Legal Developments

ORDERS ISSUED UNDER BANK HOLDING COMPANY ACT

Orders Issued Under Section 3 of the Bank Holding Company Act

Associated Banc-Corp
Green Bay, Wisconsin

Order Approving the Merger of Bank Holding Companies

Associated Banc-Corp ("Associated"), a bank holding company within the meaning of the Bank Holding Company Act ("BHC Act"), has requested the Board's approval under section 3 of the BHC Act[1] to merge with State Financial Services Corporation ("State Financial"), Milwaukee, and thereby acquire its subsidiary bank, State Financial Bank, National Association ("State Bank"), Hales Corners, all of Wisconsin.

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (70 *Federal Register* 38,930 (2005)). The time for filing comments has expired, and the Board has considered the application and all comments received in light of the factors set forth in section 3 of the BHC Act.

Associated, with total consolidated assets of approximately $20.8 billion, operates one depository institution, Associated Bank, National Association ("Associated Bank"), also in Green Bay, with branches in Wisconsin, Illinois, and Minnesota.[2] Associated Bank is the third largest depository institution in Wisconsin, controlling deposits of approximately $8.4 billion, which represent 8.7 percent of the total amount of deposits of insured depository institutions in the state ("state deposits"). Associated Bank is the 23rd largest depository institution in Illinois, controlling deposits of approximately $2.2 billion, which represent less than 1 percent of the total amount of state deposits.

State Financial, with total consolidated assets of approximately $1.5 billion, operates one depository institution, State Bank, with branches in Wisconsin and Illinois. State Financial is the 24th largest insured depository organization in Wisconsin, controlling deposits of approximately $472.1 million. State Bank is the 63rd largest depository institution in Illinois, controlling deposits of approximately $595.3 million.

On consummation of the proposal, Associated would have consolidated assets of approximately $22.5 billion and would control deposits of $13.2 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the United States. Associated would remain the third largest depository organization in Wisconsin, controlling deposits of approximately $8.9 billion, which represent 9.2 percent of state deposits. Associated would become the 19th largest depository organization in Illinois, controlling deposits of approximately $2.8 billion, which represent 1 percent of state deposits.

Interstate Analysis

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the home state of such bank holding company if certain conditions are met. For purposes of the BHC Act, the home state of Associated is Wisconsin,[3] and State Financial is located in Wisconsin and Illinois.[4]

Based on a review of the facts of record, including a review of relevant state statutes, the Board finds that all conditions for an interstate acquisition enumerated in section 3(d) of the BHC Act are met in this case.[5] In light of

1. 12 U.S.C. § 1842.

2. Associated Bank Minnesota, National Association, Minneapolis, Minnesota, and Associated Bank Chicago, Chicago, Illinois, were merged into Associated Bank on July 16, 2005. Asset, deposit, and ranking data are as of June 30, 2004, and are adjusted to reflect these mergers. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

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

4. 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. 12 U.S.C. §§ 1841(o)(4)–(7) and 1842(d)(1)(A) and (d)(2)(B). Associated Bank also operates branches in Minnesota and Illinois.

5. 12 U.S.C. §§ 1842(d)(1)(A)–(B), 1842(d)(2)(A)–(B). Associated is adequately capitalized and adequately managed, as defined by applicable law. Associated's proposed acquisition of State Financial's branches in Illinois is not subject to the minimum age requirement or deposit limit imposed by Illinois law. On consummation of the proposal, Associated 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

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

Competitive Considerations

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

Associated and State Financial compete directly in the Milwaukee and Walworth banking markets in Wisconsin and the Chicago banking market in Illinois.[7] The Board has carefully reviewed the competitive effects of the proposal in each of these banking markets in light of all the facts of record, including the number of competitors that would remain in the markets, the relative shares of total deposits in depository institutions in each market (''market deposits'') controlled by Associated Bank and State Bank,[8] the concentration level of market deposits and the increase in this level as measured by the Herfindahl-Hirschman Index (''HHI'') under the Department of Justice Merger Guidelines (''DOJ Guidelines''),[9] and other characteristics of the markets.

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in each of these banking markets. After consummation, the Milwaukee banking market would remain moderately concentrated, and the Walworth and Chicago banking markets would remain unconcentrated, as measured by the HHI. In each market, the increase in concentration would be small and numerous competitors would remain.[10]

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

Based on all the facts of record, the Board concludes that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of resources in any of the banking markets in which Associated and State Financial 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, Managerial, and Supervisory Considerations

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

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 measures, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the financial condition of the combined organization at consummation, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

Based on its review of these factors, the Board finds that Associated has sufficient financial resources to effect the proposal. The proposed transaction is structured as a share

insured depository institutions in Illinois. All other requirements of section 3(d) of the BHC Act would be met on consummation of the proposal.

6. 12 U.S.C. § 1842(c)(1).

7. The Milwaukee banking market is defined as Milwaukee, Waukesha, and Ozaukee Counties; East Troy township in Walworth County; Waterford, Norway, and Raymond townships in Racine County; Ixonia township in Jefferson County; and Polk, Jackson, Richfield, and Germantown townships in Washington County, all in Wisconsin. The Walworth banking market is defined as Walworth County, excluding East Troy township; Burlington township in Racine County; and Wheatland and Randall townships in Kenosha County, all in Wisconsin. The Chicago banking market is defined as Cook, DuPage, and Lake Counties, all in Illinois.

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

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

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

exchange and cash purchase. Associated will use existing resources to fund a cash purchase of fractional shares. Associated and Associated Bank are well capitalized and would remain so on consummation of the proposal.

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

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

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board also must consider the effects of the proposal on the convenience and needs of the communities to be served and take into account the records of the relevant insured depository institutions under the Community Reinvestment Act (''CRA'').[11] The CRA requires the federal financial supervisory agencies to encourage insured depository institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation, and requires the appropriate federal financial supervisory agency to take into account a relevant depository institution's record of meeting the credit needs of its entire community, including low- and moderate-income (''LMI'') neighborhoods, in evaluating bank expansionary proposals.[12]

The Board has considered carefully all the facts of record, including data reported by Associated under the Home Mortgage Disclosure Act (''HMDA''),[13] reports of examination of the CRA performance records of the subsidiary banks of Associated and State Financial,[14] other information provided by Associated, confidential supervisory information, and public comment received on the proposal. A commenter alleged, based on 2003 HMDA data, that Associated Bank had low levels of home mortgage lending to LMI borrowers and on properties in LMI census tracts, and to minority borrowers and on properties in substantially minority census tracts, in the Milwaukee/Waukesha Metropolitan Statistical Area (''Milwaukee MSA'').[15] The commenter also criticized Associated Bank's record of small business lending in LMI census tracts in the Milwaukee MSA. In addition, the commenter criticized Associated Bank's and State Bank's levels of community development investments in LMI and minority communities in that MSA.

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.[16]

Associated Bank received a ''satisfactory'' rating at its most recent CRA evaluation by the Office of the Comptroller of the Currency (''OCC''),[17] as of November 10, 2003.[18] State Bank received an overall rating of ''satisfactory'' at its most recent CRA performance evaluation by the OCC, as of August 26, 2002.[19] The Board also consulted with the OCC about the CRA performance of Associated Bank and State Bank since their most recent CRA

11. 12 U.S.C. § 2901 et seq.

12. 12 U.S.C. § 2903.

13. 12 U.S.C. § 2801 et seq.

14. The Board's analysis of the HMDA data of Associated Bank includes HMDA data reported by Associated Bank, Associated Bank's subsidiary mortgage lending company, and Associated's subsidiary banks that were subsequently merged into Associated Bank. The Board reviewed HMDA data for 2002 and 2003 reported by Associated Bank in the bank's primary assessment areas. Specifically, the Board reviewed HMDA data for Associated Bank in the Green Bay and Milwaukee MSAs and in the bank's assessment areas on a statewide basis in Wisconsin.

15. A substantially minority census tract means a census tract with a minority population of 50 percent or more.

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

17. Examiners evaluated Associated Bank's CRA performance in its twelve assessment areas in Wisconsin and took into consideration the home mortgage lending of the bank's subsidiary, Associated Mortgage, Inc., De Pere, Wisconsin. The majority of the bank's deposits, loans, and branches were in the Milwaukee and Green Bay MSAs and in the non-MSA areas of Wisconsin. The evaluation period for home mortgage loans and loans to small businesses and farms was January 1, 1999, through December 31, 2002. The evaluation period for community development loans and the investment and service tests was March 8, 1999, to November 10, 2003.

18. As noted, Associated Bank Minnesota, National Association and Associated Bank Chicago were merged into Associated Bank on July 16, 2005. The most recent CRA performance evaluation ratings for these banks are as follows: Associated Bank Chicago—''satisfactory'' rating from the Federal Deposit Insurance Corporation, as of December 1, 2003; and Associated Bank Minnesota, National Association—''satisfactory'' rating from the OCC, as of December 6, 2004. Associated Trust Company, National Association, Milwaukee, is a limited-purpose trust company that is not examined under the CRA. *See* 12 CFR 25.11(c)(3).

19. The evaluation period for home mortgage loans and loans to small businesses was January 1, 2000, through June 30, 2002. The evaluation period for community development loans and the investment and services tests was May 1, 2000, to August 26, 2002.

evaluations.[20] Associated has indicated that, on consummation of the proposal, it would evaluate the best practices for CRA-related lending programs of Associated Bank and State Bank, with the goal of using the institutions' combined resources to meet the credit and banking needs of LMI individuals and neighborhoods, including minority neighborhoods.[21]

Associated Bank. The November 2003 CRA evaluation of Associated Bank was discussed in the Board's order approving Associated's proposal to acquire First Federal Capital Corporation (''First Federal Capital'') and its wholly owned subsidiary, First Federal Capital Bank, a federally chartered savings association, both in La Crosse, Wisconsin.[22] Based on a review of the record in this case, the Board hereby reaffirms and adopts the facts and findings detailed in the First Federal Capital Order concerning Associated Bank's CRA performance record. Associated provided the Board additional information about its CRA performance since its November 2003 evaluation.

In the November 2003 evaluation, examiners reported that the total volume of Associated Bank's housing-related and small business loans demonstrated excellent responsiveness to credit needs across the bank's assessment areas, including the Milwaukee MSA.[23] Examiners stated that the bank demonstrated good loan distribution among borrowers of different geographies and income levels and noted favorably that the bank's market share of home purchase loans to low-income areas exceeded its overall market share in the Milwaukee MSA. Examiners noted, however, that Associated Bank's opportunity to extend home finance loans in LMI areas was limited by the small number of owner-occupied units in those geographies.

