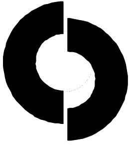

Comptroller of the Currency
Administrator of National Banks

Washington, D.C.

Corporate Decision #98-19
May 1998

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION TO MERGE NATIONSBANK OF TEXAS, NATIONAL ASSOCIATION, DALLAS, TEXAS, WITH AND INTO NATIONSBANK, NATIONAL ASSOCIATION, CHARLOTTE, NORTH CAROLINA

April 2, 1998

I. INTRODUCTION

A. The Application.

On October 23, 1997, NationsBank, National Association, Charlotte, North Carolina, ("NationsBank") and its national bank affiliate, NationsBank of Texas, National Association, Dallas, Texas ("NationsBank/Texas"), applied to the Office of the Comptroller of the Currency ("OCC") for approval to merge NationsBank/Texas with and into NationsBank, under NationsBank's charter and title, under 12 U.S.C. §§ 215a & 1828(c) (the "Texas Merger"). NationsBank has its main office in Charlotte, North Carolina, and operates branches in a number of states, including Texas.[1] NationsBank/Texas has its main office in Dallas, Texas, and operates

[1] NationsBank operates three branches in El Paso, Texas, as a result of the merger of its affiliate, Sun World, N.A., Santa Teresa, New Mexico, into NationsBank. See Decision on the Application to Merge Sun World, N.A., into NationsBank, N.A. (OCC Corporate Decision No. 98-07, January 15, 1998) (the "Sun World Merger"). Sun World had the three branches in El Paso as the result of an earlier interstate main office relocation transaction under 12 U.S.C. § 30. See Ghiglieri v. Sun World, National Ass'n, 117 F.3d 309 (5th Cir. 1997) ("Sun World"), *reversing* 942 F.Supp. 1111 (W.D. Tex. 1996), *cert. denied,* (U.S. March 30, 1998) (No. 97-1078) (reviewing the OCC's Decision on the Applications of Sun World, N.A., El Paso, Texas (OCC Corporate Decision No. 96-40, August 2, 1996) ("OCC Sun World Relocation Decision")).

NationsBank also operates branches in North Carolina, South Carolina, Georgia, Florida, Virginia, Maryland, the District of Columbia, Missouri, Kansas, Oklahoma, Illinois, Arkansas, Iowa, and New Mexico. NationsBank's

branches only in Texas. In the Texas Merger application, OCC approval is also requested for NationsBank (as the resulting bank in this merger) to retain NationsBank/Texas' main office and branches and NationsBank's branches as branches after the merger under 12 U.S.C. § 36(b)(2). As a result of the Texas Merger, NationsBank will acquire additional branches in Texas. It already operates branches in Texas acquired in its initial entry into Texas in the earlier Sun World Merger.

Both NationsBank and NationsBank/Texas are affiliates, both subsidiaries of NationsBank Corporation, a multistate bank holding company headquartered in Charlotte, North Carolina.[2] After the Texas Merger is completed, their Texas banking offices would operate as branches of NationsBank (NationsBank Corporation's lead bank) rather than as branches of separate subsidiary banks of the holding company.

Notices of the merger application were published in general circulation newspapers in Dallas and Charlotte, as required by 12 U.S.C. § 1828(c)(3) and 12 C.F.R. § 5.33(f)(1). In addition, NationsBank sent copies of the application to the Director of the New Mexico Financial Institutions Division and to the Commissioner of the Texas Department of Banking.

On November 13, 1997, the Independent Bankers Association of Texas ("IBAT") filed a comment letter with the OCC on the proposed merger ("IBAT Comment"). On November 18, 1997, the Texas Banking Commissioner (the "Texas Commissioner" or "Commissioner") also filed a comment letter ("Commisioner Comment"). And on November 24, 1997, six members of the Texas State House of Representatives ("the Texas Legislators") also filed a comment letter ("Texas Legislators Comment"). The three comments (collectively, "the Texas commenters") all objected to the proposed merger and raised questions about the legal authority for the merger. The commenters argue that the Texas Merger could occur only under the authority for interstate merger transactions in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 ("the Riegle-Neal Act"), and not under the separate authority of section 215a. They also claim that, because Texas has opted-out of the authority for mergers under the Riegle-Neal Act, no interstate merger transactions under the Riegle-Neal Act may occur involving Texas banks.

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branches in these states are the result of a number of earlier transactions. See, e.g., Decision on the Application to Merge NationsBank, N.A. (South) with NationsBank, N.A. (OCC Corporate Decision No. 97-40, June 1, 1997); Decision on the Application to Merge Boatmen's Bank of Vandalia, Vandalia, Missouri, and Twenty-Two Other Affiliated Banks with NationsBank, N.A. (OCC Corporate Decision No. 97-47, June 6, 1997) ("OCC NationsBank/Missouri Decision"); Decision on the Application to Merge Boatmen's National Bank of Arkansas, Little Rock, Arkansas, and Twenty-Five Other Affiliated Banks with NationsBank, N.A. (OCC Corporate Decision No. 97-75, August 7, 1997).

[2] NationsBank is a direct wholly-owned subsidiary of NB Holdings Corporation ("NB Holdings"), an intermediate holding company, which in turn is a direct wholly-owned subsidiary of NationsBank Corporation. NationsBank/Texas is a direct wholly-owned subsidiary of NationsBank Texas Bancorporation, Inc ("Bancorporation"), which in turn is a direct wholly-owned subsidiary of NB Holdings. In addition to the proposed bank merger, Bancorporation also will be merged into NB Holdings.

In order to allow additional time to conduct a complete review of the issues raised by the objections, on November 24, 1997, the OCC removed the merger application from the expedited review procedures normally available for applications by eligible banks. See 12 C.F.R. §§ 5.13(a)(2) & 5.33(i).

While the Texas Merger application was still pending before the OCC, on November 26, 1997, the Texas Commissioner filed suit in federal district court against NationsBank and NationsBank/Texas for a judicial determination that there was no authority for the Texas Merger and to enjoin the banks from merging. See Ghiglieri v. NationsBank of Texas, N.A., No. CA3:97-CV-289-P (N.D. Texas, filed November 26, 1997). The parties agreed to stay further proceedings in the case until the OCC acted on the merger application.

On December 4, 1997, NationsBank submitted material in response to the three comments. The December 4th submission reiterated NationsBank's view that the Texas Merger was authorized under 12 U.S.C. § 215a. It also questioned the effectiveness of Texas' opt-out statute under the terms of the Riegle-Neal Act. NationsBank pointed out that the Texas statute did not prohibit interstate mergers by state savings banks and argued that it therefore did not meet the requirement in the Riegle-Neal Act that a state opt-out law apply equally to all banks.

On December 22, 1997, IBAT replied to NationsBank's December 4th submission ("IBAT Supplemental Comment"). On December 23, 1997, the Texas Commissioner also replied to NationsBank's December 4th submission ("Commissioner Supplemental Comment"). Both IBAT and the Commissioner reiterated their argument that the Texas Merger could occur only under the authority for interstate merger transactions in the Riegle-Neal Act, and therefore could not occur under the separate authority of section 215a. They also defended the validity of the Texas opt-out statute as a qualifying opt-out for Riegle-Neal Act purposes. On January 8, 1998, NationsBank replied to IBAT's Supplemental Comment and the Commssioner's Supplemental Comment.

The issues raised by the Texas Commissioner, IBAT, and the Texas Legislators regarding the legal authority for the Texas Merger are addressed at appropriate places in the OCC's analysis of the legal authority for the merger in Part II.

IBAT's initial Comment and its Supplemental Comment also included a number of matters that IBAT alleged raised concerns about the management of NationsBank and NationsBank/Texas that should require the OCC to deny the application. On January 29, 1998, NationsBank responded to IBAT's allegations in this area. These matters are addressed in the OCC's review of the managerial resources factor under the Bank Merger Act in Part III-A-2.

B. Summary of Analysis of Legal Authority.

First, we address the authority for the Texas Merger under 12 U.S.C. §§ 215a and 36(b). Section 215a authorizes mergers between two national banks that are "located" in the same state. NationsBank already has three branches in Texas, and so it is located in Texas for purposes of mergers with other banks in Texas under section 215a. Section 36(b) governs branch retention in mergers under section 215a, and NationsBank is authorized to retain the branches in Texas under the terms of section 36(b)(2). Transactions such as this one -- i.e., a transaction in which an existing interstate national bank merges with another bank in one of the states *in which the acquiring bank already has branches* -- have been approved under sections 215a and 36(b) in many prior decisions of the OCC. This authority of an interstate bank to merge with another bank in one of its existing states under section 215a was not superseded by the Riegle-Neal Act. The Riegle-Neal Act clearly provides that its provisions are exclusive only with respect to a bank's *initial entry into a state*. Here, NationsBank is already in Texas, and so the Riegle-Neal Act's exclusivity feature does not come into play. Similarly, since this merger is not a Riegle-Neal merger, the Riegle-Neal Act's opt-out provision does not affect it. Finally, under the Fifth Circuit's holding in Sun World, NationsBank clearly is authorized to establish new branches, or acquire new branches through purchase, under section 36(c) throughout Texas. The OCC's analysis, which concludes that the same branch system can be acquired through merger, promotes both statutory and functional consistency.

