June 12, 1975

HONORABLE RICHARD F. SCHAUB
Commissioner of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 13—1975

Dear Commissioner Schaub:

You have requested an opinion as to the legality of a State chartered savings and loan association issuing negotiable orders of withdrawal (hereinafter referred to by the popular acronym "NOW"). A NOW allows a depositor to transfer funds from his account to a third party via withdrawal orders in negotiable form (NOWs) without requiring the depositor or his representative to appear at the bank's offices. The NOW is an unconditional order to the bank signed by the drawer/depositor to pay a specified sum payable to order and on demand, and possesses the attributes of negotiability required by the Uniform Commercial Code, N.J.S.A. 12A:3-104 (1). *Consumers Savings Bank v. Commissioner of Banks,* 282 N.E. 2d 416 (Sup. Jud. Ct. Mass. 1972). The NOW account thus operates on much the same basis as a conventional checking account. For the following reasons, you are advised that State chartered savings and loan associations may not issue NOWs on either interest bearing or interest free accounts.[1]

A statement of relevant background is important to place the issue in the proper perspective. The proposal to create this new type of account was first made by the Consumer Savings Bank in Massachusetts in July of 1970. The Massachusetts Commissioner of Banks denied approval of the proposal. In May of 1972, the Supreme Judicial Court of Massachusetts overruled the Commissioner, holding that the Massachusetts banking statutes allow the savings banks to permit its depositors to make withdrawals via NOWs. *Consumers Savings Bank v. Commissioner of Banks, supra.* Subsequently, NOW accounts were introduced in savings banks in New Hampshire as well as in Massachusetts, but had spread no farther than these two states, due in part to certain exemptive language found in the regulations promulgated by the Federal Deposit Insurance Corporation.[2]

In August of 1973, Congress enacted legislation restricting the use of interest bearing NOW accounts to the states of Massachusetts and New Hampshire. 12 U.S.C.A. § 1832 provides as follows:

> "(a) No depository institution shall allow the owner of a deposit or account on which *interest or dividends are paid* to make withdrawals by negotiable or transferable instruments for the purpose of making transfers to third parties, except that such withdrawals may be made in the States of Massachusetts and New Hampshire.
>
> "(b) For purposes of this section, the term 'depository institution' means -
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> * * *
>
> "(6) any . . . savings and loan association organized and operating according to the laws of the State in which it is chartered or organized, ..."

No limitation was enacted on the issuance of NOWs drawn on interest free accounts.[3]

The issue consequently posed is whether a State chartered savings and loan association may issue NOWs on interest free accounts under the applicable provisions of the New Jersey Savings and Loan Act of 1963, N.J.S.A. 17:12B-1 *et seq.*[4] It is initially clear that a savings and loan association has only such powers and rights with respect to types of withdrawals as are granted to it by statute. *Rodrock v. Materialman's Building & Loan,* 126 N.J. Eq. 457 (Ch. 1939), reargument den. 128 N.J. Eq. 72 (Ch. 1940). In this instance, the Act does not grant either express or implicit authority to a savings and loan association to issue NOWs.

N.J.S.A. 17:12B-133 does not appear to authorize interest free accounts, a prerequisite for NOW accounts consistent with 12 U.S.C.A. § 1832. That section provides, *inter alia*, that

> "The board of an association may classify savings deposits and savings accounts as to notice, amount and term, and may determine to pay different rates of earnings with respect to savings deposits and savings accounts in different classes. All accounts of the same type and class shall be paid the same rate of earnings. Such earnings of dividends may be described as interest."[5]

A review of the legislative history of N.J.S.A. 17:12B-133 discloses that it was not intended to permit interest free, demand accounts. This section originated in L. 1925, c. 65, sec. 67, which first established "reward profit plans," under which additional interest or reward was paid to regular depositors of building and loan associations. The section was carried forward in the Revised Statutes, R.S. 17:12-16, in 1937, the Savings and Loan Act of 1946 and the further revision now known as Section 133 of the Savings and Loan Act (1963). The 1963 Act read that accounts eligible for the reward profit "may be classified as to type and the reward profit may be a different rates for different classes of accounts . . . ." L. 1963, c. 144, sec. 133. The section was further revised by L. 1969, c. 28, sec. 3, but the intent remained the same, *i.e.*, to permit classification of accounts for purposes of promoting an effective reward or bonus plan for conscientious savers, not to allow interest free demand accounts.[6]

Likewise, N.J.S.A. 17:12B-130(a) cannot be deemed to authorize interest free checking accounts. Said statute provides:

> "At least annually and after determination of the net income for the accounting period and the establishment of reserves required or permitted by this act, the board of such State association shall determine by resolution, the rate or rates of dividend, if any, which shall be declared for each class of account. Such dividends shall be taken only from the net income or from the undivided profits accounts . . . ."

The language of the above quoted section clearly relates the rate of dividend to the availability of net income and reserves, implying that if there is sufficient net income and reserve, there should be dividends paid on the account.

