

OPINION NO. 87-027**Syllabus:**

1. Pursuant to R.C. 9.38 and R.C. 131.02, moneys that are collected by the Ohio Student Loan Commission on behalf of lenders and are to be remitted to lenders are public moneys that must be paid to the Treasurer of State.
2. Moneys that are collected by the Ohio Student Loan Commission on behalf of lenders and are to be remitted to lenders are not available for other uses and should not be placed in the state treasury. Such moneys should, instead, be held either in the Treasurer of State's Contingent Fund or in a custodial account, as determined by the Treasurer of State.

To: David H. Harmon, Executive Director, Ohio Student Loan Commission,
Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, May 22, 1987

I have before me your request for an opinion on the question whether certain moneys received by the Ohio Student Loan Commission are public moneys that must be deposited with the Treasurer of State. Your letter of request states, in part:

The Ohio Student Loan Commission has encountered questions relative to the propriety of our handling of funds received and paid out as a function of servicing loans under contract with a number of participating OSLC lenders. Under the current arrangement, the payments are received from student borrowers and deposited into an account maintained for this purpose with Bank One of Columbus. Checks are subsequently drawn on this account on a regular basis to remit payments to the lenders which own the loans; at no point in time does the Commission ever have anything other than a temporary possession of the funds, nor does the Commission have the authority to divert any of the funds to its own purposes. Fees paid to OSLC by participating lenders are collected under an entirely separate process and are deposited into the Commission's custodial reserve account.

This letter is to request a formal opinion of your office on the question of whether or not the payments described above are within the meaning of "public money" as defined in Section 131.01 of the Ohio Revised Code. It is the contention of the Commission that the student payments received and processed on behalf of participating lenders are not public monies and do not need to be deposited with the Treasurer of State. (Emphasis in original.)

It is my understanding that a division of the Ohio Student Loan Commission known as the Columbus Repayment Center (CRC) has entered into agreements with various approved lenders to engage in the servicing of student loans on behalf of those lenders. Pursuant to the agreements, the CRC collects payments from student borrowers, deposits them into a bank account, and periodically remits the amounts so collected to the lenders on whose behalf they were collected. Your question is whether the amounts so collected may properly be deposited by the Commission into its own bank account, or whether they should be deposited with the Treasurer of State.

In considering the question whether these moneys should be deposited with the Treasurer of State, I recognize that their use is limited to the payment of the lenders as provided by agreement. You have stated that the agreements under which the Commission collects the moneys in question provide clearly that the moneys are collected on behalf of the lenders and are to be remitted to the lenders. The moneys do not constitute payment for any services of the Commission. They are owed to the lenders, rather than to the Commission, and are not available for the general use of the Commission. Your question raises the issue of how the moneys are to be held, but does not affect the conclusion that they are to be held on behalf of the lenders and remitted to them, rather than to be used by the Commission or the state for any other purpose. See generally 1982 Op. Att'y Gen. No. 82-082; 1982 Op. Att'y Gen. No. 82-003; 1979 Op. Att'y Gen. No. 79-113; 1979 Op. Att'y Gen. No. 79-030.

I begin my discussion with a review of the powers of the Ohio Student Loan Commission. The Commission was created pursuant to R.C. 3351.05 and is authorized to guarantee student loans. See R.C. 3351.06; R.C. 3351.07(A). The purposes of the Commission are set forth in R.C. 3351.05 as follows:

There is hereby created the Ohio student loan commission for the purposes of making available to residents and qualified nonresidents, improved opportunities for education, and improving the general health and welfare by raising the educational levels of such residents and qualified nonresidents by guaranteeing loans made to persons who are attending or plan to attend eligible institutions of education and their parents, when such loans are made to assist such persons and their parents in meeting their expenses of education in accordance with sections 3351.05 to 3351.14 of the Revised Code.

The Commission is given statutory powers which enable it to carry out its purposes. Its powers include the following:

(A) The Ohio student loan commission may:

...
 (4) Enter into contracts with any approved lender, upon such terms as may be agreed upon between the commission and the approved lender, to provide for the administration by such approved lender of any loan or loan plan guaranteed by the commission including applications therefor and terms and repayment thereof and to establish the conditions for payment by the commission to the approved lender of the guarantee on any loan....

...
 (8) Perform such other acts as may be necessary or appropriate to carry out effectively the objects and purposes of the commission.

