Legal Developments: First Quarter, 2010

ORDER ISSUED UNDER BANK HOLDING COMPANY ACT

Order Issued under Sections 3 and 4 of the Bank Holding Company Act

First Niagara Financial Group, Inc.
Buffalo, New York

Order Approving Formation of a Bank Holding Company and Notice to Engage in Nonbanking Activities

First Niagara Financial Group, Inc. (''FNF Group''), a savings and loan holding company that owns First Niagara Bank (''FN Bank''), both of Buffalo, a federal savings bank, and its subsidiary, First Niagara Commercial Bank (''FNC Bank''),[1] Lockport, all of New York, has requested the Board's approval to become a bank holding company by acquiring another bank holding company. FNF Group also has requested approval to operate FN Bank as a subsidiary savings association until it becomes a subsidiary bank on its conversion to a national bank.

Specifically, FNF Group has requested approval under section 3 of the BHC Act[2] to merge with Harleysville National Corporation (''Harleysville'') and thereby acquire Harleysville National Bank and Trust Company (''Harleysville Bank''), both of Harleysville, Pennsylvania. After the merger, FNF Group would convert FN Bank to a national bank and would merge FNC Bank and Harleysville Bank into FN Bank, with FN Bank as the survivor.[3] Accordingly, FNF Group has requested approval under section 3 for FN Bank to become a subsidiary bank on the proposed conversion and to hold FNC Bank as a subsidiary of FN Bank until such conversion and merger.[4] In addition, FNF Group has requested the Board's approval pursuant to sections 4(c)(8) and 4(j) of the BHC Act[5] to retain FN Bank and thereby operate FN Bank as a savings association until its conversion to a national bank. Operating a savings association is an activity permissible for bank holding companies under the Board's Regulation Y.[6] FNF Group also has requested the Board's approval under section 3 of the BHC Act to acquire Harleysville's minority ownership interest in Berkshire Bancorp, Inc. (''Berkshire'') and to own up to 19.9 percent of the voting shares of Berkshire and its subsidiary bank, Berkshire Bank, both of Wyomissing, Pennsylvania.[7]

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (75 *Federal Register* 2544 and 4395 (2010)). 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 sections 3 and 4 of the BHC Act.

FNF Group, with total consolidated assets of approximately $14.6 billion, controls FN Bank and FNC Bank, which operate in Pennsylvania and New York. FN Bank is the 18th largest insured depository institution in Pennsylvania, controlling deposits of approximately $3.7 billion, which represent 1 percent of the total amount of deposits of insured depository institutions in that state (''state deposits'').[8]

1. FNC Bank is a state-chartered bank that accepts only municipal deposits. Although FNC Bank is a ''bank'' for purposes of the Bank Holding Company Act of 1956, as amended (''BHC Act''), FNF Group is not treated as a bank holding company. FNF Group controls FNC Bank pursuant to section 2(a)(5)(E) of the BHC Act, 12 U.S.C. § 1841(a)(5)(E), which exempts a company from treatment as a bank holding company if the state-chartered bank or trust company is owned by a thrift institution and only accepts deposits of public money.

2. 12 U.S.C. § 1842.

3. FN Bank has filed applications that are pending with the Office of the Comptroller of the Currency (''OCC'') to convert FN Bank to a national bank and to merge Harleysville Bank with and into FN Bank. All the nonbanking subsidiaries of FN Bank will remain subsidiaries of FN Bank after the conversion and merger. After its charter conversion, FN Bank will do business as First Niagara Bank, N.A.

4. The Board received comments from the Office of Thrift Supervision (''OTS''), FN Bank's primary federal supervisor, concerning FN Bank's proposed charter conversion as contemplated under the July 1, 2009, Statement on Regulatory Conversions (''Policy Statement'') issued by the Federal Financial Institutions Examination Council. The Board has considered carefully the comments made by OTS in light of the information provided by FNF Group. After consultation with other appropriate federal supervisors, and based on all the facts of record, the Board believes the transaction is consistent with the Policy Statement.

5. 12 U.S.C. §§ 1843(c)(8) and 1843(j).

6. 12 CFR 225.28(b)(4). FNF Group also has applied to retain or acquire subsidiaries that engage in lending and other credit-related activities, leasing, and the sale of credit-related insurance. These nonbanking subsidiaries are listed in Appendix A.

7. As a result of the merger, FNF Group will acquire Harleysville's ownership of 17.5 percent of Berkshire's voting shares. FNF Group also has requested approval to own up to 19.9 percent of Berkshire's voting shares.

8. Asset and deposit data are as of June 30, 2009, with the exception of data for FNF Group, which are as of September 30, 2009. Deposit data include the deposits of FNC Bank. In this context,

Harleysville, with total consolidated assets of approximately $5.2 billion, controls Harleysville Bank, which operates only in Pennsylvania. Harleysville Bank is the 17th largest insured depository institution in Pennsylvania, controlling deposits of $4 billion.

On consummation of the proposal, FNF Group would become the ninth largest depository organization in Pennsylvania, controlling deposits of approximately $7.6 billion, which represent approximately 2.5 percent of state deposits.

Berkshire Bank, with total assets of $145 million, is the 182nd largest insured depository institution in Pennsylvania. The bank operates only in Pennsylvania and controls deposits of approximately $108 million. If FNF Group were deemed to control Berkshire on consummation of the proposal, FNF Group would remain the ninth largest banking organization in Pennsylvania, controlling approximately $7.7 billion in deposits, which would represent 2.6 percent of state deposits.

Interstate Analysis

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the bank holding company's home state if certain conditions are met. For purposes of the BHC Act, the home state of FNF Group will be Pennsylvania,[9] and FN Bank, after the conversion, will be located in Pennsylvania and New York.[10] Based on a review of all the facts of record, including relevant state statutes, the Board finds that the conditions for an interstate acquisition enumerated in section 3(d) of the BHC Act are met in this case.[11]

Competitive Considerations

The Board has considered carefully the competitive effects of FNF Group's acquisition of Harleysville. Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly. 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 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.[12] In addition, the Board must consider the competitive effects of a proposal to acquire a savings association under the public benefits factor of section 4(j) of the BHC Act.

