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Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

Robert E. Corbin

December 31, 1980

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ARIZONA ATTORNEY GENERAL

INTERAGENCY
Mr. Walter C. Madsen
Superintendent of Banks
1601 West Jefferson
Phoenix, Arizona 85007

Re: 180- 235(R80-170)

Dear Mr. Madsen:

This opinion is in response to your letter of June 19, 1980, inquiring whether the CMA Money Trust offered by Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and other similar programs constitute the business of banking as defined by A.R.S. § 6-201.B and whether Merrill Lynch or the CMA Money Trust must be chartered as a commercial bank. For the reasons set forth hereafter, it is our opinion that no component of the CMA Money Trust operated by Merrill Lynch constitutes banking business within the meaning of the Arizona Banking Code and neither Merrill Lynch, nor the trust need be chartered as a commercial bank within this state.

In reaching our opinion in this matter we must begin with an analysis of the CMA Money Trust. The trust and related components of the program is described by Merrill Lynch in its CMA Money Trust Prospectus as follows:

The Trust is a no-load, diversified open-end investment company whose shares are offered exclusively to participants in the Cash Management Account program ("CMA") of Merrill Lynch, Pierce, Fenner & Smith, Incorporated ("Merrill Lynch") to provide a medium for the investment of free credit cash balances held in CMA accounts. A CMA account is a conventional Merrill Lynch securities margin account which is linked to the Trust and to a Visa transaction card account maintained by the City National Bank & Trust Company of Columbus, Ohio ("Visa Card Account"). A CMA account permits a

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customer to automatically invest his free credit balances periodically in shares of the Trust and earn a return thereon pending further investment of such funds in the securities account for utilization through the Visa Card Account. . . . Investors should be aware that the checking feature of the CMA account is intended to provide customers with easy access to the assets in their accounts and that the CMA account is not a bank account. As with any investment in securities, the value of a shareholder's investment in the Trust will fluctuate.

The CMA Money Trust or a similar program is offered by Merrill Lynch, without regulatory objection, in California, Colorado, Florida, Georgia, Hawaii, Kansas, Louisiana, Massachusetts, Missouri, Nevada, New Jersey, New York, North Carolina, Pennsylvania and Ohio. In only one state, Oregon, has the Attorney General's office rendered an opinion finding that the program constitutes banking.

Whether the CMA Money Trust constitutes banking in Arizona, is governed by A.R.S. § 6-201 which provides as follows:

A. No person, except a national banking association with its principal place of business in this state, shall engage in the banking business in this state without a banking permit.

B. For the purposes of this section, a person engaged in the business of receiving money on deposit subject to payment by check or any other form of order or request or on presentation of a certificate of deposit or other evidence of debt is engaged in the banking business.

There are two aspects of the CMA Money Trust which could conceivably fall within the foregoing definition of banking--the Trust itself and the free credit balances held by Merrill Lynch.

CMA MONEY TRUST

The CMA Money Trust is no-load money market mutual fund which is subject to federal and state securities regulation. The investor in the fund obtains shares in a diversified portfolio of short-term money market securities and investments. The principal distinction between an investment in this mutual fund and a deposit in a commercial bank is the fact that an investor in the trust is the owner of that investment. A depositor in a bank is merely a creditor of the bank. The investor's ownership share in the mutual fund is subject to the risk of market fluctuation. This risk includes the risk of depreciation in the investment as well as the opportunity for appreciation. In the case of a deposit with a commercial bank, the risk attending the investment activities of the bank does not fall on the depositors but rather falls on the capital structure of the bank. Since the investor in the mutual fund is the owner of the investment and knows going in that the risk falls on him, there is no need for traditional banking regulation which is aimed at preserving an adequate capital structure of the financial institution.

FREE CREDIT BALANCES

A component of the CMA Money Trust is a traditional brokerage account with Merrill Lynch. The brokerage account is a regular margin account and from this account the investor may purchase or sell his shares in the CMA Money Trust by depositing cash in the account or through the use of credit, which is subject to the provisions in Regulation T of the Board of Governors of the Federal Reserve System, 12 CFR § 220.g. As a by-product of this investment activity, there will under certain circumstances arise "free credit balances" in the brokerage account. A free credit balance will result when the investor deposits cash in the account for the purpose of investing in the mutual fund or where cash is generated from the sale of shares in that mutual fund. These "free credit balances" are subject to and are defined by SEC Rule 15c:

The term "free credit balances" shall mean liabilities of a broker or dealer to customers which are subject to immediate cash payment to customers on demand, whether resulting from sales of securities, dividends, interests, deposits or otherwise, excluding, however, funds in commodity accounts which are segregated in accordance with the Commodity Exchange Act or in a similar manner. (Emphasis supplied).

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These "free credit credit balances" which exist in the brokerage account are also not deposits within the meaning of A.R.S. § 6-201 for the reason that they are the by-product of investment activities by the investor and are not obtained as the result of solicitation by the brokerage firm.

VISA CARD AND CHECK CASHING FEATURES

As the foregoing discussion makes apparent, the brokerage account and the resulting "free credit balances" and the investment in the CMA Money Trust mutual fund are securities transactions and are not banking deposits. If Merrill Lynch offered only these services, it would be clear that a banking charter would be unnecessary. Merrill Lynch, however, has added an additional feature which has given rise to the question proposed in your letter. The final component added by Merrill Lynch is the Visa card and check cashing privilege.

