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## Branch Banking in Montana

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# BRANCH BANKING IN MONTANA

Paul L. Frantz

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## I. INTRODUCTION

Few subjects are as controversial in Montana banking circles as branch banking. A branch bank is a bank office located away from the main bank building. Montana law prohibits branching,<sup>1</sup> but proponents and opponents nevertheless continue to argue over whether the legislature should permit branch banking.

This comment analyzes the law of branching of financial institutions in Montana. The real controversy lies with commercial banks, but this comment examines branching of savings and loan associations and credit unions as well. The question of whether to permit branching by Montana banks is a political question, one reserved exclusively for the Montana Legislature. This comment, therefore, does not take a stand on the issues.

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1. MONT. CODE ANN. §32-1-372 (1981). The original statute (now 32-1-372(1)) provided: "No bank may maintain any branch bank, receive deposits, or pay checks except over the counter of and in its own banking house, provided that nothing in this section prohibits ordinary clearinghouse transactions between banks." Subsequent amendments provided exceptions for drive-in and walk-up facilities and satellite terminals.

## II. MONTANA LAWS

### A. Background

The United States has a "dual banking system" as it has both national and state banks. National banks are those chartered by the federal government while state banks are those chartered by a state government. Montana has 166 banks. Fifty-five are national banks and 111 are state banks.<sup>2</sup> Montana is one of twelve states prohibiting branch banking.<sup>3</sup> These states are commonly referred to as "unit banking" states.<sup>4</sup>

Historically, banks have always been subject to intense scrutiny because of their importance in the community. This scrutiny led to a highly regulated banking industry that includes control over branching. Montana has prohibited branch banking by statute since 1927 when the legislature enacted what is now section 32-1-372 of the Montana Code.<sup>5</sup> The banking prohibition was part of a comprehensive banking bill that significantly altered Montana's banking laws. The branch banking issue was but one of many provisions of the banking bill and was largely unnoticed during its discussion and approval.<sup>6</sup>

Although the Montana Legislature did not prohibit branch banking until 1927, a 1909 Montana Attorney General's Opinion ruled that banks may not branch. The Attorney General reasoned that banks receive their operative authority from statute, and since no statute expressly authorizes branching, banks should not be allowed to branch.<sup>7</sup> Later in 1909, the same Attorney General declared that the prohibition on branching applies to all banks in-

2. Montana Department of Commerce statistics (December 31, 1982).

3. The other eleven are Colorado, Illinois, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, Texas, West Virginia, and Wyoming. For state statutes, see *infra* note 36.

4. Graham & Rolnick, *A Case For Branch Banking in Montana*, FED. RESERVE BANK OF MINNEAPOLIS Q. REV., SPRING 1980, at 8, 9.

5. Bank Act, ch. 89, § 101, 1927 Mont. Laws 253 (codified at MONT. CODE ANN. § 32-1-372(1) (1981)).

6. News reports after Governor Erickson signed House Bill 50, the "Banking Bill," concentrated on the power given to the Superintendent of Banks (now Department of Commerce) to oversee liquidation of state banks and ignored the branching prohibition. *Governor Puts Signature on New Bank Code*, Great Falls Tribune, March 9, 1927, at 4, col. 6. In 1961, however, a Montana Federal District Court opinion set forth the proposition that Montana enacted the branching prohibition as a direct response to the McFadden Act. The court stated: "It is interesting to note that the Montana legislation prohibiting branch banking was enacted shortly [after passage of the McFadden Act] and was obviously enacted to meet the challenge of the McFadden Act." *First National Bank in Billings v. First Bank Stock Corp.*, 197 F. Supp. 417, 426 (D. Mont. 1961), *aff'd.*, 306 F.2d 937 (9th Cir. 1962). See *infra* text accompanying notes 29-32 for discussion of the McFadden Act.

7. 3 Mont. Op. Att'y. Gen. 245, 246-47 (1909).

cluding trust deposit, security, and savings banks.<sup>8</sup> In 1957, the Attorney General was called upon to determine if a bank violated the branch banking prohibition by selling money orders through business firms located away from the bank building. The Attorney General determined that this activity was prohibited because it was branch banking.<sup>9</sup>

When the Montana Legislature adopted the Uniform Commercial Code (UCC) in 1963, it adopted the UCC's definition of "branch" bank,<sup>10</sup> but only because it wanted to conform to the national UCC. Montana's specific legislative intent is set forth statutorily:

References to a "branch" or "separate office" of a bank in this code are included to preserve uniformity in a Uniform Act and are not to be construed as affecting or amending in any way the laws of this state relative to the operation of branches or separate offices of a bank.<sup>11</sup>

Therefore, the UCC provisions on branching<sup>12</sup> apply to the few limited exceptions in Montana where branching occurs.<sup>13</sup>

Congress has the power, which it has never used, to authorize branching by national banks notwithstanding state law. In 1981, the Montana Legislature, foreseeing the day when Congress might exercise that power, added a provision that puts state banks on equal footing with national banks where branching is concerned.<sup>14</sup> The law now provides that state banks may establish branches if Congress "allows national banks to establish branches without regard to state prohibitions."<sup>15</sup>

### B. Legislative Action

Throughout Montana's history, the legislature has consistently defeated attempts to liberalize the branch banking statutes.<sup>16</sup> The question remains an active and divisive issue among legislators as

8. 3 Mont. Op. Att'y. Gen. 261 (1909).

9. 26 Mont. Op. Att'y. Gen. 170, 172 (1957).

