



STATE OF INDIANA  
OFFICE OF THE ATTORNEY GENERAL  
INDIANA GOVERNMENT CENTER SOUTH, FIFTH FLOOR  
302 W. WASHINGTON STREET · INDIANAPOLIS, IN 46204-2770

**STEVE CARTER**  
ATTORNEY GENERAL

TELEPHONE (317) 232-6201

May 7, 2004

**OFFICIAL OPINION 2004-5**

The Honorable Tim Berry  
Treasurer of the State of Indiana  
Indianapolis, IN 46204

Dear Treasurer Berry:

You have requested our opinion on Indiana law relating to contracts for banking services<sup>1</sup> for state agencies. In your letter you advised us that some banks have solicited various state agencies for deposit, checking and cash handling services without the knowledge or consent of your office. Several individual agencies are considering entering into a contract with a bank with fees and charges much less favorable than those that your office negotiates on behalf of the state as a whole. Moreover, the agencies would not be required to purchase their own banking services by paying these fees and charges. Instead, banks would charge their fees against the investment income on state treasury funds your office has invested pursuant to Indiana Code article 5-13.

Your office wishes to clarify the underlying statutory authority to contract for banking services on behalf of agencies of the State of Indiana. Accordingly, you have asked for an official opinion on whether a state agency may deposit public funds and earn interest and incur transaction fees on an account without the prior approval and consent of the state treasurer.

**SHORT ANSWER**

It is our opinion that the authority to contract for banking services for state agencies rests exclusively with the treasurer of the state. Individual state agencies are not authorized to enter into independent contracts for banking services.

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<sup>1</sup> For the purposes of this Advisory Opinion, "banking services" shall mean the maintenance of any checking, deposit or other account into which public funds are placed, the computation, posting and payment of any interest thereon, the transfer of any public funds (whether by warrant, check, wire transfer, ACH or other means), the making of any loans or advancements on any account in which public funds are placed, and the preparation and maintenance of all statements, notices, computations, postings and charges in connection with such accounts.

### **STATUTORY ANALYSIS**

The deposit and investment of public funds<sup>2</sup> is extensively regulated by law. We begin with the receipt of funds by a state agency. Indiana Code section 4-13-2-21 requires that

All receipts from any source coming into the possession of any state agency<sup>3</sup> shall be deposited with the state treasurer each day or as soon as practicable after the same is received, unless otherwise provided by law . . . . (emphasis added).

Our laws further provide that “[t]he treasurer of state shall receive, account for, and pay over all moneys which are required by law to be paid into the state treasury”<sup>4</sup>, the state treasury being composed of, among other things “all monies from any source paid, belonging, or accruing to the state for the use of the state or to a state fund for any purpose.”<sup>5</sup> It is the treasurer of state, and not an employee of a state agency, who “is responsible for the safekeeping and investment of moneys and securities paid into the state treasury.”<sup>6</sup> It is the treasurer of the state, and not an employee of an individual agency, who is required to “give bond in an amount determined by the auditor of the state and the governor . . . conditioned on the faithful performance of the duties as treasurer.”<sup>7</sup>

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<sup>2</sup> “Public funds” means “all fees and funds of whatever kind or character coming into the possession of any public officer by virtue of that office.” IND. CODE § 5-13-4-20

<sup>3</sup> As used in IND. CODE § 4-13-2-1:

[T]he term ‘agencies of the state’, ‘agency’, or ‘agencies’ shall mean and include every officer, board, commission, department, division, bureau, committee, employee, and other instrumentality of the state including without limiting the effect of the foregoing, state hospitals, state penal institutions, and other state institution enterprises and activities wherever located, but excepting, unless specifically included, military officers and military and armory boards of the state, the state fair commission, the Supreme Court and the Court of Appeals, the legislative department of state government, including but not limited to the Senate, the House of Representatives, the legislative council, and the legislative services agency, and state colleges and universities supported in whole or in part by state funds, and persons and institutions under their control and excepting all counties, cities, towns, townships, school towns, townships and cities, and other municipal corporations or political subdivisions of the state.

