

May 24, 1996

The Honorable Tony Knowles  
Governor  
State of Alaska  
P.O. Box 110001  
Juneau, Alaska 99811

Re: CSSB 301 (FIN) am H -- relating to  
postsecondary education  
A.G. file no: 883-96-0063

Dear Governor Knowles:

At the request of your legislative director, Pat Pourchot, we have reviewed CSSB 301(FIN) am H ("SB 30111) that restructures the Alaska Commission on Postsecondary Education ("Commission") and the Alaska Student Loan Corporation ("Corporation") and makes certain amendments to the student loan program.

#### SEPARATION OF LOAN/REGULATION FUNCTIONS OF THE COMMISSION

Both the Commission and the Corporation currently have authority over the Alaska student loan programs. This can be a cumbersome process, especially in light of the problems with the membership of the Commission, discussed below. Another significant problem is that the Corporation, the agency incurring the debt, does not have control over the issuance and administration of the student loans -- that function is performed by the Commission. Historically, the Commission has been willing, outside the scope of state law authority, to grant borrowers leniency on loan amounts due and repayment schedules.

In your Executive Order 97,<sup>1</sup> the Commission and the Corporation board were combined into one body and the numbers were reduced to a manageable size. Because the functions of the combined body included institutional regulation, a remaining problem was the liability of the loan program for licensing and regulatory actions (or failure to act) affecting the quality, or lack, of education. For example, when Gordon's Aviation closed unexpectedly, the student loan program wrote off several hundred thousand dollars of student loan debt where the education had not been provided and Gordon's had misused the tuition deposits. Several times each year, borrowers under

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<sup>1</sup> Executive Order 97 was disapproved by the legislature. See Legislative Resolve 42, SLA 1996.

the loan program have raised these kinds of defenses to loan collection actions. Bond counsel has previously noted the problem for the loan program of these litigation expenses and potential liability. Under the bill, that problem would be resolved.

Under secs. 6, 11, 37, 41, 44, and 56 of the bill, the student loan functions would be transferred wholly to the Corporation. Under secs. 9, 10, 29, 36, 40, and 56 of the bill, the (mostly empty) revolving loan accounts established under the Commission would be deleted and all loan accounts would be established within the Corporation's student loan fund. Under sec. 2 of the bill, the Corporation would be moved out from the Department of Education to the Department of Revenue; this change was also made in your executive order. The Corporation's independence from the Department would be maintained; the Department of Revenue would provide administrative support services only.

Under sec. 56 of the bill, all sections of art. I of AS 14.42 (Alaska Commission on Postsecondary Education) would be deleted. All provisions regarding the Commission would be combined in AS 14.48 (Regulation of Postsecondary Educational Institutions). Under secs. 46 and 47 of the bill, the Commission's duties would be narrowed to regulation of postsecondary educational institutions and to advisory and information-gathering functions related to postsecondary education. The Commission would remain under the administrative oversight of the Department of Education. The size of the Commission would be reduced to seven members. The membership would be the same as would have existed for the consolidated body under your executive order, if it had not been disapproved.

Section 58 of the bill would provide transitional provisions that would allow for the necessary transfer of personnel, regulatory authority, contracts, litigation, and other items between the Commission and the Corporation. Part (h) of that section would notify employees that they would no longer be eligible for membership in the state teachers' retirement system, rather than the public employees' retirement system. At this time, there are no Commission employees who are members in the state teachers' retirement system.

Subsection (a) of sec. 58 of the bill is not consistent with the other amendments made to the bill in the Senate HES Committee. CSSB 301(HES) incorporated amendments made in the working draft to CSHB 535(HES), including subsection (a) of the transitional provisions, but reversed the appointment order to the Corporation and Commission. In the House version, the appointments to the Corporation became members of the Commission; the reverse provided for in the Senate version. Although subsection (a) of sec. 58 of the bill does not address the present structure of the respective agencies, nothing in subsection (a) appears to pose a problem.

A. MAKE-UP OF THE COMMISSION

Subsections (a) - (c) of sec. 45 of the bill are the same as your disapproved executive order for the make-up of the combined entities, with the addition of a stated confirmation requirement. The membership would be reduced to seven members within your appointment power.

Under art. III, sec. 26 of the Alaska Constitution, the governor is granted the power to appoint all members of boards and commissions that head regulatory or quasi-judicial agencies, subject to the legislature's approval.<sup>2</sup> Bradner v. Hammond, 553 P.2d 1 (Alaska 1976). Currently, the Commission consists of fourteen persons, only half of whom you have the statutory power to appoint. Two legislators are appointed by the leaders of the respective houses, two members are designated by the University of Alaska Board of Regents, one member is selected alternatively by the Boards of Trustees of Sheldon Jackson University and Alaska Pacific University, one member is designated by the Alaska Human Resource Investment Council, and one member is selected by the Board of Education. Of the seven positions within your power to appoint, limitations are placed on three of those appointments -- requiring appointments of a student, a propriety school administrator, and a member of the local community college advisory councils.

