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

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Washington, D.C. 20219

**Corporate Decision #97-36  
June 1997**

**DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY  
ON THE APPLICATION TO MERGE  
COLORADO NATIONAL BANK, DENVER, COLORADO,  
COLORADO NATIONAL BANK ASPEN, ASPEN, COLORADO,  
FIRST BANK NATIONAL ASSOCIATION, CHICAGO, ILLINOIS,  
FIRST BANK NATIONAL ASSOCIATION, OMAHA, NEBRASKA,  
FIRST BANK OF SOUTH DAKOTA (NATIONAL ASSOCIATION),  
SIOUX FALLS, SOUTH DAKOTA,  
FIRST BANK (NATIONAL ASSOCIATION), MILWAUKEE, WISCONSIN,  
FIRST INTERIM BANK OF DES MOINES, N.A., DES MOINES, IOWA, AND  
FIRST INTERIM BANK OF CASPER, N.A., CASPER, WYOMING,  
WITH AND INTO  
FIRST BANK NATIONAL ASSOCIATION, MINNEAPOLIS, MINNESOTA**

**June 1, 1997**

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**I. INTRODUCTION**

On March 17, 1997, First Bank National Association, Minneapolis, Minnesota ("FBNA") filed an Application with the Office of the Comptroller of the Currency ("OCC") for approval to merge affiliated national banks located in other states into FBNA under FBNA's charter and title, pursuant to 12 U.S.C. §§ 215a-1, 1828(c) & 1831u(a) (the "Merger Application"). The merger is structured as a single merger transaction with multiple affiliated target institutions. The affiliated banks are: Colorado National Bank, Denver, Colorado ("Colorado NB"), Colorado National Bank Aspen, Aspen, Colorado ("Aspen NB"), First Bank National Association, Chicago, Illinois ("FB Chicago"), First Bank National Association, Omaha, Nebraska ("FB Omaha"), First Bank of South Dakota (National Association), Sioux Falls, South Dakota ("FB South Dakota"), First Bank (National Association), Milwaukee, Wisconsin ("FB Milwaukee"), First Interim Bank of Des Moines, National Association, Des Moines, Iowa ("FB Des Moines"), and First Interim Bank of Casper, National Association, Casper, Wyoming ("FB Casper"). FB Des Moines and FB Casper are considered to be members of the Savings Association Insurance Fund; FBNA and the other banks are members of the Bank Insurance Fund. Each target bank operates branches only

in its home state. In the Merger Application, OCC approval is also requested for FBNA, as the resulting bank, to retain FBNA's main office as the main office of the resulting bank under 12 U.S.C. § 1831u(d)(1) and to retain FBNA's branches and the main offices and branches of the other merging banks as branches after the merger under 12 U.S.C. §§ 36(d) & 1831u(d)(1).<sup>1</sup>

All of the banks are subsidiaries of First Bank System, Inc. ("FBS"), a multistate bank holding company headquartered in Minneapolis, Minnesota. In the proposed merger, a number of FBS's existing bank subsidiaries will combine into one bank with branches in various states.

## **II. LEGAL AUTHORITY**

### **A. The Interstate Merger is Authorized under 12 U.S.C. §§ 215a-1 & 1831u.**

#### **1. The proposed merger may be approved under section 1831u(a).**

In 1994, Congress enacted legislation to create a framework for interstate mergers and branching by banks. See Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (enacted September 29, 1994) ("the Riegle-Neal Act"). The Riegle-Neal Act added a new section 44 to the Federal Deposit Insurance Act that authorizes certain interstate merger transactions beginning on June 1, 1997. See Riegle-Neal Act § 102(a) (adding new section 44, 12 U.S.C. § 1831u). It also made conforming amendments to the provisions on mergers and consolidations of national banks to permit national banks to engage in such section 44 interstate merger transactions. See Riegle-Neal Act § 102(b)(4) (adding a new section, codified at 12 U.S.C. § 215a-1). It also added a similar conforming amendment to the McFadden Act to permit national banks to maintain and operate branches in accordance with section 44. See Riegle-Neal Act § 102(b)(1)(B) (adding new subsection 12 U.S.C. § 36(d)).

Section 44 authorizes mergers between banks with different home states:

(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.

