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NO.
STATE OF NEBRASKA
OFFICIAL
OCT 15 1997
DEPT. OF JUSTICE

DATE: October 10, 1997

SUBJECT: Application of Deposit Limitation Provisions of the Nebraska Bank Holding Company Act to Formation of ***De Novo*** National Banks in this State by Bank Holding Companies

REQUESTED BY: James A. Hansen
Director of Banking and Finance

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

This is in response to your request for an opinion of the Attorney General regarding application of provisions of the Nebraska Bank Holding Company Act of 1995, Neb. Rev. Stat. §§ 8-908 to 8-917 (Cum. Supp. 1996) (the "Nebraska Act") to the organization of newly-chartered national banks in this state by an out-of-state bank holding company and its parent company, a Nebraska bank holding company.

The specific question you ask is whether the Nebraska Act prohibits the formation and acquisition of a Nebraska bank by an out-of-state bank holding company, that is owned or controlled by a Nebraska bank holding company. Under the facts you present, the Nebraska Bank holding company and its affiliated companies have deposits greater than fourteen percent of the total deposits of certain Nebraska financial institutions as described in Neb. Rev. Stat. § 8-910(2)(c) (Cum. Supp. 1996). It is the opinion of this office that the deposit limit provisions of the Nebraska Act are applicable and prohibit the formation of ***de novo*** national banks by the bank holding companies under the facts you describe.

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BACKGROUND

A Nebraska bank holding company and its wholly-owned subsidiary, an out-of-state bank holding company, have made application to the Comptroller of the Currency and the Board of Governors of the Federal Reserve System for approval to establish newly-chartered national banks in two cities in Nebraska. It is related that the applicant Nebraska bank holding company, together with its affiliated companies, presently have deposits exceeding the fourteen percent deposit limitation set forth in the Nebraska Act. It is in the context of these facts that we respond to your question.

Section 3(d) of the federal Bank Holding Company Act of 1956, as amended by § 101 of the Riegle-Neal Interstate Banking and Efficiency Act of 1994, 12 U.S.C. §§ 1842 (d)(1)(A) and (B) and 1842 (d)(2)(A) and (B), allows the Federal Reserve Board to approve an application by a bank holding company to acquire control of a bank in a state other than the home state if certain conditions are met. The federal Bank Holding Company Act, as amended, among other things, expressly preserves state deposit limits and provides in particular part:

> **(C) Effectiveness of State deposit caps**
>
> No provision of this subsection shall be construed as affecting the authority of any State to limit, by statute, regulation, or order, the percentage of the total amount of deposits of insured depository institutions in the State which may be held or controlled by any bank or bank holding company (<u>including all insured depository institutions which are affiliates of the bank or bank holding company</u>) to the extent the application of such limitation does not discriminate against out-of-State banks, out-of-State bank holding companies, or subsidiaries of such banks or holding companies.

12 U.S.C. § 1842(d)(2) (emphasis added).

Provisions of the Nebraska Act make it unlawful for certain actions to be taken by banks and bank holding companies unless the banks owned or controlled would have deposits no greater than fourteen percent of the total deposits of certain financial institutions in Nebraska as determined by the Director of the Department of Department of Banking and Finance. Neb. Rev. Stat. § 8-910 (Cum. Supp. 1996) in its entirety states:

Unlawful acts; authorized ownership or control of banks; limitation. (1) It shall be unlawful, except as provided in this section, for:

(a) Any action to be taken that causes any company to become a bank holding company;

(b) Any action to be taken that causes a bank to become a subsidiary of a bank holding company;

(c) Any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than twenty-five percent of the voting shares of such bank;

(d) Any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or

(e) Any bank holding company to merge or consolidate with any other bank holding company.

(2) The prohibition set forth in subsection (1) of this section shall not apply if:

(a)(i) The bank holding company is registered with the department as of September 29, 1995, as a bank holding company for any bank or banks; or (ii) the bank holding company registers with the department in accordance with the provisions of section 8-913 as a bank holding company;

(b) The bank holding company does not have a name deceptively similar to an existing unaffiliated bank or bank holding company located in Nebraska;

(c) Upon any action referred to in subsection (1) of this section and subject to subsection (3) of this section, the bank or banks so owned or controlled would have deposits in Nebraska in an amount no greater than fourteen percent of the total deposits of all banks in Nebraska plus the total deposits, saving accounts, passbook accounts, and shares in savings and loan associations and building and loan associations in Nebraska as determined by the director on the basis of the most recent calendar-year-end reports, except as provided in subsection (4) and (5) of this section;

(d) The bank holding company is adequately capitalized and adequately managed;

(e) The bank holding company complies with sections 8-1501 to 8-1505 if the bank or banks to be acquired are chartered in this state under sections 8-101 to 8-1,139; and

(f) The bank holding company, if an out-of-state bank holding company, complies with the limitations of section 8-911.

