Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Corporate Decision #97-110
December 1997

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATIONS OF GREAT LAKES NATIONAL BANK MICHIGAN, ANN ARBOR, MICHIGAN

December 24, 1997

I. INTRODUCTION

On November 12, 1997, Great Lakes National Bank Michigan, Ann Arbor, Michigan ("Great Lakes"), filed an application with the Office of the Comptroller of the Currency ("OCC") for approval to establish a branch in the Jewel Food Store located in Highland, Indiana (the "Highland Branch"), under 12 U.S.C. § 36(g) (the "Branch Application"). Great Lakes' main office is in Ann Arbor, Michigan, and all its existing branches are in Michigan.[1]

Also on November 12, 1997, Great Lakes filed an application with the OCC for approval to purchase, within sixty days after the Highland Branch is established, the assets and liabilities of the Highland, Indiana branch operated by Bank of America, FSB, Portland, Oregon ("BofA"), under 12 U.S.C. §§ 24(7), 1815(d) & 1828(c) (the "P&A Application"). The BofA branch is located within the Jewel Food Store where Great Lakes proposes to establish its branch ("BofA Jewel Food Store branch"). Great Lakes also requests approval for its proposed Highland Branch and the BofA Jewel Food Store branch to operate at the same location for the short period of time before Great Lakes acquires the assets and liabilities of the BofA Jewel Food Store branch. Great Lakes is a member of the Savings Association Insurance Fund ("SAIF") and BofA is a member of the Bank Insurance Fund("BIF").

Great Lakes is a wholly-owned subsidiary of TCF Financial Corporation, Minneapolis, Minnesota. BofA is a wholly-owned subsidiary of BankAmerica Corporation, San Francisco, California. As of September 30, 1997, Great Lakes had approximately $2.1 billion in assets

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[1] Great Lakes became a national bank on April 7, 1997, when it converted from a Federal savings bank. See Decision of the Comptroller of the Currency to Approve Applications by TCF Financial Corp., Minneapolis, Minnesota, to Convert Federal Savings Banks Located in Minnesota, Michigan, Illinois, and Wisconsin and to Establish De Novo Banks in Ohio and Colorado and to Engage in Certain Related Transactions (OCC Corporate Decision 97-13, February 24, 1997).

and $1.4 billion is deposits. The BofA Jewel Food Store branch had, and Great Lakes is acquiring, approximately $700,000 in assets and $700,000 in deposits.

II. LEGAL AUTHORITY

A. The Establishment of a *De Novo* Branch is Authorized under 12 U.S.C. § 36(g).

Great Lakes has applied for approval to establish an initial *de novo* branch in another state under 12 U.S.C. § 36(g). 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). These requirements are met here, and so Great Lakes' proposed Highland Branch is authorized.

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 --
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> (A) there is in effect in the host State a law that --
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> (i) applies equally to all banks; and
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> (ii) expressly permits all out-of-State banks to establish de novo branches in such State; and
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> (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(g)(1), 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 this Branch Application, Michigan is Great Lakes' home State, and Indiana is the host State.[2]

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[2] 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. Although 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), section 36(g), once triggered, singles out and specifically incorporates into the federal authority and makes applicable to national banks only those aspects of state law referenced in section 36(g)(2).

Thus, in evaluating an application for a *de novo* branch in a host State under section 36(g), the OCC must determine, first, whether the host State (here, Indiana) 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.

Great Lakes applied to establish a *de novo* branch in Highland, Indiana. Indiana law permits an out-of-state bank that does not operate a branch in the state to establish and maintain a *de novo* branch in Indiana. See Ind. Code Ann. § 28-2-18-20 (Burns Supp. 1997). However, one feature of Indiana law casts uncertainty on the conclusion that Indiana has a law that successfully meets the provisions of paragraph 36(g)(1)(A). Indiana has placed a condition of nationwide reciprocal treatment on an out-of-state bank's establishment of a *de novo* branch in Indiana. An out-of-state bank may establish a *de novo* branch in Indiana only if the home state of the out-of-state bank permits Indiana banks to establish *de novo* branches in that state under substantially the same terms and conditions as in the Indiana statute. Ind. Code Ann. § 28-2-18-29 (Burns Supp. 1997).

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 Indiana under the terms of the Indiana law. This raises a question whether Indiana 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 Indiana.

However, 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 Indiana statutes, 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 Indiana law discriminate among types of banks or exclude banks from a fixed list of states. From the perspective of Indiana, the Indiana law lets in all out-of-state banks. Nothing in the Indiana law needs to be changed for out-of-state banks from every state to enter Indiana. Thus, we believe that Indiana has a law that meets the provisions of paragraph 36(g)(1)(A).[3]

An application by a national bank to establish an interstate *de novo* branch under section 36(g) is also subject to certain conditions set forth in 12 U.S.C. § 36(g)(2)(A). 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). These conditions are: (1) compliance with state filing requirements, (2) community reinvestment compliance, and (3) adequacy of capital and management skills.

