

**OPINION NO. 2011-011**

**Syllabus:**

2011-011

1. Provided the requirements of R.C. 9.35(C)(1)-(4) are satisfied, a township fiscal officer may contract with a credit union service organization to assist the township with the preparation of payroll and other records, the preparation, signing, and issuance of checks, the

preparation of reports and accounts, and the performance of all similar duties.

2. Pursuant to R.C. 9.37, a township fiscal officer may contract with a credit union service organization for services necessary to transfer payments of money to township employees' accounts using electronic funds transfers in satisfaction of the township's payroll obligation, provided that the board of township trustees authorizes such a contract by resolution. Such an arrangement under R.C. 9.37 between a township fiscal officer and a credit union service organization does not contravene the requirements of R.C. Chapter 135.

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**To: Dennis Watkins, Trumbull County Prosecuting Attorney, Warren, Ohio**  
**By: Michael DeWine, Ohio Attorney General, April 12, 2011**

You have requested a formal opinion concerning the legal propriety of a payroll processing arrangement involving a township, a credit union, and a credit union service organization under R.C. 9.35, R.C. 9.37, R.C. Chapter 135 (uniform depository law), and R.C. 507.11.

A statutory township sought the guidance of your office concerning the legal propriety of its payroll processing arrangement. Based on information provided by the township, one of your assistants advised the township that it may not deposit its net payroll into a credit union account for the purpose of having the credit union issue payroll checks or make direct deposit payments to the accounts of township employees. Asserting that the initial information sent by the township to your office regarding its payroll processing arrangement was not accurate, the township's private legal counsel forwarded additional information about the township's payroll processing arrangement and asked the assistant prosecuting attorney to reconsider his opinion.

You now seek our advice and ask the following questions:

1. Is it proper under Ohio law [specifically R.C. 9.35, R.C. 9.37, R.C. 507.11, and R.C. Chapter 135] for a non home rule township to transfer the total net direct deposit employee payroll to a credit union, or its wholly owned subsidiary, in order for such credit union/subsidiary to issue direct payroll deposits for township employees?
2. If the answer to question 1 is in the affirmative, then would the conditions contained in R.C. 9.35(C) apply before this type of payroll processing is legally permissible? (Footnote omitted.)

#### **Township's Payroll Processing Arrangement**

The description of the township's payroll processing arrangement that you have provided suggests that the township satisfies its payroll obligations by means of electronic funds transfer through a series of payment orders. Documents accompanying your request explain that a township has contracted with a "for-profit"

credit union service organization (CUSO), a wholly-owned subsidiary of an Ohio credit union, for payroll processing services pursuant to R.C. 9.35. According to these documents, the payroll processing arrangement involves transfer of a “payroll file” and “payroll funds.” The township’s fiscal officer electronically forwards a payroll file with township employees’ bank account numbers and bank routing numbers to the CUSO. The township’s fiscal officer then contacts the bank that serves as the public depository of the township’s moneys and instructs the bank to “wire payroll funds” to a “general ledger.”<sup>1</sup> Debiting the township’s account, the bank processes the township’s request as a payment order to the credit union’s “Federal Reserve General Ledger.” After the payroll funds are transferred to the credit union’s “Federal Reserve General Ledger,” a CUSO employee transfers the payroll funds from the credit union’s “Federal Reserve General Ledger” to a “Public Entity General Ledger,” where the payroll funds are held until the payroll file is forwarded to a federal reserve bank.

After confirming receipt of payroll funds to the “general ledger,” a CUSO employee forwards the payroll file to an automated clearing house (ACH) origination processor. The ACH origination processor forwards the payroll file to the federal reserve bank, which disburses funds to township employees’ bank account numbers contained in the payroll file. The federal reserve bank then debits the credit union’s account at the ACH origination processor and, in turn, the credit union transfers the payroll funds from its “Public Entity General Ledger” to the ACH origination processor to complete the payroll processing transaction.

**A Township Fiscal Officer May Contract With a Financial Institution For Mechanical, Clerical, or Record-Keeping Services Necessary in the Performance of His Duties**

R.C. 9.35 permits a public official to contract for certain services in connection with his performance of duties such as issuing checks, keeping books and records, and preparing payroll. *See* 1983 Op. Att’y Gen. No. 83-027, at 2-102 (“R.C. 9.35 authorizes certain public officials to contract with firms which are capable of rendering electronic data processing or computer services for the performance of mechanical, clerical, or record-keeping services”).

R.C. 9.35(B) provides, in part, that “[a]ny public official may contract for and engage the services of a financial institution . . . to perform the mechanical, clerical, or record-keeping services necessary in the performance of his duties. Such services may include, but are not limited to, the preparation of payroll and other records[.]”<sup>2</sup> R.C. 9.35(B) does not, however, define “financial institution” for purposes of R.C. 9.35. Therefore, we must determine whether the term “financial

<sup>1</sup> A “ledger,” also termed “general ledger,” is defined as “[a] book or series of books used for recording financial transactions in the form of debits and credits.” *Black’s Law Dictionary* 974 (9th ed. 2009).