FNF Group and Harleysville do not compete in any relevant banking market. Harleysville Bank and Berkshire Bank, however, compete in the Reading, Pennsylvania banking market (''Reading market'').[13] Although the Board has determined that FNF Group would not control Berkshire Bank, the Board previously has found that one company need not acquire control of another company to lessen competition between them substantially and has recognized that a significant reduction in competition can result from the sharing of nonpublic financial information between two organizations that are not under common control. In each case, the Board analyzes the specific facts to determine whether the minority investment in a competitor would result in significant adverse competitive effects in a banking market.[14] In particular, the Board has considered the number of competitors that would remain in the banking market; the relative shares of total deposits in depository institutions in the market (''market deposits'') controlled by FN Bank and Berkshire Bank;[15] the concentration level of market deposits and the increase in the level as measured by the Herfindahl–Hirschman Index (''HHI'') under the Department of Justice Merger Guidelines (''DOJ Guidelines'');[16] other characteristics of the market; and the

insured depository institutions include commercial banks, savings associations, and savings banks.

9. A bank holding company's home state is the state in which the total deposits of all banking subsidiaries of such company were the largest on July 1, 1966, or the date on which the company became a bank holding company, whichever is later (12 U.S.C. § 1841(o)(4)(C)). FNF Group plans to acquire Harleysville before it converts FN Bank to a national bank. Accordingly, the state where the total deposits of all of FNF Group's banking subsidiaries will be the largest is Pennsylvania on the date of consummation.

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

11. 12 U.S.C. §§ 1842(d)(1)(A)–(B) and 1842(d)(2)–(3). FNF Group is adequately capitalized and adequately managed, as defined by applicable law. FN Bank has been in existence and operated for the minimum period of time required by New York law and for more than five years. *See* 12 U.S.C. § 1842(d)(1)(B)(i)–(ii). On consummation of the proposal, FNF Group would control less than 10 percent of the total amounts of deposits of insured depository institutions in the United States (12 U.S.C. § 1842(d)(2)(A)). FNF Group also would control less than 30 percent of, and less than the applicable state deposit cap for, the total amount of deposits in insured depository institutions in the relevant states (12 U.S.C. §§ 1842(d)(2)(B)–(D)). All other requirements of section 3(d) of the BHC Act would be met on consummation of the proposal.

12. 12 U.S.C. § 1842(c)(1).

13. The Reading market is defined as Berks County, Pennsylvania.

14. *See, e.g., The Bank of Nova Scotia*, 93 *Federal Reserve Bulletin* C136 (2007); *Passumpsic Bancorp*, 92 *Federal Reserve Bulletin* C175 (2006); *BOK Financial Corp*., 81 *Federal Reserve Bulletin* 1052, 1053–54 (1995); *Sun Banks, Inc*., 71 *Federal Reserve Bulletin* 243 (1985).

15. Deposit and market share data are as of June 30, 2009, and are based on calculations in which the deposits of thrift institutions are included at 50 percent, except as noted. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. *See, e.g., Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386, 387 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743, 744 (1984). The Board regularly has included thrift institution deposits in the market share calculation on a 50 percent weighted basis. *See, e.g., First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52, 55 (1991). In this case, FNF Group's deposits are weighted at 50 percent pre-merger and 100 percent post-merger to reflect the resulting ownership by a commercial banking organization.

16. Under the DOJ Guidelines, 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

commitments made by FNF Group to the Board not to control Berkshire and Berkshire Bank.

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in the Reading market. On consummation of the proposal, the Reading market would remain moderately concentrated. The change in the HHI would be small, and numerous competitors would remain in the market.[17]

The Board also has carefully considered the competitive effects of FNF Group's proposed acquisition of Harleysville's other nonbanking subsidiaries and activities in light of all the facts of record. FNF Group and Harleysville do not engage in the same nonbanking activities. As a result, the Board expects that consummation of the proposal would have a de minimis effect on competition for these services.

Based on all the facts of record, the Board concludes that consummation of the proposal would not have any significantly adverse effects on competition or on the concentration of banking resources in the Reading market or in any other relevant banking or nonbanking market and that the competitive factors are consistent with approval.

Financial, Managerial, and Other Supervisory Considerations

Sections 3 and 4 of the BHC Act require 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.[18] The Board has carefully considered these factors in light of all the facts of record, including supervisory and examination information received from the relevant federal and state supervisors of the organizations involved in the proposal and other available financial information, including information provided by FNF Group.

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 the organizations' significant nonbanking operations. In this evaluation, the Board considers a variety of information, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the financial condition of the combined organization at consummation, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

The Board has carefully considered the proposal under the financial factors. FNF Group, Harleysville, and their subsidiary depository institutions are well capitalized and would remain so on consummation of the proposal. Based on its review of the record, the Board also finds that FNF Group has sufficient financial resources to effect the proposal.[19] The proposed transaction is structured as a share exchange.

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

Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources and future prospects of the organizations involved in the proposal are consistent with approval, as are the other supervisory factors under the BHC Act.[20]

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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 more than 200 points. The DOJ 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 entities.

17. If FNF Group were deemed to control Berkshire, FNF Group would be the ninth largest depository organization in the market, controlling $19.8 million in deposits, which would represent 2.6 percent of market deposits. The HHI would increase 3 points to 1354.

18. 12 U.S.C. § 1842(c)(2) and (3).

19. FNF Group has issued nearly $1 billion in common equity since late 2008.

20. A comment from the public expressed concern that FNF Group acquired control over Harleysville before obtaining Board approval of the application because of an extension of credit FNF Group made to Harleysville. In December 2009, and after FNF Group filed its application with the Board to acquire Harleysville, FNF Group loaned Harleysville $50 million, secured by the shares of Harleysville Bank. Harleysville invested the loan proceeds in Harleysville Bank to increase the bank's capital.

The Board is concerned when a banking organization seeking to acquire another banking organization makes a loan to the acquiree in advance of the Board's approval of the acquisition. Those types of loans raise concern that the transaction would be, in substance, the acquisition of a controlling interest or would provide the acquirer with the ability to exercise a controlling influence over the management and policies of the bank holding company before receiving Board approval. The Board has reviewed carefully the loan to Harleysville, including the circumstances and terms of the loan, the merger agreements, the purpose of the loan, and the relationships of the organizations after the loan transaction. Based on all the facts of record, the Board does not believe that the loan resulted in FNF Group acquiring voting securities of, or a controlling equity interest in, Harleysville, or in FNF Group exercising, or having the ability to exercise, a controlling influence over Harleysville in this case. The Board continues to believe that loans made by an acquirer to a target organization before agency approval of its acquisition proposal raise important issues, and it will review these arrangements critically and carefully.

