

Legal Developments

ORDERS ISSUED UNDER BANK HOLDING COMPANY ACT

Orders Issued Under Section 3 of the Bank Holding Company Act

Barclays PLC
London, England

Barclays Bank PLC
London, England

Barclays Group US Inc.
Wilmington, Delaware

Order Approving the Formation of Bank Holding Companies and Acquisition of a Bank Holding Company

Barclays PLC (“Barclays”) and its subsidiaries, Barclays Bank PLC (“Barclays Bank”) and Barclays Group US Inc. (“Barclays US”) (collectively, “Applicants”), have requested the Board’s approval under section 3 of the Bank Holding Company Act (“BHC Act”) to become bank holding companies and to acquire Juniper Financial Corp. (“Juniper”) and its subsidiary bank, Juniper Bank (“Juniper Bank”), both in Wilmington, Delaware.¹

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (69 *Federal Register* 56,067 (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.

Barclays, with total consolidated assets of approximately \$901 billion, is the 11th largest banking organization in the world.² Barclays operates branches in New York and Miami and representative offices in New York, San Francisco, and Washington, D.C. Juniper Bank, with

consolidated assets of approximately \$437 million, is the 21st largest depository organization in Delaware, controlling \$326.8 million in deposits.³

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 are clearly outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.⁴

Applicants do not currently engage in retail banking activities in the United States and, therefore, do not compete with Juniper Bank in any relevant banking market. Accordingly, the Board concludes, based on all the facts of record, 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 Factors

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has carefully considered these factors in light of all the facts of record, including confidential supervisory and examination information from the various U.S. banking supervisors of the institutions involved, publicly reported and other financial information, information provided by Applicants, and public comment on the proposal.⁵ In addi-

1. 12 U.S.C. § 1842. Barclays and Barclays Bank are each treated as a financial holding company for purposes of the BHC Act. Barclays US has elected to become a financial holding company on consummation of the proposal. The Board has determined that its election would become effective on consummation of the proposal, if on that date, Juniper Bank remains well capitalized and well managed. On that date, Juniper Bank must also have received a rating of at least “satisfactory” at its most recent performance evaluation under the Community Reinvestment Act (“CRA”). 12 U.S.C. § 2901 et seq.

2. Worldwide asset data are as of June 30, 2004, and worldwide ranking data are as of December 31, 2003. Asset figures are based on United Kingdom generally accepted accounting principles.

3. Asset, deposit, and ranking data are as of June 30, 2004.

4. 12 U.S.C. § 1842(c)(1).

5. Using press reports, a commenter expressed concern that:

- (1) projects that Barclays financed in Asia have negative environmental consequences,
- (2) Barclays Bank is a defendant in litigation involving the apartheid policies of the former government in South Africa, and

tion, the Board consulted with the Financial Services Authority (“FSA”), which is responsible for the supervision and regulation of financial institutions in the United Kingdom.

In evaluating financial factors in expansion proposals by banking organizations, the Board reviews the financial condition of the organizations involved on both a parent-only and consolidated basis and the financial condition of the subsidiary banks and significant nonbanking operations. In this evaluation, the Board considers a variety of areas, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the financial condition of the combined organization on consummation, including its capital position, asset quality, earnings prospects, and the impact of the proposed funding of the transaction. Based on its review of these factors, the Board finds that Applicants have sufficient financial resources to effect the proposal. The capital levels of Barclays Bank would continue to exceed the minimum levels that would be required under the Basel Capital Accord and its capital levels are considered equivalent to the capital levels that would be required of a U.S. banking organization. Furthermore, Juniper Bank is well capitalized and would remain so on consummation of the proposal. The proposed transaction is structured as a share purchase, and the consideration to be received by Juniper’s shareholders would be funded from Applicants’ existing cash resources.

The Board also has considered the managerial resources of Applicants, Juniper, and Juniper Bank, particularly the supervisory experience of the other relevant banking supervisory agencies with the organizations and their records of compliance with applicable banking laws. The Board has reviewed assessments by the relevant federal and state banking supervisory agencies of the organizations’ management and of the risk-management systems of the Applicants’ U.S. operations and of the operations of Juniper and Juniper Bank. The Board also has considered Applicants’ plans to integrate Juniper and Juniper Bank and Applicants’ proposed business plan for, and management structure of, Juniper Bank.

Based on these and all other facts of record, the Board concludes that the financial and managerial resources and future prospects of the organizations involved in the proposal are consistent with approval.

Section 3 of the BHC Act also provides that the Board may not approve an application involving a foreign bank unless the bank is subject to comprehensive supervision or regulation on a consolidated basis by the appropriate

authorities in the bank’s home country.⁶ The home country supervisor of the Applicants is the FSA.

In approving applications under the BHC Act and the International Banking Act (“IBA”),⁷ the Board previously has determined that various banks in the United Kingdom, including Barclays Bank, were subject to home country supervision on a consolidated basis.⁸ In this case, the Board finds that the FSA continues to supervise Barclays Bank in substantially the same manner as it supervised United Kingdom banks at the time of those determinations. Based on this finding and all the facts of record, the Board concludes that Barclays Bank continues to be subject to comprehensive supervision on a consolidated basis by its home country supervisor.

In addition, section 3 of the BHC Act requires the Board to determine that a company has provided adequate assurances that it will make available to the Board such information on its operations and activities and those of its affiliates that the Board deems appropriate to determine and enforce compliance with the BHC Act.⁹ The Board has reviewed the restrictions on disclosure in relevant jurisdictions in which Applicants operate and has communicated with relevant government authorities concerning access to information. In addition, Applicants previously have committed to make available to the Board such information on the operations of Applicants and their affiliates that the Board deems necessary to determine and enforce compliance with the BHC Act, the IBA, and other applicable federal law. Applicants have also previously committed to cooperate with the Board to obtain any waivers or exemptions that may be necessary to enable Applicants and their affiliates to make such information available to the Board. In light of these commitments, the Board concludes that Applicants have provided adequate assurances of access to any appropriate information that the Board may request. Based on these and all the facts of record, the Board concludes that the supervisory factors it is required to consider are consistent with approval.

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board must consider the effects of the proposal on the

(3) Barclays Bank is increasing its interest in banking organizations in Zimbabwe and Zambia.

These matters are not within the Board’s jurisdiction to adjudicate or within the limited 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) (“*Western Bancshares*”).

6. 12 U.S.C. § 1842(c)(3)(B). Under Regulation Y, the Board uses the standards enumerated in Regulation K to determine whether a foreign bank is subject to consolidated home country supervision. See 12 CFR 225.13(a)(4). Regulation K provides that a foreign bank will be considered subject to comprehensive supervision or regulation on a consolidated basis if the Board determines that the bank is supervised or regulated in such a manner that its home country supervisor receives sufficient information on the worldwide operations of the bank, including its relationship with any affiliates, to assess the bank’s overall financial condition and its compliance with laws and regulations. See 12 CFR 211.24(c)(1).

7. 12 U.S.C. § 3101 et seq.

8. See, e.g., *HBOS Treasury Services plc*, 90 *Federal Reserve Bulletin* 103 (2004); *The Royal Bank of Scotland Group*, 90 *Federal Reserve Bulletin* 87 (2004); Board letter to Gerald LaRocca, January 16, 2003.

9. See 12 U.S.C. § 1842(c)(3)(A).

convenience and needs of the communities to be served and 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 record of Juniper Bank in light of all the facts of record, including public comments received on the proposal. A commenter opposing the proposal expressed concern about Juniper Bank's record of community development lending.

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of examination by the appropriate federal supervisor of the CRA performance record of the relevant insured depository institution. 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.¹⁰

Juniper Bank received a "satisfactory" rating at its most recent CRA performance examination by the Federal Deposit Insurance Corporation ("FDIC"), as of May 13, 2003. Juniper Bank engages primarily in credit card operations and has been designated as a limited purpose bank by the FDIC for purposes of assessing its CRA performance.¹¹ The performance test for limited purpose banks evaluates an institution's record of community development lending, investments, and services in its designated assessment area.¹²

In the last performance evaluation of Juniper Bank, examiners indicated that the bank originated an adequate level of community development loans in its assessment area in Delaware during the evaluation period.¹³ Community development loans made by Juniper Bank that examiners noted favorably included a bridge loan to a nonprofit organization that was used in the construction of a group home in New Castle County for LMI individuals with mental illness, and the bank's participation in a loan fund administered by a community development financial institution that financed the rehabilitation of fifteen apartments

and the construction of four group homes for low-income individuals in Wilmington.

Examiners also indicated that the level of qualified investments, grants, and in-kind donations of property in Juniper Bank's assessment area reflected an adequate responsiveness to the credit and development needs of the bank's assessment area. Examiners stated that the bank purchased a \$250,000 bond from the Delaware State Housing Authority, the proceeds of which were used to fund affordable housing initiatives in Delaware.

Examiners also praised Juniper Bank for the high level of community development services provided to fifteen organizations throughout its assessment area. They commended the bank for providing financial-skills education and outreach programs to three nonprofit organizations in Delaware. Examiners concluded that the high level of community services provided by the bank demonstrated an excellent responsiveness in addressing the LMI and community economic development needs of its assessment area.

Applicants represented that since the last performance evaluation, Juniper Bank has purchased more than \$1 million of securities backed by mortgages in LMI communities in New Castle County and has committed \$400,000 to pooled loan funds that financed community development initiatives in the bank's assessment area. Applicants also represented that Juniper Bank continues to provide services to its community, including participating in programs to increase financial literacy and other life skills for children and young adults transitioning from the foster care system and for young mothers. In addition, Applicants represented that after consummation of the proposal, they would continue to implement Juniper Bank's existing CRA program and would not change or discontinue any services or products now offered by Juniper Bank.¹⁴ The FDIC, as Juniper Bank's primary federal supervisor, will continue to evaluate the bank's CRA performance record after consummation.

The Board has carefully considered all the facts of record, including reports of examination of the CRA record of Juniper Bank, information provided by Applicants, public comments received on the proposal, and confidential supervisory information. Applicants represented that the proposal would enable the combined organization to increase Juniper Bank's credit card business and would provide Juniper's customers access to Applicants' interna-

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

11. A "limited purpose bank" is a bank that:

- (1) offers only a narrow product line, such as credit card loans, to a regional or broader market and
- (2) has been designated as a limited purpose bank by the appropriate federal banking agency. 12 CFR 345.12(o). The FDIC designated Juniper Bank as a limited purpose bank on April 15, 2002.

12. 12 CFR 345.25(a) and (c).

13. The evaluation period for the examination was May 24, 2001, to May 12, 2003.

14. The commenter asserted that Barclays Bank's activities negatively affected lower-income communities outside the United States and that this record should be viewed as a predictor of Juniper Bank's performance under the CRA after Applicants acquire the bank. As previously noted, allegations concerning these types of activities outside the United States are within the jurisdiction of the foreign supervisor for the organization to adjudicate and are not within the limited statutory factors that the Board is authorized to consider when reviewing an application under the BHC Act. See *Western Bancshares*. Moreover, the CRA requires the relevant banking agency to assess an insured depository institution's record of meeting the credit needs of its community in the United States, but does not extend to activities conducted by foreign banks outside the United States. See 12 U.S.C. § 2903.

tional banking products and services that are currently unavailable to its customers. 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 record of Juniper Bank, are consistent with approval.

Conclusion

Based on the foregoing and in light of all the facts of record, the Board has determined that the application should be, and hereby is, approved.¹⁵ 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 Applicants with the conditions imposed in this order, the commitments made to the Board in connection with the application, and the prior commitments to the Board referenced in this order. These commitments and conditions are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The proposal 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 New York, acting pursuant to delegated authority.

By order of the Board of Governors, effective November 9, 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

15. The commenter requested that the Board hold a public meeting or hearing on the proposal. Section 3(b) of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authority for the bank to be acquired makes a timely written recommendation of denial of the application. The Board has not received such a recommendation from the appropriate supervisory authority. Under its regulations, the Board also may, in its discretion, hold a public meeting or hearing on an application to acquire a bank if a meeting or hearing is necessary or appropriate to clarify factual issues related to the application and to provide an opportunity for testimony. 12 CFR 225.16(e). The Board has considered carefully the commenter's request in light of all the facts of record. In the Board's view, the public had ample opportunity to submit comments on the proposal, and in fact, the commenter has submitted written comments that the Board considered carefully in acting on the proposal. The commenter's request fails to demonstrate why its written comments do not present its views adequately and fails to identify disputed issues of fact that are material to the Board's decision that would be clarified by a public meeting or hearing. For these reasons, and based on all the facts of record, the Board has determined that a public hearing or meeting is not required or warranted in this case. Accordingly, the request for a public meeting or hearing on the proposal is denied.

BNP Paribas
Paris, France

BancWest Corporation
Honolulu, Hawaii

Order Approving the Acquisition of a Bank Holding Company

BNP Paribas ("BNP") and its subsidiary, BancWest Corporation ("BancWest") (collectively, "Applicants"), financial holding companies within the meaning of the Bank Holding Company Act ("BHC Act"), have requested the Board's approval under section 3 of the BHC Act to acquire Community First Bankshares, Inc. ("CFB") and its subsidiary bank, Community First National Bank ("CFB Bank"), both in Fargo, North Dakota.¹

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (69 *Federal Register* 21,535 (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.

BNP, with total consolidated assets of approximately \$1.2 trillion, is the tenth largest banking organization in the world.² BNP operates branches in Chicago, New York City, and San Francisco; agencies in Houston and Miami; and representative offices in Atlanta, Dallas, and Los Angeles.

BancWest, with total consolidated assets of \$40 billion, is the 29th largest depository organization in the United States, controlling deposits of \$24 billion.³ In California, BancWest is the eighth largest depository organization, controlling deposits of \$16 billion. BancWest also operates subsidiary insured depository institutions in Hawaii, Idaho, Nevada, New Mexico, Oregon, Washington, Guam, and the Northern Mariana Islands. CFB, with total consolidated assets of approximately \$5.6 billion, is the 133rd largest depository organization in California and controls deposits of \$242 million.

1. 12 U.S.C. § 1842. Applicants propose to acquire the nonbanking subsidiaries of CFB in accordance with section 4(k) of the BHC Act and the post-transaction notice procedures in section 225.87 of Regulation Y. 12 U.S.C. § 1843(k); 12 CFR 225.87. BancWest's wholly owned subsidiary bank, Bank of the West, San Francisco, California, has requested the approval of the Federal Deposit Insurance Corporation ("FDIC") under section 18(c) of the Federal Deposit Insurance Act, 12 U.S.C. § 1828(c), to merge with CFB Bank, with Bank of the West as the surviving institution. Today, the Board approved the separate application filed by Applicants to acquire USDB Bancorp ("USDB") and its subsidiary bank, Union Safe Deposit Bank, both in Stockton, California ("the USDB transaction"), under section 3 of the BHC Act. See *BNP Paribas*, 91 *Federal Reserve Bulletin* 58 (2005).

2. Asset data are as of March 31, 2004. International ranking data are as of December 31, 2003, and are based on the exchange rate then available.

3. Asset data are as of June 30, 2004; national deposit and ranking data are as of March 31, 2004; and statewide deposit and ranking data are as of June 30, 2003. Data reflect subsequent consolidations through August 1, 2004.

On consummation of this proposal and the USDB transaction, BancWest would become the 27th largest depository organization in the United States, with total consolidated assets of \$46 billion, and would control deposits of \$30 billion, representing less than 1 percent of the total amount of deposits of insured depository institutions in the United States. BancWest would remain the eighth largest insured depository organization in California, controlling deposits of approximately \$17 billion, which represent approximately 3 percent of the total amount of deposits of insured depository institutions in the state.

Interstate Analysis

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the home state of such bank holding company if certain conditions are met.⁴ For purposes of the BHC Act, the home state of BNP is California, and CFB's subsidiary bank is located in Arizona, California, Colorado, Iowa, Minnesota, Nebraska, New Mexico, North Dakota, South Dakota, Utah, Wisconsin, and Wyoming.⁵

All the conditions for an interstate acquisition enumerated in section 3(d) of the BHC Act are met in this case. Applicants currently are adequately capitalized and adequately managed, as defined by applicable law, and would remain so on consummation of this proposal.⁶ CFB Bank has existed and operated for at least the minimum age requirements established by applicable state law.⁷ On consummation of the proposal, Applicants and their affiliates would control less than 10 percent of the total amount of deposits of insured depository institutions in the United States and less than 30 percent, or the appropriate percentage established by applicable state law, of the total amount of deposits of insured depository institutions in each state in which both institutions currently are located.⁸ All other requirements of section 3(d) are 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

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

5. For purposes of section 3(d), the Board considers a bank to be located in the states in which the bank is chartered or headquartered or operates a branch. See 12 U.S.C. 1841(o)(4)–(7) and 1842(d)(1)(A) and (d)(2)(B). California is the home state of BNP for purposes of the International Banking Act and Regulation K. 12 U.S.C. § 3101 et seq.; 12 CFR 211.22.

6. See 12 U.S.C. § 1842(d)(1)(A).

7. See 12 U.S.C. § 1842(d)(1)(B).

8. See 12 U.S.C. § 1842(d)(2)(A) and (B). Ariz. Rev. Stat. § 6-328 (30 percent); Colo. Rev. Stat. § 11-104-202(4) (25 percent); Iowa Code § 524.1802(2)(b) (15 percent).

in furtherance of any attempt to monopolize the business of banking in any relevant banking market. It 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 clearly are outweighed in the public interest by its probable effect in meeting the convenience and needs of the community to be served.⁹

BancWest and CFB compete directly in the San Diego, California and the Las Cruces, New Mexico banking markets.¹⁰ 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 BancWest and CFB,¹¹ the concentration levels of market deposits and the increases in these levels as measured by the Herfindahl–Hirschman Index ("HHI") under the Department of Justice Merger Guidelines ("DOJ Guidelines"),¹² 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.¹³ Both the San Diego and the Las Cruces banking markets would remain moderately concentrated as measured by the HHI. In both markets the increases in concentration would be small and numerous competitors would remain.

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 com-

9. 12 U.S.C. § 1842(c)(1).

10. The San Diego banking market is defined as the San Diego Ranally Metro Area ("RMA"), Camp Pendleton, and Pine Valley. The Las Cruces banking market is defined as Dona Ana County, New Mexico, excluding those communities in the El Paso, Texas–New Mexico RMA.

11. Market share data are based on Summary of Deposits reports filed as of June 30, 2003, adjusted for transactions through April 14, 2004, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift deposits in the market share calculation on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991).

12. 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.

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

petition in these markets or in 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 these and all other 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 confidential supervisory and examination information from the various banking supervisors of the institutions involved, publicly reported and other financial information, information provided by Applicants, and comments received on the proposal.¹⁴ The Board also has consulted with the French Banking Commission ("FBC"), which is responsible for the supervision and regulation of French financial institutions.

In evaluating financial factors in expansion proposals by banking organizations, the Board consistently has considered capital adequacy to be especially important. BNP and its U.S. subsidiary depository institutions are considered to be well capitalized and would remain so on consummation of the proposal. BNP's capital levels exceed the minimum levels that would be required under the Basel Capital Accord, and its capital levels are considered equivalent to the capital levels that would be required of a U.S. banking organization. The proposed transaction is structured as a share purchase, and the consideration to be received by CFB shareholders would be funded from BNP's available resources. The Board finds that the

Applicants have sufficient financial resources to effect the proposal.

The Board also has considered the managerial resources of BNP, BancWest, CFB, and their subsidiary banks, particularly the supervisory experience of the various bank supervisory agencies with the organizations and their records of compliance with applicable banking laws. The Board has reviewed assessments of the organizations' management and risk-management systems by the relevant federal and state banking supervisory agencies. Domestic banking organizations and foreign banks operating in the United States are required to implement and operate effective anti-money laundering programs. Accordingly, the Board has also considered the existing anti-money laundering programs at BNP and the assessment of these programs by the relevant federal supervisory agencies, state banking agencies, and the FBC. Furthermore, the Board has considered additional information provided by BNP on enhancements it has made and is currently making to its systems as the organization expands its operations. The Board expects that BNP will take all necessary steps to ensure that sufficient resources, training, and managerial efforts are dedicated to maintaining a fully effective anti-money laundering program. The Board also has considered BancWest's plans to implement the proposal, including its proposed management after consummation and the company's record of successfully integrating acquired institutions into its existing operations. Based on these and all other facts of record, the Board concludes that the financial and managerial resources and future prospects of the organizations involved in the proposal are consistent with approval.¹⁵

Section 3 of the BHC Act also provides that the Board may not approve an application involving a foreign bank unless the bank is subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in the bank's home country.¹⁶ The home country supervisor of BNP is the FBC.

In approving applications under the BHC Act and the International Banking Act ("IBA"),¹⁷ the Board previously

14. A commenter cited press reports of litigation concerning alleged gender-based employment discrimination brought by two current or former employees of BNP in London, and a press report of an alleged wrongful termination of a BNP employee in New York. The Board notes that the laws of the relevant jurisdictions provide causes of action and remedies with respect to individual complaints of gender-based employment discrimination and wrongful termination occurring in those jurisdictions and that such matters are not within the Board's jurisdiction to adjudicate. See, e.g., *Norwest Corporation*, 82 *Federal Reserve Bulletin* 580 (1996); see also *Western Bancshares, Inc. v. Board of Governors*, 480 F.2d 749 (10th Cir. 1973) ("*Western Bancshares*").

The commenter also expressed concern that BNP's involvement in financing certain foreign projects or its business relationships with energy companies doing business in a foreign country damaged the environment, caused additional social harm, or raised other unspecified concerns. These contentions contain no allegation of illegality or action that would affect the safety and soundness of the institutions involved in the proposal and are outside the limited statutory factors that the Board is authorized to consider when reviewing an application under the BHC Act. See, e.g., *The Royal Bank of Scotland Group plc*, 90 *Federal Reserve Bulletin* 87, 88 n.16 (2004); *Western Bancshares*.

15. The commenter, citing press reports, also expressed concerns about BNP's role in handling payments for the United Nations' Oil-for-Food program with Iraq. As part of its review and assessment of the managerial resources of BNP, the Board reviewed records of BNP's New York branch concerning this program in conjunction with state regulators. The Board notes that BNP's role in this program was to act as the exclusive bank to facilitate payments under an agreement with the United Nations, which currently is conducting its own review of this program. The Board will continue to monitor the progress and results of investigations of the Oil-for-Food program by the Congress and by the United Nations.

16. 12 U.S.C. § 1842(c)(3)(B). Under Regulation Y, the Board uses the standards enumerated in Regulation K to determine whether a foreign bank is subject to consolidated home country supervision. See 12 CFR 225.13(a)(4). Regulation K provides that a foreign bank will be considered subject to comprehensive supervision or regulation on a consolidated basis if the Board determines that the bank is supervised or regulated in such a manner that its home country supervisor receives sufficient information on the worldwide operations of the bank, including its relationship with any affiliates, to assess the bank's overall financial condition and its compliance with laws and regulations. See 12 CFR 211.24(c)(1).

17. 12 U.S.C. § 3101 et seq.

has determined that various French banks, including BNP, were subject to home country supervision on a consolidated basis by the FBC.¹⁸ In this case, the Board has determined that the FBC continues to supervise BNP in substantially the same manner as it supervised French banks at the time of those determinations. Based on this finding and all the facts of record, the Board has concluded that BNP continues to be subject to comprehensive supervision on a consolidated basis by its home country supervisor.

In addition, section 3 of the BHC Act requires the Board to determine that an applicant has provided adequate assurances that it will make available to the Board such information on its operations and activities and those of its affiliates that the Board deems appropriate to determine and enforce compliance with the BHC Act.¹⁹ The Board has reviewed the restrictions on disclosure in relevant jurisdictions in which BNP operates and has communicated with relevant government authorities concerning access to information. In addition, BNP previously has committed to make available to the Board such information on the operations of BNP and its affiliates that the Board deems necessary to determine and enforce compliance with the BHC Act, the IBA, and other applicable federal law. BNP also has committed to cooperate with the Board to obtain any waivers or exemptions that may be necessary to enable BNP and its affiliates to make such information available to the Board. In light of these commitments, the Board concludes that BNP has provided adequate assurances of access to any appropriate information the Board may request. Based on these and all other facts of record, the Board has concluded that the supervisory factors it is required to consider are consistent with approval.

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board must consider the effects of the proposal on the convenience and needs of the communities to be served and take into account the records of the relevant insured depository institutions under the Community Reinvestment Act (“CRA”).²⁰ 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 Banc West’s subsidiary banks and CFB Bank in light of all the facts of record, including public comment on the proposal.

18. See, e.g., *BNP Paribas*, 88 *Federal Reserve Bulletin* 221 (2002); *Caisse Nationale de Credit Agricole*, 86 *Federal Reserve Bulletin* 412 (2000).

19. See 12 U.S.C. § 1842(c)(3)(A).

20. 12 U.S.C. § 1842(c)(2); 12 U.S.C. § 2901 et seq.

One commenter opposed the proposal and alleged, based on data reported under the Home Mortgage Disclosure Act (“HMDA”),²¹ that BancWest and CFB Bank engaged in disparate treatment of minority individuals in home mortgage lending in the banks’ assessment areas.²² The commenter also expressed concern about possible branch closures.

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution’s most recent CRA performance evaluation is a particularly important consideration in the applications process because it represents a detailed, on-site evaluation of the institution’s overall record of performance under the CRA by its appropriate federal supervisor.²³

Bank of the West, BancWest’s largest subsidiary bank as measured by total deposits, received a “satisfactory” rating at its most recent CRA performance evaluation by the FDIC, as of February 3, 2003 (“February 2003 Evaluation”). First Hawaiian Bank, Honolulu, BancWest’s other subsidiary bank, received an “outstanding” rating at its most recent CRA performance evaluation by the FDIC, as of August 19, 2003. CFB Bank received a “satisfactory” rating at its most recent CRA performance evaluation by the Office of the Comptroller of the Currency, as of December 31, 2002 (“December 2002 Evaluation”).

