

INTERPRETIVE LETTER 94-015 (AUGUST 26, 1994)

A foreign banking corporation that possesses a certificate of authority under the Foreign Banking Office Act may apply for a certificate of authority to accept and execute trusts under the Corporate Fiduciary Act.

This is in response to your letter of * in which you asked whether the Chicago Branch of * ("Bank") may obtain a certificate of authority to accept and execute trusts in Illinois ("Certificate") pursuant to the Corporate Fiduciary Act ("CFA"), 205 ILCS 620/1-1 (1992). The Bank is a foreign banking corporation possessing a certificate of authority under the Foreign Banking Office Act ("FBOA"), 205 ILCS 645/1 (1992). With your inquiry, you provided the statutory and regulatory authority that permits national banks and federally chartered branches of foreign banks to exercise trust powers. For the reasons set forth herein, the Commissioner of Banks and Trust Companies ("Commissioner") concludes that the Bank may apply for a Certificate.

Foreign Bank Statutory Powers

Section 3 of the FBOA grants foreign banks the same powers as state chartered banks in Illinois when it provides that:

Upon receipt of a certificate of authority under this Act, a foreign banking corporation may conduct its banking business in this State with the same, but no greater, rights and privileges as a State bank, and except as otherwise provided in this Act, subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed under the Illinois Banking Act upon a State bank; provided, however, that said rights and privileges shall not be construed to include the establishment of branches....

205 ILCS 645/3 (1992) (emphasis added).

The Commissioner, in construing what are the "same...rights and privileges as a state bank," has concluded that Section 3 of the FBOA grants to foreign banks the same powers enjoyed by state banks in Illinois, except for the power to establish branches. Interpretive Letter 91-22 (September 12, 1991) (A state bank is authorized to establish a subsidiary to hold title to property obtained in collection of a debt; therefore, a foreign bank may do so).

Illinois State Bank Powers

If, as the Commissioner has previously concluded, the Bank has the same powers as a state bank, we must then determine what those powers are. The

general statute governing the conduct of banking in Illinois is the Illinois Banking Act, 205 ILCS 5/1 (1992) ("Act"). Section 3 of the Act authorizes the formation of banks, subjects them to the jurisdiction of the Act, and grants them the authority to engage in the general business of banking. Section 3 states:

It shall be lawful to form banks, as herein provided, for the purpose of discount and deposit, buying and selling exchange and doing a general banking business, excepting the issuing of bills to circulate as money; and such banks shall have the power to loan money on personal and real estate security, and to accept and execute trusts upon obtaining a certificate of authority pursuant to the "Corporate Fiduciary Act", and shall be subject to all of the provisions of this Act.

205 ILCS 5/3 (1992) (emphasis added).

Section 3 relates to banks organized under the Act and chartered by the Commissioner. Section 3 does not by its terms grant authority to other corporate entities, whether foreign or domestic, to transact a banking business in Illinois .

Section 4 of the Act does, however, recognize that a corporate entity engaged in a banking business might transact business in Illinois without being chartered pursuant to the Act. Section 4 states:

The certificates, permits and charters of state banks existing at the time of the adoption of this Act shall continue in full force and effect, and the provisions of this Act shall apply thereto. Any corporation with banking powers availing itself of or accepting the benefits of this Act and all corporations with banking powers existing by virtue of any special charter or

general law of this State, shall be subject to the provisions and requirements of this Act in every particular, as if organized under this Act.

205 ILCS 5/4 (1992) (emphasis added).

Section 4, however, is not enabling legislation. Unlike Section 3, it neither authorizes corporations to engage in the banking business, nor authorizes a corporation with banking powers to avail itself of the Act or to accept benefits from the Act. By its plain meaning, Section 4 applies to instances when corporations with banking powers that operate in Illinois without being chartered under the Act, pursuant to some independent authority. An example of such a corporation would be a foreign bank branch, such as the Bank, that has received a certificate of authority under the FBOA, and which by the terms of the FBOA also is made subject to the Act. 205 ILCS 645/3 (1992).

Section 5 of the Act enumerates specific powers conferred upon Illinois banks in addition to the general banking powers authorized by Section 3. The introductory clause of Section 5 states:

A bank organized under this Act or subject hereto shall be a body corporate and politic and shall, without specific mention thereof in the charter, have all the powers conferred by this Act and the following additional general corporate powers....