Convenience and Needs and CRA Performance Considerations

In acting on a proposal under section 3 of the BHC Act, the Board must 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 depository institutions under the Community Reinvestment Act (''CRA'').[21] The Board must also review the records of performance under the CRA of the relevant insured depository institutions when acting on a notice under section 4 of the BHC Act to acquire voting securities of an insured savings association.[22]

The Board has carefully considered the convenience and needs factor and the CRA performance records of FN Bank and Harleysville Bank in light of all the facts of record. As provided in the CRA, the Board evaluates the record of performance of an institution in light of examinations by the appropriate federal supervisors of the CRA performance records of the relevant 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.[23]

FN Bank received a ''satisfactory'' rating under the CRA at its most recent performance evaluation by the OTS, as of March 12, 2007. The OCC rated Harleysville Bank ''satisfactory'' after its most recent CRA evaluation, as of September 18, 2007. FNF Group has represented that after the acquisition of Harleysville Bank, the combined organization will offer the same or substantially similar products and services as are currently offered by the respective organizations.

The Board also has considered the fair lending records of, and the 2008 lending data reported under the Home Mortgage Disclosure Act (''HMDA'')[24] by, FN Bank and Harleysville Bank in light of a comment from the public received on the proposal. The commenter alleged, based on 2008 HMDA data, that FN Bank had denied applications for conventional home purchase loans and refinancings by minority applicants more frequently than those applications by nonminority applicants in the Buffalo MSA. The commenter also alleged that in the Philadelphia MSA in 2008, Harleysville Bank denied applications for conventional home purchase loans by minority applicants more frequently than those applications by nonminority applicants.

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

Accordingly, the Board has taken into account other information, including examination reports that provide on-site evaluations of compliance with fair lending laws by FNF Group and its subsidiaries. The Board also has consulted with the OTS and OCC about FN Bank's and Harleysville Bank's records of fair lending compliance. In addition, the Board has considered information provided by FNF Group about its compliance-risk management systems.

The record of this application, including confidential supervisory information, indicates that FNF Group has taken steps to ensure compliance with fair lending and other consumer protection laws and regulations. FNF Group represents that it has policies and procedures to help ensure compliance with all fair lending and consumer protection laws applicable to its lending activities and that its policies and procedures will apply to the combined institution on consummation of the proposal. FNF Group's compliance program includes annual training of lending personnel, regular fair lending analyses, and oversight and monitoring of consumer lending functions. Under the compliance program, FN Bank has used a third party to analyze its HMDA data for evidence of discriminatory lending patterns or practices and has provided the analysis to FN Bank's board of directors and to the OTS. FNF Group also represents that it performs quarterly loan file compliance assessments to monitor compliance with lending laws and regulations. In addition, mortgage loan applications slated for denial undergo a second review to ensure complete and careful treatment of loan applicants and to prevent discriminatory lending practices. FN Bank also has implemented a formal complaint-resolution process managed by the bank's vice president for customer relations.

Based on a review of the entire record and for the reasons discussed above, including the consultations with the OTS and OCC, the Board has concluded that considerations relating to convenience and needs and the CRA

21. 12 U.S.C. § 2903; 12 U.S.C. § 1842(c)(2).

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

23. *See Interagency Questions and Answers Regarding Community Reinvestment*, 74 *Federal Register* 11642 at 11665 (2009).

24. 12 U.S.C. § 2801 et seq. The Board reviewed HMDA data reported by FN Bank and by Harleysville Bank in each bank's combined assessment areas, as well as in each bank's headquarters assessment area of the Buffalo, New York, Metropolitan Statistical Area (''Buffalo MSA'') and the Philadelphia, Pennsylvania, MSA (''Philadelphia MSA''), respectively.

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

performance records of FN Bank and Harleysville Bank are consistent with approval of the proposal.

NONBANKING ACTIVITIES

FNF Group also has filed a notice under sections 4(c)(8) and 4(j) of the BHC Act to retain its ownership interest in FN Bank and thereby operate a savings association and to engage in activities that are permissible for bank holding companies through its nonbanking subsidiaries, including lending, loan servicing and related activities, leasing, and the sale of credit-related insurance.[26] The Board previously has determined by regulation that the operation of a savings association by a bank holding company, and the other nonbanking activities for which FNF Group has requested approval, are closely related to banking for purposes of section 4(c)(8) of the BHC Act.[27] As part of its evaluation of the public interest factors under section 4(j) of the BHC Act, the Board also must determine that the operation of FN Bank by FNF Group ''can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.''[28]

The record indicates that consummation of the proposal would create a stronger and more diversified financial services organization and would provide the current and future customers of Harleysville Bank with expanded financial products and services. For the reasons discussed above, and based on the entire record, the Board has determined that the conduct of the proposed nonbanking activities within the framework of Regulation Y and Board precedent is not likely to result in significantly adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. Moreover, based on all the facts of record, the Board has concluded that consummation of the proposal can reasonably be expected to produce public benefits that would outweigh any likely adverse effects. Accordingly, the Board has determined that the balance of the public benefits under the standard of section 4(j)(2) of the BHC Act is consistent with approval.

FNF Group engages in certain activities that are not permissible for a bank holding company. Section 4 of the BHC Act by its terms provides a company that becomes a bank holding company two years within which to conform (including by divestiture if necessary) its existing nonbanking investments and activities to the section's requirements, with the possibility of three one-year extensions.[29] FNF Group must conform any impermissible activities and investments that it currently conducts or holds, directly or indirectly, to the requirements of the BHC Act within the time periods provided by the act.

