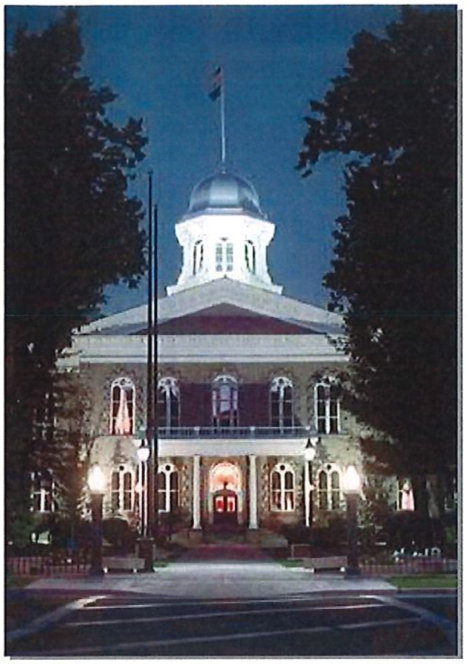

State of Nevada
Governor's Finance Office
Division of Internal Audits

Audit Report

Department of Administration/ Deferred Compensation Program and Governor's Finance Office

*****

Board of Pharmacy Deferred Compensation Match

***

Clarifying deferred compensation statutes necessary to help guide agency decisions.

DIA Report No. 21-05
January 28, 2021

EXECUTIVE SUMMARY
DofA/Deferred Compensation Program and GFO
Board of Pharmacy Deferred Compensation Match
Clarify Deferred Compensation Program Statutory Guidelines

Objective: Clarify Deferred Compensation Program Guidelines

Proposing legislation clarifying state agency (employer) matching contributions, if any, will ensure all state employees are treated equitably and the intent for state employee compensation limits are adhered to by agency management. The Nevada Deferred Compensation Program, a voluntary 457(b) retirement savings program for employees of the state and local governments, allows state agency (employer) matching contributions despite unclear statutory guidance. There is no statutory language provided for employer matches, the language speaks only to managing a program for employee contributions.

The Board of Pharmacy employer matching contributions are unique and generous when compared to public and private sector matches. The Board's 50% match may not be excessive by private sector standards; however, the board offers both a defined-benefit pension plan (PERS) in addition to the deferred compensation plan with employer contribution, which is exceedingly rare in either a public or private sector plan. The Board's matching contributions favor higher paid, senior staff and may violate the intent of the "95% rule" for state employee compensation relative to the Governor's salary.

Three other state independent licensing boards contribute a percentage of salary regardless of the employees' contribution; none of these boards participate in PERS. The Board of Pharmacy is the only board or state agency that provides contributions to employees' deferred compensation accounts and also participates in PERS. The Department of Administration/Deferred Compensation Program plans to fully implement the recommendation by July 2023.

Referring facts to the Office of the Attorney General to determine if open meeting law violations were made by the Board of Pharmacy on deferred compensation match decisions will enhance public confidence in state agency decisions that employee compensation is equitable and the intent of state employee compensation limits is adhered to by agency management. The Board of Pharmacy's approval on matching contribution increases may not have been transparent. Board meeting agendas and minutes do not support public disclosure of deferred compensation decisions. The Board appears to hide staff compensation increases while approving increases in license fees for the professionals regulated by the Board. The Governor's Finance Office plans to fully implement the recommendation by March 2021.

INTRODUCTION

At the request of the Executive Branch Audit Committee, the Division of Internal Audits (DIA) audited the Board of Pharmacy. The audit focused on the appropriateness and process of establishing Board matching contributions to employee deferred compensation accounts. The audit's scope and methodology, background, and acknowledgements are included in Appendix A.

The audit objective was to develop recommendations to:

✓ Clarify Deferred Compensation Program statutory guidelines.

