Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

Corporate Decision # 97-68
August 1997

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION TO MERGE FIRST BANK NATIONAL ASSOCIATION, MINNEAPOLIS, MINNESOTA, AND FIRST NATIONAL BANK OF EAST GRAND FORKS, EAST GRAND FORKS, MINNESOTA

July 10, 1997

I. INTRODUCTION

On June 4, 1997, First Bank National Association, Minneapolis, Minnesota ("FBNA"), and First National Bank of East Grand Forks, East Grand Forks, Minnesota ("FB/EGF"), applied to the Office of the Comptroller of the Currency ("OCC") for approval to merge FBNA with and into FB/EGF under FB/EGF's charter and with the title "First Bank National Association" (the "Resulting Bank" or "New FBNA"), under 12 U.S.C. §§ 215a & 1828(c) (the "Merger Application"). Both banks are insured national banks. The banks are affiliates, and are subsidiaries of First Bank System, Inc., a multistate bank holding company headquartered in Minneapolis. The merger combines two of the holding company's banks into one bank. FBNA has its main office in Minneapolis and operates branches in Minnesota, Colorado, Illinois, Iowa, Kansas, Nebraska, North Dakota, South Dakota, Wisconsin, and Wyoming.[1] FB/EGF has its main office in East Grand Forks and does not have branches. In the Merger Application, OCC approval is also requested for the Resulting Bank to retain FBNA's main office and branches as branches after the merger under 12 U.S.C. §§ 36(b) & 36(e).

[1] FBNA's branches in these states are the result of earlier transactions. See Decision on the Application to Merge Eight Affiliated Banks in Other States with and into First Bank National Association, Minneapolis, Minnesota (OCC Corporate Decision No. 97-36, June 1, 1997) ("the Interstate Bank Merger"); Decision to Approve Applications by First Bank National Association, Minneapolis, Minnesota, to Acquire First Bank, FSB, Fargo, North Dakota, and to Engage in Certain Related Transactions (OCC Corporate Decision No. 97-32, May 31, 1997).

II. LEGAL AUTHORITY

This transaction involves a merger between an interstate national bank whose home state is Minnesota and another affiliated bank whose home state is also Minnesota. Thus, while this merger includes an interstate bank, and of course an interstate Resulting Bank, this merger does not come under the interstate merger provisions of 12 U.S.C. § 1831u because those provisions address only mergers between banks with different home states.[2] However, mergers between an already existing national bank and another national bank in one of the states in which the interstate bank has offices are authorized under other law governing national banks. Such mergers are authorized under 12 U.S.C. § 215a, and the resulting bank may retain the offices of the banks under 12 U.S.C. § 36(b)(2). The OCC previously has considered many such applications under sections 215a and 36(b) both before and after the Riegle-Neal Act. As discussed in Part II-C below, the Riegle-Neal Act did not change existing authority under sections 215a and 36(b). Accordingly, the Merger Application does not raise new issues, but only the application of established precedent for applying sections 215a and 36(b) to interstate national banks.

A. FBNA may Merge with FB/EGF under Section 215a.

Mergers of national banks, and of state banks into national banks, generally are authorized under 12 U.S.C. § 215a. Section 215a provides in relevant part:

> One or more national banking associations or one or more State banks, with the approval of the Comptroller, under an agreement not inconsistent with this subchapter, may merge into a national banking association located within the same State, under the charter of the receiving association.

12 U.S.C. § 215a(a) (emphasis added). In many prior decisions, both before and after the Riegle-Neal Act, the OCC has interpreted and applied this section with respect to mergers involving an existing interstate national bank.[3] We concluded that, just as for branching purposes under section

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[2] Section 1831u(a) provides:

> (1) In General. -- Beginning on June 1, 1997, the responsible agency may approve a merger transaction under section 18(c) [12 U.S.C. § 1828(c), the Bank Merger Act] between insured banks with different home States, without regard to whether such transaction is prohibited under the law of any State.

12 U.S.C. § 1831u(a)(1) (new section 44 of the Federal Deposit Insurance Act, as added by section 102(a) of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (enacted September 29, 1994) ("the Riegle-Neal Act").

