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RE: Investments in Cooperative Finance Corporation ("CFC"), CoBank, and Rural Electric Supply Cooperative ("RESCO")

Dear Troy:

I. Introduction

Questions have been raised as to whether a Public Power District ("PPD") can conduct business with CFC, CoBank, and RESCO in accordance with Nebraska law, more specifically, if PPD's can lawfully own stock or become a member of such entities. While it is clear such business is authorized under Nebraska Statute, the question arises under the Nebraska Constitution. Therefore, this opinion is intended to address the inconsistency between the statutes and Nebraska Constitution.

This opinion will initially review and identify each of the pertinent constitutional provisions. Then, the case law interpreting these constitutional provisions will be analyzed. The Nebraska Attorney General's office has issued several opinions related to this topic over the past thirty years, and therefore, each opinion is also addressed. Each of the applicable statutes authorizing investment or relationships with these types of entities will then be addressed, followed by an analysis of membership in CFC, CoBank, and RESCO.

II. Analysis

Constitutional Provisions

A. Article XI, Section 1 of the Nebraska Constitution provides:

> **No** city, county, town, precinct, municipality, or other **subdivision of the state shall ever become** a **subscriber** to the capital stock, or **owner of such stock**, or

> any portion **or interest** therein **of any** railroad, or **private corporation, or association**, except that, notwithstanding any other provision of this Constitution, the Legislature may authorize the investment of public endowment funds by any city which is authorized by this Constitution to establish a charter, in the manner required of a prudent investor who shall act with care, skill, and diligence under the prevailing circumstance and in such investments as the governing body of such city, acting in a fiduciary capacity for the exclusive purpose of protecting and benefiting such investment, may determine, subject to such limitations as the Legislature may by statute provide.

This Constitutional article was first adopted in 1875. Its only actual amendment occurred recently in 2008. However, that amendment established an exception only for investment of public endowment funds. There was no discussion or proposed amendment to allow a subdivision of the state to become a subscriber or owner of stock in a private corporation or association. But for an Ernie Chambers floor amendment to the originally proposed language, public power districts would have been afforded the ability to invest endowment funds into these entities. Case law indicates the original intent of the Constitutional provision was to keep states/political subdivisions out of private business. By prohibiting these investments, it prevented public funds from being used in construction of railways, canals, and similar projects. *See, Nebraska League of Savings and Loan Associations v. Mathes*, 201 Neb. 122 (1978). Additionally, the provision was intended to keep public entities out of private enterprise. *See, State ex rel Johnson v. Consumers Public Power District*, 143 Neb. 753, 10 N.W.2d 784 (1943).

B. Article XV, Section 17. Retirement and pension funds; investment, states:

> Notwithstanding section 3 of Article XIII or any other provision in the Constitution:
>
> (1) The Legislature may provide for the investment of any state funds, including retirement or pension funds of state employees and Nebraska school employees in such manner and in such investments as it may by statute provide; and
>
> (2) The Legislature may authorize the investment of retirement or pension funds of cities, villages, school districts, public power districts, and other governmental or political subdivisions in such manner and in such investments as the governing body of such city, village, school district, public power district and other governmental or political subdivision may determine but subject to such limitations as the Legislature may by statute provide.

Except for Article XIII, Section 3, which prohibits the State from lending its credit to private enterprises, there are numerous instances in which Article XV, Section 17(2) is described as one of the few exceptions to the general rule in Article XI, Section 1. However, in conducting this research, only one instance could be located in interpreting Article XV, Section 17(1). In a March 15, 1967, Attorney General Opinion ("AGO"), the question as to whether state funds could be deposited in savings and loan association was addressed. "We consider the provisions of Article XV, Section 17(1), Nebraska Constitution, to allow the Legislature an extremely broad discretion in authorizing the investment of state funds. The investment of any funds of the state itself, as opposed to those of political and governmental subdivisions, may be invested in such manner as the Legislature may provide. No limitations upon this discretion are provided." As pointed out in a 1987 and 2007 AGOs, the term "state funds" is not defined by either case law or statute. (Opinion No. 87001 and 07016). Without definitions or more explicit guidance, the question remains as to when and to which funds the legislature has unfettered control over. To state that "state funds" are not those of political subdivisions, but rather, only the funds of the state creates inconsistencies. PPDs commonly comply with state laws that are also applicable to state agencies. Examples include public records laws, Opens Meetings Act, election laws, and various tax laws. Commonly, these laws limit and prescribe the manner in which state funds can be expended. The AGO does not address the question at issue.

A review of the Nebraska statutes provides instances of inconsistencies with the general concept of state funds. The terms "public resources" and "public funds" are defined by statute and analyzed in various contexts applicable to PPDs. NEB. REV. STAT. § 49-14,101.02 sets forth how a public employee may expend "public resources or funds." "Public resources means personnel, property, resources, or funds under the official care and control of a public official or public employee." This definition appears straightforward and indicates that political subdivision funds are at the very least "public resources." However, this conclusion is less clear when considering the same term as defined by the Nebraska Budget Act. First, there is some inconsistency as to whether the Nebraska Budget Act even applies to PPDs. By statute, The Nebraska Budget Act is codified at NEB. REV. STAT. §§ 13-501-513. But, § 13-501 contains an annotation for educational board requirements found at § 13-518. This annotation, in theory, would extend the Nebraska Budget Act's applicability beyond § 13-513. PPDs do have a budget requirement found at § 13-517, within the general vicinity and context of the Nebraska Budget Act. Assuming the PPD budget requirements do fall within the Nebraska Budget Act, the Act defines

"public funds" as all money, including nontax money, used in the operation and functions of governing bodies." The term "governing body" includes a list of various governing bodies. Public Power Districts are not on that list. The reason for their exclusion is not immediately clear because irrigation districts, natural resource districts, and municipal utility districts are each listed and are similarly situation to PPDs.

Additionally, *United Community Services v. Omaha National Bank*, 162 Neb. 786 (1956) determined that Omaha Public Power District ("OPPD") could not expend public funds for charitable purposes outside explicit legislative authority. OPPD had authority to expend revenues for operating expenses, indebtedness, and maintenance. OPPD argued the charitable contributions were incidental to their business operations. The Court stated, "While the revenues received by the district in the operations of its business are not public funds in the same sense as those derived from taxation, however, they are public funds collected by the district for certain purposes and the Legislature may, under its control of the district, authorize their expenditure for a public purpose beneficial to such district…"

With the above analysis in mind, it raised doubt as to whether the March 15, 1967 AGO actually provides guidance as to whether Article XV, § 17(1) has meaningfully been examined. It is a basic construct of statutory interpretation that "A statute is not to be read as if open to construction as a matter of course; where words of statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning and in absence of anything to indicate the contrary, words must be given their ordinary meaning and it is not within province of court to read a meaning into a statute that is not warranted by legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute." (*O'Neill Production Credit Ass'n v. Schnoor*, 208 Neb. 105, 302 N.W.2d 376 (1981)).

