STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

April 17, 1980

ATTORNEY GENERAL OPINION NO. 80-94

The Honorable Paul Feliciano, Jr.
State Senator, Twenty-Eighth District
Room 401-S, State Capitol
Topeka, Kansas 66612

Re: Uniform Consumer Credit Code--Supervised Lenders--Examination of National Banks

Synopsis: By virtue of 12 U.S.C.A. §484, national banks are insulated from "visitorial powers" other than those specifically authorized by law. As a result, even though a national bank has obtained a license from the Consumer Credit Commissioner to make supervised loans under the Uniform Consumer Credit Code, the Commissioner is precluded from examining or investigating any such national bank under authority of K.S.A. 16a-2-305(1), as such would constitute the exercise of "visitorial powers." Moreover, predicated on the judicial constructions of 12 U.S.C.A. §85 (prescribing maximum rates for national banks), it is unnecessary for a national bank to be so licensed in order to charge the higher interest rates authorized for "licensed" supervised lenders by K.S.A. 1979 Supp. 16a-2-401(2).

Cited herein: K.S.A. 16a-1-30(38),(39),(40)(as amended by section 4 of 1980 Senate Bill No. 731), K.S.A. 16a-2-301, 16a-2-304(2) and 16a-2-305(1), K.S.A. 1979 Supp. 16a-2-401(2), 12 U.S.C.A. §§85, 484 and 12 C.F.R. §§7.6025, 7.7310(a).

* * *

Dear Senator Feliciano:

You have asked us to determine if the consumer credit commissioner (hereinafter "administrator") may examine national banks which have been duly licensed by the administrator to make supervised loans in this state. It is our opinion that national banks are not subject to such examinations in light of the provisions of 12 U.S.C.A. §484 and cases decided thereunder.

Under the Uniform Consumer Credit Code (U3C), "supervised loans" (consumer loans in which the rate of the finance charge exceeds 12% per year) [16a-1-301(40)] may be made by a "supervised financial organization" [16a-1-301(38)] or by a lender licensed by the administrator to engage in the business of making supervised loans. K.S.A. 16a-2-301. National banks are "supervised financial organizations" within the meaning of 16a-1-301(38) and, therefore, may make supervised loans as "supervised lenders" [16a-1-301(39)]. However, by virtue of K.S.A. 1979 Supp. 16a-2-401(2), supervised lenders who are licensed by the administrator may contract for and receive a higher finance charge on supervised loans than those supervised lenders who are not so licensed.

Apparently as a result of this differentiation made by the U3C as to the amount of finance charges on supervised loans, several national banks situated in Kansas have applied for and received a license from the administrator to engage in the business of making supervised loans. However, because operation as a "licensed" supervised lender necessitates filing composite annual reports with the administrator [K.S.A. 16a-2-304(2)], and it also subjects such supervised lenders to periodic examinations and investigations by the administrator [K.S.A. 16a-2-305(1)], you have questioned the ability of the administrator to conduct such examinations and investigations in light of 12 U.S.C.A. §484. That federal statute provides:

> "No bank shall be subject to any visitorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof of by any committee of Congress or of either House duly authorized."

"Visitorial powers" were explained and defined in Guthrie v. Harkness, 199 U.S. 148, 50 L.Ed. 130 (1905), a case in which a shareholder of a national bank petitioned for a writ of mandamus to compel the directors of the national bank in which he held stock to allow him to inspect the books. The Supreme Court held that the provisions of the banking act which limited the statutory visitorial powers of national banking officials did not limit the common law right of shareholders to examine the records of a corporation in which they owned stock. The court analyzed the term "visitorial powers" as used in the predecessor statute of 12 U.S.C.A. §484:

> "We are unable to find any definition of 'visitorial powers' which can be held to include the common law right of the shareholder to inspect the books of the corporation. 'Visitation'is defined by Bouvier (Law Dict. vol. 2, p. 1199) as follows:
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> "'The act of examining into the affairs of a corporation.'
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> . . . .
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> "The meaning of this section was before Judge Baxter in the case of First Nat. Bank v. Hughes, 6 Fed. 737, and of the meaning of the term 'visitorial powers,' as used in § 5241, that learned judge said:
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> "'Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations. Burrill defines the word to mean "inspection; superintendence; direction; regulation."'
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> . . . .
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> " . . . The right of visitation being a public right, existing in the state for

