

Legal Developments: Third Quarter, 2007

ORDERS ISSUED UNDER BANK HOLDING COMPANY ACT

ORDERS ISSUED UNDER SECTION 3 OF THE BANK HOLDING COMPANY ACT

Bank of America Corporation Charlotte, North Carolina

Order Approving the Acquisition of a Bank Holding Company

Bank of America Corporation (“Bank of America”), a financial holding company within the meaning of the Bank Holding Company Act (“BHC Act”), has requested the Board’s approval under section 3 of the BHC Act¹ to acquire ABN AMRO North America Holding Company (“ABN AMRO North America”) and thereby indirectly acquire LaSalle Bank Corporation (“LaSalle”), both of Chicago, Illinois, and its subsidiary banks, LaSalle Bank National Association (“LaSalle Bank”), Chicago, and LaSalle Bank Midwest National Association (“LaSalle Bank Midwest”), Troy, Michigan.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (72 *Federal Register* 31,582 (2007)). The time for filing comments has expired, and the Board has considered the proposal and all comments received in light of the factors set forth in the BHC Act.³

Bank of America, with total consolidated assets of approximately \$1.5 trillion, is the second largest depository

organization in the United States.⁴ Bank of America controls seven insured depository institutions⁵ that operate in thirty-one states and the District of Columbia. In Illinois, Bank of America is the 14th largest depository organization, controlling deposits of \$5.4 billion, which represent 1.6 percent of the total amount of deposits of insured depository institutions in the state (“state deposits”).⁶

ABN AMRO North America has total consolidated assets of approximately \$160 billion and controls indirectly two depository institutions, LaSalle Bank and LaSalle Bank Midwest, which operate in Illinois, Indiana, and Michigan. In Illinois, ABN AMRO North America is the second largest depository organization, controlling deposits of \$37 billion, which represent 11.2 percent of state deposits.

On consummation of the proposal, Bank of America would remain the second largest depository organization in the United States, with total consolidated assets of approximately \$1.7 trillion. Bank of America would become the largest depository organization in Illinois, controlling deposits of approximately \$42.4 billion, which represent approximately 12.9 percent of the total amount of state deposits.

INTERSTATE AND DEPOSIT CAP ANALYSIS

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the bank holding company’s home state if certain conditions are met. For purposes of the BHC Act, the home state of Bank of America is North Carolina,⁷ and ABN AMRO North America’s subsidiary banks are located in Illinois, Indiana, and Michigan.⁸

1. 12 U.S.C. § 1842.

2. ABN AMRO North America is a wholly owned subsidiary of ABN AMRO Bank N.V. (“ABN AMRO”), Amsterdam, the Netherlands. Bank of America also proposes to acquire two other subsidiaries of ABN AMRO North America, Standard Federal International, LLC and LaSalle Trade Services Corporation, both of Chicago, which are agreement corporations under section 25 of the Federal Reserve Act (“FRA”), 12 U.S.C. § 601 et seq. In addition, Bank of America proposes to acquire the nonbanking subsidiaries of ABN AMRO North America, other than ABN AMRO WCS Holding Company (“WCS Holding”), New York, New York, in accordance with section 4(k) of the BHC Act, 12 U.S.C. § 1843(k). ABN AMRO North America would divest WCS Holding and its subsidiaries by distributing them to ABN AMRO before Bank of America consummates the proposed transaction.

3. Four commenters supported the proposal, and 18 commenters expressed concerns about various aspects of the proposal.

4. Asset data are as of June 30, 2007, and are adjusted to reflect the acquisition by Bank of America of U.S. Trust Corporation and its subsidiary bank, United States Trust Company, National Association (“U.S. Trust Bank”), both of New York, New York, that was consummated on July 2, 2007. See *Bank of America Corporation, 93 Federal Reserve Bulletin C49* (2007) (“BOA/U.S. Trust Order”).

5. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

6. State deposit data and rankings are as of June 30, 2006.

7. See 12 U.S.C. § 1842(d). A bank holding company’s home state is the state in which the total deposits of all banking subsidiaries of such company were the largest on July 1, 1966, or the date on which the company became a bank holding company, whichever is later.

8. For purposes of section 3(d) of the BHC Act, the Board considers a bank to be located in the states in which the bank is chartered or

The Board may not approve an interstate acquisition under section 3(d) if the applicant (including all its insured depository institution affiliates) controls, or on consummation of the proposed transaction would control, more than 10 percent of the total amount of deposits of insured depository institutions in the United States (“nationwide deposit cap”).⁹ As required by section 3(d), the Board has carefully considered whether Bank of America controls, or on consummation of the proposed transaction would control, more than 10 percent of the total amount of deposits of insured depository institutions¹⁰ in the United States. In analyzing this matter, the Board calculated the percentage of total deposits of insured depository institutions in the United States and the total deposits that Bank of America controls, and on consummation of the proposal would control, based on the definition of “deposit” in the FDI Act,¹¹ the deposit data collected in reports filed by all insured depository institutions,¹² and the methods and adjustments used by the FDIC to compute total deposits. These calculations were made using the methodology described in the Board’s 2004 order approving Bank of America’s acquisition of FleetBoston Financial Corporation¹³ and take into account the voluntary use by some insured depository institutions of the newly revised Call Report and Thrift Financial Report forms, which became available in the first quarter of 2007.¹⁴

headquartered or operates a branch. *See* 12 U.S.C. §§ 1841(o)(4)–(7) and 1842(d)(1)(A) and (d)(2)(B).

9. Several commenters expressed concerns about the proposal’s consistency with the nationwide deposit cap.

10. The BHC Act adopts the definition of “insured depository institution” used in the Federal Deposit Insurance Act (12 U.S.C. § 1811 et seq.) (“FDI Act”). *See* 12 U.S.C. § 1841(n). The FDI Act’s definition of “insured depository institution” includes all banks (whether or not the institution is a bank for purposes of the BHC Act), savings banks, and savings associations that are insured by the Federal Deposit Insurance Corporation (“FDIC”) and insured U.S. branches of foreign banks, as each of those terms is defined in the FDI Act. *See* 12 U.S.C. § 1813(c)(2).

11. Section 3(d) of the BHC Act specifically adopts the definition of “deposit” in the FDI Act (12 U.S.C. § 1842(d)(2)(E)) (incorporating the definition of “deposit” at 12 U.S.C. § 1813(l)).

12. Each insured bank in the United States must report data regarding its total deposits in accordance with the definition of “deposit” in the FDI Act on the institution’s Consolidated Report of Condition and Income (“Call Report”). Each insured savings association similarly must report its total deposits on the institution’s Thrift Financial Report. Deposit data for FDIC-insured U.S. branches of foreign banks and federal branches of foreign banks are obtained from the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks. These data are reported quarterly to the FDIC and are publicly available.

13. *Bank of America Corporation*, 90 *Federal Reserve Bulletin* 217, 219 (2004) (“*BOA/Fleet Order*”); *see also Bank of America Corporation*, 92 *Federal Reserve Bulletin* C5 (2006) (order approving Bank of America’s merger with MBNA Corporation, Wilmington, Delaware) (“*BOA/MBNA Order*”).

14. Reporting on the revised Call Report and Thrift Financial Report forms is voluntary until calendar year 2008. Most insured depository institutions continue to use the previously authorized version of these forms. To compute the amount of deposits held by those institutions, the Board used the formula described in the *BOA/Fleet Order* to combine the appropriate lines from the previous version of the forms. Some insured depository institutions are already

Based on the latest available deposit data reported by all insured depository institutions, the total amount of deposits of insured depository institutions in the United States is approximately \$6.828 trillion as of June 30, 2007. Also based on the latest Call Report, Bank of America (including all its insured depository institution affiliates) controls deposits of approximately \$615.4 billion, and ABN AMRO North America controls deposits of approximately \$59.1 billion. Bank of America, therefore, currently controls approximately 9.01 percent of total U.S. deposits. On consummation of the proposed transaction, Bank of America would control approximately 9.88 percent of the total amount of deposits of insured depository institutions in the United States. Accordingly, the Board finds that Bank of America does not now control, and on consummation of the proposed transaction would not control, an amount of deposits that would exceed the nationwide deposit cap.¹⁵

Section 3(d) also prohibits the Board from approving a proposal if, on consummation, the applicant would control 30 percent or more of the total deposits of insured depository institutions in any state in which both the applicant and the organization to be acquired operate an insured depository institution, or the applicable percentage of state deposits established by state law (“state deposit cap”).¹⁶ On consummation of the proposal, Bank of America would control less than 30 percent of the total amount of deposits of insured depository institutions in Illinois, Indiana, and Michigan and would not hold deposits in excess of any applicable state deposit caps.

All other requirements of section 3(d) of the BHC Act also would be met on consummation of the proposal.¹⁷ Based on all the facts of record, the Board is permitted to approve the proposal under section 3(d) of the BHC Act.

COMPETITIVE CONSIDERATIONS

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or

using the revised versions of the Call Report and the Thrift Financial Report. The amount of deposits held by those institutions was computed as outlined in Appendix A.

15. Bank of America’s lead bank, Bank of America, National Association, Charlotte, North Carolina, recently acquired nonvoting convertible shares of Countrywide Financial Corporation (“Countrywide”), Calabasas, California, which operates a savings association. This investment by Bank of America was a noncontrolling investment for purposes of the BHC Act and was made pursuant to section 4(c)(6) of the BHC Act (12 U.S.C. § 1843(c)(6)). Because the investment did not cause Countrywide’s subsidiary savings association to become an “affiliate” of Bank of America, as defined by the BHC Act, the deposits of Countrywide are not included in the calculation of the deposit cap, which, by statute, refers only to affiliated insured depository institutions of a bank holding company. *See* 12 U.S.C. § 1841(k).

16. 12 U.S.C. § 1842(d)(2)(B)–(D).

17. Bank of America is adequately capitalized and adequately managed as defined by applicable law (12 U.S.C. § 1842(d)(1)(A)). LaSalle Bank and LaSalle Bank Midwest have been in existence and operated for the minimum period of time required by applicable state law. *See* 12 U.S.C. § 1842(d)(1)(B). The other requirements in section 3(d) of the BHC Act also would be met on consummation of the proposal.

would be in furtherance of an attempt to monopolize the business of banking in any relevant banking market. The BHC Act also prohibits the Board from approving a bank acquisition that would substantially lessen competition in any relevant banking market, unless the anticompetitive effects of the proposal are clearly outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.¹⁸

Bank of America and ABN AMRO North America have subsidiary depository institutions that compete directly in five banking markets in Illinois: Aurora, Chicago, Elgin, Joliet, and Woodstock. The Board has reviewed carefully the competitive effects of the proposal in each of these banking markets in light of all the facts of record. In particular, the Board has considered the number of competitors that would remain in the markets, the relative shares of total deposits in depository institutions in the markets (“market deposits”) controlled by Bank of America and ABN AMRO North America,¹⁹ the concentration level of market deposits and the increase in this level as measured by the Herfindahl–Hirschman Index (“HHI”) under the Department of Justice Merger Guidelines (“DOJ Guidelines”),²⁰ and other characteristics of the markets.

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in each of the five banking markets.²¹ The change in the HHI’s measure of concentration would be small and numerous competitors would remain in each market. On consummation, three markets would remain unconcentrated and two markets would remain moderately concentrated, as measured by the HHI.

The DOJ has conducted a detailed review of the potential competitive effects of the proposal and has advised the Board that consummation of the transaction would not likely have a significantly adverse effect on competition in

any relevant banking market. In addition, the appropriate banking agencies have been afforded an opportunity to comment and have not objected to the proposal.

Based on all the facts of record, the Board concludes that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of resources in any of the five banking markets where Bank of America and ABN AMRO North America compete directly or in any other relevant banking market. Accordingly, the Board has determined that competitive considerations are consistent with approval.

FINANCIAL, MANAGERIAL, AND SUPERVISORY CONSIDERATIONS

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has considered these factors in light of all the facts of record, including confidential reports of examination and other supervisory information received from the relevant federal and state supervisors of the organizations involved in the proposal, publicly reported and other financial information, and information provided by Bank of America.

In evaluating financial factors in expansion proposals by banking organizations, the Board reviews the financial condition of the organizations involved on both a parent-only and consolidated basis, as well as the financial condition of the subsidiary banks and significant nonbanking operations. In this evaluation, the Board considers a variety of information, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the financial condition of the combined organization at consummation, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

The Board has considered carefully the proposal under the financial factors. Bank of America and its subsidiary banks, LaSalle Bank, and LaSalle Bank Midwest are all well capitalized and would remain so on consummation of the proposal. Based on its review of the record, the Board finds that Bank of America has sufficient financial resources to effect the proposal. The proposed transaction is structured as a cash purchase of shares, and Bank of America will use existing resources to fund the purchase.

The Board also has considered the managerial resources of the organizations involved and the proposed combined organization. The Board has reviewed the examination records of Bank of America, ABN AMRO North America, and their subsidiary banks, including assessments of their management, risk-management systems, and operations.²²

18. 12 U.S.C. § 1842(c)(1).

19. Deposit and market share data are as of June 30, 2007, adjusted to reflect mergers and acquisitions through July 9, 2007, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. *See, e.g., Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386, 387 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743, 744 (1984). Thus, the Board regularly has included thrift deposits in the market share calculation on a 50 percent weighted basis. *See, e.g., First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52, 55 (1991).

20. Under the DOJ Guidelines, a market is considered unconcentrated if the post-merger HHI is under 1000, moderately concentrated if the post-merger HHI is between 1000 and 1800, and highly concentrated if the post-merger HHI exceeds 1800. The Department of Justice (“DOJ”) has informed the Board that a bank merger or acquisition generally will not be challenged (in the absence of other factors indicating anticompetitive effects) unless the post-merger HHI is at least 1800 and the merger increases the HHI more than 200 points. The DOJ has stated that the higher-than-normal HHI thresholds for screening bank mergers and acquisitions for anticompetitive effects implicitly recognize the competitive effects of limited-purpose and other nondepository financial entities.

21. These markets and the effects of the proposal on the concentration of banking resources in these markets are described in Appendix B.

22. A commenter opposing the proposal expressed concern about Bank of America’s connection to investigations and lawsuits related to the bankruptcy of Parmalat SpA, Parma, Italy. The commenter also expressed unsubstantiated concerns about Bank of America’s student

In addition, the Board has considered its supervisory experiences and those of the other relevant bank supervisory agencies with the organizations and their records of compliance with applicable banking law, including anti-money-laundering laws.²³ The Board also has considered Bank of America's plans for implementing the proposal, including with respect to the proposed management of the organization after consummation.

Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources and future prospects of the organizations involved in the proposal are consistent with approval, as are the other supervisory factors under the BHC Act.²⁴

CONVENIENCE AND NEEDS CONSIDERATIONS

In acting on a proposal under section 3 of the BHC Act, the Board is required to consider the effects of the proposal on the convenience and needs of the communities to be served and to take into account the records of the relevant insured depository institutions under the Community Reinvestment Act ("CRA").²⁵ The CRA requires the federal financial supervisory agencies to encourage insured depository institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation, and requires the appropriate federal financial supervisory agency to take into account a relevant depository institution's record of meeting the credit needs

loan policies. The Board has considered these comments in light of all the facts of record, including reports of examination assessing the financial and managerial resources of the organizations, information on the allegations raised by the pending lawsuits, and information provided by the Office of the Comptroller of the Currency ("OCC").

23. As part of its consideration of managerial factors, the Board has reviewed confidential supervisory information on the policies, procedures, and practices of Bank of America and its subsidiary banks for complying with the Bank Secrecy Act and consulted with the OCC. One commenter reiterated concerns that it previously expressed about the handling of certain money transfers through the New York branch of Bank of America, National Association ("BA Bank"), Charlotte, North Carolina. The Board notes that this matter was addressed in the *BOA/U.S. Trust Order* at footnote 22 and incorporates those findings in this order.

24. Some commenters expressed concerns about Bank of America's relations with unaffiliated third parties engaged in subprime lending. The commenters provided no evidence that Bank of America has originated, purchased, or securitized "predatory" loans or otherwise engaged in abusive lending practices. Bank of America has policies and procedures to help ensure that the subprime loans it purchases and securitizes are in compliance with applicable state and federal consumer protection laws. Bank of America stated that it conducts extensive due diligence reviews of the third-party loan originators with which it does business, as well as the loans that it purchases and the servicers of each pool, to help ensure that Bank of America is not facilitating "predatory" lending. The Board expects all banking organizations to conduct their operations in a safe and sound manner with adequate systems to manage operational, compliance, and reputational risks and will take appropriate supervisory actions to address and prevent abusive lending practices.

25. 12 U.S.C. § 2901 et seq.; 12 U.S.C. § 1842(c)(2).

of its entire community, including low- and moderate-income ("LMI") neighborhoods, in evaluating bank expansionary proposals.²⁶

The Board has considered carefully all the facts of record, including reports of examination of the CRA performance records of the subsidiary banks of Bank of America and ABN AMRO North America, data reported by Bank of America under the Home Mortgage Disclosure Act ("HMDA"),²⁷ other information provided by Bank of America, confidential supervisory information, and public comments received on the proposal.

Four commenters supported the proposal. Those commenters commended Bank of America's focus on economic integration in the communities in which it operates, sponsorship of homebuyer events in LMI communities, and financial support for small business and microlending programs. Several other commenters expressed concerns about either the lending record of Bank of America or its ability to adequately meet its CRA obligations, and some of them opposed the proposal or recommended approval only if subject to conditions suggested by the commenter.²⁸ Some commenters alleged that Bank of America has not addressed the diversity and community reinvestment needs of California communities or expressed concern about the CRA performance of Bank of America in California. Another commenter alleged that Bank of America has discriminated against, and has not addressed the convenience and needs of, LMI and minority residents of Chicago. One other commenter alleged more generally, based on HMDA data, that Bank of America has engaged in disparate treatment of minority individuals in home mortgage lending.

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications

26. 12 U.S.C. § 2903.

27. 12 U.S.C. § 2801 et seq.

28. Some commenters criticized Bank of America's performance under its previous community reinvestment pledges, urged the Board to require Bank of America to provide specific pledges or plans or to take certain future actions, or asked the Board to condition its approval on a commitment by Bank of America to improve its CRA record. The Board consistently has stated that neither the CRA nor the federal banking agencies' CRA regulations require depository institutions to make pledges or enter into commitments or agreements with any organization and that the enforceability of any such third-party pledges, initiatives, and agreements are matters outside the CRA. See *BOA/Fleet Order* at 232–33. Instead, the Board focuses on the existing CRA performance record of an applicant and the programs that an applicant has in place to serve the credit needs of its assessment areas at the time the Board reviews a proposal under the convenience and needs factor.

process because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.²⁹

Bank of America's lead bank, BA Bank, received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of December 31, 2001 ("BOA 2001 Evaluation").³⁰ The two other subsidiary banks of Bank of America subject to the CRA, FIA Card Services, N.A., Wilmington, Delaware, and U.S. Trust Bank, also received "outstanding" ratings at their most recent CRA performance evaluations.³¹

ABN AMRO North America's lead subsidiary bank, LaSalle Bank, received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of December 31, 2002 ("2002 Evaluation").³² The other subsidiary bank, LaSalle Bank Midwest, received a "satisfactory" rating at its most recent CRA performance evaluation by the OCC, as of December 31, 2002.³³ Bank of America has represented that it would combine the community development and community investment activities of BA Bank and ABN AMRO North America's subsidiary banks to strengthen and help meet the banking needs of its communities.³⁴

CRA Performance of BA Bank. The BOA 2001 Evaluation was discussed in the *BOA/Fleet Order*.³⁵ The Board also considered BA Bank's CRA performance earlier this year in the *BOA/U.S. Trust Order*. Based on a review of the record in this case, the Board hereby reaffirms and adopts the facts and findings detailed in those orders concerning BA Bank's CRA performance record. Bank of America also provided the Board with additional information about its CRA performance since the Board last reviewed such matters in the *BOA/U.S. Trust Order*. In addition, the Board

has consulted with the OCC with respect to BA Bank's CRA performance since the *BOA/U.S. Trust Order*.

In the BOA 2001 Evaluation, examiners commended BA Bank's overall lending performance, which they described as demonstrating excellent or good lending-test results in all its rating areas. Examiners reported that the bank's distribution of HMDA-reportable mortgage loans among areas of different income levels was good, and they commended BA Bank for developing mortgage loan programs with flexible underwriting standards. In addition, examiners reported that the bank's small business lending was excellent or good in the majority of its rating areas, and they commended the distribution of small business loans among businesses of different sizes in several of BA Bank's assessment areas.³⁶ Examiners also noted in the BOA 2001 Evaluation that BA Bank's level of community development lending was excellent.

Since the BOA 2001 Evaluation, BA Bank has maintained a substantial level of home mortgage, small business, and community development lending. In 2005 and 2006, the bank originated more than 756,000 HMDA-reportable home mortgage loans totaling approximately \$161 billion throughout its assessment areas, including more than \$18 billion in loans to LMI individuals.³⁷ In 2006, BA Bank was recognized by the U.S. Small Business Administration ("SBA") for the ninth consecutive year as the leading small business lender in the country, based on its origination of SBA loans totaling more than \$405 million.³⁸ As noted in the *BOA/U.S. Trust Order*, BA Bank's community development lending during 2005 and 2006 totaled approximately \$5.8 billion.³⁹

In the BOA 2001 Evaluation, examiners reported that BA Bank consistently demonstrated strong performance under the investment test, noting that its performance was excellent or good in the majority of its assessment areas.⁴⁰

29. See *Interagency Questions and Answers Regarding Community Reinvestment*, 66 *Federal Register* 36,620 and 36,639 (2001).

30. The evaluation period for the BOA 2001 Evaluation was January 1, 2000, through December 31, 2001.

31. FIA Card Services, N.A., formerly known as MBNA America Bank, National Association, was last evaluated by the OCC as of April 4, 2005. U.S. Trust Bank was formed in 2006 by the conversion of United States Trust Company of New York ("USTC New York") to a national bank charter and its subsequent merger with U.S. Trust Company, National Association ("USTC Los Angeles"). The CRA performance of USTC New York was evaluated by the Federal Reserve Bank of New York as of March 15, 2004, before its sale to Bank of America and conversion to a national bank charter in 2006. The CRA performance of USTC Los Angeles was last evaluated by the OCC as of October 15, 2002. The OCC has not yet evaluated U.S. Trust Bank's CRA performance.

32. The evaluation period for the 2002 Evaluation was January 1, 2000, through December 31, 2002.

33. LaSalle Bank Midwest was formerly known as Standard Federal Bank, N.A., Troy, Michigan.

34. Several commenters questioned Bank of America's efforts in awarding contracts to minority- and women-owned businesses. Although the Board fully supports programs designed to promote equal opportunity and economic opportunities for all members of society, the comments about supplier diversity programs are beyond the factors the Board is authorized to consider under the BHC Act. See e.g., *Deutsche Bank AG*, 85 *Federal Reserve Bulletin* 509, 513 (1999).

35. *BOA/Fleet Order* at 225-229.

36. In this context, "small business loans" are loans with original amounts of \$1 million or less that are secured by nonfarm, nonresidential properties or are commercial and industrial loans to borrowers in the United States.

37. In California in 2005 and 2006, the bank originated more than 150,000 HMDA-reportable home mortgage loans totaling approximately \$51 billion throughout its assessment areas, including more than \$2.8 billion in loans to LMI individuals. In the Chicago metropolitan statistical area ("MSA"), the bank originated more than 20,000 HMDA-reportable home mortgage loans totaling approximately \$2.2 billion throughout its assessment areas, including more than \$610 million in loans to LMI individuals.

38. Bank of America represented that BA Bank's small business loans of less than \$50,000 in California in 2006 more than doubled from the level attained in 2005, both in number and dollar amounts of such loans.

39. BA Bank's community development lending during 2005 and 2006 in its California assessment areas and in the Chicago market totaled approximately \$1.2 billion and \$34 million, respectively. BA Bank has entered into partnerships with approximately 500 housing-counseling agencies throughout its assessment areas, including 16 housing-counseling agencies in the Chicago metropolitan area, to offer pre- and post-purchase home mortgage counseling to LMI borrowers. Such counseling includes reviewing the buyer's credit report, income, and debt; preparing a budget; and conducting an affordability analysis.

40. One commenter criticized the amount of Bank of America's charitable donations and its methodology for making these donations.

During the evaluation period, BA Bank funded more than 17,000 housing units for LMI families with its community development investments throughout its assessment areas.⁴¹ Examiners commended BA Bank for taking a leadership role in developing and participating in complex investments that involved multiple participants and both public and private funding.

Since the BOA 2001 Evaluation, BA Bank has maintained a substantial level of community development investment activities in its assessment areas. Bank of America represented that BA Bank's qualifying community development investments totaled approximately \$3.7 billion during 2005 and 2006, and that BA Bank's subsidiary community development corporation had helped develop more than 6,200 housing units in LMI census tracts or for LMI individuals since 2003.⁴²

Examiners commended BA Bank's service performance throughout its assessment areas in the BOA 2001 Evaluation. They reported that the bank's retail delivery systems were generally good and that the bank's distribution of branches among geographies of different income levels was adequate. Examiners also commended BA Bank for its community development services, which typically responded to the needs of the communities served by the bank throughout its assessment areas.

