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DATE: March 28, 1991

SUBJECT: Credit Card Banks

REQUESTED BY: James A. Hansen, Director
Department of Banking and Finance

WRITTEN BY: Don Stenberg, Attorney General
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QUESTION 1: Do Nebraska statutes allow a change in control of a credit card bank and if so do the guidelines relative to an initial acquisition apply?

CONCLUSION: Yes

QUESTION 2: Would an entity which is not a bank, thrift institution or financial institution holding company be authorized to acquire a national credit card bank?

CONCLUSION: Generally, no

QUESTION 3: Can a credit card bank secure credit card borrowings with deposits from the individuals or entities maintaining the credit card accounts?

CONCLUSION: No

QUESTION 4: Can a credit card bank be converted into a full service bank?

CONCLUSION: Yes

In your inquiry, you asked whether Nebraska statutes prescribe the method for changing control of a credit card bank in the situation in which the purchaser is an out-of-state company. Credit card banks are authorized pursuant to Neb.Rev.Stat. §§8-1511 through 1514 (Reissue 1987). Those statutes do not explicitly authorize a change of control of credit card banks. Rather, those statutes specifically describe the requirements to be met in establishing a credit card bank.

It must be noted, however, when originally adopted, some of the provisions now found in Neb.Rev.Stat. §§8-1511 through 1513 were certified as Neb.Rev.Stat. §§8-905 and 906. Thus those provisions were grouped with statutes relating in part to the change in control of other types of banks. Subsequent amendments required the moving of the credit card bank statutes to reflect the possibility of ownership of credit card banks by thrift institutions other than banks. However when considered in its original context it appears that the credit card bank statutes contemplated the possibility of a change of ownership. This is reflected not only by the original location of the credit card bank statutes but also the specific exemption which exists in Neb.Rev.Stat. §8-903 on the acquisition of control of a newly established credit card bank. By choosing the particular words of limitation it appears that the legislature intended Neb.Rev.Stat. §8-903 to apply if the stock of the credit card bank being acquired either was not a newly established bank or if it was more than the first newly established bank being acquired by the purchaser. Thus the original location and the specific language support the interpretation that the legislature intended to authorize a procedure for a change in control of credit card banks.

Alternatively, by failing to enact explicit transfer statutes one conclusion that could be reached is that the legislature did not intend that control of credit card banks be allowed to be changed. Instead such banks could only be established and the control would have to stay with the establishing entity. However, such a conclusion encounters a significant problem. If a credit card bank experienced financial difficulties, the inability to allow a change of control could result in the credit card bank's failure. Alternatively, if control could be changed, then control could be transferred to a more financially stable entity which could prevent the bank from being placed into receivership. If it is concluded that changes in control are allowed, such conclusion would add stability and increase confidence in this segment of the banking system. Such confidence and stability could be beneficial to all financial institutions. Moreover, under Nebraska law, control can be transferred in every other type of financial institution. Thus, if control cannot be transferred in this type of institution, it would be the only financial institution for which that result would exist.

The Nebraska Supreme Court has given some guidelines regarding appropriate interpretations to be given to statutes when a literal interpretation could lead to unjust consequences. For instance the Court has said:

> In construing a statute, the Court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.
>
> The intention of the Legislature when ascertained will prevail over the literal sense of the words used and this is especially true when the strict letter of the law would lead to injustice or absurdity. In interpreting a statute the legislative intent may be found from the reason for the enactment.
>
> When the intent of the Legislature is clear, it is the duty of the Courts to construe it in accordance with such intent. A sensible construction will be placed upon it to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.
>
> The rationale involved in this rule of construction does not mean the Court is substituting its judgment for that of the legislative body. Rather, it is attempting to ascertain the legislative intent. It will presume the Legislature intended a sensible, just, and reasonable result rather than the opposite.

Nebraska v. Goham, 191 Neb. 639, 642, 216 N.W.2d 869 (1974).

> Additionally, the Supreme Court has said:
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> In construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result.

Cornhusker Christian Children's Home v. Department of Social Services, 229 Neb. 837, 842, 429 N.W.2d 359 (1988).

