Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

Corporate Decision #99-25
September 1999

DECISION OF THE COMPTROLLER OF THE CURRENCY ON APPLICATIONS BY FOUR NATIONAL BANKS IN OKLAHOMA TO ESTABLISH BRANCHES BASED ON 12 U.S.C. § 36 AND THE BRANCHING AUTHORITY OF SAVINGS AND LOAN ASSOCIATIONS CHARTERED BY THE STATE OF OKLAHOMA

September 2, 1999

I. BACKGROUND

A. Factual background

Four national banks in Oklahoma have filed applications with the Office of the Comptroller of the Currency to establish de novo branch offices in various locations in Oklahoma under 12 U.S.C. § 36(c)(2), 12 C.F.R. § 5.30, and state law as made applicable to national banks by section 36. The four are:

(1) Central National Bank of Poteau, Poteau, Oklahoma ("CNB Poteau"), with assets of about $113 million, which filed an application on June 22, 1999, to establish a branch in Stigler, Oklahoma;

(2) First National Bank of Pryor Creek, Pryor, Oklahoma, ("FNB Pryor Creek"), with assets of about $105 million, which filed an application on July 21, 1999, to establish a branch in Tulsa, Oklahoma;

(3) Oklahoma National Bank of Duncan, Duncan, Oklahoma ("ONB Duncan"), with assets of about $77 million, which filed applications on July 2, 1999, to establish one branch each in Lawton, Oklahoma, and Walters, Oklahoma; and

(4) First National Bank of Edmond, Edmond, Oklahoma ("FNB Edmond"), with assets of about $50 million, which filed an application on June 16, 1999, to establish one branch in Oklahoma City, Oklahoma.

Because of state law limitations on de novo branching by state-chartered commercial banks, the applicants base their authority to branch on state statutory branching law applicable to state savings and loan associations. The applicants state that as of July 1, 1999, state statutory branching law authorizes state savings and loan associations to branch statewide unencumbered by limitations on de novo branching. These limitations, which had been identical to de novo branching limitations applicable to state-chartered commercial banks, expired on that date while state branching limitations applicable to state-chartered commercial banks did not. The applicants also contend that state savings and loan associations in Oklahoma constitute "State banks" as defined in section 36(*l*). Consequently, the applicants contend that because state savings and loan associations in Oklahoma have authority to establish de novo branches statewide, under section 36(c)(2) applicants may rely on branching authority available to state savings and loan associations.[1]

The OCC received one comment letter on the application submitted by CNB Poteau to establish a branch in Stigler and received no comments on the other applications addressed in this Decision Statement.[2]

B. Legal background: Reliance on branching authority of state savings and loan associations

With respect to branching by national banks, 12 U.S.C. § 36(c)(2) provides:

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate 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 by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

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[1] The branching authority relied on by the applicants is the same as that upon which the OCC relied in its Decision Statement of July 28, 1999, approving branch applications filed by InterBank, National Association, Elk City Oklahoma; Bank of Oklahoma, National Association, Tulsa, Oklahoma; First National Bank and Trust Company of Weatherford, Weatherford, Oklahoma; and First Fidelity Bank, National Association, Oklahoma City, Oklahoma. *See* Decision of the Comptroller of the Currency on Applications by Four National Banks in Oklahoma to Establish Branches Based on 12 U.S.C. § 36 and the Branching Authority of Savings and Loan Associations Chartered by the State of Oklahoma (July 28, 1999) ("OCC Oklahoma Decision"). Today's Decision Statement reiterates the analysis set forth in the OCC Oklahoma Decision.

[2] The comment was submitted on behalf of First National Bank, Stigler, Oklahoma, and Farmers State Bank, Quinton, Oklahoma. The protestants assert that the branch proposed by CNB Poteau would constitute an impermissible branch in their market areas. The protest is more fully discussed in Part II.A.4. of this Decision Statement.

Section 36(*l*) further provides that:

> The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, *or other such corporations or institutions carrying on the banking business under the authority of State laws.*[3]

As discussed, Oklahoma places limitations on branching by state-chartered commercial banks. These institutions generally are limited to the establishment of two de novo branches which must be located either within the bank's main office town or within 25 miles of the main office if located in a town that has no state or national bank. Because the proposed branches do not satisfy these requirements,[4] the applicants may not rely on de novo branching authority available to state commercial banks.

Instead, the applicants rely upon precedents permitting national banks to rely on state branching authority available to state savings and loan associations if those associations are "carrying on the banking business under the authority of State laws." If so, they are considered to be "State banks" for purposes of section 36(*l*) and section 36(c) and the OCC may rely on their branching authority to determine the extent of intrastate branching allowed for national banks in the state. OCC decisions permitting national banks to rely on the branching authority of state savings and loan associations have been upheld judicially by two federal courts of appeal and four district courts.[5] In addition, this

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[3] Emphasis added.

[4] *See* Okla. Stat. Ann. tit. 6, § 501.1.A. (West 1999).

[5] *See* Decision of the Comptroller of the Currency on the Application of Deposit Guaranty National Bank of Jackson, Mississippi, to Establish Domestic Branch Offices in Counties Other than in the County in Which Its Principal Office is Located (July 9, 1985) ("OCC Deposit Guaranty Decision"), *rev'd, Department of Banking and Consumer Finance v. Selby*, 617 F. Supp. 556 (S.D. Miss. 1985), *rev'd*, 809 F.2d 266 (5th Cir), *cert. denied*, 483 U.S. 1010 (1987) ("*Deposit Guaranty");* Decision of the Comptroller of theCurrency on the Application of First National Bank and Trust Company, Columbia, Boone County, Missouri, to Establish Branches in Jefferson City, Cole County and Fulton, Callaway County, Missouri (January 26, 1989) ("OCC Missouri Decision"), *aff'd, Independent Bankers Association of America v. Clarke* (W.D. Mo. 1989), *aff'd*, 917 F.2d 1126 (8th Cir. 1990) ("*Missouri Decision")*; Decision of the Comptroller of the Currency on the Applications of the National Bank of Commerce, Memphis, Tennessee and the First National Bank of Livingston, Livingston, Tennessee to Establish Domestic Branch Offices in Counties Other than in the County in Which Their Principal Offices are Located (October 2, 1987) ("OCC Tennessee Decision"), *aff'd, Volunteer State Bank v. National Bank of Commerce*, 684 F.Supp. 964 (M.D. Tenn. 1988) ("*Tennessee Decision*"); Decision of the Comptroller of the Currency on the Applications of Union National Bank of Laredo, Texas, to Establish a Branch in San Antonio, Texas, and Texas Capital Bank Westwood, N.A. to Establish a Branch in Austin, Texas (December 3, 1987) ("OCC Texas Decision") *aff'd, Texas v. Clarke*, 690 F.Supp. 573 (W.D. Tex. 1988) ("*Texas Decision"*); Decision of the Comptroller of the Currency on the Application of Consolidated Bank, N.A., Hialeah, Florida to Establish a Branch in West Palm Beach, Florida (May 11, 1988) ("OCC Florida Decision") *aff'd, Barnett Bank of South Florida, N.A. v. Clarke*, 712 F. Supp. 1549 (S.D. Fla. 1989) ("*Florida Decision"*); Decision of the Comptroller of the Currency on the Application of Indiana National Bank of Indianapolis, Marion County, Indiana, to Establish a Branch in Bloomington, Monroe County, Indiana (March 16, 1990) ("OCC Indiana

authority, known as the *Deposit Guaranty* precedent based on the leading case establishing the precedent, has been relied upon by the OCC in other States where no court challenge resulted.[6] As noted, the OCC also recently relied on this precedent in approving branches for four national banks in Oklahoma.[7]

As a result, the first question that arises is whether the precedents cited above may be relied on in Oklahoma. In other words, as interpreted by the OCC and the courts in *Deposit Guaranty* and the subsequent cases, are state-chartered savings and loan associations in Oklahoma "carrying on the banking business" under state law for purposes of section 36(*l*) and, thus, considered to be state banks for purposes of section 36(c)?

