



**Comptroller of the Currency
Administrator of National Banks**

Washington, D.C. 20219

**Corporate Decision #97-20
April 1997**

**DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY
ON THE APPLICATION TO MERGE
BOATMEN'S CREDIT CARD BANK, ALBUQUERQUE, NEW MEXICO,
WITH AND INTO
NATIONSBANK OF DELAWARE, N.A., DOVER, DELAWARE**

March 20, 1997

I. INTRODUCTION

On February 4, 1997, an Application was filed with the Office of the Comptroller of the Currency ("OCC") for approval to merge Boatmen's Credit Card Bank, Albuquerque, New Mexico ("BCCB") with and into NationsBank of Delaware, National Association, Dover, Delaware ("NationsBank/Delaware") under the charter and title of the latter ("the Resulting Bank"), under 12 U.S.C. §§ 215a-1, 1828(c) & 1831u(a) ("the Merger Application"). BCCB is an insured New Mexico state-chartered nonmember bank. It is engaged principally in credit card operations on a nationwide basis and has its main office in Albuquerque, New Mexico, and no branches. NationsBank/Delaware is an insured national bank. It also is engaged principally in credit card operations on a nationwide basis and has its main office in Dover, Delaware, and no branches. Coincident with consummation of the merger, the Resulting Bank will close the Albuquerque office of BCCB and will not receive deposits, pay checks, or lend money from any New Mexico location on or after the date of the merger. Consequently, the Resulting Bank will retain no branch in New Mexico.

Both banks are wholly-owned subsidiaries of NationsBank Corporation, a multistate bank holding company with its headquarters in Charlotte, North Carolina. BCCB was acquired by NationsBank Corporation as part of NationsBank Corporation's acquisition of Boatmen's Bancshares, Inc. *See Order Approving the Merger of Bank Holding Companies: NationsBank Corporation*, 83 Federal Reserve Bulletin ____ (December 16, 1996). In the proposed bank merger, NationsBank Corporation's two credit card banks will be combined in NationsBank/Delaware. As of December 31, 1996, BCCB had approximately \$696 million in assets and \$1 million in deposits. As of the same date, NationsBank/Delaware had approximately \$6.7 billion in assets and \$1 million in deposits.

II. LEGAL AUTHORITY

A. **The statutory framework: During the early opt-in period, banks with different home states may merge under a national bank charter under 12 U.S.C. §§ 215a-1 & 1831u(a) if each home state has a law that meets the provisions of section 1831u(a)(3) and the banks meet the relevant conditions of section 1831u(a) & (b).**

In 1994, Congress enacted legislation to create a framework for interstate mergers and branching by banks. See 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"). The Riegle-Neal Act added a new section 44 to the Federal Deposit Insurance Act that authorizes certain interstate merger transactions beginning on June 1, 1997. See Riegle-Neal Act § 102(a) (adding new section 44, 12 U.S.C. § 1831u). It also made conforming amendments to the provisions on mergers and consolidations of national banks to permit national banks to engage in such section 44 interstate merger transactions. See Riegle-Neal Act § 102(b)(4) (adding a new section 12 U.S.C. § 215a-1). It also added a similar conforming amendment to the McFadden Act to permit national banks to maintain and operate branches in accordance with section 44. See Riegle-Neal Act § 102(b)(1)(B) (adding new subsection 12 U.S.C. § 36(d)).

Section 44 authorizes mergers between banks with different home states, creating an interstate bank:

(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).¹ The Act permits a state to elect to prohibit such interstate merger transactions involving a bank whose home state is the prohibiting state by enacting a law between September 29, 1994, and May 31, 1997, that expressly prohibits all mergers with all out-of-state banks. See 12 U.S.C. § 1831u(a)(2) (state "opt-out" laws).

