



Office of the Comptroller of the Currency

Interpretations - Corporate Decision #96-47

Published in Interpretations and Actions September 1996

**DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY
 ON THE APPLICATION TO MERGE
 PNC BANK, NATIONAL ASSOCIATION, PITTSBURGH, PENNSYLVANIA, WITH
 MIDLANTIC BANK, NATIONAL ASSOCIATION, NEWARK, NEW JERSEY,
 UNDER THE CHARTER OF THE LATTER AND WITH THE TITLE
 PNC BANK, NATIONAL ASSOCIATION
 August 20, 1996**

I. INTRODUCTION

On May 13, 1996, an Application was filed with the Office of the Comptroller of the Currency ("OCC") for approval to merge PNC Bank, National Association, Pittsburgh, Pennsylvania ("PNC") with and into Midlantic Bank, National Association, Newark, New Jersey ("Midlantic") under the charter of the latter and with the title, "PNC Bank, National Association" ("PNC-Resulting" or "the Resulting Bank"), under 12 U.S.C. 215a-1, 1828(c) & 1831u(a) ("the Merger Application"). The two banks are affiliates, and both banks are insured national banks. PNC has its main office in Pittsburgh and operates branches in both Pennsylvania and New Jersey, *see* note 5 below. Midlantic has its main office in Newark and operates branches in both New Jersey and Pennsylvania, *see* note 6 below. In the Merger Application, OCC approval is also requested for PNC-Resulting to retain PNC's main office in Pittsburgh as the main office of the resulting bank under 12 U.S.C. 1831u(d)(1) and to retain the branches of both merging banks, and the main office of Midlantic in Newark, as branches of the resulting bank after the merger under 12 U.S.C. 36(d) & 1831u(d)(1).

Both banks are subsidiaries of PNC Bank Corp., a multistate bank holding company with its headquarters in Pittsburgh, Pennsylvania. Midlantic became a subsidiary of PNC Bank Corp., effective December 31, 1995, as a result of PNC Bank Corp.'s acquisition of its parent holding company, Midlantic Corporation. The proposed merger is the second step of a two-step plan to combine the operations of the two banks into one bank. In the first step, most of Midlantic's branches in Pennsylvania were transferred to PNC in a purchase and assumption transaction approved by the OCC on June 26, 1996, and completed on July 19, 1996. In the second step, the rest of Midlantic will be combined with PNC in the proposed merger. The purpose of these transactions is to effect a corporate reorganization that will simplify the structure of PNC Bank Corp.'s subsidiary banking operations in Pennsylvania and New Jersey. The applicants believe the combination of operations into one interstate national bank will enable them to more readily adapt to regulatory and competitive changes in today's complex banking environment. The mergers will produce added convenience for the customers of the banks to conduct business at any PNC-Resulting branch in both states. In addition, certain operational efficiencies will be gained by the integration of data processing and other systems enabling the resulting bank to operate as efficiently and cost effectively as

possible.

As of March 31, 1996, PNC had approximately \$41.8 billion in assets and \$24.7 billion in deposits and operated 461 branch offices in Pennsylvania and New Jersey. As of the same date, Midlantic had approximately \$12.9 billion in assets and \$11.2 billion in deposits and operated 250 branch offices in New Jersey and 73 branch offices in Pennsylvania.

II. LEGAL AUTHORITY

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

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

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

(1) In General. -- Beginning on June 1, 1997, the responsible agency may approve a merger transaction under section 18(c) [12 U.S.C. 1828(c), the Bank Merger Act] between insured banks with different home States, without regard to whether such transaction is prohibited under the law of any State.

12 U.S.C. 1831u(a)(1). <NOTE: For purposes of section 1831u, the following definitions apply: The term "home State" means, with respect to a national bank, "the State in which the main office of the bank is located." The term "host State" means, "with respect to a bank, a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch." The term "interstate merger transaction" means any merger transaction approved pursuant to section 1831u(a)(1). The term "out-of-State bank" means, "with respect to any State, a bank whose home State is another State." The term "responsible agency" means the agency determined in accordance with 12 U.S.C. 1828(c)(2) (namely, the OCC if the acquiring, assuming, or resulting bank is a national bank). *See* 12 U.S.C. 1831u(f)(4), (5), (6), (8) & (10).> The Act permits a state to elect to prohibit such interstate merger transactions involving a bank whose home state is the prohibiting state by enacting a law between September 29, 1994, and May 31, 1997, that expressly prohibits all mergers with all out-of-state banks. *See* 12 U.S.C. 1831u(a)(2) (state "opt-out" laws).

