April 19, 2004

Fred L. Dailey, Director
Ohio Department of Agriculture
8995 East Main Street
Reynoldsburg, Ohio 43068-3399

SYLLABUS: 2004-017

It is permissible under R.C. 926.16(E) for accumulated interest from previous years to be transferred from the Agricultural Commodity Depositors Fund to the Commodity Handler Regulatory Program Fund to pay the examination and administrative costs of R.C. Chapter 926. Pursuant to R.C. 926.16(E), the Director of Budget and Management has discretion to determine whether to make such a transfer.

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
JIM PETRO, ATTORNEY GENERAL

Opinions Section
30 E. Broad St., 15th Floor
Columbus, OH 43215-3400
Telephone: (614) 752-6417
Facsimile: (614) 466-0013
www.ag.state.oh.us

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OPINION NO. 2004-017

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Ohio Department of Agriculture
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Reynoldsburg, Ohio 43068-3399

Dear Director Dailey:

We have received your request for a formal opinion of the Attorney General concerning the transfer of interest from the Agricultural Commodity Depositors Fund to the Commodity Handler Regulatory Program Fund pursuant to R.C. 926.16. Your question is as follows:

> Is it permissible under R.C. 926.16(E) for accumulated interest from previous years to be transferred to the Commodity Handler Regulatory Program Fund to cover the administrative expenses of the grain warehouse regulatory program during a given fiscal year?

Background

Your question concerns two funds created in the state treasury to hold moneys relating to the operations of the Department of Agriculture. The first is the Agricultural Commodity Depositors Fund ("Depositors Fund"), created in the state treasury by R.C. 926.16. The Depositors Fund holds per-bushel fees that are charged for agricultural commodities deposited with licensed commodity handlers, sums collected by legal action on behalf of the Depositors Fund, and property or securities acquired through the use of moneys in the Depositors Fund. R.C. 926.16(A). The moneys collected under R.C. 926.16(A) and paid into the Depositors Fund may be used only to indemnify depositors of agricultural commodities in the event that a licensed handler experiences financial failure or ceases to be licensed. R.C. 926.16(A); R.C. 926.18; *see also* R.C. 926.02(A)(2). *See generally* 1987 Op. Att'y Gen. No. 87-020, at 2-130 (the Depositors Fund indemnifies "persons who suffer financial loss due to the insolvency of warehouses in which they have stored agricultural commodities").

The second fund is the Commodity Handler Regulatory Program Fund ("Program Fund"), created in the state treasury by R.C. 926.19. Moneys in the Program Fund are used to

pay the examination and administrative costs of R.C. Chapter 926, which include the costs of licensing handlers of agricultural commodities and examining their facilities. R.C. 926.19; *see* R.C. 926.02; R.C. 926.04-.06; R.C. 926.10.

The final paragraph of R.C. 926.16 provides for interest to be transferred from the Depositors Fund to the Program Fund, as follows:

> *All interest earned by the fees collected under this section shall be credited to the [agricultural commodity depositors] fund and*, at the request of the director of agriculture and to the extent necessary to pay the examination and administrative costs of this chapter as provided in section 926.19 of the Revised Code, *may be transferred by the director of budget and management to the commodity handler regulatory program fund* created in that section.

R.C. 926.16(E) (emphasis added). The question presented by your request is whether this provision permits the transfer from the Depositors Fund to the Program Fund of accumulated interest from previous years, or whether it permits the transfer during a given fiscal year of only interest earned during that fiscal year.[1]

You have informed us that the Ohio Department of Agriculture maintains account records that separately identify the moneys collected from licensed handlers, which constitute the principal of the Depositors Fund, and the interest accumulated on the principal. The distinction between principal and interest has been maintained over the years, and unused interest has been carried forward from year to year, so that, at present, roughly half the moneys in the Depositors Fund are principal and the other half are accumulated interest.[2] Because interest rates are currently at low levels, the Director of Agriculture is seeking, pursuant to R.C. 926.16(E), to

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[1] We are aware of pending legislation that, if enacted in its current form, would amend R.C. 926.16(E) and related provisions to change the analysis and conclusions set forth in this opinion. The pending legislation is H.B. 421, 125th Gen. A. (2004), which was introduced on March 4, 2004, and referred to the House Agricultural and Natural Resources Committee. As introduced, H.B. 421 permits both fees and investment earnings paid into the Depositors Funds to be used to pay examination and administrative costs under R.C. 926.19, and requires the Director of Budget and Management to transfer an amount up to five hundred thousand dollars per fiscal year from the Depositors Fund to the Program Fund at the request of the Director of Agriculture. It also makes a number of other changes to R.C. Chapter 926.

