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

DATE: January 13, 1997

SUBJECT: Nebraska Bank Holding Company Act of 1995; *De Novo* Formation of a National Bank by an Out-of-State Bank Holding Company

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 the request of the Department of Banking and Finance 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 - 8-917 (Cum. Supp. 1996) ("Nebraska Act") to formation and acquisition of banks by out-of-state bank holding companies. Two specific questions are asked. First, whether the Nebraska Act prohibits an out-of-state bank holding company from forming and acquiring a new bank in this state. The second question consists of a request for a "ruling" that prior informal opinions issued by this Office "are no longer applicable as a result of the repeal of the laws" which were addressed by the opinions.

It is our opinion that the "charter age requirements" of Neb. Rev. Stat. § 8-911 (Cum. Supp. 1996) do not prohibit the formation of a *de novo* national bank in Nebraska by an out-of-state bank holding company. We further conclude that the application of prior opinions of this Office, Op. Att'y General No. 87102 (October 7, 1987) and Inf. Op. Att'y General (September 12, 1988) is limited to

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the provisions of the Nebraska Banking Holding Company Act of 1963.[1]

BACKGROUND

You have related that an out-of-state bank holding company has made application to federal banking authorities, the Comptroller of the Currency and the Board of Governors of the Federal Reserve System, to establish a newly chartered national bank in Nebraska. The Federal Reserve Board is the approving authority for expansion by bank holding companies into another state under the Bank Holding Act of 1956, §§ 2-105, 12 U.S.C.A. §§ 1841-1850 ("Federal Act"). The Federal Act, administered by the Federal Reserve Board, requires a bank holding company to apply for approval for certain expansion activities across state lines. 12 U.S.C.A. §§ 1842 (d)(1)(A) and (B) and 1842 (d)(2)(A) and (B).

The question whether provisions of the Nebraska Bank Holding Act of 1963 prohibited out-of-state bank holding companies from forming or establishing a newly chartered national bank was previously addressed by this Office. In Op. Att'y General, No. 87102 (October 7, 1987) and Inf. Op. Att'y General (September 12, 1988) this Office concluded that charter age requirements set forth in Neb. Rev. Stat. § 8-903 applied only to the acquisition of an existing bank and did not prohibit the formation of a new bank by an out-of-state bank holding company.[2] Section 8-903 prohibited a bank holding company from acquiring any bank which has been chartered for less than five years. The requests for the opinions were in part due to application by Norwest Corporation, an out-of-state bank holding company, to establish a ***de novo*** bank in Nebraska. The application of Norwest Corporation was approved by the Federal Reserve Board in 1988. Reportedly, other ***de novo*** banks

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[1]The Nebraska Bank Holding Company Act of 1963, Neb. Rev. Stat. §§ 8-901 - 8-904, was repealed by LB 384, section 35. The repeal of these sections became operative September 29, 1995.

[2]Prior to amendment by the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, provisions of the Federal Act, the Douglas Amendment (12 U.S.C.A. § 1842(d)), prohibited the Federal Reserve Board from approving an application by a bank holding company to acquire any bank outside the bank holding company's home state unless the acquisition is "specifically authorized by the statute laws of the State in which the bank is located, by language to that effect and not merely by implication."

have been formed by bank holding companies under the Nebraska Bank Holding Company Act of 1963 prior to its appeal.

The Federal Act was amended by passage of the Riegle-Neal Banking and Branching Efficiency Act of 1994. (Pub. L. No. 103-328, 108 Stat. 2338 (1994) (effective date Sept. 29, 1995). Following amendment, the Federal Act authorizes the Federal Reserve Board to approve an application by a bank holding company to expand into another state without regard to whether the transaction is prohibited by state law. 12 U.S.C.A. § 1842(d)(1)(A) (1996). However, the Federal Act as amended further provides:

> Notwithstanding subparagraph (A), the Board may not approve an application pursuant to such sub-paragraph that would have the effect of permitting an out-of-State bank holding company to acquire a bank in a host State that has not been in existence for the minimum period of time, if any, specified in the statutory law of the host state.

