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TITLE GUARANTY AND TRUST COMPANY:

1. ENGAGING IN BUSINESS OF BANKING—BY ACCEPTANCE OF DEPOSITS OF MONEY, ENTRIES IN PASS BOOK, PROVISION MONEY MAY BE WITHDRAWN PLUS INTEREST—SECTION 710-2 G. C.

2. CERTIFICATE OF DEPOSIT—WHEN STIPULATIONS CONSTITUTE ENGAGING IN BUSINESS OF BANKING.

3. WHEN COMPANY IMPROPERLY ENGAGES IN BUSINESS OF BANKING WITHOUT POWER TO DO SO, IT IS SUBJECT TO SECTION 710-171 NOT SECTION 710-169 G. C.

4. COMPANY WHICH HAS OFFICE LOCATED IN TERRITORIAL LIMITS OF SUBDIVISION IS ELIGIBLE AS DEPOSITORY FOR PUBLIC MONEY OF THAT SUBDIVISION, OTHER THAN ACTIVE DEPOSITS IN AMOUNT EQUAL TO THE GREATER OF THE TWO AMOUNTS AS SET FORTH IN SECTION 2295-4 G. C.

5. AUDITOR OF STATE—NOT REQUIRED BY LAW TO FURNISH COMPANY CERTIFICATE ITS ACCOUNTS HAVE BEEN EXAMINED BY HIM.

SYLLABUS:

1. A title guaranty and trust company which accepts deposits of money at its regular place of business, which deposits are made under a passbook agreement which recites that the passbook shall be the depositor's voucher and evidence of the company's indebtedness to him and which provides, in substance, that the money deposited shall be applied to the purchase of a bond in stated denominations as the depositor may select, or if the depositor elects so to do, he may, before the full purchase price of the bond selected by him is deposited, withdraw money deposited by him plus interest thereon, constitutes engaging in the business of banking by such title guaranty and trust company within the meaning of Section 710-2 of the General Code.

2. The deposit of money with a title guaranty and trust company and at a regular place of business of such company by a number of people, under a certificate of deposit which provides, in substance, that ——— has deposited $——— payable to ——— in current funds on the return of the certificate properly endorsed with interest at 5% per annum, payable semi-annually, and signed by the Vice President and Secretary of said company, constitutes engaging in the business of banking by such title guaranty and trust company within the meaning of Section 710-2, General Code.

3. A title guaranty and trust company improperly engaging in the business of banking without having acquired power to so do is nevertheless not subject to the provisions of Section 710-169, General Code, but is still subject to Section 710-171, General Code.

4. A title guaranty and trust company which has an office located within the territorial limits of a subdivision is eligible as a depository for public money of that subdivision other than the active deposits in an amount equal to the greater of the two amounts as set forth in Section 2296-4, General Code.

5. The auditor of state is not required by law to furnish a title guaranty and trust company with a certificate to the effect that its accounts have been examined by him.

Columbus, Ohio, October 17, 1946

Hon. Joseph T. Ferguson, Auditor of State
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"We are inclosing herewith specimens of a form of certificate of deposit and form of pass book by which a Title Guarantee Company has accepted deposits.

The said Company, like a number of others in this state, is organized under the law as expressed in Section 9850, et seq., of the General Code, and it and they report to, and their accounts are examined by, the Auditor of State, in accordance with the provisions of Section 710-171, General Code.

A copy of the report of said examination is filed with the Company, and it has been the custom to furnish such companies, in addition to the copy of the audit report, a form of certificate, a specimen of which is also attached hereto for your inspection.

In view of the form of deposits accepted by the said Title Guarantee Company, and the further fact that deposits of public funds have been accepted by it in an amount in excess of its capital and surplus, as defined in Section 2296-1, paragraph (k), General Code, may we request your opinion in answer to the following questions?

Question 1. Do the deposit transactions as indicated by the attached specimens, constitute banking so as to render the said Company subject to the provisions of Section 710-169, General Code, under which its reports should be made to, and its accounts examined by, the State Banking Department?