205 ILCS 5/5 (emphasis added).

Section 2 of the Act defines the term "bank" as "any person doing a banking business whether subject to the laws of this or any other jurisdiction." 205 ILCS 5/2 (1992). Section 2 defines the term "person" as "an individual, corporation, partnership, joint venture, trust, estate, or unincorporated association." *Id.* Like Section 4, the language of Section 5 does not grant foreign banks the authority to transact business in Illinois; however, it grants them the powers authorized by Section 5 once they already are subject to the Act by virtue of the FBOA. Therefore, the Bank is subject to the Act and possesses the powers conferred by Section 5, including the powers authorized by Section 5(11).

Section 5(11)

In 1961, the Illinois legislature added paragraph 11 to Section 5 of the Act ("Section 5(11)"), which in a limited fashion granted state banks unspecified powers that were available to national banks in addition to those enumerated in the Act. This first version of Section 5(11) provided that a state bank or a bank subject to the Act was granted the general corporate powers to:

Do any act and to own, possess and carry as assets property of such character, including stock, which is at the time authorized to National Banks by statutory provisions of an act of Congress by language specifically granting such authority affirmatively and not merely by implication or recognition, but subject always to the same limitations and restrictions as are applicable to National Banks by the pertinent Federal law; provided, however, that the terms of this subparagraph shall not operate to authorize or permit a State Bank to do any act or to own, possess or carry as assets any property the doing of which or the owning, possessing or carrying whereof is expressly prohibited or limited by this Act, nor to limit or restrict the exercise by any State Bank of any power of the ownership, possession or carrying of any asset which is expressly authorized or permitted to State Banks by the terms of this Act.

1961 Laws of Illinois 2361, adopted at referendum election November 6, 1962, effective January 1, 1963.

There is no legislative history surrounding the passage of this law. However, Section 5(11) evidenced a restrictive legislative intent when it provided that : (1) the authority granted to national banks had to be "by statutory provisions of an act of Congress;" (2) the statutory provisions had to be "by language specifically granting such authority affirmatively and not merely by implication or recognition;" and (3) even if the first two conditions were met, Section 5(11) did not apply to powers "expressly prohibited or limited by" the Act.

Section 5(11) was amended in 1969 to significantly broaden its scope. The amended version, which remains in effect today, states:

Notwithstanding any other provisions of this Act, to do any act and to own, possess and carry as assets property of the character, including stock, that is at the time authorized or permitted to national banks by an Act of Congress, but subject always to the same limitations and restrictions as are applicable to national banks by the pertinent federal law.

P.A. 76-1826, adopted at referendum election, November 3, 1970.

The 1969 amendment to Section 5(11) transformed it from a limited grant to a broad grant of authority when the limiting proviso at the end of the section which withdrew the section's application to powers "expressly prohibited or limited by this Act," was deleted and the preface "notwithstanding any other provisions of this Act" was added. Also, the words "statutory provision of," which had preceded "an Act of Congress," were eliminated, and the words "by language specifically granting such authority affirmatively and not merely by implication or recognition," which had followed "an "Act of Congress," were deleted.

By adding the "notwithstanding" introductory phrase, deleting the proviso and making the other changes to Section 5(11), the legislature clearly intended to place state banks on the same competitive footing as national banks and to empower a state bank to act, operate and hold property to the same extent as national banks. These amendatory changes also show that the legislature intended state banks to look to other authoritative pronouncements regarding national bank powers in addition to an express "Act of Congress" in determining the reach of Section 5(11).

The Illinois courts also have interpreted Section 5(11) broadly. In Town & Country Bank of Quincy v. E. & D. Bancshares, Inc., et al., 172 Ill. App.3d 1066 (4th Dist. 1988), the court considered the ability of a state bank to pledge its bank premises to secure a debt of the bank's holding company. The court described the purposes and effect of Section 5(11) as follows:

Section 5(11) of the Illinois Banking Act extends to State banks all of the powers which national banks enjoy under acts of Congress, court decisions interpreting the applicable Federal legislation, and regulations issued by the Comptroller of the Currency which interpret that legislation. As the FDIC points out, the Illinois Banking Act does specify seven circumstances under which a bank may "borrow; and *** pledge its assets" (Ill. Rev. Stat. 1985, ch. 17, par. 311(7)), and the mortgaging of bank assets to secure a debt owed by a third party in order to avoid a run on the bank is not listed among those circumstances. However, Section 5(11) provides that "[n]otwithstanding any other provisions of this Act," *State banks may do any act which is at the time permitted to national banks.* (Ill. Rev. Stat. 1985, ch. 17, par. 311(11)). Thus the legislature has clearly indicated an intent that State banks not be limited to the pledging of their assets only in the situations specified in the Illinois Banking Act, if the power to pledge assets under other circumstances is permitted to national banks.

