Office of the Comptroller of the Currency

Interpretations - Corporate Decision #96-53

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DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION OF AMERICAN NATIONAL BANK & TRUST COMPANY DANVILLE, VIRGINIA TO PURCHASE CERTAIN OF THE ASSETS AND ASSUME ALL OF THE LIABILITIES OF THE YANCEYVILLE, NORTH CAROLINA BRANCH AND RELATED CBCT OF FIRSTSOUTH BANK, BURLINGTON, NORTH CAROLINA

September 24, 1996

I. INTRODUCTION

On August 5, 1996, application was made to the Office of the Comptroller of the Currency (OCC) for authorization to purchase certain assets and assume all liabilities of the Yanceyville, North Carolina, branch and related CBCT of FirstSouth Bank (FirstSouth), Burlington, North Carolina by American National Bank and Trust Company (American National), Danville, Virginia under the charter and title of American National under 12 U.S.C. 1828(c), 1831u(a) (Interstate Branch Acquisition Application). The Interstate Branch Acquisition Application also requests OCC approval for American National, as the resulting bank, to retain, maintain, and operate the Yanceyville branch and related CBCT pursuant to 12 U.S.C. 36(d) and 1831u(d).<**NOTE:** The related CBCT is not an extension of the Yanceyville branch and therefore requires a separate branch certification.> This application was based on an agreement entered into between American National and FirstSouth on July 25, 1996.

American National is a national bank and FirstSouth is a North Carolina chartered bank. They are not affiliates. American National has its main office in Danville, Virginia, and operates nine branches in Virginia. American National is a wholly-owned subsidiary of American National Bankshares, Inc., Danville, Virginia. As of June 30, 1996, American National had approximately $399 million in assets and $331 million in deposits. FirstSouth has its main office in Burlington, North Carolina, and operates branches in North Carolina. FirstSouth is not owned by a holding company. As of June 30, 1996, FirstSouth had approximately $178 million in assets and $159 million in deposits. As of the same date, the Yanceyville branch and related CBCT of FirstSouth subject to the purchase and assumption agreement had approximately $21 million in deposits.

II. LEGAL AUTHORITY

A. The statutory framework: During the early opt-in period, a national bank may acquire an out-of-state branch of an insured bank under 12 U.S.C. 1831u(a) in an interstate merger transaction that does not constitute the acquisition of all or substantially all of that insured bank if the home state of the acquiring bank and the state in which the branch is located each has a law that meets the provisions of section 1831u(a)(3)(A), the state in which the

branch is located has a law that meets the provisions of section 1831u(a)(4), and the banks satisfy 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). Such transactions include the acquisition by a bank of an out-of-state branch of an insured bank in an interstate merger transaction that does not constitute the acquisition of all or substantially all of that insured bank. *See* Riegle Neal Act 102(a)(4) (adding new section 44(a)(4), 12 U.S.C. 1831u(a)(4)). It also made a 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(a) 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 1828(c) of this title [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). In addition, for interstate branch acquisitions section 1831u(a)(4)(B) provides that the branch to be acquired is treated "as an insured bank the home State of which is the State in which the branch is located."> The Riegle-Neal 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).

Section 44(a) also authorizes acquisition by a bank of an out-of-state branch of an insured bank in an interstate merger transaction that does not constitute the acquisition of all or substantially all of that insured bank:

> (4) Interstate Merger Transactions Involving Acquisitions of Branches --
>
> > (A) In General -- An interstate merger transaction may involve the acquisition of a branch of an insured bank without the acquisition of the bank only if the law of the State in which the branch is located permits out-of-State banks to acquire a branch of a bank in such State without acquiring the bank.
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> > (B) Treatment of Branch for Purposes of This Section -- In the case of an interstate merger transaction which involves the acquisition of a branch of an insured bank without the acquisition of the bank, the branch shall be treated, for purposes of this section, as an insured bank the home State of which is the State in which the branch is located.

12 U.S.C. 1831u(a)(4)(A) and 1831u(a)(4)(B). The Riegle-Neal Act classifies these types of transactions

as a type of "interstate merger transaction." 12 U.S.C. 1831u(a)(4). However, for purposes of this decision, such transactions are referred to as "interstate branch acquisitions."

In addition, the Riegle-Neal Act also provides that interstate merger transactions, including interstate branch acquisitions, 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.
>
> (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 --
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> (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.
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> 12 U.S.C. 1831u(a)(3).

The availability of the authority for an interstate branch acquisition under section 1831u(a) during the early opt-in period, therefore, is triggered by the existence of the requisite state law in the relevant home states. During this early opt-in period, the federal merger authority for interstate branch acquisitions 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) and if the state in which the branch is located has a law that meets the provisions of section 1831u(a)(4). <**NOTE:** When the early opt-in period expires on May 31, 1997, the provisions of section 1831u(a)(3) will no longer apply. However, the provisions of section 1831u(a)(4) will continue to apply after May 31, 1997. Accordingly, after the early opt-in period expires on May 31, 1997, the authority for interstate branch acquisitions in section 1831u(a) is available only if the law of the state in which the branch is located satisfies the requirements of section 1831u(a)(4). > 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. Under the Riegle-Neal Act's interstate branch acquisition provisions, federal law does not 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 branch acquisitions 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) and the state in which the branch is located has a law that meets the provisions of section 1831u(a)(4). 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 sections 1831u(a)(3)(A) and 1831u(a)(4). 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 --
>
> > (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.
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> 12 U.S.C. 1831u(c)(3). While the Riegle-Neal Act thus preserves for the states their rights with respect to interstate mergers, including interstate branch acquisitions, and branching by the state's own state-chartered banks, it 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 interstate branch acquisition authority is ineffective if the state adds other features. That is, the state may add other features to its interstate branch acquisition law, and, as long as those features do not cause the state law to fail to meet the provisions of sections 1831u(a)(3)(A) and 1831u(a)(4), the federal interstate branch acquisition 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 interstate branch acquisition authority only certain features of state law referenced in various subsections of section 1831u. Similarly, after May 31, 1997, section 1831u continues to single out and specifically incorporate into the federal interstate branch acquisition 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, including interstate branch acquisitions.

Thus, in summary, the Riegle-Neal Act's provisions for interstate branch acquisitions set forth a federal framework for a national bank to acquire a branch in a different home state 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 such that the state's only decision is 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, including interstate branch acquisition 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 (including interstate branch acquisitions) 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 branch acquisition under section 1831u during the early opt-in period, the OCC must determine, first, whether each of the relevant home states (here, Virginia and North Carolina) has a law that meets the provisions of subsections 1831u(a)(3)(A), second, whether the state in which the branch is located (here, North Carolina) has a law that meets the provisions of section 1831u(a)(4), and third, whether the applicant meets the requirements and conditions for approval in section 1831u, including state provisions to the extent applicable in section 1831u. We now address these requirements in turn.