<sup>2</sup> As used in R.C. 9.35, “public official” “means an elected or appointed officer, employee, or agent of any political subdivision . . . who is permitted or required in the performance of his duties to issue checks, keep books and records, prepare and

institution,” as used in R.C. 9.35(B), may be understood to include a “credit union” or “credit union service organization.”

R.C. Chapter 1733 governs credit unions in Ohio. Pursuant to R.C. 1733.03, “[t]he purpose for which a credit union may be formed is to promote thrift among its members, and to that end to establish, on a cooperative basis, facilities for savings, credit for provident and productive purposes, assistance to members in budgeting and money management and the effective use of their assets and resources, and all activities necessary or incidental thereto.” *Accord State ex rel. Leach v. Price*, 168 Ohio St. 499, 501, 156 N.E.2d 316 (1959) (explaining that a credit union is not an ordinary private corporation for profit; it is organized under special statutory provisions; its object is to promote thrift among its members and credit for its members; its membership is limited to certain well-defined groups of people; and its monetary benefits inure solely to its members). See R.C. 1181.01 (requiring the superintendent of financial institutions to appoint a deputy superintendent for credit unions); *Black’s Law Dictionary* 706 (9th ed. 2009) (defining “financial institution” as “[a]

preserve payroll and other employee records, and make reports or perform other similar duties.” R.C. 9.35(A). The term “political subdivision” is not statutorily defined for purposes of R.C. 9.35. Therefore, this term should be construed according to its common usage. See R.C. 1.42; see also *State v. McConville*, 124 Ohio St. 3d 556, 2010-Ohio-958, 925 N.E.2d 133, at ¶8. In 2002 Op. Att’y Gen. No. 2002-038, at 2-244, the Attorney General explained that the general definition of “political subdivision” includes townships:

The term “political subdivision” has been defined as “a limited geographical area of the State, within which a public agency is authorized to exercise some governmental function.” 1972 Op. Att’y Gen. No. 72-035 at 2-135; accord 1984 Op. Att’y Gen. No. 84-055 at 2-183; see also *Black’s Law Dictionary* 1179 (7th ed. 1999) (defining the term “political subdivision” as “[a] division of a state that exists primarily to discharge some function of local government”). Moreover, it has been determined that this general definition of “political subdivision” includes townships. *Tuber v. Perkins*, 6 Ohio St. 2d 155, 157, 216 N.E.2d 877, 879 (1966); see *Washington Twp. v. Rapp*, 50 Ohio App. 1, 3, 197 N.E. 413, 414 (Lucas County 1934); 1950 Op. Att’y Gen. No. 2498, p. 730, at 731.

Accordingly, for purposes of R.C. 9.35, a township is a “political subdivision,” and an elected or appointed officer of a township is a “public official” if such an employee “is permitted or required in the performance of his duties to issue checks, keep books and records, prepare and preserve payroll and other employee records, and make reports or perform other similar duties.” R.C. 9.35(A). A township fiscal officer is required in the performance of his duties to keep an accurate record of a board of township trustees’ accounts and transactions and enter into the record a detailed statement of the receipts and expenditures of a township. A township fiscal officer, therefore, is a “public official” for purposes of R.C. 9.35. See R.C. 507.04(A) (“[t]he township fiscal officer shall keep an accurate record of the proceedings of the board of township trustees at all of its meetings, and of all its accounts and transactions”).

business, organization, or other entity that manages money, credit, or capital, such as a bank, *credit union*, savings-and-loan association, securities broker or dealer, pawnbroker, or investment company” (emphasis added); *see also* note 9, *infra* (stating that for purposes of R.C. 1304.51-.85 the term “[b]ank,” as defined in R.C. 1304.51(A)(2), includes credit unions, and pursuant to Official Comments to Uniform Commercial Code § 4A-105, this definition reflects the fact that many financial institutions now perform functions previously restricted to commercial banks). Thus, it is readily apparent that a credit union, an entity that manages money and credit for its members, is a “financial institution” as that term is commonly used. This means that a township fiscal officer may contract with a credit union under R.C. 9.35.

Pursuant to R.C. 1733.41, “the superintendent [of credit unions] may from time to time make, issue, amend, and rescind such rules and orders as he may consider necessary or appropriate to further the purposes of [R.C. Chapter 1733] or to protect the public interest, including rules defining accounting, technical, trade, and other terms, whether or not used in [R.C. Chapter 1733], insofar as such rules do not contradict [R.C. Chapter 1733].” According to R.C. 1733.41, “the superintendent [also] may specify terms to be included in the articles or code of regulations of credit unions . . . [and] required and prohibited practices related to . . . the character of investments credit unions may make . . . .” Under R.C. 1733.41, “[r]ules promulgated pursuant to [R.C. 1733.41] shall be made subject to [R.C. 119.01 to R.C. 119.13].”

