



STATE OF KANSAS

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July 12, 1988

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ATTORNEY GENERAL OPINION NO. 88- 99

W. Newton Male  
Bank Commissioner  
Banking Department  
700 Jackson, Suite 300  
Topeka, Kansas 66603-3714

Re: Banks and Banking -- Miscellaneous Provisions --  
Bank Holding Companies; Ownership Limitations;  
Exceptions

Synopsis: An option contract is a continuing offer which, when supported by consideration, may not be revoked by the offeror. An option to purchase an interest in a bank is not a direct or indirect ownership of that bank. However, such an option does constitute control over the subject matter of the agreement, and the arrangement would violate Kansas law which prohibits a bank holding company from directly or indirectly acquiring ownership or control of more than 5% of the shares of a bank which has not been in existence for five or more years. Cited herein: K.S.A. 1987 Supp. 9-521(a).

\* \* \*

Dear Commissioner Male:

As Bank Commissioner, you have requested our opinion concerning bank holding companies. Specifically, you inquire whether a bank holding company may acquire an option to purchase more than 5% of a Kansas bank, the direct purchase of

which is prohibited until such bank has been in existence for five or more years.

The ownership limitation relevant to your inquiry appears in K.S.A. 1987 Supp. 9-521(a). That section states:

"No bank holding company or any subsidiary thereof shall directly or indirectly acquire ownership or control of, or power to vote, more than 5% of any class of the voting shares of any bank domiciled in this state unless such bank, if chartered after January 1, 1985, has been in existence and actively engaged in business for five or more years."

Your question involves a situation whereby a company would acquire an option to purchase an interest in a bank following the bank's fifth year anniversary date. The proposed option would not include any stock voting rights nor any right to influence or participate in the management of the bank. The issue therefor is whether such an option is direct or indirect ownership or control.


In construing a lease agreement containing an option provision for extending the agreement, the court in Smith v. Russ, 184 Kan. 773 (1959), stated that an "option is a choice or right to choose. In the law of contracts by the use of the term 'option' is normally meant a legally binding option [emphasis in original]." 184 Kan. at 177. A option contract is an inchoate contract for sale. When not supported by consideration, it is merely a continuing offer to sell which may be withdrawn at any time prior to acceptance. Berryman v. Knoch, 221 Kan. 304, 306 (1977). When consideration is given by the offeree (the optionee), the agreement becomes a contract to keep the offer open for a specified duration. Thus, two elements exist: first, there is the offer which does not become a contract until accepted by the optionee, and second, there is a completed contract to keep the offer open. Steele v. Eagle, 207 Kan. 146, 150 (1971).

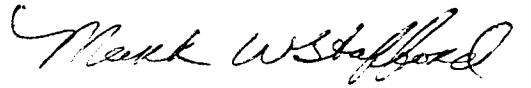
Given the nature of an option contract, we believe that an agreement which involves an option to purchase, with voting rights and rights to participate in management vesting only when the option is exercised, does not constitute ownership within the meaning of K.S.A. 1987 Supp. 9-521(a). However, an option to purchase which is supported by consideration gives

the optionee the exclusive right to purchase. We believe that the exclusive right to purchase amounts to "control" within the meaning and spirit of the statute.

In conclusion, it is our opinion that an option is a continuing offer which may not be revoked if supported by consideration. An option to purchase an interest in a bank is not a direct or indirect ownership of that bank. However, such an option does constitute control over the subject matter of the agreement, and the arrangement would violate Kansas law which prohibits a bank holding company from directly or indirectly acquiring ownership or control of more than 5% of the shares of a bank which has not been in existence for five or more years.

Very truly yours,

  
ROBERT T. STEPHAN  
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RTS:JLM:MWS:bas