Approved 2/1/90
Date

MINUTES OF THE SENATE COMMITTEE ON FINANCIAL INSTITUTIONS AND INSURANCE.

The meeting was called to order by SENATOR RICHARD L. BOND at
Chairperson

9:00 a.m./~~p.m.~~ on WEDNESDAY, JANUARY 31, 1990, 19__ in room 529-S of the Capitol.

All members were present ~~except~~:

Committee staff present:
Bill Edds, Revisors Office
Bill Wolff, Research Department
Louise Bobo, Committee Secretary

Conferees appearing before the committee:

Jim Maag, Kansas Bankers Association
Tom Holman, Kansas Independent Bankers

Chairman Bond called the meeting to order at 9:10 a.m.

Bill Edds, Assistant Revisor, appeared before the committee on behalf of Martin Dickinson, Attorney from Lawrence, Kansas, to request that the committee allow the introduction of a bill relating to the transfer of the domicile of certain domestic life insurance companies to other states. (Attachment 1)

Senator Moran made a motion to allow introduction of this bill. The motion was seconded by Senator Salisbury. The motion passed.

HB 2628 - Statewide branch banking.

Jim Maag, Kansas Bankers Association, addressed the committee in support of HB 2628.

He informed the committee that this bill would correct a major inequity currently existing in the banking industry in Kansas, namely, that nationally chartered banks in this state have a tremendous advantage over state chartered banks in their ability to establish branch offices. Mr. Maag advised that all levels of the banking industry support this legislation. (Attachment 2)

A brief discussion followed with a committee member inquiring if the Bank Commissioner would be capable of following the expansion and maintaining control in the event of unlimited banking. Mr. Maag responded that he did not anticipate any difficulty since we have had de facto branch banking for the last few years. A committee member also asked if the application procedure for branch banks would be the same as for savings and loan institutions. Mr. Maag said that the procedure would be similar.

Tom Holman, Kansas Independent Bankers, appeared in support of HB 2628 and told the committee that the bill would correct three current inequities regarding the branching laws of Kansas banks. Mr. Holman also advised the committee that his organization supported the current legislation as written but would strongly oppose any attempt to expand the bill to include any form of interstate banking. (Attachment 3)

There being no further conferees on HB 2628, Chairman Bond announced the hearing on this bill closed.

Senator Salisbury made a motion to pass HB 2628 out of committee favorably. Senator Kerr seconded the motion. The motion passed.

Minutes of Tuesday, January 30, 1990, were approved as written on a motion of Senator Salisbury with Senator McClure adding the second. The motion passed.

Chairman Bond adjourned the meeting at 9:30 a.m.

GUEST LIST

COMMITTEE: FINANCIAL INSTITUTIONS & INSURANCE COMMITTEE DATE: Wed. Jan. 31, 1990

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Donna Adams	1500 Merchants Natl Bldg	KBA
Marvin Lane Stattelman	Carbondale	KIBA
Pete McGill	Topeka	KIBA
Tom Holman	730 x 54 Leon, Ks. 67074	KIBA
Lisa Mann	Topeka	KAA
[illegible]	[illegible]	[illegible]
M. Harris	"	Gen. Counsel
Jan Turner	Topeka	KNLSI
Scott Heinell	Topeka	Kansas Inc.

SENATE BILL NO. ____

By Committee on Financial Institutions and Insurance

AN ACT concerning insurance; relating to transfer of the domicile of certain domestic life insurance companies to other states.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Any life insurance company that was originally incorporated under the laws of this state on March 28, 1907, may, with the approval of the commissioner of insurance, transfer its domicile to any other state in which it is admitted to transact the business of insurance. Every such transferring insurer shall notify the commissioner of insurance of the details of the proposed transfer and shall file promptly any resulting amendments to its articles of incorporation or by-laws. The commissioner of insurance may require additional information, hold hearings, and take such other action as may be necessary to evaluate the proposed transfer. The commissioner of insurance shall approve any such proposed transfer and issue written evidence thereof in the form required by the state to which the transfer shall be made, unless it is determined that such transfer is not in the interest of the policyholders of this state. Upon such transfer the company shall cease to be a domestic insurer and shall be admitted to transact the business of insurance in this state if qualified as a foreign insurer. Upon such transfer the transferring company shall no longer be required to deposit securities pursuant to K.S.A. 40-401, 40-404 or any other provision of chapter 40 of the Kansas Statutes Annotated and amendments thereto; however, the commissioner of insurance shall retain an amount of securities equal to the legal reserves on all policies owned by residents of this state in force at the time of such transfer, and the transferring company

Attachment 1
FI & I
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shall periodically deposit with the commissioner of insurance additional securities so that at all times the amount on deposit is at least equal to the legal reserves of such policies.

