FEDERAL DEPOSIT INSURANCE CORPORATION
OFFICE OF THE COMPTROLLER OF THE CURRENCY
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

July 28, 2006

Mr. John "Buz" Gorman
General Counsel
Conference of State Bank Supervisors
1155 Connecticut Ave NW, 5th Floor
Washington, DC 20036-4306

Re: State Restrictions On the Establishment of
Interstate De Novo Branches By Industrial Loan Companies

Dear Mr. Gorman:

You have asked our opinion regarding certain state legislation intended to restrict interstate de novo branching by industrial loan companies and industrial banks (collectively, "ILCs"). Specifically, we understand that some states have proposed or enacted legislation that prohibits an out-of-state ILC, but not other types of banks, from establishing a de novo branch in their states. These restrictions have particular significance for those states that generally permit out-of-state banks to establish de novo branches in their states. With respect to such states, the question has been raised whether these state ILC restrictions, if enacted, would affect the ability of other out-of-state banks to establish de novo branches in those states.

Riegle-Neal Act

The establishment of interstate de novo branches was first authorized under Federal law in 1994 when Congress enacted the Riegle Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle Neal").[1] Riegle Neal was generally intended to enhance and expand interstate banking and branching. In accordance with that purpose, it added provisions to both the Federal Deposit Insurance Act (the "FDI Act") and the National Bank Act authorizing both state banks and national banks to establish and operate interstate de novo branches under certain conditions.[2]

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1 Pub. L. No. 103-328, 108 Stat. 2339 (1994).

2 *See id.* § 103.

Specifically, Riegle Neal added section 18(d)(4) of the FDI Act, 12 U.S.C. § 1828(d)(4) ("Section 1828(d)(4)") regarding state nonmember banks and 12 U.S.C. § 36(g) ("Section 36(g)") regarding national banks.[3] Section 36(g) applies to state member banks by virtue of section 9 of the Federal Reserve Act.[4] These sections generally provide that the appropriate Federal banking agency (i.e., the FDIC, for state nonmember banks; the Office of the Comptroller of the Currency, for national banks; and the Federal Reserve Board, for state member banks) may approve an application to establish and operate a de novo branch in a state (other than the bank's home state) in which the bank does not maintain a branch, if the host state has a law in effect that meets certain criteria.[5]

These criteria include the requirements that the host state have a law in effect that "(I) applies equally to all banks, and (II) expressly permits all out-of-state banks to establish de novo branches in such state."[6] For purposes of this discussion, these criteria are collectively referred to as the "Host State Law Requirements." If a host state's law fails either of these requirements, the appropriate Federal banking agency would not be able to approve the establishment of a de novo branch in the host state by any out-of-state bank.[7]

For purposes of Section 1828(d)(4), the term "bank" includes any national bank and any state bank.[8] Under the FDI Act, a "State bank" is defined to include "any bank, banking association, trust company, savings bank, industrial bank (or any similar depository institution which the Board of Directors finds to be operating substantially in the same manner as an industrial bank) or other banking institution which – (A) is engaged in the business of receiving deposits, other than trust funds . . . and (B) is incorporated under the laws of any State or which is operating under the Code of Law for the District of Columbia (except a national bank)."[9] Similarly, the term "bank" as used in Section 36(g) includes "trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of state law."[10] Consequently, the term "bank" as used in both Section 36(g) and Section 1828(d)(4) includes ILCs.

State Restrictions on De Novo Branching by ILCs

As noted above, some states have enacted or proposed legislation that prohibits an out-of-state ILC, but not other types of banks, from establishing a de novo branch in their states. Viewing these state ILC restrictions in light of the Host State Law Requirements, it is

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3 *Id.* § 103(a), (b).

4 *See* 12 U.S.C. § 321.

5 Both Section 36(g) and Section 1828(d)(4) include definitions of the terms "de novo branch," "home state," and "host state." *See* 12 U.S.C. §§ 36(g)(3)(A), (B) and (C), 1828(d)(4)(C), (D) and (E).

6 12 U.S.C. §§ 36(g)(1)(A), 1828(d)(4)(A(i).

7 Approval of such an application is also subject to certain additional conditions and provisions dealing generally with host state filing requirements, community reinvestment, and the adequacy of capital and management. *See* 12 U.S.C. §§ 36(g)(1)(B), 1828(d)(4)(B).

8 *See* 12 U.S.C. § 1813(a)(1).

9 12 U.S.C. § 1813(a)(2).

10 12 U.S.C. § 36(l).

apparent that, if enacted, these restrictions would cause a host state's law to fail those requirements. If a state enacted these restrictions, the state's de novo branching law would not apply equally to all banks because the state's law would exclude one type of bank, i.e., ILCs. Similarly, the state's de novo branching law would not expressly permit all out of-state banks to establish de novo branches in such state because the state's law would not permit one category of out-of-state banks (i.e., out-of-state ILCs, generally, or in some state laws, Utah-chartered ILCs) to establish de novo branches in such state.

Consequently, in our view, a state that enacted this type of de novo branching restriction on ILCs would cause its interstate de novo branching law to fail the Host State Law Requirements, and the appropriate Federal banking agency would not be permitted to approve the establishment of de novo branches in that state by any out of-state bank. This determination, however, does not affect the validity of any interstate de novo branches approved under Section 36(g), Section 1828(d)(4) or section 9 of the Federal Reserve Act prior to the enactment of such restrictions.

Another type of state law permits all out-of-state banks to establish de novo branches in the host state, but prohibits an out-of-state ILC (but not other types of banks) from establishing a branch on the premises of a commercial affiliate of the ILC.[11] This type of state law does not apply equally to all banks and therefore fails the Host State Law Requirements. If, however, the state law expressly permits all out-of-state banks to establish de novo branches in the state, but also provides that neither banks chartered in the state nor out-of-state banks may establish or maintain a branch in the state on the premises of a commercial affiliate,[12] the state law would apply equally to all banks and would appear to comply with the Host State Law Requirements. While this latter type of law does impose a "locational limitation" on where any bank (whether an out-of-state bank or an in-state bank) may establish a branch within the state, this limitation does not treat any class of banks differently than any other banks contrary to the requirements of the Riegle Neal Act.

We hope this response addresses your concerns.

Sincerely,

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COMPTROLLER OF THE CURRENCY

Douglas H. Jones
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11 *See, e.g.*, VA CODE ANN., § 6.1-232.3 (2006).

12 *See, e.g.*, MD CODE ANN., FIN. INST., §§ 5-1003(a) and (b) (2006).