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**MEMORANDUM**

**To:** Joseph M. Torsella, State Treasurer  
**From:** Christopher B. Craig, Chief Counsel  
**Subject:** Budgetary Impasse Payment Authority

The following outlines the limited legal basis by which the Treasurer may issue a warrant for the expenditure of public funds during a budgetary impasse. The articulation of expenditure approval criteria to be used in the absence of direct appropriation authority is intended to provide notice and guidance, in advance of an impasse, to Commonwealth agencies within each branch of government.<sup>1</sup>

**Summary of Conclusion**

Without a General Fund budget, there is no direct appropriation authority for most government expenditures. Under such circumstance, Article III, Section 24 of the Pennsylvania Constitution would prohibit the State Treasurer from authorizing the payment of any public funds, with certain limited exceptions to this general prohibition. If presented with a requisition for the expenditure of public funds during a budgetary impasse, the Treasurer may approve the

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<sup>1</sup> Following the general rule that administrative agencies are not bound by prior precedent, the State Treasurer is similarly not bound by the legal opinions rendered during prior administrations. *See, Barringer v. State Employees' Retirement Board*, 987 A.2d 163, 166 (Pa. Cmwlth. 2009). Treasury's Chief Counsel has issued three prior opinions involving the expenditure of public funds without direct appropriations authority. Opinion of September 9, 2015 (Payment of legislative salaries); Opinion of October 14, 2015 (Payment of legislative operating expenses); Opinion of March 2, 2016 (Payment of State Correctional Institutions operating expenses). Though expressing a more stringent standard through which future payment requisitions involving general government operations for each branch of government are to be considered by the State Treasurer during a budgetary impasse, this opinion builds upon prior stated legal reasoning. This opinion is subject to revision depending upon changes in law or circumstances.

issuance of a warrant for payment only if the expenditure request, at the time of its submission, is:

- 1) pursuant to a prior fiscal year appropriation unaffected by the impasse;
- 2) mandated pursuant to state or federal authority, independent of the annual General Fund budget; or,
- 3) necessary to maintain public health, safety and welfare pursuant to the police powers of the Commonwealth.

Only under these limited circumstances does the state Treasurer have the authority to permit the expenditure of public funds in the absence of an appropriation.

Unless payment authority is unaffected by the impasse (e.g., continuing appropriation, mandated federal expenditure), the presentment of all requisitions will require agencies to identify how the expenditure is necessary to maintain public health, safety and welfare pursuant to the police powers of the Commonwealth.

### **General Rule**

If an annual general appropriations bill is not passed by the General Assembly and subsequently signed by the Governor prior to the beginning of the next fiscal year, there will be no direct appropriations authority for most general governmental operations for the three branches of government. Under such circumstances, a budgetary impasse would exist and state constitutional restrictions within Article III, Section 24 would be triggered, providing that:

“No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers . . .”

Additionally, Section 3422 of the Pennsylvania Fiscal Code provides:

“[I]f the state treasurer shall pay out of any appropriations named in an appropriation bill, a greater sum than is named therein for each appropriation. . . [he] shall be deemed guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, for each and every offense.” 72 P.S. §3422.

Collectively, these two provisions create the general rule that public funds under the custodial care of the state Treasurer are not to be disbursed without an appropriation. However, there are several legal exceptions to the strict application of the Article III Section 24 prohibition,

including, federal expenditure mandates that supersede the state constitution, and conflicting state constitutional provisions.<sup>2</sup>

## **Treasurer's Authority**

### Payment Process.

Treasury may only approve or disapprove requests for the expenditure of public funds, it cannot initiate a request. 72 P.S. §§ 307 (“No money shall be paid from any of the funds of the State Treasury, except upon warrant of the State Treasurer, issued upon requisition pursuant to law. . . .”); 1501 (“No money shall be paid out of any fund in the State Treasury . . . until a requisition shall have been presented. . . .”). With the exception of the Department’s own payment requests, Treasury cannot compel or initiate an expenditure of funds without a corresponding request from the originating agency. *Id.* As a consequence, it is not until a payment requisition is presented for payment that the State Treasurer possesses any authority to consider the legality of payment of public funds.