CRA Performance of LaSalle Bank. As noted, LaSalle Bank received an overall "outstanding" rating in the 2002 Evaluation, with "outstanding" ratings on both the lending and investment tests and a "high satisfactory" rating on the service test. Examiners noted that LaSalle Bank's mortgage and small business lending performance was excellent and had a positive impact on individuals and businesses in LMI areas as well as persons of different income levels. In addition, examiners found that the bank's community development lending activity was excellent and that several lines of business, ranging from commercial credit to apartment lending, contributed to the bank's community development lending efforts. Examiners noted that during the evaluation period, LaSalle Bank extended 390 community development loans totaling more than \$523 million, includ-

ing \$182 million in loans for affordable housing and multifamily community development projects.

In the 2002 Evaluation, examiners characterized LaSalle Bank's performance under the investment test as excellent. They reported that the bank made more than 700 qualified community development investments totaling approximately \$140 million during the evaluation period, despite significant competition from more than 300 insured depository institutions in its assessment areas. Examiners also reported that LaSalle Bank made 715 CRA qualified grants and contributions to community organizations in its assessment areas during the evaluation period, totaling more than \$4 million, with half of those grants and contributions to organizations providing community development services to LMI individuals. In addition, examiners commended LaSalle Bank's excellent level of community development services, particularly in providing financial education.

B. HMDA and Fair Lending Record

The Board has carefully considered the fair lending records and HMDA data of Bank of America in light of public comments received on the proposal. One commenter alleged, based on 2005 HMDA data, that Bank of America denied the home mortgage loan applications of African American and Hispanic borrowers more frequently than those of nonminority applicants in various MSAs and nationwide. The commenter also alleged, based on 2005 and preliminary 2006 HMDA data, that Bank of America and its subsidiary banks made disproportionately higher-cost loans to African American and Hispanic borrowers than to nonminority borrowers.⁴³ The Board has focused its analysis primarily on the 2006 HMDA data reported by BA Bank.⁴⁴

Although the HMDA data might reflect certain disparities in the rates of loan applications, originations, and denials among members of different racial or ethnic groups in certain local areas, they provide an insufficient basis by themselves on which to conclude whether or not Bank of America is excluding or imposing higher costs on any group on a prohibited basis. The Board recognizes that HMDA data alone, even with the recent addition of pricing information, provide only limited information about the covered loans.⁴⁵ HMDA data, therefore, have limitations

Bank of America represented that it has a record of providing significant corporate philanthropic donations in all the communities that it serves. The Board notes that neither the CRA nor the agencies' implementing rules require institutions to engage in charitable giving.

41. Bank of America also has provided grants to nonprofit organizations that promote SBA programs and originate microloans in amounts as low as \$500.

42. Bank of America represented that BA Bank's qualifying community development investments during 2005 and 2006 in its California assessment areas and in the Chicago market totaled approximately \$821 million and \$82 million, respectively. Bank of America further represented that BA Bank made at least 11 Low Income Housing Tax Credit investments totaling more than \$134 million in 2005 and 2006 in California, which supported the renovation or construction of 1,070 housing units for LMI individuals and senior citizens. The bank also stated that it has allocated more than \$27 million to California Community Development Financial Institutions ("CDFIs") since 2005 in more than 20 of its assessment areas, including \$9.4 million for CDFIs focused on small business microfinancing and \$17.7 million for CDFIs focused on affordable housing.

43. Beginning January 1, 2004, the HMDA data required to be reported by lenders were expanded to include pricing information for loans on which the annual percentage rate (APR) exceeds the yield for U.S. Treasury securities of comparable maturity 3 or more percentage points for first-lien mortgages and 5 or more percentage points for second-lien mortgages (12 CFR 203.4.)

44. The Board reviewed HMDA data for BA Bank nationwide and in the MSAs noted by the commenter.

45. The data, for example, do not account for the possibility that an institution's outreach efforts may attract a larger proportion of marginally qualified applicants than other institutions attract and do not provide a basis for an independent assessment of whether an applicant who was denied credit was, in fact, creditworthy. In addition, credit history problems, excessive debt levels relative to income, and high loan amounts relative to the value of the real estate collateral (reasons most frequently cited for a credit denial or higher credit cost) are not available from HMDA data.

that make them an inadequate basis, absent other information, for concluding that an institution has engaged in illegal lending discrimination.

The Board is nevertheless concerned when HMDA data for an institution indicate disparities in lending and believes that all lending institutions are obligated to ensure that their lending practices are based on criteria that ensure not only safe and sound lending but also equal access to credit by creditworthy applicants regardless of their race or ethnicity. Because of the limitations of HMDA data, the Board has considered these data carefully and taken into account other information, including examination reports that provide on-site evaluations of compliance with fair lending laws by Bank of America and its subsidiaries. The Board also has consulted with the OCC, the primary federal supervisor of Bank of America's subsidiary banks.

The record, including confidential supervisory information, indicates that Bank of America has taken steps through policies and procedures to ensure compliance with fair lending and other consumer protection laws and regulations.⁴⁶ Bank of America's compliance program includes fair-lending policy and product guides, compliance file reviews, testing of HMDA data's integrity, and other quality-assurance measures. In addition, Bank of America represented that it provides fair lending training annually to ensure that Bank of America's associates understand their responsibility for complying with the fair lending policy and how to employ fair lending "best practices" in all aspects of the lending process. Bank of America has stated that its fair lending policies will continue to apply to current Bank of America operations and that it will review and make appropriate modifications to the fair lending policies that will apply to the operations of LaSalle Bank and LaSalle Bank Midwest after consummation of the proposal.

The Board also has considered the HMDA data in light of other information, including the programs described above and the overall performance records of the subsidiary banks of Bank of America under the CRA. These established efforts and record of performance demonstrate that the institutions are active in helping to meet the credit needs of their entire communities.

46. One commenter alleged that the terms of Bank of America's credit card contracts are unfair and deceptive and suggested that the Board should require Bank of America to modify its credit card contracts to avoid unfair and deceptive consequences and to adopt certain credit card-related practices that have been adopted by other banking organizations. Bank of America has stated that it does not engage in or condone deceptive practices and that it conducts multiple, ongoing reviews to ensure that the terms, conditions, and marketing of its credit card products are appropriate and comply with applicable laws and regulations, including the Truth in Lending Act and the Board's Regulation Z. The Board has consulted with the OCC, the primary federal supervisor of Bank of America's subsidiary bank that engages in credit card operations.

C. Conclusion on Convenience and Needs and CRA Performance

The Board has considered carefully all the facts of record, including reports of examination of the CRA records of the institutions involved, information provided by Bank of America, comments received on the proposal, and confidential supervisory information.⁴⁷ Bank of America represented that the proposal would result in greater convenience for Bank of America and LaSalle customers through expanded delivery channels and a broader range of products and services. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant insured depository institutions are consistent with approval of the proposal.⁴⁸

CONCLUSION

Based on the foregoing, and in light of all the facts of record, the Board has determined that the application should be, and hereby is, approved.⁴⁹ In reaching its

47. Some commenters expressed concern that the proposed acquisition would result in a loss of jobs. The effect of a proposed transaction on employment in a community is not among the factors that the Board is authorized to consider under the BHC Act, and the federal banking agencies, courts, and the Congress consistently have interpreted the convenience and needs factor to relate to the effect of a proposal on the availability and quality of banking services in the community. See, e.g., *Wells Fargo & Company*, 82 *Federal Reserve Bulletin* 445, 457 (1996).

48. One commenter reiterated comments it made in connection with the *BOA/Fleet Order* and *BOA/MBNA Order*, urging the Board not to approve the proposal until Bank of America meets certain "commitments" regarding its lending programs in Hawaii and its goal for mortgage lending to Native Hawaiians on Hawaiian Home Lands. See e.g., *BOA/Fleet Order* at 232-33. As noted in that order, Bank of America's publicly announced plans to engage in certain lending programs in Hawaii were not commitments to the Board, and these plans were not conditions to the Board's approvals in earlier applications by Bank of America or its predecessors. See *id.* As also previously noted, the Board views the enforceability of such third-party pledges, initiatives, and agreements as matters outside the CRA. Bank of America has represented that it has complied with its commitment to the State of Hawaii's Department of Hawaiian Home Lands by making loans and investments exceeding \$151 million under the terms of that commitment.

49. Several commenters requested that the Board hold a public meeting or hearing on the proposal. Section 3 of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authority for the bank to be acquired makes a written recommendation of denial of the application. The Board has not received such a recommendation from the appropriate supervisory authorities. Under its rules, the Board also may, in its discretion, hold a public meeting or hearing on an application to acquire a bank if necessary or appropriate to clarify factual issues related to the application and to provide an opportunity for testimony (12 CFR 225.16(e), 262.25(d)). The Board has considered carefully the commenters' requests in light of all the facts of record. In the Board's view, the commenters had ample opportunity to submit their views and, in

conclusion, the Board has considered all the facts of record in light of the factors that is required to consider under the BHC Act, the FRA, and other applicable statutes.⁵⁰ The Board's approval is specifically conditioned on compliance by Bank of America with the conditions in this order and all the commitments made to the Board in connection with the proposal. For purposes of this transaction, these commitments and conditions are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The proposal may not be consummated before the 15th calendar day after the effective date of this order, or later than three months after the effective date of this order unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Richmond, acting pursuant to delegated authority.

By order of the Board of Governors, effective September 14, 2007.

fact, submitted written comments that the Board has considered carefully in acting on the proposal. The commenters' requests fail to demonstrate why written comments do not present their views adequately or why a meeting or hearing otherwise would be necessary or appropriate. For these reasons, and based on all the facts of record, the Board has determined that a public meeting or hearing is not required or warranted in this case. Accordingly, the requests for a public meeting or hearing on the proposal are denied.

50. A number of commenters have contended that a longer public comment period should have been provided in light of, or that consideration of the proposal should be delayed until a final disposition of, litigation in the Netherlands concerning the need for ABN AMRO shareholder approval of the proposed transaction. As discussed above, the Board has carefully reviewed the record in this case, in light of the Board's limited jurisdiction under the BHC Act and the International Banking Act (12 U.S.C. § 3101 et seq.). The Board notes that the Supreme Court of the Netherlands has ruled that the proposed acquisition of ABN AMRO North America did not require shareholder approval and, accordingly, this matter has been resolved. Further, as noted above, the commenters have had ample opportunity to submit their views and, in fact, have provided written submissions that the Board has considered carefully in acting on the proposal. Moreover, the Board is required under applicable law and its regulations to act on applications submitted under the BHC Act and the FRA within specified time periods. Based on all the facts of record, the Board concludes that the record is sufficient to act on this proposal under the factors the Board is required to consider under the relevant statutes and that delay in considering the proposal or extension of the comment period on the bases set forth by these commenters is not warranted.

Voting for this action: Chairman Bernanke, Vice Chairman Kohn, and Governors Warsh, Kroszner, and Mishkin.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Appendix A

Computation of the Amount of Deposits Held by Institutions Using the Revised Call Report and Thrift Financial Report Forms

INSURED BANKS WITHOUT FOREIGN DEPOSITS

The amount of deposits held by insured banks without foreign deposits using the revised Call Report was computed by adding the "Total deposit liabilities before exclusions (gross) as defined in section 3(l) of the Federal Deposit Insurance Act and FDIC regulations," reported on Schedule RC-O, and the "Interest accrued and unpaid on deposits in domestic offices," reported on Schedule RC-G.

INSURED BANKS WITH FOREIGN DEPOSITS

The amount of deposits held by insured banks with foreign deposits using the revised Call Report was computed by subtracting "Total foreign deposits" from the "Total deposit liabilities before exclusions (gross) as defined in Section 3(l) of the Federal Deposit Insurance Act and FDIC regulations," reported on Schedule RC-O, and adding the "Interest accrued and unpaid on deposits in domestic offices," reported on Schedule RC-G.

INSURED SAVINGS ASSOCIATIONS

The amount of deposits held by insured savings associations using the revised Thrift Financial Report was computed by subtracting "Total Foreign Deposits" from the "Total Deposit Liabilities Before Exclusions (Gross) as Defined in Section 3(l) of the FDI Act and FDIC Regulations," reported on Schedule DI, and adding "Accrued Interest Payable—Deposits," reported on Schedule SC.

Appendix B

ILLINOIS BANKING MARKETS WITH COMPETITIVE OVERLAP

Bank	Rank	Amount of deposits	Market deposit shares (percent)	Resulting HHI	Change in HHI	Remaining number of competitors
<i>Aurora—The southern three tiers of townships in Kane County (Virgil, Campton, St. Charles, Kaneville, Blackberry, Geneva, Batavia, Big Rock, Sugar Grove, and Aurora townships); Little Rock, Bristol, Oswego, Fox, and Kendall townships in Kendall County; and Sandwich township in De Kalb County</i>						
Bank of America Pre-Consummation ...	27	\$42.5 mil.	.6	1,042	1	40
ABN AMRO North America	25	\$50.6 mil.	.7	1,042	1	40
Bank of America Post-Consummation ..	18	\$93.1 mil.	1.4	1,042	1	40
<i>Chicago—Cook, Du Page, and Lake counties</i>						
Bank of America Pre-Consummation ...	12	\$4.6 bil.	2.1	807	69	192
ABN AMRO North America	1	\$36.5 bil.	16.5	807	69	192
Bank of America Post-Consummation ..	1	\$41.1 bil.	18.6	807	69	192
<i>Elgin—Marengo, Seneca, Nunda, Riley, Coral, Grafton, and Algonquin townships in McHenry County; and the northern two tiers of townships in Kane County (Hampshire, Rutland, Dundee, Burlington, Plato, and Elgin townships).</i>						
Bank of America Pre-Consummation ...	27	\$28.4 mil.	.5	573	2	38
ABN AMRO North America	19	\$107.4 mil.	1.7	573	2	38
Bank of America Post-Consummation ..	15	\$135.7 mil.	2.2	573	2	38
<i>Joliet—Will County (excluding Florence, Wilmington, Reed, Custer, and Wesley townships); Aux Sable township in Grundy County; and Na-Au-Say and Seward townships in Kendall County.</i>						
Bank of America Pre-Consummation ...	28	\$46.5 mil.	.6	1,203	3	53
ABN AMRO North America	8	\$202.2 mil.	2.5	1,203	3	53
Bank of America Post-Consummation ..	8	\$248.7 mil.	3.1	1,203	3	53
<i>Woodstock—Chemung, Alden, Hebron, Richmond, Burton, Dunham, Hartland, Greenwood, McHenry, and Dorr townships in McHenry County</i>						
Bank of America Pre-Consummation ...	19	\$7.5 mil.	.3	843	2	24
ABN AMRO North America	9	\$84.9 mil.	3.7	843	2	24
Bank of America Post-Consummation ..	9	\$92.3 mil.	4.0	843	2	24

NOTE: All amounts of deposits are unweighted. All rankings, market deposit shares, and HHIs are based on thrift institution deposits weighted at 50 percent.

*Mercantile Bancorp, Inc.
Quincy, Illinois*

Order Approving the Acquisition of a Bank Holding Company

Mercantile Bancorp, Inc. (“Mercantile”), a bank holding company within the meaning of the Bank Holding Company Act (“BHC Act”), has requested the Board’s approval under section 3 of the BHC Act¹ to acquire HNB Financial Services, Inc. (“HNB”) and thereby acquire its subsidiary bank, HNB National Bank (“HNB Bank”), both of Hannibal, Missouri.

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published in the *Federal Register* (72 *Federal Register* 33,506 (2007)). The time for filing comments has expired, and the Board has considered the application and all comments received in light of the factors set forth in section 3 of the BHC Act.

Mercantile, with total consolidated assets of approximately \$1.4 billion, controls eight subsidiary banks that operate in Florida, Illinois, Kansas, and Missouri. Mercantile is the 60th largest depository organization in Missouri, controlling deposits of \$290.7 million, which represent less than 1 percent of total deposits of insured depository institutions in Missouri (“state deposits”).²

HNB, with total consolidated assets of \$164.9 million, is the 111th largest depository organization in Missouri, controlling deposits of approximately \$133.3 million. On consummation of this proposal, Mercantile would become the 35th largest depository organization in Missouri, controlling deposits of approximately \$424 million, which represent less than 1 percent of state deposits.

INTERSTATE ANALYSIS

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the bank holding company’s home state if certain conditions are met. For purposes of the BHC Act, the home state of Mercantile is Illinois,³ and HNB is located in Missouri.⁴

Based on a review of all the facts of record, including relevant state statutes, the Board finds that the conditions for an interstate acquisition enumerated in section 3(d) of

the BHC Act are met in this case.⁵ In light of all the facts of record, the Board is permitted to approve the proposal under section 3(d) of the BHC Act.

COMPETITIVE CONSIDERATIONS

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of an attempt to monopolize the business of banking in any relevant banking market. The BHC Act also prohibits the Board from approving a bank acquisition that would substantially lessen competition in any relevant banking market, unless the anticompetitive effects of the proposal are clearly outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.⁶

Mercantile and HNB have subsidiary depository institutions that compete directly in two banking markets: St. Louis, Missouri-Illinois; and Hannibal, Missouri. The Board has reviewed carefully the competitive effects of the proposal in each banking market in light of all the facts of record. In particular, the Board has considered the number of competitors that would remain in the markets, the relative shares of total deposits in depository institutions in the markets (“market deposits”) controlled by Mercantile and HNB,⁷ the concentration level of market deposits and the increase in this level as measured by the Herfindahl–Hirschman Index (“HHI”) under the Department of Justice Merger Guidelines (“DOJ Guidelines”),⁸ and other characteristics of the markets.

5. 12 U.S.C. §§ 1842(d)(1)(A)–(B) and 1842(d)(2)(A)–(B). Mercantile is adequately capitalized and adequately managed, as defined by applicable law. HNB Bank has been in existence and operated for the minimum period of time required by Missouri state law (five years). See Mo. Rev. Stat. § 362.077.1. On consummation of the proposal, Mercantile would control less than 10 percent of the total amount of deposits of insured depository institutions in the United States. Mercantile also would comply with the state deposit cap in Missouri, where it will control less than 13 percent of state deposits. See Mo. Rev. Stat. § 362.915. All other requirements of section 3(d) of the BHC Act would be met on consummation of the proposal.

6. 12 U.S.C. § 1842(c)(1).

7. Deposit and market share data are as of June 30, 2006, adjusted to reflect mergers and acquisitions through July 6, 2007, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386, 387 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743, 744 (1984). Thus, the Board regularly has included thrift institution deposits in the market share calculation on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52, 55 (1991).

8. Under the DOJ Guidelines, a market is considered unconcentrated if the post-merger HHI is under 1000, moderately concentrated if the post-merger HHI is between 1000 and 1800, and highly concentrated if the post-merger HHI exceeds 1800. The Department of Justice (“DOJ”) has informed the Board that a bank merger or acquisition generally will not be challenged (in the absence of other factors indicating anticompetitive effects) unless the post-merger HHI is at least 1800 and the merger increases the HHI more than 200 points. The DOJ has stated that the higher-than-normal HHI thresholds for screening bank mergers and acquisitions for anticompetitive effects

1. 12 U.S.C. § 1842.

2. Asset data are as of March 31, 2007; statewide deposit and ranking data are as of June 30, 2006, and reflect merger activity through July 6, 2007. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

3. See 12 U.S.C. § 1842(d). A bank holding company’s home state is the state in which the total deposits of all banking subsidiaries of such company were the largest on July 1, 1966, or the date on which the company became a bank holding company, whichever is later.

4. For purposes of section 3(d) of the BHC Act, the Board considers a bank to be located in the states in which the bank is chartered or headquartered or operates a branch. See 12 U.S.C. §§ 1841(o)(4)–(7) and 1842(d)(1)(A) and 1842(d)(2)(B).

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ guidelines in the St. Louis market.⁹ On consummation of the proposal, there would be no increase in concentration and the St. Louis market would remain unconcentrated as measured by the HHI. In addition, numerous competitors would remain in the market.¹⁰

The Hannibal banking market¹¹ warrants a detailed review of the competitive effects because the post-consummation concentration level would exceed the threshold levels in the DOJ Guidelines. In the Hannibal banking market, Mercantile is the largest depository organization, controlling deposits of approximately \$106.3 million, which represent approximately 19 percent of market deposits. HNB is the second largest depository organization in the market, also controlling deposits of approximately \$106.3 million. On consummation of the proposal, Mercantile would remain the largest depository organization in the market, controlling deposits of approximately \$212.6 million, which represent approximately 37.9 percent of market deposits. The HHI would increase 718 points to 1972.

One thrift institution operating in the market serves as a significant source of commercial loans and provides a broad range of consumer, mortgage, and other banking products. Competition from this thrift institution closely approximates competition from a commercial bank. Accordingly, the Board has concluded that deposits controlled by this institution should be weighted at 100 percent in market-share calculations.¹² Accounting for the revised weighting of these deposits, Mercantile would control

approximately 34.6 percent of market deposits on consummation of the proposal, and the HHI would increase 599 points to 1871.

The Board has considered carefully whether other factors either mitigate the competitive effects of the proposal or indicate that the proposal would have a significantly adverse effect on competition in the market. The number and strength of factors necessary to mitigate the competitive effects of a proposal depend on the size of the increase and the resulting level of concentration in the banking market.¹³

In this market, the record indicates that the proposal would not have a significant adverse impact on competition. After consummation of the proposal, ten other depository organizations would continue to operate in the market. In addition, the second largest competitor in the market would have a branch network comparable to Mercantile's branch network.

The Board also has concluded that the activities of a community credit union in the market exert a sufficient competitive influence to mitigate, in part, the potential adverse competitive effects of the proposal. The credit union offers a wide range of consumer products, operates street-level branches, and has membership open to all the residents in the market.¹⁴ This active community credit union controls approximately \$10.8 million in deposits in the market, which represent approximately 1 percent of market deposits on a 50 percent weighted basis. Accounting for the revised weighting of these deposits, Mercantile would control approximately 34.3 percent of market deposits on consummation of the proposal, and the HHI would increase 588 points to 1839.

The DOJ has conducted a detailed review of the potential competitive effects of the proposal and has advised the Board that consummation of the transaction would not likely have a significantly adverse effect on competition in any relevant banking market. In addition, the appropriate banking agencies have been afforded an opportunity to comment and have not objected to the proposal.

Based on all the facts of record, including the number of competitors that would remain in the Hannibal banking market after consummation, the branch networks of competitors, the presence of an active credit union, and other data, the Board concludes that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of resources in either banking market where Mercantile and HNB compete directly or in any other relevant banking market. Accord-

implicitly recognize the competitive effects of limited-purpose and other nondepository financial entities.

9. The St. Louis banking market is defined as: (1) in Missouri—the city of St. Louis; Franklin, Jefferson, Lincoln, Saint Charles, St. Louis, Warren, and Washington counties; Roark, Boeuf, Canaan, and Brush Creek townships and the cities of Hermann and Owensville, all in Gasconade County; Boone township in Crawford County; and Loutre township in Montgomery County; and (2) in Illinois—Bond, Calhoun, Clinton, Jersey, Macoupin, Madison, Monroe, and St. Clair counties; the western part of Randolph County (defined by Route 3 on the east and the Kaskaskia River on the south), including the cities of Red Bud, Ruma, and Evansville; Washington County, excluding Ashley and Du Bois townships; and the city of Centralia.

10. On consummation of the proposal, the HHI would remain unchanged at 665 for the St. Louis market. Mercantile operates the 63rd largest depository organization in the market, controlling deposits of approximately \$100.4 million, which represent less than 1 percent of market deposits. HNB operates the 114th largest depository organization in the market, controlling deposits of approximately \$27.1 million. After consummation, Mercantile would operate the 56th largest depository organization in the market, controlling deposits of approximately \$127.5 million, which represent less than 1 percent of market deposits. One hundred thirty-nine depository institutions would remain in the banking market.

11. The Hannibal banking market is defined as Marion and Ralls counties and the Monroe township in Monroe County, all in Missouri.

12. The Board previously has indicated that it may consider competition from a thrift institution at a level greater than 50 percent of its deposits when appropriate. *See, e.g., Banknorth Group, Inc., 75 Federal Reserve Bulletin 703 (1989)*. The thrift institution in the Hannibal banking market has a ratio of commercial and industrial loans to assets of more than 10 percent, which is comparable to the

national average for all commercial banks. *See First Union Corporation, 84 Federal Reserve Bulletin 489 (1998)*.

13. *See NationsBank Corporation, 84 Federal Reserve Bulletin 129 (1998)*.

14. The Board previously has considered competition from similarly active credit unions as a mitigating factor. *See, e.g., The PNC Financial Services Group, Inc., 93 Federal Reserve Bulletin C65 (2007); Wachovia Corporation, 92 Federal Reserve Bulletin C183 (2006); F.N.B. Corporation, 90 Federal Reserve Bulletin 481 (2004); Gateway Bank & Trust Co., 90 Federal Reserve Bulletin 547 (2004)*.

ingly, the Board has determined that competitive considerations are consistent with approval.

FINANCIAL, MANAGERIAL, AND SUPERVISORY CONSIDERATIONS

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has considered these factors in light of all the facts of record, including confidential reports of examination, other supervisory information from the primary federal and state supervisors of the organizations involved in the proposal, publicly reported and other financial information, and information provided by Mercantile.