(b) Upon approving any such transfer, the commissioner of insurance shall file with the secretary of state, in accordance with subsections (c) and (d) of K.S.A. 17-6003 and amendments thereto a certificate stating that the commissioner of insurance has approved transfer of the company's domicile to another state and the state to which the company will transfer its domicile. One hundred and eighty days after the filing of such certificate, or on such earlier date as may be communicated in writing by the president and secretary of the transferring company to the secretary of state, the secretary of state shall issue a certificate that the company has transferred its domicile to the state designated by the commissioner of insurance, and thereupon the existence of the corporation as a domestic corporation shall terminate, if the certificate of the secretary of state shall be recorded in the office of the register of deeds of the county in which the corporation maintained its registered office in this state in compliance with the requirements of subsection (d) of K.S.A. 17-6003 and amendments thereto.

(c) At the discretion of the commissioner of insurance, the certificate of authority, agents' appointments and certificates, rates, forms and other documents required as a precedent to the holding of a Kansas certificate of authority, which are in existence at the time any insurer transfers its domicile to any other state pursuant to subsections (a) and (b), shall continue in full force and effect upon such transfer if such insurer remains duly qualified to transact the business of insurance in this state. All in force policies of any transferring insurer shall remain in full force and effect and shall be endorsed as necessary to display the new name and location of the company.

(d) The transferring company shall not be treated as discontinuing its business for purposes of K.S.A. 40-248 or any other provision of chapter 40 of the Kansas Statutes Annotated

and amendments thereto. The transferring company shall not be treated as uniting, merging or consolidating with any other company for purposes of K.S.A. 40-309 or any other provision of chapter 40 of the Kansas Statutes Annotated and amendments thereto. The transfer shall not be treated as a merger or acquisition of control for purposes of K.S.A. 40-3304 or any other provision of chapter 40 of the Kansas Statutes Annotated and amendments thereto.

(e) The commissioner of insurance of this state may promulgate rules and regulations to carry out the purposes of this act.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

January 31, 1990

TO: Senate Committee on Financial Institutions and Insurance
RE: **HB 2628** - Branching equality for state-chartered banks

Mr. Chairman and Members of the Committee:

We appreciate this opportunity to appear before the committee in support of **HB 2628** which would correct a major inequity currently existing in the banking industry of this state. At the current time, the 158 nationally-chartered banks in Kansas have a tremendous advantage over the 411 state-chartered banks in their ability to establish branch offices. **HB 2628** creates branching equality for state-chartered banks. All levels of the banking industry in Kansas support this legislation. We are requesting your support of this important amendment to our state banking code.

HB 2628 would grant state-chartered banks the same branching authority nationally-chartered banks in Kansas now have as the result of actions by the Office of the Comptroller of the Currency (OCC) which is the primary regulator for national banks. The OCC actions are based on a Mississippi case several years ago (the Deposit Guaranty case) wherein the federal courts ruled that nationally-chartered banks must be allowed the same branching authority as that granted to state-chartered savings & loan associations (S&Ls) within a state if it can be shown that state-chartered S&Ls are engaged in "the business of banking". A copy of that decision by the Fifth Circuit Court of Appeals is attached.

On March 30, 1989, Peoples National Bank of Ottawa was granted the authority by the OCC to establish a de novo (new) branch office in Aubry township in southern Johnson County. The establishment of such a branch office violates the branching provisions of the Kansas banking code, but the OCC permitted the Peoples National request on the grounds that they had proven state-chartered S&Ls in Kansas are involved in the business of banking and, therefore, as a national bank Peoples National could not be denied the same branching authority as that granted to state-chartered S&Ls. Currently in Kansas, state-chartered S&Ls may branch with no geographical or numerical restrictions. A copy of the Comptroller's opinion in the Peoples National application is attached.

