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DATE: June 15, 1992

SUBJECT: Establishment of a National Bank to Engage in Credit Card Activities in Nebraska

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

WRITTEN BY: Don Stenberg, Attorney General
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This Office issued an Opinion which concluded in part that an entity which is not a bank, thrift institution or financial institution holding company could not acquire an existing national credit card bank in Nebraska. Opinion of the Attorney General No. 91023, March 28, 1991. You now ask whether Nebraska law prohibits a non-bank company from establishing a national credit card bank in Nebraska.

It is our opinion that an entity that is not a bank, thrift institution or financial institution holding company, is not prohibited from establishing a national bank in this State to engage in credit card activities if the formation of the National Credit Card Bank has been authorized by federal law. The immediate acquisition of the stock of such bank by a non-bank company incident to its formation likewise is not prohibited by state law.

BACKGROUND

Investment banks and companies, as well as other entities interested in expanding financial services, have increasingly acquired or organized entities providing services typically offered by banks-i.e., consumer loans, trust operations, deposit accounts, and credit card services. These "banks" primarily have been established in two ways: (1) through acquisition of an existing

bank or savings and loan association, and divestiture of its commercial lending and/or demand deposit operations, or (2) through establishment of a newly chartered bank, which conducts no commercial lending and/or demand deposit operations. In either case the bank entity has typically become a wholly-owned subsidiary of a non-bank institution. While such entities offer, or may offer, most services which banks generally may provide, they are not classified as "banks" for purposes of the Bank Holding Company Act, 12 U.S.C. § 1841 et seq., (the "Act") because they do not offer commercial loans and/or demand deposits. Such entities are referred to as nonbank banks. Affiliations Among Financial Institutions-Nonbank Banks, 5 Banking Law (MB) § 96.16.

The Douglas Amendment, section 3(d) of the Act, 12 U.S.C. § 1842(d), prohibits a bank holding company from acquiring banks outside the state in which it principally conducts its operations, unless a state statute governing the target bank specifically authorizes the acquisition. In enacting the Douglas Amendment, Congress permits each state to choose for itself whether out of state bank holding companies may acquire banks within the state's borders. Several states, including Nebraska, have enacted statutes (Douglas Amendment statutes) which permit interstate bank acquisitions in limited circumstances or for specialized purposes. Neb. Rev. Stat. §§ 8-1511 to 8-1514 (Reissue 1991) were enacted in part to authorize the establishment and acquisition of credit card banks in this state by bank holding companies.

NEBRASKA STATUTES

Legislation enacted in Nebraska authorizes bank holding companies and other financial institutions to acquire newly established banks whose services are limited to credit card activities. Neb. Rev. Stat. § 8-1512 (Reissue 1991) in part states:

> Notwithstanding any other provisions of law and subject to the provisions of this section and to the approval of the Director of Banking and Finance, any bank or thrift institution, as defined in section 8-1511, may acquire and hold all or substantially all of the voting stock of one newly established bank located in this state when and so long as the following conditions are satisfied:
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> (1) The bank whose stock is to be acquired is a newly established bank that shall be limited to one banking office and the bank may not acquire, establish, share, or maintain any additional banking office or remote service unit in this state whether by merger, consolidation, or otherwise, and the 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; . . .

The terms, "bank" and "thrift institutions" are defined in Neb. Rev. Stat. § 8-1511 (Reissue 1991) and non-financial entities are not included within these definitions. Accordingly, the issue is raised whether a corporation that is not a bank or a thrift institution is precluded from establishing a national credit card bank in Nebraska. The statutes do not directly address this question and the legislative history does not reflect that the purpose of the statutes was to preclude ownership of a nationally chartered credit card bank by a non-banking entity. The basic rule in interpretation of a statute is to ascertain legislative intent and give effect to it. State ex rel. Meyer v. Lancaster County, 173 Neb. 195, 113 N.W.2d 63 (1962). Further, in determining legislative intent, reasons for enactment of the statute and purposes and objects of the act as obtained from examination of legislative history may be used as guides to give effect to the main intent of lawmakers. Adkisson v. City of Columbus, 214 Neb. 129, 333 N.W.2d 661 (1983).

The statutes by their provisions do not expressly prohibit or preclude non-banking corporations from establishing national credit card banks in this State nor does the legislative history[1] reflect that the purposes of the legislative acts were to preclude other entities from establishing credit card banks within this state. The legislative history reflects that primary purposes of the legislation were to authorize the acquisition of credit card banks by banks and thrift institutions and to encourage the establishment of credit card banks in this State.

