



ALAN WILSON  
ATTORNEY GENERAL

December 13, 2021

William J. Condon, Jr., Esq.  
Deputy General Counsel  
Office of the State Treasurer  
Post Office Box 11778  
Columbia, South Carolina 29211

Dear Mr. Condon:

We received your request for an opinion on behalf of the South Carolina State Treasurer, Curtis M. Loftis, Jr.. From your letter, we understand a county treasurer recently inquired to your office as to whether the county “could invest in a repurchase agreement, also referred to as a repo, being offered by Synovus Bank (‘Trust Certificate Repo’).” You state the Office of the State Treasurer (“STO”) “does not believe that Synovus’ Trust Certificate Repo is an authorized investment for South Carolina political subdivisions, including county treasurers.” However, in order to provide guidance for local governments in South Carolina, you ask us to address whether South Carolina political subdivisions or county treasurers may invest in Synovus’ Trust Certificate Repo.

#### Law/Analysis

There are several statutes in South Carolina allowing political subdivisions and county treasurers to make investments with money under their control. Section 6-5-10(a) of the South Carolina Code (Supp. 2021) lists investments authorized for political subdivisions and applies specifically to county treasurers:

(a) The governing body of any municipality, county, school district, or other local government unit or political subdivision and county treasurers may invest money subject to their control and jurisdiction in:

- (1) Obligations of the United States and its agencies, the principal and interest of which is fully guaranteed by the United States.
- (2) Obligations issued by the Federal Financing Bank, Federal Farm Credit Bank, the Bank of Cooperatives, the Federal Intermediate Credit Bank, the Federal Land Banks, the Federal Home Loan Banks, the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Housing Administration, and the Farmers Home Administration, if, at the time of investment, the obligor has a

long-term, unenhanced, unsecured debt rating in one of the top two ratings categories, without regard to a refinement or gradation of rating category by numerical modifier or otherwise, issued by at least two nationally recognized credit rating organizations.

(3)(i) General obligations of the State of South Carolina or any of its political units; or (ii) revenue obligations of the State of South Carolina or its political units, if at the time of investment, the obligor has a long-term, unenhanced, unsecured debt rating in one of the top two ratings categories, without regard to a refinement or gradation of rating category by numerical modifier or otherwise, issued by at least two nationally recognized credit rating organizations.

(4) Savings and Loan Associations to the extent that the same are insured by an agency of the federal government.

(5) Certificates of deposit where the certificates are collaterally secured by securities of the type described in (1) and (2) above held by a third party as escrow agent or custodian, of a market value not less than the amount of the certificates of deposit so secured, including interest; provided, however, such collateral shall not be required to the extent the same are insured by an agency of the federal government.

(6) Repurchase agreements when collateralized by securities as set forth in this section.

....

S.C. Code Ann. § 6-5-10 (emphasis added). Additionally, section 12-45-220 of the South Carolina Code (2014) lists investments specifically allowed for county treasurers:

(A) A county treasurer may invest or reinvest any sum of money not necessary for current expenses in:

(1) obligations of the United States and its agencies;

(2) general obligations of this State or any of its political subdivisions;

(3) savings and loan associations if their deposits are insured by an agency of the federal government;

(4) certificates of deposit where the certificates are collaterally secured by securities of type described in items (1) and (2) of this subsection

held by the third party as escrow agent or custodian, of a market value not less than the amount of the certificates of deposit so secured, including interest, but the collateral is not required to the extent the certificates of deposit are insured by an agency of the federal government; or

(5) no load open-end or closed-end management type investment companies or investment trusts registered under the Investment Company Act of 1940, as amended, where the investment is made by a bank or trust company or savings and loan association or other financial institution when acting as trustee or agent for a bond or other debt issue of that county treasurer, if the particular portfolio of the investment company or investment trust in which the investment is (i) limited to obligations described in items (1) and (2) of this subsection, and (ii) have among its objectives the attempt to maintain a constant net asset value of one dollar a share and to that end, value its assets by the amortized cost method. The portfolio may also consist of repurchase agreements when collateralized by obligations described in items (1) and (2) of this subsection.

