HB 547 cont. Leg. Finance 402 402

nature, involving the personal deliberation, decision and judgment of the employees.[136] Thus, under current law, those employed by the Commissioner may be immune from suit for nonmalicious breach of their fiduciary obligations toward the Funds.[137]

That an employee of the Commissioner may be immune to suit for breach of a fiduciary obligation to a Fund may be viewed as inconsistent with the public policy considerations underlying many of the Commissioner's proposals; an employee

---

136 The conclusion that employees of the Commissioner may be immune from suit is supported by a 1982 informal opinion of the Alaska Attorney General regarding the Alaska Permanent Fund Corporation. In that opinion, the Attorney General concluded that "[t]he immunity for discretionary acts [as defined by Alaska courts] probably covers most decisions and actions of the trustees [of the Permanent Fund]. Relationship of Alaska Permanent Fund Corporation to State, Op. (Inf.) Att'y Gen. (Dec. 1982).

137 Note that once an official act is deemed to be of a discretionary nature, the Alaska Supreme Court has utilized a balancing test to determine whether an official is entitled to "absolute immunity," applicable even if improper motives were involved in the official's acts, or "qualified immunity," which is applicable only when the acts under scrutiny were done in good faith, free of malice or corruption. The Court has stated that in making such a determination, a balance must be struck between the public's interest in vigorous, unfettered administration of policy by state officials and the interests of maliciously injured parties. The following factors should be considered in deciding whether motives are to be considered in granting employee immunity: (1) the nature and importance of the function that the officer performed to the administration of government; (2) the likelihood that the officer will be subjected to frequent accusations of wrongful motives and how easily the officer can defend against these allegations; and (3) the availability to the injured party of other forms of relief. Aspen Exploration Corp. v. Sheffield, 739 P.2d at 159-60.

who has no concern regarding potential suits may be less diligent in meeting his fiduciary obligations.[138] Thus, the Commissioner may wish to consider amending current law to provide explicitly that an employee of the Commissioner will generally not be immune from a suit asserting a breach of a fiduciary obligation, but will not be liable for a breach so long as in seeking to fulfill his obligation he acted in good faith, acted within the scope of his employment and acted prudently under the circumstances. This standard for limitation of liability of a fiduciary is generally consistent with one deemed acceptable by the staff of the Securities and Exchange Commission (the "SEC") for investment advisers registered under the Investment Advisers Act of 1940, as amended.[139]

---

138 ERISA reflects the view that immunity from suit is inconsistent with fiduciary obligations. Section 410 of ERISA specifies that, subject to certain limited exceptions, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under [ERISA] shall be void as against public policy.

139 See, e.g., Auchincloss & Lawrence, SEC No-Action Letter (February 8, 1974); Funds Advisory Co., SEC No-Action Letter (December 12, 1974); Westamerica Securities, Inc., SEC No-Action Letter (March 14, 1974). In these letters the SEC staff suggests that indemnification of an adviser guilty of negligence is inappropriate. The United States Supreme Court has stated that a registered investment adviser is a fiduciary who owes his clients an affirmative duty of utmost good faith and full and fair disclosure of all material facts. SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963).

[B] Liability of Service Providers

As suggested in Section I.D of this Memorandum, the Bill, if adopted, would serve not only to authorize the Commissioner to delegate certain responsibilities with respect to the Funds to independent third parties, but also to require delegation to third parties under certain circumstances. Neither the Bill nor the statutes governing the operation of the Funds currently in effect, however, address the potential liability of third parties for breaches of fiduciary obligations toward the Funds. Moreover, neither the Bill nor current law deals with the potential liability of the Commissioner for the actions or non-actions of third parties providing services to the Fund.

In the absence of an express provision dealing with the issue of third party liability to the Funds, an Alaska court might well look to the provisions of ERISA for guidance. Under ERISA, a third party service provider is liable under Section 409(a) of ERISA,[140] if the party meets the definition of "fiduciary." ERISA defines the term quite broadly to include any person who (1) has discretionary authority or control regarding management or administration of a plan, (2) gives investment advice to the plan or (3) exercises control or authority with respect to management or disposition of a plan's

---

140 The terms of Section 409 are set out in full in the text in the immediately preceding sub-section of this Memorandum.

assets.[141] Most third party service providers to which the Commissioner would typically delegate responsibilities for the Funds are likely to fall within the ERISA definition of fiduciary and, thus, under an ERISA analysis, would be potentially liable for breaches of their obligations toward the Funds.[142]

ERISA provides guidance with respect to not only the potential liability of independent third parties rendering services to the Funds, but also the potential liability of the Commissioner for misconduct of those parties. ERISA expressly authorizes a fiduciary of a plan to delegate investment responsibility for the plan to any entity meeting the definition of an "investment manager."[143] If the delegation is undertaken in accordance with procedures specified in

---

141 ERISA § 3(21).

142 In general, third party service providers who do not come within ERISA's definition of fiduciary are those that perform administrative functions within a framework of policies and interpretations made by other persons. See O'Toole v. Arlington Trust Co., 681 F.2d 94 (1st Cir. 1982) (non-trustee custodial bank having only physical control of plan assets and limited responsibilities for certain ministerial functions held not a fiduciary under ERISA); see also Donovan v. Williams, 4 Employee Benefits Cas. (BNA) 1237 (N.D. Ohio 1983).

143 ERISA § 405 (d)(1). Under Section 3(38) of ERISA, an investment manager is limited to an investment adviser registered under the Investment Advisers Act of 1940, as amended, a bank, as defined in that Act, or an insurance company qualified under the laws of more than one state to manage, acquire or dispose of any assets of a plan.

ERISA,[144] then the fiduciary is generally relieved of any direct liability incurred by the investment manager.[145] The Department of Labor has taken the position that the delegating fiduciary retains the duty to monitor the activities of his managers[146] and is not relieved of responsibility merely because he has followed the advice of his investment managers.[147]

Like its rules regarding delegation, ERISA's provisions dealing with co-fiduciary liability are instructive in analyzing the Commissioner's potential liabilities for breaches of fiduciary obligations towards the Funds by independent third parties. Section 405(a) of ERISA provides that a plan fiduciary is liable for a breach of fiduciary responsibility of another fiduciary to the same plan if (1) the plan fiduciary participates knowingly in, or knowingly undertakes to conceal, an act or omission of the co-fiduciary that the plan fiduciary knows constitutes a breach; (2) by his failure to comply with the prudence, diversification, exclusive

---

144 See ERISA § 402(c).

145 ERISA § 405(d)(1). Section 405(d)(1) may be viewed as generally similar to the common law rule of delegation by a trustee. Under common law, a trustee may delegate its responsibilities so long as delegation is authorized by the terms of the trust. Restatement § 171 comment j; Bogert, Trusts & Trustees § 555 (2d ed. 1980).