On May 8, 1989, Attorney-General Stephan, in response to a request from State Bank Commissioner Newton Male as to the legality of the OCC's action, stated that "a challenge to the branching authority of Peoples National Bank would be unsuccessful given the current state and federal laws and the Comptroller's interpretation." A copy of the Attorney-General's letter is also attached. Since granting Peoples National their de novo application the OCC has also granted similar branching rights to several other national banks in Kansas.

Attachment 2
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1/31/90

Office of Executive Vice President • 1500 Merchants National Building
Eighth and Jackson • Topeka, Kansas 66612 • (913) 232-3444

There is certainly no indication the OCC plans to change its current branching policy and, in fact, their actions in Kansas and other states have not been successfully challenged in the courts. Therefore, the KBA believes it is imperative that the Legislature proceed with all due speed to grant branching equality to state-chartered banks.

HB 2628 simply removes the existing restrictions in K.S.A. 9-1111 on branching and allows state-chartered banks to establish branch offices in the same manner as nationally-chartered banks at any location and in any number, subject to the normal hearing process and approval by the state banking board. The bill would become effective upon its publication in the State Register in order to establish branching equality as soon as possible.

The provisions of **HB 2628** are completely separate from the issue of interstate banking. That issue has been introduced in another bill (SB 532) and should be considered on its own merits.

Thank you for allowing us to present and discuss this important issue at this early point in the session. Your support for **HB 2628** will be greatly appreciated by the Kansas banking industry.

Sincerely,

Jim

James S. Maag
Senior Vice President

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 85-4722

THE DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI, *et al.*,
Plaintiffs-Appellees,

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES and DEPOSIT GUARANTY NATIONAL BANK,
Defendants-Appellants.

Feb. 9, 1987

Anthony J. Steinmeyer, Appellate Staff, Civil Div., Dept. of Justice, Washington, D.C., Dan M. McDaniel, Jr., Asst. U.S. Atty., John F. Daly, Jackson, Miss., for Controller of Currency.

Luther T. Munford, Lawrence J. Franck, Jackson, Miss., for Deposit Guar. Bank

Hubbard T. Saunders, Stephen J. Kirchmayr, Jr., Robert M. Arentson, Jr., Champ Terney, Jackson, Miss., for Dept. of Banking.

G.E. Estes, Jr., Gulfport, Miss., for Merchants Bank.

John M. Harral, Knox White, Gulfport, Miss., for Hancock Bank, et al.

W. Joel Blass, Gulfport, Miss., for Gulf Nat'l. Bank.

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Appeal from the United States District Court for the uthern District of Mississippi.

Before POLITZ, RANDALL, and JOLLY, Circuit Judges.

POLITZ, Circuit Judge:

This appeal by the Comptroller of the Currency of the United States and Deposit Guaranty National Bank of Jackson, Mississippi, from a judgment enjoining the Comptroller and Deposit Guaranty from establishing a branch office in Gulfport, Mississippi, poses a sole question: did the Comptroller err in his interpretation of the term "State bank" as found in 12 U.S.C. § 36(h), when he granted approval of Deposit Guaranty's application to establish the branch? The district court concluded that the Comptroller had erred. We disagree and reverse.

Background

In September 1984 Deposit Guaranty, a national banking corporation chartered under the laws of the United States with its principal office in Jackson, Mississippi, applied to the Comptroller for permission to open a branch bank in Gulfport, Mississippi. Gulfport is more than 100 miles distant from Jackson. During the public comment period following the publication of notice of Deposit Guaranty's application, the Department of Banking and Consumer Finance of the State of Mississippi and several state-chartered commercial banks with offices in or near Gulfport protested. On July 9, 1985, the Comptroller rejected the protests and granted the requested approval. The Department of Banking promptly filed the instant action, seeking to enjoin the opening of the Gulfport branch. Several state commercial banks were allowed to intervene. After reviewing the record developed before the Comptroller, the district court granted the injunctive relief. Both the Comptroller and Deposit Guaranty timely appealed.

Like most states, the State of Mississippi has historically recognized and chartered two kinds of financial institutions, commercial banks and savings associations. The commercial banks are chartered under Miss.Code Ann. § 81-3-3 and are regulated by the Department of Banking. The savings associations are chartered under Miss.Code Ann §§ 81-12-25 to 81-12-43 and are under the authority of the Mississippi Department of Savings Associations, Miss.Code Ann. § 81-12-11. Originally the financial activities of the two institutions differed. In recent years, however, because of changes in state and federal law, the savings associations have become highly competitive with the state banks and other financial institutions, including national banks.

