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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

December 2, 2005

The Honorable Hugh K. Leatherman, Sr.
Chairman, Senate Finance Committee
111 Gressette Building
Columbia, South Carolina 29202

Dear Senator Leatherman:

You have asked for our opinion concerning the legal authority of the Comptroller General with respect to action taken by him at the close of this past fiscal year. This action related to the 2004-2005 General Fund accounting books. In this regard, you referenced the fact that in his news release of August 11, 2005 "the Comptroller General announced that he had booked an item titled 'Correction of Prior Year's' Accounting Errors' in the amount of $104,934,400." In your view, such action constituted an effort by the Comptroller General to "appropriate funds," which the State Constitution only empowers the General Assembly to do. By way of additional background, you state the following:

> [t]hese "accounting errors" were related to three separate instances when specific General Fund revenue collections were moved from a cash basis of accounting to an accrual basis of accounting. The oldest of these transactions took place some fourteen years ago in Fiscal Year 1990-1991. The first transaction was actually adopted by the State Budget and Control Board as a way to avoid borrowing to close the fiscal year. The General Assembly subsequently spoke on the issue of the Board's accrual decision by enacting Section 11-9-85 of the South Carolina Code of Laws by stating that the sales tax, as well as several other taxes, would be accounted for on an accrual basis. In 2002, the General Assembly designated the documentary tax to be accounted for on an accrual basis.
>
> The problem with these revenue accruals was that they created a liability from the standpoint of Generally Accepted Accounting Principles (GAAP). These accruals along with a number of other factors, most notably the over-withholding of individual income tax, created a liability that exceeded assets at the close of most fiscal years. So, while our State showed cash basis surpluses over the past several fiscal years, we nevertheless suffered from a General Fund GAAP deficit.

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Richard Gettis

At the close of Fiscal Year 2004-2005, the Comptroller General determined that all defined obligations had been satisfied, including a supplemental appropriation of $286,777,347. However, he decided that prudent policy would dictate that the GAAP liability of $104,934,400 be addressed, so he transferred that amount of unencumbered General Fund revenues to the General Deposit Account to counterbalance the liability caused by previous accruals. I cannot identify any constitutional or statutory authority for the Comptroller to make such a transfer absent specific legislative directive.

Please understand that I have the utmost respect for the Office of the Comptroller General as well as its current occupant, General Richard Eckstrom. But, I also have an obligation as the Senate Finance Committee Chairman to defend those powers granted to the legislative branch. The Comptroller in effect appropriated funds that were not authorized by the General Assembly. In my opinion, the Comptroller did not possess the constitutional authority to make such an appropriation of funds.

While reluctant to offend my friend and fellow colleague on the Budget and Control Board, of greatest concern to me is the precedent set by this accounting transfer. Left unchecked and unchallenged, tacit approval of this transaction may be seen as an invitation for future comptrollers to act unilaterally with the public's funds. Thus, I am compelled to bring this constitutional issue to your attention.

Comptroller General's Statement

Comptroller General Eckstrom takes a markedly different view of his actions. Specifically, it is the Comptroller General's opinion that his action is in no way an "appropriation" by him, but is instead the exercise of his legal responsibility as Comptroller General to insure that past accounting "errors" for purposes of GAAP are corrected. His Statement of August 11, 2005 explains his position as follows:

[w]hen the State faced economic downturns and budget problems in three previous fiscal years – 1991, 1993, and 2001 – former office holders improperly included a total of 104.9 million of "additional revenues" in the State's operating budget by "picking up an extra month" (i.e., 13 months) of certain taxes and fees in one or the other of those years. Former State officials made those ill-advised decisions in their fruitless attempts to protect the State's AAA credit rating.

As a result, since 1991 the State's budgetary records used by the General Assembly have been artificially inflated. Ironically, this condition has produced chronic *deficit* fund balances in the State's audited financial statements since that time.

> Because this practice creates chronic *deficit* fund balances for the State, it has been one of the many underlying causes of the loss of the State's AAA credit rating in 1993 – and again in 1995. Furthermore, unless the prior years' accounting errors were corrected, the damage they caused would have seriously hindered the State in recovering its AAA rating.
>
> Accordingly, the Comptroller General has directed his staff to correct for the effect of those prior years' errors in connection with closing the books for the fiscal year ended June 30, 2005. As a result, this correction properly reduces the State's budgetary fund balance to 533.4 million at June 30, 2005. *This correction in no way affects any previous appropriations made by the General Assembly, neither in the FY 05-06 Appropriation Act nor in the FY 05 Supplemental Appropriation Bill.*
>
> This correction is underwritten entirely by 104.9 of *additional* FY 05 surplus revenues that were received during FY 05 – yet will *not* be recognized as budgetary surplus in the State's FY 05 budgetary accounts. Because this amount of revenue previously had been improperly recognized and spent by the State in 1991, 1993, and 2002, it would have been improper to *again recognize and spend*, this 104.9 million in FY 05.

(emphasis in original). We note also that the Comptroller General has submitted to us in response to this opinion request numerous additional materials explaining his actions in this matter and documenting the history of how the negative GAAP Fund balance came about. We are appreciative of his untiring efforts to provide as much information to this Office as possible regarding this issue.

Law / Analysis

Our analysis begins with an examination of the generally governing law with respect to the powers and duties of state officers, such as the Comptroller General. In *Op. S.C. Atty. Gen.*, Op. No. 79-79 (June 12, 1979) we stated the following in that regard:

> '[i]n general, the powers and duties of officers are prescribed by the constitution or by statute or both, and they are measured by the terms and necessary implication of the grant, and must be executed in the manner directed and by the officer specified. If broader powers are desirable, they must be conferred by the proper authority. They cannot be merely assumed by administrative officers, nor can they be created by the courts in the proper exercise of their judicial functions. No consideration of public policy can properly induce a court to reject the statutory definition, of the powers of an officer ....

(Quoting 63 Am.Jur.2d *Public Officers and Employees*, § 263). And, in *Op. S.C. Atty. Gen.*, February 19, 1988, we said the following:

> [t]he administrative officer's power must be exercised within the framework of the provisions bestowing regulatory powers on him and the policy of the statute which he administers. He cannot initiate policy in the true sense, but must fundamentally pursue a policy predetermined by the same power from which he derives his authority. It is the statute, not the agency, which directs what shall be done. The statute is not a mere outline of policy which the agency is at liberty to disregard or put into effect according to its own ideas of the public welfare ....

(Quoting 1 Am.Jur.2d *Administrative Law* § 132). In that same opinion, we also observed that

> [t]he powers of administrative agencies, bodies or officials are not to be derived from mere inference, and their jurisdiction cannot be conferred by implication. As a general rule, however, in addition to the powers expressly conferred on them by organic or legislative enactment, such officials and bodies, in the absence of restricting limitations of public policy or express provisions as to the manner of exercise of the powers given, have such implied powers, as are necessarily inferred or implied from, or incident to, the express powers granted to, or duties imposed on them, and to accomplish the purposes of the legislation which established them.
>
> The implied powers of administrative agencies and bodies are not to be extended beyond fair and reasonable inferences, or what may be necessary for the just and reasonable execution of the powers expressly granted ... .