[3] See, e.g., Decision on the Application to Merge Girard Bank, Bala Cynwyd, Pennsylvania, into Heritage Bank, N.A., Jamesburg, New Jersey,with the Title of Mellon Bank (East), N.A. (March 27, 1984), reprinted in [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,925 (Part III-C); Decision on the Application of State Savings Bank, Southington, Connecticut, to Convert into a National Banking Association and Merge into Connecticut National Bank, Hartford, Connecticut (OCC Merger Decision No. 91-07, April 8, 1991) (Part II-B-1) ("OCC Shawmut

36, a national bank with its main office and branch offices in more than one state was "located" in each such state, for the purpose of mergers with other banks in that state under 12 U.S.C. § 215a (mergers) or 12 U.S.C. § 215 (consolidations). This reading is consistent with the plain meaning of the statute and its legislative history. It is also supported by judicial construction of "situated" in section 36(c) and similar locational phrases in other sections of the National Bank Act. Any other reading could render section 215a largely unworkable in the case of interstate banks. Finally, the Riegle-Neal Act itself suggests that subsequent mergers in a state by a Riegle-Neal interstate bank may occur under relevant law for in-state mergers. See 12 U.S.C. § 1831u(d)(2) (quoted in note 10 below). The reasoning and support for this position are set out in the earlier OCC decisions, such as those in note 3.

Accordingly, in this Merger Application, both FBNA and FB/EGF are located in Minnesota for purposes of section 215a, and so they may merge under section 215a.

B. The Resulting Bank may Retain the Offices of Both Banks.

The Applicants have also requested that, upon completion of the merger, the Resulting Bank, New FBNA, be permitted to retain and operate, as its main office, the main office of FB/EGF and to retain and operate, as branches, the main office and branches of FBNA. Branch retention by the resulting bank in a merger under section 215a is covered by the McFadden Act. See 12 U.S.C. § 36(b)(2). Section 36(b)(2) applies different standards for the resulting bank's retention of the branches of the bank under whose charter the merger is effected, see section 36(b)(2)(C), and for its retention of the main office and branches of the other bank(s) in the merger ("merging banks"), see section 36(b)(2)(A).[4] In this Merger Application, the banks

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Decision") (both banks owned by Shawmut National Corporation; at the time of conversion, State Savings Bank had branches in Rhode Island); Decision on the Applications of First Fidelity Bank, N.A.(Pennsylvania) and First Fidelity Bank, N.A. (New Jersey) (OCC Corporate Decision No. 94-04, January 10, 1994), reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644 (Part III-A) ("OCC First Fidelity/New Jersey Decision"); Decision on the Applications of American Security Bank, N.A., Washington, D.C., and Maryland National Bank, Baltimore, Maryland (OCC Corporate Decision No. 94-05, February 4, 1994), reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,695 (Part III-A) ("OCC NationsBank/Maryland National Decision"); Decision on the Applications to Merge NationsBank of D.C., N.A., Maryland National Bank, and NationsBank of Maryland, N.A. (OCC Corporate Decision No. 94-22, April 29, 1994) (Part II-A-1) ("OCC NationsBank/D.C.-Maryland Decision"); Decision on the Application for the Merger of Continental Bank, Norristown, Pennsylvania, into Midlantic National Bank, Newark, New Jersey (OCC Corporate Decision No. 94-37, August 12, 1994) (Part II-A); Decision on the Applications of Bank Midwest of Kansas, N.A., and Bank Midwest, N.A. (OCC Corporate Decision No. 95-05, February 16, 1995), reprinted in Fed. Banking L. Rep. (CCH) ¶ 90,474 (Part II-C-1) ("OCC Bank Midwest Decision"); Decision on the Application to Merge Bank and Trust Company of Old York Road into Midlantic Bank, N.A. (OCC Corporate Decision No. 95-18, May 25, 1995) (Part II-A) ("OCC Midlantic/Old York Decision"); Decision on the Application to Merge Fleet Bank of New York, N.A. with NatWest Bank N.A. (OCC Corporate Decision No. 96-20, April 12, 1996) (Part II-A) ("OCC Fleet/NatWest Decision"); Decision on the Applications to Merge Boatmen's Bank of Vandalia, Vandalia, Missouri, and Twenty-Two Other Affiliated Banks with NationsBank, N.A., Charlotte, North Carolina (OCC Corporate Decision No. (97-47, June 6, 1997) (Part II-B-1) ("OCC NationsBank/Missouri Decision").