(3) If any person, association, partnership, limited liability company, or corporation owns or controls twenty-five percent or more of the voting stock of any bank holding company acquiring a bank and any such person, association, partnership, limited liability company, or corporation owns or controls twenty-five percent or more of the voting stock of any other bank or bank holding company in Nebraska, then the total deposits of such other bank or banks and of all banks in Nebraska owned or controlled by such bank holding company shall be included in the computation of the total deposits of a bank holding company acquiring a bank.

(4) A bank or bank holding company which acquires and holds all or substantially all of the voting stock of one newly established bank under sections 8-1512 and 8-1513 shall not have such acquisition count against the limitations set forth in subdivision (2)(c) of this section.

(5) A bank holding company which acquired an institution or which formed a bank which acquired an institution under sections 8-1506 to 8-1510 or which acquired any assets and liabilities from the Resolution Trust Corporation or the Federal Deposit Insurance Corporation prior to January 1, 1994, shall not have such acquisition or formation count against the limitations set forth in subdivision (2)(c) of this section.

(Emphasis added).

ANALYSIS

It is the province of the Board of Governors of the Federal Reserve System to apply provisions of the federal Bank Holding Company Act and to give effect to valid state law. The federal

Bank Holding Company Act defers to state law with respect to deposit limitations which may be held or controlled by a bank holding company to the extent the limitations do not discriminate against out-of-state banks or out-of-state bank holding companies. 12 U.S.C. § 1842(d)(2). And, it has been held that the Federal Reserve Board could not approve a bank holding arrangement involving the organization and opening of a new bank if the opening of the new bank, by virtue of its ownership by a bank holding company, would be prohibited by state law. ***See Whitney Nat. Bank in Jefferson Parish v. Bank of New Orleans & Tr. Co.***, 379 U.S. 411 85 S.Ct. 551, 13 L.Ed.2d 386 (1965). Thus, the deposit limitation provisions of the Nebraska Act are necessarily considered for purposes of determining the validity of a proposal for the organization of newly-chartered banks in Nebraska by bank holding companies.

DEPOSIT LIMITATION PROVISIONS

The question you ask regarding the formation of ***de novo*** national banks by an out-of-state-bank holding company that is a subsidiary of a Nebraska Bank holding company raises two primary issues. The <u>first</u> issue is whether provisions of the Nebraska Act apply to the organization and formation of newly-chartered banks by a bank holding company. It is clear that the deposit limit provisions are intended to apply to newly-chartered banks by bank holding companies. Section 8-910(1)(b) prohibits "<u>[a]ny action</u> to be taken that causes a bank to become a subsidiary of a bank holding company." The language "any action" is broad in its scope and would include the formation of newly-chartered banks that would become subsidiaries of a bank holding company. The prohibition does not apply if certain conditions set forth in the statute are complied with. Section 8-910(2)(c) establishes a limitation that the bank or banks owned or controlled would have deposits in Nebraska in an amount no greater than fourteen percent of the total deposits of certain financial institutions in Nebraska as determined by the Director of the Department of Banking and Finance.

This office previously concluded that the "charter age" provisions of § 8-911 of the Nebraska Act are not applicable to the organization of ***de novo*** banks. ***See*** Op. Att'y General No. 97007 (Jan. 15, 1997) and Op. Att'y General No. 87102 (Oct. 7, 1987). In those opinions, it was concluded that the charter age provisions of the Nebraska Act do not prohibit the establishment of a ***de novo*** national bank in Nebraska by an out-of-state bank holding company since Nebraska statutes recognize a distinction between the formation of a ***de novo*** bank and the acquisition of an <u>existing bank</u>. Section 8-910 provides that an out-of-state bank holding

company may "acquire" a bank or banks under the Nebraska Act if the bank or banks to be acquired have been chartered for five years or more.

It is noteworthy that the deposit limit provisions of § 8-910(2)(c) do not limit application of its deposit cap requirements to the acquisition of existing banks. Rather, the statute employs the language with respect to the bank or banks "so owned or controlled." We think the language is clear and unambiguous. The general rule governing statutory construction and interpretation provides that, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. ***State ex rel. Wieland v Beerman***, 246 Neb. 808, 523 N.W.2d 518 (1994); ***In re Application of Jantzen***, 245 Neb. 81, 511 N.W.2d 504 (1994). Thus, the statutory language employed in § 8-910(c)(2), taken in its plain and ordinary meaning, includes the formation of newly-chartered banks within the scope of its application.

The aggregation provisions of § 8-910(3) also apply to formation of newly-established banks by bank holding companies. This section provides for the aggregation of the deposits of affiliated banks, bank holding companies, and other entities for purposes of determining the total deposits of a bank holding company acquiring a bank. It is apparent that the aggregation provisions apply because § 8-910(4) provides an express exception to the deposit limitations if the newly-organized bank is established under the provisions of §§ 8-1512 and 8-1513. Sections 8-1512 and 8-1513 authorize the formation of a new bank for the limited purpose of conducting credit card operations. Thus, the deposit limit provisions apply to the establishment of a newly-chartered bank unless the newly-formed bank is established for the limited purpose of conducting credit card operations.

