

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672

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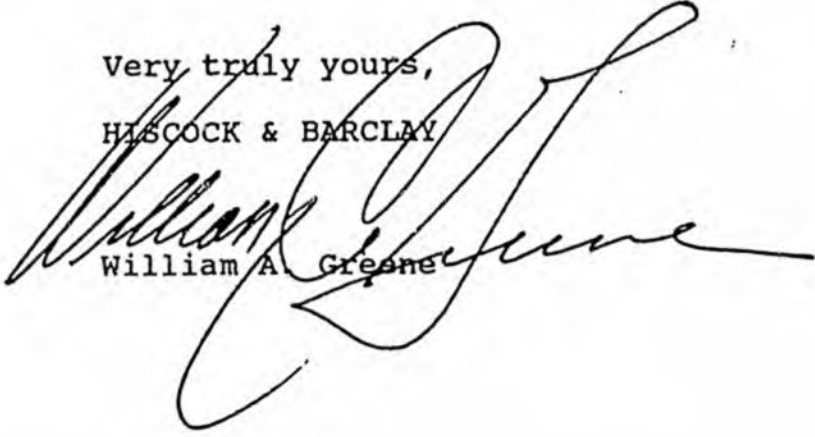
HISCOCK & BARCLAY

Mr. Terry L. Lutz  
Affiliates and Common Trust  
Funds  
June 27, 1990  
Page 4

additional information you might desire. Thank you for your  
consideration.

Very truly yours,

HISCOCK & BARCLAY

  
William A. Greene

WAG:jj  
Enclosures

cc: Robert R. Nokes  
Vernon Sayles

ENCLOSURE A

Register \_\_, \_\_, 1990

COMMERCE AND ECONOMIC  
DEVELOPMENT

3 AAC \_\_. \_\_

3 AAC \_\_ is amended by adding a new section to read:

3 AAC \_\_. \_\_ COMMON TRUST FUNDS

(a) Any bank or trust company, state or national, qualified to act as a fiduciary in this state, may:

(1) establish and administer, either solely or jointly with one or more affiliated banks, trust companies or a combination thereof, common trust funds to furnish investments to itself as a fiduciary, any affiliated bank or trust company as fiduciaries, itself or an affiliated bank or trust company and others as co-fiduciaries, or other common trust funds established and administered by itself, by any affiliated bank or trust company or by itself or any one or more affiliated banks or trust companies in any combination as co-fiduciaries; and

(2) invest, as fiduciary, affiliate of a fiduciary or co-fiduciary, or co-fiduciary, directly or by other common trust funds, those funds which it lawfully holds for investment, in interests in common trust funds established and administered by itself, by any affiliated bank or trust company or by itself or any affiliated bank or trust company as co-fiduciaries, if such investment is not prohibited by the instrument, judgment, decree, order or other document creating such fiduciary relationship and, in the case of co-fiduciaries, obtains the consent of its co-fiduciary to such investment.

(b) For purposes of paragraph (a) of this section, any two or more banks or trust companies in any combination of banks or trust companies are affiliated if they are members of the same affiliated group, within the meaning of Section 1504 of the United States Internal Revenue Code, as amended, regardless of whether the affiliate's place of charter or principal place of business is within or outside the State of Alaska.

Authority: AS 06.01.020  
AS 06.05.005  
AS 06.05.075  
12 CFR 9.1(k) &  
12 CFR 9.18

# UNIFORM COMMON TRUST FUND ACT

## *Table of Jurisdictions Wherein Act Has Been Adopted*

Jurisdiction	Laws	Effective Date	Statutory Citation
Alabama .....	1943, p. 563	7-8-1943	Code 1975, §§ 5-12A-1 to 5-12A-15.
Alaska .....	1964, c. 14	7-1-1964	AS 06.35.010 to 06.35.050.
Arizona .....	1971, c. 160	1-1-1972	A.R.S. §§ 6-871 to 6-874.
Arkansas .....	1947, Act 394	7-1-1947	Ark.Stats. §§ 58-106 to 58-112.
California .....	1947, p. 903	9-19-1947	West's Ann.Cal.Fin.Code, § 1564.
Colorado .....	1947, c. 325	1-1-1948	C.R.S. 11-24-101 to 11-24-107.
Dist. of Columbia	1949, 63 Stat. 938	11-1-1949	D.C.Code 1981, §§ 26-301 to 26-304.
Florida .....	1941, c. 20353	5-19-1941	West's F.S.A. §§ 660.42 to 660.45.
Hawaii .....	1947, c. 130		HRS §§ 406-25 to 406-34.
Idaho .....	1949, c. 34	2-5-1949	I.C. §§ 68-701 to 68-703.
Illinois .....	1943, p. 230	7-29-1943	S.H.A. ch. 17, §§ 2101 to 2108.
Iowa .....	1963, c. 326	1-1-1964	I.C.A. §§ 633.126 to 633.129.
Kansas .....	1951, c. 123	3-29-1951	K.S.A. 9-1609, 9-1610.
Maine .....	1954, c. 59	9-1-1951	18-A M.R.S.A. §§ 7-501, 7-502.
Massachusetts ...	1969, c. 417	6-16-1969	M.G.L.A. c. 203A, §§ 1 to 6.
Michigan .....	1941, No. 174	1-10-1942	M.C.L.A. §§ 555.101 to 555.113.
Mississippi .....	1950, c. 328	6-30-1950	Code 1972, § 81-5-37.
Missouri .....	1955, p. 253	5-24-1955	V.A.M.S. § 362.580.
Montana .....	1955, c. 64	3-4-1955	MCA 32-1-701 to 32-1-708.
Nebraska .....	1953, c. 67	3-28-1953	R.R.S.1943, §§ 24-601.01, 24-601.02.
Nevada .....	1955, c. 21	7-1-1955	N.R.S. 164.070 to 164.120.
New Hampshire ..	1953, c. 109	4-17-1953	RSA 391:1 to 391:8.
New Mexico .....	1955, c. 66	3-4-1955	NMSA 1978, §§ 46-1-13 to 46-1-16.
North Carolina ...	1939, c. 200	7-1-1939	G.S. §§ 36A-90 to 36A-94.
Ohio .....	1943, p. 209	5-14-1943	R.C. § 1109.20 et seq.
Oklahoma .....	1949, p. 412		60 Okl.St. Ann. § 162.
Oregon .....	1951, c. 79	2-22-1951	ORS 709.170.
Rhode Island .....	1956, c. 3839		Gen.Laws 1956, §§ 18-5-1 to 18-5-7.
South Dakota ....	1941, c. 20	3-14-1941	SDCL 55-6-1 to 55-6-7.
Tennessee .....	1953, c. 148	4-10-1953	T.C.A. §§ 35-4-101 to 35-4-105.
Texas .....	1947, c. 209, p. 371	1-1-1948	V.T.C.A. Property Code, §§ 113.171, 113.172.
Utah .....	1951, c. 9	3-1-1951	U.C.A.1953, 7-5-13.
Washington .....	1943, c. 55	3-3-1943	West's RCWA 11.102.010 to 11-102.050.
West Virginia ....	1945, c. 4	2-22-1945	Code, 44-6-6 to 44-6-8.
Wisconsin .....	1943, c. 274	6-10-1943	W.S.A. 223.055.
Wyoming .....	1955, c. 17	1-25-1955	W.S.1977, §§ 2-3-401 to 2-3-403.

### Historical Note

The Uniform Common Trust Fund Act of Commissioners on Uniform State Laws, was approved by the National Conference and the American Bar Association, in 1938.

# COMMON TRUST FUND ACT

## PREFATORY NOTE

A common trust fund is a group of securities set aside by a trustee for investment by two or more trusts operated by the same trustee. It is almost invariably used by banks and trust companies, and not by individual trustees.

The purposes of such a common or joint investment fund are to diversify the investments of the several trusts and thus spread the risk of loss, and to make it easy to invest any amount of trust funds quickly and with a small amount of trouble.

Such a common trust fund cannot legally be operated without statutory sanction, because its operation involves a mixture of trust funds which was not permitted by doctrines of equity. There is a strong sentiment among trust men that the great utility of these common trust funds justifies a statutory exception to the rule regarding the mixture of two or more trust funds.

The Uniform Common Trust Fund Act is a simple enabling statute suitable for adoption by any state which is willing to permit banks and trust companies to set up one or more common trust funds. The Uniform Act does not set out in detail the restrictions on the operation of such common trust funds, except that they must be composed of investments legal for trusts in that state. The reason for not covering in this proposed Uniform State Act the details of the operation of such a common trust fund is that as a practical matter such details are covered by the regulations issued by the Federal Reserve Board which went into effect December 31, 1937.

The Federal Revenue Act of 1936, § 169 [see 26 U.S.C.A.Int.Rev. Code § 584] provides that a common trust fund shall be taxed as an association on its income unless it is operated in accordance with the regulations issued by the Federal Reserve Board. Consequently, every bank or trust company, whether a national or a state institution, will have to operate its common trust funds in accordance with the Federal Reserve Board regulations if it wants to escape the federal corporation income tax, and the difference between such tax and the individual income taxes assessed against the different beneficiaries of the trusts would be so great that no trustee could afford to operate its fund otherwise than in accordance with the Federal Reserve Board regulations.

Therefore, the passage by a state of the Uniform Common Trust Fund Act will enable banks and trust companies in that state to set up one or more common trust funds composed entirely of legal trust investments for its fiduciary funds, these common trust funds necessarily being subject to restrictions and regulations of the Federal Reserve Board as they exist from time to time.

### General Statutory Notes

**Alabama.** The Alabama Act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

**Arizona.** Title 6 of the Arizona Statutes, which includes the Uniform Common Trust

Fund Act (A.R.S. §§ 6-871 to 6-874) is repealed on Jan. 1, 1995. See A.R.S. § 41-2376.

**Arkansas.** Adds section as follows:

"58-112. Fiduciary defined.

"For the purposes of this Act [§§ 58-106—58-112] generally 'fiduciary' includes a trustee under any express trust, executor,

## COMMON TRUST FUND ACT

administrator, guardian, curator or agent. For the purposes of section four [§ 58-109] hereof 'fiduciary' also includes a trustee under an implied, resulting or constructive trust, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, nominee, or any other person acting in a fiduciary capacity for any person, trust or estate."

**Colorado.** The Colorado Act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

**District of Columbia.** Adds section which reads:

### "§ 26-302. Taxability.

"(a) A common trust fund, as herein defined, shall not be subject to any tax imposed by Chapter 18 of Title 47, and for the purpose of said subchapter shall not be deemed to be a corporation.

"(b) The net income of a common trust fund shall be computed in the same manner and on the same basis as in the case of an individual. Each participant in a common trust fund shall include, in computing its net income, its proportionate share of the net income of such fund, whether or not distributed to it, and the amount so included in the net income of a participant shall be taxable to such participant, or its beneficiaries, in the manner and to the extent provided in Subchapter IX of Chapter 18 of Title 47, as if any amount not distributed to the participant during its taxable year actually had been so distributed.

"(c) No gain or loss shall be realized by a common trust fund upon the admission or withdrawal of a participant, or upon the admission or withdrawal of any interest of a participant. The withdrawal of any participating interest by a participant shall be treated as a sale or exchange of such interest by such participant.

"(d) Every bank or trust company maintaining a common trust fund shall make a return under oath for the taxable year of such fund.

"(e) If the taxable year of a common trust fund is different from that of a participant therein, the proportionate share of the

net income of such fund to be included in computing the net income of such participant for its taxable year shall be based upon the net income of such fund for its taxable year ending within the taxable year of such participant."

**Florida.** L.1981, c. 81-318, rewrote statutes providing for legislative review of laws regulating professions, occupations, business, industry and other endeavors in Florida as originally provided for under the Regulatory Reform Act of 1976, L.1976, c. 76-168, as amended. Hence, as a result of L.1981, c. 81-318, chapter 660 of the Florida Statutes is repealed Oct. 1, 1991, and shall be reviewed by the legislature pursuant to the Regulatory Sunset Act as contained in West's F.S.A. § 11.61.

Adds sections as follows:

### "660.43. Common trust fund investments

"No bank association, or trust company shall mingle its own funds with any common trust fund managed by such trust company or trust department, and every investment of a common trust fund shall, at all times, be such as would be a proper investment for each fiduciary account owning an interest in such common trust fund."

### "660.44. Common trust fund to be audited annually

"A trust company or trust department administering a common trust fund shall keep proper records, which in addition to all other necessary and proper matters shall show at all times the proportionate interest of each fiduciary account in the common trust fund, and, at least once during each period of 12 months, shall cause an audit to be made of the common trust fund by auditors responsible only to the board of directors of the trust company or trust department. The report of such audit shall include a list of the investments comprising the common trust fund at the time of the audit, which shall show the valuation placed on each item on such list by the board of directors or the trust investment committee of the trust company or trust department as of the date of the audit; a statement of purchases, sales, and any other investment changes and of income and disbursements since the last audit; and appropriate comments as to any investment in default as to payment of principal or interest. The reasonable expenses of any such audit made by independent public accountants may be

## COMMON TRUST FUND ACT

charged to the common trust fund. The bank or association shall manage such common trust funds without charge, save necessary expenses, and shall send a copy of the latest report of such audit annually to each person to whom a regular periodic accounting of the fiduciary accounts participating in the common trust fund ordinarily would be rendered or shall send advice to each such person annually that the report is available and that a copy will be furnished without charge upon request."

**Hawaii.** Adds sections as follows:

**"406-26 Investment of common trust funds.** The funds of a common trust fund may be invested and reinvested in those investments in which trust companies are authorized to invest trust funds."

**"406-27 Plan, approval, contents.** Each common trust fund shall be established and maintained in accordance with a written plan approved by resolution of the board of directors of the trust company. The plan shall state the manner in which the fund is to be operated, the apportionment of income, capital gains and losses, the terms and conditions governing the admission and withdrawal of investments from or participation in the fund, the auditing and settlement of accounts with respect thereto, the basis and method of valuing assets therein, the basis upon which the fund may be terminated, and such other matters as may by the board of directors be deemed necessary to clearly define the rights of participants therein, or otherwise desirable. The plan, or a copy thereof, shall be available at the principal office of the trust company during regular business hours for inspection by any person having an interest in a fiduciary account any funds of which are invested in the common trust fund. The trust company shall designate clearly upon its records the names of the fiduciary accounts on behalf of which the trust company, as fiduciary or cofiduciary, owns a participation in the common trust fund and the extent of the interest of the fiduciary accounts therein."

**"406-28 Participations in common trust fund.** The following shall apply with respect to participations in a common trust fund:

**"(1) Participations in a common trust fund shall be held only by fiduciary accounts of which the trust company is fiduciary or cofiduciary and shall be nontransferable.**

**"(2) No funds of any trust shall be invested in a participation in a common trust fund if the investment would cause the interest of the trust at the time of such investment to be in excess of ten per cent of the value of the assets of the common trust fund as determined in accordance with the plan. In applying the limitation stated in the foregoing sentence, if two or more trusts are created by the same settlor or settlors, and as much as one-half of the income or principal, or both, of each trust is payable or applicable to the use of the same person or persons, such trusts shall be considered as one.**

**"(3) Not less frequently than once each calendar quarter the trust company administering a common trust fund shall determine the value of the assets therein upon such basis as the plan provides. No participation shall be admitted to or withdrawn from the common trust fund except on the valuation date. A reasonable period, not to exceed seven days, following each valuation date may be used to make the computations necessary to determine the value of the fund and the participations therein.**

**"(4) Upon the withdrawal of a participation the trust company may make distribution in cash or ratably in kind, or partly in cash and partly in kind, but all distributions made at any one time shall be made on the same basis."**

**"406-29 Fiduciary not to participate.** A trust company administering a common trust fund shall not invest any of its own funds therein and if, because of a creditor relationship or otherwise, it acquires an interest therein its participation shall be withdrawn on the first date on which a withdrawal can be effected in accordance with the plan."

**"406-30 Title to assets.** No fiduciary account owning an interest in a common trust fund shall be deemed to have individual ownership of any asset thereof but only a proportionate undivided equitable interest in the fund. Title to all assets of the fund shall at all times be vested in the trust company maintaining the same, as fiduciary for the participants therein."

**"406-31 Mistakes.** No mistakes made in good faith and in the exercise of care and prudence in connection with the administration of any common trust fund shall be held to exceed any power granted to or to violate any duty imposed upon a trust company as

## COMMON TRUST FUND ACT

fiduciary if promptly after the discovery of the mistake the trust company takes such action as is practicable in the circumstances to remedy the mistake."

**"406-33 Taxation.** No common trust fund shall be subject to taxation as a corporation, association, partnership, or individual but it shall be deemed an estate or trust within the meaning of section 235-92, and the income therefrom and all capital gains or losses thereof shall be deemed to be income, gains, or losses, respectively, of the fiduciary accounts participating in the fund in accordance with their ratable participations."

**"406-34 Management fees.** No separate fee, commission, or compensation for the management of a common trust fund shall be charged by the trust company, but the compensation of the trust company for such management shall be limited to the fees, commissions, or compensation properly charged to the participating accounts. The trust company shall be entitled to charge against the fund the usual fee or commission for services rendered as a realtor or stockbroker in connection with the sale or purchase of any assets by or for a common trust fund, unless the plan otherwise provides and any expense incurred in the management thereof."

**Illinois.** The Illinois act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

**Iowa.** Adds section as follows:

### **"633.126. Definitions**

"1. 'Common trust fund' means a fund maintained by a bank or trust company exclusively for the collective investment and reinvestment of moneys contributed thereto by that bank or trust company, or by another bank or trust company at least eighty percent of the voting stock of which is owned or controlled by a bank holding company which owns or controls at least eighty percent of the voting stock of the bank or trust company maintaining the common trust fund, in its capacity as a fiduciary or cofiduciary.

"2. 'Fiduciary', for the purposes of sections 633.126 to 633.129, inclusive, of this Code, means acting in any of the following capacities, namely: testamentary trustee appointed by any court, trustee under any written agreement, declaration or instru-

ment of trust, executor, administrator, guardian, or conservator."

**Maine.** L.1979, c. 540, repealed 18 M.R.S.A. §§ 4101 to 4103, which previously constituted the Uniform Common Trust Fund Act, and reenacted said Uniform Act as part of the Maine Probate Code in 18-A. M.R.S.A. §§ 7-501 and 7-502.

**Massachusetts.** Adds section as follows:

**"Section 1A. Investments by national banking association or foreign corporation acting as fiduciary.**

"Any national banking association or foreign corporation either alone or in conjunction with one or more other persons acting with it in a fiduciary capacity having qualified as fiduciary in this state pursuant to the provisions of section forty-three of chapter one hundred and sixty-seven, may invest any funds held by it as such fiduciary in any common trust fund which it maintains according to the laws of the state where its principal place of business is located, provided the instrument, judgment, decree or order creating such fiduciary relationship, does not specifically or otherwise prohibit such investment."

**Michigan.** The Michigan act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

**Montana.** Adds sections as follows:

**"32-1-706. Common trust funds established.** Each common trust fund established hereunder is a separate and distinct entity from the fiduciary relationships participating in the fund. No fiduciary, in administering a participating fiduciary relationship, may be required to make any apportionment or allocation between the principal and income of such relationship different from that made for the common trust fund. No such participating fiduciary relationship or person having an interest in the relationship may have or be considered to have any ownership in any particular property of the common trust fund; but each participating fiduciary relationship shall have a proportionate undivided interest in the fund and its income; and the ownership of all property of the common trust fund shall be in the trustee of the fund."

**"32-1-707. Affiliated defined.** For purposes of this part, two or more banks or trust companies are affiliated if they are members of the same affiliated group, with-

## COMMON TRUST FUND ACT

↓ in the meaning of section 1504 of the United States Internal Revenue Code."

"32-1-708. Limited application of insurance law—exemption. (1) Nothing in this part exempts a common trust fund or any fiduciary thereof from the requirements of Title 33 if such common trust fund or fiduciary is used for insurance purposes.

"(2) The establishment and maintenance of common trust funds under this part are exempt from the provisions of Title 30, chapter 10."

New Hampshire. Adds sections as follows:

"391:1-a. Establishment and Use of Common Trust by Bank Holding Company Affiliates. Any such bank or trust company which is an affiliate of a bank holding company, as defined by RSA 384-B:1, IV and V, may establish common trust funds for the purpose of furnishing investments to itself as fiduciary, to other affiliates of the same bank holding company qualified to act as fiduciary in this state as fiduciary, or to itself and others as co-fiduciaries, or to such other affiliates and others as co-fiduciaries. Subject to the limitations upon the investment of funds held in a fiduciary capacity in common trust funds contained in RSA 391:1, the bank or trust company affiliate of a bank holding company establishing such common trust funds and other affiliates of the same bank holding company qualified to act as fiduciary in this state may, as such fiduciary or co-fiduciary, invest funds which it lawfully holds for investment in interest in such common trust funds. The bank or trust company establishing, maintaining, or so utilizing any such common trust fund shall comply with and be subject to all of the provisions of this chapter as though such bank or trust company and the other banks or trust companies participating in such common trust fund or funds were one and the same corporate entity. Any person acting as a co-fiduciary with any such bank or trust company is hereby authorized to consent to the investment in interest in a common trust fund or funds created hereunder."

"391:3 Taxability. A common trust fund shall not constitute a taxable entity within the meaning of RSA 77. Each estate having a participating interest in a common trust fund shall include in its return its proportionate share of any taxable income of the classes described in RSA 77:4, received by such common trust fund, whether

or not such income is distributed by the common trust fund."

North Carolina. The North Carolina act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

Ohio. The Ohio Act is a substantial adoption of the major provisions of the Uniform Act but it contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

Rhode Island. The Rhode Island act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions, and additional matter which cannot be clearly indicated by statutory notes.

South Dakota. Adds sections as follows:

"55-6-2.1. Establishment of common trust funds for funds held by affiliated bank or trust company—Chapter applicable. A bank or trust company qualified to act as a fiduciary in this state may:

"(1) Establish and maintain common trust funds for the collective investment or funds held in any fiduciary capacity by it or by another bank or trust company which is owned or controlled by a corporation which owns or controls such bank or trust company;

"(2) Invest funds which it holds in common trust funds established and maintained pursuant to subdivision (1).

"The provisions of §§ 55-6-1 to 55-6-6, inclusive, relating to common trust funds shall apply to the establishment and maintenance of common trust funds under this section.

"This section shall apply to all fiduciary relationships."

"55-6-3. Operation of common trust funds—Compliance with law governing administration of trust estates. The bank or trust company operating such common trust funds shall comply with the provisions of chapter 21-22 in the administration of the trust estate."

