

OPINION NO. 96-020**Syllabus:**

The Director of Commerce may not act on behalf of the Superintendent of Financial Institutions in negotiations that arise during the course of executing and enforcing the laws relating to savings and loan associations or liquidating a savings and loan association.

To: Richard G. Ward, Inspector General, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, April 10, 1996

One of your predecessors requested an opinion concerning the authority of the Director of Commerce ("Director") to discharge the powers conferred upon the office of Superintendent of Savings and Loan Associations. Specifically, he wished to know whether the Director may act on behalf of the Superintendent of Savings and Loan Associations in negotiations that arise during the course of executing and enforcing the laws relating to savings and loan associations, or liquidating a savings and loan association.

I note initially that the General Assembly has abolished the office of Superintendent of Savings and Loan Associations, and created, in its stead, the office of Superintendent of Financial Institutions. Am. Sub. S.B. 162, 121st Gen. A. (1995) (eff. Oct. 25, 1995, with relevant provisions eff. Oct. 29, 1995). The office of Superintendent of Financial Institutions succeeds the office of Superintendent of Savings and Loan Associations, and assumes all functions, powers, duties, rights, privileges, obligations, and liabilities of the office of Superintendent of Savings and Loan Associations. Am. Sub. S.B. 162 (section 21, uncodified). As such, this opinion is prospective and will examine the relationship between the Director of Commerce and the newly created office of Superintendent of Financial Institutions ("Superintendent").

The office of Superintendent of Financial Institutions is created within the Department of Commerce pursuant to R.C. 121.04. The Superintendent is the chief executive officer of the Division of Financial Institutions,¹ R.C. 121.08(C)(2), and is responsible for administering the Division of Financial Institutions, R.C. 121.08(C)(1), enforcing the laws relating to banks, savings and loan associations, savings banks, and credit unions, R.C. 1125.02(A)(1); R.C. 1155.011(A)(1); R.C. 1163.02(A); R.C. 1733.32(A)(1), and liquidating banks, savings and loan

¹ Pursuant to R.C. 121.08(C)(1), as amended by Am. Sub. S.B. 162, the General Assembly has created the Division of Financial Institutions within the Department of Commerce. The Division of Financial Institutions "succeeds the Divisions of Banks, Savings and Loan Associations, Savings Banks, and Credit Unions, and assumes all functions, powers, duties, rights, privileges, obligations, and liabilities of the Divisions of Banks, Savings and Loan Associations, Savings Banks, and Credit Unions." Am. Sub. S.B. 162 (section 21, uncodified).

associations, savings banks, and credit unions, R.C. Chapter 1113; R.C. Chapter 1157; R.C. Chapter 1165; R.C. 1733.37.

Pursuant to R.C. 121.07, the Superintendent is under the general direction, supervision, and control of the Director, unless the context of R.C. 121.07 indicates otherwise. Similarly, except as provided in R.C. 121.07, all the powers conferred and duties imposed upon the Superintendent are to be construed as vested in the Department of Commerce, and the Department is authorized to exercise all the powers and perform all the duties vested in the Superintendent. R.C. 121.08(B).

However, R.C. 121.07 creates a specific exception to the Director's control over the Superintendent in the regulatory area. R.C. 121.07 states:

In performing or exercising any of the examination or *regulatory* functions, powers, or duties vested by law in the superintendent of financial institutions, the superintendent of financial institutions and the division of financial institutions are independent of and are not subject to the control of the department or the director of commerce. (Emphasis added.)

See generally R.C. 121.08(C)(3) (the Director is prohibited from transferring any of the functions from the Division of Financial Institutions). Accordingly, if the act of participating on behalf of the Superintendent in negotiations that arise during the course of executing and enforcing the laws relating to savings and loan associations, or liquidating a savings and loan association constitutes the performance or exercise of a regulatory function, power, or duty vested by law in the Superintendent, the Director may not act on behalf of the Superintendent in such negotiations.

