Legal Developments

ORDERS ISSUED UNDER BANK HOLDING COMPANY ACT

Orders Issued Under Section 3 of the Bank Holding Company Act

Capital City Bank Group, Inc.
Tallahassee, Florida

Capital City Bank
Tallahassee, Florida

Order Approving the Merger of Bank Holding Companies, Merger of Banks, and Establishment of Branches

Capital City Bank Group, Inc. ("Capital City"), 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 Act[1] to merge with First Alachua Banking Corporation ("First Alachua"), with Capital City as the surviving entity, and thereby indirectly acquire First Alachua's wholly owned subsidiary, First National Bank of Alachua ("First National Bank"), both of Alachua, Florida. In addition, Capital City's subsidiary bank, Capital City Bank, a state member bank, has requested the Board's approval under section 18(c) of the Federal Deposit Insurance Act[2] ("Bank Merger Act") to merge with First National Bank, with Capital City Bank as the surviving entity. Capital City Bank has also applied under section 9 of the Federal Reserve Act ("FRA") to retain and operate branches at the locations of First National Bank's main office and branches.[3]

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published in the *Federal Register* (69 *Federal Register* 71,056 (2004)) and locally in accordance with the relevant statutes and the Board's Rules of Procedure.[4] As required by the BHC Act and the Bank Merger Act, reports on the competitive effects of the mergers were requested from the United States Attorney General and the appropriate banking agencies. The time for filing comments has expired, and the Board has considered the applications and all comments received in light of the factors set forth in section 3 of the BHC Act, the Bank Merger Act, and the FRA.

Capital City, with total consolidated assets of approximately $2.4 billion, is the 28th largest insured depository organization in Florida, controlling deposits of approximately $1.4 billion.[5] First Alachua, with total consolidated assets of approximately $231.8 million, is the 111th largest insured depository organization in Florida, controlling deposits of approximately $207 million. On consummation of the proposal, Capital City would become the 26th largest insured depository organization in Florida, controlling deposits of approximately $1.6 billion, which would represent less than 1 percent of total deposits of insured depository institutions in the state.[6]

Competitive Considerations

Section 3 of the BHC Act and the Bank Merger Act prohibit 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 and the Bank Merger Act also prohibit 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]

Capital City Bank and First National Bank compete directly in the Gainesville and Palatka banking markets in Florida.[8] The Board has carefully reviewed the competitive effects of the proposal in these banking markets in light of all the facts of record, including the number of competitors that would remain in the markets, the relative shares of total deposits in depository institutions in each market ("market deposits") controlled by Capital City Bank and

1. 12 U.S.C. § 1842.
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 December 31, 2004, and deposit data and statewide ranking data are as of June 30, 2004. Ranking data are adjusted to reflect merger and acquisition activity through March 4, 2005.

6. In this context, the term "insured depository institutions" includes insured commercial banks, savings banks, and savings associations.

7. *See* 12 U.S.C. § 1842(c)(1); 12 U.S.C. § 1828(c)(5).

8. The Gainesville banking market is defined as Alachua, Gilchrist, and Levy Counties. The Palatka banking market is defined as Putnam County and the town of Hastings in St. Johns County.

First National Bank,[9] 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"),[10] 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 the Gainesville banking market. This banking market would remain moderately concentrated, and the post-merger HHI would increase 67 points, to 1,293. Fourteen competitors would remain in the banking market.[11]

In the Palatka banking market, the HHI would slightly exceed DOJ Guidelines on consummation. Capital City Bank is the fifth largest depository institution in the market, controlling approximately $63.8 million in deposits, which represent approximately 13.5 percent of market deposits. First National Bank is the sixth largest depository institution with deposits of approximately $42.7 million, which represent approximately 9 percent of market deposits. On consummation of the merger, Capital City Bank would become the largest depository institution in the market, controlling deposits of approximately $106.5 million, which represent approximately 22.5 percent of market deposits. The HHI would increase 242 points, to 1,808.

In reviewing the competitive effects of this proposal, the Board has considered that several factors appear to mitigate the likely effect of the proposal on competition in the Palatka banking market. The Palatka banking market has five commercial banking organizations and one thrift organization that would remain in the market after consummation. Two commercial bank competitors each would control approximately 20 percent of market deposits and local branch networks as large as Capital City's.

The Board also has considered that this banking market has two active community credit unions in Palatka that offer a wide range of consumer banking products. The First Coast Community Credit Union controls $45.9 million in deposits in the Palatka banking market, and the Putnam County Federal Credit Union controls $22.5 million in deposits in the market. Almost all residents in the Palatka banking market are eligible for membership in each credit union, and both credit unions operate street-level branches with drive-up service lanes. The Board concludes that these credit unions exert a competitive influence that mitigates, in part, the potential anticompetitive effects of the proposal.[12]

The Board concludes that the foregoing considerations, including the presence of two accessible credit unions, the number and size of competitors that would remain in the Palatka banking market after consummation, and other factors, mitigate the transaction's potential anticompetitive effects. The DOJ has advised the Board that consummation of the proposal is not likely to have a significantly adverse competitive effect in the Palatka banking market. The Board also has received no objections to the proposal from the other federal banking agencies.

Based on all the facts of record, the Board concludes that consummation of the proposed transaction would not likely result in a significantly adverse effect on competition or on the concentration of banking resources in any relevant banking market and that competitive factors are consistent with approval.

Financial and Managerial Resources and Supervisory Considerations

In reviewing the proposal under section 3 of the BHC Act, the Bank Merger Act, and the FRA, the Board has carefully considered 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, among other things, confidential reports of examination and other supervisory information received from the federal and state banking supervisors of the organizations involved, publicly reported and other financial information, and information provided by the applicants.

9. Deposit and market share data are as of June 30, 2004, 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).

10. Under the DOJ Guidelines, a market is considered moderately concentrated if the post-merger HHI is between 1000 and 1800, and a market is considered highly concentrated if the post-merger HHI is more than 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 by 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.

11. Capital City Bank operates the seventh largest depository institution in the market, controlling deposits of approximately $148.1 million, which represent approximately 5.5 percent of market deposits. First National Bank operates the fifth largest depository institution in the market, controlling deposits of approximately $164.3 million, which represents approximately 6.1 percent of market deposits. On consummation of the proposal, Capital City Bank would become the third largest depository institution in the market, controlling deposits of approximately $312.4 million, which represents approximately 11.6 percent of market deposits.

12. The Board previously has considered the competitiveness of certain active credit unions as a mitigating factor. *See FNB. Corporation*, 90 *Federal Reserve Bulletin* 481 (2004); *Gateway Bank & Trust Co.*, 90 *Federal Reserve Bulletin* 547 (2004). With deposits of these credit unions included at 50 percent, Capital City Bank would be the fifth largest of nine depository institutions in the market, with approximately 12.6 percent of market deposits, and First National Bank would be the sixth largest depository institution in the market, controlling approximately 8.4 percent of market deposits. On consummation of the proposal, Capital City Bank would be the largest depository institution in the market with deposits of approximately $106.5 million or approximately 21 percent of market deposits. The HHI would increase 211 points, to 1,598.

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 areas, 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, including its capital position, asset quality, and earnings prospects and the impact of the proposed funding of the transaction.

Based on its review of these factors, the Board finds that Capital City has sufficient financial resources to effect the proposal. The transaction would be effected through a combination of cash and an exchange of shares. Capital City would fund the cash consideration by issuing trust preferred securities. Capital City and Capital City Bank are well capitalized and would remain so on consummation of the proposal.

The Board also has evaluated the managerial resources of the organizations involved and of the proposed combined organization. The Board has reviewed the examination records of Capital City, First Alachua, and their subsidiary depository institutions, including assessments of their management, risk-management systems, and operations. In addition, the Board has considered its supervisory experience and that of the other relevant banking supervisory agencies with the organizations and their records of compliance with applicable banking law. The Board also has considered Capital City's plans to integrate First Alachua and First National Bank and the proposed management, including the risk-management systems, of the resulting organization.

Based on all the facts of record, the Board has concluded that the financial and managerial resources and future prospects of the organizations and the other supervisory factors involved are consistent with approval of the proposal.

Convenience and Needs and Other Considerations

In acting on the proposal, 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").[13] Capital City Bank received an overall rating of "satisfactory" at its most recent CRA performance evaluation by the Federal Reserve Bank of Atlanta, as of November 17, 2003. First National Bank also received a "satisfactory" rating at its most recent CRA performance evaluation by the Office of the Comptroller of the Currency, as of October 7, 2002. The Board notes that the proposal would provide the combined entity's customers with access to a broader array of products and services in expanded service areas, including access to expanded branch and automated teller machine networks. Based on all the facts of record, the Board concludes that the considerations relating to the convenience and needs of the communities to be served and the CRA performance records of the institutions involved are consistent with approval of this proposal.

As previously noted, Capital City also has applied under section 9 of the FRA to establish branches at the 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, including section 208.6 of the Board's Regulation H, which implements section 9(4) of the FRA, and finds those factors to be consistent with approval.[14]

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 BHC Act, the Bank Merger Act, and the FRA. The Board's approval is specifically conditioned on compliance by Capital City 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 fifteenth 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 Atlanta, acting pursuant to delegated authority.

By order of the Board of Governors, effective April 28, 2005.

Voting for this action: Chairman Greenspan, Vice Chairman Ferguson, and Governors Gramlich, Bies, Olson, Bernanke, and Kohn.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Appendix

Addresses of Main Office and Branches in Florida to be Acquired by Capital City

Alachua
15000 N.W. 140th Street

13. 12 U.S.C. § 2901 et seq.

14. 12 U.S.C. § 322; 12 CFR 208.6(b).

Gainesville
4000 N. Main Street
6360 N.W. 13th Street
4040 N.W. 16th Boulevard
4041 N.W. 37th Place, Suite A

Hastings
207 N. Main Street

High Springs
660 N.E. Santa Fe Boulevard

Jonesville
14009 W. Newberry Road

Newberry
24202 W. Newberry Road, Suite F

C-B-G, Inc.
West Liberty, Iowa

Order Approving the Acquisition of Shares of a Bank Holding Company

C-B-G, Inc. ("C-B-G"), 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 Act[1] to acquire up to 24.35 percent of the voting shares of Washington Bancorp ("Washington") and thereby indirectly acquire an interest in Washington's subsidiary bank, Federation Bank, both of Washington, Iowa.

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (69 *Federal Register* 78,028 (2004)). 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 3 of the BHC Act.

C-B-G, with consolidated assets of approximately $189 million, is the 63rd largest depository organization in Iowa, controlling deposits of $160 million, which represent less than 1 percent of total deposits of insured depository institutions in Iowa ("state deposits").[2] Washington, with total consolidated assets of $106 million, is the 154th largest depository organization in Iowa, controlling $75 million in deposits. If C-B-G were deemed to control Washington on consummation of the proposal, C-B-G would become the 43rd largest depository organization in Iowa, controlling approximately $235 million in deposits, which represents 1 percent of state deposits.

The Board received comments from Washington and a local resident objecting to the proposal and expressing concern that the proposal would result in C-B-G controlling and potentially harming Washington.[3] The Board has considered carefully these comments in light of the factors that the Board must consider under section 3 of the BHC Act.

The Board previously has stated that 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.[4] However, the requirement in section 3(a)(3) of the BHC Act that the Board's approval be obtained before a bank holding company acquires more than 5 percent of the voting shares of a bank suggests that the Congress contemplated the acquisition by bank holding companies of between 5 percent 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]

C-B-G has indicated that it does not propose to control or exercise a controlling influence over Washington or Federation Bank. C-B-G has agreed to abide by certain 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 company for purposes of the BHC Act.[7] For example, C-B-G has committed not to exercise or attempt to exercise a controlling influence over the management or policies of Washington or any of its subsidiaries; not to seek or accept representation on the board of directors of Washington or any of its subsidiaries; and not to have any director, officer, employee, or agent interlocks with Washington or any of its subsidiaries. C-B-G also has committed not to attempt to influence the dividend policies, loan decisions, or operations of Washington or any of its subsidiaries. The Board notes that the BHC Act prohibits C-B-G from acquiring additional shares of Washington or attempt-

1. 12 U.S.C. § 1842.

2. Asset data are as of December 31, 2004. Statewide deposit and ranking data are as of June 30, 2004. Deposit data reflect the total of the deposits reported by each organization's insured depository institutions in their Consolidated Reports of Condition and Income or Thrift Financial Reports. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

3. Washington requested a private meeting with C-B-G about the proposal. Under the Board's Rules of Procedures, the Reserve Bank may arrange a private meeting between a protestant and the applicant for the purposes of clarifying and narrowing issues and resolving differences when both parties agree to such a meeting. 12 CFR 262.25(c). The parties ultimately declined the invitation of the Federal Reserve Bank of Chicago to participate in a private meeting.

4. *See, e.g., Brookline Bancorp, MHC*, 86 *Federal Reserve Bulletin* 52 (2000) ("*Brookline*"); *North Fork Bancorporation, Inc.*, 81 *Federal Reserve Bulletin* 734, 735 (1995) ("North Fork"); *First Piedmont Corp.*, 59 *Federal Reserve Bulletin* 456, 457 (1973).

5. 12 U.S.C. § 1842(a)(3).

6. *S&T Bancorp, Inc.*, 91 *Federal Reserve Bulletin* 74 (2005) (acquisition of up to 24.9 percent of the voting shares of a bank holding company); *Brookline* (acquisition of up to 9.9 percent of the voting shares of a bank holding company); *GB Bancorporation*, 83 *Federal Reserve Bulletin* 115 (1997) (acquisition of up to 24.9 percent of the voting shares of a bank).

7. *See, e.g., S&T Bancorp*; *Brookline*; *FleetBoston Financial Corp.*, 86 *Federal Reserve Bulletin* 751, 766 (2000). The commitments are set forth in the appendix. Washington also has expressed concern that C-B-G might in the future seek relief from some of these commitments. Any such request would be evaluated by the Board in light of all facts and circumstances at that time.

ing to exercise a controlling influence over Washington without the Board's prior approval.

The Board has adequate supervisory authority to monitor compliance by C-B-G with its commitments and can take enforcement action against C-B-G if it violates any of the commitments.[8] The Board also has authority to initiate a control proceeding against C-B-G if facts presented later indicate that C-B-G or any of its subsidiaries or affiliates in fact controls Washington for purposes of the BHC Act.[9] Based on these considerations and all other facts of record, the Board has concluded that C-B-G would not acquire control of, or have the ability to exercise a controlling influence over, Washington through the proposed acquisition of voting shares.[10]

Competitive and Convenience and Needs 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 any attempt to monopolize the business of banking in any relevant banking market. Section 3 also prohibits the Board from approving a proposal that would substantially lessen competition in any relevant banking market, unless the Board finds that the anticompetitive effects of the proposal clearly are outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.[11]

The Board previously has stated that one company need not acquire control of another company to lessen competition between them substantially.[12] C-B-G and Washington, however, 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 have no significant adverse effect on competition or on the concentration of banking resources in any relevant banking market and that competitive factors are consistent with approval of the proposal.

In addition, considerations relating to the convenience and needs of the communities to be served, including the records of performance of the institutions involved under the Community Reinvestment Act ("CRA"),[13] are consistent with approval. C-B-G's subsidiary banks each received "satisfactory" ratings, and Federation Bank received an "outstanding" rating, at their most recent evaluations for CRA performance by the FDIC.[14]

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 carefully these factors in light of all the facts of record, including confidential reports of examination, other confidential supervisory information from the federal and state banking supervisors of the organizations involved, publicly reported and other financial information, information provided by C-B-G, and comments received.[15]

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 areas, 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 on consummation, including its capital position, asset quality, and earnings prospects and the impact of the proposed funding of the transaction.[16]

Based on its review of these factors, the Board finds that C-B-G has sufficient financial resources to effect the proposal. C-B-G and its subsidiary banks currently are well capitalized and would remain so on consummation of this proposal. The proposed transaction is structured as a cash transaction, and the consideration to be received by the Washington shareholders who are selling their shares to C-B-G would be funded from issuance of trust preferred securities.

8. *See* 12 U.S.C. § 1818(b)(1).

9. *See* 12 U.S.C. § 1841(a)(2)(C).

10. Washington asserted that the proposal is inconsistent with the Board's source of strength doctrine. As explained above, the Board previously has permitted a bank holding company that meets the requirements of section 3 of the BHC Act to acquire shares of a bank or bank holding company in a transaction that does not trigger the Board's source of strength regulation.

Washington also expressed concern that the proposal could subject Federation Bank to liability under the cross-guarantee provision of the Federal Deposit Insurance Act, 12 U.S.C. § 1815(e) ("FDI Act"), if a subsidiary bank of C-B-G were to fail or require assistance from the Federal Deposit Insurance Corporation ("FDIC"). The Board notes that the application of this provision of the FDI Act is a matter for the FDIC to decide.

11. 12 U.S.C. § 1842(c)(1).

12. The Board has found that noncontrolling interests in directly competing depository institutions may raise serious questions under the BHC Act and has concluded that the specific facts of each case will determine whether the minority investment in a company would be anticompetitive. *See, e.g., BOK Financial Corp.*, 81 *Federal Reserve Bulletin* 1052, 1053–54 (1995); *Mansura Bancshares, Inc.*, 79 *Federal Reserve Bulletin* 37, 38 (1993).