[2] Although we have been informed that the Department of Agriculture has not expended interest held in the Depositors Fund for the purposes for which principal may be expended, we note that the statutory provisions appear to permit the expenditure of the interest for any purpose for which other moneys in the Depositors Fund may be expended, in addition to permitting its transfer to the Program Fund. *See* R.C. 926.16(E); R.C. 926.18.

have the Director of Budget and Management transfer interest from prior years from the Depositors Fund to the Program Fund to be used to pay examination and administrative costs incurred under R.C. Chapter 926.

You have also informed us that the Director of Budget and Management is reluctant to transfer interest income from previous fiscal years. A representative of the Office of Budget and Management has informed us that records kept by that office indicate, when money is paid into the Depositors Fund, whether the money constitutes principal or interest. At the end of each fiscal year, any interest income from that year remaining in the Depositors Fund is retained as part of the balance of the Depositors Fund. With respect to disbursements from that balance, the records kept by the Office of Budget and Management do not indicate whether particular disbursements come from principal or interest. Therefore, under records kept by the Office of Budget and Management, it is not possible to determine how much of the balance of the Depositors Fund originated as interest.

We will consider first whether accumulated interest, if it can be identified, may be transferred from the Depositors Fund to the Program Fund. Then we will address other issues relating to the requested transfer of interest income.

Transfer of interest from the Depositors Fund to the Program Fund

The initial question is whether, if it is possible to identify interest moneys in the Depositors Fund that have been carried over from previous years, those moneys may be transferred to the Program Fund to pay for the costs of R.C. Chapter 926. The provisions of R.C. 926.16(E) state plainly how the interest earned on the Depositors Fund is to be managed. Initially, the interest earned by the fees collected "shall be credited" to the Depositors Fund. R.C. 926.16(E). After it is so credited, the interest may (at the request of the Director of Agriculture and to the extent necessary to pay the examination and administrative costs of R.C. Chapter 926 as provided in R.C. 926.19) be transferred by the Director of Budget and Management to the Program Fund. *Id.* R.C. 926.16(E) does not indicate that the transfer may be made only during the fiscal year in which the interest is credited to the Depositors Fund.

The fact that the interest must be credited to the Depositors Fund before it may be transferred to the Program Fund suggests that interest moneys may retain their identity as interest moneys after they are credited to and held in the Depositors Fund. The statutes do not limit the amount of interest that may be carried forward from year to year. *Cf.* 1993 Op. Att'y Gen. No. 93-075 (syllabus, paragraph 3) (there is no statutory limit upon the amount of revenue in a special fund comprised of county sales tax proceeds that may be carried forward from year to year). Our research has disclosed no provision of statute or principle of accounting that prevents

a public body from continuing to identify interest moneys beyond the end of the fiscal year in which they are received.[3]

The history of R.C. Chapter 926 supports the conclusion that the identity of interest moneys may be retained past the end of the fiscal year. When the provisions of R.C. 926.19 were initially enacted, R.C. 926.19(C) stated that, "[i]f at any time" the moneys in the Commodity Handler Regulatory Program Special Account (now the Program Fund) were not sufficient to pay the examination and administrative costs of R.C. Chapter 926, "the director [of agriculture] may use the interest earned by the fees collected under section 926.16 of the Revised Code to pay those costs." 1981-1982 Ohio Laws, Part II, 4396, 4410 (Am. Sub. H.B. 770; act eff. Mar. 7, 1983; R.C. 926.19 eff. Apr. 1, 1983). The use of the words "at any time" indicated that the possible transfer of funds was not restricted to the current fiscal year.[4]

Further, language then enacted in R.C. 926.16(F) and currently appearing in R.C. 926.16(E) refers to the moneys in the Agricultural Commodity Depositors Special Account (now the Depositors Fund) as "fees collected" under R.C. 926.16 and "interest earned" by the fees collected. 1981-1982 Ohio Laws, Part II, 4396, 4407 (R.C. 926.16(F)); R.C. 926.16(E). Clearly, the interest moneys earned under this provision, when deposited into the Depositors Fund, do not become "fees." Rather, it appears that the interest moneys retain their identity as interest moneys indefinitely, and thus are distinguished from the fee moneys and remain available for purposes of paying examination and administrative costs under R.C. 926.19.