In accordance with authority granted to him under R.C. 1733.41, the superintendent of credit unions has promulgated 3B Ohio Admin. Code Chapter 1301:9-2. 3B Ohio Admin. Code 1301:9-2-32(N) defines a “credit union service organization” as follows:

A “Credit Union Service Organization” (CUSO) means any organization, as determined by the superintendent, in which a credit union can invest in and make loans if the CUSO primarily serves credit unions, its membership, or the membership of other credit unions and whose business relates to the daily or routine operation of the credit unions it serves, are incidental to the credit union, are provided for the benefit of the members of the credit union or whose activities or services are approved by the superintendent. A credit union may invest in or loan to a CUSO by itself, with other credit unions or with non-credit union parties.

Division (H)(1) of rule 1301:9-2-32 provides examples of activities in which a CUSO may participate:<sup>3</sup>

Operational services. Credit card and debit card services; check cashing and wire transfers; internal audits for credit unions; ATM

<sup>3</sup> *See also* 3B Ohio Admin. Code 1301:9-2-32(O) (“[t]he superintendent may expand the range of activities and services a credit union service organization can offer for purposes of a credit union investing in or lending to the credit union service organization”).

[automatic teller machine] services; EFT [electronic funds transfer] services; accounting services; data processing; . . . sale, lease or servicing of computer hardware or software; . . . payment item processing; . . . debt collection services; credit analysis; consumer mortgage loan origination; loan processing, servicing and sales, coin and currency services, and provision of forms and supplies; money orders; savings bonds; travelers checks; purchase and sale of U.S. mint commemorative coins services; . . . and cyber financial services[.]

*See also* rule 1301:9-2-32(H)(2) (providing examples of “[f]inancial services” in which a CUSO may participate). *Cf.* 12 C.F.R. § 712.5 (2010) (non-exhaustive list of preapproved activities and services for certain CUSOs).

The operational services of a CUSO such as credit card and debit card services, check cashing, wire transfers, electronic funds transfers, coin and currency services, provision of money orders, savings bonds, travelers checks, and cyber financial services are the kind of services offered by a financial institution, an “entity that manages money, credit, or capital,” *Black’s Law Dictionary* 706 (9th ed. 2009). It follows that a CUSO is a “financial institution,” as that term is commonly and ordinarily used, for purposes of R.C. 9.35(B). Consequently, pursuant to R.C. 9.35(B) a township fiscal officer may, in the performance of his duties, contract with a CUSO to perform mechanical, clerical, or record-keeping services.

Division (C) of R.C. 9.35 specifies conditions for such a contract. A public official may enter into a contract authorized by R.C. 9.35(B) only if a public official’s surety bond includes coverage for any loss that might occur as a result of such contract; if a resolution is duly adopted by a public body having jurisdiction over a public official authorizing such a contract; if the contract does not conflict with accounting requirements prescribed by the Auditor of State or the Director of Budget and Management; and if satisfactory assurances are made that books and records in possession of the entity or person performing such a contract shall be subject to audit by the Auditor of State. R.C. 9.35(C)(1)-(4). Moreover, division (E) of R.C. 9.35 provides that “[n]othing contained in this section relieves such public official from the primary responsibility for the maintenance of the records and performance of the duties of his office.” *See generally State v. Dickerson*, 45 Ohio St. 3d 206, 209, 543 N.E.2d 1250 (1989) (“when asked to interpret a statute, a court should consider the statute in its entirety”); *accord* 1983 Op. Att’y Gen. No. 83-027, at 2-103 (“any contract entered into under R.C. 9.35 must comply with all provisions of that section”).

Accordingly, in this instance, if the requirements of R.C. 9.35(C)(1)-(4) are met, a township fiscal officer may contract with a credit union or a CUSO to assist the township with “the preparation of payroll and other records, the preparation, signing, and issuance of checks, the preparation of reports and accounts, and the performance of all similar duties.” R.C. 9.35(B). A township fiscal officer who contracts with a credit union or a CUSO to process the township’s payroll is not relieved from his primary responsibility for the maintenance of the payroll records and performance of the duties of his office. R.C. 9.35(E).

### **A Township Fiscal Officer May Contract With a Financial Institution For Services Necessary To Make Direct Deposits**

In R.C. 9.37 the General Assembly has authorized a public official of a political subdivision to make payments of public moneys by means of electronic funds transfers. R.C. 9.37(B) declares that “[e]xcept as provided in [R.C. 9.37(F)], any public official may make by direct deposit of funds by electronic transfer, if the payee provides a written authorization designating a financial institution and an account number to which the payment is to be credited, any payment such public official is permitted or required by law in the performance of official duties to make by issuing a check or warrant.”<sup>4</sup> See R.C. 9.37(A) (defining “public official” as used in R.C. 9.37).<sup>5</sup> The Attorney General previously has advised that a township may use direct deposit of funds by electronic transfer to pay its employees, provided that a township employee furnishes a written authorization designating a financial institution and account number to which a payment is to be credited; the board of township trustees authorizes such automatic payments by resolution; and the requirements of R.C. 5705.41(B), (C), and (D)(1) and R.C. 507.11(B) are satisfied. See 2009 Op. Att’y Gen. No. 2009-034 (syllabus, paragraph 2); 1997 Op. Att’y Gen. No. 97-053 (syllabus).