Since the original *Deposit Guaranty* decision in 1985,[8] courts considering the question have uniformly held that a determination of which entities are "State banks" for purposes of section 36(*l*) is a matter of federal law and depends on what functions the entities perform, not on the label given to them under state law.[9] As the court stated in *Deposit Guaranty:*

Decision") *aff'd*, 766 F. Supp 1519 (S.D. Ind. 1990) ("*Indiana Decision*").

[6] *See* Decision of the Comptroller of the Currency on the Application of Hibernia National Bank of New Orleans, Louisiana to Establish Domestic Branches within One Hundred Miles of Its Principal Office, in a Parish other than the Parish in which Its Principal Office is Located (Dec. 3, 1987) ("OCC Louisiana Decision"), *reprinted in* 1988-89 Transfer Binder, Fed. Banking L. Rep. (CCH) ¶ 87,322 ("OCC Louisiana Decision"); Decision of the Comptroller of the Currency on the Application of Associated Citizens Bank, N.A., Marshfield, Wood County, Wisconsin, to Establish a Domestic Branch in Marshfield, Wood County, Wisconsin (March 13, 1989) ("OCC Wisconsin Decision"); Decision of the Comptroller of the Currency on the Application of Peoples National Bank and Trust Company, Ottawa, Kansas, to Establish a Branch Office in Johnson County, Kansas (March, 30, 1989) ("OCC Kansas Decision"); Decision of the Comptroller of the Currency on the Application of First National Bank of Florence, Florence, Lauderdale County, Alabama, to Establish a Branch in Muscle Shoals, Colbert County, Alabama (May 22, 1990) ("OCC Alabama Decision").

[7] *See supra* note 1.

[8] *See supra* note 5.

[9] The Court of Appeals for the Fifth Circuit in *Deposit Guaranty* emphasized the importance of applying a federal definition to assure that states could not act to disadvantage national banks:

> [A] federal definition of "State bank" . . . prevent(s) states from disadvantaging national banks vis-à-vis state-chartered institutions by merely denominating these institutions 'banks' and treating them somewhat differently from state commercial banks, though not so differently as to prevent these institutions from competing with national banks.

Deposit Guaranty at 270. *See also, e.g., Missouri Decision* at 1129-1130 (8th Circuit determines that fact that Missouri savings and loan associations, under state law, cannot call themselves bank is not dispositive of what is a bank for purposes section 36); *Florida Decision* at 1552-1554; *Indiana Decision* at 1522-1527; *Texas Decision* at 576-577.

> We hold that the Comptroller was statutorily mandated to determine whether the Mississippi savings associations . . . were actually "carrying on the banking business." This task could only be accomplished by a targeted functional analysis.[10]

Consequently, it is clear that placing function over form, the term "State bank," for purposes of the federal branching statute, includes state-chartered entities engaged in the banking business, as determined based on a functional analysis of their activities, regardless of how they are designated by state authorities.[11]

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[10] *Deposit Guaranty* at 270. *See also, e.g., Missouri Decision* at 1129 ("We think it is well within the bounds of reason for the Comptroller to conclude that the term 'State banks' should be given a practical, or functional, definition"); *Florida Decision* at 1555; *Texas Decision* at 577.

[11] *See, e.g., Deposit Guaranty* at 270; *Texas Decision* at 577-78 n.8 (stating that "the definition of 'state bank' in no way depends on what state law denominates as a state financial institution").

In adopting this test of function over form in determining what constitutes a "state bank" for purposes of section 36, the courts specifically did not follow earlier cases that had placed form over function in overturning OCC decisions permitting national banks to branch based on the branching authority of state-chartered financial institutions other than commercial banks. These cases are *Mutschler v. Peoples National Bank of Washington*, 607 F.2d 274 (9th Cir. 1979) ("*Mutschler"*) (denying branching authority on the grounds that national banks are not mutual savings banks, do not have the required attributes of mutual savings banks under state law, and that mutual savings banks are a legislative creation distinct from state commercial savings banks), and *State Chartered Banks in Washington v. Peoples National Bank of Washington*, 291 F. Supp. 180 (W.D. Wash. 1966) ("*State-Chartered*") (holding that national banks could not rely on branching authority of state mutual savings banks because national banks do not satisfy all of the provisions of the state law governing mutual savings banks).

The courts in *Deposit Guaranty* and its progeny did not follow those cases though they clearly were aware of them. The court in *Deposit Guaranty* reversed the district court decision striking the OCC's reliance on the branching authority of state savings associations in Mississippi based, in part, on *Mutschler* and *State-Chartered. See Department of Banking and Consumer Finance of the State of Mississippi v. Selby*, 617 F. Supp. 566, 571 (S.D. Miss. 1985) *reversed* 809 F.2d 266 (5th Cir. 1987) *cert. denied* 483 U.S. 1010 (1987*).* Moreover, the OCC Deposit Guaranty Decision had specifically addressed why those two cases should not be determinative. Likewise, subsequent courts faced with *Deposit Guaranty* issues either specifically declined to follow these earlier cases or distinguished them based on changes in the business of savings associations between the issuance of those decisions and the *Deposit Guaranty* cases. *See Indiana Decision* at 1523-24, 1528-29 (noting changes in the nature of savings associations and questioning analysis in *Mutschler* and *State-Chartered); Florida Decision* at 1554-55 (noting that *Mutschler* did not thoroughly analyze the blurring of the functional distinctions between savings and loan associations and commercial banks while noting that the reasoning of the courts in *Deposit Guaranty* and the *Texas Decision* is "sound and persuasive"); *Tennessee Decision* at 966 n.1 (declining to follow the "contrary" opinion of the Ninth Circuit in *Mutschler* while finding the reasoning of the Fifth Circuit in *Deposit Guaranty* to be "more persuasive").

