May 21, 1996

The Honorable Tony Knowles
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: HCS CSSB 191(FIN) am H -- relating to election campaigns, election campaign financing, the oversight and regulation of election campaigns, the activities of lobbyists that relate to election campaigns, the definitions of offenses of campaign misconduct, and to the use of the net proceeds of charitable gaming activities in election campaigns; and providing for an effective date
A.G. file no: 883-96-0048

Dear Governor Knowles:

At the request of your legislative director, Pat Pourchot, we have reviewed HCS CSSB 191 am H (hereinafter "SB 191"), which substantially changes campaign finance law for state and local elective offices in Alaska. SB 191 is the legislative version of a campaign finance initiative that initiative sponsors filed with the lieutenant governor on December 15, 1995 (identified by the division of elections as Initiative Petition 95 CFPO). According to sec. 1 of the bill, the bill's purpose is to "substantially revise Alaska's election campaign finance laws in order to restore the public's trust in the electoral process and to foster good government." Although the bill raises constitutional issues relating, especially, to the protected freedoms of speech and association under the First Amendment to the United States Constitution and art. I, sec. 5 of the Alaska Constitution, we do not believe that those constitutional concerns necessitate a veto.

As a threshold matter, we recommend that the lieutenant governor find SB 191 substantially similar to the campaign finance initiative. If the lieutenant governor agrees that the bill is substantially similar, under AS 15.45.210 the initiative will not be placed on the ballot this fall.

I. SB 191 IS SUBSTANTIALLY SIMILAR TO THE CAMPAIGN FINANCE INITIATIVE

We believe that SB 191 is substantially similar to the campaign finance initiative. SB 191 includes nearly all of the campaign finance reform provisions set out in the initiative. The provisions of SB 191 achieve the same general purposes as the initiative and accomplish those purposes by means or systems that are fairly comparable. Although the two measures are not identical, because of the broad reach of the subject of campaign finance reform, the legislature is entitled to broad latitude with respect to the similarity between the bill and the initiative.

The source of the substantial similarity requirement is art. XI, sec. 4 of the Alaska Constitution, which provides:

> An initiative petition may be filed at any time. The lieutenant governor shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

(Emphasis added.) In Warren v. Boucher, 543 P.2d 731, 736 (Alaska 1975), the Alaska Supreme Court set the standard for determining whether a subsequent legislative enactment is substantially the same as an initiative:

> It is clear that the legislative act need not conform to the initiative in all respects, and that the framers intended that the legislature should have some discretion in deciding how far the legislative act should differ from the provision of the initiative.
>
> . . . .
>
> If in the main the legislative act achieves the same general purpose as the initiative, if the legislative act accomplishes that purpose by means or systems which are fairly comparable, then substantial similarity exists. It is not necessary that the two measures correspond in minor particulars, or even as to all major features, if the subject matter is necessarily complex or if it requires comprehensive treatment. The broader the reach of the subject matter, the more latitude must be allowed the legislature to vary from the particular features of the initiative.

It is notable that campaign finance reform was also the subject of the initiative and subsequent statute in Boucher. the court found in Boucher that the initiative and the statute were subsequently similar despite notice numerous differences between the two measures, including differences in regulation of out-of-state campaign contributions, contribution and expenditure limits, administrative responsibility, reporting requirements, and enforcement. In finding substantial similarity the court stated:

> Viewing the two measures as a whole we find that they accomplish the same general goals. They adopt similar, although not identical, functional techniques to accomplish those goals. The variances in detail between the measures are no more than the legislature might have accomplished through reasonable amendment had the initiative become law. Nothing is present here to suggest that the act was a subterfuge to frustrate the ability of the public to obtain consideration and enactment of a comprehensive system to regulate election campaign contributions and expenditures.

Boucher, 543 P.2d at 739.

Another reason that we believe that a court would find that SB 191 is substantially similar to the initiative is that the statute at issue in Boucher was far less similar to the corresponding initiative than are SB 191 and the current initiative.[1] Yet, the Boucher court found the initiative and statute in that case substantially similar. SB 191 differs from the current initiative in far fewer instances. The major differences include allowing larger contributions from political parties, allowing larger contributions from political parties, allowing larger contributions from groups, allowing limited carry-forward of surplus campaign funds, limiting contributions from out-of-state individuals, slightly reducing criminal penalties, and imposing a waiting period before citizens may go directly to court to remedy a violation. The differences between the initiative and statute in Boucher were thus much greater than the differences between SB 191 and the present initiative.

---

[1] Of the 19 sections of the Boucher initiative, only six were the same in the statute. The statute also eliminated seven sections of the initiative, including references to United States representatives, local elections changed to local option, jurisdiction over out-of-state contributors, individual penalties, subpoena or investigatory powers of the watchdog committee, limits on media spending, requirements for equal time to candidates, and equal charges by media, almost all reporting by media and media permit requirements, requirements of reporting and disposition of surplus money, most definitions, and the statement of purpose.

