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## OFFICE OF THE ATTORNEY GENERAL

June 8, 2007

### MEMORANDUM

To: Director, Department of Administration

From: Deputy Attorney General

Re: Opinion Request - Creditor Promissory Notes for COLA Class Members

DIRECTIONS OFFICE

DIRECTOR'S OFFICE

You have asked a number of questions about the issuance of promissory notes to the COLA class in the case of Rios v. Camacho, Superior Court No. SP0206-93. Since a judgment has been issued in the Rios case, the COLA class members are now judgment creditors of the government.

Pursuant to 5 GCA § 22415, creditors of the government are entitled to receive promissory notes which bear 7% interest.<sup>1</sup> This includes "[a]ny creditor of the government of Guam," except a tort claimant with an adjudicated claim. There is no exclusion for a judgment creditor.

<sup>1</sup> 5 GCA § 22415 provides:

Any creditor of the government of Guam (other than a tort claimant with an adjudicated claim) who is not paid within thirty (30) days of filing his claim may file a request for the Director of Administration for issuance of a one year negotiable promissory note payable to bearer from the Government of Guam, bearing interest at 7% per annum. Within 30 days of the request, the Director of Administration shall either issue said promissory note or shall deliver to the claimant a statement that part or all of the claim is disputed. If only part of the claim is disputed, a promissory note shall be issued for the undisputed portion. The Director shall, in the statement that part of all of the claim is disputed, designate a hearing officer for a hearing pursuant to the Administrative Adjudication Law, set a hearing date not less than 30 days nor more than 60 days from the date of the statement, and indicate with particularity the reasons the claim is disputed. If no such statement of disputed claim is issued within 30 days, the claim shall be deemed undisputed.

Any such promissory note may be used by the bearer at the fact [sic] value plus accrued interest for payment of tax or other obligation due the Government of Guam. If only part of the promissory note is used for such purpose, the Director of Revenue and Taxation may make a notation of partial redemption on the back of the note indicating amount redeemed, date, balance due, etc., or may issue a new promissory note with the same expiration date for the balance due. At the request of the bearer, any excess amount may be credited against future obligations at no additional interest. The promissory note may not be used in payment of sums due autonomous agencies or instrumentalities of the Government of Guam.

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The Department of Administration (DOA) has issued § 22415-promissory notes to at least one judgment creditor in the past. And the Guam Supreme Court has reviewed the appropriateness of paying 7% interest to a judgment creditor when such a promissory note has been issued. In Pacific Rock Corporation v. Perez, 2005 Guam 15, the Department of Administration issued a § 22415-promissory note for payment of the amount of a judgment against the government. However, the government claimed that sovereign immunity barred charging 7% interest on the note because post-judgment interest is not allowed against the government. The Court rejected the government's argument. The Court held that the trial court properly concluded that notes issued to a judgment creditor pursuant to § 22415 must bear interest at the rate of 7%. Hence, the use of promissory notes to pay judgments is not new. Since "any creditor" of the government is entitled to a promissory note, when a promissory note is requested, DOA must issue a note in accord with the statute and its standard policies and procedures.

1. You have asked if issuing promissory notes to individual COLA class members and their attorney, violates the government's debt ceiling as defined in Section 11 of the Organic Act.

Section 11 of the Organic Act provides in pertinent part: "That no public indebtedness of Guam shall be authorized or allowed in excess of 10 per centum of the aggregate tax valuation of the property in Guam." The amount of the 10 percent debt ceiling must be calculated by those with the information and knowledge required to make such a determination. To make the calculation is beyond the realm of expertise and function of the Office of the Attorney General. However, this office can comment about the meaning of "public indebtedness" (also called "debt" herein) in Section 11.

"Whether certain governmental obligations constitute debts in the constitutional sense, and are thus to be included in the debt limit calculation, is a highly litigated issue." In re: Camacho, 2003 Guam 16, ¶ 49, overturned on other grounds in Limtiaco v. Camacho, 127 S. Ct. 1413 (2007). The U.S. Supreme Court in Limtiaco v. Camacho did not rule on the specific issue raised; nonetheless, at this time, a reasonable opinion can be given based on language from the Guam Supreme Court's decision in In re: Camacho.

