

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF CORPORATION FINANCE

September 24, 1982

Re: Buffalo Savings Bank (the "Bank")
Incoming letter dated July 28, 1982

Based upon the facts presented, this Division is unable to assure you that it would not recommend enforcement action to the Commission if the certificates are offered and sold by the Bank without compliance with the registration requirements of the 1933 Act. In this connection, we are unable to conclude that the certificates would be deemed to be "securities issued or guaranteed by any bank" within the meaning of Section 3(a)(2) of the 1933 Act inasmuch as (1) the certificates do not appear to be the kind of securities intended by Congress to be exempt as having been "issued" by a bank, since they represent neither an equity interest in, nor a debt obligation of, the Bank, and (2) the certificates do not appear to be "guaranteed" by a bank in that the Bank's obligation to repurchase is qualified in certain respects and otherwise does not appear to be the type of arrangement intended to be considered a bank guarantee within the meaning of Section 3(a)(2). Moreover, we are unable to conclude that Section 304(a)(4) of the 1939 Act would be available to exempt the certificates from the requirements of the 1939 Act. With respect to your reference to the staff's letter concerning Merrill Lynch, Pierce, Fenner & Smith, Inc. (available November 4, 1981), please be advised that the position expressed in that letter concerning the application of the 1933 Act was subsequently revised in a letter dated March 31, 1982.

The Division of Investment Management has requested us to advise you that based on the representations in your letter of July 28, 1982, that Division is unable to assure you that it would not recommend any enforcement action under the Investment Company Act of 1940 ("1940 Act") if the Bank should proceed with its proposed investment program without registering it under the 1940 Act. That Division believes that the offer and sale to the public of certificates representing undivided participations in municipal securities involves the offer and sale of a security separate from the underlying securities and that the issuer of the separate security is subject to the 1940 Act, absent an appropriate exception or exemption. See, Josephthal & Company (pub. avail. November 25, 1974); Lawyers Financial Corp. (pub. avail. April 14, 1975, and, on reconsideration, May 1, 1975); and Securities & Exchange Commission v. American Deposit Trust Co. [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,808. It believes that the exception for banks in section 3(c)(3) of the 1940 Act from the definition of "investment company" would not be available to the program, which would be the "issuer" of the certificates for the purposes of the 1940 Act. See, Prudential Ins. Co. v. Securities & Exchange Commission 326 F.2d 383 (CA3, 1964).

Sincerely,
Norman R. Schou
Norman R. Schou
Special Counsel

1933 Act/Section 3(a)(2)