

**OPINION NO. 85-077****Syllabus:**

1. Pursuant to R.C. 135.35(A)(2), a county investing authority may invest inactive moneys of the county in United States Small Business Administration secondary market certificates.
2. Pursuant to R.C. 135.35(A)(2), a county investing authority may invest inactive moneys of the county in United States Small Business Administration secondary market certificates by payment of a premium even though such premium is not covered by a federal guaranty and is subject to loss in the event of prepayment of, or default on, the underlying obligation.
3. Pursuant to R.C. 135.39, if the county investing authority invests inactive moneys in United States Small Business Administration secondary market certificates and the premium is lost, no liability will attach to the investing authority if it acted reasonably. Even if the investing authority did not act reasonably in purchasing United States Small Business Administration secondary market certificates at a premium and the premium is lost, such officials and their sureties shall be relieved from liability if they have acted pursuant to R.C. 135.35(A)(2) and all other pertinent provisions of law.

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To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio  
By: Anthony J. Celebrezze, Jr., Attorney General, December 6, 1985

I have before me your request for my opinion concerning the authority of a county to invest in United States Small Business Administration secondary market certificates.

Pursuant to a telephone conversation with a member of your staff, I have rephrased your questions to read as follows:

1. May a county investing authority as defined in R.C. 135.31(C) invest inactive county moneys in United States Small Business Administration (S.B.A.) secondary market certificates notwithstanding the repeal of R.C. 321.44 by Amended Substitute House Bill No. 230 of the 114th Ohio General Assembly, effective March 15, 1982?
2. If the answer to the preceding question is in the affirmative, may the county investing authority purchase such certificates at a premium when the S.B.A. guarantees only the unpaid principal balance and accrued interest due thereon as of the date of purchase by the S.B.A.?
3. Are the county investing authorities and their sureties personally liable for a loss to the county arising from the purchase of an S.B.A. secondary market certificate at a premium and the subsequent prepayment of or default upon the loan by the debtor?

In 1981 Op. Att'y Gen. No. 81-029, my predecessor concluded:

When the Small Business Administration guarantees the payment of principal and interest on secondary market certificates, the faith of the United States is pledged for such obligations. A board of county commissioners may, therefore, invest currently inactive funds in such certificates pursuant to R.C. 321.44.

Op. No. 81-029 (syllabus). Your first question arises in light of the repeal of R.C. 321.44.<sup>1</sup>

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<sup>1</sup> Prior to its repeal in 1981-1982 Ohio Laws, Part I, 2079 (Am. Sub. H.B. 230, eff. March 15, 1982), R.C. 321.44 provided in pertinent part as follows:

The board of county commissioners in each county may, by resolution adopted and recorded, invest so much of the funds received by the county as are not required to meet current expenses, in bonds or other interest bearing obligations of the United States or those for the payment of principal and interest of which the faith of the United States is pledged, provided the maturity of the bonds is not later than three years after the date of the investment.

Am. H.B. 1, 100th Gen. A. (1953) (eff. Oct. 1, 1953).

In the same act in which it repealed R.C. 321.44, the General Assembly enacted R.C. 135.31-.40 as part of the Uniform Depository Act. 1981-1982 Ohio Laws, Part I, 2079 (Am. Sub. H.B. 230, eff. March 15, 1982). R.C. 135.35 governs the deposit and investment of the inactive moneys of a county. See R.C. 135.31(B) (defining "inactive moneys" for purposes of R.C. 135.31-.40 as "all public moneys in public depositories in excess of the amount determined to be needed as active moneys"). See also R.C. 135.31(A) (defining "active moneys" for purposes of R.C. 135.31-.40 as "an amount of public moneys in public depositories determined to be necessary to meet current demands upon a county treasury"). R.C. 135.35(A) provides in pertinent part as follows:

The investing authority<sup>2</sup> shall deposit or invest any part or all of the county's inactive moneys. The following classifications of securities and obligations are eligible for such deposit or investment:

(2) Bonds, notes, debentures, or other obligations or securities issued by any federal government agency, including, but not limited to, federal national mortgage association debentures and discount notes, or by the export-import bank of Washington, whether or not they are guaranteed by the United States.... (Footnote added.)

