STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#93058

NO.
STATE OF NEBRASKA
OFFICIAL
JUL 23 1993
DEPT. OF JUSTICE

DATE: July 19, 1993

SUBJECT: Application of Registration Provisions of the Securities Act of Nebraska to Employees of Financial Institutions.

REQUESTED BY: James A. Hansen, Director
Department 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 the registration provisions of the Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 to 8-1124 (1991 and Cum. Supp. 1992). The Securities Act is comprehensive in nature and in general regulates the conduct of investment and securities transactions in the State of Nebraska. Registration is required for securities offered for sale to the public and persons and individuals engaged in the sale of securities are subject to registration requirements. The Act provides that it is unlawful for any broker-dealer to effect securities transactions in this state unless the agent is registered. *See* Neb. Rev. Stat. § 8-1103 (1991).

The specific question you ask is whether "[T]he exclusion from registration as a broker-dealer afforded to financial institutions in Section 8-1103 also exclude (sic) their employees from the agent registration requirements in Section 8-1103?" It is our opinion that employees of financial institutions are excluded from agent registration requirements since a financial institution is not a "broker-dealer" as that term is defined by the Act. It would be anomalous to conclude that employees of financial institutions are

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required to register as agents under the Act while the employer financial institution expressly is excluded from the definition of the term, broker-dealer, and thereby exempt from registration requirements. Non-registered employees of financial institutions engaged in sales of securities to the public is a legitimate regulatory concern. However, we do not believe that the Department's position is sufficiently supported by legislative enactment to legally compel registration.

The legal issue raised by your question is whether the employee(s) of a financial institution is an agent as that term is defined in the Act. An individual representing a broker-dealer in the sale of securities is subject to agent registration requirements.[1] The terms, "agent" and "broker-dealer" are defined in Neb. Rev. Stat. § 8-1101 (1991) which in pertinent part states:

> (2) Agent shall mean <u>any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect sales of securities</u> but agent shall not include an individual who represents an issuer in (a) effecting a transaction in a security exempted by subdivision (8), (9) or (10) of section 8-1110, (b) effecting certain transactions exempted by section 8-1111, or (c) effecting transactions with existing employees, partners, or directors of the issuer or any of its subsidiaries if no commission or other remuneration is paid or given directly or indirectly for solicitating any person in this state. A partner, officer, or director of a broker-dealer shall be an agent only if he or she otherwise comes within this definition.

(Emphasis added).

As you have noted, financial institutions are expressly excluded from the definition of broker-dealer in section 8-1101 which provides:

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[1]Registration requirements for broker-dealers, issuer-dealer, agents, or investment advisors are set forth in Neb. Rev. Stat. § 8-1103 (1991) which provides for application for registration and information to be included relates to qualifications, experience and financial history. Examination regarding securities knowledge may be required. Registration fees are assessed and agents are required to maintain records as prescribed by the Director of Banking and Finance. Registration may be denied, suspended, or revoked for cause by the Director of Banking and Finance.

> (3) Broker-dealer shall mean any person engaged in the business of effecting transactions in securities for the account of others or for his or her own account. Broker-dealer shall not include (a) an issuer dealer, agent, bank, savings institution, or trust company, (b) a person who has no place of business in this state if he or she effects transactions in this state exclusively with or through issuers of the securities involved in the transactions, or other broker-dealers, or banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or (c) a person who has no place of business in this state if during any period of twelve months he or she does not direct more than fifteen offers to sell or to buy into this state in any manner to persons other than those specified in subdivision (3)(b) of this section; . . .

(Emphasis added).

Your inquiry is to be addressed in the context that the financial institution is engaged in investment brokerage activities and offers for purchase or sale investment securities to its customers and to the public. From other information and materials that have been submitted to this office, the securities offered are investment products such as mutual funds and similar investment funds sponsored by an investment company other than the financial institution. It is the position of the Department of Banking and Finance that employees of financial institutions are not excluded from the definition of agent unless the activities of the financial institution are limited to the offering of securities issued by that financial institution such as certificates of deposits. The Department interprets the Act to mean that agent registration requirements apply to employees who sell other types of securities and investments not issued by the financial institution.[2]

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[2]For purposes of the Act, the term, security, means any note, stock, treasury stock, bond, debenture, units of beneficial interest in a real estate trust, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas,

The difficulty with the position of the Department is that the statutory provisions regarding registration are not congruous with the relationships in place between the financial institution, its employees, and the investment company whose securities are marketed by the financial institution. Under the circumstances you have described, the investment company or mutual fund sponsor has entered into a sales agreement with the financial institution for marketing investment products of the company by the financial institution to the public. The employee is not a party to the agreement with the investment company nor is the employee subject to supervision or oversight by the investment company. The statutes do not or inadequately address the relationships that are in existence and the nature of transactions that are being conducted by employees of financial institutions. Further, certain types of securities and securities offerings and transactions are exempt from registration; and certain persons and individuals are excluded from the terms, broker-dealer and agent. For example, broker-dealer does not include a person who has no place of business in this state and he or she effects transactions in this state exclusively with or through other broker-dealers or financial institutions. *See* section 8-1101(3)(b) *supra*.

