

OPINION NO. 90-058**Syllabus:**

Letters of credit issued by the Federal Home Loan Bank of Cincinnati to its member financial institutions are not "obligations" under R.C. 135.18(B)(2) and do not qualify as eligible securities for purposes of R.C. 135.18(A)'s security pledging requirement.

To: Mary Ellen Withrow, Treasurer of State, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, September 7, 1990

You have requested my opinion whether standby letters of credit issued by the Federal Home Loan Bank of Cincinnati (FHLBC) may be used by certain public depository financial institutions to satisfy the pledging requirement of R.C. 135.18 with respect to public moneys deposited in those institutions. In that regard certain Ohio financial institutions that have been designated as public depositories qualified to accept deposits of public moneys, *see* R.C. 135.12 (biennial designation of depositories), also maintain membership in the Federal Home Loan Bank System, *see* 12 U.S.C.S. §§1423 (1978 and Supp. 1990) (apportionment of the Federal Home Loan Bank districts, and establishment of a Federal Home Loan Bank in each district); 1424 (qualifications for financial institutions to become members of a Federal Home Loan Bank). Several of those financial institutions have asked whether standby letters of credit issued to them by the Federal Home Loan Bank of

Cincinnati qualify as eligible securities under R.C. 135.18(B)(2) for purposes of R.C. 135.18(A).

R.C. 135.18(A) states that, before public moneys are deposited in a public depository pursuant to the provisions of R.C. 135.01-.21, the public depository must pledge and deposit appropriate security for the repayment of those moneys, over and above the amount thereof that is insured by the federal government. 1989 Op. Att'y Gen. No. 89-077 at 2-354. Thus, as pertains herein, R.C. 135.18(A) reads as follows:

The treasurer,¹ before making the initial deposit in a public depository pursuant to an award made under sections 135.01 to 135.21 of the Revised Code, shall require the institution designated as a public depository to pledge to and deposit with him, as security for the repayment of all public moneys to be deposited in the public depository during the period of designation pursuant to the award, *eligible securities* of aggregate market value equal to the excess of the amount of public moneys to be at the time so deposited, over and above such portion or amount of such moneys as is at such time insured by the federal deposit insurance corporation or by any other agency or instrumentality of the federal government.... (Footnote and emphasis added.)

R.C. 135.18(B)(1)-(6) enumerate the types of securities that shall be eligible for purposes of the foregoing requirement. The following securities are listed in R.C. 135.18(B)(2):

¹ Except as otherwise provided in R.C. 135.14 and R.C. 135.181, R.C. 135.01(M) defines "[t]reasurer," as used in R.C. 135.01-.21, in the following manner:

"Treasurer" means, in the case of the state, the treasurer of state and in the case of any subdivision, the treasurer, or officer exercising the functions of a treasurer, of such subdivision. In the case of a board of trustees of the sinking fund of a municipal corporation, the board of commissioners of the sinking fund of a school district, or a board of directors or trustees of any union or joint institutions or enterprise of two or more subdivisions not having a treasurer, such term means such board of trustees of the sinking fund, board of commissioners of the sinking fund, or board of directors or trustees.

Subject to the same exception, R.C. 135.01(L) defines "[s]ubdivision," as used in R.C. 135.01-.21, as follows:

"Subdivision" means any municipal corporation, except one which has adopted a charter under Article XVIII, Ohio Constitution, and the charter or ordinances of the chartered municipal corporation set forth special provisions respecting the deposit or investment of its public moneys, or any school district including a county school district, a county school financing district, township, municipal or school district sinking fund, special taxing or assessment district, or other district or local authority electing or appointing a treasurer, except a county. In the case of a school district, special taxing or assessment district, or other local authority for which a treasurer, elected or appointed primarily as the treasurer of a subdivision, is authorized or required by law to act as ex officio treasurer, the subdivision for which such a treasurer has been primarily elected or appointed shall be considered to be the "subdivision." The term also includes a union or joint institution or enterprise of two or more subdivisions, that is not authorized to elect or appoint a treasurer, and for which no ex officio treasurer is provided by law.

Bonds, notes, debentures, or other *obligations* or securities issued by any federal government agency, or the export-import bank of Washington; bonds, notes, or other obligations guaranteed as to principal and interest by the United States or those for which the faith of the United States is pledged for the payment of principal and interest thereon, by interpretation or otherwise and not by language appearing in the instrument specifically providing such guarantee or pledge. (Emphasis added.)

