

OPINION NO. 89-094

Syllabus:

1. Pursuant to R.C. 135.45, all moneys placed in the State Treasurer's Investment Pool must be deposited or invested in the same types of instruments provided for the deposit and investment of the interim moneys of the state by R.C. 135.01-.20, except that the moneys placed in the State Treasurer's Investment Pool may not be invested in the linked deposits established under R.C. 135.61-.76.
2. Pursuant to R.C. 135.08 and R.C. 135.45, if moneys which have

been paid into the Ohio Subdivision's Fund are to be deposited in a financial institution, they must be deposited in an institution designated pursuant to R.C. 135.12 by the State Board of Deposit in the most recent biennial designation of depositories for state moneys unless the institution is exempted from such requirements as a bank that is owned or controlled by one or more socially or economically disadvantaged persons, as provided for under R.C. 135.04(G)(1).

3. Pursuant to R.C. 135.143 and R.C. 135.45, moneys paid into the Ohio Subdivision's Fund may be invested in commercial paper notes, maturing in one hundred eighty days or less, issued by any corporation that is incorporated under the laws of the United States or a state, which such notes are rated in the two highest categories by two nationally recognized rating agencies, provided that the total amount invested in commercial paper at any time shall not exceed ten percent of the state's total average portfolio, as determined by the Treasurer of State.
4. Pursuant to R.C. 135.143 and R.C. 135.45(A), the Ohio Subdivision's Fund and the interim moneys of the state are subject to separate limitations of total investments in commercial paper not to exceed, at any time, ten percent of the State's total average portfolio, as determined by the Treasurer of State.
5. Pursuant to R.C. 127.16(B)(1), the Treasurer of State may not, using money that has been appropriated to that office directly, purchase from a particular supplier other than a state agency, any services, equipment, materials, or supplies, or any combination thereof, that when combined with all other such purchases the Treasurer of State has made from the supplier during the fiscal year, will amount to ten thousand dollars or more, unless the purchase is competitively bid or approved by the Controlling Board. Pursuant to R.C. 135.45(B), however, the administrative expenses of the State Treasurer's Investment Pool are to be paid from the earnings of the Pool prior to their placement in the state treasury where they are subject to appropriation. R.C. 113.05, R.C. 113.09, R.C. 135.21, and R.C. 135.45(B). Thus, because such funds are not in the state treasury and directly appropriated to the Treasurer of State, the Treasurer of State is not required by R.C. 127.16(B)(1) to award a contract for the administration of the State Treasurer's Investment Pool by competitive bid or, in the alternative, to obtain the approval of the Controlling Board. The authority to award a contract without competitive bidding or without Controlling Board approval, however, is subject to the limitation that the terms and conditions of such a contract may not breach the fiduciary duty owed by the Treasurer of State to the people of the State of Ohio.
6. The implementation of the State Treasurer's Investment Pool does not impose any additional responsibilities and liabilities upon the individual members of the State Board of Deposit.
7. As officers or employees of the state within the meaning of R.C. 9.85, 9.86, and R.C. 109.36(A), the members of the State Board of Deposit shall not be liable in any civil action that arises under the laws of this State for damage or injury caused in the performance of their duties unless their actions are manifestly outside the scope of their employment or official responsibility, or unless they act with malicious purpose, in bad faith, or in a wanton or reckless manner.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, December 20, 1989

I have before me your request for my opinion on several questions pertaining to the State Treasurer's Investment Pool ("STIP"), created in the custody of the Treasurer of State pursuant to R.C. 135.45. Your staff has indicated that, under R.C. 117.15, the Auditor of State is required to audit the accounts and transactions of the Treasurer of State. In doing so, several questions concerning the legal authority of the Treasurer have been raised. Further, pursuant to R.C. 135.02, the Auditor of State is designated as a member of the State Board of Deposit. In this capacity, you are also concerned about the effect the implementation of the State Treasurer's Investment Pool may possibly have upon the State Board of Deposit. Specifically, you ask:

1. May STIP moneys be invested or deposited other than as set forth in Section 135.14[3],¹ Revised Code?
2. If deposits of STIP moneys are to be made, are they limited to institutions selected by the State Board of Deposit in the most recent biennial designation of depositories of State?
3. If the answer [to the preceding question] is in the negative, by what method is the selection of eligible depositories to be identified?
4. If interim investments of STIP moneys are to be made, may they be made in commercial paper as set forth by 135.14[3], Revised Code?
5. If the answer [to the preceding question] is in the affirmative, does the fifty million dollar (\$50,000,000.00) limitation apply to all moneys so invested by the Treasurer of State, including State and STIP moneys in the aggregate, or separately to State and STIP moneys?
6. If the Treasurer of State wishes to contract for services to carry out the purposes of the STIP program pursuant to Section 135.45, Revised Code, and the payments under the contract will exceed \$10,000.00 to a single vendor within one fiscal year, must the Treasurer of State, under Section 127.16, Revised Code, either obtain the concurrence of the State Controlling Board or award the contracts by competitive bid?
7. [If the answer to the preceding question is in the affirmative] what constitutes "competitive bids" for purposes of compliance with Section 127.16, Revised Code, for the Treasurer of State?
8. To what extent, if any, are additional responsibilities and

¹ At the time that your request was made, the statutory provisions concerning the investment of state interim moneys were codified in R.C. 135.14. Since that time, however, R.C. 135.14 has been subject to two amendments. Sub. H.B. 292, 117th Gen. A. (1988) (eff. December 15, 1988) amended R.C. 135.14 to authorize the investment of the interim moneys of the state in depressed economic area linked deposits. Shortly after the passage of Sub. H.B. 292, however, the authority of the Treasurer of State to invest interim moneys was again modified through the enactment of Am. Sub. H.B. 584, 117th Gen. A. (1988) (eff. March 17, 1989). In addition to substantially modifying the provisions which govern the investment and deposit of State interim moneys, Am. Sub. H.B. 584 also renumbered the relevant provisions as a separate section. See R.C. 135.143.

potential liabilities imposed on the members of the State Board of Deposit by the implementation of the STIP program?²

In 1985, the General Assembly enacted R.C. 135.45 allowing the subdivisions³ of the state to pool the public moneys of their subdivisions⁴ in order to receive a higher rate of return on their investments. See Am. H.B. 760, 115th Gen. A. (1984) (eff. March 19, 1985). See also 1973 Op. Att'y Gen. No. 73-111 (prior to the enactment of R.C. 135.45, R.C. Chapter 135 did not permit two or more subdivisions to pool their interim moneys for the purpose of receiving higher interest rates). These moneys are collectively referred to by the statute as the "Ohio subdivision's fund." R.C. 135.45. As deposited or invested, this fund is statutorily designated the "State Treasurer's Investment Pool," also known as the "State Treasury Asset Reserve of Ohio" or "STAR Ohio." R.C. 135.45. Pursuant to R.C. 135.143(A)(9), interim moneys of the state may also be invested in the State Treasurer's Investment Pool.

Your first question concerns whether the Treasurer of State may invest or deposit moneys placed in the State Treasurer's Investment Pool in a manner other than as designated by R.C. 135.143. With reference to the deposit and investment of these funds, R.C. 135.45(A) provides:

A treasurer, governing board, or investing authority of a subdivision may pay public moneys of the subdivision into the Ohio subdivision's fund, which may be established in the custody of the treasurer of state. *The treasurer of state shall invest the fund as the*

² I note that two additional questions were included in your original request for my advice. I am advised, however, that the matters raised by these questions were resolved independently and have therefore been withdrawn.