R.C. 9.37 also authorizes a public official to contract with a “financial institution” for services necessary to make direct deposits. See R.C. 9.37(C). R.C. 9.37 does not, however, define the term “financial institution” for purposes of R.C. 9.37. Having already concluded that for purposes of R.C. 9.35 a credit union and a CUSO are “financial institution[s],” as that term is commonly and ordinarily used, it reasonably follows that, for purposes of R.C. 9.37, a credit union and a CUSO also are “financial institution[s].” See *State ex rel. Comm. for the Proposed Ordinance to Repeal Ordinance No. 146-02, West End Blight Designation v. City of Lakewood*, 100 Ohio St. 3d 252, 2003-Ohio-5771, 798 N.E.2d 362, at ¶20 (“[i]t is a fundamental rule of statutory construction that statutes relating to the same subject

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<sup>4</sup> See R.C. 9.37(F) (“[p]ursuant to [R.C. 307.55, R.C. 319.16, and R.C. 321.15], a county auditor may issue, and a county treasurer may redeem, electronic warrants authorizing direct deposit for payment of county obligations in accordance with rules adopted by the director of budget and management pursuant to [R.C. Chapter 119]”).

<sup>5</sup> R.C. 9.37(A) provides, in part, that “[a]s used in [R.C. 9.37], ‘public official’ means any elected or appointed officer, employee, or agent of the state, . . . any political subdivision, board, commission, bureau, or other public body established by law.” “For purposes of R.C. 9.37, the term ‘public official’ includes, among others, any elected or appointed officer or employee of any political subdivision . . . . Because township trustees and the township clerk [now township fiscal officer] are elected township officers, see R.C. 505.01 and R.C. 507.01, they are public officials for purposes of R.C. 9.37.” 1997 Op. Att’y Gen. No. 97-053, at 2-326. See 2005-2006 Ohio Laws, Part I, 406, 458 (Sub. S.B. 107, effective Dec. 20, 2005) (substituting the term “fiscal officer” for “clerk” in R.C. 507.01); see also 2002 Op. Att’y Gen. No. 2002-038, at 2-244 (the term “political subdivision” includes a township).

matter should be construed together' and '[i]n construing such statutes *in pari materia*, they should be harmonized so as to give full application to the statutes'" (quoting *State ex rel. Thurn v. Cuyahoga County Bd. of Elections*, 72 Ohio St. 3d 289, 294, 649 N.E.2d 1205 (1995)); see also *State v. Moaning*, 76 Ohio St. 3d 126, 128, 666 N.E.2d 1115 (1996) ("[i]t is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an inter-related body of law").

R.C. 9.37(E) permits a public official to make direct deposits and enter into contracts under R.C. 9.37 "pursuant to a resolution of authorization duly adopted by such governing board, commission, bureau, or other public body[,]" "[i]f the issuance of checks and warrants by a public official requires authorization by a governing board, commission, bureau, or other public body having jurisdiction over the public official[.]"<sup>6</sup> Under R.C. 507.11(B), an order signed by at least two township trustees, and countersigned by the township fiscal officer, is needed to authorize a payment of money belonging to a township, which would include the issuance of a check or warrant as payment for township expenses. See R.C. 507.11(B); see also 1997 Op. Att'y Gen. No. 97-053, at 2-327. It therefore follows that pursuant to R.C. 9.37(E) a board of township trustees must adopt a resolution before a township fiscal officer may contract with a financial institution for services necessary to make direct deposits of the township's payroll payments.

Accordingly, pursuant to R.C. 9.37, a township may contract with a credit union or a CUSO for services necessary to transfer payments of money to township employees' accounts using electronic funds transfers in satisfaction of the township's payroll obligation, provided that the board of township trustees authorizes such a contract by resolution.

### **Township's Payroll Processing Arrangement Does Not Result in the Deposit of Public Moneys With an Institution That Is Not Eligible To Serve As a Public Depository**

Under Ohio law, R.C. 1304.51-.85 governs "funds transfers." See 1991-1992 Ohio Laws, Part III, 3675 (Am. Sub. H.B. 221, eff. Oct. 23, 1991) (adopting Uniform Commercial Code Article 4A pertaining to fund transfers involving business firms and financial institutions).<sup>7</sup> "Funds transfer," as used in R.C. 1304.51-.85, "means the series of transactions, beginning with the originator's payment or

<sup>6</sup> See generally *Black's Law Dictionary* 269 (9th ed. 2009) (defining "check" as "[a] draft signed by the maker or drawer, drawn on a bank, payable on demand, and unlimited in negotiability"); *id.* at 1724 (defining "warrant," as among other things, "[a]n order by which a drawer authorizes someone to pay a particular sum of money to another").

