Legal Developments

ORDERS ISSUED UNDER BANK HOLDING COMPANY ACT

Orders Issued Under Section 3 of the Bank Holding Company Act

JP Morgan Chase & Co.
New York, New York

Order Approving the Merger of Financial Holding Companies

JP Morgan Chase & Co. (''Morgan Chase''), 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 (12 U.S.C. §1842) to merge with Bank One Corporation[1] and to acquire Bank One Corporation's subsidiary banks, including its lead subsidiary bank, Bank One, National Association, also in Chicago (''Bank One'').[2]

JP Morgan, with total consolidated assets of approximately $771 billion, is the third largest insured depository organization in the United States,[3] controlling deposits of $197.2 billion, which represents approximately 3.8 percent of total deposits of insured depository institutions in the United States.[4] JP Morgan operates insured depository institutions in California, Connecticut, Delaware, Florida, New Jersey, New York, and Texas[5] and engages nationwide in numerous nonbanking activities that are permissible under the BHC Act.

Bank One Corporation, with total consolidated assets of approximately $327 billion, is the sixth largest depository organization in the United States, controlling deposits of approximately $147.4 billion, which represents approximately 2.8 percent of total deposits of insured depository institutions in the United States. Bank One Corporation operates depository institutions in Arizona, Colorado, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Texas, Utah, West Virginia, and Wisconsin. It also engages in a broad range of permissible nonbanking activities in the United States and abroad.[6]

On consummation of the proposal, JP Morgan would become the second largest insured depository organization in the United States, with total consolidated assets of approximately $1.1 trillion and total deposits of $344.6 billion, representing approximately 6.7 percent of total deposits of insured depository institutions in the United States.

Factors Governing Board Review of the Transaction

The BHC Act enumerates the factors the Board must consider when reviewing the merger of bank holding companies or the acquisition of banks. These factors are the competitive effects of the proposal in the relevant geographic markets; the financial and managerial resources and future prospects of the companies and banks involved in the transaction; the convenience and needs of the communities to be served, including the records of performance under the Community Reinvestment Act (12 U.S.C. §2901 *et seq.*) (''CRA'') of the insured depository institutions involved in the transaction; and the availability of information needed to determine and enforce compliance with the BHC Act. In cases involving interstate bank acquisitions, the Board also must consider the concentration of deposits nationwide and in certain individual states,

1. JP Morgan and Bank One Corporation also have requested the Board's approval to hold and exercise options to purchase up to 19.9 percent of each other's common stock. Both options would expire on consummation of the proposal.

2. Bank One Corporation also owns Bank One, National Association (''Bank One-Ohio'') and Bank One Trust Company, both in Columbus, Ohio; Bank One, Dearborn, National Association, Dearborn, Michigan (''Bank One-Dearborn''); and Bank One, Delaware, National Association, Wilmington, Delaware.

3. Asset data for JP Morgan are as of December 31, 2003, and nationwide ranking data are as of September 30, 2003, and are adjusted to reflect mergers and acquisitions completed through May 2004.

4. Deposit data are as of December 31, 2003, and reflect the unadjusted total of the deposits reported by each organization's insured depository institutions in their Consolidated Reports of Condition and Income for December 31, 2003. In this context, insured depository institutions include commercial banks, savings banks, and savings associations .

5. JP Morgan owns JPMorgan Chase Bank, New York, New York (''JP Morgan Bank''); Chase Manhattan Bank USA, National Association, Newark, Delaware (''Chase USA''); and JP Morgan Trust Company, N.A., Los Angeles, California (''JP Morgan Trust''). On January 30, 2004, the Board approved JP Morgan's acquisition of Chase FSB, Newark, Delaware, a de novo federal savings bank that JP Morgan subsequently elected not to establish.

6. JP Morgan proposes to acquire Bank One Corporation's domestic and foreign nonbanking subsidiaries, all of which are engaged in permissible activities listed in section 4(k)(4)(A)–(H) of the BHC Act, pursuant to section 4(k) and the post-transaction notice procedures of section 225.87 of Regulation Y. JP Morgan also proposes to acquire Bank One Corporation's Edge and Agreement corporations, which are organized under sections 25 and 25A of the Federal Reserve Act. (12 U.S.C. §601 *et seq.*; 12 U.S.C. §611 *et seq.*).

as well as compliance with other provisions of the Riegle–Neal Interstate Banking and Branching Efficiency Act of 1994 (''Riegle–Neal Act'').[7]

Public Comment on the Proposal

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (69 *Federal Register* 7,748 and 17,664 (2004)), and the time for filing comments has expired. Because of the extensive public interest in the proposal, the Board held public meetings in New York and Chicago and provided an extended comment period of 81 days to allow interested persons an opportunity to present oral or written testimony on the factors that the Board must review under the BHC Act.[8] More than 150 people testified at the public meetings, many of whom also submitted written comments. Approximately 290 additional commenters submitted written comments.

A large number of commenters supported the proposal and commended JP Morgan and Bank One Corporation for their commitment to local communities and for their leadership in community development activities. These commenters praised both institutions' records of providing affordable mortgage loans, investments, grants and loans in support of economic and community revitalization projects, charitable contributions in local communities, and other community services. Many of the commenters also praised JP Morgan's nationwide $800 billion, ten-year community economic development plan (''Community Development Initiative'') that was announced at the public meeting in New York.

Many commenters, however, expressed concern about the proposal or opposed the acquisition. Most of these comments alleged general or specific deficiencies in the record of performance of JP Morgan or Bank One Corporation in helping to meet the credit needs of their communities under the CRA. Several commenters believed that the merger would reduce competition for banking services, substantially increase concentration in the banking industry, and result in the loss of local control over lending and investment decisions. Many commenters were generally troubled by the size of the acquisition and alleged deficiencies in the Community Development Initiative. Some commenters expressing concerns had enjoyed positive experiences with either JP Morgan or Bank One Corporation and were concerned about the effect of the merger on their relationships in the future.

In evaluating the statutory factors under the BHC Act, the Board carefully considered the information and views presented by all commenters, including the testimony at the public meetings and the information and views submitted in writing. The Board also considered all the information presented in the applications, notices, and supplemental filings by JP Morgan and Bank One Corporation, various reports filed by the relevant companies, publicly available information, and other reports. In addition, the Board reviewed confidential supervisory information, including examination reports of the bank holding companies and the depository institutions involved and information provided by other federal banking agencies, the Securities and Exchange Commission (''SEC''), and the Department of Justice (''DOJ''). After a careful review of all the facts of record, and for the reasons discussed in this order, the Board has concluded that the statutory factors it is required to consider under the BHC Act and other relevant banking statutes are consistent with approval of the proposal.

Interstate Analysis

The Board may not approve an interstate proposal under section 3(d) of the BHC Act if the applicant controls, or upon consummation of the proposed transaction would control, more than 10 percent of the total amount of deposits of insured depository institutions in the United States. On consummation of this proposal, JP Morgan would control approximately 6.7 percent of deposits nationwide. Accordingly, Board approval of this proposal is not barred by the nationwide deposit limitation in section 3(d).

Section 3(d) 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 JP Morgan is New York,[9] and Bank One Corporation's subsidiary banks are located in Arizona, Colorado, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Texas, Utah, West Virginia, and Wisconsin.[10]

Based on a review of all the facts of record, including relevant state statutes, the Board finds that all the conditions for an interstate acquisition enumerated in section 3(d) are met in this case.[11] In light of all the facts of

7. Pub. L. No. 103-328, 108 Stat. 2338 (1994).

8. The New York public meeting was held on April 15, 2004, and the Chicago public meeting was held on April 23.

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

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

11. *See* 12 U.S.C. §§ 1842(d)(1)(A)–(B) and 1842(d)(2)(A)–(B). JP Morgan is adequately capitalized and adequately managed, as defined by applicable law. In addition, on consummation of the proposal, JP Morgan would control less than 30 percent of, or less than the applicable state deposit cap for, the total deposits of insured depository institutions in each of Arizona, Colorado, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Texas, Utah, West Virginia, and Wisconsin. Two commenters contended that, on consummation of this proposal, JP Morgan's deposits in Texas would exceed the state's deposit cap. The Texas Banking Commissioner has informed the Board that consummation of the proposal would comply with all the requirements of Texas law. All of Bank One Corporation's subsidiary banks have been in existence for more than five years, and all other requirements under section 3(d) of the BHC Act also would be met on consummation of this proposal.

record, the Board is permitted to approve the proposal under section 3(d) of the BHC Act.

Competitive Considerations

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

JP Morgan and Bank One Corporation compete directly in seven local banking markets in Delaware, Florida, and Texas.[13] The Board has reviewed the competitive effects of the proposal in each of these banking markets in light of all the facts of record, including public comments on the proposal.[14] In particular, the Board has considered the number of competitors that would remain in the markets, the relative shares of total deposits in depository institutions in the markets (''market deposits'') controlled by JP Morgan and Bank One Corporation,[15] the concentration level of market deposits and the increase in this level as measured by the HHI under the DOJ Merger Guidelines, and other characteristics of the markets.[16]

Consummation of the proposal would be consistent with DOJ Merger Guidelines and Board precedent in six of these banking markets. After consummation, one market would remain unconcentrated and four markets would be moderately concentrated.[17] The remaining market would be highly concentrated, but with only a modest increase in concentration.[18] In addition, numerous competitors would remain in each of these banking markets after consummation of the proposal.[19]

Houston Banking Market

The structural effects of the proposal in the Houston, Texas, banking market (''Houston banking market''), as measured by the HHI on the basis of deposits, would substantially exceed the DOJ Guidelines. According to the Summary of Deposits (''SOD'') for June 30, 2003, JP Morgan operates the largest depository institution in the Houston banking market, controlling deposits of $32.7 billion, which represents approximately 41.6 percent of market deposits. Bank One Corporation operates the fourth largest depository institution in the market, controlling deposits of $4.3 billion, which represents approximately 5.5 percent of market deposits. After the proposed merger, JP Morgan would continue to operate the largest depository institution in the market, controlling deposits of approximately $37 billion, which represents approximately 47.1 percent of market deposits. Based on market deposits, the HHI would increase by 459 points to 2421. As indicated in the DOJ Merger Guidelines and Board precedent, the Board conducts an in-depth review of the competitive effects of a merger in any highly concentrated market that experiences a significant change in the HHI for deposits. As the HHI increases or the change in the HHI resulting from a proposal becomes larger, increasingly stronger mitigating factors are required to support a determination that the competitive effects of the proposal are not significantly adverse.

JP Morgan has argued that, for purposes of evaluating the competitive effects of the proposal in the Houston banking market, the Board should exclude deposits from various JP Morgan business lines that are national or international in nature (''national business line deposits'') and booked at JP Morgan's largest Houston branch (''Main

12. *See* 12 U.S.C. § 1842(c)(1).

13. These banking markets are described in appendix A.

14. Some commenters alleged that approval of this proposal would adversely affect competition among credit card issuers. The Board continues to believe that the appropriate product market for analyzing the competitive effects of bank mergers and acquisitions is the cluster of products and services offered by banking institutions. This approach is based on Supreme Court precedent, which emphasizes that it is the cluster of products and services that, as a matter of trade reality, makes banking a distinct line of commerce. *See United States v. Philadelphia National Bank*, 374 U.S. 321, 357 (1963); accord, *United States v. Connecticut National Bank*, 418 U.S. 656 (1974); *United States v. Phillipsburg National Bank*, 399 U.S. 350 (1969). Even if the approach advocated by the commenters were adopted, the Board notes that the increase in the Herfindahl–Hirschman Index (''HHI'') and the resulting HHI would be within Department of Justice Merger Guidelines (''DOJ Merger Guidelines''), 49 *Federal Register* 26,823 (1984). Accordingly, the Board concludes that the proposal would not result in significantly adverse competitive effects on credit card issuance, because that activity is conducted on a national or global scale, with numerous other large financial organizations providing the service.

15. Market share data are as of June 30, 2003, 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). Some thrifts meet the Board's criteria for increased weight in the calculation of market competition, and their deposits are weighted at 100 percent.

16. Under the DOJ Merger 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 concentrated if the post-merger HHI is more than 1800. The 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 for anticompetitive effects implicitly recognize the competitive effects of limited-purpose lenders and other nondepository financial institutions.

17. The Fort Worth, Texas, banking market would remain unconcentrated and the Austin, Dallas, and San Antonio banking markets, all in Texas, and the West Palm Beach, Florida, banking market would be moderately concentrated.

18. The HHI would increase by only 91 points in the highly concentrated Wilmington, Delaware, banking market.

19. Market data for these banking markets are provided in appendix B.

Houston Branch'').[20] Approximately $21.9 billion of the deposits in the Main Houston Branch are deposits of JP Morgan's Treasury and Securities Services (''TSS''), investment banking, and mortgage escrow businesses. These deposits previously were maintained at JP Morgan Bank's main office in New York and were assigned to the Main Houston Branch over a three-year period that began in 2001 for business reasons unrelated to JP Morgan's efforts to compete in the Houston banking market. Less than 5 percent of these deposits are held in the accounts of customers whose addresses are in the Houston banking market. Furthermore, JP Morgan contends that almost half of the national business line deposits are not, as a practical matter, available to fund lending by JP Morgan in the Houston banking market. JP Morgan asserts that inclusion of these deposits in calculations of market share indices for JP Morgan in the Houston banking market would distort the measures of its competitive position.

TSS has three business units: Institutional Trust Services, Investor Services, and Treasury Services. The TSS business units provide financial services, primarily to larger corporate customers located throughout the United States, Europe, and Asia. As of June 30, 2003, the TSS Treasury Services business unit accounted for $11.2 billion of the deposits booked to the Main Houston Branch. The TSS Investor Services and Institutional Trust Services business units accounted for $7.2 billion and $605 million, respectively, of the deposits maintained at the Main Houston branch. JP Morgan's investment banking business controls $718.5 million in deposits at the Main Houston Branch, and mortgage escrow deposits total $2.2 billion at the branch.

In conducting its competitive analysis in previous cases, the Board has adjusted the market deposits held by an applicant to exclude specified types of deposits only in rare situations in which evidence supported a finding that the excluded deposits were not, as a legal matter, available for use in that market, and data were available to make comparable adjustments to the market shares for all other market participants.[21] In light of the arguments and data provided by JP Morgan, the Board has conducted a more detailed analysis of its measures for predicting the likely competitive effects of the transaction in this case. As an initial step, the Board examined several alternative measures of concentration in the Houston banking market, together with other relevant data. These alternative concentration measures for the market include HHIs based on the number of branches, the dollar amount of small business loan originations, and the dollar amount of mortgage loan originations.[22] For each of these measures, the increase in the HHI is less than 100 points and the resulting HHI is well below 1000. All changes in the alternative measures are modest and are indicative of a significantly smaller effect on competition than suggested by indices based on deposits. Accordingly, these alternative HHI calculations support the proposition that the SOD data overstate the competitive effects of the proposal in the Houston banking market.

Moreover, although JP Morgan holds $32.7 billion in deposits in the Houston banking market based on SOD data, its offices there hold only $5.2 billion in loans, by far the lowest loan-to-deposit ratio for JP Morgan in any banking market in Texas. This unusually low loan-to-deposit ratio is also consistent with the proposition that SOD deposit data significantly overstate JP Morgan's presence in the Houston banking market.

In addition, data for the Houston banking market indicate that the decision by JP Morgan to maintain national business line deposits there did not affect deposit interest rates in the banking market. An analysis of the pricing of retail banking products in the Houston banking market and other banking markets in Texas (Austin, Dallas, and San Antonio) revealed that, from January 1, 2000, through December 31, 2003, the average interest rate on deposits in the Houston Metropolitan Statistical Area (''MSA'') did not deviate significantly from the average rates offered in three other Texas MSAs. In addition, the movement of these deposits to the Houston banking market has not caused a significant change in JP Morgan's pricing behavior. From January 1, 2000, through December 31, 2003, JP Morgan's interest rates on deposits did not significantly deviate from those rates offered by its competitors in the Houston MSA.

As noted above, JP Morgan states that approximately half of its national business line deposits are subject to practical restrictions that constrain the organization's ability to use the deposits to support general banking activities. Some of these deposits are maintained in volatile investment accounts. Other national business line deposits are used to fund collateral requirements related to the deposits or are regularly extended by JP Morgan Bank to depositors as overdraft loans or other forms of credit. JP Morgan also states that the deposit balances held by TSS's Treasury Services unit are sufficient to fund only part of the credit demands of the unit's customers.

There also is no evidence in the record that the national business line deposits were moved to Houston or from another branch in an attempt to manipulate the SOD data used for competitive analyses by the appropriate federal supervisory agency. Rather, JP Morgan has provided evidence to demonstrate that the national business line deposits were placed in the Main Houston Branch for business reasons unrelated to JP Morgan's efforts to compete in Houston.

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20. JP Morgan also argues that the Board's market share calculations should include at 100 percent the deposits of Washington Mutual, Inc., Stockton, California, a large thrift that operates in the Houston banking market, and should include at 50 percent the deposits of several credit unions that also compete in this market. Based on a review of the commercial lending and other activities of Washington Mutual, Inc. in Texas, the Board has determined that the thrift's deposit weighting should remain at 50 percent. The Board also reviewed the credit unions identified by JP Morgan and determined that they do not meet the criteria for increased weighting under Board precedent.

21. *See First Security Corp.*, 86 *Federal Reserve Bulletin* 122 (2000).

22. The HHI for small business loans is based on loans to businesses originated in amounts of $1 million or less.

Based on this review, the Board concludes that the SOD data substantially overstate the effective presence of JP Morgan in the Houston banking market and thus overstate the competitive effect of this acquisition in the market.[23]

To account for this overstatement, the Board has considered the structural effects of the proposal after adjusting market deposits to exclude the portion of national business line deposits in the Main Houston Branch that are attributable to customers with mailing addresses outside the Houston banking market who also do not have a presence in the Houston banking market. The total amount of national business line deposits that are unrelated to Houston is approximately $17.2 billion.[24]

To account for the possibility that other market competitors might maintain similar deposits in the Houston banking market, the Board has considered several methods for approximating the amount of their national business line deposits and has excluded those deposits in analyzing the competitive effects of the proposal. After making these adjustments, the structural effects of the proposal in the Houston banking market are either within or moderately exceed the DOJ Merger Guidelines, depending on which method is used to adjust the competitors' deposits.[25]

The Board also examined other aspects of the structure of the Houston banking market. After consummation of the proposal, 85 depository institutions would compete in the Houston banking market, including three insured depository institutions that each would control more than 6 percent of market deposits. The second and third largest competitors in the market currently rank among the five largest bank holding companies nationally by asset data as of December 31, 2003. Two of JP Morgan's bank competitors also operate similar branch networks in the market.

In addition, the Houston banking market is attractive for entry by out-of-market competitors. Seven de novo banks have been chartered since 1998, and five existing banking organizations have entered the market through branching since 2000. Moreover, demographic data indicate that the Houston banking market will likely remain attractive for entry. The Houston MSA is the second most populous of 25 MSAs in Texas, and since 2000, its population growth has exceeded the average population growth in all other Texas MSAs.

Based on a careful review of these and other facts of record, the Board concludes that the SOD data overstate the competitive effect of the proposal in the Houston banking market and that the characteristics of the market further mitigate the transaction's potential anticompetitive effects. Although the analysis and data in this case are more complex than in previous cases, the Board believes that, together and under the particular circumstances of this case, they provide a more accurate picture of the likely competitive effects of the proposed transaction.

The Board also has consulted with and considered the views of the DOJ on the competitive effects of the proposal in the Houston banking market. The DOJ has advised the Board that consummation likely would not have a significantly adverse effect on competition in any relevant market. In addition, the Board has requested the views of the Comptroller of the Currency ("OCC") on the competitive effects of the proposal, and the OCC has not indicated that it raises competitive issues.

In this light, and 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 banking resources in the Houston banking market or in any relevant banking market. Accordingly, competitive considerations are consistent with approval.

Financial, Managerial, and Other Supervisory Factors

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. The Board has carefully considered the financial and managerial resources and future prospects of JP Morgan, Bank One Corporation, and their respective subsidiary banks in light of all the facts of record. In reviewing the financial and managerial factors, the Board has considered, among other things, confidential reports of examination and other supervisory information

23. A commenter noted that JP Morgan instituted numerous changes in its SOD data immediately before submitting this proposal and maintained that the Board should prevent large banking organization from arbitrarily shifting deposits through amendments to SOD data. These changes are separate from the considerations discussed above. JP Morgan has provided information about the changes to support its contention that they were principally to correct errors in the SOD data as originally reported.

24. Approximately $21.9 billion in deposits have been identified by JP Morgan as national business line deposits. If those deposits were excluded from the calculation of the competitive effect of this proposal, JP Morgan would have a pro forma market share of 26.6 percent and the banking market's HHI would increase by 290 points to 1104. Of the $21.9 billion in deposits, approximately $20.9 billion is attributable to customers with addresses outside the Houston banking market. If $20.9 billion in deposits were excluded from the calculations, JP Morgan would have a pro forma market share of 27.9 percent and the HHI would increase 306 points to 1159. Of this $20.9 billion, $3.7 billion in deposits is attributable to customers with addresses outside the Houston market, but who maintain a physical presence (*e.g.*, retail establishment, manufacturing plant, or business office) in the Houston banking market. If the $17.2 billion in deposits associated with customers with non-Houston addresses and no physical presence in the Houston banking market were excluded from the calculation, the pro forma market share of JP Morgan would be 32.2 percent and the HHI would increase 356 points to 1375. All of these increases are within the DOJ Merger Guidelines.

25. The Board considered three methods for approximating comparable deposits held by competitors in the Houston banking market. The first method excluded deposits in the largest branch of every market competitor, including competitors headquartered in Texas and competitors controlled by out-of-state banking organizations. This method likely overstates the amount of out-of-market deposits held by competitors in the Houston banking market and, therefore, understates the competitive strength of those institutions. The second method excluded deposits in the largest branch of all out-of-state market competitors. The third method excluded from each out-of-state institution's Houston deposits the same percentage of deposits that were excluded from JP Morgan's Houston deposits (53 percent). Under these methods, the HHIs increased by 577 to 1985, by 432 to 1532, and by 492 to 1748, respectively.

received from the primary federal supervisors of the organizations and institutions involved in the proposal, the Federal Reserve System's confidential supervisory information, and public comments on the proposal. In addition, the Board has consulted with the relevant supervisory agencies, including the OCC, the primary supervisor for two of JP Morgan's banks and all of Bank One Corporation's banks. The Board also has considered publicly available financial and other information on the organizations and their subsidiaries and all information on the proposal's financial and managerial aspects submitted by JP Morgan and Bank One Corporation during the application process.

In addition, the Board has considered the public comments that relate to these factors. Commenters expressed concern about the size of the combined organization and questioned whether the Board and other federal agencies have the ability to supervise the combined organization and whether the combined organization presents special risks to the federal deposit insurance funds or the financial system in general.

In evaluating financial factors in expansionary proposals by banking organizations, the Board consistently has considered capital adequacy to be an especially important factor. JP Morgan, Bank One Corporation, and their subsidiary banks are well capitalized and would remain so on consummation of the proposal. The Board has considered that the proposed merger is structured as an exchange of shares and would not increase the debt service requirements of the combined company. In addition, the Board has carefully reviewed other indicators of the financial strength and resources of the companies involved, including the earnings performance and asset quality of the subsidiary depository institutions. The Board has also considered the ability of the organizations to absorb the costs of the merger and their proposed integration.

The Board has considered the managerial resources of the proposed combined organization. JP Morgan, Bank One Corporation, and their subsidiary depository institutions are considered well managed overall. The Board has considered its experience and that of the other relevant banking supervisory agencies with the organizations and their records of compliance with applicable banking law.[26] The Board also has reviewed carefully the examination records of JP Morgan, Bank One Corporation, and their subsidiary depository institutions, including assessments of their risk management systems and other policies.

Senior management of the combined organization proposes to draw from the senior executives of JP Morgan and Bank One Corporation based on the individual management strengths of each company. In this case, senior executives of the two companies have formed a transition team to plan and manage the integration into the combined organization. Both companies have experience with large mergers and have indicated that they are devoting significant resources to address all aspects of the merger process.

The Board and other financial supervisory agencies have extensive experience supervising JP Morgan, Bank One Corporation, and their subsidiary depository institutions, as well as other banking organizations that operate across multiple states or regions. The Board already has instituted an enhanced supervisory program that will permit it to monitor and supervise the combined organization effectively on a consolidated basis. This program involves, among other things, continuous holding company supervision, including both on- and off-site reviews of the combined organization's material risks on a consolidated basis and across business lines; access to and analyses of the combined organization's internal reports for monitoring and controlling risks on a consolidated basis; and frequent contact with the combined organization's senior management. It also includes reviews of the policies and procedures in place at JP Morgan for ensuring compliance with applicable banking, consumer, and other laws.

Consistent with the provisions of section 5 of the BHC Act, as amended by the Gramm–Leach–Bliley Act,[27] the Board relies on the SEC and other appropriate functional regulators to provide examination and other supervisory information about functionally regulated subsidiaries in order for the Board to fulfill its responsibilities as holding company supervisor of the combined entity.[28] The Board has consulted with the SEC and the other relevant agencies on JP Morgan's management and compliance efforts. The Board also has taken account of publicly reported issues raised about the past practices of JP Morgan and Bank One Corporation and the efforts and successes of their management to address these matters when they were raised.[29]

Based on these and 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 JP Morgan, Bank One Corporation, and their respective subsidiaries are consistent with approval of the proposal, as are the other super-

26. Some commenters criticized the management of JP Morgan and Bank One Corporation based on the existence of private litigation alleging infringement of patent rights related to digital capturing, processing, and archiving of checks and other improprieties. These are isolated private disputes that are within the jurisdiction of the courts to resolve.

27. Pub. L. No. 106-102, 113 Stat. 1338 (1999).

28. For additional information about the Board's supervisory program for large, complex banking organizations, such as JP Morgan, *see Supervision of Large Complex Banking Organizations*, 87 *Federal Reserve Bulletin* 47 (2001).

29. A commenter provided press reports of litigation involving the acquisition of a small number of mortgage loans from a mortgage broker by Chase Manhattan Mortgage Corporation (''CMMC''), a subsidiary of JP Morgan Bank. The commenter asserted that JP Morgan and CMMC lacked adequate policies and procedures for monitoring the acquisition of loans in the secondary market. The Board previously has considered similar comments in the context of recent applications by JP Morgan Bank or JP Morgan, and hereby adopts its findings in those cases. *See JPMorgan Chase Bank*, 89 *Federal Reserve Bulletin* 511 (2003) (''JP Morgan/Bank One Corporation Order'') and *JP Morgan Chase & Co.*, 90 *Federal Reserve Bulletin* 212 (2004) (''JP Morgan/Chase FSB Order''). The commenter also raised concerns about an investigation by the Oregon Department of Justice (''Oregon DOJ'') into the alleged use by borrowers of fraudulent Social Security numbers in three mortgage loans underwritten by CMMC. The Board previously addressed these concerns in the JP Morgan/Chase FSB Order. As the Board noted in that order, the Oregon DOJ closed its inquiry into this matter on June 10, 2003.

visory factors that the Board must consider under section 3 of the BHC Act.[30]

Convenience and Needs Considerations

Section 3 of the BHC Act requires the Board 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 CRA. 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 bank expansionary proposals. The Board has carefully considered the convenience and needs factor and the CRA performance records of the subsidiary depository institutions of JP Morgan and Bank One Corporation, including public comments on the effect the proposal would have on the communities to be served by the resulting organization.

A. Summary of Public Comments on Convenience and Needs

In response to the Board's request for public comment on the proposal, more than 440 commenters submitted their views or testified at the public meetings on the proposal. Approximately 300 commenters commended JP Morgan or Bank One Corporation for the financial and technical support provided to their community development organizations or related their favorable experiences with specific programs or services offered by JP Morgan or Bank One Corporation. Many of these commenters also expressed their support for the proposal.

More than 140 commenters expressed concern about the lending records of JP Morgan or Bank One Corporation, recommended approval of the proposal only if subject to conditions suggested by the commenter, expressed concern about large bank mergers in general, or opposed the proposal. Some of these commenters alleged that community lending and philanthropy deteriorated at JP Morgan after the merger between JP Morgan and Chase Manhattan in 2001.[31] Approximately 40 commenters opposed the proposal, criticizing the consumer and small business lending of JP Morgan or Bank One Corporation.[32] Commenters also criticized JP Morgan or Bank One Corporation for their activities related to subprime lending. Several commenters contended that data submitted under the Home Mortgage Disclosure Act (12 U.S.C. § 2801 *et seq.*) (''HMDA'') demonstrated that JP Morgan and Bank One Corporation engaged in disparate treatment of minority individuals in home mortgage lending in certain markets. In addition, several commenters asserted that JP Morgan and Bank One Corporation are plaintiffs in an unusually large number of foreclosures in certain markets and expressed concern that these cases resulted from unscrupulous practices by both organizations.[33] Some commenters criticized Bank One Corporation's involvement in tax-refund-anticipation lending and urged the Board to condition approval of the proposal on a pledge to discontinue this activity.[34] In addition, several commenters expressed concerns about possible branch closures resulting from the proposed merger.

B. CRA Performance Evaluations

As provided in the BHC Act, the Board has evaluated the convenience and needs factor in light of the appropriate federal supervisors' examinations of the CRA performance

30. Several commenters expressed concerns about the potential loss of jobs in New York or Chicago and about the degree of diversity in senior management positions in both organizations. These concerns are outside the statutory factors that the Board is authorized to consider when reviewing an application under the BHC Act. *See Western Bancshares, Inc. v. Board of Governors*, 480 F.2d 749 (10th Cir. 1973).

31. Some commenters alleged that mismanagement of accounts, service interruptions, mishandled transactions, and other irregularities occurred after acquisitions by JP Morgan and Bank One Corporation. The Board has reviewed these comments about individual accounts and transactions in light of the facts of record, including information provided by JP Morgan and Bank One Corporation. These letters have also been forwarded to the consumer complaint function at the OCC and the Board, the primary supervisors of the subsidiary banks of JP Morgan and Bank One Corporation.

32. Several commenters asserted that JP Morgan has a poor record of CRA performance in California. The only banking presence that JP Morgan has in California is JP Morgan Trust, which offers private banking and trust services and is examined as a ''wholesale'' bank for CRA purposes. JP Morgan Trust's total deposits were $106.9 million as of its most recent CRA examination and only $17.8 million of that amount was on deposit at the bank's main office in Los Angeles, which is the bank's only California branch that accepts deposits.

33. The Board notes that JP Morgan and Bank One Corporation act as loan servicers or trustees for a large number of mortgages. The legal capacity in which either institution is involved in a foreclosure may not be readily apparent from court records. Foreclosure actions in an institution's capacity as a loan servicer or trustee would not indicate safety and soundness issues or a failure to meet the convenience and needs of the communities served by the institution. The Board notes, however, that JP Morgan has implemented a program to assist borrowers facing foreclosure by providing counseling and refinancing. On consummation of this proposal, JP Morgan would be better able to assist in mitigating borrowers' losses through local branch staff in areas currently served by Bank One Corporation.

34. Bank One-Ohio offers tax-refund-anticipation loans to customers through independent tax preparers. All underwriting credit decisions are made by Bank One-Ohio using credit criteria consistent with safe and sound banking practices and in compliance with applicable laws. Bank One Corporation also provides financing to its customers engaged in the business of tax-refund-anticipation lending, but is not involved in the lending practices or credit decisions of these lenders. The credit documents executed in connection with the financing, however, require these lenders to comply with applicable laws. The Board expects all bank holding companies and their affiliates to conduct tax-refund-anticipation lending free from any abusive lending practices and in compliance with all applicable law, including fair lending laws. The Federal Trade Commission (''FTC''), Department of Housing and Urban Development (''HUD''), and DOJ are responsible for enforcing compliance by nondepository institutions with laws governing the activity.

