Corporate Decision 96-22

Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATIONS OF COMMUNITY NATIONAL BANK, SOUTH BOSTON, VIRGINIA, TO ESTABLISH A BRANCH IN HENDERSON, NORTH CAROLINA, AND TO ESTABLISH A BRANCH IN LOUISBURG, NORTH CAROLINA

April 19, 1996

I. INTRODUCTION

On February 21, 1996, Community National Bank, South Boston, Virginia ("Community") filed an application with the Office of the Comptroller of the Currency (OCC) to establish a branch in Henderson, North Carolina, under 12 U.S.C. § 36(g) (the "Henderson Branch Application"). Community's main office is in South Boston, Virginia, and all its existing branches are also in Virginia. The proposed Henderson branch would be Community's first branch in North Carolina. On February 21, 1996, Community also filed an application with the OCC to establish a branch in Louisburg, North Carolina (the "Louisburg Branch Application"). Community plans to open the Louisburg branch after the Henderson branch is opened. No comments or protests have been filed regarding Community's Applications. Community has approximately $112 million in assets.

II. DISCUSSION

A. Community may Establish the Henderson Branch under 12 U.S.C. § 36(g).

1. The de novo interstate branching authority of section 36(g) is triggered since the host state, North Carolina, has a law that meets the provisions of section 36(g)(1).

Community has applied for approval to establish an initial de novo branch in another state under 12 U.S.C. § 36(g). Section 36(g) authorizes a national bank to establish such a branch, subject to the requirements of the section:

> Subject to paragraph (2), the Comptroller of the Currency may approve an application by a national bank to establish and operate a de novo branch in a State (other than the bank's home State) in which the bank does not maintain a branch if --

(A) there is in effect in the host State a law that --
(i) applies equally to all banks; and
(ii) expressly permits all out-of-State banks to establish de novo branches in such State; and
(B) the conditions established in, or made applicable to this paragraph by, paragraph (2) are met.

12 U.S.C. § 36(g)(1) (Revised Statutes § 5155, as added by section 103(a) of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338, 2352 (the "Riegle-Neal Act")). In this Branch Application, Virginia is Community's home state, and North Carolina is the host state.[1]

The availability of the authority for a national bank to establish an initial de novo branch in a host state under section 36(g) therefore is triggered by host state law. The federal authority in section 36(g) is available only if the host state has a law that meets the features specified in paragraph 36(g)(1)(A). However, section 36(g) appears to structure the relationship between federal authority and host state law differently than some other federal banking statutes that refer to state law. On the one hand, the federal authority in section 36(g) is triggered only if the host state has a law that meets the features specified in paragraph 36(g)(1)(A). But section 36(g) does not prohibit host states from having other features in their interstate branching laws beyond those needed to meet the provisions of paragraph 36(g)(1)(A). Nor does section 36(g) provide that the federal authority is ineffective if the state adds other features. That is, the state may add other features to its interstate branching law, and, as long as those features do not cause the state law to fail to meet the provisions of paragraph 36(g)(1)(A), the federal authority in section 36(g) continues to be available.[2]

Thus, in evaluating an application for an initial de novo branch in a host state under section 36(g), the OCC must determine, first, whether the host state (here North Carolina) has a law that meets the provisions of paragraph 36(g)(1)(A), and second whether the applicant bank has met the conditions in section 36(g)(2).

---

[1] For purposes of section 36(g), the following definitions apply: The term "home State" means "the State in which the main office of a national bank is located." 12 U.S.C. § 36(g)(3)(B). The term "host state" means, "with respect to a bank, a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch." 12 U.S.C. § 36(g)(3)(C). The term "de novo branch" means a "branch of a national bank which (i) is originally established by the national bank as a branch, and (ii) does not become a branch of such bank as a result of (I) the acquisition by the bank of an insured depository institution or a branch of an insured depository institution or (II) the conversion, merger, or consolidation of any such institution or branch." 12 U.S.C. § 36(g)(3)(A). Moreover, section 36(g) applies only to a national bank's initial de novo branch in a host state. If the bank already has a branch or branches in the state, then that state is not one "in which the bank does not maintain a branch." In such states, as discussed in Part II-B below, subsequent branching by a national bank is governed by the other subsections of section 36, as appropriate.

[2] Yet, section 36(g), once triggered, singles out and specifically incorporates into the federal authority only certain features of state law referenced in section 36(g)(2).

North Carolina has a law that meets the provisions of section 36(g)(1)(A). In response to the Riegle-Neal Act, North Carolina enacted legislation, effective July 1, 1995, that permits interstate branching. See N.C. Gen. Stat. §§ 53-224.9 through 53-224.22 (1995). The statute includes provisions that expressly permit de novo branches in North Carolina by out-of-state banks:

> An out-of-state bank that does not have a branch in North Carolina and that meets the requirements of this Article may establish and maintain a de novo branch in this State.

