



January 22, 2016

H. Grant Stephenson, Esq.
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Re: Request for Interpretive Opinion Regarding Certificates of Deposit

Dear Mr. Stephenson:

This is in response to your letter of August 5, 2015 to the Commonwealth of Pennsylvania Department of Banking and Securities (the "Department") in which you request an interpretive opinion that, based upon the representations set forth in your letter, federally-insured certificates of deposit ("CDs") are not "securities" under Section 102(t) of the Pennsylvania Securities Act of 1972 ("1972 Act"), 70 P.S. §1-102(t). In the alternative, you request an opinion that if the CDs are securities, they are exempt from registration and your client, Primary Financial Company, LLC ("Primary") and its credit union owners and co-agents are not subject to registration as broker-dealers in Pennsylvania.

Background

You have indicated the following factual background. Your client, Primary, is a credit union service organization owned by 11 non-profit wholesale corporate credit unions, which are mutually owned by their credit union members to whom the corporate credit unions provide financial services.

You describe Primary's activities as matching credit-union depositors with federally insured banks and credit unions that wish to issue CDs and facilitating the deposit. Primary acts as the custodial and administrative agent for the credit-union depositors. Further, it is represented that all of the CDs are issued by depository institutions organized and chartered under the laws of a state or of the United States, and that the federal deposit insurance coverage of the CDs passes through to the credit unions. All of the CDs that Primary places are insured either by the Federal Deposit Insurance Corporation ("FDIC") or the National Credit Union Share Insurance Fund ("NCUSIF").

You also state that information about the availability of CDs from issuing financial institutions is distributed by Primary and its co-agents. Primary does not render investment advice to the credit unions, but rather provides custodial service and the collection and distribution of payments thereafter.

Analysis

Our analysis begins with whether bank-issued CDs are included in the definition of “security” found under § 102(t) of the 1972 Act, which includes “evidence of indebtedness”, “investment contract”, and “certificate of deposit for a security.” Section 102, which includes all definitions used in the 1972 Act, begins with the sentence: “When used in this act, the following definitions shall be applicable, **unless the context otherwise requires** [emphasis added].”

Pennsylvania appellate courts have not addressed whether a bank-issued CD is a security under the 1972 Act. Section 703(a) of the 1972 Act, however, provides that “[t]his act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact the “Uniform Securities Act” and to coordinate the interpretation and administration of this act with related Federal regulation.” 70 P.S. § 1-703(a).

We are mindful of the United States Supreme Court decision in *Marine Bank v. Weaver*, 455 U.S. 551 (1982), in which the Court ruled that the CDs issued by a federally regulated bank in that matter were not securities under the Securities and Exchange Act of 1934 (“1934 Act”). The Court reasoned that the purchaser of a CD issued by a federally regulated bank is virtually guaranteed payment in full, noting that such banks are protected by the reserve, reporting, and inspection requirements of the federal banking laws, and are insured by the FDIC. *See Id at 558*. In reliance on the *Marine Bank* decision, the Pennsylvania Securities Commission¹ granted no-action relief to Allstate Bank for the marketing of FDIC-insured CDs without compliance with the registration provisions of Section 301 of the 1972 Act.² 70 P.S. § 1-301.

We also note that Federal case law interprets the phrase “certificate of deposit for a security” found in the definition of “security” in the 1934 Act, 15 U.S.C. §78c(a)(10), as not referring to bank-issued CDs. Instead, the phrase refers to “instruments issued by protective committees in the course of corporate reorganizations.” *Id. at 557*, citing *Canadian Imperial Bank of Commerce v. Fingland*, 615 F.2d 465, 468 (7th Cir. 1980).

You also provide that the CDs at issue will include those issued by credit unions as well as banks. We note that the National Credit Union Administration supervises and insures Federal credit unions as well as State-chartered credit unions, and that the insurance provided by NCUIF to credit unions is identical to that provided by the FDIC to federal and state regulated banks (currently \$250,000).

Conclusion

The Department agrees and concludes that the federally-insured CDs described in your letter are not securities under § 102(t) of the 1972 Act and that therefore Primary’s activities, as described in your letter, are not subject to the 1972 Act.

¹ The Pennsylvania Securities Commission merged with the Department of Banking effective October 1, 2012, creating the Department.

² Staff Letter 01-3 (Nov. 15, 2001) Allstate Bank Northbrook, IL.

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The Department's position is based solely on the representations contained in your letter. Any change in the facts or circumstance could result in an amendment or reversal of the Department's position. This letter has been authorized by the appropriate Department personnel and constitutes a duly authorized statement of the Department's position regarding the issues discussed herein. This letter may not be relied upon or construed as constituting legal advice.

Please do not hesitate to contact me if you have any further questions regarding this matter.

For the Commonwealth of Pennsylvania
Department of Banking and Securities:



Scott A. Lane
Senior Deputy Chief Counsel for Securities