OFFICE OF POLICY AND LEGAL ANALYSIS

Date: March 1, 2022

To: Joint Standing Committee on Health & Human Services

From: Samuel Senft, Esq., MPH, Legislative Analyst

LD 1523 An Act To Establish the Trust for a Healthy Maine (Rep. Millet)

SUMMARY: This bill does the following:

1. It establishes the Trust for a Healthy Maine (the "Trust") as a body corporate and politic and requires that the State Controller, by July 1, 2023, transfer all settlement funds in the Fund for a Healthy Maine and a pro rata share of investment income in the Fund for a Healthy Maine to the Trust;

2. It provides that the Trust be governed by a 15 member Board of Trustees ("the Board") composed of the Director of the Maine Centers for Disease Control and Prevention and 14 members appointed by the Governor and elected on staggered terms;

3. It empowers the Trust to receive all money paid to the State pursuant to the tobacco settlement as well as from other sources and to distribute that money to state agencies or designated agents of the State; to make recommendations to the Governor, Legislature and other public officials regarding public health; to administer the trust and trust funds to promote public health; to participate in the development of a state health plan by the CDC or similar entity; to promote multilevel planning and coordination that includes state, district, community and municipal decision making and advisory boards and to take other necessary actions;

4. It directs the Board to, with the input of interested parties, annually develop and approve a funding disbursement plan to disburse funds;

5. It requires that in FY 2023-34, 30% of settlement funds projected to be received in FY 2023-2034 be used for medical care, and after that year, that no funds be used for medical care;

6. It requires that in FY 23-24, the Board disburse funds that, when combined with other funding received by DHHS, is equal to at least 70% of the recommended US CDC level for evidence based tobacco prevention and control programs, and in FY 24-25 and thereafter, at least 100% of the recommended US CDC level;

7. It requires that in FY 23-24, the Board disburse funds equal to .5% of the settlement funds to the Office of the Attorney General, and in subsequent years .5% adjusted by the Chained Consumer Price Index;

8. It establishes a fund for administration of the trust and requires that in FY 23-24, the Board disburse funds equal to .3% of the settlement funds administration fund, and in subsequent years .3% adjusted by the Chained Consumer Price Index;

9. It establishes an internal stabilization fund to decrease year to year funding disruptions and requires that the Board disburse funds not to exceed 5% of the settlement funds to the internal stabilization fund;

10. It establishes an internal flexible account for the purpose of responding rapidly to public health threats and requires that the Board disburse funds not to exceed 5% of the settlement funds to the internal flexible account;

11. It establishes a health equity and health improvement account and requires that remaining funds be disbursed to the account and also requires that for FY 23-34, at least 15% of settlement funds be disbursed to the account and in later years at least 20% to the account. The funds in the account must be used for improving data regarding health disparities and social determinants of health, enhancing health improvement and equity planning to address systemic racism and structural inequities, supporting public private partnerships that prioritize health equity, supporting the public health workforce, and providing training and technical assistance;

12. It requires the Trust to transmit informational copies of the funding disbursement plan to the Governor and the Legislature;

13. It requires the Trust to annually provide a report on the results of the funded tobacco programs as well as other trust activities;

14. It requires that the Trust be audited at least annually by an independent certified public auditor;

15. It requires that the Board appoint a coordinator in a full time position;

16. It requires that the Board adopt routine technical rules regarding establishing and administering the Trust;

17. It states that the Trust is subject to oversight by the Joint Standing committee of jurisdiction;

18. It states that the court must liberally construe the powers and duties of the Trust;

19. It states that the proceedings of the board and Trust are subject to the freedom of access laws;

20. It requires that all officers, trustees, employees and other agents of the Trust entrusted with the custody of funds or authorized to disburse funds be bonded by a blanket bond or an individual bond of at least $100,000 per person, or equivalent fiduciary liability insurance;

21. It requires that each trustee be indemnified by the Trust against expenses incurred in defending any action in which the trustee in a party by reason of status as a trustee;

22. It states that the Trust may uses the administrative services of DAFS for the management of the Trust funds and that the role of DAFS in such a case would be nondiscretionary;

23. It authorizes the State Controller to provide an annual advance from the General Fund to the Trust fund to provide money for disbursements. That money must be returned to the General Fund; and

24. It states that upon repeal or dissolution of the Trust fund the State Controller is to transfer the balance of the trust fund to the Fund for a Healthy Maine.