Because of the current size of the Commission, it has difficulty maintaining a quorum at its meetings. Even though the Commission attempts to teleconference in absent members, its meetings often start late and have long recesses while waiting for the necessary numbers.

An additional problem with the Commission's current make-up is that there can be inherent conflicts arising from required membership by special interests and the allocation of appointment power to separate bodies -- the University of Alaska, private colleges, and state boards.

Under sec. 45 of the bill, all the Commission members would be appointed by you and special interests would not be designated for membership. The make-up of the membership would be the same as that which would have been established for the combined board under your disapproved executive order. As noted below in Section B, restrictions on special interests, as a practical matter, apply to the Corporation board as well.

AS 14.42.015(c) now provides for legislative confirmation of Commission members, but the governor's office has never submitted names for confirmation in the Commission's 21-year history. We believe that this is based in part on our past advice that confirmation would not be appropriate under article III, section 26 of the Alaska Constitution. See 1977 Inf. Op. Att'y Gen. at 7. (February 3). Cf. AS 14.25.035 (Teachers' Retirement Board with some quasi-judicial powers not subject to confirmation.) The Commission's assigned duties are so diverse that an argument could

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<sup>2</sup> As discussed below in this section of the review, there is some dispute whether the Commission is a •regulatory or quasi-judicial agency• for the purposes of art. III, sec. 26 of the Alaska Constitution.

be made that its regulatory and adjudicatory roles are insignificant parts of its overall duties for the purposes of art. III, sec. 26 of the Alaska Constitution. Another basis for our advice was that regulation of postsecondary education was not a traditional function of government because it was not within traditional notions of the government's police power. The legislature never challenged the executive branch's determination that the members of the Commission were not subject to confirmation. That may be in part because the presence of legislators as voting members of the board was not challenged by the executive branch. See section B. below.

An argument can be made that the Commission's duties would be reduced under the bill to regulatory and quasi-judicial powers, under AS 14.48 and AS 14.48.110 - 14.48.140 and AS 44.62.330(a)(43), over the postsecondary education industry and related advisory functions so that its members would become subject to legislative confirmation under art. III, sec. 26 of the Alaska Constitution

#### B. MAKE-UP OF CORPORATION BOARD OF DIRECTORS

Section 3 of the bill gives the members of the Commission a dual role as directors on the Corporation's board. Affiliates of postsecondary education institutions may not be Corporation public members. This restriction would necessarily restrict appointments to the Commission, as well. There would be three additional non-voting members on the Corporation's board, alone -- a student and two legislators.

Legislative membership violates art. II, sec. 5 of the Alaska Constitution, which precludes legislators from dual office-holding. See State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 777-78 (Alaska 1980). In Begich v. Jefferson, 441 P.2d 27 (Alaska 1968), the court explained the rationale is to "guard against conflicts of interest, self-aggrandizement, concentration of power, and dilution of separation of powers. . . ." There is a consistent line of opinions from this office that legislators may not hold positions on executive branch boards. Cf. 1980 Op. Att'y Gen. No. 21 (September 14; J-66-212-81) (legislators may not serve on statehood commission); 1988 Inf. Op. Att'y Gen. 226 (April 12; 883-88-0022) (legislative appointments to children's trust unconstitutional); 1988 Inf. Op. Att'y Gen. 37 (July 1; 663-88-0430) (state legislator should not serve on land use advisory committee); 1989 Inf. Op. Att'y Gen. 297 (May 1; 663-89-0506) (legislators should not serve on commission to investigate Exxon Valdez spill); 1989 Inf. Op. Att'y Gen. 45 (July 1; 883-89-0111) (inclusion of legislators on Amateur Sports Authority is unconstitutional). Membership by legislators is constitutionally precluded even if the position is construed as not "for profit" and as advisory only. 1988 Inf. Op. Att'y Gen. (July 1; 663-88-0430).

Under the executive order, confirmation of appointees to the consolidated agency was an unresolved issue, because it would have had regulatory and quasi-judicial powers under AS 14.48. Under the bill, no confirmation requirement would be stated for Corporation members, but they would be necessarily confirmed in their dual role as Commission members. In the absence of this dual role, there would be no authority for confirmation for board members, because the Corporation would not be a principal department and would not have regulatory or quasi-judicial powers. Walker v. Alaska

State Mortgage Ass'n, 416 P.2d 245 (Alaska 1966). There is some precedent for having one board perform two functions. E.g., AS 39.35.030(b) (personnel board constitutes majority of the public employee relations board).

You have several options on this issue. If you choose to sign the bill, or allow it to become law, you or a subsequent governor could decide to challenge the dual membership in a declaratory court action, asserting that legislative membership is unlawful, that the members of the Commission are not subject to confirmation, or that the practical effect of dual membership is to limit your power to appoint non-confirmed persons to the Corporation board of directors, or any combination of these theories. It would be important that any action brought be tailored in such a way that it did not cast doubt on the Corporation's authority to issue bonds to finance the loan program.