10. MONT. CODE ANN. § 30-1-201(7) (1981).

11. MONT. CODE ANN. § 30-1-111 (1981) (2d paragraph).

12. E.g., MONT. CODE ANN. §§ 30-4-102(2), -106 (1981).

13. See *infra* text accompanying notes 71-79.

14. Act of Mar. 27, 1981, ch. 163, § 1, 1981 Mont. Laws 225 (codified at MONT. CODE ANN. § 32-1-362(2) (1981)).

15. MONT. CODE ANN. § 32-1-362(2) (1981).

16. Between 1961 and 1979, for example, three different measures were presented to the legislature. All were defeated. H.R. 276, 44th Mont. Leg. (1969); H.R. 300, 41st Mont. Leg. (1969); and H.R. 449, 39th Mont. Leg. (1965).

well as among Montana bankers.<sup>17</sup> The 1979 Montana Legislature was so interested in the subject that it created an interim committee to study branch banking.<sup>18</sup> The committee concluded that limited branch banking would be beneficial for Montana<sup>19</sup> and proposed a bill to the 1981 Legislature.<sup>20</sup> The legislature, however, defeated the bill.<sup>21</sup>

Attempts to expand branch banking did not end there. In 1983, House Bill 605 was introduced into the Montana Legislature that, if passed, would have authorized branch banking. House Bill 605 would have permitted a phase-in of branch banking over a five-year period. It also would have allowed out-of-state bank holding companies to acquire new banks in Montana, which they are now prohibited from doing.<sup>22</sup> At the committee meeting held to discuss House Bill 605, proponents, led principally by bank holding company representatives, spoke in favor of the bill for the potential benefits to their businesses and to their customers. Opponents, represented by members of the Montana Independent Bankers Association, were concerned about unhealthy concentration of capital.<sup>23</sup> The day following the hearing, the Committee tabled the bill, thus ending another attempt to modify Montana's branch banking prohibition.<sup>24</sup>

### III. FEDERAL LAWS

#### A. History

Branching of banks has been a hotly debated issue in banking circles in the United States since the formation of the Bank of North America in 1781, the first bank in the United States. The issue was the same then as it is today—undesirable concentration of economic resources. However, the opposition in the late eighteenth century was directed mainly at banks in general and not spe-

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17. See, e.g., Johnson, *Bill to open up branch banking in state still feared by smaller financial houses*, Great Falls Tribune, Feb. 6, 1983, at 7-A, col. 3.

18. H.R.J. Res. 49, 46th Leg., 1979 Mont. Laws 2128.

19. MONTANA LEGISLATIVE COUNCIL, BRANCHING OF FINANCIAL INSTITUTIONS 29 (1980) [hereinafter cited as BRANCHING].

20. S. 5, 47th Mont. Leg. (1981).

21. The bill received a do not pass recommendation in committee that was overwhelmingly accepted by the full Senate. 47th Mont. Leg., Senate Journal 473 (1981).

22. See *infra* text accompanying notes 49-52.

23. Remarks at Hearings on H.R. 605 before the House Business and Industry Committee, 48th Mont. Leg. in Helena, Montana (Feb. 9, 1983). See also *Branch banking advocates, foes square off before committee*, Great Falls Tribune, Feb. 10, 1983, at 4-A, col. 1.

24. After seeing that defeat was inevitable, Representative Les Kitselman, the bill's sponsor, requested that House Bill 605 be tabled. Telephone interview with Representative Les Kitselman (Mar. 2, 1983).

cifically at branching. It is interesting that Alexander Hamilton is credited with one of the first criticisms of branching as he feared that weaknesses of individual branches might endanger the entire banking system.<sup>25</sup>

By the middle of the nineteenth century, Congress decided it should take a more aggressive role in regulation of banks. The most significant piece of legislation to come out of this era was what is commonly called the National Bank Act of 1864.<sup>26</sup> Although this act did not mention branches, the Comptroller of the Currency in 1865 interpreted it as a prohibition of the establishment of additional offices by national banks.<sup>27</sup> In 1924, in *First National Bank in St. Louis v. Missouri*,<sup>28</sup> the United States Supreme Court solidified the prohibition by interpreting the wording of the National Bank Act to forbid national banks from branching. Thus, state banks could branch while national banks could not.

This inherent unfairness in the dual banking system led Congress to take a decisive stand on branch banking, something it had never done. Due to the large increase in the number of state bank branches in the first quarter of the twentieth century, Congress believed it must act to prevent state banks from dominating the banking industry through branching.<sup>29</sup> As a result, in 1927 Congress passed what is commonly called the McFadden Act,<sup>30</sup> which expressly permits national banks to branch, thus establishing the concept of "competitive equality"<sup>31</sup> between national and state banks.

The Act as it now reads, however, specifically permits branch banking only if the establishment and operation of new branches "are at the time *expressly authorized to State banks*" by state law and then only if the proposed branch is within the limits of the

25. G. FISCHER, *AMERICAN BANKING STRUCTURE* 9-10 (1968) [hereinafter cited as FISCHER].

26. National Bank Act, ch. 106, 13 Stat. 99 (1864).

27. FISCHER, *supra* note 25, at 19-20.

28. 263 U.S. 640, 657-58 (1924).

29. J. WHITE, *BANKING LAW* § 6, at 478 (1976) [hereinafter cited as WHITE].

30. McFadden Act, ch. 191, § 7, 44 Stat. 1224, 1228-29 (1927) (codified as amended at 12 U.S.C. § 36(c) (1976)).

31. Rep. McFadden, sponsor of the bill creating the McFadden Act, commented: As a result of the passage of the act, national banks are able to meet the needs of modern industry and commerce and *competitive equality* has been established among all member banks of the Federal reserve system. This action was necessary: otherwise national banks were sure to seek the greater advantage offered by State banking laws, . . . .

