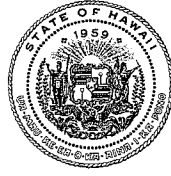


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**STATE OF HAWAII**  
**DEPARTMENT OF BUDGET AND FINANCE**  
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EMPLOYEES' RETIREMENT SYSTEM  
HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND  
OFFICE OF THE PUBLIC DEFENDER  
PUBLIC UTILITIES COMMISSION

ADMINISTRATIVE AND RESEARCH OFFICE  
BUDGET, PROGRAM PLANNING AND  
MANAGEMENT DIVISION  
FINANCIAL ADMINISTRATION DIVISION

April 14, 2009

FINANCE MEMORANDUM

MEMO NO. 09-06

TO: All Department Heads

FROM: Georgina K. Kawamura  
Director of Finance

SUBJECT: Proposed 2009 Bills Regarding Non-General Funds

The purpose of this memorandum is to alert all departments to the potential impact of proposed legislation that is currently being considered by the 2009 Legislature.

House Bill No. 39, Senate Bill No. 292 and Senate Bill No. 884, as amended, propose the following actions, or a combination thereof:

1. Transfer of excess balances from various non-general funds to the General Fund.
2. Transfer of interest earnings from non-general funds to the General Fund.
3. Repeal of current exemptions from central services assessment and administrative expenses for certain non-general funds.

These actions are being considered by the Legislature as options for closing the projected budget gaps in FY 2009 and in FB 2009-11. A summary list of non-general funds that are affected is available for your information.

Departments must be prepared to address the following issues/concerns relating to the proposed legislation:

1. In light of the recent court decision on the Hawaii Insurers Council case, which non-general funds under the purview of the department may be eligible for the proposed transfers to the General Fund? It is our understanding that generally, revenues that are derived from fees established by statutes may be transferred and revenues that are derived from fees set by administrative rules must remain in their respective funds. For your information, a preliminary review from the Department of the Attorney General is attached.

The proportion (percentage) of statutorily-derived revenues in total fund revenues should be determined.

2. What is the expected balance in each non-general fund on June 30, 2009? Of this total, what amount may be available for the proposed transfers?
3. What is the impact of the proposed transfers or exemption repeals on program operations and services?
4. Are there other concerns, including financial or legal concerns?

Please provide the information to the Department of Budget and Finance (B&F) by April 20, 2009.

The electronic file of the list of funds and reporting format will be sent to you by the B&F analysts assigned to your departments.

Attachment



**TESTIMONY OF THE STATE ATTORNEY GENERAL  
TWENTY-FIFTH LEGISLATURE, 2009**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 884, S.D. 2, Proposed H.D. 1, RELATING TO NON-GENERAL FUNDS.

**BEFORE THE:**

HOUSE COMMITTEE ON FINANCE

**DATE:** Tuesday, April 7, 2009 **TIME:** 3:30 PM

**LOCATION:** State Capitol, Room 308

**TESTIFIER(S):** Mark J. Bennett, Attorney General,  
or Randall S. Nishiyama, Deputy Attorney General

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Chair Oshiro and Members of the Committee:

This bill proposes to transfer moneys from various non-general funds to the general fund for fiscal year 2008-2009. In addition, this bill amends the authorized purposes section of the Wireless Enhanced 911 Fund and the Deposit Beverage Container Special Fund to remove the restrictions on the use of moneys from these special funds. Also, this bill repeals the central service and administrative fee exemptions for various funds; transfers interest earnings from non-general funds to the general fund; and redistributes the conveyance tax revenues.

The Department of the Attorney General offers our comments on the Legislature's ability to transfer non-general funds to the general fund given the decision of the Hawaii Supreme Court in Hawaii Insurers Council v. Lingle, 120 Haw. 51, 201 P.3d 564 (2008) (hereinafter "Hawaii Insurers Council"). In addition, while section 12 of this bill proposes to transfer \$2,000,000 from the Medicaid Investigations Recovery Fund to the general fund for fiscal year 2008-2009, we respectfully request that any transfer out of the Medicaid Investigations Recovery Fund be limited to not more than \$1,500,000. Further, we do not object to section 13 of this bill, which proposes to

transfer \$600,000 from the State Identification Revolving Fund to the general fund for fiscal year 2008-2009.