In addition, one other district court case, arising in Oklahoma, addressed issues similar to those raised here. *See First National Bank & Trust Co. v. Empie*, No. 78-296-C (E.D. Okla., Nov. 15, 1982). ("*Empie*"). That case addressed a situation where the OCC had approved a national bank branch based on the branching authority of state-chartered

II. LEGAL ANALYSIS

A. Oklahoma savings and loan associations are "State banks" under section 36(*l*); they are authorized under state law to engage in the "banking business" and are carrying on the banking business

In relying on the *Deposit Guaranty* precedent, the OCC must apply the functional test to state-chartered savings and loans associations in Oklahoma to determine if they may be considered to fall within the definition of "State banks" for purposes of section 36. The OCC and the courts have utilized a three-step analysis in making this determination. The first step is to define the term "banking business" as used in section 36. The second step is to review relevant state law to determine whether savings and loan associations in the State at issue are authorized to engage in the banking business. The third step is to determine whether savings and loan associations in the State at issue are in fact carrying on the banking business.[12]

1. As a matter of federal law, the "banking business" includes taking deposits, paying checks, and making loans

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trust companies in Oklahoma. The *Empie* court noted that it was

> unable to distinguish [*Mutschler*] from the case at bar. Trust Companies in the State of Oklahoma are in the identical posture as savings banks are in the State of Washington. They are separate and distinct creations from State banks. Hence, under the authority of that case, nationally-chartered banks in Oklahoma cannot branch in Oklahoma if Oklahoma State-chartered banks are prohibited from doing so.

As discussed, courts have repeatedly held that reliance on *Mutschler* in this regard is misplaced. Consequently, like *Mutschler, Empie* does not constitute persuasive authority against application of *Deposit Guaranty.* We further note that the court in *Empie,* in prohibiting national bank branching based on reliance on trust company branching authority also held, in light of the requirements of section 36(c)(2), that nothing in state law expressly authorized trust company branching. As will be discussed, state law, in the present case, clearly authorizes state-chartered savings and loan associations to branch statewide. (A more thorough discussion of *Mutschler, State-Chartered and Empie* is set forth in various OCC opinions including the OCC Depository Guaranty Decision and the OCC Indiana Decision.) The *Deposit Guaranty* cases also distinguished another case, *Dakota National Bank & Trust Co. v. First National Bank & Trust Co. of Fargo,* 554 F.2d 345 (8th Cir.), *cert. denied,* 434 U.S. 877 (1977) which had held that national banks could not branch under branching authority available under state law only to a state-owned bank. The Eighth Circuit, explaining its own precedent in the *Indiana Decision,* limited that case to its "plainly unique" facts holding that nothing in section 36 addresses privately-chartered institutions and the sovereign activities of the state in the banking field. *Indiana Decision* at 1129.

[12] *See, e.g. Texas Decision* at 577-78; *Indiana Decision* at 1528; OCC Deposit Guaranty Decision at 20-30; OCC Louisiana Decision.

The first step in the analysis is to determine the activities that constitute the "banking business." This term is not explicitly defined in section 36 or elsewhere in the National Bank Act. However, a functional description of the term is found in the principal powers provision of the National Bank Act:

> [A] national banking association . . . shall have . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter.[13]

The OCC and the courts have accepted this description as "the most reliable guide as to what is encompassed in the term the 'business of banking.'"[14] Disregarding the powers of issuing notes and selling coin, which have little present relevance, the courts in *Deposit Guaranty* and its progeny have determined that for purposes of section 36 the core "banking business" essentially involves accepting deposits, making loans and paying checks.[15] Thus, it is appropriate to focus on these core functions in determining whether a state-chartered institution in Oklahoma is engaged in the banking business for purposes of section 36.

2. State-chartered savings and loan associations are authorized by state law to carry on the banking business

The second step is determining whether Oklahoma savings and loan associations are authorized to engage in the banking business. Among other powers, state law authorizes state-chartered savings and loan associations to offer deposit accounts to the public and to pay interest on them.[16] State law also provides that "savings accounts or savings deposits may be subject to check or to transfer or withdrawal on negotiable order or authorization to the association," and authorizes savings associations to offer money market deposit accounts.[17] In addition, state law also authorizes state savings and loan

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[13] 12 U.S.C. § 24 (Seventh).

[14] *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972); *accord Deposit Guaranty*, 809 F.2d at 266.

[15] *Deposit Guaranty* at 268; *Tennessee Decision* at 964; *Texas Decision* at 576-77. *See also Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987) (finding that the banking business, at a minimum, includes the "core functions" of deposit-taking, lending, and the paying of checks); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 371, 376 (1963) (identifying those activities that constitute the business of banking as the "creation of additional money and credit, the management of the checking account system, and the furnishing of short-term business loans . . . .").

[16] *See* Okla. Stat. Ann. tit. 18, § 381.54 (West 1999).

[17] Okla. Stat. Ann. tit. 18, § 381.46 (West 1999).

associations to make and service loans, to invest their funds, to perform limited trust activities, and to conduct a safe deposit business.[18] Finally, the parity provision of state law,[19] which provides generally that insured state-chartered savings and loan associations may take advantage of any rights and privileges available to federally-chartered savings and loan associations, also provides an additional basis of authority for FDIC-insured Oklahoma state-chartered savings and loan associations to carry on the banking business.

Review of the rights and privileges granted to federally-chartered savings and loan associations under federal law reveals that such institutions are authorized to: offer saving accounts and pay interest thereon at fixed or variable rates;[20] accept demand deposits;[21] offer checking or negotiable order of withdrawal ("NOW") accounts;[22] provide funds transfer services;[23] invest in, sell, or otherwise deal in loans on the security of its savings accounts, loans on the security of liens on residential real estate, and home improvement and manufactured home loans;[24] invest in United States government securities, stock of a Federal home loan bank or the Federal National Mortgage Association, Federal Home Loan Mortgage Corporation instruments, obligations issued by any State or political subdivision thereof, stock of open-end investment companies, and mortgage-backed securities;[25] make credit card loans,[26] educational loans,[27] and loans to financial institutions, brokers, and dealers.[28] Federal associations may also make the following types of loans and investments subject to certain percentage-of-assets limitations:

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[18] *See* Okla. Stat. Ann. tit. 18, § 381.54 (West 1999).

[19] Okla. Stat. Ann. tit. 18, § 381.9. *See also* Oklahoma Department of Banking Rule 625:10-5-1.

[20] *See* 12 U.S.C. § 1464(b)(1)(A); 12 C.F.R. § 557.14.

[21] *See* 12 U.S.C. § 1464(b)(1)(A).

[22] *See* 12 U.S.C. § 1464(b)(1)(E).

[23] *See* 12 C.F.R. § 545.17.

[24] *See* 12 U.S.C. § 1464(c)(1).

[25] *See* 12 U.S.C. § 1464(c)(1)(C)-(F), (H), (Q), (R).

[26] *See* 12 U.S.C. § 1464(c)(1)(T).

[27] *See* 12 U.S.C. § 1464(c)(1)(U).

[28] *See* 12 U.S.C. § 1464(c)(1)(L).

commercial loans;[29] commercial paper and corporate debt securities;[30] community development loans and equity investments;[31] construction loans without security;[32] consumer loans;[33] finance leasing;[34] general leasing;[35] and nonresidential real property loans.[36]

These activities, permissible for state savings and loan associations either directly as a result of Oklahoma statutes or, indirectly, as a result of the Oklahoma parity statute applicable to insured Oklahoma savings and loan associations, clearly suffice to satisfy the *Deposit Guaranty* test of what constitutes the banking business.[37] Therefore, the *Deposit Guaranty* requirement that state-chartered savings and loan associations be authorized under state law to engage in the banking business has been satisfied.[38]

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[29] *See* 12 U.S.C. § 1464(c)(2)(A).