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<sup>1</sup> This merger is part of a series of transactions aimed at combining most of the depository institutions owned by First Bank System, Inc., Minneapolis, Minnesota, into its lead bank, FBNA. Prior steps were approved in an earlier OCC Decision. See Decision to Approve Applications by First Bank National Association, Minneapolis, Minnesota, to Acquire First Bank, FSB, Fargo, North Dakota, and to Engage in Certain Related Transactions (OCC Corporate Decision No. 97-\_\_\_, May 31, 1997) ("OCC FBNA/FSB Decision"). The First Interim Bank of Des Moines and the First Interim Bank of Casper are banks resulting from transactions in the earlier decision. Shortly after those transactions, and without opening for business, the interim banks will be merged into FBNA in the merger that is the subject of this Merger Application. For purposes of discussing the merger in this decision, we describe FB Des Moines and FB Casper with the characteristics they have at the time of this merger. In addition, after the earlier transactions, at the time of this merger FBNA will have branches in Kansas and North Dakota, as well as in Minnesota.

12 U.S.C. § 1831u(a)(1).<sup>2</sup> The Act permits a state to elect to prohibit such interstate merger transactions involving a bank whose home state is the prohibiting state by enacting a law between September 29, 1994, and May 31, 1997, that expressly prohibits all mergers with all out-of-state banks. See 12 U.S.C. § 1831u(a)(2) (state "opt-out" laws). In this Merger Application, the home state of FBNA is Minnesota; and the home states of the merging banks are Colorado, Illinois, Iowa, Nebraska, South Dakota, Wisconsin, and Wyoming. None of these states has opted out. Accordingly, this Merger Application may be approved under 12 U.S.C. §§ 215a-1 & 1831u(a).

## **2. The proposed merger meets the requirements in sections 1831u(a) & 1831u(b).**

An application by a national bank to engage in an interstate merger transaction under 12 U.S.C. § 1831u is also subject to certain requirements and conditions set forth in sections 1831u(a)(5) and 1831u(b) of the Riegle-Neal Act. These conditions are: (1) compliance with state-imposed age limits, if any, subject to the Act's limits; (2) compliance with certain state filing requirements, to the extent the filing requirements are permitted in the Act; (3) compliance with nationwide and state concentration limits; (4) community reinvestment compliance; and (5) adequacy of capital and management skills.

### **a. Compliance with state age laws.**

The proposal satisfies the state-imposed age requirements permitted by section 1831u(a)(5). Under that section, the OCC may not approve a merger under section 1831u(a)(1) "that would have the effect of permitting an out-of-State bank or out-of-State bank holding company to acquire a bank in a host state that has not been in existence for the minimum period of time, if any, specified in the statutory law of the host State." 12 U.S.C. § 1831u(a)(5)(A). In this Merger Application, FBNA is acquiring by merger banks in the host states of Colorado, Illinois, Iowa, Nebraska, South Dakota, Wisconsin, and Wyoming.

Colorado's statute on interstate bank acquisitions and interstate branching is unclear, but some provisions suggest the state intended to impose a five-year age requirement for an interstate merger of a Colorado bank with a resulting out-of-state bank.<sup>3</sup> Colorado NB has been in existence since 1866, and Aspen NB has been in existence since 1970. Therefore, the age restriction, if applicable, would be met. Thus, the merger of Colorado NB and Aspen NB into

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<sup>2</sup> 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).

<sup>3</sup> It is unclear whether the five year requirement is actually imposed in the case of interstate mergers, especially between affiliated banks. Since Colorado NB and Aspen NB are more than five years old, however, and the five year requirement, if applicable, is met, it is not necessary to consider these issues further here.

FBNA satisfies the Riegle-Neal Act's age requirement. In a merger with an out-of-state bank in which the out-of-state bank is the surviving bank, the Illinois interstate bank merger statute currently contains no minimum time requirement for which the Illinois bank must have been in existence.<sup>4</sup> Thus, the merger of FB Chicago into FBNA satisfies the age requirement.

The Nebraska interstate bank merger statute has a five-year age requirement. See Interstate Branching By Merger Act of 1997, 95th Leg., 1997 Neb. Laws 351, Section 4. FB Omaha and its predecessors have been in existence since 1866. Thus, the merger of FB Omaha into FBNA satisfies the Riegle-Neal Act's age requirement. South Dakota's interstate bank merger statute also has a five-year age requirement. See S.D. Codified Laws Ann. § 51A-7-16 (Supp. 1996). FB South Dakota and its predecessors have been in existence since 1926. Thus, the merger of FB South Dakota into FBNA satisfies the Riegle-Neal Act's age requirement. Wisconsin has not yet enacted legislation with respect to the interstate mergers and branching provisions of the Riegle-Neal Act, and so it presently does not have an age requirement for interstate mergers between banks. Moreover, FB Milwaukee has been in existence for more than five years. Thus, the merger of FB Milwaukee into FBNA satisfies the age requirement.

