Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

Corporate Decision #97-10
February 1997

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATIONS OF FIRST & OCEAN NATIONAL BANK, NEWBURYPORT, MASSACHUSETTS

February 10, 1997

I. INTRODUCTION

On November 14, 1996, First & Ocean National Bank, Newburyport, Massachusetts ("First & Ocean") filed an application with the Office of the Comptroller of the Currency ("OCC") for approval to change the location of its main office from Newburyport, Massachusetts to Seabrook, New Hampshire, under 12 U.S.C. § 30 ("the Relocation Application"). The location in Seabrook is approximately six miles from Newburyport. In connection with the Relocation Application, First & Ocean requested the OCC's confirmation that it may continue to operate its two existing branches in Massachusetts. In addition to its main office, First & Ocean has a branch in Amesbury, and a branch in Salisbury. On November 14, 1996, First & Ocean also applied for approval under 12 U.S.C. § 36(c) to establish a new branch at the location of the former main office in Newburyport to continue existing banking services there (the "Branch Application"). As of September 30, 1996, First & Ocean had approximately $135 million in assets.

Notice of the Applications was published on November 15, 1996 in The Daily News, a Newburyport, Massachusetts newspaper and the Hampton Union, an Exeter, New Hampshire newspaper. Both The Daily News and the Hampton Union are newspapers of general circulation and together service the Bank's market area, including Seabrook, New Hampshire and Newburyport, Massachusetts.

On December 17, 1996, the New Hampshire Bank Commissioner ("the Commissioner") wrote the OCC to oppose the Applications, objecting to First & Ocean's retention of its existing branches in Massachusetts when it relocates its main office to New Hampshire. With respect to the Relocation and Branch Applications, the Commissioner believes such branch retention is an illegal mechanism to engage in interstate banking. The New Hampshire Commissioner's protest letter referenced support for the Texas Banking Commissioner's United States District Court challenge of these same issues in Catherine A. Ghiglieri v. Eugene A. Ludwig ("the Texarkana

case"), 1996 U.S. Dist. LEXIS 8321 (N.D. Tex. May 22, 1996), appeal docketed, No. 96-10818 (5th Cir. July 10, 1996). In that case, the district court issued Findings of Fact and Conclusions of Law, adopting the views of the Texas Banking Commissioner and finding the OCC's statutory interpretation, that 12 U.S.C. §§ 30 & 36 permit a national bank to keep its existing branches when it relocates its main office across state lines, to be erroneous.[1] The New Hampshire Commissioner's objections are addressed in the discussion below.

On January 2, 1997, the Massachusetts Commissioner of Banks also wrote the OCC regarding First & Ocean's Applications. The Commissioner noted the challenges by other state commissioners to interstate main office relocations, including the relocation in Ghiglieri, and the fact that these challenges are still in litigation. Then, in light of these ongoing developments which have yet to resolve the issue, the Commissioner declined to opine on First & Ocean's Applications or the legality of the main office relocation aspects of the transaction under Massachusetts' branching law.

II. LEGAL AUTHORITY

These Applications involve two transactions:

(A) The relocation of the national bank's main office from Newburyport, Massachusetts to Seabrook, New Hampshire, and the bank's retention of its two existing branches in Massachusetts, under 12 U.S.C. § 30; and

(B) The relocated bank's establishment of a new branch at the former site of its main office in Newburyport, Massachusetts, under 12 U.S.C. § 36(c).

The Relocation and Branch Applications present one central legal issue: the authority of a national bank to retain its lawfully established, existing branches when it moves its main office. The interstate relocation of the main office in itself is well-established, as set out at pages 5 - 12. If the branch retention in the relocation is authorized, then First & Ocean can become an interstate national bank (i.e., a bank with branches in another state). Then, in the second transaction, the statutes of each state in which the bank is located are applied to determine whether the bank can establish new intrastate branches in each of those states. But, without the branch retention in the relocation transaction, there is no basis to proceed to the second transaction.

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[1] The Ghiglieri court was reviewing the OCC's Decision on the Applications of Commercial National Bank of Texarkana (OCC Corporate Decision No. 95-11, March 8, 1995) ("OCC Commercial National Bank Decision"). The OCC believes the district court opinion in Ghiglieri is incorrect as a matter of law for several reasons. Most significantly, the court did not follow the language of the statutes in effect at the time of the agency's decision in the case. The court ignored Congress's action in amending sections 30 and 36 after the OCC's earlier adoption of the construction of the statutes at issue. In addition, the court also failed to properly consider the OCC's earlier statutory interpretation under the appropriate standards. See Smiley v. Citibank (South Dakota), N.A., __ U.S. __, 116 S. Ct. 1730, 135 L. Ed.2d 25, (June 3, 1996); NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co., 513 U.S. 251 (1995); Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The district court opinion is discussed at pages 10-11, 20-32, and 35-36.

Thus, the central legal issue is a national bank's power to retain lawfully established, existing branches in an interstate relocation of its main office. In 1994, Congress addressed this very issue and confirmed the OCC's prior interpretation of the statutes.[2] In two decisions in early 1994, the OCC determined that the bank could continue to operate its existing branches in its original state when it relocated its main office to another state under section 30, without regard to section 36 or state law.[3] We based our conclusions on the consideration of many factors, including an extensive review of the statutes, legislative history, caselaw, the development of the statutes, and the impact of branch retention on the exercise of the primary statutory right to move the main office. We found nothing that required existing branches to be divested in a main office relocation, and concluded a congressional intent to require such divestiture, which would result in depriving thousands of customers of access to their regular banking facilities, could not be inferred from silence. The OCC's statutory construction of section 30 before the Riegle-Neal Act is summarized at pages 13-16

In the Riegle-Neal Act, Congress visited section 30 after the earlier OCC decisions and added new language to 12 U.S.C. §§ 30 & 36 to clarify and govern the power of national banks to have interstate branches through retaining existing branches in an interstate main office relocation. This action recognized that, under section 30, national banks had such power before, and then limited it, beginning on June 1, 1997, to co-ordinate the section 30 power with the new Riegle-Neal framework for interstate branches. Section 30, as so amended, is the statute that applies to transactions today. Before the Riegle-Neal Act, nothing in sections 30 or 36 required the constructive divestiture of existing lawful branches, and the disenfranchisement of customers of those branches, in a main office relocation. In the Riegle-Neal Act, Congress added a constructive divestiture requirement, but did so explicitly, only for certain interstate relocations, and only to begin on June 1, 1997. Congressional action on section 30 in the context of the prior OCC interpretation is especially compelling. Thus, in the relocation of its main office from one state to another, the power of a national bank to retain its existing branches under section 30 is now clearly established. Section 30 and the Riegle-Neal Act are discussed at pages 16-32.

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[2] Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (enacted September 29, 1994)(codified in sections of 12 U.S.C.)("the Riegle-Neal Act").

[3] See Decision on the Applications of American Security Bank, N.A., Washington, D.C., and Maryland National Bank, Baltimore, Maryland (OCC Corporate Decision No. 94-05, February 4, 1994), reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,695 ("OCC NationsBank/Maryland National Decision"); Decision on the Applications of First Fidelity Bank, N.A., Pennsylvania, Philadelphia, Pennsylvania, and First Fidelity Bank, N.A., New Jersey, Newark, New Jersey (OCC Corporate Decision No. 94-04, January 10, 1994), reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644 ("OCC First Fidelity/New Jersey Decision"). There were also other decisions before the Riegle-Neal Act that involved only the interstate relocation of a bank's main office (i.e., the bank did not have branches to retain). See Decision on the Applications of the First National Bank of Polk County (OCC Corporate Decision No. 94-21, April 28, 1994) (relocation from Tennessee into Georgia); Decision on the Application of the First National Bank of Spokane (1991) (relocation from Washington into Idaho) ("OCC FNB Spokane Decision"); Decision on the Application of SouthTrust National Bank (1989) (relocation from Alabama into Georgia) ("OCC SouthTrust Decision"); Decision on the Application of the Bank of New Jersey, N.A. (1986) (relocation from New Jersey into Pennsylvania) ("OCC Bank of New Jersey Decision"); Decision on the Application of Mark Twain Bank, N.A. (1985) (relocation from Missouri into Kansas) ("OCC Mark Twain Decision").

Once First & Ocean is an interstate national bank with branches in Massachusetts, the establishment of the new branch in Newburyport, Massachusetts, at the former site of its main office, is evaluated under the statutes, cases, and prior OCC decisions for such transactions by an interstate bank. Before the Riegle-Neal Act, there had been a number of decisions applying the applicable federal branching and merger statutes to transactions by interstate national banks.[4] In the pre-Riegle-Neal decisions, the OCC determined that, when the federal statutes refer to state law, they were intended to apply state laws on a state-by-state basis for transactions in each state by an interstate national bank. That is, an interstate bank could establish new branches within each state under section 36(c), depending upon that state's law for in-state branching for its own state-chartered banks. In the Riegle-Neal Act, Congress left these statutes unchanged after this OCC interpretation and, in the new Riegle-Neal interstate provisions, adopted a similar state-by-state framework for subsequent transactions by a Riegle-Neal interstate bank. First & Ocean's establishment of the new branch in Newburyport is discussed at pages 33-36.

Since passage of the Riegle-Neal Act, the OCC has applied these statutes in the foregoing manner in many applications, including decisions in October 1994 shortly after the enactment of the Riegle-Neal Act. In particular, in one decision, a state bank commissioner objected to the transaction, arguing that the maintenance of interstate branches in the state would violate a state law and also raising interpretive questions under the Riegle-Neal Act.[5] In that decision, because

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[4] The OCC First Fidelity/New Jersey Decision and the OCC NationsBank/Maryland Decision involved such transactions after the relocation, and there were also several other applications that did not involve a relocation but did involve interstate merger and branching transactions. See Decision on the Application to Merge Girard Bank, Bala Cynwyd, Pennsylvania, into Heritage Bank, N.A., Jamesburg, New Jersey, with the Title of Mellon Bank (East) N.A. (March 27, 1984), reprinted in [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,925 (Heritage had a grandfathered branch in Philadelphia; the 1984 transaction was not consummated and Heritage later became part of Midlantic National Bank); Decision on the Application of State Savings Bank, Southington, Connecticut, to Convert into a National Banking Association, State Savings Bank, N.A., and Merge into Connecticut National Bank, Hartford, Connecticut (OCC Merger Decision No. 91-07, April 8, 1991) ("OCC Shawmut Decision") (both banks owned by Shawmut National Corporation; at the time of conversion State Savings Bank had branches in Rhode Island); Decision on the Application for the Merger of First Peoples National Bank, Kingston, Pennsylvania, with and into First Fidelity Bank, N.A., Salem, New Jersey (OCC Corporate Decision No. 94-07, February 23, 1994); Decision on the Applications to Merge NationsBank of D.C., N.A., Maryland National Bank, and NationsBank of Maryland, N.A. (OCC Corporate Decision No. 94-22, April 29, 1994); Decision on the Application for the Merger of Continental Bank, Norristown, Pennsylvania, into Midlantic National Bank, Newark, New Jersey (OCC Corporate Decision No. 94-37, August 12, 1994).

[5] See Decision of the Office of the Comptroller of the Currency on the Applications of Bank Midwest of Kansas, N.A., and Bank Midwest, N.A. (OCC Corporate Decision No. 95-05, February 16, 1995), reprinted in Fed. Banking L. Rep. (CCH) ¶ 90,474 ("OCC Bank Midwest Decision"). Other decisions after the Riegle-Neal Act include: Decision on the Applications of National Westminster Bank USA and National Westminster Bank NJ (OCC Corporate Decision No. 94-43, October 20, 1994); Decision on the Applications of First Fidelity Bank, N.A., and The Bank of Baltimore (OCC Corporate Decision No. 94-47, November 4, 1994); Decision on the Application to Merge Chase Savings Bank into The Chase Manhattan Bank, N.A. (OCC Corporate Decision No. 95-08, February 10, 1995) ("OCC Chase Decision"); Decision on the Applications of American National Bank and Trust Company of Wisconsin and American National Bank and Trust Company of Chicago (OCC Corporate Decision No. 95-12, March 8, 1995); Decision on the Applications of PNC Bank, Northern Kentucky, N.A. and PNC Bank, Ohio, N.A. (OCC Corporate Decision No. 95-13, March 14, 1995); Decision on the Application to Merge Bank and Trust Company of Old York Road into Midlantic Bank, N.A. (OCC Corporate Decision No. 95-18, May 25, 1995); Decision on the Applications of BayBank Connecticut, N.A. and BayBank Boston, N.A. (OCC Corporate Decision No. 95-34, July 26, 1995);

of the issues raised by the objection, we revisited our analysis of pre-Riegle-Neal law and thoroughly considered the impact of the Riegle-Neal Act on existing authority and the applicability of state law.

Therefore, the Relocation and Branch Applications by First & Ocean are similar to a number of prior interstate relocation and branching applications approved by the OCC. Indeed, the objections raised to them by the New Hampshire Bank Commissioner are similar to those that were raised by the Kansas Bank Commissioner in the OCC Bank Midwest Decision. The legal analysis and authorities set forth in the prior decisions, especially the OCC Bank Midwest Decision, the OCC NationsBank/Maryland National Decision, and the OCC First Fidelity/New Jersey Decision, also apply here and are, thus, incorporated herein by reference.

A. First & Ocean may Relocate its Main Office to Seabrook, New Hampshire and Continue to Operate its Existing Branches in Massachusetts, under 12 U.S.C. § 30.