Applicants have indicated that after the merger of Bank of the West and CFB Bank, the CRA activities of the resulting bank would conform to Bank of the West’s current CRA program.

B. CRA Performance of Bank of the West

Bank of the West received an overall rating of “high satisfactory” under the lending test in the February 2003

21. 12 U.S.C. § 2801 et seq.

22. The commenter also expressed concern about lending by Bank of the West and CFB Bank to unaffiliated retail check cashers and pawn shops. Applicants responded that Bank of the West and CFB Bank provide credit to pawn shops and retail check cashers but that neither bank plays any role in the lending practices or the credit review processes of those borrowers. These businesses are licensed by the states where they operate and are subject to applicable state law.

In addition, the commenter expressed concern about instances in which BNP may have underwritten the securitizations of subprime loans. BNP acknowledged that its U.S. broker–dealer subsidiary may from time to time underwrite securitization of assets that include subprime loans but stated that the subsidiary plays no role in the lending practices or credit review processes of any lender involved in the transaction. BNP has indicated that the due diligence implemented by its broker–dealer subsidiary would include consideration of whether the lender is known to have experienced legal or regulatory compliance problems.

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

Evaluation.²⁴ Examiners reported that the bank originated more than 15,800 residential mortgage loans totaling \$2.3 billion in its assessment areas during the evaluation period. They found that the Bank of the West's lending levels in LMI census tracts were good and noted favorably that the bank offered several loan programs to meet the needs of low-income and first-time homebuyers. Such programs included the First Time Home Buyer Program, which offers low down payments and waivers of most origination costs when certain income or geographic requirements are met, and Fannie Mae's 97% Program and Flex 97% Product, under which closing costs or down payments could be funded from gifts, grants, loans from a nonprofit organization, or other sources. During the evaluation period, the bank extended 405 loans totaling \$64.5 million through these three programs.

Bank of the West originated more than 20,600 small business loans totaling approximately \$2.9 billion in its assessment areas during the review period.²⁵ Examiners stated that the bank's lending to small businesses with gross annual revenues of \$1 million or less was good and was responsive to small business credit needs. They noted favorably that the bank was a certified Small Business Administration ("SBA") "Preferred Lender" and extended more than 1,250 SBA loans totaling approximately \$739 million during the evaluation period. In addition, examiners noted the bank's partnerships with the Export-Import Bank of the United States and the California State World Trade Commission's Export Finance Office to finance exports by small and medium-size businesses.

Examiners reported that the bank extended a high level of community development loans during the evaluation period, with 234 of such loans totaling more than \$1.02 billion. They found that many of these loans were complex and represented credits not routinely extended by banks. The majority of the bank's community development loans by number financed affordable housing and community development services for LMI individuals and were made in partnership with community development organizations, government-sponsored affordable housing agencies, bank consortia, and multifamily housing developers.

Bank of the West received an "outstanding" rating overall under the investment test in the February 2003 Evaluation, and examiners reported that the bank had taken a leadership role by making investments not routinely provided by the private sector. The bank made 824 qualified community development investments totaling more than \$51.8 million during the review period. Examiners

particularly noted the bank's investment in a California environmental cleanup and redevelopment fund and the bank's \$10.7 million of investments in six housing projects that created more than 370 units of affordable housing in LMI areas.

The bank received a "high satisfactory" rating overall under the service test in the February 2003 Evaluation. Examiners reported that the bank's distribution of its branches generally mirrored community demographics across all its assessment areas. They also reported that the bank provided a relatively high level of community development services in its combined assessment areas that focused on affordable housing for LMI individuals. The evaluation made particular note of the bank's affiliation with the Affordable Housing Program administered by the Federal Home Loan Bank of San Francisco, which makes awards to develop and rehabilitate single-family and multi-family housing for very low- and low-income individuals.

C. CRA Performance of CFB Bank

As noted, CFB Bank received an overall "satisfactory" rating in the December 2002 evaluation. Under the lending test, CFB Bank received an overall rating of "high satisfactory." During the evaluation period,²⁶ CFB Bank originated or purchased more than 4,500 HMDA-reportable loans totaling \$386 million in three states that together accounted for 61 percent of the bank's deposits ("Representative States").²⁷ Examiners reported that the bank's distribution of loans across geographies of different income levels was generally good and that the bank had an excellent distribution of loans to borrowers of different income levels.

CFB Bank originated or purchased more than 12,400 small loans to businesses totaling more than \$1.15 billion in the Representative States during the evaluation period.²⁸ In addition, the bank originated or purchased more than 6,500 small loans to farms totaling \$326 million in the Representative States.²⁹ Examiners reported that the bank's distribution of loans to businesses of varying sizes generally was excellent.

During the evaluation period, CFB Bank also made 11 community development loans totaling almost \$2.6 million in the Representative States. These community development loans helped provide affordable housing and social services to LMI families and financing for start-up and existing small businesses.

24. The evaluation periods were from January 1, 2000, through September 30, 2002, for lending and extended through December 31, 2002, for community development loans and qualified investments. Examiners conducted full-scope reviews for the Los Angeles and San Francisco Consolidated Metropolitan Statistical Areas ("CMSAs"), which together accounted for more than 60 percent of the bank's small business loans and nearly 70 percent of the bank's mortgages reportable under HMDA.

25. In this context, a "small business loan" is a loan in an original amount of \$1 million or less that either is secured by nonfarm, nonresidential properties or is classified as a commercial and industrial loan.

26. The evaluation period was from January 1, 2000, through December 31, 2002.

27. The Representative States are Colorado, Wyoming, and Minnesota, which respectively accounted for 27 percent, 19 percent, and 15 percent of CFB Bank's deposit base at the time of the December 2002 Evaluation.

28. In this context, "small loans to businesses" are loans with original amounts of \$1 million or less that either are secured by nonfarm or residential real estate or are classified as commercial and industrial loans.

29. In this context, "small loans to farms" are loans with original amounts of \$500,000 or less that either are secured by farmland or are classified as loans to finance agricultural and other loans to farmers.

CFB Bank received an overall rating of “high satisfactory” under the investment test in the December 2002 Evaluation. During the evaluation period, CFB made more than 190 qualified investments totaling \$5.3 million in the Representative States. Examiners noted that almost all these investments assisted in providing affordable housing for LMI families.

Under the service test, CFB Bank received an overall rating of “high satisfactory.” Examiners reported that the percentage of the bank’s branches in LMI census tracts often exceeded the percentage of the population residing in these areas. In addition, examiners noted that the bank provided relatively high levels of community development services in nonmetropolitan assessment areas in each of the Representative States.

D. HMDA Data and Fair Lending Records

The Board has carefully considered the lending records of Applicants and CFB in light of comments on the HMDA data reported by their subsidiary banks. Based on 2002 HMDA data, the commenter alleged that Bank of the West and CFB Bank disproportionately excluded or denied African-American or Hispanic applicants for home mortgage loans in various MSAs.³⁰ The Board reviewed HMDA data for 2002 and 2003 reported by Bank of the West and CFB Bank for the major markets they each serve and the MSAs identified by the commenter.³¹

The 2002 and 2003 HMDA data reported by Bank of the West indicate that the bank’s denial disparity ratios,³² for African-American and Hispanic applicants for total HMDA-reportable loans were comparable with or more favorable than those ratios for the aggregate of lenders (“aggregate lenders”) in the San Francisco MSA, and comparable or less favorable than those ratios for the aggregate lenders in the Los Angeles CMSA.³³ From 2002 to 2003, Bank of the West’s percentages of total HMDA-reportable loans to African Americans and Hispanics increased in most of the areas reviewed, including in the

San Francisco MSA and the Los Angeles CMSA.³⁴ In addition, Bank of the West’s percentages of total HMDA-reportable loans to borrowers in predominantly minority census tracts in the San Francisco MSA and Los Angeles CMSA in 2003 exceeded the percentages for the aggregate lenders in those areas.

The 2003 data reported by CFB Bank indicate that the bank’s denial disparity ratios for Hispanic applicants for HMDA-reportable loans in the MSAs cited by the commenter were more favorable than those ratios for the aggregate lenders. In addition, the bank’s percentages of total HMDA-reportable loans to Hispanic borrowers in these areas were higher than the percentages for the aggregate lenders.

Although the HMDA data may reflect certain disparities in the rates of loan applications, originations, and denials among members of different racial groups, the HMDA data generally do not indicate that Bank of the West or CFB Bank are excluding any racial groups or geographic areas 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 and provide only limited information about covered loans.³⁵ 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 BancWest and CFB with fair lending laws. Examiners noted no fair lending law issues or concerns in either the February 2003 or the December 2002 Evaluations. The Board also consulted with the FDIC and the OCC, which have responsibility for enforcing compliance with fair lending laws by Bank of West and CFB Bank, respectively, about this proposal and the record of performance of Bank of the West since the last examination.

30. Specifically, the commenter cited HMDA data on Bank of the West’s lending to African Americans or Hispanics in the following MSAs: Albuquerque, Los Angeles, Las Vegas, Modesto, Stockton-Lodi, and Portland. The commenter cited HMDA data for CFB Bank’s lending to Hispanics in the Boulder, Colorado and Las Cruces, New Mexico MSAs.

31. The Board also reviewed HMDA data for Bank of the West in the San Francisco MSA, which is the bank’s home market, and for CFB Bank in the Fargo, North Dakota MSA, which is that bank’s home market.

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

33. The bank’s denial disparity ratios were comparable or less favorable than those ratios for aggregate lenders in the other MSAs reviewed. In 2003, the Los Angeles CMSA and San Francisco MSA together accounted for 31 percent of all of Bank of the West’s HMDA-reportable loans. The lending data of the aggregate lenders represent the cumulative lending for all financial institutions that have reported HMDA data in a given market.

34. From 2002 to 2003, Bank of the West’s percentage of total HMDA-reportable loans to Hispanics declined in the Las Vegas and Portland MSAs, and its percentage of total HMDA-reportable loans to African Americans declined in the Modesto MSA. African Americans accounted for only 2.6 percent of the population of the Modesto MSA.

35. 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.

The record also indicates that Bank of the West and CFB Bank have taken steps to ensure compliance with fair lending laws. Bank of the West has instituted policies and procedures to help ensure compliance with all fair lending and other consumer protection laws and regulations, including a second-review process, regular internal fair lending examinations, risk-based regulatory audits, and compliance self-assessments. CFB Bank's compliance program includes a second-review process, along with regular internal fair lending audits and examinations. Applicants have represented that, on consummation of the proposed bank merger, CFB Bank's compliance function will be integrated into Bank of the West's compliance management system.

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

E. Branch Closings

The Board has considered the commenter's concern about possible branch closings in light of all the facts of record. Applicants have indicated that they have no plans as a result of the transaction to close any branches of Bank of the West or CFB Bank in the banking markets where the banks overlap.³⁶ The Board has considered Bank of the West's branch banking policy and its record of opening and closing branches. In the February 2003 Evaluation, examiners concluded that Bank of the West's record of opening and closing branches had not adversely affected the bank's delivery of services in LMI areas and to LMI individuals and that the bank's branch closing policy met all regulatory requirements.

The Board also has considered the fact that federal banking law provides a specific mechanism for addressing branch closings.³⁷ 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 FDIC, as the appropriate federal supervisor of Bank of the West, will continue to review the bank's branch closing record in the course of conducting CRA performance evaluations.

36. Applicants have stated that CFB Bank is in the process of relocating one of its branches in Las Cruces, New Mexico, and that the bank initiated this relocation process before CFB's execution of its purchase and sales agreement with Applicants. This branch is not in an LMI census tract.

37. 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.

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 Applicants, public comments on the proposal, and confidential supervisory information. Applicants have stated that the proposal would provide CFB customers with expanded products and services, including access to BNP's international banking and financial services network. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor, including the CRA performance records of the relevant depository institutions, are consistent with approval.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the application should be, and hereby is, approved.³⁸ 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.³⁹ The Board's approval is specifically

38. The commenter requested that the Board extend the comment period. The Board believes that the record in this case does not warrant postponing its consideration of the proposal. During the applications process, the Board has accumulated a significant record, including reports of examination, supervisory information, public reports and information, and 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 processing rules establish time periods for consideration and action on acquisition proposals. Moreover, as discussed above, the CRA requires the Board to consider the existing record of performance of an organization and does not require an organization to enter into contracts or agreements with interested parties to implement its CRA programs. For the reasons discussed above, the Board believes that commenter has had ample opportunity to submit its views, and in fact, commenter has provided substantial written submissions that the Board has considered carefully in acting on the proposal. Based on a review of all the facts of record, the Board concludes that granting an extension of the comment period is not warranted.

39. The commenter requested that the Board hold a public meeting or hearing on the proposal. Section 3 of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authority for the bank to be acquired makes a 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). The Board has considered carefully commenter's request in light of all the facts of record. In the Board's view, the commenter had ample opportunity to submit its views, and in fact, commenter has submitted written comments that the Board has considered carefully in acting on the proposal. The commenter's request fails to demonstrate why the written comments do not present its views adequately. The request also fails to identify disputed issues of fact that are material to the Board's decision and 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

conditioned on compliance by Applicants with the conditions imposed in this order and the commitments made to the Board in connection with the application, including compliance with state law. The commitments made to the Board in the applications 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 proposal 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 San Francisco, acting pursuant to delegated authority.

By order of the Board of Governors, effective October 15, 2004.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Appendix

Banking Market Data

San Diego, California

BancWest operates the 39th largest depository institution in the San Diego banking market, controlling \$55 million in deposits, which represents less than 1 percent of market deposits. CFB operates the 16th largest depository institution in the market, controlling \$242 million in deposits, which represents less than 1 percent of market deposits. On consummation of the proposal, BancWest would operate the 16th largest depository institution in the market, controlling deposits of \$297 million, which represent less than 1 percent of market deposits. The HHI would remain at 1105. Seventy bank and thrift competitors would remain in the market.

Las Cruces, New Mexico

BancWest operates the 12th largest depository institution in the Las Cruces banking market, controlling \$15 million in deposits, which represents 1.6 percent of market deposits. CFB operates the third largest depository institution in the market, controlling \$92 million in deposits, which represents 9.8 percent of market deposits. On consummation of the proposal, BancWest would operate the third largest depository institution in the market, controlling deposits of \$108 million, which represent approximately 11 percent of market deposits. The HHI would increase

32 points to 1435. Sixteen bank and thrift competitors would remain in the market.

BNP Paribas
Paris, France

BancWest Corporation
Honolulu, Hawaii

Order Approving the Acquisition of a Bank Holding Company

BNP Paribas (“BNP”) and its subsidiary, BancWest Corporation (“BancWest”) (collectively “Applicants”), financial holding companies within the meaning of the Bank Holding Company Act (“BHC Act”), have requested the Board’s approval under section 3 of the BHC Act to acquire USDB Bancorp (“USDB”) and its subsidiary bank, Union Safe Deposit Bank (“USDB Bank”), both in Stockton, California.¹

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (69 *Federal Register* 31,821 (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.

BNP, with total consolidated assets of approximately \$1.2 trillion, is the tenth largest banking organization in the world.² BNP operates branches in Chicago, New York City, and San Francisco; agencies in Houston and Miami; and representative offices in Atlanta, Dallas, and Los Angeles.

BancWest, with total consolidated assets of \$40 billion, is the 29th largest depository organization in the United States, controlling deposits of \$24 billion.³ In California, BancWest is the eighth largest depository organization, controlling deposits of \$16 billion. BancWest also operates subsidiary insured depository institutions in Hawaii, Idaho, Nevada, New Mexico, Oregon, Washington, Guam, and the Northern Mariana Islands. USDB, with total consolidated assets of approximately \$1.1 billion, is the 61st largest depository organization in California and controls deposits of \$786 million.

1. (12 U.S.C. § 1842). BancWest’s wholly owned subsidiary bank, Bank of the West, San Francisco, California, has requested the approval of the Federal Deposit Insurance Corporation (“FDIC”) under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. § 1828(c)) to merge with USDB Bank, with Bank of the West as the surviving institution. Today, the Board approved the separate application filed by Applicants to acquire Community First Bankshares, Inc. and Community First National Bank, both in Fargo, North Dakota (“the CFB transaction”), under section 3 of the BHC Act. See *BNP Paribas*, 91 *Federal Reserve Bulletin* 51 (2005) (“CFB Order”).

2. Asset data are as of March 31, 2004. International ranking data are as of December 31, 2003, and are based on the exchange rate then available.

3. National deposit and ranking data are as of March 31, 2004, and statewide deposit and ranking data are as of June 30, 2003, adjusted for transactions through August 1, 2004.

case. Accordingly, the request for a public meeting or hearing on the proposal is denied.

On consummation of this proposal and the CFB transaction, BancWest would become the 27th largest depository organization in the United States, with total consolidated assets of \$46 billion, and would control deposits of \$30 billion, representing less than 1 percent of the total amount of deposits of insured depository institutions in the United States. BancWest would remain the eighth largest insured depository organization in California, controlling deposits of approximately \$17 billion, which represent approximately 3 percent of the total amount of deposits of insured depository institutions in the state.

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. It 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 clearly are outweighed in the public interest by its probable effect in meeting the convenience and needs of the community to be served.⁴

BancWest and USDB compete directly in the Modesto and Stockton banking markets, both in California.⁵ 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 BancWest and USDB,⁶ the concentration levels of market deposits and the increases in these levels as measured by the Herfindahl–Hirschman Index (“HHI”) under the Department of Justice Merger Guidelines (“DOJ Guidelines”),⁷ and other characteristics of the markets.

4. 12 U.S.C. § 1842(c)(1).

5. The Modesto banking market is defined as the Modesto Ranally Metro Area (“RMA”) and the towns of Crows Landing, Denair, Gustine, Hilmar, Newman, Patterson, and Ripon. The Stockton banking market is defined as the Stockton RMA and the towns of Galt, Lockeford, Manteca, and Walnut Grove.

6. Market share data are based on Summary of Deposits reports filed as of June 30, 2003, updated to include transactions through September 10, 2004, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift deposits in the market share calculation on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991).

7. 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

Consummation of the proposal would be consistent with Board precedent and the DOJ Guidelines in both banking markets.⁸ The Modesto banking market would remain moderately concentrated and the Stockton banking market would remain highly concentrated, as measured by the HHI. In both markets the increases in concentration would be small and numerous competitors would remain.

The Department of Justice also has reviewed the competitive effects of the proposal and advised the Board that consummation of the proposal would not have a significantly adverse effect on competition in these banking markets or in 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 these and all other 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 confidential supervisory and examination information from the various banking supervisors of the institutions involved, publicly reported and other financial information, information provided by Applicants, and public comments received on the proposal.⁹ The Board also has consulted with the French Banking Commission (“FBC”), which is responsible for the supervision and regulation of French financial institutions.

In evaluating financial factors in expansion proposals by banking organizations, the Board consistently has considered capital adequacy to be especially important. BNP and its U.S. subsidiary depository institutions are considered to be well capitalized and would remain so on consummation of the proposal. BNP’s capital levels exceed the minimum levels that would be required under the Basel Capital Accord, and its capital levels are considered equivalent to the capital levels that would be required of a U.S. banking organization. The proposed transaction is structured as a share purchase, and the consideration to be received by

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.

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

9. One commenter expressed several concerns about Applicants that related to employment discrimination litigation, business relationships with certain foreign projects or companies operating in foreign countries, and the United Nations’ Oil-for-Food program. These concerns are discussed in the CFB Order. The Board hereby reaffirms and adopts the facts and findings detailed in the CFB Order with respect to these allegations and concerns.

USDB shareholders would be funded from BNP's available resources. The Board finds that the Applicants have sufficient financial resources to effect the proposal.

The Board also has considered the managerial resources of BNP, BancWest, USDB, and their subsidiary banks, particularly the supervisory experience of the various bank supervisory agencies with the organizations and their records of compliance with applicable banking laws. The Board has reviewed assessments of the organizations' management and risk-management systems by the relevant federal and state banking supervisory agencies. Domestic banking organizations and foreign banks operating in the United States are required to implement and operate effective anti-money laundering programs. Accordingly, the Board has also considered the existing anti-money laundering programs at BNP and the assessment of these programs by the relevant federal supervisory agencies, state banking agencies, and the FBC. Furthermore, the Board has considered additional information provided by BNP on enhancements it has made and is currently making to its systems as the organization expands its operations. The Board expects that BNP will take all necessary steps to ensure that sufficient resources, training, and managerial efforts are dedicated to maintaining a fully effective anti-money laundering program. The Board also has considered BancWest's plans to implement the proposal, including its proposed management after consummation and the company's record of successfully integrating acquired institutions into its existing operations. Based on these and all other facts of record, the Board concludes that the financial and managerial resources and future prospects of the organizations involved in the proposal are consistent with approval.

Section 3 of the BHC Act also provides that the Board may not approve an application involving a foreign bank unless the bank is subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in the bank's home country.¹⁰ In addition, the foreign bank must have provided adequate assurances that it will make available to the Board such information on its operations and activities and those of its affiliates that the Board deems appropriate to determine and enforce compliance with the BHC Act.¹¹ The Board has carefully reviewed these matters in light of the facts of record in considering Applicants' application for approval of the CFB transaction. For the reasons set forth in the CFB Order, the Board concludes that BNP continues to be subject to comprehensive supervision on a consolidated basis by its home country supervisor and that the other supervisory factors it is required to consider are consistent with approval.

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board must consider the effects of the proposal on the

10. 12 U.S.C. § 1842(c)(3)(B).

11. See 12 U.S.C. § 1842(c)(3)(A).

convenience and needs of the communities to be served and take into account the records of the relevant insured depository institutions under the Community Reinvestment Act ("CRA").¹² 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 BancWest and USDB in light of all the facts of record, including public comment on the proposal. One commenter opposed the proposal and alleged, based on data reported under the Home Mortgage Disclosure Act ("HMDA"),¹³ that Bank of the West and USDB Bank engaged in disparate treatment of minority individuals in home mortgage lending in the banks' assessment areas. The commenter also expressed concern about possible branch closures.

A. CRA Performance Evaluations

The Board has carefully reviewed the CRA performance records of Bank of the West and USDB Bank. 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.¹⁴ Bank of the West, BancWest's largest subsidiary bank as measured by total deposits, received a "satisfactory" rating at its most recent CRA performance evaluation by the FDIC, as of February 3, 2003 ("February 2003 Evaluation").¹⁵ Applicants have indicated that after the merger of Bank of the West and USDB Bank, the CRA activities of the resulting bank would conform to Bank of the West's current CRA program.

A detailed discussion of the February 2003 Evaluation and the policies and programs implemented by Bank of the West to help meet the credit needs of its communities is provided in the CFB Order. Based on its review of the record in this case, the Board hereby reaffirms and adopts the facts and findings detailed in the CFB Order.

In summary, examiners characterized Bank of the West's overall record of home mortgage and small business lending as good and stated that the bank had a high level of community development lending. Examiners noted favor-

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

13. 12 U.S.C. § 2801 et seq.

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

15. First Hawaiian Bank, Honolulu, Hawaii, BancWest's other subsidiary bank, received an "outstanding" rating at its most recent CRA performance evaluation by the FDIC, as of August 19, 2003.

ably that the bank offered several flexible lending products designed to address affordable housing needs of low-income and first-time homebuyers and reported that the bank had taken a leadership role in providing qualified investments. They also found that the bank provided a relatively high level of community development services and that the bank's branch distribution generally mirrored community demographics.

USDB Bank received a "satisfactory" rating at its most recent CRA performance evaluation by the Federal Reserve Bank of San Francisco, as of December 2, 2002 ("December 2002 Evaluation"). Examiners reported that USDB Bank had a good distribution of home mortgage and small business loans by geography, borrower income, and sizes of business. They also reported that the bank funded an adequate level of qualified investments and provided an adequate level of community development services.

B. HMDA Data, Subprime Lending, and Fair Lending Records

The Board has carefully considered the lending records of Applicants and USDB in light of comments on the HMDA data reported by their subsidiary banks. The commenter repeated the allegations it made about Applicants in connection with the CFB transaction. These allegations are addressed in detail in the CFB Order and the Board hereby reaffirms and adopts the HMDA analysis of Bank of the West detailed in the CFB order.

The commenter also alleged, based on 2002 HMDA data, that USDB Bank disproportionately excluded or denied African-American applicants for home mortgage loans in the Modesto and Stockton-Lodi Metropolitan Statistical Areas ("MSAs."). The Board reviewed HMDA data for 2002 and 2003 reported by USDB Bank in these MSAs. The data indicate that, in 2003, the bank's denial disparity ratios for African Americans for HMDA-reportable loans in these MSAs were less favorable than those ratios for the aggregate of lenders ("aggregate lenders") and that the bank's percentages of total HMDA-reportable loans to African-American borrowers in these areas were lower than the percentages for the aggregate lenders.¹⁶ However, the bank's percentages of total HMDA-reportable loans to borrowers in predominantly minority census tracts in both MSAs in 2003 exceeded or was comparable with the percentages for the aggregate lenders in those MSAs.

Although the HMDA data may reflect certain disparities in the rates of loan applications, originations, and denials among members of different racial groups, the HMDA data generally do not indicate that Bank of the West and USDB Bank is excluding any racial groups or geographic areas on

a prohibited basis. The Board 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 and provide only limited information about covered loans.¹⁷ 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 BancWest and USDB with fair lending laws. Examiners noted no fair lending law issues or concerns in the February 2003 Evaluation or the December 2002 Evaluation. The Board has consulted with the Federal Reserve Bank of San Francisco about USDB Bank's record since the last examination. The Board also has consulted with the FDIC, which has responsibility for enforcing compliance with fair lending laws by Bank of the West, about this proposal and the record of the Bank of the West since the last examination.