68 CONG. REC. H5815 (daily ed. Mar. 3, 1927) (statement of Rep. McFadden) (emphasis added).

community where the bank is located.<sup>32</sup> The authority of national banks to branch was expanded in 1933 when Congress passed the Banking Act of 1933 which permits statewide branching but only if state law allows state banks to branch "by language specifically granting such authority *affirmatively and not merely by implication or recognition*. . . ."<sup>33</sup>

### B. Current Status

As federal law now stands, Montana's national banks could only branch if state banks are allowed to branch. National banks do not have the power to ignore state branching prohibitions simply by virtue of their status as national banks.<sup>34</sup>

Even though state law determines whether banks may branch, federal law controls in defining exactly what constitutes a "branch." State law remains effective, though, "in deciding how, where, and when branch banks may be operated. . . ."<sup>35</sup>

## IV. OTHER STATES

By far, most states allow some form of branch banking. Twenty-one states and the District of Columbia authorize statewide branching. Seventeen states permit limited branching. This leaves the twelve states mentioned above that allow no branching. Montana's neighbors range from the most restrictive to the most permissive. Wyoming does not permit branching while North Dakota allows "paying and receiving stations" within a bank's own county, but expressly prohibits branch banking. South Dakota and Idaho authorize statewide branching.<sup>36</sup>

32. 12 U.S.C. § 36(c)(1) (1976) (emphasis added).

33. Banking Act of 1933, ch. 89, § 23, 48 Stat. 162, 189-90 (codified as amended at 12 U.S.C. § 36(c) (1976)) (emphasis added).

34. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

35. *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 133-34 (1969).

36. States with statewide branching are Alaska (ALASKA STAT. §§ 06.05.395, .399 (1978)); Arizona (ARIZ. REV. STAT. ANN. § 6-190 (1974)); California (CAL. FIN. CODE § 500 (West Supp. 1982)); Connecticut (CONN. GEN. STAT. § 36-59 (1983)); Delaware (DEL. CODE ANN. tit. 5, § 770 (Supp. 1982)); District of Columbia (D.C. CODE ANN. § 26-103(b) (1981)); Hawaii (HAWAII REV. STAT. § 403-53 (Supp. 1982)); Idaho (IDAHO CODE § 26-301 (Supp. 1982)); Maine (ME. REV. STAT. ANN. tit. 9-B, § 331 (1964)); Maryland (MD. FIN. INST. CODE ANN. § 5-501 (1980 & Supp. 1982)); Nevada (NEV. REV. STAT. § 660-015 (1979)); New Jersey (N.J. REV. STAT. § 17:9A-19 (Supp. 1982)); New York (N.Y. BANKING LAW § 105 (McKinney 1970 & Supp. 1982)); North Carolina (N.C. GEN. STAT. § 53-62 (Supp. 1982)); Oregon (OR. REV. STAT. §§ 714.030 to .130 (1981)); Rhode Island (R.I. GEN. LAWS § 19-1-13 (1982)); South Carolina (S.C. CODE ANN. § 34-1-70 (Law. Co-op 1976)); South Dakota (S.D. CODIFIED LAWS ANN. § 51-20-1 (1980)); Utah (UTAH CODE ANN. § 7-3-5 (1982)); Vermont (VT. STAT. ANN. tit. 8, § 651 (1970 & Supp. 1982)); Virginia (VA. CODE § 6.1-39 (Supp. 1982)); Washing-

## V. BANK HOLDING COMPANIES

A bank holding company is a "corporation that owns or controls one or more banks and frequently a wide variety of other financially related businesses."<sup>37</sup> Even though Montana law requires each bank to be a separate unit, several individual unit banks may be owned by the same entity. This is commonly referred to as multiple-unit banking and includes both group and chain banking. "Group banking" is a form of bank organization where two or more banks are controlled by a bank holding company.<sup>38</sup> "Chain banking" is similar to group banking except ownership of the banks (two or more) is held by a natural person and not by a corporation.<sup>39</sup> A holding company, however, does not necessarily own several banks. It may own only one bank.<sup>40</sup>

A large number of the principal bank holding companies in the United States today began operating in the late 1920's. Between 1925 and 1930, there was a large expansion in the number of affiliates of bank holding companies.<sup>41</sup> While there are many reasons for this sudden growth of bank holding companies, one of the

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ton (WASH. REV. CODE ANN. § 30.40.020 (Supp. 1983)). States allowing limited branching are: Alabama (ALA. CODE § 5-5A-20 (1981)); Arkansas (ARK. STAT. ANN. § 67-360 (1980)); Florida (FLA. STAT. § 658.26(2)(a) (Supp. 1980)); Georgia (GA. CODE ANN. § 7-1-601(c) (1982)); Indiana (IND. CODE ANN. § 28-1-17-1 (Burns 1982)); Iowa (IOWA CODE ANN. § 524.1201 (West Supp. 1982)); Kentucky (KY. REV. STAT. ANN. § 287.180(2) (Baldwin 1981)); Louisiana (LA. REV. STAT. ANN. §§ 6:54, :328 (West 1950 & Supp. 1983)); Massachusetts (MASS. ANN. LAWS ch. 172, § 11 (Michie/Law Coop. 1977 & Supp. 1982)); Michigan (Mich. Comp. Laws § 487.471 (MICH. STAT. ANN. § 23.710 (171) (Callaghan 1983))); Mississippi (MISS. CODE ANN. § 81-7-5 (Supp. 1982)); New Hampshire (N.H. REV. STAT. ANN. § 384-B:2 (1968 & Supp. 1979)); New Mexico (N.M. STAT. ANN. § 58-5-3 (Supp. 1982)); Ohio (OHIO REV. CODE ANN. § 1111.03 (Supp. 1982)); Pennsylvania (PA. STAT. ANN. tit. 7, § 902 (Purdon 1967)); Tennessee (TENN. CODE ANN. § 45-2-614 (Supp. 1982)); Wisconsin (WIS. STAT. ANN. § 221.04(j) (West 1982)). States prohibiting branching are: Colorado (COLO. REV. STAT. § 11-6-101 (Supp. 1982)); Illinois (Referendum of Nov. 6, 1956, 1955 Ill. Laws 83, § 6, ILL. REV. STAT. ch. 17, ¶ 313 (Smith-Hurd 1981)); Kansas (KAN. STAT. ANN. § 9-1111 (1982)); Minnesota (MINN. STAT. ANN. § 48.34 (Supp. 1983)); Missouri (MO. ANN. STAT. § 362.107 (Vernon Supp. 1983)); Montana (MONT. CODE ANN. § 32-1-372 (1981)); Nebraska (NEB. REV. STAT. § 8-157 (Supp. 1982)); North Dakota (N.D. CENT. CODE § 6-03-14 (1981)); Oklahoma (OKLA. STAT. ANN. tit. 6, § 501 (West Supp. 1982)); Texas (TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon Supp. 1982)); West Virginia (W. VA. CODE 31A-8-12 (Supp. 1982)); Wyoming (Wyoming has no statute prohibiting branch banking. However, it is accepted that branching is prohibited. See Jackson State Bank v. Bonham, No. 73-545 (Wyo. 1st Judicial Dist. Laramie County, Aug. 12, 1974)).

