

December 18, 2018

The Honorable Josh Mandel
Treasurer of State
30 East Broad Street, 9th Floor
Columbus, Ohio 43215

SYLLABUS:

2018-033

1. Pursuant to R.C. 135.143(A)(8), the Treasurer of State is authorized to invest interim moneys of the state in share certificates issued by credit unions participating in the agricultural linked deposit program or the business linked deposit program.
2. Share certificates purchased by the Treasurer of State pursuant to the agricultural linked deposit program or the business linked deposit program are “public deposits” for purposes of R.C. Chapter 135.
3. R.C. 135.08 requires credit unions desiring to participate in the agricultural linked deposit program or the business linked deposit program to file a written application to hold interim funds with the State Board of Deposit.
4. A credit union participating in the agricultural linked deposit program or the business linked deposit program is a public depository that is awarded public deposits pursuant to R.C. 135.01-.21. It must, therefore, comply with the collateral requirements set forth in R.C. 135.18, as well as any applicable rules promulgated by the Treasurer of State pursuant to R.C. 135.78.
5. The Treasurer of State may not take into account private share insurance held by a credit union when calculating the uninsured amount of public moneys held by a credit union. All public moneys held by a credit union that are not insured by the National Credit Union Administration or another agency or instrumentality of the federal government are “uninsured public deposits” that must be collateralized in accordance with R.C. 135.18.

6. The Treasurer of State may not accept private excess share insurance as collateral for public deposits held by a credit union pursuant to the agricultural linked deposit program or the business linked deposit program.



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December 18, 2018

OPINION NO. 2018-033

The Honorable Josh Mandel
Treasurer of State
30 East Broad Street, 9th Floor
Columbus, Ohio 43215

Dear Treasurer of State Mandel:

You have requested an opinion about the agricultural linked deposit program and the business linked deposit program. In 2017, the General Assembly enacted Am. Sub. H.B. 49, which created the business linked deposit program and made certain changes to the ongoing agricultural linked deposit program. *See* Am. Sub. H.B. 49, 132nd Gen. A. (2017) (eff. Sept. 29, 2017, with certain provisions effective on other dates). The changes made by Am. Sub. H.B. 49 have prompted the following questions:¹

1. May the Treasurer of State, pursuant to his investment authority under R.C. 135.143, invest state interim funds in share certificates issued by credit unions participating in the agricultural linked deposit program or the business linked deposit program?
2. Are share certificates purchased by the Treasurer of State considered “public deposits” under R.C. Chapter 135?
3. If the answer to question number two is affirmative, should credit unions apply to the State Board of Deposit to hold interim funds?
4. How, if at all, must funds placed at credit unions be collateralized? Should the collateral requirements meet or exceed the collateral requirements under R.C. 135.18?
5. May the Treasurer of State accept private insurance for a share certificate at a credit union to calculate the uninsured amount at the credit union?

¹ For ease of discussion, we have reordered and rephrased your questions.

6. May the Treasurer of State accept private excess share insurance, either as insurance or collateral, for a share certificate?
7. Does the Treasurer of State's placement of interim funds and membership at a credit union violate Section 4 of Article VIII of the Ohio Constitution?

Before addressing your specific questions, it is helpful to begin with a brief overview of the agricultural linked deposit program and the business linked deposit program.

The Agricultural Linked Deposit Program

Pursuant to the Uniform Depository Act, R.C. Chapter 135, the Treasurer of State is responsible for presiding over and managing the moneys of the state deposited in the state treasury. The agricultural linked deposit program, R.C. 135.71-.76, authorizes the Treasurer of State to deposit interim funds of the state² with an eligible lending institution at a rate below current market rates, with the proviso that the lending institution shall lend an equivalent amount of money to eligible agricultural businesses at below market rates. In creating the agricultural linked deposit program, the General Assembly found that there is "an inadequate supply of agricultural credit and loan financing at affordable interest rates[.]" R.C. 135.72. Accordingly, the agricultural linked deposit program is designed to provide agricultural credit and loan financing at affordable interest rates. *See* R.C. 135.71-.76; 1997 Op. Att'y Gen. No. 97-021, at 2-123.