This lack of recognition by the Court and Attorney General's office directly conflicts with this principle. The plain reading of Article XV, Section 17(1) indicates that the legislature may provide how state funds may be invested. This includes but is not necessarily limited to pension and retirement funds. This would be a significant interpretation, as there are multiple statutes indicating investments and the business relationship with CFC, CoBank, and RESCO are each permissible. The argument that Article XV, Section 17 should only apply to pension funds can be challenged with another simple principle of statutory construction—article and statute headings do not have the force of law and are not part of the

statute. *State v. Riensche*, 283 Neb. 820, 812 N.W.2d 293 (2012); *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007). Based on this principle and the language of section 17(1), it would be plausible to argue that the Constitution does allow for statutes to provide authority for investments in CFC, CoBank, and RESCO.

C. Nebraska Case Law interpreting Article XI, Section 1:

There are three significant cases that address this provision, including: *Nebraska League of Savings and Loan Associations v. Mathes*, 201 Neb. 122 (1978); *Nebraska League of Savings and Loan Associations v. Johnson*, 215 Neb. 19 (1983); and *State ex rel Johnson v. Consumers Public Power District*, 143 Neb. 753, 10 N.W.2d 784 (1943).

1. *Johnson v. Consumers Public Power District.*

In *Johnson v. Consumers Public Power District*, the Nebraska Supreme Court was presented with a quo warranto action to determine whether Consumers Public Power District could purchase and control a privately held electric system. Consumers sought to purchase all of the common stock of Western Public Service Company. In doing so, Consumers would then own and control its electric utility facilities within the State of Nebraska and certain facilities located in South Dakota. The first issue was whether Consumers had the authority to purchase equipment outside Nebraska. The second question was whether the purchase of common stock was prohibited by Article XI, Section 1 of the Constitution. The Nebraska Supreme Court stated, "Section 1, Article XI of our Constitution must be construed with reference to the evils it was intended to correct or prevent. It was intended to prohibit any subdivision of the state from entering into private business by being associated as a stockholder, or by being a partner, or a part owner, in a private business venture or enterprise" (*Johnson*, at 753, 788). The Court went on to state that the Constitutional provision "was never intended to prohibit a purchase by a subdivision of the state of all the capital stock of a corporation solely for the purpose of lawfully acquiring the physical property of such corporation for a public use, constitutionally defined and lawfully authorized by the legislature." (*Id*. at 765, 794). This case is not subsequently cited in other Supreme Court jurisprudence and rarely cited by the Attorney General. Curiously, this case does not appear in the annotations to Article XI. Other states, including Missouri, which includes a similar constitutional prohibition, have cited *Johnson* for similar factual instances where all capital stock was purchased for a public purpose. *Johnson* stands for the proposition that intent must be a consideration in

construing this constitutional provision. This proposition lends credence to an argument that the intent of the constitutional prohibition was not to prohibit what the Legislature deemed appropriately and expressly authorized. This argument is strengthened by the language of Article XV, Section 17(1), as the Legislature has authorized these investments and business relationships.

2. *Nebraska League of Savings and Loan Associations v. Mathes*.

In *Nebraska League of Savings and Loan Associations v. Mathes*, the Court takes a very different approach. First, it explicitly sets forth that the Constitution prohibits the deposit of funds by subdivisions of the State in both federal and state chartered mutual savings and loan associations. Second, it allows for deposit of retirement and pension funds, as authorized under Article XV, section 17(2), in mutual savings and loan association. The Nebraska Supreme Court reasoned that a deposit is not a contribution to permanent capital as it can be withdrawn. The private mutual savings and loan associations do not issue stock for depositors, but the depositor becomes a member. With membership comes the right to vote and a right to share in the assets upon liquidation. The Court makes a key distinction between a savings and loan association and a bank. A deposit in a bank does not come with rights to vote or in the assets. Rather, it makes the depositor a creditor of the bank. The Court then engaged in a discussion of similar cases in Washington and Michigan. The Washington Supreme Court determined a deposit in a mutual savings and loan association not did violate a similar constitutional prohibition because a depositor did not contribute capital and the right to vote and membership privileges were "purely incidental to the purpose for the transaction." The Michigan Court; however, held that the deposit was in violation of a similar constitutional provision because a deposit came with ownership rights like voting, which were inseparable from the deposit.

In order to fully understand what *Mathes* prohibits, we must examine the inherent characteristics of the various financial institutions. Under the Nebraska Banking Act, there are numerous definitions that are relevant to this review. (NEB. REV. STAT. § 8-101). However, the institutions at issue in this opinion are not organized under Nebraska law. Therefore, the below definitions should be considered as general principles and not directly applicable to CFC, CoBank, or RESCO.

There are two types of savings and loan associations: capital stock and mutual. A capital stock savings and loan association is organized for the purpose of encouraging home financing and that issues a capital stock which has a par value that is credited to the capital stock account and any excess is

credited to the permanent capital of the association (NEB. REV. STAT. § 8-356). A mutual savings and loan association operates under either federal or state statute and has authority to raise capital through savings deposits, shares, certificates of deposit, etc.

As provided in *Mathes*, the accounts are subject to withdrawal and do not issue any stock which can be negotiated or assigned as an ordinary stock certificate. "A depositor…becomes a member of the association, has the right to vote for the officers thereof, and has the right to share in the assets of the association upon liquidation." (*Mathes* at 721, 124). It goes on to further state that all savings and loan associations organized in Nebraska are corporations and are "mutual" and not "stock" corporations. Additionally, they are within the ambit of prohibited constitutional investment entities because a deposit in a mutual savings and loan association created a different interest than does a deposit in a bank. A deposit in a mutual savings and loan association constitutes the acquisition of an ownership interest and a right to share in the control and profits or losses on liquidation of the mutual savings and loan association.

The *Mathes* Court weighed the reasoning adopted in other jurisdictions. The Court first examined the Supreme Court of Washington, a state that has a similar constitutional prohibition. The Washington Court held that investment in a savings and loan association was not an unconstitutional investment because voting and membership privileges accompanying a deposit is incidental to the purpose for the transaction. The Supreme Court of Michigan rejected the Washington reasoning, instead reasoning that deposit in a savings and loan association was different from a bank because ownership is inseparable from the actual deposit in a mutual savings and loan association.