[4] Specifically, section 36(b)(2) provides:

are combining under the charter of FB/EGF. FB/EGF currently has no branches, and so branch retention under section 36(b)(2)(C) is not involved in this transaction. In the Merger Application, FBNA is the merging bank, and the Resulting Bank's power to retain its main office and branches is governed by, and is authorized under, section 36(b)(2)(A).

Under section 36(b)(2)(A), the resulting bank may retain the branches or the main offices of the merging banks if the resulting bank could establish them as new branches of the resulting bank under section 36(c). For branching purposes under section 36(c), a national bank is "situated" in any state in which it has a branch or main office and may establish branches in each such state in the same manner as in-state national banks. See Seattle Trust & Savings Bank v. Bank of California, N.A., 492 F.2d 48, 51 (9th Cir. 1974), cert. denied, 419 U.S. 844 (1974). In applying the branch retention provisions of section 36(b)(2)(A) in the context of mergers involving interstate banks, it is therefore necessary to determine in which state(s) the resulting bank is situated. The OCC previously concluded that the resulting bank is properly treated as situated in all of the states in which the participating banks were situated in order to then apply the section 36(b)(2)(A) and 36(c) standard for the retention of the merging bank's branches, using each state's law for the retention of branches for the branches in that state.[5] We first reached this

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> A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as --
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> > (A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;
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> > (B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or
> >
> > (C) a branch of the national bank and which, on February 25, 1927, was not in operation as a branch of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.
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> The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation.

12 U.S.C. § 36(b)(2). For purposes of this subsection, the term "consolidation" includes a merger. 12 U.S.C. § 36(b)(3). FBNA and FB/EGF have not indicated whether any of FBNA's branches was in operation as a branch of any bank on February 25, 1927, and so we do not consider whether section 36(b)(2)(B) also may be applicable.

[5] For purposes of section 36(b) and section 36(c) of the McFadden Act, the state law that is incorporated is state law dealing with branching by that state's banks within the state. State laws pertaining to the activities of the state's banks outside the state or to the activities of out-of-state banks within the state are not within the scope of what these sections of the McFadden Act refer to. See, e.g., OCC Bank Midwest Decision (Parts II-B, II-C-2, II-D, III-B-1-b).

analysis in 1990 in a decision involving the conversion of an interstate state bank and its subsequent merger into a national bank, see OCC Shawmut Decision, and have consistently applied it in many subsequent decisions involving mergers with interstate banks both before and after the Riegle-Neal Act.[6] Thus, the power of the resulting bank to retain the merging bank's branches in each state is determined by reference to that state's laws for that state's banks for mergers in the state. The OCC's rationale for this interpretation involves the following considerations.

Since section 36(b)(2)(A) refers to section 36(c), it is necessary to determine in which state the resulting national bank is situated. In contexts in which all the banks operate only in the same state, it is clear in what state the resulting bank is situated. But in the context of a national bank resulting from the merger of banks, one or more of which already have lawfully established interstate branches, the statutory language does not expressly address the issue, and it becomes necessary to fill this gap through interpretation. We believe the proper interpretation is that the resulting bank is situated in all of the states in which the banks participating in the merger were situated. This result is based upon several statutory analysis considerations. First, this construction of section 36(b)(2)(A) is consistent with the interpretation of "situated" in section 36(c). See Seattle Trust, 492 F.2d at 51.

Second, in the context of an existing interstate bank, it is the simplest application of the statute to the underlying facts. When a bank with its main office in one state and branches in another state merges with another bank, the ordinary assumption would be that the resulting bank continues to be situated in the same places. There is no logical reason to disregard some of the existing locations of the participating banks in determining the location of the resulting bank at the moment of its creation, unless the statutory language clearly requires another result. Cf. Old Kent Bank & Trust Company v. Martin, 281 F.2d 61, 63 (D.C. Cir. 1960) (construing 12 U.S.C. § 321; in merger of national bank with branches into state member bank, the branches are retained as an incident of the merger in the absence of clear language to the contrary). With respect to the power of the resulting bank to retain branches within each state, the statute does expressly require the branches to be re-examined under its terms. But with respect to determining in which state or states the resulting bank is treated as situated in conducting that re-examination, the statute does not indicate that any of the predecessor banks' existing states is to be ignored.

