LETTER OPINION
94-L-239

September 8, 1994

Honorable James Maxson
State Senator
6 Ninth Street SE
Minot, ND 58701

Dear Senator Maxson:

Thank you for your August 10, 1994, letter concerning First Bank System, Inc. ("FBS"), a Minnesota bank holding company, and its agreement to merge with Metropolitan Financial Corporation ("MFC"), and thereby acquire Metropolitan Federal Bank, F.S.B. ("MFB"), a North Dakota federal savings association. Specifically, you ask whether the transaction would be subject to North Dakota's Regional Reciprocal Interstate Banking Act, North Dakota Century Code (N.D.C.C.) ch. 6-08.3 and, if so, whether the Commerce Clause of the United States Constitution would invalidate any of the Act's restrictions to the proposed transaction.

To address your inquiry, it is necessary to examine the structure of the Bank Holding Company Act of 1956 ("BHCA"), 12 U.S.C. ?? 1841-1850, as amended. The BHCA regulates the acquisition of state and national banks by bank holding companies. Northeast Bancorp v. Board of Governors of the Fed. Reserve Sys., 472 U.S. 159, 162-163 (1985). The BHCA generally defines a bank as any institution organized under state or federal law which "(i) accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others; and (ii) is engaged in the business of making commercial loans." 12 U.S.C. ? 1841(c)(1)(B). Under 12 U.S.C. ? 1841(c)(2)(B) an "insured institution" as defined in 12 U.S.C. ? 1841(j) is excluded from the definition of a bank. A savings association or insured institution is defined as "(1) any Federal savings association or Federal savings bank; (2) any building and loan

association, savings and loan association, homestead association, or cooperative bank if such association or cooperative bank is a member of the Savings Association Insurance Fund; and (3) any savings bank or cooperative bank which is deemed by the Director of the Office of Thrift Supervision to be a savings association under section 1467a(1) of this title." 12 U.S.C. ? 1841(j).

Before a company may become a bank holding company or before a bank holding company may acquire a bank or substantially all of the assets of a bank, section 3 of the BHCA, 12 U.S.C. ? 1842, requires it to obtain the approval of the Board of Governors of the Federal Reserve System ("Federal Reserve Board"). Section 3(a) of the BHCA, 12 U.S.C. ? 1842(a), provides that, "[i]t shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than five per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company." Section 3(d) of the BHCA, 12 U.S.C. ? 1842(d), commonly known as the Douglas Amendment, prohibits the Board from approving an application of a bank holding company located in one state to acquire a bank located in another state unless the acquisition is "specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication."

Section 4(c)(8) of the BHCA, 12 U.S.C. ? 1843(c)(8), authorizes the Federal Reserve Board to approve an application by any bank holding company to acquire any savings association in accordance with the

requirements and limitations of that section. See 12 U.S.C. ? 1843 (i)(1). The Federal Reserve Board implements Section 4(c)(8) of the BHCA with Regulation Y, 12 C.F.R. ? 225.25, which contains a list of activities the Board has determined to be "closely related" to banking. The Board has determined that the acquisition of a savings association is closely related to banking. See 12 C.F.R. ? 225.25(b)(9) ("Owning, controlling or operating a savings association, if the savings association engages only in deposit taking activities and lending and other activities that are permissible for bank holding companies under this subpart C.").

Unless section 3(a) of the BHCA requires an application to be filed with the Federal Reserve Board, "the express terms of the Douglas Amendment - which merely prohibit the approval of certain applications - have no effect." State of Idaho, Dept. of Finance v. Clarke, 994 F.2d 1441, 1446 (9th Cir. 1993). See also Lewis v. B.T. Investment Managers, Inc., 447 U.S. 27, 47 (1980) ("[T]he structure of the Act reveals that ? 3(d) applies only to holding company acquisitions of banks. Non-banking activities are regulated separately in ? 4, which does not contain a parallel provision.") This is consistent with N.D.C.C. ? 6-08.3-13 which provides that N.D.C.C. ch. 6-08.3 was enacted "in accordance with section 3 of the Bank Holding Company Act of 1956, as amended [12 U.S.C. 1842], [to authorize] reciprocal interstate banking in the state."

Original exclusive jurisdiction as to the interpretation of the BHCA rests with the Federal Reserve Board. Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans, 379 U.S. 411, 414 (1965). As the United States Supreme Court more recently observed in Securities Industry Ass'n v. Board of Governors of the Fed. Reserve Sys., 468 U.S. 137, 142 (1984), "[t]he Board is the agency responsible for federal regulation of the national banking system, and its interpretation of a federal banking statute is entitled to substantial deference." The Federal Reserve Board in its Commentary, "Acquisition and Operation of Savings Association by Bank Holding Companies," 54 Fed. Reg. 37297 (Sept. 8, 1989) ("Commentary"), has explained how the BHCA applies to the acquisition of savings associations by bank holding companies.