NONCONTROLLING INVESTMENT

As noted, FNF Group proposes to acquire 17.5 percent of Berkshire's voting shares that Harleysville currently owns and to increase up to 19.9 percent its total ownership interest of Berkshire's voting shares. Harleysville's investment in Berkshire is a passive investment, and Harleysville has complied with certain commitments previously relied on by the Board in determining that an investing bank holding company would not exercise a controlling influence over another bank holding company or bank for purposes of the BHC Act (''Passivity Commitments'').[30] FNF Group has stated that it does not propose to control or exercise a controlling influence over Berkshire and that its indirect investment in Berkshire Bank also would be a passive investment. In this light, FNF Group has provided the Passivity Commitments to the Board.[31] For example, among other things, FNF Group has committed not to exercise or attempt to exercise a controlling influence over the management or policies of Berkshire or any of its subsidiaries; not to have or seek to have any employee or representative of FNF Group or its affiliates serve as an officer, agent, or employee of Berkshire or any of its subsidiaries; and not to seek or accept representation on the board of directors of Berkshire or any of its subsidiaries. FNF Group also has committed not to attempt to influence the dividend policies, loan decisions, or operations of Berkshire Bank or any of its subsidiaries.

Based on these considerations and all the other facts of record, the Board has concluded that FNF Group would not acquire control of, or have the ability to exercise a controlling influence over, Berkshire or Berkshire Bank through the proposed acquisition of Berkshire's voting shares. The Board also notes that the BHC Act would require FNF Group to file an application and receive the Board's approval before the company could directly or indirectly acquire additional shares of Berkshire or attempt to exercise a controlling influence over Berkshire or Berkshire Bank.[32]

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26. 12 U.S.C. §§ 1843(c)(8) and 1843(j); *see* 12 U.S.C. § 1843(i).
27. 12 CFR 225.28(b)(1), (2), (3), (4), (8), and (11).
28. 12 U.S.C. § 1843(j)(2)(A).
29. *See* 12 U.S.C. § 1843(a)(2).
30. Although the acquisition of less than a controlling interest in a bank or bank holding company is not a normal acquisition for a bank holding company, the requirement in section 3(a)(3) of the BHC Act 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 Congress contemplated the acquisition by bank holding companies of between 5 percent and 25 percent of the voting shares of banks. *See* 12 U.S.C. § 1842(a)(3). 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. *See, e.g., Penn Bancshares, Inc.*, 92 *Federal Reserve Bulletin* C37 (2006) (acquisition of up to 24.89 percent of the voting shares of a bank holding company); *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 Bancorp, MHC*, 86 *Federal Reserve Bulletin* 52 (2000) (acquisition of up to 9.9 percent of the voting shares of a bank holding company).
31. The commitments made by FNF Group are set forth in Appendix B.
32. *See, e.g., Emigrant Bancorp, Inc.*, 82 *Federal Reserve Bulletin* 555 (1996); *First Community Bancshares, Inc.*, 77 *Federal Reserve Bulletin* 50 (1991).

CONCLUSION

Based on the foregoing and all the facts of record, the Board has determined that the applications under section 3 and the notice under section 4 of the BHC Act should be, and hereby are, 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. The Board's approval is specifically conditioned on compliance by FNF Group with all the conditions imposed in this order and all the commitments made to the Board in connection with the applications and notice and on the receipt of all other required regulatory approvals for the proposal. The Board's approval of the proposed nonbanking activities is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c),[34] and to the Board's authority to require such modification or termination of the activities of a bank holding company or any of its subsidiaries as the Board finds necessary to ensure compliance with, and to prevent evasion of, the provisions of the BHC Act and the Board's regulations and orders issued thereunder. 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 proposal may not be consummated before the 15th calendar day after the effective date of this order, or later than three months after the effective date of this order, unless such period is extended for good cause by the Board or the Federal Reserve Bank of New York, acting pursuant to delegated authority.

By order of the Board of Governors, effective March 25, 2010.

Voting for this action: Chairman Bernanke, Vice Chairman Kohn, and Governors Warsh, Duke, and Tarullo.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Appendix A

FNF GROUP'S NONBANKING SUBSIDIARIES

Nonbanking Subsidiaries Retained by FNF Group

1. Homestead Funding Corporation and thereby engage in activities related to extending credit, in accordance with section 225.28(b)(2) of Regulation Y (12 CFR 225.28(b)(2)).

Nonbanking Subsidiaries Acquired from Harleysville by FNF Group

2. Harleysville Financial Company (in dissolution) and thereby engage in investment transactions as principal, in accordance with section 225.28(b)(8) of Regulation Y (12 CFR 225.28(b)(8)).
3. Harleysville Reinsurance Company and thereby engage in insurance activities, in accordance with section 225.28(b)(11) of Regulation Y (12 CFR 225.28(b)(11)).

Appendix B

FNF GROUP'S PASSIVITY COMMITMENTS

FNF Group will not, without the prior approval of the Board of Governors of the Federal Reserve System (''Board'') or its staff, directly or indirectly:

1. Exercise or attempt to exercise a controlling influence over the management or policies of Berkshire Bancorp, Inc. (''Berkshire''), Wyomissing, Pennsylvania, or any of its subsidiaries;
2. Have or seek to have a representative of FNF Group serve on the board of directors of Berkshire or any of its subsidiaries;
3. Have or seek to have any employee or representative of FNF Group serve as an officer, agent, or employee of Berkshire or any of its subsidiaries;
4. Take any action that would cause Berkshire or any of its subsidiaries to become a subsidiary of FNF Group;
5. Acquire or retain shares that would cause the combined interests of FNF Group and its officers, directors, and affiliates to equal or exceed 19.9 percent of the outstanding voting shares of Berkshire or any of its subsidiaries;
6. Propose a director or slate of directors in opposition to a nominee or slate of nominees proposed by the management or board of directors of Berkshire or any of its subsidiaries;
7. Solicit or participate in soliciting proxies with respect to any matter presented to the shareholders of Berkshire or any of its subsidiaries;
8. Attempt to influence the dividend policies; loan, credit, or investment decisions or policies; pricing of services; personnel decisions; operations activities, including the location of any offices or branches or their hours of operation, etc.; or any similar activities or decisions of Berkshire or any of its subsidiaries;

33. The commenter also 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 authorities for the bank to be acquired make a timely written recommendation of denial of the application (12 CFR 225.16(e)). The Board has not received such a recommendation from the appropriate supervisory authorities. The Board's regulations provide for a hearing under section 4 of the BHC Act if there are disputed issues of material fact that cannot be resolved in some other manner (12 CFR 225.25(a)(2)). 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 262.3(e) and 262.25(d)). 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 views and, in fact, submitted written comments that the Board has considered carefully in acting on the proposal. The request 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. 12 CFR 225.7 and 225.25(c)).

