August 5, 1994

OPINION NO. 94-048

The Honorable Thomas E. Ferguson
Auditor of State
P.O. Box 1140
Columbus, Ohio 43266-0040

Dear Auditor Ferguson:

You have requested an opinion concerning the investment of public moneys by a county's investing authority. Specifically, you wish to know:

1. Does R.C. 135.35(A)(2) authorize a county investing authority to invest in obligations and securities issued by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation?

2. If it is determined that a county investing authority was not authorized to invest in a particular investment, and a loss of principal is sustained, should a finding for recovery be issued for the amount of such loss?

3. If the answer to question number two is in the affirmative, against whom should such finding be issued?

4. If it is determined that a county investing authority was not authorized to invest in a particular investment, and a loss of principal is sustained, is the county investing authority personally liable for the amount of such loss?

5. If it is determined that a county investing authority was not authorized to invest in a particular investment, and a loss of principal is sustained, how should such loss be allocated among the various funds that comprise such investment?

I. A County May Invest in Obligations and Securities Issued by the Federal National

Mortgage Association and the Federal Home Loan Mortgage Corporation, But Any Such Investment Must Satisfy Fiduciary Standards of Care, Skill, and Judgment

Your first question asks whether R.C. 135.35(A)(2) authorizes a county investing authority to invest in obligations and securities issued by the Federal National Mortgage Association ("FNMA") and the Federal Home Loan Mortgage Corporation ("FHLMC"). Pursuant to R.C. 135.35(A)(2), as amended by Sub. H.B. 300, 120th Gen. A. (1994) (eff. July 1, 1994), the investing authority[1] of a county is specifically authorized to invest all or any part of the county's inactive moneys,[2] and all of the money in the county library and local government support fund when required by R.C. 135.352, in "[b]onds, notes, debentures, or any other obligations or securities issued by any federal government agency or instrumentality." This language represents a specific clarification of the general thrust of this section, and makes it plain that a county's investing authority is explicitly authorized to invest in obligations and securities issued by federal government instrumentalities.

Insofar as the FNMA and the FHLMC are publicly held, government-sponsored corporations engaged in the performance of governmental functions, the FNMA and the FHLMC are federal government instrumentalities. *See* 12 U.S.C. §§1451-1459 (1988 & Supp. IV 1992) (providing for the creation and operation of the FHLMC); 12 U.S.C. §§1716-1723i (1988 & Supp. IV 1992) (providing for the creation and operation of the FNMA); *Rust v. Johnson*, 597 F.2d 174 (9th Cir.) (the FNMA is an instrumentality of the federal government), *cert. denied*, 444 U.S. 964 (1979). Therefore, pursuant to R.C. 135.35(A)(2), a county investing authority is authorized to invest the county's inactive moneys in obligations and securities issued by the FNMA and the FHLMC.

However, as stated in 1993 Op. Att'y Gen. No. 93-054,

> any decision with respect to the investment of moneys of a governmental entity must be made in accordance with the fiduciary standards generally applicable to the investment of public moneys by such entity. *See, e.g., State v. Herbert*, 49 Ohio St. 2d 88, 358 N.E.2d 1090 (1976); *Crane Township, ex rel. Stalter v. Secoy*, 103 Ohio St. 258, 132 N.E. 851 (1921). In general, a public officer, as a fiduciary with respect to public funds under such officer's control, is required to exercise the same degree of

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[1] Except as designated by the board of county commissioners under R.C. 135.34, the county treasurer is a county's investing authority. R.C. 135.31(C).

[2] R.C. 135.31(B) defines "inactive moneys" as all public moneys in public depositories in excess of the amount determined to be necessary to meet current demands upon a county treasury, and deposited in a commercial account and withdrawable, in whole or in part, on demand, a negotiable order of withdrawal account as authorized in 12 U.S.C. §1832(a), or a money market deposit account as authorized in 12 U.S.C. §3503.

> care, skill, and judgment with respect to investment decisions as are consistent with the fiduciary responsibility to preserve and safeguard the financial integrity and soundness of such funds. *See generally* 1989 Op. Att'y Gen. No. 89-033 at 2-151 to 2-156. As noted in *Black's Law Dictionary* (6th ed. 1990) at 625, "[t]he status of being a fiduciary gives rise to certain legal incidents and obligations, including the prohibition against investing the money or property in investments which are speculative or otherwise imprudent."