Texas. L.1983, chapters 576 and L.1983, c. 567, effective Jan. 1, 1984, repealed Vernon's Ann.Civ.St. art. 7425b-48, which constituted the Uniform Common Trust Fund Act, and reenacted the same as V.T.C.A. Property Code §§ 113.171, 113.172.

## COMMON TRUST FUND ACT

Adds section as follows:

"§ 113.172. **AFFILIATED INSTITUTIONS.** A bank or trust company that is a member of an affiliated group under Section 1504, Internal Revenue Code of 1954 (26 U.S.C. 1504), with a bank or trust company maintaining common trust funds may participate in one or more of the funds."

**Washington.** The Washington Act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

**Wisconsin.** W.S.A. 223.055, constituting the entire Uniform Common Trust Fund Act, contains additional provisions in subsec. (3) thereof which reads as follows:

"(3) **Investments.** The bank or trust company operating such common trust fund may buy, sell, hold, invest and reinvest the funds and assets thereof in its discretion and shall not be limited or restricted by ch. 881 or any amendment thereof, but the bank or trust company shall not invest the funds of any fiduciary account in any common trust fund unless every investment in such fund is one that would then be a permissible investment for such fiduciary account."

# UNIFORM COMMON TRUST FUND ACT

1938 ACT

An Act concerning common trust funds and to make uniform the law with reference thereto.

## Section

1. Establishment of Common Trust Funds.
2. Court Accountings.
3. Uniformity of Interpretation.
4. Short Title.
5. Severability.
6. Repeal.
7. Time of Taking Effect.

*Be it enacted . . . . .*

## § 1. Establishment of Common Trust Funds

Any bank or trust company qualified to act as fiduciary in this state may establish common trust funds for the purpose of furnishing investments to itself as fiduciary, or to itself and others, as co-fiduciaries; and may, as such fiduciary or co-fiduciary, invest funds which it lawfully holds for investment in interests in such common trust funds, if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship, and if, in the case of co-fiduciaries, the bank or trust company procures the consent of its co-fiduciaries to such investment.

### Action in Adopting Jurisdictions

#### Variations from Official Text:

**Arizona.** Section reads:

"A. Any bank or trust company qualified to act as a fiduciary in this state may establish and administer common trust funds composed of property permitted by law for the investment of trust funds for the purpose of furnishing investments to any one or more of the following:

- "1. Itself as fiduciary.
- "2. Itself and others, as cofiduciaries.
- "3. Any affiliated bank or trust company, including any foreign affiliated bank or trust company, as fiduciary.
- "4. Any affiliated bank or trust company, including any foreign affiliated bank or trust company, and others, as cofiduciaries.

"Any bank or trust company may as such fiduciary or cofiduciary invest funds which it lawfully holds for investment in interests in such common trust funds administered by itself or by any affiliated bank or trust company, including any foreign affiliated bank or trust company, if such investment is not prohibited by the instrument, judgment, decree, order or statute creating and governing such fiduciary relationship, and if, in the case of cofiduciaries, the bank or trust company procures the consent of its cofiduciaries for such investment.

"B. Each common trust fund established under this section is as a separate and distinct entity from the fiduciary relationships participating in the fund. A fiduciary in administering a participating fiduciary relationship is not required to make any

apportionment or allocation between the principal and income of the relationship different from that made for the common trust fund. A participating fiduciary relationship, or person having an interest in the relationship, is not deemed to have any ownership in particular property of the common trust fund, but each participating fiduciary relationship has a proportionate undivided interest in the fund and its income and the ownership of all property of the common trust fund is in the trustee of the fund.

"C. This section applies to all fiduciary relationships, including those established prior to the effective date of this subsection, whether the relationships are revocable or irrevocable. This section and § 6-872 apply to common trust funds established under this section and the banks and trust companies operating these common trust funds.

"D. For purposes of this section, two or more bank or trust companies are affiliated if they are members of the same affiliated group, within the meaning of § 1504 of the United States Internal Revenue Code.

"E. Nothing in this article shall exempt a common trust fund or any fiduciary thereof from the requirements of title 20, if such common trust fund or fiduciary is used for insurance purposes."

**Arkansas.** Specifies state or national bank.

**California.** Section reads:

"For purposes of this section, two or more trust companies shall be deemed to be affiliated if they are members of the same affiliated group, within the meaning of Section 1504 of the Internal Revenue Code.

"Any trust company may establish and administer common trust funds composed of property permitted by law for the investment of trust funds, for the purpose of furnishing investments to any one or more of the following: (1) itself, as fiduciary; (2) itself and others, as cofiduciaries; (3) any affiliated trust company (including, without limitation, any foreign affiliated trust company), as fiduciary; and (4) any affiliated trust company (including, without limitation, any foreign affiliated trust company) and others, as cofiduciaries. Any trust company may as such fiduciary or cofiduciary invest funds which it lawfully holds for investment in interests in such common trust funds administered by itself or by any affiliated trust company organized under

laws of this state, if such investment is not prohibited by the instrument, judgment, decree, order, or statute creating or governing such fiduciary relationship, and if, in the case of cofiduciaries, the trust company procures the consent of its cofiduciaries to such investment.

"Each common trust fund established hereunder shall be treated as an entity separate and distinct from the fiduciary relationships participating therein. No fiduciary in administering a participating fiduciary relationship shall be required to make any apportionment or allocation between the principal and income of such relationship different from that made for such common trust fund. No such participating fiduciary relationship, nor any person having an interest in such relationship, shall have or be deemed to have any ownership in any particular property of such common trust fund, but each such participating fiduciary relationship shall have a proportionate undivided interest in such fund and its income; and the ownership of all property of such common trust fund shall be in the trustee of such fund.

"This section shall apply to fiduciary relationships now in existence or hereafter established, whether the same be revocable or irrevocable. The superintendent, at his direction, may make an examination of any common trust fund established hereunder at such times and to such extent as he may deem advisable. The provisions of the Corporate Securities Law shall not apply to the creation, administration, or termination of common trust funds, nor to participation therein."

**District of Columbia.** Inserts "subject to such rules and regulations as may be promulgated from time to time by the Board of Governors of the Federal Reserve System under the provisions of § 92a of Title 12, United States Code, as amended, pertaining to the collective investment of trust funds by national banks" preceding "establish", and inserts "written" preceding "consent".

**Florida.** Section reads:

"(1) Any trust company or trust department may establish one or more common trust funds for the exclusive purpose of furnishing investments to itself as fiduciary, including estates, guardianships, managing agencies, and all other fiduciary relationships, now in existence or hereafter created, requiring or authorizing investment of

funds held as fiduciary including managing agencies, or to itself and others, as cofiduciaries. It may, as such fiduciary or cofiduciary, invest funds which it lawfully holds for investment in interests in such common trust funds if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship and if, in the case of cofiduciaries, the trust company or trust department procures the consent of its cofiduciary or cofiduciaries to such investment, which consent such cofiduciary is hereby authorized to grant. The full management of the fund shall at all times be in full charge of such trust company or trust department, and no cofiduciary shall have any right to interfere in the management of such common trust funds.

"(2) For the purposes of this section, the term 'trust company or trust department' shall include two or more trust companies or trust departments which are members of the same affiliated group as defined in s. 1504 of the Internal Revenue Code of 1954, as amended, with respect to any fund established pursuant to this section of which any of such trust companies or trust departments is trustee or of which two or more of such trust companies or trust departments are cotrustees. The fiduciary relationship that exists between an individual trust company or trust department and its customer shall not be altered due to the fact of the enactment of this subsection."

**Hawaii.** Section reads: "Any trust company may establish one or more common trust funds for the collective investment and reinvestment of moneys contributed thereto by it as fiduciary, and by it and others as cofiduciaries; and the trust company and its cofiduciaries may invest funds held as trustee, guardian, or in any other fiduciary capacity in which it or they shall be authorized to invest funds, in any common trust fund, if the investment is not expressly forbidden by the instrument, decree, or order creating the fiduciary relationship."

**Idaho.** Specifies state or national bank.

**Iowa.** Section now reads: "Any bank or trust company qualified to act as fiduciary in this state may establish common trust funds, or may utilize one or more common trust funds previously established by it, for the purpose of furnishing investments to itself as fiduciary, or to itself and others, as cofiduciaries, or to another bank or trust company as fiduciary or cofiduciary; and

may, as a fiduciary or cofiduciary, invest funds which it lawfully holds for investment in interests in common trust funds maintained by it or by another bank or trust company at least eighty percent of the voting stock of which is owned or controlled by a bank holding company which owns or controls at least eighty percent of the common stock of the bank or trust company investing such funds, if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship, and if, in the case of cofiduciaries, the bank or trust company procures the consent of its cofiduciaries to such investment. If the instrument creating the fiduciary relationship gives to the bank or trust company the exclusive right to select investments, the consent of the cofiduciary shall not be required."

**Kansas.** Inserts "state or national" preceding "bank or trust company" where first appearing, and adds "The state banking board is hereby authorized to adopt rules and regulations for a plan of operation for the management of said funds for state banks and trust companies" at end of section.

**Maine.** Section reads: "Any bank or trust company qualified to act as fiduciary in this State may establish and operate common trust funds for the purpose of furnishing investments to itself as fiduciary or to itself and others, as cofiduciaries; and for the purpose of furnishing investments to affiliated banks, within the meaning of section 1504 of the Internal Revenue Code, acting for themselves or for themselves and others as cofiduciaries; and may, as such fiduciary or cofiduciary or acting for affiliated banks alone or with their cofiduciaries; invest funds which are lawfully held for investment in interests in such common trust funds, if such investment is not prohibited by the instrument, judgment, decree or order creating such fiduciary relationship, and if, in the case of cofiduciaries, the bank or trust company or affiliate procures the consent of its cofiduciaries to such investment. Any person acting as a cofiduciary with any such bank or trust company or affiliate is authorized to consent to the investment in such interests."

**Massachusetts.** Section reads: "Any individual, corporation or association qualified to act as fiduciary in this state may establish common trust funds for the purpose of furnishing investments to itself as fiduciary or to itself and others, as cofiduciaries;

and may, as such fiduciary or co-fiduciary, invest funds which it lawfully holds for investment in interests in such common trust funds, if such investment is not prohibited by the instrument, judgment, decree or order creating such fiduciary relationship. Each such common trust fund shall be administered in accordance with a written declaration of trust which shall have been filed in the registry of probate in the county in which such individual, corporation or association resides or has his or its principal place of business, and such written declaration may provide that premiums paid on the purchase of interest bearing securities need not be amortized."

Adds a separate section relating to consent of co-fiduciaries which reads:

"§ 2. Fiduciary consent

"If the individual, corporation or association maintaining a common trust fund holds property as a fiduciary together with a co-fiduciary or co-fiduciaries, investment of such property in participations in a common trust fund may be made only with the written consent of such co-fiduciary or co-fiduciaries and shall be withdrawn upon the written request of any such co-fiduciary."

**Missouri.** Section reads: "Any state or national bank or trust company qualified to act as fiduciary in this state may establish common trust funds for the purpose of furnishing investments to itself as fiduciary, or to itself and others as co-fiduciaries, or to other banks and trust companies acting as fiduciaries or co-fiduciaries. Funds may be invested in such common trust fund only if the investment is not prohibited by the instrument, judgment, decree, or order creating the fiduciary relationships, and if, in the case of co-fiduciaries, the banks or trust companies procure the consent of their co-fiduciaries to the investment."

**Montana.** Section reads:

"(1) Any bank or trust company qualified to act as fiduciary in this state may establish and administer common trust funds composed of property permitted by law for the investment of trust funds for the purpose of furnishing investments to:

"(a) itself as fiduciary;

"(b) itself and others as co-fiduciaries;

"(c) any affiliated bank or trust company, including any foreign affiliated bank or trust company, as fiduciary;

"(d) any affiliated bank or trust company, including any foreign affiliated bank or trust company, and others as co-fiduciaries; or

"(e) any combination of the entities listed in subsections (1)(a) through (1)(d).

"(2) Any bank or trust company may, as that fiduciary or co-fiduciary, invest funds which it lawfully holds for investment in interests in the common trust funds administered by itself or by any affiliated bank or trust company if the investment is not prohibited by the instrument, judgment, decree, order, or statute creating and governing such fiduciary relationship and if, in the case of co-fiduciaries, the bank or trust company procures the consent of its co-fiduciaries to the investment."

**New Hampshire.** Adds a sentence at end of section which reads: "Any person acting as a co-fiduciary with any such bank or trust company is hereby authorized to consent to the investment in such interests."

**New Mexico.** Section reads:

"Any bank or trust company qualified to act as fiduciary in this state may establish common trust funds for the purpose of furnishing investments to itself and its affiliated bank or trust company as fiduciary or to itself and its affiliated bank or trust company and others as co-fiduciaries and may, as fiduciary or co-fiduciary, invest funds which it lawfully holds for investment in interests in the common trust funds, if such investment is not prohibited by the instrument, judgment, decree or order creating the fiduciary relationship and if, in the case of co-fiduciaries, the bank or trust company procures the consent of its co-fiduciaries to the investment.

"As used in this section, 'affiliated' means two or more banks or trust companies in which eighty percent or more of the voting shares of each bank or trust company, excluding shares owned by the United States or by any company wholly owned by the United States, are directly or indirectly owned or controlled by a holding company."

**Oklahoma.** The substance of sections 1 and 2 of the Official Text is contained in the following section of the Oklahoma act:

"§ 162. Common trust funds

"Any state or national bank or trust company acting in a fiduciary capacity, may create and maintain a common trust fund with the approval of the State Bank Com-

missioner or State Banking Board for the purpose of furnishing investments to itself as fiduciary and to other fiduciaries, and may as such fiduciary invest funds which it lawfully holds for investment in interests in such common trust fund if such investment is not prohibited by the instrument, judgment, decree or order creating such fiduciary relationship, and if in case of co-fiduciaries the bank or trust company procures the consent of its co-fiduciaries to such investment; provided that no such common trust fund shall be created until the plan thereof shall be submitted to the Bank Commissioner and the same be approved. If the State Bank Commissioner disapproves said plan, any interested party may appeal to the State Banking Board, and its decision in the matter shall be final. Any such plan may be amended from time to time by the company, bank or trust company upon obtaining the approval of the State Bank Commissioner.

"A bank or trust company maintaining a common trust fund may at any time file in the District Court of the County in which it maintains its principal office an account of the administration of such trust fund, provided that every such company must file in said District Court an account of the administration of the trust fund within three (3) years from the date of the establishment of such fund, and thereafter an account shall be filed at intervals of not less than three (3) years from the date of the last preceding accounting. Upon the filing of such account, the court shall fix a day for hearing not less than forty-five (45) days from said filing date, and appoint a guardian ad litem to represent the interests of all infant, incompetent, unborn, unascertained and absent beneficiaries. At the same time the court shall order the bank or trust company to give notice of such hearing to all beneficiaries of the trusts participating in the common trust fund, whose names are known to the bank or trust company from the records kept by it in the regular course of business in the administration of said trusts, in the following manner: (1) by personal service or by sending such notice by registered mail to such beneficiaries or their guardians or attorneys of record directed to them at the addresses shown by the records above mentioned, in either case at least fourteen (14) days prior to the date of the hearing; and (2) by one publication of such notice in a newspaper published therein, in some newspaper having a general circulation in said county, such publication

to be at least twenty (20) days prior to the date of the hearing; and (3) by such further notice, if any, as the court may order. Such notice shall require all parties to show cause on the date fixed by the court why such account should not be judicially settled and the order made by the court at the conclusion of the hearing shall, subject to the right of appeal to the Supreme Court, be a final judgment and binding on the bank or trust company and on every person interested in said common trust fund.

"No expression of intent by the creator of a trust shall excuse the trustee of a common trust fund from the duty to account as herein provided.

"The provisions of this Act shall apply to fiduciary relationships in existence at the time this Act takes effect or thereafter established."

**Oregon.** The substance of sections 1 and 2 of the Official Text is contained in the following section of the Oregon act:

**"709.170 Establishment of and investment in common trust funds; accounting.**

"(1) 'Common trust fund' as used in this section means any fund maintained by a trust company exclusively for the collective investment and reinvestment of moneys contributed thereto by the trust company or an affiliated trust company as a fiduciary. For the purposes of this section, two or more trust companies are affiliated if they are members of the same affiliated group, within the meaning of section 1504 of the Internal Revenue Code. ✓

"(2) A trust company may establish common trust funds for the purpose of furnishing investments to itself as fiduciary, to an affiliated trust company as fiduciary, or to itself or an affiliated trust company and others as cofiduciaries. A trust company may, as a fiduciary or cofiduciary, invest funds which it lawfully holds for investment, in interests in the common trust fund or a common trust fund of an affiliated trust company, if the investment is not prohibited by the instrument, judgment, decree or order creating the fiduciary relationship, and if, in the case of cofiduciaries, the trust company procures the consent of its cofiduciary or cofiduciaries to the investment.

"(3) The division may, pursuant to ORS 183.310, 183.315, 183.330, 183.335 and 183.341 to 183.410, promulgate rules necessary to control the establishment and operation of common trust funds and to protect the

investors. A trust company except national banks which are qualified to act as fiduciaries pursuant to the laws of the United States shall, in the operation of the common trust fund, comply with the rules.

"(4) Unless ordered by a court a trust company operating common trust funds is not required to render a court accounting with respect to the funds, but it may, upon application to the circuit court of the county in which it has its principal office, obtain a settlement of its common trust fund accounts on conditions specified by the court. When application for the settlement is presented to a circuit court for approval, the circuit court shall assign a time and place for hearing and order notice thereof by:

"(a) Publication once a week for three successive publications, the first publication to be not less than 20 days prior to the date of hearing, of a notice in a newspaper having a general circulation in the county in which the trust company operating the common trust fund has its principal office;

"(b) Mailing, not less than 14 days prior to the date of the hearing, a copy of the notice to all beneficiaries of the trusts participating in the common trust fund whose names are known to the trust company from the records kept by it in the regular course of business in the administration of the trust, directed to them at the addresses shown by the records; and

"(c) Such further notice, if any, as the court may order."

Tennessee. Substitutes ", or to another bank or trust company, which may," for "; and may".

Texas. Section reads:

"(a) A bank or trust company qualified to act as a fiduciary in this state may establish common trust funds to provide investments to itself as a fiduciary, including as a custodian under the Texas Uniform Gifts to Minors Act (Chapter 141) or a uniform gifts to minors act of another state or to itself and others as cofiduciaries.

"(b) The fiduciary or cofiduciary may place investment funds in interests in common trust funds if:

"(1) the investment is not prohibited by the instrument or order creating the fiduciary relationship; and

"(2) if there are cofiduciaries, the cofiduciaries consent to the investment.

"(c) A common trust fund includes a fund:

"(1) qualified for exemption from federal income taxation as a common trust fund and maintained exclusively for eligible fiduciary accounts; and

"(2) consisting solely of assets of retirement, pension, profit sharing, stock bonus, or other employees' trusts that are exempt from federal income taxation."

Utah. The Utah provision corresponding to section 1 of the Uniform Act [U.C.A. 1953, 7-5-13(1)] reads as follows: "Any trust company chartered by this state or by a federal agency, qualified to engage in the trust business in this state, may establish common trust funds. Funds held by a trust company may be invested collectively in a common trust fund in accordance with the rules prescribed by the appropriate governmental regulatory agency or agencies, if such investment is not specifically prohibited under the instrument, judgment, decree or order creating the regulatory relationship."

West Virginia. Section reads:

"(a) Any bank or trust company qualified to act as fiduciary in this State may establish common trust funds for the purpose of furnishing, or making available, investments to itself as fiduciary, or to itself and others, as cofiduciaries, and may, as such fiduciary or cofiduciary, invest funds which it lawfully holds for investment in interests in such common trust funds, if such investment is not prohibited by the instrument, judgment, decree or order creating its fiduciary status or relationship, and if, in the case of cofiduciaries, the bank or trust company procures the consent of its cofiduciaries to such investment: Provided, that unless such fiduciary acquiring or holding any interest in any common trust fund is specifically permitted by the instrument, judgment, decree or order creating the fiduciary status or relationship to invest in securities other than those described in section two [§ 44-6-2] of this article, or any amendments or reenactments thereof, such common trust funds shall be invested only in those securities described in said section two and subject to the limitations and conditions of said section, and any amendments or reenactments thereof, except that a common trust fund or funds may be established for the purchase of securities of the type described in said section two without regard to the percentage limitation specified in sub-

paragraph (1), subdivision (h) of said section two [§ 44-6-2(h)(1)], in which event the funds invested by a fiduciary in interests in such last mentioned common trust fund or funds shall not exceed the percentage limitation specified in said subparagraph (1) of subdivision (h) unless a larger investment is permitted by the instrument, judgment, decree or order creating the fiduciary status or relationship.

"(b) Any bank or trust company qualified to act as a fiduciary in this State may establish and maintain common trust funds for the collective investment of funds held in any fiduciary capacity by it or by any

bank or trust company qualified to act as fiduciary in this State which is owned or controlled by a bank holding company which owns or controls such establishing bank or trust company. Any such commonly owned or controlled bank or trust company may, as fiduciary or co-fiduciary with others, invest funds which it holds in common trust funds so established and maintained. The restrictions contained in subsection (a) of this section shall apply to the establishment, maintenance and investment of common trust funds under this subsection."

#### Law Review Commentaries

Commingled investment by corporate fiduciaries in Pennsylvania. 87 U.Pa.L.Rev. 577 (March 1939).

Common trust fund legislation. Robert W. Bogue. 5 Law and Contem.Prob. 430 (Summer 1938).

Common trust fund statutes; a legalization of commingling. 37 Colum.L.Rev. 1384 (Dec.1937).

Common trust funds. Ernest L. Averill. 13 Conn.Bar J. 14 (1939).

Common trust funds. James J. Saxon and Dean E. Miller. 53 Geo.L.J. 994 (Summer 1965).

#### Library References

Banks and Banking ¶86, 315(1).  
Trusts ¶217.3(3).

C.J.S. Banks and Banking §§ 157 et seq.,  
1054 et seq.  
C.J.S. Trusts § 326.

#### Notes of Decisions

Amount of investment 4  
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Parties eligible to invest 2  
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Plan of common trust fund 5  
Purpose 1

Leith v. Mercantile Trust Co. Nat. Ass'n, Mo.App.1967, 423 S.W.2d 75.

#### 3. Permissible investments

Notwithstanding provisions of RSA 564:18, detailing investment for trustees generally and limiting them to four general categories, all or any part of testamentary charitable trust fund could be invested in a common trust fund by virtue of RSA 391:1 et seq., where there was nothing in will explicitly or impliedly prohibiting investment in common trust funds. *Mechanicks National Bank of Concord v. D'Amours*, 1957, 129 A.2d 859, 100 N.H. 461, 64 A.L.R.2d 260.

