Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #757
January 1997
12 U.S.C. 35

April 1, 1996

James B. Watt
President
Conference of State Bank Supervisors
1015 18th Street, N.W.
Washington, D.C. 2003-5725

Dear Mr. Watt:

Thank you for your letter of March 6, 1996, addressed to Comptroller Ludwig, inquiring about a decision of the Office of the Comptroller of the Currency. In particular, your letter concerned our decision to permit Magna Bank of Missouri (the "bank" or the "state bank") to convert to a national bank and retain its ownership interest in two subsidiaries engaged in insurance agency activities and another subsidiary engaged in real estate brokerage of farm properties.[1] There appears to be some misunderstanding about the scope of this decision and the conditions under which the bank may continue to retain these holdings. Consequently, we appreciate your inquiry and the opportunity that it gives us to correct these misunderstandings.

In 1993, Magna Bank acquired the two insurance subsidiaries at issue. Magna Bank acquired the real estate brokerage subsidiary in 1995, from an affiliated trust company that originated the real estate brokerage in 1987. Ownership interests in subsidiaries engaged in these lines of businesses are fully permissible for state banks under applicable state law.[2]

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[1] Corporate Decision 95-55 (November 15, 1995).

[2] See Mo. Ann. Stat. § 362.105.3.(7) (Vernon 1968 & Supp. 1996); Interpretive Letters by Irven L. Friedhoff, General Counsel, State Division of Finance, to Mr. John D. Harkins, Vice President, Associate General Counsel, and Assistant Secretary of the bank (April 4, 1995 and September 12, 1995); Interpretive Letter by Earl L. Manning, Commissioner of Finance, to Mr. Harkins (December 15, 1993); and Interpretive Letter by John W. Hoffman, Jr. Assistant Attorney General (April 9, 1936). State-chartered banks also are permitted to hold these kinds of ownership interests under applicable federal law. See 12 C.F.R. § 362.2(c), 362.4(a)(1) (1995); 58 Fed. Reg. 64,462, 64,468 (December 8, 1993).

Following the conversion, these subsidiaries remain in the same lines of business that they engaged in prior to the conversion and no change in their method of operations is contemplated. Further, the OCC made clear to the bank in granting the approval that the insurance agency and real estate brokerage operations will be "subject to the same State law restrictions and requirements" as would be applicable if the subsidiaries were owned by a State-chartered bank. Thus, our decision does not increase the bank's ability to participate in the insurance business nor interfere with the authority of state regulators. From the perspective of state regulation, therefore, the results should be viewed positively since the two subsidiaries at issue remain fully subject to state regulation.

It is also important to view this transaction in a proper context. It occurred in connection with a consolidation of multiple banks owned by a holding company ("Magna") into one bank. We understand that Magna's purpose in undertaking this consolidation was to serve customers more efficiently and to enable the resulting bank to compete more effectively. Like other holding companies that have considered consolidating multiple charters to increase efficiencies and enhance customer service, Magna faced the question of what type of charter, state or national, to select for the surviving bank. Many factors must be taken into account in making such a choice. One factor may be whether the resulting bank will have to divest assets legitimately acquired and held pursuant to applicable law. In the case of surviving state banks, this problem is often taken care of by so-called "wild-card" statutes at the state level. Well over half of the states have statutes that allow state banks broad parity with many powers and activities authorized for national banks. In the case of a surviving national bank, Congress, for its part, has expressly provided a narrower method for a state bank to convert to a national charter without surrendering the earning assets it has lawfully acquired. And as demonstrated briefly below, those retainable assets include interests in subsidiaries carrying on one or more businesses permitted by state law.

When a state bank converts to a national charter, the second paragraph of 12 U.S.C. § 35 provides:

> The Comptroller of the Currency may, in his discretion and subject to such conditions as he may prescribe, permit such converting bank to retain and carry at a value determined by the Comptroller of the Currency such of the assets of such converting bank as do not conform to the legal requirements relative to assets acquired and held by national banking associations.

This language, adopted in 1935,[3] unambiguously permits the retention of the subsidiaries by Magna Bank. The statute's legislative history makes it clear that its general purpose was to facilitate the conversion of state banks by not requiring them to dispose of assets which they permissibly held as state banks. This legislative history, the circumstances under which it was adopted, and related authorities all support a straightforward reading of the legislative

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[3] See Banking Act of 1935, ch. 614, § 312, 49 Stat. 711 (1935).

language. For example, the relevant House report explains the provision in very sweeping, clear and unambiguous terms:[4]

> Section 311 amends section 5154 of the Revised Statutes so as to authorize the Comptroller of the Currency to permit State banks converting into national banks to retain and carry, at a value determined by the Comptroller, assets not permitted to be acquired and held by national banks.

