



State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS
DIVISION OF CREDIT UNIONS

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TO: Washington State-Chartered Credit Unions

FROM: Linda K. Jekel, Director of Credit Unions

DATE: December 23, 2009

SUBJECT: The Extent to Which Credit Unions Can Accept Government Sub-grant Funds

DCU Interpretive Letter I-09-04

THE ISSUE

Under current law [RCW 39.58], credit unions cannot serve as “public depositaries” for state and local government funds. However, there are limited circumstances in which credit unions may accept Sub-grants of government funds. This Interpretive Letter explains the background, and provides the legal reasoning for dealing with this complex issue.

BACKGROUND

The Washington State Department of Commerce (“COM”) has reimbursement authorization from the federal government for a total of \$60.9 million for the State Energy Program, earmarked for the promotion of energy-related projects. State legislation in 2009 (ESSSB 5649, Chapter 379 Laws of 2009, “the bill”) formalized Washington State’s participation in this nationwide federal stimulus program.

The bill authorized COM to use \$5 million of the State Energy Program funding to award competitive grants to financial institutions, for the creation of “credit enhancements” to promote energy efficiency lending (the “Credit Enhancement Program”). Under the new law, COM may award grants directly to state or local government entities with grant money deposited at banks

that are members of the PDPC.¹ A local government grant recipient may, in turn, issue Sub-grants to financial institutions. As an example, a local government issued a Request for Proposal (RFP) titled “Federal Stimulus Program to Promote Energy Efficiency in City of Bellingham and Whatcom County Energy Efficiency Community Challenge Program, RFP #92-2009” for Sub-grants to financial institutions.

This Interpretive Letter clarifies the role that credit unions may play in accepting Sub-grants under the Credit Enhancement Program, or similar local government programs also funded with federal stimulus dollars.

The bill² authorized the development of a program in which banks, credit unions and energy financing companies (“Financial Institutions,” as defined under the bill) are the ultimate recipients of federal grant funds, to create “credit enhancements” related to energy efficiency in buildings.

COM is required to consult with the Department of Financial Institutions (“DFI”) in the design and implementation of this program, and has already consulted with DFI on initial aspects of its grant-administering authority under the new law. On October 28, 2009, COM issued an RFP for the Credit Enhancement Program, seeking proposals to establish credit enhancements, such as loan loss reserves, reduced interest rates, or mitigation of lender risks for energy efficiency lending.

QUESTIONS

The credit enhancement program creates special questions for credit unions:

May a credit union that is not a member of the Washington Public Deposit Protection Program (“PDPP”) be a recipient of federal grant funds, by way of a Sub-grant from the City and/or County?

Before federal funds under this program are authorized for release to a Sub-grant recipient that is a credit union (or bank that is not a member of the PDPP), may COM or a local government entity permit the federal funds to be held on deposit with such a credit union or bank?

May a credit union, a non-depository energy financing company or a bank that is not a public depository under chapter 39.58 RCW be a recipient of a grant or Sub-grant from either COM or a local government entity?

Are undistributed funds, or funds distributed to local government entities “public funds” governed by chapter 39.58 RCW.

¹ Note: In addition, COM may award grants directly to financial institutions; however, the deposit must be held by banks that are members of the PDPC. For more information about the direct grant program please call the State Treasurer’s Office.

² Section 205(1) of ESSSB 5649

ANSWERS

DFI consulted with the State Treasurer's Office, its legal counsel and Assistant Attorney General, and COM, and determined that a Financial Institution is not precluded from being a Sub-grant recipient under COM's intended program or a local government program, as described above. Even though a credit union* or a non-depository energy financing company cannot be a member of the PDPP, it would not *for that reason* be disqualified from applying to COM or to a local government entity for a Sub-grant. Neither would a bank that is *not* a public depository.**

However, neither COM nor any local government entity may establish terms and conditions of a Sub-grant that call for a credit union or a bank that is not a public depository, which is the ultimate recipient of the Sub-grant, to act as an interim depository of the federal funds until such time as the credit union or bank in question is authorized to draw on those funds. Prior to their ultimate use under the terms and conditions of the Sub-grant, such interim deposits are "public funds" and must be deposited with a bank that is a member of the PDPP. This excludes any credit union or bank that is a non-member of the PDPP, even though it is the ultimate grant recipient. In order to treat all applicants equally and not preclude any bank, energy financing company or credit union from applying under its Sub-grant program, COM or any local government entity should establish procedures whereby interim deposits of these federal funds are held with a "public depository" (i.e., a member of the PDPP) that is not the Sub-grant recipient.

Credit union Sub-grant applicants are strictly advised that nothing in the federal stimulus legislation, or Chapter 379 Laws of 2009 (the bill"), or the Public Deposit Protection Commission Act, Chapter 39.58 RCW ("PDPCA"), or any other term or condition of this federal grant program in any way confers upon credit unions or other non-members of the PDPP the authority to accept and maintain deposits that are "public funds," as defined in the PDPCA at RCW 39.58.010(16). In short, such credit enhancement programs are in no way a means to circumvent the prohibition from credit unions accepting the deposit of "public funds." Neither are they a means for non-depository financial institutions and banks that are not members of the PDPP to accept the deposit of "public funds."