[30] *See* 12 U.S.C. § 1464(c)(2)(D); 12 C.F.R. § 560.40.

[31] *See* 12 U.S.C. § 1464(c)(3)(A).

[32] *See* 12 U.S.C. § 1464(c)(3)(C).

[33] *See* 12 U.S.C. § 1464(c)(2)(D).

[34] *See* 12 U.S.C. § 1464(c)(1)(B), (c)(2)(A), (B), (D); 12 C.F.R. § 560.41.

[35] *See* 12 U.S.C. § 1464(c)(2)(C).

[36] *See* 12 U.S.C. § 1464(c)(2)(B).

[37] *See Deposit Guaranty* at 268; *Tennessee Decision* at 964; *Texas Decision* at 576-77.

[38] The OCC is cognizant of the numerous changes to the savings and loan industry occasioned by the passage of federal legislation in the 1980s and 1990s. These changes do not materially affect the analysis used in earlier OCC and judicial *Deposit Guaranty* decisions. We note, that in the past, parties challenging the OCC's reliance on *Deposit Guaranty* have argued that Federal law in the 1980s, while expanding the authority of savings associations, created a material distinction between the powers of savings associations and commercial banks. The OCC and the courts rejected these arguments. Thus, the Fifth Circuit in *Deposit Guaranty* recognized that the Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97-320, 96 Stat. 1409 (1982), placed limits on commercial and consumer loans and investments of savings associations. But the court concluded that that legislation "neither proscribes the functional analysis made by the Comptroller nor militates against his interpretation of [what is now section 36(*l*)]." *Deposit Guaranty Decision* at 271. Similarly, the Eighth Circuit, in the *Missouri Decision*, recognized that the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183 (1989) ("FIRREA"), would require savings associations to increase the proportion of funds placed in qualified thrift investments. *Missouri Decision* at 1130. The court, however, stated:

> As a practical matter the percentage of "portfolio assets" that savings and loans will have to place in qualified thrift investments will increase from sixty per cent to seventy per cent. Even after this change, however, more than thirty per cent of a savings and loan association's total assets may be entirely devoted to consumer loans. In addition, FIRREA does not affect at all the ability of savings and loan associations to accept deposits and offer the equivalent of checking accounts.

3. Oklahoma savings and loan associations carry on the banking business

The third step in the analysis is to determine whether state-chartered savings and loan associations in Oklahoma are actually carrying on the banking business.[39] To support the position that Oklahoma state-chartered savings and loan associations are conducting the banking business, the applicants have asserted that Oklahoma savings and loan associations offer checking, NOW, money market, and demand deposit accounts; certificates of deposit and IRAs; and consumer, commercial, industrial, and real estate loans. The validity of these assertions is borne out by financial information maintained by

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> We agree with plaintiffs that the effect of FIRREA is probably to reinforce the distinctions that remain between commercial banks and savings and loans, but we do not agree that the new statute . . . is a development sufficiently significant to justify our rejection of the Comptroller's otherwise reasonable interpretation of the [section 36].

Id. See also Indiana Decision at 1528. Likewise, federal legislation after FIRREA addressing the powers of savings associations is not inconsistent with the determination that savings associations carry on the banking business for purposes of section 36. In fact, this subsequent federal legislation in several respects has increased the lending authority of savings associations and provided more flexibility to savings associations in meeting the qualified thrift lender test. We note, for instance, that the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. 102-242, 105 Stat. 2236 (1991) and the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (1996) expanded the authority of savings associations to make various types of loans including secured or unsecured loans for commercial, corporate, business, or agricultural purposes; to make loans for personal, family, household or educational purposes; and to invest in and hold commercial paper and corporate debt securities. 12 U.S.C. § 1464(c)(1)(u), (2)(A) and (D). These Acts also reduced the percentage of investments needed to meet the qualified thrift lender test; and expanded the list of types of investments that could be used to satisfy the test. *Id.* at § 1467a(m)(1), (4)(C)(ii)(VI), (VII), (iii)(VI) and (VII), and (iv).

[39] Two of the Oklahoma-chartered savings and loan associations, Fairview Savings and Loan and Okmulgee Savings and Loan, are mutual associations. In *Mutschler*, the court held that a national bank in the state of Washington could not branch to the extent allowed mutual savings banks in that state. *See supra* note 11. The court concluded that only the state law concerning the limits on the branching powers of state commercial banks was incorporated by section 36 to determine the branching powers of national banks. Without engaging in a functional analysis of the products and services offered by state-chartered mutual savings banks in Washington, the court found that a mutual savings bank was not a "State bank" for purposes of section 36(c)(2). However, as discussed, the courts in *Deposit Guaranty* and its progeny pointed out that not only does federal law govern the definition of terms in the federal branching statute, but the "function of the institutions" is the primary guide to a determination of whether an institution is "engaged in the banking business." *Deposit Guaranty* at 270. As the OCC and courts have consistently held since the OCC Deposit Guaranty Decision in 1985, the issue of whether a savings association is engaged in the business of banking is of importance, not the form or manner of its ownership.

federal and state regulators and other information obtained by the OCC including submissions by the applicants.[40]

Information available to the OCC shows that two of the three state-chartered savings and loan associations in existence at the time of the filing of these applications, Fairview and Home, offer some combination of checking, NOW, money market, and demand deposit accounts; certificates of deposit and IRAs; wire transfers, money orders, and traveler's checks; consumer, commercial, industrial, and real estate loans; and safe deposit services. Two product lines, transaction accounts and nonmortgage loans, have been of particular importance in past findings that state-chartered thrifts were engaged in the banking business.[41] These two institutions have an average of 15.6% of their deposits in transaction accounts and nonmortgage loans make up 3.4% of their assets.

Moreover, while the OCC has looked primarily to information concerning the three state-chartered savings and loan associations in existence at the time the application was filed, we note that a state-chartered commercial bank recently converted to a state savings and loan charter.[42] This new savings and loan association had total deposits of $90,713,000 as of December 31, 1998. Of those deposits, $29,892,000, or 33%, were held in transaction accounts. Further, this institution held commercial and consumer nonmortgage loans of $29,899,000. This makes up 26.7% of its $112,139,000 in assets. Finally, this institution offers a range of traditional bank products and services, including: checking accounts; money market deposit accounts; cashier's checks, money orders and traveler's checks; automated bill payment services and Internet banking; debit cards, corporate credit cards, and merchant credit card services; certificates of deposit, IRAs, and Keogh Plan accounts; consumer, commercial, industrial, and real estate loans; and safe deposit services.[43]

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[40] This information includes forms and other printed material used by state savings and loan associations in Oklahoma in connection with the offering of these products and services, and a market study, prepared by the Market Analysis Group, Inc., addressing the activities of the state's savings and loan associations.

[41] *See, e.g., Missouri Decision* at 1129-30; *Texas Decision* at 577; *Indiana Decision* at 1528; OCC Alabama Decision at 6-7; OCC Indiana Decision at 25-27; OCC Mississippi Decision at 28-29.