Associated stated that the HMDA data did not reflect all its lending programs designed to assist LMI borrowers and small businesses. Associated represents that it participates in the home purchase and home improvement loan programs of the Wisconsin Housing and Economic Development Authority (''WHEDA''), which offer long-term, below-market, fixed-rate financing for LMI first-time homebuyers and home improvement loans at fixed interest rates with no equity requirements for LMI homeowners.[24] Associated stated that it has provided more than $93 million in funding for WHEDA loans during the years 2001 through 2004. Associated noted that it was the state's largest WHEDA loan producer in 2004 and had quadrupled its number and dollar volume of loans extended under the program from 2003 to 2004, from 147 loans totaling $13.6 million to 609 loans totaling $59.2 million.[25] In addition, Associated stated that it has further met the credit needs of its communities through participation in lending programs sponsored by the Small Business Administration (''SBA'') and has extended more than $44 million in such loans during 2004.[26]

In the November 2003 evaluation, examiners reported that the bank's level of qualified investments and grants was good, considering the needs and opportunities available to the bank and its size and financial capability.[27] During the evaluation period, the bank's qualified investments in Wisconsin totaled more than $14 million. Examiners stated that Associated Bank's responsiveness to credit and community development needs in the Milwaukee MSA was excellent and that the bank was responsive to those identified needs of the community.[28]

In addition, examiners found that Associated Bank had an adequate level of community development services and that the bank's delivery systems were reasonably accessible to geographies and individuals of different income levels.[29]

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20. Associated has filed an application under the Bank Merger Act (12 U.S.C. § 1828(c)) with the OCC to merge State Bank into Associated Bank, with Associated Bank as the surviving entity.

21. The commenter expressed concern that the proposed acquisition would negatively affect State Bank's CRA performance, which the commenter asserted was stronger than Associated Bank's performance.

22. The First Federal Capital proposal was approved by the Board on August 16, 2004 (''First Federal Capital Order''). *Associated BancCorp*, 90 *Federal Reserve Bulletin* 503 (2004).

23. The commenter expressed concern that Associated Bank lagged its competitors in home mortgage lending to LMI individuals and on properties in LMI census tracts in the Milwaukee MSA. The percentages of Associated Bank's total HMDA-reportable loans originated for borrowers in LMI census tracts in the Milwaukee MSA was below the percentage for the aggregate of lenders (''aggregate lenders'') in 2003. However, the number of loans Associated Bank originated on properties in LMI census tracts in the Milwaukee MSA increased substantially from 2002 to 2003. In addition, other HMDA data suggest that Associated Bank's lending is more favorable. For example, the HMDA data for 2003 indicate that the percentages of Associated Bank's total HMDA-reportable loans originated to LMI borrowers in the Milwaukee MSA exceeded the percentage for the MSA's aggregate lenders. In this context, the lending data of the aggregate lenders represent the cumulative lending for all financial institutions that have reported HMDA data in a particular area.

24. Associated also noted that it participates in several Federal Home Loan Affordable Housing programs that provide down-payment and closing-cost assistance to LMI borrowers. In addition, Associated Bank recently started its own Community Affordable Real Estate Mortgage Program (''CARE''). The CARE program provides low-cost loans with no down-payment requirements for qualified buyers in LMI areas, including LMI areas in the Milwaukee MSA.

25. These loans were not eligible for reporting as part of Associated Bank's HMDA data.

26. Associated Bank stated that it has Preferred Lender and Dedicated Authority Express designations from the SBA, which expedite the lending process.

27. The commenter expressed concern that Associated Bank's qualified investments in the Milwaukee MSA were primarily CRA-qualified, mortgage-backed securities and not direct grants. The CRA does not require banks to provide any particular type of qualified CRA investments to meet the credit needs of their communities.

28. Associated stated that it recently established Associated Community Development, LLC for the purpose of partnering and investing in affordable housing and commercial development principally in LMI areas, including LMI areas in the Milwaukee MSA.

29. The commenter expressed concerns about Associated Bank's and State Bank's branch distribution in LMI and predominantly minority census tracts in the Milwaukee MSA. A predominantly minority census tract means a census tract with a minority population of 80 percent or more. The OCC, as the appropriate federal supervisor of Associated's subsidiary banks, will continue to review Associated Bank's branch distribution in the course of conducting CRA performance evaluations of the bank.

State Bank. As noted, State Bank received an overall "satisfactory" rating in its August 2002 evaluation. The institution received a "high satisfactory" rating under the lending and service tests. Examiners 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 Milwaukee MSA to LMI borrowers than both the percentage of owner-occupied units and the bank's overall market share for home purchase loans in the MSA. Examiners also noted that State Bank had a good distribution of delivery systems that were accessible to geographies and individuals of different income levels in the assessment area.

Although State Bank's overall investment test performance was rated "low satisfactory," examiners characterized the bank's performance under this test in the Milwaukee MSA as adequate. Examiners reported that the institution's qualified community development investments included grants to 15 community development organizations in its assessment area and an investment in a minority-owned bank holding company that is certified as a Community Development Financial Institution ("CDFI"). The CDFI provided development banking services to the central city of Milwaukee through traditional and nontraditional bank products and services.

B. HMDA and Fair Lending Record

The Board has carefully considered Associated's lending record and HMDA data in light of public comment about its record of lending to minorities and in predominantly minority communities. The commenter expressed concern, based on 2003 HMDA data, that Associated Bank lagged its competitors in home mortgage lending to minorities and on properties in substantially minority census tracts in the Milwaukee MSA. As noted, the Board reviewed the HMDA data for 2002 and 2003 reported by Associated Bank in its primary assessment areas, including in the Milwaukee MSA and on a statewide basis in Wisconsin.

The number of total HMDA-reportable loans originated by Associated Bank to African-American or Hispanic borrowers and on properties in predominantly minority census tracts as a percentage of the bank's total HMDA-reportable loans generally lagged the performance of the aggregate lenders in the markets reviewed. However, the data indicate that the number and percentage of loans Associated Bank originated to African Americans and Hispanics increased in those markets from 2002 to 2003. In addition, the number of HMDA-reportable loans that Associated Bank originated on properties in predominantly minority census tracts in the Milwaukee MSA and the bank's Wisconsin assessment areas more than tripled from 2002 to 2003.

Although the HMDA data may reflect certain disparities in the rates of loan applications and originations among members of different racial groups in certain local areas, the HMDA data do not indicate that Associated 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, even with the recent addition of pricing information, provide only limited information about the covered loans.[30] HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution has engaged in illegal lending discrimination.

Because of the limitations of HMDA data, the Board has considered these data carefully and taken into account other information, including examination reports that provide on-site evaluations of compliance by the subsidiary depository and lending institutions of Associated with fair lending laws. Examiners noted no substantive violations of applicable fair lending laws in the examinations of the depository institutions controlled by Associated or State Financial.

The record also indicates that Associated has taken steps to ensure compliance with fair lending laws and other consumer protection laws. Associated Bank represented that its fair lending compliance program covers all aspects of the bank's services and includes underwriting standards and a second review of each loan marked for denial. Exceptions to underwriting standards must be reviewed by regional bank management. The bank stated that it monitors compliance by conducting internal tests of random samples of loans. Associated Bank's program will be implemented at State Bank.

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

Conclusion on CRA Performance Records

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 Associated, comments received on the proposal, and confidential supervisory information. The Board notes that the proposal would expand the availability and array of banking products and services to the customers of State Bank, including access to expanded branch and ATM networks. Based on a review of the entire record, and for the reasons discussed

30. 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.

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.[31]

Conclusion

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

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

By order of the Board of Governors, effective September 8, 2005.

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

Robert deV. Frierson
Deputy Secretary of the Board

Appendix

Market Data for Banking Markets

Unconcentrated Banking Markets

Walworth, Wisconsin

Associated operates the third largest depository institution in the market, controlling deposits of $141.1 million, which represent approximately 8.7 percent of market deposits. State Financial operates the 14th largest depository institution in the market, controlling deposits of approximately $26.4 million, which represent approximately 1.6 percent of market deposits. After the proposed acquisition, Associated would remain the third largest depository institution in the market, controlling deposits of approximately $167.5 million, which represent approximately 10.3 percent of market deposits. Nineteen depository institutions would remain in the banking market. The HHI would increase 28 points, to 971.

Chicago, Illinois

Associated operates the 42nd largest depository institution in the market, controlling deposits of $484.9 million, which represent less than 1 percent of market deposits. State Financial operates the 58th largest depository institution in the market, controlling deposits of approximately $323.5 million, which represent less than 1 percent of market deposits. After the proposed acquisition, Associated would operate the 33rd largest depository institution in the market, controlling deposits of approximately $808.4 million, which represent less than 1percent of market deposits. One hundred and eighty-seven depository institutions would remain in the banking market. The HHI would remain unchanged at 751.

Moderately Concentrated Banking Markets

Milwaukee, Wisconsin

Associated operates the fourth largest depository institution in the market, controlling deposits of $1.7 billion, which represent approximately 5.1 percent of market deposits. State Financial operates the 15th largest depository institution in the market, controlling deposits of approximately $445.7 million, which represent approximately 1.3 percent of market deposits. After the proposed acquisition, Associated would remain the fourth largest depository institution in the market, controlling deposits of approximately $2.2 billion, which represent approximately 6.4 percent of market deposits. Fifty-four depository institutions would remain in the banking market. The HHI would increase 13 points, to 1,772.

31. The commenter requested that the Board condition its approval of the proposal on Associated Bank's making certain lending, service, 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.*, *The Toronto-Dominion Bank*, 91 *Federal Reserve Bulletin* 277 (2005); *Fifth Third Bancorp*, 91 *Federal Reserve Bulletin* 63 (2005); *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 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 Associated under this factor, the Board similarly will review Associated's actual CRA performance record and the programs it has in place to meet the credit needs of its communities at that time.

Capital One Financial Corporation
McLean, Virginia

Order Approving the Merger of Bank Holding Companies

Capital One Financial Corporation (''Capital One''), a financial holding company within the meaning of the Bank Holding Company Act (''BHC Act''), has requested the Board's approval under section 3 of the BHC Act[1] to acquire Hibernia Corporation (''Hibernia'') and its subsidiary bank, Hibernia National Bank (''HNB''), both of New Orleans, Louisiana.[2]

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (70 *Federal Register* 24,796 (2005)). 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.

Capital One, with total consolidated assets of approximately $55.6 billion, is the 26th largest depository organization in the United States,[3] controlling deposits of approximately $25.9 billion. Capital One operates two subsidiary depository institutions in Virginia: Capital One Bank (''COB''), Glen Allen, and Capital One, F.S.B. (''COFSB''), McLean.

Hibernia, with total consolidated assets of approximately $22.2 billion, is the 50th largest depository organization in the United States, controlling deposits of $17.7 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the United States. In Louisiana, HNB is the largest depository institution, controlling deposits of $12.4 billion, which represent 22.4 percent of the total amount of deposits of insured depository institutions in the state.[4] HNB also operates branches in Texas and two mortgage loan production offices in Mississippi.

On consummation of the proposal, Capital One would become the 23rd largest depository organization in the United States, with total consolidated assets of approximately $80.1 billion (including pro forma accounting adjustments), and would control deposits of approximately $43.6 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the United States.

Interstate Analysis

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the home state of such bank holding company if certain conditions are met. For purposes of the BHC Act, the home state of Capital One is Virginia,[5] and HNB is located in Louisiana and Texas.[6]

Based on a review of the facts of record, including a review of relevant state statutes, the Board finds that all conditions for an interstate acquisition enumerated in section 3(d) of the BHC Act are met in this case.[7] In light of all the facts of record, the Board is permitted to approve the proposal under section 3(d) of the BHC Act.

Competitive Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market. The BHC Act also prohibits the Board from approving a proposed bank acquisition that would substantially lessen competition in any relevant banking market, unless the Board finds that the anticompetitive effects of the proposal clearly are outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.[8]

Capital One and Hibernia do not compete directly in any relevant banking market. Based on all the facts of record, the Board has concluded that consummation of the proposal would have no significant adverse effect on competition or on the concentration of banking resources in any relevant banking market and that competitive factors are consistent with approval.

