



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

Washington, D.C. 20219

**Corporate Decision #97-52
July 1997**

**DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY
ON THE APPLICATIONS OF
BANK OF AMERICA TRUST COMPANY OF FLORIDA, N.A., BOCA RATON, FLORIDA,
BANK OF AMERICA FLORIDA INTERIM NATIONAL BANK, BOCA RATON, FLORIDA,
AND BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,
SAN FRANCISCO, CALIFORNIA**

June 25, 1997

I. INTRODUCTION

These are applications to merge two of a holding company's national bank subsidiaries, using an interim national bank to effect the corporate reorganization. On May 13, 1997, applications were filed with the Office of the Comptroller of the Currency ("OCC") for approval to charter an interim national bank, Bank of America Florida Interim National Bank, Boca Raton, Florida ("Florida Interim"), under 12 U.S.C. § 21 ("the Charter Application") and to merge Bank of America Trust Company of Florida, National Association, Boca Raton, Florida ("BofA-Florida") with and into Florida Interim under 12 U.S.C. § 215a ("the Interim Merger").¹ BofA-Florida is not insured and is limited to exercising fiduciary powers. It currently has its main office in Boca Raton and operates three nonbranch trust representative offices in Sarasota, Stuart, and Jacksonville, Florida. Florida Interim will be insured. In the Charter Application, fiduciary powers were requested for Florida Interim under 12 U.S.C. § 92a. After the Interim Merger, Florida Interim will succeed to BofA-Florida's fiduciary appointments and activities, and it will have its main office in Boca Raton and the three nonbranch trust representative offices.

Also on May 13, 1997, an application was filed with the OCC for approval, immediately after the Interim Merger, to merge Florida Interim with and into Bank of America National Trust & Savings Association, San Francisco, California ("BANTSA") under the charter and title of the latter, under 12 U.S.C. §§ 215a-1, 1828(c) & 1831u(a) ("the Interstate Merger"). BANTSA is

¹ The merger of BofA-Florida into Florida 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 June 13, 1997.

an insured national bank. It has its main office in San Francisco and operates branches in California, Alaska, Arizona, Idaho, Nevada, New Mexico, New York, Oregon, and Washington. In the Interstate Merger, OCC approval is also requested for the resulting bank to retain BANTSA's main office as the main office of the resulting bank under 12 U.S.C. § 1831u(d)(1) and to retain BANTSA's branches and Florida Interim/BofA-Florida's main office in Boca Raton as branches after the merger under 12 U.S.C. §§ 36(d) & 1831u(d)(1). BANTSA also will continue to operate Florida Interim/BofA-Florida's three nonbranch trust representative offices in Florida and will succeed to the fiduciary appointments and activities of Florida Interim/BofA-Florida.

All three banks are (or in the case of Florida Interim, will be) subsidiaries of BankAmerica Corporation ("BAC"), a multistate bank holding company headquartered in San Francisco, California. In the proposed transactions, two of the holding company's national bank subsidiaries will be combined into one bank.

II. LEGAL AUTHORITY

A. Florida Interim may be Chartered, and BofA-Florida 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.² The transaction for which Florida 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 and in 12 U.S.C. § 92a for fiduciary powers, are satisfied. Accordingly, the formation of Florida Interim is authorized.

BofA-Florida may merge into Florida 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). BofA-Florida and Florida Interim are both located in Florida; thus their merger is authorized under section 215a. Florida Interim will succeed to the fiduciary appointments and activities of BofA-Florida through the merger by operation of the statute. See

² 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 Florida 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.

12 U.S.C. § 215a(e). Florida Interim also will continue the main office of BofA-Florida in Boca Raton and the three trust representative offices.³

B. The Interstate Merger is Authorized, and the Resulting Bank may Retain the Boca Raton 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 states of the banks are California and Florida; neither state has opted out. Accordingly, the Interstate Merger may be approved under 12 U.S.C. §§ 215a-1 & 1831u(a).⁴

³ At the three trust offices, BofA-Florida 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, BofA-Florida originally established them and currently operates them without McFadden Act considerations, and so similarly may Florida Interim. We note that, if they had been branches, Florida Interim would have been authorized to retain them under 12 U.S.C. § 36(b)(2)(A).

⁴ 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

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.

This 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, BANTSA is acquiring by merger a bank (Florida Interim/BofA-Florida) in the host state of Florida. Florida requires that, in a merger with an out-of-state bank in which the out-of-state bank is the surviving bank, the Florida bank must have been in existence for at least three years. See Fla. Stat. Ann. § 658.2953(7)(c). BofA-Florida has been in existence since 1982, and under the Riegle-Neal Act, a "shell bank" such as Florida Interim is deemed to have the age of its target (here, BofA-Florida). See 12 U.S.C. § 1831u(a)(6).⁵ Thus, the Interstate Merger 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

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).

⁵ 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). Florida Interim is being chartered solely for the Interim Merger with BofA-Florida and will not open for business prior to that merger. And immediately afterwards it will merge into BANTSA in the Interstate Merger.

state. See 12 U.S.C. § 1831u(b)(1).⁶ The Florida interstate bank merger statute requires an out-of-state bank that results from an interstate merger with a Florida bank to notify the state banking department within 15 days after it has filed its merger application with the appropriate federal regulatory agency and to submit a copy of the application to the department. See Fla. Stat. Ann. § 658.2953(8).⁷ BANTSA notified the state banking department and provided a copy of its OCC applications. BANTSA also confirmed with the department that no other filings are required by the department. Thus, the Interstate Merger 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). BANTSA, Florida Interim, and BofA-Florida 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. BANTSA and Florida Interim/BofA-Florida are affiliates. However, the Community Reinvestment Act itself is applicable, as discussed below, see Part III-B.

