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December 19, 1984

ATTORNEY GENERAL OPINION 84- 125

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

Re: Corporations -- Savings and Loan Association; Incorporation and Organization -- Use of Words "Banking" and "Bank" in Advertising and Title

Synopsis: Pursuant to K.S.A. 17-5601, the savings and loan commissioner has broad authority to authorize state chartered associations to engage in activities permitted to federal associations should the commissioner deem such activity reasonably required to preserve and protect the welfare of state associations and to promote competitive equality between state and federal associations. The ability of a federally chartered association to adopt a corporate title, as well as the activity of advertising, are regulated by the Federal Home Loan Bank Board (FHLBB) at 12 C.F.R. §§543.1 and 563.27. As a result of these regulations and board interpretations, federal associations may use the word "banking" in their corporate titles, although the word "savings" must also be used. They may also use the words "banking" (as in "Do Your Banking With Us") and "bank" ("Bank With Us") in their advertising, provided also that the institution is identified as a savings association. In view of the power to engage in these activities which has been granted to federal associations, the savings and loan commissioner may utilize K.S.A. 17-5601 to equalize the powers of state associations with federal ones. However, for the reasons set forth in Attorney General

Opinion No. 84-87, the commissioner may not authorize, nor may a state association use, the word "bank" in its title. Cited herein: K.S.A. 9-1715, 9-2011, 17-2244, 17-5101, 17-5222, 17-5601, 12 U.S.C.A. §1726, P.L. 97-320, 12 C.F.R. §§543.1, 547.1, 561.1, 563.27.

* * *

Dear Mr. Steinert:

As Commissioner of the Kansas Savings and Loan Department, you request our opinion on the authority of your office to issue a special order under K.S.A. 17-5601. Specifically, you wish us to address two questions which were not answered in a previous opinion to you (No. 84-87), which dealt with the authority of your office to issue a special order allowing state associations to use the word "bank" in their corporate titles, specifically in the phrase "savings bank." Therein, we concluded that your authority under K.S.A. 17-5601 did not extend to such action. You now inquire if state associations may be authorized to use the word "banking" in their titles, and the words "bank" and "banking" in their advertising.

As was the case in the previous opinion, the pivotal statute is K.S.A. 17-5601, the so-called "wild card" statute which allows your office to authorize state associations to engage in business on a competitive basis with federal associations. The statute states 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 <u>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</u>, 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. <u>The commissioner shall</u>

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.)

We are informed that this statute has been employed by your office on a number of occasions in the past, most recently in December, 1983, when a special order was issued to bring the definition of insolvency for state associations into line with that for federal institutions. 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. K.S.A. 17-5601 was in fact modeled upon the bank statute, which was enacted in 1967, eight years before similar language was added to the savings and loan statute.

In order for action to be taken under K.S.A. 17-5601, there must first be changes on the federal level which broaden the powers of savings and loan associations which hold federal charters. If the savings and loan commissioner determines the federal changes to be of the type which place state associations at a competitve disadvantage, he can act to restore equality through a special order. In this situation, the federal action consisted of amendments to federal regulations made by the Federal Home Loan Bank Board (FHLBB) which became effective September 28, 1984. These amendments [to 12 C.F.R. 543.1(a) and 563.27] were necessary due to numerous changes contained in the Garn-St. Germain Depository Institutions Act of 1982 (P.L. 97-320) which affected the thrift industry. Due to the proliferation of different types of federal thrift institutions, the FHLBB was concerned about an increased risk of confusion as to the identity and nature of the institutions with which the public dealt. The regulatory amendments were intended to prevent the adoption of corporate titles or advertising practices which created public misperceptions by characterizing thrift institutions as commercial banks.

The two regulations now state thusly:

"§543.1 Corporate title."

"(a) General. Except for corporate titles in existence or applied for as of May 4, 1984, a Federal association's title shall include the word 'Savings' and in some manner indicate that it is a Federal association. A Federal association shall not adopt a title that mis-

represents the nature of the institution or the services it offers.

. . . .

"§563.27 Advertising."

"(a) No insured institution shall use advertising (which includes print or broadcast media, displays and signs, stationery, and all other promotional materials), or make any representation which is inaccurate in any particular or which in any way misrepresents its services, contracts, investments, or financial condition.

"(b) Any advertising shall specifically indicate that an insured institution is a savings institution; except that if the work 'bank' is not used in the advertising of the institution's name, the word 'savings' need not be used in such advertising. No insured institution shall advertise or hold itself out to the public as a commerical bank. Signs existing or ordered on May 4, 1984, depicting the name of the insured institution, may be used for as long as the institution chooses to continue to use the corporate title in existence on that date, and may also be used on offices established or acquired after that date for the same period. Stationery and other promotional materials on hand as of that date are exempt until such time as the insured insitution needs to reorder such materials in the ordinary course of business."

