Office of the Comptroller of the Currency

Interpretations - Corporate Decision #96-49

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**DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY
ON THE APPLICATION TO MERGE
WELLS FARGO BANK OF ARIZONA, N.A., PHOENIX, ARIZONA,
WITH AND INTO
WELLS FARGO BANK, N.A., SAN FRANCISCO, CALIFORNIA**

August 31, 1996

I. INTRODUCTION

On April 8, 1996, an Application was filed with the Office of the Comptroller of the Currency ("OCC") for approval to merge Wells Fargo Bank of Arizona, National Association, Phoenix, Arizona ("Wells-Arizona") with and into Wells Fargo Bank, National Association, San Francisco, California ("Wells") under the charter and title of the latter, under 12 U.S.C. 215a-1, 1828(c) & 1831u(a) ("the Merger Application"). Both banks are national banks. Wells has its main office in San Francisco and operates branches in California, Idaho, Nevada, New Mexico, Oregon, Utah, and Washington. <NOTE: 0 Wells-Arizona was formerly named First Interstate Bank of Arizona, N.A. It changed its name on June 1, 1996. Along with this Merger Application, Wells filed seven other merger applications to merge other affiliated banks into Wells. The transactions were structured as a series of separate mergers of each affiliated bank into Wells. The other affiliated banks were: First Interstate Bank of Alaska, N.A., Anchorage, Alaska ("FIB-Alaska"), First Interstate Bank of Idaho, N.A., Boise, Idaho ("FIB-Idaho"), First Interstate Bank of Nevada, N.A., Las Vegas, Nevada ("FIB-Nevada"), First Interstate Bank of New Mexico, N.A., Santa Fe, New Mexico ("FIB-New Mexico"), First Interstate Bank of Oregon, N.A., Portland, Oregon ("FIB-Oregon"), First Interstate Bank of Utah, N.A., Salt Lake City, Utah ("FIB-Utah"), and First Interstate Bank of Washington, N.A., Seattle, Washington ("FIB-Washington"). The other mergers were previously approved by the OCC and, except for FIB-Alaska, have been consummated. *See* OCC Corporate Decision No. 96-30 (June 6, 1996) (FIB-Washington); OCC Corporate Decision No. 96-29 (June 1, 1996) (other banks).> Wells-Arizona has its main office in Phoenix and operates branches in Arizona. In the Merger Application, OCC approval is also requested for the resulting bank to retain Wells' main office as the main office of the resulting bank under 12 U.S.C. 1831u(d)(1) and to retain the branches of both merging banks, and the main office of Wells-Arizona, as branches after the merger under 12 U.S.C. 36(d) & 1831u(d)(1).

Both Wells and Wells-Arizona are wholly-owned subsidiaries of Wells Fargo & Company ("WFC"), a multistate bank holding company with its headquarters in San Francisco, California. Wells-Arizona became a subsidiary of WFC, and an affiliate of Wells, earlier this year as a result of the merger of First Interstate Bancorp with and into WFC. *See Wells Fargo & Company,* 82 Federal Reserve Bulletin 445 (March 6, 1996). As of December 31, 1995, Wells had approximately $76 billion in assets and $59 billion in deposits and operated 1317 branch offices in California. As of the same date, Wells-Arizona had approximately $8.7 billion in assets and $7.1 billion in deposits and operated 180 branch offices in

Arizona.

