



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

DIVISION OF  
CORPORATION FINANCE

March 2, 1992

Act	ICA 1940
Section	3
Rule	
Public Availability	3/2/92

Mr. J. J. Brecht  
Wohforth, Argetsinger, Johnson & Brecht  
900 West 5th Avenue, Suite 600  
Anchorage, Alaska 99501

Re: University of Alaska Advance College Tuition Payment Plan

Dear Mr. Brecht:

In regard to your letters of February 19, 1992, November 29, 1991, and July 17, 1991 our response thereto is attached to the enclosed photocopy of your correspondence. By doing this, we avoid having to recite or summarize the facts set forth in your letter.

Sincerely,

*Abigail Arms*

Abigail Arms  
Chief Counsel

March 2, 1992

IM  
Monica Parry  
10-6

RESPONSE OF THE DIVISION OF CORPORATION FINANCE  
DIVISION OF CORPORATION FINANCE

RE: University of Alaska Advance College Tuition Payment Plan ("Plan")  
Incoming letters dated February 19, 1992, November 29, 1991, and July 17, 1991

Based on the facts presented, the Division will not recommend any enforcement action to the Commission if the Contracts (as defined in your letter), in reliance upon your opinion as counsel that registration is not required, are offered and sold without compliance with the registration provisions of the Securities Act of 1933.

The Division of Market Regulation has asked us to inform you that based on the facts presented, it will not recommend enforcement action to the Commission if the officers and employees of the University, acting in the course of their official duties, offer and sell the Contracts without registering with the Commission under Sections 15(b) and 15B(a) of the Securities Exchange Act of 1934 (the "Exchange Act"). In addition, the Division of Market Regulation concurs with the Division of Corporation Finance in not recommending enforcement action to the Commission if the University of Alaska offers the Contracts without complying with the registration provisions of the Exchange Act.

The Division of Investment Management has asked us to inform you that it would not recommend enforcement action to the Commission if the University, in reliance on your opinion as counsel that registration is not required, issues Alaska Plan contracts through the Alaska Advance College Tuition Payment Plan ("Alaska Plan") without registration under the Investment Company Act of 1940. Further, we would not recommend any enforcement action to the Commission under Section 203(a) of the Investment Advisers Act of 1940 if employees, agents, and officers of the University involved with the administration, operation, and other aspects of the Alaska Plan, in reliance upon your opinion as counsel that registration is not required, do not register under the Investment Advisers Act.

This position is based on the facts and representations in your letters of July 17, 1991 and February 19, 1992. We note in particular that: (1) the Alaska Department of Revenue will manage the Alaska Plan's assets, (2) the Alaska Department of Revenue will act as the custodian of the Plan's assets, and (3) the Plan may invest only in certain prescribed investments. Any different facts or representations may require a different conclusion.

Further, this response expresses the Division's position on enforcement action only and does not purport to express any legal conclusion on the issues presented.

Because these positions are based upon the representations made to the Divisions in your letters, supplemented by conversations with the staff, it should be noted that any different facts and conditions might require a different conclusion. Furthermore, this response merely expresses the Divisions' positions on enforcement action, and does not purport to express any legal conclusion on the questions presented.

Sincerely,

A handwritten signature in cursive script, appearing to read "Felicia Smith", with a long horizontal flourish extending to the right.

Felicia Smith  
Special Counsel

**WOHLFORTH, ARGETSINGER, JOHNSON & BRECHT**

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

900 WEST 5TH AVENUE, SUITE 600

ANCHORAGE, ALASKA 99501

PETER ARGETSINGER  
JULIUS J. BRECHT  
CYNTHIA L. CARTLEDGE  
ROBERT M. JOHNSON  
BARBARA E. KISSNER  
THOMAS F. KLINKNER  
ANDREW M. LEBO  
BRADLEY E. MEYEN  
JAMES A. SARAFIN  
KENNETH E. VASSAR  
ERIC E. WOHLFORTH

TELEPHONE  
(907) 276-6401  
TELECOPY  
(907) 276-5093

RECD S.E.C.

FEB 21 1992

135

February 19, 1992

Office of Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
Washington, DC 20549

ATTN: Monica L. Parry, Staff Attorney

Re: University of Alaska Advanced College Tuition Payment Plan;  
Our File No. 3120.0501

Dear Ms. Parry:

As per our telephone conversations on this date regarding the above-captioned subject ("Plan"), please be advised that it is the intent of the University of Alaska as follows: (1) pursuant to Alaska Statutes 14.40.805, the day-to-day investments of the Plan will be managed by the Alaska Department of Revenue, and the department will otherwise act as the custodian of the Plan; and (2) pursuant to Alaska Statutes 14.40.809(b)(3), the funds in the Plan will be placed in conservative investments, e.g., as per the draft Investment Policy set forth in Exhibit J to my letter of July 17, 1991 on this subject.

As we further discussed, the Common Fund referred to in the Investment Policy is a fund in which approximately 500 universities around the country participate including the University of Alaska, having investment managers separate from the participating universities, the Short Term Fund and Intermediate Cash Fund of which are considered of an investment quality similar to that of the other six authorized investments of that policy.

Finally, as I discussed with you, the University has numerous substantial contacts with and is subject to regulation by the State of Alaska in a variety of areas, many of which have been interpreted by the Alaska Supreme Court as being the basis for concluding that the University is an instrumentality of the State including that (1) it is formed as a state university under Article VII of the

Monica L. Parry, Staff Attorney  
Securities & Exchange Commission  
February 19, 1992  
Page 2

Alaska Constitution with a statewide purpose and is the only funded statewide university in Alaska, (2) it must submit annual reports and accountings to the Alaska legislature and to the governor, (3) its board of regents is appointed by the governor subject to approval by the Alaska legislature, (4) it is a land grant and sea grant college under federal law, (5) it must submit a budget to the Alaska Department of Administration as do other departments of the state government, and that budget is in turn submitted to the Alaska legislature only through which state funds may be appropriated for the University, (6) all of its revenues (including tuition) are subject to appropriation by the Alaska legislature, (7) it is subject to the Alaska Administrative Procedure Act as are various other state instrumentalities and departments of state government, and (8) the legislature may dispose of lands of the University without approval from the University.

Should you have any further questions regarding these matters, I would be pleased to respond to them.

Sincerely,

WOHLFORTH, ARGETSINGER, JOHNSON  
& BRECHT



J. J. Brecht

JJB/jk

**WOHLFORTH, ARGETSINGER, JOHNSON & BRECHT**

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

900 WEST 5TH AVENUE, SUITE 600  
ANCHORAGE, ALASKA 99501

TELEPHONE (907) 276-6401  
TELECOPY (907) 276-5093

PETER ARGETSINGER  
JULIUS J. BRECHT  
CYNTHIA L. CARTLEDGE  
ROBERT M. JOHNSON  
BARBARA E. KISSNER  
THOMAS F. KLINKNER  
ANDREW M. LEBO  
BRADLEY E. MEYEN  
JAMES A. SARAFIN  
KENNETH E. VASSAR  
ERIC E. WOHLFORTH

OF COUNSEL  
ROGER G. CONNOR

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

November 29, 1991

DELIVERY VIA DHL

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
Washington, DC 20549



Att: Felicia Smith

Re: Addendum to July 17, 1991 letter on University of Alaska Advance  
College Tuition Payment Plan; Our File No. 3120.0501

Dear Ms. Smith:

In our telephone conversation of earlier this week, I inquired as to whether those reviewing the no-action letter request which this firm presented to the Securities and Exchange Commission on behalf of the University of Alaska ("University") in the context of the University's proposed Advanced College Tuition Payment Plan ("Plan") were having substantive difficulty with the request. That initial request was contained in my letter to the Office of Chief Counsel dated July 17, 1991.