Department of Administration/Deferred Compensation Program and Governor's Finance Office Response and Implementation Plans

DIA provided draft copies of this report to the Department of Administration/ Deferred Compensation Program, the Governor's Finance Office, and the Board of Pharmacy for review and comment. Their comments have been considered in the preparation of this report and are included in Appendix B. In their response, the Department of Administration/Deferred Compensation Program and the Governor's Finance Office accepted the recommendations. Appendix C includes a timetable to implement the recommendations.

NRS 353A.090 requires within six months after the final report is issued to the Executive Branch Audit Committee, the Administrator of the Division of Internal Audits shall evaluate the steps the Department of Administration/Deferred Compensation Program and the Governor's Finance Office have taken to implement the recommendations and shall determine whether the steps are achieving the desired results. The administrator shall report the six-month follow-up results to the committee and agency officials.

The following report (DIA Report No. 21-05) contains DIA's *findings, conclusions,* and *recommendations.*

Respectfully,

Warren Lowman
Administrator

Clarify Deferred Compensation Program Statutory Guidelines

The Department of Administration/Deferred Compensation Program can help clarify deferred compensation statutory guidelines for state agencies by proposing legislation on state agency (employer) matching contributions, if any, to employee deferred compensation accounts. Legislation clarifying state agency (employer) matching contributions, if any, will ensure all state employees are treated equitably and the intent for state employee compensation limits is adhered to by agency management.

The Governor's Finance Office can help clarify deferred compensation statutory guidelines for state agencies by ensuring open meeting laws are followed when determining agency match rates, if any, and that decisions are transparent and made in a public forum. Advising the Office of the Attorney General for determinations of open meeting law violations will enhance public confidence that state agency decisions about employee compensation are equitable and the intent for state employee compensation limits is adhered to by agency management.

Propose Legislation Clarifying State Agency (Employer) Matching Contributions to Employee Deferred Compensation Accounts

The Department of Administration/Deferred Compensation Program should propose legislation clarifying state agency (employer) matching contributions, if any, to employee deferred compensation accounts. The Nevada Deferred Compensation (NDC) Program provides for employee contributions; the statute is unclear on state agency (employer) matches. The statute does not specifically address contribution matches although the NDC Plan concludes state agencies (employers) may, in fact, provide matching contributions to an employee's deferred compensation account. State agencies do not, in general, provide employer matches to employee deferred compensation accounts. However, four independent licensing boards make employer contributions to employees' NDC accounts but only one, the Board of Pharmacy, is based on a match to employee contributions and are provided in addition to participation in Public Employees' Retirement System (PERS). Contributions by the other boards are based on a percentage of employee salary and are provided in lieu of PERS contributions.

The Board of Pharmacy's employer matching contributions to the NDC Program are unique and generous. Moreover, the Board matches may violate the legislative intent of compensation for state employees being limited to 95% of the Governor's salary.

Legislation clarifying state agency (employer) matching contributions, if any, will ensure all state employees are treated equitably and provide guidance to ensure state employee compensation limits are honored by agency management.

Nevada Deferred Compensation Program Allows State Agency (Employer) Matching Contributions Despite Unclear Statutory Guidance

The NDC Program is a voluntary 457(b) retirement savings for employees of the State of Nevada and local government employers. The program is designed to supplement employee PERS pension and/or other retirement savings and pensions. Contributions are made through payroll deductions and can be pre-tax or post-tax/Roth Individual Retirement Account (IRA). The program is funded from a portion of the NDC investment fees that are paid by participants. NDC does not receive money from the State General Fund.

<u>No Statutory Language Providing for State Agency (Employer) Matches</u>

The NDC's governing statute, NRS 287, is silent regarding employer contributions. Moreover, the statute allows the state agency (employer) to "...agree with any of its employees...to defer the *compensation due to them*..."[1] and requires the employer to "...withhold the amount of compensation which an employee has, by such agreement, directed the employer to defer."[2] The statute further states, "The employer may invest the *withheld money* in any investment approved by the Committee[3]...."[4] The statute does not address investing money not withheld (i.e., contributions from the employer).