Investments of assets of testamentary charitable trust in common trust fund in accordance with trustee's plan did not, under the circumstances preclude continued investments of testamentary charitable trust assets in such fund. *Mechanicks National Bank of Concord v. D'Amours*, 1957,

#### 1. Purpose

This act has for its purpose the establishment of a new class of investments, interests in common trust fund, in which bank qualified to act as fiduciary, acting prudently, may properly invest funds of particular underlying trust. *Mechanicks Nat. Bank of Concord v. D'Amours*, 1957, 129 A.2d 859, 100 N.H. 461, 64 A.L.R.2d 260.

#### 2. Parties eligible to invest

Only a bank acting as fiduciary or co-fiduciary is eligible to invest trust funds in common trust fund maintained by bank.

129 A.2d 859, 100 N.H. 461, 64 A.L.R.2d 260.

#### 4. Amount of investment

RSA 564:18, providing that 50 per cent of a trust estate may be invested in stocks, bonds and other securities in which a prudent man would invest if other 50 per cent is invested as provided therein does not limit to 50 per cent the assets of a trust which may be invested in a common trust fund. *Mechanicks National Bank of Concord v. D'Amours*, 1957, 129 A.2d 859, 100 N.H. 461, 64 A.L.R.2d 260.

#### 5. Plan of common trust fund

Common trust fund plan, under which trusts were to be administered in conformity with laws of state and nation and federal reserve regulations, trust investment committee was to review investments, trustee was to act in good faith and to be governed by rule of prudence, and was to refrain from investing assets of testamentary trust contrary to provisions of will and investment in securities of any one corporation was not to exceed ten per cent of total value of common fund, was in accordance with RSA 391:1 et seq., and federal reserve regulations. *Mechanicks Nat. Bank of Concord v. D'Amours*, 1957, 129 A.2d 859, 100 N.H. 461, 64 A.L.R.2d 260.

Any trust which does not expressly or impliedly prohibit investment in common trust funds may be invested by a bank qualified to act as fiduciary in its common trust fund when that fund is operated under a plan subject to 26 U.S.C.A. (I.R.C.

1954) § 584 and RSA 391:1 et seq., governing common trust funds and investments made by trustees. *Mechanicks Nat. Bank of Concord v. D'Amours*, 1957, 129 A.2d 859, 100 N.H. 461, 64 A.L.R.2d 260.

#### 6. Ownership of assets

Party who was sole distributee or appointee of trust estate could not claim virtual ownership over trust assets which consisted of units in trustee bank's common trust fund on or prior to date of withdrawal of units from common trust fund where she could not own units of common trust fund and bank was unaware of provisions of life beneficiary's will. *Leith v. Mercantile Trust Co. Nat. Ass'n.*, Mo.App.1967, 423 S.W.2d 75.

#### 7. Assignment of transfer of fund

Units of bank's common trust fund could not be assigned or transferred to party who claimed to be sole distributee or appointee of trust estate holding such units. *Leith v. Mercantile Trust Co. Nat. Ass'n.*, Mo.App. 1967, 423 S.W.2d 75.

Where assets of trust consisted of units of trustee bank's common trust fund which had many types of investments and numerous units, trustee did not abuse its discretion in failing to make distribution in kind to plaintiff who claimed to be sole distributee or appointee of trust estate notwithstanding provision of common trust fund which allowed distribution in kind. *Leith v. Mercantile Trust Co. Nat. Ass'n.*, Mo.App. 1967, 423 S.W.2d 75.

## § 2. Court Accountings

Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such funds; but it may, by application to the [ ] court, secure approval of such an accounting on such conditions as the court may establish.

When an accounting of a common trust fund is presented to a court for approval, the court shall assign a time and place for hearing and order notice thereof by: (1) publication once a week for [three] weeks, the first publication to be not less than [twenty] days prior to the date of hearing, of a notice in a newspaper having a circulation in the [county] in which the bank or trust company or branch thereof operating the common trust fund is located, and (2) mailing not less than [fourteen] days prior to the date of the hearing a copy of the notice to all

beneficiaries of the trusts participating in the common trust fund whose names are known to the bank or trust company from the records kept by it in the regular course of business in the administration of said trusts, directed to them at the addresses shown by such records, and (3) such further notice if any as the court may order.

As Amended Sept. 1952.

#### Amendments

The amendment of 1952 added the second paragraph.

In approximately twenty states there are common trust fund provisions containing the substance of the Uniform Act but in a

different form. This amendment is recommended to the corresponding sections of those Acts, and in the states where there is no provision for court accountings, it is recommended that the whole of this section, as amended, be used.

#### Action in Adopting Jurisdictions

##### Variations from Official Text:

**Alaska.** In second paragraph, substitutes "judicial district" for "[county]" in clause (1), and "participating trusts" for "said trusts" in clause (2).

**Arizona.** In the second paragraph, clause (1), substitutes "home office of the bank or trust company" for "bank or trust company or branch thereof".

**Arkansas.** Section reads: "Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such funds; but it may, by application to the Chancery court of the county in which it has its place of business, secure approval of such an accounting on such conditions as the court may establish."

**California.** Omits this section.

**District of Columbia.** Omits second paragraph.

**Hawaii.** Section reads:

"A trust company maintaining any common trust fund shall be required to render only such accounts with respect thereto as may be required for the participating accounts."

**Idaho.** Omits this section.

**Iowa.** Second paragraph reads: "When an accounting of a common trust fund is presented to a court for approval, the court shall assign a time and place for hearing, and order notice thereof by: (1) publication once each week for three consecutive weeks

in a newspaper of general circulation, published in the county in which the bank or trust company operating the common trust fund is located, the first publication to be not less than twenty days prior to the date of hearing, and (2) sending by ordinary mail not less than fourteen days prior to the date of hearing, a copy of the notice prescribed to all beneficiaries of the trust participating in the common trust fund whose names are known to the bank or trust company from the records kept by it in the regular course of business in the administration of said trusts, directed to them at the addresses shown by such records, and (3) such further notice, if any, as the court may order.

**Kansas.** Section reads: "Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such funds."

**Maine.** Section reads: "Unless ordered by decree of the Superior Court, the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such funds; but it, as accountant, may by petition to the Superior Court or the probate court, in the county where the accountant has its principal place of business, secure approval of such accounting on such conditions as the court may establish. Whenever a petition for the allowance of such an account is presented, the court having jurisdiction thereof shall assign a time and place for hearing and shall cause public notice thereof to be given, meaning thereby notice pub-

lished 3 weeks successively in a newspaper published in the county whose court has jurisdiction. In addition thereto said court shall, except to such extent as the several instruments creating the trusts participating in such common trust fund provide otherwise, order personal notice upon all known beneficiaries of the participating trust estates who have a place of residence known to the accountant. Personal notice to known beneficiaries having a place of residence known to the accountant shall denote service by a written notice deposited in the mails addressed to each such known beneficiary at such known place of residence at least 14 days before the time of hearing, or by a written notice either in hand or left at such known place of residence 14 days at least before the time of hearing. The method of service and the form of such notice shall be as the court shall order. 'Place of residence known to the accountant' as used in this section shall include only places of residence actually known to the accountant, and shall not include residences which could be discovered upon investigation but which do not in the due course of business come to the actual knowledge of the accountant. The allowance of such an account shall be conclusive as to all matters shown therein upon all persons then or thereafter interested in the funds invested in said common trust funds."

**Massachusetts.** Section reads: "An account of the administration of each common trust fund shall be filed annually in the registry of probate in which the declaration of trust has been filed and application for its allowance shall be made in accordance with [M.G.L.A. c. 206 § 24]. The allowance of such an account shall be conclusive as to all matters shown therein upon all persons then or thereafter interested in the funds invested in said common trust fund."

**Mississippi.** Omits second paragraph.

**Missouri.** Omits this section.

**Nebraska.** Omits this section.

**Nevada.** Omits second paragraph.

**New Hampshire.** Specifies that application be presented to the probate court in the county in which the bank or trust company operating the trust fund is located if court approval of accounting is desired.

**Oklahoma.** The substance of sections 1 and 2 of the Official Text is contained in 60 Okl.St. Ann. § 162 in the Oklahoma Act.

See text of said section in variation note in section 1, supra.

**Oregon.** The substance of sections 1 and 2 of the Official Text are contained in ORS § 709.170 of the Oregon act. See text of said section in variation note in Section 1, supra.

**South Dakota.** Omits this section, but adds a section 55-6-3 which refers to the general provisions regarding administration of trust estates. For text of said section, see general statutory note, supra.

**Texas.** Omits this section.

**Utah.** The Utah provision corresponding to section 2 of the Uniform Act [U.C.A. 1954, 7-5-13(2)] reads as follows: "Unless ordered to do so by a court of competent jurisdiction a trust company operating common trust funds is not required to render a court accounting with regard to those funds; but it may, by application to the district court, secure approval of such an accounting on such conditions as the court may establish."

**West Virginia.** Section reads: "Unless ordered by a court of competent jurisdiction, the bank or trust company operating such common trust fund, as provided for in section six [§ 44-6-6] of this article, shall not be required to render an accounting with regard to such fund, before any commissioner of accounts, but it may, by application to the circuit court of the county in which is located the principal place of business of said bank or trust company, secure the approval of an accounting in such condition as the court may fix: Provided, however, that nothing herein shall be interpreted as relieving any fiduciary acquiring, holding or disposing of an interest in any common trust fund from making an accounting as required by law with respect of such interest."

**Wisconsin.** Section reads: "Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such funds; but it may, by application to the circuit court of the county in which it has its principal office, secure approval of such an accounting on such conditions as the court may establish. When an accounting of a common trust fund is presented to a court for approval, the court shall assign a time and place for hearing and order notice thereof by:

## § 2

## COMMON TRUST FUND ACT

"(a) Publication of a class 3 notice, under ch. 985, in the county in which the bank or trust company or branch thereof operating the common trust fund is located; and

"(b) Mailing not less than 14 days prior to the date of the hearing a copy of the notice to all beneficiaries of the trusts participating in the common trust fund whose

names are known to the bank or trust company from the records kept by it in the regular course of business in the administration of said trusts, directed to them at the addresses shown by such records; and

"(c) Such further notice if any as the court may order."

Wyoming. Omits second paragraph.

### Library References

Trusts ⇐289, 291, 326.  
C.J.S. Trusts §§ 377 to 379, 413.

## § 3. Uniformity of Interpretation

This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

### Library References

Banks and Banking ⇐311.  
Statutes ⇐226.  
Trusts ⇐217.3(3).

C.J.S. Banks and Banking § 1045.  
C.J.S. Statutes § 371 et seq.  
C.J.S. Trusts § 326.

## § 4. Short Title

This Act may be cited as the Uniform Common Trust Fund Act.

### Library References

Statutes ⇐64(2).  
C.J.S. Statutes § 96 et seq.

## § 5. Severability

If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

### Library References

Statutes ⇐64(2).  
C.J.S. Statutes § 96 et seq.

## § 6. Repeal

All acts or parts of acts which are inconsistent with the provisions of this Act are hereby repealed.

Library References

Banks and Banking ⇐311.  
Statutes ⇐157.  
Trusts ⇐217.3(3).

C.J.S. Banks and Banking § 1045.  
C.J.S. Statutes § 286.  
C.J.S. Trusts § 326.

§ 7. Time of Taking Effect

This Act shall take effect ( ) and shall apply to fiduciary relationships then in existence or thereafter established.

Library References

Statutes ⇐250.  
C.J.S. Statutes § 400.

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May 11, 1990

Mr. Willis Kirkpatrick, Director  
Division of Banking,  
Securities & Corporations  
Department of Commerce and  
Economic Development  
State of Alaska  
Pouch D  
9th Floor, State Office Building  
Juneau, Alaska

RECEIVED  
MAY 15 1990  
Key Trust Company  
of Alaska

Re: Key Trust Company of Alaska Participation  
In Affiliates' Common Trust Funds

Dear Mr. Kirkpatrick:

This is to request that the authority granted by Alaska Banking Code's "Wild Card" statute, Alaska Statute 06.01.020, be invoked and regulations issued by the Department confirming the authority of Alaska chartered banks and trust companies to invest their fiduciary funds in the common trust funds established by affiliates both within and outside of Alaska. The purpose of this request is to equalize, promote and maintain the competitive equality of state-chartered banks and trust companies with other financial institutions conducting business in Alaska.

As you know, Key Trust Company of Alaska ("Key Trust Alaska"), is an Alaska trust company chartered under Alaska Statutes 06.25. It is an "affiliate" of Key Trust Company of the Northwest ("Key Trust Northwest"), a trust company chartered under the laws of the State of Washington. These trust companies are direct or indirect subsidiaries of KeyCorp, a registered bank holding company and ultimate parent of Key Bank of Alaska. The latter, of course, is the immediate parent of Key Trust Alaska.

Key Trust Northwest has established and manages common trust funds for the purpose of furnishing investment vehicles to itself as a fiduciary of trust funds primarily belonging to employee benefit trusts, usually exempt from federal income tax, and personal trusts. Qualifying common trust funds such as these are themselves authorized and exempt from federal income taxation under Internal Revenue Code §584 provided the common funds comply with Comptroller of the Currency Regulations §9.18. That regulation authorizes national banks to establish such funds. Generally speaking, these common trust funds are also provided exemptions from the federal securities laws. Key Trust Northwest desires to make its common trust funds available for investment

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by affiliates of the affiliate's fiduciary funds. The Comptroller of the Currency has stated that absent state law authorization, investment of fiduciary funds in another bank's common trust funds might be considered an unauthorized delegation of investment responsibility.

Authority to commingle trust funds in contravention of the common law prohibition against commingling was the purpose of the Uniform Common Trust Fund Act ("Uniform Act"), adopted in the large majority of the States. In Alaska it is Alaska Statute 06.35.010. Under Washington's version of the Uniform Act, Key Trust Northwest may establish and operate common trust funds not only for investment of its own fiduciary funds, but also for investment by affiliates of their fiduciary funds. (Investments by affiliates as fiduciaries is also contemplated and permitted by the Internal Revenue Code and federal securities laws.)

While the Alaska Statute authorizes Key Trust Alaska to establish and to invest in common trust funds "it establishes", the literal wording of the statute does not appear to authorize an Alaska trust company to invest its fiduciary funds in a common trust fund established by an affiliate either within or outside of Alaska. The Uniform Act version in most states permits investments by affiliates. The purpose of this apparently was to make state law consistent with and allow smaller affiliates to avail themselves of the federal tax benefits. The investment vehicle of common trust funds as well as affiliate investment in common trust funds has become quite common throughout the United States.

I am advised that, among others, Security Pacific Bank, First Interstate Bank, First Interstate Bank of Oregon, Bank of California, U.S. National Bank of Oregon, Seattle First National Bank, Columbia Trust Company of Portland, Oregon and Trust Company of the West of Los Angeles, California either have trust customers or trust or banking facilities in Alaska and directly compete with Key Trust Alaska by making available the use of their common trust funds as an investment vehicle for their Alaska trust customer's fiduciary funds. Common trust funds, if of a sufficient size, offer a cost effective and reduced risk vehicle for the safe investment of fiduciary funds with the opportunity for enhanced investment returns to the trust customer. The availability of common trust funds in the management of trust customer's funds is a significant part of the competitive service.

Since national banks and subsidiary banks of bank holding companies are permitted to invest their fiduciary funds in

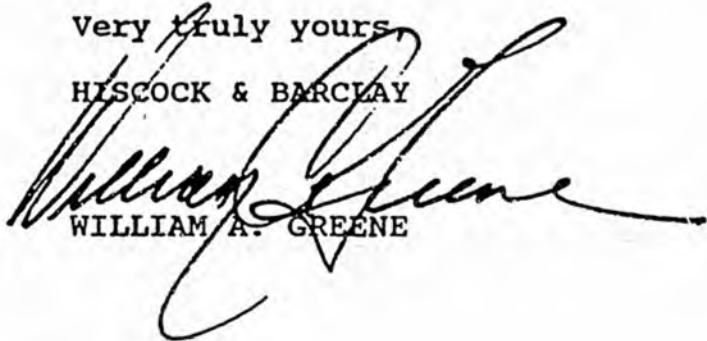
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May 10, 1990  
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affiliates' common trust funds, regulations issued under Alaska Statute 06.01.020 would equalize and maintain the competitive equality of Alaska's state-chartered institutions with federally chartered financial institutions. We appreciate your consideration of this request and would be pleased to provide whatever additional information and support you may desire. Should you have any questions, please do not hesitate to contact me. Copies of the Alaska statute, the Comptroller's Regulation and the Washington statute are enclosed for your convenience.

Very truly yours,

HISCOCK & BARCLAY



WILLIAM A. GREENE

WAG:jj

cc: Robert Nokes  
Vern Sayles  
Carter Chase  
John Mancuso



# Resource Development Council

for Alaska, Inc.

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035

Position Paper - HB 467/SB 398 Phone 907/276-0700 Fax 276-3887

April 27, 1992

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HB 467/SB 398 would create special recovery rights under Alaska law for "cultural" damages in the volatile area of subsistence. The damages the bill would recognize are not for tangible losses, but for alleged cultural, psychological or emotional damage to the subsistence lifestyle.

RDC recognizes the importance of preserving the cultural heritage of Alaska Natives and their subsistence lifestyle. Subsistence remains an absolute necessity for many rural Alaskan residents. However, RDC is puzzled by the necessity to pass this particular piece of legislation given the March 20, 1992 Attorney General's letter that states this bill "does not expand existing law." RDC is an organization that opposes unnecessary overregulation by governmental bodies, and HB 567 goes one step further - it is an example of unnecessary legislating.

There are some other ramifications of the bill that cannot be ignored. As currently written, it creates a risk of "cultural damages" lawsuits over impacts of business activity in Alaska that result in the release of hazardous substances. It could also potentially open the door to new claims by non-development groups for damages beyond any physical injury, property damage or economic loss.

As outlined by the Department of Law, existing statute provides for the recovery of "use values" for participants in a subsistence economy. According to that opinion, not only are replacement costs of the subsistence catch considered, but may include a "premium" based on the value of the subsistence activity to the user. Given the safeguards already in statute, HB 467 appears to be an attempt to further shore up legal claims now in the works - an exercise that RDC views as an inappropriate waste of legislative time. The council opposes HB 467/SB 398.

rates for such furnishing or sale as subject to the jurisdiction of a public service or public utility commission or other similar body of the District of Columbia or of any State.

"(D) A corporation engaged in the furnishing or sale of telephone or telegraph service, if the rates for such furnishing or sale meet the requirements of subparagraph (A).

"(E) A corporation engaged in the furnishing or sale of transportation as a common carrier by air, subject to the jurisdiction of the Civil Aeronautics Board.

"(F) A corporation engaged in the furnishing or sale of transportation by common carrier by water, subject to the jurisdiction of the Interstate Commerce Commission under part III of the Interstate Commerce Act, or subject to the jurisdiction of the Federal Maritime Board under the Intercoastal Shipping Act, 1933.

"(2) Limitation.—For purposes of subsection (b), the term 'regulated public utility' does not (except as provided in paragraph (3)) include a corporation described in paragraph (1) unless 80 percent or more of its gross income (computed without regard to dividends and capital gains and losses) for the taxable year is derived from sources described in paragraph (1). If the taxpayer establishes to the satisfaction of the Secretary or his delegate that—

"(A) its revenue from regulated rates described in paragraph (1)(A) or (D) and its revenue derived from unregulated rates are derived from its operation of a single interconnected and coordinated system or from the operation of more than one such system, and

"(B) the unregulated rates have been and are substantially as favorable to users and consumers as are the regulated rates, such revenue from such unregulated rates shall be considered, for purposes of this paragraph, as income derived from sources described in paragraph (1)(A) or (D).

"(3) Certain railroad corporations.—

"(A) Lessor corporation.—For purposes of subsection (b), the term 'regulated public utility' shall also include a railroad corporation subject to part I of the Interstate Commerce Act, if (i) substantially all of its railroad properties have been leased to another such railroad corporation or corporations by an agreement or agreements entered into prior to January 1, 1934, (ii) each lease is for a term of more than 20 years, and (iii) at least 80 percent or more of its gross income (computed without regard to dividends and capital gains and losses) for the taxable year is derived from such leases and from sources described in paragraph (1). For purposes of the preceding sentence, an agreement for lease of railroad properties entered into prior to January 1, 1934, shall be considered to be a lease including such term as the total number of years of such agreement may, unless sooner terminated, be renewed or continued under the terms of the agreement, and any such renewal or continuance under such agreement shall be considered part of the lease entered into prior to January 1, 1934.

"(B) Common parent corporation.—For purposes of subsection (b), the term 'regulated public utility' also includes a common parent corporation which is a common carrier by railroad subject to part I of the Interstate Commerce Act if at least 80 percent of its gross income (computed without regard to capital gains or losses) is derived directly or indirectly from sources described in paragraph (1). For purposes of the preceding sentence, dividends and interest, and income from leases described in subparagraph (A), received from a regulated public utility shall be considered as derived from sources described in paragraph (1) if the regulated public utility is a member of an affiliated group (as defined in section 1504) which includes the common parent corporation.

"(d) Special rule for application of foreign tax credit when overall limitation applies.

"[(1) and (2) same as current (b)(1) and (2)].

"(3) Special rules.—

"(A) For purposes of paragraph (2), a corporation is a regulated public utility only if it is a regulated public utility within the meaning of subparagraph (A) (other than clauses (i) and (ii) thereof) or (D) of subsection (c)(1). For purposes of the preceding sentence, subsection (c)(2) shall be applied as if subsection (c)(1) were limited to subparagraphs (A)(i) and (D) thereof.

"(B) For purposes of paragraph (2), the foreign countries referred to in this subparagraph include only any country from which any public utility referred to in the first sentence of paragraph (2) derives the principal part of its income.

"(C) For purposes of paragraph (1)(A), the amount of tax which would be computed with respect to the portion of the consolidated taxable income attributable to any corporation or corporations shall be determined without regard to the increase of 2 percent provided in subsection (a)."

In '68, P.L. 86-780 had added subsec. (d), for tax yrs. begin. after '60.

## Sec. 1504. Definitions.

### (a) Affiliated group defined

For purposes of this subtitle—

(1) In general. The term "affiliated group" means—

(A) 1 or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation, but only if—

(B)(i) the common parent owns directly stock meeting the requirements of paragraph (2) in at least 1 of the other includible corporations, and

(ii) stock meeting the requirements of paragraph (2) in each of the includible corporations (except the common parent) is owned directly by 1 or more of the other includible corporations.

(2) 80-percent voting and value test. The ownership of stock of any corporation meets the requirements of this paragraph if it—

(A) possesses at least 80 percent of the total voting power of the stock of such corporation, and

(B) has a value equal to at least 80 percent of the total value of the stock of such corporation.