R.C. 3351.07 (emphasis added). The Commission has exercised these powers by establishing the CRC and entering into agreements under which the CRC collects loan payments on behalf of lenders.

Certain moneys of the Commission are expressly required by statute to be deposited with the Treasurer of State or to be held in the custody of the Treasurer of State. See R.C. 3351.08(B) ("[t]he commission shall hold and maintain on deposit with the treasurer of state funds or negotiable securities having a market value of not less than six and two-thirds per cent of the aggregate amount of unpaid principal and interest of all notes guaranteed by the commission, exclusive of such portion thereof as may have been reinsured or guaranteed by the United States or an agency, department, or instrumentality thereof"); R.C. 3351.08(F) ("[e]ach guaranteed loan may carry a special loan insurance premium...which shall be paid to the commission by the borrower and deposited into a fund in the custody of the treasurer of state, which shall not be part of the state treasury. Money in the fund may be used only to maintain the money available to the commission to guarantee loans and to make payments to the student loan commission operating expense fund created by section 3351.131 of the Revised Code"); R.C. 3351.131 ("[t]here is hereby created in the state treasury the student loan commission operating fund. The fund shall consist of money paid into it by the Ohio student loan commission under division (F) of section 3351.08 and section 3351.13 of the Revised Code, and

money in the fund shall be used solely to pay the expenses of the commission. All expenses of the commission shall be paid from the fund"). The moneys about which you have inquired are not subject to these provisions.

R.C. 3351.07 sets forth general powers of the Commission to accept, hold, and deposit money, as follows:

(A) The Ohio student loan commission may:

...
(2) Reject or take, hold, and administer, on behalf of the commission and for any of its purposes, real property, personal property, and moneys, or any interest therein, and the income therefrom, either absolutely or in trust, for any purpose of the commission. The commission may invest its funds in any investments in which funds of the public employees retirement system may be invested pursuant to section 145.11 of the Revised Code. The commission may acquire property or moneys for its purposes by the acceptance of gifts, grants, bequests, devises, or loans; provided, that no obligation of the commission shall be a debt of the state, and the commission shall have no power to make its debts payable out of moneys except those of the commission. (Emphasis added.)

Pursuant to this provision, the Commission is authorized to take, hold, and administer moneys, and the income from such moneys, on behalf of the Commission and for its purposes, and to invest such moneys in investments authorized under R.C. 145.11.

Neither R.C. 3351.07 nor any other provision of R.C. Chapter 3351. specifically addresses the question whether moneys of the sort to which your question relates must be deposited with the Treasurer of State or whether they may be administered directly by the Commission, without action or approval by the Treasurer. Cf. R.C. 145.11 (giving the Public Employees Retirement Board "full power to invest" moneys in the funds created by R.C. 145.01-.58 in certain types of investments) and R.C. 145.26 ("[t]he treasurer of state shall be the custodian of the funds of the public employees retirement system, and all disbursements therefrom shall be paid by him only upon instruments authorized by the public employees retirement board and bearing the signatures of the board"); R.C. 4123.42 ("[t]he treasurer of state shall be custodian of the state insurance fund...and disbursements...shall be paid by him upon warrants drawn by the industrial commission and signed by any two members of the commission") and R.C. 4123.44 (giving the Administrator of the Bureau of Workers' Compensation, with the approval of the Industrial Commission, authority to "invest any of the surplus or reserve belonging to the state insurance fund" in certain types of investments); R.C. 5126.05 ("[a]ny county board of mental retardation and developmental disabilities may receive by gift, grant, devise, or bequest any moneys, lands, or property for the benefit of the purposes for which the board is established and hold, apply, and dispose of the same according to the terms of the gift, grant, or bequest. All money received by gift, grant, bequest, or disposition of lands or property received by gift, grant, devise, or bequest shall be deposited in the county treasury..."). See generally 1983 Op. Att'y Gen. No. 83-055; 1980 Op. Att'y Gen. No. 80-033; 1962 Op. Att'y Gen. No. 3104, p. 503; 1956 Op. Att'y Gen. No. 7539, p.

891. Our inquiry does not, therefore, end with an examination of R.C. Chapter 3351. It is, in addition, necessary to examine general statutory provisions concerning the receipt and deposit of funds by public officials.