In the Relocation Application, First & Ocean applied to change the location of its main office from Newburyport, Massachusetts, to Seabrook, New Hampshire, a distance of approximately six miles. First & Ocean will continue to operate its three existing branches in Massachusetts. Thus, after the relocation, First & Ocean will be an interstate national bank operating in two states, with its main office in New Hampshire and branches in Massachusetts.

1. The Interstate Relocation of First & Ocean Main Office to Seabrook, New Hampshire is Authorized.

The relocation of First & Ocean's main office is legally authorized under 12 U.S.C. § 30. Section 30 authorizes a national bank to change the location of its main office to any location within 30 miles of the limits of the city in which its main office is located. 12 U.S.C. § 30(b). Such a relocation, even across state lines, is authorized by the literal language of the statute, and nothing in the legislative history gives any reason not to adhere to the literal language. Section 30 operates independently of section 36, and the authority to relocate a main office is not limited by the McFadden Act. Thus, a main office relocation can result in a national bank having an office at a location where it would not be authorized to establish a branch. Finally, section 30 preempts state laws that conflict with the authority it confers on national banks.

The authority of a national bank to relocate its main office is set out in 12 U.S.C. § 30(b), which provides:

Decision on the Applications of PNC Bank, New Jersey, N.A. and PNC Bank, N.A. (OCC Corporate Decision No. 95-36, August 7, 1995); Decision on the Applications of Fleet National Bank, Providence, Rhode Island, et al. (OCC Corporate Decision No. 96-17, March 27, 1996) ("OCC Fleet Decision"); Decision on the Applications of Union Planters Bank, N.A. (OCC Corporate Decision No. 96-48, August 28, 1996); Decision on the Applications of Ledyard National Bank, Hanover, New Hampshire (OCC Corporate Decision No. 95-66, December 15, 1995); Decision on the Applications of Connecticut River Bank, Charlestown, New Hampshire (OCC Corporate Decision No. 96-58 , September 30, 1996).

> Any national banking association, upon written notice to the Comptroller of the Currency, may change the location of its main office to any authorized branch location within the limits of the city, town, or village in which it is situated, or, with a vote of shareholders owning two-thirds of the stock of such association for a relocation outside such limits and upon receipt of a certificate of approval from the Comptroller of the Currency, to any other location within or outside the limits of the city, town, or village in which it is located, but not more than thirty miles beyond such limits.

12 U.S.C. § 30(b) (emphasis added).

Statutory interpretation begins with the language of the statute itself, which must be interpreted in accordance with its plain meaning. See Lewis v. United States, 445 U.S. 55, 60 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). A fundamental canon of statutory construction is that, when a statute's language is clear and unambiguous, the plain meaning of the statute must be applied. See, e.g., Caminetti v. United States, 242 U.S. 470, 485 (1917); Higgins v. Marshall, 584 F.2d 1035, 1037 (D.C. Cir. 1978), cert. denied, 441 U.S. 931 (1979). See generally 2A Sutherland Statutes and Statutory Construction § 46.01 (5th ed. 1992). The OCC, as the agency charged with administering the statute, is bound no less than courts by this canon of construction. "If the statute is clear and unambiguous, 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 368 (1986) (quoting Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)). Moreover, the legislative history of section 30 provides no basis for departing from the plain meaning of the statute. See OCC Bank Midwest Decision (Part II-A-1-b) (review of legislative history of section 30 from enactment in 1886 through 1959 amendment that removed language limiting relocations to places within the same state to 1982 amendment that was the last change prior to the Riegle-Neal Act).

Under the "plain meaning" rule of statutory construction, then, section 30 clearly permits a national bank to relocate its main office to any location within 30 miles. See State of Idaho Department of Finance v. Clarke, 994 F.2d 1441, 1444 (9th Cir. 1993) (interstate relocation); Synovus Financial Corporation v. Board of Governors of the Federal Reserve System, 952 F.2d 426, 428 & n.1, 435 (D.C. Cir. 1991) (interstate relocation); McEnteer v. Clarke, 644 F.Supp. 290, 292 (E.D. Pa. 1986) (interstate relocation). See also Ramapo Bank v. Camp, 425 F.2d 333, 344 (3d Cir.), cert. denied, 400 U.S. 828 (1970) (in-state relocation). The plain language in section 30 authorizes a national bank to relocate its statutory "main office" to "any other location" within thirty miles of the limits of the city in which the main office is currently located. This authorization for relocations within 30 miles contains no limitation or other references to state borders or to state law. In the Relocation Application the proposed main office location in Seabrook, New Hampshire is approximately six miles from Newburyport, Massachusetts. Thus, on its face, section 30 authorizes the proposed main office relocation.

The proposed location in Seabrook, New Hampshire will meet the criteria to be a main office under section 30. Section 30 does not define the term "main office." The term also is not defined elsewhere in the National Bank Act. Nor does the National Bank Act impose any specific requirements or criteria for a national bank's main office. However, examination of the original version of section 30, related statutes, and the historical introduction of the term "main office" reveals its intended meaning. The bank's main office is the office designated as such in its articles of association -- i.e., the office that is the registered location of the corporation as distinct from its branches -- provided only that it conducts a banking business at such office. There is no requirement in statute or case law that the bank conduct the principal portion, or any required minimum portion, of the bank's business at the "main office" rather than at one of its "branches." See Bank of Western Oklahoma v. First National Bank of Sayre, 1996 U.S. Dist. LEXIS 11909 (W.D. Okla. July 29, 1996). Indeed, the volume and nature of business conducted at the location is not an appropriate determinant of a valid main office because those factors can be affected by external events that have no connection to the original designation. For example, changing demographics in the market area and changes in local business patterns may cause business at one site (the main office) to shrink, while business at other sites (branches) increases. This interpretation of "main office" in section 30 is confirmed in judicial decisions, prior OCC practice and, by analogy, general corporate law. This issue is set out more fully in the OCC First Fidelity/New Jersey Decision (Part II-A-1, pages 12-17) and the OCC Bank Midwest Decision (Part II-A-1-a, pages 12-15).

An extensive discussion of this issue appears in Ramapo Bank v. Camp, 425 F.2d 333 (3d Cir.), cert. denied, 400 U.S. 828 (1970). In Ramapo Bank, a national bank proposed to relocate its main office to another town (at a location where it could not establish a branch) and to establish a branch at the site of the original main office. The plaintiffs argued that the proposal was a subterfuge to evade the McFadden Act by locating a "main office" where the bank could not locate a "branch." (The McFadden Act issue is discussed below.) In particular, they argued that the proposed new main office was not a bona fide main office, but was in economic substance a branch because the former main office would continue to exist as a branch and would serve the bulk of the bank's existing customers. 425 F.2d at 340.

The court rejected plaintiffs' arguments and cited with approval the criteria used by the OCC in determining that the relocated main office was bona fide. All these criteria relate to the legal characteristics that differentiate a main office from a branch, not business differences. See Ramapo Bank, 425 F.2d at 341. The court also considered the volume of business that would be transferred to or conducted by the relocated main office, because the plaintiffs argued that the relocated main office would not conduct a sufficient volume of business. The court, however, dismissed this as a factor in reviewing the legal authority for the main office and agreed with the OCC's analysis that factors such as the number of customer accounts, addresses of customers, business volume, or size of the office were not relevant to its status as the main office. See id. at 342.

It also has been argued in the past that section 30 should not be interpreted so as to allow a bank to obtain, through main office relocation, a configuration of offices that it could not establish as branches under section 36(c). That is, the bank should not be permitted to move its main office to a location at which the bank could not establish a branch from its old main office.

Under such an interpretation, section 30 would not be given full literal effect, but would be understood as impliedly limited by section 36(c). In practical effect, such an interpretation would read into section 30 a penalty that requires a relocating bank to divest branches and disenfranchise potentially thousands of customers. The OCC has rejected this view. See, e.g., OCC Bank Midwest Decision (Part II-A); OCC NationsBank/Maryland National Decision (Part II-A & II-B); OCC First Fidelity/New Jersey Decision (Part II-A & II-B). Before the Riegle-Neal Act, most courts did not follow this approach. Congress' recent action in the Riegle-Neal Act confirmed the OCC's interpretation of section 30 (discussed below in section A-2).[6]

The overwhelming weight of case precedent supports the interpretation that section 30 must be given its literal meaning and that it alone governs main office relocations. Courts repeatedly have held that section 30 operates independently of the McFadden Act and other statutes. See, e.g., Ramapo Bank, 425 F.2d at 340-46 (section 30 independent of McFadden Act and state law); Traverse City State Bank v. Empire National Bank, 228 F.Supp. 984, 992 (W.D. Mich. 1964) (section 30 independent of McFadden Act and state law). See also McEnteer, 644 F.Supp. at 292-94 (section 30 independent of state law and Bank Holding Company Act). Cf. Synovus Financial Corporation, 952 F.2d at 434-36 (section 30 independent of Bank Holding Company Act). But see Marion National Bank of Marion v. Van Buren Bank, 418 F.2d 121, 124 (7th Cir. 1969) (using section 36 to limit section 30) (discussed below).[7]

Several courts have considered the interplay between section 30 and section 36(c) with respect to the issue of the location to which the main office could be located if the bank were simultaneously applying to establish a new branch at its former main office location. In Ramapo Bank, the United States Court of Appeals for the Third Circuit upheld the OCC's approval of a main office relocation to an adjacent town along with the establishment of a branch at the site of the former main office. Under state law neither the relocation nor the establishment of a branch at the new main office location, would have been permissible for a state bank; but a bank originally at the new main office location, could establish a branch at the old main office location. Consequently, the issue raised was whether, by operation of the McFadden Act, 12 U.S.C. § 36, state law branching restrictions were applicable to relocations by national banks under section 30.

The Ramapo Bank court upheld the decision of the Comptroller that the relocation was bona fide and not subject to state branching laws. Most importantly, the court refused to

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[6] As discussed further below in section A-2, in the Riegle-Neal Act Congress amended section 30 to limit a national bank's power to keep branches in its former state when it relocates its main office to another state, beginning on June 1, 1997. In so doing, Congress recognized that section 30 authorizes national banks to relocate their main office across a state line and did nothing to change section 30 in that respect.

[7] The district court in Ghiglieri followed Marion National Bank for the general proposition that section 30 must be read in conjunction with section 36, with section 36 limiting section 30, and then applied that proposition to the issue of the relocating bank's authority to keep its existing branches in Arkansas. But the court also found the bank was authorized to relocate the main office itself from Arkansas into Texas. The court's reliance on Marion National Bank was misplaced because Congress has now addressed the relationship of sections 30 and 36 when it amended the sections in the Riegle-Neal Act. The Ghiglieri decision is addressed separately below in section A-2.

incorporate the McFadden Act and state law restrictions into the clear and unambiguous language of section 30:

> We agree with the holding in [Traverse City State Bank] that Section 30 controls with respect to an application for a national bank's main office relocation free of the impact of state banking laws or policy, and that administrative approval of such an application must be sustained if it is not arbitrary, capricious or an abuse of discretion, and it is supported by substantial evidence. It is certainly not within our province to pass upon the wisdom or desirability of Section 30. That Congress has the power to exempt national banks from state regulation is unquestioned. That Congress has done so with regard to the relocation of the main offices of nationally chartered banks is equally certain, both from the lack of express language to the contrary in Section 30, and the absence of contrary suggestion in the congressional history of the National Bank Act, or Section 30 in particular.

425 F.2d at 344 (footnotes and citations omitted).

In particular, the Ramapo Bank court specifically considered the argument that there should be a conjunctive reading of sections 30 and 36(c) in an application for a main office relocation when the existing main office would be retained as a branch. 425 F.2d at 344. In a careful analysis directed to the then-recent Marion National Bank case, the court rejected this argument. The two statutes have separate scope and purpose. Their language and legislative history give no evidence that they were intended to be construed together. Judicial precedent relating to the interpretation of section 36 on matters within its scope is inapposite on the question of whether section 36 is meant to limit section 30. 425 F.2d at 344-46. The Ramapo Bank court concluded:

> Thus, we are of the opinion that branching considerations are inapplicable to the main office relocation of a national bank, and that the bona fides of the relocation is governed solely by the statutory provisions of Section 30 of the National Bank Act.

425 F.2d at 345 (footnote omitted).

The Traverse City State Bank court upheld the OCC's approval of a national bank main office relocation that opponents similarly challenged as inconsistent with state branching law. The court, noting that section 30 is self-contained and, unlike the McFadden Act, does not incorporate state law, declared that:

> It was apparently the intent of Congress not to limit the relocation of main offices of national banking associations by reference to state banking laws, since there is no such limitation [in 12 U.S.C. § 30].
>
> If we were to hold [that main office relocations are subject to state law], as plaintiffs urge us to do, we would write into Section 30 of the National Banking Act that which Congress decided not to include in the Act. This court thus would

> be legislating and usurping the power of Congress. 228 F.Supp. at 992 (emphasis in original).

Three other district court cases have followed the same analysis and reached the same result as Ramapo Bank and Traverse City State Bank. See Bank of Western Oklahoma v. First National Bank of Sayre, No. CIV-95-1930-A (W.D. Okla. July 29, 1996); First National Bank & Trust Co. v. Smith, No. K75-19 (W.D. Mich. Sept. 28, 1977); Merchants and Miners Bank v. Saxon, No. 1042 (W.D. Mich. July 13, 1966) (discussed in Ramapo Bank, 425 F.2d at 343).

