



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**JOHN BEN SHEPPERD
ATTORNEY GENERAL**

March 5, 1953

Hon. Max C. Smith, Chairman
House Appropriations Committee

Hon. Ottis E. Lock, Chairman
Senate Finance Committee

Fifty-third Legislature
Austin, Texas

Letter Opinion No. MS-06

Re: Form and legality of
Legislative Budget
Board draft of appro-
priations bill for bi-
ennium beginning Sep-
tember 1, 1953.

Gentlemen:

You have requested our advice, comments and suggestions on the Legislative Budget Board draft of the biennial appropriations bill for the fiscal years beginning September 1, 1953. In particular you have directed our attention to the adequacy of the caption, to the use and effect of estimated "open-ended" appropriations, to the validity of the special and general provisions, and to the form of organization of the bill.

In the beginning, we desire to point out that time will not permit us to study every phase of the proposed Act. Consequently, we have not undertaken to determine whether all of the appropriations therein made are authorized by provision of a valid general law. Nor have we made any study from which we could advise on whether State functions not supported by any appropriation herein should be or could be included.

What we have attempted to do in this opinion is to treat your particular inquiries as thoroughly as possible and, in addition, to raise such other points as have come to our attention which may cause or tend to cause problems in executing the proposed Act. But it would be presumptuous to assume that, within the time devoted, we have discovered all possible trouble spots. Therefore, we earnestly invite you to forward to us further particular questions on any matter not discussed herein about which you have any doubts.

We also want to point out that all of the opinions herein expressed are necessarily based upon the proposed Act in its present form. Changes in the form of this draft may cause us to revise our opinions about various questions discussed herein as well as questions passed on but not discussed. Matters discussed by us, including your particular questions,

will be taken up, in so far as possible, in the order in which they appear in the proposed Act.

One of your particular questions is whether the caption of the proposed draft, appearing on page 1, is a sufficient title under the requirements of Section 35 of Article III of the Texas Constitution. As you know, that Section states:

"No bill, (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof, as shall not be so expressed."

We have recently discussed at length the history and purpose of this constitutional requirement in Attorney General's Opinion V-1254 (1951).¹ The present opinion need not be extended by a repetition of the views therein set out.

It is obvious that those who drafted the caption to the proposed draft have abandoned the practice followed in many recent appropriation bills of including within the caption numerous specific and detailed references to provisions in the body. We think this change from an "index" form to a brief general form of caption is a wise and commendable step. There can be no question on whether the use of a general style of caption is permissible. The Supreme Court has stated that

"The generality of a title is no objection to it so long as it is not made a cover to legislation which by no fair intendment can be considered as having a necessary or proper connection."²

And, likewise, the Supreme Court has said that

"We are of the opinion that the rule that the expression of one thing excludes another should not be applied to the title of a statute. It would be burdensome if not intolerable to require that the title should be as full as the act itself. The word 'title' implies that no such requirement exists. The purpose of the constitutional provision is merely to reasonably apprise the

1/ Copies of all Attorney General's Opinions referred to herein are attached.

2/ San Antonio & A.P. Ry. v. State, 128 Tex. 33, 95 S.W.2d 680,688 (1936).

legislators of the contents of the bill, to the end that surprise and fraud in legislation may be prevented."³

Having in mind that a single defect in this form of caption would necessarily render more provisions of the body void than would a single defect in a specific and detailed type of caption, we desire to call your attention to two features of the present caption which constitute departures from previous practice. One is the fact that the present caption incorporates a reference to all agencies in all branches of state government by the extremely general words "the State Government." As you know, heretofore in the most general caption provisions used it has been the uniform practice to specify lesser units of "the State Government" such as the judiciary, the executive and administrative departments, the several State institutions of higher learning, and others. Likewise, heretofore in the most generally worded captions of appropriation acts it has been the uniform practice to describe the time period for which the appropriations in the body are made. In view of the acknowledged rule that all captions, whether general or specific, must "reasonably apprise the legislators" and must not be "capable of misleading those interested in the bill,"⁴ and in view of the long standing customs mentioned, we think that out of an abundance of caution slight modifications, similar to those suggested two paragraphs below, should be made.

We think that the remaining language of the present caption-- "authorizing and prescribing conditions, limitations, rules, and procedures, for allocating and expending the appropriated funds; and declaring an emergency"--is quite sufficient as a caption reference to all other valid provisions contained in the body of the proposed Act. Cf. Att'y Gen. Op. V-1336 (1951).

