

NOTE 24 – CONTINGENCIES AND COMMITMENTS

Primary Government

Litigation

In the government-wide and proprietary fund financial statements, the State accrues liabilities related to significant legal proceedings if a loss is probable and reasonably estimable. In the governmental fund financial statements, liabilities are accrued when cases are settled and the amount is due and payable.

The State is a party to various legal proceedings seeking damages, injunctive, or other relief. In addition to routine litigation, certain of these proceedings could, if unfavorably resolved from the point of view of the State, substantially affect State programs or finances. These lawsuits involve programs generally in the areas of corrections; tax collection; commerce and budgetary reductions to school districts and governmental units; and court funding. Relief sought generally includes damages in tort cases; improvement of prison medical and mental health care and refund claims for State taxes. The State is also a party to various legal proceedings that, if resolved in the State's favor, would result in contingency gains to the State, but without material effect upon fund balance/net assets. The ultimate dispositions and consequences of all of these proceedings are not presently determinable, but such ultimate dispositions and consequences of any single proceeding or all legal proceedings collectively should not themselves, except as listed below, in the opinion of the Attorney General of the State and the Office of the State Budget, have a material adverse effect on the State's financial position. Those lawsuits pending which may have a significant impact or substantial effect on State programs or finances, if resolved in a manner unfavorable to the State, include the following:

Durant et al v State of Michigan: On November 15, 2000, more than 365 Michigan school districts and individuals filed two suits in the Michigan Court of Appeals. The first suit, Durant et al v State et al ("Durant III"), asserts that the State School Aid appropriation act, P.A. 297 of 2000, violates the State Constitution, Article 9, Sections 25-34 (the "Headlee Amendment"), because it allegedly transfers per pupil revenue guaranteed to school districts under the Constitution of 1963, Article 9, Section 11, for unrestricted school operating purposes, in order to satisfy the State's independent funding obligation to those school districts under Article 9, Section 29. The State won this case in the Court of Appeals, and the Supreme Court denied the plaintiffs' application for leave to appeal.

The second suit, Adair et al v State et al ("Adair"), was filed on November 15, 2000, by more than 400 school districts and asserts that the State has, by operation of law, increased the level of various specified activities and services beyond that which was required by State law as of December 23, 1978 and, subsequent to December 23, 1978, added various specified new activities or services by State law, including mandatory increases in student instruction time, without providing funding for these new activities and services, all in violation of the Headlee Amendment. The Adair plaintiffs sought an unspecified money judgment equal to the reduction in the State financed proportion of necessary costs incurred by the plaintiff school districts for each school year from 1997-1998 through the date of any judgment and for attorneys' fees and litigation costs. The Adair plaintiffs also sought a declaratory judgment that the State has failed to meet its funding responsibility under the Headlee Amendment to provide the plaintiff school districts with revenues sufficient to pay for the necessary increased costs for activities and services first required by State law after December 23, 1978, and to pay for increases in the level of required activities and services beyond that which was required by State law as of December 23, 1978.

On January 2, 2001, plaintiffs filed a first amended complaint in both Durant III and Adair increasing the number of school district plaintiffs to 443. On February 22, 2001, plaintiffs filed a second amended complaint in Durant III increasing the number of school district plaintiffs to 457. On April 16, 2001, plaintiffs filed a second amended complaint in Adair increasing the number of school district plaintiffs to 463. The second amended complaint includes a request for declaratory relief, attorneys' fees and litigation costs but does not include a request for money judgment.

On April 23, 2002, the Court of Appeals dismissed the complaint in its entirety and with prejudice. Plaintiffs filed an application for leave to appeal in the Michigan Supreme Court on May 14, 2002, which was granted on December 18, 2002.

On June 9, 2004, the Michigan Supreme Court issued its opinion in Adair. The Court held that, with three exceptions, all of the plaintiffs' claims were barred by the doctrines of *res judicata* and release. The Court ruled that all but three of the claims that plaintiffs alleged were new or increased activities could have been included in the Durant I litigation because the activities existed during the time that the Durant I litigation was pending.