In our telephone conversation you indicated the advanced college tuition plans from other states considered by the staff of the Commission involved specific authorities being established to administer the plans, whereas the Plan is administered through a committee of the University. You further stated that there was some question as to whether the University was in fact an instrumentality of the State of Alaska.

The following is offered as a supplement to the discussion of the status of the University as an instrumentality of the State of Alaska which appears at page 23 of my letter of July 17, 1991.

The University is created under Article VII, Sections 2 and 3 of the Alaska Constitution, which provide:

**Section 2. State University.** The University of Alaska is hereby established as the state university and constituted a body corporate. It shall have title to all real and personal property now or hereafter set aside for or conveyed to it. Its property shall be administered and disposed of according to law.

**Section 3. Board of Regents of University.** The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The board shall, in accordance with law, formulate policy and appoint the president of the university. He shall be the executive officer of the board.

The Alaska Supreme Court has determined the University to be an integral part of the State of Alaska for a variety of purposes. These include procedures governing lawsuits against the state, University of Alaska v. National Aircraft Leasing, Ltd., 536 P.2d 121 (Alaska 1975); federal civil rights statutes, Brown v. Wood, 575 P.2d 760 (Alaska 1978); public access to government documents, Carter v. Alaska Public Employees Association, 663 P.2d 916 (Alaska 1983); and open meetings laws, University of Alaska v. Geistauts, 666 P.2d 424 (Alaska 1983). Copies of these decisions are enclosed as exhibits M through P, respectively.

In University of Alaska v. National Aircraft Leasing, Ltd., 536 P.2d at 124-125, the court concluded:

Despite the degree of constitutional as well as statutory autonomy the University clearly possesses, we are of the opinion that it must be considered to be an integral part of the state educational system mandated by the constitution. In its constitutional status it stands as the single governmental entity which was specifically created by the people to meet the statewide need for a public institution of higher education. In this light, the University must be regarded as an instrumentality of the state itself. Unlike other public educational

Office of Chief Counsel  
November 29, 1991  
Page 3

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

institutions created to meet the needs of local areas, it exists constitutionally to act for the benefit of the state and the public generally.

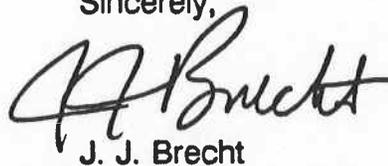
In Brown v. Wood, 575 P.2d at 766, the court followed University of Alaska v. National Aircraft Leasing, Ltd., and held:

Thus, because the University is in essence a branch of the state government, it follows that it is not a "person" which may be held liable under 42 U.S.C. Section 1983.

Based upon the foregoing authorities, we submit that the University should be considered an instrumentality of the State of Alaska for purposes of exempting advance college tuition payment contracts offered by the University through the Plan from registration and other provisions of the federal securities laws as outlined in my July 17, 1991 letter.

Please let me know if we may provide further information on this subject, or on any other matter related to our request.

Sincerely,



J. J. Brecht

:lca

Enclosures

WOHLFORTH, ARGETSINGER, JOHNSON & BRECHT

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

900 WEST 5TH AVENUE, SUITE 600

ANCHORAGE, ALASKA 99501

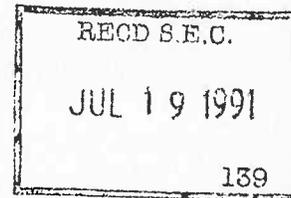
TELEPHONE (907) 276-6401  
TELECOPY (907) 276-5093

PETER ARGETSINGER  
JULIUS J. BRECHT  
CYNTHIA L. CARTLEDGE  
ROBERT M. JOHNSON  
BARBARA E. KISSNER  
THOMAS F. KLINKNER  
ANDREW M. LEO  
BRADLEY E. MEYER  
JAMES A. SARAFIN  
KENNETH E. VASSAR  
ERIC E. WOHLFORTH

OF COUNSEL  
ROGER G. CONNOR

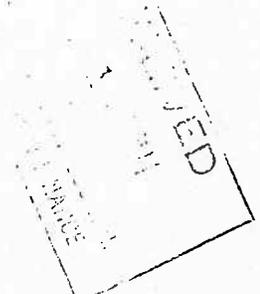
1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

July 17, 1991



Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
Washington, DC 20549

Re: University of Alaska Advance College Tuition Payment Plan;  
Our File No. 3120.0501



Ladies and Gentlemen:

This firm represents the University of Alaska ("University") in its efforts to establish the University of Alaska Advance College Tuition Payment Plan ("Alaska Plan"). On behalf of the University, we are writing to you to request certain interpretive or "no-action" positions from the staff of the Securities and Exchange Commission ("Commission") with respect to the contemplated offering by the University of advance college tuition payment contracts ("Contracts"), as more fully described in this letter. Enclosed with this letter are sufficient copies of this request as required by Release Nos. 33-5127 and 33-6269, i.e., seven copies for the Division of Corporation Finance and six copies, one for each statutory section cited above (after the first citation), with each copy including all exhibits referenced in this letter.

AFF0133C

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 2

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

Specifically, the advice of the Division of Corporation Finance is hereby requested as to whether it would recommend any action to the Commission if the University and its Alaska Plan, through its employees, officers and approved agents, offered and sold Contracts using the Alaska Plan without registration under the Securities Act of 1933 ("Securities Act"). That is, we request confirmation that the proposed sale of the Contracts will not involve the offer or sale of a "security" within the meaning of Section 2(1) of the Securities Act. Furthermore, we request confirmation that, if the sale of the Contracts would be a sale of a "security" within the meaning of Section 2(1) of the Securities Act, those Contracts would be exempted securities issued or guaranteed by a state or a public instrumentality of a state of the United States pursuant to Section 3(a)(2) of the Securities Act. We request confirmation that the Division of Corporation Finance would not recommend any action to the Commission upon the sale of the Contracts without registration pursuant to the exemption provided by Section 304(a)(4)(A) of the Trust Indenture Act of 1939 ("Trust Indenture Act").

We request confirmation that the Division of Market Regulation would not recommend any enforcement action to the Commission if the officers and employees of the University through the Alaska Plan offer and sell Contracts without registering with the Commission as "brokers" or "municipal securities brokers" under Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and without the University or the Alaska Plan registering with the Commission as a "dealer" or "municipal securities dealer" under Section 15(b) or 15B(a) of the Exchange Act, respectively.

Through this letter, we request confirmation that the Division of Investment Management would not recommend any enforcement action to the Commission if the University, through the Alaska Plan, issues the Contracts without registration under the Investment Company Act of 1940 ("Investment Company Act") pursuant to the "instrumentality" of a state exclusion provided by Section 2(b) of the Investment Company Act.

Additionally, we request confirmation that the Division of Investment Management would not recommend any enforcement action to the Commission if the University, through the Alaska Plan, issues the Contracts without registration of University or Alaska Plan employees and officials, if any, as "investment

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 3

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

advisers" under the Investment Advisers Act of 1940 ("Investment Advisers Act") pursuant to the "instrumentality" of a state exclusion provided by Section 202(b) of that act.

The University seeks the determinations from you as set forth in this letter at this time because it wishes to implement the Alaska Plan no later than the 1991 fall academic term.

A. Statement of Facts

The University is authorized to establish the Alaska Plan through Alaska Statutes AS 14.40.803-14.40.817 ("Alaska Advance College Tuition Payment Act"). The Alaska Advance College Tuition Payment Act was enacted by the Alaska legislature and signed into law by the governor of the State of Alaska with an effective date of September 2, 1990. On May 21, 1991, at the request of the University, the Alaska legislature enacted a number of amendments to the Alaska Advance College Tuition Payment Act which became effective on June 19, 1991. Copies of the Alaska Plan, the Contract, and the Alaska Advance College Tuition Payment Act, as amended, are enclosed with this letter as Exhibits A, B, and C, respectively.

