



Comptroller of the Currency
Administrator of National Banks

Licensing Department
250 E Street, S.W.
Washington, D.C. 20219

November 15, 2010

**Conditional Approval #980
December 2010**

Jeffrey L. Hare, Esq.
DLA Piper LLC
500 Eighth Street, NW
Washington, DC 20004

Re: Application to merge Bank Midwest, National Association, Kansas City, Missouri, into
Armed Forces Bank, National Association, Fort Leavenworth, Kansas
Control No: 2010-WE-02-0021

Dear Mr. Hare:

The Office of the Comptroller of the Currency (“OCC”) hereby conditionally approves the application to merge Bank Midwest, National Association, Kansas City, Missouri (“BMW”), with and into Armed Forces Bank, National Association, Fort Leavenworth, Kansas (“AFB” or “Applicant”), for the reasons and subject to the requirements set forth herein. This approval is granted after a thorough evaluation of the application, other materials you have supplied, and other information available to the OCC, including commitments and representations made in the application and by the Applicant’s representatives during the application process and a determination that the proposal meets certain regulatory and policy requirements. This approval is also subject to the condition set out herein.

I. Introduction

On August 20, 2010, AFB applied to the OCC to acquire BMW by merger. The two banks are insured by the Federal Deposit Insurance Corporation and are wholly owned by Dickinson Financial Corporation, which in turn is wholly owned by Dickinson Financial Corporation II. AFB has branches in Fort Leavenworth, Kansas, and Junction City, Kansas.¹ BMW has

¹ AFB also operates banking facilities under the authority of 12 U.S.C. § 90 on military installations in 17 states. Section 90 authorizes the Secretary of the Treasury to designate national banks to act as depositories of public money and as financial agents of the federal government and to perform “reasonable duties” related thereto. Since the 1940s, the Secretary has construed this statute as empowering him to authorize the establishment of banking facilities on military installations. Such facilities may be established on military installations only with the approval and upon the recommendation of the appropriate unit of the Department of Defense. This construction of § 90 received judicial endorsement in *State of Texas v. National Bank of Commerce*, 209 F.2d 299 (5th Cir.), cert. denied, 368 U.S. 832 (1961). This court held that such facilities are not considered to be branches and are not subject to 12

branches in Missouri and Kansas. Most are traditional branches, but some in each state are located on the premises of Wal-Mart stores (the “store branches”).

As proposed, the merger is to immediately follow the sale of a substantial amount of BMW’s assets, deposits, and branches to a bank to be established and owned by an unrelated company, NBH Holdings Corp. (“NBH” and the “NBH transaction”).² AFB seeks approval to retain, following consummation of the NBH transaction and the merger, the store branches of BMW in both Kansas and Missouri, and one traditional branch of BMW located in Leavenworth, Kansas. AFB also seeks to retain the one operating subsidiary of BMW.

Notices of the proposed merger, as required by the Bank Merger Act, were published in the *The Leavenworth Times* and *The Kansas City Star* on August 20th and 27th and on September 14th, 2010. The OCC received no comments.

II. Legal Analysis

A. Merger pursuant to § 215a

Title 12 U.S.C. § 215a(a) provides:

One or more national banking associations . . . may merge into a national banking association located within the same State, under the charter of the receiving association.

The OCC has long held that for purposes of § 215a a national bank is located in its main office state and in any state in which it maintains a branch or branches.³ Here, AFB has its main office

U.S.C. § 36. *See also United States v. Papworth*, 156 F. Supp. 842 (N.D. Tex. 1957), *aff’d on other grounds*, 256 F.2d 125, *cert. denied*, 358 U.S. 854 (1958).

² Pursuant to the NBH transaction, the bank would acquire all but one of BMW’s traditional branches in Kansas and Missouri, specified loans and deposits relating to those branches, and certain other loans and assets of BMW. NBH has applied to the Federal Reserve Board under the Bank Holding Company Act for approval to own and control the new bank, to the OCC for a national bank charter and for approval for that bank’s purchase and assumption of assets, deposits, and branches of BMW, and to the FDIC for deposit insurance for the new bank. The OCC granted final conditional approval with respect to the establishment of a national bank by NBH and of its acquisition of assets, liabilities and branches from BMW. *See* Letter to Richard K. Kim, by Stephen A. Lybarger, Deputy Comptroller, Licensing (October 28, 2010). The FDIC granted approval for insurance for the new NBH bank on November 4, 2010. The application to the FRB is pending.

