

**OPINION NO. 2006-049****Syllabus:**

1. R.C. 3901.011 authorizes the Superintendent of Insurance to execute and enforce the laws relating to insurance and R.C. 3953.231(I) authorizes the Superintendent of Insurance to adopt rules related to the use of Interest on Trust Accounts and the enforcement of R.C. 3953.231.
  2. Pursuant to the authority vested in the Superintendent of Insurance by R.C. 3953.231(I) to adopt rules, in accordance with R.C. Chapter 119, concerning the use of Interest on Trust Accounts and the enforcement of R.C. 3953.231, the Superintendent may determine the charges that may be deducted from the interest earned or dividends paid on Interest on Trust Accounts before such interest or dividends are forwarded to the Treasurer of State.
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**To: Ann Womer Benjamin, Superintendent, Ohio Department of Insurance, Columbus, Ohio**

**By: Jim Petro, Attorney General, December 19, 2006**

You have submitted an opinion request concerning the disposition of interest earned on Interest on Trust Accounts (IOTAs) under R.C. 3953.231(A)(3). Your specific questions are as follows:

3. Does the Department [of Insurance] have statutory authority to execute and enforce the provisions of R.C. 3953.231?
4. Does the Department have exclusive authority to determine whether wire transfer fees charged by a financial institution against an IOTA account, that are reasonable in amount and appropriate for an IOTA transaction, are “reasonable service charges and other related charges” that can be deducted from IOTA interest prior to remittance of such interest to the treasurer of state?

By way of background, your opinion request states that there is a difference of opinion between the Department of Insurance (ODI) and the Ohio Legal Assistance Foundation (OLAF) concerning the calculation of the sum of money payable to the Treasurer of State from interest earned on IOTAs. The Department of Insurance takes the position that certain charges made against such accounts for wire transfers may be deducted from the interest earned on the accounts before the remainder of the interest is forwarded to the Treasurer of State for deposit in the legal aid fund in the state treasury. OLAF, which has the duty to distribute the moneys from the legal aid fund, however, takes the position that these charges should not be deducted from the interest earned on such accounts before such interest is forwarded for deposit into the legal aid fund.

Because your questions concern the authority of ODI to regulate with respect to IOTAs, let us begin with a brief discussion of the statutory scheme governing the establishment and operation of such accounts.

### **Title Insurance**

R.C. Chapter 3953 governs the business of title insurance<sup>1</sup> and those who

<sup>1</sup> For purposes of R.C. Chapter 3953, “title insurance” means “insuring, guaranteeing, or indemnifying owners of real property or others interested in real property against loss or damage suffered by reason of liens or encumbrances upon, defect in, or the unmarketability of the title to the real property, guaranteeing, warranting, or otherwise insuring by a title insurance company the correctness of searches relating to the title to real property, or doing any business in substance equivalent to any of the foregoing.” R.C. 3953.01(A). *See generally* R.C. 3953.01(B) (defining the “business of title insurance”); R.C. 3953.01(H) (defining “title insurance agent” as meaning, “a person, partnership, or corporation authorized in writing by a title insurance company to solicit insurance and collect premiums and to issue or countersign policies on its behalf. ‘Title insurance agent’

engage in that business. Only those companies that constitute title insurance companies, as defined in R.C. 3953.01(C), “shall underwrite or issue a policy of title insurance.” R.C. 3953.03. R.C. Chapter 3953 imposes various duties upon, and prohibitions against, title insurance companies and agents in the conduct of their business. *See, e.g.*, R.C. 3953.04 (organization of title insurance companies); R.C. 3953.05 (capital and surplus requirements); R.C. 3953.09 (specific activities in which a title insurance company may not engage). Among the activities in which a title insurance agent may engage, subject to certain limitations and requirements, is “the business of handling escrows of real property transactions.” R.C. 3953.23(B).<sup>2</sup>

#### **R.C. 3953.231 – Interest on Trust Accounts (IOTAs)**

Pursuant to R.C. 3953.231(A)(1), each title insurance agent or title insurance company is required to establish and maintain an interest-bearing trust account for the deposit of all “non-directed escrow funds”<sup>3</sup> that meet the requirements of R.C. 1349.20-.22, concerning residential realty escrow transactions. R.C. 3953.231(A)(2) requires that such accounts be “established and maintained in any federally insured bank,<sup>4</sup> savings and loan association, credit union, or savings bank that is authorized to transact business in this state.” (Footnote added.)

Division (C) of R.C. 3953.231 describes certain necessary features of IO-TAs, as follows:

does not include officers and salaried employees of any title insurance company authorized to do a title insurance business within this state”).

