OPINION NO. 88-056

Syllabus:

1. For purposes of R.C. 3905.01(B), a corporate appointee insurance agency may be owned as a subsidiary of a bank or savings and loan association.

2. For purposes of R.C. 3905.01(B), a corporate appointee insurance

agency may be owned by a bank or savings and loan association holding company.

3. For purposes of R.C. 3905.18(C), a corporate appointee insurance agency may be owned as a subsidiary of a bank or savings and loan association, provided the corporate appointee does not use its agent license for the principal purpose of placing insurance upon the lives of persons for whom the parent bank or savings and loan association is an agent, custodian, vendor, bailee, trustee, or payee. All voting shares of stock of such corporate appointee insurance agency must be beneficially owned by natural persons who are residents of Ohio.

4. For purposes of R.C. 3905.18(C), a corporate appointee insurance agency may be owned by a bank or savings and loan association holding company, provided the corporate appointee does not use its agent license for the principal purpose of placing insurance upon the lives of persons for whom the bank or savings and loan association holding company is an agent, custodian, vendor, bailee, trustee, or payee. All voting shares of stock of such corporate appointee insurance agency must be beneficially owned by natural persons who are residents of Ohio.

5. Pursuant to 5 Ohio Admin. Code 3901-1-11(B), the sale of bank or savings and loan association customer lists to an insurance agency is prohibited if the fees paid therefor are "(1) conditioned on the issuance by the compensating insurer of a policy of insurance to the prospect; and/or (2) not reasonably related to actual expense reimbursement by the insurer to the [bank or savings and loan association] referring the prospect."

6. For purposes of R.C. 3905.05, R.C. 3905.16, R.C. 3905.22, and 5 Ohio Admin. Code 3901-1-10(H), lease payments by an insurance agency to a bank or savings and loan association for lobby space that are based upon a percentage of the agency's income may be deemed payments of commission if it is established that such payments are intended to compensate the lessor for the lessor's negotiating, or otherwise procuring, placing, or transmitting contracts of insurance for the agency in question, notwithstanding that such payments also serve as consideration for the fair market value of the agency's leasehold interest.

7. For purposes of R.C. 3905.05, R.C. 3905.16, R.C. 3905.22, and 5 Ohio Admin. Code 3901-1-10(H), remuneration paid by an insurance agency to a bank or savings and loan association for clerical or administrative services that the employees thereof perform for the agency may be deemed payments of commission if such services may be characterized, upon the facts presented, as negotiating, or otherwise procuring, placing, or transmitting contracts of insurance for the insurance agency in question.

8. An individual who is a licensed real estate broker may be licensed under R.C. 3905.01(B), provided he does not use his agent license for the principal purpose of placing insurance upon the property of persons for whom he has served, in his capacity as a licensed real estate broker, as agent or vendor in transactions concerning such property.

9. An individual who is a licensed real estate broker may be licensed under R.C. 3905.18(A) notwithstanding the principal purpose for which he uses his agent license.

10. A corporate appointee insurance agency that is affiliated with a corporate real estate brokerage firm through the same individual shareholder may be licensed under R.C. 3905.01(B) notwithstanding the use of its agent license for the principal

purpose of placing insurance upon property in connection with which the corporate real estate brokerage firm has served as agent or vendor.

11. A corporate appointee insurance agency that is affiliated with a corporate real estate brokerage firm through the same individual shareholder may be licensed under R.C. 3905.18(C) notwithstanding the use of its agent license for the principal purpose of placing insurance upon the lives of persons for whom the corporate real estate brokerage firm has served as agent or vendor in transactions pertaining to real property.

To: George Fabe, Director, Department of Insurance, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, August 29, 1988

You have requested my opinion regarding the licensing authority of the Department of Insurance with respect to the sale of insurance, and several related activities, by entities that are affiliated with financial institutions or real estate brokers.[1] Pursuant to R.C. 3901.011, the Superintendent of Insurance has all the powers and is authorized to perform all the duties vested in and imposed upon the Department of Insurance, and "shall see that the laws relating to insurance are executed and enforced." Such laws appear primarily in R.C. Title 39, and address virtually every aspect of the business of soliciting, selling, and underwriting a variety of insurance products. In particular, R.C. Chapter 3905 establishes a comprehensive scheme for the licensing and qualification of agents of insurance companies who sell or solicit insurance for those companies within Ohio. Individuals and other entities who wish to become licensed as agents of insurance companies for the purpose of selling property and casualty insurance and life insurance must follow the application procedures and satisfy the licensing requirements set forth in R.C. 3905.01 and R.C. 3905.18, respectively.[2] In this regard, R.C. 3905.01 and R.C. 3905.18 require that certain information and recitals be furnished, under oath, to the Department with respect to an applicant who requests to be licensed as an agent of

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1 As used in your letter, the term "affiliated," is to be understood as referring to a parent/subsidiary or holding company relationship in which capital stock of the licensed insurance agent entity is owned by a parent bank corporation or savings and loan association, or a bank holding company. A holding company has been defined as a corporation

> which owns or at least controls such a dominant interest in one or more other corporations [*i.e.*, brother-sister corporations] that it is enabled to dictate their policies through voting power, or which is in position to control or materially to influence the management of one or more companies by virtue, in part at least, of its ownership of securities in the other company or companies.

Kelley, Glover & Vale, Inc. v. Heitman, 220 Ind. 625, 634, 44 N.E.2d 981, 985 (1942). *See also North American Co. v. Securities & Exchange Commission*, 327 U.S. 686, 701 (1946) ("[t]he dominant characteristic of a holding company is the ownership of securities by which it is possible to control or substantially to influence the policies and management of one or more operating companies in a particular field of enterprise"). Bank holding companies are subject to specific federal regulation in the form of the Bank Holding Company Act of 1956, as amended, 12 U.S.C.S. §§1841-1850 (1984). *See generally Florida Department of Banking and Finance v. Board of Governors of the Federal Reserve System*, 760 F.2d 1135, 1136 (11th Cir. 1985).

2 Pursuant to R.C. 3901.041, the Superintendent of Insurance has promulgated rules implementing such application procedures and licensing requirements. Those rules appear at 5 Ohio Admin. Code 3901-1-10.

an insurance company. Thereafter, the Superintendent of Insurance relies upon the information and recitals thus furnished in deciding whether to issue an agent license to the applicant in question. In the case of an application submitted under R.C. 3905.01, there is to be included therewith a declaration that in applying for such license "it is not the appointee's purpose or intention principally to solicit or place insurance on appointee's own property or that of relatives, employers, or employees or that for which they or the appointee is agent, custodian, vendor, bailee, trustee, or payee," R.C. 3905.01(B). Similarly, in the case of an application submitted under R.C. 3905.18 on behalf of a corporation, there is to be included therewith a declaration that in applying for such license

> it is not the appointee's purpose or intention principally to solicit or place insurance on the lives of the appointee's officers, employees, or shareholders, or the lives of relatives of such officers, employees, or shareholders, or upon the lives of persons for whom they, their relatives, or the appointee is agent, custodian, vendor, bailee, trustee, or payee,

R.C. 3905.18(C).

You state in your letter that the Department of Insurance has received licensing applications under R.C. 3905.01 and R.C. 3905.18 from entities that are affiliated with either financial institutions or real estate brokers. You note that, historically, the Department "has taken inconsistent legal positions" on whether R.C. Title 39 prohibits entities that are so affiliated from being licensed as agents of insurance companies. This has been attributed, in large part, to difficulty the Department has encountered in arriving at an appropriate interpretation of the foregoing language of R.C. 3905.01(B) and R.C. 3905.18(C) as applied to such affiliate relationships. Although the courts have, on occasion, addressed the application of the licensing requirements of R.C. 3905.01 and R.C. 3905.18 to other insurance marketing arrangements, *see, e.g., In the Matter of the Suitability of 870-B Insurance Agency, Inc.*, Nos. 8796-8800 (Franklin County Ct. App. August 6, 1968) (unreported); *Motors Insurance Corporation v. Dressel*, 80 Ohio App. 505, 73 N.E.2d 817 (Franklin County 1947); *Jarus v. Robinson*, 71 Ohio Law Abs. 510, 133 N.E.2d 441 (C.P. Cuyahoga County 1954); *Motors Insurance Corporation v. Robinson*, 62 Ohio Law Abs. 58, 106 N.E.2d 572 (C.P. Franklin County 1951), *affirmed*, 62 Ohio Law Abs. 72, 106 N.E.2d 581 (App. Franklin County 1951), *appeal dismissed for lack of a debatable constitutional question*, 157 Ohio St. 354, 105 N.E.2d 61 (1952), there apparently has been no court decision examining the language of those sections within the specific business contexts described in your letter.

Accordingly, you have asked that I clarify for the Department of Insurance the meaning of the language of R.C. 3905.01 and R.C. 3905.18 quoted above and, in conjunction therewith, address the following specific questions:

1. In light of *In the Matter of the Suitability of 870-B Insurance Agency, Inc.*, may an insurance agency be a wholly owned subsidiary of a bank or savings and loan pursuant to O.R.C. Section 3905.01 or 3905.18? (See Exhibit "A" for diagram.)

2. In light of *In the Matter of the Suitability of 870-B Insurance Agency, Inc.*, may an insurance agency be owned by a bank or savings and loan holding company pursuant to O.R.C. Sections 3905.01 and 3905.18? (See Exhibit "B" for diagram.)

3. Does Title 39 of the Ohio Revised Code prohibit or restrict insurance agencies that are affiliated with financial institutions from engaging in the following activities:

   a. The sale of bank or savings and loan customer lists to an affiliated insurance agency?

   b. The lease of lobby space by an insurance agency from an affiliated bank or savings and loan at a fixed rental rate, or at a percentage of the agency's income?

c. The use of employees of the bank or savings and loan to perform clerical and/or administrative services for the insurance agency?

d. Entering into a joint venture or any other similar arrangement with a financial institution?

4. Does Title 39 of the Ohio Revised Code prohibit or restrict insurance agencies that are not affiliated with financial institutions from engaging in any of the aforementioned activities?

5. In light of *Jarus v. Robinson*, 71 Ohio Law Abs. 510, 133 N.E.2d 441 (C.P. Cuyahoga County 1954), and O.R.C. Sections 3905.01 and 3905.18, is an insurance agent or agency prohibited or limited from entering into a joint venture or any other similar arrangement with a real estate broker if the principal purpose of the affiliation is the sale of insurance products in conjunction with the sale of real estate?

Finally, you have asked that I confine my discussion of the foregoing questions to R.C. Title 39 as it applies to the licensing and regulatory authority of the Department with respect to the sale of insurance.