Iowa also has a five-year age requirement. See Iowa Code Ann. § 524.1805(1) (West 1996). For purposes of this age requirement, under Iowa law, an interim bank, such as FB Des Moines, that has been chartered solely for the purpose of, and does not open for business prior to, acquiring one or more branches owned and operated on January 1, 1997, by an affiliated savings association is deemed to have been in existence for the combined periods of the bank and savings association from which the branch or branches were acquired. See id. at § 524.1805(3)(A). FB Des Moines is such a bank, having been chartered to acquire Iowa branches of First Bank, FSB ("First Bank Savings"), an affiliated savings association. First Bank Savings had been in existence for more than five years, and so FB Des Moines is deemed to be more than five years old.<sup>5</sup> Thus, the merger of FB Des Moines into FBNA satisfies the Riegle-Neal Act's age requirement.

The Wyoming interstate bank merger statute provides that an interstate merger transaction resulting in an out-of-state bank shall not be permitted "unless the Wyoming bank, or a predecessor, has as of the proposed date of acquisition been in existence and in continuous operation, for at least three (3) years." See Act of February 20, 1997, Enrolled Act No. 20 (to be codified at Wyo. Stat. § 13-2-804(c)). The statute also provides that a state or national bank

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<sup>4</sup> The Illinois legislature passed a bill amending the state's interstate bank merger statute to introduce a five-year age requirement, but that legislation has not yet been enacted and therefore is inapplicable to the present transaction. See Senate Bill 690, Illinois 90th General Assembly. Moreover, FB Chicago and its predecessors have been in existence since 1933, and so the five-year age limit, if it were applicable, would be met.

<sup>5</sup> In addition to FB Des Moines, seventeen other similar interim national banks were chartered in Iowa to acquire Iowa branches of First Bank Savings. The other seventeen then merged into FB Des Moines. Each of the interim banks separately would have been deemed to be more than five years old under section 524.1805(3)(A) if they had sought to merge directly into FBNA, and for the merger into FB Des Moines were deemed to be more than five years old under a similar statute for retaining branches in an in-state merger, Iowa Code Ann. § 524.1213.4A. See OCC FBNA/FSB Decision (Part II-C, pages 24-30) (analysis of prior in-state transactions in Iowa).

resulting from the conversion of a state or federal savings association shall be deemed to have been in existence for the same time as the converting institution. Id. FB Casper, an interim national bank resulting from prior transactions to hold the Wyoming branches of First Bank Savings, assumes the age of First Bank Savings with respect to the Wyoming age requirement.<sup>6</sup> First Bank Savings has been in operation since 1926, and so FB Casper meets the three year age requirement. Thus, the merger of FB Casper into FBNA satisfies the age requirement.

**b. Compliance with state filing requirements.**

Each proposed merger meets the applicable filing requirements of the host state involved in that merger. A bank applying for an interstate merger transaction under section 1831u(a) must (1) "comply with the filing requirements of any host State of the bank which will result from such transaction" as long as the filing requirement does not discriminate against out-of-state banks and is similar in effect to filing requirements imposed by the host state on out-of-state nonbanking corporations doing business in the host state, and (2) submit a copy of the application to the state bank supervisor of the host state. See 12 U.S.C. § 1831u(b)(1).<sup>7</sup> FBNA submitted a copy of its OCC merger application to the state bank supervisor of each host state. As set forth below, FBNA also has complied with the filing requirements, if any, of each host state, to the extent permitted under section 1831u(b)(1)(A)(i).

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<sup>6</sup> In the prior transactions, two interim federal savings banks were formed, each of which acquired Wyoming branches of First Bank Savings. Then, the two interim federal savings banks converted into interim national banks one of which is FB-Casper, and the other bank merged FB-Casper, to reach the stage in the transactions that is the subject of this Merger Application. See OCC FBNA/FSB Decision (Part II-D, pages 31-34) (analysis of prior Wyoming transactions). Through this sequence of transactions, First Bank Savings is a "predecessor" of FB Casper, and FB Casper has the age of First Bank Savings under Wyoming's age requirement. This analysis was confirmed by OCC staff in a telephone conversation with Jeffrey C. Vogel, Deputy Banking Commissioner, Wyoming Division of Banking.

<sup>7</sup> Under this provision, states are permitted to impose a filing requirement on out-of-state banks that will operate branches in the state as a result of an interstate merger transaction under the Riegle-Neal Act, but the states may impose only those requirements that are within the terms specified. Since Congress has specifically set forth and limited what state filing requirements apply for these interstate transactions, it clearly intended that only those requirements would apply, and the states may not impose others. Thus, in a transaction involving only national banks, only the filing requirements allowed under section 1831u(b)(1) must be complied with. However, where a state bank is involved, a state may continue to have authority to impose greater requirements on its own state-chartered banks, because of the reservation of authority in section 1831u(c)(3). Moreover, as a general matter, national banks are formed and incorporated under, and governed by, federal law. Their authority to enter mergers, to establish branches, or to undergo other changes in their corporate existence is determined by federal law, not state law; and any requisite approval is by the OCC, not state authorities. For a fuller discussion of this subject, see, e.g., Decision on the Applications to Merge First Interstate Banks into Wells Fargo Bank, N.A. (OCC Corporate Decision No. 96-29, June 1, 1996) (at pages 4-5, 12-14 & note 11). In addition, the filing requirements of section 1831u(b)(1) apply only with respect to the host states that will become host states as a result of the merger transaction under review in the application, not the host states in which the acquiring bank already operates branches. See Decision on the Application to Merge First Interstate Bank of Washington, N.A., into Wells Fargo Bank, N.A. (OCC Corporate Decision No. 96-30, June 6, 1996) (page 7, note 9). Thus, for this merger transaction, FBNA must comply with the filing requirements of section 1831u(b)(1) for Colorado, Illinois, Iowa, Nebraska, South Dakota, Wisconsin, and Wyoming, not for Minnesota, Kansas, and North Dakota, states in which FBNA has branches before this merger.

Under Colorado's interstate banking statute, an out-of-state bank proposing to conduct interstate branching in Colorado must send a copy of its federal application to, and obtain a certificate from, the state banking board. See Colo. Rev. Stat. §§ 11-6.4-103(9) (copy of federal filing) & 11-6.4-103(10) (certificate).<sup>8</sup> FBNA submitted a copy of the Merger Application and applied for a certificate. FBNA advises that the Colorado Division of Banking is satisfied it has all the information needed and will issue a certificate to FBNA. Thus, the merger of Colorado NB and Aspen NB into FBNA satisfies the Riegle-Neal Act's filing requirement.

The Illinois interstate bank merger statute does not contain any filing or notice requirement for an interstate merger transaction between two national banks or for a merger with a state bank when the resulting bank is a national bank.<sup>9</sup> FBNA provided a copy of its OCC Merger Application to the Illinois state bank supervisor, as required by section 1831u(b)(1)(ii). FBNA advises the Illinois state bank supervisor asked for no further action. The FBNA/FB Chicago merger satisfies the Riegle-Neal Act's filing requirement.

The Iowa interstate bank merger statute requires that an "out-of-state bank or out-of-state bank holding company that is organized under laws other than those of this state is subject to and shall comply with the provisions of chapter 490, division XV, relating to foreign corporations, and shall immediately provide the superintendent of banking with a copy of each filing submitted to the secretary of state under that division." Iowa Code Ann. § 524.1805(5). Chapter 490, division XV contains the provisions for out-of-state nonbanking corporations to qualify to do business in Iowa. See Iowa Code Ann. § 490.1501 et seq. As implemented to date, the filing requirements of section 524.1805(5) do not appear to discriminate against out-of-state banks or to impose a filing requirement more burdensome than that imposed on nonbanking corporations.

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<sup>8</sup> Section 11-6.4-103(10) provides in relevant part: "No bank . . . may conduct interstate branching in Colorado . . . without first obtaining a certificate from the banking board certifying that such branch . . . complies with the provisions of this article." The statute also requires the bank to provide the banking board with the name under which it proposes to conduct business at its Colorado branches and authorizes the banking board to withhold a certificate if the proposed name is identical to or deceptively similar to the name of an existing Colorado bank or is likely to cause the public confusion. See Colo. Rev. Stat. § 11-6.4-103(8). Insofar as the process of applying for the certificate comports with the filing requirements permitted in section 1831u(b)(1), its requirements apply to national banks. However, the name requirement and the authority to withhold the certificate in general (which is tantamount to an approval requirement) may go beyond the filing requirements permitted by the Riegle-Neal Act for the reasons discussed in note 7. We need not address this further here since FBNA proposes to continue to use the name "Colorado National Bank" at its branches in Colorado, and has been advised by the state that it will be issued a certificate. FBS operated its banks in Colorado with the "Colorado National Bank" name because another institution operated in Colorado under the name "First Bank" before FBS entered the state. After the merger, the branches will continue business under the Colorado National Bank name. The OCC has previously approved the operation of a branch under a trade name. See OCC Interpretive Letter No. 698 (February 1, 1996).

<sup>9</sup> The Illinois statute does contain provisions addressing application requirements for a merger with a national bank, and these provisions apply only when an out-of-state state bank is involved and not when the out-of-state resulting bank is a national bank. See 205 Ill. Comp. Stat. Ann § 5/21.1 (application for certificate of authority in interstate mergers with a state bank and other requirements for an "out-of-state bank") & 205 Ill. Comp. Stat. Ann. § 5/20 (mergers with resulting national bank). See also 205 Ill. Comp. Stat. Ann § 5/2 (definition of "out-of-state bank" includes only state-chartered institutions; definition of national bank after May 31, 1997, includes out-of-state national banks).

FBNA provided a copy of its OCC Merger Application to the Iowa state bank supervisor and is obtaining a certificate of authority under the Iowa filing requirement. FBNA advises the Iowa state bank supervisor asked for no further action. Thus, the FBNA/FB Des Moines merger satisfies the Riegle-Neal Act's filing requirement.

The Nebraska interstate bank merger statute does not appear to contain a filing requirement applicable to out-of-state banks with branches in Nebraska. FBNA submitted a copy of its OCC Merger Application to the Nebraska state bank supervisor. FBNA advises that the Nebraska state bank supervisor asked for no further action. Thus, the FBNA/FB Omaha merger satisfies the Riegle-Neal Act's filing requirement.

The South Dakota interstate bank merger and branching statute requires an out-of-state bank to "provide written application of the proposed transaction to the commission," to obtain a certificate of authority from the director, and to comply with the provisions of South Dakota law for out-of-state nonbanking corporations to do business in the state. S.D. Codified Laws Ann. §§ 51A-7-17 & 51A-7-18. FBNA submitted a copy of the Merger Application, together with a cover letter, as an application for a certificate of authority. FBNA advises that the South Dakota Division of Banking is satisfied it has all the information needed, and no further action is required.<sup>10</sup> Thus, the FBNA/FB South Dakota merger satisfies the Riegle-Neal Act's filing requirement.

Wisconsin has not yet enacted legislation with respect to the interstate mergers and branching provisions of the Riegle-Neal Act, and so it presently does not have filing requirements for interstate mergers between banks. FBNA submitted a copy of its OCC Merger Application to the Wisconsin state bank supervisor, as required by section 1831u(b)(1)(ii). FBNA advises the Wisconsin state bank supervisor requested no further action. Thus, the FBNA/FB Milwaukee merger satisfies the Riegle-Neal Act's filing requirement.

The Wyoming interstate bank merger statute provides that "any out-of-state bank that will be the resulting bank pursuant to an interstate merger transaction involving a Wyoming bank shall notify the commissioner of the proposed merger not later than the date on which it files an application for an interstate merger transaction with the responsible federal bank supervisory agency, and shall submit a copy of that application to the commissioner together with a filing fee, if any, not exceeding four thousand five hundred dollars (\$4,500.00), as required by the commissioner." Act of February 20, 1997, Enrolled Act No. 20 (to be codified at Wyo. Stat.

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<sup>10</sup> The South Dakota statute also contains other requirements that appear to go beyond the state filing requirements permitted in section 1831u(b)(1) for national banks, including a hearing requirement, authority to approve or deny applications, a requirement that the bank submit in writing that it will comply with all applicable South Dakota laws, and authority to examine branches. See S.D. Codified Laws Ann. §§ 51A-7-17, 51A-7-18 & 51A-7-19. These features are substantially different from the qualifying to do business process for nonbanking corporations. To the extent the South Dakota statute's requirements go beyond those permitted by the Riegle-Neal Act, they are not applicable to national banks for the reasons discussed in note 7. However, the statute may be interpreted and administered in practice in a manner consistent with the Riegle-Neal Act. Here, FBNA was required only to send a copy of its OCC merger application, together with a cover letter.

§ 13-2-805(a)). Section 13-2-805 also requires that the resulting out-of-state bank provide evidence of compliance with the foreign corporation filing requirement provisions of the Wyoming Business Corporation Act. Wyo. Stat. § 13-2-805(a). As implemented to date, the filing requirements of section 13-2-805 do not appear to discriminate against out-of-state banks or to impose a filing requirement more burdensome than that imposed on nonbanking corporations.<sup>11</sup> FBNA provided a copy of its OCC Merger Application to the Wyoming state bank supervisor. FBS is also obtaining a certificate of authority under the Wyoming Business Corporation Act filing requirement. FBNA advises that the Wyoming state bank supervisor requested no further action. Thus, the FBNA/FB Casper merger satisfies the filing requirement.