146 Department of Labor letter to J.J. O'Donnell and Frank Borman (June 2, 1980).

147 H.R. Rep. 1280, 93d Cong., 2d Sess. 302 (1974).

purpose and plan document requirements of Section 404(a)(1) of ERISA in the administration of his own fiduciary duties, the plan fiduciary enables another fiduciary to commit a breach; or (3) the plan fiduciary has knowledge of a breach of the other fiduciary and does not make reasonable efforts under the circumstances to remedy the breach.

The Department of Labor has stated its views regarding remedial actions that should be taken to prevent co-fiduciary breaches under ERISA.[148] The Department has suggested co-fiduciaries must take all reasonable and legal steps to prevent the breach. Those steps might include obtaining a court injunction of the breach,[149] notifying the Department of the breach, notifying the plan sponsor or publicizing the action. In addition, according to the Department, all meetings with respect to management and control of plan assets should be documented and an objection on grounds of potential violations of fiduciary responsibility provisions should be made part of the record. The Department has also suggested that, if a fiduciary believes a co-fiduciary has already committed a breach, resignation as a protest against the breach will not

---

148 Fiduciary Responsibility Question and Answer 10 appearing in ERISA I.B. 75-5, 29 C.F.R. § 2509.75-5 (1987).

149 See ERISA § 502(a)(3).

generally be considered sufficient to discharge the duty to make reasonable efforts to remedy the breach.[150]

Cases decided to date under Section 405(a) of ERISA indicate instances in which co-fiduciary liability may be present. In Freund v. Marshall & Ilsley Bank,[151] for example, the court found that certain trustees' lack of involvement in a company sale transaction did not relieve them of their fiduciary duties, because their failure to monitor the conduct of the seller trustees enabled and facilitated the seller trustees' breach. In Donovan v. Williams,[152] the court found a fiduciary to have violated Section 405 when he failed to make reasonable efforts to correct a wide range of breaches committed by a co-fiduciary and others. The court held that given his unique responsibilities for, and knowledge of, the financial books of the plans involved, and his failure to provide trustees access to those books, the fiduciary enabled the plan administrator to violate ERISA's reporting and disclosure provisions. The court also found that the fiduciary's detailed knowledge of the finances and operations of the collection account, plan book accounts and unions covered by the plans was sufficient to establish the type of knowledge required for a violation of Section 405, when the

---

150 Fiduciary Responsibility Question and Answer 10 appearing in ERISA I.B. 75-5, 29 C.F.R. § 2509.75-5 (1987).

151 485 F. Supp. 629 (W.D. Wis. 1979).

152 4 Employee Benefit Cas. (BNA) 1237 (N.D. Ohio 1983).

fiduciary failed to make reasonable efforts to remedy the trustees' failure to collect amounts owed to the plan. In Free v. Briody,[153] the court concluded that a trustee's nonfeasance enabled a co-fiduciary to entrust plan assets with an embezzler. Although the majority of the losses occurred only four days after he assumed trustee status, the court found the trustee liable, noting that no grace period exists between the date one becomes a trustee and the date one is expected to assume the duties of the office.

ERISA's provisions with respect to delegation and co-fiduciary liability and court and administrative interpretations of those provisions suggest that the Commissioner may limit its potential liability for misconduct of third party service providers by diligently selecting those entities and monitoring their services. Perhaps more importantly, the various interpretations of ERISA's delegation and co-fiduciary provisions suggest that the issue of third party conduct is a significant one with which the Commissioner may wish to deal by express statute rather than by application of analogous provisions of law.

(2) Indemnification

Related to the issue of potential liability of the Commissioner for breaches of fiduciary obligations owed the Funds is the question of indemnification by the State of

---

153 732 F.2d 1331 (7th Cir. 1984).

employees of the Commissioner in connection with alleged breaches.[154] A 1982 informal opinion of the Attorney General noted that "[t]o the extent that the state is exposed to liability due to the acts or omissions of an officer or employee, it is state policy to defend and indemnify the officer or employee against any personal liability, but there is no statute expressing this policy."[155] The same opinion continued by saying that Alaska "law regarding . . . indemnification of public officers is somewhat confusing, and the adoption of a statute stating the scope of indemnity would undoubtedly ease the concerns of state employees or officers who have considered the issue."[156]

The Bill in its current form contains no specific provision for indemnification of the Commissioner's employees for alleged breaches of fiduciary duty. In view of the increased amount of fiduciary duties that would be imposed on those employees under the Bill, if adopted, the Commissioner

---

154 We assume that the State would not as a matter of policy wish to indemnify independent third parties in connection with alleged breaches. We understand that many state pension plans and other state authorities have adopted such a policy on the basis of notions of sovereign immunity. To our knowledge, the State has not adopted such a policy to date.

155 Relationship of Alaska Permanent Fund Corporation to State, Op. (Inf.) Att'y Gen. (Dec. 2, 1982).

156 Id. As of the date of this opinion, the Alaska Commercial Fishing and Agriculture Bank was the only Alaskan public corporation specifically providing by statute for indemnification of its officers and employees.

might consider adding a provision to the Bill concerning indemnification, even if the Bill is not amended to provide specifically that those employed by the Commissioner are not immune from suit for a breach of fiduciary responsibility toward the Funds. We suggest that, at the very least, such a provision condition indemnification on an employee's acting prudently and in good faith within the scope of his employment.

(3) Insurance

The Commissioner, in addition to providing indemnification for his employees in connection with alleged breaches of fiduciary duties, may wish to consider obtaining insurance covering those breaches. That the purchase of insurance is consistent with a policy of promoting a high level of fiduciary conduct is suggested by Section 410(b) of ERISA, which specifically authorizes the obtaining of insurance covering ERISA fiduciaries.[157] We note our general understanding, however, that a meaningful amount of insurance is currently quite difficult to obtain at acceptable prices. Due to the proliferation of fiduciary suits under ERISA, many insurance companies have significantly increased premiums for fiduciary insurance, while cutting back the coverage offered. In other cases, insurance companies have ceased completely to offer fiduciary insurance.

---

157 ERISA § 410(b).

Section III: Establishment of Independent Trust Company

The Commissioner has presented, in a legislative package separate from the Bill, a proposal to create an independent trust company (the "Trust Company") that would be responsible for the management of the investments and the custody of the assets of the Public Employees' Retirement Fund, the Teachers' Retirement Fund, the Judicial Retirement Fund, the Alaska National Guard and Alaska Naval Militia Retirement Fund, the Public School Fund and the University of Alaska Fund. The Trust Company would operate under the general supervision of a board of directors (the "Board") composed of a Chairman, proposed to be either the Commissioner or Deputy Commissioner of Revenue, three outside directors, each of whom would be a professional executive trust officer from outside the State and unconnected in any way with the State, and two in-state directors, one an elected member of the administrative board of the Public Employees' Retirement System, and the other a member of the board of the Teachers' Retirement System selected by that board. Compensation of the Chairman of the Board and the in-state directors would be limited to travel expenses, a per diem and out-of-pocket expenditures, whereas outside directors would receive a flat annual fee equal to a percentage of the market value of the assets administered by the Trust Company at the start of each year.

