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FILE NO. S-1049

**BANKS AND BANKING:
Definition of a Bank
Holding Company**

**Richard K. Lignoul
Commissioner of Banks and Trust Companies
Room 400 Reisch Building
4 West Old State Capitol
Springfield, Illinois 62701**

Dear Mr. Lignoul:

I have your letter requesting my opinion regarding a possible violation of The Bank Holding Company Act of 1957 (Ill. Rev. Stat. 1973, ch. 16 1/2, pars. 71 et seq.) by reason of the following facts. Madison Financial Corporation of Chicago is sole owner (less directors' qualifying shares) of the stock of Madison Bank and Trust Company. Recently certain of Madison Financial's officers and directors have undertaken to organize Madison National Bank of Niles. Madison Financial

proposes to acquire 14.9% of the voting shares of Madison National Bank in order to form a "subsidiary relationship". An additional 27.4% or more of Madison National's stock will be purchased by persons who are officers or directors of Madison Financial and/or its wholly owned subsidiary, Madison Bank and Trust Company.

Section 3 of The Bank Holding Company Act of 1957 (Ill. Rev. Stat. 1973, ch. 16 1/2, par. 73) provides in part that it shall be unlawful for any company to take any action resulting in its becoming a bank holding company. The question you pose is whether the stock acquisition plan outlined above will lead to Madison Financial becoming a "holding company" as defined in section 2 of The Bank Holding Company Act of 1957. (Ill. Rev. Stat. 1973, ch. 16 1/2, par. 72.) Section 2 states in pertinent part:

> "* * * (c) 'Bank holding company' means any company (1) which directly or indirectly owns or controls 15 per centum or more of the voting shares of each of two or more banks or of a company which is a bank holding company by virtue of this Act, or * * * "

It is evident from the language of this provision that because of its ownership of Madison Bank and Trust Company, Madison Financial could not itself purchase directly 15% or

more of the voting stock of Madison National. The problem to be resolved is whether the plan proposed will result in Madison Financial acquiring "indirect" ownership or control of 15% or more of the stock of Madison National.

In construing the phrase "indirectly owns or controls" used in section 2, it is necessary to begin by noting that because of the penalty provisions contained in section 4 (Ill. Rev. Stat. 1973, ch. 16 1/2, par. 74), the Bank Holding Company Act of 1957 is a penal statute. (Salzman v. Boeing, 304 Ill. App. 405.) In dealing with penal statutes the courts of Illinois have generally applied the rule that such statutes are to be strictly construed. (People v. Isaacs, 37 Ill. 2d 205.) At the same time, however, it should be remembered that the object in construing a penal statute, as well as with other statutes, is to determine the intention of the legislature. Thus, the rule of strict construction is only of value as assisting in ascertaining the legislative intent and therefore, it should be applied in conjunction with other appropriate rules of construction. People v. Kirkland, 397 Ill. 588.

One of the most fundamental rules of construction is that in seeking to give effect to the intention of the General

Assembly, one should look beyond the words of the statute to the object to be attained and the evil to be remedied. (People v. Dednam, 55 Ill. 2d 565.) The evil to be remedied by The Bank Holding Company Act of 1957 is unmistakably set forth in section 1 of the Act (Ill. Rev. Stat. 1973, ch. 16 1/2, par. 71) which states:

> "§ 1. It is held to be in the public interest that competition prevail in the banking system and to that end that the independence of unit banks be protected."

"Indirect" ownership or control of stock within the meaning of section 2 is thus limited to the sort of influence that would impair the ability of individual unit banks to carry on an independent banking business.

Another generally applicable rule of construction states that in the absence of specific statutory definition, it is presumed that words in a statute are to be given their ordinary and popularly understood meaning. (People v. Dednam, 55 Ill. 2d 565.) According to Webster's Third New International Dictionary the word "indirect" indicates the doing of a thing in an obscure, roundabout or circuitous manner. The question thus becomes one of defining what it means to own or control stock in such a manner.

Black's Law Dictionary, Revised Fourth Edition, defines the word "own" as meaning: "To have good legal title; to hold as property; to have legal or rightful title to; to have; or to possess". Based on this definition it would seem that a corporation might be said to own stock in a bank indirectly when a right to possession of or title to the stock appears to reside in a third party when it, in fact, belongs to the corporation.