Finally, in a more recent case involving the interstate relocation of a national bank's main office from New Jersey into Pennsylvania, it was argued that section 30 did not authorize the relocation because it would violate state law and the Douglas Amendment of the Bank Holding Company Act. While the case did not involve the McFadden Act, the court followed the earlier cases in construing section 30 as independently governing national bank main office relocations free of any impact of state banking law or policy. McEnteer, 644 F.Supp. at 292-93 (following Ramapo Bank). In reaching its decision, the court applied the plain language of section 30:

> The plain language of the statute allows national banks to relocate "to any other location" within 30 miles of the limits of the city, town, or village within which it is currently located. The proposed relocation complies with that requirement, and [the court] will apply the plain language of the statute. There is no ambiguity in the statute.

McEnteer, 644 F.Supp. at 292.

Before the OCC's decisions in early 1994, only one court reached the opposite result and made main office relocations subject to the McFadden Act and state law. Marion National Bank, 418 F.2d at 124.[8] In Marion, in circumstances similar to those in Ramapo Bank and Traverse City State Bank, a national bank applied to relocate its main office to a nearby town and to establish a new branch at the location of its former main office. State law would not permit a new branch to be established at the proposed new main office location. The Marion National Bank court conceded that the relocation in itself would be lawful under section 30, but then concluded that because the transaction as a whole meant that a bank ended up with a new facility where it could not establish a branch, the transaction as a whole must therefore fail on McFadden Act

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[8] Recently, the Ghiglieri court followed Marion National Bank. The court's reliance on Marion was misplaced because Congress has now addressed the relationship of sections 30 and 36 when it amended the sections in the Riegle-Neal Act. The Ghiglieri decision is addressed separately in section A-2 below. Another earlier case involving a proposed main office relocation application cited Marion. See First National Bank of Southaven v. Camp, 333 F.Supp. 682 (N.D. Miss. 1971), aff'd without opinion, 467 F.2d 944 (5th Cir. 1972). There the Comptroller had denied a bank's applications to move its main office to another town and establish a new branch at its former main office location in circumstances similar to the applications in Marion and Ramapo Bank. In FNB Southaven, the district court held the denial was within the administrative discretion granted the Comptroller. See 333 F.Supp. at 686 - 88. In *dicta*, the court also discussed the conflict between Marion and Ramapo Bank, but determined it need not adopt either interpretation in the circumstances of the case before it, holding only that, within the Comptroller's discretion in administering applications under the national banking laws, the Comptroller may consider the relationship of the two applications and state law factors, even when not required to. Id. at 689-90.

grounds. 418 F.2d at 124. As explained above and also discussed in Ramapo Bank, the Marion National Bank court's analysis fails to give effect to the literal language of section 30 and assumes -- without any evidence or support -- that section 36 is both germane to interpreting section 30 and supersedes it. For these reasons, we believe it is unpersuasive.

As far as we have been able to determine, only two courts have followed Marion, namely, Ghiglieri and, more recently, Ghiglieri v. Sun World, 942 F. Supp. 1111 (W.D. Tex. Oct. 29, 1996), appeal docketed, No. 96-50847 (5th Cir. Nov. 5, 1996). In Ghiglieri v. Sun World, the OCC approved the application of Sun World, N.A., to relocate its main office, within thirty miles, from El Paso, Texas, to Santa Teresa, New Mexico, while retaining its existing branches in Texas. The OCC also approved the bank's application to establish a new branch at the former main office site in Texas upon the relocation. See Decision on the Applications of Sun World, N.A. (OCC Corporate Decision No. 96-40, August 2, 1996). The district court found that although the Sun World's relocation to New Mexico was permissible, Sun World could not retain existing branches in Texas after the interstate main office relocation. The court found that section 30 must be read in conjunction with, and is limited by, section 36, and that there exists no authority, either expressed or implied, to support the position that a national bank may retain its existing branches after it relocates its main office. Also, as a result of the relocation, Sun World was no longer "situated" in Texas; therefore, it was not permitted to establish a new branch at its former main office site in Texas. In large measure, the district court in Ghiglieri v. Sun World followed the same analysis as the Ghiglieri v. Ludwig court, and we discuss them later in this decision both as "Ghiglieri."

Subsequent to the Ghiglieri court's opinion, but prior to the Sun World decision, in another case raising the relationship of sections 30 and 36(c) in a main office relocation, another district court followed Ramapo and rejected Marion. See Bank of Western Oklahoma v. First National Bank of Sayre, No. CIV-95-1930-A (W.D. Okla. July 29, 1996). The issue in Bank of Western Oklahoma was similar to that in Ramapo and Marion. The First National Bank of Sayre applied to relocate its main office from Sayre to Elk City, while keeping an existing branch in Sayre and moving it to the old main office location. Under the applicable branching law, the bank could not establish a branch in Elk City from its main office in Sayre, but it could have the branch in Sayre from the new main office in Elk City. In its recent decision, the court in Bank of Western Oklahoma followed Ramapo and the other courts that have held that section 30 operates independently of the McFadden Act and state law and rejected Marion. See id. slip op. at 6 - 7.

Finally, as discussed below, in the amendments it made to sections 30 and 36 in the Riegle-Neal Act, Congress has expressly addressed the relationship between section 30 and section 36 in the context of interstate main office relocations. Since Congress now has addressed the manner in which these two statutes act together, and that manner is different from the position in Marion National Bank, there is no reason to follow that case.[9]

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[9] In some prior main office relocation decisions, the OCC distinguished Marion National Bank by emphasizing the business reasons for the relocation. The presence of business reasons was used to support the validity of the relocation despite alleged inconsistency with state law. However, section 30 does not require a showing of business justification for a relocation. See, e.g., Traverse City State Bank, 228 F.Supp. at 990 (showing

In his comment letter, the New Hampshire Bank Commissioner contends that the proposed transaction includes the establishment of a *de novo* bank in New Hampshire and that New Hampshire law does not allow the establishment of a *de novo* bank by an out-of-state bank or bank holding company. See Letter from Roland Roberge to Michael Tiscia, dated December 17, 1996. The Commissioner's argument appears to be that the relocation of First & Ocean's main office into New Hampshire amounts to the establishment of a *de novo* bank in New Hampshire by First & Ocean Bancorp, a bank holding company whose home state is Massachusetts. However, First & Ocean clearly continues to be the same corporate entity it was before; no new bank is involved at all; First & Ocean Bancorp does not establish or acquire any new bank. Indeed, courts that have considered this argument in the past have concluded that the relocation of the main office of a bank is not the establishment or acquisition of a bank by the relocating bank's holding company and so the federal Bank Holding Company Act (and specifically 12 U.S.C. § 1842(d) governing interstate acquisitions) is inapplicable to a main office relocation. See State of Idaho Department of Finance, 994 F.2d 1441, 1448 (9th Cir. 1993) (reviewing interstate main office relocation in FNB Spokane Decision) (BHCA analysis); Synovus Financial Corporation v. Board of Governors of the Federal Reserve System, 952 F.2d 426, 434 (D.C. Cir. 1991) (reviewing interstate main office relocation in OCC SouthTrust Decision) (BHCA analysis); McEnteer v. Clarke, 644 F.Supp. 290, 293 (E.D. Pa. 1986) (reviewing interstate main office relocation OCC Bank of New Jersey Decision) (section 30 analysis, BHCA analysis, and state law analysis). See also OCC First Fidelity/New Jersey Decision (Part II-A-3-b, pages 29-31) (fuller discussion of main office relocations and BHCA). Because the Bank Holding Company Act does not apply to the relocation of a national bank's main office, First & Ocean may relocate its main office from Newburyport, Massachusetts, to Seabrook, New Hampshire, without implicating the Bank Holding Company Act.

In summary, national banks are authorized to move their main office to any location within 30 miles, even across state lines. First & Ocean's proposed main office location in Seabrook is approximately six miles from Newburyport. The relocation of its main office, therefore, is legally authorized.

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of necessity not required for main office relocation). Moreover, this analysis may not clearly distinguish Marion. First, the essence of Marion is that the McFadden Act and state law should apply to and limit section 30 in such cases. Second, it is unlikely a bank would propose a main office relocation unless it had good business reasons for doing so. Rather than attempting to distinguish a flawed case, it is preferable to recognize the case was incorrectly decided, especially now that Congress has established the relationship of sections 30 and 36. See also First National Bank & Trust Co. v. Smith, supra (rejecting Marion and following Ramapo); McEnteer, 644 F.Supp. at 292 - 93 (following Ramapo). In any event, First & Ocean has amply demonstrated its business reasons for proposing the main office relocation, principally to expand its banking services in the nearby Seabrook area and to serve customers more effectively in the whole First & Ocean market. See Letter from First & Ocean, N.A. to Deputy Comptroller Karen Wilson, dated November 12, 1996.

2. First & Ocean's Continued Operation of Its Existing Branches in Massachusetts is Authorized under Section 30. Congress Re-affirmed this Authority for National Banks in the Statutory Language and Legislative History of the Riegle-Neal Act.

When it relocates its main office to Seabrook, New Hampshire, First & Ocean will continue to operate its existing branches in Massachusetts. In four of the OCC's earlier decisions involving the relocation of a national bank's main office across a state line and the continuation of existing branches in the original state, we extensively analyzed the legal authority for the continued operation of existing branches and concluded that continued operation of such existing branches is legally authorized. In two decisions before the Riegle-Neal Act, we considered the meaning and application of sections 30 and 36, as they then existed. We concluded that there was no requirement, explicit or otherwise, for divestiture of lawfully established, existing branches when a national bank's main office relocates to another state. Rather, section 30 authorized a national bank to keep existing branches when the main office is relocated. See OCC NationsBank/Maryland National Decision (Part II-B-1); OCC First Fidelity/New Jersey Decision (Part II-B-1).

In decisions after the Riegle-Neal Act, we considered the changes Congress made to sections 30 and 36. With these amendments, enacted by Congress effective September 29, 1994, the statutory language now expressly addresses the retention of branches in an interstate main office relocation. It is the statute as amended that now governs these transactions and on which we rely. Reviewing the statutory language and legislative history, we found Congress had agreed with the OCC's interpretation of section 30, and had taken steps to limit branch retention under section 30 as of June 1, 1997, in conjunction with the implementation of the new interstate branching authority of the Riegle-Neal Act. See OCC Bank Midwest Decision (Parts II-A-2-e & II-D); OCC Fleet Decision (Part II-A-2). Other decisions after the Riegle-Neal Act, including those shortly after enactment, contained a shorter version of the same analysis. See, e.g., OCC decisions cited in note 5. The same analysis applies to the present transaction.

a. Branch retention under section 30 before the Riegle-Neal Act.

When a national bank that has branches relocates its main office under section 30 (whether the relocation is in-state or interstate), the question naturally arises: what is to become of the bank's existing branches? Logically, there are two possibilities: either (1) the branches simply are kept under section 30 and continue as is, or (2) the branches are effectively treated as divested and may be kept only if the bank could establish them as new branches from its new main office location under section 36(c). As a practical matter, this question has significance only in circumstances, such as First & Ocean's here, in which the authority of the bank to establish its old branches as new branches under section 36 from its new main office location is unclear. Thus, in practice, this question means the difference between the bank's keeping its existing branches when it moves its main office or being required to close them. In practical effect, the question is essentially whether, as a result of an authorized main office relocation, a bank will be penalized by being required to divest existing bank branches and whether potentially thousands of bank customers will be deprived of their accustomed banking facilities.

In 1994, in the interstate main office relocation decisions before the Riegle-Neal Act that involved branches, the OCC examined the statutory language, its legislative history, caselaw, the overall statutory framework, and its historical development and concluded Congress intended that, when a national bank relocates its main office under section 30, it may continue to operate its existing branches, without regard to section 36 and state law. It is not required to divest lawfully established, existing branches. See OCC NationsBank/Maryland National Decision (Part II-B-1); OCC First Fidelity/New Jersey Decision (Part II-B-1). See also OCC Bank Midwest Decision (Part II-A-2). Moreover, even earlier, beginning in 1981, the OCC had reached the same conclusion regarding in-state main office relocations where in-state branching limits presented the issue -- namely, that a bank was not required to divest existing lawfully established branches when it relocated its main office, even though those offices could not be established as new branches from the new main office location.[10]

As more fully discussed in those decisions, we based this conclusion on a number of considerations, particularly the following. First, the language of neither section 30 nor section 36 (before the Riegle-Neal Act) explicitly addressed what was to happen to existing branches when the main office relocated. Similarly, the legislative history of neither section explicitly addressed the retention of existing lawful branches in a main office relocation. In addition, this issue had not been addressed in the caselaw. Ramapo Bank, Traverse City State Bank, and Marion National Bank involved a main office relocation with a simultaneous application to establish a new branch at the former main office location. They did not address the status and retention of existing branches. Thus, this situation required consideration of additional sources to determine congressional intent.