(Quoting 73 C.J.S. *Public Administrative Law and Procedure* § 51). Thus, it is clear that there must be express statutory authority for the Comptroller General's actions or such authority must be derived by necessary implication from existing statutes. The fact that such actions are based upon sound public policy or the protection of the State's credit rating, while admirable, are not sufficient to bestow legal authority to the officer.

We note also that it is usually "presumed that a ... public officer ... properly or regularly discharged duties or performed acts required by law, in accordance with the law and the authority conferred." 55 C.J.S. *Mandamus* § 351. "Public officers, in the absence of evidence to the contrary, are presumed to have done their duty." *Cantrell v. Fowler*, 24 S.C. 424 (1886). In short, the law requires "that every public officer is presumed to have acted correctly in the discharge of his official duties, until the contrary is proved." *Nixon v. Bynum*, 17 S.C.L. 148 (1 Bail. 148) (1829).

With respect to the Comptroller General of South Carolina, of course, the office is constitutionally created, being recognized in Art. VI, § 7 of the State Constitution. Such provision states that "[t]he duties and compensation of such officers [including the Comptroller] shall be prescribed by law ...." This terminology is deemed to encompass not only statutory, but whatever common law powers the officer may possess as well. *See, Kinross et al. v. Cooper*, 224 Ill. App. 111, 1922 WL 22066 (Ill. App. 2 Dist. 1922).

While our Supreme Court has held that certain constitutional officers, such as the Attorney General and the Sheriff, possess common law authority, *see*, *State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (2002) [Attorney General possesses broad common law authority] and *Prosser v. Parsons*, 245 S.C. 493 141 S.E.2d 342 (1965) [at common law, sheriff possesses power and authority to arrest without warrant in certain instances], our Court has determined that the Comptroller General possesses no powers at common law. In *State of South Carolina v. Corbin and Stone*, 161 S.C. 533, 1882 WL 5537 (1882), the Court concluded as follows:

> *[t]here are no common law powers attached to this office.* On the contrary, the comptroller is a constitutional officer, having only such powers and duties as have been, or may be provided by law .... We have not been cited to any act in which such power [regarding the power at issue in the case] is expressly delegated, nor in which such duties are imposed, as would by necessary implication invest him with such power. Nor have we been able to find any act of the kind. We conclude, therefore, that no such act exists.

(emphasis added). Thus, absent common law powers vested in the Office of Comptroller General, we must look to the existing statutes relating to that Office. Obviously important also is the state Constitution bestowal of any such powers as are relevant or limitations upon the authority employed in a given instance.

The Comptroller General is, by statute, designated a member of the "executive department." *See,* S.C. Code Ann. Section 1-1-110. In *Bank of Johnston v. Prince*, 136 S.C. 439, 134 S.E. 387 (1926), our Supreme Court stated that "[i]t appears, therefore, and we so hold, that the General Assembly of the state has full power and authority to prescribe the duties and powers of ... the comptroller general ...." 134 S.E. at 388.

Over the years, the General Assembly has indeed delegated numerous statutory powers and duties upon the Comptroller General pursuant to provisions contained throughout the Code. For example, the Comptroller is authorized to make various deductions for compensation. See e.g. Chapter 11 of Title 8. He is also required to "account for and control expenditures of individual federally funded projects for all agencies using the Statewide Accounting and Reporting System." *See* § 2-65-60. Many of the financial and accounting duties of the Comptroller General are codified in Chapter 3 of Title 11. Section 11-3-50, for instance, requires the Comptroller to maintain records concerning "all appropriations of the General Assembly ...." and all "contingent accounts allowed by the General Assembly and the time at which payment on such accounts shall be made."

In addition, the Comptroller is mandated to provide a statement of all property taxes throughout the State (§ 11-3-60). He is required pursuant to § 11-3-90 to report annually to the General Assembly "his transactions in regard to unappropriated funds in the State Treasury." Section 11-3-100 mandates that the Comptroller "keep a set of books exhibiting the separate transactions of the State Treasury." He is also obligated to "annually report to the General Assembly

a balance sheet of the books aforesaid, setting forth as well by whom debts are due to the State as the amounts of those debts."

Payments by the State Treasurer, except in certain instances, must be made pursuant to warrants drawn by the Comptroller General. Section 11-3-130. Section 11-3-170 further provides that "[a]fter the approval of the annual appropriation act by the Governor, moneys may be obtained from the State Treasury only by drawing vouchers upon the Comptroller General." Moreover, § 11-3-185 also states:

> [t]he expenditure of money appropriated by the General Assembly is by warrant requisitions directed to the Comptroller General. Upon receipt of the requisition, accompanied by invoices or other satisfactory evidence of the propriety of the payment, and itemized according to standard budget classifications, the Comptroller General shall issue a warrant on the State Treasurer to the payee designated in the requisition. Requisitions for warrants may not be processed for amounts less than one dollar. Upon approval and designation by the State Budget and Control Board, state institutions may requisition funds in favor of their own treasurer, itemized only to the extent of the purpose of the appropriation as expressed in the act or joint resolution appropriating the funds, and may deposit these funds in the name of the institution in the bank or banking institutions designated by the State Treasurer, and disbursed these funds by check in order to meet the purposes of the appropriation. Strict account must be kept of all these expenditures according to standard budget classifications. Money may be drawn only when actually owing and due. The Comptroller General shall establish rules and regulations for the uniform reimbursement, remittance, and transfers of funds to the general fund of the State as required by law.

The Comptroller also possesses other statutory duties which we do not find it necessary to enumerate herein.

In materials submitted to this Office, the Comptroller General specifically relies upon "three legal bases for this Office correcting an accounting error." *See, Memorandum* of Comptroller General Richard Eckstrom, October 26, 2005. See also: Research and Information Concerning Opinion Request (submitted by Comptroller General and dated October 7, 2005). In his *Memorandum*, the Comptroller General notes that his Office dates back to 1799 and, since that time, "has been charged with the duties of superintending and adjusting the accounts of the State and rendering 'true and accurate' accounts of the actual state of the 'treasury.' (Citing Act No. 1729, The Statutes at Large of South Carolina 1838-1841, Volume V at 360). While Act No. 1729 of 1799 is no longer on the books, the Comptroller argues that "[t]hese responsibilities have been carried forward over the years in both the S.C. Code of Laws (Title 11, Chapter 3) and in various provisos."

Specifically, the Comptroller cites § 11-3-50 and 11-3-90 which are referenced above. In addition, he relies upon Proviso 59.2 of the annual Appropriations Act, which states as follows:

> [i]t is the intent of the General Assembly that the State of South Carolina issue financial statements in conformance with Generally Accepted Accounting Principles (GAAP). To this end, the Comptroller General is directed, as the State Accounting Officer, to maintain a Statewide Accounting and Reporting System that will result in proper authorization and control of agency expenditures, including payroll transactions, and in the preparation and issuance of the official financial reports of the State of South Carolina. Under the oversight of the General Assembly, the Comptroller General is given full power and authority to issue accounting policy directives to state agencies in order to comply with GAAP. The Comptroller General is also given full authority to conduct surveys, acquire consulting services, and implement new procedures required to implement fully changes required by GAAP.