An additional reason why the Riegle-Neal Act's opt-out provision does not affect NationsBank's authority to undertake the merger is analyzed in Part II-A-4-b. Congress explicitly set out the condition that state opt-out laws under the Riegle-Neal Act must apply equally to all out-of-state banks. The term "bank" for this provision includes state savings banks because Congress included this part of the Riegle-Neal Act within the Federal Deposit Insurance Act, and that Act expressly includes state savings banks within the term "bank," and treats them as banks elsewhere throughout the Act. However, the Texas opt-out law does not cover state savings banks, and Texas state savings banks are permitted to merge with out-of-state state savings banks. Accordingly, the Texas opt-out statute is flawed. Thus, clearly, this flawed opt-out under the Riegle-Neal Act is not a basis to prevent a transaction that is authorized under an entirely different statutory authority.

Finally, in Part II-B, we address the application of Texas laws to this transaction in their own right as state laws. They are subject to review under traditional preemption analysis. The Texas laws would prohibit NationsBank from engaging in the merger or having branches in Texas. Thus they directly conflict with NationsBank's authority to engage in this merger under federal law. The Fifth Circuit, in Sun World, reached a similar result in approving Sun World's authority to maintain branches in Texas, notwithstanding the Texas laws barring out-of-state banks from having branches in Texas.

II. LEGAL AUTHORITY

A. The Texas Merger is authorized, and the resulting bank may retain the offices of the merging banks, under 12 U.S.C. §§ 215a & 36(b)(2). The authority for such mergers remains effective after the Riegle-Neal Act.

The Texas Merger is authorized under 12 U.S.C. § 215a, and the resulting bank may retain the offices of the merging banks under 12 U.S.C. § 36(b)(2). In the Texas Merger, a bank whose main office is in Texas (NationsBank/Texas) will be merged into its interstate bank affiliate, NationsBank, which currently operates branches in Texas (i.e., the three branches in El Paso that were branches of Sun World). The Texas Merger is, therefore, a merger between an interstate national bank and another national bank in one of the states in which the interstate bank already has branches. Section 215a authorizes mergers between two national banks "located within the same State." A bank is located in a state for purposes of section 215a if it has its main office or a branch in the state. Here, both NationsBank and NationsBank/Texas are located in Texas and may merge under the authority of section 215a. In essence, while NationsBank is an interstate bank, this merger (a merger within one of the states in which the bank is already located) is an in-state merger. The OCC previously has approved such applications under sections 215a and 36(b) on numerous occasions, including transactions that Congress acknowledged in the legislative history of the Riegle-Neal Act. The Texas Merger, therefore, does not raise new issues, but represents only the application of established precedent for applying sections 215a and 36(b) to interstate national banks.

The Riegle-Neal Act did not change existing authority under sections 215a and 36(b). The Riegle-Neal Act created a new merger authority that allows mergers between banks with different home states. In some situations, such as here, a particular proposed merger could come within the scope of, and so be authorized under, either statute. In such situations, nothing in the Riegle-Neal Act requires or implies that it was intended to supersede section 215a. In particular, in the precise situation raised in the Texas Merger -- i.e., when an interstate national bank is merging with another national bank in one of the states in which *it already has branches* -- the statutory language, overall statutory structure, and legislative history of the Riegle-Neal Act clearly show that mergers under section 215a may continue to occur. Since the Texas Merger is an in-state merger under section 215a, Texas' opt-out effort does not affect it. A state's authority to opt-out under the Riegle-Neal Act extends only to opting out of interstate merger transactions effected under the Riegle-Neal Act. Moreover, this result (acquiring additional branches in an existing host state by merging with another bank) is also consistent with established caselaw under which the interstate bank could expand within the host state by establishing or acquiring additional branches under section 36(c). Since it has branches in El Paso, NationsBank could establish or acquire through purchase additional branches throughout the State of Texas under the Fifth Circuit's holding in Sun World. Permitting the acquisition of the same branch system through merger under sections 215a and 36(b) is consistent with the court's interpretation of section 36(c). And, since the same result occurs under either method, there is no policy reason why acquisition of the branches by merger should not be authorized.

1. The merger of NationsBank/Texas into NationsBank is authorized under section 215a because both banks are located in Texas for purposes of merging under section 215a.

The general authority and procedures for national banks to merge with other national banks, or with state banks, is contained in section 3 of the National Bank Consolidation and Merger Act, 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, the OCC has applied section 215a in the context of a merger with an existing interstate national bank and concluded that a national bank with its main office and branch offices in more than one state is "located" in each such state, for the purpose of mergers with other banks in that state under section 215a. The Texas commenters have not challenged this longstanding interpretation of "located" in section 215a.

This question first arose long before the Riegle-Neal Act in connection with mergers involving the small number of banks that had interstate branches under other authority -- namely, grandfathered interstate national banks,[3] interstate state banks that converted to national banks,[4] and national banks with interstate branches after an interstate main office relocation.[5] After enactment of the Riegle-Neal Act, the OCC has continued to apply section 215a in connection

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[3] See Decision on the Application to Merge Girard Bank, Bala Cynwyd, Pennsylvania, into Heritage Bank, N.A., Jamesburg, New Jersey (March 27, 1984), reprinted in [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,925; Decision on the Application to Merge Continental Bank, Norristown, Pennsylvania, into Midlantic Bank, N.A., Newark, New Jersey (OCC Corporate Decision No. 94-37, August 12, 1994) ("OCC Midlantic Decision").

[4] See 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) ("OCC Shawmut Decision") (both banks were owned by Shawmut National Corporation; at the time of conversion, State Savings Bank had branches in Rhode Island).

[5] See 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 ("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 ("OCC NationsBank/Maryland National Decision"); Decision on the Application for the Merger of First Peoples National Bank, Kingston, Pennsylvania, with and into First Fidelity Bank, N.A., Salem, New Jersey (OCC Corporate Decision No. 94-07, February 23, 1994) ("OCC First Peoples 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) ("OCC NationsBank/D.C.-Maryland Decision").

with mergers involving such banks.[6] We have also applied section 215a in connection with later mergers in a state by a bank that initially entered that state by means of a Riegle-Neal merger.[7] The OCC has consistently applied this interpretation of the statute since the issue first arose in 1984. The reasoning and support for it are extensively set out in earlier decisions, and only a summary will be presented here.

Section 215a does not have any definition or explanation of where a bank is considered "located." There is nothing in the usual meaning of the word "located" that would preclude a national bank from being deemed "located" at its branch offices as well as its main office. Under section 81, both the main office and branches are places at which the general business of the bank is conducted.

This reading is also supported by judicial construction of the term "situated" in section 36(c) and similar locational phrases in other sections of the National Bank Act. The leading case involves the interpretation of 12 U.S.C. § 36(c) with respect to a bank with branches in more than one state. 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) (an interstate national bank is "situated" in each state in which it has offices for purposes of establishing additional branches under section 36(c)). See also Ghiglieri v. Sun World, N.A., 117 F.3d 309, 315-16 (5th Cir. 1997) ("Sun World") (same, agreeing with Seattle Trust). Under 12 U.S.C. § 36(c), a national bank may establish branches "within the State in which [the bank] is situated" if state law allows state banks to have branches. 12 U.S.C. § 36(c) (emphasis added). In Seattle Trust, the Bank of California (a bank with its main office in California and existing branches in California, Oregon, and Washington) applied to establish an additional branch in Washington. The court held that, because of its existing branches, the bank was "situated" in Washington for purposes of establishing branches in that state and could establish branches to the same extent as Washington banks. See Seattle Trust, 492 F.2d at 51. Similarly, in Sun World, the court held that Sun World was situated in both New Mexico (its home state) and in Texas because of its existing branches there. Thus, it

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[6] See, e.g., 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) ("OCC Chase Decision"); 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 ("OCC Bank Midwest Decision"); 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 Application to Merge Citizens Bank & Trust Company of Kansas City, Kansas, into Bank Midwest, N.A., Kansas City, Missouri (OCC Corporate Decision No. 95-17, April 20, 1995) ("OCC Citizens Bank 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) ("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) ("OCC Fleet/NatWest Decision"); Decision on the Applications of Union Planters Bank, N.A., and Union Planters National Bank (OCC Corporate Decision No. 96-48, August 28, 1996).

