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October 23, 2009

OFFICIAL OPINION 2009-3

The Honorable Brian C. Bosma
Indiana House of Representatives
200 W. Washington St.
Indianapolis, IN 46204-2786

RE: Hoosier Fund Indiana Local Government Investment Pool

Dear Representative Bosma:

By letter of June 16, 2009, you posed several questions arising from the creation of the Hoosier Fund Indiana Local Government Investment Pool (hereafter, "Hoosier Fund" or "Interlocal Agreement"), a cooperative venture organized pursuant to the Interlocal Cooperation Act, Ind. Code § 36-1-7 *et seq.* Specifically, your questions are:

1. Where public funds are placed by a governmental entity in the local government investment pool created solely by governmental entities, do such funds, if invested according to state law as authorized by Ind. Code § 5-13, retain their status as public funds?
2. Are public funds invested solely in investments authorized by state law pursuant to Ind. Code § 5-13 through an interlocal agreement created under Ind. Code § 36-1-7 eligible for a determination of coverage by the Public Depository Insurance Fund (PDIF)?
3. Is an entity properly created, pursuant to Ind. Code § 36-1-7 by several governmental entities, a public entity?

BRIEF ANSWER

1. All funds invested by the Participants to the Interlocal Agreement would be "public funds," although some "public funds" may not necessarily be eligible for coverage by the PDIF should the designated depository become a "closed depository."
2. Public funds invested by Participants with the Custodian, a designated depository, would be eligible for a determination of coverage by the PDIF should the Custodian become a "closed depository." An exception might include "public funds" invested by "an independent body politic and corporate set up as an

instrumentality of the state," as this is an exclusion under the definition of "public officer." However, no conclusion is reached in this regard because such a matter has not been presented for a determination.

3. This Interlocal Agreement does not create a separate legal entity. It creates a joint board whereby all Participants are represented.

LEGAL ANALYSIS

The Hoosier Fund Interlocal Agreement was established in October of 2006 pursuant to Ind. Code § 36-1-7 *et seq.*, the Interlocal Cooperation Act.[1] The Hoosier Fund is designed to provide an investment pool for political subdivisions[2] or other legislatively created quasi-governmental entities or bodies corporate and politic that elect to participate. Neither the State nor a State agency may be a participant unless specifically authorized by the State Treasurer to do so.[3]

The Board of Representatives[4] includes all Participants and is composed of those persons empowered by Indiana law to direct the investment of public funds. The Interlocal Agreement acknowledges that, any confidentiality agreement notwithstanding, the State Board of Accounts is authorized access to any records concerning the balance and transaction activity of each participant.[5] Any meeting of the Board is subject to the Open Door Law, Ind. Code § 5-14-1.5 *et seq.*, and any records are subject to the Access to Public Records Act, Ind. Code § 5-14-3 *et seq.*[6]

The Program Administrator is CRF Financial Group, Inc.[7] However, the Program Administrator does not have investment discretion. Investment discretion remains with

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[1] The Hoosier Fund Interlocal was approved by the Indiana Attorney General, pursuant to Ind. Code § 36-1-7-4, on October 24, 2006. However, this is not the "effective date." According to the terms of the Interlocal Agreement, **Sec. 10.13** and **Article I Definitions**, the "effective date" is the first date that copies of the Interlocal Agreement have been executed by two Participants, the Custodian, and the Program Administrator. The Program Administrator (CRF Financial Group, Inc.) signed off on October 24, 2006, but the Custodian (US Bank National Association) did not sign off until March 23, 2009. It is not known whether any Participants have yet to join.

[2] A "political subdivision" would include any unit, school corporation, library district, local housing authority, fire protection district, public transportation corporation, local building authority, local hospital authority or corporation, local airport authority, special service district, or other separate local governmental entity that may sue and be sued, as well as a "special taxing unit." See, *e.g.*, Ind. Code §§ 36-1-2-13 ("political subdivision"), 36-1-2-10 ("municipal corporation"), and 36-1-2-18 ("special taxing district"). See also Ind. Code § 5-13-4-19, defining a "political subdivision" authorized to invest public funds.