R.C. 3905.01 sets forth the requirements that must be satisfied by a person who applies to be licensed as an agent for the sale or solicitation of insurance other than life insurance. R.C. 3905.01(B) reads, in pertinent part, as follows:

> No *person* shall procure, receive, or forward applications for insurance unless he is a resident of this state and duly licensed by the superintendent of insurance. Upon written notice by an insurance company authorized to transact business in this state of its appointment of a *person* to act as its agent, the superintendent, if he is satisfied that the appointee is a suitable person and intends to hold himself out in good faith as an agent; that the appointee is honest, trustworthy, and understands the duties and obligations of an agent, and is familiar with the insurance laws of this state and with the terms and provisions of the policies and contracts of insurance he proposes to effect; ***that in applying for such license it is not the appointee's purpose or intention principally to solicit or place insurance on appointee's own property or that of relatives, employers, or employees or that for which they or the appointee is agent, custodian, vendor, bailee, trustee, or payee***; and, on and after July 1, 1987, that the appointee has completed the educational requirements set forth in section 3905.48 of the Revised Code, shall issue to the appointee a license which shall state in substance that the company is authorized to do business in this state and that the person named therein is a constituted agent of the company in this state for the transaction of such business as it is authorized to transact therein. (Emphasis added.)

See also R.C. 3905.01(A)(1) (defining the term "[a]gent," as used in R.C. Chapter 3905, as a "person who is appointed, in compliance with [R.C. Chapter 3905], by an insurer to solicit applications for a policy or contract of insurance or to negotiate a policy or contract of insurance on its behalf"). *See generally* 1936 Op. Att'y Gen. No. 5078, vol. I, p. 19 (concluding that the term "person," as used in G.C. 644, the statutory predecessor of R.C. 3905.01, includes a corporation, which, accordingly, may be licensed thereunder as an insurance agent).

R.C. 3905.16-.18, on the other hand, address the licensing of persons who seek to be appointed as agents of life insurance companies. R.C. 3905.16 states, in part, that a life insurance agent is a person "who solicits, negotiates for, places, or renews policies or agreements of life insurance for a consideration or compensation given, paid, or promised by any insurance corporation or any firm or person." R.C. 3905.17 further provides that the Superintendent of Insurance "may issue, as provided by [R.C. 3905.18], to any natural person who is a citizen of the United States, or who is a resident of the United States and has filed a declaration of

intention to become a citizen, a life insurance agent's license." With certain exceptions, the licensing requirements for life insurance agents delineated in R.C. 3905.18 duplicate the standards set forth in R.C. 3905.01. Under R.C. 3905.18(A), for example, it must appear to the Superintendent of Insurance that the applicant in question satisfies certain fitness requirements pertaining to the applicant's reputation, character, trustworthiness, education, and general suitability for licensure. Unlike R.C. 3905.01(B), however, R.C. 3905.18(A) contains no language addressed to the applicant's "purpose or intention principally to solicit or place insurance" with respect to either himself or persons with whom the applicant maintains certain legal relationships. Rather, if the fitness requirements delineated in R.C. 3905.18(A) are, in fact, satisfied by an applicant, the Superintendent of Insurance is directed to issue such applicant a life insurance agent license.

R.C. 3905.18(C) further authorizes the Superintendent of Insurance to issue a life insurance agent license to a corporation that qualifies therefor. R.C. 3905.18(C) states as follows:

> Upon written notice by a life insurance company authorized to transact business in this state of its appointment of a ***corporation*** to act as its agent in this state, the superintendent of insurance shall furnish such ***corporation*** with an application for agent's license which shall contain such questions as will enable the superintendent to determine that such corporation was organized for the purpose of acting as an insurance agent, that each employee of such corporation who will negotiate for, place, or renew policies or agreements of life insurance on behalf of such corporation has been issued a life insurance agent's license pursuant to division (A) of this section; that the voting shares of such corporation are beneficially owned by natural persons who are residents of this state; that such corporation and such life insurance company have executed a written agreement whereby the rights and duties of each are set forth; and ***that in applying for such license it is not the appointee's purpose or intention principally to solicit or place insurance on the lives of the appointee's officers, employees, or shareholders, or the lives of relatives of such officers, employees, or shareholders, or upon the lives of persons for whom they, their relatives, or the appointee is agent, custodian, vendor, bailee, trustee, or payee.*** Unless it appears that such corporation was not organized for such purpose or that each such employee has not been so licensed or that the voting shares of such corporation are not so beneficially owned or that such a written agreement has not been executed, the superintendent shall issue to such corporation a license which shall state, in substance, that such corporation is a life insurance agent.[3] (Footnote and emphasis added.)

Thus, under R.C. 3905.01(B), a person who is appointed to act as an agent of an insurance company other than life will be issued a license therefor if the Superintendent of Insurance is satisfied, *inter alia*, that, in applying for a license, it is not the appointee's purpose or intention principally to solicit or place insurance either on appointee's own property, property of appointee's relatives, employers, or employees, or property for which appointee's relatives, employers, employees, or appointee himself, is agent, custodian, vendor, bailee, trustee, or payee. Similarly, under R.C. 3905.18(C), a corporation that is appointed to act as an agent of a life insurance company will be issued a license therefor if the Superintendent determines that, in applying for a license, it is not the corporate appointee's purpose or intention principally to solicit or place insurance upon the lives of appointee's officers, employees, or shareholders, the lives of relatives of such officers,

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3 R.C. 3905.18 was amended in 1965 for the purpose of adding thereto subdivisions (C) and (D) expressly authorizing the licensure of corporations as life insurance agents. *See* 1965 Ohio Laws 919-20, 1472-73 (Am. S.B. 86, eff. Aug. 23, 1965). Perhaps as a result of inadvertence on the part of the General Assembly, R.C. 3905.17, which refers to the licensure only of a "natural person" as a life insurance agent, was not similarly amended to reflect this enlargement of the Superintendent's licensing authority.

employees, or shareholders, or the lives of persons for whom either such officers, employees, or shareholders, the relatives of such officers, employees, or shareholders, or the corporate appointee, is agent, custodian, vendor, bailee, trustee, or payee.

In conversations with members of my staff, you have indicated that the Department of Insurance is, in the first instance, uncertain about how this licensing standard in R.C. 3905.01(B) and R.C. 3905.18(C) should be interpreted and applied in evaluating the suitability of an applicant that either is a wholly owned subsidiary of a bank or savings and loan association, or is owned by a bank or savings and loan association holding company. In particular, you have asked that I analyze this requirement, in the light of case law addressed thereto, in an effort to ascertain, as a general matter, the meaning to be accorded the reference to an applicant's principal purpose or intention in seeking licensure as an insurance agent; identify, if possible, the criteria by which such purpose may be determined in the case of an applicant that is affiliated with a bank or savings and loan association, or a holding company thereof; and, with respect to an applicant that is so affiliated, explain the meaning and application of the terms "agent," "custodian," "vendor," "bailee," "trustee," and "payee." These essentially are the issues implicit in your first two questions, in which you ask whether an insurance agency may, pursuant to R.C. 3905.01 or R.C. 3905.18, be a wholly owned subsidiary of a bank or savings and loan association, or owned by a bank or savings and loan association holding company. Your first question contemplates an arrangement in which the licensed insurance agency is owned by, and as a subsidiary of, a bank or savings and loan association. In your second question you have in mind an arrangement in which the licensed insurance agency is owned by a bank holding company that also owns one or more banks or savings and loan associations.

In your first question you have described the insurance agency as a wholly owned subsidiary of a bank or savings and loan association. You have informed me that the use of the term "wholly owned," is not intended to imply that all the shares of the corporate agency's stock will be owned by the parent bank or savings and loan association. Rather, for the purpose of this opinion, it is to be understood that voting shares of the corporate agency's stock will, in accordance with the requirement set forth in R.C. 3905.18(C), *see* note 9, *infra*, be beneficially owned by natural persons who are residents of Ohio, and that the parent bank or savings and loan association will own only nonvoting shares of the agency's stock. The same will also apply in the case of a bank holding corporation, which is the focus of your second question.

I commence my analysis of these issues with an examination of the case law addressed to the licensing requirements set forth in R.C. 3905.01(B) and R.C. 3905.18(C), and the statutory predecessors thereto. Several court decisions in this area provide guidance in discerning the legislative intent underlying the requirement that information shall be elicited regarding an applicant's likely purpose or intention to solicit or place insurance with respect to himself, or persons with whom either the applicant, or certain other individuals, maintain particular legal relationships, and identifying the nature and scope of the discretion lodged in the Superintendent of Insurance in applying this requirement. In this regard, I find that the decision of the court in *Motors Insurance Corporation v. Robinson* furnishes the clearest available articulation of the rationale for this particular requirement. In that case, plaintiffs, a corporate car dealership and an individual car dealer and car salesman, sought to enjoin the Superintendent of Insurance, *inter alia*, from denying the renewal of licenses previously issued to them under G.C. 644, the statutory predecessor of R.C. 3905.01, as agents of the Motors Insurance Corporation. Plaintiffs sued as representatives of a class comprised of all other car dealerships and salesmen similarly situated, alleging that the Superintendent's interpretation and application of G.C. 644 with respect to the manner in which they were using their licenses to place theft and damage insurance on cars they sold was incorrect as a matter of law, and that a revocation or denial of licensure as a result thereof would impinge upon rights guaranteed them under the Ohio and United States Constitutions. The Superintendent of Insurance had apparently determined that plaintiffs' principal use of such licenses had been to procure insurance for vehicles that plaintiffs themselves had sold, in contravention of the statutory requirement.

In support of their claim, plaintiffs asserted that the principal purpose requirement of G.C. 644 was intended by the General Assembly to forestall "rebating and other discriminatory practices in connection with insurance premiums." *Motors Insurance Corporation v. Robinson*, 62 Ohio Law Abs. at 66, 106 N.E.2d at 577. Thus, insofar as they had not, in fact, engaged in such prohibited practices in connection with the sale of insurance, plaintiffs argued that it was immaterial, for the purpose of the Superintendent's determination, that they had used their licenses in a manner that contravened the literal terms of the statute.

The court, however, rejected this argument as a mischaracterization of the General Assembly's purpose in including this particular restriction in G.C. 644. The court first noted that to attribute an antirebating or nondiscrimination rationale to this restriction would be needlessly redundant because those concerns were already adequately addressed in G.C. 9589-1 (now R.C. 3933.01 (prohibition against rebates and advantages in policies)), and because the denial of licensure would be an unreasonably broad response to the potential problems of rebating and discriminatory premium rates. *Motors Insurance Corporation v. Robinson*, 62 Ohio Law Abs. at 68, 106 N.E.2d at 578 ("[t]he absolute guaranty that there would be no violation of §9589-1 GC, would be, of course, to inhibit the licensee from writing any insurance, which of course leads to an absolute absurdity"). Instead, the court viewed the restriction as a method of preventing several perceived evils associated with certain sales of insurance that might ultimately redound to the detriment of consumers and the insurance industry alike. On this point the court, having reviewed the treatment accorded related issues in *Motors Insurance Corporation v. Dressel* and *Automobile Insurance Agency, Inc. v. Lloyd*, 36 Ohio Law Abs. 448 (C.P. Franklin County 1941), *affirmed*, 36 Ohio Law Abs. 455, 44 N.E.2d 792 (App. Franklin County 1942), stated as follows:

> It clearly appears, therefore, that the interpretation placed on the added provisions of §644 GC made in 1935, was that there was a restriction against licensees placing insurance on motor vehicles sold by them or their employers, and this restriction was not limited to or determined by the vendor's interest, but was intended to apply to those transactions where the licensee or his employer had actually sold the particular automobile involved.
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> *The purpose of the restriction was undoubtedly intended to prevent an unfair advantage in the placing of insurance and the licensing of persons who were not intending to do a general insurance business, but simply to supplement their primary business of selling automobiles.*
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> This having been the interpretation of the provisions of §644 GC, prior to the amendment of §644-3 GC when the added provisions for revocation were incorporated which were in effect those provisions of §644 GC added in 1935, it is concluded by the court that the legislature intended the same interpretation of the amended 644-3 GC and that the restrictions with respect to insurance on property of which the licensee or his employer is the vendor applies to the time the sale is consummated, and the licensee *is in an especially advantageous position to place the insurance.*
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> ....
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> In the instant case it is not difficult to see that *if automobile salesmen may be licensed as insurance agents without restriction or limitation, the effecting of all kinds of insurance involving automobiles could conceivably and reasonably become in theory, if not in fact, a monopoly controlled by that company or companies which were successful in having the automobile agents licensed to sell their insurance.*
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> The prevention of such an eventuality could well have been the purpose of the legislature in enacting the law under consideration, which the court determines is not in contravention with any of our

state or national constitutional provisions.[4] (Footnote and emphasis added.)