The request to process and pay the operational expenses of any governmental agency is typically initiated / authorized by the comptroller of the particular branch of government in which the governmental entity resides (legislative, judicial or executive). As is common practice, the comptroller presents to Treasury a requisition identifying the expense to be paid, listing vendor or service provider’s address or depository account information, amount of payment and such other information necessary to complete payment. 72 P.S. § 1501 (“Requisitions for payment may be presented to the Treasury Department by electronic transmission which shall evidence the approval of the comptroller . . .”) (Emphasis added).

During a budgetary impasse, the presentment of a requisition for the payment of the operational expenses of a governmental entity would customarily correspond with an “Expenditure Symbol Notification Number” memorandum issued by the Secretary of the Budget to the Treasurer specifically identifying an impasse. The purpose of the impasse ESN memorandum is to provide the Treasurer instructions by which the expenditures are to be accounted during an impasse and reconciled with the correct appropriations upon the enactment of a current fiscal year budget. Importantly, the ESN impasse memorandum is not legal authority to expend public funds, rather it is a mechanism to properly account for funds expended pursuant to authority separate from the annual General Fund budget.

### Treasurer's Payment Approval Authority.

Pursuant to the Pennsylvania Fiscal Code, the Treasurer shall issue a warrant for the payment of a requisition only if it “appear[s] to be lawful and correct.” 72 P.S. § 1502. The statutory standard employed by the Treasurer is subjective in nature - if the requisition “appears”

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<sup>2</sup> See, e.g., Attorney General Opinion Letter to Pennsylvania Treasury (February 25, 2016) (Opinion of Attorney General that Article III, Section 24 and 92 P.S. § 3422 were superseded to the extent that state law directly conflicted with the U.S Constitution and federal statutes.)

to the Treasurer, in his sole discretion, to be “lawful and correct.” The presence of the term “appears” within the Fiscal Code is significant, acknowledging the myriad of circumstances in which requisitions are presented to the Treasurer that may lack legal certainty or absolute clarity. As a consequence, the Fiscal Code permits the Treasurer to exercise independent discretionary judgment when considering the legality of an expenditure requisition and to approve the payment of an expenditure if it “appears” lawful under the particular circumstances.

It is within this statutory framework that Treasury would ordinarily audit and approve the expenditure request by the Comptroller for the Secretary of the Budget, the judiciary or the legislature, if the Treasurer were to find the payment lawful and correct. As part of its review, Treasury would consider any supporting documentation submitted by the particular government agency characterizing the expenditure as “lawful and correct,” justifying the issuance of the Treasurer’s warrant releasing public funds for the payment of the expenditure request. Within the context of a budgetary impasse, it would be appropriate for the Treasurer to request the submitting governmental agency to provide legal justification, independent of a General Fund appropriation, to support the expenditure payment request.

#### Budgetary Impasse.

Each fiscal year, the General Assembly is constitutionally directed to enact a general appropriations act to provide for the operations of the Executive, Legislative and Judicial branches of state government. Pa. Const. art. VIII, § 13; art. III, § 11. The annual General Fund budget is the primary (though not exclusive) appropriations authority for the expenditure of public funds. The Commonwealth’s fiscal year begins July 1<sup>st</sup> and ends the following June 30<sup>th</sup>. With several limited exceptions, notably appropriations to support legislative operations, funds appropriated but not expended within a fiscal year lapse and are returned to the originating fund, typically the General Fund. *See, e.g.,* General Fund Appropriations Act of 2016, § 2106 (“[E]xcept as otherwise provided by law . . . that part of all appropriations [pursuant to this Act] . . . unexpended, uncommitted or unencumbered as of June 30, 2017, shall automatically lapse as of that date.”)

#### **Budgetary Impasse Limited Payment Authority**

##### Prior Fiscal Year Appropriation.

Several categories of requisitions associated with expenditure authority, involving a prior fiscal year appropriation, are unaffected by an impasse in adopting a new fiscal year General Fund budget. For example, the following would ordinarily be approved for payment in the absence of a current fiscal year appropriations:

- Requisitions for the payment of goods or services received in the prior fiscal year, but not invoiced until after June 30<sup>th</sup>;
- Requisitions of funds subject to a proper lapse waiver; and,
- Requisitions of funds pursuant to a continuing appropriation (*e.g.*, highway and flood control projects).

