expressly agreed that the terms of this agreement shall be made public, that the Governor waives her right to confidentiality regarding this agreement, and that Independent Counsel and the Governor shall be authorized to communicate the terms of this agreement to the public and to the Attorney General for purposes of seeking clarifying regulations. Independent Counsel, the Governor and her staff, and members of the Department of Administration

charged with arranging Protocol Travel shall be free to participate in the regulatory process as they choose or as they may be called upon.

5. Nothing in this agreement constitutes an admission of wrongdoing, and none has been found, nor may any inference of wrongdoing be inferred by virtue of the execution of this agreement in any other proceeding.

DATED this 23rd day of February, 2009


Governor Sarah Palin


Timothy J. Petumenos, Independent Counsel
Alaska Personnel Board

Approved as to form and content:

2-23-09 
Thomas Van Flein, Attorney for Governor Palin

TA #	DATES	EVENT DESCRIPTION	COST DESCRIPTION	
01-1624	1/25 - 1/30/07	First Family attended Alaska Native Heritage Center First Family event in Anchorage (n/a); Bristol later attended opening night of Beauty and the Beast at Valley Performing Arts Center.	Additional cost to State for attending Beauty and the Beast to be reimbursed.	
01-1901	4/18 - 4/22/07	First Family attended Elders and Community dinner in Glennallen (n/a); attended Alaska Prudential Student Recognition ceremony (n/a); attended Alaska Moose Federation banquet with Governor.	Trip to be prorated between three events, with Moose Federation to be reimbursed for marginal cost.	
01-1857 01-1858 01-1859	5/6 - 5/8/07	First Family attended family dinner at the Outpost and attended the Skagway Community Reception for Palin family.	Family traveled via Ferry and DPS King Air.	
01-1876 01-1877	5/9 - 5/10/07	Governor, Willow and Piper attend Cordova Shorebird Festival and documentary. Governor spoke to Cordova Chamber of Commerce.	Family traveled via DPS King Air. Two round trip tickets for Willow and Piper.	
01-2134	10/7 - 10/11/07	Governor and Bristol attend Newsweek's Third Annual Women and Leadership Conference.	Airfare and one meal.	
01-2335 01-2336	1/12/2008	Willow and Piper returned to Juneau to State of the State Address.	Willow and Piper traveled with Governor on DPS King Air.	
01-2381	2/8 - 2/10/08	Start of the Iron Dog and Alaska Outdoor Council Banquet.	Piper traveled with Governor on DPS King Air.	
01-2519	4/10/08	Curves Ribbon Cutting Ceremony, and bill signing for recycled eyeglasses during the Lions Club of Alaska and Yukon Territory Annual Convention.	Juneau to Anchorage	
01-3151 01-3152	7/9 - 7/15/08	National Governor's Association Annual Summer Meeting.	Airfare and hotel	

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

SARAH PALIN, GOVERNOR

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ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)276-8554

August 21, 2008

Annette Kreitzer
Commissioner
Department of Administration
P.O. Box 110200
Juneau, AK 99811-0200

Re: Personal Use of Electronic Equipment
AGO File No. 661-08-0388

Dear Commissioner Kreitzer:

You requested an attorney general opinion addressing the applicability of the Executive Branch Ethics Act, AS 39.52, to the personal use of a state-owned cell phone, personal digital assistant, such as a BlackBerry (PDA), laptop computer, and other state-owned equipment. We conclude that the questions posed involve matters of general applicability and therefore, the standards should be addressed by promulgation of regulations by the Department of Law. Our advice regarding the considerations leading to adoption of particular standards is addressed in Part I of this opinion.¹

¹ Part I of this opinion principally addresses use of cell phones and PDAs, which are both issued subject to a usage plan. It also addresses other equipment used away from the regular workplace, such as satellite phones and portable computers, but is not applicable to office equipment, such as copiers. This opinion also does not apply to the use of state-owned vehicles, which is regulated by AS 44.68.010-44.68.040, the Department of Transportation and Public Facilities Policy and Procedure No. 11.04.010 and the Department of Administration policy addressing the personal use of state vehicles, dated January 29, 2007. An acceptable personal use under the state's vehicle policies is an insignificant use for purposes of the Ethics Act. Designated ethics supervisors must address other circumstances on a case-by-case basis.

You also asked that we address whether a public officer who elects to receive an allowance to purchase a personal cell phone or PDA to be used in part for state business, waives confidentiality for personal emails and call records. We conclude that personal emails and call records are not public records and public disclosure of such personal information would likely run afoul of the individual's right to privacy under the Alaska Constitution. However, because business related calls and business related email messages would also be generated through these personal devices, it is possible that a state official or a court could be required to review all call records and messages in order to locate the calls and email messages that concern state business and thus are public records. This issue is addressed in Part II of this opinion.

I. PERSONAL USE OF STATE-OWNED ELECTRONIC EQUIPMENT

You asked that we answer the following questions addressing the applicability of the Ethics Act to the personal use of state-owned equipment: What constitutes de minimis or insignificant use?² Can we establish a bright line for determining when usage is no longer insignificant? What are the criteria for determining whether insignificant use is permissible? What should a work supervisor do upon determining that the Ethics Act has been violated? What is a work supervisor's authority to address an Ethics Act violation? You also asked that we discuss the remedies and penalties available for an Ethics Act violation for misuse of state-owned equipment. Our advice and answers to your questions are set out below.

A. Applicable Ethics Act Provisions and Regulations

The Ethics Act contains several provisions applicable to the personal use of state equipment by public officers.³

² Your request used the phrase "de minimis or insignificant." The term "de minimis" has occasionally been used in ethics opinions to describe a minor use that does not violate the Ethics Act. The term "insignificant" as used in the Ethics Act and applicable regulations describes interests or circumstances that do not violate the Ethics Act or that result in no substantial impropriety, even if there was a violation. We have not used the term "de minimis" in this opinion to avoid confusion with the use of that term to describe a nontaxable fringe benefit under the Internal Revenue Service rules.

³ We use the term "public officer" as defined in the Ethics Act to include both state employees and the members of state boards and commissions. AS 39.52.960(21). The prohibitions and standards discussed in this opinion apply equally to both.

1. Prohibition on Use for Personal Benefit or to Benefit Another

Alaska Statute 39.52.120(a) states that a “public officer may not use, or attempt to use, an official position for personal gain and may not intentionally secure or grant unwarranted benefits or treatment for any person.” “Gain” includes “actual or anticipated gain, benefit, profit, or compensation.”⁴ Thus, as a general rule, a public officer may not use state equipment for personal benefit, regardless of whether there is financial gain.⁵ The officer also may not use state equipment to intentionally give an unwarranted benefit to any person.⁶

2. Prohibition on Use to Benefit Personal or Financial Interests

Alaska Statute 39.52.120(b)(3) states that a public officer may not “use state time, property, equipment, or other facilities to benefit personal or financial interests.” The terms “personal interest” and “financial interest” are specially defined in the Ethics Act. “Personal interest” means “an interest held or involvement by a public officer, or the officer’s immediate family member or parent, including membership, in any organization, whether fraternal, nonprofit, for profit, charitable, or political, from which,

⁴ AS 39.52.960(10). “Personal gain” has been further defined to mean “a benefit to a person’s or immediate family member’s personal interest or financial interest.” 9 AAC 52.990(b)(6). We construe this regulation as explaining, not limiting, the definition of “gain” and the scope of the language in AS 39.52.120(a). There is a presumption that every word of a statute was intended for some useful purpose, that some effect is to be given to each word and that no superfluous words were used. *Alaska Transp. Comm’n v. Airpac, Inc.*, 685 P.2d 1248 (Alaska 1984). In addition, to be valid, a regulation must be consistent with and reasonably necessary to implement the statute authorizing its adoption and not conflict with other statutes. *O’Callaghan v. Rue*, 996 P.2d 88 (Alaska 2000). Thus, all words in the statutory definition of “gain” must be acknowledged and “gain” is not limited to situations involving “personal interests” or “financial interests,” as defined in the Ethics Act.