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

⁶ 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).

⁷ The Florida statute currently also requires the out-of-state bank to comply with the general foreign corporation filing requirements of Fla. Stat. Ann. §§ 607.1501 - 607.1532. However, recent legislation in Florida amended the statute to delete that requirement. While the amendment is not effective until October, BANTSA was advised by the Florida authorities that no filing would be required.

satisfactorily managed. The OCC has also determined that, following the merger, BANTSA 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 BANTSA and Florida Interim/BofA-Florida is legally permissible under section 1831u.

2. The resulting bank may retain the banking offices of the banks under sections 36(d) & 1831u(d)(1).

The applicants have requested that, upon the completion of the Interstate Merger, BANTSA (as the resulting bank in the merger) be permitted to retain and continue to operate its existing main office in San Francisco 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 office of Florida Interim/BofA-Florida in Boca Raton. 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, BANTSA, the resulting bank in this interstate merger transaction, may retain and continue to operate, as its main office, the main office in San Francisco and may retain and continue to operate as branches both its own existing branches and the former main office of Florida Interim/BofA-Florida in Boca Raton, Florida, under 12 U.S.C. §§ 36(d) & 1831u(d)(1).⁸

⁸ 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) refer to section 36(b)(2). Congress clearly was aware of the McFadden Act's existing

BANTSA will also continue to operate Florida Interim/BofA-Florida's three existing trust offices in Florida. At those offices, BofA-Florida did not, and BANTSA 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). BofA-Florida originally established the trust offices, and has operated them for many years, without McFadden Act considerations, and so similarly may BANTSA. We note that, if they had been branches, BANTSA would have been authorized to retain them under 12 U.S.C. §§ 36(d) & 1831u(d)(1). The only office in Florida at which BANTSA will receive deposits, pay checks, or make loans is its branch in Boca Raton.

Moreover, BANTSA will succeed to the fiduciary appointments and activities of Florida Interim/BofA-Florida through the merger by operation of the statute. Similarly, at its branch in Boca Raton, as well as those in its other host states and in California, BANTSA 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 Decision on the Applications of Bank One Wisconsin Trust Company, N.A., and BankOne Trust Company, N.A. (OCC Corporate Decision No. 97-___, June 1, 1997); 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).

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

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).

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. BANTSA expects to achieve efficiencies by operating the fiduciary business in Florida as a branch rather than a separate corporate entity. 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. BANTSA will continue to serve its customers in California and all the other states in which it has branches and will add BofA-Florida's offices and customers. BANTSA offers a full range of banking products and services and will continue to do so in its current markets after the merger. BofA-Florida currently offers a comprehensive range of personal trust, investment advisory, and estate management services to individuals and charitable foundations located in Florida. In addition, BofA-Florida's private banking customers are offered personal credit products currently delivered through an affiliate's loan production offices. After the merger, BANTSA will continue to offer these trust and credit services. In addition, the resulting Boca Raton branch will also commence offering regular, jumbo, and retirement time deposits. Thus, there will be an expansion of products offered in Florida. 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. BANTSA has an outstanding rating with respect to CRA performance. BofA-Florida is not an insured institution; and so the CRA has not applied to it. No public comments were received by the OCC relating to these applications, and the OCC has no other basis to question the banks' performance in complying with the CRA.

The merger is not expected to have any adverse effect on the resulting bank's CRA performance. BANTSA will continue its current CRA programs and policies in California and the other states where it has branches. After Florida Interim/BofA-Florida is merged into BANTSA, its Boca Raton office will remain open as a branch of BANTSA. Initially, BANTSA will designate the entire West Palm Beach-Boca Raton Metropolitan Statistical Area in which the Boca Raton office is located as its assessment area. As part of BANTSA's and BAC's overall CRA Program and Goals, a CRA Plan for this assessment area will be developed within 90 days of the effective date of the merger, and a CRA officer for the state of Florida named. The CRA Plan will address the lending, investment, and service tests for CRA performance.

BofA-Florida is an uninsured limited purpose trust bank, and after the merger BANTSA's activities in Florida will also be limited. After the merger, when the Boca Raton office becomes a branch of BANTSA, it will become subject to the CRA, and the OCC will evaluate the performance of BANTSA's Florida operations as part of the OCC's evaluation of BANTSA by applying the lending, investment, and service tests set forth in 12 C.F.R. §§ 25.22, 25.23 & 25.24. While BANTSA as a whole is a full-service bank that includes extensive retail operations, its business strategy in Florida will be one of several factors the OCC will take into account in determining the performance context when evaluating BANTSA's CRA performance, consistent with applicable regulatory provisions. In addition, BANTSA may request the OCC to consider the activities of its affiliates when evaluating its CRA performance.

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, that the resulting bank (BANTSA) is authorized to retain and operate the offices of the banks, and that the Interstate Merger meets the other statutory criteria for approval. Accordingly, these applications are hereby approved.

_____/s/
Julie L. Williams
Chief Counsel

06-25-97
Date

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