The traditional powers and functions of a bank, constituting the business of banking, are enumerated in the National Bank Act, 12 U.S.C. § 24 (seventh):

(1) the discounting and negotiating of promissory notes, drafts, bills of exchanges, and other evidence of debt;

(2) the receiving of deposits;

(3) the buying and selling of exchange, coin and bullion;

(4) the loaning of money on personal security; and

(5) the issuing and circulating of notes under the National Bank Act.

As is noted by the Comptroller and generally acknowledged, items (3) and (5) are of little relevance. Hence, the banking business, reduced to essentials, involves receiving deposits, making commercial loans, and negotiating checks and drafts.

Starting in 1980, Mississippi's statutes and regulations dramatically changed, conferring traditional banking powers upon Mississippi savings associations which are

v authorized to: offer negotiable order of withdrawal (NOW) accounts and interest-bearing checking accounts, Miss.Code Ann. §§ 81-12-149, 81-12-151; receive and pay interest on savings deposits and other accounts, Miss. Code Ann. § 81-12-49(d); lend and invest funds, Miss. Code Ann. §§ 81-12-49(p), 81-12-155, 81-12-159; service loans and investments, Miss.Code Ann. § 81-12-49(n); and sell money orders and travelers' checks, Miss.Code Ann. § 81-12-49(*l*). Under what is sometimes referred to as the "wild card" statute, Miss.Code Ann. § 81-12-49(r), Mississippi savings associations may engage in ny activity permitted a federally chartered savings and loan association in that state. And, of some significance, savings associations may now use the appellation "savings bank," contrary to the former law reserving the title "bank" for commercial banking institutions. Miss.Code Ann. § 81-3-3; Miss Savings Rule 16.1.

Consistent with the previous sharp separation of functions, banks and savings associations were accorded different treatment. One difference central to the case at bar involves branch units. A savings association may open branches throughout the state, Miss.Code Ann. § 81-12-175, whereas the state commercial banks, since the 1986 amendments, are allowed to open branches only in the county in which the bank's principal office is located, or within a 100-mile radius, Miss.Code Ann. § 81-7-7.

The Comptroller is responsible for the supervision of 5,000 national banks chartered under federal law. Congress has empowered the Comptroller to make definitive judgments on the application of national banks for permission to relocate or to open branches, 12 U.S.C. §§ 30, 36. The federal branching provision, commonly referred to as the McFadden Act, permits a national bank to open branches anywhere that a state bank may. The National Bank Act, 12 U.S.C. § 36, provides in pertinent part:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . at any poir within the State in which said association is situatec if such establishment and operation are at the tim authorized to State banks by the statute law of th State in question by language specifically grantin such authority affirmatively and not merely by im plication or recognition, and subject to the restric tions as to location imposed by the law of the Stat on State banks.
>
> * * * * * *
>
> (h) The words "State bank," "State banks," "bank, or "banks," as used in this section, shall be held t include trust companies, savings banks, or other suc corporations or institutions carrying on the bankin business under the authority of State laws.

In his consideration of the application of Depos Guaranty for permission to open a Gulfport branch, th Comptroller received in evidence a study of the bankin industry in Mississippi reflecting that savings associatior offered traditional banking services such as, *inter alic* interest-bearing checking accounts, commercial checkin accounts, consumer loans, business and constructio loans, savings deposits, and related incidental service After considering the evidence presented, applicable fe eral and state statutes and regulations, and the relevar jurisprudence, the Comptroller determined that savin associations in Mississippi were engaged in the busine of banking and were "State banks" within the meanir of 12 U.S.C. § 36(h). The Comptroller accordingly co cluded that "[n]ational banks in Mississippi may, thu branch to the same extent as Mississippi savings ass ciations, *i.e.*, statewide." We are charged to uphold th Comptroller's determination if we find it to be a "pe missible construction" of the National Bank Act. S *Chevron v. Natural Resources Defense Council*, 4(U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 6 (1984); *Texas v. United States*, 756 F.2d 419 (5th Cir.

cert. denied, —— U.S. ——, 106 S.Ct. 129, 88 L.Ed.2d 106 (1985). In reaching his conclusion the Comptroller applied a federal definition of banking, eschewed state-applied labels, and looked primarily to the function of the institutions.