LD 1693 An Act To Advance Health Equity, Improve the Well-being of All Maine People and Create a Health Trust (Rep. Talbot-Ross)

SUMMARY: The Trust language appearing in Part A is the same in LD 1693 as it is in LD 1523, with the following exception:

> It requires that in FY 23-24, the Board disburse funds equal to at least 70% of the recommended US CDC level for evidence-based tobacco prevention and control programs and in FY 24-25 and thereafter, at least 100% of the recommended US CDC level; (the language specifying that these totals are to be met when combined with other DHHS funds is absent)

LD 1693 also does the following:

- Part B establishes the Office of Health Equity within the Department of Health and Human Services. The office is tasked with providing advice to the Commissioner of Health and Human Services, the Governor's Office of Policy Innovation and the Future and other state agencies, the Legislature and the Governor on health systems, policies and practices; providing recommendations to advance health equity in all sectors and settings; producing and updating a state health equity plan; and producing an annual Maine Health Equity Report Card;

- Part C requires the Department of Education to revise its nutrition, physical activity, screen time and sugary drink standards to increase obesity prevention in early care and education and to revise its school nutrition and physical activity standards to increase obesity prevention in public schools and requires those standards to match those specified by various national organizations and federal agencies;

- Part D prohibits the sale and distribution of flavored tobacco products, including flavored cigars and electronic smoking devices;

- Part E increases the tax on cigarettes from 100 mills to 200 mills per cigarette effective November 1, 2021 and eliminates the provision that allows the sale of cigarette stamps to licensed distributors at a discount. The amount of increased revenue from the cigarette tax is credited to the Fund for a Healthy Maine. Part E also provides funding for the health initiatives in the bill.

AMENDMENTS

The sponsor for LD 1523 has proposed an amendment that:

1. Removes the requirement that one of the Board members be an employer, and replaces that with a requirement that the person have experience recruiting, employing, developing, and retaining a healthy workforce;

2. Add experience in oral healthcare to the allowable background requirements for one of the Board members;

3. Change the percentage of funds dedicated to administration in the first year from .003 to .006 percent;

4. Change the percentage of funds dedicated to the Attorney General's Office in the first year from .005 to .006 percent;

5. Adds development of the public health workforce to the allowable uses of the funds in the health equity and health improvement account;

6. Deallocates funding for Head Start, Low-cost Drugs to Maine's Elderly, MaineCare provider payments, and Purchased Social Services from the Fund for a Healthy Maine and adds on-going appropriations to the General Fund to maintain these programs; and

7. Removes the 2021-22 appropriations.

The sponsor for LD 1693 has proposed an amendment that:

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2. Adds experience in oral healthcare to the allowable background requirements for one of the council members;

3. Changes to percentage of funds dedicated to administration in the first year from .003 to .006 percent;

4. Changes to percentage of funds dedicated to the Attorney General's Office in the first year from .005 to .006 percent;

5. Adds development of the public health workforce to the allowable uses of the funds in the health equity and health improvement account;

6. Changes the name of the Office of Health Equity to the Office of Population Health Equity;

7. Removes the language stating that contingent upon state funding, the department shall make all students, regardless of household income, eligible to receive a breakfast and lunch at the public school free of charge;

8. Adds language creating an Obesity Advisory Council within the Department of Health and Human Services;

9. Deallocates funding for Head Start, Low-cost Drugs to Maine's Elderly, MaineCare provider payments, and Purchased Social Services from the Fund for a Healthy Maine and adds on-going appropriations to the General Fund to maintain these programs;

10. Removes the 2021-22 appropriations.

ISSUES FROM TESTIMONY (Please note that the below represent only high-level selection of submitted comments. Please see the submitted testimony for detailed commentary):

- There was disagreement among commenters regarding the intended use of the tobacco settlement funds. Some commenters argued that using funds for medical care amounted to supplanting, rather than supplementing, other state funds, and that such supplanting was contrary to the intent of the Master Settlement Agreement (MSA) and ensuing state legislation regarding FHM spending. Other commenters disagree and argue that using funds medical care is squarely within the scope of the original intent of the MSA;

- There was disagreement as to the authority of the Legislature to involve itself in the work of the Trust, beyond termination of the Trust itself. Some commenters raised concerns that a Trust structure could be easily defunded, while others argued that a Trust structure was more stable than relying on legislative appropriations.

- It was suggested that in LD 1693, Part C, Section C.1 clarify which state entity has responsibility for rulemaking related to physical activity, screen time, and sugary drinks.

- The Attorney General expressed concerns that the Trust structure was incompatible with the Maine Constitution in that it attempted to constrain the power of the Legislature to designate public funds.

- Some commenters raised concerns over the costs of administration of the Trust structure.

- Some commenters raised concerns about potential lack of transparency proposed in the proposed model.

- Some commenters testified that the proposed flavored tobacco ban would be financially damaging to their businesses and put Maine businesses at a competitive disadvantage to New Hampshire.

- Some commenters stated that when Massachusetts banned flavored tobacco in summer 2020, sales of menthol cigarettes increased.

- Some commenters noted that e-cigarettes were public health tools insofar as they help tobacco smokers quit and that banning flavored tobacco would have a negative effect on public health.

- Some commenters stated that an increase in taxes on cigarettes would disproportionality impact low income individuals.

