Office of the Comptroller of the Currency

Washington, DC 20219

Interpretive Letter #1164
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Jonathan Rushdoony
Northeastern District Counsel
340 Madison Avenue, 5th Floor
New York, NY 10173

Subject: Applicability of the Bank Merger Act to the Assumption of Deposits related to Corporate Trust Business being acquired

Dear Jonathan:

You recently asked whether an unpublished letter of the Northeastern district office dated June 11, 1990, (1990 Letter) represents the current views of the Office of the Comptroller of the Currency (OCC). The 1990 Letter concerned the applicability of the Bank Merger Act (BMA), 12 U.S.C. § 1828(c), to certain transactions involving the assumption of deposits by a national bank from another insured depository institution when the assumption of deposits was part of a transaction in which the national bank was acquiring corporate trust relationships from the other institution. The 1990 Letter concluded that the bank would not be required to file an application under the BMA. As explained below, we believe that conclusion is incorrect.

I. 1990 Letter

The transaction in the 1990 Letter involved a national bank's purchase of the corporate debt trusteeship, corporate trust agency, and escrow businesses of another national bank. In connection with the debt trusteeship transaction, certain cash transaction accounts would be transferred from one bank to the other. These cash transaction accounts were established to accumulate funds to make payments of principal and interest on debt instruments, redemptions of and dividends on stock, and other cash disbursement. These cash transaction accounts constituted deposit liabilities and met the definition of a "deposit" under 12 U.S.C. § 1813(l).

The 1990 Letter concluded that the assumption of the cash transaction deposit accounts that are associated with trust accounts would not require application and approval under the BMA despite the assumption of deposit liabilities because (1) the deposits are incidental to trust accounts in which the bank is acting in a fiduciary capacity and (2) the assumption of the liabilities does not impact competition and is not within the scope of the BMA.

II. BMA Applicability to Assumption of Deposits

The BMA provides, in relevant part: "No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or *assume liability to pay any deposits* made in, any other insured bank except with the prior written approval of the responsible agency…." 12 U.S.C. § 1828(c)(2) (emphasis added).

A. Liability to Pay Any Deposit

The first basis for the 1990 Letter's conclusion relied on the cash transaction deposit accounts' relationship to the trust accounts, characterizing the cash transaction accounts as operated on behalf of the trust customers. However, the BMA applies to the assumption of *any* deposit (the Deposit Prong). The cash transaction accounts are deposits. Therefore, their assumption by one bank from another is covered by the BMA.

In one limited instance, the banking agencies determined that the BMA was not applicable to the acquisition of deposit liabilities associated with credit card accounts. OCC Interpretive Letter No. 1083 (May 3, 2007) (Interpretive Letter 1083)[1] concluded that a bank's acquisition of credit card portfolios with *de minimis* amounts of credit balances that constitute deposits are not subject to the BMA as long as the transactions meet certain conditions.[2]

However, while the cash transaction deposit accounts discussed in the 1990 letter are related to the corporate trust accounts, this relationship is different from the credit card balances and credit card accounts addressed in Interpretive Letter 1083. Deposit liabilities arising from cash transaction deposit accounts related to trust accounts are separate relationships between customers and banks from the associated corporate trust account relationships. In contrast, a "credit balance" does not represent a separate relationship between a customer and the insured bank that could be entered into independently of, or transferred or assumed separately from, the credit card account.[3] As such, credit balances may be assumed when credit cards are purchased subject to certain conditions without an application under the BMA.[4] Unlike the credit balances in Interpretive Letter 1083, the cash transaction deposit accounts in the 1990 letter represent separate relationships with customers that can be transferred separately from the trust accounts.[5]

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[1] This letter was issued on an interagency basis by the Federal Deposit Insurance Corporation, the Federal Reserve, and the OCC.

[2] The credit balances must represent less than 1 percent of the value of the credit card receivables transferred and the selling institution must be in compliance with section 165 of the Truth in Lending Act, 15 U.S.C. § 1666d. *See* Interpretive Letter 1083, p. 2.

[3] *Id*.

[4] *Id*. The rationale underlying Interpretive Letter 1083 is that assumption of credit balance deposit liabilities would trigger an application under the BMA if not for the letter's conclusion regarding the relationship between the accounts and a transaction meeting the conditions imposed by the letter.

[5] *See* 12 CFR 9.10(c) (funds awaiting investment or distribution may be deposited by the trustee national bank at an affiliated insured institution). *See also* OCC Letter from Emory W. Rushton (December 22, 1987), 1987 WL

B. Competitive Effects

The second basis for the 1990 Letter's conclusion is that the assumption of liability for corporate trust deposits would not result in an impact on competition, and therefore it is not within the scope of the BMA. This conclusion is incorrect because it inappropriately transposed an element of the OCC's reasoning underlying the interpretation of the statutory text of "acquire the assets of . . . any other insured depository institution" (the Asset Prong) to determine the meaning and scope of the Deposit Prong of the BMA.

The OCC has long interpreted the Asset Prong of the BMA—emphasizing the BMA covers acquisitions of "*the* assets" of one bank by another—to require an application under the BMA only for acquisitions of all or substantially all of a bank's assets.[6] This reading is most consistent with the plain text of the statute. The plain reading of the Asset Prong is consistent with the purpose of the BMA to ensure that mergers do not substantially lessen competition, since generally only acquisitions of all or substantially all of a bank's assets could have a substantial negative effect on the competitive environment as only these acquisitions have the potential to remove a competitor from the relevant markets.[7] Accordingly, generally an application under the BMA is not required for an acquisition of only some assets, without an assumption of any deposits.

The 1990 Letter mistakenly extends the reasoning relating to competition in the Asset Prong to the interpretation of the Deposit Prong despite there being no indication in the statutory text to support this connection, indeed despite the clear difference in language between "acquire *the* assets" and "assume liability to pay *any* deposits."[8] If a bank is to "assume liability to pay any deposits" of another insured bank, under the plain language of the statutory text that assumption is subject to application and approval under the BMA.

149889 (1987 Letter), p. 2-3 (the transaction was structured so that deposit liabilities were not conveyed to the institution that purchased the trust accounts).

[6] *See* 1987 Letter, p. 2. *See also* Interpretive Letter 1083.

[7] *See* 1987 Letter, p. 2. The legislative history discusses purchases of the assets, along with mergers and consolidations, as ways for one bank to absorb another. *See generally* Regulation of Bank Mergers, Hearings Before the Senate Committee on Banking and Currency, 86th Cong., 1st Sess. (Mar. 18-19, 1959); Hearings Before Subcommittee No. 2 of the House Committee on Banking and Currency, 86th Cong., 2nd Sess. (Feb 16-18, 1960).

[8] In this manner, the 1990 Letter erroneously applied a factor—i.e., competition—relating to approval of merger transactions that are subject to the BMA to determine the scope of the BMA itself. The plain text of the BMA, however, clearly distinguishes the applicability or scope of the statute from the approval of a transaction that is within the scope of the statute. Under the BMA, a "merger transaction" includes "any proposed transaction for which approval is required under paragraphs [1828(c)(1) and (2)]." 12 U.S.C. 1828(c)(3); see also 12 U.S.C. 1831u(g)(7). The responsible agency may not approve a merger transaction under BMA if the transaction would, among other things, "substantially lessen competition." 12 U.S.C. 1828(c)(5).

If you have any questions regarding this letter, please contact Valerie Song, Assistant Director, Bank Advisory group, at 202-649-5221.

Sincerely,

/s/

Jonathan V. Gould
Senior Deputy Comptroller and Chief Counsel