It is our opinion that the present caption is legally sufficient. Conceivable arguments that it may not be sufficient could be answered, we think, by a few minor changes which need not destroy its vital simplicity and clarity. We do believe that the present caption could be improved, and to that end we suggest a version similar to the following:

An Act appropriating money for the support of the judicial and executive branches of the State Government, and for State aid to designated public junior colleges for the two-year period beginning September 1, 1953,

3/ Doeppenschmidt v. International & G.N.R.R., 100 Tex. 532, 101 S.W. 1080, 1081 (1907).

4/ Gulf Ins. Co. v. James, 143 Tex. 424, 185 S.W.2d 966, 971 (1945).

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and ending August 31, 1955; authorizing and prescribing conditions, limitations, rules, and procedures, for allocating and expending the appropriated funds; and declaring an emergency.

Turning from the caption to the body of the Act, on page 7, Section 4, appears a definition of the term "Other Operating Expense" as used in Article I. The section provides that "Other Operating Expense" "means" items of expense "included" in three named headings in the State Comptroller's Classification of Accounts as revised to August 31, 1952. Our first question arises over the fact that the quoted headings other than "Repairs" do not appear in the said classification manual. Our second question concerns the meaning intended by the verb "means". We recently discussed a similar definition in Attorney General's Opinion V-1410 (1952) and held that the verb "includes" is non-restrictive, that is, that the defined term included all the items named or referred to but was not limited in meaning to what was named or referred to. In that opinion we distinguished verbs such as "means" which ordinarily do limit the meaning of the term defined to what is named or referred to. Such phrasing as "shall include only" which is used on page 163, Section 27, always clearly limits the meaning of the term defined to what is named or referred to. On page 8, Section 5, we notice that monies appropriated for "Other Operating Expense" in Article I may be spent for other named purposes. In view of Section 5, we think it is not entirely clear in Section 4 whether the definition is non-restrictive or restrictive. If a non-restrictive sense is intended, we suggest substitution of the words "may include". If a restrictive sense is intended, we suggest the words "shall include only."

On page 9, Section 2 defines certain terms as used in Article II. It appears to us that one or more words have been erroneously deleted from the first sentence with the result that the sentence is rendered ambiguous. Secondly, the Comptroller's Classifications of Accounts referred to, though apparently the same manual referred to in Article I, Section 2, is not described in the same way. Thirdly, we suggest that the non-restrictive or restrictive nature of the verb "shall include" be definitely clarified by the substitution of the words "may include" or "shall include only", whichever is the legislative intent. Lastly, we suggest, purely as a matter of form, that Section 2 be shifted back into the "Special Provisions" portion of Article II.

On page 20, Section 6, subsection b provides that collection for certain services and employee benefits shall be made by a deduction from the recipient's salary and subsection e requires that the State be reimbursed for materials and supplies used by barbers and cosmetologists who charge State employees for them. The amounts deducted and the charges for reimbursement must be placed in some fund in the State Treasury but we find no indication of whether such amounts and charges

should be returned to the General Revenue Fund, should go to the Board Local Fund, or should be placed in some other fund. We suggest that a definite destination for such monies be indicated.

On page 21, Section 7, subsection b makes a special appropriation to the State Hospitals and Special Schools Building Fund. The final sentence of the subsection declares that the intent and policy of the present Legislature is that the Board shall use such monies from this fund "as may be required to repair and rehabilitate existing buildings and facilities." In our judgment the words "to repair and rehabilitate" can be construed to cover all kinds of minor repairs as well as major or rehabilitory repairs. If it is the intent of the Legislature that all manner of repairs be made with these funds, we suggest for clarity that the words "for maintenance, repair, and rehabilitation of" be substituted between the words "required" and "existing". If it is the intent of the Legislature that only rehabilitory repairs be financed from this fund, we suggest substitution of the words "for major repair and rehabilitation of" between the words "required" and "existing".

On page 21, Section 7, subsection c makes "all unexpended balances" subject to transfer to be used for operating expense. We think the operative effect of this subsection would be clearer to all readers if the parenthetical words ", not otherwise restricted by general law," were inserted between the words "balances" and "remaining".

On page 21, Section 8 restricts the encumbrance of appropriated funds unless a sufficient unobligated or unencumbered balance exists. We suggest that the responsibility for preventing unauthorized encumbrances be more definitely indicated. At present we understand that the particular State agency spending the money is the only possible agency upon which the responsibility could rest since it alone is in a position to know all the facts. If it is the intention of the Legislature expressly to impose this restriction only on State agencies mentioned in Article II, we suggest as a minimum that the words "by the responsible State agency" be inserted between the words "incurred" and "against". On the other hand, if it is the legislative intent that this restriction be imposed against all State agencies covered by the proposed Act, we recommend that Section 8 be eliminated altogether from Article II and that a modified form of the present language of Section 8 be incorporated in the General Provisions of Article VI.