- Some commenters testified about the need for more obesity related resources in the state.

- DHHS testified that the Office of Population Health Equity (OPHE) had not yet been re-established within Maine CDC at the time LD 1693 was drafted. OPHE is now established within Maine CDC and OPHE's Director reports to the Maine CDC Director.

ANALYSIS:

These bills are closely related (see attached chart). Both establish a body politic (the Trust) that receives and administers funds paid to the State pursuant to the tobacco settlement. LD 1693 contains additional provisions.

The Fund for a Healthy Maine

The Master Settlement Agreement (MSA) reached by Maine, along with 45 other states in the case of S*tate of Maine v. Philip Morris, et. al., Kennebec County Superior Court*, Docket No. CV-97-134 provided for ongoing annual payments from tobacco product manufacturers to the states to compensate for tobacco related illness. Here is a link to a webpage that tracks FHM funds. The MSA does not restrict how states may spend their funds.

Title 22 Chapter 260-A, enacted in 1999, establishes and describes the Fund for a Healthy Maine. Section 1511, subsection 6 lists the purposes to which the fund may be applied:

6. Health promotion purposes. Allocations are limited to the following prevention and health promotion purposes:

A. Smoking prevention, cessation and control activities, including, but not limited to, reducing smoking among the children of the State;

A-1. Prevention, education and treatment activities concerning unhealthy weight and obesity;

B. Prenatal and young children's care including home visits and support for parents of children from birth to 6 years of age;
C. Child care for children up to 15 years of age, including after-school care;
D. Health care for children and adults, maximizing to the extent possible federal matching funds;
E. Prescription drugs for adults who are elderly or disabled, maximizing to the extent possible federal matching funds;
F. Dental and oral health care to low-income persons who lack adequate dental coverage;
G. Substance use disorder prevention and treatment; and
H. Comprehensive school health and nutrition programs, including school-based health centers.

Recent Legislative History – Fund for Healthy Maine

- 2009 OPEGA report[1]: In fall of 2008, the HHS Committee requested that OPEGA review the FHM programs. OPEGA completed its review in 2009 and issued a report. The report concluded:

  For the four FHM programs OPEGA reviewed in depth, adequate frameworks were in place for ensuring cost-effectiveness of specific activities. However, there does not appear to be a process for periodically reassessing Fund allocations to the various health-related efforts to assure the Fund as a whole is advancing the State's health vision and goals in the most cost-effective manner. The ability to have on-going, meaningful conversations regarding the Fund and the activities it supports is currently challenged by:

  - an apparent reluctance to deviate from the agreement made 10 years ago regarding the original menu of activities and funding levels;
  - lack of clarity as to which State entity is formally responsible for assuring the Fund as a whole is cost-effectively supporting State health goals and strategies;
  - incomplete financial and performance data at the activity level (unless the activity is captured solely by one budgetary program or contract);
  - general, vague and sometimes inaccurate descriptions of budgetary programs in budget documents submitted by the Governor to the Legislature; and
  - poor alignment of financial and performance information between budgetary programs, the key activities within them, and the administrative functions that support them.

  Link to 2009 OPEGA Information brief comparing the FHM Allocations to other states

- 2011 Legislative Commission[2]: Resolve 2011, ch. 112 created the Commission to Study Allocations of the Fund for a Healthy Maine. A report was released in December of 2011.

[1] Maine Legislature Office of Program Evaluation and Government Accountability. *Fund for a Healthy Maine Programs– Frameworks Adequate for Ensuring Cost-Effective Activities but Fund Allocations Should be Reassessed; Cost Data and Transparency Can Be Improved*. Report No. SR-FHM-08. October 2009. Online at Microsoft Word - FFHM Final Report for Printing 10-14-09.doc (maine.gov)

[2] Maine State Legislature; Maine Office of Policy and Legal Analysis; Orbeton, Jane; and Broome, Anna, "Final Report of the Commission to Study Allocations of the Fund For A Healthy Maine, 2011" (2011). Office of Policy and Legal Analysis. 40. Available online at: https://digitalmaine.com/opla_docs/40

The commission issued a number of recommendations. Including to make the FHM a separate fund; to include health promotion and prevention and overweight and obesity to the list of health purposes for the FHM; to require separate accounts and annual reporting about the use of FHM funds; to require the Health and Human Services Committee review of Fund for a Healthy Maine legislation; to require study commission review of Fund for a Healthy Maine allocations every four years; to review program structure for the programs of the Fund for a Healthy Maine and to recommend a new program structure, including a program for overweight and obesity prevention, education and treatment; to issue a statement of support for funding continued enforcement by the Office of the Attorney General; and to Issue a statement of support for investments in public health and prevention and for the original intent of the funding.

