



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

May 17, 2005

Darren Bond
Finance Division
Oregon Department of Treasury
350 Winter Street
Salem, OR 97310-0840

RE: ORS 294.035 And Investment in Certificates of Deposit
DOJ File No. 170200-GT0224-05

Dear Darren:

You asked whether local governments may lawfully invest in certificates of deposit ("CDs") issued by banks that do not have either a head office or a branch in Oregon, if the certificates of deposit meet the qualifications for corporate indebtedness under ORS 294.035(9). Your question arises because ORS 294.035(4) may be interpreted as the exclusive authority for local governments to invest moneys through certificates of deposit. Certificates of deposit that are issued by an out-of-state bank do not meet the requirements of ORS 294.035(4).

SHORT ANSWER

Although not free from doubt, I advise that an Oregon court is more likely than not to conclude that the legislature did not intend to include certificates of deposit within the description of corporate indebtedness found in ORS 294.035(9). This conclusion is based on a reading of the text and context of ORS 294.035, as well as the legislative history of the statute.

DISCUSSION

I. Text and Context

To answer your question we must determine the legislature's intended meaning of the term "corporate indebtedness" as it is used in ORS 294.035(9), and the legislature's intent when it adopted ORS 294.035(4). That determination must begin with an examination of the text and context of the statutes at issue. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). The text itself provides the best evidence of the legislature's intent. *Id.*, 317 Or at 610; *Owens v. Maas*, 323 Or 430, 433, 918 P2d 808, 810 (1996). If there is more than one plausible reading of the text and context, we may resort to legislative history. *PGE v. BOLI*, 317 Or at 610-611 (1993); *Stevens v. Czerniak*, 336 Or 392, 403, 84 P. 3d 140 (2004).

ORS 294.035 provides in relevant part:

Subject to ORS 294.040 and 294.135 to 294.155, the custodial officer may * * * invest any sinking fund, bond fund or surplus funds in the custody of the custodial officer in the bank accounts, classes of securities at current market prices, insurance contracts and other investments listed in this section. * * * Investments authorized by this section are:

* * * * *

(4) Time deposit open accounts, certificates of deposit and savings accounts in insured institutions as defined in ORS 706.008, in credit unions as defined in ORS 723.006 or in federal credit unions, if the institution or credit union maintains a head office or a branch in this state.

* * * * *

(9)(a) Corporate indebtedness subject to a valid registration statement on file with the Securities and Exchange Commission or issued under the authority of section 3(a)(2) or 3(a)(3) of the Securities Act of 1933, as amended. Corporate indebtedness described in this subsection does not include banker's acceptances. The corporate indebtedness must be issued by a commercial, industrial or utility business enterprise, or by or on behalf of a financial institution, including a holding company owning a majority interest in a qualified financial institution.

(b) Corporate indebtedness must be rated on the settlement date P-1 or Aa or better by Moody's Investors Service or A-1 or AA or better by Standard & Poor's Corporation or equivalent rating by any nationally recognized statistical rating organization.

(c) Notwithstanding paragraph (b) of this subsection, **the corporate indebtedness must be rated on the settlement date P-2 or A or better by Moody's Investors Service or A-2 or A or better by Standard & Poor's Corporation or equivalent rating by any nationally recognized statistical rating organization when the corporate indebtedness is:**

(A) Issued by a business enterprise that has its headquarters in Oregon, employs more than 50 percent of its permanent workforce in Oregon or has more than 50 percent of its tangible assets in Oregon; or

(B) Issued by a holding company owning not less than a majority interest in a qualified financial institution, as defined in subsection (8) of this section, located and licensed to do banking business in Oregon or by a holding

company owning not less than a majority interest in a business enterprise described in subparagraph (A) of this paragraph.