R.C. 9.38 states, in part:

As used in this section...of the Revised Code, "color of office," "public office," and "public official" have the same meanings as in section 117.01 of the Revised Code.

A state officer, employee, or agent shall pay to the treasurer of state all public moneys received by him as required by rule of the treasurer of state adopted pursuant to section 113.09 of the Revised Code.¹ (Emphasis and footnote added.)

The Ohio Student Loan Commission was established pursuant to R.C. 3351.05 to carry out the purposes set forth therein. It is, thus, an entity established by law for the purpose of exercising functions of the state. See Ohio Const. art. VI,

¹ R.C. 113.09 states:

Except as provided in section 113.10 of the Revised Code, all moneys deposited with the treasurer of state, the disposition of which is not otherwise provided for by law, shall be credited to the general revenue fund. If a warrant for the payment of money from the state treasury has been illegally or improperly issued by the auditor of state, or the amount of a warrant issued by him exceeds the sum which should have been named therein, and payment of such warrant or excess has been made by the treasurer of state, the director of budget and management shall, unless the account of the appropriation from which it was paid has been closed, credit the amount collected to such appropriation; but, if such account has been closed, he shall credit the amount so collected to the fund on which the warrant was originally drawn.

All investment earnings on moneys deposited in the state treasury, the disposition of which is not otherwise provided for by law, shall be credited to the general revenue fund.

R.C. 113.10, discussed later in this opinion, provides for the establishment of the Treasurer of State's Contingent Fund.

R.C. 113.08, discussed later in this opinion, provides for the adoption by the Treasurer of State of rules governing the deposit of moneys with the Treasurer. It is possible that the reference in R.C. 9.38 was intended to be to R.C. 113.08, rather than to R.C. 113.09. In any event, it is apparent that R.C. 9.38 requires that public moneys received by a state officer, employee, or agent be paid to the Treasurer of State in accordance with any applicable rules. See generally 1 Ohio Admin. Code Chapters 113-1 through 113-10.

§5; 1983 Op. Att'y Gen. No. 83-048 at 2-188 ("the Ohio Student Loan Commission is a creature of the General Assembly which serves, at least for some purposes, as an office or agency of the state"). See also R.C. 1.60. An officer, employee, or agent of the Commission is, therefore, a "state officer, employee, or agent" required by R.C. 9.38 to "pay to the treasurer of state all public moneys received by him," in accordance with applicable rules of the Treasurer of State.

"Public money" is defined in R.C. 117.01(C) as "any money received, collected by, or due a public official under color of office, as well as any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office." R.C. 9.38 expressly references and adopts certain definitions appearing in R.C. 117.01, but does not mention the definition of "public money." That definition is, therefore, not directly applicable to R.C. 9.38.

The definition of "public money" currently appearing in R.C. 117.01(C) does, however, reflect the common meaning that has been given to that term. See generally, e.g., 1986 Op. Att'y Gen. No. 86-067; Op. No. 83-055; Op. No. 82-003; Op. No. 79-030; note 2, infra. Since the moneys in question are received by the CRC in connection with its official duties in order to carry out the statutory purposes of the Commission, I conclude that such moneys are public moneys for purposes of R.C. 9.38 and must, as a result, be paid to the Treasurer of State in accordance with applicable rules. See generally State ex rel. Tracy v. State Board of Accountancy, 129 Ohio St. 66, 68, 193 N.E. 750, 751 (1934) ("[i]t is in accordance with sound public policy that funds coming into the possession of a state board through the performance of a state function should be payable to the treasurer").

I reach this conclusion notwithstanding your statements that, pursuant to the loan servicing agreements, the Commission never has anything other than a temporary possession of the funds and the Commission has no authority to divert the funds to its own purposes. I understand that the Commission is collecting moneys on behalf of lenders and is obligated to remit the moneys to the lenders. I find, nonetheless, that, since the moneys are paid to the CRC, which is a division of the Commission, and are collected by CRC officials as part of the exercise of their statutory functions, they are public moneys that must, under R.C. 9.38, be paid to the Treasurer of State. As noted above, this conclusion does not mean that the moneys in question will be available for any purpose other than the payment of lenders pursuant to agreement. The manner in which the moneys may appropriately be held by the Treasurer of State is discussed below, following a discussion of R.C. 131.01 and related provisions.