The Comptroller General further argues that "[b]ecause revenues in three prior fiscal years had been improperly recognized, the budgetary general fund balance had been overstated by 104.9 million." Thus, he contends, he has, as the State's Accounting Officer, corrected "prior errors," and has sought to comply with the General Assembly's directive in Proviso 59.2 to "issue financial statements in conformance with ... (GAAP)." *Memorandum, Id.* In the Comptroller's view, he is required by law to present an accurate statement of the State's books, and thus he is mandated under the law to reduce the amount of the surplus to accurately reflect the State's financial status.

The Comptroller also references Proviso 73.20 of the Appropriations Act, now codified at § 11-11-345. Such proviso states as follows:

> [i]f the Comptroller General determines upon the closing of the state's financial books for Fiscal Year 2004-2005, that the State has a negative Generally Accepted Accounting Principles Fund balance (GAAP Fund Deficit), the expenditure of surplus general fund revenues by this provision are suspended and must be used to the extent necessary to offset the GAAP Fund Deficit. A negative GAAP Fund balance is defined as the amount remaining after subtracting all state liabilities and reserve funds from state assets on an accrual basis.

Regarding this provision, the Comptroller General writes that "[t]his proviso ... clearly indicates the General Assembly's intent *for the Comptroller General* to address the underlying negative GAAP fund balance 'upon the closing of the state's financial books.'" *Memorandum, Id.* (emphasis added). He states that "[t]his is precisely what this Office did when it corrected the accounting error in the budgetary fund balance." *Id.* Most recently, the Comptroller, in a November 30, 2005 Memorandum directed to all Agency Directors and Finance Directors advised the following:

> I am happy to report that the supplemental funds authorized under part 1B, section 73.18 of the 2005-2006 Appropriations Act will be available in the designated agency accounts on December 1, 2005, except for any agency that has not provided the State its required 2005 audited financial statements ... .

Thus, the Comptroller, in conformity with Proviso 73.20, reported that it was not necessary to use the surplus funds which were actually appropriated by the Legislature pursuant to Proviso 73.18 to offset the GAAP fund deficit.[1]

The Comptroller General emphasizes that, pursuant to 11-3-90, which requires the Comptroller to report annually, to the General Assembly "his transactions in regard to unappropriated funds in the State Treasury ...", his Office "has routinely made corrections to, and adjustment of, unappropriated surplus funds." *Memorandum, Id.* He cites a number of examples from past years in this regard.

Finally, the Comptroller General argues he has made no "appropriations" of funds. He writes:

> [w]hat I did in this instance is exactly the opposite of an "appropriation" in that I neither spent any money nor authorized any expenditure. *Rather, I corrected the State's accounting records so that the budgetary Fund Balance is now properly recorded . The $104.9 million of surplus underlying this correcting entry now becomes a part of the GAAP general fund balance.* Furthermore, my action in this matter in no way affects any previous appropriations made by the General Assembly ....
>
> [i]n this instance, I have properly corrected a long-standing trio of accounting errors that has long distorted the State's accounting records. I have acted in good faith under the mantle of authority that this Office has had for over 200 years. I believe that my duty and authority to correct these accounting errors was clear.

The Comptroller adds that

> ... if the General Assembly should decide to overturn this correction because it contests my legal authority for taking the action I did. I urge it then to instruct my Office to reverse the correcting entry that I made – and to re-record it under the General Assembly's direction.

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[1] At the time the 2005-2006 Appropriations Act was enacted, the Legislature had not anticipated the ultimate size of the surplus which turned out to be more than $400 million. However, the Comptroller General used a portion of the surplus - $104.9 million – which had not yet been encumbered by the General Assembly in order to offset the GAAP fund deficit.

Memorandum, Id. (emphasis added)

Article X, § 7(a) of the South Carolina Constitution provides that "[t]he General Assembly shall provide by law for a budget process to insure that annual expenditures of state government may not exceed annual state revenue." In an opinion dated June 18, 1991, we construed Art. X, § 7(a), noting the following:

> ... prior to 1985, the specific procedures for dealing with a *year-end deficit* were set forth in the State Constitution. Now, however, it appears that the State Constitution merely leaves it to the General Assembly to insure that the state budget is balanced. The language of Article X, Section 7(a) simply states that the General Assembly shall provide for a budget process to insure a balanced budget but does not specify the manner or procedure for removing any deficit which may occur. In the past, the General Assembly has seen fit to enact methods to meet the expenses of the State, such as Sections 11-9-230 through 11-9-300 of the Code which authorize the State Budget and Control Board to borrow funds. See also Act No. 612 of 1990, section 129.15 (1990-1991 Appropriations Act) [General Assembly has delegated to the Budget and Control Board the authority to reduce appropriations in order to insure a balanced budget.] *However, from the standpoint of the State Constitution, it remains within the discretion of the General Assembly, pursuant to Article X, Section 7(a) to determine as a matter of state policy what specific course of action should be taken where an operating deficit occurs at the conclusion of a fiscal year.*

(emphasis added).

Thus, it is clear that the Constitution only speaks in terms of what action is mandated at the end of *every fiscal year* in terms of correcting a deficit. In other words, Art. X, § 7 "requires the General Assembly to provide for a balanced budget ..." each fiscal year. *Town of Hilton Head v. Morris*, 324 S.C. 30, 484 S.E.2d 104, 107 (1997). If revenues are less than expenditures at the close of a particular fiscal year, there is a "deficit" in the constitutional sense. The Constitution leaves it to the General Assembly in terms of action which must be taken to address a "deficit" in the constitutional sense. *Op. S.C. Atty. Gen.*, June 18, 1991, *supra.*

With respect to a budgetary surplus – when revenues exceed expenditures at the close of the fiscal year – our Supreme Court has held that Art. X, § 7 "does not prohibit a surplus." The Court has also made it clear that it is completely within the province of the General Assembly as to how to use or employ the surplus funds. As was stated by the Court in *Cox v. Bates*, 237 S.C. 198, 116 S.E.2d 828, 834 (1960)

> [t]he General Assembly ... set aside a certain amount of the possible surplus as a reserve fund against future deficits and appropriated any additional surplus to the counties for school purposes. While it is a continuing appropriation in terms, it is

> subject to future legislative repeal .... Therefore, plaintiff and others so minded may seek at the ballot box remedy for what they consider a wrong. Much of his argument here is, wittingly or not, concerned with legislative policy, with which the court has nothing to do ....
>
> We find no provision of the constitution which prohibits continuing appropriations, which are subject to repeal by any future General Assembly, as has been said ... .
>
> As we hold here, *it is generally the law elsewhere that where a surplus remains after payment of appropriations, it may be appropriated to other purposes.* 42 Am.Jur. 776, Public Funds, Sec. 80. Annotation Ann. Cas. 1917 B, 867. *Parker v. Bates*, [216 S.C. 52, 56 S.E.2d 723 (1949)] ....