9. Dispose or threaten to dispose (explicitly or implicitly) of shares of Berkshire in any manner as a condition or inducement of specific action or non-action by Berkshire or any of its subsidiaries;
10. Enter into any other banking or nonbanking transactions with Berkshire or any of its subsidiaries, except that FNF Group may establish and maintain deposit accounts with Berkshire, provided that the aggregate balance of all such deposit accounts does 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 Berkshire.
11. Acquire or seek to acquire any nonpublic financial information of Berkshire or any of its subsidiaries, beyond the information already available to it as a shareholder of Berkshire. FNF Group also confirms that there are no legal, contractual, or statutory provisions that would allow it or its subsidiaries to have any access to financial information of Berkshire or its subsidiaries beyond the information available to shareholders.

The terms used in these commitments have the same meanings as set forth in the BHC Act and the Board's Regulation Y.

ORDER ISSUED UNDER FEDERAL RESERVE ACT

The Warehouse Trust Company LLC New York, New York

Order Approving Application for Membership

The Warehouse Trust Company LLC (''Warehouse Trust''), an uninsured trust company under New York law,[1] has requested the Board's approval under section 9 of the Federal Reserve Act (the ''Act'')[2] to become a member of the Federal Reserve System.[3] Warehouse Trust proposes to operate a central trade registry for credit default swap (''CDS'') contracts and to offer related services, including the processing of life-cycle events for the contracts and facilitation of payments settlement.

Warehouse Trust is a wholly owned subsidiary of DTCC Deriv/SERV LLC (''Deriv/SERV''), which in turn is a wholly owned subsidiary of The Depository Trust & Clearing Corporation (''DTCC'').[4] Through its subsidiaries, DTCC provides clearing and settlement services with respect to equities, corporate and municipal bonds, government and mortgage-backed securities, money market instruments, and over-the-counter (''OTC'') derivatives.

MarkitSERV LLC (''MarkitSERV''), a subsidiary of Deriv/SERV, provides a confirmation and matching service for OTC derivatives trades, under which parties to trades submit transaction information to MarkitSERV, which then compares the information received, and matches, confirms, and reports discrepancies in unmatched trades.[5] Information on confirmed CDS transactions flows into Deriv/SERV's Trade Information Warehouse (''TIW'').[6] TIW creates a unique electronic record for each contract, which then is deemed to be the official record of the contract for the contracting parties. TIW updates the record for credit events over the life of the contract, including transfers, terminations, and reorganizations, and for credit events such as a reference entity's bankruptcy or default. In addition, TIW calculates payments as they come due on the contracts and transmits payment instructions to facilitate settlement. All of TIW's operations will be transferred to Warehouse Trust when Warehouse Trust opens for business.

FACTORS GOVERNING BOARD REVIEW OF THE PROPOSAL

In acting on an application for membership in the Federal Reserve System, the Board is required by the Act and Regulation H to consider the financial history and condition of the applying bank; the adequacy of its capital in relation to its assets and to its prospective deposit liabilities and other corporate responsibilities; its future earnings prospects; the general character of its management; whether its corporate powers are consistent with the purposes of the Act; and the convenience and needs of the community to be served.[7] In addition, all state member banks are required to establish and maintain programs for compliance with the Bank Secrecy Act.[8]

According to DTCC, TIW currently houses the records of approximately 95 percent of CDS trades worldwide. The

1. Under New York law, a limited-liability trust company may not accept deposits from the general public and must obtain an exemption from the general requirement under state law that New York-chartered banks and trust companies have federal deposit insurance. *See* New York Banking Law §§ 32 and 102a. The New York State Banking Board (''NYSBB'') has approved Warehouse Trust's articles of organization and its exemption from the deposit insurance requirement. *See* letter from NYSBB to Douglas J. McClintock, Esq., November 5, 2009.
2. 12 U.S.C. § 321 et seq.
3. 12 U.S.C. §§ 221 and 321. Warehouse Trust would be a bank for purposes of the Act and, therefore, is eligible for membership in the Federal Reserve System.
4. Neither The Depository Trust Company (''DTC''), a state member bank subsidiary of DTCC in New York, New York, nor Warehouse Trust, are banks as defined in the Bank Holding Company Act (''BHC Act'') (12 U.S.C. § 1841 et seq.). *See* 12 U.S.C. § 1841(c)(1). Deriv/SERV and DTCC, therefore, are not bank holding companies for purposes of the BHC Act. The NYSBB has approved DTCC's application to become a bank holding company under New York law when Warehouse Trust opens for business. *See* New York Banking Law § 142.
5. MarkitSERV is a joint venture of Deriv/SERV and Markit, a company that provides data, trade processing, and other services to the derivatives markets.
6. MarkitSERV also provides matching and confirmation services for OTC equity and interest rate derivatives in addition to CDS, but only confirmed CDS contracts are recorded by TIW.
7. 12 U.S.C. §§ 322 and 329; 12 CFR 208.3(b)(3).
8. 12 CFR 208.63.

Board, therefore, has also reviewed the applicable factors in light of elements of the Federal Reserve's Policy on Payment System Risk (''PSR Policy'') that are relevant to Warehouse Trust.[9] These elements include standards regarding participation and access criteria, operational risk and reliability, and governance.[10]

Financial Considerations

In considering the financial history and condition, future earnings prospects, capital adequacy, and other financial factors as they relate to this proposal, the Board has reviewed Warehouse Trust's business plan and financial projections and has assessed the adequacy of its anticipated capital levels in light of the proposed assets and liabilities. TIW has been in business since November 2006, and because Warehouse Trust will assume TIW's operations, the Board has also considered TIW's financial history and condition. Warehouse Trust will be well capitalized at the time it commences operations, and it will maintain capital that is sufficient to allow for an orderly wind-down if confronted with the need to cease operations.[11]

After carefully considering all the facts of record, the Board has concluded that Warehouse Trust's financial condition, capital adequacy, future earnings prospects, and other financial factors are consistent with approval of the proposal.