R.C. 135.631 provides that the Treasurer of State shall attempt to place up to one hundred sixty-five million dollars in agricultural linked deposits. An "agricultural linked deposit" is defined as "a certificate of deposit placed by the treasurer of state with an eligible lending institution under [R.C. 135.74], share certificates issued by an eligible lending institution that are purchased by the treasurer of state, or an investment in bonds, notes, debentures, or other obligations or securities issued by the federal farm credit bank with regard to an eligible lending institution." R.C. 135.71(C). An eligible lending institution that desires to receive an agricultural linked deposit shall accept and review applications for loans that are submitted by eligible agricultural businesses. *See generally* R.C. 135.71(A) (defining "eligible agriculture business"). For purposes of the agricultural linked deposit program, an "eligible lending institution" is defined as a financial institution that is eligible to make commercial loans, agrees to participate in the agricultural linked deposit program, and is any of the following:

- (1) Is a public depository of state funds under [R.C. 135.03];

² Interim funds of the state are state dollars that have been received by the state treasury, but are not needed to meet immediate obligations of state government. *See* R.C. 135.01(F) (defining "interim deposit" and "interim moneys").

(2) Notwithstanding [R.C. 135.01-.21], is an institution of the farm credit system organized under the federal ‘Farm Credit Act of 1971,’ 85 Stat. 583, 12 U.S.C.A. 2001, as amended;

(3) Notwithstanding [R.C. 135.01-.21], is a federal credit union, a foreign credit union licensed pursuant to [R.C. 1733.39], or a credit union as defined in [R.C. 1733.01], located in this state.

R.C. 135.71(B).

In applying for a loan under the agricultural linked deposit program, an eligible agricultural business must certify that the reduced-rate loan “will be used exclusively for agricultural purposes on land or in facilities owned or operated by the business in this state and that the loan will materially contribute to the preservation of the business.” R.C. 135.73(B). A loan received by an eligible agricultural business pursuant to the agricultural linked deposit program shall not exceed one hundred fifty thousand dollars. R.C. 135.73(A).

After an eligible lending institution receives loan applications from agricultural businesses, it shall then forward an agricultural linked deposit loan package to the Treasurer of State, in the form and manner prescribed by the Treasurer of State. R.C. 135.73(D). The Treasurer of State may accept or reject an agricultural linked deposit loan package, or any portion thereof, based on an evaluation of the businesses included in the package, the amount of individual loans in the package, and the overall amount of the package. R.C. 135.74(A). The Treasurer of State must enter into a deposit agreement with any eligible lending institution that receives an agricultural linked deposit. R.C. 135.74(C). When an agricultural linked deposit is placed with an eligible lending institution, that institution is required to lend those funds to each approved eligible agricultural business listed in the agricultural linked deposit loan package at a below market rate. R.C. 135.75(A); *see also* R.C. 135.74(C) (explaining how the reduced interest rate is to be calculated). In lending funds to each eligible agricultural business, the eligible lending institution must also comply with the terms of its agricultural linked deposit agreement with the Treasurer of State. R.C. 135.75(A).

The Business Linked Deposit Program

The business linked deposit program, which was created by the General Assembly in 2017 as part of Am. Sub. H.B. 49, has a similar purpose as the agricultural linked deposit program—to provide credit and loan financing to eligible small businesses at affordable interest rates. *See* R.C. 135.771 (the business linked deposit program is designed “to foster economic growth and development within Ohio’s small businesses, and to protect the jobs of this state”). A “business linked deposit” means “share certificates issued by an eligible lending institution that are purchased by the treasurer of state in accordance with [R.C. 135.772-.774].” R.C. 135.77(A). For purposes of the business linked deposit program, an “eligible lending institution” is defined as a federal credit union, a foreign credit union licensed pursuant to R.C. 1733.39, or a credit union as defined in R.C. 1733.01, located in Ohio. R.C. 135.77(B). An eligible lending institution that desires to receive a business linked deposit shall accept and review applications for loans from eligible small businesses and forward a linked deposit

loan package to the Treasurer of State. R.C. 135.772(A); *see also* R.C. 135.77(C) (defining “eligible small business”).

The Treasurer of State may accept or reject a business linked deposit loan package, or any portion thereof. R.C. 135.773. The Treasurer of State shall enter into a deposit agreement with any eligible lending institution that receives a business linked deposit. *Id.*; *see also* R.C. 135.65(C). When a business linked deposit is placed with an eligible lending institution, that institution is required to lend those funds to each approved eligible small business listed in the linked deposit loan package, and in accordance with its deposit agreement with the Treasurer of State, at a below market rate. R.C. 135.774(A) (explaining how the reduced interest rate is to be calculated). The business linked deposit program thus facilitates lending to eligible small businesses at affordable interest rates.