The Nebraska Supreme Court in *Mathes* went on to explain that there would undoubtedly be a probation in acquiring capital stock in a stock corporation (*Id*. at 128). In further explaining why mutual savings and loan association investment was prohibited, it relied on *Family Savings & Loan Association v. Stewart*, 232 Md. 424, 194 A.2d 118; which stated, "Every member or shareholder is entitled to the same rights and privileges, and must bear the same burdens as every other member or shareholder holding the same class of investment security." This was also explained as the members or shareholders own the association and are entitled to conduct its affairs through their officers and Board of Directors. In doing so, the Court blurred the scope of the case's holding. In using the term "shareholder" it appears the Court intended to lump corporations into the scope of the opinion. This assumption is further confirmed in the final paragraph of the opinion in which the Court states, "The constitutionally

prohibited acquisition of any interest applies to any interest in private associations, which ordinarily issue no capital stock, to the same extent as it does to corporations which issue capital stock." (*Id*. at 128).

While the reasoning in this case has been applied by the Attorney General to other types of investments in financial institutions other than savings and loan associations, it is plausible that this case is not indicative of how a court may interpret a membership fee in cooperative associations like CFC, CoBank, or RESCO.

3. *Nebraska League of Savings and Loan Associations v. Johnson*.

In *Nebraska League of Savings and Loan Associations v. Johnson,* 215 Neb. 19 (1983), the Court addressed whether political subdivisions could somehow waive their rights in the corporation or association. The Nebraska Supreme Court held that a political subdivision could not sign away their ownership rights that come with depositing in a savings and loan association. Relying upon *Saunders v. State Savings and Loan Ass'n,* 121 Neb. 473, 478, 237 N.W. 572, 574 (1931); the Court held, "The basic and essential principle of a savings and loan association is mutuality…Members, whether borrowers or nonborrowers, have a mutual interest in the affairs, and sharing alike in its earnings, must share alike in its losses." For those associations organized under the laws of Nebraska, "all savings accounts and demand accounts shall have the same priority upon liquidation. Holders of accounts and obligors of an association shall, to such extent as may be provided by its charter or by regulations of the Board, be members of the association, and shall have such voting rights and such other rights as are thereby provided." To waive these principles of mutuality destroys the essential character of the savings and loan association and is beyond the powers of the association.

D. Attorney General Opinions

There are a multitude of AGOs somewhat related to the issues presented in this opinion.

In an Opinion dated March 7, 1967, a senator requested an opinion as to whether a political subdivision could deposit in state and federal savings and loan associations.

In its 1979 AGO number 65, Senator Keyes sought an opinion as to whether bill, LB 339, which would amend statutes authorizing political subdivisions to deposit funds in cooperative credit associations, would violate Article XI, Section 1, of the Constitution. In issuing its opinion, the AG cited *Mathes*' reasoning: "The court discussed the effect of a deposit in a savings and loan association,

pointing out that such a deposit gives the depositor a right to share in the control of the association and in the profits or losses upon its liquidation. The Court therefore held that a deposit in such association constituted the acquisition of an ownership interest in the association, and therefore was prohibited to political subdivisions by Article XI, Section 1." Even though a deposit in a cooperative credit association would create a similar ownership interest if deposited in a cooperative credit association, the AG ultimately opined that LB 339 did not violate the Constitution because NEB. REV. STAT. § 21-1316.01 did not require political subdivisions to be issued a share or become members in cooperative credit associations. The key determining factor in whether or not a deposit or membership violates the constitution is if such grants the holder ownership rights. Importantly, the statutes at issue in the opinion have since been repealed, as all cooperative credit associations organized pursuant to Nebraska law subsequently converted to a bank or other type of financial institution.

In AGO No. 241 in 1982, Senator Chris Beutler sought whether a technical community college could purchase retail repurchase certificates from a mutual savings and loan association. This particular savings and loan association authorized its members to serve as the holders of these certificates, which were bought by the savings and loan association. The AG first examined whether such an arrangement would constitute a violation of Article XIII, Section 3, which states: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation, except that the state may guarantee or make long-term, low-interest loans to Nebraska residents seeking adult or post high school education at any public or private institution in this state." This prohibition extends to political subdivisions as set forth in *State ex rel. Beck v. City of York,* 164 Neb. 223, 82 N.W.2d 269 (1957). Technical community colleges appeared to have statutory authority to invest funds in any section of § 72-1246, which includes savings and loan associations. However, the AG stated this would be a violation the Constitution pursuant to the reasoning set forth in *Mathes*. No further inquiry or reasoning was provided, rather it was summarized as violating Article XIII, Section 3 and lacking statutory authority.

In the 1995 AGO Opinion 95041, the question of whether a county hospital could invest surplus funds in mutual funds comprised of U.S. Government securities was addressed. The AG noted that such an inquiry was fact specific, and "the mutual fund's organization and prospectus would have to be carefully examined." The Opinion went on to further discuss the issue of whether such an investment would violate Article XI, Section 1. In doing so, the investment would need to be examined in light of

the intent of the prohibition. It was ultimately the opinion that there is no definitive answer. However, the AG opined that so long as the mutual funds only involved the issuance of corporate stocks and did not amount to an active role in operating or acquiring an interest any private business venture, then it would likely be constitutional.

In AGO Opinion 85132 the question presented was whether a county treasurer could deposit funds in a savings and loan association. The AG ultimately determined county funds could not be deposited in a savings and loan association, but a constitutional prohibition was not the reason. The AG determined that deposit with a capital stock savings and loan association would be permissible under the constitution because the ownership and control of the capital and assets is in the stockholders, not in the hands of the depositors. So while the constitution would not prohibit this deposit, NEB. REV. STAT. § 77-2312 explicitly requires county funds to be deposited in a bank, which therefore would prohibit such a deposit. The AG went on to reason that the only exception to the statutory prohibition would be for surplus funds, which is authorized under NEB. REV. STAT. § 77-2341.

In AGO Opinion 85142, the question asked was whether political subdivisions could deposit funds in a state charted credit union. By way of background, when Cooperative credit associations converted to other forms of financial institutions, many converted to credit unions. NEB. REV. STAT. § 21-1316.01 allowed political subdivisions to lawfully deposit funds in cooperative credit associations. The question at issue before the AG was what happened to the funds originally deposited with a cooperative credit association that had subsequently converted into a credit union. The AG determined such deposits were contrary to state law. The AG reasoned that NEB. REV. STAT. § 21-1773 prohibited political subdivisions from depositing their funds with credit unions because only members could deposit with a credit union and to become a member would require the political subdivision to subscribe to shares of stock. Even though the funds originally were deposited with a cooperative credit association, by virtue of the credit association becoming a credit union, those funds were then considered deposited with a credit union. The AG found this subscription to be contrary to Article XI, Section 1, of the Constitution.

