Office of the Comptroller of the Currency

Interpretations - Corporate Decision #96-38

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DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY

ON THE APPLICATIONS OF

THE FIRST NATIONAL BANK OF MARYLAND,

BALTIMORE, MARYLAND,

TO ESTABLISH DE NOVO BRANCHES

IN RESTON, VIRGINIA AND WASHINGTON, D.C.

July 18, 1996

I. INTRODUCTION

On June 11, 1996, The First National Bank of Maryland, Baltimore, Maryland ("FNB of Maryland" or the "Bank") filed applications with the Office of the Comptroller of the Currency (OCC) to establish two de novo branches, one in Reston, Virginia, and one in the District of Columbia, under 12 U.S.C. 36(g) (the "Branch Applications"). The Bank's main office is in Baltimore, Maryland and all of its existing branches also are in Maryland. The proposed branches would be the Bank's first branches in Virginia and the District of Columbia. No protests have been filed regarding the Bank's Applications. The Bank had total assets of $8.4 billion as of December 31, 1995.

II. LEGAL AUTHORITY

A. The statutory framework: Under 12 U.S.C. 36(g), an out-of-state national bank may establish an initial *de novo* branch in a host state if the host state has a law that meets the provisions of section 36(g)(1) and the bank meets the conditions of section 36(g)(2).

The Bank has applied for approval to establish initial *de novo* branches in two states, Virginia and the District of Columbia, under 12 U.S.C. 36(g). Section 36(g) authorizes a national bank to establish such branches, 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 (enacted September 29, 1994) (the "Riegle-Neal Act")). In these Branch Applications, Maryland is the Bank's home state, and Virginia and the District of Columbia are host states. <**NOTE:** 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. Once the bank 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, subsequent branching by a national bank is governed by the other subsections of section 36, as appropriate.>

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. <**NOTE:** 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).>

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 (in the Bank's case, Virginia and the District of Columbia) 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). We now address these requirements in turn.

B. Virginia has a law that meets the provisions of 12 U.S.C. 36(g)(1)(A).

Since the Bank is applying to establish an initial *de novo* branch in Virginia, the branch may be approved under section 36(g) only if Virginia has "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." 12 U.S.C. 36(g)(1)(A). Virginia enacted legislation, effective July 1, 1995, that permits interstate branching. *See* Va. Code Ann. 6.1-44.1 through 6.1-44.25 (1995). The statute includes provisions that expressly permit *de novo* branches in Virginia by out-of-state banks:

> An out-of-state bank that does not already maintain a branch in this Commonwealth and that meets the requirements of this article may establish and maintain a *de novo* branch in this Commonwealth.

Va. Code Ann. 6.1-44.4 (1995). *See also* Va. Code Ann. 6.1-44.6 & 6.1-44.7 (1995) (filing requirements and reciprocity condition for interstate branches). <**NOTE:** Virginia also expressly provides for interstate branching through the acquisition of a branch. *See* Va. Code Ann. 6.1-44.5 (1995). Sections 6.1-44.6 and 6.1-44.7 apply to both a *de novo* interstate branch and to one acquired through acquisition. These sections provide:

> 6.1-44.6 Filing requirements.
> An out-of-state bank desiring to establish and maintain a de novo branch or to acquire a branch in this Commonwealth shall submit to the Commission a copy of the application it files with its home state supervisor or the responsible federal banking agency to establish or acquire such branch. Such submission shall be made at the same time the application is filed by the out-of-state bank with such home state supervisor or responsible federal banking agency. The out-of-state bank shall also comply with the requirements of Article 17 (13.1-757 et seq.) of the Virginia Stock Corporation Act and pay any filing fee required by the Commission.
>
> 6.1-44.7 Conditions for approval.
> No branch of an out-of-state bank may be established under this article, unless:
>
> > 1. In the case of a *de novo* branch, the laws of the home state of the out-of-state bank permit Virginia banks to establish and maintain *de novo* branches in that state under substantially the same terms as set forth in this article.
> >
> > 2. In the case of a branch to be established through the acquisition of a branch, the laws of the out-of-state bank [sic] permit Virginia banks to establish and maintain branches in that state through the acquisition of branches under substantially the same terms as set forth in this article.

Va. Code Ann. 6.1-44.6 & 6.1-44.7 (1995). For the Virginia statute, the following definitions apply: The term "bank" has the meaning set forth in 12 U.S.C. 1813(h). The term "out-of-state bank" means "a bank whose home state is a state other than Virginia." A bank's "home state" with respect to a national bank is "the state in which the main office of the bank is located." The term "*de novo* branch" means a "branch of a bank located in a host state which (i) is originally established by the bank as a branch and (ii) does not become a branch of the bank as a result of the acquisition of another bank or a branch of another bank, or the merger, consolidation, or conversion of any such bank or branch." Va. Code Ann. 6.1-44.2 (1995).>

