

**OPINION
70-23**

November 23, 1970

(OPINION)

Mr. H. L. Thorndal
President
The Bank of North Dakota

RE: Bank of North Dakota - Small Business Investment Corporation - Ownership of Stock.

This is in response to your request for an opinion on the question whether or not the Bank of North Dakota can become a regular stockholder (Section 10-30-06), and if so, could we also be a nonstockholder member? If we could be a stockholder, is there any limit to how much the Bank of North Dakota could invest? \$75,000? Another question is: Could a member of our advisory board act as a board member on a small business investment corporation acting for the Bank of North Dakota?

Chapter 10-30 contains no special provision as to who may purchase the stock issued by a small business investment corporation. Section 10-30-08 sets forth loan limitations and among other things provides as follows:

"NONSTOCKHOLDER MEMBERS - LOAN LIMITATION. The nonstockholder members of the corporation shall consist of such national or state banks, savings banks, savings and loan associations, trust companies, stock or mutual insurance companies, the Bank of North Dakota, and other financial institutions as may make application for membership in said corporation, and membership shall become effective upon the acceptance of such application by the board of directors. * * *The total amount of loans by any member at any one time shall not exceed the following limit, to be determined as of the time such member becomes a member (on the basis of the balance sheet of such member at the close of its preceding fiscal year, certified by its proper officers); two and one-half percent of the capital and surplus of the commercial banks and trust companies, and the Bank of North Dakota,* *

It is noted that the Bank of North Dakota is authorized to be a nonstockholder member, but nowhere do we find any indication that the Bank of North Dakota may be a stockholder member.

In this connection, we should take cognizance of Section 6-03-38 as amended which provides that no bank except as otherwise provided in Title 6 shall employ its money or assets in the stock of any corporation, bank, partnership, firm, or association. This same section continues with the following proviso:

"ASSETS NOT TO BE USED IN OTHER BUSINESS - EXCEPTIONS - VIOLATION A MISDEMEANOR. * * *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 stock in small business investment companies organized under Public Law No. 85-699, Eighty-fifth Congress, known as 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,* * *

The quoted provision leaves much to be desired and is, in a sense, paradoxical because the federal act to which reference is made provides that shares of stock in small business investment companies shall be eligible for purchase by national banks and shall be eligible for purchase by other member banks of the Federal Reserve System and nonmember insured banks to the extent permitted under applicable state law. The purchase of shares is limited under Section 6-03-38 as permitted by the Federal Act. The Federal Act in turn says as permitted by state law. In addition to this, we find that the authorization is pursuant to federal law

and amendments thereto. The language "and amendments thereto" makes this provision vulnerable as being unconstitutional on the grounds that it is an unlawful delegation of authority.

We are not taking the position that it is unconstitutional but would rather urge a construction that the reference to the federal law be as it existed at the time Section 6-03-08 was amended. We are not aware of any state law which authorizes banks to purchase stock in another company and the permission in Section 6-03-38 is conditional. What is more significant is that Section 6-03-38 prohibits the purchase of stock except under the limited conditions. Chapter 6-09 pertaining primarily to the functions of the Bank of North Dakota contains no authority to purchase stock. Because the Bank of North Dakota is an instrumentality of the state, and has been declared by the courts to be the State of North Dakota doing business as the Bank of North Dakota, it would appear that Section 185 of the North Dakota Constitution would be applicable at least to a degree which prohibits the state from subscribing to or becoming the owner of capital stock in any association or corporation.

Because the Legislature has specifically provided that the Bank of North Dakota may be a nonstockholder member and set forth the conditions under which it may be such member and limited its participation and because of the specific prohibition and limitation found in Section 6-03-38 and because of the provisions of Section 185 of the North Dakota Constitution, we are convinced that the specific authority would have to be found authorizing the Bank of North Dakota to be a stockholder member of a small business investment corporation before we could conclude that the bank may be such member.

It is therefore our opinion that the existing provisions of law which are applicable to the Bank of North Dakota militate against rather than in favor of the proposition that the Bank of North Dakota may be a stockholder member in a small business investment corporation.

As to a member of the advisory board being a board member on a small investment corporation acting for the Bank of North Dakota, we do not find any statutory language which is controlling. If there is any incompatibility, it would rest upon common law conflicts of interest.

It is noted that Chapter 6-09.1 creates the advisory board for a specific purpose. The provisions of Chapter 6-09.1 do not set forth the minimum qualifications for members to be appointed to such board nor does it set forth any disqualifying factors. However, under Section 6-09.1-03 we find the following language.

"* * *and such advisory board shall act in behalf of the Bank of North Dakota in such other capacity as may be approved by the Industrial Commission of North Dakota." This language refers to the board as a whole and not to individual members.

While a board member might not have a conflict of interest as between the Bank of North Dakota and the small business investment corporation with reference to the Bank of North Dakota; nevertheless, the investment corporation justifiably might claim a conflict of interest or undue influence.

It is our opinion that a board member on a small business investment corporation could be appointed on the advisory board under Chapter 6-01.1 and such member could represent the interest of the Bank of North Dakota. However, we have strong reservations that such board member could act for the Bank of North Dakota under any situation. The actions of the Bank of North Dakota must be carried out through the duly constituted officers of the bank or the Industrial Commission. Such duties and responsibilities cannot be delegated in the absence of a statute to the advisory board or to a member of such advisory board.

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Attorney General