Your letter of request references R.C. 131.01 and sets forth the contention that the moneys in question are not public moneys as defined in that section and, therefore, need not be deposited with the Treasurer of State. R.C. 131.01 and related provisions were amended by Sub. H.B. 201, 116th Gen. A. (1985) (eff., in part, July 1, 1985). R.C. 131.01 contains definitions of various terms, to be applied to R.C. Chapters 113., 117., 123., 124., 125., 126., 127., and 131. "and any statute that uses the terms in connection with state accounting

or budgeting." R.C. 131.01 does not, however, define the term "public moneys."²

R.C. 131.02 does relate to the payment of certain moneys to the Treasurer of State. It reads as follows:

Whenever any amount is payable to the state, the officer, employee, or agent responsible for administering the law under which the amount is payable shall immediately proceed to collect the amount or cause the amount to be collected and shall pay the amount into the state treasury in the manner set forth pursuant to section 113.08 of the Revised

² The version of R.C. 131.01 that was repealed by Section 2 of Sub. H.B. 201, 116th Gen. A. (1985) (eff., in part, July 1, 1985) stated, in part:

On or before Monday of each week, every state officer, state institution, department, board, and commission shall pay to the treasurer of state all moneys, checks, and drafts received for the state, or for the use of any such state officer, state institution, department, board, or commission, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, or otherwise, and file with the auditor of state a detailed, verified statement of such receipts.

1965 Ohio Laws 68, 1768 (Am. H.B. 307, eff. Sept. 15, 1965); see Sub. H.B. 428, Section 22 (uncodified), 116th Gen. A. (1986)(eff. Dec. 23, 1986). That version was construed as applying only when money was "received for the state or for the use of any state officer or board." 1979 Op. Att'y Gen. No. 79-030 at 2-100. Its companion sections, R.C. 131.05 and 131.06, applied "when a state officer [received] fees or advances of money that [might] be subject to refund or return to the sender or when such receipts [had] not yet accrued to the state," requiring that such contingent moneys be deposited in a separate or individual account within the State Depository Trust Fund in the state treasury. Id. at 2-100. The intent of the earlier version of R.C. Chapter 131. was described by my predecessor as follows:

The intent of the General Assembly in the enactment of the aforementioned statutes is, in my opinion, quite clear; any funds coming into the possession of a state officer or board through the performance of a state function are payable to the state treasury unless the officer or board is expressly exempt from the provisions of R.C. Chapter 131. State ex rel. Tracey [sic] v. State Board of Accountancy, 129 Ohio St. 66 (1934); see e.g., 1956 Op. Att'y Gen. No. 7539, p. 891 (R.C. 5593.12 exempts the State Bridge Commission from the provisions of R.C. Chapter 131.)

Id. at 2-100. See generally 1979 Op. Att'y Gen. No. 79-113; 1957 Op. Att'y Gen. No. 1230, p. 631.

Code. If the amount is not paid within forty-five days after payment is due, the officer, employee, or agent shall certify the amount due to the attorney general, in the form and manner prescribed by the attorney general, and notify the director of budget and management thereof. The attorney general shall give immediate notice by mail or otherwise to the party indebted of the nature and amount of the indebtedness and shall collect the claim or secure a judgment and issue an execution for its collection. Each claim shall bear interest, from the day on which the claim is due, at the base rate per annum for advances and discounts to members banks in effect at the federal reserve bank in the second federal reserve district. The attorney general and the chief officer of the agency reporting the claim may adjust any claim in such manner as is equitable. They may extend the time of the payment of a claim or judgment for such period of time not to exceed one year as is best for the interests of the state, and they may require and take security for its payment. (Emphasis added.)

It is my understanding that moneys collected by the Commission pursuant to the service agreements in question are payable to the Commission, which serves as agent for the lenders. Since, in collecting such moneys, the Commission is exercising its statutory authority, the Commission must be viewed as collecting moneys that are payable to the state and the persons responsible for administering the statutes under which the Commission functions must, under R.C. 131.02,³ pay such amounts into the state treasury in the manner set forth in R.C. 113.08.

