Opinion No. 44-4562

August 23, 1944

BY: C. C. McCULLOH, Attorney General

TO: Mr. Woodlan P. Saunders, State Bank Examiner, Santa Fe, New Mexico

We are in receipt of your letter of August 16, 1944, in which you state that one of the state chartered building and loan associations will desire to continue in business as a mortgage company after paying off all its savings accounts and installment shares. You further state that this association was organized in 1888 under Chapter 9 of the Laws of 1887. In view of these facts, you ask our opinion as to whether or not this association has the right to operate strictly as a mortgage company after discontinuing operations as a building and loan association.

Chapter 9 of the Laws of 1887 provided, among other things, as follows:

"Section 1. Whenever any number of persons, not less than eight, may desire to become incorporated as a mutual building and loan association for the purpose of building and improving homesteads and **loaning money to the members thereof,** they shall * * * make a statement * * *."

"Section 6. * * * No loan shall be made by such a corporation except to its own members unless it shall happen at any time that there is no demand by any of its shareholders for the funds. Then such funds may be loaned to others who are not shareholders."

The above quoted provisions remained the law with minor amendments until Chapter 147 of the Laws of 1931 was enacted. Section 6, as amended by Chapter 4 of the laws of 1937, was enacted providing that:

"No loan shall be made by such corporation except to its own members; provided, that if at any time there is no demand by any of the shareholders for the loan of the surplus funds of such corporation, then such funds may be loaned upon real estate security as herein provided to non-members."

Further, the above quoted portion of Section 1 was carried on down in almost the identical language. In view of this language contained in both the original and present acts it is my opinion that an association so incorporated cannot cease to do business as a building and loan association and do business as a mortgage firm.

One additional thing in this connection is called to your attention. The original act limited the duration of such corporations to 40 years and provided that the articles of corporation should so state. The present law, while limiting the duration to 100 years, applies only to corporations created since the date of its passage. While Section 50-

1409 of the 1941 Compilation gives recognition to all corporations previously created, it does not authorize the extension of such corporations. It would thus appear that the life of the corporation involved terminated both by virtue of the law under which it was created and its own charter.

In your letter you also call attention to what appears to be a conflict between sections 50-1403 and 50-1411 in that the first section of the law is so worded that it appears an association could issue optional payment shares and limit the dividend rate to not more than 6% per annum, while the other section provides that all classes of shares should participate to the full extent of the net earnings of the association. This section is as follows:

"50-1411. -- It shall be unlawful for any mutual building and loan association to issue, sell or dispose of, or receive subscriptions, or pay for any kind or class of stock certificate or shares which shall not be entitled to participate equally, share per share, with every other kind or class of stock certificates or shares of such associations (in their respective classes) in the earnings, profits and surplus assets thereof in proportion to the amount of the monthly, or yearly dues to be paid thereon, or the subscription price thereof. And it shall be unlawful for any building and loan association through any by-laws, resolution or act of its stockholders, directors or officers, by any allowance in the way of salaries or perquisites, or otherwise, to give any preference to any kind or class of stock certificates or shares whereby the owners or holders thereof will receive any advantage over owners and holders of other stock certificates or shares of such association in the distribution of profits, or otherwise, (except as herein provided)."

The 1931 law was amended by Section 3, Chapter 78 of the Laws of 1933 by inserting the bracketed language. It appears to the writer that the specific purpose of the legislature in inserting this language was to eliminate the question submitted by you. That is to say, by inserting the language "in their classes" the legislature intended that only the same classes of shares should participate equally and that by inserting the language "except as hereinbefore provided" the legislature showed its intent to resolve any conflict as to the 6% limitation found in Section 50-1403.

It is therefore my opinion that there is no conflict between Sections 50-1403 and 50-1411, and that under no circumstances may optional payment shares receive in excess of 6% dividends.

By ROBERT W. WARD,

Asst. Atty. General