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CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 2, 1996

The Honorable John E. Courson
Senator, District No. 20
Box 11619
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Senator Courson,

You have asked us to review an opinion dated February 11, 1970, in light of numerous changes in federal and state law since that time. That opinion addressed the issue of whether "loan production offices" are regarded as "branch banks" for purposes of the South Carolina banking code. There, we concluded that

> ... an office which performs servicing activities of soliciting borrowers, negotiating terms and processing applications for loans is engaged in branch banking. As such, these banks or branches thereof would be subject to state banking regulations to insure the furtherance of the State's public policy, no matter what their corporate structure.

You state that "[t]here have been tremendous changes in the area of banking in South Carolina in the last 25 years, and this letter is to inquire and confirm that the conclusion reached in the Opinion is no longer applicable." You cite the following in support thereof:

1. S. C. Code Ann. Sec. 34-24-20 (3)(c) of the Bank Holding Company Act provides that a loan production office is not considered "banking" under the Act and that such an office is

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not considered a "branch office" for purposes of Section 34-28-300 (4)(c).

2. Cades v. H & R Block Inc., 43 F.3d 869 (4th Cir. 1994).

3. The Commissioner of Banking has no objection to this Office reviewing its earlier opinion.

I have reviewed the various authorities which you submit in your letter, as well as cases and Attorney General's opinions from various jurisdictions. Based upon this review, it is my opinion that the law has been substantially changed since the 1970 opinion was rendered. Thus, the 1970 opinion has been superseded by intervening law.

The 1970 opinion itself recognized that "[n]o law that we can find gives a definitive legal answer to the questions raised herein." Moreover, the opinion also stated that "[w]e can find no conclusive definition of either "branch bank" or "loan production office."

Generally speaking a "loan production office" advises "customers on types of loan transactions available, interest rates, terms of payments and completion of loan applications and other necessary documentation." Such information regarding application for loan is then electronically transmitted to the bank's principal office where the loan is approved or disapproved. If the bank approves the loan, the necessary closing documents and authorization to distribute funds are electronically transmitted to the loan reproduction office. OAG 83-471 (Ky., Dec. 7, 1983). It was stated in the 1970 opinion that such offices engage in "soliciting borrowers, negotiating terms and processing applications for loans". A "loan production office" solicits loans on behalf of the bank. FDIC v. Levitas, 1993 WL 228858 (S.D.N.Y. 1993). In Red Bird Bank of Dallas v. Crocker National Bank, 667 S.W.2d 885 (Tex. App. 5 Dist. 1984), it was stated that the Dallas "loan production office" at issue in that case

> ... solicits loan applications from businesses in this region and forwards them to the San Francisco office for consideration. There are pre-established criteria which, if not met by an application, result in such application not being forwarded by the Dallas office to California for consideration. The Dallas office also checks the credit of the applicant and submits to California a recommendation thereon. If the California office approves the application, the legal documents are finalized through the mail, and all proceeds are distributed directly from California to the client. Although payments are due in San

> Francisco, occasionally one is mistakenly mailed to the Dallas office which redirects it to California. The Dallas office has no books, ledgers, or accounting system for recording debits or credits to a customer's account. If a client defaults on a loan, the Dallas office might arrange to repossess the collateral involved and sell it.

In Southland Mobile Homes v. Associates Fin. Services Co., 270 S.C. 527, 244 S.E.2d 212 (1978), our Supreme Court discussed the meaning of "branch bank" in the context of jurisdiction and venue. The Court cited 12 U.S.C.S. § 36(f) which states that for purposes of the National Banking Act, a branch is any place "at which deposits are received or checks paid, or money lent."

In Red Bird Bank, supra in the specific context of a "loan production office" performing the duties referenced above, the Court concluded that such office, typically, does not engage in "lending money". Red Bird cited the 1982 interpretive ruling of the Controller of the Currency, which states as follows:

> [o]rigination of loans by employees or agents of a national bank or of a subsidiary corporation at locations other than the main office or a branch office of the bank does not violate 12 U.S.C. § 36 and 81: Provided, that the loans are approved and made at the main office or a branch office of the bank or at an office of the subsidiary located on the premises of, or contiguous to, the main office or branch office of the bank. 12 C.F.R. §7.7380(b) (1982)

Thus, concluded the Court in Red Bird, the "loan production office" was not a branch bank for purposes of the federal statute and, therefore, for purposes of venue. Said the Court,

> [i]n this case, the loans are approved and made at Crocker's California office. The forwarding of sufficient loan application by the Dallas office do not constitute "approval" as both are dictated by pre-established criteria with no apparent discretion vested in the Dallas personnel. Neither are the other activities of Crocker's Dallas office so significant as to compel as to contradict the interpretation of the Comptroller who enforces the statute. Therefore, Crocker does not operate

> a "branch office" in Texas, and Red Bird cannot use that exception to force Crocker into court here.