³ The OCC has held this position both long before and after the enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. *See, e.g.*, Decision of the Application to Merge Girard Bank, Bala Cynwyd, Pennsylvania, into Heritage Bank, N.A. Jamesburg, New Jersey (March 24, 1984); *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) para. 99,925; Decision on the Application of State Savings Bank, Southington, Connecticut, to Convert into a National Banking Association, and Merge into Connecticut National Bank, Hartford, Connecticut (OCC Merger Decision No. 91-078, April 8, 1991)(savings bank had branches in Rhode Island); Decision on the Application to Merge Continental Bank, Norristown, Pennsylvania, into Midlantic Bank, N.A., Newark, New Jersey (OCC Corporate Decision No. 94-37, August 12, 1994). *See also, e.g.*, Decision of the Office of the Comptroller of the Currency on the Application to Merge NationsBank of Texas, National Association,

in Kansas, and BMW has its main office and branches in Missouri and branches in Kansas.⁴ Accordingly, both AFB and BMW are located in Kansas for purposes of § 215a, and so the merger between AFB and BMW is legally permissible under § 215a.

B. Retention of branches

AFB also has requested OCC approval following the merger to retain as branches the branches of BMW in Missouri and Kansas that are to be retained by BMW following the NBH transaction. These branches are the 25 store branches, four of which are located in Kansas and 21 of which are located in Missouri.⁵ In addition, AFB seeks to retain the one traditional branch of BMW that is not being sold as part of the NBH transaction. This branch is located in Leavenworth, Kansas.

Branch retention following a merger under § 215a is addressed in 12 U.S.C. § 36(b) (2), which provides that a bank that results from a merger⁶ may retain and operate as a branch any office which immediately prior to the merger was in operation as a main office or branch office of any target bank if it may be established as a new branch of the resulting bank under § 36(c).⁷ Section 36(c), in turn, provides that a national bank may establish or acquire intrastate branches to the same extent that a state bank may establish or acquire such branches.⁸

Applying § 36(b)(2) and (c) to retention of the branches and main office of BMW, we find that AFB is legally authorized to retain all of the offices as branches. For purposes of branch retention following a merger under § 215a, the OCC has long held that the resulting bank is properly treated as situated in all of the states in which the participating banks were situated in

Dallas, Texas, with and into NationsBank, National Association, Charlotte, North Carolina (OCC Corporate Decision 98-19, April 2, 1998) (and decisions and other precedents cited therein).

⁴ BMW has notified the OCC that just prior to the NBH acquisition, BMW will relocate its main office from the current site located at 1111 Main Street, Kansas City, Missouri, to 1701 W. 133rd Street, Kansas City, Missouri, where BMW operates a store branch, which will not be sold to NBH. As provided in 12 U.S.C. § 30(b), upon written notice to the OCC, a national bank may change the location of its main office to any authorized branch location within the limits of the same city, town, or village. *See also* 12 C.F.R. §§ 5.40(b) and (d)(1).

⁵ As previously noted, one of the Kansas City, Missouri, store branches will be designated as the main office of BMW during the brief period of time following the NBH transaction until consummation of the merger with AFB.

⁶ While § 36(b)(2) uses the term “consolidation,” § 36(b)(3) defines “consolidation” as including a “merger.”

⁷ Section 36(c) provides in pertinent part:

A national banking association may, with the approval of the [Comptroller], establish and operate new branches: . . . at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the statute law of the State in question”

⁸ For purposes of § 36(c), “new branch” has been interpreted to mean “new to the acquiring bank” and, thus, § 36(c) encompasses establishment of de novo branches and acquisition of branches from other depository institutions. *State of Washington v. Heimann*, 633 F.2d 886 (9th Cir. 1980).

order to then apply the § 36(c) standard, using each state's law to determine the permissibility of retention of the branches in that state.⁹ Consequently, for these purposes, AFB is considered to be situated in Kansas and Missouri and the branching statutes of Kansas and Missouri permit state banks to establish or acquire intrastate branches without geographic restriction.¹⁰ Consequently, under § 36(b)(2) and (c) and state law applied therein to national banks, AFB is authorized to retain the Kansas and Missouri branches and Missouri main office of BMW acquired as a result of the merger because AFB could establish the branches and main office as de novo branches.¹¹

Finally, upon consummation of the merger, AFB may also retain its own two traditional branches in Kansas, which are not established under 12 U.S.C. § 90. Section 36(b)(2) provides that the resulting bank in a merger may retain its own branches provided a state bank that results from the merger into a state bank of another bank would not be prohibited by the law of such state from retaining and operating as a branch an identically situated office which was a branch of the acquiring bank immediately prior to the merger.¹² No Kansas law prohibits a bank that results