One of the matters to which you have directed our particular attention is the use and effect of estimated "open-ended" appropriations in the proposed Act. Referring to the use of this device, your request states:

"There were some instances, however, where unforeseeable events in the next biennium seemed to make it impracticable to close appropriations with a sum certain that would operate

as a fixed and rigid limit. In such instances, an estimate has been made and is so described. The estimate represents 1/an effort to inform fully members of the Legislature, and the public, of just what sums of money are involved.

"The natural question arises as to whether the 'estimate' actually operates as intended, and may not be construed either as 2 a liability on other resources of the State should the estimate actually prove too high, nor as 3 a ceiling on the amount available should actual amounts exceed the estimated figure." (brackets and numbers added)

Accordingly, our consideration of all estimated items has been directed to the three subjects numbered above. We have reviewed the various estimated items to see if each would fully inform and not mislead a reader about what sums of money are involved, and to see if each could create a liability on other resources or could impose a ceiling on the amount appropriated.

On page 31, items 45 and 46 of the proposed appropriations for the Attorney General's office are the first instances of the estimated line items. At this point we will express our general views on the subject of estimates with the thought that subsequent discussion of particular estimates will be thereby facilitated. Item 45 appropriates 10% of the recoveries of delinquent franchise taxes, penalties, and court costs, and item 46 appropriates all of the annual proceeds from the sale of books. In our opinion the absolute language of Section 15 of Article VI, General Provisions (page 172) clearly and definitely forestalls any possibility of construing items 45 and 46 so as to appropriate from or in any way create any additional liability on the General Revenue Fund if the indicated estimates should prove to be too high. Moreover, we are of the opinion that Section 15 of Article VI is likewise effective to prevent such a construction of any other estimated line item appropriation of funds other than from the General Revenue Fund.

Secondly, in our opinion the estimates made in items 45 and 46 could not be construed to impose a ceiling on the unlimited appropriating language of these items, the unlimited language being "ten per cent (10%) of the total amount" and "the annual proceeds," respectively. Only if the appropriating language were limited would there be an effective ceiling imposed on the appropriated funds. For instance, if the language appropriating "any moneys" or "all moneys" from a certain source are followed by the symbol "NTE," as is the case with item 96 on page 26, then in our opinion the appropriation is clearly limited and is not to exceed the amounts stated in the columns on the right side of the page.

We offer a word of caution respecting the possible choice to close, by "NTE" limitations, any items now merely estimated. Many agency budget hearings have already been held and it is obvious that these estimated items were there considered in their present "estimated" form. We recommend that before closing any such items the agency affected ought to be given an opportunity to be reheard on the question of adequacy of any proposed closed-end appropriation. For instance, item 45 of the Attorney General's proposed appropriation obviously should not be closed as it now stands because item 44 covers six months while item 45 covers eighteen months. Both items relate to identical expense items yet at present both contain a \$7,000 entry in the right-hand column.

Consequently, having concluded that the estimates in items 45 and 46, and in all similar items in this bill, cannot be construed to create any additional liability on the General Revenue Fund nor to impose a ceiling on the appropriation estimated, the only function that can be served by including such estimates in the Act is generally to inform readers of the Act about the sums involved. In our opinion the style adopted on page 31 which includes the estimated line items within "GRAND TOTAL, ATTORNEY GENERAL'S OFFICE" should not be used because the estimated appropriations are added into the "Grand Total" in the same manner as if they were ordinary, definite line items appropriations. The grand total is not indicated to be an "Estimated Grand Total" yet this total must necessarily vary with estimated items included therein. We believe that this style is apt to mislead rather than to inform readers of the Act. If it should be the will of the Legislature that one or more of the various items appearing in the proposed Act should remain "open ended", we suggest that such items pertaining to a given State agency be excluded from the grand total for that agency and be listed after the grand total in the manner followed in appropriating estimated refunds of the Texas Liquor Control Board on page 89, and in appropriating certain funds to the Board of Water Engineers in item 19 on page 128. We think this style is more informative, more definite, and consequently more to be preferred than is the alternative appearing on page 34 wherein a grand total of "actual and estimated appropriations" is used.

