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Branching

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The ability to provide services at more than one location—whether within a single state or across state lines—is central to the business strategies of many insured depository institutions (IDIs). Historically, the ability of banks to establish branches was significantly restricted (in contrast to thrifts, which enjoyed greater branching freedom). Over time, these restrictions have been eased, and banks have shown a consistent interest in establishing branches, even though increasingly sophisticated online banking, remote deposit capture, and mobile payments technology would seem to make brick and mortar banking less crucial.¹ The Federal Deposit Insurance Corporation (FDIC) has noted that “physical offices remain a vital channel through which FDIC-insured institutions deliver financial services to their customers.”²

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Basics of Branching

Q 2.1 What is a branch?

While the definition of “branch” differs depending on the charter type, it generally captures any office at which core banking activities are conducted—namely, where deposits are received, checks are paid, or money is lent.

Q 2.2 What is considered a “branch” of a national bank?

With respect to national banks, the term “branch” is defined by statute to include “any branch bank, branch office, branch agency, or additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.”³ Automated teller machines (ATMs) and remote service units are specifically excluded from the definition of “branch.”⁴

Q 2.3 What is considered a “branch” of a federal savings association?

The Home Owners’ Loan Act (HOLA), the main statute applicable to federal savings associations, does not make any reference to branching by these entities.⁵ Nevertheless, the Office of the Comptroller of the Currency’s (OCC’s) predecessor agency with regard to federal savings associations, the Office of Thrift Supervision (OTS), took the position that the HOLA gave the OTS authority over federal savings association branching, and this position has been upheld in court and subsequently

adopted by the OCC.⁶ The OCC implementing HOLA regulations define “branch” as any office other than the home office, agency office, administrative office, data processing office, or an electronic means or facility, such as an ATM.⁷ OCC regulations do not otherwise define “branch” or list the types of activities that would constitute a branch. Rather, what is considered a branch is determined by negative implication—if it is not an agency office, data processing office, administrative office, or electronic means or facility of a savings association, then it is a branch. That said, while the applicable regulations define “branch” differently for savings associations versus national banks, the OTS interpreted its branching regulations to allow for parity with national banks.⁸

Q 2.4 What is considered a “branch” of a state chartered insured depository institution?

State IDIs, including state savings associations, are generally subject to state branching laws, which can vary widely. State member banks⁹ are also subject to section 9 of the Federal Reserve Act (FRA) and the regulations of the Board of Governors of the Federal Reserve System (the “Federal Reserve”).¹⁰ The Federal Reserve’s Regulation H defines “branch” to include “any branch bank, branch office, branch agency additional office, or any branch place of business that receives deposits, pays checks, or lends money.”¹¹ It further defines branch to include a temporary, seasonal, or mobile facility, but not a loan origination facility unless loan proceeds are disbursed; the office of an affiliate or unaffiliated institution that provides services to the bank’s customers; an ATM; a remote service unit; a facility without public access; and sites that are an extension of the bank’s main office or existing branch office.¹²

State nonmember banks¹³ also are subject to section 18 of the Federal Deposit Insurance Act (the “FDI Act”)¹⁴ and the regulations of the FDIC.¹⁵ The FDIC defines “branch” to include any branch bank, branch office, additional office or any branch place of business located in any state or territory of the United States at which deposits are received or checks paid or money lent.¹⁶ The FDIC specifically excludes ATMs, automated loan machines and remote services units from this definition.¹⁷ Also excluded are facilities operated pursuant to a qualifying financial education program.¹⁸

Intrastate and Interstate Branching

Q 2.5 Where are national banks allowed to branch?

With regard to *intrastate* branching, national banks are generally permitted to branch within the limits of the city, town, or village in which the national bank is located and anywhere else within its home state, comparable to the branching authority permitted to a state bank chartered in that state.¹⁹

With regard to *interstate* branching, a national bank may branch interstate by merger (that is, acquire an IDI located in another state and retain the main office and branches of the IDI as branches of the national bank).²⁰ However, a national bank may not branch interstate by merger if the IDI to be acquired has been in existence for less than five years and the laws of that state prohibit the acquisition of IDIs that have been in existence for less than five years.²¹

PRACTICE NOTE

Interstate branching by merger without regard to state law was first permitted for national and state chartered banks by the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (“Riegle-Neal”).²² Riegle-Neal gave each state the opportunity to expressly prohibit, by statute, interstate branching by merger. This opt-out was required to be done between enactment (September 29, 1994) and June 1, 1997, and was required to apply equally to all out-of-state banks. Texas and Montana were the only states that opted-out, but both later opted back in.

