

LEGAL SERVICES

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MEMORANDUM

June 16, 2021

SUBJECT: Retroactive effective dates (Work Order No. 32-LS1041)

TO: Representative Louise Stutes
Speaker of the House
Attn: Matt Gruening

FROM: Megan A. Wallace
Director



You asked what happens if the effective dates in CCS HB 69, the operating budget, fail.

Special effective dates require a two-thirds vote. If the special effective dates fail, the bill will take effect 90 days after enactment.^{1, 2}

Retroactivity and Effective Dates.

If the special effective dates do not receive the required two-thirds vote, the bill will take effect 90 days after it is signed by the governor, in accordance with AS 01.10.070.³ However, the bill contains a retroactivity provision, which makes *all* of the provisions retroactive to their corresponding intended effective dates.⁴ A retroactive clause does not

¹ See art. II, sec. 18, Constitution of the State of Alaska.

SECTION 18. Effective Date. Laws passed by the legislature become effective ninety days after enactment. The legislature may, by concurrence of two-thirds of the membership of each house, provide for another effective date.

² Enactment occurs when the governor signs the bills or allows the bill to become law without signature. See AS 01.10.070, and art. II, sec. 17, Constitution of the State of Alaska.

³ The difference in the effective dates does not trigger a requirement that the other house concur before the bill takes effect. *Alaska Legislative Council v. Hammond*, Case No. 4 FA-80-1989 (March 1981).

⁴ The supplemental sections of the bill are retroactive to April 15, 2021.

amount to a special effective date. Accordingly, the retroactivity provision may be adopted by majority vote rather than the two-thirds vote required for effective dates.⁵

Because the bill contains a retroactivity provision for all appropriations in the bill, the executive branch may choose to give effect to the retroactivity clause, and allow state government to continue operating before the bill takes effect 90 days later, knowing that the appropriations are retroactive to their intended effective dates. The Alaska State Legislature has historically used retroactivity provisions in appropriation bills, and those retroactivity clauses have been given effect by the administration. Nevertheless, please note that the administration may choose not to give effect to the retroactivity clause. There also might be unintended consequences of failing to adopt the special effective dates that are not immediately foreseeable.

If there are cash flow issues while the administration waits for the bill to take effect, there may be some accounting tools available to temporarily shift money from one account to a depleted account on a short-term basis. In addition, there previously has been a practice by the executive branch to use money from the constitutional budget reserve fund (CBR) (art. IX, sec. 17, Constitution of the State of Alaska) to meet cash flow shortages and to repay the money used at a later date.

In addition, the constitution specifically contemplates interim borrowing, and the administration could utilize that provision to continue operations during the 90-day period before the bill takes effect.⁶ Borrowing in anticipation of revenue is dealt with statutorily under AS 43.08.010 - 43.08.060. Under these provisions, the commissioner of revenue is authorized to borrow money to meet appropriations for a year in anticipation of the collection of revenues for that same year. The commissioner has the discretion to decide the amount and terms of the notes, but "a note may not be sold at less than par and accrued interest." Under AS 43.08.035, an appropriation from the general fund is provided for to pay for notes "when the term of those notes measured from the date of issuance to the date of first maturity does not exceed nine months."

⁵ *ARCO Alaska, Inc. v. State*, 824 P.2d 708 (Alaska 1992). See also 1989 1 Op. (Inf.) Att'y Gen. 367 (June 1, 1989).

⁶ See art. IX, sec. 10, Constitution of the State of Alaska:

SECTION 10. Interim Borrowing. The State and its political subdivisions may borrow money to meet appropriations for any fiscal year in anticipation of the collection of the revenues for that year, but all debt so contracted shall be paid before the end of the next fiscal year.

⁷ AS 43.08.040.

Accordingly, it is possible that the executive branch may choose to contract for short-term debt to keep some or all governmental services operational during a 90-day period before the bill takes effect.

Constitutional Sweep

The constitutional sweep in art. IX, sec. 17(d), Constitution of the State of Alaska, provides:

(d) If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law.

The constitutional sweep will occur on June 30, 2021, if the legislature fails to adopt the "reverse sweep" language, which requires approval upon an affirmative vote of three-fourths of the members of each house of the legislature.⁸ This is irrespective of passage of the special effective dates. If the legislature does adopt the "reverse sweep" language but fails to adopt the special effective date for that provision, the "reverse sweep" language is intended to apply retroactively to July 1, 2021. Please be advised, however, that this may not be sufficient to avoid the constitutional sweep that must occur on June 30, 2021. Nevertheless, there is a chance that a court would uphold the retroactivity clause to allow the "reverse sweep" language to operate, even after July 1, 2021.

Expenditure Before Effective Date

The attorney general has opined on several different occasions in several different contexts that funds may be obligated and expended prior to the actual effective date of an appropriation.⁹ In 1989, the attorney general advised that

A strict interpretation of the absence of an effective date would imply that no money may be expended under the appropriations made in this bill until 90 days after you sign the bill. However, it would be irresponsible to disrupt state government functions to await the constitutionally specified effective date.¹⁰

In 1990, in concurrence with the earlier opinion, the attorney general stated:

⁸ See art. IX, sec. 17(d), Constitution of the State of Alaska.

⁹ See, e.g., 1990 Att'y Gen Op. No. 221 (May 18, 1990); 1989 Inf. Op. Att'y Gen. (May 25, 883-89-0076); 1981 Inf. Op. Att'y Gen. (July 10, J-66-866-81), citing the rule of necessity and AS 37.05.170.

¹⁰ 1989 Inf. Op. Att'y Gen. (May 25, 883-89-0076), attached hereto.

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To summarize our analysis of the effective date issue, there is strong precedent for remedying the absence of an effective date for the supplemental appropriations contained in the bill. They can be given retrospective application to the beginning of the current fiscal year. Care should be taken to assure that the governor's power of veto is not compromised. For other appropriations in the bill, there is authority in the form of an earlier opinion of this office that these appropriations can be obligated at least from the beginning of the fiscal year for which they are made. However, as an additional measure to assure the validity of an expenditure, any advance obligation incurred under those appropriations must be justified as necessary to protect the public interest.¹¹

If I can be of further assistance, please advise.

MAW:lme
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Attachment

¹¹ 1990 Att'y Gen Op. No. 221 (May 18, 1990) at 9.