In addition, the statute increased the dollar limits on expenditures and eliminated sections on failure to report, false reports, or perjury in reporting, provisions for substantial fines for withholding candidate records, and all sections permitting citizens to sue to enforce the initiative's provisions.

Consequently, we believe that SB 191 is substantially similar to the initiative.

II. ANALYSIS OF SB 191

An analysis of SB 191's provisions is provided below.

A. Contributions from Individuals to Candidates

Section 10 of the bill would repeal and reenact AS 15.13.070(b) to limit contributions from an individual to a candidate, or to a group that is not a political party, to $500 per year. Under current law, the limit is $1,000. In Buckley v. Valeo, 424 U.S. 1, 22 (1976), the United States Supreme Court noted that any limits on campaign contributions restrict a person's First Amendment right of free political association.

The court stated that governments must narrowly tailor contribution limits to advance compelling governmental interests. The court upheld a $1,000 contribution limit to candidates for federal office, recognizing the government's interest in preventing both corruption and the appearance of corruption from large contributions as sufficiently important to justify infringement of associational rights. Buckley, 424 U.S. at 25, 26. The court did not state whether contribution limits lower than $1,000 would be acceptable under the First Amendment, but noted that such lower limits might be invalidated when "distinctions in degree" became "differences in kind." Id. at 30.

The $500 limit under proposed AS 15.13.070(b)(1) would be lower than the limit that the court upheld in Buckley, but higher than contribution limits that a court recently ruled unconstitutional in Carver v. Nixon, 72 F.3d 633, 644 (8th Cir. 1995) (contribution limits from $100 to $300 for various state and local offices). Although it is a close question, the new $500 limit in SB 191 should withstand a First Amendment challenge so long as the courts find that the new limit is only different in degree from the old limit.

B. Contributions from Political Parties to Candidates

Currently there are no limits on political parties' contributions to candidates. Section 10 of the bill would repeal and reenact AS 15.13.070(d) to limit such contributions as follows: $100,000 per year to each governor and lieutenant governor candidate ($200,000 total per team per year); $15,000 per year for each state senate candidate; $10,000 per year for each state house candidate; and $5,000 per year for each judicial, municipal, and constitutional convention candidate.

Under the Federal Election Campaign Act ("FECA") local and state political party committees may contribute up to $5,000 to a candidate for Congress. 2 U.S.C. • 441a(a). The United States Supreme Court upheld FECA's contribution limits in Buckley, 424 U.S. at 23-35. See also Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm., 59 F.3d 1015, 1023-24 (10th Cir. 1995) (recognizing government's interest in preventing corruption or the appearance of corruption as legitimate reason to curtail large campaign contributions from state political parties). Since the limits in proposed AS 15.13.070(d) would equal or exceed the limits under FECA, this provision should withstand a First Amendment challenge.

C. Contributions from Lobbyists to Candidates

Section 11 would amend AS 15.13 by adding new sections, including AS 15.13.074 relating to prohibited contributions. Proposed AS 15.13.074(g) would prohibit an individual required to register as a lobbyist under AS 24.45 from making a contribution to a legislative candidate, except to a candidate in the district in which the lobbyist is eligible to vote.

In Fair Political Practices Comm'n v. Superior Court, 599 P.2d 46, 51-53 (Cal. 1979), the California Supreme Court struck down a total prohibition on contributions by lobbyists to state candidates. The court, citing Buckley, noted that the prohibition was a substantial restriction on the lobbyists' freedom of association, and that the state could preserve the restriction only by demonstrating a sufficiently important governmental interest and that the prohibition was closely drawn to avoid unnecessary abridgement of associational freedoms. Id. at 52. The court held that the total prohibition on lobbyist contributions was not closely drawn to serve the claimed state interest of ridding the political system of both apparent and actual corruption and improper influence. Id.

However, other courts have upheld prohibitions on campaign contributions by targeted occupations in the face of challenges under both the First Amendment and the Equal Protection Clause of the 14th Amendment. Petition of Soto, 565 A.2d 1088, 1097-98 (N.J. Super. Ct. App. Div. 1989); cert. denied, 496 U.S. 937 (1990) (casino officers and key casino employees); Schiller Park Colonial Inn, Inc. v. Berz, 349 N.E.2d 61, 66 (Ill. 1976) (liquor licensees).