In AGO Opinion 94045, Lincoln Electric System ("LES") requested an opinion as to whether or not they could participate in a risk retention group. The risk retention group would be an insurance company owned by its members. Members would be required to be engaged in similar business practices and needing similar insurance coverage. The AG analyzed whether membership in such a

group would amount to an ownership interest in violation of Article XI, Section 1. "While the Consortium is not itself a corporation, each subscriber shall participate in the collective profits and also assume additional contingent liability for assessments to meet unexpected obligations and to maintain surplus reserves. Consequently, it appears that subscribers have an ownership interest to the extent of their participation in the Consortium as well as interests in other private corporate entities owned and controlled by the Consortium." As the basis of their reasoning, the AG cited *Mathes* and noted the Court found no distinction between ownership represented by a stock certificate or by some other form of ownership and ultimately found that LES could not participate in the group.

In Ag Opinion 05006, the question presented was whether cities could invest in equity securities as pondered in LB 186. The AG opined that Article XI, Section 1 of the Constitution would need to be expanded in order to allow cities to make such investments. The opinion first notes the Nebraska Investment Council's policy of treating retirement funds and non-retirements funds of political subdivisions differently based on the Article XV, Section 17(2), which allows for retirement funds to be invested in such capital stock corporations and associations. The opinion too cites *Mathes*: "historical background warrants the conclusion that the constitutional provision was directed against acquisition by a subdivision of the state of any ownership or proprietary interest in a private corporation or association…" The opinion then goes on to cite another Nebraska case, *State ex rel Johnson v. Consumers Public Power District*, 143 Neb. 753, 10 N.W.2d 784 (1943), which held that a political subdivision may acquire stock in a corporation or association in order to acquire physical property for a defined public purpose. The opinion quotes, "This provision of our Constitution [Article XI, § 1] must be construed with reference to the evils it was intended to correct or prevent. It was intended to prohibit any subdivision of the state from entering into private business by being associated as a stockholder, or by being a partner, or a part owner in a private business venture or enterprise…Section 1, Article XI of our Constitution was never intended to prohibit a purchase by a subdivision of the state of all the capital stock solely for the purpose of lawfully acquiring the physical property of such corporation for a public use, constitutionally defined and lawfully authorized by the legislature." In a somewhat counterintuitive statement, the AG then proclaimed that, "The Nebraska Supreme Court's holding in *State ex rel Johnson v. Consumers Public Power District* reflects the view that the purchase of a majority if not all of the capital stock of a private company to acquire physical property for public use does not fall within the constitutional prohibition. Thus, this line of authority suggests that the purchase of lesser stock holdings,

not for the purpose of acquiring physical property for public use, but rather for investment would be violative of the constitutional prohibition barring a government subdivision from being associated with a private company as a shareholder." Based upon these excerpts, the AG determined that LB 186 amendments would run counter to the Constitution and would therefore require a Constitutional amendment.

E. Nebraska Statutory Review.

The Nebraska statutes take a strikingly different approach when considering deposits versus investments. It is unquestionably clear that the deposit of funds within a mutual associations and capital stock corporations poses no constitutional challenge. However, upon review of the statutes for investments, it becomes confusing because there is a statute dedicated solely to a public power district which authorizes such investments. From the plain language of the statute, it appears that investment in CFC, CoBank, and RESCO, is statutorily authorized. What brings confusion and is the conflict with the constitutional prohibition and yet, during the adoption of these statutes no mention of this constitutional prohibition was ever made during the committee hearings or floor debates. It is as if the legislature too completely glossed over the constitution. For the benefit of analysis, both the deposit and investment statutes have been included.

1. Deposit statutes:

> **77-2353. Public power and irrigation district funds; deposit required.**
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> All funds of any public power district, public irrigation district, or public power and irrigation district organized and existing under the laws of this state shall be deposited by the treasurer or other competent officer of such district in such bank, capital stock financial institution, or qualifying mutual financial institution as shall have been designated as official depositories for the funds belonging to such district. Such deposits shall either be made in accordance with and subject to agreements of such district with its bondholders or noteholders or, in the absence of any such agreement, shall be subject to the provisions and conditions provided in sections 77-2353 to 77-2361. Section 77-2366 shall apply to deposits in capital stock financial institutions. Section 77-2365.01 shall apply to deposits in qualifying mutual financial institutions.

77-2365.01. Funds of state or political subdivisions; deposit with qualifying mutual financial institutions; conditions.

(1)(a) Notwithstanding any other provision of law, any local ordinance, regulation, or resolution, or any rule or regulation to the contrary, the funds of this state or any political subdivision of the state may be deposited, by the appropriate custodians of such funds, with qualifying mutual financial institutions to the same extent and subject to the same terms, conditions, and limitations, including collateralization required, if any, as may be otherwise provided for the deposit of such funds in banks and capital stock financial institutions. In making such a deposit of public funds, it shall not be necessary for the state or any political subdivision to become an owner of any interest in the qualifying mutual financial institution or to acquire voting rights therein, and a qualifying mutual financial institution is authorized and empowered to receive public funds under these conditions. Qualifying mutual financial institution means a state or federal mutual building and loan association, a state or federal mutual savings and loan association, a state or federal mutual savings bank, or a state or federal mutual organized bank, which has a main chartered office in this state, any branch thereof in this state, or any branch in this state of a qualifying mutual financial institution which maintained a main chartered office in this state prior to becoming a branch of such qualifying mutual financial institution, which, by its charter and bylaws, restricts the rights of the state or a political subdivision as an account holder as follows:

(i) Interest in the qualifying mutual financial institution is limited to the withdrawal value of the state's or the political subdivision's account;

(ii) The state or the political subdivision has no voting rights in the qualifying mutual financial institution; and

(iii) The state or the political subdivision has no entitlement to any distribution of assets upon voluntary or involuntary liquidation, dissolution, or winding up of the affairs of the qualifying mutual financial institution.

(b) To the extent any deposit in any bank is:

(i) Required to be subject to check or draft, then such deposit may be subject to order; and

(ii) Required to be made, maintained, or otherwise dealt with by reference to the capital of any bank, then it may be so made, maintained, or dealt with by reference to the capital or net worth of such qualifying mutual financial institution, and if by reference to the undivided profits, capital notes, debentures, or other capital items of any bank, then to any unimpaired reserves, capital notes, and debentures or comparable capital items of such qualifying mutual financial institution.

(2) To the extent the state or a political subdivision is or may ever be required by law to deposit funds in a bank, the state or political subdivision shall, to the same extent and subject to the same terms, conditions, and limitations, including collateralization required, be required to make deposits in a qualifying mutual financial institution on the same basis.

(3) The restriction in subdivision (1)(a)(iii) of this section shall not apply to the interest of the state or political subdivision in any security required by law to be furnished by the qualifying mutual financial institution.

(4) A qualifying mutual financial institution that amends its charter or bylaws in such a manner that it no longer meets the restrictions set forth in subdivisions (1)(a)(i) through (iii) of this section shall immediately give notice that it is no longer a qualifying mutual financial institution to the custodial official, as that term is defined in section 77-2387, of every state and political subdivision depositor, and that the state or political subdivision must immediately withdraw its deposits.

