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ATTORNEY GENERAL OPINION NO. 83- 29

The Honorable Roy M. Ehrlich
State Senator, Thirty-Fifth District
Room 138-N, Statehouse
Topeka, Kansas 66612

John A. O'Leary, Jr.
State Bank Commissioner
818 Kansas Avenue
Topeka, Kansas 66612

Re: Banks and Banking -- State Banking Code -- Merger
of Bank with General Business Corporation

Corporations -- Formation of Corporations -- Appli-
cation of General Corporation Code to Banking Cor-
porations

Synopsis: The merger of a general business corporation,
organized under the laws of Kansas, into a state-
chartered bank in Kansas is not subject to special
statutory regulation under the State Banking Code
or other banking statutes. Hence, pursuant to
K.S.A. 17-6001(c), such merger may be accomplished
in accordance with the Kansas General Corporation
Code, as long as the surviving bank does not ac-
quire any assets or succeed to any business acti-
vities which are impermissible for state banks.
Cited herein: K.S.A. 9-903, 9-1101, 9-1110,
9-1604, 17-6001, 17-6003, 17-6701.

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Dear Senator Ehrlich and Commissioner O'Leary:

Each of you has posed an identical question for our considera-
tion. You have inquired whether the stockholders of a parti-
cular state-chartered bank ("Bank") may transfer ownership
of Bank to a bank holding company ("BHC"). Accompanying

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Commissioner O'Leary's letter of request was a letter from Bank's counsel explaining in detail the proposed transfer. As outlined in that letter, the essential elements of the transfer are as follows:

"(1) the incorporation of BHC under the Kansas General Corporation Code (sometimes hereinafter referred to as the 'Code');

"(2) the incorporation of a Kansas general business corporation pursuant to the Code which will be a wholly-owned subsidiary of BHC (hereinafter referred to as 'Subsidiary');

"(3) the merger of Subsidiary into Bank pursuant to K.S.A. §17-6701, with Bank being the surviving corporation. The agreement of merger shall be adopted by the boards of directors of Bank and Subsidiary and shall provide that:

"(a) each share of stock in Subsidiary which is issued and outstanding immediately prior to the merger shall be converted into one share of stock in Bank;

"(b) each share of stock in Bank which is issued and outstanding immediately prior to the merger shall be converted into one share of stock in BHC; and

"(c) each share of stock in BHC which is issued and outstanding immediately prior to the merger shall be cancelled;

"(4) the agreement of merger shall be submitted to the respective stockholders of Subsidiary and Bank and shall be subject to the approval of a majority of the outstanding shares of stock entitled to vote thereon of both corporations;

"(5) BHC shall obtain prior approval of the proposed merger by the Board of Governors of the Federal Reserve System pursuant to section 3(a)(1) of the Bank Holding Company Act of 1956, as amended;

"(6) BHC shall file a Registration Statement on Form S-14 with the Securities and Exchange

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Commission with respect to the shares of BHC to be issued to the present stockholders of Bank upon consummation of the merger;

"(7) the agreement of merger shall be filed with the Kansas secretary of state in accordance with K.S.A. §17-6003. The merger shall become effective upon its being filed by the secretary of state; and

"(8) Bank shall report the transfer of its stock from the present stockholders of Bank to BHC within ten days after the merger becomes effective, pursuant to K.S.A. §9-903."

Bank counsel's letter also indicates that "[t]he effect of this transaction will be the complete ownership by BHC of all issued and outstanding shares of stock in Bank and 100% ownership by the stockholders of Bank at the time of the merger of all issued and outstanding shares of stock in BHC."

It is evident from the proposal outlined above that it requires utilization of the Kansas General Corporation Code ("Code") for its effectuation. Thus, the essential question is whether the Code has application in this instance. Here, we note the provisions of K.S.A. 17-6001(c), which states:

"Corporations subject to special statutory regulation may be organized under this act if required by or otherwise consistent with such other statutory regulation, but such corporations shall be subject to the special provisions and requirements applicable to such corporations. Where the provisions and requirements of this act are not inconsistent, they shall be construed as supplemental to such other statutes and not in derogation or limitation thereof, and such corporations shall be governed thereby. Subject to the foregoing provisions of this subsection, any corporation organized under the laws of this state or authorized to do business in this state shall be governed by the applicable provisions of this code."

By the terms of this statute, the Code is made applicable to regulated corporations. See State ex rel. Stephan v. Lane, 228 Kan. 379 (1980). Hence, the Code has apparent application to banks, where the Code's provisions are not inconsistent with applicable provisions of the State Banking Code or other banking statutes. We think this, in fact, is its intended purpose.