⁹ See Decision of the Office of the Comptroller of the Currency on the Application to Merge First Bank National Association, Minneapolis, Minnesota, and First National Bank of East Grand Forks, East Grand Forks, Minnesota, (Corporate Decision 97-68, July 10, 1997) (and cases cited therein); Decision of the Office of the Comptroller of the Currency on the Merger Applications of Firststar Bank, National Association, Cincinnati, Ohio; U.S. Bank National Association, Minneapolis, Minnesota; U.S. Bank National Association, Canby, Oregon; and U.S. Bank National Association Montana, Billings, Montana (CRA Decision 109, July 18, 2001)(bank with main office in Cincinnati and branches in Minnesota, acquired target bank with main office in Minnesota and branches in a number of states where the acquiring bank had no branches, including California, Colorado, Idaho, North Dakota, Nebraska, Nevada, Oregon, South Dakota, Utah, Washington, and Wyoming.) See also cases cited in n. 3, *supra*.

¹⁰ Kan. Stat. Ann. § 9-1111(b)(6) and (c)(7); Missouri Stat. Ann. § 362.107.4. The OCC has determined that retention by AFB of BMW's main office and its branches in both states otherwise satisfies applicable requirements contained in each of the state branching statutes. See also Kan. Stat. Ann. 9-1111(e)(banks acquiring other banks through a merger may retain any acquired branches).

¹¹ Approval for AFB to retain the Missouri branches of BMW is consistent with 12 C.F.R. § 36(e), which provides that national banks may not acquire or establish a branch in a state where it does not already have a branch or its main office unless the authority is set forth in "this section or section 1823(f), 1823(k), or 1831u . . ." As used in § 36(e), this section refers to § 36, and as discussed, AFB's authority to retain the Missouri branches of BMW arises from § 36(b)(2) and (c).

Following the merger, AFB advises that it will operate the store branches under the trade name "Academy Bank – a division of Armed Forces Bank, N.A." AFB has represented that it will comply with its obligations under the Interagency Statement on Branch Names (May 1, 1998). More specifically, it represents that it will clearly and conspicuously identify any branches branded as "Academy Bank" as a division of AFB; that it will use AFB's legal name for legal documents, certificates of deposit, signature cards, loan agreements, account statements, checks, drafts and similar documents; that it will educate staff about possible customer confusion over deposit insurance; and that it will obtain customer acknowledgements that they are aware that "Academy Bank" is the same bank as AFB.

¹² 12 C.F.R. § 36(b)(2)(C).

from a merger from retaining its own branches. Consequently, AFB may retain its two traditional branches in Kansas upon consummation of the merger.¹³

C. Retention of operating subsidiary

AFB also has requested approval to retain BMW's one wholly-owned subsidiary, Midwest Leasing LLC ("MWL"), which engages in personal property lease financing transactions under 12 U.S.C. §§ 24(7th) and 24(10th) and 12 C.F.R. Part 23. This activity is permissible for a national bank operating subsidiary pursuant to 12 C.F.R. § 5.34(e)(5)(v)(M). AFB has further represented that, as MWL already is owned by a national bank, AFB's ownership and control of the MWL will continue to be in conformity with applicable laws, regulations, and guidance.

D. Applicability of the Bank Merger Act and the Community Reinvestment Act

The OCC reviewed the proposed merger of BMW into AFB under the criteria of the Bank Merger Act ("BMA"), 12 U.S.C. § 1828(c). Among other matters, we found that the proposed transaction would not have any anticompetitive effects because, as previously noted, the banks are affiliated and will continue to be affiliated at the time of the merger.

As provided for in the BMA, the OCC also considered the financial and managerial resources of the banks and their future prospects. As currently structured, both banks face less than favorable prospects. The sale of assets, liabilities, and traditional branches by BMW to NBH, followed by the merger of BMW into AFB, will result in the termination of one of the charters and, in the short run, will place additional stress on AFB. However, the transactions will result in a substantial influx of capital to AFB, along with BMW's entire allowance for loan and lease losses. This will result in an increased leverage ratio for AFB than either BMW or AFB would have without the transactions, and which will provide a greater cushion for AFB to withstand losses from its loan portfolio following the merger; and enhanced ability to market nonperforming assets, including sales of nonaccrual loans and other real estate owned, while retaining an appropriate level of capital. By streamlining operations, the merger also will result in more focused management; improved financial ratios that could help attract additional Board and management expertise to AFB; and a strategic plan for AFB that focuses on continuing to serve military personnel on their bases and customers at lower-cost branch sites on the premises of a major retailer by offering deposit products and loans, with particular emphasis on residential mortgage loans. Thus, the OCC finds that merger of BMW into AFB, following immediately upon the NBH transaction, will result in a bank better equipped to address the issues faced by the parties to the merger than if BMW and AFB were to continue to operate separately.¹⁴ As a result, we have determined that the financial and managerial resources of the banks and their future prospects are consistent with approval of this merger.