³ R.C. 135.45 defines "subdivision" as "having the same meaning as in section 135.01 of the Revised Code, but also includes a county, or a municipality that has adopted a charter under Article XVIII, Ohio Constitution." R.C. 135.01(L) defines the term "subdivision" as meaning:

[A]ny municipal corporation, except one which has adopted a charter under Article XVIII, Ohio Constitution, and the charter or ordinances of the chartered municipal corporation set forth special provisions respecting the deposit or investment of its public moneys, or any school district, including a county school district, a county school financing district, township, municipal or school district sinking fund, special taxing or assessment district, or other district or local authority electing or appointing a treasurer, except a county. In the case of a school district, special taxing or assessment district, or other local authority for which a treasurer, elected or appointed primarily as the treasurer of a subdivision, is authorized or required by law to act as ex officio treasurer, the subdivision for which such a treasurer has been primarily elected or appointed shall be considered to be the "subdivision." The term also includes a union or joint institution or enterprise of two or more subdivisions, that is not authorized to elect or appoint a treasurer, and for which no ex officio treasurer is provided by law.

⁴ R.C. 135.45(E)(2)(b) provides that "public moneys of a subdivision" has both of the meanings provided for by R.C. 135.01 and R.C. 135.31. R.C. 135.01(K) defines "public moneys" as meaning "all moneys in the treasury of the state or any subdivision of the state, or moneys coming lawfully into the possession or custody of the treasurer of state or of the treasurer of any subdivision." R.C. 135.31(E) defines "public moneys" as meaning "all moneys in the treasury of a county or moneys coming lawfully into the possession or custody of the treasurer."

state treasurer's investment pool, in the same manner, in the same type of instruments, and subject to the same limitations provided for the deposit and investment of interim moneys of the state, except that the fund shall not be invested in the linked deposits authorized under sections 135.61 to 135.67 of the Revised Code. (Emphasis added.)

Pursuant to this section, the Treasurer of State must invest the State Treasurer's Investment Pool "in the same manner, and in the same type of instruments...provided for the deposit and investment of interim moneys of the state..."⁵ The Ohio Subdivision's Fund may not be deposited, however, in the linked deposits provided for by R.C. 135.61-.67. It is an axiom of statutory interpretation that plain and unambiguous statutory language leaves no occasion to resort to other rules of statutory construction. *State ex rel. Stanton v. Zangerle*, 117 Ohio St. 436, 159 N.E. 823 (1927). The investment of the interim moneys of the state is expressly provided for by R.C. 135.01-.20. Pursuant to R.C. 135.143, the Treasurer of State "may invest interim moneys of the state in linked deposits as provided in sections 135.61 to 135.67 of the Revised Code." See Am. Sub. S.B. 149, 117th Gen. A. (1987) (eff. July 14, 1987). As noted above, however, R.C. 135.45(A) proscribes the investment of moneys in the State Treasurer's Investment Pool in the linked deposits provided for by R.C. 135.61-.67. While the provisions of R.C. 135.45(A) are silent as to the investment of such moneys in the agricultural linked deposits authorized by R.C. 135.71-.76, I note that the sole express authority for the Treasurer of State to invest in the agricultural linked deposits established by these sections is found in R.C. 135.63. Thus, since R.C. 135.45(A) prohibits the investment of the moneys paid into the State Treasurer's Investment Pool "in the linked deposits *authorized* under [R.C.] 135.61 to 135.67" (emphasis added), and because R.C. 135.63 falls within these enumerated statutes, I conclude that such moneys may not be invested in either the linked deposits provided for by R.C. 135.61-.67 or the agricultural linked deposits provided for by R.C. 135.71-.76. With this exception, the moneys paid into the State Treasurer's Investment Pool must be deposited or invested in the same manner prescribed for the investment of the interim moneys of the state as provided for by R.C. 135.01-.20.

Your second question asks if moneys which have been paid into the Ohio Subdivision's Fund must be deposited in an institution which was selected by the State Board of Deposit at the most recent biennial designation of state depositories. As noted above, the Treasurer of State is required by R.C. 135.45(A) to invest the moneys paid into the Ohio Subdivision's Fund in "the same manner...provided for the deposit and investment of interim moneys of the state." R.C. 135.08 further provides that:

Each eligible institution desiring to be a public depository of interim deposits of the public moneys of the state or of the interim deposits of the public moneys of the subdivision shall, not more than thirty days prior to the date fixed in section 135.12 of the Revised Code for the designation of public depositories, make application therefor in writing to the proper governing board.