There is no definition for the term "regulatory" in the Revised Code. It is a general rule of statutory construction that a term that is not specifically defined for purposes of a statute must be accorded its natural, literal, common, or plain meaning. R.C. 1.42. "Regulatory" is defined as "of or relating to regulation : making or concerned with the making of regulations : regulative." *Webster's Third New International Dictionary* 1913 (unabridged ed. 1993). "Regulate," in turn, is defined as "[t]o fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws." *Black's Law Dictionary* 1286 (6th ed. 1990). Therefore, while it can be said that the Director may exercise general authority over the Superintendent, in areas where the Superintendent has been given specific statutory authority to control, regulate, examine, or prescribe by rule, the Superintendent functions independently of the Director.

A review of the powers and duties of the Superintendent discloses that he is vested with sole authority to regulate savings and loan associations.² Pursuant to R.C. 1155.011(A)(1), the Superintendent is required to "see that the laws relating to savings and loan associations are executed and enforced." In discharging this responsibility, the Superintendent is authorized to conduct supervisory conferences to inquire into the actions or business practices of a savings and loan association. R.C. 1155.021. "If it appears to the superintendent that such actions or business practices are likely to cause harm to the association, its depositors, shareholders, or

² Prior to Am. Sub. S.B. 162, the Superintendent of Savings and Loan Associations was vested with sole authority to regulate and examine Savings and Loan Associations.

creditors, the superintendent may negotiate and conclude an agreement with the association, its officers, directors, employees, or controlling persons as to action that is to be taken by the association, its officers, directors, employees, or controlling persons to correct or prevent the actions or business practices which are the subject of the supervisory conference." R.C. 1155.021(B). The Supervisor is also authorized to take possession and liquidate a savings and loan association when he determines that the affairs of the savings and loan association are in an unsound or unsafe condition, that it is conducting its business in whole or in substantial part contrary to law, that it is failing to comply with the law, or that its affairs are not being conducted for the best interests of its depositors, shareholders, or creditors. R.C. 1157.02. If the Superintendent takes possession of the business and property of a savings and loan association for the purpose of liquidation, the Superintendent is authorized to sell, or compromise for cash or other consideration, any bad or doubtful assets and any debts owed to the association, R.C. 1157.10(A), compromise and settle, for cash or other considerations, claims and demands against the association, R.C. 1157.10(A), sell, lease, exchange, or otherwise dispose of any assets of the savings and loan association, R.C. 1157.10(B); R.C. 1157.12, and borrow money, issue evidences of indebtedness for such money, and secure its repayment by mortgage, pledge, transfer in trust, or hypothecation of any of the property of the association, R.C. 1157.10(D). Moreover, in regulating savings and loan associations, the Superintendent may enter into negotiations to see that the laws relating to savings and loan associations are executed and enforced, and liquidate savings and loan associations. *See Waliga v. Kent State Univ.*, 22 Ohio St. 3d 55, 488 N.E.2d 850 (1986).

Because negotiations concerning the execution and enforcement of the laws relating to savings and loan associations, and liquidation of savings and loan associations are conducted for the purpose of controlling the financial health of the savings and loan industry and protecting depositor's interests, the Superintendent's participation in such negotiations constitutes the performance of a regulatory function. As noted above, R.C. 121.07 and R.C. 121.08(B) provide that the Director may not exercise or perform any of the regulatory functions vested by law in the Superintendent. The participation by the Director in negotiations that arise during the course of executing and enforcing the laws relating to savings and loan associations, and liquidation of savings and loan associations constitutes the performance of a regulatory function vested by law in the Superintendent. Therefore, the Director may not act on behalf of the Superintendent in negotiations that arise during the course of executing and enforcing the laws relating to savings and loan associations or liquidating a savings and loan association.

Based upon the foregoing, it is my opinion, and you are hereby advised that the Director of Commerce may not act on behalf of the Superintendent of Financial Institutions in negotiations that arise during the course of executing and enforcing the laws relating to savings and loan associations or liquidating a savings and loan association.