<sup>2</sup> R.C. 3953.23(B) states:

A title insurance agent may engage in the business of handling escrows of real property transactions, provided that the agent shall maintain a separate record of all receipts and disbursements of escrow funds and shall not commingle any such funds with the agent’s own funds or with funds held by the agent in any other capacity; and if at any time the superintendent of insurance determines that an agent has failed to comply with any of the provisions of this section, the superintendent may revoke the license of the agent pursuant to [R.C. 3905.14], subject to review as provided for in [R.C. Chapter 119].

<sup>3</sup> As used in R.C. 3953.231, “non-directed escrow funds” means “any funds delivered to a title insurance agent or title insurance company with instructions to hold or disburse the funds pursuant to a transaction in which a title insurance policy will be issued, but without written instructions to either deposit the funds in an account for the benefit of a specific person, or to pay the interest earned on the funds to a specific person.” R.C. 3953.01(L).

<sup>4</sup> *See* R.C. 1109.03(A) (“[n]o bank shall transact business in this state unless its deposit accounts are insured by the federal deposit insurance corporation, except a bank that by the terms of its articles of incorporation or articles of association is not permitted to solicit or accept deposits other than trust funds. Each bank whose deposit accounts are insured by the federal deposit insurance corporation shall maintain that insurance as a condition of doing business in this state”).

*Each account established under division (A) of this section shall comply with all of the following:*

(1) All funds in the account shall be subject to withdrawal or transfer upon request and without delay, or as soon as permitted by law;

(2) The rate of interest payable on the account shall not be less than the rate paid by the bank, savings and loan, credit union, or savings bank to its regular depositors. The rate may be higher if there is no impairment of the right to the immediate withdrawal or transfer of the principal;

(3) *All interest earned on the account, net of service charges and other related charges, shall be transmitted to the treasurer of state for deposit in the legal aid fund established under [R.C. 120.52 (establishment of legal aid fund in the state treasury “for the charitable public purpose of providing financial assistance to legal aid societies that provide civil legal services to indigents”)]. No part of the interest earned shall be paid to the title insurance agent or company.* (Emphasis added.)

R.C. 3953.231(C)(3) thus requires that all interest earned on an IOTA, “net of service charges and other related charges,” be transmitted to the Treasurer of State for deposit into the legal aid fund in the state treasury. R.C. 3953.231(C) expressly prohibits the payment of any interest on an IOTA to the account holder title insurance agent or company, but does not state who must forward such interest to the Treasurer of State.

Additional provisions regarding the disposition of interest earned on IOTAs, as well as dividends paid on such accounts, are set forth in R.C. 3953.231(D), as follows:

The title insurance agent or company establishing an account under division (A) of this section *shall direct* the bank, savings and loan association, credit union, or savings bank to do *both* of the following:

(1) *Remit interest or dividends*<sup>5</sup> on the average monthly balance in the account, or as otherwise computed in accordance with the standard accounting practice of the bank, savings and loan association, credit union, or savings bank, *less reasonable service charges and other related*

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<sup>5</sup> Unlike R.C. 3953.231(C)(3), which refers only to interest earned on IOTAs, division (D)(1) addresses both interest and dividends from IOTAs. *See generally*, e.g., R.C. 1151.52 (stating, in part, “[a]fter provision for payment of expenses, interest, and the maintenance of the loss reserve and other net worth accounts as required by [R.C. 1151.33], [a building and loan] association may declare *dividends* on withdrawable share accounts and pay *interest* on deposits. Such dividends or interest may be credited to the account or paid to the holder thereof” (emphasis added)); R.C. 1733.24(E) (stating, in part, “[t]he credit union may pay dividends on share draft accounts [and] may pay dividends at different rates on different types of share draft accounts”).

*charges*, to the treasurer of state at least quarterly for deposit in the legal aid fund established under [R.C. 120.52];

(2) At the time of each remittance, transmit to the treasurer of state, and if requested, to the Ohio legal assistance foundation, and the title insurance agent or company, a statement showing the name of the title insurance agent or company for whom the remittance is sent, the rate of interest applied, the accounting period, the net amount remitted to the treasurer of state for each account, the total remitted, the average account balance for each month of the period for which the report is made, and the *amount deducted for service charges and other related charges*. (Emphasis and footnote added.)

Accordingly, R.C. 3953.231(D)(1) imposes a duty upon each title insurance company or agent that establishes an IOTA to direct the financial institution in which such account is established to remit to the Treasurer of State the interest or dividends, “*less reasonable service charges and other related charges*,” earned or paid on that account, as well as the required reporting information described in R.C. 3953.231(D)(2).