Motors Insurance Corporation v. Robinson, 62 Ohio Law Abs. at 69, 71, 106 N.E.2d at 579-80.

Thus, according to the court, the "principal purpose" requirement of these several statutes was most likely intended to prevent an "unfair advantage" accruing to those licensed agents who were planning to place insurance only in conjunction with the sale of another product, a practice commonly known as a "tie in sale" or "tying arrangement." Such a sale or arrangement has been defined generally as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier," the possible deleterious effects of which are several:

> Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected. Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most.

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[4] The provisions of former G.C. 644-3 now appear in R.C. 3905.04 (refusal to grant or continue license).

In contrast to the opinion of the court in *Motors Insurance Corporation v. Robinson*, 62 Ohio Law Abs. 58, 106 N.E.2d 572 (C.P. Franklin County 1951), *affirmed*, 62 Ohio Law Abs. 72, 106 N.E.2d 581 (App. Franklin County 1951), *appeal dismissed for lack of a debatable constitutional question*, 157 Ohio St. 354, 105 N.E.2d 61 (1952), the earlier decision of the court of appeals in *Kraus v. Lloyd*, 46 Ohio Law Abs. 1, 3, 68 N.E.2d 350, 352 (App. Franklin County 1943) reflects less certainty about the reason for the restriction in G.C. 644:

> The section of the statute providing the conditions under which licenses shall not be issued does not disclose the purpose of this legislation. Counsel for plaintiff in his brief states that the purpose was to avoid the rebating of agent's commissions. If such be the purpose there was no evidence in the instant case that any rebating had taken place, but of course this would not necessarily be determinative for the reason that the section makes a positive declaration without the necessity of establishing the reason for such purpose.

In later affirming the decision in *Motors Insurance Corporation v. Robinson*, however, the court of appeals expressed confidence in the result and reasoning thereof: "We have examined the well-considered opinion of Judge Reynolds and are in accord with the logic and legal conclusions contained therein." 62 Ohio Law Abs. at 73, 106 N.E.2d at 581.

Northern Pacific Railway Co. v. United States, 356 U.S. 1, at 5-7 (1958) (footnotes and citations omitted). In the insurance field, for example, Congress has conferred an exemption upon the insurance industry from federal antitrust law regulation in the McCarran-Ferguson Act, 15 U.S.C.S. §§1011-1015 (1984 and Supp. 1987).[5] Nevertheless, tie in sales of insurance products have been the focus of litigation in which the applicability of such exemption to certain insurance activities has been questioned. *See, e.g., Dexter v. Equitable Life Assurance Society*, 527 F.2d 233 (2d Cir. 1975); *Addrisi v. Equitable Life Assurance Society*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *Federal Trade Commission v. Manufacturers Hanover Consumer Services, Inc.*, 567 F. Supp. 992 (E.D. Pa. 1983). *See generally* Kintner, Bauer & Allen, *Application of the Antitrust Laws to the Activities of Insurance Companies: Heavier Risks, Expanded Coverage, and Greater Liability*, 63 N. Car. L. Rev. 431, at 461-65 (1985) (discussing the foregoing cases, and other such decisions considering the McCarran-Ferguson provisions, where insurance is either the tied or tying product).[6] As noted by the court in *Motors Insurance Corporation v. Robinson*, such tie in sales could result in several

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5 In 15 U.S.C.S. §1011 (1984 and Supp. 1987), Congress has declared that the following general policy shall prevail with respect to federal regulation of the business of insurance:

> The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Consonant with the foregoing policy, 15 U.S.C.S. §1012 further provides:

> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [15 USCS §§ 1 et seq.], and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 16, 1914, known as the Federal Trade Commission Act, as amended [15 USCS §§ 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law. (Bracketed material in original.)

6 In the financial services field, sales of insurance may occur in connection with certain extensions of credit. Thus, at issue in *Federal Trade Commission v. Manufacturers Hanover Consumer Services, Inc.*, 567 F. Supp. 992 (E.D. Pa. 1983) was the sale of insurance by several finance companies to their customers simultaneously with the consummation of consumer credit transactions. With respect to such practice the Federal Trade Commission alleged that the defendant finance companies were engaged in unfair or deceptive trade practices by misrepresenting, directly or by implication, that the purchase of credit insurance was a prerequisite to the extension of credit. *Id.* at 993.

In R.C. 3933.04 the General Assembly has, *inter alia*, prohibited lenders from making a loan, or its renewal or extension, contingent upon the borrower's purchase of insurance from a particular insurance company or agent. R.C. 3933.04 reads, in part, as follows:

> No person, firm, or corporation engaged in selling real or personal property, engaged in the business of financing the purchase of real or personal property, or engaged in the business

undesirable consequences. First, agents who relied upon the sale of insurance as their sole livelihood might be deprived of an equal opportunity to place insurance with respect to the property that was the subject of the tie in sale. Further, consumers to whom such sales were directed might be unduly influenced or coerced to purchase insurance from the same agent who sold them the property in question. Finally, the insurance industry as a whole might suffer from the growth of monopolies within certain sectors of the industry that such tie in sales might encourage.

Accordingly, by including the "principal purpose" restriction in R.C. 3905.01(B) and R.C. 3905.18(C), the General Assembly hoped to forestall a proliferation of tie in sales or tying arrangements by agents licensed thereunder to sell or solicit insurance.[7] In this regard, the General Assembly may well have concluded that the probability of tie in sales of insurance would be greatest in those instances in which the licensed appointee placed insurance upon property for which either his relatives, employers, employees, or the appointee himself was agent, custodian, vendor, bailee, trustee, or payee. R.C. 3905.01(B). In the case of a corporate life agent licensed under R.C. 3905.18(C), this restriction was extended to include officers and shareholders of the appointee, two categories of individuals that are unique to the corporate setting.[8]

> of lending money on the security of real or personal property, and no trustee, director, officer, agent, or other employee of any such person, firm, or corporation shall require, as a condition precedent to the sale or financing the purchase of such property, to lending money upon the security of a mortgage thereon, or as a condition prerequisite for the renewal or extension of any such loan or mortgage or for the performance of any other act in connection therewith, that the person, firm, or corporation purchasing such property, for whom such purchase is to be financed, to whom the money is to be loaned, or for whom such extension, renewal, or other act is to be granted, or performed, negotiate any policy of insurance or renewal thereof covering such property through a particular insurance company, agent, solicitor, or broker. This section does not prevent the exercise by any person, firm, or corporation of its right to designate minimum standards as to the company, the terms and provisions of the policy, and the adequacy of the coverage with respect to insurance on property pledged or mortgaged to such person, firm, or corporation.

See also R.C. 3918.11 (providing, with respect to credit life insurance or credit accident insurance, that the debtor shall "have the option of furnishing the required amount of insurance through existing policies of insurance owned or controlled by him or of procuring and furnishing the required coverage through any insurer authorized to transact an insurance business within this state").

7 Obviously, applying such restriction in the case of the appointee's own property, or property of the appointee's relatives, employers, or employees, was probably intended to serve a purpose unrelated to tie in sales. With respect to the former, the General Assembly may have wished to forestall self-insurance by certain entities that hoped to obtain insurance without the assistance of an independent sales agent. With respect to the latter, the General Assembly may have intended to prevent the entry into the insurance sales field of persons who, whether by design or because of their own inability to do otherwise, would sell insurance only to their relatives, friends, and close acquaintances. Such concerns may, in turn, have reflected a desire on the part of the insurance industry to maintain high standards of professionalism within the industry in general, and among the ranks of individual sales agents in particular.

8 Nevertheless, this restriction has not been included in R.C. 3905.01(B) with respect to a corporate appointee licensed thereunder, thus revealing an inconsistency in the statutory scheme that is not easily explained.

As is evident from the statutory language, however, the licensing restriction imposed by R.C. 3905.01(B) and R.C. 3905.18(C) with regard to the sale of insurance to persons who fall within any of the categories enumerated therein is by no means absolute. Rather, such restriction precludes licensure only in those instances in which it is the appointee's "purpose or intention principally" to engage in such sales. *See, e.g., Kraus v. Lloyd*, 46 Ohio Law Abs. 1, 2, 68 N.E.2d 350, 352 (App. Franklin County 1943) ("the statute does not prohibit the writing of insurance upon an agent's own property or that of his relatives, employees or employers, but it only applies where the applicant is applying for a license for such principal purpose"). You have asked that I specify and discuss the criteria by which such a purpose may be determined in the case of an appointee that is affiliated with a bank or savings and loan association, or a holding company thereof, and, in conjunction therewith, explain the meaning and application of the terms "agent," "custodian," "vendor," "bailee," "trustee," and "payee." In particular, you wish to know under what circumstances, if any, a corporate appointee that is so affiliated may be considered to be an "agent," "custodian," "vendor," "bailee," "trustee," or "payee" of either (1) property upon which it intends to place insurance, R.C. 3905.01(B), or (2) persons whose lives it intends to insure, R.C. 3905.18(C).

I note initially that, in imposing this requirement, neither R.C. 3905.01(B) nor R.C. 3905.18(C) makes any distinction based upon the nature of the entity seeking licensure, or the fact that such entity may be affiliated with a particular parent corporation or holding company. There is, for example, nothing in either of these sections to suggest that this requirement was intended to be applied or interpreted in such a manner as to prohibit outright the licensing of either particular classes of applicants, *see, e.g., Motors Insurance Corporation v. Dressel*, 80 Ohio App. at 509, 73 N.E.2d at 819 (declaring invalid a rule promulgated by the Superintendent of Insurance stating that, as a matter of policy, the Department would no longer issue agents' or solicitors' licenses under G.C. 644 to new applicants who were connected with the automobile sales business); *Motors Insurance Corporation v. Robinson*, 62 Ohio Law Abs. at 68, 106 N.E.2d at 578 (noting that in *Motors Insurance Corporation v. Dressel* the court of appeals held that the Superintendent of Insurance "could not add to the qualifications or conditions for an insurance agent's license and that automobile salesmen could not be denied licenses simply for that reason"), or applicants that are affiliated with another legal entity. It would, therefore, be inappropriate to deny licensure under R.C. 3905.01(B) or R.C. 3905.18(C) to an applicant that is affiliated with a bank or savings and loan association, or a bank holding company, on that basis alone.[9]

Accordingly, in ascertaining whether such an applicant's principal purpose or intention in seeking licensure under R.C. 3905.01(B) or R.C. 3905.18(C) is to sell insurance to persons falling within the prohibited classes specified therein, the Department of Insurance should make an effort to apply criteria and standards similar, or, where appropriate, analogous to those it utilizes in the case of applicants that are not so affiliated. Such standards and criteria have not been defined or described in these statutes. It has been stated, however, that where statutory authority to perform an act is granted, and there is no provision governing the manner in which that authority shall be exercised, the act may be performed in any

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[9] On the other hand, R.C. 3905.18(C) does require as a condition of licensure that the voting shares of a corporate life appointee be "beneficially owned by natural persons who are residents of [Ohio]." *See* 5 Ohio Admin. Code 3901-1-10(C)(3).

