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

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Washington, D.C. 20219

**Corporate Decision #97-33  
June 1997**

**DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY  
ON THE APPLICATIONS OF  
BANK ONE WISCONSIN TRUST COMPANY, N.A., MILWAUKEE, WISCONSIN,  
BANK ONE ALPHA INTERIM TRUST COMPANY, N.A.,  
MILWAUKEE, WISCONSIN, AND  
BANK ONE TRUST COMPANY, NATIONAL ASSOCIATION, COLUMBUS, OHIO**

**June 1, 1997**

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**I. INTRODUCTION**

These are applications to merge two of a holding company's trust bank subsidiaries, using an interim national bank to effect the corporate reorganization. On February 21, 1997, applications were filed with the Office of the Comptroller of the Currency ("OCC") for approval to charter an interim national bank, Bank One Alpha Interim Trust Company, National Association, Milwaukee, Wisconsin ("Wisconsin Interim"), under 12 U.S.C. § 21 ("the Charter Application") and to merge Bank One Wisconsin Trust Company, National Association, Milwaukee, Wisconsin ("Wisconsin Trust") with and into Wisconsin Interim under 12 U.S.C. § 215a ("the Interim Merger").<sup>1</sup> Wisconsin Trust is not insured and is limited to exercising fiduciary powers. It currently has its main office in Milwaukee and operates nine nonbranch trust offices at nine other locations in Wisconsin. Wisconsin Interim will be insured. In the Charter Application, fiduciary powers were requested for Wisconsin Interim under 12 U.S.C. § 92a. After the Interim Merger, Wisconsin Interim will succeed to Wisconsin Trust's fiduciary appointments and activities, and it will have its main office in Milwaukee and the nine nonbranch trust offices.

Also on February 21, 1997, an Application was filed with the OCC for approval immediately after the Interim Merger, to merge Wisconsin Interim with and into Bank One Trust

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<sup>1</sup> The merger of Wisconsin Trust into Wisconsin Interim also requires the approval of the Federal Deposit Insurance Corporation ("FDIC") under the Bank Merger Act. See 12 U.S.C. § 1828(c)(1)(A). That approval was granted on May 9, 1997.

Company, National Association, Columbus, Ohio ("Bank One Trust") under the charter and title of the latter, under 12 U.S.C. §§ 215a-1, 1828(c) & 1831u(a) ("the Interstate Merger"). Bank One Trust is an insured national bank. It has its main office in Columbus and operates nine nonbranch trust offices in Ohio. In the Interstate Merger, OCC approval is also requested for the resulting bank to retain Bank One Trust's main office as the main office of the resulting bank under 12 U.S.C. § 1831u(d)(1) and to retain Wisconsin Interim/Wisconsin Trust's main office in Milwaukee as a branch after the merger under 12 U.S.C. §§ 36(d) & 1831u(d)(1). Bank One Trust also will continue to operate the nine existing nonbranch trust offices in Wisconsin and will succeed to the fiduciary appointments and activities of Wisconsin Interim/Wisconsin Trust.

All three banks are (or in the case of Wisconsin Interim, will be) subsidiaries of Banc One Corporation, a multistate bank holding company headquartered in Columbus, Ohio. In the proposed transactions, two of the holding company's trust bank subsidiaries will be combined into one bank. As of December 31, 1996, Bank One Trust had approximately \$553 million in assets and \$513 million in deposits, and Wisconsin Trust had approximately \$43 million in assets and does not have deposits.

Bank One Trust published notice of the applications in general circulation newspapers in Columbus and Milwaukee on February 21st, March 7th, and March 24th. It also sent a copy of the applications to the Wisconsin Department of Financial Institutions. In addition, because of certain issues raised by the applications, the OCC published notice of the applications in the Federal Register and invited comment. See 62 Fed. Reg. 19,172 (April 18, 1997). The notice and comments received are discussed in Part II-C below.