On the other hand, if it should be the will of the Legislature definitely to close many of the estimated appropriations that remain open in the proposed Act, we recommend: (1) that the style employed in item 96 on page 26 be used as to each special or local fund appropriation desired to be closed; or (2) that a final proviso such as appears on page 38 be incorporated into each agency appropriation which would put a definite maximum limit on the total agency appropriation irrespective of the sources of agency funds. Where deemed necessary, express exceptions to the maximum limitation can be specified. With the thought in mind that the Legislature may desire to bring about a more uniform handling of similar appropriations to the various State agencies covered by this Act, we will attempt at this point to call attention to all estimated

"open ended" items in the proposed Act and to recommend that they be handled uniformly according to one of these alternatives.

Before concluding our general discussion of the effect of estimates and undetermined appropriation items, we would like to call your attention to one final matter. Under the terms of Section 14 of Article VI, General Provisions, all funds received from the United States "are hereby appropriated to such agencies for the purposes for which the federal grant, allocation, aid, or payment was made." In our opinion, this provision has the effect of appropriating all federal money for the purposes and to the extent specified by the grantor except where the Texas Legislature specifically limits an appropriation of federal funds. For instance, on page 28 grand totals of all itemized appropriations of the Department of Agriculture are definitely specified for each year. Immediately following these totals is a provision stating that the appropriations for the Department of Agriculture are to be paid from the following funds:

"General Revenue Fund	327,500	327,500
Special Department of Agriculture Fund	271,040	278,240
Market News Cash Fund (Federal)	18,500	18,500
	<u>\$ 617,040</u>	<u>\$ 624,240"</u>

We think it is clear that even though federal funds contributed to the Department of Agriculture's Market News Cash Fund should exceed \$18,500 during either year of the biennium, the Legislature has appropriated only \$18,500 for expenditure therefrom each year, and that this specific provision would govern and limit the effect of Article VI, Section 14. On the other hand, it is our opinion that mere estimates of federal funds, such as appears on page 34, item 14, cannot be construed as limitations on the general appropriative language of Article VI, Section 14.

In conformity with the practice recommended to be followed hereafter, we call your attention to the fact that items 45 and 46 on page 31 are estimates. We recommend that you reconsider the necessity of leaving these items open. Whatever your final decision may be, we recommend that these items be handled according to one of the alternatives suggested on page 7 above. We make these identical recommendations as to each of the following: items 13, 14 and 15 on page 34; items 2, 3, 4 and 5 on pages 45 and 46; item 38 on page 88; two special appropriations following item 167 on page 103⁵; Federal Government funds included in total of Department of Public Welfare on page 113; certain balances

⁵/ Obviously, "Item No. 173" referred to at the bottom of page 103 should read "Item No. 167."

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and receipts appropriated at the bottom of page 120; and item 58 on page 126. Related recommendations as to other estimated items are made in the paragraphs immediately following.

We call your attention to the fact that appropriation items to the Employees Retirement System of Texas on page 48 and to the Teachers' Retirement System in item 25 on page 124 are estimates. While we know of no feasible alternative to the use of estimates to some extent in the situation here dealt with, we recommend that you reconsider the necessity of leaving all of these items open. Whatever your final decision may be, we recommend that these items be handled according to the appropriate alternative suggested on page 7 above.

We call your attention to the fact that item 24 on page 53 is an estimate. We recommend that you reconsider the necessity of leaving this item open. We think also that this item could be clarified on the question of whether or not the Commission is authorized to spend any money other than receipts from the stated subscriptions and advertising for the purpose of publishing the monthly publication named. We especially call your attention to the fact that item 25 on page 53 is an unlimited appropriation. We recommend that you reconsider the necessity of leaving this item open and that you consider the possibility of incorporating the final two special provisions into the listing in the main part of item 26. Whatever your final decisions may be as to items 24 and 25, we recommend that these items be handled according to the alternatives suggested on page 7 above.

We call your attention to the fact that item 18 on page 58 is an estimate. We recommend that you reconsider the necessity of leaving this item open. Whatever your final decision may be, we recommend that this item be handled according to the alternatives suggested on page 7 above. In addition, we strongly recommend the deletion of the words "or mistake of law" from this item, from item 18 on page 128, and from any similar items in the Act since it is fundamental that these words cannot be given their desired effect and their retention in the bill will only confuse the average reader. *Austin Nat. Bank v. Sheppard*, 123 Tex. 272, 71 S.W.2d 242 (1934); *City of Houston v. Feizer*, 76 Tex. 365, 13 S.W. 266 (1890).

We call your attention to the fact that the special Health Department provisions on pages 63 and 64 are estimates. We recommend that you reconsider the necessity of leaving all of these items open. Whatever your final decision may be, we recommend that these items be handled according to the alternatives suggested on page 7 above. In addition we recommend clarification of the special provision on page 63 dealing with the Bedding Division Fund, and we recommend substitution of the words "Federal Health Fund #273" for the words "Rapid Treatment Center Fund #222" on page 64 since we are informed by the Comptroller that #222 no longer exists and has been replaced by #273.

We call your attention to the fact that items 23 and 25 on pages 70 and 71 are estimates. We recommend that you reconsider the necessity of leaving these items open. Whatever your final decision may be, we recommend that these items be handled according to the alternatives suggested on page 7 above. In addition we recommend clarification of the last clause of the final special proviso on page 72.

We call your attention to the fact that items 105 and 106 on page 98 are estimates. We recommend that you reconsider the necessity of leaving these items open. Whatever your final decision may be, we recommend that this item be handled according to the alternatives suggested on page 7 above. We also recommend substitution of the words "hereby appropriated" for the words "in the Special Parks Board Funds" in the final sentence of item 106 in order to eliminate possible ambiguity arising from use of the preposition "in".

We call your attention to the fact that item 7 of the appropriation to The University of Texas -- Main University on page 135 is an estimate which we construe to be of the same nature as estimates in previous articles because, by the provisions of Article V, Sections 2, 4, 28, and 30, all institutional and special educational fund balances and income are appropriated. We also call your attention to the different form followed in setting out this estimate and related totals. We submit that this form of reference creates a very serious interpretation problem of determining whether the Legislature intends the "GRAND TOTAL, Educational and General" item to be a maximum, non-variable limitation or whether the Legislature intends the "Net General Revenue Appropriation" to be an absolute, non-variable appropriation. Both cannot be intended to be non-variable so long as a variable estimated item is supposed to compose part of the difference. We are inclined for practical reasons toward the view that it is the "NET-General Revenue Appropriation" that is intended to be definite and non-variable, but it is our opinion that the present form-- which is used throughout Article V--should be re-arranged clearly to indicate same. We recommend that indicated totals and estimates pertaining to the Main University and all other similar items be redrafted and handled according to the appropriate alternatives suggested on page 7 above. Other similar items in Article V are as follows:

1. The totals and estimate set out in connection with item 16 on page 136.
2. The totals and estimate set out in connection with Texas Western College item 6, Medical Branch item 6, and Southwestern item 5 on page 137.
3. The totals and estimate set out in connection with Dental Branch item 5, Anderson item 6, and A. & M. Administrative item 7 on page 138.

4. The totals and estimate set out in connection with A. & M. Main item 7 and A. & M. Extramural item 6 on page 139.
5. The totals and estimate set out in connection with A. & M. Agricultural item 5 on page 140.
6. The totals and estimate set out in connection with Forest item 7 on page 141.
7. The totals and estimate set out in connection with Rodent item 5 on page 142.
8. The totals and estimate set out in connection with other State institutions for higher learning as follows: item 6 on page 144; item 8 on page 145; item 5 on page 147; item 7 on page 147; item 7 on page 148; item 7 of Southwest on page 149; item 7 of Austin on page 149; item 6 on page 150; item 7 on page 151; item 6 of T.S.C.W. on page 152; item 6 of Southern on page 152; item 6 of Lamar on page 153; item 7 of Arts on page 153; item 8 on page 154; and item 8 on page 155.

On page 31, item 4 of the State Auditor's appropriation provides that salaries, other than for the State Auditor and his six top assistants, and all operating expenses shall be financed from a yearly lump sum appropriation which is "to be budgeted by Legislative Audit Committee." The special provisions following the State Auditor's appropriation, which appear on page 32, restate that the Auditor's appropriation is "to be expended under the direction and subject to control of the Legislative Audit Committee in accordance with the provisions of Senate Bill No. 27, Acts of the Regular Session of the Forty-eighth Legislature." Such provisions further provide that certain transfers of funds to reimburse the General Revenue Fund as well as the reappropriation to the State Auditor of items so transferred are to be accomplished "only after approval" or "subject to the approval" of the Legislative Audit Committee.

We have examined the provisions of Senate Bill 27, which was enacted as Chapter 393, Acts of the 48th Legislature, 1943, and which was codified as Articles 4413a-8 to 4413a-23 of Vernon's Civil Statutes and Article 422b of Vernon's Penal Code. Section 11 of the Act (Article 4413a-17) does provide, among other things, that "All sums appropriated to the State Auditor for that department shall be expended under the direction and subject to the control of the Legislative Audit Committee."

