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BANKS: Agencies for insurance.

State chartered banks may be licensed to sell credit life insurance in the state of Michigan. Employees of federally or state chartered banks may receive limited licenses to sell credit life insurance.

ADMINISTRATIVE RULES: Amendment of

Existing administrative rules may not be amended by unpublished administrative guidelines which do not have the force of law.

LEGISLATURE: Revocation of administrative rules.

Committees of the House of Representatives do not have the authority to revoke a published administrative rule. Administrative guidelines which are unpublished and do not have the force of law need not be revoked by committee action.

No. 4614 April 4, 1968.

Hon. George H. Edwards
House of Representatives
Lansing, Michigan

You have requested my opinion on the following seven questions:

1. Is the Insurance Department permitted by law or through the Administrative Code to license banks as insurance agents?

2. May the Insurance Department license bank employees to sell any type of insurance?

3. Whether the insuring company working with a bank may pay any money to the bank for services rendered in behalf of the sale of insurance.

4. What is the legal status of "Guidelines" (copy attached) as used in conjunction with a recent memo issued by the Department of Commerce in comparison to Administrative Rules? How effective are "Guidelines"?

5. Interpreting the sections of the Administrative Code relative to agents selling credit life insurance, are the provisions of paragraph numbered 3 in the recent "Guidelines" issued by the Department of Commerce legal?

6. In the sections of the Administrative Code having to do with agents selling credit life insurance, what is the definition of the word "remuneration" in comparison with the word "reimbursement"? What specifically is the difference in the meaning of the two words?

7. Does any committee of the House of Representatives, whether it be a standing committee, one appointed as a result of a resolution, or a sub-committee of a standing committee, have the right to revoke an administrative ruling, a "Guideline," or do any of these committees have the right to request the "Guideline" or implementation to rulings as they appear in the 1944 Code be withdrawn?

In response to your request, it is necessary to consider the insurance code of 1956,[1] and regulations, in order to determine whether banks would
M.S.A. 1957 Rev. Vol. § 24.1100, et seq.
qualify for agency licenses, and to consider the financial institutions act and the national bank act in order to determine whether banks have powers, either express or incidental, to act as insurance agents.

A. The Insurance Code and Regulations.

Pertinent parts of the insurance law before the adoption of the insurance code of 1956 were:

Section 8 of chapter III, part two of the 1917 insurance code (Act 256, P.A. 1917, as amended, being C.L. 1948 § 513.8), which prohibited "controlled business," provided:

> "The commissioner of insurance shall have power after a hearing to refuse to grant any license requested under the provisions of this subdivision should he be satisfied that the person, partnership or corporation for whom the requisition is made is not *a proper or fit person, partnership or corporation* to be permitted to transact such business within this state. *In order to prevent indirect rebating of insurance premiums the commissioner of insurance shall likewise have power after a hearing to refuse to grant any license to a partnership or corporation if he be satisfied that the partnership or corporation* was organized or is existing or *is availed of for the purpose, among others, of writing insurance* for the members of the partnership, stockholders of the corporation or *for persons,* partnerships or corporations *represented by* said members or stockholders. * * *." (emphasis supplied)

and section 9a of chapter IV, part two of the 1917 insurance code was added in 1947 by Act 67, being C.L. 1948 § 514.9a, provided:

> "Henceforth *it shall be illegal* for any person, firm or corporation *to require, as a condition precedent to the lending of money or* extension of credit, or any renewal thereof, *that the person to whom such money or credit is extended, or whose obligation said creditor is to acquire or finance, negotiate any policy or contract of insurance through a particular insurance agent or with a particular insurer*: Provided, however, That this section shall not be construed as forbidding the vendor or creditor from exercising a reasonable right to approve or disapprove the insurance selected by the debtor for protection of the property securing the credit or lien: Provided further, That nothing in this section shall forbid any insurer from requiring as a condition precedent for the lending of its own funds that the debtor insure his own life for a reasonable amount with such insurer. * * *." (emphasis supplied).

The insurance code of 1956 expressly repealed the above provisions of the 1917 code. However, these same provisions were adopted substantially by the insurance code of 1956, supra, specifically as section 1426 and section 2077 thereof.

