



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #814
January 1998
12 U.S.C. 36J3

November 3, 1997

Joseph T. Green
General Counsel
TCF National Bank Minnesota
801 Marquette Avenue
Minneapolis, MN 55402

Dear Mr. Green:

This is in response to your letter of October 1, 1997, as supplemented by your letter of October 29, 1997, seeking our concurrence that offices of [] (the Subsidiary), a wholly-owned subsidiary of TCF National Bank Minnesota (the Bank), are not branches of the Bank.

The Bank became a national bank on April 7, 1997, following its conversion from a Federal savings bank charter. This conversion was approved by the OCC on February 24, 1997. At the time of the conversion, the OCC permitted the Bank to continue to own the Subsidiary which engages in the sale of title insurance policies as agent for third party title insurance companies as permitted under 12 U.S.C. § 92. See Decision of the Comptroller of the Currency to Approve Applications by TCF Financial Corp., Minneapolis, Minnesota, to Convert Federal Savings Bank Located in Minnesota, Michigan, Illinois, and Wisconsin and to Establish De Novo Banks in Ohio and Colorado and to Engage in Certain Related Transaction, p. 35 (OCC Corporate Decision 97-13) (February 24, 1997) (the Conversion Decision). In addition, this Subsidiary performs abstracting, escrow and closing services for first mortgage residential loans originated by the Bank, other affiliates and third parties and issues title reports for second mortgage loans originated by the Bank, other affiliates and third parties. Id.¹

¹ As described in the Conversion Decision, the OCC has permitted national banks to perform surveys and title searches and to arrive at legal opinions in connection with their real estate mortgage business. Id. The OCC also has permitted national banks to prepare and sell abstracts of title, the handling of escrow accounts and the closing of real estate transactions at least in connection with its own real estate loans. Id. The Conversion Decision permitted the Subsidiary to engage in these activities indefinitely. However, to the extent that the Subsidiary provides services beyond those which were permitted at the time for national bank operating subsidiaries, the Conversion Decision required that those services must be terminated within two years of consummation of the conversion unless, within that time period, the OCC determines that the services are permissible. In this regard, the Bank has requested a determination on the

Offices of a subsidiary of a national may be considered branches of the national bank if they engage in branching functions. See 12 C.F.R. §§ 5.34(d)(3), 7.1003(a)(1). Because you have represented that the Minnesota offices of the Subsidiary close loans made by the Bank, and borrowers receive, in-person, the loan proceeds from the lender, branching issues are raised. See 12 C.F.R. § 7.1003(a). It was originally envisioned that the offices of the Subsidiary would not constitute branches of the Bank because funds disbursed to borrowers at the offices of the Subsidiary would be those of an unaffiliated third party drawn on an account of that party at an unaffiliated bank, rather than funds of the Bank or the Subsidiary. See the Conversion Decision at p. 35, n. 57 and p. 26, n. 41. See also OCC Interpretive Letter No. 721, March 6, 1996, reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-036. This procedure would be in accordance with 12 C.F.R. § 7.1003 and the OCC would not consider these offices to be branches of the Bank. Id.² This procedure has not been possible to implement at these offices for a variety of reasons, however, and you have sought our concurrence that these offices should not constitute branches because they provide similar services on substantially similar terms and conditions to customers of the Bank and its subsidiaries as well as to customers of unaffiliated entities including unrelated banks, savings associations and savings banks, credit unions, finance companies and mortgage brokers. Based on your representations, we agree with your conclusion that, for the following reasons, these offices do not constitute branches of the Bank.

In finalizing revisions to its branching rules, codified at 12 C.F.R. § 5.30, the OCC stated:

Proposed § 5.30(d)(1)(ii)(B) clarified that the term ‘branch’ does not include a facility that is ‘generally available to customers of other banks to receive substantially similar services pertaining to their accounts at other banks on the basis of substantially similar terms and conditions.’ As

permissibility of a national bank operating subsidiary providing abstracting, closing, and escrow services to affiliates and to third parties. Id. at pp. 35-36. The OCC is reviewing this request. Consequently, at least until April 7, 1999, the Subsidiary may conduct its business as it did prior to the conversion.

As stated in the Conversion Decision, the Subsidiary operates offices for the conduct of this business in Minnesota, Michigan, Wisconsin, Illinois, and Indiana. You have clarified that the Subsidiary does not operate offices in Missouri.

