INSPECTOR GENERAL REPORT

2009-02-0013 and 2008-06-0165

September 7, 2010

DEPOSITORY RULE AMENDMENT RECOMMENDATIONS

Summary

A recommendation to repeal one of the two depository rules and evaluate its application and penalty.

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Inspector General David O. Thomas reports as follows:

This report respectfully recommends a change to legislation regarding the existence of two different statutory depository rules.

The purpose of this recommendation is to clarify and reconcile what appear to be two inconsistent statutes that address what is required of public employees with regard to the deposit of money received in the course of public employment.

The Office of Inspector General (OIG) is charged to "recommend policies and carry out other activities designed to deter, detect, and eradicate fraud, waste, abuse, mismanagement and misconduct in state government." IC 4-2-7-3(2). The OIG is also authorized to "recommend legislation to the governor and general

assembly to strengthen public integrity laws, including the code of ethics." IC 4-2-7-3(9).

With this jurisdiction in mind, the OIG respectfully makes the following findings and recommendation for consideration by the Indiana General Assembly.

I

Findings

A

The depository rule sets out a requirement that government workers who receive government money immediately deposit the funds in the state treasury. The purpose of the rule is to account for and prevent the theft of government funds. Our experience reveals that misappropriating the initial receipt of government funds from the public is one of the most common ways for workers to embezzle money.

B

The depository rule is an investigative and prosecutorial tool. Because the embezzlement of government funds is rarely done in an open manner, and physical evidence of the receipt of funds is often deliberately destroyed or manipulated, thieves are often caught by being unable to explain why funds discovered in their possession or control were not immediately deposited with the government treasury.

C

The first of the two depository rules currently in existence was announced in the Indiana Financial Reorganization Act of 1947 which states:

> All receipts from any source coming into the possession of any state agency shall be deposited with the state treasurer each day or as soon as practicable after the same is received, unless otherwise provided by law, and at the end of each calendar month each agency shall file a report of all receipts deposited since the last previous report, which report shall show the disposition thereof. Said report shall be submitted to the director of auditing by the depositing agency. All moneys so received by the treasurer during any month shall be credited by him and by the director of auditing to the proper funds not later than the fifth day of the following month.

IC 4-13-2-21 (1947).

Absent from this rule is (1) a mandatory 24-hour deposit requirement and (2) a criminal penalty for non-compliance found in the subsequent version of the rule.

D

The second depository rule, also currently in existence, was implemented forty years later in 1987 through Public Law 19-1987. Here, the Legislature created a new rule on this same topic, which states in relevant part:

> A [1] public officer or state officer who [2] receives and has control of public funds paid into the treasury of the state or the treasuries of the respective political subdivisions and who [3] later than the business day following the receipt of the public funds fails to deposit the public funds in one or more depositories in the name of the state or political subdivision, commits a violation of the depository rule, a class B felony, and is liable upon the officer's official bond for any loss or damage that may accrue.
>
> However, state employees from the Department of Natural Resources and Department of Revenue are exempted from this rule if the daily receipt is less than $100.

IC 5-13-6-1 (rule); IC 5-13-14-3 (penalty classified as class B felony); IC 5-13-4-19

(political subdivision defined); IC 5-13-4-21[1] (public officer defined); IC 5-13-4-20 (public funds defined); IC 5-13-8-1 and IC 5-13-9.5 (designation of depositories). *See also*: SBOA State and Quasi Manual, Chapter 3.

Unlike the original depository rule in 1947, this 1987 rule (1) mandates the 24-hour deposit requirement and (2) imposes a criminal penalty for non-compliance. A class B felony in Indiana includes potential penalties ranging from 6 to 20 years of imprisonment and a fine not to exceed $10,000. IC 35-50-2-5. By being classified as a class B felony, this depository rule carries the same penalties as rape in Indiana. IC 35-42-4-1.[2]

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[1] IC 5-13-4-2: "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.
As added by P.L.19-1987, SEC.6.

[2] I.C 35-42-4-1: "Rape":

Sec. 1. (a) Except as provided in subsection (b), a person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when:

(1) the other person is compelled by force or imminent threat of force;

(2) the other person is unaware that the sexual intercourse is occurring; or

(3) the other person is so mentally disabled or deficient that consent to sexual intercourse cannot be given;

commits rape, a Class B felony.