[42] *See* Letter of June 30, 1999 from Mick Thompson, Commissioner, State Banking Department, to C. Bruce Crum (approving conversion of Arvest United Bank to a state savings association); Letter of July 21, 1999 from Dennis W. Blasé, Assistant Vice President, Federal Reserve Bank of St. Louis, to Rick Chapman, Vice President, Arvest Bank Group, Inc. This conversion was consummated on July 23, 1999. We note that under Oklahoma law, "savings and loan association," "savings bank," and "savings association" are interchangeable. Okla. Stat. Ann. tit. 18, § 381.22 (West 1999).

[43] We understand that the converting bank anticipates few, if any, material changes in its operations following consummation of the conversion**.** The bank's Plan of Reorganization and Conversion, included as part of its conversion application to the State, represents that "the Resulting Savings Bank's business plan will be to continue the current business and methods of operation . . . subject to compliance with any state or federal requirements applicable to an Oklahoma-chartered stock savings bank . . . ."

Although the degree to which Oklahoma state-chartered savings and loan associations are engaged in non-traditional thrift activities is less than the level of comparable activities by national and state commercial banks, section 36(*l*) imposes no test based on whether the *level* of activity engaged in by a banking institution is sufficient to warrant the institution's consideration as a "State bank." Section 36(*l*) does not require a showing of a special level of competitive impact. The key issue is whether a state financial institution does carry on the banking business. As the Eighth Circuit stated in the *Missouri Decision*:

> In addition, plaintiffs argue that . . . Mississippi savings associations were in fact engaged in bank-like activities to a greater extent than Missouri savings and loans are now. For example, plaintiffs assert that as of June 1987 only 3.6 per cent of the loans made by savings and loan associations in Missouri were non-mortgage loans, a figure considerably below the comparable number in Mississippi. We do not doubt that these are relevant differences between the two cases, but they are differences of degree, rather than of kind.[44]

Based on the foregoing information, it is clear that Oklahoma state-chartered savings and loan associations accept deposits, pay checks (or their functional equivalent), and make loans, including commercial loans. In addition, they offer a variety of products and services common to commercial banks. They are clearly not limited to taking savings deposits and offering mortgage credit in the way savings and loan associations traditionally have been restricted.[45]

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[44] *Missouri Decision* at 1129-30. In Missouri, non-mortgage loans made by thrifts amounted to 3.6% of assets compared to over 6.9% in Mississippi. In Oklahoma, the ratio, not including the ratio for the newly converted savings and loan association, is 3.4%. Similarly to the *Missouri Decision*, the court in the *Indiana Decision* noted that the policy underlying section 36 "looks at competitive, not actual or numerical equality under federal law between state and national institutions." *Missouri Decision* at 1525.

[45] The Eighth Circuit recognized the evolution of the savings and loan industry in the *Missouri Decision:*

> Traditionally, of course, and originally, savings and loan associations were primarily created to provide a source of credit for home-mortgage financing. They did not accept demand deposits, nor did they make loans on security other than residential real estate. But, as everyone with a nodding acquaintance with the modern development of the financial industry knows, the clear, bright-line distinctions between commercial banks and savings and loans have, over the years, gradually become blurred. . . . [S]avings and loans have increasingly engaged in activities once thought to be the private preserve of commercial banks or trust companies.

Missouri Decision at 1128.

Therefore, for the reasons stated above, the OCC concludes that under Oklahoma law, Oklahoma savings and loan associations are authorized to, and are carrying on, the banking business within the meaning of section 36(*l*). Consequently, Oklahoma-chartered savings and loan associations meet the definition of "State banks" under section 36(*l*). As a result, under section 36(c), national banks are accorded the same branching rights as are accorded Oklahoma-chartered savings and loan associations under state law and are permitted to branch to the same extent as state-chartered savings and loan associations.

4. Response to protestants' assertion that Oklahoma savings and loan associations are not "carrying on the banking business"

For a variety of reasons, however, the protestants contend that Oklahoma savings and loan association should not be considered to be "carrying on the banking business" and, thus, should not be considered to be "State banks" for purposes of section 36. As a result, protestants conclude, national banks cannot rely on the *Deposit Guaranty* precedent permitting them to branch based on branching authority given by state law to state savings and loan associations.

Protestants first argue, based on a 1937 Oklahoma Supreme Court case, that state law provides for savings and loan associations "to solicit and accept relatively long-term, stable money, to form the capital, or deposit, base to support likewise long-term and stable loans predominantly in the residential real estate market."[46] But the statutory framework under which state savings and loan associations operated at the time of this state Supreme Court decision 62 years ago is far different from the framework in place today. Nothing underscores this evolution more than the fact that the very question being decided by that 1937 court would, today, be specifically answered by the state savings and loan code and answered in a manner opposite to the conclusion reached by the Court. As stated by the Court, the issue to be decided was whether a building and loan association had the "corporate power to sell and assign a note and mortgage" which originally had been made to the association.[47] The Court concluded:

> It is not intended that such an association accumulate cash assets by the outright sale of its properties, or obtain its profits and earnings by brokerage or discount transactions. The intent [underlying the formation of these entities] is that by means of the system of small periodical payments, the association's cash assets will accumulate and that its profits shall accrue through the loan of such cash assets to its members.[48]

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[46] In this regard, protestants cite generally to *V.S. Cook Lumber Co. v. Harris*, 71 P.2d 446 (Okla. 1937) (*Cook Lumber Co.*).

[47] *Id.* at 447.

[48] *Id.* at 451.

In contrast, today's Oklahoma savings and loan code explicitly recognizes the authority of state savings and loan associations to sell or assign their loans.[49] The evolution of the powers of Oklahoma savings and loan associations, in fact, mirrors the evolution of the thrift industry generally as reflected by a variety of state statutes linking the powers available to state thrifts to the powers available to federal thrifts.[50] As previously discussed, in deciding *Deposit Guaranty* cases holding that state savings and loan associations are "State banks" for purposes of section 36, courts have recognized this evolution in the savings and loan industry.[51] Consequently, we conclude that *Cook Lumber Co.* has no vitality insofar as it relates to functions of savings and loan associations today.

The protestants next argue that the state parity regulation permitting state savings and loan associations to exercise all powers granted to federal associations under federal law is invalid as being beyond the scope of authority of the state savings and loan regulator.[52] Protestants argue that because the state savings and loan code limits their activities to "specialized lending functions" the parity regulation goes beyond what the legislature intended and is invalid. The problem with this argument is that the

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[49] Okla. Stat. Ann. tit. 18, § 381.54.5. (permitting savings and loans associations "to sell and assign without recourse any loan" provided only that the state banking board may by regulation limit the total dollar volume sold in a given year to a certain percentage of loans held by the association). *See also* Okla. Stat. Ann. tit. 18, § 381.57 (state savings and loan associations may sell and otherwise deal in loans to the same extent permitted for federal associations except as otherwise provided by the state savings and loan code); Oklahoma Department of Banking Rule 625:10-5-5 (insured state savings and loan associations may buy, sell, and hold participating interests in loans subject to certain safety and soundness requirements).

