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SPRINGFIELD

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FILE NO. S-1048

BANKS AND BANKING:
Certificate of Deposit
As a Loan

Richard K. Lignoul
Commissioner of Banks and Trust Companies
Room 400 Reisch Building
4 West Old State Capitol Plaza
Springfield, Illinois 62701

Dear Mr. Lignoul:

This responds to your request for an opinion as to whether your policy determination of a number of years standing that certificate of deposit transactions between banks are governed by the loan limitation of section 32 of the Illinois Banking Act (Ill. Rev. Stat. 1973, ch. 16 1/2, par. 132) is valid. Section 32 provides in part as follows:

> "§ 32. Basic Loaning Limits.) The total liabilities to any state bank of any person for money borrowed, including in the liabilities of a partnership the liabilities of the several

> members thereof, shall at no time exceed fifteen per cent of the amount of the capital of such bank, and fifteen per cent of its surplus; * * * "

You state that some banks are purchasing certificates of deposit which sometimes exceed three to four times the amount of their capital and surplus. For example, Bank A having on hand more funds than it can lend profitably through normal channels will buy a certificate of deposit from Bank B or other institution. If that certificate of deposit, and any additional certificates purchased by Bank A from Bank B, and loans by Bank A to Bank B, exceed, in total, fifteen per cent of the total of Bank A's capital and surplus, the question arises whether the transactions violate section 32. Clearly that section has been violated if certificates of deposit are loans and create liabilities of Bank B to Bank A within the meaning of section 32. The banks which engage in these transactions have not treated these transactions as loans. You believe that in these situations they should be so treated.

While certificates of deposit are normally considered deposits and not loans, and thus may not come within the literal meaning of this section, the literal interpretation of a statute may produce a result which defeats its plain purpose and thus

is often not binding. All statutes must be given a reasonable interpretation. "Statutes are construed according to their intent and meaning, and a situation that is within the object, spirit and meaning of the statute is regarded as within the statute, although not within the letter". (The People v. Thillens, 400 Ill. 224, 231.) It is necessary to consider the nature of the business and the character of the transaction and not just the form. "To hold otherwise would be to give preference to form over substance and to defeat the very object and purpose of the statute". (The People v. Belt, 271 Ill. 342, 347.) Thus, the question to be considered is not the technical definition of a loan or "money borrowed" but whether these transactions are, in substance, within the limit set in section 32.

The obvious purpose of this provision is to prevent a bank from putting too many of its assets in the hands of one person or corporation. This provision protects not only the stockholders but also the depositors. There is a risk to the stockholders and depositors when a bank has its assets in the hands of another bank, whether that is done in the form of a loan or a deposit. The risk is similar to that which

would exist in a direct loan to a commercial customer which exceeds the lending bank's loan limit. I, thus am of the opinion that your policy determination is within the spirit of the Act and of the objective which it seeks to secure, and is valid.

Similar determinations have been made. A member bank of the Federal Reserve System may not "make any loan or any extension of credit to, or purchase securities under repurchase agreement from, any of its affiliates", which will exceed certain limits. (12 U.S.C., sec. 371c.) The regulations of the Comptroller of the Currency interpreting this provision, specifically provide that interest bearing deposits are to be considered loans. See 12 C.F.R. 7.7370.

Section 32 of the Illinois Banking Act, supra, is similar to section 5200 of the Revised Statutes of the United States, as amended (12 U.S.C. sec. 84) which subjects national banks to a loan limitation. Before 1927 the language of the two sections was practically identical, both using the term "money borrowed". In McRoberts v. Spaulding, 32 F. 2d 315, the Federal court held that the term "money borrowed" bears a

broader construction than the technical definition of a loan. In that case it also included any rediscount purchase on which the borrower is primarily liable.

In Illinois there are no cases holding that a certificate of deposit can never be considered a loan. Whether it is or is not depends on the circumstances. In Kavanagh v. Bank of America, 239 Ill. 404, the court specifically held that certificates of deposit were promissory notes. While the court in other cases has held that a certificate of deposit is not a loan (McCormick v. Hopkins, 287 Ill. 66; and Logenmeyer v. Fulton State Bank, 384 Ill. 11), these cases recognize that in other factual situations certificates of deposit may, in fact, be loans.

Considering the purpose of the limitation set forth in section 32, and the interpretation given to similar provisions, your determination that certificates of deposit should be considered in calculating the loan limitation is reasonable and in accordance with the intent and purpose of section 32 of the Illinois Banking Act.

Very truly yours,

ATTORNEY GENERAL