Another option is to continue the past practice and decline to submit the names of the Commission members to the legislature. However, the reductions in the Commission's functions as outlined above may yield a result different than that of past practice. Additionally, bond counsel has requested that this course not be followed in the absence of judicial sanction in order to preserve bond counsel's ability to give a "clean" opinion to the bond investors regarding the authority of the board to act. Your other option, of course, is to veto the bill. Under that scenario, the legal and other problems that led you to introduce the executive order would continue.

#### C. STAFF OF CORPORATION AND COMMISSION

Under secs. 4 and 5 of the bill, the statutes providing for staffing and legal counsel would be moved from the Commission to the Corporation. This change is consistent with your disapproved executive order. The major difference is that with the retention of regulatory authority by the Commission, it will continue to require staff. (It is my understanding that approximately one and one-half employees currently perform that function.) Under (d) of sec. 45 of the bill, the Department of Education would assume that staffing requirement.

#### FEES AND SANCTIONS

Currently, the costs of regulating postsecondary educational institutions are financed out of the student loan receipts. The Commission presently has authority to collect fees of \$100, for authorizations to operate and renewals, and \$50, for agent permits and renewals. Generally, renewals take place every third year. 20 AAC 17.020(g). Those fees are deposited into the general fund and are not reappropriated to the Commission. No fees are established for the costs of reviewing an application.

By separating the two entities under the bill, the regulatory function would no longer be a draw on the student loan fund. Additionally, sec. 48 of the bill would authorize the Commission to establish fees and sanctions that would make the regulatory function self-sufficient.

Under sec. 48 of the bill, the Commission would be granted authority to establish regulations setting fees for applications, authorizations, permits, and renewals under AS 14.48. Until the regulations are adopted, sec. 47 of the bill would continue the current fee structure in effect. In sec. 49 of the bill, the Commission would be given authority to impose a monetary sanction on an institution for the costs, not to exceed \$5,000, of investigating and adjudicating a disciplinary matter.

In enacting ch. 5, SLA 1996, several errors were made that would be corrected in this bill. In sec. 12 of the bill, the bill would correct the maximum loan amounts for half-time students, that were reversed in sec. 1, ch. 5, SLA 1996 between graduate and undergraduate students. Sections 12 and 28 also correct the impression that a student is eligible for a \$2,000 loan for attendance half-time in a six-week course. Section 30 of the bill would amend AS 14.43.300(g) to make it parallel to the amendments to AS 14.43.120(u) made in sec. 14, ch. 5, SLA 1996. Section 42 of the bill would amend AS 14.43.740(d) to make it parallel to the amendments to AS 14.43.120(g) made in sec. 6, ch. 5, SLA 1996.

Throughout the bill, the term "scholarship" would be to deleted to remove the impression that the loan is a grant. See e.g., sec. 20 of the bill. Although the word, "scholarship" has a meaning that can broadly apply to scholarly endeavors, the common meaning includes a "grant-in-aid awarded to a student." Sections 6, 37, and 56 of the bill would consolidate the regulatory authority for all of the student loan programs in one statutory provision, rather than scattering it into numerous sections dealing with the various loan programs. AS 14.43.120(i) would be amended under sec. 18 of the bill to correct the impression that notice of default and acceleration of payment is only provided if the borrower has an occupational license. In secs. 37 and 38 of the bill, the duty to provide materials in support of an application for a teacher scholarship loan would be moved to the section placing requirements on the applicant, rather than the Corporation.

Section 54 of the bill would remove the "execution" language from AS 43.23.067(a), so that the taking of a permanent fund dividend would be considered automatic and not a levy for the purposes of determining the date of transfer under federal bankruptcy law. Additionally, the statute would be clarified so that a dispute over the total amount owed would not be relevant as long as there was no dispute that the borrower owed at least as much as the amount claimed from the permanent fund dividend.

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In establishing the new duties of the Commission, secs. 47 and 56 of the bill would delete archaic functions. Currently, under AS 14.42.030(b) (I) - - (3), the Commission is required to carry out mandates under federal laws that are no longer in effect. Under AS 14.42.030(a)(3), the Commission is required to review the budget requests of all public and private colleges and universities in the state, a function it has not performed for many years. Under AS 14.42.030(a)(4) and 14.42.055, the Commission is required to review consortia agreements and arbitrate consortia disputes, although no such agreements exist in the state.

#### CONFORMING AMENDMENTS

Sections 1, 7, 8, 9, 13 - 17, 19 - 27, 31 - 35, 39, 43, 46, 50 - 53, 55, and 56 of the bill would make technical amendments to conform the Alaska Statutes to the other provisions of the bill.

#### EFFECTIVE DATE

Section 60 of the bill provides that the bill would take effect on July 1, 1996. The authority of the Commission and Corporation to immediately commence the regulation adoption process to implement the bill would be provided in sec. 59 of the bill.

Other than those comments made above, we see no constitutional or other legal problems with this bill.

Sincerely,

Bruce M. Botelho  
Attorney General

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