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ATTORNEY GENERAL OPINION NO. 82- 195

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

Re: Banks and Banking -- Bank Holding Companies -- Definition of Bank Holding Company

Synopsis: The state bank commissioner has the ultimate responsibility for determining whether a violation of the Kansas bank holding company statutes has occurred. Such determination requires a case by case application of these statutes to the factual circumstances established by the commissioner. Thus, where it is proposed that each of three existing one-bank holding companies is to own voting shares of a new company which will own a national bank, the bank commissioner must determine whether any of the existing one-bank holding companies will directly or indirectly own, control or hold with power to vote 25% or more of the national bank's voting shares, or will control in any manner the election of a majority of the directors of the national bank. If neither of such determinations can be made, none of the existing one-bank holding companies is a "bank holding company," as defined in K.S.A. 9-504(a). Cited herein: K.S.A. 9-504, 9-505a, 9-505b, 9-505c, 12 U.S.C.A. §1841, 12 C.F.R. §225.1.

* * *

Dear Commissioner O'Leary:

Your predecessor requested our opinion regarding the proposed formation of a national bank in Garden City, Kansas, in light of the Kansas statutes pertaining to bank holding companies (K.S.A. 9-504 to 9-505c, inclusive). By your letter of

August 2, 1982, you expressed your desire to receive our opinion on this matter, indicating your belief that the resolution of this issue "would be to the best interests of the banking industry in Kansas."

Subsequent to the submission of this opinion request, your predecessor was requested by this office to advise all interested parties, in particular, and the Kansas banking industry, in general, that we would welcome the receipt of briefs or memorandums concerning the questions of law deriving from this request. We received four responses to this invitation, and the briefs and memorandums submitted to us have been most helpful in identifying the issues and in guiding our research.

As we understand the proposal in question, a new one-bank holding company (New OBHC) will be formed, and New OBHC will own 100% of the voting stock of the proposed national bank (New Bank). Apparently, each of three existing one-bank holding companies (OBHC's) will own 24.9% of New OBHC's voting stock. The remaining 25.3% of New OBHC's voting stock will be held by various individuals, and it is our understanding that certain of these individuals own and control each of the existing OHBC's.

Because of the involvement of existing OBHC's in the formation of New OBHC, your predecessor wrote to the Comptroller of the Currency on June 10, 1982, requesting that action be deferred on the application for a national bank charter in Garden City, until our office had an opportunity to advise him as to "whether, under the laws of the State of Kansas, commonly owned bank holding companies can cooperate in the organization of a new bank or bank holding company under K.S.A. 9-504 et seq." Subsequently, in requesting our opinion, this was the precise question presented by your predecessor for our consideration.

Before addressing this question, two preliminary comments are appropriate. First, even though this issue arises from an application for a national bank charter, your inquiry has relevance to 12 U.S.C.A. §1846, which provides that the federal Bank Holding Company Act is not to be "construed as preventing any state from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." In Commercial Nat. Bank of Little Rock v. Board of Gov., 451 F.2d 86 (8th Cir., 1971), it was held that, by virtue of this statute, the State of Arkansas was "free to prohibit, by specific legislation, the formation of bank holding companies." Id. at 89. Similarly, in a recent decision by the Supreme Court of Appeals of West Virginia, it was held that "[s]tate regulation of bank holding companies is not preempted by the Federal Bank Holding Company Act, 12 U.S.C.

§1841, et seq., because Section 1846 specifically reserves to the state the power to regulate them." (Citations and footnotes omitted.) Sec. Nat. Bank, Etc. v. First W. Va. Bancorp., 277 S.E.2d 613, 615 (1981). Accordingly, your determination as State Bank Commissioner as to whether the proposal in question is consonant with the Kansas bank holding company statutes has relevance to the federal proceedings. This leads to our second preliminary observation.

As the administrative officer charged under our laws with the administration of our banking laws and the general supervision of the banking industry in Kansas, you have the ultimate responsibility for determining this issue and advising the appropriate federal authorities accordingly. It is not the prerogative of this office to usurp your authority and make that decision. Thus, we must necessarily confine our efforts to a consideration of questions of law, so that you might have the benefit or our opinion as to the controlling legal principles. Your determination, of course, will require the application of these principles to a particular set of factual circumstances, which we assume will be established through investigation by your office. At this time, however, we have no indication that you or your staff have independently established the facts presented for our consideration. Hence, while we must consider the legal issues presented by the proposal before us, you should be cognizant that our conclusions of law may not be appropriate to factual circumstances which vary from those considered here. With these caveats in mind, we turn to a consideration of the pertinent statutory requirements.