172 Ill. App. 3d 1066 at 1073 (emphasis added).

In Estate of Lindberg v. Beverly Bank, 69 Ill. App. 3d 714 (1st Dist. 1979), the court was asked to apply prohibitions applicable to national banks when selling the state bank's own stock held in an estate for which the bank was executor. The bank as executor sold the stock to its bank officers. The court concluded that the national bank prohibition did not apply, because the bank had the authority to sell the stock without resorting to Section 5(11) (albeit with potential liability for the bank). The court stated that Section 5 of the Illinois Banking Act "merely spells out some of the general corporate powers possessed by banks subject to the Act; section 5(11) merely *adds all powers possessed by national banks, as restricted by federal law.*" 69 Ill. App. 3d 714 at 723 (emphasis added).

The Commissioner is aware of two opinions issued by the Illinois Attorney General which have construed Section 5(11). The first Attorney General opinion, No. S-698, issued February 14, 1974, considered whether Section 5(11) permitted state banks to charge interest in excess of amounts permitted under Section 4 of the Interest Act, 815 ILCS 205/4, because national banks were granted such authority. Opinion S-698 properly

concluded that the language in Section 5(11) stating "[n]otwithstanding any other provisions of this [Illinois Banking] Act" was not intended to override the provisions of the Interest Act, which is a separate act.

The Commissioner is not persuaded by the second Attorney General Opinion, No. S-1488, issued April 15, 1980, which adopted a restrictive interpretation of Section 5(11). The question raised was whether a state bank could establish a

branch of its trust department in light of the fact that national banks were permitted to do so. The Attorney General concluded that Section 5(11) was limited in its application solely to the authority "to own, possess and carry as assets property, including stock," and therefore the state bank could not establish the branch in reliance on Section 5(11).

The Commissioner believes that Opinion S-1488 is inconsistent with the wording and intent of Section 5(11), as well as subsequent case law. First, the construction and punctuation of Section 5(11) provides strong support for the view that "act" and "ownership" are two separate and independent forms of powers granted to a state bank and that the reference to "stock" in Section 5(11) is illustrative as opposed to exclusive. Second, as explained above, the purpose of Section 5(11), especially as amended in 1969, was to put state banks on an equal competitive footing with national banks. Third, the opinion relied on statements describing the reach of Section 5(11) that were made in 1961, well before the 1969 amendments that significantly broadened Section 5(11). Fourth, the subsequent case of Town & Country interpreted Section 5(11) as authorizing actions as well as ownership.

Attorney General opinions lack the authority of a court decision, and while entitled to deference and consideration, a court decision is entitled to much greater weight. See City of Springfield v. Allphin, 74 Ill.2d 117 (1978); People v. Savaiano, 66 Ill.2d 7 (1976); Hagopian v. Board of Education, 56 Ill. App.3d 940 (1978); People v. Anderson, 50 Ill. App.3d 516 (1977). Opinion S-1488 was issued prior to Town & Country. The Commissioner concludes, therefore, that Town & Country is controlling and correctly articulates the application and scope of Section 5(11), which will permit Illinois state-chartered banks to perform acts and to hold assets to the same extent as that permitted for national banks under acts of Congress, court decisions or the OCC regulations and interpretations.

National Bank Powers

National banks have the power to accept and execute trusts. Clearly, if the Bank were a national bank, it could apply for and obtain authority to accept and execute trusts. Because the Bank is "subject to" the Act, the Bank possesses the powers granted to a state bank, including those authorized for a national bank. Because a national bank may apply for a certificate of authority to accept and execute trusts, pursuant to Section 5(11), we conclude that the Bank may do so.

The Attorney General, in Illinois Attorney General Opinion, S-1487 (April 15, 1980), concluded that the business of acting as a fiduciary is not per se the "general banking business," and therefore, found that the authority in Section 3 of the FBOA did not authorize a licensee under the FBOA to obtain a trust certificate. Opinion S-1487 obviously did not consider the applicability of Section 5(11) because Opinion S-1487 was issued on the same day the Attorney General concluded in Opinion S-1488 that Section 5(11) was restricted solely to

holding property. We therefore conclude that Opinion S-1487 is distinguishable and not controlling.

