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JUN 10 2010

OPINION COMMITTEE

June 9, 2010

RQ-0895-GA
FILE # ML-46485-10
I.D. # 46485

The Honorable
Gregory W. Abbott
Attorney General of Texas
Post Office Box 12548
Austin, Texas 78711-2548

Attention: Nancy S. Fuller,
Chair, Opinion Committee

Re: Request for Opinion

Dear Mr. Attorney General:

Currently, investment returns for public and private funds are at historically low levels. Interest-bearing checking accounts and money market accounts that are insured by the Federal Deposit Insurance Corporation currently provide higher returns than certain more traditional investments. However, the Public Funds Investment Act does not explicitly authorize investment of public funds in these types of demand accounts. I believe that the Act's statutory language implicitly authorizes the use of these accounts as an authorized investment.

Accordingly, I request your official opinion on the following question:

May investing entities subject to the Public Funds Investment Act (Chapter 2256, Government Code) invest in money market deposit accounts or other money market accounts insured by the Federal Deposit Insurance Corporation?

1. Background

Local governments are "investing entities" authorized to make certain investments of public funds as provided by the Act and locally-adopted investment policies. *See* Govt. Code §§ 2256.002(5), (7); 2256.003(a)(1).

Local governments may only invest in authorized investments. *See id.* §§ 2256.005(b)(4)(a); 2256.009(a). One type of authorized investment is "other obligations, the principal and interest of which are unconditionally guaranteed or insured by, or backed by the full faith and credit of, this state or the United States or their respective agencies and instrumentalities." (emphasis added) *Id.* 2256.009(a)(4).

FDIC-insured interest-bearing checking accounts or money market accounts, or “money market deposit accounts,”¹ are essentially demand deposits in which the investing entity deposits cash with an FDIC-insured financial institution. There are restrictions on how many withdrawals the depositor can make from these accounts over a certain period of time, but the accounts are available on demand within those restrictions and the accounts pay interest. All accounts will be in an amount equal to or less than the maximum amount insured by the FDIC.

It should be assumed that the investment is made in accordance with the general requirements of the Act, including those requirements requiring the adoption of an investment policy, its annual review by the investing entity’s governing body, the standard of care in making investments, and regarding investment training. *See id.* §§ 2256-005-2256-007. All investments will meet the requirements for, and will be insured by, the Federal Deposit Insurance Corporation.

2. Argument and Authorities

A. Money market accounts are an “obligation” of the bank

Under the act, an authorized investment must meet two requirements:

(1) it must be in an “obligation”; and

(2) payment of principal and interest on the obligation must be unconditionally *insured by, or backed by the full faith and credit of, the State of Texas, the United States of America, or their respective agencies and instrumentalities.*² *Id.* 2256.009(a)(4) (emphasis added).

When a demand deposit is created (whether it is a regular checking account that does not bear interest, or a money market account that does bear interest), the legal obligation that is created is one in which the bank is a debtor and the depositing governmental entity is a creditor.

“Ordinarily, funds placed with a bank become general deposits owned by the bank, and create a debtor-creditor relationship between the bank and the depositor. *Tex. Bank & Trust Co. v. Spur Sec. Bank*, 705 S.W.2d 349, 352 (Tex. App.—Amarillo 1986, no writ).

“The relationship between banker and depositor is one of debtor and creditor.” *Strickland Transp. Co. v. First St. Bank of Memphis*, 147 Tex. 193, 214 S.W. 2d 934, 939 (1948).

¹ There are different names for interest-bearing demand accounts including “money market accounts” and “money market deposit accounts”, but they are all interest-bearing demand accounts, and insured by the FDIC for purposes of this opinion.

² Note that if an “obligation” is “insured” by an agency or instrumentality of the United States, it meets the requirement to be an authorized investment.

“It is elementary that the making and acceptance of an ordinary or general deposit of money or its equivalent in a bank creates, as between the bank and the depositor, the simple relation of debtor and creditor.” *Stone Fort Natl. Bank of Nacogdoches v. Forbess*, 126 Tex. 568, 91 S.W.2d 674, 676 (1936)

B. *The “debtor-creditor relationship” creates an “obligation” of the bank*

While I am unable to find a Texas case directly on point that uses the term “obligation” to describe a money market account, there are several cases that use the term “obligation” to describe deposit relationships generally.

The Supreme Court of the United States held that “deposits are debtor *obligations* of the bank.” *Delaware v. New York*, 507 U.S. 490, 502; 113 S. Ct. 1550, 1558 (1993) (emphasis added). Texas courts considering the question have held that a “relationship created by a checking account is one creating benefits and *obligations* only between the bank and the depositor.” *Groos Natl. Bank v. Shaw’s of San Antonio, Inc.*, 555 S.W.2d 492, 494 (Tex. Civ. App.—San Antonio 1977, writ ref’d n.r.e.) (emphasis added).

Other courts considering the issue have held that “bank and depositor stand in debtor-creditor relationship that is contractual in nature. The bank owns the deposit, the depositor has claim to payment against bank, and the bank has corresponding *obligation* to pay its depositor.” *In re Masterware Corp.*, 229 B.R. 301, 310 (Bankr. S.D.N.Y. 1999) (emphasis added); *see also Crump v. Bank One Corp.*, 817 So. 2d 1187 (La. App. 2d Cir. 2002) (noting that “the money market certificate at issue in this case only establishes a contractual obligation on the part of Homer National Bank”).

C. *The Federal Deposit Insurance Corporation is a Federal agency*

Section 2256.009(a)(4) of the Act requires that the investment be one which is insured, as to both principal and interest, by the State of Texas, the United States, or “their respective agencies and instrumentalities”.

The FDIC is such an entity because it is an agency or instrumentality of the United States. *U.S. v. Doherty*, 18 F.Supp. 793, 794 (D. Neb. 1937); *see FDIC v. Golden Imports, Inc.*, 859 SW 2d 635, 648 (Tex. App.—Houston [1st Dist] 1993, no writ) (stating that “[i]n its capacity as receiver and therefore an *instrumentality of the United States* the FDIC is entitled to the protection of sovereign immunity” (emphasis added)); *Bank One Tex. v. Taylor*, 970 F. 2d 16, 35 (5th Cir. 1992) (observing that “Taylor, however, is not entitled to an award of punitive damages because the FDIC, as an *agency of the United States*, is immune from such damages” (emphasis added)); *Mendrala v. Crown Mortg. Co.*, 955 F.2d 1132, 1135 (7th Cir. 1992) (stating that “[t]his circuit has held that the Federal Deposit Insurance Corporation . . . qualifies as a *federal agency* under the provisions of the (Federal Tort Claims Act)” (emphasis added)).

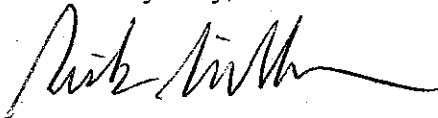
Finally, although it does not have the force of law, the FDIC's website states that it is an "independent agency of the federal government." FDIC, *Who is the FDIC?*, <http://www.fdic.gov/about/learn/symbol/index.html> (last accessed June 1, 2010).

3. Summary

The foregoing supports my belief that the Legislature clearly intended that bank accounts (whether checking accounts, money market accounts, or money market deposit accounts) insured by the FDIC are a proper investment under the Public Funds Investment Act.

I would be happy to provide additional information in response to any inquiries that you may have. I look forward to hearing from your office as soon as possible.

Yours very truly,

A handwritten signature in black ink, appearing to read "Rick Miller", with a long, sweeping horizontal flourish extending to the right.

Rick Miller
County Attorney
Bell County, Texas