The United States Supreme Court has also recognized a legitimate government interest in regulating lobbyists. See United States v. Harriss, 347 U.S. 612 (1954) (upholding disclosure law for lobbyists because legislators must know whose interests lobbyists are promoting). It is also significant that art. II, sec. 12 of the Alaska Constitution expressly provides that the "legislature shall regulate lobbying." Moreover, proposed AS 15.13.074(g) would not prohibit all contributions -- a lobbyist could still contribute to legislative candidates in the lobbyist's own district. Accordingly, SB 191's lobbyist contribution provision is not as likely to be invalidated as was the California provision in the Fair Political Practices Comm'n case.

D. Contributions from Nonresidents to Candidates

Section 11 of the bill would amend AS 15.13 to add a new section AS 15.13.072 relating to restrictions on solicitation and acceptance of contributions. Proposed AS 15.13.072(a)(3) would prohibit a candidate from accepting a contribution from a group organized under the laws of another state, resident in another state, or whose participants are not residents of Alaska. Thus, the bill would bar nonresident groups from making contributions to state candidates. See also proposed AS 15.13.074(a) (prohibited contributions) in sec. 11.

Nonresident individuals could contribute to state candidates, but their contributions would be subject to the limits on aggregate contributions from all nonresidents set out in proposed AS 15.13.072(e): $20,000 for each governor and lieutenant governor candidate; $5,000 for each state

senator candidate; and $3,000 for each state representative and municipal or other candidate. Thus, a nonresident individual could not make a contribution in any amount to a candidate who had already received the maximum allowable aggregate amount of contributions from other nonresidents.

In Vannata v. Keisling, 899 F. Supp. 488, 496-97 (D. Or. 1995), the court struck down an Oregon law that limited out-of-district campaign contributions to candidates. The court noted that such contributions are political speech protected by the First Amendment, citing Buckley and Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 656 (1990). Vannata, 899 F. Supp. at 496. The court stated that laws which directly burden First Amendment rights are subject to strict scrutiny: the state must show that the restriction is narrowly tailored to serve a compelling state interest. Id.

The court found that the limitation on out-of-district contributions was not narrowly tailored to prevent corruption and that it therefore violated the First Amendment. The court observed that the law banned non-corrupt, out-of-district contributors from politically associating with candidates who could have a direct impact on the contributors' interests; failed to thwart any in-district corruption; and even failed to prevent large out-of-district contributions, since a candidate could accept out-of-district contributions so long as they did not exceed 10 percent of the candidate's total campaign funding. Id. at 497.

We could defend proposed AS 15.13.072(a)(3) and (e) on both First Amendment and equal protection grounds by noting that these provisions apply only to nonresidents, as opposed to the Oregon law, which limited contributions from out-of-district Oregonians. A court might find that nonresidents do not have a sufficient interest in Alaska elections to warrant overturning the contribution limitations (as to nonresident individuals) or prohibitions (as to nonresident groups), since nonresidents cannot vote in Alaska elections. 2 U.S.C. • 441e; 11 C.F.R. • 110.4(a). Finally, SB 191 would allow nonresident individuals and groups (registered with the Alaska Public Offices Commission ("APOC")) to make independent expenditures relating to a candidate, so nonresidents would still have a means of political expression.

E. Contributions from Organizations Registered with APOC as "Groups" to Candidates

Section 10 of the bill would repeal and reenact AS 15.13.070 relating to limitations on the amount of political contributions. Proposed AS 15.13.070(c) provides that a "group" (other than a political party) that is eligible to register with the APOC under AS 15.13.050 may contribute not more than $1,000 per year to a particular candidate (as is true under current law), group, or political party (current law allows unlimited contributions to a group or political party). The bill would not limit the amount of contributions that a group could make to influence the outcome of a ballot proposition. See sec. 9 (proposed AS 15.13.065(c)).

F. Contributions to Political Parties

Section 9 of the bill would amend AS 15.13 to add AS 15.13.065, a new section relating to contributions. Proposed AS 15.13.065(a) states that an individual or group can make a contribution to a political party. In sec. 10 of the bill, proposed AS 15.13.070(b)(2) would allow an individual to contribute not more than $5,000 per year to a political party, while proposed AS 15.13.070(c)(2) would allow a group to contribute not more than $1,000 per year to a political party. Similarly, FECA (at 2 U.S.C. • 441a(a)) limits individual contributions to state and local political party committees to $5,000 for congressional races.

Section 9, proposed AS 15.13.065(b), provides that a political party may contribute to a subordinate unit of the party, and that a subordinate unit of a political party may contribute to the political party of which it is a subordinate unit. Section 11 of the bill would add AS 15.13.072, a new section relating to restrictions on solicitation and acceptance of contributions. Proposed AS 15.13.072(f) provides that a political party may solicit or accept contributions from individual nonresidents, but the amounts accepted may not exceed 10 percent of the total contributions that the political party received during that calendar year.