(emphasis added).

In *Cox*, the Court also recognized that the Legislature required the reserve fund created "to be set up and maintained from surplus funds if the latter are in hand at the end of the fiscal year, and held subject to meet any subsequent deficit." The Court observed that "'[t]he transfer of the general fund of the unused surplus of an appropriation is not an appropriation.'" Citing 81 C.J.S. *States* § 164, p. 1215; *People ex rel. Colorado State Hospital v. Armstrong*, 104 Cola. 238, 90 P.2d 522 (1939). *Nevada-California Electric Corp. v. Corbett*, 1938, 22 F.Supp. 951 (N.D.Cal. 1938). Also, the Court quoted with approval *Briggs v. Greenville Co.*, 137 S.C. 288, 135 S.E. 153, 156 (1926) to the effect that "'[t]he power of the Legislature over the matter of appropriations is plenary, except as restricted by the Constitution.'"

As we noted earlier, while the Constitution expressly provides that the General Assembly must "provide by law for a budget process" when a year-end operating deficit occurs, the Constitution does not address nor recognize a "GAAP Fund" deficit in any way. Indeed, the accounting methodology which resulted in the creation of this "GAAP Fund deficit" beginning in 1991 was approved and ratified by State authorities, and was subsequently enacted into state law shortly thereafter. The accrual method for calculating sales tax revenues was expressly approved by the Budget and Control Board, chaired by then Governor Carroll Campbell, at that time. In *Op. S.C. Atty. Gen.*, Op. No. 92-22 (April 28, 1992), we described that process of approval as follows:

> As noted, Art. X, § 7 of the State Constitution requires that the State not end its fiscal year with a deficit. It appeared at the end of FY90-91 that a deficit would occur. The General Assembly had adjourned by that point in time and could not act to resolve the deficit. The Budget and Control Board decided to accrue revenue from the June collections of sales tax, formerly accounted for in July (i.e., the next fiscal year, by the cash method) in June, to post it to the 1990-91 fiscal year to avoid reporting a deficit. Had the General Assembly been in session, perhaps the solution

might have been different; but the Budget and Control Board had to fashion a solution to prevent a year-end deficit.

We understand that sales tax revenues were singled out for this treatment due to the nature of the tax. Because the sales tax is collected each time a sale is made, and further because those who collect the sales tax (merchants) are considered paid agents of the State (see § 12-36-2610), sales tax revenues in the hands of the agents are or can be considered to be in the hands of the State (i.e., the principal of the agent) when received by the agent. Thus, this tax and the resulting revenues are somewhat unique and can be treated in a fashion different from other tax revenues.

The language of the statute providing the time when payment of sales tax revenue is due, is also instructive as to legislative intent. Section 12-36-2570 provides in part (A) that

> [t]he taxes imposed under the provisions of this chapter, except as otherwise provided, are due and payable in monthly installments on or before the twentieth day of the month following the month in which the tax accrues.

(Emphasis added.) As you have pointed out, this statue is a taxation statute rather than a statute prescribing an accounting method. By using the term "accrues," however, and since agents of the State received the revenue on behalf of the principal (the State) at the time of a taxed sale, the legislature has acknowledged that the revenue has been acquired. See Black's Law Dictionary, "accrue," page 19 (5th Ed. 1979); "accrued taxes," page 20 ("taxes which are properly chargeable in a given accounting period but not yet payable"). Thus, the statute offers additional support for application of the accrual method of accounting to this form of revenue.

By making this decision at a time when it was apparent that spending (pursuant to the approved appropriations act) would exceed revenues, changing the accounting method as to sales tax revenues authorized the replenishment of moneys already spent. Thus, a means was provided to pay for already-received revenues to meet the State's financial obligations.

We further understand that once this sales tax revenue has been accelerated by changing the accounting method, to reverse the situation by again changing the accounting method would create an immediate deficit. To prevent such deficit, the general fund of the State would require an immediate infusion of the amount previously transferred, which we understand to be $83.1 million, in real cash, at one time.

> The foregoing is intended to be an explanation of the change in the accounting method for sales tax revenues and is not intended to comment on the wisdom, necessity, or appropriate application of accounting principles or auditing standards. We reiterate our belief that such is a policy decision rather than a question of law.
>
> In conclusion, it must be noted that the Budget and Control Board is a creation of the General Assembly and derives its authority to act from the General Assembly. That body is certainly in the position to limit or modify the Board's actions as it sees fit. Also, the General Assembly could, if it wished, direct that a particular accounting system be utilized as to any or all of the various sources of revenue. Based on the foregoing and the legal principles discussed thoroughly in the enclosures, *we are of the view that the Budget and Control Board was most probably acting within its scope of authority when taking the above-discussed actions.*

(emphasis added).

Following the approval by the Budget and Control Board in 1991 of the use of the "accrual" method to calculate revenues, so that the budget might be balanced that year, the General Assembly did not act to "limit or modify" the Board's action. Indeed, the Legislature ratified and approved that action. It enacted into law what is now § 11-9-85 authorizing the use of such method to determine revenues produced by certain taxes, including sales taxes. Section 11-9-85 states:

> [f]or accounting purposes, the Comptroller General *shall* calculate revenues of the following taxes and fees on an accrual basis:
>
> (1) stamp and business license;
>
> (2) alcoholic liquor;
>
> (3) beer and wine;
>
> (4) soft drink;
>
> (5) electric power;
>
> (6) gasoline and motor fuel;
>
> (7) admissions, including bingo admissions;
>
> (8) sales, use, and casual excise; and

(9) recording a deed.

Thus, as a matter of legislative policy, the General Assembly has required use of the "accrual" method of accounting to determine *the amount of revenues* which certain taxes and fees produce in a given fiscal year. Included within the group of taxes therein is, of course, the sales tax. Why the Legislature did not direct that the accrual method also be used to determine the State's expenditures, is unclear. However, we are aware of no provision in the Constitution of South Carolina which would preclude or prohibit the General Assembly from enacting § 11-9-85. *See, Unisys v. S.C. Budget and Control Bd., et al.*, 346 S.C. 158, 551 S.E.2d 263 (2001) [General Assembly possesses plenary authority to enact any law not prohibited by State Constitution].

As discussed more fully below, while no provision in our Constitution addresses a GAAP Fund deficit, we think that it is the General Assembly which must deal with this problem. Of course, it is elementary that

> [t]he supreme legislative power of the State is vested in the General Assembly; the provisions of our State Constitution are not a grant but a limitation of legislative power, so that the General Assembly may enact any law not expressly, or by clear implication prohibited by the State or Federal Constitution ....