### Independent Expenditure Authority.

Though extensive, the annual General Fund budget does not contain all appropriations authority. Several different categories of expenditures are authorized pursuant to separate act of the legislature outside of the annual General fund budget. Examples would include:

- Restricted receipt funds that are continuously appropriated pursuant to an act of the General Assembly (e.g., SWIF payments from Labor & Industry);
- Restricted revenue funds that are continuously appropriated pursuant to an act of the General Assembly (e.g., Crime Victim payments);
- Expenditures eligible to be made pursuant to statute authorizing executive approval of payments (e.g., PLCB liquor purchases, Lottery payments); and,
- Appropriations made by separate act of the General Assembly (e.g., payments to Pennsylvania College of Technology, payments for Rural Education Outreach).

In addition to funds that are statutorily appropriated by the legislature, independently of the annual budget, there are additional expenditures that are directly authorized under state or federal constitutional law. *See, Knoll v. White*, 141 Pa. Cmwith. 188, 595 A.2d 665 (1991). Such authorizations would include:

- Federally funded programs for which federal funds are mandated to be expended, such as medical assistance, cash assistance and WIC account replenishments;
- General Obligation debt service payments (Pa. Const. art. VIII, § 7.); or,
- Tax refunds (Pa. Const. art III, § 24.).

### Employee Salaries (Federal Fair Labor Standards Act)

Pennsylvania Courts have consistently held that public employees, who are covered by the Federal Fair Labor Standards Act and not furloughed, are to be paid notwithstanding the Article III, Section 24 prohibition against the expenditure of public funds without an appropriation. *Council 13, AFSCME v. Casey*, 156 Pa. Cmwith. 92, 96, 626 A.2d 683, 686 (1993) (“The duty of the Executive Branch, including the Governor, the Budget Office and the State Treasurer, to make payment for the performance of essential work by state employees is therefore undoubted . . .”); *Council 13, AFSCME v. Rendell*, 604 Pa. 352, 383, 986 A.2d 63, 82 (2009) (“[W]e hold . . . that Section 24 did not prohibit the Commonwealth from continuing to employ and pay all FLSA nonexempt Commonwealth employees in the event that the Pennsylvania General Assembly failed to pass a budget . . .”).

In particular, the Pennsylvania Supreme Court in *Rendell* determined that the Supremacy Clause in the U.S. Constitution requires FLSA covered employees to be timely paid, thereby superseding the Pennsylvania constitutional limitation in the Article III, Section 24 prohibition. Accordingly, state employees who are covered by the FLSA and remain on the job are federally mandated to be timely paid by the Commonwealth, notwithstanding the lack of state budgetary authority. *Council 13, AFSCME v. Rendell*, 604 Pa. 352, 986 A.2d 63 (2009).

## Employee Salaries (Non-FLSA Covered Employees)

In addition, the Federal Department of Labor regulations under the Fair Labor Standards Act provide that exempt employees (employees not covered by the FLSA) who are not furloughed must be paid a minimum salary of not less than \$455 per week. 29 CFR 541.660 (amount of salary required). If an exempt employee is not paid a minimum salary, the employee becomes subject to the compensation requirements imposed by the Fair Labor Standards Act and therefore may risk the Commonwealth to federal penalties and sanctions if salaries are not timely paid. As a consequence, if an exempt employee remains on the job, federal law requires them to be timely paid a minimum salary, notwithstanding any state constitutional prohibition.

Additional legal authority embedded in the Non-Impairment Clause of the Pennsylvania Constitution (Pa. Const. art. 1, § 17); the Equal Protection Clause of the U.S. Constitution (U.S. Const. art. XIV, § 1); and procedural due process rights that are associated with vested payment obligations with past performance of work (43 P.S. §§ 251 and 260.3) may be construed to support the payment of full salaries of both FLSA exempt and non-exempt employees.