N.C. Gen. Stat. § 53-224.12 (1995). In an earlier decision, the OCC reviewed the North Carolina statute for section 36(g) purposes and determined it met the provisions of section 36(g)(1)(A) and so the federal de novo interstate branching authority of section 36(g) was triggered for national banks. See Decision on the Application of Patrick Henry National Bank, Bassett, Virginia, to Establish a Branch in Eden, North Carolina (OCC Corporate Decision No. 96-04, January 19, 1996).

2. Community National Bank meets the conditions in 12 U.S.C. § 36(g)(2).

An application by a national bank under section 36(g) to establish and operate an interstate branch is also subject to certain conditions set forth in 12 U.S.C. § 36(g)(2). These conditions are incorporated from the provisions for approval of an interstate merger transaction by the appropriate federal banking agency under section 44 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831u. Specifically, the conditions are those contained in paragraphs (1), (3), and (4) of 12 U.S.C. § 1831u(b), in subsection 1831u(c), and in subsection 1831u(d)(2). These conditions are: (1) compliance with state filing requirements, (2) community reinvestment compliance, (3) adequacy of capital and management skills, (4) applicability of certain state laws, and (5) additional branching authority in the host state subsequent to the initial branch. The first three conditions apply to the establishment of the section 36(g) branch; the others apply to ongoing operations but may also have some bearing upon initial establishment.

Community's Henderson Branch Application satisfies all these conditions to the extent applicable. First, the proposal complies with applicable filing requirements. A bank applying for an interstate branch must (1) comply with the filing requirements of the host state as long as the filing requirement does not discriminate against out-of-state banks and is similar in effect to filing requirements imposed by the host state on out-of-state nonbanking corporations doing business in the host state, and (2) submit a copy of the application to the state bank supervisor of the host state. See 12 U.S.C. § 36(g)(2)(A)(incorporating section 1831u(b)(1)). The North Carolina statute requires an out-of-state bank desiring to establish a de novo branch in North Carolina to provide written notice of the proposed transaction to the Commissioner of Banks for the State of North Carolina (Commissioner) not later than the date on which the bank applies to the responsible federal bank supervisory agency for approval to establish the branch and to comply with the applicable requirements of the Foreign Corporations Article in North Carolina's Business Corporation Act. See N.C. Gen. Stat. § 53-224.14(a) & .14(b). As implemented to date, these requirements do not appear to discriminate against out-of-state banks or to impose a filing requirement more burdensome than that imposed on nonbanking corporations.

Community filed a timely notice with, and submitted a copy of its Henderson Branch Application to, the Commissioner. Thus, it has complied with the applicable state filing requirements in accordance with the provisions of sections 36(g)(2)(A) and 1831u(b)(1).

Second, the proposal satisfies all requirements relating to community reinvestment compliance. In determining whether to approve an application under section 36(g), the OCC must (1) comply with its responsibilities under section 804 of the federal Community Reinvestment Act ("CRA"), 12 U.S.C. § 2903, (2) take into account the CRA evaluations any affiliated banks of the applicant bank, and (3) take into account the applicant's record of compliance with applicable state community reinvestment laws. See 12 U.S.C. § 1831u(b)(3) (as incorporated by section 36(g)(2)(A)). The CRA requires the OCC to take into account Community's record of helping to meet the credit needs of its entire community, including low- and moderate-income neighborhoods. See 12 U.S.C. § 2903. Based on the most recent examination, Community has an outstanding rating with respect to CRA performance. Community is one bank in a chain banking group with four other banks. The OCC reviewed the CRA records of the other banks and determined there are no CRA concerns.[3] The State of Virginia does not have community reinvestment laws applicable to Community.

Third, the proposal satisfies the adequacy of capital and management skills requirements. The OCC may approve an application for a de novo branch only if the bank is adequately capitalized as of the date the application is filed and will continue to be adequately capitalized and managed after the transaction. See 12 U.S.C. § 1831u(b)(4) (as incorporated by section 36(g)(2)(A)). As of the date the application was filed, Community satisfied all regulatory and supervisory requirements relating to adequate capitalization, including the standards prescribed by 12 U.S.C. § 1831o(b)(1)(A) and 12 C.F.R. § 6.4. Additionally, the capital requirements of 12 U.S.C. § 51 are satisfied. The OCC has also determined that following establishment of the de novo interstate branch, Community will continue to exceed the standards for an adequately capitalized and adequately managed bank. The requirements of 12 U.S.C. § 1831u(b)(4) are therefore satisfied.