(B) The governing body may delegate the investment authority provided above to the county treasurer who shall assume full responsibility for the investment transactions until the delegation of authority terminates or is revoked.

(C) The State Treasurer may assist local governments in investing funds that are temporarily in excess of operating needs.

(D) All interest and other earnings, when collected, must be added to the fund and paid out as other funds of the same sort are paid.

S.C. Code Ann. § 12-45-220 (emphasis added).

In prior opinions, we interpreted these provisions as limiting the investment authority of political subdivisions and county treasurers to those investments for which the Legislature specifically provided for. See Ops. Att’y Gen., 2002 WL 31958827 (S.C.A.G. Dec. 11, 2002); 1998 WL 746079 (S.C.A.G. Jun. 25, 1998); 1987 WL 245444 (S.C.A.G. Apr. 21, 1987). However, as emphasized above, section 6-5-10(a)(6) explicitly allows counties to invest in repurchase agreements so long as they are collateralized by securities as set forth in section 6-5-10(a). Moreover, specifically related to county treasurers, section 12-45-220(A)(5) allows county treasurers to invest in portfolios of investments that include repurchase agreements when collateralized by obligations described in subsections (1) and (2) of section 12-45-220. Therefore, the answer to your question depends on how the treasurer invests in the repurchase agreement and

whether the repurchase agreements meet the collateral requirements set forth in sections 6-5-110 and 12-45-220. These are factual determinations, which are beyond the scope of an opinion of this Office. See Op. Att’y Gen., 1988 WL 485333 (S.C.A.G. Nov. 10, 1988) (“addressing questions of fact does not fall within the scope of opinions of this Office.”). Therefore, we cannot make a conclusive determination as to whether a county treasurer can invest in Synovus’ Trust Certificate Repos. Nonetheless, you provided us with some information regarding Synovus’ Trust Certificate Repos, which we will consider in order to provide some guidance. However, please keep in mind our opinion is based solely on information you provided and we have not independently researched the collateralization of Synovus’ Trust Certificate Repos.

Section 12-45-220(A)(5) of the South Carolina Code allows treasurers to invest in repurchase agreements as part of an investment in an investment company or investment trust. It is our understanding the county treasurer you reference seeks to make a direct investment in Synovus’ Trust Certificate Repo as opposed to an investment in an investment company or investment trust that holds repurchase agreements as part of a portfolio. Therefore, we do not believe section 12-45-220(A)(5) provides a county treasurer with the ability to invest in Synovus’ Trust Certificate Repos.

Next, we look to section 6-5-10 to determine if such an investment is permitted under that statute. In your letter, you explain the Trust Certificates “are the securities that collateralize the repo” and you do not believe they constitute one of the types of securities listed in section 6-5-10(a) so that Synovus’ Trust Certificate Repos qualify as a permissible investment. You describe the creation of the Trust Certificates according to Synovus as follows:

1. After originating a mortgage loan, the mortgage loan originator will select loans for the Trust Certificate Repo program that fit the approval criteria of a [Government Sponsored Enterprise (“GSE”)].
2. The mortgage loan originator will deliver the loans to its custodial account at Deutsche Bank Trust Company (“Deutsche”), who will then run the loans through a [Government National Mortgage Association (“GNMA”) or [Federal National Mortgage Association (“FNMA”)] processing tool.
3. Deutsche will then issue a Trust Certificate report following the verification and create and deliver Trust Certificates to the originator.

You note the Trust Certificates are backed by the mortgage notes. Synovus then acquires the Trust Certificates for use in its Trust Certificate Repo program as follows:

1. The mortgage loan originator will exchange the Trust Certificates with Synovus for cash.
2. Synovus, as the seller of the Trust Certificate Repo, will then sell the Trust Certificates to the buyer for cash.
3. On the specified repurchase date, the buyer (or, if a tri-party repo, the custodian) will return the Trust Certificates to the seller, and the seller (or,

if a tri-party repo, the custodian) will return the buyer's cash plus interest at an agreed-upon rate.

