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September 12, 1989

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ATTORNEY GENERAL OPINION NO. 89- 114

Richard Oler, Chairman  
Kansas State Board of Accountancy  
900 S.W. Jackson, Suite 907  
Topeka, Kansas 66612

Re: Accountants, Certified Public--Licensure;  
Examination and Registration--Registration of  
Partnerships; Professional Corporations

Synopsis: While generally an administrative agency has the power to adopt general statements of policy, it cannot do so in lieu of regulations. If the "policy" establishes a "binding norm" and operates prospectively, eliminating the use of discretion in individual cases, the "policy" must be promulgated as a regulation, with notice and comment under K.S.A. 77-401 et seq. Cited herein: K.S.A. 1988 Supp. 1-202; 1-308; K.S.A. 1988 Supp. 1-311, as amended by L. 1989, ch. 1, sec. 3; K.S.A. 77-401 et seq.; K.A.R. 74-5-403; 74-5-406.

\* \* \*

Dear Mr. Oler:

As Chairman of the Kansas State Board of Accountancy you make several inquiries regarding the Kansas State Board of Accountancy's policy of not approving registration of CPA firms using the terms "& Company" and "& Associates" except under certain conditions.

You indicate that the Kansas State Board of Accountancy (hereinafter the Board) at its July 1988 meeting reaffirmed

the policy not to allow sole practitioners to use the terms "& company" or "& Associates" in the registration of their firm names. This policy has been in effect since before 1973. The Board also voted to adopt a new policy that use of the terms in firm names must be representative of some unnamed partner or member of the firm. Both of these "policies" were adopted to interpret K.A.R. 74-5-406 that states:

"Firm names. A certified public accountant shall not practice public accountancy under a firm name which is misleading in anyway, as to the legal form, or as to the persons who are partners, officers or shareholders of the firm, or as to any matter with respect to which public communications are restricted by 74-5-403. However, names of one or more past partners or shareholders may be included in the firm name of a partnership or corporation or its successor, and a partner surviving the death or withdrawal of all other partners may continue to practice under a partnership name for up to two (2) years after becoming a sole practitioner. (Authorized by K.S.A. 1-202; effective May 1, 1978).

K.A.R. 74-5-403, referenced above, concerns advertising and provides:

"A certified public accountant shall not use, or participate in the use of, any form of public communication that refers to such accountants' professional services that contains a false, fraudulent, misleading, deceptive or unfair statement or claim."

Your inquire whether the Board has the power to adopt this "policy" and require firms to conform within two (2) years by means other than seeking legislative changes or at a minimum promulgating formal regulations.

In short, an administrative agency, exercising its discretion and judgment has the power to adopt general statements of policy. 1 Am.Jur.2d Administrative Law §96 (1962). However, the real problem here is one of classification rather than power.

Therefore we must determine whether the Board's "policy" is in effect a substantive rule and therefore must be promulgated as one under K.S.A. 77-401 et seq. Distinguishing rules from policy statements is at best a difficult task and at worst "enshrouded in considerable smog." Noel v. Chapman, 507 F.2d 1023, 1030 (2d Cir.). cert. denied, 423 U.S. 824, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975); see generally, K. Davis, Administrative Law Treatise §7.5 (2d ed. 1979). There are generally two criteria to determine whether a directive announcing a new policy constitutes a rule or a general statement of policy: first, the binding effect of the pronouncement (i.e. whether it is finally determinative of the issues or rights or leaves room for discretion in various cases) and second whether it operates prospectively. Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1014 (9th Cir. 1987); Jran v. Nelson, 711 F.2d 1455, 1481 (11th Cir. 1983). Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir. 1983). But c.f. Bellarno International Ltd., v. Food and Mug Administration, 678 F.Supp. 410 (E.D.N.Y. 1988 (requires four factors be considered: binding effect; agency's degree of discretion in applying the pronouncement; deference to the agency's characterization; and the language of the pronouncement itself.)

In addition to the test or standard cited above, courts consistently cite the U.S. Attorney General's manual that defines general statements of policy as statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power. One court explains:

"As this court has had occasion to note, a critical test of whether a rule is a general statement of policy is its practical effect in a subsequent administrative proceeding: 'A general statement of policy . . . does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed.'  
Pacific Gas & Electric Co. v. FPC, 164 U.S.App.D.C. 371, 376, 506 F.2d 33, 38 (1974). When the agency applies the policy in a particular situation, it must be prepared to defend it, and cannot claim that the matter is foreclosed by the prior policy statement."