Under the Commissioner's proposal, the Trust Company's budget would not be controlled by the Executive or Legislative branches of the State, the Trust Company's operations would not

be subject to review, approval or control by the State's Department of Administration, and the Trust Company's employees and management would not be State employees. The Trust Company's management, which would include a chief executive officer, a chief investment officer, an internal auditor, a vice president of operations, a vice president of research and a senior portfolio manager, would have authority to hire and fire employees, managers, custodians, advisers, consultants, legal counsel and service vendors, procure equipment facilities and supplies, and enforce contracts and agreements. Management would also be responsible for preparing various reports, analyses and records that would be provided to the Board. Financial records of the Trust Company would be audited annually by an independent certified public accounting firm.

The investment policies to be undertaken by the Trust Company would be determined, under the Commissioner's proposal, by a committee that would be chaired by the Trust Company's chief investment officer and that would include the Trust Company's chief executive officer, vice president of research, senior portfolio manager and three out-of-state and unrelated investment management professionals recommended by the chief investment officer and appointed by the chief executive officer, who are well-regarded and have established records as managers of comparable private funds. Investment policies of the Trust Company would be executed free of any statutory restrictions other than a prudent expert rule. Thus, in the

establishment of its policies and its general operations, the Trust Company would operate in a manner similar to investment management and trust operations in the private sector, except that all personnel at decision levels would be required to be professionally accredited.

The proposal to create the Trust Company reflects an attempt to deal with perhaps the most significant problem involved in the investment management of public plans; those officials responsible for that management face a conflict of interest because they "are generally appointed by, and answer to, the political process rather than plan participants."[158] As the Commissioner has himself noted, formation of the Trust Company would, among other things, "substitute a professional corporation for the state as trustee, thus reducing the chance of political or administrative factors interfering with investment policy. . ."[159]

In seeking to deal with the conflicts of interest involved in the investment management of the Funds, the Commissioner is proposing a fundamental change in the structure of the Funds' operations. Two basic structures for the control of public enterprises have been identified by commentators: the

---

158 Public Pension Funds, supra note 12, at 213.

159 Memorandum from Hugh Malone, Commissioner of Revenue, to Robert A. Evans, Legislative Liaison, Office of the Governor (August 14, 1987).

government department form and the public corporation form.[160] Investment management of the Funds currently takes the government department form, which is generally characterized by

> direct responsibility on all matters devolv[ing] on the director of the department and ultimately on the chief executive of the government. Direct government control of operations is exercised by executive order and legislative review. Personnel are usually subject to civil service regulation. The enterprise is financed by annual appropriations and is subject to the budget, accounting, and audit controls applicable to other government activities. The enterprise frequently possesses the sovereign immunity of the state.[161]

The public corporation form, which form the Trust Company would take, is generally characterized by its own board of directors, financing, budget accounting and auditing procedures, as well as the ability to sue and be sued in its own name.[162]

Each of the government department and the public corporation forms suffers from operational problems. Due to pressures to conform to standard government regulations and procedures, the government department form is characterized by a lack of information, an inability to respond quickly and a high degree of operating difficulty.[163] Although the public

---

160 N. Hamilton & P. Hamilton, Governance of Public Enterprise 78 (1981); United Nations Technical Assistance Administration, Some Problems in the Organization and Administration of Public Enterprises in the Industrial Field, U.N. Doc. ST/TAA/M/7 (1954).

161 N. Hamilton and P. Hamilton, supra note 160, at 72.

162 Id. at 75-84.

163 Id. at 73-75.

corporation form deals with these problems by being autonomous, it is often characterized by a lack of a consistent pattern or coherent theory addressing the issues of policy formation and efficient operation.[164] The Trust Company's proposed investment committee would appear to represent a reasonable solution to this problem of the public corporation form.

In general, public plans in the United States take the government department form.[165] Some precedent does exist, however, for the format offered by the Commissioner in proposing the Trust Company. Under the laws of the State of Minnesota, for example, public retirement systems are operated by retirement boards, but investment responsibility for the systems is delegated to the State Board of Investment, which includes five constitutional officers.[166] An executive director, who must be an experienced investment professional, is appointed by the State Board of Investments and is responsible for planning, directing, coordinating and executing administrative and investment functions in accordance with the

---

164 Id. at 78.

165 See Task Force Report at 65.

166 Minn. Stat. Ann. §§ 11A.03-.04 (West 1988). The five officers include the governor, state auditor, state treasurer, secretary of state and attorney general. The Minnesota retirement system is described and analyzed at some length in Murphy, Regulating Public Employee Retirement Systems for Portfolio Efficiency, 67 Minn. L. Rev. 211 (1982).

policies and directives of the State Board.[167] Both the executive director and the State Board of Investments are in turn advised by a statutorily created Investment Advisory Council composed of seventeen members, ten of whom must be individuals experienced in general investment matters.[168] The operational framework reflected in the Minnesota statutes, like the Commissioner's Trust Company proposal, reflects an attempt at reducing the local political pressures inherent in many public employee plans.[169]

A second precedent for the proposed structure of the Trust Company is one well-known to the Commissioner, the Permanent Fund. The Permanent Fund, which has a legal existence independent of, and separate from, the State, is operated under the direction of a six-person board of trustees appointed by the Governor that includes the Commissioner, two other State commissioners and three public members.[170] The public members, who must be confirmed by the Legislature, may not hold any other State or federal office or employment and must have recognized competence and wide experience in finance, investments or other business management-related fields.[171]

---

167 Minn. Stat. Ann. § 11A.07 (West 1988).

168 Minn. Stat. Ann. § 11A.08 (West 1988).

169 Murphy, supra note 166, at 212 n.3.

170 Alaska Stat. §37.13.050 (1983).

171 Alaska Stat. §37.13.050 (1983).

Confirmation of the public members of the Permanent Fund's board reflects a legislative intent somewhat different from that implicit in the Trust Company proposal; as noted in the legislative history of the Permanent Fund, the aim of the Legislature was "to establish a management system for the Alaska Permanent Fund which would be protected from political influence but, at the same time, responsive to changes in state policy and accountable to the people through their elected officials. In short, the aim was insulation without isolation."[172]

Additional precedential support for the Commissioner's Trust Company proposal may be found in actions taken by the State of Connecticut in the early 1970s to reform its public pension systems.[173] In 1972, the assets of five state trust funds, which were centrally managed under the authority of the state treasurer, were organized for investment purposes into a fixed-income, a common stock and a mortgage fund. The treasurer also appointed an investment advisory council, composed principally of insurance company executives and others with investment experience, that assisted the treasurer to select an in-house staff and outside investment advisers. As a further measure, the treasurer established Connecticut Nutmeg

---

172 Alaska State Legislature, Free Conference Committee Report, FCCS For SB 161 (April 2, 1980) (emphasis added).

173 The reforms are described in detail in Kohlmeier, supra note 19, at 878.

Securities, Inc., which remains operational at present, and which was the first brokerage firm owned and operated by a governmental unit to execute stock transactions. The elements of Connecticut's reforms--separation and centralization of functions and the use of experts--are generally similar to those underlying the Trust Company proposal.