### **Regulatory Authority of Department of Insurance over IOTAs**

With this general background in mind, let us now turn to your specific questions concerning ODI’s powers with respect to IOTAs. Your first question asks whether the Department of Insurance has authority to execute and enforce R.C. 3953.231. In answering this question, we begin with the principle that creatures of statute, like ODI or the Superintendent of Insurance, possess only those powers and duties vested in them by statute either expressly or by necessary implication. See *Tongren v. PUCO*, 85 Ohio St. 3d 87, 88, 706 N.E.2d 1255 (1999) (a creature of statute “has and can exercise only the authority conferred upon it by the General Assembly”); *Dreger v. Public Employees Ret. Sys.*, 34 Ohio St. 3d 17, 20-21, 516 N.E.2d 214 (1987) (a creature of statute “has no authority beyond that which is expressly or impliedly conferred by statute”).

Examination of the statutes addressing the powers and duties of ODI and the Superintendent reveals that, pursuant to R.C. 3901.011, the Superintendent of Insurance possesses the fundamental duty to “see that the laws relating to insurance are executed and enforced.” In addition, R.C. 3901.041 imposes upon the Superintendent the duty to “adopt, amend, and rescind rules and make adjudications, necessary to discharge the superintendent’s duties and exercise the superintendent’s powers, including, but not limited to, the superintendent’s duties and powers under Chapters 1751. and 1753.[,] Title XXXIX [39] of the Revised Code, subject to Chapter 119. of the Revised Code.”

Regarding IOTAs specifically, division (I) of R.C. 3953.231 expressly authorizes the Superintendent of Insurance to “adopt, in accordance with [R.C. Chapter 119], *rules that pertain to the use of accounts established under division (A) of this section and to the enforcement of this section.*” (Emphasis added.) It is clear, therefore, that the Superintendent possesses the authority to adopt rules, in ac-

cordance with the procedure prescribed in R.C. Chapter 119, that relate to two subjects: (1) the “use” of IOTAs, and (2) the “enforcement” of R.C. 3953.231.<sup>6</sup> In answer to your first question, therefore, we conclude that R.C. 3901.011 authorizes the Superintendent of Insurance to execute and enforce the laws relating to insurance and R.C. 3953.231(I) authorizes the Superintendent to adopt rules related to the use of IOTAs and the enforcement of R.C. 3953.231.

**Authority to Identify Fees That May Be Deducted from IOTA Interest or Dividends Prior to Forwarding Interest or Dividends to Treasurer of State under R.C. 3953.231**

We now turn to your second question, which asks whether ODI has “exclusive authority to determine whether wire transfer fees charged by a financial institution against an IOTA account, that are reasonable in amount and appropriate for an IOTA transaction, are ‘reasonable service charges and other related charges’ that can be deducted from IOTA interest prior to remittance of such interest to the treasurer of state.”<sup>7</sup> This question is broadly worded in asking whether ODI has authority, to the exclusion of all other persons or entities, to determine whether wire transfer fees charged against an IOTA may be deducted from the interest earned or dividends paid on such an account before the remaining interest or dividends are forwarded to the Treasurer of State in accordance with R.C. 3953.231. It is our understanding, however, that your real concern is whether OLAF or ODI possesses authority to determine that wire transfer fees charged against an IOTA constitute “reasonable service charges and other related charges,” within the meaning of R.C. 3953.231.

Pursuant to R.C. 3953.231(I), the Superintendent of Insurance possesses authority, in accordance with R.C. Chapter 119, to adopt rules pertaining to both the

<sup>6</sup> To date, however, the Ohio Department of Insurance (ODI) has not adopted rules in accordance with R.C. Chapter 119 regarding the use of IOTAs or the enforcement of R.C. 3953.231.

<sup>7</sup> R.C. 3953.231(A)(2) requires that IOTAs be established and maintained in “any federally insured bank, savings and loan association, credit union, or savings bank that is authorized to transact business in this state.” The named financial institutions are subject to extensive regulation under both federal and state law by entities other than the Department of Insurance. *See generally, e.g.*, 12 U.S.C.A. Chapter 16 (Federal Deposit Insurance Corporation); R.C. 1121.02(A) (“[t]he superintendent of financial institutions shall see that the laws relating to banks are executed and enforced”); R.C. 1155.011(A)(1) (“[t]he superintendent of financial institutions shall see that the laws relating to savings and loan associations are executed and enforced”); R.C. 1163.02(A) (“[t]he superintendent of financial institutions shall see that the laws relating to savings banks are executed and enforced”); R.C. 1733.32(A)(1) (“[t]he superintendent of financial institutions shall see that the laws relating to credit unions are executed and enforced”). We will assume, for purposes of discussion, that the wire transfer fees imposed by a financial institution against an IOTA are authorized by federal or state law.

use of IOTAs and the enforcement of R.C. 3953.231. As explained above, R.C. 3953.231(C)(3) requires that all interest earned on an IOTA, “net of service charges and other related charges,” be forwarded to the Treasurer of State, while R.C. 3953.231(D)(1) requires each holder of an IOTA to direct the financial institution in which the IOTA is established and maintained to forward interest or dividends on such account, “less reasonable service charges and other related charges,” to the Treasurer of State. A determination of those charges that may be deducted from interest earned or dividends paid on an IOTA before the interest or dividends are forwarded to the Treasurer of State, as required by R.C. 3953.231(C)(3) and (D)(1), is part of the implementation of the requirements of R.C. 3953.231. Accordingly, such determination falls squarely within the Superintendent’s rule-making authority under R.C. 3953.231(I), as a matter related to the enforcement of R.C. 3953.231.

