MEMORANDUM

State of Alaska

Department of Law

TO: John Boucher
Deputy Commissioner
Department of Administration

DATE: August 3, 2015

FILE NO.: JU2015200187

TEL. NO.: (907) 465-3600

FROM: Marjorie Vandor
Chief Assistant
Attorney General
Labor and State Affairs Section

Bill Milks
Senior Assistant
Attorney General
Labor and State Affairs Section

SUBJECT: GASB Reporting

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

INTRODUCTION

You posed certain questions regarding the State's reporting of unfunded pension liability on its balance sheet pursuant to the Government Accounting Standards Board (GASB) statement 68 (GASB 68). Specifically, you asked whether AS 39.35.280 and AS 14.25.085 create legal responsibility in the State for a portion of the retirement system unfunded liability of participating TRS and PERS employers (in addition to the state's portion of liability as a TRS and PERS employer) such that the State is required to book an additional allocated portion of participating employer unfunded liability as a legal obligation on its balance sheet?

In short, we believe that these statutes do not require the State to incur debt and assume the unfunded liability of participating employers but instead are discretionary municipal funding statutes that are subject to annual appropriation. There is nothing in the statutes' text or legislative history that suggests the legislature intended the State to assume legal liability or responsibility for a portion of the participating employers' unfunded liability. Moreover, these statutes cannot be interpreted to bind future legislatures to make future appropriations because that would undermine the Legislature's constitutional power of appropriation and possibly create a dedicated fund which is also prohibited under Alaska's Constitution. The issue of how to report any unfunded

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

liability on the state's balance sheets also requires consideration of accounting principles. One way to meet the apparent intent behind the GASB standards of transparency in reporting of the fiscal health of pension plans while recognizing Alaska law concerning appropriations would be to report the State's share of unfunded liability as an employer but also include a footnote that calculates the sum if GASB 68 was interpreted to require that the state book an additional allocated portion to reflect other participating employers' unfunded liability.

BACKGROUND

1. The State's Retirement Plans and SB 125

The State administers two large multi-employer defined benefit retirement systems: the Public Employees' Retirement System (PERS) and the Teachers' Retirement System (TRS). Since 2002, both PERS and TRS have had an unfunded liability. As a result of that unfunded liability, the contribution rates paid by employers increased sharply towards the middle of the last decade.

In 2008, the legislature enacted SB 125, which capped the employer contribution rates for PERS and TRS participating employers. The PERS employer contribution rate is capped at 22 percent. AS 39.35.255(a). The TRS employer contribution rate is capped at 12.56 percent. AS 14.25.070(a). SB 125 also enacted AS 39.35.280 and AS 14.25.085, requiring the state to make additional contributions to PERS and TRS when the Alaska Retirement Management Board (ARMB) sets employer contribution rates in excess of the capped rates. The additional state contributions plus the participating employer contributions are intended to equal the full actuarial contribution called for by the ARMB.

The specific language of the statutes is as follows:

> In addition to the contributions that the state is required to make under AS 39.35.255 as an employer, the state shall contribute to the plan each July 1 or, if funds are not available on July 1, as soon after July 1 as funds become available, an amount for the ensuing fiscal year that, when combined with the total employer contributions that the administrator estimates will be allocated under AS 39.35.255(c), is sufficient to pay the plan's past service liability at the contribution rate adopted by the board under AS 37.10.220 for that fiscal year.[1]

[1] AS 39.35.280. *See also* AS 14.25.085 (same for TRS).

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

Significantly, SB 125 also enacted a new statute governing termination costs. When an employer terminates participation in PERS, the employer is responsible for paying the entire past service contribution rate adopted by the ARMB on the terminated positions "until the past service liability of the plan is extinguished."[2] Thus, the 22 percent cap is eliminated upon termination—and the employer's full liability for its share of the unfunded liability remains.

2. GASB 68

The Governmental Accounting Standards Board (GASB) adopted a new accounting statement (GASB 68), effective for FY 2015. GASB 68 requires third parties who are "legally responsible" for the unfunded liability of a participating employer to book the amount of the unfunded liability for which the third party has legal responsibility on the balance sheet of the third party. The GASB has suggested that a funding statute can create such legal responsibility for the underlying unfunded liability.