<u>Nevada Deferred Compensation Plan Concludes State Agency (Employer) Matches May Occur</u>

The NDC Plan concludes that state agencies may provide employer contributions to employees' NDC accounts. There is no authority in statute that specifically provides for this decision. Despite the absence of statutory guidance regarding employer contributions, the NDC Plan notes that "nothing in this Plan prohibits the Employer (state agency) from making deposits to a Participant's Account as an additional compensation for services rendered, subject to the Participant's contribution limit."[5]

The NDC Plan does not recommend or specify appropriate employer contribution match percentages or limitations should a state agency wish to contribute amounts in addition to the amount specified by the employee to be withheld. The NDC Plan

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[1] NRS 287.320 (1).
[2] NRS 287.320 (2).
[3] Committee to Administer the Public Employees' Deferred Compensation Program.
[4] NRS 287.320 (3).
[5] Nevada Public Employees' Deferred Compensation Program Plan Document (Attachment A), Article III – Contributions and Limitations, 3.1e.

only addresses the IRS limitations set forth in Section 457(b) of Title 26, Internal Revenue Code, which apply generally to the amount that may be contributed to an individual's account through individual deferrals, employer contributions, or both.

Board of Pharmacy Matching Contributions Are Unique and Generous

The Board of Pharmacy's matching contributions are unique in that the benefit is provided as an addition to staff participation in PERS. No state Executive Branch agencies provide employer contributions to employee NDC accounts; however, four independent licensing boards make employer contributions to employee NDC accounts. See Exhibit I for details.

Exhibit I

Comparison of Boards' Contributions to Employee NDC Accounts

Board	Contribution Rate	NDC Contribution Amount	Participates in PERS
Pharmacy	**50%**	**Up to $6,500 Match**	✓
Occupational Therapy	NA	9.05% of Salary ($8,800)	X
Speech-Language Pathology	NA	9.05% of Salary ($8,800)	X
Funeral and Cemetery Services	NA	14.5% of Salary ($14,081)	X

Source: Nevada Deferred Compensation Program and Board Information

Three of the boards contribute a percentage of salary regardless of the employees' contributions; however, none of these boards participate in PERS. These three boards' contribution rates are equal to or less than a state agency's required contribution rate to PERS. Essentially, they have chosen the NDC as the sole method of funding their employees' retirement. ***The Board of Pharmacy is the only board or state agency that provides contributions to employees' NDC accounts and also participates in PERS.***

Board Compensation Generous
Compared to Public and Private Sectors

The Board of Pharmacy's total compensation to employees is generous compared to both public and private sector models. The 50% deferred compensation match rate may not be excessive by private sector standards; however, offering both a defined-benefit retirement plan (PERS) *in addition to* a deferred-compensation plan (NDC) *with employer contribution matches* is uncommon in the private sector and rare in the public sector.[6]

The private sector equivalent of the NDC plan would be a company-sponsored 401(k) plan, commonly used as a vehicle for employees to defer pre-tax salary income. Some companies offer both a defined-benefit retirement plan and a 401(k); some offer only a 401(k); and some offer neither.

[6] Bureau of Labor Statistics – 2018 National Compensation Survey

Among those offering a 401(k) plan, the employer contribution match provisions vary widely. Commonly, employers will match a certain amount for each dollar of employee contribution up to a certain percentage of salary. For example, an employer may offer to match $.50 for every $1 contributed by the employee, up to 5% of the employee's salary. This 50% match would allow the employee to essentially save 7.5% of his/her salary before exhausting the employer contribution match benefit. In this case, the employee would be free to continue contributing without an employer contribution match up to the IRS maximum, but the employer's contribution would not continue beyond the 5% salary limit. Some employers match dollar-for-dollar, or 100% match, up to a certain salary level. This 100% match would work the same way. Some companies simply contribute an absolute dollar amount or percentage of salary to each employee's 401(k) account regardless of whether the employee also contributes, like the three boards that do not participate in PERS.