It has been suggested that, for purposes of R.C. 135.18(A), standby letters of credit issued by the Federal Home Loan Bank of Cincinnati qualify as eligible securities pursuant to R.C. 135.18(B)(2) as "obligations...issued by [a] federal government agency." You have, accordingly, asked whether such letters of credit do so qualify.

Resolution of your question thus depends upon the particular nature and character of the letters of credit to which you refer in your letter, and the meaning to be accorded the term "obligations," as used in R.C. 135.18(B)(2). According to your letter, the Federal Home Loan Bank of Cincinnati contemplates issuing what it refers to as standby letters of credit to its member institutions to be used by such institutions in satisfaction of R.C. 135.18(A)'s security pledging requirement. A representative sample letter of credit has been furnished to you by FHLBC and a copy of that sample letter accompanies your opinion request. The sample document is captioned a "LETTER OF CREDIT," and is to be issued by FHLBC to a member financial institution on behalf of the individual or entity named therein as "[b]eneficiary." The letter authorizes the designated beneficiary to draw from the member financial institution's account at FHLBC up to the aggregate amount of money specified in the letter. The letter further states that such authorization is "irrevocable, unconditional, and nontransferable." The letter does provide, however, that drafts drawn thereunder must specify the letter of credit number and be presented at the FHLBC office by an authorized officer of the beneficiary not later than 2:00 PM on the day and date therein stated.²

I am of the opinion that the sample document is a letter of credit as defined and understood by Ohio law. In Ohio the use of letters of credit in commercial transactions is addressed in R.C. Chapter 1305. In that chapter the General Assembly has selectively adopted, and subsequently enacted as a part of the Revised Code, the provisions of Article 5 (letters of credit) of the Uniform Commercial Code, U.C.C. §§5-101 - 5-117 (1977). See R.C. 1305.01-.16; 1961 Ohio Laws 13, 102 (Am. S.B. 5, eff. July 1, 1962). R.C. 1305.01 defines a "[c]redit" or "letter of credit," as used in R.C. 1305.01-.16, in the following manner:

"Credit" or "letter of credit" means an engagement by a bank or other person made at the request of a customer and of a kind within the scope of section 1305.02 of the Revised Code, that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit. A credit may be either revocable or irrevocable. The engagement may be either an agreement to honor or a statement that the bank or other person is authorized to honor.

R.C. 1305.01(A)(1). R.C. 1305.02, to which R.C. 1305.01(A)(1) refers, further defines a credit or letter of credit by describing the several circumstances in which such instruments are issued. R.C. 1305.02(A) thus reads as follows:

² A member of your staff has informed me that the Federal Home Loan Bank of Cincinnati intends to issue these letters of credit to its member financial institutions, and that thereafter those financial institutions will deposit the letters with the governmental entities for which those institutions will be serving as public depositories. Upon receipt of the letters of credit, the governmental entities will proceed to place public funds with those institutions in accordance with the terms of R.C. 135.01-.21. Structured in this way, the transaction comports with the procedure specified by R.C. 135.18(A) for the pledging and depositing of eligible securities by a public depository.

Sections 1305.01 to 1305.16, inclusive, of the Revised Code, apply:

(1) to a credit issued by a bank if the credit requires a documentary draft or a documentary demand for payment; and

(2) to a credit issued by a person other than a bank if the credit requires that the draft or demand for payment be accompanied by a document of title; and

(3) to a credit issued by a bank or other person if the credit is not within divisions (A)(1) or (2) of this section, but conspicuously states that it is a letter of credit or is conspicuously so entitled.

R.C. 1305.03(A) further states that, except as otherwise required in R.C. 1305.02(A)(3), "no particular form of phrasing is required for a credit." A credit, however, "must be in writing and signed by the issuer and a confirmation must be in writing and signed by the confirming bank."³ *Id.*

The sample letter of credit included with your opinion request comes within the purview of both R.C. 1305.01(A)(1) and R.C. 1305.02. By the express terms of that document, the Federal Home Loan Bank of Cincinnati, as issuer, engages to honor, upon compliance with the terms therein stated, drafts for payment that are drawn upon a financial institution's account at FHLBC. R.C. 1305.01(A)(1). Further, such document conspicuously states that it is a letter of credit, and is conspicuously so entitled. R.C. 1305.02(A)(3). Accordingly, such document is a "letter of credit" as defined in R.C. 1305.01(A)(1) and R.C. 1305.02.⁴

³ Specific definitions of other terms used in R.C. 1305.01-16 are set forth in R.C. 1305.01(A)(2)-(7) as follows:

(2) A "documentary draft" or a "documentary demand for payment" is one honor of which is conditioned upon the presentation of a document or documents. "Document" means any paper including document of title, security, invoice, certificate, notice of default, and the like.