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1. 12 U.S.C. § 1842.

2. Hibernia is a financial holding company that offers a range of financial products and services through its bank and nonbank subsidiaries, including two subsidiaries that engage in securities underwriting and brokerage activities and insurance agency activities under section 4(k)(4) of the BHC Act. Capital One proposes to acquire those 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. After consummation of this proposal Capital One intends to operate HNB as a subsidiary bank.

3. Asset and national ranking and deposit data are as of March 31, 2005. Asset and national ranking data are based on total assets reported by bank holding companies on Consolidated Financial Statements for Bank Holding Companies and by thrifts on Thrift Financial Reports. Deposit data reflect the total of the deposits reported by each organization's insured depository institutions in their Consolidated Reports of Condition and Income or Thrift Financial Reports.

4. State ranking and deposit data are as of June 30, 2004. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

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

6. 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. 12 U.S.C. §§ 1841(o)(4)–(7) and 1842(d)(1)(A) and (d)(2)(B).

7. 12 U.S.C. §§ 1842(d)(1)(A) and (B), 1842(d)(2)(A) and (B). Capital One is adequately capitalized and adequately managed, as defined by applicable law. HNB has been in existence and operated for the minimum period of time required by applicable state law (five years). On consummation of the proposal, Capital One would control less than 10 percent of the total amount of deposits of insured depository institutions in the United States and less than 30 percent of the total amount of deposits of insured depository institutions in Texas and Louisiana. All other requirements of section 3(d) of the BHC Act would be met on consummation of the proposal.

8. 12 U.S.C. § 1842(c)(1).

Financial, Managerial, and Supervisory Considerations

Section 3 of the BHC Act also requires the Board to consider the financial and managerial resources and future prospects of 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 reports of examination, other confidential supervisory information from the primary federal and state supervisors of the organizations involved, publicly reported and other financial information, information provided by Capital One, and public comments received on the proposal.[9]

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

Based on its review of these factors, the Board finds that Capital One has sufficient financial resources to effect the proposal. Capital One currently is well capitalized and would remain so on consummation of the proposal. The proposed transaction is structured as a partial share exchange and partial cash purchase of shares. Capital One will use existing resources to fund the cash purchase of shares.

The Board also has considered the managerial resources of Capital One and Hibernia and the managerial resources of the combined organization. The Board has reviewed the examination records of Capital One, Hibernia, and their subsidiary depository institutions, including assessments of their management, risk-management systems, and operations.[10] In addition, the Board has considered its supervisory experiences and those of the other relevant banking agencies with the organizations and their records of compliance with applicable banking law.[11] Capital One, Hibernia, and their subsidiary depository institutions are considered well managed. The Board also has considered Capital One's plans for implementing the proposal, including its proposed management after consummation.[12]

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

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board is required to consider the effects of the proposal on the convenience and needs of the communities to be served and to take into account the records of the relevant insured depository institutions under the Community Reinvestment Act ("CRA").[13] 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 opera-

9. The commenter reiterated its concern about Capital One's lobbying efforts in the Virginia legislature raised in a previous application by Capital One. *See Capital One Financial Corporation*, 90 *Federal Reserve Bulletin* 479 (2004). As the Board previously noted, such matters are outside 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).

10. The commenter criticized Capital One's and Hibernia's relationships with unaffiliated subprime lenders, 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. Capital One stated that its business relationships with such providers are limited to business credit-card loans or loans extended under Small Business Administration ("SBA") programs. Any such extensions of credit would be in the ordinary course of Capital One's small business credit-card lending activities or in accordance with SBA requirements. HNB's Small Business Lending Division extends a limited number of loans to businesses in these industries and HNB's commercial loan division extends credit to certain subprime lenders subject to certain limits. HNB requires an opinion letter from borrowers' counsel at the closing of each of these loans concluding that the borrowers' loans comply with the Truth in Lending Act and applicable state law. In addition, the agreement HNB typically uses to document loans to consumer finance companies includes a negative covenant that the borrower will not engage in activities that would violate applicable law or regulation, including laws or regulations related to predatory lending. HNB has represented that it monitors the borrower for compliance with this covenant by reviewing the borrower's annual compliance audit. Capital One has represented that neither it nor HNB plays any role in the lending practices or credit review processes of these firms.

11. The commenter also opposed the proposal based on news reports of lawsuits and investigations undertaken by the Attorneys General of Minnesota and West Virginia in their respective states relating to Capital One's marketing of its credit cards. These investigations and lawsuits are pending and have not yet reached conclusion, and there has been no determination of liability, damage, or wrongdoing in these cases. The Board has consulted with the relevant state authorities about these matters and will continue to monitor these matters in the supervisory process. Board action under the BHC Act would not interfere with the ability of the courts to resolve any litigation pertaining to these matters.

12. The commenter also expressed concern about newspaper reports of a civil complaint filed by the Securities and Exchange Commission ("SEC"). The Board has reviewed the complaint, which alleges that a former Capital One officer engaged in insider trading and failed to report to the SEC certain of his transactions in Capital One securities. This action relates to that former officer's actions with respect to the Capital One securities owned by him and does not make allegations against Capital One as a corporate entity or any current member of management. The SEC, rather than the Board, has jurisdiction to investigate and adjudicate any violations of federal securities laws. The Board has consulted with the SEC regarding this pending complaint.

13. 12 U.S.C. § 2901 et seq.

tion, 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 and mortgage lending records of Capital One's subsidiary insured depository institutions and HNB in light of all of the facts of record, including public comment on the proposal. A commenter opposed the proposal and alleged, based on data reported under the Home Mortgage Disclosure Act (''HMDA''),[14] that HNB engaged in discriminatory treatment of minority individuals in its home mortgage operations.

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.[15]

Capital One's lead subsidiary depository institution, COB, received an ''outstanding'' rating at its most recent CRA performance evaluation by the Federal Reserve Bank of Richmond (''Reserve Bank''), as of April 28, 2003. COFSB received a ''satisfactory'' rating at its most recent CRA performance evaluation by the Office of Thrift Supervision, as of April 28, 2003. HNB received a ''satisfactory'' rating from the Office of the Comptroller of the Currency, as of January 12, 2004.

In addition, Capital One has indicated that it intends to continue its level of support for community investment and development and expects that the proposed transaction would allow it to expand the services and products offered to customers in the communities served by Capital One and HNB. Capital One has also indicated that it does not expect the merger to result in the discontinuation of any products or services offered by HNB, except to the extent that Capital One offers a comparable product or service.

B. CRA Performance of Capital One

1. *Capital One Bank.* COB is engaged primarily in credit card operations and has been designated a limited purpose bank for purposes of evaluating its CRA performance. As such, it is evaluated under the community development test.[16] Because COB is designated as a limited purpose bank, in assigning a rating, examiners may consider the bank's community development investments, loans, and services nationwide rather than solely in the bank's assessment area. In rating COB ''outstanding'' at its April 2003 evaluation, Reserve Bank examiners noted that COB's nationwide qualified investments increased from $28.5 million to approximately $82 million during the evaluation period.[17] These investments included investments in low-income-housing tax credit projects, bonds issued by the Virginia Housing Development Authority, and entities that support microenterprise development.

During the evaluation period, COB contributed more than $5 million to a variety of organizations that primarily assist LMI individuals or areas or support microenterprise development. Examiners also noted that COB provided technical assistance and financial expertise to organizations dedicated to community development, including affordable housing, social services, and small business development.

2. *Capital One, FSB.* As noted above, COFSB received an overall ''satisfactory'' CRA performance rating at its April 2003 evaluation.[18] The institution received a ''high satisfactory'' rating under the lending and services tests and an ''outstanding'' rating under the investment test in this evaluation.

Examiners noted that COFSB's geographic distribution of consumer loans was reasonable in relation to demographic characteristics of its assessment area, and the geographic distribution of small loans to businesses was commensurate with both demographic and peer lending data. According to examiners, the percentage of consumer installment loans made to LMI borrowers in the institution's assessment area exceeded the percentage of LMI families residing in that area. COFSB's distribution of consumer credit cards, according to borrower income levels, was reasonable compared with the demographic data. Examiners also noted the institution's innovative special installment loan product that was primarily used by LMI borrowers.[19]

Examiners stated that COFSB's community development lending, totaling approximately $11 million for the evaluation period, was adequate and included innovative lending arrangements with community development fund initiatives, affordable housing organizations, and other nonprofit organizations that served LMI individuals.

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14. 12 U.S.C. § 2801 et seq.

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

16. *See* 12 CFR 228.25(a). If COB engages in activities that cause the bank to lose this designation, its CRA performance will be evaluated under the appropriate tests and standards. *See* 12 CFR 228.25(b).

17. The evaluation period was from May 7, 2001, to April 28, 2003.

18. The evaluation period was from January 1, 2000, to March 31, 2003, except for the lending test, which was evaluated from January 1, 2000, to December 31, 2002. COFSB is a nationwide provider of consumer and commercial lending and offers consumer deposit products.

19. This product featured low minimum loan amounts of $500 to $1000 and had no minimum income requirements. Approximately 87 percent of these loans were made to LMI borrowers.

During the evaluation period, COFSB's qualified investments totaled approximately $81.5 million and included purchases of qualified mortgage-backed securities and low-income-housing tax credits, investments in small business investment corporations, and deposits in community development fund initiatives. In addition, examiners noted that COFSB made approximately $7 million in financial grants during the assessment period.

Although COFSB has no public offices, examiners noted that it provided customer-service call centers with extended hours and had begun to issue ATM cards to allow customers to access their money market accounts. Examiners also noted COFSB's contributions in the form of technical assistance and financial expertise to a variety of nonprofit organizations in its assessment area and the communities in which COFSB operated.

C. CRA Performance of HNB

As noted, HNB received an overall "satisfactory" rating in its January 2004 evaluation.[20] The bank received a "high satisfactory" rating under the lending and investment tests and an "outstanding" rating on the service test in this evaluation.

Examiners commended HNB's responsiveness to the credit needs of its assessment areas, particularly in providing loan products to small businesses. Examiners also noted HNB's good overall distribution of loans to borrowers of different income levels and recognized HNB's use of innovative and flexible loan products designed to benefit LMI individuals and geographies. In addition, examiners characterized as significant HNB's community development lending, which consisted of approximately $140 million in loan originations in the areas receiving a full-scope review during the evaluation period.

Examiners reported that during the evaluation period, HNB had a good level of qualified community development investments in Louisiana and an adequate level in Texas in light of HNB's resources and capacity. In addition, they noted that the bank's service delivery systems were accessible to geographies and individuals of different income levels throughout its assessment areas. Examiners also reported that the bank's community development services were excellent.