Let us now examine the authority of the Ohio Legal Assistance Foundation (OLAF) with respect to the interest earned on IOTAs. R.C. 120.52 establishes in the state treasury the legal aid fund, which consists of money from various sources, including interest from IOTAs, as required by R.C. 3953.231. Moneys in the legal aid fund are used for “the charitable public purpose of providing financial assistance to legal aid societies that provide civil legal services to indigents.” R.C. 120.52. As further provided in R.C. 120.52, “[t]he state public defender, through the Ohio legal assistance foundation, shall administer the *payment of moneys out of the fund.*” (Emphasis added.)<sup>8</sup> OLAF also has a duty to determine the eligibility of applicants for legal aid fund moneys and to allocate such moneys among eligible applicants. R.C. 120.53.

R.C. 120.52 imposes further duties upon OLAF, as follows:

The Ohio legal assistance foundation shall establish, in accordance with Chapter 119. of the Revised Code, rules governing the administration of the legal aid fund, including the programs established under sections 1901.26, 1907.24, 2303.201, 4705.09, and 4705.10 of the Revised Code regarding interest on interest-bearing trust accounts of an attorney, law firm, or legal professional association.

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<sup>8</sup> R.C. 120.52 specifies the manner in which moneys in the legal aid fund shall be used, as follows:

Four and one-half per cent of the moneys in the fund shall be reserved for the actual, reasonable costs of administering sections 120.51 to 120.55 and sections 1901.26, 1907.24, 2303.201, 3953.231, 4705.09, and 4705.10 of the Revised Code. Moneys that are reserved for administrative costs but that are not used for actual, reasonable administrative costs shall be set aside for use in the manner described in division (A) of section 120.521 of the Revised Code. The remainder of the moneys in the legal aid fund shall be distributed in accordance with section 120.53 of the Revised Code.

Thus, although R.C. 120.52 requires OLAF to adopt rules governing the other programs that generate fees for the legal aid fund,<sup>9</sup> OLAF has no such authority with respect to IOTAs established under R.C. 3953.231. Based upon the principle of statutory construction, *expressio unius est exclusio alterius*, we must conclude that the General Assembly did not intend to grant OLAF authority to regulate the administration of IOTA accounts. *See generally State v. Droste*, 83 Ohio St. 3d 36, 39, 697 N.E.2d 620 (1998) (“[u]nder the general rule of statutory construction *expressio unius est exclusio alterius*, the expression of one or more items of a class implies that those not identified are to be excluded”). We conclude, therefore, that OLAF has no authority to determine what charges against an IOTA account established under R.C. 3953.231 may be deducted from the interest earned or dividends paid on such account before such interest or dividends are forwarded to the Treasurer of State.

In answer to your second question, we conclude that, pursuant to the authority vested in the Superintendent of Insurance by R.C. 3953.231(I) to adopt rules, in accordance with R.C. Chapter 119, concerning the use of Interest on Trust Accounts and the enforcement of R.C. 3953.231, the Superintendent may determine the charges that may be deducted from the interest earned or dividends paid on Interest on Trust Accounts before such interest or dividends are forwarded to the Treasurer of State.

### Conclusions

1. R.C. 3901.011 authorizes the Superintendent of Insurance to execute and enforce the laws relating to insurance and R.C. 3953.231(I) authorizes the Superintendent of Insurance to adopt rules related to the use of Interest on Trust Accounts and the enforcement of R.C. 3953.231.
2. Pursuant to the authority vested in the Superintendent of Insurance by R.C. 3953.231(I) to adopt rules, in accordance with R.C. Chapter 119, concerning the use of Interest on Trust Accounts and the enforcement of R.C. 3953.231, the Superintendent may determine the charges that may be deducted from the interest earned or dividends paid on Interest on Trust Accounts before such interest or dividends are forwarded to the Treasurer of State.

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<sup>9</sup> Pursuant to R.C. 120.52, the legal aid fund “shall contain all funds credited to it by the treasurer of state pursuant to sections 1901.26, 1907.24, 2303.201, 3953.231, 4705.09 and 4705.10 of the Revised Code.” *See* R.C. 1901.26(C) (municipal court fees); R.C. 1907.24(C) (county court fees); R.C. 2303.201(C) (fees in court of common pleas), R.C. 4705.09 (interest on lawyers’ trust accounts), and R.C. 4705.10 (interest on lawyers’ trust accounts).