Analysis

The threshold issue we confront is whether the Comptroller, in his interpretation and application of a federal statute, in this case 12 U.S.C. § 36(h), should look to state or federal law to define the statute's terms. We conclude and hold that in his interpretation of 12 U.S.C. § 36(c) and (h) the Comptroller may seek the guidance of helpful state law, but is bound to follow federal law in defining terms contained in the federal statute. This includes, of course, the terms "State bank" and "banking business."

The Supreme Court's reasoning in *First National Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343 (1966), illuminates our path. The Court there held that national banks in Utah were constrained to establish branches in the same manner as state banks in that state. The Court opined that "[i]t appears clear from . . . the legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." 385 U.S. at 261, 87 S.Ct. at 497. It was this concern for competitive equality that drove the Court's decision in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), wherein it held that the definition of "branch" in 12 U.S.C. § 36 was a matter of federal law.

In *Plant City*, the Court emphasized the importance of employing a federal definition to ensure that national banks would be able to perform the same branching functions as neighboring state banks. The Court relied on the legislative history of the McFadden Act, codified as 12 U.S.C. § 36, reasoning that to allow the states to regulate banking functions "would make them the sole judges of their own powers. Congress did not intend such an improbable result. . . ." 396 U.S. at 133-34, 90 S.Ct. at 343. The court cited legislative history demonstrating that Congress was concerned that "neither system have advantages over the other in the use of branch banking" and that national banks would be protected "from the unrestricted branch bank competition of state banks." *Id.* at 131, 90 S.Ct. at 342.[1]

The principle of competitive equality guided the Comptroller's analysis and informed his decision in the present case. He observed that "the concept of competitive equality requires a federal definition of 'State bank' to prevent states from disadvantaging national banks vis-a-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."

We conclude that the Comptroller's use of federal law and the competitive equality standard was legally correct. By doing so the Comptroller was faithful to the congressional mandate and demonstrated considerable expertise in balancing national and state interests in this constantly evolving area.

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[1] In other areas traditionally regulated by state law, the Supreme Court has applied federal definitions to federal statutory terms even when the federal statute contains references to state law provisions. *See Chase Manhattan Bank v. City Finance Admin.*, 440 U.S. 447, 99 S.Ct. 1201, 59 L.Ed.2d 445 (1979) (definition of "tax" under federal statute governing state taxation is a question of federal law); *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959) (definitions of "insurance" and "annuities" for purposes of federal regulation are questions of federal law even if such definitions work to displace or hinder state regulation).

Having concluded that the federal definition of banking business controls the meaning of that term in § 36 (h), we must now determine whether the Comptroller correctly placed the Mississippi savings associations within that subsection. The Comptroller looked to function and found as a fact that the savings associations were engaged in the banking business. The district court did not address those factual findings.

We agree with the Comptroller that the language of § 36(h) expressly requires a consideration of function. The statute directs that the term "State bank," as used therein, "shall be held to include . . . corporations or institutions carrying on the banking business under the authority of state laws." We hold that the Comptroller was statutorily mandated to determine whether the Mississippi savings associations, some of which publicly refer to themselves as "savings banks," were actually "carrying on the banking business." This task could only be accomplished by a targeted functional analysis.[7] The very recent Supreme Court decision in *Clarke v. Securities Industry Association*, —— U.S. ——, 107 S.Ct. 750, —— L.Ed.2d —— 1987), implicitly supports the Comptroller's use of this functional analysis methodology.

As noted above, Congress has defined the business of banking, stripped to its essentials, as accepting deposits, paying checks, and making loans. As observed by the Comptroller, these three primary functions are listed in the National Bank Act's definition of branch in 12 U.S.C. § 36(f).[8]

As a reviewing court, we must accept the Comptroller's factual findings unless we find that they are arbitrary or capricious. 5 U.S.C. § 706. Our determination must be made on the basis of the administrative record. *Camp v. Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

The Comptroller's factual determination that the savings associations are engaged in the banking business is amply supported by the record. These associations, consistent with state law, accept deposits, pay interest on accounts, offer checking accounts, act in a fiduciary capacity, make personal loans, sell money orders and travelers' checks, service loans, manage investments, honor withdrawals from savings accounts, and purchase, sell, lease, and mortgage both personal and real properties. This factual finding by the Comptroller is neither arbitrary nor capricious. It is patently correct.