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.[35]

JP Morgan's lead bank, JP Morgan Bank, received an ''outstanding'' rating at its most recent CRA performance evaluation by the Federal Reserve Bank of New York, as of September 8, 2003. JP Morgan's other subsidiary banks also received ''outstanding'' ratings from the OCC at their most recent CRA evaluations: Chase USA, as of March 3, 2003, and JP Morgan Trust, as of November 4, 2002.

Bank One Corporation's lead bank, Bank One, which accounts for approximately 75 percent of the total consolidated assets of Bank One Corporation. It is the successor to Bank One, N.A., Illinois, Chicago, Illinois (''Bank One-Illinois''), which received a ''satisfactory'' rating at its most recent CRA performance evaluation by the OCC, as of March 31, 2000 (''Bank One Evaluation'').[36] All of Bank One Corporation's other subsidiary banks received either ''outstanding'' or ''satisfactory'' ratings at the most recent evaluations of their CRA performance.[37]

C. CRA Performance of JP Morgan

1. JP Morgan Bank

Overview. As noted above, JP Morgan Bank received an overall ''outstanding'' rating for performance under the CRA during the evaluation period.[38] The bank also received an ''outstanding'' rating under the lending test. Examiners concluded that JP Morgan Bank's lending activity showed excellent responsiveness to retail credit needs in its assessment areas, as measured by the number and dollar amount of HMDA-reportable and small business loans originated and purchased in each area. In particular, examiners characterized lending activity in the bank's primary assessment area, which included New York City, Long Island, Northern New Jersey, and parts of Connecticut and Pennsylvania as excellent and lending activity in the Texas and upstate New York assessment areas as good.

During the evaluation period, the bank and its affiliates originated or purchased more than 266,000 HMDA-reportable and small business loans totaling approximately $32.8 billion.[39] Examiners also noted that overall loan volume had increased 44 percent since the bank's previous examination. Although a significant part of the growth was attributable to the volume of refinancings, small business lending increased 22 percent. Examiners also reported that the overall geographic distribution of HMDA-reportable and small business lending reflected good loan penetration in LMI geographies across all assessment areas reviewed.

Examiners noted that JP Morgan Bank's LMI Mortgage Subsidy Program helped increase the bank's mortgage loan penetration in LMI geographies. Under this program, borrowers purchasing properties in LMI geographies of the bank's assessment areas are eligible for a 2 percent subsidy, up to a maximum of $4,000, on loans of up to $200,000. More than 5,200 loans were made under this program during the examination period. Examiners also concluded that various innovative and flexible lending products enhanced lending to LMI borrowers and small businesses, noting that JP Morgan Bank's Residential Lending Group (''RLG'') worked with local community organizations to develop new lending products and enhance existing products designed for LMI families. Many of RLG's flexible lending products provide lower down-payment requirements to first-time home buyers. During the examination period, more than 12,000 such loans were originated in the bank's assessment areas.

Examiners also concluded that JP Morgan Bank's performance record for community development lending was outstanding overall and in each assessment area; the bank made more than $1.3 billion in community development loans during the examination period. Examiners stated that this type of lending was responsive to the credit needs identified by the bank's community contacts and that affordable housing initiatives totaled $927 million or 70 percent of its community development lending. Overall, JP Morgan Bank's community development lending supported the financing of more than 11,500 units of affordable housing throughout its assessment areas.

JP Morgan Bank also was rated ''outstanding'' for its investment performance in light of its excellent record in the bank's assessment areas. Overall, JP Morgan Bank's significant portfolio of qualified investments and grants, totaling $1.1 billion, included $313 million in new investments since the previous examination. These investments focused on affordable housing, economic development, community services, and revitalization and stabilization projects. Examiners concluded that the bank's investments reflected excellent responsiveness to the most significant

35. *See Interagency Questions and Answers Regarding Community Reinvestment*, 66 *Federal Register* 36,620 and 36,639 (2001). A commenter, however, suggested that JP Morgan Bank manipulates its CRA performance evaluations by significantly increasing its percentage of loans to LMI and minority individuals in the year preceding its CRA evaluation and that its performance diminishes in the years after an evaluation. CRA evaluations measure performance during the applicable period and do not give undue weight or consideration to a bank's increased performance within that time period. If a bank's CRA performance was uneven during the evaluation period, the Board expects that its CRA performance evaluation would reflect such an inconsistent performance.

36. After the Bank One Evaluation, Bank One Corporation merged 16 of its subsidiary banks into Bank One and Bank One-Ohio (''Merged Lead Banks''). Each of the banks that was merged into the Merged Lead Banks received a ''satisfactory'' or ''outstanding'' rating at its most recent CRA performance evaluation by the appropriate federal financial supervisory agency.

37. The CRA performance ratings of all of Bank One Corporation's subsidiary depository institutions are provided in appendix C.

38. The evaluation period was from January 1, 2001, to December 31, 2002.

39. The Reserve Bank considered home purchase and refinance and small business loans by JP Morgan Bank and its affiliates, CMMC and Chase USA, for purposes of the CRA performance examination.

credit and community development needs in the bank's assessment areas.[40]

JP Morgan Bank received an ''outstanding'' rating on the service test in light of its performance in all assessment areas. In particular, examiners noted that its branches were readily accessible to all portions of the bank's assessment areas. Examiners reported that JP Morgan Bank opened and closed branches and automated teller machines (''ATMs'') during the evaluation period, concluding that these changes did not adversely affect the overall accessibility of the bank's delivery network. In addition, examiners noted that extended morning, evening, and weekend hours were tailored to accommodate the convenience and needs of the assessment areas, particularly LMI areas. Examiners also noted that JP Morgan Bank offered multiple alternative delivery systems that enhanced the distribution of banking services, such as a network of 329 ATMs in which 28 percent were in LMI areas. Many of these ATMs feature instructions in Spanish, Korean, Chinese, French, Italian, Russian, or Portuguese. Examiners stated that JP Morgan Bank offered Chase Online Banking for Small Businesses, which allowed customers to view business and personal accounts together and pay employees electronically. In addition, they reported that JP Morgan Bank offered Ready Pay Electronic Transfer Accounts to provide people without bank accounts an opportunity to receive direct deposits of government payments.

New York. JP Morgan Bank received an ''outstanding'' rating under the lending test in its New York assessment area.[41] Examiners concluded that an analysis of the bank's lending activity, distribution of loans among borrowers of different income levels and businesses of different sizes, and community development loans demonstrated excellent performance with good geographic loan distribution. Specifically, examiners noted that the overall geographic distribution of HMDA-reportable and small business loans reflected good penetration in LMI geographies. Examiners also concluded that home purchase and refinance lending by JP Morgan Bank in LMI geographies generally exceeded the performance of the aggregate lenders[42] in low-income census tracts and moderate-income census tracts. In addition, examiners found that JP Morgan Bank's performance equaled or exceeded the performance of the aggregate lenders in home purchase and refinance lending to LMI borrowers.

Examiners also commented favorably on JP Morgan Bank's performance in small business lending, noting that the overall distribution of small business loans across different income-level geographies was good and that performance in LMI census tracts equaled or exceeded the aggregate lenders' performance. The distribution of loans to businesses of different sizes was considered excellent in light of the proportion of loans for $100,000 or less, the number of assessment area loans to businesses with gross annual revenues of $1 million or less, and JP Morgan Bank's performance relative to the aggregate lenders.

JP Morgan Bank's performance under the investment test was rated ''outstanding'' by examiners, who cited the bank's level of qualified community development investments and grants as indicating excellent responsiveness to credit and community development needs. Examiners noted that the bank's investments exhibited excellent responsiveness to the need for affordable housing (identified as a critical need in the New York assessment area), with investments of approximately $717 million in low-income-housing tax credits (''LIHTC'') that benefited its assessment area for New York, New Jersey, and Connecticut.

JP Morgan Bank's performance under the service test was rated ''outstanding'' in light of its excellent branch distribution and volume of community development services in its assessment area. Of the 368 branches in the bank's assessment area, 73 or 20 percent were in LMI areas. Examiners reported that 44 percent of JP Morgan Bank's branches were in or adjacent to LMI census tracts (four branches were in census tracts with no designated income level). Examiners concluded that alternative delivery systems somewhat enhanced the bank's performance in the assessment area and noted that 31 percent of its off-site ATMs in the assessment area were in LMI areas. In addition, examiners noted that JP Morgan Bank had 15 mortgage offices in the assessment area, including two in LMI census tracts. They also reported that JP Morgan Bank's products and services were tailored to accommodate the convenience and needs of the assessment area, including LMI areas.[43]

In addition, examiners reported that JP Morgan Bank was a leader in providing community development services in the assessment area. They noted that JP Morgan Bank officers served on 240 boards of qualifying community development organizations in the assessment area and that the bank participated in more than 480 seminars that promoted financial literacy.

Texas. JP Morgan Bank's rating for CRA performance in Texas was ''outstanding.'' Examiners identified such factors as good responsiveness to assessment-area credit needs, good geographic distribution of loans in the bank's

40. Several commenters contended that JP Morgan should be required to donate a specified percentage of its pretax income to charities. JP Morgan responded that it has a record of providing significant philanthropic donations in all the communities that it serves. The Board notes that neither the CRA nor the agencies' implementing rules require that institutions make charitable donations.

41. The New York assessment area consists of the consolidated metropolitan statistical area (''CMSA'') (New York–Northern New Jersey–Long Island, New York–NJ–CT–PA).

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

43. Some commenters recommended that JP Morgan initiate certain changes to the electronic benefits transfer (''EBT'') business that it purchased from Citigroup Inc., New York, New York. EBT in New York provides cash access for the Temporary Assistance for Needy Families program (''TANF''). In response to these suggestions, JP Morgan indicated that it plans to use its ATM network to provide recipients of TANF benefits with access to cash free of charge. JP Morgan also noted that several of the commenters' requests were matters to be addressed by the State of New York or the NYCE ATM Network.

assessment areas, good distribution of loans among individuals of different income levels and businesses of different sizes, an excellent level of community development lending, an excellent level of qualified investments, and readily accessible delivery systems for banking services to geographies and individuals of different income levels to support the rating.[44]

JP Morgan Bank's performance on the lending test in Texas was rated "high satisfactory," based primarily on a good performance in the Dallas–Fort Worth and Houston–Galveston–Brazoria CMSAs, and an adequate performance in the El Paso MSA. Examiners concluded that JP Morgan Bank's responsiveness to retail credit needs in the Texas assessment area was good relative to the bank's capacity and performance, noting that the bank and its mortgage affiliate originated and purchased more than 95,000 loans totaling approximately $10.7 billion during the examination period. The overall geographic distribution of HMDA-reportable and small business loans reflected good penetration in LMI geographies.

Examiners also concluded that JP Morgan Bank's community development lending performance was outstanding during the examination period, with loan commitments in the Texas assessment area totaling $234 million. These loans financed 4,400 units of affordable housing.

JP Morgan Bank's performance on the investment test in Texas was rated "outstanding." Examiners noted that JP Morgan Bank had a high level of qualified investments that exhibited excellent responsiveness to community development needs.[45] At the examination, these investments totaled $161 million or 15 percent of the bank's qualified investments. A majority of the qualified investments were directed to affordable housing initiatives. JP Morgan Bank's performance on the investment test varied across its assessment area. Examiners reported that the bank made a significant number of investments in the Dallas–Fort Worth CMSA and fewer investments in the Houston–Galveston–Brazoria CMSA and El Paso MSA, but that all these areas benefited from the bank's affordable housing initiatives that were implemented statewide.

JP Morgan bank's overall performance in the Texas assessment area was rated "outstanding," in light of its performance in the Dallas–Forth Worth and Houston–Galveston–Brazoria CMSAs and the El Paso MSA. The bank's delivery systems were readily accessible to all geographies in the assessment area, including LMI areas. The percentage of branches in or adjacent to LMI areas exceeded 40 percent in the three largest areas in the Texas assessment area.

2003 Performance. JP Morgan Bank represented that its total home mortgage originations and purchase lending in its assessment areas in 2003, which includes a period of time after its most recent CRA performance evaluation, amounted to more than 157,000 loans totaling $32.6 billion. Of these loans, 11 percent were in LMI census tracts and 17 percent were to LMI borrowers. During 2003, JP Morgan Bank's small business lending originations in its assessment areas totaled more than 80,000 loans, for $4.1 billion dollars. Approximately 28 percent of these loans were in LMI census tracts. JP Morgan Bank also noted that in 2003, it originated more than 46,000 loans to businesses with revenues of $1 million or less, representing almost 60 percent of JP Morgan Bank's total small business loan originations.

JP Morgan Bank also stated that it continued in 2003 to provide financing for affordable housing and economic development projects in LMI communities by focusing on LMI housing development and rehabilitation through construction lending, interim financing, permanent financing, and letters of credit; commercial revitalization projects in LMI communities; technical assistance to intermediaries; community development loans; and bridge lending to facilitate LIHTC investments. The bank also made more than 300 loans totaling more than $1.2 billion for affordable housing and economic development projects in 2003. For example, it provided a $45 million revolving credit facility to be used as bridge financing for low-income housing investments in limited partnerships that qualify for LIHTCs. JP Morgan Bank will underwrite the entire facility, syndicate a portion to one or two banks, and retain a $20 million share. The facility will invest in low-income multifamily residential housing nationwide.

JP Morgan Bank also stated that it provided a five-year renewal of three lines of credit for the areas served by the Community Preservation Corporation ("CPC") in downstate New York ($31 million), upstate New York ($3.2 million), and New Jersey ($5 million). CPC has financed almost 85,000 housing units in approximately 2,000 separate projects in New York and New Jersey in the last 26 years.

As of December 2003, JP Morgan Bank's qualified community development investments totaled almost $1.4 billion. Approximately $1.2 billion of these investments were in the New York Tri-State area and $207 million were in Texas. New commitments in 2003 totaled $177 million, and the bank provided more than $25.7 million in grants eligible for consideration under the CRA. JP Morgan Bank also had $1.2 billion in outstanding LIHTC investments in its assessment areas, of which $175 million were new investments made in 2003.

2. *Chase USA*

Overview. Chase USA also received an "outstanding" rating at its most recent CRA performance examination by

44. The examiners' conclusions on CRA performance in Texas were based predominantly on JP Morgan Bank's performance in the Dallas and Houston CMSAs and the El Paso MSA. Together, these areas had a majority of the bank's deposits, branches, and HMDA-reportable and small business loans and the assessment area's population, LMI census tracts, owner-occupied housing units, and business establishments in Texas. JP Morgan's assessment area encompassed the State of Texas.

45. A qualified investment is any lawful investment, deposit, or grant that has as its primary purpose community development.

the OCC.[46] The bank primarily engages in credit card lending nationwide and does not operate any branches.[47] Examiners commended Chase USA for good lending activity in its assessment area, excellent borrower distribution of home mortgage loans, and good geographic distribution of home mortgage loans and awarded the bank ''outstanding'' ratings on the lending, investment, and service tests.[48] Examiners also concluded that community development lending and flexible loan programs had an overall positive impact on the lending test and that the bank exhibited excellent responsiveness to the credit and community development needs of its assessment area through high levels of qualified investments and grants.

Mortgage loans represented 87 percent of the loans originated by Chase USA in its New Castle County assessment area and loans to small businesses comprised approximately 13 percent. Approximately 62 percent of the home mortgage loans made by Chase USA in its assessment area were for home purchase, and the remaining loans were for home refinance. During the evaluation period, Chase USA's home mortgage loans originations almost doubled to approximately 2,570 loans and more than doubled in total dollar amount to $377 million. Chase USA ranked second in home purchase lending in the New Castle County assessment area and fourth in home refinance lending. Examiners reported that Chase USA's distribution of home mortgage loans was considered good in light of the demographics of the assessment area, where less than 16 percent of owner-occupied housing units were in LMI geographies.

Examiners considered the geographic distribution of Chase USA's loans to small business to be adequate. The bank's market share of loans to small businesses in the assessment area's two LMI geographies was substantially comparable with its overall market share in each geography.

In addition, examiners reported that Chase USA's community development lending adequately addressed the community development needs of the New Castle County assessment area. They noted that Chase USA and its affiliates originated 24 community development loans totaling almost $100 million in the assessment area or the broader regional area during the evaluation period. In addition, Chase USA issued six letters of credit for community development purposes totaling $30 million. For example, the Chase Community Development Corporation (''CCDC'') provided a ten-month, $3 million credit facility that financed the construction of a charter school in a moderate-income geography of Wilmington, Delaware. Student from LMI families residing in LMI communities were expected to comprise most of the school's student body. CCDC also originated a $2.6 million construction loan to assist in rehabilitating a co-op building in the New Castle County assessment area into a 50-unit apartment complex for LMI senior citizens.

During the evaluation period, Chase USA and its affiliates made commitments of $23.4 million for qualified investments in the New Castle County assessment area, which increased its total outstanding commitments to $36.8 million. Examiners stated that Chase USA had taken a leadership role in several of the investments. Some investments were innovative or complex and accommodated the identified needs in the assessment area.

2003 Performance. In 2003, Chase USA's mortgage originations and purchases in its assessment area totaled more than 3,600 loans for approximately $562 million, of which 12 percent were to borrowers in LMI census tracts and 34 percent were to LMI borrowers. Chase USA originated approximately 290 loans for $3 million, of which 25.3 percent were to businesses in LMI census tracts. Chase USA increased its community development lending, making approximately $80 million in community development loans in 2003. For example, Chase USA provided a $5.6 million construction loan to finance the development of 96 units of family rental housing on a 15-acre site in Salisbury, Maryland. As of December 2003, Chase USA funded an additional $1.2 million in grants. Chase USA also made $2.7 million in new investments in LIHTCs in 2003.

D. CRA Performance of Bank One Corporation

As previously discussed, the most recent CRA performance evaluations of Bank One Corporation's subsidiary banks predate the current structure of the organization. Therefore, in addition to reviewing the relevant CRA performance evaluations, the Board also has evaluated extensive information submitted by Bank One Corporation about the CRA performance of its banks after their most recent CRA performance evaluations.

Overview. As noted above, the Merged Lead Banks all received ''outstanding'' or ''satisfactory'' ratings at their most recent CRA evaluations. Examiners determined that Bank One-Illinois demonstrated adequate responsiveness to the credit needs of its communities, including LMI borrowers and geographies. Examiners also reported that the Merged Lead Banks offered a variety of products and programs to assist in meeting the housing-related credit needs of LMI individuals and in LMI communities.

46. The performance evaluation was as of March 3, 2003, and covered the period from January 1, 1999, through December 31, 2002. At the request of Chase USA, the CRA performance examination included the activities of JP Morgan Bank, CMMC, JP Morgan Chase Community Development Corporation, Chase Community Development Corporation, and JP Morgan Mortgage Capital.

47. Chase USA focuses on nationwide retail lending and is the fifth largest credit card issuer in the country. It obtains deposits through the treasury desk of JP Morgan Bank and through private banking deposits. A majority of these deposits are from outside its New Castle County, Delaware, assessment area.

48. Commenters questioned the accuracy of the OCC's rating, noting that Chase USA closed its branch in Bellefonte, Delaware. That branch was originally opened in Bellefonte, a town with a population of less than 5,000 persons, to permit Chase USA to sell insurance products nationwide. After the Gramm–Leach–Bliley Act, Chase USA no longer required this branch. Chase USA's main office, which provided banking services primarily to employees, was closed during the performance evaluation period and relocated to Newark, Delaware.

Bank One has continued to provide home mortgage loans to consumers throughout its assessment areas, including those assessment areas previously served by its predecessor institutions. Bank One Corporation has represented that, from 2000 through 2003, Bank One originated or purchased approximately $27.5 billion in home mortgage loans and that approximately 17.4 percent and 29.6 percent of these loans by number were originated in LMI geographies and to LMI borrowers, respectively. Bank One Corporation also has represented that Bank One continues to participate in a variety of programs designed to assist the housing-credit needs of LMI individuals. For example, Bank One participates in and funds a program to subsidize down-payment and closing costs in connection with home mortgage loans for LMI borrowers. Bank One Corporation has represented that home mortgage loans totaling more than $37 million were originated in connection with Bank One's participation in this subsidy program in 2003.

In general, examiners favorably commented on the small business lending records of the Merged Lead Banks. For example, the Bank One Evaluation reported that Bank One-Illinois was the largest local small business lender in its Chicago assessment area. In addition, examiners favorably noted the small business lending penetration of the Merged Lead Banks in LMI geographies in their Dallas, Detroit, Houston, Indianapolis, and Phoenix assessment areas.

Bank One Corporation reported that, from 2000 through 2003, the Merged Lead Banks have originated more than 250,000 loans to small businesses throughout its assessment areas, of which approximately 13.9 percent were to small businesses in LMI geographies.[49] Bank One Corporation also has initiated a Business Banker program through which certain Bank One employees are assigned to Bank One branches selected specifically for the convenience of small business customers. Bank One employees in the Business Banker program focus exclusively on small businesses requiring loans of less than $250,000. In addition, Bank One has represented that in 2003, it originated approximately $22 million in loans through its Community Express Loan program offered in partnership with the Small Business Administration (''SBA''). Bank One also launched in the same year an SBA-guaranteed revolving line of credit for small businesses, including firms that might not have otherwise qualify for credit without the SBA's guarantee.

Examiners noted the positive impact of Bank One-Illinois's community development lending on its overall lending activities and generally praised the community development lending activities of the Merged Lead Banks.[50] Examiners also reported that the Merged Lead Banks offered an array of consumer and business loan products, including products with flexible underwriting criteria that assisted LMI customers who might not have qualified for credit under traditional underwriting standards. Bank One has represented that it continues to provide community development loans throughout its assessment areas for projects that support affordable housing; economic development; and medical, employment, or other social services in LMI geographies.

Examiners reported that the qualified investment activities of Bank One and the Merged Lead Banks were responsive to the small business and affordable housing needs of their communities. Bank One has represented that it made community development investments totaling more than $859 million throughout its assessment areas since the Bank One Evaluation. These investments benefited a variety of organizations and projects, including programs that provide affordable housing, social services for at-risk children, credit and technical assistance for small businesses, and financial literacy education for low-income persons.

Examiners generally reported that the delivery systems of Bank One Corporation and the Merged Lead Banks for banking services were adequately accessible throughout their assessment areas. Bank One has represented that, as of December 31, 2003, approximately 27 percent of its branches and 26 percent of its ATMs were in LMI geographies. Moreover, Bank One has indicated that from 2000 to 2003, it has opened 21 new branches in LMI census tracts.

Chicago. Examiners most recently evaluated Bank One Corporation's CRA performance record in the Chicago MSA as part of the Bank One Evaluation and the evaluations of American National Bank and Trust Company of Chicago, Chicago, Illinois (''American National'') (''American National Evaluation'') and Bank One, Illinois, National Association, Springfield, Illinois (''Bank One-Springfield'') (''Bank One- Springfield Evaluation'').[51] Examiners determined that the lending records of Bank One-Illinois, American National, and Bank One-Springfield demonstrated adequate responsiveness to the credit needs of their communities, which included LMI borrowers and geographies. Moreover, examiners commended American National's lending record in the Chicago MSA and noted a good distribution of the bank's

49. A commenter criticized Bank One Corporation's management of farm properties through Bank One Farm and Ranch Management (''BOFRM''), contending that its primary orientation is towards ''cash rent'' programs that require substantial initial payments from farmers who lease farmland from BOFRM. BOFRM manages farms for both trust and agency accounts. According to the commenter, these credit arrangements generally do not benefit small independent farming enterprises and negatively affect rural economies. JP Morgan stated that BOFRM rents approximately 95 percent of its farms to family farmers. JP Morgan also stated that Bank One Corporation's agricultural loan products are structured flexibly to meet the needs of the individual businesses, which generally require working capital to meet cash flow needs, and funding to purchase equipment and other large assets and to purchase or improve real estate. JP Morgan represented that, under Bank One's Agricultural Financing Policy, specialized agricultural lenders have the discretion to adjust the commercial lending products to the special credit needs of agricultural businesses.

50. Examiners described as good or excellent the community development lending by Bank One, Arizona, National Association, Phoenix, Arizona; Bank One, Indiana, National Association, Indianapolis, Indiana; and Bank One, Texas, National Association, Dallas, Texas. In addition, examiners characterized Bank One-Dearborn as a leader in making community development loans in the Detroit MSA.

51. The assessment areas of Bank One and American National for their respective CRA evaluations included the entire Chicago MSA.

home mortgage loans among borrowers of all income levels.

Examiners commended Bank One-Illinois's home mortgage loan penetration in LMI census tracts. During the evaluation period, Bank One-Illinois originated 16.4 percent of its total home mortgage loans to borrowers in LMI census tracts, which examiners noted exceeded the percentage of owner-occupied units in those areas. The Bank One Evaluation also reported that Bank One-Illinois's home improvement and refinance loan penetration among LMI borrowers was good and that its total home mortgage loan distribution among borrowers of all income levels was adequate. In addition, examiners determined that the overall distribution of home mortgage loans for American National and Bank One-Springfield among census tracts of various income levels, including LMI geographies, was good in the Chicago MSA. Bank One indicated that in 2003, it originated approximately 22.5 percent of its total home mortgage loans in the Chicago MSA to borrowers in LMI census tracts and approximately 30.1 percent to LMI borrowers.

Examiners reported that the geographic distribution of small loans to businesses by Bank One-Illinois and American National was adequate and that the distribution of such loans in moderate-income areas was good.[52] During their evaluation periods, Bank One-Illinois, American National, and Bank One-Springfield provided 13.3 percent, 12.9 percent, and 9.3 percent of their small loans to businesses, respectively, to firms in LMI geographies. In addition, examiners noted that all three banks provided a variety of SBA-sponsored loan products.

Bank One Corporation reported that from 2000 through 2003, Bank One provided more than 47,000 loans to small businesses in the Chicago MSA. In addition, Bank One Corporation represented that in 2003, approximately 13 percent of its loans to small businesses in the Chicago MSA were originated to firms in LMI census tracts.

The Bank One-Illinois, American National, and Bank One-Springfield Evaluations noted that community development lending primarily related to the development of affordable housing, which examiners identified as a significant credit need in the Chicago MSA. Examiners reported that Bank One-Illinois and American National engaged in an adequate volume of community development lending activities in the Chicago MSA. Community development lending by all three banks helped construct or renovate a total of 3,227 units of affordable housing during their evaluation periods.

Bank One has continued to engage actively in community development lending in the Chicago MSA. For example, Bank One states that it has provided more than $55 million in collateral trust notes from 2000 through 2003 to a community development financial institution that specializes in financing affordable multifamily housing.

52. The Bank One-Illinois and American National CRA performance examinations reported that the volume of small loans to businesses was adequate.

Examiners commented favorably on the community development investments of Bank One-Illinois in its Chicago assessment area. The Bank One Evaluation also noted that the bank's investment activities demonstrated excellent responsiveness to the most significant credit needs of its Chicago assessment area. In addition, examiners noted that Bank One-Illinois and American National provided an adequate level of community development investments in the Chicago MSA. Bank One-Illinois, American National, and Bank One-Springfield maintained a total of approximately $132.1 million in qualified investments in their Chicago assessment areas during their evaluation periods. Examiners noted that the community development investments of all three banks included complex qualified investments. Bank One-Illinois, American National, and Bank One-Springfield made community development investments in a variety of programs, including projects related to the development of affordable housing and small businesses. The Bank One Evaluation noted that the bank's community development investments in Chicago had facilitated the development or preservation of more than 5,550 housing units.

Bank One has continued to make qualified community development investments in the Chicago MSA, such as an $8.9 million investment in a mixed-income senior housing complex in an LMI community. In addition, Bank One reported that it provided approximately $4.2 million in capital to a 107-unit multifamily housing project in Chicago by purchasing tax credits.

Examiners also determined that Bank One-Illinois, American National, and Bank One-Springfield each provided an adequate level of banking services in the Chicago MSA, including LMI communities, and that the banks' delivery systems for those services were adequately accessible to all portions of their assessment areas. Examiners reported that, during the evaluation period, Bank One-Illinois's record of opening and closing branches in the Chicago MSA resulted in more services in LMI areas and to LMI individuals. They also noted that all three banks offered alternative delivery systems, including ATMs, 24-hour telephone banking, and Internet banking.

In addition, examiners reported favorably on the community development services of Bank One-Illinois, American National, and Bank One-Springfield in their Chicago assessment areas. These services included offering low-cost checking accounts for individuals with no previous banking experience and providing technical assistance to organizations that provided affordable housing and small business loans.

Ohio. As previously noted, Bank One-Ohio received a ''satisfactory'' rating at its most recent CRA evaluation (''Bank One-Ohio Evaluation''). This evaluation indicated that the bank's lending record demonstrated a good responsiveness to the credit needs of its communities.[53] Examin-

53. The review period was from March 1998 to March 2000. Bank One-Ohio's assessment areas for the evaluation included the Akron, Canton, Cleveland, Dayton, Hamilton–Middletown, Lima, Mansfield, Parkersburg–Marietta, and Youngstown MSAs in Ohio; the Cincinnati

ers commended the distribution of Bank One-Ohio's home mortgage lending among geographies and borrowers of different income levels throughout its assessment areas, including the Cincinnati MMA and the Cleveland MSA. For example, in the Cincinnati MMA, Bank One-Ohio provided approximately 15 percent of its home mortgage loans in LMI census tracts, which exceeded the percentage of owner-occupied units in those areas. Bank One Corporation has represented that from 2000 to 2003, Bank One-Ohio originated more than 77,200 home mortgage loans in its Ohio assessment areas, of which approximately 17 percent were in LMI census tracts and approximately 33 percent were to LMI borrowers.

Examiners noted that the volume and geographic distribution of Bank One-Ohio's small loans to businesses was good. For example, in the Columbus MSA, Bank One-Ohio provided approximately 23 percent of its small loans to businesses to firms in LMI census tracts. In addition, examiners noted that Bank One-Ohio offered a variety of SBA-sponsored loan products. Bank One Corporation reported that from 2000 to 2003, Bank One-Ohio provided approximately 40,350 small loans to businesses in its Ohio assessment areas, of which almost 18 percent were originated to businesses in LMI census tracts.

The Bank One-Ohio Evaluation noted that the bank's overall community development lending was adequate; however, examiners characterized the bank as a leader in community development lending in the Cincinnati MMA. For example, Bank One-Ohio participated in the structuring and financing of a community development fund that renovated affordable housing and supported economic development projects in low-income areas in the Cincinnati MMA. Bank One Corporation represented that, since the Bank One-Ohio Evaluation, the bank has provided more than $9.6 million in community development loans to support affordable housing, economic development, and educational and vocational training in its Ohio assessment areas.

Examiners reported that Bank One-Ohio adequately responded to community needs in Ohio through its community development investments. In addition, examiners commended Bank One-Ohio's community development investment activities in the Cincinnati MMA and praised the bank's use of complex qualifying investments. During the evaluation period, Bank One-Ohio made community development investments totaling $44.2 million throughout its assessments areas, including investments in projects that provided housing, job-training services, and adult education for LMI individuals. Moreover, examiners noted that Bank One-Ohio's community development investments facilitated the development or renovation of more than 2,100 units of affordable housing. Bank One Corporation states that the bank has made more than $155 million in qualified community development investments and donations since the Bank One-Ohio Evaluation.

multistate metropolitan area (''MMA'') in Ohio and Kentucky; and the non-MSA communities of Athens, Portsmouth, Sidney, Ashland–Wooster, Findley–Marion, and Zanesville, all in Ohio.