Managerial Considerations

In reviewing Warehouse Trust's managerial resources, the Board has considered carefully the experience of Warehouse Trust's proposed management, as well as its planned risk-management systems, operations, and anti-money-laundering compliance program. In addition, the Board has reviewed Warehouse Trust's proposed governance arrangements. The Board notes that the directors and officers of Warehouse Trust are all currently employed in similar capacities by DTCC and its subsidiaries. The Board has also considered its supervisory experience with the DTCC organization, the parent of Warehouse Trust, including the compliance record of DTC with applicable banking laws and anti-money-laundering laws.

Based on this review and all the facts of record, the Board has concluded that the general character of Warehouse Trust's management is consistent with approval of the proposal.

Other Considerations

In considering whether the corporate powers exercised by Warehouse Trust are consistent with the purposes of the Act, the Board notes that Warehouse Trust's proposed activities are permissible for a state member bank under the Act's applicable provisions and would not pose substantial risks to the bank's safety and soundness.[12] Under Regulation H, Warehouse Trust would be required to obtain the Board's approval before changing the general character of its business or the scope of the corporate powers it exercises.[13] In addition, Warehouse Trust has provided the Board with several commitments intended to ensure that the Board will have adequate enforcement authority over Warehouse Trust as an uninsured state member bank.[14] For these reasons and based on a review of the entire record, the Board has concluded that this consideration is consistent with approval of the proposal.

The Board also has considered the convenience and needs of the community to be served.[15] As the primary trade repository for CDS, the TIW is an essential component of the market infrastructure for CDS, and Warehouse Trust membership in the Federal Reserve System would subject DTCC's provision of CDS trade repository services to active federal banking agency oversight for the first time. Warehouse Trust would promote greater market transparency by making CDS data publicly available pursuant to applicable statutes, regulations, policy statements, and guidance. For these reasons and based on a review of the entire record, the Board has concluded that the convenience and needs considerations are consistent with approval of the proposal.

Conclusion

Based on the foregoing and all the facts of record, including all the commitments, stipulations, and representations made in connection with the application, and subject to all the terms and conditions set forth in this order, the Board has determined that Warehouse Trust's application for membership in the Federal Reserve System should be, and hereby is, approved. The Board's approval is specifically conditioned on compliance with Regulation H,[16] with receipt of

9. *Federal Reserve Policy on Payments System Risk*, available at www.federalreserve.gov/paymentsystems/psr/default.htm. The PSR Policy incorporates minimum standards issued jointly by the Committee on Payment and Settlement Systems of the Bank for International Settlements and by the Technical Committee of the International Organization of Securities Commissioners with respect to central counterparties (*Recommendations for Central Counterparties* (''RCCP''), issued in November 2004) and with respect to securities settlement systems (*Recommendations for Securities Settlement Systems* (''RSSS''), issued in November 2001).

10. RCCP 2, 8, and 13; RSSS 11, 13, and 14.

11. In addition, the Board retains the authority to specify capital requirements for Warehouse Trust if the Board at any time concludes that Warehouse Trust's capital is inadequate in view of its assets, liabilities, and responsibilities (12 CFR 208.4(a)).

12. *See* 12 U.S.C. §§ 330 and 335.

13. 12 CFR 208.3(d)(2).

14. Warehouse Trust has stipulated that it will be subject to the supervisory, examination, and enforcement authority of the Board under the Federal Deposit Insurance Act as if Warehouse Trust were an insured depository institution for which the Board is the appropriate federal banking agency under that act.

15. Because Warehouse Trust will not accept deposits or have federal deposit insurance, it will not be subject to the Community Reinvestment Act (12 U.S.C. § 2901 et seq).

16. 12 CFR part 208.

required authorizations from the New York State Banking Department,[17] and with all the commitments, stipulations, and representations made in connection with the application, including the commitments and conditions discussed in this order.[18] The commitments, stipulations, representations, and conditions relied on in reaching this decision shall be 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.

Warehouse Trust will become a member of the Federal Reserve System upon its purchase of stock in the Federal Reserve Bank of New York (''Reserve Bank''). This transaction must occur not later than three months after the effective date of this order, unless such period is extended for good cause by the Board or the Reserve Bank acting pursuant to delegated authority.

By order of the Board of Governors, effective February 2, 2010.

Voting for this action: Chairman Bernanke, Vice Chairman Kohn, and Governors Warsh, Duke, and Tarullo.

Robert deV. Frierson
Deputy Secretary of the Board

ORDER ISSUED UNDER INTERNATIONAL BANKING ACT

ABN AMRO Bank N.V. Amsterdam, The Netherlands

Order Approving Establishment of a Representative Office

ABN AMRO Bank N.V., Amsterdam, The Netherlands (''Bank''), a foreign bank within the meaning of the International Banking Act (''IBA''), has applied under section 10(a) of the IBA[1] 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 (*The New York Times*, January 26, 2010). The time for filing comments has expired, and all comments received have been considered.

Bank, with total consolidated assets of approximately $276 billion, is the third largest bank in The Netherlands.[2] Bank is indirectly owned by a consortium (''Consortium'') composed of the government of The Netherlands, the Royal Bank of Scotland Group plc (''RBS''), and Banco Santander S.A. (''Santander'').[3] Bank is a newly licensed entity resulting from the decision by the Consortium to divide the businesses of the entity formerly called ABN AMRO Bank (''Former ABN AMRO''). Certain assets of Former ABN AMRO (''State Allocated Assets'') have been allocated by the Consortium to the government of The Netherlands. On February 6, 2010, the State Allocated Assets were transferred to Bank from Former ABN AMRO, and Former ABN AMRO was renamed The Royal Bank of Scotland N.V. The members of the Consortium remained the indirect parents of Bank after the transfer. In a transaction scheduled to occur on March 31, 2010, the government of The Netherlands will become the sole owner of Bank.

The operations of Former ABN AMRO allocated to Bank include The Netherlands business, the global private client business, most of the global asset management business, and the global diamond and jewelry financing business. Subject to receipt of required regulatory approvals, Bank plans to operate branch offices in Belgium, Dubai, Hong Kong, India, Japan, Jersey, and Singapore; a representative office in Spain; and subsidiaries in Botswana, France, Germany, Luxembourg, and Switzerland. The proposed New York representative office will solicit loans and market other products of Bank in the United States, perform preliminary and servicing steps in connection with lending, and act as a liaison between Bank and its prospective U.S.-based customers.[4]

In acting on an application under the IBA and Regulation K by a foreign bank to establish a representative office, the Board shall take into account whether (1) the foreign bank has furnished to the Board the information it needs to assess the application adequately; (2) the foreign bank and any foreign bank parent engage directly in the business of banking outside of the United States; and (3) the foreign bank and any foreign bank parent are subject to comprehensive supervision on a consolidated basis by their home-

17. Before Warehouse Trust may begin operations, the Superintendent must issue an authorization certificate. *See* New York Banking Law § 25.

