

VOLUME NO. 43

OPINION NO. 76

BANKS AND BANKING - Activities of state chartered banks;
COMMERCE, DEPARTMENT OF - Consent to activities of state chartered banks;
MONTANA CODE ANNOTATED - Sections 32-1-105, 32-1-362;
OPINIONS OF THE ATTORNEY GENERAL - 16 Op. Att'y Gen. No. 191 (1935).

HELD: Pursuant to section 32-1-362, MCA, with the consent of the Department of Commerce, a state chartered bank may directly market fixed annuities, provided that national banks are permitted to do so and that no state statute expressly prohibits such activity.

November 16, 1990

Annie M. Bartos
Chief Legal Counsel
Department of Commerce
1424 Ninth Avenue
Helena MT 59620

Dear Ms. Bartos:

You have requested my opinion concerning whether, pursuant to section 32-1-362, MCA, a state chartered bank may directly market fixed annuities provided that this activity is sanctioned for national banks by the Office of the Comptroller of the Currency (OCC). On February 12, 1990, the Comptroller issued Interpretive Letter No. 499, which determined that national banks may broker fixed annuities. The letter opines that annuities are not insurance, but rather are financial investment instruments and are a specialized product which national banks may sell as agents, so long as certain warnings are given to consumers addressing the fact that the product is not FDIC insured. The OCC ruling does not directly control state banks, but is controlling for national banks unless overturned by a court. Your question is whether state law permits state banks to act as agents in selling fixed annuities. My conclusion is that current state law permits this activity if the Department of Commerce (department) gives its consent.

Section 32-1-362(1), MCA, provides:

With the consent of the department, every bank organized under the laws of the state shall have power to and may engage in any activity or business in which such bank could engage if it were operating as a national bank. The department may prescribe, amend, and repeal regulations affecting and controlling the exercise of the powers granted by this section, provided that,

subject to subsection (2), such regulations and powers shall not apply to activities which are expressly prohibited or limited by the statutes of the state. [Emphasis added.]

A plain reading of this statute reveals that state banks are granted the power to engage in any activity in which national banks are permitted to engage, subject only to an express prohibition or express limitation that may be imposed by the Montana statutes or the department. The question becomes whether any Montana statute expressly prohibits or limits the brokering of fixed annuities.²

It is your opinion that section 32-1-105, MCA, exhaustively and exclusively lists the activities in which state banks are permitted to engage. Section 32-1-105, MCA, provides as follows:

The term "commercial bank" means any bank authorized by law to:

- (1) receive deposits of money;
- (2) deal in commercial paper or make loans thereon;
- (3) lend money on real or personal property;
- (4) sell credit life and disability insurance on loans to its borrowers;
- (5) discount bills, notes, or other commercial papers; and
- (6) buy and sell securities, gold and silver bullion, foreign coins, or bills of exchange.

The selling of fixed annuities is not listed in this section. An opinion of one of my predecessors stated: "[S]ince a bank is created by law for certain purposes, the extent of its powers is measured not by what is prohibited but by what is granted by law." 16 Op. Att'y Gen. No. 191 at 197 (1935). This holding, indeed, follows the general rule that state banks have only those powers which are expressly conferred by statute or such as may be fairly implied from those expressly given. Washington Bankers Ass'n v. Washington Mutual Savings Bank, 598 P.2d 719 (Wash. 1979); Indep. Ins. Agents of

²It should be noted that since the OCC and other authorities have held that annuities are not insurance, see 1 J. Appelman, Insurance Law and Practice § 74 (1981), nothing in the Montana insurance statutes would directly prohibit the sale of fixed annuities by the employees of a bank. However, this opinion does not reach the question of whether the bank or its employees must be licensed under Title 33, chapter 17, MCA, in order to sell fixed annuities.

Georgia v. Dept. of Banking & Finance of Georgia, 285 S.E.2d 535 (Ga. 1982); Iowa Credit Union League v. Iowa Dept. of Banking, 268 N.W.2d 165 (Iowa 1978); Security Trust & Savings Bank v. Marion County Banking Co., 253 So. 2d 17 (Ala. 1971).

However, the opinion was issued prior to the 1973 enactment of section 32-1-362, MCA, which operates as an express grant of those powers possessed by national banks, to the extent such powers are not expressly prohibited or limited by state statute and if the department gives consent. This section effects a reversal of the general rule that banks "cannot operate on the basis that they can proceed with a new function unless it is forbidden; they must show that it is within the intendment of their statute--either granted by the statute in express terms or necessary or requisite to a granted power." Iowa Credit Union League, supra, 268 N.W.2d at 171. Now, so long as the Department of Commerce gives its consent, state banks are granted the power to engage in any activity permitted national banks.

It has been suggested that the list of activities in section 32-1-105, MCA, according to the maxim *expressio unius est exclusio alterius*, does pose a limitation on permissible activities. However, to follow this interpretation would be to render section 32-1-362, MCA, meaningless. Under this interpretation, section 32-1-362, MCA, would say that all powers granted to national banks are given to state banks so long as they are already enumerated by section 32-1-105, MCA. It is presumed that the Legislature does not pass meaningless legislation, and statutes relating to the same subject must be harmonized with effect given to each. Crist v. Segna, 191 Mont. 210, 622 P.2d 1028 (1981). In construing a statute, it is presumed that the Legislature intended to make some change in existing law. Cantwell v. Geiger, 228 Mont. 330, 742 P.2d 468 (1987); Foster v. Kovich, 207 Mont. 139, 673 P.2d 1239 (1983).

These principles compel the conclusion that the Legislature intended to place state banks on a par with national banks, in the absence of an express prohibition on an activity and so long as the Department of Commerce gives its consent with regard to each activity.

THEREFORE, IT IS MY OPINION:

Pursuant to section 32-1-362, MCA, with the consent of the Department of Commerce, a state chartered bank may directly market fixed annuities, provided that national banks are permitted to do so and that no state statute expressly prohibits such activity.

Sincerely,

MARC RACICOT
Attorney General