In evaluating financial factors in expansion proposals by banking organizations, the Board reviews the financial condition of the organizations involved both on a parent-only and on a consolidated basis, as well as the financial condition of the subsidiary depository institutions and the organizations' nonbanking operations. In this evaluation, the Board considers a variety of information, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the financial condition of the combined organization at consummation, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

The Board has considered carefully the financial factors of the proposal. Mercantile, HNB, and their subsidiary depository institutions currently are well capitalized and would remain so on consummation of the proposal. Based on its review of the record, the Board also finds that Mercantile has sufficient financial resources to effect the proposal. The proposed transaction is structured as a cash purchase that would be funded from the proceeds of issuing trust preferred securities and debt.

The Board also has considered the managerial resources of Mercantile, HNB, and their subsidiary depository institutions. The Board has reviewed the examination records of these institutions, including assessments of their management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences and those of the other relevant banking supervisory agencies with the organizations and their records of compliance with applicable banking laws and with anti-money-laundering laws. The Board also has considered Mercantile's plans for implementing the proposal, including the proposed management after consummation.

Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources and future prospects of the organizations involved in the proposal are consistent with approval, as are the other supervisory factors under the BHC Act.

CONVENIENCE AND NEEDS CONSIDERATIONS

In acting on a proposal under section 3 of the BHC Act, the Board also must consider the effects of the proposal on the convenience and needs of the communities to be served and take into account the records of the relevant insured depository institutions under the Community Reinvestment Act ("CRA").¹⁵ All of Mercantile's banks received "outstanding" or "satisfactory" ratings at their most recent CRA performance evaluations by the banks' primary federal supervisors. HNB Bank received a "satisfactory" rating at its most recent CRA performance evaluation by the Office of the Comptroller of the Currency, as of July 14, 2003. After consummation of the proposal, Mercantile plans to integrate its CRA program with HNB Bank's operations. Mercantile has represented that consummation of the proposal would allow it to provide a broader range of financial products and services over a larger area. Based on all the facts of record, the Board concludes that considerations relating to the convenience and needs of the communities to be served and the CRA performance records of the relevant depository institutions are consistent with approval.

CONCLUSION

Based on the foregoing and all the facts of record, the Board has determined that the application should be, and hereby is, approved. In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act. The Board's approval is specifically conditioned on compliance by Mercantile with the conditions imposed in this order and the commitments made to the Board in connection with the application. For purposes of this action, the conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision herein and, as such, may be enforced in proceedings under applicable law.

The proposed transaction may not be consummated before the 15th calendar day after the effective date of this order, or later than three months after the effective date of this order, unless such period is extended for good cause by the Board or the Federal Reserve Bank of St. Louis, acting pursuant to delegated authority.

By order of the Board of Governors, effective August 7, 2007.

Voting for this action: Chairman Bernanke, Vice Chairman Kohn, and Governors Warsh, Kroszner, and Mishkin.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

15. 12 U.S.C. § 2901 et seq.; 12 U.S.C. § 1842(c)(2).

Wells Fargo & Company
San Francisco, California

Order Approving the Merger of Bank
Holding Companies

Wells Fargo & Company (“Wells Fargo”), a financial holding company within the meaning of the Bank Holding Company Act (“BHC Act”), has requested the Board’s approval under section 3 of the BHC Act¹ to acquire Greater Bay Bancorp (“Greater Bay”), East Palo Alto, and its subsidiary bank, Greater Bay Bank, National Association (“GB Bank”), Palo Alto, both in California.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (72 *Federal Register* 35,246 (2007)). The time for filing comments has expired, and the Board has considered the proposal and all comments received in light of the factors set forth in the BHC Act.

Wells Fargo, with total consolidated assets of approximately \$539.9 billion, is the fifth largest depository organization in the United States,³ controlling deposits of approximately \$329.8 billion, which represent 4.3 percent of the total amount of deposits of insured depository institutions in the United States. Wells Fargo’s subsidiary banks operate in 23 states, including California. Wells Fargo is the second largest depository institution in California, controlling \$101.9 billion in deposits.

Greater Bay has total consolidated assets of \$7.3 billion and operates only in California. It is the 18th largest depository organization in the state, controlling deposits of approximately \$5.3 billion.

On consummation of the proposal, Wells Fargo would remain the fifth largest depository institution in the United States, with total consolidated assets of approximately \$547.2 billion. Wells Fargo would control deposits of approximately \$335.3 billion, which represent approximately 4.4 percent of the total amount of deposits of insured depository institutions in the United States. In California, Wells Fargo would remain the second largest depository organization, controlling deposits of approximately \$107.2 billion, which represent approximately 15 percent of the total amount of deposits of insured depository institutions in the state.

1. 12 U.S.C. § 1842.

2. Wells Fargo also proposes to acquire the nonbanking subsidiaries of Greater Bay in accordance with section 4(k) of the BHC Act, 12 U.S.C. § 1843(k). In addition, Wells Fargo has requested the Board’s approval to hold and, in certain circumstances, exercise an option to purchase up to 19.9 percent of Greater Bay’s stock. The option would terminate on consummation of Wells Fargo’s acquisition of Greater Bay.

3. Asset data are as of June 30, 2007; national deposit and ranking data are as of March 31, 2007; statewide deposit and ranking data are as of June 30, 2006. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

INTERSTATE ANALYSIS

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the bank holding company’s home state if certain conditions are met. For purposes of the BHC Act, the home state of Wells Fargo is Minnesota,⁴ and Greater Bay is located in California.⁵

Based on a review of all the facts of record, including relevant state statutes, the Board finds that the conditions for an interstate acquisition enumerated in section 3(d) of the BHC Act are met in this case.⁶ In light of all the facts of record, the Board is permitted to approve the proposal under section 3(d) of the BHC Act.

COMPETITIVE CONSIDERATIONS

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of an attempt to monopolize the business of banking in any relevant banking market. The BHC Act also prohibits the Board from approving a bank acquisition that would substantially lessen competition in any relevant banking market, unless the anticompetitive effects of the proposal are clearly outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.⁷

Wells Fargo and Greater Bay have subsidiary depository institutions that compete directly in five banking markets in California: Monterey-Seaside-Marina; San Francisco-Oakland-San Jose; Santa Cruz; Santa Rosa; and Watsonville. The Board has reviewed carefully the competitive effects of the proposal in each of these banking markets in light of all the facts of record. In particular, the Board has considered the number of competitors that would remain in the markets, the relative shares of total deposits in depository institutions controlled by Wells Fargo and Greater Bay

4. See 12 U.S.C. § 1842(d). A bank holding company’s home state is the state in which the total deposits of all banking subsidiaries of such company were the largest on July 1, 1966, or the date on which the company became a bank holding company, whichever is later.

5. For purposes of section 3(d) of the BHC Act, the Board considers a bank to be located in the states in which the bank is chartered or headquartered or operates a branch. See 12 U.S.C. §§ 1841(o)(4)–(7) and 1842(d)(1)(A) and 1842(d)(2)(B).

6. 12 U.S.C. §§ 1842(d)(1)(A)–(B) and 1842(d)(2)(A)–(B). Wells Fargo is adequately capitalized and adequately managed, as defined by applicable law. California does not have a minimum age requirement applicable to the proposal. On consummation of the proposal, Wells Fargo would control less than 10 percent of the total amount of deposits of insured depository institutions in the United States and less than 30 percent of state deposits. All other requirements of section 3(d) of the BHC Act would be met on consummation of the proposal.

7. 12 U.S.C. § 1842(c)(1).

8. Deposit and market share data are as of June 30, 2006, adjusted to reflect mergers and acquisitions through June 29, 2007, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant

in the markets (“market deposits”),⁸ the concentration level of market deposits and the increases in these levels as measured by the Herfindahl–Hirschman Index (“HHI”) under the Department of Justice Merger Guidelines (“DOJ Guidelines”),⁹ and other characteristics of the markets.

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in all five banking markets.¹⁰ On consummation of the proposal, each market would remain moderately concentrated, as measured by the HHI. Also, the change in the HHI measure of concentration would be very small and numerous competitors would remain in each market.

The DOJ has conducted a detailed review of the potential competitive effects of the proposal and has advised the Board that consummation of the transaction would not likely have a significantly adverse effect on competition in any relevant banking market. In addition, the appropriate banking agencies have been afforded an opportunity to comment and have not objected to the proposal.

Based on all the facts of record, the Board concludes that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of resources in any of the five banking markets where Wells Fargo and Greater Bay compete directly or in any other relevant banking market. Accordingly, the Board has determined that competitive considerations are consistent with approval.

FINANCIAL, MANAGERIAL, AND SUPERVISORY CONSIDERATIONS

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has considered these factors in light of all the facts of record, including confidential reports of examination and other supervisory information received from the relevant federal supervisors of the organizations involved in the proposal, and publicly reported and other financial information, including information provided by Wells Fargo.

competitors of commercial banks. *See, e.g., Midwest Financial Group, 75 Federal Reserve Bulletin 386, 387 (1989); National City Corporation, 70 Federal Reserve Bulletin 743, 744 (1984).* Thus, the Board regularly has included thrift institution deposits in the market share calculation on a 50 percent weighted basis. *See, e.g., First Hawaiian, Inc., 77 Federal Reserve Bulletin 52, 55 (1991).*

9. Under the DOJ Guidelines, a market is considered unconcentrated if the post-merger HHI is under 1000, moderately concentrated if the post-merger HHI is between 1000 and 1800, and highly concentrated if the post-merger HHI exceeds 1800. The Department of Justice (“DOJ”) has informed the Board that a bank merger or acquisition generally will not be challenged (in the absence of other factors indicating anticompetitive effects) unless the post-merger HHI is at least 1800 and the merger increases the HHI more than 200 points. The DOJ has stated that the higher-than-normal HHI thresholds for screening bank mergers and acquisitions for anticompetitive effects implicitly recognize the competitive effects of limited-purpose and other nondepository financial entities.

10. Those banking markets and the effects of the proposal on the concentration of banking resources therein are described in Appendix A.

In evaluating financial factors in expansion proposals by banking organizations, the Board reviews the financial condition of the organizations involved on both a parent-only and consolidated basis, as well as the financial condition of the subsidiary depository institutions and significant nonbanking operations. In this evaluation, the Board considers a variety of information, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the financial condition of the combined organization at consummation, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

The Board has considered the proposal carefully under the financial factors. Wells Fargo, Greater Bay, and their subsidiary depository institutions are currently well capitalized and would remain so on consummation of the proposal. Based on its review of the record, the Board finds that Wells Fargo has sufficient financial resources to effect the proposal. The proposed transaction is structured primarily as a share exchange.

The Board also has considered the managerial resources of the organizations involved and the proposed combined organization. The Board has reviewed the examination records of Wells Fargo, Greater Bay, and their subsidiary depository institutions, including assessments of their management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences and those of the other relevant bank supervisory agencies with the organizations and their records of compliance with applicable banking laws and with anti-money-laundering laws. Wells Fargo, Greater Bay, and their subsidiary depository institutions are considered well managed. The Board also has considered Wells Fargo’s plans for implementing the proposal, including the proposed management after consummation.

Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources and future prospects of the organizations involved in the proposal are consistent with approval, as are the other supervisory factors under the BHC Act.

CONVENIENCE AND NEEDS CONSIDERATIONS

In acting on a proposal under section 3 of the BHC Act, the Board is required to consider the effects of the proposal on the convenience and needs of the communities to be served and to take into account the records of the relevant insured depository institutions under the Community Reinvestment Act (“CRA”).¹¹ The CRA requires the federal financial supervisory agencies to encourage insured depository institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation, and requires the appropriate federal financial supervisory agency to take into account a relevant

11. 12 U.S.C. § 2901 et seq.; 12 U.S.C. § 1842(c)(2).

depository institution's record of meeting the credit needs of its entire community, including low- and moderate-income ("LMI") neighborhoods, in evaluating bank expansionary proposals.¹²

The Board has considered carefully all the facts of record, including evaluations of the CRA performance records of the subsidiary depository institutions of Wells Fargo and Greater Bay, data reported by Wells Fargo and Greater Bay under the Home Mortgage Disclosure Act ("HMDA"),¹³ other information provided by Wells Fargo, confidential supervisory information, and public comment received on the proposal. A commenter expressed concerns about Wells Fargo's record of serving the credit and community-development-investment needs of its assessment areas,¹⁴ particularly in California, and criticized a specific credit product offered by WF Bank.¹⁵ The commenter also alleged, based on HMDA data, that WF Bank engaged in disparate treatment of African American individuals in home mortgage lending. In addition, the commenter contended, without specific allegations, that GB Bank had demonstrated little responsiveness to community needs during its operating history. The commenter also

expressed concern that the proposal would lead to closings of the combined organization's branches.

A. CRA Performance Evaluations

As provided in the CRA, the Board reviewed the proposal in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the insured depository institutions of Wells Fargo and Greater Bay. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.¹⁶

Wells Fargo's lead bank, WF Bank, received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of September 30, 2004 ("2004 WF Bank Evaluation"). Each of Wells Fargo's other subsidiary banks that is subject to the CRA received an "outstanding" or "satisfactory" rating at its most recent CRA performance evaluation.¹⁷ GB Bank also received an "outstanding" CRA performance rating by the OCC, as of May 17, 2006 ("2006 GB Bank Evaluation"). Wells Fargo has represented that it would implement its CRA programs, policies, and procedures at GB Bank.

CRA Performance of WF Bank. In the 2004 WF Bank Evaluation, the bank received "outstanding" ratings on each of the lending, investment, and service tests for its CRA performance overall and in California.¹⁸ Examiners reported that WF Bank's overall lending performance was excellent and that it had a good distribution of home mortgage loans to borrowers of different income levels. They also noted that the bank had an excellent geographic distribution of small loans to small businesses.¹⁹

In WF Bank's California assessment areas, examiners concluded that the bank's distribution of loans among borrowers of different income levels was good and that its lending levels reflected an excellent responsiveness to credit needs. Examiners reported that the bank's community development lending had a positive impact on its performance within the state and commended the bank for providing flexible lending programs to meet the credit

12. 12 U.S.C. § 2903.

13. 12 U.S.C. § 2801 et seq.

14. The commenter also requested that Wells Fargo renew certain community commitments that it made in 1998 and make annual community goals. In addition, the commenter requested that Wells Fargo Bank, National Association ("WF Bank"), Sioux Falls, South Dakota, agree to declare a six-month moratorium on home mortgage foreclosures because of current concerns about the mortgage industry. The Board has consistently stated that neither the CRA nor the federal banking agencies' CRA regulations require depository institutions to make pledges or enter into commitments or agreements with any organization. See *Bank of America Corporation*, 93 *Federal Reserve Bulletin* C49, C52 footnote 27 (2007). Instead, the Board focuses on the existing CRA performance record of an applicant and the programs that an applicant has in place to serve the credit needs of its CRA assessment areas at the time the Board reviews a proposal under the convenience and needs factor. Wells Fargo represented that it will continue to communicate with, and provide information regarding its CRA performance to, community organizations. Wells Fargo also noted that it works with customers who encounter financial difficulties to prevent foreclosures whenever possible.

15. The commenter urged WF Bank to reduce the price of its Direct Deposit Advance Service, which the commenter characterized as a costly payday-loan product. Wells Fargo represented that the service provides an open-end line of credit available only to WF Bank's checking account customers who have recurring income electronically deposited in their checking accounts. Wells Fargo indicated that although the service is a higher-priced form of credit, it provides customers with short-term emergency access to funds. Wells Fargo indicated that it has developed tools to help customers understand how the service works and whether other lower-cost alternatives may be available. The Board has consulted with the Office of the Comptroller of the Currency ("OCC"), WF Bank's primary federal supervisor, about this product. The Board also recognizes that although banks can help to serve the banking needs of communities by making certain products or services available on certain terms or at certain rates, the CRA neither requires an institution to provide any specific types of products or services nor prescribes the costs charged for them.

16. See *Interagency Questions and Answers Regarding Community Reinvestment*, 66 *Federal Register* 36,620 and 36,639 (2001); 72 *Federal Register* 37,922 at 37,951 (2007).

17. Appendix B lists the most recent CRA ratings of Wells Fargo's other subsidiary depository institutions that are subject to the CRA.

18. The evaluation period for the California assessment areas was October 1, 2001, through December 31, 2003, for HMDA and small business lending under the lending test; and November 1, 2001, through September 30, 2004, for community development lending under the lending test and for the investment and service tests.

19. Small businesses are businesses with gross annual revenues of \$1 million or less. Small loans to small businesses include loans with original amounts of \$1 million or less that are either secured by nonfarm, nonresidential properties or classified as commercial and industrial loans.

needs in its assessment areas, including the credit needs of LMI individuals and businesses. WF Bank represented that since the 2004 WF Bank Evaluation, it has provided 401 community development loans in California totaling more than \$1.2 billion.²⁰

Examiners characterized the bank's investment activity in the 2004 WF Bank Evaluation as reflecting an excellent level of responsiveness to a wide variety of community development needs in its California assessment areas, particularly the need for affordable housing. They reported that WF Bank funded 4,038 investments during the evaluation period, totaling more than \$307 million and benefiting more than 2,000 different entities that help meet community development needs. WF Bank represented that it has generally provided increased levels of community development investments since the 2004 WF Bank Evaluation. The bank stated that between 2004 and 2006 it provided more than 4,450 community development investments and grants in California totaling more than \$330 million, including more than \$11 million in investments and grants in San Francisco. In addition, WF Bank represented that it has made numerous investments in or grants to programs directed at community-based small businesses since 2004.

Examiners commended WF Bank for providing services that showed an excellent responsiveness to banking needs in its assessment areas. They reported that the bank's services were accessible to essentially all portions of its assessment areas and that the bank's alternative delivery systems, including ATMs, banking by phone or mail, and Internet banking, helped accessibility throughout all geographies. Examiners also noted that the level of community development services the bank provided had an overall positive influence on its performance under the service test in its California assessment areas. WF Bank represented that since the 2004 WF Bank Evaluation, it also has implemented several programs to improve financial literacy and to make banking services accessible to traditionally underserved communities.

CRA Performance of GB Bank. As noted, GB Bank received an overall "outstanding" rating in the 2006 GB Bank Evaluation.²¹ Examiners reported that the bank's level of lending activity was adequate and that its geographic distribution of small loans to businesses was good in the San Francisco Bay Area assessment area. Examiners also commended GB Bank's level of community development lending and noted that the bank made 89 community development loans totaling \$294 million in this assessment area during the evaluation period. In addition, they reported

that the bank's performance under the investment test in the San Francisco assessment area was excellent and that many of the bank's qualified investments provided affordable housing and economic revitalization. Examiners found that GB Bank's distribution of branches was good and that the bank's retail services and alternate delivery systems were responsive to the needs of the community. They also commended GB Bank's community development services.

B. Branch Closings

The commenter expressed concern about the proposal's possible effect on branch closings. Wells Fargo represented that as a result of the acquisition, branches might be closed in those markets where branches of WF Bank overlap with those of GB Bank but that it has not made any decisions about specific branches to be closed, relocated, or consolidated. Wells Fargo has indicated that it would follow its own branch closing policy with respect to branch closings, relocations, and consolidations related to the proposal.

The Board has considered carefully Wells Fargo's branch closing policy and its record of opening and closing branches. The Board notes that the branch closing policy, which applies to all Wells Fargo subsidiary banks that are subject to the CRA, generally requires a CRA impact report and recommendation to be prepared for any branch closing in an LMI area. A CRA impact report also is required for a branch closing that is more than five miles from another Wells Fargo branch. Each CRA impact report must include alternatives to closing and steps that could be taken to mitigate the effect of the proposed closing on the community served.

In the 2004 WF Bank Evaluation, examiners reported that the bank's branch opening and closing activity in LMI areas did not have an impact on the overall evaluation of its performance under the service test in California. Examiners noted, however, that such activity in the assessment areas receiving full-scope reviews generally had a positive effect on the evaluation of the bank's performance. The Board has consulted with the OCC on WF Bank's record of branch openings and closings since the 2004 WF Bank Evaluation. The OCC will continue to review WF Bank's record of opening and closing branches in the course of conducting CRA performance evaluations.

The Board also has considered that federal banking law provides a specific mechanism for addressing branch closings. Federal law requires an insured depository institution to provide notice to the public and to the appropriate federal supervisory agency before closing a branch.²²

20. The commenter urged Wells Fargo to provide a "one-stop" loan product for multifamily housing to enhance its competitive position in California. Wells Fargo noted that WF Bank has recently established such a loan product that is available to the bank's existing nonprofit developers of affordable multifamily housing.

21. The evaluation period for the 2006 GB Bank Evaluation was January 1, 2004, through December 31, 2005, for HMDA and CRA data under the lending test; and January 1, 2004, through June 5, 2006, for community development lending under the lending test and for the service and investment tests.

22. Section 42 of the Federal Deposit Insurance Act (12 U.S.C. §1831r-1), as implemented by the Joint Policy Statement Regarding Branch Closings (64 *Federal Register* 34,844 (1999)), requires that a bank provide the public with at least 30 days' notice and the appropriate federal supervisory agency and customers of the branch with at least 90 days' notice before the date of the proposed branch closing. The bank also is required to provide reasons and other supporting data for the closing, consistent with the institution's written policy for branch closings.

C. HMDA and Fair Lending Record

The Board has carefully considered the fair lending records and HMDA data of Wells Fargo and Greater Bay in light of public comment received on the proposal. The commenter alleged that Wells Fargo had engaged in disparate treatment of African American individuals in the pricing of home mortgage loans in six Metropolitan Statistical Areas (“MSAs”), including the Los Angeles MSA.²³ The Board has focused its analysis on the 2005 and preliminary 2006 HMDA data reported by Wells Fargo.²⁴

Although the HMDA data might reflect certain disparities in the rates of loan applications, originations, and denials among members of different racial or ethnic groups in certain local areas, they provide an insufficient basis by themselves on which to conclude whether or not Wells Fargo is excluding or imposing higher costs on any group on a prohibited basis. The Board recognizes that HMDA data alone, even with the recent addition of pricing information, provide only limited information about the covered loans.²⁵ HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution has engaged in illegal lending discrimination.

The Board is nevertheless concerned when HMDA data for an institution indicate disparities in lending and believes that all lending institutions are obligated to ensure that their lending practices are based on criteria that ensure not only safe and sound lending but also equal access to credit by creditworthy applicants regardless of their race or ethnicity. Because of the limitations of HMDA data, the Board has considered these data carefully and taken into account other information, including examination reports that provide

23. The commenter based the allegation on a study it recently completed using loan-pricing data reported under HMDA in 2005. The commenter urged WF Bank to institute an underwriting system that directs a borrower to the least expensive loan available to that customer regardless of the lending channel chosen by the customer to apply for a loan. Wells Fargo noted that the study did not include Federal Housing Administration loans designed for LMI borrowers or reflect the fact that the majority of Wells Fargo’s loans to individuals were priced below the thresholds that require HMDA price reporting. Wells Fargo has represented that its pricing is fully disclosed, competitive, and reflects the customer’s particular credit risk. In addition, Wells Fargo stated that its subsidiary banks offer prime pricing options to all first mortgage customers who qualify for such pricing regardless of the channel or division through which the customer applies.

24. The Board reviewed HMDA data reported by Wells Fargo’s significant lending subsidiaries in California and Texas and in the Los Angeles, Houston, and Chicago MSAs where Wells Fargo’s primary assessment areas are located. The Board notes that 2006 HMDA data are preliminary and that final data will not be available for analysis until fall 2007.

25. The data, for example, do not account for the possibility that an institution’s outreach efforts may attract a larger proportion of marginally qualified applicants than other institutions attract and do not provide a basis for an independent assessment of whether an applicant who was denied credit was, in fact, creditworthy. In addition, credit history problems, excessive debt levels relative to income, and high loan amounts relative to the value of the real estate collateral (reasons most frequently cited for a credit denial or higher credit cost) are not available from HMDA data.

on-site evaluations of compliance with fair lending laws by Wells Fargo and its subsidiaries. The Board also has consulted with the OCC, the primary federal supervisor of WF Bank.

The record, including confidential supervisory information, indicates that Wells Fargo has taken steps to ensure compliance with fair lending and other consumer protection laws. All Wells Fargo business units, whether those units are separate companies or line-of-business departments in a subsidiary bank or nonbanking subsidiary, develop and maintain comprehensive compliance programs for all laws and regulations applicable to their business, including fair lending compliance programs. Wells Fargo’s Compliance and Risk Management Group provides oversight for and guidance on these compliance programs, and a corporate fair lending committee that includes senior executives from Wells Fargo’s consumer lending subsidiaries coordinates Wells Fargo’s enterprise-wide fair lending strategy. Wells Fargo’s subsidiary banks and home mortgage lending subsidiaries provide fair lending training for their employees and conduct self-assessments and audits to verify compliance and consistent underwriting practices. Several subsidiaries also provide second-review programs for credit applications designated for denial. Wells Fargo has stated that it will review and make appropriate modifications to the fair lending policies for GB Bank’s operations after consummation of the proposal.

The Board also has considered the HMDA data in light of other information, including the programs described above and the overall performance records of the subsidiary banks of Wells Fargo and Greater Bay under the CRA. These established efforts and records of performance demonstrate that the institutions are active in helping to meet the credit needs of their entire communities.

