INTERPRETIVE LETTER 90-20 (OCTOBER 12, 1990)

State bank that has second mortgage may purchase title to real estate at foreclosure sale, but may not purchase first mortgage prior to foreclosure if aggregate of loans would exceed lending limits.

In your letter dated *, you described a situation wherein a * has borrowed approximately $115,000 from the Bank. Additionally, * owes approximately $67,000 on a note to a second bank ("Bank2") which is secured by a first mortgage. The Bank has a second mortgage on that same real estate. Bank2 is foreclosing on the real estate in question, and the property may go up for bid at a Sheriff's sale. You were inquiring whether, if the real estate were put up for bid at a Sheriff's sale, the Bank could "buy out the Bank2 at the Sheriff's sale or before." If the $67,000 which * owes Bank2 were added to the $115,000 which * owes directly to the Bank, the total of approximately $182,000 would exceed the Bank's current lending limit of $152,000. The Bank is considering bidding on the real estate at the Sheriff's sale or buying out the first mortgage note from Bank2 so that the Bank could protect its equity position (its collateral interest in the real estate).

This Office has taken the position that a state bank may bid on real estate at a Sheriff's sale in order to protect a collateral interest that the state bank has in the real estate. If the Bank is the successful bidder at the Sheriff's sale, the Bank would acquire title to the real estate and the real estate would be treated the same as "other real estate" under the Illinois Banking Act (the Bank would be obligated to divest the real estate within a five-year period). The Bank, of course would be expected to exercise prudent business judgment in determining whether and how much to bid for the real estate at the Sheriff's sale in order to protect the Bank's position. There is, however, no exception or exemption in the Illinois Banking Act which would allow the Bank to buy out the note from Bank2 in advance of the Sheriff's sale. If the Bank actually buys the note from Bank2, the Bank will have acquired another "evidence of indebtedness" of *. Section 32 of the Illinois Banking Act forbids the Bank from loaning more than 20% of its capital and surplus to any one borrower. The note which would be bought from Bank2 would be treated as any other note evidencing debt of * to the Bank, and therefore would have to be aggregated with the debt that * already owes the Bank. The aggregation of the $67,000.00 to the $115,000.00 which * already owes the Bank would create an excess lending situation which would cause a violation of Section 32 of the Illinois Banking Act.

To summarize, this Office would not object to the Bank, in the exercise of its prudent banking judgment, bidding at a Sheriff's sale to obtain title to real estate in which the Bank has a collateral interest which it does not want to lose. However, there is no authority for the Bank to buy out the note from Bank2 because such action would create debt of * to the Bank in excess of the lending limit set forth in the Illinois Banking Act.