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ATTORNEY GENERAL OPINION NO. 84- 87

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

Re: Corporations -- Savings and Loans; Incorporation and
Organization -- Change of Name; Use of Word "Bank"

Synopsis: K.S.A. 17-5226 provides that a state-chartered savings and loan association may change its name, with such change subject to the approval of the commissioner pursuant to K.S.A. 17-5227. Requirements for the name of a state-chartered association are set out at K.S.A. 17-5222, and include provisions that the words "savings" and "association" must be used, together with an "appropriate descriptive word or words." In view of K.S.A. 9-2011, which makes it unlawful for any corporation to advertise that is engaged in the banking business without being subject to the banking code, the word "bank" is not an appropriate descriptive word for use in the name of a savings and loan association chartered by the State of Kansas. While the commissioner has broad authority under K.S.A. 17-5601 to authorize state savings and loan associations to engage in activities permitted to federal associations, this authority does not extend to the creation of an entire new entity such as savings banks which do not exist under state law. Accordingly, the commissioner may not, through the issuance of a special order, modify K.S.A. 17-5222 to authorize a state-chartered savings and loan association to change its name to include the words "savings bank." Cited herein: K.S.A. 9-162 (repealed L. 1947, ch. 102), 9-702, 9-1715, 9-2011, 9-2016, 17-2244, 17-5101, 17-5222, 17-5226, 17-5227, 17-5601, 17-5606, 12 C.F.R. 547.1, P.L. 97-320.

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Dear Mr. Steinert:

As Commissioner of the Kansas Savings and Loan Department, you request our opinion on two inter-related questions concerning the permissible name for a state-chartered savings and loan association. You first inquire whether such an association may use the word "bank" in its title, pursuant to K.S.A. 17-5222 et seq. Second, if the statutes do not now allow use of such wording, you ask whether, under your supervisory authority pursuant to K.S.A. 17-5601, you may issue a special order to allow state associations to call themselves "savings banks," a power which is now held by federally-chartered institutions.

These inquiries have arisen as a result of an application for change of name which has been filed with your office pursuant to K.S.A. 17-5227. That statute comes into play following a resolution authorizing the change by the association's board of directors and publication of the proposed change, both as required by K.S.A. 17-5226. In pertinent part, K.S.A. 17-5227 states:

"Five copies of an application to the commissioner for approval shall be signed by two officers of the association, acknowledged before an officer competent to take acknowledgments of deeds, and filed with the commissioner. Upon receipt of application for change of name the commissioner shall notify each association [sic] chartered to do business in the applicant's county of such application, by registered mail. Such notification shall set a time at which a hearing will be held before the commissioner. The commissioner shall inquire into the advisability of such change. After the hearing the commissioner shall promptly approve or disapprove the change. . . . Any association aggrieved by any action or non-action of the commissioner under this section may appeal therefrom to the savings and loan board in the manner provided by K.S.A. 17-5606 and acts amendatory thereof."

In making a determination whether a proposed change of name should be approved, the standards set forth in K.S.A. 17-5222 are controlling on the commissioner. Therein, it is provided that:

"The name of every association hereafter incorporated shall include the words 'savings' and 'association.' These words shall be preceded by an appropriate descriptive word or words approved by the board. An ordinal number may

not be used as a single descriptive word preceding the words 'savings' and 'association,' unless such words are followed by the words 'of _____,' the blank being filled by the name of the town, city or county in which the association has its home office. An ordinal number may be used together with another descriptive word, preceding the words 'savings' and 'association,' provided the other descriptive word has not been used in the corporate name of any other association in the state, in which case the suffix mentioned above is not required to be used. An ordinal number may be used together with another descriptive word, preceding the words 'savings' and 'association' even when such other descriptive word has been used in the corporate name of an association in the state provided the suffix 'of _____,' as provided above, is also used. The suffix provided above may be used in any corporate name."

In the application before you now, the association wishes to change its name from First of Kansas Savings Association of Russell to First of Kansas Bank and Savings Association. The use of the word "bank" has previously been approved by the State Savings and Loan Board as an appropriate "descriptive word" (Minutes of April 29, 1983 meeting). While we find nothing in either the Savings and Loan Code (K.S.A. 17-5101 et seq.) or the statutes governing the board (K.S.A. 74-3101 et seq.) which specifically authorizes such action, given the overview powers of the board over the commissioner, who makes the initial determination on changes of name, and its authority to hear any appeal from his decision (K.S.A. 17-5227, 17-5606), power to take this action could be inferred. However, whether such action with regard to the word "bank" is permissible is another question.