G. Contributions from Corporations, Companies, Partnerships, Firms, Associations, and Labor Unions to Candidates

Section 11 of the bill would prohibit a "corporation, company, partnership, firm, association, organization, business trust or surety,[2] labor union, or publicity funded entity that does not satisfy the definition of group in [the proposed] AS 15.13.400" from making a contribution to a candidate or group. Proposed AS 15.13.074(f). Furthermore, the proposed law would allow only an individual or a "group" to make independent expenditures supporting or opposing a candidate for election to public office. Sec. 24 (proposed AS 15.13.135(a)). The bill defines a "group" as:

> (A) every state and regional executive committee of a political party; and
> (B) any combination of two or more individuals acting jointly who organize for the principal purpose to influence the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election;
>
> . . . .

[2] It is possible that the term "surety" was, somewhere in the drafting process, mistakenly substituted for the term "society." Compare proposed AS 15.13.076(f), proposed AS 15.13.400(9), and AS 01.10.060.

Sec. 24 (proposed AS 15.13.400(5)). The bill would not limit independent expenditures or contributions to groups to influence the outcome of ballot propositions. Sec. 24 (proposed AS 15.13.140(a)); sec. 9 (proposed AS 15.13.065(c)).

In reviewing limitations on contributions and expenditures, courts have generally allowed greater restriction of corporations and labor unions than of individuals. For example, the United States Supreme Court rejected a constitutional challenge to a Michigan statute that prohibited corporations from using general treasury money to make independent expenditures in support of candidates for elective office. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). However, in reach that conclusion, the court acknowledged that corporations, too, have rights of expression that the First Amendment protects. The court concluded that the restriction on corporate expression was nonetheless appropriate because the state-created advantages of corporate structure would otherwise afford corporations disproportionate power to influence the marketplace of political ideas. The court also noted that the statute did not completely bar corporations from expressing their political views, since they could express their views by using segregated political money, which the corporations collect from contributors who understand that the corporations are going to use the money for political purposes.

The court has observed that limitations on expenditures impose significantly greater burdens on protected freedoms of speech and association than do limitations on financial contributions. See Buckley v. Valeo, 424 U.S. 1 (1976). Thus, if particular limitations on corporations' expenditures are constitutional, equivalent limitations on corporate contributions would also likely be constitutional. The court has, at least implicitly, upheld prohibitions against corporations' use of general treasury funds to make contributions to candidates. See Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197 (1982).

The United States Supreme Court seemed to express approval in National Right to Work Comm. of the constitutionality of prohibitions on labor unions' expenditures for and contributions to candidates. At least one federal district court has held that state laws prohibiting unions from using general treasury money to make contributions or expenditures on behalf of candidates do not violate the First Amendment or the Fourteenth Amendment. See Michigan State AFL-CIO v. Miller, 891 F. Supp. 1210 (E.D. Mich. 1995). In Miller, the court noted that unions -- like corporations -- have available the alternative to using segregated political funds to finance their contributions and expenditures on behalf of candidates. In Austin, the United States Supreme Court rejected the argument that Michigan's restriction on corporations' expenditures was under-inclusive because it did not also apply to unincorporated labor unions. The court noted that union members have the right to insist that none of their dues go to support their unions' political activities.

Even when the option of using segregated money is available, the ability to prohibit corporations' and labor unions' contributions and expenditures on behalf of candidates is not absolute. The United States Supreme Court ruled that federal law imposed an unconstitutional burden on the First Amendment rights of a nonprofit, nonstock corporation composed entirely of individuals who organized for political purposes. See Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986). The court concluded that, in light of the characteristics of that particular corporation, requiring it to meet various reporting and accounting requirements imposed an unjustified

burden upon its speech. The court cited three factors to support its conclusion that application of the federal requirements to that corporation was constitutional: (1) the corporation was formed for the purpose of promoting political ideas; (2) the corporation had no shareholders or others with claims to its assets; and (3) neither a business corporation nor a labor union formed the corporation.

The court's decision raises concerns about the constitutionality of the proposed ban on contributions from all corporations, labor unions, and other associations that do not meet the statutory definition of "group." While federal election laws permit corporations and labor unions to pay the administrative expenses of their political action committees, SB 191 apparently would not allow such payments. A court might also find that requiring the members of some corporations, unions, or other associations -- particularly those that organize for political purposes unrelated to specific elections -- to form separate groups in order to make contributions or expenditures on behalf of candidates unjustifiably burdens their freedom of speech.

In apparent recognition of these possible problems, SB 191 includes a backup provision that would become effective if a court were to rule that corporations, labor unions, and other associations must be permitted to make contributions:

> If a court determines that, under the federal or state constitutions, persons who are not individuals must be allowed to contribute to candidates or groups, then the requirements, monetary limitations, and restrictions of AS 15.13 are applicable to those persons.