For purposes of the Kansas bank holding company statutes, a "bank holding company" is defined in K.S.A. 9-504(a) as meaning

> "any company: (1) Which directly or indirectly owns, controls, or holds with power to vote, twenty-five percent (25%) or more of the voting shares of each of two (2) or more banks or of a company which is or becomes a bank holding company by virtue of this act; (2) which controls in any manner the election of a majority of the directors of each of two (2) or more banks; or (3) for the benefit of whose shareholders or members twenty-five percent (25%) or more of the voting shares of each of two (2) or more banks or a bank holding company is held by trustees; and for the purposes of this act, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor

> company became a bank holding company. Notwithstanding the foregoing (A) no bank shall be a bank holding company by virtue of its ownership or control of shares in a fiduciary capacity, except where such shares are held for the benefit of the shareholders of such bank."

Essential to an understanding of this definition is the meaning of "company," which is defined in subsection (b) of that statute to mean

> "any corporation, business trust, association, or similar organization, but shall not include: (1) Any corporation the majority of the shares of which are owned by the United States or by any state; (2) any corporation or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; or (3) any partnership."

K.S.A. 9-504 has not been amended since its enactment in 1957 (L. 1957, ch. 75, §1). From an historical perspective, this statute was enacted a year after the Congress enacted the Bank Holding Company Act of 1956 (see 12 U.S.C.A. §§1841 et seq.), and the language of the definitions set forth above was substantively similar to the corresponding definitional language of the federal act. This fact is particularly relevant to our deliberations, because several of the legal arguments submitted to us in opposition to the proposal under consideration are predicated on administrative and case law interpretations of the federal act. The arguments suggest that, under the Bank Holding Company Act (BHCA), the existing OBHC's would control the New Bank, thereby making each of these OBHC's a "bank holding company" under the BHCA, because: (1) the existing OBHC's would exercise a controlling influence over the management and policies of the New Bank; (2) the existing OBHC's would obtain control over New Bank through their respective officers and directors who own voting shares of New OBHC; and (3) each of the existing OBHC's would be presumed to control the New OBHC pursuant to regulations adopted by the Federal Reserve Board to implement the BHCA, and the existing OBHC's would thereby exercise indirect control of the New Bank.

Without in any way commenting upon the validity of these arguments, insofar as they reflect interpretations of federal law, we do not find such interpretations persuasive to a determination of the question presented for our review. However, before considering the factors which have prompted this conclusion, it should be recognized that federal law does not prohibit bank holding companies. It requires, instead, that a company must receive the approval of the Federal Reserve Board before it may operate as a bank holding company, and it also imposes limitations on the activities of a bank holding company. By contrast, K.S.A. 9-505a prohibits any bank holding company, as defined in K.S.A. 9-504, from being organized or transacting business in the state of Kansas after March 21, 1974. While this distinction considered by itself does not preclude the application of federal law interpretations to the Kansas law, it does reflect distinctly different legislative philosophies underlying the two acts.

It is within this context we have considered these interpretations of federal law, which have been urged upon us on the theory that the language of the state and federal laws are "nearly identical." However, it is our judgment that the necessary similarity in language does not exist and the federal law interpretations are not appropriate to a resolution of this matter, because of the pertinent dissimilarities which exist between the Kansas and federal statutes.

The federal definition of "bank holding company" appears in subsection (a) of 12 U.S.C.A. §1841 and reads in pertinent part, as follows:

> "(a)(1) Except as provided in paragraph (5) of this subsection, 'bank holding company' means any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this chapter.
>
> "(2) Any company has control over a bank or over any company if --
>
> "(A) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company;
>
> "(B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or

> "(C) the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.
>
> "(3) For the purposes of any proceeding under paragraph (2)(C) of this subsection, there is a presumption that any company which directly or indirectly owns, controls, or has power to vote less than 5 per centum of any class of voting securities of a given bank or company does not have control over that bank or company.
>
> "(4) In any administrative or judicial proceeding under this chapter, other than a proceeding under paragraph (2)(C) of this subsection, a company may not be held to have had control over any given bank or company at any given time unless that company, at the time in question, directly or indirectly owned, controlled, or had power to vote 5 per centum or more of any class of voting securities of the bank or company, or had already been found to have control in a proceeding under paragraph (2)(C)." (Emphasis added.)