In our opinion, such useage cannot be lawfully permitted. Referring to the state banking code (K.S.A. 9-701 et seq.), K.S.A. 9-2011 states:

"It shall be unlawful for any individual, firm or corporation to advertise, publish or otherwise promulgate that they are engaged in the banking business, without first having obtained authority from the bank commissioner as herein provided. Any such individual or member of any such firm or officer of any such corporation so offending shall be deemed

guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$5,000."

While savings and loan associations are exempted from the provisions of the banking code by virtue of K.S.A. 9-702, in our view that statute removes them from the penalties of K.S.A. 9-2016, which makes it a criminal offense to transact banking business without a certificate of authority from the state bank commissioner. In our opinion, a savings and loan association which attempts to "advertise, publish or otherwise promulgate" that it was engaged in the banking business would still be subject to the provisions of K.S.A. 9-2011. See, e.g., Independence Savings & Loan Association v. Sellars, 149 Kan. 652 (1939), decided under the predecessor statute to K.S.A. 9-2011, K.S.A. 9-162 (repealed L. 1947, ch. 102). Clearly, the use of the word "bank" in an association's title would constitute advertising of the sort which the statute contemplates and prohibits. Similar statutes have been upheld as to constitutionality in other Kansas cases. Kansas State Board of Pharmacy v. Wilson, 8 Kan.App. 2d 359 (1983) (use of word "Pharmacy" by unlicensed business violated Kansas Pharmacy Act).

You also inquire whether your office could, through the issuance of a special order under K.S.A. 17-5601, permit Kansas savings and loan associations to use the phrase "savings bank" in their names. That statute provides in pertinent part:

"In addition to any and all other powers heretofore granted to the state savings and loan commissioner, the commissioner, with the prior approval of the savings and loan board, shall have the power to authorize state savings and loan associations to engage in any activity in which such associations could engage were they operating as federal savings and loan associations at the time such authority is granted, including but without limitation because of enumeration, the power to do any act, and own, possess and carry as assets, property of such character, including stocks, bonds or other debentures which, at the time said authority is granted, is authorized under federal laws and regulations to be done by federal savings and loan association, notwithstanding any restrictions elsewhere contained in the statutes of the state of Kansas. The commissioner shall exercise such power by the issuance of a special order therefor, if such commissioner deems it reasonably required to preserve and protect

the welfare of state savings and loan associations and promote competitive equality of state and federal savings and loan associations."
(Emphasis added.)

This statute has been used on a number of occasions in the past, most recently in December of last year, when a special order was issued to bring the definition of insolvency for state-chartered institutions into line with that for federal associations. K.S.A. 17-5101(k), 12 C.F.R. 547.1. Similar statutes exist for state-chartered banks (K.S.A. 9-1715) and credit unions. K.S.A. 17-2244.

In order for K.S.A. 17-5601 to operate, there must initially be some action on the federal level which broadens the powers of savings and loan associations holding federal charters. If the commissioner deems the federal changes to be of the sort which place state associations at a competitive disadvantage, he can act to restore equality through a special order. In this situation, the federal action which arguably triggers the statute took place in the 1982 legislation which is popularly-known as the Garn-St. Germain Depository Institutions Act. P.L. 97-320. Sections of that act completed the process which began in 1978 by which savings banks were placed on an equal footing with savings and loan associations on the federal level. As Attorney General Opinion No. 83-97 noted (at pages 3-5):

"In 1978, the Homeowner's Loan Act was amended (P.L. 95-630) to authorize federally-chartered mutual savings banks. Section 1201 of the law (92 Stat. 3710) amended 12 U.S.C. §1462 to broaden the term 'association' to include such entities along with federal savings and loan associations. Section 1202 amended 12 U.S.C. §1464(a)(1) to allow state mutual savings banks to convert to a federal charter, provided such conversion was not in violation of the state law. In that this was the only way a federally-chartered mutual savings bank could be created, the 1978 amendments had no effect in Kansas, since no savings banks existed in this state. Such federally-chartered organizations were also limited to establishing branches according to the law of the state governing savings banks, with two exceptions (no limit on number of branches; establishment of branches within

thirty-five miles of home office, state law notwithstanding).

"The 1982 amendments contained in the Garn-St. Germain act further enlarged the concept of federally-chartered savings banks in a variety of ways. Section 311 (96 Stat. 1496) amended 12 U.S.C. §1464(a) to eliminate the restrictions on conversion by a state mutual savings bank, as well as removing other limitations on the activities of savings banks with federal charters. In an express attempt to provide for greater flexibility in the area of thrift institutions, the section was amended to read as follows:

'In order to provide thrift institutions for the deposit or investment of funds and for the extension of credit for homes and other goods and services, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings and loan associations, or Federal savings banks, and to issue charters therefor, giving primary consideration to the best practices of thrift institutions in the United States. The lending and investment authorities are conferred by this section to provide such institutions the flexibility necessary to maintain their role of providing credit for housing.'