- LD 1232, 126th Leg., *An Act to Maintain the Integrity of the Fund for a Healthy Maine* removes the provision of current law that allows the Legislature to approve transfers of funds from the Fund for a Healthy Maine to the General Fund. The bill received a divided vote out of committee and passed the full Legislature but was vetoed and the veto was sustained.

- 2015 Study: Resolve 2015, ch 17 directed the Joint Standing Committee on Health and Human Services to meet to review the alignment of allocations from the Fund for a Healthy Maine with the State's current public health care and preventive health priorities and goals.

- LD 1650, 127th Leg., *An Act to Enact the Recommendations of the Study of the Allocations of the Fund for Healthy Maine* requires DHHS to submit an annual report to the Legislature, to include expenditures, progress made, and other information. The bill received an "ought to pass" vote out of committee and passed the full Legislature but was vetoed and the veto was sustained.

- LD 1961, 129th Leg., *An Act to Establish the Trust for a Healthy Maine*, was a predecessor to the current bills. It received a divided report out of committee but died at the conclusion of the session.

Legislative History – Flavored Tobacco

- LD 1550, 130th Leg., *An Act to End the Sale of Flavored Tobacco Products* prohibits the sale and distribution of flavored tobacco products, including 8 flavored cigars and electronic smoking devices. The bill was carried over from the first session and remains in the House.

Trust Construction– Constitutional Issues

Both bills establish a body politic, termed the Trust for a Healthy Maine. It should be noted that the term trust has a specific legal meaning. Black's Legal Dictionary (2nd ed) defines trust as follows:

trust, *n.* **1.** The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*). For a trust to be valid, it must involve specific property, reflect the settlor's intent, and be created for a lawful purpose.

The Maine Uniform Trust Code lays out the following requirements for the creation of a trust:

18-B MRSA §402 Requirements for Creation

1. Requirements. A trust is created only if:

A. The settlor has capacity to create a trust;

B. The settlor indicates an intention to create the trust;

C. The trust has a definite beneficiary or is:

(1) A charitable trust;

(2) A trust for the care of an animal, as provided in section 408; or

(3) A trust for a noncharitable purpose, as provided in section 409;

D. The trustee has duties to perform; and

E. The same person is not the sole trustee and sole beneficiary

If the proposed entity is indeed a trust, it would presumably be a charitable trust. Charitable trusts are those in which the settlor donates property and directs that the trust property be used for a specified charitable purpose, as described in the Maine Uniform Trust Code:

18-B MRSA §405. Charitable purposes; enforcement

1. Purposes. A charitable trust may be created for the relief of poverty; the advancement of education or religion; the promotion of health; governmental or municipal purposes; or other purposes the achievement of which is beneficial to the community.

2. Selection by court. If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.

3. Enforcement. The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.

It appears unlikely that entity described in the bills can be accurately described as a charitable trust. First, the property (that is, the FHM money) is not being provided by a settlor for a specified charitable purpose. Instead, the funds in question are those that the state receives as part of a settlement (the Master Settlement Agreement), which did not designate a specific charitable purpose in its terms as a condition of the State receiving the settlement funds.

The second reason the entity cannot be considered a true charitable trust is because it cannot both be a trust and operate in accordance with the Maine Constitution. The Maine Constitution provides that,

> "The Legislature, with the exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the deference and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States."[3]

An important tenant of the power granted to the Legislature by the Maine Constitution is that it cannot be limited or overridden by statute. The Maine Constitution controls. A charitable trust is irrevocable. However, because the Legislature by statute may not limit its own power as guaranteed by the Constitution, it cannot establish an irrevocable trust, which would be, by definition, unreachable by the Legislature itself.

In a 2003 opinion, Attorney General Rowe described this conflict when he wrote the following,

> *While public funds and charitable funds may share some characteristics, they are fundamentally different. Charitable funds are private monies that have been given by a person to be used for an identified purpose that benefits some segment of the public. Public funds, on the other hand, are monies raised by government in one or more ways – through taxation, imposition of assessments or fees, issuance of bonds – that must constitutionally be used for public purposes. Even if the Legislature chose to establish a trust to hold public monies for some specified purpose, establishing such trust to be irrevocable would amount to a surrender of Legislative power. The Constitution does not permit this. At most the Legislature could be characterized as a trust grantor or settlor that can change its mind about the appropriate use of funds under its control.*[4]

Related to the issue described about is the tenet that a Legislature cannot bind a future Legislature. The authority of the Legislature, as affirmed by the constitution, cannot be curtailed. In other words, the Legislature cannot permanently take power away from itself via statute. While the bills in question would appear to attempt to create a legal barrier to preclude future Legislatures from accessing FHM funds , the constitution prohibits such a blockade. A future Legislature would therefore have the right to change the law, up to and including dissolving the trust structure. The power of the Legislature to amend the trust structure, its powers, or its duties remains and cannot be restricted by statute.

