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FINANCIAL INSTITUTIONS

State chartered banks may not issue preferred stock as a means of raising equity capital.

QUESTIONS

May a bank chartered under the provisions of the New Mexico Banking Act, Sections 58-1-1 **et seq.** NMSA 1978, issue preferred stock as a means of raising equity capital.

CONCLUSIONS

No.

ANALYSIS

Preferred stock generally is that class of stock of a corporation that is entitled by agreement between the stockholder and the corporation to some form of preference over other classes of stock. 18 C.J.S. Section 220, Corporations. The issuance of preferred stock is authorized for general New Mexico corporations by the Business Corporation Act, Sections 53-11-1 to 53-18-12, NMSA 1978 Comp. The Business Corporation Act authorizes corporate powers that may be exercised by any corporation organized pursuant to the provisions of the Act, including the authority for a corporation to issue preferred stock. See Sections 53-11-15 and 16, **supra**.

Section 53-11-3, **supra**, of the Business Corporation Act states:

"Purposes.

Corporations may be organized under the Business Corporation Act for any lawful purpose or purposes, **except banking**, insurance, credit unions, savings and loan associations, railroads and waterworks organized under the Laws of 1887, Chapter 12." (Emphasis added.)

Thus, if a corporation will be engaging in the business of banking it may not be organized under the provisions of the Business Corporation Act, so that the powers and authorities established under the Act would not be applicable to such a corporation. This view is supported by the case of **First Thrift and Loan Assn. v. State ex rel. Robinson**, 62 N.M. 61, 304 P.2d 582 (1956), in which the Supreme Court held, under a similar statutory provision now repealed, that a corporation incorporated for the purpose of conducting a savings bank business could not organize under the general corporation laws, but must instead seek incorporation under the statutes dealing with savings banks. Therefore, the powers and authorities established for corporations by the Business Corporation Act, including the authority to issue preferred stock, would not apply to a corporation organized for the purpose of banking.

Corporations organized for the purpose of banking must instead be organized under the provisions of the Banking Act, Sections 58-1-1 **et seq.** NMSA 1978. It is an axiomatic principle of banking law that the powers authorized to banks must be {^{*13}} determined by the terms of the statutory provisions under which the bank is organized, and thus that only those powers and authorities expressly conferred by the statute are to be deemed exercisable by banks. See 9 C.J.S. Section 157, Banks and Banking; and 10 Am. Jur. 2d Section 270, Banks. The New Mexico courts have apparently adopted this principle in the case of **In re Armijo's Will**, 57 N.M. 649, 656, 261 P.2d 833 (1953), where the Supreme Court noted with approval the principle that a national bank was limited to only those powers expressly conferred by Congress, and that any powers not so conferred were denied to the bank. From the **Armijo** case it can be assumed that banks chartered under the Banking Act likewise are limited to only those powers expressly conferred by the Act.

A review of the Banking Act shows that the term "preferred stock" is used at only one place in the statute. Section 58-1-29, **supra**, provides in part as follows:

"Issuance of capital debentures or notes.

A. After obtaining approval of the commissioner [director of the financial institutions division of the commerce and industry department] and the approval of the stockholders owning two-thirds of the issued and outstanding shares of stock of the bank entitled to vote, a bank may issue and sell its capital debentures or notes. Capital debentures or notes may be converted into shares of common or preferred stock in accordance with the provisions of the debentures or notes and under any terms or conditions prescribed or approved by the commissioner [director]. The principal amount of any capital debentures or notes outstanding at any time shall not exceed an amount equal to the sum of one hundred percent of the banks' [bank's] unimpaired paid-in capital stock and fifty percent of its unimpaired surplus fund."

We would interpret this provision as authorizing a state chartered bank to issue preferred stock only in the circumstance of a conversion of a note or capital debenture of the bank, and then only under those terms and conditions as may be prescribed by the director of the Financial Institutions Division. We do not view this provision as

creating a general grant of authority for state chartered banks to issue preferred stock as a means of raising equity capital for the institution. The purpose of Section 58-1-29, **supra**, is to provide restrictions on the accumulation of debt capital by a banking institution, and the issuance of preferred stock upon conversion from capital notes or debentures is consistent with this purpose.

Section 58-1-55, **supra**, sets forth the capital structure requirements for a state chartered bank. In this section the legislature has spoken in terms of "common capital" and "common stock" in establishing minimum capitalization requirements, and has not determined that a bank may be capitalized by the issuance of preferred stock. From a reading of this provision it is clear that the legislature intended that the equity capital of a banking corporation should be composed of "common stock," and that the issuance by such a corporation of preferred stock to raise equity capital was not expressly authorized.

Finally, Section 58-1-53, **supra**, of the Banking Act provides in part that:

"State banks shall have . . . all the powers provided and conferred on {^{*14}} them in the Banking Act and such general corporate powers as are appropriate to its purpose. . ."

It is apparent from a reading of the Banking Act that the power of a banking corporation to issue preferred stock has not been conferred by the Act except in the limited situation allowed by Section 58-1-29, **supra**. We do not view the authority to issue preferred stock as a "general corporate power" appropriate and necessary to the purpose of such a banking corporation, and thus this section does not establish an implied authorization for a banking corporation to issue such stock.

Although national banks may issue preferred stock, they do so only in accordance with express statutory authorization. See Title 12, U.S.C., Section 51a. Prior to such express statutory authorization, national banks could not legally issue preferred stock. See **Baltimore National Bank v. State Tax Commission of Maryland**, 297 U.S. 209, 80 L. Ed. 586, 589, 56 S. Ct. 417 (1936); 9 C.J.S. Section 572, Banks and Banking. The authority thereby granted national banks by Title 12, U.S.C., Section 51a does not automatically extend to banks chartered by the state. However, since the Banking Act does not expressly prohibit the issuance of preferred stock by state banks, such authority may be conferred by regulation adopted by the director of the Financial Institutions Division in his discretion pursuant to his power under the so called "wild card" provision, Section 58-1-54, **supra**.

In conclusion, it is our opinion that a bank chartered under the provisions of the New Mexico Banking Act may only issue preferred stock upon conversion of capital notes or debentures pursuant to Section 58-1-29, **supra**, and that the Banking Act does not authorize such a bank to issue preferred stock as a means of raising equity capital.

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