. . . .

"It is in the area of conversion, however, that the 1982 act makes changes which are of crucial importance to this inquiry. In place of the limited powers granted by the 1978 amendments (cited above), Section 313 of the act (96 Stat. 1497) amends 12 U.S.C. §1464(i) to allow the following types of conversions:

'(1) Any institution which is, or is eligible to become, a member of a Federal home loan bank may convert itself into a Federal savings

and loan association or Federal savings bank under this chapter (and in so doing may change directly from the mutual form to the stock form, or from the stock form to the mutual form), but such conversion shall be subject to such rules and regulations as the Board shall prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this chapter.

'(2) Subject to the rules and regulations of the Board, any Federal association may convert itself from the mutual form to the stock form of organization, or from the stock form to the mutual form, and any Federal association may change its designation from a Federal savings and loan association to a Federal savings bank or the reverse.

'(3)(A) Any Federal association may convert itself into a savings and loan or savings bank type of institution organized pursuant to the laws of the State, district, commonwealth, or territory (hereinafter referred to in this section as the "State") in which the principal office of such Federal association is located (Emphasis added.)'

"In our opinion, should a federal savings and loan association located in Kansas wish to change its designation to a savings bank pursuant to subsection (2) of 12 U.S.C. §1464(i), the effect would be just that -- one of a name change, and no more. Jurisdiction over the institution would be retained by the FHLBB, the same regulations would apply, and the same concepts of federal preemption over state statutes would continue to hold true for the new association as for its predecessor."

Accordingly, as things stand at the present time, a federal savings and loan association may, through changing its charter, become a federal savings bank, as several in Kansas have in fact done. However, as the opinion noted, the practical effect is

merely a change in name, for the 1982 changes achieve, in the words of the federal legislative history, a "parity of entitlements between all Federal associations." United States Code, Congressional and Administrative News, 97th Congress, Second Session, Vol. 3. p. 3106 (at §311). Given the above, is it proper for a special order to amend K.S.A. 17-5222 to allow state-chartered association to use the words "savings bank" in addition to those already authorized?

In our opinion, the answer to the foregoing must be in the negative. As noted in the excerpt from the earlier opinion set out above, Kansas law does not at the present time permit state-chartered savings banks, under either the banking or savings and loan codes. To permit a state savings and loan association to call itself a savings bank without any statutory authority for such institutions would go beyond the scope of K.S.A. 17-5601, broad as it may be. The situation would clearly be different if Kansas law recognized savings banks, but prohibited them from converting to savings and loan associations, and vice versa. In such a case, the federal changes would authorize use of the wild-card statute to equalize the powers of state institutions with those at the federal level. In the absence of any indication that the legislature wishes to permit state-chartered savings banks, we cannot conclude that a state savings and loan association can be authorized to call itself something which does not presently exist.¹ While there may well be little if any practical difference between a savings and loan association and a savings bank at the federal level, the two are legally distinct, with separate legal bases, and it is the lack of this basis in state law which prevents us from concluding that K.S.A. 17-5601 can be employed to amend K.S.A. 17-5222 and so permit the use of the words "savings bank" in the title of a state-chartered savings and loan association.

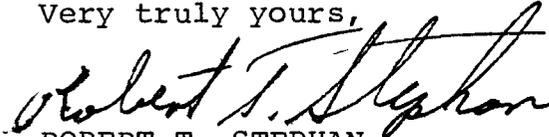
In conclusion, K.S.A. 17-5226 provides that a state-chartered savings and loan association may change its name, with such change subject to the approval of the commissioner pursuant to K.S.A. 17-5227. Requirements for the name of a state-chartered association are set out at K.S.A. 17-5222, and include provisions that

¹The legislature is clearly aware of the existence of federally chartered savings banks, for it amended the idle funds statute, K.S.A. 1983 Supp. 12-1675, to authorize municipalities to deposit such moneys in such institutions. See also K.S.A. 1983 Supp. 17-5002, which authorizes municipalities to invest in "state or federally chartered savings and loan associations or federally chartered savings banks."

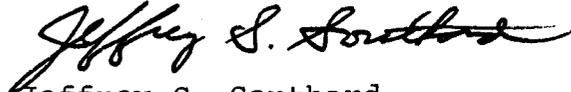
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Very truly yours,



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