Some states that have decided to limit or restrict banks and other financial institutions from engaging in the business of insurance, or activities connected therewith, have enacted separate statutory provisions to that effect. *See, e.g.*, Ga. Code Ann. §33-3-23; Va. Code §38.2-205. As in the case of the Georgia and Virginia code provisions, states sometimes adopt restrictions and exceptions similar to those that apply to either national banks, which appear at 12 U.S.C.S. §92 (1978), or those that apply to bank holding companies under the Bank Holding Company Act of 1956, as amended, which appear at 12 U.S.C.S. §1843(c)(8).

reasonable manner. *Jewett v. Valley Railway Co.*, 34 Ohio St. 601 (1878); 1984 Op. Att'y Gen. No. 84-080; 1984 Op. Att'y Gen. No. 84-047; 1984 Op. Att'y Gen. No. 84-036. *See also State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 12, 112 N.E. 138, 141 (1915), *affirmed*, 241 U.S. 565 (1916) (where no direction has been given, an officer "has implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method" of performing his duties); 1986 Op. Att'y Gen. No. 86-064; 1985 Op. Att'y Gen. No. 85-007; 1984 Op. Att'y Gen. No. 84-075. It has also been stated that the Superintendent of Insurance, in applying and enforcing the laws pertaining to insurance agents generally, "is, by the very nature of his duties, vested with a sound discretion in the exercise of which he is answerable to no one, except in case of its abuse." *State ex rel. Allstate Insurance Company v. Bowen*, 130 Ohio St. 347, 364, 199 N.E. 355, 362 (1936). Thus, as a general matter, the Superintendent may, in the exercise of a reasonable discretion, establish whatever standards and criteria he deems to be best suited to facilitating a true and accurate appraisal of an applicant's purpose in requesting licensure.

You have informed me that the Department of Insurance has often made this determination by means of a simple numerical percentage test, in which the percentage of an agent's sales to persons within the prohibited classes is compared with the agent's total sales volume. If the former figure amounts to a majority of the agent's total sales (*i.e.*, fifty-one per cent or more), there arises a presumption that the agent has sought licensure with the purpose or intention principally to sell insurance to persons within the prohibited classes. This type of test appears to have met with the approval of the courts. *See, e.g., Jarus v. Robinson*, 71 Ohio Law Abs. 510, 133 N.E.2d 441 (C.P. Cuyahoga County 1954) (a real estate broker primarily engaged in the brokerage business and incidentally in the insurance business, in that more than fifty-one per cent of the property that he insures is upon real estate for which he has acted as broker, selling the insurance to the purchaser of such property, comes within the purview of R.C. 3905.04, and pursuant thereto the Superintendent of Insurance shall refuse to renew his license). *See generally* R.C. 1.42 (words and phrases left undefined by statute "shall be read in context and construed according to the rules of grammar and common usage"); *State v. Dorso*, 4 Ohio St. 3d 60, 62, 446 N.E.2d 449, 451 (1983) ("any term left undefined by statute is to be accorded its common, everyday meaning"); *Eastman v. State*, 131 Ohio St. 1, 1 N.E.2d 140 (1936) (syllabus, paragraph five) (same); *Webster's New World Dictionary* 1130 (2d college ed. 1978) (defining the word "principal," in part, as "first in rank, authority, importance, degree, etc."). Thus, the Department may continue to apply such a standard to applicants that are affiliated with financial institutions, or any variation thereof that is reasonably calculated to accommodate any circumstances that characterize, or that may be unique to, the sale or solicitation of insurance by applicants that are so affiliated.

Finally, you have asked me to explain the meaning and application of the terms "agent," "custodian," "vendor," "bailee," "trustee," and "payee," as they appear in R.C. 3905.01(B) and R.C. 3905.18(C), in the case of an applicant that is affiliated with a bank or savings and loan association, or a holding company thereof. To reiterate, R.C. 3905.01(B) provides that a person who is appointed to act as an agent of an insurance company other than life will be issued a license if the Superintendent of Insurance finds that in applying for such license, it is not the appointee's purpose or intention principally to solicit or place insurance either on (1) appointee's own property; (2) property of appointee's relatives, employers, or employees; or (3) property for which appointee's relatives, employers, employees, or appointee himself, is agent, custodian, vendor, bailee, trustee, or payee. R.C. 3905.18(C) in turn states that a corporation that is appointed to act as an agent of a life insurance company will be issued a license if the Superintendent determines that in applying for a license it is not the corporate appointee's purpose or intention principally to solicit or place insurance upon (1) the lives of appointee's officers, employees, or shareholders; (2) the lives of relatives of such officers, employees, or shareholders; or (3) the lives of persons for whom either (a) such officers, employees, or shareholders, (b) the relatives of such officers, employees, or shareholders, or (c) the corporate appointee, is agent, custodian, vendor, bailee, trustee, or payee.

It is the third category of relationships set forth above that is the focus of your question. As I have already suggested, this particular restriction most likely represents a judgment on the part of the General Assembly that the potential for tie in sales of insurance by licensed agents is most prevalent in those instances in which

the foregoing types of relationships are also present.[10] Thus, R.C. 3905.01(B) and R.C. 3905.18(C) describe several different legal relationships that may exist between either the appointee or the appointee's relatives, employers, employees, officers, or shareholders, and the insured, as a result of certain transactions (albeit unspecified) pertaining to property. With respect to tie in sales, the most obvious of such transactions are those in which the appointee or any of the other enumerated individuals have, as "vendor[s]," sold or conveyed certain property to the insured. *See Motors Insurance Corporation v. Dressel; Motors Insurance Corporation v. Robinson.* Less obvious, perhaps, are those transactions as a result of which such persons are "agent[s]," "custodian[s]," "bailee[s]," "trustee[s]," or "payee[s]" of either property, R.C. 3905.01(B), or the insured, R.C. 3905.18(C). For the purpose of this opinion, however, I find it unnecessary to identify and address all the various transactions that may confer upon an appointee the status of agent, custodian, vendor, bailee, trustee, or payee. Rather, I find it sufficient to consider the circumstances in which such status may apply with respect to a corporate appointee that is owned by either a bank or savings and loan association or a bank holding company.

From the nature of the two corporate ownership situations you have posed, one may reasonably assume that the potential for tie in sales of insurance by the corporate appointee will, by definition, arise primarily with respect to individuals who otherwise are consumers of services offered by the parent bank or savings and loan association, or a bank or savings and loan association owned by a bank holding company. Such individuals, for example, may be general depositors who maintain checking or savings accounts at such financial institutions. They may also invest their funds through such institutions in instruments such as certificates of deposit and money market accounts, or utilize the credit services provided by these institutions for the purpose of financing a home mortgage, the purchase of a new car, a particular home improvement, or the purchase of other consumer products. Accordingly, the discussion that follows shall be framed, as a general matter, in terms of individuals who make use of these, and related types of services at the financial institutions in question. For the sake of greater clarity and ease of understanding, the specific questions that must be addressed in this regard with respect to each of the two corporate ownership schemes described in your letter may be subdivided as follows:

I. In the case of a corporate appointee that is owned as a subsidiary

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[10] A common synonym for tie in sales generated as a result of, or in connection with, the relationships enumerated in R.C. 3905.01(B) and R.C. 3905.18(C) is "captive" or "controlled" business. As noted by the court in *Motors Insurance Corporation v. Robinson*, 62 Ohio Law Abs. at 67, 106 N.E.2d at 577, the language selected by the General Assembly in former G.C. 644 to represent this sales practice "is perhaps needlessly verbose and should not be held up as an example of the best English or grammatical perfection." In contrast, one example of a more carefully tailored legislative response in this area may be found in those provisions of Georgia statutory law addressed to the licensing of agents for the sale or solicitation of property, casualty, or surety insurance. *See* Ga. Code Ann. §33-23-43(a)(2) (stating that among the requirements applicable to persons applying for an agent's or broker's license, the applicant "must not in any calendar year effect controlled business that will aggregate as much as 25 percent of the volume of insurance effected by him during such year, as measured by the comparative amounts of premiums"). *See also* Ga. Code Ann. §33-23-40(a)(5) (defining "[c]ontrolled business of a person" as insurance for a person or a person's spouse; for any relative by blood or marriage within the second degree of kinship as defined by paragraph 5 of Ga. Code Ann. §53-4-2; for a person's employer or the firm of which a person is a member; for any officer, director, stockholder, or member of a person's employer or of any firm of which a person is a partner; for any spouse of the officer, director, employer, stockholder, or member of a person's firm; for a person's ward or employee; or for any person or in regard to any property under a person's control or supervision in any fiduciary capacity).

of a bank or savings and loan association, whether any of the following may, for purposes of R.C. 3905.01(B), be considered agents, custodians, vendors, bailees, trustees, or payees of property of persons doing business with the parent bank or savings and loan association:

a. the corporate appointee; or,

b. employees of the corporate appointee.[11]

II. In the case of a corporate appointee that is owned as a subsidiary of a bank or savings and loan association, whether any of the following may, for purposes of R.C. 3905.18(C), be considered agents, custodians, vendors, bailees, trustees, or payees of persons doing business with the parent bank or savings and loan association:

a. the corporate appointee;

b. officers of the corporate appointee;

c. employees of the corporate appointee;

d. shareholders of the corporate appointee; or,

e. relatives of the officers, employees, or shareholders of the corporate appointee.

III. In the case of a corporate appointee that is owned by a bank holding company, whether any of the following may, for purposes of R.C. 3905.01(B), be considered agents, custodians, vendors, bailees, trustees, or payees of property of persons doing business with a bank or savings and loan association similarly owned by the bank holding company:

a. the corporate appointee; or,

b. employees of the corporate appointee.

IV. In the case of a corporate appointee that is owned by a bank holding company, whether any of the following may, for purposes of R.C. 3905.18(C), be considered agents, custodians, vendors, bailees, trustees, or payees of persons doing business with a bank or savings and loan association similarly owned by the bank holding company:

a. the corporate appointee;

b. officers of the corporate appointee;

c. employees of the corporate appointee;

d. shareholders of the corporate appointee; or,

e. relatives of the officers, employees, or shareholders of the corporate appointee.

Resolution of the foregoing questions depends, in part, upon the meanings to be accorded the terms "agent," "custodian," "vendor," "bailee," "trustee," and

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[11] The terms "employers" and "relatives," have been omitted here and in subdivision III, *infra*, and in the subsequent text, simply because they are not germane to a corporate appointee licensed under R.C. 3905.01(B).