Sec. 30. Because this section specifically addresses only contributions, it is not entirely clear what the effect would be of a court ruling that corporations, labor unions, and other associations must be allowed to make independent expenditures. While their expenditures might then be subject to the disclosure requirements, SB 191 does not expressly answer the question.

Another source of concern is the possibility that SB 191 would prohibit a corporation, labor union, or other association from spending money on, for example, newsletters to its members in which endorsements of particular candidates are included. Courts have indicated that internal communications deserve much greater protection from governmental regulation than do general appeals to the public. See United States v. Congress of Indus. Orgs., 335 U.S. 106 (1948); Toledo Area AFL-CIO Council v. Pizza, 898 F. Supp. 554 (N.D. Ohio 1995), j'ment amended, 907 F. Supp. 263 (N.D. Ohio 1995). However, for nearly a decade the APOC has had a regulation that excludes from the definition of "contribution" the costs of an organization's internal communications, where the organization uses to communicate on nonpolitical subjects. See 2 AAC 50.313(l)(4). Furthermore, SB 191 would not prohibit a corporation, labor union, or other association from conducting election-related educational communications and activities such as:

1. publicizing the date and location of an election;

2. educating students about voting and elections;

3. sponsoring open candidate debates;

4. participating in get-out-the-vote or voter registration drives that do not favor a particular candidate, political party, or political position; or

5. disseminating the views of all candidates running for a particular office.

Sec. 24 (proposed AS 15.13.150).

H. Time Limits on Fundraising

SB 191 would also limit when a person or group could make contributions to a candidate. In general election races for governor, lieutenant governor, or state legislative offices, SB 191 would prohibit making contributions for January 1 of the general election year. However, a person or group would not be able to make contributions -- even after January 1 of that year -- until the individual to receive the contribution had become a candidate or had filed with the APOC the document necessary to permit the individual to incur certain election-related expenses. Sec. 11 (proposed AS 15.13.074(c)(1) and (2)). For municipal elections, the proposed law would allow contributions to begin nine months before the date of the election. Again, however, a person or group could not make a contribution until the individual to incur certain election-related expenses. Sec. 11 (proposed AS 15.13.074(c)(3)). With regard to special elections, a person or group could not make a contribution before the date of proclamation of the special election at which the candidate or individual would seek election. Id.

SB 191 would also provide a 45-day cutoff for post-election contributions. A person or group could not contribute to a candidate later than the 45th day after a primary election if the candidate won the primary or ran as a write-in candidate, and was not opposed in the general election. The 45-day limitation would also apply to candidates in primary elections who were not nominated at the primary elections, as well as to candidates in general, municipal, or municipal runoff elections who were opposed in the elections. Sec. 11 (proposed AS 15.13.074(c)(4)).

Apparently anticipating a court challenge to this provision, the legislature included an alternate provision in sec. 12 of the bill that would take effect only if a court were to enter a final order declaring that the temporal restrictions on contributions in sec. 11 of the bill are unconstitutional. Sec. 33(b). The alternate provision includes the same limitation on post-election contributions, but would permit contributions much further in advance of elections. For general and municipal elections, the alternate provisions would allow a person or group to make a contribution no later than 18 months before the election to a candidate or to an individual who had filed the necessary document with the APOC. Sec. 12 (proposed alternate AS 15.13.074(c)(1) and (2)). For a special election, a person or group still could not make a contribution before the date of the proclamation of the special election to a candidate or to an individual who had filed the necessary document with the APOC. Sec. 12 (proposed alternate AS 15.13.074(c)(2)).

The temporal restrictions on contributions to candidates raise serious constitutional questions. Courts in other states have found that restricting how far in advance of elections candidates may begin accepting contributions unjustifiably burdens the candidates' and their supporters' constitutional rights. In Zeller v. Florida Bar, 909 F. Supp. 1518 (N.D. Fla. 1995), a federal court ruled unconstitutional a provision of the Florida Code of Judicial Conduct that prohibited judicial candidates from soliciting or accepting contributions more than one year in advance of the election. The court quoted an advisory opinion of the Supreme Judicial Court of Massachusetts, in which the Massachusetts justices reviewed a statute that restricted the aggregate amounts of contributions that candidates could receive in nonelection years:

> "[L]egislation that has the effect of prohibiting a contributor from expressing support and affiliation with a candidate for a lengthy period constitutes a significant interference with the right of association."

Zeller, 909 F. Supp. at 1527 (quoting Opinion of the Justices to the House of Representatives, 637 N.E.2d 213, 218 (Mass. 1994)). In both decisions, the courts concluded that the restrictions burdened constitutional rights of speech and association without being narrowly tailored to meet compelling state interests.