(3) 5 years must elapse before reconsolidation.

(A) In general. If—

(i) a corporation is included (or required to be included) in a consolidated return filed by an affiliated group for a taxable year which includes any period after December 31, 1984, and

(ii) such corporation ceases to be a member of such group in a taxable year beginning after December 31, 1984,

with respect to periods after such cessation, such corporation (and any successor of such corporation) may not be included in any consolidated return filed by the affiliated group (or by another affiliated group with the same common parent or a successor of such common parent) before the 61st month beginning after its first taxable year in which it ceased to be a member of such affiliated group.

(B) Secretary may waive application of subparagraph (A). The Secretary may waive the application of subparagraph (A) to any corporation for any period subject to such conditions as the Secretary may prescribe.

(4) Stock not to include certain preferred stock. For purposes of this subsection, the term "stock" does not include any stock which—

(A) is not entitled to vote,

(B) is limited and preferred as to dividends and does not participate in corporate growth to any significant extent,

(C) has redemption and liquidation rights which do not exceed the issue price of such stock (except for a reasonable redemption or liquidation premium), and

(D) is not convertible into another class of stock.

(5) Regulations. The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection, including (but not limited to) regulations—

(A) which treat warrants, obligations convertible into stock, and other similar interests as stock, and stock as not stock,

(B) which treat options to acquire or sell stock as having been exercised,

(C) which provide that the requirements of paragraph (2)(B) shall be treated as met if the affiliated group, in reliance on a good faith determination of value, treated such requirements as met.

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## USCS Code Sec. 1504

(D) which disregard an inadvertent ceasing to meet the requirements of paragraph (2)(B) by reason of changes in relative values of different classes of stock,

(E) which provide that transfers of stock within the group shall not be taken into account in determining whether a corporation ceases to be a member of an affiliated group, and

(F) which disregard changes in voting power to the extent such changes are disproportionate to related changes in value.

**(b) Definition of "includible corporation."**

As used in this chapter, the term "includible corporation" means any corporation except—

(1) Corporations exempt from taxation under section 501.

(2) Insurance companies subject to taxation under section 801.

(3) Foreign corporations.

(4) Corporations with respect to which an election under section 936 (relating to possession tax credit) is in effect for the taxable year.

(6) Regulated investment companies and real estate investment trusts subject to tax under subchapter M of chapter 1.

(7) A DISC (as defined in section 992(a)(1)).

**(c) Includible insurance companies.**

Notwithstanding the provisions of paragraph (2) of subsection (b)—

(1) Two or more domestic insurance companies each of which is subject to tax under section 801 shall be treated as includible corporations for purposes of applying subsection (a) to such insurance companies alone.

(2) (A) If an affiliated group (determined without regard to subsection (b)(2)) includes one or more domestic insurance companies taxed under section 801, the common parent of such group may elect (pursuant to regulations prescribed by the Secretary) to treat all such companies as includible corporations for purposes of applying subsection (a) except that no such company shall be so treated until it has been a member of the affiliated group for the 5 taxable years immediately preceding the taxable year for which the consolidated return is filed.

(B) If an election under this paragraph is in effect for a taxable year—

(i) section 243(b)(3) and the exception provided under 243(b)(2) with respect to subsections (b)(2) and (c) of this section;

(ii) section 542(b)(5), and

(iii) subsection (a)(4) and (b)(2)(D) of section 1563, and the reference to section 1563(b)(2)(D) contained in section 1563(b)(3)(C),

shall not be effective for such taxable year.

**(d) Subsidiary formed to comply with foreign law.**

In the case of a domestic corporation owning or controlling, directly or indirectly, 100 percent of the capital stock (exclusive of directors' qualifying shares) of a corporation organized under the laws of a contiguous foreign country and maintained solely for the purpose of complying with the laws of such country as to title and operation of property, such foreign corporation may, at the option of the domestic corporation, be treated for the purpose of this subtitle as a domestic corporation.

**(e) Includible tax-exempt organizations.**

Despite the provisions of paragraph (1) of subsection

(b), two or more organizations exempt from taxation under section 501, one or more of which is described in section 501(c)(2) and the others of which derive income from such 501(c)(2) organizations, shall be considered as includible corporations for the purpose of the application of subsection (a) to such organizations alone.

**(f) Special rule for certain amounts derived from a corporation previously treated as a DISC.**

In determining the consolidated taxable income of an affiliated group for any taxable year beginning after December 31, 1984, a corporation which had been a DISC and which would otherwise be a member of such group shall not be treated as such a member with respect to—

(1) any distribution (or deemed distribution) of accumulated DISC income which was not treated as previously taxed income under section 805(b)(2)(A) of the Tax Reform Act of 1984, and

(2) any amount treated as received under section 805(b)(3) of such Act.

In '90, P.L. 101-508, Sec. 11814(b)(1), substituted "section 243(b)(3)" for "section 243(b)(6)" in clause (c)(2)(B) (i) . . . Sec. 11814(b)(2), substituted "243(b)(2)" for "section 243(b)(5)" in clause (c)(2)(B)(i), effective for tax yrs. begin. after 12/31/90 except as provided in Sec. 11814(c)(2) of this Act, which reads as follows:

"(2) Treatment of old elections. For purposes of section 243(b)(3) of the Internal Revenue Code of 1986 (as amended by subsection (a)), any reference to an election under such section shall be treated as including a reference to an election under section 243(b) of such Code (as in effect on the day before the date of the enactment of this Act)."

In '89, P.L. 101-239, Sec. 7815(d), amended Sec. 5021(e) of P.L. 100-647, [reproduced below] by substituting "no provision in any law enacted after the date of the enactment of this Act [11/10/88]" for "no provision in any law (whether enacted before, on, or after the date of enactment of this Act)" see below.

In '88, P. L. 100-647, Sec. 1018(d)(10)(A) amended para. (b)(7) . . . Sec. 1018(d)(10)(B) added new subsec. (f), effective for tax yrs. begin. after 12/31/84.

Prior to amendment para. (b)(7) read as follows:

"(7) A DISC (as defined in section 992(a)(1)), or any other corporation which has accumulated DISC income, which is derived after December 31, 1984."

—P.L. 100-647, Secs. 5021(a)-(e), [as amended by P.L. 101-239, Sec. 7815(b), see above] of this Act provide:

**"SEC. 5021. REPEAL OF RULES PERMITTING LOSS TRANSFERS BY ALASKA NATIVE CORPORATIONS.**

"(A) *General rule.* Nothing in section 60(b)(5) of the Tax Reform Act of 1984 (as amended by section 1804(e)(4) of the Tax Reform Act of 1986)—

"(1) shall allow any loss (or credit) of any corporation which arises after April 26, 1988, to be used to offset the income (or tax) of another corporation if such use would not be allowable without regard to such section 60(b)(5) as so amended, or

"(2) shall allow any loss (or credit) of any corporation which arises on or before such date to be used to offset disqualified income (or tax attributable to such income) of another corporation if such use would not be allowable without regard to such section 60(b)(5) as so amended.

"(b) *Exception for existing contracts.*—

"(1) In general. Subsection (a) shall not apply to any loss (or credit) of any corporation if—

"(A) such corporation was in existence on April 26, 1988, and

"(B) such loss (or credit) is used to offset income assigned (or attributable to property contributed) pursuant to a binding contract entered into before July 26, 1988.

"(2) *\$40,000,000 limitation.* The aggregate amount of losses (and the deduction equivalent of credits as determined in the same manner as under section 469(j)(5) of the 1986 Code) to which paragraph (1) applies with respect to any corporation shall not exceed \$40,000,000. For purposes of this paragraph, a Native Corporation and all other corporations all of the stock of which is owned directly by such corporation shall be treated as 1 corporation.

"(3) *Special rule for corporations under title 11.* In the case of a corporation which on April 26, 1988, was under the

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jurisdiction of a Federal district court under title 11 of the United States Code—

"(A) paragraph (1)(B) shall be applied by substituting the date 1 year after the date of the enactment of this Act for 'July 26, 1988'.

"(B) paragraph (1) shall not apply to any loss or credit which arises on or after the date 1 year after the date of the enactment of this Act, and

"(C) paragraph (2) shall be applied by substituting '\$99,000,000' for '\$40,000,000'.

"(e) *Special administrative rules.*—

"(1) Notice to native corporations of proposed tax adjustments. Notwithstanding section 6103 of the 1986 Code, the Secretary of the Treasury or his delegate shall notify a Native Corporation or its designated representative of any proposed adjustment—

"(A) of the tax liability of a taxpayer which has contracted with the Native Corporation (or other corporation all of the stock of which is owned directly by the Native Corporation) for the use of losses of such Native Corporation (or such other corporation), and

"(B) which is attributable to an asserted overstatement of losses by, or misassignment of income (or income attributable to property contributed) to, an affiliated group of which the Native Corporation (or such other corporation) is a member. Such notice shall only include information with respect to the transaction between the taxpayer and the Native Corporation.

"(2) *Rights of Native Corporation.*—

"(A) In General. If a Native Corporation receives a notice under paragraph (1), the Native Corporation shall have the right to—

"(i) submit to the Secretary of the Treasury or his delegate a written statement regarding the proposed adjustment, and

"(ii) meet with the Secretary of the Treasury or his delegate with respect to such proposed adjustment.

The Secretary of the Treasury or his delegate may discuss such proposed adjustment with the Native Corporation or its designated representative.

"(B) Extension of statute of limitations. Subparagraph (A) shall not apply if the Secretary of the Treasury or his delegate determines that an extension of the statute of limitation is necessary to permit the participation described in subparagraph (A) and the taxpayer and the Secretary or his delegate have not agreed to such extension.

"(3) *Judicial proceedings.* In the case of any proceeding in a Federal court or the United States Tax Court involving a proposed adjustment under paragraph (1), the Native Corporation, subject to the rules of such court, may file an amicus brief concerning such adjustment.

"(4) *Failures.* For purposes of the 1986 Code, any failure by the Secretary of the Treasury or his delegate to comply with the provisions of this subsection shall not affect the validity of the determination of the Internal Revenue Service of any adjustment of tax liability of any taxpayer described in paragraph (1).

"(d) *Disqualified income defined.* For purposes of subsection (a), the term 'disqualified income' means any income assigned (or attributable to property contributed) after April 26, 1988, by a person who is not a Native Corporation or a corporation all the stock of which is owned directly by a Native Corporation.

"(e) *Basis determination.* For purposes of determining basis for Federal tax purposes, no provision in any law enacted after the date of enactment of this Act [11/10/88] shall affect the date on which the transfer to the Native Corporation is made. The preceding sentence shall apply to all taxable years whether beginning before, on, or after such date of enactment."

In '86, P.L. 99-514, Sec. 1024(e)(15), substituted "section 801" for "section 801 or 821" in para. (b)(2) . . . Sec. 1024(e)(16), substituted "section 801" for "section 801 or 821" in subpara. (c)(2)(A), effective for tax yrs. begin. after 12/31/86.

—P.L. 99-514, Sec. 1804(e)(1), amended subpara. (a)(4)(C), effective for tax yrs. begin. after 12/31/84. Prior to amendment, subpara. (a)(4)(C) read as follows:

"(C) has redemption and liquidation rights which do not exceed the paid-in capital or par value represented by such stock (except for a reasonable redemption premium in excess of such paid-in capital or par value), and"

—P.L. 99-514, Sec. 1804(e)(2)-(5), amended Sec. 60(b)(2)-(5) of P.L. 98-369 [reproduced below], special rules and exceptions to the effective date for changes made by Sec. 60(a) of P.L. 98-369, by adding the last sentence to Sec. 60(b)(2), by amending Sect. 60(b)(3) and (5), by adding Sects. 60(b)(6)-(9), and by adding the last sentence to Sec. 60(b)(4), see below. Prior to amendment, Sec. 60(b)(3) and (5) of P.L. 98-369 read as follows:

"(3) Special rule not to apply to sell-downs after June 22, 1984.—If—

"(A) the requirements of subsection (b)(2) are satisfied with respect to a corporation,

"(B) more than a de minimis amount of the stock of such corporation is sold or exchanged (including in a redemption), or issued (other than in the ordinary course of business) after June 22, 1984, and

"(C) the requirements of the amendment made by subsection (a) are not satisfied after such sale, exchange, or issuance, then the amendments made by subsection (a) shall apply for purposes of determining whether such corporation continues to be a member of such group."

"(5) *Native corporations.*—The amendments made by subsection (a) shall not apply to any Native Corporation established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) during any taxable year beginning before 1992 or any part thereof in which such Corporation is subject to the provisions of section 7(b)(1) of such Act (43 U.S.C. 1605(b)(1)).

—P.L. 99-514, Sec. 1804(e)(10), amended para. (b)(7), effective for tax yrs. begin. after 12/31/87. Prior to amendment, para. (b)(7) read as follows:

"(7) A DISC or former DISC (as defined in section 992(a))."

—P.L. 99-514, Sec. 1899A(35), substituted "subsection (b)(2) includes" for "subsection (b)(2) includes" in subpara. (c)(2)(A), effective 10/22/86.

In '84, P.L. 98-369, Sec. 60(a), amended subsec. (a), effective for tax yrs. begin. after 12/31/84. Sects. 60(b)(2)-(9) [as amended by Sec. 1804(e)(2)-(5) of P.L. 99-514, see above] of this Act provide the following special rules and exceptions:

"(2) *Special rule for corporations, affiliated on June 22, 1984.*

—In the case of a corporation which on June 22, 1984, is a member of an affiliated group which files a consolidated return for such corporation's taxable year which includes June 22, 1984, for purposes of determining whether such corporation continues to be a member of such group for taxable years beginning before January 1, 1988, the amendment made by subsection (a) shall not apply. The preceding sentence shall cease to apply as of the first day after June 22, 1984, on which such corporation does not qualify as a member of such group under section 1504(a) of the Internal Revenue Code of 1954 (as in effect on the day before the date of the enactment of this Act).

"(3) *Special rule not to apply to certain sell-downs after June 22, 1984.*—If—

"(A) the requirements of paragraph (2) are satisfied with respect to a corporation,

"(B) more than a de minimis amount of the stock of such corporation—

"(i) is sold or exchanged (including in a redemption), or

"(ii) is issued,

after June 22, 1984 (other than in the ordinary course of business), and

"(C) the requirements of the amendment made by subsection (a) are not satisfied after such sale, exchange, or issuance;

then the amendment made by subsection (a) shall apply for purposes of determining whether such corporation continues to be a member of the group. The preceding sentence shall not apply to any transaction if such transaction does not reduce the percentage of the fair market value of the stock of the corporation referred to in the preceding sentence held by members of the group determined without regard to this paragraph.

"(4) *Exception for certain sell-downs.*—Subsection (b)(2) (and not subsection (b)(3)) will apply to a corporation if such corporation issues or sells stock after June 22, 1984, pursuant to a registration statement filed with the Securities and Exchange Commission on or before June 22, 1984, but only if the requirements of the amendment made by subsection (a) (substituting 'more than 50 percent' for 'at least 80 percent' in paragraph (2)) . . . of section 1504(a) of the Internal Revenue Code of 1954 are satisfied immediately after such issuance or sale and at all times thereafter until the first day of the first taxable year beginning after December 31, 1987. For purposes of the preceding sentence, if there is a letter of intent between a corporation and a securities underwriter entered into on or before June 22, 1984, and the subsequent issuance or sale is effected pursuant to a registration statement filed with the Securities and Exchange Commission, such stock shall be treated as issued or sold pursuant to a registration statement filed with the Securities and Exchange Commission on or before June 22, 1984.

"(5) *Native corporations.*—

"(A) In the case of a Native Corporation established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), or a corporation all of whose stock is owned directly by such a corporation, during any taxable year (beginning after the effective date of these amendments and before 1992), or any part thereof, in which the Native Corporation is subject to the provisions of section 7(b)(1) of such Act (43 U.S.C. 1605(b)(1))—

"(A) the requirements of subsection (b)(2) are satisfied with respect to a corporation,

"(B) more than a de minimis amount of the stock of such corporation is sold or exchanged (including in a redemption), or issued (other than in the ordinary course of business) after June 22, 1984, and

"(C) the requirements of the amendment made by subsection (a) are not satisfied after such sale, exchange, or issuance, then the amendments made by subsection (a) shall apply for purposes of determining whether such corporation continues to be a member of such group."

Consolidated returns

USCS Code Sec

"(i) the amendment made by subsection (a) shall not apply, and

"(ii) the requirements for affiliation under section 1504(a) of the Internal Revenue Code of 1986 before the amendment made by subsection (a) shall be applied solely according to the provisions expressly contained therein, without regard to escrow arrangements, redemption rights, or similar provisions.

"(B) Except as provided in subparagraph (C), during the period described in subparagraph (A), no provision of the Internal Revenue Code of 1986 (including sections 269 and 482) or principle of law shall apply to deny the benefit or use of losses incurred or credits earned by a corporation described in subparagraph (A) to the affiliated group of which the Native Corporation is the common parent.

"(C) Losses incurred or credits earned by a corporation described in subparagraph (A) shall be subject to the general consolidated return regulations, including the provisions relating to separate return limitation years, and to sections 382 and 383 of the Internal Revenue Code of 1986.

"(D) Losses incurred and credits earned by a corporation which is affiliated with a corporation described in subparagraph (A) shall be treated as having been incurred or earned in a separate return limitation year, unless the corporation incurring the losses or earning the credits satisfies the affiliation requirements of section 1504(a) without application of subparagraph (A).

"(6) Treatment of certain corporations affiliated on June 22, 1984.—In the case of an affiliated group which—

"(A) has as its common parent a Minnesota corporation incorporated on April 23, 1940, and

"(B) has a member which is a New York corporation incorporated on November 13, 1969,

for purposes of determining whether such New York corporation continues to be a member of such group, paragraph (2) shall be applied by substituting for "January 1, 1983," the earlier of January 1, 1994, or the date on which the voting power of the preferred stock in such New York corporation terminates.

"(7) Election to have amendments apply for years beginning after 1983.—If the common parent of any group makes an election under this paragraph, notwithstanding any other provision of this subsection, the amendments made by subsection (a) shall apply to such group for taxable years beginning after December 31, 1983. Any such election, once made, shall be irrevocable.

"(8) Treatment of certain affiliated groups.—If—

"(A) a corporation (hereinafter in this paragraph referred to as the "parent") was incorporated in 1968 and filed consolidated returns as the parent of an affiliated group for each of its taxable years ending after 1969 and before 1983,

"(B) another corporation (hereinafter in this paragraph referred to as the "subsidiary") became a member of the parent's affiliated group in 1978 by reason of a recapitalization pursuant to which the parent increased its voting interest in the subsidiary from not less than 56 percent to not less than 85 percent, and

"(C) such subsidiary is engaged (or was on September 27, 1983, engaged) in manufacturing and distributing a broad line of business systems and related supplies for binding, laminating, shredding, graphics, and providing secure identification; then, for purposes of determining whether such subsidiary corporation is a member of the parent's affiliated group under section 1504(a) of the Internal Revenue Code of 1954 (as amended by subsection (a)), paragraph (2)(B) of such section 1504(a) shall be applied by substituting "55 percent" for "80 percent."

"(9) Treatment of certain corporations affiliated during 1971.—In the case of a group of corporations which filed a consolidated Federal income tax return for the taxable year beginning during 1971 and which—

"(A) included as a common parent on December 31, 1971, a Delaware corporation incorporated on August 26, 1969, and

"(B) included as a member thereof a Delaware corporation incorporated on November 8, 1971,

for taxable years beginning after December 31, 1970, and ending before January 1, 1983, the requirements for affiliation for each member of such group under section 1504(a) of the Internal Revenue Code of 1954 (before the amendment made by subsection (a)) shall be limited solely to the provisions expressly contained therein and by reference to stock issued under State law as common or preferred stock. During the period described in the preceding sentence, no provision of the Internal Revenue Code of 1986 (including sections 269 and 482) or principle of law, except the general consolidated return regulations (including the provisions relating to separate return limitation years) and sections 382 and 383 of such Code, shall apply to deny the benefit or use of losses incurred or credits earned by members of such group.

Prior to amendment, subsec. (a) read as follows:

"(a) Definition of "affiliated group."

"As used in this chapter, the term 'affiliated group' means one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation if—

"(1) Stock possessing at least 80 percent of the voting power of all classes of stock and at least 80 percent of each class of the nonvoting stock of each of the includible corporations (except the common parent corporation) is owned directly by one or more of the other includible corporations; and

"(2) The common parent corporation owns directly stock possessing at least 80 percent of the voting power of all classes of stock and at least 80 percent of each class of the nonvoting stock of at least one of the other includible corporations.

As used in this subsection, the term "stock" does not include nonvoting stock which is limited and preferred as to dividends, employer securities (within the meaning for section 409A(1)) while such securities are held under an employee stock ownership plan, or qualifying employer securities (within the meaning of section 4975(c)(8)) while such securities are held under an employee stock ownership plan which meets the requirements of section 4975(c)(7).

—P.L. 98-369, Sec. 211(b)(20), substituted "section 801" for "section 802" in para. (b)(2), para. (c)(1), and subpara. (c)(2) (A), effective for tax yrs. begin. after 12/31/83.

In '80, P.L. 96-222, Sec. 101(a)(7)(B), corrected Sec. 141(g) of P.L. 95-600 [see below]. Prior to corrections Sec. 141(g) of P.L. 95-600 read as follows:

"(g) Effective dates.

"(1) In general. The amendments made by this section (other than by subsection (f)(3)) shall apply with respect to qualified investment for taxable years beginning after December 31, 1978.

—P.L. 96-222, Sec. 101(a)(7)(L)(viii), substituted "tax credit employee stock ownership plan" for "an ESOP" in subsec. (a) . . . Sec. 101(a)(7)(L)(vi)(ii), substituted "employee" for "leveraged employee" in subsec. (a), presumably intended by Congress to be effective for qualified investments in tax yrs. begin. after '78 [Sec. 101(b)(2)] although technically effective with respect to decedents dying after 4/1/80 [Sec. 101(b)(1)(D)].

In '78, P.L. 95-600, Sec. 141(f)(4), amended the last sentence of subsec. (a), for qualified investments in tax yrs. begin. after '78.

Para. (g)(2) of Sec 141 provides as follows:

"(2) Election to have amendments apply during 1978. At the election of the taxpayer, paragraph (1) shall be applied by substituting "December 31, 1977" for "December 31, 1978"; except that in the case of a plan in existence before December 31, 1978, any such election shall not affect the required allocation of employer securities attributable to qualified investment for taxable years beginning before January 1, 1979. An election under the preceding sentence shall be made at such time and in such manner as the Secretary of the Treasury or his delegate shall prescribe. Such an election, once made, shall be irrevocable. Prior to amendment, the last sentence in subsec. (a) read as follows:

"As used in this subsection, the term "stock" does not include nonvoting stock which is limited and preferred as to dividends, employer securities within the meaning of section 301(d)(9)(A) of the Tax Reduction Act of 1975, or qualifying employer securities within the meaning of section 4975(c)(8) while such securities are held under an employee stock ownership plan which meets the requirements of section 301(d) of such Act or section 4975(c)(7), respectively."