[7] See, e.g., Decision on the Application to Merge Three Affiliated Banks into Deposit Guaranty National Bank, Jackson, Mississippi (OCC Corporate Decision No. 97-45, June 4, 1997) ("OCC Deposit Guaranty Decision"); OCC NationsBank/Missouri Decision, supra note 1; Decision on the Application to Merge Fifteen Banks in Michigan into Huntington National Bank, Columbus, Ohio (OCC Corporate Decision No. 97-88, September 15, 1997) ("OCC Huntington/Michigan Decision").

could establish an additional branch in Texas under section 36(c) in the same manner as other in-state national banks.

Under section 36(c), as construed in Seattle Trust and Sun World, a national bank is "situated" in each state in which it has offices for purposes of establishing branches. We believe the same reasoning and result are equally applicable to the interpretation of "located" in section 215a. Indeed, a contrary construction would produce anomalous results. If "located" in section 215a were not construed as "situated" in section 36 has been, it would inexplicably permit a national bank with existing branches in a state to establish new branches or to acquire additional branches through purchase from another bank in that state under section 36(c), but not to acquire branches through merger with another bank in that state.

In the present case, the banks could accomplish the same result by having NationsBank purchase all the assets and assume all the liabilities of NationsBank/Texas, including taking over its main office and branches and establishing these offices as branches under section 36(c) under Seattle Trust and Sun World. Since the same result could occur in another form, there is no policy reason for interpreting section 215a narrowly. 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, since the interstate bank has the same power to acquire branches in the host state that its in-state predecessor bank had. See 12 U.S.C. § 1831u(d)(2) (quoted and discussed further on pages 9 and 16 below).

Accordingly, just as with "situated" in section 36(c), we conclude that, in section 215a, a national bank is "located" in each state where it maintains a banking office, whether the main office or a branch. NationsBank/Texas, with its main office and branches in Texas, and NationsBank, with branches in Texas, are therefore located in the same state for purposes of section 215a. Thus, the two banks meet the only locational requirement to merge under the authority of section 215a. The Texas Merger is legally authorized under 12 U.S.C. § 215a.

2. The Resulting Bank in the Texas Merger may retain the offices of both merging banks under section 36(b)(2).

NationsBank has also requested OCC approval for the bank resulting from the Texas Merger (referred to in this subsection as "NationsBank-Resulting" or "the Resulting Bank" to distinguish it from NationsBank or NationsBank/Texas prior to the merger) to retain the main office and branches of NationsBank/Texas and the branches of NationsBank as branches of the Resulting Bank after the merger. Branch retention following a merger under section 215a is covered by 12 U.S.C. § 36(b)(2). Applying the various provisions of section 36(b)(2) to the two groups of branches involved in the Texas Merger, we find that NationsBank-Resulting is legally authorized to retain all the offices as branches.

a. The Resulting Bank may retain and operate the main office and branches of NationsBank/Texas under subsection 36(b)(2)(A).

In this Merger Application, the banks are combining under the charter of NationsBank, and so NationsBank/Texas is the target bank and NationsBank is the lead bank. Different paragraphs in section 36(b)(2) apply different rules for branch retention to the target bank and the lead bank in the merger.[8] Paragraph (C) addresses the resulting bank's authority to retain the branches of the bank under whose charter the merger is effected, i.e., the lead bank. Paragraph (A) addresses the resulting bank's authority to retain the branches and main offices of the other banks in the merger or consolidation, i.e., target banks. NationsBank-Resulting is authorized to retain the branches of NationsBank/Texas under section 36(b)(2)(A).

Under section 36(b)(2)(A), the resulting bank may retain the branches and the main office of the target bank as branches 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 Sun World, 117 F.3d at 315-16; Seattle Trust, 492 F.2d at 51.[9] 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

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[8] The McFadden Act authorizes the national bank resulting from the consolidation or merger of a national bank with another bank or banks to retain branches in three ways. First, under section 36(b)(2)(A), the resulting bank may retain as branches any of the main offices or branches of any of the target banks in the merger if it might be established as a branch by the resulting bank under section 36(c). Second, under section 36(b)(2)(B), the resulting bank may retain any branch of any bank participating in the merger that was in operation by any bank on February 25, 1927. Finally, under section 36(b)(2)(C), the resulting national bank may retain the pre-merger branches of the lead national bank (i.e., the national bank under whose charter the merger is effected) unless a similarly situated state bank resulting from the merger of other banks into a state bank would be prohibited by state law from retaining as a branch an identically situated office.

[9] Indeed, provisions in the Riegle-Neal Act have, in effect, codified the Seattle Trust interpretation of section 36 for Riegle-Neal interstate national banks, as NationsBank is with respect to Texas. 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). Under this provision a national bank resulting from a Riegle-Neal interstate merger transaction may establish or acquire additional branches in a host state under the federal law applicable to branching in that state by the predecessor national bank in that state (e.g., section 36(b)(2) with respect to branches acquired through merger, and section 36(c) with respect to branches acquired by purchase or established de novo). The legislative history confirms the statutory language. See H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 50, 56 (August 2, 1994). See also Decision on the Applications of Community National Bank (OCC Corporate Decision No. 96-22, April 19, 1996) (further discussion of these provisions).

were situated in order to then apply the section 36(c) standard, using each state's law for the branches in that state. This necessarily follows from the courts' holdings regarding section 36(c) and the fact that section 36(b)(2)(A) refers to section 36(c). See, e.g., OCC Bank Midwest Decision (Part II-C-2-a); other OCC decisions cited in notes 3-7 above.[10]

Accordingly, in the Texas Merger, NationsBank (and also NationsBank-Resulting) is situated in Texas (as well as in all the other states in which NationsBank has branches) for purposes of section 36(b)(2). Texas permits the resulting bank in an in-state merger involving Texas state banks to retain and operate branches that were part of a bank participating in the merger. See Tex. Fin. Code § 32.301(c). In addition, Texas also permits its state banks to branch statewide within Texas. See Tex. Fin. Code § 32.203(a). Thus, a national bank situated in Texas, such as NationsBank, could establish branches at all the locations of NationsBank/Texas' main office and branches under section 36(c). Indeed, the authority of NationsBank (as the successor to Sun World) to establish additional branches in Texas was specifically upheld in Sun World. Therefore, NationsBank-Resulting may retain and operate the main office and branches of NationsBank/Texas in Texas under section 36(b)(2)(A).

b. The Resulting Bank may retain and operate the branches of NationsBank under subsection 36(b)(2)(C).

In this merger, NationsBank is the acquiring or lead bank. Section 36(b)(2)(C) authorizes the national bank resulting from a merger to retain and operate as a branch any branch the lead bank had prior to the merger, unless a state bank resulting from a merger would be prohibited by state law from retaining as a branch an identically situated office of a state bank. In prior merger decisions involving interstate national banks, both before and after the Riegle-Neal Act, the OCC has addressed the interpretation of section 36(b)(2)(C) with respect to lead banks that have offices in more than one state. See, e.g., OCC Bank Midwest Decision (Part II-C-2-b); other OCC decisions cited in notes 3-7 above.

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[10] 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 what these sections of the McFadden Act refer to. See, e.g., OCC PNC/Kentucky Decision (at page 12, note 10); OCC Bank Midwest Decision (Parts II-B, II-C-2, II-D, III-B-1-b). In the Sun World decision, the Fifth Circuit necessarily also took this position when it determined that Sun World was situated in Texas for purposes of establishing additional branches in Texas under section 36(c), and then looked to Texas law for in-state branching by Texas banks to supply the relevant state law for section 36. See Sun World, 117 F.3d at 316. The court did not consider Texas' law barring out-of-state banks from establishing branches in Texas (a part of Texas' purported "opt-out" statute) as part of the court's section 36 analysis. The Texas Banking Commissioner had argued in district court that the general in-state branching provision was "expressly overridden by the Texas 'opt out' law that specifically prohibits interstate branching." See Plaintiff's Memorandum in Support of Cross-Motion for Summary Judgment at page 11, 942 F.Supp. 1111 (W.D. Tex. 1996) (No. EP-96-CA-324-DB), *rev'd* 117 F.3d 309 (5th Cir. 1997). In comments on this application, Texas Bank Commissioner (Commissioner Comment, page 3; Commissioner Supplemental Comment, pages 4-5) again raises the argument that branch retention is not permissible under section 36(b) because of the Texas opt-out law. However, just as in Sun World with respect to section 36(c), the Texas opt-out statute is not the relevant state branching law for purposes of section 36(b)(2).

We determined that the resulting national bank is situated in each state in which it operates for purposes of applying section 36(b)(2)(C). In this way, the three related subsections of section 36 -- subsections 36(c), 36(b)(2)(A), and 36(b)(2)(C) -- will be interpreted consistently. And, just as with respect to the state law incorporated in subsections 36(b)(2)(A) and 36(c), see note 10 above, the state law incorporated into subsection 36(b)(2)(C) is -- for each state in which the lead bank has branches -- that state's law for the retention of branches by a lead state bank in a merger within that state. The state bank parity comparison used in applying paragraph (C) is a comparison, within each state, to the state law for that state's banks. Thus, the power of the resulting bank to retain the lead bank's branches in each state is determined by reference to that state's laws for in-state bank mergers.