Similarly, in Florida v. Dodd, 561 So.2d 263 (Fla. 1990), the Supreme Court of Florida ruled unconstitutional a ban on contributions during legislative sessions to any candidate for the legislature -- regardless of whether the candidate was an incumbent or a challenger. The court concluded that, although the statute was designed to prevent actual or perceived corruption through contributions to legislators during the session, the ban unfairly favored incumbents (who would have access to publicity during the legislative session through performance of their legislative duties) and failed to address the fact that corruption of legislators could occur even when the legislature was not in session.

Applying the same analysis to the proposed temporal restrictions on contributions in SB 191, a court might well conclude that the limitations are unconstitutional. In that circumstance, the alternate provision would take effect. The alternate provision is more likely to pass constitutional review. However, a court might find that even the alternate provision is unconstitutional. The 18-month limitation would probably be constitutional with respect to candidates for the Alaska House of Representatives, because they serve two-year terms and the limitation would reduce by only six months the amount of time during the two-year period that contributors could express their support for a candidate. The limitation might be more significant for candidates who seek offices with four-year terms, such as the governor, lieutenant governor, and members of the Alaska Senate.

I. Candidates' or Groups' Use of Campaign Funds

Section 19 of the bill adds the following new sections to AS 15.13: proposed AS 15.13.112 relating to uses of campaign contributions held by a candidate or group; proposed AS 15.13.114 relating to disposition of prohibited contributions; and proposed AS 15.13.116 relating to disbursement of campaign assets after election.

Campaign contributions held by a candidate or group could not be used for the candidate's personal benefit, loaned to a person, used to pay a criminal fine, used to pay a civil penalty without APOC approval, or used to make contributions to another candidate or group (unless an exception elsewhere in the bill applies), according to proposed AS 15.13.112. Proposed AS 15.13.114 would require a candidate or group that receives a prohibited contribution to return it to the contributor. If the contribution were anonymous, it would be forfeited to the state for deposit in the general fund.

J. Carry Forward of Surplus Campaign Funds

Section 19, in proposed AS 15.13.116, would require a candidate to distribute unused campaign contributions within 90 days after the election (or the date that the candidate withdraws as a candidate). A candidate could transfer no more than the following amounts to a future election campaign under proposed AS 15.13.116(a)(8): $50,000 if the transfer were made by a candidate for governor or lieutenant governor; $10,000 if the transfer were made by a state senate candidate; and $5,000 if the transfer were made by a state house or other candidate.

Besides transferring money to a future election campaign as described above, a candidate could distribute unused campaign contributions within 90 days for the following purposes under proposed AS 15.13.116(a): to pay campaign expenses and debts; to pay for a victory or thank-you party costing less than $500; to make donations to a political party or to federal, state, or local governments; to make donations to charitable organizations; to repay loans from the candidate to the candidate's own campaign within certain limits under proposed AS 15.13.078(b); to repay contributors on a pro rata basis; to establish a fund to pay attorney's fees and costs incurred in the prosecution or defense of an action that directly concerns a challenge to the victory or defeat of the candidate in the election; to transfer money to a legislative office account (limited to $5,000 multiplied by the number of years in the term to which the legislative candidate is elected); or to transfer money to a municipal office account (limited to $5,000 for a candidate elected as mayor or as a member of an assembly, city council, or school board).

Proposed AS 15.13.116(b) provides that, after an election, a candidate may retain the ownership of one computer and printer, and of personal property acquired by and for use in the campaign (except money) not exceeding $2,500 in fair market value. Property remaining after the candidate made allowable disbursements would be forfeited to the state. Proposed AS 15.13.116(c).

Section 32 of the bill contains a grandfathering provision that would allow an individual who holds campaign assets on the effective date of SB 191 (January 1, 1997), notwithstanding AS 15.13.116, to retain for a future election campaign those unused campaign contributions obtained while the person was a candidate. After the candidate used the campaign contributions to a future election campaign, the unused assets would become subject to the limited carry-forward provisions of AS 15.13.116. Thus, the grandfathering provision would exempt unused campaign contributions held on January 1, 1997 from the provisions of AS 15.13.116 for only the first election in which the candidate participates after January 1, 1997.

The carry-forward limitations raise constitutional concerns because two federal courts have rejected as unconstitutional state laws that prohibited candidates from carrying forward excess contributions from one campaign to another. See Shrink Mo. Gov't PAC v. Maupin, 71 F.2d 1422 (8th Cir. 1995); Service Employees Int'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312 (9th Cir. 1992), cert. denied, 505 U.S. 1230 (1992). In those cases the courts concluded that the laws were not narrowly tailored to address compelling state interests. However, the state laws that those courts considered banned all carry-forwards. SB 191 would allow candidates to carry forward limited amounts. A court might be more likely to conclude that these limitations are appropriately tailored to meet constitutional requirements.