(3) An "issuer" is a bank or other person issuing a credit.

(4) A "beneficiary" of a credit is a person who is entitled under its terms to draw or demand payment.

(5) An "advising bank" is a bank which gives notification of the issuance of a credit by another bank.

(6) A "confirming bank" is a bank which engages either that it will itself honor a credit already issued by another bank or that such a credit will be honored by the issuer or a third bank.

(7) A "customer" is a buyer or other person who causes an issuer to issue a credit. The term also includes a bank which procures issuance or confirmation on behalf of that bank's customer.

⁴ In your opinion request you have referred to these instruments as "standby letters of credit," and similar references appear in correspondence from FHLBC and its legal counsel. The sample document states only that it is a "letter of credit," and is so entitled. The particular sense in which these instruments may be considered "standby letters of credit" is not, however, readily apparent from any of the written materials you have provided to me. The general view is that a standby letter of credit creates an obligation on the part of the issuer to pay money or perform some other act in the event that another contracting party that has the primary responsibility therefor defaults or fails in that regard. *See, e.g., Security Finance Group, Inc. v. Northern Kentucky Bank & Trust, Inc.*, 858 F.2d 304, 306 n. 3 (6th Cir. 1988) ("[t]he documents at issue here can be held valid only as 'standby letters of credit.' This is a device by which a bank will promise to pay a customer's debt in the event he defaults, as long as proper documentation is provided"); *American Insurance Association v. Clarke*, 865 F.2d 278, 282 (D.C. Cir. 1988) ("[a] standby letter of credit represents the other side of the commercial letter of credit coin. Whereas the latter is used to guarantee

I shall now consider whether these letters of credit are also "obligations" under R.C. 135.18(B)(2), and thus qualify as eligible securities for purposes of R.C. 135.18(A). The term "obligation," as used in R.C. 135.18(B)(2), has not been defined by statute. In accordance with the rule of statutory construction set forth in R.C. 1.42, therefore, such term shall be "read in context and construed according to the rules of grammar and common usage." *Black's Law Dictionary* 968 (5th ed. 1979) provides the following general definition of "[o]bligation": "A generic word, derived from the Latin substantive "obligatio," having many, wide, and varied meanings, according to the context in which it is used. That which a person is bound to do or forbear; any duty imposed by law, promise, contract, relations of society, courtesy, kindness, etc." The same entry further notes that "[o]bligation" may also be used in a more concrete sense to denote "any certain written promise to pay money." *Id.* at 969.

Certainly, a letter of credit, viewed in this broad sense, creates an "obligation" on the part of the issuer, which, in this instance, is a commitment by FHLBC to honor drafts for specified sums of money that are presented to it by the beneficiary named in the letter of credit. The question, however, is whether the term "obligation," as used in R.C. 135.18(B)(2), is to be understood in this wider sense, or whether it should be understood in a more specific and formal sense. The context in which that term appears in R.C. 135.18 persuades me that the latter interpretation should prevail. In particular, I am of the opinion that the language of R.C. 135.18(B)(2) presents an instance in which the rule of statutory construction expressed in the maxim *noscitur a sociis*, according to which the "meaning of a word may be ascertained by reference to the meaning of words associated with it...and...the coupling of words together shows that they are to be understood in the same sense," is controlling. *Myers v. Seaberger*, 45 Ohio St. 232, 236, 12 N.E. 796, 798 (1887). See also *State v. Tarrant*, 83 Ohio App. 199, 201, 80 N.E.2d 509, 510 (Franklin County 1948) ("[w]here a term is used in a statute it is a rule of construction that the court will give to it that meaning which is consistent with the entire context of the statute"); *State v. Allen*, 30 Ohio Misc. 87, 88, 282 N.E.2d 60, 61 (C.P. Montgomery County 1971) ("[t]he meaning of a word is, or may be known, from the accompanying words. The doctrine likewise means that general and specific words are associated with and take color from each other"). Applying that