By way of background, it is important to note that GASB actually issued two new statements, GASB 67 and 68, which impact how public pension plans and government employers, respectively, account for pension liabilities. The statements provide a consistent way for plans and employers to report pension liabilities. GASB 67 and 68 adopt new terminology and methods for measuring public pension liabilities. In lieu of measuring the "unfunded actuarial accrued liability," the GASB statements measure the "Net Pension Liability" (NPL). Actuarial smoothing is eliminated from the Net Pension Liability calculation, which requires use of mark-to-market fair valuation of assets. For cost-sharing multiple employer pension plans like Alaska's PERS and TRS, GASB 67 requires public pension plans to report the total NPL for the pension plan. GASB 68 requires that the NPL be allocated to participating employers and that those employers report the allocated NPL on their balance sheets.[3]

---

[2] AS 39.35.625(a).

[3] GASB 67 and 68 only provide guidance to government accountants for liabilities associated with pension benefits, and do not apply to liabilities associated with "other post-employment benefits" (OPEB) i.e., health and life insurance benefits. GASB has recently adopted similar statements (GASB 74 and 75) that apply to accounting for OPEB NPL. Those statements will take effect in 2017-2018.

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

In cases where a "non-employer" governmental entity is "legally responsible for making contributions directly to a pension plan" and such contributions are not dependent on certain factors unrelated to pensions, the non-employer entity must report the portion of the NPL attributable to such special funding on its balance sheet. *See* Appendix (containing relevant excerpts from GASB 68, and GASB 68 Implementation Guide). The GASB 68 Implementation Guide provides that a funding requirement set out in statute meets the "legally responsible" test. Appendix, GASB 68 Implementation Guide, Question 26. The Guide suggests that a historical practice of making such contributions in the absence of a funding statute, however, does not meet the "legally responsible" test. *Id.*, Question 27. The Implementation Guide does not address situations where a state's constitution may limit the enforceability of such funding statutes. GASB 67 takes effect for public pension plans for the FY 2014 CAFR (publication scheduled December 2014). GASB 68 takes effect for government employers for the FY 2015 CAFR. (publication scheduled December 2015).

3. Alaska Law Regarding Spending and Appropriations

The Alaska Constitution places the power of appropriation with the Legislature and expressly provides that: "No money shall be withdrawn from the treasury except in accordance with appropriations made by law."[4] The Constitution also generally prohibits the state from incurring debt except for capital improvements and certain other limited circumstances not related to the circumstances presented here.[5] Further, the Constitution prohibits the dedication of funds for "any special purpose, except as provided in section 15 of this article [Permanent Fund] or when required by the federal government for state participation in federal programs."[6]

The Alaska Supreme Court, in addressing these constitutional provisions, has recognized the Legislature's authority to annually decide how to spend the state's funds through its appropriation power: "The constitutional clause prohibiting dedicated funds seeks to preserve an annual appropriation model

---

4 art. IX, sec. 13, Constitution of Alaska.

5 art. IX, sec. 8, Constitution of Alaska.

6 art. IX, sec. 7, Constitution of Alaska.

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

which assumes that . . . the legislature remain[s] free to appropriate all funds for any purpose on an annual basis."[7]

DISCUSSION

AS 39.35.280 and AS 14.25.085 appear to be subject-to-appropriation funding statutes. The words themselves underscore that the statute is only operative when funding is "available" ("the state shall contribute to the plan each July 1 or, if funds are not available on July 1, as soon after July 1 as funds become available…"). Nor is there is there anything in the text of these statutes that purports to transfer the legal responsibility for a portion of the participating employers' unfunded liability to the State. Funding availability is thus within the sole judgment of the legislature.

The legislative history of these statutes supports this interpretation. The original version of SB 125 did seek to transfer unfunded liability from participating employers to the State, but this part of the statute did not survive in its final adopted form.[8] The fiscal note for this prior version of the bill reflected an intention for the State to assume an additional $1.05 billion of unfunded liability from other participating employers.[9] But this language also did not make it into the final bill. No unfunded liability was transferred to the State. The final

---

[7] *See Sonneman v. Hickel*, 836 P.2d 936, 938-39 (Alaska 1992).

[8] * Sec. 7. AS 39.35.260 is amended by adding a new subsection to read:

(b) Notwithstanding AS 39.35.255, the employer contribution rate calculated under AS 39.35.255 and (a) of this section for the state shall include 65 percent of the plan's unfunded liability as of June 30, 2006, as established in the valuation as of that date and subsequently approved by the board; the employer contribution rate calculated under AS 39.35.255 and (a) of this section for all other participating employers shall include the remaining 35 percent of that unfunded liability. Any subsequent changes to the plan's unfunded liability shall be included in the employer contribution rate calculated under AS 39.35.255 and (a) of this section for all participating employers, including the state. SB 125, sec. 7 (note, the original version of SB 125 did not address TRS).