D. HMDA and Fair Lending Record

The Board has carefully considered the lending record of HNB in light of public comment received on the proposal. A commenter alleged, based on a review of 2003 HMDA data, that HNB's denial disparity ratios in certain markets in Louisiana indicated that it disproportionately denied African-American applicants for home mortgage loans.[21] The commenter also contended that HNB's denial disparity ratios in the Dallas Metropolitan Statistical Area ("MSA") indicated that it disproportionately denied African-American and Hispanic applicants for home mortgage loans.[22]

The Board reviewed 2003 HMDA data reported by HNB in various MSAs and the States of Louisiana and Texas.[23] The total HMDA-reportable lending data in Louisiana and Texas indicate that HNB's denial disparity ratios for African-American applicants were higher than, and for Hispanic applicants generally comparable with, those ratios for the aggregate of lenders ("aggregate lenders") in those states.[24] The 2003 data in Louisiana also indicate that the percentages of the bank's total HMDA-reportable loans originated to African Americans were somewhat lower than, and to Hispanics were generally comparable with, the percentages for the aggregate lenders. In the Beaumont and Texarkana MSAs, the percentages of HNB's HMDA-reportable loans to African Americans exceeded the percentages for the aggregate lenders in that year.[25]

Although the HMDA data may reflect certain disparities in the rates of loan applications, originations, and denials among members of different racial groups in certain local areas, the HMDA data do not demonstrate that HNB is excluding any racial group 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. The Board recognizes, however, that HMDA data alone, even with the recent addition of pricing information, provide only limited information about the covered loans.[26] HMDA data, therefore,

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20. The evaluation period was from October 18, 1999, through January 12, 2004, except for the lending test, which was evaluated from January 1, 2000, through December 31, 2002.

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

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

23. This review included analysis of HMDA data for HNB's combined lending activity in all the MSAs in which HNB had branches in Texas and Louisiana, and in the Beaumont, Dallas, Texarkana, New Orleans, Baton Rouge, and Shreveport MSAs. In 2003, a majority of HNB's total HMDA-reportable loans was originated to borrowers within MSAs in Louisiana.

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

25. HNB's percentages of HMDA-reportable loans to African Americans were greater than the percentages for the aggregate lenders in the Beaumont and Texarkana MSAs. In those MSAs, HNB's percentage of loans to Hispanics was slightly lower than that for the aggregate lenders. In the Dallas MSA, HNB's percentages of loans to African Americans and Hispanics were smaller than the percentages for the aggregate lenders.

26. The data, for example, do not account for the possibility that an institution's outreach efforts may attract a larger proportion of

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

Because of the limitations of HMDA data, the Board has considered these data carefully and taken into account other information, including examination reports that provide an on-site evaluation of compliance by HNB and its subsidiaries with fair lending laws. Importantly, examiners noted no fair lending issues or concerns in the performance evaluations of HNB.

The record also indicates that HNB has taken steps to help ensure compliance with fair lending laws and other consumer protection laws. HNB has a fair lending compliance program that includes a second review of each loan marked for denial and an annual fair lending review of its mortgage portfolio to determine whether there are any race- or ethnicity-based disparities in loan underwriting.

The Board also has considered the HMDA data in light of other information, including the programs described above and the overall performance records of the subsidiary banks of Capital One and HNB under the CRA. These established efforts demonstrate that the institutions are active in helping to meet the credit needs of their entire communities. Capital One has represented that it is in the process of developing a new and comprehensive enterprise-wide fair lending program and intends to implement a similar program at HNB after the merger. Capital One plans to incorporate the most effective policies and procedures of Capital One's and HNB's respective fair lending programs into its comprehensive program for the combined institution.

E. Conclusion on Convenience and Needs and CRA Performance

The Board has carefully considered all the facts of record, including reports of examination of the CRA performance records of the institutions involved, information provided by the applicant, comments on the proposal, and confidential supervisory information. The Board notes that Capital One's national presence and financial and managerial resources will enhance HNB's ability to service its customers and broaden its geographic reach and that HNB's branch banking business will allow Capital One to offer a broader variety of products 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 and the CRA performance records of the relevant depository institutions are consistent with approval.

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.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the application should be, and hereby is, approved.[27] 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 Capital One with the conditions imposed in this order and the commitments made to the Board in connection with the application. For purposes of this transaction, the commitments made to the Board in the application process are deemed to be conditions imposed in writing by the Board in connection with its findings and decisions and, as such, may be enforced in proceedings under applicable law.

The 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 Reserve Bank, acting pursuant to delegated authority.

By order of the Board of Governors, effective August 16, 2005.

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

Robert deV. Frierson
Deputy Secretary of the Board

Sixth Bancshares, Inc.
Salina, Kansas

Order Approving the Formation of a Bank Holding Company

Sixth Bancshares, Inc. (''Sixth'') has requested the Board's approval under section 3 of the Bank Holding Company

27. 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 the 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, 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 the 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 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.

Act (''BHC Act'')[1] to become a bank holding company and to acquire all the voting shares of Geneseo Bancshares, Inc. (''Geneseo'') and control of its subsidiary, The Citizens State Bank, (''CSB''), both of Geneseo, Kansas.

Notice of the proposal, affording interested persons an opportunity to comment, has been published in the *Federal Register* (70 *Federal Register* 34,120 (2005)) and locally in accordance with the Board's Rules of Procedure.[2] The time for filing comments has expired, and the Board has considered the application and all comments received in light of the factors set forth in section 3 of the BHC Act.

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

Sixth is a newly organized corporation that does not control a depository institution and has been formed to acquire Geneseo and CSB. CSB, with total assets of approximately $5.3 million, is the 334th largest banking organization in Kansas, controlling deposits of approximately $4.9 million, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the state.[4] Based on all the facts of record, the Board has concluded that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of banking resources in any relevant banking market and that competitive considerations are consistent with approval of the proposal.

In acting on proposals under section 3 of the BHC Act, the Board is required to consider the effects of the proposal on the convenience and needs of the communities to be served and to take into account the records of the relevant insured depository institutions under the Community Reinvestment Act (''CRA'').[5] CSB received a ''Satisfactory'' rating at its most recent CRA performance evaluation by the Federal Deposit Insurance Corporation (''FDIC''), as of April 30, 2003. Sixth plans to increase CSB's products and services and expand its operations into the Salina, Kansas, banking market. Sixth also has represented that it will maintain CSB's existing CRA program for its operations in Geneseo and will institute similar programs in the future for its operations in Salina. Based on all the facts of record, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance record of the relevant depository institution are consistent with approval.

Section 3 of the BHC Act also requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has considered these factors in light of all the facts of record, including information provided by Sixth, confidential reports of examination and other confidential supervisory information from the FDIC, the primary federal supervisor of CSB, and public comments received on the proposal.

In evaluating financial factors in proposals involving newly formed small bank holding companies, the Board reviews the financial condition of both the applicant and the target depository institution. The Board also evaluates the financial condition of the pro forma organization, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

Based on its review of these factors, the Board finds that Sixth has sufficient financial resources to effect the proposal. Sixth proposes to fund this transaction through an offering of equity securities. CSB is well capitalized and would remain so on consummation of this proposal.

The Board also has considered the managerial resources of the applicant, including the proposed management of the organization. The Board has reviewed the examination record of CSB, including assessments of its current management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences and those of the other relevant banking agencies with Geneseo, CSB, and the proposed management officials and principal shareholders of Sixth.[6] The Board also has considered Sixth's plans to implement the proposal, including its proposed expansion of CSB's operations.

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

Based on the foregoing and after considering 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

1. 12 U.S.C. § 1842.
2. 12 CFR 262.3(b).
3. *See* 12 U.S.C. § 1842(c)(1).
4. Asset data are as of June 30, 2005. Deposit data and state rankings are as of June 30, 2004.
5. 12 U.S.C. § 2901 et seq.
6. The Board received more than 50 comments in support of the proposal. In addition, the Board received a comment from Security Savings Bank, F.S.B. (''Security''), Olathe, Kansas, the former employer of the organizers of Sixth, objecting to the proposal. Among other things, Security expressed concern about the managerial ability of Sixth's organizers and made certain allegations concerning their conduct before and after leaving Security. Sixth's organizers denied the allegations. The Board notes that it has reviewed confidential reports of examination of Security and consulted with the Office of Thrift Supervision, Security's primary federal supervisor, about the managerial record of Sixth's organizers at Security. In addition, the Board has consulted with the Office of the State Bank Commissioner of Kansas, which is considering an application by Sixth to acquire control of CSB. The Board also notes that, to the extent the comment reflects allegations surrounding the end of organizers' employment with Security, the Board does not have jurisdiction to adjudicate disputes about such employment matters.

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 Sixth with the conditions imposed in this order and the commitments made to the Board in connection with the application and receipt of all other regulatory approvals. For purposes of this transaction, the conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

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

By order of the Board of Governors, effective August 1, 2005.

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

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

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

iTeam Companies, Inc.
Brookfield, Wisconsin

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

iTeam Companies, Inc. (''iTeam'') has requested the Board's approval under section 3 of the Bank Holding Company Act (''BHC Act'')[1] to become a bank holding company by acquiring all the voting shares of Bank of Kenney, Kenney, Illinois. In addition, iTeam has requested the Board's approval under sections 4(c)(8) and 4(j) of the BHC Act[2] and section 225.28(b)(14) of the Board's Regulation Y[3] to engage in permissible data processing activities through its subsidiary, iStream Imaging, Inc. (''iStream''), Brookfield, Wisconsin.

Notice of the proposal, affording interested persons an opportunity to comment, has been published in the *Federal Register* (70 *Federal Register* 13,031 (2005)). The time for filing comments has expired, and the Board has considered the application and notice and all comments received in light of the factors set forth in sections 3 and 4 of the BHC Act.

Applicant is a newly organized corporation formed to acquire Bank of Kenney and engage in data-processing activities through iStream. Bank of Kenney, with total assets of approximately $5.3 million, is the 658th largest insured depository institution in Illinois, controlling deposits of approximately $4 million.[4]

Competitive Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or that would be in furtherance of an attempt to monopolize the business of banking 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.[5]

iTeam is a newly organized corporation that does not control a depository institution. Based on all the facts of record, the Board has concluded that consummation of the proposed transaction would have no significantly adverse effect on competition or on the concentration of banking resources in any relevant banking market and that competitive considerations are consistent with approval.

Financial, Managerial, and Supervisory Considerations

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has considered, among other things, confidential reports of examination, other confidential supervisory information from the primary federal supervisor of Bank of Kenney, the Federal Deposit Insurance Corporation (''FDIC''), the Office of Thrift Supervision, and the Illinois Department of Financial and Professional Regulation, Division of Banks and Real Estate.

In evaluating financial factors in BHC Act proposals involving newly formed small bank holding companies, the Board reviews the financial condition of both the applicant and target depository institution. The Board also evaluates the financial condition of the pro forma organization, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

Based on its review of these factors, the Board finds that iTeam has sufficient financial resources to effect the proposal. Bank of Kenney is well capitalized and would remain so on consummation of this proposal. The transaction is structured as a cash purchase. After the proposed acquisition, iTeam plans to inject capital into Bank of Kenney.

1. 12 U.S.C. § 1842.
2. 12 U.S.C. §§ 1843(c)(8) and 1843(j).
3. 12 CFR 225.28(b)(14).
4. Asset data are as of June 30, 2005. Deposit data and state ranking are as of June 30, 2004. Ranking data are adjusted to reflect mergers and acquisitions completed through July 29, 2005.
5. *See* 12 U.S.C. § 1842(c)(1).

The Board also has considered the managerial resources of the applicant, including the proposed management of the organization. The Board has reviewed the examination record of Bank of Kenney, including assessments of its current management, risk management systems, and operations. In addition, the Board has considered the supervisory experiences of the other relevant banking agencies with Bank of Kenney and the management officials and principal shareholders of iTeam. The Board also has considered iTeam's plan for the proposed acquisition, including the proposed changes in management at Bank of Kenney after the acquisition.