18. As a condition of the Board's approval, Warehouse Trust will, before purchasing stock in the Federal Reserve Bank of New York, take certain actions and execute certain commitments to the Board. These commitments and conditions also shall be deemed to be conditions imposed in writing by the Board in connection with its findings and decision on Warehouse Trust's application.

1. 12 U.S.C. § 3107(a).

2. Data are as of September 30, 2009, and are on a pro forma basis.

3. Bank is wholly owned by RFS Holdings B.V., a Netherlands corporation (''RFS''). RBS owns 38.3 percent of RFS, the government of The Netherlands owns 33.8 percent, and Santander owns 27.9 percent. The government of the United Kingdom owns 84 percent of RBS.

4. A representative office may engage in representational and administrative functions in connection with the banking activities of the foreign bank, including soliciting new business for the foreign bank; conducting research; acting as a liaison between the foreign bank's head office and customers in the United States; performing preliminary and servicing steps in connection with lending; and performing back-office functions. A representative office may not contract for any deposit or deposit-like liability, lend money, or engage in any other banking activity (12 CFR 211.24(d)(1)).

country supervisor.[5] The Board may also consider additional standards set forth in the IBA and Regulation K.[6] 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. This is a lesser standard than the comprehensive, consolidated supervision standard applicable to applications to establish branch or agency offices of a foreign bank. The Board considers the lesser standard sufficient for approval of representative office applications because representative offices may not engage in banking activities.[7] This application has been considered under the lesser standard.

As noted above, Bank engages directly in the business of banking outside the United States. Santander also engages directly in the business of banking outside the United States. Bank has provided the Board with information necessary to assess the application through submissions that address the relevant issues. At the proposed representative office, Bank may engage only in activities permissible for a representative office under Regulation K, which include the proposed solicitation and customer-liaison activities noted above.[8]

With respect to supervision by home-country authorities, the Board has considered that Bank is supervised by De Nederlandsche Bank N.V. (''DNB''), the primary regulator of financial institutions in The Netherlands. The Board previously has considered the supervisory regime in The Netherlands for financial institutions in connection with applications involving other Netherlands banks.[9] Bank is supervised by the DNB 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 a supervisory framework that is consistent with the activities of the proposed representative office, taking into account the nature of such activities.[10]

The additional standards set forth in section 7 of the IBA and Regulation K have also been taken into account.[11] The DNB has no objection to the establishment of the proposed representative office.

With respect to the financial and managerial resources of Bank, taking into consideration the record of operation of Former ABN AMRO 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.

The Netherlands is a member of the Financial Action Task Force and subscribes to its recommendations on measures to combat money laundering. In accordance with these recommendations, The Netherlands 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 The Netherlands, 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 that are monitored by governmental entities responsible for anti-money-laundering compliance.

With respect to access to information about Bank's operations, the Board has reviewed the restrictions on disclosure in relevant jurisdictions in which Bank operates and has communicated with relevant government authorities regarding access to information. Bank and Santander have committed to make available to the Board such information on Bank's operations 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 and Santander have commit-

5. 12 U.S.C. § 3107(a)(2); 12 CFR 211.24(d)(2). In assessing the supervision standard, the Board considers, among other indicia of comprehensive, consolidated supervision, the extent to which 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 the 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. No single factor is essential, and other elements may inform the Board's determination.

6. *See* 12 U.S.C. § 3105(d)(3)–(4); 12 CFR 211.24(c)(2). These standards include (1) whether the bank's home-country supervisor has consented to the establishment of the office; the financial and managerial resources of the bank; (2) whether the bank has procedures to combat money laundering, whether there is a legal regime in place in the home country to address money laundering, and whether the home country is participating in multilateral efforts to combat money laundering; (3) whether the appropriate supervisors in the home country may share information on the bank's operations with the Board; and (4) whether the bank and its U.S. affiliates are in compliance with U.S. law; the needs of the community; and the bank's record of operation. *See also Standard Chartered Bank*, 95 *Federal Reserve Bulletin* B98 (2009).

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

8. *See supra* note 4.

9. *See Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Rabobank Nederland*, 89 *Federal Reserve Bulletin* 81 (2003); *see also ING Bank*, 85 *Federal Reserve Bulletin* 448 (1999).

10. Santander has been found to be subject to comprehensive consolidated supervision by the Bank of Spain. *See, e.g., Banco Santander S.A.*, 85 *Federal Reserve Bulletin* 441 (1999). The Royal Bank of Scotland plc, a United Kingdom bank subsidiary of RBS, has been found to be subject to comprehensive consolidated supervision by the United Kingdom Financial Services Authority. *The Royal Bank of Scotland plc*, 93 *Federal Reserve Bulletin* C104 (2007).

11. *See supra* note 6.

ted 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 DNB 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 and Santander have 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 the representative office is hereby approved.[12] 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 and Santander with the conditions imposed in this order and the commitments made to the Board in connection with this application.[13] For purposes of this action, these commitments and conditions are deemed to be conditions imposed by the Board in writing in connection with these 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 February 26, 2010.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

FINAL ENFORCEMENT DECISION ISSUED BY THE BOARD

IN THE MATTER OF

Adam L. Benarroch,
A former institution-affiliated party of

Midwest Bank and Trust,
Elmwood Park, Illinois

Docket No. 09-052-I-E

12. 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.

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

FINAL DECISION

This is an administrative proceeding pursuant to the Federal Deposit Insurance Act ("FDI Act") in which the Board of Governors of the Federal Reserve System ("Board") seeks to prohibit the Respondent, Adam L. Benarroch ("Respondent"), from further participation in the affairs of any financial institution based on actions he took while employed as an Assistant Vice President at Midwest Bank and Trust, Elmwood Park, Illinois ("Midwest").