**c. Riegle-Neal Act deposit concentration limits.**

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

**d. Riegle-Neal Act community reinvestment compliance provisions.**

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

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<sup>11</sup> The Wyoming statute also contains other requirements that appear to go beyond the state filing requirements permitted in section 1831u(b)(1) for national banks, including the potential of excessive initial (up to \$4500) or annual fees, a requirement of annual licensing for every branch, and authority to examine branches. See Wyo. Stat. §§ 13-2-805 & 13-2-807. To the extent the Wyoming statute's requirements go beyond those permitted by the Riegle-Neal Act, they are not applicable to national banks for the reasons discussed in note 7. However, the statute may be interpreted and administered in practice in a manner consistent with the Riegle-Neal Act. Here, FBNA was required only to send a copy of its OCC merger application and to obtain a certificate of authority under the foreign corporation filing requirement.



state in which it did not have a branch or bank affiliate before. Thus, this Riegle-Neal Act provision is not applicable to the Merger Application. However, the Community Reinvestment Act itself is applicable, as discussed below. See Part III-B.

**e. Riegle-Neal Act capital and management skills requirements.**

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

Accordingly, the proposed interstate merger transaction between FBNA and the merging banks is legally permissible under section 1831u.

**B. Following the Merger, the Resulting Bank may Retain FBNA's and the Merging Banks' Existing Main Offices and Branches under 12 U.S.C. §§ 36(d) & 1831u(d)(1).**

The Applicants have requested that, upon the completion of the merger, FBNA (as the resulting bank in the merger) be permitted to retain and continue to operate its existing main office in Minneapolis as the main office of the resulting bank and to retain and continue to operate as branches (1) its own existing branches and (2) the main offices and branches of the merging banks in Colorado, Illinois, Nebraska, South Dakota, Wisconsin, Iowa, and Wyoming. In an interstate merger transaction under section 1831u, the resulting bank's retention and continued operation of the offices of the merging banks is expressly provided for:

(1) Continued Operations. -- A resulting bank may, subject to the approval of the appropriate Federal banking agency, retain and operate, as a main office or a branch, any office that any bank involved in an interstate merger transaction was operating as a main office or a branch immediately before the merger transaction.

12 U.S.C. § 1831u(d)(1). The resulting bank is the "bank that has resulted from an interstate merger transaction under this section [section 1831u(a)]." 12 U.S.C. § 1831u(f)(11). In addition, Congress also added a conforming amendment to the McFadden Act to emphasize that branch retention in an interstate merger transaction under section 1831u occurs under the authority of section 1831u(d):

(d) Branches Resulting From Interstate Merger Transactions. -- A national bank resulting from an interstate merger transaction (as defined in section 44(f)(6) of the Federal Deposit Insurance Act) may maintain and operate a branch in a State

other than the home State (as defined in subsection (g)(3)(B)) of such bank in accordance with section 44 of the Federal Deposit Insurance Act [12 U.S.C. § 1831u].

12 U.S.C. § 36(d) (as added by Riegle-Neal Act § 102(b)(1)(B)). Therefore, FBNA, the resulting bank in this interstate merger transaction, may retain and continue to operate all of the existing banking offices of FBNA and each merging bank under 12 U.S.C. §§ 36(d) & 1831u(d)(1).<sup>12</sup>

Moreover, at its branches in all its host states, as well as those in Minnesota, FBNA is authorized to engage in all activities permissible for national banks, including fiduciary activities. See, e.g., 12 U.S.C. §§ 215a-1 (Riegle-Neal mergers with a resulting national bank occur under the National Bank Consolidation and Merger Act), 215a(e) (the resulting national bank in a merger succeeds to all the rights, franchises and interests, including fiduciary appointments, of the merging banks), & 1831u(d)(1) (continued operations at retained interstate branches). See also OCC Interpretive Letter No. 695 (December 8, 1995) (national banks may engage in fiduciary business at trust offices and branches in different states); 12 U.S.C. § 36(f) (general provisions for host state laws applicable to branches in the host state of out-of-state national banks).