Therefore, under subsection 36(b)(2)(C), for each state, the resulting bank may retain the branches of the lead bank unless the state has expressly prohibited branch retention for identically situated offices in a merger between its state banks. With respect to NationsBank's branches in North Carolina, South Carolina, Georgia, Florida, Virginia, Maryland, the District of Columbia, Missouri, Kansas, Oklahoma, Illinois, Arkansas, Iowa, Texas, and New Mexico, there are no provisions in the laws of these jurisdictions that would prohibit a state-chartered bank, following a merger with another state bank in that state, from retaining its own similarly situated branches in the state. Indeed, all these jurisdictions permit banks to retain branches after an in-state merger. Therefore, NationsBank-Resulting may retain the branches of NationsBank under section 36(b)(2)(C).

3. The Riegle-Neal Act did not displace sections 215a and 36(b). A merger between an interstate national bank and another bank in a state in which the interstate bank already has branches may occur under section 215a even after the Riegle-Neal Act.

The authority for the Texas Merger is based on longstanding provisions governing national banks, 12 U.S.C. §§ 36(b), 36(c), & 215a. The authority for mergers and branch retention under these provisions, including mergers by an interstate bank in one of the states in which it is already located by virtue of existing branches, continues unchanged after the Riegle-Neal Act. 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. 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)) conflicts with any authority in these sections. The OCC previously addressed this question of the relationship of sections 215a and 36(b) to the Riegle-Neal Act in many prior decisions, several of which involved precisely the same context as the Texas Merger: an interstate national bank merging with another bank in one of the states in which it already had branches. See, e.g., OCC Citizens Bank Decision; OCC Midlantic/Old York Decision; OCC Fleet/NatWest Decision; OCC Deposit Guaranty Decision; OCC NationsBank/Missouri Decision; OCC Huntington/Michigan Decision. Because this is the central legal issue in the Texas Merger Application, and the merger has been protested on this issue, we will set out the reasons and analysis supporting the OCC's statutory interpretation in detail.

In 1994, Congress enacted legislation to create a framework for interstate mergers and branching by banks. The Riegle-Neal Act added a new section 44 to the Federal Deposit Insurance Act ("FDI Act") that authorized certain interstate merger transactions beginning on June 1, 1997. See Riegle-Neal Act § 102(a) (adding new section 44, 12 U.S.C. § 1831u). Section 44 authorizes mergers between banks with different home states:

> (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).[11] The Riegle-Neal Act also made conforming amendments to the provisions on mergers and consolidations of national banks to grant national banks the corporate authority to engage in such section 44 interstate merger transactions:

> (a) In General. -- A national bank may engage in a consolidation or merger under this Act with an out-of-State bank if the consolidation or merger is approved pursuant to section 44 of the Federal Deposit Insurance Act.

See 12 U.S.C. § 215a-1(a) (as added by Riegle-Neal Act § 102(b)(4), adding a new section 4 to the National Bank Consolidation and Merger Act).[12]

These provisions in the Riegle-Neal Act give rise to the question of statutory interpretation that is the central issue in the Texas Merger: if a particular merger falls within the scope of both section 215a and section 44, can that merger still be effected under section 215a, or is the new section 44 interstate merger provision intended to be exclusive?[13] The statutory framework and

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[11] 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).

[12] It also added a similar conforming amendment to the McFadden Act to permit national banks to maintain and operate branches after interstate merger transactions under section 44. See Riegle-Neal Act § 102(b)(1)(B) (adding new subsection 12 U.S.C. § 36(d)).

[13] In the case of national banks, these would include transactions, such as the present one between NationsBank and NationsBank/Texas, in which an interstate national bank, with its main office in state A and branches in state B proposed to absorb through merger another national bank whose main office was in state B. In that transaction, both banks are "located" in state B for section 215a purposes and the branches could be retained under section 36(b)(2)(A), and so the transaction is permissible under existing law. In addition, the two banks have different "home states" for section 44 purposes, and so could come within the scope of section 44(a)(1)'s authority for mergers between banks with different home states. Similarly, the interstate bank could apply to acquire some additional branches from another bank in state B in a purchase and assumption transaction. Those additional branches would be permissible under section 36(c).

legislative history clearly show that Congress intended section 44 and section 215a-1 as a separate and parallel source of authority for interstate merger transactions. They allow interstate mergers, overriding any conflicting state laws. But they do not supplant existing federal law in sections 215a and 36(b) that authorizes some interstate transactions for national banks -- namely, mergers between two banks located in the same state where *one bank is already an interstate bank.*

First, there is nothing in the language of sections 44 and 215a-1 that indicates they were intended to be exclusive. Section 44 does provide authority for "interstate merger transactions," and section 215a-1 grants national bank the corporate power to engage in section 44 interstate merger transactions. But neither provision contains any language that requires that all interstate mergers in which the merging banks have different home states can occur only under its terms, or that precludes use of other pre-existing authority for national bank mergers -- such as section 215a. In particular, the term used in section 215a-1 ("may") is permissive, not mandatory, and the clause referring to section 44 is introduced by "if" not "only if" or "provided that."

The Texas Commissioner, IBAT, and the Texas Legislators (collectively, "the Texas commenters") assert that all interstate mergers can occur only under sections 44 and 215a-1.[14] Their principal argument is to cite the sections and the related provisions that define some of the terms used in section 44 mergers (e.g., "interstate merger transaction," "out-of-State bank," "home state") as support for the argument that the Texas Merger could occur only as a Riegle-Neal merger under section 44. However, these provisions merely establish the characteristics of the kind of interstate merger transaction that can be approved under section 44. They do not show that a transaction that meets the definition of an interstate merger transaction under section 44 cannot also be a merger under section 215a.[15] In fact, the two statutes have an area of overlap: a category of mergers that can be authorized under either statute. The Texas Commissioner's argument (Commissioner Supplemental Comment, page 2) that this interpretation would render sections 44 and 215a-1 superfluous is mistaken: the two statutes overlap only when the merging

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That transaction could also come within the scope of section 44(a)(4).

[14] See Commissioner Comment, page 1; Commissioner Supplemental Comment, pages 1-4; IBAT Comment, page 1; IBAT Supplemental Comment, pages 4-5; Texas Legislators Comment, pages 4-5.

[15] The Texas commenters' claim that section 44 supersedes section 215a and renders it inapplicable to mergers between banks located in the same state when the banks also have different home states appears based on the unstated assumption that section 44 impliedly amended, or repealed in part, section 215a. However, Congress expressed no such intention. To find that section 44 supersedes section 215a, we would have to conclude that Congress implicitly intended that result. But that is contrary to the "'cardinal rule . . . that repeals by implication are not favored.'" County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 262 (1992), *quoting* Posadas v. National City Bank, 296 U.S. 497, 503 (1936). When two statutes relate to the same subject, they should be read in harmony to give effect to each one, not as in conflict with one displacing the other. See, e.g., Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). This principle is especially applicable where, as here, the two statutes are easily capable of being construed without conflict, as the OCC's interpretation shows. Since there is no necessary conflict between the statutes, the Texas Commissioner's argument that section 44 is a more specific statute and so should control over section 215a is inapposite (Commissioner Supplemental Comment, page 2).

banks are located in the same state; only section 44, not section 215a, authorizes mergers between national banks with different home states where neither bank has branches in the other's state.

Second, there are other provisions in the Riegle-Neal Act that directly and expressly address the question of its exclusivity and the relationship of new law to existing law governing national banks. See Riegle-Neal Act §§ 102(b)(1)(B) (adding new subsection 12 U.S.C. § 36(e) on exclusive authority for additional branches for national banks).[16] Since Congress explicitly dealt with the question, using express language when it intended the Riegle-Neal Act to be exclusive, clearly it must have intended only those provisions to govern the determination when the Riegle-Neal Act was to be exclusive. Accordingly, there is no basis to read additional exclusivity into the Act in other places by interpretation.

Moreover, the exclusive branching authority provisions are carefully crafted to leave existing federal law in place for the bank's home state and states in which it already has a branch and to make the Riegle-Neal framework exclusive, after June 1, 1997, *only for initial entry into new states*. Indeed, the Texas Commissioner's interpretation of sections 44 and 215a-1 directly contradicts the express language of section 36(e)(1). The Commissioner's interpretation would require the use of a section 44 merger even in states in which the acquiring bank already had a branch; but section 36(e)(1) expressly excludes the acquisition of additional branches in such states from the requirement that such acquisition be authorized under section 44.

Furthermore, Congress was clearly aware of the existing applicability of sections 215a, 36(b), and 36(c) to a certain range of interstate transactions and chose not to displace that law. The statutory changes and legislative history of the Riegle-Neal Act shows that Congress was completely aware of the OCC's prior interstate decisions. See, e.g., H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 57 (August 2, 1994) ("Conference Report") (referring to OCC interstate main office relocation transactions that also involved mergers under section 215a). OCC decisions prior to the Riegle-Neal Act addressed interstate mergers and involved issues and analysis of

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[16] That provision provides in relevant part:

> 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 Deposit Insurance Act.

