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STATE OF NEBRASKA
OFFICIAL
OCT 2 1991
DEPT. OF JUSTICE

DATE: September 30, 1991

SUBJECT: Authority of the Auditor of Public Accounts to Conduct Performance Audits

REQUESTED BY: Senator Scott Moore, Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

This is in response to your inquiries regarding the necessity of legislative enactment to authorize the Auditor of Public Accounts to conduct performance audits and for payment of that service. Legislative Bill 493 was introduced during the recent legislative session.[1] The bill in present form would amend Neb.Rev.Stat. § 84-304 (Reissue 1987) by adding the following provision:

> (5) To analyze, at his or discretion, the performance, management, and accomplishments of the programs of all executive state officers, agencies, boards, bureaus, commissions, associations, societies, and libraries supported by the state, state institutions, the University of Nebraska, and the Nebraska state colleges.

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[1]The bill was placed on general file and will be a carry-over bill to the next session of the Legislature. UNICAMERAL UPDATE, Vol. XIV, Number 23, June 28, 1991.

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You first inquire whether passage of LB 493 or similar legislation is "necessary" for the State Auditor to conduct performance audits of state agencies, the University of Nebraska and State Colleges, or other entities supported by the State. We believe that statutory authority is in place to authorize the Auditor of Public Accounts to conduct performance audits of political subdivisions which may include some of the public bodies you have referenced.

Existing authority is provided in Neb.Rev.Stat. § 84-304.01 (Reissue 1987) which in relevant part states:

> . . . In connection with his duties, but at his discretion, the Auditor of Public Accounts may conduct performance audits of all political subdivisions receiving more than twenty-five thousand dollars in the audit year in tax funds from the state including all public utilities and all counties, townships, municipalities, cities, villages, districts, authorities and other public corporations and entities.

The statute in very broad fashion lists the public bodies which may be the subject of a performance audit and also states that performance audits may be conducted in connection with the duties of the Auditor of Public Accounts. The duties are described in Neb.Rev.Stat. § 84-304 (Reissue 1987) which generally provides that the Auditor examine books and records of state entities and other political subdivision and public bodies when deemed necessary by the Auditor or when requested by that public body. The statutes include no express authority for conducting performance audits of state officers, boards, bureaus, commissions, or other state institutions. The description of political subdivisions included in Neb.Rev.Stat. § 84-304.01 (Reissue 1987) may be sufficiently broad to include state colleges and the University of Nebraska; however, this authority is not clearly expressed and may be subject to other limitations.

As you have indicated, the legislative history reflects that the Auditor of Public Accounts previously was authorized to conduct performance audits of state agencies and other state entities and this authority was removed by legislative enactment.[2] It is our

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[2]LB 280 was passed into law on January 15, 1974, with the emergency clause. The bill amended Neb.Rev.Stat. § 84-304 to authorize the Auditor to analyze the performance, management, and accomplishments of the programs of all state officers, boards,

opinion that the Auditor of Public Accounts has no express authority to conduct performance audits of state agencies, officers, and other state entities. Accordingly, it is our view that additional legislative enactment would be necessary for the Auditor of Public Accounts to conduct performance audits of state officials, agencies and other entities supported by the state.

You ask further whether passage of special statutory authority is necessary for the state auditor to conduct performance audits of state entities and political subdivisions and charge that public body for the cost when the audit was not requested by the public body. Existing statutes do not expressly state that the cost of conducting performance audits shall be paid by the public body which was the subject of the audit. The only existing statutory reference is included in Neb.Rev.Stat. § 84-304(3)(b) (Reissue 1987) which generally provides that audit examinations shall be at the expense of the political subdivision. This provision does not expressly and clearly state that the public body, particularly state entities, shall be the subject of performance audits and that the cost shall be paid by the state entity being audited.

Accordingly, we conclude that additional legislative enactment would be necessary to clearly authorize performance audits of state entities and that the expense be borne by these public bodies.

We note that the amendatory provisions of LB 493 and your inquiry include the University of Nebraska as the subject of a performance audit. This opinion should not be construed to mean that legislative enactment would serve to authorize performance audits of the University of Nebraska by the Auditor of Public Accounts. This office has previously concluded in an informal opinion that the Auditor's authority to conduct performance audits of the University of Nebraska is limited. Opinion of the Attorney General No. 91-026, April 5, 1991. As previously pointed out, Neb.Rev.Stat. § 84-304.01 provides that performance audits may be conducted of political subdivisions and public corporations. While the University may be a political subdivision or a public corporation, oversight of the management and conduct of university

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commissions, agencies and other state institutions. LB 193 was passed into law on February 24, 1977, with the emergency clause. The Auditor's authority to conduct performance audits was removed by amendment of Neb.Rev.Stat. § 84-304.

affairs by state authorities is restricted by other statutes[3] and constitutional provisions. [See Neb.Rev.Stat. §§ 85-103, 85-105, and 85-106 (Reissue 1987)].

Article VII, Section 10 of the Nebraska Constitution provides in part: "The general government of the University of Nebraska shall, under the direction of the Legislature, be vested in . . . the Board . . . who shall be elected . . . . Their duties and powers shall be prescribed by law; . . . ." Our Supreme Court has held that the general government of the University must be vested in the Board of Regents and that a statute may not be so detailed and specific as to eliminate all discretion and authority on the part of the Regents as to how a duty shall be performed. Board of Regents v. Exon, 199 Neb. 146, 256 N.W.2d 330 (1977). In arriving at this conclusion, the Court commented:

> We think it is clear that the purpose of the constitutional provision was to remove the University from the plenary control of the Legislature and establish the Board of Regents as an independent body charged with the power and responsibility to manage and operate the University as free from political influence and control as possible.

Id. at 148, 256 N.W.2d at 332.

Based on these authorities, oversight of management functions of the University by other state officials and agencies is limited. Accordingly, we conclude that the provisions of LB 493 would not provide clear and unquestionable authority for the Auditor of Public Accounts to conduct performance audits of the University of Nebraska. In other respects, the proposed amendment would serve to clarify the authority of the Auditor; but additional legislative act is necessary to require public bodies, including state entities, to pay the costs of performance audits.

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[3]These sections define the powers and duties of the Board of Regents and provide that the general government of the University of Nebraska shall be vested in the Board.

Sincerely yours,

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cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved By:

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21-196-6.91