Investment of State Interim Funds in Share Certificates

You ask whether the Treasurer of State, pursuant to his investment authority under R.C. 135.143, may invest state interim funds in share certificates³ issued by credit unions participating in the agricultural linked deposit program or the business linked deposit program. R.C. 135.143 lists the classifications of obligations in which the Treasurer of State may invest or execute transactions for interim moneys, *see* R.C. 135.01(F), of the state. It provides, in part:

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:

...;

(8) Certificates of deposit in eligible institutions applying for interim moneys as provided in [R.C. 135.08], including linked deposits as provided in [R.C. 135.61-.67], agricultural linked deposits as provided in [R.C. 135.71-.76], business linked deposits as provided in [R.C. 135.77-.774], and housing linked deposits as provided in [R.C. 135.81-.87.]

R.C. 135.143(A)(8). Thus, the Treasurer of State is expressly authorized to invest interim moneys of the state in agricultural linked deposits and business linked deposits.

As explained above, an agricultural linked deposit is defined by R.C. 135.71(C) to include, *inter alia*, “share certificates issued by an eligible lending institution that are purchased by the treasurer of state[.]” For purposes of R.C. 135.71(C), the phrase “eligible lending institution” is defined to include a federal credit union, a foreign credit union licensed pursuant to R.C. 1733.39, and a credit union as defined in R.C. 1733.01, located in this state, provided it is eligible to make commercial loans and has agreed to participate in the agricultural linked deposit program. R.C.

³ A share certificate is a financial instrument issued by a credit union that is similar to a certificate of deposit issued by a bank. *See United States v. Hernandez*, 267 F. Supp. 3d 911, 913 n.2 (W.D. Tex. 2016).

135.71(B). Accordingly, R.C. 135.143(A)(8) authorizes the Treasurer of State to invest interim moneys of the state in share certificates issued by an eligible lending institution—which includes a federal credit union, a foreign credit union licensed in Ohio, or a credit union as defined in R.C. 1733.01, located in Ohio—that is eligible to make commercial loans and has agreed to participate in the agricultural linked deposit program.

Similarly, R.C. 135.143(A)(8) authorizes the Treasurer of State to invest interim funds of the state in business linked deposits. A “business linked deposit” is defined as “share certificates issued by an eligible lending institution that are purchased by the treasurer of state in accordance with [R.C. 135.772-.774].” R.C. 135.77(A). For purposes of R.C. 135.77-.774, “eligible lending institution” is defined as “a federal credit union, a foreign credit union licensed pursuant to [R.C. 1733.39], or a credit union as defined in [R.C. 1733.01], located in this state.” R.C. 135.77(B). Thus, the Treasurer of State is authorized to invest state interim funds in share certificates issued by a federal credit union, a foreign credit union licensed pursuant to R.C. 1733.39, or a credit union as defined in R.C. 1733.01, that is located in Ohio and participating in the business linked deposit program.

In response to your first question, the Treasurer of State is authorized by R.C. 135.143(A)(8) to invest interim moneys of the state in share certificates issued by credit unions participating in the agricultural linked deposit program or the business linked deposit program.⁴ *See* Ohio Legislative Service Comm’n, Final Bill Analysis, Am. Sub. H.B. 49, at p. 621 (2017) (“[t]he act expands the financial institutions that are authorized to hold public money by allowing credit unions to participate in the Business Linked Deposit Program, which the act creates, and in the ongoing Agricultural Linked Deposit Program”).

Share Certificates as Public Deposits

You next ask whether share certificates purchased by the Treasurer of State pursuant to the agricultural linked deposit program or the business linked deposit program are “public deposits” under R.C. Chapter 135. For purposes of the Uniform Depository Act, the term “public deposit” is defined as “public moneys deposited in a public depository pursuant to [R.C. 135.01-.21].” R.C. 135.01(I). A “public depository” is an “institution which receives or holds any public deposits.” R.C. 135.01(J). Whether share certificates purchased by the Treasurer of State pursuant to the agricultural linked deposit program or the business linked deposit program are public deposits thus turns on whether they are public moneys deposited by the Treasurer of State pursuant to R.C. 135.01-.21.

For purposes of the Uniform Depository Act, “public moneys” are “all moneys in the treasury of the state or any subdivision of the state, or moneys coming lawfully into the possession or custody

⁴ While the Treasurer of State is authorized to invest interim moneys of the state with credit unions participating in the agricultural linked deposit program or the business linked deposit program, R.C. Chapter 135 does not authorize other subdivisions, such as municipal corporations or townships, to deposit public moneys with credit unions. *See generally* R.C. 135.01(L) (defining “subdivision” for purposes of R.C. Chapter 135).

of the treasurer of state or of the treasurer of any subdivision.” R.C. 135.01(K). Share certificates purchased by the Treasurer of State pursuant to the agricultural linked deposit program or the business linked deposit program, therefore, constitute public money.