The notion of separation of functions as a means of resolving conflicts of interest is one that is used not only by public pension plans, but by other financial institutions. Banks, for example, have for some time made use of a procedure, typically referred to as a "Chinese Wall," that is designed to limit, or in some instances completely block, the flow of information between trust and commercial departments. Although the use of Chinese Walls by banks was promoted in the 1960s as a means of preventing the inappropriate use of "inside information" that could potentially expose banks to liability under the federal securities laws,[174] the segregation of

---

174 The concept of the Chinese Wall as a device designed to deal with potential liability under the federal securities laws was first endorsed in a late 1960s settlement of a case involving the selective "leaking" by Merrill, Lynch, Pierce, Fenner & Smith Incorporated ("Merrill") of negative news its underwriting division had learned about Douglas Aircraft Co., Inc. In settling the case with the SEC, Merrill's underwriting division agreed not to disclose material, non-public (that is, "inside") information to Merrill's other divisions. Exchange Act Release No. 8,459 [1967-1969 Dec.] Fed. Sec. L. Rep. (CCH) ¶ 77,629 (Nov. 25, 1968). The use of a Chinese Wall to ensure the compliance with federal securities laws has since been supported by the SEC, in adopting Rule 14e-3, 17 C.F.R. § 240.14e-3 (1987), and by
(Footnote Continued)

functions between a bank trust and commercial departments has proven to be useful in preventing the use of trust assets to further policies or goals of the commercial departments and their corporate clients.[175]

Among the conflicts of interest that banks have had to resolve in operating both commercial and trust departments are: (1) the exertion of pressure by the commercial side upon the trust department to service the needs of commercial customers that maintain large commercial deposits through the use of trust assets, possibly to the detriment of trust beneficiaries; (2) the allocation of brokerage commissions from trust account trades to brokers that maintain large demand deposits with, or provide research services to, the commercial side; and (3) the placement of uninvested trust cash in low-interest or non-interest bearing time deposit accounts on the commercial side of the bank, thereby limiting the productivity of trust assets.[176]

(Footnote Continued)

174 the Comptroller of Currency, in regulating the conduct of national banks, 12 C.F.R. § 9.7(d) (1987).

175 See Mendez-Penate, The Bank "Chinese Wall": Resolving and Contending with Conflicts of Duties, 93 Bank. L.J. 674, 689 (1976). See also Lybecker, Regulation of Bank Trust Department Investment Activities, 82 Yale L.J. 977 (1973).

176 See Mendez-Penate, supra note 175, at 689; Herman, Conflicts of Interest: Commercial Bank Trust Departments, 45-56, 108-114 (1975); Lybecker, supra note 175, at 981-992. Note that, although the commercial side of a bank may have the ability to influence investment decisions by the trust department, the commingling of

(Footnote Continued)

Although some of the conflicts faced by banks have been addressed by specific state and federal banking regulations limiting certain practices,[177] many commentators have endorsed the use of a self-imposed separation of the commercial and trust departments to help assure that the interests of trust beneficiaries in maximizing investment performance is not subordinated to the bank's interest in maximizing profits from its commercial operations.[178] Most commentators have suggested the use of an "impermeable" or a "semi-impermeable" Chinese Wall between the trust and commercial sides of the bank to block the flow of certain types of information between the departments. Other commentators, however, have suggested the separate incorporation of the trust department outside the bank complex--that is, the complete divorce of the trust business from the commercial bank--in

---

(Footnote Continued)

176 trust assets with other accounts in the bank is expressly prohibited by most state and federal banking law statutes. See 12 C.F.R. § 9.13 (1987) (expressly mandating the separation of trust assets from bank assets).

177 See 12 C.F.R. §§ 9.7, 9.10, 9.12 (1987) (Comptroller of Currency National Bank regulations concerning the administration of fiduciary duties, the allocation of uninvested trust cash, and bank self-dealing).

178 See, Mendez-Penate, supra note 175, at 689-710; Lybecker, supra note 175, at 981-984.

order to alleviate completely the many conflicts of interest that exist between the two sides.[179]

The Chinese Wall approach suggested by the banking industry is instructive in analyzing the Trust Company proposal; the Commissioner, in managing the investment of the Funds, is faced with conflicts of interest somewhat analogous to those faced by banks. State officials, for example, may wish to exert pressure on Fund administrators to invest Fund assets in the securities of Alaska issuers to promote regional economic vitality, or other social policies. State officials may also desire that the Funds use local service providers in managing Fund assets, even though better, lower-cost services may be available out of state.[180] The Chinese Wall procedure established by Banks suggests that the separation of the State's political policy-making function from the Funds' investment operations might help assure that political pressure will not influence the administration and investment of Fund

---

179 See Lybecker, Regulation of Bank Trust Department Investment Activities: Seven Gaps, Eight Remedies: Part II, 2 Sec. Reg. L. J. 225, 262-265 (1974); Lybecker, supra note 175, at 1001; Mendez-Penate, supra note 175, at 705-709. The proposals to divorce the trust business from commercial banking completely have been severely criticized as economically unfeasible and impractical because of the economic interdependencies of the two departments. The general consensus among commentators has been that independent trust companies would be unable to survive on their own resources; this concern would not necessarily be a problem for the proposed Trust Company. Id.

180 See, generally, L. Kohlmeier, supra note 19.

monies, and that investments on behalf of the Funds will be made in a manner consistent with the interests of Fund beneficiaries.

Of the various precedents described above supporting the establishment of the Trust Company, the one most closely resembling the Trust Company is the State of Minnesota public retirement systems. Those systems were the subject of a detailed scholarly study in 1982.[181] The shortcomings of the Minnesota systems noted in that study provide a means of evaluating the Trust Company proposal.