## **II. LEGAL AUTHORITY**

### **A. Wisconsin Interim may be Chartered, and Wisconsin Trust may Merge into it.**

The National Bank Act authorizes the chartering of national banks, including those whose operations are limited to those of a trust company and activities related thereto. See, e.g., 12 U.S.C. § 21, 26 & 27. OCC regulations set out special requirements and procedures for chartering a national bank that is an "interim bank" -- *i.e.*, a national bank that does not operate independently but exists solely as a vehicle for a business combination.<sup>2</sup> The transaction for which Wisconsin Interim is being established (the Interim Merger and the Interstate Merger) constitutes a business combination. The requirements of section 5.33, with respect to interim banks, as well as those in 12 U.S.C. §§ 21, 26 and 27 for chartering a new bank, are satisfied. Accordingly, the formation of Wisconsin Interim is authorized.

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<sup>2</sup> See 61 Fed. Reg. 60,342, 60,372-73 (November 27, 1996) (effective December 31, 1996) (to be codified at 12 C.F.R. § 5.33(e)(4)). A "business combination" includes mergers between affiliated national banks. Id. at 60,372 (to be codified at 12 C.F.R. § 5.33(d)(1) & (d)(2)). In addition, interim federally-chartered depository institutions that are chartered by the appropriate federal banking agency and will not open for business, such as Wisconsin Interim, are FDIC-insured upon issuance of the institution's charter by the agency. See 12 U.S.C. § 1815(a)(2). If the interim bank will be acquired by a bank holding company, the holding company also must meet applicable requirements.

Wisconsin Trust may merge into Wisconsin Interim under 12 U.S.C. § 215a. Under section 215a, a national bank may merge with another national bank “located within the same State.” 12 U.S.C. § 215a(a). Wisconsin Trust and Wisconsin Interim are both located in Wisconsin; thus their merger is authorized under section 215a. Wisconsin Interim will succeed to the fiduciary appointments and activities of Wisconsin Trust through the merger by operation of the statute. See 12 U.S.C. § 215a(e). Wisconsin Interim also will continue the main office of Wisconsin Trust in Milwaukee and the nine trust offices.<sup>3</sup>

**B. The Interstate Merger is Authorized, and the Resulting Bank may Retain the Milwaukee Office as a Branch under 12 U.S.C. §§ 215a-1, 1831u & 36(d) (the Riegle-Neal Act).**

**1. The interstate merger is authorized under sections 215a-1 & 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.

12 U.S.C. § 1831u(a)(1). 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 the Interstate Merger, the home

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<sup>3</sup> At the nine trust offices, Wisconsin Trust does not receive deposits, pay checks, or lend money; and so these locations are not “branches” for purposes of the McFadden Act. See 12 U.S.C. § 36(j). Thus, Wisconsin Trust originally established them and currently operates them without McFadden Act considerations, and so similarly may Wisconsin Interim. We note that, if they had been branches, Wisconsin Interim would have been authorized to retain them under 12 U.S.C. § 36(b)(2)(A).

states of the banks are Ohio and Wisconsin; neither state has opted out. Accordingly, the Interstate Merger may be approved under 12 U.S.C. §§ 215a-1 & 1831u(a).<sup>4</sup>

In addition, an application 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.

Bank One Trust's Interstate Merger satisfies all these conditions to the extent applicable. First, 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 the Interstate Merger, Bank One Trust is acquiring by merger a bank (Wisconsin Interim/Wisconsin Trust) in the host state of Wisconsin. Wisconsin has not yet enacted legislation with respect to the interstate bank mergers and branching provisions of the Riegle-Neal Act, and so it presently does not have an age requirement for interstate mergers between banks.<sup>5</sup> Moreover, even if there were an applicable age requirement, Wisconsin Interim would meet it. Under the Riegle-Neal Act, a "shell bank" such as Wisconsin Interim is deemed to have the age of its target (here, Wisconsin Trust). See 12 U.S.C. § 1831u(a)(6).<sup>6</sup> Wisconsin Trust was established in 1979, and so it meets the maximum five-year age limit the Riegle-Neal Act permits states to impose. Thus,

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<sup>4</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>5</sup> Wisconsin did enact a statute responding to the interstate *banking* provisions of the Riegle-Neal Act, Riegle-Neal Act § 101 (amending section 3(d) of the Bank Holding Company Act). See Wis. Stat. § 221.0901.

