STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL
STATE CAPITOL
600 E BOULEVARD AVE DEPT 125
BISMARCK, ND 58505-0040
(701) 328-2210 FAX (701) 328-2226

Wayne Stenehjem
ATTORNEY GENERAL

**LETTER OPINION**
**2008-L-19**

December 22, 2008

Mr. Tim Karsky
Commissioner of the North Dakota
Department of Financial Institutions
2000 Schafer St, Ste G
Bismarck, ND 58501-1204

Dear Mr. Karsky:

Thank you for your letter asking whether security must be pledged for public deposits that exceed the general deposit insurance limitation of the Federal Deposit Insurance Corporation ("FDIC"), but are guaranteed under the FDIC's Temporary Liquidity Guarantee Program ("TLG Program"). It is my opinion that public deposits guaranteed under the Transaction Account Guarantee Program portion of the TLG Program should be treated the same as deposits insured under the FDIC's general deposit insurance, and security need not be pledged for such deposits.

ANALYSIS

Generally, state agencies and political subdivisions must deposit public funds in the Bank of North Dakota or in financial institutions[1] which meet the requirements found in N.D.C.C. ch. 21-04. One of the chief requirements for deposit in a private financial institution concerns security for deposits,[2] but there is an exception when the deposits are FDIC insured. N.D.C.C. § 21-04-09 provides in part:

> No pledge of security or bond may be required for any funds deposited with a financial institution <u>to the extent that the deposits are insured by the federal deposit insurance corporation</u> or the national credit union administration or an insurance company that is qualified to offer excess deposit insurance in this state and which has a rating of A- or better by A.M. Best Company Inc.,

[1] N.D.C.C. § 21-04-01(3).
[2] N.D.C.C. §§ 21-04-08, 21-04-09.

> or the equivalent rating by another recognized rating organization as determined by the insurance commissioner.[3]

When the preceding statutory language was enacted and later amended, the insurance offered by the FDIC only covered deposits up to $100,000 for all FDIC insured institutions.[4] It has not been until recently that the FDIC has offered a product that guarantees deposits in addition to the general deposit insurance covered by the FDIC for insured banks (currently $250,000). According to FDIC Chairman Sheila C. Bair, the offering of this type of guarantee program is an "unprecedented action".[5]

"On October 3, 2008, President George W. Bush signed the Emergency Economic Stabilization Act of 2008, which temporarily raises the basic limit on federal deposit insurance coverage from $100,000 to $250,000 per depositor."[6] "The legislation provides that the basic deposit insurance limit will return to $100,000 after December 31, 2009."[7] "On October 14, 2008, the FDIC announced the Temporary Liquidity Guarantee Program to strengthen confidence and encourage liquidity in the banking system."[8] The TLG Program can be divided into two parts: (1) a guarantee for newly issued senior unsecured debt of eligible institutions, including FDIC-insured banks and thrifts, as well as certain holding companies (the "Debt Guarantee Program"), and (2) full deposit insurance coverage for non-interest bearing deposit transaction accounts in FDIC-insured institutions, regardless of the dollar amount (the "Transaction Account Guarantee Program").[9] Like the increase in the general deposit insurance coverage, the TLG Program is set to expire after December 31, 2009.[10]

---

[3] N.D.C.C. § 21-04-09 (emphasis added); accord N.D.C.C. § 21-04-16 (showing a general intent of the legislature to provide an exemption for federal programs which "guarantee" deposits).

[4] See Hearing on S.B. 2157 Before the House Industry, Business and Labor Comm., 1997 N.D. Leg. (Jan. 20) (Testimony of Marilyn Foss, North Dakota Bankers Association); see also Hearing on H.B. 1327 before the Senate Industry, Business and Labor Comm., 1983 N.D. Leg. (Feb. 14) (Statement of Sen. Reiten) ("You say that this bill they could deposit public funds up to the limit of your insurance which is $100,000 – nothing above – if above it must be backed by some other government security? Ans. – that's correct.").

[5] FDIC Press Release PR-100-2008 (Oct. 14, 2008).

[6] FDIC Press Release PR-93-2008 (Oct. 7, 2008).

[7] FDIC Financial Institution Letter 102-2008 (Oct. 3, 2008).

[8] FDIC Financial Institution Letter 103-2008 (Oct. 15, 2008).

[9] Id.