Cook Lumber Co. also cites and relies on cases emphasizing the mutual nature of building and loan associations. *Cook Lumber Co.* at 449-450. Today, however, under the state savings and loan code, Oklahoma savings and loan associations may be organized either as mutual or stock associations. Okla. Stat. Ann., tit. 18, § 381.16. In fact, two of the four existing Oklahoma savings and loan associations are organized as stock associations.

[50] Okla. Stat. Ann. tit. 18, § 381.57 (pertaining to lending); § 381.46 (relating to deposit accounts); and § 381.9 (relating to powers generally).

[51] *See supra* n. 45.

[52] The regulation states:

> Insured savings and loan associations chartered under the laws of the State of Oklahoma may exercise all powers granted to federal associations under federal law and rules and regulations of the Office of Thrift Supervision or Federal Deposit insurance Corporation, subject to all restrictions on such powers imposed on federal associations; provided, however, that when state law or rule is less restrictive, it shall apply unless expressly preempted by federal law.

Oklahoma Department of Banking Rule 625:10-5-1.

Oklahoma legislature specifically authorized the promulgation of the parity regulation. In this respect, the state savings and loan code itself specifically provides:

> The State Banking Commissioner is hereby further vested with authority, by adoption of appropriate rule or regulation, to grant to insured associations such powers, not specified in this act, as may now or hereafter be conferred upon Federal Savings and Loan Associations by or pursuant to the laws of the United States.[53]

In light of this statutory grant of authority, the OCC cannot agree that the parity regulation is invalid as in excess of the state regulator's authority.

Protestants further argue that under the state savings and loan code, savings and loan associations are significantly limited in the deposit and loan products they may offer.

With respect to loans, protestants recognize that the state savings and loan code explicitly permits state savings and loan associations to make the same types of loans, and subject to the same limitations and conditions, which are authorized for federal savings associations.[54] Protestants argue, however, that because of the limitations on the amount of certain types of loans, as a percentage of an association's assets or in relation to an association's capital, neither state or federal savings associations may be considered to be "a lender for all sources." Thus, protestants appear to conclude that because of these restrictions, state savings and loan associations may not be considered to be "State banks" for purposes of section 36. As discussed, however, the courts have previously rejected this argument and have held that these types of limits do not preclude a determination that a state savings association subject to them is a "State bank" for purposes of section 36.[55]

With respect to deposit products, protestants first argue that state savings and loan associations are limited to offering savings accounts and cannot offer "typical" demand accounts. As discussed, however, the parity statute and regulations permit Oklahoma state savings and loan associations to avail themselves of all powers granted by federal law to federal savings associations. This explicitly includes the authority to offer demand accounts.[56]

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[53] 18 Okla. Stat. Ann., tit. 18, § 381.9.

[54] The state code at section 381.57 explicitly applies 12 U.S.C. § 1464(c), the statutory provision governing the lending authority of federal savings associations, to state savings and loan associations. The scope of this lending authority is discussed in Part II.A.2. of this Decision Statement.

[55] *See supra* note 38.

[56] 12 U.S.C § 1464(b)(1)(A)(I).

Protestants next assert correctly that even under federal law applicable to federal associations and applied to state savings and loan associations under the parity statute they cannot pay interest on demand accounts.[57] They then argue that because of this restriction they cannot, unlike banks, pay interest on other types of transaction accounts such as NOW accounts. We note that there is simply no disparity here between federal savings associations, Oklahoma savings and loan associations, and commercial banks, whether state or national. Like savings associations, commercial banks are prohibited from paying interest on demand accounts.[58] Despite these limitations, however, federal law specifically permits national banks, state banks, federal savings associations and state savings and loan associations to pay interest on negotiable order of withdrawal accounts.[59] Moreover, Oklahoma law itself grants similar authority to state savings and loan associations.[60] Consequently we simply disagree with the protestants that differences exist between the deposit-taking authority of Oklahoma savings and loan associations and commercial banks that would justify a determination that the former are not "carrying on the banking business" for purposes of section 36(*l*) and, thus, could not be considered to be "State banks" for purposes of section 36.[61]

Finally, protestants argue that because federal law distinguishes between federal savings associations and national banks, the OCC "cannot make the unilateral decision that Federal thrifts are the functional equivalent of national banks." Protestants then reason that because the powers of Oklahoma savings and loan associations are, as a result of state law, in large part dependent upon the authority of federal

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[57] *Id*. at § 1464(b)(1)(B)(I).

[58] 12 U.S.C. § 371a and 12 C.F.R. § 217.3 (prohibiting Federal Reserve member banks from paying interest on demand deposits); 12 U.S.C. § 1828(g) and 12 C.F.R. § 329.2 (prohibiting FDIC-insured banks from paying interest on demand deposits).

[59] 12 U.S.C. § 1832 (specifically permitting insured state and national banks and state-chartered savings and loan associations to pay interest on accounts that are subject to withdrawals by negotiable or transferable instruments for the purpose of making transfers to third parties); 12 U.S.C. §1464(b)(1)(E) and 12 C.F.R. § 557.14(a), §561.29 and §561.42 (permitting federal savings associations to offer negotiable order of withdrawal accounts as savings accounts and permitting the payment of interest on these accounts.)

[60] Okla. Stat. Ann. tit. 18, § 381.46 (providing authority to state savings and loan associations, similar to that provided under 12 U.S.C. §1832, with respect to withdrawals from savings accounts by check or transfer or withdrawal on negotiable order or authorization to the association; also applying federal law to offering by state savings and loan associations of money market deposit accounts).

[61] Protestants also assert that state savings and loan associations could not be considered to be "State banks" because they have certain authority, regarding the ownership of real estate, that is not available to state banks. Assuming this is true, it is irrelevant. That a state savings and loan association, otherwise determined to be "carrying on the banking business" for purposes of section 36(*l*), has authority to engage in other activities, cannot change the conclusion that it is "carrying on the banking business." In other words, state savings associations authorized to carry on the banking business are so authorized even if they also are authorized to do something else and even if that other activity has nothing to do with banking.

savings associations, the Comptroller cannot make the unilateral decision that Oklahoma savings associations are the same as state banks. Protestants then assert that this determination would "eliminate the need for any separate regulation of Oklahoma 'savings associations'" and cause the "functional elimination of the Oklahoma Savings and Loan Code." The protestants then conclude that a federal regulator should not be empowered to eliminate a state created legal entity and a state created body of law particularly where it could not make that same determination with respect to similar federal entities.

This objection completely misconstrues the scope and effect of a *Deposit Guaranty* ruling that state savings and loan associations are "State banks" for purposes of section 36. The *Deposit Guaranty* precedent, when applied, holds that state savings and loan associations are "State banks" because they conduct certain *activities,* and that conclusion applies *only for purposes of the definition of that term in a specific federal law* -- 12 U.S.C. § 36. Such a determination has nothing to do with determining whether federal thrifts are equivalent to national banks or that state thrifts are the same as state commercial banks. Nor does the conclusion imply that the Oklahoma savings and loan code or the State's separate regulation of state banks and state savings and loan associations are eliminated. Nothing in *Deposit Guaranty* or section 36 alters the manner in which a State chooses to regulate either state savings and loan associations or, for that matter, state banks.