If the stock of a newly chartered national credit card bank were acquired by a non-banking entity, that entity would become a one bank holding company as that term is defined in section 8-1202(4) of the One Bank Holding Company Act of 1973, Neb. Rev. Stat. § 8-1201 et seq. (Reissue 1991). Under the Act, a one bank holding company after formation is required to register with the Department of Banking and Finance and examinations may be conducted of the holding company and its subsidiary. See Neb. Rev. Stat. §§ 8-1204 to 8-1206 (Reissue 1991). While the bank would be

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[1]The proposal '[w]ould attempt to adopt a "credit card business attraction plan" similar to the laws of South Dakota and Delaware. The proposal would allow an out-of-state bank to charter a new national bank solely for the purpose of processing credit card transactions.' Explanation of Amendments; Committee Statement, Legislative Bill 454 (Eighty-Eighth Legislature, First Session, 1983).

nationally chartered, it would be subject to state regulation of its affairs so long as the regulation does not interfere with the purposes of its creation, tend to impair or destroy its efficiency, or conflict with paramount federal law. Dovey v. State, 116 Neb. 533, 218 N.W. 390 (1928). Also, see Omaha Nat. Bank v. Spire, 223 Neb. 209, 389 N.W.2d 269 (1986).

LAW GOVERNING NATIONAL BANKS

National banks are entities of the federal government and the states have power to regulate national banks only to the extent permitted by federal law. Nationally chartered banks are organized pursuant to federal law, and the power to acquire or be acquired is governed by federal law. The courts have recognized the limited authority of states to regulate national banks and consistently have held that state law has no applicability to the chartering of a national bank.

In the matters relating to regulation of national banks by states based on the authority of the Douglas Amendment, the courts consistently have determined that the state's regulation is limited to permitting out of state bank holding companies to acquire banks within the state's borders. In a case involving the application and interpretation of Florida statutes restricting activities of a nationally chartered bank, the Supreme Court held that section 3(d) of the Bank Holding Company Act (Douglas Amendment) did not authorize state restrictions of any nature on bank holding company activities. The Court stated:

> . . .The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to permit expansion of banking across state lines where it otherwise would be federally prohibited. Furthermore, the structure of the Act applies only to holding company acquisitions of banks. . . .

Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 47, 100 S.Ct. 2009, 2021, 65 L. Ed. 2d 702 (1980). It is clear that the Douglas Amendment does not constitute authority for states to restrict the chartering or acquisition of national banks unless the acquiring entity is a bank holding company. In Independent Community of Bankers, Ass'n v. Board of Governors, 820 F.2d 428 (D.C. Cir. 1987), cert. denied, 108 S.Ct. 695 (1985), the Court upheld an order of the Board of Governors of the Federal Reserve System approving a newly chartered national bank and stated:

> We can locate no grounds for declaring that the Douglas Amendment authorizes regulation of the operations of national banks acquired pursuant to the State's "Douglas

> Amendment" statutes. . . . Neither the language of the amendment nor its legislative history indicates an intention to abrogate extant federal law governing bank holding companies and their subsidiary nationally chartered banks. We therefore decline to hold that Congress created, through the Douglas Amendment, the specific authority for South Dakota to impose restrictions on national banks.

ICBA, 820 F.2d at 438.

Nationally chartered banks are federal institutions, and, as such, are subject to the paramount authority of federal law. For the most part, state regulation regarding national banks, and particularly with regard to the chartering of a national bank, is preempted by federal law. See Pineland State Bank v. Proposed First National Bank of Bricktown, 335 F.Supp. 1376 (D.N.J. 1971). Based on these authorities, states are authorized by the Bank Holding Company Act to restrict only acquisitions by bank holding companies but otherwise may not impose restrictions on establishing national banks by other entities except to the extent permitted by federal law.

While the states are limited by paramount federal law with respect to the chartering and acquisition of national banks, not all regulation of a national bank by the state in which it is situated is prohibited. A national bank is subject to the laws of the state in which it is located in respect of its affairs if such laws do not interfere with the purposes of its creation, tend to impair or destroy its efficiency as a federal agency, conflict with paramount law of the United States, or discriminate against such national bank. Jennings v. United States Fidelity & G. Co., 294 U.S. 216, 55 S.Ct. 394, 79 L.Ed. 869 (1935).

CONCLUSION

The Douglas Amendment permits states to restrict inter-state acquisition of banks by bank holding companies but does not authorize states to prohibit the chartering of new national banks by a non-bank entity. State authorization for banks and thrift institutions to acquire newly established credit card banks does not preclude the establishment of a national credit card bank by a nonfinancial entity. Once established, the nonfinancial entity would be a one bank holding company and subject to regulation by the Department of Banking and Finance.

Sincerely yours,

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