



Office of the Comptroller of the Currency

Interpretations - Corporate Decision #96-41

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DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATIONS TO CHARTER

GREAT WESTERN BANK, N.A. (CALIFORNIA), BEVERLY HILLS, CALIFORNIA

AND

GREAT WESTERN BANK, N.A. (FLORIDA), LAKE WORTH, FLORIDA

August 2, 1996

I. INTRODUCTION

On March 1, 1995, Great Western Financial Corporation, Chatsworth, California ("Great Western" or "the Applicant"), filed applications in the OCC's Western District Office to charter two national banks. The proposed banks are Great Western Bank, N.A. (California), Beverly Hills, California, and Great Western Bank, N.A. (Florida), Lake Worth, Florida ("the Banks"). The initial applications were filed in the OCC's Western District Office and have been supplemented from time to time with additional or amended information. The American Bankers Association ("ABA") and others filed comments opposing these applications. Most of the protestants voiced similar concerns, although the ABA's comments were the most extensive. <NOTE: In addition to the ABA, comments were received from Laurence B. Frank, Attorney at Law, Los Angeles, California; Harbor Bank, Long Beach, California; and Oklahoma National Bank and Trust Company, Chickasha, Oklahoma. The two banks focused on deposit conversion and competitive harm to existing banks, while Mr. Frank informed the OCC of litigation pending against Great Western and its subsidiaries related to mutual fund sales.>

Each Bank will be wholly-owned, except for directors' qualifying shares, by Great Western. The Applicant, a Delaware corporation, is a consumer-oriented financial services company focused on mortgage lending. It is the owner of Great Western Bank, a Federal Savings Bank ("GWB"), a federally-chartered thrift institution which has 417 branch offices in California and Florida. Great Western is therefore a savings and loan holding company within the meaning of the Home Owners Loan Act, 12 U.S.C. 1461 *et seq.*, and GWB will be an affiliate of the Banks. GWB engages in real estate lending directly and through subsidiaries at over 250 offices in 22 states, with concentrations in California, Florida, and Washington. <NOTE Great Western also owns other, non-thrift subsidiaries. These include Aristar, Inc., a consumer finance company with more than 500 offices in 22 states, and Great Western Mortgage Corporation. In addition to OCC approval to charter the Banks, Great Western will need approval from the Federal Reserve to become a bank holding company pursuant to the Bank Holding Company Act ("BHC Act"), 12 U.S.C. 1841 *et seq.*, and the Banks must apply to the Federal Deposit Insurance Corporation ("FDIC") for deposit insurance under the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. 1811 *et seq.*>

Great Western has indicated in its applications that the establishment of national bank subsidiaries will

enhance its competitive position by enabling it to offer a more diverse range of products and services. In particular, it wishes to expand its commercial lending business, but has been hampered by the market's perception that thrifts are primarily retail-oriented institutions. By chartering the Banks, Great Western will be better positioned to serve the business community, particularly small- and medium-sized businesses.

In addition, by establishing these BIF-insured national banks, Great Western will be able to reduce deposit insurance expenses while still keeping the deposits within the corporate group as deposits voluntarily migrate to Bank products that are more favorably priced due to the current premium differential between the Savings Association Insurance Fund ("SAIF") and the Bank Insurance Fund ("BIF"). <NOTE: The minimum insurance premium for SAIF-insured institutions is 23 cents per hundred dollars of deposits, while most BIF-insured institutions currently pay a flat rate of \$2000 per year. 61 Fed. Reg. 26078, 26083 (1996).> The applications outline a plan whereby GWB and the Banks will co-exist into the future, providing alternatives for customers and enabling Great Western to remain competitive with BIF-insured competitors.

Each Bank's main office will be located in a building housing an existing branch of GWB. The main office of the California Bank will be located at 8484 Wilshire Boulevard, Beverly Hills, California, while the main office address of the Florida Bank will be 2601 Tenth Avenue, Lake Worth, Florida. Each building will be subdivided in such a way that there will be permanent, physical barriers between Bank and GWB offices, and there will be separate entrances for each institution.

Certain directors of both Banks will be officers or directors of GWB and/or Great Western. However, the Applicant has committed that at least one-third of each board will consist of individuals who are independent of Great Western and its affiliates and who do not sit on either the board of GWB or Great Western. Each Bank will have a separate president and a separate cashier who will not hold any positions with Great Western or GWB. Great Western proposes to share the senior lending officer between the Banks and GWB, but does not expect that any other persons who hold senior positions with GWB will be executive officers of the Banks. All employees at each Bank main office that deal directly with the public will be employees of the Bank only, including tellers, product specialists, customer relations personnel, and managers.

