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business. Moreover, the consummation of the transaction by the New Jersey bank or savings bank is subject to the receipt of instructions by the New Jersey institution from the foreign bank's home offices. It is contemplated that the foreign institution will not employ any personnel in this State in conjunction with the ATM, nor will it maintain any office or other form of tangible presence in New Jersey. For these reasons, it is our view that under the specific facts outlined in the proposal, PNB or other foreign state chartered banking institution or national bank would not be "transacting business" in this State within the meaning of the prohibition set forth in N.J.S.A. 17:9A-316.

For these reasons, it is our opinion that there is no statutory impediment to a bank or savings bank chartered under the laws of this State allowing customers of a banking institution chartered in another state or by the federal government to access their accounts in those banking institutions through automatic teller machines established, operated and maintained by the New Jersey banking institutions under the supervision of the Commissioner of Banking.³

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

3. It should be noted that the Commissioner has pervasive powers to limit or control the extent to which state-chartered banks permit access by foreign bank customers to ATM's located at branch offices established and maintained by the New Jersey institutions. These powers are derived not only from the Commissioner's authority to adopt regulations concerning the operation of communication terminal branch offices, N.J.S.A. 17:9A-20G, but also from his general supervisory powers over banks and savings banks as contained in N.J.S.A. 17:9A-266 *et seq.*

November 10, 1982

HONORABLE JAMES J. BARRY, JR.
Director, Division of Consumer Affairs
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 7—1982

Dear Director Barry:

You have asked for an opinion as to whether individual Retirement Accounts (IRA), Keogh Plans, Simplified Employee Pension Plans, and bank deposit accounts are consumer contracts within the meaning of the Plain Language Law. For the following reasons, you are advised that all language contained in documents required to open and maintain an IRA account providing professional investment and management services for a fee or a Keogh Plan for self-employed individuals should conform with the "plain language" requirements of the Law, with the exception of language contained or copied from an Internal Revenue Service (IRS) model account form.

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The Plain Language Law requires that a consumer contract shall be written in a simple, clear, understandable and readable way. N.J.S.A. 56:12-2. A creditor, seller, insurer or lessor may be liable to a consumer for damages if the failure to write a consumer contract in a simple, clear, understandable and readable way caused the consumer to be substantially confused about his rights and remedies under the agreement. N.J.S.A. 56:12-3. It is further provided that there shall be no liability if a consumer contract is in conformity with an opinion of the Attorney General that the agreement conforms with the plain language requirements of the act. It is therefore clear that prior to invoking the jurisdiction of the Attorney General, it must be determined whether an agreement is a "consumer contract" within the meaning of the law. For purposes of your inquiry, a "consumer contract" is defined in pertinent part to mean a written agreement in which an individual:

f. Contracts for services including professional services, for cash or on credit and the money, property or services are obtained for personal, family or household purposes. 'Consumer contract' includes writings required to complete the consumer transaction.

Consequently, each of the investment retirement or bank deposit accounts mentioned in your inquiry must be reviewed separately to determine whether they fall within the meaning of a consumer contract as defined by law.

A Keogh Plan is a retirement account which is established by employers for the benefit of the employer or eligible employees. As a general rule, a Keogh Plan is not a consumer contract because the services are not obtained for personal, family or household purposes. Only in an instance where a self-employed individual establishes a Keogh Plan for himself is there an agreement pursuant to which services are obtained for personal, family or household purposes.

A Simplified Employee (SEP) Pension Plan is a plan which permits an employer to pay either \$15,000.00 or 15% of an employee compensation (whichever is less) to an individual retirement account. As with Keogh Plans, SEPs are not consumer contracts for personal, family or household purposes.

An IRA provides for the creation of retirement plans by individuals through tax incentives. Contributions to such plans are deductible for federal income tax purposes and no federal tax is paid on earnings on the funds until they are withdrawn. An IRA may include investment services for which a financial institution charges a commission or fee. Also, an IRA may provide in certain cases for investments directed by the customer for which a fee or commission may be charged by the institution for the administration and management of the account.

At the outset, it is clear to us that an IRA which does not provide for investment or management services does not qualify as a "consumer contract". In that instance a consumer does not pay a fee to a financial institution for professional services. A financial institution does not invest, reinvest, acquire, sell, exchange or manage investments. The money placed into that form of IRA is often invested in savings accounts or Certificates

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of Deposit either with a nominal or no charge to the depositor and comingled with other deposit monies of the banking institution.