We must next examine whether share certificates purchased by the Treasurer of State pursuant to the agricultural linked deposit program or business linked deposit program are public moneys deposited in a public depository *pursuant to R.C. 135.01-21*. As explained above, share certificates purchased by the Treasurer of State pursuant to the agricultural linked deposit program or the business linked deposit program are public moneys deposited pursuant to the investment authority granted to the Treasurer of State by R.C. 135.143(A)(8). They, therefore, constitute public moneys deposited in a public depository pursuant to R.C. 135.01-21. Accordingly, share certificates purchased by the Treasurer of State pursuant to the agricultural linked deposit program or the business linked deposit program are “public deposits” for purposes of R.C. Chapter 135. *See also generally* R.C. 135.78(C) (“[n]otwithstanding any provision of law to the contrary, the treasurer of state may require an eligible lending institution *that holds public deposits under* ... [R.C. 135.71-.76, the agricultural linked deposit program, or R.C. 135.77-.774, the business linked deposit program] ... to pay interest” at a certain rate (emphasis added)).

Application to Hold Interim Funds

You next ask whether credit unions desiring to participate in the agricultural linked deposit program or the business linked deposit program should apply to the State Board of Deposit to hold interim funds. R.C. 135.08 addresses applications to become a public depository of interim funds. It provides, in pertinent part:

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

R.C. 135.08. For purposes of this statute, “public depository” means “an institution which receives or holds any public deposits.” R.C. 135.01(J). As explained in response to the previous question, share certificates purchased by the Treasurer of State pursuant to the agricultural linked deposit program or the business linked deposit program are “public deposits” for purposes of the Uniform Depository Act. Thus, a credit union that participates in the agricultural linked deposit program or business linked deposit program holds public deposits and is, therefore, a public depository for purposes of the Uniform Depository Act.⁵ In order to become a public depository of interim funds, a financial

⁵ We are aware that R.C. 135.03 lists certain institutions that are, subject to R.C. 135.01-21, eligible to become a public depository and that credit unions are not included among that list. While credit unions are not among the list of institutions mentioned in R.C. 135.03, we do not read R.C. 135.03 as preventing a credit union from becoming a “public depository,” as defined in R.C.

institution is required by R.C. 135.08 to file a written application to hold interim funds with the “the proper governing board.” In the case of the state, the proper governing board is the State Board of Deposit. R.C. 135.01(D).

135.01(J), for purposes of the agricultural linked deposit program or the business linked deposit program. Reading R.C. 135.03 in such a manner would effectively negate the legislature’s intent—expressed throughout various provisions of Am. Sub. H.B. 49, 132nd Gen. A. (2017) (eff. Sept. 29, 2017, with certain provisions effective on other dates)—to allow credit unions to participate in the agricultural linked deposit program and the business linked deposit program. *See* Ohio Legislative Service Comm’n, Final Bill Analysis, Am. Sub. H.B. 49, at p. 621 (2017) (“[t]he act expands the financial institutions that are authorized to hold public money by allowing credit unions to participate in the Business Linked Deposit Program, which the act creates, and in the ongoing Agricultural Linked Deposit Program”); *see also generally* R.C. 1.47 (“[i]n enacting a statute, it is presumed that: ... [t]he entire statute is intended to be effective; [and a] result feasible of execution is intended”); *State ex rel. Cleveland Elec. Illum. Co. v. City of Euclid*, 169 Ohio St. 476, 479, 159 N.E.2d 756 (1959), *appeal dismissed*, 362 U.S. 457 (1960) (“the General Assembly is not presumed to do a vain or useless thing, and ... when language is inserted in a statute it is inserted to accomplish some definite purpose”).