In reaching our conclusion we are not unmindful of the Garn-St. Germain Act, adopted in 1982, 12 U.S.C. § 1461 *et seq.*, expanding the regulatory scheme for savings and loan associations. That regulatory scheme, intended to ensure that savings and loan institutions main-

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[7] Our colleagues in the District of Columbia Circuit used this approach in defining "branch" in *Independent Bankers Association of America v. Smith*, 534 F.2d 921 (D.C.Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 166, 50 L.Ed.2d 141 (1976). There, the court determined that all bank offices, state or national, that perform any one of three branch banking services, are "branches" for purposes of the National Bank Act, regardless of the offices' actual labels. Thus, for example, automatic teller machines constitute "branches" for purposes of the Act.

[8] The Supreme Court has defined "banking business" similarly in antitrust cases. In *United States v. Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963), the Court stated that of the various banking services and products,

> the creation of additional money and credit, the management of the checking account system, and the furnishing of short-term business loans would appear to be the most important.

374 U.S. at 326-27, 83 S.Ct. at 1721. The Court has repeated this delineation of banking functions in subsequent antitrust cases, *see, e.g., United States v. Phillipsburg National Bank*, 399 U.S. 350, 90 S.Ct. 2035, 26 L.Ed.2d 658 (1970); *United States v. First National Bank*, 376 U.S. 665, 84 S.Ct. 1033, 12 L.Ed.2d 1 (1964).

tain their status "as the nation's primary home lender," S.Rep. No. 641, 97th Cong.2d Sess. 88, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3054, 3131, differs from the regulation of the traditional bank. The principal difference involves the limits placed on the commercial and consumer loans and investments of the savings institutions, designed to protect their capacity to make needed home loans. That legislation neither proscribes the functional analysis made by the Comptroller nor militates against his interpretation of 12 U.S.C. § 36(h).

The Comptroller did not incorrectly interpret the controlling statutory provisions. His interpretation was more than a mere "permissible construction," all that is required in order to secure this court's deference. *See Chevron v. Natural Resources Defense Council*; *United States v. Riverside Bayview Homes, Inc.*, —— U.S. ——, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985); and *Texas v. United States*. We find the Comptroller's interpretation to be amply supported by the express "language employed by Congress," giving the words it chose their "ordinary meaning." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982).

The district court erred in enjoining the Comptroller and Deposit Guaranty. The injunction imposed is vacated and the judgment is reversed. The Comptroller is entitled to judgment as a matter of law. The matter is returned to the district court for entry of an appropriate judgment.

REVERSED.

The relevant portion of Section 36(c) of the McFadden Act, 12 U.S.C. § 36(c), provides as follows:

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . (2) 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.

Section 36(f) of the McFadden Act, 12 U.S.C. § 36(f), provides as follows:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

Section 36(h) of the McFadden Act, 12 U.S.C. § 36(h), provides as follows:

> 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.

Miss. Code Ann. § 81-7-5 (1972) provided as follows:

> Branch offices in certain cities—permission of state comptroller—branch offices may make loans.
>
> The state comptroller may permit banks to establish branch offices within the corporate limits of the

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

I. BACKGROUND

By application dated August 10, 1988, as supplemented November 2, 1988, Peoples National Bank and Trust Company, Ottawa, Kansas (PNB), requests approval to establish a branch near the intersection of U.S. 69 Highway and 199th Street in Johnson County, Kansas. PNB's main office in Ottawa, Kansas, is located in Franklin County, which borders the southwest corner of Johnson County.

Notice of PNB's branch application was published on August 10, 1988 in the Kansas City Times, a newspaper published daily in Kansas City, Missouri. No comments or protests to the application were received.

V. CONCLUSION

Based on my determination that Kansas savings and loans associations are authorized to carry on the banking business and are carrying on that business, I conclude that such associations are "State banks" for purposes of 12 U.S.C. § 36(h). A national bank in Kansas may therefore branch to the same extent and subject to the same conditions imposed on savings and loans associations under Kansas law. Accordingly, because PNB's application conforms to the policies of this Office and is consistent with applicable law, the application is approved.

J. Michael Shepherd
J. Michael Shepherd
Senior Deputy Comptroller for
Corporate and Economic Programs

March 30, 1989
Date

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

May 8, 1989

W. Newton Male
State Bank Commissioner
Banking Department
700 Jackson, Suite 300
Topeka, Kansas 66603-3714

Dear Commissioner Male:

My office has reviewed your request of April 19, 1989 regarding the authority of a federally chartered bank to establish branch facilities in the same manner as state chartered savings and loan institutions. It is my opinion that the Stilwell branch of the Peoples National Bank and Trust of Ottawa, Kansas is not an illegal branch.