[9] SB 125, Department of Administration Fiscal Note, March 15, 2007. (http://www.legis.state.ak.us/PDF/25/F/SB0125-1-2-031607-ADM-Y.PDF).

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

bill simply provided for "employer relief" in the form of additional state contributions when "available."[10]

Other provisions adopted in SB 125 are consistent with this interpretation. SB 125 enacted a new statute governing termination costs. It provides that when an employer terminates participation in PERS, the employer is responsible for paying the entire past service contribution rate adopted by the ARMB on the terminated positions "until the past service liability of the plan is extinguished." AS 39.35.625(a). Thus, the 22 percent cap is eliminated upon termination—and the employer's full liability for its share of the unfunded liability remains.[11]

Further, the Alaska Constitution's prohibition against dedicated funds generally prohibits revenues from being dedicated for a particular purpose unless expressly authorized by the Alaska Constitution.[12] The Alaska Supreme Court has held that the objectives of the prohibition against dedicated funds are to ensure the legislature has flexibility in exercising its power of appropriation, and to ensure that the legislature does not abdicate its responsibility for budgeting.[13] The prohibition thus protects each legislature's power of appropriation from encroachment by a prior legislature. *See, e.g., Sonneman v. Hickel*,

---

[10] See SB 125, Department of Administration Fiscal Note, March 12, 2008. (http://www.legis.state.ak.us/PDF/25/F/SB0125-3-3-031208-ADM-Y.PDF)

[11] The contractual relationship between the State and the PERS participating employers is governed by the participation agreement each employer executes. The language of those agreements remained the same, both before and after the enactment of SB 125. PERS employers are required to contribute at the rates adopted by the Board and the agreement is subject to the statute. In the event that the statute capping PERS rates at 22 percent is repealed, the contractual language requiring payment at the full board adopted rate would remain in place. And as noted above, in the event that a participating employer terminates service it remains liable for the full amount of its allocated unfunded liability, and must pay the total past service rate until the plan's unfunded liability is extinguished.

[12] *See* art. IX, sec. 7, Constitution of Alaska.

[13] *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 1169 (Alaska 2009) ("*SEACC*"); *Sonneman v. Hickel*, 836 P.2d 936, 938-39 (Alaska 1992); *Fairbanks v. Convention & Visitors Bureau*, 818 P.2d 1153, 1158 (Alaska 1991); *State v. Alex*, 646 P.2d 203, 209 (Alaska 1982).

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

("The constitutional clause prohibiting dedicated funds seeks to preserve an annual appropriation model which assumes that . . . the legislature remain[s] free to appropriate all funds for any purpose on an annual basis.").[14] Because of the framers' intent, the Court has held that "the prohibition is meant to apply broadly."[15] In *Southeast Alaska Conservation Council v. State* ("*SEACC*"), the Court considered a statute that sought to create an endowment fund for the University of Alaska and to dedicate the proceeds of sales from university land selections to the endowment fund. The Court struck down the statute as prohibited by the dedicated funds clause.[16]

The Court in *SEACC* did include a limited reference to the issue of whether the state's receipt of pension contributions would be covered by the prohibition on dedicated funds. It noted that the constitutional provision was drafted to apply to the "proceeds of any state tax or license" instead of "all revenues" in order to permit the creation of particular special funds for certain monies received by the state such as "sinking funds for the repayment of bonds," "pension contributions," "proceeds from bond issues," and "contributions from local government units for state-local cooperative programs."[17] It seems clear, however, that exempting the state's receipt of pension fund contributions from participating employers and employees from the scope of the dedicated funds clause is conceptually distinct

---

[14] 836 P.2d at 940.

[15] *SEACC*, 202 P.3d at 1170.

[16] *SEACC*, 202 P.3d at 1176-77.

[17] *SEACC*, 202 P.3d at 1169, n. 29, *citing* 1975 Formal Op. Att'y Gen. 9, 6-7 (May 2, 1975) and Mem. from Pub. Admin. Serv., Jan. 4, 1956. This office also addressed generally the subject of the dedicated funds clause and particular funds including the PERS Fund in 1982. *See* 1982 Inf. Op. Att'y Gen. (Nov. 30; J-66-785-81; J-66-649-80), 1982 WL 43799. In that opinion, we noted that there is an implied exception to the dedicated funds prohibition for certain monies received by the state such as pension fund contributions submitted by employees and employers under AS 39.35.280 and AS 39.39.170. As noted above, we consider the issue raised in this memorandum concerning a separate payment by the state to pension funds that is not linked to the state's status as an employer participant in the funds to be very different and not likely considered to be encompassed within any implied exception to the prohibition against dedication of public funds.