Similarly, "company" is defined in §1841(b) as meaning

> "any corporation, partnership, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State. 'Company covered in 1970' means a company which becomes a bank holding company as a result of the enactment of the Bank Holding Company Act Amendments of 1970 and which would have been a bank holding company on June 30, 1968, if those amendments had been enacted on that date."

As previously noted, the definition of "bank holding company" in K.S.A. 9-504 was substantially the same as the corresponding definition in the BHCA of 1956. Now, however, as a result of amendments made to the BHCA in 1966 (P.L. 89-485) and

1970 (P.L. 91-607), there are important differences, some of which are reflected by the emphasized language in the above-quoted provisions of §1841(a). In paragraph (2)(A) of the federal definition, it is now provided that a company is deemed to have control over a bank or over any company if such company, "acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company." (Emphasis added.) No comparable provision is included in K.S.A. 9-504(a). Hence, we find no basis for applying judicial or administrative interpretations of this distinctive federal requirement in construing the Kansas statute.

Further, §1841(a)(2)(C) provides that a company has "control" over a bank or over any company where the Federal Reserve Board finds "that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company." Again, there is no comparable provision in the Kansas definition. Whereas the Kansas definition is predicated, in part, on a finding that a company exercises "control" over the requisite voting shares of two or more banks, or over the election of their boards of directors, the threshold for the federal definition is "control over a bank," with the specific recognition that such control may be evidenced by the exercise of a "controlling influence over the management or policies of the bank." Thus, we think it inappropriate to apply to the Kansas statute any interpretations of the federal definition which depend upon this provision of §1841 for their efficacy.

Finally, we note that there are no counterparts in K.S.A. 9-504 to subsections (a)(3) and (a)(4) of §1841. These subsections establish a threshold for determining whether a company controls a bank or another company by virtue of its ownership, control or holding with power to vote any class of voting securities of the bank or such other company. The threshold so established is 5% of such class of voting securities. In furtherance of these provisions, and in pursuance of its authority in 12 U.S.C.A. §1844(b) "to issue such regulations . . . as may be necessary to enable it to administer and carry out the purposes" of the BHCA, the Federal Reserve Board has established in 12 C.F.R. §225.2(b) certain rebuttable presumptions of control. These presumptions are predicated, in part, on a company's ownership, control or power to vote more than 5% of any class of voting securities of a bank or another company. However, we find no basis for extending these presumptions to a company that is being measured against K.S.A. 9-504(a) to determine if it is a bank holding company.

Accordingly, in our judgment, the arguments previously noted which are based on the judicial and administrative interpretations of distinctive federal requirements are not persuasive in construing the Kansas bank holding company statutes.

Thus, in the absence of any Kansas case law precisely on point, we are constrained to construe our statutes in the light of established rules of statutory interpretation.

As noted in Southeast Kansas Landowners Ass'n v. Kansas Turnpike Auth., 224 Kan. 357 (1978):

> "The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statutes. Easom v. Farmers Insurance Co., 221 Kan. 415, Syl. 2, 560 P.2d 117 (1977); Thomas County Taxpayers Ass'n v. Finney, 223 Kan. 434, 573 P.2d 1073 (1978); Brinkmeyer v. City of Wichita, 223 Kan. 393, 573 P.2d 1044 (1978)." 224 Kan. at 367.

The Court also has provided guidance in ascertaining the legislature's intent, and we believe the following statement of the Court to be of relevance here:

> "A primary rule for the construction of a statute is to find the legislative intent from its language, and where the language used is plain and unambiguous and also appropriate to the obvious purpose the court should follow the intent as expressed by the words used and is not warranted in looking beyond them in search of some other legislative purpose or extending the meaning beyond the plain terms of the Act. (Alter v. Johnson, 127 Kan. 443, 273 Pac. 474; Hand v. Board of Education, 198 Kan. 460, 426 P.2d 124; City of Overland Park v. Nikias, 209 Kan. 643, 498 P.2d 56; Hunter v. Haun, 210 Kan. 11, 499 P.2d 1087.)" City of Kiowa v. Central Telephone & Utilities Corporation, 213 Kan. 169, 176 (1973).

