

**LETTER OPINION  
2003-L-08**

February 11, 2003

Honorable Robert R. Peterson  
State Auditor  
600 East Boulevard Avenue  
Bismarck, ND 58505

Dear Mr. Peterson:

Thank you for your letter asking whether a financial institution holding securities under a repurchase agreement<sup>1</sup> with a school district must be a designated depository financial institution pursuant to N.D.C.C. ch. 21-04. You indicate that a public school district sold general obligation bonds to finance construction of school buildings and invested the temporary construction funds in United States treasury obligations in accordance with N.D.C.C. § 21-06-07(1)(a). You also indicate the treasury obligations were purchased by the school district as part of an agreement to repurchase pursuant to N.D.C.C. § 21-06-07(1)(b). The treasury obligations are owned by the school district and held by a New York financial institution, which is not situated or doing business within the state, under a related custodial agreement.

Generally, public funds belonging to or in the custody of any political subdivision must be either deposited in the Bank of North Dakota or in a financial institution which the political subdivision has designated as its depository. N.D.C.C. §§ 21-04-03; 21-04-05. To be designated as a depository, the financial institution must either be incorporated in the state or situated and doing business within the state. N.D.C.C. § 21-04-05.

Chapter 21-04, N.D.C.C., however, is not the exclusive means by which public funds are handled or managed. The laws of this state provide a number of alternatives for doing so.

There are . . . general statutory provisions applicable to a broad range of political subdivisions concerning investment and deposit of their funds.

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<sup>1</sup> A “repurchase agreement” or “repo” is an “agreement between a seller and a buyer, usually of U.S. Government Securities, whereby the seller agrees to repurchase the securities at an agreed upon price and, usually, at a stated time.” Barron’s Dictionary of Finance and Investment Terms 367 (3d ed. 1991).

For example, N.D.C.C. § 21-06-07 permits certain political subdivisions to invest monies in their general or special funds in “[c]ertificates of deposit fully insured by the federal deposit insurance corporation or by the state.”

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All political subdivisions of the state are permitted to invest their funds and monies in notes or bonds secured by mortgages insured by the federal housing administrator, debentures issued by the federal housing administrator, and securities issued by national mortgage associations.

N.D.A.G. 2000-L-96.

See also N.D.C.C. § 61-02-72 (permitting political subdivisions to invest in bonds issued by the Water Commission), N.D.C.C. § 54-30-24.1 (permitting political subdivisions to invest funds in real estate bonds issued by the state), and N.D.C.C. § 6-09.4-15 (permitting political subdivisions to invest their funds in bonds of the Municipal Bond Bank).

Section 21-06-07(1)(b), N.D.C.C., provides another alternative. It permits political subdivisions to invest in securities sold under repurchase agreements written by a “financial institution.” Section 21-04-09, N.D.C.C., requires the securities purchased under such a repurchase agreement to be held by a “financial institution” other than the depository. While the phrase “financial institution” is not defined in N.D.C.C. ch. 21-06, N.D.C.C. §21-04-01(3), which is in a related chapter of law to N.D.C.C. ch. 21-06, defines “financial institutions” to include “state and national banks insured by the federal deposit insurance corporation, state-chartered or federally chartered savings and loans insured by the federal savings and loan insurance corporation, and state-chartered or federally chartered credit unions insured by the national credit union administration.”<sup>2</sup> There is no requirement in the definition that a financial institution be incorporated in the state or situated and doing business within the state. Moreover, N.D.C.C. § 21-04-09

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<sup>2</sup> According to documentation you provided to this office, it appears that the custodian of the securities, as a bank, would qualify as a “financial institution” under N.D.C.C. § 21-04-01(3); it is less clear that the seller of the securities in this case would meet the statutory definition since, while arguably a financial institution (see Black’s Law Dictionary 630-31 (6th ed. 1990)), it is not an insured bank, savings and loan, credit union, or similar government-insured institution. However, the definition of financial institution in N.D.C.C. §21-04-01(3) is prefaced by the word “includes,” which, unlike “means,” is not an exhaustive definition but rather indicates an incomplete list. See Americana Healthcare Centers v. N.D. Dept. of Human Services, 510 N.W.2d 592, 594-95, n.2 (N.D. 1994).

provides that securities sold under a repurchase agreement as described in N.D.C.C. § 21-06-07 must be held by “any financial institution” other than the depository.

The only requirements for investing in a repurchase agreement under pertinent law are: (1) that the repurchase agreement be written by a “financial institution”; (2) that the underlying securities are of the type listed in N.D.C.C. § 21-06-07(1)(a), that is, bonds, treasury bills and notes, or other securities that are direct obligations<sup>3</sup> of, or insured or guaranteed by, the United States or its agencies or instrumentalities; and (3) that securities sold under agreements to repurchase as described in N.D.C.C. § 21-06-07 must be “delivered to and held for safekeeping by any financial institution” agreed to by the parties, other than the depository (emphasis supplied). N.D.C.C. § 21-04-09. If those requirements are met, the investment is permissible. Consequently, it is my opinion that a financial institution holding treasury obligations as a custodian in connection with a repurchase agreement with a school district need not be designated a depository financial institution within the meaning of N.D.C.C. §§ 21-04-03 and 21-04-05.

Sincerely,

Wayne Stenehjem  
Attorney General

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<sup>3</sup> It is not clear from the information you provided exactly what securities were purchased by the school district. A schedule attached to the custodial agreement lists several types of “acceptable” securities. The custodial agreement recites that one form of acceptable securities is those held in the name of the custodian or its nominee, i.e., in street name. However, a prior opinion issued by this office indicates that a political subdivision may not invest its funds under N.D.C.C. § 21-06-07 in securities held in “street name.” N.D.A.G. 94-L-206.