⁵ “Benefit” means “anything that is to a person’s advantage or self-interest, or from which a person profits, regardless of the financial gain, including any dividend, pension, salary, acquisition, agreement to purchase, transfer of money, deposit, loan or loan guarantee, promise to pay, grant, contract, lease, money, goods, service, privilege, exemption, patronage, advantage, advancement, or anything of value.” AS 39.52.960(3).

⁶ “Person” includes a natural person, a business, an organization and a governmental entity. AS 39.52.960(17); 9 AAC 52.990(b)(5).

or as a result of which, a person or organization receives a benefit.”⁷ “Financial interest” means –

(A) an interest held by a public officer or an immediate family member, which includes an involvement or ownership of an interest in a business, including a property ownership, or a professional or private relationship, that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit;

(B) holding a position in a business, such as an officer, director, trustee, partner, employee, or the like, or holding a position of management.⁸

A public officer violates the Ethics Act by using state equipment to benefit an organization with which the officer or an immediate family member has a relationship or to benefit an interest held by the officer or an immediate family member, including an interest in a business or other professional or private relationship, that is a source of income or financial benefit.

A related regulation, 9 AAC 52.050, provides a limited exception:

A public officer who uses state time, property, equipment, or other facilities to benefit the officer's personal or financial interest is not in violation of AS 39.52.120(b)(3) if the officer's designated supervisor determines that the use is insignificant, the attorney general has not issued a general opinion against the use, and the attorney general does not advise the officer against the use.

Therefore, if use to benefit a personal or financial interest occurs, the designated ethics supervisor may review the circumstances and determine that the public officer has not violated the Ethics Act, if the ethics supervisor concludes that the use was “insignificant” and the attorney general has not either generally or specifically advised against the use.

⁷ AS 39.52.960(19). The term “benefit” is broadly defined. *See supra* note 5.

⁸ AS 39.52.960(9).

3. Prohibition on Use of State Equipment for Partisan Political Purposes

Alaska Statute 39.52.120(b)(6) states that a public officer may not “use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for partisan political purposes.”⁹ As stated in the subsection, the phrase “for partisan political purposes” means “having the intent to differentially benefit or harm a (i) candidate or potential candidate for elective office; or (ii) political party or group.” It does not include “having the intent to benefit the public interest at large through the normal performance of duties.”

We interpret this provision stringently to prohibit any use of state equipment for political activity. Also, under the State of Alaska’s *Personal Use of State Office Technologies Policy (SP-017)* it is unacceptable to use state equipment “for fundraising, political campaign activities, or public relations activities not specifically related to state government activities.”

A state officer may reply to a communication relating to a partisan political activity only to advise the sender that use of state equipment for such purposes is prohibited and to provide an alternate place of contact, if courtesy would require it, without violating the Ethics Act. Any other activity related to partisan political activity is prohibited. The considerations discussed in the next section of this opinion do not create an exception when the use involved is related to partisan political purposes.

B. Standards for Determining Permissible Insignificant Personal Use¹⁰

The Ethics Act recognizes that public officers come to state service with private and independent outside interests. The Act acknowledges that public officers may pursue independent interests so long as the activity does not interfere with the full and faithful discharge of their public duties and responsibilities. It also directs that we distinguish between minor and inconsequential conflicts that are unavoidable and those that are

⁹ The subsection states exceptions for use of the governor’s residence and so long as there is no charge to the state, use of communications equipment in the residence and some limited use of state aircraft.

¹⁰ The term “personal use” as used in this section includes a use addressed in AS 39.52.120(a) or (b)(3) as discussed above; that is, a use for personal gain or benefit, to provide an unwarranted benefit to any person or to benefit personal interests or financial interests.

substantial and material.¹¹ Those judgments are ordinarily based on the particular circumstances.

The Ethics Act provides guidance for determining when conduct that might otherwise be unethical under the Act's code of conduct, results in no violation because there is no substantial impropriety. Alaska Statute 39.52.110 excuses potential violations or permits action when a conflict exists if a public officer's "personal or financial interest in the matter is insignificant, or of a type that is possessed generally by the public or a large class of persons to which the public officer belongs," or when the "action or influence would have insignificant or conjectural effect on the matter."¹² These standards do not provide specific guidance for establishing a rule governing the personal use of cell phones or PDAs in the course of day-to-day activity. They do confirm that potential violations of the Ethics Act that may be characterized as "insignificant" are not the type of conduct that the Alaska Legislature considered "substantial and material" and to be avoided.

The Alaska Legislature amended the Ethics Act in 2007 to set standards for determining the significance of certain activities and these standards provide additional guidance for application of the Ethics Act to the use of state-owned electronic equipment. Alaska Statute 39.52.110, discussed above, was amended to provide that stock or other ownership interest in a business is presumed insignificant if its value is less than \$5000.¹³ Thus, the legislature set a bright line for defining an insignificant ownership interest in a business, but, by stating the rule as a presumption, it gave ethics supervisors the flexibility to address unusual circumstances.¹⁴ The legislature also limited the use of state aircraft for partisan political purposes to use that is collateral or incidental to the normal performance of official duties and that is no more than 10 per cent of the total use of the aircraft for official state purposes on a single trip. The person using the aircraft for this purpose must reimburse the state for the proportionate share of the actual cost of the

¹¹ AS 39.52.110(a).

¹² AS 39.52.110(b).

¹³ AS 39.52.110(d).

¹⁴ The legislature also amended the gift provisions to prohibit the receipt of gifts from registered lobbyists, but that bar was again stated as a presumption, providing flexibility to address circumstances where gifts are given to public officers by lobbyists for reasons unrelated to their state service. See AS 39.52.130(a).

use.¹⁵ Thus, the legislature reaffirmed its original intent that the responsibilities of an officer's state position should be reconciled with the officer's independent activity and interests where possible and that the state may accommodate outside matters that are insignificant and have limited impact on state business so long as there is no cost to the state.

We propose to promulgate regulations to set standards for determining when personal use of certain state equipment is presumed not to violate the Ethics Act. At this point, we contemplate proposing regulations that reflect the standards discussed below with respect to the equipment identified. We expect that the proposed regulations would permit designated ethics supervisors to review personal use that is inconsistent with the standards and therefore presumptively violates the Ethics Act and determine on a case-by-case basis whether the personal use was unavoidable and insignificant under the circumstances.