Question 2. Is the said Company eligible as a depository for the inactive public funds of a subdivision, under Section 2296-4, General Code, in an amount in excess of its capital, as defined in Section 2296-1(k), General Code?

Question 3. Is the Auditor of State required by law to furnish a Title and Guarantee Company with a certificate to the effect that its accounts have been examined by him, in addition to the official report of examination?"

Your first question is as to whether the acceptance of money under the agreements expressed by the passbook or expressed by the certificate, copies of which you have submitted as a part of your request, constitute engaging in the business of banking in this state by a title guaranty and trust company.

The passbook submitted is entitled "Contract and Rules and Regulations Respecting Partial Payment Contracts to Which All Who Accept This Book Assent;" and provides in part as follows:

"1. Deposits will be received in amounts of one dollar and upwards.

2. All payments shall be entered into the depositor's book, which shall be his voucher and the evidence of the Company's indebtedness to him.

* * * 4. Interest at the rate of 4 per cent. per annum will be allowed on the first days of January, April, July and October on all sums which shall have been deposited for three months next previous to these dates, * * *

6. All credits appearing in this book are to be applied to the purchase of a five per cent. guaranteed first mortgage bond offered for sale by the ———— Title and Trust Company, in such denominations as the holder of this book may select; the selection may be either $50, $100 or $500 denominations. Whenever said total credit shall have reached an amount to enable the purchase of such a bond, the said The ———— Title and Trust Company shall give notice to the holder of this book of that fact, and the cost represented by the purchase price of said bond shall be charged to the account of the holder of this book.

7. It is agreed between the holder of this book and the Company, that the credits herein are in no wise to be considered a Savings Account within the ordinary meaning of such term as applied to banking, but it is a definite contract to purchase on partial payment plan one of the said guaranteed first mortgage bonds. If for any reason the purchaser cannot complete the payments on the bonds selected, he may withdraw the funds herein credited. The Company may require ninety days' notice from the purchaser of his intention to elect to determine this contract and withdraw the credits herein. * * *"

The certificate submitted in your request is as follows:

Certificate of Deposit

THE ..... TITLE & TRUST CO.

....., Ohio ..... No. ....

..... ha.. deposited $.....

..... Dollars

Payable to ..... in current funds on the return of this Certificate properly endorsed, with interest 5% per annum

Payable semi-annually

The ..... Title & Trust Co.

..... Vice President

Not subject to Check Secretary

Certificate of Deposit

The powers of title guaranty and trust companies are set forth in Section 9850, General Code, as follows:

"A title guarantee and trust company may prepare and furnish abstracts and certificates of title to real estate, bonds, mort-

gages and other securities, and guarantee such titles, the validity and due execution of such securities, and the performance of contracts incident thereto, make loans for itself or as agent or trustee for others, and guarantee the collection of interest and principal of such loans; take charge of and sell, mortgage, rent or otherwise dispose of real estate for others, and perform all the duties of an agent relative to property deeded or otherwise entrusted to it."

It will be noted that this section does not authorize such a company to engage in the banking business. However, such a company may acquire banking powers by authority of Section 710-168, General Code, upon compliance with the banking act (Sections 710-1 to 710-189, General Code). I assume from your request that the company in question has not so complied.

The term "bank" is defined in Section 710-2, General Code, as follows:

"The term 'bank' shall include any person, firm, association, or corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a passbook, a note, a receipt, or other writing, and unless the context otherwise requires as used in this act includes commercial banks, savings banks, trust companies, special plan banks, and unincorporated banks; provided that nothing herein shall apply to or include money left with an agent pending investment in real estate or securities for or on account of his principal; nor to building and loan associations or title guarantee and trust companies incorporated under the laws of this state; * * *"

The exception in the above statute to title guaranty and trust companies obviously applies only when such companies are doing business as authorized under Section 9850, General Code, and does not apply when such companies are doing a banking business; after such companies have acquired banking powers under the statutes, they are thereafter subject to the banking laws.