<sup>4</sup> IND. CODE § 4-8.1-2-2

<sup>5</sup> IND. CODE § 4-8.1-1-1

<sup>6</sup> IND. CODE § 4-8.1-2-1. *See generally* IND. CODE §§ 4-8.1-2-6 through 4-8.1-2-14 for additional requirements placed upon the treasurer of state relative to reports, acknowledgements, and reconciliation of deposits made to the state treasury, and payments made from the state treasury.

<sup>7</sup> IND. CODE § 4-8.1-2-4.

The deposit of public funds is governed by Indiana Code chapter 5-13-6, and the investment “of the money in the state treasury is governed by IC 5-13.”<sup>8</sup> Indiana Code article 5-13 details the deposit and investment powers both of the state treasurer and the various political subdivisions and local government entities.<sup>9</sup> In order to be designated a depository for state public funds, a financial institution must make an application through the state treasurer for submission to the state board of finance and be approved by that body.<sup>10</sup> All depositories that have public funds on deposit are required to make monthly reports to the state board of depositories and pay an assessment to the public deposit insurance fund, which assessment “shall be deducted from the interest otherwise payable on that account.”<sup>11</sup>

Indiana Code section 5-13-6-1(b) directly addresses where public funds may be deposited, and it is clear that it is the state treasurer who makes the selection:

(b) . . . all public funds collected by state officers<sup>12</sup>, other than the treasurer of state, shall be deposited with the treasurer of state, or an approved depository selected by the treasurer of state not later than the business day following the receipt of the funds. The treasurer of state shall deposit daily on business days of the depository all public funds deposited with the treasurer of state. . . . (emphasis added).

Thus, if an agency comes into the possession of “receipts” at a time of day that they can be deposited anywhere, the only place they may be deposited is “with the state treasurer, or an approved depository selected by the treasurer”. Given the availability of statewide banking and the routine electronic transfer of funds, we can perceive of no practical reason why a state agency should find it necessary to independently contract with a bank to accept the deposit of public funds.<sup>13</sup>

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<sup>8</sup> IND. CODE § 4-8.1-1-4.

<sup>9</sup> The scope of this advisory letter is limited to banking services for state agencies and intentionally does not address requirements placed upon political subdivisions and other governmental entities.

<sup>10</sup> IND. CODE § 5-13-9.5, *et. seq.*

<sup>11</sup> IND. CODE §§ 5-13-12-1, -5; IND. CODE § 5-13-10.5-15.

<sup>12</sup> IND. CODE § 5-13-4-21 states: "Public officer" means any person elected or appointed to any office of the state or any political subdivision. "Public officer" includes an officer of all boards, commissions, departments, institutions, and other bodies established by law to function as a part of the government of the state or political subdivision that are supported wholly or partly by appropriations of money made from the treasury of the state or political subdivision or that are supported wholly or partly by taxes or fees. "Public officer" does not include an officer of an independent body politic and corporate set up as an instrumentality of the state but not constituting a political subdivision.

<sup>13</sup> Compliance with the “next business day” requirement is not required for detached offices of the department of natural resources or the department of state revenue if the funds on hand do not

Selection of the designated depository is particularly important when one considers the investment authority of the state. “Upon determination by the treasurer of state that cash of the state on deposit is in excess of its anticipated daily cash requirements, the treasurer of state may deposit the excess funds in deposit accounts of designated depositories,”<sup>14</sup> and these deposit accounts “must bear interest at rates of interest not less than the rates of interest paid from time to time by each financial institution to all its depositors making comparable investments.”<sup>15</sup>

The state treasurer does not, however, have the unfettered discretion to decide which designated depository receives state funds. Indiana Code section 5-13-10-3 states:

The treasurer of state may not deposit aggregate funds in deposit accounts in any one (1) designated depository in an amount aggregating at any one (1) time more than fifty percent (50%) of the combined capital, surplus, and undivided profits of that depository as determined by its last published statement of condition filed with the treasurer of state. . . .