1. Cell Phones and Personal Digital Assistants

We assume that cell phones and PDAs are issued to state officers to ensure out-of-office accessibility, during the day but particularly after hours and on weekends. PDAs may also be needed when public officers travel and require access to email. Based on information provided by the Department of Administration, use of each individual state cell phone and PDA is governed by one of several plan options under a contract with a service provider. Plans typically provide a block or allowance of minutes, such as 500 or 800 minutes, for a set monthly fee, with additional fees for minutes that exceed that amount, out-of-state long distance, roaming, text messaging or data transfer.¹⁶

Generally, state equipment is not a substitute for an officer's personal equipment and personal use should be collateral or incidental to the performance of official duties. Personal calls or contacts during the work day should be of short duration as reasonably necessary to tend to family and individual matters, such as child care, medical appointments or social appointments, or to address matters relating to personal or financial interests, similar to the permitted use of a desk telephone. No use of state equipment may be made for partisan political purposes, except for limited replies to incoming contacts as stated earlier in this opinion.

¹⁵ AS 39.52.120(f).

¹⁶ The possible fees vary from plan to plan. This opinion is based on the current state of technology and contracts for cell phone and PDA use. Advances in technology or changes to plans may require modification of the standards discussed in this opinion.

Considering the legislature's intent, the standards defining conduct resulting in no substantial impropriety under the Ethics Act and input from the Department of Administration, we intend to propose regulations establishing that a public officer's personal use of cell phones and PDAs that is consistent with the following standards is presumed not to violate the Ethics Act.

- Personal use that does not exceed the greater of 30 minutes or five percent of the allowance of minutes under the applicable plan per month.
- Any personal use that results in a separate charge must be reimbursed to the state in full. Charges for minutes of use exceeding the monthly allowance of minutes under the officer's plan are presumed to have been incurred for the officer's personal benefit and must be reimbursed to the extent of the officer's personal use that month.¹⁷

In summary, personal use of state-issued cell phones and PDAs will be presumed insignificant if the amount of use does not exceed the greater of 30 minutes per month or five percent of the monthly minute allowance and all extra charges attributable to personal use are reimbursed.¹⁸ Personal use of this equipment is presumed to violate the Ethics Act if the personal use exceeds the allowed usage or the officer fails to reimburse charges incurred for personal use.

2. Field or Satellite Phones

A public officer may be issued a field or satellite phone to facilitate communication regarding state business when on assignment in the field. For such phones, not covered by an individual usage plan, a state officer may make personal calls, as described above, without limitation so long as the officer reimburses the state for all costs incurred for personal calls and the personal use does not interfere with use of the phones for state business. Work supervisors should advise officers being sent to the field

¹⁷ One contract has a "local call only" option, charging a set fee per minute for all calls. We presume that the business use of a cell phone under this option is intended to be limited, resulting in charges less than the least monthly fee. Any personal use is subject to the same charge and must be paid by the employee, as is the case for field or satellite telephone use.

¹⁸ These standards may be reconsidered as a result of comments on the proposed regulations. In addition these standards are not intended to address what is a de minimis fringe benefit under Internal Revenue Service regulations and may also be revised if necessary to address IRS requirements.

of this policy and any special limitations or modifications on use that may be warranted by the circumstances.

3. Portable Computers

Portable computers may be provided to employees to facilitate state business when the employees must work out of the office and when on travel. Portable computers may also be provided to members of boards and commissions in connection with official meetings and other state business. These public officers may make reasonable incidental personal use of portable computers, including use for private email or personal entertainment, so long as there is no cost to the state and any use is acceptable under the State of Alaska's *Personal Use of State Office Technologies Policy (SP-017)*.¹⁹

C. **Procedures for Addressing Ethics Act Violations**

The Ethics Act authorizes designated ethics supervisors, the attorney general and the Personnel Board to take certain actions relating to potential or actual ethics violations.²⁰ It also provides that agency disciplinary action may be taken to address ethics violations by a public employee. Alaska Statute 39.52.420 states that "an agency may reprimand, demote, suspend, discharge, or otherwise subject an employee to agency disciplinary action commensurate with the violations of [the Act]" and that the Act does not prohibit review of the discipline under applicable collective bargaining agreements or personnel statutes and rules. The regulations implementing the Ethics Act recognize that the attorney general may forward information obtained in the course of an ethics investigation to a designated ethics supervisor or other appropriate superior for potential disciplinary action.²¹

In situations where misconduct first comes to the attention of a work supervisor or designated ethics supervisor, the Department of Law recommends that executive branch agencies and public corporations conduct internal investigations into the misconduct and take appropriate disciplinary action with guidance or assistance from human resource

¹⁹ The minute limitation applicable to personal cell phone use is not applicable. We assume that batteries are rechargeable or the computer may be plugged in and internet access is free or the employee pays for the charges, such as a fee imposed by a hotel, related to personal use.

²⁰ See generally AS 39.52.210; AS 39.52.220; AS 39.52.310 – 39.52.460.

²¹ 9 AAC 52.160(b).

managers.²² A work supervisor should generally follow the same procedures and exercise similar judgment when addressing ethics issues as any disciplinary matter. The work supervisor should consult with the designated ethics supervisor about all matters believed to involve violations or potential violations of the Ethics Act. If, after a decision regarding discipline is made, the work supervisor and ethics supervisor believe the circumstances warrant review under the Ethics Act for consideration of additional penalties, the designated ethics supervisor may then refer the matter to the attorney general for review and additional action. The work supervisor or other officer imposing discipline should notify the subject employee that a referral is being made at the same time the employee is notified of the discipline being imposed.

D. Remedies and Penalties under the Ethics Act for Misuse of Equipment

If a public officer, whether public employee or board or commission member, has made inappropriate use of state equipment, a work supervisor or the designated ethics supervisor should initially direct that it not happen again.²³ In addition, state policy provides that incremental charges on invoices to the state resulting from personal use of cell phones and electronic equipment must be reimbursed to the state.²⁴

The particular circumstance of misuse by a public employee may require other discipline, up to and including termination. Care should be taken to ensure that appropriate personnel rules and the terms of collective bargaining agreements are followed to protect the integrity of the action taken. Work supervisors should consult with the appropriate human resource manager for guidance. Work supervisors should also coordinate with the agency's designated ethics supervisor.

Under the Ethics Act, the remedies available to a designated ethics supervisor of a public employee are limited to certain actions to address potential violations, i.e. reassignment of duties or ordering divestiture, and these remedies are not generally

²² If the circumstances suggest significant Ethics Act violations and the need for external investigation, matters may be referred to the attorney general initially for issuance of a complaint. The designated ethics supervisor should consult with the state ethics attorney if this course of action is believed necessary.

²³ Access to the equipment may also be removed, but we assume that there will be a continuing business need for the officer to use the equipment so that taking away the equipment will not usually be an option.