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

from the issue raised in this matter which concerns a separate payment by the state to pension funds which is not tied to the state's status as an employer participant in the funds.

New Jersey's Supreme Court recently considered a similar issue when it struck down a pension funding statute under that state's debt limitation and appropriation clauses. The New Jersey Legislature attempted to enact contractual anti-diminishment protection and funding requirements for public pensions by statute. The Court stated as follows:

> Chapter 78's purported creation of an enforceable long-term financial contractual obligation, payable by the State through dedicated line items in ensuing annual appropriations acts, falls squarely within the sights of the Debt Limitation Clause and all that that Clause is intended to prohibit. The Debt Limitation Clause precludes such action precisely to save the State from itself -- itself being the presently positioned, albeit well-intentioned legislators and Governor, who were not given permission to fiscally bind, by contract or otherwise, future taxpayers, legislators, and governors tasked with evaluating on an annual basis the appropriations spending for the fiscal year in issue, unless voter approval was obtained.
>
> The Legislature and Governor were without power, acting without voter approval, to transgress the Debt Limitation Clause and, similarly, the corresponding Appropriations and other budget clauses of the State Constitution. ….[18]

This reasoning would seem to apply with equal force to any claim that AS 39.35.280 and AS 14.25.085 are legal mandates to incur debt and assume the unfunded liability of participating employers rather than being discretionary municipal funding statutes that are subject to annual appropriation. These statutes cannot be interpreted to mandate future spending or dedicate funds for additional state contributions on behalf of other participating employers without raising serious problems under the appropriations and dedicated funds clauses of the Alaska Constitution. A primary reason for the prohibition against dedication of funds is to ensure that the legislature does not lose control of budgeting. When AS 39.35.280 and AS 14.25.085 were enacted, the fiscal note projected that the state's

[18] *Burgos v. State*, __ A.3d. ___, 2015 WL 3551326 at 18 (June 9, 2015, N.J.)

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

funding requirement would be $381 million in FY14.[19] Instead, it was $629 million.[20] And in 2012, the ARMB made changes to its rate-setting methodology that put the state contributions on a course to exceed $1 billion in FY16.[21] As has been widely reported, the State is projecting only $2.2 billion in unrestricted general revenue for FY16. The notion that these statutes could essentially result in an earmark of 50 percent of the state's general funds is not reasonable.[22]

When the ARMB amended its rate-setting methodology in 2012, it did so in order to accelerate the amortization of the PERS and TRS unfunded liability, which at the time was approaching $12 billion. This resulted in projected state contributions exceeding $1 billion in FY 16, and remaining above $1 billion through FY 19. The state's contribution amount was projected to remain well above $760 million (double what the SB 125 fiscal note projected for FY14) through 2029. In response, in 2014 the legislature appropriated $3 billion from the Constitutional Budget Reserve to the PERS ($1 billion) and TRS ($2 billion) trusts. The legislature also amended the ARMB's rate setting authority to specify the methodology and term of amortization that must be applied.[23] The combined result of these actions was to reduce the FY16 state contribution amount from over $1 billion under the ARMB methodology to $256 million under the new statutory methodology.[24]

---

[19] See SB 125, Department of Administration Fiscal Note, March 12, 2008. (http://www.legis.state.ak.us/PDF/25/F/SB0125-3-3-031208-ADM-Y.PDF).

[20] Sec. 29, CCS HB 65, 2013 (FY14 operating budget).

[21] See HB 385, Department of Administration Fiscal Note, April 19, 2014. (http://www.legis.state.ak.us/PDF/28/F/HB0385-4-11-041914-FIN-Y.PDF).

[22] The legislature removed the ARMB's power to set rates in this fashion, which is addressed above.

[23] SCS HB 385(FIN), 2014.

[24] See Sec. 10, CCS HB 2001, 2015 (FY16 operating budget). http://www.legis.state.ak.us/PDF/29/Bills/HB2001Z.PDF).