> the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers, Congress had in mind, in passing this section, that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and authorizing the appointment of a receiver to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.
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> "That the statute did not intend, in withholding visitorial powers, to take away the right to proceed in courts of justice to enforce such recognized as are here involved, is evident from the language used. If the right to compel the inspection of books was a well-recognized common-law remedy, as we have no doubt it was, even if included in visitorial powers as the terms are used in the statute, it would belong to that class 'vested in courts of justice' which are expressly excepted from the inhibition of the statute." (Footnotes omitted.) 199 U.S. at 157, 158, 50 L.Ed. at 133, 134.

The proper interpretation of visitorial power was further clarified in State v. First Nat. Bank, 123 P. 712 (1912). In that case the State of Oregon sought to require the compliance of a national bank with escheat provisions of the Oregon law. The national bank claimed exemption because, among other reasons, provision of the national banking code prohibited visitation for other than designated federal officials. The Supreme Court of Oregon interpreted the

visitorial powers enumerated in the National Banking Act, determining that this act

> "provides for the appointment of bank examiners, authorized to make a thorough examination of the affairs of every banking association, examine its officers and agents, under oath and make a report of the condition of the bank to the controller. These, we take, are the visitorial powers referred to and which no authority but Congress can authorize." Id. at 715.

The court then quoted from the case of First Nat. Bank of Youngstown v. Hughes (C.C.), 6 Fed. 737, as follows:

> "'Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations.'" Id.

Applying this definition, the Oregon court found that the escheat statute did not allow a supervisory inspection and that:

> "[N]ational banks are only exempted from state legislation to the extent that such legislation impairs their efficiency to perform the functions which they were designed to serve, and that the legislation here proposed does not have this effect." Id. at 716.

Further explanation of the proper application of "visitorial powers" is found at 12 C.F.R. §7.6025, which provides, in pertinent part:

> "(a) Inspection. The only provision of Federal banking law authorizing persons other than the comptroller of the Currency or his authorized representatives to inspect books or records of a national bank is contained in 12 U.S.C. 62, relating to the right of shareholders, creditors, and certain tax officials to inspect the list of shareholders of a bank. Production of records may, however, be required under normal judicial procedures.
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> "(b) Visitorial powers. The exercise of visitorial powers over national banks is

> vested in the Comptroller of the Currency. See 12 U.S.C. 484. Other officials, including State banking officials, have no authority to conduct examinations or to inspect or require the production of books or records of national banks, except as authorized by law."

In light of the foregoing judicial and administrative opinions, it is our conclusion that the inspection of national banks contemplated by K.S.A. 16a-2-305 is beyond the powers of the administrator, since such an examination is clearly for the purposes of examining the conduct of business of the bank and to enforce observance of the U3C and regulations adopted thereunder. As a result of this conclusion, the question arises whether a national bank must be licensed to charge the higher rates authorized by K.S.A. 1979 Supp. 16a-2-401(2). In our opinion, it does not.

According to 9 C.J.S. Banks and Banking §708:

> "Questions relating to the rate of interest which national banks may contract for, or take, and usury as respects such banks are determined by federal, rather than state laws."

This principle has been judicially stated as follows:

> "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court." Davis v. Elmira Savings Bank, 161 U.S. 275, 283, 40 L.Ed. 700, 701 (1896).

Quoting from the foregoing, it was held in Marquette National Bank of Minneapolis v. First of Omaha Service Corporation, 439 U.S. 299, 58 L.Ed.2nd 534 (1978), that federal law controls the interest rates that may be charged by national banks. 439 U.S. at 308, 58 L.Ed.2nd at 542. The rate of interest national banks may charge is that permitted by 12 U.S.C.A. §85, which provides in pertinent part:

> "Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, . . . , except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title."