D. Conclusion on Convenience and Needs and CRA Performance

The Board has considered carefully all the facts of record, including reports of examination of the CRA records of the institutions involved, information provided by Wells Fargo, public comment received on the proposal, and confidential supervisory information. Wells Fargo has represented that consummation of the proposal would provide customers of Greater Bay with expanded access to the products and services offered by Wells Fargo’s bank and nonbank subsidiaries. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant insured depository institutions are consistent with approval of the proposal.

CONCLUSION

Based on the foregoing, and in light of all the facts of record, the Board has determined that the applications should be, and hereby are, approved. In reaching its

conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act and other applicable statutes. The Board's approval is specifically conditioned on compliance by Wells Fargo with the conditions in this order and all the commitments made to the Board in connection with the proposal. For purposes of this transaction, these commitments and conditions are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The proposal may not be consummated before the 15th calendar day after the effective date of this order, or later

than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of San Francisco, acting pursuant to delegated authority.

By order of the Board of Governors, effective August 21, 2007.

Voting for this action: Chairman Bernanke, Vice Chairman Kohn, and Governors Warsh, Kroszner, and Mishkin.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Appendix A

BANKING MARKETS CONSISTENT WITH BOARD PRECEDENT AND DOJ GUIDELINES

Bank	Rank	Amount of deposits	Market deposit shares (percent)	Resulting HHI	Change in HHI	Remaining number of competitors
MONTEREY-SEASIDE-MARINA BANKING MARKET						
<i>Monterey-Seaside-Marina—Monterey-Seaside-Marina Ranally Metro Area (RMA)</i>						
Wells Fargo Pre-Consummation	1	\$659.8 mil.	22.6	1,499	17	14
Greater Bay	13	\$10.8 mil.	.4	1,499	17	14
Wells Fargo Post-Consummation	1	\$670.6 mil.	23.0	1,499	17	14
SAN FRANCISCO-OAKLAND-SAN JOSE BANKING MARKET						
<i>San Francisco-Oakland-San Jose—San Francisco-Oakland-San Jose RMA and the towns of Byron, Hollister, Pescadero, Point Reyes Station, and San Juan Bautista</i>						
Wells Fargo Pre-Consummation	2	\$40.5 bil.	19.4	1,427	93	109
Greater Bay	9	\$5.0 bil.	2.4	1,427	93	109
Wells Fargo Post-Consummation	2	\$45.5 bil.	21.8	1,427	93	109
SANTA CRUZ BANKING MARKET						
<i>Santa Cruz—Santa Cruz RMA</i>						
Wells Fargo Pre-Consummation	3	\$420.0 mil.	13.8	1,767	215	12
Greater Bay	6	\$236.9 mil.	7.8	1,767	215	12
Wells Fargo Post-Consummation	2	\$656.9 mil.	21.6	1,767	215	12
SANTA ROSA BANKING MARKET						
<i>Santa Rosa—Santa Rosa RMA and the city of Cloverdale</i>						
Wells Fargo Pre-Consummation	3	\$830.1 mil.	13.8	1,043	3	21
Greater Bay	18	\$7.1 mil.	.1	1,043	3	21
Wells Fargo Post-Consummation	3	\$837.3 mil.	14.0	1,043	3	21

Appendix A—Continued

BANKING MARKETS CONSISTENT WITH BOARD PRECEDENT AND DOJ GUIDELINES—Continued

Bank	Rank	Amount of deposits	Market deposit shares (percent)	Resulting HHI	Change in HHI	Remaining number of competitors
WATSONVILLE BANKING MARKET						
<i>Watsonville—Watsonville RMA</i>						
Wells Fargo Pre-Consummation	1	\$187.8 mil.	23.5	1,650	113	11
Greater Bay	10	\$19.3 mil.	2.4	1,650	113	11
Wells Fargo Post-Consummation	1	\$207.2 mil.	25.9	1,650	113	11

NOTE: Data are as of June 30, 2006. All amounts of deposits are unweighted. All rankings, market deposit shares, and HHIs are based on thrift institution deposits weighted at 50 percent.

Appendix B

CRA PERFORMANCE EVALUATIONS

Subsidiary Bank	CRA Rating	Date	Supervisor
1. Placer Sierra Bank, Auburn, California	Satisfactory	March 2005	Federal Reserve
2. Wells Fargo Bank Northwest, National Association, Ogden Utah	Satisfactory	December 2005	OCC
3. Wells Fargo HSBC Trade Bank, National Association, San Francisco, California	Outstanding	June 2006	OCC
4. Wells Fargo Financial National Bank, Las Vegas, Nevada	Outstanding	June 2006	OCC
5. Wells Fargo Financial Bank, Sioux Falls, South Dakota	Outstanding	March 2005	FDIC

ORDERS ISSUED UNDER SECTION 4 OF THE BANK HOLDING COMPANY ACT

*National City Corporation
Cleveland, Ohio*

Order Approving the Acquisition of a Savings Association and Notice to Engage in Nonbanking Activities

National City Corporation (“National City”), a financial holding company within the meaning of the Bank Holding Company Act (“BHC Act”), has requested the Board’s approval under sections 4(c)(8) and 4(j) of the BHC Act and section 225.24 of the Board’s Regulation Y¹ to acquire

Mid America Bank, fsb (“Mid America”), a savings association, by merging with its holding company, MAF Bancorp, Inc. (“MAF”), both of Clarendon Hills, Illinois. National City also has requested the Board’s approval under those provisions to acquire St. Francis Equity Properties, Inc. (“St. Francis”), Brookfield, Wisconsin, a subsidiary of Mid America, and thereby engage in community development activities in accordance with section 225.28(b)(12) of the Board’s Regulation Y.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published in the *Federal Register* (72 *Federal Register* 28,491 (2007)). The time for filing comments has expired, and the Board has considered the proposal and all comments received in light of the factors set forth in section 4 of the BHC Act.

1. 12 U.S.C. §§ 1843(c)(8) and (j); 12 CFR 225.24.

2. 12 CFR 225.28(b)(12). National City also proposes to acquire Mid America Insurance Agency, Inc., Clarendon Hills, and Mid America Re, Inc., Burlington, Vermont, in accordance with section 4(k) of the BHC Act, 12 U.S.C. § 1843(k).

National City, with total consolidated assets of \$138.5 billion, is the 13th largest depository organization in the United States, controlling deposits of approximately \$88.6 billion, which represent approximately 1 percent of the total amount of deposits of insured depository institutions in the United States.³ National City controls one insured depository institution, National City Bank, Cleveland, Ohio, that operates in eight states.⁴ National City is the ninth largest depository organization in Illinois, controlling deposits of approximately \$7.2 billion, which represent approximately 2.3 percent of the total amount of deposits of insured depository institutions in the state (“state deposits”).

MAF has total consolidated assets of approximately \$10.4 billion and Mid America, MAF’s only subsidiary insured depository institution, operates in Illinois and Wisconsin. MAF is the 12th largest depository organization in Illinois, controlling deposits of approximately \$5.7 billion.

On consummation of the proposal, National City would remain the 13th largest insured depository organization in the United States, with total consolidated assets of approximately \$150.7 billion. National City would control deposits of approximately \$95.7 billion, representing 1.4 percent of the total amount of deposits of insured depository institutions in the United States. In Illinois, National City would become the fourth largest insured depository organization, controlling deposits of approximately \$12.9 billion, which represent approximately 4 percent of state deposits.

The Board previously has determined by regulation that the operation of a savings association by a bank holding company is closely related to banking for purposes of section 4(c)(8) of the BHC Act.⁵ The Board requires that savings associations acquired by bank holding companies conform their direct and indirect activities to those permissible for bank holding companies under section 4 of the BHC Act.⁶ National City has committed to conform all the activities of Mid America to those that are permissible under section 4(c)(8) of the BHC Act and Regulation Y. The Board also has determined that community development activities are closely related to banking, and National City has committed to conduct those activities in accordance with the Board’s regulations and orders.⁷

Section 4(j)(2)(A) of the BHC Act requires the Board to determine that the proposed acquisition of Mid America and St. Francis “can reasonably be expected to produce benefits to the public that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.”⁸ As part of its evaluation under these public

interest factors, the Board reviews the financial and managerial resources of the companies involved, the effect of the proposal on competition in the relevant markets, and the public benefits of the proposal.⁹ In acting on a notice to acquire a savings association, the Board also reviews the records of performance of the relevant insured depository institutions under the Community Reinvestment Act (“CRA”).¹⁰ The Board has considered the proposal under these factors in light of all the facts of record, including confidential supervisory and examination information, publicly reported financial and other information, and public comments submitted on the proposal.

COMPETITIVE CONSIDERATIONS

The Board has considered carefully the competitive effects of National City’s acquisition of MAF, including Mid America and St. Francis.¹¹ National City Bank and Mid America compete directly in four banking markets in Illinois: Aurora, Chicago, Elgin, and Joliet.¹² The Board has reviewed carefully the competitive effects of the proposal in each of these banking markets in light of all the facts of record. In particular, the Board has considered the number of competitors that would remain in the markets, the relative share of total deposits of National City Bank and Mid America in the markets (“market deposits”),¹³ the concentration level of market deposits and the increase in this level as measured by the Herfindahl–Hirschman Index (“HHI”) under the Department of Justice Guidelines (“DOJ Guidelines”),¹⁴ and other characteristics of the markets.

9. See 12 CFR 225.26; see, e.g., *BancOne Corporation*, 83 *Federal Reserve Bulletin* 602 (1997).

10. 12 U.S.C. § 2901 et seq.

11. See *First Hawaiian, Inc.*, 79 *Federal Reserve Bulletin* 966 (1993).

12. These banking markets and the effects of the proposal on the concentration of banking resources in them are described in the appendix.

13. Deposit and market-share data are as of June 30, 2006, and reflect merger activity through July 5, 2007. The deposits of thrift institutions are included at 50 percent, except as noted below. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift institution deposits in the market-share calculation on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991). In this case, Mid America’s deposits are weighted at 50 percent pre-merger and at 100 percent post-merger to reflect the resulting ownership by a commercial banking organization.

14. Under the DOJ Guidelines, a market is considered unconcentrated if the post-merger HHI is under 1000, moderately concentrated if the post-merger HHI is between 1000 and 1800, and highly concentrated if the post-merger HHI exceeds 1800. The Department of Justice (“DOJ”) has informed the Board that a bank merger or acquisition generally will not be challenged (in the absence of other factors indicating anticompetitive effects) unless the post merger HHI is at least 1800 and the merger increases the HHI more than 200 points. The DOJ has stated that the higher than normal HHI thresholds for screening bank mergers and acquisitions for anticompetitive effects implicitly recognize the competitive effects of limited purpose and other nondepository financial entities.

3. Asset and nationwide deposit-ranking data are as of March 31, 2007. Statewide deposit and ranking data are as of June 30, 2006, and reflect merger activity through July 5, 2007. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

4. National City Bank operates branches in Florida, Illinois, Indiana, Kentucky, Michigan, Missouri, Ohio, and Pennsylvania.

5. 12 CFR 225.28(b)(4)(ii).

6. *Id.*

7. 12 CFR 225.28(b)(11).

8. 12 U.S.C. § 1843(j)(2)(A).

Consummation of the proposal would be consistent with Board precedent and the DOJ Guidelines in each relevant banking market. After consummation of the proposal, the Chicago and Elgin markets would remain unconcentrated, and the Aurora and Joliet markets would remain moderately concentrated. In each of these markets, the changes in the HHI measure of concentration would be small and numerous competitors would remain. Based on all the facts of record, the Board has concluded that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of resources in any of the four banking markets where National City Bank and Mid America compete directly or in any other relevant banking market.

The Board also has considered the effects of the proposed transaction on competition in community development activities. National City and St. Francis do not both engage in community development activities in any relevant market. Moreover, the market for this nonbanking activity is local in scope and unconcentrated, and there are numerous participants that engage in these activities. Based on all the facts of record, the Board concludes that consummation of the proposal would not have a significantly adverse effect on competition among providers of community development activities in any relevant market.

FINANCIAL AND MANAGERIAL RESOURCES

In reviewing the proposal under section 4 of the BHC Act, the Board has carefully considered the financial and managerial resources of National City, MAF, and their subsidiaries. The Board also has reviewed the effect the transaction would have on those resources in light of all the facts of record, including confidential reports of examination, other supervisory information from the primary federal supervisors of the organizations involved in the proposal, and publicly reported and other financial information, including information provided by National City.

In evaluating financial resources in expansion proposals by banking organizations, the Board reviews the financial condition of the organizations involved on both a parent-only and consolidated basis, as well as the financial condition of the subsidiary insured depository institutions and significant nonbanking operations. In this evaluation, the Board considers a variety of information, including capital adequacy, asset quality, and earnings performance. In assessing financial resources, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the financial condition of the combined organization at consummation, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

The Board has carefully considered the proposal under the financial factors. National City, MAF, and their subsidiary depository institutions are well capitalized and would

remain so on consummation of the proposal. Based on its review of the record, the Board finds that National City has sufficient financial resources to effect the proposal. The proposed transaction is structured as a share exchange.

The Board also has considered the managerial resources of the organizations involved and the proposed combined organization. The Board has reviewed the examination records of National City, MAF, and their subsidiary depository institutions, including assessments of their management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences and those of the other relevant financial supervisory agencies with the organizations and their records of compliance with applicable banking law and with anti-money-laundering laws. National City, MAF, and their subsidiary depository institutions are considered to be well managed. The Board also has considered National City's plans for implementing the proposal, including the proposed management after consummation.

Based on all the facts of record, the Board has concluded that the financial and managerial resources of the organizations involved in the proposal are consistent with approval under section 4 of the BHC Act.

CRA PERFORMANCE RECORDS

As previously noted, the Board considers the records of performance under the CRA of the relevant insured depository institutions when acting on a notice to acquire a savings association. The CRA requires the federal financial supervisory agencies to encourage insured depository institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation, and requires the appropriate federal financial supervisory agency to take into account a relevant depository institution's record of meeting the credit needs of its entire community, including low- and moderate-income ("LMI") neighborhoods, in evaluating bank expansion proposals.¹⁵

The Board has considered carefully all the facts of record, including evaluations of the CRA performance records of National City's and MAF's subsidiary depository institutions, data reported under the Home Mortgage Disclosure Act ("HMDA")¹⁶ by the subsidiaries of National City and MAF that engage in home mortgage lending, other lending data reported under the CRA, other information provided by National City and MAF, confidential supervisory information provided by the federal supervisor of each bank, and public comment received on the proposal.

The Board received a comment related to the CRA performance records of National City Bank and Mid America. The commenter alleged that in the Milwaukee

15. 12 U.S.C. § 2903.

16. 12 U.S.C. § 2801 et seq.

area, National City has not adequately served the mortgage credit needs of LMI borrowers¹⁷ and that Mid America has not provided adequate levels of loans of less than \$100,000 to businesses.¹⁸

As provided in the CRA, the Board has evaluated the proposal in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the application process because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.¹⁹

National City Bank received an "outstanding" rating at its most recent CRA performance evaluation by the Office of the Comptroller of the Currency ("OCC"), as of June 30, 2005 ("NC Evaluation").²⁰ Mid America received an "outstanding" rating at its most recent CRA performance evaluation by the Office of Thrift Supervision ("OTS"), as of July 18, 2005 ("MA Evaluation"). National City has indicated that Mid America's CRA program will remain in place on consummation of the proposal.

CRA Performance of National City Bank. In addition to the overall "outstanding" rating that National City Bank received in the NC Evaluation, the bank received separate overall "outstanding" or "satisfactory" ratings for its CRA performance in each of the states reviewed. Examiners reported that the bank's distribution of HMDA loans to borrowers of different income levels was excellent, as was the bank's distribution of small loans to businesses in LMI census tracts.²¹ Examiners stated that the bank's record of community development lending and qualified community development investments demonstrated excellent responsiveness to community credit and investment needs.

17. As the commenter acknowledges, National City Bank operates no branches in the Milwaukee area. The Milwaukee area, therefore, is not part of the bank's assessment areas for purposes of evaluating its CRA performance.

18. The commenter also requested that National City and Mid America commit to implement a number of the commenter's recommendations. The Board has consistently found that neither the CRA nor the federal banking agencies' CRA regulations require depository institutions to make pledges or enter into commitments or agreements with any organization. See, e.g., *Bank of America Corporation*, 93 *Federal Reserve Bulletin* C52, footnote 27 (2007). Instead, the Board focuses on the existing CRA performance record of an applicant and the programs that an applicant has in place to serve the credit needs of its assessment areas at the time the Board reviews the proposed acquisition of an insured depository institution.

19. See *Interagency Questions and Answers Regarding Community Reinvestment*, 66 *Federal Register* 36,620 at 36,640 (2001).

20. The evaluation periods were October 1, 1999, through December 31, 2004, for the lending test; and February 23, 2000, through June 30, 2005, for the service and investment tests. The NC Evaluation included the activities within National City Bank's assessment areas of five affiliated banks that were consolidated into National City Bank in July 2006 and of three nonbank mortgage lending subsidiaries of National City.

21. "Small loans to businesses" are loans with original amounts of \$1 million or less that are either secured by nonfarm, nonresidential properties or classified as commercial and industrial loans.

Since the NC Evaluation, National City has continued its high level of CRA lending activity. In 2005 and 2006, it made more than \$22 billion HMDA-reportable loans in National City Bank's assessment areas. National City also made approximately \$1.2 billion in total qualified community development loans during 2005 and 2006 in the bank's assessment areas.

Examiners rated National City's performance under the investment test as "outstanding" or "high satisfactory" in most of the states reviewed. They reported that the bank's investments were complex in nature and demonstrated excellent responsiveness to the needs of the community. During the evaluation period, the bank made qualified investments totaling more than \$182 million and contributed more than \$5 million to charities with community development purposes.

National City continued to make a significant amount of qualified investments since the NC Evaluation. In 2005 and 2006, National City made approximately \$222 million in qualified investments and grants in the bank's assessment areas. These investments included several projects that created affordable housing through the low-income-housing tax credit program.

Examiners concluded that the bank's retail banking services generally were accessible to geographies and individuals of different income levels. They also reported that the bank generally provided a high level of community development services, including service by bank employees on the boards of nonprofit groups involved in providing affordable housing and other services to LMI individuals.

CRA Performance of Mid America. As noted, Mid America received an overall "outstanding" rating in the MA Evaluation.²² Under the lending test, examiners commended the savings association's responsiveness to the credit needs of its assessment areas. Examiners characterized Mid America as a market leader in originating mortgages reportable under HMDA in LMI geographies and to LMI borrowers when compared with its peer group. In addition, they commended Mid America for offering numerous innovative and flexible programs to LMI borrowers, including several mortgage lending programs in the Chicago and Milwaukee areas under which the savings association made more than 1,100 loans totaling more than \$167 million. Examiners also reported that the savings association's geographic distribution of small loans to businesses was good and that a significant percentage of Mid America's small loans to businesses were in amounts of \$100,000 or less.

In the MA Evaluation, examiners described Mid America's performance as a community development lender as excellent. During the evaluation period, the savings association originated community development loans totaling

22. The evaluation periods were January 1, 2003, through December 31, 2005, for the lending test; and July 1, 2002, through June 30, 2005, for the service and investment tests. Full-scope evaluations were conducted in the Chicago-Naperville-Joliet Metropolitan Statistical Area ("MSA") in Illinois, and in the Milwaukee-Waukesha MSA in Wisconsin. Limited-scope evaluations were conducted in other areas in Wisconsin.

\$53.4 million, including more than \$40 million in multifamily loans that supported affordable housing in LMI areas. Examiners also reported that Mid America made qualifying community development investments during the evaluation period totaling \$18.3 million, which included investments in Chicago-based community investment funds for affordable housing development and in 14 projects in Wisconsin that were eligible for the low-income housing tax credit.

Examiners noted that Mid America's retail delivery systems were reasonably accessible to all geographies in its assessment areas. In addition, examiners reported that the bank provided a reasonable level of community development services and noted that bank employees conducted more than 200 seminars on homebuying and served on the boards of organizations that address community needs such as affordable housing and educational programs for inner-city youths.

Conclusion on CRA Performance. Based on a review of the entire record, and for the reasons discussed above, the Board has concluded that considerations relating to the CRA performance records of the relevant depository institutions are consistent with approval.

OTHER CONSIDERATIONS

In light of public comments on the proposal, the Board also has carefully considered the fair lending record and HMDA data reported by subsidiaries of National City and MAF in its evaluation of the public interest factors. A commenter alleged, based on 2005 HMDA data for the Milwaukee MSA, that National City made a disproportionately small number of mortgage loans to female borrowers and made a disproportionately high number of high-cost loans to Hispanic borrowers.²³ The commenter also alleged that Mid America made a disproportionately small number of prime loans to African American borrowers. The Board has analyzed the 2005 and 2006 HMDA data reported by the insured depository institution subsidiaries of National City and MAF in their primary assessment areas, including the Milwaukee MSA, and statewide in the states where those institutions operated branches.

Although the HMDA data might reflect certain disparities in the rates of loan applications, originations, denials, or pricing among members of different racial or ethnic groups in certain local areas, they provide an insufficient basis by themselves on which to conclude whether or not National City or MAF is excluding or imposing higher credit costs on those groups on a prohibited basis. The Board recognizes that HMDA data alone, even with the

addition of pricing information, provide only limited information about the covered loans.²⁴ HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution has engaged in illegal lending discrimination.

The Board is nevertheless concerned when HMDA data for an institution indicate disparities in lending and believes that all lending institutions are obligated to ensure that their lending practices are based on criteria that ensure not only safe and sound lending but also equal access to credit by creditworthy applicants regardless of their race or ethnicity. Because of the limitations of HMDA data, the Board has considered these data carefully and taken into account other information, including examination reports that provide on-site evaluations of compliance by National City, MAF, and their subsidiaries with fair lending laws. The Board has consulted with the OCC and the OTS about the fair-lending and consumer-protection compliance records of National City Bank and Mid America.

The record indicates that National City and MAF have taken steps to ensure compliance with fair lending and other consumer protection laws. National City has a centralized compliance function and has implemented corporate-wide compliance policies and procedures to help ensure that all National City business lines comply with all fair lending and other consumer protection laws and regulations. It employs compliance officers and staff responsible for compliance training and monitoring, and conducts file reviews for compliance with federal and state consumer protection rules and regulations for all product lines and origination sources. National City also regularly performs self-assessments of its compliance with fair lending laws and provides training in fair lending policy for its employees. MAF also employs compliance techniques, such as a second-review process for mortgage loans and annual fair lending training for its employees. MAF also conducts internal testing of products and practices for illegal discrimination, which includes testing for potential steering of certain products to minority borrowers and the use of regression analysis of credit and pricing decisions. National City has indicated that Mid America's fair lending and consumer compliance program will remain in place on consummation of the proposal.

The Board also has considered the HMDA data in light of other information, including the CRA performance records of National City Bank and Mid America. Based on all the facts of record, the Board has concluded that the fair lending

23. Beginning January 1, 2004, the HMDA data required to be reported by lenders were expanded to include pricing information for loans on which the annual percentage rate (APR) exceeds the yield for U.S. Treasury securities of comparable maturity 3 or more percentage points for first-lien mortgages and 5 or more percentage points for second-lien mortgages (12 CFR 203.4).

24. The data, for example, does not account for the possibility that an institution's outreach efforts may attract a larger proportion of marginally qualified applicants than other institutions attract and do not provide a basis for an independent assessment of whether an applicant who was denied credit was, in fact, creditworthy. In addition, credit history problems, excessive debt levels relative to income, and high loan amounts relative to the value of the real estate collateral (reasons most frequently cited for a credit denial or higher credit cost) are not available from HMDA data.

record and HMDA data of National City and MAF are consistent with approval under section 4 of the BHC Act.

PUBLIC BENEFITS

As part of its evaluation of the public interest factors under section 4 of the BHC Act, the Board also has reviewed carefully the public benefits and possible adverse effects of the proposal. The record indicates that consummation of the proposal would result in benefits to consumers and businesses currently served by Mid America. National City has represented that the proposed transaction would provide Mid America’s customers with expanded products and services, including a wider range of commercial lending products, brokerage, and trust services. In addition, National City has represented that its acquisition of St. Francis would facilitate the provision of low-income housing, including affordable housing for seniors, in Wisconsin.

The Board has determined that the conduct of the proposed nonbanking activities within the framework of Regulation Y and Board precedent is not likely to result in adverse effects, such as undue concentrations of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. Based on all the facts of record, the Board has concluded that consummation of the proposal can reasonably be expected to produce public benefits that would outweigh any likely adverse effects. Accordingly, the Board has determined that the balance of the public benefits under section 4(j)(2) of the BHC Act is consistent with approval.

CONCLUSION

Based on the foregoing and all the facts of record, the Board has determined that the proposal should be, and

hereby is, approved. In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act. The Board’s approval is specifically conditioned on compliance by National City and Mid America with the conditions imposed in this order and the commitments made to the Board in connection with the notice. The Board’s approval also is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c),²⁵ and to the Board’s authority to require such modification or termination of the activities of the bank holding company or any of its subsidiaries as the Board finds necessary to ensure compliance with, and to prevent evasion of, the provisions of the BHC Act and the Board’s regulations and orders issued thereunder. For purposes of this action, these conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision herein and, as such, may be enforced in proceedings under applicable law.

The acquisition shall not be consummated later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Cleveland, acting pursuant to delegated authority.

By order of the Board of Governors, effective August 29, 2007.

Voting for this action: Chairman Bernanke, Vice Chairman Kohn, and Governors Warsh, Kroszner, and Mishkin.