Enclosed please find a copy of Kansas Attorney General Opinion No. 87-182. In that opinion, I addressed the interpretation of the Comptroller of the Currency of 12 U.S.C. § 36 (1982). The Comptroller has determined that national banks may branch in the same manner as state savings institutions because state savings institutions are generally engaged in the same business as state banks. The Comptroller's interpretation of the federal law was upheld in Dept. of Banking and Consumer Finance v. Clarke, 809 F.2d 266 (5th Cir. 1987), cert. denied, 107 S.Ct. 3240, 97 L.Ed.2d 745. Similar results are found in subsequent federal district court decisions. It appears that a challenge to the branching authority of Peoples National Bank would be unsuccessful given the current state and federal laws and the Comptroller's interpretation.

If you require further assistance in this or other matters, please feel free to contact my office.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

RTS:MWS:bas

2-11

Branch bank challenges state law

By W. Randolph Heaster
Of the Business Staff

A Kansas bank's branch office sets a precedent that could change state laws regarding the operation of branches, banking observers said Monday.

The Peoples National Bank & Trust of Ottawa has been operating a branch in Stilwell since early April under approval from the U.S. Comptroller of the Currency's office, said Daniel P. Winter, president of the branch office of Peoples National in Louisburg.

The bank headquarters is in Franklin County and the new Stilwell branch in Johnson County, in apparent conflict with Kansas banking laws restricting the ability of banks to establish branches across county lines.

But in a letter to the Kansas banking commissioner last week, Kansas Attorney General Bob Stephan said that under current law he did not think that the Peoples National branch was illegal.

Because it has a national charter, Peoples National does not come under the same provisions in the Kansas law as do state-chartered banks, said Newton A. Male, the Kansas banking commissioner.

As a result of Peoples National's move, banks with national charters can establish brancnes all over Kansas without regard for state banking regulations, according to banking industry experts.

"This puts all state-chartered banks at a competitive disadvantage," Male said. "I would say it's up to the state Legislature to make a change."

But the Legislature's next session doesn't start until January, so nationally chartered banks will have an advantage over state banks for at least several months, said Harold Stones, executive director of the Kansas Bankers Association.

There are more than 400 state-chartered banks and about 200 national banks in Kansas, Male said.

Stones said he sent Stephan's ruling to association members last week but had not yet received strong negative reactions from state-chartered banks.

"It doesn't seem that there is very much state banks can do," said George Walden, president of the Kansas Independent Bankers Association, which represents mostly small banks. "It looks like Peoples National is home free."

Walden is also president of Garden Plain (Kan.) State Bank.

Many banking observers said the next likely step was for the Kansas Legislature to give state-chartered banks the same branching privileges

See BANK, D-17, Col. 1

Branch bank challenges law about crossing county lines

Continued from Page D-3

as national banks.

Until Peoples National opened its branch in Stilwell, all Kansas banks were limited to establishing branches by buying failed banks or merging with other banks to create branches in other counties, Male said. Peoples National took over a failed bank in Louisburg to start its branch there.

A bank also could establish a branch in a bordering county that did not already have a bank, Male said.

"We decided that there was another way to skin the cat," Winter said.

Winter said that in its application to the comptroller of the currency, Peoples National argued that savings and loan associations had the freedom to open branches statewide without restrictions. Because thrifts operate similarly to banks, Winter said Peoples National argued that banks should have the same ability.

The comptroller approved People National's application in March.

But a similar move by First National Bank & Trust Co. of Columbia, Mo., is being challenged in Missouri by the state's finance division and others.

That lawsuit, which contends that branching into different counties is illegal, was filed in January in U.S. District Court in Kansas City, said Earl L. Manning, commissioner of the Missouri Division of Finance.

In a similar case in Mississippi, a federal court in 1987 upheld the right of nationally chartered banks to branch statewide.

Missouri and Kansas aren't the only states that are coping with challenges to branching restrictions since that ruling, Male said. Other states that have allowed more liberal branch banking include Tennessee, Texas, Louisiana and Florida.

Expanding with a branch as opposed to opening a separate bank can be advantageous because capital requirements are not increased with a branch, Winter said.