The other three claims involve statutes that were enacted after the Court's 1997 Durant I decision. The Court ruled that two of these post-Durant I statutes are not new mandates because the activities are either not new or are merely permissive. The third claim involves the record keeping activities and the operation of the Center for Educational Performance and Information (CEPI), which was created by executive order in 2000 (Michigan Compiled Laws (MCL) Section 388.1752; EO 2000-9). Plaintiffs alleged that the statute and executive order require districts to create and maintain student data following State-specified data-gathering procedures and transmit the data electronically to the State. The Supreme Court ruled that the plaintiffs' allegation that districts had to now actively participate in maintaining data that the State requires for its own purposes presents a colorable claim under the Headlee Amendment. The Court reversed the Court of Appeals' dismissal of the claim

and remanded the issue to the Court of Appeals to determine whether this claim constitutes a new State-mandated activity in violation of the Headlee Amendment.

On August 4, 2005, the Court of Appeals held that the school districts failed to present documentary support from which it can be inferred that either MCL 388.1752 or Executive Order 2000-9 mandates the school districts to actively participate in the maintenance of data that the State requires for its purposes. Further, the record keeping claim cannot survive summary disposition in the absence of any factual support, either expressed or implied, demonstrating that a genuine issue of material fact exists with regard to whether the dictates of the statute and the EO impermissibly shift a State obligation to the school districts to avoid the costs of obligation. The Court of Appeals granted summary disposition in the State's favor. Plaintiffs estimated their claim to be \$30 million plus ongoing costs. The plaintiff school districts filed an application for leave to appeal with the Michigan Supreme Court. A brief in opposition was filed on October 11, 2005.

On March 8, 2006, the Supreme Court issued an order vacating the August 4, 2005, Court of Appeals decision and remanded the issue to the Court of Appeals for reevaluation of the record keeping claim. The Court of Appeals appointed a Special Master to oversee discovery and make proposed findings to the Court of Appeals. An evidentiary hearing before the Special Master was held in the summer of 2007.

On January 27, 2008, the Special Master issued her opinion. She found that the increased recordkeeping and reporting requirements imposed upon the school districts by the State was an attempt to shift the burden to comply with additional requirements to the districts without appropriating the necessary costs to comply. She concluded that this was a shifting of the recordkeeping and reporting requirement burden from the State to the local units of government in violation of the Headlee Amendment.

The State filed objections to the Special Master's Opinion in the Court of Appeals. The school districts sought attorney fees in the Court of Appeals.

On July 3, 2008, the Court of Appeals issued its Opinion on Second Remand, essentially adopting the conclusions of law and factual findings of the Special Master. The Court entered a declaratory judgment of favor of the Plaintiff school districts, requiring the State to fund the "necessary costs associated with the data collection reporting mandates" associated with CEPI. The Court denied Plaintiff's request for attorney fees.

Both parties have filed applications to appeal in the Michigan Supreme Court. The State is currently awaiting a decision as to whether the Supreme Court will hear these appeals. It is reasonably possible that the State will be paying substantial amounts to school districts for the unfunded mandates, and over \$1 million in attorney fees to the Plaintiffs.

County Road Association of Michigan et al v John M. Engler et al: On March 6, 2002, the County Road Association of Michigan and the Chippewa County Road Commission filed a complaint in Ingham County Circuit Court challenging various provisions of Executive Order 2001-9. The executive order was proposed by the Governor and approved by the appropriations committees of both houses of the Legislature on November 6, 2001, for the purpose of reducing appropriated expenditures, to balance the State budget. The complaint consists of five counts, alleging that Defendant State agencies: (1) violated Article 9, Section 9 of the State Constitution, by unlawfully allowing the Department of State to bill the Department of Transportation for expenses in excess of those necessary to collect motor vehicle taxes and fees; (2) violated Article 9, Section 9 of the State Constitution, by utilizing, for non-transportation purposes, revenues from the sale of information, or products, the creation of which was funded by constitutionally restricted transportation funds; (3) violated Article 5, Section 20 and Article 9, Section 17 of the State Constitution, and MCL 247.661 *et seq* by allowing the Department of Treasury to bill the Department of Transportation for expenses in excess of those necessary to collect motor vehicle taxes and fees; (4) violated Article 9, Section 17 of the State Constitution, by transferring funds from the Comprehensive Transportation Fund (CTF) to the General Fund; and (5) violated Article 9, Section 17 of the State Constitution, by transferring funds from the Transportation Economic Development Fund to the General Fund.