<sup>6</sup> Section 1831u(a)(6) provides:

(6) Shell Banks. -- For purposes of this subsection, 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 assets of, an existing bank or branch shall be deemed to have been in existence for the same period of time as the bank or branch to be acquired.

12 U.S.C. § 1831u(a)(6). Wisconsin Interim is being chartered solely for the Interim Merger with Wisconsin Trust and will not open for business prior to that merger. And immediately afterwards it will merge into Bank One Trust in the Interstate Merger.

the merger of Wisconsin Interim/Wisconsin Trust into Bank One Trust satisfies the Riegle-Neal Act's age requirement.

Second, the proposal meets the applicable filing requirements. 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> Wisconsin has not yet enacted legislation with respect to the interstate bank mergers and branching provisions of the Riegle-Neal Act, and so it presently does not have filing requirements for interstate mergers between banks. Bank One Trust submitted a copy of its OCC Merger Application to the Wisconsin state bank supervisor, as required by section 1831u(b)(1)(ii). Thus, the merger of Wisconsin Interim/Wisconsin Trust into Bank One Trust satisfies the Riegle-Neal Act's filing requirement.

Third, 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). Bank One Trust, Wisconsin Interim, and Wisconsin Trust are affiliates; thus section 1831u(b)(2) is not applicable to this merger.

Fourth, the proposed interstate merger transaction also does not raise issues with respect to the special community reinvestment compliance provisions of the Riegle-Neal Act, 12 U.S.C. § 1831u(b)(3). This provision does not apply to mergers between affiliated banks. Bank One Trust and Wisconsin Interim/Wisconsin Trust are affiliates. Moreover, Bank One Trust is a special purpose bank under 12 C.F.R. § 25.11(c)(3), and Wisconsin Trust is not an insured institution; and so the Community Reinvestment Act does not apply to them.

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<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) ("OCC Wells Fargo Decision") (at pages 4-5, 12-14 & note 11).

Fifth, the proposal 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, the banks satisfied all regulatory and supervisory requirements relating to adequate capitalization. Currently, each bank is at least satisfactorily managed. The OCC has also determined that, following the merger, Bank One Trust 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 Bank One Trust and Wisconsin Interim/Wisconsin Trust is legally permissible under section 1831u.

**2. The resulting bank may retain the Milwaukee office as a branch under sections 36(d) & 1831u(d)(1).**

The Applicants have requested that, upon the completion of the Interstate Merger, Bank One Trust (as the resulting bank in the merger) be permitted to retain and continue to operate its existing main office in Columbus as the main office of the resulting bank and to retain and continue to operate the main office of Wisconsin Interim/Wisconsin Trust in Milwaukee as a branch. 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. § 36(d) (as added by Riegle-Neal Act § 102(b)(1)(B)). Therefore, Bank One Trust, the resulting bank in this interstate merger transaction, may retain and continue to operate, as its main office, the main office in Columbus and may retain and continue to operate, as a branch, the

former main office of Wisconsin Interim/Wisconsin Trust in Milwaukee, under 12 U.S.C. §§ 36(d) & 1831u(d)(1).

Bank One Trust will also continue to operate Wisconsin Interim/Wisconsin Trust's nine existing trust offices in Wisconsin. At those offices, Wisconsin Trust did not, and Bank One Trust will not, receive deposits, pay checks, or lend money; and so these locations are not "branches" for purposes of the McFadden Act. See 12 U.S.C. § 36(j). See also Clarke v. Securities Industry Association, 479 U.S. 388 (1987) (only offices that engage in section 36(j) activities are subject to section 36's branching limits, and section 81 is read in conjunction with section 36); OCC Interpretive Letter No. 695 (December 8, 1995) (trust offices are not branches if they do not engage in section 36(j) activities). Wisconsin Trust originally established the trust offices, and has operated them for many years, without McFadden Act considerations, and so similarly may Bank One Trust, as discussed further below. We note that, if they had been branches, Bank One Trust would have been authorized to retain them under 12 U.S.C. §§ 36(d) & 1831u(d)(1). The only office in Wisconsin at which Bank One Trust will receive deposits, pay checks, or make loans is its branch in Milwaukee.<sup>8</sup>