Put differently, while the Legislature could pass a statute creating an entity that is given the title of "Trust" the entity created is not truly a trust in the legal sense. Similarly, the board members, called "trustees" in the bills, are not trustees in the usual sense of the term. As such, the "fiduciary duty" defined in the bills (in LD 1523, that definition appears on page 6, line 4), is not the fiduciary duty of a trustee but rather the fiduciary duty any member of a board would owe to an organization. A trustee is held to a high standard of care. A trustee owes the duty to administer a trust in good faith and in accordance with the terms of the trust, a duty of loyalty to the trust beneficiaries, a duty of impartiality if there are multiple beneficiaries, and a duty of

[3] Me. Const. art. IV. Pt 3, §1.
[4] Letter from Attorney General Rowe to Senator Christopher Hall and Representative Lawrence Bliss. May 20,2003.

prudent trust administration.[5] Board members typically owe a duty of care in administration of assets, a duty of loyalty to the entity and a duty of obedience to the entity.

Specific provisions of the bills that may need to be amended to reflect the true legal status of the entity referred to as a "trust" include the following:

- §1520-E, sub-§3 states that "money in the trust fund is held in trust". If the entity described in the bills is not in fact a trust, the meaning of this terminology is not clear.

Administration

Because these bills give over administration of Trust funds to an entity outside the direct control of the state, it provides that a percentage of funds be directed to fund administration. Section 1517 describes funding disbursements, and includes language under subsection 4, paragraph C, subparagraph 1 designating .003 of the settlement funds to administration. The amendments offered by the sponsors double this amount to .006.

The bills define "administrative costs" in section 1514 as follows:

1. **Administrative costs.** "Administrative costs" means staffing, overhead and related operational costs, including costs for a coordinator, professional assistance and bond premiums, incurred by the tryst in carrying out its duties under this subchapter.[6]

Section 1519 describes administration of the funds. Subsection 1 directs the board to establish an administration fund to defray administrative costs (defined above). It also states that the board shall "define the roles and responsibilities of any professional assistance in accordance with in this subsection"

Subsection 2 describes the role of the full time coordinator. The definition of "administrative costs" includes both professional assistance and the coordinator. However, it is not clear what the term professional assistance is intended to include.

Also, it is not clear whether the annual audit requires per section 1517, subsection 10 is to be paid out of the administration fund.

§1517, sub-§5 Health equity and health improvement account

Section 1517, subsection 5 establishes a health equity and health improvement account. The prior subsection describes funding disbursement requirements, and state that funds remaining after the requires disbursements be sent to the Health equity account. However, additional language in section 1517 requires that at last 15% of funds in FY 23-24 go to the health equity account., and 20% in later years. These requirements appear to conflict.

[5] 18-B MRSA ch.8

§1518 Restrictions; construction[7]

This section restricts the Trust's activity to "receiving and disbursing funds and any actions necessary and appropriate to receive and disburse funds." It states further that the "trust may not create, manage or operate public health or health delivery programs" and that "nothing in this subchapter may be construed to empower the Trust to direct, manage or oversee any program, fund or activity of any other state agency."

The language in section 1518 would appear to conflict in some ways with the language in section 1516, which establishes the powers and duties of the Trust as follows:

§1516. Powers and duties

1. Powers. The trust may:

A. Receive all settlement funds;

B. Receive money from any other source, whether public or private, designated for deposit into or credited to the trust;

C. Receive funds transferred from the Fund for a Healthy Maine under subchapter 1;

D. Through funding disbursement plans under section 1517, disburse funds; and

E. Make recommendations to the Governor, the Legislature and other public officials regarding improving public health outcomes and promoting public health awareness and understanding.

2. Duties. The trust shall:

A. Administer the trust and the trust fund;

B. Promote the visibility and understanding of public health issues among children and adults;

C. Participate in the development and promotion of a state health plan by the Department of Health and Human Services, Maine Center for Disease Control and Prevention or another planning entity and provide funding for the planning process if necessary;

D. Promote multilevel planning and coordination that includes state, district, community and municipal decision-making and advisory boards; and

E. Take other actions necessary and appropriate to fulfill the purposes of this subchapter.

While section 1518 precludes the Trust from "directing, managing or overseeing any program, fund or activity of any other state agency", the duties specified in section 1516 include a duty to "participate in the development and promotion of a state health plan by the Department of Health and Human Services, Maine Center for Disease Control and Prevention or another planning entity and provide funding for the planning process if necessary" as well as to "promote multilevel planning and coordination that includes state, district, community and municipal decision-making and advisory boards." Additionally, Section 1520-E allows the Trust to direct

[7] LD 1523: 22 MRSA §1518 (pg 10 lines 19 - 24); LD 1693: 22 MRSA §1518 (pg 10 lines 21 - 26)

the Department of Administrative and Financial Services to provide administrative services for the Trust.

Sections 1516 appears to potentially conflict with sections 1518 and 1520-E as regards to the duties of the Trust.