In examining the so-called passbook, the plan set forth therein seems to be one whereby the purchaser-depositor pays into the company in installments money which immediately becomes the money of the company and for which the company becomes indebted to the purchaser-depositor and agrees to pay interest therefor; after a sufficient sum is paid in, equal

to the cost of a bond, such bond is issued and the passbook debited or the purchaser-depositor may withdraw his deposits if he is not able to complete the payments on the bond selected.

Under Section 9850, General Code, previously quoted, the company has the power to make loans for itself or for others and guarantee the collection of interest and principal of such loans. It would seem that if the company has the right to make the loans, it would have the right to sell them on the installment plan, provided that in so doing it does not engage in the banking business. See Opinions of the Attorney General for 1914, No. 1371.

The fact that it is a contract to sell a bond after accumulation of the entire price by installment pre-payments on the part of the purchaser-depositor or if he elects the return of his money plus interest, does not preclude the transaction from being a banking business within the meaning of the statute. It is to be noted that this is not an agreement whereby a bond has been sold to be paid for in installments and the bond retained by the seller as security so that as payments are made the seller receives payments on a debt owed to him.

In the case of MacLaren v. State, Supreme Court of Wisconsin (1910), 124 N. W. 667, under a banking statute similar to ours, it was held that:

> "A corporation engaged in the general business of operating a department store, which receives money on deposit up to a certain amount from any persons desiring to deposit with it, such amount with interest to be repaid on demand, in money or goods at the election of the depositor, is within the terms of the statute which declares the soliciting, receiving or accepting of money on deposit as a regular business by a person or corporation would be a banking business."

The court on page 668 of that opinion has this to say:

> "* * * Independent of any constitutional authority, there is no doubt about the right of the Legislature to regulate banking, and neither is there any doubt about its right to regulate the business carried on by Gimbel Bros. in the way of receiving deposits, if it should be held not to be banking. The main purpose of regulating the banking business as the business is now carried on is to insure the safety of deposits. The calamities that befall individuals and communities as a result of bank failures are well known. The necessity for the regulation of establishments carry-

ing on the kind of business that Gimbel Bros. carries on is just as apparent as it is in the case of regular banking institutions. It receives deposits to the amount of $500 from all persons desiring to leave money with it. The depositors may, if they wish, purchase goods with the money so deposited, but they are not required to do so. It matters not that a depositor has never purchased a dollar's worth of goods from the corporation, or that he never intends to. So long as he elects to allow his deposit to remain, he is allowed interest thereon at the rate of 4 per cent. per annum compounded every four months, and he may withdraw his money at any time he wishes on demand and without previous notice of intention to withdraw it. When the high financial standing of the corporation is considered, the inducement offered to depositors is not only attractive, but alluring. We think it would be no invasion of the domain of common knowledge to say that no bank or trust company doing business in the city of Milwaukee offers so inviting a contract to the small investor in the matter of interest rates and the privilege of converting the indebtedness to the depositor into cash. It was stipulated as a fact that the 'deposit purchase department' of Gimbel Bros. had been in operation upwards of a year prior to the date upon which the alleged offense was committed, and that on said date there was deposited with said corporation $115,738.10 by 5,915 different depositors. * * *"

I am not unmindful of Opinions of the Attorney General for 1933, Vol. II, No. 977 nor of Opinions of the Attorney General for 1914, Vol. II, No. 1371, in which opinions the passbooks in question provided otherwise than as set forth in your request.

The certificate of deposit, previously set out, indicates that the deposit has been received generally; while such companies have the power to receive money to invest for others, such money always remaining that of the depositor, they do not have the right to change this relationship into a debtor-creditor one and use such money deposited as their own without complying with the banking act provided for the protection of the public. In the Opinions of the Attorney General for 1914, previously mentioned, this distinction is stated in the syllabus as follows:

"These companies have not the power to receive deposits generally, in the same manner as banks, but the power given such companies 'to make loans for themselves or others' implies the power to receive the money with which to make such loans and to that extent to receive deposits; that is such companies can only receive deposits for the purpose of loaning the money deposited for the benefit of the person making the deposit."

