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October 12, 1981

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ATTORNEY GENERAL OPINION NO. 81-239

Robert L. Elliott
Consumer Credit Commissioner
Suite 1114, 535 Kansas Avenue
Topeka, Kansas 66603

Re: Contracts -- Investment Certificates of Investment
Companies -- Standards of Operation; Permissible
Loans

Synopsis: The sale of investment certificates by investment companies is restricted by K.S.A. 16-601 et seq. Two such restrictions appear at K.S.A. 16-601 (8) and (9) (as amended by L. 1981, ch. 90, §1). The former proscribes loans from investment companies in excess of a specified percentage of the unimpaired capital of the company, except where the loan is to a majority-owned affiliate or subsidiary Kansas corporation of the company or of its parent corporation. An affiliate of the company's parent which was not a Kansas corporation would accordingly not be a proper recipient of such a loan. Furthermore, such a transaction would not come under the exception for the purchase of commercial paper contained in K.S.A. 16-601(8), nor is it an investment which is "inherent" to the business of the investment company as required by K.S.A. 16-601(9). Cited herein: K.S.A. 16-601(8), 16-601(9) (both as amended by L. 1981, ch. 90, §1), K.S.A. 16-613, 16-620, K.S.A. 1980 Supp. 16a-2-302 (as amended by L. 1981, ch. 95, §1), K.S.A. 84a-3-104.

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Dear Mr. Elliott:

As Consumer Credit Commissioner for the state of Kansas, you request our opinion on the construction to be given to K.S.A. 16-601, as amended by L. 1981, ch. 90, §1. That statute,

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which is a portion of the Investment Certificates of Investment Companies Act, contains provisions which govern the permissible conduct of companies engaged in such business. Your specific query concerns the applicability of K.S.A. 16-601 (8) and (9) to a particular transaction, a brief summary of which is set out below.

As presented to us, we understand the facts of the transaction to be as follows. A Kansas company has engaged in the business of issuing investment certificates, pursuant to K.S.A. 16-601 et seq. The company also engages in the business of making both commercial loans and consumer loans under the provisions of the Kansas Consumer Credit Code, 16a-1-101 et seq., and is in fact licensed by your office pursuant to K.S.A. 1980 Supp. 16a-2-302. The corporation is wholly owned by a Missouri company ("parent") which, although engaged in the same type of business, is not licensed to do business in Kansas. Among the parent's other wholly-owned subsidiaries is an Oklahoma company which is likewise engaged in the consumer and commercial loan business in that state, as well as in the sale of investment certificates. On March 25 of this year, the Kansas company loaned the sum of \$5,000,000 to the Oklahoma company, in return obtaining an unsecured demand note bearing interest at 18% per annum. Six days later, on March 31, 1981, the Oklahoma company purchased all of the Kansas company's stock from the parent corporation, using a portion of the loan proceeds as its source of funds. To date there have been no changes in the Kansas company's operations.

Following the amendment by the 1981 Legislature, the two sections of K.S.A. 16-601 about which you inquire read as follows (new language is underscored, with that deleted appearing as crossed out):

"(8) No investment company shall make any loan ~~or discount~~, directly or indirectly, to any person or company, corporation or firm, including in the liabilities of the company or firm, the liabilities of the several members thereof, in an amount in excess of fifteen percent (15%) of the paid in and 10% of the unimpaired capital and surplus of the issuer. ~~Provided, however, except that this restriction shall not apply to any loan or discount to any majority-owned affiliate or subsidiary Kansas corporation or company of the issuer or its parent which is also an investment company as that term is defined in section 1 (1) K.S.A. 16-630, as amended, nor to the purchase of commercial paper, except that loans secured by~~

mortgages on real estate located in Kansas or in a state adjacent to Kansas where the total mortgage indebtedness is not more than 85% of appraised value may be made in an amount not in excess of 15% of the paid-in and unimpaired capital and surplus of the issuer.

"(9) No company shall allow the investment of funds obtained from the sale of certificates to be made that is not inherent to the principal business of the issuer, at the time the authority is granted a licensed lender under the Kansas uniform consumer credit code, except that this restriction shall not apply to any majority-owned affiliate or subsidiary company of the issuer which does not issue certificates but which is engaged in the same type of business, nor to the purchase of commercial paper."

However, inasmuch as the situation you describe took place prior to the effective date of the statute, the statute must be construed as it appeared prior to its amendment. See, e.g., Nitchals v. Williams, 225 Kan. 285 (1979) (retroactive application of amendment to existing statute not favored).

An examination of the sections as they formerly read indicates that section (8) contained a general prohibition against the making of loans by an investment company which were in excess of 15% of the paid-in and unimpaired capital and surplus of the "issuer." (Note: while the percentage is now 10%, in the present situation there is no question but that the loan about which you inquire exceeded either figure). This restriction did not apply in two situations: (1) when the loan was made "to any majority-owned affiliate or subsidiary Kansas corporation or company of the issuer or its parent which is also an investment company"; or (2) when the "purchase of commercial paper" was involved. Accordingly, it may be presumed that should the instant transaction not fall within either of these two exceptions, it would come within the scope of the general prohibition under the principle of expressio unius est exclusio alterius. Southwestern Bell Telephone v. Miller, 2 Kan. App. 2d 558 (1978).