37. BRANCHING, *supra* note 19, at 1. A total of 118 of Montana's 166 banks are owned by bank holding companies.

38. *Id.* at 4.

39. *Id.* at 1.

40. In Montana, 45 of the 166 banks are owned by single bank holding companies. Federal Reserve Bank of Minneapolis statistics (Apr. 9, 1983).

41. FISCHER, *supra* note 25, at 95.



most significant in Montana must have been the decline of Montana banks due to the depression. Between 1920 and 1926, 214 of Montana's commercial banks—over half—failed.<sup>42</sup> Before 1918, many sections of the country, including Montana, were over-banked. For example, one Montana county with 14,000 people had 21 banks in the early 1920's. By 1931, only two remained.<sup>43</sup> Uncertainty and weakness made many banks eager to sell to the large holding companies.<sup>44</sup>

By 1956, Congress viewed the continued expansion of bank holding companies as a threat to the American banking system. This led Congress to pass the Bank Holding Company Act of 1956<sup>45</sup> which regulates bank holding companies. As a result, the Federal Reserve Board regulates all bank holding companies.<sup>46</sup> During discussions surrounding passage of the Act, members of Congress expressed their concern about bank holding companies and the possible harmful effects of "undue concentration of control in the banking field to the detriment of public interest. . . ."<sup>47</sup> The Senate Committee, which reported favorably on the bill creating the Act, concluded that bank holding companies threatened to destroy "the independent unit bank as an institution having its ownership and origin in the local community. . . ."<sup>48</sup>

Another concern of Congress was the acquisition of banks by out-of-state holding companies, i.e. holding companies whose principal subsidiaries are in another state. Three out-of-state bank holding companies operate in Montana: First Bank System (Minnesota), First Interstate Bancorp (California), and Norwest Corporation (Minnesota).<sup>49</sup> By way of amendment to the original draft of the Bank Holding Company Act of 1956, Congress added what is generally called the Douglas Amendment, which prohibited acquisition of a bank over a state line by a bank holding company.<sup>50</sup> In

42. M. MALONE & R. ROEDER, *MONTANA: A HISTORY OF TWO CENTURIES* 218 (1976).

43. FISCHER, *supra* note 25, at 206.

44. *Id.* at 95.

45. Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133 (generally codified as amended at 12 U.S.C. §§ 1841-1850 (1976 & Supp. V 1981)).

46. 12 U.S.C. § 1844 (1976 & Supp. V 1981).

47. S. Rep. No. 1095, 84th Cong., 1st Sess. 10, *reprinted in* 1956 U.S. CODE CONG. & AD. NEWS 2482, 2491.

48. H.R. Rep. No. 609, 84th Cong., 1st Sess. 2 (1955).

49. In Montana, First Bank System controls fifteen banks, Norwest Corporation (formerly Northwest Bancorporation) controls seven, and First Interstate Bancorp controls three. Together, the three out-of-state bank holding companies control 41.22% of total bank resources in Montana. The First Bank System alone controls 24.91% of total bank resources in Montana. Sixteen of the twenty largest banks in Montana are controlled by the three out-of-state holding companies. Montana Department of Commerce Statistics (Dec. 31, 1982).

50. 12 U.S.C. § 1842(d) (1976 & Supp. V 1981).

the debate, Senator Douglas, the amendment's sponsor, argued successfully that his amendment would impede further monopolistic expansion of the large bank holding companies.<sup>51</sup> As a result of the Douglas Amendment, bank holding companies today may not expand into another state unless expressly authorized by state law where the holding company proposes to expand.<sup>52</sup> For instance, since 1956, none of the three out-of-state bank holding companies operating in Montana have been allowed to acquire any additional banks in Montana.

Some authorities believe that the reason bank holding companies are formed is to circumvent state prohibitions on branching.<sup>53</sup> Many people view bank holding company affiliates as branch banks.<sup>54</sup> Even the committee proposing the Bank Holding Company Act of 1956 recognized that differences between bank branches and holding company affiliates are "differences without distinction."<sup>55</sup> The same committee noted that most bankers view subsidiaries as branches.<sup>56</sup> Today, eleven multi-bank holding companies, including the three out-of-state holding companies discussed above, operate in Montana.<sup>57</sup>

Since the line between a branch and a bank holding company affiliate is so thin, a fair amount of litigation has developed in this area. The leading case in the United States for setting the standard that distinguishes branch banks from holding company subsidiaries arose in Billings, Montana, in the late 1950's. In *First National Bank in Billings v. First Bank Stock Corp.*,<sup>58</sup> a group of Billings area banks brought suit in the Montana Federal District

51. 102 CONG. REC. S6860 (daily ed. Apr. 24, 1956) (statement of Sen. Douglas). As an example of the power of large bank holding companies, Senator Douglas stated that at the end of 1954, the First Bank System and the Norwest Corporation together controlled forty-four percent of bank deposits in Montana. *Id.* at S6858.