This distinction was also made and the 1914 Attorney General's opinion above quoted was approved in Opinions of the Attorney General for 1933, Vol. II, No. 977. See also Security Company v. State, 105 O. S. 113.

I am of the opinion that the deposit of money with a title guaranty and trust company under the passbook agreement as set forth or under the certificate set forth at a regular place of business of the company by a number of people does amount to engaging in the banking business within the meaning of our statutes. However, it does not necessarily follow that the company is subject to the provisions of Section 710-169, General Code, since the title company is improperly engaging in the banking business without complying with Section 710-168, General Code, which provides as follows:

> "A title guaranty and trust company heretofore organized and now existing may be granted the power to establish a commercial or a savings bank or a combination of both in the manner provided in this act for the organization, conduct and supervision of commercial and savings banks; provided, that such title guaranty and trust company shall, in addition to its present capital, establish and maintain the capital required for a commercial or a savings bank or a combination of both as prescribed in section 37 of this act; provided, such capital and all other assets of the commercial savings bank or both of such title guaranty and trust company, shall be held solely for the repayment of the depositors of said bank and shall not be liable for or be pledged or used to pay any other obligation or liability of such title guaranty and trust company until provision has been made for payment in full of all of the depositors of said bank; provided, further, that said commercial or savings bank or both shall be governed by all of the provisions of law applicable to commercial and savings banks; but nothing in this act shall limit the powers now granted by law to title guaranty and trust companies."

It is only after compliance with the banking act (Sections 710-1 to 710-189, General Code) that such a company shall thereafter make its report to and be examined by the superintendent of banks as provided for in Section 710-169, General Code, which reads as follows:

> "When a title guaranty and trust company has complied with the provisions of this act and acquired banking powers herein granted, such company as to business transacted under powers heretofore granted to such title guaranty and trust company, shall thereafter make its report to and be examined by the superin-

tendent of banks, who shall inspect and supervise such company according to the provisions of sections 9850, 9851, 9852 and 9855 of the General Code; and as to the banking powers granted herein, it shall be subject to all requirements of this act as to commercial and savings banks. A title guaranty and trust company accepting the provisions of this act shall not be subject to the limitations prescribed by section 9853 of the General Code."

It follows then that such a company, although improperly engaging in the business of banking, is still subject to Section 710-171, General Code, which provides in substance that such a company shall make its reports to and be examined by the auditor of state.

Your second question reads as follows:

"Is the said Company eligible as a depository for the inactive public funds of a subdivision, under section 2296-4, General Code, in an amount in excess of its capital, as defined in section 2296-1(k), General Code?"

Section 2296-1, General Code, provides in part as follows:

"This act shall be known as 'the uniform depository act.' As used in this act: * * *

(b) 'Subdivision' means any county, school district, municipal corporation, * * *

(d) 'Public depository' means an institution which receives or holds any public deposits.

(e) 'Active deposit' means a public deposit payable or withdrawable, in whole or in part, on demand.

(f) 'Inactive deposit' means a public deposit which is not payable on demand. * * *

(k) 'Capital funds' means, in the case of an incorporated institution, the sum of the following: the par value of the outstanding common capital stock, the par value of the outstanding preferred capital stock, if any, the aggregate par value of all outstanding capital notes and debentures, if any, and the surplus; and in the case of an unincorporated institution said term means the capital and surplus thereof; but in the case of an institution having offices in more than one county, the capital funds thereof, for the purpose of all the provisions of this act relative to the deposit of the public moneys of each county and the other subdivisions therein, shall be considered to be that proportion of the capital funds of the institution which is represented by the ratio

which the deposit liabilities thereof originating at the office or offices located in such county bears to the total deposit liabilities of the institution."