13. 12 U.S.C. § 2901 et seq.

14. The most recent CRA performance evaluations of Community Bank, Muscatine, Iowa, the larger of C-B-G's subsidiary banks, and Wilton Savings Bank, Wilton, Iowa, C-B-G's other subsidiary bank, were as of February 2004 and July 2003 respectively. Federation Bank's most recent CRA performance evaluation was as of August 2004.

15. Washington also expressed concern that C-B-G could seek access to Washington's confidential records. The Board notes that Iowa law delineates the rights of shareholders to access an Iowa corporation's records. *See* Iowa Code § 490.1602.

16. As previously noted, the current proposal provides that C-B-G would acquire only up to 24.35 percent of Washington. Under these circumstances, the financial statements of C-B-G and Washington would not be consolidated for purposes of Federal Reserve reporting requirements.

The Board also has considered the managerial resources of the organizations involved. The Board has reviewed the examination records of C-B-G, Washington, 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 banking agencies with the organizations and their records of compliance with applicable banking laws. C-B-G, Washington, and their subsidiary depository institutions are considered well managed.

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, as are the other supervisory factors the Board must consider under the BHC Act.

Other Considerations

Washington has asserted that the proposal would violate an Iowa statute that requires a bank holding company making an offer to purchase, directly or indirectly, shares of an Iowa-chartered bank to extend the same offer to all shareholders of the bank.[17] If a bank is wholly owned by a bank holding company, as in this case, Washington argues that the same offer must be made to all the shareholders of the parent holding company. C-B-G, which made an offer only to some shareholders of Washington, has responded that the Iowa statute does not apply to the proposal because it is acquiring shares of a bank holding company, and not a bank, and that no additional shares of Federation Bank exist to purchase.

The Board may not approve a proposal that is prohibited by a valid state law.[18] The Board is not, however, the arbiter of disputes regarding the applicability or meaning of state corporate law.

The Board has reviewed the state law in this case and the submissions from C-B-G and Washington regarding the interpretation of the Iowa statute. In addition, the Board has consulted with the Iowa Superintendent of Banking and the Iowa Attorney General's Office.

Based on this review, it appears that the proposed acquisition of Washington shares is not prohibited under state law and can be consummated without violating state law. Under C-B-G's interpretation, the transaction would be permitted as structured. Even under Washington's interpretation, C-B-G would be permitted to acquire the shares at issue if it made a similar offer to all Washington shareholders. Accordingly, state law does not prohibit C-B-G from acquiring shares of Washington under either interpretation.

The Board conditions its action in this case on C-B-G's compliance with applicable state law.[19] If C-B-G must offer to purchase and then acquire additional shares of Washington, further review and approval by the Federal Reserve may be required under the BHC Act at that time.

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 and other applicable statutes. The Board's approval is specifically conditioned on compliance by C-B-G with the conditions imposed in this order and all the commitments made to the Board in connection with the application. For purposes of this transaction, those 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 of Washington's voting shares may not be consummated before the fifteenth 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 Chicago, acting pursuant to delegated authority.

By order of the Board of Governors, effective April 26, 2005.

Voting for this action: Chairman Greenspan, Vice Chairman Ferguson, and Governors Gramlich, Bies, Olson, Bernanke, and Kohn.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Appendix

In connection with its application to acquire up to 24.35 percent of Washington, C-B-G commits that it will not, directly or indirectly:

(1) take any action that would cause Washington[1] to become a subsidiary of C-B-G;
(2) acquire or retain shares that would cause the combined interests of C-B-G and its officers, directors, and affiliates to equal or exceed 25 percent of the outstanding voting shares of Washington;
(3) exercise or attempt to exercise a controlling influence over the management or policies of Washington;
(4) seek or accept representation on the board of directors of Washington;

17. Iowa Code § 524.1803.

18. *Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Co.*, 379 U.S. 411 (1965).

19. *See also Central Pacific Financial Corp.*, 90 *Federal Reserve Bulletin* 93 (2004); *Brookline Bancorp, MHC*, 86 *Federal Reserve Bulletin* 52 (2000); *Security Pecos Bancshares, Inc.*, 85 *Federal Reserve Bulletin* 640 (1999).

1. All references to Washington in these commitments include any subsidiary of Washington.

(5) have or seek to have any representative serve as an officer, agent, or employee of Washington;
(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 Washington;
(7) solicit or participate in soliciting proxies with respect to any matter presented to the shareholders of Washington;
(8) attempt to influence the dividend policies or practices; the loan, credit, or investment decisions or policies; the pricing of services; any personnel decisions; any operations activities, including the location of any offices or branches or their hours of operation; or any similar activities or decisions of Washington;
(9) dispose or threaten to dispose of shares of Washington in any manner as a condition of specific action or nonaction by Washington; or
(10) enter into any other banking or nonbanking transactions with Washington, except that C-B-G may establish and maintain deposit accounts with bank subsidiaries of Washington, 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 unaffiliated with Washington.

The PNC Financial Services Group, Inc. Pittsburgh, Pennsylvania

Order Approving the Merger of Bank Holding Companies

The PNC Financial Services Group, Inc. ("PNC"), 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 Act[1] to acquire Riggs National Corporation ("Riggs"), Washington, D.C., and its subsidiary bank, Riggs Bank National Association ("Riggs Bank"), McLean, Virginia.[2]

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (69 *Federal Register* 50,382 (2004)). 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 3 of the BHC Act.

PNC, with total consolidated assets of approximately $80 billion, is the 20th largest depository organization in the United States, controlling deposits of approximately $52.2 billion, which represent less than 1 percent of the total deposits of insured depository institutions in the United States.[3] PNC operates subsidiary insured depository institutions in Delaware, Florida, Indiana, Kentucky, New Jersey, Ohio, and Pennsylvania.

Riggs, with total consolidated assets of approximately $6 billion, controls deposits of $3.8 billion through Riggs Bank, its only subsidiary depository institution. On consummation of this proposal, PNC would become the 19th largest depository organization in the United States, with total consolidated assets of approximately $85.5 billion and total deposits of $56 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the United States.

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 home state of such bank holding company if certain conditions are met.[4] For purposes of the BHC Act, the home state of PNC is Pennsylvania, and Riggs's subsidiary bank is located in Washington, D.C., Maryland, and Virginia.[5]

Based on a review of all the facts of record, including a review of relevant state statutes, the Board finds that all the conditions for an interstate acquisition enumerated in section 3(d) of the BHC Act are met in this case.[6] Accordingly, 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 would be

1. 12 U.S.C. § 1842.

2. Immediately after the merger of Riggs into PNC, PNC would contribute all the shares of Riggs Bank to PNC Bancorp, Inc., Wilmington, Delaware, a subsidiary bank holding company of PNC. PNC's lead subsidiary bank, PNC Bank, National Association ("PNC Bank"), Pittsburgh, Pennsylvania, then would acquire substantially all the assets and assume substantially all the liabilities of Riggs Bank. This proposed transaction by PNC Bank is subject to approval by the Office of the Comptroller of the Currency ("OCC") under section 18(c) of the Federal Deposit Insurance Act. 12 U.S.C. § 1828(c).

3. Asset, deposit, and nationwide ranking data are as of December 31, 2004. Deposit data reflect the unadjusted total of the deposits reported by each organization's insured depository institutions in their Consolidated Reports of Condition and Income or Thrift Financial Reports. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

4. A bank holding company's home state is the state in which the total deposits of all subsidiary banks of the company were the largest on the later of July 1, 1966, or the date on which the company became a bank holding company. 12 U.S.C. § 1841(o)(4)(C).

5. For purposes of section 3(d), 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 (d)(2)(B).

6. 12 U.S.C. §§ 1842(d)(1)(A) & (B), and (d)(2)(A) & (B). PNC is adequately capitalized and adequately managed, as defined by applicable law. Riggs Bank has been in existence and operated for the minimum period of time required by applicable law. On consummation of the proposal, PNC would control less than 10 percent of the total amount of deposits of insured depository institutions in the United States. All other requirements of section 3(d) would be met in this case.

in furtherance of any attempt to monopolize the business of banking in any relevant banking market. The BHC Act also prohibits the Board from approving a proposed bank acquisition that would substantially lessen competition in any relevant banking market, unless the Board finds that the anticompetitive effects of the proposal clearly are 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]

PNC and Riggs do not compete directly in any relevant banking market. Accordingly, the Board concludes, based on all the facts of record, that consummation of the proposal would not have an adverse effect on competition or on the concentration of banking resources in any relevant banking market and that competitive factors are consistent with approval of the proposal.

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 banks involved in the proposal and certain other supervisory factors. In reviewing these factors, the Board has considered, among other things, confidential reports of examination and other supervisory information received from the primary federal supervisors of the organizations involved in the proposal. In addition, the Board has consulted with the relevant supervisory agencies, including the OCC and the Federal Deposit Insurance Corporation ("FDIC"). The Board also has considered publicly available financial and other information on the organizations and their subsidiaries, all the information submitted on the financial and managerial aspects of the proposal by PNC, and public comment received by the Board about the financial and managerial resources of PNC and Riggs.

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 areas, 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 effect of the transaction on the financial condition of the applicant and the target, including their capital positions, asset quality, and earnings prospects and the impact of the proposed funding of the transaction.

The Board has reviewed these factors carefully in this case and believes that financial factors are consistent with approval of this application. The Board notes that PNC and its subsidiary depository institutions are well capitalized and would remain so on consummation of the proposal.[8] The Board also finds that PNC has sufficient financial resources to effect the proposal.[9] The proposed transaction is structured as a partial share exchange/partial cash purchase of shares, and PNC will use existing cash resources to fund the cash purchase of shares.

The Board also has considered the managerial resources of PNC, Riggs, and the banking institutions and nonbanking subsidiaries to be acquired, and the effect of the proposal on these resources.[10] In reviewing this proposal, the Board has assembled and considered a broad and detailed record, including substantial confidential and public information about PNC and Riggs. The Board has carefully reviewed the examination records of PNC, Riggs, and their subsidiaries, including assessments of their risk-management systems by relevant supervisors. The Board also reviewed confidential supervisory information on the policies, procedures, and practices of PNC and Riggs for complying with the Bank Secrecy Act ("BSA"), and other anti-money-laundering laws, and has consulted with the appropriate federal financial supervisory agencies of PNC's subsidiary banks and Riggs Bank about their records of compliance with anti-money-laundering laws.

In assessing these matters, the Board notes that PNC is considered well managed overall. The Board has taken account of the experience and capability of PNC's senior management; the enterprise-wide risk-management programs used to identify, measure, and control corporate and business line risks; and the adequacy of the organization's internal controls and audit procedures as well as other management programs and matters. The Board also has considered PNC's plans for integrating Riggs into the PNC organization, including the experience of the management team PNC has named to run the banking operations to be acquired from Riggs.[11]

7. 12 U.S.C. § 1842(c)(1).

8. One commenter questioned the basis for the selection by Riggs's board of directors of PNC's bid from among the competing offers and expressed concern that certain senior management officials of Riggs Bank may receive excessive severance payments. The Board notes that the transaction may be consummated only if approved by the Riggs shareholders, that information concerning the selection of PNC's bid and the management officials' severance payments has been disclosed to shareholders, and that PNC would remain well capitalized on consummation. The Board also notes that the price or consideration received by shareholders is not, by itself, within the limited statutory factors the Board may consider when reviewing an application under the BHC Act. *See Western Bancshares, Inc. v. Board of Governors*, 480 F.2d 749 (10th Cir. 1973).

9. The commenter expressed concern about PNC's disclosure in a recent filing with the Securities and Exchange Commission that it may have to adjust its tax treatment for certain leveraged leases, based on an Internal Revenue Service ("IRS") audit of PNC's tax returns for the years 1998 to 2000. PNC has stated in its filing that it believes that its tax treatment of these leases was appropriate under federal tax law and that it plans to file an appeal with the IRS. The Board notes that the IRS and the federal courts, and not the Board, have jurisdiction to adjudicate compliance with federal tax laws. The Board has taken account of this matter, including the effect of both the current treatment and potential adjustment on the financial resources of PNC.

10. The commenter expressed concern about lending by PNC to unaffiliated payday lenders. PNC stated that neither it nor any of its subsidiaries currently have any banking or similar financial relationships with any payday lenders.

11. The commenter expressed concerns about PNC's managerial record in light of past enforcement actions against the organization, including enforcement actions by the Department of Justice ("DOJ"),

The Board has taken into account that Riggs Bank pleaded guilty to a criminal violation of the BSA and paid a $16 million fine,[12] and that Riggs and Riggs Bank were subject to enforcement actions by the Board and the OCC, respectively, that included payment by Riggs Bank of a $25 million civil money penalty for BSA violations.[13] The Board continues to monitor investigations of Riggs and Riggs Bank by various U.S. governmental authorities and is consulting with the DOJ and the OCC about the ongoing investigations of former and current management officials of Riggs and its subsidiaries.[14]

The Board notes that most of Riggs's supervisory issues arose from its international banking and foreign embassy banking business. In 2004, Riggs announced its intention to exit those lines of business, and Riggs Bank has substantially completed the sale or termination of those activities.[15] The Board has reviewed the progress of Riggs, and has consulted with the OCC about the progress of Riggs Bank, in complying with the Consent Orders. In addition, the Board has consulted with the OCC about enhancements Riggs Bank has made to its programs for complying with the requirements of the BSA.

The Board has also reviewed and taken account of proposals by PNC as the acquiring institutions to implement enhanced risk-management and BSA-compliance programs at Riggs after consummation of this proposal. The Board has considered PNC's record of enhancing its own risk-management and BSA-compliance programs and its plans for implementing those programs at Riggs. These considerations included PNC's proposed management personnel and implementation of corporate-wide risk-management systems for compliance, including BSA-compliance programs, for the expanded PNC operations after consummation and PNC's record of successfully integrating acquired institutions into its existing operations. As previously noted, the banking operations of Riggs Bank will be merged into PNC Bank after consummation of the proposal.

Based on all the facts of record, the Board concludes that considerations relating to the financial and managerial resources and future prospects of PNC and the depository institutions involved in the proposal are consistent with approval, as are the other supervisory factors under the BHC Act.[16]

Convenience and Needs Considerations

In acting on this proposal, the Board must consider the effects of the proposal on the convenience and needs of the

the Federal Reserve Bank of Cleveland ("Reserve Bank"), and the OCC. The Board previously considered these enforcement actions in its order approving PNC's application to acquire United National Bancorp, Bridgewater, New Jersey (order dated November 19, 2003) (the "United National Order"). As noted in the United National Order, PNC has developed a new ethics policy and training program, an enterprise-wide risk-management program, and enhanced credit administration procedures, internal controls, and corporate governance procedures. The Board notes that the Federal Reserve and the OCC terminated their respective enforcement actions with PNC in September 2003. In addition, the DOJ's complaint against PNC was dismissed in June 2004, with the DOJ's concurrence, after PNC's compliance with the deferred prosecution agreement that PNC and the DOJ entered into in June 2003. *U.S. v. PNC ICLC Corp.*, CRIM. No. 03-M-187 (W.D. Pa. June 2, 2003). Based on its review of the record in this case, the Board hereby reaffirms and adopts the facts and findings detailed in the United National Order with respect to these enforcement matters. *See* 90 *Federal Reserve Bulletin* 72, 74 n.9 (2004).

12. *See United States of America v. Riggs Bank N.A.*, Cr. 05-35 (RMU). The commenter objected to the size of the fine and to other terms of the plea agreement. The Board notes that the United States District Court for the District of Columbia, and not the Board, has jurisdiction to adjudicate the criminal complaint against Riggs Bank and that the court has approved the fine amount and the other terms of Riggs Bank's plea agreement.

13. The Consent Orders entered into in May 2004 required Riggs and Riggs Bank to improve management and internal controls, in addition to enhancing compliance with BSA and other anti-money-laundering requirements and requiring Riggs Bank to pay the $25 million civil money penalty. The Board and the OCC modified their consent orders with Riggs and Riggs Bank in January 2005 to reflect the progress made in fulfilling the requirements of the May 2004 Consent Orders and to add provisions reflecting the most recent examinations of the institutions. The Board notes that the reviews required by the May 2004 Consent Orders of certain Riggs accounts to ensure that suspicious activity reports were properly filed have been completed.

14. As a matter of practice and policy, the Board has generally not tied consideration of an application or notice to the scheduling or completion of an investigation if the applicant has an overall satisfactory record of performance and the issues being reviewed can be resolved in the examination and supervisory process. *See* 62 *Federal Register* 9,290 (1997) (Preamble to the Board's Regulation Y). In this case, as explained above, the Board has also considered the progress and cooperation shown by Riggs as well as the plans and ability of the acquiring institution to address these matters. As the Board has indicated previously, it has broad supervisory authority under the banking laws to address matters that are found in the examination and supervisory process. *See Citigroup Inc.*, 91 *Federal Reserve Bulletin* 262 (2005). Moreover, many issues are more appropriately and adequately addressed in the supervisory process, where particular matters and violations of law can be identified and addressed specifically, rather than in the application process, which requires a weighing of the overall record of the companies involved. The Board further notes that consummation of the proposed transaction would not impede the ability of the Congress, the DOJ, or the appropriate federal banking agencies to gain access to the records of Riggs or otherwise to complete investigations of these matters.