12 U.S.C. § 36(e)(1) (emphasis added). A similar provision applies for state banks. See Riegle-Neal Act § 102(b)(3)(A) (adding new paragraph 12 U.S.C. § 1828(d)(3) on exclusive authority for additional branches for state banks). The Texas Commissioner's assertion (Commissioner Supplemental Comment, page 3) that section 36(e)(1) is not about exclusive authority for additional branches, but merely is a reference to the limitation on the Comptroller's rulemaking authority under section 36, contained in 12 U.S.C. § 93a, is incorrect. First, section 36(e)(1) does not mention the Comptroller's rulemaking authority or refer to section 93a. Second, since section 93a already limits rulemaking authority under section 36, nothing needed to be added to make it apply to interstate branches under section 36. Finally, the parallel provision regarding state banks shows that this is a provision about the substantive branching authority of national banks, not a provision about the Comptroller's rulemaking authority.

sections 36 and 215a. See decisions in notes 3-6. 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.[17] Nor did Congress, in crafting its exclusivity provision in the Riegle-Neal Act, include any provision that would make section 44 exclusive over section 215a for such mergers in the future.

Third, the Riegle-Neal Act's legislative history clearly indicates that, insofar as the Act's framework provides the exclusive procedures for interstate expansion, such exclusivity applies only to a bank's initial entry into a state. The Conference Report provides in relevant part:

> The Conferees adopted provisions to assure that the comprehensive framework for interstate branching established by Title I will, when the provisions take effect, be the exclusive means for national and State banks to enter new States with interstate branches.
>
> Paragraphs (2) and (3) of section 102(b) amend the National Bank Act and the Federal Deposit Insurance Act, respectively, to state that when the interstate merger and branching provisions take effect, initial interstate entry into a host State may, with exceptions for certain emergency situations, occur only in accordance with this legislation.

H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. at 56-57 (emphasis added). In view of the care taken to address exclusivity in the context of initial entry into new states both in the legislative history and in the statutory text in section 36(e)(1), the fact that Congress left existing law unchanged for states in which the bank has its main office or already has a branch, rather than extending the exclusivity of the new Act to interstate aspects of those situations as well, must be seen as intended.

Fourth, consistent with its intent that the Riegle-Neal Act's interstate provisions are exclusive only with respect to initial entry transactions, section 44 itself contains a provision showing that, after a bank has entered a state in a Riegle-Neal interstate merger, subsequent transactions within the state may be treated like other transactions in that state under existing law for in-state transactions and need not be another section 44 interstate merger. Section 44(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

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[17] Moreover, Congress did change prior law in a related area in view of the OCC's interpretation of prior law on the authority of a national bank to retain existing branches in an interstate main office relocation. See Riegle-Neal Act §§ 102(b)(1)-(2) (adding new sections 12 U.S.C. §§ 36(e)(2) & 30(c)). See also Riegle-Neal Act § 114 (adding new Revised Statutes § 5244, 12 U.S.C. § 43) (adding a new procedure for agency preemption determinations in certain instances). Since Congress actively reviewed existing OCC actions regarding interstate branching, its agreement with the interpretation of sections 36(b), 36(c), and 215a cannot be thought inadvertent.

> established, acquired, or operated a branch under applicable Federal or State law if such bank had not been a party to the merger transaction.

Riegle-Neal Act § 102(a) (adding new subsection 44(d)(2) to FDI Act, codified at 12 U.S.C. § 1831u(d)(2) (emphasis added).[18] Thus, after a section 44 interstate merger between a bank in state A and a bank in state B in which the resulting bank has its main office in state A, if the bank later proposes to establish additional branches in state B or acquire additional branches in state B by merger with another bank in state B, the transaction may occur under the laws applicable to branch establishment or branch acquisition by banks located in state B. It need not be treated as a new section 44 interstate merger. The Texas commenters' position that later mergers in the state must also be regarded as Riegle-Neal interstate mergers is therefore contrary to this express provision that the bank may acquire additional branches as its predecessor bank could. Since its predecessor bank could acquire branches at additional locations by in-state mergers under sections 215a and 36(b), the Riegle-Neal interstate bank is authorized to do the same.

Finally, the provisions in the Riegle-Neal Act on the establishment of *de novo* interstate branches provide further evidence that Congress did not intend to require that subsequent mergers with a bank in a state in which the acquiring bank already had branches must be effected under section 44. Under 12 U.S.C. § 36(g), an out-of-state national bank can establish a *de novo* branch in a host state if the host state has a law that meets certain requirements, but this provision explicitly applies only to the bank's initial branch in that state.[19] The establishment of any

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[18] The legislative history reiterates this principle. See H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. at 50 ("Once a bank has established branches in a host State through an interstate merger transaction, such bank may establish and acquire additional branches at any location in the host State where any bank involved in the interstate merger transaction could have established or acquired branches under applicable Federal or State law."). This provision in essence adopts into the statute reasoning similar to that in the Seattle Trust case. In addition, since section 44(d)(2) is itself a separate grant of authority, it constitutes an additional basis in federal law for NationsBank to acquire additional branches in Texas by merger with NationsBank/Texas.

[19] Section 36(g)(1) provides:

> Subject to paragraph (2), the Comptroller of the Currency may approve an application by a national bank to establish and operate a de novo branch in a State (other than the bank's home State) in which the bank does not maintain a branch if --
>
> (A) there is in effect in the host State a law that --
>
> (i) applies equally to all banks; and
>
> (ii) expressly permits all out-of-State banks to establish de novo branches in such State; and
>
> (B) the conditions established in, or made applicable to this paragraph by, paragraph (2) are met.

12 U.S.C. § 36(g)(1) (added by section 103(a) of the Riegle-Neal Act) (emphasis added). See also Decision on the Applications of Community National Bank (OCC Corporate Decision No. 96-22, April 19, 1996) (further discussion of section 36(g) with respect to initial branch and subsequent branches). This provision explictly applies only for the initial entry, and so it cannot be used for later *de novo* branches in the host state. Section 44 is not explicitly limited only to the merger that effects the bank's initial entry into a state; thus, it can be used, at the bank's option, for subsequent mergers in the state. But the bank also has the option of effecting later mergers under section 215a, in accordance with

subsequent, additional *de novo* branches in that state cannot occur under section 36(g), because section 36(g) expressly does not apply in a state in which the bank already has a branch. Instead, section 36(g)(2)(D) incorporates section 44(d)(2) of the FDI Act, so that later branching in the host state occurs under the law for in-state transactions.

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 merger transaction that is authorized under other existing authority under sections 215a and 36(b) 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. The Texas Merger complies with section 36(e)(1) because NationsBank already has branches in Texas and because NationsBank/Texas' branches are retained and operated under the authority of section 36(b), a part of "this section" referred to in section 36(e)(1). Accordingly, the Texas Merger is authorized by section 215a. The Riegle-Neal Act does not require that this merger also qualify under section 44.

4. The Texas opt-out statute is not incorporated in the federal law that governs the Texas Merger.

a. State opt-out laws under the Riegle-Neal Act apply only to the authority to effect mergers under the Riegle-Neal Act, not to mergers under section 215a.

Since the Texas Merger is authorized by section 215a, not section 44, the Riegle-Neal Act's opt-out provision does not apply to it. In section 44(a)(2) (quoted and discussed further in section 4-b below), Congress permitted the states to elect to prohibit interstate merger transactions under the Riegle-Neal Act, provided the state enacted legislation that met certain conditions. However, section 44(a)(2)'s terms apply only to remove the authority to engage in a Riegle-Neal interstate merger transaction that would be effected under section 44(a)(1). Thus, section 44(a)(2) incorporates a state opt-out law only with respect to a merger under section 44(a)(1). Therefore, even if the Texas opt-out statute, Tex. Fin. Code § 32.0095(a)(1) (quoted in note 24 below), were a valid opt-out under the Riegle-Neal Act, but see discussion in section 4-b, it would have no effect on the authority for a merger under section 215a. The Texas Merger is being effected under section 215a, not section 44(a)(1). Therefore, section 44(a)(2) and the Texas law (even if it were incorporated therein) do not apply to it.[20]

b. Even if state opt-out laws enacted under the Riegle-Neal Act were applicable to mergers under section 215a, the Texas opt-out statute does not meet the

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section 44(d)(2), as discussed above.

[20] The Texas commenters maintain that the Texas Merger is barred by the Texas opt-out law. They also maintain that the merger could be undertaken only under section 44, arguing that section 44 is the exclusive authority for all types of interstate mergers. They do not address how section 44(a)(2) and a state opt-out enacted pursuant to it, even if valid, would apply to a merger effected under section 215a. (The applicability of the Texas law, solely as a matter of state law that is not incorporated in federal law, is discussed in Part II-B.)

requirements of the Riegle-Neal Act, and so it clearly could not prevent the Texas Merger from being effected under section 215a.