To interpret that a credit card bank can be formed but its control cannot be transferred would be to interpret the legislature's actions in such a way that an absurd result would be reached rather than a sensible and reasonable one.

Neb.Rev.Stat. §8-903 prescribes some of the limitations applicable to the change in control of a bank by an out of state entity. A credit card bank is a bank (See Neb.Rev.Stat. §§8-1512, and 8-902(1)). Thus Neb.Rev.Stat. §8-903 could apply to a change in control of a credit card bank. Additionally, Neb.Rev.Stat. §8-1512 provides limitations which specifically must be met relating to national credit card banks. For instance, the statute specifies the capital requirements for such institutions and if a credit card bank were below such requirements when it was sold, in order to approve the sale one condition could be to require a capitol infusion by the purchaser. Thus, the guidelines for acquisition of a credit card bank should include the requirements which exist in Section 8-903 and those in Section 8-1512.

You next inquired whether an entity which is not a bank, thrift institution or financial holding company, is authorized to acquire a credit card bank. Neb.Rev.Stat. §8-1512 specifies which entities may own the stock of a credit card bank. Those entities are "any bank or thrift institution, as defined in Section 8-1511." Section 8-1511(3) defines a bank and Section 8-1511(5) defines what constitutes a thrift institution. These statutes thus very specifically identify which entities may acquire a credit card bank. The Nebraska Supreme Court has said:

> [W]here a statute or ordinance enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention.

Nebraska City Education Association v. School District of Nebraska City, 201 Neb. 303, 306, 267 N.W.2d 530 (1978).

Consequently, by specifying with particularity which entities can own credit card banks, by not including those entities which are not banks, thrift institutions, or financial holding companies as entities which may acquire a credit card bank, such entities are precluded from such ownership.

It should be noted that one aspect of the definition of bank found in Neb.Rev.Stat. §8-1511(3)(e) includes a bank holding company as defined in the Bank Holding Company Act of 1956, as amended, 12 U.S.C. 1841 et seq. Obviously, what constitutes a bank holding company pursuant to that federal law can change over time. Statutory rules of construction however prescribe that:

> It is a general rule that when a statute adopts a part or all of another statute, domestic or foreign, general or local, by a specific and descriptive reference thereto, the adoption takes the statute as it exists at

> that time and does not include subsequent additions or modifications of the adopted statute, where it is not expressly so declared.

73 Am.Jur.2d Statute Section 29 Page 285. That principal is followed in Nebraska to the point that an incorporated statute which is subsequently repealed nonetheless retains its validity for the purpose of that statute which incorporated it. See Estate of Tetherow v. State, 193 Neb. 150, 226 N.W.2d 116 (1975); School Dist. No. 17 and Westside Comm. Schools v. State, 210 Neb. 762, 316 N.W.2d 767 (1982). See also Union Cemetery v. City of Milwaukee, 13 Wis.2d 64, 108 N.W.2d 180 (1961). Consequently, because the context does not otherwise require and because subsequent actions of the legislature regarding this definition have not addressed subsequent changes in the federal definition of a bank holding company, the definition which was in effect at the time of the adoption of §8-1511(3)(c) (LB1076, Laws 1984) applies. Any subsequent amendments thus do not apply.

You next asked if a credit card bank is permitted to secure individual credit card borrowings with deposits by the individual borrowers. Neb.Rev.Stat. §8-1512(1) establishes some of the conditions which are applied to credit card banks. In particular it specifies ". . .[T]he services of the bank shall be limited to the solicitation, processing, and matters relating to the making of loans instituted by credit card or transaction card." Additionally, subsection 2 of that statute provides, in part, "[T]he bank whose stock is to be acquired is limited to accepting deposits only from affiliated banks or thrift institutions not domiciled in the State of Nebraska. . . ." Legislative history reflects that deposits were to be strictly limited to the entities named. (Floor debate, March 2, 1984, pp. 8704, 8708-9.) Thus the express language of the statute limits deposits with the credit card bank to non-domiciled institutions. Deposits cannot be from individual card holders as a consequence.

