The Honorable Roy T. Combs  
Auditor of State  
State House  
Indianapolis, Indiana

Dear Mr. Combs:

This is in reply to your letter in which you request an Official Opinion on the following:

“1. Did the State of Indiana assume the liability for the payment of the employee’s share of the Social Security contribution regardless of whether or not deductions were made from the employee’s compensation, if the employee was employed in a covered position?

“2. If the answer to the first question is in the affirmative and the state is liable, as an employer, for failure to make deductions, then can such payments be made out of the regular appropriation to pay the State’s share of such contributions due? If not, what fund must this be taken from?

“3. If the answer to question 2 is in the affirmative then in the event the Social Security Administration assesses penalties and interest—can such penalties and interest also be paid from the regular state appropriation for the State’s share of Social Security contributions due? If not, what fund must this be taken from?”

Social security coverage was extended to employees of political subdivisions of the State of Indiana who were not members of retirement systems by the terms of the Acts of 1951, Ch. 313. The intention had been to cover all state employees at this time also, but due to the faulty title of the act, state employees were excluded from coverage until the title was amended in 1955. Section 3 of the 1951 Act, as found in Burns’ (1957 Supp.), Section 60-1903, provides, in part, as follows:

“(2) The state will pay to the secretary of the treasury, at such time or times as may be prescribed
under the Social Security Act, contributions with respect to wages (as defined in section 2 of this act), equal to the sum of the taxes which would be imposed by the Federal Insurance Contributions Act [F. C. A., tit. 26, §§ 1400, 1410] if the services covered by the agreement constituted employment within the meaning of that act;

“(3) Such agreement shall be effective with respect to services in employment covered by the agreement performed after a date specified therein but in no event may it be effective with respect to any such services performed prior to the first day of the calendar year in which such agreement is entered into or in which the modification of agreement making it applicable to such services, is entered into; * * *.” (Our emphasis)

Section 218 of the Social Security Act, as found in 42 U. S. C. A. § 418, provides for the extension of coverage to employees of the state and political subdivisions and reads, in part, as follows:

“(a) (1) The Secretary of Health, Education, and Welfare shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request.

* * *

“(e) Each agreement under this section shall provide—

“(1) that the State will pay to the Secretary of the Treasury, at such time or times as the Secretary of Health, Education, and Welfare may by regulations prescribe, amounts equivalent to the sum of the taxes which would be imposed by sections 1400 and 1410 of Title 26 if the services of employees covered by the
agreement constituted employment as defined in section 1426 of Title 26; and

“(2) that the State will comply with such regulations relating to payments and reports as the Secretary of Health, Education, and Welfare may prescribe to carry out the purposes of this section.” (Our emphasis)

Section 1400, referred to above, provides for the imposition on the income of each individual of a tax equal to a certain percentage of his wages for specified years. Section 1410 provides for the imposition on every employer of an excise tax, with respect to having individuals in his employ, equal to a certain percentage of the wages paid by him for specified years.

In accordance with the authority given the state agency by both the federal act and the State Enabling Act, the state agency entered into an agreement with the federal security administrator on September 12, 1951, purporting to extend social security coverage as of that date to employees of the state and of any political subdivisions or local units of the state. Members of retirement systems were specifically excluded, and as a matter of law, state employees were not eligible for coverage at this time, as pointed out above. Therefore, only employees of local units and political subdivisions were eligible for coverage by the original agreement. That agreement reads, in part, as follows:

“The Federal Security Administrator (hereinafter referred to as the ‘Administrator’), and the State of Indiana, acting by and through the Public Employees’ Retirement Fund (hereinafter called ‘the state’), hereby agree, in accordance with the terms and conditions stated in this agreement, to extend, in conformity with section 218 of the Social Security Act, the insurance system established by title II of the Social Security Act, to services performed by individuals as employees of the State and as employees of those political subdivisions of the State listed in the appendix attached hereto and made a part hereof, except services expressly excluded from this agreement.

* * *
“(c) Contributions by the State:

“The State will pay to the Secretary of the Treasury, at such time or times as the Administrator may by regulation prescribe, amounts equivalent to the sum of the taxes which would be imposed by sections 1400 and 1410 of the Internal Revenue Code if the services of employees covered by this agreement constituted employment as defined in section 1426 of such code.

* * *

“(h) Adjustments, refunds, and interest on delinquent payments:

* * *

“(2) If the State does not make, at the time or times due, the payments provided for under this agreement, there shall be added, as part of the amounts due (except in the case of adjustments made in accordance with the provisions of subpart (1) of this part), interest at the rate of six per centum per annum from the date due until paid, and without prejudice to other available methods of collection, the Administrator, in his discretion, may deduct such amounts plus interest from any amounts, now or hereafter provided, which he may certify to the Secretary of the Treasury for payment to the State under any provision of the Social Security Act. Amounts so deducted shall be deemed to have been paid to the State under such provisions of the Social Security Act.”

From time to time the state agency entered into suitable modifications with the Secretary of Health, Education, and Welfare to extend social security coverage as it was elected by separate units and as the federal and state laws were amended to extend coverage to persons ineligible under previous laws. For instance, in September, 1955, the terms of the original federal-state agreement were changed by Modifications No. 48 and 49 to extend social security coverage to state employees and to members of retirement systems, who were now eligible for such coverage due to amendments in the fed-

In Modification No. 48, part (c) of the original agreement, set out above, relating to contributions by the state, was amended to read as follows:

“The State will pay to the Secretary of the Treasury, at such time or times as the Secretary of Health, Education, and Welfare may by regulation prescribe, amounts equivalent to the sum of the taxes which would be imposed under the Federal Insurance Contributions Act if the services of employees covered by this agreement constituted employment as defined in such Act.”

The Handbook for State OASI Administrators, developed by the Social Security Administration, contains a section on payment of contributions in which the provisions of the Social Security Act and regulations made pursuant to it are discussed. Section 465 of the Handbook reads as follows:

“465. Liability for Contributions.—Under the terms of an old-age and survivors insurance coverage agreement, the State is liable for the payment of all contributions due with respect to wages paid for services of employees covered by the agreement. This includes liability for contributions on wages paid to employees of the State as well as to employees of political subdivisions of the State.

“The liability of the State attaches at the time wages are paid to individuals performing services covered under the agreement. Where coverage under an agreement or modification is made effective retroactively, the liability of the State for contributions with respect to wages paid to employees for services covered retroactively attaches as of the date of execution of the agreement or modification.

“In administering coverage agreements, the Social Security Administration looks only to the State for the payment of contributions due. Arrangements between a State and its political subdivisions to provide for payment of contributions by political subdivisions with respect to wages paid to employees of the political sub-
divisions are intrastate matters in which the Federal Government does not participate.

“One-half of the contribution rate is to be paid by the employee and one-half by the employer. However, the State, under its agreement, is liable for both the employer's and employee's share of the contributions. Provision for withholding the employee's share of contributions from his wages is a matter to be worked out within the State.

“The raising of funds within the State for the payment of contributions and interest is also an intrastate matter.” (Our emphasis)

Therefore, it would appear that the state agency which administers the old-age and survivors' insurance coverage agreement within the state is responsible for reporting wages and paying both the employer's and employee's share of the contributions due with respect to wages paid to all employees of the state and of political subdivisions of the state whose services are covered under the federal-state agreement.

It should be pointed out, however, that under the terms of the Indiana law, an employee is always liable for his share of social security contributions. The contributions are to be deducted from wages as and when paid, but failure to make such deductions shall not relieve the employee from liability for such contributions. [See Acts of 1955, Ch. 329, Sec. 6, as amended, as found in Burns' (1957 Supp.), Section 60-1917 (a), and Acts of 1951, Ch. 313, Secs. 4 and 5, as amended, as found in Burns' (1957 Supp.), Sections 60-1904 and 60-1905 (c) (2).] However, this liability of the employee for his own individual contributions does not relieve the state of its primary liability to the federal agency for the payment of all contributions due under the agreement.

Your second question asks whether these payments for which the state is liable can be made out of the regular appropriations made to the state agency by the General Assembly.

When Ch. 329, supra, was enacted in 1955, it contained a provision in Sec. 8 that appropriated for the next biennial period such sum as should be required to discharge all of the obligations of the state on accounts of social security under
the federal-state agreement on account of any modification pursuant to the act. Any of the payments in question could have been made from this appropriation as long as it was in existence. Section 8 also provided that for each biennial period thereafter there should be appropriated a sum sufficient for such purpose.

Acts of 1951, Ch. 313, Sec. 6(c), as amended, as found in Burns’ (1951 Repl.), Section 60-1906(c), provides that the custodian of the fund (the State Treasurer) shall pay to the Secretary of the Treasury, from the Contribution Fund, such amounts and at such time or times as may be directed by the state agency in accordance with any agreement entered into under the terms of the act. Section 6 (e) (1) further authorizes the annual appropriation of such additional sums as are found necessary in order to make the payments to the Secretary of the Treasury which the state is obligated to make pursuant to the federal-state agreement. By the terms of Acts of 1955, Ch. 329, Sec. 7, as found in Burns’ (1957 Supp.), Section 60-1918, all the provisions with respect to the Contribution Fund of Ch. 313, supra, shall be applicable to all contributions or other payments of any character required of employees, the state, and political subdivisions.

The current appropriation was made to the Public Employees’ Retirement Fund for social security contributions by the terms of the Acts of 1957, Ch. 285, Sec. 2, pp. 695, 696. (The proviso following the appropriation refers to the Acts of 1955, Ch. 392. Since there is no Chapter 392 in the Acts of 1955, it is assumed the Legislature had reference to Chapter 329, which deals with social security and supplemental retirement benefits to state employees.) Chapter 285, supra, reads as follows:

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"FOR THE PUBLIC EMPLOYEES’ RETIREMENT FUND"
Current Obligations  2,000,000  2,000,000

"FOR THE PUBLIC EMPLOYEES’ RETIREMENT FUND—SOCIAL SECURITY CONTRIBUTIONS"
State Employees  1,470,000  1,500,000
Teachers  2,750,000  2,800,000
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"PROVIDED, That if the above appropriation for any one year is greater than the amount actually required for any system, under the provisions of Section 23, Chapter 392, Acts of 1955, then such excess shall be returned to the General Fund of the State of Indiana, together with any earnings that such excess may have received. PROVIDED FURTHER, That should the amount actually required for any system be greater than the above appropriation, then there is hereby appropriated from the General Fund a sufficient amount to pay such contribution as may be required, under the provisions of Chapter 392, Acts of 1955. Provided, Further, That the General Fund will be reimbursed for the expenditures made for Social Security contributions from any special funds including Motor Vehicle Highway Account, State Teachers' Retirement Fund, Alcoholic Beverage Commission Fund, Highway Department Fund, Conservation Rotary Funds, Employment Security Account inclusive but not limited to the above enumerated funds or accounts."

From a study of the applicable provisions of the acts concerning social security coverage, it would appear that the state could meet its obligation for the liability incurred for social security payments with any money available from the Contribution Fund set up by the Acts of 1951, Ch. 313, as amended, supra, and incorporated in the Acts of 1955, Ch. 329, as amended, supra. This Fund consists of all contributions, interest, penalties, appropriations, miscellaneous items, and all other moneys received for the Fund from any other source. Withdrawals from this fund are to be made solely for payments of amounts required to be paid to the Secretary of the Treasury pursuant to an agreement entered into by the state, and for refunds to employees in case of a deduction of more than the correct contribution.

Inasmuch as the payments in question are all liabilities of the state assumed under the federal-state agreement and subsequent modifications, such payments may be made to the Secretary of the Treasury from the Contribution Fund. Since the agreement also provides for the payment of interest by the state for delinquent payments, that amount also is payable
from the Contribution Fund. By the terms of the 1957 Appropriation Act set out above, if the amount actually required for any system is greater than the amount appropriated, then there is appropriated from the General Fund a sufficient amount to pay such contributions as may be required.

It should be pointed out that some specific state departments and agencies are required by law to reimburse the General Fund for expenditures made for social security contributions. It is possible that these funds could be charged also for the payments in question here. This would depend upon an individual determination of the particular terms relating to each of the special funds.

In conclusion, I would answer each of your questions as follows:

1. The State of Indiana assumed the liability to pay to the Secretary of the Treasury both the employee’s and employer’s share of the social security contributions due with respect to wages paid to all employees whose services are covered under the federal-state agreement.

2. The payments for which the state is liable under the federal-state agreement are to be paid from the Contribution Fund set up for this purpose, which includes the regular appropriation made to pay the state’s share of contributions. If the amount in the Contribution Fund is insufficient to meet these payments, then a sufficient amount to pay such contributions as may be required is appropriated from any money not otherwise appropriated in the General Fund of the State of Indiana.

3. In the event the Social Security Administration assesses penalties and interest for delinquent payments for which the State of Indiana is liable, such penalties and interest may be paid from the regular fund from which payments are made by the state for social security purposes.