You also informed us that Synovus asserts "the Trust Certificates are backed by FHA and VA mortgage notes and other loans of GSE," but Synovus also stated "Freddie Mac, FNMA, and GNMA are not counterparties to the Trust Certificate Repo transaction and that the mortgage notes backing the Trust Certificates are 'prior to issuance of the related GSE loans.'"

We agree with your assessment that the Trust Certificates do not appear to be the type of investments listed in sections 6-5-10(a)(2)-(8) as they are not issued by a federal bank, do not constitute obligations of the State of South Carolina or its political subdivisions, are not an investment in a Savings and Loan Association, are not a certificate of deposit, are not a repurchase agreement, are not an investment in an investment company or investment trust, and do not constitute appropriated funds or monies generated by hospital operations. Therefore, the only possible qualifying collateral the Trust Certificates could be under section 6-5-10(a) is an "[o]bligation of the United States and its agencies, the principal and interest of which is fully guaranteed by the United States." S.C. Code Ann. § 6-5-10(a)(1).

Synovus states the Trust Certificates are backed by FHA and VA mortgages made by GSEs. Therefore, at first blush, the Trust Certificate Repos are collateralized by obligations guaranteed by the United States. But, as you point out, the Trust Certificates are not issued by the United States or a GSE, such as Freddie Mac, FNMA, or GNMA. From the description you provided, it appears Deutsche Bank issues the Trust Certificates. Furthermore, you informed us that Synovus states "the mortgage notes or loans that back the Trust Certificates are 'prior to issuance of the related GSE loans'" and in describing the credit risk associated with the Trust Certificates, Synovus stated the mortgage notes and loans "carry only an 'implicit U.S. Government guarantee of monthly principal and interest.'" (citing Synovus). Accordingly, based on your letter, it does not appear the Trust Certificates themselves are "fully guaranteed by the United States." S.C. Code Ann. § 6-5-10(a)(1). Based on this information, we do not believe the Trust Certificates qualify as sufficient collateral to allow a county to invest in the Trust Certificate Repos described in your letter.

In a 1998 opinion, we considered a political subdivision's ability to invest in natural gas futures. Op. Att'y Gen., 1998 WL 746079 (S.C.A.G. June 25, 1998). In that opinion, we stated:

The General Assembly has authorized several permissible investments by political subdivisions, none of which include the investment in futures contracts. A cardinal rule of statutory construction is "expressio unius est exclusio alterius" or "the enumeration of particular things excludes the idea of something else not mentioned." Pennsylvania National Mutual Casualty Insurance Company v. Parker, 282 S.C. 546, 320 S.E.2d 458 (1984). Therefore, as the statute does not currently authorize political subdivisions to invest in

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futures contracts, the Authority would not be permitted to invest its funds in futures contract for natural gas.

Employing the same restrictive reading of section 6-5-10 as we did in 1998, regardless of whether the loans underlying the Trust Certificates are issued by GSEs or are fully guaranteed by the United States, the Trust Certificates themselves fail to meet this criteria. As such, we do not believe Synovus' Trust Certificate Repos as described in your letter, satisfy the collateralization requirements in section 6-5-10(a)(6).

### Conclusion

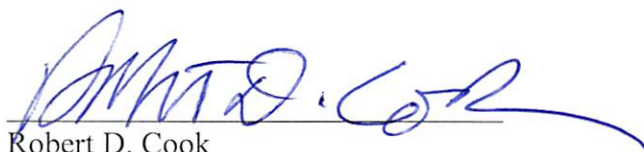
While the Legislature allows political subdivisions to invest in repurchase agreements, it restricted their ability to do so by requiring those repurchase agreements be collateralized with one of the other permissible investments in section 6-5-10(a). As you point out in regard to the Synovus' Trust Certificate Repos, they are collateralized by Trust Certificates, which we believe do not qualify as a security provided for under section 6-5-10(a). As such, we are of the opinion the Synovus' Trust Certificate Repos fail to qualify under the narrow reading of section 6-5-10(a) our Legislature intended. While we believe this to be true based on the information provided to us, we caution that due to our inability to find facts, we cannot make a conclusive determination as to whether the Synovus' Trust Certificate Repos, or any other particular investment, qualifies under section 6-5-10.

Sincerely,



Cydney Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General