"payee." Such terms, as used in R.C. 3905.01(B) and R.C. 3905.18(C), have not been expressly defined by statute.[12] Thus, in accordance with the rule of construction set forth in R.C. 1.42, they shall be read in context and construed according to the rules of grammar and common usage. Several of these terms describe relationships that may be understood as possessing one or more characteristics common to a fiduciary. An agency relationship, for example, has been described as a "consensual fiduciary relationship between two persons where the agent has the power to bind the principal by his actions, and the principal has the right to control the actions of the agent." *Funk v. Hancock*, 26 Ohio App. 3d 107, 110, 498 N.E.2d 490, 493-94 (Fayette County 1985). The Restatement (Second) of Agency §§1(1) and (3) (1971) respectively define "[a]gency" as the "fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act,"[13] and "agent" as the "one who is to act." The one for whom such action is to be taken is the "principal." *Id.* at §1(2). *See also* Restatement (Second) of Agency §§14A-14O (distinguishing agency from other relations, such as those of trust, buyer and seller, and partnership). A bailment, on the other hand, has been defined as a "delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is

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12 I am aware that R.C. 3905.01 was recently amended by the General Assembly for the purpose of adding thereto definitions of the terms "agent" and "solicitor," as used in R.C. Chapter 3905. *See* 1985-1986 Ohio Laws, Part II 3201 (Am. Sub. H.B. 310, eff. Jan. 1, 1987). R.C. 3905.01(A)(1) now provides that the term "[a]gent," means "a person who is appointed, in compliance with [R.C. Chapter 3905], by an insurer to solicit applications for a policy or contract of insurance or to negotiate a policy or contract of insurance on its behalf." *See also* R.C. 3905.01(A)(2) (the term "[s]olicitor," means "a person who is employed, in compliance with [R.C. Chapter 3905], by an agent to solicit policies and contracts of insurance but is not an agent of the insurer"). Notwithstanding the introductory language of R.C. 3905.01(A) ("[a]s used in this chapter"), however, logic, reason, and the separate contexts in which these two words appear dictate that the definition of "[a]gent" set forth in R.C. 3905.01(A)(1) does not apply to the word "agent" as it appears in R.C. 3905.01(B) and R.C. 3905.18(C) conjoined with the terms "custodian," "vendor," "bailee," "trustee," and "payee." Rather, in this instance, I find that the rule of statutory construction expressed in the maxim *noscitur a sociis*, according to which the "meaning of a word may be ascertained by reference to the meaning of words associated with it...and...the coupling of words together shows that they are to be understood in the same sense," *Myers v. Seaberger*, 45 Ohio St. 232, 236, 12 N.E. 796, 798 (1887); *see also State v. Allen*, 30 Ohio Misc. 87, 282 N.E.2d 60 (C.P. Montgomery County 1971); 1986 Op. Att'y Gen. No. 86-071, must prevail.

13 The comment to §1(1) of the Restatement (Second) of Agency (1971) elaborates upon the nature of an agency relationship, in part, as follows:

> *a.* The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control. *Either of the parties to the relation may be* a natural person, groups of natural persons acting for this purpose as a unit such as a partnership, joint undertakers, or *a legal person, such as a corporation.*
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> *b. Agency a legal concept.* Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for

accomplished, or kept until the bailor reclaims it." *Travelers Insurance Co. v. Pond*, 143 N.E.2d 189, 190 (C.P. Hamilton County 1957) (quoting with approval *Ballantine's Law Dictionary*). Thus, in the bailment situation, the "bailee" is the party to whom the personal property is delivered and by whom such property is held to the exclusion of all other persons. *Id.* at 191; *Cummins v. Wikoff*, 20 Ohio N.P. (n.s.) 587, 592 (Mun. Ct. Columbus 1918). *See generally David v. Lose*, 7 Ohio St. 2d 97, 218 N.E.2d 442 (1966); *Agricultural Insurance Co. v. Constantine*, 144 Ohio St. 275, 58 N.E.2d 658 (1944). *Cf.* R.C. 1307.01(A)(1) (as used in R.C. Chapter 1307, which is addressed to warehouse receipts, bills of lading, and other documents of title, and unless the context otherwise requires, "[b]ailee" means "the person who by a warehouse receipt, bill of lading, or other document of the title acknowledges possession of goods and contracts to deliver them"). A "trustee" has been generally defined as "a person in whom there is vested, for the benefit of another, some estate, interest or power in or affecting property." *Muth v. Maxton*, 68 Ohio Law Abs. 164, 170, 119 N.E.2d 162, 166 (C.P. Montgomery County 1954). *See also* Restatement (Second) of Trusts §2 (1959) (a trust, when not qualified by the word "charitable," "resulting," or "constructive," is a "fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it"); §3(3) ("[t]he person holding property in trust is the trustee"); Bogert, *The Law of Trusts and Trustees* §1 at 4 (2nd ed. rev. 1984) (a trust "presupposes described, ascertained or ascertainable property, a defined interest in which is to be owned or held by the trustee").

Black's Law Dictionary 347 (5th ed. 1979) states that "[c]ustodian" is a "[g]eneral term to describe anyone who has charge or custody of property, papers, etc.," and further provides that "[c]ustody" denotes, *inter alia*, "[i]mmediate charge and control, and not the final, absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody." "Payee" is variously defined as follows:

> The person in whose favor a bill of exchange, promissory note, or check is made or drawn; the person to whom or to whose order a bill, note, or check is made payable. The entity to whom a cash payment is made or who will receive the stated amount of money on a check. One to whom money is paid or is to be paid.

Id. at 1016. Finally, the following entry appears for the term "[v]endor": "The person who transfers property by sale, particularly real estate; 'seller' being more commonly used for one who sells personalty. The latter may, however, with entire propriety, be termed a vendor. A merchant; a retail dealer; a supplier; one who buys

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> him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking. The relation which the law calls agency does not depend upon the intent of the parties to create it, nor their belief that they have done so. To constitute the relation, there must be an agreement, but not necessarily a contract, between the parties; if the agreement results in the factual relation between them to which are attached the legal consequences of agency, an agency exists although the parties did not call it agency and did not intend the legal consequences of the relation to follow. Thus, when one who asks a friend to do a slight service for him, such as to return for credit goods recently purchased from a store, neither one may have any realization that they are creating an agency relation or be aware of the legal obligations which would result from performance of the service. On the other hand, one may believe that he has created an agency when in fact the relation is that of seller and buyer.
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> *See generally Haluka v. Baker*, 66 Ohio App. 308, 34 N.E.2d 68 (Wayne County 1941).

to sell." *Id.* at 1395. *Cf.* R.C. 1302.01(A)(4) (as used in R.C. Chapter 1302 (sales), unless the context otherwise requires, "[s]eller" means "a person who sells or contracts to sell goods"). *See also* R.C. 1302.01(A)(8) (defining "[g]oods," as used in R.C. Chapter 1302).

As is evident from the preceding discussion, the terms "agent," "custodian," "vendor," "bailee," "trustee," and "payee," often describe specific relationships between persons that are the products of, or are characterized by, shared interests in particular property, either real or personal. In the case of the appointee and the other enumerated individuals, such interests may be legal ("trustee"), pecuniary ("payee"; "vendor"), or possessory ("bailee"; "custodian") in nature. From the context in which they appear in R.C. 3905.01(B) and R.C. 3905.18(C), it is clear that such terms are intended to denote just such interests and relationships.

Given the foregoing definitions of these terms, one may reasonably conclude that a bank or savings and loan association or bank holding company will, in the appropriate circumstances, be an agent, custodian, bailee, trustee, or payee of persons for whom those institutions provide financial services. Clearly, such financial institutions are payees (*e.g.*, mortgagees) of persons to whom they extend credit. In addition, there may be situations in which a bank or savings and loan association or bank holding company is a trustee for the benefit of particular individuals. Under Ohio law, for example, a state bank, upon complying with the pertinent requirements of R.C. Chapter 1109 (trust companies), may exercise all the trust powers conferred upon qualified trust companies by that chapter, and that are otherwise permitted a bank by its articles of incorporation. *See* R.C. 1101.01(B) (as used in R.C. Chapters 1101-1129, the term "[b]ank," includes, *inter alia*, trust companies); R.C. 1101.01(BB) (as used in R.C. Chapters 1101-1129, the term "[t]rust company" means "any corporation having trust powers"). *See generally In Re Estate of Binder*, 137 Ohio St. 26, 27 N.E.2d 939 (1940); *Ulmer v. Fulton*, 129 Ohio St. 323, 195 N.E. 557 (1935); 1934 Op. Att'y Gen. No. 2823, vol. II, p. 867. The duties, powers, and responsibilities conferred upon trust companies by R.C. Chapter 1109 include the power to "receive and hold moneys or property, in trust or on deposit," R.C. 1109.05; "accept and execute any trusts...in regard to the holding, management, and disposition of any property, real or personal, which may be committed or transferred to, or vested in the trust estate," and "act as trustee under any instrument creating a trust for the care and management of property," R.C. 1109.07; and "accept and execute all trusts committed to it by order of any court of record or probate court of any state or of the United States," and "act as executor, administrator, assignee, guardian, receiver, or trustee, or in any other trust capacity," R.C. 1109.08. *See also* R.C. 1109.021. Similarly, federal law provides that the United States Comptroller of the Currency is authorized to permit a national bank the right to act as a trustee or in any other fiduciary capacity in which state banks and trust companies are permitted to act under the laws of the state where the national bank is located. 12 U.S.C.S. §92a (1978 and Supp. 1987). Thus, in appropriate circumstances, a bank or savings and loan association or bank holding company may function as a trustee for certain persons, notwithstanding that those persons may not be general depositors or mortgagors of such financial institutions.

There may also be situations in which a bank or savings and loan association or bank holding company is either a bailee or custodian of persons doing business with the bank or savings and loan association. In this regard, there is case law to the effect that a bank is a bailee of property placed in a safe deposit box by a bank patron. *Wilson v. Citizens Central Bank*, 56 Ohio App. 478, 480, 11 N.E.2d 118, 119 (Athens County 1936) ("[t]he authorities are not in harmony as to the legal relation existing between a renter of a safe deposit box and a bank. Some authorities hold that the relation is that of lessor and lessee....The weight of authority, however, seems to be that the relation existing is that of bailor and bailee"); *Blair v. Riley*, 37 Ohio App. 513, 175 N.E. 210 (Franklin County 1930) (syllabus, paragraph five) ("[r]elation of safety deposit box holder and bank is that of special bailment"). Further, the existence of a bailment relationship between the bank or savings and loan association and its safe deposit box holders would also make such financial institution a custodian with regard to those persons, insofar as the institution would have temporary custody of the property placed in those boxes, and ultimate responsibility for the preservation and safe return of that property. *See also* R.C. 1151.19(A) and (B) (authorizing a building and loan association to, *inter alia*, receive certain deposits as a custodian therefor). Finally, it is reasonable to

assume that there will be situations in which a bank or savings and loan association is designated, either expressly or impliedly, to act as the agent of persons for whom it provides financial services, depending upon the type of financial services that are being performed.