²⁴ AAM 320.340.

applicable to the inappropriate use of equipment addressed in this opinion.²⁵ The designated ethics supervisor for a board or commission may direct a member to refrain from action to avoid a further violation.²⁶

The Ethics Act gives the attorney general authority to recommend action to correct or prevent a violation and provides that the subject must comply. The Act does not limit the scope of possible corrective action.²⁷ It may include reimbursement to the state of costs incurred in violation of the Act or other action suitable to the circumstances, such as increased reporting or monitoring of use. The attorney general has authority to recover a benefit received by a person as a result of a violation of the Act.²⁸ Thus, the attorney general may seek to recover expense avoided by a public officer by making use of state electronic equipment. The attorney general also has broad authority to void actions taken in violation of the Ethics Act and to pursue other legal or equitable remedies.²⁹

The Personnel Board has varied authority to address Ethics Act violations depending on the circumstances. As appropriate to the misuse of equipment by a public employee, the board may order the employee to stop engaging in any official action related to the violation, direct the employee to make restitution or recommend disciplinary action, including termination.³⁰ The board may order a board or commission member to make restitution or recommend removal of the member from the board or commission to the appointing authority, which is required to immediately act to do so. Violation of the Ethics Act is grounds for removal for cause.³¹ If the board determines that a former public officer violated the Act, it may issue a public statement of its

²⁵ See AS 39.52.210.

²⁶ AS 39.52.220.

²⁷ AS 39.52.330. In so doing, the attorney general is guided by the remedies and penalties that may be imposed by the Personnel Board for violations.

²⁸ AS 39.52.430(d). Action must be brought within two years of discovery of the violation.

²⁹ AS 39.52.430(a)-(c).

³⁰ AS 39.52.410(a).

³¹ AS 39.52.410(b). If the officer is only removable by impeachment, the board must report its findings to the president of the Senate. AS 39.52.410(d).

findings and request the attorney general to take action seeking appropriate relief.³² In addition, the board may impose civil penalties of up to \$5000 per violation and require a public officer who has benefited a person in violation of the Act to pay the state up to twice the amount that the person realized.³³

In most instances, misuse of equipment would likely result in direction to stop the misuse and a demand for reimbursement of state expenses incurred or the value of the benefit received, absent serious violations of the Ethics Act or the Personal Use of State Office Technologies Policy, such as recurring misuse after direction to stop or misuse resulting in a substantial expense to the state or benefit to the officer.

II. CONFIDENTIALITY OF PERSONAL INFORMATION WHEN STATE ALLOWANCE IS USED FOR PERSONAL CELL PHONE OR PDA

You also asked whether an employee: (a) who is required to be accessible for business purposes by cell phone or PDA; (b) owns his or her own personal cell phone or PDA; and (c) elects to receive from the state an allowance to defray the additional cost of using these personally owned devices for business purposes, waives the confidentiality of his or her personal emails and call records. As explained below, the answer is that personal emails and call records are not public records under the definition in the Public Records Act and public disclosure of such personal information would likely run afoul of the individual's right to privacy under the Alaska Constitution. However, a state official or a court could be required to review all call records and messages in order to locate records generated through these personal devices that concern state business and that are public records. **In summary, state business records generated on a personal cell phone or PDA are public records subject to review and disclosure, unless the Public Records Act permits them to be withheld. Personal records are likely protected from public disclosure but are not protected from state official or court review to the extent necessary to identify state business records.**

Alaska Statute 40.25.110 provides, with certain exceptions, that public records of all public agencies are open to inspection by the public. The Public Records Act defines the term "public records" to mean "books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as

³² AS 39.52.410(c).

³³ AS 39.52.440 and .450.

evidence of the organization or operation of the public agency; 'public records' does not include proprietary software programs."

From the definition of public records, it appears that personal emails and call records from a personal cell phone or a PDA are not "accounts" or "writings" "developed or received by a public agency," and are not "preserved for their informational value or as evidence of the organization or operation of the public agency." Instead, they are writings developed or received by people in their personal, non-employee capacities and preserved for personal reasons. The personal emails and call records thus do not fit the definition of public records. Additionally, the Alaska Constitution provides, in article I, section 22, that the right of the people to privacy is recognized and shall not be infringed. This provision of the constitution provides additional protection from public disclosure by the government of personal emails and call records.

As stated above, however, a state official or a court could be required to review personal call records and emails while seeking to locate and identify the business related calls or business related emails sent or received through the personally owned devices. **Thus, again, although generally personal call records and emails would not be disclosed to the public, they could be reviewed by a state official or court in the limited circumstances described to comply with the Public Records Act.** We recommend that you advise all state officers who request the allowance of this information and have each acknowledge that he or she was so advised.

Please do not hesitate to contact us if you have further questions regarding the issues addressed in this opinion.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By: *Julia B. Bockmon*
Julia B. Bockmon
Assistant Attorney General

JBB/WEM

DOR TAX DIVISION -
ACES REGULATIONS
PROCESS

Senate Administration Regulation Review 2/8/10

OVERVIEW

ACES passed 12/20/2007.

Regulatory Process governed by AS 44.62 – APA

DOR worked with the Department of Law in order to ensure the legality, constitutionality, and consistency with other regulations

All of our regulations are reviewed by the Department of Law as required. (AS 44.62.060)

Public Workshops

DOR shared outline of approach and then held “public workshops” to gain public input at early regulation design stage.

Significant changes were made as a result of comments received during workshops. If big changes on important issues, then second and third workshops held.

Workshops were also teleconferenced.

APA – 30-Day Formal Notice

After Workshops, near final draft regulation is put out for formal minimum 30 day comment under AS 44.62.190.

- 1) Published in a newspaper
- 2) furnished to every person who has filed for a request of proposed action (“Interested Parties)
- 3) Furnished to Dept. of Law
- 4) Provided to all incumbent State of Alaska legislators, and also to the Legislative Affairs Agency.

APA – Notice of Proposed Action

The agency shall give each interested person an opportunity to present statements, arguments, or contention in writing, with or without opportunity to present them orally (AS 44.62.210)

Agency then addresses in writing every comment received during public comment period.

APA- Final Step

Assuming public comments do not result in material changes to the draft regulation:

- Regulation is put in final form
- Final review by Department of Law
- Submitted to Lt. Governor for review and signature
- Regulation effective 30 days after release by Lt. Governor

Tax Division ACES Reg. Process

12/20/2007 ACES(HB2001)
1/2/2008 Production Tax Monthly Information Form
1/2/2008 1/14/2008 Workshop
1/3/2008 Department of Revenue, Tax Division Notice of Public Workshop On Potential Changes to Oil and Gas Production Tax Regulations and Interim Monthly Reporting Form
1/24/2008 Workshop for 2-4-2008
1/30/2008 Draft Interim Form for Monthly Production Tax Information
1/30/2008 Request for Public Comments on Draft Interim Production Tax Information
1/31/2008 Potential changes to oil and gas production tax regulations
2/5/2008 Comments on Discussion Draft Lease Expenditures extended to February 12
2/14/2008 Request for Public Comment Draft Annual Report Form
2/28/2008 DOR Interim Annual Information Report Forms - Now Online
2/28/2008 Potential changes to Oil & Gas Production Tax Regulations
2/28/2008 Notice of Proposed Oil & Gas Production Tax Regulations
2/29/2008 Text of Proposed Oil & Gas Production Tax Regulations
2/29/2008 Public Workshop March 12, 2008