Banking Powers Do Not Exclude Acting As A Fiduciary

Section 3 of the Act authorizes a state bank to conduct a general banking business and "to accept and execute trusts upon obtaining a certificate of authority pursuant to the 'Corporate Fiduciary Act.'" Opinion S-1487 focused upon which powers if exercised by an entity constituted conducting the "general business of banking" so that that the entity was required to obtain a banking charter, and upon older statements that banks are corporations of limited authority and powers not specifically granted are withheld. See Wedesweiler v. Brundage (1921) 297 Ill. 228, 235-236, and Knass v. Madison and Kedzie Bank (1933), 354 Ill. 554, 563 respectively. These cases did not address whether authority could be granted to a state bank or a bank "subject to" the Act, such as a foreign bank, pursuant to Section 5(11) since that provision did not exist when those cases were decided. Because S-1487 focused solely upon what constituted a "general banking business," its discussion also does not address the clear statement in Section 4 that provides a banking corporation, such as a foreign bank, that has availed itself of benefits of the Act is subject to the provisions and requirements of the Act as if organized under the Act.

The power to conduct a "general banking business" encompasses many of the activities traditionally conducted by banks. The term is an expanding one and banks are permitted to engage in activities that are not traditionally associated with banking. In Corbett v. Devon Bank et al., 12 Ill. App. 3d 559, 299 N.E. 2d 521 at 529 (1st Dist. 1973), the court found that banks may sell renewal license plates and forward the proceeds to the Secretary of State. When describing the powers of a state bank, the court said:

As regards the state banks here involved, their powers are established and governed by the Illinois Banking Act. (Ill. Rev. Stat. 1971, ch. 16 1/2, pars. 101 et seq.) The statute authorizes the formation of banks for the purpose of "doing a general banking business." (Par. 103) The statute also enumerates the general corporate powers of Illinois state banks. (Par. 105) The crucial words are those used in the phrase "doing a general banking business." These words "are to be used in their common and ordinary sense." (People v. Wiersema State Bank, 361 Ill. 75, 88, 197 N.E. 537, 543.) In Illinois, some 35 years ago, our Supreme Court recognized that the trend of "modern decisions" was toward an expansion of the functions of banking. (Watt v. Cecil, 368 Ill. 510, 513, 15 N.E.2d 292.)...As above stated, the transactions here are incidental and germane to the carrying on of a general banking business. The transactions here are not *ultra vires* as regards the state banks.

We consider Corbett to be a better statement of powers of state banks than the cases cited in Opinion S-1487. The court in Corbett also cited Watt v. Cecil, 368 Ill. 510, 15 N.E. 2d 292 (1938), for the proposition that modern decisions recognize that banking functions are expanding. More directly on point, in Watt, three years after Knass (cited in Opinion S-1487), the court said:

[W]e hold that banks in this state have power to accept and execute trusts, and that such power is sufficiently embraced in the title of the act [Banking Act].

The contention that the acceptance and execution of trusts is not banking or the exercise of banking powers, and that, therefore, the power to legislate in

reference to such trusts is vested in the General Assembly and may not be delegated to the people by referendum, is equally untenable.

368 Ill. 510 at 514.

The Attorney General did not discuss Watt or distinguish it in Opinion S-1487. Because we cannot determine the basis that Opinion S-1487 failed to consider the direct statements in Watt, we conclude that the general rule that a court case is entitled to greater weight than an Attorney General opinion should also apply in this instance. Because the Bank possesses the powers of a state bank and the power to apply for and obtain a certificate to accept and execute trusts is not *ultra vires* for a state bank, then the Bank pursuant to the FBOA should be permitted to avail itself of the same privilege to apply for a Certificate, absent a specific prohibition in the FBOA.

Because the Bank possesses banking powers and is subject to the Act, we also conclude that Section 3 of the Act grants Bank the same privileges as a state bank, including the privilege to apply for a certificate to accept and execute trusts.

Corporate Fiduciary Act Provisions

Article II of the CFA, 205 ILCS 620/2-1 -- 2-10 (1992), provides the application procedure for a general certificate of authority to exercise trust powers. Section 2-4 of the CFA, 205 ILCS 620/2-4 (1992), requires that any corporate fiduciary, including the trust department of a bank, apply for and obtain a Certificate before it accepts a trust or deposit. In turn, Section 1-5.01 of the CFA, 205 ILCS 620/1-5.01 (1992), defines a "bank" by incorporating the definition in Section 2 of the Act. Section 2 defines a "bank" as "any person doing a banking business whether subject to the laws of this or any other jurisdiction." 205 ILCS 5/2 (1992). This functional description is broad enough to include foreign banks, out-of-state

banks, state-chartered banks and national banks. As the court observed in Heritage Bank and Trust Company v. Harris, 132 Ill. App.3d 969 (1st Dist. 1985):

"Bank" is a person doing a banking business "whether subject to the laws of this or any other jurisdiction." By contrast, a "national bank" must be "located in this State" and a "state bank" must be "organized under or subject to this Act." The Act thus imposes no jurisdictional limits on the range of institutions that may satisfy the definition of "bank." A "bank" may be an institution chartered under federal law or the law of this or another state.