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

I. PROCEDURAL HISTORY

On April 14, 2009, the Board issued a Notice upon Respondent that sought an order of prohibition against him based on his fabrication of bank documents and forgery of the signatures of bank officials in connection with origination of loans while he was an Assistant Vice President of Midwest. After several extensions, Respondent appeared *pro se* and filed his Answer on July 27, 2009. Respondent's Answer does not deny the specific allegations of the Notice. Rather, it concedes that the Respondent made certain "bad decisions while employed at Midwest Bank and Trust Company" and claims that he operated "under tremendous pressure to close loan transactions" as his year-end bonus depended on loan volume. Respondent claims that he lacked the necessary assistance in this position to perform his duties and he apologized "for putting the bank in jeopardy" through the various loan transactions at issue here. Respondent concluded his Answer by requesting a second chance in the banking industry short of a permanent ban, and proposing certain limitations and restrictions on permitted activities (limitations short of prohibition) that would enable him to continue to work in the industry.

On September 16, 2009, Board Enforcement Counsel moved for summary disposition of the proceeding and submitted documentary evidence supporting the allegations of the Notice. Board Enforcement Counsel contended that no genuine issue of material fact existed and that the Board was therefore entitled to the relief sought in the Notice. In his October 7, 2009, response, Respondent conceded the factual assertions set forth in the evidentiary exhibits submitted in support of the motion and again offered apologies for his actions. Respondent also offered further details concerning his personal, professional, and family situation, which he submitted in mitigation of the offenses he otherwise admits.

On October 29, 2009, the ALJ granted the Board's Motion for Summary Disposition because there were no material facts in dispute and the evidence presented by Enforcement Counsel supported an order prohibiting Respondent from further participation in the industry, as provided in section 8(e) of the FDI Act, 12 U.S.C.

§ 1818(e). On November 30, 2009, Respondent submitted a document entitled ''Appeal,'' in which he specifically states that he ''do[es] not deny the specific [allegations] in the Notice'' but asks that the decision be modified for several other reasons, including the fact that he could not afford to hire an attorney to represent him throughout this process.

II. Statutory and Regulatory Framework

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

III. Facts

The undisputed facts of this case show that with respect to 14 loan transactions handled by Respondent, Respondent forged signatures of bank officers, fabricated documents to make it appear that loans had been properly approved when they had not, and changed the terms of approved loans to the detriment of Midwest, including increasing the amount of the loan and lowering the interest rate and fees. As a result of these actions, Midwest was exposed to additional risk on numerous loans, was deprived of more than $350,000 in interest and fees, and was forced to write off $109,000 in principal. The specific details regarding each of the loan transactions are recounted in the ALJ's Recommended Decision on Summary Disposition. (Rec. Dec., pages 3-16.)

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. As explained below, the Board agrees that a prohibition order should be issued.

a. Respondent's Appeal dated November 30, 2009

As previously noted, Respondent filed an Appeal 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 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).

Respondent's Appeal does not 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 Respondent is deemed to have waived his right to object to any portion of the Recommended Decision.

However, even if Respondent's filing could be considered a valid exception, the Board finds that it raises no meritorious claim. In his Appeal, Respondent does not contest the allegations in the Notice, but requests that the Board modify the final decision because (1) Respondent could not afford an attorney during the process and did not have an adequate defense; (2) Respondent misunderstood Enforcement Counsel's statement regarding his fifth amendment right against self-incrimination; (3) Respondent was terminated from employment at a different financial institution because his employer was informed of these public proceedings; and (4) the financial condition of Midwest has significantly deteriorated. None of these issues merits modification of the ALJ's final decision.

First, Enforcement Counsel consented to and the ALJ provided several extensions to permit Respondent time to find counsel to represent him. A respondent in this type of administrative action is not entitled to free counsel, and Respondent's inability to pay for counsel does not taint these proceedings. *See, e.g., Crothers v. Commodities Futures Trading Comm'n*, 33 F.3d 405 (4th Cir. 1994) (sixth amendment rights inapplicable to administrative license revocation proceedings). Second, although it appears that Respondent initially misunderstood Enforcement Counsel's statement regarding his fifth amendment rights and may have believed he did not have to respond to the Notice of Charges, this issue was clarified and he was given additional time to respond. As noted, in his response he did not contest the facts stated in the Notice. Third, the fact that Respondent was terminated from employment at another institution as a result of the pendency of this case does not suggest that a prohibition order should not issue. In fact, Respondent will be prohibited from such employment upon issuance of the order. Finally, the current financial condition of Midwest is irrelevant to these proceedings. Accordingly, even if Respondent's Appeal qualified as an exception, it would be entirely unpersuasive.

b. Prohibition Order

The Respondent does not contest any of the allegations in the administrative record, including Enforcement Counsel's initial Notice or the summary of facts in the ALJ's Recommended Decision. Based on the undisputed evidence in the administrative record, Respondent's actions satisfy the misconduct, effect, and culpability elements required for an order of prohibition.

The Respondent's conduct meets all the criteria for entry of an order of prohibition under 12 U.S.C. §1818(e). Creating false entries in the books and records of a bank violates 18 U.S.C. §1005, and constitutes an unsafe or unsound practice. Exposing the bank to additional risk and lowering interest rates and fees breaches a bank employee's fiduciary duty. Respondent's actions caused actual losses to Midwest of over $460,000. Finally, Respondent's actions also exhibit both personal dishonesty and a willful and continuing disregard for the safety or soundness of Midwest. 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 12th day of March, 2010.

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 (''FDI Act'') (12 U.S.C. §1818(e)), the Board of Governors of the Federal Reserve System (''Board'') is of the opinion, for the reasons set forth in the accompanying Final Decision, that a final Order of Prohibition should issue against ADAM L. BENARROCH (''Benarroch''), a former employee and institution-affiliated party, as defined in section 3(u) of the FDI Act (12 U.S.C. §1813(u)) of Midwest Bank and Trust, Elmwood Park, Illinois (''Midwest'').

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

1. In the absence of prior written approval by the Board, and by any other Federal financial institution regulatory agency where necessary pursuant to section 8(e)(7)(B) of the FDI Act (12 U.S.C. §1818(e)(7)(B)), Benarroch 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 Benarroch 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 12th day of March 2010.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

JENNIFER J. JOHNSON
Secretary of the Board