

STATE OF NORTH DAKOTA
ATTORNEY GENERAL'S OPINION 97-F-03

Date issued: May 29, 1997

Requested by: Gary D. Preszler, Banking & Finance Commissioner

- QUESTIONS PRESENTED -

I.

Whether a North Dakota federal savings association may be merged into an out-of-state national bank.

II.

If the answer to the first question is yes, whether, in a non-emergency situation, the out-of-state national bank may retain the North Dakota savings association's main office and its intra-state branches as interstate branches.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a North Dakota federal savings association may be merged into an out-of-state national bank subject to certain federal interstate limitations and applicable state law.

II.

It is my further opinion that an out-of-state national bank that is not situated in North Dakota may not, in a non-emergency situation, retain the merged savings association's main office and its intra-state branches as interstate branches unless, on or after May 31, 1997, the savings association is converted or merged into a North Dakota bank.

- ANALYSES -

I.

"Courts have, in the main, consistently recognized the wide area of discretion delegated by Congress to the Comptroller in the complex field of national banking" Ramapo Bank v. Camp, 425 F.2d 333, 341 (2d Cir.), cert. denied, 400 U.S. 828 (1970). However, "[t]he

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Comptroller, . . . , must be subordinate to the law from which he received his authority, and is subject to the limitations imposed by that law." First Nat'l Bank of Bellaire v. Comptroller of the Currency, 697 F.2d 674, 680 (5th Cir. 1983), quoting Webster Groves Trust Co., 370 F.2d 381, 387 (8th Cir. 1966).

Authority for a federal savings association to merge into a national bank is found under 12 U.S.C. § 215c. That section provides, in part, that "[s]ubject to section 1815(d)(3) [the Oakar Amendment] and 1828(c) [of the Bank Merger Act] and all other applicable laws, any national bank may acquire or be acquired by any insured depository institution."

The Office of the Comptroller of the Currency (OCC) has concluded that "under the plain language of section 215c , if a transaction comports with the Oakar Amendment [including its interstate limitations under 12 U.S.C. § 1815(d)(3)(F)] and the Bank Merger Act and other applicable laws, then the section authorizes a merger between a national bank and a Federal savings association." Decision of the Comptroller of the Currency on the Application to Merge Washington Federal Savings Bank, Herndon, Virginia, with and into the First National Bank of Maryland, Baltimore, Maryland (Corporate Decision 96-39, July 25, 1996).

12 U.S.C. § 1815(d)(3)(F), the Oakar Amendment interstate limitations, provides that

[a] Bank Insurance Fund [BIF] member which is a subsidiary of a bank holding company may not be the acquiring, assuming, or resulting depository institution in a transaction under subparagraph (A) unless the transaction would comply with the requirements of section 1842(d) of this title if, at the time of such transaction, the Savings Association Insurance Fund [SAIF] member involved in such transaction was a State bank that the bank holding company was applying to acquire.

In other words, a North Dakota federal savings association may be merged into an out-of-state national bank subject to the same limitations for the merger between an out-of-state national bank and a North Dakota bank. Those limitations are set forth under 12 U.S.C. § 1842(d)(1)(A). That section provides for approval of an application "by a bank holding company that is adequately capitalized and adequately managed to acquire control of, or acquire all or substantially all of the assets of, a bank located in a State other than the home State of such bank holding company, without regard to

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whether such transaction is prohibited under the law of any State." Although 12 U.S.C. § 1842(d)(1)(A) generally overrides state law that would prohibit an out-of-state bank holding company from acquiring a North Dakota bank, states are permitted to legislate in specific areas and impose certain conditions. For example, 12 U.S.C. § 1842(d)(1)(B) allows a host state to establish an age restriction up to five years on acquisitions of insured banks and 12 U.S.C. § 1842(d)(2)(B) allows a state to set a statewide deposit concentration limit. See N.D.C.C. § 6-08.3-03.1 (setting a twenty-five percent statewide deposit concentration cap).