Moreover, at its branch in Milwaukee and its nine trust offices in Wisconsin, as well as its office in Ohio, Bank One Trust is authorized to engage in all activities permissible for national banks, including fiduciary activities, subject to the limits in its Articles of Association. 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). Cf. 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. Bank One Trust may Exercise Fiduciary Powers at its Branch and Trust Offices in Wisconsin under Federal Law, notwithstanding Wisconsin Law that Restricts Out-of-State National Banks from Having Offices to Engage in Fiduciary Business.**

Thus, Bank One Trust is authorized to retain and operate Wisconsin Trust's main office in Milwaukee as a branch under the Riegle-Neal Act. See 12 U.S.C. §§ 36(d) & 1831u(d)(1). And, also under provisions added in the Riegle-Neal Act, that branch generally is treated, with respect to the application of state law, like a national bank whose main office is in Wisconsin. See 12 U.S.C. § 36(f)(2). Bank One Trust is authorized to engage in fiduciary activities under 12 U.S.C. § 92a. Thus, under the Riegle-Neal Act, at its branch in Wisconsin, it may engage in fiduciary activities, subject to Wisconsin state law to the same extent as such state law would apply to a national bank whose main office was in Wisconsin.

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<sup>8</sup> Bank One Trust engages in certain deposit-taking and lending activities related to its fiduciary business. In Ohio it conducts these activities only at its main office, not at its nonbranch trust offices. Similarly, in Wisconsin it plans to conduct these activities only at its branch in Milwaukee, not at its nonbranch trust offices.

The authorization to engage in fiduciary activities in Wisconsin under the Riegle-Neal Act also extends, in the case of Bank One Trust, to the nonbranch trust offices. Once Bank One Trust has the branch in Milwaukee under the Riegle-Neal Act, then under 12 U.S.C. § 36(f)(2) the authority of state law to limit its right to have nonbranch offices in Wisconsin is no greater than it would be with respect to a national bank whose main office was in Wisconsin (assuming *arguendo* that a state could limit an in-state national bank's trust offices at all). Wisconsin Trust, a national bank, operated the nonbranch trust offices in Wisconsin for years. Other banks in Wisconsin operate nonbranch trust offices. We also note that Wisconsin state-chartered trust company banks are permitted to have trust service offices. See Wisc. Stat. § 223.07. Clearly, a national bank whose main office was in Wisconsin could operate nonbranch trust offices in Wisconsin. Thus, since it will have a branch in Wisconsin, Bank One Trust need not rely, in Wisconsin, solely on 12 U.S.C. § 92a (as interpreted in OCC Letter No. 695) for authority to have trust offices in another state. Once it has the branch in Milwaukee, under section 36(f)(2) Bank One Trust may operate trust offices in Wisconsin from that branch just as a national bank whose main office was in Milwaukee could operate trust offices in Wisconsin from that main office.

However, Wisconsin has a statute which can be interpreted in such a way that, if it were applied to Bank One Trust's proposal, it would prohibit Bank One Trust from maintaining the branch in Milwaukee and the nonbranch trust offices for the conduct of business as a fiduciary. See Wisc. Stat. § 223.12.<sup>9</sup> This raised the question whether the state law conflicted with the

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<sup>9</sup> Section 223.12 provides in part:

(1) Exception from qualification to do business. Any foreign corporation may act in this state as trustee, executor, administrator, guardian, or in any other like fiduciary capacity, whether the appointment is by will, deed, court order or otherwise, without complying with any laws of this state relating to the qualification of corporations organized under the laws of this state to conduct a trust business or laws relating to the qualification of foreign corporations other than this section, only if the foreign corporation meets all of the following requirements:

(a) The foreign corporation is authorized by the laws of the state of its organization to act as a fiduciary in that state.

(b) The foreign corporation is organized under the laws of a state that permits [Wisconsin institutions to act in a fiduciary capacity under no more restrictive conditions].

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(3) Restrictions on in-state presence. A foreign corporation acting under sub. (1) may not establish or maintain in this state a place of business or branch office for the conduct of business as a fiduciary, but may establish and maintain in this state one or more representative offices if those offices do not act in a fiduciary capacity.

