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ATTORNEY GENERAL OPINION 84- 11

Donald O. Phelps  
Consumer Credit Commissioner  
217 SE 4th Street, 4th Floor  
Topeka, Kansas 66603

Re: Consumer Credit Code -- Definitions -- Supervised  
Lender; Supervised Financial Organization

Synopsis: The Federal Deposit Insurance Corporation (FDIC) does not come under the definition of supervised lender [K.S.A. 1983 Supp. 16a-1-301(38)] or supervised financial organization [K.S.A. 1983 Supp. 16a-1-301(37)] when it acquires supervised loans as the result of a take-over of a state or national bank which it has insured. As a result, it does not need a license issued by the Consumer Credit Commissioner prior to accepting payments on such loans or taking steps to enforce those loans which are in default. Cited herein: K.S.A. 9-1905, 9-1906, 9-1907, 9-1908, K.S.A. 1983 Supp. 16a-1-301(37), (38), (39), K.S.A. 16a-2-301, 16a-2-401, 16a-5-109, 12 U.S.C.A. §§1811, 1821, 1828.

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Dear Commissioner Phelps:

As Consumer Credit Commissioner for the State of Kansas, you request our opinion on a question concerning the status of the Federal Deposit Insurance Corporation (FDIC) under the Kansas Uniform Consumer Credit Code (Code), K.S.A. 16a-1-101 et seq. Specifically, the question has arisen whether the FDIC is subject to the provisions of the Code when it acquires consumer loans as the result of being appointed receiver for a state or national bank which has been federally insured and which has been declared insolvent.

The Code provides that only certain persons (which term includes both individuals and corporations) may make supervised loans, i.e. loans in which the rate of finance charge exceeds 12% annually. K.S.A. 1983 Supp. 16a-1-301(39). This limitation is set out in K.S.A. 16a-2-301, which reads as follows:

"Unless a person is a supervised financial organization; or is an agricultural credit corporation organized under the laws of the United States or the state of Kansas; or has first obtained a license from the administrator authorizing such person to make supervised loans, such person shall not engage in the business of

(1) making supervised loans; or  
(2) taking assignments of and undertaking direct collection of payments from or enforcement of rights against debtors arising from supervised loans, but such person may collect and enforce for three months without a license if the person promptly applies for a license and such person's application has not been denied. Nothing in this section shall be construed to require the licensing of an attorney who is forwarded contracts for collection." (Emphasis added.)

The term "supervised financial organization" in turn is defined at K.S.A. 1983 Supp. 16a-1-301(37) to include the following:

"'Supervised financial organization' means a person, other than an insurance company or other organization primarily engaged in an insurance business:

- (a) Organized, chartered, or holding an authorization certificate under the laws of this state or of the United States which authorizes the person to make loans and to receive deposits, including a savings, share, certificate or deposit account; and  
(b) subject to supervision by an official or agency of this state or of the United States."

While supervised financial organizations do not have to obtain a license from the Commissioner before making consumer loans (being already subject to supervision by a state or federal official or agency), without such a license they may not charge the rates allowed by K.S.A. 16a-2-401(2) and (9). Rather, they are limited to the rates of subsection (1) of that statute, which are set at 18% for balances of up to \$1,000 and 14.45% for amounts in excess of that figure.

The situation you present in your letter involves a bank doing

business in Kansas (whether state or federally chartered you do not say) which has been making consumer loans as a supervised financial organization. Again, while you do not say whether the bank took the additional step of obtaining a license, this fact is not material, except as to the rate of the finance charge which the loans may contain. Pursuant to a finding by the state bank commissioner (or the federal reserve board, as the case may be) that the institution was insolvent and could not re-organize its affairs so as to continue, a receiver was appointed. K.S.A. 9-1905. As in the case of most banks, the Federal Deposit Insurance Corporation insured the deposits, and so took charge as receiver, either directly in the case of national banks or upon appointment by the state bank commissioner. K.S.A. 9-1907. The FDIC then assumed possession of all bank property and assets (K.S.A. 9-1908), and proceeded to liquidate the bank's affairs. K.S.A. 9-1906. This liquidation process includes the collection of any loans which are late or in actual default. See, e.g. 12 U.S.C.A. §1821(c).

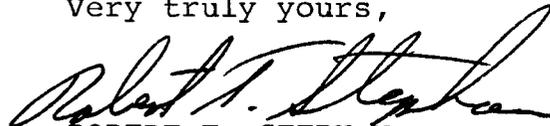
The FDIC was created in 1933 as part of the New Deal legislative efforts, and was intended to provide federal protection for depositors of both national and state chartered banks. As provided in 12 U.S.C.A. §1811 et seq., the FDIC insures deposits in all member banks, with protection for individual depositors up to \$100,000. The agency is recognized as a branch of the United States government [FDIC v. Abraham, 439 F.Supp. 1150 (E.D. La. 1977)], and has as its directors the Comptroller of the Currency and two other persons appointed by the President. Given these facts, as well as the specific definition found in K.S.A. 16a-1-301(37) for supervised financial organizations, it cannot be concluded that the FDIC comes under such a definition. The FDIC does not make loans or receive deposits, and, instead of being "subject to supervision" by an agency of the federal government, is in fact an agency which does the supervising, at least in some matters. 12 U.S.C.A. §1828 et seq. In short, if the FDIC is to come under the scope of the Code, it will not be as a supervised financial organization, which definition explicitly exempts those organizations primarily engaged in the business of insurance (in this case, the insurance of accounts.)

Nor, in our opinion, should the FDIC be considered on the same basis as supervised lenders who obtain a license from the Commissioner under K.S.A. 16a-2-301. While the language of that statute [at subsection (2)] would arguably apply to the FDIC when it undertakes "direct collection of payments from or enforcement of rights against debtors arising from supervised loans," we believe that receivership is not a situation contemplated by the statute. Unlike an assignee of consumer loans who collects them for a consideration, the FDIC literally steps into the shoes of the bank which originally made the loans and acts in its place, the bank itself having gone out of existence. As receiver, the FDIC has the power to do everything that the bank would have done, including the enforcement of delinquent loans. See, e.g.,

Cates v. Musgrove Petroleum Corp., 190 Kan. 609 (1962). Like an attorney who seeks collection on behalf of his client (a situation specifically exempted from licensure by the statute), the FDIC seeks collection on behalf of the federal government, which otherwise will bear the loss for the delinquent loans. While the loans themselves remain consumer loans subject to the protections of the Code (K.S.A. 16a-5-109 et seq.), the FDIC does not have to obtain a supervised lender's license from the Commissioner prior to instituting collection efforts.

In conclusion, the Federal Deposit Insurance Corporation (FDIC) does not come under the definition of supervised lender [K.S.A. 1983 Supp. 16a-1-301(38)] or supervised financial organization [K.S.A. 1983 Supp. 16a-1-301(37)] when it acquires supervised loans as the result of a take-over of a state or national bank which it has insured. As a result, it does not need a license issued by the Consumer Credit Commissioner prior to accepting payments on such loans or taking steps to enforce those loans which are in default.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard  
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