**C. The Merger of FB Des Moines and FB Casper into FBNA Complies with 12 U.S.C. § 1815(d).**

The merger of FB Des Moines and FB Casper into FBNA also complies with the Oakar Amendment, 12 U.S.C. § 1815(d)(3). FB Des Moines and FB Casper are considered to be members of the Savings Association Insurance Fund (“SAIF”), and FBNA is a member of the Bank Insurance Fund (“BIF”). The merger of a SAIF member into a BIF member is a conversion transaction under 12 U.S.C. § 1815(d)(2)(B)(ii). Institutions may participate in such transactions, without being subject to the requirements of section 1815(d)(2), if the transaction complies with the provisions of section 1815(d)(3).

The Oakar Amendment imposes several conditions on approval of these transactions. First, the acquiring or resulting bank must meet all applicable capital requirements upon

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<sup>12</sup> By its action in adding section 36(d), Congress made it clear that section 44(d)(1) is an express and complete grant of office-retention authority for interstate merger transactions effected under section 44 and that it operates independently of the provisions for branch retention in mergers under 12 U.S.C. § 36(b)(2). Neither section 36(d) nor section 1831u(d)(1) refers to section 36(b)(2). Congress clearly was aware of the McFadden Act's existing provisions for branch retention in mergers at the time it acted on Section 44 and the way in which those provisions applied for interstate national banks, since the OCC had approved interstate main office relocation transactions that also involved mergers with affiliate banks in which the resulting bank's authority to retain branches was based on section 36(b)(2). The Conference Report to the Riegle-Neal Act makes reference to such OCC decisions. See H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 57 (1994). By expressly providing for office-retention in section 1831u(d)(1) and then incorporating that into the McFadden Act in section 36(d), Congress clearly intended that those provisions apply to branch retention in interstate merger transactions under section 1831u, rather than the complex branch retention provisions of section 36(b)(2). Of course, section 36(b)(2) continues to govern branch retention in national bank mergers that are not entered into under section 1831u, including mergers involving an interstate bank (such as a merger of an interstate bank into another national bank in its home state).

consummation of the transaction. See 12 U.S.C. § 1815(d)(3)(E)(iii). As discussed above in section II-A-2-e, the OCC has determined the acquiring and resulting banks meet all applicable capital requirements.

Second, in the case of a merger of a SAIF member into a BIF member that is a subsidiary of a bank holding company, as here, the Oakar Amendment also incorporates the standards for an interstate bank acquisition from section 3(d) of the Bank Holding Company Act, 12 U.S.C. § 1842(d), and applies them to the transaction, with the target SAIF member being treated as a state bank that the BIF member's parent bank holding company was applying to acquire. See 12 U.S.C. § 1815(d)(3)(F).<sup>13</sup> In the case of FB Des Moines and FB Casper into FBNA, this analysis is self-evident because FB Des Moines and FB Casper, while SAIF members, are in fact *banks* already owned by the bank holding company. Thus, this transaction is unlike the usual Oakar transaction which involves the acquisition of a SAIF-insured *thrift*. Nevertheless, we will briefly set out the analysis.

Section 1842(d), as incorporated into section 1815(d)(3)(F), imposes limitations on Oakar transactions pertaining to the age of the bank being acquired, deposit concentration limits, compliance with federal Community Reinvestment Act requirements and applicable state community reinvestment requirements, and capital and management of the resulting institution. All of these are met with respect to FB Des Moines and FB Casper.

First, the age limits are met for each bank. Iowa imposes a five-year age requirement. See Iowa Code Ann. § 524.1805.1 (West 1993 & Supp. 1997). This limitation is satisfied because under a recently enacted Iowa statute, a bank that has been chartered solely for the purpose of, and does not open for business prior to, acquiring control of, or acquiring all or substantially all of the asset of, one or more branches owned and operated on January 1, 1997, by an affiliated savings association, assumes the age of the savings association to be acquired. Consequently, FB Des Moines assumes the age of First Bank Savings which is more than five years. Wyoming permits out-of-state bank holding companies to acquire in-state banks only if the in-state bank, or a predecessor, has been in existence for at least three years; and more specifically, banks resulting from conversions of savings associations are deemed to have been in existence for the same period of time as the converted savings association or a predecessor. See Act of February 20, 1997, Enrolled Act No. 20 (to be codified at Wyo. Stat. § 13-9-310(c)). FB Casper resulted from the conversion of a savings association, the predecessor of which, First Bank Savings, was in existence for more than 70 years. Thus, FB Casper meets the Wyoming age requirements.<sup>14</sup>

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<sup>13</sup> Review of bank acquisitions under section 1842(d), and so also review of Oakar transactions under section 1815(d)(3)(F), is required only where the holding company is acquiring a bank located in a state other than the holding company's home state. The home state of FBS is Minnesota, and FB Des Moines and FB Casper are located in Iowa and Wyoming respectively; and so it is necessary to undertake the analysis.

