

OPINION
73-1

August 3, 1973 (OPINION)

Mr. G. W. Ellwein
Commissioner
Department of Banking and
Financial Institutions
State Capitol
Bismarck, ND 58501

Dear Mr. Ellwein:

This is in response to your letter of July 25, 1973, wherein you request an opinion of this office relative to Section 7-02-02 of the North Dakota Century Code in connection with a proposed issue of savings and loan association shares which would effect a new class of shares. You submit the following facts and inquiry in your letter:

"At its regular meeting of the State Banking Board, July 20, 1973, the Board considered the following proposed classes of shares to be issued by savings and loan associations:

'Daily Dividend Shares shall be shares for which any amount may be deposited or withdrawn by the shareholder without penalty or loss of dividend subject only to a maximum annual dividend subject only to a maximum annual dividend rate of 5.25 percent.'

'Term Certificate Shares shall be shares with such maturity classifications, minimum balances and maximum dividend rates as follows:

	Maturity	Minimum Balance	Maximum Rate
a.	30 days	None	5.25 percent
b.	90 days	\$1,000	5.75 percent
c.	1 Year	\$1,000	6.50 percent
d.	2 Year	\$5,000	6.50 percent
e.	30 Months	\$5,000	6.75 percent
f.	4 Years	None	6.75 percent
g.	4 Years	\$1,000	No maximum ra
h.	Not less than 30 days	\$100,000 or more	No maximum ra

"Upon motion made by Nicklawsky, seconded by Klefstad, and pursuant to provisions of Section 7-02-02, North Dakota Century Code, the above named classes of shares are hereby approved for issuance by savings and loan associations, effective retroactive to July 5, 1973. Motion carried with one member in

opposition.

At a Special State Banking Board meeting called by Commissioner Ellwein through a Conference Call held at 11:30 A.M., July 25, 1973, with all members present, the above motion was rescinded upon motion by Nicklawsky and seconded by Lamb. The Commissioner was requested to proceed at once to submit to the Attorney General all information presently available to the Board and to request an opinion if the Board may authorize the two classes of shares as above described.

* * *

Is the State Banking Board authorized per provisions of Section 7-02-02, North Dakota Century Code, to approve the 'Daily Dividend Shares' and 'Term Certificate Shares' as proposed? If so authorized, does provisions of Chapter 28-32 of the North Dakota Century Code apply?

* * * "

You have also enclosed with your letter of inquiry a letter of application from the Secretary-Treasurer of the North Dakota Savings and Loan League, requesting authority to issue such shares as proposed together with a letter expressing the legal opinion of legal counsel of one of the financial institutions which we understand is making a specific application for such authority in the matter.

We would initially note the provisions of Section 7-02-02 of the North Dakota Century Code, under which such authority must be found and to which your letter of inquiry makes reference. The same provides as follows:

"7-02-02. POWER TO ISSUE SHARES - CLASSES OF SHARES - DIVIDENDS. Such an association has the power to issue shares to members in any one or more of the following forms: 'installment shares,' 'fully paid shares,' 'prepared shares,' 'optional payment shares,' and such other classes of shares as may be approved by the state banking board. Such shares shall be paid in by the subscriber in the manner provided by the bylaws, and all such payments shall be called dues. Certificates shall be issued to each shareholder upon the first payment of dues by him. The classes of shares which may be issued by an association are defined as follows:

1. Installment shares shall be shares upon which the shareholder shall be required to pay such dues and amounts, and at such times, as the bylaws may provide, and such payments shall continue on each share until, with the dividends allotted thereon, it reaches its matured value or is withdrawn or canceled. On all such issues, the dividends shall be apportioned or credited equally to all shares in the same class;
2. Fully paid shares shall be shares upon which the full par value of the shares shall be paid at the time of the issuance thereof and upon which the holder shall be

entitled either to a full participation in the net profits, or to an agreed rate of dividends not exceeding six percent per annum paid semiannually, to be specified in the body of the certificate issued;

3. Prepaid shares shall be shares upon which an amount less than the par value of the shares shall be paid and shall mature and be payable when the amount so paid, together with the dividends allotted thereon, shall equal the par value of the shares; and
4. Optional payment shares shall be shares upon which amounts may be deposited or withdrawn at any time, subject to the provisions of this title. The rate of dividend on such shares in no event shall exceed five percent per annum. No dividend on such shares shall be paid or credited thereon more often than once every three months."

(emphasis supplied)

We understand your inquiry to relate to two specific types of classes of shares which you have defined by your letter, the first of which is "Daily Dividend Shares" and are defined as follows:

'Daily Dividend Shares shall be shares for which any amount may be deposited or withdrawn by the shareholder without penalty or loss of dividend subject only to a maximum annual dividend rate of 5.25 percent.'

We note the provisions and definition set forth in Subsection 4 of said Section 7-02-02, relating to "Optional Payment Shares", which are defined in nearly the same language as the above definition furnished for "daily dividend shares". It appears that the above defined "Daily Dividend Shares" are in fact "Optional Payment Shares" as defined by the statute and which are limited to a maximum five percent rate of dividend with the further limitation that dividends upon such shares shall not be paid or credited thereon more often than once every three months. Thus, we are of the opinion that the five percent limitation would be applicable to the "Daily Dividend Shares" as proposed by virtue of the fact that the same constitute "Optional Payment Shares" as defined by the statute.

A similar relationship appears to exist between the proposed "Term Certificate Shares", and the "fully paid shares" which are defined by Subsection 2 of said Section 7-02-02 of the North Dakota Century Code. While the definition of "Term Certificate Shares" specifies certain minimum balances, maturity classifications and maximum dividend rates, the statutory definition is sufficiently broad to encompass the proposed classification of shares. We note that the statutory definition imposes a six percent maximum per annum rate which may be paid semiannually and insofar as the proposed class of shares are within the statutory definition of "fully paid shares", we are of the further opinion that the limitations prescribed by the statute will prevail and apply to the proposed class of shares referred to as "Term Certificate Shares".

We know of no other instance where the legislative assembly has

legally delegated, directly or by implication, the authority to set maximum interest rates. We do not believe that such authority is contained in Chapter 7-02. It may be that the realities of a complex economy call for such an approach, but that is a matter for the legislative assembly, not this office, to determine.

With regard to your question relating to Chapter 28-32 of the North Dakota Century Code, more commonly known as the Administrative Practices Act, it would appear that the same would not be applicable should the Banking Board approve or authorize an additional class of shares. Since the first question was answered in the negative, however, it appears that this question is moot.

In conclusion, it is the opinion of this office that the proposed classes of shares to be issued by savings and loan associations are not "such other classes of shares" as specified in Section 7-02-02 of the North Dakota Century Code, but in reality constitute classes specified and defined in said Section 7-02-02, to which have been given different names. We are further of the opinion that the limitations specified in said Section 7-02-02 of the North Dakota Century Code are applicable to the proposed classes of shares described in your letter of inquiry.

We trust that the foregoing general comments and information will adequately set forth the opinion of this office upon the questions submitted.

Sincerely yours,

ALLEN I. OLSON

Attorney General