payment upon performance, the former guarantees payment upon a failure to perform"); *Matter of Val Decker Packing Co.*, 61 Bankr. 831, 837 (Bankr. S.D. Ohio 1986) ("[t]he standby letter of credit functions as a 'back up' against customer default, the default of the customer triggering the issuer's obligation, somewhat like a guaranty"). Thus, unlike that of the issuer of a traditional letter of credit, the obligation of the issuer of a standby letter of credit is secondary to that of the contracting party at whose request the standby letter is issued, insofar as the issuer need pay or perform only upon proof of the contracting party's default or failure. The issuer of a traditional letter of credit, on the other hand, assumes a primary obligation to the beneficiary thereof, which is not contingent or dependent upon the contracting party's default or failure. Cf., e.g., *First Empire Bank v. Federal Deposit Ins. Corporation*, 572 F.2d 1361, 1366 (9th Cir. 1978) (the traditional or commercial letter of credit "creates an absolute, independent obligation and payment must be made upon presentation of the proper documents regardless of any dispute between the buyer and seller concerning their agreement, such as a dispute over the quality of the goods delivered"); *Sherwood & Roberts, Inc. v. First Security Bank*, 682 P.2d 149, 155 (Mont. 1984) (a bank that issues a letter of credit "creates a *primary* obligation as principal, not as an agent of the account party. On the issuance of a credit the bank assumes a primary obligation independent of the underlying contract") (emphasis in original).

The sample document at issue here obligates FHLBC to honor drafts drawn by the beneficiary upon a financial institution's account at FHLBC. The document does not expressly condition FHLBC's obligation upon a first refusal by the depository financial institution to pay the amount of such draft to the beneficiary, or any other default on the part of the financial institution.

rule of construction to the language of R.C. 135.18(B)(2) under consideration here means that the term "obligation" should be understood in the same sense as the several other words with which it has been grouped.

R.C. 135.18(B)(2) states that, for purposes of R.C. 135.18's security pledging requirement, "[b]onds, notes, debentures, or other obligations or securities issued by any federal government agency" qualify as eligible securities. (Emphasis added.) Parsing the foregoing language thus indicates that the obligations specifically contemplated are those such as "bonds," "notes," and "debentures." Those three terms have, in turn, been defined as follows:

Bond. A certificate or evidence of a debt on which the issuing company or governmental body promises to pay the bondholders a specified amount of interest for a specified length of time, and to repay the loan on the expiration date. In every case a bond represents debt – its holder is a creditor of the corporation and not a part owner as is the shareholder. Commonly, bonds are secured by a mortgage.

....

Debenture. A promissory note or bond backed by the general credit of a corporation and usually not secured by a mortgage or lien on any specific property.

....

Note. An instrument containing an express and absolute promise of signer (*i.e.* maker) to pay to a specified person or order, or bearer, a definite sum of money at a specified time.

Black's Law Dictionary at 161, 361, and 956. *See also id.* at 1093 (a "[p]romissory note" is a "promise or engagement, in writing, to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or bearer"). Thus, bonds, debentures, and notes are instruments that serve to document debt that is created whenever money is loaned by individuals or institutions to private business concerns or public governmental entities. Corporations use such instruments as a means of acquiring capital to finance their operations in pursuit of the purposes for which those corporations are organized. *See, e.g.,* R.C. 1701.13(F)(6) (in carrying out the purposes stated in its articles of incorporation and subject to limitations prescribed by law or in its articles, a for profit corporation may "[b]orrow money, and issue, sell, and pledge its notes, bonds, and other evidences of indebtedness"); *Gilchrist Transportation Co. v. Phenix Ins. Co.*, 170 F. 279 (6th Cir. 1909) (syllabus, paragraph four) (the power given corporations by R.S. 3256, now R.C. 1701.13(F)(6), to borrow money and issue its notes or bonds therefor secured by mortgage includes the power to pledge its bonds secured by mortgage to secure the payment of another of its obligations); *Hays v. Galion Gas Light & Coal Co.*, 29 Ohio St. 330 (1876) (syllabus, paragraph three) (a corporation organized under the general incorporation act of May 1, 1852, for the purpose of manufacturing and supplying gas to the inhabitants of a city or village may borrow money to enable it to accomplish the legitimate objects of its creation, and secure the payment thereof by note, and a mortgage of the corporate property). Governments use such instruments to fund the particular public projects and functions as are specifically delineated in the statutes and constitutional provisions that authorize the issuance of such instruments. *See, e.g.,* Ohio Const. art. VIII, §§2b–2k (authorizing the state to issue bonds, notes, and other debt obligations to raise money for veterans' bonuses and a variety of capital improvement projects); §13 (authorizing the state and its political subdivisions to issue bonds and other obligations for economic development purposes within the public and private sectors); R.C. Chapter 133 (comprising the uniform bond law, which sets forth the mechanisms and procedures that govern the issue of bonds, notes, certificates of indebtedness, and other obligations by municipal corporations, political subdivisions of the state, and other taxing authorities for public purposes); R.C. Chapter 165 (providing for the issuance of industrial development bonds, thus implementing the terms of Ohio Const. art. VIII, §13). Individuals and institutions generally make such loans for investment purposes, insofar as bonds, notes, and debentures ordinarily pay interest at predetermined rates to their holders on the principal that has been loaned to the issuing entity. *See generally, e.g.,* R.C. 133.26(A); R.C. 165.03(A); R.C. 1701.68. Indeed, from the lender's standpoint, investment in the hope of gain or profit is an important feature of bonds, debentures, and notes that distinguishes