Great Lakes' 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)). Indiana law requires that an out-of-state bank desiring to establish a *de novo* branch in Indiana must provide written notice to the Department of Financial Institutions not later than the date on which the bank applies to the responsible federal bank supervisory agency for approval to establish the branch. See Ind. Code Ann. § 28-2-18-22 (Burns Supp. 1997). It also requires

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[3] As already noted, 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). Great Lakes provided the OCC with a letter from the Indiana Department of Financial Institutions which reflects the Department has previously recognized Michigan law as meeting the reciprocity condition contained in the Indiana law. See Letter to Charles P. Hoffman, Jr., Great Lakes National Bank Michigan, from James M. Cooper, Deputy Director, Indiana Department of Financial Institutions, dated November 13, 1997. Thus, the reciprocity condition does not present a separate issue.

the bank to file as a foreign corporation pursuant to Indiana Code Annotated § 28-1-22. See Ind. Code Ann. § 28-2-18-23. This statute makes out-of-state banks subject to the same foreign corporation filing requirements as out-of-state nonbanking corporations. Great Lakes sent a copy of its OCC Branch Application to the Indiana Department of Financial Institutions, as required by section 1831u(b)(1)(A)(ii), and has filed the required notice under Indiana law. Thus, this Branch Application satisfies the Riegle-Neal Act's filing requirements.

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"), (2) take into account the CRA evaluations of 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 the Bank'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. Great Lakes does not have a current CRA rating from the OCC because it recently became a national bank. Its predecessor, a Federal savings bank, had a satisfactory rating with respect to CRA performance. The OCC reviewed the CRA records of Great Lakes' four affiliated banks and determined there are no CRA concerns. TCF National Bank Minnesota, Minneapolis, Minnesota, TCF National Bank Illinois, Burr Ridge, Illinois, and TCF National Bank Wisconsin, Milwaukee, Wisconsin, do not have current CRA ratings from the OCC because they recently became national banks. However, the predecessors to TCF National Bank Minnesota and TCF National Bank Illinois had outstanding CRA ratings and the predecessor to TCF National Bank Wisconsin had a satisfactory CRA rating. TCF National Bank Colorado, N.A., Englewood, Colorado, has no rating because it is a new charter and has not had a CRA examination to date. Finally, Michigan does not have community reinvestment laws applicable to Great Lakes. Therefore, this Branch Application satisfies the Riegle-Neal Act's requirements relating to community reinvestment compliance.

Third, the proposal satisfies the adequacy of capital and management skills requirements in the Riegle-Neal Act. The OCC may approve an application for a *de novo* branch under section 36(g) only if the bank is adequately capitalized as of the date the application is filed and will continue to be adequately capitalized and adequately 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, Great Lakes satisfied all regulatory and supervisory requirements relating to adequate capitalization, and it currently is at least satisfactorily managed. The OCC has also determined that, following the transaction, Great Lakes 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.

The proposed Highland Branch is permissible under section 36(g)(1), and Great Lakes' Branch Application satisfies the conditions of section 36(g)(2). Accordingly, the Highland Branch is authorized under 12 U.S.C. § 36(g).

B. The Highland Branch and the BofA Jewel Food Store Branch May Operate at the Same Location.

Great Lakes' Highland Branch and the BofA Jewel Food Store branch will operate at the same location in the Jewel Food Store for a short period of time. As noted, in the P&A Application, Great Lakes has applied to purchase the assets and acquire the liabilities of the BofA Jewel Food Store branch. National banks are authorized to share space with other financial institutions. See 12 C.F.R. § 7.3001 (1997). Great Lakes has committed that its operations at the Highland Branch during the short period it shares space with the BofA Jewel Food Store branch will be conducted in accordance with the conditions and requirements set out in section 7.3001. Accordingly, the Highland Branch is authorized to share space with the BofA Jewel Food Store branch.

C. The Purchase and Assumption Transaction is Authorized under 12 U.S.C. § 24(7).

Great Lakes has applied for approval to purchase the assets and assume the liabilities of the BofA Jewel Food Store branch (the "P&A transaction"). National banks have long been authorized to purchase bank-permissible assets and assume bank-permissible liabilities from sellers, including assuming the deposit liabilities from other depository institutions, as part of their general banking powers under 12 U.S.C. § 24(7). See, e.g., City National Bank of Huron v. Fuller, 52 F.2d 870, 872-73 (8th Cir. 1931); In re Cleveland Savings Society, 192 N.E.2d 518, 523-24 (Ohio Com. Pl. 1961). See also 12 U.S.C. § 1828(c)(3) (purchase and assumption transactions included among transactions requiring review under the Bank Merger Act). Such purchase and assumption transactions are commonplace in the banking industry.