Wisc. Stat. § 223.12 (emphasis added). Bank One Trust argues this provision does not apply to out-of-state national banks since the statute's own terms refer to a "foreign corporation" as an entity organized under the laws of a state, but national banks are not organized under the laws of a state but under the laws of the United States. In further support of this position, the bank points to Wisc. Stat. § 223.10 which lists the organizations which Wisconsin courts may appoint as fiduciaries and includes "a national bank" without any limitation to national banks located in Wisconsin or whose main office is in Wisconsin and refers separately to foreign corporations operating under section 223.12. However, the Division of Banking of the Wisconsin Department of Financial Institutions disagreed with the bank's interpretation and advised the bank that it believed the statute was intended to apply to all foreign trust corporations, including out-of-state national banks, and that it was preparing draft legislation to clarify the statute in that manner. See Letter from Michael J. Mach, Administrator, Division of Banking, to Thomas G. Boyer, State

authority of out-of-state national banks to conduct fiduciary business in Wisconsin under 12 U.S.C. § 92a and, in the case of Bank One Trust, under the Riegle-Neal Act. The OCC elected to publish notice of the application in the Federal Register and requested comment. See 62 Fed. Reg. 19,172 (April 18, 1997).

The OCC received 12 comment letters. Six commenters agreed with the OCC's analysis of the interstate fiduciary authority of national banks under 12 U.S.C. § 92a, as set out in OCC Letter No. 695, and supported approval of Bank One Trust's proposal on that basis.<sup>10</sup> Three commenters, including the Wisconsin Division of Banking, disagreed with Letter No. 695, but expressed the view that Bank One Trust's proposal was authorized under the Riegle-Neal Act, and believed it should be approved under the Riegle-Neal Act.<sup>11</sup> One commenter also expressed the view that Bank One Trust's proposal was authorized under the Riegle-Neal Act, and believed it should be approved under the Riegle-Neal Act, but did not address Letter No. 695.<sup>12</sup> Two other commenters disagreed with Letter No. 695, but did not address the authority for the applications under the Riegle-Neal Act.<sup>13</sup>

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General Counsel (Wisconsin/Illinois), Banc One Wisconsin Corporation (January 16, 1997). In its recent comment letter (discussed further below and in the text), the Division of Banking maintains that its position in the January 16th letter applied only to an earlier proposal of Bank One Trust in which the merger with Wisconsin Trust, and subsequent operation of offices in Wisconsin, would have occurred under authority other than the Riegle-Neal Act, and does not apply to the current proposal under the Riegle-Neal Act. In fact, the Division finds the current proposal "permitted under Wisconsin law." However, if out-of-state national banks are covered by section 223.12 (as the Division's January 16th letter asserted), then logically, as a threshold matter, Bank One Trust, an out-of-state national bank, is covered, no matter how it obtains the offices in Wisconsin, unless some other provision in Wisconsin law or federal law provides otherwise. See note 14 below. In view of the Division's expressed position on the scope of section 223.12 as a matter of state law in the January 16th letter, for purposes of this discussion we will treat out-of-state national banks as within the literal scope of the state law, with the effect that such national banks would be prevented from having branches or offices in Wisconsin for the conduct of business as a fiduciary.

<sup>10</sup> These commenters were: the American Bankers Association, Bank of America National Trust and Savings Association, Norwest Corporation, State Street Bank and Trust Company, Wells Fargo & Co., and Goodwin, Procter & Hoar LLP, a law firm writing on behalf of several national bank clients.

<sup>11</sup> These commenters were: the Wisconsin Division of Banking, the Conference of State Bank Supervisors ("CSBS"), and the Texas Commissioner of Banking. The Wisconsin Division of Banking, while stating that the application pending before the OCC is permitted under both federal and Wisconsin law after June 1, 1997, expressly referred only to offering trust services at the branch and did not mention the nine trust offices. The CSBS' letter simply stated that the proposed merger will be authorized under the Riegle-Neal Act and permissible under Wisconsin law, but did not address the conduct of fiduciary business at either the branch or the trust offices. The Texas Commissioner's letter asserted that the nine trust offices were branches, and that Bank One Trust can retain them under the Riegle-Neal Act. However, as noted above, the nine offices have not been branches of Wisconsin Trust and will not be branches of Bank One Trust. None of the letters explains how the transaction is permissible under Wisconsin law.

