

## Opinion No. 68-56

May 31, 1968

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Mr. Charles F. McConnell Commissioner of Banking Department of Banking 113 Washington Avenue Santa Fe, New Mexico

### QUESTION

#### QUESTIONS

1. Does the term "all reserve accounts" mentioned in Section 48-15-46M, N.M.S.A., "special reserves" author-1953 Compilation include the "special reserves" authorized by Section 48-15-72?
2. If the answer to the first question is "Yes" what is the meaning of the term "reserves" as used in Section 48-15-72?

#### CONCLUSIONS

1. Yes
2. See analysis.

### OPINION

#### {\*93} ANALYSIS

Section 48-15-72, N.M.S.A., 1953 Compilation provides as follows:

"Charging off or setting up reserves against bad assets. -- A-serves {\*94} against bad assets. -- After a determination of value, the supervisor may order that assets in the aggregate, to the extent that the assets exceed appraised value, be charged off, or that a special reserve or reserves equal to the depreciation in value be set up by transfers from surplus, undivided profits or reserves."

Subsection M of Section 48-15-46, N.M.S.A., 1953 Compilation defines "net worth" as ". . . the sum of all reserve accounts, undivided profits, surplus, capital stock and any other nonwithdrawable accounts." There is no ambiguity in this definition; therefore it is not subject to construction. **In re Stutzman's Estate**, 57 N.M. 710, 262 P.2d 990 (1953). It is therefore our opinion that the special reserves provided for in Section 48-15-72, supra, are to be included in the net worth of a savings and loan association.

We recognize that the conclusion we have reached can result in the special reserve provided for in Section 48-15-72, supra, not furnishing the protection apparently intended. However, since the statutes are clear there is no reason for construction. Further, under this section you may order that assets be charged off.

The word "reserves" is not defined in the Savings and Loan Act. In seeking a definition of this term we find that there are many meanings and uses for it. However, because of what we believe to be the purpose of Section 48-15-72, supra, i.e., a protection to the public, the following remarks and definitions from **United States v. Zions Savings and Loan Association**, 313 F.2d 331 (10th Cir. 1963) are pertinent:

"Consideration of the meaning and application of the phrase 'surplus, undivided profits, and reserves' brings us into the mysterious field of corporate accounting. The many judicial decisions which have explored this field are not particularly helpful because they deal with specific situations not comparable with that presented here. The principles and procedures of accountancy found in the writings of acknowledged leaders in the profession are not decisive because, depending on the selection of material, support can be found for the position of each party to this controversy.

The Supreme Court has said that 'the words of statutes -- including revenue acts -- should be interpreted where possible in their ordinary, everyday senses.'" With full knowledge of the danger of over-simplification, we shall give to the pertinent phrases what we believe to be the common meaning.

Surplus is the name of an account which 'represents the net assets of a corporation in excess of all liabilities including its capital stock.' Undivided profits are profits 'which have neither been distributed as dividends nor carried to surplus account upon the closing of the books; that is, current undistributed earnings.' A prerequisite to the existence of either undivided profits or surplus is an excess of net assets over capital stock. Although the term 'reserves' has many meanings, as used in the situation with which we are confronted it represents 'an appropriation or a segregation of surplus.'"

(Citations omitted)

It is therefore our opinion that the reserves referred to in Section 48-15-72, supra, are an appropriation or a segregation of surplus.

By: Roy G. Hill

Deputy Attorney General