Legislative Oversight

Section 1520-A states that the "trust is subject to the oversight of the joint standing committee of the Legislature having jurisdiction over public health matters." It is not clear what form or breadth this oversight will take. The only specific language related to oversight is the requirement for the Trust to submit an annual report to the Legislature. The bills specify in Section 1515, subsection 8 that the chair is the liaison to the legislature, but no duties associated with that position are specified.

Typically, when a joint staining committee wishes to obtain information on program funding, OFPR analysts and executive branch officials are abel to easily pull up to date data. Should the funds to moved to the structure proposed by the bills, its may be more difficult from the Legislature to readily access fiscal information. OFPR staff will be able to see incoming funds (revenue), but may not be able to see dynamic information on spending, a they can today. The bills do require an annual report, but that is a single point in time report.

Construction by Court

Section 1520-B states that "the court shall liberally construe this subchapter to give the greatest possible effect to the powers and duties accorded to the trust." The legal effect of this provision is unclear, as the powers and duties of the Trust are specifically provided for in section 1516, and a public instrumentality has only the powers provided to it by statute.

DAFS Management

Section 1520-E describes the administration of the fund. Subsection 3 states:

> The trust may use administrative services of the Department of Administrative and Financial Services for the management of the trust fund, but the role of the Department of Administrative and Financial Services is nondiscretionary and the Department of Administrative and Financial Services shall carry out all lawful functions of the trust for all matters relating to accessing the trust fund without the requirement of an additional legislative authorization or a financial order.

It is unclear how this delegation of administrative services to DAFS would work in practice. Would the Trust reimburse DAFS for these administrative services? If so, would that reimbursement come out of the administration fund? What does it mean that DAFS's role is "nondiscretionary"? What does it mean that DAFS shall carry out all lawful functions relating to accessing the Trust fund without the requirement of an additional legislative authorization or a financial order?

Working Capital Advance

Section 1520-E, subsection 4 states that the State Controller is authorized to provide an annual advance from the General Fund to the Trust fund to provide money for disbursements from the Trust fund. It requires that this money be returned to the General Fund as a first priority from the settlement amounts credited to the fund.

The treatment of interest on these advances is not provided for in the bills. The committee may wish to add such language if the intent is that any interest be returned to the state.

Fiscal Implications

The fiscal notes for these bills account only for the current biennium, and don't reflect impact on future bienniums, when the bills take effect. However, the amended versions of the bills deallocate funds from the FHM for Head Start, Low-cost Drugs to Maine's Elderly, MaineCare provider payments, and Purchased Social Services and replace those funds with General Fund dollars.

It is important to note that state dollars expended on MaineCare costs receive Federal Medical Assistance Percentage (FMAP) reimbursement from the federal government. Maine's current FMAP is currently 64%.[8] If Maine does not replace the MaineCare funds it strikes from the FHM, it will also lose the federal match.

Additional costs that would appear to result from these bills include Trust administrative costs (.003 of the settlement funds in bills as originally drafted and .006 of settlement funds in amendments); increased spending on Attorney General costs (.005 of the settlement funds in bills as originally drafted and .006 of settlement funds in amendments); Board member travel and expense reimbursement; discretionary disbursements to the internal stabilization funds and internal flexible accounts; independent internal audit costs; bonding and indemnification costs.

Finally, it should be noted that a great deal of uncertainly exists as to future spending for programs that rely on FHM dollars. These funding decisions are currently made by the Legislature. However, because authority for determining spending would transfer to the Trust authority under these bills, it is possible that currently funded programs will lose some or all of their funding. This could include state programs. If these programs lose funding, the Legislature may decide to fill the funding gaps with General Fund dollars, or thy may choose not to do so.

DRAFTING ISSUES

- Section 1517, subsection 4, paragraph B refers to the "Department of the Attorney General." This should be changed to the Office of the Attorney General

PUBLIC POLICY CONSIDERATIONS RELATED TO THE CREATION OF PUBLIC INSTRUMENTALITIES:[9]

[8] Medicaid and CHIP Payment and Access Commission. Online at: https://www.macpac.gov/publication/federal-medical-assistance-percentages-fmaps-and-enhanced-fmaps-e-fmaps-by-state-selected-periods/

[9] This section is not intended to provide an exhaustive list of potential public policy considerations.

I. Reasons for Creating a Public Instrumentality

A. What problems, issues or public policy objectives is the creation of a public instrumentality intended to address?
    1. What other methods, if any, might address those problems or issues?
    2. What would be the public instrumentality's overall purpose/mission?
        a. How would the entity's independence or autonomy service its intended purpose?
        b. How would the entity's interaction with the Executive/Legislative branches serve its intended purpose?

B. What benefits might the entity realize as a result of its status as a public instrumentality?
    1. Who are the beneficiaries of the services provided by the public instrumentality?