(5) This section shall be applied in a manner consistent with the intention of the Legislature which is to provide for the deposit of funds of the state or any political subdivision in qualifying mutual financial institutions.

77-2366. Funds of state or political subdivisions; deposit with capital stock financial institutions; conditions.

(1) Notwithstanding any other provision of law, any local ordinance or regulation, or any rule or regulation to the contrary, the funds of this state or any political subdivision of the state may be deposited, by the appropriate custodians of such funds, with capital stock financial institutions to the same extent and subject to the same terms, conditions, and limitations, including collateralization required, if any, as may be otherwise provided for the deposit of such funds in banks. Capital stock financial institutions shall include state and national banks, capital stock state building and loan associations, capital stock federal savings and loan associations, capital stock federal savings banks, and capital stock state savings banks, which have a main chartered office in this state, any branch thereof in this state, or any branch in this state of a capital stock financial institution which maintained a main chartered office in this state prior to becoming a branch of such capital stock financial institution. To the extent any deposit in any bank is:

(a) Required to be subject to check or draft, then such deposit may be subject to order; and

(b) Required to be made, maintained, or otherwise dealt with by reference to the capital of any bank, then it may be so made, maintained, or dealt with by reference to the capital or net worth of such financial institution, and if by reference to the undivided profits, capital notes, debentures, or other capital items of any bank, then to any unimpaired

> reserves, capital notes, and debentures or comparable capital items of such other financial institution.
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> (2) To the extent the state or any political subdivision is or may ever be required by any law to deposit funds in any bank, the state or any such political subdivision shall, to the same extent and subject to the same terms, conditions, and limitations, including collateralization required, be required to make deposits in any capital stock financial institution on the same basis.
>
> (3) This section shall be applied in a manner consistent with the intention of the Legislature which is to provide for the deposit of funds of the state and any political subdivision in capital stock financial institutions.

NEB. REV. STAT. § 77-2366, was enacted in 1988. On the Introducer's Statement of Intent dated March 2, 1987, Senator Johnson explained the intended result in enacting LB 488 was to allow all political subdivisions the same authority to deposit and invest in capital stock savings and loan associations and in federal savings banks as was allowed in banks. "The Nebraska Supreme Court has held that the Nebraska Constitution prohibits deposits by political subdivisions in mutual savings and loan associations, therefore this bill only applies to capital stock associations. The prohibitions do not apply to them."

Based on the committee hearing transcript, this bill was brought by the savings and loan association industry and was opposed by the banking industry. The banking industry did not want other institutions to compete for public monies. Taking the hearing testimony as a whole, it is assumed the banking industry was not paying enough interest—below market value—on public money. For that reason, legislation was introduced to provide more competition for the public's money. The only mention of a constitutional prohibition relates to the principles set forth in the above described case law—that it is unconstitutional to invest in mutual savings and loan associations.

The Nebraska Banker's Association President, Kelly Holthus, testified "traditionally the thrifts [savings and loan associations] have been prohibited from having political subdivision funds by a constitutional prohibition against the purchasing of stock of corporations. The constitution was amended a few years ago to give access to a very narrow portion of state funds and some pension funds which was not opposed by the bankers at that time. Recent events have seen a few traditional mutual S&Ls convert to stock organizations. Thereby, allegedly removing the old constitutional argument." The recent events he referenced presumably was the enactment of statutes, as the constitutional provisions

related to this issue were not amended at that time. The first time a relevant constitutional article was amended subsequent to the enactment of this statute was 2008, nearly twenty years after this litigation.

> **77-2365.02. Funds of state or political subdivisions; investment or deposit in interest-bearing deposits; conditions.**
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> Notwithstanding any other provision of law, to the extent that the funds of this state or any political subdivision of this state, by the appropriate custodian of such funds, in interest-bearing deposits with banks, capital stock financial institutions, or qualifying mutual financial institutions, such authorization may include the investment or deposit of funds in interest-bearing deposits in accordance with the following conditions as an alternative to the furnishing of securities or the providing of a deposit guaranty bond pursuant to the Public Funds Deposit Security Act:
>
> (1) The bank, capital stock financial institution, or qualifying mutual financial institution in this state through which the investment or deposit of funds is initially made arranges for the deposit of a portion or all of such funds in interest-bearing deposits with other banks, capital stock financial institutions, or qualifying mutual financial institutions located in the United States;
>
> (2) Each such interest-bearing deposit is fully insured or guaranteed by the Federal Deposit Insurance Corporation;
>
> (3) The bank, capital stock financial institution, or qualifying mutual financial institution through which the investment or deposit of funds was initially made acts as a custodian for the state or political subdivision with respect to any such interest-bearing deposit issued for the account of the state or political subdivision; and
>
> (4) At the same time that the funds are deposited into other banks, capital stock financial institutions, or qualifying mutual financial institutions, the bank, capital stock financial institution, or qualifying mutual financial institution through which the investment or deposit of funds in interest-bearing deposits was initially made receives an amount of deposits from customers of other banks, capital stock financial institutions, or qualifying mutual financial institutions located in the United States which is equal to or greater than the amount of the investment or deposit of funds in interest-bearing deposits initially made by the state or political subdivision.

2. Investment Statutes:

77-2341. Funds of governmental subdivision; investment of surplus; securities authorized.

(1) Whenever any county, city, village, or other governmental subdivision, other than a school district, of the State of Nebraska has accumulated a surplus of any fund in excess of its current needs or has accumulated a sinking fund for the payment of its bonds and the money in such sinking fund exceeds the amount necessary to pay the principal and interest of any such bonds which become due during the current year, the governing body of such county, city, village, or other governmental subdivision may invest any such surplus in excess of current needs or such excess in its sinking fund in certificates of deposit, in time deposits, and in any securities in which the state investment officer is authorized to invest pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act and as provided in the authorized investment guidelines of the Nebraska Investment Council in effect on the date the investment is made. The state investment officer shall upon request furnish a copy of current authorized investment guidelines of the Nebraska Investment Council.

(2) Whenever any school district of the State of Nebraska has accumulated a surplus of any fund in excess of its current needs or has accumulated a fund for the payment of bonds and the money in such fund exceeds the amount necessary to pay the principal and interest of any such bonds which become due during the current year, the board of education of such school district may invest any such surplus in excess of current needs or such excess in the bond fund in securities in which such board of education is authorized to invest pursuant to section 79-1043.

(3) Nothing in subsection (1) of this section shall be construed to restrict investments authorized pursuant to section 14-563.

(4) Nothing in subsections (1), (2), and (3) of this section shall be construed to authorize investments in venture capital.

