Office of the Comptroller of the Currency

Interpretations - Corporate Decision #96-39, Part 2

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DECISION OF THE OFFICE 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
AND OPERATE BRANCHES OF WASHINGTON FEDERAL SAVINGS BANK
IN VIRGINIA, THE DISTRICT OF COLUMBIA AND MARYLAND
AS BRANCHES OF THE FIRST NATIONAL BANK OF MARYLAND
July 25, 1996 -- Continued

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The next issue is to determine the location of the hypothetical state bank for purposes of this analysis. The key statutory phraseology is virtually identical to phraseology employed in section 1842(d) prior to September 29, 1995, when the current version of section 1842(d) took effect, and which was in effect at the time that the geographical language of the Oakar Amendment was originally adopted in 1989. Analysis of Board precedent in applying the pre-September 29, 1995, language indicates that in applying the "located" language contained in the Douglas Amendment to a multistate target institution, the Board has uniformly determined that such an institution is "located" in one state for purposes of section 1842 analysis and analyzed the applicability of that provision to a particular transaction based only on the target institution's location in that state. *See, e.g.*, 70 Federal Reserve Bulletin 518 (June 1984); 71 Federal Reserve Bulletin 458 (June 1985); 70 Federal Reserve Bulletin 441 (May 1984). In determining the state of the target bank's location, the Board has looked at the percentage of deposits attributable to the states involved, the percentage of offices located in the states involved and the location of the main office of the bank to be acquired. Thus, in approving the acquisition of Bank of California, N.A., an interstate bank, by a California bank holding company, the Board determined in that case that the bank was "located" in California for purposes of the section 1842(d) placing heavy emphasis on the fact that the bank was chartered in California, 80% of the bank's offices were located in California, and 75% of the bank's deposits were controlled by the California offices. 70 Federal Reserve Bulletin at 518. <**NOTE:** Moreover, the Board, in another case noted that section 1842(d):

> states explicitly that the location of the acquiring bank holding company . . . is determined by the state in which the total deposits of its subsidiary banks are the largest . . . . It is evident that Congress had in mind some level of appropriate contacts as a basis for determining location, which in turn would serve as a basis for applying the policies contained in the Amendment.
>
> In the absence of specific Congressional direction on this issue, the Board believes it would be reasonable to apply

the [same standard] . . . to determine the state in which [the target bank] is located.

70 Federal Reserve Bulletin 441, 443-444 (May 1984). The pre-1995 provision cited by the Board remains unchanged. *See* 12 U.S.C. 1841(o)(4)(C).> Thus, while the hypothetical state bank does have a branch in Maryland, it does not appear that this hypothetical state bank would be considered to be "located" in Maryland for purposes of section 1842(d) since it is not chartered in that state, only one of 12 surviving branches is located in that state and only about 12% of the hypothetical state bank's deposits would be attributed to Maryland operations. <**NOTE:** If the hypothetical state bank were determined to be "located" in Maryland for purposes of section 1842(d), the restrictions of that section would be inapplicable since the hypothetical state bank would be located in the home state of the Bank Holding Company.> Rather, the percentages present in the Bank of California case more nearly approximate the percentages of offices and deposits attributable to the hypothetical state bank in the District of Columbia. Not only are 75% of its surviving offices located in the District, but 73% of its deposits are attributed to those offices. On the other hand, the head office of the hypothetical state bank is in Virginia.

Because one can make an argument that the hypothetical state bank would appear to be "located" either in the District of Columbia or Virginia for purposes of section 1842(d)(1), we will not decide this issue and, instead, will analyze the hypothetical acquisition as if the state bank were "located," for purposes of section 1842(d), in either of those jurisdictions. <**NOTE:** This appears consistent with the approach taken by the Board in at least one case following the effective date of the new section 1842(d). In an order dated April 15, 1996, the Board approved the acquisition by Fleet Financial Group, Inc., a bank holding company with its home state in Rhode Island, of NatWest Bank, National Association ("NatWest"), an interstate national bank with its main office and branches in New Jersey and branches in New York. The Board, without analysis as to where NatWest should be considered to be "located" for purposes of section 1842(d), appears to have applied the standards set forth in section 1842(d) as if NatWest were located in either state. *See* Federal Reserve System, Fleet Financial Group, Inc., Boston, Massachusetts, Order Approving the Acquisition of a Bank, p. 3 n. 5 (April 15, 1996). *But see* 81 Federal Reserve Bulletin 1143, 1145 n. 5 (December 1995) (in approving acquisition of First Fidelity Bancorporation by First Union Corporation, Board discussed laws pertaining to age limits only of home states of banks being acquired though at least one was an interstate bank). > Section 1842(d) imposes, or permits, the following limitations to be imposed on acquisitions of banks by out-of-state bank holding companies:

- First, the host state -- that is, the state in which an out-of-state bank holding company seeks to control a bank subsidiary -- may prohibit acquisitions if the target bank is less than five years old. 12 U.S.C. 1842(d)(1)(B). The transaction comports with this limitation because the hypothetical state bank would assume the age of the actual target which has been in existence and continuously operated since 1883, became a Federal savings and loan association in 1974 and a Federal savings bank in 1987.<**NOTE:** The target relocated its home office from the District of Columbia to Virginia in 1990. Even assuming that the Federal Savings Bank dated its existence just from 1990, that would be sufficient to satisfy any permissible age limitations of state law as incorporated into section 1842(d). > Hence, if the Federal Savings Bank were a state bank, the state bank could be acquired by an out-of-state bank holding company despite any age limitation that could be imposed by the law of either Virginia or the District of Columbia.
- Second, the acquisition could not occur if the National Bank and all of its insured depository institution affiliates would control more than 10% of the total amount of insured deposits in the United States or more than 30% of the insured deposits in the state of the bank to be acquired or a state in which it has branches if the bank holding company already controls an insured depository institution or any branch of an insured depository institution in the relevant state or states. 12 U.S.C. 1842(d)(2). These limits are not violated by this transaction whether the hypothetical state bank is considered to be located in Virginia or the District of Columbia.<**NOTE:** Total deposits of the

target in Virginia is under $57.2 million while total deposits controlled by insured depository institutions in Virginia are about $59 billion. Consequently, the 30% limitation is easily complied with. Any deposits attributable to the National Bank's de novo branch established in Virginia within the last two weeks would have no material impact on this determination.

This transaction also would not violate the 30% limit in the District of Columbia even though the Bank Holding Company already owns a national bank in the District of Columbia. As of March 31, 1996, the Federal Savings Bank had about $334.1 million in deposits in the District of Columbia and First National Bank of Maryland, D.C., the Bank Holding Company's national bank in the District of Columbia, controlled about $52.6 million in deposits. Deposits of all insured depository institutions in the District of Columbia as of March 31, 1996, exceeded $4 billion. Consequently, the percentage to be controlled by the Bank Holding Company following this acquisition is well under the 30% limitation. Any deposits attributable to the National Bank's de novo branch established in the District of Columbia within the last two weeks would have no material impact on this determination.

We further note that section 1842(d)(2)(C) states that "no provision of this subsection shall be construed as affecting the authority of any State to limit . . . the percentage of the total amount of deposits of insured depository institutions in the State which may be held or controlled by any bank or bank holding company. . . ." The District of Columbia and Virginia have imposed no deposit concentration limits applicable to this transaction.

In addition, the broad language of section 1842(d)(2)(C), referring to the authority of "any State" to impose deposit concentration limits, could implicate the Maryland deposit concentration limit since the National Bank is acquiring a target entity with a branch in Maryland. The Maryland concentration limit, like the Riegle-Neal state concentration limit, is 30%. Md. Code Ann., Fin. Inst. 5-1013 (Michie 1992 & Supp. 1995). We need not, however, decide the applicability of the Maryland limits and whether a violation of those limits would be grounds for denial because, following the acquisition, the Bank Holding Company will control about $6.15 billion in deposits in Maryland while total deposits in Maryland exceed $53 billion.>

- Third, section 1842(d)(3)(A) requires consideration of the Holding Company's compliance with the Community Reinvestment Act of 1977 (CRA). We note that on May 23, 1996, in connection with the acquisition of Thrift Holding Company by the Bank Holding Company, the Federal Reserve Board reviewed the CRA compliance record of the Bank Holding Company and its subsidiaries and found it to be consistent with the approval of an application by the Bank Holding Company to acquire the Thrift Holding Company and its thrift subsidiaries. *See* the Board approval letter.<**NOTE:** In considering acquisitions by bank holding companies of thrift holding companies and their thrift subsidiaries under section 4(c)(8) of the Bank Holding Company Act, the Board has made it clear that it considers the CRA record of the bank holding company and its depository institution subsidiaries. *See BayBanks, Inc.*, 81 Federal Reserve Bulletin 724-725 (1995) (*BayBanks*).>
- Fourth, section 1842(d)(3)(B) requires consideration of the applicant's record of compliance with applicable state community reinvestment laws. With respect to the District of Columbia, we note that the District of Columbia imposes on out-of-state bank holding companies which entered the District under its interstate banking provisions certain responsibilities with respect to fostering the development and revitalization of housing and commercial corridors in underserved neighborhoods in the District of Columbia and helping to meet the credit and deposit service needs of the low income and minority residents of the District. D.C. Code Ann. 26-802.1(b)(11). The Bank Holding Company first entered the District of Columbia in 1990 with its acquisition of a bank now known as First National Bank of Maryland, D.C. Representatives of the District of Columbia's Office of Banking and Financial Institutions advised OCC staff members on April 30, 1996, that they were satisfied with the Bank Holding Company's compliance with its CRA responsibilities in the District of Columbia. Virginia has no state community reinvestment law imposing obligations on bank holding companies. Moreover, even if one existed and were determined to be applicable to the Bank Holding Company, it would be virtually impossible to evaluate compliance by the holding company because it would not have operated any depository