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

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

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

- (i) applies equally to all out-of-State banks; and
- (ii) expressly permits interstate merger transactions with all out-of-State banks.

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

- (i) the conditions do not have the effect of discriminating against out-of-State banks, out-of-State bank holding companies, or any subsidiary of such bank or company (other than on the basis of a nationwide reciprocal treatment requirement);
- (ii) the imposition of the conditions is not preempted by Federal law; and
- (iii) the conditions do not apply or require performance after May 31, 1997.

12 U.S.C. 1831u(a)(3).

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

On the one hand, the federal authority in section 1831u(a) is triggered, during the early opt-in period, only if each of the home states has a law that meets the features specified in section 1831u(a)(3)(A). But section 1831u does not expressly prohibit states from having other features in their interstate merger laws beyond those needed to meet the provisions of section 1831u(a)(3)(A). In fact, the Act expressly reserves to each state the right to determine branching by that state's state-chartered banks. <NOTE: Section 1831u(c)(3) provides:

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

- (A) determine the authority of State banks chartered by that State to establish and maintain branches; or
- (B) supervise, regulate, and examine State banks chartered by that State.

12 U.S.C. 1831u(c)(3). While the Act thus preserves for the states their rights with respect to interstate mergers and branching by the state's own state-chartered banks, the Riegle-Neal Act did not give the states any additional powers with respect to national banks (or state banks chartered by other states), other than in the areas specifically set out in section 1831u.> Nor does section 1831u(a) provide that the federal merger authority is ineffective if the state adds other features. That is, the state may add other features to its interstate merger law, and, as long as those features do not cause the state law to fail to meet the provisions of section 1831u(a)(3)(A), the federal merger authority in section 1831u(a) continues to be available.

But, on the other hand, section 1831u, once triggered during the early opt-in period, singles out and specifically incorporates into the federal merger authority only certain features of state law referenced in various subsections of section 1831u. Similarly, after June 1, 1997 (when subsection 1831u(a)(3) will no longer be relevant), section 1831u continues to single out and specifically incorporate into the federal merger authority only certain features of state law referenced in various subsections of section 1831u. In addition to the state law features that are included in section 1831u on that permanent basis, Congress permitted host states, during the early opt-in period, to impose conditions on branches within the host

state, as long as the conditions met the requirements of section 1831u(a)(3)(B) -- namely, that they do not discriminate against out-of-state banks, that they are not preempted by federal law, and they do not continue beyond May 31, 1997. Indeed, the inclusion of section 1831u(a)(3)(B) allowing host states to impose other conditions during the early opt-in period (subject to the limits in the section) indicates Congress believed that, without such permission (and therefore also in the period after June 1, 1997), host states would not have the authority to impose any conditions or requirements beyond those included in the specific provisions of section 1831u that refer to state law (including the reserved authority of a state to regulate its own state-chartered banks in section 1831u(c)(3)). <NOTE: If the states otherwise had the power to impose additional conditions and requirements, there would have been no need for section 1831u(a)(3)(B)'s permission for certain conditions during the early opt-in period and section 1831u(c)(3)'s reservation of rights to states with respect to their own state-chartered banks. > This would follow from the fact that in the Riegle-Neal Act Congress has created the comprehensive federal framework governing interstate merger transactions.