Nevertheless, we are persuaded that such a provision in the general law authorizing appropriations to the State Auditor cannot validate appropriation bill riders requiring the same kind of fiscal super-

vision if such supervision is obnoxious to the mandate of Article II, Section 1 of the Texas Constitution prescribing the separation of powers of the three branches of government. It is our opinion that from the nature of its composition the Legislative Audit Committee is clearly a part of the legislative branch of the government and that from the nature of his duties the State Auditor is clearly a member of the executive branch of the government. Consequently, we perceive no important constitutional distinctions between functions here to be performed by the Legislative Audit Committee and functions attempted to be conferred on the Legislative Budget Board under the provisions of numerous riders in the current appropriations Act. The only factual difference between the two situations is that in the present case, but not in the case of the Legislative Budget Board, the continuing legislative supervision over the expenditure of appropriations appears to be authorized by a general statute as well as by appropriation act riders. But, as we have observed, it is fundamental that neither a general statute nor an appropriation bill rider may violate the Constitution, either standing alone or taken together.

A complete statement of the authorities on this question may be found on pages 13 through 17 of Attorney General's Opinion V-1254. Your special attention is called to the analysis of legislative and executive functions on page 15 of that opinion. The first statement on page 17 is not understood by us to conflict with the conclusion now reached since we construe it to be so phrased purely to illustrate the quantity rather than the quality or nature of the unconstitutional Budget Board provisions in that act. It should be emphasized that the opinion expressed here does not in any manner concern the constitutional propriety of the duties performed by the State Auditor nor does it concern the constitutional propriety of the organization and duties of the Legislative Audit Committee, save and except the particular matters of continuing fiscal supervision over the State Auditor which we specifically point out herein.

On pages 34 to 38 your attention is called to the fact that the proposed Act places no limit on the number of employees hired by the Comptroller in any of the listed grades. We construe this to permit unlimited hiring of personnel by that officer in any of the grades shown, so long as he does not exceed his limited total appropriation in doing so. If it is the intention of the Legislature to permit this total maximum of flexibility in hiring policies, then such is accomplished by the present draft. If it is the legislative intent to modify this authority to some extent, then consideration should also be devoted to Groups XIV et seq. of the employment grades of the Central Education Agency on pages 42 to 44, to all grades of the Game and Fish Commission on pages 49 to 53, and to group 6 et seq. of the grades of the Highway Department on pages 66 to 79. As indicated, we construe the proviso on page 38 to place a total maximum limitation on all appropriations to the Comptroller. If it is the legislative intent that appropriation items such as the one to pay refunds out of the Highway Motor Fuel Tax and the one to pay refunds out of the Stock Transfer Tax (page 37), or any others, should not be

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included in calculating the total maximum appropriation, then we recommend that such items be grouped together, be relocated following the stated maximum limitation and, most important, be expressly excepted from the scope of the maximum appropriation limitation.

As a formal matter, we recommend that items reimbursing the General Revenue Fund should either be consistently included or consistently excluded from departmental totals. For instance, item 12 on page 47 is included, whereas item 26 on page 54 is excluded from indicated totals.

On page 78, in item 77 the reference following the Title Insurance Fund should read "162" rather than "126".

On page 110, in the first sentence of the first special provision, we recommend that the words "Safety Responsibility Division" be added if it is the intention of the Legislature, as indicated on page 108, that this division be supported from this fund.

On page 122 in item 35 the words "Fifty-third Legislature, 1953" should be substituted for the words "Fifty-second Legislature, 1951."

On page 122, the final rider, in purporting to vest in the Comptroller a discretionary power to delay the transfer of unexpended balances from the Securities Act Fund, is clearly at variance with the mandatory transfer language of the general law referred to (which is codified as Article 600a, Section 36, V.C.S.). We understand that the general law may be amended on this point by the Fifty-third Legislature, but, in the event said general law is not amended, it is our opinion that this rider would be ineffective to confer such discretionary power.

On page 129, Section 2 of the Special Provisions relating to Article III, and on page 165, Section 33 of the Special Provisions relating to Article V, appears a prohibition against paying alien employees for longer than ninety days from appropriated funds. Both sections except from the prohibition any alien who has begun naturalization proceedings. Section 2 specially excepts employees of the Good Neighbor Commission and Section 33 specially excepts employees performing instructional services as well as regular students employed as "student assistants or minor employees in the educational institutions of this State." In Attorney General's Opinion V-1254 at page 8 we state the general rule governing riders as follows:

"In addition to appropriating money and stipulating the amount, manner, and purpose of the various items of expenditure, a general appropriation bill may contain any provisions or riders which detail, limit, or restrict the use of the funds or otherwise insure that the money is

spent for the required activity for which it is therein appropriated, if the provisions or riders are necessarily connected with and incidental to the appropriation and use of the funds, and provided they do not conflict with general legislation." (emphasis added)

