Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #846
December 1998
12 UCS 36J

June 29, 1998

Dear [ ]:

This is in response to your inquiry of May 1, 1998, asking whether nonbranch offices of [ ] (the bank), and its subsidiary, [ ], (the mortgage company), would be considered to be branches if a title insurance agency subsidiary of an affiliated state bank, [ ], (respectively referred to as the title agency subsidiary and the state bank) in its capacity as escrow agent closed loans and disbursed funds to borrowers at those sites.[1] As discussed below, under the facts presented the OCC would not consider these sites to be branches of the bank.

As you explain, both the bank and the mortgage company subsidiary currently use independent third parties for escrow and loan closing services. Funds are transferred by the bank or mortgage company subsidiary by check or electronic transfer to the escrow agent prior to disbursal to the borrower or the borrower's designee. Prior to disbursal the funds are held in the name of the escrow agent. Use of the title agency subsidiary enables the bank to retain the benefits of utilizing a third party for these services.[2] In this regard, you note that because of

[1] As we understand the facts, the bank acquired the title insurance agency when it acquired, through merger, [Bank] in [Month Year]. Because the title insurance subsidiary was not located in a place of under 5,000, and, thus, was not a permissible subsidiary for a national bank under 12 C.F.R. § 5.34 and 12 U.S.C. § 92, the bank was given two years to divest or conform the subsidiary. Consequently, the holding company of the bank is contemplating the transfer of the ownership of the title insurance agency from the bank to an existing insurance agency subsidiary of the state bank. This would permit the holding company to retain the title insurance agency subsidiary in the corporate family.

[2] As you note, the Real Estate Settlement Procedures Act does not permit a lender to require the borrower to use an affiliated title agency or closing agent. After a borrower accepts a loan commitment, the borrower is free to choose any title agency or closing agent that is reasonably acceptable to the lender.

their reliance on third party closing agents, neither the bank or the mortgage company subsidiary have a cadre of closing personnel on which to rely for escrow and closing services. Using personnel from the affiliate would avoid the cost in time and money of training additional personnel and, moreover, because of the availability of more personnel, it permits an expanded number of closings and locations at which closings could be accommodated on a particular day. Further, you note that there is an inherent convenience in having the title insurance entity that is obtaining the first lien letter for a property, and will therefore be familiar with its details, qualifications and limitations, also perform the escrow and closing work for the same property. As you note, fewer procedures and documents need be duplicated and internal communications within the agency are facilitated.

In addition, you note that closing of the loans by bank or mortgage company personnel creates a conflict of interest because commissions payable to bank and mortgage company personnel for originating loans are dependent on the actual closing of those loans. You are concerned that if bank and mortgage company personnel were also engaged in the closing of the loans, this could create otherwise avoidable incentive to not properly apply standards for escrow and closing services.

Title 12 U.S.C. 7.1003(a) provides:

> (a) *General*. For purposes of what constitutes a branch within the meaning of 12 U.S.C. 36(j) and 12 CFR 5.30[3], "money" is deemed to be "lent" only at the place, if any, where the borrower in-person *receives loan proceeds directly from bank funds:*
>
> (1) From the lending bank or its operating subsidiary; or
>
> (2) At a facility that is established by the lending bank or its operating subsidiary.

(Emphasis added.)

The OCC has long recognized that acting as an escrow agent at a loan closing is a line of business that may be provided by a variety of parties -- attorneys, title companies, or other escrow agents.[4] In fact, in the present case, you estimate that about five percent of the title

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[3] Section 36(j) provides the statutory definition of what constitutes a branch and provides, in pertinent part, that it is a bank's place of business at which "money [is] lent]." Section 5.30 incorporates that definition into the OCC's regulations. Section 7.1003 interprets the phrase "money lent" as it is used in those provisions.

[4] See Interpretive Letter No. 368, reprinted in [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538 (July 11, 1986) noting that the "closing agent (an attorney, an escrow company, or an escrow department of a title company or bank) is responsible for coordination among the parties, compliance with all closing instructions

agency subsidiary's business will be in connection with loans made by nonaffiliated lenders. Thus, where the funds that are disbursed to a borrower are held in the name of such an escrow agent and are, in turn, disbursed by that agent to the borrower that does not constitute a transaction between the bank and the borrower and, consequently, no branching issues arise regardless of the location of the closing and disbursal.[5] Moreover, in interpreting section 7.1003(a), the OCC has recognized a variety of reasons that loan funds may be disbursed from funds held by third parties and a variety of mechanisms that are utilized in which funds that are disbursed to borrowers are not at the time of disbursal funds of the bank. In these circumstances, the OCC has recognized that the site of disbursal, when not otherwise a branch of the lending bank, is not considered to be a branch of the lending bank.[6]

Consequently, under 12 U.S.C. § 7.1003(a) and the facts presented, the OCC would not consider the sites that you describe to be branches of the bank.

Sincerely,

/s/

Eric Thompson
Director, Bank Activities and Structure Division

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received from the parties, proper handling of all legal documents and funds involved in consummating the transaction, and, finally, obtaining a title insurance policy for each party to be insured which complies in form and content with the previously established requirements of the insured."

We note, however, that this letter does not purport to express any opinion about the authority of the state bank in Ohio, which is beyond the jurisdiction of the OCC, to provide the services proposed in the manner proposed.

[5] See Interpretive Letter No. 721, reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-036 (March 6, 1996) (affiliate acting as closing agent and disbursing funds held in its own name with respect to loans made by affiliated bank is not considered a branch of the lending bank). See also Interpretive Letters by Christopher Manthey, Senior Attorney, Bank Activities and Structure (December 22, 1994, and August 22, 1995) (unpublished) (checks drawn by a third party escrow agent on his or her own account are the funds of the escrow holder, not the lender; since bank funds are not delivered to the borrower at the closing, the loan is not "made" for branching purposes at that time).

[6] See Decision of the Comptroller of the Currency to Approve Applications By TCF Financial Corp., Minneapolis, Minnesota, To Convert Federal Savings Banks Located in Minnesota, Michigan, Illinois, and Wisconsin And to Establish De Novo Banks in Ohio and Colorado and To Engage in Certain Related Transactions, p.26, n. 41 (OCC Corporate Decision 97-13, February 24, 1997); OCC Interpretive Letter No. 818 by Eric Thompson, Director, Bank Activities and Structure Division (January 12, 1998).