

OPINION NO. 1005

Syllabus:

For purposes of approving stock option and stock purchase plans adopted by state banks pursuant to Section 1103.311, Revised Code, the Superintendent of Banks must determine that such options and plans comply with all the requirements of Section 1103.311, Revised Code, including the requirement that stock options issued under this section shall qualify as restricted stock options under Section 421 of the Internal Revenue Code of 1954, as amended. The determination requires no formality, however, and the evidence necessary to support such action is within the discretion of the Superintendent of Banks.

All terms pursuant to which options are granted by state banks must be set forth in detail in the stock option or stock purchase plan adopted by the directors, voted upon by the stockholders, and approved by the Superintendent of Banks as provided in Section 1103.311, Revised Code, and any subsequent changes or amendment to the terms of the plan will be subject to the same procedure as therein set forth.

**To: Clarence C. Luft, Superintendent of Banks, Department of Commerce,
Columbus, Ohio**
By: William B. Saxbe, Attorney General, April 28, 1964

Your request for my opinion reads as follows:

"In the last session of the Legislature, Section 1103.311, Revised Code, effective as of September 24, 1963, was enacted authorizing banks to grant employee stock option and stock purchase plans provided such plans meet the requirements as therein prescribed. In addition to the approval of the plan by the Superintendent of Banks, it is further provided that options issued under the plan shall qualify as restricted stock options under Section 421 of the Internal Revenue Code of 1954, as it may be amended from time to time.

"In considering stock option plans submitted for approval the following questions have arisen regarding the responsibility of the Superintendent in approving these plans.

"1. Is it the responsibility of the Superintendent as a condition precedent to the approval of any such plan to determine whether any option issued thereunder will qualify as a restricted stock option under the applicable provisions of the Internal Revenue Code.

"2. If so, may the Superintendent require

that such plans are submitted to the Internal Revenue Department for approval and evidence of such option presented to the Superintendent prior to his granting approval..

"3. May the Superintendent require that all the salient features of the plan and provisions for the granting of options and the exercise of the same be made a part of the plan and not left to be included in the option agreement which would be controlled by the directors of the bank or option committee.

"4. Are amendments to an approved plan also subject to the approval of the Superintendent?

"Because of the importance of the questions herein raised to all state banks I wish to request your formal opinion regarding the role and responsibility of the Superintendent in carrying out the requirements of Section 1103.311, supra."

The Ohio Legislature resolved the question whether state banks had the authority to grant employee stock options by enacting Section 1103.311, Revised Code, which reads as follows:

"A bank may grant options to purchase, sell, or enter into agreements to sell shares of its capital stock to its employees, for a consideration of not less than one hundred per cent of the fair market value of the shares on the date the option is granted, or, if pursuant to a stock purchase plan, eighty-five per cent of the fair market value of the shares on the date the purchase price is fixed, pursuant to the terms of an employee restricted stock option plan or an employee stock purchase plan which has been adopted by the board of directors of the bank and approved by the holders of at least three-fourths of the particular class or classes of stock entitled to vote on such proposal and by the superintendent of banks. Provided, in no event shall the option to purchase such shares be for a consideration less than the par value thereof. Stock options issued hereunder shall not extend beyond a period of ten years from the date of issuance and shall otherwise qualify as restricted stock options under section 421 of the Internal Revenue Code of 1954, as it may be amended from time to time.

"A bank may, with the approval of the superintendent of banks and by the vote of the holders of at least two-thirds of the stock of the particular class or classes of stock entitled to vote on such proposal, amend its articles to authorize an increase in the common stock of the bank in the category of authorized but unissued stock in an amount not to exceed ten per cent of the outstanding shares of such class or classes of stock and shares so authorized shall

be deemed released from preemptive rights. Such authorized but unissued stock may be issued from time to time to employees of the bank pursuant to a stock option or stock purchase plan adopted in accordance with this section."

In addition to the specific restrictions set forth in Section 1103.311, supra, the legislature imposed the condition that all bank stock options must qualify under Section 421 of the Internal Revenue Code, as may be amended. Section 421, supra, was extensively amended by the passage of the Revenue Act of 1964 (H.R. 8363) signed into law on February 26, 1964. The present applicable federal law is found in Title 26, Section 421 through 425, Federal Code which sets forth restrictions upon ownership, the grant, transference, and exercise of options, the disposition of stock obtained thereunder and other conditions in order that an optionee may qualify for special capital gains tax treatment. These same restrictions have been engrafted by the Ohio Legislature upon options granted by state banks.

Although the restrictions are clearly defined, you have asked in effect what are the criteria upon which to base your approval of plans under Section 1103.311, supra. In reading Section 1103.311, supra, to the point requiring your approval, there appears to be two bases for your consideration. First is the obvious determination that the plan has been properly adopted by the directors and approved by the stockholders. Second is the general determination whether the plan is financially sound for the particular bank based upon the amount of stock subject to the plan and the consideration for the stock in accordance with the provisions of Section 1103.311, supra. The question you raise, however, is whether the restrictions imposed by the concluding sentence of the first paragraph of Section 1103.311, supra, constitute independent restrictions on the banks or whether such also form a basis upon which the Superintendent of Banks must determine his approval of such plans.