As set out above, the Texas Merger is authorized under section 215a and the authority for the merger under section 215a is independent of the authority for interstate mergers in the Riegle-Neal Act; and so the opt-out provision in section 44(a)(2) does not apply to the Texas Merger at all. In addition, even if it were assumed that Congress intended that state opt-out laws adopted pursuant to section 44(a)(2) would also apply to mergers under section 215a, the Texas opt-out statute is defective under the Riegle-Neal Act's requirements for a state opt-out set out in section 44(a)(2). In order to be an effective state opt-out law under section 44(a)(2), a state statute prohibiting interstate mergers must apply equally to all out-of-state banks, so that it bars mergers between all out-of-state banks and *all banks* in the state. Section 44 is part of the Federal Deposit Insurance Act; and in the FDI Act, the term "bank" includes state savings banks. But Texas' opt-out law does not include state savings banks in its prohibition on interstate mergers, and other Texas statutes expressly permit mergers between Texas state savings banks and out-of-state state savings banks. Therefore, since Texas statute fails the standards for an effective opt-out under section 44, it clearly could not prevent a transaction authorized under section 215a.

The Riegle-Neal Act requires that a state's opt-out law apply equally to <u>all</u> banks, including state savings banks. Congress permitted a state to elect to "opt-out" of the framework for interstate merger transactions established in the Riegle-Neal Act and prohibit such interstate transactions involving banks whose home state is the prohibiting state. But this permission has specified requirements. The state must enact a law that expressly prohibits all mergers with <u>all</u> out-of-state banks. <u>See</u> 12 U.S.C. § 1831u(a)(2)(A).[21] The Riegle-Neal Act's interstate merger transaction provision, including the opt-out provision in section 44(a)(2), is part of the Federal Deposit Insurance Act. The FDI Act's general definitions provision contains a detailed definition of "bank," which specifically includes state savings banks. <u>See</u> 12 U.S.C. § 1813(a)(1)-(2). State savings banks have been included in the FDI Act's basic definition of "bank" for decades.

Section 44 contains some definitions of terms specifically for purposes of the section, <u>see</u> 12 U.S.C. § 1831u(f), but these definitions do <u>not</u> include any special, or more limited, definition of the basic terms, "bank" or "state bank." Nothing in the terms defined in section 44, or in its

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[21] Section 1831u(a)(2)(A) provides:

> (A) In General. -- Notwithstanding paragraph (1), a merger transaction may not be approved pursuant to paragraph (1) if the transaction involves a bank the home state of which has enacted a law after the date of enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and before June 1, 1997, that --
>
> (i) applies equally to all out-of-State banks; and
>
> (ii) expressly prohibits merger transactions involving out-of-State banks.

Federal Deposit Insurance Act § 44(a)(2)(A), 12 U.S.C. § 1831u(a)(2)(A). The legislative history makes the purpose of these requirements on state opt-out laws clear. Congress wanted to be certain that states electing to opt-out would treat all banks the same; states were not given the choice of opting out as to some banks, but not others. <u>See</u> H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 56 (1994).

legislative history, suggests that the general definitions of "bank" and "state bank" from section 1813 that prevail throughout the FDI Act are not intended to be applicable in section 44. There is no basis to conclude that Congress intended the term "bank" in section 44 to mean anything other than "bank" as defined for the FDI Act in section 1813.[22]

The Texas Commissioner (Commissioner Supplemental Comment, page 5) asserts that the Riegle-Neal Act is intended to apply only to interstate branching by commercial banks, and so the term "bank" in section 44 should be interpreted as referring only to commercial banks, not state savings banks. However, nothing in the Riegle-Neal Act supports this interpretation, and one must ignore the plain meaning of the basic definitions of the statute to reach that result. The Commissioner attempts to support the contention that section 44 applies only to commercial banks by referring to the fact that federal savings banks and federal savings and loan associations already possessed interstate branching authority under other federal law and so there was no need for the Riegle Neal Act to cover them. But, federal savings banks and federal savings and loan associations are not "banks" under the FDI Act at all; they are "savings associations," see 12 U.S.C. § 1813(b); and so the Riegle-Neal Act's interstate merger provisions do not apply to them. Moreover, state savings banks gained interstate branching authority in the Riegle-Neal Act. The Commissioner's assertion that "savings banks" already had the power to branch interstate, and so the Riegle-Neal Act was unnecessary for them, ignores the distinction between federal savings banks and state savings banks.[23]

Accordingly, state savings banks are banks for purposes of the interstate merger transaction provisions of the Riegle-Neal Act in section 44 of the FDI Act. Therefore, a state law that prohibits interstate mergers must apply to state savings banks in order to meet the requirements for a valid Riegle-Neal opt-out in section 44(a)(2).

However, Texas' opt-out law does not cover state savings banks. The statute provides that "a domestic bank may not engage in a merger transaction involving an out-of-state bank . . ."

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[22] Intrinsic evidence in the Riegle-Neal Act itself also supports the conclusion that the FDI Act's general definitions of bank and state bank apply within section 44. The basic provision authorizing interstate merger transactions in section 44(a)(1) treats these mergers as a subset of merger transactions under section 18(c) (i.e., 12 U.S.C. § 1828(c), the Bank Merger Act). State savings banks have long been considered banks in section 18(c). Any conclusion other than that the same general definition of bank in the FDI Act applies within section 44, and so state savings banks are banks within section 44, is inconsistent with the overall merger provisions of the FDI Act.

[23] In addition, since federal savings banks are not "banks" under the FDI Act and the Riegle-Neal Act, a state's opt-out law can exclude them and still meet the condition in section 44(a)(2) of applying equally to all banks, and so Texas was not obligated to include them in order for its opt-out law to be effective. Thus, the Texas Commissioner's claim (Commissioner Supplemental Comment, page 6) that Texas could not have included federal savings banks in its opt-out law without intruding on the existing federal regime for interstate branching by federal savings banks is misplaced. Similarly, the Commissioner is wrong in claiming that the Texas opt-out law would have been impermissibly discriminatory if it had included state savings banks but not federal savings banks. The distinction between state savings banks (which are "banks" in the FDI Act) and federal savings banks (which are "savings associations" in the FDI Act) was already made by Congress.

Tex. Fin. Code § 32.0095(a)(1).[24] For state banks, "domestic bank" means "a state bank chartered by this state." Id. § 32.0095(b)(2)(B). The Texas Finance Code defines the term "state bank" (including for purposes of the Texas opt-out statute) so that it does not include state savings banks. See Tex. Fin. Code § 31.002(a)(50). Therefore, the Texas opt-out statute does not cover Texas state savings banks, and so does not prohibit them from engaging in interstate mergers with out-of-state banks. Moreover, other provisions in the Texas Finance Code governing state savings banks explicitly permit Texas state savings banks to merge with out-of-state savings banks. See Tex. Fin. Code §§ 92.401 - 92.407. In addition, the Texas state banking authorities construe the Texas statutes to permit interstate mergers by state savings banks.

Clearly, then, the Texas opt-out law does not prohibit interstate mergers between Texas state savings banks and out-of-state state savings banks. Since it does not apply to state savings banks, it does not apply equally to "all out-of-State banks" as required under section 44(a)(2). Therefore, even if it were assumed that state opt-out laws adopted pursuant to section 44 were also applicable to mergers under section 215a, the Texas opt-out law clearly could not block the Texas Merger.

B. NationsBank may merge and operate branches in Texas as authorized by federal law notwithstanding Texas state laws that attempt to prohibit it.

As we have seen, the proposed Texas Merger is authorized under federal law. While the Texas state opt-out law is not applicable to the merger as incorporated by the governing federal law,[25] it could be argued that the state opt-out law applies of its own force. Indeed, the Texas

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[24] The Texas statute provides:

> Notwithstanding any other law:
>
> (1) pursuant to Section 44(a)(2), Federal Deposit Insurance Act (12 U.S.C. Section 1831u(a)(2)), a domestic bank may not engage in a merger transaction involving an out-of-state bank;
>
> (2) an out-of-state bank may not establish a de novo branch in this state or acquire a branch in this state by purchase or other means; and
>
> (3) a domestic bank may not establish a de novo branch in a state other than this state or acquire a branch in a state other than this state by purchase or other means.

Tex. Fin. Code § 32.0095(a), formerly Tex. Rev. Civ. Stat. Ann. art. 489f, § 2. This provision expires on September 2, 1999. See Tex. Fin. Code § 32.0095(c).