Thus, it would seem clear that Virginia has "opted-in" to interstate branching through de novo branches for purposes of section 103 of the Riegle-Neal Act. *See also* Va. Code Ann. 6.1-44.1 (1995) (statement of express intent of this article to permit interstate branching under sections 102 and 103 of the Riegle-Neal Act). However, one feature of the Virginia law casts uncertainty on the conclusion that Virginia has a law that successfully meets the provisions of paragraph 36(g)(1)(A). Virginia has placed a condition of nationwide reciprocal treatment on an out-of-state bank's establishment of a *de novo* branch in Virginia. Under the Virginia statute, an out-of-state bank may establish a *de novo* branch in Virginia only if the home state of the out-of-state bank permits Virginia banks to establish *de novo* branches in that state under substantially the same terms as in the Virginia statute. Va. Code Ann. 6.1-44.7(2) (1995). <**NOTE:** The nationwide reciprocal treatment condition also applies to the establishment of an interstate branch in Virginia through acquisition of a branch. But the issue at hand would not arise in that context. In the Riegle-Neal Act, the acquisition of branches is treated as a type of merger transaction authorized in section 102, see 12 U.S.C. 1831u(a)(4), and the provisions under which states may "opt-in" to interstate merger transactions in the period before June 1, 1997, specifically address state imposition of a nationwide reciprocal treatment condition during that time period. See 12 U.S.C. 1831u(a)(3)(B)(I). By contrast, section 103 of the Riegle-Neal Act, 12 U.S.C. 36(g), does not have a provision for nationwide reciprocal treatment.>

The reciprocal treatment condition means that, for the time being and until all states enact suitable interstate branching laws, out-of-state banks from some states would not in fact be permitted to establish *de novo* branches in Virginia under the terms of the Virginia law. This raises a question whether Virginia indeed has a law that "applies equally to *all* banks" and "expressly permits *all* out-of-State banks to establish *de novo* branches" as set forth in paragraph 36(g)(1)(A) (emphasis added). Reciprocal treatment is a condition that limits which banks actually may enter Virginia. The OCC recently addressed a similar

issue with respect to a *de novo* interstate branch in North Carolina, and the same analysis applies here. *See* Decision on the Application of Wachovia Bank of North Carolina, National Association, Winston-Salem, North Carolina, to Establish a Branch in Norfolk, Virginia (OCC Corporate Decision No. 96-14, March 15, 1996); *see also* 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).

We believe that the fact that a state's opt-in law contains conditions on entry and so some banks would in practice not be permitted to branch into a state under the state law's terms cannot itself be sufficient to make the law fail to meet the terms of paragraph 36(g)(1)(A). It is unlikely that any state would have a law that had absolutely no conditions on entry by out-of-state banks. But, if we were to adopt a strict reading of section 36(g)(1)(A), only a state law that allowed every out-of-state bank to enter without qualification would fulfill the provisions of section 36(g)(1). This could render section 103 of the Riegle-Neal Act a nullity, and so we believe Congress did not intend such a strict reading. Instead, for purposes of meeting the terms of section 36(g)(1)(A), the proper inquiry is the nature of the conditions. This means, in terms of the statutory language, the important criteria are (1) that the state law opens the state for all out-of-state banks to apply under the same standards ("applies equally to all banks"); and (2) that the state law does not discriminate among banks -- *i.e.*, it does not by its own terms exclude a fixed class of banks, whether by type of bank such as national bank, state commercial bank, or state savings bank or by listed state of origin ("expressly permits all out-of-state banks").

Under the Virginia statute, including its nationwide reciprocal treatment condition, all out-of-state banks would be subject to the same standard, and the entry requirements would apply to the same degree to any bank seeking to establish a branch. Nor does the Virginia law discriminate among types of banks or exclude banks from a fixed list of states. From the perspective of Virginia, the Virginia law lets in all out-of-state banks. Nothing in the Virginia law needs to be changed for out-of-state banks from every state to enter Virginia. Thus, we believe that Virginia has a law that meets the provisions of paragraph 36(g)(1)(A). <**NOTE:** As already noted, see note 2, the structure of section 36(g) does not specifically incorporate state law or otherwise make state law applicable to national banks, except as provided in section 36(g)(2). The reciprocity condition contained in the Virginia law is met here, however, and therefore does not present a separate issue.

Under the laws of Maryland (FNB of Maryland's home state), a Virginia bank may establish a *de novo* branch in Maryland provided the laws of Virginia permit a Maryland bank to establish a branch in Virginia under substantially the same terms as are set forth in Maryland law. Md. Fin. Inst. Code Ann., 5 - 1014 (1996). There are slight variations in the definition of "bank" under the Maryland and Virginia laws thereby creating a slight variation in the definition of "out-of-state bank" (Virginia) and "other state bank" (Maryland). Virginia law provides that any "insured bank" as defined in the Federal Deposit Insurance Act ("the FDIA") is a "bank" for purposes of the Virginia interstate *de novo* branching law. Maryland law provides that any "bank" as defined in the Bank Holding Company Act is a "bank" for purposes of the Maryland interstate *de novo* branching law. This definition includes, with limited exceptions, all "insured banks" as defined in the FDIA. This variation in the definition of "bank" under the Virginia and Maryland laws is not material. A full service national bank is a "bank" under either definition. As such, the Maryland law meets the reciprocity approval condition established under Virginia law as a precondition to the establishment of a branch in Virginia by FNB of Maryland.>