Protestant's assertion that because the OCC cannot determine that federal savings associations are banks, the OCC also should not be able to determine that Oklahoma savings and loan associations are banks, particularly in light of the dependence of Oklahoma savings and loan associations on the powers of federal savings associations, also misses the mark. Again, we note that *Deposit Guaranty* is interpreting a specific statutory provision -- "'State bank,' 'State banks,' 'bank,' or 'banks' as used in [section 36], shall be held to include . . . corporations or institutions carrying on the banking *business under the authority of State laws*."[62] Because federal savings associations carry on business under the authority of federal law, not state law, they cannot fit within the definition of a bank under section 36(*l*). Consequently, for purposes of section 36, the OCC does not determine whether federal savings associations are "carrying on the banking business."

B. Oklahoma-chartered savings and loan associations have statewide branching authority

Having determined that national banks may rely on the branching authority of state savings and loan associations, the next question to resolve is the extent of branching authority available to Oklahoma savings and loan associations. The source of de novo branching authority for state-chartered savings and loan associations in Oklahoma is title 18, section 381.24a of the Oklahoma statutes. That section

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[62] 12 U.S.C. § 36(*l*) (emphasis added).

contains numerical and geographic limitations on de novo branching.[63] Those limitations, however, expired on July 1, 1999. The statute provides:

> Authorization to establish branches. From and after May 3, 1990, and until July 1, 1999, new association branches may be established only under the guidelines set forth in this section. From and after July 1, 1999, new association branches may be established with permission granted by order of the State Banking Commissioner without regard to the restrictions otherwise provided in this subsection.[64]

Thus, state savings and loan associations now clearly have statewide branching authority. Moreover, the authority clearly qualifies as an affirmative grant of branching authority as contemplated in section

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[63] The geographic restrictions set out at section 381.24a.B. are:

> 1. Any association may establish and perform any association function at no more than two branches on property owned or leased by the association as follows:
>
> a. located within the corporate city limits where the main office is located, or
>
> b. located within twenty-five (25) miles of the main office if located in a city or town which has no state or federal savings association and no state or national bank is located in said city or town; provided however, if an application for a certificate of authority to transact savings and loan business has been filed the Commissioner shall give priority to the application for certificate of authority.
>
> 2. The Commissioner shall not grant a certificate for any branch unless it is more than three hundred thirty (330) feet from any main office or branch or another association or federal association in counties with a population of five hundred thousand (500,000) or more according to the last Federal Decennial Census unless the branch is established with the irrevocable consent of such other association or federal association. This distance limitation shall be determined by measuring along a straight line drawn between the nearest exterior wall of the appropriate main office building or branch building and the nearest exterior wall of the branch office building.
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> 3. If at the time of acquisition of an association or federal association pursuant to subsection C of this section no other association or federal association was located in the same city or town as the acquired association or federal association, the Commissioner shall not grant any other association a certificate to establish a branch within such city or town for a period of five (5) years after the acquisition and operation of the branch.

Okla. Stat. Ann. tit. 18, § 381.24a.B. (West 1999).

[64] Okla. Stat. Ann. tit. 18, § 381.24a.B. (West 1999). Prior to July 1, branching authority of state savings and loan associations was constrained in the same manner as branching by state banks. *Compare id.* § 381.24a.B.1. 2., and 3. *with* Okla. Stat. Ann. tit. 6, § 501.1.A., B., and C. (each imposing identical numerical and geographical limitations on de novo branching by, respectively, state savings and loan associations and state banks).

36(c)(2).[65] Similar language in *Deposit Guaranty* and the subsequent cases has been held to affirmatively authorize branching for purposes of section 36(c)(2). As the United States District Court for the Western District of Texas stated:

> The Texas statute authorizing savings and loan branching reads "[a]n association may not without the prior approval of the commissioner, establish an office other than the principal office stated in its articles of incorporation." Texas argues that this wording only authorizes branching by implication, not by a specific grant of authority. This Court disagrees and finds that the branching statute does contain an affirmative branching grant. In *Deposit Guaranty*, the Mississippi statute allowing Mississippi savings associations branching reads "[n]o association may establish or operate a branch office without authorization of the board." The Fifth Circuit interpreted this to mean that a savings association may branch throughout the state.[66]

Consequently, it is plainly evident that Oklahoma savings and loan associations, and, thus, national banks in Oklahoma, have statewide branching authority in Oklahoma.[67]

Thus, as a legal matter, the OCC may approve the branch applications under consideration.[68]

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[65] *See Deposit Guaranty* at 268; *Florida Decision* at 1555; *Texas Decision* at 578.

[66] *Texas Decision* at 578 (citations omitted). An additional source of branching authority may be found in the Oklahoma statute granting parity with federal savings associations. *See* Okla. Stat. Ann. tit. 18, § 381.9 (West 1999). In the OCC Alabama Decision, a federal savings association parity provision was determined to be the source of an affirmative branching right for Alabama state-chartered savings and loan associations. *See* OCC Alabama Decision at 15-18. Federal savings associations have extensive intrastate branching rights. 12 U.S.C. § 556.5.

[67] While not material to the OCC's decision on these applications, we note that while the decision provides branching parity between national banks and state savings and loan associations in Oklahoma, state commercial banks also may be able to avail themselves of increased branching authority. The Oklahoma statute providing parity between state banks and national banks now reads:

> A bank shall have the power to exercise by its directors, duly authorized officers or agents, all such incidental powers as shall be necessary to carry on the banking business including, but not limited to, all such powers as may now or hereafter be conferred upon national banks by the laws of the United States and the regulations and policies of the U.S. Comptroller of the Currency, unless otherwise prohibited or limited by the Commissioner or the Board.

1999 Okla. Sess. Law Serv. Ch. 27, section 6 (H.B. 1326) (West) (effective July 1, 1999). The previous parity provision, which specifically exempted branching from its scope, was repealed by this same legislation. *See id.* amending title 6, section 402, subsection 12.

[68] We note that the failure of most state-chartered savings and loan associations in Oklahoma to exercise branching rights does not preclude the OCC from applying *Deposit Guaranty* in Oklahoma. As noted in the OCC Indiana Decision:

> [T]here is no requirement imposed by statutory or case law that state-chartered institutions which carry on the banking business must actually exercise their branching powers to the fullest extent permitted by law in order for those powers to be shared by national banks.

OCC Indiana Decision at 28-29 n.20. We note, however, that the state recently approved two branches for Arvest United following its conversion to a state savings and loan association. *See* Letters to Gregg B. Eichner by Mick Thompson, Bank Commissioner (August 10, 1999) (approving branch applications in Oklahoma City and Yukon, Oklahoma).

We note, too, that the July 28, 1999 OCC Oklahoma Decision addressed several other grounds for protest. While these grounds have not been raised in connection with any of the applications addressed in this Decision Statement, the following reiterates those grounds and the OCC's response.