<sup>12</sup> This commenter was the Ohio Division of Financial Institutions.

<sup>13</sup> These commenters were: the Illinois Office of Banks and Real Estate and the Virginia Bureau of Financial Institutions.

The Wisconsin Division of Banking's letter indicates that it now believes the proposed transaction will be permitted after June 1, 1997, under the provisions of the Riegle-Neal Act and that it will be permitted under Wisconsin law. See Letter from Michael J. Mach, Administrator, Division of Banking, to Richard Erb, Licensing Manager, OCC Multinational Banking Department (May 21, 1997). However, the Division of Banking's letter acknowledges only that Bank One Trust "will have the ability to operate a branch in Wisconsin, and will be able to offer trust services at that branch . . ." May 21st Letter at page 2 (emphasis added). The letter does not address the impact of Wisconsin law on Bank One Trust's nonbranch trust offices, however. Moreover, the meaning of Wisconsin law (as a matter of state law, without consideration of the impact of federal law on the applicability of state law) may be ambiguous in this regard.<sup>14</sup> Thus, it is still necessary to consider federal law.

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 law may not impair the ability of national banks to exercise powers granted to them under federal law. See, e.g., 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 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) (pages 63-68) (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. \_\_\_, 134 L.Ed.2d 237, 245 (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 a clear intent to preempt, courts will find contrary state laws to be preempted. Id. at 244, citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977), Fidelity Fed. Sav. & Loan Assn v. De la Cuesta, 458 U.S. 141, 152-53 (1982), and other cases.

In the Riegle-Neal Act, Congress' intent to preempt state law is explicit:

(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]

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<sup>14</sup> Wisconsin has not yet enacted a statute responding to the provisions of the Riegle-Neal Act on interstate bank mergers and branching. If the state had enacted such legislation allowing interstate mergers, then it would have been possible to argue that such later state statute superseded section 223.12 for branches and offices resulting from interstate mergers, and so Bank One Trust's proposal was lawful even as a matter of state law. (Indeed, the Wisconsin letter and the CSBS' comment letter claim, without explanation, that the Bank One Trust proposal is permissible under Wisconsin law.) However, without that state action or a change in the Wisconsin Division of Banking's interpretation of the scope of section 223.12, section 223.12 stands as a matter of state law, and then whether it applies to a national bank, or is preempted, is considered as a matter of federal law. See also discussion in note 9.

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) (emphasis added). The Riegle-Neal Act explicitly permits a resulting national bank in interstate mergers to retain and operate branches in the host state. See 12 U.S.C. §§ 36(d) & 1831u(d)(1). And in the Riegle-Neal Act Congress added provisions to section 36 to explicitly establish that the host state's laws apply to a branch in the host state of an out-of-state national bank "to the same extent as such laws would apply if the branch were a national bank the main office of which is in such State." 12 U.S.C. § 36(f)(2).<sup>15</sup>

Accordingly, the Riegle-Neal Act clearly preempts Wisc. Stat. § 223.12 with respect to Bank One Trust's fiduciary business in Wisconsin after the proposed Riegle-Neal interstate merger transaction. This includes Bank One's conduct of fiduciary business at both the branch in Milwaukee and at the nonbranch trust offices, as explained above at pages 7-8. The Riegle-Neal Act provides that the transaction may occur and that afterward Bank One Trust's business in Wisconsin is treated like that of a national bank whose main office is in Wisconsin. To apply the Wisconsin statute to Bank One Trust, and thus to treat Bank One Trust differently than a national bank whose main office is in Wisconsin, directly conflicts with the Riegle-Neal Act.