The Alaska Plan will be implemented by offering to the public the Contracts whereby the cost of tuition may be paid in advance of enrollment at the University at a rate lower than the projected corresponding costs at the time of actual enrollment. Payments made to the Alaska Plan will be combined and invested in a manner that yields sufficient earnings to generate the difference between the prepaid amount and the cost of tuition at the time of actual enrollment. Students who enroll in the University pursuant to the Alaska Plan will be charged no tuition in excess of the terms delineated in the Contract. However, other fees incurred in enrolling in the University must be paid by the student. Under the Alaska Plan, excess tuition credits can be purchased by or for the student for paying those other fees.

In anticipation of the implementation of the Alaska Plan, the Board of Regents of the University ("Board of Regents") has authorized the preparation of

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 4

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

a brochure to be used in responding to initial inquiries concerning the Alaska Plan. A copy of that brochure is enclosed with this letter as Exhibit D.

Also, in anticipation of the implementation of the Alaska Plan and in order to meet the deadline imposed by the Alaska Department of Revenue, the Board of Regents authorized the preparation and inclusion of questions in the adult and child application forms included in the Alaska Permanent Fund Dividend Program 1991 Household Application Booklet distributed to residents of the state of Alaska. These questions (numbers 13 and 15 in the adult and child applications, respectively) allow the applicant for an Alaska Permanent Fund dividend ("Permanent Fund Dividend") to choose whether he or she wishes to use 50% of his or her Permanent Fund Dividend to purchase tuition credits for himself or herself or another person. A copy of the booklet is enclosed as Exhibit E to this letter. Under AS 43.23.005, each resident of the State of Alaska (as defined under the Permanent Fund statutes enacted to implement the Permanent Fund Dividend program) is entitled to a Permanent Fund Dividend when declared on the assets of the Alaska Permanent Fund, a fund that was established pursuant to an amendment to the Alaska Constitution. The Alaska Permanent Fund was initially and continues in part to be funded from oil royalties derived by the state from leasing of certain lands to oil companies producing oil in the state. Copies of AS 43.23.005 and the relevant portion of the Alaska Constitution are enclosed with this letter as Exhibits F and G, respectively.

A Contract will be entered into by the University and a member of the general public, i.e., a purchaser ("Purchaser") for the benefit of a Beneficiary. The term "Purchaser" is defined under Section 1 of the Alaska Plan to mean a person at least 18 years of age, an emancipated minor, or any other entity obligated to make payments under a Contract. A Purchaser may include a parent or grandparent as well as an organization such as a non-profit association or business. The term "Beneficiary" is defined under Section 1 of the Alaska Plan to mean an individual designated to receive benefits under a Contract or a prepaid tuition scholarship issued in accordance with the Alaska Plan. The purchase of a Contract will not guarantee to the student admission to the University and will not provide preferential treatment. A student must meet standard academic and other requirements as established by the University from time to time.

AFF0133C

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 5

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

The Alaska Plan will be administered by the Advance College Tuition Payment Plan Administrative Committee ("Committee") to be established pursuant to the Alaska Plan to carry out the day-to-day administration of the Alaska Plan at the direction of the president of the University. The president is appointed and serves at the pleasure of the Board of Regents, whose members are appointed by the governor for fixed terms. The Alaska Plan was approved by the Board of Regents on April 19, 1991. The Committee, through the president, is delegated the responsibilities and duties as set forth in Section 11 of the Alaska Plan. Under that section, the president will appoint three or more persons to be members of the Committee. Any person employed by the Committee in the context of the Alaska Plan or the Alaska Tuition Fund will be an employee of the University. No member of the Committee who is an employee of the University will receive additional compensation with respect to such services. The University anticipates the formation of the Committee shortly so as to prepare for the implementation of the Alaska Plan for the fall semester of this year.

The Committee will be further governed by Administrative Committee Bylaws ("Bylaws"). A copy of the proposed Bylaws is enclosed with this letter as Exhibit H. The proposed Bylaws set forth the powers and duties of the Committee, terms of membership, term of office, terms for removal of members, guidelines for filling of vacancies on the Committee, quorum requirements, guidelines for executive sessions, compensation of members, and other administrative details pertaining to the conduct of business of the Committee. The Committee, when formed, will take action on the proposed Bylaws.

The Bylaws also provide that the president will appoint a director for the Alaska Plan ("Director"). The Director will be responsible for directing the University's advanced college tuition payment program in accordance with the Alaska Plan, procedures adopted by the Committee, and other policies and procedures of the University. The proposed specific delegation of duties to the Director and those specifically retained by the Committee are set forth in a document entitled Delegation of Duties, a copy of which is included with this letter as Exhibit I. The Committee, when formed, will take action on this proposed Delegation of Duties.

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 6

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

Under AS 14.40.805 of the Alaska Advance College Tuition Payment Act, the Alaska Advance College Tuition Payment Fund ("Alaska Tuition Fund") is established for the purpose of enhancing the ability of the University to accomplish the following: (1) to provide higher education for the people of the state; (2) to provide wide and affordable access to higher education for Residents and their children; (3) to provide an incentive for Residents to achieve higher academic standards in grades 7-12; and (4) to provide an incentive for Residents to continue to complete secondary and postsecondary education. The term "Resident" is defined under the Alaska Plan to mean an individual who is living in the state of Alaska and has declared the intent to remain in Alaska indefinitely.

Under AS 14.40.803, the Alaska Tuition Fund is authorized as a non-lapsing fund of the University. The Alaska Tuition Fund will be established by the University as a designated fund within the University's unrestricted funds to account for and finance the liabilities to Beneficiaries and others under the Contracts and the Alaska Plan.

The Alaska Tuition Fund will consist of Alaska Permanent Fund dividend contributions and cash payments made under the terms of the Contracts, appropriations, gifts, bequests, and contributions of other assets. The assets of the Alaska Tuition Fund may be expended to make payments to the University for refunds, redemptions, and awards under the Alaska Plan and to pay the costs of administration of the Alaska Tuition Fund. Since all assets of the Alaska Tuition Fund will ultimately be expended for tuition, refunds, or administrative costs, the distinction between principal and income is not required nor made. All income and earnings of the Alaska Tuition Fund will be added to principal.

The Board of Regents will establish an investment policy for the purposes of the Alaska Plan. The Alaska Plan, through the Committee, may place assets of the Alaska Tuition Fund in any of a number of investments. A copy of the proposed investment policy ("Investment Policy") is included as Exhibit J to this letter. Through this proposed Investment Policy, the commissioner of the Alaska Department of Revenue may place assets of the Alaska Tuition Fund in specific enumerated investments. The Committee, when formed, will take action on the proposed Investment Policy.

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 7

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

To clarify the relationship between the University and the State of Alaska as pertains to the Alaska Plan, AS 14.40.807(c) expressly provides that, in order to assure the actuarial soundness of the Alaska Tuition Fund, the Alaska legislature may appropriate annually to the Alaska Tuition Fund a sum certified by the Board of Regents to the governor and the Alaska legislature that is necessary to restore the Alaska Tuition Fund to a level that is actuarially sound. That subsection further provides that the Board of Regents must annually, before January 30, make and deliver to the governor and to the Alaska legislature a certificate stating the sum required to restore the Alaska Tuition Fund to a level that is actuarially sound. The Alaska legislature then has the discretion to appropriate and pay to the Alaska Tuition Fund that sum during that fiscal year. Finally, that subsection expressly provides that it does not create a debt or liability of the State of Alaska. That is, the subsection sets forth a "moral" obligation of the State of Alaska to the University in the context of the Alaska Tuition Fund.

