THE ATTORNEY GENERAL
OF TEXAS

AUSTIN 11, TEXAS

WAGGONER CARR
ATTORNEY GENERAL

August 2, 1965

Honorable J. M. Falkner
Banking Commissioner of Texas
Austin, Texas

No. C- 488

Re: Under the given factual situation and the provisions of the Texas Trust Act, is the bank in question, as trustee, prohibited from depositing the $37,500 in time certificate deposits in its own institution for a period of more than one year and related questions.

Dear Mr. Falkner:

You have requested our opinion on certain questions under the following relevant facts:

"As state chartered bank and trust company has been named trustee under various trust indentures which authorize the bank in its fiduciary capacity, irrespective of any provision or part of the Texas Trust Act, to invest in shares of a savings and loan association located in the same city and deposit money in the trustee bank. The trustee is also given the right and is requested to deposit the income from the trust estates in the savings and loan associations to earn the current rate of interest.

"The trustee bank has deposited with itself on time certificates of deposit $37,500 which has been so deposited for one year. Trustee bank has also deposited with a savings and loan association various savings accounts which form part of the trust estates under specific authorization in the various trust indentures irrespective of any provision of the Texas Trust Act. . . .

"The bank's directors own 85.4% of the outstanding stock in the bank. The savings and loan directors own 97% of the outstanding stock in the savings and loan association. Directors of both the bank and the savings and loan association own 82.3% of the bank stock and 77.6% of the savings and loan stock."

Under the foregoing facts you have requested our opinion to the following questions:

1. Is the trustee bank prohibited from depositing the $37,500 in time certificate deposits in its own institution for a period of more than one year?

2. Is the trustee bank prohibited from making deposits of trust funds in savings accounts in the savings and loan association?

3. If question number 2 is answered in the affirmative, then if the savings and loan association increases its permanent reserve stock by selling shares of additional stock, would the trustee bank be prohibited from investing trust funds in such stock of the savings and loan association?

In some legal relationships, the fiduciary element is more intense than in others. It is peculiarly intense in the case of a trust. While this fiduciary relationship creates a number of duties, none is more fundamental than the duty owed by the trustee to the beneficiaries in the nature of the duty of loyalty. This duty is sometimes characterized as not permitting a trustee to place himself in a position where it would be for his own benefit to violate his duties to the beneficiaries. This duty of loyalty is based on a general principal of policy and morality which forbids a fiduciary from placing himself in a situation where there is or could be conflict between his self-interest and his duty to others. See Scott on Trust, § 170, Duty of Loyalty, et seq.

A number of states have expressly enacted statutes that set out the duty of loyalty in clear and unambiguous terms. In Texas, any deviation from this high degree of loyalty is expressly prohibited by Article 7425b-22, V.A.C.S., which provides:

> " . . . but no act of the trustor shall relieve a corporate trustee from the duties, restrictions, and liabilities imposed upon it by Sections 10, 11, and 12 of the Texas Trust Act." (Emphasis added)

Neither can the beneficiary relieve the trustee of the prohibitions contained in Sections 10, 11 and 12 of the Texas Trust Act. See Article 7425b-23.

However, pursuant to Article 7425b-24 (E), Vernon's Civil Statutes, a court of competent jurisdiction may modify or entirely relieve any trustee from any or all of the duties, limitations and restrictions imposed upon him by the Texas Trust Act, to-wit:

> "E. A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the duties, limitations, and restrictions which would otherwise be placed upon him by this Act, or wholly or partly release and excuse a trustee, who has acted honestly and reasonably, from liability for violations of the provisions of this Act." (Emphasis added)

Obviously, the principles which are applicable to a corporate trustee are equally applicable to corporations affiliated with it. By statutory definition, an affilliate is defined in Article 7425b-4(E) to mean:

> ". . . any person directly or indirectly controlling or controlled by the person, or any person under direct or indirect common control with another person . . ." (Emphasis added)

The aforementioned Sections 10, 11 and 12 of the Texas Trust Act, that are equally applicable to both the corporate trustee and any affiliate, are as follows:

> "Art. 7425b-10. Loan of trust funds
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> "Except as provided in Section 11 of this Act, a corporate trustee shall not lend trust funds to itself or an affiliate (as defined herein), or to any director, officer, or employee of itself or of an affiliate; nor shall any noncorporate trustee lend trust funds to himself, or to his relative, employer, employee, partner, or other business associate.