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[1] Act 218, P.A. 1956, as amended, being C.L.S. 1961, §§ 500.100, et seq.;

Although the insurance commissioner was not expressly given general rulemaking powers until 1966 when section 210 was added to the insurance code of 1956 by Act 73, P.A. 1966, being M.S.A. 1968 Cum. Supp. § 24.1210, he did, prior to 1943, promulgate rules covering "controlled business," which rules were incorporated into the 1944 Administrative Code pursuant to section 2 of Act 88, P.A. 1943, being C.L. 1948 § 27.72; M.S.A. 1960 Rev. Vol. § 3.560(8). This section was later repealed by Act 161, P.A. 1964.

It must also be observed that Act 173, P.A. 1958, being C.L.S. 1961 § 550.601, et seq; M.S.A. 1968 Cum. Supp. § 24.568(1), provides for the regulation of credit life insurance. Section 19 of the act requires that all policies of credit life insurance shall be issued only by an insurance agent authorized to do business in Michigan and shall be issued only through holders of licenses or authorization issued by the commissioner. In section 22 the legislature has conferred express authority upon the commissioner of insurance to promulgate rules and regulations as he deems appropriate for the supervision of the act.

There is authority to support the legal proposition that an administrative agency has implied power to adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of the power expressly granted. *California Drive-In Restaurant Association, et al v. Clark, et al,* 140 P 2d 657 (Cal. 1943). This holding of the California Supreme Court was quoted and adopted by the Michigan Supreme Court in *Ranke v. Corporation & Securities Commission,* 317 Mich. 304 (1947), and *Coffman v. State Board of Examiners in Optometry,* 331 Mich. 582 (1951).

Thus it must be concluded that the commissioner of insurance promulgated the following rules and regulations pursuant to implied authority conferred by the legislature as being necessary to the due and efficient exercise of the express power to license insurance agents. However, since the insurance commissioner has express statutory authority to promulgate rules and regulations, it may be desirable for him to re-adopt the rules so as to remove any doubt as to their validity.

Two of the rules which were thus adopted by the commissioner were those dealing with "controlled business," and "limited licenses," respectively (regulation 501.4 and regulation 501.6), which provide as follows:

"R 501.4 * * *

"In view of the insurance law which authorizes the commissioner of insurance to issue a license to an applicant as an insurance agent or solicitor, it has been established as a rule of this department that no person, firm or corporation can qualify for license to act as an insurance agent or solicitor for the purpose of writing insurance and obtaining commission on those risks within his control, and no license will be issued to an agent whose own business and that of his relatives, employers and business associates or affiliates, all combined, exceeds 15% of his total business written.

"Any person, firm or corporation to qualify as a proper person for license will be required to devote a substantial portion of his time to the active solicitation of insurance and comply with the insurance

law. Such amount of time will be determined by the commissioner of insurance.

*"If the application of this regulation appears impracticable when applied to cases in cities of 5000 population or less, the same may be modified upon petition submitted to the commissioner of insurance with all facts relating thereto. * * *."* (emphasis supplied).

"R. 501.6. *Licenses will be issued to employees of banks and other financial institutions for the purpose of taking applications and collecting premiums on individual policies of credit life insurance, which policies are issued co-extensively with the making of the loan by the financial institution employing such licensee:* Provided, That the authority of such licensee shall be limited to the sale of the form of insurance and in the manner above described: *And provided further, That such licensed employee of the financial institution shall receive no commissions or other remuneration for the taking of the applications and/or the collection of premiums nor shall any remuneration be paid to the financial institution employing the said licensee: And provided further, That the said licensed employee of the financial institution shall be a sub-agent of a duly licensed resident agent of the company issuing the credit life insurance policies, which agent shall be devoting his full time to the insurance business."* (emphasis supplied).

B. The National Bank Act and the Michigan Financial Institutions Act.

With respect to national banks, Congress has enacted legislation expressly empowering national banks in places with population not exceeding 5000 inhabitants, to act as agent for any fire, life or other insurance company authorized by the authorities of the state in which such bank is located. 12 U.S.C.A. § 92.