Under AS 14.40.809, the Board of Regents will, among other things, establish investment objectives, criteria and asset allocation guidelines for the Alaska Tuition Fund based on prudent institutional investor guidelines and actuarial analysis of the earnings requirements for the Alaska Plan and make the obligation under the Alaska Plan a general obligation of the University. The Board of Regents will review the actuarial soundness of the Alaska Plan on a periodic basis in accordance with a policy statement on actuarial assessment ("Actuarial Assessment Statement"). A copy of the proposed Actuarial Assessment Statement is enclosed with this letter as Exhibit K. The Committee, when formed, will take action on the proposed Actuarial Assessment Statement.

The proposed Actuarial Assessment Statement provides that the Committee will annually evaluate the actuarial soundness of the Alaska Tuition Fund and determine whether additional assets are needed to defray the obligations of the Alaska Tuition Fund. The proposed Actuarial Assessment Statement provides that the assessment will be conducted by a nationally recognized actuary or firm providing actuarial services. The proposed Actuarial Assessment Statement further provides that the assessment will include, but not be limited to, the following: (1) forecasts of assets, liabilities and fund balances under various assumptions; (2) forecasts of the value of graduation incentive credits; (3) forecasts of funds available for the award of prepaid tuition scholarship; (4)

sensitivity analyses of the forecasts to changes in participation rates, matriculation rates, tuition inflation rates, investment returns, selling prices of Tuition Credits, operating expenses and other significant factors; and (5) estimates of any potential tuition review shortfalls for the University resulting from tuition costs in excess of estimated Cash Value (as defined later in this section) of tuition redemptions. The annual assessments are to further include recommendations to the Committee and the Board of Regents on the selling price for Tuition Credits and other matters related to the financial strength and actuarial soundness of the Alaska Plan and the Alaska Tuition Fund. The Actuarial Assessment Statement further requires that, if the Committee determines that the assets in the Alaska Tuition Fund are not sufficient to meet the obligations of the Alaska Plan on an actuarially sound basis, the Committee is to recommend to the Board of Regents that it request an appropriation from the Alaska legislature to the Alaska Tuition Fund and certify to the governor and to the Alaska legislature, in accordance with AS 14.40.807, as to the sum required to restore the Alaska Tuition Fund to an actuarially sound basis. The Committee, when formed, will take action on the proposed Actuarial Assessment Statement.

Under AS 14.40.805, the commissioner of the Alaska Department of Revenue is the custodian of the Alaska Tuition Fund and has the following duties: (1) to act as the official custodian of the cash and investments belonging to the Alaska Tuition Fund and to secure adequate and safe custodial facilities; (2) to receive all items of cash and investments belonging to the Alaska Tuition Fund; (3) to collect and deposit the principal and income from investments of the Alaska Tuition Fund; (4) to invest and reinvest the assets of the Alaska Tuition Fund in accordance with investment objectives, criteria, and asset allocation guidelines established by the Board of Regents; (5) to exercise the powers of a custodian with respect to the assets of the Alaska Tuition Fund; (6) to do all acts, whether or not expressly authorized, that the commissioner of the Alaska Department of Revenue, as custodian, considers necessary or proper in administering the assets of the Alaska Tuition Fund; (7) to maintain accounting records of the Alaska Tuition Fund in accordance with investment accounting principals; (8) to engage an independent firm of certified public accountants to annually audit the financial condition of the Alaska Tuition Fund's investments and investment transactions; (9) to enter into and enforce Contracts or agreements considered necessary for investment purposes of the Alaska Tuition Fund; (10) to report to the University the

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 9

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

condition and investment performance of the Alaska Tuition Fund; and (11) to make payments to the University as requested by the Board of Regents, including payments for refunds and redemptions under a Contract or a prepaid tuition scholarship, and costs of administration of the Alaska Tuition Fund.

Under Section 2 of the Alaska Plan, the minimum initial Tuition Credit purchase for opening a Contract will be six Tuition Credits. The term "Tuition Credit" is defined in Section 1 of the Alaska Plan to mean a unit of credit for tuition purchased under a Contract or awarded as a prepaid tuition scholarship under the Alaska Plan. Additional purchases may be made in units not smaller than one Tuition Credit. Alternatively, the Purchaser may purchase the full 120 Tuition Credits for enrollment at the University at one time.

The price of a Tuition Credit will be established each year by the Board of Regents based on projected future college costs. As college expenses rise, the costs of Tuition Credits will also increase for Purchasers who purchase Tuition Credits in later years. However, once a Purchaser has purchased Tuition Credits under a Contract, neither the Purchaser nor the Beneficiary will be affected by subsequent increases in costs of tuition at the University.

While the Alaska Advance College Tuition Payment Act provides for the University to enter into installment purchase contracts with participants (AS 14.40.811), the University had not prepared such contracts as of the date of this letter. The University may consider offering such financing in the future, however, such contracts are not the subject of the opinion requests made by the University through this letter. The only method of purchase of Tuition Credits offered by the University through the Alaska Plan as of the date of this letter is through entering into a Contract for the direct purchase of Tuition Credits.

Under Section 3 of the Alaska Plan, the University guarantees that, subject to the terms and conditions of the Contract and the Alaska Plan, the Primary Beneficiary will be entitled to redeem Tuition Credits under a Contract regardless of the amount paid for such Tuition Credits, the investment earnings of the Alaska Tuition Fund or cost of tuition at the time of redemption. The term "Primary Beneficiary" is defined under the Alaska Plan to mean an individual

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 10

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

designated to receive benefits under a Contract prior to any other named Beneficiaries or a Beneficiary of a prepaid tuition scholarship under that plan.

Furthermore, under the Alaska Plan, a Beneficiary may attend an eligible institution ("Eligible Institution") other than the University and receive a refund of tuition value ("Tuition Value") for up to 15 Tuition Credits not to exceed the cash value ("Cash Value") of the Tuition Credits during periods of attendance at the Eligible Institution.

The term "Tuition Value" is defined under the Alaska Plan to mean the value of a Tuition Credit as determined by the Board of Regents based on a weighted average of the University resident undergraduate tuition rates (calculated at the percentage of undergraduate credit hour activity for each campus during the previous fall semester times the current resident undergraduate tuition rates in effect at those campuses). The term "Cash Value" is defined under the Alaska Plan to mean the value of a Tuition Credit as determined annually by the Board of Regents based on market value of investments made by the University under the Alaska Advance College Tuition Payment Act, the outstanding Tuition Credits, adjustments for any actuarially determined funding excess or deficiency and other actuarial adjustments deemed necessary.

The Alaska Plan defines an "Eligible Institution" as a nonprofit post-secondary institution approved by the U.S. Department of education for receipt of Title IV funding. The Alaska Plan further provides that the Board of Regents may enter into reciprocal agreements with other institutions or states to provide advance tuition payment benefits if such agreements further the purposes of the Alaska Plan. In addition, AS 14.40.809 requires that the University will enter into reciprocal agreements with Sheldon Jackson College and Alaska Pacific University, the only two other institutions of higher education in the state of Alaska.

The Alaska Plan provides that to be eligible to redeem Tuition Credits, a Beneficiary must be a qualified Beneficiary ("Qualified Beneficiary"). The term "Qualified Beneficiary" is defined under the Alaska Plan to be a Resident or the child or legal ward of a Resident or of an alumnus of the University.