¹³ As previously explained, the military facilities of AFB are not branches and are not subject to the retention and divestiture provisions of § 36.

¹⁴ As a result of the merger, the Consent Order issued by the OCC on May 11, 2010, with respect to AFB will be terminated and replaced by a new OCC Consent Order.

The OCC also, as provided for by the BMA, considered the convenience and needs of the community to be served¹⁵ and found this factor to be consistent with approval of the application. The sale of the traditional branches of BMW in Missouri and Kansas assures that even as BMW scales back its operations and merges into AFB, customers of those branches will continue to be served. Moreover, the merger will have no impact on AFB's military customers, who will continue to be served by all of the facilities that AFB operates on military bases, and retail customers of BMW will continue to be served at the BMW's store branches, with products and services specifically geared to retail customers.

Finally, as required by the BMA, the OCC has considered and found that “. . . the effectiveness of any insured depository institution involved in the proposed merger transaction in combatting money laundering activities . . .” is consistent with approval of the application to merge BMW into AFB.¹⁶

Additionally, the Community Reinvestment Act (“CRA”) requires the OCC to take into account the applicant's record of helping to meet the credit needs of the community, including low- and moderate-income (“LMI”) neighborhoods, when evaluating transactions that are subject to the BMA.¹⁷ The OCC considers the CRA performance evaluation of each institution involved in the merger. A review of the record of these applicants and other information available to the OCC as a result of its regulatory responsibilities revealed no evidence that the applicants' records of helping to meet the credit needs of their communities, including LMI neighborhoods, are less than satisfactory. Consequently, the records of compliance of BMW and AFB with CRA are consistent with approval of this merger application.

III. Section 1818 condition

This approval is subject to the following condition:

AFB shall not consummate the merger of BMW into AFB prior to the consummation of the NBH transaction, but shall consummate the merger of BMW into AFB immediately following the consummation of the NBH transaction.

This condition of approval is a condition ‘imposed in writing by a Federal Agency in connection with any action on any application, notice or other request’ within the meaning of 12 U.S.C. § 1818. As such, the condition is enforceable under 12 U.S.C. § 1818.”

¹⁵ 12 U.S.C. § 1828(c)(5).

¹⁶ *Id.* at § 1828(c)(11).

¹⁷ *Id.* at §§ 2903(a)(2) and 2902(a)(3)(E); 12 C.F.R. § 25.29(a)(3).

IV. Consummation guidance and conclusion

For the reasons set forth above, and subject to: the commitments and representations made in the application and by representatives of the applicants; the section 1818 condition set forth above; the receipt of all other applicable regulatory approvals, non-objections or waivers with respect to the proposed transaction; and the passage of any related pre-consummation waiting periods, the OCC hereby conditionally approves the merger of BMW into AFB, the retention by AFB of the BMW branches and main office in Missouri and Kansas, the retention by AFB of its own branches in Kansas, and the retention by AFB of MWL as an operating subsidiary.

Please refer to the Business Combination Booklets for steps to complete the merger.

As a reminder, the Western District Licensing unit must be advised in writing 10 days in advance of the desired effective date for the merger so that the OCC may issue the necessary merger certification letter.

With respect to the merger application, please ensure that you have submitted the following prior to your desired consummation date:

1. An executed merger agreement and the Amended Articles of Association for AFB.
2. A Secretary's Certificate from each institution certifying that shareholder approvals required under applicable federal have been obtained.
3. A Secretary's Certificate from each institution certifying that the percentage of directors required under applicable federal have approved the merger.

If the transaction has not been consummated immediately upon consummation of the NBH transaction, the approvals will automatically terminate, unless the OCC grants an extension of the time period.

This approval and the activities and communications by OCC employees in connection with the filing do not constitute a contract, express or implied, or any other obligation binding upon the OCC, the United States, any agency or entity of the United States, or any officer or employee of the United States, and do not affect the ability of the OCC to exercise its supervisory, regulatory and examination authorities under applicable law and regulations. Our approval is based on the bank's representations, submissions, and information available to the OCC as of this date. The OCC may modify, suspend or rescind this approval if a material change in the information on which the OCC relied occurs prior to the date of the transaction to which this decision pertains. The foregoing may not be waived or modified by any employee or agent of the OCC or the United States.

A separate letter is enclosed requesting your feedback on how we handled your application. We would appreciate your response so we may improve our service. If you have questions regarding

this letter, please contact me at (202) 874-5060 or Senior Licensing Analyst Louis Gittleman at 720-475-7656. Please reference the application control number in any correspondence.

Sincerely,

signed

Stephen A. Lybarger
Deputy Comptroller, Licensing

Enclosure: Survey Letter