It is anticipated that Great Western will file applications to establish six branch offices for each Bank during the organizational phase. The Applicant expects that these branches will share space and some employees with branch offices of GWB, but that a significant number of employees at the Banks' branches will be solely Bank employees.

The Banks will initially enter into a series of service and correspondent arrangements with Great Western and GWB to provide back office and operational support to the Banks. These services will consist of such activities as data processing, statement generation, account reconciliation, and tele-services. The Banks and GWB will establish the necessary policies and procedures to ensure that the operations of the Bank are kept separate and distinct from the operations of GWB, and to ensure that the Bank operates independently from GWB. The Banks will compensate Great Western or GWB, as the case may be, for their appropriate share of the costs associated with their operations.

Each Bank intends initially to offer only time deposits and mortgage and consumer lending. Thereafter, a full range of banking products and services for both individuals and businesses will be phased in over a time period not to exceed 18 months. This will include transaction and term accounts and retail loan

products. The proposed Banks expect to be able to offer customers deposit products in a manner that is more competitive and profitable than the terms under which GWB could offer such products. Customers will be encouraged to place deposits at the Banks through various pricing and marketing incentives. For instance, the Banks expect to pay a higher rate of interest on time deposits than GWB. Accordingly, the Banks expect that as deposits mature at GWB, customers will decide independently to deposit their funds with the Banks. The Banks expect to market their products and services primarily to the general public, and they do not intend to purchase or assume any deposit liabilities of GWB.

Since Great Western has had significant experience in mortgage and consumer lending, the Banks intend at the outset to concentrate on these types of loans. However, they plan to expand into commercial lending in the future as the necessary expertise is acquired. Initially, it is anticipated that the volume of direct lending originated at each office will be significantly less than the level of deposits generated. Therefore, in order to employ the excess deposits, the Banks plan to acquire loans from GWB and other sources. Over eighteen months, as the Banks expand, it is anticipated that they will engage in substantial direct lending and will rely less on participations and purchases of assets.

For the reasons discussed below, the OCC has concluded that the statutory and licensing factors have been satisfactorily met and, accordingly, the OCC approves these applications.

II. LEGAL ANALYSIS

A. *National Bank Act Standards*

The statutory requirements for chartering a national bank under the National Bank Act are relatively few: articles of association and an organization certificate must be drafted and filed with the OCC, 12 U.S.C. 21-23; the required amount of capital must be paid in, 12 U.S.C. 53; certain requirements relating to directors must be satisfied, 12 U.S.C. 71-73; and the OCC must be notified when these things have been accomplished, 12 U.S.C. 26. Normally, most of these requirements are satisfied after the OCC grants preliminary approval for a charter.

Once they are completed, the OCC must issue the charter if the bank "is lawfully entitled to commence the business of banking." However, "the Comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter" (*i.e.*, the National Bank Act). 12 U.S.C. 27(a).

1. *"Legitimate Objects" Requirement*

The "legitimate objects" provision of 12 U.S.C. 27 originated in section 12 of the National Bank Act, ch. 106, 13 Stat. 99, 103 (1864). There is very little guidance in either legislative history or case law to help us interpret this phrase. However, the statutory language suggests something more serious than merely an unusual or unconventional business plan. "Legitimate" is defined as "that which is lawful, legal, recognized by law, or according to law." Black's Law Dictionary 901 (6th ed. 1990). Therefore, "legitimate objects" may be construed to mean lawful activities, and a bank that is being chartered to engage in lawful activities satisfies the "legitimate objects" test. <NOTE: By the same token, a bank chartered to facilitate illegal activities would be formed for "other than legitimate objects." The legislative history of this provision, although brief, supports such an interpretation. The discussion in the debates focused on the fear that the Comptroller was being vested with too much power, and might deny a charter based on personal animus. It was suggested that "[i]f [banks] do other than a legitimate business, the courts will lay their hands upon them and stop them. The courts see to it that they

do a legitimate business, and that is the proper way to control these associations." Cong. Globe, 38th Cong., 1st Sess. 1270 (1864). >

There appears to be only one case construing the "legitimate objects" provision of 12 U.S.C. 27. In 1977, the federal district court in New Jersey ruled that the OCC had violated 12 U.S.C. 27 in granting a charter to City Trust Services, N.A., Elizabeth, New Jersey, a national bank limited to trust powers. The court reasoned that since City Trust would exercise only trust powers under 12 U.S.C. 92a (not originally part of the National Bank Act) and not the banking powers granted under 12 U.S.C. 24(Seventh), it was not formed for the legitimate objects of "this chapter," the National Bank Act. Although it is uncertain how much weight should be accorded to this decision, <NOTE: The decision was reversed on appeal because 12 U.S.C. 27 had been amended to retroactively validate City Trust's charter. Since the case was now moot, the appeals court declined to decide whether the trial court's decision had been correct at the time. *National State Bank of Elizabeth, New Jersey v. Smith*, No. 76-1479, (D.N.J. Sept. 16, 1977), *rev'd*, 591 F.2d 223, 231-32 (3d Cir. 1979). > in any event, it is not an impediment to approving the present applications for the Banks here would meet the court's standard.