667 S.W.2d at 887. Accord, FDIC v.Levitas, supra. [Under New York banking laws, a loan production office is not a "branch office of a bank."]

A number of Attorney General's opinions in other states have also concluded that a "loan production office" ordinarily is not a "branch". See, Op. No. 88-43 (Kan. March 24, 1988); Op. No. 83-471 (Ky. Dec. 7, 1983); Op. No. 79-221 (Utah, Jan. 29, 1980). In the Utah opinion, the Attorney General placed emphasis upon "the money actually being lent at the banking house or branch."

In the Kansas opinion, the Attorney General wrote:

> [a]n LPO [loan production office] does not fit into the common meaning of a branch bank. The term "branch bank" commonly refers to "an office of a bank physically separated from its main office, with common services and functions and corporately part of the bank." Black's Law Dictionary 170, (5th ed. 1979). The term implies more than a singular function, suggesting that the services available at the main office are generally available at the branch. ... Additionally, through not binding on state statutes regarding state banks, branch banking is defined by federal law at 12 U.S.C.S. § 36(f) (1986). That definition was refined by the comptroller ... in an interpretive ruling to exclude an LPO ... .

Similarly, as you indicate, in Cades v. H & R Block, Inc., supra, the Fourth Circuit recently set forth the test for branch banking under 12 U.S.C. § 36(f). Opined the Court,

> ... [a]s the district court noted, courts apply a two-part test to decide whether a bank is operating a branch office. First, the Court determines whether a branch bank is "establish[ed] and operat[ed]" by the bank under section 36(c). If a branch is found to exist, the court then asks whether the branch office is transacting branch business under section 36(f) by accepting deposits, paying checks, or lending money ... .
>
> The district court correctly held that the relationship of Beneficial and Block fails the first part of the test for identify-

> ing a branch office. Beneficial has no ownership of leasehold interest in Block's South Carolina offices. No Beneficial employees work in Block's offices. Beneficial exercises no authority or control over Block's employees or methods of operation. Therefore, Block's South Carolina offices are not branch offices established and operated by Beneficial. Quite properly the district court did not need to reach the second part of the test. Cade's argument that South Carolina's usury laws apply in this case therefore fails.

43 F.3d at 874.

In South Carolina "branch banking" is regulated in Title 34 of the Code. See, Sections 34-3-400 [statements required from branch banks]; 34-1-70 [approval of charters of branches]; 34-3-60 [branch bank shall identify itself]; 34-3-250 [association with national reserve association]. As noted above, however there is no comprehensive definition of "branch" or "branch banking" in the Code. See also, Op. Atty. Gen., Nov. 5, 1980 ["There is no specific statutory definition of what constitutes the business of banking. It has been simplistically defined, however, as the receipt of deposits of money, the lending of money, and the issuance of promissory notes."] As you indicated, for purposes of South Carolina's Bank Holding Company Act [§ 34-24-20], loan production offices are specifically exempted from the definition of "banking office". Section 34-24-20 (3)(c) states that the term "banking office" does not include

> (c) [l]oan production offices, representative offices, or other offices at which deposits are not accepted. et seq.

Also, for purposes of Section 34-28-300 [Savings and Loan Acquisitions and Holding Companies], Section 34-28-300 (4)(c) defines "branch office" as not including loan production offices. Both of these enactments were well after the 1970 opinion was written,[1] but are in pari materia with other banking provisions of the Code. Thus, a court would look to such definitions as relevant in any determination of whether a "loan production office" is a "branch."

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[1] Indeed, the definition of "banking office" to exclude "loan production offices" was reaffirmed by the Legislature with amendments to the South Carolina Bank Holding Company Act in the 1994 session. See, Act No. 491 of 1994.

It would thus appear that most authorities since 1970 have recognized that a "loan production office" is, as a general rule, not a "branch" of a bank, as that term is commonly understood and defined. As seen, the reasoning of these authorities is to the effect that, typically, a loan production office does not lend money because the actual lending decision is made elsewhere. Thus, the analysis contained in the 1970 opinion is generally not being followed by other authorities. For that reason, it is my opinion that a loan production office as that term is typically understood is not inherently a "branch" of a bank.

Of course, the question of whether a "branch" is operating in a given instance is primarily a question of fact. This Office cannot resolve issues of fact in an opinion. Op. Atty. Gen., Dec. 12, 1983. Thus, I cannot conclude herein whether a particular institution or office is or is not a "branch" of a bank in a given instance. Such determination would have to be made on a case-by-case basis, considering all the facts. However, the conclusion reached in the 1970 opinion that a "loan production office" is inherently or automatically "branch banking" is not consistent with subsequent statutes and case law and is thus superseded.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph