

OPINION NO. 93-030**Syllabus:**

1. Pursuant to R.C. 135.143(A)(2), the Treasurer of the State of Ohio is authorized to invest "interim moneys" of the State of Ohio in payment guarantees issued by the Commodity Credit Corporation under the Export Credit Guarantee Program (GSM-102) established pursuant to 7 C.F.R. Part 1493 (1993).
2. Pursuant to R.C. 135.143(A)(2), the Treasurer of State of Ohio is authorized to invest "interim moneys" of the State of Ohio in payment guarantees issued by the Export-Import Bank of the United States pursuant to 12 U.S.C. §635 et. seq. (1988 & Supp. III 1991).

To: Mary Ellen Withrow, Treasurer of State, Columbus, Ohio
By: Lee Fisher, Attorney General, October 29, 1993

You have requested a formal opinion regarding whether the program described below is a permissible investment by the Treasurer of State under Ohio law.

You have indicated that a program has been proposed to the Treasurer, which involves the investment of a portion of the state funds held by the Treasurer in certain payment guarantees issued by the Commodity Credit Corporation ("CCC") and/or the Export-Import Bank of the United States ("Eximbank"). The materials submitted in connection with your request indicate that the CCC and the Eximbank provide payment guarantees with respect to loans made by lending institutions to various business entities, and that such payment guarantees of the CCC and Eximbank by their terms bear the full faith and credit of the United States Government. Under the proposed program, the investment of state funds by the Treasurer would be only in the respective guarantees of the CCC and the Eximbank, and there would be no direct recourse to any underlying collateral or other security. Thus, the State's ownership interest in the investments would be limited to an interest in the CCC's and Eximbank's payment guarantees.

I. The CCC and Eximbank Guarantee Programs

A. Commodity Credit Corporation

As noted in the materials submitted in connection with your request, 15 U.S.C. § 714 (1988), provides that: "there is created a body corporate to be known as Commodity Credit Corporation ..., *which shall be an agency and instrumentality of the United States*, within the Department of Agriculture, subject to the general supervision and direction of the Secretary of Agriculture...." (Emphasis added.) Thus, pursuant to the express statutory language creating the CCC, it is clear that the CCC constitutes an agency of the federal government.

The statutory purposes of the CCC include "stabilizing, supporting and protecting farm income and prices, ... assisting in maintenance of balanced and adequate supplies of agricultural commodities, products thereof, foods, feeds, and fibers ..., and ... facilitating the orderly distribution of agricultural commodities." *Id.* In furtherance of these purposes, the CCC has developed a number of programs, including the Export Credit Guarantee Program (GSM-102), to expand U.S. agricultural exports by making available export credit guarantees to encourage U.S. private sector financing of foreign purchases of U.S. agricultural commodities on credit terms where financing would not otherwise be available. *See* 7 C.F.R. Part 1493 (1993). The materials provided in connection with your request include an opinion of the General Counsel of the U.S. Department of Agriculture, concluding that guarantees issued by the CCC under the GSM-102 Program are "general obligations of the United States government backed by the full faith and credit of the United States." *See* Letter from A. James Barnes, General Counsel, U.S. Department of Agriculture, to Seeley G. Lodwick, Under Secretary, International Affairs and Commodity Programs (April 9, 1982).

Under the specific GSM-102 Program you have described, guarantees are provided by the CCC to facilitate commercial bank financing to certain less developed countries for their imports of U.S. agricultural commodities. The CCC guarantee allows banks to provide more favorable credit terms than would normally be available to such importing countries, because the credit risk becomes essentially that of the U.S. Government. This lower cost financing stimulates increased sales of U.S. commodities for export.

Your request indicates that the proposed investment by the State of Ohio is limited to the CCC-guaranteed portion of each loan, with the private lending institution retaining the residual foreign country credit risk. In addition, such investments will relate only to guarantees entered into in connection with the financing of products of a type grown in the State of Ohio.