Board's Matching Contributions Favor Higher Paid, Senior Staff

The Board's higher paid employees are favored in the match formula because they are in a better position to max out the employer contribution match, currently set at $6,500. An employee who contributes $13,000 of his/her own pre-tax earnings in a calendar year would receive the $6,500 maximum employer contribution. Together, the contributions provide a mechanism for an employee to provide the current maximum allowable contribution set by the IRS ($13,000 employee contribution + $6,500 employer contribution = $19,500).[7] It appears the employer contribution match construct was created by the Board of Pharmacy with this goal in mind.

The percentage of the employee's salary that must be contributed to receive the maximum employer contribution decreases as the salary increases. Because the cap is expressed as an absolute amount rather than a percentage, converting it to a percentage of salary to judge whether it is equitable shows employees may receive a higher benefit relative to salary as the salaries decline; however, the amount the employee must contribute as a percent of salary increases. See Exhibit II for a conversion of the $6,500 cap to percentage at various salary levels.

[7] IRS Publication 4484. This does not include "catch-up" provisions. The $6,500 maximum contribution does not increase if the employee is eligible for "catch-up" provisions.

Exhibit II

$6,500 Employer Contribution Match Limit as a Percentage of Salary

(95% of Governor's Salary is $136,228)[8]

Salary[9]	Contribution	% of Salary	Total
$135,200	$6,500	4.9	$141,700
$100,000	$6,500	6.5	$106,500
$ 75,000	$6,500	8.7	$81,500
$ 50,000	$6,500	13.0	$56,500

Source: DHRM compensation schedules and Board of Pharmacy information.

Setting Match Rates is a Policy Decision

The four independent licensing boards that contribute to employees' NDC accounts are making policy decisions about how to compensate employees (see Exhibit I). Three of the boards have opted for a certain percent of the employee's salary to provide a retirement savings mechanism. The Board of Pharmacy has opted to limit the employer's contribution based on an absolute dollar amount to ensure all employees may potentially receive the same dollar benefit to its supplemental retirement savings mechanism.

Employees at the higher end of the pay scale receive a greater benefit from the perspective they contribute a lower portion of their salary to attain the maximum match from the employer. Should the contribution limit be set as a percentage of salary rather than an absolute dollar value, higher-paid employees would receive a greater dollar benefit from the employer match. Concerns that the employer contribution is inequitable would be true whether the maximum employer contribution was set as an absolute dollar limit or a percentage of income.

Board's Matching Contributions May Violate the Intent of the "95% Rule"

The Board's employer deferred compensation match may not violate "salary" guidelines of statute, but may, in fact, violate the legislative intent of the guidelines to restrict state employee compensation to 95% of the Governor's salary. Section 1 of NRS 281.123 limits the salary of a person employed by the state to 95% of the Governor's salary during the same period, with certain exceptions.[10]

[8] 95% of Governor's salary based on Pay Policy 31, Employer Paid Retirement Compensation Schedule is $136,228 ($143,398 x .95).

[9] $133,200 is the salary of the four highest paid Board employees as of September 2019 during the first follow-up to DIA Report No. 18-05.

[10] Section 1 does not apply to dentists and physicians employed full-time by the state, officers and employees of the Nevada System of Higher Education, and salaries authorized by statute where the statute refers specifically to a position.

Limiting Salary and Not Compensation
Allows for Loopholes to be Exploited

The current restriction on state employee salaries that is not tied to state agency (employer) deferred compensation matches provides, in effect, a loophole that can be exploited to exceed the "95% rule." The definition of salary is the limiting factor in determining compliance with NRS 281.123. The DIA Deputy Attorney General's initial legal analysis concludes that 457(b) employer contribution matches would not be considered salary based on case law analysis because salary is only one component of compensation and NRS 281.123 excludes non-salary components in its limitation.