K. Political Use of Public Money

Section 24 of the bill would add new sections to AS 15.13, including proposed AS 15.13, including proposed AS 15.13.145 relating to political use of money of the state and its political subdivisions. The following entities could not use money that they hold to influence the outcome of the election of a candidate to a state or municipal office: the state, its agencies, and its corporations; the University of Alaska and its Board of Regents; municipalities, school districts, and regional attendance areas; and any other political subdivision of the state. Proposed AS 15.13.145(b) would allow the entities described above to use money to influence the outcome of an election concerning a ballot proposition or question, but only if the money were specifically appropriated for that purpose by a state law or ordinance. Proposed AS 15.13.145(c) would allow public entities to disseminate nonpartisan information about all candidates, a ballot proposition or question, or the time and place of an election.

As noted above in the discussion of sec. 11 of the bill, proposed AS 15.13.074(f) would prohibit publicly funded entities from making contributions to a candidate or group. Section 24, in proposed AS 15.13.400(11), defines a "publicly funded entity" as an organization that receives half or more of the money on which it operates during a calendar year from government, including a public corporation.

L. Restrictions on Political Use of Charitable Gaming Proceeds

Section 2 of the bill would amend AS 05.15.150(a) governing the use of net proceeds from charitable gaming activity. The bill would prohibit payment of any portion of the net proceeds from bingo or pull-tab activities to candidates for public office, political parties and their affiliates, or any group seeking to influence the outcome of any political election. The proceeds of lotteries and raffles could still be donated to candidates, political parties and their affiliates, or to a group that seeks to influence the outcome of an election. Proposed AS 05.15.150(a)(3). Candidates, groups, and political parties that are otherwise eligible under AS 05.15 would still be permitted to receive charitable gaming permits to conduct the charitable gaming activities. However, candidates, groups, and political parties that engage in bingo or pull-tab activities would be forbidden from using those net proceeds for political purposes. The charitable gaming division within the Department of Revenue would enforce the prohibitions on political use of charitable gaming proceeds.

A bill passed last year, HB 44, sought to limit the participation of political organizations in charitable gaming. HB 44 did so by barring political organizations from conducting any gaming activities other than raffles. The bill contained flaws which led to a veto. Among those flaws was the requirement that political organizations file reports with the Department of Revenue, which duplicated much of the APOC reporting already required. HB 44 also contained a curious anomaly in that it permitted donations of gaming proceeds directly to a candidate, but not to a candidate's campaign committee. Although the candidate was prohibited from using the donated gaming proceeds for political purposes, it would have been very difficult to enforce the ban on that use. SB 191 does not contain HB 44's flaws.

M. Civil Penalties and Enforcement

Sections 20, 21, 22, and 23 of the bill relate to civil penalties concerning violations of AS 15.13 and enforcement of AS 15.13 by the APOC. As is true under current law, a complaint must be filed initially with the APOC (not directly with the superior court). However, sec. 21 of the bill would allow a complainant to file a superior court action if the APOC did not act on the complaint within a prescribed period.

Section 20 of the bill would repeal and reenact AS 15.13.120(d) relating to administrative complaints, which may be filed with the APOC by an APOC commissioner, the APOC executive director, or a person who believes that a violation of AS 15.13 has occurred. If APOC accepted the complaint, it would have to open the preliminary investigation within 90 days. After the respondent had notice of the complaint and an opportunity to be heard, if APOC found a violation of AS 15.13, it would need to enter an order requiring the violation to be remedied and assess civil penalties under AS 15.13.125. The commission order could be appealed to the superior court within 30 days, by either the complainant or respondent.

Section 21 of the bill would repeal and reenact AS 15.13.120(e), by providing that a complainant could file a complaint in superior court if the APOC did not open a preliminary investigation within 90 days of the filing date of the administrative complaint, or complete action on the complaint within 180 days of the filing. Section 21 of the bill would allow the APOC to intervene in the superior court action. A superior court complaint would have to be filed within two years of the alleged violation.

Section 22 of the bill would amend AS 15.13.125 to increase the civil penalties for the late filing of reports from the current levels which range from $10 to $50 per day, to new penalties which range from $50 to $500 per day. The scope of violations for which civil penalties are authorized has been expanded to include all other violations of AS 15.13. A person fined could appeal to superior court.