The most significant deficiency observed in the operation of the Minnesota retirement systems was a lack of knowledge or expertise in investment, banking and finance on the part of the members of the State Board of Investment.[182] Exacerbating this fundamental problem were the time and political demands placed on State Board members, many of whom were elected government officials whose election to office was often unrelated to State Board policies.[183] Those demands, when combined with the State Board's lack of knowledge and expertise, resulted in a number of inefficiencies in the internal operation of the Minnesota retirement systems, including: (1) difficulty in formulating investment policies;

---

181 Murphy, supra note 166.

182 Id. at 230.

183 Id. at 231-32. See supra note 166 and accompanying text.

(2) difficulty in delineating powers and duties among the State Board of Investment, the executive director of the systems and the Investment Advisory Council; (3) difficulty in establishing adequate communication and reporting among the various participants in the investment process; and (4) difficulty in the establishment of appropriate investment performance measurements and staff evaluation procedures.[184] Compounding these internal inefficiencies were legal list requirements limiting investment by the Minnesota retirement systems to specified categories.[185]

The Trust Company, if operated as proposed, should be able to avoid the problems faced by the Minnesota retirement systems. The Trust Company will not be operated under the direction of unknowledgeable and inexperienced personnel; the three outside Board members, the three out-of-state members of the investment policy committee and the members of the Trust Company's staff are all proposed to be seasoned professionals with money management experience. Those individuals responsible for the operation of the Trust Company should not face the time and political pressures experienced by their Minnesota counterparts, because only a minority of the Board will be political appointees and elected office holders. The investment policy committee, and the auditing, accounting and

---

184 Id. at 232-35, 237.

185 Id. at 235. Authorized investments are set out in Minn. Stat. Ann. § 11A.24 (West 1988).

reporting procedures to be applicable to the Trust Company, should serve to enable the Trust Company to avoid most, if not all, of the operational inefficiencies that has characterized the Minnesota retirement systems. Finally, in operating the Trust Company, management will be subject only to a prudent expert rule and will not face the limitations of any legal lists.

Although we believe that the Trust Company proposal represents a significant improvement over the Minnesota structure, we wish to emphasize that we are expressing no view of the merits of the proposal from a policy perspective; both the Commissioner and the Legislature are in a far better position than we to assess the problems currently presented in the investment operations of the Funds, and the benefits that would be provided to the Funds and their beneficiaries if the proposal were adopted. In addition, we express no view as to matters of Alaska law bearing on the Trust Company proposal such as the ability of the Legislature to establish an independent corporation and the legal status of such a corporation under Alaska law.

Acknowledging the improvements over the Minnesota statutory framework reflected in the Trust Company proposal, we nonetheless believe that the Commissioner may wish to consider adding two kinds of provisions to the proposal, each of which is designed to strengthen accountability of those individuals responsible for managing the assets of the Funds. The first of

the provisions would specify clearly the parties who are potentially liable for breaches of their statutory obligations to the participants and beneficiaries of the Funds having assets administered by the Trust Company. Each potentially liable party could be designated as a fiduciary of the assets held by the Trust Company. The term "fiduciary" could in turn be defined functionally as it is under ERISA. Under such a definition, the Commissioner would not be potentially liable for actual investments made by Trust Company personnel on behalf of the Funds; the Trust Company proposal contemplates that responsibility for investment policies undertaken for the Funds rests with the Trust Company's investment committee and management and not with the Commissioner. The Commissioner and the other members of the Board would be potentially liable, on a co-fiduciary theory, if they did not undertake their oversight responsibility prudently.[186]

A second kind of provision that the Commissioner might consider adding to the Trust Company proposal is one specifically authorizing the participants and beneficiaries of the Funds having assets administered by the Trust Company to institute appropriate legal actions against the Company.[187]

---

186 See the discussion of co-fiduciary liability included in Section II.B(1)[B] of this Memorandum.

187 An example of this sort of provision is Section 502 of ERISA, which designates the parties who may sue and the action that may be brought to enforce the provisions of ERISA.

The attorney general might also be given standing to commence an action against the Trust Company on behalf of Fund participants and beneficiaries.[188] Expressly authorizing the parties that may bring actions in connection with the investment operations of the Funds could only serve to help to ensure effective management of the Funds and compliance with fiduciary standards imposed under Alaska law.

Conclusion

The Bill, if adopted, should serve to remedy the practical problems currently faced by the Commissioner in investing on behalf of the Funds. In general, the Bill's proposals would increase the amount of the Commissioner's investment flexibility. At the same time, however, the Bill's proposals would increase the Commissioner's responsibility and accountability with respect to the Fund's investments.

The Trust Company proposal reflects a more dramatic form, than does the Bill, of changing current Alaska law regarding the Funds' investment operations. Although it contemplates a fundamental change in the structure of those operations, the Trust Company proposal is not without some precedent. Moreover, the proposal appears to reflect a significant improvement over similar structures now in place outside Alaska.

WILLKIE FARR & GALLAGHER

---

188 Under Section 502 of ERISA, the Department of Labor is authorized to bring certain suits.

Introduced: 3/23/88
Referred: Finance

5-2059A

IN THE HOUSE BY THE FINANCE COMMITTEE

HOUSE BILL NO. 547

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the investment and management of certain state funds; and providing for an effective date."

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

* Section 1. AS 14.25.035(c) is repealed and reenacted to read:

(c) The board shall confer with the commissioner of administration regarding the administration of the system and may make recommendations that it considers necessary.

* Sec. 2. AS 14.25.035(d) is repealed and reenacted to read:

(d) The commissioner of administration shall report to the board concerning the condition and administration of the system. The reports shall be distributed to the members of the system. The commissioner of revenue shall provide reports to the board on the condition and investment performance of the teachers' retirement trust fund.

* Sec. 3. AS 14.25.170 is amended to read:

Sec. 14.25.170. ADMINISTRATION. The commissioner of administration is responsible for the administration of the retirement system and for making the provisions of this chapter effective. The [AND THE] powers and duties of the commissioner for this purpose include [BUT ARE NOT LIMITED TO]

(1) maintaining the accounts of the system;

(2) making payments for the various purposes specified;

(3) submitting required [SUCH] periodic reports or statements of account [AS MAY BE REQUIRED];

(4) establishing [PRESCRIBING] by regulation the rate of interest that shall be credited to the individual contribution accounts of teachers each year; the rate of interest shall be adopted on the basis of the probable effective rate of interest on a long-term basis, and the rate may be changed from time to time by subsequent regulation;

(5) establishing a teachers' retirement trust fund in which the assets of the system shall be deposited and held; and

(6) engaging an independent certified public accountant to conduct an annual audit of the system's accounts and the annual report of the system's financial condition and financial activity.