Board of Pharmacy Historically
Violated the "95% Rule"

The Board had historically violated the "95% rule" for salaries of senior staff prior to DIA's review of independent regulatory board operations. The Board was one of several boards cited in DIA Audit Report No. 18-05 as having salaries that exceeded the "95% rule." At the time of the six-month follow-up of DIA Report No.18-05, the Board had reduced the affected employees' salaries to become compliant. After reduction, each of the Board's four highest paid employees' salaries was $135,200.[11] As a comparison, this salary, in general, is above a department director, chief deputy of a constitutional officer, and a cabinet-level department director.

Conclusion

The Nevada Deferred Compensation Program (NDC) allows employer contributions despite unclear authority to do so in its governing statute, NRS 287. No executive branch state agencies provide employer contributions; however, four independent licensing boards do; three of the boards provide contributions in lieu of PERS participation. One of the boards, the Board of Pharmacy, provides a matching contribution, limited to $6,500 annually, and does so as a supplement to PERS participation. The employer matching contribution has not been determined to be a component of "salary" for purposes of the "95% rule." If the match is considered salary for this purpose, several employees at the Board of Pharmacy would be in violation of the "95% rule."

Recommendation

1. Propose legislation clarifying state agency matching contributions to employee deferred compensation accounts.

[11] The four highest paid employees all participated in the Employer Paid Retirement Compensation Schedule.

Refer Facts to the Office of the Attorney General to Determine Open Meeting Law Violations by the Board of Pharmacy on Deferred Compensation Match Decisions

The Governor's Finance Office should refer facts to the Office of the Attorney General (OAG) to determine if open meeting law violations by the Board of Pharmacy on deferred compensation match decisions occurred since June 2019. The Board's approval on matching contribution increases may not have been transparent.

Ensuring open meeting laws are followed when determining agency deferred compensation match rates, if any, and that decisions are transparent and made in a public forum is central to government accountability. An OAG's determination of open meeting law violations will enhance public confidence in the Board of Pharmacy's decisions that employee compensation is equitable and the intent for state employee compensation limits are adhered to by agency management.

Board's Approval on Matching Contribution Increases May Not Have Been Transparent

The Board first initiated an employer-match about 2001 at the rate of $.10 for every $1 (10%) contributed by the employee. The employer contribution match rate was increased from 10% to 30% after the June 5, 2019 Board meeting as part of the fiscal year 2020 budget discussion, effective July 1, 2019. Another employer contribution match rate increase from 30% to 50% became effective January 1, 2020.

Board officials stated both increases were authorized at the June 5, 2019 meeting. We note the following with respect to the June 5, 2019 Board meeting:

- The meeting agenda did not itemize employer contribution match rate increases;
- The meeting minutes reference only the Board's approval to "modify deferred compensation benefits;"
- The audio recording of the meeting does not mention "increases" to the employer-contribution match rate; and
- The budget document provided to the Board for discussion of Agenda Item 14 (Nevada State Board of Pharmacy Approval FY 20 Budget) did not provide any details of employer contributions to employee NDC accounts nor did it reference an increase in the contribution rate.

The decision to increase the contribution rate from 30% to 50% was apparently made toward the end of fiscal year 2020 and included a retroactive provision to January 1, 2020, not as part of the June 5, 2019 meeting as represented by Board officials.

Board Appears to Hide Employer Match Increases
While Approving Increases in License Fees

The timing of the first increase from 10% match to 30% match coincided with a request from staff, at the same Board meeting on June 5, 2019, seeking Board approval to increase license fees to close a structural deficit in the budget. According to the audio discussion from the Board meeting, the fee increase was necessary to avert a fiscal threat if two revenue sources from grants proved unreliable, especially in light of existing structural deficits. Like the match increase from 10% to 30%, the license fee increase was discussed under Agenda Item 14 and not called out as a separate agenda item at the Board meeting. While the audio recording discussed in some detail that authority to increase fees may be necessary to rectify the structural deficit, no such detail was discussed about increases to the employer match rate, despite inquiries from the Board.