15. Specifically, Riggs has represented that it has terminated all banking relationships with foreign embassies and is in the process of closing or selling its operations outside the United States. Riggs terminated the operations of Riggs International Banking Corporation ("RIBC"), Miami, Florida, the Edge Act subsidiary of Riggs Bank, during the third quarter of 2004, and RIBC surrendered its permit in December 2004.

16. The commenter also noted press reports about litigation against Riggs, including suits claiming Riggs was negligent in failing to alert authorities to suspicious financial transactions allegedly related to the September 11, 2001, terrorist attacks and criminal and civil claims in a Spanish court asserting Riggs's concealment of assets and money laundering in connection with Riggs accounts held for the benefit of former Chilean President Augusto Pinochet. The Board notes that the Spanish civil and criminal claims were dismissed after Riggs reached a settlement with the plaintiffs in the civil suit in Spain. As previously noted, the courts, and not the Board, have jurisdiction to adjudicate legal claims against Riggs. In considering the financial and managerial factors in this case, the Board has considered how these litigation matters might affect the future prospects of the combined organization.

communities to be served and take into account the records of the relevant insured depository institutions under the Community Reinvestment Act ("CRA").[17] The CRA requires the federal financial supervisory agencies to encourage financial institutions to help meet the credit needs of 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.

The Board has considered carefully the convenience and needs factor and the CRA performance records of PNC's subsidiary banks and Riggs Bank in light of all the facts of record, including public comment received on the proposal. One commenter opposed the proposal and alleged, based on data reported under the Home Mortgage Disclosure Act ("HMDA"),[18] that PNC Bank and Riggs Bank engaged in disparate treatment of minority individuals in home mortgage lending in the banks' assessment areas. The commenter also expressed concern about possible branch closures.

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.[19]

PNC Bank. PNC Bank, PNC's largest subsidiary bank as measured by total deposits, received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of April 15, 2002 ("2002 Evaluation").[20] Riggs Bank received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of April 7, 2003 ("2003 Evaluation"). The Board consulted with the OCC about the CRA performance of PNC Bank and Riggs Bank since their most recent CRA evaluations. PNC has indicated that after the merger of PNC Bank and Riggs Bank, PNC Bank's CRA program will be implemented at the resulting bank.

The 2002 Evaluation was discussed in the United National Order.[21] In that evaluation, PNC Bank received a "high satisfactory" rating under the lending test and "outstanding" ratings under the investment and service tests.[22] Examiners reported that the bank had excellent lending activity in its major markets and good distribution of loans by geography and borrower income. They noted that the bank had developed a bank-wide lending program to assist LMI borrowers through expanded credit criteria, reduced minimum loan amounts, and closing cost assistance. Examiners further stated that the bank's record of community development lending for affordable housing, community services, and economic revitalization was strong. Examiners also reported that PNC Bank made more than $169 million of qualifying community development investments during the evaluation period, a level examiners characterized as excellent. In addition, they reported that the bank's services were readily accessible to LMI individuals and geographies and that the bank was a leader in providing community development services in its assessment areas.

Riggs Bank. In the 2003 Evaluation, Riggs Bank received "outstanding" ratings under the lending, investment, and service tests.[23] Examiners reported that the percentage of home purchase loans by Riggs Bank to LMI borrowers exceeded the percentage of LMI families in the bank's assessment area and that the bank's market share of home purchase loans to LMI borrowers exceeded its overall market share of home purchase loans in that area. Examiners stated that the bank made use of innovative and flexible loan products, which provide relaxed underwriting standards for LMI borrowers. Examiners also indicated that the bank had a high level of community development lending.

Examiners characterized Riggs Bank's level of qualified investments as excellent and stated that the bank played a vital role in increasing the level of funds available for affordable mortgages in the bank's assessment area. In addition, examiners reported that the bank provided a relatively high level of community development services, which included participation in or sponsorship of seminars that provided training and assistance on home buying, consumer loans, debt and credit management, and building financial knowledge and relationships with financial institutions.

B. HMDA Data and Fair Lending Record

The Board has carefully considered the lending record of PNC in light of public comment received on the proposal. The commenter alleged, based on a review of 2003 HMDA data, that PNC Bank and Riggs Bank disproportionately

17. 12 U.S.C. § 1842(c)(2); 12 U.S.C. § 2901 et seq.

18. 12 U.S.C. § 2801 et seq.

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

20. PNC Bank, Delaware, PNC's other subsidiary bank, also received an "outstanding" rating at its most recent CRA performance evaluation by the FDIC, as of January 21, 2003.

21. 90 *Federal Reserve Bulletin* at 74–77.

22. The evaluation period for the lending test was January 1, 1998, through December 31, 2001, except for community development loans, which were evaluated from July 6, 1998, through December 31, 2001. The evaluation period for the investment and service tests was July 6, 1998, through March 31, 2002.

23. The evaluation period for the lending test was from September 1, 1999, through December 31, 2002, except for community development lending, which was evaluated from September 1, 1999, through April 7, 2003. For the investment test and the service test, the evaluation period was from September 1, 1999, through April 7, 2003.

excluded or denied African-American or Hispanic applicants for home mortgage loans in various Metropolitan Statistical Areas ("MSAs").[24] The Board reviewed the HMDA data for 2002 and 2003 reported by PNC Bank and PNC Bank, Delaware (collectively "PNC Banks"), and by Riggs Bank for the states or MSAs where the banks' primary assessment areas were located.[25]

The HMDA data indicate that the PNC Banks' denial disparity ratios[26] for African-American and Hispanic applicants for the banks' total HMDA-reportable loans in Delaware, New Jersey, and Pennsylvania, which together accounted for more than 77 percent of the banks' combined HMDA-reportable loans in 2003, were generally comparable with the ratios for the aggregate of lenders ("aggregate lenders") in those areas.[27] In addition, the percentages of the PNC Banks' total HMDA-reportable loans to African Americans and Hispanics in these states in 2003 were generally comparable with the percentages for the aggregate lenders. The data also indicate that the PNC Banks increased the percentages of their total HMDA-reportable loans originated to African Americans and Hispanics in each of these states from 2002 to 2003.[28]

The HMDA data indicate that Riggs Bank's denial disparity ratios for African-American applicants in its assessment area were higher than those ratios for the aggregate lenders in both years. The data indicate, however, that Riggs Bank significantly reduced its denial disparity ratios for African-American applicants and increased the number and percentage of its total HMDA-reportable loans to African Americans in 2003.

Although the HMDA data might reflect certain disparities in the rates of loan applications, originations, and denials among members of different racial groups in certain local areas, these data generally do not demonstrate that either PNC Bank or Riggs excluded any racial group on a prohibited basis. The Board nevertheless is concerned when HMDA data for an institution indicate disparities in lending and believes that all banks 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 income level. The Board recognizes, however, that HMDA data alone provide an incomplete measure of an institution's lending in its community because these data cover only a few categories of housing-related lending. HMDA data, moreover, provide only limited information about covered loans.[29] HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution has not assisted adequately in meeting its community's credit needs or has engaged in illegal lending discrimination.

Because of the limitations of HMDA data, the Board has considered these data carefully in light of other information, including examination reports that provide an on-site evaluation of compliance by PNC and its subsidiary banks and Riggs Bank with fair lending laws. The Board also consulted with the OCC, which has responsibility for enforcing compliance with fair lending laws by PNC Bank and Riggs Bank, about this proposal and the compliance record of these banks.[30]

The record indicates that PNC has taken steps to ensure compliance with fair lending laws. PNC's fair lending policy includes a commitment to provide full and equal access to credit while maintaining safe and sound credit standards. To implement this commitment, PNC's fair lending compliance program includes employee training and review by senior management of credit decisions, pricing, marketing, and fair lending-related polices and procedures.

The Board has also considered the HMDA data and the overall performance records of the subsidiary banks of PNC and Riggs under the CRA. Their established efforts demonstrate that the banks are actively helping to meet the credit needs of their entire communities.

C. Branch Closings

PNC has indicated that it has no plans to close any branches of PNC Bank or Riggs Bank as a result of the proposed transaction.[31] The Board has considered PNC Bank's branch banking policy and its record of opening

24. Specifically, the commenter cited HMDA data on lending by PNC's subsidiary banks to African Americans or Hispanics in the Wilmington MSA in Delaware, Newark and Jersey City MSAs in New Jersey, Harrisburg and Pittsburgh MSAs in Pennsylvania, Philadelphia MSA in Pennsylvania and New Jersey, and Newburgh MSA in New York. The commenter cited HMDA data on Riggs Bank's lending to African Americans in the Washington MSA in Washington, D.C., Maryland, and Virginia.

25. The Board reviewed HMDA data for the PNC Banks in Delaware, New Jersey, and Pennsylvania, and in the Newark, Philadelphia, and Pittsburgh MSAs.

26. The denial disparity ratio equals the denial rate of a particular racial category (*e.g.*, African American) divided by the denial rate for whites.

27. The lending data of the aggregate lenders represent the cumulative lending for all financial institutions that have reported HMDA data in a particular area.

28. The commenter also commented on HMDA data it derived from 2004 loan application registers of PNC Bank and Riggs Bank. The Board notes that such data are preliminary and that 2004 data for lenders in the aggregate are not yet available.

29. 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. Credit history problems and excessive debt levels relative to income (reasons most frequently cited for a credit denial) are not available from HMDA data.

30. In addition, the Board consulted with the FDIC, the primary supervisor of PNC Bank, Delaware, about the bank's record of compliance with fair lending laws.

31. The commenter also expressed concern about possible job losses resulting from this proposal. The effect of a proposed acquisition on employment in a community is not among the limited factors the Board is authorized to consider under the BHC Act, and the convenience and needs factor has been interpreted consistently by the federal banking agencies, the courts, and the Congress 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).

and closing branches. In the 2002 Evaluation, examiners concluded that PNC Bank's record of opening and closing branches had not adversely affected the bank's delivery of services in LMI areas or to LMI individuals.

The Board also has considered the fact that federal banking law provides a specific mechanism for addressing branch closings.[32] Federal law requires an insured depository institution to provide notice to the public and to the appropriate federal supervisory agency before closing a branch. In addition, the Board notes that the OCC, as the appropriate federal supervisor of PNC Bank, will continue to review the bank's branch closing record in the course of conducting CRA performance evaluations.

D. Conclusion on Convenience and Needs Factor

The Board has carefully considered all the facts of record, including reports of examination of the CRA records of the institutions involved, information provided by PNC, public comments on the proposal, and confidential supervisory information. PNC has stated that the proposal would provide PNC and Riggs customers with expanded products and services, including access to expanded branch 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, including 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.[33] 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.[34] The Board's approval is specifically conditioned on compliance by PNC with the conditions imposed in this order and the commitments made to the Board in connection with the application.[35] For purposes of this transaction, these conditions and commitments 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 merger with Riggs and the acquisition of Riggs Bank may not be consummated before the fifteenth 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 Cleveland, acting pursuant to delegated authority.

By order of the Board of Governors, effective April 26, 2005.

Voting for this action: Chairman Greenspan, Vice Chairman Ferguson, and Governors Gramlich, Bies, Olson, Bernanke, and Kohn.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Republic Bancorp, Inc.
Munden, Kansas

Order Approving the Formation of a Bank Holding Company

Republic Bancorp, Inc. ("Republic") has requested the Board's approval under section 3 of the Bank Holding

32. 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 thirty days' notice and the appropriate federal supervisory agency and customers of the branch with at least ninety days' notice before the date of the proposed branch closing. The bank also is required to provide reasons and other supporting data for the closure, consistent with the institution's written policy for branch closings.

33. The commenter requested that the Board hold a public meeting or hearing on the proposal. Section 3(b) 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 timely written recommendation of denial of the application. The Board has not received such a recommendation from the appropriate supervisory authority. Under its regulations, the Board also 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 225.16(e). The Board has considered carefully the commenter's request in light of all the facts of record. In the Board's view, the commenter has had ample opportunity to submit its views, and in fact, commenter has submitted written comments that the Board has considered carefully in acting on the proposal. The commenter's request fails to demonstrate why written comments do not present its views adequately. The request also fails to identify disputed issues of fact that are material to the Board's decision that would be clarified by a public meeting or hearing. 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 request for a public meeting or hearing on the proposal is denied.

34. The commenter also requested that the Board extend the comment period and delay action on the proposal. As previously noted, the Board has accumulated a significant record in this case, including reports of examination, confidential supervisory information, public reports and information, and public comment. In the Board's view, the commenter has had ample opportunity to submit its views and, in fact, has provided multiple written submissions that the Board has considered carefully in acting on the proposal. Moreover, the BHC Act and Regulation Y require the Board to act on proposals submitted under those provisions within certain time periods. Based on a review of all the facts of record, the Board has concluded that the record in this case is sufficient to warrant action at this time and that neither an extension of the comment period nor further delay in considering the proposal is warranted.

35. The commenter asked that the Board's Chairman recuse himself from consideration of the application. The Board and the Chairman have carefully considered this request and concluded that recusal is not required by any law or warranted. The commenter also expressed concern about compliance by staff with the Board's *ex parte* communications policies in this case. The Board has carefully considered this concern and concludes that Federal Reserve System staff did not engage in any inappropriate communications.

Company Act ("BHC Act")[1] to become a bank holding company and acquire 99.7 percent of the voting shares of National Family Bank ("NFB"), Munden, Kansas.[2]

Notice of the proposal, affording interested persons an opportunity to comment, has been published (70 *Federal Register* 10,402 (2005)). 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.

Republic is a newly organized corporation formed for the purpose of acquiring control of NFB. NFB, with total assets of approximately $15.5 million, is the 287th largest insured depository institution in Kansas, controlling deposits of approximately $14.8 million, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the state.[3]

Competitive Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or that would be in furtherance of an attempt to monopolize the business of banking. 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.[4]

This proposal represents Republic's initial entry into retail banking in Kansas. 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 banking 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 has considered these factors in light of all the facts of record, including information provided by Republic, confidential reports of examination, and other confidential supervisory information from the Office of the Comptroller of the Currency ("OCC"), the primary federal supervisor of NFB.

In evaluating financial factors in proposals involving newly formed small bank holding companies, the Board reviews the financial condition of both the applicant and the target depository institution. 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.

Based on its review of these factors, the Board finds that Republic has sufficient financial resources to effect the proposal. NFB is well capitalized and would remain so on consummation of this proposal. Republic proposes to fund this transaction through a combination of debt and equity. The Board has recognized that the transfer of ownership of small banks often requires the use of acquisition debt.[5] It appears that Republic would have sufficient financial flexibility to service this debt without unduly straining the resources of Republic or NFB.

The Board also has considered the managerial resources of the applicant, including the proposed management of the organization. The Board has reviewed the examination record of NFB, including assessments of its current management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences and those of the other relevant banking agencies with NFB and the management officials and principal shareholders of Republic. The Board also has considered Republic's plans to implement the proposal, including its proposed expansion of NFB's products and services and the changes in management at NFB after the acquisition.

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

Convenience and Needs Considerations

In acting on proposals under section 3 of the BHC Act, the Board is also 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").[6] The CRA requires the federal financial supervisory agencies to encourage financial 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 neighborhoods, in evaluating proposals under section 3 of the BHC Act.

The Board has considered carefully the convenience and needs factor and the CRA performance record of NFB

1. 12 U.S.C. § 1842.

2. Admiral Family Banks, Inc., Alsip, Illinois, currently owns 99.7 percent of the voting shares of NFB, and Republic has applied to acquire all these shares.

3. Asset data are as of December 31, 2004. Deposit data and state rankings are as of June 30, 2004. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

4. *See* 12 U.S.C. § 1842(c)(1).

5. Small Bank Holding Company Policy Statement, 12 CFR Part 225, Appendix C.

6. 12 U.S.C. § 2901 et seq.

in light of all the facts of record, including public comment received regarding the proposal and the bank's CRA record. The Board received one comment from an individual suggesting that NFB was not serving the needs of its community, particularly its agricultural lending needs, and that Republic also might not serve the community's needs.[7]

NFB received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of November 25, 2002 ("2002 Examination"). Examiners reported that the bank's record of lending to borrowers of different income levels and farms of different revenue amounts was excellent. They also noted that the bank's average loan-to-deposit ratio of 70 percent was comparable to the ratio for its peer group. Since the examination, however, NFB's lending volume and average loan-to-deposit ratio has significantly declined.

Several factors have affected NFB's overall lending activity in its assessment area, which is Republic County, Kansas, a nonmetropolitan area in north central Kansas. This area has experienced a population decline of 9 percent since 2000. Of the six depository institutions in the assessment area, NFB is the smallest bank in terms of deposits, and its deposits decreased from 2003 to 2004. Moreover, the main business in Republic County is agriculture, and drought conditions have had a negative impact on lending during the past two years. These factors have affected NFB's ability to make loans to its community and resulted in a marked decrease in lending since the 2002 Examination.