Whether any of these financial institutions may be deemed vendors with respect to persons for whom they provide services that are financial or fiduciary in nature is less clear. As noted above, the term "vendor," is generally understood as referring, in the strict sense, to an individual or other legal entity that is engaged in selling real property. In a broader sense it may also be used to denote a seller of personal property. In this regard, there would appear to be few instances, if any, in which such institutions would be vendors of real property to those persons. Whether a bank or savings and loan association may qualify as a vendor of personal property, however, presents a closer question. Insofar as a bank or savings and loan association markets certificates of deposit, money market certificates, corporate securities, bonds, promissory notes, and other investment instruments, such bank or savings and loan association may arguably qualify as a vendor of intangible personal property.

That a bank or savings and loan association or bank holding company may be an agent, custodian, vendor, bailee, trustee, or payee of persons for whom such institutions provide or perform various financial services[14] does not end my inquiry. I must now determine to what extent such status on the part of those financial institutions may affect the licensing of a corporate appointee affiliated therewith under R.C. 3905.01(B) and R.C. 3905.18(C), respectively.

In the case of a corporate appointee that places insurance pursuant to a license issued under R.C. 3905.01(B), the fact that potential insureds may utilize the credit, depositary, or investment services provided by a parent (I) or sister (III) bank or savings and loan association does not thereby confer upon the corporate appointee or its employees the status of agents, custodians, vendors, bailees, trustees, or payees with respect to the insureds' property, notwithstanding any relationship that may exist in that regard between those insureds and the parent or sister financial institution. On this point, I find that the decision of the court of appeals in the case of *In the Matter of the Suitability of 870-B Insurance Agency, Inc.* (hereinafter *870-B Insurance Agency, Inc.*), to which you refer in your first two questions, is helpful in explaining how this language of R.C. 3905.01(B) should be interpreted and applied when the corporate appointee is affiliated, either directly or indirectly, with another corporate entity. Although addressed to the prohibition appearing in R.C. 3905.18(C), it is clear that the reasoning and conclusions of the court therein also apply to R.C. 3905.01(B). In *870-B Insurance Agency, Inc.* the court of appeals was asked to review a decision of the court of common pleas affirming a prior order

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[14] In reaching these conclusions, I am aware of the particular legal relationship that is recognized as existing between a bank and its general depositors. In *Cincinnati Insurance Co. v. First National Bank of Akron*, 63 Ohio St. 2d 220, 223, 407 N.E.2d 519, 522 (1980), for example, the court, in addressing the question whether R.C. 1304.24 (when bank may charge customer's account) requires a bank to recredit a customer's account if an item the bank has paid was not "properly payable," noted that it is a "settled premise that the relationship between bank and customer is that of debtor and creditor, based upon a contractual undertaking." *See also Speroff v. First-Central Trust Co.*, 149 Ohio St. 415, 417, 79 N.E.2d 119, 120 (1948) ("[t]he relations of bank and general depositor is simply the ordinary one of debtor and creditor, not of agent and principal, or trustee and *cestui que trust*," quoting from *Cincinnati, Hamilton & Dayton Railroad v. Bank*, 54 Ohio St. 60, 71, 42 N.E. 700, 702 (1896)); *Squire v. Harris*, 135 Ohio St. 449, 451, 21 N.E.2d 463, 464 (1939) (in the banking field, the expression "to deposit money," implies generally the delivery of funds to a bank for employment in the ordinary course of its business, with the understanding that an equivalent amount will be returned upon demand, "thus establishing the relationship of creditor and debtor between the depositor and the bank"); *Bank v. Brewing Company*, 50 Ohio St. 151, 33 N.E. 1054 (1893) (syllabus,

of the Superintendent of Insurance revoking, pursuant to R.C. 3905.18(D), the licenses of five different corporate appointees issued previously under R.C. 3905.18(C). Shareholders of two of such corporate appointees had relatives who were shareholders in two other nonagency corporations that were vendors to persons upon whom the corporate appointees had placed life insurance. In this instance the two nonagency vendor corporations were car dealerships. The sole shareholder of the third corporate appointee was an attorney whose client was a shareholder of a nonagency car dealership corporation that was a vendor to persons upon whom the corporate appointee had placed life insurance. The sole shareholder of the fourth corporate appointee was also the sole shareholder of a nonagency car dealership corporation that was, again, a vendor to persons upon whom the corporate appointee had placed life insurance. Shareholders of the fifth corporate appointee were simultaneously shareholders of a nonagency finance corporation which, through the purchase of mortgage notes and installment contracts, became a mortgagee (*i.e.*, a "payee") of automobile purchasers to whom the corporate appointee had sold life insurance.

In revoking their licenses the Superintendent determined that the five corporate appointees in question had violated the proscription of R.C. 3905.18(C) by selling insurance principally to persons for whom the appointees, or their shareholders or shareholders' relatives, were vendors or payees. In support thereof the Superintendent claimed that the status of the several nonagency corporations as vendors or payees should be imputed to either the corporate appointees, or their shareholders or their shareholders' relatives, as a result of the shareholders' ownership of stock in both the agency and nonagency corporations. *870-B Insurance Agency, Inc.*, slip op. at 6 ("[t]he position of the director is, in effect, that a person who holds some or all of the shares in a vendor corporation is to be considered as a 'vendor' within [R.C. 3905.18]," and, therefore, "[i]t is in this sense that the director and the Common Pleas Court 'pierced the corporate veil'"). The court of common pleas agreed, and held, that on the facts presented, "the corporate identity of the vendor or payee corporation should be disregarded or 'pierced,'" and, on such basis, ruled that the corporate appointees had violated the terms of R.C. 3905.18(C). *Id.* at 4.

Upon review the court of appeals reversed the lower court holding, and specifically rejected the Superintendent's interpretation and application of R.C. 3905.18(C) with respect to the corporate appointees in question. The court first noted that the corporate form of doing business should not be lightly disregarded, and then only in those "exceptional circumstances where a corporate entity is used as a cloak for fraudulent or other illegal conduct," which, in fact, were not shown to exist in any of the cases under review. *870-B Insurance Agency, Inc.*, slip op. at 7. Further, the facts presented to the court also failed to establish that any of the

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paragraph one) ("[m]oney received by a bank on general deposit becomes the property of the bank, and its relation to the depositor is that of debtor, and not of bailee or trustee of the money"); *Treasurer v. Bank*, 47 Ohio St. 503, 522, 25 N.E. 697, 701 (1890) (same); *Kares Construction Co., Inc. v. Associates Discount Corporation*, 82 Ohio Law Abs. 501, 163 N.E.2d 913 (App. Cuyahoga County 1960) (syllabus, paragraph two) (the relation between a bank and its depositors is that of debtor and creditor and not of agent and principal, and money deposited in a bank becomes a part of the bank's general funds, and in discharging checks a bank pays its own money as a debtor and not its depositors' money as an agent). Nonetheless, the existence of a debtor-creditor relationship between a bank and its depositors certainly does not foreclose the possibility that the bank may, at the same time, and as a result of other business dealings, maintain with those depositors one or more of the relationships enumerated in R.C. 3905.01(B) or R.C. 3905.18(C). More importantly, in evaluating a financial institution's status as agent, custodian, vendor, bailee, trustee, or payee under those sections, one must not confine the examination to general depositors only, because such individuals might not comprise the entire class of prospective insureds to whom a corporate appointee that is affiliated with a bank or savings and loan association may seek to sell insurance.

corporate entities had used their shareholders' joint ownership for the purpose of gaining an unfair advantage over either their competition, or persons to whom they sold insurance or automobiles, which might also provide a basis for disregarding the corporate entity in this situation. *Id.* ("[t]here is nothing in the evidence to indicate that anyone doing business with either the agency corporation or the vendor corporation will be denied some benefit, or suffer some detriment, as creditor or customer, which would arise from an overlap in shareholders or shareholders' relatives").

Finally, the court noted that the corporate entity may be disregarded when it is demonstrated that the corporate form of ownership has been selected as a means of circumventing particular statutory purposes, obligations, or responsibilities. On this point, the court, again finding no such evidence in this instance, stated as follows:

> In the present case, we are unable to discern with any clarity what the legislative position was with respect to inter-corporate dealings where there is more or less relationship or tie-in between officers, employees or shareholders. This is particularly unclear for the reason that Section 3105.18[sic], Revised Code, simply does not literally apply to that situation. Further, the statute deliberately and specifically does "pierce the corporate veil" as to the agency corporation. As to it, the General Assembly reached out to deal with not only the corporate entity of the agency corporation, but its officers, its employees and its shareholders or their relatives. Thus the failure of the statute to deal with the effect of separate corporate identity on the other side of business transactions seems hardly an oversight. The legislators were not only generally aware of corporate principles, but they have specifically considered them in relation to the policies involved in this statute. Certainly, too, an industry as well organized as that involved here is quite aware of the distinction between a corporation and its shareholders.

870-B Insurance Agency, Inc., slip op. at 8-9. Accordingly, the court held that none of the corporate appointees were in violation of R.C. 3905.18.

For purposes of R.C. 3905.01(B), therefore, the decision of the court in *870-B Insurance Agency, Inc.* may be cited inferentially for the proposition that, absent evidence of fraud, other illegal conduct, or an intent to evade certain defined statutory purposes, the status of a nonagency corporation as agent, custodian, vendor, bailee, trustee, or payee may not be imputed to the corporate appointee or its employees simply because the corporate appointee is affiliated, either directly or indirectly, with the nonagency corporation. In the case of a corporate appointee that is owned as a subsidiary of a bank or savings and loan association or is owned by a bank holding company, this means that the legal status the parent (I) or sister (II) bank or savings and loan association maintains with respect to persons who utilize the financial services provided thereby, and to whom the corporate appointee sells insurance, will not attach to the corporate appointee. Accordingly, in most cases, a corporate appointee insurance agency may be, for purposes of R.C. 3905.01(B), either owned as a subsidiary of a bank or savings and loan association or owned by a bank holding company.[15]

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15 A different conclusion would be warranted, however, if the parent bank or savings and loan association is itself designated, and licensed as, a corporate appointee under R.C. 3905.01(B), or if employees of a bank or savings and loan association are licensed under that section to sell or solicit insurance. In the first instance, R.C. 3905.01(B) will prohibit the bank or savings and loan association from using its license for the principal purpose of selling insurance to persons for whom the bank or savings and loan association (*i.e.*, the "appointee") is an agent, custodian, vendor, bailee, trustee, or payee. Similarly, R.C. 3905.01(B) will prohibit licensed employees of the bank or savings and loan association from using their licenses for the principal purpose of selling insurance to persons for whom their "employer" (*i.e.*, the bank or savings and loan association) is an agent, custodian, vendor, bailee, trustee, or payee.

Similarly, the holding of the court in *870-B Insurance Agency, Inc.* makes it clear that the status of a parent (II) or sister (IV) bank or savings and loan association or bank holding company as agent, custodian, vendor, bailee, trustee, or payee will not, with one important exception, be attributed to the corporate appointee or its officers, employees, shareholders, or relatives thereof in those instances in which the corporate appointee places insurance, pursuant to a license issued under R.C. 3905.18(C), upon the lives of persons doing business with the parent or sister bank or savings and loan association simply because the corporate appointee has the same shareholders or corporate officers as the parent corporation or bank holding company. According to the court, in such circumstance the corporate identity of the nonagency corporation may not be disregarded for the purpose of conferring upon its shareholders or officers and, in turn, the corporate appointee, the corporation's status as agent, custodian, vendor, bailee, trustee, or payee.