12 C.F.R. §7.7310(a) provides the interpretation of the Comptroller of the Currency as to the interest rate policy contemplated by the National Banking Act:

> "A national bank may charge interest at the maximum rate permitted by state law to any competing state chartered or licensed lending institution. If state law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of state law relative to such class of loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a state licensed small loan company or morris plan bank without being so licensed."

The foregoing statutory and regulatory provisions have been cited, discussed and interpreted by a number of state and federal courts. One of the earliest cases relied upon by a number of such decisions that have followed is Tiffany

v. National Bank of Missouri, 18 Wall (85 U.S.) 409, 21 L.Ed. 862 (1873). There, the U.S. Supreme court had occasion to construe section 30 of the National Banking Act (a nearly identical predecessor of 12 U.S.C.A.§85), holding as to the history and purpose of that enactment:

> "There are three provisions in section 30, each of them enabling. If no rate of interest is defined by state laws, seven per cent is allowed to be charged. If there is a rate of interest fixed by state laws for lenders generally, the banks are allowed to charge that rate, but no more; except that if state banks of issue are allowed to reserve more, the same privilege is allowed to national banking associations. Such, we think, is the fair construction of the act of Congress, entirely consistent with its words and with its spirit. It speaks of allowances to national banks and limitations upon state banks, but it does not declare that the rate limited to state banks shall be the maximum rate allowed to national banks. . . . It cannot be doubted, in view of the purpose of Congress in providing for the organization of national banking associations, that it was intended to give them a firm footing in the different states where they might be located. It was expected they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar state institutions. This was considered indispensable to protect them against possible unfriendly state legislation. Obviously, if state statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, national banking associations could not compete with them, unless allowed the same. On the other hand, if such associations were restricted to the rates allowed by the statute of the state to banks which might be authorized by the state laws, unfriendly legislation might make their existence in the state impossible.

> A rate of interest might be prescribed so low that banking could not be carried on except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to national associations the rate allowed by the state to natural persons generally, and a higher rate, if state banks of issue were authorized to charge a higher rate. This construction accords with the purpose of Congress, and carries it out. It accords with the spirit of all the legislation of Congress. National banks have been national favorites." 18 Wall at 411-413, 21 L.Ed. at 863, 864.

Subsequently, the Supreme Court's position in Tiffany was reaffirmed in Daggs v. Phoenix National Bank, 177 U.S. 549, 44 L.Ed. 882 (1899), where it was stated:

> "We said in Tiffany v. National Bank, 18 Wall. 409, 21 L.Ed. 862, that national banks were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the general government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the states, or to ruinous competition with state banks." 177 U.S. at 555, 44 L.Ed. at 884.

Further, with regard to the statutory provisions now embodied in 12 U.S.C.A. §85, the Court held:

> "The meaning of these provisions is unmistakable. A national bank may charge interest at the rate allowed by the laws of the state or territory where it is located; and equality is carefully secured with local banks.
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> ". . . The intention of the national law is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it. Tiffany v. National Bank, 18 Wall. 409, 21 L.Ed. 862." 177 U.S. at 555, 44 L.Ed. at 885.

In Northway Lanes v. Hackley Union Bank & Trust Co., 464

F.2d 855 (6th Cir. 1972), the Sixth Circuit Court of Appeals held that a Michigan national bank could legally charge closing costs of a real estate loan in addition to interest, since savings and loan associations in Michigan were permitted to make such additional charges, even though a state bank was not permitted to do so. In holding thus, the court discussed Title 12, United States Code, stating in part:

> "The legislative history of this statute indicates a Congressional intent to give national banks special competitive advantages over state banks, by permitting national banks to charge interest at the highest rate available to lenders generally in each respective state." (Emphasis added.) Id. at 861.

Continuing as to the specific issue at bar, the court held as follows:

> "Appellants contend that 12 U.S.C. §85 restricts the rate of interest national banks may charge to the rate established by state law for state 'banks'; that savings and loan associations are not 'banks'; and that national banks, accordingly, may not charge a borrower interest which a savings and loan association concededly could charge under Michigan law on the same type of loan. The legislative history of the act simply does not support this construction. . . . The legislative history of Section 85 therefore requires the conclusion that national banks may charge as much interest as savings and loan associations are allowed to charge on equivalent transactions by Michigan law." Id. at 862.