(b) An offense described in subsection (a) is a Class A felony if:

(1) it is committed by using or threatening the use of deadly force;

(2) it is committed while armed with a deadly weapon;

(3) it results in serious bodily injury to a person other than a defendant; or

(4) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge.

E

Cannons of statutory construction dictate that when two statutes conflict, the one enacted last prevails. *Leges posteriores priores contrarias abrogant*. See e.g. *Fort Wayne Community Schools v. State ex rel. New Haven Public Schools*, (1959), 240 Ind. 57, 159 N.E.2d 708; *Indiana Alcoholic Beverage Commission v. Osco Drug, Inc.*, (1982), Ind.App., 431 N.E. 2d 823. Restated, subsequent laws repeal earlier laws enacted to the contrary.

F

Unlike the 1947 depository rule, the definition of who is subject to the 1987 depository rule is defined as a "public officer." Also unlike the 1947 depository rule, the individual identified as a "public officer" is then statutorily defined in IC 5-13-6-1.[3]

Although not in either the 1947 or 1987 depository rules, a "public servant" (in contrast to an IC 5-13-6-1 "public *officer*") is defined in IC 35-41-1-24.[4]

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[3] See footnote 1, *supra.*

[4] IC 35-41-1-24: "Public servant" defined

Sec. 24. "Public servant" means a person who:
(1) is authorized to perform an official function on behalf of, and is paid by, a governmental entity;
(2) is elected or appointed to office to discharge a public duty for a governmental entity; or
(3) with or without compensation, is appointed in writing by a public official to act in an advisory capacity to a governmental entity concerning a contract or purchase to be made by the entity.
The term does not include a person appointed by the governor to an honorary advisory or honorary military position.
As added by P.L.311-1983, SEC.25. Amended by P.L.13-1987, SEC.15.

We find it relevant that the earlier 1947 depository rule (IC 4-13-2-21, *supra*) applies to "all receipts from any source coming into the possession of any state agency." See: IC 4-13-2-21. In contrast, the 1987 depository rule is limited to "state officers" who are "elected or appointed" to the government unit, without clearly defining whether the rule applies to all employees who, in most cases, are actually receiving funds or just state officers who lead an agency.

It is our experience that the persons with the most opportunity to embezzle money are those who actually receive and physically handle the money that is received from the public, rather than the single agency leader. In the event an agency leader participates in the theft, but does not actually handle the money, he or she, of course, can be criminally culpable through the accomplice (IC 35-41-2-4) or conspiracy (IC 35-41-5-2) theories in Indiana.

II

Recommendations

Due to the above inconsistent statutory provisions and the applicable authorities, the OIG makes the following recommendations:

1

That a consolidated statement of the depository rule be enacted. This could be accomplished through the repeal of IC 4-13-2-21 (1947).

2

That the term “public officer” in IC 5-13-6-1 be replaced with the term “public servant” pursuant to the definition in IC 35-41-1-24.

3

That the class of the offense be modified from a class B felony to either a class D felony (IC 35-50-2-7) or class A misdemeanor (IC 35-50-3-2).

We believe that an evaluation of the class B felony penalty be reconsidered. Such a severe penalty might be considered by some to be too severe, and may even hamper investigative efforts through the reluctance of Prosecuting Attorneys to charge persons with this offense which could result in the same penalties for rape in IC 35-42-4-1.

4

Should the Legislature wish to address a potential enhancement for repetitive violations of the depository rule, it might also consider adding this offense (IC 5-13-6-1) as a qualifying predicate offense for “racketeering activity” in the Racketeer Influenced and Corrupt Organizations (RICO) statute in IC 35-45-6-1(e)[5], which could elevate an egregious case to that of a class C felony through

[5] IC 35-45-6-2
Corrupt business influence
Sec. 2. A person:
(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in property or to establish or to operate an enterprise;
(2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of property or an enterprise; or

the offense of Corrupt Business Influence in IC 35-45-6-2.[6]

Conclusion

For all the above reasons, the OIG respectfully recommends these rules be examined by the General Assembly. The OIG remains committed to provide additional information or research upon request.

Dated this 7th day of September, 2010.

David O. Thomas, Inspector General

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(3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;
commits corrupt business influence, a Class C felony.

[6] "Government entities" qualify as an "enterprise" in IC 35-45-6-1(c).