In '76, P.L. 94-453, Sec. 803(b)(3), substituted "dividends, employer securities within the meaning of section 301(d)(9)(A) of the Tax Reduction Act of 1975, or qualifying employer securities within the meaning of section 4975(a)(8) while such securities are held under an employee stock ownership plan which meets the requirements of section 301(d) of such Act or section 4975(c)(7), respectively," for "dividends" at the end of subsec. (a), for tax yrs. begin. after '74.

—P.L. 94-453, Sec. 1051(g), amended para. (b)(4), for tax yrs. begin. after '73, except that "qualified possession source investment income" as defined in section 936(d)(2) of the Internal Revenue Code of 1954 shall include income from any source outside the United States if the taxpayer establishes to the satisfaction of the Secretary of the Treasury or his delegate that the income from such sources was earned before 10/1/76. Prior to amendment, para. (b)(4) read as follows:

"(4) Corporations entitled to the benefits of section 931, by reason of receiving a large percentage of their income from sources within possessions of the United States."

—P.L. 94-453, Sec. 1053(d)(2), deleted para. (b)(5), for tax yrs. begin. after '77. Prior to amendment, para. (b)(5) read as follows:

"(5) Corporations organized under the China Trade Act, 1972."

—P.L. 94-453, Sec. 1507(a), amended . . .

begin. after '80. Sec. 1507(c)(2) of the Act provided the following transitional rule:

"(2) Transition rules with respect to carryovers or carrybacks relating to pre-election taxable years and nontermination of group.—

"(A) Limitations on carryovers or carrybacks for groups electing under section 1504(c)(2).—If an affiliated group elects to file a consolidated return pursuant to section 1504(c)(2) of the Internal Revenue Code of 1954, a carryover of a loss or credit from a taxable year ending before January 1, 1981, and losses or credits which may be carried back to taxable years ending before such date, shall be taken into account as if this section had not been enacted.

"(B) Nontermination of affiliated group.—The mere election to file a consolidated return pursuant to such section 1504(c)(2) shall not cause the termination of an affiliated group filing consolidated returns."

Prior to amendment, subsec. (c) read as follows:

"(c) Includible insurance companies.

"Despite the provisions of paragraph (2) of subsection (b), two or more domestic insurance companies each of which is subject to taxation under the same section of this subtitle shall be considered as includible corporations for the purpose of the application of subsection (a) to such insurance companies alone."

In '71, P.L. 91-178, Sec. 502(c), 12/10/71, added para. (b)(7).

In '69, P.L. 91-172, Sec. 121(a)(4), added subsec. (e), for tax yrs. begin. after 12/31/69.

In '66, P.L. 89-589, deleted subsec. (b)(7), effective 1/1/69.

Prior to repeal the subsec. read: (7) Unincorporated business enterprises subject to tax as corporations under section 1361.

In '60, P.L. 86-779 inserted "and real estate investment trusts" following "Regulated investment companies" in subsec. (b)(6), for tax yrs. begin. after '60.

In '59, P.L. 86-69 eliminated reference to section 811 in subsec. (b)(2) for tax yrs. begin. after '57 . . . deleted subsec. (b)(8), which exempted an electing small business corporation from the term "includible corporation", effective 9/24/59.

In '58, P.L. 85-866 added subsec. (b)(8) for tax yrs. begin. after '58.

In '54, P.L. 429 inserted reference to section 811 in subsec. (b) (2) for tax yrs. begin. after '54.

#### ec. 1504. Cross references.

- (1) For suspension of running of statute of limitations when notice in respect of a deficiency is mailed to one corporation, see section 6503(a)(1).
- (2) For allocation of income and deductions of related trades or businesses, see section 482.

#### Subchapter B.—Related Rules

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- I. In general.
- II. Certain controlled corporations.

#### PART I—IN GENERAL

G.

51. Disallowance of the benefits of the graduated corporate rates and accumulated earnings credit.
52. Earnings and profits.

In '78, P.L. 95-600, Sec. 301(b)(1)(B) amended item 1531. Prior to amendment item 1531 read as follows:  
"1531. Disallowance of surtax exemption and accumulated earnings credit."

In '64, P.L. 88-272 inserted the table of parts, and the heading to Part I.

- z. 1531. Disallowance of the benefits of the graduated corporate rates and accumulated earnings credit.

In general.

f—

- 1) any corporation transfers, on or after January 1, 1951, and on or before June 12, 1963, all or part of its

property (other than money) to a transferee corporation,

(2) any corporation transfers, directly or indirectly, after June 12, 1963, all or part of its property (other than money) to a transferee corporation, or

(3) five or fewer individuals who are in control of a corporation transfer, directly or indirectly, after June 12, 1963, property (other than money) to a transferee corporation,

and the transferee corporation was created for the purpose of acquiring such property or was not actively engaged in business at the time of such acquisition, and if after such transfer the transferor or transferors are in control of such transferee corporation during any part of the taxable year of such transferee corporation, then for such taxable year of such transferee corporation the Secretary may (except as may be otherwise determined under subsection (c)) disallow the benefits of the rates contained in section 11(b) which are lower than the highest rate specified in such section, or the accumulated earnings credit provided in paragraph (2) or (3) of section 535(c), unless such transferee corporation shall establish by the clear preponderance of the evidence that the securing of such benefits or credit was not a major purpose of such transfer.

#### (b) Control.

For purposes of subsection (a), the term "control" means—

(1) With respect to a transferee corporation described in subsection (a)(1) or (2), the ownership by the transferor corporation, its shareholders, or both, of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock; or

(2) With respect to each corporation described in subsection (a)(3), the ownership by the five or fewer individuals described in such subsection of stock possessing—

(A) at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation, and

(B) more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such individual only to the extent such stock ownership is identical with respect to each such corporation.

For purposes of this subsection, section 1563(e) shall apply in determining the ownership of stock.

#### (c) Authority of the Secretary under this section.

The provisions of section 269(c), and the authority of the Secretary under such section, shall, to the extent not inconsistent with the provisions of this section, be applicable to this section.

In '64, P.L. 88-314, Sec. 1899A(16), substituted "296(c)" for "296(b)" in subsec. (c), effective 10/22/64.

In '81, P.L. 97-34, Sec. 232(a), deleted "\$150,000" before "accumulated earnings credit" in subsec. (a), for tax yrs. begin. after 12/31/81.

In '78, P.L. 95-600, Sec. 301(b)(1)(A), substituted "disallow the benefits of the rates contained in section 11(b) which are lower than the highest rate specified in such section" for "disallow the surtax exemption (as defined in section 11(d)) in subsec. (a) . . . substituted "such benefits or" for "such exemption or" in subsec. (a) . . . Sec. 301(b)(1)(B) amended the heading of Code Sec. 1531, for tax yrs. begin. after 12/31/78.

However, the cost to the financial institution in connection with an examination may not exceed \$7,500 per examination. The assessment shall be made by the commissioner as soon as feasible after the examination or investigation has been completed. All assessments shall be paid to and received by the department by each institution within 30 days after receipt of notice of the assessment.

(c) A financial institution that fails to make the payments required by the commissioner under (a) and (b) of this section within the time specified is subject to a penalty of not more than \$100 each day it is late. The penalty, together with the amount due under (a) of this section, may be recovered in a civil action brought by the department. (§ 42 ch 169 SLA 1978)

Sec. 06.01.020. General powers of department. (a) Notwithstanding other provisions of this title, the commissioner may by regulation authorize financial institutions, except licensees subject to AS 06.20 or AS 06.40, to exercise any of the powers conferred upon, or to be subject to any of the limitations imposed upon, a federally chartered bank, trust company, savings association, federally chartered credit union, or other federally chartered institution doing business in this state which is subject to the regulations of the United States Comptroller of the Currency, the Federal Reserve Board, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the National Credit Union Administrator, or the successor or successors of them, if the commissioner finds that the exercise of the power or imposition of the limitation both

(1) serves the public convenience and advantage; and

(2) equalizes and maintains the quality of competition between state-chartered financial institutions and corresponding federally chartered financial institutions.

(b) The authority granted to the commissioner by this section may not be limited by law unless that law expressly refers to this section. (§ 42 ch 169 SLA 1978; am § 1 ch 47 SLA 1980; am § 1 ch 63 SLA 1981)

Revisor's notes. — In 1981 the word "upon" was inserted after the word "imposed" in (a) of this section to correct a manifest error in § 1, ch. 63, SLA 1981.

Editor's notes. — Section 2, ch. 63, SLA 1981 provides that (b) of this section applies only to statutes enacted after October 8, 1981.

Opinions of attorney general. — The Administrative Procedure Act (AS 44.62) provides that the commissioner shall be subject to its provisions. 1960 Op. Atty. Gen. No. 7.

provisions of that section, revoke the fiduciary powers granted to the bank.

[47 FR 27822, June 25, 1982]

**§ 9.18 Collective investment.**

(a) Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively:

(1) In a common trust fund maintained by the bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as trustee, executor, administrator, guardian or custodian under a uniform gifts to minors act.

(2) In a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or other trusts which are exempt from Federal income taxation under the Internal Revenue Code.

(b) Collective investments of funds or other property by national banks under paragraph (a) of this section (referred to in this paragraph as "collective investment funds") shall be administered as follows:

(1) Each collective investment fund shall be established and maintained in accordance with a written plan (referred to herein as the Plan) which shall be approved by a resolution of the bank's board of directors and filed with the Comptroller of the Currency. The Plan shall contain appropriate provisions not inconsistent with the rules and regulations of the Comptroller of the Currency as to the manner in which the fund is to be operated, including provisions relating to the investment powers and a general statement of the investment policy of the bank with respect to the fund; the allocation of income, profits and losses; the terms and conditions governing the admission or withdrawal of participations in the fund; the auditing of accounts of the bank with respect to the fund; the basis and method of valuing assets in the fund, setting forth specific criteria for each type of asset; the minimum frequency for valuation of assets of the fund; the period following each such valuation date during which the valuation may be made (which period in usual circumstances should not exceed 10 business days);

the basis upon which the fund may be terminated; and such other matters as may be necessary to define clearly the rights of participants in the fund. Except as otherwise provided in paragraph (b)(15) of this section, fund assets shall be valued at market value unless such value is not readily ascertainable, in which case a fair value determined in good faith by the fund trustees may be used. A copy of the Plan shall be available at the principal office of the bank for inspection during all banking hours, and upon request a copy of the Plan shall be furnished to any person.

(2) Property held by a bank in its capacity as trustee of retirement, pension, profit sharing, stock bonus, or other trusts which are exempt from Federal income taxation under any provisions of the Internal Revenue Code may be invested in collective investment funds established under the provisions of paragraph (1) or (2) of paragraph (a) of this section, subject to the provisions herein contained pertaining to such funds, and may qualify for tax exemption pursuant to section 584 of the Internal Revenue Code. Assets of retirement, pension, profit sharing, stock bonus, or other trusts which are exempt from Federal income taxation by reason of being described in section 401 of the Code may be invested in collective investment funds established under the provisions of paragraph (2) of paragraph (a) of this section if the fund qualifies for tax exemption under Revenue Ruling 56-267, and following rulings.

(3) All participants in the collective investment fund shall be on the basis of a proportionate interest in all of the assets. In order to determine whether the investment of funds received or held by a bank as fiduciary in a participation in a collective investment fund is proper, the bank may consider the collective investment fund as a whole and shall not, for example, be prohibited from making such investment because any particular asset is nonincome producing.

(4) Not less frequently than once during each period of 3 months, a bank administering a collective investment fund shall determine the value of the assets in the fund as of the date

set for the valuation of assets. No participation shall be admitted to or withdrawn from the fund except (i) on the basis of such valuation and (ii) as of such valuation date. No participation shall be admitted to or withdrawn from the fund unless a written request for or notice of intention of taking such action shall have been entered on or before the valuation date in the fiduciary records of the bank and approved in such manner as the board of directors shall prescribe. No requests or notices may be cancelled or countermanded after the valuation date. If a fund described in paragraph (a)(2) of this section is to be invested in real estate or other assets which are not readily marketable, the bank may require a prior notice period, not to exceed 1 year, for withdrawals.

(5)(i) A bank administering a collective investment fund shall at least once during each period of 12 months cause an adequate audit to be made of the collective investment fund by auditors responsible only to the board of directors of the bank. In the event such audit is performed by independent public accountants, the reasonable expenses of such audit may be charged to the collective investment fund.

(ii) A bank administering a collective investment fund shall at least once during each period of 12 months prepare a financial report of the fund. This report, based upon the above audit, shall contain a list of investments in the fund showing the cost and current market value of each investment; a statement for the period since the previous report showing purchases, with cost; sales, with profit or loss and any other investment changes; income and disbursements; and an appropriate notation as to any investments in default.

(iii) The financial report may include a description of the fund's value on previous dates, as well as its income and disbursements during previous accounting periods. No predictions or representations as to future results may be made. In addition, as to funds described in paragraph (a)(1) of this section, neither the report nor any other publication of the bank shall make reference to the performance of

funds other than those administered by the bank.

(iv) A copy of the financial report shall be furnished, or notice shall be given that a copy of such report is available and will be furnished without charge upon request, to each person to whom a regular periodic accounting would ordinarily be rendered with respect to each participating account. A copy of such financial report may be furnished to prospective customers. The cost of printing and distribution of these reports shall be borne by the bank. In addition, a copy of the report shall be furnished upon request to any person for a reasonable charge. The fact of the availability of the report for any fund described in paragraph (a)(1) of this section may be given publicity solely in connection with the promotion of the fiduciary services of the bank.

(v) Except as herein provided, the bank shall not advertise or publicize its collective investment fund(s) described in paragraph (a)(1) of this section.

(6) When participations are withdrawn from a collective investment fund, distributions may be made in cash or ratably in kind, or partly in cash and partly in kind: *Provided*, That all distributions as of any one valuation date shall be made on the same basis.

(7) If for any reason an investment is withdrawn in kind from a collective investment fund for the benefit of all participants in the fund at the time of such withdrawal and such investment is not distributed ratably in kind, it shall be segregated and administered or realized upon for the benefit ratably of all participants in the collective investment fund at the time of withdrawal.

(8)(i) No bank shall have any interest in a collective investment fund other than in its fiduciary capacity. Except for temporary net cash overdrafts or as otherwise specifically provided herein, it may not lend money to a fund, sell property to, or purchase property from a fund. No assets of a collective investment fund may be invested in stock or obligations, including time or savings deposits, of the bank or any of its affiliates: *Provided*,

That such deposits may be made of funds awaiting investment or distribution. Subject to all other provisions of this part, funds held by a bank as fiduciary for its own employees may be invested in a collective investment fund. A bank may not make any loan on the security of a participation in a fund. If because of a creditor relationship or otherwise the bank acquires an interest in a participation in a fund, the participation shall be withdrawn on the first date on which such withdrawal can be effected. However, in no case shall an unsecured advance until the time of the next valuation date to an account holding a participation be deemed to constitute the acquisition of an interest by the bank.

(II) Any bank administering a collective investment fund may purchase for its own account from such fund any defaulted fixed income investment held by such fund, if in the judgment of the board of directors the cost of segregation of such investment would be greater than the difference between its market value and its principal amount plus interest and penalty charges due. If the bank elects to so purchase such investment, it must do so at its market value or at the sum of cost, accrued unpaid interest, and penalty charges, whichever is greater.

(9) Except in the case of collective investment funds described in paragraph (a)(2) of this section:

(i) No funds or other property shall be invested in a participation in a collective investment fund if as a result of such investment the participant would have an interest aggregating in excess of 10 percent of the then market value of the fund: *Provided*, That in applying this limitation if two or more accounts are created by the same person or persons and as much as one-half of the income or principal of each account is payable or applicable to the use of the same person or persons, such accounts shall be considered as one;

(ii) No investment for a collective investment fund shall be made in stocks, bonds, or other obligations of any one person, firm, or corporation if as a result of such investment the total amount invested in stocks, bonds, or other obligations issued, or guaranteed

by such person, firm or corporation would aggregate in excess of 10 percent of the then market value of the fund: *Provided*, That this limitation shall not apply to investments in direct obligations of the United States or other obligations fully guaranteed by the United States as to principal and interest;

(iii) A bank administering a collective investment fund shall maintain, in cash and readily marketable investments, such percentage of the assets of the fund as is necessary to provide adequately for the liquidity needs of the fund and to prevent inequities among fund participants.

(10) The reasonable expenses incurred in servicing mortgages held by a collective investment fund may be charged against the income account of the fund and paid to servicing agents, including the bank administering the fund.

(11)(I) A bank may (but shall not be required to) transfer up to 5 percent of the net income derived by a collective investment fund from mortgages held by such fund during any regular accounting period to a reserve account: *Provided*, That no such transfers shall be made which would cause the amount in such account to exceed 1 percent of the outstanding principal amount of all mortgages held in the fund. The amount of such reserve account, if established, shall be deducted from the assets of the fund in determining the fair market value of the fund for the purposes of admissions and withdrawals.

(ii) At the end of each accounting period, all interest payments which are due but unpaid with respect to mortgages in the fund shall be charged against such reserve account to the extent available and credited to income distributed to participants. In the event of subsequent recovery of such interest payments by the fund, the reserve account shall be credited with the amount so recovered.

(12) A national bank administering a collective investment fund shall have the exclusive management thereof. The bank may charge a fee for the management of the collective investment fund: *Provided*, That the fractional part of such fee proportionate

to the interest of each participant shall not, when added to any other compensations charged by a bank to a participant, exceed the total amount of compensations which would have been charged to said participant if no assets of said participant had been invested in participations in the fund. The bank shall absorb the costs of establishing or reorganizing a collective investment fund.

(13) No bank administering a collective investment fund shall issue any certificate or other document evidencing a direct or indirect interest in such fund in any form.

(14) No mistake made in good faith and in the exercise of due care in connection with the administration of a collective investment fund shall be deemed to be a violation of this part if promptly after the discovery of the mistake the bank takes whatever action may be practicable in the circumstances to remedy the mistake.

(15) Short-term investment funds established under paragraph (a) of this section may be operated on a cost, rather than market value, basis for purposes of admissions and withdrawals, if the plan of operation satisfies the following conditions:

(i) Investments must be limited to bonds, notes or other evidences of indebtedness which are payable on demand (including variable amount notes) or which have a maturity date not exceeding 91 days from the date of purchase. However, 20 percent of the value of the fund may be invested in longer term obligations;

(ii) The difference between the cost and anticipated principal receipt on maturity must be accrued on a straight-line basis;

(iii) Assets of the fund must be held until maturity under usual circumstances; and

(iv) After effecting admissions and withdrawals, not less than 20 percent of the value of the remaining assets of the fund must be composed of cash, demand obligations and assets that will mature on the fund's next business day.

(c) In addition to the investments permitted under paragraph (a) of this section, funds or other property received or held by a national bank as fi-

duciary may be invested collectively, to the extent not prohibited by local law, as follows:

(1) In shares of a mutual trust investment company, organized and operated pursuant to a statute that specifically authorizes the organization of such companies exclusively for the investment of funds held by corporate fiduciaries, commonly referred to as a "bank fiduciary fund."

(2)(i) In a single real estate loan, a direct obligation of the United States, or an obligation fully guaranteed by the United States, or in a single fixed amount security, obligation or other property, either real, personal or mixed, of a single issuer; or

(ii) On a short-term basis in a variable amount note of a borrower of prime credit: *Provided*, That such note shall be maintained by the bank on its premises and may be utilized by it only for investment of moneys held in its trust department accounts: *Provided further*, That the bank owns no participation in the loans or obligations authorized under paragraph (c)(2) (i) or (ii) of this section, and has no interest in any investment therein except in its capacity as fiduciary.

(3) In a common trust fund maintained by the bank for the collective investment of cash balances received or held by a bank in its capacity as trustee, executor, administrator, or guardian, which the bank considers to be individually too small to be invested separately to advantage. The total investment for such fund must not exceed \$100,000; the number of participating accounts is limited to 100, and no participating account may have an interest in the fund in excess of \$10,000: *Provided*, That in applying these limitations if two or more accounts are created by the same person or persons and as much as one-half of the income or principal of each account is presently payable or applicable to the use of the same person or persons, such account shall be considered as one: *And provided*, That no fund shall be established or operated under this paragraph for the purpose of avoiding the provisions of paragraph (b) of this section.

(4) In any investment specifically authorized by court order, or authorized

by the instrument creating the fiduciary relationship, in the case of trusts created by a corporation, its subsidiaries and affiliates or by several individual settlors who are closely related: *Provided*, That such investment is not made under this subparagraph for the purpose of avoiding the provisions of paragraph (b) of this section.

(5) In such other manner as shall be approved in writing by the Comptroller of the Currency.

(The information collection requirements contained in paragraph (b)(1) were approved by the Office of Management and Budget under control number 1557-0141. The information collection requirements contained in paragraph (b)(5) were approved under control number 1557-0140)

[37 FR 24161, Nov. 15, 1972, as amended at 40 FR 18771, Apr. 30, 1975; 40 FR 20812, May 12, 1975; 41 FR 28679, June 29, 1976; 41 FR 47938, Nov. 1, 1976; 47 FR 27832, June 25, 1982; 49 FR 11824, Mar. 28, 1984]

#### § 9.19 Forms.

All forms referred to in this part and all such forms as amended from time to time shall be a part of this part.

#### § 9.20 Registration of national bank transfer agents.

(a) An application for registration, pursuant to section 17A(c) of the Securities Exchange Act of 1934, as amended (the "Act"), of a transfer agent for which the Comptroller is the appropriate regulatory agency, as defined in section 3(a)(34)(B) of the Act, shall be filed with the Comptroller on Form TA-1, in accordance with the instructions contained therein and shall become effective on the thirtieth day following the date on which the application is filed, unless the Comptroller takes affirmative action to accelerate, deny or postpone such registration in accordance with the provisions of section 17A(c) of the Act.

(b) The filing of any amendment to an application for registration as a transfer agent pursuant to paragraph (a) of this section, which registration has not become effective, shall postpone the effective date of the registration until the thirtieth day following the date on which the amendment is filed, unless the Comptroller takes affirmative action to accelerate, deny or postpone the registration in accord-

ance with the provisions of section 17A(c) of the Act.

(c) Within sixty calendar days following the date on which any information reported on Form TA-1 becomes inaccurate, misleading or incomplete, the registrant shall file an amendment on Form TA-1 correcting the inaccurate, misleading or incomplete information.