Section 4 of the Alaska Plan sets out the conditions under which refunds will be issued. These conditions are as follows:

1. Full refund of the Cash Value to any Primary Beneficiary who, in the opinion of the Plan Administrator, becomes so disabled that he or she can no longer complete his or her education;
2. Full refund of the Cash Value to the estate of a Primary Beneficiary on the death of the Primary Beneficiary, unless an Alternate Beneficiary has previously been designated;
3. A refund of the Tuition Value for up to 15 Tuition Credits per semester (or its equivalency for trimester, quarters or other academic periods), not to exceed the Cash Value of the Tuition Credits at the effective date of the refund, to the Primary Beneficiary during the periods of attendance at any Eligible Institution other than the University; provided that a Primary Beneficiary may also request a refund for periods of attendance at the University or any Eligible Institution if he or she fails to meet the requirements of a Qualified Beneficiary under the Alaska Plan;
4. A refund of the Tuition Value of Tuition Credits in excess of the number of Tuition Credits required for attainment of a student's planned degree or certificate (based on use of 30 Tuition Credits for each academic year), not to exceed the Cash Value of the Tuition Credits at the effective date of the refund, to the Primary Beneficiary for any semester for which he or she attends an Eligible Institution, where the refund is limited to an amount established each semester by the Plan Administrator as the standard cost of on-campus room and board, fees, and books for a full-time student at the University; provided that a part-time student may request a refund of a pro rata amount based on a 15 semester hour full-time workload; provided further that a refund of the Tuition Value for any unredeemed Tuition Credits, not to exceed the Cash Value of the Tuition Credits at the effective date of the refund, may be requested by the Primary Beneficiary upon submission of proof, satisfactory to the Plan

Administrator, of attainment of a degree or certificate at an Eligible Institution;

5. Full refund of the Tuition Value for any unredeemed Tuition Credits, not to exceed the Cash Value of the Tuition Credits at the effective date of the refund, to the Primary Beneficiary if not admitted to the University after making proper application; provided that the Primary Beneficiary must submit proof, to the satisfaction of the Plan Administrator, of failure to be admitted and that all Alternate Beneficiaries, if any, have completed waivers of their rights under the Contract;
6. Full refund of the Principal Amount only for any unredeemed Tuition Credits, not to exceed the Cash Value of the Tuition Credits at the effective date of the refund, to the Primary Beneficiary if he or she decides not to attend college or participate in the Alaska Plan; provided that the Primary Beneficiary must submit a statement of nonparticipation and proof to the satisfaction of the Plan Administrator that all Alternate Beneficiaries, if any, have completed appropriate waivers of their rights under the Contract; and
7. Refund of the Principal Amount only paid for the Tuition Credits, not to exceed their Cash Value at the effective date of the refund, to the Primary Beneficiary except where the Purchaser is also the Primary Beneficiary; provided that such refund must be requested within 60 days of the issuance of a written notice of purchase and right to refund by the University to the Primary Beneficiary.

Section 4 of the Alaska Plan further provides that an Alternate Beneficiary is not entitled to a refund under a Contract unless the Primary Beneficiary and all Alternate Beneficiaries with prior rights under the Contract are deceased or have waived their rights in writing.

The term "Plan Administrator" is used within the Alaska Plan interchangeably with the term "Committee." The term "Principal Amount" is defined under the Alaska Plan to mean the amount paid by the Purchaser for Tuition

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 13

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

Credits under the Alaska Plan, exclusive of any transaction fees, investment earnings or forfeitures. The term "Alternate Beneficiary" is defined under the Alaska Plan to mean an individual designated to receive benefits under a Contract if the Primary Beneficiary is ineligible to receive benefits or a refund under the Alaska Plan or has waived his or her rights under the corresponding Contract.

There is no provision in the Alaska Plan for the Purchaser to obtain a refund of payments made to the Alaska Tuition Fund, unless the Purchaser is also the Primary Beneficiary under a Contract. Except for refunds requested because of attendance at other Eligible Institutions or Tuition Credits in excess of tuition need (both of which require three months advance notice for processing) and refund for non-participation for which the Alaska Plan provides for deferral of payments under Section 4.9 of the Alaska Plan, all refunds will be paid to the appropriate recipient as soon as practicable after receipt and approval of a request for a refund.

Purchasers will receive no interest or earnings on money paid into the Alaska Plan. Furthermore, the effective interest rate on the payments made by a Purchaser is not disclosed to the Purchaser nor to the Beneficiary in that the thrust of the Alaska Plan is to provide Tuition Credits and not to imply any actual or apparent return on investment.

Advertisements, brochures and other solicitation materials will not expressly or impliedly promote any assertions that Purchasers will receive any profits by engaging in the Alaska Plan. Upon cancellation or termination of a Contract, the Purchaser will not receive any reimbursement, however, the Beneficiary will receive benefits as previously described in this letter.

The Alaska Plan, as seen from the standpoint of the participant, will be a prepaid tuition plan and will not earn interest. Rather, the Alaska Plan will guarantee to meet the rising cost of college education.

The University will not set up an individual savings account for each Purchaser. Rather each Purchaser's funds will be combined in the Alaska Tuition Fund with those funds of all Purchasers. However, the University will maintain records of individual Purchasers and Beneficiaries and their contributions for

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 14

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

purposes of refunds, tax reporting, and administering tuition payments when a student enters college.

Under present Internal Revenue Service rulings, any tax liability for the beneficiary is deferred until the student enters college. At that time, the difference between the amount paid in and the value of the benefits received is taxable to the student over his or her college years. The University will provide an accounting of this amount to the student.

The Beneficiary must be named when the Contract is purchased. There must be a separate application for each Primary Beneficiary named. If a student dies before attending college, the Alternate Beneficiary will receive the benefits under the corresponding Contract as discussed previously in this letter.

Under Section 5 of the Alaska Plan, a Purchaser at the initiation of a Contract may designate up to three Alternate Beneficiaries to receive benefits under the Contract in the order named. The Alaska Plan also provides that all additions, substitutions or changes in Beneficiaries must be subject to the approval of the Plan Administrator, must be in writing and must bear an acknowledged signature of the Purchaser and the Primary Beneficiary. No substitution will be effective until it has been received and approved by the Plan Administrator. Section 4 of the Alaska Plan further provides that the next named Alternate Beneficiary will be substituted for the Primary Beneficiary under a Contract at such time and date as the previous Primary Beneficiary dies, submits a statement of non-participation, is not admitted to the University after proper application, or completes a waiver of his or her rights under that Contract. The Alaska Plan further provides that Beneficiaries may waive their rights under a Contract and the Alaska Plan, but will have no right to transfer or designate Alternate Beneficiaries. A student may go to school part time and use prepaid tuition over a period longer than four years. However, the Alaska Plan further provides under Section 5 that the next named Alternate Beneficiary will be substituted for the Primary Beneficiary under a Contract if there has been no activity under that Contract for any six year period and the Primary Beneficiary does not initiate use of his or her Tuition Credits subsequent to notice by the Plan Administrator.

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 15

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

Dividends, interest, and gains accruing to the Alaska Tuition Fund will increase the total funds available for the Alaska Plan. Any balance contained within the Alaska Tuition Fund at the end of a fiscal year will remain in the Alaska Tuition Fund and will be available for carrying out the purposes of the Alaska Plan. Should those dividends, interest and gains exceed the amount necessary for Alaska Plan administration and disbursements, the University may use the excess for two programs under the Alaska Plan: (1) graduation incentive awards and (2) tuition scholarship awards.

As an incentive for Alaskans to continue to complete their post-secondary education, a graduation incentive award account will be established within the Alaska Tuition Fund pursuant to Section 6 of the Alaska Plan. Effective each January 1, the Board of Regents will allocate a portion of the excess amount, if any, over the actuarial requirements of the Alaska Tuition Fund to the graduation incentive award account. To be eligible for award of graduation incentive credits under the Alaska Plan, a Primary Beneficiary must have been a Resident or a child or legal ward of a Resident or of an alumnus of the University at the date of purchase of the Contract, the date of redemption, or during some intervening period. A Qualified Beneficiary will earn one graduation incentive credit for each Tuition Credit redeemed or refunded for payment of tuition at the University or any other Eligible Institution. Annually, the Board of Regents will establish the refund value of the outstanding graduation incentive credits. The amount of the award of graduation incentive credits will be established according to equivalencies set forth in Section 6 of the Alaska Plan.