This section of law was enacted by the Congress on September 7, 1916 and is found in 39 Stat. 753. A study of its legislative history thereafter indicates that on April 5, 1918 this section was revised and the provision authorizing banks in places with a population of 5000 inhabitants or less to solicit and sell insurance was deleted. 40 Stat. 512.

Subsequently the case of *Georgia Association of Independent Insurance Agents, Inc., et al v. Saxon,* 268 Fed. Supp. 236 (1967), was decided[2] and held that 12 U.S.C.A. § 92, by providing banks in any place where the population does not exceed 5000 inhabitants may act as insurance agents, impliedly prohibits banks in places of more than 5000 inhabitants from acting as insurance agents. It does not appear from a reading of this case that the action of Congress in 40 Stat. 512 was brought to the attention of the court and made an issue in the case.

In another case the Supreme Court of Appeals of Virginia in *Marshall National Bank & Trust Co. v. Corder,* 194 S.E. 734 (Va 1938), held that, as said section 92 expressly authorizes national banks in small places to act as agents for insurance companies, a contract of a national bank in a village to procure insurance is not *ultra vires.*

While the law is unclear whether or not a federal bank has power to act as an agent for an insurance company, the question presented is of

[2] We understand that the decision has been appealed.

no moment since section 1424 of the insurance code of 1956, supra, permits only Michigan corporations to be insurance agents which eliminates federally chartered banks from consideration, nor could such federally chartered banks be licensed under section 1440 of the insurance code of 1956, supra, as non-resident agents in that they would not be a resident of another state.

In the case of *Washington Agency, Inc. v. Commissioner of Insurance,* 309 Mich. 683 (1944), the Michigan Supreme Court upheld the revocation of an insurance agent's license issued to a Michigan corporation which was affiliated with a national bank and thus prohibited the national bank from doing indirectly what it cannot do directly.

There is no express prohibition in the Michigan financial institutions act, being Act 341, P.A. 1937, as amended; C.L. 1948 § 487.1, et seq.; M.S.A. 1957 Rev. Vol. and 1968 Cum. Supp. § 23.71, et seq., against a bank or its officers and employees being licensed as insurance agents. Neither is there an expressed power for them to be so licensed.

Section 33 of the Michigan financial institutions act (C.L. 1948 § 487.33; M.S.A. 1968 Cum. Supp § 23.761), enumerates the powers of a state bank, and in paragraph seventh empowers the bank

> "To exercise by its board of directors or duly authorized officers or agents, subject to law, *all such incidental powers as shall be necessary to carry on the business of banking;* by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, *and by loaning money on the security of real estate or personal property.* * * *. (emphasis supplied).

Substantial similar language is found in paragraph seventh of section 5136 of the Revised Statutes of the United States, which section governs national banks. 12 U.S.C.A. § 24.

C. Incidental Powers.

Section 33 of the Michigan financial institutions act, supra, empowers banks to exercise "all such incidental powers as shall be *necessary* to carry on the business of banking."

The word "necessary" was defined in the case of *Moran v. State Banking Commissioner,* 322 Mich. 230, 245 (1948), where the court quoted from the case of *M' Culloch v. Maryland,* 4 Wheat 316 (1819), as follows:

> "Concerning the import of the word 'necessary' as used in the Federal Constitution [art. 1, § 8] at p. 413, he (Chief Justice Marshall) said:
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> " 'It is true, that this (indispensable) is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. * * *. It is essential to just construction, that many words

> which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. * * *.'"

The U. S. Comptroller of the Currency has issued an opinion (Par. 9700 of the Comptroller's Digest of Opinions) to the effect that national banks, as an incidental power, may provide travel services for their customers and may act as travel agents charging fees therefor. Many banks have been in the business of travel bureaus for many years and this opinion of the Comptroller has recently been reconfirmed in a letter from the Comptroller dated February 27, 1963, reported at Par. 93, 701, CCH, Federal Banking Law Reporter (Transfer Binder 1960-66), which points out that a bank, as an incidental power, may not only operate such a travel department in the interest of furnishing its existing customers but also may advertise, develop and extend the services for the purpose of attracting new customers.

In Par. 58,701, 3 CCH, Federal Banking Law Reporter, "incidental powers" are discussed as follows:

> "Incidental powers exist only to carry into effect such powers as are granted. The following acts have been construed as being included within the incidental powers of a national bank: Assignment of assets and liabilities to a going bank; assumption of the assets and liabilities of another bank; attachment of a shareholder's stock for a debt owed by him; advancement of funds to a failing bank in consideration for a transfer of stock; making of loans and discounts; purchase of notes, drafts and other commercial paper, since the right to 'discount and negotiate' has been held to include the right to buy; engagement in the safe deposit business; execution of contracts to pay commissions to agents and to share profits and losses with a bond expert on bonds purchased on his advice; employment of attorneys: formation of a clearing house; creation of a pension fund by shareholders; purchase of notes at less than face value; rediscounting of bills receivable; and receipt of special deposits. On the other hand, incidental powers have been construed not to include the power to: Acquire a 99-year lease from another national bank to secure payment of the latter's liabilities; engage in buying and selling cotton on the market to increase the deposits in the bank; buy bonds under a contract to resell at the same or a lower price; act as broker in negotiating a loan; or to act as guarantor or accommodation indorser unless the bank is to derive some benefit."

In *Webster v. Jossman*, 199 Mich. 98 (1917), the court held that a savings bank is a creature of the statute and has the powers expressly granted to it and such as are fairly *incidental thereto*. See also, 10 Am. Jur. (2d), "Banks," § 270; 9 Corpus Juris Secundum, "Banks and Banking," § 157.

First National Bank in St. Louis v. State of Missouri at the Information of Barrett, Attorney General, 263 U.S. 640 (1924), held that an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted.

The Banking Commissioner of Michigan has permitted state banks to provide data processing services to their customers on a fee basis as an "incidental power" necessary to carry on the business of banking.

Based upon the foregoing:

In answer to your first question, it is my opinion that the Insurance Bureau is not prohibited by statute from licensing state chartered banks as insurance agents to sell credit life insurance by promulgating a regulation authorizing agency licenses for banks. I believe that taking applications and collecting premiums with respect to credit life insurance policies is an incidental power necessary to carry on the business of banking. These policies, however, must be issued co-extensively with the making of the loan by the bank.

In answer to your second question, my opinion is that Rule 501.6 is a valid rule and permits the licensing of federally and state chartered bank employees under the conditions prescribed in the rule to sell credit life insurance.

In answer to your third question, an insurance company may not pay any money to an unlicensed bank for services rendered in the sale of insurance by an employee licensed pursuant to Rule 501.6.

Your next inquiry is as to the legal status of the "Guidelines" issued by the Insurance Bureau on September 1, 1967 in comparison to administrative rules. These "Guidelines" are entitled "Marketing and Administration of Individual Mortgage Life and Disability Insurance Policies Through Mortgage Institutions." The Insurance Bureau, in the second paragraph of the Guidelines, states:

> "The following guidelines are established by the Insurance Bureau to provide direction to those insurers participating in these programs. It is expected that these guidelines will be adhered to until such time as rules and regulations can be promulgated by the Commissioner in accordance with the provisions of Act 88 of the Public Acts of 1943, as amended, or related legislation is enacted."

This office issued an exhaustive opinion dealing with the question of the legal status of a guideline (O.A.G. 4601, issued October 20, 1967). I distinguished in that opinion between procedural rules, legislative rules and interpretive rules. Tersely stated guidelines or interpretive rules do not have the force of law and are not subject to the provisions of Article IV, Section 37 of the Michigan Constitution of 1963, and Act 88, P.A. 1943, as amended. Administrative rules, by contrast, which include legislative and procedural rules, have legal force, while interpretive rules are merely the agency's opinion of the meaning of a statute or properly adopted administrative rule. The language of the second paragraph of the Guidelines indicates that it was the intention of the Insurance Bureau that the Guidelines be legislative in nature rather than simply interpreting existing published administrative rules. Any attempt to exercise the legislative rule-making power by this means is ineffective.