<sup>7</sup> Prior to the enactment of Article 4A, electronic funds transfers were governed by a mish mash of common law, contract, Federal Reserve rules, Federal Reserve operating letters, rules of automated clearing houses, rules of organizations such as CHIPS (Clearing House Interbank Payment System), and Title IX of the Federal Consumer Credit Protec-

der, made for the purpose of making payment to the beneficiary of the order.” R.C. 1304.51(A)(6). “‘Funds transfer’ includes any payment order issued by the originator’s bank or an intermediary bank intended to carry out the originator’s payment order. A funds transfer is completed by acceptance by the beneficiary’s bank of a payment order for the benefit of the beneficiary of the originator’s payment order.” *Id.*<sup>8</sup> See R.C. 1304.51(A)(13) (defining “payment order” as used in R.C. 1304.51-.85); *see also* R.C. 1304.51(A)(2) (defining “bank” as used in R.C.

tion Act (15 U.S.C. §§ 1693 et seq.). With the adoption of Article 4A, electronic funds transactions are governed not only by Article 4A, but also by common law, contract, Federal Reserve rules, Federal Reserve operating letters, rules of automated clearing houses, CHIPS and Title IX of the Federal Consumer Credit Protection Act—still a mish mash. Article 4A is comprehensive, but at the same time not comprehensive.

3 James J. White & Robert S. Summers, *Uniform Commercial Code* § 22-2 (4th ed. 1995).

<sup>8</sup> The Prefatory Note to Article 4A (Funds Transfers), *Uniform Commercial Code*, 2B U.L.A. 6, 7 (2002) describes an electronic funds transfer:

The funds transfer that is covered by Article 4A is not a complex transaction and can be illustrated by the following example[.] . . . X, a debtor, wants to pay an obligation owed to Y. Instead of delivering to Y a negotiable instrument such as a check or some other writing such as a credit card slip that enables Y to obtain payment from a bank, X transmits an instruction to X’s bank to credit a sum of money to the bank account of Y. In most cases X’s bank and Y’s bank are different banks. X’s bank may carry out X’s instruction by instructing Y’s bank to credit Y’s account in the amount that X requested. The instruction that X issues to its bank is a “payment order.” X is the “sender” of the payment order and X’s bank is the “receiving bank” with respect to X’s order. Y is the “beneficiary” of X’s order. When X’s bank issues an instruction to Y’s bank to carry out X’s payment order, X’s bank “executes” X’s order. The instruction of X’s bank to Y’s bank is also a payment order. With respect to that order, X’s bank is the sender, Y’s bank is the receiving bank, and Y is the beneficiary. The entire series of transactions by which X pays Y is known as the “funds transfer.” With respect to the funds transfer, X is the “originator,” X’s bank is the “originator’s bank,” Y is the “beneficiary” and Y’s bank is the “beneficiary’s bank.” In more complex transactions there are one or more additional banks known as “intermediary banks” between X’s bank and Y’s bank. In the funds transfer the instruction contained in the payment order of X to its bank is carried out by a series of payment orders by each bank in the transmission chain to the next bank in the chain until Y’s bank receives a payment order to make the credit to Y’s account. In most cases, the payment order of each bank to the next bank in the chain is transmitted electronically, and often the payment order of X to its bank is also transmitted electroni-

1304.51-.85).<sup>9</sup> Pursuant to R.C. 1304.51(A)(8), as used in R.C. 1304.51-.85, a “[f]unds-transfer system” “means a wire transfer network, automated clearing house, or other communication system of a clearing house or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.”<sup>10</sup>

In this instance, the description of the township’s payroll processing arrangement that you have provided explains that the township (“originator” and “sender” of first payment order)<sup>11</sup> transmits an instruction (first payment order) to the bank serving as a public depository of the township’s moneys (“receiving bank” of first payment order, “originator’s bank,” and “sender” of second payment

cally, but the means of transmission does not have any legal significance.

A payment order may be transmitted by any means, and in some cases the payment order is transmitted by a slow means such as first class mail.

<sup>9</sup> R.C. 1304.51(A)(2) provides that as used in R.C. 1304.51-.85, the term “[b]ank” “means a person engaged in the business of banking and includes a savings bank, savings and loan association, *credit union*, and trust company. A branch or separate office of a bank is a separate bank for purposes of [R.C. 1304.51-.85].” (Emphasis added.) See also U.C.C. § 4A-105 cmt. 1, 2B U.L.A. 30 (2002) (stating, in part, that “[t]he definition of ‘bank’ . . . includes some institutions that are not commercial banks. The definition reflects the fact that many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers”).

<sup>10</sup> See U.C.C. § 4A-105 cmt. 3, 2B U.L.A. 31 (2002) (explaining that the term “funds transfer system” “also includes automated clearing houses, operated by a clearing house or other association of banks, which process and transmit payment orders of banks to other banks . . . . The definition also includes the wire transfer network and automated clearing houses of Federal Reserve Banks. Systems of the Federal Reserve Banks, however, are treated differently from systems of other associations of banks. Funds transfer systems other than systems of the Federal Reserve Banks are treated in Article 4A as a means of communication of payment orders between participating banks. Section 4A-206. The Comment to that section and the Comment to Section 4A-107 explain how Federal Reserve Banks function under Article 4A. Funds transfer systems are also able to promulgate rules binding on participating banks that, under Section 4A-501, may supplement or in some cases may even override provisions of Article 4A”); see also R.C. 1304.61 (except for a funds transfer system of the federal reserve banks, a funds transfer system or other third-party communication system is deemed to be an “agent” of the sender for the purpose of transmitting a payment order to a bank. Thus, if a discrepancy arises between the terms of the payment order transmitted to the system and the terms of the payment order transmitted by the system to the bank, the terms of the payment order of the sender are those transmitted by the system).