In addition, a national bank may acquire branches of out-of-state IDIs and retain those branches as branches of the national bank only if the laws of the state in which the branch is located permit out-of-state IDIs to acquire a branch of an IDI in that state without acquiring the

IDI itself.²³ Further, a national bank may branch interstate de novo if the laws of the state where the branch is to be located permit a bank chartered by such state to do so.²⁴

PRACTICE NOTE

Riegle-Neal gave states the opportunity to opt-in to de novo interstate branching by statute, which was required to apply equally to all out-of-state banks. By year-end 2005, almost half of the states permitted de novo branching, with about half of those permitting it with reciprocity.²⁵ Section 613 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) repealed this opt-in provision, and de novo interstate branching is now freely permitted, so long as the state where the branch is located permits banks chartered by that state to establish a branch.²⁶

A national bank may also merge with an out-of-state bank or acquire branches of an out-of-state bank pursuant to the emergency acquisition provision of the FDI Act, regardless of any state law restrictions.²⁷

Q 2.6 Where are state member banks allowed to branch?

State chartered banks that are members of the Federal Reserve System are permitted to branch to the same extent as national banks, subject to the laws of the chartering state.²⁸

Q 2.7 Where are state nonmember banks allowed to branch?

With regard to *intrastate* branching, a state chartered bank that is not a member of the Federal Reserve System may branch according to the laws of the chartering state.²⁹

With regard to *interstate* branching, a state chartered bank may branch by merger (that is, acquire a bank located in another state and retain the main office and branches of the bank as branches of the acquiring bank).³⁰ However, a state bank may not branch interstate by merger if the bank to be acquired has been in existence for less than five years and the laws of that state prohibit the acquisition of IDIs that have been in existence for less than five years.³¹

In addition, a state chartered bank may acquire branches of out-of-state banks and retain those branches as branches only if the laws of the state in which the branch is located permit out-of-state banks to acquire a branch of a bank in that state without acquiring the bank itself.³² Further, a state chartered bank may branch *de novo* interstate if the laws of the state where the branch is to be located permit a bank chartered in that state to do so.³³

Q 2.8 Where are federal savings associations allowed to branch?

So long as a federal savings association meets the Qualified Thrift Lender (QTL) Test, discussed in more detail elsewhere in this book,³⁴ it generally may branch freely intrastate and interstate without regard to state branching laws.³⁵

Regulatory Considerations When Opening, Moving, or Closing a Branch

Q 2.9 Is regulatory approval required before opening a branch?

Regulatory approval or, in some cases, simply providing notice to regulators is generally required in order for IDIs to establish a branch. While the rules and regulations of the IDI's chartering authority and its primary federal regulator if state chartered will determine the process, an IDI generally must submit an application and publish notice of the intent to establish a branch, and provide the public with thirty days to comment.³⁶

Q 2.10 Is regulatory approval required before moving a branch?

Yes, regulatory approval is generally required in order for an IDI to move or relocate a branch.³⁷ For federal savings associations, however, the OCC provides an exception to this requirement for short-distance relocations—those within the market area of the current branch site.³⁸

Q 2.11 Is regulatory approval required before closing a branch?

Yes, by statute, regulatory approval is required for IDIs to close a branch.³⁹ IDIs must give ninety days' prior written notice to the appropriate federal banking agency and affected customers before closing a branch.⁴⁰ The notification requirement does not apply to ATMs, the relocation or consolidation of a branch within the immediate neighborhood, or a branch closing that results from an emergency acquisition.⁴¹ The federal banking agencies have implemented the statutory requirements via the Interagency Policy Statement Concerning Branch Closing Notices and Policies.⁴² The policy statement clarifies that main offices, remote service facilities, loan production offices, and insured branches of foreign banks are not subject to the notification requirements.⁴³

State chartered IDIs must also consider any state branch closure laws.

Trade Names**Q 2.12 Can branches operate under trade names?**

There are no federal laws requiring IDIs to operate branches using a single name. However, due to concerns that consumers might believe they are dealing with different IDIs for purposes of calculating deposit insurance coverage, the federal banking agencies have issued an Interagency Statement on Branch Names.⁴⁴ In order to prevent consumer confusion, an IDI seeking to operate branches under a trade name must, at a minimum, do the following:

- disclose, clearly and conspicuously, in signs, advertising, and similar materials, that the facility is a branch, division, or other unit of the insured institution;
- use the legal name of the insured institution for legal documents, certificates of deposit, signature cards, loan agreements, account statements, checks, drafts, and other similar documents;
- educate staff regarding the possibility of customer confusion with respect to deposit insurance coverage and limits;⁴⁵ and
- obtain from depositors opening new accounts at the branch a signed statement acknowledging that they are aware that the branch and other facilities are, in fact, part of the same IDI and that deposits held at each facility are not separately insured.⁴⁶

In addition to the above, state laws on the use of trade names must also be considered.