In addition, the Act also provides that interstate merger transactions may be approved before June 1, 1997 (the "early opt-in period") if the home states of the merging banks have the requisite enabling legislation:

(3) State Election to Permit Early Interstate Merger Transactions. --

¹ For purposes of section 1831u, the following definitions apply: The term "home State" means, with respect to a national bank, "the State in which the main office of the bank is located." The term "host State" means, "with respect to a bank, a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch." The term "interstate merger transaction" means any merger transaction approved pursuant to section 1831u(a)(1). The term "out-of-State bank" means, "with respect to any State, a bank whose home State is another State." The term "responsible agency" means the agency determined in accordance with 12 U.S.C. § 1828(c)(2) (namely, the OCC if the acquiring, assuming, or resulting bank is a national bank). See 12 U.S.C. § 1831u(f)(4), (5), (6), (8) & (10).

(A) In General. -- A merger transaction may be approved pursuant to paragraph (1) before June 1, 1997, if the home State of each bank involved in the transaction has in effect, as of the date of the approval of such transaction, a law that --

(i) applies equally to all out-of-State banks; and

(ii) expressly permits interstate merger transactions with all out-of-State banks.

(B) Certain Conditions Allowed. -- A host State may impose conditions on a branch within such State of a bank resulting from an interstate merger transaction if --

(i) the conditions do not have the effect of discriminating against out-of-State banks, out-of-State bank holding companies, or any subsidiary of such bank or company (other than on the basis of a nationwide reciprocal treatment requirement);

(ii) the imposition of the conditions is not preempted by Federal law; and

(iii) the conditions do not apply or require performance after May 31, 1997.

12 U.S.C. § 1831u(a)(3).

The availability of the authority for an interstate merger transaction under section 1831u(a) during the early opt-in period, therefore, is triggered by the existence of the requisite state law in the home states of the merging banks. The federal merger authority in section 1831u(a) is available only if each of the home states has a law that meets the features specified in section 1831u(a)(3)(A). However, section 1831u appears to structure the relationship between federal authority and state law differently than some other federal banking statutes that refer to state law. The Riegle-Neal Act's interstate merger transaction provisions do not make federal law completely supplant state law. But they also do not defer entirely to each state's law, or entirely incorporate each state's law, regarding the extent and manner in which interstate merger transactions can occur in that state.

On the one hand, the federal authority in section 1831u(a) is triggered, during the early opt-in period, only if each of the home states has a law that meets the features specified in section 1831u(a)(3)(A). But section 1831u does not expressly prohibit states from having other features in their interstate merger laws beyond those needed to meet the provisions of section 1831u(a)(3)(A). In fact, the Act expressly reserves to each state the right to determine branching by that state's state-chartered banks.² Nor does section 1831u(a) provide that the

² Section 1831u(c)(3) provides:

(3) Reservation of Certain Rights to States. -- No provision of this section shall be construed as limiting in any way the right of a State to --

(A) determine the authority of State banks chartered by that State to establish and maintain branches; or

(B) supervise, regulate, and examine State banks chartered by that State.

12 U.S.C. § 1831u(c)(3). While the Act thus preserves for the states their rights with respect to interstate mergers

federal merger authority is ineffective if the state adds other features. That is, the state may add other features to its interstate merger law, and, as long as those features do not cause the state law to fail to meet the provisions of section 1831u(a)(3)(A), the federal merger authority in section 1831u(a) continues to be available.

