

Opinion No. 72-68

December 8, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Thomas Patrick Whelan, Jr.,
Assistant Attorney General

TO: Mr. Roy Davidson, Commissioner of Banking, Department of Banking, Lew Wallace
Building, Santa Fe, New Mexico 87501

QUESTIONS

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May a state chartered savings and loan association whose accounts are insured by the Federal Savings and Loan Insurance Corporation and which is a member of the Federal Home Loan Bank establish a branch office more than 75 miles but less than 100 miles from its home office?

CONCLUSION

Yes.

OPINION

{*111} ANALYSIS

Section 48-15-94, N.M.S.A., 1953 Comp. (1971 P.S.) supplies the answers to this question. That section provides:

"48-15-94. Powers and privileges of associations. -- A. Notwithstanding any other provision of the Savings and Loan Act [48-15-45 to 48-15-142], {*112} every company, association or corporation licensed under the provisions of the savings and loan laws of this state whose accounts are insured by the federal savings and loan insurance corporation or its successor, and which is a member of a federal home loan bank or its successor, shall possess at least the same rights, powers, privileges, immunities and exceptions which are possessed by any federally chartered association.

B. When more permissive lending and investment privileges and provisions regarding payments of interest and dividends or other powers, privileges, immunities and exceptions are extended to federally chartered associations, the same shall be extended to every company, association or corporation licensed under the provisions of the Savings and Loan Act whose accounts are insured by the federal savings and loan insurance corporation or its successor and which is a member of a federal home loan bank or its successor."

In Opinion of the Attorney General No. 71-77, we concluded that the establishment of a branch office was one of the "rights, powers, privileges, immunities and exceptions" conferred by federal law and that this section controlled the question of the permissible distance between a branch office and the principal office. See Opinion of the Attorney General No. 71-77, issued June 16, 1971.

The meaning of Subsection B is clear. Eligible savings and loan associations are to enjoy not only the rights and powers extended to federally chartered associations when Section 48-15-94, **supra**, was enacted, but also any rights and powers extended after the passage of the law. The purpose of the section is evidently to allow eligible state chartered associations to compete on an equal basis with federally chartered associations without requiring an amendment of the state statutes every time the Federal Home Loan Bank Board passes a new regulation on federally chartered associations.

At the time Section 48-15-94, **supra**, was enacted Federal Home Loan Bank Board regulations allowed a distance of 75 miles between the branch and principal offices. That distance was extended to 100 miles on December 7, 1968. 33 Fed. Reg. 18229. According to Section 48-15-94B, the 100 miles distance limitation is now applicable to eligible state chartered associations.

We note that a statute which, like Section 48-15-94B, incorporates by reference the provisions of future federal law is not without its problems. A majority of jurisdictions have held that such a statute is an unconstitutional delegation of the legislative power. See Annotation 133 A.L.R. 401; 16 Am.Jur.2d, **Constitutional Law**, § 245. There is authority in New Mexico that this kind of statute may be unconstitutional. See **State v. Armstrong**, 31 N.M. 220, 243 P. 333 (1924); N.M. Const. Art IV, § 18. There are, however, some courts which have upheld statutes like Section 48-15-94B, **supra**. See for example **People v. Oyama**, 173 P.2d 794, 29 C.2d 164 (1946) reversed on other grounds, 332 U.S. 633, 68 S. Ct. 269, 92 L. Ed. 249; **Ex parte Lasswell**, 1 Cal. App.2d 183, 36 P.2d 678 (1934); **People v. Goldfogle**, 242 N.Y. 277, 151 N.E. 452 (1926); **Hunter v. City of Louisville**, 265 S.W. 277 (Ky. 1924); **James v. Walker**, 132 S.W. 149 (Ky. 1910).

In view of the fact that there are authorities supporting this kind of statute, and in view of the presumption of validity accorded to legislative acts, we advise you to follow Section 48-15-94B, **supra**, when considering applications for savings and loan branch offices. So that there will be no question about the matter in the future, we suggest that a request to the Legislature to amend Section 48-15-94B, **supra**, is in order.