³ R.C. 131.02 sets forth a procedure that is to be followed if amounts are not paid within forty-five days after payment is due. Such procedure is not, however, applicable to the collection of loan payments pursuant to the service agreements in question. Federal and state laws governing the guarantee of student loans require that certain collection efforts be made to collect delinquent guaranteed loans. See 20 U.S.C. §§1071 through 1087-2; 3 Ohio Admin. Code 3351-1-08 (setting forth requirements for due diligence efforts by lenders to collect delinquent guaranteed loans and time periods within which such efforts must be undertaken); 3 Ohio Admin. Code 3351-1-09 (describing the collection assistance provided to lenders by the Collection Assistance Department of the Ohio Student Loan Commission). Only after a specified time period has passed is a guaranteed loan considered to be in default. See 20 U.S.C. §1078; 20 U.S.C. §1080(a) (requiring that the beneficiary of federal loan insurance "meet the standards of due diligence in the collection of the loan"); 20 U.S.C. §1080(e)(2) (defining "default" to include "only such defaults as have existed for (A) one hundred and twenty days in the case of a loan which is repayable in monthly installments, or (B) one hundred and eighty days in the case of a loan which is repayable in less frequent installments"); 3 Ohio Admin. Code 3351-1-10(A) ("[a] loan is considered to be eligible for guarantee payment whenever any of the following occurs:...(d) A borrower's failure to make contractual loan payments for one hundred twenty days"). Once a default is established, the guarantee is paid, and at that point the Attorney General becomes

R.C. 113.08 states, in part:

Except as otherwise provided by law, every state officer, employee, and agent shall, at the times and in the manner prescribed by rule of the treasurer of state, pay to the treasurer of state all money, checks, and drafts received for the state, or for the use of the officer, employee, or agent, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, or otherwise. The rules shall include procedures for dealing with checks not accepted for deposit by a financial institution and procedures for making deposits into the custodial funds of the treasurer of state. (Emphasis added.)

The language "received for the state, or for the use of the officer, employee, or agent" appears to apply only to money that accrues to the state for its benefit, see generally Op. No. 79-030; note 2, supra, and not to money collected on behalf of lenders pursuant to loan servicing agreements. R.C. 113.08 does, however, also require that rules adopted by the Treasurer include "procedures for making deposits into the custodial funds of the treasurer of state," thereby indicating that the Treasurer is to establish a comprehensive scheme covering the deposit of all moneys paid to the state, whether or not they are available for the use of the state, except where statutory exemptions apply. See R.C. 131.02. See generally Op. No. 80-033; Op. No. 79-113 at 2-377 (stating that R.C. Chapter 131 applies to any money received by any state department or commission, unless there is an express exemption); 1957 Op. Att'y Gen. No. 1230, p. 631 (syllabus, paragraph two) ("[t]he

involved in collection efforts. 3 Ohio Admin. Code 3351-1-11 states:

(A) The Ohio student loan commission continues to perform collection activities on defaulted accounts after lenders have been reimbursed.

....
(E) Attorney general involvement

(1) To ensure total liquidation, many default accounts require litigation initiated by the Ohio attorney general's office. Litigation may include a court order for a wage garnishment, a bank account attachment, a lien on real property, a lien on a trust account, or any combination of these actions. Litigation can be brought against out-of-state borrowers who are in default as well as against Ohio residents.

(2) The commission utilizes the Ohio attorney general and contracts with nationwide collection agencies to perform collection activities both inside and outside the state of Ohio. The commission and the collection agencies maintain constant follow-up on all default accounts but make sure to adhere to all collection laws.

The more specific provisions governing the collection and guarantee of student loans prevail over the general provisions of R.C. 131.02 in this regard. See R.C. 1.51.

retention and deposit of all receipts received by state officers, departments, boards and commissions are subject to the provisions of Sections 131.01 and 131.05, Revised Code"); 1956 Op. No. 7539.

The Treasurer of State has enacted various rules governing the deposit of moneys received by state officials. 1 Ohio Admin. Code 113-1-01 governs the deposit of "moneys, checks, and drafts received for the state, or for the use of any...state officer, state institution, department, board, or commission." The moneys with which you are concerned, although received by the state, are not received for its use and, thus, do not appear to be subject to rule 113-1-01. See note 2, supra. The Treasurer has, however, also adopted rules governing state agency custodial accounts, 1 Ohio Admin. Code 113-2-01, and the Treasurer of State's Contingent Fund, 1 Ohio Admin. Code 113-3-01. These rules appear to be applicable to the situation with which you are concerned.

