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ATTORNEY GENERAL OPINION NO. 82-232

Donald O. Phelps
Consumer Credit Commissioner
535 Kansas Avenue, Suite 1114
Topeka, Kansas 66603

Re: Contracts and Promises -- Investment Certificate Guaranty Fund Act -- Board of Directors; Composition of

Synopsis: As provided by K.S.A. 16-6a02, the Kansas investment certificate guaranty corporation is governed by a board of directors. Subsection (c) of the statute requires the corporate by-laws to provide that the "initial" board of directors contain four classes of members. These classes, of equal number, represent large, medium and small companies, as well as the general public. In the absence of any statutory provision allowing these classes to be abolished, thus depriving one or more of them of board representation, the provisions of the statute apply to both the initial and subsequent boards of directors. Cited herein: K.S.A. 16-6a02, 16-6a03, 16-6a05, 16-6a07.

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Dear Mr. Phelps:

As Consumer Credit Commissioner for the State of Kansas, you request our opinion on a question concerning the Kansas Investment Certificate Guaranty Fund Act, K.S.A. 16-6a01 et seq. Specifically, you inquire whether a definition establishing the membership of the "initial" board of directors of the guaranty corporation applies to subsequent boards as well.

The Kansas Investment Certificate Guaranty Fund Act was enacted in 1981, and required all lenders licensed under the

Consumer Credit Code, K.S.A. 16a-1-101 et seq. to become members of a guaranty corporation. This corporation, which has the purpose of standing behind the investment certificates issued by its members, was established on December 31, 1981, pursuant to K.S.A. 16-6a02(a). A ceiling of $10,000 is established for certificates that are guaranteed for an individual investor (K.S.A. 16-6a05), with the corporation itself funded through assessments made upon the members. (K.S.A. 16-6a03). As provided by this latter statute and by K.S.A. 16-6a07, assessments are based upon the individual member's outstanding investment certificates. Hence, larger companies having a potentially greater liability must contribute more.

This distinction between companies of different sizes is also reflected in K.S.A. 16-6a02(c), concerning the corporation's board of directors. Therein, it is stated:

> "The bylaws of the guaranty corporation shall provide for an initial board of directors of four classes of directors of equal number which shall be known as class "A", "B", "C", and "D" directors. Class "A" shall consist of representatives of companies with a capitalization of not more than $300,000; class "B" shall consist of representatives of companies with a capitalization between $300,001 to $500,000; class "C" shall consist of representatives of companies with a capitalization of over $500,000; and, class "D" shall consist of persons other than representatives of member companies for the purpose of protecting the interest of the public." (Emphasis added.)

Your inquiry deals with the use herein of the words "initial board of directors", and the effect such language has on the board's membership requirements. While the first board did have members from all four classes, you indicate that there may be difficulty in filling the positions for class A and B members, due to a lack of qualifying companies. The next election will be at the annual meeting in the spring of 1983.

In our opinion, the requirements of the subsection are as binding on subsequent boards as on the initial one. The contrary result would allow the directors, by amending the bylaws, to eliminate the protections currently provided for small and medium-sized companies. Further, the public at large is guaranteed (as Class D members) directors equal in number to each of the other classes, again for the purpose "of protecting the interest of the public." The act of which this subsection is a part is clearly a remedial one, designed to protect investors who purchase certificates from

such companies, and so must be liberally construed to achieve this end. Smith v. Marshall, 225 Kan. 70 (1978). Wheeler v. Wheeler, 196 Kan. 697 (1966). Accordingly, the subsection should be read in such a way as to apply the classes of membership to succeeding boards of directors, not merely the first, or "initial," one.

At the same time, however, the subsection should not be so narrowly interpreted as to require the performance of impossible acts. If a situation is foreseeable whereby one or more of the first three classes (i.e. those reserved for companies) cannot be filled due to an absolute lack of eligible members, the by-laws may provide for the directors of the particular class or classes to be apportioned among other classes. Alternatively, the quorum set by the by-laws may be adjusted to reflect the lesser number of total directors. Finally, should the limits set by K.S.A. 16-6a02(c) prove to be unworkable, recourse may always be had to the legislature for an amendment.

In conclusion, as provided by K.S.A. 16-6a02, the Kansas investment certificate guaranty corporation is governed by a board of directors. Subsection (c) of the statute requires the corporate by-laws to provide that the "initial" board of directors contain four classes of members. These classes, of equal number, represent large, medium and small companies, as well as the general public. In the absence of any statutory provision allowing these classes to be abolished, thus depriving one or more of them of board representation, the provisions of the statute apply to both the initial and subsequent boards of directors.

Very truly yours,

Robert T. Stephan

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RTS:BJS:JSS:hle