## Police Powers Expenditure Authority.

The most important function of government is the exercise of the police power for the purpose of preserving the public health, safety and welfare. *Commonwealth v. Mikulan*, 504 Pa. 244, 470 A.2d 1339 (1983). The police power of government is the chief attribute of a state: “if in its exercise there is a conflict with parts of the Constitution, the police power exercised to promote its major objects will prevail...” *White’s Appeal, No. 7*, 287 Pa. 259, 263, 134 A. 409, 411 (1926). Under the police power, the legislature may enact laws to suppress insurrection and to maintain the safety, peace and order of its citizens. *Commonwealth v. Widovich*, 295 Pa. 311, 145 A. 295 (1929). The scope of the police power of the Commonwealth is necessarily very broad and “transcends all other powers of government,” however, the basis of every exercise of the police power must be to promote or maintain the health, safety or general welfare of the public. *Commonwealth ex. Rel. Woodside v. Sun Ray Drug Co.*, 383 Pa. 1, 116 A.2d 833, 837 (1955). For instance, the Supreme Court of the United States has held the concept of “the public welfare” to be very broad and include public safety, public health, morality, peace and quiet, and law and order as some of the more conspicuous applications of the police power. *Berman v. Parker*, 75 S.Ct. 98, 99 L.Ed. 27, 348 U.S. 26, 32 (1954).

State governments consistently utilize their police power to accomplish their primary duty, the preservation of the health, safety and welfare of all citizens. In many cases, that has required the police power to supersede a separate provision of state law in direct conflict with the United States Constitution or federal statutes. Accordingly, Pennsylvania courts have held that “the police power is the greatest and most powerful attribute of government; upon it the very existence of the state depends ... If the exercise of the police power should be in irreconcilable opposition to a constitutional provision or right, the police power would prevail. It needs no constitutional reservation or declaration to support it.” *Commonwealth v. Wiemienowicz*, 1936 Pa. Dist. & Cnty. Dec. LEXIS 151, \*3, 27 Pa. D. & C. 590, \*\*592 (Pa.C.P. 1936) quoting *Commonwealth v. Stofchek*, 322 Pa. 513, 519. See also *Burns v. Paulak*, 1948 Pa. Dist. & Cnty. Dec. LEXIS 369, \*8, 63 Pa. D. & C. 388, \*\*394 (Pa.C.P. 1948) (“the exercise of the police

power by the legislature is not curtailed by article III, sec. 7, and that that body may delegate a part of the police power to a municipality, we turn to the question of whether or not there has been such a delegation to the City of Philadelphia as would warrant the adoption of the ordinance under consideration.”).

An inherent function associated with the state’s obligation to preserve the public health, safety and welfare is to provide the critical and necessary operations required to facilitate this responsibility. Importantly, states may not abandon their responsibility under the police power and are required to continuously and consistently carry out this obligation. *See, e.g., Coatesville Borough v. Coatesville Electric Light, Heat & Power Co.*, 32 Pa. Super. 513 (1907) (“a municipality cannot bargain away its right to exercise at all times its police power...”); *See also Pa. Human Rels. Comm’n v. Sch. Dist. Of Philadelphia*, 681 A.2d 1366, 1383 (Pa. Cmwlth, 1996) (“Where the Commonwealth has delegated a particular obligation to one of its political subdivisions and the political subdivision proves that its resources are inadequate to carry out its functions, the Commonwealth is obligated to adequately fund the political subdivision to satisfy its legally delegated obligations.”). Without sufficient spending authority, the Commonwealth would be unable to fulfill its constitutional obligation to “maintain order and to preserve the safety and welfare of all citizens.” *County of Allegheny v. Commonwealth*, 507 Pa. 360, 490 A.2d 402, 410 (1985) (emphasis added).

In the absence of a current appropriation, the constitutional necessity to provide critical and essential governmental services pursuant to the Commonwealth’s police powers is the central legal premise upon which public funding continues to be provided for such purposes as: the continued operation of the prison system and the associated employee salaries;<sup>3</sup> the completion of bridge safety and road maintenance;<sup>4</sup> the processing and delivery of critical public records; and most law enforcement activities. Unwavering adherence to Article III, Section 24’s prohibition against the expenditure of public funds without an appropriation would effectively eliminate all payments for critical and essential governmental services and thereby jeopardize public health, safety and welfare within the Commonwealth.