In determining the effect of the above regulations, we contacted staff counsel for the FHLBB who were involved in the drafting of the amendments. At that time, we specifically inquired whether these amended regulations had the effect of altering a previous legal opinion of the general counsel for the FHLBB, which was approved by the board in April, 1980. Staff counsel have since informed us that this 1980 ruling remains the position of the FHLBB. In that this general counsel opinion provides a legal analysis of the type of activities at issue here, it would be helpful to quote from it at some length.

Issued to the then-Attorney General of Missouri, John Ashcroft, the general counsel's letter dealt with a federally-chartered institution which was using the trademark "Bank from Home," which action was challenged by the State of Missouri as being in

violation of state statutes prohibiting non-banks from engaging in the business of banking or advertising themselves in such a manner. Mo.Rev.Stat. §§362.420, 362.421, 362.425. (In this regard, the situation is similar to that discussed in Attorney General Opinion No. 84-87, where K.S.A. 9-2011 was construed to prohibit state savings and loan associations from including the word "bank" in their titles.) After concluding that federal law (the Home Owners' Loan Act of 1933, 12 U.S.C.A. §§1461 et seq.) pre-empted the state statute, the opinion addressed the question of whether a federal savings and loan is in the business of "banking", and states:

> "For several reasons it is beyond question that a federal savings and loan association is a different type of financial institution than is a bank. First, these two types of institutions operate under totally different governing statutory schemes and accordingly are under the jurisdiction of different regulatory and examining authorities. Federal S&L's are exclusively regulated in all respects by the Bank Board under the HOLA, whereas banks are regulated by such agencies as the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Comptroller of the Currency and the states where their principal offices are located, under different statutory schemes. See e.g., People v. Coast Federal Savings & Loan Ass'n, supra, 98 F.Supp. at 313.
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> "Second, federal savings and loan associations presently cannot perform all of the same services that banks generally are permitted to perform.
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> "Accordingly, if a savings and loan association used the word 'bank' as a noun to indicate that it was a 'bank -- as opposed to a savings and loan association -- the association, in the absence of unique or extraordinary circumstances, would be in violation of 12 C.F.R. §563.27. However, after a detailed review of the matter brought to the Bank Board's attention by your Office, this Office has concluded that Roosevelt Federal's written advertisement of its bill paying services is not inaccurate or misleading.
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> "Our primary reason for reaching this conclusion is that in our view, when the general public uses the word 'bank' as a verb -- as in 'Bank

from Home' -- or as an adjective -- as in 'performing a banking transaction' or as 'being in the banking business' --, it uses these words in a very general sense and does not reserve such use only for entities which are in fact 'banks.' This is recognized by the definition of 'the business of banking' in Michie's treatise, Banks and Banking, which defines the phrase as including the exercise of any banking function,

"'The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans; and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations; or the exercise of any banking function. (emphasis supplied) Michie, Banks and Banking, Ch. 1 & 2 p. 9 (1973).'

"Unquestionably, savings and loan associations perform many of these 'banking' functions. Although a bank may be authorized to perform more services than a savings and loan association, when the latter deposits and allows withdrawals, it generally carries on a 'banking' business, if these services are performed as a regular activity. (Citations omitted.)" (General Counsel letter, February 12, 1980, p. 14-15.)

See also, First Federal Savings and Loan Association of Puerto Rico v. Zequeira, 305 F.Supp. 37 (D. P.R. 1969); Rosenblum v. Anglim, 43 F.Supp. 889 (N.D. Cal. 1942); City of Houston v. Morgan Guarantee International Bank, 666 S.W.2d, 524 (Tex.App. 1983); American Building and Loan Assn., Inc. v. State, 376 P.2d 370 (Alaska 1961).

Having determined that a federal savings and loan association is in the general sense engaged in the business of banking, the letter concluded that only if the specific advertisements were somehow misleading could there be a violation of the regulation. As the advertisements clearly identified the institution as a dederally chartered savings and loan association, the use of the words "bank" and "banking" as adjectives or verbs was not a misrepresentation of the associaton's functions,

nor did it give the appearance of being a commercial bank. This same analysis appears in the preliminary comments to the amendments to the two federal regulations set out hereinabove, with the FHLBB concluding that the proposed (now final) changes would guard against an institution calling itself a bank when in truth it is not. Apart from this prohibition (and the requirement that the institution identify itself as a savings association), no other specific limits are set out. The ultimate test remains whether the title or advertising is misleading or somehow misrepresents the nature of the institution, with the use of the words "bank" and "banking" permissible under certain circumstances.

It appears therefore to be well settled that a federal savings and loan association may in certain circumstances make use of the words "bank" or "banking" in its title or advertising, notwithstanding a state statute which prohibits such useage. (In Kansas, this would mean that K.S.A. 9-2011 does not apply to federally chartered institutions.) The use of such words is authorized both by interpretative rulings of FHLBB's general counsel and the recently-revised regulations appearing at 12 C.F.R. §543.1 and 12 C.F.R. §563.27. Given this, what may your office do under K.S.A. 17-5601 to place state institutions in a position of comparative equality?