Notes to Chapter 2

1. See *Brick-and-Mortar Banking Remains Prevalent in an Increasingly Virtual World*, 9 FDIC Q. 37 (2015), http://www.fdic.gov/bank/analytical/quarterly/2015_vol9_1/FDIC_4Q2014_v9n1_BrickAndMortar.pdf. In particular, the Office of the Comptroller of the Currency considers brick and mortar branches a stabilizing force in low-income neighborhoods, and cautions that innovative technology should not be used as a substitute for a physical presence in these neighborhoods. OFF. OF THE COMPTROLLER OF THE CURRENCY, SUPPORTING RESPONSIBLE INNOVATION IN THE FEDERAL BANKING SYSTEM: AN OCC PERSPECTIVE (Mar. 2016), <http://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf>.
2. *Id.*
3. 12 U.S.C. § 36(j).
4. *Id.*
5. See 12 U.S.C. § 1464. The Home Owners' Loan Act does, however, require approval of the Office of the Comptroller of the Currency for District of Columbia savings associations to branch outside the district and for other savings associations to branch into the District. 12 U.S.C. § 1464(m)(1).
6. 12 C.F.R. § 145.92; *Fid. Fed. Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 145 (1982) (citing *People v. Coast Fed. Sav. and Loan Ass'n*, 98 F. Supp. 311, 316 (S.D. Cal. 1951)).
7. 12 C.F.R. § 145.92(a).
8. OTS Op. Acting Chief Counsel (June 13, 1994), http://www.ots.treas.gov/_files/56414.pdf.
9. For a discussion of state member banks, see *supra* chapter 1.
10. 12 U.S.C. § 321; 12 C.F.R. § 208.6.
11. 12 C.F.R. § 208.2(c)(1).
12. 12 C.F.R. § 208.2(c)(1), (2). This last exclusion must be determined by the Federal Reserve on a case-by-case basis.
13. For a discussion of state nonmember banks, see *supra* chapter 1.
14. Federal Deposit Insurance Act, 12 U.S.C. § 1828(d).
15. 12 C.F.R. § 303, subpt. C.
16. 12 C.F.R. § 303.41(a).
17. *Id.*
18. 12 C.F.R. §§ 303.41(a), 303.46.
19. 12 U.S.C. § 36(c).
20. 12 U.S.C. §§ 36(d) & 1831u(a)(1), (2).
21. 12 U.S.C. § 1831u(a)(5).
22. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (Sept. 29, 1994).

23. CHRISTIAN A. JOHNSON & TARA RICE, FED. RES. BANK CHI., ASSESSING A DECADE OF INTERSTATE BANK BRANCHING (Apr. 2007), http://www.chicagofed.org/digital_assets/publications/working_papers/2007/wp2007_03.pdf [hereinafter JOHNSON & RICE], at 17.

24. 12 U.S.C. § 36(g)(1).

25. JOHNSON & RICE, *supra* note 23.

26. *See* 12 U.S.C. §§ 36(g)(1)(A), 1828(d)(4)(A)(i).

27. 12 U.S.C. §§ 36(6)(e)(1), 1823(f), (k).

28. 12 U.S.C. § 321; *see also* 12 C.F.R. § 208.6.

29. 12 U.S.C. § 1828(d).

30. 12 U.S.C. §§ 1828(d)(3), 1831u(a)(1), (2).

31. 12 U.S.C. § 1831u(a)(5).

32. 12 U.S.C. § 1831u(a)(4).

33. 12 U.S.C. § 1828(d)(4).

34. *See supra* Q 1.45.

35. 12 U.S.C. § 1464(r)(1). There are certain limited exceptions to this rule, including branching that results from emergency acquisitions. 12 U.S.C. § 1464(r)(2)(A).

36. 12 C.F.R. §§ 5.30(b), 145.93, 145.95, 208.6, 303.40–.46.

37. *See* 12 C.F.R. §§ 5.30(b), 145.93(a), 208.6(a)(2), 303.42; *see also* 12 U.S.C. § 30 (concerning certain national bank main office relocations).

38. 12 C.F.R. § 145.93(b)(2). In order to use this exception, the relocation must meet one of the following criteria: (i) the new site is within a 1,000-foot radius of the old site if the branch is located within a principal city of a metropolitan statistical area (MSA) designated by the Department of Commerce; (ii) the new site is within a one-mile radius of the old site if it is located within an MSA, but not within a principal city; or (iii) the new site is within a two-mile radius of the old site if it is not located within an MSA.

39. 12 U.S.C. § 1831r-1.

40. 12 U.S.C. § 1831r-1(a), (b).

41. 12 U.S.C. § 1831r-1(e).

42. 64 Fed. Reg. 34,844 (June 29, 1999).

43. *Id.* at 34,845.

44. FDIC, Financial Institution Letter, 46–98 (May 1, 1998), <http://www.fdic.gov/news/news/financial/1998/fil9846.html>.

45. Specifically, the federal banking agencies recommend that the IDI instruct staff at the branch and any other facilities operating under trade names to inquire of customers, prior to opening new accounts, whether they have deposits at the IDI's other facilities or branches. Further, during the time period soon after one institution acquires or combines with another, staff should be reminded to call customers' attention to disclosures that identify a particular branch or facility as part of the IDI. *Id.*

46. *Id.*