[10] Id.

The core issue presented by your question is whether public deposits guaranteed under the FDIC's Transaction Account Guarantee Program[11] should be considered "insured" by the FDIC under N.D.C.C. § 21-04-09, and therefore, exempt from the need for additional security or bond. The term "insured" is not defined under N.D.C.C. ch. 21-04.[12]

Although called a "guarantee" program, the Transaction Account Guarantee Program is operated nearly identically to general deposit insurance offered by the FDIC. As with general deposit insurance, a bank is required to pay an assessment or premium to remain covered under the Transaction Account Guarantee Program.[13] As a result of a bank participating in the Transaction Account Guarantee Program, qualifying deposits are secured by the FDIC through the full faith and credit of the United States of America, as is the case with general deposit insurance.[14] The practical effect of the Transaction Account Guarantee Program is to extend insurance coverage for particular types of deposits beyond the current $250,000 limit of general deposit insurance.

Although N.D.C.C. ch. 21-04 does not define "insured," and the terms "insurance" and "guarantee" have acquired distinct, technical meanings,[15] the North Dakota Supreme Court has cautioned us "not to make a fortress out of the dictionary."[16] "If no definition to a word contained in a certain section is given, the word is to be understood in its ordinary sense, construed according to the context in which it lies, and interpreted to give a reasonable result."[17] A guaranty may also be considered a type of insurance business subject to state regulation.[18] Further, if a statute appears ambiguous, one may take into

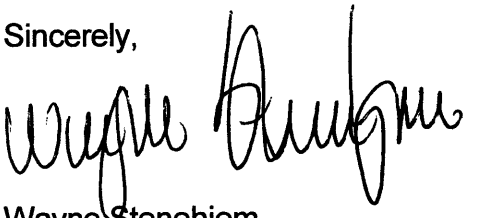
---

[11] Included as a type of non-interest bearing transaction for the purposes of the Transaction Account Guarantee Program are Interest on Lawyers Trust Accounts ("IOLTA") and low interest negotiable order of withdrawal accounts ("NOW accounts"). See Temporary Liquidity Guarantee Program (Final Rule), 73 Fed. Reg. 229,72244, 229,72266 (Nov. 26, 2008) (to be codified at 12 C.F.R. pt. 370).
[12] See N.D.C.C. § 21-04-01.
[13] See 73 Fed. Reg. 229,72271 (Nov. 26, 2008) (to be codified at 12 C.F.R. 370.7).
[14] See 73 Fed. Reg. 229,72269 (Nov. 26, 2008) (to be codified at 12 C.F.R. 370.5).
[15] Compare "insurance" defined as "[a] contract whereby . . . one party undertakes to compensate the other for loss on a specified subject by specified perils," Black's Law Dictionary, 802 (6th ed. 1990), with "guaranty" defined as "[a] collateral agreement for performance of another's undertaking." Id. at 705.
[16] Northern X-Ray Co., Inc. v. State, 542 N.W.2d 733, 736 (N.D. 1996).
[17] Case Credit Corp. v. Oppegard's Inc., 701 N.W.2d 891 (N.D. 2005); see also N.D.C.C. § 1-02-02.
[18] N.D.C.C. § 26.1-02-06(2).

consideration the object sought to be attained by the law;[19] in other words, the mischief that was sought to be remedied by the statute.[20]

The purpose of the subject language in N.D.C.C. § 21-04-09 seems clear, that public funds deposited with a financial institution, and backed by the FDIC, should not require an additional pledge of security or bond. At the time the subject language of section 21-04-09 was passed in 1983, the Legislature would not have contemplated a program from the FDIC using the word "guarantee" as opposed to the word "insurance." The Transaction Account Guarantee Program operates as an extension of the current $250,000 general deposit insurance for qualifying deposits, and these deposits will be secured by the FDIC through the full faith and credit of the United States of America in the same fashion as those covered though general deposit insurance. Therefore, for the purposes of section 21-04-09, it is my opinion that deposits guaranteed under the FDIC's Transaction Account Guarantee Program should be treated the same as deposits insured under the FDIC's general deposit insurance, and security need not be pledged for such deposits.

Sincerely,



Wayne Stenehjem
Attorney General

akw/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[21]

---

[19] N.D.C.C. § 1-02-39(1).
[20] Northern X-Ray, at 736.
[21] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).