

1321.

DEPOSITORY CONTRACTS FOR PUBLIC FUNDS — TWO
YEARS FEDERAL DEPOSIT INSURANCE CORPORATION.

SYLLABUS:

The depository contracts for public funds which were entered into for two years by a Village after August 23, 1935, and before February 1, 1936, with non-member banks insured by the Federal Deposit Insurance Corporation are enforceable as to payment of interest to their dates of expiration under the provisions of exception (3) of Section 2, Regulation IV of the Federal Deposit Insurance Corporation.

COLUMBUS, OHIO, October 18, 1937.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: This will acknowledge the receipt of your recent communication in which you requested an opinion upon the following statement of facts.

“We are inclosing herewith a letter received from the Solicitor of the Village of Worthington, in which it is indicated that the Village has two depository contracts, both of which cover two year periods, entered into in good faith after August 23, 1935, but before February 1, 1936. He also indicates that these contracts expire September 18, 1937, and December 23, 1937, respectively.

Said official states that his attention has been called to General Bulletin No. 115 of the Ohio Bankers' Association, dated August 13, 1937, advising non-member banks that on contracts entered into after August 23, 1935, for the deposit of public funds, no interest should be paid after August 23, 1937.

In Section 2 of Regulation IV of the Federal Deposit Insurance Corporation, certain exceptions as to the payment of interest on demand deposits are shown. * * *

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We also have on file copy of a letter written by L. E. Birdzell, General Counsel for the F. D. I. C., dated August 7, 1937, in which he holds, at that date, that contracts made after August 23, 1935, providing for payment of interest after August 23, 1937, are of no effect.

Question. Will you kindly advise us if the depository contracts of the Village of Worthington, entered into after August 23, 1935, and before February 1, 1936, in good faith, are legal and binding upon the non-member banks for the payment of interest to the dates of expiration of said contracts?"

The 1935 Banking Act which became effective on August 23rd of that year, revised and set forth the powers and duties of the F. D. I. C. (see U. S. C. A., Title 12, Section 264). Subsection (J) of the section cited provides in part as follows:

(J) "Upon June 16, 1935, the corporation shall become a body corporate and as such shall have power * * *

Seventh: To exercise by its board of directors or its duly authorized officers or agents all powers specifically granted by the provisions of this section and such incidental powers as shall be necessary to carry out the powers so granted. * * *

Tenth: To prescribe by its board of directors such rules and regulations as it may deem necessary to carry out the provisions of this section. * * *"

Reading in Section 264, as cited, we come to subsection (V) which specifically provides in paragraph 8:

"The board of directors *shall by regulation prohibit* the payment of interest on demand deposits *in insured non-member banks* and for such purpose it may define the term '*demand deposits*', but such exceptions from this prohibition shall be made as are now or may hereafter be prescribed with respect to deposits payable on demand in member banks by Section 571b of this title, as amended, or by regulation of the Board of Governors of the Federal Reserve System. * * *" (Italics the writer's.)

The contracts in question are two year contracts calling for interest which were entered into by the Village of Worthington with the Worthington Savings Bank after advertising for bids pursuant to the Ohio Statutes then in effect. The contracts were made on September 18, 1935, and December 23, 1935. While these contracts were made after the passage of the Banking Act, there is nothing to bring in the question of good faith as the contracts were legal under the then existing law. No regulations concerning payment of interest or providing for exceptions had been made by the F. D. I. C.

Original Regulation IV was issued January 23, 1936, and Supplemental Regulation IV became effective February 1, 1936. Following these regulations New Regulation IV was made and became effective February 11, 1937. All these regulations contained provisions for exceptions under which these contracts could come. The latest new Regulation 4 which is now in effect and applicable provides:

“* * * This regulation relates to the payment of deposits and interest thereon by insured non-member banks.* * *”

Section 2 of the same Regulation 4, further provides in part as follows:

“(a) Except as hereinafter provided, no insured non-member bank shall directly or indirectly, by any device whatsoever, pay any interest on any demand deposit.* * *

(b) EXCEPTIONS: The prohibition stated in subsection (a) above does not apply to—

* * * * *

(2) Payment of interest accruing before August 24, 1937, on any deposit of public funds made by or on behalf of any state, county, school district, or other subdivision or municipality, or on any deposit of trust funds, if the payment of interest with respect to such deposit of public funds or of trust funds is required by State law when such deposits are made in State banks;

(3) Payment of interest in accordance with the terms of any certificate of deposit or other contract which was lawfully entered into in good faith before February 1, 1936 (or, if the bank became an insured non-member bank thereafter, before the date upon which it became an insured non-member bank), which was in force on such date, and which may not legally be terminated or modified by such bank at its option and without liability; but no such certificate of deposit or other contract may be renewed or extended unless it be modified to eliminate any provision for the payment of interest on demand deposits, and every insured non-member bank shall take such action as may be necessary, as soon as possible consistently with its contractual obligations, to eliminate from any such certificate of deposit or other contract any provision for the payment of interest on demand deposits.”

The contracts in question may come under exception (2) or (3). Should they be considered to come under exception (2) supra, an interpretation that no interest could be paid which accrued after August 24, 1937, would be correct. However, while exception (2) specifically provides for public funds as such, it is not my view that a contract for public funds is necessarily limited to the conditions set forth in that exception since exception (3) supra, by its broad language includes any certificate of deposit or other contract which was lawfully entered into in good faith before February 1, 1936.

The National Banking Act of 1935 necessitated many changes in banking practice and administration. For this reason, if for no other reason, the matter of regulation and administration was left largely to the board of directors of the F. D. I. C., in order that the act should be applied so as to prevent confusion and to allow contracts which were made in good faith, to be executed according to their terms if legally possible. One of the contracts in question, has recently expired and the other expires shortly. There can be no doubt as to future contracts. The broad language of exception (3) supra, can be made to apply to both of the contracts in question and will enable the intent of the parties to be legally carried out.

There has been some contention as to the matter of good faith in regard to these contracts. If good faith were at issue the contracts would come under no exceptions. Moreover, there has been no evidence to support an issue. In view of this fact, it would appear that the matter before us is not so much a question of whether or not good faith is to be assumed or proved in these instances, but rather a question as to whether or not these depository contracts which involve public funds are limited to the provisions of exception (2) in Regulation IV, supra, which expressly provides for such deposits of public funds, or whether or not the provisions of exception (3) supra, which applies to contracts generally, make these contracts, as others which come within its terms, enforceable according to the intent of the parties as to interest.

In consideration of these facts, it is my opinion that these depository contracts for public funds made by the Village of Worthington which were entered into after August 23, 1935, and before February 1, 1936, with non-member banks insured by the F. D. I. C. are enforceable as to payment of interest to the date of expiration of such contracts under the provisions of exception (3) of Section 2, Regulation IV of the Federal Deposit Insurance Corporation.

Respectfully,

HERBERT S. DUFFY,
Attorney General.