The record also indicates that Bank of the West and USDB Bank have taken steps to ensure compliance with fair lending laws. The banks have instituted policies and procedures to help ensure compliance with all fair lending and other consumer protection laws and regulations. Bank of the West's compliance programs include a second-review process, regular internal fair lending examinations, risk-based regulatory audits, and compliance self-assessments. USDB Bank's compliance program includes a second-review process, along with regular internal fair lending audits. Applicants have represented that, on consummation of the proposed bank merger, USDB Bank's compliance function will be integrated into Bank of the West's compliance management system.

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

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

17. 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.

C. Branch Closings

The Board has considered the commenter's concern about possible branch closings in light of all the facts of record. Applicants have indicated that as a result of the transaction, they plan to consolidate three branches of USDB Bank with branches of Bank of the West in the same neighborhoods. The Board has considered Bank of the West's branch banking policy and its record of opening and closing branches. In the February 2003 Evaluation, examiners concluded that Bank of the West's record of opening and closing branches had not adversely affected the bank's delivery of services in LMI areas and to LMI individuals and that the bank's branch closing policy met all regulatory requirements.

The Board also has considered the fact that federal banking law provides a specific mechanism for addressing branch closings.¹⁸ 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 FDIC, as the appropriate federal supervisor of Bank of the West, will continue to review the bank's branch closing record in the course of conducting CRA performance evaluations.

D. Conclusion on Convenience and Needs Factor

The Board has carefully considered all the facts of record, including reports of examination of the CRA records of the institutions involved, information provided by Applicants, public comments on the proposal, and confidential supervisory information. Applicants have stated that the proposal would provide USDB customers with access to BNP's international banking and financial services network. Based on all the facts of record, and for the reasons discussed above and in the CFB Order, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant depository institutions are consistent with approval.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the application should be, and hereby is, approved.¹⁹ In reaching its conclusion, the Board

18. 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.

19. The commenter requested that the Board extend the comment period. The Board believes that the record in this case does not warrant postponing its consideration of the proposal. During the

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.²⁰ The Board's approval is specifically conditioned on compliance by Applicants with the conditions imposed in this order and the commitments made to the Board in connection with the application, including compliance with state law. The commitments made to the Board in the applications 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 proposal 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 San Francisco, acting pursuant to delegated authority.

By order of the Board of Governors, effective October 15, 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

applications process, the Board has accumulated a significant record, including reports of examination, supervisory information, public reports and information, and 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 processing rules establish time periods for consideration and action on acquisition proposals. Moreover, as discussed above, the CRA requires the Board to consider the existing record of performance of an organization and does not require an organization to enter into contracts or agreements with interested parties to implement its CRA programs. For the reasons discussed above, the Board believes that commenter has had ample opportunity to submit its views, and in fact, commenter has provided substantial written submissions that the Board has considered carefully in acting on the proposal. Based on a review of all the facts of record, the Board concludes that granting an extension of the comment period is not warranted.

20. The commenter requested that the Board hold a public meeting or hearing on the proposal. Section 3(b) of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authority for the bank to be acquired makes a timely written recommendation of denial of the application. The Board has not received such a recommendation from the appropriate supervisory 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). The Board has considered carefully commenter's request in light of all the facts of record. In the Board's view, the commenter had ample opportunity to submit its views, and in fact, commenter has submitted written comments that the Board has considered carefully in acting on the proposal. The commenter's request fails to demonstrate why the written comments do not present its views adequately. The request also fails to identify disputed issues of fact that are material to the Board's decision and that would be clarified by a public meeting or hearing. For these reasons, and based on all the facts of record, the Board has determined that a public meeting or hearing is not required or warranted in this case. Accordingly, the request for a public meeting or hearing on the proposal is denied.

Appendix

Banking Market Data

Modesto, California

BancWest operates the third largest depository institution in the Modesto banking market, controlling \$340 million in deposits, which represents 7.6 percent of market deposits. USDB operates the eighth largest depository institution in the market, controlling \$234 million in deposits, which represents 5.2 percent of market deposits. On consummation of the proposal, BancWest would continue to operate the third largest depository institution in the market, controlling deposits of approximately \$575 million, which represent approximately 12.9 percent of market deposits. The HHI would increase 80 points to 1,104. Twenty-one bank and thrift competitors would remain in the market.

Stockton, California

BancWest operates the tenth largest depository institution in the Stockton banking market, controlling \$153 million in deposits, which represents 1.8 percent of market deposits. USDB operates the fifth largest depository institution in the market, controlling \$542 million in deposits, which represents 6.3 percent of market deposits. On consummation of the proposal, BancWest would operate the fourth largest depository institution in the market, controlling deposits of \$695 million, which represent 8.1 percent of market deposits. The HHI would increase 22 points to 2,402. Twenty-five bank and thrift competitors would remain in the market.

*Fifth Third Bancorp
Cincinnati, Ohio**Fifth Third Financial Corporation
Cincinnati, Ohio**Fifth Third Bank
Grand Rapids, Michigan*

Order Approving the Acquisition of a Bank Holding Company, Merger of Banks, and Establishment of Branches

Fifth Third Bancorp and its wholly owned subsidiary, Fifth Third Financial Corporation (collectively “Fifth Third”), both financial holding companies within the meaning of the Bank Holding Company Act (“BHC Act”), have requested the Board’s approval under section 3 of the BHC Act¹ to acquire First National Bankshares of Florida, Inc. (“First National”) and its wholly owned subsidiary, First National Bank of Florida (“First National Bank”), both in

Naples, Florida.² In addition, Fifth Third’s subsidiary bank, Fifth Third Bank, Grand Rapids, Michigan (“Fifth Third Bank”), a state member bank, has requested the Board’s approval under section 18(c) of the Federal Deposit Insurance Act³ (“Bank Merger Act”) to merge with First National Bank, with Fifth Third Bank as the surviving entity.⁴ Fifth Third Bank also has requested the Board’s approval under section 9 of the Federal Reserve Act⁵ (“FRA”) to retain and operate branches at the locations of First National Bank’s main office and branches.⁶

Notice of the proposal, affording interested persons an opportunity to comment, has been published in the *Federal Register* (69 *Federal Register* 59,597 (2004)) and locally in accordance with the relevant statutes and the Board’s Rules of Procedure.⁷ As required by the BHC Act and the Bank Merger Act, reports on the competitive effects of the merger were requested from the United States Attorney General and the appropriate federal banking agencies. The time for filing comments has expired, and the Board has considered the applications and all comments received in light of the factors set forth in section 3 of the BHC Act, the Bank Merger Act, and the FRA.

Fifth Third, with total consolidated assets of approximately \$98.3 billion, is the 16th largest depository organization in the United States. Fifth Third operates subsidiary depository institutions in Florida, Illinois, Indiana, Kentucky, Michigan, Ohio, Tennessee, and West Virginia. Fifth Third Bank is the 38th largest depository institution in Florida, controlling deposits of approximately \$820.1 million.⁸ First National, with total consolidated assets of approximately \$5.5 billion is the 12th largest depository organization in Florida, controlling deposits of approximately \$3.9 billion. On consummation of the proposal, Fifth Third would become the 15th largest depository organization in the United States and Fifth Third Bank would become the tenth largest depository institution in Florida, controlling deposits of approximately \$4.7 billion, which represent approximately 1.7 percent of the total

2. Fifth Third’s other subsidiary depository institutions are Fifth Third Bank, Cincinnati, Ohio (“Fifth Third Ohio”), and Fifth Third Bank, N.A., Franklin, Tennessee (“Fifth Third, N.A.”).

3. 12 U.S.C. § 1828(c).

4. Under the proposal, Fifth Third would acquire all the issued and outstanding stock of First National. Simultaneously with the acquisition of First National’s stock, First National would merge with and into Fifth Third, and First National Bank would merge with and into Fifth Third Bank. Fifth Third proposes to acquire First National’s nonbanking subsidiaries and engage only in 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. 12 U.S.C. § 1843(k)(4)(A)–(H); 12 CFR 225.87.

5. 12 U.S.C. § 321.

6. These branches are listed in Appendix A.

7. 12 CFR 262.3(b).

8. Asset data and national rankings are as of September 30, 2004. Deposit data and state rankings are as of June 30, 2004, and are adjusted to reflect mergers and acquisitions completed through December 8, 2004.

1. 12 U.S.C. § 1842.

amount of deposits of insured depository institutions in the state.⁹

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. Section 44 of the Federal Deposit Insurance Act¹⁰ (“FDI Act”) authorizes a bank to merge with another bank under certain conditions unless, before June 1, 1997, the home state of one of the banks involved in the transaction adopted a law expressly prohibiting merger transactions involving out-of-state banks.¹¹ For purposes of the BHC Act, the home state of Fifth Third is Ohio,¹² and for purposes of section 44 of the FDI Act, the home state of Fifth Third Bank is Michigan. Fifth Third proposes to acquire a bank in Florida.¹³

Based on a review of all the facts of record, including a review of relevant state statutes, the Board finds that all conditions for an interstate acquisition and bank merger enumerated in section 3(d) of the BHC Act and section 44 of the FDI Act are met in this case.¹⁴ In light of all the facts of record, the Board is permitted to approve the proposal under section 3(d) of the BHC Act and section 44 of the FDI Act.

Competitive Considerations

Section 3 of the BHC Act and the Bank Merger Act prohibit the Board from approving a proposal that would result in a monopoly or would be in furtherance of an attempt to monopolize the business of banking. The BHC

Act and the Bank Merger Act also prohibit the Board from approving a bank acquisition that would substantially lessen competition in any relevant banking market unless the anticompetitive effects of the proposal are clearly outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.¹⁵

Fifth Third Bank and First National Bank compete directly in the Naples, Fort Myers, and Sarasota banking markets in Florida.¹⁶ 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 of depository institutions in the markets (“market deposits”) controlled by Fifth Third Bank and First National Bank,¹⁷ 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”),¹⁸ and other characteristics of the market.

Consummation of the proposal would be consistent with Board precedent and the DOJ Guidelines in each of these banking markets.¹⁹ After consummation, the Naples, Fort Myers, and Sarasota banking markets would remain moderately concentrated, with only modest increases in market concentration as measured by the HHI. Numerous competitors would remain in all these banking markets.

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

9. In this context, the term “insured depository institutions” includes insured commercial banks, savings banks, and savings associations.

10. 12 U.S.C. § 1831u.

11. Pub. L. No. 103-328, 108 Stat. 2338 (1994); see 12 U.S.C. § 1831u.

12. Under section 3(d) of the BHC Act, a bank holding company’s home state is the state in which the total deposits of all banking subsidiaries of such company were the largest on July 1, 1966, or the date on which the company became a bank holding company, whichever is later. 12 U.S.C. § 1842(d). Under section 44 of the FDI Act, a state member bank’s home state is the state where it is chartered. 12 U.S.C. § 1831u(g)(4).

13. For purposes of section 3(d), the Board considers a bank to be located in 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) & (d)(2)(B).

14. 12 U.S.C. § 1842(d)(1)(A) & (B), 1842(d)(2)(A) & (B); 12 U.S.C. § 1831u. Fifth Third and Fifth Third Bank are well capitalized and well managed, as defined by applicable law. First National Bank has been in existence and operated for the minimum period of time required by Florida law. On consummation of the proposal, Fifth Third and Fifth Third Bank would control less than 10 percent of the total amount of deposits of insured depository institutions in the United States and less than 30 percent of the total amount of deposits of insured depository institutions in Florida. See Fla. Stat. ch. 658.295(8)(b) (2004). All other requirements under section 3(d) of the BHC Act and section 44 of the FDI Act also would be met on consummation of the proposal.

15. 12 U.S.C. § 1842(c)(1); 12 U.S.C. § 1828(c)(5).

16. These banking markets are described in Appendix B.

17. Deposit and market share data are as of June 30, 2004, adjusted to reflect subsequent mergers and acquisitions through December 8, 2004, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift deposits in the market share calculation on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991).

18. Under the DOJ Guidelines, a market is considered unconcentrated if the post-merger HHI is less than 1000 and moderately concentrated if the post-merger HHI is between 1000 and 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.

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

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

Financial and Managerial Resources and Future Prospects

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 and to consider certain other supervisory factors under the BHC Act. The Board has carefully considered these factors in light of all the facts of record including, among other things, information provided by Fifth Third, confidential reports of examination and other supervisory information received from the federal and state banking supervisors of the organizations involved, publicly reported and other financial information, and public comments received on the proposal.

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

Based on its review of these factors, the Board finds that Fifth Third has sufficient financial resources to effect the proposal. Fifth Third and its subsidiary banks are well capitalized and would remain so on consummation of this proposal. The proposed transaction is structured as a share exchange, and the cash consideration in lieu of fractional shares will be funded from Fifth Third's existing resources.²⁰

The Board also has evaluated the managerial resources of the organizations involved, including the proposed combined organization. The Board has reviewed the examination records of Fifth Third, First National, and their subsidiary depository institutions, including assessments of their management, risk-management systems, and operations.

20. A commenter expressed concern that the consideration Fifth Third would provide to effect this proposal was excessive and suggested that this issue reflected negatively on its managerial resources. The Board notes that the consideration has been disclosed to shareholders and that Fifth Third would remain well capitalized on consummation.

In addition, the Board has considered its supervisory experience and that of the other relevant banking supervisory agencies with the organizations and their records of compliance with applicable banking law.²¹ Fifth Third, First National, and their subsidiary depository institutions are considered well managed. The Board also has considered Fifth Third's plans to integrate First National and its subsidiaries and the proposed management, including the risk-management systems, of the resulting organization.

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

Convenience and Needs Considerations

In acting on this proposal, 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").²² 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 banks of Fifth Third and First National in light of all the facts of record, including public comment on the proposal.²³ Two commenters opposed the proposal and asserted, based in part on data reported under the Home Mortgage Disclosure Act ("HMDA"),²⁴ that Fifth Third engaged in disparate treatment of African-American and Hispanic individuals in its home mortgage lending opera-

21. A commenter also expressed concern about Fifth Third's managerial record in light of a recent enforcement action against the organization by the Federal Reserve Bank of Cleveland. The Written Agreement required Fifth Third to enhance its risk-management systems, internal controls, and compliance procedures. After a careful review of the steps taken by Fifth Third to meet the requirements of the enforcement action, the Reserve Bank terminated the Written Agreement in April 2004.

22. 12 U.S.C. § 2901 et seq.

23. One commenter criticized Fifth Third's relationships with unaffiliated payday lenders, car-title lending companies, and other nontraditional providers of financial services. As a general matter, these businesses are licensed by the states where they operate and are subject to applicable state law. Fifth Third also responded that it has entered into lending relationships with several check-cashing organizations, pawn shops, and rent-to-own companies, but that it plays no role in the lending practices, credit review, or other business practices of those borrowers. Fifth Third represented that in all such cases, it requires borrowers to represent and warrant to Fifth Third that they comply with applicable laws.

24. 12 U.S.C. § 2801 et seq.

tions. In addition, one of these commenters expressed concern about potential branch closings. Approximately 25 commenters supported the proposal and commended Fifth Third for the technical and financial support provided to their community development organizations as well as the active involvement of the bank's officers and staff.

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.²⁵

All the subsidiary insured depository institutions of Fifth Third received either "outstanding" or "satisfactory" ratings at the most recent examinations of their CRA performance. Fifth Third's lead bank, Fifth Third Ohio, which currently accounts for approximately 60 percent of the total consolidated assets of Fifth Third, received a "satisfactory" rating at its most recent CRA performance evaluation by the Federal Reserve Bank of Cleveland. Fifth Third Bank also received a "satisfactory" rating at its most recent CRA performance evaluation by the Federal Reserve Bank of Chicago.²⁶ First National Bank, First National's only subsidiary bank, received a "satisfactory" rating at its most recent CRA performance evaluation by the OCC, as of August 5, 2002.

Fifth Third has indicated that Fifth Third's CRA program would continue to be implemented after First National Bank is merged into Fifth Third Bank, including Fifth Third's CRA-related loan products, tax credit and equity investment programs, and grant and donation programs. Fifth Third has also represented that Fifth Third's fair lending compliance program would continue to be implemented at the combined entity.

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

26. Both ratings are as of April 14, 2003. Fifth Third Bank, Florida, Naples, Florida ("Fifth Third Florida"); Fifth Third Bank, Indiana, Indianapolis, Indiana ("Fifth Third Indiana"); Fifth Third Bank, Kentucky, Inc., Louisville, Kentucky (Fifth Third Kentucky); and Fifth Third Bank, Northern Kentucky, Inc., Covington, Kentucky ("Fifth Third Northern Kentucky") were merged into Fifth Third Bank on December 31, 2003. The most recent CRA performance evaluation ratings for these banks, also as of April 14, 2003, are as follows: Fifth Third Florida—"satisfactory" rating from the Federal Reserve Bank of Atlanta; Fifth Third Indiana—"satisfactory" rating from the Federal Reserve Bank of Chicago; Fifth Third Kentucky—"outstanding" rating from the Federal Reserve Bank of St. Louis; and Fifth Third Northern Kentucky—"satisfactory" rating from the Federal Reserve Bank of Cleveland. Fifth Third's third subsidiary insured depository institution, Fifth Third, N.A., acquired Franklin National Bank, Franklin, Tennessee ("Franklin National"), on June 11, 2004. Franklin National received an "outstanding" rating from the Office of the Comptroller of the Currency ("OCC"), as of February 26, 2001.

B. CRA Performance of Fifth Third and First National

Fifth Third Ohio. In the most recent CRA performance evaluation of Fifth Third Ohio, examiners commended the depository institution for its responsiveness to the credit needs of the communities it serves.²⁷ Examiners also praised Fifth Third Ohio's level of community development lending and noted favorably the use of diverse, flexible, innovative, and creative financing methods. Examiners stated that the bank's level of qualified investments was excellent and reported that Fifth Third Ohio's community development lending increased from \$77 million during the previous examination period to \$150.9 million during its most recent evaluation period. In addition, examiners praised Fifth Third Ohio's community development services, including the bank's partnerships with schools and various nonprofit organizations to provide educational and financial literacy programs to LMI individuals.

Fifth Third Bank. At Fifth Third Bank's most recent CRA performance evaluation, examiners commended the bank's loan volume and general responsiveness to the credit needs of the communities it serves. Examiners noted that Fifth Third Bank originated or purchased higher percentages of HMDA-reportable loans to LMI borrowers in its assessment areas during the evaluation period than the percentages for the aggregate of lenders²⁸ ("aggregate lenders") in those areas. Examiners also noted that the bank had increased the number of home mortgage loans it made in LMI areas during the previous year. In addition, examiners praised the bank's record of community development lending and its use of innovative and flexible loan products such as the Good Neighbor home mortgage loan program, which provides flexible underwriting standards for LMI borrowers. They also noted Fifth Third Bank's excellent level of qualified investments and stated that its investments had helped stabilize and revitalize various neighborhoods and had benefited each of the bank's assessment areas. According to examiners, Fifth Third Bank participated in almost \$28 million in qualified investments during the evaluation period. In addition, examiners commended the bank's community development services, which included free credit and money-management counseling services as well as counseling on first-time home buying.

27. In evaluating the CRA performance records of Fifth Third Ohio, Fifth Third Bank, and Fifth Third Florida, examiners considered mortgage loans by certain affiliates in the banks' assessment areas. The loans reviewed by examiners included loans reported by Fifth Third Mortgage Company, Dayton, Ohio (a subsidiary of Fifth Third Ohio), and Fifth Third Mortgage-MI, LLC, Grand Rapids, Michigan (a subsidiary of Fifth Third Bank). The evaluation period for the three performance evaluations was from January 1, 2001, to December 31, 2002.

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

Fifth Third Florida. In the most recent CRA performance evaluation of Fifth Third Florida, examiners found that the depository institution's lending levels were responsive to the credit needs of the communities it served and reflected adequate penetration among customers of different income levels, including LMI individuals. For instance, approximately 20 percent of the HMDA-reportable loans that Fifth Third Bank originated or purchased during the evaluation period were made to LMI borrowers. This compared adequately with the 21.6 percent of HMDA-reportable loans to LMI borrowers that the aggregate of lenders in the bank's assessment areas originated or purchased during the same period. In addition, examiners commended Fifth Third Florida's level of community development investments and grants, particularly those not routinely provided by private investors. Examiners also noted the bank's strong efforts to reach out to the growing Hispanic and Latino community.

First National Bank. Examiners at First National Bank's most recent CRA performance evaluation commended the bank's home mortgage loan record among borrowers of different income levels, including LMI individuals. In particular, examiners noted that the bank originated a higher percentage of its home purchase loans in the Naples Metropolitan Statistical Area ("MSA") to LMI borrowers than the percentage of LMI families residing in the MSA.²⁹ Examiners also noted the bank's use of a flexible home mortgage loan product called "Own-A-Home," which is designed to increase mortgage lending to LMI individuals. Features of the program include a loan-to-value ratio of up to 97 percent and no requirement for private mortgage insurance. Examiners stated that First National Bank's level of qualified investments was responsive to the credit and community development needs of the bank's assessment areas. In addition, examiners commended the bank's high level of community development services, noting that more than 90 percent of its qualified investments were mortgage-backed securities with underlying mortgages to LMI individuals.

C. HMDA and Fair Lending Record

The Board has carefully considered the lending record of Fifth Third in light of public comment on the HMDA data reported by its subsidiaries. Based on 2003 HMDA data, two commenters alleged that Fifth Third disproportionately excluded or denied applications by minorities for HMDA-reportable loans.³⁰

The HMDA data for 2002 and 2003 indicate that Fifth Third's denial disparity ratios³¹ for African-American

and Hispanic applicants in 2002 and 2003 were generally higher than or comparable with the ratios for the aggregate lenders in the markets reviewed.³² However, the bank's denial disparity ratios for African-American and Hispanic applicants decreased from 2002 to 2003 in most of the markets reviewed. The percentages of total HMDA-reportable loans originated by Fifth Third to African Americans and Hispanics generally was comparable with or lagged the performance of the aggregate lenders in the markets reviewed. The data also indicate that the percentages of Fifth Third's total HMDA-reportable loans to African Americans and Hispanics increased from 2002 to 2003 in most of the markets reviewed.³³

Although the HMDA data may reflect certain disparities in the rates of loan applications, originations, and denials among members of different racial groups in certain local areas, the HMDA data generally do not indicate that Fifth Third is excluding any racial group 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. 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.³⁴ HMDA data, therefore, have limitations that make

32. For purposes of this review, Fifth Third's HMDA data include data reported by its mortgage subsidiaries operating in the relevant markets. The Board analyzed HMDA data for 2002 and 2003 reported by Fifth Third in the Naples, Florida, and Chicago, Illinois MSAs, and in certain MSAs on a statewide basis in Michigan and Ohio. The statewide data include the relevant data from the MSAs in Fifth Third Bank's and Fifth Third Ohio's assessment areas in Michigan and Ohio. Fifth Third's percentages of HMDA-reportable loan originations to Hispanic applicants in 2003 exceeded or were generally comparable with the performance of the aggregate lenders in Michigan and Ohio, but lagged the percentages for the aggregate lenders in the Naples and Chicago MSAs.

33. One commenter criticized Fifth Third's response to a fair lending complaint filed by the Department of Justice in May 2004 against Old Kent Financial Corporation and Old Kent Bank (collectively "Old Kent"). Fifth Third acquired Old Kent in 2001. The Board notes that the alleged lending violations at Old Kent occurred between 1996 and 2000 and that Fifth Third was accused of no wrongdoing. The Board also notes that Fifth Third cooperated fully with the Department of Justice's investigation into the earlier lending practices at Old Kent and in May 2004 agreed to settle the matter without contested litigation.

The commenter also expressed concern that Fifth Third Ohio's home purchase loan data were reported in violation of HMDA. The Board reviewed the data reported by Fifth Third Ohio and has found that its home purchase loan data were reported in compliance with HMDA.

34. 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

29. Examiners conducted a full-scope review of the Naples MSA, which represents the bank's major market and accounts for 56 percent of all loan originations and for 35 percent of First National Bank's deposits.

30. A commenter also criticized generally First National Bank's record of lending to minorities and its CRA performance.

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

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 Fifth Third with fair lending laws. The record also indicates that Fifth Third has taken steps to ensure compliance with fair lending laws. The bank has implemented corporate-wide fair lending policies, procedures, and training programs, and it regularly conducts internal reviews for compliance with policies and procedures. In addition, Fifth Third has a compliance function with 17 full-time professionals devoted to consumer-law compliance issues. Fifth Third's compliance programs include compliance training and testing and input from the heads of business units as well as from Fifth Third's corporate Legal, Internal Audit, Consumer Credit, Commercial Credit, Compliance, and Community Development functions.

In addition, Fifth Third has taken various steps to increase its mortgage lending to minorities. For example, to market its home mortgage loan products more effectively to Hispanics, Fifth Third Bank implemented a Spanish Language Outreach Program ("Outreach Program"). Under the Outreach Program, the bank instituted new-account opening procedures and a Spanish-language advertising campaign, provided information about homeownership in Spanish, created loan documents in Spanish, and increased the availability of Spanish-speaking service representatives.³⁵

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

D. Branch Closures

One commenter expressed concern about possible branch closures and reductions in service after consummation of this proposal.³⁶ Fifth Third has stated that it plans to close or consolidate five branches as a result of this proposal, but that these actions would not leave any markets without

frequently cited for a credit denial) are not available from HMDA data.

35. Fifth Third represented that the Outreach Program will be implemented at all Fifth Third subsidiary banks.

36. The commenter also expressed concern about possible job losses resulting from this proposal. The effect of a proposed acquisition on employment in a community is not among the limited factors the Board is authorized to consider under the BHC Act or the Bank Merger Act, and the convenience and needs factor has been interpreted consistently by the federal banking agencies, the courts, and the Congress to relate to the effect of a proposal on the availability and quality of banking services in the community. *See, e.g., Wells Fargo & Company*, 82 *Federal Reserve Bulletin* 445, 457 (1996).

service. In addition, Fifth Third has represented that none of the branches it plans to close or consolidate as a result of this proposal is in an LMI census tract.

