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Opinion No. 55-51

REQUESTED BY: Mr. Abner Swanson, Agency Counsel
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QUESTION: May Arizona banking and similar
institutions validly purchase and
hold FNMA stock?

CONCLUSION: 1. Commercial banks and trust companies
may legally invest available funds in
FNMA stock.
2. Savings and loan associations and
building and loan associations may also
acquire stock in FNMA providing such
stock is acquired within the limits of
the applicable statutes pertaining to
investments by these institutions.

The Code defines three categories of banks by outlining their
functions: commercial banks, savings banks and trust companies.
Quoting from Section 51-101, A.C.A. 1939, as amended in 1954:

"51-101. Definition of terms. --As used in
this article, the term 'bank' shall include
commercial banks, savings banks and trust
companies;

The term 'commercial bank' means any bank
authorized by law to receive deposits of money,
deal in commercial paper, or to make loans
thereon, to lend money on real or personal
property, to discount bills, notes, or other
commercial paper, and to buy and sell securities,
gold and silver bullion or foreign currency or
bills of exchange;

The term 'savings bank' means a bank organized for the purpose of accumulating and loaning its funds, receiving deposits of money, loaning, investing and collecting the same with interest and repaying depositors with or without interest and having power to invest said funds in such property, securities, and obligations, as may be prescribed by its board of directors, and to pay a stipulated rate of interest on deposits made for a stated period or upon special bonds;

The term 'trust company' means any bank authorized by law to take, acquire, execute trusts committed to it, and to act as trustee or fiduciary, and to receive deposits of money and other personal property and issue its obligations therefor, and to lend money;"

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Section 51-601, A.C.A. 1939, defines "building and loan association" as follows:

"51-601. Association defined.--Building and loan associations are organizations having for their object accumulation by the members of their money by periodical payments into the treasury thereof, to be invested, from time to time, in loans to the members upon real estate for home purposes."

Section 51-207, A.C.A. 1939, is as follows:

"51-207. Stock in other corporations.-- No bank, trust company or loan association, may purchase, own, hold, or sell or otherwise dispose of the shares of the capital stock of any other corporation, unless such purchase shall be authorized by the executive committee or approved by the board of directors; and if the purchase is of stock in a bank the approval of said purchase must also be had from the superintendent; provided, however, any bank, trust company or loan association may purchase, own and hold shares of the capital stock of a federal home loan bank of which such bank, trust company or loan association may be eligible to become a member, without the approval of the superintendent."

The authority of savings banks to make loans and investments is set forth in Section 51-214, A.C.A. 1939, as amended:

"51-214. Savings banks loans and investments.

--A savings bank may invest its capital and deposits and the income derived therefrom:

1. In first lien mortgages upon real property.

No such loan shall exceed sixty (60) per cent of the market value, as of the time when the loan is made, of the property mortgaged, unless the federal housing administrator has insured or made a commitment to insure the loan. At least fifty (50) per cent of such loans shall at all times be upon real property situated in the state. A lien of the federal government on account of any United States reclamation project or of the state on account of any project organized under the laws of Arizona shall not be considered a first lien. Any such mortgage or any assignment thereof shall be immediately recorded in the office of the county recorder.

2. In securities issued by the United States government and securities wholly guaranteed by the United States government. In other listed bonds, notes and debentures which have a standard rating above the first four (4) grades, providing such investment is approved in writing by at least two-thirds of the directors of such bank, and the superintendent of banks of the state of Arizona. In interest bearing bonds or other securities of the state, or of any county, city, town, school district or road district thereof; local improvement bonds or securities lawfully issued under the authority of a law of this state; bond (s), debentures, or notes issued by any national mortgage association or similar credit institution; debentures issued by the federal housing administrator, or capital stock issued by any federal home loan bank of which such savings bank may be eligible to become a member; 2a. or obligations issued pursuant to the provisions of the Federal Home Loan Bank Act (U.S.C., tit. 12, §§ 1421-1449; 4 F.C.A., tit. 12, §§ 1421-1449), approved July 22, 1932, as now or hereafter amended; in obligations issued pursuant to Title IV of the National Housing Act (U.S.C., tit. 12, §§ 1724-1730; 4 F.C.A., tit. 12 §§ 1724-1730), approved June 27, 1934, as now or hereafter amended; and in the shares, share accounts, investment certificates or accounts of any building

and loan association, savings and loan association or other institution wherever located, including any federal savings and loan association, which has the insurance protection provided by Title IV of the National Housing Act (U.S.C., tit. 12, §§ 1724-1730; 4 F.C.A., tit. 12, §§ 1724-1730), approved June 27, 1934, as now or hereafter amended, up to the amount such shares, share accounts, investment certificates or accounts are insured by the federal savings and loan insurance corporation."