It is equally clear, however, that in the foregoing situation there will be one instance in which the pertinent legal status of the parent corporation or bank holding company will, figuratively speaking, "attach" to a corporate appointee licensed under R.C. 3905.18(C), which, in turn, may prevent the corporate appointee from placing insurance upon the lives of persons who do business with a parent or sister bank or savings and loan association. Specifically, this may occur as a result of the parent corporation's or bank holding company's ownership of stock in the corporate appointee. Such an occurrence, wherein a vendor or payee corporation is also a shareholder of the corporate appointee, was not specifically at issue in *870-B Insurance Agency, Inc.* Nonetheless, the court did acknowledge that in such case the language of R.C. 3905.18(C) might operate to prevent licensure of the corporate appointee. *Id.*, slip op. at 8 ("[f]urther, [R.C. 3905.18(C)] deliberately and specifically does 'pierce the corporate veil' as to the agency corporation. As to it, the General Assembly reached out to deal with not only the corporate entity of the agency corporation, but its officers, its employees *and its shareholders* or their relatives"). (Emphasis added.) To the extent that the parent corporation or bank holding company is, in that situation, both a shareholder of the corporate appointee and either an agent, custodian, vendor, bailee, trustee, or payee of persons to whom it provides financial services, the prohibition of R.C. 3905.18(C) will apply to prevent the corporate appointee from using its license for the principal purpose of placing insurance upon the lives of such persons. Whether such a result obtains, however, is a question that will have to be resolved ultimately by the Department of Insurance on a case-by-case basis, taking into account the specific facts and circumstances of each applicant that is affiliated with a bank or savings and loan association or bank holding company. Accordingly, for purposes of R.C. 3905.18(C), a corporate appointee insurance agency may be either owned as a subsidiary of a bank or savings and loan association or owned by a bank holding company, provided the corporate appointee does not use its agent license for the principal purpose of placing insurance upon the lives of persons for whom the parent bank or savings and loan association or bank holding company is an agent, custodian, vendor, bailee, trustee, or payee.[16] Further, all voting shares of stock of the corporate appointee insurance agency must be beneficially owned by natural persons who are residents of Ohio.

In your third question you have asked whether R.C. Title 39 prohibits or restricts insurance agencies that are affiliated with financial institutions from engaging in any of the following activities: (a) the sale of bank or savings and loan association customer lists to an affiliated insurance agency; (b) the lease of lobby space by an affiliated insurance agency from a bank or savings and loan association

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16 As in the case of R.C. 3905.01(B), *see* note 15, *supra*, the same restriction will also apply if the parent bank or savings and loan association is itself designated, and licensed as, a corporate appointee under R.C. 3905.18(C). Thus, R.C. 3905.18(C) will prohibit the bank or savings and loan association from using its life agent license for the principal purpose of selling insurance to persons for whom the bank or savings and loan association (*i.e.*, the "appointee") is an agent, custodian, vendor, bailee, trustee, or payee.

at a fixed rental rate, or at a rate based upon a percentage of the agency's income; (c) the use of employees of a bank or savings and loan association to perform clerical or administrative services for the affiliated insurance agency; and, (d) entering into a joint venture or any other similar arrangement with a financial institution. In your fourth question you have asked whether R.C. Title 39 prohibits or restricts insurance agencies that are not affiliated with financial institutions from engaging in any of the aforementioned activities. In a conversation with a member of my staff you have indicated that questions 3(d) and 4 are, in fact, addressed to the same matter.

You have stated that you specifically wish to know whether any of the activities delineated in questions 3(a)-(c) may implicate provisions appearing in R.C. Chapters 3905, 3933, and 3999, and the administrative rules promulgated thereunder, that prohibit rebates and other advantages offered as inducements to purchase insurance, and the payment of agent commissions to unlicensed persons or entities that are not otherwise authorized to receive such commissions. In particular, you have mentioned R.C. 3905.05, R.C. 3905.16, R.C. 3905.22, R.C. 3933.01, R.C. 3933.05, R.C. 3999.05, 5 Ohio Admin. Code 3901-1-10(H) and 5 Ohio Admin. Code 3901-1-11(B).

With respect to the payment of commissions to unlicensed entities, R.C. 3905.05 reads as follows:

> No insurance company authorized to do business in this state shall pay or allow, or cause to be paid or allowed, any commission, consideration, money, or other thing of value to any person, firm, or corporation not licensed in accordance with sections 3905.01 to 3905.06, inclusive, of the Revised Code, ***for negotiating any contract of insurance***, other than life insurance, within this state, provided all persons authorized to solicit powers of attorney or applications for contracts of indemnity in this state for any reciprocal exchange, insurance exchange or attorney in fact regulated by Chapter 3931. of the Revised Code shall comply with the provisions of sections 3905.01 to 3905.05, inclusive, of the Revised Code, except that traveling full time salaried non-commissioned employees of such attorney whose duties as such employees are primarily the performance of inspection, loss prevention engineering, and claim services, shall not be required to comply with said sections but such persons shall be regulated and controlled solely by the provisions of section 3931.11 of the Revised Code. (Emphasis added.)

See also R.C. 3905.06 (providing, in part, that R.C. 3905.01-.06 do not apply to companies or associations transacting the business of life insurance or their agents). With respect to life insurance agent commissions, R.C. 3905.22 states that, "[a]ny licensed agent of a life insurance corporation or association authorized to do business in this state may pay a commission to any other life insurance agent licensed by [the State of Ohio]." R.C. 3905.16 further states that a life insurance agent "is a person who solicits, negotiates for, places, or renews policies or agreements of life insurance for a consideration or compensation given, paid, or promised by any insurance corporation or association or any firm or person." 5 Ohio Admin. Code 3901-1-10(H) reiterates the prohibitions contained in the foregoing sections as follows:

> (1) Payment of commissions by authorized insurance companies: Payments of any commission, consideration, money, or other thing of value by an insurance company authorized to do business in this state for soliciting, negotiating, procuring, placing, writing, renewing, forwarding, or transmitting or any application for or any contract of insurance shall be made only to those licensed agents of said company.
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> (2) Payment of commissions by licensed agents of insurance companies other than life: Pursuant to sections 3905.01 and 5729.07[17] of the Revised Code, only a licensed agent of an insurance

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[17] The provisions of former R.C. 5729.07, which addressed reciprocal state countersignature requirements, were repealed, and subsequently reenacted in R.C. 3905.41, by 1981-1982 Ohio Laws, Part II 4558 (Sub. H.B. 851, eff. March 4, 1983).

> company authorized to do business in this state may procure the insurance of risks, or parts thereof, other than life insurance, in other like companies authorized to do business in this state through a licensed agent of such company taking the risk and may receive the payment of any commission, consideration, money, or other thing of value only from said licensed agent of such company taking the risk.
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> In addition, payment of any commission, consideration, money, or other things of value by a licensed agent to a licensed foreign insurance broker shall be made only as provided in section 5729.07 of the Revised Code.
>
> (3) Payment of commissions by licensed agents of life insurance companies: Payment of any commission, consideration, money or other thing of value by a licensed agent of a life insurance company shall be made only to other licensed agent of life insurance companies as provided in section 3905.22 of the Revised Code. (Footnote added.)

R.C. 3933.01 and R.C. 3999.05 prohibit rebates of insurance premiums, or the offering of comparable benefits, as inducements to the purchase of property and casualty and life insurance respectively. R.C. 3933.01 states, in part, as follows:

> No corporation, association, or partnership engaged in this state in the guaranty, bonding, surety, or insurance business, ***other than life insurance***, nor any officer, agent, solicitor, employee, or representative thereof, shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as inducements to insurance, and no person shall knowingly receive as an inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any paid employment or contract for services of any kind, or any special advantage in the date of the policy or date of its issue, or any valuable consideration or inducement not plainly specified in the policy or contract of insurance or agreement of indemnity, or give, receive, sell, or purchase, or offer to give, receive, sell, or purchase, as inducements to insurance or in connection therewith, any stock, bonds, or other obligations of an insurance company or other corporation, association, partnership, or individual. (Emphasis added.)

See also R.C. 3933.05 (no corporation and no officer, agent, solicitor, or other person shall violate, *inter alia*, R.C. 3933.01, and fines levied and collected for the violation of R.C. 3933.05 shall be paid to the county treasurer for the use of the schools as provided in R.C. 3315.31 and R.C. 3315.32 (since repealed)). R.C. 3999.05 similarly provides as follows:

> No ***life insurance*** company doing business in this state, or an officer, agent, solicitor, or representative thereof, shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as an inducement to insurance, a rebate of the premium payable on a policy, or a special favor or advantage in the dividends or other benefits to accrue thereon, or a paid employment or contract for services of any kind, or any valuable consideration or inducement not specified in the policy of insurance, or give, sell, or purchase, or offer to give, sell, or purchase, as an inducement for insurance, any stocks, bonds, or securities of an insurance company or other corporation, association, or partnership, or any dividends or profits to accrue thereon, or anything of value not specified in the policy. (Emphasis added.)

Finally, R.C. 3901.041 authorizes the Superintendent of Insurance to adopt rules he deems necessary for the discharge of his duties and the exercise of his powers under R.C. Title 39. Pursuant thereto there appears in 5 Ohio Admin. Code Chapter 3901-1 a rule that prohibits the payment of fees by insurance companies or agents to unlicensed entities in return for their referrals of prospective insureds to such companies or agents. Rule 3901-1-11(B) states as follows:

> Certain agents and/or insurance companies licensed and authorized to transact the business of property and casualty or life insurance business in Ohio have paid sums of money to unlicensed

> individuals or corporations in return for the names of prospective insurance clients. Because the permanence of such payments largely depends upon the degree of success in the placement of insurance coverages with individuals, and the amount of such sums bear no reasonable relationship to the expense to the person furnishing such prospect lists, it is presumed that the unlicensed entity receiving such payments is engaged in the solicitation or negotiation for insurance policies and that such payments are "consideration or compensation given" for that purpose, in violation of Section 3905.05 or Section 3905.16. "Lead fees" as used herein are defined as payments by an insurer to a person, firm or corporation not licensed as an agent, for referrals of prospective insureds which are: (1) conditioned on the issuance by the compensating insurer of a policy of insurance to the prospect; and/or (2) not reasonably related to actual expense reimbursement by the insurer to the person, firm or corporation referring the prospect. No insurer or licensed agent shall enter into agreements in this State involving lead fees with unlicensed entities after the effective date of this rule, and all insurers or agents involved in such arrangements shall terminate all such contracts for lead fees within 90 days after the effective date of this rule.

I note that the foregoing provisions make no distinctions with respect to either the particular persons or entities to whom various fees, commissions, or rebates are paid, or the nature or type of affiliation, if any, that an insurance agency may have with those persons or entities. Thus, the analysis that follows shall apply regardless of the existence or the type of an affiliation that an insurance agency has with a particular financial institution.