Consequently, it is my opinion that, under 12 U.S.C. § 215c, the merger of a North Dakota located federal savings association into an out-of-state national bank may be approved by the responsible federal regulatory agency if it is consistent with the interstate limitations of the Oakar Amendment and applicable state law.

II.

The next issue is whether in a non-emergency situation the retention of the North Dakota savings association's main office and its intra-state branches by the out-of-state national bank complies with the Bank Merger Act and other applicable laws. The OCC has relied upon 12 U.S.C. § 36(c) under the Bank Merger Act as authority for a national bank to retain the branches of a merged savings association. See OCC Corporate Decision 96-39, Decision of the Comptroller of the Currency on the Application to Merge Chemical Bank FSB, Palm Beach, Florida, with and into the Chase Manhattan Private Bank (Florida) National Association, Tampa, Florida, and operate Branches of Chemical Bank FSB as Branches of the Chase Manhattan Private Bank (Florida) (Corporate Decision 96-60, October 31, 1996). See also First Nat'l Bank of Logan v. Walker Bank and Trust Co., 385 U.S. 252, 260 (1966) (Section 36(c) permits national banks to establish branches if such branches could be established by state banks under state law.)

Section 36(c) provides, in part, that "[a] national bank may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . at any point within the State in which said association is situated. . . ."

The central issue posed under section 36(c) concerning branch retention is whether the out-of-state national bank is "situated" in North Dakota so as to establish and operate new branches in North Dakota in places where the North Dakota savings association was located before the merger.

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In OCC Corporate Decision 96-39, the OCC addressed the issue of the merger of a Maryland national bank with branches in Maryland, Virginia, and the District of Columbia with a Virginia federal savings association with branches in Virginia, Maryland, and the District of Columbia. The OCC granted approval for the merger and the retention of all the branches of the federal savings association by the national bank. The OCC commented, in a gratuitous statement, that it would not have been necessary for the national bank to have branches in all states before the merger since after the merger the national bank would be situated in those states where the savings association had branches. The OCC stated:

[E]ven if the National Bank did not operate de novo branches in Virginia and the District of Columbia prior to the consummation of the proposed transaction, the resulting bank would still be considered to be situated in Virginia and the District of Columbia and could retain the Federal Savings Bank's branches in those jurisdictions. As stated, the courts since 1977 have recognized that a national bank, for purposes of 12 U.S.C. § 36(c), is situated in any state where it has branches. See [Seattle Trust & Savings Bank v.] Bank of California[, 492 F.2d 48, 51 (9th Cir.), cert. denied, 419 U.S. 844 (1974)].

Seattle Trust & Savings Bank, supra, does not provide authority for the proposition that a national bank is situated in another state based solely on a merger of a national bank with an out-of-state federal savings association. The issue in Seattle Trust & Savings Bank was whether a California national bank was situated in Washington based on the national bank's branch in Washington. 492 F.2d at 50. In effect, Seattle Trust & Savings Bank stands for the proposition that a national bank may branch intra-state from a branch in that state to the same extent that a national bank may branch intra-state from its main office. 492 F.2d at 51-53. It does not provide any authority for the proposition that a national bank is situated in states where the national bank does not have its main office or any branch. This is contrary to the assertion in OCC Corporate Decision 96-39, and, because the authority cited does not support the gratuitous statement made in that decision, OCC Corporate Decision 96-39 does not provide convincing precedent for allowing an out-of-state national bank to retain a North Dakota federal savings association's branches in North Dakota.

In OCC Corporate Decision 96-60, the OCC approved an application by a Florida national bank to merge with a Florida federal savings

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association and for the national bank to retain the savings association's branch in California. In approving the retention of the California branch by the Florida national bank, the OCC reasoned the national bank would be "situated" in California after the merger because the savings association branch was located in California, relying on the dictum in OCC Corporate Decision 96-39.

OCC Corporate Decision 96-60 also does not provide authority for the question presented here because in that decision the national bank and the federal savings association were both located in the same state, although the federal savings association was also located in California. In the question presented, there is not a corresponding overlap between the out-of-state national bank and the North Dakota federal savings association to warrant the application of OCC Corporate Decision 96-60. The question presented does not address the issue of having a North Dakota federal savings association merge into a North Dakota national bank and for the resulting national bank to retain the federal savings association's North Dakota locations.