The Guam Supreme Court has stated: "[D]ebt only arises out of an obligation to pay money from funds to be provided in the future, as distinguished from funds presently on hand." (citations omitted). *Id.* at ¶ 47. The government's deficit - i.e., obligations made in anticipation of revenues for the fiscal year - are not debt. *Id.* at ¶ 55. "Obligations which are part of current expenses and are expected to be paid from current revenues, are not debt." (citations omitted). *Id.* In In re: Camacho, the Court found that past due obligations such as utility payments, payments to the retirement fund, vendor payments and other past due obligations, were not debt. *Id.* at ¶ ¶ 56-7. The Court said:

These items appear to have been incurred with the purpose of payment out of revenues for the years that they were incurred. Thus, at the time they were incurred they were current obligations, and they have not changed in form merely because they were not paid as contemplated during the fiscal year in which they became due.

*Id.* at ¶ 57.

The COLA retirees were to be paid from money "automatically appropriated from the General Fund on an annual basis." 4 GCA § 8137.1 (repealed by P. L. 23-45:IV:7(b)). The Court in Rios v. Camacho, *supra*, held that this language in § 8137.1 was a valid appropriation. (J. Weeks, Decision and Order, January 19, 1994). Hence, the COLA payments owed to retirees under 4 GCA § 8137.1 were current obligations in the year they became due and have not changed simply because they were not paid. When these obligations were not paid in the fiscal year in which they were due, they became a part of the

government's deficit. The payments due the COLA retirees are, therefore, a government deficit, but are not debts which would impact the debt ceiling. See In re: Camacho, at ¶¶ 55-7.

As discussed above, the Legislature, in 5 GCA § 22415, established a mechanism for the payment of government creditors by issuing them promissory notes which can be used to pay taxes and other obligations owed to the government. Creditors have the right to avail themselves of this method of payment.

The amount payable to the COLA retirees is already an obligation of the government. This obligation is not indebtedness as the term is used in Section 11. Issuing the § 22415-notes is not creating the COLA obligation. It is merely providing a mechanism for payment of the obligation. An agreement to pay an obligation that does not impact the debt ceiling should not change the nature of the obligation to one that does impact the debt ceiling, particularly when the Legislature has mandated that a creditor is entitled to avail himself of the promissory note provisions of § 22415 in order to obtain payment of his debt. Therefore, issuing the promissory notes to the COLA class members and their attorney would not impact the debt ceiling.

2. You have asked if the amount owed by the government is disputed because in a separate case, a tax payer law suit to stop the COLA payments has been filed.

The claim dispute provision of § 22415 contemplates a dispute between the government, as debtor, and the government's creditor. As between the government and the members of the COLA class, the amount of the debt can no longer be disputed.

On November 21, 2006, the government and the other parties in the Rios case stipulated to the issuance of a final, non-appealable judgment. (Regardless of the non-appeal stipulation, the 30 day appeal period has already run.) It was further stipulated that the Court would select the final amount of the judgment in accord with its previous decision and order. On the same date, the court issued a judgment in the amount of \$123,580,231.00. As a result of the stipulation and judgment, the amount of the debt is not and cannot be disputed by either the government or the COLA class. Hence, for the purposes of § 22415, the amount of the debt is not disputed. The separate taxpayer lawsuit does not give rise to a dispute among the parties to the obligation about the amount of the debt owed.

3. You have asked how you can issue promissory notes to the entire COLA class if it is unclear who the beneficiaries are.

Most, if not all, of the members of the COLA class should have been identified. Those that have been identified are entitled to § 22415-promissory notes. If there are others who are members of the class, but have not been identified, it will be up to the plaintiff's attorney to advise DOA of their identities, or at least work with DOA and the retirement fund to determine their identities.

4. You ask whether the notes should have a renewable period.

The notes should be issued according to the usual terms, standards and procedures followed when issuing the notes to other creditors. The members of the COLA class should not be treated any different than other creditors of the government who have received the promissory notes.

5. You have asked if the fact that some "anomalies" have been discovered by the Public Auditor, means that the amount of the claimed debt is in dispute.

We do not know what you mean by anomalies. In any case, there should be a good faith effort to comply with the judgment of the Court by working with the plaintiffs' attorney to determine the amounts owed to each individual COLA class member.

If you need further assistance with numbers 3, 4 and 5 above, please let us know. This is an informational memorandum. It is not a formal opinion of the Attorney General.

A handwritten signature in black ink, appearing to read "J. Patrick Mason", with a long horizontal flourish extending to the right.

J. Patrick Mason