Republic's proposed business plan includes several improvements to services and products that should strengthen the bank's overall condition and its ability to serve the community's lending and other banking needs. The Board has consulted with the OCC about Republic's proposed business plan for NFB. The business plan includes a strategy for growth through enhanced product offerings and by hiring employees and management officials with agricultural lending experience and a familiarity with the community and its banking needs. Republic also proposes to update the bank's processing systems and introduce internet banking, ATMs, and debit and credit cards, as well as other banking products in the future. In addition, the proposed principals of Republic and its management are residents who are familiar with the community and its needs and who have banking experience.[8]

The Board has considered carefully all the facts of record, including reports of examination of the CRA performance records of the institutions involved, the business plan and other information provided by Republic, public information about the economic conditions of NFB's community, and confidential supervisory information. 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 institution are consistent with approval.

Conclusion

Based on the foregoing and all 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 Republic with the condition imposed in this order and the commitments made to the Board in connection with the application. For purposes of this transaction, the condition and commitments 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 proposed transaction may not be consummated before the fifteenth 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 Kansas City, acting pursuant to delegated authority.

By order of the Board of Governors, effective April 26, 2005.

Voting for this action: Chairman Greenspan, Vice Chairman Ferguson, and Governors Gramlich, Bies, Olson, Bernanke, and Kohn.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Wells Fargo & Company
San Francisco, California

Order Approving the Acquisition of a Bank Holding Company

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 Act to acquire First Community Capital Corporation ("FCCC"), Houston, and its subsidiary banks, First Community Bank, National Association, Houston, and First Community Bank San Antonio, National Association, San Antonio, all in Texas.[1]

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (69 *Federal Register* 60,877 (2004)). The time for filing comments has expired, and the Board has considered the

7. The commenter also questioned the identity of the proposed purchasers. Republic has disclosed its ownership structure, as required by the BHC Act, and has stated that the commenter has met with some of Republic's principal shareholders.

8. The proposed president and vice president of NFB recently served as management officials at a bank that received an "outstanding" CRA rating at its last examination.

1. 12 U.S.C. § 1842.

proposal and all comments received in light of the factors set forth in the BHC Act.

Wells Fargo, with total consolidated assets of approximately $434.6 billion, is the fifth largest depository organization in the United States,[2] controlling deposits of approximately $267.8 billion, which represents approximately 4.7 percent of the total amount of deposits of insured depository institutions in the United States.[3] Wells Fargo is the third largest depository institution in Texas, controlling $22.7 billion in deposits, which represents approximately 7.3 percent of the total amount of deposits of insured depository institutions in the state ("state deposits"). Wells Fargo operates subsidiary depository institutions in 23 states, including Texas, and engages in numerous nonbanking activities that are permissible under the BHC Act.

FCCC, with total consolidated assets of approximately $604.6 million, is the 76th largest depository organization in Texas, controlling deposits of $446 million. FCCC operates subsidiary insured depository institutions only in Texas. On consummation of the proposal, Wells Fargo would remain the third largest depository organization in Texas, controlling deposits of approximately $23.2 billion, which represents 7.5 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 home state of such bank holding company if certain conditions are met.[4] For purposes of the BHC Act, the home state of Wells Fargo is Minnesota, and FCCC's subsidiary banks are located in Texas.[5]

Based on a review of all the facts of record, including a review of relevant state statutes, the Board finds that all the conditions for an interstate acquisition enumerated in section 3(d) of the BHC Act are met in this case.[6] Accordingly, in light of 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 proposed bank acquisition 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. In addition, section 3 prohibits the Board from approving a proposed 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 its probable effect in meeting the convenience and needs of the community to be served.[7]

Wells Fargo competes directly with FCCC's subsidiary banks in the Brazoria, Grimes County, Houston, and San Antonio banking markets in Texas.[8] The Board has reviewed 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 markets ("market deposits") controlled by Wells Fargo and FCCC,[9] 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"),[10] and other characteristics of the markets.

Consummation of the proposal would be consistent with Board precedent and the DOJ Guidelines in each of these

2. Asset data are as of March 31, 2005, and national ranking data are as of December 31, 2004, and reflect consolidations through that date.

3. Deposit data reflect the total of the deposits reported by each organization's insured depository institutions in their Consolidated Reports of Condition and Income or Thrift Financial Reports for June 30, 2004. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

4. A bank holding company's home state is the state in which the total deposits of all subsidiary banks of the company were the largest on July 1, 1966, or the date on which the company became a bank holding company, whichever is later. 12 U.S.C. § 1841(o)(4)(C).

5. For purposes of section 3(d), 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 (d)(2)(B).

6. *See* 12 U.S.C. §§1842(d)(1)(A) & (B), and (d)(2)(A) & (B). Wells Fargo is adequately capitalized and adequately managed, as defined by applicable law. FCCC's subsidiary depository institutions have been in existence and operated for the minimum period of time required by applicable law. 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 the total amount of deposits of insured depository institutions in Texas. All other requirements pursuant to section 3(d) of the BHC Act also would be met on consummation of the proposal.

7. 12 U.S.C. §1842(c)(1).

8. These banking markets are described in Appendix A.

9. Deposit and market share data are as of June 30, 2004, adjusted to reflect mergers and acquisitions through May 20, 2005, and 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).

10. Under the DOJ Guidelines, 49 *Federal Register* 26,823 (1984), a market is considered unconcentrated if the post-merger HHI is less than 1000, moderately concentrated if the post-merger HHI is between 1000 and 1800, and highly concentrated if the post-merger HHI is more than 1800. The Department of Justice 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 by more than 200 points. The Department of Justice has stated that the higher than normal HHI thresholds for screening bank mergers for anticompetitive effects implicitly recognize the competitive effects of limited-purpose lenders and other nondepository financial institutions.

banking markets.[11] After consummation of the proposal, the Brazoria and San Antonio banking markets would remain moderately concentrated, and the Grimes and Houston banking markets would remain highly concentrated, as measured by the HHI.[12] In each of the four banking markets, the increase in market concentration would be small, and numerous competitors would remain.

The Department of Justice also has conducted a detailed review of the anticipated 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. 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 four banking markets where Wells Fargo and FCCC compete directly or in any other relevant banking market. Accordingly, based on all the facts of record, 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. In reviewing these factors, the Board has considered, among other things, confidential reports of examination and other supervisory information from the primary federal and state supervisors of the organizations involved in the proposal. The Board also has considered publicly reported and other financial information, comments received on the proposal, and information provided by Wells Fargo.[13] In addition, the Board has consulted with the Office of the Comptroller of the Currency ("OCC"), the primary supervisor of Wells Fargo's lead bank, Wells Fargo Bank, N.A. ("WF Bank"), Sioux Falls, South Dakota ("WF Bank"), and FCCC's subsidiary banks.

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 and the financial condition of the subsidiary banks and significant nonbanking operations. In this evaluation, the Board considers a variety of areas, 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 on a pro forma basis, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

Based on its review of the financial factors in this case, the Board finds that Wells Fargo has sufficient financial resources to effect the proposal. Wells Fargo, FCCC, and their subsidiary depository institutions currently are well capitalized and the resulting organization and its subsidiary banks would remain so on consummation of the proposal. The proposed transaction is structured primarily as a share exchange.

The Board also has considered the managerial resources of Wells Fargo, FCCC, and the banking subsidiaries to be acquired and the effect of the proposal on these resources. In reviewing this proposal, the Board has assembled and considered a broad and detailed record, including substantial confidential and public information about Wells Fargo, FCCC, and their subsidiaries. The Board has carefully reviewed assessments and examinations of the organizations' management, risk-management systems, and compliance records by, and consulted with, relevant federal and state supervisors.[14] In addition, the Board has considered Wells Fargo's plans for implementing the proposal, including its proposed management after consummation, and the company's record of successfully integrating acquired institutions into its existing operations.

In evaluating the managerial resources of a banking organization in an expansion proposal, the Board considers assessments of an organization's risk management—that is, the ability of the organization's board of directors and senior management to identify, measure, monitor, and control risk across all business and corporate lines in the organization—to be especially important.[15] As part of an appropriate risk-management system, the Board expects each banking organization, including Wells Fargo, to implement and operate effective, enterprise-wide compliance risk assessment and management programs and internal audit programs to identify, manage, address, and monitor the risks of the organization's activities. As part of compliance risk management, banking organizations operating in the United States are required to implement and operate effective anti-money-laundering programs.

11. The effects of the proposal on the concentration of banking resources in these banking markets are described in Appendix B.

12. Analysis of the Houston banking market is based on the Summary of Deposits for June 30, 2004, without the adjustments reflected in the Board's analysis of the Houston Market in *J.P. Morgan Chase*, 90 *Federal Reserve Bulletin* 352, 354 (2004). If such adjustments were made to the deposit data for the Houston banking market, the market would be moderately concentrated on consummation of the proposal.

13. A commenter criticized Wells Fargo's relationships with unaffiliated payday and car title lenders and other nontraditional providers of financial services. Wells Fargo represented that it has acted as a lender or provider of credit facilities and in other ordinary business relationships to unaffiliated consumer finance businesses, which may include payday and title lenders. Wells Fargo stated that it does not participate in the credit review process of such lenders and customarily requires the entities to represent, warrant, and covenant to Wells Fargo in credit agreements that such entities have and will comply with all applicable laws in the conduct of their business.

14. This included consultations with relevant state agencies with oversight authority for Wells Fargo's nonbank consumer finance subsidiaries and the appropriate functional regulators of Wells Fargo's securities-related activities.

15. *See Revisions to Bank Holding Company Rating System*, 69 *Federal Register* 70,444 (2004).

In this case, the Board has considered the existing compliance risk-management systems and internal audit programs at Wells Fargo and the assessment of these systems and programs by the relevant federal and state supervisory agencies. The Board has also considered additional information provided by Wells Fargo on enhancements it has made and is currently making to its systems and programs as part of the ongoing review, development, implementation, and maintenance of effective enterprise-wide risk-management systems.

Based on all the facts of record, including a review of the comments received, the Board concludes that considerations relating to the financial and managerial resources and future prospects of Wells Fargo, FCCC, and their respective subsidiaries are consistent with approval, as are the other supervisory factors under the BHC Act.[16]

Convenience and Needs Considerations

Section 3 of the BHC Act requires the Board to consider the effects of a 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").[17] The CRA requires the federal financial supervisory agencies to encourage financial 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 depository institutions' expansionary proposals.[18]

The Board has considered carefully the convenience and needs factor and the CRA performance records of the subsidiary depository institutions of Wells Fargo and FCCC in light of all the facts of record, including public comments received on the proposal. A commenter opposing the proposal asserted, based on data reported under the Home Mortgage Disclosure Act ("HMDA"),[19] that Wells Fargo engages in discriminatory treatment of African-American and Hispanic individuals in its home mortgage operations.[20]

16. A commenter expressed concern about Wells Fargo's and WF Bank's information security systems and cited a press report describing three instances of theft of computers containing information relating to customers of Wells Fargo's subsidiaries. Wells Fargo represented that it is not aware of actual identity theft or fraudulent activity as a result of these incidents and that it provided potentially affected customers with notice of the thefts and credit bureau monitoring and identity theft insurance services. In reviewing Wells Fargo's application, the Board has considered the enhancements Wells Fargo is making to its information security systems and has consulted with the OCC, the primary federal supervisor of WF Bank.

17. 12 U.S.C. § 2901 et seq.

18. 12 U.S.C. § 2903.

19. 12 U.S.C. § 2801 et seq.

20. A commenter included in its comment three individual customer complaints concerning mortgage loans from WF Bank and Wells Fargo Home Mortgage, Des Moines, Iowa ("WF Mortgage"), a former subsidiary of WF Bank that became a division of the bank in May 2004. The complaints provided by the commenter have been forwarded to the OCC, the primary federal supervisor of WF Bank.

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 insured depository institutions of both organizations. 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.[21]

Wells Fargo Bank, N.A. ("WF Bank CA"), San Francisco, California, received an "outstanding" rating at its performance evaluation from the OCC, as of October 1, 2001.[22] In addition, Wells Fargo's subsidiary depository institutions that were evaluated under the CRA received either "outstanding" or "satisfactory" ratings at their most recent CRA performance evaluations.[23] FCCC's lead bank, First Community Bank, N.A., received a "satisfactory" rating at its most recent CRA performance evaluation by the OCC, as of June 18, 2004.[24] Wells Fargo has represented that it will implement its program for managing community reinvestment activities at FCCC's subsidiary depository institutions on consummation of the proposal.

B. CRA Performance of Wells Fargo

As noted above, WF Bank CA received an overall "outstanding" rating for CRA performance in the OCC's most recent CRA performance evaluation.[25] WF Bank CA received an "outstanding" rating under each of the lending, investment, and service tests.

Examiners commended the excellent lending performance of WF Bank CA overall and reported that the bank had good distribution of home mortgage loans to borrowers of different income levels. They noted that WF Bank

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

22. In 2001, WF Bank CA was the largest subsidiary depository institution of Wells Fargo in terms of deposits and assets. In the performance evaluation, examiners weighted WF Bank CA's performance in California more heavily than its performance in other areas in its overall rating because more than 98 percent of its deposits and more than 87 percent of its loans were in California during the evaluation period. On February 20, 2004, Wells Fargo consolidated 18 of its subsidiary depository institutions, including WF Bank CA, with and into WF Bank. Wells Fargo currently operates ten subsidiary depository institutions, including WF Bank.

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

24. In 2004, FCCC transferred the San Antonio operations of First Community Bank, N.A., to the newly chartered First Community Bank San Antonio, N.A., which has not yet been examined under the CRA by the OCC.

25. The evaluation period was April 1, 1998, through September 20, 2001. At the time of the 2001 Evaluation, WF Bank SF had sixty assessment areas in nine states (Arizona, California, Colorado,

CA had excellent geographic distribution of small loans to small businesses.[26]

Examiners reported that WF Bank CA demonstrated a significant responsiveness overall to the needs of its assessment areas through community development lending. They found that WF Bank CA helped address a significant need for affordable housing in California through its community development lending. WF Bank CA's community development loans for affordable housing in its assessment areas subject to a full-scope review totaled $312 million during the evaluation period.

Examiners commended WF Bank CA for its excellent level of qualified investments and noted that the investments were highly responsive to the needs of the bank's assessment areas. They reported that WF Bank CA's investment and grant activities helped address essential identified needs in the full-scope assessment areas subject to review, particularly with respect to financing of affordable housing. Community development investments in those assessment areas totaled $162.4 million during the evaluation period.

Examiners reported that WF Bank CA's banking services were readily accessible to essentially all portions of the bank's assessment areas. They noted that WF Bank CA's alternative delivery systems included ATMs, banking by phone or mail, and Internet banking. Examiners also reported that Wells Fargo provided numerous community development services such as financial educational community seminars.

C. HMDA Data and Fair Lending Record

The Board has carefully considered the lending record of Wells Fargo in light of public comments received on the proposal. A commenter alleged, based on a review of 2003 data reported pursuant to the Home Mortgage Disclosure Act, 12 U.S.C. 2891 et seq. ("HMDA"), that Wells Fargo engages in discriminatory lending by directing African-American and Hispanic applicants in certain markets to Wells Fargo Financial, Inc. ("WF Financial"), Des Moines, Iowa, a subsidiary of Wells Fargo that is engaged primarily in subprime lending, rather than to Wells Fargo's subsidiary banks and other prime lending channels. The commenter further alleged, based on a review of 2003 HMDA data, that there are systemic disparities in Wells Fargo's lending because it disproportionately excludes or denies applications for HMDA-reportable loans by African-American and Hispanic applicants.[27]

The Board reviewed HMDA data reported by the lending subsidiaries of Wells Fargo in 2002 and 2003 in certain areas.[28] An analysis of the HMDA data does not support the contention that Wells Fargo disproportionately directs African-American and Hispanic borrowers to WF Financial or that WF Prime Lenders have disproportionately denied applications of African-American or Hispanic individuals.[29] The 2003 HMDA data show that the WF Prime Lenders extended more HMDA-reportable loans to African-American and Hispanic borrowers than WF Financial in most of the MSAs reviewed. Moreover, the data show that the percentages of the WF Prime Lenders' total home mortgage applications that were received from African-American and Hispanic applicants at the WF Prime Lenders exceeded the percentages received at WF Financial in all of the markets reviewed.

In addition, the origination rates[30] for the WF Prime Lenders' total HMDA-reportable loans to African-American and Hispanic borrowers was comparable to or exceeded the rates for the aggregate of lenders ("aggregate lenders") in most of the markets reviewed.[31] The HMDA data indicate that the percentages of the WF Prime Lenders' total HMDA-reportable loans to African Americans and Hispanics increased or remained constant from 2002 to 2003 in most of the markets reviewed. The percentages of the WF Prime Lenders' total HMDA-reportable loan originations in minority census tracts also increased during this time period in all the markets reviewed.

Moreover, a review of the 2003 HMDA data indicates that the WF Prime Lenders' denial disparity ratios for

Idaho, Minnesota, Nevada, Oregon, Utah, and Washington), including sixteen that received full-scope reviews.

26. Small businesses are businesses with gross annual revenues of $1 million or less. Small loans to 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.