Finally, section 36(g)(2)(B) applies subsections (c) and (d)(2) of 12 U.S.C. § 1831u to de novo interstate branches of national banks established under section 36(g). None of the provisions of those subsections are applicable in determining the permissibility of the initial establishment of Community's branch in Henderson, North Carolina. Thus, Community's proposed branch in Henderson, North Carolina, is authorized under 12 U.S.C. § 36(g).

---

[3] It is not clear that the OCC is required to take into account the CRA evaluations of the other four banks in the chain group. The Riegle-Neal Act requires the OCC to take into account the CRA evaluation of "any bank that would be an affiliate." But this provision is in 12 U.S.C. § 1831u, a part of the Federal Deposit Insurance Act ("FDIA"), and the definition of "affiliate" in the FDIA incorporates by reference the definition of "affiliate" in the Bank Holding Company Act. See 12 U.S.C. § 1813(w)(6) (incorporating 12 U.S.C. § 1841(k)). By this definition ("affiliate means any company that controls, is controlled by, or is under common control with another company"), banks in a chain banking group are not affiliates of each other, although they may be affiliates within the meaning of 12 U.S.C. § 221a or 12 U.S.C. § 371c. The OCC need not resolve this issue in this application, however, since the other banks, even if they were considered affiliates, would present no CRA concerns.

B. Community may Establish the Louisburg Branch under 12 U.S.C. § 36(c).

Community also applied to establish a branch in Louisburg, North Carolina. Community intends to open the Louisburg branch after the Henderson branch has opened. Although Community has no branches in North Carolina today or at the time it filed the Louisburg Branch Application, it will have established the Henderson branch before the Louisburg branch opens. Thus, at the time it opens, the Louisburg branch will be another branch in a state in which Community already has a branch. As such, it is not within the scope of 12 U.S.C. § 36(g)(1), since section 36(g)(1) addresses the authority of a national bank to establish "a de novo branch in a State (other than the bank's home State) in which the bank does not maintain a branch." 12 U.S.C. § 36(g)(1) (emphasis added). When the Louisburg branch opens, the Henderson branch already will have opened and so North Carolina will no longer be a state in which Community "does not maintain a branch," and so section 36(g)(1) is not applicable.

Instead, after a national bank's first branch in a host state, subsequent de novo branches by the national bank in that state are governed by 12 U.S.C. § 36(c). Under the Riegle-Neal Act, once a national bank has obtained interstate branches in a host state by an interstate merger transaction under 12 U.S.C. § 1831u or has established an interstate de novo branch in a host state under 12 U.S.C. § 36(g), then the national bank's later acquisition or establishment of additional branches in that state is subject to the same branching authority governing branching by other national banks in that state. See 12 U.S.C. § 1831u(d)(2) (additional branches by interstate banks formed by Riegle-Neal interstate merger transactions) & 12 U.S.C. § 36(g)(2)(B) (incorporating section 1831u(d)(2) to apply to additional branches by interstate banks formed by Riegle-Neal de novo branch).[4] The legislative history of the de novo branching provisions of the Riegle-Neal Act reaffirms this:

---

[4] Section 1831u(d)(2) provides:

> (2) Additional Branches. -- Following the consummation of any interstate merger transaction, the resulting bank may establish, acquire, or operate additional branches at any location where any bank involved in the transaction could have established, acquired, or operated a branch under applicable Federal or State law if such bank had not been a party to the merger transaction.

12 U.S.C. § 1831u(d)(2). Thus, in any host state, a national bank resulting from an interstate merger among national banks in different states may establish or acquire additional branches in the host state under the federal law applicable to branching by national banks in the host state (e.g., section 36(b)(2) with respect to branches acquired through merger, and section 36(c) with respect to branches acquired by purchase or established de novo).

Section 36(g)(2)(B) provides:

> (B) Operation. -- Subsections (c) and (d)(2) of section 44 of the Federal Deposit Insurance Act [12 U.S.C. §§ 1831u(c) & 1831u(d)(2)] shall apply with respect to each branch of a national bank which is established and operated pursuant to an application approved under this subsection in the same manner and to the same extent such provisions of section 44 apply to a branch of a national bank which resulted from an interstate merger transaction approved pursuant to such section 44.

12 U.S.C. § 36(g)(2)(B).

> Once a bank has established a branch in a host State by de novo branching such bank may establish and acquire additional branches at any location in the host State in the same manner as a bank could have established or acquired under applicable Federal or State law.

H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 56 (August 2, 1994) (Report on H.R. 3841, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994).