"Art. 7425b-11. Corporate trustee depositing trust funds with self

"A corporate trustee may deposit with itself trust funds which are being held pending investment, distribution, or to pay debts, provided it maintains under control of its trust department (if it has a trust department separate from its banking department) as security for such deposit a separate fund consisting of securities legal for trust investments which have at all times during the deposit a total market value equal to the amount of the deposit. No such security shall be required to the extend said deposit is insured or otherwise secured by or under state or federal law. The separate fund of securities shall be marked as such. Withdrawals from or additions to it may be made from time to time, as long as the required value is maintained. The income of such securities shall belong to the corporate trustee.

"Art. 7425b-12. Trustee buying from or selling to self

"A trustee shall not buy nor sell, either directly or indirectly, any property owned by or belonging to the trust estate, from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee, or of an affiliate; or from or to himself, a relative, employer, partner or other business associate; provided a national banking association, or a state chartered bank and trust company, or a state chartered trust company, or a state chartered bank having trust powers, or any other state chartered corporation having the right to exercise trust powers, when acting or serving as executor, administrator, guardian, trustee, or receiver, may sell shares of the capital stock of itself so owned or held by itself, for any estate, to one or more of its officers, stockholders or directors, upon a court of competent jurisdiction finding that any such sale will be to the best interest of the estate owning such shares; fixing or approving the price to be paid therefor, and the terms of sale, upon entering an order, decree or judgment, authorizing, approving and directing such sale to be made; and provided further that a corporate trustee, executor,

> administrator, or guardian, when authorized by will, trust agreement, other trust instrument, or judicial order, to retain its own capital stock in trust, may exercise rights to purchase its own stock when increases in its capital stock are offered pro rata to stockholders; provided, more-over that such exercise of rights, in the circumstances then prevailing, shall be consistent with the judgment and care which men of ordinary prudence exercise in the management of their own affairs." (Emphasis added)

In the absence of a court of competent jurisdiction relieving the trustee bank of the provisions of Sections 10, 11 and 12, supra, it is the opinion of this office that a corporate trustee, or affiliate, is absolutely prohibited from disregarding the provisions of the Texas Trust Act and must strictly comply therewith. Under these restrictions, such a trustee may only deposit trust funds with itself "pending investment, distribution, or to pay debts." We conclude, under the facts presented, that the depositing of a sum in time certificate deposits for more than one year would not fall within the aforesaid permissive category of deposit. Such common ownership of stock in the bank and savings and loan association as set forth in your letter clearly demonstrates that the savings and loan association is, by statutes, an affiliate of the trustee bank for the purposes of the Texas Trust Act. Therefore, the savings and loan association is governed by the same restrictions as the trustee bank. Thus, deposits of trust funds may only be made in the savings and loan association "pending investment, distribution, or to pay debts."

If the trust corpus originally contained shares of stock of the affiliate, then the trustee can, if consistent with the prudent man rule, purchase additional shares of such stock when increases in said stock are offered on a pro rata basis to all stockholders alike. If the trust corpus did not originally contain such stock, then the trustee is prohibited from purchasing shares of its affiliate's stock for the trust.

It should also be observed that this question has not arisen by virtue of any intentional wrongdoings by a trustee bank or that any loss has resulted. In fact, the

numerous saving accounts are all in amounts less than the current insurance limit of liability of the Federal Savings and Loan Insurance Corporation. We also appreciate having the benefit of the full explanation of this matter and of your policies.

SUMMARY

Article 7425b-22, V.C.S., provides that no act of the trustor shall relieve a corporate trustor from the restrictions, duties and liabilities imposed on it by Section 10, 11 and 12 of the Texas Trust Act.

However, a court of competent jurisdiction may modify or entirely relieve any trustee from any or all of the duties, limitations and restrictions imposed upon him by the Texas Trust Act.

In the absence of such judicial relief, it is our opinion that:

1. A trustee bank is prohibited from depositing trust funds in time certificate deposits in its own institution, unless such deposit is made "pending investment, distribution, or to pay debts."

2. The savings and loan association, under the stated facts, is an affiliate with the trustee bank, and as such is prohibited from having trust funds deposited in it except "pending investment, distribution or to pay debts."

3. The trustee bank may purchase additional shares of permanent reserve stock of the affiliate savings and loan association if the trust corpus originally contained shares of such stock, and the additional shares constitute increases in the capital stock offered pro rata to all stockholders.

Yours very truly,

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APPROVED BY:
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