

January 5, 2016

OFFICIAL OPINION 2016-2

The Honorable Suzanne Crouch
Auditor of State
200 W. Washington St.
Indianapolis, IN 46204

RE: Electronic Payment Policy and Electronic Funds Transfer

Dear Auditor Crouch:

You requested the opinion of the Office of the Attorney General (OAG) regarding the authority of the Auditor of the State to institute an electronic payment policy that would require political subdivisions and others to utilize an electronic funds transfer for certain remittances. Your specific questions are delineated below.

QUESTIONS PRESENTED

1. Can the Auditor of State (AOS) require political subdivisions to remit State funds using an electronic funds transfer (EFT)?
2. If the AOS can mandate the use of EFTs, how can the AOS enforce compliance with such a mandate?

BRIEF ANSWERS

1. Yes, the AOS can require political subdivisions to remit State funds using an EFT so long as in doing so it complies with the conditions provided in Ind. Code § 4-7-1-4.1.
2. The AOS can enforce the use of EFTs by rejecting payments made through other means; a political subdivision that does not make an acceptable payment by the time such payment is due is subject to statutory enforcement mechanisms.

ANALYSIS

- 1. The AOS has conditional authority to require political subdivisions to use EFTs when remitting State funds.**

The AOS has the power and duty to “[d]irect and superintend the collection of all money due to the state.” Ind. Code § 4-7-1-2(7). The AOS also has the power and duty to “[s]uperintend the fiscal concerns of the state and their management in the manner required by law and furnish the proper forms to [various officials of political subdivisions].” Ind. Code § 4-7-1-2(10).

Ind. Code § 4-7-1-4.1(b) directly addresses the use of forms: “The auditor of state shall approve forms and reports used by the auditor of state in a paper form, as a facsimile, or in an electronic form” Ind. Code § 4-7-1-4.1(c) empowers the AOS to facilitate this function: “The auditor of state may require that a form or report submitted to the auditor of state for processing must be submitted in paper form, as a facsimile, or electronically”

Though none of these sections explicitly directs the AOS to compel the use of EFTs, such a power is implicit in the AOS’s power to direct the use of particular forms. As a practical matter, before banks will make an EFT out of one account and into another, they require an authorization form giving them the authority to do so. Such a form must be properly authorized by the owner of the originating account (*i.e.*, the political subdivision).

Ind. Code § 4-7-1-4.1 gives the AOS the authority to create such an EFT authorization form and procedure. This statute, in concert with Ind. Code § 4-7-1-2, effectively requires compliance with the forms promulgated by the AOS. Without such a requirement, the AOS’s power to promulgate forms (and their attendant processes) would be largely meaningless, depriving the statute of its apparent purpose. *See e.g. Sexton v. Sexton*, 970 N.E.2d 707, 713 (Ind. Ct. App. 2012) (a court’s “goal is to construe the statute to effect the evident purpose for which it was enacted”) (internal quotations omitted).

Thus, as with other forms, the AOS can compel the use of an EFT authorization form. This would have the practical effect of compelling the use of EFTs for payments subject to such an authorization. Though this power is implicit, it is consistent with the apparent intent of these statutes and the Indiana Code as a whole. Several sections of the Indiana Code make specific authorizations for the use of EFTs, including authorizations for the AOS to make payments using EFTs. *See, e.g.*, Ind. Code §§ 4-8.1-2-7; 4-15-5.9-2; 6-8.1-10-5; 20-26-4-1; 33-39-7-12.5; 36-1-8-11.5; 36-12-7-10. This demonstrates that the legislature has sanctioned the use of this mechanism for a variety of purposes, including those similar to the one at issue here.

Moreover, the fact that specific authorizations of EFTs appear elsewhere but not within Ind. Code Chpt. 4-7-1 is not a “meaningful variation.” *See e.g. Cent. States, Se. and Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 941 (7th Cir. 2000) (“different words in a statute ... should be given different meanings unless the context indicates otherwise”). The specific authorizations that appear elsewhere in the Indiana Code were required because older language specifically allowed only for older mechanisms to make certain payments; without amending such language, EFTs could not be used. Under Ind. Code Chpt. 4-7-1, however, the AOS has broad, general powers to craft the mechanisms facilitating its functions; without any limiting language, no explicit authorization was ever required to allow the use of EFTs. This lack of necessity, combined with the legislature’s approval of EFTs throughout the Indiana Code, makes it unlikely that the lack of an explicit authorization of EFTs within Ind. Code Chpt. 4-7-1 is a meaningful variation. *See e.g. Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 825 (2013) (canon of meaningful variation is “no more than a rule of thumb”) (internal quotations omitted).