In other cases, an individual may enter into a written agreement with an entity such as a brokerage firm to obtain investment services or the professional management of a variety of investments "self directed" by the depositor. Although the statute does not provide any definition of the meaning of "professional services," a statute should be interpreted according to its common meaning unless some technical or special meaning is indicated. *Service Armament Co. v. Hyland*, 70 N.J. 550, 556 (1976). A profession is generally defined as a calling requiring specialized knowledge and often long and intensive academic preparation. *Webster's Seventh Collegiate Dictionary*, p. 680. "Professional services" are defined in the Local Public Contracts Law to mean services rendered by a person authorized by law to practice a recognized profession whose practice is regulated by law and the performance of which services requires knowledge of an advanced type acquired by a formal course of specialized instruction. N.J.S.A. 40A:11-2(6). The activities of financial institutions are highly regulated under State law and investment decisions are commonly made by persons who have acquired a specialized knowledge and skill in the area. Moreover, trustees and fiduciaries must "exercise care and judgment . . . which persons of ordinary prudence and reasonable discretion exercise in the management of and dealing with the property and affairs of another." Furthermore, it is provided that "if a fiduciary has special skills or is named as the fiduciary on the basis of representation of such skills or expertise, he is under a duty to exercise those skills." N.J.S.A. 3B:20-13. There can be no question therefore that the investment and management services provided by these entities with regard to the IRA accounts of their customers may be properly characterized as a form of professional services within the meaning of the Plain Language Law.

A bank deposit account is not a contract for professional services nor is a bank deposit account a trust. In *Kronish v. Howard Savings Institution*, 161 N.J. Super. 592 (App. Div. 1978) the court held that deposits paid by mortgagors to mortgagees as a reserve for payment of taxes were not trusts. Further, the court held that the question of whether an agreement is a trust or a debt depends upon the intention of the parties. If the intention is that the money should be kept or used as a separate fund for the benefit of the payor or a third person, a trust is created. If the intention is that the party receiving the money shall have the unrestricted use thereof being liable to pay back a similar amount, with or without interest, a debt is created. This same reasoning was followed by the Supreme Court in *State v. Atlantic City Electric Co.*, 23 N.J. 259 (1957), where the court held that there is a strong presumption that a debt is created rather than a trust when the recipient of money obligates himself to pay a fixed rate of interest. The court also found that there was no trust created because there was no indication in the agreement that the parties intended a relation of confidence. It is therefore clear that a bank deposit account like an IRA account, which does not provide for professional investment or management services, contemplates a creditor-debtor relationship and does not include the receipt of services by the consumer. Neither then would be included as a consumer contract under the Plain Language Law.*

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A further question arises as to whether those documents used in the establishment of an IRA fall within the meaning of a consumer contract. The answer is in the affirmative. N.J.S.A. 56:12-1 provides in pertinent part that a consumer contract includes writings required to complete the consumer transaction. Also, N.J.S.A. 56:12-6 provides as follows:

The use of specific language in a consumer contract required, permitted or approved by a law, regulation, rule or published interpretation of a State or Federal agency shall not violate this act.

We are informed that the IRS provides sponsors of IRA's with model forms. In an instance where an IRA form is adopted by the plan sponsor, there can be no question that the specific language in those documents does not violate the Plain Language Law, since the document has been approved by a published interpretation of a federal agency. We are further advised that IRA sponsors are not required to use the model forms supplied by the IRS. IRA prototype forms are prepared by the sponsor and reviewed by the IRS as to whether the prototype is consistent with federal requirements. Since the statutory language clearly requires a published interpretation of a federal agency to remove an agreement from the purview of the act, it is clear that a prototype form does fall within the meaning of a consumer contract under law. Finally, federal income tax regulations require an IRA sponsor to provide a consumer with a disclosure statement. A disclosure statement, therefore, is clearly a writing required to complete the consumer transaction and is a consumer contract within the meaning of the law.

In conclusion, it is our opinion that a Keogh Plan established by an employer other than a self employed individual and a Simplified Employee Pension Plan are not consumer contracts within the meaning of the Plain Language Law. Further, although some IRA and bank deposit accounts are not consumer contracts within the meaning of the law, an IRA account providing for investment or management services for a fee or commission is a consumer contract that must conform with the requirements of the act. Finally, it is our opinion that language in IRA's patterned on IRS required model account forms are not subject the the requirements of the act but language in prototype forms reviewed by the IRS would be subject the requirements of the act.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

By: J. MICHAEL BLAKE
Deputy Attorney General

* A consumer may set up an IRA by buying an annuity or endowment contract from a life insurance company. This form of IRA is not subject to the Plain Language Act. It is subject to the Life and Health Insurance Policy Language Simplification Act. See N.J.S.A. 56:12-1(c).