SOUTH CAROLINA
STATE BOARD OF FINANCIAL INSTITUTIONS

August 5, 2020

[redacted]

Re: BOFI Advisory Opinion

Dear [redacted]

In your letter dated July 13, 2020, you asked the Board of Financial Institutions ("BOFI") to provide guidance on whether S.C. Code Ann. § 34-3-850 allows a South Carolina state-chartered bank to sell its assets and liabilities to an entity that is not a bank or trust company, such as a federal credit union. In our opinion, as more fully explained below, the language of S.C. Code Ann. § 34-3-850 does not allow a South Carolina state-chartered bank to enter into the proposed transaction.

BOFI is empowered by statute to provide this interpretive guidance. S.C. Code Ann. § 34-1-60 provides the general powers of the Board: "The Board may supervise all banks and building and loan associations and provide regulations and instructions for the direction, control and protection of all such institutions, the conservation of their assets and the liquidation thereof, as may be necessary or proper to effectuate the purposes of [Title 34]." The South Carolina Administrative Procedures Act, which governs rule-making by State agencies, indicates that State agencies have the authority to issue "policy or guidance… other than in a regulation," with the caveat that such policy or guidance does not have the force or effect of law. S.C. Code Ann. § 1-23-10(4). Accordingly, this letter shall serve as the official statement of BOFI's policy, interpretation, and guidance regarding the above-referenced question, but is not binding.

As it is our duty and intent to apply the law as the legislature intended, we look to our courts for guidance in statutory interpretation. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 85 (2000).

Generally, banks have "all the rights, powers and privileges in law incident or appertaining to such corporations," (S.C. Code Ann. § 34-3-210); however, banks are unique corporations, and their operations, including "the

conservation of their assets and the liquidation thereof" (S.C. Code Ann. § 34-1-60), are limited by State law, and subject to BOFI's supervision in accordance with Title 34 of the South Carolina Code.

One such limitation regarding bank assets and liabilities is contained in S.C. Code Ann. § 34-3-850(A), which restricts the merger, consolidation, sale, or transfer of those assets and liabilities as follows:

> A bank or trust company organized under the laws of South Carolina or the acts of Congress, and doing business in this State, may merge or consolidate with, or sell or transfer some or all of its assets and liabilities to any other such bank or trust company when all applicable laws governing the transactions are first complied with.

As for what types of entities may purchase these bank assets and liabilities, when determining the effect of statutory language, "the canon of construction… holds that 'to express or include one thing implies the exclusion of another, or the alternative.'" City of Rock Hill v. Harris, 391 S.C. 149, 154 (2011).

The statute in question names only two entities to whom banks may sell their assets and liabilities, and, applying this concept of statutory construction, must be read to imply the exclusion of all other entities. Therefore, it is our opinion that the clear, unambiguous language of S.C. Code § 34-3-850 allows a bank to sell its assets and liabilities to banks or trust companies, and no other type of entity.[1]

In your memorandum advocating for the proposed transaction, you assert that language of S.C. Code Ann. § 34-3-850(B)(5)(c), references a "transferee" that is neither bank nor trust company, thus broadening the scope of allowed transactions, apparently without limitation. To wit, S.C. Code Ann. § 34-3-850(B)(5) provides that, when a bank or trust company executes a transaction under the provisions of the above-referenced S.C. Code Ann. § 34-3-850(A), the following rights and duties are transferred:

> 5) each and every other interest, as a fiduciary, or contractual relationship, of or belonging to:
>
> (a) the disappearing corporation in the case of a merger;
>
> (b) each corporation in the case of a consolidation; or
>
> (c) the transferor, but only to the extent transferred, in the case of a transfer, as the case may be, *shall, upon the effective date of the transaction and without further act or deed, vest in, devolve upon, and thereafter be performed by the resultant bank or trust company, or transferee, as the case may be.*

(emphasis added).

In our view, the language in question simply makes a distinction between a merger or consolidation, and a transfer: in a merger or consolidation, there is a "resultant bank or trust company" which emerges from two smaller entities; but a transfer involves a "transferee," yet in either case, the resultant entity or transferee must be a bank or trust company.

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[1] We have not been asked to address the question of when and how a bank may purchase trust assets and liabilities, or vice versa; however, we note that such transfers may be limited or prohibited by law under certain circumstances, and that this statute allows the purchase or sale of bank assets and liabilities only "when all applicable laws governing the transactions are first complied with." S.C. Code Ann. § 34-3-850(A).