In addition, 12 U.S.C. § 92a, separately and independently, also would authorize the operation of offices in Wisconsin. While the OCC believes Bank One Trust's fiduciary activities in Wisconsin -- at both the branch and the trust offices -- are authorized under, and state law preempted by, the Riegle-Neal Act, as set out above, a short explanation of the permissibility of fiduciary activities at the trust offices in Wisconsin under section 92a is called for because of the ambiguities in the Wisconsin Division of Banking's May 21st Letter. In the letter, the Division directly addressed Bank One Trust's conduct of fiduciary business only at the branch in Milwaukee; it did not explicitly mention the trust offices. As set out above, the OCC believes these trust offices are authorized under the Riegle-Neal Act; but even if they were not, section 92a itself authorizes Bank One Trust to have trust offices in Wisconsin, as discussed below. However, because the state did not object to this transaction and the transaction is authorized under the Riegle-Neal Act, we will present only a summary of the analysis under section 92a. The analysis is set out in detail in Letter No. 695.<sup>16</sup>

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<sup>15</sup> The Riegle-Neal Act does permit the states to impose certain requirements on interstate merger transactions involving national banks (i.e., age limits and filing requirements). But that only underscores the general preemptive scope of section 1831u(a); these state authorities exist only because Congress specifically granted them. See OCC Wells Fargo Decision (pages 4-5) (further discussion of the limited role of state law in the Riegle-Neal framework).

<sup>16</sup> Each of the major points raised by the commenters is addressed in the summary of the analysis, and the summary cross-references to the portions of Letter No. 695 that contain more detailed analysis of each responsive point. Moreover, when 12 C.F.R. Part 9 was revised, the Notice of Proposed Rulemaking specifically sought comment on the interstate fiduciary activities of national banks and Letter No. 695. See 60 Fed. Reg. 66163, 66171-72 (December 21, 1995). Many comments were received on that topic. In the final rule, the OCC added language to the revised Part 9 to add to the regulation the interstate framework of section 92a and Letter No. 695. See 61 Fed. Reg. 68543, 68545 (preamble), 68554 (regulatory text) (effective January 29, 1997) (to be codified at 12 C.F.R. § 9.2(g)) (fiduciary powers of out-of-state national banks are the same as those of in-state national banks). The

The authority of a national bank, such as Bank One Trust, to conduct fiduciary activities at a trust office in another state rests primarily on three considerations. First, a trust office at which a bank engages only in fiduciary activities and does not engage in banking activities (*i.e.*, does not receive deposits, pay checks, or make loans) is not a “branch” within the meaning of 12 U.S.C. § 36(j). Since it is not a branch, it is not subject to the branching limits of section 36, and so a national bank may establish one at any location, including locations in other states, just as national banks may establish brokerage offices at any location without regard to branching limits. See *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987) (permitting brokerage offices) (only offices that engage in section 36(j) activities are subject to section 36's branching limits, and section 81 is read in conjunction with section 36). See also OCC Letter No. 695 (pages 4-5).

Second, section 92a does not impose a geographic limit of its own on the locations at which a national bank may have offices to engage in fiduciary activities or the location of customers to whom the bank may offer fiduciary services. Thus, were it not for the reference to state law in section 92a(a), there would be no possible basis for geographic limitation at all, and states would have no more power to prohibit a national bank from offering these services than they have with respect to other national bank activities. See OCC Letter No. 695 (page 5 & note 2).

Third, while section 92a(a) refers to state law and provides that national banks may be authorized to engage in fiduciary activities “when not in contravention of State or local law,” section 92a(b) specifically limits the power granted to the states in this clause. Under section 92a(b), if a state permits its own state banks, trust companies, or other corporations that compete with national banks to engage in fiduciary activities, then national banks may exercise such powers, even if state law purports to limit or prohibit national banks. The statutory language, legislative history, and circumstances surrounding the adoption of the language make it absolutely clear that, if a state permits its own state institutions to exercise certain fiduciary powers, then national banks are authorized to exercise those fiduciary powers in that state, and the state may not limit them. Section 92a does not limit the application of this principle only to national banks whose main office is in the state in question. There is no basis in the statutory language to apply section 92a in a different manner to a national bank's proposed trust office or other proposed fiduciary business in a state depending upon whether the national bank also has its main office in that state or not.