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

RECOMMENDATION

The Alaska Constitution places the responsibility for yearly appropriations with the legislature and prohibits the creation of statutory dedications of revenue. In this legal context, the additional state contribution statutes, AS 39.35.280 and AS 14.25.075, cannot reasonably be interpreted to mandate that future legislatures make appropriations to these funds and thereby essentially transfer liability for unfunded liabilities from participating employers to the State. This interpretation is consistent with the statutes' legislative history and with SB 125's express method of addressing termination costs, which provides that when an employer terminates participation in PERS, it is responsible for paying its share of any unfunded liability.

The GASB Implementation Guidance does not address situations where a state constitution includes an anti-dedication clause like Alaska's that would make a statute void or unenforceable if interpreted as a continuing debt. But it does appear that the GASB Implementation Guidance to third parties that make voluntary contributions could be applicable to a state which by its constitution places the power of appropriations with the legislature and prohibits the dedication of funds. This GASB Implementation Guidance is as follows:

> 27. Q—In the past, a governmental nonemployer entity that is not otherwise identified as being responsible for making contributions to a defined benefit pension plan has made contributions directly to the pension plan as a nonemployer entity. Should the nonemployer entity's involvement be accounted for as a special funding situation? If not, which accounting and financial reporting standards apply?
>
> A—No. The first characteristic of a special funding situation as described in paragraph 15 of Statement 68 is that the nonemployer entity is legally responsible for making contributions directly to the pension plan. A historical pattern of appropriating resources to make contributions directly to the pension plan is not equivalent to a legal obligation for the nonemployer entity to make contributions to the pension plan. Therefore, in this circumstance, the nonemployer entity's involvement should not be accounted for as a special funding situation. The employers that provide benefits through the plan should apply the requirements of Statement 68 for employers that are not in special funding situations. In periods in which it makes contributions, the nonemployer entity should apply the requirements of paragraph 13 of Statement No. 24, Accounting and Financial Reporting

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

for Certain Grants and Other Financial Assistance, as amended, for on-behalf payments of fringe benefits.[25]

This GASB Guidance appears to allow the State to report in its CAFR balance sheet *only* the amount of the NPL attributable to the State as a participating PERS and TRS employer (i.e. State's proportionate share of the NPL). Likewise, participating employers should report the NPL allocated to them by the Division of Retirement & Benefits, without reference to additional state contributions. But to ensure full disclosure occurs under the GASB 68 special funding rule, both the State and participating employers could consider including a footnote to their respective balance sheets reflecting the respective amounts of NPL attributable to additional state contribution funding under AS 14.25.085 and AS 39.35.280. The Division of Retirement & Benefits can supply that number upon request.

[25] GASB 68 Implementation Guide, Question 27.

Appendix

GASB 68 Excerpts

GASB 68 – Summary
Special Funding Situations
In this Statement, special funding situations are defined as circumstances in which a nonemployer entity is legally responsible for making contributions directly to a pension plan that is used to provide pensions to the employees of another entity or entities and either (1) the amount of contributions for which the nonemployer entity legally is responsible is not dependent upon one or more events unrelated to pensions or (2) the nonemployer is the only entity with a legal obligation to make contributions directly to a pension plan.

This Statement requires an employer that has a special funding situation for defined benefit pensions to recognize a pension liability and deferred outflows of resources and deferred inflows of resources related to pensions with adjustments for the involvement of nonemployer contributing entities. The employer is required to recognize its proportionate share of the collective pension expense, as well as additional pension expense and revenue for the pension support of the nonemployer contributing entities. This Statement requires the employer to disclose in notes to financial statements information about the amount of support provided by nonemployer contributing entities and to present similar information about the involvement of those entities in 10-year schedules of required supplementary information.

The approach required by this Statement for measurement and recognition of liabilities, deferred outflows of resources and deferred inflows of resources, and expense by a governmental nonemployer contributing entity in a special funding situation for defined benefit pensions is similar to the approach required for cost-sharing employers.

The information that should be disclosed in notes to financial statements and presented in required supplementary information of a governmental nonemployer contributing entity in a special funding situation depends on the proportion of the collective net pension liability that it recognizes. If the governmental nonemployer contributing entity recognizes a substantial proportion of the collective net pension liability, it should disclose in notes to financial statements a description of the pensions, including the types of benefits provided and the employees covered, and the discount rate and assumptions made in the measurement of the net pension liability. The governmental nonemployer contributing entity also should present schedules of required supplementary information similar to those required of

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

a cost-sharing employer. Reduced note disclosures and required supplementary information are required for governmental nonemployer contributing entities that recognize a less-than-substantial portion of the collective net pension liability.

This Statement also establishes requirements related to special funding situations for defined contribution pensions.