(d) A custodial officer shall not permit more than 35 percent of the moneys of a local government that are available for investment, as determined on the settlement date, to be invested in corporate indebtedness, and shall not permit more than five percent of the moneys of a local government that are available for investment to be invested in corporate indebtedness of any single corporate entity and its affiliates or subsidiaries.
(emphasis added)

A. "Corporate Indebtedness"

It is not clear whether the legislature intended certificates of deposit to be within the scope of "corporate indebtedness" described in ORS 293.035(9). The term "corporate indebtedness" is very broad and may be read literally to include any obligation to pay issued by a corporation or financial institution.¹ To be within ORS 294.035(9), however, such indebtedness must also be registered with the Securities and Exchange Commission, or be issued under an exemption from registration provided in the Securities Act of 1933. It must also meet the ratings specified in the statute. If a certificate of deposit issued by an out-of-state bank meets these requirements, it arguably is an authorized investment under ORS 294.035(9).

B. Certificates of Deposit

The Securities Act of 1933 covers a broad range of financial and negotiable instruments. It defines a "security" as "unless the context otherwise requires, any note, stock, treasury stock, security future, bond, debenture, [or] evidence of indebtedness * * *." 15 USC § 77(b)(1). A certificate of deposit may be a form of note or evidence of indebtedness, because it is a promise to pay. Therefore, certificates of deposit that meet the required ratings appear to be within the scope of ORS 294.035(9).

The federal courts, however, have held that not all notes and financial instruments are securities under the 1933 Act. *Marine Bank v. Weaver et ux.*, 455 US 551; 102 S Ct 1220; 71 L Ed2d 409 (1982). In *Marine Bank v. Weaver*, the Supreme Court held that an ordinary certificate of deposit purchased directly from a bank was not a security under the Act. The Court distinguished a CD, that is subject to a comprehensive set of federal banking regulations and insured by the Federal Deposit Insurance Corporation, from a long-term debt obligation where the holder assumes the risk of the borrower's insolvency. *Marine Bank*, 455 US 458-459. Accordingly, an ordinary bank issued CD may not be within the scope of ORS 294.035(9) because it is not a "security" under the 1933 Act. See *Owens v. Maass*, at 438, citing *State v. Waterhouse*, 209 Or 424, 436, 307 P2d 327 (1957) (substantive law in place at time of enactment is part of court's contextual analysis to determine legislative intent).

¹ Indebtedness means "the condition of being indebted." Indebted is "being under the obligation of paying or repaying money". WEBSTER'S THIRD NEW INT'L DICTIONARY 1147 (unabridged ed 1993).

On the other hand, the federal courts have distinguished between “brokered certificates of deposit” and an ordinary CD when examining the reach of the 1933 Act. *See Safeway Portland Employees’ Federal Credit Union v. S.H. Wagner & Co., Inc.* 501 F2d 1120, (9th Cir. 1974); *Olson v. E.F. Hutton & Co., Inc.*, 957 F2d 622, 628-629 (8th Cir. 1992); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F2d 230 (2nd Cir. 1985), *cert. denied* 498 US 1025; 111 S Ct 675; 112 L ed 2d 667 (1991). When a brokerage firm or similar institution has bundled CD’s and marketed them to potential investors, the courts have held that such arrangements may be “securities” under the 1933 Act. *Gary Plastic*, 756 F2d at 240-242. Thus, a CD purchased under such an arrangement and with the appropriate rating, may be “corporate indebtedness” within the meaning of ORS 294.035(9).