The legislative history also indicates that the provision was enacted at the request of the OCC. The 71st Annual Report of the Comptroller of the Currency (January 3, 1934), in a section setting forth legislation proposed by the Comptroller, states at page 16 that section 35:

> provides for conversion of State banks into national banks. There has been an increased number of State banks which have applied to the Comptroller of the Currency for conversion. In examining these banks it is found that they possess some assets which it is not legal for national banks to acquire and hold. To require a State bank to eliminate these assets places a burden on it which it may be unable to meet and many times results in its inability to join the national system.

The Senate Committee on Banking and Currency in 1934 recommended the passage of the Comptroller's proposed legislation containing the revision to section 35. In explaining this revision, the Committee adopted verbatim the explanation set forth by the Comptroller in the 1934 Annual Report.[5] Relevant historical material also shows that, prior to 1935, the Comptroller considered that interests in nonconforming enterprises and activities were "assets" and were subject to divestiture under the then-existing version of section 35.[6] In your letter, you argue that section 35 cannot be read to permit the bank to retain the stock of the three subsidiaries at issue. Among other things, you argue that retention of these assets ignores the first paragraph of section 35 which, in part, provides that the converted bank "shall have the same powers and privileges, and shall be subject to the same duties, liabilities, and regulations, in all respects, as shall have been prescribed by the Federal Reserve Act and the National Banking Act for associations originally organized as national banking

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[4] H.R. Rep. No. 742, 74th Cong., 1st Sess., at 19 (1935).

[5] The Committee Report stated that "the amendment is in accordance with the following recommendation contained in the Annual Report of the Comptroller of the Currency, dated January 3, 1934" and then reiterated the language of that report. S. Rep. 1260, 73d Cong., 2nd Sess 3 (1934)

[6] See, e.g., H.W. Magee, A Treatise on the Law of National and State Banks, 896 (2d ed. 1914).

associations." But whatever "powers and privileges" were bestowed on newly-converted national banks by that paragraph, originally adopted in 1864[7], it is clear that in 1935, by adopting the second paragraph, Congress bestowed on national banks the additional power, with the approval of the Comptroller, to hold "assets" that a bank held as a state bank but which it otherwise could not hold as a national bank. Basic rules of statutory construction require that, if ownership of stock of subsidiaries constitutes "assets" within the meaning of the second paragraph of section 35, then that paragraph is applicable to this situation and authorizes the Comptroller to permit retention of those assets. As stated in Sutherland Statutory Construction:

> It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.[8]

Thus, if the first paragraph of section 35 were construed to control in this situation and prohibit the power to hold nonconforming assets, the second paragraph would be a nullity. This would be a clearly erroneous interpretation under the basic rules of statutory construction. Alternatively, principles of statutory construction provide that if the two provisions were construed to be "in irreconcilable conflict . . . the subsequent act must prevail."[9] Likewise, under the basic rules of statutory construction, the second paragraph would prevail over the first paragraph with respect to the power to hold nonconforming assets. Moreover, we note that the Supreme Court has clearly stated that "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987). Thus, a provision, such as the second paragraph of section 35, addressing the power of a converting bank specifically to retain assets will prevail over a provision, such as the first paragraph of section 35, generally addressing the "powers and privileges . . . duties, liabilities and regulations . . . " applicable to national banks following conversions from state charters.

Thus, it is clear that the second paragraph of section 35 governs the retention of the stock of the subsidiaries if the stock constitutes "assets" within the meaning of section 35. In fact, the

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[7] See National Bank Act of 1864, ch. 106, § 44, 13 Stat. 99, 112-13 (1864) (containing language virtually identical to the present language contained in the first paragraph of section 35). The predecessor statute also contained virtually identical language. See National Bank Act of 1863, ch. 58, § 61, 12 Stat. 665, 681-82 (1863).

[8] See 2A Norman J. Singer, Sutherland Statutory Construction § 46.06 (5th ed. 1992 & Supp. 1995).

[9] Id. at 2B § 51.03.

meaning of the terms “assets” in that paragraph is central to this analysis. The key question that exists in this situation is: Does the ownership of stock representing a controlling interest in a corporation constitute an “asset” for purposes of the second paragraph of section 35?