Id. at 2-258. Whether a particular investment is appropriate depends upon a careful analysis of all relevant factors. *Id.* at 2-259. Factors to be considered include the amount of the proposed investment in such securities, the marketability or lack of marketability of such securities, the investing authority's need for liquidity, the size and diversity of the investing authority's portfolio, the investment authority's investment policies, and a variety of other possible factors, such as the contingent nature of the income stream and the risks associated with such investments, including the potential loss of principal. *Id.* Thus, pursuant to R.C. 135.35(A)(2), as amended by Sub. H.B. 300, 120th Gen. A. (1994) (eff. July 1, 1994), a county investing authority is authorized to invest the county's inactive moneys in obligations or securities issued by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, provided that any such investment is made in accordance with those fiduciary standards of care, skill, and judgment as are generally applicable to the investment of inactive moneys of a county.[3]

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[3] With regard to your first question, you also wish to know whether, if a county investing authority is authorized to invest in obligations and securities issued by the FNMA, a county investing authority is authorized to invest, in particular, in Guaranteed REMIC Pass-Through Certificates ("REMIC Certificates") and Stripped Mortgage-Backed Securities ("SMBS Certificates") issued by the FNMA. "REMIC" is an acronym for "real estate mortgage investment conduits." Both the REMIC Certificates and SMBS Certificates constitute trust certificates of beneficial interest issued pursuant to 12 U.S.C. §1719(d).

According to information provided with your request, the REMIC Certificates are issued pursuant to a trust agreement executed by the FNMA in its corporate capacity and its capacity as trustee, and are guaranteed as to timely distribution of principal and interest by the FNMA. The REMIC Certificates represent the beneficial ownership interest in the REMIC Trust created pursuant to the trust agreement. The assets of the REMIC Trust consist of the "regular interests" in a separate trust fund, the "Lower Tier REMIC." The assets of the Lower Tier REMIC will vary depending upon the trust agreement creating the Lower Tier REMIC.

The SMBS Certificates are issued and guaranteed as to timely distribution of principal and interest by the FNMA. The SMBS Certificates represent beneficial ownership interests in the principal distributions or the interest distributions on certain Fannie Mae Guaranteed Mortgage Pass-Through Certificates (the "MBS Certificates") held either directly or through one or more Guaranteed MBS Pass-Through Securities ("MEGA Certificates"), for the holders of SMBS Certificates by FNMA in its capacity as trustee of the related SMBS Trust. The MBS Certificates represent all or part of the beneficial interests in pools of first lien, single family, fixed-rate residential mortgage loans or participation interests therein.

As indicated in the text above, pursuant to R.C. 135.35(A)(2), as amended by Sub. H.B. 300,

II.Finding of Recovery Against a County Investing Authority

Your second question asks, if it is determined that a county investing authority was not authorized to invest in a particular investment, and a loss of principal is sustained, must a finding for recovery be issued for the amount of such loss. Pursuant to R.C. 117.24, the Auditor of State is required "to determine whether any public money has been illegally expended." *See* 1976 Op. Att'y Gen. No. 76-017 at 2-52 (the Auditor of State has a duty "to determine whether an illegal expenditure has occurred after the facts and the circumstances of the expenditure have been fully and thoroughly developed by the bureau of inspection and supervision").[4] After the Auditor of State determines that public money has been illegally expended, the Auditor of State incorporates his

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120th Gen. A. (1994) (eff. July 1, 1994), and subject to the same fiduciary standards of care, skill, and judgment as are generally applicable to the investment of inactive moneys of a county, a county investing authority is authorized to invest a county's inactive moneys in bonds, notes, debentures, or other obligations or securities issued by the FNMA. Accordingly, if the investment of public moneys in the particular REMIC Certificates and SMBS Certificates that are the subject of your request were determined to be consistent with the fiduciary standards generally applicable to the investment of public moneys by the county investing authority, a county investing authority would be authorized to invest in those certificates.

