

August 13, 2007 Collateralization of county funds

The Honorable Leonard Lee Rawson
New Mexico State Senator
P.O. Box 996
Las Cruces, NM 88004

Re: Opinion Request—Collateralization of County Funds

Dear Senator Rawson:

You have requested an Attorney General's opinion concerning the necessary levels of collateralization for Doña Ana County funds held by financial institutions acting as depositories.

Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that the Board of County Commissioners of Doña Ana County may direct the County Treasurer to allow financial institutions who otherwise qualify to act as depositories of county funds to collateralize the account(s) holding those funds at 50 percent of the aggregate value of those funds or at a higher percentage as the Board may determine in the exercise of its discretion.

Article VIII, section 4 of the New Mexico Constitution requires, in pertinent part, that:

All public money not invested in interest-bearing securities shall be deposited in national banks in this state, in banks or trust companies incorporated under the laws of the state, in federal savings and loan associations in this state, in saving and loan associations incorporated under the laws of this state whose deposits are insured by an agency of the United States and in credit unions incorporated under the laws of this state to the extent that such deposits of public money in credit unions are insured by an agency of the United States...The conditions of such deposits shall be provided by law.

As directed by that constitutional provision, there are a number of relevant statutory provisions. The first is NMSA 1978, Section 6-10-8 (1987), which provides that the board of county commissioners of each county shall constitute the county board of finance and as such is charged with supervision over the determination of the qualifications and selection of financial institutions to receive county funds for deposit. Upon certification or designation of a particular financial institution, the county treasurer may then deposit county funds with that institution upon it qualifying by posting collateral security or giving bond. See NMSA 1978, §§ 6-10-10(A) and (B) (2006), 6-10-15 (1981), and 6-10-16.1 (2001). Specifics as to the types of securities that may be posted or the bond to be provided are set out in NMSA 1978, Sections 6-10-16 (2000), 6-10-16.1 (2001), and 6-10-15 (1981).

In particular, and perhaps of greatest import, is the language of Section 6-10-17, which provides: "[T]he securities delivered shall have an aggregate value equal to one-half the amount of public money to be received in accordance with Subsection B of Section 6-10-16 NMSA 1978." NMSA 1978, § 6-10-17 (1999) (emphasis added). (The referenced Subsection B describes the valuation to be accorded the different types of securities that may be pledged.) Although the legislature has set a minimum value requirement of 50 percent, it has also authorized any board of finance to "at any time within its discretion" require a financial institution that has qualified as a depository under its control to provide additional security of the kind authorized in Section 6-10-16. See NMSA 1978, § 6-10-20 (1991).

In short, it is up to the Board of County Commissioners, sitting as the county board of finance, to determine, at any time and within its discretion, whether depositories holding county funds must collateralize those accounts in an amount greater than 50 percent of the aggregate amount of the county funds each has received, and, subject to a risk-based or some other form of analysis, under what conditions and to which otherwise qualified depositories the higher level(s) of collateralization will apply.¹

If we may be of further assistance, please let us know. Your request was for an Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

MARTHA A. DALY
Assistant Attorney General

cc: Albert Lama, Chief Deputy Attorney General

[1] For example, the State Board of Finance has determined by rule when a depository holding public monies under the Board's authority must collateralize in an amount greater than 50 percent of the aggregate amount of state funds the financial institution has received based on a risk assessment analysis which includes a determination of its primary capital-to-asset ratio, net operating income to total average asset ratio and non-performing loans to primary capital ratio for the past four consecutive quarters. See 2.60.4.9 NMAC.