R.C. 113.10 establishes the Treasurer of State's Contingent Fund, which holds certain moneys that are not part of the state treasury. R.C. 113.10⁴ states:

There is hereby created the treasurer of state's contingent fund, which shall not be a part of the state treasury. Money received by the treasurer of state that is provisional in nature or the disposition of which cannot be determined immediately shall, in accordance with rules adopted by the treasurer of state, be credited to this fund until a determination is made as to the final disposition of the money. The treasurer of state shall establish by rule the form and manner of deposits into and disbursements from the fund and the circumstances under which deposits may be

⁴ Prior to the enactment of existing R.C. 113.10, see Sub. H.B. 201, 116th Gen. A. (1985) (eff., in part, July 1, 1985), contingent receipts were held in the State Depository Trust Fund. R.C. 131.04, which was repealed, as of January 1, 1986, by Section 3(F) of Sub. H.B. 201, stated:

For the purpose of providing a method to properly collect, deposit, and audit contingent receipts received by various state departments, there is hereby created the "state depository trust fund" of which the treasurer of state shall be the custodian.

See 1963 Ohio Laws 69, 1516 (Am. S.B. 276, eff. Sept. 16, 1963); 1982 Op. Att'y Gen. No. 82-082 at 2-230 n. 1; 1980 Op. Att'y Gen. No. 80-044. Section 29 (uncodified) of Sub. H.B. 201 states:

All moneys in the State Depository Trust Fund created by former section 131.04 of the Revised Code are hereby transferred to the Treasurer of State's Contingent Fund created by section 113.10 of the Revised Code as enacted by this act. The transfer of these moneys is not intended to alter their final disposition according to law.

made into and disbursements may be made from the fund. All income earned on money credited to this fund shall be credited to the general revenue fund. (Emphasis added.)

"Provisional" ordinarily means "having the nature of a temporary provision; arranged or established for the time being, pending permanent arrangement or establishment." Webster's New World Dictionary 1145 (2d college ed. 1978). Moneys that are received as loan payments and held temporarily before being transferred to the lenders appear to fit within this concept. See generally 1980 Op. Att'y Gen. No. 80-044.

With respect to the administration of the Contingent Fund, rule 113-3-01 states:

(A) All money collected by the treasurer that, in the treasurer's discretion, is provisional in nature or the disposition of which cannot be determined immediately, shall be deposited to the treasurer of state's contingent fund.

(B) Any agency that receives money which the agency believes is provisional in nature or the disposition of which cannot be determined immediately, may request approval by the treasurer for deposit into the contingent fund. Such requests shall be in writing and shall include the agency's reasons for believing that the money should be deposited in the contingent fund and not into or as a part of the state treasury. The agency shall provide such additional information as may be required by the treasurer in considering a request.

(C) In making a determination on a request, the treasurer shall consider the nature of the money (i.e., escrow, refund, etc.), whether other feasible methods of accounting for the money exist, and such other factors or information as the treasurer deems appropriate to each particular circumstance. The treasurer shall notify the agency, in writing, of the approval or denial of a request.

(D) Upon receipt of the approval of a request, the agency shall provide to the treasurer a list of signatures of three individuals who are authorized to request withdrawals of the money.

(E) Deposit of moneys approved for inclusion in the treasurer's contingent fund shall be on forms provided by the treasurer.

(F) Withdrawal of money in the treasurer of state's contingent fund shall be requested on forms provided by the treasurer, and shall be affected by the treasurer upon cash availability in the agency's account. The agency must certify that the withdrawal is for a proper and legitimate use of such money. (Emphasis added.)

It appears, therefore, that, if the approval of the Treasurer of State is obtained, the moneys in question may be deposited into the Contingent Fund.

Another manner in which the Treasurer of State may hold moneys that are not available for the use of the state is by the establishment of a custodial account. R.C. 113.05 states, in part:

(A) The state treasury consists of the moneys, claims, bonds, notes, other obligations, stocks, and other securities, receipts or other evidences of ownership, and other intangible assets of the state that are required by law to be deposited in the state treasury or are otherwise a part of the state treasury. All assets of the state treasury shall be kept in the rooms assigned the treasurer of state, with the vaults, safes, and other appliances therein; provided, that:

(1) Securities required by law to be deposited or kept in the state treasury may be deposited for safekeeping with the federal reserve bank of Cleveland, Ohio or secured and insured depositories in or out of this state as designated by the treasurer of state.

(2) Public moneys may be kept in constituted state depositories.