State v. Charron, 351 S.C. 319, 569 S.E.2d 388 (Ct. App. 2003) (referencing *Moseley v. Welch*, 209 S.C. 19, 26-27, 39 S.E.2d 133, 137 (1946). As a corollary, it is also well recognized that "[g]overnmental agencies ... can exercise only those powers conferred upon them by their enabling legislation or constitutional provisions, expressly, inherently, or impliedly." *Op. S.C. Atty. Gen.*, September 9, 2002; *Op. S.C. Atty. Gen.*, January 8, 1999; *Op. S.C. Atty. Gen.*, September 22, 1988.

With that background, we turn now to your specific question regarding the Comptroller's actions in reducing the amount of the 2004-2005 surplus by $104.9 million and allocating such amount as part of the GAAP general fund balance in order to remove the GAAP Fund deficit. As referenced above, the appropriations power is exclusively a legislative function. Moreover, our Supreme Court stated in *Gregory v. Rollins*, 230 S.C. 269, 95 S.E.2d 487, 489 (1956), "[i]t is fundamental that the appropriation of public funds is a legislative function ... and therefore beyond the power of the power of the Grand Jury ... beyond the power of the County Board of Commissioners or, in Lancaster County, its Board of Directors [or] beyond the province of the judiciary ...." The Courts "... may not by mandamus or otherwise, direct the appropriation of public funds, for to do so would be to trespass upon the legislative domain." *Id.* As the Court stated in *Crawford v. Johnston*, 177 S.C. 399, 181 S.E. 476, "[u]nquestionably, the General Assembly may appropriate funds from the State treasury to whatever purpose it thinks proper so long as its acts are not in conflict with the Constitution, even if in doing so it changes existing laws and requires the levy of additional taxes." *See also, State ex rel. Richards v. Moorer*, 152 S.C. 455, 150 S.E.269 (1929) ["'The power of the Legislature over the matter of appropriations is plenary, except as restricted by the Constitution."] And, in *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993),

the Court recognized "... the Legislature's power to appropriate revenues as needed among legitimate government objectives ...." *See also*, Art. X, § 5 of the South Carolina Constitution [no tax, subsidy or charge may be fixed, laid or levied without the consent of the people or their representatives lawfully assembled. Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied]; Art. X, § 9 ["(a)n accurate statement of the receipts and expenditures of the public money shall be published annually in such manner as may be prescribed by law."]; Art. X, § 10 ["The General Assembly may direct, by law in what manner claims against the State may be established and adjusted."]

Our Supreme Court has consistently recognized the Legislature's plenary power to appropriate funds as it sees fit and has guarded such power from the intrusions of or interference from other branches of government. For example, in *Gilstrap v. South Carolina Budget and Control Board*, 310 S.C. 210, 423 S.E.2d 101 (1992), the Court held that the legislative power to appropriate public funds may not be delegated to executive officers or boards. There, an action for injunctive relief was sought to prohibit the Budget and Control Board from implementing its proposed plan for budget reductions. In anticipation of a year-end deficit, the Board "adopted a plan to reduce appropriations under the 1992 Appropriations Act ... [basing such plan] on the rate of growth in each agency's budget over the past year." 310 S.C. at 212. The Court concluded that such power assumed by the Board exceeded its legislative grant of authority to make reductions only across the board based on the total appropriations." *Id.* at 214. Its reasoning was expressed as follows:

> [t]he legislature may not delegate its power to make laws. *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 295 S.E.2d 633 (1982); *Beaver v. S.C. State Housing Authority*, 271 S.C. 219, 246 S.E.2d 869 (1978). The appropriation of public funds is a legislative function. *State ex rel. McLeod v. McInnis, supra; Gregory v. Rollins*, 230 S.C. 269, 95 S.E.2d 487 (1956). A statute which, in effect, gives an administrative body an "*absolute, unregulated and undefined discretion*" bestows arbitrary powers and is an unlawful delegation of legislative powers. *Bauer*, 271 S.C. at 233, 246 S.E.2d at 876.
>
> If the Act is so broad as to allow the Board to apply reductions with the only requirement being that they be applied uniformly, the effect would be to allow the Board to appropriate funds with unbridled discretion. Such an interpretation would make the Act an unlawful delegation of legislative authority. We will not construe to do that which is unconstitutional ....
>
> The clear statutory language, evidence of legislative intent, longstanding administrative interpretation, and required constitutional construction of the Act leave no doubt that the Board exceeded its statutory authority in proposing cuts based on growth .... In the absence of statutory and constitutional authority to reduce the rate of expenditure based on growth, either the Board must make the budget cuts

> across the board proportionately ... or the Governor must recall the Legislature to deal with budget reductions.

Id. at 216.

Another landmark case in this area, which will be discussed more fully below, is *State ex rel. McLeod v. McInnis, supra.* In *McInnis*, the Court, in striking down the delegation by the Legislature of powers to the Joint Appropriations Review Committee, observed that

> [t]he General Assembly has, beyond question, the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. This the Assembly traditionally does by way of the annual State Appropriations Bill. In writing the appropriations bill, it attempts as best it can to predict the needs of the various departments of state government.

278 S.C. at 314.

And, in *Condon v. Hodges*, *supra*, the Court concluded that the Governor, Comptroller General and Treasurer could not coordinate a transfer of $28,500,000.00 to the General Fund. These were monies which the Appropriations Act had allocated from the escrow fund, created by the Atomic Energy and Radiation Control Act ("Barnwell fund"), to the colleges and universities of South Carolina. In *Condon*, the General Assembly had transferred $38,500,000, among other items, to the colleges and universities from the Barnwell fund. The Governor vetoed, among other items, the specific base-like reductions of each of the colleges and universities budget, thus returning the colleges and universities to their prior funding level, but leaving the state budget out of balance. In order to correct the deficit created by these vetoes, the Governor included a statement in his veto message indicating that certain colleges and universities had agreed to return a total of $28,500,000 in funds appropriated by the Legislature. Subsequently, the Governor, Treasurer and Comptroller formally requested, through the Commission on Higher Education, the return of the Barnwell funds.

The Attorney General then brought suit in the original jurisdiction of the Supreme Court against the Governor, Treasurer and Comptroller General, alleging that the State Constitution had been violated by such transfer of funds to the General Fund. The Court agreed.

