

N.D.A.G. Letter to Preszler (Jan. 3, 1992)

January 3, 1992

Gary D. Preszler, Commissioner
Department of Banking and
Financial Institutions
State Capitol
600 E Boulevard Avenue
Bismarck, ND 58505

Dear Gary:

Thank you for your September 4, 1991, letter in which you ask the following questions concerning loan production offices:

1. Does North Dakota law expressly allow a state-chartered bank to establish a loan production office?
2. If the answer to no.1 is "no," is a loan production office a "branch" within N.D.C.C. § 6-03-13.4?
3. If a loan production office is a "branch," is N.D.C.C. § 6-03-13.4 applicable to both state and national banks desiring to establish loan production offices?
4. May a national bank establish and operate a loan production office in North Dakota regardless of State law?

The first step in responding to your questions is to define the terms "loan production office" and "branch." Neither of these terms is defined by State law. They are defined in federal law, however. As explained below, the federal definitions concerning these terms are controlling when applied to national banks.

A "loan production office" is defined by an interpretative ruling of the Board of Governors of the Federal Reserve System (the "Board of Governors") as an office where the following activities, individually or collectively, may be performed:

"Soliciting loans on behalf of a bank (or a branch thereof), assembling credit information, making property inspections and appraisals, securing title information, preparing applications for loans (including making recommendations with respect to action thereon), soliciting investors to purchase loans from the bank, seeking to have such investors contract with the bank for the servicing of such loans, and other similar agent-type activities."

12 C.F.R. § 250.141(h) (1991).

The term "branch," as defined by federal law, means "[a]ny branch bank, branch office, branch agency, additional office, or any branch place of business located in any State . . . at which [1] deposits are received, or [2] checks paid, or [3] money lent." 12 U.S.C. § 36(f) (1991). (12 U.S.C. § 36 is a part of the McFadden Act, a federal act adopted by Congress in 1927 in part as a response to concerns about permissive state branch banking laws which prompted many national banks to convert to state-chartered banks. Stephen K. Huber, *Bank Officer's Handbook of Government Regulation* 13.02[1] (2nd ed. 1989).)

I am unable to locate any State statute which expressly allows a state bank to establish a loan production office. The only banking facilities other than the home office which are expressly permitted pursuant to State law are paying and receiving stations (N.D.C.C. § 6-03-14) and the separate facilities authorized pursuant to N.D.C.C. § 6-03-13.1. It would seem logical to conclude, however, that the activities authorized by N.D.C.C. § 6-03-13.1, specifically the activity of "making loans," include by implication activities which may be performed by a loan production office.

To answer your second and fourth questions, it is necessary to examine the relationship between federal law and state law on the subject of branch banking. Although N.D.C.C. § 6-03-13.4 provides that N.D.C.C. § 6-03-13.1 does not authorize branch banking, a facility established pursuant to that statute is a branch as provided in 12 U.S.C. § 36(f). N.D.C.C. § 6-03-13.4, on its face, provides that branch banking is not permitted in North Dakota:

"Nothing in section 6-03-13.1 and 6-03-13.3 authorizes the maintenance or operation of a branch bank, but a facility authorized under those sections may be supplementary or in addition to paying and receiving stations permitted under section 6-03-14. National banking associations located in this state have the same, but no greater right by virtue of sections 6-03-13.1 and 6-03-13.3 as banks organized under the laws of this state."

N.D.C.C. § 6-03-13.4. N.D.C.C. § 6-03-13.1 authorizes state and national banks, subject to approval by the state banking board, to establish "separate facilities":

Upon compliance with section 6-03-13.3, any bank organized under chapter 6-02 and under the supervision of the state banking board, and any national bank doing business in this state, may maintain and operate separate and apart from its banking house facilities for drive-in and walkup service, in addition to such service at its main banking house, and at its paying and receiving stations, if any. A separate facility must be within the corporate city limits of the main banking house or within three miles [4.38 kilometers] of such city but may not be within the corporate limits of another city. The services rendered at a separate facility are limited to receiving deposits of every kind and nature, cashing checks or orders to pay, issuing exchange, making loans, and receiving payments payable at the bank.

N.D.C.C. § 6-03-13.1

Although a branch may be established by a national bank only "when, where, and how" state law would authorize a state bank to establish and operate a branch, the determination of what constitutes branch banking is controlled by the definition of the term branch as provided in 7 of the McFadden Act (12 U.S.C. § 36(f)). First National Bank in Plant City v. Dickinson, 396 U.S. 122 (1969). See also First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252 (1966).

In Dickinson, the Court discussed the federal definition of the term branch as provided in 12 U.S.C. § 36(f):

"Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes any place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more. It should be emphasized that, since § 36(f) is phrased in the disjunctive, the offering of any one of the three services mentioned in that definition will provide the basis for finding that "branch" banking is taking place."

First National Bank v. Dickinson, 396 U.S. at 135, 136. In addition, the Board of Governors has ruled that the activities performed by a loan production office do not constitute branch banking (12 C.F.R. 250.141(h) (1991)). The Comptroller of the Currency has issued the following interpretive rule:

"Origination of loans by employees or agents of a national bank or of a subsidiary corporation at locations other than the main office or a branch office of the bank does not violate 12 U.S.C. 36 and 81: provided, That the loans are approved and made at the main office or a branch office of the bank or at an office of the subsidiary located on the premises of, or contiguous to, the main office or branch office of the bank."

12 C.F.R. § 7.7380(b) (1991). Based upon a comparison of this rule and 12 C.F.R. § 250.141(h), I conclude the phrase "origination of loans" includes the activities which may be performed by a loan production office. Both of these rules provide that loans must be approved and made (disbursed) at the main office or a branch of the bank. If these requirements are met, the facility is not a branch within the meaning of 12 U.S.C. § 36(f). Even though it may be argued that these rules are in violation of the branching provisions of the McFadden Act, great weight must be given "to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of the banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws." Investment Company Institute v. Camp, 401 U.S. 617, 626, 627 (1971). Therefore, it is my opinion that a loan production office established by a national bank performing only the activities described in 12 C.F.R. § 250.141(h), and which is in compliance with 12 C.F.R. § 7.7380(b), is not a branch under N.D.C.C. § 6-03-13.4. It is also my opinion that a national bank may establish a

loan production office in North Dakota.

Because it is my opinion that a loan production office is not a branch, N.D.C.C. § 6-03-13.4 is not applicable to a state or a national bank desiring to establish a loan production office. However, because there is no provision in State law which expressly authorizes state banks to establish loan production offices, a state bank may not establish a loan production office other than as described in my response to your first question, i.e., a facility established by a state bank pursuant to N.D.C.C. § 6-03-13.1 may function as a loan production office.

This, of course, opens the door for state banks to apply to the state banking board for authority to establish loan production offices pursuant to the "wild card" provision of N.D.C.C. § 6-03-38, which provides that "the state banking board has power to authorize state banks to engage in any banking activity in which such banks could engage were they operated as national banks at the time such authority is granted, notwithstanding any restriction elsewhere contained in this code."

I trust that this response will be helpful to you. Please let me know if you have any questions or would like to discuss this matter in further detail.

Sincerely,

Nicholas J. Spaeth

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