27. Specifically, the commenter's allegations are based on 2003 HMDA data by WF Bank CA and WF Financial. The commenter cited Well Fargo's HMDA data for lending to African Americans and Hispanics in the Los Angeles and San Francisco Metropolitan Statistical Areas ("MSAs"), in California, and the Austin, Dallas, El Paso, San Antonio, and Houston MSAs, in Texas.

28. The Board reviewed 2002 and 2003 HMDA data reported by all of Wells Fargo's lending subsidiaries, including WF Financial, in California and Texas and in the MSAs that comprise the major assessment areas of WF Bank CA and Wells Fargo's depository institutions in those states, which are noted in footnote 27. For WF Financial in the Texas MSAs, the Board's review included only 2003 HMDA data. Wells Fargo's lending subsidiaries that offered prime mortgage products in California and Texas in 2002 and 2003 included WF Bank CA; Wells Fargo Bank Texas, N.A., San Antonio, Texas; Wells Fargo Bank Nevada, N.A., Las Vegas, Nevada; Wells Fargo Funding, Inc., Minneapolis, Minnesota; and WF Mortgage ("WF Prime Lenders"). Although some of these entities made some loans that could be considered subprime, these loans represented a small portion of their loan portfolios. In the MSAs reviewed, the Board compared the HMDA data reported by the WF Prime Lenders with the HMDA data reported by WF Financial.

29. The commenter also alleged that Wells Fargo engaged in discriminatory lending based on a review of the prices of loans extended to African-American and Hispanic borrowers as compared to white borrowers in 2004. The commenter based this allegation on 2004 HMDA data derived from loan application registers that it obtained from Wells Fargo. These data are preliminary and 2004 data for lenders in the aggregate are not yet available. *See Frequently Asked Questions About the New HMDA Data* (March 31, 2005) available at (www.federalreserve.gov/boarddocs/press/bcreg/2005).

30. The origination rate equals the total number of loans originated to applicants of a particular racial category divided by the total number of applications received from members of that racial category.

31. The lending data of the aggregate lenders represent the cumulative lending for all financial institutions that have reported data in a particular area.

African-American and Hispanic applicants for the banks' total HMDA-reportable loans in the markets reviewed were generally comparable with the ratios for the aggregate lenders in those areas.[32] In addition, WF Prime Lenders' denial disparity ratios for African-American and Hispanic applicants decreased from 2002 to 2003 in most of the markets reviewed.

Although the HMDA data may reflect certain disparities in the rates of loan applications, originations, and denials among members of different racial groups in certain local areas, the HMDA data do not demonstrate that the WF Prime Lenders are excluding any racial group on a prohibited basis. The Board, nevertheless, is concerned when the record of an institution indicates disparities in lending and believes that all banks 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 race or income level. The Board recognizes, however, that HMDA data alone, even with the recent addition of pricing information, provide an incomplete measure of an institution's lending in its community because these data cover only a few categories of housing-related lending and provide only limited information about covered loans.[33] HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution has not assisted adequately in meeting its community credit needs or has engaged in illegal lending discrimination. Moreover, HMDA data indicating that one affiliate is lending to minorities or LMI individuals more than another affiliate do not, without more information, indicate that either affiliate has engaged in illegal discriminatory lending activities.

Because of the limitations of HMDA data, the Board has considered these data carefully in light of other information, including examination reports that provide on-site evaluations of compliance with fair lending laws by the subsidiary depository and lending institutions of Wells Fargo and FCCC. Examiners noted no substantive violations of applicable fair lending laws in the examinations of the depository institutions controlled by Wells Fargo or FCCC. Moreover, the Board has consulted with the OCC about the consumer compliance records of the WF Prime Lenders and with relevant state supervisors about the consumer compliance records of WFFI.

The record also indicates that Wells Fargo has taken various measures to help ensure compliance with fair lending laws and other consumer protection laws at all its lending subsidiaries, including WF Financial.[34] Wells Fargo represented that it has implemented corporate-wide policies and procedures to help ensure compliance with all fair lending and other consumer protection laws and regulations. These policies and procedures apply to all of Wells Fargo's prime and subprime lending subsidiaries. Wells Fargo's corporate Fair Lending Policy requires each business unit to adopt and implement fair lending policies and procedures, including control standards related to marketing, pricing, and referrals. Wells Fargo's Compliance Risk Management Group guides, maintains, and monitors compliance of business units with fair lending and consumer protection laws. Wells Fargo's Law Department provides oversight and guidance on the fair lending policies and on the business unit compliance programs. Furthermore, Wells Fargo's Corporate Fair Lending Steering Committee, which includes senior management representatives from its bank and nonbank subsidiaries, meets regularly to identify and provide guidance on fair lending practices throughout the company.

Wells Fargo represented that each of its lending operations has developed, implemented, and maintained compliance programs for fair lending and other consumer protection laws. These fair lending compliance programs include components such as pricing limits, programs for second review of initially declined applications, analysis of decision and pricing data, and comparative file analysis. All lending operations are required to include compliance training in employee training programs. Wells Fargo's internal audit unit conducts audits for compliance with fair lending and consumer law that involve an independent evaluation of results through data analysis or comparative file review.

The Board also has considered the HMDA data in light of other information, including the CRA performance records of the subsidiary depository institutions of Wells Fargo and FCCC. These records demonstrate that Wells Fargo and FCCC are active in helping to meet the credit needs of their entire communities.

Conclusion on Convenience and Needs Considerations

The Board has carefully considered all the facts of record, including reports of examination of the CRA records of the

32. The denial disparity ratio equals the denial rate for a particular racial category (e.g., African American) divided by the denial rate for whites.

33. 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. Credit history problems and excessive debt levels relative to income (reasons most frequently cited for a credit denial) are not available from HMDA data.

34. A commenter criticized the customer service and complaint procedures of a Wells Fargo subsidiary engaged in subprime lending in Puerto Rico and urged the Board, without specific allegations, to closely scrutinize the subprime lending operations of Wells Fargo in general. Wells Fargo originates subprime mortgage loans through WF Financial and Island Finance, and numerous joint ventures originate subprime loans that are underwritten and processed through WF Mortgage's unit, Wells Fargo Mortgage Resource. WF Financial and Island Finance are nonbanking subsidiaries of Wells Fargo. As the Board has previously noted, subprime lending is a permissible activity that provides needed credit to consumers who have difficulty meeting conventional underwriting criteria. The Board, however, continues to expect all bank holding companies and their affiliates to conduct their subprime lending operations without any abusive lending practices. *See, e.g., Royal Bank of Canada*, 88 *Federal Reserve Bulletin* 385, 388 n. 18 (2002).

institutions involved, information provided by Wells Fargo and FCCC, comments on the proposal,[35] confidential supervisory information, and Well Fargo's plans to implement its CRA-related policies, procedures, and programs at FCCC's subsidiary banks. The Board notes that the proposal would expand the availability and array of banking products and services to the customers of Wells Fargo and FCCC, including access to expanded branch and ATM networks and internet banking 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 depository institutions are consistent with approval.

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. In reaching this conclusion, the Board has considered all the facts of record in light of the factors it is required to consider under the BHC Act and other applicable statutes.[36] 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 this proposal. For purposes of this action, the 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 shall not be consummated before the fifteenth 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 June 23, 2005.

Voting for this action: Chairman Greenspan, Vice Chairman Ferguson, and Governors Gramlich, Bies, and Olson. Absent and not voting: Governor Kohn.

JENNIFER J. JOHNSON
Secretary of the Board

35. A commenter expressed concern that the length of the Board's review of the proposal negatively affected the customers, stockholders, and employees of FCCC.

36. A commenter requested that the Board hold a public hearing or meeting 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 any of the banks to be acquired makes a timely written recommendation of denial of the application. The Board has not received such a recommendation from any supervisory authority. Under its rules, the Board also 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 225.16(e). The Board has considered carefully the commenter's requests in light of all the facts of record. In the Board's view, the public has had ample opportunity to submit comments on the proposal and, in fact, the commenter has submitted written comments that the Board has considered carefully in acting on the proposal. The commenter's requests fail to demonstrate why its written comments do not present its views adequately or why a meeting or hearing otherwise would be necessary or appropriate. The requests also fail to identify disputed issues of fact that are material to the Board's decision that would be clarified by a public hearing or meeting. For these reasons, and based on all the facts of record, the Board has determined that a public hearing or meeting is not required or warranted in this case. Accordingly, the requests for a public hearing or meeting on the proposal are denied.

Appendix A

Texas Banking Markets Where Wells Fargo and FCCC Subsidiary Depository Institutions Compete Directly

Brazoria
Brazoria County, excluding the cities of Alvin and Pearland and the surrounding unincorporated area in the Houston Ranally Metropolitan Area ("RMA").

Grimes County
Grimes County.

Houston
Houston RMA, including the portion of Montgomery County not included in the Houston RMA.

San Antonio
Bexar, Comal, Guadalupe, Kendall, and Wilson counties.

Appendix B

Market Data for Banking Markets

Moderately Concentrated Banking Markets

Brazoria
Wells Fargo operates the fifth largest depository institution in the market, controlling deposits of approximately $68.2 million, which represent approximately 8.3 percent of market deposits. FCCC operates the 12th largest depository institution in the market, controlling deposits of approximately $12.4 million, which represent approximately 1.5 percent of market deposits. After the proposed merger, Wells Fargo would operate the fifth largest depository institution in the market, controlling deposits of approximately $80.6 million, which represent approximately 9.8 percent of market deposits. Fifteen depository institutions would remain in the banking market. The HHI would increase 25 points, to 1,279.

San Antonio
Wells Fargo operates the fourth largest depository institution in the market, controlling deposits of approximately $1.4 billion, which represent approximately 6.8 percent of market deposits. FCCC operates the 42nd largest depository institution in the market, controlling deposits of approximately $13.4 million, which represent less than 1 percent of market deposits. After the proposed merger, Wells Fargo would remain the fourth largest depository institution in the market, controlling deposits of approximately $1.4 billion, which represent approximately 6.8 percent of market deposits. Fifty-one depository institutions would remain in the banking market. The HHI would increase 1 point, to 1,574.

Highly Concentrated Banking Markets

Grimes
Wells Fargo operates the fourth largest depository institution in the market, controlling deposits of approximately $23.4 million, which represent approximately 10.2 percent of market deposits. FCCC operates the sixth largest depository institution in the market, controlling deposits of approximately $4.9 million, which represent approximately 2.1 percent of market deposits. After the proposed merger, Wells Fargo would remain the fourth largest depository institution in the market, controlling deposits of approximately $28.3 million, which represent approximately 12.4 percent of market deposits. Five depository institutions would remain in the banking market. The HHI would increase 44 points, to 2,408.

Houston
Wells Fargo operates the third largest depository institution in the market, controlling deposits of approximately $6.1 billion, which represent approximately 8.1 percent of market deposits. FCCC operates the 23rd largest depository institution in the market, controlling deposits of approximately $415.3 million, which represent less than 1 percent of market deposits. After the proposed merger, Wells Fargo would remain the third largest depository institution in the market, controlling deposits of approximately $6.5 billion, which represent approximately 8.7 percent of market deposits. Ninety depository institutions would remain in the banking market. The HHI would increase 9 points, to 1,912.

Appendix C

CRA Performance Evaluations of Wells Fargo

Subsidiary Bank	CRA Rating	Date	Supervisor
1. Wells Fargo Bank, N.A., San Francisco, California (now Sioux Falls, South Dakota)	Outstanding	October 2001	OCC
2. Wells Fargo Bank Northwest, N.A., Ogden, Utah	Outstanding	May 1999	OCC
3. Wells Fargo HSBC Trade Bank, N.A., San Francisco, California	Satisfactory	August 2000	OCC
4. Wells Fargo Financial National Bank, Las Vegas, Nevada	Outstanding	March 2003	OCC
5. Wells Fargo Financial Bank, Sioux Falls, South Dakota	Outstanding	March 2005	FDIC

ORDERS ISSUED UNDER BANK MERGER ACT

The Citizens Bank
Batesville, Arkansas

Order Approving the Acquisition and Establishment of a Branch

The Citizens Bank ("Citizens Bank"),[1] a state member bank, has requested the Board's approval under section 18(c) of the Federal Deposit Insurance Act (the "Bank Merger Act")[2] to purchase the assets and assume the liabilities of the Cave City branch ("Branch") of First National Bank and Trust Company ("First National Bank"), Mountain Home, Arkansas.[3] Citizens Bank also has requested the Board's approval to operate Branch as a branch of Citizens Bank pursuant to section 9 of the Federal Reserve Act ("FRA").[4]

Notice of the proposal, affording interested persons an opportunity to submit comments, has been given in accor-

1. Citizens Bank is a wholly owned subsidiary of Citizens Bancshares of Batesville, Inc., also of Batesville, which is a bank holding company within the meaning of the Bank Holding Company Act, 12 U.S.C. § 1842.

2. 12 U.S.C. § 1828(c).

3. The branch's address is 201 South Main Street, Cave City, Arkansas.

4. 12 U.S.C. § 321.

dance with the Bank Merger Act and the Board's Rules of Procedure.[5] As required by the Bank Merger Act, reports on the competitive effects of the merger were requested from the United States Attorney General and relevant banking agencies. The time for filing comments has expired, and the Board has considered the applications and all the facts of record in light of the factors set forth in the Bank Merger Act and section 9 of the FRA.

Citizens Bank, with total consolidated assets of approximately $418.6 million, is the 24th largest insured depository institution in Arkansas, controlling deposits of approximately $301.9 million.[6] Branch controls deposits of approximately $7 million. On consummation of the proposal, Citizens Bank would become the 23rd largest insured depository institution in Arkansas, controlling deposits of $308.9 million, which represent less than 1 percent of total deposits of insured depository institutions in the state.

Competitive Considerations

The Bank Merger Act prohibits the Board from approving an application if the proposal would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market.[7] 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 the probable effect of the proposal in meeting the convenience and needs of the community to be served.[8]

Citizens Bank and First National Bank compete directly in the Batesville banking market in Arkansas.[9] The Board has carefully reviewed the competitive effects of the proposal in this banking market in light of all the facts of record, including the number of competitors that would remain in the market, the relative shares of total deposits in depository institutions in the market ("market deposits") controlled by Citizens Bank and First National Bank,[10] 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"),[11] and other characteristics of the market.

Although the Batesville banking market would remain highly concentrated on consummation of the proposal, the increase in the post-merger HHI would be consistent with DOJ Guidelines and Board precedent. Citizens Bank is the largest depository institution in the market, controlling approximately $291.5 million in deposits, which represents approximately 45.6 percent of market deposits.[12] First National is the smallest depository institution in the market, with deposits of approximately $7 million, which represent approximately 1.1 percent of market deposits. On consummation of the proposal, Citizens Bank would remain the largest depository institution in the market, controlling deposits of approximately $298.5 million, and its market share would increase by a small percentage to 46.7 percent of market deposits. The HHI would increase 100 points, to 3,145, which is consistent with DOJ Guidelines.

The Board also has considered other factors that indicate the proposal is not likely to have a significant effect on competition in the Batesville banking market. Six commercial banking organizations would remain in the market after consummation, including two competitors each with more than 10 percent of deposits in the market. In addition, the second largest competitor increased its market share from 14.2 percent to 27.6 percent between 1999 and 2004, while Citizens Bank's market share decreased four percentage points during the same period.

In addition, several factors indicate that the Batesville banking market is attractive for entry. One of the existing competitors entered the market de novo in February 2005 and another commercial banking organization recently received approval to open a de novo branch in the market. Moreover, Independence County, the main county in the market, experienced above-average population and deposit growth rates relative to the average rates for nonmetropolitan counties in Arkansas between 1996 and 2003, and its per capita income exceeded the averages for nonmetropolitan counties during this period.

The DOJ has reviewed the proposal and advised the Board that consummation of the proposal is not likely to have a significantly adverse competitive effect in the Batesville banking market. The other federal 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 proposed transaction would not likely result in a significantly adverse effect on competition or on the concentration of banking resources in the Batesville banking market or in any other relevant banking market and that competitive factors are consistent with approval.

5. 12 CFR 262.3(b).

6. In this context, depository institutions include commercial banks, savings banks, and savings associations. Deposit and ranking data are as of June 30, 2004. Ranking data are adjusted to reflect merger and acquisition activity through May 6, 2005.

7. 12 U.S.C. § 1828(c)(5)(A).

8. 12 U.S.C. § 1828(c)(5)(B).

9. The Batesville banking market is defined as Independence County and Sharp County south of the Strawberry River.

10. Deposit and market share data are as of June 30, 2004.

11. Under the DOJ Guidelines, a market is considered highly concentrated if the post-merger HHI is more than 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 by 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.

12. Citizens Bank increased its market share by opening seven de novo branches over a 23-year period.

Financial and Managerial Considerations

In reviewing the proposal under the Bank Merger Act and section 9 of the FRA, the Board has carefully considered 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, among other things, confidential reports of examination and other supervisory information received from the federal and state banking supervisors of Citizens Bank and First National Bank, publicly reported and other financial information, and information provided by Citizens Bank.