In its opinion, the Court noted that "[t]he question is whether the concerted efforts of members of the executive branch encroached upon this power [of the Legislature to appropriate funds] by having appropriated funds transferred from the schools to the General Fund." *Id.* at 245. Concluding that the actions of the Governor, Treasurer and Comptroller General were violative of the state Constitution, the Court explained as follows:

> ... there is no provision in the South Carolina Code or Constitution which provides that the members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money. In fact, there is clear legislative intent that the ability to transfer appropriated money will lie only with the General Assembly. *See* S.C. Code Ann. § 11-9-10 (1986) ("It shall be unlawful for any moneys to be expended for any purpose or activity except that for which it is specifically appropriated, and *no transfer from one appropriation account to another shall be made unless such transfer be provided for in the annual appropriation act.*") (emphasis added); S.C.Code Ann. § 11-9-20(A) (Supp.2001) ("It is *unlawful* for an officer, clerk, or other person charged with disbursements of state funds appropriated by the General Assembly to exceed the amounts and purposes stated in the appropriations, or *to change or shift appropriations from one item to another. Transfers may be authorized by the General Assembly in the annual appropriation act for the State.*") (emphasis added)
>
> Furthermore, the General Assembly cannot delegate this legislative power even if it so desired. *See Gilstrap v. South Carolina Budget and Control Bd., supra* (General Assembly may not delegate its power to make laws); *State ex rel. McLeod v. McInnis, supra* (General Assembly's attempt to delegate to Joint Appropriations Review Committee power to control expenditure of state and federal funds was found to violate separation of powers because committee was permitted to control expenditures by administration rather than by legislation); *Bauer v. South Carolina State Housing Auth.*, 271 S.C. 219, 246 S.E.2d 869 (1978) (non-delegation doctrine is based on the constitutional requirement that branches of government be forever separate and distinct from each other).
>
> Therefore, the authority to transfer appropriated money lies with the General Assembly and not the executive branch ....

Id. at 245-246.

Thus, it would appear that *Gilstrap* and *Condon* go far in resolving the issue which you have raised. *Condon* held that executive officers could not transfer appropriated funds without legislative authorization. *Gilstrap* concluded that the Budget and Control Board could not be constitutionally delegated the authority to make appropriations and thus could not reduce appropriations in a manner inconsistent with the governing statute.

However, the Comptroller General argues that his action here did not contravene these principles because the surplus funds in question here were not appropriated, see Proviso 73.18 of the 2005-2006 Appropriations Act, but were instead *unappropriated* surplus funds. He contends that § 11-3-90 requires him to report annually "his transactions in regard to unappropriated funds in the State Treasury" and that such provision has been employed over the years by Comptrollers General

to correct various accounting errors. The Comptroller maintains that he is simply correcting the earlier accounting errors which resulted in an overly inflated surplus (through use of the accrual method of calculating revenues) or, as he puts it, such surplus was "overstated." However, we do not believe that the authorities distinguish between appropriated and unappropriated funds in terms of the exclusive province of the General Assembly to determine how funds which come into the Treasury are allocated or spent.

A good example of this is *State ex rel. McLeod v. McInnis, supra.* There, the Court struck down the Legislature's delegation to the Joint Appropriation Review Committee ("JARC") the power to determine how unappropriated federal funds were spent. Such statute provided in part that

> [t]he Governor, with prior approval of the Committee (JARC), in accordance with the procedure set forth in Sections 4 and 5, may waive the requirement that indirect cost recoveries or overhead cost reimbursements shall be returned to the general funds revenue if it determines that it is in the best interests of the agency or institution seeking the grants ....
>
> All Federal Funds received shall be deposited in the State Treasury, if not in conflict with federal regulations, and withdrawn therefrom as needed, in the same manner as that provided for the disbursement of state funds. If it shall be determined that federal funds are not available for, or cannot be appropriately used in connection with, all or any part of any activity or program for which state funds are specifically appropriated in this Act to match Federal funds, the appropriated funds may not be expended and shall be returned to the General fund, except upon specific written approval of the Budget and Control Board after review by the Joint Appropriations Review Committee ....

278 S.C. at 316.

The *McInnis* Court, however, rejected any argument that the Act empowering JARC did not contravene the constitutional requirement of separation of powers. Concluded the Court:

> [t]he inspiration for the creation of JARC arose from the fact that the federal government has in recent years after the appropriations bill had been approved, allocated substantial sums of money by way of revenue sharing, etc. to departments of South Carolina government and local governmental entities. Accordingly, the agencies were receiving and spending not only appropriations which the legislature meant for them to have but, in addition, substantial federal contributions. As a result, the General Assembly was not effectively controlling departmental programs and appropriations.

> Typically, a department would spend all that the legislature meant for it to have, plus those amounts it could procure by way of application for grants to the federal government. A report of the Legislative Audit Council in the record shows that various executive agencies were supplementing their state appropriations with millions of dollars in grants of which the General Assembly was not aware. The effect of all this brought about a result obviously inconsistent with the right and duty of the legislature to determine the appropriations of agencies and the programs undertaken.

278 S.C. at 314. The Court deemed such spending by JARC as a violation of the separation of powers provision of the South Carolina Constitution (Art. I, § 8). In the view of the Court,

> [a]n agency, by applying for an receiving grants, for all intents and purposes was, by indirection, coming to determine programs and policy matters which were the province of the General Assembly. *The net effect was that the Assembly was not, in the last analysis determining the total amount of money expended by state agencies.* JARC, by exercising the powers allocated to it makes determinations that should be those of the entire General Assembly. This it undertakes to do not through a legislative process, as it surely could, but through the administration of appropriations which is the function of the executive department. The desirability of the General Assembly's "getting a handle" on these matters is understandable and appropriate but its effort to control these matters through a committee composed of twelve of its members is constitutionally impermissible.

Id. Thus, the Court concluded:

> ... the board authority which the Assembly would confer upon JARC is apparent. The legislature, through these sections, has attempted to delegate to JARC the power to control expenditure of state and federal funds. These sections are constitutionally invalid because they permit the twelve Defendants to control expenditures by administration rather than legislation. JARC would have, in effect a veto power.
>
> We would hold that the powers assigned to JARC by the sections quoted hereinabove are executive in nature and are not reasonably incidental to the performance of any legislative duty. ...
>
> It is not amiss to point out that a ruling that the work of JARC is legislative would be of little comfort. Legislative authority may not be delegated. *Gunter v. Blanton, 259 S.C. 436, 192 S.E.2d 473 (1972).*

Accordingly, *McInnis* found that the allocation of unappropriated funds (from federal grants) were "determinations that should be those of the entire General Assembly." Moreover, the Court

concluded that if such power were considered legislative, it could not be delegated by the Legislature to the executive branch,

Cases from other jurisdictions which have addressed the expenditure of unappropriated funds have likewise concluded that members of the executive branch could not determine how to expend or allocate such funds. For example, in *Wiseman v. Boren*, 545 P.2d 753 (Okl. 1976), the Oklahoma Supreme Court concluded that the Governor and other state officials did not possess authority to transfer surplus funds from the state's general revenue fund to a sinking fund for the purpose of retiring state bonds, absent a legislative appropriation. The Court found that the applicable provision of the Constitution did not require further automatic devotion of surplus revenue to the sinking fund once sufficient funds had been accumulated in the fund to pay off all outstanding bonds and coupons of the State. Thus, the Court reasoned that it was not for it to "usurp the prerogative exercised by the Legislature in making appropriations for state purposes." 545 P.2d at 760.

And, in *Fletcher v. Commonwealth of Ky.*, 163 S.W.3d 852 (Ky. 2005), the Kentucky Supreme Court held that the Governor of Kentucky possessed no constitutional authority to expend unappropriated funds by declaring an emergency when the Kentucky Legislature failed to enact a budget. Stated the Court,

> [w]e reject the proposition that a Governor can unilaterally declare an emergency and spend unappropriated funds to resolve it. ... The Governor possesses no "emergency" or "inherent" powers to appropriate money from the state treasury that the General Assembly, for whatever reason, has not appropriated.