The Board has reviewed Fifth Third's branch closing policy. The policy requires Fifth Third to consider the impact on the community, the business viability and profitability of the branch, branch usage, demographic growth or decline in the community, the impact on credit access, and the necessity of ensuring that the branch closing has no discriminatory impact. The policy requires that, before a final decision is made to close a branch, management must conduct an impact study to assess the likely effects of any closure. The impact study of a branch in an LMI area includes consideration of concerns and ideas from the local community, an assessment of the closure's potential impact on customers, and other possible ways the community's credit needs will be met. In addition, examiners noted no instance in which Fifth Third's subsidiary depository institutions' records of opening and closing branches had adversely affected the level of services available in LMI areas during their most recent CRA performance evaluations.

The Board also has considered the fact that federal banking law provides a specific mechanism for addressing branch closings. Federal law requires an insured depository institution to provide notice to the public and to the appropriate federal supervisory agency before closing a branch.³⁷ In addition, the Board notes that the Board and the OCC, as the appropriate federal supervisors of Fifth Third's subsidiary banks, will continue to review the banks' branch closing records in the course of conducting CRA performance evaluations.

E. Conclusion on Convenience and Needs and CRA Performance

The Board has carefully considered all the facts of record,³⁸ including reports of examination of the CRA performance records of the institutions involved, information provided

37. 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.

38. One commenter requested that the Board condition its approval of the proposal on Fifth Third's making certain community reinvestment and other commitments. As the Board previously has explained, an applicant must demonstrate a satisfactory record of performance under the CRA without reliance on plans or commitments for future actions. The Board has consistently stated that neither the CRA nor the federal banking agencies' CRA regulations require depository institutions to make pledges or enter into commitments or agreements with any organization. *See, e.g., Wachovia Corporation*, 91 *Federal Reserve Bulletin* 77 (2005); *J.P. Morgan Chase & Co.*, 90 *Federal Reserve Bulletin* 352 (2004). 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

by Fifth Third, public comments received on the proposal, confidential supervisory information, and Fifth Third's plans to continue to implement its CRA-related policies and programs and its consumer compliance programs after First National Bank merges into Fifth Third Bank. The Board notes that the proposal would provide the combined entity's customers with access to a broader array of products and services in an expanded service area, including access to an expanded branch and ATM network and increased capital resources. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant depository institutions are consistent with approval.

Conclusion

Based on the foregoing and all facts of record, the Board has determined that the applications should be, and hereby are, approved.³⁹ In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act, the Bank Merger Act, and the FRA.⁴⁰ The Board's approval is

the credit needs of its CRA assessment areas when the Board reviews the proposal under the convenience and needs factor. In reviewing future applications by Fifth Third under this factor, the Board similarly will review Fifth Third'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.

39. A commenter requested that the Board deny the proposal, delay action on the proposal, or extend the comment period until Fifth Third provides information that the commenter has requested. The Board believes that the record in this case does not warrant postponement of 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 Bank Merger Act, and the FRA. The BHC Act and the Board's rules establish time periods for consideration and action on proposals such as the current proposal. For the reasons discussed above, the Board believes that the commenter has had ample opportunity to submit its views and, in fact, has provided substantial written submissions that the Board has considered carefully 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 an extension of the comment period, or denying the proposal on the grounds discussed above is not warranted.

40. A commenter also requested that the Board hold a public hearing or meeting on the proposal. Section 3 of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authority for the bank to be acquired makes a timely written recommendation of denial of the application. The Board has not received such a recommendation from the appropriate supervisory authority. The Bank Merger Act and the FRA do not require the Board to hold a public hearing or meeting.

Under its rules, the Board may, in its discretion, hold a public meeting or hearing on an application to acquire a bank if a meeting or hearing is necessary or appropriate to clarify factual issues related to the application and to provide an opportunity for testimony. 12 CFR 225.16(e). The Board has considered carefully the commenter's request in light of all the facts of record. In the Board's view, the commenter had ample opportunity to submit comments on the pro-

specifically conditioned on compliance by Fifth Third and Fifth Third Bank with the condition imposed in this order and the commitments made to the Board in connection with the applications. For purposes of this transaction, the condition and these commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

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

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

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Appendix A

Addresses of Main Office and Branches to be Acquired by Fifth Third

Altamonte Springs
254 West State Road 436

Apopka
211 S. Edgewood Avenue

Belleair Bluffs
601 Indian Rocks Road North

Boca Raton
1850 North Federal Highway

Bonita Springs
9021 Bonita Beach Road
8800 West Terry Street

Bradenton
5305 26th Street

posal, and, in fact, 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 adequately present its evidence and fails to identify disputed issues of fact that are material to the Board's decision that would be clarified by a public meeting or hearing. For these reasons, and based on all the facts of record, the Board has determined that a public meeting or hearing is not required or warranted in this case. Accordingly, the request for a public meeting or hearing on the proposal is denied.

Cape Coral

859 Cape Coral Parkway
1600 East Cape Coral Parkway
2724 Del Prado Boulevard
1801 Pine Island Road
1530 Santa Barbara Boulevard

Clearwater

11030 49th Street North
1150 Cleveland Street
100 Island Way

Daytona Beach

519 North Oleander Avenue
444 Seabreeze Boulevard, Suite 100
1030 West International Speedway Boulevard

Fort Lauderdale

600 South Andrew Avenue, Suite 100

Fort Myers

7130 College Parkway
2915 Colonial Boulevard
15221 Tamiami Trail South

Indian Shores

18395 Gulf Boulevard

Lake Mary

175 Timucuan Boulevard

Largo

705 8th Avenue SW
12360 Indian Rocks Road

Longwood

2491 West State Road 434

Maitland

100 South Orlando Avenue

Marco Island

650 East Elkcarn Circle

Naples

7925 Airport Road
5475 Airport Pulling Road North
4794 Golden Gate Parkway
900 Goodlette Road
2150 Goodlette Road North¹
2470 Immokalee Road

4025 Radio Road

8771 Tamiami Trail North
5101 Tamiami Trail East
2911 Tamiami Trail North

North Dunedin

1255 Belcher Road

North Port

12767 Tamiami Trail South

North Ruskin

1020 US Highway 41

Orlando

1401 Lee Road
250 North Orange Avenue
2324 Sand Lake Road
5292 South Orange Blossom Trail

Ormond Beach

4 North Beach Street

Oviedo

1753 East Broadway

Palm Beach Gardens

319 Peruvian South
4400 PGA Boulevard, Suite 100

Palm Harbor

1100 East Lake Road
1027 Nebraska Avenue

Port Orange

5100 Clyde Morris Boulevard

Saint Petersburg

4105 Gulf Boulevard

Sarasota

2035 Cattleman Road
3700 Tamiami Trail South

Seffner

11710 Martin Luther King Jr. Boulevard East

Seminole

9111 Oakhurst Road
10899 Park Boulevard
11201 Park Boulevard #71

1. Main Office of First National Bank.

Tampa

2028 East 7th Avenue
 2001 Adamo Drive
 3117 West Columbus Drive
 1921 South Dale Mabry Highway
 719 Harbour Post Drive
 8603 West Hillsborough Avenue
 4401 West Kennedy Boulevard
 4427 West Kennedy Boulevard
 1901 West Swann Avenue
 8809 West Waters Avenue

Treasure Island

180 Treasure Island Causeway

Valrico

3402 Lithia Pinecrest Road

Venice

1340 East Venice Avenue
 1641 Jacaranda Boulevard
 273 Tamiami Trail South

West Palm Beach

606 North Olive Avenue

Winter Park

1500 Lee Road

Appendix B

Florida Banking Market Definitions

Naples

Collier County, excluding the town of Immokalee.

Fort Myers

Lee County, excluding Gasparilla Island, and the town of Immokalee in Collier County.

Sarasota

Manatee and Sarasota Counties, excluding the towns of Northport and Port Charlotte; the towns of Englewood, Englewood Beach, New Point Comfort, Grove City, Cape Haze, Rotonda, Rotonda West, and Placido in Charlotte County; and Gasparilla Island in Lee County.

Appendix C

Banking Market Data

Naples, Florida

Fifth Third operates the sixth largest depository institution in the Naples banking market, controlling \$511.4 million in

deposits, which represents 6.5 percent of market deposits. First National operates the second largest depository institution in the market, controlling \$1.2 billion in deposits, which represents 15.3 percent of market deposits. On consummation of the proposal, Fifth Third would be the largest depository organization in the market, controlling deposits of approximately \$1.7 billion, which represent approximately 21.8 percent of market deposits. The HHI would increase 198 points to 1,261. Thirty-one other bank and thrift competitors would remain in the market.

Fort Myers, Florida

Fifth Third operates the seventh largest depository institution in the Fort Myers banking market, controlling \$288.6 million in deposits, which represents 3.4 percent of market deposits. First National operates the fourth largest depository institution in the market, controlling \$636.8 million in deposits, which represents 7.6 percent of market deposits. On consummation of the proposal, Fifth Third would be the fourth largest depository organization in the market, controlling deposits of approximately \$925.5 million, which represent approximately 11 percent of market deposits. The HHI would increase 52 points to 1,212. Twenty-five other bank and thrift competitors would remain in the market.

Sarasota, Florida

Fifth Third operates the 38th largest depository institution in the Sarasota banking market, controlling \$20.1 million in deposits, which represents less than 1 percent of market deposits. First National operates the eighth largest depository institution in the market, controlling \$308.6 million in deposits, which represents 2.2 percent of market deposits. On consummation of the proposal, Fifth Third would be the eighth largest depository organization in the market, controlling deposits of approximately \$328.7 million, which represent approximately 2.4 percent of market deposits. The HHI would increase one point to 1,258. Thirty-nine other bank and thrift competitors would remain in the market.

First National Bank Group, Inc.

Edinburg, Texas

Order Approving the Acquisition of Shares of a Bank Holding Company

First National Bank Group, Inc. (“First National”), a bank holding company within the meaning of the Bank Holding Company Act (“BHC Act”), has requested the Board’s approval under section 3 of the BHC Act¹ to acquire up to 14.99 percent of the voting shares and control of Alamo Corporation of Texas, Alamo, Texas (“Alamo”), and thereby acquire control of Alamo Corporation of Delaware, Wilmington, Delaware (“ACD”), and Alamo’s sub-

1. 12 U.S.C. § 1842.

subsidiary bank, Alamo Bank of Texas, (“Alamo Bank”), also in Alamo.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (69 *Federal Register* 56,765 (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.

First National, with total consolidated assets of \$2.6 billion, is the 22nd largest depository organization in Texas. It controls First National Bank of Edinburg (“First National Bank”), Edinburg, Texas, with deposits of \$2.2 billion, which represent less than 1 percent of total deposits of insured depository institutions in Texas (“state deposits”).³ Alamo, with total consolidated assets of \$284 million, is the 144th largest depository organization in Texas, controlling deposits of \$236 million. On consummation of the proposal, First National would become the 19th largest depository organization in Texas, controlling deposits of approximately \$2.47 billion, which would represent less than 1 percent of state deposits.

Although First National would be acquiring only 14.99 percent of the voting shares of Alamo, First National has requested approval to control Alamo for purposes of the BHC Act. In doing so, First National would be subject to certain obligations imposed by the BHC Act and other federal statutes, including obligations to serve as a source of financial and managerial strength to Alamo and to treat Alamo Bank as a subsidiary of First National.⁴

The Board received a comment from the management of Alamo objecting to the proposal and alleging that First National already owned or controlled, directly and indirectly, more than 5 percent of the voting shares of Alamo without having obtained prior Board approval.⁵ Alamo also questioned First National’s financial ability to acquire additional shares of Alamo and asserted that future acquisitions by First National could negatively affect its financial condition and its ability to serve as a source of strength to its

own subsidiary bank.⁶ The Board has considered carefully Alamo’s comment in light of the factors it must consider under section 3 of the BHC Act.

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 considered carefully these factors in light of all the facts of record, including the comment submitted by the management of Alamo. The Board has considered, among other things, information provided by First National, confidential reports of examination and other supervisory information received from the primary federal supervisors of the organizations and institutions involved in the proposal, the Federal Reserve System’s confidential supervisory information, publicly reported and other financial information, and public comment received on the proposal.⁷

In evaluating financial factors in expansion proposals by banking organizations, the Board reviews the financial condition of the organizations involved on both a parent-only and consolidated basis, as well as the financial condition of the subsidiary banks and significant nonbanking operations. In this evaluation, the Board considers a variety of areas, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the effect of the transaction on the financial condition of the applicant, including its capital position, asset quality, earnings prospects, and the impact of the proposed funding of the transaction.⁸

Based on its review of these factors, the Board finds that First National has sufficient resources to effect the proposal. First National and its subsidiary bank are well capitalized and would remain so on consummation of this proposal. The proposed transaction is structured as a share purchase, and the consideration to be received by Alamo’s shareholders would be funded from First National’s existing liquid assets.

2. ACD is a wholly owned subsidiary of Alamo that directly owns all the voting shares of Alamo Bank.

3. Asset data and statewide deposit and ranking data are as of June 30, 2004.

4. See 12 CFR 225.4; 12 U.S.C. § 1815(e)(1).

5. Alamo claimed that First National, its president, and a certain First National shareholder acted together to acquire more than 5 percent of the shares of Alamo. The Board has reviewed information provided by First National and Alamo and confidential supervisory information regarding the current ownership of both organizations, including information about the ownership of Alamo’s shares by individuals associated with First National. Although the Board’s rules would require aggregation of the shares held by First National’s president with the shares owned by First National in determining First National’s current ownership percentage, that total is less than the 5 percent of the shares of Alamo and, therefore, would not require prior Board approval. The record does not support a finding that First National or its president acted with or through the identified First National shareholder to acquire additional shares of Alamo. Based on all the facts of record, the Board has determined that First National did not acquire 5 percent or more of Alamo’s shares without prior approval by the Board in violation of the BHC Act.

6. Alamo also contended that certain information contained in First National’s application is inaccurate. First National subsequently submitted to the Board information correcting the inaccuracies in its application.

7. As noted above, Alamo contended that any future acquisitions of its shares by First National could negatively affect First National’s financial condition and impede its ability to serve as a source of strength to its own subsidiary bank. First National has committed not to acquire any additional shares of Alamo without obtaining prior Board approval. The financial and managerial impact on First National of any future acquisition of Alamo’s shares, along with all other factors the Board is required to consider under section 3 of the BHC Act, cannot be predicted at this time and would be evaluated if and when an acquisition is proposed in the future.

8. As previously noted, the current proposal provides that First National would acquire only up to 14.99 percent of Alamo. Under these circumstances, the financial statements of Alamo and First National would not be consolidated.

The Board also has considered the managerial resources of First National, Alamo, and Alamo Bank, particularly the supervisory experience of the other relevant banking supervisory agencies with the organizations and their records of compliance with applicable banking laws. The Board has reviewed assessments by the relevant federal and state banking supervisory agencies of the organizations' management, the risk-management systems of First National, and the operations of Alamo and Alamo Bank. First National, Alamo, and their subsidiary depository institutions are considered well managed overall.

Based on all the facts of record, the Board has concluded that the financial and managerial resources and the future prospects of First National, Alamo, and their subsidiaries are consistent with approval of this application, as are the other supervisory factors the Board must consider under section 3 of the BHC Act.

Competitive and Convenience and Needs Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market. Section 3 also prohibits the Board from approving a proposal that would substantially lessen competition in any relevant banking market, unless the Board finds that the anticompetitive effects of the proposal clearly are outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.⁹

First National and Alamo compete directly in the Brownsville and McAllen, Texas banking markets.¹⁰ 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 First National and Alamo,¹¹ the concentration levels of market deposits and the increases in these levels as measured by the Herfindahl-Hirschman Index ("HHI") under the Department of Justice Merger Guidelines ("DOJ Guidelines"),¹² and other characteristics of the markets.

9. 12 U.S.C. § 1842(c)(1).

10. The Brownsville banking market is defined as Cameron County, and the McAllen banking market is defined as Hildago County, both in Texas. Market data for both of these markets is provided in the Appendix.

11. Deposit and market share data are as of June 30, 2004, adjusted to reflect subsequent mergers and acquisitions through October 29, 2004, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386, 387 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743, 744 (1984).

12. Under the revised DOJ Guidelines, 49 *Federal Register* 26,823 (June 29, 1984), a market in which the post-merger HHI is between 1000 and 1800 is considered moderately concentrated. The Depart-

ment 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 thresholds for an increase in the HHI when screening bank mergers and acquisitions for anticompetitive effects implicitly recognize the competitive effects of limited-purpose and other nondepository financial entities.

Consummation of the proposal would be consistent with Board precedent and the DOJ Guidelines in each of these banking markets. The Brownsville and McAllen banking markets would remain moderately concentrated as measured by the HHI, and the increases in concentration would be small in both markets. In addition, numerous competitors would remain in these markets after consummation of the proposal.

The Department of Justice also has conducted a detailed review of the competitive effects of the proposal and has advised the Board that consummation would not have a significantly adverse effect on competition in either market or in any relevant banking market. The appropriate banking agencies have been afforded an opportunity to comment and have not objected to the proposal.

Based on these and all other facts of record, the Board has concluded that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of banking resources in any relevant banking market and that competitive considerations are consistent with approval.

In addition, considerations relating to the convenience and needs of the communities to be served, including the records of performance of the institutions involved under the Community Reinvestment Act ("CRA"),¹³ are consistent with approval of the application. First National Bank received an "outstanding" rating at its most recent examination for CRA performance by the Office of the Comptroller of the Currency, as of October 7, 2002. Alamo Bank received a "satisfactory" rating at its most recent examination for CRA performance by the Federal Deposit Insurance Corporation, as of February 3, 2003.

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 First National with the condition imposed in this order and the commitment made to the Board in connection with the application. The condition and commitment are deemed to be conditions imposed in writing by the Board in connection with its findings and decision herein and, as such, may be enforced in proceedings under applicable law.

13. 12 U.S.C. § 2901 et seq.

The acquisition of Alamo's voting shares may not be consummated before the fifteenth calendar day after the effective date of this order, or later than three months after the effective date of this order, unless such period is extended for good cause by the Board or the Federal Reserve Bank of Dallas, acting pursuant to delegated authority.

By order of the Board of Governors, effective November 12, 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

Banking Market Data

Brownsville, Texas

First National operates the fourth largest depository institution in the Brownsville banking market, controlling \$354.5 million in deposits, which represents 10.4 percent of market deposits. Alamo operates the 12th largest depository institution in the market, controlling \$44 million in deposits, which represents 1.3 percent of market deposits. On consummation of the proposal, First National would continue to operate the fourth largest depository institution in the market, controlling approximately \$399 million in deposits, which represents 11.7 percent of market deposits. The HHI would increase by 28 points to 1438. Fourteen depository institution competitors would remain in the market.

McAllen, Texas

First National operates the second largest depository institution in the McAllen banking market, controlling \$982 million in deposits, which represents 15.4 percent of market deposits. Alamo operates the seventh largest depository institution in the market, controlling \$175.5 million in deposits, which represents 2.8 percent of deposits in the market. On consummation of the proposal, First National would continue to operate the second largest depository institution in the market, controlling approximately \$1.2 billion in deposits, which represents approximately 18.2 percent of market deposits. The HHI would increase by 84 points to 1548. Sixteen depository institution competitors would remain in the market.

S&T Bancorp, Inc. Indiana, Pennsylvania

Order Approving Acquisition of Shares of a Bank Holding Company

S&T Bancorp, Inc. ("S&T"), 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 up to 24.9 percent of the voting shares of Allegheny Valley Bancorp, Inc. ("AVB"), and thereby indirectly acquire an interest in AVB's subsidiary bank, Allegheny Valley Bank of Pittsburgh ("Allegheny Bank"), both in Pittsburgh, Pennsylvania.¹

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (69 *Federal Register* 52,506 (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.

S&T, with consolidated assets of \$3.0 billion, is the 20th largest banking organization in Pennsylvania, controlling total deposits of \$2.0 billion, which represents 1 percent of total deposits in banking organizations in the state ("state deposits").² AVB, with consolidated assets of \$317 million, is the 97th largest banking organization in Pennsylvania, controlling \$264 million in deposits. If S&T were deemed to control AVB on consummation of the proposal, S&T would become the 18th largest banking organization in Pennsylvania, controlling approximately \$2.2 billion in deposits, which would represent 1.2 percent of state deposits.

The Board received a comment from AVB objecting to the proposal on the grounds that the investment could create uncertainty about the future independence of AVB and Allegheny Bank or result in S&T acquiring control of AVB. The Board has considered carefully AVB's comment in light of the factors that the Board must consider under section 3 of the BHC Act.

The Board previously has stated that the acquisition of less than a controlling interest in a bank or bank holding company is not a normal acquisition for a bank holding company.³ However, the requirement in section 3(a)(3) of the BHC Act that the Board's approval be obtained before a bank holding company acquires more than 5 percent of the voting shares of a bank suggests that Congress contemplated the acquisition by bank holding companies of between 5 and 25 percent of the voting shares of banks.⁴ On this basis, the Board previously has approved the acquisition by a bank holding company of less than a controlling interest in a bank or bank holding company.⁵

1. S&T owns 4.95 percent of AVB's voting shares. S&T proposes to acquire the additional voting shares in a negotiated purchase from a shareholder and through open market purchases.

2. Asset data are as of June 30, 2004. Deposit and ranking data are also as of June 30, 2004, and reflect merger activity through November 18, 2004.

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

4. See 12 U.S.C. § 1842(a)(3).

5. See, e.g., *S&T Bancorp, Inc.*, 90 *Federal Reserve Bulletin* 82 (2004) (acquisition of up to 9.9 percent of the voting shares of a bank holding company); *Brookline* (acquisition of up to 9.9 percent of the voting shares of a bank holding company); *GB Bancorporation*, 83 *Federal Reserve Bulletin* 115 (1997) (acquisition of up to 24.9 percent of the voting shares of a bank).

S&T has stated that the acquisition is intended as a passive investment and that it does not propose to control or exercise a controlling influence over AVB or Allegheny Bank. S&T has agreed to abide by certain commitments previously relied on by the Board in determining that an investing bank holding company would not be able to exercise a controlling influence over another bank holding company or bank for purposes of the BHC Act.⁶ For example, S&T has committed not to exercise or attempt to exercise a controlling influence over the management or policies of AVB or any of its subsidiaries; not to seek or accept representation on the board of directors of AVB or any of its subsidiaries; and not to have any director, officer, employee, or agent interlocks with AVB or any of its subsidiaries. S&T also has committed not to attempt to influence the dividend policies, loan decisions, or operations of AVB or any of its subsidiaries. Moreover, the BHC Act prohibits S&T from acquiring additional shares of AVB or attempting to exercise a controlling influence over AVB without the Board's prior approval.⁷

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

Financial, Managerial, and Supervisory Considerations

The Board also is required under section 3(c) of the BHC Act to consider the financial and managerial resources and future prospects of the companies and banks concerned and certain other supervisory factors. The Board has con-

sidered carefully these factors in light of all the facts of record. The Board has considered, among other things, information provided by S&T, confidential reports of examination and other supervisory information received from the primary federal supervisors of the organizations involved in the proposal, the Federal Reserve System's confidential supervisory information, publicly reported and other financial information, and the public comments submitted by AVB.

In evaluating financial factors in proposals under section 3 of the BHC Act by banking organizations, the Board reviews the financial condition of the organizations involved on both a parent-only and consolidated basis, as well as the financial condition of the subsidiary banks and significant nonbanking subsidiaries. In this evaluation, the Board considers a variety of areas, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the effect of the transaction on the financial condition of the applicant and the target, including their capital position, asset quality, earnings prospects, and the impact of the proposed funding of the transaction.¹⁰

Based on its review of these factors, the Board finds that S&T has sufficient resources to effect the proposal. S&T, AVB, and their subsidiary banks are well capitalized and would remain so on consummation of the proposal. The proposed acquisition of shares would be funded from S&T's general corporate resources.

The Board also has considered the managerial resources of S&T and AVB, particularly in light of the supervisory experience of the other relevant banking supervisory agencies with the organizations and their records of compliance with applicable banking laws. The Board has reviewed assessments by the relevant federal and state banking supervisory agencies of the organizations' management, the risk-management systems of S&T, and the operations of AVB and Allegheny Bank. S&T, AVB, and their subsidiary depository institutions are considered well managed overall.

AVB contends that S&T's investment would cause confusion among AVB's shareholders, customers, and employees about the continued independence of AVB; compromise AVB's ability to recruit executive leadership and retain other employees; and adversely affect the price of AVB's shares.¹¹ The Board believes that the commitments made by S&T to maintain its investment as a passive investment and not to exercise a controlling influence over

6. See, e.g., *Emigrant Bancorp, Inc.*, 82 *Federal Reserve Bulletin* 555 (1996); *First Community Bancshares, Inc.*, 77 *Federal Reserve Bulletin* 50 (1991). These commitments are set forth in the Appendix.

7. AVB contends that, despite S&T's commitments, S&T would nonetheless control AVB after consummation of the proposal because one major individual shareholder of S&T also owns 3 percent of the voting shares of AVB. The Board's rules provide for aggregation of shares held by officers or directors of S&T with the shares owned by S&T in determining S&T's ownership percentage of AVB. No officer or director of S&T owns any voting shares of AVB. In reaching this conclusion, the Board reviewed information provided by S&T regarding the current ownership of AVB's shares by officers and directors of S&T, and the ownership of S&T's shares by an individual who sits on one of its local advisory boards but is not an officer or director of S&T. Based on S&T's description of this individual's relationship with S&T and the limited functions of S&T's local advisory boards, the Board has concluded that this individual is not a controlling shareholder or advisory director of S&T for purposes of the Board's Regulation Y. The record does not support a finding that any shares of AVB owned by S&T shareholders should be attributed to S&T for purposes of determining control of AVB under the BHC Act.

