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Honorable Kay Ivey
State Treasurer and Secretary of
Alabama Trust Fund
State Capitol, Suite S-106
600 Dexter Avenue
Montgomery, Alabama 36130-2510

Alabama Trust Fund – Capital Gains – Funds – Investments

Discussion of issues concerning the income and distribution of funds from the Alabama Trust Fund.

Dear Ms. Ivey:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

(1) Who should recommend an amount of realized capital gains of the Alabama Trust Fund to be transferred under section 219.04(III)(b) of the Recompiled Constitution of Alabama, and how should the amount be determined?

(2) Are the examples provided correct calculations of gains?

(3) If the calculations of gains of 2003-2007 are incorrect, what is an acceptable method for the Board of Trustees of the Alabama Trust Fund to make adjustments, or is the method at its discretion?

(4) Is income from replenished funds in the Education Trust Fund and General Fund Rainy Day Accounts under section 260.02(III)(c) of the Recompiled Constitution of Alabama considered income of the Alabama Trust Fund subject to distribution under section 219.04(III)(a)?

(5) Did section 260.02 repeal section 260.01(II)(c) of the Recompiled Constitution of Alabama?

FACTS AND ANALYSIS

Your request states that, since the passage of section 219.04 of the Recompiled Constitution of Alabama [ALA. CONST. art. XI, § 219.04 (amend. 666)] providing for the distribution of income of the Alabama Trust Fund, realized capital gains have been calculated in accordance with generally accepted accounting principles that have been audited annually with no findings. You further state that the maximum of 75 percent of the gains for the fiscal years from 2003 through 2007 have been transferred.

The minutes of the August 20, 2009, meeting of the Board of Trustees of the Alabama Trust Fund ("Board") accompanying your request reflect that the gains had been calculated by subtracting the cost of the investment from the proceeds received from the sale. You further state that, at that meeting, the Board was informed that the definition of "realized capital gains" in section 219.04 provides for a different calculation method, which would appear to cause the previous calculations to be incorrect. The Board was unaware of the potential miscalculation until that meeting. If, when the amounts are recalculated, they are more than the 75 percent maximum, corrections could be made as prior year adjustments, immediately in the current fiscal year or against future transfers.

The Alabama Trust Fund exists pursuant to section 219.02 of article XI of the Recompiled Constitution of Alabama. ALA. CONST. art. XI, § 219.02 (amend. 450). Section 219.04 altered the distribution of income earned by the Alabama Trust Fund and capital incomes earned by the Alabama Trust Fund. Section 219.04(III)(b) provides for the distribution of realized capital gains. You correctly state that section 219.04 provides no guidance as to a prudent purpose for, rationalization to determine the amount of, or who is responsible to make the recommendation of the transfer.

In addressing the amount of the distribution, this Office has explained that the Board may transfer any percentage up to 75 percent of the gains for the fiscal year. Opinion to Honorable James Allen Main, Director, State Finance Department, dated December 6, 2004, A.G. No. 2005-027. The *Main* opinion emphasized that "[t]he Board may, ***in its discretion***, transfer 75 percent or less." *Id.* at 2 (emphasis added). The decision of whether to make a particular transfer lies solely within the discretion of the Board.

Your second question seeks confirmation of the calculation of realized capital gains in the following examples:

> **Security A**: The security is purchased and booked prior to September 2009. At September 2009, the fair value of the security is updated. At sale of the security during fiscal year 2010, the realized gain is calculated by subtracting the September 2009 fair value from the sale price. This calculation would not include the original purchase price.
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> **Security B**: The security is purchased during fiscal year 2010 and sold during the same fiscal year. The purchase price represents the fair market value of the security since the security was not on the books at the end of fiscal year 2009. At sale of the security during fiscal year 2010, the realized gain is calculated by subtracting the purchase price from the sale price.
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> **Security C**: The security is purchased and booked prior to September 2009. At September 2009, the fair value of the security is updated. At sale of the security during fiscal year 2010, the realized loss is calculated by subtracting the September 2009 fair value from the sale price.