Of similar import is the Court's pronouncement in Lakeview Gardens, Inc. v. State, ex rel. Schneider, 221 Kan. 211 (1976):

> "[T]his court must ascertain and give effect to the intent of the legislature. In so doing we must consider the language of the statute; its words are to be understood in their plain and ordinary sense. (Hunter v. Haun, 210 Kan. 11, 13, 499 P.2d 1087; Roda v. Williams, 195 Kan. 507, 511, 407 P.2d 471.) When a statute is plain and unambiguous this court must give effect to the intention of the legislature as expressed rather than determine what the law

> should or should not be. (Amoco Production Co. v. Armold, Director of Taxation, 213 Kan. 636, 647, 518 P.2d 453; Jolly v. Kansas Public Employees Retirement System, 214 Kan. 200, 204, 519 P.2d 1391.)" 221 Kan. at 214.

Admittedly, the Kansas bank holding company statutes are less than artfully drawn. They contain meaningless surplusages, circuitous usage of defined terms and erroneous duplications of the corresponding federal statutes. The defective draftsmanship of these statutes was noted in several of the briefs submitted on this proposal, and the overriding, contextual ambiguity of the entire act was called to the legislature's attention in 1974 by conferees who testified regarding the enactment of K.S.A. 9-505a, 9-505b and 9-505c. (See, e.g., Minutes of House Committee on Commercial and Financial Institutions, March 4, 1974.)

However, even conceding the careless and inattentive drafting of these statutes, it is our judgment there is no ambiguity in the definitional requirements pertinent to our consideration, at least to the extent that we find no legislative intent to circumscribe the type of arrangement considered here by the definition of "bank holding company" in K.S.A. 9-504(a). Such conclusion, of course, obviates the necessity of considering the succeeding sections which proscribe the activities of a bank holding company.

As is necessary in resolving most legal issues, it is the application of the pertinent law to the facts provided us which has prompted our conclusion. To briefly reiterate these facts, each of the existing OBHC's involved is owned and controlled by substantially the same individuals (hereafter referred to as "Organizers"), and collectively these existing OBHC's own 74.7% of the voting shares of the New OBHC. In addition, the Organizers collectively own 25.3% of the voting shares of the New OBHC.

Before proceeding, it is important to again note that we have no indication that you or your staff have conducted an independent verification of these facts. Hence, our consideration of this matter has necessarily been predicated on the assumption that these are, in actuality, all of the essential facts. We have been provided no information, for example, to indicate that any of the existing OBHC's is a party to a stockholders' agreement, voting trust or other voting agreement regarding the voting shares of New OBHC. Nor have we any indication that there is any oral or written agreement or arrangement which would provide for the horizontal integration of two or more of the existing OBHC's. Obviously, should you find through independent investigation that any of these agreements or arrangements exist, it may well justify

a conclusion by you that the organizational structure created thereby creates a bank holding company. However, in the absence of any indication as to the existence of any such agreement or arrangements, we have premised our opinion on the assumption that the organizational scheme outlined above constitutes the facts essential to our conclusion.

Under this set of facts, there can be no serious question that, by virtue of their ownership of each of the existing OBHC's, as well as their ownership of voting shares of the New OBHC, the Organizers will control not only the New OBHC, but also will control the operation of the New Bank, since it is to be wholly owned by the New OBHC.

We find nothing inappropriate that the Organizers own and control a multiplicity of one-bank holding companies and, as a consequence thereof, control the operation of a corresponding number of banks. It must be recognized that a "bank holding company" must be a "company," as defined by K.S.A. 9-504(b), i.e., it must be a "corporation, business trust, association, or similar organization." Clearly, then, a person acting in his or her individual capacity and on his or her own behalf is not a company and, as a consequence, cannot be a bank holding company. Moreover, paragraph (3) of K.S.A. 9-504(b) specifically excludes a partnership from the definition of "company." Hence, even if the Organizers were to form a partnership for the purpose of owning and controlling the various one-bank holding companies, it would not render such arrangement a bank holding company within the meaning of K.S.A. 9-504(a).