It is to be noted that following the provision for approval by the Superintendent of Banks the language of Section 1103.311, supra, continues thereafter with the word "Provided" and again deals with the matter of consideration, restricts the term of the options, and imposes the conditions that options must qualify under the applicable provisions of the Internal Revenue Code. It is an accepted principle of statutory construction that a proviso is generally used to qualify or limit the operation of the general terms contained in a previous part of the enactment. However, the controlling principle always is that a proviso shall be interpreted in accordance with the general intent of the legislature. In Crawford, Statutory Construction, Section 297, page 604-605, the following statement is made:

"Even though the primary purpose of the proviso is to limit or retain (sic) the general language of a statute, the legislature, unfortunately does not always use it with technical correctness. Consequently, where its use creates an ambiguity, it is the duty of the court to ascertain the legislative intent, through resort to the usual rules of construction applicable to statutes generally, and

give it effect even though the statute is thereby enlarged or the proviso made to assume the force of an independent enactment and although the proviso as such has no existence apart from the provision which it is designed to limit or qualify. It should be construed in harmony with the rest of the statute,...."

These same general principles are discussed in Sutherland, Statutory Construction, Vol. 2, Sections 4932 through 4934.

It is clear that the additional language following the word "Provided" in Section 1103.311, supra, limits the application of current market value to the consideration for stock which is set forth in the foregoing provisions of the paragraph and which I have stated is a matter of consideration for the Superintendent in approving such plans, whether the proviso also includes the last sentence of that paragraph and, if so, whether such is independent of any other provisions is not altogether clear.

In reviewing the history of Section 1103.311, supra, it is of interest to note that this legislation is nearly a verbatim enactment of the regulation of the Comptroller of the Currency, 12 Code of Federal Regulations, 13, by which the Comptroller authorized federal banks to grant stock options. Consequently, the primary purpose of the Ohio legislation was to enable state banks to provide similar employee incentive plans. In the absence of any other apparent consideration, it is my opinion that the general rule of construction should be applied and all the restrictions following the word "Provided" in Section 1103.311, supra, considered to limit the foregoing provisions dealing with the plans subject to the approval of the Superintendent of Banks. To find to the contrary would make approval by the Superintendent of Banks of little value from the standpoint of supervisory control.

It is important to emphasize, however, that at all times the responsibility rests upon the state bank to provide that options granted pursuant to stock option or stock purchase plans shall qualify under the applicable provisions of the Internal Revenue Code. Although I have stated that the Superintendent of Banks must consider this requirement in approving such plans, it is my further opinion that the legislature did not intend to place upon the Superintendent the responsibility or the duty to assure that all plans shall in fact qualify under the Internal Revenue Code as a condition precedent to the approval of any such plan. Such a duty cannot be implied from the language of Section 1103.311, supra. The purpose for the approval of the Superintendent is to provide a check that the banks have taken proper steps to meet the requirements prescribed by the legislature and when upon reasonable consideration the plan appears to meet these requirements the Superintendent may approve the plan and thereby fulfill his responsibility under the provisions of Section 1103.311, supra. Therefore, for purposes of approval, it is necessary that you, as Superintendent, are satisfied that options granted pursuant to such plans shall qualify under the Internal Revenue Code and this may be accomplished by your evaluation of the specific terms, by requiring a certification of the plan from the Internal Revenue Service, or requir-

ing any type of documentation which you consider sufficient to support such a determination to your satisfaction. The manner in which you arrive at such a determination is a matter of administrative discretion which you may reasonably exercise.

It is my understanding that your third inquiry arises from the desire of certain banks to include only the general provisions for the granting of options in the plan and placing the more detailed terms in the option agreement. The obvious purpose of such type of drafting would be to simplify stockholder consideration of the plans and to facilitate a more expedient procedure for subsequent amendments and change. In answer to this question, I refer you to the following language of Section 1103.311, supra, which provides in pertinent part:

"A bank may grant options to purchase, sell or enter into agreements to sell shares of its capital stock to its employees,...pursuant to the terms of an employee restricted stock option plan or an employee stock purchase plan..... Stock options issued hereunder...shall otherwise qualify as restricted stock options under section 421 of the Internal Revenue Code..."
(Emphasis added)

The legislature in this provision limited reference to the "terms" of the "plan" which can be contrasted to the wording of the general corporation act, Section 1701.16, Revised Code, which refers to the terms of "securities, contracts, warrants, or instrument evidencing such options." It therefore follows and it is my opinion that it was the intent, apart from any other provisions or procedures that may be applicable to general corporations, that a bank must set forth the terms governing stock options in the plan which is to be adopted by directors, voted on by the stockholders, and approved by the Superintendent of Banks. This conclusion is further supported by the fact that it would be difficult to determine whether options issued under a plan meet all of the requirements of Section 1103.311, supra, if not all the terms are contained in the plan which ultimately must be approved by the Superintendent of Banks before the plan can become effective.

Although there is no specific provision regarding amendments in Section 1103.311, supra, it follows by reasonable implication that amendments are likewise subject to the same statutory procedures necessary to effectuate the original plan. As hereinbefore pointed out, Section 1103.311, supra, provides that banks shall grant options pursuant to the "terms" of a plan and the reference therein is not limited to the original plan but includes any terms pursuant to which options are granted. To hold amendments are not subject to the same procedures as provided for the adoption of the original plan would be to divest the stockholders and the Superintendent of Banks of the control that the legislature has clearly placed in their hands.

I should add in passing, however, that the stockholders may by agreement waive stockholder approval of subsequent changes or amendments, but the Superintendent of Banks must carry out his responsibility and determine that all amendments

to plans meet the requirements of Section 1103.311, supra, before they may become effective.

Therefore, it is my opinion and you are hereby advised that:

For purposes of approving stock option and stock purchase plans adopted by state banks pursuant to Section 1103.311, Revised Code, the Superintendent of Banks must determine that such options and plans comply with all the requirements of Section 1103.311, Revised Code, including the requirement that stock options issued under this section shall qualify as restricted stock options under Section 421 of the Internal Revenue Code of 1954, as amended. The determination requires no formality, however, and the evidence necessary to support such action is within the discretion of the Superintendent of Banks.

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