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[6] See, e.g., Decision on the Applications of First Fidelity Bank, N.A. (New York) and First Fidelity Bank, N.A. (OCC Corporate Decision No. 94-42, October 20, 1994) (Part III-B-1); Decision on the Application to Merge Chase Savings Bank into The Chase Manhattan Bank, N.A. (OCC Corporate Decision No. 95-08, February 10, 1995) (Part II-B-1); OCC Bank Midwest Decision (Part II-C-2-a); Decision on the Applications of PNC Bank, Northern Kentucky, N.A. and PNC Bank, Ohio, N.A. (OCC Corporate Decision No. 95-13, March 14, 1995) ("OCC PNC/Kentucky Decision"); Decision on the Applications of NationsBank of Florida, N.A., and NationsBank of Georgia, N.A. (OCC Corporate Decision No. 95-68, December 22, 1995) (Part II-B-2-a); Decision on the Applications of KeyBank, N.A., and Society National Bank (OCC Corporate Decision No. 96-32, June 14, 1996) (Part II-C-2-a); OCC NationsBank/Missouri Decision (Part II-B-2-a). See also OCC First Fidelity/New Jersey Decision; OCC NationsBank/Maryland National Decision. Cf. Decision on the Application of Republic Bank for Savings, New York, New York (OCC Corporate Decision No. 95-32, July 25, 1995) (in conversion of state-chartered savings bank with branches in New York and Florida, resulting national bank is considered "situated" in both states for purposes of applying branch retention provisions of 12 U.S.C. § 36(b)(1)).

Third, this result is consistent with the statutory power to retain branches directly under the consolidation statute at an earlier time period when the McFadden Act did not yet exist. The statutory provision authorizing the consolidation of national banks was originally enacted in 1918 ("1918 Act").[7] At that time, there was no general branching statute for national banks. But there was an 1865 provision that expressly allowed any state bank converting to a national charter to keep branches it had ("1865 Act").[8] So, in 1918 and thereafter, there were some national banks that had branches -- i.e., state banks with branches that had converted. After 1918, these national banks could consolidate under the 1918 Act with other national banks that were originally chartered national banks. This would raise the question whether the resulting bank could keep the branches of the predecessor converted state bank. The resulting bank was no longer the converted state bank and so did not itself have branching authority directly under the 1865 Act. But the 1918 Act provided that all the rights, franchises, interests, and property of the consolidating banks are deemed transferred to the consolidated bank; and so the outcome was that the resulting bank succeeded to the branching rights of the predecessor bank under the 1918 Act. The 1918 Act was used to acquire branches by acquiring a converted state bank that had branches. See 1926 Annual Report of the Comptroller of the Currency 14-15 (list of national banks with branches under 1918 Act). See also Ginsburg, Interstate Banking, 9 Hofstra L. Rev. 1133, 1153 (1981). These statutory developments are discussed in more detail in earlier OCC decisions. See OCC Bank Midwest Decision (Part II-A-2-b); OCC NationsBank/Maryland National Decision (Part II-B-1-b); OCC First Fidelity/New Jersey Decision (Part II-B-1-b).

Thus, between 1918 and 1927 the consolidation statute itself was the authority for the resulting bank to continue the branches. In 1927, the McFadden Act amended Revised Statutes 5155 to add, inter alia, specific provisions covering branch retention in consolidations, thereby superseding the general power to retain under the 1918 Act in the areas covered by the specific provisions. But in areas not specifically covered by the McFadden Act, arguably the power to retain under the 1918 Act continued. Thus, in interpreting section 36(b)(2)(A) today on an issue that the statute does not expressly address, it is not inappropriate to look back to the underlying

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[7] See Act of November 7, 1918, ch. 209, 40 Stat. 1043 (codified as amended at 12 U.S.C. § 215). The 1918 Act authorized two or more national banks to consolidate into one national bank. The Act was later amended to add provisions for mergers, as well as consolidations, between national banks and for mergers or consolidations of state banks into national banks. (Previously, state banks were required first to convert into national banks under 12 U.S.C. § 35 and then consolidate under the 1918 Act.) Recently, the Riegle-Neal Act further amended the 1918 Act and renamed it the "National Bank Consolidation and Merger Act". See Riegle-Neal Act § 102(b)(4).

[8] See Act of March 3, 1865, ch. 78, § 7(proviso), 13 Stat. 469, 484. The 1865 Act was included in the Revised Statutes as follows:

> It shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother-bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother-bank, and each branch, to be regulated by the amount of capital assigned to and used by each.

Rev. Stat. § 5155 (prior to 1927 amendment by the McFadden Act).

merger authority. And, just as the 1918 Act provided that the consolidation carried the existing branches forward to the successor bank, so we interpret section 36(b)(2)(A) in a manner that carries existing states forward to the successor bank for purposes of determining in which states the resulting bank is situated.

Fourth, the literal language of section 36(b)(2)(A), while not directly addressing this issue, supports the OCC's interpretation. The language of the section focuses on whether the "resulting bank" could establish the branches of a participating bank as new branches. The term "resulting bank" expressly refers to the combined bank that results from the merger, as distinct from either of the pre-existing banks. In particular, the "resulting bank" is differentiated from the acquiring bank in the merger, which is referred to in section 36(b)(2) by the term "national bank." Since the term “resulting bank” refers to the combined bank, it is appropriate to consider where all participating banks -- and not merely the acquiring bank -- had locations prior to the merger. Another interpretation, one that used only the locations of the acquiring bank in determining where the resulting bank is situated, would not give effect to the actual wording of section 36(b)(2)(A), but instead would be construing it as if the term "national bank" were substituted for "resulting bank." Since the OCC's interpretation gives effect to Congress' use of the term "resulting bank" in this context, there is no warrant to disregard the language of the statute.

Finally, we note that in the interstate merger transactions authorized under the Riegle-Neal Act essentially the same result occurs: the resulting bank keeps the branches of all its predecessors. See Riegle-Neal Act §§ 102(a) & 102(b)(1)(B) (adding 12 U.S.C. §§ 1831u(d)(1) & 36(d)). In the Riegle-Neal Act, Congress has created this result for the broad class of interstate mergers that the Act authorizes, including mergers involving banks with different home states that initially create an interstate bank. It is logical to interpret section 36(b)(2)(A) to have the same result in the limited situations in which mergers involving an existing interstate bank and another bank with the same home state can occur under existing law.

Therefore, in the present Merger Application, the Resulting Bank, New FBNA, is situated in each state where FBNA or FB/EGF had its main office or branches for purposes of applying the branch retention provisions of sections 36(b)(2)(A) & 36(c). The Resulting Bank may retain the branches in each state in the same way that other national banks situated in that state could retain branches in that state in mergers there under sections 36(b)(2)(A) & 36(c). In the states of Colorado, Illinois, Kansas, Minnesota, North Dakota, South Dakota, and Wisconsin, each state’s law allows its state banks to acquire branches in a merger, or to establish branches *de novo*, without geographic limitation within the state. See Colo. Rev. Stat. §§ 11-25-103(8)(b) (*de novo*) & 11-25-103(1)(a) (merger); 205 Ill. Stat. Ann. 5/5(15)(a) (both); Kan. Stat. Ann. §§ 9-1111(b) (*de novo*) & 9-1111(k) (merger); Minn. Stat. §§ 47.52(a) (*de novo*) & 49.34(2)(a) (merger); N.D.Cent. Code § 6-03-13.1 (both); S.D. Codified Laws § 51A-7-4 (both); Wis. Stat. Ann. §§ 221.0302(1) (*de novo*) & 221.0302(2) (merger). Thus, in each of those states, a national bank in that state could acquire in a merger, and retain under sections 36(b)(2)(A) & 36(c), branches in that state at the locations where FBNA’s main office and branches are located. Therefore, the Resulting Bank in this Merger Application also may retain and operate the main office and

branches of FBNA in those states under sections 36(b)(2)(A) & 36(c). In the states of Iowa, Nebraska, and Wyoming, state law does not permit the unlimited establishment of *de novo* branches by state banks. However, each of those states allows its state banks to acquire branches in a merger without geographic limitation within the state. See Iowa Code Ann. § 524.1213(3)&(4A); Neb. Rev. Stat. § 8-157(3); Wyo. Stat. § 13-4-104(b). Thus, in each of those states, a national bank in that state could acquire in a merger, and retain under sections 36(b)(2)(A) & 36(c), branches in that state at the locations where FBNA's branches are located.[9] Therefore, the Resulting Bank in this Merger Application also may retain and operate the main office and branches of FBNA in those states under sections 36(b)(2)(A) & 36(c).

C. This Existing Authority for National Banks under 12 U.S.C. § 215a & 36(b) Continues After the Riegle-Neal Act.

Our analysis of the legal authority for the Merger Application is based on pre-existing law for national banks, in particular 12 U.S.C. §§ 36(b), 36(c), & 215a. The Riegle-Neal Act did not alter these provisions, did not change the legal analysis and result under them, and indeed confirmed it. The statutory language and legislative history in the Riegle-Neal Act clearly contemplate that existing authority under these provisions remains in effect. The language of these sections is not changed, and the legislative history contains no indication of any intent to modify the operation of these sections. Moreover, nothing in the new sections added in the Riegle-Neal Act (in particular the provision on exclusive authority for additional branches, 12 U.S.C. § 36(e), discussed below) conflicts with any authority in these sections. Our analysis of the relationship of the Riegle-Neal Act to existing law is discussed in more detail in prior decisions, such as the OCC Bank Midwest Decision (Part II-D), the OCC Midlantic/Old York Decision (Part II-C), and the OCC Fleet/NatWest Decision (Part II-C).

The statutory changes and legislative history of the Riegle-Neal Act shows that Congress was completely aware of the OCC's prior interstate decisions. OCC decisions prior to the Riegle-Neal Act addressed interstate mergers and involved issues and analysis of sections 36 and 215a. In the Riegle-Neal Act, Congress did not change sections 36(b), 36(c), or 215a or express any disagreement with OCC's interpretation and application of them.[10] The fact that Congress, during

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[9] While section 36(c) refers to the establishment of new branches, it has been held to include a national bank's acquisition of branches as well, when state law permits state banks to acquire branches by merger or purchase. See State of Washington ex rel. Edwards v. Heimann, 633 F.2d 886, 889-90 (9th Cir. 1980). See also OCC PNC/Kentucky Decision (at page 12) (earlier decision in a similar interstate merger involving retention of branches under the state's branching-by-merger statute where state did not permit unlimited *de novo* branching). The application of Iowa's branching-by-merger statute to the particular facts of FBNA's Iowa branches is discussed further in OCC Corporate Decision No. 97-32, supra note 1, at pages 27-30.

[10] The Conference Report expressly shows that Congress was aware of existing authority and of OCC analysis and approvals under that authority. See H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 57 (1994). The OCC decisions Congress was directly considering involved an interstate main office relocation with branches retained in the original state, after which the interstate bank then merged with another bank under section 215a and the resulting bank retained branches under section 36(b)(2). Congress changed the statutes that address interstate relocation, but did not change sections 36(b), 36(c), or 215a. We believe the reference in the Conference Report to the OCC's prior decisions includes

legislation in which it was comprehensively considering interstate branching, left these statutes and OCC interpretation of them unaffected is conclusive evidence that the intended meanings of sections 36(b), 36(c), and 215a in the interstate context are those previously expressed by the OCC and set out above.

Nor does the new section 44 authority for interstate merger transactions in the Riegle-Neal Act and the corresponding new provision authorizing national banks to engage in section 44 mergers, 12 U.S.C. § 215a-1, supplant existing merger authority possessed by national banks. Review of the statutory framework and legislative history shows that the intended operation of section 44 and section 215a-1 is that they are a separate and parallel source of authority for interstate merger transactions. They will allow interstate mergers after June 1, 1997, overriding any conflicting state laws. Section 44 permits states to opt-out or to opt in early. But it does not supplant existing federal laws for national banks that allow some forms of interstate transaction *with a bank that is already interstate*. Indeed, the Riegle-Neal Act itself suggests that subsequent mergers in a state by a Riegle-Neal interstate national bank are to occur under section 215a. See 12 U.S.C. § 1831u(d)(2) (quoted in note 10 above).