8. See 12 U.S.C. § 1818(b)(1).

9. See 12 U.S.C. § 1841(a)(2)(C).

10. As previously noted, the current proposal provides that S&T would acquire only up to 24.9 percent of AVB's voting shares and would not be considered to control AVB. Under these circumstances, the financial statements of S&T and AVB would not be consolidated.

11. The Board is limited under the BHC Act to the consideration of factors specified in the Act. See *Western Bancshares, Inc. v. Board of Governors*, 480 F.2d 749 (10th Cir. 1973). The potential effect of a proposal on the share price of the parties to the proposed transaction is not among the limited statutory factors that the Board is authorized to consider when reviewing an application under the BHC Act. *Id.*; see also *S&T Bancorp, Inc.*, 90 *Federal Reserve Bulletin* 79, 81 n.16 (2004).

AVB reduce the potential adverse effects of the proposal. As noted above, S&T has committed that it will not attempt to influence the operations, activities, or the dividend, loan, or credit policies of AVB. No evidence has been presented to show that the purchase of shares of AVB on the open market by S&T would adversely affect the financial condition of AVB or S&T.

Based on all the facts of record, the Board has concluded that the financial and managerial resources and the future prospects of S&T, AVB, and their subsidiaries are consistent with approval of this application, as are the other supervisory factors the Board must consider under section 3 of the BHC Act.

Competitive and Convenience and Needs Considerations

In considering an application under section 3 of the BHC Act, the Board is required to evaluate a number of factors, including the competitive effects of the proposal. 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. It 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 its probable effects in meeting the convenience and needs of the community to be served.¹²

The Board previously has noted that one company need not acquire control of another company to lessen competition between them substantially.¹³ The Board has found that noncontrolling interests in directly competing depository institutions may raise serious questions under the BHC Act and has concluded that the specific facts of each case will determine whether the minority investment in a company would be anticompetitive.¹⁴

S&T and AVB compete directly in the Pittsburgh, Pennsylvania banking market (“Pittsburgh market”).¹⁵ AVB asserts that S&T’s ownership of up to 24.9 percent of AVB’s voting shares would provide S&T with the ability to exert control over AVB and Allegheny Bank, with a result-

ing adverse effect on competition. The Board concludes that the commitments made by S&T to maintain its investment as a passive investment and not to exercise a controlling influence over AVB reduce the potential adverse competitive effects of the proposal. Moreover, the Board notes that if S&T and AVB were viewed as a combined organization, consummation of the proposal would be consistent with Board precedent and the Department of Justice Merger Guidelines¹⁶ in the Pittsburgh market. The market would remain moderately concentrated as measured by the HHI, with only a small increase in concentration and numerous competitors would remain in the market.¹⁷

The Department of Justice also has reviewed the proposal and has advised the Board that it does not believe that the acquisition would likely have a significantly adverse effect on competition in any relevant banking market. The appropriate banking agencies have been afforded an opportunity to comment and have not objected to the proposal.

Accordingly, in light of all the facts of record, the Board concludes that consummation of the proposal would not have a significant adverse effect on competition or on the concentration of resources in any relevant banking market and that competitive considerations are consistent with approval of the proposal.

In addition, considerations relating to the convenience and needs of the communities to be served, including the

12. See 12 U.S.C. § 1842(c)(1).

13. See, e.g., *SunTrust Banks, Inc.*, 76 *Federal Reserve Bulletin* 542 (1990); *First State Corp.*, 76 *Federal Reserve Bulletin* 376, 379 (1990); *Sun Banks, Inc.*, 71 *Federal Reserve Bulletin* 243 (1985) (“*Sun Banks*”).

14. See, e.g., *BOK Financial Corp.*, 81 *Federal Reserve Bulletin* 1052, 1053–54 (1995); *Mansura Bancshares, Inc.*, 79 *Federal Reserve Bulletin* 37, 38 (1993); *Sun Banks* at 244.

15. The Pittsburgh market is defined as Allegheny County; the townships of Gilpin, Kiskiminetas, Parks, and South Buffalo in Armstrong County; Beaver County; the townships of Adams, Buffalo, Clinton, Cranberry, Forward, Jackson, Jefferson, Lancaster, Middlesex, Muddy Creek, Penn, and Winfield in Butler County; the townships of Bullskin, Jefferson, Lower Tyrone, Perry, Salt Lick, Upper Tyrone, and Washington in Fayette County; the townships of Burrell, Conemaugh, and West Wheatfield in Indiana County; the townships of Little Beaver, New Beaver, Perry, and Wayne in Lawrence County; Washington County; and Westmoreland County, excluding St. Clair township, all in Pennsylvania.

16. Under the revised Department of Justice Merger Guidelines, 49 *Federal Register* 26,823 (June 29, 1984), a market in which the post-merger Herfindahl–Hirschman Index (“HHI”) is between 1000 and 1800 is considered moderately concentrated. 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 thresholds for an increase in the HHI when screening bank mergers and acquisitions for anticompetitive effects implicitly recognize the competitive effects of limited-purpose and other nondepository financial entities.

17. S&T is the ninth largest depository institution in the market, controlling \$664.2 million in deposits, which represents 1.3 percent of the total deposits in depository institutions in the market (“market deposits”). AVB is the 19th largest depository institution in the market, controlling \$249 million in deposits, which represents less than 1 percent of market deposits. If considered a combined banking organization on consummation of the proposal, S&T and AVB would be the eighth largest depository institution in the Pittsburgh market, controlling \$913.2 million in deposits, which would represent 1.9 percent of market deposits. The HHI for the Pittsburgh market would increase 2 points to 1586, and numerous competitors would remain in the market. Market deposit data are as of June 30, 2003, and reflect mergers and acquisitions through August 3, 2004.

In this context, depository institutions include commercial banks, savings banks, and savings associations. Market share data are based on calculations that include the deposits of thrift institutions at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386, 387 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743, 744 (1984). Thus, the Board regularly has included thrift deposits in the calculation of market share on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52, 55 (1991).

records of performance of the institutions involved under the Community Reinvestment Act ("CRA"),¹⁸ are consistent with approval of the application. S&T's lead subsidiary bank, S&T Bank, Indiana, Pennsylvania, and Allegheny Bank each received "satisfactory" ratings at their most recent evaluations for CRA performance by the Federal Deposit Insurance Corporation, as of April 1, 2002, and October 25, 1999, respectively.

Conclusion

Based on the foregoing and all other facts of record, the Board has determined that the application should be, and hereby is, approved. In reaching this conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act and other applicable statutes. The Board's approval is specifically conditioned on compliance by S&T with the condition imposed in this order and all the commitments made to the Board in connection with the application, including the commitments discussed in this order. The condition and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The acquisition of AVB's voting shares 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 December 6, 2004.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Appendix

As part of this proposal, S&T Bancorp, Inc. ("S&T"), Indiana, Pennsylvania, commits that S&T will not, without the prior approval of the Federal Reserve, directly or indirectly:

- (1) Exercise or attempt to exercise a controlling influence over the management or policies of Allegheny Valley Bancorp, Inc. ("AVB") or any of its subsidiaries;
- (2) Seek or accept representation on the board of directors of AVB or any of its subsidiaries;
- (3) Have or seek to have any employee or representative serve as an officer, agent, or employee of AVB or any of its subsidiaries;

- (4) Take any action that would cause AVB or any of its subsidiaries to become a subsidiary of S&T, or any of S&T's subsidiaries;
- (5) Acquire or retain shares that would cause the combined interests of S&T and any of S&T's subsidiaries and their officers, directors, and affiliates to equal or exceed 25 percent of the outstanding voting shares of AVB or any of its subsidiaries;
- (6) Propose a director or slate of directors in opposition to a nominee or slate of nominees proposed by the management or the board of directors of AVB or any of its subsidiaries;
- (7) Solicit or participate in soliciting proxies with respect to any matter presented to the shareholders of AVB or any of its subsidiaries;
- (8) Attempt to influence the dividend policies or practices; the investment, loan, or credit decisions or policies; the pricing of services; personnel decisions; operations activities (including the location of any offices or branches or their hours of operation, etc.); or any similar activities or decisions of AVB or any of its subsidiaries;
- (9) Dispose or threaten to dispose of shares of AVB or any of its subsidiaries as a condition of specific action or nonaction by AVB or any of its subsidiaries; or
- (10) Enter into any banking or non-banking transactions with AVB or any of its subsidiaries, except that S&T may establish and maintain deposit accounts with any depository institution subsidiary of AVB; provided that the aggregate balance of all such accounts does not exceed \$500,000 and that the accounts are maintained on substantially the same terms as those prevailing for comparable accounts of persons unaffiliated with AVB or any of its subsidiaries.

Wachovia Corporation
Charlotte, North Carolina

Order Approving the Merger of Financial Holding Companies

Wachovia Corporation ("Wachovia"), a financial holding company within the meaning of the Bank Holding Company Act ("BHC Act"), has requested the Board's approval under section 3 of the BHC Act to merge with SouthTrust Corporation, Birmingham, Alabama ("SouthTrust"), and to acquire SouthTrust's subsidiary bank, SouthTrust Bank, also in Birmingham.¹ In addition, Wachovia proposes to acquire SouthTrust International, Inc., also in Birmingham, an agreement corporation subsid-

1. 12 U.S.C. §1842. Wachovia has also applied to acquire SouthTrust of Alabama, Inc., Birmingham, Alabama ("SouthTrust of Alabama"), an intermediate subsidiary bank holding company of SouthTrust. In addition, Wachovia has requested the Board's approval to hold and exercise an option to purchase up to 19.5 percent of SouthTrust's common stock. The option would expire on consummation of the proposal.

18. 12 U.S.C. §2901 et seq.

inary of SouthTrust of Alabama, pursuant to sections 25 and 25A of the Federal Reserve Act and the Board's Regulation K.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (69 *Federal Register* 43,419 (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 and the Federal Reserve Act.

Wachovia, with total consolidated assets of approximately \$418 billion, is the fifth largest insured depository organization in the United States, controlling deposits of approximately \$251 billion, which represent approximately 4 percent of the total amount of deposits of insured depository institutions in the United States.³ Wachovia operates insured depository institutions in Connecticut, Delaware, Florida, Georgia, Maryland, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Virginia, and the District of Columbia⁴ and engages nationwide in numerous nonbanking activities that are permissible under the BHC Act.

SouthTrust, with total consolidated assets of approximately \$53 billion, is the 25th largest insured depository organization in the United States, controlling deposits of approximately \$37 billion, which represents less than 1 percent of the total amount of deposits of insured depository institutions in the United States. SouthTrust operates depository institutions in Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. It also engages in a broad range of permissible nonbanking activities in the United States and abroad.⁵

On consummation of the proposal, Wachovia would become the fourth largest insured depository organization in the United States, with total consolidated assets of approximately \$471 billion and total deposits of approximately \$288 billion, representing approximately 4.6 percent of the total amount of deposits of insured depository institutions in the United States.

2. 12 U.S.C. §§ 601 et seq. and 611 et seq.; 12 CFR Part 211.

3. Asset data are as of June 30, 2004, and national ranking data are as of June 30, 2004, and are adjusted to reflect mergers and acquisitions completed through October 4, 2004. Deposit data are as of June 30, 2004, and reflect the unadjusted total of their deposits reported by each organization's insured depository institutions in their Consolidated Reports of Condition and Income for June 30, 2004. In this context, the term "insured depository institutions" includes insured commercial banks, savings associations, and savings banks.

4. Wachovia's subsidiary depository institutions are Wachovia Bank, N.A., Charlotte, North Carolina ("Wachovia Bank"); Wachovia Bank of Delaware, N.A. ("Wachovia Bank-DE") and Wachovia Trust Company, N.A., both in Wilmington, Delaware; and First Union Direct Bank, N.A., Augusta, Georgia.

5. Wachovia proposes to acquire SouthTrust'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.

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 ("CRA")⁶ 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, as well as compliance with other provisions of the Riegle–Neal Interstate Banking and Branching Efficiency Act of 1994.⁷

Interstate Analysis

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the bank holding company's home state if certain conditions are met. For purposes of the BHC Act, the home state of Wachovia is North Carolina,⁸ and SouthTrust's subsidiary bank is located in Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.⁹

Based on a review of all the facts of record, including relevant state statutes, the Board finds that all conditions for an interstate acquisition enumerated in section 3(d) are met in this case.¹⁰ In light of all the facts of record, the Board is permitted to approve the proposal under section 3(d) of the BHC Act.

6. 12 U.S.C. § 2901 et seq.

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

8. 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.

9. For purposes of section 3(d), the Board considers a bank to be located in 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)–(B) and 1842(d)(2)(A)–(B). Wachovia is adequately capitalized and adequately managed, as defined by applicable law. On consummation of the proposal, Wachovia and its affiliates would control less than 10 percent of the total amount of deposits in insured depository institutions in the United States and less than 30 percent of total deposits, or the applicable percentage established by state law, in each state in which subsidiary banks of both organizations are located (Florida, Georgia, North Carolina, South Carolina, and Virginia). In addition, SouthTrust Bank has 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 the proposal.

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. It 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 its probable effects in meeting the convenience and needs of the community to be served.¹¹

Wachovia and SouthTrust have subsidiary depository institutions that compete directly in forty-one banking markets in five states.¹² The Board has reviewed carefully the competitive effects of the proposal in each of these banking markets in light of all the facts of record, including public comment on the proposal.¹³ In particular, the Board has considered the number of competitors that would remain in the markets, the relative shares of total deposits of depository institutions in the markets (“market deposits”) controlled by Wachovia and SouthTrust,¹⁴ the concentration levels of market deposits and the increases in these levels as measured by the Herfindahl–Hirschman Index (“HHI”) under the Department of Justice Guidelines (“DOJ Guidelines”),¹⁵ and other characteristics of the markets. In addition, the Board has considered commitments made by Wachovia to the Board to reduce the potential that the proposal would have adverse effects on competition by divesting eighteen SouthTrust Bank branches (the “divestiture branches”), which account for approximately \$592 million in deposits, in four banking markets (the “divestiture markets”).¹⁶

11. See 12 U.S.C. § 1842(c)(1).

12. These banking markets are described in Appendix A.

13. Two commenters expressed general concerns about the competitive effects of this proposal.

14. Deposit and market share data are as of June 30, 2003, adjusted to reflect subsequent mergers and acquisitions through July 12, 2004, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift deposits in the market share calculation on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991).

15. Under the DOJ Guidelines, a market is considered unconcentrated if the post-merger HHI is less than 1000, moderately concentrated if the post-merger HHI is between 1000 and 1800, and highly 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.

16. Wachovia has committed that, before consummating the proposed merger, it will execute an agreement for the proposed divestitures in each divestiture market, consistent with this order, with a

A. Banking Markets within Established Guidelines

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in 35 banking markets.¹⁷ Three banking markets would remain unconcentrated;¹⁸ twenty-six banking markets would remain moderately concentrated;¹⁹ and six banking markets would remain highly concentrated,²⁰ with only modest increases in market concentration as measured by the HHI. Numerous competitors would remain in each of the 35 banking markets.

B. Six Banking Markets in which Special Scrutiny Is Appropriate

Wachovia and SouthTrust compete directly in six banking markets that warrant a detailed review: Jacksonville, Polk County, Daytona Beach, and Punta Gorda, all in Florida; and Transylvania and Charlotte–Rock Hill, both in North Carolina. In each of these six markets, the concentration levels on consummation would exceed the DOJ Guidelines or the resulting market share would be significant.

For each of these six markets, the Board has considered whether other factors either mitigate the competitive effects of the proposal or indicate that the proposal would have a significantly adverse effect on competition in the market. The number and strength of factors necessary to mitigate the competitive effects of a proposal depend on the size of the increase in and resulting level of concentration in a banking market.²¹ In each of these markets, the Board has

purchaser determined by the Board to be competitively suitable. Wachovia also has committed to divest total deposits in each of the four divestiture markets of at least the amounts discussed in this order and to complete the divestitures within 180 days after consummation of the proposed merger. In addition, Wachovia has committed that, if it is unsuccessful in completing the proposed divestiture within such time period, it will transfer the unsold branches to an independent trustee that will be instructed to sell such branches to an alternate purchaser or purchasers in accordance with the terms of this order and without regard to price. Both the trustee and any alternate purchaser must be deemed acceptable to the Board. See *BankAmerica Corporation*, 78 *Federal Reserve Bulletin* 338 (1992); *United New Mexico Financial Corporation*, 77 *Federal Reserve Bulletin* 484 (1991).

17. The effects of the proposal on the concentration of banking resources are described in banking markets without divestitures in Appendix B and in banking markets with divestitures in Appendix C.

18. The unconcentrated banking markets are: Fort Walton Beach and Miami–Fort Lauderdale, both in Florida; and Athens, Georgia.

19. The moderately concentrated banking markets without divestitures are: Brevard, Fort Myers, Fort Pierce, Gainesville, Highlands, Indian River, Naples, North Lake/Sumter, Ocala, Pensacola, Sarasota, Tallahassee, Tampa Bay, and West Palm Beach, all in Florida; Atlanta and Dalton, both in Georgia; Greensboro–High Point and Raleigh, both in North Carolina; Charleston, Columbia, Greenville, and Spartanburg, all in South Carolina; and Newport News–Hampton and Norfolk–Portsmouth, both in Virginia. The moderately concentrated banking markets with divestitures are Orlando, Florida, and Augusta, Georgia.

20. The highly concentrated banking markets are: St. Augustine, Florida; Columbus, Georgia; Rutherford, Salisbury, and Shelby, all in North Carolina; and Richmond, Virginia.

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

identified factors that indicate the proposal would not have a significantly adverse impact on competition, despite the size of increase in and resulting level of the HHI or market share.

Jacksonville. Wachovia is the second largest depository organization in the Jacksonville banking market, controlling \$4.7 billion of deposits, which represents approximately 31.1 percent of market deposits. SouthTrust is the fourth largest depository organization in the market, controlling approximately \$806 million of deposits, which represents approximately 5.4 percent of market deposits. To reduce the potential for adverse effects on competition in the Jacksonville banking market, Wachovia has committed to divest nine SouthTrust branches with at least \$275 million in deposits in the market to an out-of-market depository organization. After accounting for the proposed divestiture, Wachovia would operate the largest depository organization in the market on consummation of the merger, controlling approximately \$5.2 billion of deposits, which represents approximately 34.8 percent of market deposits. The HHI would increase by not more than 210 points and would not exceed 2416.

A number of factors indicate that the proposal is not likely to have a significantly adverse effect on competition in the Jacksonville banking market. As a result of the proposed divestiture to an out-of-market depository organization, 27 competitors would remain in the market. In addition, the size of the proposed divestiture helps create a competitively viable market participant. Moreover, the second largest bank competitor in the market would control 30 percent of market deposits and operate a large number of branches, and another bank competitor would control more than 5 percent of market deposits.

In addition, one thrift institution operating in the market serves as a significant source of commercial loans and provides a broad range of consumer, mortgage, and other banking products. Competition from this thrift institution closely approximates competition from a commercial bank. Accordingly, the Board has concluded that deposits controlled by this institution should be weighted at 100 percent in market share calculations.²² Accounting for the revised weighting of these deposits, Wachovia would control 34.7 percent of market deposits and the HHI would increase by not more than 208 points and would not exceed 2397 on consummation of the proposal.

The Board also has considered that the market has six credit unions that are accessible to the public and offer a wide range of consumer products and services.²³ These credit unions have street-level branches and their mem-

berships are open to at least 73 percent of the market's residents.²⁴ The Board concludes that these credit unions exert a competitive influence that mitigates, in part, the potential anticompetitive effects of the proposal.

In addition, two depository institutions entered the Jacksonville banking market de novo in 2001 and 2002, indicating that the market has been attractive for entry. Other factors indicate that the Jacksonville banking market would remain attractive for entry. Deposit growth in the five major counties in the market²⁵ was more than twice the average growth in the metropolitan counties in the state between 2001 and 2003. In those major counties, both population growth between 2001 and 2003 and the level of per capita income in 2003 also slightly exceeded the averages for metropolitan counties in Florida.

Polk County. In the Polk County banking market, Wachovia is the third largest depository organization, controlling \$746 million of deposits, which represents approximately 17.1 percent of market deposits. SouthTrust is the fifth largest depository organization in the market, controlling approximately \$490 million of deposits, which represents approximately 11.2 percent of market deposits. To reduce the potential for adverse effects on competition in the Polk County banking market, Wachovia has committed to divest five SouthTrust branches with at least \$95 million in deposits to an out-of-market depository organization. On consummation of the merger and after accounting for the proposed divestitures, Wachovia would operate the largest depository organization in the market, controlling approximately \$1.1 billion of deposits, which represents approximately 26.2 percent of market deposits. The HHI would increase by not more than 270 points and would not exceed 1841.

Certain factors indicate that the proposal is not likely to have a significantly adverse competitive effect in the Polk County banking market. After consummation of the proposal, 12 other depository institutions would remain in the market. The two largest bank competitors in the market, one of which would have a branch network comparable to Wachovia's, would each control at least 20 percent of market deposits. Another bank competitor would control more than 10 percent of market deposits. Moreover, one depository institution has entered the market de novo since 2001.

The Board also has considered the competitive influence of two credit unions that offer a wide range of consumer products and services and have a significant competitive presence in the market.²⁶ These credit unions have street-

22. The Board previously has indicated that it may consider the competitiveness of a thrift institution at a level greater than 50 percent of its deposits when appropriate. See, e.g., *Banknorth Group, Inc.*, 75 *Federal Reserve Bulletin* 703 (1989). The thrift in this case has a ratio of commercial and industrial loans to assets of 9.04 percent, which is comparable to the national average for all commercial banks. See *First Union Corporation*, 84 *Federal Reserve Bulletin* 489 (1998).

23. These credit unions collectively account for approximately 9.3 percent of total market deposits.

24. After accounting for the proposed divestiture and including the deposits of these credit unions in market share calculations at 50 percent, Wachovia would become the largest depository organization in the market with 31.4 percent of market deposits. The HHI would increase by not more than 171 points and would not exceed 2022 as a result of this transaction.

25. These major counties are Baker, Clay, Duval, Nassau, and St. Johns Counties.

26. These two credit unions collectively account for approximately 5.3 percent of total market deposits.

level branches accessible to the public and their memberships are open to all residents of the banking market.²⁷ The Board concludes that these credit unions exert a competitive influence that mitigates, in part, the potential anticompetitive effects of the proposal.

Daytona Beach. In the Daytona Beach banking market, Wachovia is the largest depository organization, controlling \$1.3 billion of deposits, which represents approximately 23.1 percent of market deposits. SouthTrust is the fifth largest depository organization in the market, controlling approximately \$413 million of deposits, which represents approximately 7.2 percent of market deposits. On consummation of the merger, Wachovia would remain the largest depository organization in the market, controlling approximately \$1.7 billion of deposits, which represents approximately 30.3 percent of market deposits. The HHI would increase by 335 points to 1880.

Several factors indicate that the proposal is not likely to have a significantly adverse competitive effect in the Daytona Beach banking market. After consummation of the proposal, 19 other depository institution competitors would remain in the market. The second and third largest bank competitors in the market would operate branch networks comparable to that of Wachovia's and each would control at least 20 percent of market deposits. Another bank competitor would control approximately 8 percent of market deposits.

In addition, the Daytona Beach banking market has been attractive for entry, as indicated by the de novo entry of three depository institutions in 2001. The market also appears to remain attractive for entry. For example, the annual population growth rate of the two major counties in the market²⁸ exceeded the average growth rate for metropolitan counties in Florida between 2001 and 2003.

Punta Gorda. In the Punta Gorda banking market, Wachovia is the fourth largest depository organization, controlling approximately \$282 million of deposits, which represents approximately 13.4 percent of market deposits. SouthTrust is the third largest depository organization in the market, controlling approximately \$339 million of deposits, which represents approximately 16.1 percent of market deposits. On consummation of the merger, Wachovia would operate the largest depository organization in the market, controlling approximately \$620 million of deposits, which represents approximately 29.4 percent of market deposits. The HHI would increase by 428 points to 1872.

A number of factors mitigate the potential for anticompetitive effects in this market. After consummation of the

proposal, 11 other depository institution competitors would remain in the market. The second and third largest bank competitors in the market would control 22 percent and 20 percent of market deposits, respectively.

In addition, the Board has considered the entry of two depository institutions in the Punta Gorda banking market since 2001 and factors indicating that the market remains somewhat attractive for entry. The market contains deposits of more than \$2 billion. Moreover, the annualized rate of population growth in Charlotte County, the main county in the market, exceeded the rate for metropolitan counties in Florida between 2001 and 2003.

Transylvania. In the Transylvania banking market, Wachovia is the third largest depository organization, controlling approximately \$73 million of deposits, which represents approximately 14.9 percent of market deposits. SouthTrust is the fifth largest depository organization in the market, controlling approximately \$36 million of deposits, which represents approximately 7.5 percent of market deposits. On consummation of the merger, Wachovia would operate the second largest depository organization in the market, controlling approximately \$109 million of deposits, which represents approximately 22.5 percent of market deposits. The HHI would increase by 224 points to 2077.

Numerous factors indicate that the proposal is not likely to have a significantly adverse effect on competition in the Transylvania banking market. After consummation of the proposal, seven other depository institutions would remain in the market. The largest bank competitor in the market would control approximately 32.5 percent of market deposits and two other bank competitors would control 17 percent and 12 percent of market deposits, respectively.

In addition, several factors indicate that the Transylvania banking market is attractive for entry. One competitor has entered the market de novo since 2001. In 2003, the average level of per capita income in the market substantially exceeded the average per capita income levels for nonmetropolitan counties in North Carolina. Moreover, deposits in the banking market increased at an annualized rate of at least 5.9 percent from June 2001 to June 2003, which exceeded the 3.5 percent annualized rate of deposit growth for nonmetropolitan counties in North Carolina during the same period.