<sup>11</sup> See R.C. 1304.51(A)(11) (“[o]riginator” means the sender of the first payment order in a funds transfer”); R.C. 1304.51(A)(16) (“[s]ender” means the person giving the instruction to the receiving bank”).

order).<sup>12</sup> As directed by the township, the bank serving as the public depository of the township's moneys ("sender" of second payment order) then wires instructions (second payment order) to the credit union ("intermediary bank," "receiving bank" of second payment order, and "sender" of third payment order).<sup>13</sup> The credit union ("sender" of third payment order) then wires instructions (third payment order) through the ACH originator<sup>14</sup> to a federal reserve bank ("receiving bank" and "intermediary bank"), which ultimately sends instructions to different banks ("beneficiary's banks"),<sup>15</sup> where township employees ("beneficiaries")<sup>16</sup> hold accounts.<sup>17</sup>

<sup>12</sup> See R.C. 1304.51(A)(15) ("[r]eceiving bank' means the bank to which the sender's instruction is addressed"); see also R.C. 1304.51(A)(12) ("[o]riginator's bank' means the receiving bank to which the payment order of the originator is issued if the originator is not a bank, or the originator if the originator is a bank").

<sup>13</sup> See R.C. 1304.51(A)(10) ("[i]ntermediary bank' means a receiving bank other than the originator's bank or the beneficiary's bank").

<sup>14</sup> Comment 2 of U.C.C. § 4A-107, 2B U.L.A. 35 (2002) states, in part:

In a typical case, Originator instructs Originator's Bank to pay to the account of Beneficiary in Beneficiary's Bank. Originator's instruction to pay a particular beneficiary is transmitted to Originator's Bank along with many other instructions for payment to other beneficiaries by many different beneficiary's banks. All of these instructions are contained in a magnetic tape or other electronic device. Transmission of instructions to the various beneficiary's banks requires that Originator's instructions be processed and repackaged with instructions of other originators so that all instructions to a particular beneficiary's bank are transmitted together to that bank. The repackaging is done in processing centers usually referred to as automated clearing houses. Automated clearing houses are operated either by Federal Reserve Banks or by other associations of banks. If Originator's Bank chooses to execute Originator's instructions by transmitting them to a Federal Reserve Bank for processing by the Federal Reserve Bank, the transmission to the Federal Reserve Bank results in the issuance of payment orders by Originator's Bank to the Federal Reserve Bank, which is an intermediary bank. Processing by the Federal Reserve Bank will result in the issuance of payment orders by the Federal Reserve Bank to Beneficiary's Bank as well as payment orders to other beneficiary's banks making payments to carry out Originator's instructions.

<sup>15</sup> See R.C. 1304.51(A)(4) ("[b]eneficiary's bank' means the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account").

<sup>16</sup> See R.C. 1304.51(A)(3) ("[b]eneficiary' means the person to be paid by the beneficiary's bank").

<sup>17</sup> By designating the credit union as an intermediary bank and requiring the township's public depository bank to issue its payment order to the credit union, the township exposes itself to potential liability under R.C. 1304.74. The township may

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incur liability if the credit union is unable to complete a payment order because the credit union is not permitted to do so by applicable law, or because the credit union suspends payments. R.C. 1304.74 provides, in part:

(E) If a funds transfer is not completed as stated in division (C) of this section and an intermediary bank is obliged to refund payment as stated in division (D) of this section but is unable to do so because not permitted by applicable law or because the bank suspends payments, a sender in the funds transfer that executed a payment order in compliance with an instruction, as provided in [R.C. 1304.69(A)(1)], to route the funds transfer through that intermediary bank may receive or retain payment from the sender of the payment order that it accepted. The first sender in the funds transfer that issued an instruction requiring routing through that intermediary bank is subrogated to the right of the bank that paid the intermediary bank to refund as provided in division (D) of this section.

(F) The right of the sender of a payment order to be excused from the obligation to pay the order as provided in division (C) of this section or to receive refund under division (D) of this section may not be varied by agreement.