Therefore, section 92a authorizes a national bank that has been granted fiduciary powers to exercise those powers in any state, including having trust offices in any state, except that the bank may not offer such services in a state that prohibits it and in which the state does not permit its state banks, state trust companies or other corporations that compete with national banks to offer such services. An out-of-state national bank has the same authority under section 92a to offer fiduciary services in a state that in-state national banks have. The state has the authority to

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interstate fiduciary activities of national banks are also recognized in the OCC's Rules, Policies, and Procedures for Corporate Activities. See 61 Fed. Reg. 60342, 60347 (preamble), 60371 (regulatory text) (effective December 31, 1996) (to be codified at 12 C.F.R. § 5.26(e)(5) (procedure for bank with fiduciary powers to notify OCC upon commencing fiduciary activities in an additional state).

restrict national banks from exercising these powers only if it restricts these powers for its own state institutions. State laws prohibiting out-of-state fiduciaries from conducting fiduciary business or having fiduciary offices in the state (such as the Wisconsin statute here), or restricting these services, or conducting such services only with state approval cannot apply to limit the section 92a authority of national banks, if the state permits its own banks to exercise fiduciary powers. Only state laws that bar any or all fiduciary activities to all corporate fiduciaries, in particular including the state's own state banks, state trust companies, and other corporations, can limit out-of-state national banks under section 92a. Thus, a national bank with its main office in one state (such as Bank One Trust) may conduct fiduciary business in that state and other states (such as Wisconsin), depending upon -- with respect to each state -- whether each state allows its own institutions to engage in fiduciary business. See OCC Letter No. 695 (pages 6-20).

In summary, Bank One Trust is authorized to engage in fiduciary activities at the proposed branch in Milwaukee and the other trust offices in Wisconsin under the Riegle-Neal Act. In addition, Bank One Trust would be authorized to engage in fiduciary business in Wisconsin under 12 U.S.C. § 92a, including fiduciary business conducted at the nonbranch trust offices. The Wisconsin statute that would prohibit Bank One Trust from having a branch or other office in Wisconsin for the conduct of fiduciary business is preempted under either (or both) federal authority.

### **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 needs of the community to be served. For the reasons stated below, we find the Interstate Merger may be approved under section 1828(c). (The Interim Merger was subject to approval by the FDIC under the Bank Merger Act, see note 1 above.)

#### **1. Competitive Analysis**

Since the 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 the banks are presently satisfactory. Bank One Trust expects to achieve efficiencies by operating the fiduciary business in Wisconsin and Ohio in one institution rather than a separate corporate entity for each state. Under an existing management agreement, Bank One Trust already has assumed responsibility for a substantial portion of Wisconsin Trust's back office operations. And Wisconsin Trust's product offerings

are substantially similar to those of Bank One Trust. The banks anticipate little delay or expense in combining their operating and back office systems and product offerings after the merger. The geographic diversification of its operations will also strengthen the combined bank. The future prospects of the existing institutions, individually and combined, are favorable. We find the financial and managerial resources factor is consistent with approval of the Interstate Merger.

**3. Convenience and needs**

The resulting bank will help to meet the convenience and needs of the communities to be served. Bank One Trust will continue to serve its fiduciary customers in Ohio and will add Wisconsin Trust's offices and customers. The banks currently offer a similar range of fiduciary products and services, and there will be no reductions in the products or services as a result of the merger. No branch or trust office closings are contemplated as a result of this merger. 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 Interstate Merger.

**B. The Community Reinvestment Act**

The Community Reinvestment Act ("CRA") requires the OCC to take into account the applicants' record of helping to meet the credit needs of their entire communities, including low- and moderate-income neighborhoods, when evaluating certain applications. See 12 U.S.C. § 2903. However, Bank One Trust is a special purpose bank under 12 C.F.R. § 25.11(c)(3), and Wisconsin Trust is not an insured institution; and so the CRA does not apply to them.

**IV. CONCLUSION AND APPROVAL**

For the reasons set forth above, including the representations and commitments made by the applicants, we find that the Charter Application, the Interim Merger, and the Interstate Merger are all legally authorized, the resulting bank (Bank One Trust) is authorized to retain and operate

the offices of the banks, and the Interstate Merger meets the other statutory criteria for approval. Accordingly, these applications are hereby approved.

\_\_\_\_\_/s/\_\_\_\_\_  
Julie L. Williams  
Chief Counsel

\_\_\_\_06-01-97\_\_\_\_  
Date

Application Control Number: 97-ML-02-0005