C. What challenges might result as a result of the entity's status as a public instrumentality?

D. How should the entity be funded?

II. Powers and Duties of the Public Instrumentality

A. What are the powers and duties of the public instrumentality?
    1. How do those powers and duties support the entity's purpose?
    2. Are those powers and duties sufficiently clear to guide the entity?

B. Should the entity have rulemaking authority?

C. Is the entity providing "essential government services"?

D. To what extent will the entity be awarding contracts for good, services, construction or other projects?
    1. What are the advantages of requiring a competitive bid process for major contracts awarded by this entity?
    2. What are the disadvantages of requiring a competitive bid process for major contracts awarded by this entity?

E. Should the entity have purchasing power?

III. Executive Oversight of the Public Instrumentality

A. What proportion of the entity's budget will come from State funds?

B. Are there any federal or state statutory limits on the ability of the entity to spend funds it receives?
    1. Do the statutory limits provide sufficient guidance to the entity?

C. What types of public policies might be important in considering requirements for accountability? For example:
    1. Public accountability?
    2. Ensuring the fiscally responsible use of State funds?
    3. Eliminating or reducing the potential for corruption?
    4. Eliminating or reducing the potential for political patronage?

D. What level of accountability would be necessary to achieve those public policies?
    1. What time and effort will be involved by the entity to provide accountability?

2. Should the entity be audited?
    a. How frequently should an audit be conducted?
    b. Is the State Auditor's audit frequent enough?
    c. Should there be a requirement for an independent audit?
3. Should the entity be required to report on activities and expenditures?
    a. How frequently should there be reporting?
    b. What information should be included in the report?
4. Should the entity receive expenditures of state funds restricted by line category (*e.g.* personal services or capital v. all other)
5. Should the entity be required to justify its request for the appropriation or allocation of State funds to the Budget Office?
6. Should there be provisions relating to conflict of interest?

IV. Legislative Oversight of the Public Instrumentality

A. Has the entity been delegated any governmental functions?
B. What level of detail should be required in the budget relating to the public instrumentality?
    1. Should the Legislature review the entity's budget? How frequently?
C. Should the entity be subject to a review under the Government Evaluation Act (GEA)?

V. Other Considerations

A. What should be the application of the Administrative Procedures Act (APA) to the entity?
B. What should be the application of the Freedom of Access Act (FOAA) to the entity?
C. What should be the application of the Maine Tort Claims Act (MTCA) to the entity?
D. What is the status of any employees of the entity?
    1. Will employees be eligible for participation in the Maine State Retirement System (MePERS)?
    2. Will employees be eligible for participation in the Employee Health Insurance Benefit?
    3. Will employees be protected from discrimination?
    4. Will employees be subject to civil service laws?
    5. Will employees be allowed collective bargaining rights?
D. Should the public instrumentality be authorized to receive insurance services provided by the Risk Management Division of DAFS or independently?
E. Should there be provisions regarding debts or obligations of the public instrumentality and whether they are debts or obligations of the State?

ADDITIONAL INFORMATION REQUESTED BY COMMITTEE:

- **During testimony, several commenters noted that there was a structural deficient in the current FHM, The Committee requested clarification on this**.

The issue in question relates to projected future decreases in tobacco settlement funds. Commenters were concerned that within several years, there will be only enough funds coming in to cover the portion of FHM devoted to MaineCare. See this page for FHM documents, including revenue forecasts.

- **It was requested that the constitutional issues raised by the Attorney General in his testimony be discussed.**

  Please see above, as well as the attached document prepared by OPLA related to constitutionality issues in LD 1961. It should be noted that the constitutional concerns raised regarding legislative members of the Board and appointment of Board members by the legislature have been resolved in the bills at hand.

- **It was asked how other states have used and administered tobacco settlement funds.**

  - Here is are FY2022 State Rankings of states by Percent of CDC-Recommended Funding Levels. Maine is ranked 10th in the nation. No state funded its tobacco programs at 100% of the CDC recommendation.

  - A number of states have established separate state entities to administer their tobacco settlement funds.

    - Indiana created the Indiana Tobacco Prevention and Cessation Agency to receive settlement funds. The entity was eliminated in 2011 and funds diverted to the Indiana State Department of Health.

    - Ohio established several trust funds to receive settlement funds. One of those funds, the Tobacco Use Prevention and Cessation Trust Fund was governed by a 20 member Board of Trustees. In 2008, funds were diverted to the state's general revenue fund.

    - Oklahoma established the Oklahoma Tobacco Settlement Endowment Trust to receive settlement funds. Voters in the state approved a constitutional amendment that required that settlement funds be spend on specified initiatives.

    - North Carolina previously deposited 25% its tobacco settlement money into a Health and Wellness Trust Funds, which funded the state's tobacco prevention and cessation program. However, in 2011 the Trust was dissolved and in 2013 the program was totally defunded.