Comment 2 of U.C.C. § 4A-402, 2B U.L.A. 93, 94 (2002) explains:

Suppose Originator instructs Bank A to pay to Beneficiary's account in Bank B and to use Bank C as an intermediary bank. Bank A executes Originator's order by issuing a payment order to Bank C. Bank A pays Bank C. Bank C fails to execute the order of Bank A and suspends payments. Under subsections (c) and (d), Originator is not obliged to pay Bank A and is entitled to refund from Bank A of any payment that it may have made. Bank A is entitled to a refund from Bank C, but Bank C is insolvent. Subsection (e) deals with this case. Bank A was required to issue its payment order to Bank C because Bank C was designated as an intermediary bank by Originator . . . . In this case Originator takes the risk of insolvency of Bank C. Under subsection (e), Bank A is entitled to payment from Originator and Originator is subrogated to the right of Bank A under subsection (d) to refund of payment from Bank C.

Thus, under the payroll processing arrangement in this matter, the township instructs the bank serving as a public depository of the township's moneys to send its payment order to the credit union, an intermediary bank. If the credit union fails to execute the payment order of the bank because the credit union is not permitted to do so by applicable law, or because the credit union suspends payments, the township assumes the risk of the credit union's insolvency. The bank serving as a public depository of the township's moneys is entitled to payment from the township and the township is subrogated to the right of the bank to a refund of payment from the credit union. See Benjamin Geva, *The Law of Electronic Funds Transfers*

Despite the use of the term “funds transfer” to identify the payment from a “sender” to a “beneficiary,” no money or property right of a sender is actually transferred to a beneficiary when a payment is made in a funds transfer governed by R.C. 1304.51-.85. *See* U.C.C. § 4A-406 cmt. 1, 2B U.L.A. 106 (2002) (“[s]ubsection (a) states the fundamental rule of Article 4A that payment by the originator to the beneficiary is accomplished by providing to the beneficiary the obligation of the beneficiary’s bank to pay”); U.C.C. § 4A-406 cmt. 2, 2B U.L.A. 106 (2002) (obligation of beneficiary’s bank to pay is substituted for the obligation of originator).<sup>18</sup> Prefatory Note to Article 4A, Uniform Commercial Code, 2B U.L.A. 6, 9 (2002) states, in part:

Although Article 4A follows convention in using the term “funds transfer” to identify the payment from X to Y that is described above, *no money or property right of X is actually transferred to Y*. X pays Y by causing Y’s bank to become indebted to Y in the amount of the payment. This debt arises when Y’s bank accepts the payment order that X’s bank issued to Y’s bank to execute X’s order. If the funds transfer was carried out by use of one or more intermediary banks between X’s bank and Y’s bank, Y’s bank becomes indebted to Y when Y’s bank accepts the payment order issued to it by an intermediary bank. The funds transfer is completed when this debt is incurred. Acceptance, the event that determines

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§ 2.04[3] (Matthew Bender 2010), at 2-84 (“[t]he effect of subsection (e) is to reallocate the loss resulting from the failure of a bank in an abortive funds transfer from the immediate prepaying sender to the first sender that had designated the subsequent routing through the intermediary bank that suspended payments”).

Accordingly, a requirement that a public depository bank route its payment order through a designated intermediary bank may have undesirable consequences for the public entity. Before making such a requirement a part of a payment order, a public entity should make a close and careful examination of the risk and determine whether that risk is worth whatever benefit, if any, the public entity may receive by requiring the public depository bank to route its payment order through a designated intermediary bank.

<sup>18</sup> Comment 2 of U.C.C. § 4A-406, 2B U.L.A. 106 (2002) states, in part:

Subsection (a) states that the beneficiary is paid by the originator when the beneficiary’s bank accepts a payment order for the benefit of the beneficiary. When that happens the effect under subsection (b) is to substitute the obligation of the beneficiary’s bank for the obligation of the originator. The effect is similar to that under Article 3 if a cashier’s check payable to the beneficiary had been taken by the beneficiary . . . . Under subsection (b) acceptance by the beneficiary’s bank will result in discharge of the obligation for which payment was made unless the beneficiary had made a contract with respect to the obligation which did not permit payment by the means used.

when the debt of Y's bank to Y arises, occurs (i) when Y's bank pays Y or notifies Y of receipt of the payment order, or (ii) when Y's bank receives payment from the bank that issued a payment order to Y's bank. (Emphasis added.)

Stated differently,

[A] funds transfer is not premised on the transfer of the originator's property from the originator's bank onward to the beneficiary's bank, through the hands of one or more intermediary's bank, as may be needed. Notwithstanding any imagery to the contrary, there is really no originator's property that is passed on from hand to hand so as to be capable of being intercepted en route. The notion of "originator's funds" being actually transferred is thus fallacious.

Indeed, from a strictly legal perspective, what the originator owns as a customer maintaining an account with bank is neither money nor funds; rather, the customer is owed a debt by the bank. Furthermore, notwithstanding dicta to the contrary, in the process of a funds transfer from an originator to a beneficiary at another bank, "the original obligation is not assigned"; rather, a new obligation by a new debtor to a new creditor is created. To that end, a funds transfer is a "process by which [the beneficiary's bank] comes to owe money to the [beneficiary] . . . and the obligation [of the originator's bank to the originator] is extinguished or reduced pro tanto."