Furthermore, in enacting Am. Sub. H.B. 49, the General Assembly expressly acknowledged that credit unions are not among the list of institutions mentioned in R.C. 135.03, but nonetheless authorized credit unions to hold public funds pursuant to the agricultural linked deposit program and the business linked deposit program. For example, this is evidenced by R.C. 135.71(B), which defines an “eligible lending institution,” for purposes of the agricultural linked deposit program, as a financial institution that is eligible to make commercial loans, agrees to participate in the agricultural linked deposit program, and is any of the following:

- (1) Is a public depository of state funds under [R.C. 135.03];
- (2) *Notwithstanding [R.C. 135.01-.21]*, is an institution of the farm credit system organized under the federal ‘Farm Credit Act of 1971,’ 85 Stat. 583, 12 U.S.C.A. 2001, as amended;
- (3) *Notwithstanding [R.C. 135.01-.21]*, is a federal credit union, a foreign credit union licensed pursuant to [R.C. 1733.39], or a credit union as defined in [R.C. 1733.01], located in this state. (Emphasis added.)

Based on this language and our reading of R.C. Chapter 135 as a whole, we do not read R.C. 135.03 as precluding credit unions from becoming a “public depository,” *see* R.C. 135.01(J), for purposes of the agricultural linked deposit program or the business linked deposit program.

In response to question three, R.C. 135.08 requires credit unions desiring to participate in the agricultural linked deposit program or the business linked deposit program to file a written application to hold interim funds with the State Board of Deposit.⁶

Securing Public Moneys Held by Credit Unions

Your next questions concern how public deposits held by a credit union should be collateralized. You ask whether credit unions that hold public deposits should meet or exceed the collateral requirements set forth by R.C. 135.18.

We first note R.C. 135.78(B), which provides that the Treasurer of State:

shall, in accordance with [R.C. Chapter 111], adopt rules addressing the participation of eligible lending institutions in the agricultural linked deposit program under [R.C. 135.71-.76] and the business linked deposit program under [R.C. 135.77-.774], including, but not limited to, the manner in which an eligible lending institution is designated and the linked deposits are placed, held, and collateralized.⁷ (Footnote added.)

Accordingly, the Treasurer of State is authorized to adopt rules governing the agricultural linked deposit program and the business linked deposit program, including rules addressing how the linked deposits are to be collateralized. These rules must, of course, comply with any applicable statutory provisions. *See* 1998 Op. Att'y Gen. No. 98-035, at 2-208 (“the standard for the promulgation of rules is that an administrative body with rulemaking authority may adopt such rules as it deems appropriate to carry out its powers and duties, provided that the rules are not unreasonable or in clear conflict with statutory enactments and do not add to statutorily-delegated powers”). We will, therefore, examine provisions of law addressing how public deposits are to be collateralized.

Generally, a public depository that receives public moneys shall provide security for uninsured public moneys. In this regard, R.C. 135.18 provides, in pertinent part:

⁶ R.C. 135.143(A)(8) provides additional evidence that the General Assembly intends credit unions desiring to participate in the agricultural linked deposit program or business linked deposit program to file an application with the State Board of Deposit pursuant to R.C. 135.08. It states that the Treasurer of State may invest in “[c]ertificates of deposit in eligible institutions *applying for interim moneys as provided in section 135.08 of the Revised Code*, including ... agricultural linked deposits as provided in [R.C. 135.71-.76 and] business linked deposits as provided in [R.C. 135.77-.774].” R.C. 135.143(A)(8) (emphasis added).

⁷ Participation of eligible lending institutions in the agricultural linked deposit program or the business linked deposit program shall not begin until the Treasurer of State has adopted rules in accordance with R.C. 135.78(B).

(A) Each institution designated as a public depository and awarded public deposits under [R.C. 135.01-.21], except as provided in [R.C. 135.144 or R.C. 135.145],⁸ shall provide security for the repayment of all public deposits by selecting one of the following methods:

(1) Securing all uninsured public deposits of each public depositor separately as set forth in divisions (B) to (J) of this section;

(2) Securing all uninsured public deposits of every public depositor pursuant to [R.C. 135.181 or R.C. 135.182], as applicable, by establishing and pledging to the treasurer of state a single pool of collateral for the benefit of every public depositor at the public depository. (Footnote added.)

Accordingly, R.C. 135.18(A) requires a public depository that receives public deposits pursuant to R.C. 135.01-.21 to provide security for the uninsured public deposits that it holds.