- **It was asked what happened to the former Office of Minority Health**

The Office of Minority Health within the Maine CDC and DHHS was established in 2006. It was charged with improving and protecting the health and wellness of Maine's racial and ethnic minority communities by enhancing the capacity of the public health system and developing health policies to eliminate racial and ethnic health disparities. In 2015, the Office was dissolved under the LePage administration.

In April 2021, the Mills administration announced plans to establish the Office of Population Health Equity (OPHE) within the Maine Center for Disease Control and Prevention

- **It was asked what CDC programs exist to address obesity**

- **It was asked what percentage of the tobacco settlement funds currently go to tobacco prevention**

  See the attached document provided by Luke Lazure of OFPR. in the 2 most recent years it was "Smoking Cessation and Prevention" accounted for about 18% of the expenditures of FHM funds.

- **Current data and trends on teen vaping were requested**

  According to the federal CDC, e-cigarettes have been the most common form of tobacco product used by youth since 2014. Rate o f use increased between 2017 and 2019, but decreased among middle and high school students from 2019 to 2020.[10] Approximately 1 in 20 middle schoolers (4.7%, down from 10.5% in 2019)[11] and 1 in 5 high schoolers (19.6%, down from 27.5% in 2019) reported use in 2020 within the past 30 days.[12]

[10] U.S. Centers for Disease Control and Prevention. *Youth and Tobacco Use*, online at https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm#current-estimates, citing Gentzke AS, Wang TW, Jamal A, Park-Lee E, Ren C et al. Tobacco Product Use Among Middle and High School Students, United States, 2020. Morbidity and Mortality Weekly Report 2020;69(50);1881–1888; Gentzke AS, Creamer M, Cullen KA, et al. Vital Signs: Tobacco Product Use Among Middle and High School Students—United States, 2011–2018. Morbidity and Mortality Weekly Report 2019;68:157–164.; Cullen KA, Gentzke AS, Sawdey MD, et al. e-Cigarette Use Among Youth in the United States, 2019external icon. JAMA. Published online November 05, 2019.; Wang TW, Gentzke A, Sharapova S, Cullen KA, Ambrose BK, Jamal A. Tobacco Product Use Among Middle and High School Students – United States, 2011-2017. Morbidity and Mortality Weekly Report, 2018;67(22):629-33.

[11] U.S. Centers for Disease Control and Prevention. *Youth and Tobacco Use*, online at https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm#current-estimates, citing Gentzke AS, Wang TW, Jamal A, Park-Lee E, Ren C et al. Tobacco Product Use Among Middle and High School Students, United States, 2020. Morbidity and Mortality Weekly Report 2020;69(50);1881–1888; Wang TW, Gentzke A, Sharapova S, Cullen KA, Ambrose BK, Jamal A. Tobacco Product Use Among Middle and High School Students – United States, 2011-2017. Morbidity and Mortality Weekly Report, 2018;67(22):629-33; Wang TW, Gentzke AS, Creamer MR, Cullen KA, Holder-Hayes E et al. Tobacco Product Use and Associated Factors Among Middle and High School Students – United States, 2019. MMWR 2019;68(12): SS 1-22

[12] U.S. Centers for Disease Control and Prevention. *Youth and Tobacco Use*, online at https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm#current-estimates, citing Gentzke AS, Wang TW, Jamal A, Park-Lee E, Ren C et al. Tobacco Product Use Among Middle and High School Students, United States, 2020. Morbidity and Mortality Weekly Report 2020;69(50);1881–1888; Wang TW, Gentzke AS, Creamer MR, Cullen KA, Holder-Hayes E et al. Tobacco Product Use and Associated Factors Among Middle and High School Students – United States, 2019. MMWR 2019;68(12): SS 1-22

The federal CDC also reports that 2020, 85% of high school students and 74% of middle school students who used tobacco products in the prior 30 days reported using a flavored tobacco product during that time.[13]

According to the 2019 Maine Integrated Youth Health Survey, 16% of middle school students and 45% of high school students have ever used e-cigarette, and 7% of middle school students and 29% of high school students have used e-cigarettes in the past 30 days.[14]

FISCAL IMPACT: The fiscal impact of these bills has yet to be determined, but see the "fiscal implications" section above.

[13] U.S. Centers for Disease Control and Prevention. *Youth and Tobacco Use*, online at https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm#current-estimates, citing Wang TW, Neff LJ, Park-Lee E, Ren C, Cullen KA & King BA. E-Cigarette Use Among Middle and High School Students – United States, 2020. Morbidity and Mortality Weekly Report, 2020;69(37):1310-12.

[14] Maine Department of Heath and Human Services and Maine Department of Education. *Vaping and E Cigarette Use: Data from the Maine Integrated Youth Health Survey* . Available online at https://www.maine.gov/miyhs/sites/default/files/2021-01/2019MIYHSVapingInfographic%20%281%29.pdf.