Tax Division ACES Reg. Process

3/3/2008 Supplemental Public Notice Proposed Oil & Gas Tax Regulations 15 AAC 55.520

3/5/2008 Draft Interim Monthly Information Report

3/7/2008 Supplemental Notice for Workshop Scheduled March 12, 2008

3/12/2008 Agenda for 3-12-2008 Workshop

3/18/2008 Draft lease expenditure and overhead regulations

3/18/2008 2007 Interim Annual Information Reporting Form

3/19/2008 2007 Revised Interim Annual Reporting Form - Second Half VERSION 2

3/19/2008 2007 Revised Interim Annual Reporting Form - First Half VERSION 2

3/21/2008 Correction in general instructions for DOR Interim Annual Information Reports 2007

3/24/2008 Advisory Bulletin 2008-01

3/24/2008 Request for Public Comment Draft Transportation Regulations

3/24/2008 A Proposed Model to Compute the Cost of Capital Allowance for Pipeline Facilities under 15 AAC 55.195(f)

3/27/2008 DOR Public Workshop April 8, 2008 Draft Transportation Regulations and Cost of Capital Model

Tax Division ACES Reg. Process

3/28/2008 DOR Public Workshop April 8, 2008 Draft Transportation Regulations and Sample Capital Allowance for Pipelines

3/28/2008 Revised Draft Transportation Regulations

4/8/2008 Comment Period Extended to 4/15/08 for Draft Transportation Regulations

4/21/2008 Public Notice: Midyear Changes, North Slope PV, and Cook Inlet & Gas Allocations

4/21/2008 Proposed Regulations: Mid-year Changes, North Slope PV, and Cook Inlet & Gas Allocations

5/8/2008 Notice of Adopted Changes in the Regulations dealing with the Oil and Gas Production Tax and Required Monthly Filings

5/8/2008 Adopted Regulation 15 AAC 55.520

5/9/2008 DOR Public Workshop June 4, 2008 Draft Transportation Regulations V2 & Cost of Capital Model V2

5/9/2008 Draft Transportation Regulations Version 2

5/9/2008 Sample Cost of Capital Model for Pipelines Version 2

5/19/2008 DOR Monthly Information Report Notice

5/19/2008 DOR Monthly Information Reporting Form - Final

Tax Division ACES Reg. Process

6/30/2008 Advisory Bulletin 2008-03, Taxability of Waste Oil Streams
8/5/2008 Public Notice: Regulation Changes Related to AS 43.55.025
8/5/2008 Proposed Regulations Text: Changes to AS 43.55.025
9/9/2008 Lease Expenditure & Overhead Workshop 9/23/08 - draft proposed regulations - Text
9/9/2008 Lease Expenditure & Overhead Workshop, 9/23/08 - Notice
9/10/2008 Post-Filing Notice AS 43.55.173
9/19/2008 Lease Expenditure & Overhead Workshop RESCHEDULED from 9/23/08 to 10/7/08
9/19/2008 Proposed Mid-year and Conforming Changes Text, Public Hearing: 10/09/2008
9/19/2008 Public Notice - Midyear & Conforming Changes Public Hearing 10/09/08
10/6/2008 Supplemental Topic October 7, 2008 Workshop, Adjustments to Lease Expenditures
10/14/2008 Prevailing Value for Gas Delivered North Slope Area 4th Qtr. 2008
11/28/2008 12/9/08 Workshop: Reimbursements Under AS 43.55.170 and Credits Under AS 43.55.023(a)&(b)

Tax Division ACES Reg. Process

11/28/2008 12/9/08 Workshop Discussion Draft: Proposal for Reimbursements Under AS 43.55.170

11/28/2008 12/9/08 Workshop Discussion Draft: Proposed Credit Safeguard Regulation

12/5/2008 Input Requested on Proposed Forms for Monthly and Annual Reporting

12/5/2008 DOR Proposed Monthly Reporting Information to Calculate Gross Value at the Point of Production

12/5/2008 DOR Proposed Annual Information and Tax Calculation Form

12/22/2008 Comment Period Extended for AS 43.55.170 Reimbursements and Credit Safeguard Regulation for AS 43.55.023(a)&(b)

12/22/2008 Monthly Electronic Reporting: New Process & Format Workshops January 20 & 27, 2009

12/24/2008 Text of Proposed Draft Regulations for Public Notice: Lease Expenditures & Overhead

12/24/2008 Public Notice: Proposed Lease Expenditure & Overhead Regulations

1/13/2009 WORKSHOP CANCELLATION: January 20 & 27 Revised Electronic Submission Process and Format of Monthly Information Reporting Form

1/13/2009 Sample Cost of Capital Model for Pipelines - Version 3 1/27/09 Workshop

1/13/2009 Transportation Costs Workshop: Tuesday, January 27, 2009

Tax Division ACES Reg. Process

1/14/2009 Transportation Workshop 1/27/09 Discussion Draft Proposed Regulations
1/14/2009 Prevailing Value for Gas Delivered North Slope Area 1st Qtr. 2009
1/16/2009 Supplemental Announcement Transportation Workshop
1/16/2009 Supplemental Topic Transportation Workshop Proposed Definition of "affiliated" AS 43.55.150(b)
1/16/2009 SUPPLEMENTAL AND CORRECTED NOTICE: Lease Expenditures & Overhead Public Hearing Comment Period Extended from February 4 to February 23, 2009 and Corrected Call-in Number for Teleconference
1/26/2009 Agenda for January 27, 2009 Transportation Workshop
1/26/2009 Discussion Topic for 1/27/09 Transportation Workshop: Determining How to Apply Lower of Actual or Reasonable Costs
1/28/2009 Proposed Transportation Regulations: Example Section 181(a).xls
1/28/2009 Proposed Transportation Regulations: Example Section 195(m).xls
1/29/2009 How to Access Audio Recording for Lease Expenditure & Overhead January 21, 2009 Public Hearing
2/10/2009 Advisory Bulletin 2009-01, gas "used in the state"
2/26/2009 Reimbursements under AS 43.55.170 Proposed 15 AAC 55.280 Revised Draft

Tax Division ACES Reg. Process

2/27/2009 Workshop Announcement Reimbursements under AS 43.55.170 Proposed 15 AAC 55.280 Revised Draft 2/27/09

3/27/2009 Revised and Corrected Credit Forms Now Available on Forms Page

4/16/2009 North Slope Gas Prevailing Value Now on Tax Division Website

5/4/2009 Announcement Regarding Revised Economic Monthly Information Report

5/4/2009 Instructions for Economic Monthly Reporting Data Delivery Process

5/18/2009 Revision to Monthly Information Report Form.