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Appendix

ILLINOIS BANKING MARKETS WITH COMPETITIVE OVERLAP

Bank	Rank	Amount of deposits (dollars)	Market deposit shares (percent)	Resulting HHI	Change in HHI	Remaining number of competitors
<i>Aurora—the southern three tiers of townships in Kane County (Virgil, Compton, St. Charles, Kaneville, Blackberry, Geneva, Batavia, Big Rock, Sugar Grove, and Aurora townships); Little Rock, Bristol, Oswego, Fox, and Kendall townships in Kendall County; and Sandwich township in DeKalb County</i>						
National City Pre-Consummation	14	110,529	1.6	1,041	–12	40
MAF	22	68,727	1.0	1,041	–12	40
National City Post-Consummation ...	6	247,982	3.6	1,041	–12	40

25. 12 CFR 225.7 and 225.25(c).

Appendix—Continued

ILLINOIS BANKING MARKETS WITH COMPETITIVE OVERLAP—Continued

Bank	Rank	Amount of deposits (dollars)	Market deposit shares (percent)	Resulting HHI	Change in HHI	Remaining number of competitors
<i>Chicago—Cook, Du Page, and Lake counties</i>						
National City Pre-Consummation	12	4,269,259	2.0	741	-4	183
MAF	17	2,427,389	1.1	741	-4	183
National City Post-Consummation ...	4	9,124,037	4.1	741	-4	183
<i>Elgin—Marengo, Seneca, Nunda, Riley, Coral, Grafton, and Algonquin townships in McHenry County; and the northern two tiers of townships in Kane County (Hampshire, Rutland, Dundee, Burlington, Plato, and Elgin townships)</i>						
National City Pre-Consummation	37	12,979	.2	571	18	37
MAF	8	284,241	4.8	571	18	37
National City Post-Consummation ...	2	581,461	9.4	571	18	37
<i>Joliet—Will County (excluding Florence, Wilmington, Reed, Custer, and Wesley townships); Aux Sable township in Grundy County; and Na-Au-Say and Seward townships in Kendall County</i>						
National City Pre-Consummation	7	245,060	3.0	1,200	-8	48
MAF	24	69,879	.9	1,200	-8	48
National City Post-Consummation ...	4	384,817	4.7	1,200	-8	48

NOTE: All rankings, market deposit shares, and HHIs are based on thrift institution deposits weighted at 50 percent, except that MAF's thrift institution deposits are weighted at 50 percent pre-merger and 100 percent post-merger.

Order Determining that Certain Activities Are Complementary to the Financial Activity of Underwriting and Selling Health Insurance

The Federal Deposit Insurance Corporation (“FDIC”) has asked the Board to determine whether the disease management and mail-order pharmacy activities described below and conducted by WellPoint, Inc. (“WellPoint”), Indianapolis, Indiana, are permissible for a financial holding company (“FHC”) under the Bank Holding Company Act (“BHC Act”), as amended by the Gramm-Leach-Bliley Act (“GLB Act”). WellPoint has filed an application with the FDIC to obtain deposit insurance for a proposed de novo industrial loan company (“ILC”), ARCUS Financial Bank, Salt Lake City, Utah (“Bank”).¹ The FDIC has

imposed a temporary moratorium on acting on applications for deposit insurance by ILCs controlled by companies that are engaged in any nonbanking activity that is not permissible for an FHC under section 4 of the BHC Act² or for all savings and loan holding companies under the Home Owners’ Loan Act.³

Section 4(k) of the BHC Act permits a bank holding company that qualifies to be an FHC to engage in a broad range of activities that are defined by statute to be financial in nature.⁴ The BHC Act also permits FHCs to engage in any activity that the Board determines, in consultation with

whether the disease management and mail-order pharmacy activities described below are permissible for FHCs. This order does not address any other issues raised by the deposit insurance application filed by WellPoint with the FDIC or the special ILC exception in the BHC Act.

2. 12 U.S.C. § 1843.

3. See Moratorium on Certain Industrial Bank Applications and Notices, 72 Federal Register 5290 (Feb. 5, 2007). The FDIC’s moratorium is scheduled to expire on January 31, 2008.

4. See 12 U.S.C. § 1843(k)(4).

1. Because of the special exception from the definition of “bank” in the BHC Act for ILCs chartered in certain states (12 U.S.C. § 1841(c)(2)(H)), WellPoint would not become a bank holding company on acquisition of Bank. This order addresses only the issue of

the Secretary of the Treasury, to be financial in nature or incidental to a financial activity.⁵

In addition, the BHC Act permits an FHC to engage in any activity that the Board (in its sole discretion) determines, by regulation or order, is “complementary to a financial activity and does not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally.”⁶ This statutory provision was intended to allow the Board to permit an FHC to engage, on a limited basis, in an activity that appears to be commercial rather than financial in nature when the activity is meaningfully connected to a financial activity such that it complements the financial activity.⁷ This limited authority was designed to allow FHCs to remain competitive with other providers of financial services and to better provide financial services to their customers in a developing marketplace. Although WellPoint is not a bank holding company, the FDIC has requested that the Board determine the permissibility of WellPoint’s disease management and mail-order pharmacy activities under the BHC Act, as amended by the GLB Act.

WellPoint is principally engaged in underwriting and selling health insurance. Underwriting and selling health insurance as principal, agent, or broker are activities deemed by Congress in the GLB Act to be financial in nature.⁸ WellPoint is one of the largest health insurance companies in the United States, with total revenues of \$57 billion for the year ending December 31, 2006, and total assets of \$51.8 billion as of December 31, 2006. WellPoint, through its regulated insurance company subsidiaries, provides health insurance in 21 states, is the Blue Cross/Blue Shield licensee in 14 states, and provides health insurance to more than 34 million members. WellPoint’s insurance offerings include preferred provider, health maintenance, point of service, Medicare and Medicaid health plans; vision, dental, pharmacy benefit, life, disability, and long-term care insurance products; and consumer-directed, high-deductible, and limited-service health insurance products. WellPoint also engages in a variety of related activities, including claims processing.

In addition, WellPoint provides disease management and mail-order pharmacy services to persons who obtain health insurance from WellPoint or another insurance company. These activities are conducted through subsidiaries that are not themselves insurance companies. Through its disease management services, WellPoint provides insurance plan members with access to a variety of tools and resources designed to help them maintain healthy lifestyles and properly manage their medical conditions. For example, WellPoint uses data analysis software to identify plan members that have, or are at high risk of developing,

chronic or complex health conditions, such as diabetes or kidney or heart disease. WellPoint employees then contact and work with the plan member (and his or her physician, as appropriate) to provide information on treatment options and ways of managing the member’s care in an appropriate and cost-effective manner and to help coordinate the member’s access to and use of health services and related insurance coverages.

Other disease management services provided by WellPoint to plan members include flu vaccinations; health screenings and assessments (*for example*, for cholesterol or blood pressure); a toll-free “Nurse Line” to respond to questions about injuries or conditions; access to online and audiotape libraries with information on a wide variety of health topics; and assistance in developing personalized plans for achieving a variety of health-related goals, such as tobacco-use cessation, weight and stress management, and proper diet and nutrition. These disease management services typically are provided by, or under the direction of, licensed health-care professionals (including doctors and nurses) employed by WellPoint.

The WellPoint subsidiaries engaged in providing mail-order pharmacy services fill prescriptions for customers who have pharmacy benefit insurance coverage from WellPoint or another insurance company, provide drug-related information to customers, and track potential issues with customer prescriptions, such as drug interactions. WellPoint’s mail-order pharmacy subsidiaries are state-licensed and employ state-licensed pharmacists. WellPoint has indicated that most customers who use mail-order pharmacy services are persons with chronic health conditions or “maintenance” medication requirements.⁹

WellPoint’s disease management and mail-order pharmacy activities are not within the scope of activities that, to date, have been determined to be financial in nature, incidental to a financial activity, or complementary to a financial activity under the BHC Act. The activities do not themselves involve the provision of insurance, are not regulated as insurance by state insurance authorities, and are not provided by an affiliate that is licensed as an insurance company or as an insurance agent or broker. Both activities also involve the provision of health-care services that, while related to insurance underwriting activities, are themselves nonfinancial activities. The Board concludes, however, for the reasons set forth below, that there is a reasonable basis for construing these activities as complementary to a financial activity within the meaning of the GLB Act.

5. *Id.* at § 1843(k)(1)(A) and (2).

6. *Id.* at § 1843(k)(1)(B).

7. See 145 Cong. Rec. H11529 (daily ed. Nov. 4, 1999) (Statement of Chairman Leach) (“It is expected that complementary activities would not be significant relative to the overall financial activities of the organization.”).

8. 12 U.S.C. § 1843(k)(4)(B).

9. WellPoint offers these mail-order pharmacy services as part of a broader “pharmacy benefit management” program offered by its subsidiaries. Pharmacy benefit managers (“PBMs”) provide employers a variety of services to improve the pharmacy benefit coverages for employees, including arranging a network of retail pharmacies where plan members can fill prescriptions under the plan and assisting plan sponsors in developing and managing the list of drugs and their costs that the plan will cover. See Federal Trade Commission, *Pharmacy Benefit Managers: Ownership of Mail-Order Pharmacies* at p. ii (August 2005) (“FTC Report”).

Both disease management and mail-order pharmacy activities help employers that obtain health insurance from an insurance company to manage and reduce the risks and costs of providing health insurance to employees. WellPoint has indicated that many of its customers request or demand that health insurers include disease management services or mail-order pharmacy services in the health insurance program designed for the customer and its employees. WellPoint has indicated that employers do so because the services help employers better manage and reduce their health insurance costs (i) in the case of disease management services, by promoting healthy lifestyle choices, reducing unnecessary doctor or hospital visits, and assisting customers with chronic conditions in developing and pursuing available treatment options to manage properly their condition; and (ii) in the case of mail-order pharmacy services, by providing employers and employees (particularly those with chronic conditions) access to a low-cost provider of prescriptions.

WellPoint also has provided data demonstrating that many of the largest health insurers in the United States provide disease management and mail-order pharmacy services both to their own insurance customers and to customers of other health insurance companies. These data indicate, for example, that of the ten largest health insurers in the United States in terms of the dollar value of direct premiums written in 2006, six provide disease management services and five provide mail-order pharmacy services.¹⁰ These data also indicate that for both services all but one of these large insurance companies currently provide the service to customers who obtain health insurance from the insurance company *or* another insurance company. The Federal Trade Commission also has found that many large insurers provide “in-house” PBM services and that many PBMs own their own mail-order pharmacies.¹¹

Based on the foregoing and other facts of record, the Board concludes that disease management and mail-order pharmacy activities complement the financial activity of underwriting and selling health insurance.

As noted above, section 4(k)(1)(B) of the BHC Act requires that the Board determine that any proposed complementary activity does not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally.¹² Moreover, the Board previously has stated that complementary activities should be limited in size and scope relative to the financial activities that they complement.¹³

WellPoint’s disease management and mail-order pharmacy activities in the aggregate currently account for less than 1 percent of WellPoint’s consolidated total assets and

less than 4 percent of WellPoint’s consolidated total annual revenues. The total assets of WellPoint’s subsidiaries engaged in disease management and mail-order pharmacy activities also constitute less than 4 percent of the total capital (calculated in accordance with applicable statutory accounting principles) of all regulated insurance company subsidiaries and health plans of WellPoint. To limit the potential size and safety and soundness risks of the proposed activities, the Board has conditioned its determination in this order that the disease management and mail-order pharmacy activities conducted by WellPoint are complementary to a financial activity on the requirement that these activities in the aggregate must not account for more than 2 percent of WellPoint’s consolidated total assets or 5 percent of its consolidated total annual revenues. In addition, the total assets of WellPoint’s subsidiaries engaged in disease management or mail-order pharmacy activities in the aggregate may not exceed 5 percent of the total capital (calculated in accordance with applicable statutory accounting principles) of all regulated insurance company subsidiaries and health plans of WellPoint.

The Board also has considered the types of risks to which WellPoint is exposed by conducting disease management and mail-order pharmacy activities and confidential information provided by WellPoint concerning how it manages and addresses those risks. WellPoint has indicated, for example, that it maintains liability insurance and provides extensive training to the employees engaged in these activities to ensure compliance with applicable laws and regulations, including relevant privacy laws and regulations. The Board notes, moreover, that WellPoint’s mail-order pharmacy units and the pharmacists they employ, as well as the doctors and nurses employed by the subsidiaries engaged in disease management services, are licensed and regulated by appropriate state licensing boards.

WellPoint also has indicated that it does not expect that Bank will make loans to, engage in cross-marketing activities with, or have other direct business relationships with the WellPoint subsidiaries that provide disease management or mail-order pharmacy services. Any future extensions of credit by Bank to, or other covered transactions by Bank with, these or other affiliates, including any covered transaction with an unaffiliated person the proceeds of which are transferred to or used for the benefit of an affiliate, must comply with sections 23A and 23B of the Federal Reserve Act and the Board’s Regulation W.¹⁴

For these reasons, the Board concludes that the proposed activities do not pose a substantial risk to the safety and soundness of depository institutions or the financial system generally.¹⁵

10. These data are based on a 2006 National Association of Insurance Commissioners report of market share by direct premiums written by all accident and health insurance carriers and have been adjusted to exclude certain large insurance carriers that engage exclusively or predominantly in underwriting nonhealth accident insurance.

11. See FTC Report at p. i and v.

12. 12 U.S.C. § 1843(k)(1)(B).

13. See 68 *Federal Register* 68493, 68497 (Dec. 9, 2003).

14. 12 U.S.C. 371c, 371c-1; 12 CFR Part 223.

15. Because this order is issued in response to a request from the FDIC, the Board has not determined whether WellPoint’s conduct of the proposed activities “can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.” See

The Board's decision is based on all the facts of record, including the representations made to the Board in connection with this order. The Board's decision is subject to, and is specifically conditioned on compliance with, the terms and conditions set forth in this order.

By order of the Board of Governors, effective September 7, 2007.

Voting for this action: Chairman Bernanke, Vice Chairman Kohn, and Governors Warsh, Kroszner, and Mishkin.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

ORDERS ISSUED UNDER SECTIONS 3 AND 4 OF THE BANK HOLDING COMPANY ACT

The Bank of Nova Scotia Toronto, Canada

Order Approving the Acquisition of Shares of a Bank and a Savings Association

The Bank of Nova Scotia ("BNS"), a foreign bank that is a financial holding company for purposes of the Bank Holding Company Act ("BHC Act"), has requested the Board's approval under section 3 of the BHC Act¹ to acquire 10 percent of the outstanding voting shares of First Bancorp ("FBC"), San Juan, and, indirectly, its subsidiary bank, FirstBank of Puerto Rico, Santurce, both of Puerto Rico. In addition, BNS has requested approval under section 4 of the BHC Act to acquire indirectly FBC's subsidiary savings association, FirstBank Florida, Miami, Florida.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published in the *Federal Register* (72 *Federal Register* 18,250 (2007)). The time for filing comments has expired, and the Board has considered the notice and all comments received in light of the factors set forth in sections 3 and 4 of the BHC Act.

BNS, with total consolidated assets of \$373 billion, is the third largest commercial bank in Canada³ and provides a variety of banking services to retail and corporate custom-

ers through more than 950 branches in Canada. It also provides stock brokerage, insurance brokerage, fund management, and financial advisory services through subsidiaries. In the United States, BNS operates branches in Houston, Texas; Portland, Oregon; and New York, New York; and agencies in Atlanta, Georgia; and San Francisco, California. BNS also has branches in the U.S. Virgin Islands and Puerto Rico. Scotia Bank de Puerto Rico ("Scotia Bank"), San Juan, BNS's subsidiary bank, operates only in Puerto Rico. BNS also provides custody and trust services through The Bank of Nova Scotia Trust Company of New York, New York, New York, a nondepository trust company.

FBC, with total consolidated assets of approximately \$17.3 billion, is the 45th largest depository organization in the United States, controlling deposits of approximately \$10.8 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the United States.⁴ If BNS were deemed to control FBC, BNS would become the 42nd largest depository organization in the United States, with total consolidated assets of approximately \$18.9 billion, controlling deposits of approximately \$12.4 billion.

NONCONTROLLING INVESTMENT

Although the acquisition of less than a controlling interest in a bank or bank holding company is not a normal acquisition for a bank holding company, the requirement in section 3(a)(3) of the BHC Act to obtain the Board's approval before a bank holding company acquires more than 5 percent of the voting shares of a bank suggests that Congress contemplated acquisitions by bank holding companies of between 5 and 25 percent of the voting shares of banks.⁵ On this basis, the Board previously has approved the acquisition by a bank holding company of less than a controlling interest in a bank or bank holding company.⁶

BNS has stated that it does not propose to control or exercise a controlling influence over FBC and that its indirect investment in FBC's subsidiary depository institutions would also be a passive investment. BNS has agreed to abide by certain commitments ("Passivity Commitments") that are substantially similar to commitments previously relied on by the Board in determining that an investing bank holding company would not be able to exercise a controlling influence over another bank holding

12 U.S.C. § 1843(j)(2). For the same reason, the Board has not reviewed the financial and managerial resources of WellPoint and the other factors set forth in section 225.26(b) of the Board's Regulation Y (12 CFR § 225.26(b)).

1. 12 U.S.C. § 1842. See 12 CFR 225.15.

2. 12 U.S.C. § 1843. See 12 CFR 225.24. BNS's indirect investments in the nonbank subsidiaries of FBC and FirstBank Florida, all in Puerto Rico and the U.S. Virgin Islands, are made in accordance with section 4(c)(9) of the BHC Act and 225.23(f)(1) of Regulation K, because these locations are outside the United States for purposes of the International Banking Act ("IBA") and Regulation K (12 U.S.C. § 3101(7); 12 U.S.C. § 1843(c)(9); 12 CFR 211.23(f)(1) and 211.2(i)).

3. Canadian asset and ranking data are as of April 30, 2007. Both are based on the exchange rate then in effect.

4. Domestic asset data are as of March 31, 2007; deposit and ranking data are as of June 30, 2006, and reflect subsequent mergers and acquisitions through April 6, 2007. In this context, the "United States" includes any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, and the Virgin Islands. In this context, depository institutions include commercial banks, savings banks, and savings associations.

5. See 12 U.S.C. § 1842(a)(3).

6. See, e.g., *Passumpsic Bancorp*, 92 *Federal Reserve Bulletin* C175 (2006); *Brookline Bancorp, MHC*, 86 *Federal Reserve Bulletin* 52 (2000).

company for purposes of the BHC Act.⁷ For example, BNS has committed not to exercise or attempt to exercise a controlling influence over the management or policies of FBC or any of its subsidiaries; not to seek or accept representation on the board of directors of FBC or any of its subsidiaries; and not to have any director, officer, employee, or agent interlocks with FBC or any of its subsidiaries. BNS also has committed not to attempt to influence the dividend policies, loan decisions, or operations of FBC or any of its subsidiaries.

Based on these considerations and all the other facts of record, the Board has concluded that BNS would not acquire control of, or have the ability to exercise a controlling influence over, FBC or its subsidiary depository institutions through the proposed acquisition of FBC's voting shares. The Board notes that the BHC Act would require BNS to file an application and receive the Board's approval before the company could directly or indirectly acquire additional shares of FBC or attempt to exercise a controlling influence over FBC.⁸

COMPETITIVE CONSIDERATIONS

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of an attempt to monopolize the business of banking in any relevant banking market. The BHC Act also prohibits the Board from approving a bank acquisition that would substantially lessen competition in any relevant banking market, unless the anticompetitive effects of the proposal are clearly outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.⁹ The Board also must consider the competitive effects of a proposal to acquire a savings association under the public benefits factor of section 4 of the BHC Act.

FirstBank of Puerto Rico and Scotia Bank, whose deposits are insured by the Federal Deposit Insurance Corporation ("FDIC"), compete directly in the Aguadilla, Mayaguez, Ponce, and San Juan banking markets in Puerto Rico.¹⁰ BNS also competes directly with FirstBank of Puerto Rico through branch offices¹¹ in the St. John-St.

Thomas and the St. Croix banking markets in the U.S. Virgin Islands.¹² BNS and First Bank Florida do not compete directly in any banking market.

The Board has reviewed carefully the competitive effects of the proposal in each of these banking markets in light of all the facts of record. In particular, the Board has considered the number of competitors that would remain in the banking markets; the relative shares of total deposits in depository institutions in the market ("market deposits") controlled by FBC and BNS;¹³ the concentration level of market deposits and the increase in the level as measured by the Herfindahl-Hirschman Index ("HHI") under the Department of Justice Merger Guidelines ("DOJ Guidelines");¹⁴ other characteristics of the market; and the Passivity Commitments made by BNS with respect to FirstBank of Puerto Rico.

A. Banking Markets within Established Guidelines

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in the Aguadilla, Mayaguez, Ponce, and San Juan banking markets in Puerto Rico.¹⁵ On consummation

Because the U.S. Virgin Islands are not a "State" for purposes of the IBA, however, the limitation on retail deposit-taking does not apply to branches of foreign banks in the U.S. Virgin Islands (12 U.S.C. §§ 3101(7) and 3104(c)). As such, branches of foreign banks operating in the U.S. Virgin Islands may accept retail deposits and offer a full range of banking services in direct competition with local depository institutions to the extent permissible under local law and regulation. In light of all the facts of record, including information provided by the U.S. Virgin Islands Division of Banking and Insurance, the Board has concluded that BNS does compete with local depository institutions for retail deposits, small business loans, and various other banking services in the U.S. Virgin Islands and that uninsured deposits held by BNS branch offices, therefore, should be included for purposes of calculating relevant market data.

12. The St. John-St. Thomas banking market includes the islands of St. John and St. Thomas. The St. Croix banking market includes the island of St. Croix.

13. Deposit and market share data are as of June 30, 2006, are adjusted to reflect subsequent mergers and acquisitions through April 6, 2007, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. *See, e.g., Midwest Financial Group, 75 Federal Reserve Bulletin 386 (1989); National City Corporation, 70 Federal Reserve Bulletin 743 (1984).* Thus, the Board regularly has included thrift deposits in the market share calculation on a 50 percent weighted basis. *See, e.g., First Hawaiian, Inc., 77 Federal Reserve Bulletin 52 (1991).*

14. Under the DOJ Guidelines, a market is considered unconcentrated if the post-merger HHI is under 1000, moderately concentrated if the post-merger HHI is between 1000 and 1800, and highly concentrated if the post-merger HHI exceeds 1800. The Department of Justice ("DOJ") has informed the Board that a bank merger or acquisition generally will not be challenged (in the absence of other factors indicating anticompetitive effects) unless the post-merger HHI is at least 1800 and the merger increases the HHI more than 200 points. The DOJ has stated that the higher-than-normal HHI thresholds for screening bank mergers and acquisitions for anticompetitive effects implicitly recognize the competitive effects of limited-purpose and other nondepository financial entities.

15. The effect of the proposal on the concentration of banking resources in these markets is described in Appendix B.

7. The commitments made by BNS are set forth in Appendix A.

8. *See, e.g., Emigrant Bancorp, Inc., 82 Federal Reserve Bulletin 555 (1996); First Community Bancshares, Inc., 77 Federal Reserve Bulletin 50 (1991).*

9. 12 U.S.C. § 1842(c)(1).

10. These banking markets, and the effects of the proposal on the concentration of banking resources in these markets, are described in Appendix B.

11. Deposits held by BNS's branch offices in the U.S. Virgin Islands are not insured by the FDIC. Pursuant to the IBA, a foreign bank wishing to engage in retail deposit-taking in the United States must organize or acquire an insured U.S. depository institution. Branch offices of foreign banks, with few exceptions, must confine their deposit-taking in the United States to activities not requiring FDIC insurance, such as wholesale deposit-taking (12 U.S.C. § 3104(c)). Typically, the Board has taken the view that these branches do not fully compete with U.S. depository institutions for purposes of the competitive analysis. *See Banco Santander Central Hispano, S.A., 92 Federal Reserve Bulletin C151 (2006).*

of the proposal, three banking markets would remain highly concentrated and one market would remain moderately concentrated, as measured by the HHI. The change in the HHI in the three highly concentrated markets would be small. In each of the four banking markets, numerous competitors would remain.

B. Two Banking Markets Warranting Special Scrutiny

BNS and FBC compete directly in two banking markets that warrant a detailed review: St. John-St. Thomas and St. Croix. As discussed below, if BNS were to acquire control of FBC, the post-consummation concentration levels would exceed the DOJ Guidelines, and BNS's resulting market share would exceed 35 percent in both markets.

St. John-St. Thomas Banking Market. BNS is the third largest depository institution in the St. John-St. Thomas market, controlling \$212 million in deposits, which represents 13.3 percent of market deposits. FirstBank of Puerto Rico is the second largest depository institution in the market, controlling \$576 million in deposits, which represents 36.2 percent of market deposits. If considered a combined organization on consummation of the proposal, BNS and FirstBank of Puerto Rico would be the largest depository organization in the banking market, controlling \$788 million in deposits, which would represent approximately 49.5 percent of market deposits. The proposal would exceed the DOJ Guidelines because the HHI for the St. John-St. Thomas banking market would increase 965 points to 5000.