The authority of a national bank to branch intra-state in North Dakota is set under N.D.C.C. § 6-03-13.1. That section provides that "any bank organized under chapter 6-02 and . . . any national bank doing business in this state, may maintain and operate separate and apart from its banking house facilities, in addition to such service at its main banking house." In North Dakota branches are named facilities. The plain language of N.D.C.C. § 6-03-13.1 requires the national bank to be "doing business in this state" before engaging in branching activities.

Because the out-of-state national bank would not be doing business in North Dakota before the consummation of the proposed transaction, it would not be able to establish and operate new branches in North Dakota and thus would not be able to retain the federal savings association's main office and its intra-state branches as interstate national bank branches.

A similar conclusion was reached by two United States District Courts in the state of Texas. See Ghiglieri v. Sun World, Nat'l Assoc., 942 F. Supp. 1111 (W.D. Tex. 1996); Ghiglieri v. Ludwig, 1996 WL 315947 (N.D. Tex. 1996). These cases are both on appeal before the United States Court of Appeals for the Fifth Circuit. This office has also gone on record as supporting those decisions by joining in an Conference of State Bank Supervisors' amicus brief in Ghiglieri v. Ludwig, supra.

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These cases held that the OCC had authority under the National Banking Act to approve a national bank's application to relocate its main office across the Texas state line, but no express or implied authority existed for the national bank to retain and operate the branches in Texas after the relocation of the main office. Addressing the national bank's argument that it would be situated in Texas, the court, Ghiglieri, 942 F.Supp. at 1117, stated:

Defendant Sun World argues that it is "situated" in Texas by virtue of its branches in Texas, and that Texas clearly grants state banks the authority to establish and maintain a branch office at any location on prior written approval of the banking commissioner. This Court finds these arguments to be without merit. Sun World's relocation of its main office to Santa Teresa, New Mexico, caused it to be "situated" in New Mexico for purposes of Section 36(c). As of the date of the relocation of its main office, Sun World was no longer "situated" in Texas. It follows that Sun World is not a Texas state bank under Article 342-3.201 *et seq.*, and therefore has no authority to establish and maintain a branch at the location of its former main office pursuant to Article 342-3.203.

The same would be true for a North Dakota federal savings association that merged into an out-of-state national bank. There would not be any authority to establish the North Dakota locations of the savings association as interstate branches of the out-of-state national bank.

On or after May 31, 1997, an out-of-state national bank would be able to retain a North Dakota savings association's main office and branches under N.D.C.C. ch. 6-08.4 if the federal savings association were first to convert or be merged into a North Dakota bank. N.D.C.C. § 6-08.4-02 provides that "[e]ffective May 31, 1997, the responsible federal regulatory authority may approve a[n interstate] merger transaction under the Federal Deposit Insurance Act . . . between a North Dakota bank and an out-of-state bank." A bank, for the purposes of N.D.C.C. ch. 6-08.4, is defined as an "insured bank as defined in 12 U.S.C. 1813(h)." 12 U.S.C. § 1813(h) defines an insured bank as "any bank (including a foreign bank having an insured branch) the deposits of which are insured in accordance with the provisions of this chapter; and the term "noninsured bank" means any bank the deposits of which are not so insured." A bank is defined, under federal law, as "any national bank, State bank, and District bank, and any Federal branch and insured branch; [and] includes any former savings association that--(i) has converted from a savings association charter; and (ii) is a Savings Association Insurance Fund

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member." 12 U.S.C. § 1813(a)(1). Accordingly, based on the above definitions, a federal savings association is not considered a bank for the purposes of N.D.C.C. ch. 6-08.4. However, if the North Dakota federal savings association were converted or merged into a North Dakota bank, the out-of-state national bank would be able to retain the savings association main office and its intra-state branches as interstate branches as long as the transaction occurred on or after May 31, 1997. N.D.C.C. § 6-08.4-04.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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