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The Kansas General Corporation Code was primarily the result of the extensive study and recommendations made by the now-defunct Kansas Legislative Council. In its Reports and Recommendations to the 1971 Legislature, whereby the Council submitted the proposed bill which served as the basis for the Code, there were included explanatory comments regarding each section of the proposed bill. These comments, with appropriate modifications, now appear in Kansas Statutes Annotated following the corresponding sections of the Code under the heading "Kansas Comment." In the "Kansas Comment" which appears after section 17-6001, there is the following statement:

"Subsection (c) is a modification of the corresponding subsection of the Delaware code, which relates to public utility corporations. It has been expanded to permit the organization of particular types or classes of corporations (such as banks, insurance companies, public utilities, etc.) but also permitting the regulation of these corporations under other statutory provisions. An amendment in 1973 attempted to clarify the application of the code to these corporations. This does not represent any change in Kansas law, since 17-4501 accomplished essentially the same result." (Emphasis added.)

Of similar import are the authors' comments in Vernon's Kansas Statutes Annotated -- General Corporation Code:

"Corporations subject to special statutory regulation may be organized under the General Corporation Code, but they will continue to be governed by provisions and requirements of law germane to their particular business purpose, where applicable, as for example those engaged in banking and insurance. Any provision of the new Code, not inconsistent with such special statutes, is to be construed as supplemental and not in derogation or limitation thereof. An amendment to clarify this concept was made to subsection (c) in 1973 (see Kan.Sess.L.1973, ch. 99)." (Emphasis added.) 14 K.S.A. Corp. Code 179.

The foregoing commentaries substantiate the apparent legislative purpose that the Code be made applicable to banking corporations where the Code's provisions are not inconsistent with the State Banking Code or other banking laws. Thus, it

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is necessary to determine whether there are any statutory provisions specifically applicable to banks that pertain to mergers of a bank with a general business corporation.

We have found no such provisions. The only statutes regulating banks that have any possible relevance to a bank's merger are K.S.A. 9-1110 and 9-1604. The latter provides inter alia for the merger of a bank's trust department with a trust company or the trust department of another bank. Clearly, this statute is inapplicable to the merger of a bank with a general business corporation. Similarly, K.S.A. 9-1110 is inapplicable to the proposal considered here. This statute states:

"Upon the affirmative vote of at least two-thirds of the outstanding voting stock any bank for the purpose of liquidation or merger or consolidation may sell all or any part of its assets to any other bank, either state or national, and may receive in payment therefor cash or its equivalent or shares of stock in the purchasing bank or both."

The foregoing provisions have application only to the situation where all or part of a bank's assets are transferred or conveyed to another bank. It, too, has no relevance to the proposal prompting your inquiry, since it contemplates the transfer of another corporation's assets to a bank.

Of course, we also are mindful of the statutory restrictions on a bank's activities and its ownership of various assets. However, under the proposed merger considered here, it is our understanding that the sole asset to be received by Bank from Subsidiary will be the money constituting Subsidiary's initial paid-in capital. Obviously, there is no proscription on Bank's ownership of such assets. Further, we are advised by Bank's counsel that, "as a result of the merger Bank will not succeed to any business activities which are impermissible for state banks. Bank will continue to engage solely in the activities permitted by K.S.A. 9-1101." Accordingly, in the absence of any special statutory regulation of the proposed merger of Subsidiary with Bank, we believe K.S.A. 17-6001(c) compels consideration of the Code's provisions governing corporate mergers.

K.S.A. 17-6701(a) provides, in part:

"Any two (2) or more corporations existing under the laws of this state and authorized to issue capital stock may merge into a single corporation, which may be any one of the constituent corporations" (Emphasis added.)

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Pursuant to the proposal under consideration, both Subsidiary and Bank are "corporations existing under the laws of this state" within the contemplation of K.S.A. 17-6701. Hence, we believe the details of the proposed merger are to be governed by this statute, and with reference to the proposed conversion of Subsidiary's issued and outstanding shares of stock into shares of Bank's stock and the accompanying conversion of Bank's issued and outstanding shares into shares of BHC's stock (described by Bank's counsel as a "reverse triangular merger"), we note that K.S.A. 17-6701(b)(4) requires that the agreement of merger shall state

"the manner of converting the shares of each of the constituent corporations into shares or other securities of the corporation surviving or resulting from the merger of consolidation, and, if any shares of any of the constituent corporations are not to be converted solely into shares or other securities of the surviving or resulting corporation, the cash, property, rights or securities of any other corporation which the holders of such shares are to receive in exchange for, or upon conversion of, such share and the surrender of the certificates evidencing them, which cash, property, rights or securities of any other corporation may be in addition to or in lieu of shares or other securities of the surviving or resulting corporation" (Emphasis added.)

As indicated by the foregoing provisions, particularly the emphasized portion thereof, the proposed "reverse triangular merger" is clearly contemplated by the Code.