52. 12 U.S.C. § 1842(d) (1976 & Supp. V 1981).

53. WHITE, *supra* note 29, at 494.

54. Indeed, a casual glance at the 1983 Mountain Bell Missoula Yellow Pages under "Banks" would lead one to believe that Missoula has only five banks, each with several offices. In fact, Missoula has eight banks.

55. H.R. REP. No. 609, 84th Cong., 1st Sess. 3 (1955). The committee also noted: Other than in form, what is the practical difference between a branch and a bank the stock of which is owned by a holding company that can select the bank's directors and change them at its pleasure, even holding repurchase rights to the directors' qualifying shares; that can hire and fire the bank's personnel and otherwise supervise its operations; that can make its investments, handle its insurance, buy its supplies, originate and place its advertising; can pass on its loans to local firms and individuals, usually receiving a fee for services performed?

*Id.*

56. *Id.*

57. Federal Reserve Bank of Minneapolis Statistics (April 9, 1983).

58. 306 F.2d 937 (9th Cir. 1962), *aff'g.* 197 F. Supp. 417 (D. Mont. 1961).

Court against the First Bank Stock Corporation (now First Bank System), the Midland National Bank (now First Bank Billings), and the newly formed Valley State Bank (now First Bank West Billings). The plaintiffs alleged that First Bank violated the Bank Holding Company Act and challenged the existence of Valley, claiming Valley was a branch of Midland and, therefore, operating in violation of Montana prohibition on branch banking. First Bank completed incorporation of Valley on April 30, 1956, owning over 98 percent of the stock of the bank, after receiving authorization from the Montana Superintendent of Banks (now Department of Commerce). Even though First Bank had authorization to open Valley in 1956, bank operations did not begin until August 1, 1960. First Bank conceded that it incorporated Valley five years before opening it because of the prohibition in the Bank Holding Company Act to the acquisition of banks by out-of-state bank holding companies.<sup>59</sup>

The Ninth Circuit affirmed the holding of the district court that First Bank did not violate either the Bank Holding Company Act or Montana's prohibition on branch banking. First Bank did not violate the Bank Holding Company Act because, according to the court, it incorporated Valley before the effective date of the Act.<sup>60</sup> The court also held that First Bank did not violate Montana's branch banking statute because the court found nothing to indicate that Valley was a branch of Midland.<sup>61</sup> The court set forth standards now widely used to determine if a bank holding company is in fact a branch.<sup>62</sup>

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59. *Id.* at 938-39.

60. *Id.* at 940.

61. *Id.* at 942.

62. The important factors cited by the court are:

At the time of judgment, the two banks had but one common director, the attorney for Midland; each is a separate corporation, with its own capital, surplus, and undivided profits; each has a separate banking house; each has its own employees; one is a national bank, the other a state bank, and thus they operate under different statutes and are supervised by different authorities; Midland is and will be Valley's chief (but not its only) correspondent bank; Midland will probably (we think the "probably" can be eliminated) participate in taking over the excess of certain loans which Valley is unable to handle; Valley is not a member of the Billings clearing house, and Billings banks may present Valley checks through Midland for clearing; this has in some cases occurred; moneys deposited with Valley are physically delivered to Midland at the close of each day's business; Valley's temporary quarters has no vault; moneys so delivered are kept in a locked container and returned to Valley next day; Valley customers may use Midland's night depository, for which Valley pays Midland a nominal (\$10) monthly rent; Valley has and maintains its own books of account, has its own stationery, checks and forms, none of which mentions Midland; since November 1, 1960 no money has been deposited at Valley's banking house to be credited to the account of the

The court put the burden on those challenging a bank holding company to prove that the bank holding company is operating through a branch and not through an affiliate. The court made that a difficult burden to carry as it stated: "The mere fact that First Bank Stock has power to cause Valley to function as if it were a branch of Midland is not enough." The challenger must show that the "unitary type of operation characteristic of branch banking" is present.<sup>63</sup>

Generally, courts have found that legitimate bank holding company affiliates are not branches.<sup>64</sup> However, when the bank holding company is actually opening a branch, courts are not reluctant to forbid it. For instance, the court in *Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*<sup>65</sup> pierced the corporate veil and held that, in fact, the holding company was operating a branch. The *Whitney* court said: "The unitary type of operation,' said in the Billings opinion to be 'characteristic of branching banking,' is present here."<sup>66</sup> The court focused on the intent of the parent bank and found that the purpose for the holding company was simply to provide a means by which the parent may operate offices in a new community.<sup>67</sup> The *Whitney* court set forth a list of factors leading it to find that a branch had been created.<sup>68</sup>

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depositors at Midland, and no money has been deposited at Midland's banking house to be credited to the account of the depositors at Valley; no customer of Midland has made a withdrawal at Valley's banking house of money on deposit at Midland; no customer of Valley has made any withdrawal at Midland's banking house of money on deposit at Valley; since September 27, 1960, no officer or employee of Midland has acted as an officer, director, employee, or authorized agent of Valley, and no officer or employee of Valley has acted as an officer, director, employee, or authorized agent of Midland.

*Id.* at 942-43.

63. *Id.* at 943.

64. See *Grandview Bank & Trust Co. v. Board of Governors of Federal Reserve System*, 550 F.2d 415 (8th Cir. 1977), *cert. denied*, 434 U.S. 821 (1977); *Central Bank v. Smith*, 532 F.2d 37 (7th Cir. 1976), *cert. denied*, 429 U.S. 895 (1976); *Commercial National Bank of Little Rock v. Board of Governors of Federal Reserve System*, 451 F.2d 86 (8th Cir. 1971); *Camden Trust Co. v. Gidney*, 301 F.2d 521 (D.C. Cir. 1962), *cert. denied*, 369 U.S. 886 (1962); *American Bank of Tulsa v. Watson*, 391 F. Supp. 573 (N.D. Okla. 1973).

