

OFFICIAL OPINION NO. 72-73, Bank stock subscriptions. Until bank charter is approved there is no corporate entity. Subscription to purchase stock in proposed bank is not under supervision and control of either Security Commissioner or Superintendent of Ba

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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Commissioner of Securities
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Walter E. Wintrode
Superintendent of Banks
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 72-73

Bank stock subscriptions. Until bank charter is approved there is no corporate entity. Subscription to purchase stock in proposed bank is not under supervision and control of either Security Commissioner or Superintendent of Banks.

Dear Mr. Andera and Mr. Wintrode:

You have requested my official opinion in answer to the following questions:

1. Does a bank exist as a corporate entity prior to the issuance of a certificate or charter?
2. When more than ten persons enter a pre-charter subscription to become stockholders in a proposed bank, which is accompanied by a payment of at least ten per cent of the subscription price, is such "security" transaction subject to registration with the Commissitner of Securities?
3. What department of the executive branch of government, if any, is responsible for overseeing the subscriptions to become stockholders in a proposed bank, such to be exercised for the protection of the public, prior to an application for a bank charter to the Banking Commission?

Before considering your inquiries, it appears proper to consider certain basic principles connected therewith. The basis of this inquiry is a noted tendency, recently developed, where proposed banks are seeking a broad spectrum of persons to be stockholders therein. This is contrary to the usual custom to limit the stockholders of a proposed bank to as few persons as possible.

The regulation of any business in South Dakota is neither inherent nor a matter arising because of the desires of any person or persons. Rather, regulation in any area depends upon legislative action. When regulation is properly enacted by the Legislature such is done in the exercise of the "police power" of the state.

At this time, the banking industry is subject to supervision and control of the South Dakota Banking Commission. The sales of securities are under the supervision and control of the Commissioner of Securities. This last statement, however, is true only as a generality, for the Legislature itself, in providing for security regulations has provided at least twenty-six (26) exemptions thereto. These are contained in SDCL 47-31-67 through 47-31-92. There appears no question that bank stock is a security within its definition as set forth in SDCL 47-31-1(4).

The present problem is to determine whether such, in the pre-charter subscription stage is an "exempt security."

My predecessor in an opinion reported in 1931-32 AGR 591, on statutes similar to those contained in our security laws of today (citing the predecessor statutes of SDCL 47-31-82 and 47-31-88) held such were exempt securities. Basically, your questions are premised on asking me to overrule this opinion of my predecessor.

I will now direct my attention to the questions you have propounded.

QUESTION 1: The method of organizing a bank is specifically set forth in SDCL 51-17. It appears proper to summarize the procedure that is necessary to follow so that a corporate entity engaged in banking may come into existence and enter into the banking community. These steps are as follows:

1. There must be at least five or more original incorporators. Proposed articles of incorporation, stating the corporation is formed for the purpose of engaging in the business

of banking, or as a bank and trust company, with a distinctive name, with a period of existence not exceeding twenty years, must be reduced to writing.

2. The capital stock of such corporation must be divided into shares with a par value of not less than ten or more than one hundred dollars per share. Such must be stated in the articles. The necessary capitalization to engage in banking is based upon the population of the community where the proposed bank will be located and is set forth in SDCL 51-17-4.

3. When such stock is offered for sale by a pre-charter subscription, it must be sold at a price of not less than ten per cent in excess of its par value. (SDCL 51-17-5). At the original subscription not less than ten per cent of the subscription price must be paid and collected. (SDCL 51-17-13).

4. After the execution of the proposed articles of incorporation and the initial subscription of stock, and the payment of the requisite payment, the incorporators are required to deliver the the original and two executed copies of such proposed Articles, an application for approval by the Banking Commission for such bank, and the requisite filing fee, to the Superintendent of Banks.

5. The Superintendent acknowledges receipts and acceptance of such application and filing fee, and thereafter he shall cause a careful investigation and examination relative to the proposed bank to be made. The subject matter of such examination is detailed and set forth in SDCL 51-17-15. The Banking Commission may, if it desires, designate itself or some other designee to make this examination.

6. After the completion of such examination and its reduction to writing as a report, the same is submitted to the Superintendent of Banks for his consideration. He must submit this report, together with all other pertinent information in his possession, together with his recommendation for approval or disapproval to the State Banking Commission.

7. Thereafter, the State Banking Commission shall consider these documents, the recommendation of the Superintendent, "and all other available relevant information" and shall in its discretion approve or disapprove such application for a bank charter.

8. If the Banking Commission approves such application, the approval is endorsed on the Articles, and the original thereof is filed with the Secretary of State, a certified copy is filed

in the office of the Superintendent of Banks, and the remaining (approved) copy is returned to the incorporators.

It is my opinion that until the above outlined steps have been accomplished, no bank as a corporate entity is in existence. With the filing of the approved Articles of Incorporation with the Secretary of State, and his issuance of a certificate of incorporation (see SDCL 47-2-6 and 47-2-7), corporate existence has been obtained. It should be noted, however, that although corporate existence is then obtained, the banking corporation cannot then engage in the banking business. Rather, until the requirements of SDCL 51-17-19 are met, and the Superintendent of Banks issues a certificate of authority, no banking business may be transacted.

Question NO.1 must be answered, NO.

QUESTION 2. This question must be answered, NO. I find the opinion of my predecessor proper. In addition to the statutes he has cited, you are referred to SDCL 47-31-69. It is my opinion that it would do violence to the legislative intent to limit this exemption to the issuance of stock or other securities of a bank, under the supervision of the State Banking Commission, after incorporation.

QUESTION 3: In these days of overzealous regulations by governmental agencies, it is hard to conceive that these remain areas of endeavor not subject to governmental interference. This concept, to many, is as hard to believe as the concept that up to this time there is no criminal sanction upon every form of human skulduggery that man can conceive. However, these concepts are true.

Insofar as the protection of the general public is concerned, it is my opinion that the procedures outlined to actually engage in the banking business, protects the general public.

I can appreciate that this protection to the general public deals with a separate problem from the protection, if any, any state department or agency may give to persons who are asked to become stockholders in a proposed bank.

However, as every person is presumed to know the law especially in connection with matters of his own concern, I can find nothing in the procedure to engage in the banking business that is too unfair to a proposed bank stockholder. Each proposed bank stockholder who subscribed to a pre-charter subscription list is presumed to know that he must pay

more than the par value for such stock. Each knows that before the application for approval is made he must pay ten percent, at least, of his subscription. He is presumed to know if the Banking Commission does not grant approval that he will not receive all of his initial down-payment for such stock refunded. Rather, he knows that he will have to pay for his proportional share of the expenses incidental to the application for approval. (See SDCL 51-17-13). He is presumed to know that in the careful investigation and examination required before approval is granted that:

The character, reputation and financial standing of the organizers or incorporators and their motives in seeking to organize the proposed state bank (SDCL 51-17-15(1)

he, along with all other proposed stockholders, will be subject to such investigation.

Certainly, as such pre-charter subscriptions are exempt from the security laws, the Commissioner of Securities can exercise no supervision or control over such subscriptions. I have been advised that in the past: the promoters of new banks have submitted their papers and documents to the approval of the Superintendent of Banks and the State Banking Commission. Certainly this practice cannot be condemned. However, if the right of the State Superintendent of Banks and the Banking Commission to require prior approval before such pre-charter subscriptions were brought to the attention of the judiciary, I can see no legal justification for such requirement.

Respectfully submitted,

Gordon Mydland
Attorney General