Section 23 of the bill would amend AS 15.13.125 by adding new subsections (b) through (f) relating to APOC administrative actions. If the APOC were to determine that the respondent engaged in the alleged violation, it would assess civil penalties, the costs of investigation

and adjudication, and reasonable attorney's fees. The APOC's determination could be appealed to superior court. Under proposed AS 15.13.125(d), the superior court would enter a judgment in the amount of the civil penalty authorized by AS 15.13.125(a) when the action had been filed in superior court as an original action (i.e., when the APOC had not acted on the complaint within the time periods specified in AS 15.13.120(e)). Under proposed AS 15.13.125(e), the APOC or the superior court could suspend imposition of penalties, or set them aside, if certain mitigating factors reduced the severity of the violation.

N. Criminal Violations

Section 25 of the bill would replace the current statutes prohibiting campaign misconduct in the first and second degrees with three new provisions -- campaign misconduct in the first, second, and third degrees.

Campaign misconduct in the first degree would be a new provision, and would prohibit a person from knowingly engaging in conduct that violates AS 15.13, which regulates state election campaigns, or a regulation adopted under AS 15.13. Campaign misconduct in the first degree would be a class A misdemeanor.

Campaign misconduct in the second degree in the bill is similar to current campaign misconduct in the first degree. The conduct prohibited would include publishing campaign literature without the author's name and address on the face of the material and publishing literature that is factually false. The bill classifies this conduct as a class B misdemeanor, while under current law it is a class A misdemeanor.

Campaign misconduct in the third degree in the bill is similar to campaign misconduct in the second degree in current law; it would prohibit certain conduct within 200 feet of the entrance to a polling place while the polls are open. However, current law requires the conduct to be intentional, while the bill would make a person strictly liable for the prohibited conduct. Additionally, under current law the offense is a class B misdemeanor, while the bill would make the offense a violation.

O. Other provisions

Sections 3 and 4 of the bill relate primarily to municipalities, which could exempt themselves from the provisions of AS 15.13 upon a majority vote of the voters in a municipality-wide election (as is true under current law). Section 4 of the bill provides that AS 15.13 does not limit the authority of a person to make contributions to influence the outcome of a voter proposition submitted to the public for a vote at a municipal election.

Sections 5 and 7 of the bill would amend AS 15.13.040 to provide that certain contribution and expenditure reporting requirements for candidates do not apply if a candidate files a form with the APOC indicating an intent not to raise or expend more than $2,500 in seeking office.

Certain expenditures and advertisements by an individual acting independently relating to a ballot proposition could be anonymous under SB 191. Section 6 (in amending AS 15.13.040(d)(2)) and section 7 (in adding a new subsection AS 15.13.040(h)) provide that an individual, acting independently of any other group or individual, is not required to report expenditures which cumulatively do not exceed $250 during a calendar year concerning a ballot proposition. The expenditures exempted from reporting requirements would have to be made for billboards, signs, or printed material. See also sec. 8 (amending AS 15.13.050(a)). This reporting exemption for individuals concerning expenditures relating to ballot propositions was enacted so that state law would be in accord with the recent United States Supreme Court decision in McIntyre v. Ohio Elections Commission, 115 S.Ct. 1511 (1995) (anonymous pamphleteering by individual concerning school bond election protected under First Amendment). Section 15 of the bill would amend AS 15.13.090 to add a new subsection (b), which provides that an individual, acting independently of any other individual or group, who pays for a billboard, sign or certain printed material (other than advertisements in a newspaper or periodical) intending to influence the outcome of a ballot proposition does not have to identify the individual, which is also in accord with the McIntyre decision.

Section 24 of the bill would amend AS 15.13 to add AS 15.13.155, relating to restrictions on earned income and honoraria by candidates for state legislature, governor, or lieutenant governor. Such candidates could not accept payments for appearances or speeches, other than travel expenses, unless the appearances or speeches were not connected with the individual's status as state officials or candidates.

P. Definitions

Section 24, in proposed AS 15.13.400, contains the definitions for AS 15.13.

Q. Severability

Section 31 of the bill provides that, under AS 01.10.030, if any provision of SB 191 is held invalid, then the remainder of SB 191 is not affected. Thus, in the event that any specific provision of SB 191 were held unconstitutional, the rest of the bill would survive.

R. Effective Date

Section 33 of the bill provides that SB 191 would only take effect if the lieutenant governor were to determine that it is substantially similar to the campaign finance initiative, in which case SB 191 would take effect on January 1, 1997 (according to sec. 35).

III. CONCLUSION

Notwithstanding our comments concerning possible constitutional infirmities to SB 191, if the bill becomes law we believe that it can be defended in good faith. We reach this

conclusion because the courts have not yet specifically addressed the constitutionality of some of the provisions included in SB 191, and the case law in the area of campaign finance reform is still developing. Several of the provisions of SB 191 are unique to Alaska and would create questions of first impression for the court. It is difficult to predict with certainty how a court would balance the competing rights and interests in some provisions of the bill.

Sincerely,

Bruce M. Botelho
Attorney General

BMB:MTS:aw