65. *Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 323 F.2d 290, 304 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965), *discussed in Comment, Are Branch Banking Limitations Applicable to Approved Bank Holding Company Operation?*, 39 N.Y.U. L. REV. 686 (1964), *reprinted in* 82 BANKING L.J. 283 (1965).

66. 323 F.2d at 303.

67. *Id.* at 304.

68. The factors considered by the court are:

[The] holding company is not providing Whitney-Jefferson with new and fresh capital, but with capital supplied by Whitney-New Orleans; the new bank will be managed and controlled by the executives of Whitney-New Orleans; and the

## VI. EXCEPTIONS TO BRANCH BANK PROHIBITIONS

### A. Drive-up Facilities

Over the years, several exceptions have been carved into Montana's prohibition on branch banking. The most obvious is the exception for drive-in banking. In 1963, the legislature amended the branching prohibition statute to permit one detached drive-in and walk-up facility for each bank.<sup>69</sup> The facility must be within 1000 feet of the main bank building and may include any number of teller windows. Limitations apply as to what banking business may be conducted in the facility and how close it may be to another bank or banking facility.<sup>70</sup>

### B. Branching by Merger

At one time, Montana statutorily allowed another exception to the branch banking prohibition. Between 1931 and 1969, a Montana bank could branch by merging with another bank in the same or in an adjoining county.<sup>71</sup> However, the 1969 legislature took that option away,<sup>72</sup> thus making Montana the only state since 1951 to move to a more restrictive type of branching law.<sup>73</sup> The only bank now in existence that took advantage of this statute is the First National Bank of Anaconda (formerly Daly National Bank of Anaconda), which has a branch in Butte.<sup>74</sup> In 1967, in *Leuthold v. Camp*,<sup>75</sup> the Montana Federal District Court authorized the Daly National Bank to acquire the First National Bank of Butte despite a 1966 Montana Attorney General's opinion<sup>76</sup> that Daly could acquire First National Bank of Butte, but could not conduct banking business in the Butte office. Plaintiffs in *Leuthold* charged that the proposed merger would violate Montana's prohibition on branch-

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name, Whitney National Bank in Jefferson Parish (the last three words in small letters on its checks and other forms), is easily susceptible of confusion with the parent organizer, The Whitney National Bank of New Orleans.

*Id.* (citations omitted).

69. Act of Feb. 8, 1963, ch. 39, § 1, 1963 Mont. Laws 53 (codified as amended at MONT. CODE ANN. § 32-1-372(2) (1981)).

70. MONT. CODE ANN. § 32-1-372(2) (1981).

71. MONT. REV. CODES ANN. § 5-1124 (repealed 1969).

72. Act of Mar. 4, 1969, ch. 205, § 1, 1969 Mont. Laws 510. The change, however, did not apply to mergers in process on the effective date of the repeal. ch. 205, § 2, 1969 Mont. Laws 510.

73. BRANCHING, *supra* note 19, at 9.

74. Montana Department of Commerce Statistics (Dec. 31, 1982).

75. 273 F. Supp. 695 (D. Mont. 1967).

76. 31 Mont. Op. Att'y. Gen. 42, 44 (1966). The *Leuthold* court rejected the Attorney General's opinion without much comment. *Leuthold*, 273 F. Supp. at 701.

ing and, since Daly was controlled by the Northwest Bancorporation (now Norwest Corporation), which is an out-of-state bank holding company, the Bank Holding Company Act of 1956. The court held that the Montana merger statute created an exception to the branching prohibition and found no violation of Montana law.<sup>77</sup> The court also rejected the argument that the Bank Holding Act of 1956 was violated. The court stated: "It is clear from the language of [12 U.S.C.] § 1842(a) that a bank, even if a subsidiary of a holding company, may without prior Federal Reserve Board approval, acquire the assets of another bank."<sup>78</sup> A bank may acquire another bank even though its parent holding company is prohibited from doing so.<sup>79</sup>

### C. *Military Installations*

Another exception appears to exist, but this is not due to any Montana legislative action; it is a gift from the United States Department of Defense. This exception is for banking facilities on military installations. First Bank Great Falls operates a "banking facility" at the Malmstrom Air Force Base near Great Falls. It prudently calls the operation at the base "Malmstrom A.F.B. facility" and avoids "branch bank."<sup>80</sup> The bank is probably correct in suggesting that the Malmstrom facility is not a branch bank. The fifth circuit, for instance, has on two occasions held that banking facilities on military bases in Texas were not branches, but were extensions of the federal government.<sup>81</sup> In one of the Fifth Circuit cases, *United States v. Papworth*,<sup>82</sup> a criminal case, the defendant was accused of robbing a banking facility on a military base. His defense was that since Texas prohibited branch banking, the facility he robbed could not be a bank and, therefore, the indictment against him for robbing a bank should be dismissed. The court rejected his argument holding that the facility was a "bank" but not a "branch bank." The court held: "It is an arm and agency of the federal government."<sup>83</sup>

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77. 273 F. Supp. at 701.

78. *Id.* at 702.

79. 12 U.S.C. § 1842(d) (1976 & Supp. V 1981).

80. First Bank Great Falls uses the term on its promotional materials.

81. *Texas ex rel. Faulkner v. Nat'l. Bank of Commerce*, 290 F.2d 229 (5th Cir. 1961), *cert. denied*, 368 U.S. 854 (1958); *United States v. Papworth*, 256 F.2d 125 (5th Cir. 1958), *cert. den.*, 358 U.S. 854 (1958).

82. *Papworth*, 256 F.2d at 843.

83. *Id.* at 844.