The answer is clearly “yes.” The plain meaning of “assets” is extremely broad and the Supreme Court has long counseled that the meaning of a statute must, in the first instance, be determined based on the language that is used.[10] Parties who argue against the plain meaning of a statute face the “daunting standard” of showing “clear evidence that reading the statute literally would thwart the obvious purposes” of the statute.[11]

No such showing can be made in this case. Neither the commonly understood meaning of the word “asset,” the plain language of section 35, nor section 35's legislative history limit the scope of the term. Nothing in any of those sources distinguishes between passive holdings such as undeveloped land, from operational assets, such as the same land with an income-producing parking lot on it. [12] Nor does the language of the statute provide any basis for concluding that shares of stock representing a small interest in an entity constitute “assets,” while those same shares, when they represent a larger interest in the entity, do not. Significantly, too, the courts have recognized that ownership interests in subsidiaries are bank assets. [13]

Nothing in your letter supports a different and narrower definition of the word “assets.” First, you cite a series of cases[14] holding or assuming that national banks are prohibited from

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[10] See, e.g., Caminetti v. United States, 242 U.S. 470, 485 (1917).

[11] Mansell v. Mansell, 490 U.S. 581, 592 (1989).

[12] See, e.g., Black’s law Dictionary, p. 117 (6th ed. 1990 (defining “asset” as “property of all kinds, real and personal, tangible and intangible”). Black’s further defines “personal assets” as including “personal property” which, in turn, is defined as “all property other than real estate; as goods, chattels, money, notes, bonds, stocks, and choses in action generally . . . .” Id. at 117-118, 1217.

[13] See Victor Hotel Corp. v. FCA Mortgage Corp., 928 F.2d 1077, 1083 (11th Cir. 1991) (stating that the Federal Savings and Loan Insurance Corporation must “rely on a financial institution’s written records and its assets, such as wholly-owned subsidiaries, to determine solvency for regulatory purposes”); Lesal Interiors Inc. v. Resolution Trust Corporation, 834 F. Supp. 721, 730 (D. N.J. 1993) (a bank’s wholly-owned subsidiary is an “asset” of the bank for purposes of 12 U.S.C. § 1823(e)).

[14] The cases which you cite are American Land Title Association v. Clarke, 968 F.2d 150, 155-57 (2d Cir. 1992), cert. denied, 113 S. Ct. 2959 (1993); Commissioner v. Morris Trust, 367 F.2d 794, 795 (4th Cir. 1966); Saxon v. Georgia Association of Independent

engaging in insurance agency activities in communities larger than 5,000. But each of these cases involved issues pertaining to the insurance authority of all national banks and either concluded or assumed that 12 U.S.C. § 92, permitting insurance agency activities in places of 5,000 population or fewer, was a bar to such activity. None had occasion to address or consider the role of the second paragraph of section 35.

With respect to real estate brokerage, the OCC no-objection letter that you cite, pertaining to the leasing by a national bank of space to a real estate brokerage firm, has no bearing on the issue at hand. [15] This letter simply spells out the conditions under which a national bank proposed to lease excess office space to a real estate brokerage and the conditions under which the OCC would not object to the lease. The letter does not involve a converted national bank and nothing in the letter addresses section 35 or the power of a converted bank under section 35 to retain stock in a real estate brokerage enterprise.

Likewise, nothing in the other cases that you cite interpreting section 35 addresses the power of state banks to retain nonconforming assets under the second paragraph of that provision. You specifically rely on Traverse City State Bank v. Empire National Bank, 228 F. Supp. 984 (W.D. Mich. 1964). But that court, addressing a main office relocation by a national bank under 12 U.S.C. § 30, did not discuss the retention of assets under the second paragraph of section 35 in any way. Thus, this case is not precedent for the proposition that you cited.

You also contend that the OCC's determination in this matter is "directly contrary" to a January 5, 1996, OCC order permitting a state bank in Michigan to convert to a national bank (the Society decision).[16] That decision interpreted the first paragraph of section 35 specifically with respect to the execution of the articles of association and organization certificate by a bank proposing to convert to a national bank charter and held, among other things, that in adopting those documents, a converting bank, like a newly chartered bank, was not limited by state law with respect to the designation of a main office. The decision did not involve the retention of any nonconforming assets nor an interpretation of the second paragraph of section 35. In fact, the decision stated:

> In 1935, Congress amended the conversion provision . . . so that a converting state bank could retain and carry assets it could not acquire and hold as a

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Insurance Agents, 399 F.2d 1010, 1012-14 (5th Cir. 1968); First Security Bank of Utah, N.A. v. Commissioner, 436 F.2d 1192, 1195-96 (10th Cir. 1971), aff'd, 405 U.S. 394 (1972).

