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15-010

SUBJECT: Whether the State's contractor which operates Nebraska.gov is required to utilize the State's banking relationship in processing payments made through Nebraska.gov for services provided by State agencies

REQUESTED BY: Don Stenberg
State Treasurer

WRITTEN BY: Douglas J. Peterson, Attorney General

In 2009, this office issued Op. Att'y Gen. No. 09003 (January 27, 2009) in response to an inquiry by the Office of the State Treasurer relating to, among other things, whether a percentage-based fee could be charged by the contractor operating Nebraska.gov for the processing of the payment for certain services provided through that website, including motor vehicle renewals. Part of our analysis included whether the contractor, Nebraska Interactive, Inc. ("NII"), could utilize its own banking relationship rather than the contract of the State Treasurer for the banking activities of the State of Nebraska and its agencies. At that time we determined that NII could utilize its own banking relationship and was not required to go through the State Treasurer in order to process payments made through Nebraska.gov. Our conclusion was based, in part, upon Visa Operating Regulations in place in 2009, which prohibited percentage-based surcharges on credit card purchases, and Neb. Rev. Stat. § 81-118.01(6), which did not permit the State of Nebraska to charge a percentage-based surcharge on credit card purchases it processed if prohibited by credit card operating regulations. At that time, NII processed credit card payments using its own banking relationship. Because we determined NII to be an independent contractor, we opined it was acceptable for NII to use its banking relationship rather than the State's banking contract. You have asked us to reconsider that conclusion. Since Op. Att'y Gen. No. 09003 was issued, it is our

understanding that the Visa Operating Regulation prohibiting percentage-based surcharges has been repealed. In light of this, we have determined that at this time it is reasonable to modify the conclusion in Op. Att'y Gen. No. 09003 in a limited fashion.

The State Treasurer is charged with the duty of establishing the banking relationship for the State of Nebraska and its agencies. This is a statutory duty that cannot be delegated and is one of the "core functions" of the Nebraska State Treasurer.[1] Op. Att'y Gen. No. 98006 (January 21, 1998). Neb. Rev. Stat. § 81-118.01 (2014) allows the State, its officials, and agencies, to accept credit and debit cards as methods of payment, the types of which "shall be determined by the State Treasurer and the Director of Administrative Services" who shall then contract with one or more companies or banks on behalf of the State of Nebraska. Neb. Rev. Stat. § 81-118.01(5). A state agency is not permitted to contract for its own banking relationship; all such relationships are established through the State Treasurer. *See* Op. Att'y Gen. No. 98006; Neb. Rev. Stat. § 81-118.01(5).

In Op. Att'y Gen. No. 09003, this office determined that NII was an independent contractor of the State of Nebraska, in part because the level of control over NII by the State of Nebraska, through the Nebraska State Records Board and its contract with NII, is one of oversight, not of day-to-day instruction or management of operations. We continue to believe that is an accurate description of the relationship between NII and the State Records Board for the design, operation, and maintenance of Nebraska.gov. You have asked us to consider whether NII is an agent of the State for the purpose of processing payments, making NII subject to the State's banking relationship. While NII is an independent contractor of the State of Nebraska, for the reasons stated below, we modify our conclusion found in Op. Att'y Gen. No. 09003 to state that NII must use the banking relationship established by the State Treasurer and the Director of Administrative Services for the purpose of processing payments made through Nebraska.gov for services provided by state agencies.[2]

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[1] "This office has indicated in previous opinions that constitutional officers such as the State Treasurer have certain core functions and inherent constitutional authority which cannot be removed by legislative enactment. Op. Att'y Gen. No. 93012 (March 4, 1993); 1969-70 Rep. Att'y Gen. 164 (Opinion No. 110, dated May 5, 1970). Our research discloses that, since the inception of statehood in Nebraska, the State Treasurer has had the duty to receive and keep all money of the State not expressly required to be received and kept by some other officer. Neb. Rev. Stat. § 84-602 (1) (1994); Neb. Rev. Stat. 1866, c. 4, § 18. Moreover, since 1891, the State Treasurer has had authority to deposit the funds of the State in his keeping in state and national banks. Neb. Rev. Stat. § 77-2301 (1996), 1891 Neb. Laws, c. 50, § 1, p. 347. It is also generally accepted that the Treasurer of a state has, by law, the custody of the monies of the State. 81A C.J.S. *States* § 135. Based upon those historical duties of the State Treasurer, it seems to us that the core functions of that office would clearly include maintaining custody of state funds. Arguably, those core functions would also include general supervision of State's relationships with state and national banks." Op. Att'y Gen. No. 98006, 6.

[2] For the purposes herein, we do not need to revisit the analysis of whether NII is an independent contractor of the State of Nebraska, or whether it is the agent of the State for any purpose. Because the statutory requirements are clear, we believe that NII is subject to the provisions in Neb. Rev. Stat. § 81-118.01 whether it is an independent contractor or an agent.

NII is acting on behalf the State of Nebraska in processing payments made through Nebraska.gov to obtain services from one or more state agencies, such as the renewal of a driver's license or motor vehicle registration. As a state agency is not permitted to process payments made through Nebraska.gov on its own, a state agency cannot authorize a third party to process credit card payments for the agency when that payment processing would circumvent the State Treasurer's banking relationship. "A governmental entity may not accomplish indirectly what it is prohibited from doing directly, whether prohibited by constitutional or statutory provisions." *Myers v. Nebraska Investment Council*, 272 Neb. 669, 682, 724 N.W.2d 776, 792 (2006). Consequently, the State Records Board cannot allow payments to be made through Nebraska.gov in circumvention of the contract(s) entered into by the State Treasurer and the Director of Administrative Services for the banking relationship of the State. In order to continue to allow payments to be made through Nebraska.gov, we believe NII is subject to Neb. Rev. Stat. § 81-118.01, and the authority delegated to the State Treasurer and Director of Administrative Services to establish the State's banking contract. In this regard, the State Records Board may require NII to process payments made through Nebraska.gov using solely the banking relationship established by the State Treasurer and the Director of Administrative Services.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

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