The treasurer is required to publish semi-annual reports of the funds maintained in each depository, listing separately “funds in accounts subject to withdrawal on demand or by negotiable orders of withdrawal and funds evidenced by other accounts”.<sup>16</sup> All interest derived from investments of public funds in these deposit accounts must be “received to the general fund except as otherwise provided by law.”<sup>17</sup>

Thus, Indiana law assumes that all deposits will be made by the state treasurer (or pursuant to his/her direction), sets a maximum ceiling on the aggregate amount of public funds that may be held in any one designated depository at one time, requires public reporting of the amount and type of each account in which public funds are held, and requires that all interest go into the general fund. In order to be able to carry out this responsibility, the treasurer must be able to determine the “aggregate funds in deposit accounts”, a determination that may be impossible if individual state agencies maintain separate deposit accounts and move funds into and out of those accounts without the approval and knowledge of the treasurer.

The type of investments that may be made with state funds is detailed, and in each instance the investment is contemplated to be made by the state treasurer. For

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exceed one hundred dollars (\$100), although funds must be deposited not later than the business day following the day that they exceed one hundred dollars (\$100). IND. CODE § 5-13-6-1(f).

<sup>14</sup> IND. CODE § 5-13-10-1

<sup>15</sup> IND. CODE § 5-13-10-2

<sup>16</sup> IND. CODE § 5-13-10-4

<sup>17</sup> IND. CODE § 5-13-10-5

example, Indiana Code section 5-13-9-2.5 describes the permitted investments. It provides, in pertinent part:

- (a) An officer designated in section 1 of this chapter [*the state treasurer and county officer, or fiscal officer of a political subdivision*] may invest or reinvest funds that are held by the officer and available for investment in investments commonly known as money market mutual funds that are in the form of securities of or interests in an open-end, no-load, management-type investment company or investment trust registered under the provisions of the federal Investment Company Act of 1940, as amended (15 U.S.C. 80a et seq.)...
- (b) The investments described in subsection (a) shall be made through depositories designated by the state board of finance as depositories for state deposits under IC 5-13-9.5.

Finally, Indiana Code section 5-13-10.5-2 provides:

In addition to any other statutory power to make investments under any other law:

(1) the treasurer of state, under the guidelines established by the state board of finance; and

(2) any other public officer of the state authorized by statute or court order to make investments;

may invest or reinvest funds held by the treasurer of state or other public officer in any combination of the investments authorized under this chapter. In making the investment, the public official shall comply with the requirements in this chapter that apply to the investment.

One of the requirements with which the public officer must comply is Indiana Code section 5-13-10.5-17:

Any public officer of the state that makes a deposit in any deposit<sup>18</sup> or other account may be required to pay a service charge to the depository in which the funds are deposited, if the depository requires all customers to pay the charge for providing that service. If the total service charge cannot be computed before the investment, the investing officer of the state shall estimate the service charge and adjust the interest rate based on this estimate. The service charge may be paid by direct charge to the deposit or

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<sup>18</sup> IND. CODE § 5-13-4-7 defines "Deposit account" as any of the following: (1) Any account subject to withdrawal by negotiable orders of withdrawal, unlimited as to amount or number, and without penalty, including NOW accounts. (2) Passbook savings accounts. (3) Certificates of deposit. (4) Money market deposit accounts. (5) Any interest bearing account that is authorized to be set up and offered by a financial institution in the course of its respective business.

other account or in any other manner mutually agreed upon by the investing officer and the depository.