S.C. Code Ann. § 34-3-850 uses this "transferee" language repeatedly to distinguish mergers and consolidations from transfers. *See, e.g.*, S.C. Code Ann. §§ 34-3-850(C) ("A merger, consolidation, or transfer described in this section does not constitute a resignation or disqualification of any party to the merger or consolidation or a resignation or disqualification of the transferor or transferee…"); 34-3-850(D) ("In the case of a transfer, the rights… are considered to have been transferred to and assumed by the transferee bank or trust company.").

Although formatted as part of subparagraph (c), the phrase "shall, upon the effective date of the transaction and without further act or deed, vest in, devolve upon, and thereafter be performed by the resultant bank or trust company, or transferee, as the case may be" clearly applies to the entirety of paragraph (5), which discusses mergers in subparagraph (a), consolidations in subparagraph (b), and transfers in subparagraph (c). This interpretation is necessary to give effect to the entire statute; otherwise subparagraphs (a) and (b) would have no conclusion, and therefore no meaning.

Our interpretation is furthermore supported by the language of S.C. Code Ann. § 34-3-850(B) itself, which begins by stating that the above-referenced provision applies "When any such bank or trust company executes a transaction under the provisions of subsection (A)"—the subsection which, as discussed above, limits the transferee to a bank or trust company.

Addressing another concern raised in your letter, we find that some clarification is necessary as to the meaning of "assets and liabilities" as used in S.C. Code Ann. § 34-3-850. Certainly, banks must, and do, have the general authority to "sell and dispose of such real estate and personal property at pleasure," when such sale "may be deemed necessary or convenient for the transaction of its business." S.C. Code Ann. § 34-3-210(3). However, a bank exists in part to "serve the public interest" (S.C. Code Ann. § 34-1-70), and it is clear that Title 34 empowers BOFI to supervise the "conservation… and the liquidation" of bank assets for the benefit and protection of both banks and the citizens of South Carolina. S.C. Code Ann. § 34-1-60; *see also* S.C. Code Ann. § 34-1-20 ("Each member [of BOFI] shall represent the best interests of the public…").

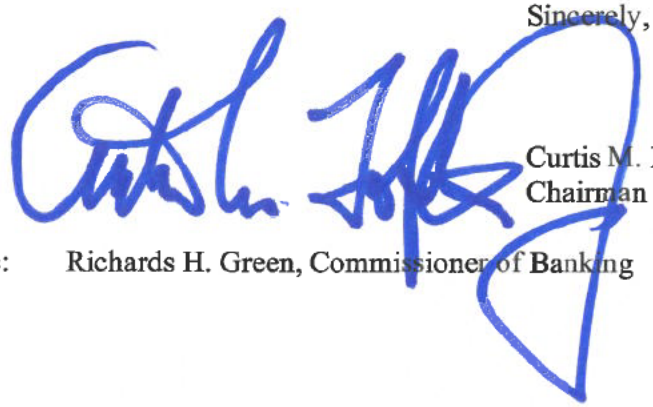
Thus, we interpret the language of S.C. Code Ann. § 34-3-850(A) to specifically address those bank "assets and liabilities" that are unique to depository institutions. We generally agree with the following summary of the law: "Presumably, assets and liabilities not unique to banking can be sold to anyone. Since there are no formal requirements concerning the dissolution of banks, general corporate law applies to the sale of all 'non-unique' assets and liabilities and the subsequent actions necessary to dissolve or otherwise cease doing business." 10 S.C. Jur. Banks and Banking § 45 (Nov. 2019).

Based on this rationale, we conclude that the language of S.C. Code Ann. § 34-3-850 is unambiguous as it relates to the entities allowed to purchase bank assets and liabilities. Thus, we find that a South Carolina state-chartered bank may not sell its assets and liabilities, which we define as those assets and liabilities unique to depository institutions, to any entity that is not a bank or trust company under S.C. Code Ann. § 34-3-850, and even then, such transaction may only occur when the parties first comply with all applicable laws governing the transaction.

Finally, though it was not referenced in your question to us, we note for the sake of thoroughness that S.C. Code Ann. § 34-25-10 *et seq.* also allows bank holding companies to acquire banks in South Carolina under certain circumstances, with BOFI's approval. Nevertheless, the provisions of S.C. Code Ann. § 34-25-10 *et seq.*, read as a whole, and in conjunction with S.C. Code Ann. § 34-3-850 as discussed above, would not allow the transaction you have described between a South Carolina state-chartered bank and a credit union.

We appreciate your request for clarification on this important issue, and we trust this letter is responsive to your request. We will make this letter available to the public for future reference.

Sincerely,



Curtis M. Loftis, Jr
Chairman

cc: Richards H. Green, Commissioner of Banking