Also, we believe that the blanket transfer of interest earnings from non-general funds and accounts to the general fund would be subject to challenge.

Legislature's Ability to Transfer Non-General Funds to the General Fund Under the Hawaii Insurers Council Case

Under the Hawaii Insurers Council case, special fund moneys derived from regulatory fees that are imposed by an administrative agency pursuant to authority delegated to the agency by the Legislature cannot be transferred to the general fund. The Hawaii Supreme Court determined that this type of transfer violated the separation of powers doctrine because administrative fees and assessments imposed by an administrative agency can only be used for the purpose of providing services to the persons or entities paying such fees. Any other use of the fees would constitute a tax, which can only be imposed by the Legislature.

The source of the money comprising the special fund is important, as it may be determinative as to whether the source of the money is a regulatory fee, a tax, or from a different source. The first prong of the regulatory fee test used by the Hawaii Supreme Court in the Hawaii Insurers Council case is whether the regulatory agency assessed the fee via an administrative rule. If so, the charge is more likely to be regulatory fee than if the money was assessed via a legislative statute. If the fee is statutorily set by the Legislature, the charge is more likely to be a tax. Generally, the Hawaii Insurers Council case does not prohibit the transfer of moneys that are derived from fees set by statute.

Likewise, the purpose of the transfer is important. The third prong of the foregoing regulatory fee test is whether the moneys are used for a public purpose or to defray regulatory expenses. If used

for the former, the moneys are more likely to be taxes than if used for the latter.

Consequently, distinguishing a regulatory fee from a tax requires a careful analysis of the facts and circumstances of the situation.

We have done a preliminary review regarding the ability of the Legislature to transfer moneys from the non-general funds listed in this bill to the general fund.

We have determined that the Wireless Enhanced 911 Fund (sections 4 and 11) and the Deposit Beverage Container Special Fund (sections 5 and 19) have moneys which may be transferred to the general fund under the Hawaii Insurers Council case. We note that this bill has duplicate provisions for the transfer of moneys from the Wireless Enhanced 911 Fund and the Deposit Beverage Container Special Fund to the general fund which should be corrected.

While further study is needed, our preliminary review indicates that moneys from the following non-general funds may be transferred to the general fund under the Hawaii Insurers Council case:

Section 7	Agricultural Loan Reserve Fund
Section 10	Stadium Special Fund
Section 12	Medicaid Investigations Recovery Fund
Section 13	State Identification Revolving Fund
Section 15	Housing Finance Revolving Fund
Section 18	Drug Demand Reduction Assessments Special Fund
Section 20	[Hawaii] Tobacco Settlement Special Fund
Section 25	Vital Statistics Improvement Special Fund
Section 28	Driver Education and Training Fund
Section 29	Judiciary Computer System Special Fund
Section 35	University Revenue-Undertakings Fund
Section 37	University of Hawaii Housing Assistance Revolving Fund
Section 38	Systemwide Information Technology and Services Special Fund
Section 39	Research and Training Revolving Fund

Our review has also indicated that the transfer of moneys from the following non-general funds to the general fund may result in adverse tax consequences because general obligation bond funds may have been used to fund these funds. Consequently, bond counsel should be consulted.

Section 16 Rental Assistance Revolving Fund

Section 41 Works of Arts Special Fund

Also, our preliminary review of the following non-general funds indicates that the discrete components of each fund would have to be analyzed to determine whether moneys derived from such components may be transferred to the general fund.

Section 8 Agricultural Loan Revolving Fund

Section 9 State Risk Management Revolving Fund

Section 14 Hydrogen Investment Capital Special Fund

Section 21 Neurotrauma Special Fund

Section 22 Noise, Radiation, and Indoor Care Quality Special Fund

Section 23 Environmental Health Education Fund

Section 24 Emergency Medical Services Special Fund

Section 26 Clean Air Special Fund

Section 27 Environmental Management Special Fund

Section 30 Special Fund for Disability Benefits

Section 32 Special Land and Development Fund

Section 33 Beach Restoration Special Fund

Section 36 Hawaii Cancer Research Special Fund

Section 40 Natural Area Reserve Special Fund

Section 42 Domestic Violence and Sexual Assault Special Fund

While section 17 of the bill proposes to transfer \$10,000,000 from the Compliance Resolution Fund to the general fund for fiscal year 2008-2009, we note that a transfer from that fund was the basis for the Hawaii Insurers Council case. We urge caution in considering such a transfer, and note that the discrete components of the Compliance

Resolution Fund would have to be analyzed to determine whether moneys derived from such components may be transferred to the general fund.