(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. All assets of the custodial funds of the treasurer of state shall be kept in either or both of the following:

(1) The rooms assigned the treasurer of state, with the vaults, safes, and other appliances therein;

(2) The federal reserve bank of Cleveland, Ohio or secured and insured depositories in or out of this state as designated by the treasurer of state.

(C) Assets of the state treasury shall not be commingled with assets of the custodial funds of the treasurer of state. (Emphasis added.)

Since moneys received by the CRC as loan payments are, pursuant to R.C. 9.38 and R.C. 131.02, required to be paid to the Treasurer of State, they are moneys "required by law to be kept in the custody of the treasurer of state" for purposes of R.C. 113.05(B), and since they must be paid periodically to the lenders on whose behalf they are collected, they "are not part of the state treasury" for purposes of R.C. 113.05(B). See generally Op. No. 82-082; Op. No. 82-003; Op. No. 79-113; Op. No. 79-030. They appear, therefore, to come within the statutory definition of custodial funds.

Rule 113-2-01 governs the establishment of custodial accounts, as follows:

(A) Any state agency requesting a custodial account must do so in writing to the treasurer of state. Specific statutory authority to establish an account outside of the state treasury must be cited. In the absence of specific legal authority, a formal recommendation of the auditor of state may be considered.

(B) The treasurer shall designate the financial institution. Special banking needs of the state agency (i.e., direct deposit) may be implemented by the treasurer.

(C) The state agency shall provide to the treasurer a list of signatures of three individuals who are authorized to request withdrawals from the account.

(D) The state agency shall provide to the treasurer a list of three persons who are authorized to provide investment instructions, including cash requirements and participation in the state treasurer's investment pool.

(E) At least once each day, every state agency shall pay to the treasurer, on forms provided by the treasurer, all moneys, checks, and drafts received by it for deposit into a custodial account.

(F) Withdrawals shall be requested on forms provided by the treasurer and shall be affected by the treasurer upon cash availability in the account. Withdrawals shall be by check or by wire transfer; provided, however, that withdrawals for the purpose of deposit into the state treasury shall be by wire transfer only.

(G) The agency must certify that the withdrawal of funds from a custodial account is for a proper and legitimate use of such funds. (Emphasis added.)

No statutory provision expressly authorizes the establishment of a custodial account to hold the moneys in question. Cf. R.C. 3351.08(F) (expressly providing for a fund in the custody of the Treasurer of State, which is not part of the state treasury, to hold special loan insurance premiums). See generally No. 82-082. It appears, however, that the fact that the moneys in question must be remitted to the lenders, together with the requirement of R.C. 9.38 and R.C. 131.02 that they be paid to the Treasurer of State, brings them within the meaning of custodial funds, as that term is used in R.C. 113.05(B), and presents the possibility that a custodial account may be established to hold such moneys. As is indicated in rule 113-2-01(B), the establishment of a custodial account might, in appropriate circumstances, permit the use of the direct deposit technique currently in use by the CRC. See generally 1974 Op. Att'y Gen. No. 74-054.

I conclude that, since the moneys in question are to be held by the Treasurer of State but are not available for the use of the state, they should not be placed in the state treasury, but should be held either in the Treasurer of State's Contingent Fund or in a custodial account. The determination as to whether a custodial account should be established in a particular case, or whether certain moneys should be held in the Treasurer of State's Contingent Fund, appears to be within the discretion of the Treasurer of State, based upon sound accounting principles, practical considerations, and recommendations from the Auditor of State. See 1 Ohio Admin. Code 113-2-01(A) and 113-3-01. It is beyond the scope of this opinion to render advice concerning the making of that determination with respect to the moneys in question. See generally 1985 Op. Att'y Gen. No. 85-007; 1984 Op. Att'y Gen. No. 84-098; 1984 Op. Att'y Gen. No. 84-067.

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

1. Pursuant to R.C. 9.38 and R.C. 131.02, moneys that are collected by the Ohio Student Loan Commission on behalf of lenders and are to be remitted to lenders are public moneys that must be paid to the Treasurer of State.
2. Moneys that are collected by the Ohio Student

Loan Commission on behalf of lenders and are to be remitted to lenders are not available for other uses and should not be placed in the state treasury. Such moneys should, instead, be held either in the Treasurer of State's Contingent Fund or in a custodial account, as determined by the Treasurer of State.