Without attempting a detailed analysis of the question we would like simply to call it to your attention that in our opinion this kind of prohibition ought to be enacted as a general law if the Legislature desires to guarantee its lawful effectiveness. Stated another way, we have doubts that this kind of general employment policy can be validly enacted as an appropriation bill rider. Our doubts arise from the fact that we are not able to see with any degree of clarity how this prohibition will help to insure that the appropriated funds will be spent for the required activity for which they are appropriated. See our discussion of this requirement on page 10 of Attorney General's Opinion V-1254. In brief, it appears to us that in order to sustain the prohibition as an appropriation bill rider, it must be assumed as a general proposition that after the ninetieth day of employment, but not before, alien employees will fail to perform assigned duties with the same degree of diligence and satisfaction as citizen employees or alien employees who have commenced naturalization proceedings or who are in other excepted categories.

On page 129, the final two sentences of Section 3 first appropriate certain receipts and charges from publications for use "during the fiscal year in which the receipts are collected" and, secondly, direct that the State Comptroller credit such receipts "to appropriation item or items from which the costs were originally paid." We call it to your attention that particular appropriating items may possibly vary between the year of receipt and the year in which the costs were originally paid and that because of this possibility these provisions may in some instances be rendered ambiguous. We recommend that phrasing similar to that used in the final sentence of Article VI, Section 1 (page 166) be substituted.

On page 130, Section 5 sets out the general rule of construction that moneys appropriated in Article III are to be construed as the maximum sums to be appropriated for the respective purposes. We believe that this section will necessarily receive special consideration by the average reader along with Article VI, Section 15, when interpreting the various uses made of estimates throughout Article III. We suggest that a brief statement be added for the purpose of clarifying the legislative intent that estimates are not to be construed as maximums.

On pages 130 and 131, Item 6 provides that after certification by the State Auditor of the fact that any required annual report has not been filed within the required time, the Comptroller should withhold salary warrants or expense reimbursement warrants to officers and employees of the certified State agency. While reasonable reporting requirements

are proper subjects for appropriation bill riders, and while full disclosure of the uses made of public funds is patently desirable, we are of the opinion that this rider attempts to limit or restrict the use of funds heretofore appropriated as well as funds appropriated by the proposed Act. We have had no opportunity to complete a thorough study of the legality of this feature of Item 6 but we do desire to express our misgivings toward its validity.

On page 134, Section 9 of Article IV vests in the Legislative Audit Committee certain authority to give notice, to afford a hearing, and to find whether or not there has been a deliberate and intentional falsification of records by any public junior college receiving State aid. In such instances wherein the Committee finds that such falsification has occurred, the rider directs that the Committee certify its findings to the State Comptroller "who shall deny payment of any further funds herein appropriated. . . ." This, in our opinion, is an attempt by rider to amend the general law duties of the Committee which are now codified in Article 4413a-16, Vernon's Civil Statutes, and as such is unconstitutional. See Att'y Gen. Op. V-1254, p. 8.

On page 136, item 14 contains the precatory expression "(Expenditures Ordinarily Restricted to Income)." We recommend clarification as to whether the restriction shall or shall not apply.

On page 136 we call your attention to the fact that the special appropriation following item 11, whereby "the residue" of the Available Fund allocable to The University of Texas is appropriated for named purposes, is not estimated.

On page 137 the special provision following item 6 of appropriations to Texas Western College states that appropriations for "Plant Improvements, Alterations and Major Repairs" should be spent "as nearly as practicable in the manner summarized below." We interpret this special provision and all similar provisions which follow in Article V to mean that the governing boards of Texas Western College and of the other institutions should spend the named appropriation in the manner and in the amounts specified if practicable, but that if such specified expenditures prove not to be practicable, said governing boards (1) may transfer amounts between the various summarized projects, and, if more practicable, (2) may spend such funds on plant improvements, alterations, and major repairs which are not listed in the summaries. If it is the legislative intent that this degree of flexibility should not exist, we suggest that the present language of each of these several provisions be appropriately modified.

On page 162, Section 24 prohibits institutions of higher learning from paying in excess of "the salary rates specified for the itemized positions in this Article" excepting positions designated as "part-time." We note that in practically all institutional appropriations in Article V the only positions for which a salary rate is "specified" is that of "Presi-

dent" except that in a few instances a limited number of salaries for other top administrative personnel are itemized. We think that a question may well be raised over whether Section 24 was intended to restrict all salaries specified in the annual budgets of the institutions which are required by Section 16 of Article V. If it is the intention of the Legislature in Section 24 to restrict all salaries specified in the annual budgets, we recommend that Section 24 be made to say so expressly.