The conclusion that the identity of interest moneys may continue to be recognized following the end of the fiscal year is consistent with provisions of law governing interest income. Absent statutory provisions to the contrary, the common law rule is that interest is credited to the fund on which it was earned and may be expended in the same manner as the

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[3] In contrast, our research has disclosed instances in which moneys are identified by their source for indefinite periods of time to earmark the moneys for particular uses. *See, e.g.,* 1981 Op. Att'y Gen. No. 81-022 (tax revenue may remain earmarked for a particular use for an indefinite period of time, and may not be diverted to any other use). *See generally* 1999 Op. Att'y Gen. No. 99-002, at 2-14 (amounts within a fund may be earmarked for particular purposes); 1983 Op. Att'y Gen. No. 83-055, at 2-224 ("even though interest derived from a gift to a county children services board or department of welfare may be credited to the county general fund, if that interest has lawfully been made subject to restricted use, it may not be expended in violation of such restriction").

[4] The words "[i]f at any time" were also used in connection with the request for an appropriation from the General Assembly, if the moneys in the Commodity Handler Regulatory Program Special Account (now the Program Fund) were not sufficient to pay the examination and administrative costs, and they continue to be used in that context. 1981-1982 Ohio Laws, Part II, 4396, 4410; R.C. 926.19(C).

other moneys in that fund. *See* 1997 Op. Att'y Gen. No. 97-043, at 2-266 to 2-267; 1992 Op. Att'y Gen. No. 92-030, at 2-116 and 2-118. The general rule for moneys held in the state treasury is that interest earned on these moneys is credited to the general revenue fund of the state, unless the disposition of the earnings is otherwise provided for by law, or the Director of Budget and Management has provided in the plan approved under R.C. 131.36[5] that a different fund is entitled to the earnings. R.C. 113.09.

In the instant case, R.C. 926.16 states plainly that interest earned on fees collected under R.C. 926.16 and paid into the Depositors Fund "shall be credited to" the Depositors Fund. R.C. 926.16(E). Accordingly, that interest must be credited to the Depositors Fund and then may be expended for any purpose for which the other moneys in the Depositors Fund may be expended. *See* note 2, *supra.* In addition, by the express terms of R.C. 926.16(E), interest earned on the fees in the Depositors Fund may also be used for another purpose – that is, the interest may be transferred to the Program Fund and used to pay examination and administrative costs of R.C. Chapter 926. No limitation is placed on the time at which the transfer may occur, and there is no basis for imposing such a limitation. *See generally Wachendorf v. Shaver*, 149 Ohio St. 231, 232, 78 N.E.2d 370 (1948) (syllabus, paragraph 5) ("[t]he court must look to the statute itself to determine legislative intent, and if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged").

We conclude, accordingly, that it is permissible under R.C. 926.16(E) for accumulated interest from previous years to be transferred from the Depositors Fund to the Program Fund to pay the examination and administrative costs of R.C. Chapter 926.

Accounting issues

We turn now to other issues relating to the proposed transfer of interest income. As reflected in the concerns raised by the Office of Budget and Management, it is not possible to transfer interest moneys earned in previous years from the Depositors Funds to the Program Fund unless it is possible to identify those interest moneys in the Depositors Fund. In order to carry out the provisions of R.C. 926.16 and R.C. 926.19 as construed above, and to allow interest moneys credited to the Depositors Fund in previous years to be used to pay examination and administrative costs as permitted by statute, it is necessary to use an accounting system that provides a means of distinguishing the "interest earned by the fees collected under [R.C. 926.16]" from the fees on which the interest is earned. R.C. 916.16(E).

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[5] R.C. 131.36 provides for the Director of Budget and Management to enter into an agreement with the United States Secretary of the Treasury establishing procedures and requirements regarding the transfer of funds between the federal government and the State of Ohio, and to prepare a plan for complying with that agreement. The plan must identify state funds entitled to investment earnings under the agreement, funds to be created by the Controlling Board, and transfers of cash to be made to implement the agreement.

An accounting system is a means of structuring the receipt and expenditure of funds. "[F]unds and accounts are procedural devices for keeping financial records." 1986 Op. Att'y Gen. No. 86-056, at 2-305; *see* R.C. 131.01(A) (defining "[a]ccount" to mean "any record, element, or summary in which financial transactions are identified and recorded as debit or credit transactions in order to summarize items of a similar nature or classification"); R.C. 131.01(O) (defining "[f]und" to mean "an independent fiscal and accounting entity with a self-balancing set of accounts recording cash or other resources, together with all related liabilities, obligations, reserves, and fund balances which are segregated for the purpose of carrying on specific activities or attaining certain objectives in accordance with special rules, restrictions, or limitations").