See also R.C. 135.03 and 135.04 (specifying which financial institutions are eligible to hold public moneys and specifying limitations on the amount of funds an eligible institution may hold); R.C. 135.09 ("[t]he treasurer or the governing board *shall*

⁵ R.C. 135.01(F) defines "interim moneys" as meaning:

[P]ublic moneys in the treasury of the state or any subdivision after the award of inactive deposits has been made in accordance with section 135.07 of the Revised Code, which moneys are in excess of the aggregate amount of the inactive deposits as estimated by the governing board prior to the period of designation and which the treasurer or governing board finds should not be deposited as active or inactive deposits for the reason that such moneys will not be needed for immediate use but will be needed before the end of the period of designation.

award the interim deposits of public moneys subject to its control to the eligible institution or institutions which offer to pay the highest permissible rate of interest on interim deposits" (emphasis added)). R.C. 135.12 concerns, *inter alia*, the designation of depositories of state moneys, providing in pertinent part:

The state board of deposit shall meet on the third Monday in March in the odd-numbered years for the purpose of designating the public depositories of the public moneys of the state, and at such meetings or any adjourned session thereof shall designate such public depositories and award the public moneys of the state to and among the public depositories so designated for the period of two years commencing on the first Monday of April next following.

Thus, it is apparent that in accordance with R.C. 135.08, .12, .143, .45(A), where moneys which have been paid into the Ohio Subdivision's Fund are to be deposited, those moneys generally must be deposited in an institution which has been designated as a public depository for state moneys by the State Board of Deposit.

This general rule is, however, not without exception. Pursuant to R.C. 135.04(G)(1):

The governing board of the state⁶ or of a subdivision may designate one or more minority banks as public depositories of its inactive, interim, or active deposits of public moneys designated as federal funds. *Except for sections 135.031, and 135.18 or 135.181 of the Revised Code and except for division (B) of this section, Chapter 135. of the Revised Code does not apply to the application for, or the award of, such deposits.* As used in this division, "minority bank" means a bank that is owned or controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, ethnic, or racial background, chronic economic circumstances, or other similar cause. Such persons include, but are not limited to, Afro-Americans, Puerto Ricans, Spanish-speaking Americans, and American Indians. (Emphasis and footnote added.)

As is demonstrated by the emphasized portions of this statute, where an institution meets the criteria specified by R.C. 135.04(G)(1), the institution need not comply with the otherwise applicable provisions of R.C. Chapter 135, with the exceptions of R.C. 135.031, R.C. 135.18, and R.C. 135.181. Instead, where the provisions of R.C. 135.04(G)(1) are applicable, the moneys paid into the Ohio Subdivision's Fund may be deposited into an institution which was not designated as a public depository for state interim moneys at the most recent biennial designation of depositories. Thus, I must conclude that pursuant to R.C. 135.08 and .12, if moneys which have been paid into the Ohio Subdivision's Fund are to be deposited, they must be deposited in an institution selected by the State Board of Deposit in the most recent biennial designation of depositories for state moneys unless they are exempted from such requirements by R.C. 135.04(G)(1) as a bank that is owned or controlled by one or more socially or economically disadvantaged persons. Having answered your second question in the affirmative, it is unnecessary for me to address your third question regarding the selection of eligible depositories.

Your fourth question concerns whether the moneys paid into the Ohio Subdivision's Fund may be invested in commercial paper. Again, I note that R.C. 135.45 provides that the Treasurer of State must invest the Ohio Subdivision's Fund "in the same manner, and in the same type of instruments...provided for the deposit and investment of interim moneys of the state...." R.C. 135.143(A)(6) provides that the interim moneys of the state may, *inter alia*, be invested in:

Various forms of *commercial paper*, maturing in one hundred eighty days or less, issued by any corporation that is incorporated under the laws of the United States or a state, which such notes are

⁶ R.C. 135.01 defines the term "governing board" of the state as the State Board of Deposit.

rated in the two highest categories by two nationally recognized rating agencies, provided that the total amount invested in commercial paper at any time shall not exceed ten per cent of the state's total average portfolio, as determined by the treasurer of state. (Emphasis added.)