But, on the other hand, section 1831u, once triggered during the early opt-in period, singles out and specifically incorporates into the federal merger authority only certain features of state law referenced in various subsections of section 1831u. Similarly, after June 1, 1997 (when subsection 1831u(a)(3) will no longer be relevant), section 1831u continues to single out and specifically incorporate into the federal merger authority only certain features of state law referenced in various subsections of section 1831u. In addition to the state law features that are included in section 1831u on that permanent basis, Congress permitted host states, during the early opt-in period, to impose conditions on branches within the host state, as long as the conditions met the requirements of section 1831u(a)(3)(B) -- namely, that they do not discriminate against out-of-state banks, that they are not preempted by federal law, and they do not continue beyond May 31, 1997. Indeed, the inclusion of section 1831u(a)(3)(B) allowing host states to impose other conditions during the early opt-in period (subject to the limits in the section) indicates Congress believed that, without such permission (and therefore also in the period after June 1, 1997), host states would not have the authority to impose any conditions or requirements beyond those included in the specific provisions of section 1831u that refer to state law (including the reserved authority of a state to regulate its own state-chartered banks in section 1831u(c)(3)).³ This would follow from the fact that in the Riegle-Neal Act Congress has created the comprehensive federal framework governing interstate merger transactions.

Thus, in summary, the Riegle-Neal Act's provisions for interstate merger transactions set forth a federal framework for mergers of banks with different home states that includes state law in specified ways in certain specific areas, but only in those areas. Those areas include the basic determination whether to participate or to opt-out. But the opt-out provision is carefully crafted by Congress to be only the single decision to be in or out of the congressionally set framework. There is no provision for a partial opt-out, a conditional opt-out, partial participation, or modification of the terms of the framework by each state (other than in the specific areas set out in section 1831u).

Therefore, in evaluating an application for an interstate merger transaction under section 1831u during the early opt-in period, the OCC must determine, first, whether each of the home states of the merging banks (here, Delaware and New Mexico) has a law that meets the provisions of subsection 1831u(a)(3)(A), and second, whether the applicant banks meet the

and branching by the state's own state-chartered banks, the Riegle-Neal Act did not give the states any additional powers with respect to national banks (or state banks chartered by other states), other than in the areas specifically set out in section 1831u.

³ If the states otherwise had the power to impose additional conditions and requirements, there would have been no need for section 1831u(a)(3)(B)'s permission for certain conditions during the early opt-in period and section 1831u(c)(3)'s reservation of rights to states with respect to their own state-chartered banks.

requirements and conditions for approval in section 1831u, including state provisions to the extent applicable in section 1831u. We now address these matters in turn.

B. Both Delaware and New Mexico have laws that meet the “early opt-in” provisions of 12 U.S.C. § 1831u(a)(3)(A).

In this Merger Application, Delaware is NationsBank/Delaware’s home state, and New Mexico is BCCB’s home state. Since the banks are applying to merge in an interstate merger transaction under section 1831u(a) during the early opt-in period, the merger may be approved only if each home state has the requisite law "opting-in" to interstate mergers, *i.e.*, "a law that -- (i) applies equally to all out-of-State banks; and (ii) expressly permits interstate merger transactions with all out-of-State banks." 12 U.S.C. § 1831u(a)(3)(A). Both Delaware and New Mexico have such laws, and therefore, the merger authority of section 1831u is triggered.

Delaware adopted legislation, effective September 29, 1995, expressly permitting mergers with out-of-state banks:

(a) Delaware banks may merge with or into out-of-state banks to form a resulting Delaware national bank.

Del. Code Ann. tit. 5, § 795C (1995). *See also* Del. Code Ann. tit. 5, §§ 795E (interstate merger with resulting out-of-state national bank), 795D (interstate merger with resulting Delaware state bank), 795F (interstate merger with resulting out-of-state state bank), 795A (statement of purpose to permit mergers as contemplated in 12 U.S.C. § 1831u(a)(3)(A), the Riegle-Neal Act's early opt-in provision).⁴

New Mexico also enacted legislation expressly permitting mergers with out-of-state banks:

One or more New Mexico banks may enter into an interstate merger transaction with one or more out-of-state banks pursuant to the Interstate Bank Branching Act, and an out-of-state bank resulting from the transaction may maintain and operate as branches in New Mexico the former New Mexico banks that participated in the transaction if the conditions and filing requirements of that act are met.

⁴ Under the Delaware statute, “out-of-state bank” means an out-of-state state bank or an out-of-state national bank, and “out-of-state national bank” means a national bank association that is not located in Delaware. Del. Code Ann. tit. 5, §§ 795(12) and 795(14) (1995).