In examining the first exception, it is our opinion that the key wording appears in the phrase "majority-owned affiliate or subsidiary Kansas corporation." Specifically, if the phrase is interpreted so as to require either an affiliate or a subsidiary to be a Kansas corporation, the result is much different than if only a subsidiary needs to be Kansas-based. In construing a statute so as to determine the intent of the Legislature, it is ordinarily the case that the meaning of the words used is found to be controlling. However,

this is the case only when the wording is clear and unambiguous. Randall v. Seeman, 228 Kan. 395 (1980). When the plain meaning is less clear, as here, other considerations may be taken into account. For example, the phrase in question may be construed so that, when the statute is considered in its entirety, its purpose is accomplished. Wachholz v. Wachholz, 4 Kan. App.2d 161 (1979). Additionally, the reasons behind the entire act may be considered in determining the construction to be given to a particular part. State ex rel., Stephan v. Martin, 227 Kan. 456 (1980). Yet another factor is the effect the statute may have under various alternative constructions. Brown v. Keill, 224 Kan. 195 (1978).

In our opinion, the phrase in question here should be read so as to provide the greatest amount of control over the way investment certificate funds are handled, thereby providing the greatest amount of protection to the investing public. To conclude that only subsidiary corporations based in Kansas can receive loans from investment companies while allowing all affiliates, whether domestic or foreign, to do so would create a wider exception to the general prohibition on this type of transaction. Given the general policy statement against such loans, any exception should be perceived in as narrow a sense as is consonant with the language used. Accordingly, an investment company may loan money to either its majority-owned affiliates or subsidiaries, or to those of its parent, but only if the entity receiving the funds is a Kansas corporation. Under the facts you present here, this exception would therefore not apply, as the Oklahoma company would not qualify. It should be noted that in this respect the statute has not been affected by the 1981 amendments, thus making the actual date of the transaction irrelevant.

Nor, in our opinion, would the exception provided for the purchase of commercial paper apply. While it is true that a promissory note was delivered, and that such notes are defined as commercial paper by the Uniform Commercial Code (at K.S.A. 842-3-104), no "purchase" has occurred here. Rather, the note was received in return for the proceeds of the loan itself, and has not been purchased as part of a commercial transaction.

Thirdly, you raise the question of whether the loan here could be justified by the provisions of K.S.A. 16-601 (9). That statute, while amended this year, continues to contain a requirement concerning the manner of investing funds obtained from the sale of certificates, i.e., the investment cannot be made in a manner "that is not inherent to the principal business" of the "issuer" (or, under the statute as amended, "a licensed lender under the Kansas uniform consumer credit code"). While this language, like that of the preceding section, is admittedly not a model of statutory clarity, we believe it to be inapplicable here for two reasons.

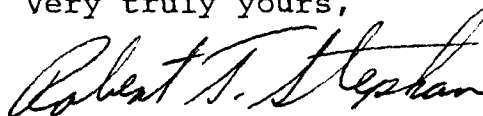
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First, the transaction here was clearly in the form of a loan, not an investment, and so would be included in the more specific language of K.S.A. 16-601(8). Second, the making of this size of loan to this type of company does not appear to be the type of transaction that is inherent to a Kansas investment company's business (or, under the present language, that of a "licensed lender"). "Inherent," we note, is defined as "naturally pertaining" to the thing or activity in question (Webster's Encyclopedic Dictionary, 3rd rev. ed, 1971), and we are unable to conclude that the making of this loan naturally pertains to a company which is engaged in the business of making consumer and commercial loans, and in the sale of investment certificates.

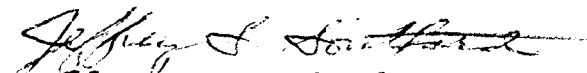
Given the above conclusion, we feel constrained to point out that the decision as to any action to be taken rests with you as Consumer Credit Commissioner, pursuant to K.S.A. 16-602 and following. For example, under K.S.A. 16-612 the commissioner has the authority to direct that any impairment of an investment company's capital be made good, while under K.S.A. 16-620 legal action may be taken to enjoin violations of the act. However, it should again be emphasized that the mere fact of a violation does not require that any or all of these steps be taken, as discretion for any such action is left with the Commissioner.

In conclusion, the sale of investment certificates by investment companies is restricted by K.S.A. 16-601 et seq. Two such restrictions appear at K.S.A. 16-601 (8) and (9) (as amended by L. 1981, ch. 90, §1). The former proscribes loans from investment companies in excess of a specified percentage of the unimpaired capital of the company, except where the loan is to a majority-owned affiliate or subsidiary Kansas corporation of the company or of its parent corporation. An affiliate of the company's parent which was not a Kansas corporation would accordingly not be a proper recipient of such a loan. Furthermore, such a transaction would not come under the exception for the purchase of commercial paper contained in K.S.A. 16-601(8), nor is it an investment which is "inherent" to the business of the investment company as required by K.S.A. 16-601(9).

Very truly yours,



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