

OPINION NO. 72-017**Syllabus:**

The Treasurer of State is authorized to enter into so-called repurchase transactions which involve the purchase, including acquisition of title and possession thereof, of securities, maturing or redeemable within two years, of the types described in divisions (A) and (B) of Section 135.14, Revised Code, and involve further an offer by the seller to repurchase said securities at the end of a stated number of days at the price paid by the Treasurer plus an additional stated sum.

To: Gertrude W. Donahey, Treas., Office of Treasurer of State, Columbus, Ohio
By: William J. Brown, Attorney General, March 14, 1972

I am in receipt of your request for my opinion, stated as follows:

"Under Section 135.14 Revised Code of Ohio, can the Treasurer of the State of Ohio invest interim monies of the State of Ohio in repurchase agreements."

You have also supplied me with materials reflecting the documentation and procedures usable by your office in this type of transaction, such materials having been revised recently in light of an opinion on a question similar to yours that the Honorable James Hughes, City Attorney of the City of Columbus, rendered to the school board of that city. The documentation form constitutes an acknowledgment by a selling bank that it has sold you securities eligible for investment, pursuant to provisions (A) and (B) of Section 135.14, Revised Code, for a price equal to the face amount of the securities and has also transferred possession thereof to your trustee, as such trustee is defined in Section 135.18, Revised Code. Additionally, the selling bank confirms an offer to repurchase the same securities, within a stated number of days following the sale, for the amount you paid plus a further amount as stated

therein. The procedures covering such transactions prescribe the detailed steps necessary to obtain such eligible securities and to retransfer them to the bank involved.

As indicated above, provisions of Section 135.14, supra, are applicable. Pertinent parts are as follows:

"The treasurer or governing board may invest or deposit any part or all of the interim moneys, provided that such investments will mature or be redeemable within two years from the date of purchase. The following classifications of obligations shall be eligible for such investment or deposit:

"(A) Bonds, notes, or other obligations of or guaranteed by the United States, or those for which the faith of the United States is pledged for the payment of principal and interest thereon;

"(B) Bonds, notes, debentures, or other obligations or securities issued by any federal government agency, or the export-import bank of Washington;

" * * * * *

"If any securities or certificates of deposit purchased under the authority of this section are issuable to a designated payee or to the order of a designated payee, the name of the treasurer and the title of his office shall be so designated. If any such securities are registrable either as to principal or interest, or both, then such securities shall be registered in the name of the treasurer as such.

"The treasurer is responsible for the safekeeping of all securities or certificates of deposit acquired by him under this section. Any of such securities may be deposited for safekeeping with a qualified trustee as provided in section 135.18 of the Revised Code. Interest earned on any investments or deposits authorized by this section shall be collected by the treasurer and credited by him to the proper fund of the state or subdivision.

" * * * * *

I assume that the repurchase transactions are restricted to securities of the types described in divisions (A) and (B) of that Section and are such that mature or are redeemable within two years of the date of purchase. Purchases of that type are expressly permitted and no objection could be made to repurchase transactions in as far as the type and maturity or redemption date are concerned. I assume also that, where time permits, the name and title of the Treasurer are designated on the securities involved in the transaction, where such securities are of the types described in the next to last paragraph quoted above from the Section.

The documentation establishes that possession of the securities is transferred to the trustee as directed and authorized under the last of the above quoted provisions of the Section. It appears therefore that the repurchase transactions you describe do involve securities that are eligible for acquisition by the Treasurer and that such transactions are executed so as to vest title and possession of such securities in the Treasurer.

That leaves for consideration the contractual language under which the Treasurer is authorized to resell the same securities to the original transferor. That language in the documentation is as follows:

"As part of the consideration of the above sale, we hereby offer to repurchase the same securities from you _____ days from date, for the amount paid by you plus _____ Dollars (\$ _____)."

It appears that the seller (transferor) undertakes to repurchase the same securities at the end of the stipulated period at the original cost to the Treasurer plus an additional amount as stipulated in the document. Without engaging in detailed analysis of the conditions and covenants of the contemplated contract, it may be concluded that the purpose and general effect of it is the creation of an irrevocable offer by the seller, that is open to acceptance of the Treasurer on the stipulated date by tender back of the securities in exchange for the total of the consideration so prescribed. Viewed in that context, the question becomes whether or not the Treasurer has the power to avail herself of such contractual provisions.