Thus, in summary, the Riegle-Neal Act's provisions for interstate merger transactions set forth a federal framework for mergers of banks with different home states that includes state law in specified ways in certain specific areas, but only in those areas. Those areas include the basic determination whether to participate or to opt-out. But the opt-out provision is carefully crafted by Congress to be only the single decision to be in or out of the congressionally set framework. There is no provision for a partial opt-out, a conditional opt-out, partial participation, or modification of the terms of the framework by each state (other than in the specific areas set out in section 1831u). <NOTE: The relationship of the federal framework and state law in the interstate merger transaction provisions in the Riegle-Neal Act is similar to the relationship of the federal framework and state law in the interstate bank acquisition provisions of the Riegle-Neal Act: in both, a comprehensive federal framework is established, and it provides for state authority only in certain specified areas. See Riegle-Neal Act 101(a) (amending section 3(d) of the Bank Holding Company Act, 12 U.S.C. 1842(d)). One difference is that until June 1, 1997, states are permitted to opt-out of the interstate merger transaction framework, but that difference does not affect the underlying relationship between federal and state law in the framework. Thus, even apart from considerations relating to preemption and state authority over national banks generally, under the provisions of the Riegle-Neal Act, after May 31, 1997, host states have no more authority to approve, or place other conditions on, interstate merger transactions that do not involve a state bank chartered by the host state than they do to approve, or place conditions on, an interstate bank acquisition of a bank in the host state by an out-of-state bank holding company. And until May 31, 1997, the conditions a host state may impose are limited by section 1831u(a)(3)(B).>

The circumstances of this transaction raise an additional issue concerning the authority for interstate mergers under the Riegle-Neal Act. PNC is already an interstate bank, with its main office in Pennsylvania and branches in Pennsylvania and New Jersey. <NOTE: PNC obtained the branches in New Jersey in 1995. An affiliated national bank in New Jersey relocated its main office from New Jersey to Philadelphia, retaining its branches in New Jersey, under 12 U.S.C. 30, and then merged into PNC under 12 U.S.C. 215a, with the resulting bank retaining the branches of both merging banks under 12 U.S.C. 36(b). See Decision on the Applications of PNC Bank, New Jersey, N.A. and PNC Bank, N.A. (OCC Corporate Decision No. 95-36, August 7, 1995) ("OCC PNC/New Jersey Decision"). Since the Riegle-Neal Act the OCC has approved a number of such interstate main office relocation applications in which the bank would retain its existing branches in its original state. Three of the approvals have been challenged in court. One case was decided adversely to the OCC, and the OCC has appealed. See *Ghiglieri v. Ludwig*, No. 3:95-CV-2001-H (N.D. Tex. May 22, 1996), *appeal docketed*, No. 96-10818 (5th Cir. July 10, 1996) ("*Ghiglieri*"). The OCC believes the district court opinion in *Ghiglieri* is incorrect for several reasons. Most significantly, the court did not follow the language of the statutes in effect at the time of the agency's decision in the case (*i.e.*, the statutes as amended in the Riegle-Neal Act) and ignored the highly relevant legislative history in the Riegle-Neal Act concerning the statutory changes and the OCC's earlier adoption of the construction of the statutes at issue. The court also rejected even the pre-Riegle-Neal weight of authority to the effect that section 30 operates independently of section 36. In addition, the court failed to follow the standards set by the United States Supreme Court for judicial review of an agency's construction of the statutes it administers, with respect both to the OCC's pre-Riegle-Neal interpretation of the statutes and the post-Riegle-Neal interpretation. See *Smiley v. Citibank (South Dakota), N.A.*, No. 95-860, 517 U.S. ___, 135 L.Ed.2d 25 (June 3, 1996); *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. ___ (1995); *Chevron*

U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). A more comprehensive discussion of the OCC position on the *Ghiglieri* case is set out in two recent OCC decisions: Decision on the Applications of Sun World, N.A. (OCC Corporate Decision No. 96-___, August 2, 1996); Decision on the Applications of KeyBank, N.A. and Society National Bank (OCC Corporate Decision No. 96-32, June 14, 1996).> Midlantic is also an interstate bank, with its main office in New Jersey and branches in New Jersey and Pennsylvania. <NOTE:Midlantic had a grandfathered interstate branch in Philadelphia, *i.e.*, a branch that it (or its predecessors) maintained there at the time the McFadden Act was adopted in 1927. In 1994, it expanded its branch network in Pennsylvania by merging an affiliated Pennsylvania state bank into Midlantic. *See* Decision on the Application to Merge Continental Bank into Midlantic National Bank (OCC Corporate Decision No. 94-37, August 12, 1994) ("*OCC Midlantic Decision*").> Since the two banks have banking offices in the same states, they are "located within the same State" (both Pennsylvania and/or New Jersey) for purposes of 12 U.S.C. 215a. Thus, the two banks could have merged under section 215a, and the resulting bank could have retained the branches of both banks under 12 U.S.C. 36(b)(2). *See, e.g., OCC PNC/New Jersey Decision* (Part II-B) (construction of sections 215a and 36(b)(2) when banks have offices in more than one state); *OCC Midlantic Decision* (Part II) (same). However, PNC and Midlantic are also "insured banks with different home States" under 12 U.S.C. 1831u(a), since their main offices are in different states. Thus, this transaction can come within the scope of either merger authority. This raises the question whether the Riegle-Neal merger authority applies in circumstances such as these, where the banks are located in the same state for section 215a purposes and the merger could occur under section 215a. Except for one provision that is not relevant to this transaction, <NOTE: In section 1831u(d)(2), Congress provided:

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). This provision suggests that, once a resulting bank has been formed in a Riegle-Neal interstate merger transaction, that bank's subsequent acquisition of branches by merger with another bank in one of the states where it has branches cannot be another Riegle-Neal merger but must be a merger under the law that would have governed the resulting bank's predecessor bank in that state (*i.e.*, "any bank involved in the [prior Riegle-Neal merger] transaction . . . if such bank had not been a party to the merger transaction"). Thus, here if either PNC or Midlantic had become interstate banks in a Riegle-Neal interstate merger transaction, then the proposed merger here could not be another Riegle-Neal merger. On the other hand, the statute's language is permissive, not mandatory ("may establish, acquire, or operate" rather than "must" or "may only"). This may indicate that Congress intended this provision to be an additional authority, *i.e.*, one that adds another provision for acquiring branches without curtailing the authority to acquire branches in another, subsequent Riegle-Neal merger. We need not determine this matter in this transaction, since neither PNC nor Midlantic became interstate banks in an earlier Riegle-Neal interstate merger transaction.> nothing in either statute suggests Congress did not intend that both could apply to a proposed merger, if the merger fell within both statutes' terms and was consistent with other applicable laws, such as 12 U.S.C. 36(b) & 36(e). The OCC previously analyzed the statutes and legislative history in this regard and determined that, if the banks were located within the same state for section 215a purposes, then they could merge under section 215a, even when they had different home states. *See* 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); 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).

Therefore, while the proposed merger would have been authorized under 12 U.S.C. 215a, it also comes within the scope of 12 U.S.C. 1831u. The applicants elected to apply under section 1831u. In evaluating an application for an interstate merger transaction under section 1831u during the early opt-in period, the OCC must determine, first, whether each of the home states of the merging banks (here, Pennsylvania and New Jersey) has a law that meets the provisions of subsection 1831u(a)(3)(A), and second, whether

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

B. Both Pennsylvania and New Jersey have laws that meet the provisions of 12 U.S.C. 1831u(a)(3)(A).

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

Pennsylvania adopted legislation, effective July 6, 1995, expressly permitting mergers with out-of-state banks:

(a) Upon compliance with the requirements of this chapter one or more institutions and one or more national banks and interstate banks, without regard to whether any such interstate bank maintains branches in this Commonwealth at the time of a merger or consolidation, may merge or consolidate into a national bank and, with the approval by the department, may merge into an institution or consolidate into a new institution

7 P.S. 1602(a). *See also* 7 P.S. 103(a)(x) (purposes of 1995 amendments to authorize institutions to participate fully in interstate banking and branching) and 901 & 904 (provisions under which out-of-state banks may establish and maintain branches in Pennsylvania). <NOTE: An "institution" for purposes of this Pennsylvania law includes a Pennsylvania state bank, a Pennsylvania state bank and trust company, a Pennsylvania state trust company, and a Pennsylvania state savings bank. 7 P.S. 1601 and 102(f), (g), (q), (x) & (dd). An "interstate bank" is "a banking institution existing under the laws of another state, the District of Columbia or a territory or possession of the United States and authorized to engage in the business of receiving demand deposits or a national bank having a head office in another state, the District of Columbia or a territory or possession of the United States and authorized to engage in the business of receiving demand deposits, which lawfully maintains one or more branch offices in this Commonwealth." 7 P.S. 102(hh).>