[15] See OCC No-Objection Letter No. 87-8, Nov. 17, 1987, reprinted in [1987-88 Transfer Binder] Fed. Banking L. Rep. ¶ 84,037.

[16] See Decision of the Office of the Comptroller of the Currency on the Applications of Society Bank, Michigan, Ann Arbor, Michigan and Society National Bank, Indiana, South Bend, Indiana (Corporate Decision 96-01).

> national bank. [Citation omitted.] The right of a state bank to hold certain assets, such as corporate stock, is a provision of its contract with the state. Absent the 1935 amendment, that right could not survive a charter conversion, since a national bank generally is not empowered to hold corporate stock. [Citation omitted.] Again, Congress had to enact legislation to permit the OCC, in its discretion, to allow some of these bank-state 'contract' provisions to survive a charter conversion.

Id. at 13, n.14. Simply stated, nothing in the Society or Magna decisions contradicts each other. The Society decision concludes that the first paragraph of section 35, as adopted by Congress, addresses the execution of the organization certificate and articles of a converting state bank and does not subject those documents to state law. The Magna Decision applies the second paragraph of section 35, addressing retention of nonconforming assets by a converting state bank and specifically granting to state banks converting to national charters the power, with the approval of the Comptroller and subject to conditions imposed by him, to retain nonconforming assets held under state law.

Finally, you argue that the second paragraph of section 35 should not be interpreted as permitting the retention of nonconforming assets, such as those at issue here, because cases interpreting the national bank merger and consolidation statutes, 12 U.S.C. §§ 215 and 215a, underscore that following a merger or consolidation a resulting national bank is subject not to state regulation, but to federal regulation. Cases decided under the merger and consolidation statutes have no bearing on this issue. Those statutes simply do not contain the language of the second paragraph of section 35 specifically contemplating the retention of nonconforming assets, with the approval of the Comptroller, following a conversion of a state bank to a national charter.[17]

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[17] Other cases and authorities on which you rely also are inapplicable. You state that the OCC's conversion regulation makes no mention of the second paragraph of section 35. But the Comptroller's authority is grounded squarely on the clear language of the statute; nothing in the statute requires repetition in a regulation for the Comptroller to use his authority under that statutory provision.

Other cases that you cite simply don't address retention of assets under the second paragraph of section 35, and some, in fact, predate the adoption of that paragraph. See State ex rel. Sorlie v. First National Bank of Whitman, 224 N.W. 161 (1929) (regarding continuation by a converted national bank of membership in North Dakota's deposit guaranty program and ascertaining the bank's liabilities to that program); The Metropolitan National Bank v. Claggett, 141 U.S. 520 (1891) (determining liability for bank bills issued by the bank as a state bank prior to its conversion to a national bank); Yonkers v. Downey. 309 U.S. 590, 596 (1940) (providing only that a national bank had no authority to pledge its assets to secure deposits); Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U.S. 315 (1935) (holding that a state-chartered thrift could not convert to a federal charter in contravention of the laws

In summary, in approving the retention of the subsidiaries in Magna, the OCC has permitted no expansion in the type of insurance activities previously conducted by the subsidiaries of the bank. State banks in Missouri are permitted to engage in the activities under both state and federal law. The subsidiaries' activities were, *and remain,* fully subject to state regulatory requirements. The OCC's decision, made on the basis of a safety and soundness evaluation of the particular application before it, simply allowed the bank to retain its investments in these subsidiaries after the bank completed a corporate reorganization that included a conversion to a national bank charter. Moreover, the decision comports with the plain language of section 35 and is consistent with its legislative history, basic rules of statutory construction and related authorities.

I hope that this has been responsive to your inquiry and allays any concerns that you may have had about the scope and legal underpinnings of this approval.

Sincerely,

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Julie L. Williams
Chief Counsel

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of its chartering state). Likewise, 12 U.S.C. § 330, preserving for state banks becoming members of the Federal Reserve System their "full charter and statutory rights as a State bank . . . [and] all [state-granted] corporate powers," casts no light on or implies or imposes any limitation on the normal meaning of the word "assets" as used in section 35.