To determine whether the legislature intended any form of CD, brokered or ordinary, to be “corporate indebtedness” we must further examine the context of ORS 294.3035(9), which includes other provisions of the same statute. A phrase whose meaning seems clear when read in isolation may be rendered ambiguous when read within the relevant context. *See Martin v. Albany*, 320 Or 175, 880 P2d 926 (1994). When reviewing relevant context, Oregon courts will give words their plain, natural and ordinary meaning. *PGE*, 317 Or at 611. It is not clear that the ordinary person, or legislator, would equate a certificate of deposit as a type corporate indebtedness. In a dictionary of general usage, a certificate of deposit is defined as “a receipt issued by a bank for an interest bearing time deposit coming due at a specified future date.” WEBSTER’S THIRD NEW INT’L DICTIONARY 367 (unabridged ed 1993). Applying this meaning to certificates of deposit, the legislature arguably grouped CDs with time deposits in 294.035(4) because it viewed them as a financial instrument similar to a form of bank account or deposit, rather than a subset of corporate debt.³

Words and phrases however, may be subject to differing meanings or descriptions. A financial dictionary provides a definition for “certificate of deposit” that more closely describes a form of indebtedness of a financial institution. CD’s are defined as “a debt instrument issued by a bank that usually pays interest. * * *” BARRON’S DICTIONARY OF FINANCE AND INVESTMENT TERMS 83 (4th ed 1995). The financial dictionary also distinguishes between a CD issued directly by a bank and a “brokered CD”. A “brokered CD” is a “certificate of deposit (CD) issued by a bank or thrift institution but bought in bulk by a brokerage firm and resold to brokerage customers.” BARRON’S at 62.

³ WEBSTER’S defines “deposit” as “to put down, lay aside *** to place in deposit in a bank or similar institution *** 1 a: the state of being deposited in trust or safekeeping b: the state of being deposited to one’s credit in a bank 2: something placed (as in a bank or in someone’s hands) for safekeeping: as a : money that is deposited in a bank or with a banker, that is subject to order, and that created the relationship of creditor and debtor.” WEBSTER’S at 605. It defines “deposit banking” as “banking in which bank credit is in the form of deposits instead of the issue of notes.” *Id.* at 606.

Simply applying literal meanings to the terms “certificate of deposit” and “corporate indebtedness”, therefore, does not provide a clear indication of legislative intent. The legislature may have viewed an ordinary CD as similar to a bank deposit that was within subsection (4) and a brokered CD as a “security”, that was a form of corporate indebtedness within subsection (9). Such treatment would be consistent with the Supreme Court’s and the market’s treatment of CDs. That distinction, however, is not reflected in the language of the statute.

C. Context supporting CDs as outside ORS 294.305(9)

Alternatively, the legislature may have viewed all certificates of deposit, ordinary or brokered, as only authorized under ORS 294.035(4). That subsection provides specific authority for local governments to invest in certificates of deposit that are issued by certain financial institutions having a branch or head office in Oregon. The argument may be made that because subsection (4) deals specifically with certificates of deposit, rather than the general category of corporate indebtedness, subsection (4) should control as a more detailed and specific legislative direction related to CDs. ORS 174.020; *State v. Dahl*, 336 Or 481, 489, 87 P3d 650 (2004) (more specific legislative intent controls). Under such a reading local governments could invest only in CDs meeting the requirements of 294.035(4), whether the CDs were purchased through a brokered package, or not. In the end, the local government holds the same form of bank debt whether it is purchased directly or as a brokered CD.⁴

Other subsections of ORS 294.035 support the view that subsections (4) and (9) do not have any overlap in the type of investments authorized. For instance, ORS 294.035(10) provides that local governments may invest in “securities of any open-end or closed-end management investment company or investment trust, if the securities are of the types specified in subsections (1) to (3), (8) and (9)* * *.” If the legislature viewed CDs as the same type of debt instrument as some of those described in (9), and the other cross-referenced debt obligations, it seems that (4) would be included in this list of securities along with subsection (9).⁵ It was not, however, and may have been excluded because the legislature did not view the bank deposits and CDs listed in subsection (4) as the same type of debt obligation.