In evaluating financial factors in expansion proposals by depository institutions, the Board reviews the financial condition of the institutions involved. In this evaluation, the Board considers a variety of areas, 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 applicant on a pro forma basis, including its capital position, asset quality, and earnings prospects and the impact of the proposed funding of the transaction.

Based on its review of these factors, the Board finds that Citizens Bank is well capitalized and would remain so on consummation of the proposal. The Board also finds that Citizens Bank has sufficient financial resources to effect the proposal. The proposed transaction would be funded with cash on hand at Citizens Bank.

The Board also has considered the managerial resources of the institutions involved, including the resources of Citizens Bank on a pro forma basis. The Board has reviewed the examination records of Citizens Bank and First National Bank, including assessments of their management, risk management systems, and operations. In addition, the Board has considered its supervisory experience and that of the other relevant banking supervisory agencies with the institutions and their records of compliance with applicable banking law. The Board also has considered Citizens Bank's plans to integrate Branch and its proposed management and to implement Citizen Bank's risk-management systems at Branch.

Based on all the facts of record, the Board has concluded that the financial and managerial resources and future prospects of the institutions and the other supervisory factors involved are consistent with approval of the proposal.

Convenience and Needs

In acting on the proposal, 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").[13] Citizens Bank received a "satisfactory" rating at its most recent CRA performance evaluation by the Federal Reserve Bank of St. Louis, as of November 12, 2003. First National Bank received an "outstanding" rating at its most recent CRA performance evaluation by the Office of the Comptroller of the Currency, as of November 4, 2002. The Board notes that the proposal would provide Branch's customers with access to a broader array of products and services in expanded service areas, including access to larger branch and ATM networks.

Based on all the facts of record, the Board concludes that the considerations relating to the convenience and needs of the communities to be served and the CRA performance records of the institutions involved are consistent with approval of this proposal.

Establishment of a Branch

Citizens Bank also has applied under section 9 of the FRA to establish a branch at the Cave City location of First National Bank. The Board has assessed the factors it is required to consider when reviewing an application under section 9 of the FRA, including section 208.6 of the Board's Regulation H, which implements sections 9(3) and 9(4) of the FRA, and finds those factors to be consistent with approval.[14]

Conclusion

Based on the foregoing and 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 Bank Merger Act and the FRA. The Board's approval is specifically conditioned on compliance by Citizens Bank with the conditions imposed in this order, 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 transaction may not be consummated before the fifteenth 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 June 2, 2005.

Voting for this action: Chairman Greenspan, Vice Chairman Ferguson, and Governors Gramlich, Bies, Olson, Bernanke, and Kohn.

Robert deV. Frierson
Deputy Secretary of the Board

13. 12 U.S.C. § 2901 et seq.

14. 12 U.S.C. §§ 321 and 322; 12 CFR 208.6(b).

ORDERS ISSUED UNDER INTERNATIONAL BANKING ACT

Aozora Bank, Ltd.
Tokyo, Japan

Order Approving Establishment of a Representative Office

Aozora Bank, Ltd. ("Bank"), Tokyo, Japan, a foreign bank within the meaning of the International Banking Act ("IBA"), has applied under section 10(a) of the IBA (12 U.S.C. § 3107(a)) 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 Times*, September 21, 2004). The time for filing comments has expired, and all comments have been considered.

Bank, with total consolidated assets of approximately $44.5 billion,[1] is the 46th largest bank in Japan. Bank provides a range of financial services to corporate and retail clients. Outside Japan, Bank operates three representative offices in Singapore, Seoul, and Jakarta. Bank's proposed New York office would be the first office in the United States under its current ownership.[2] A limited partnership, Cerberus NCB Acquisition, L.P. ("Acquisition"), Cayman Islands, holds approximately 62 percent of Bank's shares.[3] Two other companies, Tokio Marine & Nichido Fire Insurance Co., Ltd. and ORIX Corporation, both in Tokyo, each hold approximately 15 percent of Bank's shares.[4]

The proposed representative office would market Bank's services to existing and potential customers in the United States. The proposed office would also act as a liaison with customers of Bank and would conduct research on loan participation opportunities for 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 (12 U.S.C. § 3107(a)(2); 12 CFR 211.24(d)(2)).[5] The Board also may consider additional standards set forth in the IBA and Regulation K (12 U.S.C. § 3105(d)(3)–(4); 12 CFR 211.24(c)(2)). The Board will consider that the supervision standard has been met if 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 proposals 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 (12 CFR 211.24(d)(2)). This application has been considered under the lesser standard.

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 previously has determined, in connection with applications involving other banks in Japan, that those banks were subject to home country supervision on a consolidated basis by their home country supervisor, Japan's Financial Services Agency ("FSA").[7] Bank is

1. Unless otherwise indicated, data are as of March 31, 2005.

2. Bank was originally established in 1957 as the Nippon Fudosan Bank, Ltd. It was renamed the Nippon Credit Bank, Ltd. and by the mid-1990s operated both banking offices and nonbanking subsidiaries in the United States. The bank was intervened in 1998; U.S. operations were closed; and the government of Japan sold Bank's shares to private investors, who changed Bank's name to Aozora Bank, Ltd.

3. The general partner of Acquisition, Cerberus Aozora GP LLC ("Cerberus Aozora"), is a U.S. entity controlled by three other U.S. entities, Cerberus Japan Investment LLC, Cerberus Series One Holdings, LLC, and Richter Investment Corporation, that hold interests of 49 percent, 26 percent, and 25 percent, respectively, in Cerberus Aozora. These companies are members of the Cerberus group, a U.S.-based investment group.

4. Regional Japanese banks hold the remaining shares of Bank.

5. In assessing the supervision 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; and
(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.

6. *See, e.g., Jamaica National Building Society*, 88 *Federal Reserve Bulletin* 59 (2002); *RHEINHYP Rheinische Hypothekenbank AG*, 87 *Federal Reserve Bulletin* 558 (2001); *see also Promstroybank of Russia*, 82 *Federal Reserve Bulletin* 599 (1996); *Komercni Banka, a.s.*, 82 *Federal Reserve Bulletin* 597 (1996); *Commercial Bank Ion Tiriac, S.A.*, 82 *Federal Reserve Bulletin* 592 (1996).

7. *See, e.g., Mitsubishi Tokyo Financial Group, Inc.*, 87 *Federal Reserve Bulletin* 349 (2001); *Mizuho Holdings, Inc.*, 86 *Federal Reserve Bulletin* 776 (2000); *The Sanwa Bank, Limited*, 86 *Federal Reserve Bulletin* 54 (2000); *The Fuji Bank, Limited*, 85 *Federal Reserve Bulletin* 338 (1999).

supervised by the FSA on substantially the same terms and conditions as those other banks. As noted above, however, Bank is part of a larger U.S.-based financial group with a complex ownership structure and is controlled by entities in the Cayman Islands and the United States.[8] 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 (*see* 12 U.S.C. §3105(d)(3)–(4); 12 CFR 211.24(c)(2)) have also been taken into account. The FSA has no objection to the establishment of the proposed representative office.

With respect to the financial and managerial resources of Bank, taking into consideration Bank's 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 of the proposed representative office. 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, as well as controls and procedures for its worldwide operations generally.

Japan is a member of the Financial Action Task Force and subscribes to its recommendations regarding measures to combat money laundering and international terrorism. In accordance with these recommendations, Japan has enacted laws and created legislative and regulatory standards to deter money laundering, terrorist financing, and other illicit activities. Money laundering is a criminal offense in Japan, and credit institutions are required to establish internal policies, procedures, 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 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 and its parent companies have 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 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 FSA 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, Bank's application to establish a representative office is hereby approved.[9] Should any restrictions on access to information on the operations or activities of Bank or 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 June 29, 2005.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Banco del Estado de Chile
Santiago, Chile

Order Approving Establishment of a Branch

Banco del Estado de Chile ("Bank"), Santiago, Chile, a foreign bank within the meaning of the International Banking Act ("IBA"), has applied under section 7(d) of the IBA (12 U.S.C. §3105(d)) to establish a branch 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 branch in the United States.

Notice of the application, affording interested persons an opportunity to comment, has been published in a newspaper of general circulation in New York, New York (*The Daily News*, June 30, 2004). The time for filing comments has expired, and all comments have been considered.

8. Establishment of a representative office will not cause Bank and its parent companies to become subject to the Bank Holding Company Act.

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.

10. 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 to license the proposed office of Bank in accordance with any terms or conditions that it may impose.

Bank, with total assets of $15.4 billion, is the third largest commercial bank in Chile,[1] and is wholly owned by the Chilean state. It provides a variety of banking services to retail and corporate customers through more than 300 branches in Chile. It also provides through its subsidiaries stock brokerage, insurance brokerage, fund management, and financial advisory services. The proposed branch would be its first office outside Chile. Bank is a qualifying foreign banking organization under Regulation K (12 CFR 211.23(b)).

The proposed branch would engage in wholesale banking business focusing on trade finance and lending activities. In addition, Bank anticipates that the branch would conduct treasury operations, participate in loan syndicates, invest in fixed-income securities, and provide cash management services.

Under the IBA and Regulation K, in acting on an application by a foreign bank to establish a branch, 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 (12 U.S.C. §3105(d)(2); 12 CFR 211.24(c)(1)).[2] The Board also may consider additional standards set forth in the IBA and Regulation K (12 U.S.C. §3105(d)(3)–(4); 12 CFR 211.24(c)(2)–(3)).

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 Federal Reserve previously has determined, in connection with applications involving other banks in Chile, that those banks were subject to home country supervision on a consolidated basis by their home country supervisor, the Superintendencia de Bancos e Instituciones Financieras ("SBIF").[3] Bank is supervised by the SBIF on substantially the same terms and conditions as those other banks. Based on all the facts of record, it has been determined that Bank is subject to comprehensive supervision on a consolidated basis by its home country supervisor.

The additional standards set forth in section 7 of the IBA and Regulation K (*see* 12 U.S.C. §3105(d)(3)–(4); 12 CFR 211.24(c)(2)–(3)) have also been taken into account. The SBIF has no objection to the establishment of the proposed branch.

Chile's risk-based capital standards are consistent with those established by the Basel Capital Accord ("Accord"). Bank's capital is in excess of the minimum levels that would be required by the Accord and is considered equivalent to capital that would be required of a U.S. banking organization. Managerial and other financial resources of Bank also are considered consistent with approval, and Bank appears to have the experience and capacity to support the proposed branch. Bank has established controls and procedures for the proposed branch to ensure compliance with U.S. law and for its operations in general.

Chile is a member of GAFISUD (Financial Action Task Force for South America), which is an observer organization to the Financial Action Task Force. Chile has enacted laws and adopted regulations to deter money laundering. Money laundering is a criminal offense in Chile, and financial institutions are required to establish internal policies, procedures, 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. Bank's compliance with applicable laws and regulations is monitored by its auditors and the SBIF.

With respect to access to information about 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 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, SBIF 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, Bank's application to establish a branch is hereby

1. Asset data are as of March 31, 2005.

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; and
(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.

3. *See Banco de Chile*, 90 *Federal Reserve Bulletin* 550 (2004); *Banco de Credito e Inversiones S.A.*, 85 *Federal Reserve Bulletin* 446 (1999). *See also*, *Banco de Chile*, 80 *Federal Reserve Bulletin* 179 (1994).

approved.[4] 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.[5] 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 June 20, 2005.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Banco Financiera Comercial Hondurena, S.A. Tegucigalpa, Honduras

Order Approving Establishment of a Representative Office

Banco Financiera Comercial Hondurena, S.A. ("Bank"), Tegucigalpa, Honduras, a foreign bank within the meaning of the International Banking Act ("IBA"), has applied under section 10(a) of the IBA (12 U.S.C. §3107(a)) to establish a representative office in Miami, Florida. 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 Miami, Florida (*Miami Daily Business Review*, March 19, 2004). The time for filing comments has expired, and all comments received have been considered.

Bank, with total consolidated assets of approximately $612 million,[1] is the fourth largest commercial bank in Honduras and provides wholesale and retail banking services through a network of domestic branches.[2] In the United States, Bank has licenses to operate nonbank subsidiaries in Florida, Georgia, New York, North Carolina, and Virginia that engage in money remittance services.[3]

The proposed representative office is intended to act as a liaison between Bank's head office in Honduras and its existing and prospective customers in Honduras 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, inform U.S.- and Honduran-owned businesses of business opportunities existing in Honduras, and receive applications for extensions of credit and other banking services on behalf of Bank.

In acting on an application by a foreign bank to establish a representative office under the IBA and Regulation K, 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 (12 U.S.C. §3107(a)(2); 12 CFR 211.24(d)(2)).[4] The Board also may consider additional standards set forth in the IBA and Regulation K (12 U.S.C. §3105(d)(3)–(4); 12 CFR 211.24(c)(2)). 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.[5] This is a lesser standard than the comprehensive, consoli-

4. 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.

5. The Board's authority to approve the establishment of the proposed branch 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 to license the proposed office of Bank in accordance with any terms or conditions that it may impose.

1. Unless otherwise indicated, data are as of December 31, 2004.

2. Corporación del Pacifico SA de CV ("CORPASA"), a Honduran holding company, is Bank's largest shareholder with a 51.3 percent ownership interest in Bank. CORPASA in turn is owned by members of the Atala family.

3. Bank owns its money remittance subsidiaries through Ficohsa Express Holding LLC, a holding company organized in Florida, which in turn is owned by Grupo Financiero Ficohsa Ltd, a company organized in the British Virgin Islands.

4. In assessing the supervision 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; and
(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. *See, e.g., Jamaica National Building Society*, 88 *Federal Reserve Bulletin* 59 (2002); *RHEINHYP Rheinische Hypothekenbank AG*, 87 *Federal Reserve Bulletin* 558 (2001); *see also Promstroybank of Russia*, 82 *Federal Reserve Bulletin* 599 (1996); *Komercni Banka, a.s.*, 82 *Federal Reserve Bulletin* 597 (1996); *Commercial Bank "Ion Tiriac," S.A.*, 82 *Federal Reserve Bulletin* 592 (1996).

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

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 on behalf of Bank, solicit deposits on behalf of Bank, or engage in activities related to securities trading, foreign exchange, or money transmission. Bank has also committed that the representative office would not solicit business for or promote the services of Bank's U.S. nonbank subsidiaries and would not share office space with those subsidiaries.

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.

Bank has provided the following information regarding home country supervision. Bank is supervised by the National Commission on Banking and Insurance ("NCBI"). The NCBI is responsible for the regulation and supervision of financial institutions operating in Honduras. The NCBI issues and implements regulations concerning accounting requirements, asset quality, management, operations, capital adequacy, loan classification and loan loss reserve requirements. In addition, the NCBI has authority to order corrective measures, impose sanctions, and assume management of a financial institution or liquidate it.

The NCBI supervises and regulates Bank in Honduras through a combination of on-site examinations and off-site monitoring.[6] On-site examinations are conducted on an annual basis and cover capital adequacy, asset quality, profitability, administrative efficiency, liquidity, and compliance with the law. If necessary, the NCBI can also conduct special on-site examinations. Off-site monitoring of Bank is conducted by the NCBI through the review of required monthly and quarterly reports. An external audit is also part of the supervisory process and must be conducted at least annually.[7]

Based on all the facts of record, including the commitments provided by Bank limiting the activities of the 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 (*see* 12 U.S.C. § 3105(d)(3)–(4); 12 CFR 211.24(c)(2)) have also been taken into account. The NCBI 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 of the proposed representative office. 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 Honduras is not a member of the Financial Action Task Force ("FATF"), Honduras has enacted laws based on the general recommendations of the FATF. Additionally, Honduras is a member of the Caribbean Financial Action Task Force and participates in other international forums that address the prevention of money laundering.[8] Money laundering is a criminal offense in Honduras, and banks are required to establish internal policies and procedures for the detection and prevention of money laundering.[9] Legislation and regulation require banks to adopt know-your-customer policies, report suspicious transactions, and maintain records. Accordingly, 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. Bank's 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 and its parent have 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 and Bank's parent have committed to cooperate with the Board to obtain any necessary consents or waivers that might be

6. The laws governing bank supervision in Honduras are in need of strengthening. The law was amended in September 2004 to require banks to obtain the prior authorization of the NCBI to establish foreign operations and to report monthly to the NCBI on their operations. The NCBI continues to work to obtain additional legislation that would allow it to supervise banks on a fully consolidated basis.

7. The external auditing firm must be approved by and registered with the NCBI.

8. Honduras is a member of the Organization of American States Inter-American Drug Abuse Control Commission Experts Group to Control Money Laundering. Honduras is also party to the 1988 UN Convention Against the Illicit Traffic of Narcotics and Psychotropic Substances, the UN International Convention Against Transnational Organized Crime and the UN International Convention for the Suppression of the Financing of Terrorism.

9. In 2002, legislation was enacted to strengthen the anti-money laundering regime in Honduras. Among other measures, the legislation expanded the definition of money laundering, strengthened enforcement, and established a financial intelligence unit within the NCBI.

required from third parties for disclosure of such information. In addition, subject to certain conditions, the NCBI 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 its parent and the terms and conditions set forth in this order, Bank's application to establish the representative office is hereby approved.[10] 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 and its parent with the conditions imposed in this order and the commitments made to the Board in connection with this application.[11] 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, as such, may be enforced in proceedings under applicable law.