Even though the Banks plan to offer only time deposits initially, they will not be limited purpose institutions. On the contrary, they will begin offering loan products and a full range of deposit products within a short period. It is not unusual for new banks to commence business with limited product offerings and then expand their activities as they become better established. Thus, in contrast to City Trust, the present Banks will have full charters and be full service institutions engaged in receiving deposits, making loans, and generally carrying on the business of banking -- all lawful activities that are encompassed by "this chapter." <NOTE: There is one other case where this provision was raised. A decade ago, OCC preliminary approvals of certain applications to charter nonbank banks were challenged in court, where one of the arguments made by the plaintiffs was that such banks were not chartered for legitimate objects under the National Bank Act because they were intended as an evasion of the BHC Act. However, the court declined to rule on that contention. *Independent Bankers Ass'n of America v. Conover*, [1984-1985 Transfer Binder] Fed. Banking L. Rep. (CCH) 86,178 at 90,537 n.7 (M.D. Fla. Feb. 15, 1985) (order granting preliminary injunction).>

2. Impact of the Deposit Conversion Moratorium

In protests that were filed with the OCC, the ABA and other protestants contended that migrating deposits out of SAIF-insured thrift institutions violates the SAIF conversion moratorium contained in section 5(d) of the FDI Act, 12 U.S.C. 1815(d)(2)(A), and that chartering a bank for this purpose is not a legitimate object under the National Bank Act. *See, e.g.*, letter from Edward L. Yingling, ABA, to Delora Jee, Deputy Comptroller, Western District (April 3, 1995); Memorandum of Law In Support of Comments of the ABA (May 2, 1995).

Briefly, section 5(d) imposes a moratorium, until the SAIF is fully capitalized, on certain transactions involving the transfer of insured deposits from the SAIF to the BIF. The statutory moratorium applies to the following "conversion transactions:"

- The change in status of an insured depository institution from a BIF member to a SAIF member or vice versa;
- The merger or consolidation of a BIF member and a SAIF member;
- The assumption of any liability by a BIF member to pay any deposits of a SAIF member or vice versa;
- The transfer of any assets of a SAIF member to a BIF member in consideration of the assumption of liabilities for any portion of the deposits of the BIF member or vice versa; or

- The transfer of deposits from a BIF member to a SAIF member or vice versa, by the receiver of a failed institution.

12 U.S.C. 1815(d)(2)(B). Deposit migration as proposed by Great Western, wherein the Banks would offer products and services designed to encourage depositors to voluntarily transfer their funds from SAIF-insured institutions to BIF-insured institutions, is not covered by the actual language of the conversion moratorium. Nevertheless, the ABA argues strenuously that deposit migration violates the moratorium because such an "evasion" violates the spirit or intent of the moratorium. ABA Memorandum of Law, *supra*; ABA Supplemental Comments (July 24, 1995).

The FDIC recently considered and rejected this argument in approving deposit insurance for two newly-chartered, BIF-insured state savings banks: First Financial Savings Bank, S.S.B., Stevens Point, Wisconsin, and MidAm Bank, S.B., Clarendon Hills, Illinois, both decided June 28, 1996. Both institutions were sponsored by thrift holding companies with existing, SAIF-insured thrift institutions.

Like Great Western's plan, both of these applications contemplate voluntary deposit migration of different degrees from existing thrifts to new, BIF-insured affiliates. According to a statement issued by the FDIC Board of Directors accompanying its order in *First Financial Savings Bank, SSB*, the new, BIF-insured institution will initially operate out of one office that will share an existing office of its SAIF-insured thrift affiliate. Customers of the thrift may be encouraged through various pricing and marketing incentives to move maturing deposits to the Savings Bank, because the latter will be able to offer more competitive rates than the thrift.

In a statement accompanying its order in *MidAm Bank, SB*, the FDIC Board noted that the new bank will be located "in a building owned by" its affiliated thrift, but the bank "does not intend to operate shared facilities to solicit" thrift customers. Nevertheless, the bank indicated that thrift customers "may choose to voluntarily move their accounts to [the bank] as a result of [its] ability to offer more competitive pricing due to the lower deposit insurance premium assessment expense at the BIF-insured institution."