While the AOS has the authority to compel use of an EFT authorization form, it should be noted that this authority is conditional. Ind. Code § 4-7-1-4.1(b) states: “This section may not be implemented in a manner that interferes with the duties and powers of ... the state board of

accounts ... or the oversight committee on public records or the Indiana archives and records administration” Similarly, Ind. Code § 4-7-1-4.1(c) states that the authority granted in this section may only be used “if the requirement: (1) is approved by the state board of accounts; and (2) does not create a hardship for a person that submits the form or report to the auditor of state.” These conditions make it clear that the AOS’s authority to promulgate forms, particularly electronic forms, is subject to cooperation with other State entities and cannot “create a hardship” for those using the forms.¹

2. The AOS is not required to accept a payment that does not conform to its prescribed forms and processes. Should a political subdivision not make a conforming payment by the due date, it is subject to statutory enforcement mechanisms unless the AOS has accepted a non-conforming payment.

A political subdivision that fails to properly utilize and submit an EFT authorization form promulgated by the AOS would not be in compliance with its legal obligations under the Indiana Code. It is possible that such a lack of compliance could support legal action, as provided in the Indiana Code and discussed below. The practical effect of a political subdivision failing to comply with an EFT authorization form could also give rise to enforcement action by the AOS. Practically speaking, if a political subdivision fails to submit an EFT authorization form, it will not be able to make its remittances through the forms mandated by the AOS. Where a political subdivision remits payment in another form (*i.e.*, a physical check), this payment would not conform to the requirements the AOS has prescribed.

As indicated above, requiring the AOS to accept non-conforming payments would make the power to prescribe forms (and their attendant processes) meaningless. Thus, to give effect to Ind. Code Chpt. 4-7-1, one must conclude that the AOS is at liberty to reject non-conforming payments, subject to the conditions provided in Ind. Code § 4-7-1-4.1. If the AOS rejects the payment and the political subdivision refuses to make a conforming payment, the political subdivision would be subject to enforcement mechanisms intended to compel payment. Ind. Code §§ 4-7-1-6, -7 provide the relevant enforcement mechanisms:

Whenever any ... person has received moneys belonging to the state ... and shall fail to render an account thereof to, and make settlement with, the auditor, within the time prescribed by law, or where no particular time is prescribed, shall fail to render such account and make settlement, upon being required so to do by the auditor, within ten (10) days after such requisition, the auditor shall state an account against such officer or person,

¹ Exactly what would constitute a “hardship” under this statute is unclear. The concern, however, seems to be with electronic submission of forms/reports. The current prevalence of access to means of electronic communication makes it somewhat unlikely that a valid claim of “hardship” under this statute could be maintained. A temporary inconvenience in complying with the requirement to establish an EFT process does not constitute a “hardship.” “Abstract injury is not enough. It must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct.” *O’Shea v. Littleton*, 414 U.S. 488, 494, 94 S. Ct. 669 (1974) (internal punctuation omitted). See also *Natural Resources Defense Council v. Abraham*, 388 F.3d 701, 706 (9th Cir. 2004) (A hardship “does not mean just anything that makes life harder; it means hardship of a legal kind, or something that imposes significant practical harm upon the plaintiff.”).

charging ten per cent (10%) damages, and interest at the rate of six per cent (6%) per annum Ind. Code § 4-7-1-6.

Whenever any ... person ... shall fail to pay ... the amount to be paid ... within the time prescribed by law, or if no time is prescribed by law, then within the time specified by such auditor, the auditor ... shall institute suit for the recovery of the amount due and unpaid. Ind. Code § 4-7-1-7.

These sections provide the AOS access to both a financial and legal enforcement mechanism for the failure to pay State funds in a timely manner. Before either of these mechanisms can be used, however, a due date for any payment must be fixed; funds cannot be overdue unless one knows when such remittances are due. While statute does not prescribe a particular due date, Ind. Code § 4-7-1-6 identifies the AOS as the official entitled to set such a date, in accordance with any statutory mandates.

As the statutes merely require notice of such due dates, the AOS could set these dates in a variety of ways. Something as simple as a letter to a political subdivision noting the due date of a particular remittance would suffice. Alternatively, if the AOS was to provide this notice in the form of a schedule, noting various statewide due dates for various remittances, this would suffice as well. Anything between these options would also suffice, so long as political subdivisions have notice of what remittances are due and when.

Once the AOS gives notice of a due date for a particular remittance, a political subdivision that fails to make the remittance on time would be subject to the enforcement mechanisms described above. Ind. Code § 4-7-1-6 effectively provides, however, for a 10-day grace period after the due date before financial penalties can be imposed. A political subdivision that chooses to submit a non-conforming payment only discharges its obligations if the AOS chooses to accept such a payment. If the AOS rejects the non-conforming payment, then the political subdivision will be delinquent in its payment if it does not make a conforming payment by the due date.

CONCLUSION

The power to require political subdivisions to submit an EFT authorization form is implied within the AOS's power to prescribe forms to discharge its functions. This provides the AOS the practical power to compel the use of EFTs. Should a political subdivision fail to timely remit State funds through an EFT, when the AOS does not accept payment in another form, the AOS has access to financial and legal enforcement mechanisms provided in statute. Because these statutory enforcement mechanisms can only be used when a payment is past due, where due dates are not fixed in statute the AOS must provide notice of specific due dates for a remittance before it can use these mechanisms to enforce compliance.

Sincerely,

Gregory F. Zoeller
Attorney General