By order, approved pursuant to authority delegated by the Board, effective April 20, 2005.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

FINAL ENFORCEMENT DECISIONS ISSUED BY THE BOARD OF GOVERNORS

In the Matter of

Carl V. Thomas, Eva June Thomas,
Stephen P. Thomas, Mary Beth Thomas,
Marguerite Thomas, Charles Tomlinson,
Herbert Phillips, Lloyd Phillips, R.L. Phillips,
Stanley Phillips, Rhonda Phillips, Scott Ward,
Angela Ward, Forrest Buckley, James C. Crowe,
Johnny V. Jones, Harper Guinn, and Jeff Guinn,
Current and Former Institution Affiliated Parties
First Western Bank,
Cooper City, Florida
(State Member Bank)

Docket Nos. 99-027-B-I (20)-(41),
99-027-CMP-I (20)-(41), 99-027-E-I (20)

Final Decision

This is an administrative proceeding pursuant to the Federal Deposit Insurance Act ("the FDI Act") in which the Office of the Comptroller of the Currency of the United States of America ("OCC") seeks to prohibit Respondent Carl Thomas from further participation in the affairs of any financial institution, and to issue civil monetary penalties as well as cease-and-desist orders against all Respondents based on their conduct as institution affiliated parties of First Western Bank, Cooper City, Florida (the "Bank").

Upon review of the administrative record, the Board issues this Final Decision adopting the Recommended Decision ("Recommended Decision" or "RD") of Administrative Law Judge Arthur L. Shipe (the "ALJ"), except as specifically supplemented or modified herein. The Board therefore orders that the attached Order of Prohibition issue against Respondent Carl Thomas, and that the attached Cease-and-Desist Order be issued against all Respondents. For the reasons set forth in this Final Decision, the Board has determined to withdraw its assessment of civil monetary penalties in this case.

I. Procedural History

On November 22, 2002, the Board issued a combined Notice of Charges and of Hearing, Notice of the Assessment of Civil Monetary Penalties and Notice of Intent to Prohibit (the "Notice"). The Notice alleged that Respondents willfully and knowingly violated the Change in Bank Control Act ("CIBC"), 12 U.S.C. § 1817(j), its implementing regulation, and an order of the Board when they acquired control of the Bank through a series of coordinated purchases without obtaining the Board's prior approval. The Notice further alleged that such actions resulted in financial gains and other benefits to Respondents; involved personal dishonesty on the part of Respondent Carl Thomas; and were part of a pattern of misconduct with respect to Respondents Carl Thomas and Stephen Thomas.

The Notice initially was issued against 22 individual Respondents. Shortly after receiving the Notice, four of the named Respondents settled with the Board by agreeing to enter into consent orders. The remaining 18 Respondents, who appeared and have participated pro se, filed answers to the Notice but did not challenge the allegations set forth in the Notice.

On September 25, 2003, Enforcement Counsel for the Board filed a Motion for Summary Disposition, supplemented by evidence submitted on March 5, 2004. On

10. 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).

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

July 30, 2004, the ALJ issued a Recommended Decision, advising that Enforcement Counsel's Motion for Summary Disposition be granted and recommending the imposition of an order of prohibition against Respondent Carl Thomas, as well as civil monetary penalties and a cease-and-desist order against all Respondents. Following the filing of a so-called "Affidavit of Proof" by Respondents and a response by Board Enforcement Counsel, the matter was referred to the Board for final decision. 12 U.S.C. §1818(h)(1).

On March 29, 2005, Enforcement Counsel filed a motion with the Board requesting that the Board withdraw its civil monetary penalty assessment and authorize Enforcement Counsel to arrange for the proceeds of the sale of Respondents' First Western shares, currently held in the registry of the United States District Court for the Northern District of Georgia, to be transferred to the registry of the United States Bankruptcy Court for the Middle District of Florida for ultimate distribution to the victims of fraud by Greater Ministries International, Inc. ("Greater Ministries").

II. Statutory Framework

1. Statutory and Regulatory Requirements For Obtaining Control of a State Member Bank

The CIBC and its implementing regulation, Regulation Y, provide that no person acting directly or indirectly or through or in concert with one or more persons, may acquire control of any state member bank unless the Board has been given at least sixty days prior written notice and has not disapproved the acquisition. 12 U.S.C. §1817(j)(1); 12 CFR 225.41. These requirements allow the Board to conduct an investigation of the competence, experience, integrity, and financial ability of each controlling person by and for whom shares of a state member bank are acquired. 12 U.S.C. § 1817(j)(2)(B)(i); 12 CFR 225.43(f).

Regulation Y defines "acting in concert" to include knowing participation in a joint activity or parallel action toward a common goal of acquiring control of a state member bank, whether or not pursuant to an express agreement. 12 CFR 225.41(b)(2). Regulation Y creates a rebuttable presumption that an individual and the individual's immediate family members act in concert. 12 CFR 225.41(d)(2).

The CIBC Act defines "control" as the power, indirectly or directly, to direct the management or policies of a state member bank or to vote 25 percent or more of any class of voting securities of a state member bank. 12 U.S.C. § 1817(j)(8)(B). Regulation Y presumes that an acquisition of voting securities of a state member bank constitutes an acquisition of control if, immediately following the transaction, the acquiring person or persons will own, control, or hold with power to vote 10 percent or more of any class of voting securities and no other person will own, control, or hold power to vote a greater percentage of that class of voting securities. 12 CFR 225.41(c)(2).

The CIBC Act sets forth the specific information that must be provided in the notice to the Board. Among other things, the notice must contain the identity, personal history, business background, and financial condition of each person by whom or on whose behalf the acquisition is to be made; the terms and conditions of each acquisition; and the identity, source, and amount of funds or other consideration used or to be used in making the acquisition. 12 U.S.C. § 1817(j)(6)(A)–(H). The CIBC Act also sets forth circumstances under which the Board may disapprove a proposed acquisition, including situations in which an acquiring person "neglects, fails, or refuses to furnish [the Board] all the information required by the Board." 12 U.S.C. § 1817(j)(7)(E); 12 CFR 225.43(h).

2. 18 U.S.C. §1001

Pursuant to 18 U.S.C. § 1001, it is a violation of law to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in a matter within the jurisdiction of a federal agency.

III. Facts

Beginning in 1997, Respondent Carl Thomas, with the primary assistance of his son, Respondent Stephen Thomas, initiated an effort to persuade a group of approximately 40 individuals and business entities to join them in acquiring shares in First Western Bank. (FF ¶¶9–10; 21–22).[1] All named Respondents in this matter, including Carl and Stephen Thomas, were members of a group that coordinated to buy shares in First Western Bank (hereinafter referred to collectively as "Purchasing Group" members). (FF ¶10). The acquisition of shares was undertaken on behalf of the Greater Ministries organization, a purported religious and charitable organization with which the Purchasing Group members were affiliated. (FF ¶12; Wall dep. at 30). Greater Ministries desired to obtain control of a financial institution and secure favorable account relationships for itself and its members, a task it had been unable to accomplish in the previous two years. (FF ¶¶2, 5, 9). Greater Ministries appointed Respondent Carl Thomas as one of its Elders and paid him approximately $535,000 between June 1997 and June 1998 as part of its "Gifting Program," a program that has been found to be essentially a Ponzi scheme. (FF ¶9; Hoch. Exh. Z-37).[2]

Respondents Carl and Stephen Thomas solicited members of the Purchasing Group to buy First Western shares on various occasions, including at the conclusion of Carl

1. "¶" denotes the ALJ's findings of fact in the Recommended Decision.

2. The ALJ described the "Gifting Program" as one in which Greater Ministries followers were persuaded to make "gifts" to the organization with the expectation of receiving returns as high as tenfold. The program was promoted by Greater Ministries with the biblical passage "Give and it shall be given unto you." (Luke 6:38) Elders such as Carl Thomas were awarded a portion of the "gifts" associated with the members they brought into the organization or who were otherwise assigned to them.

Thomas's Bible study meetings. (Skrobot Decl. ¶9). They advocated the opportunity to purchase shares in a "Christian-tied bank" that would protect Greater Ministries' privacy against the government. (Skrobot Decl. ¶9). Before solicitation by Carl and Stephen Thomas, members of the Purchasing Group had never heard of First Western Bank, or thought to invest in it. (Sellers depo p. 57; Skrobot Decl. ¶12). At least some of the Purchasing Group members were specifically told of Greater Ministries' ultimate goal to take control of the Bank's board of directors, while others were simply told it was necessary that multiple individuals purchase the stock so that it was not all in one name. (FF ¶13; Sellers dep. at 58, 60). The members of the Purchasing Group were assured that either Greater Ministries, Carl Thomas, or Stephen Thomas would provide the funds for the purchases of the shares or reimburse the members for such purchases. (FF ¶11). The evidence establishes that it was widely apparent to all Purchasing Group members that they were involved in a group effort to acquire shares in the Bank. (FF ¶12).

Members of the Purchasing Group generally did not communicate with the individuals from whom they purchased First Western shares. (FF ¶22). Instead, Carl and Stephen Thomas contacted individuals who were willing to sell their shares to negotiate and establish the amount of shares that would be purchased as well as the price. (FF ¶22). Subsequently, Carl or Stephen Thomas instructed the Purchasing Group members to write checks for the determined amount. (FF ¶22). Carl or Stephen Thomas provided the Purchasing Group members with funds derived from Greater Ministries to pay for the acquired shares. (FF ¶22). In some cases, such payments were made to members of the Purchasing Group in cash. (Agee Decl; Nieminen Decl. ¶6; Salhgreen Aff. ¶4; Skrobot Decl. ¶10). Carl or Stephen Thomas instructed the Purchasing Group members to deposit the cash in amounts under $10,000 each, so as not to raise any "red flags."[3] (Nieminen Decl. ¶9; Skrobot Decl. ¶10).

The Purchasing Group acquired their First Western shares between August 1997 and the end of February 1998, with the largest concentration of shares purchased in October 1997. (FF ¶¶16–21; 23; 27–28; 33–34). At various points, the Purchasing Group's accumulation of shares triggered notification requirements pursuant to the CIBC Act and its implementing regulation. Each time, however, Respondents and the other members of the Purchasing Group failed to provide proper notification and other necessary information.

The first of these required notification points came by October 16, 1997, when members of the Purchasing Group had acquired in excess of 10 percent of outstanding First Western shares. (FF ¶23). Even after a series of correspondence from Federal Reserve staff advising of the requirements of the CIBC Act and the Board's regulations, the Purchasing Group members refused to supply the required information. (FF ¶24–25). Instead, in a group response organized by Carl and Stephen Thomas, the Purchasing Group members insisted that the CIBC Act and other regulations did not apply to them. (FF ¶26). The evidence reveals that the Purchasing Group members habitually deferred to Respondents Carl and Stephen Thomas to organize responses on behalf of the group. (Agee Aff. at p. 2; Sahlgren Aff. ¶11, 12; Skrobot Decl. ¶16).

The second point came on or about December 2, 1997, when Respondent Carl Thomas and his wife, Respondent Eva Thomas, made a purchase of shares through a nominee which brought their joint ownership from about 18,814 to approximately 20,539 shares and elevated the Purchasing Group's ownership to over 25 percent. (FF ¶¶28–29).[4] The Purchasing Group members failed to file prior written notification with the Board before acquiring these shares and continued to conceal the source of funds used to acquire their shares. (FF ¶¶28, 32). Further, in an apparent attempt to conceal that the Purchasing Group owned more than 25 percent, Carl Thomas maintained in a December 9, 1997, "Draft" CIBC notice, as well as in another document he submitted to the Board on December 22, 1997, that he and his wife only owned 18,814 shares. (FF ¶29).

The third failure to adhere to the notification requirements took place around February 2, 1998, after additional purchases resulted in the "immediate" Thomas family[5] owning over 10 percent of First Western shares. (FF ¶33). The Thomas family failed to file prior written notice of the acquisition and failed to submit evidence rebutting the presumption that they were acting in concert and acquired control of First Western. (FF ¶33). Finally, prior notification also was not sought before the Purchasing Group made its last known purchase on February 26, 1998, which brought the group's ownership to over 29 percent. (FF ¶34; Bd. Rec. 1–39). Instead, in documents submitted on April 10, 1998, and August 17, 1998, Carl Thomas continued to conceal the true ownership of his family and of the group. In both documents, he continued to claim that he and his immediate family owned only 18,814 shares, when they actually owned at least 33,039 by that time.[6] (FF ¶¶35, 37). In the April 10, 1998, document, he failed to disclose that the Purchasing Group's acquisition of shares exceeded

3. Cash deposits of $10,000 or more require a financial institution to file a Currency Transaction Report ("CTR") with the Department of the Treasury, thus alerting government officials to large cash deposits. *See* 31 CFR 103.22(b).

4. Other members of the Purchasing Group also acquired additional shares between October 16, 1997, and December 2, 1997. (Hoch. Add. 2).

5. Pursuant to 12 CFR 225.41(c)(3), the "immediate" Thomas family includes Carl Thomas; his wife, Eva Thomas; his son and daughter-in-law, Stephen and Mary Beth Thomas; his mother, Marguerite Thomas; and his brother-in-law, William Barber.

6. Contrary to representations he consistently made to Federal Reserve staff, Carl Thomas asserted in a February 20, 2004, letter to the First Western Board of Directors that he held 33,039 shares of First Western stock. (Enforcement Counsel's March 5, 2004, Motion to File Supplemental Evidence.) Mr. Thomas sent the letter to First Western in response to proxy solicitations the Bank had mailed to Mr. Thomas and his family in connection with a proposed merger between First Western and 1st United Bank. Mr. Thomas presumably claimed ownership of 33,039 shares in his February 20, 2004, letter because he stood to benefit from the sale of the shares in the proposed merger.

25 percent. In the August 17, 1998 submission, he admitted that the Purchasing Group had acquired an additional 14,212 shares, but claimed the these shares were held in "open title." (FF ¶35, 37). Neither the April nor August 1998 submission revealed that Greater Ministries provided the funds used by Purchasing Group members to acquire First Western shares. (FF ¶35–38).

From August 24, 1998, to December 22, 1998, Federal Reserve staff persisted in its attempt to obtain information from the Respondents and other Purchasing Group members in order to achieve compliance with the CIBC and other regulations. (FF ¶38). Despite numerous letters requesting additional information, including the source of funds used to acquire the First Western shares, the Purchasing Group failed to correct its deficiencies. (FF ¶38). Ultimately, on February 10, 1999, the Board issued an order mandating that each Respondent divest his or her shares within ninety days of the date of the order. (FF ¶39). None of the Respondents divested their respective shares within that time. (FF ¶40).

In March 1999, eight Greater Ministries officials pleaded guilty or were convicted of fraud, money laundering, and conspiracy charges in connection with a "Gifting Program" operated by Greater Ministries, which was found to be a Ponzi scheme through which Greater Ministries defrauded thousands of United States residents. (FF ¶8). In August 1999, a United States District Court placed Greater Ministries into receivership after multiple states filed lawsuits against the organization for fraudulent violation of federal and state securities laws. (FF ¶6).

By letter dated May 18, 1999, Federal Reserve staff advised Respondents that they would be subject to an enforcement action for their continued violations of the CIBC and its accompanying regulation. (FF ¶40; Hoch. Dec. Ex. Z42). The letter also informed Respondents that prompt action to terminate their voting control of First Western shares could mitigate and possibly eliminate the need to impose remedies, but Respondents failed to take such action. (Hoch. Dec. Ex. Z42 and Z43; FF ¶40).

In November 2002, Board Enforcement Counsel initiated this action against Respondents, seeking an order of prohibition against Carl Thomas, a cease-and-desist order against all Respondents, and civil money penalties ranging from $10,000 to $250,000 against each Respondent.

On February 27, 2004, the Board approved an application submitted by 1st United Bank, Boca Raton, Florida, to merge with First Western by purchasing First Western shares for $17 per share. In March 2004, Board Enforcement Counsel filed an asset freeze action in United States District Court for the Northern District of Georgia pursuant to 12 U.S.C. §1818(i)(4) in order to require the payment into the court of the sales proceeds necessary to pay the civil money penalty amounts assessed in the Notice in the event the Board's final decision assessed penalties against the Respondents. *Board of Governors v. Thomas*, et al., No. 1:04-CV-0777. The District Court issued a temporary restraining order on April 2, 2004, and a preliminary injunction on April 28, 2004, ordering each Respondent to direct 1st United to deposit in the court registry the proceeds of the sale of Respondents' First Western shares to the extent of the civil money penalty assessed in the Notice, pending final resolution of this enforcement action. Also on April 28, 2004, the United States Bankruptcy Court for the Middle District of Florida ordered 1st United to transfer into the registry of the bankruptcy court all amounts due to any Respondent in excess of the civil money penalties already ordered to be deposited in the District Court in Georgia [7] Thus, pursuant to these orders, the Respondents have been divested of the proceeds of the sale of First Western shares they acquired in the course of the Greater Ministries scheme.