E. HMDA Data and Fair Lending Record

The Board also has carefully considered the lending records of JP Morgan and Bank One Corporation in light of comments on the HMDA data reported by their subsidiaries.[54] Based on 2002 HMDA data, several commenters alleged that JP Morgan Bank, Chase Mortgage, Chase USA, and Bank One disproportionately excluded or denied African-American and Hispanic applicants for home mortgage loans in various MSAs in several states and did not adequately serve LMI geographies and individuals and small businesses.[55] These commenters asserted that JP Morgan's denial rates for minority applicants were higher than the rates for nonminority applicants and that JP Morgan's denial disparity ratios compared unfavorably with those ratios for the aggregate lenders in certain MSAs. In the JP Morgan/Bank One Corporation Order and the JP Morgan/ChaseFSB Order, the Board considered substantially similar comments about JP Morgan's HMDA data for MSAs in several of these states, and the Board's HMDA analysis in those orders is incorporated by reference.[56]

The 2002 data indicate that JP Morgan's denial disparity ratios[57] for African-American and Hispanic applicants for HMDA-reportable loans overall were comparable with or more favorable than those ratios for the aggregate lenders in all markets reviewed, with the exception of Florida.[58] JP Morgan's percentages of total HMDA-reportable loans to African-Americans and Hispanic borrowers generally were comparable with or exceeded the total percentages for aggregate lenders in most of the areas reviewed. Moreover, JP Morgan's percentage of total HMDA-reportable loans to borrowers in minority census tracts generally was

54. The Board analyzed 2001 and 2002 HMDA data for JP Morgan Bank and Bank One and reviewed HMDA-reportable loan originations in various MSAs and states. The data for each state consisted of total mortgage originations in metropolitan areas included in the assessment areas of both banks.

55. Several commenters criticized the lending performance of JP Morgan or Bank One in markets where they had no branches and, therefore, no obligations under the CRA.

56. The Board reviewed the following MSAs in the JP Morgan/Bank One Corporation Order: Benton Harbor and Detroit, both in Michigan; Boston, Massachusetts; Dallas, Texas; Memphis, Tennessee; Raleigh, North Carolina; Richmond, Virginia; San Francisco, California; St. Louis, Missouri; and Washington, D.C. In the JP Morgan/Chase FSB Order, the Board reviewed the following MSAs: Denver, Colorado; Jackson, Mississippi; Portland, Oregon; and Seattle, Washington. Commenters on this proposal cited these MSAs again. The only MSAs identified by commenters that were not discussed in the two previous JP Morgan orders were Little Rock, Arkansas; Tucson, Arizona; and Milwaukee, Wisconsin. HMDA data for these additional MSAs indicate that the percentage of JP Morgan's loan originations to African Americans and Hispanics equaled or exceeded those percentages for the aggregate lenders.

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

58. JP Morgan operates in a portion of Florida through branches of JP Morgan Trust. As previously noted, the bank is a wholesale institution that does not engage in retail bank activities.

comparable with or exceeded the total percentage for aggregate lenders in the areas reviewed.[59]

The 2002 data indicate that Bank One's denial disparity ratios for African-American and Hispanic applicants for HMDA-reportable loans overall in the areas reviewed generally were comparable with or more favorable than those ratios for the aggregate lenders.[60] These data also indicate that Bank One's percentage of total HMDA-reportable loans to borrowers in minority census tracts generally was comparable with or exceeded the total percentage for the aggregate lenders.[61] Moreover, Bank One Corporation's percentage of total HMDA-reportable loans to African-American and Hispanic borrowers generally was comparable with or exceeded the total percentage for the aggregate lenders in the markets reviewed.

Although the HMDA data may reflect certain disparities in the rates of loan application, originations, and denials among members of different racial groups and persons with different income levels in certain local areas, the HMDA data generally do not indicate that JP Morgan and Bank One Corporation are excluding any race, income segment of the population, or geographic area 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 the covered loans.[62] 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 the subsidiary depository institutions of JP Morgan and Bank One Corporation with fair lending laws. Examiners noted no fair lending law issues or concerns in the CRA performance evaluations of the depository institutions controlled by JP Morgan or Bank One Corporation.

The record also indicates that JP Morgan and Bank One Corporation have taken steps to ensure compliance with fair lending laws. Both organizations have instituted corporate-wide policies and procedures to help ensure compliance with all fair lending and other consumer protection laws and regulations. These programs include file reviews for compliance with federal and state fair lending and other consumer protection rules and regulations, fair lending policies, and testing the integrity of HMDA data. JP Morgan and Bank One Corporation also conduct regular compliance and fair lending training for their employees. JP Morgan has stated that it is reviewing the compliance programs of Bank One Corporation and that, on consummation of the transaction, the combined organization will adopt the best practices of both JP Morgan and Bank One Corporation.

The Board also has considered the HMDA data in light of the programs described above and the overall performance records of the subsidiary banks of JP Morgan and Bank One Corporation under the CRA. These established efforts demonstrate that the banks are actively helping to meet the credit needs of their entire communities.

F. Subprime Lending and Abusive Lending Practices

As previously noted, a number of commenters cited concerns about the subprime mortgage lending and related activities of JP Morgan and Bank One Corporation. These commenters expressed concern that both organizations originate subprime loans and other alternative loan products and criticized the role of JP Morgan in purchasing subprime loans from other lenders, securitizing packages of subprime loans, purchasing securitized packages of subprime loans, and servicing or acting as trustee of record for subprime loan pools. Commenters generally argued that JP Morgan purchased subprime loans and securitized packages of subprime loans without performing adequate due diligence to screen for ''predatory'' loans. Other commenters expressed concern that JP Morgan and Bank One Corporation were financing unaffiliated lenders who provided subprime mortgage loans and alternative products such as payday loans.

JP Morgan Bank, Chase USA, and CMMC originate subprime mortgage loans. Bank One Corporation and its subsidiaries, however, do not engage in this activity.[63] CMMC services subprime mortgage loans and purchases subprime loans in the secondary market. JP Morgan

59. For purposes of this HMDA analysis, a minority census tract means a census tract with a minority population of 80 percent or more.

60. One commenter alleged disparities in Bank One's mortgage lending record in the New Orleans, Louisiana, and Phoenix, Arizona, MSAs. The OCC reviewed and rejected this allegation in connection with its approval of JP Morgan's acquisition of Bank One's corporate trust business in November 2003. The Board also notes that Bank One's HMDA-related lending in the Phoenix MSA equals or exceeds such lending by the aggregate lenders, including loans to all applicant groups that are frequently underserved.

61. Delaware was the only assessment area where Bank One's lending in minority census tracts was less favorable than the aggregate lenders. Bank One does not operate a retail branch in the state.

62. 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.

63. Bank One does not originate subprime mortgage loans through brokers or purchase loans from correspondent lenders. It also does not originate or purchase ''high cost'' mortgage loans, as defined in the Home Ownership and Equity Protection Act (''HOEPA''), and originates prime mortgage loans only for sale in the secondary market.

Securities, Inc. (''JPMSI''), a subsidiary of JP Morgan, securitizes subprime mortgage loans originated by CMMC, its affiliates, and third parties. As an underwriter of mortgage-related asset-backed securities, JPMSI does not control the selection criteria for the loans and receivables in the loan pools that it securitizes and plays no role in the lending practices or credit review processes of the lenders involved.[64] JP Morgan Bank is a warehouse lender providing temporary financing to mortgage lenders, including non-affiliated subprime mortgage lenders. The bank also serves as a trustee for securities backed by mortgages or other assets, including subprime mortgage loans. Bank One also participates in the securitization of mortgage loans as an underwriter of mortgage-backed securities and provides warehouse lines of credit to some mortgage lenders engaged in subprime lending. In addition, JP Morgan and Bank One Corporation lend to companies that make payday or tax-anticipation-refund loans.

The Board has previously noted that subprime lending is a permissible activity and can provide needed credit to consumers who have difficulty meeting conventional underwriting criteria.[65] The Board continues to expect all bank holding companies and their affiliates to conduct their operations related to subprime lending free of any abusive lending practices and in compliance with all applicable law, including fair lending laws.[66]

JP Morgan has a number of policies and procedures in place to ensure that its activities are conducted in compliance with applicable fair lending laws and are not abusive. JP Morgan's subsidiary, CMMC, has developed lending practices that are used by all of the subsidiary's mortgage lending affiliates. CMMC's mortgage-underwriting procedures assess the borrower's ability to repay the mortgage debt as well as the borrower's total debt. Applications are also reviewed for loan-to-value ratios and credit bureau scores to determine if the applicant is eligible for a prime mortgage loan from a JP Morgan subsidiary. Qualified applicants are offered the opportunity to have their applications processed as prime mortgage loans. CMMC's lending procedures also prohibit HOEPA loans, mandatory prepayment penalties, short-term subprime loans with balloon payments, loan-to-value ratios in excess of 100 percent, and mandatory arbitration. As discussed above, JP Morgan has implemented corporate-wide policies and procedures to help ensure compliance with all fair lending and other consumer protection laws. In addition, CMMC's procedures require reappraisal of any real estate if questions are raised about its value. This process uses software programs that review recent sales and foreclosures in the area to identify real estate that might be overvalued.

JP Morgan has implemented a system of due diligence to help ensure that it does not purchase or otherwise invest in ''predatory'' subprime loans. These practices include requiring originating lenders to meet specific criteria established by CMMC, conducting on-site due diligence of the lender and its operations before purchasing their loans, and obtaining representation and warranties in the purchase agreements that the loans are not ''high cost,'' ''predatory,'' or abusive under federal, state, or local laws and ordinances and that the lender uses procedures to ensure that no such loans are sold.[67]

In addition, JP Morgan follows policies and procedures, including sampling loans in the pool, to help ensure that the subprime loans it purchases and securitizes are in compliance with applicable state and federal consumer protection laws. The loan sampling process includes obtaining a secondary value on the mortgaged property, performing cost tests before purchase, and performing targeted reviews of purchased loans. The review also seeks to identify any instances of ''equity stripping.'' Moreover, JP Morgan conducts a due diligence review of firms selling subprime loans and the firms selected to service loans in each securitization to help prevent the purchase and securitization of loans that are not in compliance with applicable federal and state consumer protection laws.[68]

JP Morgan and Bank One Corporation consider the reputation of potential customers engaged in subprime lending that apply for warehouse lines of credit and have other protections in place to limit transactions with lenders that might originate loans with abusive terms. These practices include accepting only conforming mortgages as collateral for a warehouse line of credit and obtaining representations and warranties in loan agreements that confirm the borrower's compliance with all applicable laws. When providing warehouse lines of credit to lenders making tax-refund-anticipation and payday loans, JP Morgan and Bank One Corporation state that their credit evaluations of these types of lenders include, as applicable, the customer's reputation and other character-related issues, as well as any issues peculiar to the borrower's business or opera-

64. JPMSI does not underwrite HOEPA mortgages or other ''high cost''mortgages as defined under state law.

65. *See, e.g., Bank of America Corporation*, 90 *Federal Reserve Bulletin* 217 (2004) (''Bank of America Order''); *Royal Bank of Canada*, 88 *Federal Reserve Bulletin* 385 (2002).

66. The Board notes that the OCC has responsibility for enforcing compliance with fair lending laws by national banks and that the FTC, HUD, and DOJ have primary responsibility for enforcing such compliance by nondepository institutions.

67. Several commenters discussed a well-publicized series of foreclosures involving mortgages originated by JP Morgan on homes purchased in the Poconos during the last decade. The Board previously has considered comments about these mortgages in the context of recent applications by JP Morgan or JP Morgan Bank and hereby adopts the findings in those cases. The Board notes, moreover, that JP Morgan has implemented a plan to stabilize the community by reducing mortgage interest rates and the outstanding principal balances to reflect the current value of the properties. More than 200 affected borrowers have accepted loan modification.

68. One commenter also stated that Fairbanks Capital Corporation, a loan servicer used by JP Morgan and Bank One Corporation, engaged in illegal practices in servicing subprime loans. The commenter's allegations were addressed in a settlement with the FTC and HUD dated November 12, 2003, by Fairbanks Capital Holding Corporation, which included its wholly owned subsidiary, Fairbanks Capital Corporation, and the founder of both entities. Neither JP Morgan nor Bank One Corporation was implicated in the complaint filed jointly by the FTC and HUD. The settlements resolved the complaint's allegations, enjoined the defendants from future law violations, and imposed restrictions on their business practices.

tions that might affect credit risk. These policies and procedures are designed to reduce the likelihood that either organization will be involved in ''predatory'' or abusive lending practices. Moreover, neither JP Morgan nor Bank One Corporation plays any role in the lending practices or credit review processes of these lenders.

G. Branch Closings

Several commenters expressed concerns that the proposed merger would result in possible branch closings and the Board has carefully considered these comments in light of all the facts of record. JP Morgan has represented that any merger-related branch closings, relocations, or consolidations would be determined after the proposed merger of JP Morgan Bank and Merged Lead Banks later this year. The Board notes that there is little geographic overlap between the branches of the subsidiary banks of JP Morgan and Bank One Corporation. JP Morgan also represents that no decision has been made on which organization's branch closure policy would be in effect after consummation of the proposed merger. Both policies require review of a number of factors before closing or consolidating a branch, including an assessment of the branch, the demographics of the market, a profile of the community where the branch is located, and the effect of the proposed action on customers. The most recent CRA evaluations of JP Morgan Bank[69] and Bank One-Illinois[70] noted favorably the banks' records of opening and closing branches.

The Board also has considered the fact that federal banking law provides a specific mechanism for addressing branch closings.[71] 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 Board and the OCC, as the appropriate federal supervisors of JP Morgan Bank and Bank One Corporation's subsidiary banks will continue to review the banks' branch closing record in the course of conducting CRA performance evaluations.

H. Other Matters

Many commenters discussed JP Morgan's Community Development Initiative. A number of commenters praised the Initiative as indicative of JP Morgan's commitment to the communities it serves. Other commenters, however, expressed concerns about the Community Development Initiative. Some criticized it for providing insufficient funding for loans, investments, and grants or for lacking specific lending and investment commitments by locality, product, or program. Others urged the Board to require JP Morgan to enter into or renew agreements with certain community organizations.

As the Board previously has explained, in order to approve a proposal to acquire an insured depository institution, an applicant must demonstrate a satisfactory record of performance under the CRA without reliance on plans or commitments for future action.[72] Moreover, the Board has consistently stated that neither the CRA nor the federal banking agencies' CRA regulations require depository institutions to make pledges or enter into commitments or agreements with any organization. The Board views the enforceability of pledges, initiatives, and agreements with third parties as matters outside the scope of the CRA.[73] In this case, as in past cases, the Board instead has focused on the demonstrated CRA performance record of the applicant and the programs that the applicant has in place to serve the credit needs of its CRA assessment areas at the time the Board reviews the proposal under the convenience and needs factor. In reviewing future applications by JP Morgan under this factor, the Board similarly will review JP Morgan's actual CRA performance record and the programs it has in place to meet the credit needs of its communities at the time of such review.

I. Conclusion on Convenience and Needs Considerations

The Board recognizes that this proposal represents a significant expansion of JP Morgan and its scope of operations. Accordingly, an important component of the Board's review has been its consideration of the effects of the proposal on the convenience and needs of all the communities served by JP Morgan and Bank One Corporation.

In conducting its review, the Board has weighed the concerns expressed by commenters in light of all the facts of record, including the overall CRA records of the depository institutions of JP Morgan and Bank One Corporation.

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69. Examiners stated that JP Morgan Bank's record of opening and closing branches did not adversely affect the accessibility of the bank's delivery systems. JP Morgan Bank sold, relocated, or consolidated 23 branches during its most recent CRA evaluation period. Ten branches were consolidated into other branches of the bank, twelve branches were relocated, and one branch was sold. One branch was relocated from a middle-income to a moderate-income census tract, and the remaining relocations involved census tracts with the same income levels. Of the ten consolidations, only two changed from LMI census tracts to non-LMI census tracts. The remaining consolidations involved census tracts with the same income levels.

JP Morgan reported that in 2003, JP Morgan Bank closed one LMI branch in Austin, Texas; consolidated one non-LMI branch into a nearby non-LMI branch in Mount Kisco, New York; and relocated one branch in Brooklyn, New York, and Bridgeport and Ridgefield, both in Connecticut. The relocations did not change the census-tract-income designation of the branches. JP Morgan Bank also opened a non-LMI branch in Pearland, Texas.

70. Bank One currently is expanding its branch network and has opened 58 branches in 2003. It recently announced plans to open 100 branches each year for the next three years.

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

72. *See* Bank of America Order; *NationsBank*, 84 *Federal Reserve Bulletin* 858 (1998).

73. *See, e.g.*, Bank of America Order at 52; *Citigroup Inc.*, 88 *Federal Reserve Bulletin* 485, 488 (2002).

A significant number of commenters have expressed support for the proposal based on the records of both organizations in helping to serve the banking needs and, in particular, the lending needs of their entire communities, including LMI areas. Other commenters have expressed concern about specific aspects of JP Morgan's or Bank One Corporation's record of performance under the CRA in their assessment areas and have expressed reservations about whether the resulting organization would be as responsive to the banking and credit needs of its community as the two organizations are now. The Board has carefully considered these concerns in the context of the overall CRA records of JP Morgan and Bank One Corporation, reports of examinations of CRA performance, and information provided by JP Morgan, including its responses to comments. The Board also has considered information submitted by JP Morgan concerning its performance under the CRA since its last CRA performance evaluation.

As discussed in this order, the record of this proposal demonstrates that the subsidiary depository institutions of JP Morgan and Bank One Corporation have strong records of meeting the credit needs of their communities. The Board expects the resulting organization to continue to help serve the banking and credit needs of all its communities, including LMI neighborhoods. Based on all the facts of 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 of the proposal.

Requests for Additional Public Meetings

As noted above, the Board held public meetings on the proposal in New York and Chicago. A number of commenters requested that the Board hold additional public meetings or hearings, including at locations in Florida, Texas, and California. The Board has carefully considered these requests in light of the BHC Act, the Board's Rules of Procedure, and the substantial record developed in this case.[74] As previously discussed, more than 150 interested persons appeared and provided oral testimony at the two public meetings held by the Board. Attendees included various elected officials, members of community groups, and representatives of businesses and business groups from cities and towns nationwide. In addition, the Board provided a period of more than 80 days for interested persons to submit written comments on the proposal. More than 260 interested persons who did not testify at the public meetings provided written comments.

In the Board's view, interested persons have had ample opportunity to submit their views on this proposal. Numerous commenters, in fact, submitted substantial materials that have been considered carefully by the Board in acting on the proposal. Commenters requesting additional public meetings have failed to demonstrate why their written comments do not adequately present their views, evidence, and allegations. They also have not shown why the public meetings in New York and Chicago and the extended comment period did not provide an adequate opportunity for all interested persons to present their views and concerns. For these reasons, and based on all the facts of record, the Board has determined that additional public meetings or hearings are not required and are not necessary or warranted to clarify the factual record on the proposal. Accordingly, the requests for additional public meetings or hearings are hereby denied.[75]

Conclusion

Based on the foregoing, and in light of all the facts of record, the Board has determined that the applications should be, and hereby are, approved. In reaching this conclusion, the Board has carefully considered all oral testimony and the written comments regarding the proposal in light of the factors it is required to consider under the BHC Act and other applicable statutes.

Approval of the applications is specifically conditioned on compliance by JP Morgan with all the commitments made to the Board in connection with the proposal and with the conditions stated or referenced in this order. For purposes of this transaction, these commitments and conditions are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

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74. Section 3(b) of the BHC Act does not require that the Board hold a public hearing on an application unless the appropriate supervisory authority for a bank to be acquired makes a timely written recommendation of denial. (12 U.S.C. § 1842(b). In this case, the Board has not received such a recommendation from any state or federal supervisory authority.

75. A number of commenters requested that the Board delay action on the proposal or extend the comment period until JP Morgan:

(i) Provides more detail about its Community Development Initiative,
(ii) Enters into a written, detailed, and publicly verifiable CRA agreement negotiated with community groups, or
(iii) Enters into new CRA agreements with local community groups.

The Board believes that the record in this case does not warrant postponing its consideration of the proposal. During the application process, the Board has accumulated a significant record, including reports of examination, supervisory information, public reports and information, and considerable public comment. The Board believes this record is sufficient to allow it to assess the factors it is required to consider under the BHC Act. The BHC Act and the Board's regulations establish time periods for consideration and action on proposals such as the current proposal. Moreover, as discussed more fully above, the CRA requires the Board to consider the existing record of performance of an organization and does not require that the organization enter into contracts or agreements with others to implement its CRA programs. For the reasons discussed above, the Board believes that commenters have had ample opportunity to submit their views and, in fact, they have provided substantial written submissions and oral testimony that have been considered carefully by the Board in acting on the proposal. Based on a review of all the facts of record, the Board concludes that delaying consideration of the proposal, granting another extension of the comment period, or denying the proposal on the grounds discussed above, including informational insufficiency, is not warranted.

The merger of JP Morgan and Bank One Corporation and the acquisition of Bank One Corporation's subsidiary banks shall not be consummated before the fifteenth calendar day after the effective date of this order, and no part of the proposal shall be consummated later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of New York, acting pursuant to delegated authority.

By order of the Board of Governors, effective June 14, 2004.

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

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Appendix A

Banking Markets in which JP Morgan and Bank One Corporation Compete Directly

Delaware Banking Market

Wilmington

New Castle County, Delaware, and Cecil County, Maryland.

Florida Banking Market

West Palm Beach

The portion of Palm Beach County east of Loxahatchee and the towns of Indiantown and Hobe Sound.

Texas Banking Markets

Austin

Austin MSA.

Dallas

Dallas and Rockwall Counties; the southeastern portion of Denton County, including the towns of Denton and Lewisville; the southwestern portion of Collin County, including the towns of McKinney and Plano; and the towns of Arlington, Ferris, Forney, Grapevine, Midlothian, Terrell, and Waxahachie.

Fort Worth

Johnson and Parker Counties; Tarrant County, excluding the towns of Grapevine and Arlington; and the southwestern portion of Denton County, including the towns of Roanoke and Justin; and the towns of Boyd, Newark, and Rhome.

Houston

Houston Ranally Metropolitan Area and Montgomery County.

San Antonio

San Antonio MSA and Kendall County.

Appendix B

Banking Market Data

Unconcentrated Banking Market

Fort Worth, Texas

JP Morgan operates the seventh largest depository institution in the market, controlling deposits of $512.3 million, representing approximately 4 percent of market deposits. Bank One Corporation operates the largest depository institution in the market, controlling deposits of $2.1 billion, representing approximately 16.1 percent of market deposits. After the proposed merger, JP Morgan would operate the largest depository institution in the market, controlling deposits of approximately $2.6 billion, representing approximately 20.2 percent of market deposits. The HHI would increase by 130 points to 991, and 59 depository institutions would remain in the banking market.

Moderately Concentrated Banking Markets

Austin, Texas

JP Morgan operates the fourth largest depository institution in the market, controlling deposits of $933.3 million, representing approximately 7.7 percent of market deposits. Bank One Corporation operates the third largest depository institution in the market, controlling deposits of $1.5 billion, representing approximately 12.2 percent of market deposits. After the proposed merger, JP Morgan would operate the largest depository institution in the market, controlling deposits of approximately $2.4 billion, representing approximately 19.9 percent of market deposits. The HHI would increase by 188 points to 1097, and 58 depository institutions would remain in the banking market.

Dallas, Texas

JP Morgan operates the fourth largest depository institution in the market, controlling deposits of $7.4 billion, representing approximately 11.6 percent of market deposits. Bank One Corporation operates the second largest depository institution in the market, controlling deposits of $8.1 billion, representing approximately 12.6 percent of market deposits. After the proposed merger, JP Morgan would operate the largest depository institution in the market, controlling deposits of $15.5 billion, representing approximately 24.2 percent of market deposits. The HHI would increase by 292 points to 1321, and 113 depository institutions would remain in the banking market.

San Antonio, Texas

JP Morgan operates the ninth largest depository institution in the market, controlling deposits of $448.8 million, representing approximately 2.3 percent of market deposits. Bank One Corporation operates the sixth largest depository institution in the market, controlling deposits of $569 million, representing approximately 3 percent of market deposits. After the proposed merger, JP Morgan would operate the sixth largest depository institution in the market, controlling deposits of approximately $1 billion, representing approximately 5.3 percent of market deposits. The HHI would increase by 14 points to 1530, and 50 depository institutions would remain in the banking market.

West Palm Beach, Florida

JP Morgan operates the 31st largest depository institution in the market, controlling deposits of $65.8 million, representing less than 1 percent of market deposits. Bank One Corporation operates the 27th largest depository institution in the market, controlling deposits of $94.4 million, representing less than 1 percent of market deposits. After the proposed merger, JP Morgan would operate the 18th largest depository institution in the market, controlling deposits of $160.2 million, representing less than 1 percent of market deposits. The HHI would increase by less than 1 point to 1325, and 55 depository institutions would remain in the banking market.

Highly Concentrated Banking Market

Wilmington, Delaware

JP Morgan operates the second largest depository institution in the market, controlling deposits of $6.6 billion, representing 10.7 percent of market deposits. Bank One Corporation operates the sixth largest depository institution in the market, controlling deposits of $2.6 billion, representing 4.3 percent of market deposits. After the proposed merger, JP Morgan would remain the second largest depository institution in the market, controlling deposits of approximately $9.3 billion, representing approximately 14.9 percent of market deposits. The HHI would increase by 91 points to 3060, and 33 depository institutions would remain in the banking market.

Appendix C

CRA Performance Evaluations of Bank One Corporation's Subsidiary Depository Institutions

1. *Subsidiary Depository Institutions in Operation*[76]

Subsidiary Depository Institution	CRA Performance Rating	Date	Agency
Bank One-Dearborn	Outstanding	March 2001	OCC
Bank One-Ohio	Satisfactory	March 2000	OCC
First USA Bank N.A., Wilmington, Delaware[77]	Outstanding	March 2002	OCC

76. Bank One Trust Company, National Association, Columbus, Ohio, is not examined for CRA performance because it is a special-purpose entity that is exempt from CRA requirements.

77. First USA Bank N.A. now does business as Bank One, Delaware, National Association.

2. *Entities Merged into Bank One*

Subsidiary Depository Institution	CRA Performance Rating	Date	Agency
American National	Satisfactory	December 1999	OCC
Bank One, Arizona, National Association, Phoenix, Arizona	Satisfactory	June 1999	OCC
Bank One, Colorado, National Association, Denver, Colorado	Outstanding	March 2000	OCC
Bank One, Florida, Venice, Florida	Satisfactory	September 1999	FDIC
Bank One-Illinois	Satisfactory	March 31, 2000	OCC
Bank One, Indiana, National Association, Indianapolis, Indiana	Satisfactory	June 1999	OCC
Bank One, Kentucky, National Association, Louisville, Kentucky	Satisfactory	March 2000	OCC
Bank One, Louisiana, National Association, Baton Rouge, Louisiana	Satisfactory	June 1999	OCC
Bank One, Michigan, National Association, Detroit, Michigan	Outstanding	December 2000	OCC
Bank One, Oklahoma, National Association, Oklahoma City, Oklahoma	Satisfactory	June 1999	OCC
Bank One-Springfield	Satisfactory	December 1999	OCC
Bank One, Texas, National Association, Dallas, Texas	Satisfactory	March 2000	OCC
Bank One, Utah, National Association, Salt Lake City, Utah	Outstanding	March 2000	OCC
Bank One, Wisconsin, Milwaukee, Wisconsin	Outstanding	February 2000	FDIC

3. *Entities Merged into Bank One-Ohio*

Subsidiary Depository Institution	CRA Performance Rating	Date	Agency
Bank One, West Virginia, Huntington, National Association, Huntington, West Virginia	Satisfactory	March 2000	OCC
Bank One, West Virginia, Wheeling, National Association, Wheeling, West Virginia	Satisfactory	March 2000	OCC

Manulife Financial Corporation
Toronto, Canada

John Hancock Financial Services, Inc.
Boston, Massachusetts

Order Approving Formation of Bank Holding Companies and Elections of Financial Holding Company Status

Manulife Financial Corporation (''Manulife'') has requested the Board's approval under section 3 of the Bank Holding Company Act (''BHC Act'')[1] to become a bank holding company and acquire all the voting shares of John Hancock Financial Services, Inc. (''John Hancock'') (together, ''Applicants''), and thereby indirectly acquire First Signature Bank and Trust Company, Portsmouth, New Hampshire (''First Signature''), a wholly owned direct subsidiary of John Hancock.[2] John Hancock has also requested the Board's approval to become a bank holding company and retain control of First Signature.[3] As part of the proposal, Manulife and John Hancock have filed with the Board elections to become financial holding companies pursuant to sections 4(k) and (*l*) of the BHC Act and section 225.82 of the Board's Regulation Y.[4]

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (68 *Federal Register* 70,506 (2003)). The time for filing comments has expired, and the Board has considered the proposal in light of the factors set forth in section 3 of the BHC Act.

Manulife, with total assets of $115.3 billion, is a Canadian insurance and financial services firm engaged principally in the business of underwriting life and health insurance and in reinsurance activities.[5] Manulife also engages in a variety of other financial activities in Canada, the United States, and other countries, including investment advisory and management services and securities brokerage activities. Manulife principally operates in the United States through subsidiaries that include two insurance companies, a registered investment advisor, and a registered open-end investment management company. Through these subsidiaries, Manulife offers individual life insurance, group pension, and annuity products and distributes educational savings plans and managed account products in every state in the United States. Manulife's only subsidiary bank, Manulife Bank of Canada, Waterloo, Ontario (''Manulife Bank''), has no banking operations in the United States.[6]

John Hancock, with total assets of $111.3 billion, is an insurance and financial services company engaged principally in underwriting life and long-term care insurance.[7] John Hancock also provides annuities, mutual funds, and other investment products, as well as investment advisory and management services, to retail and institutional customers in the United States and internationally. First Signature is a New Hampshire state chartered bank and John Hancock's only subsidiary depository institution. First Signature, the 8th largest depository institution in New Hampshire, controls assets of $355 million, which represents less than 2 percent of assets held by banks in the state.[8]

The combined organization would be the second largest life insurer in North America by market capitalization.

Factors Under the Bank Holding Company Act

The BHC Act sets forth the factors the Board must consider when reviewing the formation of a bank holding company or the acquisition of a bank. These factors are the competitive effects of the proposal in the relevant geographic markets; the financial and managerial resources and future prospects of the companies and banks involved in the proposal; the convenience and needs of the communities to be served, including the records of performance of the insured depository institutions involved in the transaction under the Community Reinvestment Act (''CRA'')[9] and the availability of information to determine and enforce compliance with the BHC Act and other applicable federal laws.[10]

The Board has considered these factors in light of a record that includes information provided by Applicants, confidential supervisory and examination information, and publicly reported financial and other information. The Board also has contacted and considered information pro-

1. 12 U.S.C. § 1842.

2. Manulife proposes to acquire John Hancock through a merger with a newly formed direct subsidiary of Manulife. After the merger, John Hancock would be a wholly owned direct subsidiary of Manulife.

3. John Hancock holds First Signature in accordance with grandfather rights under section 4(f) of the BHC Act (12 U.S.C. § 1843(f)), which exempts from treatment as a bank holding company a company that has continually owned an institution that became a bank as a result of the enactment of the Competitive Equality Banking Act of 1987 (Pub. L. No. 100-86 (1987)). First Signature is an insured bank that currently accepts demand deposits but does not make commercial loans. On consummation of this proposal, neither John Hancock nor Manulife would be entitled to the exemption under section 4(f) of the BHC Act.

4. 12 U.S.C. §§ 1843(k) & (*l*); 12 CFR 225.82.

5. Asset data are as of December 31, 2003. Manulife was incorporated under Canada's Insurance Companies Act in 1999 to become the holding company for The Manufacturers Life Insurance Company (''Manufacturers Life''), which converted from mutual to stock organization in September 1999. Manufacturers Life is now a life insurance company with common shares and a wholly owned direct subsidiary of Manulife.