D. *Montana Electronic Funds Transfer Act*

Montana's legislature statutorily created a large exception to the branch banking prohibition when it enacted the Montana Electronic Funds Transfer Act<sup>84</sup> in 1977. Included within the purview of the Act are automatic teller machines (ATM) and point-of-sale terminals. ATM's allow customers of financial institutions to make transfers of money without assistance. Point-of-sale terminals provide a means for merchants to transfer money immediately from a customer's account directly into the merchant's account. A satellite terminal includes ATM's located off the premises of a financial institution and point-of-sale terminals.<sup>85</sup>

At the same time as the enactment of the Montana Electronic Funds Act, the legislature amended the statute prohibiting branch banking to authorize the use of satellite terminals.<sup>86</sup> As a general rule, courts consider satellite terminals to be branch banks.<sup>87</sup> Montana's legislature, by its action in the early days of the usage of satellite terminals, prevented unnecessary litigation to determine whether satellite terminals are subject to branch bank prohibitions by statutorily declaring that satellite terminals are not governed by the restrictions placed on drive-in and walk-up facilities and, subject to some limitations, may be placed anywhere within three miles of the city limits where a financial institution is located.<sup>88</sup>

In a case considering the applicability of the Montana Electronic Funds Transfer Act to national banks, the Montana Federal District Court in *State v. First National Bank of Bozeman*,<sup>89</sup> held that if the Comptroller of the Currency has authorized a national bank to set up an off-premises ATM, then the state cannot also require a national bank to seek state authorization to install an ATM. In *First National*, two Bozeman banks and the state attempted to make First National Bank comply with the Montana Electronic Funds Transfer Act even though the Comptroller of the

84. Act of Apr. 28, 1977, ch. 503, 1977 Mont. Laws 1611 (generally codified as amended at MONT. CODE ANN. § 32-6-101 to -402 (1981)).

85. MONT. CODE ANN. § 32-6-103 (1981).

86. Act of Apr. 28, 1977, ch. 503, § 22, 1977 Mont. Laws 1611, 1621-22 (codified at MONT. CODE ANN. § 32-1-372(3) (1981)).

87. See, e.g., *State Bank of Fargo v. Merchants Nat'l. Bank and Trust Co.*, 593 F.2d 341 (8th Cir. 1979); *Illinois ex rel. Lignoul v. Continental Illinois Nat'l. Bank & Trust Co.*, 536 F.2d 176 (7th Cir. 1976), cert. denied, 429 U.S. 871 (1976); *Missouri ex rel. Kostman v. First Nat'l. Bank*, 538 F.2d 219 (8th Cir. 1976), cert. denied, 429 U.S. 941 (1976); *Colorado ex rel. State Banking Board v. First Nat'l. Bank*, 540 F.2d 497 (10th Cir. 1976), cert. denied, 429 U.S. 1091 (1976); *Independent Bankers Ass'n v. Smith*, 534 F.2d 921 (D.C. Cir. 1976), cert. denied, 429 U.S. 862 (1976).

88. MONT. CODE ANN. §§ 32-1-372(3), and -6-202, -204 (1981).

89. No. CV-78-102-H and CV-78-139-H (D. Mont. Oct. 3, 1978).

Currency had issued an ATM permit. The court held that a national bank cannot be required first to seek state authorization in order to set up an off-premises ATM. By this holding, the court wanted "to prevent an absolute veto from resting in the hands of the state administrative agency."<sup>90</sup> The court suggested, however, that the remedy would be to sue the Comptroller regarding his application of state law in granting authorization for the ATM.<sup>91</sup> This would force recognition of the rights of states to determine permissive branch banking.

Another potential problem with ATM's is possible liability that may fall to businesses which permit financial institutions to install the machines on their premises. So far, only one case has arisen that discusses this problem.<sup>92</sup> In *State ex rel. Meyer v. American Community Stores Corporation*,<sup>93</sup> the state brought an action against a retail store for unauthorized banking. The Nebraska Supreme Court held that where a savings and loan association had properly installed an ATM in the retail store, the owner of the store was "not engaging in either a banking or a savings and loan business."<sup>94</sup>

## VII. OTHER FINANCIAL INSTITUTIONS

### A. *Savings and Loan Associations*

Savings and loan associations<sup>95</sup> traditionally have served a different function from that of commercial banks in that savings and loan associations historically have been formed for the dual purposes of promoting savings and providing residential financing. Consequently, the laws governing banks and savings and loan associations developed differently. In addition, the federal government has taken an active role in regulating savings and loan associations.<sup>96</sup> Like banks, savings and loan associations may be chartered by either the federal government or by the state. Montana has fourteen savings and loan associations. Only two are state chartered. Ten of the remaining twelve federally chartered savings

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90. *Id.*, slip op. at 6.

91. *Id.*

92. See Annot., 73 A.L.R. 3d 1282 (1976).

93. 193 Neb. 634, 228 N.W. 2d 299 (1975).

94. *Id.* at 640, 228 N.W. 2d at 303.

95. Savings and loan associations were once known as building and loan associations. Despite common usage of the modern term "savings and loan," the law still clings to the term "building and loan."

96. COMMITTEE ON SAVINGS AND LOAN ASS'NS, SECTION OF CORPORATION, BANKING AND BUSINESS LAW, A.B.A., HANDBOOK OF SAVINGS AND LOAN LAW 57 (1973).



and loan associations are domiciled in Montana. The remaining two federally chartered savings and loan associations are domiciled elsewhere but have branches in Montana.<sup>97</sup>

Federal law completely preempts state law with respect to branching and most other questions involving federally chartered savings and loan associations. Congress allocated regulation of federally chartered savings and loan associations to the Federal Home Loan Bank Board<sup>98</sup> pursuant to the Home Owners Loan Act of 1933.<sup>99</sup> Although Congress did not expressly state that federally chartered savings and loan associations have the power to branch, the Act provides for establishment of branches,<sup>100</sup> and courts have consequently indicated that this gives federally chartered savings and loan associations the power to branch regardless of state law.<sup>101</sup>

The Montana Legislature in 1981 granted all the rights of federally chartered savings and loan associations to state chartered savings and loan associations.<sup>102</sup> This presumably includes the right to branch. Before Montana statutorily guaranteed equality of rights for state chartered savings and loan associations, there was some question as to whether a state chartered savings and loan association could branch.<sup>103</sup> Apparently, that problem has now been eliminated.