[3] Pursuant to Ind. Code § 4-13-2-21 and Ind. Code § 5-13-6-1(b), a State agency must deposit funds it receives with the Treasurer.

[4] See **Article III** of the Interlocal Agreement. The Interlocal Agreement creating the Hoosier Fund is expansive. Only select, relevant portions of the Interlocal Agreement will be referenced.

[5] See **Article II, Sec. 2.5(e).** The State Board of Accounts acknowledged that it has received a copy of the Interlocal Agreement, as required by Ind. Code § 36-1-7-6.

[6] See **Article III, Sec. 3.6** and **Article X, Sec. 10.9**.

[7] See **Article IV, Sec. 4.1(b)**. CRF Financial Group, Inc., is a registered Indiana corporation. See also **Article VII, Sec. 7.3(a).**

the Board of Representatives[8] acting through its Treasurer.[9] The Program Administrator "shall at no time have custody of, or physical control over, any of the Investment Property."[10] The Program Administrator will, *inter alia*, advise the Board of Representatives concerning investments and assist in the making of certain transactions as permitted by Indiana law.[11] The Program Administrator will also maintain pertinent records, provide logistical support for meetings of the Board of Representatives, pay certain liabilities incurred, and engage in marketing activities to increase the number of participating governmental or quasi-governmental entities.[12] The Program Administrator can be terminated by the Board of Representatives or can resign.[13] Should the Interlocal Agreement be terminated, the Interlocal Agreement does provide for the disposition of the property, as required by Ind. Code § 36-1-7-3(a)(4).[14]

The Custodian for the collective interests of the Participants is U.S. Bank National Association.[15] The investment funds and property of the Participants are to be accounted for separately and do not "become assets or liabilities of the Custodian."[16]

Fees for the Program Administrator, the Custodian, and others retained by the Program Administrator, if needed, would be paid from the earnings on the Account.[17] All Participants must have the statutory authority to participate in the investment pool created by the Interlocal Agreement.[18] Participants can only invest funds that are authorized to be invested under Indiana law.[19]

Participating entities do not intend for the Interlocal Agreement to create a "business for profit," a "partnership or any other joint venture or association."[20]

The Interlocal Agreement is similar to the "master agreement" for the creation of a joint investment fund for political subdivisions authorized by the General Assembly through P.L. 224-2003, Sec. 276, adding Ind. Code § 5-13-9-10, effective July 1, 2003. However, the joint investment fund permitted under Ind. Code § 5-13-9-10 is limited to political

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[8] See **Article IV, Sec. 4.1(d)**.
[9] The Treasurer is elected from among the members of the Board of Representatives. See **Article III, Sec. 3.8**.
[10] See **Article IV, Sec. 4.1(e)**.
[11] See **Article IV, Sec. 4.4(a), (b)** and **Exhibit E**.
[12] See **Article IV, Sec. 4.6**.
[13] See **Article IV, Sec. 4.7** and **Article IX, Sec. 9.2**.
[14] See **Article IX**.
[15] The U.S. Bank National Association is designated by the State Board of Finance as an approved depository for public funds under Ind. Code § 5-13-9.5 *et seq.* See http://www.in.gov/tos/deposit/files/ALLDEP.pdf (last visited August 19, 2009). See also **Article VII, Sec. 7.2(a)**.
[16] See **Article V, Secs. 5.1(c) , 5.3** and **5.4**.
[17] See **Article VI, Sec. 6.1, Exhibit F,** and **Exhibit G**.
[18] See **Article VII, Sec. 7.1**.
[19] See **Article VIII, Sec. 8.1**.
[20] See **Article X, Sec. 10.6**.

subdivisions located within a county. The Interlocal Agreement expanded the concept beyond county borders.[21]

