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December 1, 1988

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ATTORNEY GENERAL OPINION NO. 88- 166

Judith Bravence-Stringer
Consumer Credit Commissioner
Landon State Office Building
900 Jackson, Room 352
Topeka, Kansas 66612

Re: Contracts and Promises--Investment Certificates of Investment Companies--Registration of Investment Certificates of Investment Companies; Restriction on Investments Not Inherent to Principal Business of Licensed Lender

Synopsis: K.S.A. 1987 Supp. 16-601i authorizes the investment of funds obtained from the sale of investment certificates in a majority-owned affiliate or subsidiary of the issuer as long as the affiliate/subsidiary is engaged in the same type of business as the issuer and does not itself issue investment certificates. Based on the historical background of the investment certificate act and the rules of statutory construction, it is our opinion that this provision would not preclude the acquisition of the majority stock of a savings and loan association with funds obtained from the sale of investment certificates. However, the Consumer Credit Commissioner has the discretion to prohibit such an investment if her determination is reasonably based on other provisions of the act. Cited herein: K.S.A. 1987 Supp. 9-1101, as amended by L. 1988, ch. 62, §1; 16-601i; 16-630; 16a-1-301, as amended by L. 1988, ch. 85, §2; 17-5501.

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Dear Commissioner Stringer:

You request our opinion regarding the limitation on investment of funds obtained from the sale of investment certificates issued pursuant to the Kansas investment certificate act, K.S.A. 16-601 et seq. Specifically, your questions are as follows:

"1. May an investment certificate company use funds obtained from the sale of investment certificates to purchase the common stock of a state chartered savings and loan company?

"2. May an investment company form a subsidiary company in which it would invest funds obtained from the sale of investment certificates so that it could purchase the common stock of the savings and loan company?"

The Kansas investment certificate act (act) requires investment companies to register investment certificates with the consumer credit commissioner prior to sale. The act sets forth standards of operation to be maintained by the investment company and limitations and restrictions on the issuance of investment certificates. One such restriction provides as follows:

"No investment 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 a licensed lender under the Kansas uniform consumer credit code, except that this restriction shall not apply to: (a) 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 in Kansas; (b) loan contracts when the proceeds of the loan are used for business or agricultural purposes, installment sales contracts or leases of personal property when used for agricultural or business purposes; or (c) the purchase of commercial paper or to loans secured by real estate mortgages as described and limited in K.S.A. 1987 Supp. 16-601h." K.S.A. 1987 Supp. 16-601i (emphasis added).

We believe the underscored language is the key to answering your questions. There is no case law and very little legislative history in terms of written minutes to aid in the interpretation of this language. Thus, we turn to the rules of statutory construction. When a statute is plain and unambiguous, the primary rule of statutory construction is to give effect to the statute's clear meaning; however, if the statute is ambiguous (when there are two or more interpretations which can be fairly made) legislative intent must be ascertained and the statute interpreted accordingly. Kansas Power and Light Co. v. State Corp. Commission, 237 Kan. 394, 397 (1985). In construing statutes, legislative intent should be determined from a general consideration of the whole act, and effect must be given, if possible, to the entire statute and every part thereof. To this end we must attempt to reconcile different provisions so as to make them consistent, harmonious and sensible. State v. Board of Education of U.S.D. 428, 231 Kan. 579, 584 (1982); State v. Adee, 241 Kan. 825, 829 (1987). A construction which renders part of a legislative act surplusage is to be avoided if reasonably possible. American Fidelity Ins. Co. v. Employers Mutual Cas. Co., 3 Kan. App. 2d 245, 249 (1979). Finally, legislative intent can be found in the historical background of an enactment and the circumstances attending its passage. State v. Kansas City, 230 Kan. 404, 432 (1981). Any changes and additions made in existing legislation raise a presumption that a change in meaning and effect was intended. State v. U.S.D. 428, supra at 582.

K.S.A. 1987 Supp. 16-601i is less than clear in its meaning. Since there is more than one interpretation which can be fairly made, we must strive to determine the legislative intent. An initial reading of the language in question might lead one to conclude that a majority-owned affiliate or subsidiary of an investment company, which is engaged in the same type of business as the parent/issuer and which has no authority to itself issue investment certificates, is not subject to the restrictions imposed by the statute. Such a reading, however, would render the entire statute meaningless as an investment company could easily form a subsidiary through which it could funnel money obtained from the sale of investment certificates thereby sidestepping any restrictions on investment of those funds. We do not believe the statute should be interpreted so as to allow such circumvention.

A second possible interpretation is that the statute allows an investment company to invest funds obtained from the sale of investment certificates in the assets of a majority-owned

affiliate or subsidiary engaged in the same type of business and which does not itself issue investment certificates. The problem with this interpretation is that it renders subsections (b) and (c) of the statute superfluous in that the principal assets of a company engaged in the same type of business as an investment company (i.e., a consumer lender, a savings and loan, a bank etc.) are the same assets as those listed in subsections (b) and (c). See K.S.A. 1987 Supp. 17-5501, 9-1101. As mentioned above, a statute should be construed, if possible, so as to give effect to all of its provisions and a construction which renders part of the act surplusage is to be avoided.