#### State Constitutional Authority (Separation of Powers)

State Constitutional authority for the payment of core operations and the salaries of employees of the judicial, executive and legislative branches of government necessary for the maintenance of public health, safety and welfare during a budgetary impasse may also be found in the Separation of Powers Doctrine. Each branch of government is constitutionally established. Pa. Const. art. II, Section 1 (legislative authority is vested in the General Assembly); art. IV, Section 1 (executive authority resides in the Governor, Lt. Governor, Auditor General, Treasurer, Attorney General and such officers established by the General Assembly); art. V, Section 1 (judicial authority is exercised by the unified judicial system). Each branch is independent and

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<sup>3</sup> *County of Allegheny v. Commonwealth*, 507 Pa. 360, 376, 490 A.2d 402, 410 (1985) (“[I]t is the State’s obligation to maintain order and to preserve the safety and welfare of all citizens. That responsibility requires the governmental unit to provide adequate and secure facilities for the housing of those individuals who have demonstrated by their conduct that they pose a danger to the other members of society.”).

<sup>4</sup> *Mikulan*, 504 Pa. 244, 247, 470 A.2d 1339, 1340 (1983) (“[T]he police powers of the Commonwealth are particularly broad in matters pertaining to the safe and efficient functioning of the highways . . .”).

co-equal. *Stilp v. Commonwealth*, 588 Pa. 539, 582, 905 A.2d 918, 943 (2006) (“Because of the basic functions and inherent powers of the three co-equal Branches of Government, the co-equal independent Judiciary must possess rights and powers co-equal with its functions and duties, including the right and power to protect itself against any impairment thereof . . .”). A branch that impairs or threatens the independence of a co-equal branch of government, violates the Separation of Powers Doctrine. *See, Stilp, citing, Jorgensen v. Blagojevich*, 211 Ill.2d 286, 285 Ill.Dec. 165, 811 N.E.2d 652 (2004). (“ . . . each of the three branches of government must be kept free from the control or coercive influence of the other branches. Insuring the independence of the respective branches of government is the real thrust of the separation of powers doctrine.”)

Within the context of providing funds for the core functions of a co-equal branch of government, the Pennsylvania Supreme Court has explicitly recognized that the failure to appropriate funds necessary for the reasonable functioning of an independent branch of government may have the effect of destroying or otherwise unconstitutionally limiting the operation of the branch of government. *Pennsylvania State Association of County Commissioners v. Commonwealth*, 617 Pa. 231, 52 A.3d 1213 (2012) (Court noted that the judiciary possesses the inherent authority to compel the payment of sufficient funds out of the public treasury for the functions of the judicial branch of government in the absence of an appropriation.)

If, by application of Article III, Section 24, the executive branch of government had the ability to remove all financial resources of the General Assembly or the Judiciary, in particular the payment of necessary employee salaries or core operations, thereby jeopardizing the continuation of the most basic function of other constitutionally established branches of government, the Executive would possess the ability to financially starve either the judiciary or the legislature through a strict application of Article III, Section 24 of the state constitution.<sup>5</sup> The citizens of the Commonwealth are constitutionally entitled to be represented by a functioning, elected General Assembly, to have cases heard and resolved by an independent judiciary and to have the laws passed by the legislature executed and enforced by the executive branch of government. *See, e.g., Goodheart v. Casey*, 521 Pa. 316, 322, 555 A.2d 1210, 1213 (1989) (State Supreme Court noted that “[i]mplicit in the constitutional right for adequate compensation for the judiciary is the public’s right to have a competent, independent judicial system supported by competent judges.”)

#### Experience in other States.

Other states have encountered similar state budgetary appropriation shortfalls. As far back as 1892, state governments have been compelled to make critical and necessary

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<sup>5</sup> The experience in other state jurisdictions is instructive. Facing a budgetary impasse that threatened the non-payment of salaries of employees of the state judiciary, the Minnesota District Court, County of Ramsey, concluded that the “[c]omplete absence of funding of any of the three branches of government would effect the withering of that branch, contrary to the clear intent of the Minnesota Constitution.” The Court thereby ordered the state to continue to pay for functions of the Minnesota judiciary at the prior fiscal year level until the enactment of a budget by the State of Minnesota. *In re Temporary Funding of Core Functions of the Judicial Branch of the State of Minnesota*, 2011 Minn. Dist. Lexis 88 \* 8 (June 28, 2011).