As a further incentive for younger Alaskans to achieve higher academic standards of performance in middle or high school and to complete their secondary education, a tuition scholarship award account will be established within the Alaska Tuition Fund pursuant to Section 7 of the Alaska Plan. Effective each January 1, the Board of Regents will allocate a portion of the actuarial excesses of the Alaska Tuition Fund, if any, to the prepaid tuition scholarship award account. Under this Section 7 of the Alaska Plan, Tuition Credits may be awarded as prepaid tuition scholarships to students in grades 6 through 12 who attend school in Alaska. The prepaid tuition scholarship awards will be approved in accordance with procedures adopted by the Board of Regents. Tuition Credits issued as prepaid tuition scholarships under the Alaska Plan will be redeemable as set forth

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 16

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

in Section 7 of the Alaska Plan. However, such Tuition Credits will not be refundable except upon termination of the Alaska Plan as previously discussed in this letter. Tuition Credits issued as prepaid tuition scholarships are not transferrable to other Beneficiaries or individuals.

Under Section 8 of the Alaska Plan, all Tuition Credits, except for those issued as prepaid tuition scholarships, will expire if not redeemed or refunded within the Redemption Period. The term "Redemption Period" is defined under the Alaska Plan to mean the period from the Redemption Period Start Date to the Redemption Period End Date. The term "Redemption Period Start Date" is defined to mean January 1 of the year designated in the Contract as the year the Primary Beneficiary is expected to enroll at an institution of higher education or, if no year is designated, January 1 of the year following the Primary Beneficiary's 18th birthday or such other date as approved by the Plan Administrator. The term "Redemption Period End Date" is defined to mean the later of the 15th anniversary of the Redemption Period Start Date or such other date as approved by the Plan Administrator.

Section 9 of the Alaska Plan provides that Contracts and rights or privileges under Contracts may not be assigned, sold, transferred or encumbered except as otherwise required by law or as provided in the Alaska Plan. That section further provides that an Alternate Beneficiary may not assign, sell, transfer or encumber his or her interests in a Contract, Tuition Credits or other benefits issued under the Alaska Plan. Each Contract is to be limited to one named Purchaser. However, a Purchaser may designate an appointee to act on behalf of the Purchaser in the event the Purchaser dies, becomes mentally incompetent or cannot be located. Under the Alaska Plan, a Contract will have no more than one named Primary Beneficiary at any one time. A Purchaser or Beneficiary may have more than one Contract under the Alaska Plan.

A Contract may be terminated and all outstanding Tuition Credits will expire after a one year waiting period, if the Contract has been inactive for a period of six years after the Redemption Period Start Date and none of the named Beneficiaries can be located by the Plan Administrator within that period.

Section 10 of the Alaska Plan provides that, subject to any advance notice or other requirements of law, the president of the University is delegated the authority to amend the Alaska Plan at any time except for provisions which further delegate the duties and responsibilities of the Board of Regents under law and the Alaska Plan or may result in full or partial termination of the Alaska Plan. All such proposed amendments are to be prepared at the direction of the Committee and submitted for approval to the president and the Board of Regents, if applicable. Notwithstanding these provisions, the Alaska Plan provides that no amendment will deprive, take away, or alter any accrued right of any Purchaser or Beneficiary under a Contract issued prior to the effective date of the amendment.

Section 10 further provides that the Board of Regents will have the right to fully or partially terminate or discontinue the Alaska Plan or merge or consolidate the Alaska Plan with another plan at any time subject to any requirements of law. Upon termination of the Alaska Plan, the Committee will continue to act for the purpose of complying with the termination provisions of the Alaska Plan and will have all powers necessary or convenient to the winding up and dissolution of the Alaska Plan. Section 10 of the Alaska Plan further provides that, in the event of discontinuance or suspension of the Alaska Plan, the University or its successor will honor all Contracts, graduation incentive credits and prepaid tuition scholarships previously issued. Should the University or its successor find that it cannot meet its obligations under the Contracts or the Alaska Plan, or the Alaska Plan is terminated for any reason, the Cash Value of all Tuition Credits, graduation incentive credits and prepaid tuition scholarships will be remitted to the respective Primary Beneficiaries at the addresses on file with the University. Distributions for Beneficiaries who cannot be located and unencumbered prepaid tuition scholarship funds will be forfeited to the University or its successor for the purpose of awarding scholarships to Residents.

B. Questions Presented

1. Whether the proposed sale of Contracts will not involve an offer or sale of a "security" within the meaning of Section 2(1) of the Securities Act;

2. Whether the Contracts, if found to be "securities" within the meaning of Section 2(1) of the Securities Act, would, nevertheless, be "exempted securities" issued or guaranteed by a state or a "public instrumentality" of a state of the United States pursuant to Section 3(a)(2) of the Securities Act;
3. Whether the Contracts (if securities) are "municipal securities" as defined in Section 3(a)(29) of the Exchange Act and therefore, by virtue of provisions of Section 3(d) of the Exchange Act, the employees and officers of the University, who, acting in the course of their official duties as such, offer or sell the Contracts through the Alaska Plan, would not be "brokers" (including "municipal securities brokers"), as defined in that statute, by reason of such activity nor would the University, the Alaska Plan or the Alaska Tuition Fund be deemed a "dealer" or "municipal securities dealer" by reason of issuing the Contracts or by offering or selling them through such officers and employees;
4. Whether the Contracts and the Alaska Tuition Fund are exempted from the provisions of the Trust Indenture Act as being issued by a "public instrumentality" of a state pursuant to Section 304(a)(4)(A) of that act;
5. Whether the University (in establishing and operating the Alaska Plan and the Alaska Tuition Fund), and therefore the Alaska Plan and the Alaska Tuition Fund, are each exempted from registration under the Investment Company Act as each being an "instrumentality" of a state by virtue of Section 2(b) of the Investment Company Act; and
6. Whether the University and therefore its employees, agents and officials, while acting in their official capacities regarding the Alaska Plan and the Alaska Tuition Fund, will be exempted from registration under the Investment Advisers Act as being agents, employees, and officials of an "instrumentality" of a state pursuant to Section 202(b) of the Investment Advisers Act.

C. Analysis and Opinion

Definition of a Security. It is the opinion of the undersigned that the offer and sale of the Contracts in conjunction with the Alaska Plan and as outlined in this letter do not constitute the offer and sale of a "security" within the meaning of Section 2(1) of the Securities Act. The term "security" is defined broadly under Section 2(1) of the Securities Act to include any "investment contract." The term "investment contract" is not further defined under the Securities Act or regulations adopted pursuant to that act. Through the years, there has developed a body of case law interpreting this term. See, Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293 (1946). In the Howey case, the Supreme Court of the United States set forth what has become the generally accepted definition of an investment contract as follows (at 298):

"A contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise."

This definition has been interpreted by the Fifth Circuit in SEC v. Koscot Interplanetary, Inc., 497 F.2d 473 (Fifth Cir. 1974). In the Koscot case, the court summarized the Howey test as consisting of three elements (at 477):

"...[F]irst, that there is an investment of money; second, that the scheme in which an investment is made functions as a common enterprise; and third, under the scheme, profits are derived solely from the efforts of individuals other than the investors."

The United States Supreme Court has further interpreted the Howey test. See, United Housing, Inc. v. Forman, 421 U.S. 837 at 851-852, 95 S. Ct 2051 at 2060, 44 L.Ed.2d 621 (1975). There the court stated that the Howey test must be applied in light of the "economic realities" of the transaction rather than the labels used by the participants in the transaction.

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 20

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

With regard to the Alaska Plan, we argue that the Howey requirement that an investment contract involve an investment is not met. That is, an investment typically involves parting with money for the purpose and in the reasonable expectation of making a profit. See, SEC v. Energy Group of America, Inc., 459 F.Supp. 1234 (S.D. NY 1978). There is a benefit to be had by the Purchaser in entering into a Contract. That is, the Purchaser ostensibly enters into a Contract to secure and quantify the tuition expense for the benefit of the Beneficiary. However, we argue that the Purchaser does not enter into a Contract to make a profit.