(d) Every registration and amendment filed pursuant to this section shall constitute a "report" or "application" within the meaning of sections 17, 17A(c) and 32(a) of the Act.

(Secs. 3(a)(34)(B), 17, 17A, and 23 of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(34)(B), 78d, 78q-1, 78w))

[40 FR 50252, Oct. 29, 1975, as amended at 47 FR 57256, Dec. 23, 1982]

#### § 9.21 Applications for stays of disciplinary sanctions or summary suspensions imposed by a registered clearing agency.

If any registered clearing agency imposes any final disciplinary sanction pursuant to section 17(b)(3)(G) of the Securities Exchange Act of 1934, or summarily suspends or limits or prohibits access pursuant to section 17A(b)(5)(C) of the Act, any person aggrieved thereby for which the Comptroller of the Currency is the appropriate regulatory agency may file with the Comptroller of the Currency, by telegram or otherwise, a request for a stay of imposition of such action. Such request shall be in writing and shall include a statement as to why such stay should be granted.

(Secs. 17A, 19 and 23 of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1, 78s and 78w))

[42 FR 26969, May 26, 1977]

#### § 9.22 Applications for review of final disciplinary sanctions, denials of participation, or prohibitions or limitations of access to services imposed by registered clearing agencies.

(a) Proceedings on an application to the Comptroller of the Currency under section 19(d)(2) of the Securities Exchange Act of 1934 for review of any final disciplinary sanction, denial or conditioning of participation, or prohibition or limitation with re-

H B

4 8 3

FISCAL NOTE

BILL NO. HB 483

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_  
Title: "...judicial approval of proposed settlements..."  
Sponsor: House Judiciary by Request  
Requestor: House Judiciary Committee

Department Affected: Department of Law  
BRU: Legal Services, Exxon Valdez Litigation  
Component: Legal Services - Operations  
Exxon Valdez Litigation  
COMPONENT SERIAL 

--	--	--	--

Expenditures/Revenues: (Thousands of Dollars)

93 and 1175

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING						

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
----------------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

The Attorney General's comments will be forthcoming after an opportunity to review the bill.

Prepared by: Richard I. Peques, Director  
Division: Administrative Services  
Approved by Commissioner: Charles E. Cole, Attorney General  
Agency: Department of Law

Phone: 465-3672  
Date: March 5, 1992  
Date: March 5, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

# State of Alaska



House Majority Leader  
COMMITTEES  
HOUSE JUDICIARY  
HOUSE RULES  
HOUSE STATE AFFAIRS  
SPECIAL COMMITTEE  
MILITARY AND VET. AFFAIRS  
LEGISLATIVE COUNCIL

Representative Max F. Gruenberg, Jr.  
District 11  
Spenard, Upper Midtown Anchorage

P.O. Box V  
JUNEAU, AK 99811  
(907) 465-3718  
465-4968/4986  
(SESSION)

3111 C STREET, SUITE 440  
ANCHORAGE, AK 99503  
(907) 561-7621

## M E M O R A N D U M

DATE: March 4, 1992

TO: Members of the House Judiciary Committee

FROM: Max F. Gruenberg, Jr. *MFG*

RE: Support for HB 483, "The Settlement in the Sunshine Bill"

I would very much appreciate your support for HB 483. As you recall, HB 483 was introduced by the Judiciary Committee at the request of the Settlement Subcommittee.

HB 483, "Settlement in the Sunshine", requires court approval of out-of-court settlements of public interest litigation. There must be public notice and a public comment period plus a finding by the court that the settlement is in the public interest. Public interest litigation is defined as lawsuits brought by the state for damages to natural resources, if the value is over \$10 million.

The subcommittee heard testimony that the final civil settlement of the Exxon Valdez oil spill litigation was essentially the same as the proposal that the House rejected with the passage of HCR 29, except that it did not provide for legislative approval or public comment, and the payment schedule was moved back resulting in a reduction in the present value of the civil settlement by about \$7.3 million.

There should be judicial involvement when the state settles lawsuits, such as our claims against Exxon, where significant issues of public interest are involved, which may not be adequately addressed or represented by the advocates of the defendant or the executive. To ensure a full and fair settlement in these cases, there should be a proceeding, open to the public, before an impartial judicial body empowered to make a final determination to accept or reject the proposed settlement. This decision should be made only after the public has been heard.

"Settlement in the Sunshine" will help prevent the type of failures of process that occurred in the second Exxon settlement.

If you have any questions please call me or my legislative assistant, Mark Handley, at 465-4986.

Thank you.

HB483.SUP



# Alaska Center for the Environment

519 West 8th Avenue, Suite 201 • Anchorage, Alaska 99501 • (907) 274-3621

March 3, 1992

Rep. Dave Donley, Chair  
House Judiciary Committee  
P.O. Box V  
Juneau, AK 99811

RE: ACE Support for HB 483, HB 484, and HB 486

Dear Rep. Donley:

The Alaska Center for the Environment (ACE) appreciates this opportunity to express our support for the above referenced legislation. It is essential that the legislature exert its full authority under the constitution to appropriate monies, and also to ensure that adequate public oversight occur in regards to how spill settlement funds are expended.

Therefore, ACE supports HB 484 and HB 486. These bills will help ensure that the legislature will retain its full constitutional authority to appropriate money from the Exxon Valdez oil spill settlement. There is widespread concern among Alaskans regarding the manner in which the Trustee Council will spend the settlement monies. For instance, despite overwhelming support from throughout the spill-impacted region for investing most of the settlement money in an aggressive program of habitat acquisition, the Trustee Council is dragging its feet while publicly expressing support for programs other than habitat acquisition. It is therefore important for the legislature to protect the public interest through full review and approval of restoration expenditures. In support of this oversight authority, we recommend that the legislature establish a citizen advisory committee to advise the legislature on questions regarding proposed expenditures.

ACE also supports HB 483, which would require court approval of, and opportunity for public review and comment on, future proposed settlements of public interest litigation. The inadequate Exxon Valdez settlement was finalized without the benefit of public review and comment, and this mistake should not be allowed to happen again. As can be seen from the high level of public interest and extensive testimony occurring in the Trustee Council proceedings, there is much to be gained by public involvement.

We appreciate the opportunity to comment on these bills.

Sincerely,

Alan Phipps  
State Lands Specialist

# Alaska State Legislature



House of Representatives  
House Judiciary Committee  
Settlement Subcommittee

P. O. Box V  
State Capitol  
Juneau, Alaska 99811

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SEVENTEENTH STATE LEGISLATURE  
SECOND SESSION

## FINAL REPORT OF THE SETTLEMENT SUBCOMMITTEE

*FROM THE OFFICE  
OF  
THE HOUSE MAJORITY LEADER*

---

**FEBRUARY**

**1992**

# HOUSE JUDICIARY COMMITTEE SETTLEMENT SUBCOMMITTEE

## FINAL REPORT

FEBRUARY 1992

FROM THE OFFICE  
OF  
THE HOUSE MAJORITY LEADER  
STATE CAPITOL  
JUNEAU, ALASKA 99801-1182  
PHONE NUMBER: (907) 465-4986

### SETTLEMENT SUBCOMMITTEE MEMBERS

REPRESENTATIVE MAX GRUENBERG, CHAIR  
REPRESENTATIVE CLIFF DAVIDSON  
REPRESENTATIVE DAVE DONLEY  
REPRESENTATIVE GENE KUBINA  
REPRESENTATIVE MIKE NAVARRE  
REPRESENTATIVE GAIL PHILLIPS

### SUBCOMMITTEE STAFF

MARK HANDLEY, STAFF ATTORNEY  
PAT WILLIAMS, SUBCOMMITTEE SECRETARY

C O N T E N T S

FINAL REPORT

FOOTNOTES

APPENDICES (COMMITTEE DOCUMENTS)

BILLS

## Final Report of the Settlement Subcommittee

### I

The Settlement Subcommittee heard testimony from Legislative Legal Counsel and an economist from Legislative Research. These witnesses had reviewed the settlement documents at the request of the subcommittee. They had prepared written comparisons of the proposed Exxon Valdez oil spill settlement that the Alaska House of Representatives rejected last session and the final settlement that Governor Hickel signed four months later.

The major points of their testimony were as follows:

1. The final criminal settlement provided an additional \$50 million<sup>1</sup> for restoration areas affected by the spill in Alaska.
2. Although the final criminal settlement requires Exxon to pay an additional \$25 million in nominal dollars,<sup>2</sup> Exxon realized substantial tax advantages because the final settlement was structured so that an additional \$50 million is deductible from Exxon's state and federal tax liability.<sup>3</sup>
3. The final civil settlement was essentially the same as the proposal that the House rejected with the passage of HCR 29, except that it did not provide for legislative approval or public comment,<sup>4</sup> and the payment schedule was moved back,<sup>5</sup> resulting in a reduction in the present value of the civil settlement by about \$7.3 million.<sup>6</sup>
4. The total value of the final civil and criminal settlements to the state and federal government is approximately \$722.5 million in present value, after-tax-loss dollars. This is \$ 5.9 million less than the value of the rejected settlement.<sup>7</sup>
5. The total cost to Exxon of final civil and criminal settlements is approximately \$434.3 million in present value, after-tax dollars. This is \$4 million less than the cost of the rejected settlement.<sup>8</sup>
6. The State of Alaska did better under the final settlement because more of it will be spent on restoration in Alaska.<sup>9</sup>
7. The federal government did worse under the final settlement because more of it was deductible, less of it goes to the federal treasury, and its present value is less.<sup>10</sup>
8. Exxon did better under the final settlement because more of it was deductible, and they will have more time to pay it off.<sup>11</sup>

## II

The subcommittee asked legislative legal counsel to review the settlement for potential conflicts with our state statutes and the Alaska State Constitution. The subcommittee also asked for suggestions regarding legislation that would help make the trust work within our existing constitutional framework and improve the state's position in the event of a legal challenge to the settlement. A summary of the advice of legal counsel follows:

1. Allowing the trust to receive and hold settlement money, without a legislative appropriation of the State's interest in that settlement money to the trust, probably violates Article II, section 1, and Article IX, section 13 of the Alaska State Constitution. The case law in this area strongly indicates that the courts would find this to be an invalid circumvention of the legislature's powers of appropriation.<sup>12</sup>

2. The settlement provides for Exxon to make payments over a period of many fiscal years. A single continuing appropriation of the state's entire interest in the settlement would probably be held to violate our state constitutional prohibition against the dedication of funds under Article IX, section 7.<sup>13</sup>

3. State constitutional considerations require that all trust expenditures be submitted to the legislature for appropriation. State statutes and the state constitution require appropriations for trust expenditures that are to be spent by state agencies.<sup>14</sup>

4. In order to place the state in the best position to defend itself against a state constitutional challenge to the structure of the Exxon spill settlement, the legislature must appropriate the state's interest in the settlement money to the trust, when that money is paid by Exxon.<sup>15</sup> The legislature should also require appropriation of all trust expenditures.<sup>16</sup>

## III

The Settlement Subcommittee solicited suggestions for settlement-related legislation and reviewed proposed and existing legislation. As a result of these deliberations the subcommittee recommends that the House Judiciary Committee introduce the following bills:

Draft #1 (7-LS1563\M) Sets out legislative findings regarding the Exxon Valdez settlement, and settlement process. It creates the Exxon Valdez Oil Spill Trust in statute. It requires state trustees and their designees to conform to the requirements of the Alaska Open Meetings Act and the Alaska Executive Branch Ethics Act. It requires that state trustees ensure that all trust expenditures are submitted to the legislature for appropriation, ensure that trust records are treated as public records, and that trust expenditures, not paid to state or federal agencies, are disbursed pursuant to our state procurement code.

Draft #2 (7-LS1675\A) appropriates the state's interest in the Exxon civil settlement money paid by Exxon in FY '92 and FY '93 to the Exxon Oil Spill Trust. This appropriation is contingent on the enactment of legislation containing the major substantive provisions of Draft #1.

Draft #3 (7-LS1605\M), "Settlement in the Sunshine", prohibits out-of-court settlements of public interest litigation, without court approval after a public comment period and a finding that the settlements are in the public interest. Public interest litigation is defined as lawsuits brought by the state for damages to natural resources, if the value of each proposed settlement is over \$10 million.

#### IV

The Settlement Subcommittee also recommends passage of the following bills:

CSHB 144(FIN)am, " An Act providing for legislative appropriation of the terms of certain proposed settlements of claims; prohibiting the payment of those terms without an express appropriation; and the requiring reports of settlements." (by Representative Ulmer)

This bill seeks to clarify the legislature's role in approving state settlements by providing when legislative appropriations are required. Testimony before the subcommittee has made it clear that the legislature needs to assert itself in this area. CSHB 144(FIN)am is presently in the Senate Judiciary Committee.

CSHB 287(FIN), " An Act disallowing under the Alaska Net Income Tax a portion of the deduction authorized by the Internal Revenue Code for certain oil and hazardous substance discharge related expenditures; and providing for a effective date." (by Representative Ellis)

This bill limits the deductibility under state tax law for certain expenses incurred as the result of the taxpayer's illegal discharge of oil or hazardous substances. Testimony and reports and legal opinions ordered by the subcommittee show that a large portion of Exxon's cleanup costs and settlement payments will be subsidized by state and federal taxpayers. CSHB 287(FIN) is presently in the House Rules Committee.

HB 411, " An Act making appropriations for restoration projects relating to the Exxon Valdez oil spill; and providing for an effective date." (by Representative Davidson)

This bill appropriates the \$50 million that the state received as a result of Exxon's criminal plea for various restoration-related purposes. HB 411 is presently in the House Resources Committee.

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## FOOTNOTES

1. See Committee Documents: #2 (page 2) #4 (page 1); and #8 (tape count 055)
2. See Committee Documents: #2 (page 2) and #8 (tape count 055)
3. See Committee Documents: #2 (page 2), #3 (pages 1, 2) and #10 (pages 1, 2)
4. See Committee Documents: #5 (page 1) and #8 (tape count 000)
5. See Committee Document #5 (page 2)
6. See Committee Document #2 (page 5). [Note: The \$7.3 million figure was calculated by Milt Barker in response to a question by committee staff]
7. See Committee Documents: #1 (page 1, #2 (page 5) and #8 (tape count 055)
8. See Committee Documents: #2 (page 3, Table II) and #8 (tape count 055)
9. See Committee Documents: #2 (page 2), and #8 (tape count 055)
10. See Committee Documents: #1 (page 1), #2 (pages 3, 5), #8 (tape counts 000 and 055), and #10 (page 2)
11. See Committee Documents: #1 (page 1), #2 (page 3), #3 (pages 1, 2) #8 (tape count 055), and #10
12. See Committee Documents: #7 (pages 1 - 8) and #8 (tape count 000)
13. See Committee Documents: #7 (page 9), and #8 (tape count 000)
14. See Committee Document #7 (pages 8, 9)
15. See Committee Documents: #7 (page 9) and #8 (tape count 000)
16. See Committee Document #7 (pages 1 - 8) [Note: The issue of whether or not the State Constitution required legislative appropriation of all trust expenditures was put to Pamela Finley, Legislative Legal Counsel. She answered in the affirmative, indicating that non-appropriated trust expenditures are constitutionally problematic because these funds came in part from the federal government and in part from income from the state's interest in the trust.

## A P P E N D I C E S

### COMMITTEE DOCUMENTS

Committee Document #1: Executive Summary dated October 10, 1991

Committee Document #2: Memorandum to Max Gruenberg from Milt Barker dated October 10, 1991 re Valuation of Exxon Settlement

Committee Document #3: Memorandum to Milt Barker from John B. Gaguine dated October 9, 1991 re Deductibility of fines and restitution in Exxon Valdez criminal case

Committee Document #4: Memorandum to Max Gruenberg from Tamara Cook dated October 3, 1991 re Exxon Litigation; Plea Agreement Dated September 26, 1991 (Work Order No. 7-LS1044)

Committee Document #5: Memorandum to Max Gruenberg from Tamara Cook dated October 7, 1991 re Exxon Litigation; Agreement and Consent Decree signed September 24 and 25, 1991 (Work Order No. 7-LS1044)

Committee Document #6: Memorandum to Max Gruenberg from Pamela Finley dated August 29, 1991 re Exxon Litigation; Memorandum of Agreement dated 9/27/91 (Work Order No. 17-LS1044)

Committee Document #7: Memorandum to Senator Curt Menard from Pamela Finley dated January 8, 1992 re Appropriation Power and the Exxon-Valdez Trust Fund; Work Order No. 7-LS1749

Committee Document #8: Minutes of House Judiciary Exxon Settlement Subcommittee meeting dated October 21, 1991

Committee Document #9: Minutes of House Judiciary Exxon Settlement Subcommittee meeting dated December 9, 1991

Committee Document #10: Memorandum to Max Gruenberg from Jack Chenoweth dated December 10, 1991 re Deductibility of certain expenses from state income tax (Work Order No. 7-LS1650A)

Legislative Research Agency



P.O. Box Y  
Juneau, AK 99811-3100  
Phone: (907) 465-3991  
Fax: (907) 463-3351

October 10, 1991

## Valuation of Exxon Settlement

### EXECUTIVE SUMMARY

This analysis compares the estimated cost to Exxon, and the value to the State of Alaska and the U.S. government, of the Exxon settlement approved October 8, 1991 (the "New Settlement") with the settlement rejected in March, 1991 (the "Old Settlement").

Taking into account inflation, the time value of money, and the effects of federal and state income taxes, the analysis found under the New Settlement, compared with the Old:

- the cost to Exxon is less in present value, even though Exxon pays more out-of-pocket
- the combined value to the state and federal governments is less in present value, although greater in actual dollars received
- the value to the State of Alaska is greater both in present value and actual dollars received
- the value to the federal government is less both in present value and actual dollars received

The lesser cost of the New Settlement is due to:

- its close similarity to the Old Settlement in dollar terms
- structuring a greater portion of the payments for purposes that are likely to be tax-deductible
- an approximate seven month delay in the payment of \$340 million

# Alaska State Legislature

Committee Document #2

Legislative Research Agency



P.O. Box Y  
Juneau, AK 99811-3100  
Phone: (907) 463-3991  
Fax: (907) 463-3351

October 10, 1991

## MEMORANDUM

TO: Representative Max Gruenberg  
FROM: Milt Barker <sup>MB</sup>  
Consultant  
RE: Valuation of Exxon Settlement  
Research Request 92.067

You requested a comparison of the estimated cost to Exxon, and the value to the State of Alaska and U.S. government, of the Exxon settlement rejected in March (the "Old Settlement" which would have been effective March 12, 1991) with the settlement approved October 8, 1991 (the "New Settlement").

This analysis takes into account inflation, the time value of money, and the effects of federal and state income taxes on the cost to Exxon and the value to the State and U.S.

The analysis does not reflect certain payments under the settlements that are not yet known. The exact dates of some payments are also uncertain.

## Summary

In both nominal (actual out-of-pocket dollars) and present value terms, the State gains and the federal government loses under the New Settlement compared to the old. The combined value to the state and federal governments of the New Settlement is greater than the Old Settlement by \$6.5 million in nominal terms, but \$5.5 million to \$5.9 million less than the Old Settlement in present value. The combined values include the loss of federal and state income tax revenue in both nominal and present value terms.

The combined government results is mirrored in the fact that Exxon pays more in nominal dollars under the New Settlement, but the actual cost to Exxon is less in present value.

One's view of the overall financial terms of the New Settlement relative to the Old Settlement might be shaped by the relative weights one gives as decision criteria to Exxon's burden under the settlement, to benefits received by the State, and to the combined benefits to the federal and all state governments.

TABLE I Exxon Settlements (\$ Millions)			
	Fine	Restitution & Civil Payments	Total Exxon Payments
Old Settlement	\$50	\$950	\$1,000
New Settlement	\$25	\$1,000	\$1,025

Cost to Exxon

Table II displays the present value of the *after-tax* costs of the Old and New Settlements to Exxon. The present values are given for two different points in time--March 12, 1991, the date the Old Settlement was signed, and October 8, 1991, the date the New Settlement was approved by the court. To accurately compare the two settlements, their present values should be stated as of the same point in time to take account of the time value of money.

TABLE II Present Value of After-Tax Cost of Settlements to Exxon (\$ Millions)		
Value as of	Old Settlement	New Settlement
3-12-91	\$439.3	\$434.3
10-8-91	\$467.7	\$462.9

If the present values are stated as of March 12, 1991, the cost to Exxon of the Old Settlement is \$439.3 million and the cost of the New Settlement is \$434.3 million. If the present values are stated as of October 8, 1991, the cost to Exxon of the Old Settlement is \$467.7 million and the cost of the New Settlement is \$462.9 million. No matter which date is chosen, the cost of the New Settlement to Exxon is less than the cost of the Old Settlement.

The lesser cost of the New Settlement arises from the following:

- the New Settlement is very close to the Old Settlement in dollar terms;
- a greater portion of Exxon's payments under the New Settlement are assumed to be tax-deductible; and,

# **CORRECTION**

**THIS DOCUMENT  
HAS BEEN REPHOTOGRAPHED  
TO ASSURE LEGIBILITY**

# Alaska State Legislature

Committee Document #2

Legislative Research Agency



P.O. Box Y  
Juneau, AK 99811-3100  
Phone: (907) 463-3991  
Fax: (907) 463-3351

October 10, 1991

## MEMORANDUM

TO: Representative Max Gruenberg  
FROM: Milt Barker *MB*  
Consultant  
RE: Valuation of Exxon Settlement  
Research Request 92.067

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This analysis takes into account inflation, the time value of money, and the effects of federal and state income taxes on the cost to Exxon and the value to the State and U.S.

The analysis does not reflect certain payments under the settlements that are not yet known. The exact dates of some payments are also uncertain.

### Summary

In both nominal (actual out-of-pocket dollars) and present value terms, the State gains and the federal government loses under the New Settlement compared to the old. The combined value to the state and federal governments of the New Settlement is greater than the Old Settlement by \$6.5 million in nominal terms, but \$5.5 million to \$5.9 million less than the Old Settlement in present value. The combined values include the loss of federal and state income tax revenue in both nominal and present value terms.

The combined government results is mirrored in the fact that Exxon pays more in nominal dollars under the New Settlement, but the actual cost to Exxon is less in present value.

One's view of the overall financial terms of the New Settlement relative to the Old Settlement might be shaped by the relative weights one gives as decision criteria to Exxon's burden under the settlement, to benefits received by the State, and to the combined benefits to the federal and all state governments.

### Assumptions

The analysis uses discount rates of 11.28 percent and 8.16 percent per annum to determine respectively the present value of costs to Exxon and benefits to the governments. The effective marginal combined federal and state income tax rate is assumed to be 37 percent. These are assumptions contained in a March 19, 1991 Congressional Research Service memorandum which has been provided to you.