In detail, located in paragraphs 15 and 16:
Special Funding Situations
15. Special funding situations are circumstances in which a nonemployer entity is legally responsible for making contributions directly to a pension plan that is used to provide pensions to the employees of another entity or entities and either of the following conditions exists:

a. The amount of contributions for which the nonemployer entity legally is responsible is not dependent upon one or more events or circumstances unrelated to the pensions. Examples of conditions that meet this criterion include (1) a circumstance in which the nonemployer entity is required by statute to contribute a defined percentage of an employer's covered employee payroll directly to the pension plan and (2) a circumstance in which the nonemployer entity is required by the terms of a pension plan to contribute directly to the pension plan a statutorily defined proportion of the employer's required contributions to the pension plan. In contrast, examples of situations in which the amount of contributions is dependent upon an event or circumstance that is unrelated to pensions include (i) a circumstance in which the nonemployer entity is required to make contributions to the pension plan based on a specified percentage of a given revenue source and (ii) a circumstance in which the nonemployer entity is required to make contributions to the pension plan equal to the amount by which the nonemployer entity's ending fund balance exceeds a defined threshold amount.

b. The nonemployer entity is the only entity with a legal obligation to make contributions directly to a pension plan. Special funding situations do not include circumstances in which resources are provided to the employer, regardless of the purpose for which those resources are provided.

16. Requirements for accounting and financial reporting by employers and by governmental nonemployer contributing entities for defined benefit pensions with special funding situations are presented in paragraphs 83−117 and 120−122 of this Statement. Requirements for accounting and financial reporting by employers and by governmental nonemployer contributing entities for defined contribution

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

pensions with special funding situations are presented in paragraphs 127−133. Requirements for governmental nonemployer entities that have a legal requirement to make contributions directly to a pension plan but that do not meet either of the criteria in paragraph 15, and for the employers to which they provide support are presented in paragraphs 118−122, 134, and 135.

GASB 68 Implementation Guide, Special Funding Situations—Defined

25. Q—For purposes of evaluating whether there is a special funding situation under Statement 68, what does it mean for a nonemployer entity to be legally responsible for contributions to a pension plan?

A—For purposes of applying paragraph 15 of Statement 68, a nonemployer entity is legally responsible for contributions if it is required by legal or contractual provisions to make the contributions. Sources of legal provisions include those arising from constitutions, statutes, charters, ordinances, resolutions, governing body orders, and intergovernmental grant or contract regulations. Therefore, for purposes of Statement 68, a nonemployer contributing entity should be considered legally responsible for contributions if, for example, there is a statutory requirement that it make a contribution. (See also Questions 26−28.)

26. Q—If a state legislature is not bound by the decisions of a prior legislature and the state's requirement to contribute directly to a pension plan as a nonemployer entity is established in statute, could the state ever have a special funding situation?

A—Yes. The fact that a decision of one legislature cannot bind a subsequent legislature should not be considered an indication that the nonemployer contributing entity does not have a legal obligation to make a contribution for the purposes of applying paragraph 15 of Statement 68. Nor should the circumstance be considered a condition that makes the contribution dependent upon an event or circumstance unrelated to the pensions. Therefore, if the amount of the contribution is defined in such a manner that it meets the criterion in paragraph 15a of Statement 68 or if the nonemployer entity is the only entity that is legally responsible to make contributions directly to the pension plan, the circumstances would be classified as a special funding situation for purposes of Statement 68.

27. Q—In the past, a governmental nonemployer entity that is not otherwise identified as being responsible for making contributions to a defined benefit

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

pension plan has made contributions directly to the pension plan as a nonemployer entity. Should the nonemployer entity's involvement be accounted for as a special funding situation? If not, which accounting and financial reporting standards apply?

A—No. The first characteristic of a special funding situation as described in paragraph 15 of Statement 68 is that the nonemployer entity is legally responsible for making contributions directly to the pension plan. A historical pattern of appropriating resources to make contributions directly to the pension plan is not equivalent to a legal obligation for the nonemployer entity to make contributions to the pension plan. Therefore, in this circumstance, the nonemployer entity's involvement should not be accounted for as a special funding situation. The employers that provide benefits through the plan should apply the requirements of Statement 68 for employers that are not in special funding situations. In periods in which it makes contributions, the nonemployer entity should apply the requirements of paragraph 13 of Statement No. 24, Accounting and Financial Reporting for Certain Grants and Other Financial Assistance, as amended, for on-behalf payments of fringe benefits.