Conclusion

Determining adherence to open meeting law will provide assurance to the public that Board decisions related to employee compensation were properly scrutinized before implementation. Regarding increases to employer contribution matches to Board employees' NDC accounts, the Board meeting agendas, minutes, and audio discussion suggest the Board may not have been fully informed prior to making relevant decisions. Moreover, the increases occurred under the context of coincident license fee increases, budget deficits, and budget austerity considerations.

Recommendation

2. Refer facts to the Office of the Attorney General to determine open meeting law violations by the Board of Pharmacy on deferred compensation match decisions.

Appendix A

Scope and Methodology, Background, Acknowledgements

Scope and Methodology

We began the audit in September 2020. In the course of our work, we communicated with management at the Nevada Deferred Compensation Program, the Board of Pharmacy and other state independent licensing boards. We researched board records, policies and procedures, professional publications, applicable Nevada Revised Statutes (NRS), Nevada Administrative Code (NAC), and other state and federal guidelines. We concluded fieldwork in November 2020.

We conducted our audit in conformance with the *International Standards for the Professional Practice of Internal Auditing.*

Background

The Nevada Deferred Compensation Program (NDC) is a voluntary 457(b) retirement savings program for employees of the State of Nevada and local government employers. The program is designed to supplement employee Public Employees' Retirement System pension and/or other retirement savings and pensions. Contributions are made through payroll deductions and can be pre-tax or post-tax/Roth Individual Retirement Account (IRA). NDC is funded from a portion of the plan's investment fees which are paid by participants. NDC does not receive money from the State General Fund.

The Nevada Board of Pharmacy is governed by NRS 639, which sets forth the general provisions of the Board. The Board concentrates on four areas of the practice of pharmacy to protect the public: proper credentialing and inspection of licenses; adoption of regulations as necessary to further legislative intent; providing timely access to accurate information in Nevada's Prescription Monitoring Database; and investigation of complaints filed by the public on activities within the Board. The Board currently has 40,000 licenses in 17 different license types including wholesalers, pharmacists, and manufacturers.

Acknowledgments

We express appreciation to the Department of Administration/Nevada Deferred Compensation Program, Governor's Finance Office, and Board of Pharmacy management and staff for their cooperation and assistance throughout the audit.

Contributors to this report included:

Warren Lowman
Administrator

Jeff Landerfelt, MBA
Executive Branch Audit Manager

Appendix B

Department of Administration/Deferred Compensation Program and Governor's Finance Office Response and Implementation Plans

Nevada Deferred Compensation

STATE OF NEVADA DEPARTMENT OF ADMINISTRATION

Steve Sisolak
Governor

Laura E. Freed
Director

Colleen Murphy
Deputy Director

Rob Boehmer
Executive Officer

PUBLIC EMPLOYEES' DEFERRED COMPENSATION PROGRAM
100 N. Stewart Street, Suite 100, Carson City, Nevada 89701
Telephone 775-684-3398 | Fax 775-684-3399 | defcomp.nv.gov

December 31, 2020

Warren Lowman
Administrator
State of Nevada Governor's Finance Office
Division of Internal Audits
209 E. Musser Street, Suite 302
Carson City, Nevada, 89701

Greetings Mr. Lowman,

We have confidentially reviewed the DRAFT Internal Audit Report (DIA No. 21-05) regarding the Board of Pharmacy's past and current contributions into the State of Nevada (State) Public Employees' Deferred Compensation Program (NDC). Specifically, we have reviewed Recommendation #1 (page 7 of the draft audit) which is to clarify state agency (employer) matching contributions, if any, to employee deferred compensation accounts.