Section 219.04(II) defines "realized capital gains" as follows:

> [G]ains from the sale or exchange of assets of the Alabama Trust Fund, other than fixed income assets, to the extent they exceed losses from the sale of such assets. The amount of gain or loss on the sale of an asset shall be determined by subtracting from the proceeds of selling the asset its ***fair market value as of the end of***

> ***the immediately preceding fiscal year***, or, in the case of the fiscal year in which this amendment is ratified, its fair market value as of the first business day following ratification of this amendment.

ALA. CONST. art. XI, § 219.04(II) (amend. 666) (emphasis added).

By tying fair market value to the end of the immediately preceding fiscal year, this section contemplates the tracking of capital gains on a year-to-year basis. Your examples for Securities A and C are straightforward applications of the plain language of the section. Regarding Security B, however, the section does not address a mid-year transaction in which the asset is purchased and sold in the same year apart from the end of the fiscal year. "When a statute is silent, [the] Court will look outside of the plain language of the statute to determine the intent of the legislature." *Fausnight v. Perkins*, 994 So. 2d 912, 922 (Ala. 2008). "Fair market value" is defined as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction." BLACK'S LAW DICTIONARY 1587 (8th ed. 2004). Accordingly, you correctly state that the gain for Security B should be calculated by subtracting the fair market value from the sale price at the time of purchase.

Regarding your third question, making adjustments to correct the improper transfer of funds is not one of the several powers of the Board enumerated in section 219.02(3)(h). Neither section 219.04(III)(b), nor any other provision of sections 219.02 or 219.04, provides authority to make changes to the amount of funds once transferred. Under the well-established rules of statutory construction, where a statute enumerates certain things on which it is to operate, the statute must be construed to exclude all things not expressly mentioned. *Ex parte Holladay,* 466 So. 2d 956, 960 (Ala. 1985). Where, as here, the framers of those sections have chosen not to give the Board the authority to adjust a transfer, it is the opinion of this Office that the Board may not do so. Nonetheless, should the Board determine that, after recalculating the gains for previous years, more than the 75 percent maximum was actually transferred, nothing would prohibit the Board from transferring less than 75 percent in future years to make up the difference, the amount of such transfers and number of years to satisfy the difference being discretionary with the Board.

On the other hand, the possibility that less than 75 percent was transferred in previous years must be considered. Although the Board lacks specific authority to make adjustments, this Office has stated that making transfers is its primary authority under section 219.04(III)(b). Opinion to Honorable Bob Riley, Governor, dated December 18, 2003, A.G. No. 2004-042. In addition, the

section does not prohibit multiple transfers that otherwise comply with its requirements.

As you point out, this Office has stated, in addressing the restriction of section 219.04(III)(b), that transfers must be made "within 30 days following the end of each fiscal year" [ALA. CONST. art. XI, § 219.04(III)(b) (amend. 666)] and that, because this phrase is directory and not mandatory, the Board may transfer funds after 30 days. *Riley* at 1. This opinion cautioned that the facts should not indicate any "intentional or unnecessarily prolonged delay." *Id.* at 7. Thus, the *Riley* opinion concluded that the Board could make a late transfer where it was unaware of the restriction but acted timely to come into compliance.

You similarly state that the Board sought legal advice when the miscalculation at issue here was first brought to its attention. Consistent with that opinion, the Board should transfer the amount of the difference, up to the maximum, that should have been transferred in previous years as soon as reasonably possible.

Your remaining questions are unrelated to the transfer of capital gains of the Alabama Trust Fund and concern the distribution of income of the Education Trust Fund and General Fund Rainy Day Accounts. The Education Trust Fund Rainy Day Account was established within the Alabama Trust Fund pursuant to section 260.01 of article XIV of the Recompiled Constitution of Alabama. ALA. CONST. art. XIV, § 260.01 (amend. 709). The account was intended to offset proration of appropriations from the Education Trust Fund and had to be replenished by the Legislature within five years of any withdrawn funds. ALA. CONST. art. XIV, § 260.01(II)(a) & (e) (amend. 709).