Here, it is appropriate to observe that this is no longer the case under the federal act, since the Bank Holding Company Act Amendments of 1970 effected a redefinition of "company" in 12 U.S.C.A. §1841(b), so as to include partnerships. The exemption of partnerships from the definition of "company" in the BHCA of 1956 was explained by the U.S. Senate Committee on Banking and Currency in its report (Senate Report No. 1095) of its consideration of the legislation which became the BHCA of 1956, as follows:

> "The third exemption from the definition of 'company' is granted to any partnership because the attributes of a partnership are similar to those presented by an individual in the sense that neither has perpetual duration. As the individual's personal control of business activities ceases with his death, any business control exercised by a partnership will likewise terminate upon the death of either partner. Usually, the death of an individual who controls banks is accompanied by a diffusion of ownership of such banks.

> "By way of contrast, corporations and similar organizations may have perpetual existence. The death of any individual member of a corporation has no effect upon continued control of banks by the corporation. This bill is designed to bring under control those types of entities that may be used as media for acquiring and maintaining in perpetuity management and control of bank shares or assets." 2 U.S. Code Cong. & Ad. News (1956), 2486.

The foregoing explanation, particularly the emphasized portion thereof, provides insight as to the congressional intent underlying the BHCA of 1956. This act was not intended to circumscribe individuals who own or control several banks. It was designed to provide safeguards "against undue concentration of control of banking activities" (Id. at 2482) in those business entities "that may be used as media for acquiring and maintaining in perpetuity management and control of bank shares or assets." Id. at 2486. Since the Kansas bank holding company statutes were patterned after the BHCA of 1956, we think it appropriate to attribute a similar intent to the Kansas Legislature.

Thus, even though the organizational scheme considered here may, in fact, be a unitary operation as a result of the control exercised by the Organizers over all of the corporate entities involved, such operation is not proscribed by our statutes unless it results in one or more of the corporate entities becoming a "bank holding company," as defined in K.S.A. 9-504(a).

The facts presented suggest only two possibilities that the proposed organizational scheme causes one or more of the existing OBHC's to become multi-bank holding companies, i.e., under these facts, any of the existing OBHC's can be regarded as a "bank holding company" only if it (1) directly or indirectly owns, controls or holds with power to vote 25% or more of the voting shares of each of two or more banks or (2) controls in any manner the election of a majority of the directors of each of two or more banks.

With regard to the first possibility, the question of "direct" ownership or control involves, in our judgment, a consideration of the percentage of New Bank's voting shares which are owned by an existing OBHC, or which are controlled through an agreement or other arrangement with other owners of such shares. The facts presented to us, or course, indicate that New OBHC will own all of New Bank's voting shares. However, if you should find that an existing OBHC will, in fact, own 25% or more of such shares, or if you find that, through an agreement or other arrangement with New OBHC, an existing

OBHC will control 25% or more of such shares, either such finding would, in our opinion, justify your conclusion that such existing OBHC would be a bank holding company under our statute.

On the other hand, if you find that, in fact, New OBHC will own all of New Bank's voting shares and that there is no agreement or other arrangement which vests control of 25% or more of such shares in any of the existing OBHC's, the question arises as to whether an existing OBHC "indirectly" owns or controls 25% or more of these shares. Thus, it is appropriate for you to consider the relationship of each of the existing OBHC's to New OBHC. For example, if the New OBHC is found to be a subsidiary of any of the existing OBHC's, we think it appropriate for you to find that the existing OBHC exercises some measure of indirect ownership or control over the voting shares of New Bank that are owned by New OBHC. Here, we note that K.S.A. 9-504 defines "subsidiary," as follows:

> "(d) 'Subsidiary,' with respect to a specified bank holding company, means: (1) Any company twenty-five percent (25%) or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the United States) is owned or controlled by such bank holding company; (2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company; or (3) any company twenty-five percent (25%) or more of whose voting shares are held by trustees for the benefit of the shareholders or members of such bank holding company."