The authority for a building and loan association to invest funds is set forth in Section 51-607, A.C.A. 1939, and is as follows:

"51-607. Investment of funds.--(a) A building and loan association may make loans:

1. Upon notes secured by first mortgages on improved real property, or on real property to be improved under contract with the association. Unless the federal housing administrator has insured or made a commitment to insure the same, no such loan shall exceed sixty (60) per cent of the conservative market value of the improved real property mortgaged; except, in case the savings or investment accounts of the association are insured by the Federal Savings and Loan Insurance Corporation, as provided in title four of the National Housing Act, such loan may equal but shall not exceed seventy-five (75) per cent of the conservative appraised value of the improved real property mortgaged. No loan shall be made except upon the report in writing of two (2) appraisers, giving the conservative market value of the property to be mortgaged.

2. Upon the security of shares of the association, to the amount of ninety (90) per cent of their withdrawal value.

(b) An association may also:

1. Lend or invest an amount not greater than twenty (20) per cent of its total assets in bonds of the United States, the Home Owners' Loan Corporation; bonds and warrants of the state of Arizona, the counties, cities, towns, school districts, road districts, and other municipalities and improvement districts of the

state; national mortgage associations; debentures issued by the federal housing administrator, and in bonds, debentures and notes issued by any federal home loan bank or consolidated federal home loan bank.

2. Invest in the stock and become a member of any federal home loan bank of which it may be eligible to become a member under the terms and provisions of the Federal Home Loan Bank Act, and nothing in the laws of this state shall prohibit any association from investing any part of its capital, surplus or funds in the stock or becoming a member of a federal home loan bank. Any association which shall be or desires to become a member of a federal home loan bank shall be subject to such examinations, inspections and regulations as may be required under the terms of the Federal Home Loan Bank Act, or by the federal home loan bank board, or the federal home loan bank of which said association is or desires to become a member. The superintendent of banks, his agents and employees, are authorized to furnish to the federal home loan bank board, to any federal home loan bank, or to the duly appointed examiners of either, such copies of instruments concerning any such association, or to disclose to them any information with reference to the conditions or affairs thereof, as they may require. Any association joining or associating itself with a federal home loan bank is authorized to borrow money, in any amount, from such bank, and to assign, pledge and hypothecate any of its assets, in such amount as may be required by said bank as security therefor, and shall have and exercise all powers which are conferred upon any member association in such federal home loan bank by the provisions of the Federal Home Loan Bank Act and the regulations of the federal home loan bank board. Any association may subscribe to the shares of any federal savings and loan association domiciled in this state, and may pay for such shares in cash or by the transfer of assets of the subscriber association approved by the federal home loan bank board in writing."

In the definition of a trust company there is no express mention of the functions of investing funds in the company's custody.

Section 51-214, A.C.A. 1939, as amended, above-quoted on savings banks loans and investments, contains the only expressive definition of permissible investments to be found in the statute. The question of whether or not the purchase of stock in the FNMA is a lawful investment for savings banks is largely one of fact.

It is the opinion of this office that savings banks may acquire stock in the FNMA providing the three factors set forth in the above-quoted statute are fulfilled.

It is also the opinion of this office that building and loan associations may lawfully invest in FNMA stock under the provisions of Section 51-607, A.C.A. 1939, above-quoted.

There is no reference in either Arizona cases or statutory law, other than those sections above-quoted, on the subject of investment by commercial banks. The wording of the definition of "commercial bank" in the statute may be said to constitute authority to invest in Federal National Mortgage Association stock. This definition recognizes the function "to buy and sell securities". In the light of such limited authority, the common law must be considered. It clearly grants the power to invest. The rule is given in Section 235, Magee on Banks and Banking, Third Edition, which states:

"All commercial and savings banks organized under State laws have the incidental power to deal in stocks, bonds, etc., of municipalities and corporations, unless specifically restricted by the statute. They may purchase stocks of another corporation, buy and sell the same as individuals may do.

* * * * *

The right of a State-banking corporation to deal in stocks, directly or indirectly, in buying or selling, where the power is not restricted by statute, is held to be a common-law right. It is a power incident to every corporation."

* * * * *

The common law does not permit banks to engage in "traffic" in financial security, that is, indulge in purely speculative practices. But:

"It is a general principle that a corporation may invest surplus capital, that it is unable to make use of in its business in outside investments." . . . Magee on Banks and Banking, Vol. 1, 6th Ed., Sec. 61.

"Such investment of surplus, though a power

not expressly guaranteed, is incidental to
an inherent power in banking business . . . "
Norse, supra, Sec. 77

It is the opinion of this office, therefore, that commercial banks have the privilege of investing available funds in securities which they deem safe and readily negotiable and that there is no restriction imposed upon commercial banks other than that imposed on themselves with reference to investing in FNMA.

As to the power of the third class banks, the trust companies, to invest in FNMA stock: Under the statutory definition in Section 51-101, supra, the trust company is a bank. See also Magee, supra, Section 358. Though the function of buying and selling securities is not included in the statutory definition, as it is in the case of commercial banks, under the common-law rule, announced above, an Arizona trust company being a banking corporation has the inherent power to invest in securities.

As there is no further statutory or case law in Arizona on the subject, it is felt that the common-law rule governs. It is, therefore, the opinion of this office that trust companies have the right to invest in FNMA and that the same rules and principles apply as those applicable to a commercial bank.

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