Generally considered, there can be no question but that the Treasurer has power to contract for the purchase and sale of securities for the simple reason that such transactions cannot be made without entering into contracts. Thus, purchase is accomplished by entering an order to buy, followed by a confirmation from the agent or broker, constituting at that point an executory contract, which is executed a few days later on or before the closing date, by deposit of a check for the amount of the purchase price and still later by receipt of the securities. Sales are effected in similar manner.

Restrictions do exist, however, as set out in the following provision of Section 135.14, supra:

"Whenever, during a period of designation, the treasurer classifies public moneys as interim moneys, he shall notify the governing board of such action. Such notification shall be given within thirty days after such classification and in the event the governing board does not concur in such classification or in the investments or deposits made under this section, the governing board may order the treasurer to sell any of such securities or certificates of deposit, and any such order shall specifically describe the securities or certificates of deposit and fix the date upon which they are to be sold. Securities or certificates of deposit so ordered to be sold shall be sold for cash by the treasurer on

the date fixed in such order at the then current market price. Neither the treasurer nor the members of the board shall be held accountable for any loss occasioned by sales of securities or certificates of deposit at prices lower than their cost. Any loss or expense incurred in making such sales is payable as other expenses of the treasurer's office."

That language is related to Section 135.15, Revised Code, the pertinent portion of which is as follows:

"Whenever the governing board is of the opinion that the actual amount of active deposits is insufficient to meet the anticipated demands on such active deposits, it shall direct the treasurer to sell interim money investments or deposits or transfer from the inactive deposits to the active deposits an amount sufficient to meet such demands. The board shall designate in such order the depositories from which withdrawals for such purpose shall be made and the amounts to be withdrawn from each. * * *"

Both such restrictions must be construed as giving the Board of Deposit supervisory power over the amounts of the total funds of the State that are to be classified as active, interim and inactive. Where the Treasurer has classified funds as interim, investment or deposit as such would normally follow and under the first of the two quoted provisions, the funds so classified could only be reclassified effectively by the Board after the securities purchased by the Treasurer had been sold. The intention of these provisions appears to be limited to those types of reclassification of funds rather than direct control over all investments, thus leaving the Treasurer to deal appropriately with the funds within each classification after the Board's determination or redetermination of the total amount to be included in each classification.

More broadly, one of my predecessors has expressed the general view that the Treasurer is authorized to deal with the funds of the State, even where not expressly authorized by statute, in accordance with accepted business methods where honest effort is involved to solve practical problems of fund investment and where such funds remain protected against loss. This is summarized, in Opinion No. 1404, Opinions of the Attorney General for 1916, at page 528 (Volume 1) as follows:

"Although there is no provision of the General Code directly authorizing the creation and use of such collection account deposit, yet by reason of the exigency resulting from the unusual situation existing during the period of time referred to, I believe that the treasurer of state was justified in following the plan adopted by him. It was in accordance with accepted business methods, and was apparently an honest endeavor to solve the situation which was not anticipated and not provided for in the depository law. It is true that any of the several possible methods of solving the difficulty is

liable to abuse in the hands of a dishonest treasurer, but so long as an honest effort is made to place such funds as rapidly as possible with qualified depositories of inactive funds, and so long as the active depositories are filled to capacity the state does not suffer and the treasurer is able to secure himself and the funds of the state."

The problem you confront is one of providing some earnings on funds not needed in the active fund account during very short periods of time, which funds would otherwise be idle and be maintained at some administrative cost without prospect of interest thereon. The device you propose is the investment of such funds in government securities of a type you are authorized to purchase, together with a contract under which you may resell them to the original seller for the amount you paid plus an amount reflecting earnings on the investment for the short time you contemplate holding it. Should the original seller default on the contract, the Treasurer has and could retain title and possession of the securities and accordingly would obtain the stated interest on the securities. If there is no default by the original seller the Treasurer would have obtained some earnings during the period the securities are held.

While there is no express statutory authorization for this type of transaction, it is my opinion that the funds of the State are fully safeguarded, that the course of dealing is in accord with customary business standards and that it is an honest effort to employ the State funds for the advantage of the State revenues.

In specific answer to your question it is my opinion, and you are so advised, that the Treasurer of State is authorized to enter into so-called repurchase transactions which involve the purchase, including acquisition of title and possession thereof, of securities, maturing or redeemable within two years, of the types described in divisions (A) and (B) of Section 135.14, Revised Code, and involve further an offer by the seller to repurchase said securities at the end of a stated number of days at the price paid by the Treasurer plus an additional stated sum.