BUILDING AND LOAN: Salesmen of "securites" for (1) State chartered B. & L. associations, (2) B. & L. Associations or Savings & Loan Associations, incorporated under laws of United States, and (3) B. & L. associations or Federal Savings & Loan Associations incorporated under laws of other states, operating in Missouri, must be licensed; (4) penalty for violation.

September 13, 1935.

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Hon. Ira A. McBride
Supervisor
Bureau of Building & Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge your letter of recent date, asking our opinion concerning Paragraph "(c)" of Section 5628a, Laws of Missouri, 1935, page 195.

You inquire:

> "Does the definition of 'Building and Loan security' or "Building and loan securities", as set forth in article 'c' of the hereinabove mentioned statute, apply alike and without discrimination to --
>
> First: All state chartered building and loan associations incorporated under Missouri laws, operating in Missouri.
>
> Second: All federal savings and loan associations incorporated under the laws of the United States operating in Missouri.
>
> Third: Any building and loan association or federal savings and loan association incorporated under the laws of any other state, whose home office is in some other state but which does business in this state."

I.

Salesmen of State chartered building and loan associations' "securities" must be licensed.

Please refer to our opinion dated September 10, 1935, to you, wherein we had under consideration the classification of "salesmen" as defined in the Act.

Paragraph "(c)" of Section 5628a, Laws of Missouri, 1935, page 195, reads as follows:

> "'Building and loan security' or 'building and loan securities' shall include stock, scrip and any other certificate or certificates of interest which have been, are now being or shall hereafter be issued by any building and loan association, or savings and loan associations incorporated under the laws of this state or of the United States or incorporated under the laws of any other state and licensed to do business in this state."

Before any building and loan "securities" may be sold in the State of Missouri by any salesman of said association, said salesman must be licensed as provided by Paragraph "(d)", Section 5628, supra (See our opinion to you, supra).

From the above it is our opinion that persons "selling" securities of a state chartered building and loan association must be licensed.

II.

Federal Savings and Loan Associations, incorporated under the laws of the United States and operating in Missouri, must also have their salesmen licensed if the stock of such associations is sold in Missouri.

It is to be noted that Paragraph "(c)", supra, specifically provides that stock or securities of "any building and

loan association or savings and loan associations incorporated under the laws of this state or of the United States" issued or sold in this State, are subject to the provisions of the Act, which means that the salesmen of such stock of any building and loan association or savings and loan association, incorporated under the laws of the United States, shall be licensed. In other words, the Legislature has recognized that Missouri has building and loan associations which are "Federalized" and it was its intention to have the salesmen of the stock of said associations licensed. We believe that the Legislature in the exercise of the police powers of the State can impose an excise or occupational tax on persons selling stock of a building and loan association incorporated under the laws of the United States, for the reason that said salesmen are not engaged in a governmental agency of the United States.

In Kansas City, Mo., v. Johnson et al., 70 Fed. (2d) 360, the Circuit Court of Appeals, Eighth Circuit, in deciding a case involving the right of Kansas City, Missouri, to collect a gasoline tax against a receiver appointed by the Federal Court, said the following (page 361):

> "Federal receivers authorized to conduct and carry on the business of a corporation as a going concern as such are not exempt from the payment of taxes legally assessed and levied against them by city ordinance or state laws. The Supreme Court of the United States in Michigan v. Michigan Trust Company, Receiver, 286 U. S. 334, loc. cit. 346, 52 S. Ct. 512, 515, 76 L. Ed. 1136, speaking through Mr. Justice Cardozo, said:
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> 'To protect through a receiver the enjoyment of the corporate privilege and then to use the appointment as a barrier to the collection of the tax that should accompany enjoyment would be an injustice to the state and a reproach to equity.'"