Section 2296-4, General Code, reads as follows:

"Any national bank located in this state, and any 'bank' as defined by section 710-2 of the General Code, subject to inspection by the division of banks, department of commerce, of this state, and any title guaranty and trust company subject to inspection by the auditor of state pursuant to section 710-171 of the General Code shall be eligible to become a public depository, subject to the provisions of this act. No such institution shall apply for, receive or have on deposit at any one time public moneys as herein defined other than active deposits of public moneys of the state in aggregate amount in excess of the greater of the two amounts hereinafter described, to-wit: (1) its capital funds as herein defined; and (2) thirty per centum of the average of its total deposit liabilities as revealed by its reports to the superintendent of banks or the comptroller of the currency, or auditor of state, as the case may be, made during the twelve months next preceding the date when this limitation shall be applied; provided, however, that this limitation shall not affect the validity of any application, award or deposit made pursuant to this act, excepting to the extent hereinafter expressly stated."

Section 2296-6, General Code, reads in part as follows:

"Any institution mentioned in section 4 of this act which has an office located within the territorial limits of a subdivision shall be eligible to become a public depository of the inactive deposits of public moneys of such subdivisions; * * *"

Reading these statutes together, it seems that the answer to your question is obvious, namely, that a title guaranty and trust company which has an office located within the subdivision is eligible to become a depository for public moneys other than the active deposits of that subdivision in an amount equal to the greater of the two amounts as set forth in Section 2296-4, General Code, above quoted.

Your third question reads as follows:

"Is the Auditor of State required by law to furnish a Title and Guarantee Company with a certificate to the effect that its accounts have been examined by him, in addition to the official report of examination?"

Section 710-171, General Code, provides in part as follows:

> "Title guaranty and trust companies shall make such reports to the auditor of state as are required to be made by trust companies to the superintendent of banks, and shall be subject to like examination, penalties and fees; such examination to be made by and such fees and penalties assessed by and paid to the auditor of state."

While the above statute provides for reports by the title guaranty and trust company to the auditor of state and for examination by the auditor of state, it is silent as to the powers and duties of the auditor after receiving such reports and making such examinations. Nor do any other statutes seem to define the powers or duties of the auditor in relation to these reports or examinations. There is no statutory provision placing a mandatory duty on the auditor of state to furnish a certificate to such company to the effect that its accounts have been examined by him.

In specific answer to your questions, I am of the opinion that:

1. A title guaranty and trust company which accepts deposits of money at its regular place of business, which deposits are made under a passbook agreement which recites that the passbook shall be the depositor's voucher and evidence of the company's indebtedness to him and which provides, in substance, that the money deposited shall be applied to the purchase of a bond in stated denominations as the depositor may select, or if the depositor elects so to do, he may, before the full purchase price of the bond selected by him is deposited, withdraw money deposited by him plus interest thereon, constitutes engaging in the business of banking by such title guaranty and trust company within the meaning of Section 710-2 of the General Code.

2. The deposit of money with a title guaranty and trust company and at a regular place of business of such company by a number of people, under a certificate of deposit which provides, in substance, that ..... ..... has deposited $..... payable to ..... in current funds on the return of the certificate properly endorsed with interest at 5% per annum, payable semi-annually, and signed by the Vice President and Secretary of said company, constitutes engaging in the business of banking by such title guaranty and trust company within the meaning of Section 710-2, General Code.

3. A title guaranty and trust company improperly engaging in the business of banking without having acquired power to so do is nevertheless not subject to the provisions of Section 710-169, General Code, but is still subject to Section 710-171, General Code.

4. A title guaranty and trust company which has an office located within the territorial limits of a subdivision is eligible as a depository for public money of that subdivision other than the active deposits in an amount equal to the greater of the two amounts as set forth in Section 2296-4, General Code.

5. The auditor of state is not required by law to furnish a title guaranty and trust company with a certificate to the effect that its accounts have been examined by him.

Respectfully,

HUGH S. JENKINS
Attorney General