5/20/2009 Notice Regarding Suspension of the Revised Economic Monthly Information Report posted May 4 and Second Revision posted May 14, 2009

6/9/2009 Supplemental Public Notice AS 43.55.025 Alternative Tax Credit Proposed Regulations

6/9/2009 Text of Proposed Regulations for AS 43.55.025 Alternative Tax Credits

7/17/2009 Workshop Announcements Proposed 15 AAC 55.280, Reimbursements Under AS 43.55.170, July 28, 2009

7/17/2009 Workshop Drafts Proposed 15 AAC 55.280, Reimbursements Under AS 43.55.170

7/30/2009 Summary of Changes, Proposed 15 AAC 55.280 as Discussed March 17 to July 28, 2009 Public Workshops

Tax Division ACES Reg. Process

9/22/2009 Adopted Regulations Text for Mid-year and Conforming Changes
9/22/2009 Adoption Notice Mid-year and Conforming Regulation Changes
9/29/2009 Advisory Bulletin 2009-02, State Purchase of Transferable Tax Credit
Certificates
10/16/2009 Text of Proposed Regulation 15 AAC 55.810 and 55.811 Heating Value of
Gas
10/16/2009 Text of Proposed Regulation 15 AAC 55.320 Credit Safeguard
10/16/2009 Text of Proposed Regulation 15 AAC 55.280 Facility Sharing
10/16/2009 Public Notice Proposed Regulations 15 AAC 55.280 Adjustments to Lease
Expenditures, 55.320 Transferable Tax Credit Certificates, and 55.810 and 55.811
Heating Value of Gas
11/5/2009 Reporting Form Draft Sample Company Credit Forms (pdf)
11/5/2009 Reporting Form Draft Sample Company Test Data Set II Excel 2003 ver.xls
11/5/2009 Reporting Form Draft Tax Return Sample Company Nov 2 2009 Excel 2003
ver.xls
11/5/2009 Reporting Forms Workshop Wednesday November 25, 2009
11/9/2009 Reporting Form Draft Tax Return Sample Company November 2 2009.xlsx
11/9/2009 Reporting Form Draft Sample Company Test Data Set II.xlsx

Tax Division ACES Reg. Process

11/13/2009 Advisory Bulletin 2009-03 Third Party Purchasers of AS 43.55.023 Tax Credit Certificates

11/17/2009 Second Reporting Forms Workshop Wednesday, December 2, 2009

11/30/2009 Adoption Notice for Alternative Tax Credits

11/30/2009 Adopted Regulations for Alternative Tax Credits

12/17/2009 2009 Tax Summary Form in Excel

12/17/2009 Instructions for 2009 Tax Summary Form

12/17/2009 Delayed Implementation Proposed Reporting Form

1/27/2010 Public Notice: Proposed Regulation Changes Location Differential 15 AAC 55.171

1/27/2010 Proposed Language Location Differential Under 15 AAC 55.171

1/29/2010 Forms Announcement

1/29/2010 Tax Return Sample Company Jan 28 2010 version "xlsx"

1/29/2010 Tax Return Sample Company Jan 28 2010 Excel 2003 version "xls"

2/2/2010 Adoption Notice Lease Expenditures and Overhead

2/2/2010 Adopted Regulations for Lease Expenditures and Overhead

What remains?

46 of the 70 production tax regulations we anticipate writing or revising are DONE. Of those remaining, 17 relate to transportation and AGIA issues, 4 relate to facility sharing and BTU heating value.

Transportation and AGIA related Regulations out for public comment week of February 8th, 2010

Unplanned Production Interruption regulations – Second workshop to be scheduled this spring.

15 AAC 55.280 Facility Sharing Costs

Must interpret AS 43.55.170 - Requires producers' lease expenditures be reduced by payments received for use of production facility or by other payments that offset the producer's lease expenditures .

Legislative Intent is that Producer cannot at same time take a cost as a lease expenditure and get reimbursed for that cost through an arrangement with another party.
Is the state being kept whole?

What we learned at Workshops and through Research

Most facility sharing arrangements require new users to pay the operating expenses and future capital expenses associated with their use of the facility, and make whole the facility owners for their lost production.

Facility Owners felt compelled to gross up all facility sharing charges since they might be required to offset the payments against their bona fide, unreimbursed lease expenditures. Their taxes might increase because of their sharing arrangements.

Lack of certainty over how facility sharing fees would be handled in future was impairing facility sharing.

Structure of 15 AAC 55.280

Payments from New Party not required to be offset against facility owners' lease expenditures:

- 1) allocated share of operating costs
- 2) *transfer of barrels to make up the facility owner loss
- 3) *payment to offset higher tax liability of facility owner
- 4) allocated share of future capital costs
- 5) contribution to historical capital costs prior to PPT/ACES

Regulation ensures that no cost is deducted or credited in the tax calculation more than once. State held whole.

* Removed from definition of "lease expenditures"

Comments from Industry

“Without clear regulatory guidance from the Department, AS43.55.170 may be interpreted in a manner which artificially inflates the costs associated with facility sharing in the state; and acts as a disincentive to future third-party facility access agreements.

....

Thanks to this collaborative effort and the Department’s hard work, the proposed regulation largely addresses the concerns Pioneer has expressed over the past year, and in doing so, removes barriers to future facility sharing opportunities in the state.”

Patrick Foley, Manager, Pioneer Natural Resources Alaska November 19, 2009

Comments from Industry

“[W]e applaud the iterative process the Department has followed in developing these regulations and others in which it has offered its preliminary thoughts up for public comment (including industry’s and has then used that feedback to revise and improve its drafts, which it then offered for further public comment. This consultative or collaborative public process is both prudent and wise. But because this takes more time than rule-making by simple fiat, it is important to recognize the more difficult path the Department has chosen for developing the ACES regulations has resulted in improvements to the earliest drafts that justify the greater time and effort that have been required. There is an old quip about never having enough time to do something right, but always time to do it over. Here the Department has avoided falling into this quip, which is no small feat and deserves recognition. “

Marilyn Crockett, Executive Director, AOGA, November 19, 2009

Conclusion

Tax Division's Regulations Process has ensured maximum meaningful input from industry and public.

When final public comment period begins, involved parties have had numerous occasions to critique approach and Division has had opportunity to fully understand how the regulations will impact industry. Changes were made in light of comments received from Legislative Affairs.

Facility Sharing Regulation is perfect example of how this process has worked well. Intent of legislation was honored and the state is held whole. In addition, the industry's ability to share oil and gas facilities has been greatly facilitated through removal of ambiguity.

Sec. 43.55.170. Adjustments to lease expenditures.

(a) A producer's lease expenditures under AS 43.55.165 must be adjusted by subtracting payments or credits, other than tax credits, received by the producer or by an operator acting for the producer for

(1) the use by another person of a production facility in which the producer has an ownership interest or the management by the producer of a production facility under a management agreement providing for the producer to receive a management fee;

(2) a reimbursement or similar payment that offsets the producer's lease expenditures, including an insurance recovery from a third-party insurer and a payment from the state or federal government for reimbursement of the producer's upstream costs, including costs for gathering, separating, cleaning, dehydration, compressing, or other field handling associated with the production of oil or gas upstream of the point of production;

(3) the sale or other transfer of

(A) an asset, including geological, geophysical, or well data or interpretations, acquired by the producer as a result of a lease expenditure or an expenditure that would be a lease expenditure if it were incurred after March 31, 2006; for purposes of this subparagraph,

(i) if a producer removes from the state, for use outside the state, an asset described in this subparagraph, the value of the asset at the time it is removed is considered a payment received by the producer for sale or transfer of the asset;

(ii) for a transaction that is an internal transfer or is otherwise not an arm's length transaction, if the sale or transfer of the asset is made for less than fair market value, the amount subtracted must be the fair market value; and

(B) oil or gas

(i) that is not considered produced from a lease or property under AS 43.55.020(e); and

(ii) the cost of acquiring which is a lease expenditure incurred by the person that acquires the oil or gas.