A public depository may provide security for the uninsured public deposits of each public depositor separately, in accordance with R.C. 135.18(B) through (J), or by pledging a single pool of collateral for the benefit of every public depositor at the public depository, in accordance with R.C. 135.181 or R.C. 135.182. *See* R.C. 135.18(A)(1)-(2). R.C. 135.18(D) sets forth the categories of securities or other obligations that a public depository may pledge as eligible collateral under either method. *See* R.C. 135.18(D)(1)-(11) (including as eligible collateral, *inter alia*, bonds, notes, or other obligations of the United States and bonds and other obligations of the state); *see also* R.C. 135.182(E) (the list of securities and obligations set forth in R.C. 135.18(D) also applies when a public depository pledges a single pool of collateral pursuant to R.C. 135.182). A public depository that elects to provide security for the uninsured public deposits of each public depositor separately shall pledge as collateral eligible securities of aggregate market value at all times equal to at least 105 percent of the total amount of the public depositor's uninsured public deposits. R.C. 135.18(B). A public depository that elects to secure all uninsured public deposits through a pool of collateral shall pledge to the Treasurer of State a pool of securities at least equal to 102 percent of the total of all uninsured public deposits or an amount that is determined by the Treasurer of State. R.C. 135.182(B)(1).

You have asked whether a credit union participating in the agricultural linked deposit program or business linked deposit program must comply with R.C. 135.18. Pursuant to R.C. 135.18(A), an eligible lending institution must comply with R.C. 135.18's collateral requirements if it is: (1) designated a public depository and (2) awarded public deposits pursuant to R.C. 135.01-.21. As explained in response to question number two, share certificates purchased by the Treasurer of State pursuant to the agricultural linked deposit program or the business linked deposit program are "public

⁸ A public depository is not required to provide security for interim moneys that are invested or deposited in certificates of deposit in accordance with R.C. 135.144(A). R.C. 135.144(B). Similarly, public moneys deposited in accordance with R.C. 135.145 (redeposit of public moneys) "are not subject to the pledging requirements described in [R.C. 135.18, R.C. 135.181, or R.C. 135.182]," except under the circumstances described in R.C. 135.145(A)(2). R.C. 135.145(B).

deposits” for purposes of R.C. Chapter 135. *See* R.C. 135.01(I). They are awarded to credit unions pursuant to the investment authority granted to the Treasurer of State by R.C. 135.143(A)(8). They, therefore, constitute public deposits awarded pursuant to R.C. 135.01-.21.

We must also consider whether credit unions participating in the agricultural linked deposit program or the business linked deposit program have been designated as public depositories. A “public depository” means “an institution which receives or holds any public deposits.” R.C. 135.01(J). A credit union participating in the agricultural linked deposit program or the business linked deposit program is a public depository by virtue of the fact that it holds public deposits. In order to receive or hold any public deposits of the state, an eligible institution must file a written application with the State Board of Deposit, R.C. 135.08, and be designated as a public depository by the State Board of Deposit, R.C. 135.12. A credit union participating in the agricultural linked deposit program or the business linked deposit program, therefore, has necessarily been designated as a public depository by the State Board of Deposit.

Because a credit union participating in the agricultural linked deposit program or the business linked deposit program is a public depository that has been awarded public deposits pursuant to R.C. 135.01-.21, it must comply with the collateral requirements set forth in R.C. 135.18, as well as any applicable rules promulgated by the Treasurer of State pursuant to R.C. 135.78.

Uninsured Public Deposits

You next ask whether the Treasurer of State may accept private insurance for a share certificate at a credit union to calculate the uninsured amount of public moneys held by the credit union. The amount of uninsured public deposits held by a credit union is significant because the credit union, as a public depository awarded public deposits pursuant to R.C. 135.01-.21, is required to provide collateral to secure the uninsured public deposits that it holds. *See* R.C. 135.18(A). The amount of uninsured public deposits held by a credit will, therefore, determine the amount of collateral the credit union is required to provide in order to comply with R.C. 135.18.

To answer this question, it is helpful to first briefly examine how deposits at credit unions are typically insured. All federal credit unions and “the overwhelming majority of state-chartered credit unions” are insured by the National Credit Union Share Insurance Fund (the Share Insurance Fund).⁹ *Mission and Vision*, National Credit Union Administration, <https://www.ncua.gov/About/Pages/Mission-and-Vision.aspx> (last visited Dec. 18, 2018). The National Credit Union Administration (NCUA) is an independent federal agency that administers the Share Insurance Fund. Like the Federal Deposit Insurance Corporation’s (FDIC) Deposit Insurance Fund, NCUA’s Share Insurance Fund is a federal insurance fund backed by the full faith and credit of

⁹ According to the National Credit Union Administration (NCUA), approximately ninety-eight percent of all credit unions in the United States are insured by the National Credit Union Share Insurance Fund (the Share Insurance Fund). *What is NCUA?*, National Credit Union Administration, <https://www.mycreditunion.gov/node/knowledgebase/what-ncua> (last visited Dec. 18, 2018).

the United States government. The Share Insurance Fund insures individual accounts up to \$250,000 and insures a credit union member's interest in all joint accounts combined up to \$250,000. *Share Insurance Fund Overview*, National Credit Union Administration, <https://www.ncua.gov/services/Pages/share-insurance.aspx> (last visited Dec. 18, 2018).