The operation of a funds transfer under U.C.C. Article 4A is premised on this analysis . . . "[T]he fundamental rule of Article 4A" is that in a funds transfer, "payment by the originator to the beneficiary is accomplished by providing to the beneficiary the obligation of the beneficiary's bank to pay;" payment is not accomplished by passing on to the beneficiary at the beneficiary's bank, through a chain of intermediaries, "funds" or any other property belonging to the originator.

Benjamin Geva, *The Law of Electronic Funds Transfers* § 2.08[6] (Matthew Bender 2010), at 2-200 to 2-201 (footnotes and citations omitted).

Thus, through a series of electronically facilitated transactions between banking systems, beginning with the township's payment order to the bank serving as its public depository and ending when a final payment order is received by a different bank where a township employee holds an account, the township pays its employees by causing financial institutions where employees have personal accounts to become indebted to each employee, but without the physical transfer of moneys.

#### **Uniform Depository Law**

R.C. Chapter 135 governs the deposit of public moneys in public depositories by subdivisions, including townships. See R.C. 135.01(J) (defining "public de-

pository”); R.C. 135.01(L) (defining “subdivision” as including a “township”); R.C. 135.01(K) (defining “public moneys”). *See generally* 2009 Op. Att’y Gen. No. 2009-036, at 2-248 to 2-252 (discussing deposits of public moneys in public depositories). For purposes of R.C. 135.01-.21, any institution mentioned in R.C. 135.03 may become a public depository of active, inactive, and interim deposits of public moneys of a subdivision. R.C. 135.04(D)-(E); 2009 Op. Att’y Gen. No. 2009-036, at 2-249. Under R.C. 135.01(A), an “[a]ctive deposit” “means a public deposit necessary to meet current demands on the treasury,” which, in this instance, would include funds necessary to satisfy a township’s payroll obligations. *See* R.C. 135.01(A)(1)-(A)(3) (designating specific types of accounts into which active deposits must be made).

R.C. 135.03 expressly lists those institutions that are eligible to become public depositories for purposes of R.C. 135.01-.21. R.C. 135.03 does not include credit unions as eligible institutions. Thus, a credit union is not eligible to be a public depository of active deposits of public moneys of a township. Consequently, a township may not deposit payroll funds into a credit union account prior to disbursement of these payroll funds into township employees’ personal accounts. *Accord* 1969 Op. Att’y Gen. No. 69-114 (syllabus) (“[u]nder the Uniform Depository Act the awarding of active deposits can be made only to eligible and qualifying institutions that file an application for such award”); *see* 1979 Op. Att’y Gen. No. 79-048, at 2-153 (stating that under the maxim *expressio unius est exclusio alterius*—expression of one thing implies the exclusion of the other—it could be presumed that the General Assembly did not intend to include stock brokerage firms within the purview of R.C. Chapter 135).

R.C. Chapter 135, however, is not implicated in this instance because no public moneys are “deposited” into a credit union account under the township’s payroll processing arrangement. *See Black’s Law Dictionary* 504 (9th ed. 2009) (defining “deposit” as “[t]he act of giving money or other property to another who promises to preserve it or to use it and return it in kind; [especially], the act of placing money in a bank for safety and convenience” and “[t]he money or property so given”).<sup>19</sup> Specifically, through its use of electronic funds transfers the township pays its employees by causing financial institutions where employees have personal accounts to become indebted to each employee without any transfer of moneys from the township to its employees. Thus, with respect to the township’s payroll processing arrangement with the credit union and CUSO, no public moneys are “deposited” with the credit union when the credit union serves as an “intermediary bank” or “receiving bank” in the electronic funds transfer process. And, because no public moneys are “deposited” into a credit union account when the credit union functions as an “intermediary bank” or “receiving bank,” it further follows that the township’s payroll processing arrangement with the credit union

<sup>19</sup> *See Black’s Law Dictionary* 1096 (9th ed. 2009) (defining “money,” as, *inter alia*, “[t]he medium of exchange authorized or adopted by a government as part of its currency; [especially] domestic currency . . . . Assets that can be easily converted to cash . . . . Capital that is invested or traded as a commodity”).

and the CUSO does not result in a deposit of public moneys in a financial institution that is not eligible to serve as a public depository. Moreover, we find nothing in R.C. Chapter 135 that prohibits the township, credit union, or CUSO from entering into the type of payroll processing arrangement as described in documents accompanying your request.

### **Conclusions**

In sum, it is my opinion, and you are hereby advised that:

1. Provided the requirements of R.C. 9.35(C)(1)-(4) are satisfied, a township fiscal officer may contract with a credit union service organization to assist the township with the preparation of payroll and other records, the preparation, signing, and issuance of checks, the preparation of reports and accounts, and the performance of all similar duties.
2. Pursuant to R.C. 9.37, a township fiscal officer may contract with a credit union service organization for services necessary to transfer payments of money to township employees' accounts using electronic funds transfers in satisfaction of the township's payroll obligation, provided that the board of township trustees authorizes such a contract by resolution. Such an arrangement under R.C. 9.37 between a township fiscal officer and a credit union service organization does not contravene the requirements of R.C. Chapter 135.