12 U.S.C. A § 1842(d)(1)(D)(i). (emphasis added).

The Nebraska Act was enacted in 1995 by passage of LB 384 in response to amendment of the Federal Act by the Riegle-Neal Act of 1994. Provisions of the new Nebraska Act establish "charter age requirements" for acquisition of banks in this state by an out-of-state bank holding company. Neb. Rev. Stat. § 8-910 (Cum. Supp. 1996) in pertinent part states:

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

(Emphasis added). Neb. Rev. Stat. § 8-911 (Cum. Supp. 1996) states:

> Upon compliance with all other provisions of the Nebraska Bank Holding Company Act of 1995 and any other applicable law, an out-of-state bank holding company may acquire a bank or banks under the act only if the bank or banks to be acquired have been chartered for five years or more. In determining whether a bank has been chartered for five years or more, a bank that has been chartered solely for the purpose of, and does not open for business prior to, acquiring all or substantially all the assets of an existing bank shall be deemed to have been in existence for the same period of time as the bank to be acquired.

ANALYSIS

At the outset, it is important to acknowledge that the ***de novo*** bank to be formed by the out-of-state bank holding company is a national bank. National Banks are quasi-public institutions established by, and subject to, regulatory laws of Congress. ***Anderson v. Cronkleton***, 32 F.2d 170 (8th Cir. 1929). And, national banks are subject to the paramount authority of the United States. ***Dovey v. State***, 116 Neb. 533, 218 N.W. 390 (1928). The parameters of state action or authority over national banks have been described by the U.S. Supreme Court. In ***Mercantile Nat. Bank v. Langdeau***, 371 U.S. 551, 83 S.Ct. 520, 9 L.Ed.2d 523 (1962), the Supreme Court stated:

> National banks are federal instrumentalities, and the power of Congress over them is extensive. National Banks are quasi-public institutions, and for the purposes for

> which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered by state legislative or judicial action, except so far as the law-making power of the Government may permit. ***Van Reed v. People's Nat. Bank***, 198 U.S. 554, 557, 25 S.Ct. 775, 49 L.Ed. 1161, 1162.

Id. 83 S.Ct. at 558-559, 83 S.Ct. at 522 (emphasis added).

Further, it is well established that the Board of Governors of the Federal Reserve System has exclusive jurisdiction to interpret and apply the Federal Act. ***American Ins. Ass'n v. Clarke***, 865 F.2d 278 (D.C. Cir. 1988). ***See generally Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.***, 379 U.S. 411, 419, 85 S.Ct. 551, 556-57, 13 L.Ed.2d 386 (1965). Thus, State law has application to formation of a ***de novo*** national bank by an out-of-state bank holding company only to the extent deference is accorded by the Federal Act. The Federal Act defers to state laws that require that an acquired institution be in existence for a specified period of time before an out-of-state bank holding company may acquire it. 12 U.S.C.A. § 1842(d) (as amended). Accordingly, the charter age requirements of the Nebraska Act are appropriately looked to in acquisition transactions by out-of-state bank holding companies.

There is sufficient similarity between the provisions of the repealed statutes and the new provisions of the Nebraska Act that our conclusion remains the same. That is, that "charter age requirements" of section 8-911 prohibit the acquisition of a bank that has been in existence for a period of less than five years but do not include any specific or express prohibition that prevents a bank holding company from forming a new bank unless the new bank is formed only for the purpose of acquiring all the assets of an existing bank.

The similarity of the repealed and new provisions is reflected in the statutory provisions set forth below:

1. Act of 1963: A bank holding company, including an out-of-state bank holding company, may not acquire any bank which has been chartered by this state or the Comptroller of the Currency of the United States for less than five years . . . .Section 8-903.

2. Act of 1995: [a]n out-of-state bank holding company may acquire a bank or banks under the act only if the bank or banks to be acquired have been chartered for five years or more. Section 8-911.

3. Act of 1963: A bank holding company acquires an institution or which forms a bank which acquires an institution. . . . Section 8-903.

4. Act of 1995: A bank holding company which acquired an institution or which formed a bank which acquired an institution. . . . Section 8-910(5).

As we previously pointed out, the statutory language reflects that the Legislature recognized the difference between the formation and acquisition of a bank. Accordingly, the meaning of the term acquisition is limited to the act of acquiring an existing bank rather than also to the formation of a new bank to accord legislative deference to the distinction between formation and acquisition. Further, Neb. Rev. Stat. § 8-910(5) (Cum. Supp. 1996) provides that a bank holding company which acquired an institution or which formed a bank which acquired an institution shall not have the acquisition count against deposit limitations set forth in the statute. This statutory language is further indicia that the terms, acquisition and formation or variations thereof, are not interchangeable.