For these reasons, we do not believe that the Department may legally compel registration of employees of financial institutions since the statutes do not provide sufficient and clear authority for the Department's position. The courts will not read into a statute something omitted from it by the Legislature or to discover a meaning not warranted by the legislative language. ***Ledwith v. Bankers Life Ins. Co.***, 156 Neb. 107, 54 N.W.2d 409 (1952). ***Also see Adkisson v. City of Columbus***, 214 Neb. 129, 333 N.W.2d 661 (1983).

You have referenced the Department's Statement of Policy No. 9, POWERS OF A STATE BANK, as a basis for requiring that employees of financial institutions be registered as agents of a broker-dealer. We do not believe that the Statement of Policy is

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or mining title or lease or in payments out of production under such title or lease or in payments out of production under such title or lease, in general any interest or instrument commonly known as a security, or any certificate of interest or participation in temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing. Security shall not include any insurance or endowment policy or annuity contract issued by an insurance company Neb. Rev. Stat. § 8-1101(12) (1991).

particularly supportive of the Department's position. The statement sets forth an enumeration and description of services, "exercise of other powers", which state banks may perform or offer. Security brokerage activities are described in paragraph 13 which provides:

> Operate a securities brokerage, through a broker-dealer licensed with the appropriate state and federal regulatory authorities, if the securities activities are limited to the buying and selling of securities solely as agent for the account of customers and do not include the underwriting of securities, except obligations issued by the United States government or general obligations of the state or political subdivision thereof.

While the policy is limited to state banks by its express provisions, it appears that the Department applies the policy to all financial institutions conducting business in this state including federally chartered institutions. To the extent the Department seeks to implement this policy for all financial institutions, the policy should be revised or otherwise formalized to expressly provide that the policy applies to all financial institutions operating securities brokerage activities in this state. Further, the policy is ambiguous or in conflict with the Department's interpretation that employees are required to register as agents. The description of brokerage activities in paragraph 13 appears to contemplate that the bank is serving as agent by express use of that term. The policy does not provide that employees of financial institutions are subject to registration provisions of the Securities Act.

In considering the issues raised by your question, we have reviewed statutes in place in other jurisdictions. Commonly, employees of financial institutions are subject to agent registration requirements in other states. In those jurisdictions however, the underlying statutes provide only partial exemption for banks and or other financial institutions from the definition of broker-dealer; or there is express provision requiring registration of employees representing a broker-dealer other than the financial institution. In the jurisdictions requiring registration, the statutes delineate circumstances where financial institutions would come within the definition of a broker-dealer and employees would be agents and subject to registration requirements. For example, in the State of Iowa, the definition of broker-dealer under the Iowa Uniform Securities Act excludes: "c. A bank when acting on its own account or when exercising trust or fiduciary powers permitted for banks under applicable state or federal laws and

regulations providing for the organization, operation, supervision, and examination of such banks; . . ." Iowa Code § 502.102 (1989).

Under the Iowa Uniform Securities Act, registration of national and state banks as broker-dealers is specifically addressed in Iowa Code § 50.81(3) (1989) which states:

> A bank, pursuant to a contract with an Iowa registered broker-dealer, may attempt to effect and effect securities transactions without registering as a broker-dealer if the bank meets all of the following requirements:
>
> a. Bank employees who attempt to effect and effect securities transactions shall become licensed agents of the broker-dealer and shall: (1) pass an acceptable subject matter examination including the National Association of Securities Dealers (NASD) Series 6 or 7 Examination, (2) pass the Uniform Securities Agent State Law Examination (NASD Series 63), (3) register with the NASD, and (4) register with the Iowa Securities bureau as agents of the broker-dealer.

We believe that the position of the Department of Banking and Finance regarding registration affords protection to the public. For this reason, the Department appropriately may encourage and recommend, as a matter of policy, that employees engaged in securities activities be registered. However, as concluded above, the Department may not legally compel registration since the provisions of the Securities Act of Nebraska exclude financial institutions as broker-dealers. Additional legislative enactment similar to provisions of the Iowa statutes is necessary to support the Department's position regarding registration.

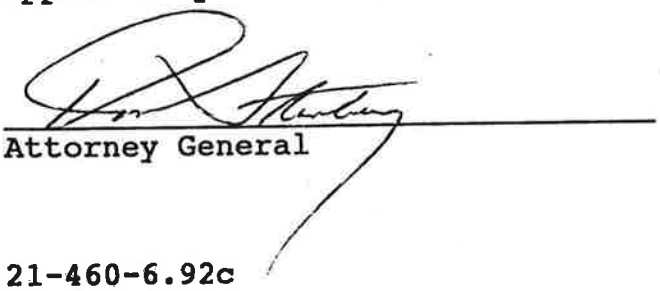
You have not specifically inquired whether the Department's application of agent registration requirements to employees of federally-chartered institutions comports with extant federal law. Consequently, we have not considered nor addressed that question is this opinion.

Sincerely yours,

DON STENBERG
Attorney General

Fredrick F. Neid
Assistant Attorney General

Approved By:



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