In entering into a Contract, a Purchaser is not subjecting himself or herself to financial loss and therefore not investing his or her money in the sense normally associated with an investment in the first component of the Howey test. See, SEC v. International Min. Exchange, Inc., 515 F.Supp. 1062 (D.C. Colo. 1981).

Another way of looking at the issue of risk of loss to the Purchaser or Beneficiary under the Alaska Plan is to see under what circumstances the participants may get refunds. These circumstances were listed previously in this letter. Under none of these refund circumstances will the Purchaser receive any of the funds that he or she paid into the Alaska Plan. The Purchaser is not putting his or her money into an "investment" but rather purchasing Tuition Credits for the benefit of the Beneficiary. The concept of the Purchaser suffering a "loss" on his or her "investment" is simply misplaced in addressing the Alaska Plan.

The second step of the Howey test requires the existence of a common enterprise. The term "common enterprise" has been interpreted by the Ninth Circuit Court. See, SEC v. Glenn W. Turner Enterprises, 474 F.2d 476, 482 n.7 (9th Cir. 1978), cert denied, 414 U.S. 821, 945 S. Ct. 117, 38 L.Ed.2d 53 (1973). The court, in that case, viewed a common enterprise as "one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment of third parties." That is, the court opined that the commonality required is vertical (between the investor and the promoter) rather than horizontal (among multiple investors).

Under the Alaska Plan, the fortunes of the Purchasers of the Contracts are not interwoven with and dependent upon the efforts and success of

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 21

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

those seeking the investment. Section 10 of the Alaska Plan provides for the establishment of the Committee which will be responsible for administration of the Alaska Plan. The Committee is to be appointed by the president of the University and composed of at least three persons who will carry out the day-to-day administration of the Alaska Plan. Section 10.3 of the Alaska Plan sets forth the authority and duties of the Committee. This section provides to the Committee all powers necessary or appropriate to carry out its duties and further provides at subsection (a) that any interpretation or action by the Committee will, with respect to the Alaska Plan and its administration, be conclusive and binding upon any and all parties and persons affected thereby. These duties are set forth at Section 10.3(b) of the Alaska Plan and include interpreting the Alaska Plan and determining any questions arising under that plan, determining the eligibility for participation in the Alaska Plan and making other determinations pertaining to Purchasers and Beneficiaries, reviewing the actuarial soundness of the Alaska Plan on a periodic basis and recommending to the president or the Board of Regents amendments to the Alaska Plan. Neither the Purchaser nor the Beneficiary have any responsibility, right or authority to share in the duties and responsibilities of establishing policy pertaining to or administration of the Alaska Plan. Under the provisions of the Alaska Advance College Tuition Payment Act, those duties and responsibilities are the exclusive purview of the University and, to a limited extent in the area of investments of assets of the Alaska Tuition Fund, the Alaska Department of Revenue as previously outlined in this letter.

The third step of the Howey test involving the expectation of profits solely from the efforts of a promoter or third party may be distinguished under the Alaska Plan. Under the Alaska Plan, a Purchaser does not enter into the transaction with the expectation of profits. Under Section 4 of the Alaska Plan, full refunds of the Cash Value will be made to the Beneficiary under limited circumstances. However, the primary purposes of the Alaska Plan are to provide for guaranteed tuition benefits to Alaskans at current tuition rates, to provide incentives for Alaskans to go to college, and to enhance the University's ability to recruit and retain qualified Alaska students. That is, the Purchaser has no interest or motivation to become involved in any way with the University and how it invests the funds received through the Alaska Plan. The Purchaser or the Beneficiary will only receive cost savings over time in relation to the price of tuition as of the date the Beneficiary enters the University. Cost savings are benefits which do not qualify

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 22

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

as profits. See, United Housing Foundation v. Forman, 421 U.S. 837, 857, 95 S.Ct. 2051, 2063, 44 L.Ed. 621. In the Forman case, the court further stated that profits consist either of the increased value of invested capital or of money received for investment capital. See, 421 U. S. at 852, 95 S. Ct. at 2060.

The promotional descriptions of the Alaska Plan (Exhibits D and E) do not, in any way, indicate that the Purchaser will derive a profit from entrustment of the Purchaser's funds in the Alaska Tuition Fund pursuant to the Alaska Plan. The University will insure that other promotional materials do not stray beyond these bounds. These promotional materials will expressly state that, if a Purchaser wishes to terminate his or her participation in the Alaska Plan, the funds entrusted by the Purchaser will be returned as provided in the Alaska Plan.

The issue of whether or not there is an expectation of profits to be derived under the Alaska Plan may also be looked at from a standpoint of what happens to any excess funds under the Alaska Plan. Such excess funds do not go to the Purchaser. As previously discussed in this letter, under Sections 6 and 7 of the Alaska Plan, portions of the excess funds, if any, over the actuarial requirements of the Alaska Tuition Fund are to be allocated to the graduation incentive award account and the prepaid tuition scholarship account within the Alaska Tuition Fund, respectively. Any increase in the Cash Value of the Tuition Credits in this context does not go to the Beneficiary or to the Purchaser. That increased value goes to the Alaska Plan. Therefore, there is no "profit" incentive to the Purchaser or the Beneficiary under the Alaska Plan.

Exemption From Registration Under Securities Act. Should it be determined that the Contracts would be securities within the meaning of Section 2(1) of the Securities Act, we are of the opinion that such securities would be exempted securities pursuant to Section 3(a)(2) of the Securities Act and therefore not subject to the registration requirements of that act.

Section 3(a)(2) of the Securities Act states in pertinent part as follows:

"Except as hereinafter expressly provided, the provisions of [the Securities Act]...shall not apply to any of the following classes of securities...(2) Any security issued or guaranteed

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 23

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

by...any State of the United States, or by any political subdivision of a State...or by any public instrumentality of one or more States...or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States...." [Emphasis added.]

The University is established through Article VII § 2 of the Alaska Constitution. Under that section, the University will have "title to all real and personal property now or hereafter set aside for or conveyed to it." The University is governed by a Board of Regents established through Article VII § 3 of the Alaska Constitution, and the members of the Board of Regents are appointed by the governor. A copy of Article VII § 2-3 of the Alaska Constitution is enclosed with this letter as Exhibit L.

The Alaska Supreme Court has determined that the University is "uniquely an instrumentality of the state itself." See, University of Alaska v. National Aircraft Leasing, Ltd., 536 P.2d 121, 124 (Alaska 1975).

Under AS 14.40.803, the Alaska Tuition Fund is established as a fund of the University. It is separate from the general fund of the State of Alaska. The general fund is the state's public fund into which appropriations of the Alaska legislature are placed and from which state operational expenses are paid. At the end of a fiscal year, funds appropriated by the Alaska legislature but not used by a state agency or instrumentality lapse and are returned to the general fund. While the Alaska Tuition Fund is established separate from the general fund, it nevertheless is a fund for which the University has the obligation to maintain through the Alaska Advance College Tuition Payment Act. Furthermore, AS 14.40.803 provides that the Alaska Tuition Fund will be a non-lapsing fund of the University and will be funded in part through appropriations from the Alaska legislature. That is, unlike other funds appropriated by the Alaska legislature, unused funds appropriated to the Alaska Tuition Fund will not lapse and will not be returned to the general fund at the end of a fiscal year. Both the Alaska Tuition Fund and the Alaska Plan are merely vehicles through which the University will carry out its mandate under the Alaska Advance College Tuition Payment Act.