Act 2008-508 was submitted to the voters on November 4, 2008, as a proposed constitutional amendment. It was proclaimed ratified on December 1, 2008, and became section 260.02 (amendment 803) of the Recompiled Constitution of Alabama, as amended. Section 260.02 repealed section 260.01 in its entirety, stating that "Amendment 709 to the Constitution of Alabama of 1901, now appearing as Section 260.01 of the Official Recompilation of the Constitution of Alabama 1901, as amended, is hereby repealed." ALA. CONST. art. XIV, § 260.02(I) (amend. 803). Section 260.02 rewrote section 260.01, adding the General Fund Rainy Day Account to the scheme to offset proration of appropriations from the State General Fund. ALA. CONST. art. XIV, § 260.02(III)(a) (amend. 803).

Although section 260.01(II)(c) was repealed along with the rest of that section, section 260.02(III)(c) carried forward the following identical language

from section 260.01(II)(c), except for the added reference to the General Fund Rainy Day Account:

> The Legislature may provide by statute for the replenishment of the Education Trust Fund or the General Fund Rainy Day Account within the Alabama Trust Fund from sources other than the Alabama Trust Fund or Oil and Gas Capital Payments. ***The earnings from the investment of funds due to the replenishment shall be deposited into the State General Fund.***

ALA. CONST. art. XIV, § 260.02(III)(c) (amend. 803) (emphasis added).

Section 219.04(III)(a) governs the distribution of income of the Alabama Trust Fund. It provides for disbursements to the Municipal and County Government Capital Improvement Funds and the State General Fund when the income exceeds $60 million. ALA. CONST. art. XI, § 219.04(III)(a) (amend. 666). "Trust income" is defined generally as "the net income . . . from the investment and reinvestment of all assets of the trust fund." ALA. CONST. art. XI, § 219.02 (amend. 450). Section 260.02(III)(c), however, specifically mandates that all income from the investment of the replenished funds in the rainy day accounts go directly to the General Fund. Specific provisions relating to specific subjects control general provisions relating to general subjects. *Ex parte Jones Mfg. Co. Inc.*, 589 So. 2d 208, 211 (Ala. 1991); *Murphy v. City of Mobile,* 504 So. 2d 243, 244 (Ala. 1987); *Herring v. Griffin*, 211 Ala. 225, 226, 100 So. 202, 203 (1924). Thus, such income is not included as trust income for purposes of distribution under the formula in section 219.04(III)(a).

CONCLUSION

The decision of whether to make a particular transfer of realized capital gains of the Alabama Trust Fund under section 219.04(III)(b) of the Recompiled Constitution of Alabama lies solely within the discretion of the Board of Trustees of the Alabama Trust Fund.

The realized capital gain for any security under section 219.04(II) is calculated by subtracting the fair market value from the sale price at the end of the immediately preceding fiscal year, except for a security purchased during a fiscal year, which is calculated by subtracting the fair market value from the sale price at the time of the purchase.

If more than the maximum amount of gains was transferred in previous years due to a miscalculation, the Board may transfer less than the maximum in future years to make up the difference.

If less than the maximum amount was transferred in previous years and the Board was unaware of the miscalculation and moved to correct it at the first meeting in which it was brought to its attention, the Board may transfer the amount of the difference, up to the maximum, more than 30 days after the end of the fiscal year and should do so as soon as reasonably possible.

Income from replenished funds in the Education Trust Fund and General Fund Rainy Day Accounts under section 260.02(III)(c) of the Recompiled Constitution of Alabama is not income of the Alabama Trust Fund subject to distribution under section 219.04(III)(a), but is instead deposited into the State General Fund.

Section 260.02 of the Recompiled Constitution of Alabama repealed section 260.01 of the Recompiled Constitution of Alabama in its entirety, including section 260.01(II)(c).

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

TROY KING
Attorney General
By:

Brenda F. Smith

BRENDA F. SMITH
Chief, Opinions Division

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