In the OCC Oklahoma Decision, the protestants argued that utilization of *Deposit Guaranty* in Oklahoma would not provide national banks with any branching rights other than those applicable to state-chartered commercial banks. Protestants cited, in support of this contention, several statutes in the state's savings and loan code. Among these is section 381.24a(A)(1) which sets forth definitions applicable to the substantive provisions of the state's savings and loan branching statutes. Section 381.24a(A)(1) defines "bank" as "any bank chartered under the laws of this state or any national bank which is authorized to engage in the banking business and is located in this state." The term "bank" is defined in the savings and loan association branching law because, prior to July 1, 1999, when all savings and loan branching limitations expired (Okla. Stat. Ann. tit. 18, § 381.24a.B), savings and loan associations could not establish a branch in a town within 25 miles of their main office town if a state or federal savings association or a state or national *bank* was located in the town. Okla. Stat. Ann. tit. 18, § 381.24a.B.1.b. The presence of the definition of "bank" in the savings and loan branching statute by no means applied the bank branching rules to savings and loan associations. The savings and loan branching statutes applied and, as modified in light of the July 1, 1999, sunset of branching restrictions, continue to apply to "associations." Nothing in the savings and loan branching statute even remotely suggests that these entities are subject to the state commercial bank branching statutes. Okla. Stat. Ann. tit. 6, § 501.1.

The protestants then argued that coupling this state definition of "bank" with the *Deposit Guaranty* holding that state savings and loan associations are "banks" would subject them to branching restrictions under Oklahoma law. The problem with this argument, as discussed previously, is that *Deposit Guaranty*, when applied, holds that state savings and loan associations are "State banks" *for purposes of the definition of that term in federal law* -- specifically 12 U.S.C. § 36. Nothing in *Deposit Guaranty* or section 36 can alter the manner in which a State chooses to regulate the branching rights of state savings and loan associations or, for that matter, state banks.

Protestants then cited several provisions of state law placing state savings and loan associations under the authority of the State Banking Commissioner, who is charged with enforcing state commercial bank branching laws against all banks. They argued that this subjects state savings and loan associations to state commercial bank branching laws. The flaw in this argument is that the statutes cited by protestant transferred all regulatory authority of the former Oklahoma Savings and Loan Board to the Banking Commissioner; authorized the Banking Commissioner to implement the statute providing parity between state and federal savings associations, and gave the State Banking Commissioner supervisory authority over state savings and loan associations. Okla. Stat. Ann., tit. 18, §§ 381.5, 381.9, and 391.11. Nothing, however, instructed the Banking Commissioner to regulate savings and loan associations under the state banking code. Rather, the Oklahoma Savings and Loan Code (Okla. Stat. Ann. tit. 18, §§ 381.1 *et seq.*) remains intact including specific provisions governing branching with the approval of the State Banking Commissioner. *Compare* Okla. Stat. Ann. tit. 18, § 381.24a *with* Okla. Stat. Ann. tit. 6, § 501.1 (respectively, current statutes governing state savings and loan branching and governing state commercial bank branching).

III. OTHER CONSIDERATIONS

In addition to legal considerations, the OCC is required to take into account the Community Reinvestment Act (CRA) record of an applicant for a branch and other policy considerations set forth in OCC regulations.

A. Community Reinvestment Act compliance

In considering an application for a branch, the OCC is required to consider an applicant's record of compliance with the Community Reinvestment Act (CRA).[69] A review of the record in connection with these applications and other information available to the OCC as a result of its regulatory responsibilities revealed no indication that each applicant's record of helping to meet the credit needs of its community, including low and moderate income neighborhoods, is not at least satisfactory. Each applicant will adjust its assessment area as necessary on a pro forma basis. Consequently, each applicant's record of compliance with CRA is consistent with approval of these applications.

B. Other regulatory considerations

OCC regulations governing establishment and operation of branches state that in determining whether to approve the establishment of a branch, the OCC is guided by the following principles:

(1) Maintaining a sound banking system;

(2) Encouraging a national bank to help meet the credit needs of its entire community;

(3) Relying on the marketplace as generally the best regulator of economic activity; and

(4) Encouraging healthy competition to promote efficiency and better service to customers.[70]

OCC regulations also provide for denial of an application if:

In addition, protestants argued that application of *Deposit Guaranty* gives a competitive edge to national banks over state commercial banks. It is enough to say that the courts have found that to be irrelevant. argument. *See, e.g. Deposit Guaranty* at 269-270; *Indiana Decision* at 1525.

[69] *See* 12 U.S.C. § 2903(2); 12 C.F.R. § 25.29(a)(1).

[70] 12 C.F.R. § 5.30(e) (1999).

(1) A significant supervisory, CRA . . . , or compliance concern exists with respect to the applicant;

(2) Approval of the filing is inconsistent with applicable law, regulation, or OCC policy thereunder; or

(3) The applicant fails to provide information requested by the OCC that is necessary for the OCC to make an informed decision.[71]

As discussed, the proposed branches are consistent with applicable law and regulation and approval is consistent with CRA. Based upon these and the other factors set forth above, in connection with the subject applications, there is no reason to deny or condition approval of the applications.[72]

IV. CONCLUSION

For the reasons set forth above, a national bank in Oklahoma may branch to the same extent that a state-chartered savings and loan association in Oklahoma may branch under Oklahoma law. Accordingly, because the applications are in accordance with applicable law, consistent with the Community Reinvestment Act, and otherwise conform to the policies of the OCC, they are approved. Therefore, the applicants may establish branches, as proposed, in the following locations:

(1) Central National Bank of Poteau, Poteau, Oklahoma, one branch in Stigler, Oklahoma;

(2) First National Bank of Pryor Creek, Pryor, Oklahoma, one branch in Tulsa, Oklahoma;

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[71] 12 C.F.R. § 5.13(b) (1999).

[72] In this regard, we note that the protests addressed in the OCC Oklahoma Decision argued that the applications to which they objected should be denied because the existing banking facilities in those markets are adequate, that economic and competitive conditions in those markets do not justify the location of an additional financial institution, that the applicants have failed to sufficiently identify the need of those markets to be served by another bank, and that they have failed to identify sufficiently the effect on the existing area of the proposed branches and have failed to provide in detail the close proximity of each proposed site to the location of the facilities of other banks. While these factors have not been raised in connection with the applications addressed in this Decision Statement, we reiterate that they are inconsistent with the principles enunciated by the OCC in its branching regulations, as set forth above, and which focus on consistency with law, the CRA, and supervision, compliance, and OCC branching policies encouraging competition, reliance on the marketplace, and the meeting of local credit needs. Moreover, nothing in relevant state statutory branching law, as applied to national banks by section 36(c), calls for consideration of the factors advocated by the protestant. *E.g. First National Bank of Fairbanks v. Camp*, 465 F.2d 586, 597 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1124 (1973) (OCC may interpret state branching statute independently of state statutory interpretations); *First National Bank of Southaven v. Camp*, 471 F.2d 1322, 1325 (5th Cir. 1973) (administrative interpretations imposing limits on branching more stringent than those imposed by state statute are not binding on the Comptroller).

(3) Oklahoma National Bank of Duncan, Duncan, one branch each in Lawton, Oklahoma, and Walters, Oklahoma; and

(4) First National Bank of Edmond, Edmond, Oklahoma, one branch in Oklahoma City, Oklahoma

/s/ 09-02-99

Julie L. Williams
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Date

Application control numbers: 99-SW-05-126, -0128, -0143, -0144, -0153.