163 S.W.3d at 871. *See also, In the Matter of County of Oneida*, 404 N.E.2d 133, 137 (N.Y. 1980) ["However laudable its goals, the executive branch may not override enactments which have emerged from the lawmaking process."]; *Dishman v. Coleman*, 244 Ky. 239, 50 S.W.2d 504, 508 (1932) [State Treasurer held personally liable for expenditure of unappropriated funds "even though the officer thought he was doing what was best for the Commonwealth, and had the concurrence of the Attorney General at the time."].

In this same regard, we note that Art. X, § 8 of the South Carolina Constitution provides that "money shall be drawn from the Treasury only in pursuance of appropriations made by laws." Such provision was placed in the Constitution to "prohibit expenditures of the public funds at the mere will and caprice of those having funds in custody without legislative sanction therefor." *Grimball v. Beattie*, 174 S.C. 422, 431, 177 S.E. 668 (1934). Our Supreme Court has broadly defined an "appropriation" in *State ex rel. Walker v. Derham*, 61 S.C. 258, 39 S.E. 379, 380 (1901) as follows:

> [t]o appropriate money is to set it apart – to designate some specific sum of money for a particular purpose or individual. To do this effectually it is necessary that the power in the legislature to defeat the application of the money to some particular

> object or individual by providing for some other use thereof cannot exist except by some legislative action to the contrary.

The General Assembly has enacted legislation to enforce Art. X, § 8. Section 11-9-10 provides that

> [i]t shall be unlawful for any moneys to be expended for any purpose or activity except that for which it is specifically appropriated, and no transfer from one appropriation account to another shall be made unless such transfer be provided for in the annual appropriation act.

Section 11-9-20 further states in pertinent part:

> [i]t shall be unlawful for any officer, clerk or other person charged with disbursements of State funds appropriated by the General Assembly to exceed the amounts and purposes stated in such appropriations, or to change or shift appropriations from one item to another; provided that transfers may be authorized by the General Assembly in the annual appropriation act for the State.

Our Supreme Court has invoked what is now Art. X, § 8 – requiring that no money "shall be drawn from the treasury but in pursuance of an appropriation made by law" – in a number of decisions. For example, in *Beacham v. Greenville County*, 218 S.C. 181, 62 S.E.2d 92 (1950), an appropriation was made to pay an architect $400,000 for work done concerning repair of a courthouse. The architect proceeded with the work which ultimately totalled $863,000. The Court noted that the architect was "charged with knowledge of the limited power and authority of the Board, had actual knowledge of their intentions that the project should cost $400,000 and, finally, he had actual and constructive notice of the legislative appropriation for the project .... 218 S.C. at 188. In addition, the Court further explained that "assurances by state officials of continuation of the program beyond the life of the appropriation for that program "are not binding upon the General Assembly. *See also*, *Caddell v. Lexington County*, 296 S.C. 397, 273 S.E.2d 598 (1988) ["nonappropriations" clause necessary for multi-year contracts entered into by a governmental agency to insure that contract is subject to additional legislative appropriations]; *Op. S.C. Atty. Gen.*, Op. No. 91-6 (January 18, 1991) ["Such a contract should contain a non-appropriation clause and be terminable with each fiscal year]; *Op. S.C. Atty. Gen.*, September 12, 1996 ["Accordingly, all long-term state contracts are subject to the contingency that funds appropriated by the General Assembly will be available."; see authorities cited therein].

In *State ex rel. Buchanan v. Jennings*, 68 S.C. 411, 47 S.E. 683, 685 (1904), the Court held that a mandamus would not lie to compel payment of a salary of an officer where no appropriation had been made by the General Assembly to pay the full salary, but instead the salary had been reduced by the Act of 1893. In that case, the Court wrote:

> ... there was not only an omission to appropriate and provide in the temporary statute the salary claimed, but an annual appropriation by the next General Assembly of a smaller amount than that claimed. So that the conclusion is inevitable that the legislative branch of the government, from which the appropriation must come, has practically declined to pay the larger salary, by providing for the payment of the smaller. We think, therefore, there has been no appropriation of public funds for the payment of the amount demanded. ... We cannot escape the conclusion that the issuance of the writ, in the circumstances, would be an effort on the part of the judicial department to coerce the legislative department.

Moreover, in *State of South Carolina v. Corbin and Stone, supra*, the Court concluded that the Comptroller General was not authorized by any statute to settle with attorneys representing the State for legal work done on behalf of the State. In the view of the Court,

> „ [i]f the comptroller had such power, it should be found in the acts creating the office and defining its duties. There are no common law powers attached to this office. On the contrary, the comptroller is a constitutional officer, having only such powers and duties as have been, or may be, provided by law. *Const.* Art. III, § 23. We have not been cited to any act in which such power is expressly delegated, nor in which such duties are imposed, as would by necessary implication invest him with such power. Nor have we been able to find any act of the kind. We concluded, therefore, that no such act exists.
>
> But, even if one could be found, would it be constitutional? The legislature might authorize the comptroller or any other officer to audit and determine claims against the State, but could it empower such officer to direct payment and satisfaction in the absence of a regular appropriation. Section 12, Article IX. of the constitution, provides in brief and express terms, "That no money shall be drawn from the treasury but in pursuance of an appropriation made by law." This section stands directly in the way of the settlement of Comptroller Dunn, as an accord and satisfaction, even if he was authorized to adjudicate the claim of defendants. The adjudication, even if legal, did not authorize appellants to retain the money in payment of their claim.
>
> No officer of the State is empowered to appropriate the public money in this shorthand way. The General Assembly makes the appropriation, the comptroller draws his warrant, and the treasurer pays. This may seem somewhat formal and technical, especially when the creditor has the money already in his hands. But experience has taught that it is best to be particular in reference to public funds. Some forms must be observed and some checks interposed. These have been required with us, and no power has been given to any officer to dispense with them.

The foregoing authorities are persuasive that the "correction" made by the Comptroller General is not based upon any "appropriation made by law" in accordance with Art. X, § 8 (formerly Art. X, § 9) of the South Carolina Constitution. Regardless of whether his action is deemed an "appropriation" or, as argued by the Comptroller, the making "an accounting entry reducing the reported net budgetary surplus by $104,934,000 ... to correct for the effect of accounting errors in the budgetary schedules in three prior fiscal years ...," we find no legislative authorization therefor. No one seems to disagree that a "surplus" of revenue in excess of appropriations for fiscal year 2004-2005 has been reported. While the General Assembly appropriated a portion of this surplus in the Appropriations Act, see, Proviso 78.13 of the 2004-2005 Appropriations Act, over $100 million has not been as yet appropriated. Regardless of the important public policy considerations underlying the removal of the GAAP Fund deficit, the fact remains that $104,934,000 of the unappropriated portion of the surplus has now been allocated or obligated by the Comptroller to the General Deposit Account in order to offset that deficit. These monies are clearly unavailable to the Legislature without further legislative action. Even were we to accept the argument that this is not an "appropriation" of funds in the sense which our Supreme Court in *State ex rel. Walker v. Derham, supra* has used that term – the "designation of some specific sum for a particular purpose ..." – nevertheless, there has been no *legislative appropriation* of these funds.