IV. Legal Conclusions

The Board has reviewed the record in this matter and finds that the ALJ properly granted Enforcement Counsel's Motion for Summary Disposition. The Board agrees that a prohibition order, civil monetary penalties and cease-and-desist order should be issued, as described in detail below.

A. Respondents' Affidavit of Truth

As noted earlier, Respondents filed a so-called "Affidavit of Truth" at the point at which exceptions to the ALJ's recommended decision were permitted by the Board's regulations. 12 CFR 263.39(a). The regulation provides that that exceptions must "set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception." 12 CFR 263.39(c)(2). Failure of a party to file exceptions to a finding, conclusion, or proposed order "is deemed a waiver of objection." 12 CFR 263.39(b)(1).

Respondents' "Affidavit of Truth" fails to conform to any of the requirements of a valid exception. It does not identify the portions of the ALJ's recommendation to which an exception was taken or cite the portions of the record or legal authority in support of its position. Accordingly, the Respondents are deemed to have waived their right to object to any portion of the Recommended Decision.

Even if Respondents' filing could be considered a valid exception, the Board finds that it raises no meritorious claim. At best, it raises only three claims related to the present case. The document claims that the Board "does not have jurisdiction of state member bank stockholder" (Aff. Truth at 16). To the contrary, such individuals qualify as "institution-affiliated parties" under the statute if they are controlling shareholders or are required to file a change in control notice, and the Board is specifically granted jurisdiction over them. 12 U.S.C. §§1813(q), (u)(1) and (2). Second, the "Affidavit of Truth" asserts that because

7. *See* Case No. 99-13967-8B1, United States Bankruptcy Court, Middle District of Florida.

Greater Ministries International was a dissolved corporation as of 1996, the present case should not have been brought against Respondents. (Aff. Truth at 18). Greater Ministries' corporate existence is irrelevant to the matter, as this action is against these individual Respondents for their role in acquiring control of First Western. Third, the Affidavit insists that an August 24, 1998, letter from the Federal Reserve Bank of Atlanta evidenced that Respondents complied with all of the CIBC Act requirements. (Aff. Truth at 19). This simply misstates the content of the letter, which in fact informed Respondents that they needed to provide additional information concerning, among other things, the source of funds for their purchases of shares. Accordingly, even if Respondents' "Affidavit of Truth" qualified as an exception, it would be entirely unpersuasive.

B. Prohibition Order

Pursuant to the FDI Act, IAPs may be prohibited from the banking industry if the appropriate federal banking agency—here, the Board—makes three separate findings: (1) that the IAP 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 IAP's conduct involved *culpability* of a certain degree—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).

Respondent Carl Thomas is the only individual Respondent against whom an order of prohibition was sought. Based on the evidence in the administrative record, his actions satisfy the misconduct, effect, and culpability element required for an order of prohibition. As mentioned previously, Carl Thomas—either as part of his immediate family, part of the Purchasing Group, or both—became subject to and failed to meet the notification requirements of the CIBC Act and its implementing Regulation Y at various points between October 1997 and February 1998. He also violated 18 U.S.C. § 1001 by falsely understating the amount of shares owned by both his immediate family and the group in submissions he made to Federal Reserve staff in December 1997, April 1998, and August 1998. Finally, he violated the Board's February 10, 1999, order by refusing to divest his First Western shares. Thus, the misconduct element is more than sufficiently established.

Through his maintenance of the shares he was ordered to divest, Carl Thomas received financial gain and other benefits, satisfying the effect element. Finally, Carl Thomas's actions also exhibited personal dishonesty. As with all members of the Purchasing Group, Respondent Carl Thomas had a legal duty to provide Federal Reserve staff with the specific information required by the CIBC Act. *See* 12 U.S.C. § 1817(j)(6)(A)–(H). He not only failed to do so on numerous occasions, even after prompting and several requests by Federal Reserve staff, the facts here demonstrate that he purposefully and willfully represented information he knew to be false. The Board agrees with the ALJ's finding that such actions were evasive and deceptive, and evidenced personal dishonesty. In sum, all elements necessary for the issuance of a prohibition order against Respondent Carl Thomas are present in this case.

C. Cease and Desist Order

An IAP also may be subject to a cease-and-desist order if the Board finds that the IAP is engaging or has engaged in an unsafe or unsound practice, or is violating or has violated a law, rule, regulation or any condition imposed in writing by the appropriate banking agency in connection with the granting of an application or other request by the depository institution or any written agreement entered into with the agency. 12 U.S.C. § 1818(b)(1). Such an order may require the IAP to "cease and desist" from the practice or violation and "to take affirmative action to correct the conditions resulting from any such violation or practice." *Id.*

Here, Enforcement Counsel sought a cease-and-desist order against all Respondents based on their collaborative actions to acquire shares in First Western. The evidence in this matter confirms that none of the Respondents ever complied with the CIBC Act or its implementing regulation in acquiring their First Western shares. In lieu of providing the required information, Respondents insisted that the CIBC Act did not apply to them, concealed that the Greater Ministries organization funded their purchases of First Western shares, and permitted Carl Thomas to make false representations to Federal Reserve staff on behalf of the group. Following the leadership of Carl Thomas, they also failed to divest their shares when ordered to do so.

Based on these violations, the Board finds that entry of a cease-and-desist order against each of the Respondents is appropriate in this case. However, the Board is not adopting all terms outlined in the proposed cease-and-desist order originally sought by Enforcement Counsel in its Motion for Summary Disposition and adopted by the ALJ in his Recommended Decision because the acquisition of First Western by 1st United in 2004 has rendered many of those terms inapplicable. As discussed above, the Respondents' shares have been acquired by 1st United, and the proceeds from these sales have been transferred to the United States District Court for the Northern District of Georgia and/or the United States Bankruptcy Court for the Middle District of Florida, as required by the orders issued by both of those courts. As such, the terms Board Enforcement Counsel initially sought for a cease-and-desist order relating to the transfer, sale, and voting of Respondents' First Western shares are no longer applicable.[8] For these

8. Also, on November 8, 2004, the United States Bankruptcy Court for the Middle District of Florida issued an order that pertained to three Respondents in this case who apparently refused to turn over their First Western stock certificates to the bankruptcy trustee. The order provided that any interest these three Respondents claimed in First Western stock or proceeds is void. Accordingly, even if these

reasons, the Board finds that the following terms for a cease-and-desist order are appropriate at this time:

(1) Respondents shall not serve as an officer, director, agent or employee of the Bank or its successor institution without prior written approval of the Board of Governors;

(2) Respondents shall not knowingly acquire any additional legal, beneficial, or other interests in the Bank or its successor institution; and

(3) Respondents shall not directly or indirectly engage or participate in any violation of the CIBC Act.

D. Civil Monetary Penalties

As noted above, the Notice in this matter assessed a civil monetary penalty against each Respondent in an amount roughly reflecting the particular respondent's level of involvement in the illegal scheme.[9] Although the Board is convinced that penalties could be assessed against each Respondent on the basis of this record, it has determined to withdraw its penalty assessment for the reasons set forth below.[10]

The Respondents' scheme to acquire First Western was undertaken as part of a broader fraudulent scheme by Greater Ministries. As the ALJ found, Greater Ministries had attempted to acquire a financial institution to assist with the influx of cash from the Gifting Program from early 1996 on. The Purchasing Group was motivated to take part in the acquisition scheme by their religious conviction and their desire to promote Greater Ministries' mission. Moreover, virtually all of the funds used by Purchasing Group members to acquire First Western shares were provided by Greater Ministries, and were presumably derived from the victims of the Gifting Program.

Greater Ministries is now in bankruptcy proceedings, and the court-appointed trustee has been working to marshal assets of the estate to pay the claims of those victims. He has obtained the cooperation of several state agencies that have pursued their own civil or criminal claims against Greater Ministries and have agreed to subordinate their claims to those of the estate for the benefit of the victims. In addition, he has obtained a Final Judgment against all of the Respondents declaring, among other things, that all First Western stock and proceeds of such stock owned by those individuals are "property of the estate" of Greater Ministries.[11] Under the bankruptcy court's orders, all First Western stock or proceeds held in the registry of the Atlanta court is "available for distribution by the trustee in accordance with the terms of the confirmed plan of liquidation or order of this Court," subject only to the claims of the Board.

The Trustee has requested that the Board withdraw its civil monetary penalty against the Respondents in order to permit the entire proceeds of the sale of their First Western shares to be distributed to the victims of Greater Ministries' fraud. The Board has determined that the public interest favors this outcome. The trustee has assured the Board that none of the Respondents will receive any payment from the bankruptcy estate. It is the Board's intention that the proceeds currently held in the registry of the United States District Court for the Northern District of Georgia be transferred to the registry of the United States Bankruptcy Court for the Middle District of Florida in accordance with that court's orders, and Board Enforcement Counsel is directed to take any appropriate measures to ensure that result.

Conclusion

For these reasons, the Board orders the issuance of the attached Order of Prohibition against Respondent Carl Thomas, as well as the Cease and Desist Order against all Respondents.

By Order of the Board of Governors, this 7th day of June 2005.

Board of Governors of the
Federal Reserve System

JENNIFER J. JOHNSON
Secretary of the Board

Order to Cease and Desist

It is hereby ordered, pursuant to 12 U.S.C. §1818(b), that Carl Thomas, Stephen Thomas, Eva Thomas, Mary Beth Thomas, Marguerite Thomas, Charles Tomlinson, Herbert Phillips, Lloyd Phillips, R.L. Phillips, Stanley Phillips, Rhonda Phillips, Scott Ward, Angela Ward, Forrest Buckley, James Crowe, Johnny V. Jones, Harper Guinn, and Jeff Guinn (collectively "Respondents"):

(1) shall not serve as an officer, director, agent, or employee of First Western Bank, Cooper City, Florida ("the Bank") or its successor institution without prior written approval of the Board of Governors;

(2) shall not knowingly acquire any additional legal, beneficial, or other interests in the Bank or its successor institution; and

(3) shall not directly or indirectly engage or participate in any violation of the Change in Bank Control Act.

Any violation of this order shall separately subject the Respondents to appropriate civil or criminal penalties or both under 12 U.S.C. §1818(i).

Respondents continue to maintain their First Western share certificates, the documents are of no value.

9. The amounts assessed ranged from $250,000 jointly and severally against Carl Thomas and his wife Eva and $100,000 against their son Stephen Thomas, to $10,000 against most other respondents.

10. The Board has the legal authority to "compromise, modify, or remit" any penalty it has previously assessed. 12 U.S.C. §1818(i)(2)(F); 12 U.S.C. §1817(j)(16)(E); *see* 12 CFR 263.63(a).

11. *See* Final Default Judgment dated September 17, 2004; Final Default Judgment dated November 4, 2004; Final Summary Judgment dated April 8, 2005, in *O'Halloran v. 1st United Bank*, et al., Adv. Pro. No. 04-223 (Bkr. M.D. Fl.)

The provisions of this order shall not bar, estop, or otherwise prevent the Board of Governors, or any other federal or state agency or department from taking any other action affecting each of the Respondents named above.

By Order of the Board of Governors, this 7th day of June 2005.

Board of Governors of the
Federal Reserve System

JENNIFER J. JOHNSON
Secretary of the Board

Order of Prohibition of Carl V. Thomas

WHEREAS, pursuant to section 8(e) of the Federal Deposit Insurance Act, as amended, (the "FDI Act") (12 U.S.C. § 1818(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 should issue against CARL V. THOMAS, an institution-affiliated party, as defined in section 3(u) of the FDI Act (12 U.S.C § 1813(u)), of First Western Bank, Cooper City, Florida.

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 Act (12 U.S.C. § 1818(e)(7)(B)), Thomas 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. Any violation of this order shall separately subject Thomas to appropriate civil or criminal penalties or both under section 8 of the FDI Act (12 U.S.C. § 1818).

3. 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 thirty days after service is made.

By Order of the Board of Governors, this 7th day of June 2005.

Board of Governors of the
Federal Reserve System

JENNIFER J. JOHNSON
Secretary of the Board

In the Matter of a Notice to Prohibit Further Participation Against

Donald K. McKinney,
Former Vice President,
American National Bank,
Wichita Falls, Texas

Docket No. OCC-AA-EC-04-70

Final Decision

This is an administrative proceeding pursuant to the Federal Deposit Insurance Act ("the FDI Act") in which the Office of the Comptroller of the Currency of the United States of America ("OCC") seeks to prohibit the Respondent, Donald K. McKinney ("Respondent"), from further participation in the affairs of any financial institution based on actions he took both to obtain employment and while employed at American National Bank, Wichita Falls, Texas (the "Bank"). Under the FDI Act, the OCC may initiate a prohibition proceeding against a former employee of a national bank, but the Board must make the final determination whether to issue an order of prohibition.

Upon review of the administrative record, the Board issues this Final Decision adopting the Recommended Decision of Administrative Law Judge Arthur L. Shipe (the "ALJ"), and orders the issuance of the attached Order of Prohibition.

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. 12 U.S.C. § 1818(e)(4). The ALJ issues a recommended decision that is referred to the deciding agency 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 an order of prohibition in the case of prohibition orders sought by the OCC. *Id.*; 12 CFR 263.40.

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).

An enforcement proceeding is initiated by filing and serving on the respondent a notice of intent to prohibit. Under the OCC's and the Board's regulations, the respondent must file an answer within twenty days of service of the notice. 12 CFR 19.19(a) and 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 19.19(c)(1) and 263.19(c)(1).

B. Procedural History

On September 27, 2004, the OCC served upon Respondent a Notice of Intention to Prohibit Further Participation and Notice of Assessment of a Civil Monetary Penalty ("Notice") that sought, *inter alia*, an order of prohibition against Respondent based on his conduct in obtaining employment and while employed at the Bank. The Notice alleged that Respondent obtained his employment at the Bank through deceitful misrepresentations. Specifically, the Notice charged that Respondent submitted an application and résume in which he lied about his prior criminal record and represented that he had been employed by two companies during a period of time when he was serving a jail sentence.

The Notice further asserted that after obtaining employment at the Bank, Respondent engaged in various other acts of misconduct. He falsified Bank records to make it appear that he was fulfilling an agreement to pay for the lease of two cars that the Bank purchased for his use. He sold a motorcycle the Bank had leased for his use but did not forward the sale proceeds to the Bank, notwithstanding that a balance was owed on the motorcycle. On multiple occasions, Respondent deposited into his own personal account checks made payable to the Bank, individuals other than himself, and two nonprofit organizations. He also withdrew for his own use funds from the Bank and from these two nonprofit organizations. Finally, Respondent abused the signatory power he had over the account of one of these nonprofit organizations by forging a required second signature for some of the withdrawals he made from that account.

The Bank's total loss from Respondent's misconduct amounted to $129,046.45. The Respondent's mother made full restitution to the Bank, and accordingly, the Notice only sought an imposition of an order of prohibition and assessment of civil monetary penalties.

The Notice directed Respondent to file an answer within twenty days and warned that failure to do so would constitute a waiver of his right to appear and contest the allegations. The record shows that the Respondent received service of the Notice. Nonetheless, Respondent failed to file an answer within the twenty-day period.

On or about November 16, 2004, Enforcement Counsel filed a Motion for Entry of an Order of Default. The motion was served on Respondent in accordance with the OCC's rules, but he did not respond to it. Finally, on or about December 3, 2004, the ALJ issued an Order to Show Cause, which was mailed to the address at which Respondent had received the Notice. The Order for Show Cause was signed for on December 6, 2004, by Respondent's mother. The order provided Respondent 20 days from the receipt of the order to appear and show cause why the ALJ should not grant Enforcement Counsel's default motion. Respondent ignored the Order to Show Cause and has never filed an answer to the Notice.

II. Discussion

The OCC's 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 19.19(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 despite notice to him 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 for Respondent to accept employment by the Bank and continue working for the Bank after lying in his job application and résumé and failing to disclose his prior criminal history. Further, it was a violation of law, breach of fiduciary duty, and an unsafe or unsound practice for Respondent to falsify bank records, forge a signature and steal funds from the bank at which he is employed. Respondent's actions caused gain to himself, as well as loss to the bank. Finally, such actions also exhibit personal dishonesty. Accordingly, the requirements for an order of prohibition 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.

By Order of the Board of Governors, this 13th day of May 2005.

Board of Governors of the
Federal Reserve System

JENNIFER J. JOHNSON
Secretary of the Board

Order of Prohibition

WHEREAS, pursuant to section 8(e) of the Federal Deposit Insurance Act, as amended, (the "FDI Act") (12 U.S.C. § 1818(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 should issue against DONALD K. McKINNEY ("McKINNEY"), a former employee and institution-affiliated party, as defined in Section 3(u) of the FDI Act (12 U.S.C. § 1813(u)), of American National Bank, Wichita Falls, Texas.

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 Act (12 U.S.C. § 1818(e)(7)(B)), McKinney 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. Any violation of this order shall separately subject McKinney to appropriate civil or criminal penalties or both under section 8 of the FDI Act (12 U.S.C. § 1818).

3. 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 thirty days after service is made.

By Order of the Board of Governors, this 13th day of May 2005.

Board of Governors of the
Federal Reserve System

JENNIFER J. JOHNSON
Secretary of the Board