The Plaintiffs obtained two injunctions from the Ingham County Circuit Court. One injunction barred the State from diverting \$20 million to the General Fund from the Michigan Transportation Fund (MTF) and the other barred the State from diverting \$12.8 million to the General Fund from the CTF. On January 13, 2004, the Court of Appeals vacated the CTF injunction, holding that Executive Order 2001-9 legitimately diverted \$12.8 million from the CTF to the General Fund. On the same day, in an unpublished opinion, the Court of Appeals reversed in part and affirmed in part the MTF injunction, holding that \$12.5 million was legitimately diverted from the MTF to the General Fund but that the remainder was not.

On November 8, 2005, the Michigan Supreme Court affirmed the Court of Appeals' decision that the State legitimately transferred \$12.8 million from the CTF to the General Fund.

On January 30, 2006, the Supreme Court denied the Defendants' application for leave to appeal. Therefore, the Court of Appeals' decision that \$12.5 million was legitimately diverted from the MTF to the General Fund, but that \$7.5 million was not, stands.

Michigan
Notes to the Financial Statements

The remaining issues in the case, involving approximately \$47.3 million, were tried in the Ingham County Circuit Court in July 2007. On August 28, 2008, the Ingham County Circuit Judge issued an Opinion requiring the Department of State to transfer \$7.3 million from fiscal year 2001 and \$6.5 million from fiscal year 2002 back to the MTF, and ordering that "an appropriate cost allocation study be done for use in the future to reflect the current costs associated with the sales tax collection." No relief was granted on any other of the Plaintiffs' claims. It is expected that the State will file an appeal to seek reversal of the order and the Plaintiffs will cross-appeal to reverse the portions of the post-trial order that denied them the relief.

Use Tax Revenue: A taxpayer has filed a claim against the State, requesting a refund of Use Taxes for the years 2001 through 2006. The refund amount is based on an earlier audit finding, in which the taxpayer received a refund for tax years 1995 through 2000. The Department of Treasury reviewed the claim and a refund of \$54.0 million will be paid to the taxpayer in December 2008.

Federal Grants

The State receives significant financial assistance from the federal government in the form of grants and entitlements. The receipt of federal grants is generally conditioned upon compliance with terms and conditions of the grant agreements and applicable federal regulations. Substantially all federal grants are subject to either federal single audits or financial and compliance audits by grantor agencies. Questioned costs as a result of these audits may become disallowances after the appropriate review of federal agencies. Material disallowances are recognized as fund liabilities in the government-wide and proprietary fund financial statements when the loss becomes probable and reasonably estimable. As of September 30, 2008, the State estimates that additional disallowances of recognized revenue will not be material to the general purpose financial statements.

Federal sanctions that may result in a loss to the State include \$11.3 million for the Food Stamp Program.

Gain Contingencies

Certain contingent receivables related to the Department of Human Services (DHS) are not recorded as assets in these statements. Amounts recoverable from DHS grant recipients for grant overpayments or from responsible third parties are recorded as receivables only if the amount is reasonably measurable, expected to be received within 12 months, and not contingent upon future grants or the completion of major collection efforts by the State. If recoveries are accrued and the program involves federal participation, a liability for the federal share of the recovery is also accrued. The unrecorded amount of potential recoveries, which are ultimately collectible, cannot be reasonably determined.