Only one provision in the Riegle-Neal Act addresses the question of exclusivity and relationship to existing law and may supersede existing law for national banks regarding mergers and branching. See Riegle-Neal Act § 102(b)(1)(B) (adding new subsection 12 U.S.C. § 36(e)(1) on exclusive authority for additional branches for national banks).[11] Since Congress dealt with

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all aspects of the prior decisions, and not merely the analysis of main office relocation and branch retention under section 30. If the other aspects of the legal analysis in the prior decisions (i.e., the issues raised under sections 36 and 215a) were not also valid, the final results in those decisions would not have been legally authorized. In that event, Congress' concurrence in the decisions would have been a nullity.

Moreover, the OCC's analysis of sections 36(b) and 215a relied on the Seattle Trust case's interpretation of section 36(c). In that regard, we note that in the Riegle-Neal Act Congress endorses the Seattle Trust approach for subsequent branching by interstate banks. Provisions in the Riegle-Neal Act have, in effect, codified the Seattle Trust interpretation of section 36 for Riegle-Neal interstate national banks. Section 1831u(d)(2) provides:

> (2) Additional Branches. -- Following the consummation of any interstate merger transaction, the resulting bank may establish, acquire, or operate additional branches at any location where any bank involved in the transaction could have established, acquired, or operated a branch under applicable Federal or State law if such bank had not been a party to the merger transaction.

12 U.S.C. § 1831u(d)(2). See also 12 U.S.C. § 36(g)(2)(B) (applying section 1831u(d)(2) to subsequent branches when a national bank has entered a state initially with a *de novo* branch under the Riegle-Neal Act); Decision on the Applications of Community National Bank (OCC Corporate Decision No. 96-22, April 19, 1996) (further discussion of these provisions).

[11] Section 36(e)(1) provides:

> Effective June 1, 1997, a national bank may not acquire, establish, or operate a branch in any State other than the bank's home State (as defined in subsection (g)(3)(B)) or a State in which the bank already has a branch unless the acquisition, establishment, or operation of such branch in such State by such national bank is authorized under this section or section 13(f), 13(k), or 44 of the Federal

this area explicitly in that provision, the assumption must be that that provision is what Congress intended the relationship of the Riegle-Neal Act to prior, existing law to be. We therefore find no basis to conclude that the Riegle-Neal Act supersedes existing law for national banks in ways other than those explicitly set out in section 36(e). Thus, a transaction that can come under other existing authority continues to be authorized under that authority, provided it is consistent with the provision on exclusive authority for additional branches in section 36(e). Such is the case here. In the Merger Application, section 36(e)(1) is complied with because the Resulting Bank retains and operates its branches under the authority of section 36(b), a part of "this section" referred to in section 36(e)(1).

Moreover, we note that this result is not inconsistent with the overall framework or underlying purposes of the Riegle-Neal Act. First, FBNA is already the result of an interstate merger transaction under the Riegle-Neal Act. It is inconceivable that Congress would have intended that such a bank could not merge with another bank in its own home state (which merger by definition cannot occur under 12 U.S.C. § 1831u), without the resulting bank being required to surrender all its branches in all the other states. Second, if the earlier interstate merger transaction had not occurred, FB/EGF (the bank under whose charter the present merger is occurring) could have engaged in the same transactions that FBNA did earlier, with the result that FB/EGF would be operating the same interstate branch system that FBNA does. Since the end result is the same that could have occurred directly as a Riegle-Neal merger, there is no reason the banks should not be able to reach that result in a Riegle-Neal merger followed by a merger under section 215a. Finally, in this transaction, the Resulting Bank has the same home state and operates the same branches in the same host states as FBNA did before the merger. There are no new host states. From the perspective of the host states, this merger makes little, if any, change.