In disposing of the above-mentioned interpretations, we are left with the conclusion that K.S.A. 1987 Supp. 16-601i(a) should be construed to allow an investment certificate company to use funds obtained from the sale of investment certificates to acquire a majority of the stock of a company engaged in the same type of business as the investment company and which does not itself issue investment certificates. This interpretation would give meaning to the entire statute and is also consistent with the historical background and circumstances surrounding the passage of the investment certificate act as we understand it. The act was introduced to the legislature in response to the downfall of the Coffeyville Loan & Investment Company, an issuer of investment certificates pursuant to the Kansas securities act. This company got into trouble when the controlling owner began investing in businesses other than those engaged in lending. These non-lending-business investments contributed to the eventual bankruptcy of the investment company which in turn led to the enactment of the investment certificate act in general, and what is now K.S.A. 1987 Supp. 16-601i in particular. Thus, K.S.A. 1987 Supp. 16-601i was intended to limit investments of funds obtained from the sale of investment certificates to those associated with the principal business of the issuer. The acquisition of a company engaged in the same type of business as the issuer would be consistent with this intent.

Disallowing the purchase of stock of a company engaged in the same type of business as an investment company would not necessarily be consistent with the overall intent of the act, which we believe to be the protection of investors. The purchase of stock in such a company is arguably no more risky than the purchase of some loans or other assets listed in K.S.A. 1987 Supp. 16-601i. Use of an investment certificate investor's money to purchase the stock would not cause that investor to be liable for the company purchased. The investor

stands to lose only his original investment in the investment certificates, just as though the funds were being used to invest in other assets such as loans or commercial paper.

We must emphasize that we are in no way making a judgment on the wisdom of the investment in question. We are merely concluding that K.S.A. 1987 Supp. 16-601i does not preclude it. We believe you, as Consumer Credit Commissioner, have the discretion to determine the wisdom of the investment based on the other provisions of the act and facts we do not have the advantage of using.

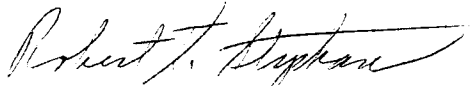
Having concluded that an investment company may use funds obtained from the sale of investment certificates to acquire the majority stock of a company engaged in the same type of business, we must now determine whether a savings and loan association is engaged in the "same type of business" as that of the issuer/investment company. Pursuant to the investment certificate act an investment company must be licensed under the provisions of the Kansas uniform consumer credit code (UCCC), K.S.A. 16a-1-101 et seq. K.S.A. 1987 Supp. 16-630. The UCCC defines "licensed lender," or "supervised lender," as one authorized to make or take assignments of supervised loans. K.S.A. 1987 Supp. 16a-1-301(38), as amended by L. 1988, ch. 85, §2. A "supervised loan" is "a consumer loan [as defined by K.S.A. 1987 Supp. 16a-1-301(13), as amended], including a loan made pursuant to open end credit, in which the rate of the finance charge . . . exceeds 12% per year." K.S.A. 1987 Supp. 16a-1-301(39), as amended.

In addition to making consumer loans, an investment company may also, with specified limitations, engage in the lending of money to persons, firms and corporations for other than consumer purposes. K.S.A. 1987 Supp. 16-630, 16-601i. Similarly, a savings and loan association is primarily engaged in the business of making consumer, business, agriculture and first mortgage loans. K.S.A. 1987 Supp. 17-5501. It is therefore our opinion that a savings and loan association is engaged in the same type of business as an investment company.

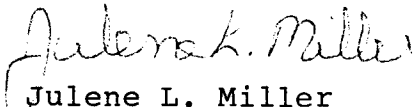
You have also inquired whether an investment company may form a subsidiary for the purpose of investing funds obtained from the sale of investment certificates issued by the investment company in the majority stock of a savings and loan. Since in our opinion the investment company could make this investment directly, we see no reason why it couldn't be made indirectly through a majority owned affiliate or subsidiary.

In conclusion, K.S.A. 1987 Supp. 16-601i authorizes the investment of funds obtained from the sale of investment certificates in a majority-owned affiliate or subsidiary of the issuer as long as the affiliate/subsidiary is engaged in the same type of business as the issuer and does not itself issue investment certificates. Based on the historical background of the investment certificate act and the rules of statutory construction, it is our opinion that this provision would not preclude the acquisition of the majority stock of a savings and loan association with funds obtained from the sale of investment certificates. However, the Consumer Credit Commissioner has the discretion to prohibit such an investment if such a determination is reasonably based on other provisions of the act.

Very truly yours,



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