LEGAL ANALYSIS

For purposes of this analysis, a "public depository" is ". . . a financial institution which does not claim exemption from the payment of any sales or compensating use or ad valorem taxes under the laws of this state, which has been approved by the commission to hold public deposits, and which has segregated for the benefit of the commission eligible collateral having a value of not less than its maximum liability; . . ." PDPCA, at RCW 39.58.010(15)

* A credit union is excluded from the definition of "public depository" under the combined language of RCW 39.58.010(8) and (15). See *Legal Analysis*.

** RCW 39.58.108. See *Legal Analysis*.

A "financial institution" is defined as ". . . any national or state chartered commercial bank or trust company, savings bank, or savings association, or branch or branches thereof, located in this state and lawfully engaged in business; . . ." PDPCA at RCW 39.58.010(8)

"Public funds" are ". . . moneys under the control of a treasurer, the state treasurer, or custodian belonging to, or held for the benefit of, the state or any of its political subdivisions, public corporations, municipal corporations, agencies, courts, boards, commissions, or committees, including moneys held as trustee, agent, or bailee belonging to, or held for the benefit of, the state or any of its political subdivisions, public corporations, municipal corporations, agencies, courts, boards, commissions, or committees; . . ." PDPCA, at RCW 39.58.010(16)

Accordingly, by reason of RCW 39.58.010(8) and (15), a credit union is not a "public depositary" and may, therefore, not be a member of the PDPC or accept on deposit "public funds." One must also be a participating member of the PDPC and therefore subject to its rules and policies in order to have on deposit "public funds" as defined in the PDPCA. See RCW 39.58.108.

The general powers of Washington state-chartered credit unions were last amended in 2001 (Laws of 2001, Chapter 83, Section 14). The Washington Credit Union Act, at RCW 31.12.402(11) and (12), as amended in 2001, declares that a Washington state-chartered credit union may –

(11) Act as fiscal agent for and receive payments on shares and deposits from the federal government or this state, and any agency or political subdivision thereof;

(12) Engage in activities and programs as requested by the federal government, this state, and any agency or political subdivision thereof, when the activities or programs are not inconsistent with this chapter;

RCW 31.12.402(12) simply means that, in the absence of some prohibition or restriction, a Washington state-chartered credit union has the general power to participate as a grant or Sub-grant recipient of federal funds under the above-referenced program.

To the extent that a Washington state-chartered credit union would act as a fiscal agent for or receive on deposit directly from the federal government any federal funds, RCW 39.58.010(8), (15) and (16) is not in conflict with RCW 31.12.402(11). Federal funds placed *directly* on deposit with a Washington state-chartered credit union by the federal government are not "public funds" within the definition under RCW 39.58.010(16).

However, assuming RCW 31.12.402(11) could be read to authorize a Washington state-chartered credit union to accept on deposit funds accepted from an agency of the State of Washington, or a county or city or other local government entity in Washington State, such provision is *superseded* by the *latest* pronouncement of the Legislature (Laws of 2009, Chapter 9, Section 1),

in which the Legislature makes clear in its amendment to RCW 39.58.010(16) that funds held on deposit, in which the depositor is a state agency, or a county or city, are “public funds” and may, therefore, not be held on deposit by a credit union pursuant to RCW 39.58.010(8) and (15).

Moreover, a Washington State-chartered credit union may not claim the powers of a federal credit union pursuant to RCW 31.12.404 in order to circumvent the limitations of the PDPCA, since (1) the restrictions set forth in the PDPCA apply equally to federal credit unions and (2) the State Treasurer neither knows of any assertion of federal preemption of state law by a federal credit union nor would it be inclined to support one.

Based upon the representations made by COM in relation to this program, COM or a local government, as custodian or grant recipient(s), must deposit any federal funds under their control and not disbursed under this program with “public depositories” – that is, banks that are participating members of the PDPP.

However, once these federal funds are authorized for complete disbursement³ to “Financial Institutions” under the terms and conditions of a Sub-grant, they cease in any way to be “public funds” under the PDPCA. For this reason, a credit union, a non-depository energy financing company or a bank that is not a participant in the PDPP may be a Sub-grant recipient.

CONCLUSION

A credit union may be a Sub-grant recipient under COM’s State Energy Program and Chapter 379, Laws of 2009. However, a credit union is not a “public depository,” within the meaning of RCW 39.58.010(8) and (15), cannot be a member of the PDPC, and therefore may not accept on deposit “public funds.”

If you have questions, please contact the Director of Credit Unions, Linda Jekel at (360) 902-8778 or Linda.Jekel@dfi.wa.gov. The Division of Credit Unions does not provide individual credit unions with legal advice. Credit unions are encouraged to consult their legal counsel, for advice based upon their specific facts.

³ Attached is a diagram showing the disbursement of federal funds for the State Energy Program