There is a limit on the total amount of corporate indebtedness, including debt issued by a financial institution, that may be held by a local government under ORS 294.035(9). A CD purchased from a bank headquartered or with a branch in Oregon under subsection (4) may be the same as a CD purchased under subsection (9). The language of subsection (9) would allow the purchase of debt issued by a financial institution located in, or out of, Oregon, if the debt met that subsections requirements. There is no reference, however, to this potential overlap in determining whether the limits set forth in subsection (9) have been met. It seems that if the

⁴ Brokered CD’s differ from an ordinary CD by the method under which they are sold and the possibility of a secondary market available for resale of the CD prior to maturity. From the perspective of the issuing bank, however, I have been informed that there is no difference between a brokered CD or one issued directly by the bank. They would be treated the same in the event of a bank’s insolvency and the availability of FDIC insurance.

⁵ ORS 294.035(1)–(3) describe debt obligations issued by federal and state entities. ORS 294.035(8) addresses banker’s acceptances.

legislature contemplated CDs being purchased under (9), they would have cross referenced (4) in the calculation of an overall limit on corporate indebtedness.

The courts have instructed that we are to reconcile and harmonize specific and general provisions to promote a consistent legislative policy. With respect to investments purchased from Oregon banking institutions, subsections (4) and (9) of ORS 294.035 appear to be inconsistent. Subsection (9) expresses a policy of limiting overall investment in corporate indebtedness and limiting investment in debt issued by Oregon entities, yet subsection (4) expressly requires an investment in CDs to be in an Oregon institution, with no limits as to how much may be invested. An argument may be made that the two subsections may be harmonized, and effect given to both, if subsection (9) is read to provide authority to invest only in out-of-state brokered CDs and in-state CDs may be purchased only under subsection (4). This distinction, however, is not expressed in the language of the statute.⁶

In addition to other subsections of the same statute, relevant context also includes other statutes related to the same subject. *Owens v. Maas*, 323 Or at 435-436. ORS 294.048 provides that when funds invested under ORS 294.035(4) are needed for current cash demands, but that immediate liquidation would result in a loss because the investment must be withdrawn or liquidated prior to maturity, a local government may issue a short term note secured by the investment to obtain immediate funds. If the legislature viewed CDs as within the scope of ORS 294.035(9), the legislature presumably would have referenced the liquidation of instruments under subsection (9) as well as subsection (4) in ORS 294.048.

The argument may be made that because brokered CDs have a secondary market they are not subject to the same sort of loss, (a penalty for early withdrawal), that applies to an ordinary CD. Therefore, the legislature did not include subsection (9) in the ORS 294.048 cross-reference. CD's with a secondary market may still be subject to loss, however, depending on the movement of interest rates in the market.⁷ Accordingly, it would appear to be more consistent with the legislative policy addressed in ORS 294.048 to also cross-reference CDs held under ORS 294.035(9).

⁶ Subsection (9) also authorizes the purchase of corporate indebtedness issued by a "holding company owning a majority in interest in a qualified financial institution." A qualified financial institution is defined by cross reference to 294.035(8) as one that is located and licensed to do banking business in Oregon. Corporate indebtedness issued by a holding company owning a majority interest in an Oregon bank, appears to be subject to limits that do not apply to a "financial institution" listed under ORS 294.035(9)(a). It is unclear why there are slightly different descriptions of Oregon banking institutions in subsections (4) and (8)-(9) and why the legislature limited only the amount of indebtedness issued by a holding company with an ownership interest in an Oregon bank rather than indebtedness issued directly by an Oregon financial institution. It may be that the legislature did not anticipate CDs issued by Oregon banks being purchased under subsection (9), either because subsection (4) provides the exclusive authority for CDs or because it intended only out-of-state CDs to be corporate indebtedness.

⁷ According to the offering materials that I reviewed, a brokered CD may not always have a secondary market for several reasons, including because the brokerage firm may not choose to maintain a secondary market or may become insolvent.