Hence, it is appropriate for funds and accounts to be structured to enable public officials to expend public moneys in accordance with the provisions of law governing the expenditure of those moneys. *See generally* R.C. 5705.09 and R.C. 5705.12 (funds of subdivisions); 1999 Op. Att'y Gen. No. 99-022, at 2-148 (earmarking money in the county's general fund for particular uses); 1997 Op. Att'y Gen. No. 97-043, at 2-260 n.5 ("[i]t may be necessary or appropriate … to have a number of funds and accounts to hold the moneys that are required to be placed in a separate and distinct fund to the credit of the district"); 1986 Op. Att'y Gen. No. 86-056 (discussing procedures for establishing separate accounts for moneys available for different purposes); 1981 Op. Att'y Gen. No. 81-035, at 2-138 (procedures for "avoiding the difficulties entailed with segregating moneys within the general fund or attempting to establish the origin of particular moneys once they have been commingled with other general fund moneys"); *cf.* 1992 Op. Att'y Gen. No. 92-030, at 2-117 to 2-118 (when interest is commingled with the principal that generated the interest, the interest becomes part of the principal and may be expended only for those purposes for which the principal may be expended).

Representatives of the Department of Agriculture have informed us that, from the inception of the Depositors Fund (initially the Depositors Special Account), the Department has maintained the records necessary to distinguish the interest moneys held in that fund from the fees held in that fund, and the records of the Department of Agriculture have carried the balance of interest moneys from year to year. If this is the case, this practice is consistent with the initial language of R.C. 926.19, discussed above, and with the Department's understanding that the interest moneys remain available for the payment of examination and administrative costs in years following their deposit in the Depositors Fund. Although the language of R.C. 926.16 and R.C. 926.19 has been amended several times since 1983, it continues to be consistent with this statutory interpretation.

It appears that, for the accounting system used in the instant case to comport with the statutory provisions authorizing the transfer of interest moneys from previous years to the Program Fund, it is necessary for the accounting system to provide for the continuing identification of interest moneys held in the Depositors Fund, and to maintain the distinction between principal and interest in disbursing moneys from the Depositors Fund as well as in depositing moneys into the Depositors Fund. It may be that records of public funds are not ordinarily kept in this manner, and that result is appropriate if it is not ordinarily necessary to

distinguish interest from principal in this manner. However, accounting systems serve as a tool that may be used to implement different statutory provisions. Where, as in the instant case, the statutes call for the identification of interest income from year to year, it is appropriate to implement an accounting system that provides that information.

Accordingly, the accounting system used for the moneys of the Depositors Fund should be designed to facilitate the identification of interest moneys from year to year and to enable their transfer from the Depositors Fund to the Program Fund in accordance with the provisions of R.C. Chapter 926. On the information that has been presented to us, it is not clear whether such a system has been implemented in the past. To carry out the current provisions of R.C. Chapter 926, however, it is evident that such a system should be implemented, and that efforts should be made to examine existing records to determine which moneys currently in the Depositors Fund are legally permitted to be transferred to the Program Fund to be used to pay expenses of R.C. Chapter 926. *But see* note 1, *supra* (proposed amendments to R.C. Chapter 926).

Authority of Director of Budget and Management to transfer interest

The discretion to decide whether to transfer interest from the Depositors Fund to the Program Fund currently rests with the Director of Budget and Management. R.C. 926.16(E) states plainly that, at the request of the Director of Agriculture and to the extent necessary to pay the examination and administrative costs of R.C. Chapter 926, the interest credited to the Depositors Fund "may be transferred" by the Director of Budget and Management to the Program Fund. Use of the word "may" indicates that the transfer is discretionary, rather than mandatory. *See, e.g., Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph 1). Hence, the Director of Budget and Management is empowered to determine whether to transfer interest moneys from the Depositors Fund to the Program Fund.[6]

It has been established that "[t]he Attorney General is not empowered, in rendering opinions, to exercise discretion on behalf of other public officials, nor do we find it appropriate

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[6] The statutory language so empowering the Director of Budget and Management was enacted in 1992. *See* 1991-1992 Ohio Laws, Part II, 2135, 2158 (Am. Sub. S.B. 351, eff. July 1, 1992) (amending, *inter alia*, R.C. 926.16(E)). Under the earlier provisions of R.C. 926.16(E) and R.C. 926.19(C), the Director of Agriculture was permitted to use the interest to pay the examination and administrative costs. *Id.* At that time, there was no requirement for the Director of Budget and Management to transfer the interest from the Depositors Fund to the Program Fund. *See* Ohio Legislative Service Comm'n, *Summary of Enactments 119th General Assembly, 1992, Part I*, at 61. By means of the 1992 legislation, the General Assembly amended the statutes to require the Director of Agriculture to request the Director of Budget and Management to transfer the interest.