B. Eximbank

12 U.S.C. §635(a)(1) (Supp. III 1991), which provides for the establishment of Eximbank, states in relevant part:

There is created a corporation with the name **Export-Import Bank of the United States**, *which shall be an agency of the United States of America*. The objects and purposes of the bank shall be to aid in the financing and to facilitate exports and imports and the exchange of commodities and services between the United States or any of its Territories or insular possessions and any foreign count[r]y or the agencies or nationals thereof. In connection with and in furtherance of its objects and purposes, the bank is authorized ... to guarantee, insure, coinsure, and reinsure against political and credit risks of loss ... and the

enumeration of the foregoing powers shall not be deemed to exclude other powers necessary to the achievement of the objects and purposes of the bank. (Emphasis added.)¹

Further, pursuant to 12 U.S.C. §635(b)(1)(A) (1988), Eximbank is authorized

to provide guarantees, insurance, and extensions of credit at rates and on terms and other conditions which are fully competitive with the Government-supported rates and terms and other conditions available for the financing of exports of goods and services from the principal countries whose exporters compete with United States exporters.

Under the Eximbank program described in the materials submitted in connection with your request, Eximbank provides payment guarantees with respect to loans made to creditworthy buyers of U.S. exports. Such guarantees cover one hundred percent of the commercial and political risks relating to such loans, by guaranteeing that the foreign buyer's obligations will be repaid in the event of default. Your request includes a copy of an opinion of a prior Attorney General of the United States, which concludes that such guarantees are backed by the full faith and credit of the United States of America, and accordingly persons holding Eximbank guarantees are holders of "valid general obligations of the United States, and are therefore in a position to reach beyond Eximbank and its assets to the United States for a source of payment, if necessary." 42 Op. U.S. Att'y Gen. 328 (1966).

II. Permissible Investments under Uniform Depository Act

Pursuant to the Ohio Uniform Depository Act, R.C. Chapter 135, the Treasurer of the State of Ohio is authorized to invest all or any part of the interim moneys² of the State in, *inter alia*, the following:

(1) United States treasury bills, notes, bonds, or any other obligations or securities issued by the United States treasury or any other obligation guaranteed

¹ Thus, as was the case with CCC, the express statutory language creating Eximbank provides that Eximbank is an agency of the federal government.

² 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.

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

as to principal and interest by the United States³;
(2) Bonds, notes, debentures, or any other obligations or securities issued
by any federal government agency or instrumentality....

R.C. 135.143(A)(1), (2) (emphasis and footnote added). The answer to your question therefore depends upon whether or not the CCC payment guarantees and the Eximbank payment guarantees described in your request fall within the authorized investments listed above. Specifically, the question arises whether such guarantees entered into by CCC and Eximbank constitute "obligations or securities issued by any federal government agency or instrumentality."

As noted above, both the CCC and Eximbank have been established by federal legislation, and pursuant to the express statutory language under which they were created, it is clear that each of them is a federal government agency.⁴ Therefore, the remaining issue is whether the types of guarantees described by you constitute "obligations" or "securities" of such entities within the meaning of R.C. 135.143.

III. CCC and Eximbank Guarantees Are "Obligations" Issued by Federal Government Agencies for purposes of R.C. 135.143

In this regard, the terms "obligations" or "securities" are not defined for purposes of R.C. 135.143. In accordance with the rule of statutory construction set forth in R.C. 1.42, such terms are therefore required to be "read in context according to the rules of grammar and common usage." Accordingly, reference must be made to other provisions of the Revised Code and other sources to determine their meaning. *See generally* 1990 Op. Att'y Gen. No. 90-058.