6. Manulife Bank, a wholly owned subsidiary of Manufacturers Life, was established in 1993 as the first federally regulated bank in Canada owned by an insurance company.

7. Asset data are as of December 31, 2003. John Hancock was incorporated in 1999 to become the holding company for John Hancock Mutual Life Insurance Company (''John Hancock Life''), which converted from mutual to stock organization on February 1, 2000. John Hancock Life is now a life insurance company with common shares and a wholly owned direct subsidiary of John Hancock.

8. Asset and ranking data are as of December 31, 2003.

9. 12 U.S.C. § 2901 *et seq*.

10. 12 U.S.C. § 1842(c). In cases involving interstate bank acquisitions by bank holding companies, the Board also must consider the concentration of deposits nationwide and in certain individual states, as well as compliance with the other provisions of section 3(d) of the BHC Act (12 U.S.C. § 1842(d)).

vided by Canada's Office of the Superintendent of Financial Institutions (''OSFI''), the primary home country supervisor of Manulife and Manulife Bank, and the appropriate federal and state agencies, including the relevant state insurance commissioners, the Federal Deposit Insurance Corporation (''FDIC''), and the Securities and Exchange Commission (''SEC'').[11]

Competitive Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or be in furtherance of any combination to monopolize or attempt to monopolize the business of banking in any part of the United States. 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 in that banking market are clearly outweighed in the public interest by the probable effects of the proposal in meeting the convenience and needs of the community to be served.[12]

The proposal involves the acquisition of a bank by Manulife, which does not have any banking operations in any banking market in the United States. 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 banking resources in any relevant banking market, and that competitive considerations are consistent with approval.[13]

Financial and Managerial Factors

As previously noted, the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and banks involved in an acquisition.[14] The Board has reviewed information provided by Manulife and John Hancock, publicly reported and other financial information, and confidential examination and other supervisory information evaluating the financial and managerial strength of Manulife, John Hancock, and First Signature. In addition, the Board has consulted relevant supervisory authorities in the United States and Canada.

The Board has consistently considered capital adequacy to be an especially important aspect of the analysis of financial factors.[15] Manulife's capital levels are considered equivalent to those that would be required of a U.S. banking organization under similar circumstances. All the subsidiaries of Manulife and John Hancock that are subject to regulatory capital requirements currently exceed those minimum regulatory capital requirements. In addition, First Signature is well capitalized under relevant federal guidelines, and would remain so on consummation. Other financial factors are also consistent with approval.[16]

The Board has carefully considered the managerial resources of Manulife, John Hancock, and First Signature in light of all the facts of record, including a public comment on the proposal.[17] The Board notes that First Signature is considered well managed, and is expected to remain so after consummation. Based on all the facts of record, the Board has concluded that the financial and managerial resources and future prospects of Applicants and First Signature are consistent with approval under section 3 of the BHC Act.

Convenience and Needs Considerations

In acting on the proposal, the Board must consider the effects of the proposal on the convenience and needs of the communities to be served and take into account the records of the relevant insured depository institutions under the CRA. 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.[18]

The Board has carefully considered the effects of the proposal on the convenience and needs of the communities to be served in light of all the facts of record, including the CRA performance record of First Signature, information provided by Applicants, and a public comment received on

11. The proposal is also subject to approval by the insurance commissioners of Massachusetts, Delaware, and Vermont, the states in which John Hancock's U.S. insurance company subsidiaries are domiciled, and by OSFI.

12. 12 U.S.C. § 1842(c)(1).

13. The combination of the nonbanking businesses of Manulife and John Hancock is subject to review for its potential effect on competition by several federal, state, and foreign regulators. The Applicants filed a pre-merger notification with the Federal Trade Commission and the Antitrust Division of the Department of Justice (''DOJ'') under the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a), and the DOJ granted early termination of the statutory waiting period on November 13, 2003.

14. 12 U.S.C. § 1842(c)(2).

15. *See Chemical Banking Corporation*, 82 *Federal Reserve Bulletin* 230 (1996).

16. A commenter expressed concern about press reports discussing a potential financial exposure of Manulife and John Hancock through John Hancock's holding of $152 million in public and private bonds issued by Parmalat Finanzaria SpA, an unaffiliated foreign company. The Board notes that the investment represented 0.1 percent of John Hancock's total assets and that John Hancock charged off most of that investment in 2003.

17. Citing various press reports, a commenter asserted that the activities of Manulife and John Hancock overseas have caused financial harm to individuals, damaged the environment, or caused other societal harm. The commenter also voiced concern about requests for information issued to Manulife by U.S. and Canadian regulators seeking information related to mutual fund activities. The commenter suggested that these issues reflect negatively on the managerial resources of Applicants. The Board notes that these contentions contain no evidence of illegality on the part of Manulife, nor do the press accounts indicate regulatory actions that would affect adversely the safety and soundness of the institutions involved in the proposal. The Board has consulted with and considered information received from the relevant supervisors and notes that, if any illegal activity is found, these agencies have ample authority to address such matters.

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

the proposal. Manulife currently does not control an institution subject to evaluation under the CRA. First Signature, the insured bank owned by John Hancock, received an overall rating of ''satisfactory'' at its most recent CRA performance examination by its primary federal supervisor, the FDIC, as of December 1, 1999. First Signature does not make commercial loans and has been designated as a wholesale institution for purposes of evaluation under the CRA.[19]

At the most recent examination, examiners characterized First Signature's loan products that target low- and moderate-income individuals as ''flexible and innovative.'' In considering First Signature's community development outreach, examiners reported that First Signature actively pursued opportunities to offer its specialized community development loan products, and that the Bank played a leadership role in many community development activities and organizations, including two affordable housing loan consortiums in New Hampshire.

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

Other Supervisory Considerations

The Board notes that a substantial portion of the U.S. activities of Manulife and John Hancock are subject to functional regulation by state insurance commissioners or the SEC. The Board will, consistent with the provisions of section 5 of the BHC Act as amended by the Gramm–Leach–Bliley Act, rely on the appropriate state insurance regulators and the SEC for examination and other supervisory information in fulfilling the Board's responsibilities as a holding company supervisor.

The Board also has considered the supervision of Manulife as a diversified financial services company organized in Canada. OSFI is the consolidated supervisor for Manulife and Manulife Bank and has legislative authority to supervise and set capital requirements for diversified financial services companies in Canada, including insurance holding companies. OSFI conducts inspections of Manulife and its subsidiaries, including Manulife Bank, and requires Manulife to submit reports about its operations on a consolidated basis. OSFI has stated that it supervises Manulife Bank in the same manner that it supervises other Canadian banks that the Board has previously determined to be subject to comprehensive consolidated supervision.[20] OSFI also may review material dealings between Manulife and its subsidiaries and has authority to require Manulife to take measures necessary to ensure the safety and soundness of the Manulife organization.

In accordance with section 3 of the BHC Act, Manulife has provided adequate assurances that it will make available to the Board information on its operations and activities and those of its affiliates that the Board deems appropriate to determine and enforce compliance with the BHC Act.[21] The Board has reviewed the restrictions on disclosure in jurisdictions where Manulife would have material operations and has communicated with relevant government authorities concerning access to information. Manulife has committed that, to the extent not prohibited by applicable law, it will make available to the Board such information on the operations of its affiliates that the Board deems necessary to determine and enforce compliance with the BHC Act and other applicable federal law. Manulife also has committed to cooperate with the Board to obtain any waivers or exemptions that may be necessary to enable its affiliates to make any such information available to the Board. In light of these commitments, the Board has concluded that Manulife has provided adequate assurances of access to any appropriate information the Board may request.

For these reasons, and based on all the facts of record, the Board has concluded that the supervisory factors it is required to consider under section 3(c)(3) of the BHC Act are consistent with approval.

Foreign Activities

Manulife Bank does not have operations in the United States. Accordingly, Manulife is not eligible under section 211.23(c) of Regulation K for the exemptions available to a qualifying foreign banking organization (''QFBO'').[22] Manulife has, therefore, requested that the Board make a specific determination of eligibility pursuant to section 211.23(e).[23] Based on all the facts of record, the Board has determined pursuant to section 211.23(e) that on consummation Manulife would be eligible for the exemptions available to a QFBO under section 211.23(c) of Regulation K and would not be eligible for the limited commercial and industrial activities exemption under section 211.23(f)(5)(iii).[24]

19. *See* 12 CFR 345.25(a). A commenter objecting to the proposal expressed concern that John Hancock planned to expand the activities of First Signature to those of a full-service bank without submitting a CRA plan as part of its application. Although on consummation of this proposal John Hancock could expand the scope of First Signature's activities, Applicants have stated that there are no current plans to do so. Moreover, the CRA requires that, in considering an acquisition proposal, the Board carefully review the existing CRA performance records of the relevant depository institutions. First Signature's future activities, performance under the CRA, and continued qualification as a wholesale institution will be reviewed by the FDIC in connection with future CRA evaluations of First Signature, and the Board will consider the actual CRA performance record in any subsequent application by Applicants to acquire a depository institution.

20. *See Canadian Imperial Bank of Commerce*, 85 *Federal Reserve Bulletin* 733 (1999); *Royal Bank of Canada*, 83 *Federal Reserve Bulletin* 442 (1997); *National Bank of Canada*, 82 *Federal Reserve Bulletin* 769 (1996); *Bank of Montreal*, 80 *Federal Reserve Bulletin* 925 (1994).

21. *See* 12 U.S.C. § 1842(c)(3)(A).

22. 12 CFR 211.23(c).

23. 12 CFR 211.23(e).

24. 12 CFR 211.23(f)(5)(iii). The Board has considered the factors specified in section 211.23(e) as they relate to Manulife's opera-

Other Issues

As noted above, Manulife and John Hancock engage primarily in a variety of insurance underwriting and sales activities, including underwriting life, health, and long-term care insurance, as well as reinsurance activities. Both companies also provide investment advisory and management services. These activities are permissible under the BHC Act for financial holding companies and, as described below, Manulife and John Hancock have elected to be financial holding companies for purposes of the BHC Act.

Manulife and John Hancock also engage in a limited number of activities that have not been approved under the BHC Act, including certain real estate investment, development, and management activities. Section 4(a)(2) of the BHC Act requires each company that becomes a bank holding company to conform its nonbanking activities and investments to the requirements of the BHC Act within two years from the date it becomes a bank holding company. The Board may extend this period for up to three years.[25] The Board's action on the proposal is subject to the condition that Applicants take all actions necessary to conform their activities and investments to the requirements of the BHC Act and the Board's regulations thereunder in a manner acceptable to the Board, including by divestiture if necessary, within two years of the date of consummation of the proposal or such extended time period that the Board, in its discretion, may grant.

Approval of Bank Holding Company Formations

Based on the foregoing, and in light of all the facts of record, the Board has determined that the applications to form bank holding companies should be, and hereby are, official.[26] In reaching its 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.[27]

Financial Holding Company Determination

Maulife and John Hancock have filed with the Board elections to become financial holding companies pursuant to sections 4(k) and (*l*) of the BHC Act and section 225.82 of Regulation Y. Manulife and John Hancock have certified that First Signature is well capitalized and well managed and would continue to be so on consummation, and they have provided all the information required by Regulation Y.

As discussed above, the Board has reviewed the examination ratings received by First Signature under the CRA and other relevant examinations and information.[28] Based on all the facts of record, the Board has determined that these elections to become financial holding companies will become effective on consummation of the proposal,[29] as long as First Signature continues to be well capitalized and well managed and has at least a ''satisfactory'' CRA rating on that date.

Conclusion

The Board's actions on this proposal are conditioned on compliance by Manulife and John Hancock with all the commitments made to the Board in connection with the proposal and with the conditions stated or referred to in this order, and receipt of all necessary regulatory approvals. For the purpose of these actions, these commitments

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tions and has determined that these factors are consistent with approval.

A commenter opposing Manulife's request for eligibility for the QFBO exemptions asserted that Manulife does not meet the definition of a foreign banking organization on technical grounds. The commenter also asserted that John Hancock would inappropriately benefit from a determination that Manulife is entitled to the QFBO exemptions. As noted above, however, the Board, after consideration of the required factors, has made a specific determination of eligibility pursuant to section 211.23(e). This QFBO determination does not apply to the non-U.S. operations of a domestic organization such as John Hancock.

25. Section 4(a)(2) authorizes the Board, on request, to grant up to three one-year extensions of this conformance period, if the Board finds that the extensions ''would not be detrimental to the public interest.'' (12 U.S.C. § 1843(a)(2).

26. A commenter requested that the Board extend the comment period on this proposal. The Board has accumulated a significant record in this case, including reports of examination, supervisory information, public reports and information, and public comment. In the Board's view, interested persons have had ample opportunity to submit views on the proposal and, in fact, the commenter has provided written submissions that the Board has considered carefully in acting on the proposal. The commenter's request for additional time to comment does not identify extraordinary circumstances that would justify an extension of the public comment period for this case. Moreover, the BHC Act and Regulation Y require the Board to act on proposals submitted under those provisions within certain time periods. (12 U.S.C. § 1842(b); 12 CFR 225.15(d). Based on a review of all the facts of record, the Board has concluded that the record in this case is sufficient to warrant Board action at this time and that an extension of the comment period is not warranted. Accordingly, the request for an extension of the comment period is denied.

27. The commenter also requested that the Board hold a public 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 any of the banks to be acquired makes a timely recommendation of denial of the application. The Board has not received such a recommendation. 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 commenter's request in light of all the facts of record. As noted above, interested persons, including the commenter, have had ample opportunity to submit comments on the proposal, and the commenter has submitted written comments that the Board has considered carefully in acting on the proposal. The commenter's request fails to demonstrate why its written comments do not present its views adequately or why a meeting or hearing otherwise would be necessary or appropriate. For these reasons, and based on all the facts of record, the Board has determined that a public hearing or meeting is not required or warranted in this case. Accordingly, the request for a public hearing on the proposal is denied.

28. *See* 12 U.S.C. § 2903(c).

29. Manulife intends to acquire John Hancock's direct and indirect nonbanking subsidiaries pursuant to section 4(k) of the BHC Act (12 U.S.C. § 1843(k)) and the post-transaction notice procedures of section 225.87 of Regulation Y (12 CFR 225.87).

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 acquisition of First Signature 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 periods are extended for good cause by the Board or the Federal Reserve Bank of Boston, acting pursuant to delegated authority.

By order of the Board of Governors, effective April 5, 2004.

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

Mountain Home Bancshares, Inc.
Mountain Home, Arkansas

Order Approving the Acquisition of a Bank Holding Company

Mountain Home Bancshares, Inc. (''Mountain Home''), 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 ((12 U.S.C. § 1842) to acquire Pocahontas Bankstock, Inc. (''Pocahontas'') and its subsidiary bank, Bank of Pocahontas (''BOP''), both in Pocahontas, Arkansas.[1]

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (69 *Federal Register* 20,623 (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.

Mountain Home is the 33rd largest depository organization in Arkansas, with total consolidated assets of $268.4 million. It controls First National Bank and Trust Company of Mountain Home (''First National''), Mountain Home, Arkansas, with deposits of $205.1 million, which represents less than 1 percent of total deposits of insured depository institutions in Arkansas (''state deposits'').[2] Pocahontas, with total consolidated assets of $129.7 million, is the 73rd largest depository organization in Arkansas, controlling deposits of $108 million. On consummation of the proposal, Mountain Home would become the 22nd largest depository organization in Arkansas, with total consolidated assets of approximately $398 million and deposits of approximately $313.2 million, which represents less than 1 percent of state deposits.

1. After consummation of the proposal, Mountain Home would operate BOP as a subsidiary bank for a period of time.

2. Asset data are as of December 31, 2003, and statewide deposit and ranking data are as of June 30, 2003.

Competitive Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of 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.[3]

Mountain Home and Pocahontas 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 adverse effect on competition or on the concentration of banking resources in any relevant banking market. Accordingly, the Board has determined 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. The Board has carefully considered these factors in light of all the facts of record, including reports of examination, other confidential supervisory information received from the primary federal banking agencies that supervise the institutions, information provided by Mountain Home, and public comment on the proposal.

Mountain Home is well capitalized and will remain so on consummation of the proposal. In addition, the Board has consulted with the Office of the Comptroller of the Currency (''OCC''), the primary federal supervisor of First National, about the proposal. The Board also has considered the managerial resources of Mountain Home and Pocahontas, including the management officials proposed for Pocahontas, and the examination records of those organizations and BOP, including their risk management systems and other policies.

A commenter opposing the proposal asserted that Pocahontas and BOP did not comply with a Cease and Desist Order issued to Pocahontas by the Federal Deposit Insurance Corporation (''FDIC'') regarding shareholder reporting requirements. The Cease and Desist Order was terminated by the FDIC on August 28, 2003.[4] The Board has

3. 12 U.S.C. § 1842(c)(1).

4. The commenter also contended that Pocahontas and BOP violated provisions of state law on minority shareholder rights and shareholder meeting requirements. In addition, the commenter alleged that he has not been provided with sufficient financial information about the proposed transaction to be able to determine the value of his stock ownership as a result of the proposal. Mountain Home stated that in accordance with its bylaws and with Arkansas law, Pocahontas will send advance notice of a special meeting to its shareholders that

considered the information provided by Mountain Home and Pocahontas in response to the comment and has reviewed confidential supervisory information about these matters.

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

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board is required to consider the effects of the proposal on the convenience and needs of the communities to be served and to take into account the records of the relevant insured depository institution under the Community Reinvestment Act (''CRA'').[5] 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 bank expansionary proposals.

The Board has considered carefully the convenience and needs factor and the CRA performance records of the subsidiary banks of Mountain Home and Pocahontas in light of all the facts of record. Considerations relating to the convenience and needs of the community, including the performance records of First National and BOP, are consistent with approval.[6]

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 Mountain Home with the conditions imposed in this order and the commitments made to the Board in connection with the application. For purposes of these actions, 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 acquisition of Pocahontas 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 7, 2004.

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

will include all the information necessary to vote on the proposal. The Board has consulted with the Arkansas State Banking Commission in light of the commenter's concerns. Moreover, courts have concluded that the Board's limited jurisdiction to review applications under the BHC Act does not authorize it to consider matters relating to shareholder relations and appropriate shareholder compensation. *See Western Bancshares, Inc. v. Board of Governors,* 480 F.2d 749 (10th Cir. 1973). These matters are governed by state corporate law and may be adjudicated by a court with jurisdiction to provide commenter with relief, if appropriate.

5. 12 U.S.C. § 2901 *et seq*.

6. At its most recent CRA evaluation by the OCC, First National received an overall ''outstanding'' rating, as of November 4, 2002. BOP received an overall ''satisfactory'' rating at its most recent CRA performance evaluation by the FDIC, as of November 1, 2002.

Sky Financial Group, Inc.
Bowling Green, Ohio

Order Approving the Acquisition of a Financial Holding Company and the Merger of Banks

Sky Financial Group, Inc. (''Sky Financial''), 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 (12 U.S.C. § 1842), to acquire Second Bancorp, Incorporated (''Second Bancorp'') and its subsidiary bank, The Second National Bank of Warren (''Second Bank''), both in Warren, Ohio. Sky Financial's subsidiary state member bank, Sky Bank, Salineville, Ohio, has requested the Board's approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. § 1828(c)) (the ''Bank Merger Act'') to merge with Second Bank, with Sky Bank as the surviving bank. In addition, Sky Bank has requested the Board's approval under section 9 of the Federal Reserve Act (''FRA'') (12 U.S.C. § 321) to establish branches at the locations of Second Bank's branches.[1]

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published in accordance with the BHC Act, the Bank Merger Act, and the Board's Rules of Procedure (12 CFR § 262.3(b)) in the *Federal Register* (69 *Federal Register* 17,416 (2004)) and locally. As required by the Bank Merger Act, reports of the competitive effects of the merger 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 proposal and all comments received in light of the factors set forth in section 3 the BHC Act, the Bank Merger Act, and the FRA.

Sky Financial, with total consolidated assets of approximately $12.9 billion, operates branches in Ohio, Pennsyl-

1. These branches are listed in appendix A.

vania, Michigan, Indiana, and West Virginia. Sky Financial controls the tenth largest insured depository institution in Ohio, controlling deposits of approximately $6.1 billion, which represents approximately 2.9 percent of total deposits in insured depository institutions in the state (''state deposits'').[2] Second Bancorp, with total consolidated assets of approximately $2.1 billion, controls the 15th largest insured depository institution in Ohio, controlling approximately $1.2 billion in deposits, which represents less than 1 percent of state deposits. On consummation of the proposal, Sky Financial would control the ninth largest insured depository institution in Ohio, controlling deposits of approximately $7.3 billion, which represents 3.4 percent of state deposits.

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 any 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 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.[3]

Sky Financial and Second Bancorp compete directly in the Akron, Ashtabula, Canton, Cleveland, and Youngstown–Warren banking markets in Ohio.[4] The Board has reviewed carefully the competitive effects of the proposal in each of these banking markets in light of all the facts of record. In particular, the Board has considered the number of competitors that would remain in the markets, the share of total deposits in depository institutions in the markets (''market deposits'') controlled by Sky Financial and Second Bancorp,[5] 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''),[6] and other characteristics of the markets.

Several factors indicate that the likely effect of consummation of this proposal on competition in these markets would not be significantly adverse.[7] Consummation of the proposal would be consistent with Board precedent and the DOJ Guidelines in the Akron, Canton, and Youngstown–Warren banking markets. These banking markets would remain moderately concentrated, and the increase in concentration in the Akron and Canton markets is small. The Cleveland market would remain highly concentrated on consummation, but the HHI would increase by only one point. In addition, more than ten competitors would remain in each of these markets.

The Ashtabula market would exceed DOJ Guidelines after consummation. Sky Financial would become the largest depository institution in the market and the HHI would increase by 289 points to 1,917. Although the Ashtabula market would become highly concentrated, numerous competitors would remain in the market. Of the nine remaining firms in the Ashtabula market, three firms, in addition to Sky Financial, would each control 18 percent or more of market deposits. The Ashtabula market also is attractive to entry, as demonstrated by the de novo entry of a bank there within the past year.

The Department of Justice has conducted a detailed review of the competitive effects of the proposal and has advised the Board that consummation of the proposal would not have a significantly adverse effect on competition in the Akron, Ashtabula, Canton, Cleveland, or Youngstown–Warren banking markets or any other relevant banking market. 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 is not likely to 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 Other Considerations

Section 3 of the BHC Act and the Bank Merger Act require the Board to consider the financial and managerial resources and future prospects of the companies and banks involved in the proposal. The Board has considered carefully these factors in light of all the facts of record, including reports of examination, other confidential supervisory information received from the primary federal banking

2. Asset data are as of December 31, 2003, and deposit data are as of June 30, 2003. In this context, the term ''insured depository institution'' includes insured commercial banks, savings associations, and savings banks.

3. 12 U.S.C. § 1842(c)(1).

4. These banking markets are described in Appendix B.

5. Market share data are as of June 30, 2003, 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 Board 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).

6. Under the DOJ Guidelines, 49 *Federal Register* 26,823 (1984), a market is considered moderately concentrated if the post-merger HHI is between 1000 and 1800 and is considered 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.

7. The effects of the proposal on the concentration of banking resources in these markets are described in appendix C.

agency that supervises each institution, and information provided by Sky Financial. Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources and future prospects of Sky Financial and Second Bancorp are consistent with approval, as are the other supervisory factors required to be considered under the BHC Act. In addition, considerations related to the convenience and needs of the communities to be served, including the records of performance of the relevant insured depository institutions under the Community Reinvestment Act (''CRA''), are consistent with approval.

As noted above, Sky Bank also has applied under section 9 of the FRA to establish branches at the locations of Second Bank's branches in Ohio. The Board has considered the factors it is required to consider under section 9 of the FRA and, for the reasons discussed in this order, finds those factors to be consistent with approval.

Conclusion

Based on the foregoing and in light of all the facts of record, the Board has determined that the applications should be, and hereby are, approved. In reaching this 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, the FRA, and other applicable statutes. The Board's approval is specifically conditioned on compliance by Sky Financial with all the representations and commitments made to the Board in connection with the applications and the receipt of all other required regulatory approvals. These representations, 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 transaction 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 Cleveland, acting pursuant to delegated authority.

By order of the Board of Governors, effective May 24, 2004.

8. 12 U.S.C. § 2901 *et seq*. The Interagency Questions and Answers Regarding Community Reinvestment provides that an institution's most recent CRA performance evaluation is an 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. 66 *Federal Register* 36,620 and 36,639 (2001). Sky Bank received a ''satisfactory'' rating at its most recent CRA performance evaluation by the Federal Reserve Bank of Cleveland, as of October 14, 2003. Second Bank received a ''satisfactory'' rating at its most recent CRA performance evaluation by the Office of the Comptroller of the Currency, as of June 26, 2000. Sky Trust, National Association, Pepper Pike, Ohio, is a special-purpose bank that is not subject to the CRA.

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 A

Branches in Ohio to be Established by Sky Bank

Akron
76 South Main Street, Suite 100

Ashtabula
4366 Main Avenue

Aurora
215 West Garfield Road

Beachwood
25201 Chagrin Boulevard, Suite 120

Canfield
6515 Tippecanoe Road

Canton
5310 Fulton Road, NW

Conneaut
328 Main Street

Cortland
259 South High Street

Fairlawn
3737 West Market Street

Garrettsville
8045 State Street

Girard
29 East Liberty Street

Hubbard
24 West Liberty Street

Hudson
5801 Darrow Road,
3477 Massillon Road

Jefferson
36 West Jefferson Street

Kent
1590 South Water Street

Lordstown
6749 Tod Avenue, SW

Medina
1065 North Court Street

Newton Falls
215 East Broad Street

Niles
5555 Youngstown-Warren Road

North Olmstead
26642 Brookpark Road Extension

Poland
2 South Main Street

Ravenna
165 North Chestnut Street

Rock Creek
3273 Main Street

Streetsboro
1190 State Route 303

Twinsburg
10071 Darrow Road

Warren
2107 Elm Road, NE
4349 Mahoning Avenue, NW
108 Main Avenue, SW
525 Niles-Cortland Road, SE
2595 Parkman Road, NW

Wooster
445 West Milltown Road

Appendix B

Ohio Banking Market Definitions

Akron

The southern two-thirds of Summit and Portage Counties; the Medina County townships of Sharon, Homer, Harrisville, Westfield, Guilford, and Wadsworth; Smith township in Mahoning County; Lawrence township and the western half of Lake township in Stark County; and Milton and Chippewa townships in Wayne County.

Ashtabula

Ashtabula County.

Canton

Stark County, excluding Lawrence township and the western half of Lake township; Carroll County; Smith township in Mahoning County; and Lawrence and Sandy townships in Tuscarawas County.

Cleveland

Cuyahoga, Lake, Lorain, and Geauga Counties; Sagamore Hills, Northfield Center, Twinsburg, Richfield, Boston, and Hudson townships in Summit County; Medina County, excluding Homer, Harrisville, Westfield, Guilford, Wadsworth, and Sharon townships; Aurora and Streetsboro townships in Portage County; and the City of Vermillion in Erie County.

Youngstown–Warren

Mahoning County, excluding Smith township; Trumbull County, excluding Brookfield and Hartford townships; and Columbiana Village and Fairfield township in Columbiana County.

Appendix C

Ohio Banking Markets in which Sky Financial and Second Bancorp Compete Directly

Akron

Sky Financial operates the 19th largest insured depository institution in the Akron banking market, controlling approximately $42 million in deposits, representing less than 1 percent of market deposits. Second Bancorp operates the 12th largest insured depository institution in the market, controlling $134 million in deposits, representing 1.7 percent of market deposits. On consummation of the proposal, Sky Financial would operate the tenth largest insured depository institution in the market, controlling deposits of approximately $176 million, representing approximately 2.3 percent of market deposits. The HHI would increase 2 points to 1,390. Twenty-four competitors would remain in the market.

Astabula

Sky Financial operates the fourth largest insured depository institution in the Ashtabula banking market, controlling $118.5 million in deposits, representing 12.2 percent of market deposits. Second Bancorp operates the fifth largest insured depository institution in the market, controlling $115.7 million in deposits, representing 11.9 percent of market deposits. On consummation of the proposal, Sky Financial would operate the largest insured depository institution in the market, controlling deposits of approximately $234.2 million, representing approximately 24.2 percent of market deposits. The HHI would increase 289 points to 1,917. Eight competitors would remain in the market.

Canton

Sky Financial operates the sixth largest insured depository institution in the Canton banking market, controlling $368.9 million in deposits, representing 7.7 percent of market deposits. Second Bancorp operates the 17th largest insured depository institution in the market, controlling $13.8 million in deposits, representing less than 1 percent of market deposits. On consummation of the proposal, Sky Financial would remain the sixth largest insured depository institution in the market, controlling deposits of approximately $382.7 million, representing approximately 8 percent of market deposits. The HHI would increase 4 points to 1,434. Sixteen competitors would remain in the market.

Cleveland

Sky Financial operates the tenth largest insured depository institution in the Cleveland banking market, controlling approximately $1.1 billion in deposits, representing 1.8 percent of market deposits. Second Bancorp operates the 17th largest insured depository institution in the market, controlling approximately $185 million in deposits, representing less than 1 percent of market deposits. On consummation of the proposal, Sky Financial would remain the tenth largest insured depository institution in the market, controlling deposits of approximately $1.2 billion, representing approximately 2.1 percent of market deposits. The HHI would increase 1 point to 1,926. Thirty-seven competitors would remain in the market.

Youngstown–Warren

Sky Financial operates the largest insured depository institution in the Youngstown–Warren banking market, controlling $773.9 million in deposits, representing 14.5 percent of market deposits. Second Bancorp operates the fourth largest insured depository institution in the market, controlling $702.7 million in deposits, representing 13.2 percent of market deposits. On consummation of the proposal, Sky Financial would operate the largest insured depository institution in the market, controlling deposits of approximately $1.6 billion, representing approximately 27.7 percent of market deposits. The HHI would increase 383 points to 1,491. Eleven competitors would remain in the market.

Orders Issued Under Sections 3 and 4 of the Bank Holding Company Act

National City Corporation Cleveland, Ohio

Order Approving the Acquisition of a Bank Holding Company

National City Corporation (''National City''), a financial holding company within the meaning of the Bank Holding Company Act (''BHC Act''), has requested the Board's approval under section 3 of the BHC Act (12 U.S.C. § 1842) to acquire Provident Financial Group, Inc. (''Provident'') and its subsidiary bank, The Provident Bank (''Provident Bank''), both in Cincinnati, Ohio. National City also has requested the Board's approval under sections 4(c)(8) and 4(j) of the BHC Act (12 U.S.C. §§ 1843(c)(8) and 1843(j)) and section 225.28(b)(6) of the Board's Regulation Y (12 CFR 225.28(b)(6)) to acquire a nonbanking subsidiary of Provident and thereby engage in permissible investment advisory activities.

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (69 *Federal Register* 8,660 (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 sections 3 and 4 of the BHC Act.

National City, with total consolidated assets of $116.4 billion, is the 11th largest depository organization in the United States, controlling deposits of $75.2 billion, which represents approximately 1.3 percent of total deposits in insured depository institutions in the United States.[1] National City is the third largest insured depository organization in Ohio, controlling deposits of $23.7 billion, which represents approximately 11.2 percent of total deposits in insured depository institutions in the state (''state deposits''). National City also operates subsidiary insured depository institutions in Illinois, Indiana, Kentucky, Michigan, Missouri, and Pennsylvania.

Provident, with total consolidated assets of approximately $17.1 billion, is the seventh largest insured depository organization in Ohio, controlling deposits of $10.3 billion, which represents approximately 4.9 percent of state deposits. Provident Bank operates branches in Ohio and Kentucky.