Additionally, the Department of Banking and Finance in its Statement of Policy number 20, adopted in 1985, prohibited the payment of interest on any credit balance on a cardholder's account. While this policy statement does not explicitly prohibit deposits by account holders, it reflects the Department's strict interpretation that credit card banks are not to compete with local banks. In this respect, the Nebraska Supreme Court has held that:

> [A]lthough construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such construction, particularly when the Legislature has failed to take any actions to change such an interpretation.

McCaul v. American Savings Company, 213 Neb. 841, 846, 331 N.W.2d 795, 798 (1983).

The statutes regulating banking were most recently revised in 1990, and no substantive changes relating to this issue were made in this section. Also in 1988, the Supreme Court affirmed its earlier holding in McCaul saying that:

> [t]here is a general rule of statutory construction that the interpretation of a statute given by an administrative agency to which the statute is directed is entitled to weight.

Vulcraft v. Karnes, 229 Neb. 676, 678, 428 N.W.2d 505, 507 (1988). The Supreme Court decisions thus provide that the statement of policy ought to be accorded some weight when interpreting the meaning of the statutes.

Additionally, Neb.Rev.Stat. §8-1512(4) in effect restricts the operation of the credit card bank so that it is operating in a manner not likely to attract customers from the general public in this state to the substantial detriment of existing banking institutions located in this state. If a credit card bank were to obtain deposits to secure its accounts, for those card holders who were residents of Nebraska, obtaining such deposits could preclude such deposits from being placed with Nebraska financial institutions, thereby detrimentally affecting financial institutions in this state. While it is acknowledged that because credit card banks are not located in Nebraska, the number of Nebraska card holders is probably not large, nonetheless the prohibition in §8-1512(4) provides additional justification for prohibiting deposits.

Your final inquiry is whether a credit card bank can be converted to a full service bank. Nothing in Neb.Rev.Stat. §§8-1511 through 1514 describes a process to be followed when a credit card bank converts to a full service bank. On the other hand, your department has advised that it is the policy of the Department of Banking and Finance for the State of Nebraska to allow any type of financial institution in Nebraska to convert to any other type of financial institution. Such conversion is permitted if the institution meets the specific statutory requirements for the particular type of conversion where such specific requirements exists. Alternatively for those conversions lacking specific statutory conversion requirements, the institution is required to meet the requirements which exist for a newly licensed institution of the type to which the institution wishes to convert.

As your past practices have recognized, not all forms of conversion possibilities have specific statutory requirements. Nonetheless, you advised that some which do not have specific statutory requirements have been approved in the past. For

instance, although no specific statutory provisions allow conversion of an industrial loan and investment company to a bank, several such conversions have been authorized by your department in the past. Just as the change in control of a credit card bank adds to the stability of financial institutions and increases public confidence, permitting conversions also serve those same purposes. Conversions also allow weaker institutions to receive needed infusions of capital and also allows flexibility in the face of increased competition and changed circumstances.

It should also be noted that the conversions you have authorized where specific statutory requirements are lacking, have been treated the same as original applications, thus requiring appropriate public notice and opportunity for all affected to be heard. Additionally the Department's authority to grant such conversions has not been challenged and the Legislature has not modified any of the statutes to specifically indicate that the Legislature did not want the Department of Banking and Finance to authorize such conversions. As noted previously, interpretation of statutes by a department charged with applying them is accorded weight especially when the Legislature has not, subsequent to the interpretation, modified the statutes. McCaul v. American Savings Company, 213 Neb. 841, 331 N.W.2d 795 (1983). Consequently, as you indicated in your inquiry, an application, notice, and hearing, as if the entity were filing for a new bank charter, would be required. Additionally, as is the usual practice, approval of the chartering regulator would be required. Also, if the chartering regulator is federal, the approval of the Department of Banking and Finance for the State of Nebraska would be required as well. Finally if the new full service bank is the only bank in Nebraska that would be owned by the entity, then the one bank holding company act of 1973, Neb.Rev.Stat. §§8-1201 through 1207 (Reissue 1987) would apply.

Sincerely,

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