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OPINION
OF
HAL STRATTON
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No. 87-50

By: Michael J. Vargon
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To: Harroll Adams
State Auditor
PERA Building--Room 302
Santa Fe, New Mexico 87503

QUESTION:

Are certificates of deposit deposits or investments for purposes of Section 6-10-36 NMSA 1978?

ANSWER:

Certificates of deposit are deposits for purposes of Section 6-10-36 NMSA 1978.

ANALYSIS:

You have asked our office whether certificates of deposit are deposits or investments for purposes of Section 6-10-36 NMSA 1978. If certificates of deposit are an interest-bearing deposit, then the entities specified in Section 6-10-36 NMSA 1978 must distribute the deposits equitably amongst the eligible banks and savings and loans pursuant to the formula specified in Section 6-10-36(C) NMSA 1978. Investments, on the other hand, are not subject to equitable distribution. See Section 6-10-36(A) NMSA 1978. We conclude that certificates of deposit are deposits for purposes of Section 6-10-36 NMSA 1978.

We understand that some counties that are subject to the requirements of equitable distribution have taken the position that the only interest-bearing accounts that are subject to

equitable distribution are interest-bearing checking accounts or similar accounts where funds can be withdrawn at any time without penalty. According to this reasoning, the difference between an investment and a deposit is that a deposit is money that is available on demand without payment of a penalty for withdrawal; a certificate of deposit is not a deposit because the funds placed in the certificate are not available on demand without paying a penalty. In addition, it is urged, certificates of deposit are commonly considered to be investments.

A certificate of deposit traditionally was viewed as a bank deposit with conditions attached. See Bank of Commerce v. Harrison, 11 N.M. 50, 66 P.460 (1901). Upon the certificate's endorsement and transfer, a new relation was considered to arise amongst all the parties. Bank of Commerce v. Harrison, 11 N.M. at 60, 66 P. at 461. As recently as 1982, the Supreme Court of the United States ruled that a conventional certificate of deposit purchased from an issuing bank was not a security under the antifraud provisions of the federal securities laws. Marine Bank v. Weaver, 455 U.S. 551, 555. See also Wolf v. Banco Nacional de Mexico S.A., 739 F.2d 1458, 1464 (9th Cir. 1984), cert denied 469 U.S. 1108.

In Marine Bank, the Supreme Court noted that whether the certificate of deposit was a security or a deposit might vary, depending on the purposes that the parties intended to be served and the factual setting as a whole. Marine Bank, supra at 560 n.11. In Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce Fenner & Smith, 756 F.2d 230 (2d Cir. 1985), the United States Court of Appeals for the Second Circuit held that certificates of deposit offered by the defendant were securities. Unlike the factual setting of Marine Bank, the defendant in Gary Plastic Packaging Corp. had initiated a program of mass marketing of certificates of deposit it had purchased from various commercial banks and savings and loans. Merrill Lynch had promised its investors that it would maintain a strong secondary market and thereby assure investors a high degree of liquidity. The court found that the negotiability or liquidity of the certificates purchased from Merrill Lynch was one of the program's primary attractions. Gary Plastic Packaging Corp. supra, at 240. Thus, certificates of deposit that are purchased from the issuing bank normally will be considered to be a deposit. Further transfer or negotiation of the certificate may change the character of the certificate to that of a security or investment.

Characterization of certificates of deposit as investments or deposits in other contexts is not, however, determinative of the question that has been posed. The relevant inquiry is whether the legislature intended certificates of deposit to be subject the

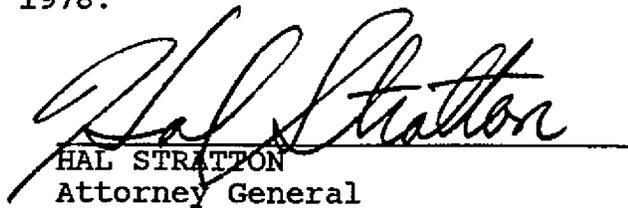
requirement of equitable distribution. Section 6-10-36(E) NMSA 1978 (as amended by Laws 1987, ch. 79, §15) provides:

The rate of interest for all public money deposited in interest-bearing accounts in banks, savings and loan associations and credit unions shall be set by the state board of finance, but in no case shall the rate of interest be less than one hundred percent of the asked price of United States treasury bills of the same maturity on the day of deposit. Any bank or saving and loan association that fails to pay the minimum rate in interest at the time of deposit provided for herein for any respective deposit forfeits it right to an equitable share of that deposit under this section.

This section clearly contemplates that the term "deposit" includes money placed in accounts that have a maturity date. It thus would appear that the legislature intended to subject time deposits such as certificates of deposit to the requirements of equitable distribution.

Certificates of deposit that are purchased in the secondary market might be considered to be investments. See Gary Plastic Packaging Corp, supra. They are not, however, permissible investments for counties under Sections 6-10-44 and 6-10-10(F) NMSA 1978. We are unaware of any alternative statutory authority for investment of county funds.

For these reasons we conclude that certificates of deposit were intended by the Legislature to be treated as deposits for purposes of Section 6-10-36 NMSA 1978.


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