

BANKS: State banks may issue capital notes pursuant to authority contained in Sec. 362.120, RSMo, 1949, though no impairment of capital exists.



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6-17-52 ✓

Honorable H. G. Shaffner
Commissioner of the Division of Finance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Shaffner:

The following opinion is rendered in answer to your inquiry reading as follows:

"Several state chartered banks have indicated that they would like to issue capital notes in order to further strengthen their capital accounts. Chapter 362, specifically Section 362.120, makes certain provisions under which capital notes may be issued.

Kindly render an opinion relative to whether or not a state chartered bank may issue capital notes when ~~there~~ ^{there} is no impairment of capital."

Section 362.120, RSMo, 1949, provides as follows:

"1. Any bank or trust company organized under the laws of this state may, through action of its board of directors and without requiring any action by stockholders, with the written consent of the finance commissioner, issue and sell at not less than par its capital notes.

2. If, at the time of the issuance of such capital notes the capital of such bank or trust company is impaired, and there shall have been issued and sold

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capital notes of such bank or trust company in accordance with the provisions of sections 362.120 to 362.135, in an amount equal to or more than the impairment of the capital of such bank or trust company, as found by the commissioner of finance, then the capital of such bank or trust company shall for all purposes be deemed to be restored and unimpaired.

3. Such capital notes may be sold for cash or, with the written consent and approval of the commissioner of finance, for property and they shall be of a nature specified in, and conform to, the requirements of the several provisions of sections 362.120 to 362.135."

The power to issue capital notes with the written consent of the Commissioner of the Division of Finance, is clearly reflected in sub-paragraph 1 of the above quoted section, and sub-paragraph 2 of said section definitely discloses that the issuance of such capital notes does not require, as a condition precedent, that an impairment of capital exists.

Section 362.125, RSMo, 1949, provides, in part, as follows:

"1. Such capital notes shall be in such denominations and the holders thereof shall be entitled to such annual return thereon not exceeding six per cent as the board of directors of such bank or trust company may determine. Such capital notes shall provide that they may be retired at such time or times and in such manner as may be fixed by the board of directors of the bank or trust company, but in no event later than twenty years after the date of their authorization; provided, however, that no bank or trust company shall retire such capital notes if by such retirement an impairment of its capital will be created.

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4. Such capital notes shall at the time of their issuance be, and shall at all times thereafter remain, subordinate in rank and subject to the prior payment

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of all of the debts and obligations of such bank or trust company except certificates of indebtedness heretofore issued, and such bank or trust company may, for the security and protection of the holders of such capital notes, agree upon such restriction upon the distribution or payment of dividends, on its capital stock as the board of directors may decide; provided, however, that subject to the provisions of sections 362.315, relating to banks, and section 363.470, relating to trust companies, such capital notes and accrued return thereon may be retired in whole or in part, with the written approval of the commissioner of finance upon his determining that the proposed retirement of such capital notes will not result in an impairment of the capital of such bank or trust company to any extent whatever, notwithstanding the debts or obligations of such bank or trust company which are senior in rank to, and are entitled to priority of payment over, such capital notes, have not been paid."

The manner in which capital notes are to be issued and their established priority of payment as outlined in the above quoted excerpts from Section 362.125, RSMo, 1949, disclose that the issuance of capital notes by a banking institution is nothing more or less than an exercise of a bank's power to borrow money.

In *Ringling v. Kohn*, 6 Mo. App. 333, l.c. 335 we find the following rule stated:

"The charter gave to the corporation general banking powers in terms such as are usually employed for that purpose. Sess. Acts 1857, p. 642, sect. 6. Nothing is said about borrowing money. But it is elementary law that a corporation may exercise any unforbidden power which is necessary to carry into effect the powers specially granted. It would be a strange limitation of the authority to purchase exchanges, or to loan money, which should deny a simple means of obtaining occasional supplies for the purpose. A specific authority to borrow money rarely, if ever, appears in any bank charter. It has always been esteemed a necessary

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and inherent privilege, inseparable from the exercise of banking functions. Without it no bank, however ample its assets, could at times avoid insolvency. Curtis v. Leavitt, 15 N. Y. 9."

In Cantley v. Drainage District 2 S. W. (2d) 607, 318 Mo. 1120, 1.c. 1132, we find the following language:

"That the bank itself can borrow money and pledge its notes as security for the payment thereof cannot be questioned. It is done every day in the commercial world. Nor is there any limitation as to the person or corporation from whom it may borrow. When we say that banks cannot borrow money we have gutted the modern banking business. When we say that the bank can borrow money, we mean when acting through its board of directors, and the authority given by such board of directors to other agents of the bank."

Under the provisions of Section 362.120, RSMo, 1949 it is not necessary to rely on any general or implied powers of banks for authorization to issue capital notes, for the statute expressly confers the power, to be exercised when written authorization is given by the Commissioner of the Division of Finance.

CONCLUSION

It is the opinion of this department that State chartered banks in Missouri may, pursuant to express authority contained in Section 362.120, RSMo, 1949, issue capital notes though no impairment of capital exists.

Respectfully submitted,

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APPROVED:



J. E. TAYLOR
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