In light of this provision, I must conclude that the Treasurer of State may properly invest moneys paid into the Ohio Subdivision's Fund in commercial paper notes that mature in one hundred eighty days or less, that are issued by any corporation incorporated under the laws of the United States or a state, where such notes are rated in the two highest categories by two nationally recognized rating agencies, and provided that the total amount invested in commercial paper at any time does not exceed ten percent of the state's total average portfolio, as determined by the Treasurer of State.

Your fifth question concerns the statutory limitation formerly imposed upon the investment of the Ohio Subdivision's Fund in commercial paper. Specifically, the statutory predecessor to R.C. 135.143(A)(6) provided that interim moneys may be invested in commercial paper notes, "provided that the aggregate total amount of interim moneys invested in commercial paper at any time does not exceed fifty million dollars." This language was removed by Am. Sub. H.B. 584, 117th Gen. A. (1988) (eff. March 17, 1989), and now reads as quoted above. For purposes of this discussion, I will therefore address your question as respecting the limitations upon investment of the interim moneys of the state as currently provided for under R.C. 135.143.

Once again the starting point for the analysis of your question must be that portion of R.C. 135.45(A) which provides that "the treasurer of state shall invest the [Ohio subdivision's] fund as the state treasurer's investment pool, in the same manner, and in the same type of instruments, and subject to the same limitations provided for the deposit and investment of interim moneys of the state...." It is unclear, however, whether the General Assembly intended for the "same" limitations to apply to the Ohio Subdivision's Fund and the interim moneys of the state separately or in the aggregate. While the language of R.C. 135.45(A) is ambiguous, I note that the General Assembly's intention with reference to the investment of the interim moneys of the state under R.C. 135.143 is clear. Specifically, R.C. 135.143(A) provides that "the treasurer of state may invest or execute transactions for any part or all of the interim funds of the state in the following classifications of obligations...." (Emphasis added.) R.C. 135.143(A) does not indicate that this limitation should be adjusted in light of the creation of the Ohio Subdivision's Fund. Instead, by its express terms, R.C. 135.143(A) only provides that the investment of "interim moneys of the state" in the obligations which follow are subject to the specified limitations. It is a well-established rule of construction that wherever possible, statutory provisions should be construed together and harmoniously in order to give full effect. *Bobb v. Marchant*, 14 Ohio St. 3d 1, 469 N.E.2d 847 (1984); *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956). Should R.C. 135.45(A) be interpreted to apply to both the interim moneys of the state and the Ohio Subdivision's Fund in the aggregate, then any investment of the Ohio Subdivision's Fund in commercial paper would limit the "full effect" of R.C. 135.143. Thus, I must conclude that the limitation on the investment in commercial paper notes under R.C. 135.143(A)(6) applies to the Ohio Subdivision's Fund as a separate and distinct limitation, independent of the otherwise identical restriction placed on the investment of the interim moneys of the state.

Your sixth question concerns whether the Treasurer of State must, in order to contract for the performance of services related to the administration of the State Treasurer's Investment Pool, either obtain the approval of the Controlling Board or award a contract by competitive bid where the payments under the contract will exceed ten thousand dollars in a single fiscal year. Your question is based upon R.C. 127.16(B)(1), which provides:

No state agency, using money that has been appropriated to it directly, shall purchase, from a particular supplier other than a state agency, any services, equipment, materials, or supplies, or any combination thereof, that, when combined with all other such purchases the agency has made from the supplier during the fiscal

year, will amount to ten thousand dollars or more, unless the purchase is competitively bid or approved by the controlling board.