New Mexico Stat. Ann. § 58-1C-5(A) (the "Interstate Bank Branching Act," effective June 1, 1996). See also N. Mex. Stat. Ann. § 58-1C-2 (statement of purpose to permit interstate bank branching by merger pursuant to the Riegle-Neal Act).⁵

Thus, both Delaware and New Mexico have laws that apply equally to all out-of-state banks and that expressly permit interstate merger transactions with all out-of-state banks. Therefore, the early interstate merger transaction authority of section 1831u(a)(3) is triggered for the merger between NationsBank/Delaware and BCCB.⁶

C. The proposed merger between NationsBank/Delaware and BCCB meets the requirements and conditions in 12 U.S.C. § 1831u(a) & 1831u(b).

An application to engage in an interstate merger transaction under 12 U.S.C. § 1831u is also subject to certain requirements and conditions set forth in sections 1831u(a)(5) and 1831u(b). These conditions are: (1) compliance with state-imposed age limits, if applicable, subject to the Act's limits; (2) compliance with certain state filing requirements, to the extent the filing requirements are permitted in the Act; (3) compliance with nationwide and state concentration limits; (4) community reinvestment compliance; and (5) adequacy of capital and management skills. In addition, during the early opt-in period until May 31, 1997, the application may also be subject to state-imposed conditions permitted under section 1831u(a)(3)(B), if any.

NationsBank/Delaware and BCCB's Merger Application satisfies all these conditions to the extent applicable. First, the proposal satisfies the state-imposed age requirements permitted by section 1831u(a)(5). Under that section, the OCC may not approve a merger under

⁵ In the New Mexico statute, a "New Mexico bank" means a bank whose home state is New Mexico, and "out-of-state bank" means a bank whose home state is a state other than New Mexico. N. Mex. Stat. Ann. § 58-1C-3(M) & (O). The New Mexico statute contains a nationwide reciprocal treatment condition for mergers prior to June 1, 1997. Interstate merger transactions prior to June 1, 1997, are not permitted unless "the laws of the home state of each out-of-state bank involved in the interstate merger transaction permit New Mexico state banks, under substantially the same terms and conditions as are set forth in the Interstate Bank Branching Act, to acquire banks and establish and maintain branches in that state by means of interstate merger transactions." N. Mex. Stat. Ann. § 58-1C-8(A). In reviewing similar reciprocity conditions in state statutes with regard to the establishment of de novo interstate branches under 12 U.S.C. § 36(g), the OCC concluded the presence of a nationwide reciprocal treatment condition did not cause the state law to fail to meet the provisions of section 36(g)(1)(A), which are substantially similar to the provisions of section 1831u(a)(3)(A). See Decision on the Application of Patrick Henry National Bank, Bassett, Virginia, to Establish a Branch in Eden, North Carolina (OCC Corporate Decision No. 96-04, January 19, 1996). The same analysis applies here, and so the presence of a nationwide reciprocal treatment condition does not mean the New Mexico law fails to trigger the early interstate merger authority of section 1831u(a)(3). See also Decision on the Application of NationsBank, N.A., Richmond, Virginia, and NationsBank, N.A. (Carolinas), Charlotte, North Carolina (OCC Corporate Decision No. 95-47, September 27, 1995) (at pages 5-6) (Riegle-Neal merger).