St. Croix Banking Market. BNS is the third largest depository institution in the St. Croix market, controlling \$131 million in deposits, which represents 20.8 percent of market deposits. FirstBank of Puerto Rico is the largest depository institution in the market, controlling \$177 million in deposits, which represents 28.1 percent of market deposits. If considered a combined organization on consummation of the proposal, BNS and FirstBank of Puerto Rico would be the largest depository organization in the St. Croix banking market, controlling \$308 million in deposits, which would represent approximately 48.9 percent of market deposits. The proposal would exceed the DOJ Guidelines because the HHI for the St. Croix banking market would increase 1171 points to 3359.

Competitive Effects in the Two Markets. The market indexes suggest that consummation of the proposal would raise competitive issues in both the St. John-St. Thomas and St. Croix banking markets.¹⁶ After careful analysis of the record, the Board has concluded, however, that no significant reduction in competition is likely to result from BNS's proposed indirect investment in FirstBank of Puerto Rico. Of particular significance in this case is the structure of the proposed investment, which is designed to limit the

ability of BNS to control FBC. Although the Board previously has noted that one company need not acquire control of another company to lessen competition between them substantially, both BNS and FBC have proposed special safeguards to limit access by BNS to competitively sensitive information and to limit the potential for BNS to influence the policies or management of FBC in the St. John-St. Thomas and St. Croix banking markets.¹⁷

As noted, the record shows that BNS intends to be a passive investor and that there will be no officer or director interlocks between BNS and FBC or FirstBank of Puerto Rico, although FBC has agreed to allow BNS to have a nonparticipating observer on FBC's board. The Board recognizes that a significant reduction in competition can result from the sharing of nonpublic financial information between two organizations that are not under common control. To address this concern, FBC and BNS have committed that FBC would restrict BNS from having access to any information that would allow anticompetitive behavior in the St. John-St. Thomas and St. Croix banking markets. For example, BNS would not be provided access to operational or management information regarding the operations of FBC in the U.S. Virgin Islands, and BNS's representative will not be present when any matters concerning those operations are presented to FBC's board. These restrictions and commitments, including the Passivity Commitments noted above, limit BNS's access to confidential information that could enable it to engage in anticompetitive behavior in the St. John-St. Thomas and St. Croix banking markets with respect to FirstBank of Puerto Rico. Anticompetitive behavior otherwise might occur in these banking markets through either coordinating BNS's activities with FBC or influencing the behavior of FBC.¹⁸

C. Views of Other Agencies and Conclusion on Competitive Considerations

The DOJ also has reviewed the proposal and has advised the Board that it does not believe that BNS's acquisition of 10 percent of the voting shares of FBC would likely have a significantly adverse effect on competition in any relevant banking market at this time. The appropriate banking agencies have been afforded an opportunity to comment and have not objected to the proposal.

Accordingly, in light of all the facts of record, the Board concludes that consummation of the proposal would not have a significantly adverse effect on competition or on the

17. See, e.g., *Passumpsic Bancorp*, 92 *Federal Reserve Bulletin* C175 (2006); *BOK Financial Corp.*, 81 *Federal Reserve Bulletin* 1052, 1053-54 (1995); *SunTrust Banks, Inc.*, 76 *Federal Reserve Bulletin* 542 (1990); *First State Corp.*, 76 *Federal Reserve Bulletin* 376, 379 (1990); *Sun Banks, Inc.*, 71 *Federal Reserve Bulletin* 243 (1985).

18. There are no other legal, contractual, or statutory provisions that would allow greater access to the bank's financial information in the two banking markets than is available to shareholders with less than a 5 percent interest.

16. The Board also notes that one depository institution entered the St. Thomas-St. John banking market de novo in 2006.

concentration of resources in any relevant banking market and that competitive considerations are consistent with approval.

FINANCIAL, MANAGERIAL, AND SUPERVISORY CONSIDERATIONS

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board also reviews financial and managerial resources of the organizations involved in a proposal under section 4 of the BHC Act.¹⁹ The Board has carefully considered these factors in light of all the facts of record, including confidential supervisory and examination information from the various U.S. banking supervisors of the institutions involved, publicly reported and other financial information, and information provided by BNS. The Board also has consulted with the Office of the Superintendent of Financial Institutions (“OSFI”), the agency with primary responsibility for the supervision and regulation of Canadian banks, including BNS.

In evaluating the financial factors in expansion proposals by banking organizations, the Board reviews the financial condition of the organizations involved both on a parent-only and on a consolidated basis, as well as the financial condition of the subsidiary depository organizations and significant nonbanking operations. In this evaluation, the Board considers a variety of information, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the financial condition of the pro forma organization, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

The Board has carefully considered the financial factors of this proposal. Canada’s risk-based capital standards are consistent with those established by the Basel Capital Accord (“Accord”). The capital ratios of BNS would continue to exceed the minimum levels that would be required under the Accord and are considered equivalent to the capital levels that would be required of a U.S. banking organization. Furthermore, the U.S. subsidiary depository institutions involved are well capitalized and would remain so on consummation. The Board also has considered the financial resources of BNS and the other organizations involved and the effects of this proposal on the capital and financial resources of FBC and its subsidiary depository institutions. Based on its review of these factors, the Board finds that BNS has sufficient financial resources to effect the proposal and that the financial factors are consistent with approval. The proposed transaction is structured as a share purchase to be funded with available cash resources.

The Board also has considered the managerial resources of the organizations involved. The Board has reviewed the examination records of FBC, its depository institutions, and the U.S. banking operations of BNS, including assessments of their management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences and those of other relevant banking supervisory agencies, including the Office of Thrift Supervision (“OTS”) and the FDIC, with the organizations and their records of compliance with applicable banking law and with anti-money-laundering laws.²⁰

Based on all the facts of record, the Board has concluded that considerations relating to the managerial resources and future prospects of the organizations involved in the proposal are consistent with approval. Section 3 of the BHC Act also provides that the Board may not approve an application involving a foreign bank unless the bank is subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in the bank’s home country.²¹ As noted, the OSFI is the primary supervisor of Canadian banks, including BNS. The Board previously has determined that BNS is subject to comprehensive supervision on a consolidated basis by its home-country supervisor.²² Based on this finding and all the facts of record, the Board has concluded that BNS continues to be subject to comprehensive supervision on a consolidated basis by its home-country supervisor.

Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources and future prospects of the organizations involved

20. On March 16, 2006, the Board issued a cease and desist order (“Order”) requiring FBC to address accounting deficiencies for certain mortgage loans, which subsequently led it to restate the company’s financial statements. *See In the Matter of First Bancorp*, Doc. No. 06-006-B-HC. In a separate and coordinated action, the FDIC also issued a cease and desist order against FirstBank of Puerto Rico. The Order required, among other actions, that FBC hire an independent consultant to review its mortgage portfolio; establish policies and procedures to ensure appropriate classification of loans; submit a written capital plan to ensure that the consolidated organization maintains an adequate capital position; and submit an acceptable liquidity contingency plan. The Board has reviewed carefully the progress made by FBC in implementing the Order’s requirements. The Board expects that FBC will continue to take all necessary steps to ensure compliance with the Order.

21. 12 U.S.C. § 1843(c)(3)(B). As provided in Regulation Y, the Board determines whether a foreign bank is subject to consolidated home-country supervision under the standards set forth in Regulation K. *See* 12 CFR 225.13(a)(4). Regulation K provides that a foreign bank will be considered subject to comprehensive supervision or regulation on a consolidated basis if the Board determines that the bank is supervised or regulated in such a manner that its home-country supervisor receives sufficient information on the worldwide operations of the bank, including its relationship with any affiliates, to assess the bank’s overall financial condition and its compliance with laws and regulations. *See* 12 CFR 211.24(c)(1).

22. *The Bank of Nova Scotia*, 93 *Federal Reserve Bulletin* C73 (2007).

19. 12 CFR 225.26(b).

in the proposal are consistent with approval, as are the other supervisory factors.²³

CONVENIENCE AND NEEDS AND CRA PERFORMANCE CONSIDERATIONS

In acting on a proposal under section 3 of the BHC Act, the Board also must consider the effects of the proposal on the convenience and needs of the communities to be served and take into account the records of the relevant insured depository institutions under the Community Reinvestment Act (“CRA”).²⁴ The Board also must review the records of performance under the CRA of the relevant insured depository institutions when acting on a notice under section 4 of the BHC Act to acquire voting securities of an insured savings association.²⁵

As provided in the CRA, the Board has evaluated the proposal in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution’s most recent CRA performance evaluation is a particularly important consideration in the applications process because it represents a detailed, on-site evaluation of the institution’s overall record of performance under the CRA by its appropriate federal supervisor.²⁶

Scotia Bank received a “satisfactory” rating from the FDIC at its most recent CRA performance evaluation, as of March 1, 2005. FirstBank of Puerto Rico received a “satisfactory” rating at its most recent CRA performance evaluation by the FDIC, as of September 1, 2006, and FirstBank Florida received a “satisfactory” rating from the OTS at its most recent CRA performance evaluation, as of February 28, 2005.

Based on all the facts of record, the Board concludes that considerations relating to the convenience and needs of the

communities to be served and the CRA performance records of the relevant depository institutions are consistent with approval.

PUBLIC BENEFITS

As noted above, BNS also has filed a notice under section 4(c)(8) and 4(j) of the BHC Act for its proposed indirect investment in FirstBank Florida. The Board previously has determined by regulation that the operation of a savings association by a bank holding company is closely related to banking for purposes of section 4(c)(8) of the BHC Act.²⁷ To approve this notice, the Board also must determine that the proposed acquisition of FirstBank Florida “can reasonably be expected to produce benefits to the public that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.”²⁸

As part of its evaluation of the public interest factors under section 4 of the BHC Act, the Board has reviewed carefully the public benefits and possible adverse effects of the proposal. The record indicates that consummation of the proposal would result in benefits to consumers currently served by FBC. BNS’s investment in FBS, and thus indirectly in FirstBank Florida, would strengthen FBC’s capital position and allow FBC to better serve its customers. For the reasons discussed above and based on the entire record, the Board has determined that the conduct of the proposed nonbanking activities within the framework of Regulation Y and Board precedent is not likely to result in adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.

Based on all the facts of record, the Board concludes that consummation of the proposal can reasonably be expected to produce public benefits that would outweigh any likely adverse effects. Accordingly, the Board has determined that the balance of the public benefits under section 4(j)(2) of the BHC Act is consistent with approval.

OTHER CONSIDERATIONS

BNS also requests that it be permitted to acquire an indirect interest in FBC’s noncontrolling minority investment in Sun American Bancorp and its subsidiary bank, Sun American Bank, both in Boca Raton, Florida (collectively, “Sun American”), without filing an application for the Board’s prior approval under section 3 of the BHC Act.²⁹ FBC has entered into and complied with commitments not to exer-

23. Section 3 of the BHC Act also requires the Board to determine that an applicant has provided adequate assurances that it will make available to the Board such information on its operations and activities and those of its affiliates that the Board deems appropriate to determine and enforce compliance with the BHC Act (12 U.S.C. § 1842(c)(3)(A)). The Board has reviewed the restrictions on disclosure in the relevant jurisdictions in which the applicant operates and has communicated with relevant government authorities concerning access to information. In addition, BNS previously has committed that, to the extent not prohibited by applicable law, it will make available to the Board such information on the operations of its affiliates that the Board deems necessary to determine and enforce compliance with the BHC Act, the IBA, and other applicable federal law. BNS also previously has committed to cooperate with the Board to obtain any waivers or exemptions that may be necessary to enable its affiliates to make such information available to the Board. In light of these commitments, the Board has concluded that BNS has provided adequate assurances of access to any appropriate information the Board may request.

24. 12 U.S.C. § 2901 et seq.; 12 U.S.C. § 1842(c)(2).

25. See, e.g., *North Fork Bancorporation, Inc.*, 86 *Federal Reserve Bulletin* 767 (2000).

26. See *Interagency Questions and Answers Regarding Community Reinvestment*, 66 *Federal Register* 36,620 at 36,640 (2001); 72 *Federal Register* 37,922 at 37,951 (2007).

27. 12 CFR 225.28(b)(4)(ii).

28. See 12 U.S.C. § 1843(j)(2)(A).

29. 12 U.S.C. § 1842(a)(3). In 2004, FBC was approved to acquire up to 9.9 percent of the voting shares of Sun American Bancorp, previously Southern Security Bank Corporation. See letter to Ms. Szendrey-Ramos from Ms. Tham, Federal Reserve Bank of New York, dated May 10, 2004.

cise or attempt to exercise a controlling influence over Sun American that are similar to the Passivity Commitments noted above, and BNS would have no meaningful interaction or influence over Sun American through BNS's proposed minority, noncontrolling investment in FBC. Based on all the facts of record, the Board has determined that no regulatory purpose would be served by requiring BNS to file an application under the BHC Act for such an investment; accordingly, the Board will not require BNS to file an application.³⁰

CONCLUSION

Based on the foregoing and all the facts of record, the Board has determined that the application and notice should be, and hereby are, approved. In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act. The Board's approval is specifically conditioned on compliance by BNS with the conditions imposed in this order and the commitments made to the Board in connection with the proposal. The Board's approval of the nonbanking aspects of the proposal is also subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c),³¹ and to the Board's authority to require such modification or termination of the activities of BNS or any of its subsidiaries as the Board finds necessary to ensure compliance with, and to prevent evasion of, the provisions of the BHC Act and the Board's regulations and orders issued thereunder. For purposes of this action, the conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision herein and, as such, may be enforced in proceedings under applicable law.

The bank-related portion of the proposal shall not be consummated before the 15th calendar day after the effective date of this order, and no part of the proposal may be consummated later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of New York, acting pursuant to delegated authority.

By order of the Board of Governors, effective August 9, 2007.

Voting for this action: Chairman Bernanke, Vice Chairman Kohn, and Governors Warsh, Kroszner, and Mishkin.

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

30. The Board notes that the requirements of section 3(d) of the BHC Act would be met if BNS were to acquire control of Sun American (12 U.S.C. § 1842(d)).

31. 12 CFR 225.7 and 225.25(c).

Appendix A

PASSIVITY COMMITMENTS

In connection with its application to acquire up to 10 percent of First BanCorp ("FBC"), San Juan, Puerto Rico, Bank of Nova Scotia ("BNS"), Toronto, Canada, commits that it will not directly or indirectly:

1. Exercise or attempt to exercise a controlling influence over the management or policies of FBC or any of its subsidiaries;
2. Seek or accept representation on the board of directors of FBC or any of its subsidiaries;
3. Have or seek to have any employee or representative serve as an officer, agent, or employee of FBC or any of its subsidiaries;
4. Take any action that would cause FBC or any of its subsidiaries to become a subsidiary of BNS or any of BNS's subsidiaries;
5. Acquire or retain shares that would cause the combined interests of BNS and any of BNS's subsidiaries and their officers, directors, and affiliates to equal or exceed 25 percent of the outstanding voting shares of FBC or any of its subsidiaries;
6. Propose a director or slate of directors in opposition to a nominee or slate of nominees proposed by the management or board of directors of FBC or any of its subsidiaries;
7. Solicit or participate in soliciting proxies with respect to any matter presented to the shareholders of FBC or any of its subsidiaries;
8. Attempt to influence the dividend policies or practices; the investment, loan, or credit decisions or policies; the pricing of services; personnel decisions; operations activities (including the location of any offices or branches or their hours of operation, etc.); or any similar activities of FBC or any of its subsidiaries;
9. Dispose or threaten to dispose of shares of FBC or any of its subsidiaries in any manner as a condition of specific action or nonaction by FBC or any of its subsidiaries; or
10. Enter into any other banking or nonbanking transactions with FBC or any of its subsidiaries, except that BNS may establish and maintain deposit accounts with FBC, provided that the aggregate balances of all such accounts do not exceed \$500,000 and that the accounts are maintained on substantially the same terms as those prevailing for comparable accounts of persons not affiliated with FBC.

Notwithstanding the foregoing, BNS and FBC's subsidiary, First Bank of Puerto Rico, directly or indirectly, may act as a syndication or administrative agent, or in a similar agency or arranging capacity, in connection with a loan syndication or similar credit offering (together, "syndication") in which the other institution is a participating lender or member of the syndicate (together, "member"), provided that (1) the total fee income derived by either party as a member in such syndications in a calendar year

will be less than 5 percent of First Bank of Puerto Rico's total fee income in dollar amounts in that year, (2) the loans booked by either party as a member in connection with such syndications in a calendar year will account for no more than 10 percent of the aggregate dollar amount

of all loans committed and originated by First Bank of Puerto Rico in that year, and (3) any syndication-related arrangements between BNS and First Bank of Puerto Rico will be nonexclusive and on an arm's length basis on market terms.

Appendix B

BNS AND FBC BANKING MARKETS CONSISTENT WITH BOARD PRECEDENT AND DOJ GUIDELINES

Bank	Rank	Amount of deposits (millions of dollars)	Share of market deposit shares (percent)	Resulting HHI	Change in HHI	Remaining number of competitors
PUERTO RICO BANKING MARKETS						
<i>Aguadilla—Aguada, Aguadilla, Anasco, Isabela, Lares, Moca, Rincon, and San Sebastian municipios</i>						
BNS Pre-Merger	6	28.6	2.31	3,175	12	8
FBC	5	30.7	2.49	3,175	12	8
BNS Post-Merger	4	59.3	4.80	3,175	12	8
<i>Mayaguez—Cabo Rojo, Hormigueros, Lajas, Las Marias, Maricao, Mayaguez, Sabana Grande, and San German municipios</i>						
BNS Pre-Merger	11	7.0	.35	2,633	3	10
FBC	6	71.7	3.55	2,633	3	10
BNS Post-Merger	6	78.7	3.90	2,633	3	10
<i>Ponce—Adjuntas, Coamo, Guanica, Guayanilla, Juana Diaz, Penuelas, Ponce, Santa Isabel, Villalba, and Yauco municipios</i>						
BNS Pre-Merger	7	88.8	4.02	1,921	21	11
FBC	10	56.3	2.55	1,921	21	11
BNS Post-Merger	5	145.1	6.57	1,921	21	11

Appendix B—Continued

BNS AND FBC BANKING MARKETS CONSISTENT WITH BOARD PRECEDENT AND DOJ GUIDELINES—Continued

Bank	Rank	Amount of deposits (millions of dollars)	Share of market deposit shares (percent)	Resulting HHI	Change in HHI	Remaining number of competitors
<i>San Juan—Aibonito, Aguas Buenas, Arecibo, Arroyo, Barceloneta, Barranquitas, Bayamon, Caguas, Camuy, Canovanas, Carolina, Catano, Cayey, Ceiba, Ciales, Cidra, Comerio, Corozal, Culebra, Dorado, Fajardo, Florida, Guayama, Guaynabo, Gurabo, Hatillo, Humacao, Jayuya, Juncos, Las Piedras, Loíza, Luquillo, Manati, Maunabo, Morovis, Naugabo, Naranjito, Orocovis, Patillas, Quebradillas, Rio Grande, Salinas, San Juan, San Lorenzo, Toa Alta, Toa Baja, Trujillo Alto, Utuado, Vega Alta, Vega Baja, Vieques, and Yabucoa municipios</i>						
BNS Pre-Merger	11	1,044	1.95	1,521	87	10
FBC	1	11,878	22.16	1,521	87	10
BNS Post-Merger	1	12,922	24.11	1,521	87	10

NOTE: Deposit and market-share data are as of June 30, 2006, are adjusted to reflect subsequent mergers and acquisitions through April 6, 2007, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. All deposit data are in millions of dollars. Data for the St. Thomas-St. John and St. Croix banking markets are discussed in the order.

ORDERS ISSUED UNDER BANK MERGER ACT

*County Bank
Merced, California*

Order Approving the Acquisition and Establishment of Branches

County Bank,¹ a state member bank, has requested the Board’s approval under section 18(c) of the Federal Deposit Insurance Act (“Bank Merger Act”)² to purchase all the assets and assume all the liabilities of eleven California branches of National Bank of Arizona (“NBA”), Tucson, Arizona. County Bank also has applied under section 9 of

the Federal Reserve Act (“FRA”) to establish and operate branches at the locations of those branches.³

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published in local publications in accordance with the Bank Merger Act and the Board’s Rules of Procedure.⁴ As required by the Bank Merger Act, a report on the competitive effects of the merger was requested from the United States Attorney General and a copy of the request was provided to the Federal Deposit Insurance Corporation. The time for filing comments has expired, and the Board has considered the proposal and all comments received in light of the factors set forth in the Bank Merger Act and the FRA.

County Bank, with total assets of approximately \$1.8 billion, operates only in California.⁵ County Bank is the 45th largest insured depository institution in California, control-

1. County Bank is a subsidiary of Capital Corp of the West, Merced, a bank holding company.

2. 12 U.S.C. § 1828(c).

3. 12 U.S.C. § 321. These branches are listed in the appendix.

4. 12 CFR 262.3(b).

5. Asset data are as of March 31, 2007. Deposit data and state rankings are as of June 30, 2006. In this context, the term “insured depository institutions” includes insured commercial banks, savings banks, and savings associations.

ling deposits of approximately \$1.5 billion, which represents less than 1 percent of the total amount of deposits of insured depository institutions in the state (“state deposits”).

NBA operates in Arizona and California. In California, NBA is the 156th largest insured depository institution in the state, controlling deposits of approximately \$198.8 million. On consummation of the proposal, County Bank would become the 40th largest insured depository institution in California, controlling deposits of approximately \$1.7 billion, which represents less than 1 percent of state deposits.

COMPETITIVE CONSIDERATIONS

The Bank Merger Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market. The Bank Merger Act also prohibits the Board from approving a proposal that would substantially lessen competition in any relevant banking market, unless the anticompetitive effects of the proposal are clearly outweighed in the public interest by its probable effect in meeting the convenience and needs of the community to be served.⁶

County Bank and NBA compete directly in three relevant banking markets in California: Fresno, Los Banos, and Merced. The Board has reviewed carefully the competitive effects of the proposal in each banking market in light of all the facts of record. In particular, the Board has considered the number of competitors that would remain in the banking markets, the relative shares of total deposits in depository institutions in the markets (“market deposits”) controlled by County Bank and NBA,⁷ the concentration levels of market deposits and the increase in those levels as measured by the Herfindahl–Hirschman Index (“HHI”) under the Department of Justice Merger Guidelines (“DOJ Guidelines”),⁸ and other characteristics of the markets.

6. 12 U.S.C. § 1828(c)(5).

7. Deposit and market share data are as of June 30, 2006, adjusted to reflect subsequent mergers and acquisitions through August 24, 2007, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. *See, e.g., Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift institution deposits in the market share calculation on a 50 percent weighted basis. *See, e.g., First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991).

8. Under the DOJ Guidelines, a market is considered unconcentrated if the post-merger HHI is under 1000, moderately concentrated if the post-merger HHI is between 1000 and 1800, and highly concentrated if the post-merger HHI exceeds 1800. The Department of Justice (“DOJ”) has informed the Board that a bank merger or acquisition generally will not be challenged (in the absence of other factors indicating anticompetitive effects) unless the post-merger HHI is at least 1800 and the merger increases the HHI more than 200 points. The DOJ has stated that the higher-than-normal HHI thresholds for screening bank mergers and acquisitions for anticompetitive effects implicitly recognize the competitive effects of limited-purpose and other nondepository financial entities.

Consummation of the proposal in the Fresno banking market⁹ would be consistent with Board precedent and within the thresholds in the DOJ Guidelines.¹⁰ On consummation of the proposal, it would remain moderately concentrated, and numerous competitors would remain in the market.

County Bank and NBA also compete directly in two banking markets, Los Banos and Merced,¹¹ that require a detailed review of the competitive effects of the proposal. In each market, County Bank is the largest depository institution and already controls approximately half the market deposits. The Board previously has recognized that merger proposals involving a depository institution with a large market share relative to the shares of other market competitors warrant close review.¹²

After careful analysis of the record, the Board has concluded that no significant reduction in competition is likely to result from County Bank’s proposed acquisition of NBA’s branches in the Los Banos and Merced banking markets. As noted below, County Bank’s existing market shares in the two banking markets would increase only slightly on consummation of the proposal. Moreover, the increase in concentration levels in each of these highly concentrated markets on consummation of the proposal would not exceed the threshold levels in the DOJ Guidelines. The Board has also considered other factors indicating that the proposal would not have a significantly adverse effect on competition in either banking market.¹³

Los Banos Banking Market. County Bank is the largest insured depository institution in the Los Banos banking market, controlling deposits of approximately \$217.3 million, which represent approximately 49.8 percent of market deposits. NBA is the fifth largest depository institution in the market, controlling deposits of approximately \$6.4 mil-

9. The Fresno banking market is defined as the Fresno metropolitan area, including the Fresno Ranally Metro Area and the towns of Chowchilla, Kingsburg, Parlier, Reedley, Orange Cove, Dinuba, Coarsegold, Oakhurst, Prather, and Shaver Lake.

10. On consummation of the proposal, the HHI would remain unchanged at 1208 for the Fresno market. County Bank operates the 14th largest depository institution in the market, controlling deposits of approximately \$183.2 million, which represents less than 2 percent of market deposits. NBA controls \$12.2 million in deposits, which represents less than 1 percent of market deposits. After consummation, County Bank would become the 13th largest depository institution in the market, controlling deposits of approximately \$195.3 million, which represents approximately 2 percent of market deposits. Twenty-six depository institutions would remain in the banking market.