You also inquire as to the legality of Guideline 3 issued by the Insurance Bureau on September 1, 1967. That Guideline reads as follows:

> "The Michigan Administrative Code provides in substance that the insurer may agree to reasonably reimburse the institution for administrative services performed in connection with such plans of insurance. On the basis of information submitted and reviewed by this Bureau it has been determined that a reasonable reimbursement for expenses directly incurred by the mortgage institution for services performed in connection with such plans shall not exceed 50 cents per month per policy. No other compensation, direct or indirect, shall be paid to the institution as a result of the solicitation, issuance or administration of such policies. A disability rider or provision in a life insurance policy shall not be deemed a policy for purposes of computing an expense reimbursement."

The first sentence of this Guideline undoubtedly refers to R 501.52(2), Michigan Administrative Code of 1954, page 6906, which provides with regard to group insurance policies as follows:

> "Wherever the insurer proposed to compensate the employer or other policyholder, or anyone else other than the insurer's usual representatives, for recordkeeping, claim adjustment, or other services, in connection with any contract of group insurance, such agreement or arrangement must first be submitted to the department for approval; and such supporting information as to the bona fide of the arrangement as the department may require shall be supplied before its inception and during its continuance."

There is no comparable provision in the Administrative Code providing compensation to financial institutions which solicit applications for individual credit life insurance policies. The lack of such provision, coupled with the language of R 501.6 quoted above which prohibits the financial institution from receiving any remuneration, indicates that the provisions of the Administrative Code presently prohibit any payments to financial institutions with reference to individual policies of credit life insurance. The proposed Guideline appears to sanction payments to financial institutions for solicitation of individual credit life insurance policies. The rationale for this sanction appears to be an attempt to distinguish between remunerating and reimbursing the financial institution. If it were intended that the financial institutions could not be remunerated but could be reimbursed, such an exception would have been spelled out and reimbursement specifically permitted as in the case of employers in group life insurance policies under R 501.52(2).

Therefore, the proposed Guideline does not properly interpret existing administrative rules but, instead, attempts to amend existing rules through the addition of proposed Guideline 3.

With respect to your next question, which is the distinction between the words "remuneration" and "reimbursement," as used in the Administrative Code, the term "remuneration" is not defined in the insurance code. "Remuneration" is defined in 76 Corpus Juris Secundum, page 1162, as:

> "A return for services; something paid for services rendered, quid pro quo. It has been held to be synonymous with, or equivalent, to wages."

Conversely, 76 Corpus Juris Secundum defines "reimbursement" at page 618 as meaning "to secure a return or restoration of an equivalent for something paid or expended." It is possible to reimburse an employee without remunerating him. For example, a state employee who is reimbursed for his travel expenses has not been remunerated under the definition in the Michigan Employment Security Act, or under most uses of the term "remuneration." However, as pointed out above, the proposed Guideline attempts to amend existing administrative rules rather than simply interpret such rules; and although it qualifies the payments to be made to financial institutions as reimbursement rather than remuneration, it would be necessary to promulgate an administrative rule in order to bring about an obvious amendment to the Administrative Code.

Your last question asks whether any committee of the House of Representatives has the right to revoke a properly promulgated and published administrative rule or an unpublished interpretive guideline. Specifically, your question concerns the administrative rules which were originally adopted in 1944 and made a part of the administrative rules of the Insurance Department in the publication of the 1954 Administrative Code.

This office has issued a comprehensive opinion on this very question (O.A.G. 1958, No. 3352, p. 246). For the purposes of your question, that opinion concluded that it would be necessary for the legislature to repeal a properly promulgated and published administrative rule through legislative act by the bill process.

With regard to the withdrawal of the guideline, as stated above, a guideline is simply an administrative interpretation of existing statutes and published administrative rules with no force of law. Such guidelines do not represent the exercise of a legislative or quasi-legislative function and the authority for their issuance is not derived from any statute. Specifically answering your question, a legislative committee would not have the power to require an administrative body to withdraw guidelines which are simply administrative interpretations.

FRANK J. KELLEY,
Attorney General.