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

Convenience and Needs Considerations

In acting on the proposal, 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 institution under the Community Reinvestment Act ("CRA").[6] The Board has carefully considered all the facts of record, including reports of examination of the CRA performance record of Bank of Kenney, information provided by iTeam, confidential supervisory information, and public comment received on the proposal.

Bank of Kenney received a "Satisfactory" rating at its most recent CRA performance evaluation by the FDIC, as of November 29, 2001. iTeam has represented that it would maintain Bank of Kenney's CRA program after the proposed acquisition. Additionally, iTeam has represented that after consummation Bank of Kenney would offer an expanded range of mortgage products, in the Kenney area and nationwide, through a planned new mortgage subsidiary. The Board received several comments from individuals concerned that iTeam might close Bank of Kenney's office in Kenney after the acquisition, which, they asserted, could cause hardship for the community. iTeam represented that it has no current plans to close Bank of Kenney's office in Kenney.

Based on all the facts of record, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance record of Bank of Kenney are consistent with approval of this proposal.

Nonbanking Activities

iTeam also has filed a notice under sections 4(c)(8) and 4(j) of the BHC Act to engage in data-processing activities through iStream. iStream intends to offer check-imaging and check-processing services to merchants. The Board has determined by regulation that financial and banking data-processing activities are permissible for a bank holding company under Regulation Y,[7] and iTeam has committed to conduct these activities in accordance with the limitations set forth in Regulation Y and the Board's orders governing these activities.

To approve the notice, the Board also must determine that the performance of the proposed activities by iTeam "can reasonably be expected to produce benefits to the public . . . that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices."[8] As part of its evaluation of these factors, the Board has considered the financial and managerial resources of iTeam and its subsidiaries, including the background and experience of the proposed principals and senior officers of iTeam and iStream, and the effect of the proposed transaction on those resources. For the reasons noted above, and based on all the facts of record, the Board has concluded that financial and managerial considerations are consistent with approval of the notice.

The Board also has carefully considered the competitive effects of the proposal, which involves de novo entry into the market for check-imaging and check-processing services. Commencement of nonbanking activities de novo is presumed under Regulation Y to result in benefits to the public through increased competition in the market for the relevant service.[9] Based on all the facts of record, the Board concludes that iTeam's proposed nonbanking activities are not likely to have any adverse competitive effects. The Board also has carefully reviewed the public benefits of the proposed nonbanking activities. The proposal is expected to benefit the public by providing iStream customers with a more efficient means of check collection, as well as a wider variety of check-processing services.

The Board concludes that the conduct of the proposed nonbanking activities within the framework of Regulation Y and Board precedent can reasonably be expected to produce public benefits that would outweigh any likely adverse effects. Accordingly, based on all the facts of record, the Board has determined that the balance of the public benefits factor that it must consider under section 4(j)(2) of the BHC Act is consistent with approval.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the application and notice should be, and hereby are, approved. In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act. The Board's approval is specifically conditioned on compliance by iTeam with the conditions imposed in this order and the commitments made to the Board in connection with the application and notice. The Board's approval of the nonbanking aspects of the proposal is also

6. 12 U.S.C. § 2901 et seq.

7. 12 CFR 225.28(b)(14).
8. *See* 12 U.S.C. § 1843(j)(2)(A).
9. *See* 12 CFR 225.26(c).

subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c),[10] and to the Board's authority to require such modification or termination of the activities of the bank holding company or any of its subsidiaries as the Board finds necessary to ensure compliance with and to prevent evasion of the provisions of the BHC Act and the Board's regulations and orders issued thereunder. For purposes of these actions, the conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The acquisition of Bank of Kenney may not be consummated before the fifteenth calendar day after the effective date of this order, and no part of the proposal may be consummated later than three months after the effective date of this order, unless such period is extended for good cause by the Board or the Federal Reserve Bank of Chicago, acting pursuant to delegated authority.

By order of the Board of Governors, effective August 4, 2005.

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

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

FINAL ENFORCEMENT DECISIONS ISSUED BY THE BOARD OF GOVERNORS

In the Matter of

Brian Bonetti
Former Sales and Service Representative,
National City Bank,
Cleveland, Ohio

Docket No. OCC-AA-EC-04-68

Final Decision

This is an administrative proceeding pursuant to the Federal Deposit Insurance Act (''the FDI Act'') in which the Office of the Comptroller of the Currency of the United States of America (''OCC'') seeks to prohibit the Respondent, Brian Bonetti (''Respondent''), from further participation in the affairs of any financial institution based on actions he took while employed at National City Bank, Cleveland, Ohio (the ''Bank''). Under the FDI Act, the OCC may initiate a prohibition proceeding against a former employee of a national bank, but the Board must make the final determination whether to issue an order of prohibition. 12 U.S.C. § 1818(e)(4).

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

I. Statement of the Case

A. Statutory and Regulatory Framework

Under the FDI Act and the Board's regulations, the ALJ is responsible for conducting proceedings on a notice of charges. 12 U.S.C. § 1818(e)(4). The ALJ issues a recommended decision that is referred to the deciding agency together with any exceptions to those recommendations filed by the parties. The Board makes the final findings of fact, conclusions of law, and determination whether to issue an order of prohibition in the case of prohibition orders sought by the OCC. *Id.*; 12 CFR 263.40.

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

An enforcement proceeding is initiated by filing and serving on the respondent a notice of intention to prohibit. Under the OCC's and the Board's regulations, the respondent must file an answer within 20 days of service of the notice. 12 CFR 19.19(a) and 263.19(a). If the respondent does not file an answer within the time provided, the respondent waives his or her right to appear and contest the allegations in the notice, and Enforcement Counsel may file a motion for entry of an order of default. *See* 12 CFR 19.19(c)(1) and 263.19(c)(1). Upon a finding that no good cause has been shown for the failure to file a timely answer, the ALJ shall file with the Comptroller and the Board a recommended decision containing the findings and the relief sought in the notice. *Id.*

B. Procedural History

On February 3, 2005, the OCC served upon Respondent a Notice of Intention to Prohibit Further Participation, Notice of Charges for Issuance of an Order to Cease and Desist for Restitution and Notice of Assessment of a Civil Money Penalty (''Notice'') that sought, inter alia, an order of prohibition against Respondent based on his conduct while employed at the Bank. Specifically, the Notice alleged that Respondent, as a sales and service representative for the Bank, diverted portions of customer loan pro-

10. 12 CFR 225.7 and 225.25(c).

ceeds on thirteen home-equity loans that Respondent made, authorized and/or booked, by issuing checks from the loan proceeds to make payments on his own credit card accounts (or accounts for which he was an authorized user) and payments on a loan in the name of related persons, or by depositing checks into accounts that were owned or controlled by Respondent. The Notice further alleges that Respondent falsified internal loan documents to hide from the Bank the fact that he was charging customers broker fees that exceeded the Bank's broker fee cap and gave customers misleading HUD-1 Settlement Statements that masked the broker fees charged. In addition, the Notice alleged that Respondent's violations caused loss to the Bank in the approximate amount of $84,970.00

The Notice directed Respondent to file a written answer within 20 days from the date of service of the Notice in accordance with 12 CFR 19.19(a) and (b), and that failure to answer within this time period "shall constitute a waiver of the right to appear and contest the allegations contained in the Notice, and shall, upon the OCC's motion, cause the Administrative Law Judge or the Comptroller to find the facts in this Notice to be as alleged." The Notice was served in accordance with OCC rules, via overnight delivery and first class U.S. mail. The record shows that Respondent was also personally served on February 26, 2005. Nonetheless, Respondent failed to file an answer within the 20-day period or thereafter.

On June 3, 2005, Enforcement Counsel filed a Motion for Entry of an Order of Default against Respondent. On the same day, the ALJ issued an Order to Show Cause, providing Respondent until June 20, 2005, to file an answer to the Notice and to show good cause for having failed to do so previously. The Order to Show Cause, which was served upon Respondent by Federal Express and first class mail, also provides that if Respondent fails to submit an answer and to show good cause by the June 20 deadline, "the relief requested in the Notice will be recommended." To date, Respondent has not filed any reply to the Order to Show Cause or answered the Notice.

II. Discussion

The OCC's Rules of Practice and Procedure set forth the requirements of an answer and the consequences of a failure to file an answer to a Notice. Under the Rules, failure to file a timely answer "constitutes a waiver of [a respondent's] right to appear and contest the allegations in the notice." 12 CFR 19.19(c). If the ALJ finds that no good cause has been shown for the failure to file, the judge "shall file . . . a recommended decision containing the findings and the relief sought in the notice." *Id.* An order based on a failure to file a timely answer is deemed to be issued by consent. *Id.*

In the instant matter, Respondent failed to file an answer to the Notice despite notice to him of the consequences of such failure, and also failed to respond to the ALJ's Order to Show Cause. Respondent's failure to file an answer constitutes a default.

Respondent's default requires the Board to consider the allegations in the Notice as uncontested. The allegations in the Notice, described above, meet all the criteria for entry of an order of prohibition under 12 U.S.C. § 1818(e). It was a breach of fiduciary duty, conflict of interest, unsafe and unsound practice, and violation of law, for Respondent to divert portions of customer loan proceeds on 13 home equity loans without the customers' knowledge, consent, or approval; falsify internal loan documents in order to hide from the Bank the fact that he was charging customers broker fees that exceeded the Bank's broker fee cap; and give customers misleading HUD-1 Settlement Statements that masked the broker fees charged. Respondent's actions also resulted in loss to the bank in the amount of approximately $89,740.00 and financial gain to Respondent, in that he diverted loan proceeds by issuing checks to make payment on his own credit card accounts or to be deposited into his own accounts. Finally, such actions also exhibit personal dishonesty and willful disregard for the safety and soundness of the Bank. Accordingly, the requirements for an order of prohibition have been met and the Board hereby issues such an order.

Conclusion

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

By order of the Board of Governors, this 20th day of September 2005.

Board of Governors of the
Federal Reserve System

JENNIFER J. JOHNSON
Secretary of the Board

Order of Prohibition

WHEREAS, pursuant to section 8(e) of the Federal Deposit Insurance Act, as amended, (the "FDI Act") (12 U.S.C. § 1818(e)), the Board of Governors of the Federal Reserve System ("the Board") is of the opinion, for the reasons set forth in the accompanying Final Decision, that a final Order of Prohibition should issue against BRIAN BONETTI ("Bonetti"), a former employee and institution-affiliated party, as defined in section 3(u) of the FDI Act (12 U.S.C. § 1813(u)), of National City Bank, Cleveland, Ohio.

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

1. In the absence of prior written approval by the Board, and by any other Federal financial institution regulatory agency where necessary pursuant to section 8(e)(7)(B) of the Act (12 U.S.C. § 1818(e)(7)(B)), Bonetti is hereby prohibited:

(a) from participating in any manner in the conduct of the affairs of any institution or agency specified in section 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A)), including, but not limited to, any insured depository institution, any insured depository institution holding company or any U.S. branch or agency of a foreign banking organization;

(b) from soliciting, procuring, transferring, attempting to transfer, voting or attempting to vote any proxy, consent or authorization with respect to any voting rights in any institution described in subsection 8(e)(7)(A) of the FDI Act;

(c) from violating any voting agreement previously approved by any federal banking agency; or

(d) from voting for a director, or from serving or acting as an institution-affiliated party as defined in section 3(u) of the FDI Act (12 U.S.C. § 1813(u)), such as an officer, director, or employee in any institution described in section 8(e)(7)(A) of the FDI Act.