(b) Except as otherwise provided under this subsection, if one or more payments or credits subject to this section are received by a producer or by an operator acting for the producer during a calendar year and if either the total amount of the payments or credits exceeds the amount of the producer's applicable lease expenditures for that calendar year or the producer has no lease expenditures for that calendar year, the producer shall nevertheless subtract those payments or credits from the lease expenditures or from zero, respectively, and the producer's applicable

adjusted lease expenditures for that calendar year are a negative number and shall be applied to the pertinent calculation under AS 43.55.160(a) as a negative number.

(c) For purposes of AS 43.55.023(a) and (b) and only as to expenditures incurred to explore for an oil or gas deposit located within land in which an explorer does not own a working interest, the term "producer" in this section includes "explorer."

((§ 25 ch 2 TSSLA 2006; am § 63 ch 1 SSSLA 2007))

Administrative Code. - For production tax value of oil and gas, see 15 AAC 55, art. 2.

Effect of amendments. The 2007 amendment, effective December 20, 2007, deleted "Unless the payment or credit has already been subtracted in calculating billable or billed costs under AS 43.55.165(c) or (d)" at the beginning of subsection (a).

Effective dates. Section 40, ch. 2, TSSLA 2006, makes this section effective August 20, 2006, in accordance with AS 01.10.070(c).

Editor's notes. Sections 35(a) and 39, ch. 2, TSSLA 2006, provide that this section is retroactive to April 1, 2006, and "appl[ies] to oil and gas produced after March 31, 2006."

Section 74(d), ch. 1, SSSLA 2007, provides that the 2007 amendment of (a) of this section is retroactive to July 1, 2007.

15 AAC 55.280. Adjustments to lease expenditures

In adjusting a producer's or explorer's lease expenditures for the receipt of a payment or credit for the sale or other transfer of an asset under AS 43.55.170(a)(3)(A), if the acquisition cost of the asset was incurred during a calendar year for which a portion of the producer's or explorer's expenditures was excluded under AS 43.55.165(e)(18) and 15 AAC 55.275, the amount required to be subtracted from the producer's or explorer's lease expenditures under AS 43.55.170(a) is reduced by a fraction of the payment or credit received for the sale or transfer of the asset as provided in this section. That fraction is equal to the quotient of (1) the total of the excluded portions of the producer's or explorer's expenditures described in this section for all segments in the state under 15 AAC 55.205, divided by (2) the sum of the (A) producer's or explorer's qualified capital expenditures incurred with respect to all segments in the state during the calendar year or portion of the calendar year for which that excluded portion was excluded, plus (B) the amount described in (1) of this section.

History: Eff. 5/3/2007, Register 182

Authority: AS 43.05.080

AS 43.55.023

AS 43.55.110

AS 43.55.165

AS 43.55.170

15 AAC 55.280 is proposed to be amended by adding new subsections to read:

(b) A fee or other consideration received by or on behalf of a producer in connection with another person's use of a production facility in which the producer has an ownership interest does not constitute a payment or credit for the use of the production facility under AS 43.55.170(a)(1) or a reimbursement or other payment that offsets the producer's lease expenditures under AS 43.55.170(a)(2), to the extent that the fee or other consideration

(1) defrays the fraction of the producer's costs to operate and maintain the production facility that is attributable to the other person's use of the facility, except to the extent the producer treats that fraction of the costs as its own lease expenditures;

(2) compensates the producer for the deferral or loss of the producer's oil or gas production resulting from the other person's use of the production facility, except to the extent the other person treats the fee or other consideration as its own lease expenditure;

(3) reimburses the producer for its additional tax liability resulting from the receipt of fees or other consideration in connection with the other person's use of the production facility, except to the extent the other person treats the amount of the reimbursement as its own lease expenditure;

(4) consists of a contribution of a share of the capital investment to acquire, construct, or improve the production facility and that is in lieu of an increase in the fee that would otherwise be charged to the other person in connection with the other

person's use of the facility, except to the extent the producer treats that share of the capital investment as its own lease expenditure; or

(5) represents a charge for use of capital invested in the production facility before April 1, 2006.

(c) For purposes of (b)(1) of this section,

(1) costs to operate and maintain the production facility do not include costs that are treated as capitalized expenditures under 26 U.S.C. (Internal Revenue Code), as amended;

(2) if the facility use agreement between the other person and the producer provides for an identifiable amount of a fee that represents the other person's share of the costs to operate and maintain the production facility, that amount will be considered the fraction of the producer's costs to operate and maintain the production facility that is attributable to the other person's use of the facility, unless the department determines that the amount is unreasonable; otherwise, the department will determine that fraction using a method of allocation that is based on relative quantities of produced fluids processed by the facility or other characteristics of the produced fluids that are reasonably related to the costs to operate and maintain the facility.

(d) For purposes of (b)(5) of this section, the extent of a fee or other consideration for a given time period that represents a charge for use of capital invested in the production facility before April 1, 2006, is equal to the following:

$$F \times (CB / (CB + CA)),$$

where

F = the total amount of the fee or fees or other consideration, excluding amounts described in (b)(1) – (4) of this section (regardless of whether treated as a lease expenditure), that would be charged for that given time period in connection with the other person's use of the facility if the total were calculated on the same per-unit basis that was used to calculate the total fee or fees or other consideration for the (1) last time period beginning before April 1, 2006, for which the other person was charged a fee or other consideration in connection with the other person's use of the facility; or (2) first time period for which the other person was charged a fee or other consideration for use of the facility, if that first time period began after March 31, 2006, but in either case not exceeding the amount of the actual total fee or fees or other consideration for the given time period for which the calculation is made;

CB = the producer's total capital investment, if any, incurred before April 1, 2006, to acquire, construct, or improve the production facility, without deduction of depreciation; the producer's capital investment excludes any contribution described in (b)(4) of this section (regardless of whether treated as a lease expenditure);

CA = the producer's total capital investment, if any, incurred after March 31, 2006, and before the beginning date of the first time period for which the other person was charged a fee in connection with the other person's use of the facility, to acquire, construct, or improve the production facility, without deduction of depreciation; the producer's capital investment excludes any contribution described in (b)(4) of this section (regardless of whether treated as a lease expenditure).

(e) For purposes of AS 43.55.170(a)(1), if a producer treats as its lease expenditure a fee or other consideration that the producer pays or imputes to or on behalf of itself, whether directly or through an operator's billing, in connection with its use of a

production facility that the producer owns in whole or in part, that fee or other consideration constitutes a payment or credit received by the producer for the use by another person of a production facility in which the producer has an ownership interest.

(f) For purposes of AS 43.55.170(a)(2), a payment or credit or portion thereof received by or on behalf of a producer to reimburse the producer for costs passed through to another person does not constitute a reimbursement or other payment that offsets the producer's lease expenditures if the reimbursed producer does not treat those costs as its own lease expenditures.