⁶ Although the interstate merger authority of section 1831u(a)(3) is triggered by the Delaware and New Mexico statutes cited, the New Mexico Financial Institutions Division has applied the state's Interstate Bank Acquisition Act (N. Mex. Stat. Ann. §§ 58-1B-1 to 58-1B-11) to the transaction, rather than the Interstate Bank Branching Act, because the Resulting Bank will not retain branches in New Mexico. This does not alter the fact that the federal authority to accomplish interstate merger transactions under section 1831u(a)(3) has been triggered by the state's enactment of the Interstate Bank Branching Act.

section 1831u(a)(1) "that would have the effect of permitting an out-of-State bank or out-of-State bank holding company to acquire a bank in a host State that has not been in existence for the minimum period of time, if any, specified in the statutory law of the host State." 12 U.S.C. § 1831u(a)(5)(A) (emphasis added). In this Merger Application, NationsBank/Delaware is acquiring BCCB by merger, but there is no "host state" for this transaction, since no branch will be maintained in New Mexico. The term "host State" means, "with respect to a bank, a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch." 12 U.S.C. § 1831u(f)(5). Thus, without a branch being retained in New Mexico, New Mexico is not a host state, and no state age limit is applicable to this transaction at all. Moreover, even if the state age limit were applicable, it would be met here. New Mexico requires that, in a merger with an out-of-state bank in which the out-of-state bank is the surviving bank, the New Mexico bank must have been in continuous operation under an active charter for a period of at least five years. See N. Mex. Stat. Ann. § 58-1C-5(C). BCCB or its predecessor has been in continuous operation since 1988.⁷ Thus, the merger of BCCB and NationsBank/Delaware satisfies the Riegle-Neal Act requirement of compliance with state age laws.

Second, the proposal meets the applicable filing requirements. A bank applying for an interstate merger transaction under section 1831u(a) must (1) "comply with the filing requirements of any host State of the bank which will result from such transaction" as long as the filing requirement does not discriminate against out-of-state banks and is similar in effect to filing requirements imposed by the host state on out-of-state nonbanking corporations doing business in the host state, and (2) submit a copy of the application to the state bank supervisor of the host state. See 12 U.S.C. § 1831u(b)(1). As discussed above with respect to the age limit requirement, in this merger transaction there is no "host state" and thus, the filing requirement provision in the Riegle-Neal Act does not apply at all. Moreover, even if the filing requirement were applicable, it would be met here. The New Mexico interstate bank merger statute does not appear to contain a "qualify to do business" filing requirement generally applicable to out-of-state banks with branches in New Mexico. But there is a provision requiring an out-of-state bank that will be the resulting bank in an interstate merger to notify the state banking supervisor, provide a copy of its federal application, and pay a fee when there is "an interstate merger transaction involving a New Mexico state bank" such as BCCB. See N. Mex. Stat. Ann. § 58-1C-7. As discussed above in note 6, the New Mexico state banking authorities have reviewed and approved this transaction under the Interstate Bank Acquisition Act, instead of the Interstate Bank Branching Act. That statute contains filing requirements similar to those imposed in section 58-1C-7, see N. Mex. Stat. Ann. § 58-1B-5, and the Applicants have complied with them. The Applicants also submitted a copy of the OCC Merger Application to the New Mexico state bank

⁷ BCCB was chartered as a New Mexico "consumer credit bank" in early 1994 pursuant to New Mexico's Consumer Credit Bank Act (N. Mex. Stat. Ann. §§ 58-1A-1 through 58-1A-8). It succeeded to an older bank when, on April 1, 1994, BCCB merged with its affiliate Boatmen's Bank of Delaware, a Delaware state-chartered consumer credit bank engaged principally in credit card operations. Boatmen's Bank of Delaware was chartered in Delaware as a state-chartered consumer credit bank on December 17, 1987, and began operations on January 4, 1988. The purpose of chartering BCCB and merging Boatmen's Bank of Delaware into BCCB was to change the location of Boatmen's Bancshares Inc.'s credit card operations from Delaware to New Mexico.

supervisor. Thus, the merger of BCCB and NationsBank/Delaware satisfies the Riegle-Neal Act requirement of compliance with state filing requirements.