2. Any violation of this Order shall separately subject Bonetti to appropriate civil or criminal penalties or both under section 8 of the FDI Act (12 U.S.C. § 1818).

3. This Order, and each and every provision hereof, is and shall remain fully effective and enforceable until expressly stayed, modified, terminated or suspended in writing by the Board.

This Order shall become effective at the expiration of 30 days after service is made.

By order of the Board of Governors, this 20th day of September 2005.

Board of Governors of the
Federal Reserve System

JENNIFER J. JOHNSON
Secretary of the Board

In the Matter of

Walter C. ''Charlie'' Cleveland,
Former Director and Senior Vice President,
First National Bank,
Lubbock, Texas

Docket No. OCC-AA-EC-04-47

Final Decision

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

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

I. Statement of the Case

A. Statutory and Regulatory Framework

Under the FDI Act and the Board's regulations, the ALJ is responsible for conducting proceedings on a notice of charges. 12 U.S.C. § 1818(e)(4). The ALJ issues a recommended decision that is referred to the deciding agency together with any exceptions to those recommendations filed by the parties. The Board makes the final findings of fact, conclusions of law, and determination whether to issue an order of prohibition in the case of prohibition orders sought by the OCC. *Id.*; 12 CFR 263.40.

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

An enforcement proceeding is initiated by filing and serving on the respondent a notice of intent to prohibit. Under the OCC's and the Board's regulations, the respondent must file an answer within 20 days of service of the notice. 12 CFR 19.19(a) and 263.19(a). Failure to file an answer constitutes a waiver of the respondent's right to contest the allegations in the notice, and a final order may be entered unless good cause is shown for failure to file a timely answer. 12 CFR 19.19(c)(1) and 263.19(c)(1).

B. Procedural History

On September 16, 2004, the OCC served upon Respondent[1] a Notice of Charges for Issuance of an Order to

1. Service of the initial Notice and every other document served on Respondent by the ALJ or OCC Enforcement Counsel was effected by service on Respondent's counsel rather than on Respondent personally. Contrary to OCC rules, Respondent's counsel did not file a notice of appearance pursuant to 12 CFR 19.6(a)(3). Accordingly, at least the initial Notice should have been served on Respondent himself, rather than his counsel. *See* 12 CFR 19.11(c)(2). In cases of default, it is particularly important to ensure that service of papers meets the minimum standards of due process. While the Board is concerned

Cease and Desist and Notice of Assessment of a Civil Monetary Penalty (''Notice'') against Respondent based on his conduct while employed at the Bank. On October 15, 2004, Respondent through counsel filed an answer to the original Notice (''Answer''), along with a timely request for a hearing on the civil money penalty.

On February 28, 2005, the OCC served the First Amended Notice of Charges for Issuance of an Order for Prohibition and Notice of Assessment of a Civil Money Penalty (''Amended Notice'') upon Respondent. The Amended Notice repeated allegations made in the original Notice,[2] added new, substantive allegations relating to a loan made to Raintree Investment, Inc. (the ''Raintree Loan''), and sought an order of prohibition. Amended Notice, Article III. The Amended Notice directed Respondent to file an answer within 20 days and warned that failure to do so would constitute a waiver of his right to appear and contest the allegations. The Amended Notice was served in accordance with the OCC rules by overnight delivery, signature requested, in care of Respondent's counsel. Respondent failed to file an answer within the 20-day period.

On March 31, 2005, Enforcement Counsel filed a Motion for Entry of an Order of Default against Respondent. On April 6, 2005, the ALJ issued an Order to Show Cause, noting that although Respondent was not in default as to the Original Notice, since he had filed an answer to it, the new allegations could be the basis for a default granting the relief sought. The Order provided Respondent until April 22, 2005, to file an answer to the Amended Notice and to show good cause for having failed to do so previously. To date, Respondent has not filed any reply to the Order to Show Cause or answered the Amended Notice.

C. The Raintree Loan

The Amended Notice alleges that Respondent, as a senior loan officer for Bank, caused the Bank to loan $53,000 to Raintree Investment, Inc. (''Raintree''). The President of Raintree is Russell Baxter, Respondent's father-in-law; Respondent also served as trustee of the Deed of Trust for the property securing the loan. Respondent failed to disclose his interest in the Raintree Loan (an insider-related loan) to Bank's Board of Directors or to OCC examiners. Respondent also received two cashier's checks from the proceeds of the loan, totaling $14,892, which he converted to his personal use, applying the bulk of the proceeds toward the closing costs on his personal residence. Respondent made cash payments on the loan until his departure from the Bank, thereby concealing the loan from the named borrower. Respondent additionally instructed Bank personnel not to send letters regarding the loan to Raintree, and on at least one occasion personally removed mail addressed to Raintree from the Bank's outgoing mail.

Over a month after Respondent left his position with the Bank in June 2004, Mr. Baxter responded to a Bank communication regarding the Raintree loan stating that he was unaware he had a loan at the Bank any longer. A survey ordered by the Bank determined that some of the property securing the loan had been sold, with no record of the sale in the Bank's loan file.[3]

II. Discussion

The OCC's Rules of Practice and Procedure set forth the requirements of an answer and the consequences of a failure to file an answer to a Notice. Under the Rules, failure to file a timely answer ''constitutes a waiver of [a respondent's] right to appear and contest the allegations in the notice.'' 12 CFR 19.19(c). If the ALJ finds that no good cause has been shown for the failure to file, the judge ''shall file . . . a recommended decision containing the findings and the relief sought in the notice.'' *Id.* An order based on a failure to file a timely answer is deemed to be issued by consent. *Id.*

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

Respondent's default requires the Board to consider the new allegations in the Amended Notice as uncontested. The new allegations in the Amended Notice, described above, meet all the criteria for entry of an order of prohibition under 12 U.S.C. § 1818(e). It was a breach of fiduciary duty, conflict of interest, unsafe and unsound practice, and violation of law, for Respondent to: fail to remove himself from approving the Raintree loan made to a family member; administer the loan while acting as trustee for its collateral; and fail to disclose his interest in the insider loan to the Bank and to OCC examiners. He received financial benefit from the loan by using proceeds of the loan for closing costs on his own personal residence. He demonstrated both personal dishonesty and willful disregard for the safety and soundness of the Bank by purposefully withholding information about the Raintree loan from the named borrower's principal, with the effect of hiding from Mr. Baxter the fact that Baxter had an outstanding loan at the Bank; and willfully interfering with the Bank's communications with a borrower regarding the borrower's obligation to the Bank.

about the notice procedures followed in this case, it concludes that in light of Respondent's counsel's participation in the case on behalf of his client, the minimum requirements of the Rules and of due process have been met. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections); 12 CFR 19.11(c)(2)(v) (permitting service ''by any other method reasonably calculated to give actual notice''). The Board will, however, direct that OCC Enforcement Counsel serve a copy of the Order of Prohibition on the Respondent by various means, including by certified mail to his last known address, which does not appear in the current record.

2. Because the motion for default is based solely on the allegations newly made in the Amended Notice, the Board does not consider any of the allegations in the original Notice in its determination.

3. Mr. Baxter subsequently paid the balance of the loan.

Accordingly, the requirements for an order of prohibition have been met and the Board hereby issues such an order. As noted above,[4] the Board directs OCC Enforcement Counsel to serve the order of prohibition on Respondent personally, by delivering to his last known address, in addition to service on his counsel.

Conclusion

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

By order of the Board of Governors, this 17th day of August 2005.

Board of Governors of the
Federal Reserve System

JENNIFER J. JOHNSON
Secretary of the Board

Order of Prohibition

WHEREAS, pursuant to section 8(e) of the Federal Deposit Insurance Act, as amended, (the ''FDI Act'') (12 U.S.C. § 1818(e)), the Board of Governors of the Federal Reserve System (''the Board'') is of the opinion, for the reasons set forth in the accompanying Final Decision, that a final Order of Prohibition should issue against WALTER C. ''CHARLIE'' CLEVELAND (''CLEVELAND''), a former employee and institution-affiliated party, as defined in section 3(u) of the FDI Act (12 U.S.C. § 1813(u)), of First National Bank, Lubbock, Texas.

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

1. In the absence of prior written approval by the Board, and by any other Federal financial institution regulatory agency where necessary pursuant to section 8(e)(7)(B) of the Act (12 U.S.C. § 1818(e)(7)(B)), Cleveland is hereby prohibited:

(a) from participating in any manner in the conduct of the affairs of any institution or agency specified in section 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A)), including, but not limited to, any insured depository institution, any insured depository institution holding company or any U.S. branch or agency of a foreign banking organization;

(b) from soliciting, procuring, transferring, attempting to transfer, voting or attempting to vote any proxy, consent or authorization with respect to any voting rights in any institution described in subsection 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A));

(c) from violating any voting agreement previously approved by any federal banking agency; or

(d) from voting for a director, or from serving or acting as an institution-affiliated party as defined in section 3(u) of the FDI Act (12 U.S.C. § 1813(u)), such as an officer, director, or employee in any institution described in section 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A)).

2. Any violation of this Order shall separately subject Cleveland to appropriate civil or criminal penalties or both under section 8 of the FDI Act (12 U.S.C. § 1818).

3. This Order, and each and every provision hereof, is and shall remain fully effective and enforceable until expressly stayed, modified, terminated, or suspended in writing by the Board.

This Order shall become effective at the expiration of thirty days after service is made.

By order of the Board of Governors, this 17th day of August 2005.

Board of Governors of the
Federal Reserve System

JENNIFER J. JOHNSON
Secretary of the Board

In the Matter of

Jean Peyrelevade,
A former institution-affiliated party of Credit Lyonnais

03-041-CMP-I
03-041-B-I
03-041-E-I

Determination on Motion for Interlocutory Review

Background

This issue arises out of an enforcement proceeding brought by the Board of Governors of the Federal Reserve System (the ''Board'') against Jean Peyrelevade (the ''Respondent''), the former chief executive officer of Credit Lyonnais. In a Notice of Charges against Respondent, the Board alleged that Respondent engaged in violations of the Bank Holding Company Act in connection with Credit Lyonnais's ownership and control over a California insurance company, Executive Life, in the early 1990s, and that Respondent made false representations to the Board in 2001 and 2002 concerning the knowledge of Credit Lyonnais's then senior management (including Respondent) relating to these activities.

At the request of Board Enforcement Counsel, the Administrative Law Judge (''ALJ'') overseeing this proceeding issued a subpoena to Cleary Gottlieb Steen & Hamilton (''Cleary Gottlieb''), attorneys for Credit Lyonnais, seeking notes taken by Cleary Gottlieb attorneys at interviews conducted as part of an internal investigation of the Executive Life matter. Among the documents requested were notes taken during two interviews of

4. *See* footnote 1.

Dominique Bazy (''Bazy''), a former Credit Lyonnais executive, that took place in May and September 1999. Bazy asserted that both sets of interview notes were subject to the attorney–client privilege and that the September 1999 interviews were protected by the joint defense or common interest privilege. At Bazy's request, Cleary Gottlieb declined to produce the notes of these interviews.

