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RE: Professional Service Providers/N.J. Public Employees' Retirement System Compliance

Dear Colleague,

I am writing to you in reference to a July 2012 investigative report¹ by the New Jersey Office of State Comptroller (“OSC report”) revealing the noncompliance of municipalities with N.J.S.A. 43:15A-7.2 (“Section 7.2”) of the New Jersey Public Employees’ Retirement System Act (“PERS Act”).

As a New Jersey public official, the OSC report should be of great concern to you, your municipality, and your constituents. It has highlighted a **problem** which every New Jersey municipality must address, but also provided **a solution** – a solution that the law firm of **Gibson&Perkins, PC, can assist you in resolving.**

The Problem

The OSC report uncovered failures by municipalities in complying with the PERS Act. The failures documented in the OSC report could result in New Jersey taxpayers having to provide pension benefits to individuals who are not entitled to them under New Jersey law.

The OSC report, entitled *IMPROPER PARTICIPATION BY PROFESSIONAL SERVICE PROVIDERS IN THE STATE PENSION SYSTEM*, identified several New Jersey municipalities² that have not taken the necessary steps to determine whether their professional employees are independent contractors who are prohibited from receiving a public pension under section 7.2 of the PERS Act.³ Section 7.2 was enacted in May 2007 and was effective as of January 1, 2008. Section 7.2 was intended to prohibit professional service providers, such as town solicitors, from participating in PERS.⁴ Section 7.2 disqualifies a professional service provider from participating in PERS, if the provider either: (a) has a “professional services contract” with a municipality;⁵ or (b) meets “the definition of independent contractor” as set forth in regulation or policy of the federal Internal Revenue Service for purposes of

¹ The report is available online at <http://www.nj.gov/comptroller/>.

² See OSC Investigation Report, pages 10-16.

³ See OSC Investigation Report, page 8.

⁴ See OSC Investigation Report, page 1.

⁵ N.J.S.A. 43:15A-7.2(a).

the Internal Revenue Code.”⁶ Section 7.2 requires that municipalities ensure that the ineligible professional service providers above do not receive improper pension benefits.

The Solution

According to the OSC report, New Jersey municipalities and school districts have not adequately instituted procedures to exclude professional service providers from receiving improper benefits.⁷ The OSC report was especially critical of the failure of municipalities to analyze whether a professional provider meets the definition of “independent contractor” under the Internal Revenue Code.⁸ The OSC report connects the failure to prevent the enrollment of ineligible professional service providers in PERS with an adverse financial impact on PERS and the concerned municipalities.⁹ However, the OSC report did contain several recommendations to municipalities for prospective compliance with section 7.2. In particular, one recommendation was for municipalities to obtain an opinion on section 7.2 compliance from an impartial attorney who does not have a personal interest in the outcome of the opinion.¹⁰ The required determination that a municipality must engage in, under section 7.2(b), is an intensive facts and circumstances test involving provisions of the Internal Revenue Code and the regulations promulgated thereunder. The analysis under section 7.2(b) requires a municipality obtain counsel well versed in the minutiae of the Internal Revenue Code.

How Gibson&Perkins, PC Can Help You

Gibson & Perkins, PC, is a multi-practice law firm with attorneys admitted to practice law before the courts of New Jersey, Pennsylvania, and Delaware. With four of our five attorneys holding Masters of Laws Degrees in Tax, we have the background and experience to address this issue on your behalf. Our tax lawyers focus on tax matters arising in all forms of tax controversies and transactions. We have represented clients at all stages of tax litigation and in various transactional matters involving tax law questions. The focus of our practice is to provide practical problem solving for our clients.

Please consider Gibson & Perkins, PC as a resource for inquiries under section 7.2(b) of the PERS Act. For more information about the OSC report and how we can assist you in addressing this important issue, go to www.gibperk.com/OSC. Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision. Lastly, if your municipality is presently represented by counsel in connection with the particular issue presented in this letter, then please disregard this letter. You may contact me at richardwelsh@gibperk.com or 610.565.1708 ext. 7.

Very truly yours,
GIBSON & PERKINS, P.C.



RICHARD M. WELSH, ESQUIRE

Notice: If you believe that this letter is inaccurate or misleading, please report same to the Committee on Attorney Advertising, Hughes Justice Complex, CN 037, Trenton, New Jersey 08625.

⁶ N.J.S.A. 43:15A-7.2 (b).

⁷ See OSC Investigation Report, pages 8-17.

⁸ See OSC Investigation Report, pages 11-13.

⁹ See OSC Investigation Report, pages 30-33.

¹⁰ See OSC Investigation Report, page 34.