them from other instruments that are, instead, used as a means of facilitating other commercial transactions.

Accordingly, the term "obligations," as used in R.C. 135.18(B)(2), is to be understood as encompassing bonds, notes, and debentures, as well as other debt instruments that, in their form, function, and purpose, possess the commonly-recognized characteristics of bonds, notes, and debentures. Such instruments must serve as evidence of a debt transaction, which, from the lender's standpoint, is intended as an investment that will generate income in the form of interest paid upon the loaned principal or, where applicable, profit upon the subsequent resale of such instruments in any of the secondary national and regional markets where those instruments are customarily traded.

Applying the foregoing criteria in this instance, I conclude that letters of credit issued by the Federal Home Loan Bank of Cincinnati to its member banks are not "obligations" under R.C. 135.18(B)(2); such instruments cannot qualify, therefore, as eligible securities for purposes of R.C. 135.18(A)'s security pledging requirement. As noted previously, R.C. 1305.01 defines a "letter of credit" as "an engagement by a bank or other person made at the request of a customer and of a kind within the scope of [R.C. 1305.02], that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit." R.C. 1305.01(A)(1). This definition is identical, in all material respects, to that found in U.C.C. §5-103(1)(a), and thus is a distillation of the common law's understanding of the fundamental character and purposes of letters of credit as typically used in modern commercial transactions. *See, e.g.*, U.C.C. §5-102, official comment ("[t]he rules embodied in [Article 5] can be viewed as those expressing the fundamental theories underlying letters of credit"); *Wichita Eagle & Beacon Pub. Co. v. Pacific National Bank of San Francisco*, 343 F.Supp. 332, 339 n. 4 (N.D. Cal. 1971) ("[i]t is evident that neither the U.C.C. nor the California Commercial Code attempted to codify all past decisional law on letters of credit nor to revolutionize the field. Rather, the purpose was to reiterate a few fundamental principles relating to the law of letters of credit and to present a basis and framework for future development"). The following excerpt from the decision in *East Girard Savings Association v. Citizens National Bank*, 593 F.2d 598, 601 (5th Cir. 1979) summarizes well that understanding, and is fairly representative of a host of similar statements on this subject by numerous courts and legal commentators:

Letters of credit were originally used to facilitate international transactions involving sales of merchandise by assuring payment for the goods. In a typical transaction, a seller in a distant country might wish to sell some goods to a buyer whose credit he did not trust. In order to ensure that the goods would be paid for, the seller could require the buyer to procure a letter of credit which would provide that upon presentation of certain documents – normally bills of lading or air freights receipts – evidencing title to the goods, the seller could draw on the letter of credit. The issuing bank would then take a security interest in the goods and deliver the title documents to the buyer, who would be obligated to repay the amount drawn on the letter of credit. (Citations omitted.)