On consummation of this proposal, National City would become the tenth largest insured depository organization in the United States, with total consolidated assets of $133.5 billion, and would control approximately 1.4 percent of total deposits in insured depository institutions in the United States.[2] National City would become the largest insured depository organization in Ohio, controlling deposits of approximately $34 billion, which represents approximately 16.1 percent of state deposits.

Interstate Analysis

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the home state of such bank holding company if certain conditions are met.[3] For purposes of the BHC Act, the home state of National City is Ohio, and Provident is located in Kentucky and Ohio.[4] Based on a review of all the facts of record, including relevant state statutes, the Board finds that all the conditions for an interstate acquisition enumer-

1. Asset, nationwide deposit, and ranking data are as of December 31, 2003, and statewide deposit and ranking data are as of June 30, 2003.

2. All data include National City after consummation of the proposal to acquire Allegiant Bancorp, Inc., St. Louis, Missouri (''Allegiant''). The Allegiant proposal was approved by the Board on March 15, 2004. *See National City Corporation*, 90 *Federal Reserve Bulletin* 236 (2004) (''*National City/Allegiant Order*'').

3. A bank holding company's home state is that state in which the total deposits of all banking subsidiaries of such 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).

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

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

Competitive Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of 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.[6]

National City and Provident compete directly in the Cleveland, Columbus, Dayton, and Springfield banking markets, all in Ohio.[7] The Board has reviewed carefully the competitive effects of the proposal in each of these banking markets in light of all the facts of record. In particular, the Board has considered the number of competitors that would remain in the markets, the relative shares of total deposits in depository institutions in the markets (''market deposits'') controlled by National City and Provident,[8] 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''),[9] and other characteristics of the markets.

Consummation of the proposal would be consistent with Board precedent and the DOJ Guidelines in each of these banking markets.[10] After consummation of the proposal, the Dayton banking market would remain moderately concentrated, as measured by the HHI, and numerous competitors would remain in the market. Although the Cleveland, Columbus, and Springfield banking markets would remain highly concentrated, the change in market shares would be small and numerous competitors would remain in the markets.

The Department of Justice also has conducted a detailed review of the competitive effects of the proposal and has advised the Board that consummation of the proposal would not have a significantly adverse effect on competition in the Cleveland, Columbus, Dayton, or Springfield banking markets or in any other relevant banking market.

Based on all the facts of record, the Board concludes that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of 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 banks involved in the proposal and certain other supervisory factors. The Board has carefully considered these factors in light of all the facts of record, including reports of examination, other confidential supervisory information received from the primary federal banking agency that supervises each institution, information provided by National City, and public comment on the proposal.

National City is well capitalized and will remain so on consummation of the proposal.[11] In addition, the Board has consulted with the Office of the Comptroller of the Currency (''OCC''), the primary federal supervisor of National City's lead banks, about the proposal.[12] The Board also has considered the managerial resources and the examination records of National City and Provident and the subsidiary depository institution to be acquired, including its risk management systems and other policies.[13] Based on all the

5. *See* 12 U.S.C. §§ 1842(d)(1)(A) and (B), 1842(d)(2)(A) and (B). National City is adequately capitalized and adequately managed, as defined by applicable law. In addition, on consummation of the proposal, National City would control less than 10 percent of the total amount of deposits of insured depository institutions in the United States and less than 15 percent of the total deposits of insured depository institutions in Kentucky, the only applicable state limitation on the amount of deposits a bank holding company can acquire in this transaction. *See* Ky. Rev. Stat. Ann. § 287.900 (Supp. 2003).

6. 12 U.S.C. § 1842(c)(1).

7. These banking markets are described in appendix A.

8. Market share data are as of June 30, 2003, 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).

9. Under the DOJ Guidelines, 49 *Federal Register* 26,823 (1984), a market is considered 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.

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

11. A commenter alleged that the compensation under severance agreements for Provident's senior management is excessive. The Board notes that the severance agreements have been disclosed to shareholders and that National City will remain well capitalized on consummation of the proposal.

12. A commenter also expressed concern that Provident restated its earnings for the years 1997 through 2002. The Board monitored the restatement by Provident and has consulted with the Securities and Exchange Commission regarding this matter.

13. One commenter criticized National City for lobbying against state and local efforts to enact and enforce anti-predatory lending laws and ordinances. Two commenters expressed concern that the proposal might result in a loss of jobs. The Board notes that the commenters do not allege and have provided no evidence that National City engaged in any illegal activity or other action that has affected, or may

facts of record, the Board has concluded that considerations relating to the financial and managerial resources and future prospects of National City, Provident, and Provident Bank are consistent with approval, as are the other supervisory factors under the BHC Act.

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board is required to consider the effects of the proposal on the convenience and needs of the communities to be served and to take into account the records of the relevant insured depository institutions under the Community Reinvestment Act (''CRA'').[14] 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 the subsidiary banks of National City and Provident in light of all the facts of record, including public comment on the proposal. The Board recently considered the convenience and needs factor in National City's proposal to acquire Allegiant. In that proposal, the Board conducted a detailed review of the CRA performance records of the insured depository institutions controlled by National City, the lending records of all the National City bank and nonbank lending subsidiaries, including an analysis of data reported by National City under the Home Mortgage Disclosure Act (''HMDA''),[15] and the branch closing policies of National City and found the record of the Allegiant proposal to be consistent with approval.

A. Summary of Public Comments on Convenience and Needs Considerations

In response to the Board's request for public comment on this proposal, approximately 56 commenters submitted their views. Of these commenters, approximately 51 commenters supported the proposal by generally commending National City or Provident for providing financial and technical support to their community development organizations or businesses. Other commenters related their favorable experiences with specific programs or services offered by National City or Provident.

Five commenters opposed the proposal. These commenters expressed concern about the subprime lending activities of First Franklin Financial Corporation, San Jose, California (''First Franklin''), a subsidiary of National City Bank of Indiana, Indianapolis, Indiana (''NC Indiana''), that originates home mortgage loans, including subprime loans. Commenters also asserted, based on data reported under the HMDA, that National City engages in discriminatory treatment of African-American and Hispanic individuals in its home mortgage lending operations. In addition, commenters expressed concern about potential branch closings resulting from this proposal and the percentage of Provident Bank branches in LMI and predominantly minority areas.

B. 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.[16] At their most recent CRA evaluations by the OCC, National City Bank, Cleveland (''NC Bank''), National City's largest bank as measured by total deposits, received an ''outstanding'' rating, and NC Indiana, National City's largest bank as measured by total assets, received a ''satisfactory'' rating.[17] In addition, National City's six other subsidiary banks received either ''outstanding'' or ''satisfactory'' ratings at their most recent CRA evaluations.[18]

The Board has carefully reviewed the CRA performance records of the insured depository institution subsidiaries of National City. A summary of the most recent CRA evaluations of NC Bank and NC Indiana was included in the *National City/Allegiant Order*. Based on its review of the record in this case, the Board hereby reaffirms and adopts the facts and findings detailed in the *National City/Allegiant Order*.

NC Bank's most recent CRA evaluation characterized its overall record of home mortgage and small business lending as excellent[19] and praised the bank's level of community development lending. Examiners noted favorably the use of several flexible lending products designed to address affordable housing needs of LMI individuals and commended the bank's level of qualified investments.

reasonably be expected to affect, the safety and soundness of the institutions involved in this proposal or other factors that the Board must consider under the BHC Act.

14. 12 U.S.C. § 2901 *et seq.*

15. 12 U.S.C. § 2801 *et seq.*

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

17. Both ratings are as of February 22, 2000.

18. Appendix C lists the most recent CRA ratings of National City's bank subsidiaries, including the recently acquired Allegiant Bank, St. Louis, Missouri.

19. In evaluating the records of performance under the CRA of NC Bank and NC Indiana, examiners considered home mortgage loans by certain affiliates in the banks' assessment areas. The loans reviewed by examiners included loans reported by National City Mortgage Corporation, Miamisburg, Ohio (''NC Mortgage'') (a subsidiary of NC Indiana); National City Mortgage Services, Kalamazoo, Michigan (''NC Mortgage Services'') (a subsidiary of National City Bank of Michigan/Illinois, Bannockburn, Illinois); and other bank and nonbank affiliates of NC Bank.

In addition, examiners reported that NC Bank's community development services were excellent and praised the distribution of the bank's branches. At NC Indiana's most recent CRA performance evaluation, examiners commended the bank's record of home mortgage lending among borrowers of different income levels and its community development lending. NC Indiana's most recent evaluation also commended its strong level of qualified investments and characterized the distribution of the bank's branches throughout its assessment area, including LMI geographies, as excellent.

Provident Bank, Provident's only subsidiary bank, received an ''outstanding'' rating at its most recent CRA performance evaluation by the Federal Reserve Bank of Cleveland, as of March 11, 2002. National City has indicated that its CRA and consumer compliance programs would be implemented at Provident on consummation of the proposal.

At Provident Bank's most recent CRA performance evaluation, examiners concluded that the bank's lending activity reflected an excellent responsiveness to assessment-area credit needs. Examiners commended Provident Bank's home mortgage lending record and noted that it demonstrated an excellent geographic distribution of HMDA-reportable loans, especially in LMI areas and among borrowers of different incomes. They also reported that the bank had a good geographic distribution of small business loans. In addition, examiners commended the bank for its significant level of community development lending and investments and reported that such investments supported the development of LMI housing. They indicated that Provident Bank has taken a leadership role in community development services, noting that the bank provides services that promote affordable housing and economic development. In addition, examiners stated that Provident Bank's branches and automated teller machines are reasonably accessible to all segments of the bank's assessment areas.

C. HMD A Data, Subprime Lending, and Fair Lending Record

The Board has carefully considered the lending record of and HMDA data reported by National City in light of public comment. Based on their review of HMDA data, commenters primarily contended that National City's lending operations are organized in a manner to direct First Franklin's higher priced loans disproportionately to minority and LMI borrowers and in LMI and predominantly minority communities, as compared with the other subsidiaries of National City engaged in home mortgage lending, including National City's bank subsidiaries, NC Mortgage, and NC Mortgage Services (collectively, ''National City Lenders'').[20] In addition, commenters criticized other aspects of the lending activities of First Franklin and the National City Lenders.[21]

The Board reviewed HMDA data reported by all of National City's bank and nonbank lending subsidiaries in the MSAs identified by the commenters and focused its analysis on the MSAs that comprise the assessment areas of the National City Lenders in Ohio, Illinois, Indiana, Kentucky, and Michigan. The analysis included a comparison of the HMDA data of First Franklin with combined data submitted by the National City Lenders.[22]

An analysis of 2002 HMDA data does not support the contention that National City disproportionately directs First Franklin's loans to minority and LMI borrowers and in LMI and predominantly minority communities as compared with the National City Lenders. The 2002 HMDA data indicate that the National City Lenders extended a larger number of HMDA-reportable loans to African-American borrowers than did First Franklin in the MSAs reviewed. In addition, the percentage and number of HMDA-reportable loans by the National City Lenders to Hispanics were generally comparable with or exceeded the percentage and number for First Franklin in each of the MSAs reviewed. The HMDA data indicate that the percentage of total HMDA-reportable loans made to African-American and Hispanic borrowers and in LMI and minority census tracts[23] by the National City Lenders generally remained the same or increased from 2002 to 2003. The HMDA data also indicate the National City Lenders generally performed favorably when compared with the aggregate lenders. The percentage of total HMDA-reportable loans originated to African-American and Hispanic borrowers by the National City Lenders was comparable to the aggregate lenders in most of the MSAs reviewed.

Moreover, the denial disparity ratios[24] of the National City Lenders for African-American and Hispanic applicants for total HMDA-reportable loans were generally comparable to or lower than those of aggregate lenders in a

20. Two commenters asserted that First Franklin's market share is disproportionately concentrated in LMI and predominantly minority areas in Ohio and that the National City Lenders have ignored these areas. Another commenter asserted that, in 2002, First Franklin originated a higher volume and a larger percentage of its HMDA-reportable loans to African-American or Hispanic borrowers than NC Bank. The commenter compared 2002 HMDA data reported by First Franklin and NC Bank in the Metropolitan Statistical Areas (''MSAs'') of Cincinnati, Columbus, and Dayton, but did not include HMDA data reported by other National City lending subsidiaries in those areas.

21. Commenters criticized First Franklin's use of loan brokers to distribute its products, including the payment of yield spread premiums to brokers. Another commenter criticized the level of due diligence performed by Provident in providing warehouse lines of credit to subprime lenders and criticized National City for financing payday lending operations.

22. The Board analyzed HMDA data for 2001 through 2003 for National City and HMDA data for 2001 and 2002 for the aggregate of lenders in the areas reviewed (''aggregate lenders''). The 2003 HMDA data are preliminary and 2003 data for the aggregate lenders are not yet available.

23. For purposes of this HMDA analysis, minority census tract means a census tract with a minority population of 80 percent or more.

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

majority of the MSAs reviewed.[25] In addition, the National City Lenders' origination rates for total HMDA-reportable loans to Hispanics and African Americans were comparable to or exceeded the rates for aggregate lenders in each of the MSAs reviewed.[26]

The Board recognizes 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 and provide only limited information about covered loans. Because of the limitations of HMDA data, the Board has considered these data carefully in light of other information, including public and confidential supervisory information, information on the use of loan brokers by First Franklin to distribute its loans, and information submitted by National City on its policies and procedures to ensure compliance with fair lending laws and to guard against abusive lending practices.

Examiners found no evidence of prohibited discrimination or other illegal credit practices at any of National City's subsidiary banks or the lending subsidiaries of these banks at their most recent CRA performance evaluations. The Board also consulted with the OCC, which has responsibility for enforcing compliance with fair lending laws by national banks and their subsidiaries, about this proposal, the comments received by the Board criticizing the lending activities of First Franklin, and the record of performance of National City's banks and their subsidiaries since the last examination.

As discussed in the *National City/Allegiant Order*, National City has taken several affirmative steps to ensure compliance with fair lending laws and to prevent abusive lending practices at First Franklin and the National City Lenders. National City represented that all loan applicants are evaluated individually on their credit qualifications and the loans they receive are based on those qualifications. National City has a centralized compliance function and has implemented corporate-wide compliance policies and procedures to help ensure that all the business lines of National City, including First Franklin, comply with fair lending and other consumer protection laws and regulations. Compliance officers and staff are responsible for compliance training and monitoring. National City also conducts file reviews for compliance with federal and state consumer protection rules and regulations for all product lines and origination sources, including First Franklin. In addition, National City regularly performs self-assessments of its fair lending law compliance and fair lending policy training for its employees. National City represented that its corporate consumer compliance program will be implemented at Provident Bank after consummation of the proposal.[27]

The Board also reviewed the use of loan brokers by First Franklin in distributing its loan products and concluded that this practice does not appear to have resulted in the disparate treatment of minorities or LMI individuals. National City represented that First Franklin has implemented a detailed program for establishing relationships with brokers, which includes the review of a prospective broker's license status, financial condition, and background. In addition, National City stated that, although the National City Lenders and First Franklin have relationships with brokers and correspondents that provide subprime credit as some portion of their business, National City does not pursue business relationships with brokers or correspondents that originate subprime loans exclusively. National City also represented that loan brokers are not chosen based on their geographic location or the income, race, or ethnicity of residents in the brokers' locations.

The Board also has considered the HMDA data, subprime lending, and fair lending record of National City in light of other information, including the CRA performance records of National City's subsidiary banks discussed above and in the *National City/Allegiant Order*, and public comment. These records demonstrate that National City is active in helping to meet the credit needs of its entire community.

D. Branch Closings

One commenter expressed concern about the effect of branch closings that might result from this proposal. The Board has considered those concerns in light of all the facts of record. National City represented that it is in the process of determining whether to close branches in markets where there is overlap and that any closures or consolidations of branches will be conducted in accordance with National City's Branch Closing Policy and Procedures. The Board carefully considered National City's branch closing policy and its record of opening and closing branches in the *National City/Allegiant Order*. In addition, examiners reviewed National City's branch closing policy as part of the most recent CRA evaluations of each of National City's banks and found that it complied with federal law.

The Board also has considered the fact that federal banking law provides a specific mechanism for addressing

25. Two commenters also alleged that the denial disparity ratios of some of National City's bank subsidiaries in certain markets indicated that the banks disproportionately denied African-American or Hispanic applicants for home mortgage loans.

26. 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.

27. Based on a review of a sample of First Franklin's loans that ended in foreclosure, one commenter expressed concern about certain terms, such as high interest rates with balloon payments, prepayment penalties, and adjustable interest rates, including ''teaser rates,'' and other lending practices of First Franklin. In addition, commenters criticized National City for not having procedures for referring to the National City Lenders loan applicants of First Franklin who qualify for credit at those affiliates. As discussed above, National City has represented that all loan applicants are evaluated individually on their credit qualifications and the loans they receive are based on those qualifications. In addition, National City has a substantial compliance program in place to ensure that First Franklin does not engage in abusive lending practices. The Board also notes that the terms of loans offered by First Franklin that were criticized by the commenter are not, in and of themselves, abusive, and the fact that some of these terms are present in foreclosed loans does not itself indicate that these terms are inappropriate or abusive.

branch closings.[28] Federal law requires an insured depository institution to provide notice to the public and to the appropriate federal supervisory before closing a branch. In addition, the Board notes that the OCC, as the appropriate federal supervisor of NC Bank, will continue to review the bank's branch closing record in the course of conducting CRA performance evaluations.

E. 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 National City, public comments on the proposal, and confidential supervisory information. Based on a review of the entire record, and for the reasons discussed above and in the *National City/Allegiant Order*, 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.

Nonbanking Activities

National City also has filed a notice under sections 4(c)(8) and 4(j) of the BHC Act to acquire Provident Investment Advisors, Inc., also in Cincinnati (''Investment Advisors''), which engages in investment advisory activities. The Board has determined by regulation that this activity is permissible for bank holding companies under the Board's Regulation Y,[29] and National City has committed to conduct these activities in accordance with the Board's regulations and orders for bank holding companies engaged in these activities.

To approve the notice, the Board must determine that National City's acquisition of Investment Advisors and the performance of the proposed activities ''can reasonably be expected to produce benefits to the public . . . that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.''[30] As part of its evaluation of these factors, the Board has considered the financial and managerial resources of National City, its subsidiaries, and the company to be acquired, and the effect of the proposed transaction on those resources. For the reasons noted above, and based on all the facts of record, the Board concludes that financial and managerial considerations are consistent with approval of the notice.

The Board also has considered the competitive effects of National City's proposed acquisition of Provident's nonbanking subsidiary in light of all the facts of record. National City and Provident engage in activities related to investment advice. The market for the activity is regional or national in scope and unconcentrated. The record in this case also indicates that there are numerous providers of these services. Accordingly, the Board concludes that National City's acquisition of Investment Advisors would not have a significantly adverse effect on competition in any relevant market.

National City has indicated that the proposal would allow National City to provide an expanded array of services to individuals, businesses, and governmental units in a wider geographic area and provide customers of Provident a full array of brokerage services. Based on all the facts of record, the Board has determined that consummation of the proposal can reasonably be expected to produce public benefits that would outweigh any likely adverse effects under the standard of section 4 of the BHC Act.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the application and notice should be, and hereby are, approved.[31] 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.[32] The Board's

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

29. *See* 12 CFR 225.28(b)(6).

30. *See* 12 U.S.C. § 1843(j)(2)(A).

31. A commenter requested that the Board extend the comment period on this proposal. The Board has accumulated a significant record in this case, including reports of examination, supervisory information, public reports and information, and public comment. In the Board's view, interested persons had ample opportunity to submit views on the proposal and, in fact, the commenter has provided written submissions that the Board has considered carefully in acting on this proposal. The commenter's request for additional time to comment does not identify extraordinary circumstances that would justify an extension of the public comment period for this case. Moreover, the BHC Act and Regulation Y require the Board to act on proposals submitted under those provisions within certain time periods. 12 U.S.C. § 1842(b); 12 CFR 225.15(d). Based on a review of all the facts of record, the Board has concluded that the record in this case is sufficient to warrant Board action at this time and that an extension of the comment period is not warranted. Accordingly, the request for an extension of the comment period is denied.

32. Commenters 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 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 authorities. 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). Section 4 of the BHC Act and the Board's regulations provide for a hearing on a notice to acquire nonbanking companies if there are disputed issues of material fact that cannot be resolved in some other manner. 12 CFR 225.25(a)(2). The Board has considered carefully the commenters' requests in light of all the facts of record. In the Board's view, the commenters had ample opportunity to submit their views and submitted written comments that have been considered carefully by the Board in acting on the proposal. The commenters' requests fail to demonstrate why written comments do not present their evidence

approval is specifically conditioned on compliance by National City with the conditions imposed in this order and the commitments made to the Board in connection with the application and notice, including compliance with state law. The Board's approval of the nonbanking aspects of the proposal is also subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c) (12 CFR 225.7 and 225.25(c)), 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. The commitments made to the Board in the application process are deemed to be conditions imposed in writing by the Board in connection with its findings and decisions and, as such, may be enforced in proceedings under applicable law.

The acquisition of Provident 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 June 8, 2004.

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 A

Ohio Banking Market Definitions

Cleveland

Cuyahoga, Lake, Lorain, and Geauga Counties; Sagamore Hills, Northfield Center, Twinsburg, Richfield, Boston, and Hudson townships in Summit County; Medina County, excluding Homer, Harrisville, Westfield, Guilford, Wadsworth and Sharon townships; Aurora and Streetsboro townships in Portage County; and the City of Vermillion in Erie County.

Columbus

Franklin, Delaware, Fairfield, Licking, Madison, Pickaway, and Union Counties; Perry township in Hocking County; and Thorn township in Perry County.

Dayton

Montgomery, Miami, and Greene Counties; Bethel and Mad River townships in Clark County; and Clear Creek, Wayne, and Massie townships in Warren County.

Springfield

Clark County, excluding Bethel and Mad River townships.

Appendix B

Ohio Banking Markets in which National City and Provident Compete Directly

Cleveland

National City operates the second largest depository institution in the Cleveland banking market, controlling $15 billion in deposits, representing 25.8 percent of market deposits. Provident operates the 25th largest depository institution in the market, controlling $65.8 million in deposits, representing less than 1 percent of market deposits. On consummation of the proposal, National City would operate the second largest depository institution in the market, controlling deposits of $15 billion, representing approximately 25.9 percent of market deposits. The HHI would increase 6 points to 1,990. Thirty-seven bank and thrift competitors would remain in the market.

Columbus

National City operates the fourth largest depository institution in the Columbus banking market, controlling $2.3 billion in deposits, representing 8.3 percent of market deposits. Provident operates the 40th largest depository institution in the market, controlling $29.4 million in deposits, representing less than 1 percent of market deposits. On consummation of the proposal, National City would operate the fourth largest depository institution in the market, controlling deposits of $2.3 billion, representing approximately 8.4 percent of market deposits. The HHI would increase 2 points to 1,996. Fifty-one bank and thrift competitors would remain in the market.

Dayton

National City operates the third largest depository institution in the Dayton banking market, controlling $1.4 billion in deposits, representing 15.3 percent of market deposits. Provident operates the sixth largest depository institution in the market, controlling $446.5 million in deposits, representing 5 percent of market deposits. On consummation of the proposal, National City would operate the second largest depository institution in the market, controlling deposits of $1.8 billion, representing approximately 20.4 percent of market deposits. The HHI would increase 155 points to 1,657. Twenty-six bank and thrift competitors would remain in the market.

adequately and fail 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 requests for a public meeting or hearing on the proposal are denied.

Springfield

National City operates the third largest depository institution in the Springfield banking market, controlling $187 million in deposits, representing 19.3 percent of market deposits. Provident operates the seventh largest depository institution in the market, controlling $36.6 million in deposits, representing 3.8 percent of market deposits. On consummation of the proposal, National City would operate the third largest depository institution in the market, controlling $223.5 million in deposits, representing approximately 23.1 percent of market deposits. The HHI would increase 146 points to 1,967. Eight bank and thrift competitors would remain in the market.

Appendix C

CRA Performance Evaluations of National City

Subsidiary Bank	CRA Rating	Date	Supervisor
1. National City Bank, Cleveland, Ohio	Outstanding	February 2000	OCC
2. National City Bank of Indiana, Indianapolis, Indiana	Satisfactory	February 2000	OCC
3. The Madison Bank and Trust Company, Madison, Indiana	Outstanding	May 1999	FDIC
4. National City Bank of Kentucky, Louisville, Kentucky	Satisfactory	February 2000	OCC
5. National City Bank of Michigan/Illinois, Bannockburn, Illinois	Outstanding	February 2000	OCC
6. National City Bank of Pennsylvania, Pittsburgh, Pennsylvania	Outstanding	February 2000	OCC
7. National City Bank of Southern Indiana, New Albany, Indiana	Satisfactory	February 2000	OCC
8. Allegiant Bank, St. Louis, Missouri	Satisfactory	October 2001	FDIC

New Regions Financial Corporation
Birmingham, Alabama

Regions Financial Corporation
Birmingham, Alabama

Order Approving the Formation of a Bank Holding Company, the Acquisition of a Bank Holding Company and a Savings Association, the Merger of Bank Holding Companies, and Election of Financial Holding Company Status

Regions Financial Corporation (''Regions'') has requested the Board's approval under section 3 of the Bank Holding Company Act (''BHC Act'')[1] of its proposal to acquire Union Planters Corporation (''Union Planters''), and thereby indirectly acquire its subsidiary banks, Union Planters Bank, National Association (''UPB-NA''), both in Memphis, and Union Planters Bank of the Lakeway Area (''Lakeway Bank''), Morristown, all in Tennessee.[2] Regions proposes to acquire Union Planters through a series of transactions that include the formation of a new bank holding company, New Regions Financial Corporation (''New Regions'').[3] New Regions also has filed with the Board an election to become a financial holding company pursuant to sections 4(k) and (*l*) of the BHC Act and section 225.82 of Regulation Y.[4] In addition, New Regions proposes to acquire Union Planters Hong Kong, Inc., also in Memphis, an agreement corporation subsidiary of UPB-NA, pursuant to section 25 of the Federal Reserve Act and section 211.5 of the Board's Regulation K.[5]

1. 12 U.S.C. § 1842.

2. New Regions expects at a later date to merge the subsidiary banks that it would control on consummation of the proposal. The Board's action at this time is limited to reviewing the proposed acquisition under the BHC Act. A subsequent bank merger may require further review under the Bank Merger Act (12 U.S.C. § 1828(c)).

3. In addition, New Regions has filed a notice under sections 4(c)(8) and 4(j) of the BHC Act and section 225.24 of the Board's Regulation Y to acquire Regions Morgan Keegan Trust, F.S.B. (''Regions FSB''), also in Birmingham. 12 U.S.C. §§ 1843(c)(8) and (j); 12 CFR 225.24.

4. 12 U.S.C. §§ 1843(k) & (*l*); 12 CFR 225.82. New Regions would acquire Regions' remaining nonbanking companies under section 4(k) and the post-transaction notice procedures of section 225.87 of Regulation Y (12 CFR 225.87): Union Planters Investment Advisors Inc., also in Memphis, which engages in asset management and investment advisory services; and Union Planters' interest in FundsXpress, Inc., Austin, Texas, which engages in data processing.

In addition to the financial holding company election by New Regions, two Union Planters mid-tier bank holding companies, Union Planters Holding Corporation in Memphis (''UPHC'') and Franklin Financial Group Incorporated in Morristown (''Franklin Financial''), have elected to become financial holding companies. On consummation of the proposal, New Regions would operate UPHC and Franklin Financial as direct subsidiaries.

5. 12 U.S.C. § 601 *et seq.*; 12 CFR 211.5.

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (69 *Federal Register* 9,828 (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 the BHC Act.

Regions, with total consolidated assets of approximately $48.9 billion, is the 27th largest depository organization in the United States,[6] controlling deposits of approximately $31.9 billion, which represents less than 1 percent of total deposits in insured depository institutions in the United States.[7] Regions operates subsidiary depository institutions in Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, South Carolina, Tennessee, and Texas.

Union Planters, with total consolidated assets of approximately $31.5 billion, is the 39th largest depository organization in the United States, controlling deposits of $22.8 billion, which represents less than 1 percent of total deposits in insured depository institutions in the United States. Union Planters operates depository institutions in Alabama, Arkansas, Florida, Illinois, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Tennessee, and Texas. It also engages in a broad range of permissible nonbanking activities nationwide.

On consummation of the proposal, New Regions would become the 21st largest depository organization in the United States, controlling deposits of approximately $54.8 billion, with total consolidated assets of approximately $80.4 billion, and would control less than 1 percent of total deposits in insured depository institutions in the United States. The combined organization would operate under the name of Regions Financial Corporation.

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 the bank holding company if certain conditions are met. For purposes of the BHC Act, the home state of New Regions will be Alabama,[8] and Union Planters' subsidiary banks are located in Alabama, Arkansas, Florida, Illinois, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Tennessee, and Texas.[9]

All the conditions for an interstate acquisition enumerated in section 3(d) of the BHC Act are met in this case. Regions currently is, and New Regions would be on consummation of this proposal, adequately capitalized and adequately managed, as defined by applicable law.[10] Each subsidiary bank of Union Planters located in a state with a minimum age requirement has been in existence and operated continuously for at least the period of time required by applicable state law.[11] On consummation of the proposal, New Regions and its affiliates would control less than 30 percent, or the applicable percentage established by state law, of total deposits held in each of these states by insured depository institutions. Section 3(d) requires review of a state deposit cap in each state in which both Regions and Union Planters currently are located.[12] All other requirements of section 3(d) would be met in this case. 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 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 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.[13]

Regions and Union Planters compete directly in 21 local banking markets, primarily in Alabama, Arkansas, Florida, Louisiana, Tennessee, and Texas.[14] 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 markets, the relative shares of total deposits in depository institutions in the markets (''market deposits'') controlled by Regions and Union Planters,[15] the concentration level of market deposits and the increase in this level as measured by the Herfindahl–Hirschman Index (''HHI'') under the Depart-

6. Asset data are as of March 31, 2004, and national ranking data are as of December 31, 2003.

7. Deposit data are as of June 30, 2003, and reflect the total of the deposits reported by each organization's insured depository institutions in their Consolidated Reports of Condition and Income for June 30, 2003. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

8. 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).

9. For purposes 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).

10. *See* 12 U.S.C. § 1842(d)(1)(A).

11. *See* 12 U.S.C. § 1842(d)(1)(B).

12. *See* 12 U.S.C. § 1842(d)(2)(A) and (B). *See* Ark. Code § 23-48-406(a) (2004); Fla. Stat. Ann. § 658.295(8)(b) (2004); Tenn. Code Ann. § 45-2-1404 (2004); and Tex. Code Ann. § 203.002(a) (2004).

13. *See* 12 U.S.C. § 1842(c)(1).

14. These banking markets are described in appendix A.

15. Market share data are as of June 30, 2003, 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).

ment of Justice Merger Guidelines (''DOJ Guidelines''), and other characteristics of the markets.[16]

Consummation of the proposed acquisition of Union Planters would be consistent with Board precedent and DOJ Guidelines in each of the banking markets affected by the proposal. After consummation, one banking market would be considered unconcentrated, eleven banking markets would be considered moderately concentrated, and nine banking markets would be considered highly concentrated, but with only small or modest increases in concentration.[17] Of the banking markets that would be considered highly concentrated after consummation of the proposal, all but the Newport, Arkansas, banking market (''Newport banking market'') would have several competitors remaining in the market. In the Newport banking market, the HHI would increase by only 106 points. After consummation of the proposal, New Regions would control approximately 23.4 percent of market deposits, while its two remaining competitors in the market would control 53.8 percent and 22.7 percent of market deposits.

The Department of Justice has reviewed the proposal and advised the Board that consummation would not likely have a significantly adverse effect on competition in any relevant market. The Board has requested the views of the Office of the Comptroller of the Currency (''OCC'') and the Office of Thrift Supervision (''OTS'') on the competitive effects of the proposal. No agency has indicated that the proposal raises competitive issues.