The NDC Committee, appointed by the Governor pursuant to NRS 287.325, with the assistance of the Executive Officer/Administrator and staff of the NDC Program, are responsible for the Administration, Plan Design, Investment Management, and overall governance of the NDC Program in accordance with 26 U.S.C. § 401(a), 401(k), 403(b), 457(b) or Section 3121 and NRS 287. This includes, without limitation, a FICA alternative plan, any other federal law authorizing a plan to reduce taxable compensation, other forms of qualified compensation, as applicable, and/or that shall be held in trust for the exclusive benefit of the participants in the Program and their beneficiaries. The NDC Committee, at one of its scheduled public meetings, will be required per NRS 287.330 to review, consult with counsel, and take formal action on any statutory change, plan design change, or amendment of the NDC Plan Document(s). Additionally, should the Committee agree with the audit's recommendation, the NDC Program is unable to implement a statutory change by the suggested draft deadline of July 2021 (Executive Summary, page i). As you know, the deadline for agencies to submit policy Bill Draft Requests (BDR) for consideration in the 81st Nevada Legislative Session was more than six months ago. After consulting with the Budget Division of the Governor's Finance Office, getting a BDR prepared, considered, and passed is not possible in this short of a timeframe. Given these facts, this will delay the Department of Administration and NDC Program from being able to submit a BDR until the 82nd Legislative Session beginning in 2023.

Furthermore, it is important to acknowledge that the NDC Committee has already been considering the future of allowing Employer Contributions for over the past year as a result of the US Governmental Accounting Standards Board (GASB) issuing Rule 97 which will require Plan Sponsors of Government 457(b) Defined Contribution Plans to increase and refine their financial reporting of employer contributions. This could potentially add significant expense to the Plan to accommodate this future mandate. The NDC Committee has been considering viable solutions to this new mandate over the past year and will be considering multiple options at its January 11th, 2021 Strategic Planning Meeting that may include redefining and amending how future employer contributions will be recorded, monitored, and reported. Other options that could be considered would be for the NDC Program to develop and administer a separate 401(a) Plan to accommodate any employer contributions from the State of Nevada, Nevada System of Higher Education, or any of the current or future participating political subdivisions in the Plan, or the potential of amending the Plan's governing documents to no longer allow employer contributions altogether. We predict that all these options will be considered and vetted through our established governance process within the first half of 2021.

In closing, the Nevada Public Employees' Deferred Compensation Program will formally consider the recommendation made by the Internal Audits Division as soon as the audit is made public and will bring it forward to the NDC Committee for review, discussion, and possible action. As aforementioned, the NDC Committee will continue to move forward to review the future of employer contributions being made based on the new requirements established in GASB Rule 97. We thank you for including the Department of Administration and NDC Administration in this process. Please feel free to contact either myself and/or Department of Administration Director, Laura Freed, with any further questions or concerns.

Sincerely,

Rob Boehmer, CRPA, CSA, CEPP
Executive Officer
State of Nevada Public Employees'
Deferred Compensation Program
Nevada State Library & Archives Building
100 North Stewart Street, Suite 100
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CC: Laura Freed, Director- State of Nevada Department of Administration

Steve Sisolak
Governor

Susan Brown
Director

Warren Lowman
Administrator

STATE OF NEVADA
GOVERNOR'S FINANCE OFFICE

209 E. Musser Street, Suite 302 | Carson City, NV 89701-4298
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MEMORANDUM

To: Warren Lowman, Administrator
Governor's Finance Office, Division of Internal Audits

From: Susan Brown, Director
Governor's Finance Office

Date: January 6, 2021

Subject: DIA 21-05, Deferred Compensation Match

Pursuant to NRS 353A.085(1), the Governor's Finance Office (GFO) provides the following statement:

Recommendation 2

Refer facts to the Office of the Attorney General to determine open meeting law violations by the Board of Pharmacy on deferred compensation match decisions.

GFO accepts this recommendation.

GFO has directed the Division of Internal Audits (DIA) to refer facts to the Office of the Attorney General as recommended.

GFO plans to fully implement this recommendation by March 1, 2021.

Nevada State Board of Pharmacy

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January 5, 2021

Warren Lowman
Administrator
Division of Internal Audits
Governor's Finance Office
209 East Musser Street, Room 302
Carson City, NV 89701

Re: Audit No. 21-05 - Board of Pharmacy Deferred Compensation Match

Dear Mr. Lowman:

This correspondence constitutes the Nevada State Board of Pharmacy (BOP) response to the audit of the BOP deferred compensation employer match, Audit Report No. 21-05 (Audit).