D. Context supporting CDs as within ORS 294.035(9)

Each of the instances described above may be read to support a determination that the legislature did not intend to include CDs within subsection (9) because it did not treat subsections (4) and (9) as overlapping in any way. A contrary argument may also be found, however, within the context of ORS 294.035 and its treatment of banker's acceptances. ORS 294.035(8) authorizes investment of local government moneys in banker's acceptances.⁸ Bankers' acceptances are time drafts drawn on and accepted by a bank for payment that are generally secured by a shipment of goods. BARRON'S at 3. These instruments are securities that are exempt from registration under the 1933 Act and so potentially within the scope of ORS 294.035(9). 15 USC § 77(1)(3). The legislature expressly recognized this overlap and provided in subsection (9) that "[c]orporate indebtedness described in this subsection does not include banker's acceptances."

If the legislature did not intend CDs to be a form of corporate indebtedness under subsection (9), it also could have enacted an express exemption for them. Because it did so with banker's acceptances, but not CDs, the inference arises that CDs were intended to remain within the scope of subsection (9). The Oregon courts have instructed that when determining legislative intent we are to give effect, if possible, to all statutory provisions and to reconcile a specific and a general provision, if possible. *Fairbanks v. Bureau of Labor and Industries*, 323 Or 88, 94, 913 P2d 703 (1996) (the specific and the general statute should be read together and harmonized, if possible, while giving effect to a consistent legislative policy); citing *State v. Pearson*, 250 Or 54, 58, 440 P2d 229 (1968). Here, the argument may be made that subsection (4) provides that CDs may be purchased from Oregon banks and, presumably, collateralized as public funds deposits under ORS chapter 295. However, brokered CDs (as securities under the 1933 Act) may also be purchased from non-Oregon banks, if they meet the requirements of subsection (9). Under that subsection assurances of a certain level of rating is used instead of collateralization to provide safety for the local government investment.

II. Legislative History

Because the plain meaning of the terms used and the text and context provide more than one plausible reading of ORS 294.035(4) and (9), we may consult the legislative history of the

⁸ (8)(a) Banker's acceptances, if the banker's acceptances are:
(A) Guaranteed by, and carried on the books of, a qualified financial institution;
(B) Eligible for discount by the Federal Reserve System; and
(C) Issued by a qualified financial institution whose short-term letter of credit rating is rated in the highest category by one or more nationally recognized statistical rating organizations.
(b) For the purposes of this subsection, "qualified financial institution" means:
(A) A financial institution that is located and licensed to do banking business in the State of Oregon; or
(B) A financial institution that is wholly owned by a financial holding company or a bank holding company that owns a financial institution that is located and licensed to do banking business in the State of Oregon.
(c) A custodial officer shall not permit more than 25 percent of the moneys of a local government that are available for investment, as determined on the settlement date, to be invested in banker's acceptances of any qualified financial institution.

two provisions for further indications of the legislature's intent. *Stevens v. Czerciak*, at 336 Or 403; *PGE*, 317 Or at 611-12. The predecessor to ORS 293.035(4) was enacted in 1965 when the legislature added "bank time deposit open accounts and bank certificates of deposit" to the list of allowable investments under ORS 294.035. Or Laws 1965, ch 404. The introductory phrase of the statute authorizing investment "in the following classes of securities at current market prices" also was modified to read "the following **bank accounts** and classes of securities * * *" (emphasis added). The reference to "bank accounts" infers that the legislature contemplated CDs as similar to, or a form of, bank accounts rather than a security subject to regulation under the 1933 Act.