D. Conclusion.

The legal analysis of this Merger Application is similar to the analysis in many prior OCC decisions. The merger is authorized under 12 U.S.C. § 215a, and the Resulting Bank may retain and operate the branches under the authority of 12 U.S.C. § 36(b)(2) and consistent with 12 U.S.C. § 36(e)(1). Accordingly, this Merger Application is legally authorized.

III. ADDITIONAL STATUTORY AND POLICY REVIEWS

A. The Bank Merger Act.

The Bank Merger Act, 12 U.S.C. § 1828(c), requires the OCC's approval for any merger between insured banks where the resulting institution will be a national bank. Under the Act, the

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Deposit Insurance Act.

12 U.S.C. § 36(e)(1) (emphasis added). The term "this section" refers to Revised Statutes § 5155, 12 U.S.C. § 36. A similar provision was added for state banks. See 12 U.S.C. § 1828(d)(3). In addition, subsection 36(e)(2) (along with new subsection 30(c)) affects prior law regarding branch retention in interstate main office relocations. This Merger Application does not involve a relocation, and so that provision is not involved here.

OCC generally may not approve a merger which would substantially lessen competition. In addition, the Act also requires the OCC to take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served. For the reasons stated below, we find the Merger Application may be approved under section 1828(c).

1. Competitive Analysis.

Since the two banks are already owned by the same bank holding company, the merger will have no anticompetitive effects.

2. Financial and Managerial Resources.

The financial and managerial resources of both FBNA and FB/EGF are presently satisfactory. Both banks currently are well-capitalized, and the Resulting Bank will be well-capitalized after the merger. The management and overall structure of the Resulting Bank will be virtually the same as FBNA, and so the merger will have no material impact on financial and managerial resources. Thus, we find the financial and managerial resources factor is consistent with approval of the Merger Application.

3. Convenience and Needs.

The Resulting Bank will help to meet the convenience and needs of the communities to be served. The Resulting Bank will continue to serve all the same areas in all the same states as FBNA and FB/EGF before the merger. There will be no reductions in products or services as a result of the merger. The Resulting Bank will continue to offer the full line of banking products and services that FBNA and FB/EGF offer. No branch closings are contemplated as a result of this merger. However, as part of its ongoing business plans, First Bank System, Inc., and FBNA continually evaluate its branch system, including branches acquired in transactions and, as a part of the normal course of business, may close redundant or unprofitable branches. Any such closures will be made in accordance with applicable statutes and regulations, including notification of customers of the branches, and will consider the needs of the community affected.

Accordingly, we believe the impact of the merger on the convenience and needs of the communities to be served is consistent with approval of the Merger Application.

B. The Community Reinvestment Act.

The Community Reinvestment Act ("CRA") requires the OCC to take into account the applicants' record of helping to meet the credit needs of their entire communities, including low- and moderate-income neighborhoods, when evaluating certain applications. See 12 U.S.C. § 2903. FBNA has an outstanding rating, and FB/EGF has a satisfactory rating, with respect to CRA performance. No comments were received by the OCC relating to this application, and the OCC has no other basis to question the banks' performance in complying with the CRA.

The merger is not expected to have any adverse effect on the Resulting Bank's CRA performance. The Resulting Bank will continue to serve the same communities that FBNA and FB/EGF currently serve. Both banks' offices will remain in operation as offices of the Resulting Bank. It will continue the current CRA programs and policies of both banks in all the states in which it operates. As a general matter, the Resulting Bank will have the same commitment to helping meet the credit needs of all the communities it serves as FBNA and FB/EGF have today as separate banks. The merger does not alter the Resulting Bank's obligation to help meet the credit needs of its communities in all the states it serves. We find that approval of the proposed merger is consistent with the Community Reinvestment Act.

IV. CONCLUSION AND APPROVAL

For the reasons set forth above, including the representations and commitments of the applicants, we find that the merger of FBNA and FB/EGF is authorized under 12 U.S.C. § 215a, the Resulting Bank may retain and operate the offices of the banks under 12 U.S.C. §§ 36(b)(2) & 36(e)(1), and that the merger meets the other statutory criteria for approval. Accordingly, this Merger Application is hereby approved.

/s/ 07-10-97

Julie L. Williams Date
Chief Counsel

Application Control Number: 97-MW-02-0044