<sup>14</sup> This analysis is consistent with that of Jeffrey C. Vogel, Deputy Banking Commissioner in Wyoming. See note 5 above.

Second, the deposit concentration limits are satisfied. With respect to national concentration limits, FBNA and all its insured depository institution affiliates must not control more than 10% of the total amount of insured deposits in the United States. See 12 U.S.C. § 1842(d)(2)(A). They controlled approximately \$24.4 billion in deposits as of December 31, 1996, less than one percent of total United States deposits. The nationwide concentration limit is satisfied. With respect to state concentration limits, the applicant and all its insured depository institution affiliates may not control more than 30% of the insured deposits in the state of the bank to be acquired if the bank holding company already controls an insured depository institution or any branch of an insured depository institution in the relevant state. See 12 U.S.C. § 1842(d)(2)(B). If these transactions are not considered initial entries in the Oakar analysis and so paragraph (d)(2)(B) is applicable to these transactions, this limit is met. First Bank System's total Iowa deposits of its insured depository institutions was about \$579 million, or about 1.5 percent of total Iowa deposits, as of December 31, 1996. And its total Wyoming deposits of its insured depository institutions was about \$267 million, or 3.8 percent of total Wyoming deposits, as of December 31, 1996. The statewide concentration limit is satisfied for both states.<sup>15</sup>

Third, the bank holding company's compliance with the federal Community Reinvestment Act and with applicable state community reinvestment laws must be considered. For the reasons discussed in Part III.A.2.a.(1)(c) and (d) of the OCC FBNA/FBS Decision, which analyzed the bank holding company's compliance with state and federal community reinvestment laws in connection with the acquisition of First Bank Savings, there is no basis to deny the pending applications. The analysis and conclusions set forth in that Decision Statement with respect to state and federal community reinvestment compliance are fully incorporated and relied upon in this Decision Statement.

Finally, we note that the condition of the bank holding company, including its capital position and management, is consistent with approval of this transaction under the standards set forth in section 1842(d)(1) as incorporated into the Oakar Amendment. Accordingly, the merger of FB Des Moines and FB Casper into FBNA complies with the Oakar Amendment.

### **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

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<sup>15</sup> Similarly, Iowa and Wyoming state-imposed concentration limits, if applicable, are met. Iowa has a state-imposed concentration limit of 10 percent, and Wyoming a state-imposed limit of 30%. See Iowa Code Ann. § 524.1802.1 (West 1993 & Supp. 1997); Act of February 20, 1997, Enrolled Act No. 20 (to be codified at Wyo. Stat. § 13-9-310(b)). In addition, with respect to 12 U.S.C. § 1842(d)(4) and federal or state antitrust laws, we note that the merging entities already are affiliated and so the transaction will have no impact on competition under federal antitrust laws. Nor do state antitrust laws, even assuming their applicability to mergers between national banks, affect the proposed transactions.

addition, the Act also requires the OCC to take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served. For the reasons stated below, we find the Merger Application may be approved under section 1828(c).

**1. Competitive Analysis**

Since FBNA and the merging banks are already owned by the same bank holding company, their merger will have no anticompetitive effects.

**2. Financial and managerial resources**

The financial and managerial resources of all the banks are presently satisfactory. FBNA expects to achieve efficiencies by operating the offices in the different states as branches rather than as a separate corporate entity in each state. The geographic diversification of its operations will also strengthen the combined bank. The future prospects of the existing institutions, individually and combined, are favorable. Thus, we find the financial and managerial resources factor is consistent with approval of the Merger Application.

**3. Convenience and needs**

The resulting bank will help to meet the convenience and needs of the communities to be served. The resulting bank will continue to serve the same areas in all the states where FBNA and the merging banks have offices. It will continue to offer a full line of banking products and services. There will be no reductions in the products or services as a result of the merger. The merger will permit the resulting bank to better serve its customers and at lower cost.

Upon completion of the merger, customers of all the 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 frequently travel across state lines 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. Especially benefitting will be those customers who live in one state and work in another, such as in the Omaha metropolitan area. No branch closings are contemplated as a result of this merger since the banks serve different areas. However, as part of its ongoing business plans, FBNA evaluates its branch system, including branches acquired in transactions and, as a part of the normal course of business, may close redundant or unprofitable branches. Any such closures will be made in accordance with applicable statutes and regulations, including notification of customers of the branches, and will consider the needs of the community affected.

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

**B. The Community Reinvestment Act**



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