NEB. REV. STAT. § 77-2341, was enacted and subsequently amended with the purpose of assisting cities and other political subdivisions as to the types of investments that legally are permissible. Specifically stated by Senator Landis, "this is a bill that makes clear how cities will be able to determine the securities that they may invest their surplus capital." Surplus capital was explained to be "any fund in excess of its current needs or has accumulated a sinking fund for the payment of its bonds and the money in such sinking fund exceeds the amount necessary to pay the principal and interest of any such bonds which become due during the current year. What I think we are talking about here is the money that we are going to hold for a longer period of time than just for our current needs or for our current

bond payments." The statute allows for governmental subdivisions to invest in "any securities in which the state investment officer is authorized to invest." Curiously, the state investment officer leads the Nebraska Investment Council. Pursuant to NEB. REV. STAT. § 72-1259, political subdivisions can ask for the state investment officer to help invest money. The Council has a policy specifically for assisting political subdivisions. Guidance from the investment office states: "The State of Nebraska Constitution explicitly prohibits subscription to stock by political subdivisions in Article XI. The statutes of the Legislature and significant precedent from State court decisions provide a distinction between the retirement funds of a political subdivision and the non-retirement funds of a political subdivision. The activity of the Legislature and the court system leads to the situation that the retirement funds of political subdivisions can own stock and the non-retirement funds of political subdivisions cannot. Thus, this policy distinguishes between the retirement funds and non-retirement funds." However, my review of the statutes and case law does not read that narrowly to say this is the only distinction or exception to the constitutional prohibition.

> **77-2353.01. Public power districts; authorized investments.**
>
> In addition to other authorized investments, public power districts are authorized to invest and reinvest in: (1) Direct obligations of or obligations guaranteed by the United States of America; (2) bonds, debentures, or notes issued by any of the following federal agencies: Bank for Cooperatives; Federal Intermediate Banks; Federal Home Loan Bank System; Export-Import Bank of Washington; Federal Land Banks; or the Federal National Mortgage Association including participation certificates issued by such association; (3) public housing bonds purchased on the open market, issued by public housing authorities, and fully secured as to the payment of both principal and interest by a pledge of annual contributions under an annual contributions contract or contracts with the United States of America or temporary notes issued by public housing authorities or preliminary loan notes issued by local public agencies, in each case, fully secured as to the payment of both principal and interest by a requisition or a payment agreement with the United States of America; (4) direct and general obligations of any state within the territorial United States to the payment of the principal of and interest on which the full credit of such state is pledged; **(5) bonds, debentures, notes, or other instruments of indebtedness issued by a bank or other financial lending institution, whether public or privately owned, established by rural electric cooperatives and public power districts to provide supplemental financing in addition to financing available from the Rural Electrification Administration**; **(6) bonds, debentures, notes, or other instruments of indebtedness of a nonprofit rural electric supply cooperative organization providing electric line materials and other related equipment**

> **without profit to its members, including public power districts; (7) stocks, bonds, debentures, notes, or other instruments of indebtedness issued by an insurance carrier providing insurance coverage to such public power district**; (8) stocks, bonds, debentures, notes, or other instruments of indebtedness issued by corporations having authority to sell, lease, and service satellite television signal descrambling or decoding devices and satellite television programming; and (9) time certificates of deposit issued by any bank, capital stock financial institution, or qualifying mutual financial institution meeting the requirements of sections 77-2354 to 77-2357. Section 77-2366 shall apply to deposits in capital stock financial institutions. Section 77-2365.01 shall apply to deposits in qualifying mutual financial institutions.
>
> Public power districts when authorized by their respective boards of directors are authorized to take such action as may be necessary in order to carry out the foregoing investment authorization.

NEB. REV. STAT. § 77-2353.01 was enacted in 1969, first amended in 1973. In 1969, LB 450 intended to allow public power districts to invest their funds in bonds of the US Government, federal and state agencies, and banks formed by borrowers from the Rural Electrification Administration. Subsequently, this came to be the CFC. The bill passed unopposed and with no mention of the constitutional prohibition. In fact, there was much discussion about the structure of CFC and how CFC would operate. The Committee and Senators were satisfied that this bill should advance because the REA was so heavily involved in its formation, in addition to the fact that the rural public power districts could not obtain the requisite financing outside this option.

Then, in 1973, LB 47 sought to allow PPDs the authority to invest surplus funds in certificates of deposit in banks. At the time, there was a statute that prohibited such investments, as they were not withdrawable on demand. LB 47 was introduced on behalf of Omaha Public Power District and Central Nebraska Public Power and Irrigation District with the idea being that while projects were constructed, the loan funds could be deposited in a certificate of deposit until the time of completion and payment, earning a much higher interest rate than in a bank. The REA did not allow the rural public power districts to undertake in such activities, but this bill was supported by the rural public power districts. The attorney for the Nebraska League of Savings and Loan Associations sought to amend the bill to allow investment in certificates of deposit in savings and loan associations. In the January 17, 1973 committee hearing, discussion included whether the amendment would pass constitutional muster. The State of Washington's Supreme Court decision cited in *Mathes* was used by the savings and loan

association supporters as reasoning that to include savings and loan associations in the amendment would not effectively make the statute unconstitutional. Ultimately, Senators determined they would rather not amend the bill to include savings and loan associations out of fear that to do so may make the entire bill unconstitutional. Rather, it was decided that a separate bill could be introduced at another time providing the same right to invest in certificates of deposit in savings and loan associations.

It is important to note some specific discussion that occurred during that January 17, 1973 committee hearing pertaining to the constitutional question. There was no discussion as to whether a certificate of deposit in a bank was constitutional. Rather, this discussion was solely limited to whether such was permissible in a savings and loan association. Dean Kratz, the Nebraska League of Savings and Loan Associations' attorney, provided the following testimony:

> Number 1, the bill, of course, is submitted by the power districts who said that they had no objection to including investment in savings and loan associations in the bill provided that it doesn't endanger the constitutionality of the bill. We are of the opinion that it does not endanger the constitutionality of this particular bill. The opinions referred to by Mr. Brandt do exist [AG opinions from 1967]. They go back to 1967. The basis of opinions is that an investment in a savings and loan association is an investment in stock, which is considered prohibited by the Constitution. I think the principal theory behind the opinions of the Attorney General were that there are two characteristics of shares of savings and loan associations, at least there were at that time, which resemble the characteristics of common stock, and that was, number 1, that the shareholder had a right to vote and, number 2, that the shareholder would share in the dissolution of the assets or the distribution of the assets in the event of dissolution of the association. Now there have been some things that have happened since those Attorney General's opinions which I think have changed entirely the position of investment in savings and loan associations with regard to the governmental subdivision, and the first thing is that, and this applies with regard to federal savings and loan associations, there have been rules and regulations in the Federal Home Loan Bank which have authorized a deposit type of savings and loan association where you receive an account which is more or less of a deposit instead of a share in the association, and secondly, there has been a recent decision in the State of Washington which deals specifically with this very same identical issue. Now, at the time the Attorney General issued these opinions in 1967 there was no legal precedent whatsoever for those opinions. He based his opinion on his interpretation of the language of the statute without assistance of any kind of court decision….it is a decision from the Supreme Court of the State of Washington where they deal with this very same identical issue, and where they have concluded that shares in a savings and loan association are not common stock.