Guardian Federal Savings and Loan Association v. Federal Savings and Loan Inc. Corp., 589 F.2d 658, 664 (D.C. Cir. 1978); State of Ohio Department of Human Services v. U.S. Department of Health, 862 F.2d 1228, 1233 (6th Cir. 1988); Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1012 (9th Cir. 1987); Pacific Gas & Electric Co. v. Federal Power Commission, 506 F.2d 33, 38 (1974).

Accordingly, we look to the circumstances under which the policy in question was adopted. The Board adopted the policy in question to eliminate a misleading outcome that resulted from the enforcement of K.A.R. 74-5-406 which prohibits the practice of accountancy under a deceptive or misleading firm name. Prior to the policy in question the Board had not allowed a sole practitioner the use of "& Company" or "& Associates" in the registration of a firm name. It had however allowed two partners, with no other named or unnamed shareholders, members or CPA employees to use either term in their firm name. Clearly the difference in the application of K.A.R. 74-5-406 produced a misleading result. To rectify the discrepancy the Board adopted the policy that only firms with unnamed partners, shareholders or owners could utilize the terms "& Company" or "& Associates" in their firm names and register as such under K.S.A. 1988 Supp. 1-308. [The Board has since changed the policy and will promulgate it as a regulation to allow any firm with unnamed partners, shareholders, owners or staff CPA's that have permits to register with the "& Company" or "& Associates" as part of their firm name. (Board of Accountancy Minutes, July 24, 1989)]

Applying the criteria set forth in caselaw and discussing the circumstances for the policy in question, courts have found directives to be general statements of policy. Guardian, supra; Noel v. Chapman, 508 F.2d 1023 (2d Cir.), cert. denied 423 U.S. 824 (1975); Pacific Gas & Electric Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974). See generally Davis Administrative Law Treatise, 2d Vol. §7.5 (1979). However, the policy adopted by the Board of Accountancy does not meet the two general criteria to qualify as a general statement of policy. It imposes a "binding norm" in that on its face the policy is finally determinative of the right to use either term in a firm name, thereby eliminating the agency's exercise of discretion in individual cases. And second it does not operate only prospectively. See also K.S.A. 77-415 defining a rule or regulation. Therefore, in our opinion the Board's policy

means than promulgating it as a regulation, with notice and comment provided for.

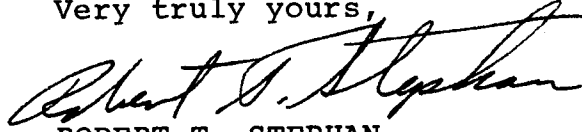
Your second question is whether the Board has the statutory authority to determine that the use of the terms "& Company" or "& Associates" is misleading and whether the Board has the authority to prohibit the use of such terms in the State of Kansas. Administrative agencies, such as the Board of Accountancy, are creatures of statute and have no general or common law powers but those conferred upon them by law expressly or by implication. 1 Am.Jur.2d Administrative Law, §70 (1962). K.S.A. 1988 Supp. 1-202 empowers the Board to adopt rules and regulations "as it may deem necessary" for the proper administration of its duties and the carrying out of the purposes of the act. The act, K.S.A. 1-201 through 1-501 is clearly a regulatory one imposing certain standards for licensure as well as for professional conduct.

One such standard that appears in K.S.A. 1988 Supp. 1-311(a) provides for revocation or suspension of any registration of a firm for dishonesty or fraud in the practice of a public accountant. Clearly the board has statutory authority to define what is dishonesty or fraud in the practice of public accounting. Exercising its authority the Board promulgated K.A.R. 74-5-406 providing that no firm should practice under a name that is misleading, as to the legal form, or as to persons who are partners, officers, shareholders or in any form of advertising under K.A.R. 74-5-403. Therefore, in our opinion the Board is authorized by statute to determine what is misleading or fraudulent in the practice of public accountancy and has the power to prohibit the use of terms it finds misleading so long as the prohibitions are reasonable and promulgated as regulations. See also Attorney General Opinion No. 73-338.

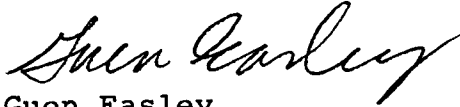
In conclusion, it is our opinion that the policy adopted by the Board of Accountancy regarding the use of the terms "& Company" and "& Associates" must be promulgated as a regulation in order to be enforceable. Furthermore, it is our opinion that the Board has statutory authority under K.S.A.

1988 Supp. 1-311 to define by regulation what constitutes the fraudulent practice of accountancy.

Very truly yours,



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