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 banking resources in any relevant banking market. Accordingly, the Board has determined that competitive considerations are consistent with approval.

Financial, Managerial, and Other Supervisory Factors

In applications and notices involving the acquisition of bank holding companies and their insured depository institutions, 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, among other things, confidential reports of examination, other confidential supervisory information from the primary federal supervisors for the depository institutions controlled by Regions and Union Planters, and public comments on the proposal.[18]

Regions, Union Planters, and their subsidiary depository institutions currently are well capitalized and well managed, and New Regions and each depository institution that it would control would be well capitalized on consummation of the proposal. In addition, the Board has consulted with the OCC, the Federal Deposit Insurance Corporation (''FDIC''), and the OTS, the primary federal supervisors of UPB-NA, Lakeway Bank, and Regions FSB, respectively, on the proposal.[19] The Board also has considered Regions' plans to implement the proposed acquisition, including its available managerial resources and Regions' record of successfully integrating acquired institutions into its existing operations. Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources and future prospects of New Regions and the depository institutions involved in the proposal are consistent with approval, as are the other supervisory factors under the BHC Act.[20]

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board is required to consider the effects of the proposal on the convenience and needs of the communities to be served and to take into account the records of the relevant insured depository institutions under the Community Reinvestment Act (''CRA'').[21] The Board also reviews the records of performance under the CRA of the relevant depository institutions when acting on a notice under section 4 of the BHC Act to acquire an insured savings association. 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

16. 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.

17. Market data for these banking markets are provided in appendix B.

18. Onter suggested that the Board encourage Regions Bank, also in Birmingham, to commit to a supplier diversity program and to provide representation by Florida residents in its management that is commensurate with the bank's share of state deposits. Although the Board fully supports programs designed to promote equal opportunity and economic opportunities for all members of society, the comments about supplier diversity programs are beyond the factors the Board is authorized to consider under the BHC Act. *See, e.g., Deutsche Bank AG*, 86 *Federal Reserve Bulletin* 509, 513 (1999). The Board also notes that federal banking laws do not impose residency requirements on the management of bank holding companies. As described above, the Board has carefully considered the competence and experience of Regions' management in its review of the proposal.

19. The Board is the primary federal supervisor of Regions Bank.

20. commenter asserted that a UPB-NA subsidiary has originated loans to a company that is controlled by an individual with alleged connections to organized crime. This assertion was based on allegations in press reports from 1999 and 2000 that cite determinations in 1980 and 1992 by the New Jersey Casino Control Commission. The allegations appear to involve the individual's business transactions and activities during the 1960s and 1970s. The Board has carefully reviewed these allegations in light of all facts of record, including relevant reports of examination by federal regulators, and has consulted the OCC concerning the relationship between the UPB-NA subsidiary and the company involved.

21. 12 U.S.C. § 2901 *et seq.*

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 the subsidiary depository institutions of Regions and Union Planters in light of all the facts of record, including public comments on the proposal. Three commenters opposed the proposal and collectively asserted that:

(i) Regions' and Union Planters' subsidiary banks have inadequate or inconsistent records of making qualified investments under the CRA in the communities that they serve;

(ii) Regions engages in an insufficient volume of small business lending in amounts of $100,000 or less in certain markets; and

(iii) Regions should provide more prime-rate home mortgage loans to LMI and minority individuals, small business loans to businesses owned by minority individuals or women, economic development investments, and charitable donations to underserved communities.[22] Commenters also asserted that data reported under the Home Mortgage Disclosure Act (''HMDA'')[23] indicate that Regions and Union Planters engage in disparate treatment of African-American and Hispanic individuals in their home mortgage lending operations. In addition, one commenter expressed concern about possible branch closings after consummation of the proposal.[24]

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.[25]

Regions Bank received a ''satisfactory'' rating at its most recent CRA performance evaluation by the Federal Reserve Bank of Atlanta, as of October 22, 2001.[26] In addition, Union Planters' largest subsidiary bank, UPB-NA, received a ''satisfactory'' rating at its most recent CRA performance evaluation by the OCC, as of December 31, 1999. Union Planters also controls Lakeway Bank, which received a ''satisfactory'' rating at its most recent CRA performance evaluation by the FDIC, as of June 11, 2001.

New Regions has represented that it would continue the existing CRA program of each depository institution after consummation of this proposal.

B. CRA Performance of Regions Bank

As noted above, Regions Bank received an overall ''satisfactory'' rating for performance under the CRA.[27] Examiners found that Regions Bank exhibited a good level of responsiveness to the credit and community development needs of its overall assessment area. In particular, examiners commended the bank's loan distribution in LMI geographies for HMDA-reportable and small business loans.[28] Examiners also favorably noted Regions Bank's use of flexible lending programs to serve the credit needs of its overall assessment area, noting that the bank originated almost 3,000 loans totaling more than $242 million under those programs during its CRA evaluation period.

In addition, Regions Bank originated or purchased more than 6,700 HMDA-reportable loans totaling approximately $468 million to borrowers in LMI census tracts and more than 13,500 such loans totaling approximately $672 mil-

22. One commenter suggested that, in light of Regions' share of Florida deposits, the Board should encourage or require Regions to become the regional leader for each of these lending categories or activities. In addition, the commenter contended that the Board should not approve the proposal because Regions had not made a CRA-related commitment to minority communities in Florida. The Board has consistently found that neither the CRA nor the federal banking agencies' CRA regulations require depository institutions to make pledges or enter into commitments or agreements with any organization. *See, e.g., Bank of America Corporation*, 90 *Federal Reserve Bulletin* 217 (2004); *Citigroup Inc.*, 88 *Federal Reserve Bulletin* 485 (2002). The commenter also suggested that Regions should commit a specific percentage of its pretax profits to philanthropic contributions in light of its share of Florida deposits. The Board notes that neither the CRA nor the agencies' implementing rules require that financial institutions engage in any type of philanthropy.

23. 12 U.S.C. § 2801 *et seq*.

24. This commenter also expressed concern about Regions Bank and a UPB-NA subsidiary allegedly financing payday and car-title lending companies. Regions responded that Regions Bank and Union Planters have depository relationships with, and provide warehouse credit facilities to, entities engaged in payday and car-title lending. These payday and car-title lenders are licensed by the states where they operate and are subject to applicable state law. Regions stated that neither it nor Union Planters plays any role in the lending practices or credit review processes of their payday and car-title lender customers. The record in this case does not indicate that Regions, Union Planters, or any direct or indirect subsidiary of either organization engages in payday or car-title lending activities directly or through agency arrangements.

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

26. Regions FSB, the only other insured depository institution controlled by Regions, is not examined by the OTS for CRA performance because it engages only in trust activities.

27. As part of the 2001 performance evaluation, 16 of Regions Bank's 91 assessment areas received full-scope reviews. The overall rating for Regions Bank is a composite of the bank's state ratings, which were derived from the full-scope reviews of its assessment areas. The evaluation period was January 1, 2000, through June 30, 2001.

28. In this context, ''small loans to businesses'' are loans with original amounts totaling $1 million or less and ''small business loans'' are business loans in amounts of $1 million or less.

lion to LMI individuals during the evaluation period.[29] It also originated or purchased more than 8,400 small business loans totaling approximately $697 million to businesses in LMI census tracts. Examiners noted that the bank originated almost $50 million in community development loans during the evaluation period, thereby exhibiting an adequate level of community development lending.

During 2002 and 2003, Regions Bank originated or purchased more than 88,000 HMDA-reportable loans totaling approximately $9.3 billion, and more than 71,000 small business loans totaling almost $7.5 billion in its overall assessment area.[30] During the same time period, Regions Bank also engaged in a significant volume and amount of community development lending. The bank originated or purchased 479 community development loans totaling approximately $673 million in its overall assessment area. These loans generally were to entities engaged in the construction and renovation of affordable housing in LMI areas, for LMI individuals, or for senior citizens.

Examiners characterized as excellent the bank's volume of qualified community development investments and grants. They reported that Regions Bank made qualified investments totaling approximately $166 million and provided an additional $4.3 million in grants and contributions during its CRA evaluation period, thereby contributing to the bank's overall qualified investment portfolio of approximately $7.9 billion, as of September 2001. In addition, examiners commended Regions Bank's extensive use of investments to support community development initiatives both inside and outside the bank's assessment areas. Examiners also praised the bank for frequently acting as a leading investor in or grantor to various community development initiatives that did not routinely receive private funding.

Since its most recent CRA performance evaluation, Regions Bank has initiated several efforts to further strengthen its overall investment performance. The bank created the CRA Investment Committee to assess investment opportunities in all the bank's assessment areas. Regions Bank has also designated community development managers for each state where the bank operates. These managers work with community development organizations in their respective states to identify and pursue lending, investment, and service opportunities.

During the period 2001 through 2003, Regions Bank invested approximately $214.5 million in qualified low-income-housing tax credits and $2 million in qualified community development projects or entities throughout its overall assessment area. For example, the bank made direct investments in 2002 that provided technical and financial assistance to nonprofit community development corporations, minority-owned small businesses, and other community organizations in Alabama. Regions Bank was also a founding member of an organization designed to address a critical need for affordable housing in central Alabama and made an equity investment in and a charitable contribution to this organization totaling $1 million during this period.

Examiners noted that 18 percent of the bank's branches were in LMI census tracts, which reasonably correlated with the percentage of families and businesses throughout Regions Bank's combined assessment area that were in LMI census tracts. Examiners considered Regions Bank's branches and alternative delivery systems, including ATMs, to be reasonably accessible to bank customers and the bank's hours of operation to be convenient for essentially all portions of its overall assessment area. They also noted that Regions Bank provided an adequate level of community development services, which included efforts by board members, officers, and employees of the bank to use their financial expertise to provide financial services that benefited the residents of its overall assessment area. Examiners found that the bank's community development services were highly responsive to affordable housing needs.

C. CRA Performance of Union Planters Bank

As noted above, UPB-NA received an overall "satisfactory" rating for performance under the CRA from the OCC, as of December 1999.[31] During its CRA evaluation period, UPB-NA purchased and originated more than 17,000 HMDA-reportable loans totaling approximately $1.5 billion in the six MSAs that represented approximately 63 percent of UPB-NA's deposits ("Representative MSAs").[32] Examiners noted that UPB-NA's overall lending record demonstrated an adequate distribution of loans to LMI borrowers and borrowers in LMI census tracts. During the evaluation period, the bank's percentage of home purchase and home improvement loans to borrowers in LMI areas generally exceeded the percentage of owner-occupied homes in those areas. Examiners determined that

29. Examiners included the HMDA-reportable lending by Regions Mortgage, Inc., Montgomery, Alabama ("RMI"), in their assessment of Regions Bank's CRA performance.

30. A commenter criticized the percentage of Regions Bank's small business loans originated in amounts of less than $100,000 in Arkansas, Louisiana, and Mississippi, stating that such loans were needed the most by minority- and female-owned businesses. Based on 2002 data on small business lending for the portions of Arkansas and Louisiana included in Regions Bank's combined assessment area, small business loans of $100,000 or less comprised 81.5 percent and 75.5 percent, respectively, of the bank's small business loan originations in those states. Although Mississippi is outside Regions Bank's combined CRA assessment area, the Board considered the bank's statewide small business lending data for 2002. The data indicate that 56.6 percent of the small business loans originated by the bank in Mississippi were in amounts of $100,000 or less. Examiners reviewed the geographic distribution of small business loans and the distribution of loans to businesses of different sizes and considered these distributions acceptable.

31. UPB-NA's 1999 CRA performance rating was a composite of the ratings for the bank's two multistate Metropolitan Statistical Areas ("MSAs") and twelve states. The bank's state ratings were based on the assessment areas in each state receiving full-scope reviews. The evaluation period was January 1, 1998, through December 31, 1999.

32. These areas are the Miami and Ft. Lauderdale, Florida, MSAs (17.5 percent of UPB-NA's deposits); the Nashville, Tennessee, MSA (14 percent of UPB-NA's deposits); the St. Louis, Missouri/Illinois, MSA (12 percent of UPB-NA's deposits); the Memphis, Tennessee/Arkansas/Mississippi, MSA (10 percent of UPB-NA's deposits); and the Jackson, Mississippi, MSA (9.7 percent of UPB-NA's deposits).

UPB- NA's distribution of HMDA-reportable loans in LMI census tracts was adequate or better in four of the six Representative MSAs and that its distribution of such loans to LMI individuals was good or excellent in four of the six Representative MSAs.

UPB-NA purchased or originated more than 7,200 small loans to businesses totaling approximately $660 million in the Representative MSAs during the evaluation period. Examiners found that UPB-NA's record for originating and purchasing such loans showed good geographic distribution in these areas, including LMI communities. Examiners noted that UPB-NA's level for originating small loans to businesses in LMI census tracts was adequate or better in all six Representative MSAs, with an excellent level of distribution in four of the six Representative MSAs. In the four Representative MSAs where small loans to farms comprised a material portion of the bank's lending record, UPB-NA originated or purchased approximately 580 such loans totaling almost $31 million during its CRA evaluation period.[33]

Examiners stated that UPB-NA's volume and amount of community development lending activities positively affected the bank's lending ratings in five of the six Representative MSAs. Examiners found that UPB-NA originated 47 community development loans in the Representative MSAs totaling approximately $44 million during the CRA evaluation period. These loans primarily supported affordable housing initiatives for LMI individuals and other kinds of initiatives to revitalize LMI census tracts.

According to information provided by Regions, UPB-NA originated or purchased in its overall assessment area almost 160,000 HMDA-reportable loans totaling more than $15.5 billion and almost 60,700 small business loans totaling approximately $5.8 billion during the period 2000 through 2003. Regions also represented that UPB-NA originated almost 260 community development loans totaling more than $137 million in its combined assessment area during the same time period. Excluding loans in multistate MSAs, these loans totaled more than $45 million in Mississippi, more than $17 million in Tennessee, and more than $6.5 million in Louisiana. UPB-NA's community development loans generally supported the construction of housing for LMI individuals, including elderly and disabled low-income individuals.

During the evaluation period, UPB-NA made more than 130 qualified investments totaling approximately $47 million in the Representative MSAs, primarily in securities backed by affordable housing mortgages. UPB-NA also made qualified investments in these MSAs in support of local community organizations dedicated to providing affordable housing and other community service and revitalization initiatives that benefited LMI census tracts and individuals.

Regions represented that UPB-NA made more than 1,200 investments totaling more than $23 million in CRA qualified projects in its assessment areas during the period 2000 through 2003. These investments totaled more than $750,000 in Florida, more than $7 million in Mississippi, and more than $5 million in Tennessee. Many of the investments were in the form of grants or donations to organizations serving the needs of LMI individuals and communities.[34]

Examiners noted that the bank's branches and ATMs were generally accessible to the communities it serves. They also noted, however, that UPB-NA provided few community development services in its assessment areas during the CRA evaluation period.

D. HMDA, Subprime, and Fair Lending Records

The Board has carefully considered the lending records of, and HMDA data reported by, Regions and Union Planters in light of the comments received. Based on a review of 2002 HMDA data, one commenter alleged that Regions has organized its mortgage lending operations in a manner that disproportionately directs higher cost subprime mortgage loans from a Regions Bank subsidiary, EquiFirst Corporation, Charlotte, North Carolina (''EquiFirst''),[35] to minority borrowers as compared with Regions' prime mortgage lending, which is conducted by Regions Bank through RMI.[36] In addition, the commenter alleged that

33. Small loans to farms are loans with original amounts of $500,000 or less. Data on the small loans to farms in these areas do not include the Miami and Ft. Lauderdale MSAs.

34. One commenter criticized UPB-NA's record for making qualified investments in Illinois and Iowa. According to information provided by Regions, UPB-NA has actively pursued qualified investment opportunities in its Illinois and Iowa assessment areas since its most recent CRA performance evaluation. These efforts have resulted in UPB-NA making qualified investments of more than $2 million in Illinois and tripling the amount of its qualified investments in Iowa since the bank's most recent CRA performance evaluation.

35. Regions stated that EquiFirst relies on a network of independent mortgage brokers to originate its loans who use underwriting standards that are commonly accepted in the secondary market and that Regions sells the loans EquiFirst originates in this market. Regions also represented that the brokers in the EquiFirst network offer their clients a variety of prime and subprime mortgage loan products from EquiFirst and other mortgage lenders. In addition, Regions noted that the independent mortgage brokers generally provide their customers with options on available mortgage loan products, including the type of products (prime or subprime) and the provider (EquiFirst or another lender). In particular, Regions represented that EquiFirst does not require its brokers to offer EquiFirst products exclusively.

36. Specifically, the commenter compared 2002 HMDA data reported for RMI and EquiFirst in the following MSAs: Atlanta, Birmingham, Montgomery, New Orleans, Memphis, and Nashville. The commenter asserted that RMI originated mortgage loans to white borrowers in greater volume and with greater frequency than to African-American borrowers in each MSA during 2002. The commenter also made the same allegations about Hispanic borrowers in the Orlando MSA. In addition, this commenter stated that EquiFirst originated a larger number of ''higher cost'' mortgage loans to minority borrowers than to white borrowers.

As the Board previously has noted, subprime lending is a permissible activity that provides needed credit to consumers who have difficulty meeting conventional underwriting criteria. *See Royal Bank of Canada*, 88 *Federal Reserve Bulletin* 385, 388, n.18 (2002). The Board continues to expect all bank holding companies and their affiliates to conduct their subprime lending operations without any abusive lending practices and in compliance with all applicable laws.

Regions Bank disproportionately denied applications for HMDA-reportable loans by minorities.[37]

The Board reviewed HMDA data reported by Regions Bank, including RMI (collectively, ‘‘Regions Prime Lenders’’) and EquiFirst in the MSAs identified by the commenter and other major markets served by Regions Bank.[38] The Board compared the HMDA data of the Regions Prime Lenders with the data of EquiFirst and the aggregate of lenders (‘‘aggregate lenders’’) in the MSAs reviewed.[39]

HMDA data for 2002 indicate that in most of the MSAs reviewed, the number of HMDA-reportable loans originated by the Regions Prime Lenders to African Americans as a percentage of their total HMDA lending was lower than the percentage for aggregate lenders. These data also show a more pronounced disparity between the proportion of loans originated by the Regions Prime Lenders to African Americans in the Atlanta MSA and the proportion of loans originated by aggregate lenders. African Americans comprise almost 30 percent of the population in the Atlanta MSA, and the percentage of applications received by the Regions Prime Lenders from African Americans was significantly lower than the percentage for aggregate lenders.[40]

The data also indicate, however, that the percentage of loans extended by the Regions Prime Lenders to African Americans increased modestly in most markets from 2001 to 2002 and again from 2002 to 2003.[41] In addition, the denial disparity ratios[42] decreased from 2001 to 2002 in most of the MSAs. HMDA data in 2002 also indicate that lending by the Regions Prime Lenders to Hispanics was generally comparable to lending by the aggregate lenders in most markets reviewed and exceeded that of the aggregate lenders in the Orlando MSA, the market with the highest percentage of Hispanic individuals.[43]

The Board 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 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.[44] Moreover, HMDA data indicating that one affiliate is lending to minorities or LMI individuals to a greater extent than another affiliate do not, without more information, indicate that either affiliate has engaged in discriminatory lending on a prohibited basis.

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 institutions of Regions and Union Planters and their lending subsidiaries, including EquiFirst. Examiners found no substantive violations of fair lending laws or regulations or other illegal credit practices at any of the depository institution subsidiaries of either organization or their lending subsidiaries.

In Regions Bank’s 2001 consumer compliance examination, examiners found the bank’s marketing efforts overall were broad-based and designed to cover all of the bank’s markets. As part of this examination, examiners reviewed the bank’s lending in minority tracts of the Atlanta MSA.[45] Examiners found no evidence that Regions Bank was deliberately excluding any geographic areas from its HMDA-reportable lending efforts in the Atlanta market and also found that no areas in the Atlanta MSA were excluded from the bank’s broad-based marketing efforts.

The record also indicates that Regions has taken several steps to ensure that the lending operations of Regions Bank and its subsidiaries, including EquiFirst, comply with fair lending laws. Regions Bank and its mortgage division have established compliance departments to help ensure compliance with federal and state banking laws and regulations, particularly those related to fair lending and consumer protection. These compliance departments are responsible for implementing fair lending and consumer protection compliance programs and procedures, which include providing annual fair lending training to all bank employees involved in lending transactions, performing a second review of all loan applications before they are denied, and

37. Based on an analysis of home purchase lending data for Regions, a commenter also alleged that Regions Bank relies heavily on its ‘‘subprime affiliates’’ to lend to African-American and LMI borrowers in Mississippi. HMDA data for Mississippi MSAs in 2002 indicate that Regions Bank, including RMI, received only five applications from African Americans and only 26 applications from LMI individuals. Neither Regions Bank nor RMI has a branch in Mississippi.

38. The Board’s review of the HMDA data for the Regions Prime Lenders included the Mobile and Little Rock/North Little Rock MSAs, as well as the MSAs cited by the commenter.

39. The lending data of the aggregate of lenders represent the cumulative lending for all financial institutions that have reported HMDA data in a given market.

40. During 2002, the Regions Prime Lenders engaged in significant overall volume of mortgage lending in the Atlanta MSA, receiving more than 4,200 loan applications and making more than 3,300 loans.

41. In the Atlanta MSA, the percentage of loans extended by the Regions Prime Lenders to African Americans increased from 2001 to 2002 but decreased from 2002 to 2003.

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

43. The HMDA data for the Orlando MSA indicate that the Regions Prime Lenders originated a larger number and higher percentage of their HMDA-reportable loans to Hispanics than EquiFirst in 2001 and 2002.

44. 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.

45. Minority census tract means a census tract with a minority population of 80 percent or more.

conducting regular compliance audits and fair lending reviews of loan documentation by product and business line.

Based on a review of the loans it sold to the Federal National Mortgage Association (''Fannie Mae'') during 2002, RMI concluded that measures were needed to increase its originations to minority borrowers. To help achieve this goal, RMI initiated an emerging markets program featuring a Community Lending Alliance (''CLA'') involving Fannie Mae to increase RMI's lending in underserved markets. RMI has pledged to use its best efforts to originate $1 billion in mortgage loans in underserved markets between August 8, 2003, and September 2, 2005, through the CLA. Regions represents that according to Fannie Mae, RMI has already closed $725 million in loans under the CLA, almost 20 percent of which were to minority loan applicants, including African Americans.

Regions also represents that EquiFirst, which originates all its loans through mortgage brokers, uses computer software to help ensure compliance with applicable federal and state fair lending laws and regulations. According to Regions, this automated compliance program generates all required disclosures for mortgage loan originations and closings. Regions reports that EquiFirst recently enhanced the software to include stand-alone programs for comparative analyses and ''predatory'' lending testing to supplement the reviews of EquiFirst's originations already performed by Regions Bank. In addition, EquiFirst staff conducts compliance testing, self-assessments, and audits of a sample of mortgage loan originations each month, and also conducts a second review of all denied mortgage loan applications.

Compliance with fair lending and consumer protection laws at UPB-NA and its consumer-loan affiliates is managed and monitored by each lending department or division separately, with oversight and assistance from the bank's Corporate Compliance division. Generally, UPB-NA's compliance programs and procedures provide for automated testing of loan portfolios for compliance with fair lending laws and regulations and include ongoing automated monitoring of rates of application denials and loan distributions for HMDA-reportable loans to minorities in each market, auditing major bank departments for compliance with all other consumer protection laws every 12 to 18 months, and quarterly automated training in fair lending and consumer protection for all staff involved in the bank's lending process.

Regions stated that, although it has not decided which organization's fair lending policies and programs will be implemented at New Regions, it expects that the New Regions' compliance program would draw from the best practices of the existing compliance programs at both organizations. Regions also indicated that the compliance program for Regions Bank, including RMI, after consummation of the proposal, would include UPB-NA's methodology for reviewing HMDA data, which uses denial disparity ratios and penetration rates for loans to minorities to analyze lending performance in the bank's assessment areas.

The Board also has considered the HMDA data in light of other information, including the CRA performance records of Regions' and Union Planters' subsidiary banks that are detailed above. These established efforts demonstrate that, on balance, the records of performance of Regions and Union Planters in meeting the convenience and needs of their communities are consistent with approval of this proposal. The record in this case also reflects an opportunity for the Regions Prime Lenders to improve the percentage of their overall applications for HMDA-reportable loans from, and the percentage of overall HMDA-reportable originations to, African-American borrowers, particularly in the Atlanta MSA. As noted above, RMI's internal review has identified the need to originate more loans to minority borrowers and it appears to have taken affirmative steps to improve this aspect of its lending operations through its emerging markets initiative that features the CLA with Fannie Mae. The Board also notes that Regions Bank, including RMI, should be better equipped on consummation of the proposal to identify the MSAs where it is underperforming in terms of originating mortgage loans to African Americans after the methodology of its internal analysis of HMDA-reportable lending has been updated. The Board expects that Regions Bank, including RMI, will continue to take steps to improve its mortgage lending performance to African-American borrowers, particularly in the Atlanta MSA. The Federal Reserve System will monitor and evaluate the performance of Regions Bank as part of the supervisory process, including assessments of this performance in subsequent consumer compliance examinations.

E. Branch Closings

A commenter expressed concern that this proposal would result in possible branch closings and requested that Regions identify which branches it would close. The Board has carefully considered these comments in light of all the facts of record. Regions represented that the number of branch closings, relocations, or consolidations related to the proposed acquisition would be small because there is little geographic overlap with Union Planters. Regions also represented that no decision has been made about the number or locations of branches to be closed, relocated, or consolidated, or about which organization's branch closing policy would be in effect at New Regions on consummation of the proposal.

The Board has considered carefully Regions' and UPB-NA's branch closing policies and Regions' record of opening and closing branches. Under their policies, Regions and UPB-NA must review a number of factors before identifying a branch for closure, consolidation, or relocation, including deposit levels, the potential impact on the community, and other relevant factors. Examiners reviewed Regions' branch closing policy as part of the most recent CRA evaluation of Regions Bank and found it to be in compliance with federal law.

The Board also has considered that federal banking law provides a specific mechanism for addressing branch closings.[46] 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 Reserve Bank and the OCC will continue to review the branch closing record of Regions Bank and UPB-NA, respectively, in the course of conducting CRA performance evaluations.

F. 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 Regions, comments on the proposal, 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, including the CRA performance records of the relevant depository institutions, are consistent with approval.

Nonbanking Activities

New Regions also has filed notice under sections 4(c)(8) and 4(j) of the BHC Act to acquire Regions FSB and thereby engage in the activity of operating a savings association. Through Regions FSB, New Regions would accept a small amount of deposits and provide trust and asset management services. The Board has determined by regulation that the activity of owning, controlling, or operating a savings association is permissible for a bank holding company, provided that the savings association directly and indirectly engages only in activities that are permissible for a bank holding company to conduct under section 4(c)(8) of the BHC Act.[47]

In order to approve New Regions' notice to acquire Regions FSB, the Board is required by section 4(j)(2)(A) of the BHC Act to determine that the acquisition "can reasonably be expected to produce benefits to the public . . . that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices."[48]

As part of its evaluation of these factors, the Board considers the financial condition and managerial resources of the notificant, its subsidiaries, and the companies to be acquired, and the effect of the proposed transaction on those resources. For the reasons discussed above and based on all the facts of record, the Board has concluded that financial and managerial considerations are consistent with approval of the notice. The Board reviewed the competitive effects of the proposal in the Birmingham banking market. Regions FSB maintains its only office in Birmingham, and Union Planters does not compete in this banking market. Based on all the facts of record, the Board concludes that it is unlikely that significantly adverse competitive effects would result from the acquisition of Regions FSB.

The Board also has reviewed carefully the public benefits of the acquisition of Regions FSB. The record indicates that consummation of the proposed thrift acquisition, when considered in the broader context of Regions' acquisition of Union Planters, would result in benefits to the customers and communities that the institutions serve. On consummation, the proposal would allow Regions to provide customers of Regions FSB, along with the customers of Regions Bank, UPB-NA, Lakeway Bank, and Regions' other direct and indirect subsidiaries, with access to a broader array of commercial banking products and services. Moreover, Regions' customers would have access to an expanded network of branch offices and ATMs.

The Board concludes that the conduct of the proposed nonbanking activities within the framework of Regulation Y and Board precedent is not likely to result in adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices, that would outweigh the public benefits of the proposal, such as increased customer convenience and gains in efficiency. Accordingly, based on all the facts of record, the Board has determined that the balance of public interest factors that the Board must consider under section 4(j)(2)(A) of the BHC Act is consistent with approval of New Region's notice.

As noted above, New Regions also has proposed to acquire Union Planters Hong Kong, Inc. The Board has concluded that all the factors required to be considered under the Federal Reserve Act and Regulation K are consistent with approval.

Financial Holding Company Election

New Regions filed with the Board an election to become a financial holding company pursuant to sections 4(k) and (*l*) of the BHC Act and section 225.82 of Regulation Y. New Regions has certified that the subsidiary depository institutions controlled by Regions and Union Planters are well capitalized and well managed and will remain so on consummation of the proposal. New Regions has provided all the information required for financial holding company election under Regulation Y.

As noted above, the Board has reviewed the examination ratings received by the subsidiary depository institutions controlled by Regions and Union Planters under the CRA and other relevant examinations and information. Based on all the facts of record, the Board has determined that New Regions' election to become a financial holding company will become effective on consummation of the proposal, if on that date Regions Bank, Regions FSB, UPB-NA, and Lakeway Bank remain well capitalized and well managed and all institutions subject to the CRA are

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

47. 12 CFR 225.28(b)(4).

48. 12 U.S.C. § 1843(j)(2)(A).

rated at least ‘‘satisfactory’’ at their most recent performance evaluations.[49]

Conclusion

Based on the foregoing and in light of all the facts of record, the Board has determined that the applications and notice should be, and hereby are, approved.[50] In reaching this 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 New Regions with the conditions in this order and with all the commitments made to the Board in connection with this proposal and the receipt of all other regulatory approvals. The Board's approval of the nonbanking aspects of the proposal also is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c) of Regulation Y (12 CFR 225.7 and 225.25(c)), 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. For purposes of these actions, 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 bank acquisitions shall not be consummated before the fifteenth calendar day after the effective date of this order, and the proposal may not be consummated later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Atlanta acting pursuant to delegated authority.

By order of the Board of Governors, effective June 16, 2004.

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 A

Banking Markets in which Regions and Union Planters Compete Directly

Alabama Banking Markets

Decatur

Morgan County, and the portion of the City of Decatur in Limestone County.

Florence

Colbert and Lauderdale Counties.

Huntsville

Madison County, and Limestone County, excluding the Town of Ardmore and the portion of the City of Decatur in Limestone County.

Mobile

Mobile County, and the towns of Bay Minette, Daphne, Fairhope, Loxley, Robertsdale, and Spanish Fort.

Arkansas Banking Markets

Blytheville

Mississippi County, and the towns of Virginia, Holland, Cooter, and Pemiscot.

Corning

Clay County.

Jonesboro

Craighead and Poinsett Counties.

Newport

Jackson County.

Paragould

Greene County.

49. This determination includes the financial holding company elections by UPHC and Franklin Financial, which also will become effective on consummation of the proposal.

50. Two commenters requested that the Board hold a public hearing on the proposal. Section 3 of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authority for 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). In addition, section 4 of the BHC Act and the Board's rules thereunder provide for a hearing on a notice to acquire a nonbanking company if there are disputed issues of material facts that cannot be resolved in some other manner. 12 CFR 225.25(a)(2). The Board has considered carefully the commenters' 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 commenters have submitted written comments that the Board has considered carefully in acting on the proposal. The commenters' requests fail to identify disputed issues of fact that are material to the Board's decisions that would be clarified by a public hearing or meeting. Moreover, the commenters' requests fail to demonstrate why their written comments do not present their views adequately or why a meeting or hearing otherwise would be necessary or appropriate. For these reasons, and based on all the facts of record, the Board has determined that a public 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.