Pursuant to this statute, state agencies⁷ are generally required to competitively bid any contracts which would result in a single supplier receiving orders of ten thousand dollars or more within a single fiscal year. R.C. 127.16(B)(1) provides in the alternative that a state agency may obtain the approval of the Controlling Board. These provisions are applicable, however, only where the state agency's purchases are made with "money that has been appropriated to it directly." R.C. 127.16(B)(1). Pursuant to Ohio Const. art. II, §22 and R.C. 126.07, moneys which are part of the state treasury must be appropriated before they may be expended by an agency. *See generally* 1982 Op. Att'y Gen. No. 82-082. In addition, under the provisions of R.C. 113.09, "[a]ll investment earnings from moneys in the state treasury, the disposition of which is not otherwise provided for by law, shall be credited to the general revenue fund." Thus, absent a contrary provision of state law, any investment earnings from moneys in the state treasury must also be appropriated before they may be expended.

The same, however, does not hold true with reference to "custodial funds." As provided for by R.C. 113.05(B):

The custodial funds of the treasurer of state consist of the moneys, claims, bonds, notes, other obligations, stocks, and other securities, receipts or other evidences of ownership, and other intangible assets that are required by law to be kept in the custody of the treasurer of state but are not part of the state treasury.

Under this provision, the Treasurer of State may administer custodial funds, outside of the treasury of the state, where the Treasurer is required by law to keep the designated items of deposit within his custody. *See also* 9 Ohio Admin. Code 113-2-01(A). The investment earnings from moneys in a custodial fund must be credited to the fund holding the principal sum. R.C. 135.21. Thus, like the principal sums of the custodial fund, the investment earnings from such a fund may be expended without being first appropriated. *See* Op. No. 82-082 at 2-230.

R.C. 135.45(B) expressly provides for the payment of the expenses of administering the State Treasurer's Investment Pool out of the investment earnings of the Pool:

The treasurer of state shall adopt such rules as are necessary for the efficient administration of an accounting for the state treasurer's investment pool, including specification of minimum amounts which may be paid into the pool and minimum periods of time for which such payments shall be retained in the pool. *The rules shall provide for the administrative expenses of the pool to be paid from its earnings and for the interest earnings in excess of such expenses to be credited to the several treasurers' governing boards, and investing authorities participating in the pool in the manner which equitably reflects the differing amounts of their respective investments in the pool and the*

⁷ The term "state agency" is not defined for purposes of R.C. 127.16 within any of the provisions of R.C. Chapter 127. R.C. 1.60 does, however, provide that:

As used in Title I of the Revised Code, "state agency," except as otherwise provided for in the title, means every organized body, office, or agency established by the laws of the state for the exercise of any function of state government.

The office of the Treasurer of State is established by the Ohio Constitution, *see* Ohio Const. art. III, §1, and its powers are provided for under R.C. Chapter 113. The Treasurer of State thus constitutes a state agency for purposes of R.C. 127.16.

differing periods of time for which such amounts were in the pool.
(Emphasis added.)

Under this provision, the Treasurer of State is authorized to adopt rules providing for the payment of the expenses out of the earnings of the State Treasurer's Investment Pool. The Treasurer of State has complied with this provision. See 8 Ohio Admin. Code 113-10-01(F). R.C. 135.45(A) provides that "[a] treasurer, governing board, or investing authority may pay public moneys of the subdivision into the Ohio Subdivision's Fund, which may be established *in the custody of the treasurer of state* (emphasis added)." The moneys paid into the Ohio Subdivision's Fund are by definition not part of the state treasury, but instead constitute a custodial fund comprised of the invested moneys of the various subdivisions. Thus, because the investment income from the Ohio Subdivision's Fund may be expended by the Treasurer of State without first being appropriated by the General Assembly, and to the extent that such investment income is attributable to the Ohio Subdivisions' Fund, the Treasurer of State is not required to let a contract for the administration of the State Treasurer's Investment Pool through competitive bid or, in the alternative, to obtain the approval of the Controlling Board.

