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Requested by: L. M. Stenehjem, Jr., Commissioner of Banking and Financial Institutions

- QUESTION PRESENTED -

Whether the State Banking Board has the power to issue regulations authorizing state banks to purchase for their own accounts, shares of stock in a bank which is owned exclusively by banks (except to the extent that state law requires directors qualifying shares) and which will be engaged exclusively in providing banking services for other banks, their officers, directors, and employees.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the State Banking Board has the power to issue regulations authorizing state banks to purchase for their own accounts, shares of stock in a bank which is owned exclusively by banks (except to the extent that state law requires directors qualifying shares) and which will be engaged exclusively in providing banking services for other banks, their officers, directors and employees.

- ANALYSIS -

Section 6-03-38 of the North Dakota Century Code states as follows:

6-03-08. ASSETS NOT TO BE USED IN OTHER BUSINESS - EXCEPTIONS - PENALTY. No bank, except as otherwise authorized in this title, shall employ its money or other assets as principal, directly or indirectly, in trade or commerce, nor shall it employ or invest any of its assets or funds in the stock of any corporation, bank, partnership, firm, or association, provided, however, that a state bank may to the extent that banks subject to the laws of the federal government are permitted to do so, purchase shares of stocks in small business investment companies organized under Public Law No 85-699, 85th Congress, known as the the Small Business Investment Act of 1958, and any amendments thereto, or chapter 10-30 of the North Dakota Century Code, but in no event shall any state bank hold shares in small business investment companies in an amount aggregating more than two percent of the bank's capital and surplus, nor in speculative margins of stock, bonds, grain, provisions, produce, or other commodities, except that it shall be lawful for a bank to make advances for grain or other products in store or in transit to market, and to invest in stocks of subsidiary corporations, when the activities of such corporations are incidental to banking activities, with the specific approval of the state banking board for each such subsidiary. The state banking board shall have the same power to make rules and regulations for the subsidiary corporations, and to examine its records and affairs, as it has for other financial corporations

under the provisions of section 6-01-04. In the event that the state banking board determines that such investments would be detrimental to the interests of a bank's depositors, it may direct the bank to divest itself of such subsidiary investments. In addition to the above, the state banking board shall have the power to issue regulations authorizing state banks to engage in any banking activity in which such banks could engage were they operated as national banks at the time such authority is granted, notwithstanding any restriction elsewhere contained in this Code. Any officer, director, or employee of any bank who shall invest or use its funds contrary to the provisions of this title shall be guilty of a class A misdemeanor.

Section 1-02-07, N.D.C.C., states as follows:

1-02-07. PARTICULAR CONTROLS GENERAL. Whenever a general provision in a statute shall be in conflict with a special provision in the same or in another statute, the two shall be construed, if possible, so that effect may be given to both provisions, but if conflict between the two provisions is irreconcilable the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest legislative intent that such general provision shall prevail.

The bar to a bank employing or investing its assets in the stock of "any corporation, bank, partnership, firm or association," was originally enacted by the 1905 Legislative Assembly. 1905 N.D. S.L. Chapter 165, Section 38. Since 1905 the Legislative Assembly has modified this absolute bar several times so that state banks are able to engage in the same types of banking activities as those in which national banks may engage. In 1969, the Legislative Assembly amended section 6-03-38 N.D.C.C., to add the following language:

In addition to the above, the state banking board shall have power to issue regulations authorizing state banks to engage in any banking activity in which such banks could engage were they operated as national banks at the time such authority is granted, notwithstanding any restriction elsewhere contained in this Code.

The legislative history behind this addition makes the intention of the Legislative Assembly clear. By the addition of this language, the Legislative Assembly intended that the State Banking Board should have the authority and flexibility to enact timely regulations to the extent such regulations are necessary to allow state banks to conduct and compete for business on an equal basis with national banks. 12 U.S.C.A. Section 24 states in part as follows:

. . . notwithstanding any other provision of this paragraph, a national banking association may purchase for its own account shares of stock of a bank

insured by the Federal Deposit Insurance Corporation if the stock of such bank is owned exclusively by other banks (except to the extent that state law requires directors qualifying shares) and if such bank is engaged exclusively in providing banking services for other banks and their officers, directors, or employees but in no event shall the total amount of such stock held by the association exceed at any time ten per centum of its capital stock and paid in and unimpaired surplus, and in no event shall the purchase of such stock result in the association's acquiring more than five per centum of any class of voting securities of such bank.

Under this provision national banks are able to invest their assets in the stock of "bankers' banks" if they choose to do so. By virtue of section 6-03-38, N.D.C.C., the State Banking Board has the power to issue regulations which allow state banks to invest assets in bankers' banks to the same extent that national banks have this power. It is therefore my opinion that the State Banking Board has the power to issue regulations authorizing state banks to purchase for their own accounts shares of stocks in a bank which is owned exclusively by banks (except to the extent that state law requires directors qualifying shares), and which will be engaged exclusively in providing banking services for other banks, their officers, their directors, and employees, and as restricted by the requirements of 12 U.S.C.A. Section 24.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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