² It is for this reason that the Subsidiary’s offices in Wisconsin and Illinois do not constitute branches of the Bank or any other affiliated bank. These offices do not close loans or disburse proceeds on behalf of the Bank. While the Subsidiary, through its offices in Wisconsin and Illinois, does close loans and disburse proceeds in connection with loans originated by other affiliated banks in those states, you have represented that the procedures followed comport with those set forth in Interpretive Letter No. 721. As that letter states: “[B]ranching limitations would not be violated when the affiliated bank issues its own cashier’s check drawn on an account held in its own name, for the benefit of borrowers, and delivers those checks to the borrowers as part of the closing transaction.” Id. at p. 5. This conclusion has now been codified at 12 C.F.R. § 7.1003(a) and the procedure you have described that is followed by these offices in closing loans and disbursing funds is consistent with the procedures set forth in Interpretive Letter No. 721. In addition, we note that you have represented that only about 2.5% of the closing transactions undertaken in the Illinois office are undertaken on behalf of an affiliate, TCF Bank Illinois; 0.5% of the closing transactions undertaken in Wisconsin office are undertaken on behalf of an affiliate, TCF Bank Wisconsin. We further note that none of the transactions closed at the Indiana office are undertaken on behalf of an affiliated entity and the Michigan office does not provide closing services.

recognized by a number of commenters, the primary impact of this provision would have been to exclude from the definition of branch ATMs that are linked to networks and, thus, provide services to bank customers and non-customers alike. However, as a result of recent statutory changes contained in Section 2205 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Public Law 104-208, Sept. 30, 1996 (110 Stat. 3009), ATMs and remote service units are no longer considered branches and, thus, are not subject to the limitations on national bank branching imposed by the McFadden Act and codified at 12 U.S.C. § 36. Consequently, the OCC has deleted this provision from the final rule and has also revised the final rule to state specifically that ATMs and remote service units are not branches. The OCC also recognizes, however, that other situations may still arise where a particular facility should not be considered to be a bank branch because it, in fact, provides services generally on a nondiscriminatory basis with respect to accounts that its customers hold as well as accounts held by noncustomers in other banks and depository institutions. The OCC believes these issues are best considered on a case-by-case basis based on the particular circumstances involved.

See 61 Fed. Reg. 60,342, 60,347 (November 27, 1996) (emphasis added).

As the OCC has recognized, a facility where members of the public -- customers and noncustomers alike -- receive substantially similar services on substantially similar terms is not a facility created to attract *bank* customers. See 59 Fed. Reg. 61,034, 61,037 (November 29, 1994) (Part 5 notice of proposed rulemaking). The analysis is a variation on the long-held analysis by the OCC that bank facilities that are engaged only in back office functions are not branches because they do not attract bank customers. Id. See also, e.g., Interpretive Letter No. 635, July 23, 1993, reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,519 (July 23, 1993) (deposit taking through facility to which public has no in-person access is not a branch) (and interpretations cited therein). Moreover, the OCC has specifically opined in the context of a lending situation, even if it is assumed that a branching function is involved, if a bank facility provides the same services to borrowers from the bank as well as borrowers from other lenders, the facility would not be considered to be a branch. See Interpretive Letter by Christopher C. Manthey, Senior Attorney, Bank Activities and Structure, to Michael E. Bleier, General Counsel, Mellon Bank, N.A. (December 22, 1994) (addressing drop boxes established by an operating subsidiary of a national bank) (unpublished). That letter, assuming only for purposes of argument that receipt of loan payments constituted a branching function, stated:

[T]he loan servicing payments received at the two drop boxes related not only to loans that were originated by the Mortgage Company, but also to loans that were originated by other lenders, from whom the Mortgage Company purchased the servicing rights. In fact, over three-fourths of the

loans serviced at the two service centers were originated by other lenders. Thus, the use of these facilities is not limited to borrowers from the Mortgage Company. Anyone whose loan is serviced by the Mortgage Company may use these drop boxes, regardless of who the original lender was. Much like a nonbranch, back office facility, these boxes do not provide a competitive advantage in gaining customers, but for the opposite reason. While a back office provides no competitive advantage because it serves no customers in person [citations omitted] the drop boxes provide no competitive advantage because they provide service to customers of competing lenders as well as the Mortgage Company's own customers. Indeed, in this case, the customers of other lenders appear to overwhelmingly predominate.

You have advised the OCC that the Subsidiary is actively engaged in soliciting and providing its services to nonaffiliated lending entities and their customers and these services are offered to customers of nonaffiliated entities on substantially similar terms and conditions as are offered to customers of the Bank. Moreover, you represent that less than 10 percent of the lending business conducted at the Minnesota offices arises from loans made by the Bank and its subsidiaries while more than 90 percent arises from loans made by nonaffiliated entities.

Based on your representations and relevant precedent, as discussed above, we concur that the offices of the Subsidiary do not constitute branches of the Bank or any affiliated bank.

I hope that this has been responsive to your inquiry.

Sincerely,

/s/

Eric Thompson
Director
Bank Activities and Structure