These provisions codify, for Riegle-Neal interstate national banks, the interpretation of section 36(c) adopted by the courts and the OCC in the context of interstate national banks formed under other, prior law. In section 36(c), the McFadden Act authorizes a national bank to establish new branches "at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question ... ." 12 U.S.C. § 36(c)(2). The interpretation of the statute adopted since at least 1974 has been that, for the purpose of establishing additional branches under section 36(c), an interstate national bank is "situated" in each state in which it has its main office or a branch: The bank can establish other branches within each state to the same extent as other national banks situated in that state, i.e., to the same extent that state allows its state banks to have branches within the state. See Seattle Trust & Savings Bank v. Bank of California, N.A., 492 F.2d 48 (9th Cir.), cert. denied, 419 U.S. 844 (1974). The OCC has applied this principle from Seattle Trust in prior decisions involving national banks with operations in more than one state. See, e.g., Decision of the Office of the Comptroller of the Currency on the Applications of Bank Midwest, N.A. (OCC Corporate Decision No. 95-05, February 16, 1995), reprinted in Fed. Banking L. Rep. (CCH) ¶ 90,474 ("OCC Bank Midwest Decision") (Part II-B) (and other OCC decisions cited therein). See also OCC Bank Midwest Decision (Part II-C-2) (applying similar analysis in section 36(b)(2)).

Thus, both by operation of 12 U.S.C. § 36(g)(2)(B) and by existing construction of 12 U.S.C. § 36(c), Community's establishment of the Louisburg branch is subject to section 36(c), not section 36(g).[5] For purposes of applying section 36(c) to Community's later branching within North Carolina after the Henderson branch, Community is treated as a national bank situated in North Carolina, and specifically as a national bank with its main office at the Henderson branch. Under North Carolina law, a North Carolina state-chartered bank is permitted to establish branches throughout North Carolina without geographic limitation. See

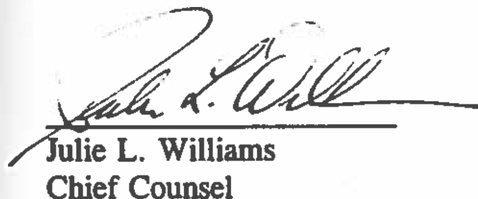
---

[5] Another provision also added to 12 U.S.C. § 36 in the Riegle-Neal Act further supports this result. Congress added section 36(f) to address the law applicable to interstate branching operations at branches in a host state of an interstate national bank. Among other provisions, section 36(f)(1)(A) provides that "the laws of the host State regarding . . . establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except – (i) when Federal law preempts the application of such State laws to a national bank . . . ." 12 U.S.C. § 36(f)(1)(A). Thus, under this provision, but for the preemption exception, it is clear that the subsequent establishment of branches within a host state is treated like the establishment of intrastate branches within the host state by the host state's state banks. Since there are federal laws specifically governing in-state branching by national banks (i.e., 12 U.S.C. §§ 36(b), 36(c), 36(g)(2)(B), & 1831u(d)(2)), those laws would preempt this provision under the preemption exception. However, since those laws also incorporate, and make applicable to national banks, state law for in-state branching by state banks, the outcome is generally the same.

N.C. Gen. Stat. § 53-62(b) (1995). A North Carolina state bank in Henderson could establish a branch in Louisburg. Thus, a national bank situated in North Carolina could establish a branch in Louisburg under 12 U.S.C. § 36(c). Therefore, Community may establish the proposed branch in Louisburg under section 36(c).[6]

III. CONCLUSION AND APPROVAL

In conclusion, Community National Bank's application to establish an initial de novo interstate branch in Henderson, North Carolina, is legally authorized under 12 U.S.C. § 36(g). Community National Bank's application to establish a second branch in North Carolina in Louisburg is legally authorized under 12 U.S.C. §§ 36(c) & 36(g)(2)(B) (incorporating 12 U.S.C. § 1831u(d)(2)). The Branch Applications raise no supervisory or policy concerns. Accordingly, the Henderson Branch Application is approved; and the Louisburg Branch Application is approved, subject to the Henderson Branch being opened first.



Julie L. Williams
Chief Counsel

4-19-96
Date

Application Control Numbers: 96-SE-05-0027 & 96-SE-05-0028

[6] Since Community plans to open the Henderson branch first, and then the Louisburg branch, the authority for each branch is section 36(g) and section 36(c) respectively. We note that, if Community were to have planned to open Louisburg first, the alternate order also would have been authorized. In that event, the Louisburg branch (the first branch in this plan) would have met the requirements for, and been authorized under, section 36(g); and the Henderson branch would have been established under section 36(c).