[25] Some federal laws governing national banks incorporate state law as part of the governing federal law. But that is not the case here. First, with respect to the authority for the Texas Merger under sections 215a and 36(b), section 215a does not incorporate state law at all for mergers between two national banks, and section 36(b) incorporates only state law for in-state branching, not interstate branching laws, see discussion in note 10 above. Thus, for the Texas Merger, Texas' law on in-state branching is the law incorporated by section 36(b), not Texas' interstate opt-out law. Second, even if a state opt-out law under section 44 were applicable to mergers under section 215a, the Texas opt-out statute does not meet the requirements of section 44(a)(2), and so it does not enjoy the authorization of, and incorporation into, section 44. Since the Texas law is not authorized by federal law, it is subject to normal principles of federal

Commissioner, IBAT, and the Texas Legislators argue that the proposed Texas Merger would violate state law, referring to three provisions in Texas law, including the Texas opt-out statute.[26] However, these Texas provisions directly conflict with NationsBank's authority to engage in this transaction under federal law; and so, under traditional federal law preemption standards, they are preempted. This question of the applicability of these state laws to prohibit an out-of-state national bank from having branches in Texas when authorized by federal law also arose earlier with respect to Sun World. See OCC Sun World Relocation Decision (Part II-C, pages 37-41).[27] The Fifth Circuit, in approving Sun World's retention of existing branches in Texas and establishment of a new branch in Texas, implicitly determined the Texas state laws could not apply to prohibit these branches. See Sun World. 117 F.3d at 315-16.

In a long line of cases, the Supreme Court, has considered the status of national banks, the supremacy of federal law over them, and the relationship of state law to national banks and has consistently held that state laws that conflict with federal law by preventing or impairing the ability of national banks to exercise powers granted to them under federal law are preempted. See, e.g., Franklin National Bank v. New York, 347 U.S. 373, 378 (1954); Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896); Farmers & Mechanics' National Bank v. Dearing, 91 U.S. 29, 33-35 (1875). See generally OCC Bank Midwest Decision (Part III-A) (discussion of national bank preemption cases); Comment, State Regulation of Federally Chartered Financial Institutions, 54 Wash. L. Rev. 339, 352-62 (1979) (survey of national bank preemption cases).

Recently, the Court summarized this history, reiterating that, when a federal statute grants authority to a national bank to engage in an activity, that grant is generally interpreted as not normally limited by, but rather ordinarily preempting, contrary state law. See Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 32-34 (1996) (surveying and discussing prior cases). Moreover, even in other contexts not involving national banks, when the language of a statute reveals an explicit congressional intent to preempt state law or the structure of the statute shows the intent to preempt, courts will find contrary state laws to be preempted. Id. at 31, citing

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preemption with respect to national banks. See, e.g. Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31-34 (1996).

[26] The other two provisions are a provision in the Texas state consitution that appears to bar out-of-state banks from conducting a banking business in Texas and a provision in the Texas Probate Code that appears to bar out-of-state banks from conducting fiduciary business in Texas. See Texas Constitution Art. XVI, Sec. 16(a) (third paragraph) ("No foreign corporation, other than the national banks of the United States domiciled in this State, shall be permitted to exercise banking or discounting privileges in this State."); Tex. Probate Code § 105A(c) ("No foreign bank or trust company shall establish or maintain any branch office, agency or other place of business within this state, or shall in any way solicit, directly or indirectly, any fiduciary business in this state of the types embraced by subdivision (a) hereof. Except as authorized herein or as may otherwise be authorized by the laws of this state, no foreign bank or trust company shall act in a fiduciary capacity in this state.").

[27] Similar questions regarding the preemption of state laws that prohibit out-of-state banks from having branches in the state or exercizing fiduciary powers in the state have arisen with respect to other states. See, e.g., OCC Bank Midwest Decision (Part III) (Kansas); Decision on the Applications of Bank One Wisconsin Trust Company, N.A., and Bank One Trust Company, N.A. (OCC Corporate Decision No. 97-33, June 1, 1997) ("OCC Bank One/Wisconsin Decision") (Wisconsin).

Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977), Fidelity Federal Savings & Loan Association v. De la Cuesta, 458 U.S. 141, 152-53 (1982), and other cases.

Here, NationsBank is authorized under federal law to merge with NationsBank/Texas and to retain and operate NationsBank/Texas' main office and branches in Texas (as well as NationsBank's own branches) as branches of NationsBank after the merger. The Texas state provisions would prohibit NationsBank from doing so. (Indeed, the Texas statutes would also bar NationsBank from maintaining its three existing branches in Texas: an issue already decided by the Fifth Circuit against Texas in Sun World.) The Texas provisions directly conflict with federal law. Thus, they are clearly preempted.[28]

In reviewing the preemption issue in this corporate application, we have not used the notice and comment procedures added in the Riegle-Neal Act for preemption determinations involving state laws in the areas of community reinvestment, consumer protection, fair lending, and establishment of intrastate branches. See Riegle-Neal Act § 114 (adding new Revised Statutes § 5244, 12 U.S.C. § 43). First, the Texas state laws at issue here are not within one of the four areas identified in section 5244. In particular, they do not relate to the establishment of intrastate branches; these Texas laws are about interstate branches. Texas laws on intrastate branching were followed in the analysis of branch retention under section 36(b)(2). Second, even if these Texas laws were within one of the four areas, prior OCC actions (e.g., the OCC Sun World Relocation Decision, the OCC Bank Midwest Decision, and the OCC Bank One/Wisconsin Decision) and a court case (Sun World) addressed essentially the same issue, and so this matter would qualify for the exception in section 5244(c)(1)(A). Finally, the procedure in section 5244 was not designed to duplicate a process that has its own public notice and comment requirement, such as a corporate application. Indeed, here interested parties -- especially the Texas Bank Commissioner -- had direct notice of the application and the preemption issue raised. Thus, the Texas Commissioner's claim (Commissioner Comment, page 3; Commissioner Supplemental Comment, pages 7-8) that this application was required to be subject to the procedures in section 5244 is incorrect.

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[28] Furthermore, since the Texas provisions are plainly directed against institutions from other states to prevent them from conducting banking and/or fiduciary business in Texas, they are also subject to challenge under the Commerce Clause of the Constitution, U.S. Const. art I, § 8, cl. 3, which limits the power of the states to erect barriers against interstate trade. Since the Texas provisions are not authorized under any federal law that would shelter them from Commerce Clause scrutiny, they appear to be invalid under well-established Commerce Clause principles. See Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35-36, 42-44 (1980); OCC Bank Midwest Decision (Part III-B).

C. Conclusion

The legal analysis of the Texas Merger under sections 215a and 36(b) is similar to prior OCC decisions. The merger of NationsBank/Texas into NationsBank is authorized under 12 U.S.C. § 215a, and the resulting bank may retain and operate the branches of both banks, including the branches in Texas, under 12 U.S.C. § 36(b)(2). This authority continues after the Riegle-Neal Act. An interstate bank can merge, under section 215a, with another bank in one of the states in which it already has branches, without using the interstate merger transaction provisions of the Riegle-Neal Act. Since this merger is not being undertaken under the Riegle-Neal Act, the various provisions governing Riegle-Neal mergers, including the state opt-out provision in section 44(a)(2), do not apply to it. In addition, Texas' opt-out law is flawed under Riegle-Neal Act standards, and thus clearly does not prevent a transaction that is authorized under an entirely different statutory authority. Texas state laws that conflict with the authority granted by federal law are preempted. Accordingly, the Texas Merger is legally authorized.[29]

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

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[29] The Texas commenters also raise several policy-based objections, implicitly suggesting that, even if the Texas Merger is legally authorized, the OCC should exercise its discretion and deny the application because of these concerns. The OCC declines to deny this otherwise lawful application on the bases asserted by the Texas commenters. First, it is alleged that approval would violate the principle of competitive equality, and other institutions will be at a competitive disadvantage, because only NationsBank will be able to operate interstate branches in Texas. This is incorrect for several reasons: (1) The principle of competitive equality is only one element in construing the national banking laws. (2) State savings banks and state and federal savings associations also can obtain branches in Texas through mergers. Thus, the competitive environment in Texas is more complex than the Texas commenters assert. (3) The same competitive equality consideration was present in Sun World; yet the Fifth Circuit approved Sun World's branches in Texas. Second, the Texas commenters claim that questions of the applicability of state law, including consumer protection laws, to branches of an out-of-state bank are unsettled in Texas. But Congress in the Riegle-Neal Act already specifically provided for the manner in which host state laws apply to the branches in the host state of an out-of-state national bank. See 12 U.S.C. § 36(f). Third, it is alleged that Texas will suffer a loss of state franchise tax revenue because the state has no mechanism to capture franchise taxes on banks whose headquarters are out-of-state. NationsBank is not engaging in the Texas Merger for the purpose of avoiding any lawful Texas taxes. It represents that it will comply with any valid system of apportionment that the Texas state tax authorities or the Texas legislature may adopt for the purpose applying the Texas franchise tax to interstate banks. Finally, IBAT (IBAT Supplemental Comment, page 3) asserts the OCC should deny this application, just as IBAT alleges OCC denied applications by several community banks in the early 1990's because they would have an adverse impact on Texas state franchise tax revenue. However, the OCC is unaware of circumstances that would serve as legal precedent for denying this application on such a basis, and IBAT did not identify the matters it referred to, or otherwise provide adequate information for the OCC to respond to this claim.

needs of the community to be served. For the reasons stated below, we find the Texas Merger application may be approved under section 1828(c).

