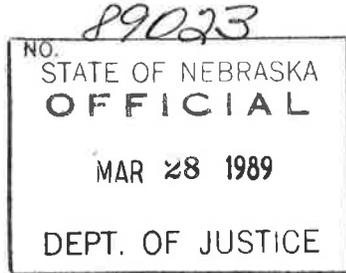


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DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: March 24, 1989

SUBJECT: School Funds. Whether a legislative act which would permit school districts to invest funds of the school district in repurchase agreements violates Neb. Const., Art. XIII, § 3.

REQUESTED BY: Senator D. Paul Hartnett
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Harold Mosher, Assistant Attorney General

You have inquired if the repurchase agreements (repos) authorized by LB 379 of the Ninety-first Legislature, First Session (1989), violate Neb. Const. Art. XIII, § 3.

LB 379 would amend Neb.Rev.Stat. § 79-1308.01 (Reissue 1987) as follows:

(1) Any school district may by and with the consent of the board of education of the school district invest the funds of the school district in securities the nature of which individuals of prudence, discretion, and intelligence acquire or retain in dealing with the property of another. Every school district having invested in such securities shall deliver the same as funds of the office. The interest received on any investments authorized by this section shall be credited to the fund from which the money was taken to make the investment.

(2) The securities referred to in subsection (1) of this section may be invested in through repurchase agreements. Each repurchase agreement shall require that the items purchased through the repurchase agreement be subject to repurchase from the school district upon

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demand by the treasurer of the school district. No such repurchase agreement shall be entered into until the treasurer of the school district who proposes to enter into the repurchase agreement has received a perfected security interest in the securities as collateral for their prompt repurchase.

Sec. 2. That original section 79-1308.01, Reissue Revised Statutes of Nebraska, 1943, is repealed.

LB 379 does not define the "securities" which school districts may purchase with funds of the school district nor does it define repos. LB 379 does limit "securities" to those "the nature of which individuals of prudence, discretion, and intelligence acquire or retain in dealing with the property of another." Thus, repos authorized by LB 379 are not limited to repos marketed to the public by national banks. It would therefore appear that repos authorized by LB 379 may be defined as written agreements whereby one party sells "securities" to another party with the understanding that at a future time certain the selling party will repurchase the securities at a stated higher price. It also appears that the only apparent legislative purpose in authorizing school districts to purchase repos is to maximize their return on funds which are not currently required for operational expenses of the school district.

Neb. Const. Art. XIII, § 3, in part declares: "The credit of the state shall never be given or loaned in aid of any individual, association, or constitution. . . ." In State ex rel. Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957), the Nebraska Supreme Court held that a violation of Neb. Const. Art. XIII, § 3, occurs only if there is both a lending of the credit of the State and if that lending is for a purpose which is not a public one. We are therefore of the opinion that the authority granted by LB 379 to school districts to purchase repos does not violate Neb. Const. Art. XIII, § 3, for the reason that the apparent purpose is entirely public: to maximize the return on investment of school funds. Obviously, the question of whether this sort of investment is otherwise appropriate for school districts is for the Legislature to decide.

Senator D. Paul Hartnett
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Conclusion

At the risk of stating the obvious, this opinion, which contains a limited analysis of repos, is not meant to be a legal "road map" to sellers and purchasers of repos. The subject is much too complicated to be dealt with here. This opinion is limited to the question asked. Repos, as authorized by LB 379, do not, in our opinion, violate Neb. Const. Art. XIII, § 3.

Respectfully submitted,

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cc: Patrick J. O'Donnell
Clerk of the Legislature

20-58-2