Opinion No. 75-53

September 30, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Mr. Snider Campbell Savings and Loan Supervisor Department of Banking Lew Wallace Building Santa Fe, New Mexico 87503

QUESTIONS

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1. In the Savings and Loan Act, Sections 48-15-45 through 48-15-151, NMSA, 1953 Comp. (1973 P.S.), may outstanding capital debentures or notes be included in the definition of the net worth of an association?

2. If the answer to question 1 is "yes," is the seventy-five percent limitation in Section 48-15-54A, **supra,** computed before or after the capital debentures or notes are issued?

3. May outstanding capital debentures or notes be used to satisfy the net worth requirements of Section 48-15-91, **supra,** or any other section of the Savings and Loan Act except for Section 48-15-111, **supra?**

CONCLUSIONS

1. No.

2. See Analysis.

3. No.

OPINION

*{*144}* **ANALYSIS**

1. The Savings and Loan Act permits associations to issue and sell its capital debentures and notes but limits the principal amount which may be outstanding to not more than "seventy-five per cent of an association's net worth." Section 48-15-54A, **supra.** Because of their applicability to this inquiry, other portions of that section follow.

"C. Capital debentures or notes are an unsecured indebtedness of the association and are subordinate to the claims of depositors and all other creditors. . . . No payment of the principal of outstanding capital debentures or notes shall be made unless, after the payment, **the aggregate of the net worth and capital debentures or notes** then

outstanding is equal to the aggregate of the foregoing items immediately after the original issue of the capital debentures or notes.

"D. The amounts of outstanding capital debentures or notes legally issued . . . shall be treated as capital for the purpose of computing reserve requirements . . . ." (Emphasis supplied.)

From the emphasized language of Section 48-15-54C, **supra,** we obtain our initial indication that capital debentures or notes are not to be treated as an element of "net worth." Were this intended to be otherwise, it is doubtful that the Legislature would have found it necessary to list those items separately.

In Section 48-15-46M, **supra,** "net worth" is defined as "the sum of all reserve accounts, undivided profits, surplus, capital stock and any other nonwithdrawable accounts."

Without elaboration, we find that capital debentures and notes are not considered as "reserve accounts, undivided profits, surplus, (or) capital stock" by statutory definition, judicial determination or trade usage. As to whether capital debentures and notes may be included within the term "any other nonwithdrawal accounts," we first note that they are usually considered as a form of subordinated debt security. While not defined in New Mexico law, subordinated debt securities are defined in the federal laws regulating federally insured associations as:

". . . any unsecured note, debenture, or other debt security issued by an insured institution and subordinated on liquidation to all claims having the same priority as savings account holders *{*145}* or any higher priority." 12 C.F.R. § 561.24.

Reading this definition along with the language of Section 48-15-54C, **supra,** it is obvious that capital debentures and notes are a form of "subordinated debt security." Again, while our statutes are silent as to whether such securities are a form of "nonwithdrawable accounts," we note that federally insured associations may not treat them as either withdrawable or nonwithdrawable accounts. 12 C.F.R. § 561.3.

The definition of net worth for federally insured associations in their relation with the Federal Savings and Loan Insurance Corporation (FSLIC) is quite similar to the New Mexico definition. 12 C.F.R. § 561.13 defines "net worth" as "the sum of all reserve accounts (except specific or valuation reserves), retained earnings, capital stock, and any other nonwithdrawable accounts . . . ." That regulation goes further than ours, however, by allowing the inclusion of a specific portion of an insured association's outstanding capital debentures and notes in its net worth computation. The inclusion is limited to twenty percent of the outstanding issues for purposes of satisfying annual closing net worth requirements. For further purposes the inclusion is limited to the extent explicitly authorized in writing by FSLIC. It thus appears that while capital debentures and notes are not strictly within the federal "net worth" definition, they are, to a degree, an acceptable inclusion into the computation of "net worth."

You have advised us that your Division has not interpreted our statutory "net worth" definition as including capital debentures or notes for reporting or other purposes where not specifically authorized by the Savings and Loan Act. This construction should be followed if it is a reasonable one, even though there might be another interpretation which is likewise reasonable, unless there are compelling indications that it is wrong. **Kenneth v. Schmoll,** 482 F.2d 90 (10th Cir. 1973). See also **Dillard v. State Tax Comm'n,** 53 N.M. 12, 201 P.2d 345 (1940). As we are unaware of any compelling indications that your interpretation is wrong, and as it appears that this interpretation is a reasonable construction of the Savings and Loan Act, we conclude the "net worth" definition in that Act does not include capital debentures or notes.

2. As we have answered "no" to the first question, suffice it to say that the limit of the principal amount of outstanding capital debentures or notes to not more than seventy-five percent of an association's net worth is to be computed prior to the issuance of new debentures or notes.

3. Since we have concluded that capital debentures or notes are not a part of an association's "net worth" for State reporting purposes, they may not be used to satisfy the net worth requirements of the Savings and Loan Act. The sole exception to this restriction of their use is for the purpose of computing an association's reserve requirements, as prescribed by Section 48-15-111B., **supra.** In that event, they are to be treated as capital. Section 48-15-54D., **supra.**

By: Harvey B. Fruman

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