In this analysis, the 11.28 percent rate is used to calculate the present value of Exxon's costs because it represents the average pre-tax return on private capital. The 8.16 percent rate is used to calculate the present value of the governments' benefits because it is closer to the average return on short or medium-term investments of public funds like the State general fund. In these respects, these two discount rates represent the respective opportunity costs of Exxon and the governments.<sup>1</sup>

Based on an October 9, 1991 memorandum from the Division of Legal Services, which has been provided to you, it is assumed that the criminal fines are not deductible for purposes of federal and state income taxes, but that the restitution and civil payments are deductible.

### Nominal Amounts

Under the New Settlement, the total out-of-pocket amount to be paid by Exxon, and received by the State and federal governments, has increased to \$1,025 million from \$1,000 million under the Old Settlement.

The amount that can be considered of benefit to the State has increased to \$1,000 million from \$950 million as the result of an increase of \$50 million in restitution payments under the plea agreement (criminal settlement).<sup>2</sup> The amount of benefit solely to the federal government, namely, the criminal fine, is decreased from \$50 million to \$25 million.

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<sup>1</sup>Even if the lesser 8.16 percent discount rate is used for Exxon, the present value of the company's after-tax cost remains less under the New Settlement.

<sup>2</sup>It should be noted that this increased \$50 million in restitution is technically paid to the U.S. government, though actually deposited in the trust. Under the New Settlement, a \$50 million restitution payment to the State contained in the Old Settlement is maintained, but is placed in the trust also, rather than being paid to the State general fund.

TABLE I Exxon Settlements (\$ Millions)			
	Fine	Restitution & Civil Payments	Total Exxon Payments
Old Settlement	\$50	\$950	\$1,000
New Settlement	\$25	\$1,000	\$1,025

Cost to Exxon

Table II displays the present value of the *after-tax* costs of the Old and New Settlements to Exxon. The present values are given for two different points in time--March 12, 1991, the date the Old Settlement was signed, and October 8, 1991, the date the New Settlement was approved by the court. To accurately compare the two settlements, their present values should be stated as of the same point in time to take account of the time value of money.

TABLE II Present Value of After-Tax Cost of Settlements to Exxon (\$ Millions)		
Value as of	Old Settlement	New Settlement
3-12-91	\$439.3	\$434.3
10-8-91	\$467.7	\$462.9

If the present values are stated as of March 12, 1991, the cost to Exxon of the Old Settlement is \$439.3 million and the cost of the New Settlement is \$434.3 million. If the present values are stated as of October 8, 1991, the cost to Exxon of the Old Settlement is \$467.7 million and the cost of the New Settlement is \$462.9 million. No matter which date is chosen, the cost of the New Settlement to Exxon is less than the cost of the Old Settlement.

The lesser cost of the New Settlement arises from the following:

- the New Settlement is very close to the Old Settlement in dollar terms;
- a greater portion of Exxon's payments under the New Settlement are assumed to be tax-deductible; and,

\$340 million of payments occur approximately 7 months later under the New Settlement.

The real financial burden to Exxon of the New Settlement is less than the Old Settlement because the company pays approximately the same sum of money but pays it seven months later. Most people would prefer to pay a bill later rather than sooner, especially a \$340 million one. It would allow them to earn interest on the amount if they had the money, or avoid paying interest if they had to borrow it. This factor is taken into account through the present value analysis.

#### Value to the State and Federal Governments

Tables III-V present, in a manner similar to Table II, the present value of Exxon's payments (before-tax) to the State and the federal governments.<sup>3</sup>

TABLE III Present Value of Settlements to State (\$ Millions)		
Value as of	Old Settlement	New Settlement
3-12-91	\$678.4	\$716.4
10-8-91	713.7	754.0

TABLE IV Present Value of Settlements to Federal Government (\$ Millions)		
Value as of	Old Settlement	New Settlement
3-12-91	\$50.0	\$6.1
10-8-91	52.3	6.5

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<sup>3</sup>In Tables III-V, the criminal restitution payments and all civil payments are considered to be of benefit to the State. The criminal fine is considered to be of benefit only to the federal government.

TABLE V Present Value of Settlements to State and Federal Governments (\$ Millions)		
Value as of	Old Settlement	New Settlement
3-12-91	\$728.4	\$722.5
10-8-91	766.0	760.5

As indicated in these tables, the State comes out ahead and the federal government loses ground under the New Settlement, in all cases. However, the combined value to the two governments is less under the New Settlement, as long as one values the two settlements at the same point in time.<sup>4</sup> This is the other side of the coin, i.e., the other side of Exxon's lesser cost for the New Settlement. Basically, the same factors are at work to produce lesser value to the combined governments as produced the lesser cost for Exxon--namely, only a slight increase in payments, deferral of payments, and greater tax deductions.

I hope this information is useful to you. If you have any questions or would like additional information, please contact this agency.

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<sup>4</sup> If the loss of \$18.5 million of federal (and state) income tax revenue due to Exxon's deduction of \$50 million of additional restitution payments were to be ignored, the combined value of the New Settlement to the governments would be greater than the Old Settlement.

**DIVISION OF LEGAL SERVICES**  
**LEGISLATIVE AFFAIRS AGENCY**  
**STATE OF ALASKA**

Committee Document #3

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Court Plaza, Room 500  
Mail Stop 3101

MEMORANDUM

October 9, 1991

**SUBJECT:** Deductibility of fines and restitution in Exxon Valdez criminal case

**TO:** Milt Barker

**FROM:** John B. Gaguine *JBG*  
Legislative Counsel

You have asked about the deductibility, under federal income tax law, of the fine and restitution that Exxon will pay under the recently approved plea agreement. The fine is clearly not deductible under 26 U.S.C. 162(f), which precludes a deduction for "any fine or similar penalty paid to a government for violation of any law." The restitution probably is deductible, but this is not entirely clear.

The IRS regulations (attached) on fines and penalties, and the case law on the issue, make it clear that any fine imposed in connection with a criminal conviction is not deductible, because of 162(f). Indeed, even if the fine here were a civil fine under the Clean Water Act, it would probably not be deductible. True v. United States, 894 F.2d 1197 (10th Cir. 1990); Colt Industries, Inc. v. United States, 880 F.2d 1311 (Fed. Cir. 1989).

The restitution probably is deductible as a business expense under section 162, with subsection (f) not applicable. See the last sentence of regulation 1.162-21(b)(2) ("Compensatory damages . . . paid to a government do not constitute a fine or penalty"). However, at least one case has held that restitution was not deductible. In Waldman v. Commissioner, 88 T.C. 1384 (U.S. Tax Ct. 1987), affirmed on basis of Tax Court opinion, 850 F.2d 611 (9th Cir. 1988), the taxpayer, convicted of grand theft in a California court in connection with business fraud, was ordered to pay restitution as a condition of probation. The court found that the order was intended at least in part as a penalty, and that the "compensatory damages" clause of the regulation did not apply. The court also found that the restitution should be seen as paid to the government, even though it would be distributed to the taxpayer's victims.

My guess, however, would be that the restitution order in the Exxon case will be treated by the Internal Revenue Service as in the nature of compensatory damages,

Milt Barker  
October 9, 1991  
Page 2

rather than as an additional penalty. (Indeed, there may already be some tacit agreement between the federal government and Exxon about the tax consequences of the plea agreement.) The fact that the restitution moneys are specifically directed to go to restoration of the environment certainly seems to qualify them as compensatory damages. Moreover, the nature of Exxon's offenses (not involving fraud or dishonesty, unlike the Waldman case) would in my opinion make the IRS and the courts less likely to find that something labelled restitution is in fact an additional, nondeductible penalty.<sup>1/</sup> However, in light of Waldman, there is certainly the possibility that the restitution order might be found to be nondeductible, too.

Please feel free to contact me if I can be of further assistance.

JBG:lmb  
91-273.lmb

cc: Pam Finley

Enclosure

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<sup>1/</sup> See, Mason and Dixon Lines, Inc. v. United States, 708 F.2d 1043 (6th Cir. 1983), holding deductible "liquidated damages" that motor carrier was required by Virginia law to pay for operating overweight trucks (in addition to nondeductible fines).

activity does not constitute an appearance or communication with respect to legislation or proposed legislation of direct interest to the organization. If an organization pays or incurs expenses allocable to legislative activities which meet the tests of subdivisions (i) and (ii) of subparagraph (2) of this paragraph (appearances or communications with respect to legislation or proposed legislation of direct interest to the organization), on behalf of its members, the dues paid by a taxpayer are deductible to the extent used for such activities. Dues paid by a taxpayer will be considered to be used for such an activity, and thus deductible, although the legislation or proposed legislation involved is not of direct interest to the taxpayer, if, pursuant to the provisions of subparagraph (2)(ii)(b)(1) of this paragraph, the legislation or proposed legislation is of direct interest to the organization, as such, or is of direct interest to one or more members of the organization. For other provisions relating to the deductibility of dues and other payments to an organization, such as a labor union or a trade association, see paragraph (c) of § 1.162-15.

(4) **Limitations.** No deduction shall be allowed under section 162(a) for any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums. For example, no deduction shall be allowed for any expenses incurred in connection with "grassroot" campaigns or any other attempts to urge or encourage the public to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation. [T.D. 6819, 30 FR 5581, April 20, 1965, as amended by T.D. 6996, 34 FR 835, Jan. 18, 1969]

§ 1.162-21 Fines and penalties.

(a) **In general.** No deduction shall be allowed under section 162(a) for any fine or similar penalty paid to—

(1) The government of the United States, a State, a territory or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico;

(2) The government of a foreign country; or

(3) A political subdivision of, or corporation or other entity serving as an agency or instrumentality of, any of the above.

(b) **Definition.** (1) For purposes of this section a fine or similar penalty includes an amount—

(i) Paid pursuant to conviction or a plea of guilty or *nolo contendere* for a crime (felony or misdemeanor) in a criminal proceeding;

(ii) Paid as a civil penalty imposed by Federal, State, or local law, including additions to tax and additional amounts and assessable penalties imposed by chapter 68 of the Internal Revenue Code of 1954;

(iii) Paid in settlement of the taxpayer's actual or potential liability for a fine or penalty (civil or criminal); or

(iv) Forfeited as collateral posted in connection with a proceeding which could result in imposition of such a fine or penalty.

(2) The amount of a fine or penalty does not include legal fees and related expenses paid or incurred in the defense of a prosecution or civil action arising from a violation of the law imposing the fine or civil penalty, nor court costs assessed against the taxpayer, or stenographic and printing charges. Compensatory damages (including damages under section 4A of the Clayton Act (15 U.S.C. 15a), as amended) paid to a government do not constitute a fine or penalty.

(c) **Examples.** The application of this section may be illustrated by the following examples:

**Example (1).** M Corp. was indicted under section 1 of the Sherman Anti-Trust Act (15 U.S.C. 1) for fixing and maintaining prices of certain electrical products. M Corp. was convicted and was fined \$50,000. The United States sued M Corp. under section 4A of the Clayton Act (15 U.S.C. 15a) for \$100,000, the amount of the actual damages resulting from the price fixing of which M Corp. was convicted. Pursuant to a final judgment entered in the civil action M Corp. paid the United States \$100,000 in damages. Section 162(f) precludes M Corp. from deducting the fine of \$50,000 as a trade or business expense. Section 162(f) does not preclude it from deducting the \$100,000 paid to the United States as actual damages.

**Example (2).** N Corp. was found to have violated 33 U.S.C. 1321(b)(3) when a vessel it operated discharged oil in harmful quantities into the navigable waters of the United States. A civil penalty under 33 U.S.C. 1321(b)(6) of \$5,000 was assessed against N Corp. with respect to the discharge. N Corp. paid \$5,000 to the Coast Guard in payment of the civil penalty. Section 162(f) precludes N Corp. from deducting the \$5,000 penalty.

**Example (3).** O Corp., a manufacturer of motor vehicles, was found to have violated 42 U.S.C. 1857f-2(a)(1) by selling a new motor vehicle which was not covered by the required certificate of conformity. Pursuant to 42 U.S.C. 1857f-4, O Corp. was required to pay, and did pay, a civil penalty of \$10,000. In addition, pursuant to 42 U.S.C. 1857f-5a(c)(1), O Corp. was required to expend, and did expend, \$500 in order to remedy the nonconformity of that motor vehicle. Section 162(f) precludes O Corp. from deducting the \$10,000 penalty as a trade or business expense, but does not preclude it from deducting the \$500 which it expended to remedy the nonconformity.

**Example (4).** P Corp. was the operator of a coal mine in which occurred a violation of a mandatory safety standard prescribed by the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 801 et seq.). Pursuant to 30 U.S.C. 819(a), a civil penalty of \$10,000 was assessed against P Corp., and P Corp. paid the penalty. Section 162(f) precludes P Corp. from deducting the \$10,000 penalty.

**Example (5).** Q Corp., a common carrier engaged in interstate commerce by railroad, hauled a railroad car which was not equipped with efficient hand brakes, in violation of 45 U.S.C. 11. Q Corp. was found to be liable for a penalty of \$50 pursuant to 45 U.S.C. 13. Q Corp. paid that penalty. Section 162(f) precludes Q Corp. from deducting the \$250 penalty.

**Example (6).** R Corp. owned and operated on the highways of State X a truck weighing in excess of the amount permitted under the law of State X. R Corp. was found to have violated the law and was assessed a fine of \$85 which it paid to State X. Section 162(f) precludes R Corp. from deducting the amount so paid.

**Example (7).** S Corp. was found to have violated a law of State Y which prohibited the emission into the air of particulate matter in excess of a limit set forth in a regulation promulgated under that law. The Environmental Quality Control Board of State Y assessed a fine of \$500 against S Corp. The fine was payable to State Y, and S Corp. paid it. Section 162(f) precludes S Corp. from deducting the \$500 fine.

**Example (8).** T Corp. was found by a magistrate of City Z to be operating in such city an apartment building which did not conform to a provision of the city housing code requiring installable fire escapes on apartment buildings of that type. Upon the basis of the magistrate's finding, T Corp. was required to pay, and did pay, a fine of \$200 to City Z. Section 162(f) precludes T Corp. from deducting the \$200 fine.

T.D. 7345, 40 FR 7437, Feb. 20, 1975; 40 FR 8948, March 4, 1975, as amended by T.D. 7366, 40 FR 29290, July 11, 1975]

### 1.162-22 Treble damage payments under the antitrust laws.

(a) In general. In the case of a taxpayer who after December 31, 1969, either is convicted in a criminal action of a violation of the Federal antitrust laws or enters a plea of guilty or *nolo contendere* to an indictment or information charging such a violation, and whose conviction or plea does not occur in a new trial following an appeal from a conviction on or before such date, no deduction shall be allowed under section 162(a) for two-thirds of any amount paid or incurred after December 31, 1969, with respect to—

(1) Any judgment for damages entered against the taxpayer under section 4 of the Clayton Act (15 U.S.C. 15), as amended, on account of such violation or any related violation of the Federal antitrust laws, provided such related violation occurred prior to the date of the final judgment of such conviction, or

(2) Settlement of any action brought under such section 4 on account of such violation or related violation.

For the purposes of this section, where a civil judgment has been entered or a settlement made with respect to a violation of the antitrust laws and a criminal proceeding is based upon the same violation, the criminal proceeding need not have been brought prior to the civil judgment or settlement. If, in his return for any taxable year, a taxpayer claims a deduction for an amount paid or incurred with respect to a judgment or settlement described in the first sentence of this paragraph and is subsequently convicted of a violation of the antitrust laws which makes a portion of such amount unallowable, then the taxpayer shall file an amended return for such taxable year on which the amount of the deduction is appropriately reduced. Attorney's fees, court costs, and other amounts paid or incurred in connection with a controversy under such section 4 which meet the requirements of section 162 are deductible under that section. For purposes of subparagraph (2) of this paragraph, the amount paid or incurred in settlement shall not include amounts attributable to the plaintiff's costs of suit and attorney's fees, to the extent that such costs or fees have actually been paid.

(b) Conviction. For purposes of paragraph (a) of this section, a taxpayer is convicted of a violation of the antitrust laws if a judgment of conviction (whether or not a final judgment) with respect to such violation has been entered against him, provided a subsequent final judgment of acquittal has not been entered or criminal prosecution with respect to such violation terminated without a final judgment of conviction. During the pendency of an appeal or other action directly contesting a judgment of conviction, the taxpayer should file a protective claim for credit or refund to avoid being barred by the period of limitations on credit or refund under section 6511.

(c) Related violation. For purposes of this section, a violation of the Federal antitrust laws is related to a subsequent violation if (1) with respect to the subsequent violation the United States obtains both a judgment in a criminal proceeding and an injunction against the taxpayer, and (2) the taxpayer's actions which constituted the prior violation would have contravened such injunction if such injunction were applicable at the time of the prior violation.

(d) Settlement following a dismissal of an action or amendment of the complaint. For purposes of paragraph (a)(2) of this section, an amount may be considered as paid in settlement of an action even though the action is dismissed or otherwise dis-

UNITED STATES FEDERAL RESERVE SYSTEM

**DIVISION OF LEGAL SERVICES**

**LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA**

Committee Document #4

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**MEMORANDUM**

October 3, 1991

**SUBJECT:** Exxon Litigation; Plea Agreement Dated September 26, 1991  
(Work Order No. 7-LS1044)

**TO:** Representative Max Grueberg

**FROM:** Tamara Brandt Cook  
Director TBC

You have asked me to identify the differences between the plea agreement in the Exxon litigation filed with the United States District Court on March 13, 1991 and rejected by the court and the new plea agreement dated September 26, 1991. The major differences between the two documents appear to be the following:

(1) the new plea agreement does not deal with Alyeska Pipeline Service Company at all whereas under the old agreement the United States agreed not to seek additional criminal, civil or administrative penalties against Alyeska;

(2) the total amount of the fine imposed and not remitted under the new plea agreement is \$25 million, whereas under the old agreement that amount was \$50 million;

(3) a new provision has been added to the effect that \$12 million of the fine is imposed for violation of the Migratory Bird Treaty Act and this amount is to be deposited into a special fund and used by the United States to carry out approved wetlands conservation projects in the United States, Canada and Mexico;

(4) an additional restitution payment of \$50 million is to be paid to the United States to be used for restoration projects within Alaska relating to the oil spill.

These are the specific differences between the two documents organized according to the numbering contained in the new plea agreement:

II. The name "E. Edward Bruce, Esq." is deleted from the list of attorneys representing Exxon Shipping;

II.C.2. This provision is entirely new and states, "The defendants, EXXON SHIPPING and EXXON, agree solely for the purpose of this plea agreement and for

no other purpose that there is a legal basis for the court to impose the payment agreed to in paragraph IV as damages recoverable for compensatory and remedial purposes by the State of Alaska." The paragraph referred to deals with the restitutionary payments.

III.A. References contained in the old plea agreement to Alyeska Pipeline Service Company are deleted.

III.B. The reference contained in the old plea agreement to Alyeska Pipeline Service Company is deleted.

III.C. The total amount of fines imposed is changed from \$100 million to \$150 million;

1. with respect to EXXON SHIPPING, the fine is changed from \$75 million to \$125 million;

3. with respect to EXXON SHIPPING, the amount remitted is changed from \$37.5 million to \$105 million; with respect to EXXON, the amount remitted is changed from \$12.5 million to \$20 million;

(b) the amount defendants have expended for clean up is designated to be \$2.1 billion, rather than \$2 billion;

(e)-(1) these are new facts added to the list of facts set out in the plea agreement as justification for the partial remission of the fines.

III.D. The amount required to discharge the criminal sanctions is reduced from \$37.5 million to \$20 million for EXXON SHIPPING and from \$12.5 million to \$5 million for EXXON.

III.E. This entirely new provision states: "The parties agree that \$7 million of Exxon Shipping's fine and all of Exxon's \$5 million fine be imposed for violation of the Migratory Bird Treaty Act. By operations of law, Title 16, United States Code, Section 4406(b), this fine is to be deposited into the North American Wetlands Conservation Fund to be used solely by the U.S. Department of the Interior to carry out approved wetlands conservation projects in the United States, Canada and Mexico."

IV.A. The amount of restitutionary payments is increased from \$50 million to \$100 million with the additional \$50 million to be paid to the United States. The state still receives the original \$50 million payment. Like the state, the United States must use this money for restoration projects within the State of Alaska relating to the oil spill.

Representative Max Gruenberg

October 3, 1991

Page 3

IV.B. The restitutionary payments are to be under the control of each recipient. Originally the paragraph dealt only with the state, since only the state was to receive a restitutionary payment. (Note that under the new Memorandum and Consent Decree between the state and the federal government "all natural resource damage recoveries shall be placed in a joint trust." (VI.A.) The phrase is defined to include criminal restitution recoveries, which may be separately managed only upon agreement of the parties (Alaska and the U.S.) (II.G.). So, despite this plea agreement it appears the state and federal government will each place its \$50 million restitutionary payment into the trust fund and not separately manage the money. Remember, Alaska is not a party to this plea agreement, so this provision in the plea agreement itself cannot serve as an agreement between the U.S. and Alaska to separately manage the recovery.)

IV.C. This entirely new provision states: "The defendants, EXXON SHIPPING and EXXON, agree, solely for the purpose of this plea agreement and for no other purpose, that there is a legal basis for the Court to impose the payments agreed to in paragraph IV as damages recoverable for compensatory and remedial purposes."

IV.D. An additional phrase is inserted to the effect that the parties agree that the restitutionary payments represent compensation for harm to the state.

TBC:lmb:gc  
91-268.lmb

Enclosure

**DIVISION OF LEGAL SERVICES**

Committee Document #5

**LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA**

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MEMORANDUM

October 7, 1991

**SUBJECT:** Exxon Litigation; Agreement and Consent Decree signed September 24 and 25, 1991 (Work Order No. 7-LS1044)

**TO:** Representative Max Gruenberg

**FROM:** Tamara Brandt Cook, <sup>TPU</sup>  
Director

You have asked me to identify differences between the Agreement and Consent Decree in the Exxon litigation under the new settlement and the Agreement and Consent Decree under the former proposed settlement. The major differences between the two documents result from the deletion from the new Agreement of the following provisions that were in paragraph 37 of the original Agreement:

- (1) the Agreement was published in the Federal Register and a public comment period of 30 days after publication was provided for;
- (2) the Agreement was submitted to the Alaska State Legislature for approval;
- (3) the United States and the state were both granted authority to withdraw from the Agreement within 15 days after close of the public comment period if the comments disclosed facts making the Agreement inappropriate, improper or inadequate or if the legislature did not approve the Agreement.