Public Funds

The Interlocal Agreement is consistent in its indication that Participants, all of whom would be governmental entities or quasi-governmental entities, must have the authority to invest funds in the investment pool, consistent with Indiana law. See, *e.g.*, **Article I** defining "Investment Funds" as available funds from each Participant for investment "but only if (i) the Representative appointed by such Participant is authorized pursuant to the laws of the State of Indiana to invest such funds[,] and (ii) the Participant has taken all actions necessary pursuant to the laws of the State or other applicable local law to authorize the delivery and investment of such funds."[22] The investment of public funds is authorized principally through Ind. Code § 5-13 *et seq.* The definition for "public funds" that applies throughout this chapter reads:

> **IC 5-13-4-20 "Public funds"**
> Sec. 20. "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. The term does not include:
> (1) support payments made to the clerk of a circuit court under IC 31-16-9 (or IC 31-1-11.5-13 before its repeal); or
> (2) proceeds of bonds payable exclusively by a private entity.

A "public officer," however, would not include all anticipated Participants in the Interlocal Agreement.[23] The applicable definition excludes officers of "an independent body politic and corporate set up as an instrumentality of the state...." Nevertheless, the Representative of such a Participant would be bound by the recitals of the Interlocal Agreement and could not invest its funds in any manner that would be inconsistent with Indiana law even though the funds may not be "public funds" as defined *supra*.

By definition, "public funds" will mean all fees and funds of whatever kind or character that come into the possession of any "public officer" by virtue of that office. "This definition indicates that funds are public only when they are in the possession of, or are

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[21] The General Assembly, during the 2007 session, authorized the creation of an "investment pool" for local governmental entities similar to the Hoosier Fund except that the State Treasurer administers the investment pool. The investment pool is not restricted to county borders. The investment pool is known as "TrustINdiana." Its website is at http://www.trustindiana.in.gov/home/ (last visited August 19, 2009).

[22] Also see **Exhibit E, Investment Criteria**, indicating that all investments must be those that are "legally permissible under Indiana law."

[23] **IC 5-13-4-21 "Public officer"**
Sec. 21. "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.

entrusted to, a public officer." *State Board of Accounts v. Indiana University Foundation*, 647 N.E.2d 342, 348 (Ind. Ct. App. 1995), *trans. den.* .

The nature of "public funds" deposited and invested by a "public officer" exercising authority granted under Ind. Code § 5-13 would not be changed through investment as contemplated by the Interlocal Agreement. Such "public funds" would remain "public funds."

Public funds can be employed for the payment of certain permissible fees under **Exhibit F (Program Administrator's Fee) and Exhibit G (Custodian's Fees)**. The fee-for-service agreements, as detailed in the Interlocal Agreement, will not transform the nature of the Program Administrator and Custodian from private entities into public entities supported by public funds. A private entity is not maintained or supported by public funds "merely because public monies make up a certain percentage of its revenue. If the relationship is, in fact, a fee-for-services (or goods) agreement then, clearly, an entity is not maintained or supported by public funds." *Indiana Convention & Visitors Association, Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208, 212-13 (Ind. 1991). See also *Perry County Development Corp. v. Kempf*, 712 N.E.2d 1020, 1026 (Ind. Ct. App. 1999).

While the operative definition for "public officer" excludes from "public funds" under Ind. Code § 5-13 those funds that entrusted to "an officer of an independent body politic and corporate set up as an instrumentality of the state but not constituting a political subdivision," this does not mean that such funds are not public in nature and subject to State oversight. The State Board of Accounts is required to "examine all accounts and all financial affairs of every public office and officer, state office, state institution, and entity." Ind. Code § 5-11-1-9(a). "State" is defined as including "any board, commission, department, division, bureau, committee, agency, governmental subdivision, military body, authority, or other instrumentality of the state, but does not include a municipality." Ind. Code § 5-11-1-16(b). A "public office" includes anyone "who for or on behalf of the state...receives, disburses, or keeps the accounts of the receipts and disbursements of any public funds," Ind. Code § 5-11-1-16(c), while a "public officer" is one "who holds, receives, disburses, or is required by law to keep any account of public funds or other funds for which the individual is accountable by virtue of the individual's public office," Ind. Code § 5-11-1-16(d). The term "public funds" is not defined in Ind. Code § 5-11; however, judicial construction has applied the definition in Ind. Code § 5-13 such that "funds are public only when they are in the possession of, or are entrusted to, a public officer." *State Bd. of Accounts v. Ind. University Foundation*, 647 N.E.2d at 348.