The Audit reveals that the BOP incentivizes employees to participate in deferred compensation to better ensure financial security in retirement. The Audit, citing the Nevada Deferred Compensation Plan, acknowledges that the BOP employer match is not prohibited by law, nor violative of NRS 281.123. The Audit fails to note that the BOP employer match was detailed in testimony to the Legislature's Sunset Subcommittee on June 30, 2020, and that the Subcommittee expressed no objections or concerns.

The BOP respectfully disagrees with two of the Audit's conclusions. First, the Audit erroneously concludes that the BOP employer match of up to $6500 favors higher paid staff when compared to a match based upon a percentage of salary. To the contrary, as demonstrated in Exhibit II of the Audit, the BOP employer match benefits lower paid staff since it is inversely proportional to an employee's salary: the match constitutes a *greater* percentage of an employee's salary as that salary *decreases*. In fact, a match based upon a percentage of salary as recommended by the Audit would favor higher paid staff. To illustrate this point, consider a match of 5% of base salary. An employee paid $130,000 annually could receive a maximum match of $6500, while an employee paid $65,000 annually could only receive a maximum match of $3250.

Second, the Audit inaccurately asserts that increases to the employer match are related to recent Legislatively-approved fee increases for certain license categories. During the 2017-18 Interim, the Sunset Subcommittee directed the BOP to analyze its fee structure and revise fees to the extent necessary to support its operations. Consistent with this directive, the BOP subsequently identified and amended its fee schedule to eliminate a structural deficit in the operating budget for the Nevada Prescription Monitoring Program (PMP).

The BOP made a separate decision to authorize an increase in payroll and benefits comparable to the pay increase for all State employees approved by the Legislature for FY20. This included authorization for the Executive Secretary to increase the deferred compensation employer match during the fiscal year. This discussion is clearly reflected in the audio recording of the June 5, 2019, meeting when the FY20 Budget was approved.

Finally, Recommendation No. 2 would refer the BOP deferred compensation employer match decisions to the Office of the Attorney General (OAG) to determine if open meeting law (OML) violations occurred. However, the OAG is legal counsel to the BOP (*see* NRS 228.110) and the BOP has already requested guidance from the OAG on this issue. Based upon past OAG opinions and guidance on the OML, the BOP is confident that no OML violations occurred.

If you have any questions, please do not hesitate to contact me at 775-850-1440 or bkandt@pharmacy.nv.gov.

Best regards,

Brett Kandt
General Counsel
Nevada State Board of Pharmacy

Appendix C

Timetable for Implementing Audit Recommendations

In consultation with the Governor's Finance Office (GFO) and the Department of Administration/Deferred Compensation Program (NDC), the Division of Internal Audits categorized the recommendations contained within this report into two separate implementation time frames (i.e., *Category 1* – less than six months; *Category 2* – more than six months). The GFO and NDC should begin taking steps to implement all recommendations as soon as possible. The target completion dates are incorporated from Appendix B.

Category 1: Recommendations with an anticipated implementation period less than six months.

Recommendation	Time Frame
1. Propose legislation clarifying state agency matching contributions to employee deferred compensation accounts. (Department of Administration/Deferred Compensation Board) (page 8)	Jul 2023
2. Refer facts to the Office of the Attorney General to determine open meeting law violations by the Board of Pharmacy on deferred compensation match decisions. (Governor's Finance Office) (page 10)	Mar 2021

The Division of Internal Audits shall evaluate the action taken by the Department of Administration/Deferred Compensation Program and the Governor's Finance Office concerning the report recommendations within six months from the issuance of this report. The Division of Internal Audits must report the results of its evaluation to the Executive Branch Audit Committee, the Department of Administration/Deferred Compensation Program, and the Governor's Finance Office.