In addition to the investment of the moneys in the Ohio Subdivisions' Fund, the General Assembly has also provided for the investment of the interim moneys of the state in the State Treasurer's Investment Pool. R.C. 135.143(A)(9) provides that the Treasurer may invest the interim moneys of the state in "[t]he state treasurer's investment pool, authorized under R.C. 135.45 of the Revised Code." As noted above, R.C. 113.09 requires that "[a]ll investment earnings from moneys in the state treasury, *the disposition of which is not otherwise provided for by law*, shall be credited to the general revenue fund" in the state treasury. (Emphasis added.) In this instance, the General Assembly has, at least in part, provided for the disposition of investment income from state interim moneys placed in the State Treasurer's Investment Pool, by providing that the administrative expenses of the Pool should be paid for from its earnings. R.C. 135.45(B). I, therefore, conclude that to the extent that such earnings are necessary for the administration of the portion of the Pool that may be attributed to the state's investment in the Pool, they may be expended by the Treasurer prior to being credited to the state treasury, and, therefore, without first being appropriated. Thus, because the provisions of R.C. 127.16(B)(1) are only applicable where the moneys being expended are in the state treasury and appropriated directly to the state agency, the Treasurer is not required to award a contract for the administration of the State Treasurer's Investment Pool by competitive bid, or in the alternative to obtain the approval of the Controlling Board before awarding such a contract.⁸ Having answered your sixth question in the negative, it is unnecessary for me to address your seventh question.

Your eighth question asks whether the implementation of the State Treasurer's Investment Pool imposes any additional responsibilities or liabilities upon

⁸ While in this very narrow instance I conclude that the Treasurer of State is not required to let a contract by competitive bid for the performance of services related to the administration of the State Treasurer's Investment Pool, I emphasize that the authority of the Treasurer to utilize such funds is not without limit. A public office is a public trust, and the Treasurer of State, as a public office, acts as a fiduciary for the people. See e.g. *Halliday v. Norfolk & Western Railway Co.*, 44 Ohio L.Abs. 208, 62 N.E.2d 716 (Ct. App. Franklin County 1945); *Crane Township ex rel. Stalter v. Secoy*, 103 Ohio St. 258, 132 N.E. 851 (1921); see also *Federal Crop Insurance v. Merrill*, 332 U.S. 380 (1947). The standard of care of a fiduciary is higher than that of ordinary care in negligence actions, instead requiring the utmost good faith, loyalty, intelligence, skill, and prudence. *Torbet v. Young*, 26 Ohio Cir. Dec. 245 (Ct. App. Holmes County 1915). Furthermore, where the terms and conditions of a contract breach a fiduciary relationship, the fiduciary may be held responsible for making restitution of any moneys lost as a result of the transaction and for punitive damages. See *Jacobson v. Western Montana Production Credit Association*, 643 F.Supp. 391 (D. Montana 1986).

the State Board of Deposit. As noted above, pursuant to R.C. 135.08 and 135.45(A), where moneys which have been paid into the Ohio Subdivision's Fund are to be deposited, those moneys generally must be deposited in an institution which has been designated as a public depository for the state moneys by the State Board of Deposit under R.C. 135.12. This requirement does not, however, impose any additional duty upon the State Board of Deposit. Rather, R.C. 135.45(A) simply requires that the Treasurer of State deposit the Ohio Subdivision's Fund in the same institutions designated by the State Board of Deposit as a public depository for state moneys. I am not aware of any other provision of R.C. 135.45 which would impose additional responsibilities upon the State Board of Deposit. Therefore, I conclude that the implementation of the State Treasurer's Investment Pool program does not impose any additional responsibilities upon the State Board of Deposit.

I also conclude that the implementation of the State Treasurer's Investment Pool does not expose the members of the State Board of Deposit to any additional liability. R.C. 9.86 provides that:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is a plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section does not affect the liability of the state in an action filed against the state in the court of claims pursuant to Chapter 2743. of the Revised Code. (Emphasis added.)

Through the language emphasized above, R.C. 9.86 extends limited immunity to officers and employees of the state. R.C. 9.85(A) provides that the terms "[o]fficer or employee," as used in R.C. 9.86, have the same meaning as that provided by R.C. 109.36(A). That section provides:

"Officer or employee" means any person who, at the time a cause of action against him arises, is serving in an elected or appointed office or position with the state; is employed by the state; or is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract with a department, agency, or institution of the state. Officer or employee does not include any person elected, appointed, or employed by any political subdivision of the state.