Outside this discussion, no constitutional debate occurred. Interestingly, in 2001, NEB. REV. STAT. § 77-2365.01, as set forth above, seems to provide authority for public power districts to at the very least deposit their funds into a mutual association like a savings and loan association provided that in exchange for the deposit, the public power district does not receive a right to vote for the governing board and does not have a right to share in the assets upon liquidations of the mutual association. The legislative history of LB 47 and its relation to §§ 77-2365.01 and 77-2353.01 seems to run counter to the logic employed in *Mathes*.

NEB. REV. STAT. § 77-2353.01 was again amended in 1982. In 1982, LB 644 added subsection (6). The floor debate transcripts and the Introducer's Statement of Purpose indicate the purpose in enacting this amendment was to allow for rural public power districts the authority to be members of RESCO. The Introducer's Statement of Purpose included the following:

> Ownership of common stock in RESCO is a prerequisite of membership. Each member is limited to one share of stock, valued at $100. With 355 members, RESCO's stock equity base is only $35,500, hardly a large equity base in which to operate under current economic conditions. To supplement the stock equity base and the member-owned preferred stock, which is earned patron dividends on net margins distributed in lieu of cash, RESCO is initiating a self-financing debenture program. This source of funding, which will be marketed in $5,000 and $10,000 security notes is expected to raise around $1.5 million to allow RESCO to finance inventory stocks. However, before RESCO member systems in Nebraska can purchase these securities, state law, section 77-2853.01 (which is a mistake, should be 77-2353.01), which limits governmental subdivision investment in government bonds, bank notes and the rurals' financial institution, the Cooperative Finance Corporation, must be extended to include non-profit cooperatives.

Senator Vickers noted that the rurals had been members and buying products for quite some time, but this statute was to even the playing field between the rural public power districts and the electric cooperatives in the state. He also specifically noted that OPPD and NPPD would not be authorized to be members or buy supplies, as they are not eligible for membership since they are not rural cooperatives or rural public power districts. Senator Sieck of Seward County then provided support stating that allowing membership in RESCO would actually provide a savings to the consumers because public power districts can buy supplies for a more reasonable price. Then, in 1987, LB 246 added subsection (7). The legislative history indicates the purpose in enacting LB 246 was to make investment in Federated Insurance a permissible investment for the public power districts. Senator Schellpeper

introduced the bill and explained it as "a very simple bill." "All it is designed to do is to allow public power districts to invest into the insurance companies that they buy their liability insurance from. At the…the way that it is now they buy from these companies, but if they can invest it, they can buy their insurance much cheaper and that's what this bill does." There was little floor debate and no references to any constitutional prohibition (did not request the committee hearing transcript).

In 1989, two bills were introduced and passed: LB 113 and LB 33. These two sections allow public power districts to invest in satellite television devices and programming; and time certificate depositions issued by banks, capital stock financial institutions, or mutual financial institutions. Again, no discussion as to the constitutional prohibition.

Noticeably absent from the statutes is direct authorization or contemplation to invest in CoBank. However, based on the history, which is more fully discussed below, reference is made in NEB. REV. STAT. § 77-2315.

> **77-2315. County funds; investment; securities authorized; interest; disposition; delivery of securities to successor.**
>
> A county treasurer may by and with the consent of the county board invest in United States Government bonds, bonds and debentures issued either singly or collectively by any of the twelve federal land banks, the twelve intermediate credit banks, or the **thirteen banks for cooperatives under the supervision of the Farm Credit Administration**, United States Treasury notes, bills, or certificates of indebtedness maturing within two years from the date of purchase, or in certificates of deposit. Every treasurer having invested in securities as aforesaid must deliver the same to his successor, who shall receive and accept the same as funds of the office. The interest received on any investments authorized by this section and section 77-2340 shall be credited to the general fund of the county, or to a fund to be used exclusively for the purposes contemplated by the provisions of section 23-120, in the discretion of the county board; *Provided*, that if such interest is received on a fund which shall not have been commingled with any other fund for investment purposes, then any interest received shall be credited to the fund from which the investment shall have been made. It shall be in the discretion of the county board whether any fund shall be commingled or invested from an identifiable account.

As will be more fully discussed, CoBank is the product of those "thirteen banks for cooperatives under the supervision of the Farm Credit Administration."

F. How Did This Get Missed?

Roughly forty states have a similar constitutional prohibition on state funds being invested in capital stock corporations and associations. So how has this question never been raised prior to now? It appears from the legislative history of Article XI, Section 1, and Article XV, Section 17, that the various investment statutes have never been fully vetted. Likewise, in enacting and amending various statutes in Chapter 77, the constitutional debate has never been included at committee hearings or during a floor debate.

Particularly concerning is the fact that NEB. REV. STAT. § 77-2535.01, the very statute that authorizes these types of investments and business relationships, has been amended five times since its enactment and not once has this constitutional debate been raised. Equally concerning is the fact that § 17(1) of the Constitution has been ignored by the Nebraska Supreme Court and Legislature. Previous discussions have cited to all the same provisions of Nebraska statute, without reference to the Constitutional provisions. In 2002, an NREA memo regarding "Investment Authority of Public Power Districts" analyzed NEB. REV. STAT. §§ 77-2353.01 and 77-2341. Then, in 2009, a second NREA memo analyzed public power district's authority to invest in CFC. Again, this memo focused heavily on NEB. REV. STAT. § 77-2353.01(5). It was determined that investing in Member Capital Securities offered by CFC would fit within the permissive language of § 77-2353.01(5). There was no reason to question the validity of these investments when there was a recent amendment in 2001 (LB 363) and no legislative discussion of a constitutional prohibition.

With so many statutes facially permitting these investments and these same statutes having numerous amendments, there has been little reason to question their constitutionality. A common principle of constitutional law and one recognized by the Nebraska Supreme Court is that statutes are presumed to be constitutional. The Supreme Court will not strike down a statute unless its unconstitutionality is clearly established. *J.M. v. Hobbs*, 288 Neb. 546 (2014). Furthermore, all reasonable doubts as to its validity will be resolved in favor of its constitutionality. *Big John's Billiards, Inc. v. State*, 288 Neb. 938, 852 N.W.2d 727 (2014). In AGO Opinion 94045 (cited above), the AG pointed out that "it is inappropriate that an opinion regarding constitutionality of existing statutes be requested of the Attorney General by legislators. Initially, we point out that the statutes you have inquired about constitute existing law and have a presumption of constitutionality…"

III. Application to Entities.

A. CFC

CFC is organized as a Nonprofit Cooperative Corporation under the District of Columbia's Corporations Act. According to the Articles of Incorporation and Bylaws, all members are equal within the Association. To be eligible for membership one must be a corporation, utility district, utility cooperative, or public body. Then, depending on the organization, there is either a $1,000 membership fee or a $200 membership fee. All receive a certificate of membership. All are entitled to the return of the par value of the membership certificate. No member is liable for the debts or other liabilities of the Association. The membership fee entitles each member to one vote. No interest or dividends are payable on certificates of membership. But each member receives a patronage dividend in proportion to their patronage. The Association may issue Patronage Capital Certificates but no dividends are payable on those certificates. In the event of a dissolution, Patronage Capital Certificates are retired without priority on a pro rate basis.