institutions or branches in Virginia prior to its acquisition of the Thrift Holding Company about two weeks ago. Likewise, Maryland has no substantive community reinvestment requirements applicable to bank holding companies instead requiring only that banks submit to the Bank Commissioner a copy of their Federal CRA statement and the public portion of their most recent Federal CRA evaluation. Md. Code Ann. [Com. Law I] 5-206.1 (1992 & Supp. 1995).<**NOTE:** Finally, we note that the Bank Holding Company owns a state chartered bank -- York Bank & Trust Company -- headquartered in York, Pennsylvania. Consequently, it would arguably be appropriate, under the language of 12 U.S.C. 1842(d)(4)(B), to review the Bank Holding Company's compliance with Pennsylvania community reinvestment laws. Pennsylvania, however, does not have a state community reinvestment act.> Consequently, no issues arise under state community reinvestment laws that would require a rejection of the acquisition of the hypothetical state bank by the Bank Holding Company.

- Finally, we note that the condition of the Holding Company, including its capital position and management, is consistent with approval of the acquisition of this hypothetical state bank under the standards set forth in section 1842(d)(1) as incorporated into the Oakar Amendment. 12 U.S.C. 1815(d)(3)(F). <**NOTE:** Title 12 U.S.C. 1842(d)(4) also provides that no provision of this section shall be construed as affecting the applicability of Federal or state antitrust laws. We note that the Board recently considered the impact of the Federal antitrust laws on the acquisition by the Bank Holding Company of the Thrift Holding Company and the Federal Savings Bank and found that the acquisition was consistent with relevant statutory factors. *See* the Board approval letter. In approving such transactions, the Board considers the impact of the transaction on competition in relevant banking markets. *See, e.g.*, *BayBank* at 725-26. The opening within the past two weeks of two de novo branches by the National Bank in Virginia and the District of Columbia should have no material impact on this analysis. State anti-trust laws, by their own terms, are inapplicable to this transaction. *See* D.C. Code Ann. 28-4518 (1981 & Supp. 1995); Va. Code Ann. 59.1-9-4(b)(2)(1992 & Supp. 1994); Md. Code Ann. [Com. Law II] 11-203(9), (10) (1990 & Supp. 1995). Consequently, no issues arise under antitrust laws that would require a rejection of the acquisition of a hypothetical state bank by the Bank Holding Company.>

2. Branch retention following the merger

The next question, given compliance with 12 U.S.C. 215c and 1467a(s) and the provisions of the Oakar Amendment, codified at 12 U.S.C. 1815(d)(3)(F), specifically contemplating the possibility of interstate transactions, and assuming that, as will be discussed, the merger complies with the Bank Merger Act and other applicable law, is whether, following the merger, the National Bank may retain as branches the branches of the Federal Savings Bank. While the merger authority language of sections 215c and 1467a(s) is broad, these statutes do not specifically address branching even though interstate Federal savings associations had long existed by the time of enactment of the statutes. <**NOTE:** In 1982, Congress specifically permitted interstate branching for Federal savings associations. *See* 12 U.S.C. 1464(r). Currently, Federal savings associations enjoy broad interstate branching powers. *See* 12 C.F.R. 556.5 (1995). These powers have been upheld by at least one court. *See Conference of State Bank Supervisors v. Office of Thrift Supervision*, 792 F. Supp. 837 (D.D.C. 1992).> In fact, section 215c(c) provides:

No provision of this section shall be construed as authorizing a national bank or a subsidiary of a national bank to engage in any activity not otherwise authorized under this chapter or any other law governing the powers of national banks. <**NOTE:** A similar provision addressing the activities of national banks following acquisitions under this provision was contained in the HOLA. *See* 12 U.S.C. 1467a(s)(5). *See* also FDICIA Joint Conference Committee Transcript, pp. 374, 376 (statements of Rep. Oakar that "no new powers are granted to any of these entities").>

Consequently, assuming this provision applies to branching, if authority to retain the branches exists, it must be found in the 12 U.S.C. 36 governing national bank branching.