Whether the investment of public moneys in REMIC and SMBS Certificates is consistent with the fiduciary standards generally applicable to the investment of public moneys by a county investing authority requires the resolution of factual questions that can only be addressed on a case-by-case basis. *See generally* 1987 Op. Att'y Gen. No. 87-082 (syllabus, paragraph three) ("R.C. 109.14 does not authorize the Attorney General to decide questions of fact by means of an opinion"). Moreover, the legality and propriety of certain purchases of FNMA obligations or securities by the investing authority of Portage County are the subjects of litigation now pending before the United States District Court for the Northern District of Ohio. *See Portage County v. Government Securities Corp. of Texas,* 5:93CV2485 (N.D. Ohio 1993). Prior opinions of the Attorney General that have considered the propriety of issuing an opinion on an issue currently the subject of pending litigation have determined that it is improper for the Attorney General "to render advice on questions which are presently awaiting judicial decision." 1991 Op. Att'y Gen. No. 91-002 at 2-12; *accord* 1972 Op. Att'y Gen. No. 72-097 (syllabus, paragraph two). Accordingly, this opinion does not address the issue whether investment of public moneys in REMIC and SMBS Certificates issued by the FNMA is consistent with the fiduciary standards generally applicable to the investment of public moneys. In addition, it should be emphasized that nothing in this opinion should be interpreted or construed as expressing either approval or disapproval of an investment of public moneys in those types of instruments when they otherwise qualify as obligations or securities of a federal government agency or instrumentality for purposes of R.C. 135.35(A)(2).

[4] The duties and functions of the bureau of inspection and supervision are now performed by the Auditor of State. 1985-1986 Ohio Laws, Part I, 1760, 1794-1824 (Sub. H.B. 201, eff. July 1, 1985); *see* R.C. 117.09.

finding in an audit report. R.C. 117.25. Certified copies of the report are filed in the office of the clerk of the legislative authority, clerk of the governing body, executive officer of the governing body, and chief fiscal officer of the audited public office. R.C. 117.26. In addition, a certified copy of the audit report is filed with the officer required by state law, municipal or county charter, or municipal ordinance to act as legal counsel to the officers of the public office, or, if no officer is so designated, with the prosecuting attorney of the county within which the fiscal office of the public office is located. R.C. 117.27. If an audit report sets forth that any public money has been illegally expended, the legal officer receiving the report may institute a civil action for the recovery of the money. R.C. 117.28. *See also* R.C. 117.30 (the Attorney General may bring an action to recover illegally expended public money); R.C. 117.42 (the Attorney General may bring an action to prevent the unlawful expenditure of public funds or to enforce the laws relating to the expenditure of public funds). Also, if an audit report sets forth any malfeasance or gross neglect of duty on the part of any public official for which a criminal penalty is provided, the prosecuting attorney of the county in which the offense is committed shall institute criminal proceedings against the public official. R.C. 117.29. *See generally* R.C. 117.24 (the Auditor of State is required to "determine whether there has been any malfeasance or gross neglect of duty on the part of any officer or employee of [a] public office").

A review of the foregoing discloses that the Auditor of State is required to make a finding for recovery if he determines that public money has been "illegally expended." Resolution of your second question thus turns on whether money invested in an investment that is not authorized by statute has been illegally expended.

Webster's Third New International Dictionary 799 (3rd ed. 1971) defines "expend" to mean "to pay out or distribute **:** spend." Where a county investing authority has invested public moneys in bonds, notes, debentures, or other obligations or securities, the authority has paid out or spent public moneys to purchase those bonds, notes, debentures, or other obligations or securities. Moreover, if the county investing authority is not authorized by statute to invest in particular bonds, notes, debentures, or other obligations or securities, the purchase of those instruments by the county investing authority is illegal. *See generally Arnold v. Board of Educ. of Smith Township*, 20 Ohio Law Abs. 220, 222 (Mahoning County 1935) ("[a]n official having the keeping or distribution of public money must do so in accordance with law"); *State ex rel. Lowe v. Wilson*, 28 Ohio Dec. 307, 312, 20 Ohio N.P. (n.s.) 233, 238 (C.P. Brown County 1917) (where the right or authority of a board or public officer to expend public moneys "is not clear or doubtful it must be resolved in favor of the public"); 1979 Op. Att'y Gen. No. 79-048 at 2-152 ("[a]bsent specific statutory authorization, public moneys cannot be loaned or invested by the officers in charge thereof"); 1973 Op. Att'y Gen. No. 73-111 at 2-426 ("the authority to deposit public moneys is to be strictly construed"). It thus appears that money invested in an investment that is not authorized by statute has been illegally expended. Accordingly, if the Auditor of State determines that a county investing authority was not authorized to invest in a particular investment, and a loss of principal is sustained, the Auditor of State must issue a finding for recovery for the amount of such loss.

III.Liability of a County Investing Authority

Because your third and fourth questions both relate to the liability of a public official, these questions will be considered together. In particular, your third and fourth questions ask, if it is determined that a county investing authority was not authorized to invest in a particular investment, and a loss of principal is sustained, against whom is a finding for recovery for lost principal issued, and, further, is the county investing authority personally liable for the amount of the loss.

