

INTERPRETIVE LETTER 90-11 (JULY 30, 1990)

Employee Stock Ownership Plan that acquires more than 20% outstanding stock of a bank holding company that controls a state bank must file a change of control application.

This letter is to inform you of this Agency's position regarding a change-of-control issue pertaining to the Employee Stock Ownership Plan ("ESOP") of * Bank ("Bank").

On *, the ESOP purchased 2,313 shares of stock in the Bank. Subsequently, the ESOP exchanged its Bank stock for stock in the * ("BHC"), the holding company of the Bank. The ESOP then owned 11,565 shares of the BHC stock. Since that time, the ESOP has accumulated additional shares of the BHC. On *, the ESOP owned 15,255 shares or 20.7% of the issued BHC stock. On June 15, 1990, the ESOP owned 17,180 shares or 23.1% of the issued BHC stock.

Paragraph (a) of subsection (9) of Section 15 of the Illinois Banking Act ("Act") (Ill. Rev. Stat. 1981, ch. 17, par. 322(9)(a)) was the governing law in 1981 on stock changes-in-control at the time the ESOP exchanged its Bank stock for BHC stock. Paragraph (a) stated in Part:

Before a change may occur in the outstanding stock of any state bank which will result in control or a change in the control of the bank or before a change in the control of a holding company having control of the outstanding stock of a state bank which will result in control or a change in control of the bank or holding company, the Commissioner shall be of the opinion and find:

- (1) That the general character of its proposed management, after the change in control, is such as to assume reasonable promise of successful operation; and
- (2) That the future earnings prospects, after the proposed change in control, are favorable.

* * *

As used in this subsection, the term "control" means the power to directly or indirectly direct or cause the direction of the management or policies of the bank.

Paragraph (a) went on to state:

If there is any doubt as to whether a change in the outstanding stock is sufficient to result in control thereof or to effect a change in the control thereof, such doubt shall be resolved in favor of reporting the facts to the Commissioner (emphasis added).

That language remained unchanged through 1986.

In 1987, the Illinois General Assembly made a few changes to paragraph (a). Public Act 84-1471 divided paragraph (a) into new paragraphs (a) and (b). Public Act 85-211 removed subsection (9) from Section 15 of the Act and transferred it to Section 18 (Ill. Rev. Stat. 1987, ch. 17, par. 325). Some of the changes made by public Act 85-211 to former subsection (9) included the following:

- (1) The words "ownership of" were added to paragraph (a) (emphasis added);
- (2) The words "ownership of such amount of stock or ability to direct the voting of such stock as to give" were added to the definition of "control" in paragraph (b) (emphasis added);
- (3) A new sentence was added to paragraph (b) which stated: "A change in ownership of stock which would result in direct or indirect ownership by a stockholder, an affiliated group of stockholders or a holding company of 20 percent...shall be presumed to constitute a change of control...." (emphasis added); and
- (4) The words "ownership or control of the" were added to paragraph (b) with respect to any doubt about filing with the Commissioner (emphasis added).

A common addition made by the Illinois General Assembly to paragraphs (a) and (b) was the word "ownership." That word was specifically inserted into important change-of-control provisions. It is reasonable to believe that the General Assembly intended to focus change-of-control decisions upon stock ownership considerations.

In the ESOP's case, it is this Agency's position that the ESOP should file a change-of-control application. It has never filed a change-of-control application since its organization. On the other hand, since the time it first acquired BHC shares, its ownership of BHC stock has increased to such an extent that both former subsection (9) of Section 15 and the present Section 18 would require the ESOP to file a change-of-control application. Although some of the ESOP's BHC stock may be pledged for debt purposes, that would not affect the requirement that the ESOP must file since the statute does not distinguish between encumbered and unencumbered ownership.