In Broad River Power Co. v. Query, 77 L. Ed. 685, 288 U. S. 178, the Supreme Court of the United States, having

before it for determination a suit to restrain the enforcement of a statute of South Carolina imposing a tax on the production and sale of electric power because said power company was granted a license by the Federal Power Commission under the Federal Power Act, held, in answer to the attack made upon said statute by the power company that it was a tax imposed upon an agency of the United States, the following:

> "The separate complaint of the Lexington Water Power Company is that it is generating current at a water power plant, on the Saluda river, which was constructed and is operated pursuant to a license granted by the Federal Power Commission under the Federal Water Power Act (U.S.C. title 16, chap. 12) and hence that the tax is an 'excise, license or privilege tax' upon a Federal agency.
>
> "It is apparent, however, that the complainant in generating and selling power is not acting as an agent for the Government. It acts with the Government's permission, and while it may be said to have received a privilege from the Government, it is not a privilege to be exercised on behalf of the Government. The tax is not upon the exertion of, and cannot be said to burden, any governmental function. Fox Film Corp. v. Doyal, 286 U. S. 123, 130, 76 L. ed. 1010, 1015, 52 S. Ct. 546. The tax is not laid upon the license granted by the Federal Water Power Commission but upon the production and sale of power which the company generates at its own pleasure and exclusively for its own profit. Notwithstanding the special characteristics of electrical energy, the company is engaged in producing and selling an article of trade. Utah Power & Light Co. v. Pfost, 286 U. S. 165, 180, 181, 76 L. ed.

> 1038, 52 S. Ct. 548. The product is property. The fact that a privilege has been received from the Federal Government does not exempt that property or the local business in producing and selling it from the burdens of taxation otherwise valid. * * * * * * * * * * Thus, the 'permissive grant' by the Federal Government to a telegraph company to use the military and post roads of the United States for its poles and wires 'did not prevent the State from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the State.'"

In Federal Compress and Warehouse Company v. McLean, 78 L. Ed. 622, 291 U. S. 17, the Supreme Court of the United States, in an opinion delivered by Mr. Justice Stone, held that a state excise tax of Mississippi, imposed upon a Delaware corporation doing business by virtue of a license issued by the United States Warehouse Act, did not violate the Federal Constitution or was not an imposition upon a Federal instrumentality, having the following to say (page 627):

> "Appellant's license under the United States Warehousing Act did not confer upon it immunity from state taxation, for neither the appellant nor its business was, by force of the license, converted into an agency or instrumentality of the federal government. The Warehousing Act confers upon licensees certain privileges and secures to the national government, by means of the licensing provisions, a measure of control over those engaged in the business of storing agricultural products who find it advantageous to apply for the license. The government exercises that control in the furtherance of a governmental purpose to secure fair and

> uniform business practices. But the appellant, in the enjoyment of the privilege, is engaged in its own behalf, not the government's, in the conduct of a private business for profit. It can no longer be thought that the enjoyment of a privilege conferred by either the national or a state government upon the individual, even though to promote some governmental policy, relieves him from the taxation by the other of his property or business used or carried on in the enjoyment of the privilege or of the profits derived from it. (Cases cited)
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> "The fact that the license is used also as a means of government control of appellant's business does not call for a different conclusion. The national government has not assumed to tax the business or to exercise any control over the taxation of it by the state. The state does not tax the license itself and the tax upon petitioner's business, applied without discrimination to all similar businesses whether licensed or not, does not impair the control which the federal authority has chosen to exert. The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy."

Building and loan associations incorporated under the Home Owners' Loan Act of 1933, are engaged in business solely for profit and gain. And the fact that such derive their entity by virtue of the Laws of the United States and are supervised and regulated by an instrumentality of the United States, does not, in our opinion, make such building and loan associations agencies or instrumentalities of the United States, especially as concerns the license

placed upon salesmen selling the "securities" of said Federalized building and loan associations.

It is our opinion that a salesman selling "securities" of a building and loan association or savings and loan association, incorporated under the laws of the United States, must be licensed in order to sell the "securities" of such association in the State of Missouri.

III.

Building and Loan Associations or Federal Savings and Loan Associations, incorporated under the laws of other states, selling "securities" and doing business in this State, must have its salesmen licensed.

It is our opinion, in view of the act to regulate sale of and dealings in building and loan "securities," and particularly Paragraph "(c)", supra, that any building and loan association, incorporated under the laws of any other state and licensed to do business in this State, must likewise have its salesmen licensed if the "securities" of said association are sold or offered for sale in this State.

IV.

Penalty.

We invite your attention to Section 5629g, Laws of Missouri, 1935, page 200, which provides a penalty for any violation of the provisions of said act, making such violators amenable to punishment by imprisonment in the county jail or payment of a fine, or both.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General