Charlotte–Rock Hill. In the Charlotte–Rock Hill banking market, Wachovia is the second largest depository organization, controlling approximately \$24.3 billion of deposits, which represents approximately 37.3 percent of market deposits. SouthTrust is the seventh largest depository organization in the market, controlling approximately \$535 million of deposits, which represents less than 1 percent of market deposits. On consummation of the merger, Wachovia would remain the second largest depository organization in the market, controlling approximately \$24.9 billion of deposits, which represents approximately 38.2 percent of market deposits. The HHI would increase by 62 points to 3853.

27. After accounting for the proposed divestiture and including the deposits of these credit unions in market share calculations at 50 percent, Wachovia would become the largest depository organization in the Polk County banking market with 24.8 percent of market deposits. The HHI would increase by not more than 243 points and would not exceed 1673 as a result of this transaction.

28. Flagler and Volusia Counties are the major counties in the Daytona Beach banking market.

Although the proposal would be consistent with the DOJ Guidelines in this market, its unique structure warrants careful consideration. Two of the nation's largest depository organizations, Wachovia and Bank of America Corporation, are headquartered in Charlotte. Bank of America controls approximately 49 percent of market deposits and Wachovia currently controls approximately 37 percent of market deposits. On consummation of the proposal, Wachovia's market share would increase by less than 1 percent. In addition, 33 other depository institution competitors would remain in the market.

Certain other factors indicate that the proposal is not likely to have a significantly adverse competitive effect in the Charlotte–Rock Hill banking market. The market has been attractive for entry, as indicated by the *de novo* entries of three depository institutions since 2001. In addition, the market is the largest banking market in North Carolina and its four major counties²⁹ have experienced above-average population growth between 2001 and 2003 relative to the average growth rate of metropolitan counties in the state. Moreover, the market's per capita income level in 2003 exceeded the average for metropolitan counties in North Carolina. Thus, consummation of the proposal does not appear to have a significantly adverse competitive effect in the Charlotte–Rock Hill banking market.

C. Views of Other Agencies and Conclusion on Competitive Considerations

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

Based on these and all other facts of record, the Board concludes that consummation of the proposal would not have a significantly adverse effect on competition or the concentration of resources in any of the 41 banking markets in which Wachovia and SouthTrust directly compete or in any other relevant banking market. Accordingly, based on all the facts of record and subject to completion of the proposed divestitures, the Board has determined that competitive considerations are consistent with approval.

Financial, Managerial, and Supervisory Considerations

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and 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. The Board has considered, among other things, confiden-

tial reports of examination and other supervisory information received from the primary federal supervisors of the organizations and institutions involved in the proposal, the Federal Reserve System's confidential supervisory information, information provided by the Securities and Exchange Commission ("SEC"), and public comments on the proposal. In addition, the Board has consulted with the relevant supervisory agencies, including the Office of the Comptroller of the Currency ("OCC"), the primary supervisor for all of Wachovia's subsidiary banks. The Board also has considered publicly available financial and other information on the proposal's financial and managerial aspects submitted by Wachovia during the application process.

In evaluating financial factors in this and other expansionary proposals by banking organizations, the Board reviews the financial condition of the holding companies on both a parent-only and consolidated basis and the financial condition of each of their subsidiary banks and significant nonbanking operations. In this evaluation, the Board considers a variety of areas, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the pro forma financial condition of the combined organization, including its capital position, earnings prospects, and the impact of the proposed funding of the transaction. Based on its review of these factors, the Board finds that the organization has sufficient financial resources to effect the proposal. Wachovia, SouthTrust, and their subsidiary banks are well capitalized and the resulting organization and its subsidiary banks would remain so on consummation of the proposal. The proposal is structured as an exchange of shares and would not increase the debt service requirements of the combined organization.

The Board also has considered the managerial resources of the proposed combined organization. The Board has reviewed the examination records of Wachovia, SouthTrust, and their subsidiary depository institutions, including assessments of their risk-management systems. In addition, the Board has considered its supervisory experience and that of the other relevant banking supervisory agencies with the organizations and their records of compliance with applicable banking law. Wachovia, SouthTrust, and their subsidiary depository institutions are considered well managed overall. The Board also has considered Wachovia's plans to integrate SouthTrust and its subsidiaries and the proposed management, including the risk-management systems, of the resulting organization.

In addition, the Board has taken account of two publicly reported SEC investigations involving Wachovia, one related to Wachovia's mutual fund business and one related to conduct by the former Wachovia Corporation in connection with its merger with First Union Corporation.³⁰ Con-

29. These major counties are Cabarrus, Gaston, and Mecklenburg Counties in North Carolina and York County in South Carolina.

30. In 2001, First Union Corporation acquired the former Wachovia Corporation, Winston-Salem, North Carolina ("Old Wachovia"), and subsequently changed its name from First Union Corporation to Wachovia Corporation. See *First Union Corporation*, 87 *Federal Reserve Bulletin* 683 (2001).

sistent with the provisions of section 5 of the BHC Act, as amended by the Gramm–Leach–Bliley Act,³¹ the Board has relied on examination and other supervisory information provided by the SEC and other appropriate functional regulators about functionally regulated subsidiaries, such as mutual funds and securities broker–dealers. The Board also has consulted with the SEC about its review of the efforts of Wachovia to comply with federal securities laws. Wachovia has provided the Board with information pertinent to the SEC’s investigations and has conducted internal inquiries into these matters. The Board also has considered the willingness and efforts undertaken by Wachovia’s management to ensure compliance with all applicable state and federal law and to improve compliance programs and policies in light of these investigations.

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 Wachovia, SouthTrust, and their respective subsidiaries are consistent with approval of the proposal, as are the other supervisory factors that the Board must consider under section 3 of the BHC Act.³²

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.³³ 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 Wachovia and SouthTrust, including public comments received 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, approximately 200 commenters submitted their views on

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

32. A commenter expressed concern about the degree of ethnic diversity in senior management positions in both organizations. This concern is 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).

33. 12 U.S.C. § 2901 et seq.

the proposal. Approximately 190 commenters commended Wachovia or SouthTrust for the financial and technical support provided to community development organizations or related their favorable experiences with specific programs or services offered by Wachovia or SouthTrust. Most of these commenters also expressed their support for the proposal.

Seven commenters expressed concern about the lending records of Wachovia or SouthTrust or opposed the proposal. Some commenters contended that data submitted under the Home Mortgage Disclosure Act (“HMDA”)³⁴ demonstrated that Wachovia and SouthTrust engaged in disparate treatment of minority individuals in home mortgage lending in certain markets.³⁵ In addition, several commenters expressed concern about branch closures or other reductions in service resulting from the proposed merger.³⁶

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 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.³⁷

Wachovia’s lead bank, Wachovia Bank, received an “outstanding” rating at its most recent CRA performance evaluation by the OCC, as of September 30, 2000, when it was known as First Union National Bank, Charlotte, North Carolina (“FUNB”) (“FUNB Evaluation”). This evaluation was conducted before the merger of First Union Corporation with Old Wachovia, and the merger of Old

34. 12 U.S.C. § 2801 et seq.

35. Several commenters also expressed concern that Wachovia and SouthTrust finance unaffiliated lenders who provide alternative products such as payday loans. Wachovia reviews loans to payday lenders, check cashing companies, and pawnshops; and it imposes increased documentation requirements, monitoring, and annual reviews of these loans to account for the potential increased risks, including legal and reputational risks, associated with these loans. Wachovia plays no role in the lending practices or credit review processes of these lenders.

One commenter disagreed with a statement in the application that SouthTrust has a policy not to lend to payday lenders, pawnshops, and other “money service businesses” (“MSBs”). Wachovia acknowledged that SouthTrust has made several exceptions to this policy and, as a result, has ten loans outstanding to pawnshops or related entities worth \$755,056, representing a de minimis portion of SouthTrust’s total loan portfolio.

36. One commenter alleged mismanagement of his accounts by Wachovia Bank, and another commenter alleged improper handling by SouthTrust Bank of a loan request. The Board has reviewed these comments about individual accounts and transactions in light of the facts of record, including information provided by Wachovia and SouthTrust. These letters have been forwarded to the consumer complaint function at the OCC and the Board, the primary supervisors of Wachovia Bank and SouthTrust Bank, respectively.

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

Wachovia's lead bank, Wachovia Bank, N.A., Winston-Salem, North Carolina ("Old Wachovia Bank"), into FUNB, which was then renamed Wachovia Bank. Old Wachovia Bank also received an "outstanding" rating at its last CRA performance evaluation by the OCC, as of December 31, 2000 ("Old Wachovia Bank Evaluation"). Wachovia Bank-DE received a "satisfactory" rating from the OCC at its most recent CRA performance evaluation, as of December 31, 2000.³⁸

SouthTrust's only subsidiary bank, SouthTrust Bank, received a "satisfactory" rating at its most recent CRA performance evaluation by the Federal Reserve Bank of Atlanta ("Reserve Bank"), as of May 5, 2003 ("SouthTrust Bank Evaluation").

C. CRA Performance of Wachovia

1. *CRA Performance Record of FUNB*—As noted, the most recent CRA performance evaluation for Wachovia Bank occurred before its 2001 merger with Old Wachovia Bank, when it was known as FUNB. FUNB received an overall "outstanding" rating from the OCC for its performance under the CRA during the period covered by the FUNB Evaluation.³⁹

FUNB received an "outstanding" rating under the lending test. Examiners concluded that FUNB's level of lending reflected an excellent responsiveness to the credit needs of its assessment areas.⁴⁰ They characterized the bank's lending performance as "outstanding" or "high satisfactory" in each of the eleven states and four of the five multistate metropolitan statistical areas ("MSAs") where FUNB operated during the evaluation period. Examiners also found that FUNB's lending record showed excellent distribution of loans among geographies of different income levels and a good distribution of loans among borrowers of different income levels. These assessments were based on a review of FUNB's housing-related loans reported under HMDA, small business and small farm loans, and qualified community development loans.

During the evaluation period, FUNB and its affiliates made more than 398,000 home mortgage loans, totaling more than \$37 billion, throughout the bank's assessment

areas.⁴¹ Examiners reported that the distribution of HMDA-reportable loans, both by geography income level and by borrower income level, was good or excellent in each of the eleven states and four of the five multistate MSAs.⁴²

FUNB originated more than 62,500 small loans to businesses and farms, totaling approximately \$7.8 billion, in its assessment areas.⁴³ Examiners generally characterized FUNB's small business lending in each of its primary rating areas as excellent or good. In assessing FUNB's small business lending, examiners focused on the distribution of loans among geographies of differing income levels and, particularly, to businesses in LMI areas. Examiners placed special emphasis on those areas where FUNB made a large number of small-denomination loans to businesses. For example, examiners noted that the proportion of FUNB's small loans to businesses that had originated amounts of \$100,000 or less was 69 percent in Pennsylvania and 75 percent in the Washington, D.C., MSA.

The FUNB Evaluation found that FUNB achieved a good or excellent level of community development lending in 19 of the 21 assessment areas selected by the examiners for full-scope review. In total, FUNB originated 410 community development loans totaling approximately \$1.24 billion during the evaluation period. These loans principally supported affordable housing projects, including \$30 million to finance the acquisition and renovation of a 1,235-unit multifamily housing complex in Philadelphia; two loans totaling \$9.5 million to help develop 870 affordable housing units in Washington, D.C.; and a \$110 million loan to an Atlanta-area hospital authority that is the primary provider of health care services for indigent persons in Georgia.

Under the investment test, examiners rated FUNB "outstanding" and concluded that the bank's investments reflected an excellent responsiveness to the needs of its assessment areas. During the evaluation period, FUNB made more than 7,300 qualified community development investments in its assessment areas, totaling approximately \$647 million. These investments included equity investments in community development financial institutions and small business investment corporations ("SBICs"), low-income housing tax credits ("LIHTCs"), grants, and financial and in-kind contributions. Among the areas supported by FUNB's community development investments were affordable housing activities, community revitalization and stabilization projects, and job creation programs for LMI

38. Wachovia's other subsidiary depository institutions, Wachovia Trust Company, N.A. and First Union Direct Bank, N.A., are limited-purpose banks that do not accept deposits from the public and are not subject to the CRA.

39. The evaluation period was from January 1, 1997, to December 31, 1999, for lending; for community development loans, investments, and services, the evaluation period extended through September 30, 2000. As part of the FUNB Evaluation, examiners also considered the lending and community development activities of several affiliates of FUNB, including First Union Mortgage Corporation (now Wachovia Mortgage Corporation ("Wachovia Mortgage")) and First Union Home Equity Bank, N.A., both in Charlotte, North Carolina (since merged into Wachovia Bank-DE).

40. At the time of the FUNB Evaluation, FUNB had 104 assessment areas, 21 of which received full-scope reviews. The overall rating for FUNB was a composite of its state/multistate ratings, although examiners placed special emphasis on FUNB's performance in five areas selected as "primary rating areas" based on FUNB's deposits in those areas: Florida, Georgia, New Jersey, North Carolina, and Pennsylvania and Philadelphia.

41. In the FUNB Evaluation, home mortgage lending data included home purchase, refinance, and improvement loans, as well as loans for multifamily dwellings and manufactured housing, reported under HMDA by FUNB and its reviewed affiliates. The data included loans originated and purchased.

42. In the remaining multistate MSA, FUNB's distribution of HMDA-reportable loans by geography income level was described as adequate.

43. "Small loans to business" are loans with original amounts of \$1 million or less that are either secured by nonfarm, nonresidential properties or classified as commercial and industrial loans. "Small loans to farms" are farm or agricultural loans with original amounts of \$500,000 or less that are secured by farmland or finance agricultural production and other loans to farmers.

individuals. Examiners praised FUNB for its use of complex investments such as LIHTCs in several of its assessment areas and noted that FUNB helped finance various projects instead of simply purchasing the tax credits.

FUNB's performance under the service test was rated "high satisfactory" because of a good distribution of branches that were accessible to geographies and individuals of different income levels and a good level of responsiveness to area needs through community services. Examiners found that, although FUNB had closed branches during the evaluation period, including some in LMI areas, these closures did not have a significantly adverse impact on access to FUNB's services in LMI areas, in part because FUNB had made alternative delivery channels available to individuals and areas of all income levels. Examiners singled out FUNB's "eCommunities First" initiative that it launched in 2000 in partnership with 15 community organizations and the city of Charlotte. This initiative sought to provide computer and financial literacy education to LMI communities, senior citizens, and students.

2. CRA Performance Record of Old Wachovia Bank—As noted above, Old Wachovia Bank received an overall rating of "outstanding" from the OCC at its last CRA performance evaluation, including separate "outstanding" ratings for its performance in each of the five states and two multistate MSAs where it operated during the evaluation period.⁴⁴ It also received an "outstanding" rating under the lending test, due in part to what examiners considered to be especially strong lending in several MSAs, including Charlotte–Gastonia–Rock Hill, Norfolk–Virginia Beach–Newport News, and Atlanta. Examiners also considered Old Wachovia Bank to have good overall farm lending performance and emphasized that the bank reported more than \$2 billion in community development loans during the evaluation period.

Examiners gave separate "outstanding" ratings to Old Wachovia Bank for its lending performance in each of its states and multistate MSAs. During the evaluation period, Old Wachovia Bank made more than 54,500 home mortgage loans, totaling more than \$8 billion, throughout its assessment areas.⁴⁵ Examiners characterized the distribution of the bank's loans among geographies of different income levels as good in each of the five states and both multistate MSAs.

Examiners commended Old Wachovia Bank and WCDC for offering innovative and flexible loan products, includ-

ing participating as a Small Business Administration Preferred Lender in North and South Carolina. The evaluation also noted that Old Wachovia Bank's Neighborhood Revitalization Program offered various affordable housing loan products and first-time homebuyer assistance programs.

Old Wachovia Bank made 41,775 small loans to businesses or farms during the evaluation period, for a total of approximately \$4 billion. The geographic distribution by income level of the bank's small loans to businesses was found to be good or excellent in each of the nine MSAs where examiners conducted a full-scope review. The distribution of these loans by businesses of different annual revenue levels ranged from adequate to excellent across the nine MSAs.

Old Wachovia Bank's community development lending was considered to be excellent in all geographic areas reviewed, and examiners noted that the bank, together with WCDC, was one of the largest community development lenders on the East Coast. Examiners found that much of the bank's community development lending supported affordable housing needs. The bank's lending financed the creation or retention of more than 9,210 units of affordable housing in the Augusta–Aiken, Charlotte–Gastonia–Rock Hill, Atlanta, and Raleigh–Durham MSAs. Old Wachovia Bank's lending also supported community development services and job creation and retention programs for LMI individuals, including programs that created or retained more than 1,830 such jobs in the Atlanta MSA and almost 1,500 such jobs in the Greenville–Spartanburg MSA.

Examiners also gave Old Wachovia Bank a rating of "outstanding" for performance under the investment test, finding that it had an excellent volume of investments addressing affordable housing and economic development needs in its communities. They also noted favorably that the bank invested in an SBIC pursuing economic development in areas across the bank's geographic footprint, as well as in tax credit investments.

Old Wachovia Bank received a "high satisfactory" rating under the service test portion of the evaluation. Examiners found the bank had a good overall geographic distribution of its branches, particularly in LMI areas. They also viewed the bank as taking a leadership role in providing community development services in each of the nine MSAs selected for full-scope review. These services included workshops and seminars to assist small businesses and homebuyers, housing education and counseling services for LMI families, and technical assistance to community development corporations.

3. CRA Performance Record of Wachovia Bank-DE—At its most recent evaluation for CRA performance by the OCC, Wachovia Bank-DE received an overall rating of "satisfactory" and a "high satisfactory" rating for its performance under each of the lending, investment, and service tests.⁴⁶

44. The evaluation period was from January 1, 1998, to December 31, 2000. In reviewing Old Wachovia Bank's community development lending, examiners also included the activities of several of Old Wachovia Bank's affiliates, particularly Wachovia Community Development Corporation, Winston-Salem, North Carolina ("WCDC"). Full-scope reviews were done for nine assessment areas, including both the bank's multistate MSAs and seven other MSAs, with at least one in each of the bank's five states.

45. In the Old Wachovia Bank Evaluation, home mortgage lending data included home purchase, refinance, and improvement loans reported under HMDA by the bank, including loans for multifamily dwellings and manufactured housing. The data included loans originated and purchased.

46. The evaluation period was from January 1, 1999, to December 31, 2000.

Examiners found the bank to have an excellent overall level of lending and a good distribution of loans among borrowers of different income levels. During the evaluation period, Wachovia Bank-DE originated or purchased HMDA-reportable loans totaling \$269 million in its three assessment areas and small loans to businesses or farms totaling \$67 million. Examiners noted that the bank had developed three home loan products offering flexible terms and conditions, including one requiring no down payment. During the evaluation period, the bank originated loans totaling \$34.2 million using these three products.

Wachovia Bank-DE focused its community development lending during the evaluation period on the Wilmington–Newark MSA.⁴⁷ Its most significant loan was a \$2.65 million loan to construct a charter school in a low-income census tract in downtown Wilmington.

Examiners characterized the bank's performance under the investment test as excellent in both the Dover MSA and the Sussex Non-MSA assessment areas. During the evaluation period, Wachovia Bank-DE made 53 qualified community development investments totaling approximately \$743 thousand, which increased its community development investment portfolio to more than \$24 million. The bulk of these investments was in the First Union Regional Foundation (now the Wachovia Regional Foundation), which supports economic and community development initiatives designed to help residents of low-income neighborhoods in Delaware, New Jersey, and eastern Pennsylvania.

Wachovia Bank-DE also received a "high satisfactory" rating for its performance under the service test. Examiners found its service delivery systems to be accessible to geographies and individuals in all three of its assessment areas. They noted that the one branch closing during the evaluation period did not adversely affect the accessibility of the bank's delivery systems.

4. *Recent CRA Activities of Wachovia*—Since the FUNB Evaluation and the Old Wachovia Bank Evaluation, Wachovia Bank and its affiliates have continued to serve the convenience and needs of their communities. For example, in 2003 Wachovia provided more than \$1.2 billion in community development loans and also delivered financial counseling and education to approximately 16,000 LMI seminar attendees.

Wachovia's recent CRA-related lending programs have focused on affordable housing needs, small business support, and community development. Wachovia's proprietary affordable mortgage products include loans for up to 100 percent of the value of the property and down payments as low as \$500, if the purchaser attends a homeownership counseling class. Wachovia also offers mortgage products sponsored or guaranteed by Fannie Mae, the Federal Housing Administration, and the Veterans Admin-

47. One commenter alleged, based on HMDA data and Wachovia's lending relationships with unaffiliated MSBs, that Wachovia was not adequately addressing the convenience and needs of Delaware communities.

istration and has participated in several programs designed to promote home ownership by LMI individuals, such as by providing matching funds for assistance with down payments. Wachovia has also partnered with nonprofit organizations and some local governments to create regional mortgage programs. For example, in May 2003, Wachovia signed an agreement to provide its mortgage loans through minority credit unions to LMI minority borrowers in North Carolina.

Between January 2001 and December 2003, Wachovia made 1,267 community development loans, totaling approximately \$3 billion, in the five states where its branches overlap with SouthTrust Bank's branches.⁴⁸ These loans financed more than 18,800 affordable housing units. Also included was a \$5 million loan (as part of a \$25.5 million syndication) to a fund that finances the purchase of farm materials by Virginia farmers with annual revenues of \$500,000 or less.⁴⁹

Wachovia's recent community development investments have included direct investments in community development funds, tax credit investments, and investments made by Wachovia's SBIC. As of December 31, 2003, Wachovia held \$2.1 billion of community development investments in the five-state overlap area. Wachovia's recent investments in the area have included \$30 million in bridge loans to, and a \$3 million equity investment in, a Virginia housing fund that lends to and invests in low-income residential rental properties; a \$10 million commitment to a fund supporting economic development in Winston-Salem; and \$6 million in tax credit investments to an apartment complex for low-income elderly tenants in Macon, Georgia.

Since the FUNB Evaluation and the Old Wachovia Bank Evaluation, Wachovia has continued to sponsor a range of educational programs for prospective homebuyers, small business owners, and nonprofit and community organizations. Among its newer CRA-related services is a pilot program, begun in 2002 in conjunction with state and local authorities and Fannie Mae, that permits federal Section 8 housing assistance vouchers to be used for mortgage payments in 11 of Wachovia Bank's markets.

D. CRA Performance of SouthTrust

As noted above, SouthTrust Bank received a "satisfactory" rating from the Reserve Bank in the SouthTrust Bank

48. These states are Florida, Georgia, North Carolina, South Carolina, and Virginia.

49. One commenter alleged that Wachovia and SouthTrust have not provided a sufficient amount of credit to African-American farmers and business owners in their respective markets and have not provided sufficient outreach and support to African-American farmers and community organizations. Wachovia noted that it had in fact provided financial support and technical assistance to many community organizations, including the commenter. The commenter also objected to Wachovia's lack of participation in U.S. Department of Agriculture lending programs. The Board notes that the CRA does not require banks to provide specific kinds of credit products or programs.

Evaluation.⁵⁰ The bank was rated “high satisfactory” for performance under the lending test. Examiners found that the bank’s lending showed excellent responsiveness to the credit needs of its assessment area and a good record of both HMDA-related lending to borrowers of differing income levels and lending to small businesses.⁵¹ SouthTrust Bank originated or purchased more than 91,100 HMDA-reportable loans in its assessment area during the evaluation period, totaling \$11.6 billion, and also made approximately 26,700 small business loans totaling \$3.8 billion. The bank made \$210.9 million of community development loans during the evaluation period, which examiners considered to be a relatively high level of lending. Examiners also favorably noted SouthTrust Bank’s use of flexible lending practices, including the offering of flexible mortgage programs of various state housing finance agencies.

In the SouthTrust Bank Evaluation, the bank received an “outstanding” performance rating under the investment test. Examiners found that it had achieved an excellent level of qualified community development investments and grants and was often in a leadership position in making investments and grants not usually provided by private investors. SouthTrust Bank made a total of \$239 million in qualified community development investments in its assessment areas during the evaluation period, which included investments in various state and local housing agency bonds, LIHTCs, mortgage-backed securities, and community development financial institutions. Examiners characterized these investments as demonstrating excellent responsiveness to community credit and development needs. SouthTrust Bank also made approximately \$387,000 in charitable contributions to community development organizations during the evaluation period.

SouthTrust Bank received a “high satisfactory” rating for performance under the service test. The bank’s delivery systems, including branches and automated teller machines (“ATMs”) were considered to be accessible to essentially all portions of the bank’s assessment areas.

E. HMDA Data and Fair Lending Records

The Board also has carefully considered the lending records of Wachovia and SouthTrust in light of comments on the HMDA data reported by their subsidiaries.⁵² Based on 2002 and 2003 HMDA data, several commenters alleged that Wachovia Bank, Wachovia Bank-DE, Wachovia

Mortgage,⁵³ and SouthTrust Bank disproportionately excluded or denied African-American and Hispanic applicants for home mortgage loans in various MSAs in several states. These commenters asserted that Wachovia’s and SouthTrust Bank’s denial rates for minority applicants were higher than the rates for nonminority applicants, and that Wachovia’s denial disparity ratios compared unfavorably with those ratios for the aggregate of all lenders (“aggregate lenders”) in certain MSAs.⁵⁴

The 2003 data indicate that Wachovia’s denial disparity ratios⁵⁵ for African-American and Hispanic applicants for HMDA-reportable loans overall were slightly less favorable than or exceeded those ratios for the aggregate lenders in all markets reviewed. Wachovia’s percentages of total HMDA-reportable loans to African-American and Hispanic borrowers generally were slightly less favorable than or exceeded the total percentages for the aggregate lenders in most of the areas reviewed. Moreover, Wachovia’s percentage of total HMDA-reportable loans to borrowers in minority census tracts generally was comparable with or exceeded the total percentages for the aggregate lenders in the areas reviewed.⁵⁶

The 2003 data indicate that SouthTrust’s denial disparity ratios for African-American and Hispanic applicants for HMDA-reportable loans generally were comparable with those ratios for the aggregate lenders in a number of the areas reviewed, although in several states and MSAs SouthTrust’s ratios were less favorable than those of the aggregate lenders. The data also indicate that in the majority of these areas SouthTrust’s percentage of originations to African-American applicants was below the percentage for the aggregate lenders, while its percentage of originations to Hispanic applicants was either slightly less favorable or more favorable than the aggregate lenders’ percentage in approximately half of the markets. However, SouthTrust originated HMDA-reportable loans to African-American and Hispanic borrowers at rates comparable with or exceeding those of the aggregate lenders in most of the states and MSAs reviewed.