Since 1977, Montana has prohibited branching in this state between a savings and loan association chartered in Montana by the state and a savings and loan association chartered by any other state.<sup>104</sup> This prohibition, however, does not apply to federally

97. Home Loan Bank of Seattle Federal Statistics (Feb. 28, 1983) and Montana Department of Commerce Statistics (May 2, 1983).

98. The Federal Home Loan Bank Board was established by the Federal Home Loan Bank Act, ch. 522, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1449 (1976 & Supp. V 1981)).

99. Home Owners' Loan Act of 1933, ch. 64, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C. §§ 1461-1468 (1976 & Supp. V 1981)).

100. 12 U.S.C. 1464(c) (1976 & Supp. V 1981). The Code of Federal Regulations specifies the criteria the Federal Home Loan Bank Board must examine before granting an application to a savings and loan association for a branch. 12 C.F.R. § 545.14 (1982).

101. See, e.g., *Springfield Inst. for Savings v. Worcester Fed. Savings & Loan Ass'n.*, 329 Mass. 184, 107 N.E. 2d 315 (1952), cert. denied, 344 U.S. 884 (1952).

102. Act of Apr. 29, 1981, ch. 558, 1981 Mont. Laws 1185 (codified at MONT. CODE ANN. § 32-2-111 (1981)). The title of the bill creating this statute is "An act to provide a state-chartered building and loan association the same rights as a federally chartered savings and loan association."

103. The Montana Attorney General determined in 1961 that a state chartered savings and loan could not branch under Montana law. 29 Mont. Op. Att'y. Gen. 3 (1961).

104. Act of Apr. 14, 1977, ch. 363, § 1, 1981 Mont. Laws 1179 (codified at MONT. CODE ANN. § 32-2-231(2) (1981)). Five years before the action of the legislature, the Montana Attorney General gave an opinion that the "statutes of Montana do not allow the establish-

chartered savings and loan associations<sup>105</sup> as they are regulated completely by the Federal Home Loan Bank Board.

Section 32-3-231(1) of the Montana Code permits mergers of state chartered savings and loan associations only "with the approval of the [Department of Commerce]."<sup>106</sup> However, in *In re the Application for Authority to Conduct Savings & Loan Activities in the State of Montana by Gate City Savings & Loan Association of Fargo, North Dakota*,<sup>107</sup> a case involving the proposed merger of savings and loan associations, the Montana Supreme Court declared that section 32-2-231(1) of the Montana Code is unconstitutional because it "contains an overly-broad delegation of legislative power" as it provides no statutory standards for the Department to utilize. The statute is still on the books and nothing has been done to make it constitutional.<sup>108</sup>

### B. Credit Unions

Credit unions, unlike commercial banks and savings and loan associations, are non-profit, voluntary organizations.<sup>109</sup> As with banks and savings and loan associations, though, credit unions may be either federally or state chartered. Montana has a total of 126 credit unions with ninety-nine holding federal charters and twenty-seven holding state charters.<sup>110</sup> Federally chartered credit unions have the power to branch regardless of state law.<sup>111</sup> In 1981, the Montana Legislature gave that same power to state chartered credit unions.<sup>112</sup> Thus, all credit unions in Montana have the right to branch.

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ment or operation of branch offices in this state by a foreign savings or building and loan association." 34 Mont. Op. Att'y. Gen. 256, 262 (1972).

105. *E.g.*, Havre Federal Savings and Loan Association merged into Capital Federal Savings of Olympia, Washington on Sept. 1, 1982. Federal Home Loan Bank of Seattle statistics (Feb. 28, 1983). Capital converted to a federal charter to facilitate the merger. Telephone interview with Kevin E. Davis, Federal Home Loan Bank of Seattle (May 2, 1983).

106. MONT. CODE ANN. § 32-2-231(1) (1981).

107. 182 Mont. 361, 371, 597 P.2d 84, 90 (1979).

108. Telephone interview with Gregory J. Petesch, staff attorney, Montana Legislative Council (May 2, 1983). *See also* Compiler's Comments to MONT. CODE ANN. § 32-2-231 (1981).

109. MONT. CODE ANN. § 32-3-102 (1981). *See also* MONTANA Credit Unions League, 1982 Annual Report, Yearbook, and Directory 5 [hereinafter cited as REPORT].

110. REPORT, *supra* note 109, at 20-27.

111. 37 Mont. Op. Att'y. Gen. 673, 677 (1978), (citing 12 C.F.R. § 740.3(a)).

112. Act of Mar. 25, 1981, ch. 140, § 1, 1981 Mont. Laws 193 (codified at MONT. CODE ANN. § 32-3-104(3) to (5) (1981)).

### VIII. CONCLUSION

This comment brings together Montana law on branching of banks, savings and loan associations, and credit unions. As regulations continue to change, the services offered by banks, savings and loan associations, and credit unions in the consumers' eyes are becoming increasingly similar. Consequently, as lawmakers wrestle with branch banking issues, they must determine whether it is in the interest of Montanans to allow branching by some financial institutions while continuing to deny it to commercial banks. They must also decide whether it is in the interest of Montanans to continue to allow multi-bank holding companies the privilege of multiple unit banking while denying that same opportunity to small unit-banks that cannot afford to open another bank in order to expand their services.