Second, section 36 was not the sole and exclusive authority for national bank branches. Instead, as courts had recognized, other statutes can contain branching authority for the specific areas covered by those statutes. See Colorado State Banking Board v. Resolution Trust Corporation, 926 F.2d 931, 946-47 (10th Cir. 1991) (branching provisions of section 1823(k) for emergency thrift acquisitions separate and independent of McFadden Act); Arkansas State Bank Commissioner v. Resolution Trust Corporation, 911 F.2d 161, 173-74 (8th Cir. 1990) (same); State of Texas v. National Bank of Commerce, 290 F.2d 229, 233 (5th Cir.), cert. denied, 368 U.S. 832 (1961) (national bank banking offices on military facilities authorized under 12 U.S.C. § 90 without regard to section 36 and state branching restrictions).[11] See also 12 U.S.C. § 1823(f)(4)(B) (branches in assisted interstate bank acquisitions). In those cases, the courts rejected the argument that these other statutes must be read in conjunction with section 36, and branches authorized under them only to the extent permissible under section 36. Instead, the courts ruled that the other statutes were independent of section 36. Thus, it was not unreasonable that section 30 also could be such a statute, not for establishing new branches but with respect to retaining existing branches.

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[10] See Decision on the Applications of Kentucky National Bank of Marion County and Kentucky National Bank of Pendleton County (July 2, 1991); OCC Letter from Peter Liebesman, Assistant Director, to Martha R. Seger, Commissioner, Michigan Financial Institutions Bureau (May 22, 1981).

[11] Indeed, under the authority of section 90, a few national banks operated banking facilities on military bases in more than one state, thus having a limited form of interstate branching even before the Riegle-Neal Act.

Third, in the period before the McFadden Act (i.e., until 1927), there were some national banks with branches (i.e., state banks that had branches and converted into national banks, and successors by merger of such banks). Under the statute that permitted those banks to retain the branches (the predecessor to the current section 36), those branches clearly could be kept if the bank's main office relocated, since the branch statute did not have any geographic limit in it, and so the geographic relationship between the main office and an existing branch location was irrelevant to its permissibility. And so, in the pre-1927 period there was no potential for a "conflict" between retaining existing branches under section 30 and retaining existing branches under the predecessor to section 36. Since the result was the same in either case, it is not surprising that the question of which statute was the source of branch retention authority did not arise then.

Fourth, in 1927, when it enacted the McFadden Act, amending section 36, Congress did not address branch retention in a main office relocation, and so did not evidence intent to change this pre-1927 result or to subject existing branches of a relocating bank to the new section 36. Congress' primary purpose in the McFadden Act was to grant national banks generally the power to establish or acquire new branches, subject to the statute's limits. In various amendments to section 30 and section 36 between 1927 and 1994, Congress similarly has not addressed branch retention in a main office relocation. Moreover, in 12 U.S.C. § 36(b) Congress did address branch retention in other contexts (i.e., conversions and mergers). This shows that, if Congress had wanted to limit or change the treatment of existing branches, it knew how to do so. However, the addition of geographic limitations to section 36 created the interpretive dilemma now posed: in a main office relocation, are existing branches that were geographically lawful when established simply continued or must they be divested and subjected to a new geographic review based on the new location of the main office.

Fifth, the existing cases on section 30, discussed above, established that section 30 operates independently of section 36. They deal with the locations to which the main office could move and do not directly address the retention of existing branches.[12] (The establishment of a new branch at the old main office location is a different question, addressed below in Part II-B.) Nevertheless, their analysis of the independence of section 30 from section 36 is pertinent. For, if existing branches were not retained under section 30 in a main office relocation but instead were required to be divested and then established anew under section 36 from the new main office location, then section 36 would be indirectly determining the new main office location. Generally, a bank will need to keep its existing branches to continue its banking operations without impairment. If the McFadden Act applies to the ability to keep existing branches, then the locations of existing branches will impose conditions upon where, in reality, the main office can be relocated. This is clearly contrary to the express and unconditional language of section 30 and the courts' holding: for section 30 would no longer be independent of the McFadden Act. Since Congress did not condition the exercise of the power to move the main office upon state law or upon the existence or non-existence of branches, there is no basis for implying such a limitation, even indirectly. Cf. Barnett Bank of Marion County, N.A. v. Nelson, No. 94-1837,

[12] The cases do not address the issue of retaining the existing branches either because the bank involved did not have an existing branch or because the existing branch was at a location that would be permissible under section 36(c) from either main office location, and so no question was raised.

slip op. at 8, 517 U.S. __, 134 L.Ed.2d 237, 246 (March 26, 1996) (regarding state law and the powers of national banks, "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies").

Finally, we noted that Congress originally enacted section 30, and had subsequently amended it and section 36 several times, without expressly requiring the divestiture, re-examination, or re-authorization of existing branches in a main office relocation. The existing branches of a bank that is relocating its main office were lawful when established. If the bank had to divest all branches that could not be newly re-established from the new main office, then a bank would be penalized for exercising a right granted under the National Bank Act, the right to relocate its main office. We did not believe that such a requirement to surrender existing branching rights, branch buildings, and established customer relationships could be inferred from Congress' silence, since even statutes that expressly affect established property or contract rights are strictly construed. Thus, in the absence of express congressional action requiring that existing lawfully established branches be re-subjected to a de novo analysis under section 36 and divested, we concluded that the intention of the statutory scheme, considered as a whole, was that existing branches were continued under section 30.

b. Section 30 and the Riegle-Neal Act.

In the Riegle-Neal Act, Congress made this understanding explicit in its amendments of sections 30 and 36. In the language of section 30, effective September 29, 1994, it is clear that national banks are authorized to keep their existing branches when they relocate their main offices. In revisions to section 30, Congress placed a new limitation on this authority in section 30 with respect to certain branches (namely, in an interstate relocation, those branches in the state from which the main office was relocating), but this limitation applies only to transactions occurring after May 31, 1997. In enacting the limitation, Congress recognized that existing branches were retained in main office relocations under section 30 and confirmed that this authority continues for branches not covered by the limitation. And, until June 1, 1997, when the new limitation begins to apply, even branches in the state of the former main office may be retained under section 30. The OCC has so interpreted the Riegle-Neal Act since its adoption. See OCC Bank Midwest Decision (Parts II-A-2-e & II-D); other OCC decisions cited in note 5.

From the OCC's prior approvals and other applications pending at the time the Riegle-Neal Act was under consideration, Congress was aware that the power to retain existing branches in a main office relocation meant that an interstate national bank could occur under that authority. In developing the Riegle-Neal Act, the issue naturally arose whether that authority should be continued or curtailed in light of the new interstate branching authorities being created in the Act. Congress adopted a compromise. Language was added to section 30 to limit branch retention in an interstate main office relocation, but only for transactions occurring after May 31, 1997. This means not only that the limits added in the new subsection 30(c) do not apply to transactions before June 1, 1997, but also that no limits existed prior to the enactment of section 30(c). Otherwise, Congress would not have found it necessary to deal with the issue.

In the Riegle-Neal Act, Congress added a new subsection (c) to section 30:

> (c) Coordination with Revised Statutes. -- In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State from which the bank relocated such office only to the extent authorized in section 5155(e)(2) of the Revised Statutes [12 U.S.C. § 36(e)(2)].

Riegle-Neal Act § 102(b)(2) (adding subsection (c) to section 30). Congress also added the corresponding new subsection to the Revised Statutes:

> (2) Retention of Branches. -- In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State which was the bank's home State (as defined in subsection (g)(3)(B) [i.e., the State of its former main office]) before the relocation of such office only to the extent the bank would be authorized, under this section or any other provision of law referred to in paragraph (1), to acquire, establish, or commence to operate a branch in such State if --
>
> (A) the bank had no branches in such State; or
>
> (B) the branch resulted from --
>
> (i) an interstate merger transaction approved pursuant to section 44 of the Federal Deposit Insurance Act; or
>
> (ii) a transaction after May 31, 1997, pursuant to which the bank received assistance from the Federal Deposit Insurance Corporation under section 13(c) of such Act.

Riegle-Neal Act § 102(b)(1)(B) (adding subsection (e)(2) to section 36).

These provisions are intended to place a new limitation on a relocating national bank's authority to keep branches in the state of its former main office. Henceforward, from June 1, 1997, a relocating national bank will be able to keep such branches only in accordance with the branching rules in new section 36(e)(2). The legislative history of these changes is especially illuminating. The Conference Report expressly shows that Congress was aware of existing authority and of OCC analyses and approvals under that authority (such as the OCC NationsBank/Maryland National Decision, the OCC First Fidelity/New Jersey Decision, and the other decisions cited in notes 3 & 4 above) and expected it to continue until June 1, 1997:

> The Comptroller of the Currency (OCC) has used the 30 mile relocation provision of the National Bank Act (section 2 of the Act of May 1, 1886, 12 U.S.C. 30), to approve several transactions which have permitted national banks to move their main offices to other States but to retain branches in the States left by the main offices. Section 102(b)(2) amends the provision so that after June 1, 1997, a national bank relocating its main office to another State may maintain its branches in the first state only if those branches could have been established by a bank with its home State in the new State. However, along with the OCC's approval for the relocation, the bank would be required to obtain the Comptroller's approval under section 5155 of the Revised Statutes [12 U.S.C.

> § 36] to continue to operate any remaining branch offices located in [a] State other than the State of its new main office. Thus, the bank would be required to file a consolidated application with the OCC covering both aspects of the transaction; the OCC would be authorized to act on the remaining out-of-State branch aspect of the transaction only pursuant to section 5155. State banks are treated in a similar manner.
>
> The Conferees are aware of the OCC procedures in permitting relocation across State lines. The Conferees concur with those procedures, including the application of appropriate State law and authority. The Conferees expect the OCC to continue to follow those procedures until the provisions of Title I become fully applicable on June 1, 1997.

H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 57 (August 2, 1994) (Report on H.R. 3841, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994) (emphasis added).

From the new statutory language and its legislative history, it is clear Congress understood that under existing law a national bank can move its main office across state lines while keeping branches in its former state and that this existing law is being changed by the amendment. While the new subsections 30(c) and 36(e)(2) directly apply only to transactions occurring after May 31, 1997, their addition to the statute is revelatory of existing section 30. If the antecedent power to retain branches was not present in existing law, there would be no need to impose the limitation. See NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co., 513 U.S. 251, ___, 130 L.Ed.2d 740, 748 (1995) (interpreting 12 U.S.C. § 24(Seventh); "Congress' insertion of the limitation decades after the Act's initial adoption makes sense only if banks already had authority [under the Act]"). This limitation on section 30, which begins on June 1, 1997, would have been unnecessary if other statutory provisions already required a national bank to divest existing branches that could not have been reestablished as branches under section 36(c) following a main office relocation under section 30. Moreover, if Congress did not believe such authority existed, it would hardly have imposed the limitation to begin only on June 1, 1997, rather than immediately. In addition, the limitation is imposed only on the ability to keep certain branches: those in the state of the former main office. In other situations, such as an in-state relocation, Congress did not change the branch retention authority of section 30.

Thus, from the amended statutory language and its legislative history, it is clear Congress understood: (1) that a national bank that relocates its main office keeps its existing branches under section 30, (2) that under existing law a national bank can move its main office across state lines while keeping branches in its former state, and (3) that this existing law is being changed and limited only by the express congressional action in the amendments. In the Riegle-Neal Act, Congress changed the power of a relocating national bank to retain branches in the state of its former main office. That change applies only to transactions occurring after May 31, 1997. Branch retention continues unchanged until then.

Moreover, this new statutory language and its legislative history must be viewed in the context of its adoption. In January and February 1994, the OCC had issued two decisions approving interstate main office relocation transactions in which the OCC set out its statutory

interpretation that section 30 governs main office relocations, including retaining existing branches, without regard to the McFadden Act. Those decisions were well-known to Congress.[13] When Congress revisits a statute that has an established administrative or judicial interpretation without pertinent change, "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 846 (1986) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974)). See also Cannon v. University of Chicago, 441 U.S. 677, 698-99 (1979) ("[O]ur evaluation of congressional action in 1972 must take into account its contemporary legal context."); Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, [citations omitted]."); Laufman v. Oakley Building & Loan Co., 408 F. Supp. 489, 496 (S.D. Ohio 1976) ("[W]here prior agency interpretations have not been overturned during subsequent congressional reenactment or amendments, these interpretations take on added importance."). This doctrine has even greater force where, as here, Congress explicitly acknowledged the OCC's interpretation, stated it agreed with the OCC's interpretation, and then changed the statute only in one specific way (and then only for transactions occurring after May 31, 1997). It must be conclusively presumed that Congress intended the statutes to have the meaning as the OCC had interpreted them. Whatever uncertainty may have existed in the statutes on this point before, the Riegle-Neal Act has now clearly established that this was the law.