Cf. Banco Nacional de Desarrollo v. Mellon Bank, N.A., 726 F.2d 87, 91 (3d Cir. 1984) ("[a] letter of credit is an efficacious arrangement which assures payment for completion of an obligation by placing the duty to pay on an issuer of good financial reputation"); *Philadelphia Gear Corporation v. Central Bank*, 717 F.2d 230, 238 (5th Cir. 1983) ("[o]ur reading of the relevant case law and commentaries confirms that at its essence a [letter of] credit is a peculiar form of executory contract, one whereby the issuer makes a continuing offer to pay upon the beneficiary's performance of the terms and conditions stipulated in the credit"); *Colorado Springs National Bank v. United States*, 505 F.2d 1185, 1190 (10th Cir. 1974) ("[a] letter of credit is 'a letter whereby one person requests some other person to advance money or give credit to a third person, and promises to repay the same to the person making the advancement,'" quoting *Second National Bank of Toledo v. M. Samuel & Sons, Inc.*, 12 F.2d 963, 966 (2d Cir. 1926)); *Mead Corporation v. Farmers and Citizens Bank*, 14 Ohio Misc. 163, 164, 232 N.E.2d 431, 433 (C.P. Montgomery County 1967) ("[t]he cases reflect generally that a letter of credit is a letter authorizing one

person to pay money or extend credit to another on the credit of the writer"). The court in *East Girard Savings Association v. Citizens National Bank* further notes that the issuance of a letter of credit ordinarily involves three distinct "contractual" arrangements:

First, the issuing bank enters into a contract with its customer to issue the letter of credit. Second, there is a contract between the issuing bank and the party receiving the letter of credit. Third, the customer who procured the letter of credit signs a contract with the person receiving it, usually involving the sale of goods or the provision of some service.

593 F.2d at 601. See also *Bank of Newport v. First National Bank*, 687 F.2d 1257, 1261 (8th Cir. 1982); *In Re Originala Petroleum Corporation*, 39 Bankr. 1003, 1007 (Bankr. N.D. Texas 1984); *In Re Longhorn Securities Litigation*, 573 F.Supp. 278, 282 (W.D. Okla. 1983); McLaughlin, *Standby Letters of Credit and Penalty Clauses: An Unexpected Synergy*, 43 Ohio St. L.J. 1, 3-4 (1982) ("[o]bviously a letter of credit is not issued in a vacuum; it is always part of a larger deal between contracting parties. Three separate contracts are required for a letter of credit to issue").

Within the modern commercial setting the utility of letters of credit has expanded beyond the international trade context, and they are now regularly employed in domestic commerce in conjunction with both the sale of goods and the performance of services. Moreover, the specific functions of letters of credit in those transactions have similarly expanded, such that a particular letter of credit may serve as a payment device, see *East Girard Savings Association v. Citizens National Bank*; *Matter of Val Decker Packing Co.*, 61 Bankr. 831, 837 (Bankr. S.D. Ohio 1986) ("[t]he commercial or more traditional letter of credit functions as a medium of payment for property or goods sold, most frequently in an international context"); *Lustrelon, Inc. v. Prutscher*, 178 N.J. Super. 128, 139, 428 A.2d 518, 523 (App. 1981) ("[l]etters of credit, widely used especially in international trade and commerce, are intended generally to facilitate the purchase and sale of goods by providing assurance to the seller of prompt payment upon compliance with specified conditions or presentation of stipulated documents without the seller's having to rely upon the solvency and good faith of the buyer"), a financing mechanism, see generally J. White & R. Summers, 2 *Uniform Commercial Code*, §19-9 (3rd ed. 1988) (discussing the various methods by which the beneficiary of a letter of credit may use the letter to secure a loan from his bank), or a guarantee that certain contractual obligations will be satisfied, see, e.g., *Sperry International Trade, Inc. v. Government of Israel*, 670 F.2d 8 (2d Cir. 1982) (as substitute for a performance bond, a building contractor's bank issues letter of credit in favor of party for whom building is to be constructed, and such party may draw upon the letter of credit in the event that the builder breaches contract by failing to complete project in a timely and proper fashion); *East Girard Savings Association v. Citizens National Bank*, 593 F.2d at 601 (same).⁵

⁵ In recent years instruments operating as letters of credit (in that they operate to create an absolute obligation upon presentation of specified documents) and termed "standby" to distinguish them from the traditional letters of credit have been used as security devices in a variety of contexts outside the traditional area of the international sale of goods. They have been used to insure construction loans, as quasi-performance bonds, to support the issuance of commercial paper and to secure the performance of purely monetary obligations such as those involved in this case.

First Empire Bank v. Federal Deposit Ins. Corporation, 572 F.2d at 1366 and 1367.

Legislation pending before the General Assembly, for example, is intended to permit the filing of an irrevocable letter of credit in lieu of a performance bond by contractors in connection with state public improvement projects, and by applicants for coal strip mining permits. S.B. 126, 118th Gen. A. (introduced March 1, 1990).