It is a well-settled rule in Ohio that a public official is liable for the loss of public moneys, even though illegal or otherwise blameworthy acts on his part were not the proximate cause of the loss of public moneys. *State v. Herbert*, 49 Ohio St. 2d 88, 96-97, 358 N.E.2d 1090, 1095 (1976); *Seward v. National Sur. Co.*, 120 Ohio St. 47, 49-50, 165 N.E. 537, 538 (1929); *Crane Township ex rel. Stalter v. Secoy*, 103 Ohio St. 258, 132 N.E. 851 (1921); 1980 Op. Att'y Gen. No. 80-074. In addition, "where any public officer orders or participates in the ordering of the expenditure of public funds, which expenditure is not authorized by law, such officer is personally liable for the amount of the funds so expended." 1952 Op. Att'y Gen. No. 1713, p. 559 at 566; *See Crane Township ex rel. Stalter v. Secoy*; *see also State v. Herbert* (syllabus) ("R.C. 135.14 which allows the Treasurer of State to invest interim moneys in the commercial paper of certain private corporations, does not alter the common-law standard of liability for loss of public funds by public officials where the investment is in violation of the maximum investment limitation embodied in the statute"). "The nature of this liability has been described as that of an insurer of the safety of the public funds." 1993 Op. Att'y Gen. No. 93-004 at 2-25; *accord State ex rel. Bolsinger v. Swing*, 54 Ohio App. 251, 6 N.E.2d 999 (Hamilton County 1936).

The common law rule of liability for public officials handling public moneys has been codified in R.C. 9.39, which provides, in pertinent part, "[a]ll public officials are liable for all public money received or collected by them or by their subordinates under color of office." As stated in Op. No. 93-004 at 2-26, "[t]he language of R.C. 9.39 with respect to the liability of public officials is plain and unambiguous. Public officials are held liable, pursuant to R.C. 9.39, only for public money that they or their subordinates *receive* or *collect*." Thus, a public official will be held personally liable if public moneys that come into his possession or custody in his official capacity are lost.

In recognition of the apparent harshness of this rule, the General Assembly enacted R.C. 135.39 to mitigate the injustice that may result from the rule's application to county treasurers, county deputy treasurers, or members of a board of county commissioners when acting as investing authorities. R.C. 135.39 provides as follows:

> A county treasurer, county deputy treasurer, or members of a board of county commissioners, when acting as investing authorities, and their bondsmen or sureties shall be relieved from any liability for the loss of any public moneys deposited or invested by them when they have acted pursuant to law or an ordinance or resolution adopted by a county pursuant to a charter adopted under Article X, Ohio Constitution, but in no event shall liability attach to a treasurer, deputy treasurer, or member of a board where the proximate cause of the loss is due to a risk arising from an investment *reasonably made under their authority* as investing authorities.

(Emphasis added.)

Thus, pursuant to R.C. 135.39, a county treasurer, deputy treasurer, or members of a board of county commissioners shall not be personally liable for the loss of public moneys invested by them if they acted in accordance with R.C. 135.31-.40 and all other pertinent provisions of law, and the proximate cause of the loss is due to a risk arising from an investment reasonably made under their authority as investing authorities. *Accord* 1985 Op. Att'y Gen. No. 85-077. *See generally Crane Township ex rel. Stalter v. Secoy*, 103 Ohio St. at 260, 132 N.E. at 852 ("[i]t is quite proper to say that matters in general that are committed to the pure discretion of a public officer, and loss to the public in funds or character of service, could not be availed of in a suit against the public officer or his bondsmen"); *Reckman v. Keiter*, 109 Ohio App. 81, 93, 164 N.E.2d 448, 458 (Montgomery County 1959) ("a public officer cannot be held accountable for any act while performing a function which requires the exercise of discretion").