On page 166, Section 4 of Article VI, General Provisions, requires an oath or affirmation which contains the identical provisions contained in the rider discussed at length by us in Attorney General's Opinion V-1263 (1951). We concluded in that opinion that the retrospective features of the oath were invalid. But while we are compelled to advise that retrospective features in such an oath are not proper subjects for an appropriation bill rider, we reiterate our statement in Opinion V-1263 that the Legislature may enact many provisions of law in a general statute which it cannot include in a general appropriation bill. We are informed that House Bill 21 of the Fifty-third Legislature, a general statute prescribing a similar oath and providing that the same shall supersede all other loyalty oaths, was finally passed by the House on February 12, 1953, but has not yet been acted upon by the Senate. The federal due process aspects of an oath similar to that prescribed in House Bill 21 are passed on in Wieman v. Updegraff, 73 S. Ct. 215 (1952).

On page 168, Section 7 sets out stipulations and restrictions pertaining to employment policies which, by our construction, are applicable to all regularly employed persons whose salaries are appropriated in the Act. The various subdivisions definitely specify the hourly work week, holidays, vacation allowance, sick leave and numerous other matters. We desire to call it to your attention that, as now written, we construe Section 7 as applying to the personnel of the institutions of higher learning, the departments and agencies covered in Article III, the hospitals, special schools and other eleemosynary institutions and the judiciary, since the salaries of the personnel in these units are appropriated in this Act. The application of the specified standards may bring about substantial changes in the employment policies heretofore followed by many of these State institutions and agencies. If it is not the intent of the Legislature to so standardize these policies throughout the employments embraced in Articles I, II, III and V, we recommend that desired exceptions be expressly incorporated into the Special Provisions sections of the articles involved, such as is done in Article II, Section 5.

On page 170, Section 10a uses the terms "personally owned automobile", "his private automobile" and "the owner of the automobile" in making provision for reimbursement for mileage traveled. As presently worded, Section 10a can be construed not to authorize reimbursement to State officers and employees who travel by private automobile in performing State business but who do not hold title to the automobile used. Unless it is the intent of the Legislature to so restrict this right of re-

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imbursement, we recommend that the term "privately owned automobile" be substituted in this section for the terms mentioned above.

On page 171, subsection c of Section 10 refers to "the State travel statute." We desire to call it to your attention that should the travel statute referred to fail to pass, or should it fail to make adequate provision for reduced per diem allowance, this subsection will be without effect. Moreover, such a contingency would leave no expense account procedure in force under which reimbursement could be effected.

On page 171, the second paragraph of Section 11a of the proposed Act requires that State agencies authorized to maintain and operate State-owned passenger cars file with the Comptroller a list identifying such cars "prior to Sept. 1, 1953." On page 175, Article IX of the Act provides that "this Act shall take effect and be in force from and after September 1, 1953." In order to eliminate this conflict we recommend substitution of the words "by September 15, 1953" (or some other date subsequent to September 1, 1953) for the words "prior to Sept. 1, 1953."

On page 172, Section 15 makes clear that one specified effect is not to be given to estimates as used throughout the Act. If it is also the intention of the Legislature that the use of an estimate is not intended to constitute a limitation on the amount appropriated where estimates are used in connection with the appropriation of "all" receipts and balances from a specified source (we have so treated such estimates in writing this opinion), we recommend that desirable clarity be infused into the whole "estimate" problem by adding one more sentence to Section 15 which would so state.

Finally, on page 175, Article VIII contains the statement that "all laws and parts of laws in conflict with the provisions of this Act are expressly suspended for the biennium beginning September 1, 1953. . . ." Obviously this provision, being a general appropriation bill rider, cannot constitutionally suspend any general laws which may conflict with provisions of the proposed draft. Tex. Const. Art. III, Sec. 35; Op. Att'y Gen. V-1254 (1951). Therefore, we are of the opinion that Article VIII, in purporting to suspend "all" laws, is highly misleading and for that reason should be eliminated. For this reason we have not included a covering reference in the caption recommended at page 3 above.

Insofar as the general form of organization of the proposed Act is concerned, we think it is logical and well planned. Obviously, this proposed Act represents the fruit of much hard work. We think the draft reflects recognition of the ordinary rules of construction that general provisions will be governed to the extent of conflict by special provisions, and that special provisions in each article will be governed to the extent of conflict by "extra-special" provisions appearing in the body of the article in connection with particular appropriations. In conclusion, may we say that we appreciate the enormity of the task facing those who drafted

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this Act, and we feel certain that they will understand the spirit in which we have attempted to offer advice in this opinion looking toward further improvements.

Yours very truly,

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