It is evident, therefore, that letters of credit do not serve the same purpose or perform the same function as bonds, debentures, and notes, and thus cannot be considered "obligations" under R.C. 135.18(B)(2). Unlike a bond or a debenture, a letter of credit does not serve to document a two-party debt transaction that is undertaken by a lender with an investment motive in mind. Rather, a letter of credit is issued as part of a larger commercial transaction in order to facilitate, expedite, or complete such transaction.

The conclusion that letters of credit are not "obligations" for purposes of R.C. 135.18(B)(2) draws further support from those provisions of R.C. 135.18 that set forth the procedures that are to be followed whenever a public depository fails to pay back to the governmental body any of the public funds that have been placed in such depository and for which eligible securities have been pledged. In that regard division (C) of R.C. 135.18 states that,

[i]f the public depository fails to pay over any part of the public deposit made therein as provided by law, the treasurer *shall sell at public sale any of the bonds or other securities deposited with him pursuant to this section* or section 131.09 of the Revised Code. Thirty days' notice of such sale shall be given in a newspaper of general circulation at Columbus, in the case of the treasurer of state, and at the county seat of the county in which the office of the treasurer is located, in the case of any other treasurer. When a sale of bonds or other securities has been so made and upon payment to the treasurer of the purchase money, the treasurer shall transfer such bonds or securities whereupon the absolute ownership of such bonds or securities shall pass to the purchasers. Any surplus remaining after deducting the amount due the state or subdivision and expenses of sale shall be paid to the public depository. (Emphasis added.)

Thus, in the event that a public depository fails to pay back part of a public deposit made therein, R.C. 135.18(C) requires the treasurer to sell at public sale the bonds or other securities previously deposited with him pursuant to R.C. 135.18(A).

Certainly, implicit in R.C. 135.18(C)'s public sale directive is the further requirement that the securities or obligations in question be of a type that are readily amenable to sale to third party purchasers for whom those securities or obligations have real value. Cf., e.g., R.C. 135.18(A) (eligible securities deposited thereunder shall have an "aggregate *market value* equal to the excess of the amount of public moneys to be at the time so deposited" over the amount otherwise insured by the federal government, and the treasurer may also require "additional eligible securities to be deposited to provide for any depreciation which may occur in the *market value* of any of the bonds so deposited"); R.C. 135.18(G) (when a public depository has deposited eligible securities described in R.C. 135.18(B)(2)-(6) with a trustee for safekeeping, see R.C. 135.18(D), the public depository may at any time "substitute or exchange eligible securities having a current *market value* equal to or greater than the current *market value* of the securities then on deposit and for which they are to be substituted and exchanged"); R.C. 135.18(I) ("a trustee shall have no duty or obligation to determine the eligibility, *market value*, or *face value* of any security deposited with the trustee by a public depository"). (Emphasis added.) While bonds and notes issued by corporations or governments can regularly be sold and purchased in secondary markets subsequent to their initial issuance, the same cannot be said for letters of credit. Unlike bonds, notes, or debentures, a letter of credit has value and utility only for those persons who are parties to, and within the context of, the particular transaction for which the letter of credit is issued. Consequently, no market for a letter of credit exists independently of such transaction, and thus the concepts of public sale and market value that are expressed throughout R.C. 135.18 have no meaning or application with respect to such an instrument. It is apparent, however, that public marketability of securities and obligations that are pledged pursuant to R.C. 135.18(A) is an important requirement of the statute, one that is, nonetheless, lacking in the case of letters of credit. See generally 1937 Op. Att'y Gen. No. 995, vol. II, p. 1738, at 1739 ("[t]here are no dark spots in [G.C. 2296-15a, now R.C. 135.18] and it admits of no interpretation. It deals with the safety of public moneys, must be strictly construed and its provisions are mandatory, unless it is clearly manifest that they

are [d]eclaratory or directory"). It follows, therefore, that letters of credit are not "obligations" under R.C. 135.18(B)(2) for purposes of R.C. 135.18(A)'s security pledging requirement.

Based upon the foregoing, it is my opinion, and you are advised that letters of credit issued by the Federal Home Loan Bank of Cincinnati to its member financial institutions are not "obligations" under R.C. 135.18(B)(2) and do not qualify as eligible securities for purposes of R.C. 135.18(A)'s security pledging requirement.