11. The Los Banos banking market is defined as southwestern Merced County, excluding the Merced Ranally Metro Area, Livingston, and Mariposa; and including the towns of Dos Palos and Los Banos.

12. *See Firststar Corporation*, 87 *Federal Reserve Bulletin* 236, 238 (2001); *The Citizens Bank*, 91 *Federal Reserve Bulletin* 438 (2005); and *First Busey Corporation*, 93 *Federal Reserve Bulletin* C90 (2007).

13. The Board has evaluated whether other factors mitigate the competitive effects of the proposal or indicate that the proposal would have a significantly adverse effect on competition in the market. The number and strength of factors necessary to mitigate the competitive effects of a proposal depend on the size of the increase in and resulting level of concentration in a banking market. *See NationsBank Corp.*, 84 *Federal Reserve Bulletin* 129 (1998).

lion. On consummation, County Bank would remain the largest depository institution in the market, controlling deposits of approximately \$223.7 million.

The NBA deposits that County Bank proposes to acquire in the Los Banos market represent less than 1.5 percent of the total market deposits, and the HHI would increase 146 points to 3477, which is consistent with the DOJ Guidelines. Accordingly, the proposal would not significantly increase the market concentration.

Other factors indicate that the increase in concentration in the Los Banos banking market, as measured by the market share of the combined organization, overstates the potential competitive effects of the proposal in the market. After consummation, two of County Bank's three competitors in the market would control 21 percent and 18 percent of market deposits, respectively. In addition, the market appears to be moderately attractive for entry. For example, the population growth rate of the Los Banos market between 2002 and 2005 increased significantly faster than the average growth rate in other rural markets in California or in rural markets nationwide during the same time period. The Los Banos market also experienced higher deposit growth rates than the average deposit growth rates in California nonmetropolitan counties and in nonmetropolitan counties nationwide during the last three years.

Merced Banking Market. County Bank also is the largest insured depository institution in the Merced banking market,¹⁴ controlling deposits of approximately \$668.6 million, which represent approximately 50.4 percent of market deposits. NBA is the tenth largest depository institution in the market, controlling deposits of approximately \$1.6 million. On consummation, County Bank would control deposits of approximately \$670.2 million, which would represent 50.5 percent of market deposits.

County Bank proposes to acquire only a small amount of deposits in this market, and the proposal would not significantly increase the market concentration. On consummation, County Bank's market share would increase by only 0.1 percent. The HHI would increase 12 points to 3035, which is consistent with the DOJ Guidelines.

Other factors also indicate that this small increase in concentration in the Merced banking market would not have significant anticompetitive effects. After consummation, eight insured depository institutions would continue to compete with County Bank in the market. The market also appears to be moderately attractive for entry. Since 2000, the population in the banking market has grown more rapidly than the average population growth in urban markets in California and nationwide.

Agency Views and Conclusion on Competitive Considerations. The DOJ also has conducted a detailed review of the potential competitive effects of the proposal and has advised the Board that consummation of the proposal would not likely have a significantly adverse effect on competition in

any relevant banking market. Based on all the facts of record, the Board concludes that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of resources in the three banking markets where County Bank and NBA compete directly or in any other relevant banking market. Accordingly, the Board has determined that competitive considerations are consistent with approval.

FINANCIAL AND MANAGERIAL RESOURCES AND FUTURE PROSPECTS

The Bank Merger Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has considered these factors in light of all the facts of record, including confidential reports of examination, other supervisory information from the primary federal and state supervisors of the organizations involved in the proposal, publicly reported and other financial information, and information provided by County Bank.

In evaluating financial factors in expansion proposals by banking organizations, the Board considers a variety of measures in this evaluation, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the financial condition of the combined organization at consummation, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

County Bank and NBA are well capitalized, and County Bank would remain so on consummation of the proposal. Capital Corp of the West also would remain well capitalized on consummation of the proposal. Based on its review of the record in this case, the Board finds that County Bank has sufficient financial resources to effect the proposal. The proposed transaction is structured as a cash purchase that will be funded through the issuance of trust preferred securities by Capital Corp of the West.

The Board also has considered the managerial resources of the organizations involved and the proposed combined organization. The Board has reviewed the examination records of County Bank and NBA, including assessments of their management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences with the relevant organizations and the organizations' records of compliance with applicable banking law, including anti-money-laundering laws. County Bank and NBA are considered to be well managed. The Board also has considered County Bank's plans for implementing the proposal, including the proposed management after consummation.

Based on all the facts of record, the Board concludes that considerations relating to the financial and managerial

14. The Merced banking market is defined as the Merced metropolitan area, including the Merced Ranally Metro Area and the towns of Livingston and Mariposa.

resources and future prospects of the organizations involved in the proposal are consistent with approval under the Bank Merger Act.

CONVENIENCE AND NEEDS CONSIDERATIONS

In acting on a proposal under the Bank Merger Act, the Board also must consider its effects on the convenience and needs of the communities to be served and take into account the records of the relevant insured depository institutions under the Community Reinvestment Act (“CRA”).¹⁵ County Bank received a “satisfactory” rating at its most recent CRA performance evaluation by the Federal Reserve Bank of San Francisco, as of March 26, 2007. NBA received a “satisfactory” rating at its most recent CRA performance evaluation by the Office of the Comptroller of the Currency, as of October 20, 2003. After consummation of the proposal, County Bank plans to implement its CRA policies at the NBA branches. County Bank has represented that consummation of the proposal would allow it to provide a broader range of financial products and services over a larger area. Based on all the facts of record, the Board concludes that considerations relating to the convenience and needs of the communities to be served and the CRA performance records of the relevant depository institutions are consistent with approval.

OTHER CONSIDERATIONS

County Bank also has applied under section 9 of the FRA to establish and operate branches at NBA’s locations listed in the appendix. The Board has assessed the factors it is required to consider when reviewing an application under section 9 of the FRA and finds those factors to be consistent with approval.¹⁶

CONCLUSION

Based on the foregoing and all facts of record, the Board has determined that the applications should be, and hereby are, approved. In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the Bank Merger Act and the FRA. The Board’s approval is specifically conditioned on compliance by County Bank with the conditions imposed in this order, the commitments made to the Board in connection with the applications, and receipt of all other regulatory approvals. For purposes of this action, the conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision herein and, as such, may be enforced in proceedings under applicable law.

The proposed transactions may not be consummated before the 15th calendar day after the effective date of this order, or later than three months after the effective date of this order, unless such period is extended for good cause by

the Board or the Federal Reserve Bank of San Francisco, acting pursuant to delegated authority.

By order of the Board of Governors, effective September 25, 2007.

Voting for this action: Chairman Bernanke, Vice Chairman Kohn, and Governors Warsh, Kroszner, and Mishkin.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Appendix

BRANCHES IN CALIFORNIA TO BE ESTABLISHED BY COUNTY BANK

Caruthers
2200 West Tahoe Avenue

Coalinga
410 North Fifth Street

Dos Palos
2142 Blossom Street

Farmersville
400 West Visalia Road

Hanford
890 West Lacey Boulevard

Lemoore
142 West D Street

Mendota
567 Oller Street

Merced
2936 G Street

Needles
1019 West Broadway Street

Tulare
140 East Tulare Avenue

Visalia
800 West Main Street

East West Bank Pasadena, California

Order Approving the Merger of Banks and Establishment of Branches

East West Bank¹ has requested the Board’s approval under section 18(c) of the Federal Deposit Insurance Act² (“Bank

15. 12 U.S.C. § 2901 et seq.

16. 12 U.S.C. § 322; 12 CFR 208.6(b).

1. East West Bank is a subsidiary of East West Bancorp, Inc., Pasadena, California, a financial holding company.

2. 12 U.S.C. § 1828(c).

Merger Act”) to merge with Desert Community Bank (“Desert Bank”), Victorville, California, both state member banks, with East West Bank as the surviving entity. East West Bank also has applied under section 9 of the Federal Reserve Act (“FRA”) to establish and operate branches at Desert Bank’s main office and branch locations.³

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published in local publications in accordance with the Bank Merger Act and the Board’s Rules of Procedure.⁴ As required by the Bank Merger Act, a report on the competitive effects of the merger was requested from the United States Attorney General and a copy of the request was provided to the Federal Deposit Insurance Corporation. The time for filing comments has expired, and the Board has considered the proposal and all comments received in light of the factors set forth in the Bank Merger Act and the FRA.

East West Bank, with total assets of approximately \$10.7 billion, operates in California and Texas.⁵ In California, East West Bank is the 15th largest insured depository institution, controlling deposits of approximately \$7.1 billion, which represent 1 percent of the total amount of deposits of insured depository institutions in the state (“state deposits”).

Desert Bank operates only in California and is the 85th largest insured depository institution in the state, controlling deposits of approximately \$494.4 million. On consummation of the proposal, East West Bank would remain the 15th largest insured depository institution in California, controlling deposits of approximately \$7.6 billion, which represents 1.1 percent of state deposits.

COMPETITIVE CONSIDERATIONS

The Bank Merger Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market. The Bank Merger Act also prohibits the Board from approving a proposal that would substantially lessen competition in any relevant banking market, unless the anticompetitive effects of the proposal are clearly outweighed in the public interest by its probable effect in meeting the convenience and needs of the community to be served.⁶ East West Bank and Desert Bank do not compete directly in any relevant banking market. Based on all the facts of record, the Board has concluded that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of resources in any relevant banking market and that competitive considerations are consistent with approval.

3. 12 U.S.C. § 321. These branches are listed in the appendix.

4. 12 CFR 262.3(b).

5. Asset data are as of March 31, 2007. Deposit data and state rankings are as of June 30, 2006. In this context, the term “insured depository institutions” includes insured commercial banks, savings banks, and savings associations.

6. 12 U.S.C. § 1828(c)(5).

FINANCIAL AND MANAGERIAL RESOURCES AND FUTURE PROSPECTS

The Bank Merger Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has considered these factors in light of all the facts of record, including confidential reports of examination, other supervisory information from the primary federal and state supervisors of the organizations involved in the proposal, publicly reported and other financial information, information provided by East West Bank, and public comment on the proposal.

In evaluating financial factors in expansion proposals by banking organizations, the Board considers a variety of measures in this evaluation, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the financial condition of the combined organization at consummation, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

East West Bank and Desert Bank are well capitalized, and the resulting bank would remain so on consummation of the proposal. East West Bancorp will also remain well capitalized on consummation of the proposal. Based on its review of the record in this case, the Board finds that East West Bank has sufficient financial resources to effect the proposal. The proposed transaction is structured as a combination share exchange and cash purchase. East West Bank will use existing resources to fund the cash portion of the transaction.

The Board also has considered the managerial resources of the organizations involved and the proposed combined organization. The Board has reviewed the examination records of East West Bank and Desert Bank, including assessments of their management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences with the relevant organizations and the organizations’ records of compliance with applicable banking law, including anti-money-laundering laws. East West Bank and Desert Bank are considered to be well managed. The Board also has considered East West Bank’s plans for implementing the proposal, including the proposed management after consummation.

Based on all the facts of record, the Board concludes that considerations relating to the financial and managerial resources and future prospects of the organizations involved in the proposal are consistent with approval under the Bank Merger Act.

CONVENIENCE AND NEEDS CONSIDERATIONS

In acting on a proposal under the Bank Merger Act, the Board also must consider its effects on the convenience and needs of the communities to be served and take into account the records of the relevant insured depository

institutions under the Community Reinvestment Act (“CRA”).⁷ The CRA requires the federal financial supervisory agencies to encourage insured depository institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation, and requires the appropriate federal financial supervisory agency to take into account an institution’s record of meeting the credit needs of its entire community, including low- and moderate-income (“LMI”) neighborhoods, in evaluating bank expansionary proposals.⁸

The Board has considered carefully all the facts of record, including evaluations of the CRA performance records of East West Bank and Desert Bank, data reported by East West Bank and Desert Bank under the Home Mortgage Disclosure Act (“HMDA”),⁹ other information provided by the banks, confidential supervisory information, and public comment received on the proposal. Twenty-eight commenters supported the proposal and commended East West Bank’s efforts to meet the banking needs of its diverse communities. Three commenters opposed or expressed concerns about the proposal. One commenter asserted that East West Bank had not adequately served the credit and investment needs of LMI communities in its assessment areas. In addition, two commenters alleged that East West Bank and Desert Bank failed to provide adequate banking services to all groups of individuals who historically have had insufficient access to banking services.¹⁰

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution’s most recent CRA performance evaluation is a particularly important consideration in the applications process because it represents a detailed, on-site evaluation of the institution’s overall record of performance under the CRA by its appropriate federal supervisor.¹¹

East West Bank received a “satisfactory” rating at its most recent CRA performance evaluation by the Federal Reserve Bank of San Francisco, as of May 15, 2006 (“2006 Evaluation”). Desert Bank also received a “satisfactory” rating at its most recent CRA performance evaluation by the Federal Reserve Bank of San Francisco, as of May 31,

2005 (“2005 Evaluation”). East West Bank’s current CRA program will be implemented at the resulting bank after consummation of the proposed merger with Desert Bank.

CRA Performance of East West Bank. In the 2006 evaluation, East West Bank received an “outstanding” rating on its lending test, a “needs to improve” rating on its investment test, and a “low satisfactory” rating on its service test.¹² Examiners reported that, throughout the California assessment areas, the bank’s overall geographic and borrower distribution of loans reflected excellent participation in LMI census tracts.¹³ Although the examiners found that East West Bank’s community development investments were low compared to the opportunity in its area, the examiners determined that the bank’s level of community development lending in California demonstrated excellent responsiveness to the need for affordable housing in its assessment areas in the state. In addition to direct loans for community development projects, the bank also offered \$70 million in credit enhancements, such as letters of credit, to support the construction or rehabilitation of more than 1,500 housing units.

Examiners reported that the bank’s excellent responsiveness to credit needs within LMI areas was a strength in its overall performance. They found that the percentage of the bank’s total mortgage loans in LMI areas was substantially higher than the percentage reported by the aggregate of all lenders (“aggregate lenders”)¹⁴ to LMI areas in Southern California.¹⁵ In most of East West Bank’s Northern California assessment area, the examiners commended the bank’s distribution of home purchase and refinance loans.¹⁶ Furthermore, examiners determined that East West Bank’s small business lending in LMI areas of its Southern California assessment area was strong and generally exceeded the performance of the aggregate lenders in those areas. More than one-third of the bank’s small business loans were made in LMI areas, and a majority of its small business loans was extended to businesses with revenues of \$1 million or less in the cities of Los Angeles and Santa Ana and the surrounding areas.¹⁷

12. One commenter expressed concern about these latter two ratings for East West Bank’s assessment areas in California. Examiners concluded that the bank’s overall record of CRA performance during the review period merited a rating of “satisfactory.” Notably, the lending test is weighted more heavily than either the investment or service test in determining the institutional rating.

13. The Southern California assessment area is defined as Los Angeles County and portions of Orange County. The Northern California assessment area is defined as San Francisco County and portions of Alameda, San Mateo, and Santa Clara counties.

14. The lending data of the aggregate lenders represent the cumulative lending for all financial institutions that have reported mortgage lending as part of their CRA data in a particular area.

15. East West Bank noted that it offers a home loan program with affordable interest rates for persons who would not qualify for traditionally underwritten loans.

16. More than half of the 1–4 and multifamily loans extended by East West Bank in its California assessment areas were made in LMI areas in 2006, while LMI areas comprised 35.8 percent of those assessment areas.

17. For purposes of the evaluation, “small business loans” are loans that have original amounts of \$1 million or less and are either secured

7. 12 U.S.C. § 2901 et seq.

8. 12 U.S.C. § 2903.

9. 12 U.S.C. § 2801 et seq.

10. Two commenters criticized East West Bank and Desert Bank for not providing effective banking services in languages other than English and Chinese. East West Bank stated that its ATMs and telephone services are available in English, Chinese, and Spanish and that it provides retail banking and mortgage lending services in multiple languages other than English. In addition, East West Bank has conducted first-time home-buyer seminars in Spanish and has expanded its home mortgage programs, which were originally created for Chinese Americans, to serve other borrowers.

11. See *Interagency Questions and Answers Regarding Community Reinvestment*, 66 *Federal Register* 36,620 and 36,639 (2001).

Examiners concluded that East West Bank's performance under the service test throughout California assessment areas was adequate. In general, retail banking services were reasonably accessible to all portions of the assessment areas.

CRA Performance of Desert Bank. As noted, Desert Bank received an overall "satisfactory" rating in its May 2005 examination. Although Desert Bank focuses on commercial lending, it offers a full range of banking products and services. Examiners concluded that the bank's overall lending levels reflected good responsiveness to community credit needs. In particular, they noted that the bank's distribution of small business loans was excellent and that such lending was strongest in LMI census tracts. In addition, more than half of the bank's small business loans were extended to businesses with revenues of \$1 million or less. Business loans in small-dollar amounts made by the bank helped meet an important credit need of its communities. Examiners found community development lending and investments to be adequate, and they rated Desert Bank as "high satisfactory" for its services.

B. HMDA and Fair Lending Record and Other Issues

The Board has carefully considered the fair lending records and HMDA data reported by East West Bank and Desert Bank in 2005 in light of public comments received on the proposal. Two commenters expressed concern that East West Bank focused its services too narrowly on the Chinese American population in its assessment areas and did not effectively serve other populations of historically underserved minority communities. In addition, one commenter questioned the bank's lending record and asserted that East West Bank made a disproportionately small number of home mortgage loans to Latinos, African Americans, and Southeast Asian Americans.

Although the HMDA data might reflect certain disparities in the rates of loan applications, originations, and denials among members of different racial or ethnic groups in certain local areas, they provide an insufficient basis by themselves on which to conclude whether or not East West Bank is excluding or imposing higher costs on any group on a prohibited basis. The Board recognizes that HMDA data alone, even with the recent addition of pricing information, provide only limited information about the covered loans.¹⁸ HMDA data, therefore, have limitations that make

them an inadequate basis, absent other information, for concluding that an institution has engaged in illegal lending discrimination.

The Board is nevertheless concerned when HMDA data for an institution indicate disparities in lending and believes that all lending institutions are obligated to ensure that their lending practices are based on criteria that ensure not only safe and sound lending but also equal access to credit by creditworthy applicants regardless of their race or ethnicity. Because of the limitations of HMDA data, the Board has considered these data carefully and taken into account other information, including examination reports that provide on-site evaluations of compliance with fair lending laws by East West Bank.

The record, including confidential supervisory information, indicates that East West Bank has taken steps and developed programs to ensure compliance with all fair lending and other consumer protection laws and regulations. These efforts include bankwide fair lending training for all employees. The bank also has a second review process for all loans recommended for denial to ensure that all applicants are evaluated properly, and it performs fair lending audits and examinations. Examiners found no evidence of discriminatory lending practices at East West Bank.

The Board also has considered the HMDA data in light of other information, including the overall performance record of East West Bank under the CRA. The institution's record of performance demonstrates that it is active in helping to meet the credit needs of all the communities it serves.

C. Conclusion on Convenience and Needs Considerations

The Board has considered carefully the CRA performance, fair lending records, and HMDA data of East West Bank and Desert Bank in light of public comments received on the proposal. The Board also has considered carefully all of the facts of record, including reports of examination of the CRA records of the institutions involved, information provided by East West Bank, comments received on the proposal, and confidential supervisory information. The Board notes that the proposal would provide customers of Desert Bank with a broader array of products and services, including expanded options for affordable mortgage loans and ATM networks. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant depository institutions are consistent with approval.

OTHER CONSIDERATIONS

East West Bank also has applied under section 9 of the FRA to establish and operate branches at Desert Bank's loca-

by nonfarm or nonresidential real estate or are classified as commercial and industrial loans. One commenter criticized East West Bank for not making a sufficient number of loans under \$100,000. The Board has previously noted that the CRA does not require an institution to provide any specific type of products or services in its assessment area.

18. The data, for example, do not account for the possibility that an institution's outreach efforts may attract a larger proportion of marginally qualified applicants than other institutions attract and do not provide a basis for an independent assessment of whether an applicant who was denied credit was, in fact, creditworthy. In addition, credit history problems, excessive debt levels relative to income, and high loan amounts relative to the value of the real estate collateral (reasons

most frequently cited for a credit denial or higher credit cost) are not available from HMDA data.

tions listed in the appendix. The Board has assessed the factors it is required to consider when reviewing an application under section 9 of the FRA and finds those factors to be consistent with approval.¹⁹

CONCLUSION

Based on the foregoing and all facts of record, the Board has determined that the applications should be, and hereby are, approved.²⁰ In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the Bank Merger Act and the FRA. The Board's approval is specifically conditioned on compliance by East West Bank with the conditions imposed in this order, the commitments made to the Board in connection with the applications, and receipt of all other regulatory approvals. For purposes of this action, the conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision herein and, as such, may be enforced in proceedings under applicable law.

The proposed transactions may not be consummated before the 15th calendar day after the effective date of this order, or later than three months after the effective date of this order, unless such period is extended for good cause by the Board or the Federal Reserve Bank of San Francisco, acting pursuant to delegated authority.

By order of the Board of Governors, effective July 16, 2007.

Voting for this action: Chairman Bernanke, Vice Chairman Kohn, and Governors Warsh, Kroszner, and Mishkin.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Appendix

BRANCHES IN CALIFORNIA TO BE ESTABLISHED BY EAST WEST BANK

Adelanto
10474 Rancho Road

Apple Valley
16003 Quantico Road

Barstow
945 E. Armory Road

Hesperia
15479 Main Street

Victorville
12022 Dunia Road
12470 Hesperia Road
12530 Hesperia Road
14800 La Paz Drive

Wrightwood
1261 Highway 2

Phelan
48895 Phelan Road

ORDERS ISSUED UNDER INTERNATIONAL BANKING ACT

Caixa Econômica Federal Brasília, Brazil

Order Approving Establishment of a Representative Office

Caixa Econômica Federal ("Bank"), Brasília, Brazil, a foreign bank within the meaning of the International Banking Act ("IBA"), has applied under section 10(a) of the IBA¹ to establish a representative office in Jersey City, New Jersey. The Foreign Bank Supervision Enhancement Act of 1991, which amended the IBA, provides that a foreign bank must obtain the approval of the Board to establish a representative office in the United States.

Notice of the application, affording interested persons an opportunity to submit comments, has been published in a newspaper of general circulation in New Jersey (*The New York Times*, January 28, 2007). The time for filing comments has expired, and all comments received have been considered.

Bank, a state-owned entity with total consolidated assets of approximately \$98 billion,² is the second largest bank in

19. 12 U.S.C. § 322; 12 CFR 208.6(b).

20. Three commenters requested that the Board hold a public meeting or hearing on the proposal. Neither the Bank Merger Act nor the FRA requires the Board to hold a public meeting or hearing. Under its rules, the Board may, in its discretion, hold a public meeting or hearing on an application to acquire a bank if a meeting or hearing is necessary or appropriate to clarify factual issues related to the application and to provide an opportunity for testimony (12 CFR 262.3(e) and 262.25(d)). The Board has considered carefully the commenters' requests in light of all the facts of record. In the Board's view, the commenters have had ample opportunity to submit their views and, in fact, submitted written comments that the Board has considered carefully in acting on the proposal. The requests by the commenters fail to demonstrate why the written comments do not present their views adequately or why a meeting or hearing otherwise would be necessary or appropriate. For these reasons, and based on all the facts of record, the Board has determined that a public meeting or hearing is not required or warranted in this case. Accordingly, the requests for a public meeting or hearing on the proposal are denied.

1. 12 U.S.C. § 3107(a).

2. Data are as of December 31, 2006.

Brazil.³ The Federative Republic of Brazil, including the states and the municipalities, owns all the capital of Bank, but Bank has its own equity and management autonomy. Bank currently has operations only in Brazil, where it provides commercial and retail banking services and investment banking services throughout the country. Through its subsidiaries, Bank manages a development fund, administers Brazilian lotteries, and offers insurance products. Bank also is the main fiscal agent for the Brazilian government, and it provides financing for the government's housing, education, and infrastructure projects.

The proposed representative office would market products of Bank in the United States, act as a liaison between Bank's head office in Brazil and its prospective U.S.-based customers, and develop relationships with international organizations.

In acting on a foreign bank's application under the IBA and Regulation K to establish a representative office, the Board takes into account whether the foreign bank: (1) engages directly in the business of banking outside of the United States; (2) has furnished to the Board the information it needs to assess the application adequately; and (3) is subject to comprehensive supervision on a consolidated basis by its home-country supervisor.⁴ The Board also considers additional standards set forth in the IBA and Regulation K.⁵ The Board will consider that the supervision standard has been met where it determines that the applicant bank is subject to a supervisory framework that is consistent with the activities of the proposed representative office, taking into account the nature of such activities. This is a lesser standard than the comprehensive, consolidated supervision standard applicable to applications to establish branch or agency offices of a foreign bank. The Board considers the lesser standard sufficient for approval of representative office applications because representative offices may not engage in banking activities.⁶

As noted above, Bank engages directly in the business of banking outside the United States. Bank also has provided

the Board with information necessary to assess the application through submissions that address the relevant issues.