We also understand there is a concern whether the proposed merger of Bank and Subsidiary is analagous to the proposed transaction considered in Attorney General Opinion No. 81-255. In that opinion, we considered whether a state bank could form a subsidiary corporation and then transfer all of the bank's assets and liabilities to the subsidiary, along with the bank's certificate of authority to engage in the business of banking. The sole legal issue embodied in that proposal was the transferability of the bank's certificate of authority, and as expressed in the opinion's synopsis, we concluded:

"A state-chartered bank's certificate of authority may not be transferred or assigned by the state banking board or bank commissioner to a successor banking corporation, even though such corporation will be a subsidiary of the

existing bank and will succeed in every way to the banking business conducted by the existing bank. The state banking code contains no express authorization for such transfer or assignment of a certificate of authority, and no such power may be implied, since it is not necessary to effectuate the specific statutory powers vested in the banking board or bank commissioner."

The proposal considered here, however, is not analogous to the proposed transaction analyzed in Opinion No. 81-255. Here, as described by counsel for Bank,

"[t]he proposed merger will not necessitate the transfer of an existing bank's certificate of authority to a new bank. Bank will retain its certificate of authority and continue to operate in the same manner as before the merger. The only substantive effect of the merger of Subsidiary into Bank will be the transfer of ownership of Bank from the present stockholders of Bank to BHC."

Based on our understanding of the proposal, we concur in Bank counsel's analysis of the proposed merger's effect, and we must conclude that Attorney General Opinion No. 81-255 has no application to the proposal considered here. Accordingly, it is our opinion that, as long as the surviving bank does not acquire any assets or succeed to any business activities which are impermissible for state banks, the proposed merger may be accomplished pursuant to K.S.A. 17-6701.

A further question arises as to the role of the State Bank Commissioner in this transaction. We note that it is not proposed that approval of the merger by the Commissioner be obtained. Rather, it is contemplated that the agreement of merger will become effective as provided in K.S.A. 17-6701(f), i.e., when the agreement is executed, acknowledged and filed with the Secretary of State in accordance with K.S.A. 17-6003. However, it is contemplated that notice will be given the Commissioner pursuant to K.S.A. 9-903, which states in pertinent part:

"Whenever a transfer of shares of stock of any bank occurs which results in direct or indirect ownership by a stockholder or an affiliated group of stockholders of ten percent (10%) or more of the outstanding stock of the bank, and whenever additional shares of stock

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of the bank are transferred to such stockholder or affiliated group of stockholders, the president or other chief executive officer of the bank shall report such transfer to the commissioner within ten (10) days after transfer of the shares of stock on the books of the bank."

In our judgment, the proposal correctly identifies the statutory prerequisites for effectuating the proposed merger. Other than the notice of the transfer of Bank's stock to BHC pursuant to the above-quoted provisions of K.S.A. 9-903, we are unaware of any other statutorily required filing with or notice to the Commissioner in order that the merger be given force and effect. However, we observe Bank counsel's willingness to make "any additional filings" the Commissioner deems appropriate. With this in mind, we also note that, on prior occasions (see, e.g., Attorney General Opinion No. 82-39), we have advised the Bank Commissioner of his general supervisory authority over state-chartered banks. Further, we have in prior opinions advised the Commissioner as to his prerogative to make the requisite factual determinations attending any matter subject to his jurisdiction. (See, e.g., Attorney General Opinion Nos. 82-195 and 82-196.) Such advice and counsel is appropriate here, as well.

Although we have undertaken in this opinion a consideration of the questions of law attending the proposed merger, our responses to these questions have been predicated on factual circumstances described in the proposal. Obviously, a course of action different from that outlined in the proposal might necessitate a change in our opinion as to the legal requirements. Hence, if the Commissioner deems it necessary to the effective exercise of his supervisory authority, it may be appropriate for the Commissioner to undertake investigative measures which will satisfy him as to the existence of the factual circumstances upon which this opinion is predicated.

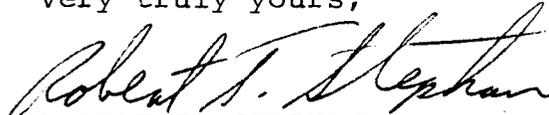
Before concluding, one further comment is pertinent. We note that the proposal presented for our review contemplates that the proposed establishment of a bank holding company and the stock transfer aspects of the proposed merger will be submitted for review and approval by the Federal Reserve Board and the Securities and Exchange Commission, respectively. While we note the necessity of such procedure, it should be recognized that these aspects of the proposal are beyond the scope of our review.

In summary, therefore, it is our opinion that the merger of a general business corporation, organized under the laws of Kansas, into a state-chartered bank in Kansas is not subject

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to special statutory regulation under the State Banking Code or other banking statutes. Hence, pursuant to K.S.A. 17-6001(c), such merger may be accomplished in accordance with the Kansas General Corporation Code, as long as the surviving bank does not acquire any assets or succeed to any business activities which are impermissible for state banks.

Very truly yours,


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