1. Competitive analysis.

Since both 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 banks are presently satisfactory. NationsBank expects to achieve administrative efficiencies by operating the offices of NationsBank/Texas as branches rather than as a separate corporate entity. The geographic diversification of its operations will strengthen the resulting bank. The addition of NationsBank/Texas's offices and operations to NationsBank will not substantially affect NationsBank's financial and managerial resources. The future prospects of the institutions, individually and combined, are favorable. Thus, we find the financial and managerial resources factor is consistent with approval of the merger application.

The OCC has carefully considered the matters raised in IBAT's two comment letters relating to the managerial resources factor. IBAT cited a number of concerns that it maintained should reflect adversely on NationsBank's managerial resources, including concerns relating to the sale of securities, the sale of insurance, an administrative complaint filed by the Department of Labor, home equity compliance issues, concerns from local clearinghouses and, in general, the issue of distant control once NationsBank/Texas is merged into NationsBank.

IBAT refers to two previously-resolved matters regarding NationsBank Corporation's sale of securities. First, the Texas State Securities Board ("Securities Board"), after receiving complaints, investigated NationsSecurities relating to the marketing of two mutual funds. (NationsSecurities is now a wholly-owned subsidiary of NationsBank; at the time of the matters involved in the complaints it was a joint venture between NationsBank and Dean Witter Venture, Inc., a subsidiary of Dean Witter & Co.) NationsSecurities and the Securities Board entered into an agreement on these matters, with no admission of wrongdoing by NationsSecurities, and the Securities Board has closed its investigation. The second matter relates to a civil suit which was settled on August 1, 1997. This suit was brought by customers against NationsSecurities and other NationsBank Corporation subsidiaries. The claims related primarily to sales practices in connection with the purchase of nondepository investment products, and the civil suit has now been settled, also with no admission of wrongdoing by NationsBank Corporation. The OCC has carefully considered the concerns raised regarding these activities in connection with our review of this application, as well as pursuant to our ongoing supervision of NationsBank. On that basis, we have concluded that issues related to the referenced sales practices have been and will be appropriately addressed by NationsBank and pursuant to the continuing regulatory oversight to which those activities are subject.

IBAT also refers to published reports that the Texas Department of Insurance ("TDI") has instituted an investigation of NationsBank/Texas with regard to its sale of insurance products. In April 1997, NationsBank/Texas solicited insurance, on behalf of an unaffiliated agent-of-record, through a statement stuffer sent to NationsBank/Texas checking account customers. As a result of the April mail solicitation, the TDI sent a letter to NationsBank/Texas, requesting certain information about the insurance solicitation. TDI has sent an additional information request to NationsBank/Texas regarding its insurance activities. The record does not indicate that this matter has resulted in any notice or finding of wrongdoing by NationsBank/Texas that would warrant denial of this application.

With respect to the administrative complaint filed by the Department of Labor concerning NationsBank Corporation's compliance with the Fair Labor Standards Act, the OCC notes that the Department of Labor complaint has not resulted in any finding of wrongdoing by NationsBank.

IBAT also refers to a 1995 incident in which NationsBank Corporation mailed to Texas residents a solicitation for home improvement loans. One page of the solicitation erroneously stated that the loans could also be used for home equity purposes (i.e., purposes other than home improvement). At that time, Texas law prohibited the enforcement of a subordinate lien on residential property except in connection with a home improvement loan. Upon discovering the error, NationsBank Corporation met with the Texas Attorney General's Office, explained the nature of the problem, and voluntarily withdrew its solicitation. No home equity loans were made to Texas residents, and no action was taken by the Texas Attorney General's Office against NationsBank Corporation. IBAT also states that NationsBank/Texas improperly attempted to solicit home equity loans in Texas prior to the effective date of the 1997 Texas legislation authorizing home equity lending. NationsBank/Texas, along with other lenders inside and outside the State of Texas, began soliciting Texas residents for home equity loans prior to the effective date, while providing in its solicitation that such loans would not be closed and funded until after the effective date. The Texas Attorney General has issued a letter confirming the legality of the practice being used by NationsBank/Texas and other lenders.

IBAT also noted general concerns that NationsBank/Texas does not comply with local clearinghouse customs, practices, and regulations, and otherwise is uncooperative with other Texas banks in connection with its clearinghouse activities. No facts in the record support the allegations, and NationsBank Corporation has stated that it has investigated these allegations and determined that they are unfounded.

Finally, IBAT expressed a general belief that what IBAT criticized as NationsBank/Texas' shortcomings in its operations within Texas would be worsened when NationsBank/Texas was merged into NationsBank and decisions were made outside the state. However, ultimate control of NationsBank/Texas already rests with its corporate parent, NationsBank Corporation, and today many activities are managed and coordinated on a company-wide basis throughout all of NationsBank Corporation's subsidiaries on a line-of-business basis. Certain decisions and other daily operating practices are delegated to local managers. After the merger, when

NationsBank/Texas' offices become branches of NationsBank, these coordinating and reporting relationships will continue.

Accordingly, after reviewing examination and other supervisory information relating to NationsBank's managerial resources, and in light of the fact that the proposed transaction represents only a corporate reorganization, the OCC has concluded that the managerial concerns raised by IBAT do not warrant denial or conditional approval of this application.

3. Convenience and needs.

The resulting bank will help to meet the convenience and needs of the communities to be served. NationsBank will continue to serve the same areas in North Carolina and its other states, and it will add the NationsBank/Texas' offices in Texas. The proposed merger will result in an expansion and enhancement of banking services for customers of both banks because of the broader geographic scope of NationsBank's branch and automated teller machine networks. There will be no reductions in products or services as a result of the merger. The combined bank will continue to offer a full line of banking products and services. The merger will permit the resulting bank to better serve its customers and at a lower cost. The combined resources, including capital and reserves, of the currently separate banks will provide a more substantial capital cushion for unexpected losses as well as provide business customers with a higher legal lending limit.

Upon completion of the merger, customers of both banks will have available to them a significantly greater number of branches at which to bank. Currently, banking is not as convenient as it could be for customers who travel in different states or for business customers who have operations in more than one state. Following the merger, customers would be dealing with the same bank in the different states and will be able to readily access their accounts with greater convenience. No branch closings are expected in connection with this merger. However, as part of its ongoing business plans, NationsBank and NationsBank Corporation continually evaluate the bank's 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 later 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, and in light of the information discussed above with respect to the managerial resources factor, 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' records of helping to meet the credit needs of their entire communities, including low- and moderate-income neighborhoods, when evaluating certain applications, including mergers. See 12 U.S.C. § 2903. See also 12 C.F.R. § 25.29. Both NationsBank and NationsBank/Texas

received outstanding ratings with respect to CRA performance at their most recent CRA examinations. No comments raising CRA concerns 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.[30]

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 the merging banks currently serve. NationsBank will continue its current CRA programs and policies in North Carolina and its other states. After the merger occurs, NationsBank/Texas' offices in Texas will remain open as branches of NationsBank. NationsBank will carry forward the same CRA programs and policies and assessment areas that the banks have today. Moreover, NationsBank has represented that it will honor all CRA-related commitments made by NationsBank/Texas. 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 NationsBank and NationsBank/Texas have today as separate banks. The merger and operation of interstate branches do 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 Texas Merger is legally authorized under 12 U.S.C. § 215a, and NationsBank may retain and operate the offices of both banks, including the offices in Texas, as branches under 12 U.S.C. § 36(b)(2). In addition, the Texas' opt-out statute does not block the merger. First, the Texas' opt-out does not apply to transactions authorized under section 215a, and moreover, the opt-out law fails to meet the Riegle-Neal Act's opt-out standards. We also find that the Texas Merger meets the other statutory criteria for approval. Accordingly, the Texas Merger Application is hereby approved.

/s/ 04-02-98

Julie L. Williams Date

Chief Counsel

[30] While the Texas Merger application was pending, the OCC received materials from three parties relating to the performance of the banks under the CRA. These materials were not filed specifically with respect to the Texas Merger. The OCC considered them in connection with other applications involving these banks also pending when the materials were received. Those applications have already been approved, and the OCC's review of the materials is discussed in the OCC's decisions on those applications. See Decision on the Application to Merge Boatmen's First National Bank of Amarillo, Amarillo, Texas, into NationsBank of Texas, Dallas, Texas (OCC Corporate Decision No. 98-11, February 3, 1998); Decision on the Application to Merge Sun World, N.A., into NationsBank, N.A. (OCC Corporate Decision No. 98-07, January 15, 1998).

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