With respect to home-country supervision of Bank, the Board has considered the following information. Bank is subject to the regulatory and supervisory authority of the Central Bank of Brazil ("Central Bank"), which has primary responsibility for the regulation of financial institutions in Brazil. The Board previously has determined that the Central Bank exercises a significant degree of supervision over the activities of four other Brazilian banks. In each case, the supervision exercised by the Central Bank was found to be sufficient to allow for the approval of a representative office in the United States by the applicant.⁷ Based on all the facts of record, it has been determined that Bank is subject to a supervisory framework that is consistent with the activities of the proposed representative office, taking into account the nature of such activities.

The additional standards set forth in section 7 of the IBA and Regulation K have also been taken into account.⁸ The Central Bank has no objection to the establishment of the proposed representative office. With respect to the financial and managerial resources of Bank, taking into consideration its record of operations in its home country, its overall financial resources, and its standing with its home-country supervisor, financial and managerial factors are consistent with approval. Bank appears to have the experience and capacity to support the proposal and has established controls and procedures for the proposed representative office to ensure compliance with U.S. law and for its operations in general.

Brazil is a member of the Financial Action Task Force and subscribes to its recommendations on measures to combat money laundering. In accordance with those recommendations Brazil has enacted laws and created legislative and regulatory standards to deter money laundering. Money laundering is a criminal offense in Brazil, and financial institutions are required to establish internal policies, pro-

3. The Bank's board of directors consists of seven members. The Minister of Economy appoints five members, including the chairman; the Minister of Planning, Budget and Management appoints one member; and the Bank's president occupies the remaining seat and serves as vice chairman of the board.

4. 12 U.S.C. § 3107(a)(2); 12 CFR 211.24(d)(2). In assessing this standard, the Board considers, among other factors, the extent to which the home-country supervisors: (i) ensure that the bank has adequate procedures for monitoring and controlling its activities worldwide; (ii) obtain information on the condition of the bank and its subsidiaries and offices through regular examination reports, audit reports, or otherwise; (iii) obtain information on the dealings with and relationship between the bank and its affiliates, both foreign and domestic; (iv) receive from the bank financial reports that are consolidated on a worldwide basis or comparable information that permits analysis of the bank's financial condition on a worldwide consolidated basis; (v) evaluate prudential standards, such as capital adequacy and risk asset exposure, on a worldwide basis. These are indicia of comprehensive, consolidated supervision. No single factor is essential, and other elements may inform the Board's determination.

5. 12 U.S.C. § 3105(d)(3)-(4); 12 CFR 211.24(c)(2).

6. 12 CFR 211.24(d)(2).

7. See *Banco Bandeirantes, S.A.*, 81 *Federal Reserve Bulletin* 742 (1995); *Unibanco-União de Bancos Brasileiros, S.A.*, 82 *Federal Reserve Bulletin* 1148 (1996); *Banco BBA-Creditanstalt S.A.*, 85 *Federal Reserve Bulletin* 518 (1999); *Banco Itaú S.A.*, 86 *Federal Reserve Bulletin* 851 (2000). The Board later determined that two privately owned commercial banks in Brazil, Banco Itaú and Banco Bradesco, were subject to comprehensive consolidated supervision by the Central Bank in connection with each bank's election to be treated as a financial holding company. Banco Itaú's election was declared effective in February 2002, and Banco Bradesco's election was declared effective in January 2004. Bank is a government-owned bank with a mandate to carry out certain policy initiatives of the Brazilian government. As such, some of its activities differ from those of privately owned Brazilian banks.

8. See 12 U.S.C. § 3105(d)(3)-(4); 12 CFR 211.24(c)(2)-(3). These standards include: whether the bank's home-country supervisor has consented to the establishment of the office; the financial and managerial resources of the bank; whether the bank has procedures to combat money laundering, whether there is a legal regime in place in the home country to address money laundering, and whether the home country is participating in multilateral efforts to combat money laundering; whether the appropriate supervisors in the home country may share information on the bank's operations with the Board; whether the bank and its U.S. affiliates are in compliance with U.S. law; the needs of the community; and the bank's record of operation.

cedures, and systems for the detection and prevention of money laundering throughout their worldwide operations. Bank has policies and procedures to comply with these laws and regulations that are monitored by governmental entities responsible for anti-money-laundering compliance.

With respect to access to information about Bank's operations, the Board has reviewed the restrictions on disclosure in relevant jurisdictions in which Bank operates and has communicated with relevant government authorities regarding access to information. Bank has committed to make available to the Board such information on the operations of Bank and any of its affiliates that the Board deems necessary to determine and enforce compliance with the IBA, the Bank Holding Company Act, and other applicable federal law. To the extent that the provision of such information to the Board may be prohibited by law or otherwise, Bank has committed to cooperate with the Board to obtain any necessary consents or waivers that might be required from third parties for disclosure of such information. In addition, subject to certain conditions, the Central Bank may share information on Bank's operations with other supervisors, including the Board. In light of these commitments and other facts of record, and subject to the condition described below, it has been determined that Bank has provided adequate assurances of access to any necessary information that the Board may request.

Based on the foregoing and all the facts of record, and subject to the commitments made by Bank and the terms and conditions set forth in this order, Bank's application to establish the representative office is hereby approved.⁹ Should any restrictions on access to information on the operations or activities of Bank and its affiliates subsequently interfere with the Board's ability to obtain information to determine and enforce compliance by Bank or its affiliates with applicable federal statutes, the Board may require termination of any of Bank's direct or indirect activities in the United States. Approval of this application also is specifically conditioned on compliance by Bank with the conditions imposed in this order and the commitments made to the Board in connection with this application.¹⁰ For purposes of this action, these commitments and conditions are deemed to be conditions imposed by the Board in writing in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

By order, approved pursuant to authority delegated by the Board, effective August 7, 2007.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

9. Approved by the Director of the Division of Banking Supervision and Regulation, with the concurrence of the General Counsel, pursuant to authority delegated by the Board. See 12 CFR 265.7(d)(12).

10. The Board's authority to approve the establishment of the proposed representative office parallels the continuing authority of the state of New Jersey to license offices of a foreign bank. The Board's approval of this application does not supplant the authority of the state of New Jersey or its agent, the New Jersey Department of Banking and Insurance, to license the proposed office of Bank in accordance with any terms or conditions that it may impose.

The State Export-Import Bank of Ukraine, Inc.
Kiev, Ukraine

Order Approving Establishment of a Representative Office

The State Export-Import Bank of Ukraine, Inc. ("Bank"), Kiev, Ukraine, a foreign bank within the meaning of the International Banking Act ("IBA"), has applied under section 10(a) of the IBA¹ to establish a representative office in New York, New York. The Foreign Bank Supervision Enhancement Act of 1991, which amended the IBA, provides that a foreign bank must obtain the approval of the Board to establish a representative office in the United States.

Notice of the application, affording interested persons an opportunity to submit comments, has been published in a newspaper of general circulation in New York, New York (*New York Post*, August 18, 2006). The time for filing comments has expired, and all comments received have been considered.

Bank, with total consolidated assets of approximately \$3.7 billion,² is the sixth largest commercial bank in Ukraine and provides wholesale and retail banking services through a network of domestic branches.³

The proposed representative office is intended to act as a liaison between Bank's head office in Ukraine, other financial institutions, and its existing and prospective customers in Ukraine and the United States. The office would engage in representative functions in connection with the activities of Bank, solicit new business, provide information to customers concerning their accounts, promote business investment in and trading opportunities with Ukraine, conduct research, and receive applications for extensions of credit and other banking services on behalf of Bank.

Under the IBA and Regulation K, in acting on an application by a foreign bank to establish a representative office, the Board must consider whether the foreign bank: (1) engages directly in the business of banking outside of the United States; (2) has furnished to the Board the information it needs to assess the application adequately; and (3) is subject to comprehensive supervision on a consolidated basis by its home-country supervisor.⁴ The

1. 12 U.S.C. § 3107(a).

2. Unless otherwise indicated, data are as of December 31, 2006.

3. Bank is wholly owned by the government of Ukraine and operates as a commercial bank in addition to promoting trade by and with Ukrainian companies.

4. 12 U.S.C. § 3107(a)(2); 12 CFR 211.24(d)(2). In assessing this standard, the Board considers, among other indicia of comprehensive, consolidated supervision, the extent to which the home-country supervisors (i) ensure that the bank has adequate procedures for monitoring and controlling its activities worldwide; (ii) obtain information on the condition of the bank and its subsidiaries and offices through regular examination reports, audit reports, or otherwise; (iii) obtain information on the dealings with and relationship between the bank and its affiliates, both foreign and domestic; (iv) receive from the bank financial reports that are consolidated on a worldwide basis or

Board also considers additional standards set forth in the IBA and Regulation K.⁵ The Board considers the supervision standard to have been met when it determines that the applicant bank is subject to a supervisory framework that is consistent with the activities of the proposed representative office, taking into account the nature of such activities.⁶ This is a lesser standard than the comprehensive, consolidated supervision standard applicable to applications to establish branch or agency offices of a foreign bank. The Board considers the lesser standard sufficient for approval of representative-office applications because representative offices may not engage in banking activities.⁷

In connection with this application, Bank has provided certain commitments that limit the activities of the representative office. It has committed that the representative office would engage only in certain specified activities and would not make credit decisions; solicit or accept deposits; process or initiate transactions on behalf of Bank; or engage in activities related to securities trading, foreign exchange, or money transmission.

As noted above, Bank engages directly in the business of banking outside the United States. Bank also has provided the Board with information necessary to assess the application through submissions that address the relevant issues.

With respect to supervision by home-country authorities, the Board has considered the following information. Bank is supervised by the National Bank of Ukraine (“NBU”), which is responsible for the regulation and supervision of financial institutions operating in Ukraine and is in the process of enhancing its supervisory framework. The NBU issues rules and implements regulations concerning accounting requirements, asset quality, management, operations, capital adequacy, loan classification, and loan-loss-reserve requirements. In addition, the NBU has authority to order corrective measures, impose sanctions, and assume management of a financial institution or liquidate it.

The NBU supervises and regulates Bank in Ukraine through a combination of on-site examinations and off-site monitoring. On-site examinations are conducted biennially and cover capital adequacy, asset quality, profitability, liquidity, and compliance with the law. If necessary, the NBU can also conduct special on-site examinations. The NBU conducts off-site monitoring of Bank through the review of required daily, monthly, and quarterly reports. An external audit is also part of the supervisory process and must be conducted at least annually.

Based on all the facts of record, including the commitments provided by Bank limiting the activities of the

comparable information that permits analysis of the bank’s financial condition on a worldwide consolidated basis; (v) evaluate prudential standards, such as capital adequacy and risk asset exposure, on a worldwide basis. No single factor is essential, and other elements may inform the Board’s determination.

5. 12 U.S.C. § 3105(d)(3)–(4); 12 CFR 211.24(c)(2)–(3).

6. See, e.g., *Victoria Mutual Building Society*, 93 *Federal Reserve Bulletin* C106, footnote 6 (2007); *Banco Financiera Comercial Hondurena*, 91 *Federal Reserve Bulletin* 444 (2005); *Jamaica National Building Society*, 88 *Federal Reserve Bulletin* 59 (2002).

7. 12 CFR 211.24(d)(2).

proposed office, it has been determined that Bank is subject to a supervisory framework that is consistent with the activities of the proposed representative office, taking into account the nature of such activities.

The additional standards set forth in section 7 of the IBA and Regulation K have also been taken into account.⁸ The NBU has no objection to the establishment of the proposed representative office.

With respect to the financial and managerial resources of Bank, taking into consideration its record of operations in its home country, its overall financial resources, and its standing with its home-country supervisor, financial and managerial factors are consistent with approval. Bank appears to have the experience and capacity to support the proposed representative office and has established controls and procedures for the proposed representative office to ensure compliance with U.S. law.

Although Ukraine is not a member of the Financial Action Task Force (“FATF”), Ukraine has enacted laws based on the general recommendations of the FATF. Additionally, Ukraine participates in international fora that address the prevention of money laundering.⁹ Money laundering is a criminal offense in Ukraine, and banks are required to establish internal policies and procedures for the detection and prevention of money laundering.¹⁰ Legislation and regulations require banks to adopt know-your-customer policies, report suspicious transactions, and maintain records. Bank has established anti-money-laundering policies and procedures, which include the implementation of know-your-customer policies, suspicious activity reporting procedures, and related training programs and manuals.

8. See 12 U.S.C. § 3105(d)(3)–(4); 12 CFR 211.24(c)(2)–(3). These standards include: whether the bank’s home-country supervisor has consented to the establishment of the office; the financial and managerial resources of the bank; whether the bank has procedures to combat money laundering, whether there is a legal regime in place in the home country to address money laundering, and whether the home country is participating in multilateral efforts to combat money laundering; whether the appropriate supervisors in the home country may share information on the bank’s operations with the Board; whether the bank and its U.S. affiliates are in compliance with U.S. law; the needs of the community; and the bank’s record of operation.

9. Ukraine is party to the 1988 United Nations Convention Against the Illicit Traffic of Narcotics and Psychotropic Substances, the United Nations International Convention Against Transnational Organized Crime, the United Nations International Convention for the Suppression of the Financing of Terrorism, and the Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of Proceeds from Crime.

10. In 2001 and 2002, Ukraine was designated by the FATF as a non-cooperative country. In response, Ukraine enacted legislation to strengthen its anti-money-laundering regime in 2002 and 2003. Among other measures, the legislation expanded the definition of money laundering, strengthened enforcement, and established a financial intelligence unit, the State Committee for Financial Monitoring. As a consequence of these improvements, Ukraine was removed from the list of non-cooperative countries by the FATF on February 27, 2004. In light of these and other actions taken by Ukraine to strengthen its anti-money-laundering policies and procedures, including identifying terrorist financing as a separate crime, the Board believes that factors related to anti-money-laundering are consistent with approval of the application to establish a representative office.

Bank's internal and external auditors review compliance with requirements to prevent money laundering.

With respect to access to information on Bank's operations, the restrictions on disclosure in relevant jurisdictions in which Bank operates have been reviewed and relevant government authorities have been communicated with regarding access to information. Bank has committed to make available to the Board such information on the operations of Bank and any of its affiliates as the Board deems necessary to determine and enforce compliance with the IBA, the Bank Holding Company Act of 1956, as amended, and other applicable federal law. To the extent that the provision of such information to the Board may be prohibited by law or otherwise, Bank has committed to cooperate with the Board to obtain any necessary consents or waivers that might be required from third parties for disclosure of such information. In addition, subject to certain conditions, the NBU may share information on Bank's operations with other supervisors, including the Board. In light of these commitments and other facts of record, and subject to the condition described below, it has been determined that Bank has provided adequate assurances of access to any necessary information that the Board may request.

Based on the foregoing and all the facts of record, and subject to the commitments made by Bank and the terms and conditions set forth in this order, Bank's application to establish the representative office is hereby approved by the Director of the Division of Banking Supervision and Regulation, with the concurrence of the General Counsel, pursuant to authority delegated by the Board.¹¹ Should any restrictions on access to information on the operations or activities of Bank or any of its affiliates subsequently interfere with the Board's ability to obtain information to determine and enforce compliance by Bank or its affiliates with applicable federal statutes, the Board may require or recommend termination of any of Bank's direct and indirect activities in the United States. Approval of this application also is specifically conditioned on compliance by Bank with the conditions imposed in this order and the commitments made to the Board in connection with this application.¹² For purposes of this action, these commitments and conditions are deemed to be conditions imposed in writing by the Board in connection with its finding and decision and may be enforced in proceedings under 12 U.S.C. § 1818 against Bank and its affiliates.

By order, approved pursuant to authority delegated by the Board, effective August 17, 2007.

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

11. See 12 CFR 265.7(d)(12).

12. The Board's authority to approve the establishment of the proposed representative office parallels the continuing authority of the state of New York to license offices of a foreign bank. The Board's approval of this application does not supplant the authority of the state of New York or its agent, the New York State Banking Department, to license the proposed office of Bank in accordance with any terms or conditions that it may impose.

FINAL ENFORCEMENT DECISION ISSUED BY THE BOARD

IN THE MATTER OF

Michelle M. Moore, Former Institution-Affiliated Party of RBC Centura Bank, Rocky Mount, North Carolina, Respondent

Docket Nos. 06-035-E-1 A, 06-035-B-1

FINAL DECISION

This is an administrative proceeding pursuant to the Federal Deposit Insurance Act ("the FDI Act") in which the Board Enforcement Counsel seeks to prohibit the Respondent, Michelle M. Moore ("Respondent"), from further participation in the affairs of any financial institution and to require her to pay restitution based on actions she took while employed at RBC Centura Bank, Rocky Mount, North Carolina (the "Bank").

Upon review of the administrative record, the Board issues this Final Decision adopting the Recommended Decision ("Recommended Decision") of Administrative Law Judge Ann Z. Cook (the "ALJ"), and orders the issuance of the attached Order of Prohibition and to Cease and Desist.

I. STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

Under the FDI Act and the Board's regulations, the ALJ is responsible for conducting proceedings on a notice of charges relating to a proposed order requiring payment of restitution or prohibition from banking (12 U.S.C. §§ 1818(b), 1818(e)(4)). The ALJ issues a recommended decision that is referred to the Board together with any exceptions to those recommendations filed by the parties. The Board makes the final findings of fact, conclusions of law, and determination whether to issue the requested orders (12 CFR 263.38).

The FDI Act sets forth the substantive basis upon which a federal banking agency may issue against a bank official or employee an order of prohibition from further participation in banking. To issue such an order, the Board must make each of three findings: (1) that the respondent engaged in identified *misconduct*, including a violation of law or regulation, an unsafe or unsound practice, or a breach of fiduciary duty; (2) that the conduct had a specified *effect*, including financial loss to the institution or gain to the respondent; and (3) that the respondent's conduct involved either personal dishonesty or a willful or continuing disregard for the safety or soundness of the institution (12 U.S.C. § 1818(e)(1)(A)-(C)).

The FDI Act also spells out the requirements for an order requiring restitution, which is a type of cease-and-desist order under the Act. Specifically, a cease-and-desist order may be imposed when the agency has reasonable cause to believe that the respondent has engaged or is about to engage in an unsafe or unsound practice in conducting the business of a depository institution, or that the respondent has violated or is about to violate a law, rule, or regulation or condition imposed in writing by the agency (12 U.S.C. § 1818(b)(1)). Such an order may require the respondent to make restitution if the respondent was “unjustly enriched” in connection with the violation or practice, or the violation or practice involved “reckless disregard” of the law or applicable regulations or a prior agency order (12 U.S.C. § 1818(b)(6)(A)).

An enforcement proceeding is initiated by filing and serving on the respondent a notice of intent to prohibit. Under the Board’s regulations, the respondent must file an answer within 20 days of service of the notice (12 CFR 263.19(a)). Failure to file an answer constitutes a waiver of the respondent’s right to contest the allegations in the notice, and a final order may be entered unless good cause is shown for failure to file a timely answer (12 CFR 263.19(c)(1)).

B. Procedural History

On January 5, 2007, the Board issued a Notice of Intent to Prohibit and Notice of Charges and of Hearing (“Notice”) that sought an order of prohibition against Respondent based on her conduct while employed at the Bank, and an order requiring her to make restitution to the Bank. A Board investigator, under the direction of Enforcement Counsel, personally served the Notice on Respondent on January 19, 2007. Respondent acknowledged that she had received the Notice in two subsequent voice mail messages to Enforcement Counsel. The Notice directed Respondent to file a written answer within 20 days of the date of service of the Notice in accordance with 12 CFR 263.19, and warned that failure to do so would constitute a waiver of her right to appear and contest the allegations. Nonetheless, Respondent failed to file an answer within the 20-day period or thereafter.

On March 29, 2007, Enforcement Counsel filed a Motion for Entry of an Order of Default against Respondent. On April 12, 2007, the ALJ issued an Order to Show Cause, providing Respondent until May 1, 2007, to file an answer to the Notice and to show good cause for having failed to do so previously. The Order was delivered by overnight delivery to Respondent’s address. To date, Respondent has not filed any reply to the Order to Show Cause or answered the Notice.

C. Respondent’s Actions

The Notice alleges that Respondent was employed as a teller and then a Customer Service Officer for Bank from May 2001 through May 2004. Her duties included oversee-

ing the balancing of other tellers’ cash supply and accounting for cash at the branch at which she worked. By virtue of her position, she had access to the cash drawers and cash vault of the branch. By using that access, Respondent was able to make unauthorized withdrawals of over \$66,000 from an account of one customer, using the proceeds for her own purposes. She concealed her activity by changing the address field for statements so that the statements no longer were sent to the customer’s home. When the customer noticed she was no longer receiving statements, she spoke to Respondent about the problem. Respondent subsequently sent a letter on Bank letterhead falsely informing the customer that the account contained over \$107,000, when in fact its funds were reduced by the amounts that Respondent had stolen. Shortly thereafter, Respondent made an unauthorized withdrawal from another customer’s account and deposited the proceeds into the account of the first customer. Within a few weeks, however, the defalcation in the first customer’s account was discovered by another Bank employee, and Respondent abruptly resigned. The Bank restored its customers’ accounts for the amounts embezzled by Respondent, and froze Respondent’s personal account at Bank. As a result of these actions, Bank’s total loss was approximately \$59,823.53.

II. DISCUSSION

The Board Rules of Practice and Procedure set forth the requirements of an answer and the consequences of a failure to file an answer to a Notice. Under the Rules, failure to file a timely answer “constitutes a waiver of [a respondent’s] right to appear and contest the allegations in the notice” (12 CFR 263.19(c)). If the ALJ finds that no good cause has been shown for the failure to file, the judge “shall file . . . a recommended decision containing the findings and the relief sought in the notice.” *Id.* An order based on a failure to file a timely answer is deemed to be issued by consent. *Id.*

In this case, Respondent failed to file an answer to the Notice despite notice to her of the consequences of such failure, and also failed to respond to the ALJ’s Order to Show Cause. Respondent’s failure to file an answer constitutes a default.

Respondent’s default requires the Board to consider the allegations in the Notice as uncontested. The allegations in the Notice, described above, meet all the criteria for entry of an order of prohibition under 12 U.S.C. § 1818(e). It was a breach of fiduciary duty, unsafe and unsound practice, and violation of law or regulation, for Respondent to make unauthorized withdrawals from customers’ accounts and to use Bank systems to conceal her actions. Respondent’s actions resulted in loss to the Bank and financial gain to the Respondent, in that the Respondent used the proceeds for her own purposes and the Bank was forced to repay its customers for the amounts embezzled by Respondent. Finally, such actions also exhibit personal dishonesty and willful disregard for the safety and soundness of the Bank.

For the same reasons, the allegations in the Notice meet all the criteria for the entry of an order requiring restitution. Respondent engaged in an unsafe or unsound practice and a violation of law when she made unauthorized withdrawals from customers' accounts, and she was unjustly enriched by her actions in that she used the proceeds of her defalcation for her own purposes.

Accordingly, the requirements for an order of prohibition and for an order for restitution have been met and the Board hereby issues such an order.

CONCLUSION

For these reasons, the Board orders the issuance of the attached Order of Prohibition and Order to Cease and Desist.

By Order of the Board of Governors, this ninth day of July, 2007.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

JENNIFER J. JOHNSON
Secretary of the Board

*ORDER OF PROHIBITION AND TO CEASE AND
DESIST*

WHEREAS, pursuant to sections 8(b) and 8(e) of the Federal Deposit Insurance Act, as amended, (the "FDI Act") (12 U.S.C. § 1818(b) and (e)), the Board of Governors of the Federal Reserve System ("the Board") is of the opinion, for the reasons set forth in the accompanying Final Decision, that a final Order of Prohibition and to Cease and Desist should issue against MICHELLE M. MOORE ("Moore"), a former employee and institution-affiliated party, as defined in Section 3(u) of the FDI Act (12 U.S.C. § 1813(u)), of RBC Centura Bank, Rocky Mount, North Carolina.

NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to section 8(e) of the FDI Act, 12 U.S.C. § 1818(e), that:

1. In the absence of prior written approval by the Board, and by any other Federal financial institution regulatory agency where necessary pursuant to section 8(e)(7)(B) of the FDI Act (12 U.S.C. § 1818(e)(7)(B)), Moore is hereby prohibited:
 - (a) from participating in any manner in the conduct of the affairs of any institution or agency specified in section 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A)), including, but not limited to, any insured depository institution, any insured depository institution holding company or any U.S. branch or agency of a foreign banking organization;
 - (b) from soliciting, procuring, transferring, attempting to transfer, voting or attempting to vote any proxy, consent or authorization with respect to any voting rights in any institution described in subsection 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A));
 - (c) from violating any voting agreement previously approved by any Federal banking agency; or
 - (d) from voting for a director, or from serving or acting as an institution-affiliated party as defined in section 3(u) of the FDI Act (12 U.S.C. § 1813(u)), such as an officer, director, or employee in any institution described in section 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A)).
2. On or before the effective date of this Order, Moore shall make restitution to the Bank in the sum of \$59,823.53 for its loss as a result of Moore's violations and unsafe or unsound practices.
3. Any violation of this Order shall separately subject Moore to appropriate civil or criminal penalties or both under section 8 of the FDI Act (12 U.S.C. § 1818).
4. This Order, and each and every provision hereof, is and shall remain fully effective and enforceable until expressly stayed, modified, terminated or suspended in writing by the Board.
This Order shall become effective at the expiration of 30 days after service is made.

By Order of the Board of Governors, this ninth day of July, 2007.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

JENNIFER J. JOHNSON
Secretary of the Board