Florida Banking Market

West Palm Beach

The portion of Palm Beach County east of Loxahatchee, and the towns of Indiantown and Hobe Sound.

Louisiana Banking Markets

Baton Rouge

Ascension, East Baton Rouge, Iberville, Livingston, and West Baton Rouge Parishes; the northern half of Assumption Parish; and the Town of Union in St. James Parish.

Houma–Thibodaux

Lafourche and Terrebonne Parishes.

New Orleans

Jefferson, Orleans, Plaquemines, St. Bernard, St. Charles, St. John the Baptist, and St. Tammany Parishes; and St.James Parish, excluding the Town of Union.

Tennessee Banking Markets

Chattanooga

Hamilton and Marion Counties, excluding the portion of the Town of Monteagle in Marion County; and Catoosa, Dade, and Walker Counties in Georgia.

Clarksville

Montgomery and Stewart Counties; and Christian County in Kentucky.

Cookeville

Jackson, Overton, and Putnam Counties.

Fayetteville

Lincoln County, excluding the portion of the Town of Petersburg in this county.

Knoxville

Anderson, Knox, Loudon, Roane, and Union Counties; the portion of Blount County northwest of Chilhowee Mountain; and the towns of Blaine, Buffalo Springs, Chestnut Hill, Danridge, Dumplin, Friends Station, Harriman, Hodges, Kodak, Joppa, Lea Springs, New Market, Oliver Springs, Powder Springs, Seymour, and Strawberry Plains.

Memphis

Fayette, Shelby, and Tipton Counties; Crittenden County in Arkansas; and De Soto and Tate Counties in Mississippi.

Nashville

Cheatham, Davidson, Robertson, Rutherford, Sumner, Williamson, and Wilson Counties.

Texas Banking Market

Houston

Houston Ranally Metropolitan Area.

Appendix B

Market Data

Unconcentrated Banking Market

Clarksville, Tennessee/Kentucky

Regions operates the 14th largest depository institution in the market, controlling deposits of $13.5 million, representing less than 1 percent of market deposits. Union Planters operates the 13th largest depository institution in the market, controlling deposits of $38.9 million, representing approximately 2.1 percent of market deposits. After the proposed merger, New Regions would operate the 12th largest depository institution in the market, controlling deposits of $52.4 million, representing approximately 2.8 percent of market deposits. Thirteen depository institutions would remain in the banking market. The HHI would increase by 3 points to 977.

Moderately Concentrated Banking Markets

Chattanooga, Tennessee/Georgia

Regions operates the 16th largest depository institution in the market, controlling deposits of $77.6 million, representing approximately 1.4 percent of market deposits. Union Planters operates the 17th largest depository institution in the market, controlling deposits of $71.7 million, representing approximately 1.3 percent of market deposits. After the proposed merger, New Regions would operate the seventh largest depository institution in the market, controlling deposits of $149.3 million, representing approximately 2.6 percent of market deposits. Twenty-four depository institutions would remain in the banking market. The HHI would increase by 4 points to 1343.

Cookeville, Tennessee

Regions operates the 13th largest depository institution in the market, controlling deposits of $31.1 million, representing approximately 2.3 percent of market deposits. Union Planters operates the fifth largest depository institution in the market, controlling deposits of $135.5 million, representing approximately 9.9 percent of market deposits. After the proposed merger, New Regions would operate the fourth largest depository institution in the market, controlling deposits of $166.6 million, representing approximately

12.2 percent of market deposits. Thirteen depository institutions would remain in the banking market. The HHI would increase by 45 points to 1110.

Decatur, Alabama

Regions operates the largest depository institution in the market, controlling deposits of $203.8 million, representing approximately 14.9 percent of market deposits. Union Planters operates the seventh largest depository institution in the market, controlling deposits of $112.8 million, representing approximately 8.3 percent of market deposits. After the proposed merger, New Regions would remain the largest depository institution in the market, controlling deposits of approximately $316.7 million, representing approximately 23.2 percent of market deposits. Thirteen depository institutions would remain in the banking market. The HHI would increase by 246 points to 1425.

Florence, Alabama

Regions operates the eighth largest depository institution in the market, controlling deposits of $116.5 million, representing approximately 6.2 percent of market deposits. Union Planters operates the 12th largest depository institution in the market, controlling deposits of $29.7 million, representing approximately 1.6 percent of market deposits. After the proposed merger, New Regions would operate the sixth largest depository institution in the market, controlling deposits of $146.2 million, representing approximately 7.8 percent of market deposits. Thirteen depository institutions would remain in the banking market. The HHI would increase by 19 points to 1257.

Houma–Thibodaux, Louisiana

Regions operates the fifth largest depository institution in the market, controlling deposits of $157.1 million, representing approximately 6.9 percent of market deposits. Union Planters operates the 11th largest depository institution in the market, controlling deposits of $52.6 million, representing approximately 2.3 percent of market deposits. After the proposed merger, New Regions would operate the fourth largest depository institution in the market, controlling deposits of approximately $209.6 million, representing approximately 9.1 percent of market deposits. Thirteen depository institutions would remain in the banking market. The HHI would increase by 31 points to 1757.

Huntsville, Alabama

Regions operates the largest depository institution in the market, controlling deposits of $913.8 million, representing approximately 21.6 percent of market deposits. Union Planters operates the ninth largest depository institution in the market, controlling deposits of $103.2 million, representing approximately 2.4 percent of market deposits. After the proposed merger, New Regions would remain the largest depository institution in the market, controlling deposits of approximately $1 billion, representing approximately 24 percent of market deposits. Thirteen depository institutions would remain in the banking market. The HHI would increase by 105 points to 1339.

Jonesboro, Arkansas

Regions operates the fourth largest depository institution in the market, controlling deposits of $160.3 million, representing approximately 9 percent of market deposits. Union Planters operates the second largest depository institution in the market, controlling deposits of $199.4 million, representing approximately 11.2 percent of market deposits. After the proposed merger, New Regions would operate the second largest depository institution in the market, controlling deposits of approximately $359.6 million, representing approximately 20.2 percent of market deposits. Fifteen depository institutions would remain in the banking market. The HHI would increase by 202 points to 1713.

Knoxville, Tennessee

Regions operates the 22nd largest depository institution in the market, controlling deposits of $32.2 million, representing less than 1 percent of market deposits. Union Planters operates the seventh largest depository institution in the market, controlling deposits of $462.8 million, representing approximately 5.2 percent of market deposits. After the proposed merger, New Regions would operate the seventh largest depository institution in the market, controlling deposits of $495 million, representing approximately 5.5 percent of market deposits. Thirty-one depository institutions would remain in the banking market. The HHI would increase by 4 points to 1118.

Nashville, Tennessee

Regions operates the 11th largest depository institution in the market, controlling deposits of $463.6 million, representing approximately 2.4 percent of market deposits. Union Planters operates the fourth largest depository institution in the market, controlling deposits of $1.1 billion, representing approximately 5.5 percent of market deposits. After the proposed merger, New Regions would operate the fourth largest depository institution in the market, controlling deposits of approximately $1.5 billion, representing approximately 7.9 percent of market deposits. Thirty-five depository institutions would remain in the banking market. The HHI would increase by 26 points to 1105.

New Orleans, Louisiana

Regions operates the fourth largest depository institution in the market, controlling deposits of $1.3 billion, representing approximately 7.4 percent of market deposits. Union Planters operates the 26th largest depository institution in the market, controlling deposits of $60.5 million, representing less than 1 percent of market deposits. After the proposed merger, New Regions would remain the fourth largest depository institution in the market, controlling deposits of approximately $1.4 billion, representing approximately 7.8 percent of market deposits. Thirty-eight depository institutions would remain in banking market. The HHI would increase by 5 points to 1628.

West Palm Beach, Florida

Regions operates the 53rd largest depository institution in the market, controlling deposits of $1.3 million, representing less than 1 percent of market deposits. Union Planters operates the 14th largest depository institution in the market, controlling deposits of $274.5 million, representing approximately 1.3 percent of market deposits. After the proposed merger, New Regions would operate the 14th largest depository institution in the market, controlling deposits of approximately $275.8 million, representing approximately 1.3 percent of market deposits. Fifth-five depository institutions would remain in the banking market. The HHI would not increase, remaining at 1325.

Highly Concentrated Banking Markets

Baton Rouge, Louisiana

Regions operates the sixth largest depository institution in the market, controlling deposits of $288.6 million, representing approximately 3.5 percent of market deposits. Union Planters operates the fourth largest depository institution in the market, controlling deposits of $638.5 million, representing approximately 7.7 percent of market deposits. After the proposed merger, New Regions would operate the third largest depository institution in the market, controlling deposits of $927.1 million, representing approximately 11.1 percent of market deposits. Thirty-two depository institutions would remain in the banking market. The HHI would increase by 53 points to 1832.

Blytheville, Arkansas

Regions operates the fifth largest depository institution in the market, controlling deposits of $31.5 million, representing approximately 6.8 percent of market deposits. Union Planters operates the seventh largest depository institution in the market, controlling deposits of $23.6 million, representing approximately 5.1 percent of market deposits. After the proposed merger, New Regions would operate the third largest depository institution in the market, controlling deposits of $55.1 million, representing approximately 11.8 percent of market deposits. Six depository institutions would remain in the banking market. The HHI would increase by 69 points to 2505.

Corning, Arkansas

Regions operates the fourth largest depository institution in the market, controlling deposits of $21.4 million, representing approximately 10 percent of market deposits. Union Planters operates the fifth largest depository institution in the market, controlling deposits of $19.5 million, representing approximately 9.1 percent of market deposits. After the proposed merger, New Regions would operate the third largest depository institution in the market, controlling deposits of approximately $41 million, representing approximately 19 percent of market deposits. Six depository institutions would remain in the banking market. The HHI would increase by 180 points to 2343.

Fayetteville, Tennessee

Regions operates the second largest depository institution in the market, controlling deposits of $77.1 million, representing approximately 20.3 percent of market deposits. Union Planters operates the seventh largest depository institution in the market, controlling deposits of $18.6 million, representing approximately 4.9 percent of market deposits. After the proposed merger, New Regions would remain the second largest depository institution in the market, controlling deposits of approximately $95.6 million, representing approximately 25.2 percent of market deposits. Six depository institutions would remain in the banking market. The HHI would increase by 199 points to 1998.

Houston, Texas

Regions operates the 33rd largest depository institution in the market, controlling deposits of $196.7 million, representing less than 1 percent of market deposits. Union Planters operates the 20th largest depository institution in the market, controlling deposits of $494.2 million, representing less than 1 percent of market deposits. After the proposed merger, New Regions would operate the 13th largest depository institution in the market, controlling deposits of $690.9 million, representing less than 1 percent of market deposits. Eighty-three depository institutions would remain in the banking market. The HHI would not increase, remaining at 2641.

Memphis, Tennessee/Arkansas/Mississippi

Regions operates the 11th largest depository institution in the market, controlling deposits of $324.1 million, representing approximately 1.3 percent of market deposits. Union Planters operates the third largest depository institution in the market, controlling deposits of $3.7 billion, representing approximately 15.5 percent of market deposits. After the proposed merger, New Regions would operate the second largest depository institution in the market, controlling deposits of approximately $4.1 billion, representing approximately 16.8 percent of market deposits. Fifty-one depository institutions would remain in the banking market. The HHI would increase by 41 points to 2250.

Mobile, Alabama

Regions operates the largest depository institution in the market, controlling deposits of $2.2 billion, representing approximately 37.3 percent of market deposits. Union Planters operates the eighth largest depository institution in the market, controlling deposits of $120.1 million, representing approximately 2.1 percent of market deposits. After the proposed merger, New Regions would remain the largest depository institution in the market, controlling deposits of approximately $2.3 billion, representing approximately 39.4 percent of market deposits. Seventeen depository institutions would remain in the banking market. The HHI would increase by 155 points to 2310.

Newport, Arkansas

Regions operates the fourth largest depository institution in the market, controlling deposits of $4.5 million, representing approximately 2.5 percent of market deposits. Union Planters operates the third largest depository institution in the market, controlling deposits of $37.4 million, representing approximately 20.9 percent of market deposits. After the proposed merger, New Regions would operate the second largest depository institution in the market, controlling deposits of approximately $42 million, representing approximately 23.4 percent of market deposits. Three depository institutions would remain in the banking market. The HHI would increase by 106 points to 3964.

Paragould, Arkansas

Regions operates the eighth largest depository institution in the market, controlling deposits of $17.4 million, representing approximately 3.1 percent of market deposits. Union Planters operates the fourth largest depository institution in the market, controlling deposits of $61.2 million, representing approximately 10.8 percent of market deposits. After the proposed merger, New Regions would operate the second largest depository institution in the market, controlling deposits of approximately $78.5 million, representing approximately 13.9 percent of market deposits. Eight depository institutions would remain in the banking market. The HHI would increase by 66 points to 2525.

Orders Issued Under International Banking Act

Hypothekenbank in Essen AG Essen, Germany

Order Approving Establishment of a Representative Office

Hypothekenbank in Essen AG (''Bank''), Essen, Germany, 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 (*The New York Times,* January 30, 2004). The time for filing comments has expired, and all comments have been considered.

Bank, with total consolidated assets of approximately $92 billion,[1] is the fifth largest mortgage bank in Germany and is primarily engaged in real estate mortgage lending and public sector lending. Bank operates representative offices in Belgium, France, and the United Kingdom.

Bank is owned by Commerzbank, AG, Frankfurt, Germany, and Helvetic Grundbesitz Verwaltung GmbH. Commerzbank, with consolidated total assets of approximately $493 billion, is the fourth largest banking organization in Germany.[2] Commerzbank engages in banking operations in the United States through branches in New York, New York; Chicago, Illinois; and Los Angeles, California; and an agency in Atlanta, Georgia. Commerzbank also engages in nonbanking activities in the United States through a number of subsidiaries.

The proposed representative office would initially act as a liaison with existing and potential customers of Bank. The office would also conduct research and may solicit commercial mortgage loans in the United States.

In acting on an application to establish a representative office, the IBA and Regulation K provide that the Board shall take into account whether the foreign bank engages directly in the business of banking outside of the United States and has furnished to the Board the information it needs to assess the application adequately. The Board also shall take into account whether the foreign bank and any foreign bank parent is subject to comprehensive supervision or regulation on a consolidated basis by its home country supervisor (12 U.S.C. § 3107(a)(2); 12 CFR 211.24(d)(2)).[3] In addition, the Board may take into account additional standards set forth in the IBA and Regulation K (12 U.S.C. § 3105(d)(3)–(4); 12 CFR 211.24(c)(2)).

As noted above, Bank and Commerzbank engage 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

1. Unless otherwise indicated, data are as of December 31, 2003.
2. Data are as of March 31, 2004.
3. In assessing this standard, the Board considers, among other factors, the extent to which the home country supervisors:

(i) Ensure that the bank has adequate procedures for monitoring and controlling its activities worldwide;
(ii) Obtain information on the condition of the bank and its subsidiaries and offices through regular examination reports, audit reports, or otherwise;
(iii) Obtain information on the dealings with and relationship between the bank and its affiliates, both foreign and domestic;
(iv) Receive from the bank financial reports that are consolidated on a worldwide basis or comparable information that permits analysis of the bank's financial condition on a worldwide consolidated basis;
(v) Evaluate prudential standards, such as capital adequacy and risk asset exposure, on a worldwide basis. These are indicia of comprehensive, consolidated supervision. No single factor is essential, and other elements may inform the Board's determination.

determined, in connection with applications involving other German banks, including Commerzbank, that those banks were subject to home country supervision on a consolidated basis.[4] Bank is supervised by the German Federal Financial Supervisory Agency on substantially the same terms and conditions as the other banks. Based on all the facts of record, it has been determined that Bank is and Commerzbank continues to be subject to comprehensive supervision and regulation on a consolidated basis by their 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)) have also been taken into account. The German Federal Financial Supervisory Agency 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.

Germany is a member of the Financial Action Task Force and subscribes to its recommendations regarding measures to combat money laundering. In accordance with these recommendations, Germany has enacted laws and created legislative and regulatory standards to deter money laundering. Money laundering is a criminal offense in Germany and credit institutions are required to establish internal policies and procedures for its detection and prevention.

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 parents have committed to make available to the Board such information on the operations of Bank and any of their 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 and its parents have 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 German Federal Financial Supervisory Agency 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.

On the basis of all the facts of record, and subject to the commitments made by Bank and its parents, and the terms and conditions set forth in this order, Bank's application to establish the representative office is hereby approved.[5] 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 companies with the commitments made in connection with this application and with the conditions in this order.[6] The commitments and conditions referred to above are conditions imposed in writing by the Board in connection with its decision and may be enforced in proceedings against Bank and its affiliates under 12 U.S.C. § 1818.

By order, approved pursuant to authority delegated by the Board, effective June 18, 2004.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

FINAL ENFORCEMENT DECISIONS ISSUED BY THE BOARD OF GOVERNORS

In the Matter of a Notice to Prohibit Further Participation Against

Garfield C. Brown, Jr.,
Former Employee,
Mellon Bank, N.A.
Pittsburgh, Pennsylvania

Docket No. OCC-AA-EC-03-11

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 Respon-

4. *See, e.g., HSH Nordbank AG,* 89 *Federal Reserve Bulletin* 344 (2003); *Eurohypo AG,* 88 *Federal Reserve Bulletin* 504 (2002); *Commerzbank AG,* 85 *Federal Reserve Bulletin* 336 (1999).

5. Approved by the Director of the Division of Banking Supervision and Regulation, with the concurrence of the Associate General Counsel, pursuant to authority delegated by the Board and the General Counsel.

6. 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.

dent, Garfield C. Brown, Jr. (''Respondent''), from further participation in the affairs of any financial institution because of his conduct as an employee of Mellon Bank, N.A., Pittsburgh, Pennsylvania (the ''Bank''), a national 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 Ann Z. Cook (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 20 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 June 3, 2003, the OCC issued a Notice initiating an enforcement action that sought, *inter alia*, an order of prohibition against Respondent for his participation in processing three cash advances for an acquaintance, totaling $15,000, knowing that his acquaintance presented false identification to obtain the cash advances. The Notice further alleges that Respondent recorded inaccurate identification information on the cash advance slips completed for these transactions, and that the Respondent received $500 from his acquaintance for his participation in these cash advances.[1] The Notice directed Respondent to file an answer within 20 days, and warned that failure to do so would constitute a waiver of her 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 20-day period.

On or about July 24, 2003, 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 July 29, 2003, Respondent received service of an Order to Show Cause directing him to submit an answer by August 13, 2003, and to demonstrate good cause for not having done so previously. That Order, too, was ignored. Respondent 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 Notice alleges, and the Board finds, that on or about July 30, 1998, Respondent processed for his acquaintance two cash advances against a credit card, each in the amount of $3,500, knowing that the driver's license presented by his acquaintance matched neither the name of the acquaintance, nor the name of the cardholder against which the cash advance was taken. Additionally, on or about August 5, 1998, Respondent processed for the same acquaintance another cash advance in the amount of $8,000 against a different credit card, after the acquaintance presented the same driver's license that was used for identification in the July 30, 1998 transactions. The Notice alleges and the Board finds that on both occasions, Respondent recorded inaccurate identification information on Bank records, at the request of his acquaintance, and that Respondent received $500 from his acquaintance for his participation in these cash advance transactions. The Bank

1. The Notice also sought an order requiring Respondent to make restitution to the Bank under 12 U.S.C. 1818(b)(6). The OCC has authority to issue a final decision with respect to this requested relief.

reimbursed the cardholders who were wrongfully charged, and thereby suffered a loss of $15,000.

This conduct by Respondent meets all the criteria for entry of an order of prohibition under 12 U.S.C. § 1818(e). It is a breach of fiduciary duty and an unsafe or unsound practice for a bank employee to give bank funds to a person the bank employee knows is not entitled to receive such funds, to accept identification documents that the bank employee knows does not belong to a customer requesting a bank transaction, and to record inaccurate information on bank records. Respondent's action caused gain to himself, as well as loss to the Bank. Finally, such actions, along with Respondent's acceptance of $500 for his involvement in this fraudulent scheme, 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 21st day of November 2003.

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 GARFIELD C. BROWN, Jr. ("Brown"), a former employee and institution-affiliated party, as defined in Section 3(u) of the FDI Act (12 U.S.C. § 1813(u)), of Mellon Bank, N.A., Pittsburgh, Pennsylvania.

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)), Brown 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 Brown 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 21st day of November 2003.

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

Marian L. Butler,
Former Employee,
CoreStates Financial (now First Union)
Philadelphia, Pennsylvania

Docket No. OCC-AA-EC-02-07

Final Decision

This is an administrative proceeding pursuant to the Federal Deposit Insurance Act ("FDI Act") in which the Office of the Comptroller of the Currency of the United States of America ("OCC") seeks to prohibit the Respondent, Marian L. Butler ("Respondent"), from further participation in the affairs of any financial institution because of her conduct as an employee of CoreStates Financial (now First Union) (the "Bank"), a national banking association. 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 Ann Z. Cook (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 20 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 August 6, 2002, the OCC issued a Notice initiating an enforcement action that sought an order of prohibition due to Respondent's actions in stealing between $10,000 and $15,000 from the Bank while working in the cash processing unit. The Notice directed Respondent to file an answer within 20 days, and warned that failure to do so would constitute a waiver of her right to appear and contest the allegations. The record shows that the OCC made numerous efforts to serve the Notice on Respondent. The initial copy of the Notice was mailed certified mail, return receipt requested, on August 7, 2002, but the receipt was never returned. A second copy of the Notice was served on Respondent by overnight delivery on September 11, 2002. The courier service returned the package as ''refused'' by the addressee. A process server was dispatched to Respondent's address on September 21, 2002, but was told that there was no one by Respondent's name at that address. On October 1, 2002, Enforcement Counsel sent two more copies to Respondent's home address, one by certified mail, return receipt requested, and one by courier, this time not indicating that the package was from the OCC. Although no return receipt was returned for the copy sent by certified mail, an individual with Respondent's last name signed for the couriered copy on October 4, 2002.[1] Nonetheless, Respondent failed to file an answer within the 20-day period specified in that copy of the Notice. On November 27, 2002, the ALJ issued an Order to Show Cause directing Respondent to submit an answer by December 16, 2002, and demonstrate good cause for not having done so previously. The record reflects that the Order was delivered by courier to Respondent's address and signed for on December 2, 2002. Respondent did not respond to 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.*

The record establishes that the OCC used methods ''reasonably calculated to give actual notice'' in its efforts to notify Respondent of the pendency of this case. 12 CFR 19.11(c)(2)(v). Nonetheless, Respondent failed to file an answer despite notice to her of the consequences of such failure, and also failed to respond to the ALJ's Order to show cause. Respondent's failure to file an answer constitutes a default.

Respondent's default requires the Board to consider the allegations in the Notice as uncontested. The Notice alleges, and the Board finds, that Respondent stole between $10,000 and $15,000 in cash from the Bank while working as a temporary employee in the cash processing unit.[2] This conduct meets all the criteria for entry of an order of prohibition under 12 U.S.C. § 1818(e). It is a violation of

1. The person who signed for the package did not provide a first name.

2. Respondent was an employee of Manpower Temps, and was contracted from Manpower Temps to work at the Bank. The Board finds that this qualifies her as an institution-affiliated party within the meaning of 12 U.S.C § 1818(u)(1), in that she was an ''employee . . . of, or agent for, an insured depository institution.''

law and an unsafe or unsound practice for a bank employee to steal bank funds. Respondent's actions caused gain to herself as well as loss to the Bank. Finally, Respondent's actions involved personal dishonesty in taking property not her own. The requirements for an order of prohibition having been met, the Board has determined that such an order will issue.

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 February, 2003.

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

Stephanie Edmond,
Former Customer Service Representative and Teller
First Tennessee Bank, NA,
Memphis, Tennessee
and
Former Teller
Bank of America, NA,
Charlotte, North Carolina

Docket No. OCC-AA-EC-03-24

Final Decision

This is an administrative proceeding pursuant to the Federal Deposit Insurance Act (''FDI Act'') in which the Office of the Comptroller of the Currency of the United States of America (''OCC'') seeks to prohibit the Respondent, Stephanie Edmond (''Respondent''), from further participation in the affairs of any financial institution based on her conduct while she was employed at First Tennessee Bank, NA, Memphis, Tennessee (''First Tennessee''), as well as Bank of America, NA, Charlotte, North Carolina (''BoA''), both national banking associations. 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 (''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. In order 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 the filing of a notice of charges which is served on the respondent. Under the OCC's and the Board's regulations, the respondent must file an answer within 20 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 24, 2003, the OCC issued a Notice initiating an enforcement action that sought an order of prohibition against Respondent based on her actions while employed at two different banks. The Notice directed Respondent to file an answer within 20 days, and warned that failure to do so would constitute a waiver of her right to appear and contest the allegations. The OCC sent the Notice by overnight delivery to the two last known addresses for Respondent. On September 25, 2003, a ''Ms. Edmond'' signed for receipt of the Notice at one of these addresses. However, Respondent failed to file an answer within the 20-day period specified in the Notice.

On November 4, 2003, Enforcement Counsel for the OCC moved for entry of an order of default based on Respondent's failure to appear and file an answer. On November 24, 2003, the ALJ issued an Order to Show Cause, noting that Respondent had not replied to the OCC's motion, and directing Respondent to appear and demonstrate why the ALJ should not grant the default motion.

From approximately December 16, 2003, through the beginning of February 2004, a private process server hired by the OCC made nine attempts to personally serve Respondent with the Order to Show Cause at the address where the Notice had been sent and received. However, residents at this address refused to acknowledge the process server when he attempted service. The OCC confirmed in a January 2004 telephone conversation with Respondent's mother that Respondent resided at this address. The record reflects that the process server ultimately posted the Order at this address on February 11, 2004. Respondent did not respond to 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 timely answer is deemed to be issued by consent. *Id.*

The record establishes that at a minimum, the OCC used methods "reasonably calculated to give actual notice'' in its efforts to notify Respondent of the pendency of this case. 12 CFR 19.11(c)(2)(v). The OCC identified two last known addresses for the Respondent. On September 25, 2003, a ''Ms. Edmond'' signed for receipt of the overnight delivery of the Notice at one of these addresses. By telephone conversation following receipt of the Notice, Respondent's mother, Mary Edmond, confirmed that the address to which the Notice had been sent was her address, and that her daughter, the Respondent, resided with her at that address. Finally, on February 11, 2004, a process server delivered the Order to Show Cause to this same address. Nonetheless, Respondent failed to file an answer despite notice to her of the consequences of such failure, and also failed to respond to the ALJ's Order to Show Cause. Respondent's failure to file an answer constitutes a default.

Respondent's default requires the Board to consider the allegations in the Notice as uncontested. The Notice alleges, and the Board finds, that while employed at First Tennessee, Respondent fraudulently benefited from a First Tennessee installment loan by, among other things, providing false information on loan documents and forging the name and signature of a cosigner. Respondent's fraudulent loan subsequently went into default. Also while employed at First Tennessee, Respondent took out a loan in the name of a First Tennessee customer, without the customer's knowledge or consent, and by forging the customer's signature on the loan application. Respondent used the proceeds of this loan for her own benefit. Furthermore, while employed at BoA, Respondent executed a cash-out ticket without posting a corresponding ticket. This conduct meets the criteria for entry of an order of prohibition under 12 U.S.C. § 1818(e). It is a violation of law, a breach of fiduciary duty, and an unsafe or unsound practice for a bank employee to fraudulently obtain and benefit from loans issued by a bank at which she is employed. Moreover, it is an unsafe or unsound practice for a bank employee to fail to maintain proper record-keeping of the transactions she executes. Respondent's actions caused gain to herself, as well as a total loss of $22,346 to these two banks. Finally, Respondent's acts involved both personal dishonesty and a willful disregard for the safety or soundness of the banks at which she was employed.

In sum, all the elements necessary for the issuance of a prohibition order are presented in this case.

Conclusion

For these reasons, the Board orders the issuance of the attached Order of Prohibition.

By order of the Board of Governors, this 17th day of June 2004.

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 STEPHANIE EDMOND (''Edmond''), a former employee and institution-affiliated party, as defined in Section 3(u) of the FDI Act (12 U.S.C § 1813(u)), of First Tennessee Bank, NA, Memphis, Tennessee, and Bank of America, NA, Charlotte, North Carolina.

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

1. In the absence of prior written approval by the Board, and by any other Federal financial institution regulatory agency where necessary pursuant to section 8(e)(7)(B) of the Act (12 U.S.C. § 1818(e)(7)(B)), Edmond 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 Edmond 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 17th day of June 2004.

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

Cynthia Rowe,
Former Employee,
Key Bank, N.A.,
Cleveland, Ohio

Docket No. OCC-AA-EC-02-13

Final Decision

This is an administrative proceeding pursuant to the Federal Deposit Insurance Act (''FDI Act'') in which the Office of the Comptroller of the Currency of the United States of America (''OCC'') seeks to prohibit the Respondent, Cynthia Rowe (''Respondent''), from further participation in the affairs of any financial institution because of her conduct as an employee of Key Bank, N.A., Cleveland, Ohio (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 Ann Z. Cook (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 20 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 October 3, 2002, the OCC issued a Notice initiating an enforcement action that sought, inter alia, an order of prohibition due to Respondent's actions in stealing over $40,000 from the Bank over a three-year period.[1] The Notice directed Respondent to file an answer within 20 days, and warned that failure to do so would constitute a waiver of her right to appear and contest the allegations.

1. The Notice also sought an order requiring Respondent to make restitution to the Bank under 12 U.S.C. § 1818(b)(6)(A). The OCC has statutory authority to issue a final decision with respect to this requested relief.

The record shows that the Respondent acknowledged receipt of the Notice. Nonetheless, Respondent failed to file an answer within the 20-day period. A second copy of the Notice was served on October 25, 2002, and received by Respondent on October 30, 2002. The ALJ served an Order Setting Telephone Conference on November 13, 2002, which was received at Respondent's residence on November 14, 2002. Respondent did not, however, participate in the telephone conference call established by the Order. On November 21, 2002, Respondent was served with Enforcement Counsel's Motion for Entry of an Order of Default, but did not respond to it. On November 25, 2002, Respondent received service of an Order to Show Cause directing her to submit an answer by December 10, 2002, and demonstrate good cause for not having done so previously. That Order, too, was ignored. Respondent 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 her of the consequences of such failure, and also failed to respond to the ALJ's Order to show cause. Respondent's failure to file an answer constitutes a default.

Respondent's default requires the Board to consider the allegations in the Notice as uncontested. The Notice alleges, and the Board finds, that Respondent repeatedly stole cash from the Bank's teller drawers over a three-year period. She also made fraudulent entries in the Bank's books and records to reverse overdrafts to her account at the Bank. Together, these thefts totaled over $40,000.

This conduct meets all the criteria for entry of an order of prohibition under 12 U.S.C. § 1818(e). It is a violation of law and an unsafe or unsound practice for a bank employee to steal bank funds and to falsify bank records. Respondent's actions caused gain to herself as well as loss to the Bank. Finally, Respondent's actions involved personal dishonesty in taking property not her own. The requirements for an order of prohibition having been met, the Board has determined that such an order will issue.

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 February, 2003.

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 ''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 CYNTHIA ROWE (''Rowe''), a former employee and institution-affiliated party, as defined in Section 3(u) of the Act (12 U.S.C § 1813(u)), of Key Bank, N.A., Cleveland, Ohio.

NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to section 8(e) of the 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)), Rowe is hereby prohibited:
   (a) from participating in the conduct of the affairs of any bank holding company, any insured depository institution or any other institution specified in subsection 8(e)(7)(A) of the Act (12 U.S.C. § 1818(e)(7)(A));
   (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 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 Act (12 U.S.C. § 1813(u)), such as an officer, director, or employee.
2. This Order, and each provision hereof, is and shall remain fully effective and enforceable until expressly stayed, modified, terminated or suspended in writing by the Board.

Conclusion

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 February, 2003.

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

Gene Ulrich,
Former Senior Vice President and
Senior Loan Officer,
and
Susan Diehl McCarthy,
Former Vice President and Loan Officer
Six Rivers National Bank,
Eureka, California

Docket No. AA-EC-00-40

Final Decision

This is an administrative proceeding brought pursuant to the Federal Deposit Insurance Act (FDI Act) in which the Office of the Comptroller of the Currency (''OCC'') seeks to prohibit the Respondents Gene Ulrich (''Ulrich'') and Susan Diehl McCarthy (''Diehl McCarthy'') from further participation in the affairs of any financial institution because of their respective conduct as officers at the Six Rivers National Bank, Eureka, California (the Bank). Respondent Ulrich served as Senior Vice President and Senior Loan Officer at the Bank, and Respondent Diehl McCarthy held the positions of Vice President and Loan Officer. As required by statute, the OCC has referred the action to the Board of Governors of the Federal Reserve System (the ''Board'') for final action.

Upon review of the administrative record, the Board issues this Final Decision adopting the Recommended Decision (''Recommended Decision'') of Administrative Law Judge Ann Z. Cook (the ''ALJ'') except as specifically supplemented or modified herein. The Board therefore orders that the attached Orders of Prohibition issued against Respondents prohibiting them from future participation in the affairs of any federally-supervised financial institution, without the approval of the appropriate supervisory agency.

I. Statement of the Case

A. Statutory Framework

1. *Standards for Prohibition*—Under the FDI Act and the Board's regulations, the ALJ is responsible for conducting an administrative hearing on a notice of intent to prohibit participation. 12 U.S.C. § 1818(e)(4). Following the hearing, 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 a prohibition order 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 an order of prohibition from further participation in banking. In order to issue such an order pursuant to section 1818(e)(1), 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 respondents 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).

2. *Statutory and Regulatory Lending Restrictions*—Section 84 of the National Bank Act (12 U.S.C. § 84) imposes limits on the degree to which national banks may concentrate credit to particular borrowers. In general, the total loans and other extensions of credit to a single borrower may not exceed 15 percent of a national bank's unimpaired capital and surplus. Under the OCC's regulations, loans to one borrower will be attributed to a second borrower when the proceeds of the loan are used for the ''direct benefit'' of the second person. 12 CFR 32.5(a)(1). Proceeds are deemed to be for the ''direct benefit'' of another person when the proceeds are ''transferred to [the other] person,'' except in the case of a ''bona fide arm's length transaction where the proceeds are used to acquire property, goods, or services.'' 12 CFR 32.5(b).

B. Procedural History

On October 12, 2000, the OCC issued a combined Notice of Intention to Prohibit Further Participation, a Notice of Charges for Restitution and a Notice of Assessment of Civil Money Penalty (together, the ''Notices'') against Ulrich and Diehl McCarthy. The Notices alleged that Ulrich and Diehl McCarthy violated law and regulation, recklessly engaged in unsafe or unsound practices and breached their fiduciary duties in connection with five loans they approved in December 1996. The Notices further alleged that Ulrich and Diehl McCarthy's misconduct resulted in a substantial monetary loss to the Bank and demonstrated personal dishonesty and a willful or continuing disregard for the safety or soundness of the Bank.

Following 18 days of hearings and post-hearing briefing, the ALJ issued a Recommended Decision in this matter, to which Respondents filed lengthy exceptions. The OCC did not file any exceptions. In her Recommended Decision, the ALJ concluded that the facts in this case warranted the imposition of an order of prohibition, restitution and second tier civil monetary penalties.

The case was then referred to the Board for review of the recommendation for prohibition, and to the OCC for review of the recommendations for restitution and civil monetary penalties. On September 2, 2003, the Comptroller issued a Decision and Order upholding the recommended restitution and imposing civil monetary penalties of $35,000 and $20,000, respectively, on Respondents Ulrich and Diehl McCarthy.

II. Discussion

The Board has reviewed the record in this matter to assure that substantial evidence in the record supports the factual and legal conclusions of the ALJ and warrants the imposition of a prohibition order against Respondents. The Board finds that the allegations contained in the OCC's Notices and proved at the hearing meet the statutory criteria for the issuance of an order of prohibition and adopts the Recommended Decision of the ALJ except as specifically modified or supplemented herein.

A. Facts

1. *Ulrich and Diehl McCarthy's Positions at the Bank*—Respondents Ulrich and Diehl McCarthy started working at the Bank around 1993 and 1994, respectively. (ALJ's Findings of Fact at ¶¶2, 7) (hereinafter ''FF at ¶__''). Prior to coming to the Bank, each Respondent had obtained a significant amount of experience working in the banking industry, including holding positions of considerable responsibility. (FF at ¶¶3–5, 8).

In December 1996, and at all other times relevant for the purposes of this Final Decision, Respondent Ulrich served as Senior Vice President and Senior Loan Officer at the Bank, and Respondent Diehl McCarthy held the positions of Vice President, Government Guaranteed Loan Manager, and Loan Officer at the Bank. (FF at ¶¶1, 6). As a senior officer of the Bank, Ulrich was responsible for ensuring that loans issued by the Bank complied with the Bank's policy, as well as recommending or making revisions to the policy. (FF at ¶67). As an officer of the Bank, Diehl McCarthy also was responsible for ensuring that loans extended by the Bank complied with the Bank's policy. (FF at ¶68).

2. *NCH and Straightline's Lending From the Bank*—Northcoast Hardwoods, Inc. (''NCH'') and Straightline Investments, Inc. (''Straightline'') were two local companies to which the Bank extended loans before and during 1996. (FF at ¶11). NCH and Straightline were owned and operated by the same individual, Matthew Galt (''Galt''). (FF at ¶¶9, 10). The two companies operated for all practical purposes as two units of the same business. NCH served as the operating and sales unit, while Straightline functioned as the holding company that owned the real property and equipment. (FF at ¶10). For these reasons, NCH and Straightline were considered a single borrower for lending limit purposes. (FF at ¶10).

As of early December 1996, the Bank had approved and issued loans to NCH and Straightline totaling at least $928,159. (FF at ¶62). The Bank's legal lending limit, in effect during December 1–30, 1996, was $985,322. (FF at ¶63). *See* 12 U.S.C. § 84, 12 CFR Part 32.

3. *Respondents' Knowledge of NCH's History of Loans from the Bank and of NCH's Financial Condition*—As of early December 1996, Respondents understood that NCH/Straightline had almost reached the maximum lending limit for a single borrower. (FF at ¶¶17, 29). In addition, Respondents knew that up to and around early December 1996, NCH consistently asked the Bank for additional loans, but simultaneously failed to meet its existing obligations to the Bank. Between February and December 1996, NCH requested and Respondents approved four loans to the company. In July and December 1996, NCH requested and Respondents approved extensions to NCH on existing loans for which payments were either ''slow'' or ''past due'' and in October 1996, NCH requested and Respondents approved a restructuring of NCH's existing debt. (FF at ¶11–12).

Finally, Respondents were familiar with the financial crisis NCH confronted by early December 1996. Respondents received letters in early December 1996 from Matthew Galt stating that NCH's net worth was negative $600,000, that the company had no money to pay for the supply and production costs of its outstanding customer orders, and that the company laid off almost 25 percent of its employees in November 1996. (FF at ¶13; OCC Exh. 51).

4. *NCH Searches For Help: Application for a Guaranteed Loan Through USDA*—Due to the financial difficulties NCH experienced in 1996, the company, with the help of both Respondents, sought additional means to obtain funds needed to maintain its operations. (FF at ¶¶18–31). Respondents worked with Galt to apply for a United States Department of Agriculture loan guarantee. (FF at ¶¶21–31). Loans guaranteed by a Federal agency do not count in the calculation of loans to a particular borrower, so the Bank could have made such a loan to NCH if the guarantee could be obtained. 12 CFR 32.2(c)(4). As Respondents assisted Galt in the application process, they were well aware of NCH's troubled credit and of the extreme difficulties NCH would encounter in attempting to raise capital for the company without first receiving a conditional commitment from the USDA for the guaranteed loan. (FF at ¶¶23, 26).

By letter dated December 9, 1996, the USDA declared it was unwilling to issue a conditional commitment to NCH for a guaranteed loan because of NCH's unproven products and markets, as well as the company's negative net worth of $600,000. (FF at ¶27). The letter stated if NCH was able to raise the company's tangible balance sheet equity to 10 percent, the USDA would consider issuing a conditional commitment subject to NCH being able to increase the company's tangible balance sheet equity to 20 percent. (FF at ¶27). However, the letter concluded by reiterating concerns about NCH's financial stability and warning that the USDA made no guaranty to approve a conditional commitment or guaranteed loan even if NCH increased the company's tangible balance sheet equity. (FF at ¶27).

After receiving the December 9th letter from the USDA, Respondents met with Galt to discuss how NCH could raise 10 percent equity, which equated to $970,000. (FF at ¶¶28, 31). The three of them spoke about the possibility of third parties injecting capital into NCH, including the possibility that the Bank could issue loans to third parties who would inject the proceeds into NCH. (FF at ¶30). At that meeting, Ulrich told Galt that the Bank could not make any further loans to NCH. (FF at ¶29).

5. *The Five December 1996 Loans From The Bank*—Within days of the conversation about obtaining funds to inject into NCH, Respondents approved five loans, totaling $900,000, to friends and business associates of Galt (hereinafter, collectively, ''the December 1996 loans''). (FF at ¶¶32, 34). On December 16, 1996, Respondents approved a $200,000 loan to Timothy and Paula Crowley and a $200,000 loan to Frank and Virginia Nemetz; on December 18, 1996, Respondents approved a $200,000 loan to Gary Johnston; and on December 30, 1996, Respondents approved a $200,000 loan to Mitchell and Maggie Tonini and a $100,000 loan to Valerie Weyna. Within a day or two of disbursement, the proceeds of each of the December 1996 loans were transferred to NCH. (FF at ¶¶38, 42, 49, 53–56, 60).[1] The aggregate amount of these loans, $900,000, equaled substantially all of the additional equity needed by NCH to enable USDA to consider a conditional commitment.

Respondents drafted and signed credit memoranda to accompany the Crowley, Nemetz and Johnston loans. These credit memoranda stated that each loan would initially ''be booked by NCH as a loan,'' and would "convert to equity'' upon approval of the USDA, or, in any event, ''even if the [USDA] loan is not approved.'' (FF at ¶¶36, 40, 47; OCC Ex. 56, 58, 60). Other documents created and/or reviewed by Respondents in connection with all five transactions also indicated that all five loans would be re-loaned to NCH. (FF at ¶52; OCC Ex. 57, 76).

The loan approval process for the December 1996 loans did not start until after the meeting Respondents had with Galt on December 10, 1996. (FF at ¶¶28–32). Respondents allowed Galt to both contact and obtain information from the five borrowers in connection with the loans, and with one exception, Respondents communicated with the borrowers only through Galt. (FF at ¶79).[2] The loans violated the Bank's lending policy, which entirely prohibited loans for ''speculative investments in securities,'' and also prohibited ''capital loans for a start-up business'' in the absence of a government loan guarantee. (FF at ¶¶69–70; OCC Exh. 140). Bank policy also provided that personal loans exceeding $20,000 required adequate collateral. (OCC Exh. 140 at 269). Respondents wrote up the December 1996 loans not as personal loans but as commercial ''term capital loans,'' a category intended to provide working capital through a direct loan to an established company. (OCC Exh. 56, 58, 60, 63, 67; OCC Exh. 140 at 23–25; Trans. 94 (Tornborg)). Under the Bank's loan policy, even this type of loans could be issued on an unsecured basis only ''extremely rarely, depending on debt coverage.'' *Id.* Yet all five of the December 1996 loans were unsecured; in none was any exception to the loan policy identified in the credit memoranda generated by Respondents. OCC Exhs. 56, 58, 60, 63, 67.

The loans were structured two-year, interest-only loans, with a balloon payment of all principal due at the end of the two-year term. OCC Exhs. 144–148. Despite the substantial amount and the short term of the loans, however, Respondents never spoke to any of the borrowers or made any efforts to identify a source of funds for repayment of the loans. In the minimal efforts they made to assess the financial condition of the borrowers, Respondents failed to obtain information necessary to make realistic credit assessments, included information that was outdated and/or not indicative of the borrowers' ability to repay the loans in accordance with their terms, and excluded critical factors such as the borrowers' living expenses. (*See, e.g.,* Trans. 3112–13, 3158 (Diehl McCarthy); Trans. 3370–71, 3373–74, 3377–78, 3384–85, 3388–90, 3392–93 (Matt Johnson); OCC Exhs. 215, 199). This was particularly critical in the case of several borrowers, who had limited cash flow and whose net worths were tied up in personal businesses or real estate. (OCC Exh. 63, 67). Assuming, as Respondents claim to have done, that the loan proceeds would be used to acquire stock in NCH, it is difficult to understand how that investment, in a closely-held private company, could serve as a source of repayment of the principal of these loans; in any event, there is no evidence that this question was ever considered by the Respondents.[3]

As Respondents acknowledge, the December 1996 Loans caused the Bank to violate its lending limits. Under the OCC's rules, loans to one borrower are attributed to another if the proceeds of the loan are transferred to the other, unless the transfer involved a ''bona fide arm's length transaction where the proceeds are used to acquire property, goods, or services.'' 12 CFR 32.5(b). Here, there was no such arm's length transaction, and the loans were properly combined with those to NCH, causing the lending limits violation.

6. *Loss to the Bank*—Ultimately, none of the borrowers ever received any value in return for the $900,000 they

1. The disbursements to NCH were made despite Respondents' representations to the Bank's loan committee that $500,000 of the proceeds would be held in a ''bank controlled account.'' (OCC Ex. 57). The account was never established. (Trans. 2635 (Ulrich)).

2. Diehl McCarthy spoke briefly with borrower Weyna at the time the loan documents were signed. (FF at ¶80).

3. Diehl McCarthy suggested that her obligation to identify a source of repayment was satisfied by suggesting to borrower Weyna that if the investment did not work out as hoped, the loan could be restructured when principal payment became due. (Trans. 3123–24 (Diehl McCarthy)). This is obviously insufficient as a means of identifying a source of repayment, even a restructured loan eventually involves the repayment of principal.

collectively gave to NCH, the USDA never issued a loan guarantee to NCH, NCH filed for bankruptcy, and the Bank was unable to collect on four of the five December loans. (FF at ¶¶61, 92, 94, 95). The Bank's board of directors bought two of the loans, and settlement and restitution paid by some of the borrowers and several members of the Bank's loan committee provided some additional recovery. However, the Bank currently maintains a loss of $232,000. (FF at ¶¶95–99).

B. Legal Conclusions

1. *Prohibition*—The sole purpose of this Final Decision and Order is to review the ALJ's recommendation for an order of prohibition against Respondents, as the ALJ's recommendation for an order of restitution and civil monetary penalties is reviewed by the OCC. To adopt the ALJ's conclusion regarding the prohibition, the Board must find that three elements have been met: (1) misconduct, including violation of law or regulation or participation in an unsafe or unsound practice, (2) a specified effect, including financial loss to the institution, and (3) culpability. 12 U.S.C. § 1818(e)(1)(A)–(C). Because the evidence in the record supports that all three elements have been met, the Board adopts the ALJ's recommendation for an order of prohibition against Respondents.

(a) *Misconduct and Specified Effect*—Respondents concede that they participated in a lending limits violation and that the Bank suffered a loss of $232,000 as a result. (Respondents' Exceptions at pp. 25, 34). These admissions, along with the record evidence that supports them, establish the first and second elements needed for an order of prohibition.

The ALJ also found, and the evidence supports, that Respondents engaged or participated in unsafe or unsound practices even apart from their participation in the lending limits violation.[4] As detailed above, in a number of critical respects, the December 1996 loans and the process by which they were approved contravened Bank policies designed to assure safety and soundness. If considered as loans to purchase stock in NCH, as Respondents contend, the loans violated the Bank's loan policies prohibiting loans for speculative investments in securities. If considered as capital loans, the loans violated the policy against capital loans to start-up businesses in the absence of an agency guarantee. If considered as personal loans to the borrowers, the loans violated the policy requiring collateral for such loans above $20,000. Even accepting the loan category in which Respondents placed these loans in their credit memoranda—commercial ''term loans for capital,'' a category clearly not intended for loans of this type—such loans too required collateral and could be issued on an unsecured basis only ''extremely rarely, depending on debt cover.'' (OCC Exh. 140 at 24).[5] Nonetheless, all of the December 1996 loans were approved on an unsecured basis, and the credit memoranda failed even to note, much less explain, the departure from the lending policy. The Bank's loan policy was established to limit the bank's exposure to risk; such violations of the loan policy clearly constituted unsafe or unsound practices.

As discussed earlier, the process by which the loans were granted also constituted an unsafe or unsound practice. Respondents rushed to approve the loans on the basis of incomplete or outdated information in violation of the loan policy, and left it to Galt, whom they knew to be desperately in need of funds, to communicate with the borrowers. They thereby opened themselves, and the Bank, up to be ''victimized'' by Galt's scheme to the extent they did not actively endorse it.[6] Respondents also failed to identify a source of repayment for the loans despite the obvious risk that such action entailed in the case of these large balloon loans made to borrowers whose cash flow did not appear sufficient to repay principal.

(b) *Culpability*—The only element in dispute in the case at hand is whether the record supports the ALJ's finding that Respondents' misconduct involved the requisite culpability. In a case involving a prohibition order under the FDI Act, culpability is established by showing that a respondent's misconduct 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)(C)(i)–(ii). Whatever the precise basis of culpability, the agency must prove that the respondent's misconduct exhibited a ''degree of culpability beyond mere negligence.'' *Kim v. Office of Thrift Supervision*, 40 F.3d 1050, 1054 (9th Cir. 1994).

Acts of personal dishonesty have been described as those ''involving fraud or lack of integrity.'' *Van Dyke v. Board of Governors of the Federal Reserve System*, 876 F.2d 1377, 1379 (8th Cir. 1989). Continuing disregard is considered to be conduct which has been ''voluntarily engaged in over a period of time with heedless indifference to the prospective consequences.'' *Grubb v. FDIC*, 34 F.3d 956, 962 (10th Cir. 1994). Willful disregard has been defined as ''deliberate conduct which exposed the bank to abnormal risk of loss or harm contrary to prudent banking practices.'' *Grubb*, 34 F.3d at 961–62; *Van Dyke*, 876 F.2d at 1380. For example, in *Cavallari v. Office of the Comptroller of the Currency*, 57 F.3d 137, 145 (2d Cir. 1995), the court upheld a pro-

4. Respondents' procedural argument that any evidence relating to unsafe and unsound practices should not have been admitted is discussed below.

5. According to the loan policy, term loans for capital were to be ''used for established companies,'' with an emphasis on those with a ''good [credit] history'' with the Bank—a category of company that clearly excluded NCH. (OCC Exh. 140 at 24).

6. The risk associated with this practice is evidenced by the fact that Respondents claim to have been unaware that the borrowers had no intention of investing the proceeds of the loans in NCH, and expected Galt to repay the loans for them. Had they discussed the loans with the borrowers, they presumably would have learned of Galt's scheme before approving the loans.

hibition order where the Board found that the respondent's misconduct evidenced an ''utter lack of attention to an institution's safety and soundness'' or a ''willingness to turn a blind eye to [the bank's] interests in the face of a known risk.''

While all three types of culpability can be present in a given case, only one type is needed to support an order of prohibition. Here, the Board finds that Respondents' misconduct involved at least willful disregard for the safety and soundness of the Bank, and therefore does not reach the other bases of culpability.

Substantial evidence in the record supports a finding that Respondents' actions went beyond negligence and amounted to ''willful disregard'' of the Bank's safety and soundness. As noted above, Respondents approved $900,000 in loans in a matter of days, on the basis of information provided solely by a source with an obvious conflict of interest. Respondents knew that the proceeds of the loans would be transferred to NCH. As experienced bankers, they should have known that the loans were therefore attributable to NCH for lending limits purposes and would cause the Bank to violate its lending limits.

Prior to approving the loans, Respondents failed to determine whether the borrowers would be able to repay the loans based on their personal cash flow, and apparently considered the possibility that the Bank would renegotiate the loans at the conclusion of their two-year term to be sufficient for purposes of assuring repayment. Moreover, regardless of whether the five December loans are classified as commercial ''term working capital loans,'' or as Respondents are more appropriately calling them now, ''loans to individuals'' (*see* Respondents' Exceptions at p. 27), Respondents ignored the risk they posed to the Bank by approving them on an unsecured basis. Several provisions of the Bank's loan policy established that the loans were of a type that posed an unacceptable risk to the Bank. To the extent Bank policy permitted loans of this type to be made at all, the policy required that they be adequately collateralized. Adequate collateral obviously would have assisted the Bank in avoiding the losses it suffered in connection with the loans. By approving these loans on an unsecured basis, Respondents not only violated Bank policy, but they ''turn[ed] a blind eye to [the bank's] interests in the face of a known risk.'' *Cavallari*, 57 F.3d at 145.

These and other actions on the part of Respondents reveal their ''utter lack of attention'' to the safety and soundness of the Bank in connection with the December 1996 loans. *Cavallari*, 57 F.3d at 145. For example, the record reveals that Respondents were expressly asked by another bank officer whether two of these loans would be combinable with the NCH loans for lending limit purposes. Without any inquiry or research, Respondent Ulrich simply asserted they were not combinable, and Diehl McCarthy followed suit. (Trans. 2688–89 (Ulrich); Trans. 3160–61 (Diehl McCarthy)). This complete lack of concern about compliance with regulations designed to safeguard the Bank is further evidence of Respondents' ''utter lack of attention'' for the safety and soundness of the Bank.

The Board rejects Respondents' argument that they lacked the requisite culpability because they believed that the borrowers would use the loan proceeds to purchase stock and, as such, that they would not be combinable with NCH's loans for lending limits purposes. First, regardless of whether Respondents truly believed that the loans would eventually be converted to stock, they cannot claim that the loans would be used to purchase NCH stock upon disbursement.[7] Their own contemporaneous credit memoranda explicitly state that each of the five December loans would be ''booked by NCH as a loan'' from the borrower and only later ''converted to equity'' upon approval of the USDA loan guarantee ''or even if the loan is not approved.'' (OCC Exhs. 56, 58, 60). Given the Respondents' knowledge of the highly uncertain nature and timing of the USDA approval, it is evident that Respondents had no expectation when they approved the loans that conversion to equity was imminent.

Moreover, even if the December 1996 loans had been for the purpose of funding the borrowers' purchase of shares in NCH immediately, the loans still would have been considered a ''direct benefit'' to NCH and therefore would still have resulted in violations of the Bank's lending limit. *See* 12 CFR 32.5(a)(1), (b); OCC Interpretive Letter, January 29, 1987 (1987 WL 149851) (OCC ''considers an equity investment in a corporation to be a direct benefit because the company thereby receives additional working capital. Thus, when a borrower uses a loan to purchase newly-issued stock in a corporation, the latter has received the benefits of the proceeds and the investor's loan must be combined with any loans to the corporation.'').[8]

Respondents' violations were not technical or minor violations. They were, instead, violations of law, policy, and prudent banking practices that are designed to protect the Bank from the very harm it suffered here. For these reasons, the Board finds that Respondents' misconduct demonstrated willful disregard and an order of prohibition against them is justified.

2. *Procedural Issues Challenged By Respondents*—The Board also finds that none of the four procedural issues raised by Respondents is sufficient to deny an order of prohibition in this case. In general, the Board defers to evidentiary and trial management rulings by an ALJ ''in

7. In any event, Respondents' contemporaneous statements make clear that they did understand that the borrowers would transfer the loan proceeds to NCH. For example, in a December 13, 1996 letter to the USDA, Diehl McCarthy stated that Crowley, Nemetz, and Johnston would each contribute to NCH the precise amount which they subsequently borrowed from the Bank, and that each would ''lend these funds to [NCH]'' and that ''NCH's pro forma balance sheet will indicate that the funds are converted to stock.'' (OCC Exh. 55).

8. Thus, the ''bona fide sale'' exception to the direct benefit rule, 12 CFR 32.5(b), is inapplicable even under Respondents' view of the case.

absence of an abuse of discretion or manifest unfairness.'' *In the Matter of Augustus I. Cavallari*, 80 *Federal Reserve Bulletin*, 1046, 1049 (1994). No such abuse or unfairness if evident here and the ALJ's rulings are therefore sustained.

First, Respondents argue that the ALJ improperly used official notice to absolve the OCC of its burden to establish jurisdiction in this case. Specifically, Respondents challenge the ALJ's post-hearing acceptance and subsequent official notice of information from the FDIC's official website to the effect that at all relevant times, the Bank was an ''insured depository institution,'' a prerequisite to Respondents' status as ''institution-affiliated parties'' as defined by 12 U.S.C. § 1813(u).

The ALJ's action was both appropriate and timely. The OCC's regulations permit the ALJ to take official notice of ''any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.'' 12 CFR 19.36(b)(1). Similar information to that accepted here has been subject of judicial notice in civil cases in the federal courts. *See, e.g., In re Wellbutrin SR/Zyban Antitrust Litigation*, 2003 WL 22099725 (E.D. Pa. 2003); *Morris v. Valesco*, 2003 WL 21397742 (N.D. Ill. 2003); *Ligon v. Doherty*, 208 F. Supp. 2d 384 (E.D.N.Y. 2002). Moreover, Respondents have not suggested that the information on the FDIC web site regarding the Bank's insured status was in any way flawed or incorrect.[9]

Nor was it improper for the ALJ to have accepted this material after the hearing. Respondents were on notice of Enforcement Counsel's request to take judicial notice and had a full opportunity to object. In addition, as the ALJ explained in her August 6, 2002 Order, Federal Rules of Evidence 201(d) and (f), applicable by analogy, permit judicial notice to be taken ''at any stage of the proceeding'' and mandate that official notice be taken if a party requests it and supplies the necessary information. Here, the OCC requested that the ALJ take official notice regarding the insured status of the Bank and supplied the necessary information as described in 12 CFR 19.36(b). Accordingly, the ALJ properly took official notice of the OCC's post-hearing submission.

Second, Respondents contend that they were denied their right to counsel because the ''sequestration'' order entered by the ALJ in this case prohibited them ''from speaking to their counsel regarding the case while they were on the stand . . . including overnight breaks.'' (Respondents' Exceptions at p. 14). Respondents claim that the sequestration order violates their right to counsel under the Administrative Procedure Act, 5 U.S.C. § 555(b), the OCC's procedural rules at 12 CFR 19.183(b), and the Sixth Amendment to the Constitution. (Respondents' Exceptions at pp. 14–17).

None of these sources provides a basis to hold that the ALJ's order, which prohibited only discussion of a witness's *testimony* while he or she was under oath (Trans. 2594, 2806), was improper. While the Administrative Procedure Act allows parties to be ''accompanied, represented, and advised by counsel,'' it does not state or suggest that parties are entitled to discuss their on-going testimony with counsel while on breaks at an administrative hearing. The regulation cited by Respondents, 12 CFR 19.183, applies to *investigative* testimony, not testimony given at an administrative hearing. Finally, the protections provided by the Sixth Amendment to the United States Constitution do not apply to administrative hearings because such protections ''are explicitly confined to 'criminal prosecutions.' '' *Austin v. United States*, 509 U.S. 603, 608 (1993); *see also United States v. Ward*, 448 U.S. 242, 248 (1980).[10]

Third, Respondents assert that the ALJ prevented them from recalling certain OCC witnesses for further testimony after their cross-examination of those witnesses, and as such, that they were denied their right to cross-examine and confront witnesses. (Respondents' Exceptions p. 17–19). The ALJ stated that she would consider permitting additional testimony from a witness who already had testified if Respondents submitted information as to the topics to be covered and how the testimony would provide relevant and non-repetitive information. This requirement was certainly within the ALJ's discretion to control the flow of witnesses at the hearing. Respondents failed to provide such information within the time permitted by the ALJ. As such, Respondents' argument is now moot.

Fourth, Respondents argue that the OCC never alleged unsafe and unsound banking practices or breach of fiduciary duties in its original Notice of Intent, and thus that the ALJ should have dismissed all testimony and evidence related to such claims.

The OCC's rules permit the ALJ conform the notice to the evidence where issues not raised in the notice are tried at the hearing by express or implied consent of the parties, or where the objecting party fails to show that admission of such evidence would unfairly prejudice the party's defense. 12 CFR 19.20(b). Here, Respondents were aware at least through the evidence introduced at the hearing that the allegations against them went beyond lending limit violations and involved the structure and approval of the loans, as well as the creditworthiness of the borrowers, and they failed to object to the introduction of such evidence at the hearings. For example, neither Respondent objected to the introduction of OCC Exhibit 140, the Bank's extensive loan policy manual. (Trans. 107). Furthermore, both Respondents testified at the hearing regarding the issues of the borrowers' creditworthiness and of compliance with loan policies and procedures. (*See, e.g.*, Trans. 2776–78 (Ulrich); Trans. 3086, 3089–90, 3104–06, 3108–13, 3176–77, 3262, 3264–75, 3279–80 (Diehl McCarthy)).[11]

9. Respondents claim that they contested the Bank's insured status in their Answers. In fact, their answers claimed only that they lacked sufficient information to respond to the allegation that the Bank was an insured depository institution, and on that basis the allegation was denied.

10. Even under the Sixth Amendment, a criminal defendant ''has no constitutional right to consult with his lawyer while he is testifying.'' *Perry v. Leeke*, 488 U.S. 272, 281 (1989).

11. Respondents also insist that the ALJ improperly excluded testimony from their witness, John Moulton, regarding the creditworthiness of the borrowers. (Respondents' Exceptions at p. 24). The

Conclusion

For these reasons, the Board orders the issuance of the attached Orders of Prohibition.[12]

By order of the Board of Governors, this 15th day of October 2003.

Board of Governors of the
Federal Reserve System

ROBERT DEV. FRIERSON
Deputy 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 GENE ULRICH (''Ulrich'');

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

1. Ulrich, without the prior written approval of the Board of Governors and, where necessary pursuant to section 8(e)(7)(B) of the FDI Act (12 U.S.C. § 1818(e)(7)(B), another federal financial institution regulatory agency, is hereby and henceforth 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 serving or acting as an institution-affiliated party as defined in section 3(u) of the FDI Act, 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 Ulrich 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 15th day of October 2003.

Board of Governors of the
Federal Reserve System

ROBERT DEV. FRIERSON
Deputy 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 SUSAN DIEHL McCARTHY (''Diehl McCarthy'');

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

1. Diehl McCarthy, without the prior written approval of the Board of Governors and, where necessary pursuant to section 8(e)(7)(B) of the FDI Act (12 U.S.C. § 1818(e)(7)(B), another federal financial institution regulatory agency, is hereby and henceforth 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

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Board concludes that the ALJ properly excluded such evidence. Respondents did not indicate in their pre-hearing filings that Mr. Moulton would testify about the borrowers' creditworthiness, even after the issue was raised by the OCC's witness designations. (Trans. 3664–3670).

12. Respondents have requested oral argument but have not established good cause for such a request or identified reasons why arguments cannot be presented adequately in writing. Accordingly, their request is denied. 12 CFR 263.40(b).

(d) from voting for a director, or serving or acting as an institution-affiliated party as defined in section 3(u) of the FDI Act, 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 Diehl McCarthy 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 15th day of October 2003.

Board of Governors of the
Federal Reserve System

ROBERT deV. FRIERSON
Deputy Secretary of the Board