Although the HMDA data may reflect certain disparities in the rates of loan applications, originations, and denials among members of different racial groups in certain local areas, the HMDA data generally do not indicate that Wachovia or SouthTrust is excluding any racial group 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

50. The evaluation period was from January 1, 2001, through December 31, 2002.

51. In this context, small businesses are those with gross annual revenues of \$1 million or less.

52. The Board analyzed 2002 and 2003 HMDA data for Wachovia Bank; Wachovia Bank-DE; First Union Mortgage Corporation; SouthTrust Bank; SouthTrust Mortgage Corporation, Birmingham, Alabama (“SouthTrust Mortgage”); and Founders National Bank-Skillman, Dallas, Texas, which was merged into SouthTrust Bank in 2003. The Board has reviewed HMDA-reportable originations in each of the states served by the banks, the assessment area of the MSA in which each bank’s headquarters is located, as well as in their respective assessment areas in MSAs identified by the commenters.

53. The data for Wachovia Bank and Wachovia Bank-DE included Wachovia Mortgage’s reported loans in the markets reviewed. Wachovia Mortgage is a subsidiary of Wachovia Bank.

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

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

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

lending, but also equal access to credit by creditworthy applicants regardless of their race. 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.⁵⁷ 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. This includes examination reports that provide an on-site evaluation of compliance by the subsidiary depository institutions of Wachovia and SouthTrust with fair lending laws.

Importantly, examiners noted no fair lending issues or concerns in the performance evaluations of the depository institutions controlled by Wachovia or SouthTrust. The record also indicates that Wachovia has taken steps to ensure compliance with fair lending laws. Wachovia has instituted corporate-wide policies and procedures to help ensure compliance with all fair lending and other consumer protection laws and regulations. Wachovia's compliance program incorporates logistic regression testing, policy and procedure review, mystery shopping, and employee training. Its internal fair lending analysis covers the lending process from a review of marketing initiatives through servicing and collection practices. Customer-contact employees receive fair lending training through internal communications, policy manuals, and interactive computer-based training. Wachovia also maintains a Corporate Fair Lending Steering Committee, which is chaired by Wachovia's Chief Risk Officer, and includes the heads of all major business units, as well as the heads of the Credit Risk, Legal, Internal Audit, Compliance, and Community Development units. Wachovia has indicated that its fair lending program would be adopted by the combined organization following the proposed merger.

The record also indicates that SouthTrust has policies and procedures intended to ensure compliance with fair lending laws. For example, SouthTrust uses a centralized underwriting process for all consumer and mortgage loans, which largely eliminates the ability of individual loan officers to give disparate treatment to similarly situated credit applicants. Both SouthTrust Bank and SouthTrust Mortgage review declined applications for HMDA-reportable loans twice to ensure that the applicant has received the proper consideration before declining the loan.

57. 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.

SouthTrust's compliance program also includes statistical testing of HMDA data for SouthTrust Bank and SouthTrust Mortgage; review of compliance procedures and controls, as well as transaction testing, by SouthTrust's internal audit department; and training.

The Board also has considered the HMDA data in light of the programs described above and the overall performance records of Wachovia's and SouthTrust's subsidiary banks under the CRA. These established efforts demonstrate that the banks are active in helping to meet the credit needs of their entire communities.

F. Branch Closures

Two commenters expressed concern about the effect of branch closings that might result from this proposal. Wachovia has stated that it plans to close or consolidate 130 to 150 branches as a result of this proposal, but that these actions would not leave any markets without service. Wachovia has represented that it will not close any branches in LMI census tracts in markets affected by the proposed merger before the end of the first quarter of 2006.

The Board has reviewed Wachovia's branch closing policy. The policy requires Wachovia to consider possible alternatives to branch closings, including adjusting hours, services, and facilities, and to examine methods of minimizing adverse effects on the community affected by the potential closure. The policy requires that, before a final decision is made to close a branch, management must conduct an impact study to assess the likely effects of any closure. If the branch under review is in an LMI area, the impact study must include concerns and ideas from the local community and an assessment of the closure's potential impact on customers and other possible ways the community's credit needs will be met.

As noted, the most recent CRA performance evaluations of Wachovia and SouthTrust's insured depository institutions have each concluded that the institutions' records of opening and closing branches has not adversely affected the level of services available in LMI areas. The Board also has considered the fact that federal banking law provides a specific mechanism for addressing branch closings.⁵⁸ 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 SouthTrust Bank and Wachovia's subsidiary banks, respectively, will continue to review the banks' branch closing records in the course of conducting CRA performance evaluations.

58. 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.

G. Other Matters

As part of the proposed merger, Wachovia has announced a \$75 billion, five-year community development plan for the states affected by the merger, including Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. Many commenters mentioned the plan, with most praising it as indicative of Wachovia's commitment to the communities it serves. Two commenters, however, expressed concerns about the community development plan, arguing that the size of the plan is too small relative to the size of the proposed merger. Another commenter alleged that Wachovia has not abided by the terms of a community development pledge made in connection with a prior merger.

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.⁵⁹ 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.⁶⁰

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 when the Board reviews the proposal under the convenience and needs factor. In reviewing future applications by Wachovia under this factor, the Board similarly will review Wachovia's actual CRA performance record at that time and the programs it has in place to meet the credit needs of its communities at the time of such review.

H. Conclusion on Convenience and Needs Considerations

The Board recognizes that this proposal represents a significant expansion of Wachovia and its scope of operations. Accordingly, an important component of the Board's review is the effects of the proposal on the convenience and needs of all the communities served by Wachovia and SouthTrust.

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 Wachovia, public comments on the proposal, and confidential supervisory information. As discussed in this order, the record demonstrates that the subsidiary depository institutions of Wachovia and SouthTrust 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. The Board notes that the proposal would expand the availability of banking products and services to customers of Wachovia and SouthTrust, for example by making Wachovia's broader range of affordable mortgage products available to SouthTrust customers. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations related to the convenience and needs factor, including the CRA performance records of the relevant depository institutions, are consistent with approval.

Foreign Activities

As noted above, Wachovia also proposes to acquire SouthTrust International, Inc., the agreement corporation subsidiary of SouthTrust of Alabama. The Board has concluded that all the factors required to be considered under section 25 of the Federal Reserve Act and section 211.5 of Regulation K are consistent with approval.⁶¹

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the application should be, and hereby is, approved.⁶² 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 Wachovia with the conditions imposed in this order and the commitments made to the Board in connection with the application. For purposes of this transaction, these conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

61. 12 CFR 211.5.

62. Several commenters 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). 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 the Board has carefully considered in acting on the proposal. The commenters' requests fail to demonstrate why written comments do not present their evidence 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.

59. See *J.P. Morgan Chase & Co.*, 90 *Federal Reserve Bulletin* 352 (2004); *Bank of America Corporation*, 90 *Federal Reserve Bulletin* 217 (2004) ("Bank of America Order"); *NationsBank Corporation*, 84 *Federal Reserve Bulletin* 858 (1998).

60. See, e.g., *Bank of America Order* at 233; *Citigroup Inc.*, 88 *Federal Reserve Bulletin* 485, 488 n.18 (2002).

The merger with SouthTrust and the acquisition of SouthTrust 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 Richmond, acting pursuant to delegated authority.

By order of the Board of Governors, effective October 15, 2004.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Appendix A

Banking Markets Where Wachovia's and SouthTrust's
Subsidiary Depository Institutions Compete Directly

Florida

Brevard

Brevard County.

Daytona Beach

Flagler County; the towns of Allandale, Daytona Beach, Daytona Beach Shores, Edgewater, Holly Hill, New Smyrna Beach, Ormond Beach, Ormond-by-the-Sea, Pierson, Port Orange, and South Daytona in Volusia County; and the town of Astor in Lake County.

Fort Myers

Lee County, excluding Gasparilla Island (the town of Boca Grande), and including the town of Immokalee in Collier County.

Fort Pierce

Martin County, excluding the towns of Indiantown and Hobe Sound, and St. Lucie County.

Fort Walton Beach

Okaloosa and Walton Counties and the town of Ponce de Leon in Holmes County.

Gainesville

Alachua, Gilchrist, and Levy Counties.

Highlands

Highlands County.

Indian River

Indian River County.

Jacksonville (Florida and Georgia)

Baker, Clay, Duval, and Nassau Counties; the towns of Fruit Cove, Ponte Vedra, Ponte Vedra Beach, Jacksonville, and Switzerland in St. Johns County; and the city of Folkston in Charlton County, Georgia.

Miami-Fort Lauderdale

Broward and Dade Counties.

Naples

Collier County, excluding the town of Immokalee.

North Lake/Sumter

Lake County, excluding the towns of Astor, Clermont, and Groveland, and Sumter County.

Ocala

Marion County and the town of Citrus Springs in Citrus County.

Orlando

Orange, Osceola, and Seminole Counties; the western half of Volusia County; and the towns of Clermont and Groveland in Lake County.

Pensacola

Escambia and Santa Rosa Counties.

Polk

Polk County.

Punta Gorda

The portion of Charlotte County that is east of the harbor or east of the Myakka River, and the portion of Sarasota County that is both east of the Myakka River and south of Interstate 75 (currently, the towns of Northport and Port Charlotte).

St. Augustine

St. Johns County, excluding the towns of Fruit Cove, Ponte Vedra, Ponte Vedra Beach, Jacksonville, and Switzerland.

Sarasota

Manatee and Sarasota Counties, excluding that portion of Sarasota County that is both east of the Myakka River and south of Interstate 75 (currently the towns of Northport and Port Charlotte); the peninsular portion of Charlotte County west of the Myakka River (currently the towns of Englewood, Englewood Beach, New Point Comfort, Grove City,

Cape Haze, Rotonda, Rotonda West, and Placido); and Gasparilla Island (the town of Boca Grande) in Lee County.

Tallahassee

Leon County and the towns of Quincy and Havana in the eastern half of Gadsden County.

Tampa Bay

Hernando, Hillsborough, Pinellas, and Pasco Counties.

West Palm Beach

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

Georgia

Athens

Barrow County, excluding the towns of Auburn and Winder, and Clarke, Jackson, Madison, Oconee, and Oglethorpe Counties.

Atlanta

Bartow County; the towns of Auburn and Winder in Barrow County; Cherokee, Clayton, Cobb, Coweta, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Rockdale, and Walton Counties; Hall County, excluding the town of Clermont; and the town of Luthersville in Meriwether County.

Augusta (Georgia and South Carolina)

Columbia, McDuffie, and Richmond Counties in Georgia, and Aiken and Edgefield Counties in South Carolina.

Columbus (Georgia and Alabama)

Chattahoochee, Harris, and Muscogee Counties in Georgia; the towns of Junction City, Geneva, and Box Springs in Talbot County; and Russell County and the portion of Lee County, both in Alabama, that is within 12 road miles of Phoenix City, Alabama, or Columbus, Georgia.

Dalton

Murray and Whitfield Counties.

North Carolina

Charlotte–Rock Hill (North Carolina and South Carolina)

The Charlotte–Rock Hill Rannally Metropolitan Area (“RMA”) and the non-RMA portion of Cabarrus County in North Carolina.

Greensboro–High Point

The Greensboro–Highpoint RMA and the non-RMA portions of Davidson and Randolph Counties, excluding the Winston-Salem RMA portion of Davidson County.

Raleigh

The Raleigh RMA; the non-RMA portions of Franklin, Johnston, and Wake Counties; and Harnett County, excluding the Fayetteville RMA portion.

Rutherford

Rutherford County.

Salisbury

The Salisbury RMA and the non-RMA portion of Rowan County, excluding the Charlotte–Rock Hill RMA portion of Rowan County.

Shelby

Cleveland County, excluding the Charlotte–Rock Hill RMA portion.

Transylvania

Transylvania County.

South Carolina

Charleston

The Charleston RMA and the non-RMA portions of Berkeley and Charleston Counties.

Columbia

The Columbia RMA and the non-RMA portions of Fairfield, Lexington, and Richland Counties.

Greenville

The Greenville RMA and the non-RMA portions of Greenville and Pickens Counties.

Spartanburg

The RMA and non-RMA portions of Spartanburg County, excluding the Greenville RMA portion of Spartanburg County.

Virginia

Newport News–Hampton

The Newport News–Hampton RMA; the non-RMA portion of James City County; Mathews County; and the independent cities of Hampton, Newport News, Poquoson, and Williamsburg.

Norfolk–Portsmouth (Virginia and North Carolina)

The Norfolk–Portsmouth RMA; the independent cities of Chesapeake, Norfolk, Portsmouth, Suffolk, and Virginia Beach; and Currituck County in North Carolina.

Richmond

The Richmond RMA; the non-RMA portions of Chesterfield, Dinwiddie, Goochland, Hanover, Henrico, Powhatan, and Prince George Counties; the independent cities of Colonial Heights, Hopewell, Petersburg, and Richmond; Amelia, Charles City, King and Queen, King William, and New Kent Counties; and the town of Mineral in Louisa County.

Appendix B

Market Data for Certain Banking Markets without Divestitures

I. Unconcentrated Banking Markets

*Florida**Fort Walton Beach*

Wachovia operates the 18th largest depository institution in the market, controlling deposits of approximately \$28.4 million, which represent 1 percent of market deposits. SouthTrust operates the 11th largest depository institution in the market, controlling deposits of approximately \$104.4 million, which represent 3.7 percent of market deposits. On consummation of the proposal, Wachovia would operate the eighth largest depository institution in the market, controlling deposits of approximately \$132.8 million, which represent 4.7 percent of market deposits. Twenty-one depository institutions would remain in the market. The HHI would increase 8 points to 810.

Miami–Fort Lauderdale

Wachovia operates the second largest depository institution in the market, controlling deposits of approximately \$11.8 billion, which represent 15.5 percent of market deposits. SouthTrust operates the tenth largest depository institution in the market, controlling deposits of approximately \$1.7 billion, which represent 2.2 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the second largest depository institution in the market, controlling deposits of approximately \$13.5 billion, which represent 17.7 percent of market deposits. Ninety-six depository institutions would remain in the banking market. The HHI would increase 68 points to 988.

*Georgia**Athens*

Wachovia operates the eighth largest depository institution in the market, controlling deposits of approximately

\$119 million, which represent 4.3 percent of market deposits. SouthTrust operates the 13th largest depository institution in the market, controlling deposits of approximately \$79.9 million, which represent 2.9 percent of market deposits. On consummation of the proposal, Wachovia would operate the sixth largest depository institution in the market, controlling deposits of approximately \$198.9 million, which represent 7.2 percent of market deposits. Nineteen depository institutions would remain in the banking market. The HHI would increase 24 points to 943.

II. Moderately Concentrated Banking Markets

*Florida**Brevard*

Wachovia operates the largest depository institution in the market, controlling deposits of approximately \$1.32 billion, which represent 26.5 percent of market deposits. SouthTrust operates the 18th largest depository institution in the market, controlling deposits of approximately \$26.6 million, which represent less than 1 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the largest depository institution in the market, controlling deposits of approximately \$1.35 billion, which represent 27 percent of market deposits. Nineteen depository institutions would remain in the banking market. The HHI would increase 29 points to 1568.

Fort Myers

Wachovia operates the third largest depository institution in the market, controlling deposits of approximately \$1.04 billion, which represent 14.2 percent of market deposits. SouthTrust operates the fifth largest depository institution in the market, controlling deposits of approximately \$460 million, which represent 6.3 percent of market deposits. On consummation of the proposal, Wachovia would operate the second largest depository institution in the market, controlling deposits of approximately \$1.5 billion, which represent 20.5 percent of market deposits. Twenty-seven depository institutions would remain in the banking market. The HHI would increase 178 points to 1268.

Fort Pierce

Wachovia operates the fourth largest depository institution in the market, controlling deposits of approximately \$577.5 million, which represent 13.6 percent of market deposits. SouthTrust operates the 14th largest depository institution in the market, controlling deposits of approximately \$51.2 million, which represent 1.2 percent of market deposits. On consummation of the proposal, Wachovia would operate the third largest depository institution in the market, controlling deposits of approximately \$628.7 million, which represent 14.8 percent of market deposits.

Sixteen depository institutions would remain in the banking market. The HHI would increase 33 points to 1292.

Gainesville

Wachovia operates the largest depository institution in the market, controlling deposits of approximately \$507 million, which represent 20.5 percent of market deposits. SouthTrust operates the tenth largest depository institution in the market, controlling deposits of approximately \$95.8 million, which represent 3.9 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the largest depository institution in the market, controlling deposits of approximately \$602.8 million, which represent 24.4 percent of market deposits. Fourteen depository institutions would remain in the banking market. The HHI would increase 159 points to 1242.

Highlands

Wachovia operates the third largest depository institution in the market, controlling deposits of approximately \$200.2 million, which represent 16.7 percent of market deposits. SouthTrust operates the seventh largest depository institution in the market, controlling deposits of approximately \$49.1 million, which represent 4.1 percent of market deposits. On consummation of the proposal, Wachovia would operate the second largest depository institution in the market, controlling deposits of approximately \$249.3 million, which represent 20.8 percent of market deposits. Ten depository institutions would remain in the banking market. The HHI would increase 137 points to 1737.

Indian River

Wachovia operates the largest depository institution in the market, controlling deposits of approximately \$632.2 million, which represent 25.2 percent of market deposits. SouthTrust operates the ninth largest depository institution in the market, controlling deposits of approximately \$113.4 million, which represent 4.5 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the largest depository institution in the market, controlling deposits of approximately \$745.6 million, which represent 29.7 percent of market deposits. Seventeen depository institutions would remain in the banking market. The HHI would increase 228 points to 1461.

Naples

Wachovia operates the second largest depository institution in the market, controlling deposits of approximately \$990.9 million, which represent 15 percent of market deposits. SouthTrust operates the 14th largest depository institution in the market, controlling deposits of approximately \$107 million, which represent 1.6 percent of market deposits. On consummation of the proposal, Wachovia

would continue to operate the second largest depository institution in the market, controlling deposits of approximately \$1.1 billion, which represent 16.6 percent of market deposits. Thirty-two depository institutions would remain in the banking market. The HHI would increase 48 points to 1073.

North Lake/Sumter

Wachovia operates the fourth largest depository institution in the market, controlling deposits of approximately \$293.1 million, which represent 10.3 percent of market deposits. SouthTrust operates the tenth largest depository institution in the market, controlling deposits of approximately \$91.2 million, which represent 3.2 percent of market deposits. On consummation of the proposal, Wachovia would operate the third largest depository institution in the market, controlling deposits of approximately \$384.3 million, which represent 13.5 percent of market deposits. Seventeen depository institutions would remain in the banking market. The HHI would increase 66 points to 1375.

Ocala

Wachovia operates the fourth largest depository institution in the market, controlling deposits of approximately \$284.6 million, which represent 9.2 percent of market deposits. SouthTrust operates the fifth largest depository institution in the market, controlling deposits of approximately \$273.7 million, which represent 8.8 percent of market deposits. On consummation of the proposal, Wachovia would operate the second largest depository institution in the market, controlling deposits of approximately \$558.3 million, which represent 18 percent of market deposits. Twenty-one depository institutions would remain in the banking market. The HHI would increase 161 points to 1425.

Pensacola

Wachovia operates the sixth largest depository institution in the market, controlling deposits of approximately \$277.6 million, which represent 7.3 percent of market deposits. SouthTrust operates the 12th largest depository institution in the market, controlling deposits of approximately \$82 million, which represent 2.2 percent of market deposits. On consummation of the proposal, Wachovia would operate the fifth largest depository institution in the market, controlling deposits of approximately \$359.6 million, which represent 9.5 percent of market deposits. Seventeen depository institutions would remain in the banking market. The HHI would increase 31 points to 1070.

Sarasota

Wachovia operates the third largest depository institution in the market, controlling deposits of approximately \$1.1 billion, which represent 9.1 percent of market deposits. SouthTrust operates the fourth largest depository insti-

tution in the market, controlling deposits of approximately \$1 billion, which represent 8.4 percent of market deposits. On consummation of the proposal, Wachovia would operate the second largest depository institution in the market, controlling deposits of approximately \$2.1 billion, which represent 17.5 percent of market deposits. Thirty-nine depository institutions would remain in the banking market. The HHI would increase 153 points to 1310.

Tallahassee

Wachovia operates the fourth largest depository institution in the market, controlling deposits of approximately \$379.4 million, which represent 11.2 percent of market deposits. SouthTrust operates the 11th largest depository institution in the market, controlling deposits of approximately \$89.6 million, which represent 2.6 percent of market deposits. On consummation of the proposal, Wachovia would operate the third largest depository institution in the market, controlling deposits of approximately \$469 million, which represent 13.8 percent of market deposits. Thirteen depository institutions would remain in the banking market. The HHI would increase 59 points to 1380.

Tampa Bay

Wachovia operates the second largest depository institution in the market, controlling deposits of approximately \$4.8 billion, which represent 14 percent of market deposits. SouthTrust operates the fourth largest depository institution in the market, controlling deposits of approximately \$2.8 billion, which represent 8.2 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the second largest depository institution in the market, controlling deposits of approximately \$7.6 billion, which represent 22.2 percent of market deposits. Fifty-four depository institutions would remain in the banking market. The HHI would increase 230 points to 1493.

West Palm Beach

Wachovia operates the largest depository institution in the market, controlling deposits of approximately \$5.8 billion, which represent 26.7 percent of market deposits. SouthTrust operates the seventh largest depository institution in the market, controlling deposits of approximately \$713.6 million, which represent 3.3 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the largest depository institution in the market, controlling deposits of approximately \$6.5 billion, which represent 30 percent of market deposits. Fifty-four depository institutions would remain in the banking market. The HHI would increase 175 points to 1529.

Georgia

Atlanta

Wachovia operates the largest depository institution in the market, controlling deposits of approximately \$16.6 bil-

lion, which represent 23.8 percent of market deposits. SouthTrust operates the fourth largest depository institution in the market, controlling deposits of approximately \$4.6 billion, which represent 6.5 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the largest depository institution in the market, controlling deposits of approximately \$21.2 billion, which represent 30.3 percent of market deposits. One hundred and one depository institutions would remain in the banking market. The HHI would increase 309 points to 1715.

Dalton

Wachovia operates the largest depository institution in the market, controlling deposits of approximately \$358.8 million, which represent 22 percent of market deposits. SouthTrust operates the 12th largest depository institution in the market, controlling deposits of approximately \$19.7 million, which represent 1.2 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the largest depository institution in the market, controlling deposits of approximately \$378.5 million, which represent 23.2 percent of market deposits. Twelve depository institutions would remain in the banking market. The HHI would increase 53 points to 1443.

North Carolina

Greensboro–High Point

Wachovia operates the largest depository institution in the market, controlling deposits of approximately \$2.5 billion, which represent 26.7 percent of market deposits. SouthTrust operates the 18th largest depository institution in the market, controlling deposits of approximately \$51.1 million, which represent less than 1 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the largest depository institution in the market, controlling deposits of approximately \$2.6 billion, which represent 27.3 percent of market deposits. Twenty-six depository institutions would remain in the banking market. The HHI would increase 29 points to 1366.

Raleigh

Wachovia operates the largest depository institution in the market, controlling deposits of approximately \$2.95 billion, which represent 26.4 percent of market deposits. SouthTrust operates the 13th largest depository institution in the market, controlling deposits of approximately \$171.2 million, which represent 1.5 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the largest depository institution in the market, controlling deposits of approximately \$3.1 billion, which represent 27.9 percent of market deposits. Twenty-two depository institutions would remain in

the banking market. The HHI would increase 81 points to 1457.

South Carolina

Charleston

Wachovia operates the largest depository institution in the market, controlling deposits of approximately \$1.2 billion, which represent 24.6 percent of market deposits. SouthTrust operates the eighth largest depository institution in the market, controlling deposits of approximately \$217.7 million, which represent 4.5 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the largest depository institution in the market, controlling deposits of approximately \$1.4 billion, which represent 29.1 percent of market deposits. Eighteen depository institutions would remain in the banking market. The HHI would increase 220 points to 1564.

Columbia

Wachovia operates the largest depository institution in the market, controlling deposits of approximately \$2.1 billion, which represent 28.4 percent of market deposits. SouthTrust operates the eighth largest depository institution in the market, controlling deposits of approximately \$95.5 million, which represent 1.3 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the largest depository institution in the market, controlling deposits of approximately \$2.2 billion, which represent 29.7 percent of market deposits. Seventeen depository institutions would remain in the banking market. The HHI would increase 73 points to 1724.

Greenville

Wachovia operates the largest depository institution in the market, controlling deposits of approximately \$1.6 billion, which represent 21.2 percent of market deposits. SouthTrust operates the 16th largest depository institution in the market, controlling deposits of approximately \$68.3 million, which represent less than 1 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the largest depository institution in the market, controlling deposits of approximately \$1.7 billion, which represent 22.1 percent of market deposits. Twenty-seven depository institutions would remain in the banking market. The HHI would increase 38 points to 1256.