II. LEGAL AUTHORITY

A. The statutory framework: During the early opt-in period, national banks with different home states may merge 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)(A) 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). <NOTE: 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).> 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. --
> (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 --
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> (i) applies equally to all out-of-State banks; and
> (ii) expressly permits interstate merger transactions with all out-of-State banks.
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> (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. <NOTE: 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 --
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> > (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 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.> Nor does section 1831u(a) provide that the 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)).<NOTE: 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. > 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). <NOTE: The relationship of the federal framework and state law in the interstate merger transaction provisions in the Riegle-Neal Act is similar to the relationship of the federal framework and state law in the interstate bank acquisition provisions of the Riegle-Neal Act: in both, a comprehensive federal framework is established, and it provides for state authority only in certain specified areas. *See* Riegle-Neal Act 101(a) (amending section 3(d) of the Bank Holding Company Act, 12 U.S.C. 1842(d)). One difference is that until June 1, 1997, states are permitted to opt-out of the interstate merger transaction framework, but that difference does not affect the underlying relationship between federal and state law in the framework. Thus, even apart from considerations relating to preemption and state authority over national banks generally, under the provisions of the Riegle-Neal Act, after May 31, 1997, host states have no more authority to approve, or place other conditions on, interstate merger transactions that do not involve a state bank chartered by the host state than they do to approve, or place conditions on, an interstate bank acquisition of a bank in the host state by an out-of-state bank holding company. And until May 31, 1997, the conditions a host state may impose are limited by section 1831u(a)(3)(B).>

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, California and Arizona) has a law that meets the provisions of subsection 1831u(a)(3)(A), and second, whether the applicant banks meet the 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 California and Arizona have laws that meet the provisions of 12 U.S.C. 1831u(a)(3)(A).

In this Merger Application, California is Wells' home state, and Arizona is Wells-Arizona's home state. Since Wells and Wells-Arizona 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 California and Arizona have such laws, and therefore, the merger authority of section 1831u is triggered. <NOTE: Under the Riegle-Neal Act, even though Wells also has branches in other states, its home state is California where its main office is located, and the early effectiveness of the interstate merger authority clearly depends only upon home state law. Thus, it is California law, not the law of the other states, that is relevant to the availability of the merger authority under section 1831u(a)(3). The other states also have statutes expressly permitting

mergers with out-of-state banks.>

California adopted legislation expressly permitting mergers with out-of-state banks:

> (a)(1) No foreign (other state) bank may merge as the surviving corporation with a California bank or California industrial loan company except that an insured foreign (other state) bank may do so in accordance with federal law, the law of the domicile of the foreign (other state) bank, this chapter, and Division 1.5 (commencing with Section 4800).
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> . . . .
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> (b) This section constitutes:
> (1) An election to permit early interstate merger transactions pursuant to Section 44(a)(3) of the Federal Deposit Insurance Act (12 U.S.C. Sec. 1831u(a)(3)).
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> . . . . .

Cal. Fin. Code 3824 (West 1996). <NOTE: The term "foreign (other state) bank" means a bank organized under the laws of another state of the United States, or a national bank whose main office is located in any other state of the United States. *See* Cal. Fin. Code 139.5 (West 1996).>

Arizona also has enacted legislation expressly permitting mergers with out-of-state banks:

> C. An out-of-state financial institution that acquires an in-state financial institution or an out-of-state financial institution that is the result of a merger with an in-state financial institution may do either of the following subject to applicable state and federal laws:
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> 1. continue to operate the in-state financial institution.
> 2. convert any existing principal banking office or any or all branches in this state into a branch of the out-of-state financial institution.

Ariz. Rev. Stat. Ann. 6-327(C) (as amended by S.B. 1019, enacted April 3, 1996, effective August 31, 1996). <NOTE: In the Arizona law, an "out-of-state financial institution" means "a state or federal bank, savings bank, savings and loan association or holding company with its home office in a state other than this state"; and an "in-state financial institution" means "a state or federal bank, savings bank, savings and loan association or holding company with its home office located in this state." Ariz. Rev. Stat. Ann. 6-101(11) & (15). In addition, "acquire" includes "the merger or consolidation of an in-state financial institution with an out-of-state financial institution." Ariz. Rev. Stat. Ann. 6-321(1)(a). Thus, with respect to out-of-state banks, the Arizona statute clearly expressly permits interstate merger transactions with all out-of-state banks, not differentiating among types of, or the home states of, out-of-state banks. The Arizona statute contains a nationwide reciprocal treatment condition: "In the case of an acquisition to create a branch in this state, the acquisition is prohibited unless the home state of the out-of-state financial institution permits reciprocal acquisitions for the same purposes." Ariz. Rev. Stat. Ann. 6-327(B). 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 Arizona 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).> Thus, both California and Arizona have laws that apply equally to all out-of-statebanks 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.