Accordingly, Great Lakes may purchase the assets and assume the liabilities of the BofA Jewel Food Store branch from BofA.[4]

D. The P&A Application Complies with 12 U.S.C. § 1815(d).

The P&A Application also complies with the Oakar Amendment, 12 U.S.C. § 1815(d)(3). Great Lakes is a member of the SAIF, and BofA is a member of the BIF. The assumption of any liability by a SAIF member to pay any deposits of a BIF member is a conversion transaction under 12 U.S.C. § 1815(d)(2)(B)(iii)(II). Institutions may participate in

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[4] No analysis is required for this transaction under the Riegle-Neal Act. The Riegle-Neal Act added a new section to the Federal Deposit Insurance Act which authorizes certain interstate merger transactions, including purchase and assumption transactions, between "insured banks". See Riegle-Neal Act § 102(a); 12 U.S.C. § 1831u(a)(1). Such interstate merger transactions are subject to certain requirements and conditions regarding age limits, filing requirements, concentration limits, community reinvestment compliance, and capital and management. See 12 U.S.C. §§ 1831u(a)(5) & 1831u(b). For purposes of section 1831u, the definition of "insured bank" does not include Federal savings associations. See 12 U.S.C. § 1813(h). As BofA is a Federal savings association, the P&A transaction is not, for purposes of the Riegle-Neal Act, between insured banks.

such transactions, without being subject to the requirements of section 1815(d)(2), if the transaction complies with the provisions of section 1815(d)(3).

The Oakar Amendment requires that the acquiring or resulting bank must meet all applicable capital requirements upon consummation of the transaction. See 12 U.S.C. § 1815(d)(3)(E)(iii). As discussed above in section II-A, the OCC has determined the acquiring bank (Great Lakes) meets all applicable capital requirements. Accordingly, the P&A Application complies with the Oakar Amendment.[5]

III. ADDITIONAL STATUTORY AND POLICY REVIEWS

A. The Bank Merger Act.

The Bank Merger Act, 12 U.S.C. § 1828(c), requires the OCC's approval for any merger transaction, including purchase and assumption transactions, between insured depository institutions where the resulting institution will be a national bank.[6] Under the Act, the OCC generally may not approve a merger transaction which would substantially lessen competition. In addition, the Act also requires the OCC to take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served. For the reasons stated below, we find the P&A Application may be approved under section 1828(c).

1. Competitive Analysis.

The OCC has reviewed the competitive effects of this proposal by using its standard procedures for determining whether a purchase of assets and assumption of liabilities clearly has minimal or no adverse competitive effects. We find that the proposal satisfies its criteria for a purchase of assets and assumption of liabilities that clearly has no or minimal adverse competitive effects.

2. Financial and Managerial Resources.

The financial and managerial resources of both banks are presently satisfactory. The proposed P&A transaction should place little additional burden on Great Lakes. Its future prospects are favorable. Thus, we find the financial and managerial resources factor is consistent with approval of the application.

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[5] This transaction is the reverse of the usual Oakar transaction wherein a BIF-insured institution acquires a SAIF-insured institution. Here, a SAIF-insured institution is acquiring assets from a BIF-insured institution. As a result, the provisions of 12 U.S.C. § 1815(d)(3)(F), which make the requirement of section 3(d) of the Bank Holding Company Act (12 U.S.C. § 1842(d)) applicable, do not apply.

[6] For purposes of section 1828(c), the definition of "insured depository institution" includes Federal savings associations. See 12 U.S.C. § 1813(c).

3. Convenience and Needs.

The resulting bank will help to meet the convenience and needs of the communities to be served. Great Lakes will continue to serve the same areas in Michigan and Indiana, and it will add the customers of the BofA Jewel Food Store branch in Indiana. Great Lakes will continue to offer its current range of banking products and services. No branch closings are contemplated as a result of this transaction. Accordingly, we believe the impact of the P&A transaction on the convenience and needs of the communities to be served is consistent with approval of the application.

B. The Community Reinvestment Act.

The Community Reinvestment Act ("CRA") requires the OCC to take into account the applicants' records of helping to meet the credit needs of their entire communities, including low- and moderate-income neighborhoods, when evaluating certain applications. See 12 U.S.C. § 2903. Great Lakes and BofA have at least satisfactory ratings with respect to CRA performance. No public comments were received by the OCC relating to this application, and the OCC has no other basis to question the banks' performance in complying with the CRA.

The P&A transaction is not expected to have any adverse effect on the resulting bank's CRA performance. Great Lakes will continue to serve the same communities that it and the target branch currently serve and will continue its current CRA programs and policies. The P&A transaction does not alter Great Lakes' obligation to help meet the credit needs of the communities it serves. We find that approval of the proposed P&A transaction is consistent with the Community Reinvestment Act.

IV. CONCLUSION AND APPROVAL

For the reasons set forth above, including the representations and commitments made by the applicants, we find that the Great Lakes' establishment of the branch in Highland, Indiana, is legally authorized under 12 U.S.C. § 36(g), the P&A transaction is legally authorized under 12 U.S.C. §§ 24(7) & 1815(d), and that the P&A transaction meets the other statutory criteria for approval. Accordingly, these Applications are hereby approved.

/s/ 12-24-97

Steven J. Weiss Date
Deputy Comptroller
Bank Organization and Structure

Application Control Numbers: 97-MW-02-0084; 97-MW-05-0166