As noted in Op. No. 90-058 at 2-249, *Black's Law Dictionary* 968 (5th ed. 1979) provides the following general definition of "[o]bligation": "A generic word, derived from the Latin substantive "obligatio," having many, wide, and varied meanings, according to the context in which it is used. That which a person is bound to do or forbear; any duty imposed by law, promise, contract, relations of society, courtesy, kindness, etc." The definition further notes that an obligation includes "[a] formal and binding agreement or acknowledgment of a liability to pay a certain sum or do a certain thing." *Id.*

Black's Law Dictionary defines a "guaranty" generally as "[a] collateral agreement for performance of another's undertaking. An agreement in which the guarantor agrees to satisfy the debt of another (the debtor), only if and when the debtor fails to repay (secondarily liable) A promise to answer for payment of debt or performance of obligation if person liable in first instance fails to make payment or perform obligation." *Id.* at 705.

³ Information submitted in connection with your request indicates that the underlying obligation to which the CCC or Eximbank guarantee attaches would properly be viewed as constituting an "obligation guaranteed as to principal and interest by the United States." However, you have indicated that under the program about which you have requested advice, investment will be only in the CCC or Eximbank guarantees, and the State would not have any interest in the underlying security. Accordingly, the provisions of R.C. 135.143(A)(1) do not appear to provide authority for the proposed investment.

⁴ In the case of CCC, it is clear that CCC is also a federal government instrumentality pursuant to the express statutory language of 15 U.S.C. §714 (1988).

In the circumstances described in your letter, the payment guarantees represent the undertaking of the CCC or Eximbank, as the case may be, to make payments to the lending bank which in the event that such payments are not made by the obligor under the guaranteed instrument. As such, it is clear that the guarantees in question constitute duties of the CCC and Eximbank, respectively, imposed by contracts entered into by such agencies. They are formal and binding agreements of the CCC and Eximbank, respectively, to make payment of the amounts owing on the underlying obligations in the event they are not paid. Moreover, as noted by the legal opinions referred to above, they are "general obligations" backed by the full faith and credit of the U.S. government.⁵

Since the payment guarantees constitute obligations of federal government agencies, it is clear that they fall within the types of investments that are permitted by R.C. 135.143. Accordingly, pursuant to R.C. 135.143, the Treasurer of the State of Ohio is authorized to invest all or any part of the interim moneys of the State of Ohio in the payment guarantees issued by the CCC and Eximbank in accordance with the programs described in your letter and the materials submitted in connection with such letter.

IV. Conclusions

It is, therefore, my opinion, and you are hereby advised, that:

1. Pursuant to R.C. 135.143(A)(2), the Treasurer of the State of Ohio is authorized to invest "interim moneys" of the State of Ohio in payment guarantees issued by the Commodity Credit Corporation under the Export Credit Guarantee Program (GSM-102) established pursuant to 7 C.F.R. Part 1493 (1993).
2. Pursuant to R.C. 135.143(A)(2), the Treasurer of State of Ohio is authorized to invest "interim moneys" of the State of Ohio in payment guarantees issued by the Export-Import Bank of the United States pursuant to 12 U.S.C. §635 et. seq. (1988 & Supp. III 1991).

⁵ It also appears that the guarantees would also constitute "securities" issued by federal agencies for purposes of R.C. 135.143. Although, as noted above, the term "security" is not defined in R.C. 135.143, there are various definitions of the term "security" within the Ohio Revised Code which indicate that a payment guaranty issued by a federal government agency would generally be viewed as a "security" under Ohio law. *See, e.g.*, R.C. 1707.01(B) (definition of "security" includes "any ... instrument which represents ... [an] interest in, or is secured by any lien or charge upon, the ... credit ... of any public or governmental ... agency"). Similarly, under the U.S. Securities Act of 1933, the term "security" is defined to include "[a]ny ... evidence of indebtedness, ... or, in general, any interest or instrument commonly known as a 'security,' or any ... guarantee of ... any of the foregoing." 15 U.S.C. §77b(1) (1988). However, in view of the conclusion reached herein that the payment guarantees issued by the CCC and Eximbank are "obligations" for purposes of the investment provisions of R.C. 135.143, it is unnecessary for this opinion to address the issue of whether they also constitute "securities" for such purposes.