Finally, in addition to confirming and preserving the section 30 main office relocation authority, Congress also kept that authority separate from the new interstate authorities created in the Riegle-Neal Act, at least until June 1, 1997. In the Riegle-Neal Act Congress authorized interstate branching by national banks through interstate merger transactions (new section 44 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831u) and through de novo interstate branches (new subsection (g) to Revised Statutes 5155, 12 U.S.C. § 36(g)). The interstate merger authority is automatically effective June 1, 1997, but states may "opt-in" early. See 12 U.S.C. § 1831u(a)(3). In addition, states may "opt-out" of the interstate merger provisions by enacting a law to that effect before June 1, 1997. See 12 U.S.C. § 1831u(a)(2). The interstate de novo branching authority is effective if the state where the branch would be has a law that triggers the federal authority. See 12 U.S.C. § 36(g)(1). But Congress addressed interstate branch retention in section 30 relocations in separate provisions of the Riegle-Neal Act (new 12 U.S.C. §§ 30(c) & 36(e)(2)) that do not depend on either of the new authorities. The only connection created by Congress between section 30 and the new Riegle-Neal authorities is that section 36(e)(2)'s new limitation on interstate branch retention under section 30 (which applies to transactions occurring after May 31, 1997) continues to permit branch retention if the relocated bank would be authorized to acquire a branch in the former state of its main office if the branch resulted from an interstate merger transaction under the Riegle-Neal Act's new provision, 12 U.S.C. § 1831u. Moreover, while Congress has granted the states authority in determining whether to participate in the new interstate authorities created in the Riegle-Neal Act, Congress did not include any similar grant of state authority in the portions of the Riegle-Neal Act that deal with the pre-

[13] The two interstate main office relocation decisions to which Congress alluded in the Conference Report (the OCC First Fidelity/New Jersey Decision and OCC NationsBank/Maryland National Decision) had also compiled previous OCC and judicial positions on the subject, including the other OCC decisions cited in notes 3 & 4 above.

existing section 30 authority. And, since Congress kept the section 30 authority separate, a state's action in opting-in to, or opting-out of, the Riegle-Neal authorities has no bearing on the section 30 authority, at least until June 1, 1997.[14] Thus, the fact that New Hampshire has opted-in to the interstate merger provisions of the Riegle-Neal Act, effective June 1, 1997, and that Massachusetts has opted in for both interstate mergers and interstate *de novo* branches, does not affect First & Ocean's current power in a transaction before June 1, 1997, to retain its existing branches after its main office relocation under section 30. The relationship between section 30 and the Riegle-Neal Act is addressed further below in connection with the New Hampshire Commissioner's objections.

Unfortunately, the district court in Ghiglieri apparently misunderstood the recent amendments to sections 30 and 36. The court mistakenly asserted that the Riegle-Neal Act provisions were not yet in effect and so did not need to be addressed. But in fact, while some parts of the interstate merger and branching provisions in the Riegle-Neal Act (including the amendments to sections 30 and 36) have a date within them (June 1, 1997) when certain standards change, the effective date of Congress' adoption of the provisions was September 29, 1994, the date of enactment of the Riegle-Neal Act.[15] By ignoring the amendments, the court did not construe and apply the statutes as they existed at the time of the OCC's decision, but as they existed before the Riegle-Neal Act. Indeed, by doing so, the Court acted as if it were reviewing the OCC's initial adoption of this statutory interpretation in early 1994, instead of reviewing an agency interpretation that has seen subsequent and intervening congressional action. The goal of statutory construction by agencies and courts, and of judicial review of agencies' construction, is to ascertain the intent of Congress. Where Congress has shown its intent in subsequent amendments of the statute that agree with an agency's interpretation and change the statute to change the agency's interpretation in only one respect, that should be the end of the matter. While the statutes' intended meaning may have been unclear when the OCC initially interpreted them in January 1994, Congress has since addressed the issue, amending the statutes and affirming the OCC's interpretation, in September 1994. In Ghiglieri, the District Court mistakenly failed to recognize that the section under which the OCC took its action and the relevant legislative history for that section were addressed by Congress in 1994.[16]

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[14] After May 31, 1997, if a state has opted out of interstate merger transactions under 12 U.S.C. § 1831u(a)(2), then the power of a bank relocating its main office out of that state to retain branches in that state under section 30 is curtailed by 12 U.S.C. §§ 30(c) & 36(e)(2).

[15] Similarly, the core provision of the Riegle-Neal Act -- namely, the new section 44 added to the Federal Deposit Insurance Act that authorizes interstate merger transactions -- has the June 1, 1997, date within it. On and after that date, interstate merger transactions are authorized unless a state has opted out. But before that date interstate merger transactions are also authorized, if the states involved have opted-in. Like the amendments to sections 30 and 36, the new section 44 was effective on September 29, 1994, and has a date within it, making a different rule for transactions before that date and after that date.

[16] Although the district court stated the provisions added in the Riegle-Neal Act do not take effect until June of 1997, some might attempt to defend the decision by arguing that, while the provision was effective on September 29, 1994, it does not convey any branch retention authority until June 1, 1997. This would be an argument about the meaning and intent of the current statute. In this interpretation, there was no branch retention authority under section 30 before, and Congress was adding a new power in the amendments to section 30. As discussed further below at pages 26 - 32, this strained interpretation is mistaken for several reasons. It ignores the significance

Accordingly, when it relocates its main office from Newburyport, Massachusetts, to Seabrook, New Hampshire, First & Ocean is legally authorized to continue to operate its existing branches in Massachusetts.

c. The New Hampshire Bank Commissioner's objections to branch retention under section 30 and the Riegle-Neal Act.

The New Hampshire Bank Commissioner objected to the Applications of First & Ocean as overall an illegal mechanism of implementing interstate branching. In his objection letter, in pertinent part, the Commissioner wrote:

> Although First and Ocean's application contrasts with other applications to which I have objected in that First and Ocean seeks to move its main office into New Hampshire, I must object to this application for many of the same reasons I have voiced in the past.
>
> Previously, I have objected when banks with main offices in New Hampshire have applied to your agency to relocate their main office to another state while retaining the former main office in New Hampshire as a branch. I have stated my objections to your agency repeatedly on the basis that such interstate "relocation/retention transactions" are an illegal way to engage in interstate branching prior to June 1, 1997 in contravention of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 . . . and New Hampshire RSA 384: 57 et. seq.

Letter from Roland Roberge, New Hampshire Bank Commissioner, to Michael Tiscia, Licensing Manager, Northeastern District, Office of the Comptroller of the Currency, dated December 17, 1996 (emphasis in original). The Commissioner further directed the OCC's attention to the amicus brief that he joined in signing in support of the Texas Banking Commissioner's challenge in the Texarkana case to the OCC's claimed authority under 12 U.S.C. § 30 to allow national banks to relocate their main offices across state lines and to retain their existing branches in their former home states without regard to the limitations on branching set forth in the McFadden Act, 12 U.S.C. § 36 or state law. The Commissioner's objections to First & Ocean's Applications incorporate by reference the arguments set forth in the amicus brief to the Texarkana case. In the

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of the term "only" in new subsection 30(c) (after May 31, 1997, the relocating bank may retain branches in its former state "only to the extent authorized" in section 36(e)(2)). The use of this term signifies a limitation, not a new grant of power. This view also ignores the legislative history and contemporaneous context.

Moreover, even if the court had been reviewing an OCC decision from before the Riegle-Neal Act's amendments to sections 30 and 36, or if the post-Riegle-Neal statutes could be characterized as ambiguous, the district court clearly erred in not deferring to the OCC. See Smiley v. Citibank (South Dakota), N.A., No. 95-860, slip op. at 3, __ U.S. __ (June 3, 1996) ("The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of the rule of deference with respect to his deliberative conclusions as to the meaning of these laws."), quoting NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co., 513 U.S. __, 130 L.Ed.2d 740, 747 (1995). See generally Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

following discussion, we address the issues raised directly or by reference in the Commissioner's December 17, 1996 objection letter.

Generally, the position asserted is that, contrary to the OCC's interpretation of the statutes, there is no authority for a national bank to keep its existing branches when it relocates its main office across a state line under section 30.[17] The arguments for this position can be summarized in the following three points: First, there is no authority to retain existing branches under section 30 because national banks' branches are governed exclusively by section 36 (the McFadden Act), and the proposed retention of Massachusetts branches is not expressly permitted by the McFadden Act. Second, Congress' action with respect to branch retention under section 30 in the Riegle-Neal Act permits branch retention only in transactions in which the branches would be in conformance with the McFadden Act and state law. Third, any broader authority for branch retention in an interstate main office relocation would violate the Riegle-Neal Act because it would permit national banks to have interstate branches by a method other than the two methods provided in the Riegle-Neal Act. The new interstate branching provisions created in the Riegle-Neal Act are intended to be the exclusive means to have a branch in a new state, and so section 30 cannot be an alternate way of having interstate branches. These issues are similar to those raised over a year ago by some state banking commissioners concerning other relocation applications. See, e.g., OCC Bank Midwest Decision (Part II-D) (Kansas Bank Commissioner); OCC Commercial National Bank Decision (Texas Bank Commissioner). We will address these points in turn.

(i) Even before the Riegle-Neal Act, section 36 did not govern all aspects of national bank branches and, in particular, did not limit the retention of existing branches after a main office relocation.

The first argument contrary to the OCC's interpretation of sections 30 and 36 is that section 36 is the exclusive source of branching authority for national banks and that there is no authority to retain existing branches under section 30, unless the branches would have been permitted as branches under section 36. But these arguments that section 36 should apply to, and limit, branch retention in a main office relocation are presented as those arguments would have been presented in the past, as if Congress did not address and settle this question in 1994. Today, after the Riegle-Neal Act, there are more current and more probative manifestations of congressional intent: the amendments to the sections, the legislative history, and congressional action after the OCC's interpretation. The Commissioner's objections to the First & Ocean Applications are premised upon disagreements with the OCC's interpretation, based on arguments that could have been raised against that interpretation in early 1994. But it was the OCC's 1994 interpretation of sections 30 and 36 that Congress had before it when it amended those sections in the Riegle-Neal Act.

Even though these pre-Riegle-Neal arguments about the meaning of sections 30 and 36 have been overtaken by later developments, they are the main focus of the Commissioner and the

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[17] It is assumed that the New Hampshire Commissioner contends there is no authority to retain existing branches in a main office relocation under section 30 in general. Our discussion in this section addresses this objection.

Ghiglieri court. Accordingly, we address them, particularly to place the Riegle-Neal amendments in context and to show again that the OCC's pre-Riegle-Neal statutory interpretation (summarized at pages 13-15 above) was reasonable.

It is asserted that allowing a bank to keep existing branches in its original state when it relocates its main office violates the limitations on branching set forth in the McFadden Act, 12 U.S.C. § 36. Accordingly, it is argued that section 30 was never intended to provide the means for national banks to branch, and so it cannot be used to result in an interstate branch network. It is noted that section 30 does not expressly address branch retention and that section 36 addresses branch retention in other circumstances (i.e., grandfathered branches, conversions, and consolidations), but not in main office relocations. (This was true of sections 30 and 36 before the Riegle-Neal Act, but now, *pace* the Ghiglieri court, sections 30(c) and 36(e)(2) do expressly address branch retention in an interstate main office relocation.) It is argued that when it enacted the McFadden Act in 1927, Congress made it the exclusive authority by which national banks could establish branches thereafter, and that it provided for establishing branches only within their home states. Moreover, in section 36 Congress made national banks' authority to establish branches depend upon state law permitting branches for state banks. Prior to the McFadden Act, in 1924 the Supreme Court held that national banks did not have an implied general power to branch, see First National Bank in St. Louis v. Missouri, 263 U.S. 640 (1924), and so national banks could establish branches only under a specific statutory authorization. Thus, as the argument goes, unless a branch is authorized under the McFadden Act, it is not permissible for a national bank.

This argument, however, mischaracterizes the OCC's position. The OCC does not claim that section 30 is an authority for national banks to establish branches. Rather, the issue in the OCC's section 30 decisions is whether pre-existing, already lawfully established branches must be treated as if they were divested when the main office relocates, and the ability of the bank to have branches at those locations tested, as if the bank had never been located there before. The branches themselves were each established (at the earlier time when they were established) under the applicable provisions of the McFadden Act or other law. Then, later when the bank applies to relocate its main office, the question arises whether the bank may keep its existing branches or, as part of relocating its main office, it must give up its existing branches and have the relocated bank re-establish them anew. In the analysis in the relocation decisions, we concluded that the existing branches did not have to be effectively divested and reestablished, but that any subsequent new branches, including a branch at the former location of the main office, would have to be established under section 36 by the relocated bank. See, e.g., OCC First Fidelity/New Jersey Decision (Part II-B-1); OCC Bank Midwest Decision (Part II-A-2). Since this is an issue of the authority to retain existing lawfully established branches, not the authority to establish new branches, the fact that the McFadden Act might once have been the exclusive means to establish new branches (even assuming that proposition to be true) and the holding in First National Bank in St. Louis that national banks had no implied general power to establish branches are simply not germane. And, of course, Congress' action in amending sections 30 and 36 confirmed the OCC's earlier interpretation.

Indeed, the mischaracterization obscures the real issue and presents the question backwards. The relocating bank already has its existing branches; thus, the proper question is

whether there is any legal requirement to divest them when the main office relocates. Or, viewed from a practical perspective, is the bank penalized with a divestiture requirement and its customers deprived of access to their regular banking facilities as a consequence of the bank relocating its main office as authorized under section 30? An attempt is made to turn the question into whether there is any authority for the relocating bank to establish branches under section 36 at the existing branch locations. This presupposes that, in a main office relocation, an additional, separate grant of authority to continue existing operations at branches is needed, and in the absence of such authority, the branches must be re-evaluated as new branches under section 36. No support is offered for the unusual proposition that when a national bank does one thing under a statutory authority, its existing other operations and powers must be affirmatively preserved in the statute or they are lost. In fact, if such a theory were applied consistently, it would mean that in every main office relocation (including those in which the location of the branches was not an issue), all existing branches would be considered divested and the bank would have to apply to re-establish them under section 36(c). In many years of administering main office relocations under section 30, the OCC has not required new branch applications for existing branches.[18]

Moreover, the assertion that the McFadden Act is the exclusive source of branch authority for national banks is simply incorrect. Before the Riegle-Neal Act, courts recognized that other statutes, in addition to the McFadden Act, can contain additional branching authority in special circumstances. See Colorado State Banking Board v. Resolution Trust Corporation, 926 F.2d at 946-47 (branching provisions of section 1823(k) for emergency thrift acquisitions separate and independent of McFadden Act); Arkansas State Bank Commissioner v. Resolution Trust Corporation, 911 F.2d at 173-74 (same); State of Texas v. National Bank of Commerce, 290 F.2d at 233 (banking offices on military facilities under section 90 independent of section 36 and state law). See also 12 U.S.C. § 1823(f)(4)(B) (branches in assisted interstate bank acquisitions). Before the Riegle-Neal Act, the McFadden Act did not specifically prohibit other sources of branching. This leaves open the possibility that branching may be authorized under other statutes. The OCC concluded section 30 was such an authority, but only to the extent of keeping existing branches in a main office relocation, not establishing new ones. In the Riegle-Neal Act, Congress added an exclusivity provision to the McFadden Act (new subsection 12 U.S.C. § 36(e)(2)) that will, when it is effective, end the authority to retain branches in the state from which the main office is relocating, unless permitted under the provisions of section 36(e)(2). But until that date (May 31, 1997), the branch retention authority of section 30 continues without limitation.

In addition, the argument that such a relocation of the main office and retention of existing branches "violates the McFadden Act" relies on a conjunctive reading of sections 30 and 36 -- i.e., the belief that section 36 limits section 30. This position ignores the precedent of the specific holdings in Ramapo Bank, Traverse City State Bank, and other cases discussed above that section 30 is independent and separate from section 36. Indeed, Ghiglieri and Sun World are the only courts that have followed Marion National Bank. But, subsequent to Ghiglieri, in Bank of Western Oklahoma, another district court again followed Ramapo Bank and the other cases,

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[18] If the relocating bank proposes to establish a new branch at the former location of its main office, the OCC does require a separate application for that new branch. See 12 C.F.R. § 5.40(d)(4). But this requirement applies only to the new branch at the former main office location; it does not apply to retaining existing branches.

rejecting Marion National Bank and the supposed conjunctive reading of sections 30 and 36. See discussion at p. 11 above. It relies solely on Marion National Bank. But the reliance on Marion National Bank is especially misplaced today, after the Riegle-Neal Act. The old disagreement in the case law, whether section 30 is independent or must be read in conjunction with section 36, has been settled by Congress. Section 30 and section 36 are indeed conjunctive today because Congress changed them in the Riegle-Neal Act to make it so by adding the new subsections 12 U.S.C. §§ 30(c) and 36(e)(2), as discussed above. Congress limited branch retention under section 30 by reference to section 36 in a very specific way for certain existing branches in an interstate relocation, left other branch retention independent, but made the new limit apply only to transactions occurring after May 31, 1997. Since Congress has acted on the question, it is no longer open for the courts to rely on Marion National Bank to read other limits from section 36 into section 30.

The McFadden Act argument asserted also relies on the doctrine of "competitive equality" -- i.e., the principle that in general in section 36(c) Congress intended to insure competitive equality between state banks and national banks with respect to branches. See First National Bank in Plant City v. Dickinson, 396 U.S. 122, 133-34 (1969); First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 261 (1966). It is suggested that it would violate the doctrine of competitive equality for a national bank to have a configuration of offices as a result of a main office relocation if a state bank could not have a similar configuration. The same argument was made in Ramapo Bank. While Ramapo Bank did not involve the retention of existing branches, it did involve applications by a national bank that would give it a configuration of offices that a state bank could not have. The court strongly rejected the competitive equality argument in the context of section 30. Section 30 is a separate statute that by its terms and history has no reference to state law or "competitive equality" with state banks for matters within its scope. 425 F.2d at 345 - 46. "Competitive equality" is a consideration in construing aspects of section 36(c). Thus, it and other doctrines in branching cases are inapposite in determining the applicability of section 30. 425 F.2d at 345. In essence, reliance on a "competitive equality" rationale begs the question. The question is whether section 30 or section 36 applies (i.e., does section 30 authorize the retention of branches or must they be subjected to section 36(c)). Competitive equality is a section 36 doctrine, and its use presupposes that section 36(c), rather than section 30, is applicable. But that is precisely the point at issue.

Moreover, even as a section 36(c) matter, the so-called "competitive equality" doctrine is not all encompassing. First, as a general matter, while the McFadden Act makes national banks' branching powers generally similar to state banks, it does not make them identical. It does not simply state that national banks may branch to the same extent as state banks. It incorporates state law and makes it applicable to national banks, but it -- as a matter of federal law -- also determines what state law is incorporated and in what manner. And more generally, definitional questions under section 36 (such as "branch," "state bank" or "situated") are determined as a matter of federal law. See, e.g., First National Bank of Plant City v. Dickinson, 396 U.S. 122, 133 - 34 (1969) ("branch"); Department of Banking & Consumer Finance v. Clarke, 809 F.2d 266, 269 - 70 & n.1 (5th Cir.), cert. denied, 483 U.S. 1010 (1987) ("state bank"); Independent Bankers Association of New York v. Marine Midland Bank, 757 F.2d 453, 459 (2d Cir. 1985) ("establish and operate" and "branch"); Seattle Trust & Savings Bank v. Bank of California, N.A., 492 F.2d 48, 51 (9th Cir.), cert. denied, 419 U.S. 844 (1974) ("situated"). This complex

relationship between federal law and state law in the McFadden Act sometimes means national banks have different branching powers than the state permits its state banks.

Second, in particular, the competitive equality doctrine had no bearing on interstate branches before the Riegle-Neal Act. Section 36(c) addresses and authorizes only the establishment of new branches by a national bank within the state in which it is situated, and incorporates the state's law for branching by its own state banks. Since it addresses only branching within the state, it does not include any state law that might permit its state banks to have branches in another state, or forbid them from having branches in another state. Similarly, it does not include state laws permitting banks from other states to establish in the state, or prohibiting them from doing so. Unlike the former Douglas Amendment to the Bank Holding Company Act, the McFadden Act (before the Riegle-Neal Act) contains no trace of Congress' permitting the states to govern interstate operations. Thus, under section 36(c), the only state law relevant for a national bank is the state's branching law for branching within that state by that state's banks. Since the only state law referred to in section 36(c) is the law for in-state branching, "competitive equality" cannot be an issue for interstate branches.[19]

Thus, careful consideration of all relevant factors reinforces the OCC's original interpretation of sections 30 and 36 before the Riegle-Neal Act. When a national bank relocates its main office, the bank is not required to divest its existing branches. The existing branches continue without re-evaluation under section 36. Section 30, including the retention of existing branches, is independent of section 36.

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[19] Indeed, in practice before the Riegle-Neal Act, there was never "competitive equality" between state banks and national banks with respect to interstate branches. States could permit state banks to have interstate branches, and state nonmember banks would be authorized to establish them. But national banks could not have taken advantage of that authority because section 36(c) permits national banks to establish new branches only within the state where the bank is situated. Before the Riegle-Neal Act, at least seven states had laws permitting interstate branching. See Interstate Banking, Banking Policy Report (volume 13, No. 3) at 12 (February 7, 1994) (survey of state laws on interstate banking and interstate branching). Here, if New Hampshire and Massachusetts had adopted such laws, state banks could have established interstate branches between those states. Thus, the McFadden Act, before the Riegle-Neal Act, did not contemplate "competitive equality" in interstate branching. While interstate branch retention under section 30 may provide an advantage to some national banks, the states also had, and continue to have until May 31, 1997, the power to grant far greater interstate branching rights to their own state banks that national banks could not easily match. After May 31, 1997, because of the Riegle-Neal Act's exclusive interstate branching provisions for both state banks and national banks (12 U.S.C. §§ 36(e) & 1828(d)(3), discussed below), the authority to enter new states with interstate branches will be the same for national banks and state banks.

(ii) Congressional action on sections 30 and 36 in the Riegle-Neal Act clearly shows that existing branches are retained in a main office relocation, and Congress acted to change that power for transactions after May 31, 1997.

Second, there is a disagreement with the OCC's interpretation of the significance of Congress' addition of sections 30(c) and 36(e)(2) in the Riegle-Neal Act. As discussed above, the OCC's view is that these provisions quite plainly impose a new limitation on a national bank's power to keep branches in its original state under section 30 when it relocates its main office from one state to another, and make the new limitation apply to transactions occurring after May 31, 1997. With the new limitation, branches in the original state may be retained (1) if the bank could establish or acquire a branch in the original state under section 36 or other specified sections if the bank had no branches in that state, or (2) if the bank could establish or acquire a branch in the original state if the branch had resulted from a Riegle-Neal interstate merger or resulted from an assisted transaction. This express limitation on branch retention following an interstate main office relocation clearly reflects Congress' understanding that national banks could generally retain their existing branches after they relocate their main office. The fact of imposing a limitation presupposes the branch retention authority pre-existed. If such branch retention were already subject to limitations based on section 36, as the Ghiglieri court asserts, there would be no need to enact a new subsection adding a limitation based on section 36. The imposition of the limitation makes sense only if banks had the power before and Congress now wanted to limit it to conform it to the new Riegle-Neal framework.

Contrary to the OCC's interpretation, it is argued that, before the Riegle-Neal Act, a national bank relocating its main office from one state to another can retain branches in the first state only if the branches are authorized under section 36 and state law. The Riegle-Neal Act did not change this. The provisions in sections 30(c) and 36(e)(2) merely continue that existing limitation on branch retention and add a reference to the wider range of such state-permitted branching available under the Riegle-Neal Act. According to this contrary reading, there is no branch retention authority under section 30, and the congressional action on sections 30 and 36 in the Riegle-Neal Act is not indicative of congressional intention regarding branch retention under section 30.

However, this contrary reading of sections 30(c) and 36(e)(2) and the legislative history has the effect of making the sections mostly pointless. Under this theory, before the Riegle-Neal Act, the only instances in which branches could be kept in a main office relocation are those in which the bank would be authorized to maintain the branches under the McFadden Act (section 36) and state law, and after the Riegle-Neal Act, more interstate branches would be authorized under section 36, as the Riegle-Neal Act added the new subsections 36(d) and 36(g). Under this contrary theory then, other than the few specialized statutes that continue to be included in section 36(e), generally branches always could be retained only when permitted under section 36; there is no additional branch retention authority under section 30. The provision addressing retention of branches that was added as part of the Riegle-Neal Act's provisions on exclusive authority for additional branches includes "this section" (*i.e.*, section 36) as a continuing source of authority for retaining branches. Thus, under this alternative theory, before sections 30(c) and 36(e)(2) were added, section 36 was the only general source of authority to retain branches in a relocation, and afterwards, section 36 continues to be the only

general source of authority to retain branches in a relocation (other than the other specific statutes also included). Thus, this theory would render sections 30(c) and 36(e)(2) redundant: everything that was properly permitted before sections 30(c) and 36(e)(2) were added continues to be permitted after; these sections do not change or restrict any branching authority national banks had before. This theory is clearly inconsistent with the statutory language and purpose of sections 30(c) and 36(e) to be limiting authority for branches to what is included in the new provisions. It also ignores the clear legislative history that the scope of branch retention under section 30 in interstate relocations will change on June 1, 1997.[20]

Moreover, the notion of the proper extent of permitted branch retention is inconsistent even with section 36. Under this alternative theory, a national bank relocating its main office from state A into state B may retain existing branches in state A only if it is permitted by section 36, which is equated with being permitted by state A -- i.e., if state A permits banks from state B to establish branches in state A. But under section 36 (before the Riegle-Neal Act added section 36(g)), a national bank from state B could not establish a branch in state A under section 36(c) (unless it already had other branches there), even if state A expressly permitted it. Thus, except for grandfathered branches,[21] such a construction of permissible branch retention in an interstate main office relocation leads to a logical vicious circle: interstate branch retention is permitted when the interstate branch would be authorized by section 36(c), but section 36(c) does not authorize interstate branches.

In contrast to this position, the OCC's construction of sections 30(c) and 36(e)(2) -- i.e., that their purpose is to limit branch retention under section 30 and thereby change a power that national banks had before -- gives meaning and effect to the section and is a much simpler and more persuasive reading of this congressional action.

Similarly, the OCC's position is that the legislative history for these sections (quoted above at page 17) shows that Congress expected interstate relocations with branch retention to

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[20] In this interpretation of sections 30(c) and 36(e)(2), the only change from prior law apparently would be the addition of a new power, after May 31, 1997, to retain branches in the original state in an interstate main office relocation if the bank could have engaged in a Riegle-Neal interstate merger under 12 U.S.C. § 1831u between the two states involved. If the only change Congress was making to branch retention in interstate main office relocations was adding this new power, the statutory language used -- replete with terms and connotations of limitation -- is puzzling. In the OCC's interpretation of these sections, the reference to the Riegle-Neal Act merger provision is not the grant of a new branch retention power where none existed before, but the preservation of prior authority, when the new limitation begins to apply, if the specified condition of Riegle-Neal merger capability exists.

[21] Indeed, consideration of branches that are grandfathered under the McFadden Act shows that the theory that branch retention in a relocation is permitted only when the branches would be authorized under the McFadden Act is also internally inconsistent. Under that theory, branches may be retained only when they would be permitted under the McFadden Act (which the Commissioner maintains means being permitted by state law). But, under the McFadden Act, grandfathered branches -- those in existence on February 25, 1927 -- are retained by national banks without any reference to state law. See 12 U.S.C. §§ 36(a), 36(b)(1)(B) & 36(b)(2)(B). Thus, even under the erroneous theory that section 36 applied to the retention of existing branches in a main office relocation, grandfathered branches could be retained solely under federal law, even if state law did not permit the branches. The treatment of grandfathered branches demonstrates that it cannot be argued that retention of existing branches is governed by the McFadden Act and that it depends only on state law.

continue until June 1, 1997. In the Conference Report, Congress explicitly acknowledged the OCC's use of section 30 to approve several transactions in which a bank moved its main office from one state into another while retaining branches in the state left by the main office. The Report then says that the Riegle-Neal provision amends section 30 so that after June 1, 1997, "a national bank relocating its main office to another state may maintain branches in the first state only if those branches could have been established by a bank with its home state in the new State." See H.R. Conf. Rep. No. 651, supra at 57. This clearly endorses the branch retention under section 30 that had occurred and was expected to continue until June 1, 1997. It also explains how branch retention will change on June 1, 1997.

A contrary reading attempts to avoid this legislative history and make a claim that the legislative history should be read more narrowly by ignoring the first (and longer) paragraph in the Conference Report and dwelling only on the second, shorter paragraph. Objectors to the OCC's interpretation assert that the language in the second paragraph referring to "appropriate State law and authority" means that the OCC is to defer to state laws that would bar relocation transactions, i.e., that Congress concurred with the retention of branches in an interstate main office relocation only when the retention of branches was in conformance with the McFadden Act and state law. In this regard, it has been noted that the two OCC decisions prior to the Riegle-Neal Act involved banks that had grandfathered branches (i.e., pre-1927 branches that have special status under the McFadden Act) and it is then asserted that Congress' concurrence in the Conference Report is limited to such branches. However, in the two OCC decisions, branch retention under section 30 was clearly presented as the primary argument, and the argument based upon grandfathered branches was an alternative, secondary argument. See OCC First Fidelity/New Jersey Decision (Part II-B-1 (branch retention under section 30) & Part II-B-2 (grandfathered branches)); OCC NationsBank/Maryland National Decision (same). Without some express indication in the Conference Report that Congress was referring only to the secondary argument in its concurrence, we must assume Congress meant the entire analysis offered, and especially the primary argument.[22]

Moreover, as explained in the OCC Bank Midwest Decision (at pages 58-61), we believe the language in the Conference Report referring to "appropriate state law and authority" is best understood as a reference to the manner in which the OCC's prior interstate decisions had addressed state law. In those decisions (the OCC First Fidelity/New Jersey Decision and the OCC NationsBank/Maryland National Decision), the OCC had determined that existing branches were retained in a main office relocation under section 30, without regard to section 36 and section 36's incorporation of state law. The OCC also had determined that section 30 preempted

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[22] The argument that the reference in the second paragraph to the "OCC procedures in permitting relocation across state lines" and the statement that the conferees "expect the OCC to continue to follow those procedures" mean that all subsequent applications approved must be virtual carbon copies of the first two. In particular, it notes that the first two applications involved transactions in which, after the interstate relocation, the interstate relocated bank then merged with another bank in the state into which the main office had relocated. Following this theory, it could be asserted that First & Ocean's proposal does not involve a subsequent merger and so does not comport with OCC's pre-Riegle-Neal procedures and so is not within the Conference Report's endorsement of the OCC's permitting interstate relocations. There is no basis for this suggestion. The critical feature of the first two transactions was the relocation application in them (which included the retention of existing branches in the original state, thus making an interstate bank). The Relocation Application here is similar.

conflicting state law in this context. Then, in the subsequent applications to establish a branch at the former main office location and to merge and retain branches, we had interpreted those provisions of federal law that do incorporate aspects of state law and determined how those federal laws applied each state's law in various steps in the transactions. The OCC Bank Midwest Decision (at page 60) summarizes the positions taken by the OCC in prior decisions on the application of appropriate state law to each step of the transactions involved in the applications. On the precise issue of whether contrary state law would bar branch retention under section 30, the two pre-Riegle-Neal decisions set forth the OCC's view that section 30 operated independently of state law, albeit in a brief form since the issue was not squarely presented in the two cases.[23] A brief phrase in legislative history referring to the OCC's procedures in applying state law in prior applications is better understood as a reference to how the OCC actually approached state law in the prior decisions than an indication of congressional intent to create a new doctrine that state laws were to apply to national banks in a new way in this area.

Finally, in addition to the detailed statutory and legislative history factors surveyed above, one fundamental fact overarches all considerations in determining the meaning of the congressional action in 1994. The OCC's position on sections 30 and 36 had been clearly set out in decisions in early 1994. These decisions and the OCC position were known to Congress and were a part of its deliberations in adopting the Riegle-Neal Act. If Congress had so fundamentally disagreed with the OCC's views, then surely a much greater change in statutory language and clearer statements in legislative history disagreeing with the OCC would be expected.

(iii) Congress intended existing limited interstate branching authority to continue during a transition period. The new Riegle-Neal interstate framework is not exclusive until June 1, 1997.

Finally, the objections to approving First & Ocean's Applications imply by their reference to the Texarkana case that to do so would violate the Riegle-Neal Act, circumventing the provisions governing interstate transactions under that Act. In the Texarkana case it was noted that in the Riegle-Neal Act Congress permitted the states to "opt-in" to or "opt-out" of the interstate merger authority created in the Act and permitted the states to determine whether to "opt-in" for de novo interstate branching. The Commissioner asserts that it is illegal for First & Ocean to have branches in Massachusetts through a main office relocation. This mistaken belief stems from two sources: (1) a confusion about the exclusiveness of the Riegle-Neal framework and (2) a faulty premise that Congress empowered the states to determine whether to permit all forms of interstate branching, not only interstate branches under the two new Riegle-Neal authorities.

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[23] See OCC NationsBank/Maryland National Decision (notes 43 & 44)(Maryland law); OCC First Fidelity/New Jersey Decision (note 41) (Pennsylvania law) & (note 44)(New Jersey law). See also McEnteer, 644 F.Supp. at 293-94 (section 30 preempts Pennsylvania state bank holding company law; state law also invalid under Commerce Clause); OCC Bank of New Jersey Decision (same); OCC Mark Twain Decision (section 30 preempts Kansas state bank holding company law; state law also invalid under Commerce Clause).

In Ghiglieri it was argued that the Riegle-Neal Act is intended to be the exclusive means to branch interstate and that, if banks could use interstate main office relocations under section 30, then the authority permitted to the states to decide whether to participate in the Riegle-Neal Act's interstate branching authority would be undercut. However, the provision in the legislative history addressing the Riegle-Neal Act's exclusivity clearly refers to the fact that the Riegle-Neal Act's authorities will be exclusive after May 31, 1997:

> The Conferees adopted provisions to assure that the comprehensive framework for interstate branching established by Title I will, when the provisions take effect, be the exclusive means for national and State banks to enter new States with interstate branches.
>
> Paragraphs (2) and (3) of section 102(b) amend the National Bank Act and the Federal Deposit Insurance Act, respectively, to state that when the interstate merger and branching provisions take effect, initial interstate entry into a host State may, with exceptions for certain emergency situations, occur only in accordance with this legislation. These provisions will assure that the conditions and safeguards which accompany initial interstate branching will apply to the establishment of interstate branching networks at the time those provisions take effect.

H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 56-57 (1994) (emphasis added). The provisions referred to are the provisions titled, "Exclusive Authority for Additional Branches," new sections 36(e) and 30(c) (for national banks) and new section 1828(d)(3) (for state nonmember banks). These are the provisions that declare that a bank may not acquire, establish, or operate a branch in a new state except under the specific provisions listed. As discussed above, section 36(e)(2) is the provision that limits a national bank's power to keep its existing branches after an interstate main office relocation. But these "exclusive authority" limitations begin to apply only on June 1, 1997. Thus, during the time until then, Congress clearly did not intend the Riegle-Neal Act's two new interstate branching authorities to be exclusive.

Underlying the objection to First & Ocean's Applications is the general theme that it is inconsistent with the interstate branching framework created in the Riegle-Neal Act for banks to be able to have interstate branches by other methods, such as a section 30 relocation, and that therefore Congress could not have intended other methods to be permitted. As we discussed earlier, in the Riegle-Neal Act Congress authorized interstate branching by interstate merger transactions and by de novo interstate branches. Each of these authorities provides means by which the states can determine whether to participate in them or not. However, this power granted to the states applies only to the two new Riegle-Neal interstate authorities. Separately, in provisions that do not grant any additional power to the states, Congress also enacted other provisions that have the effect of making the two Riegle-Neal methods the exclusive means for national and state banks to enter new states with interstate branches. See 12 U.S.C. §§ 36(e) (national banks) & 1828(d)(3) (state nonmember banks). But, these exclusivity provisions do not begin to limit other interstate branches until June 1, 1997. On the face of it, this clearly seems designed to provide that until then, any such other methods of interstate branching as may exist will continue in force alongside the two new Riegle-Neal methods. Then, after June 1, 1997,

Congress terminates the other authorities, leaving the two Riegle-Neal Act authorities (and the other authorities listed in sections 36(e) and 1828(d)(3)) as exclusive.

It is not unreasonable for Congress to provide just such a transition period when it adopts new comprehensive legislation replacing whatever patchwork of existing practices was present before. Here, Congress delayed the automatic federal authorization for interstate mergers for just over two and a half years until June 1, 1997. Similarly, Congress allowed other interstate branching authority (for both national banks and state banks) to continue during the same two and a half year transition period. Just as Congress did not impose interstate branching immediately upon Riegle-Neal's enactment, so also it did not make the new Riegle-Neal framework exclusive immediately upon enactment.

Moreover, state banks also enjoy the benefits of this transition period. For example, before the Riegle-Neal Act, some states had statutes allowing limited forms of interstate branching, such as allowing branching only among adjacent states or only for state savings banks or for state banks.[24] Such statutes would not qualify as opt-in statutes for Riegle-Neal Act purposes, since they are limited. But they are not rendered immediately invalid under the Riegle-Neal Act. State banks in two such states could have interstate branches under these laws. It is only on June 1, 1997, when the exclusivity provision of section 1828(d)(3) begins to limit other interstate branches, that a state bank could no longer acquire or establish an interstate branch under these limited state laws. Thus, just as the section 30 authority continues in force for national banks until June 1, 1997, so these limited state interstate branching laws continue in force for state banks until then. The OCC believes Congress intended to treat national banks and state banks consistently: the impact of the Riegle-Neal Act on limited interstate branching by national banks under section 30 is treated the same way as limited interstate branching by state banks under state law.

Indeed, these provisions bear the hallmarks of a classic legislative compromise. Some may have argued that section 30 never contained branch retention authority or that, if it did, it should end immediately upon the enactment of Riegle-Neal. Similarly, some may have argued that limited state interstate branching statutes should end immediately upon the enactment of Riegle-Neal, so that the Riegle-Neal framework would be exclusive from its inception. On the other hand, others may have argued that these other sources of interstate branching (retaining existing branches under section 30 for national banks, limited state interstate branching laws for state banks) should be allowed to continue indefinitely as a parallel authority to the Riegle-Neal framework. Congress crafted a compromise: the parallel authorities will be ended and the Riegle-

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[24] We are aware of at least two instances in which state banks used such limited state laws to form an interstate state bank. Before their Riegle-Neal implementing legislation, Connecticut, New York, and Rhode Island had such limited interstate branching statutes. In the multi-step transactions involved in the OCC Shawmut Decision (Connecticut and Rhode Island) and the OCC Chase Decision (New York and Connecticut), the applicants used an intermediate step in which an interstate state bank would be formed with state approval (in one instance with its main office in Connecticut and branches in Rhode Island, and in the other instance with its main office in New York and branches in Connecticut). The applicants used interstate state banks because national banks could not use the interstate branching authority under the state laws to form an interstate bank. Once the interstate state bank had been created, then it could convert into, or merge into, a national bank under 12 U.S.C. §§ 35, 36(b) & 215a.

Neal framework made exclusive, but only on June 1, 1997, when the Riegle-Neal framework is fully implemented.

3. Conclusion.

Accordingly, under section 30 a national bank may relocate its main office to any location within 30 miles, including locations across a state line. And, under section 30 and the transition provisions of the Riegle-Neal Act, after the interstate relocation of its main office, a national bank may continue to operate its existing branches in its original state. Thus, in the present Relocation Application, First & Ocean is legally authorized to relocate its main office from Newburyport, Massachusetts to Seabrook, New Hampshire, and to continue to operate its existing branches in Massachusetts.

B. First & Ocean may Establish a New Branch at the Site of its Former Main Office in Newburyport, Massachusetts, under 12 U.S.C. § 36(c).

After its main office relocation, First & Ocean will be an interstate national bank. It will have its main office in Seabrook, New Hampshire, and its existing branches in Massachusetts. First & Ocean has applied then to establish a new branch at the site of its former main office in Newburyport, under 12 U.S.C. § 36(c), following the main office relocation. The Branch Application is a separate transaction from the main office relocation and retention of existing branches. After the relocation, if no other application were made, First & Ocean would have its main office in Seabrook, New Hampshire and only its existing branches in Massachusetts, but not an office at the former main office location in Newburyport. To have a branch at that location, First & Ocean must apply to open a new branch there. Since it has continued its existing branches in Massachusetts in the relocation, this Branch Application is an application by an interstate national bank for an additional branch in one of the states in which it already has branches. This question has been considered before by the OCC and the courts. Thus, the present Branch Application does not raise new issues, but only the application of established precedent for applying section 36(c) to interstate national banks.