The provisions of § 8-910 are appropriately construed together since they are in ***pari materia***. The interpretation of a statute requires the court to determine and give effect to the purpose and intent of the legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. ***Omaha Public Power Dist. v. Dep't of Revenue***, 248 Neb. 518, 537 N.W.2d 312 (1995); ***Chrysler Corp. v. Lee Janssen Motor Co.***, 248 Neb. 281, 534 N.W.2d 568 (1995). Similarly, a fundamental rule in construing statutes is that they shall be considered in ***pari materia*** and from their language as a whole to determine the intent of the legislature. ***Malone v. Benson***, 219 Neb. 28, 361 N.W.2d 184 (1985). And, it is well established that the courts will construe provisions of a statute relating to the same subject matter together so that the provisions of a statute are consistent, harmonious, and sensible. ***McCook Nat. Bank v. Bennet***, 248 Neb.

567, 537 N.W.2d 353 (1995). In application of these principles, we conclude that the deposit limitation and deposit aggregation provisions of § 8-910 are applicable to the formation of newly-chartered banks by a bank holding company.

AFFILIATE AND SUBSIDIARY RELATIONSHIPS

The second key issue raised by your inquiry is whether the deposit limitations apply to a proposal for formation of ***de novo*** banks by an out-of-state bank holding company that is a wholly-owned subsidiary of Nebraska bank holding company. We believe the deposit limitation provisions of § 8-910 apply to both the Nebraska bank holding company as well as the out-of-state bank holding company by virtue of the fact that the out-of-state bank holding company is a wholly-owned subsidiary of the Nebraska bank holding company. To conclude otherwise would defeat clear legislative intent expressed in the statutory provisions.

The language employed in § 8-910 does not include language to the effect that the subsidiary be directly owned or controlled by the parent holding company. If the legislature intended that the subsidiary be directly owned or controlled by the parent holding company, that intention would be expressed in the statute. Qualifying words cannot be added to the statute to require that the subsidiary bank or banks be directly owned or controlled. It is a well recognized tenet of statutory construction that it is not within the province of a court to read a meaning into a statute that is not warranted by the statutory language. ***Wendt v. Cavalier Ins. Corp.***, 197 Neb. 622, 250 N.W.2d 243 (1977); ***Ledwith v. Bankers Life Ins. Co.***, 156 Neb. 107, 54 N.W.2d 409 (1952). Further, a court may not add language to plain terms of statutes to restrict or extend their meaning. ***Wittler v. Baumgartner***, 180 Neb. 446, 144 N.W.2d 62 (1966).

Further, § 8-909(3)(a) of the Nebraska Act defines the term, bank holding company, to include any company, including an out-of-state bank holding company, which ". . . (i) Directly or indirectly owns or controls twenty-five percent or more of the voting shares of any bank; . . ." (emphasis added). This definition of bank holding company is applicable to the organizational proposal under review and necessitates that the ***de novo*** banks be viewed as subsidiaries of the Nebraska bank holding company. The federal Bank Holding Company Act also recognizes that state deposit limitations apply to insured depositary institutions which are "affiliates" of the bank holding company. The term, "affiliate" is defined in 12 U.S.C. § 1841(k) "as any company that controls, is controlled by, or is under common control with another company."

The widely accepted definition of the term, holding company, also supports the conclusion that the banks to be organized would be appropriately viewed as subsidiaries of the Nebraska holding company. The term, holding company, has been defined as a corporation which owns or at least controls such a dominant interest in one or more other corporations that it is enabled to dictate their policies through voting power, or which is in a position to control or materially to influence the management of one or more companies by virtue, in part, at least, of its ownership of securities in the other company or companies. ***North American Co. v. SEC***, 327 U.S. 686, 90 L.Ed. 945, 66 S.Ct. 785 (1946); ***Kelley, Glover & Vale v. Heitman***, 220 Ind. 625, 44 N.E.2d 981, ***cert. denied*** 319 U.S. 762, 87 L.Ed. 1713, 63 S.Ct. 379 (1943). Utilizing this definition of the term, holding company, the proposed ***de novo*** banks would be subsidiaries of the Nebraska holding company through its ownership of the out-of-state bank holding company. Through ownership of the out-of-state bank holding company, the Nebraska bank holding company would be in a position to control or materially influence the management of the new banks to be organized.

In summary, it is our opinion that the deposit limitation provisions of the Nebraska Act are applicable and prohibit the formation of ***de novo*** national banks in this state by an out-of-state bank holding company that is a wholly-owned subsidiary of a Nebraska bank holding company, when the Nebraska bank holding company already has deposits in Nebraska in excess of the fourteen percent limitation set forth in Neb. Rev. Stat. § 8-910(2)(c) (Cum. Supp. 1996) ("the deposit cap").

Sincerely yours,

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Approved By:

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