However, if a county investing authority invests in a type of investment that is not authorized by statute or an ordinance or resolution adopted by a county pursuant to a charter adopted under article X of the Ohio Constitution, R.C. 135.39 does not relieve a county investing authority from any liability for the loss of any public moneys resulting from that unauthorized investment. Rather, pursuant to R.C. 9.39 and common law standards of liability for loss of public funds by public officials, a county investing authority is personally liable for any loss of public moneys that are in the possession or custody of the investing authority. Therefore, if it is determined that a county investing authority was not authorized to invest in a particular investment, and a loss of principal is sustained, the county investing authority is personally liable for the amount of the loss. *See State v. Herbert.*

Moreover, since the county investing authority is personally liable for such loss, the Auditor of State must issue a finding for recovery against the county investing authority for the amount of such loss. R.C. 117.28. After the Auditor of State makes a finding under R.C. 117.28 that public moneys have been illegally expended, civil actions may be initiated to recover such funds. *Id.; see also* R.C. 117.30. These civil actions may be initiated against the public officers who were responsible for the illegal expenditure. *See* Op. No. 76-017 (syllabus, paragraph two).

IV.Allocation of Loss Among the Various Funds that Comprise an Investment

Your final question asks, if it is determined that a county investing authority was not authorized to invest in a particular investment, and a loss of principal is sustained, how should such loss be allocated among the various funds that comprise such investment. No provision in R.C. 135.31-.40 directs the manner in which a county investing authority is to allocate a loss of principal.[5]

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[5] A review of the list of permissible investments for counties under R.C. 135.35 discloses that the investments listed therein are ones that the General Assembly has determined are not likely to result in a loss of public moneys. *See* 1937 Op. Att'y Gen. No. 995, vol. II, p. 1738 (syllabus, paragraph one) ("[t]he Uniform Depository Act has to do with the safeguarding of public moneys"). Because the provisions of the statute are to be strictly construed, *see* 1973 Op. Att'y Gen. No. 73-111

Where a statute authorizes performance of a particular act, but does not specify how the act is to be performed, the inference is that it is to be carried out in a reasonable manner. *State ex rel. Attorney General v. Morris*, 63 Ohio St. 496, 512, 59 N.E. 226, 230 (1900); *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, 608 (1878). Insofar as R.C. 135.35 authorizes a county investing authority to invest the inactive moneys of the county, the county investing authority may determine a reasonable manner in which to allocate a loss of principal if the investments of the county investing authority result in a loss of principal. Any exercise of discretion must be reasonable and within the limitations set by statute. *See generally State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39, 40 (1918) ("[e]very officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty").

V.Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised, that:

1.Pursuant to R.C. 135.35(A)(2), as amended by Sub. H.B. 300, 120th Gen. A. (1994) (eff. July 1, 1994), a county investing authority is authorized to invest the county's inactive moneys in obligations or securities issued by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, provided that any such investment is made in accordance with those fiduciary standards of care, skill, and judgment as are generally applicable to the investment of inactive moneys of a county.

2.If the Auditor of State determines that a county investing authority was not authorized to invest in a particular investment, and a loss of principal is sustained, the Auditor of State must issue a finding for recovery against the county investing authority for the amount of such loss.

3.If it is determined that a county investing authority was not authorized to invest in a particular investment, and a loss of principal is sustained, the county investing authority is personally liable for the amount of the loss.

4.A county investing authority may determine a reasonable manner in which to allocate a loss of principal if the investments of the county investing authority result in a loss of principal.

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at 2-426; 1937 Op. No. 995 at 1739, and any decision of the county investing authority with respect to the investment of the county's public moneys must be made in accordance with the fiduciary standards generally applicable to the investment of public moneys, 1993 Op. Att'y Gen. No. 93-054 at 2-258, it is unlikely that a county that invests in the instruments listed in R.C. 135.35 will sustain a loss of principal.

Respectfully,

LEE FISHER
Attorney General

June 10, 2009

The Honorable Thomas E. Ferguson
Auditor of State
P.O. Box 1140
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SYLLABUS: 94-048

1. Pursuant to R.C. 135.35(A)(2), as amended by Sub. H.B. 300, 120th Gen. A. (1994) (eff. July 1, 1994), a county investing authority is authorized to invest the county's inactive moneys in obligations or securities issued by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, provided that any such investment is made in accordance with those fiduciary standards of care, skill, and judgment as are generally applicable to the investment of inactive moneys of a county.

2. If the Auditor of State determines that a county investing authority was not authorized to invest in a particular investment, and a loss of principal is sustained, the Auditor of State must issue a finding for recovery against the county investing authority for the amount of such loss.

3. If it is determined that a county investing authority was not authorized to invest in a particular investment, and a loss of principal is sustained, the county investing authority is personally liable for the amount of the loss.

4. A county investing authority may determine a reasonable manner in which to allocate a loss of principal if the investments of the county investing authority result in a loss of principal.