* * * * *

The section 2 definition of "bank" as thus related to function, differs markedly from the definitions in that section of "state bank" and "national bank." The former is "any banking corporation organized under or subject to this Act"; the latter, "a national banking association located in this State." These two definitions refer to specific territorial jurisdictions over, or the location of, the banking institution. Each excludes certain classes, i.e., "national bank" is defined to exclude institutions not organized as "national banking institutions"; "state bank", to exclude institutions not organized under or subject to the Banking Act. On the other hand, "bank" is defined solely by function. Statutory authorization, jurisdiction or organizational structure are immaterial.

132 Ill. App.3d at 975-976. Given the use of the defined term "bank" when referring to a corporate fiduciary as "the trust department of a bank," Section 1-5.01 provides support for the conclusion that a "corporate fiduciary" may be a foreign banking corporation with a certificate of authority pursuant to the FBOA. As the court in Heritage stated: "Where an act defines its terms, those terms must be construed according to the definitions in the act." 132 Ill. App.3d at 973. The provisions of the CFA clearly do not exclude the Bank from obtaining a Certificate.

The powers of a corporate fiduciary are described in Section 1-6 of the CFA, 205 ILCS 620/1-6 (1992). "[I]f it is a state bank, [it possesses] those powers granted under Sections 3 and 5 of the Illinois Banking Act, as now or hereafter amended...." Id. As stated earlier, we conclude that a certificate holder under the FBOA possesses the same powers conferred by Sections 3 and 5 of the Act not because it is a state bank, but rather because the FBOA permits it to avail itself of the benefits of the Act and then Section 4 of the Act confirms that it is thereafter subject to the Act in all particulars. We further conclude that because the Bank possesses powers as if it were a state bank, under the CFA, the Bank would be treated in the same manner as a state bank.

Article IV of the CFA, 205 ILCS 620/4-1 -- 4-5 (1992), relating to "Foreign Corporate Fiduciaries" is not applicable to the question you asked because the "foreign corporation" to which Section 1-5.08 of the CFA, 205 ILCS 620/1-5.08 (1992), refers is a bank, national bank, savings and loan association or other corporation "organized under the laws of [or in the case of a national bank, having its principal place of business in] any state or territory of the United States of America, including the District of Columbia, other than the State of Illinois...", but not a corporate entity organized under the laws of another country. Since Bank does not meet the definition of "foreign corporation," it may not obtain a certificate pursuant to Article IV. Therefore, Opinion S-1487 is also inapposite because it focuses upon a "foreign corporation" that is authorized to accept trusts.

Foreign Banking Office Act Does Not Prohibit

Bank Exercising Trust Powers

As outlined in IL 91-22, the Bank as a certificate holder under the FBOA has the same powers as state bank. A state bank clearly has the authority to apply for and receive a certificate of authority pursuant to Section 2-4 of the CFA, and therefore, we conclude that the Bank may apply for such a certificate. We conclude that the plain language of Section 3 of the FBOA was intended to grant certificate holders under the FBOA broad parity with Illinois state banks. The only power that the General Assembly excluded from this grant was the authority to establish branches. If the General Assembly intended to exclude the authority for a FBOA certificate holder to apply for and obtain a certificate under the CFA they could have done so. They did not.

Conclusion

For reasons set forth above, the Commissioner concludes that, in fact, the General Assembly did not exclude Bank from exercising trust powers if it first applied for and obtained a certificate of authority to accept and execute trusts in the same manner that a state bank must apply to obtain this power. We conclude that a better reading of Section 3 of the FBOA which gives effect to provisions of the FBOA, the Act and the CFA, demonstrates that the General Assembly regarded a certificate holder under the FBOA as "subject to" the provisions of the Act. We further conclude that Bank has availed itself of the benefits of the Act within the meaning of Section 4 of the Act so that Bank is subject to all the provisions of the Act and therefore, possesses all the powers provided in the Act (except branching), including the powers authorized by Sections 3 and 5 of the Act, including Section 5(11). We conclude that these sources of authority combine to permit the Bank to apply for and, upon meeting the appropriate criteria, to obtain a certificate of authority to accept and execute trusts.