In our judgment, neither §§ 11-3-50 or 11-3-90 nor Provisos 59.2 or 73.20 authorize this action by the Comptroller General. These statutes, while clearly bestowing powers – even broad authority – upon the Comptroller General in certain areas, do not authorize him to reduce the surplus by allocating these revenues to the GAAP general fund balance, so as to bring the balance of the GAAP Fund to zero.

Conclusion

In the 2005-2006 Appropriations Act, the General Assembly enacted Proviso 73.20. This provision required that, should the Comptroller General determine at the close of the state's financial books for Fiscal Year 2004-2005 that the State has a negative GAAP Fund Deficit, "the expenditure of surplus general fund revenues by this provision are suspended and must be used to the extent necessary to offset the GAAP Fund Deficit." The General Assembly had contingently appropriated almost $300 million of the surplus to various line item allocations. It was not these appropriated surplus funds which were allocated to offset the GAAP Fund deficit, however, but $104.9 million of the unappropriated portion of the year-end surplus funds which the Legislature probably did not anticipate when the Appropriations Act was enacted. The Comptroller reasoned that this surplus was "overstated" by the $104.9 million amount and he thus corrected the "accounting errors" from previous fiscal years, in which the "accrual method" for calculating revenues was used and which may have contributed to such GAAP Fund deficit. We further understand that the Comptroller has recently advised Agency Directors that the previously *appropriated* surplus revenues are now available to be spent as the General Assembly designated in the Appropriations Act.

It is our opinion that the Comptroller General does not possess the requisite authority to reduce or adjust the year-end surplus by almost $105 million by making these funds "a part of the GAAP general fund balance" in order to correct what he believed were the accounting errors made in previous fiscal years. While we, of course, defer to the Comptroller's considerable expertise as a CPA, and as the chief accounting officer of South Carolina, still, he must be bestowed with the necessary constitutional and statutory power to make adjustments in the size and amount of the surplus in the manner which the Comptroller did here. Although the Comptroller argues that several statutes provide him such authority, we do not read these enactments as sufficiently broad to do so. Proviso 73.20 expresses the General Assembly's concern regarding the GAAP deficit, to be sure, and indeed requires the use of the *appropriated* surplus funds be suspended upon a finding by the Comptroller at the close of the fiscal year 2004-2005 books that such a GAAP Fund deficit exists. If such finding is made, these appropriated funds must be used to the extent necessary to "offset" the GAAP Fund deficit. However, Proviso 73.20 does not designate how the remaining amount of the appropriated portion of the surplus is to be allocated once such GAAP Fund deficit is offset by those funds. Most importantly, the Proviso does not speak to *unappropriated* surplus funds and clearly does not empower the Comptroller to use those funds for the GAAP Fund deficit offset.

Moreover, § 11-9-85 *requires* the Comptroller General to use the "accrual" method for determining the *revenues* from certain taxes, including the sales tax. Such statute does not mention such method with respect to liabilities or expenditures, however. While this methodology may have contributed to the negative GAAP fund balance, it is a methodology which the Legislature has mandated by law. In our view, even though the Comptroller certainly may disagree from the standpoint of sound fiscal management and the maintenance of a superior credit rating by the State, § 11-9-85 remains the law in South Carolina.

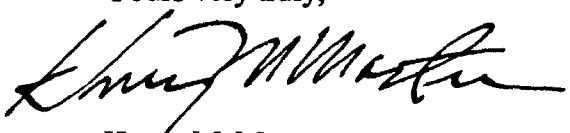
Our Supreme Court has recognized that an "appropriation" of revenues is not a technical term, but merely a setting apart of public funds for a particular purpose. *State ex rel. Walker v. Derham, supra.* Whether the Comptroller's reduction or adjustment of the year-end surplus is viewed as an "appropriation" by him or not, we deem it to be an allocation of available funds without an appropriation of the General Assembly. As the Comptroller General has correctly described his action, "[t]he 104.9 million of surplus underlying this correcting entry *now becomes a part* of the GAAP general fund balance." (emphasis added). Art. X, § 8 mandates that monies shall not be drawn from the Treasury without "an appropriation made by law." Although in a literal sense no monies may have been drawn from the Treasury in this instance, a portion of the surplus has been allocated as "part of the GAAP general fund balance" and is unavailable for use by the General Assembly without further legislative action. As we understand it, these funds are not reflected as part of the budgetary general fund. Thus, Art. X, § 8 would require "an appropriation made by law" for this to be done. No appropriation made by law, however, has yet been enacted by the General Assembly authorizing this reduction. In other words, not yet knowing that this additional surplus would be available, the Legislature has not yet spoken with respect to the $104.9 million portion of the surplus in any way. While it is true that § 11-3-90 requires the Comptroller to report annually his transactions in regard to unappropriated funds "we do not believe this statute serves as an

appropriation by the General Assembly of these funds in this instance. Thus, even assuming the "accounting error" upon which the Comptroller bases his action, there has not been an "appropriation made by law" of these funds.

In taking the action he did, we do not doubt that the Comptroller General acted entirely in good faith and for the benefit of the taxpayers of South Carolina. We are absolutely convinced also that the Comptroller sought to protect the credit rating of the State by reporting what he deems to be an accurate picture of South Carolina's books. The public is entitled to this accuracy and the Legislature has required the Comptroller to present to it a true account regarding the State's finances – including unappropriated funds. Again, we defer to the Comptroller General's judgment regarding these important issues concerning South Carolina's fiscal policy and financial stability.

However, that is not the question posed to us. Under our Constitution, it is for the General Assembly, and the General Assembly only, to determine how funds – including surplus funds – are allocated. As we have previously advised, "the Legislature has the exclusive power to direct how, when and for what purposes the public monies shall be applied in carrying out the objects of the State government." *Op. S.C. Atty. Gen.*, January 24, 1984. Our Supreme Court has consistently adhered to this fundamental principle in *Condon v. Hodges* and in the *Gilstrap* and *McInnis* cases, discussed above. Furthermore, in the *Corbin* and *Stone* case, the Court concluded that, while the Legislature might authorize the Comptroller General to "audit and determine claims against the State," it could not "empower such officer to direct payment and satisfaction [of such claims] in the absence of a regular appropriation." These decisions stand squarely for the constitutional principle that only the Legislature may determine how funds are spent, or allocated, or applied, whether they be surplus funds, or any other monies belonging to the State. Accordingly, if the year-end surplus is to be reduced in order to remove the negative GAAP fund balance, it is a matter for the General Assembly – and the General Assembly alone, to do so.

Yours very truly,



Henry McMaster

HM/an