In 1985, the legislature further amended the statute to require that the accounts and deposits be held in a financial institution "which maintains a head office or branch in this state in the capacity of a bank, mutual savings bank or savings and loan association." Or Laws 1985, ch 440. According to testimony by, and materials provided to, the legislative committees who heard the bill, the restriction to Oregon institutions was to ensure that moneys were placed in "healthy" institutions. *Staff Measure Analysis*, House Committee on Consumer and Business Affairs (SB 720), June 11, 1985. Institutions located in Oregon were viewed as safer because they were under Oregon regulatory supervision. If an institution got into trouble all public funds deposits would be collateralized at 110%, including bankers' acceptances and commercial deposits under ORS 294.035. Minutes, Senate Committee on Business, Housing and Finance (SB 720), April 30, 1985, at 2-6, Tape 77 side A, Tape 78, side A. The Deputy State Treasurer testified that "the bill provides if a local government is going to be investing in CDs, they should be investing in in-state banks." Testimony of Bob Moore, Deputy Treasurer, House Committee on Consumer and Business Affairs (SB 720), June 11, 1985, Tape 213 at 342. It appears from the foregoing, that the legislature contemplated local governments investing in CDs solely under the provisions of ORS 294.035(4).

Subsection (9) of ORS 294.035 originally authorized investment in commercial paper. The statute was amended in 1993 to replace "commercial paper" with "corporate indebtedness" and to extend the maximum investment period from 270 days to eighteen months. Or Laws 1993, ch 721. Commercial paper generally consists of "short-term negotiable instruments that are direct obligations of the issuer." WEBSTER'S at 457. They generally have a maturity ranging from two to 270 days. BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 96 (4th ed. 1995).

The legislative materials related to the change from "commercial paper" to "corporate indebtedness" repeatedly refer to the bill as increasing the types of corporate debt in which local governments are authorized to invest by adding "corporate bonds and notes," which typically have a longer maturity than commercial paper. *Staff Measure Summary*, House Committee on General Government (SB 690-A), June 2, 1993; *Staff Measure Summary*, Conference Committee on SB 690, July 26, 1993; *Revenue Analysis of Proposed Legislation*, SB 690-A, July 7, 1993; Minutes, Senate Committee on Business, Housing and Consumer Affairs (SB 690), April 26, 1993, at 1-2 (Tape 58 side A). The types of corporate debt used as examples of investment that the bill would allow included Boeing, Microsoft, Boise Cascade, Nordstrom and Idaho Power and Light. Minutes, House Committee on General Government (SB 690), June 24, 1993,

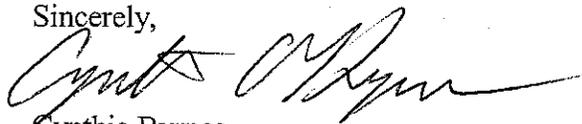
Exhibit U. The legislature was informed that a strong bond rating should be assigned to the investments to help ensure their safety. Minutes, Conference Committee (SB 690), July 26, 1993, Exhibit D; Minutes, House Committee on General Government (SB 690), June 24, 1993 at 16-17, (Tape 69 side A).

There is no mention in the legislative materials of the possibility that "corporate indebtedness" may include certificates of deposit. Therefore, there is no indication that the legislature intended to authorize investment in CDs through ORS 294.035(9). Instead, the focus of the legislative materials and related discussion is on expanding investment authority to include corporate "notes and bonds". Such instruments are not commonly understood to be equivalent to certificates of deposit. The committee heard information related to assigning a "bond rating" to the corporate debt. Again, there is no indication that the committee thought such a rating would, or should, apply to certificates of deposit or that language should be added to the bill to address the appropriate regulatory body or ratings requirement for CDs.

The legislative history materials tend to support a reading of ORS 294.035(9) that excludes certificates of deposit from its scope. The legislature appears to have consciously dealt with the treatment of CDs only under ORS 294.305(4). This supports a reading of the statute under which CDs are viewed as similar to a form of bank deposit, rather than a security. Although, under a literal reading of ORS 294.035(9), CDs, particularly brokered CDs, may be within its scope. Other related statutory provisions and the legislative history, however, provide stronger support for a contrary reading of the statute. Therefore, although not entirely free from doubt, I advise that an Oregon court is more likely than not to hold that the legislature did not intend CDs to be within the scope of ORS 294.035(9).

Please call me if you have any additional questions regarding this matter.

Sincerely,



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