* Sec. 4. AS 14.25.180 is repealed and reenacted to read:

Sec. 14.25.180. INVESTMENT AND TREASURY. (a) The commissioner of revenue is the treasurer of the system and the fiduciary of the fund. In managing the fund, the commissioner of revenue shall

(1) consider the status of the fund's investments and the system's liabilities on both a current and a probable future basis;

(2) determine the appropriate investment objectives for the fund;

(3) establish investment policies aimed at achieving the objectives; and

(4) act only in regard to the best financial interests of the system's beneficiaries.

(b) The commissioner of revenue may invest the fund on the basis of probable total rate of return without regard to the distinction between principal and income or to the generation of income.

(c) In carrying out investment duties under this chapter, the commissioner of revenue has the same powers and duties in regard to the teachers' retirement trust fund as are provided in AS 37.10.071,

except that the standard of prudence that the commissioner must obey under AS 37.10.071(c) shall be in regard to the management of large trust investments rather than large investments.

* Sec. 5. AS 14.40.255 is amended to read:

Sec. 14.40.255. INVESTMENT OF SURPLUS MONEY. If the Board of Regents determines that there is a surplus of money, received in the form of state and federal appropriations, above the amount sufficient to meet current and projected cash expenditure needs of the university, the surplus must be invested as [IN THE SAME INSTRUMENTS] set out in AS 37.10.071. Income [AS 37.10.070 APPROVED FOR INVESTMENT OF STATE TREASURY SURPLUS. INTEREST INCOME] earned on investments made under this section may be retained by the university and expended in accordance with the Executive Budget Act (AS 37.07).

* Sec. 6. AS 14.40.400(a) is amended to read:

(a) The Department of Revenue shall establish a separate endowment trust fund in which all money derived from the sale or lease of the land granted under the Act of Congress approved January 21, 1929, and in which all monetary gifts, bequests or endowments made to the University of Alaska for the purpose of the fund, shall be held in trust.

* Sec. 7. AS 14.40.400(b) is repealed and reenacted to read:

(b) The commissioner of revenue is the fiduciary of the trust fund and shall account for and invest the fund as set out in AS 37.-14.110(c), 37.14.160, and 37.14.170, except that the commissioner shall report the condition and investment performance of the fund to the Board of Regents.

* Sec. 8. AS 14.40.400(c) is amended to read:

(c) The net income from the trust fund shall be used exclusively for the Agricultural College and School of Mines.

* Sec. 9. AS 14.40.400(e) is amended to read:

(e) The Department of Administration shall disburse the net income from the trust fund upon vouchers approved by the president and treasurer of the University of Alaska specifying the purpose for which the money is to be used and showing it is to be used in conformity with this section.

* Sec. 10. AS 14.42.200(8) is amended to read:

(8) invest or reinvest, subject to its contracts with noteholders and bondholders, money held by the corporation as set out in AS 37.10.071 [OBLIGATIONS OR OTHER SECURITIES AUTHORIZED FOR INVESTMENTS OF THE COMMISSIONER OF REVENUE UNDER AS 37.10.070(a)];

* Sec. 11. AS 14.42.210(b) is amended to read:

(b) Money and other assets of the student loan fund may be used to secure bonds of the corporation, invested in student loans and investments under AS 37.10.071 [DESCRIBED IN AS 37.10.070(a)] and used to purchase loans approved under AS 14.43.090 - 14.43.325, 14.43.600 - 14.43.700, or 14.43.710 - 14.43.790.

* Sec. 12. AS 18.26.170 is amended to read:

Sec. 18.26.170. INVESTMENTS BY AUTHORITY. Except as otherwise provided by this chapter, the authority may invest any funds, not needed to meet current cash expenditure needs, as set out in AS 37.10.071 [SECURITIES, OBLIGATIONS OR CERTIFICATES OF DEPOSIT APPROVED FOR INVESTMENT OF THE STATE TREASURY SURPLUS UNDER AS 37.10.070(a)(1) - (4). THESE INVESTMENTS SHALL BE PURCHASED AT NO HIGHER PRICE THAN THE OFFERING OR MARKET PRICE OF THEM AT THE TIME OF THE PURCHASE].

* Sec. 13. AS 18.56.095(b) is amended to read:

(b) In addition to any other fees and charges that the corporation may charge on mortgage loans, it may collect or cause to be

collected on all mortgage loans made or purchased with the proceeds of the sale of mortgage insurance bonds, either or both a special mortgage loan insurance commitment fee or a mortgage loan insurance premium. The special mortgage loan insurance commitment fees and special mortgage loan insurance premiums when received shall be deposited in the mortgage insurance fund by the corporation, or by any mortgage loan servicer, trustee, or agent designated by the corporation to receive them, and shall be held, invested and, together with all investment income derived from them, reinvested by the commissioner of revenue as set out in AS 37.10.071 [INVESTMENTS AUTHORIZED UNDER AS 37.10.070(a)], subject to any agreement with the corporation under (a) of this section.

* Sec. 14. AS 22.25.048(a) is amended to read:

(a) The commissioner of administration shall establish a judicial retirement trust fund for the judicial retirement system in which the assets of the system are deposited and held. The commissioner [AND] shall maintain accounts and records for the [JUDICIAL RETIREMENT] system.

* Sec. 15. AS 22.25.048(c) is repealed and reenacted to read:

(c) The commissioner of revenue is the treasurer of the system and the fiduciary of the fund and has the same powers and duties under this section in regard to the judicial retirement trust fund as are provided in AS 14.25.180.

* Sec. 16. AS 26.05.228(a) is amended to read:

(a) The commissioner of administration shall establish a military retirement trust fund for the system in which the assets of the system are deposited and held. The commissioner shall [AND] maintain accounts and records for the system.

* Sec. 17. AS 26.05.228(c) is repealed and reenacted to read:

(c) The commissioner of revenue is the treasurer of the system and the fiduciary of the fund and has the same powers and duties under this section in regard to the fund as are provided under AS 14.25.180.

* Sec. 18. AS 36.30.850(b) is amended to read:

(b) This chapter applies to every expenditure of state funds, irrespective of their sources, including federal assistance except as otherwise specified in AS 36.30.890, by the state, acting through an agency, under a contract, except that this chapter does not apply to

(1) grants;

(2) contracts for professional witnesses to provide for professional services or testimony relating to existing or probable lawsuits in which the state is or may become a party;

(3) contracts of the University of Alaska where the work is to be performed substantially by students enrolled in the university;

(4) contracts for medical doctors and dentists;

(5) acquisitions or disposals of real property or interest in real property, except as provided in AS 36.30.080;

(6) disposals under AS 38.05;

(7) contracts for the preparation of ballots under AS 15.-15.030;

(8) acquisitions or disposals of property and other contracts relating to airports under AS 02.15.070, 02.15.090, and 02.15.-091;

(9) disposals of obsolete property under AS 19.05.060;

(10) disposals of obsolete material or equipment under AS 35.20.060;

(11) agreements with providers of services under AS 47.07; AS 47.08; AS 47.10; AS 47.17; AS 47.24; AS 47.25.195, and 47.25.310;

(12) contracts of the Department of Fish and Game for

flights that involve specialized flying and piloting skills and are not point-to-point;

(13) purchases of income-producing assets for the state treasury or a public corporation of the state; or

(14) a contract that is a delegation, in whole or in part, of investment powers held by the commissioner of revenue under AS 14.25.180, AS 14.40.400, AS 14.42.200, 14.42.210, AS 18.56.095, AS 22.25.048, AS 26.05.228, AS 37.10.070, 37.10.071, AS 37.14, or AS 39.35.080.

