BANKING DEPARTMENT: Public depositaries—whether preferred stock may be considered in fixing the relative amount which any one of two or more legal depositaries may receive.

November 29, 1933.

Mr. R. A. McKinley,
Director, Department of Financial Institutions,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion construing the meaning of the term “capital stock” as used in section 12631 of Burns Annotated Indiana Statutes of 1926, in view of section 301 of the National Banking Emergency Relief Act, approved March 9, 1933, authorizing the issuance of preferred stock by national banks. Section 12631, supra, provides in part as follows:

“When two or more banks or trust companies in the same county, city, town or township, propose to become depositaries of the funds thereof and offer the rate of interest provided for herein, it shall be the duty of the board of finance of such county, city, town or township to select, impartially, as many of such banks or trust companies for depositaries as tender satisfactory security for such deposits: Provided, That maximum amount of deposits to be made in any depository selected by one or more of the boards of finance created by this act shall not exceed the sum of five hundred thousand dollars: Provided, That the maximum sum to be deposited in the several depositaries shall be awarded among the qualifying depositaries in proportion to their capital stock and surplus.”

I am advised that certain state banks have raised the question as to whether issuance of preferred stock by national banks, as above provided, should be taken into consideration as a part of the capital stock of such national bank in establishing the proportion of public deposits which such banks may receive where more than one bank in the same county, city, town or township make application for public funds thereof. It is true that such preferred stock does not stand upon the same basis as common stock. It has preference in
the payment of dividends; its holders have no individual liability for any of the debts, contracts, or engagements of the association and are not liable for assessments to restore impairments in the capital of such association as provided by law with reference to holders of common stock; in addition to which it is expressly provided that:

"The term 'capital' as used in provisions of law relating to the capital of national banking associations shall mean the amount of unimpaired common stock plus the amount of preferred stock outstanding and unimpaired; and the term 'capital stock,' as used in section 12 of the act of March 14, 1900, shall mean only the amount of common stock outstanding."

The last above clause with reference to the term "capital stock" refers to Section 101, Title XII, U. S. C. A., which restricts the amount of circulating notes furnished to national banking associations to not exceed at any time the amount of its capital stock actually paid in.

Notwithstanding the foregoing particular provisions with reference to the preferred stock of national banking associations, in the ordinary sense of the term the preferred stock of a corporation is considered a part of its capital stock and, while at the time of enactment of section 12631, supra, neither state banks nor national banks were authorized to issue preferred stock, I do not think the term "capital stock" can be so limited as to include only common stock. In other words, if legislation were enacted authorizing state banks to issue preferred stock similar to the preferred stock authorized to be issued by national banks and section 12631 were to remain unchanged, I do not think it would be contended that such preferred stock was not a part of the capital stock, and I am quite sure that it could not be successfully so contended. The term capital stock has a well defined meaning. Its ordinary meaning would include preferred, as well as common stock, and, in my opinion, it should be thus construed in arriving at the proportion which any one of two banks applying for public deposits would be entitled to receive.