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 24

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

Under the Alaska Advance College Tuition Payment Act, the University is responsible for the establishment and operation of the Alaska Plan and the Alaska Tuition Fund. Under AS 14.40.809(b), obligations under the Alaska Plan will be general obligations of the University. Furthermore, AS 14.40.807 expressly requires the University to perform reviews of the actuarial soundness of the Alaska Plan and the Alaska Tuition Fund and to report its findings to the governor and the Alaska legislature and that the legislature has the discretion to appropriate and pay to the Alaska Tuition Fund a sum necessary to make the Alaska Tuition Fund actuarially sound. That is, as previously discussed, Section 807 sets forth a "moral" obligation of the State of Alaska to the University in the context of the Alaska Tuition Fund.

Given the nature and organization of the Alaska Plan, the purposes of its creation and the significant governmental functions intended to be performed by it, and its accountability to the State of Alaska, the University, through the Alaska Plan, is a "public instrumentality" of the state and therefore that the Contract should be exempt from registration under Section 3(a)(2) of the Securities Act. The Contracts, if securities, are then issued and guaranteed by the University, an instrumentality of the State of Alaska, if not guaranteed through a moral obligation of the State of Alaska.

In 1934, the pertinent portion of Section 3(a)(2) of the Securities Act, which prior to that point exempted securities issued by "any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories exercising an essential government function," was amended to delete the phrase "exercising an essential government function." The conference report concerning that amendment indicates that it was adopted for purposes of extending "the scope of the public instrumentality exemption to expanding activities in which governments are engaging." H.R. Rep. No. 1838 (Conference Report), 73rd Cong. Sd. Sess. 40 (1934). Education is described in Brown v. Board of Education, 483, 493, 74 S.Ct. 686, 98 L. Ed. 483 (1954) as "perhaps the most important function of state and local governments." Under the circumstances, the purpose of and functions to be performed by the University through the Alaska Plan would render them each a "public instrumentality" even under the unamended version of Section 3(a)(2), as well as under the version currently in effect.

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 25

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

Exemption From Exchange Act. Should it be determined that the Contracts would be securities under the Securities Act, we are of the opinion that (1) the Contracts are "municipal securities" as defined in Section 3(a)(29) of the Exchange Act in that the University, and therefore to the extent distinguishable from the University, the Alaska Plan and the Alaska Tuition Fund, are each an "instrumentality of a State," for the reasons previously given in this letter, and (2) by virtue of the provisions of Section 3(d) of the Exchange Act, the employees and officers of the University, who, acting in the course of their official duties as such, offer or sell the Contracts through the Alaska Plan, are not "brokers" (including "municipal securities brokers"), as defined in that statute, by reason of such activity and the University, the Alaska Plan and the Alaska Tuition Fund are each not a "dealer" or "municipal securities dealer" by reason of issuing the Contracts or by offering or selling them through such officers or employees.

Exemption From Trust Indenture Act. Should it be determined that the Contracts would be securities under the Securities Act, we are of the opinion that the Contracts and the Alaska Tuition Fund are exempted from the provisions of the Trust Indenture Act under Section 304(a)(4)(A) of that act in that the University, and therefore to the extent distinguishable from the University, the Alaska Plan and Alaska Tuition Fund, if trusts under that act, are each a "public instrumentality" of a state for the reasons previously given in this letter.

Exemption From Investment Company Act. Should it be determined that the Contracts would be securities under the Securities Act, we are of the opinion that the University, and therefore to the extent distinguishable from the University, the Alaska Plan and the Alaska Tuition Fund, are each an "instrumentality" of a state for the reasons previously given in this letter, and therefore each is exempted from the Investment Company Act through Section 2(b) of that act.

Exemption From Investment Advisers Act. Should it be determined that the Contracts should be securities under the Securities Act, we are of the opinion that the employees, agents, and officials of the University involved with the administration, operation and other aspects of the Alaska Tuition Fund and the Alaska Plan in acting in their official capacities are working for an "instrumentality" of a state and therefore are exempt from the provisions of the Investment Advisers Act by virtue of Section 202(b) of that act.

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 26

1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

As further precedent as to the issue of whether the University and the Alaska Plan and Alaska Tuition Fund which it will administer are each an "instrumentality" of a state and therefore that their activities with respect to the Alaska Plan are distinguishable from those regulated under the Investment Adviser Act, one may look also to a previous SEC no-action letter. See, Venture Capital Network, Inc. (SEC 1984), 1984 CCH Dec. Par. 77,660.

D. Previous No-Act Letters

Our position concerning the federal statutes which are the subject of this letter is consistent with relevant portions of "no-action" positions taken by the staff of the Commission in the past. See, State of Ohio, Ohio Tuition Trust Authority, S.E.C. no-action letter, issued April 16, 1990; Florida Prepaid Postsecondary Education Expense Program and Trust Fund, S.E.C. no-action letter, issued September 4, 1989; and State of Michigan, Michigan Education Trust, S.E.C. no-action letter, issued June 30, 1988. In each of these cases, the staff of the Commission ruled in favor of the state (Florida and Michigan) or authority (Ohio) involving similar prepaid tuition programs. In all three of those programs, funds were involved and found to be instrumentalities of the respective state, and contracts were to be issued and the funds were to be directed by boards of trustees consisting of government officials and other members appointed by the respective governors. In all three cases, the state appropriated public monies to the funds which were in turn invested in various allowable investment vehicles. The principal distinctions between those three funds and the Alaska Tuition Fund are that the Alaska Tuition Fund will be established and administered through the University as opposed to the State of Alaska directly and, in the case of the Alaska Plan, the members of the Committee will be appointed by the president of the University. However, ultimately, the responsibility for the functioning of the Alaska Plan lies with the University which, in turn, is administered through a Board of Regents appointed by the governor of the State of Alaska.

E. Conclusion

On behalf of the University of Alaska, we respectfully request the staff's concurrence by means of an interpretive letter with the conclusions expressed under Section B of this letter, or the assurance of the staff that no

Division of Corporation Finance  
Securities & Exchange Commission  
July 17, 1991  
Page 27

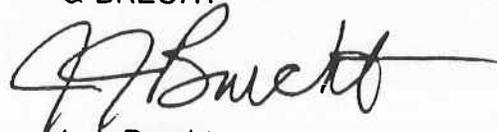
1933 Act/2(1), 3(a)(2)  
1934 Act/3(a)(29), 3(d)  
Trust Ind. Act/304(a)(4)(A)  
Invest. Co. Act/2(b)  
Invest. Advis. Act/202(b)

enforcement action will be recommended if the offering of the Contracts as described in this letter and set forth in the Alaska Plan proceeds (1) without registration of the Contracts under the Securities Act, (2) without use or qualification of an indenture or indenture trustee under the Trust Indenture Act, (3) (3) without registration of the University, the Alaska Plan, or the Alaska Tuition Fund as an investment company under the Investment Company Act, (4) without registration of the University, the Alaska Plan, the Alaska Tuition Fund, its employees, officers and agents under the Investment Advisers Act, and (5) without registration of the University, the Alaska Plan or the Alaska Tuition Fund as a dealer or municipal securities dealer or of its officers or employees as brokers or municipal securities brokers under the Exchange Act.

Since the Alaska Plan is of substantial significance to the University and the residents of the State of Alaska, consideration of these requests on an expedited basis would be most appreciated. Should any staff person, within the Division of Corporation Finance or within any other division to which you may consider it appropriate to refer certain of these requests, require further information or would like to meet with personnel from this office or with officials from the University to discuss the Alaska Plan or the contents of this letter, please contact me at the above address or telephone number ((907) 276-6401). I would be most pleased to be of assistance in this regard. I would also appreciate being informed at your earliest convenience by letter or telephone of the identity of the staff persons assigned to consider this letter.

Sincerely,

WOHLFORTH, ARGETSINGER, JOHNSON  
& BRECHT



J. J. Brecht

JJB/jk

Enclosures

AFF0133C