The Interlocal Agreement acknowledges the role of the State Board of Accounts. See **Article II, Sec. 2.5(e)**. Although the definition of "public funds" under Ind. Code § 5-13 would seem to exclude investment funds from certain instrumentalities of the State, which are otherwise eligible to be a Participant in the Interlocal Agreement, the funds would still be "public funds" to the extent that such funds are subject to audit by the State Board of Accounts. The State Board of Accounts' examination "is designed to ensure the

safekeeping of funds held under a trust created by law." *Id.* at 350. All funds invested through the Interlocal Agreement will be considered "public funds."

Public Depository Insurance Fund

Assuming such funds are "public funds," you asked whether the public funds invested through the Interlocal Agreement would be eligible for a determination of coverage by the Public Depository Insurance Fund (PDIF).

The Board for Depositories has as its purpose "to insure the safekeeping and prompt payment of all public funds deposited in any depository, to the extent they are not covered by insurance of any federal deposit insurance agency, by maintaining and operating in its own name the public deposit insurance fund[.]" Ind. Code § 5-13-12-1(a). A "depository" is "a financial institution designed as a depository of public funds[.]" Ind. Code § 5-13-4-8. Under the Interlocal Agreement, the U.S. Bank National Association is the Custodian. It is a "financial institution" under Ind. Code § 5-13-4-10 and is designated as a depository under Ind. Code § 5-13-9.5. See **Article VII, Sec. 7.2 (Representations and Warranties of the Custodian).**[24]

Should a "depository" become a "closed depository,"[25] the Board for Depositories would make payments from the PDIF to public officers of public funds that were deposited in the closed depository to the extent the public funds were not covered by insurance of any federal deposit insurance agency. Ind. Code § 5-13-13-1(a). The Department of Financial Institutions, within twenty (20) days after taking possession of the "closed depository" or after a receiver has been appointed, is to ascertain the amount of public funds on deposit in any closed depository and certify the amount to the Attorney General, the State Auditor, the Board for Depositories, and the affected public officers. Ind. Code § 5-13-13-1(b). This certification constitutes a claim on the PDIF. Within ten (10) days after receipt of the certification from the Department of Financial Institutions, the affected public officers are required to furnish to the Attorney General and the State Auditor verified statements of the amount of public funds on deposit in the closed depository, certified copies of the resolution or resolutions under which the deposits were made, and any other information the Attorney General or the State Auditor may require. Ind. Code § 5-13-13-1(c).

The Attorney General and the State Auditor have sixty (60) days from receipt of the certification from the affected public officials to determine whether there are valid claims

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[24] See also http://www.in.gov/tos/deposit/files/ALLDEP.pdf, listing the U.S. Bank National Association on the Approved Depository List (August 7, 2009).

[25] **IC 5-13-4-4 "Closed depository"**

Sec. 4. "Closed depository" includes:

(1) a financial institution the business and property of which the department of financial institutions has taken possession of under IC 28-1-3.1 for the purpose of liquidation;

(2) a financial institution the business and property of which the department of financial institutions has authorized the institution to liquidate under IC 28-1-9 and IC 28-7-1-27.1; and

(3) any national banking association, federal savings association, or federally chartered savings bank for the business and property of which a receiver has been appointed.

against the PDIF. A copy of this determination is to be provided to the affected public officials and the Department of Financial Institutions (or receiver, if one has been appointed). In reaching this decision, the Attorney General and the State Auditor are to ascertain and fix the amount of public funds in the closed depository, but only those public funds that have been deposited appropriately under Ind. Code §5-13. Ind. Code § 5-13-13-2. Public funds deposited contrary to Ind. Code § 5-13 are not insured by the PDIF. Ind. Code § 5-13-13-2(a). Where the Attorney General and the State Auditor agree, that decision is final and has the same force and effect as a final judgment. This determination is appealable to a court of competent jurisdiction. Ind. Code § 5-13-13-2(d).[26]