B. CoBank

The history is important to CoBank's analysis. In 1916, Congress created the Farm Credit System and established twelve banks. Then in 1933, Congress expanded the Farm Credit System to create thirteen Banks for Cooperative. In 1985, noncooperative rural electric systems become eligible for financing. In 1989, eleven of the thirteen Banks for Cooperative merge and are now called CoBank. In 2001, CoBank issued preferred stock to outside investors for $300 million. Presently, CoBank is still a national cooperative bank and a member of the Farm Credit System. The Farm Credit System has always and remains dedicated to funding agriculture and rural business through loans and leases. CoBank provides direct financing to large agribusinesses, cooperatives and rural utilities. Like CFC, CoBank is a member-owned cooperative lender that offers qualified borrowers patronage based on their average daily loan balance for the year, which further lowers borrower's overall net cost.

With the 2001 issuance of capital stock, CoBank established three types of ownership stock: preferred, common A stock, and common B stock. The type of ownership interest a PPD would obtain by entering into a loan agreement with CoBank would either be common A or common B stock. Class A stock members are entitled to vote in CoBank's affairs, whereas Class B common stock is not. The two types of common stock are in direct response to this question of whether public entities such as PPDs

can own stock or be members of associations such as CoBank. Remember, this issue is not unique to Nebraska. CoBank has undertaken an analysis and provided options for those public entities that determine they cannot be a member and own stock. Discussions with CoBank representatives indicates that it is up to legal counsel in each transaction to determine whether such transaction conforms to law. Because CoBank does not make the decision, they offer different classes of membership.

The relationship between CoBank and the PPD would closely resemble the relationship with CFC. To become eligible for financing, a PPD must pay $1000. In exchange, the PPD would become a class A common stock member. Class A common stock entitles the member to patronage dividends and a right to vote. Class B common stock does not entitle the member to patronage dividends or the right to vote. Class B common stock members are those entities that have determined they cannot be a class A common stock member under the laws under which they are organized.

Ultimately, like CFC, there are arguments to be made that becoming a class A common stock member, one entitled to patronage dividends, is permissible under Nebraska law. CoBank's history as a national cooperative bank under the Farm Credit System, a specifically contemplated and authorized investment under Nebraska statute, makes ownership of class A common stock a defensible membership. However, becoming a class B common stock member would eliminate the question of whether there was an acquisition of an unconstitutional ownership interest. Because CoBank is not authorized to take deposits, it is fundamentally a different organization structure from the savings and loan association. The Nebraska case law holding that there cannot be two different types of membership in a savings and loan association because the principle of mutuality is inherent in the organization is inapplicable to the CoBank analysis.

C. RESCO

RESCO is organized under the laws of Wisconsin as a stock cooperative. RESCO is member-owned comprised of Rural Electric Cooperatives, Municipal Electric Utilities and Investor Owned Utilities in the upper Midwest extending from Michigan to Montana. RESCO assists its member/customers in procuring their distribution and transmission electrical material supply needs at very low and competitive prices. Membership is limited to cooperatives, other self-help or mutual organizations, municipalities, and public power districts, which are engaged in the business of providing electric energy or telephone services to users at cost and without profit.

If RESCO does make profit, or excess margins, RESCO's Member-Owners receive patronage refunds in the form of cash and capital credits for the excess margins that are generated by RESCO. RESCO pays back 20% of the refund in the form of cash and the other 80% back in the form of a capital credit certificate based on the pro-rata share of margins each member contributes. Additionally, on an annual basis, RESCO's Board of Directors determines the amount of the previous years' capital credits should be paid back and retired. This translates into RESCO's members eventually receiving cash for all of their prior years' capital credits. RESCO members are the owners of one of the largest electrical supply distributors in the Midwest.

Because RESCO is member owned, each member receives one vote and the ability to participate in the governance of RESCO by attending the annual meeting, electing directors, or running for the board of directors. All members are treated equally.

Are these permissible memberships and investments?

The question to ask is will that membership fee be considered an "investment" prohibited by the constitution? Remember, political subdivisions cannot become a "subscriber" or "owner" of "capital stock" or "interest" in any private corporation or association. There are arguments to be made that membership in CFC, CoBank and RESCO is permissible. Membership in RESCO, like membership in CFC, was explicitly contemplated by the Nebraska legislature in enacting NEB. REV. STAT. § 77-2353.01. Membership and investment in CFC and RESCO was specifically named as the purpose in the amendments to § 77-2353.01. With that said, the constitutional prohibitions were never discussed by the legislature during those amendments. Secondly, Article XV, Section 17(2) contemplates that the legislature may determine how political subdivisions may invest their money. The case law currently available ignores that constitutional provision. The case law itself is not consistent. Some look to the constitutional prohibition's intent, while others ignore intent entirely and focus on the organization structure and rights available within that structure. A related argument is that CFC, CoBank and RESCO are not really a private associations or corporations within the scope of the constitution, as they cater to public needs at the regional or national level. Particularly in CFC's and CoBank's case, they are more of a private/public partnership, as they were created pursuant to federal law. The risk the constitutional prohibition seeks to avoid—engaging in private enterprise at the expense of state money—is not a legitimate threat. Additionally, the risk of collapse is so minute in comparison to the benefits associated with membership.

Ultimately, membership in RESCO and CFC is likely permissible and, if challenged, are defensible memberships and investments.

IV. Conclusion

Ultimately, the constitution, statutes, case law, and AGOs are not cohesive. In order to formally determine the constitutionality of these types of investments and business relationships, either the constitution will need to be amended or a case must be brought and the Nebraska Supreme Court opines on this issue. Based on the amount of ambiguity and incongruity in the law, presently there is no explicit prohibition to these memberships and investments.

But, it should be noted that as the Nebraska Supreme Court stated in *Johnson v. Consumers Public Power District*, "Section 1, Article XI of our Constitution must be construed with reference to the evils it was intended to correct or prevent." If the Court were to examine this question in that light, it should be difficult to find that a $1,000 investment in CFC, CoBank, or RESCO would be in violation of this Constitutional provision.

Sincerely,

David A. Jarecke

DAJ:EDK/sm