(g) For purposes of AS 43.55.170(a)(3), a fee or other consideration received by or on behalf of a producer in connection with another person's use of a production facility in which the producer has an ownership interest (1) that consists of a contribution of a share of the capital investment to acquire, construct, or improve the production facility and that is in lieu of an increase in the fee that would otherwise be charged to the other person in connection with its use of the facility, or (2) that represents a charge for use of capital invested in the production facility, does not constitute a payment or credit for the sale or transfer of an asset, unless legal title or a similar ownership interest in the facility is transferred from the producer to the other person. (Eff. 5/3/2007, Register 182; am ___/___/____, Register _____)

Authority: AS 43.05.080 AS 43.55.110 AS 43.55.170
AS 43.55.023 AS 43.55.165

NOTICE OF
PROPOSED CHANGES IN THE REGULATIONS
of the
DEPARTMENT OF REVENUE

The Department of Revenue proposes to adopt regulation changes in Title 15, Chapter 55 of the Alaska Administrative Code, dealing with the oil and gas production tax, including the following:

- (1) 15 AAC 55.280, dealing with adjustments to lease expenditures under AS 43.55.170, is proposed to be amended by adding new provisions relating to the shared use of production facilities in which a producer has an ownership interest; fees a producer pays or imputes to itself in connection with its use of a production facility in which the producer has an ownership interest; and the reimbursement of a producer's costs passed through to another person.
- (2) 15 AAC 55.320, dealing with transferable tax credit certificates under AS 43.55.023, is proposed to be amended by adding new provisions relating to assurances and financial security in situations where a tax credit is claimed in connection with expenditures for an asset or other item that has not yet been placed in service.
- (3) 15 AAC 55.810, dealing with the heating value of gas, is proposed to be amended to limit its application to gas produced before the effective date of the regulation.
- (4) A new section, 15 AAC 55.811, is proposed to be adopted, for the determination of the heating value of gas produced on or after the effective date of the regulation.

You may comment on the proposed regulation changes, including the potential costs to private persons of complying with the proposed changes, by submitting written comments to:

John Larsen
Alaska Department of Revenue, Tax Division
550 W. 7th Ave., Ste. 500
Anchorage, AK 99501

Or, via email to: john.larsen@alaska.gov, or by fax to: (907) 269-6644. Written comments must be received no later than 12:01 p.m. on Monday, November 23, 2009. Written comments received are public records and are subject to public inspection.

Oral or written comments also may be submitted at a hearing to be held on Tuesday, November 10, 2009 in the East Hearing Conference Room of the Regulatory Commission of Alaska, located at 701 West 8th Avenue, Suite 300, Anchorage, Alaska. The hearing will be held from 1:30 p.m. to 2:30 p.m. and might be extended to accommodate those present before 2:00 p.m. who did not have an opportunity to comment. If you are unable to attend the public hearing, you may participate by teleconference by dialing, 1-800-315-6338, and entering 1003# when prompted.

If you are a person with a disability who needs a special accommodation in order to participate in this process, please contact Dave Flavin at (907) 269-6620 no later than Thursday, November 5, 2009 for the public hearing, and, no later than Wednesday, November 18, 2009 for the written comment period, to ensure that any necessary accommodations can be provided.

For a copy of the proposed regulation changes, contact the Tax Division at (907) 269-6620 or go to <http://www.tax.alaska.gov>.

After the public comment period ends, the Department of Revenue will either adopt these or other provisions dealing with the same subject, without further notice, or decide to take no action on them. The language of the final regulations may be different from that of the proposed regulations. **YOU SHOULD COMMENT DURING THE TIME ALLOWED IF YOUR INTERESTS COULD BE AFFECTED.**

Statutory Authority: AS 43.05.080; AS 43.55.023; AS 43.55.110; AS 43.55.165; AS 43.55.170.
Statutes Being Implemented, Interpreted, or Made Specific: AS 43.55.023; AS 43.55.170; AS 43.55.900.

Fiscal Information: The proposed regulation changes are not expected to require an increased appropriation.

DATE: October 15, 2009

/s/ John Larsen
Audit Master
Department of Revenue

ADDITIONAL REGULATIONS NOTICE INFORMATION
(AS 44.62.190(d))

1. Adopting Agency: Department of Revenue
2. General subject of regulation: Alaska Oil and Gas Production Tax
3. Citation of regulations: 15 AAC 55.280; 15 AAC 55.320; 15 AAC 55.810; and 15 AAC 55.811.
4. Reason for the proposed action:
 - () compliance with federal law
 - (x) compliance with new or changed state statutes
 - () compliance with court order
 - (x) development of program standards
5. RDU/component affected: Tax Division, Revenue Operations
6. Cost of implementation to the state agency and available funding (in thousands of dollars):

	Initial Year FY 2010	Subsequent Years
Operating Cost	\$ 0	\$ 0
Capital Cost	\$ 0	\$ 0
Federal receipts	\$ 0	\$ 0
General fund match	\$ 0	\$ 0
General fund	\$ 0	\$ 0
General fund/ program receipts	\$ 0	\$ 0
General fund/ mental health	\$ 0	\$ 0
Other funds (specify)	\$ 0	\$ 0

7. The name of the contact person for the regulations:
 - Name: John Larsen
 - Title: Audit Master
 - Address: 550 W. 7th Ave., Ste. 500, Anchorage, AK 99501
 - Telephone: (907) 269-8436
 - FAX: (907) 269-6644
 - E-mail: john.larsen@alaska.gov

8. The origin of the proposed action:
 - staff of state agency
 - federal government
 - general public
 - petition for regulation change
 - other (please list) _____

9. DATE: October 15, 2009

Prepared by: /s/John Larsen
Audit Master, Tax Division
(907) 269-6620

The Department of Revenue, Tax Division, keeps a list of individuals and organizations interested in its regulations. Those on the list will automatically be sent a copy of all of the Tax Division's Notices of Proposed Regulation Changes. To be added to or removed from the list, send a request to:

Dave Flavin
Department of Revenue, Tax Division
550 W. 7th Ave., Ste. 500
Anchorage, AK 99501-3566

giving your name, and either your e-mail address or mailing address, as you prefer for receiving such notices.

You may also add or unsubscribe yourself to the Department of Revenue (DOR) Tax Division Interested Parties List Server, by the following:

1. go to <http://list.state.ak.us/guest/RemoteAvailableLists>
2. click on "D" in the Mailing List Directory
3. Scroll down and click on DOR-Tax-Division-Regs@list.state.ak.us
4. A new window will open up – in the "Your E-mail address" box, type in the e-mail address you wish to receive the DOR Tax notices.
5. Click the button "Immediate Delivery" or "Unsubscribe". Immediate Delivery will add the e-mail address you entered into the list server immediately.
6. Click the "Submit" button.

The e-mail address you entered will immediately receive the DOR Tax Division "Welcome" notice explaining how the list serve works and also advises that you are now a member of the list serve. Please read this "Welcome" advisory – it contains important information regarding the list serve.

You may also unsubscribe, by following steps 1-6 above, except in step 5, please select the button "Unsubscribe". You will immediately receive an e-mail advisory stating that you will no longer receive e-mail notifications regarding the DOR Tax Division.

If you do not receive a welcome notice or unsubscribe notice, please contact Dave Flavin at (907) 269-6620.