Public funds invested under the Interlocal Agreement with the named Custodian could be eligible for consideration should the Custodian, a designated depository, become a "closed depository." The Interlocal Agreement only permits investments authorized by Indiana law. Its terms are in concert with Ind. Code § 5-13. There are two cautions: (1) The public funds invested by "an independent body politic and corporate set up as an instrumentality of the state," a person not included within the definition of "public officer" for Ind. Code § 5-13 purposes, may not eligible for consideration under the PDIF; and (2) the Interlocal Agreement allows the Custodian to employ "sub-custodians" that may not necessarily meet the definition of "depository." See **Article V, Sec. 5.1(b)**.[27] It cannot be stated definitively at this writing that such public funds would not be covered by the PDIF as such a situation has not yet presented itself for a determination.

Public Entity

The Hoosier Fund Interlocal Agreement has been formed pursuant to Ind. Code § 36-1-7 *et seq.*, the Interlocal Cooperation Act. Under this Act, certain governmental entities, including the State of Indiana, public instrumentalities, and public corporate bodies, can enter into a formal agreement to exercise certain permissible powers. Ind. Code § 36-1-7-1, Ind. Code § 36-1-7-2. The resulting agreement can be administered through "a separate legal entity" or by "a joint board composed of representatives of the entities that are parties to the agreement, and on which all parties to the agreement must be represented." Ind. Code § 36-1-7-3(a)(5)(A),(B).

The Hoosier Fund Interlocal Agreement does not indicate an intention to create a "separate legal entity" that could sue or be sued. The Interlocal Agreement does indicate that is does not wish to have the Hoosier Fund construed as a "partnership" or "any other joint venture or association." See **Article X, Sec. 10.6 (No Partnership)**. There is no express language indicating an intent to create a separate legal entity.

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[26] There are detailed time frames and other procedures that are to be or may be employed. These additional time frames and responsibilities are not germane to the questions posed. See, *e.g.*, Ind. Code § 5-13-13-2(e), Ind. Code § 5-13-13-3.

[27] A "sub-custodian" under the Interlocal Agreement can be either a "designated depository" or a "financial institution" with a combined capital and surplus of at least $10 million.

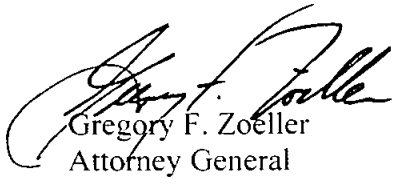
Under the Interlocal Agreement, there is a Board on which all parties to the agreement must be represented. The Participants are acting through a joint board. See **Article III, Sec. 3.1, Sec. 3.2**. The Participants did not intend, and have not created, a separate legal entity. As noted *supra*, the Interlocal Agreement is subject to audit by the State Board of Accounts, the meetings of the Board are subject to the Open Door Law, Ind. Code § 5-14-1.5 *et seq.*, and its records are subject to the Access to Public Records Act, Ind. Code § 5-14-3 *et seq.*

CONCLUSIONS

1. All funds invested by the Participants under the Interlocal Agreement are "public funds," even though some "public funds" invested by "an independent body politic and corporate set up as an instrumentality of the state" may not necessarily be eligible for coverage by the PDIF. However, no determination is being made in this regard as such a situation has not been presented for resolution.
2. Although not all "public funds" invested through the Interlocal Agreement may be eligible for a determination of coverage by the PDIF, public funds invested by public officers with the named Custodian, a designated depository, would be eligible for such consideration, should the Custodian become a "closed depository." The Custodian is a designated depository under Indiana law.
3. The parties to the Interlocal Agreement operate through a joint board where all Participants are represented. The Participants did not intend to create a separate legal or public entity. Notwithstanding, the Interlocal Agreement is subject to audit by the State Board of Accounts, the meetings of the Board of Representatives are subject to the Open Door Law, and the records of the Participants are subject to the Access to Public Records Act.

We are hopeful this addresses your concerns. Should you require anything additional in this regard, please advise.

Sincerely,



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