

Office of the Attorney General
State of North Dakota

Opinion No. 85-34

Date Issued: September 10, 1985
Requested by: Peter A. Quist
Securities Commissioner

--QUESTIONS PRESENTED--

I.

Whether the term 'issued' and its cognates as used in 1985 N.D. Sess. Laws 119 are synonymous with the term 'sale.'

II.

Whether foreign banks are prohibited by 1985 N.D. Sess. Laws 119 from issuing or selling certificates of deposit in North Dakota.

III.

Whether the answer to question II is dependent upon whether the bank is covered by FDIC insurance.

IV.

Whether federally chartered banks are prohibited by 1985 N.D. Sess. Laws 119 from issuing or selling certificates of deposit in North Dakota.

V.

Whether under 1985 N.D. Sess. Laws 119 foreign and federally chartered financial institutions other than banks can issue or sell certificates of deposit in North Dakota as long as they are federally insured.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that the term 'issued' and its cognates as used in 1985 N.D. Sess. Laws 119 are not synonymous with the term 'sale.'

II.

It is my further opinion that foreign banks are not prohibited by 1985 N.D. Sess. Laws 119 from issuing or selling certificates of deposit in North Dakota.

III.

It is my further opinion that the answer to question II is not dependent upon whether the bank is covered by FDIC insurance.

IV.

It is my further opinion that federally chartered banks are not prohibited by 1985 N.D. Sess. Laws 119 from issuing or selling certificates of deposit in North Dakota.

V.

It is my further opinion that federally insured foreign and federally chartered financial institutions other than banks are not prohibited by 1985 N.D. Sess. Laws 119 from issuing or selling certificates of deposit in North Dakota.

--ANALYSES--

This opinion cites the law in question as 1985 N.D. Sess. Laws 119, rather than by reference to House Bill 1372 as used in the request for an opinion, since the Session Laws were published after the request but before the issuance of the opinion. This opinion does not cite each individual chapter of the Century Code affected by the bill as it is more expedient and less confusing to refer to the Session Laws throughout.

I.

To sell is 'to exchange or deliver for money or its equivalent . . .' The American Heritage Dictionary, (New College Edition, 1981). That same dictionary defines 'negotiate' as '2. Finance a. To transfer title or ownership of . . . to another person or party in return for value received. b. To sell or discount.' The North Dakota Century Code defines 'negotiation' as 'the transfer of an instrument in such form that the transferee becomes the holder.' N.D.C.C. § 41-03-24(1).

Not all certificates of deposit are negotiable and even a negotiable certificate of deposit need not necessarily be transferred for value. While value is one important consideration in determining whether the holder is a holder in due course, that question is beyond the scope of this opinion. However, when a certificate of deposit is negotiated for value, the transaction can commonly be called a sale.

A sale of a certificate of deposit would mean the negotiating of that certificate for value to a transferee who becomes a holder. Sales of certificates of deposit can occur by persons not necessarily authorized to issue certificates of deposit (you or I can sell or negotiate our own certificate of deposit). This type of transaction

was not addressed anywhere in 1985 N.D. Sess. Laws 119 and was not a matter of concern to the House Committee on Industry, Business and Labor of the 1985 Legislative Assembly when it considered the bill.

On the other hand, to issue is 'to give out, emit, pass for delivery, or distribute.' Glen G. Munn, Encyclopedia of Banking and Finance, (7th Ed., 1973). 'A certificate of deposit is ordinarily defined as a written acknowledgment by a bank or banker of the receipt of a sum of money on deposit which the bank or banker promises to pay to the depositor . . . whereby the relation of debtor and creditor between the bank and the depositor is created.' 10 Am. Jur.2d Banks § 455 at 426 (1963). When a bank issues a certificate of deposit, it is giving out or distributing this written acknowledgment or receipt. In my opinion, a certificate of deposit is issued at the bank. Often the depositor receives the certificate of deposit at the same place, but if a deposit were to be made by mail or electronic funds transfer the place of issue would be the location of the bank making receipt therefor.

It is this meaning of 'issue' which is the subject of 1985 N.D. Sess. Laws 119. In my opinion, 1985 N.D. Sess. Laws 119 does not apply to the sale of certificates of deposit by anyone. Further, since each section of the law refers to certificates of deposit which 'may only be issued in this state,' the law does not apply to the issuance of certificates of deposit outside North Dakota.

II.

Under the interpretation discussed in I above, out-of-state financial institutions which take deposits and issue certificates of deposit by mail, through broker intermediaries or through electronic funds transfer, would not be within the scope of 1985 N.D. Sess. Laws 119. In none of the above are certificates of deposit issued in North Dakota. Therefore, foreign banks are not prohibited by the bill from issuing certificates of deposit to persons in North Dakota.

III.

Section 1 of the law, 1985 N.D. Sess. Laws 119, states as follows:

SECTION 1. A new section to chapter 6-03 of the North Dakota Century Code is hereby created and enacted to read as follows:

ISSUANCE OF CERTIFICATES OF DEPOSIT--PENALTY. Certificates of deposit, as defined in section 41-03-04, may only be issued in this state by financial institutions authorized to issue certificates of deposit and chartered to do business in this state under this chapter 1, or as authorized under sections 2, 3, and 4 of this Act. Any person violating this section is subject to a civil penalty not to exceed five thousand dollars.

There is no question under the statute that federal deposit insurance corporation insurance is irrelevant to the interpretation of Section 1. Whether or not an institution qualifies to issue certificates of deposit (under Section 1) is not determined by whether or not its deposits are insured. In my opinion the qualifications in Section 1 for the issuance of certificates of deposit are (1) that the institution be one authorized to issue certificates of deposit and (2) chartered to do business in this state or authorized under other sections of the Act. Sections 2, 3, and 4 of the bill concern financial institutions other than banks.

IV.

Your letter points out the puzzling reference in Section 1 to 'this chapter 1.' There is no 'this chapter 1' to which we can refer to determine the meaning of that phrase and N.D.C.C. Ch. 6-03 (if the phrase were interpreted to mean only 'this chapter') is not the chapter which charters banks or any other financial institution. North Dakota law provides that the letter of an unambiguous statute is not to be disregarded under the pretext of pursuing its spirit. N.D.C.C. § 1-02-05. However, when ambiguous, a statute must be interpreted with an eye to its intended objectives, the circumstances and legislative history surrounding its enactment, and the consequences of each possible interpretation. N.D.C.C. § 1-02-39.

In my opinion, the phrase 'under this chapter 1' should be deleted in interpreting the section so that the section reads as follows:

Issuance of certificates of deposit--Penalty. Certificates of deposit, as defined in section 41-03-04, may only be issued in this state by financial institutions authorized to issue certificates of deposit and chartered to do business in this state or as authorized under sections 2, 3, and 4 of this Act. Any person violating this section is subject to a civil penalty not to exceed five thousand dollars. [Strike-overs supplied to indicate new interpretation.]

Section 1 of the bill would then purport to prohibit only those institutions which are not now authorized to issue certificates of deposit and those institutions which otherwise cannot do business in North Dakota from issuing certificates of deposit in North Dakota. National banks are authorized to issue certificates of deposit and to do business in North Dakota and would not be prohibited from so doing under 1985 N.D. Sess. Laws 119. The other sections of the bill concern only non-bank financial institutions.

V.

Sections 2 through 4 of 1985 N.D. Sess. Laws 119, inclusive, concern non-bank financial institutions. Each authorizes a particular type of financial institution to issue certificates of deposit in North Dakota if organized under each section's respective

chapter of the Century Code or insured by the respective federal insurance corporation.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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