After Board Enforcement Counsel filed a motion with the ALJ to overrule these, and other, privilege objections, Bazy filed an opposition to Enforcement Counsel's motion and a sur-reply to its reply brief. Cleary Gottlieb represented that it and its client Credit Lyonnais do not object to producing the internal interview notes. On June 21, 2005, the ALJ issued an Order rejecting Bazy's privilege claims and ordering Cleary Gottlieb to produce the requested interview notes within 20 days. On July 1, 2005, Bazy filed with the ALJ a motion for interlocutory review of the June 21, 2005, Order, and requested the ALJ to stay the production of the disputed documents pending the interlocutory review request. In his motion, Bazy contends that the ALJ ignored evidence demonstrating that he had an objectively reasonable belief that his May 1999 and September 1999 meetings with Cleary Gottlieb lawyers were subject to attorney–client privilege; applied an inappropriate standard in determining the attorney–client privilege issue given Bazy's circumstance; and improperly held that Cleary Gottlieb could unilaterally waive the joint defense agreement privilege with respect to the content of the September 1999 meetings. Board Enforcement Counsel filed a response to Bazy's motion, arguing that the Board's Rules of Practice (''Rules'') do not allow a nonparty such as Bazy to seek interlocutory review by the Board. In a reply to Enforcement Counsel's response, Bazy argued that he is an interested party to the proceeding as it relates to the enforcement of the subpoena served on Cleary Gottlieb and that the Board's Rules of practice merely failed to contemplate his particular circumstance. On July 11, 2005, the ALJ granted a stay of the order requiring Cleary Gottlieb to produce the documents, and, pursuant to Uniform Practice Rule 263.28(c), referred Bazy's motion to the Board for final disposition.

Discussion

A. Availability of Interlocutory Review

The Board's Rules of Practice provide that ''[a]ny request for interlocutory review shall be *filed by a party* with the administrative law judge within 10 days of his or her ruling . . .'' 12 CFR 263.28(c) (emphasis added). The Rules also specifically define ''party'' to include only ''the Board and any person named as a party in any notice.'' 12 CFR 263.3(j). Thus, under this definition, the only ''party'' in this proceeding, other than the Board, is Jean Peyrelevade, and Bazy, as a nonparty, is not entitled to interlocutory review under the Board's rules.

Bazy's arguments to the contrary are not persuasive. Bazy first argues that he is plainly ''an interested party to the action as it relates to Enforcement Counsel's attempt to obtain production of the meeting notes'' based upon his substantial participation in the proceedings relating to the notes. While Bazy obviously has an interest in the outcome of the production issue, the Board's rules are clear that interlocutory review is available only to a ''person named as a party in [the] notice.''

Bazy also argues that the Rules ''do not appear to contemplate the unique procedural posture of his present circumstance.'' The lack of an available administrative remedy for Bazy's circumstance does not, in and of itself, demonstrate a failure to contemplate the existence of such a circumstance, nor does it leave Bazy without a remedy. In fact, the Rules contemplate allowing a party to seek interlocutory review of an ALJ discovery order that requires the production of allegedly privileged materials, while including no comparable provision for nonparty subpoenas, such as the subpoena at issue here. *Compare* 12 CFR 263.25 (document requests to parties) *with* 12 CFR 263.26 (document subpoenas to nonparties).

This distinction in the Rules pertaining to remedies available in party and nonparty discovery is logical. If a party fails to comply with a discovery order, the Board can review the discovery orders at the end of the proceeding or on an interlocutory basis under Rule 263.28 and impose effective relief. If a nonparty fails to comply with a discovery order, however, the remedy is court enforcement. *See* 12 CFR 263.26(c). Administrative subpoenas are not otherwise self-enforcing. *See generally, Government of the Territory of Guam v. SeaLand Service, Inc.* 958 F.2d 1150, 1153–54 (D.C. Cir. 1992) (noting that party to administrative proceeding may apply to district court to enforce subpoena issued by ALJ under agency procedures). Thus, if Cleary Gottlieb declined to produce the documents in violation of the ALJ's Order, Enforcement Counsel could seek to enforce the subpoena in district court. 12 CFR 263.26(c). Similarly, in the event that Cleary Gottlieb decides to produce the documents pursuant to the ALJ's Order, Bazy could initiate a court action and assert any alleged privilege claims in an attempt to enjoin Cleary Gottlieb from complying with the Order. Thus, the Board's discovery rules reflect a conscious decision to distinguish between party and nonparty discovery, as demonstrated by the enactment of separate rules setting forth distinct procedures to be applied with regard to each category of discovery requests.

Interlocutory appeals are generally disfavored because they interrupt the main proceeding and distract from the completion of the case. They present the decisionmaker with small and often disjointed parts of the underlying case, often out of context, prior to the development of the entire case. Accordingly, federal court rules and practice evince a ''firm congressional policy against interlocutory or 'piecemeal' appeals, and courts have consistently given effect to that policy.'' *Abney v. United States*, 431 U.S. 651, 656 (1976).

The Board's rules and prior decisions reflect the same policy against interlocutory review. Interlocutory review is always discretionary even when the rules permit it, *see*

12 CFR 263.28(b) (the Board ''may exercise interlocutory review'' under specified circumstances), and in prior cases the Board has noted that ''the scope within which such discretion should be exercised is extremely narrow,'' reflecting ''a strong and longstanding policy against piecemeal appeals before a final judgment.'' *In the Matter of Incus Co.*, 86 *Federal Reserve Bulletin* 246 (2000). In that light, the Board's rules limiting interlocutory review to a party are consistent with other aspects of the rules relating to such reviews.

In short, because the Board's Rules expressly reserve interlocutory review to parties, Bazy is not entitled to interlocutory review of the ALJ's June 21, 2005, Order.

B. Bazy's Privilege Claims

In the alternative, given the deferential standard with which the Board treats an ALJ's discovery decisions, even if the Board were to grant interlocutory review, it would affirm the ALJ's Order with respect to Bazy's privilege claims.

1. Attorney–Client Privilege Claim

Using the widely adopted five-factor test set forth by the Third Circuit in *Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 125 (3d Cir. 1986) to determine whether a corporation's attorney is separately representing a corporate employee, the ALJ properly determined that Cleary Gottlieb represented only Credit Lyonnais and not Bazy during the interviews conducted by the firm in May 1999 and September 1999 as part of Credit Lyonnais's internal investigation. Under settled law, corporate employees seeking to establish the existence of a separate attorney–client privilege with corporate counsel must show, among other things, that ''the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.'' *Id.*, 805 F.2d at 123. Here, it is undisputed that Bazy's interview related specifically to ''matters within the company''; he does not claim that he was seeking advice from Cleary Gottlieb in his individual capacity. Thus, the conflicting record evidence regarding Bazy's asserted belief that the interviews were confidential is immaterial to the determination regarding privilege. Moreover, by the time of the September 1999 interview, Bazy had retained his own counsel at the request of Credit Lyonnais. This refutes any reasonable argument that Bazy believed Cleary Gottlieb was acting as his attorney during the September 1999 meeting.

2. Joint Defense Privilege Claim

Finally, Bazy has failed to demonstrate that a joint defense privilege applies to the content of his September 1999 interviews. Although Bazy cites case law noting that a joint defense privilege protects communications between an individual and an attorney for another when the communications are part of an ongoing and joint effort to set up a common defense strategy, he has failed to present any evidence demonstrating the existence of a joint defense agreement between himself and Credit Lyonnais. While a written agreement is not required to establish the existence of a joint defense privilege, a party must show, among other things, that ''the parties had agreed to pursue a joint defense strategy.'' *Bevill, Bresler, supra*, 805 F.2d at 126; *see also U.S. v. Weissman*, 195 F.3d 96, 100 (2d Cir. 1999) (noting that in order to demonstrate the existence of a joint defense privilege, a showing of some form of joint strategy is necessary, ''rather than merely the impression of one side'').

Bazy's only support for his joint defense privilege claim is his stated belief that it was ''[his] understanding that the Cleary Gottlieb attorneys would maintain the confidentiality of [his] statements during [the September 1999] meeting.'' Bazy Declaration, ¶7. Bazy has made no assertion that Cleary Gottlieb or Credit Lyonnais directly or indirectly communicated to him an agreement to pursue a joint defense strategy. Bazy's unilateral belief is plainly insufficient to establish the existence of a joint agreement, as noted in the cases cited above. Accordingly, Bazy has failed to establish that a joint defense privilege exists with respect to his September 1999 interview.

As set forth herein, the arguments advanced by Bazy fail to demonstrate an appropriate basis upon which the Board may grant interlocutory review of the ALJ's Order given his nonparty status. In the alternative, even if the Board were to grant interlocutory review, it would affirm the ALJ's June 21, 2005, Order with regard to Bazy's privilege claims. Accordingly, the Board declines Bazy's request for interlocutory review of the ALJ's June 21, 2005, Order.

By order of the Board of Governors, this 5th day of August, 2005.

Board of Governors of the
Federal Reserve System

JENNIFER J. JOHNSON
Secretary of the Board

In the Matter of

Jean Peyrelevade,
A former institution-affiliated party of Credit Lyonnais

03-041-CMP-I
03-041-B-I
03-041-E-I

Determination on Motion for Interlocutory Review

Background

On December 18, 2003, Board Enforcement Counsel initiated this proceeding against Respondent Jean Peyrelevade (''Peyrelevade''). In the Notice of Charges, Enforcement Counsel alleged that Peyrelevade participated in alleged

violations of the Bank Holding Company Act of 1956 in his role as chairman of Credit Lyonnais, specifically with respect to Credit Lyonnais's ownership and control over a California insurance business, Executive Life, and that Peyrelevade made false representations to the Federal Reserve Board in 2001 and 2002 regarding his knowledge of these alleged violations. Peyrelevade, who resides in France, is also currently under indictment in the United States District Court for the Central District of California for alleged conduct relating to the Executive Life matter, but has not appeared in the United States to defend the pending charges. France's extradition treaty with the United States does not permit French nationals to be extradited to the United States. *See* Article 3, Paragraph 1, 1996 U.S.T. LEXIS 53 (entered into force February 1, 2002, www.state.gov/documents/organization/38535.pdf).

On February 1, 2005, in response to the parties' Joint Motion for the Issuance of Requests for International Judicial Assistance (''the Joint Motion''), the Administrative Law Judge (''ALJ'') issued Letters of Request and Commissions to a consular official under the Hague Convention for the Taking of Evidence Abroad authorizing testimony to be taken in Paris of 13 French national witnesses proposed by the parties, including Peyrelevade. The Joint Motion noted that the parties were not asking the ALJ to determine at that point whether particular depositions were for discovery purposes or for preservation of testimony purposes. In fact, the Joint Motion specifically indicated Enforcement Counsel's intention to file a motion with the ALJ regarding the proposed testimony of Respondent (as well as two other French witnesses of Respondent who were also named in the indictment charges in California), but that because of the lead time necessary to schedule the depositions in France, the parties agreed to submit their request to the ALJ, pending the outcome of Enforcement Counsel's anticipated motion.[1]

Accordingly, on February 18, 2005, Board Enforcement Counsel filed a Motion in Limine, requesting, among other things, that the ALJ rule that Peyrelevade be permitted to testify only by appearing in person at the hearing in the United States, rather than by a deposition to be taken in France. In its Motion in Limine, Enforcement Counsel argued that Peyrelevade should not be considered ''unavailable'' under the Board's Rules of Practice (''the Rules'') merely because he was residing overseas, given that he would be using the deposition testimony to substitute for live testimony in order to avoid arrest for the pending criminal indictment in California, and that in-person testimony is necessary to enable the ALJ to properly assess Peyrelevade's credibility. After extensive briefing from Peyrelevade and Enforcement Counsel, on June 6, 2005, the ALJ issued an Order (''the June 6 Order'') finding that Peyrelevade's residence abroad ''does not . . . meet the standards of 'unavailable' '' and accordingly, that Peyrelevade's deposition could not be taken to preserve his testimony under Rule 263.27 of the Board's Rules or offered into evidence at the hearing under Rule 263.36 of the Board's Rules.