Because Kansas law restricts branching, Peoples National sought federal approval, Winter said.

Robert W. Asmann, executive vice president of the rapidly expanding Fourth Financial Corp. of Wichita, said his bank holding company does not have an official position on the Peoples National ruling, but Fourth Financial generally favors the liberalization of banking laws.

In its recent expansion, Fourth Financial has bought existing banks that already have significant market shares.

"To go into a well-established area and open a branch is not something we'd be inclined to do," Asmann said.

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St Louis Post-Dispatch 12/5/89

State Loses On Bank Challenge

By Jim Gallagher
Of the Post-Dispatch Staff

A federal court has refused to halt the U.S. Comptroller of the Currency's efforts to overturn Missouri's branch banking regulations.

If not blocked by higher courts, the move would let Missouri's 90 national banks place branches anywhere in the state.

"It would change the chemistry of banking as we've known it in Missouri," said Robert Crawford, executive vice president of the Missouri Bankers Association.

Under state law, outstate banks cannot set up branches outside their own counties. St. Louis and Kansas City banks have permission to cross county lines.

The case stems from efforts by First National Bank & Trust Co. of Columbia to open branches in Jefferson City and Fulton. The Comptroller of the Currency, the federal agency that regulates national banks, joined First National in the legal battle.

A federal judge in Kansas City on Nov. 20 rejected the Missouri Finance Division's request for an injunction blocking the move. Earl Manning, Missouri commissioner of finance, said the ruling would be appealed.

The comptroller argues that Missouri law discriminates in favor of savings and loan institutions. S&Ls can set up as many branches as they want, wherever they want in the state.

S&Ls these days behave much like banks, the comptroller argued, and banks should have as much freedom.

Manning said a victory by the comptroller would set up a two-tier banking system in the state. National banks would be free to branch across the state. But Missouri's 470 state-chartered banks would still be bound by the state's branching limits.

A national bank from another county could set up a branch across the street from a state bank, but the state bank couldn't retaliate, Manning said.

Banking analyst Anthony Polint of A.G. Edwards & Sons Inc. said he doubts that a comptroller's victory would make much difference in the state's banking scene.

Banks that want to expand already find ways around the law — often by setting up a whole new bank in the target county using same name as the parent bank.

The system makes for some inefficiencies. Customers of Mercantile Bancorporation's Jefferson County bank, for instance, can't make deposits at Mercantile Bank branches in St. Louis.

S B L THE STATE BANK OF LEON
P.O. Box 68, Leon, Ks 67074

1-31-90

(316) 745-3241
Thomas V. Holman, President

Branching bill.

The Kansas Independent Bankers Association supports this legislation which corrects current inequities regarding the branching laws of Kansas banks.

(3) such inequities now exist:

The first: Circumstances whereby banks in towns with only (1) financial institution, can transfer their charter to another area and then branch-back to the original location, thereby, circumventing the intent of current branching laws. This creates an inequity against banks in towns where there are more than one financial institution, since in some cases you could not branch into a town or city if an existing financial institution is already in place there.

Secondly: Due to the recent OCC ruling on the Ottawa bank case, basing his(the Comptroller) ruling on the fact that S & L's are bank like and can themselves branch state wide, the comptroller ruled therefore National banks could also branch in like manner. This then leaves state banks at a competitive disadvantage with National banks under current branching laws.

The third inequity occurred when FIRREA, the Federal S & L bail-out legislation, was inacted. State banks would have been unable to bid on branches of these failed S & L's and would have been at a competitive disadvantage with National banks and out-of-state institutions, if current state branching laws were to be enforced to the letter of the law.

The Kansas Independent Bankers Association would always prefer the banking industry working with the legislature in determining its banking law structure instead of being forced to conform by actions and circumstances of the OCC and the S & L industry; however, the only feasible alternative at this point and given these circumstances seems to be this particular legislation.

We are supportive of this proposed legislation in its present form; however, if an attempt to expand it to encompass any form of interstate banking is made, we will strongly oppose such an attempt. Interstate banking contains the crucial element of out-of-state ownership and control of Kansas deposit resources, an element currently prohibited by law and not yet addressed in structure issues of the past. It therefore must be addressed as a separate issue and on its own merits as to the effects on the people and economy of Kansas.

Thank you Chairman Bond.

Attachment 3
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