In a recent analogous case, the New York Supreme Court, Appellate Division, struck down regulations issued by the Superintendent of the Banks of the State of New York permitting New York savings banks to offer NOW accounts. *N.Y. State Bankers Assn. et al v. Albright*, 46 App. Div. 2d 269, 361 N.Y.S. 2d 949 (App. Div. 1974). The court, in striking down the regulations, engaged in an historical analysis of the functional distinctions between commercial banks and savings institutions and, after analyzing provisions of the New York State Banking Law allowing for withdrawal without passbook, concluded that the Superintendent of Banks was without statutory authority to promulgate regulations permitting NOW accounts. The court concluded that such a fundamental change from the traditional functions of savings banks should be brought about through legislation and not by administrative fiat. The same conclusion is warranted with respect to the right of New Jersey savings and loan associations to offer NOW accounts, since in New Jersey the power to maintain accounts subject to withdrawal by check has traditionally been exercised only by (commercial) banks and savings banks.

For the reasons expressed above, it is our opinion that State chartered savings and loan associations do not have the authority under the Savings and Loan Act of 1963 to offer NOW accounts.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

BY: MICHAEL E. GOLDMAN
Deputy Attorney General

1. Federal Savings and Loan Associations are prohibited from issuing NOWs. 12 U.S.C.A. § 1464(b)(1).
2. 12 C.F.R. § 329.0 *et seq.*
3. In response to this legislation, the three major federal banking regulatory agencies—Federal Reserve Board, the Federal Deposit Insurance Corporation and the Federal Home Loan Bank Board—have issued regulations dealing with NOW accounts. For an analysis of the current status of NOW accounts under 12 U.S.C.A. § 1832 and pertinent regulations, see Kaplan, *Federal Legislative and Regulatory Treatment of NOW Accounts*, 91 Banking Law Journal 439 (1974); Riordan, *NOW Accounts: A Legal Analysis*, 40 Legal Bulletin 1 (1974).
4. There were two bills introduced in the Legislature to expressly grant savings and loan associations the power to provide for accounts which would be subject to withdrawal by check, draft or other negotiable order. A-2306 was defeated in committee on January 23, 1975. A-2325 was defeated in the General Assembly and held over for future consideration on April 7, 1975 and again on May 5, 1975.
5. It has been stated that the right of savings banks to offer checking accounts is incident to the power of savings banks to maintain classes of depositors and to regulate interest according to class. *Hudson Co. Nat'l Bank v. Provident Inst. for Savings*, 80 N.J. Super. 339, 356 (Ch. Div. 1963), aff'd 44 N.J. 282 (1965). However, the precedential value of the *Hudson* case is questionable. The court in that case put primary reliance on the fact that savings banks had been offering checking accounts to their depositors for at least 20 years before the enactment of the Banking Act of 1948, N.J.S.A. 17:9A-1 *et seq.*, under which savings banks are organized, and that said practice had been condoned by the Department of Banking and Insurance. The offering of checking accounts was thus within the usual custom of savings banks and therefore within the powers conferred by N.J.S.A. 17:9A-26(1). In the case of savings and loan associations, there has been no similar customary practice to offer checking to their customers.
6. The statement attached to the bill, which was enacted as the 1969 amendment, states in pertinent part as follows:

> "This act. . .authorizes State chartered associations to classify their accounts as to amount and term in the same manner authorized by federally chartered associations by the Housing Act of 1948 and the regulations of the Federal Home Loan Bank Board."

In view of the fact that Federal Savings and Loan Associations are prohibited from issuing NOW accounts (12 U.S.C.A. § 1464(b) (1)), this amendment can hardly be used to support the contention that New Jersey associations can issue NOW accounts.

June 23, 1975

WILLIAM L. JOHNSTON
Acting Executive Director
New Jersey Housing Finance Agency
3535 Quakerbridge Road
Trenton, New Jersey

FORMAL OPINION NO. 14–1975

Dear Mr. Johnston:

You have asked for an opinion as to whether the New Jersey Housing Finance Agency (hereinafter "HFA") is empowered to finance housing projects which are fully constructed and occupied in instances where no rehabilitation is contemplated. You are hereby advised that the HFA does not have the statutory authority to provide financing, by mortgage loans or otherwise, to qualified sponsors of a fully constructed and occupied housing project. Such housing projects are solely eligible for HFA financing for rehabilitation, where appropriate, within the meaning of the act.

A reading of the statute in its entirely, including its history, demonstrates that the Legislature did not intend to authorize the HFA to make mortgage loans or other advances for fully constructed and completed housing projects; but rather to encourage through financial assistance the construction of new projects or the completion of projects in various stages of construction. The HFA was established by the New Jersey Housing Finance Agency Law of 1967, Laws of 1967, c. 81., N.J.S.A. 55:14J-2 *et seq.* The introductory policy declaration to the Act notes that there is a need in this State for the construction of new facilities and the rehabilitation of existing housing at rentals available for families of moderate means; and that a public agency has been created to accomplish the foregoing objectives through the use of public financing, loans and other financial assistance. N.J.S.A. 55:14J-2.

After establishing the HFA to administer the Act, the Legislature, in defining the scope of its responsibilities, used language clearly compatible with its declaration to allow for the use of public financial assistance for new construction of moderate income housing. The language of the Act clearly puts the emphasis on contemplated construction throughout the entire statutory framework. Housing projects are defined in part by N.J.S.A. 55:14J-3(g) to mean: "any work or undertaking, whether new construction or rehabilitation, which is designed for the primary pur-