In November 1998, the Attorney General joined 45 other states and five territories in a settlement agreement against the nation's largest tobacco manufacturers, to seek restitution for monies spent by the states under Medicaid and other health care programs for treatment of smoking-related diseases and conditions. Michigan's share of the settlement is expected to be \$8.5 billion over the next 25 years, and then \$350.0 million per year, adjusted for inflation and other factors, in perpetuity. While Michigan's percentage share of the base payments will not change over time, the amount of the annual payment is subject to a number of modifications including adjustments for inflation and usage volumes. Some of the adjustments may result in increases in the payments (inflation, for example), while other adjustments will likely cause decreases in the payments. As the market share of the participating manufacturers shifts to companies that are not participating in the settlement, the participating companies are entitled to an adjustment. A state, however, may negate the effects of the market share adjustment by either demonstrating that it diligently enforced the escrow requirements, tax laws, and other statutes against the non-participating tobacco manufacturers. The states are currently in litigation over the application and interpretation of the market share adjustment and diligent enforcement provisions of the master settlement agreement. At best, Michigan will avoid any reduction of its tobacco payments. At worst, an entire year's payment can be eliminated through application of the market share adjustment. The net effect of these adjustments on future payments is unclear, therefore only receivables and deferred revenues which can be reasonably estimated have been recorded for future payments.

Construction Projects

The Department of Transportation has entered into construction contracts that will be paid with transportation related funds. As of September 30, 2008, the balances remaining in these contracts equaled \$835.0 million.

Contingent Liability for Local School District Bonds

The Michigan Constitution, Article 9 Section 16 resulted in a contingent liability for the bonds of any school district which are "qualified" by the State Treasurer. If for any reason a qualified school district will be, or is unable, to pay the principal and interest on its qualified bonds when due, the school district shall borrow, and the State shall lend to it, any amount necessary for the school district to avoid a default on its qualified bonds. In the event that adequate funds are not available in the School Loan Revolving Fund to make such a loan, the State is required to make loans from the General Fund. As of September 30, 2008, the principal amount of qualified bonds outstanding was \$14.0 billion. Total debt service requirements on these bonds including interest will approximate \$1.4 billion in 2009. The amount of loans by the State (related to local school district bonds qualified under this program), outstanding to local school districts as of September 30, 2008, is \$720.1 million. Interest due on these loans as of September 30, 2008, is \$160.4 million.

Discretely Presented Component Units

Student Loan Guarantees

The Michigan Higher Education Assistance Authority (MHEAA) is contingently liable for loans made to students by financial institutions that qualify for guaranty. The State, other than MHEAA, is not liable for these loans. The MHEAA's default ratio is currently below 5% for the fiscal year ended September 30, 2008. As a result, the federal government's reinsurance rate for defaults for the fiscal year ended September 30, 2007, is 100% for loans made prior to October 1, 1993, and 98% for loans made on or after October 1, 1993, to September 30, 1998. In the event of future adverse default experience, MHEAA could be liable for up to 25% of defaulted loans. Management does not expect that all guaranteed loans could default in one year. At the beginning of each fiscal year, MHEAA's reinsurance rate returns to 98%.

For loans made on or after October 1, 1998, the reinsurance rate will be 95%. In the event of future adverse default experience, MHEAA could be liable for up to 25% of such defaulted loans. Accordingly, MHEAA's expected maximum contingent liability is less than 25% of outstanding guaranteed loans; however, the maximum contingent liability at September 30, 2008, is \$1.1 billion.

The MHEAA entered into commitment agreements with all lenders that provide, among other things, that the MHEAA will maintain cash and marketable securities at an amount sufficient to guarantee loans in accordance with the Higher Education Act of 1965, as amended. The MHEAA was in compliance with this requirement as of September 30, 2008.

Multi-Family Mortgage Loans

As of June 30, 2008, the Michigan State Housing Development Authority (MSHDA) has commitments to issue multi-family mortgage loans in the amount of \$107.6 million and single-family mortgage loans in the amount of \$114.6 million.

The MSHDA has committed up to approximately \$1.1 million per year for up to 30 years from the date of completion of the respective developments (subject to three years advance notice of termination) from its accumulated reserves and future income to subsidize operations or rents for certain tenants occupying units in certain developments funded under MSHDA's multi-family program.