* Sec. 19. AS 37.10.070 is repealed and reenacted to read:

Sec. 37.10.070. INVESTMENT OF RESIDUAL MONEY. (a) The commissioner shall invest, as set out in AS 37.10.071, the money in the state treasury above an amount sufficient to meet immediate expenditure needs. In managing the invested assets, the commissioner shall

(1) consider the status of the assets and liabilities on both a current and a probable future basis;

(2) determine the appropriate investment objectives;

(3) establish investment policies to achieve the objectives; and

(4) act only in regard to the best financial interests of the state.

(b) The commissioner may invest on the basis of probable total rate of return without regard to the distinction between principal and income and without regard to the generation of income.

(c) In this section, "commissioner" means the commissioner of revenue.

* Sec. 20. AS 37.10 is amended by adding a new section to read:

Sec. 37.10.071. INVESTMENT POWERS AND DUTIES. (a) In making investments under this section, the commissioner of revenue shall

(1) act as official custodian of cash and investments by securing adequate and safe custodial facilities for them;

(2) receive all items of cash and investments;

(3) collect and deposit the principal of and income from owned or acquired investments;

(4) invest and reinvest the assets in accordance with this section;

(5) receive and spend appropriations to cover the cost of the exercise of duties under this section;

(6) exercise the powers of an owner with respect to the assets;

(7) perform all acts, not prohibited by this section, whether or not expressly authorized, that the commissioner considers necessary or proper in administering the assets;

(8) maintain accounting records in accordance with investment accounting principles;

(9) engage an independent certified public accountant to conduct an annual audit of the financial condition and investment transactions;

(10) enter into and enforce contracts or agreements considered necessary, convenient, or desirable for the investment purposes of this section; and

(11) when choosing to acquire or dispose of investments, secure competitive national or international market rates or prices, or the equivalence of those rates or prices in the judgment of the commissioner.

(b) Under this section, the commissioner or the commissioner's designee may

(1) delegate investment, custodial, or depository authority

on a discretionary or nondiscretionary basis to officers or employees of the state or to independent firms, banks, or trust companies, by designation through appointments, contracts, or letters of authority;

(2) acquire or dispose of investments either directly, indirectly, or through investment pools or trusts, by competitive or negotiated agreements, contracts, or auctions, in public or private markets;

(3) concentrate or diversify investments as the commissioner considers appropriate to increase the probable total rate of return or to decrease the overall exposure to potentially adverse market value risks;

(4) protect the market value or the rate of return of the investments by entering into forward agreements to buy or sell assets at a future date as a hedge against existing held assets or as a precommitment of future cash flows;

(5) lend assets, under an agreement and for a fee, against deposited collateral of equivalent market value;

(6) borrow assets on a short-term basis, under an agreement and for a fee, against the deposit of collateral consisting of other assets in order to accommodate temporary cash or investment needs;

(7) hold investments in bearer or registered form in the name of the state, a fund, or nominees authorized by the commissioner;

(8) utilize consultants, advisors, custodians, investment services, and legal counsel for assistance in investment matters on either a continuing or a limited-term basis and with or without compensation;

(9) declare records to be confidential and exempt from AS 09.25.110 and 09.25.120 if the records contain information that discloses the particulars of the business or the affairs of a private

enterprise, investor, borrower, advisor, consultant, counsel, or manager.

(c) In exercising investment, custodial, or depository powers or duties under this section, the commissioner shall exercise the judgment and care under the circumstances then prevailing that an institutional investor of ordinary professional prudence, discretion, and intelligence exercises in managing large investments with consideration for the purpose of the fund, the investment objectives, the continuing disposition of the fund's investments, and the probable safety of the capital as well as the probable investment returns.

(d) In exercising investment, custodial, or depository powers or duties under this section, the commissioner or a designee of the commissioner is liable for a breach of a duty that is assigned or delegated under this section, or under AS 14.25.180, AS 14.40.400(b), AS 37.10.070, AS 37.14.110(c), 37.14.160, 37.14.170, or AS 39.35.080. However, the commissioner or the commissioner's designee is not liable for a breach of a duty that has been delegated to anothr person if the delegation is prudent under the applicable standard of prudence set out in statute or if the duty is assigned by law to another person, except to the extent that the commissioner or designee

(1) knowingly participates in, or knowingly undertakes to conceal, an act or omission of another person, knowing that the act or omission is a breach of that person's duties under this chapter;

(2) by failure to comply with this section in the administration of specific responsibilities, enables another person to commit a breach of duty; or

(3) has knowledge of a breach of duty by another person, unless the commissioner or designee makes reasonable efforts under the circumstances to remedy the breach.

(e) The state shall defend and indemnify the commissioner or an officer or employee of the state against liability under (d) of this section to the extent that the alleged act or omission was performed in good faith and was prudent under the applicable standard of prudence.

(f) In this section, "commissioner" means the commissioner of revenue.

* Sec. 21. AS 37.10.079(b) is amended to read:

(b) The commissioner of revenue may purchase bonds sold by political subdivisions of the state if [:

(1) THEY HAVE BEEN SOLD IN ACCORDANCE WITH THE TERMS OF THE NOTICE OF THEIR SALE SUBJECT ONLY TO DELIVERY OF THE BONDS WITH AN APPROVING OPINION OF BOND COUNSEL TO THE EFFECT THAT THE BONDS ARE VALID AND LEGALLY BINDING GENERAL OBLIGATIONS OF THE POLITICAL SUBDIVISION AND A STATEMENT TO THE EFFECT THAT NO LITIGATION IS THREATENED OR PENDING WHICH AFFECTS THE VALIDITY OF THE BONDS; OR

(2)] the bond counsel nominated by the issuing political subdivision in connection with the original offer for sale of the bonds certifies that

(1) [(A) THAT] a lawsuit has been filed or is threatened that [WHICH] challenges the corporate existence of the issuer or its power to issue the bonds or to levy taxes to pay the bonds or otherwise prevents a [THE] statement to the effect that no litigation is threatened or pending that affects the validity of the bonds;

(2) [AS TO LITIGATION REFERRED TO IN (1) OF THIS SUBSECTION, (B) THAT] as a consequence of the filing of the suit, the bonds cannot be sold or can only be sold at interest rates substantially in excess of the interest rates the municipality would otherwise reasonably expect to pay; [,] and

(3) [(C) THAT,] in the opinion of counsel [,] the municipality is or will be pursuing all available means to establish the validity of the bonds so that the lawsuit will be ultimately determined so as to permit the delivery of the bonds with the statement as to litigation referred to in (1) of this subsection.