Further, it is clear that the charter age requirements of section 8-911 are applicable to the formation of a ***de novo*** bank if the new bank is established only for the purpose of acquiring the assets of an existing bank. In relevant part, section 8-911 states:

> . . . In determining whether a bank has been chartered for five years or more, a bank that has been chartered solely for the purpose, and does not open for business prior to, acquiring all or substantially all of the assets of an existing bank shall have been deemed to have been in existence for the same period of time as the bank to be acquired.

(emphasis added).

It is a well established 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). In application of these principles, we believe the charter age restrictions of section 8-911 have limited application to ***de novo*** bank formations only if the new bank is chartered for the purpose of acquiring all the assets of an existing bank.

LEGISLATIVE HISTORIES

To the extent there is any ambiguity or lack of clarity in the provisions of an act, legislative history may be resorted to for purposes of ascertaining legislative intent. Legislative intent is the cardinal rule in statutory construction to ascertain the meaning of the provisions of an act. ***County of Lancaster v. Maser***, 224 Neb. 566, 400 N.W.2d 238 (1987); ***Iske v. Papio Nat. Resources Dist.***, 218 Neb. 39, 352 N.W.2d 172 (1984). And, a statute is open to construction where the language used requires interpretation or may reasonably be considered ambiguous. ***Omaha P.P. Dist. v. Nebraska State Tax Commissioner***, 210 Neb. 309, 314 N.W.2d 246 (1982).

The legislative history of the Riegle-Neal Act of 1994 reflects that its purposes include reducing interstate banking barriers to loosen geographical constraints on banking. By mandating that all states allow interstate banking, the Riegle-Neal Act would:

> [g]ive banks an opportunity to structure themselves more efficiently, eliminate duplicative functions and reduce purposes. Second, it will tend to promote a safer and sounder banking system. Third, it will promote customer convenience. Fourth, it will encourage competition by making it easier for institutions to enter markets that are not now fully competitive.

H.R. 448, 103rd Cong., 2nd Sess. (1994).

Another important aspect of the Riegle-Neal Act is its intent to preempt any state laws which have the effect of discriminating against out-of-state bank, out-of-state bank holding companies, or

their subsidiaries. While the applicability of state anti-trust law is preserved, the legislative history indicates that other state laws which discriminate against out-of-state bank holding companies are overridden. ***Id.***

The legislative history of LB 384 reflects that the Nebraska Act was enacted as a direct response to passage of the Riegle-Neal Act and to conform Nebraska law with provisions of the Federal Act as amended by Riegle-Neal. The Committee Report reflects that the charter age requirements of existing law were to be retained. The Summary of purpose and/or changes of LB 615 includes the following comment:

> LB 615 would (with section numbers in parentheses): . . .(4) provide that an out-of-state BHC may acquire a bank or banks only if the bank or banks to be acquired have been chartered for at least five years (similar to current provisions in section 8-903).

Committee Statement, p. 2, LB 615 (Hr'g Date February 6, 1995) (emphasis added).[3]

Further, the testimony and statements of record at the committee hearing generally reflect that a purpose of the bill is to retain existing structure requirements except those discriminatory to out-of-state bank holding companies. Committee Hearing on LB 615, 94 Session Legis. 1995, (Feb. 6, 1995) (Statements of Senator David Landis, Principal Introducer, and James A. Hansen, Director of the Department of Banking and Finance).

It is noted that the legislative history of the Nebraska Act includes information and comment that the charter age restrictions are intended to preclude ***de novo*** entry by out-of-state bank holding companies. However, this effect is not clearly reflected in the legislative record nor expressly stated in the provisions of the Nebraska Act. We believe the legislative intent expressed in the legislative record is more supportive of the conclusion that the charter age restrictions do not apply to ***de novo*** bank formations unless the new bank is formed solely to acquire assets of existing

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[3]The 1995 Nebraska Act was originally introduced in LB 615 which was subsequently amended into LB 384.

institutions. To conclude otherwise would be anomalous in view of the fact that an important purpose of the Bill was to preserve existing law.

Sincerely yours,

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Approved By:

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