Again, our statutes contemplate that the treasurer will be making unified deposit and investment decisions on behalf of the State, and is mandated to make his investment decisions after taking into account service charges made by the depository. This intent is frustrated if individual agencies maintain deposit accounts for their own use, but banks charge the service fees and public deposit insurance fund assessments against accounts maintained by the treasurer.<sup>19</sup>

Having reviewed Indiana Code article 5-13, we find no authorization for a state agency to enter into any independent contract or agreement with any financial institution (even a depository otherwise approved by the state board of finance) either to receive or invest public funds. If the agency is not paying bank fees and assessments out of funds appropriated for that purpose, it could be argued that the practice violates article 10, section 3 of the Indiana Constitution, which provides that “no money shall be drawn from the treasury, but in pursuance of appropriations made by law.” Although a general appropriation has been made to the treasurer to pay fees and assessments on deposits and investments made by that office, no such appropriation has been made to pay fees and assessments on behalf of deposits and investments made by governmental agencies.<sup>20</sup>

Our laws regulating public purchasing by state agencies are not inconsistent with this analysis. Although the General Assembly has given the Department of Administration the authority “to supervise and regulate the making of contracts by state agencies”<sup>21</sup> and has enacted a comprehensive statutory framework governing public

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<sup>19</sup> There are indeed criminal sanctions for public officers who violate the requirements of title 5, article 13: “A public officer who knowingly fails to deposit public funds, or knowingly deposits or draws any check or negotiable order of withdrawal against the funds except in the manner prescribed in this article [IC 5-13], commits a Class B felony. The public officer also is liable upon the officer’s official bond for any loss or damage that may accrue.” IND. CODE § 5-13-4-3. See, *Cole v. State*, 790 N.E.2d 1049 (Ind. Ct. App. 2003) at 1053 holding that the lack of a “knowing or intentional” mens rea proof in Indiana Code section 5-13-4-3 does not violate the proportionality clause of article I, section 16 of the Indiana Constitution because the harm to the public “may be more pervasive yet difficult to detect.”

<sup>20</sup> See, e.g., IND. CODE § 5-13-10.5-17 (bank service charges) and Indiana Code § 5-13-10.5-15 (public depository insurance assessments). See generally *Orbison v. Welsh*, 179 N.E.2d 727, 736 (Ind. 1962) (“[N]o particular form need be followed in making of appropriation and it is not necessary that any particular language or words be used. The Legislature must merely indicate purpose for which money is to be used, the source from which it is to come, and indicate in some manner either sum to be used or method of ascertaining a maximum that may be used.”).

<sup>21</sup> IND. CODE § 4-13-1-4(2). A “state agency” to which Indiana Code 4-13 applies “means an authority, board, branch, commission, committee, department, division, or other instrumentality of the executive, including the administrative, department of state government. The term ‘state agency’ does not include the judicial or legislative departments of state government, nor does that term include a state educational institution as defined in IC 20-12-0.5-1”. IND. CODE § 4-13-1-1(b).

purchasing,<sup>22</sup> the general procurement statutes do not “apply to . . . (5) an investment of public funds.”<sup>23</sup> Rather, the legislature has reserved that activity to the constitutionally created office of the treasurer of state.

In summary, the General Assembly clearly recognizes the fact that financial institutions pay higher rates of interest, make certain types of investment opportunities available, and waive or substantially reduce service charges on larger accounts. By requiring that the oversight and responsibility for the deposit and investment of state funds be centralized in one office – that of the state treasurer – our laws are structured to maximize the earning potential of the state treasury within explicitly drawn parameters calculated to minimize risk, and contemplates that the treasurer will use the State’s aggregate investment portfolio to secure the optimum combination of interest earnings and banking fees by negotiating for all of the State’s investment and deposit services on a unified basis.

### **CONCLUSION**

It is our opinion that the authority to contract for banking services for state agencies rests exclusively with the treasurer of the state. Individual state agencies are not authorized to enter into independent contracts for banking services.

We trust the foregoing is responsive to your question.

Sincerely,

Stephen Carter  
Attorney General

Susan W. Gard  
Deputy Attorney General

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<sup>22</sup> IND. CODE § 5-22, et. seq.

<sup>23</sup> IND. CODE § 5-22-1-3(5)