Third, the proposed interstate merger transaction does not raise issues with respect to the deposit concentration limits of the Riegle-Neal Act. Section 1831u(b)(2) places certain nationwide and statewide deposit concentration limits on section 1831u(a) interstate merger transactions. However, interstate merger transactions involving only affiliated banks are specifically excepted from these provisions. See 12 U.S.C. § 1831u(b)(2)(E). BCCB and NationsBank/Delaware are affiliates; thus, section 1831u(b)(2) is not applicable to this merger.

Fourth, the proposed interstate merger transaction also does not raise issues with respect to the community reinvestment compliance provisions of the Riegle-Neal Act. In determining whether to approve an application for an interstate merger transaction under section 1831u(a), the OCC must (1) comply with its responsibilities under section 804 of the federal Community Reinvestment Act ("CRA"), 12 U.S.C. § 2903, (2) take into account the CRA evaluations of any bank which would be an affiliate of the resulting bank, and (3) take into account the applicant banks' record of compliance with applicable state community reinvestment laws. See 12 U.S.C. § 1831u(b)(3). However, this provision does not apply to mergers between affiliated banks since it applies only "for an interstate merger transaction in which the resulting bank would have a branch or bank affiliate immediately following the transaction in any State in which the bank submitting the application (as the acquiring bank) had no branch or bank affiliate immediately before the transaction." 12 U.S.C. § 1831u(b)(3). See also H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 52 (1994). In this Merger Application, NationsBank/Delaware (the bank submitting the application as the acquiring bank) has a bank affiliate in New Mexico before the transaction (*i.e.*, BCCB as well as other affiliated banks), and is also not otherwise obtaining a branch or bank affiliate in any state in which it did not have a branch or bank affiliate before. Thus, this Riegle-Neal Act provision is not applicable to the Merger Application. However, the Community Reinvestment Act itself is applicable, see Part III-B.

Fifth, the proposal satisfies the adequacy of capital and management skills requirements in the Riegle-Neal Act. The OCC may approve an application for an interstate merger transaction under section 1831u(a) only if each bank involved in the transaction is adequately capitalized as of the date the application is filed and the resulting bank will continue to be adequately capitalized and adequately managed upon consummation of the transaction. See 12 U.S.C. § 1831u(b)(4). As of the date the application was filed, both NationsBank/Delaware and BCCB satisfied all regulatory and supervisory requirements relating to adequate capitalization. Currently, each bank is at least satisfactorily managed. The OCC has also determined that, following the merger, the Resulting Bank will continue to exceed the standards for an adequately capitalized and adequately managed bank. The requirements of 12 U.S.C. § 1831u(b)(4) are therefore satisfied.

Accordingly, the proposed interstate merger transaction between BCCB and NationsBank/Delaware is legally permissible under section 1831u. In this transaction, the Resulting Bank will close BCCB's office in New Mexico and will not maintain a branch there.

We note that retention of the office in New Mexico as a branch would have been authorized under 12 U.S.C. §§ 36(d) & 1831u(d)(1).

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 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 Applications may be approved under section 1828(c).

1. Competitive Analysis

Since NationsBank/Delaware and BCCB are already owned by the same bank holding company, their merger would have no anticompetitive effects.

2. Financial and managerial resources

The financial and managerial resources of both the banks are presently satisfactory. This merger simply combines the holding company's two credit card banks into the larger bank. It will have only minimal impact on the financial and managerial resources of NationsBank/Delaware. Thus, we find the financial and managerial resources factor is consistent with approval of the Merger Application.

3. Convenience and needs

The merger will have no adverse affect on the convenience and needs of the communities served. Both banks are credit card banks and do not provide deposit or general banking services in their local area. Indeed, BCCB is generally prohibited by New Mexico law from accepting deposits or providing general banking services to New Mexico residents, other than credit card loans. See N. Mex. Stat. Ann. § 58-1A-3. After the merger, the Resulting Bank will continue to make credit card loans to New Mexico residents. Thus, the merger will have no impact on local banking services. We find the convenience and needs factor 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. Since both banks are principally engaged in credit card operations on a nationwide

