

**OPINION**  
**73-5**

September 25, 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 August 23, 1973, wherein you request an opinion of this office relative to the legality of the creation of a new class of share accounts for state chartered savings and loan associations. You submit the following in your letter:

"We have received from Gate City Savings and Loan Association, Fargo, North Dakota, a proposal to create a new class of share accounts for state chartered Savings and Loan Associations, as provided under Section 7-02-02, North Dakota Century Code.

"We enclose for your information a resolution presented containing the type of share they request the State Banking Board to create.

"We respectfully request an opinion if the State Banking Board can lawfully create this share under North Dakota law."

You also have enclosed a copy of the resolution describing the share accounts referred to in your letter. The same provides as follows:

"BE IT RESOLVED that, under the provisions of Section 7-02-02, North Dakota Century Code, the State Banking Board approves the following class of shares for savings and loan associations organized under the laws of North Dakota:

Insured Passbook Shares: Insured passbook shares shall be shares having the following characteristics:

1. Such shares shall be evidenced by a passbook and account signature card bearing the signature of the shareholder.
2. Such shares shall be insured by the Federal Savings and Loan Insurance Corporation, or successor organization, for the amount paid or deposited by the shareholder, up to the amount of \$20,000.00.
3. The passbook shall indicate the insured status of the share account.
4. Withdrawals or deposits shall be upon presentation of the passbook or other evidence of the account.

5. The status of the share account with respect to withdrawals and deposits shall be reflected in the passbook.
  6. There shall be no fixed term for such share account and no service fees or penalties payable upon such share account.
  7. The rate of dividends upon such shares shall be determined from time to time by action of the board of the association but shall not exceed the rate authorized for fully paid shares and in no case shall exceed the rate on passbook as established by the Federal Home Loan Bank Board.
- . Dividends may be paid or credited upon a periodic basis as determined by the association, but not more often than monthly.

"This resolution shall be effective from and after the date of its adoption."

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,' 'prepaid 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 note the provisions and definition set forth in Subsection 4 of said Section 7-02-02, relating to "Optional Payment Shares", which have many of the same characteristics as the proposed "Insured Passbook Shares". In this connection we are enclosing herewith a letter dated September 8, 1971, addressed to the Honorable Charles E. Herman, Representative, Fargo, North Dakota, wherein this office had opportunity to discuss passbook savings certificates and passbook accounts. In that letter the following discussion was offered concerning same, as follows:

"We have obtained what is known as a passbook savings certificate used by one of the associations. It used the term passbook savings certificate account. We are not aware of any certificate of share authorized which is entitled passbook savings certificate. Savings certificates shares were authorized by the banking board on April 27, 1970. At the same time, we are not prepared to say that merely because the certificate is entitled passbook as well as savings certificate, that same is in violation of the laws or the regulations of the state banking board. In this respect, we believe that the main point is whether or not the certificate is a savings certificate. Unfortunately, we do not have any further definition or description of a savings certificate other than the regulation adopted by the state banking board. A certificate generally refers to that instrument which states the number of shares or interest a person has in a given corporation, association or company. A passbook can satisfy this requirement if it contains the requisite language and is otherwise properly safeguarded to prevent fraud or misrepresentation. We are not in a position, nor is it our function, to comment on the advisability of using a passbook savings certificate. The state banking board, however, if it deems it necessary or proper, may promulgate regulations on this subject.

"On the basis of the discussion, we would be inclined to view the passbook savings certificate as coming within the provisions of the saving certificate shares authorized by the state banking board on April 27, 1970.

"However, because of the ad which provides and announces that one may add or withdraw from the account without penalty

indicates that the certificate is in reality an optional payment share as authorized under Subsection 4 of Section 7-02-02 which has a limited dividend rate of 5 percent. In this respect, we would find that the passbook savings certificate is contrary to law because of the provision that payments may be made or withdrawn at any time without subject to penalty.

"The passbook savings certificate, however, does not contain such language. We would thus conclude that either the savings and loan association is misrepresenting itself to the public in the ad, or, if it is complying with the ad, is in violation of Section 7-02-02." (emphasis supplied)

A review of the basic characteristics of the proposed "Insured Passbook Shares", indicate that one may add or withdraw from the account without penalty as stated in item number 6, as "There shall be no fixed term for such share account and no service fees or penalties payable upon such share account." (emphasis supplied) In reality, we are again considering a proposed class of shares which is an "Optional Payment Share", upon which there exists a limited dividend rate of five percent, in addition to the restriction that no dividend on such shares shall be paid or credited thereon more often than once every three months. We note that item number 8 of the proposed class of shares regarding the payment or crediting of dividends upon such shares or account is contrary to the restrictions set forth in Subsection 4 of Section 7-02-02, which defines the classes of shares which may be issued by an association. Thus, we are of the opinion that the five percent limitation would be applicable to the proposed "Insured Passbook Shares", with the further limitation that dividends upon such shares shall not be paid or credited thereon more often than once every three months by virtue of the fact that the same in reality constitute "Optional Payment Shares" as defined by the statute. While the proposed class of shares presents a minor variation from the statutorily defined class of shares, characteristics of the same are so aligned that it is made to appear that such proposed classification is only for the purpose of circumventing the mandate of the statute.

In conclusion, it is the opinion of this office that the proposed "Insured Passbook Shares" described and defined in the resolution proposed by a savings and loan association is in reality a class specified and defined in said Section 7-02-02, which has, by slight variation, and a different name, been proposed as a new class of shares. We are further of the opinion that the limitations and restrictions specified in said Section 7-02-02 of the North Dakota Century Code are applicable to the proposed class of shares described in the resolution accompanying your letter of inquiry.

We feel it proper to note or observe that the statute appears to contemplate two theories of benefit or payment for investment return, one being based upon a fixed rate and the other upon participation in the net profits. Accordingly, and while this office cannot foresee nor suggest all the various types of shares or accounts which would possibly qualify under one of the other of the two restrictions, it appears clear that if any class of shares is made or proposed under the fixed rate theory under subsections 2 and 4 of Section 7-02-02 of

the North Dakota Century Code, the same would be bound by and governed by the rates and limitations therein specified. We would also acknowledge that it may be possible certain types of accounts or shares may be so created which would have a basis for investment return a participation in the net profits of the subject entity.

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