Initially, the Federal Reserve Board phrases the applicable test concerning the acquisition of a savings association by a bank holding company as follows:

Under the BHC Act, a savings association is expressly excluded from the definition of "bank" and is treated as a nonbank company. Its acquisition by a bank holding company is therefore governed by the nonbanking provisions of section 4(c)(8) of the Act. Section 4(c)(8) permits bank holding companies to acquire a nonbank company if it is engaged only in activities the Board has determined to be "so closely related to banking . . . as to be a proper incident thereto." In order to meet the standards of section 4(c)(8), the Board must make two findings. First, the Board must find that the activity is closely related to banking. Second, the Board must find that the proposed activity is a proper incident to banking, that is, that the expected public benefits outweigh the potential adverse effects associated with the proposed activity.

Commentary, Fed. Reg. at 37298. Given this initial analysis, it would appear that the acquisition of a savings association by a bank holding company would not fall under the provisions of section 3 of the BHCA and also N.D.C.C. ch. 6-08.3 would not apply since it would be characterized as a section 4(c)(8) acquisition. However, the Federal Reserve Board in its Commentary did not eliminate the effect of the Douglas Amendment and noted that the Douglas Amendment would apply under a section 4(c)(8) acquisition as follows:

In FIRREA[1], Congress focused again on the acquisition of savings associations by bank holding companies, and, in authorizing such acquisitions, did not impose any geographic limitations. In addition, nothing in the legislative history of this provision indicates that Congress intended the Board to impose geographic restrictions on these acquisitions. On the contrary, the only geographic restriction imposed by FIRREA on affiliations of savings associations and banks applies in the event the savings association seeks to merge or convert into a bank. In that situation only, the transaction must be consistent with the Douglas Amendment.

Commentary, Fed. Reg. at 37299.

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[1]The Financial Institution Reform, Recovery and Enforcement Act of 1989, Pub.L. No. 101-73.

The Federal Reserve Board provides an apt illustration of the Commentary's analytical framework with its decision in Old National Bancorp, 79 Fed. Res. Bull. 55 (January 1993). Old National Bancorp, an Indiana bank holding company, had applied for Federal Reserve Board approval under section 3 of the BHCA to merge with an Illinois bank holding company and thereby acquire various Illinois banks. Old National Bancorp had also applied for Federal Reserve Board approval in a separate transaction to merge with an Illinois savings bank holding company and thereby acquire an Indiana federal savings bank pursuant to section 4(c)(8) of the BHCA and 12 C.F.R. ? 225.25(b)(9) (Regulation Y). Under the section 4(c)(8) acquisition, the Federal Reserve Board specifically noted that acquisition of the Indiana federal savings bank, "which is deemed to be a savings association for purposes of the BHC Act, is not subject to the interstate banking restrictions of the Douglas Amendment." Id. at 56, n. 4. However, the Douglas Amendment was implicated because the Illinois Savings Association was to be merged with Old National's subsidiary bank. The Board determined that "[s]ince Illinois law allows the acquisition of an Illinois bank by an Indiana bank holding company, the proposed transaction would comply with the Douglas Amendment if [the Indiana savings association] were a state bank that Old National was applying to acquire directly." Id. at 61. See 12 U.S.C. ? 1815(d)(3).

Giving due deference to the Federal Reserve Board's interpretation of the BHCA in its Commentary concerning the acquisition of savings associations by bank holding companies, it is my opinion that the Commentary correctly states the law in this area and provides the necessary analytical framework upon which to determine whether the Douglas Amendment and, thereby, N.D.C.C. ch. 6-08.3, applies to the acquisition of MFB by FBS through the merger of FBS with MFC.

Thus, it becomes a question of fact whether the Douglas Amendment, and thereby N.D.C.C. ch. 6-08.3 which gives effect to that amendment in North Dakota, applies to the acquisition of MFB by FBS through the merger of FBS with MFC. Although the initial section 4(c)(8) acquisition of MFB by FBS through the merger of FBS with MFC may not be subject to the Douglas Amendment, if FBS intends to merge or convert MFB into

a bank, then the Douglas Amendment and N.D.C.C. ch. 6-08.3 would be implicated. Because it is a question of fact, I believe that it is appropriate for the North Dakota State Banking Board to determine that factual question for itself and, as factfinder, to assert whatever proper jurisdiction it has consistent with the Federal Reserve Board's Commentary on the acquisition of savings associations by bank holding companies. As long as the State Banking Board's assertion of jurisdiction is consistent with the Federal Reserve Board's Commentary, and therefore the BHCA, such an assertion of jurisdiction would be constitutional under the Commerce Clause. See Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys., 472 U.S. 159, 174 (1985) ("Here the commerce power of Congress is not dormant, but has been exercised by that body when it enacted the Bank Holding Company Act and the Douglas Amendment to the Act . . . . When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.").

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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