Spartanburg

Wachovia operates the third largest depository institution in the market, controlling deposits of approximately \$388.5 million, which represent 15.7 percent of market deposits. SouthTrust operates the 15th largest depository institution in the market, controlling deposits of approxi-

mately \$9.2 million, which represent less than 1 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the third largest depository institution in the market, controlling deposits of approximately \$397.7 million, which represent 16 percent of market deposits. Fourteen depository institutions would remain in the banking market. The HHI would increase 12 points to 1150.

Virginia

Newport News–Hampton

Wachovia operates the second largest depository institution in the market, controlling deposits of approximately \$672.1 million, which represent 17.5 percent of market deposits. SouthTrust operates the eighth largest depository institution in the market, controlling deposits of approximately \$107.2 million, which represent 2.8 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the second largest depository institution in the market, controlling deposits of approximately \$779.3 million, which represent 20.3 percent of market deposits. Sixteen depository institutions would remain in the banking market. The HHI would increase 98 points to 1504.

Norfolk–Portsmouth (Virginia and North Carolina)

Wachovia operates the second largest depository institution in the market, controlling deposits of approximately \$2 billion, which represent 20 percent of market deposits. SouthTrust operates the fifth largest depository institution in the market, controlling deposits of approximately \$757.1 million, which represent 7.5 percent of market deposits. On consummation of the proposal, Wachovia would operate the largest depository institution in the market, controlling deposits of approximately \$2.8 billion, which represent 27.5 percent of market deposits. Twenty-one depository institutions would remain in the banking market. The HHI would increase 299 points to 1624.

III. Highly Concentrated Banking Markets

Florida

St. Augustine

Wachovia operates the third largest depository institution in the market, controlling deposits of approximately \$149.4 million, which represent 15.4 percent of market deposits. SouthTrust operates the seventh largest depository institution in the market, controlling deposits of approximately \$36.8 million, which represent 3.8 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the third largest depository institution in the market, controlling deposits of approximately \$186.2 million, which represent 19.2 percent of market deposits. Twelve depository institutions

would remain in the banking market. The HHI would increase 117 points to 2000.

Georgia

Columbus (Georgia and Alabama)

Wachovia operates the fourth largest depository institution in the market, controlling deposits of approximately \$288.1 million, which represent 9.3 percent of market deposits. SouthTrust operates the third largest depository institution in the market, controlling deposits of approximately \$328.1 million, which represent 10.6 percent of market deposits. On consummation of the proposal, Wachovia would operate the second largest depository institution in the market, controlling deposits of approximately \$616.2 million, which represent 19.9 percent of market deposits. Ten depository institutions would remain in the banking market. The HHI would increase 198 points to 3252.

North Carolina

Rutherford

Wachovia operates the second largest depository institution in the market, controlling deposits of approximately \$122.9 million, which represent 19.2 percent of market deposits. SouthTrust operates the seventh largest depository institution in the market, controlling deposits of approximately \$31.3 million, which represent 4.9 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the second largest depository institution in the market, controlling deposits of approximately \$154.2 million, which represent 24.1 percent of market deposits. Seven depository institutions would remain in the banking market. The HHI would increase 189 points to 2153.

Salisbury

Wachovia operates the third largest depository institution in the market, controlling deposits of approximately \$182.5 million, which represent 21 percent of market deposits. SouthTrust operates the ninth largest depository institution in the market, controlling deposits of approximately \$15.2 million, which represent 1.7 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the third largest depository institution in the market, controlling deposits of approximately \$197.7 million, which represent 22.7 percent of market deposits. Ten depository institutions would remain in the banking market. The HHI would increase 70 points to 2221.

Shelby

Wachovia operates the sixth largest depository institution in the market, controlling deposits of approximately

\$32.4 million, which represent 4.1 percent of market deposits. SouthTrust operates the eighth largest depository institution in the market, controlling deposits of approximately \$11.7 million, which represent 1.5 percent of market deposits. On consummation of the proposal, Wachovia would operate the fifth largest depository institution in the market, controlling deposits of approximately \$44.1 million, which represent 5.6 percent of market deposits. Eight depository institutions would remain in the banking market. The HHI would increase 112 points to 2772.

Virginia

Richmond

Wachovia operates the largest depository institution in the market, controlling deposits of approximately \$5.2 billion, which represent 27 percent of market deposits. SouthTrust operates the seventh largest depository institution in the market, controlling deposits of approximately \$307.8 million, which represent 1.6 percent of market deposits. On consummation of the proposal, Wachovia would continue to operate the largest depository institution in the market, controlling deposits of approximately \$5.5 billion, which represent 28.6 percent of market deposits. Twenty-seven depository institutions would remain in the banking market. The HHI would increase 87 points to 2031.

Appendix C

Market Data for Certain Banking Markets with Divestitures

Orlando, Florida

Wachovia operates the third largest depository organization in the market, controlling deposits of \$2.7 billion, which represent approximately 13.5 percent of market deposits. SouthTrust is the fifth largest depository organization in the market, controlling deposits of approximately \$795.6 million, which represent approximately 3.9 percent of market deposits. Wachovia proposes to divest one SouthTrust branch in the De Land RMA portion of the banking market to either an out-of-market depository organization or an in-market depository organization that has less than 2 percent of total deposits in the market. This branch had deposits of approximately \$63.9 million as of June 30, 2003. After the proposed divestiture and on consummation of the merger, Wachovia would continue to operate the third largest depository organization in the market, controlling deposits of approximately \$3.4 billion, which represent approximately 17.1 percent of market deposits. The HHI would increase by 96 points to 1555. At least 44 depository institutions would remain in the market.

Augusta (Georgia and South Carolina)

Wachovia operates the largest depository organization in the market, controlling deposits of \$1.2 billion, which

represent approximately 26.1 percent of market deposits. SouthTrust is the sixth largest depository organization in the market, controlling deposits of approximately \$389.3 million, which represent approximately 8.5 percent of market deposits. Wachovia proposes to divest three SouthTrust branches in the Augusta RMA portion of the banking market to an out-of-market depository organization. These branches had deposits of approximately \$127 million as of June 30, 2003. Wachovia has committed to divest not less than \$105 million in deposit liabilities. After the proposed divestitures and on consummation of the merger, Wachovia would continue to operate the largest depository institution in the market, controlling deposits of approximately \$1.5 billion, which represent approximately 32.3 percent of market deposits. The HHI would increase by not more than 361 points and would not exceed 1764. At least 13 depository institutions would remain in the market.

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

Park National Corporation Newark, Ohio

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

Park National Corporation (“Park”), a bank holding company within the meaning of the Bank Holding Company Act (“BHC Act”), has requested the Board’s approval under sections 4(c)(8) and 4(j) of the BHC Act and section 225.24 of the Board’s Regulation Y¹ to merge with First Federal Bancorp, Inc. (“First Federal”) and thereby acquire its wholly owned federal savings bank, First Federal Savings Bank of Eastern Ohio (“FFSB”), both in Zanesville, Ohio. Park also has requested the Board’s approval under section 3 of the BHC Act to control Century National Bank, Zanesville, Ohio, after FFSB converts to a national bank and merges with one of Park’s existing bank subsidiaries.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (69 *Federal Register* 55,632 and 60,152 (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.

Park, with total consolidated assets of \$5.1 billion, is the 11th largest depository organization in Ohio, controlling

deposits of \$3.5 billion.³ First Federal, with total consolidated assets of \$258.4 million, is the 75th largest depository organization in Ohio, controlling deposits of \$183.6 million. On consummation of the proposal and after accounting for the divestiture discussed in this order, Park would remain the 11th largest depository organization in Ohio, controlling deposits of \$3.7 billion, which represent approximately 1.9 percent of the total deposits in insured depository institutions in the state.

The Board previously has determined by regulation that the operation of a savings association by a bank holding company is closely related to banking for purposes of section 4(c)(8) of the BHC Act.⁴ The Board requires that savings associations acquired by bank holding companies conform their direct and indirect activities to those permissible for bank holding companies under section 4 of the BHC Act. Park has committed to conform all the activities of FFSB to those permissible under section 4(c)(8) and Regulation Y.

Section 4(j)(2)(A) of the BHC Act requires the Board to determine that Park’s acquisition of First Federal “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.”⁵ As part of its evaluation of a proposal under these public interest factors, the Board reviews the financial and managerial resources of the companies involved, the effect of the proposal on competition in the relevant markets, and the public benefits of the proposed transaction. In acting on notices to acquire a savings association, the Board also reviews the records of the relevant insured depository institutions under the Community Reinvestment Act (“CRA”).⁶

Competitive Considerations

As part of its review under section 3 of the BHC Act and its consideration of the public interest factors under section 4 of the BHC Act, the Board has considered carefully the competitive effects of the proposal in light of all the facts of record.⁷ Park and First Federal compete directly in the Coshocton and Muskingum, Ohio banking markets.⁸ The Board has reviewed carefully the competitive effects of the proposal in these banking markets in light of all the facts of record, including the number of competitors that would remain in the market, the relative share of total deposits in depository institutions in the market (“market

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

2. 12 U.S.C. § 1842(c)(3). Park proposes to acquire FFSB through a series of transactions. After Park’s merger with First Federal, FFSB will convert to a national bank (“New National Bank”), and Park’s wholly owned subsidiary, Century National Bank, will merge into New National Bank, with New National Bank as the surviving institution to be known as Century National Bank. Park has filed an application with the Office of the Comptroller of the Currency (“OCC”) for approval of the proposed conversion and merger transactions.

3. Asset and deposit data are as of June 30, 2004, and reflect merger and acquisition activity through October 29, 2004. In this context, depository institutions include commercial banks, savings banks, and savings associations.

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

5. 12 U.S.C. § 1843(j)(2)(A).

6. 12 U.S.C. § 2901 et seq.

7. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991).

8. The Muskingum, Ohio banking market recently has been renamed the Zanesville, Ohio banking market.

deposits”) that Park would control,⁹ the concentration level of market deposits and the increase in this level as measured by the Herfindahl–Hirschman Index (“HHI”) under the Department of Justice Merger Guidelines (“DOJ Guidelines”),¹⁰ and other characteristics of the markets.

Although the Coshocton market¹¹ would remain highly concentrated after consummation of the proposal, the increase in the post-merger HHI would be consistent with the DOJ Guidelines and Board precedent.¹² Five competitors would remain in the banking market.

In the Muskingum banking market, Park is the second largest depository organization, controlling \$259.7 million of deposits, which represents approximately 21.4 percent of market deposits.¹³ First Federal is the sixth largest depository organization in the market, controlling approximately \$79.8 million in deposits, which represents approximately 6.6 percent of market deposits. To mitigate the potentially adverse competitive effects of the proposal in the Muskingum banking market, Park has committed to divest one branch in the market with at least \$12.98 million in deposits to an out-of-market depository organization.¹⁴

9. Market share data are based on calculations in which the deposits of thrift institutions are included at 50 percent before consummation. The Board has previously 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 calculation of market share on a 50 percent weighted basis. Because FFSB’s deposits are being acquired by a commercial banking organization, they are included at 100 percent in the calculation of Park’s post-consummation share of market deposits. See *Norwest Corporation*, 78 *Federal Reserve Bulletin* 452 (1992); *First Banks, Inc.*, 76 *Federal Reserve Bulletin* 669 (1990).

10. Under these guidelines, 49 *Federal Register* 26,823 (1984), a market 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 thresholds for an increase in the HHI when screening bank mergers and acquisitions for anticompetitive effects implicitly recognize the competitive effects of limited-purpose and other nondepository financial entities.

11. The Coshocton banking market is defined as Coshocton County, Ohio.

12. Park operates the fifth largest depository institution in the market, controlling deposits of approximately \$20.8 million, which represent 6 percent of market deposits. First Federal operates the sixth largest depository institution in the market, controlling deposits of \$7.4 million, which represent 2.1 percent of market deposits. On consummation of the proposal, Park would remain the fifth largest depository institution in the market, controlling deposits of \$35.5 million, which represent 10 percent of market deposits. The HHI would decrease by 34 points to 2291.

13. The Muskingum banking market is defined as Muskingum County and Harrison Township in Perry County, all in Ohio.

14. Park has committed that, before consummating the proposed merger, it will execute an agreement for the proposed divestiture in the Muskingum market, consistent with this order, with a purchaser determined by the Board to be competitively suitable. Park also has committed to complete the divestiture within 180 days after consummation of the proposed merger. In addition, Park has committed that, if it is unsuccessful in completing the proposed divestiture within such time period, it will transfer the unsold branch to an independent

trustee that will be instructed to sell such branch to an alternate purchaser or purchasers in accordance with the terms of this order and without regard to price. Both the trustee and any alternate purchaser must be deemed acceptable to the Board. See *BankAmerica Corporation*, 78 *Federal Reserve Bulletin* 338 (1992); *United New Mexico Financial Corporation*, 77 *Federal Reserve Bulletin* 484 (1991).

On consummation of the proposal and after accounting for the proposed divestiture, Park would remain the second largest depository organization in the market, controlling approximately \$406.3 million of deposits, which represents approximately 31.4 percent of market deposits. The HHI would increase by not more than 237 points and would not exceed 2816.

A number of factors indicate that the proposal is not likely to have a significantly adverse effect on competition in the Muskingum banking market. After the proposed divestiture to an out-of-market depository organization, eight depository institutions would remain in the market. Moreover, the largest bank competitor would control more than 40 percent of market deposits and operate a large number of branches. Four additional bank competitors including Park would control more than 5 percent of market deposits. One bank entered the market de novo in 2000, and the Muskingum market has economic characteristics that suggest it is moderately attractive for new entry. Per capita income in 2002 and deposit growth between 2000 and 2003 exceeded the averages for nonmetropolitan counties in the state.

The Department of Justice has reviewed the proposal and advised the Board that consummation is not likely to have a significantly adverse effect on competition in the Muskingum banking market. The other federal banking agencies also have been afforded an opportunity to comment on the proposal and have not objected.

Based on these and all other 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 Coshocton and Muskingum banking markets or any other relevant banking market and that competitive considerations are consistent with approval.

Financial and Managerial Resources and Future Prospects

In reviewing the proposal under sections 3 and 4 of the BHC Act, the Board has carefully considered the financial and managerial resources and future prospects of Park and First Federal and their respective subsidiaries. The Board also has reviewed the effect the transaction would have on those resources in light of all the facts of record. The Board’s review of these factors has considered, among other things, confidential reports of examination and other supervisory information received from the primary federal supervisors of the organizations involved, as well as publicly reported and other financial information provided by Park and First Federal. In addition, the Board has consulted with the relevant supervisory agencies, including the Office of Thrift Supervision (“OTS”).

trustee that will be instructed to sell such branch to an alternate purchaser or purchasers in accordance with the terms of this order and without regard to price. Both the trustee and any alternate purchaser must be deemed acceptable to the Board. See *BankAmerica Corporation*, 78 *Federal Reserve Bulletin* 338 (1992); *United New Mexico Financial Corporation*, 77 *Federal Reserve Bulletin* 484 (1991).

Park and its subsidiary insured depository institutions are well capitalized and would remain so on consummation of the proposal. The merger would be effected by a cash purchase of First Federal's shares and outstanding stock options. Park has represented that it will fund the merger through the liquidation of a portion of its investment portfolio and would not incur debt to consummate the proposal.

The Board also has considered the managerial resources of Park, First Federal, and FFSB, particularly in light of the supervisory experience of the other relevant banking supervisory agencies with the organizations and their records of compliance with applicable banking laws. The Board has reviewed assessments by the relevant banking supervisory agencies of the organizations' management and of the risk-management systems of Park and of the operations of First Federal and FFSB. The Board also has considered Park's plans to integrate FFSB into its organization.

Based on all the facts of record, the Board concludes that the financial and managerial resources of the organizations involved in the proposal are consistent with approval under sections 3 and 4 of the BHC Act.

Convenience and Needs Considerations

In acting on proposals under section 3 of the BHC Act, the Board is also required to consider the effects of the proposal on the convenience and needs of the communities to be served and to take into account the records of the relevant insured depository institutions under the CRA.¹⁵ In addition, the Board must review the records of performance under the CRA of the relevant insured depository institutions when acting on a notice under section 4 of the BHC Act to acquire 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 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.

All of Park's depository institutions, including Century National Bank, received either an "outstanding" or a "satisfactory" rating at their most recent CRA performance evaluations.¹⁶ FFSB received a "satisfactory" rating at its most recent CRA performance evaluation by the OTS, as of February 2003. Based on all the facts of record, the Board concludes that the CRA performance records of the institutions involved are consistent with approval of this proposal.

15. See, e.g., *Citigroup Inc.*, 88 *Federal Reserve Bulletin* 485 (2002); *Banc One Corporation*, 83 *Federal Reserve Bulletin* 602 (1997).

16. Century National Bank received a "satisfactory" rating by the OCC, as of April 20, 2002.

Other Considerations

As part of its evaluation of the public interest factors under section 4 of the BHC Act, the Board also has carefully reviewed the public benefits and possible adverse effects of the proposed transaction. The record indicates that consummation of the proposal would allow Park to broaden and enhance the services provided to FFSB's current customers, including expanded trust management services and a larger network of ATM facilities, and would provide longer branch operating hours and more days of service for the customers. 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 review set forth in section 4(j)(2) of the BHC Act.

Conclusion

Based on the foregoing and having reviewed all the facts of record, the Board has determined that the application and notice 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 Board's approval is specifically conditioned on compliance by Park with all the representations and commitments made to the Board in connection with this order and the receipt of all other regulatory approvals. The Board's approval also is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c) (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 this action, the commitments and conditions are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

Park may not consummate the banking acquisition in the proposal before the fifteenth calendar day after the effective date of this order, and no part of this 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 Cleveland, acting pursuant to delegated authority.

By order of the Board of Governors, effective December 7, 2004.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

*ORDERS ISSUED UNDER FEDERAL RESERVE ACT**RBC Centura**Bank Rocky Mount, North Carolina**Order Approving Establishment of a Branch*

RBC Centura Bank (“Bank”), a state member bank, has given notice under section 9 of the Federal Reserve Act (“Act”)¹ of its intent to establish a branch at 4221 W. Boy Scout Boulevard, Suite 190, Tampa, Florida.

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published in accordance with the Board’s Rules of Procedure.² The time for filing comments has expired, and the Board has considered the notice and all comments received in light of the factors specified in the Act.

Bank is the 25th largest depository organization in Florida, controlling approximately \$1.2 billion in deposits, which represents less than 1 percent of total deposits of insured depository institutions in the state.³ Bank and its direct parent company, RBC Centura Banks, Inc., also in Rocky Mount, are wholly owned subsidiaries of Royal Bank of Canada, Montreal, Canada. Bank operates branches in North Carolina, South Carolina, Virginia, Florida, and Georgia.

Considerations Under the Federal Reserve Act

Section 9(4) of the Act⁴ requires the Board, when acting on a branch application, to consider the financial condition of the applying bank, the general character of its management, and whether its corporate powers are consistent with the purposes of the Act.⁵ The Board has carefully reviewed these factors in light of all the facts of record. As part of its consideration, the Board has reviewed reports of examination and other supervisory information. Based on all the facts of record, the Board has concluded that the statutory factors are consistent with approval of the notice.⁶

1. 12 U.S.C. § 321 et seq.

2. 12 CFR 262.3(b).

3. Statewide and market deposit data and ranking data are as of June 30, 2003, and are updated to reflect subsequent merger activity as of October 22, 2004. Insured depository institutions include all insured banks, savings banks, and savings associations.

4. 12 U.S.C. § 322.

5. Section 208.6 of the Board’s Regulation H, which implements Section 9(4) of the Act, provides that the factors given special consideration by the Board in acting on branch applications include the following:

- (1) the financial history and condition of the applying bank and the general character of its management;
- (2) the adequacy of the bank’s capital and its future earnings prospects;
- (3) the convenience and needs of the community to be served by the branch; and
- (4) in the case of branches with deposit-taking capability, the bank’s performance under the Community Reinvestment Act. 12 CFR 208.6(b).

6. Section 9 of the Act, 12 U.S.C. § 321, which applies the interstate branching provisions of the National Bank Act, 12 U.S.C.

Convenience and Needs Considerations

In acting on a notice to establish a branch, the Board also is required to take into account the convenience and needs of the community to be served, including the bank’s record under the Community Reinvestment Act (“CRA”).⁷ 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 supervisory authority to assess the institution’s record of meeting the credit needs of its entire community, including low- and moderate-income (“LMI”) neighborhoods, in evaluating branch applications. The Board has carefully considered the effect of the proposal on the convenience and needs of the communities served by Bank in light of all the facts of record, including a public comment received on the proposal.

A. CRA Performance Evaluation

As provided in the CRA, the Board has evaluated Bank’s performance in light of evaluations by the appropriate federal supervisor of its CRA performance record. 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.⁸ Bank received an overall “satisfactory” rating at its most recent CRA examination by the Federal Reserve Bank of Richmond, as of March 29, 2004, with ratings of “high satisfactory” under the lending, investment, and service tests.

B. Services and Branch Closing

The Board received a comment opposing the proposal. The commenter expressed dissatisfaction with Bank’s level of service and alleged anticompetitive practices in the Rocky Mount area and asserted that Bank imposes unreasonably high service charges.⁹ Specifically, the commenter con-

§ 36(e), provides that a state member bank may not establish a branch in any state other than a bank’s home state, except under certain specified conditions, including when a bank has already established a branch in that state. Bank has previously established branches in Florida. *See, e.g., Royal Bank of Canada/RBC Centura Banks, Inc., 89 Federal Reserve Bulletin 139 (2003).*

7. 12 U.S.C. § 2901 et seq.; 12 CFR 208.6(b).

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

9. Commenter contended that after the merger of its predecessor banks to form Bank, Bank imposed additional fees and account charges and reduced its level of service. Commenter also asserted that Bank should not be allowed to expand into other markets until it reduced its service charges. Bank represented that the fees charged in connection with its banking services are reasonable and compare favorably with service fees charged by other banks. Bank also has offered to have a personal banker review the commenter’s accounts to determine if other types of accounts would better serve his banking needs. Although the Board previously has recognized that banks help to serve the banking needs of their communities by making basic banking services available at a nominal or no charge, the CRA does

tended that Bank had closed a banking office in Rocky Mount and subsequently refused to sell the closed location to a bank competitor in an effort to monopolize the local market. This branch closing allegedly resulted in inconvenience to customers for banking services.

Bank represented that as a result of the merger of its predecessor banks in 1990, Bank consolidated two branches in a shopping center in the Edgecombe County portion of the Rocky Mount, North Carolina banking market ("Rocky Mount Market")¹⁰ into one location from which it continues to provide banking services and has retained the other location in the shopping center as a mail center and storage facility. Bank also indicated it is unaware of the attempted purchase alleged by the commenter.¹¹ Bank noted that it is the only bank that operates a branch in Edgecombe County.¹² Based on a review of these and other facts of record, the Board finds no evidence to support commenter's contention that Bank has engaged in anticompetitive behavior in the Rocky Mount area.

Commenter also expressed dissatisfaction with Bank's level of service in the Rocky Mount area. As noted previously, Bank received an overall "satisfactory" rating in its most recent CRA evaluation, with a "high satisfactory" under the service test overall and separately in North Carolina. Examiners considered Bank's performance in its Rocky Mount assessment area under the service test to be excellent.¹³

Examiners noted that Bank's branch locations and business hours were convenient and met the needs of the Rocky Mount assessment area and that its distribution of branches within the area was good. Examiners also noted that Bank provided customers with 24-hour access to their accounts through ATMs and bank-by-computer service. In addition, examiners found the bank to be a leader in facilitating community development service projects within the Rocky Mount assessment area.

Examiners also concluded that Bank's branch closings, both overall and in North Carolina, had not adversely affected LMI neighborhoods. Examiners reported that

not require that banks limit the fees charged for services. *See Bank of America Corporation*, 90 *Federal Reserve Bulletin* 217, 226 n.50 (2004).

10. The Rocky Mount Market includes Edgecombe, Nash, and Wilson Counties in North Carolina. Bank is the largest depository institution in the market, controlling \$628.4 million in deposits, which represents 29.5 percent of market deposits in insured depository institutions. The banking market is considered attractive for entry. Since 2000, three depository institutions have entered the Rocky Mount Market de novo, and three institutions have entered the market by acquisition. Twelve commercial banks and two thrifts compete in the market.

11. Bank noted that it leases the location identified by the commenter and that inquiries about its purchase might have been made directly to the landlord or landlord's representatives without the bank's knowledge.

12. In addition to the Oakwood Shopping Center branch, Bank operates a branch in Harambee Square, also in Edgecombe County.

13. Bank's Rocky Mount assessment area includes Edgecombe and Nash Counties.

Bank maintained a written branch closure policy that conforms with regulatory requirements.¹⁴

Based on a review of these and other facts of record, the Board finds that commenter's allegations concerning Bank's level of service and convenience of branches in the Rocky Mount area do not warrant denial of the proposal.

C. Conclusion on Convenience and Needs Considerations

The Board has considered carefully the entire record as it relates to convenience and needs considerations, including the comment received, information provided by Bank, Bank's most recent CRA performance examination, and confidential supervisory information. The Board notes that the establishment of a new branch in Tampa would expand the availability of products and services to banking customers. Based on all the facts of record, the Board concludes that convenience and needs considerations, including Bank's record of performance under the CRA, are consistent with approval of the proposal.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the notice should be, and hereby is, approved. The Board's approval is specifically conditioned on Bank's compliance with all commitments made to the Board in connection with the proposal. The commitments and conditions relied on by the Board are deemed to be conditions imposed in writing in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

Approval of this notice is subject to the establishment of the proposed branch within one year of the date of this order, unless such period is extended by the Board or the Federal Reserve Bank of Richmond, acting under authority delegated by the Board.

By order of the Board of Governors, effective November 23, 2004.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

14. 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 a 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.