In order to resolve your first question, I must determine whether secondary market certificates issued by the Small Business Administration (S.B.A.) constitute obligations issued by a federal government agency within the meaning of R.C. 135.35(A)(2).

The S.B.A. is a creature of federal law, and clearly is a federal government agency. See 15 U.S.C. §633 (establishment of Small Business Administration under the direction and supervision of the President of the United States); Small Business Administration v. McClellan, 364 U.S. 446 (1960). The S.B.A. guarantees a portion of a qualifying loan made by a lender to a small business under a guaranty agreement between the lender and the S.B.A. 15 U.S.C. §636(a); 50 Fed. Reg. 12480 (1985) (to be codified at 13 C.F.R. §120.3-3). Under the guaranty agreement, the lender advances the total amount of the loan and the S.B.A. agrees to purchase, upon demand by the lender and subject to specific conditions, an agreed portion of the outstanding balance. 50 Fed. Reg. 12480 (1985) (to be codified at 13 C.F.R. §120.3-3). Federal law authorizes the sale of the guaranteed portion of any S.B.A. loan in the secondary market, subject to specified conditions. 15 U.S.C. §634(f). In a typical sales transaction, the S.B.A. issues, subject to a number of requirements, a certificate to the registered holder representing ownership of the S.B.A. guaranteed portion of an individual loan. 50 Fed. Reg. 12234 (1985) (to be codified at 13 C.F.R. §§120.800-.809). Each certificate issued by the S.B.A. is in the form of a security

<sup>2</sup> See R.C. 135.31(C) and R.C. 135.34 (providing that the investing authority is the county treasurer, except that where the county treasurer has failed to invest the inactive moneys of the county as provided by law or in disregard of the advice of the county investment advisory committee, then the board of county commissioners, one of its members, or one of its employees may be designated the investing authority).

obligation. See 50 Fed. Reg. 12235 (1985) (to be codified at 13 C.F.R. §120.803). The United States, through the S.B.A., guarantees to purchase from the registered holder, upon default of the small business borrower or upon the lender's failure to perform, the guaranteed portion for an amount equal to the unpaid principal balance of the guaranteed portion and the accrued interest due thereon as of the date of purchase by the S.B.A. 50 Fed. Reg. 12234 (1985) (to be codified at 13 C.F.R. §120.801); S.B.A. Form 1086, Secondary Participation Guaranty and Certification Agreement; Revised, 50 Fed. Reg. 5715 (1985).

From the foregoing discussion, it is apparent that secondary market certificates issued by the S.B.A. constitute obligations issued by a federal government agency within the meaning of R.C. 135.35(A)(2), and thus, pursuant to that section, a county investing authority may invest inactive moneys of the county in such certificates. In answer to your first question, it is my opinion that pursuant to R.C. 135.35(A)(2), a county investing authority may invest inactive moneys of the county in S.B.A. secondary market certificates.

Since I have answered your first question affirmatively, I turn now to your second question, whether a county investing authority may invest inactive moneys of the county in S.B.A. secondary market certificates by payment of a premium when such premium is not covered by a guaranty obligation of the United States through the S.B.A. but is subject to loss in the event of prepayment or default. As you note in your request letter, any premium paid by the registered holder of an S.B.A. secondary market certificate for the guaranteed portion is not covered by the guaranty obligation of United States through the S.B.A. and is subject to loss in the event of prepayment of, or default upon, the underlying obligation.<sup>3</sup> 50 Fed. Reg. 12235 (1985) (to be codified at 13 C.F.R. §804); S.B.A. Form 1086, Secondary Participation and Certification Agreement; Revised, 50 Fed. Reg. 5715 (1985).

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<sup>3</sup> As you explain in your request,

[P]urchases [of SBA secondary market certificates] are normally made at a premium, in that the purchase price paid exceeds the face amount of the certificate. The premium is paid under the assumption that the amount received by the county during the term of the loan (principal and interest) will exceed the purchase price. As a result, the effect of paying the premium is to reduce the interest revenue to the county and to reduce the overall rate of return on the investment.

S.B.A. loans may, however, be prepaid without penalty or may default prior to maturity. As the guarantee of the S.B.A. only covers principal and interest to the date of default, the premium paid by an investor is at risk.