expenditures despite the lack of legislative appropriation authority in order to ensure continuity of core governmental services. *See, e.g., Smartt v. Bd. Of County Comm'rs*, 1917 OK 590, P6 (1917) (“The very purpose of creating a state government by the people is to delegate thereto the performance of certain functions looking to the common safety and welfare, and the necessity for the performance of these functions through the agency of the state and its various subdivisions is the sole object for its creation.”). Moreover, courts in Illinois and Minnesota have emphasized that during a budget impasse, where there is a lack of an appropriation bill, the state is still responsible for maintaining its core government functions in order to preserve the health, safety, and welfare of its citizens. *See, e.g., In re Temp. Funding of Core Functions of Exec. Branch*, 2011 Minn. Dist. LEXIS 61 (Minn. Dist. Ct. 2011) (The court held that the failure to properly fund critical core functions of the executive and legislative branches including matters relating to the life, health, and safety of Minnesota citizens will violate the Minnesota and United States Constitutions.); *See also AFSCME v. State*, 2015 IL App (5<sup>th</sup>) 150277-U, P36 (Ill. App. Ct. 5<sup>th</sup> Dist. 2015) (The court determined that if the budget impasse continues indefinitely and the Comptroller is unable to issue paychecks, the state may become unable to provide crucial government services.).

When addressing the question of expending public funds in excess of a legislative appropriation, the courts of other states have reached the same conclusion – approving the expenditure of funds necessary to ensure public health, safety and welfare, notwithstanding a constitutional prohibition, similar to article III, § 24 that would suggest otherwise. *See, e.g., State v. Staub*, 61 Conn. 553, 565-66 (Conn. 1892) (Compelling the Comptroller to make payments where the legislature had not passed an appropriation bill, the Connecticut Supreme Court stated “duties essential to the preservation of order, the administration of justice, and the protection of property...are not imposed by statute but their performance is demanded by the constitution and is of necessity involved in the existence of a government.”); *Connecticut Attorney General Opinion*, 1991 Conn. AG LEXIS 79, \*10 (1991) (“if conflicting laws cannot be reconciled by a reasonable construction, then the paramount law must control.”); *In Re Temporary Funding of Core Functions of the Judicial Branch of the State of Minnesota*, 2011 Minn Dist. LEXIS 88 (Minn. Dist. Ct. 2011) (“when the traditional processes of government have failed, the rigidity of [the law] must give way to the safety and protection of [the public].”)

The state of Washington Supreme Court was faced with the same predicament that Pennsylvania has encountered, the issuance of payments in the absence of an appropriation for the preservation of the health, safety and welfare of prisoners. In that case, the court stated “[T]he feeding of prisoners is an indispensable governmental function, so far so, that warrants issued for that purpose by a city in excess of its constitutional limit of indebtedness are valid on the score of necessity; and claims for such expenditures made by a sheriff must be paid by a county, although the county's constitutional debt limit be exceeded thereby.” *Ass'n Collectors v. King County*, 194 Wash. 25, 32 (1938) quoting *Gladwin v. Ames*, 30 Wash. 608, 71 Pac. 189 (1903); and *Smart v. Board of County Commissioners*, 67 Okla. 141, 169 Pac. 1101. (1917). The court there continued by saying “fires, floods, explosions, storms, earthquakes, riots, and insurrections do not wait for commissioners to adopt resolutions by unanimous vote at meetings had on reasonable notice. Surely, there must be a legal way to relieve a sheriff who exceeds the budget in the face of such emergencies. The feeding of prisoners may not be so actively emergent as in those cases, but it involves a no less mandatory duty.” *Id.*

## Conclusion

Though the state Treasurer possesses the authority to issue his warrant for the payment of public funds in the absence of an appropriation (as a consequence of a budgetary impasse), such authority is limited and premised upon the presence of specific circumstances. If payment of the requisition is not (1) pursuant to an appropriation unaffected by a budgetary impasse or (2) mandated pursuant to independent federal or state law, then the requisition must be (3) necessary for the maintenance of public health, safety and welfare in order for the Treasurer to approve the release of public funds.

In order to ensure requisitions submitted during a budgetary impasse are payable, the submitting agency will need to provide justification, demonstrating that the expenditure satisfies at least one of the exceptions to the Article III, Section 24 prohibition. Agencies within each branch of government will therefore be requested to identify the specific circumstances and authority that would permit its payment during an impasse.