The sale of bank or savings and loan association customer lists to an insurance agency presents a matter within the purview of 5 Ohio Admin. Code 3901-1-11(B). Rule 3901-1-11(B) states a presumption that an unlicensed entity that receives such payments is engaged in the solicitation or negotiation of insurance policies, and that such payments are, therefore, consideration or compensation given for that purpose, in violation of R.C. 3905.05 or R.C. 3905.16. Accordingly, rule 3901-1-11(B) states that such payments, or "lead fees," are prohibited if they "are (1) conditioned on the issuance by the compensating insurer of a policy of insurance to the prospect; and/or (2) not reasonably related to actual expense reimbursement by the insurer to the person, firm or corporation referring the prospect."

Under rule 3901-1-11(B), therefore, an insurance agency may purchase customer lists of banks or savings and loan associations, provided the fees it pays for those lists satisfy the requirements set forth in the rule. In this regard, the payment of such fees may not be conditioned upon the issuance by the compensating insurer of a policy of insurance to a prospective insured. Further, the amount of such fees must be reasonably related to the actual costs incurred by a bank or savings and loan association in making its customer lists available to the insurance agency in question.

With respect to the lease of lobby space by an insurance agency from a bank or savings and loan association, the question has been raised whether lease payments that are based upon a percentage of the agency's income constitute the payment of an agent commission to an unlicensed entity that is not otherwise authorized to receive commission payments. An insurance agency's income is generally comprised of the commissions it collects and receives on policies of insurance it has sold or solicited.[18] The payment of agent commissions to unlicensed persons or entities is prohibited by R.C. 3905.05 in the case of insurance other than life, and by R.C. 3905.16 and R.C. 3905.22 in the case of life insurance.

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[18] *Black's Law Dictionary* (5th ed. 1979) 246, defines "[c]ommission," in part, as the "recompense, compensation or reward of an agent, salesman, executor, trustee, receiver, factor, broker, or bailee, when the same is calculated as a percentage on the amount of his transactions or on the profit to the principal."

Under the foregoing statutes and administrative regulations, the dispositive question is whether the percentage lease payments are, in some sense, intended to compensate the lessor for "negotiating any contract of insurance," R.C. 3905.05, or for otherwise assisting in "procuring, placing, writing, renewing, forwarding, or transmitting...any contract of insurance," 5 Ohio Admin. Code 3901-1-10(H)(1), notwithstanding that such payments are, in fact, calculated upon commissions the insurance agency receives upon policies of insurance it has sold or solicited. Thus, if it can be established that the percentage lease payments are meant to compensate the lessor for the lessor's negotiating or otherwise procuring, placing, or transmitting contracts of insurance for the agency in question, in addition to serving as consideration for the fair market value of the leasehold interest, then they may properly be deemed payments of commission for purposes of R.C. 3905.05, R.C. 3905.16, R.C. 3905.22, and 5 Ohio Admin. Code 3901-1-10(H). A conclusive determination in this regard, however, will depend ultimately upon the facts and circumstances of each particular case. *Cf., e.g., Wright v. Trotta*, 34 Md. App. 309, 367 A.2d 557 (1976) (lease payments by an insurance agency that were based upon a percentage of the agency's commissions did not constitute a payment of commissions under Maryland statute prohibiting such payments to unlicensed entities in the absence of evidence that the lessor received such payments for procuring or influencing the procurement of any insurance).

You have also asked whether an insurance agency's use of bank or savings and loan association employees to perform clerical or administrative services for the agency is an activity permitted under R.C. Title 39. I assume that the agency intends to pay for the use of such employees' services. As in the case of percentage lease payments, one might question whether such activity results in the payment of agent commissions to an unlicensed entity. Again, such a conclusion might be warranted if the clerical and administrative services performed by those employees can be characterized as negotiating, procuring, placing, or transmitting contracts of insurance for the agency. Whether such a characterization is warranted will depend upon the facts and circumstances of each particular case.

Finally, the activities enumerated in questions 3(a)-(c) are not prohibited by the terms of R.C. 3933.01 or R.C. 3999.05, which address rebates of premiums or other inducements for the purchase of property and casualty insurance and life insurance respectively. As is evident from the language of those statutes, a rebate of premium or other inducement for the purchase of insurance is an advantage that inures to the benefit of, or is paid to, the person or entity that purchases insurance. In contrast, payments rendered by an insurance agency in connection with the activities you have mentioned are made to an entity other than a prospective insured. Thus, for purposes of R.C. 3933.01 and R.C. 3999.05, such payments are not rebates of premiums or other inducements for the purchase of insurance.

In your fifth question you have asked whether, in light of *Jarus v. Robinson*, and R.C. 3905.01 and R.C. 3905.18, an insurance agent or agency is prohibited or limited from entering into a joint venture or other similar arrangement with a real estate broker if the principal purpose of such affiliation is the sale of insurance products in conjunction with the sale of real estate. As in the case of questions 1 and 2, your fifth question contemplates two distinct ownership arrangements. In the first, you have in mind a situation in which a single individual is both a licensed real estate broker and an insurance agent, and, in such capacity, operates as the sole proprietor of an unincorporated real estate brokerage firm and an unincorporated insurance agency. In the second, you have in mind an arrangement in which a single individual is the sole shareholder of an incorporated real estate brokerage firm and an incorporated insurance agency.

In *Jarus v. Robinson* a real estate broker appealed a decision by the Superintendent of Insurance denying a renewal, pursuant to R.C. 3905.04, of the insurance agent license that had been issued to the broker under R.C. 3905.01. It was established that more than fifty-one percent of the real property that appellant had insured was the subject of sale transactions in which appellant had acted, in his capacity as a real estate broker, as the agent of either the seller or purchaser of the property in question. On that basis, the Superintendent concluded that appellant had violated the conditions of R.C. 3905.01 by using his license for the principal purpose of placing insurance upon the property of persons for whom he had acted as an agent. On appeal, the court of common pleas upheld the Superintendent's

determination as reflecting, in light of the evidence presented and the decision in *Motors Insurance Corporation v. Robinson*, a correct application and interpretation of the licensing restriction in R.C. 3905.01. *Jarus v. Robinson*, 71 Ohio Law Abs. at 512, 133 N.E.2d at 442-43.

With respect to a situation in which a single individual proposes to engage in business, on an unincorporated basis, as an insurance agent and real estate broker, the decision in *Jarus v. Robinson* will control for the purpose of determining whether such individual may be licensed under R.C. 3905.01. In this regard, such individual may be licensed under R.C. 3905.01(B) provided he does not use his agent license for the principal purpose of placing insurance upon the property of persons for whom he has served, in his capacity as a licensed real estate broker, as agent or vendor in transactions concerning such property. Because R.C. 3905.18 imposes no principal purpose restriction in the case of a noncorporate, natural person appointee, *see* R.C. 3905.18(A), such individual may be licensed thereunder as a life insurance agent notwithstanding the principal purpose for which he uses his life agent license.

On the other hand, the decision of the court in *870-B Insurance Agency, Inc.* will govern, for purposes of R.C. 3905.01 and R.C. 3905.18, with respect to an individual who is a shareholder of an incorporated real estate brokerage firm and an incorporated insurance agency. Thus, in the case of both R.C. 3905.01(B) and R.C. 3905.18(C), the status of the corporate real estate brokerage firm as agent or vendor in transactions pertaining to real property will not be imputed to the corporate insurance agency simply because those two entities have the same shareholder. Accordingly, this means that the corporate insurance agency in this particular situation may be licensed under R.C. 3905.01(B) notwithstanding the use of such license for the principal purpose of placing insurance upon property in connection with which the corporate real estate brokerage firm has served as agent or vendor. The corporate insurance agency in this particular situation may also be licensed under R.C. 3905.18(C) notwithstanding the use of such license for the principal purpose of placing insurance upon the lives of persons for whom the corporate real estate brokerage firm has served as agent or vendor in transactions pertaining to real property.

Accordingly, in response to your questions, it is my opinion, and you are advised that:

1. For purposes of R.C. 3905.01(B), a corporate appointee insurance agency may be owned as a subsidiary of a bank or savings and loan association.

2. For purposes of R.C. 3905.01(B), a corporate appointee insurance agency may be owned by a bank or savings and loan association holding company.

3. For purposes of R.C. 3905.18(C), a corporate appointee insurance agency may be owned as a subsidiary of a bank or savings and loan association, provided the corporate appointee does not use its agent license for the principal purpose of placing insurance upon the lives of persons for whom the parent bank or savings and loan association is an agent, custodian, vendor, bailee, trustee, or payee. All voting shares of stock of such corporate appointee insurance agency must be beneficially owned by natural persons who are residents of Ohio.

4. For purposes of R.C. 3905.18(C), a corporate appointee insurance agency may be owned by a bank or savings and loan association holding company, provided the corporate appointee does not use its agent license for the principal purpose of placing insurance upon the lives of persons for whom the bank or savings and loan association holding company is an agent, custodian, vendor, bailee, trustee, or payee. All voting shares of stock of such corporate appointee insurance agency must be beneficially owned by natural persons who are residents of Ohio.

5. Pursuant to 5 Ohio Admin. Code 3901-1-11(B), the sale of bank

or savings and loan association customer lists to an insurance agency is prohibited if the fees paid therefor are "(1) conditioned on the issuance by the compensating insurer of a policy of insurance to the prospect; and/or (2) not reasonably related to actual expense reimbursement by the insurer to the [bank or savings and loan association] referring the prospect."

6. For purposes of R.C. 3905.05, R.C. 3905.16, R.C. 3905.22, and 5 Ohio Admin. Code 3901-1-10(H), lease payments by an insurance agency to a bank or savings and loan association for lobby space that are based upon a percentage of the agency's income may be deemed payments of commission if it is established that such payments are intended to compensate the lessor for the lessor's negotiating, or otherwise procuring, placing, or transmitting contracts of insurance for the agency in question, notwithstanding that such payments also serve as consideration for the fair market value of the agency's leasehold interest.

7. For purposes of R.C. 3905.05, R.C. 3905.16, R.C. 3905.22, and 5 Ohio Admin. Code 3901-1-10(H), remuneration paid by an insurance agency to a bank or savings and loan association for clerical or administrative services that the employees thereof perform for the agency may be deemed payments of commission if such services may be characterized, upon the facts presented, as negotiating, or otherwise procuring, placing, or transmitting contracts of insurance for the insurance agency in question.

8. An individual who is a licensed real estate broker may be licensed under R.C. 3905.01(B), provided he does not use his agent license for the principal purpose of placing insurance upon the property of persons for whom he has served, in his capacity as a licensed real estate broker, as agent or vendor in transactions concerning such property.

9. An individual who is a licensed real estate broker may be licensed under R.C. 3905.18(A) notwithstanding the principal purpose for which he uses his agent license.

10. A corporate appointee insurance agency that is affiliated with a corporate real estate brokerage firm through the same individual shareholder may be licensed under R.C. 3905.01(B) notwithstanding the use of its agent license for the principal purpose of placing insurance upon property in connection with which the corporate real estate brokerage firm has served as agent or vendor.

11. A corporate appointee insurance agency that is affiliated with a corporate real estate brokerage firm through the same individual shareholder may be licensed under R.C. 3905.18(C) notwithstanding the use of its agent license for the principal purpose of placing insurance upon the lives of persons for whom the corporate real estate brokerage firm has served as agent or vendor in transactions pertaining to real property.