1981 Op. Att'y Gen. No. 81-029 did not consider the fact that investors normally pay a premium for S.B.A. secondary market certificates, payment of which is not guaranteed by the S.B.A.

As noted above, R.C. 135.35(A) provides that the county investing authority must deposit or invest any part or all of the inactive moneys of the county in enumerated types of obligations, including obligations issued by any federal government agency "whether or not [such obligations] are guaranteed by the United States." R.C. 135.35(A)(2). I have already concluded that secondary market certificates issued by the S.B.A. constitute obligations issued by a federal government agency within the meaning of R.C. 135.35(A)(2). Under R.C. 135.35(A)(2), a county investing authority may invest county inactive moneys in S.B.A. secondary market certificates whether or not such certificates are guaranteed by the United States. Cf. R.C. 135.35(A)(1) (providing for investment of county inactive moneys in "[b]onds, 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"). Under R.C. 135.35(A)(2), since a guaranty by the United States is not required, a county investing authority is not precluded from paying a premium on an investment of county inactive moneys in such certificates even though such premium is not covered by the guaranty of the United States through the S.B.A. In answer to your second question, I conclude that, pursuant to R.C. 135.35(A)(2), a county investing authority may invest inactive moneys of the county in S.B.A. secondary market certificates by payment of a premium even though such premium is not covered by a federal guaranty and is subject to loss in the event of prepayment or default.

In your final question, you ask whether county investing authorities and their sureties are personally liable for any loss to the county arising from the purchase of S.B.A. secondary market certificates at a premium and the subsequent prepayment of, or default upon, the loan by the borrower. R.C. 135.39 provides in pertinent part as follows:

A county treasurer, county deputy treasurer, or members of a board of county commissioners, when acting as investing authorities, and their bondsmen or sureties shall be relieved from any liability for the loss of any public moneys deposited or invested by them when they have acted pursuant to law ... but in no event shall liability attach to a treasurer, deputy treasurer, or member of a board where the proximate cause of the loss is due to a risk arising from an investment reasonably made under their authority as investing authorities.

Thus, pursuant to R.C. 135.39, liability shall not attach to a county treasurer, deputy treasurer, or member of a board of county commissioners for the loss of public moneys, see R.C. 135.31(E), invested by them where the proximate cause of the loss is due to a risk arising from an investment reasonably made under their authority as investing authorities. R.C. 135.39 further provides that where liability does attach to a county treasurer, deputy treasurer, or member of a board of county commissioners, such officials and their sureties shall be relieved from any liability for the loss of any public moneys invested by them when they have acted pursuant to law. As I concluded in response to your second question, a county investing authority may pursuant to R.C. 135.35(A)(2) invest inactive moneys of the county in S.B.A. secondary market certificates by payment of a premium even though such premium is not covered by a federal guaranty and is subject to loss in the event of a prepayment of, or default on, the underlying

obligation. Thus, if the county investing authority invests inactive moneys in S.B.A. secondary market certificates and the premium is lost, no liability will attach to the investing authority if it acted reasonably. Even if the investing authority did not act reasonably in purchasing S.B.A. secondary market certificates at a premium and the premium is lost, such officials and their sureties shall be relieved from liability if they have acted pursuant to R.C. 135.35(A)(2) and all other pertinent provisions of law.

In conclusion, it is my opinion, and you are hereby advised, that:

1. Pursuant to R.C. 135.35(A)(2), a county investing authority may invest inactive moneys of the county in United States Small Business Administration secondary market certificates.
2. Pursuant to R.C. 135.35(A)(2), a county investing authority may invest inactive moneys of the county in United States Small Business Administration secondary market certificates by payment of a premium even though such premium is not covered by a federal guaranty and is subject to loss in the event of prepayment of, or default on, the underlying obligation.
3. Pursuant to R.C. 135.39, if the county investing authority invests inactive moneys in United States Small Business Administration secondary market certificates and the premium is lost, no liability will attach to the investing authority if it acted reasonably. Even if the investing authority did not act reasonably in purchasing United States Small Business Administration secondary market certificates at a premium and the premium is lost, such officials and their sureties shall be relieved from liability if they have acted pursuant to R.C. 135.35(A)(2) and all other pertinent provisions of law.