These are the specific differences between the two documents organized according to the new Agreement and Consent Decree:

Introduction, 3rd paragraph. The dates the United States (March 13) and the state (March 15) each filed a complaint in United States District Court asserting civil claims have been inserted into the new Agreement. The old Agreement was drafted before those claims had been asserted. The following sentence from the old Agreement is omitted: "Exxon Corporation and Exxon Shipping Company have also filed administrative demands against the United States Coast Guard, with the U.S.

Coast Guard, Coast Guard Maintenance and Logistics Command-Pacific at Alamenda, California under date of September 21, 1990."

5th paragraph. The original Agreement read: "Exxon represents that, during the period from the Oil Spill through the end of 1992, it expended in excess of \$2 billion for clean-up activities. . ." The new Agreement is modified to read: "Exxon represents that, during the period from the oil spill through August, 1991, it expended in excess of \$2.1 billion for clean-up activities. . ."

Definitions. 6(c) The reference to natural resources controlled by the United States "and/or" the State is modified to reflect control by the United States, the State, "or both the United States and the State."

(f) The Commissioner of Environmental Conservation and the Commissioner of Fish and Game is added to the other listed state trustee, the Attorney General. This change is probably not significant, since the original MOA included these three as state trustees.

(i) Two events are deleted from the list of events that must occur under the definition of "Final Approval" which originally read: "(1) the Agreement has been lodged with the Court and noticed in the Federal Register, and the period for submission of public comments has expired; (2) the period for withdrawal of consent by the Governments under Paragraph 37 has expired;" These events are no longer applicable, since all of the original paragraph 37 has been deleted.

Payment Terms. 8(b) The date for payment is changed from September 1, 1992 to December 1, 1992. The amount of the payment up to the \$4,000,000 maximum, is reduced by Exxon's clean-up expenditures from January 1, 1991 through March 12, 1991 rather than from January 1, 1991 to the effective date of the agreement, and by expenditures after March 12, 1991 rather than after the effective date. A new provision reads: "provided that all such Expenditures shall be subject to audit by the Governments." (Note: March 12, 1991 was the date the original Agreement was signed.)

9. Reference to the events under the original paragraph 37 are deleted.

10. Items dealing with reimbursement to the governments for costs incurred prior to the effective date have been altered to refer to costs incurred prior to March 12, 1991. Under clause 5 after March 12, 1991, rather than after the effective date, the governments are permitted to receive reimbursement for costs to assess certain injuries. Injuries to "archaeological sites and artifacts" is added to the list. Item 6 is added and reads: "to reimburse the State for reasonable Litigation Costs incurred by it after March 12, 1991." The aggregate amount allocated for United States reimbursement under items 1 and 2 shall not exceed \$67, rather than \$62, and the

amount allocated to the state for reimbursement under items 1-3 shall not exceed \$75 million, rather than \$72. The amount allocated for state litigation costs incurred after March 12, 1991 (new item 6) shall not exceed \$1 million per month. Reference to the MOA that "the Governments have submitted or will submit to this Court to resolve claims of the Governments against one another. . ." is changed to a reference to the MOA "this court entered on August 28, 1991. . ."

Releases and Covenants Not to Sue by the Governments. (c) and (d) These are entirely new and replace the following material in the original Agreement: "nothing in this Agreement shall affect or impair. . . (b) the rights and obligations, if any, of Alaska Native villages to act as trustees for the purpose of asserting and compromising claims for injury to destruction of, or loss of natural resources, if any, belonging to, managed by, controlled by or appertaining to such village; (c) the rights and obligations, if any, of legal entities or persons other than the Governments who are holders of any present right, title, or interest in land or other property interest affected by the Oil Spill;"

16(b) and (c) are added. (b) requires dismissal of the claims asserted by the governments against Exxon or Exxon Pipeline in federal court and dismissal of counterclaims within 15 days of final approval of the Agreement. (c) required claims asserted by Exxon in Exxon Shipping Company, et al., v. Lujan, et al., against the governments to be dismissed not later than 5 days after court approval of any agreements between the governments and the non-government defendants in Lujan under which all of the non-Government defendants disclaim any right to recover natural resource damages.

Third Party Litigation. 26(a) An exception is added identifying (b), which is new.

(b) This is a new indemnification provision under which Exxon agrees to indemnify the governments from liability to a third party (other than the TAPL Fund or Alyeska) (1) only to the extent of the value received by Exxon or Exxon Pipeline from the third party; and (2) only if the governments assert all defenses they have to the claim.

Election to Terminate. Paragraph 37 of the original Agreement is deleted as previously mentioned in this memorandum and all the remaining paragraphs in the Agreement are renumbered.

TBC:gc  
91-363.glc

**DIVISION OF LEGAL SERVICES**

**LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA**

*Committee Document #6*

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Mail Stop 3101

**MEMORANDUM**

August 29, 1991

**SUBJECT:** Exxon Litigation; Memorandum of Agreement dated 9/27/91  
(Work Order No. 17-LS1044)

**TO:** Representative Max Gruenberg

**FROM:** Pamela Finley  
Assistant Revisor of Statutes

You asked for a summary of the major differences between the memorandum of agreement (MOA) between the State of Alaska and the U.S. dated March 12, 1991 and the one dated August 27, 1991 in Civ. Action No. A91-081 Civ., filed in federal District Court in Anchorage. The two MOAs are very similar; the major differences are as follows.

1. Public Participation. A public advisory group to advise the trustees is required in the new MOA. In the first MOA it was allowed, but not required. (Compare IVA4 at p. 11 of original MOA with VA4 at p.11 of new MOA.)

2. Cooperation Agreement. The new MOA contains a cooperation agreement between the governments that did not appear in the first MOA. (Since the first MOA was tied to a settlement with Exxon, provisions for cooperation in litigation and settlement would have been superfluous.) The cooperation agreement appears at paragraph VII of the new MOA on pages 15-16. It (1) requires the governments to cooperate in civil litigation and in the settlement of restitution claims connected with criminal proceedings; and (2) allows the governments to share information with each other or third parties, although the government receiving the information is required to do its best to maintain the information as privileged and may not share it with a third party without the consent of the government producing the information.

3. Termination of the Trust. Under the old MOA the trust terminated in 16 years or upon termination of the consent decree with Exxon. In the new MOA, the trust terminates when the governments certify to the court, or the court finds, that all activities contemplated under the MOA have been completed. (Compare XI at p. 17 of the old MOA with XIII at page 20 of the new MOA.)

4. Trust Money vs. General Revenues. This is the biggest change in the MOA. The differences can be seen by comparing the definitions of "allowed expenses" and "natural resource damage recovery" at pages 6 and 7 of the old MOA and paragraph VB at pages 12-13 of the old MOA with the definitions of "base allowed expenses" and "natural resource damage recovery" at pages 5 and 6-7 of the new MOA and paragraph VIB at pages 13-14 of the new MOA.

Under the old MOA (and the related criminal plea agreement):

(1) the state general fund was to be reimbursed \$72 million for damage assessment, restoration, and litigation expenses incurred on or before March 12, 1991, and for unreimbursed response and cleanup costs incurred on or before December 31, 1991;

(2) the federal government was to be reimbursed \$62 million for damage assessment and restoration expenses incurred on or before March 12, 1991, and for response and cleanup costs incurred on or before December 31, 1990;

(3) both governments were to be reimbursed for response and cleanup costs they incurred after December 31, 1990;

(4) the above reimbursements were to be made within five years; and

(5) the state general fund was to receive \$50 million in restitution as part of the criminal plea bargain, to be paid within 30 days, and to be used for restoration or replacement of equivalent resources.

Under the new MOA:

(1) recovery for response and cleanup costs will go directly to the government recovering it (see p.7 of new MOA);

(2) the state and federal governments will be reimbursed for assessment and restoration costs incurred on or before 3/12/91, and the state will be reimbursed for litigation costs incurred on or before 3/12/91 (see pp.5 and 13 of new MOA) ;

(3) the state and federal governments will be reimbursed for jointly agreed upon assessment and restoration costs incurred after 3/12/91 (see p. 13 of new MOA);

(4) money recovered by the federal government for its litigation costs and attorney fees will go directly to the federal government (see p.7 of new MOA); the state general fund will be reimbursed for its litigation costs and attorney fees incurred on or before March 12, 1991 (pp. 5 and 13 of new MOA.); the state will be

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August 29, 1991

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reimbursed for its litigation costs and attorneys fees incurred after March 12, 1991 only up to \$40 million and not more than \$1 million for any one month;

(5) if money is received in settlement, \$67 million shall be reimbursed to the federal government for assessment and restoration incurred on or before 3/12/91 and for response and cleanup costs incurred before 1/1/91; and \$75 million shall be reimbursed to the state general fund for assessment, restoration, and litigation and attorney fees incurred on or before 3/12/91 and for response and cleanup costs incurred before 1/1/91 (pages 5 and 13 of new MOA);

(6) money received as restitution in a criminal case (e.g., the \$50 million in the rejected criminal plea agreement) will go to the trust, rather than the state general fund unless the state and federal governments agree otherwise (page 7 of new MOA);

(7) money received for lost royalty, taxes, licenses, fees, punitive damages, and criminal fines or penalties (which are different from restitution) go directly to the government recovering them (page 7 of new MOA); this appears to have been true in the old MOA and related agreements as well;

(8) the reimbursements are to be paid before the trust fund is paid (page 14 of new MOA); under the old MOA the reimbursements were to be paid in 5 years.

In my view, the major financial provisions are (1) the placing of any criminal restitution money that might be due the state in the trust rather than the general fund; (2) the direct recovery of each government of response and cleanup costs; (3) the preference given reimbursement over the trust fund; and (4) the \$40 million limitation on the post-March 12, 1991 litigation costs and attorney fees incurred by the state, without any similar limitation on the federal government's recovery for litigation costs and attorney fees.

I will be preparing a more detailed analysis, which I will send to you next week.

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**DIVISION OF LEGAL SERVICES**  
**LEGISLATIVE AFFAIRS AGENCY**  
**STATE OF ALASKA**

Committee Document # 7

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MEMORANDUM

January 8, 1992

**SUBJECT:** Appropriation Power and the Exxon-Valdez Trust Fund;  
Work Order No. 7-LS1749

**TO:** Senator Curt Menard

**FROM:** Pamela Finley *PF*  
Assistant Revisor

**I. QUESTIONS PRESENTED.** You have asked the following questions about the trust fund (established by a Memorandum of Agreement (MOA)) consisting of proceeds from the state and federal governments' settlement of claims against Exxon and managed by three federal and three state trustees:

1. What authority does the legislature have to appropriate money paid by Exxon into the trust fund?
2. What authority does the legislature have over trust money given by the trustees to state agencies or entities?
3. What specific actions can the legislature take to exercise control over expenditure of the trust fund?

**II. ANSWERS.**

1. While the question has not been directly answered by Alaska's Supreme Court, and while the Attorney General disagrees, in my opinion the trustees may not expend money from the trust fund unless it is appropriated by the state legislature. The MOA does not require (or provide for) appropriation by the state legislature, but I believe that (1) at least some of the trust fund represents state money; (2) the state constitution requires an appropriation before state money can be expended; (3) an appropriation requirement must be read into the trust agreement or else it will have been beyond the power of the Attorney General to agree to it.

2. This question has also not been definitely answered by the Alaska's Supreme Court, but in my opinion the state constitution prohibits a state agency from

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spending money received by the state from the trust unless the legislature has appropriated the money to the agency.

3. (a). There are many ways that the legislature can exercise control over the expenditure of trust money because the state trustees must agree to any expenditure and the state trustees are state officials subject to legislative control. The main legal limitation on the legislature's power over appropriations in this case is the federal Supremacy Clause, which requires that legislative measures not conflict with federal law. In addition, the trust agreement allows the federal district court judge to authorize expenditures if the state and federal trustees cannot agree; this provision, if valid, might allow the federal judge to act in a way that is beyond the control of the legislature.

(b). If the legislature wants to satisfy the constitutional appropriation requirement, but exercise very little control over how the trustees expend the money, it could simply appropriate the state's interest in money received from Exxon to the trust for the purposes outlined in the MOA. This might be considered an unconstitutionally excessive delegation of legislative power, but I suspect (though am not sure) that the purposes set out in the MOA (while somewhat vague) would be sufficient and that our courts would uphold such an appropriation. However, appropriations to the trust may have to be made each year that money is received from Exxon; a one time appropriation of money to be received in the future may be unconstitutional.

(c). On the other hand, if the legislature wants to exercise maximum power over the trust expenditures,

(1) an appropriation to the trust of the state's interest in money received from Exxon should be conditioned on the passage of legislation requiring the state trustees not to agree to any expenditures from the trust unless the legislature has appropriated the money from the trust for those projects;

(2) the legislature could require the state trustees to submit proposed expenditures from the trust as part of the budget process, and then specifically appropriate the state's interest in the trust fund money to those projects that the legislature and the trustees (state and federal) could agree on;

(3) the legislature should review the general "program receipts" appropriations (see e.g., SLA 1991, ch. 73, sec. 2) and decide whether it wants to allow money to flow from the trust to state agencies under such a general appropriation, with review by LB&A under AS 37.07.080(h), or whether it wants to draft these general "program receipts" appropriations in such a way that they do not inadvertently allow the money to flow from the trust to state agencies unless there is a specific appropriation to a specific project;

(4) the legislature could enact legislation that in some way limited the state trustees' power to agree to expenditures (e.g., to agree only to those projects for which there is a legislative appropriation.)

### III. DISCUSSION.

A. The State's Interest in Trust Money is Subject to Appropriation. Article II, sec. 1 of the state constitution vests the legislative power in the legislature. Article IX, sec. 13 of the state constitution reads as follows:

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. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

Because the latter section refers to money in the state treasury, one could argue that this section does not apply to money before it reaches the state treasury. However, when dealing with constitutional questions involving public funds, courts have generally held that constitutional provisions apply if the money is subject to deposit in the treasury, even if the actual deposit has not occurred. State v. Nelson, 7 N.W.2d 735 (N.D. 1943)(Money due the state under state law must be deposited in the treasury and be subject to appropriation; it cannot be withheld by a local government to recoup money admittedly owed by the state to the local government); Texas Pharmaceutical Ass'n. v. Dooley, 90 S.W.2d 328,330 (Tex. Ct. Civ. App. 1936)(Money due the state under state law is public money, "whether deposited in the state treasury or not," for the purposes of a constitutional prohibition against gifts to private persons). The real question is whether the trust fund money is subject to appropriation and whether the state trustees have the authority to obligate the expenditure of the trust fund money without legislative authorization.

Alaska's Supreme Court has taken a fairly strict view of the legislature's appropriation power. In State v. Fairbanks North Star Borough, 736 P.2d 1140 (Alaska 1987), the court held that a statute allowing the governor to withhold or reduce appropriations when anticipated revenues would not cover appropriations was an unconstitutional delegation of the legislature's appropriation power. In Public Employees' Local 71 v. State, 775 P.2d 1062 (Alaska 1989), the court noted that the state's collective bargaining agreements were conditioned on appropriations by the legislature because the funding of such an agreement was relegated to the legislature by art. IX, sec. 13 of the state constitution. Finally, in McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988), the court held that a provision of an initiative requiring the university to transfer property to the community college system established by the initiative, was an appropriation, which could not constitutionally be accomplished by initiative. The court noted that the reason for prohibiting

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appropriation by initiative was "to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs." McAlpine v. University of Alaska, 762 P.2d 81 at 88 (Alaska 1988) (emphasis in original). See also Thomas v. Bailey, 595 P.2d 1 (Alaska 1979) (Initiative requiring transfer of state land to private persons was attempted appropriation of state asset); Alaska Conservative Political Action Cmtee. v. Municipality of Anchorage, 745 P.2d 936 (Alaska 1987) (sale of utility worth over \$32 million in exchange for \$1 is appropriation prohibited by initiative); McNevin v. McNevin, 444 N.E.2d 320 (Ind. Ct. App. 1983) (claim for money damages is asset). Former Superior Court Judge Thomas Stewart has ruled that "so-called trust or custodial monies received from federal or other sources for specific functions and purposes" were subject to appropriation under art. IX, sec. 13 of the state constitution. Kelley v. Hammond, Super. Ct., 1st Jud. Dist. at Juneau, Case No. 77-4 (May 30, 1978). However, since the state Supreme Court has not decided a case similar to one involving the Exxon settlement, further discussion is needed.

In his April 2, 1991 opinion (a copy of which is enclosed), the attorney general appears to take the position that the legislature's power of appropriating money and authorizing expenditures is not implicated because the money never becomes the property of the state; the federal government and members of the executive branch of the state spend the money without ever deciding how much is owned by the state and how much is owned by the federal government. There are several problems with this argument.

First, if a court were to decide that the attorney general could authorize money to be spent (without legislative authorization or appropriation) whenever the money was subject to the competing claim of another person or entity, it would set a rather dangerous precedent. Unfortunately, such a rationale could not be based on the Clean Water Act (which was one basis for the state's claim against Exxon), because neither the Clean Water Act nor regulations enacted under it require joint use of the natural resource damage recovery from Exxon. On the contrary, 43 CFR 11.92(a) contemplates that the state and federal recoveries will be deposited and administered separately, although of course the state and federal trustees could cooperate in spending their respective recoveries. Therefore, if a court were to find no violation of the appropriation or authorization requirements on the ground that no part of the Exxon settlement ever became state money, (because the trustees spent it all before deciding what belonged to whom) the same rationale could be applied to any case in which the attorney general agreed with an opposing party that they should jointly spend disputed money. A court may be very reluctant to make such a decision, especially given the decisions in the Fairbanks North Star Borough and McAlpine cases.

Second, if no part of the natural resource damage recovery from Exxon is state money, then elementary logic compels the conclusion that the state got nothing for

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the damage to its natural resources: the money from Exxon cannot at the same time be a state asset and not be a state asset. Under this rationale, the state has given up one asset (its claim for damages to its natural resources) without receiving anything (money) in exchange. The argument assumes that the attorney general has given away the state's claims against Exxon for immense damage to the state's natural resources and the state has received nothing in return. If this is indeed what the attorney general maintains, then there is a substantial question as to whether the governor, through the attorney general, has faithfully executed the law, as required by art. III, sec. 16, Constitution of the State of Alaska.<sup>1/</sup>

However, the documents themselves belie the notion that the state has not recovered for damages to its natural resources. The consent decree with Exxon clearly reflects that the state, as trustee, is recovering (jointly with the federal government) for damage to natural resources. The MOA also recites that the "state" is a trustee for the damaged natural resources: MOA, p.2. The fact that the recovery is joint does not make it (or at least part of it) any less the recovery of the state. Nor does the state and federal governments' agreement to spend the money without deciding to whom it belongs, obliterate the fact that it is (at least in part) a recovery of the state. Finally, the fact that the trustees intend to use state employees and agencies for their projects, see 56 Fed Reg. No. 41, p. 8898 (1991), clearly indicates that the "trust" is not entirely separate from the state government.

In my opinion, the better view is that the trust fund recovery does include state money, albeit of undetermined amount, and albeit imposed with a trust. However the question still remains as to whether that state money imposed with a trust is subject to appropriation.

Different jurisdictions have taken divergent positions on what money is subject to appropriation. E.g., Kittredge v. Boyd, 18 P.2d 563 (Kan. 1933)(Taxes paid under protest are not subject to appropriation); Oesterle v. Lavik, 52 N.W.2d 297 (N.D. 1952)(Taxes paid under protest are subject to appropriation.) Some states hold that money coming from a non-state source (usually the federal government) that the source designates for a particular purpose, is not subject to the appropriation process. Opinion of the Justices, 378 N.E.2d 433 (Mass 1978)(federal trust fund money); Navaio Tribe v. Arizona Dept. of Administration, 528 P.2d 623 (Ariz. 1974)(funds from a purely federal source to be disbursed to Indian Tribe and two cities); State ex rel Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974)(Federal and private funds given to state university are not subject to appropriation.)

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<sup>1/</sup> Interestingly enough, the U. S. Supreme Court has held that a state legislature violates its public trust in disposing of certain public lands in certain circumstances, and that in such cases, the disposal is void. Ill. Central R. Co. v. Illinois, 146 U.S. 387, 36 L.Ed. 1018 (1892). While a court is almost certainly not going to prevent an attorney general from dismissing claims as a general matter, it might do so if the harm to the public interest were sufficiently egregious.

The resolution of this issue in Colorado has changed somewhat over time. In MacManus v. Love, 499 P.2d 609 (Colo. 1972), the court held that federal funds that are not connected to state appropriations are not subject to appropriation. In Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo. 1985), the court held that money received by the state from a settlement between a federal agency and a private entity (without participation by the state) was not subject to appropriation. However, in Colorado General Assembly v. Lamm, 738 P.2d 1156 (Colo. 1987), the court held that federal funds that required state matching money, or that could be transferred among block grants, were subject to appropriation.

At least two states with provisions similar to art. IX, sec. 13 of Alaska's constitution have held that all federal funds must be appropriated before they can be spent. In Anderson v. Regan, 425 N.E.2d 792 (N.Y. 1981), the court held that federal funds must be appropriated, even though their use is severely limited by federal law, in order to restrain the executive from overspending, to maintain the balance of power between the executive and legislative branches, and to ensure accountability in government. In Shapp v. Sloan, 391 A. 2d 595 (Pa. 1978), appeal dismissed sub nom Thornburgh v. Casey, 440 U.S. 942, 59 L.Ed.2d 630 (1979), the court came to the same conclusion. The court noted that the Advisory Commission on Intergovernmental Relations, established by Congress, had urged state legislatures to assume greater control over federal funds coming to state governments.

Given the divergent decisions on this issue in other jurisdictions, it is impossible to state with certainty what Alaska's Supreme Court would decide. However, in my opinion, allowing the trustees to spend money recovered from Exxon without an appropriation would violate art. II, sec. 1, or art. IX, sec. 13, of the state constitution. This conclusion is based on five considerations.

First, the Alaska cases in this area are based on the premise that control over state assets and finances is vested in the legislature and only the legislature. The court was unwilling to "bend" that principle, even in the face of the fiscal emergency in the Fairbanks North Star Borough case. It has also refused, in the McAlpine case, to limit the appropriation power to cover only money. Finally, it applied the principle in the Public Employees Local 71 case even though that case involved a contract already negotiated by the governor with public employees. In addition, a highly respected Superior Court judge has found that custodial and trust funds are subject to appropriation in Alaska. Kelley v. Hammond, 1st Jud. Dist. at Juneau, case No. 77-4 (May 30, 1978). There seems little reason for the court to depart from the principle when the state is recovering money for damage to natural resources of the state.

Second, the possibility that other parts of the state budget would be affected by spending the money—the consideration behind the shift in the Colorado cases—may well apply here. If trust fund money is to be spent on certain environmental or fish