As to the use of advertising terms, it may be argued that no action is necessary, given the fact that all state savings and loan institutions are presently insured by the Federal Savings and Loan Insurance Corporation (FSLIC). Pursuant to 12 U.S.C.A. § 1726(b), each insured association agrees that it "will not carry on any sales plan or practices, or any advertising, in violation of regulations" made by FHLBB. The regulation concerning advertising, 12 C.F.R. §563.27, appears within those regulation which apply to all "insured associations," with this term defined to include any state association whose accounts are insured by FSLIC. 12 C.F.R. §561.1.

However, while this reasoning would be persuasive if Kansas law provided <u>more</u> authority than that allowed by the federal regulations, we do <u>not</u> believe that such is actually the case. K.S.A. 9-2011, while pre-empted as to federal association (see herein-above), still applies on its face to state associations, and is more restrictive than is 12 C.F.R. §563.27. Unlike federal associations, over which the FHLBB has plenary control [<u>Fidelity Federal Savings and Loan Assn. v. de la Cuesta</u>, 458 U.S. 141, 73 L.Ed.2d 664 (1982)], state associations are still regulated by the statutes of Kansas except where such statutes are incompatible with federal laws or regulations. Since it is possible for a state association to comply with both the federal regulation and the

state statute (e.g. by not using any form of the word "bank" in its advertising), in our opinion no incompatibility exists. Therefore, if a Kansas savings and loan association wishes to use the words "bank" or "banking" in its advertisements, it must do so by virtue of a special order issued by your office, notwithstanding the federal regulations.

It is further our opinion that the issuance of such a special order by your office in the area of advertising would be permissible under the terms of K.S.A. 17-5601. Federal associations clearly have the authority to employ such phrases as "Bank with us" and "For all your banking needs," and it may reasonably be determined by your office that similar authority should be granted to state associations in the interest of promoting competitive equality. While K.S.A. 9-2011 has historically precluded such activity by a state association, K.S.A. 17-5601 specifically provides that a special order may authorize additional activities "notwithstanding any restrictions elsewhere contained in the statutes of the state." Accordingly, a special order could be issued which incorporates the provisions of 12 C.F.R. §563.27. Further, in applying the order, your office would be able to consult the federal interpretations which have been made concerning the regulation, including the 1980 letter opinion which has been reaffirmed by the FHLBB following the promulgation of the 1984 revisions.

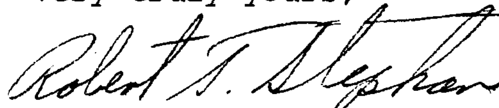
We reach a similar conclusion as to the power of your office to issue a special order permitting the use of the word "banking" in the title of a state association. Given the broad wording of 12 C.F.R. §543.1 and the position of the FHLBB that the word "banking" is very general in its meaning and does not reference only those entities which are "banks," federal associations may make use of such a term, provided that the word "savings" is also used (e.g. First Federal Banking and Savings Association). The word "banking" may be considered a descriptive word of the type referred to in K.S.A. 17-5222, the statute which sets forth requirements for corporate titles for state associations. As a result, provided that the words "savings" and "association" are used, the word "banking" may also be used by a state association in its title.

However, for the reasons set forth in our earlier opinion to you, No. 84-87, the use of the work "bank" in a state association's title cannot be permitted. Comments to the federal regulation (12 C.F.R. 543.1) indicate that the use of this term was one of, if not the, primary reasons for the revisions made this year. While the federal regulation does not preclude the use of the word "bank," it requires the additional use of the word "savings," as in "savings bank," which is a recognized

entity at the federal level, as the earlier opinion noted. However, the use of the word "bank" by itself would run afoul of the language in 12 C.F.R. §543.1 which proscribes the use of a title which misrepresents the nature of the institution or the services it offers. Insofar as Kansas does not recognize "savings banks" even the limited usage allowed by the federal regulation would constitute a misrepresentation of the nature of the association.

In conclusion, pursuant to K.S.A. 17-5601, the savings and loan commissioner has broad authority to authorize state chartered associations to engage in activities permitted to federal associations, should the commissioner deem such activity reasonably required to preserve and protect the welfare of state associations and to promote competitive equality between state and federal associations. The ability of a federally chartered association to adopt a corporate title, as well as the activity of advertising, are regulated by the Federal Home Loan Bank Board (FHLBB) at 12 C.F.R. §§543.1 and 563.27. As a result of these regulations and board interpretations, federal associations may use the word "banking" in their corporate titles, although the word "savings" must also be used. They may also use the words "banking" (as in "Do Your Banking With Us") and "bank" ("Bank With Us") in their advertising, provided also that the institution is identified as a savings association. In view of the power to engage in these activities which has been granted to federal associations, the savings and loan commissioner may utilize K.S.A. 17-5601 to equalize the powers of state associations with federal ones. However, for the reasons set forth in Attorney General Opinion No. 84-87, the commissioner may not authorize, nor may a state association use, the word "bank" in its title.

Very truly yours,



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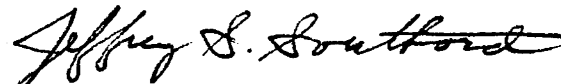

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