On July 1, 2005, Peyrelevade filed with the ALJ a Request for Interlocutory Review of the June 6 Order (''the Request''). In the Request, Peyrelevade contends that interlocutory review is appropriate and necessary in this case because the ALJ's ruling improperly resolves a controlling issue of law by denying consideration of Peyrelevade's deposition testimony and by barring Peyrelevade from preserving his testimony by way of a testimonial deposition pursuant to Rule 263.27 of the Board's Rules, thereby eliminating his ability to ''preserve a full and accurate record for the Board's consideration.'' Peyrelevade also contends that interlocutory review is appropriate in order to avoid the additional delay and expense of reinitiating the lengthy process of arranging and taking Peyrelevade's deposition in France, which would be required in the event that the Board later modifies the ALJ's June 6 Order.

Board Enforcement Counsel filed a response to Peyrelevade's Request for Interlocutory Review, arguing that the Board has previously denied an almost identical request for interlocutory review in an earlier enforcement action and that Peyrelevade has failed to satisfy any of the elements necessary for the Board to find that the circumstances ''are extraordinary enough'' to merit interlocutory review. On July 22, 2005, the ALJ, pursuant to Rule 263.28(c) of the Board's Rules, referred Peyrelevade's Request for Interlocutory Review to the Board for final disposition.[2]

Discussion

I. Applicable Standard

Rule 263.28 of the Board's Rules provides that the Board may exercise interlocutory review of an ALJ's ruling if the Board finds that:

(1) the ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;
(2) immediate review of the ruling may materially advance the ultimate termination of the proceeding;
(3) subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or
(4) subsequent modification of the ruling would cause unusual delay or expense.

12 CFR 263.28(b). These provisions are similar to 28 U.S.C. § 1292(b), which sets forth the circumstances under which federal appellate courts may exercise jurisdiction over interlocutory appeals. Thus, the Board has previously observed that ''[w]hile section 1292(b) and case law governing interlocutory review in civil proceedings are not

1. Notably, on August 26, 2005, the French Ministry of Justice authorized the requested depositions.

2. On August 15, 2005, the ALJ granted a request by Peyrelevade for leave to file an additional reply in support of his Request for Interlocutory Review. Accordingly, Peyrelevade's additional reply was transmitted to the Board on August 15, 2005.

binding in this administrative proceeding, they provide useful guidance to the [agencies] in deciding procedural issues such as the one presented here.'' *In re Incus Co. Ltd*, 86 *Federal Reserve Bulletin* 246 (2000) (citations omitted).

The Board has also repeatedly emphasized that interlocutory review is discretionary, and that ''the scope within which such discretion should be exercised is extremely narrow.'' *Id.* (citations omitted). The Board's limitation on interlocutory review reflects a strong and longstanding federal policy against piecemeal appeals before a final judgment. *Id.* (citing *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24–25 (1966)). Accordingly, while a finding of one of the four circumstances set forth in Rule 263.28(b) is a necessary precondition to interlocutory review by the Board, it is not alone sufficient to require that the Board grant such review.'' *Id.* All four of the prerequisites are to be used to guide the Board in the exercise of its discretion. *Id.* at 246.

Interlocutory appeals are generally disfavored because they undermine the independence of the trial judge, expose the parties to harassment and the burdensome costs of a succession of separate appeals, promote delay, and require the unnecessary expenditure of scare judicial resources. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *Catlin v. United States*, 324 U.S. 229, 233-34 (1945). Thus, the Board has stated that a party seeking interlocutory review ''has the burden of persuading the Board that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment.'' *Incus*, at 246–47, (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)).

For the reasons set forth below, the Board determines that Peyrelevade has failed to meet that burden, and his request for interlocutory review is denied.

II. Analysis of June 6 Order Under Standard of Rule 263.28(b)

A. Existence of Controlling Question of Law or Policy

Peyrelevade contends that the June 6 Order involves a ''controlling question of law or policy as to which substantial grounds exist for a difference of opinion.'' The Board has previously noted that ''[p]retrial rulings on the admissibility of evidence are not ordinarily subject to interlocutory review.'' *In re Pharaon, Order Denying Motion for Interlocutory Review*, Docket Nos. 91-037-E-I7 and 91-043-E-I7, p. 3 (Sept. 12, 1995) (citing *Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329, 1342 (9th Cir. 1985)). More specifically, the Board has determined, on nearly identical facts, that no controlling question of law or policy existed, where the ALJ issued a prehearing order ruling that a foreign national respondent subject to a related pending criminal indictment may not present his testimony at the hearing via a deposition taken abroad. *Pharaon, Order Denying Motion for Interlocutory Review*, at p. 4. In denying the motion for interlocutory review in *Pharaon*, the Board observed that ''[i]t is impossible to know whether and to what extent an in limine ruling on the admissibility of evidence would control the outcome of a proceeding absent the holding of the hearing, a ruling in the context of that hearing, and the issuance of a recommended decision.'' *Id.*

Peyrelevade contends that the instant matter is distinguishable from *Pharaon* and does involve a controlling issue of law in that the ALJ has ruled not only that Peyrelevade may not introduce his deposition as testimony at the hearing, but also that his deposition cannot be taken to preserve his testimony pursuant to Rule 263.27, thereby eliminating his ability to ''preserve a full and accurate record for the Board's consideration.'' [3] The Board finds, however, that the ultimate impact of the ALJ's ruling on the outcome of this case is still entirely speculative. For instance, Peyrelevade may ultimately decide to testify in person at the hearing despite his current position; or he could prevail in the hearing without recourse to his testimony. Either one of these outcomes would moot the questions presented at this stage. Moreover, it is entirely unclear at this stage what impact his deposition testimony, even if permitted, would have on the outcome of the hearing. As the Ninth Circuit noted in *Coursen*, ''[i]n limine rulings are by their very nature preliminary. It is impossible to determine whether the movant will be prejudiced by such ruling absent a trial, a ruling in the context of trial, and the return of a verdict.'' *Coursen* 764 F.2d at 1342.

Even if the ALJ's June 6 ruling did involve a ''controlling question of law or policy,'' Peyrelevade has failed to establish that ''substantial grounds exist for a difference of opinion'' on the issue of whether he has a right under these circumstances to testify at the hearing by deposition.[4] To the contrary, the D.C. Circuit Court of Appeals upheld the ALJ's decision in *Pharaon*, on nearly identical facts, that a foreign respondent was required to testify in person if he wanted his testimony considered at the hearing.

In his June 6 Order, the ALJ ruled that because Peyrelevade's testimony will involve ''significant determinations regarding credibility,'' it is ''both important and proper that [Peyrelevade] be required to appear in person at hearing if he intends to testify.'' The D.C. Circuit, in explaining its conclusions with respect to the ALJ's ruling in *Pharaon*, noted that ''[g]iven the significance of personal observation to credibility determinations, we cannot say that [the ALJ's] ruling amounted to an abuse of discretion.'' *Pharaon v. Board of Governors of the Federal Reserve System*, 135 F.3d 148 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 947 (1998). Particularly in absence of authority to the contrary, this opinion demonstrates that no substantial grounds exist for a difference of opinion with regard to the June 6 Order.

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3. Peyrelevade is listed on his own witness list but not on Enforcement Counsel's. While Enforcement Counsel could take Peyrelevade's deposition under the Board's discovery rules, 12 CFR 263.53, Enforcement Counsel have indicated that they do not intend to do so.

4. Unless he has that right, the issue of whether he is ''unavailable'' within the meaning of the Board's rules is ultimately unimportant.

B. Other Rule 263.28(b) Criteria

Additionally, the Board does not find that immediate review of the June 6 Order would materially advance the ultimate termination of the proceeding or that subsequent modification of the Order would be an inadequate remedy or cause unusual delay or expense. Peyrelevade combines his arguments with respect to these three criteria, contending only that because the June 6 Order precludes the taking of Peyrelevade's deposition for the purpose of preserving testimony, unusual and unnecessary delay and expense will result if review and modification of the June 6 Order are deferred until the conclusion of the proceedings before the ALJ. Peyrelevade argues that because such delay and expense can be avoided through the Board's exercise of interlocutory review, the ultimate termination of this proceeding would be materially advanced by the Board's decision to exercise review.

In *Pharaon*, the Board determined that immediate review of the ALJ's similar in limine ruling would not materially advance the ultimate termination of the proceeding and, moreover, that subsequent modification of the ALJ's ruling would not lead to unusual expense or delay. The Board specifically rejected Pharaon's argument that the entire proceeding would have to be repeated if the Board subsequently decided that Pharaon should have been permitted to testify by deposition. *See In re Pharaon, Order Denying Motion for Interlocutory Review*, Docket Nos. 1-037-E-I7 and 91-043-E-I7, p. 4 (Sept. 12, 1995). Peyrelevade points out that the Board's decision denying interlocutory review in *Pharaon* assumed that Enforcement Counsel in that proceeding would take Pharaon's deposition for discovery purposes and expressly anticipated that the ALJ would transmit the deposition transcript to the Board along with any other rejected exhibits. This was not, however, the controlling basis for the Board's denial of interlocutory review in *Pharaon* and does not warrant a different outcome with respect to the ALJ's June 6 Order in this matter.[5] Even if the Board ultimately determines that the June 6 Order is improper and that Peyrelevade should be permitted to testify by deposition, the Board can simply remand the matter for consideration of a deposition of Peyrelevade by the ALJ. While Peyrelevade and Enforcement Counsel disagree on the amount of delay that would be caused by rescheduling Peyrelevade's deposition, it seems unlikely at this point that any substantial delay or expense would result even if it is ultimately necessary to re-request authorization for Peyrelevade's deposition, given that the French Ministry of Justice authorized the requested depositions (including Peyrelevade's) on August 26, 2005. Therefore, as the Board noted in *Pharaon*, "the extent to which subsequent modification would result in any delay and expense, let alone unusual delay and expense, is wholly speculative." *Id.* (emphasis in original).

As set forth herein, the arguments advanced by Peyrelevade fail to provide an appropriate basis upon which the Board may grant interlocutory review of the ALJ's Order. Peyrelevade has not demonstrated the *exceptional* circumstances necessary to justify a departure from the Board's basic policy of postponing review until the conclusion of the hearing and the close of the record. Accordingly, the Board declines Peyrelevade's request for interlocutory review of the ALJ's June 6, 2005 Order.

By order of the Board of Governors, this 16th day of September, 2005.

Board of Governors of the
Federal Reserve System

JENNIFER J. JOHNSON
Secretary of the Board

5. The Board notes that Pharaon ultimately declined to appear for a deposition in that matter.