

INTERPRETIVE LETTER NO. 98-15 (OCTOBER 9, 1998)

State banks may purchase Illinois real estate tax sale certificates. Banks should have adequate policies, procedures and controls in place to protect against inherent risk and safety and soundness concerns relating to the purchase of such certificates.

This letter responds to your inquiry regarding the ability of state banks to purchase real estate tax sale certificates ("certificates"). You have asked the Office of Banks and Real Estate ("Agency") whether this type of activity would be permissible under Illinois law in light of a recent interpretation by the Office of Comptroller of the Currency ("OCC"). We conclude that purchasing certificates is a permissible activity for Illinois state banks.

The Agency and the OCC have previously addressed the issue of whether banks may invest in certificates. In 1986, the Agency issued an interpretive letter which concluded that state banks may not invest in certificates under the Illinois Banking Act ("Act") . Agency Interpretive Letter 86-01 (April 10, 1986). We based our conclusion on the fact that real estate tax liens were not readily marketable securities pursuant to Section 33 of the Act. 205 ILCS 5/33. The OCC issued an interpretive letter three years later which reached a similar conclusion and discussed the safety and soundness concerns inherent in purchasing certificates. OCC Investment Securities Letter No. 41 (June 16, 1989).

In 1996, the OCC revisited the issue of certificate purchasing by national banks. OCC Interpretive Letter 717 (March 22, 1996). In its letter, the OCC reiterated its earlier finding that certificates are not permissible investment securities. However, the letter concluded that national banks may purchase certificates if the relevant state law on certificate purchasing meets certain criteria. The letter focused on Michigan, the state in which the petitioning bank was located.

First, the OCC determined that Michigan courts hold that a certificate purchaser acquires a lien for unpaid taxes and not actual title to the property. This is significant because the National Bank Act ("NBA") generally prohibits national banks from purchasing real estate unless such property is necessary for their accommodation in the transaction of business. 12 U.S.C. 29. The NBA does, however, permit national banks to purchase loans or extensions of credit secured by liens on interests in real estate. 12 U.S.C. 371. The OCC also established that Michigan treats certificates as "evidences of debt," the purchase of which is permissible for national banks under 12 U.S.C. 24(7). Finally, the OCC found the purchase of a Michigan certificate to be the functional equivalent of factoring or purchasing open accounts, a traditional activity for national banks. 12 C.F.R. 7.1020.

The Agency reviewed Illinois law to determine whether Illinois certificates are treated in the same manner as Michigan certificates before concluding that Illinois banks may purchase them. As with Michigan, Illinois property taxes are a prior and first lien on the property until the taxes are paid or the property is sold. 35 ILCS 200/21-75. Similarly, Illinois certificates do not constitute title to the property, but instead represent "a lien on the property in favor of the tax buyer and the tax buyer's right to enforce the lien and institute tax deed proceedings after the redemption period expires." Cook County Treasurer, Matter of, 542 N.E.2d 15, 16 (1989). Furthermore, Section 3 of the Act permits state banks to purchase loans secured by liens on real

estate and evidences of debt just as the NBA does. 205 ILCS 5/3. Based on the general banking authority of Section 3, we conclude that Illinois state banks may purchase certificates.

The similarities between Illinois law and the Michigan facts described in OCC Interpretive Letter 717 suggest that a supplemental and additional source of authority for Illinois banks to purchase certificates is Section 5(11) of the Act. 205 ILCS 5/5(11). Section 5(11), sometimes called the "wildcard" provision, gives state banks the authority to engage in activities authorized by the OCC for national banks, subject to the same limitations imposed upon national banks.¹

Regardless which is the source of authority for purchasing certificates, the Agency agrees with the OCC that there are serious safety and soundness concerns involved when banks purchase certificates. The main concern is whether the bank has sufficient information regarding both the nature of the property subject to the certificate and the reliability of the property's owner. However, we also agree that these concerns can be mitigated through proper banking policies, procedures, and controls. A bank should have these in place before undertaking this activity.

¹ Section 5 of the Act states:

"A bank organized under this Act or subject hereto shall...have all the powers conferred by this Act and the following additional general corporate powers:

...

(11) Notwithstanding any other provisions of this Act or any other law, 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 and subject to applicable provisions of the Financial Institutions Insurance Sales Law." 205 ILCS 5/5.