Some state-chartered credit unions, however, are not federally insured. These credit unions may choose instead to purchase primary share insurance from any insurer qualified under Ohio law to write such insurance. *See* R.C. 1733.041 (requiring credit unions to obtain insurance for the protection of their members' accounts); *see also generally* R.C. Chapter 1761 (governing credit union guaranty corporations). Additionally, regardless of whether a credit union is federally insured or not, it may choose to purchase excess share insurance from any insurer qualified under Ohio law to write such insurance. *See* R.C. 1761.09(B) (“[i]n addition to the primary guaranteed amount, [a credit union guarantee corporation] may establish an excess coverage guarantee for the benefit of those participating credit unions that voluntarily elect to obtain such additional guarantee”). Excess share insurance is intended to provide additional protection for credit union members' deposits, above and beyond the credit union's primary share insurance coverage.

Returning to your question, you ask whether the Treasurer of State may accept private share insurance held by a credit union to calculate the uninsured amount of public moneys held by the credit union. R.C. 135.18(A) requires each institution that is designated a public depository and awarded public deposits pursuant to R.C. 135.01-.21 to provide security for the repayment of all uninsured public deposits it holds. R.C. 135.01(Q) defines “uninsured public deposit” as “the portion of a public deposit that is not insured by the federal deposit insurance corporation or by any other agency or instrumentality of the federal government.” Therefore, the Treasurer of State may not take into account private share insurance when calculating the uninsured amount of public moneys held by a credit union. All public moneys held by a credit union that are not insured by the National Credit Union Administration or another agency or instrumentality of the federal government are “uninsured public deposits” that must be collateralized in accordance with R.C. 135.18. *See* 1990 Op. Att’y Gen. No. 90-058, at 2-246 (R.C. 135.18(A) requires that “before public moneys are deposited in a public depository pursuant to the provisions of R.C. 135.01-.21, the public depository must pledge and deposit appropriate security for the repayment of those moneys, over and above the amount thereof that is insured by the federal government”).

Private Excess Share Insurance

You also ask whether the Treasurer of State may accept private excess share insurance, either as insurance or collateral, for share certificates purchased by the Treasurer of State. We will first consider whether the Treasurer of State may accept private excess share insurance as collateral for public deposits held by a credit union.

As explained earlier in this opinion, R.C. 135.18(A) requires a public depository that holds public deposits pursuant to the provisions of R.C. 135.01-.21 to pledge appropriate security for the repayment of those moneys, over and above the amount thereof that is insured by the federal government. A public depository may provide security for uninsured public deposits separately, in

accordance with R.C. 135.18(B) through (J), or by pledging a single pool of collateral for each public depositor at the public depository, in accordance with R.C. 135.181 or R.C. 135.182.¹⁰ Regardless of whether a public depository chooses to provide security for the uninsured public deposits separately or by pledging pooled collateral, R.C. 135.18(D)(1)-(11) specify the securities or other obligations that are eligible to be used as collateral. Included among these specified eligible securities or obligations are: bonds, notes, or other obligations of the United States, R.C. 135.18(D)(1); obligations partially insured or partially guaranteed by any federal agency or instrumentality, R.C. 135.18(D)(4); and bonds and other obligations of the state, R.C. 135.18(D)(6). Private excess share insurance is not included among R.C. 135.18(D)'s list of eligible securities or obligations that may be pledged as security for public deposits. Therefore, the Treasurer of State may not accept private excess share insurance as collateral for public deposits held by a credit union pursuant to the agricultural linked deposit program or the business linked deposit program.

You also ask whether the Treasurer of State may accept private excess share insurance as insurance for share certificates purchased by the Treasurer of State pursuant to the agricultural linked deposit program or the business linked deposit program. Because all public moneys deposited pursuant to the agricultural linked deposit program or the business linked deposit program will be either federally insured or secured in accordance with R.C. 135.18(B) through (J), *see* note 10, *supra*, it is not necessary for us to answer this question. A public depository that secures public deposits separately pursuant to R.C. 135.18(B)-(J) shall pledge to the public depositor eligible securities of aggregate market value at all times equal to at least 105 percent of the total amount of the public depositor's uninsured public deposits. R.C. 135.18(B). Therefore, all public deposits held by a credit union pursuant to the agricultural linked deposit program or the business linked deposit program will be insured or secured, and private excess share insurance will not be necessary.