R.C. 135.02 provides for the membership of the State Board of Deposit:

There shall be a state board of deposit consisting of the treasurer of state or an employee of his department designated by him, the auditor of state or an employee of his department designated by him, and the attorney general or an employee of his department designated by him....

As either an elected or appointed official, or as an employee of the state, each member of the State Board of Deposit is an "officer or employee" within the meaning of R.C. 109.36(A). Thus, no member of the State Board of Deposit shall be liable in any civil action that arises under the laws of this State for damage or injury caused in the performance of his duties unless his actions were manifestly outside the scope of his employment or official responsibilities, or unless he has acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

Accordingly, I conclude and you are hereby advised that:

1. Pursuant to R.C. 135.45, all moneys placed in the State Treasurer's Investment Pool must be deposited or invested in the

same types of instruments provided for the deposit and investment of the interim moneys of the state by R.C. 135.01-.20, except that the moneys placed in the State Treasurer's Investment Pool may not be invested in the linked deposits established under R.C. 135.61-.76.

2. Pursuant to R.C. 135.08 and R.C. 135.45, if moneys which have been paid into the Ohio Subdivision's Fund are to be deposited in a financial institution, they must be deposited in an institution designated pursuant to R.C. 135.12 by the State Board of Deposit in the most recent biennial designation of depositories for state moneys unless the institution is exempted from such requirements as a bank that is owned or controlled by one or more socially or economically disadvantaged persons, as provided for under R.C. 135.04(G)(l).
3. Pursuant to R.C. 135.143 and R.C. 135.45, moneys paid into the Ohio Subdivision's Fund may be invested in commercial paper notes, maturing in one hundred eighty days or less, issued by any corporation that is incorporated under the laws of the United States or a state, which such notes are rated in the two highest categories by two nationally recognized rating agencies, provided that the total amount invested in commercial paper at any time shall not exceed ten percent of the state's total average portfolio, as determined by the Treasurer of State.
4. Pursuant to R.C. 135.143 and R.C. 135.45(A), the Ohio Subdivision's Fund and the interim moneys of the state are subject to separate limitations of total investments in commercial paper not to exceed, at any time, ten percent of the State's total average portfolio, as determined by the Treasurer of State.
5. Pursuant to R.C. 127.16(B)(1), the Treasurer of State may not, using money that has been appropriated to that office directly, purchase from a particular supplier other than a state agency, any services, equipment, materials, or supplies, or any combination thereof, that when combined with all other such purchases the Treasurer of State has made from the supplier during the fiscal year, will amount to ten thousand dollars or more, unless the purchase is competitively bid or approved by the Controlling Board. Pursuant to R.C. 135.45(B), however, the administrative expenses of the State Treasurer's Investment Pool are to be paid from the earnings of the Pool prior to their placement in the state treasury where they are subject to appropriation. R.C. 113.05, and 113.09, R.C. 135.21, and R.C. 135.45(B). Thus, because such funds are not in the state treasury and directly appropriated to the Treasurer of State, the Treasurer of State is not required by R.C. 127.16(B)(1) to award a contract for the administration of the State Treasurer's Investment Pool by competitive bid or, in the alternative, to obtain the approval of the Controlling Board. The authority to award a contract without competitive bidding or without Controlling Board approval, however, is subject to the limitation that the terms and conditions of such a contract may not breach the fiduciary duty owed by the Treasurer of State to the people of the State of Ohio.
6. The implementation of the State Treasurer's Investment Pool does not impose any additional responsibilities and liabilities upon the individual members of the State Board of Deposit.
7. As officers or employees of the state within the meaning of R.C. 9.85, 9.86, and R.C. 109.36(A), the members of the State Board of Deposit shall not be liable in any civil action that arises under the laws of this State for damage or injury caused in the

performance of their duties unless their actions are manifestly outside the scope of their employment or official responsibility, or unless they act with malicious purpose, in bad faith, or in a wanton or reckless manner.