



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 83- 113

Marvin S. Steinert
Commissioner
Savings and Loan Department
503 Kansas Avenue, Room 220
Topeka, Kansas 66603

Re: Corporations -- Savings and Loan Association Code --
Examinations; Acceptance of Examinations Made by
Federal Savings and Loan Insurance Corporation

Synopsis: Pursuant to K.S.A. 17-5612, the savings and loan commissioner or a deputy commissioner is required to examine, without prior notice, each savings and loan association organized under the law of this state at least once every 18 months. In lieu of such examinations, the commissioner may accept examinations made by the Federal Savings and Loan Insurance Corporation, even though federal examinations may be made only every 20 months. In that the legislature has expressly permitted the commissioner to adopt the federal report as a substitute for his own, the 18 month period must be construed as being directory, rather than mandatory. Cited herein: K.S.A. 17-5612.

* * *

Dear Commissioner Steinert:

On behalf of the Savings and Loan Department, you request the opinion of this office on a question involving the duty of your office to examine savings and loan associations organized under Kansas law. Specifically, you inform us that K.S.A. 17-5612(a) provides that your office shall examine the affairs of each such association at least once every 18 months. However, subsection (c) of the same statute provides that you may accept examinations which the Federal Savings and Loan Insurance Corporation (FSLIC) makes of the same

institutions. In that the federal examination schedule allows up to 20 months between audits, you inquire whether your office can properly discharge its duties by the acceptance of examinations which may conceivably be made outside the 18 month time frame.

The relevant portions of K.S.A. 17-5612 state as follows:

"(a) The commissioner in person or by one or more of the deputies of the commissioner, at times determined by the commissioner or the board but at least once very eighteen (18) months, without previous notice, shall visit and examine into the affairs of every association organized under the laws of this state;

. . . .

"(c) The commissioner is authorized to expend the moneys in such fund in the administration and enforcement of the provisions of this act and the act to which this act is amendatory and supplemental. The commissioner may accept any examination of a savings and loan association organized under the laws of the state of Kansas made by a federal home loan bank or the federal savings and loan insurance corporation or may examine such association jointly with the federal home loan bank or federal savings and loan insurance corporation. . . ." (Emphasis added.)

Both of these subsections appear in the original Savings and Loan Code of 1943 (at chapter 133 of the session laws of that year), with the only substantive change since then being the time in which examinations done by the commissioner are to be performed. Now 18 months, initially the requirement called for annual visits. L. 1942, ch. 133, §165. While a sentence in the latter subsection initially allowed the commissioner to charge a percentage of the examination fee whenever he accepted a federal report "in lieu of" his own, this language was removed in 1970. L. 1970, ch. 95, §3. However, the general grant of authority to accept federal examinations remains.

In view of the obvious fact that 18 months is not the same as 20, you inquire whether your office can continue to consider the federal examinations (which are made of all savings and loan associations in Kansas) as acceptable. At the outset, we would note that the mere use of the word "shall" in subsection (a) is not dispositive of the question. Numerous Kansas decisions have construed statutes containing "shall" as being directory, rather than mandatory, when the context

requires it. City of Kansas City v. Wyandotte County Commissioners, 213 Kan. 777 (1974), Spalding v. Price, 210 Kan. 337 (1972), Paul v. City of Manhattan, 212 Kan. 381 (1973). In Paul, the Court stated:

"In determining whether a legislative provision is mandatory or directory, it is a general rule that where strict compliance with the provision is essential to the preservation of the rights of parties affected and to the validity of the proceeding, the provision is mandatory, but where the provision fixes a mode of proceeding and a time within which an official act is to be done, and is intended to secure order, system and dispatch of the public business, the provision is directory." Syl. ¶1.

"Factors which would indicate that a statute or ordinance is mandatory are: (1) the presence of negative words requiring that an act shall be done in no other manner or at no other time than that designated, or (2) a provision for a penalty or other consequence of noncompliance." Syl. ¶2. (Emphasis added.)

In the present situation, there exist no "negative words" which would conflict with the 20 month time frame employed by the federal examiners, nor is there any provision for a penalty or other consequence of noncompliance.

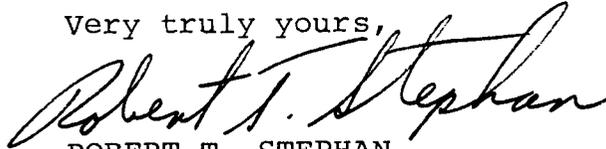
It would accordingly be our opinion that the provision which calls for an examination every 18 months in subsection (a) must be read as being discretionary, rather than mandatory. While it is clearly the intent of the legislature that the commissioner inspect the institutions under his jurisdiction on a regular basis, the legislature has also allowed federal reports to be accepted in lieu of a separate state examination. In that every savings and loan association subject to the commissioner's authority is also subject to the FSLIC, such a pooling of resources and information is eminently sensible. To require separate examinations because the federal schedule differs by 2 months from that in subsection (a) would be an unnecessarily narrow reading of the statute, and would frustrate, rather than foster, the efficient use of the state examiners' time.

In conclusion, pursuant to K.S.A. 17-5612, the savings and loan commissioner or a deputy commissioner is required to examine, without prior notice, each savings and loan association organized under the law of this state at least once

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every 18 months. In lieu of such examinations, the commissioner may accept examinations made by the Federal Savings and Loan Insurance Corporation, even though federal examinations may be made only every 20 months. In that the legislature has expressly permitted the commissioner to adopt the federal report as a substitute for his own, the 18 month period must be construed as being directory, rather than mandatory.

Very truly yours,



ROBERT T. STEPHAN
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RTS:BJS:JSS:hle