Finally, the Court in Northway Lanes discussed 12 C.F.R. §7.7310, noting that the interpretations contained therein,

> "made by an office charged with the responsibility of promulgating reasonable regulations pursuant to the National Banking Act, and supported by the legislative history of the Act and by the Supreme Court's decision in Tiffany, supra, are entitled to deference by this Court. . . . The fact that

> savings and loan associations may be organized and operated in a manner different from banks generally does not, contrary to appellant's suggestions, alter the fact that such associations should be treated as 'competing state-chartered or licensed lending institution[s],' within the meaning of Ruling 7.7310, supra. The conclusion is inescapable that the National Bank Act accorded national banks the right to charge the interest rate afforded their state competitors whether the competitor was a state bank or other non-bank lender. See, Tiffany v. National Bank of Missouri, supra." Id. at 864.

The holding in Northway Lanes and decision in United Missouri Bank of Kansas City, N.A. v. Danforth, 394 F. Supp. 774 (W.D. Mo. 1975), were relied upon in holding that a Nebraska national bank could legally charge, with respect to credit card transactions, rates allowed by Nebraska law to small loan companies. Fisher v. First Nat. Bank of Omaha, 548 F.2d 255 (1977). In reaching that conclusion, the Eighth Circuit Court of Appeals discussed the "most favored lender" doctrine developed by prior judicial interpretations of Congressional intent underlying the National Banking Act.

> "12 U.S.C. §85 was designed by Congress to place national banks on a plane of at least competitive equality with other lenders in the respective states, and, indeed, to give to national banks a possible advantage over state banks in the field of interest rates. Thus, a national bank is not limited to the interest rate that a state bank may charge with respect to a particular type of loan if another lender in the state is permitted to charge a higher rate of interest on the same type of loan. In that situation the national bank may charge the higher rate. This 'most favored lender' doctrine was recognized by the Supreme Court in Tiffany v. National Bank of Missouri, 18 Wall. (85 U.S.) 409, 21 L.Ed. 862(1873), and it was discussed and applied by this court in First Nat'l Bank in Mena v. Nowlin, 509 F.2d 872 (8th Cir. 1975). The doctrine was also applied in Fisher v. First Nat'l Bank of Chicago, supra, and in Northway Lanes v. Hackley Union Bank & Trust Co., supra.

> "As pointed out in Northway Lanes, supra, 464 F.2d at 864, the Comptroller of the Currency has considered for many years that §85 incorporates the 'most favored lender' doctrine, and that national banks may charge the maximum rate permitted by state law to any competing state chartered or licensed lending institutions, including institutions licensed by state law to make 'small loans.'" Id. at 259, 260.

With these judicial decisions in mind, we have reached the conclusion that a national bank situated in Kansas may charge the interest rates specified in K.S.A. 1979 Supp. 16a-2-401(2) without obtaining a license from the administrator to make supervised loans, as provided in K.S.A. 16a-2-302. It is clear that, under the U3C, a lender may become a supervised lender by virtue of a license therefor issued by the administrator. All supervised lenders that are so licensed constitute a distinct class of lenders that is entitled to charge the interest rates specified in 16a-2-401(2). Thus, by application of the "most favored lender" doctrine, as enunciated by the courts in construing 12 U.S.C.A. §85 and 12 C.F.R. §7.7310, a national bank may charge these same interest rates on supervised loans, by virtue of existing federal statutory authority. A license from the administrator is unnecessary, therefore, since it would not serve to grant a national bank any greater authority than it already possesses. Moreover, since we perceive the primary purpose of such licensing procedure to be regulatory in nature, i.e., designed to insure a licensee's compliance with applicable laws and rules and regulations, licensing of national banks would achieve no real purpose, because state officials cannot exercise the type of "visitorial powers" envisioned by such licensing scheme.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

W. Robert Alderson

W. Robert Alderson
First Deputy Attorney General

RTS:WRA:phf