¹⁰ Ohio's Pooled Collateral Program, R.C. 135.181-.182, allows a public depository to "pledge to the treasurer of state a single pool of eligible securities for the benefit of *all public depositors* at the public depository to secure the repayment of all uninsured public deposits at the public depository[.]" R.C. 135.182(B)(1) (emphasis added). For purposes of this statute, "public depositor" means "the state or a subdivision, as applicable, that deposits public moneys in a public depository pursuant to [R.C. 135.01-.21]." R.C. 135.01(P). The state is the only public depositor authorized by law to participate in the agricultural linked deposit program or the business linked deposit program. *See* R.C. 135.143(A)(8); R.C. 135.63; R.C. 135.71(C); R.C. 135.77(A). Furthermore, R.C. Chapter 135 does not authorize any entity other than the state to deposit public moneys with a credit union. Accordingly, the state will necessarily be a credit union's only "public depositor." Because a credit union will not have more than one "public depositor," it will not be able to participate in Ohio's Pooled Collateral Program, but rather will be required to provide security for uninsured public deposits in accordance with R.C. 135.18(B) through (J).

Constitutionality of Statutory Authority to Deposit Interim Funds in Share Certificates of Credit Unions

Finally, you have asked whether placing state interim funds at (and therefore becoming a member of) a credit union is consistent with the Ohio Constitution's prohibition against the state lending its credit to private enterprise. *See generally* Ohio Const. art. VIII, §§ 4, 6. R.C. 135.143(A)(8) authorizes the Treasurer to invest interim funds in, among other investments, "share certificates," R.C. 135.71(C); R.C. 135.77(A), at credit unions, R.C. 135.71(B)(3); R.C. 135.77(B). Because these statutes together authorize deposits of state interim moneys in credit unions, your last question asks whether those statutes *can* authorize such deposits under the Ohio Constitution.

The Attorney General is part of the executive branch of state government, and is not empowered to determine the constitutionality of state statutes. Those determinations are exclusively the function of the judiciary. *See, e.g., Maloney v. Rhodes*, 45 Ohio St. 2d 319, 324, 345 N.E.2d 407 (1976) ("[a]n attack upon the constitutional validity of a law must be made in a proper court. The judicial power to declare a law unconstitutional is exclusively within the judicial branch of government"); *State ex rel. Davis v. Hildebrant*, 94 Ohio St. 154, 169, 114 N.E. 55 (1916) ("[t]he power of determining whether a law or constitutional provision is valid or otherwise is lodged solely in the judicial department"), *aff'd*, 241 U.S. 565 (1916); 1986 Op. Att'y Gen. No. 86-095, at 2-540 ("[i]t is not the function of [the Attorney General's Office] ... to opine on the constitutionality of state statutes." (citation omitted)). Accordingly, the Attorney General refrains from issuing an opinion on the constitutionality of provisions of the Revised Code. In this instance, therefore, we respectfully decline to offer an opinion on the constitutionality of these statutes.

Conclusions

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

1. Pursuant to R.C. 135.143(A)(8), the Treasurer of State is authorized to invest interim moneys of the state in share certificates issued by credit unions participating in the agricultural linked deposit program or the business linked deposit program.
2. Share certificates purchased by the Treasurer of State pursuant to the agricultural linked deposit program or the business linked deposit program are "public deposits" for purposes of R.C. Chapter 135.
3. R.C. 135.08 requires credit unions desiring to participate in the agricultural linked deposit program or the business linked deposit program to file a written application to hold interim funds with the State Board of Deposit.
4. A credit union participating in the agricultural linked deposit program or the business linked deposit program is a public depository that is awarded public

deposits pursuant to R.C. 135.01-.21. It must, therefore, comply with the collateral requirements set forth in R.C. 135.18, as well as any applicable rules promulgated by the Treasurer of State pursuant to R.C. 135.78.

5. The Treasurer of State may not take into account private share insurance held by a credit union when calculating the uninsured amount of public moneys held by a credit union. All public moneys held by a credit union that are not insured by the National Credit Union Administration or another agency or instrumentality of the federal government are “uninsured public deposits” that must be collateralized in accordance with R.C. 135.18.
6. The Treasurer of State may not accept private excess share insurance as collateral for public deposits held by a credit union pursuant to the agricultural linked deposit program or the business linked deposit program.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General