We are not familiar with the statutory basis of the Salvinia Molesta Removal Fund (section 31) and the Na Ala Hele Program Fund (section 34), and are unable to make a preliminary determination as to whether moneys from these funds can be transferred to the general fund.

We would be happy to work with the Committee to resolve this matter.

#### Section 12 Medicaid Investigations Recovery Fund

Section 12 of this bill proposes to transfer \$2,000,000 from the Medicaid Investigations Recovery Fund to the general fund for fiscal year 2008-2009.

As we explained to the Senate Committee on Ways and Means when that committee asked for our input on this matter, we believe that a transfer of more than \$1,500,000 would have adverse consequences on the operations of the Medicaid Investigations Division (MID). The Medicaid Investigations Recovery Fund has allowed MID to operate in a self-sufficient manner without using any general funds to pursue and prosecute Medicaid fraud cases. We note that the federal government has changed the allocation of moneys that the State would be receiving for the Medicaid Investigations Revolving Fund, which may cause the State to receive lower revenues in the future, thus adversely impacting our ability to operate effectively. We respectfully request that any transfer out of the Medicaid Investigations Recovery Fund be limited to not more than \$1,500,000.

#### Section 13 State Identification Revolving Fund

We do not object to section 13 of this bill, which proposes to transfer \$600,000 from the State Identification Revolving Fund to the general fund for fiscal year 2008-2009.

As we explained to the Senate Committee on Ways and Means when that committee asked for our input on this matter, we believe that a

transfer of more than \$600,000 would have adverse consequences on the operations of the State ID program. The federal government is imposing increasingly stringent requirements regarding the authentication and issuance of identity documents. These requirements are placing fiscal stress on our identification program. We respectfully request that any transfer out of the State Identification Revolving Fund be limited to not more than \$600,000.

Transfer of Interest Earnings from Non-General Funds to the General Fund

Part IV of this bill, sections 53 through 57, proposes that interest earned on the short-term investment of moneys from certain special funds, revolving funds, and special accounts, instead of being retained by the pertinent fund, would be transferred to the general fund.

The Legislature stated:

This Act does not require the temporary transfer of any fee or user charge collected from a beneficiary of the state service. It only provides for the temporary transfer of interest earned on the unexpended fee or charge. Thus, the legislature intends that this Act be in conformance with state judicial interpretation concerning the proper use of the proceeds from a fee or user charge established by a state agency.

We believe that the blanket application of this transfer provision would be subject to challenge. We believe that to transfer the interest earnings from a non-general fund to the general fund, the discrete components of that fund would have to be analyzed to determine whether the interest earnings derived from such components may be transferred to the general fund. For example, moneys from federal sources may require that any interest earnings from such funds be retained for that particular purpose or may require the payment of such interest earnings back to the federal government. We urge your reconsideration of this aspect of the proposed bill.



In summary, we respectfully request that:

1. The Committee reconsider the transfer of moneys to the general fund from non-general funds that may be funded by general obligation bonds due to the potential adverse tax consequences that may result;
2. The Committee analyze the discrete components of the non-general funds that our preliminary review has identified that moneys in such funds cannot be transferred to the general fund in total;
3. The Committee reconsider the transfer of moneys from the Compliance Resolution Fund to the general fund;
4. Not more than \$1,500,000 be transferred from the Medicaid Investigations Recovery Fund to the general fund for fiscal year 2008-2009;
5. Not more than \$600,000 be transferred from the State Identification Revolving Fund to the general fund for fiscal year 2008-2009; and
6. The Committee reconsider the transfer of interest earnings on certain non-general funds and accounts to the general fund.