The problem with utilizing this definition to determine the existence of a bank holding company is obvious. It is predicated on the presumed existence of a parent corporation which meets the definitional requirements of a "bank holding company." It has apparent relevance only to those provisions of the Kansas bank holding company statutes which circumscribe the activities of subsidiaries of bank holding companies. To apply this definition to the relationship existing between the New OBHC and any of the existing OBHC's for the purpose of determining whether any such existing OBHC is a "bank holding company" would be circuitous, at best.

Thus, in the absence of an appropriate definition in K.S.A. 9-504, we note that the commonly accepted definition of a subsidiary corporation is one in which another corporation owns at least a majority of the shares, and thus has control. See, e.g., Black's Law Dictionary (Rev. 4th Ed.), p. 1596.

and 40 Words and Phrases, "Subsidiary Corporation," p. 748. In our opinion, it is appropriate for you to measure the relationship between New OBHC and the existing OBHC's against this standard. We also note that, under appropriate circumstances, ownership of less than a majority of a corporation's shares will permit control of that corporation, i.e., will permit control over the election of a majority of the corporation's board of directors. Thus, should you find that, even though each of the existing OBHC's owns less than 25% of New OBHC's voting shares, through an agreement or other arrangement which, for example, either affects the horizontal integration of the existing OBHC's or vests in one or more of the existing OBHC's control over the voting shares of New OBHC held by the Organizers, you may well conclude that an existing OHBC controls the New OBHC and thereby indirectly controls 25% or more of New Bank's voting shares. Of course, the question of control is a factual issue which, in the absence of statutory guidelines, is properly left to your sound discretion for resolution.

It requires no discussion or citation of authority to note that the stockholders of a corporation are the owners of that corporation and, by virtue of their authority to select its board of directors, they exercise ultimate control over the operation of the corporation. Of course, corporations exist by legislative grace, and the activities of corporations and their officers, directors and stockholders are subject to appropriate legislative regulation. Accordingly, we recognize the potential power of the legislature to limit the amount of stock that the officers, directors or stockholders of one banking corporation may own in another banking corporation, or to create certain presumptions of control deriving from such ownership of stock. However, there are no such limitations or presumptions either expressly or impliedly contained in the pertinent Kansas statutes, and absent any such statutory requirement, we are aware of no general legal principle which would impute to a corporation the control over its stockholders' ownership of stock in another corporation. Hence, we are unable to conclude as a matter of law that any of the existing OBHC's will exercise control over the voting shares of the New OBHC to be held by the Organizers or, for that matter, over the shares held by the Organizers in each of the other existing OBHC's. However, as we have previously noted, whether such control exists in actuality is a factual issue to be resolved through investigation and the exercise of your discretion and judgment in light of the facts as you determine them.

Thus, whether any of the existing OBHC's will exercise control over the voting shares of the New OBHC to be held by the Organizers, or over the shares held by the Organizers in each of the other existing OBHC's, becomes a question of

fact. To answer this question in the affirmative would require a finding that the Organizers, as shareholders, officers and directors of each of the existing OBHC's, are acting on behalf of the existing OBHC's and not on their own behalf.

We also have no basis for concluding, as a matter of law, that any of the existing OBHC's will be able to control in any manner the election of a majority of the directors of each of two or more banks. The directors of New Bank will be elected by its shareholders. Thus, in order to find that an existing OBHC controls in any manner the election of a majority of these directors, you must conclude that such existing OBHC directly or indirectly owns or controls or holds with power to vote such voting shares of New Bank as are necessary to elect such majority of directors. Here, again, this is a question involving the same factual considerations noted above, and for the reasons previously stated, such question must be left for your resolution in accordance with the statutory interpretations and legal principles enunciated herein.

In summary, therefore, it is our opinion that the state bank commissioner has the ultimate responsibility for determining whether a violation of the Kansas bank holding company statutes has occurred. Such determination requires a case by case application of these statutes to the factual circumstances established by the commissioner. Thus, where it is proposed that each of three existing one-bank holding companies is to own voting shares of a new company which will own a national bank, the bank commissioner must determine whether any of the existing one-bank holding companies will directly or indirectly own, control or hold with power to vote 25% or more of the national bank's voting shares, or will control in any manner the election of a majority of the directors of the national bank. If neither of such determinations can be made, none of the existing one-bank holding companies is a "bank holding company," as defined in K.S.A. 9-504(a).

Very truly yours,

ROBERT T. STEPHAN
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First Deputy Attorney General

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