to advise one public body on matters concerning the powers and duties of another public body." 2001 Op. Att'y Gen. No. 2001-032, at 2-193; *accord* 2003 Op. Att'y Gen. No. 2003-028, at 2-235 to 2-236; 2003 Op. Att'y Gen. No. 2003-019, at 2-153; 2002 Op. Att'y Gen. No. 2002-025, at 2-169; 1986 Op. Att'y Gen. No. 86-076, at 2-422. The Director of Budget and Management has been given the responsibility of exercising reasonable discretion to decide whether to transfer money from the Depositors Fund to the Program Fund. Thus, the Director is responsible for identifying interest moneys that are available for transfer and determining whether to transfer them. While we do not purport to exercise discretion on behalf of the Director, we note that factors that may influence the decision whether to transfer interest moneys from the Depositors Fund to the Program Fund may include the need for the interest moneys to pay costs under R.C. 926.19 and the availability of interest moneys for that purpose.

The examination and administrative costs of R.C. Chapter 926 are initially computed by the Director of Agriculture pursuant to R.C. 926.19(B) to cover the following biennium. They are submitted to the Commodity Advisory Commission, which is created by R.C. 926.32 and consists of seven members appointed by the Director of Agriculture, including farmers, licensed handlers, and an officer of a rural bank. R.C. 926.19(B); R.C. 926.32. The Commodity Advisory Commission has authority to determine the amount of examination and administrative costs to be paid from the Program Fund, and may approve a request to the Controlling Board for an increase or decrease in the appropriation authority for the biennial examination and administrative costs. *See* R.C. 926.19(B). The Commission "shall approve, and may amend" the costs submitted by the Director of Agriculture. *Id.* Once the Commission has taken this action, its decision "shall be binding" on the Director of Agriculture. *Id.*

In order to transfer interest moneys from the Depositors Fund to the Program Fund, the Director of Budget and Management must determine that the Depositors Fund holds sufficient moneys that are available for the transfer. As discussed above, the Office of Budget and Management has stated that its records identify amounts of principal and interest that were posted to the Depositors Fund, but do not identify whether amounts disbursed from the Depositors Fund originated as principal or interest. Hence, the Office of Budget and Management states that it is unable to identify amounts of interest from previous years that may be transferred from the Depositors Fund to the Program Fund. The Department of Agriculture states that it has records that establish those amounts of interest. Whether existing records are sufficient to establish the identity of interest income involves questions of fact and accounting that cannot be determined by means of this opinion. *See, e.g.,* 2003 Op. Att'y Gen. No. 2003-019, at 2-145; 1999 Op. Att'y Gen. No. 99-002, at 2-16 ("[a]n opinion of the Attorney General cannot resolve questions of fact or provide advice with respect to disputed factual matters"). The Director of Budget and Management may, however, consider these questions in exercising discretion under R.C. 926.16(E). *See generally* R.C. 131.32 (authorizing the Director of Budget and Management, for external financial reporting purposes, to "classify the funds of the state and the custodial funds of the treasurer of state in a manner required or permitted by generally accepted accounting principles"); *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 117 N.E. 6 (1917) (syllabus, paragraph 3) (in case of doubt regarding the authority to expend

public moneys, the doubt "must be resolved in favor of the public and against the grant of power").

R.C. 926.19(A) lists several sources of moneys that are in the Program Fund and are used to pay the examination and administrative costs of R.C. Chapter 926. They include revenues collected from the distribution of forms required for the administration of R.C. Chapter 926, the application and examination fees for the licensing of commodity handlers, agricultural commodity tester certificate fees, fines and penalties collected for violations of R.C. Chapter 926, and amounts collected under contracts with marketing associations. R.C. 926.19(A). If these amounts, together with interest income transferred from the Depositors Fund, "are not sufficient to pay the examination and administrative costs of [R.C. Chapter 926], the director [of agriculture] shall request an appropriation from the general revenue fund to pay those costs." R.C. 926.19(C). Hence, if the Director of Budget and Management does not transfer from the Depositors Fund to the Program Fund amounts of interest income that, with the other moneys in the Program Fund, are sufficient to provide for the payment of examination and administrative costs of R.C. Chapter 926, it may be necessary to seek an appropriation from the general revenue fund to pay those costs.

Conclusion

For the reasons discussed above, it is my opinion, and you are advised, that it is permissible under R.C. 926.16(E) for accumulated interest from previous years to be transferred from the Agricultural Commodity Depositors Fund to the Commodity Handler Regulatory Program Fund to pay the examination and administrative costs of R.C. Chapter 926. Pursuant to R.C. 926.16(E), the Director of Budget and Management has discretion to determine whether to make such a transfer.

Respectfully,

JIM PETRO
Attorney General