In the case of State ex rel. Uebelhor v. Armstrong, 248 N.E. 2d 32 (Ind. 1969), the Supreme Court of Indiana reached a similar conclusion when asked to construe that State's Bank Holding Company Act. (Burns' Indiana Ann. St. § 18-1814 et seq.) It held at page 37 that "indirect ownership" meant "shares held by the real owner in the name of a third party". Although certainly not binding in Illinois, the conclusion of the Indiana court is not totally unpersuasive. Section 1 of the Indiana Bank Holding Company Act (Burns' Indiana Ann. St. § 18-1814) states as does section 1 of the Illinois Act, that the purpose of the statute is to maintain competition among banks by preventing the expansion of bank holding

companies. In addition, section 2(c) of the Indiana Bank Holding Company Act (Burns' Indiana Ann. St. § 18-1815) sets forth a definition of "holding company" which is almost identical to that contained in The Bank Holding Company Act of 1957.

In the facts presented here, there is no indication that Madison Financial will have any claim of right or title to the shares of Madison National Bank stock to be purchased by the officers and directors of Madison Financial and the Madison Bank and Trust Company. It appears that the individuals themselves and not Madison Financial will be, in every sense, the true owners of the stock.

It is therefore my opinion that based on the facts provided, Madison Financial will not indirectly own any stock in Madison National Bank within the meaning of The Bank Holding Company Act of 1957.

The word "control" is defined by Black's Law Dictionary, Revised Fourth Edition, as the: "Power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee". Similarly, Webster's Third New International Dictionary defines it as the exercise of a "restraining or directing influence".

It is apparent from these definitions that the concept of "control" is broader and more flexible than that of "ownership". A corporation need not have any claim of right or title to the stock of a bank in order to exercise a "directing influence" over it. As the facts of this case illustrate, it is sometimes necessary to look beyond simple ownership to the realities of control in order to protect the independence of unit banks. cf. B. Forman Co. v. Commissioner of Internal Revenue, 453 F. 2d 1144 (2d Cir. 1972); Borge v. Commissioner of Internal Revenue, 405 F. 2d 673 (2d Cir. 1968); and Hall v. Commissioner, 32 T.C. 390 (1959), aff'd. 294 F. 2d 82 (5th Cir. 1961).

On page 6 of its application to the Federal Reserve Bank of Chicago, Madison Financial asserts that it seeks to acquire 14.9% of the voting shares of Madison National Bank of Niles in order to form a "subsidiary relationship". The application goes on to state that Madison Financial plans to provide the new bank with certain "management services", both through its own facilities and those of its wholly owned subsidiary, the Madison Bank and Trust Company. These services,

it is said, will include: "[The] establishing of policies and the general supervision of the Madison National Bank of Niles' operation, direct involvement in lending decisions, direction of the purposes and sale of investment securities, and any other services that might be required to insure [the] safe and efficient operation [of] the bank".

It is evident from these statements that Madison Financial intends to use the interest it acquires in the shares of Madison National, together with the shares purchased by its own officers and directors and those of Madison Bank and Trust, to control the policies and operation of the bank. Given this express intention to influence the bank's management, it would be unrealistic to suppose that Madison Financial's power to control the stock of Madison National Bank will be limited to the 14.9% it proposes to own directly.

The decisions regarding the nature and extent of the "management services" to be provided Madison National by Madison Financial and by the Madison Bank and Trust Company must necessarily originate with the directors and officers of the latter two corporations. They are the individuals charged with the management of the business of their corporations by

sections 33 and 43 of the Business Corporation Act. (Ill. Rev. Stat. 1973, ch. 32, pars. 157.33 and 157.43.) Once those decisions are made by the boards and officers of the two corporations, the directors of Madison Financial will vote that corporation's shares of Madison National stock accordingly. When they do so, it would be remarkable if most of the officers and directors of Madison Financial and Madison Bank and Trust did not vote their personal shares of Madison National Bank stock in the same way.

The facts as presented indicate that those individuals responsible for the policy decisions which will determine how Madison Financial votes its shares of Madison National stock will personally own additional shares in the same bank. When totalled together, their combined interest and that of Madison Financial itself amount to over 42% of the bank's voting shares. Viewed realistically, such a situation involves a clear threat to the ability of Madison National to operate as an independent banking unit.

It is therefore my opinion that the shares of stock of Madison National to be purchased by officers and directors of Madison Financial and its wholly owned subsidiary, Madison

Bank and Trust, would be "indirectly controlled" by Madison Financial within the meaning of The Bank Holding Company Act of 1957. The stock acquisition plan proposed by Madison Financial would therefore result in its becoming a "holding company" in violation of that Act.

Very truly yours,

ATTORNEY GENERAL