The McFadden Act authorizes a national bank to establish new branches "at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question ... ." 12 U.S.C. § 36(c)(2). The interpretation of the statute adopted since at least 1974 has been that, for the purpose of establishing additional branches under section 36(c), an interstate national bank is "situated" in each state in which it has its main office or a branch: The bank can establish other branches within each state to the same extent as other national banks situated in that state, i.e., to the same extent that state allows its state banks to have branches within the state. See Seattle Trust & Savings Bank v. Bank of California, N.A., 492 F.2d 48 (9th Cir.), cert. denied, 419 U.S. 844 (1974). Both before and after the Riegle-Neal Act, the OCC has applied this principle from Seattle Trust in prior decisions involving national banks with operations in more than one state. See, e.g., OCC Bank Midwest Decision (Part II-B); OCC NationsBank/Maryland National Decision (Parts II-B-2 and III); OCC First Fidelity/New Jersey Decision (Parts II-B-2 and III). See also OCC Decisions listed in notes 4 and 5 above.

The Seattle Trust case involved the Bank of California, a national bank with its main office in San Francisco and branches in California. It also had grandfathered branches in Seattle and Tacoma, Washington, and in Portland, Oregon. In 1970, it applied to the OCC for approval to establish a new branch in Seattle. The OCC approved the branch, concluding that the Bank of California was situated in Washington for purposes of section 36(c) because of its grandfathered branches and so could establish other branches in Washington as Washington law allowed Washington banks to do. The Ninth Circuit affirmed this conclusion. The court expressly held that the Bank of California was "situated" in Washington for section 36(c) purposes through its grandfathered branch. Seattle Trust, 492 F.2d at 51.

The OCC has consistently applied this interpretation of "situated" in section 36(c) -- that a bank is situated in the state(s) where it has branches as well as the state of its main office. This statutory language and interpretation continue after the Riegle-Neal Act. Existing branch authority in sections 36(a), 36(b), and 36(c) is not changed in the Riegle-Neal Act. The statutory language and legislative history clearly contemplate that existing authority under these provisions remains in effect. First, the new provision on exclusive authority for additional branches (new subsection 36(e)) is not operational until June 1, 1997. In addition, even after that date, it expressly does not apply in states in which the bank has its main office or already has a branch; and it also expressly includes, as a continuing source of authority, branching authorized "under this section" (i.e., Revised Statutes § 5155, which includes existing subsections 36(a), (b), and (c)). See Riegle-Neal Act § 102(b)(1) (adding new subsection (e) to section 36).[25]

Therefore, after the main office relocation, First & Ocean continues to be situated in Massachusetts (as well as New Hampshire) for section 36(c) purposes by virtue of its existing branches there. And thus, as a matter of federal law under section 36, it can establish additional branches in Massachusetts to the same extent that national banks whose main office is in Massachusetts may establish branches. Massachusetts branching law provides that "a bank may establish and maintain one or more branch offices or depots in any city or town within the commonwealth where . . . the public would benefit by the establishment of additional banking facilities." See M.G.L. c. 167C § 3 (1994). Massachusetts imposes no restriction as to location on the establishment of branches within Massachusetts by Massachusetts banks. Since a Massachusetts state bank could establish a branch at the site of First & Ocean's former main office in Newburyport, a national bank situated in Massachusetts could establish a new branch at that location under 12 U.S.C. § 36(c). Therefore, First & Ocean may establish a new branch at that location under section 36(c).

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[25] Indeed, the section of the Riegle-Neal Act that sets out the new source of interstate branching authority in the new interstate merger transaction provides that interstate banks formed under its provisions ("section 4 4 interstate banks") have a similar rule covering the establishment of additional branches by section 44 interstate banks within each state in which they have existing branches. See Riegle-Neal Act § 102(a) (new section 44(d)(2)). Similarly, the provisions in the Riegle-Neal Act regarding state opt-in to permit interstate branching through de novo branches apply only to the de novo establishment of a bank's first branch in another state (other than the bank's home state) "in which the bank does not maintain a branch." See Riegle-Neal Act § 103(a) (adding new subsection 36(g)). It does not apply to situations where a bank is establishing a new branch in its home state or in one of the states in which it already has a branch. In those situations, existing law under section 36(c) still applies. See Decision on the Applications of Community National Bank (OCC Corporate Decision No. 96-22, April 19, 1996) (Part II-B).

Moreover, another provision added to 12 U.S.C. § 36 in the Riegle-Neal Act further supports First & Ocean's authority to establish the branch at the former location of its main office in Newburyport. Congress added section 36(f) to address the law applicable to interstate branching operations at branches in a host state of an interstate national bank. Among other provisions, section 36(f)(1)(A) provides that "the laws of the host State regarding . . . establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except -- (i) when Federal law preempts the application of such State laws to a national bank . . . ." 12 U.S.C. § 36(f)(1)(A). The provisions of section 36(f) apply to any interstate national bank (i.e., to the branches in a host state of any out-of-state national bank), without regard to the manner in which the national bank became interstate. They apply to First & Ocean even though it did not obtain its out-of-state branches through one of the two new interstate branching authorities adopted in the Riegle-Neal Act. Thus, under this provision, but for the preemption exception, it is clear that, once an out-of-state national bank has branches in a host state, then the subsequent establishment of another branch within the host state is treated like the establishment of intrastate branches within the host state by the host state's state banks. As discussed above, Massachusetts imposes no restriction as to location on the establishment of branches within Massachusetts by Massachusetts banks, and a Massachusetts state bank could establish an intrastate branch at the site of First & Ocean's former main office in Newburyport. Thus, First & Ocean would be able to do likewise under section 36(f). However, since there are federal laws specifically governing in-state branching by national banks (i.e., 12 U.S.C. §§ 36(b), 36(c), 36(g)(2)(B), & 1831u(d)(2)), those laws would preempt this provision under the preemption exception. But, since those laws also incorporate, and make applicable to national banks, state law for in-state branching by state banks, as discussed above, the outcome is generally the same.[26] Thus, with respect to First & Ocean's Branch Application, under the OCC's interpretation of section 36(c), First & Ocean is authorized to establish the branch at the site of its former main office in Newburyport, Massachusetts, under section 36(c). And, if section 36(c) does not apply in this way, then section 36(f)(1) would be applicable, and the branch authorized under section 36(f)(1).

The New Hampshire Bank Commissioner objected to the Branch Application, stating that the establishment of a "new" branch at the location of the former main office is not authorized by section 36(c) and that the establishment of a branch at the former main office was not authorized because "interstate branching by New Hampshire banks is not allowed until June 1, 1997." See Letter from Roland Roberge to Michael Tiscia, dated December 17, 1996. New Hampshire has adopted interstate "opt in" legislation in conformity with the provisions of Riegle-Neal. See New Hampshire Acts of 1995, ch. 304 (effective September 29, 1995). The New Hampshire statute on interstate establishment or acquisition of branches provides that "a New Hampshire bank may establish a branch in any state or may acquire a branch or branches of an out-of-state bank in any state in accordance with the law of such state." N.H.R.S.A. § 384:60 (Michie Cum. Supp. 1995). This provision becomes effective on June 1, 1997.

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[26] In some instances, there may be a difference between the manner in which state law would apply if applied directly in section 36(f)(1)(A) and the manner in which it is incorporated in the other statutes. However, that is not the case here, and so we need not address which statutes would take precedence in such an instance.

The Commissioner's argument, similar to the Ghiglieri court's, appears to be that a New Hampshire state bank is not permitted to establish branches in Massachusetts, and so a national bank in New Hampshire is similarly barred from establishing branches in Massachusetts. We agree that, if First & Ocean did not have its existing branches in Massachusetts, it would not have authority under section 36(c) to establish the new branch in Newburyport, Massachusetts. But, after the relocation, First & Ocean does have its existing branches in Massachusetts. To the extent that the Commissioner is merely restating his objection to the retention of existing branches in the Relocation Application, that issue was addressed above. The Branch Application is a second transaction that occurs after and depends upon the first. Thus, in analyzing the legality of the Branch Application, the Relocation Application is assumed to have occurred.

Once First & Ocean is an interstate bank, with its existing branches in Massachusetts, the position that New Hampshire state branching law is incorporated into section 36(c) with respect to branches in Massachusetts or that Massachusetts law with respect to out-of-state banks' interstate branches in Massachusetts is incorporated into section 36(c) for additional branches in Massachusetts is clearly erroneous. When an interstate national bank is applying to establish an additional branch in one of the states in which it already has branches (a host state), the law is clear that the applicable state branching law incorporated into federal law for the national bank is the host state's statute for the establishment of in-state branches by the host state's own state banks. Seattle Trust established this construction of section 36(c) for interstate national banks. Section 36(f) leads to the same result if section 36(c) is not so applied. The Riegle-Neal Act has the same rule for additional branches in a state by interstate national banks formed under the new interstate provisions of the Riegle-Neal Act. See 12 U.S.C. §§ 36(g)(2)(B) & 1831u(d)(2).[27]

The New Hampshire Bank Commissioner's objection also appears to confuse First & Ocean's application for an additional branch in Massachusetts with an application for a *de novo* interstate branch in Massachusetts under the Riegle-Neal Act, 12 U.S.C. § 36(g). For such transactions under section 36(g), the laws of the host state regarding interstate branching are relevant, but section 36(g) applies only to an out-of-state bank's first branch in a host state (since it applies to the establishment of a branch in a host state "in which the bank does not maintain a branch"). See note 25. However, here after the relocation, First & Ocean has existing branches in Massachusetts, and so Massachusetts is not a state in which the bank does not maintain a branch. Thus, section 36(g) is inapplicable to First & Ocean's establishment of additional branches in Massachusetts. Instead, as discussed above, such additional branches are governed

[27] The Ghiglieri court's analysis of the branch application in that case was similarly flawed. Once the court determined that the bank's existing branches in Arkansas could not be retained under section 30, there was no need to address the establishment of the new branch at the old main office site, since the legal authority for the new branch under section 36(c) depended upon the bank being situated in Arkansas because of its existing branches. If there are no existing branches in Arkansas, the court's additional discussion about the new branch is superfluous. If there are existing branches in Arkansas, then the court's additional discussion that both Texas and Arkansas law apply through section 36(c) to the bank's authority to establish an additional branch in Arkansas, as well as the court's manner of applying Arkansas law, are clearly contrary to the federal statutes, as set out in the text above.

by section 36(c) or section 36(f), both of which incorporate only Massachusetts branching law for branching within Massachusetts by Massachusetts state banks.[28]

C. Conclusion

In conclusion, our legal analysis of these Applications follows our analysis of prior interstate main office relocation decisions and other prior decisions involving interstate national banks. The relocation of First & Ocean's main office from Newburyport, Massachusetts, to Seabrook, New Hampshire, is authorized under 12 U.S.C. § 30. First & Ocean may continue to operate its existing branches in Massachusetts under section 30. First & Ocean may also establish a new branch at the former location of its main office in Massachusetts under 12 U.S.C. § 36(c). The Riegle-Neal Act re-affirmed the federal authority for these transactions. Accordingly, these Applications are legally authorized.

III. ADDITIONAL STATUTORY AND POLICY REVIEWS

The Community Reinvestment Act ("CRA") requires the OCC to take into account the applicant's record of helping to meet the credit needs of its entire community, including low- and moderate-income neighborhoods, when evaluating certain applications. See 12 U.S.C. § 2903. First & Ocean has received an outstanding rating from the OCC with respect to its CRA performance. No public comments regarding CRA performance were received by the OCC relating to these Applications, and the OCC has no other reason to question the bank's performance in complying with the CRA.

The relocation and operation of interstate branches should have no adverse effect on the bank's CRA performance. The bank will continue the same CRA statement, policies, programs, and personnel that it has today. The relocation and operation of interstate branches do not alter the bank's obligation to help meet the credit needs of its community in both states.

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[28] We note that, in fact, Massachusetts has "opted-in" to interstate branching through *de novo* branches for purposes of section 103 of the Riegle-Neal Act (including 12 U.S.C. § 36(g)). Under Massachusetts' opt-in legislation, an out-of-state bank that does not maintain a branch in the commonwealth may, with the approval of the commissioner "establish and maintain a branch de novo in the commonwealth . . .; provided, however, that in each instance the laws of the jurisdiction in which such bank has its principal place of business expressly authorize, under conditions no more restrictive than those imposed by this chapter as so determined by the commissioner, a Massachusetts bank to establish therein a branch de novo . . . ." M.G.L c. 167 § 39C, as added by section 14 (1996). For a general discussion of section 36(g) and national banks' *de novo* interstate branches under the Riegle-Neal Act, see, e.g., Decision on the Application of Patrick Henry National Bank, Bassett, Virginia, to Establish a Branch in Eden, North Carolina (OCC Corporate Decision No. 96-04, January 19, 1996).

IV. CONCLUSION AND APPROVAL

For the reasons set forth above, the Relocation Application and the Branch Application are legally authorized under 12 U.S.C. §§ 30 and 36. The transactions also meet the criteria for approval under other statutory factors. Accordingly, these Applications are hereby approved.

\s\ 02-10-97

Julie L. Williams Date
Chief Counsel

Application Control Numbers: 96-NE-07-047 & 96-NE-05-178