* Sec. 22. AS 37.14.110(a) is amended to read:

(a) There is established as a separate endowment trust fund the public school trust fund.

* Sec. 23. AS 37.14.110(c) is repealed and reenacted to read:

(c) The commissioner of revenue shall determine the net income of the fund in accordance with investment accounting principles and in a manner that preserves the distinction between principal and income and that excludes capital gains or losses realized on principal. The principal of the fund and the capital gains or losses realized on principal shall be perpetually retained in the fund for investment purposes.

* Sec. 24. AS 37.14.140 is repealed and reenacted to read:

Sec. 37.14.140. UTILIZATION OF INCOME. The net income of the fund may not be appropriated for a purpose other than the support of the state public school program. The commissioner of revenue shall invest realized net income that has not been appropriated or that has been appropriated but not expended until the income is appropriated and expended.

* Sec. 25. AS 37.14.160 is repealed and reenacted to read:

Sec. 37.14.160. DUTIES OF THE COMMISSIONER OF REVENUE. The commissioner of revenue is the treasurer of the trust fund created in AS 37.14.110 and shall

(1) exercise the powers and duties established in AS 14.25.180(c);

(2) deposit the principal and income from investments in separate principal and income accounts for the fund;

(3) invest and maintain accounting records that distinguish between the principal and income of the fund;

(4) provide reports to the board established under AS 37.14.120 on the condition and investment performance of the fund.

* Sec. 26. AS 37.14.170 is repealed and reenacted to read:

Sec. 37.14.170. INVESTMENTS. (a) The commissioner of revenue is the fiduciary of the trust fund and shall invest the fund to provide increasing net income over long-term periods to the fund's income beneficiaries. The commissioner may invest the money in the fund on the basis of probable total rate of return to promote the long-term generation of income. In managing the trust fund, the commissioner shall

(1) consider the status of the fund's capital and the income generated on both a current and a probable future basis;

(2) determine the appropriate investment objectives;

(3) establish investment policies to achieve the objectives; and

(4) act only in regard to the long-term financial interests of the fund's beneficiaries.

* Sec. 27. AS 39.25.110 is amended by adding a new paragraph to read:

(25) investment officers in the Department of Revenue.

* Sec. 28. AS 39.30.095(a) is amended to read:

(a) The commissioner of administration shall establish the group health and life benefits fund as a special account in the general fund to provide for group life and health insurance under AS 39.30.090 and 39.30.160. The commissioner shall maintain accounts and records for the fund. The fund consists of employer contributions, employee

contributions, appropriations from the legislature, and income [INTEREST] earned on investment of the fund as provided in (d) of this section.

* Sec. 29. AS 39.30.095(d) is amended to read:

(d) If the commissioner of administration determines that there is more money in the fund than the amount needed to pay premiums or benefits for the current fiscal year, the surplus, or so much of it as the commissioner of administration considers advisable, may be invested by the commissioner of revenue in the same manner as retirement funds are invested under AS 14.25.180 [AS 39.35.110].

* Sec. 30. AS 39.35.020 is amended to read:

Sec. 39.35.020. ADMINISTRATION. The commissioner of administration is responsible for the administration of the system and for carrying out this chapter. In addition the commissioner shall [HAS THE FOLLOWING POWERS AND DUTIES:]

(1) maintain the accounts of the system;

(2) make payments for the various purposes specified;

(3) submit periodic reports or statements of account that are needed;

(4) issue a statement of account to an employee requesting it showing the amount of the employee's contributions to the system;

(5) as soon as possible after the close of each fiscal year, and not later than six months after the close of each fiscal year, send to the governor, the legislature, and the board an annual statement on the operations of the system containing

(A) a balance sheet;

(B) a statement of income and expenditures for the year;

(C) a report on an actuarial valuation of its assets

and liabilities;

(D) [REPEALED

(E)] a summary [LIST] of assets held in the pension fund listed by the categories of investment, as provided by the commissioner of revenue [INVESTMENTS OWNED];

(E) [(F)] other statistical financial data that are necessary for a proper understanding of the financial condition of the system and the result of its operations;

(6) establish a public employees retirement trust fund in which the assets of the system shall be deposited and held;

(7) engage an independent certified public accountant to conduct an annual audit of the system's accounts and the annual report of the system's financial condition and activity. [REPEALED]

* Sec. 31. AS 39.35.080 is repealed and reenacted to read:

Sec. 39.35.080. DUTIES OF THE COMMISSIONER OF REVENUE. The commissioner of revenue is the treasurer of the system and the fiduciary of the fund. The commissioner has the same powers and duties established under this chapter in regard to the fund as are provided in AS 14.25.180.

* Sec. 32. AS 44.83.386 is amended to read:

Sec. 44.83.386. INVESTMENT OF FUND. The Department of Revenue shall invest the money in the fund in accordance with AS 37.10.070, 37.10.071, and 37.10.075. The Department of Revenue shall provide money in the fund to the authority only after costs have been incurred or amounts in the fund have been otherwise obligated under contracts for the acquisition and construction of a project. Amounts that have been obligated, but for which costs have not yet been incurred, may be segregated by the Department of Revenue or transferred to the authority only with the prior approval or agreement of the

commissioner of revenue. Income [INTEREST] received on money that is segregated or transferred under this section must be deposited in the general fund.

* Sec. 33. AS 44.88.155(c) is amended to read:

(c) Money and other assets of the enterprise development account may be used to secure bonds of the authority issued to finance the purchase of loans for projects and shall be held and invested by the authority in accordance with AS 37.10.071 [THE TYPES OF INVESTMENTS DESCRIBED IN AS 37.10.070(a) AND AS 39.35.110(a)(9) AND (14)] or shall be used to purchase loans for projects.

* Sec. 34. AS 18.55.375; AS 21.88.210(d); AS 26.15.060; AS 37.10.080; AS 37.14.130(3); AS 39.25.120(c)(13); AS 39.35.110; AS 45.95.030, 45.95.040(b); and AS 45.98.050(b) are repealed.

* Sec. 35. This Act takes effect immediately under AS 01.10.070(c).