When a customer opens a CMA account with Merrill Lynch by depositing a minimum of \$20,000, he must simultaneously apply for a Visa card and a checking account with City National Bank of Ohio. If the bank refuses to establish such a Visa or checking account, Merrill Lynch will not permit participation in the CMA Money Trust, but rather will refer the investor to a more traditional mutual money market fund. If the Visa and checking accounts are established, checks written by the customer and charges on the Visa card are presented to and paid by the bank in the normal course of its banking business. On the following day the bank seeks reimbursement from Merrill Lynch. In effect, the City National Bank extends overnight credit to CMA customers which extension of credit is analogous to the overdraft protection provided by numerous banks throughout the country.

Merrill Lynch and City National Bank have interfaced their computers so that all checks or charges are cleared the next day after they are received and paid by City National Bank. Payment is made by Merrill Lynch in the following order: (1) from existing free credit balances in the investor's brokerage account; (2) from proceeds of the sale of the CMA Money Trust shares; and, finally, (3) should these sources prove insufficient, from margin loans to the customer by Merrill Lynch within the available margin loan value of the securities held in the account. Under the CMA Money Trust program Merrill Lynch performs only conventional securities broker activities while City National Bank provides the

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necessary banking services. It is City National Bank which agrees to the establishment and operation of a checking and Visa card account. It is the bank which pays checks drawn by the CMA customer and presented to the bank. Only subsequent to the payment of the check or Visa card charge does the bank seek out Merrill Lynch for reimbursement as described above. The unique characteristic of the CMA Money Trust program is quite simply that the existence of a computer link between the bank and Merrill Lynch eliminates need for the CMA customer to physically contact his broker to obtain a check representing either his investment shares in the mutual fund, his free credit balance or a loan on margin and the need to deposit the check at the bank. The availability of a mechanism for an investor to transfer his ownership in an investment held by Merrill Lynch is a mere formality and serves in no way to alter the substance of his status as an owner of that investment. The check writing and Visa charge card provision does not transform his status as an investor to one of a depositor. As between the investor and the CMA Money Trust mutual fund, the potential for capital gain or loss on the investment remains unaffected by the means the investor may select to realize his investment. By utilizing the check cashing and Visa charge privileges, the investor is not converted into a mere creditor of the fund with no expectation of capital gain or loss from the fund.

CONCLUSION

Since no deposits within the meaning of A.R.S. § 6-201.B are being received by Merrill Lynch, Merrill Lynch is not engaged in banking business and a commercial bank charter is not necessary.

Sincerely,



BOB CORBIN
Attorney General

BC:cp

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October 29, 1980

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POLLARD
R80-235

Dr. L. Dow Rhoton, Superintendent
Pinetop-Lakeside School District #3
P. O. Box 885
Lakeside, Arizona 85929

EDUCATION OPINION
ISSUE NO LATER THAN
1-2-80

Dear Dr. Rhoton:

As I understand the question presented in your letter of October 28, 1980, the school district desires to sell a small parcel of land which is the southwest corner of the Blue Ridge High School campus and the question is whether or not it is necessary to have a vote of the district to sell this property. I must answer your question in the affirmative, and advise you that it is necessary to have a vote of the district prior to selling the property in question.

A.R.S. §15-442(13) authorizes the board of trustees to purchase or sell school sites when authorized to do so by a vote of the district. Also, A.R.S. §15-1302(a)(2) also authorizes special elections on the purchase or sale of school sites or buildings but also requires a vote of the district.

The letter from Attorney General Bruce Babbitt dated May 14, 1975, to which you refer, approved the conveyance of school property without an election in view of the fact that an election had actually been held for the purchase of the property and the action to be taken was merely to settle a problem of a boundary dispute. The letter clearly pointed out that the voter approval had already been obtained for the purchase of the property and that the school would retain the amount of property authorized by the voters when the boundary dispute was settled.

That Attorney General Opinion to which you refer, No. 74-24-C does not cite any authority, and does not set out sufficient particulars to determine what the facts and circumstances this disposition of school property actually was. The Opinion further sets forth three particular facts which were deemed to be controlling under those circumstances. Those ~~three factors are~~ *three factors are* apparently not all present in your situation, which may or may not make any difference anyway.

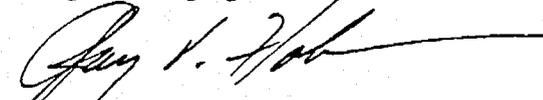
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The statutes cited above are quite clear in requiring a vote of the district to dispose of school property and I cannot advise you to circumvent or attempt to circumvent the clear intent and purpose of the statutes. For these reasons, I must advise you to proceed with an election before disposing of a portion of your high school campus.

I am sending a copy of this Opinion to the Attorney General's Office for their concurrence or revision pursuant to law.

Very truly yours



JAY V. FLAKE
Navajo County Attorney

JVF/mj

cc: Bob Corbin
Arizona Attorney General
State Capitol
Phoenix, Arizona 85007