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# Legal Developments: Second Quarter, 2006

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## ORDERS ISSUED UNDER BANK HOLDING COMPANY ACT

### ORDERS ISSUED UNDER SECTION 3 OF THE BANK HOLDING COMPANY ACT

#### *BB&T Corporation Winston-Salem, North Carolina*

#### Order Approving the Merger of Bank Holding Companies

BB&T Corporation (“BB&T”), a financial holding company within the meaning of the Bank Holding Company Act (“BHC Act”), has requested the Board’s approval under section 3 of the BHC Act to merge with First Citizens Bancorp (“First Citizens”), Cleveland, and acquire its subsidiary banks: The Bank/First Citizens Bank, Cleveland (“First Citizens Bank”); The Home Bank of Tennessee, Maryville (“Home Bank-Maryville”); and The Home Bank, Ducktown (“Home Bank-Ducktown”), all of Tennessee.

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published in the *Federal Register* (71 *Federal Register* 20,401 (2006)). 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.

BB&T, with total consolidated assets of approximately \$110 billion, is the 17th largest depository organization in the United States.<sup>2</sup> BB&T operates subsidiary-insured depository institutions in Alabama, Florida, Georgia, Indiana, Kentucky, Maryland, North Carolina, South Carolina, Tennessee, Virginia, West Virginia, and the District of Columbia. In Tennessee, BB&T is the eighth largest depository organization, controlling deposits of approximately \$1.3 billion. BB&T is the third largest depository organization in North Carolina, controlling deposits of approximately \$23.7 billion, and the fifth largest depository orga-

nization in Georgia, controlling deposits of approximately \$6.3 billion.

First Citizens, with total consolidated assets of approximately \$719.8 million, operates subsidiary-insured depository institutions in Tennessee, North Carolina, and Georgia. In Tennessee, First Citizens is the 22nd largest depository organization, controlling deposits of approximately \$518.1 million. First Citizens is the 95th largest depository organization in North Carolina, controlling deposits of approximately \$25.1 million, and the 70th largest depository organization in Georgia, controlling deposits of approximately \$240.1 million.

On consummation of this proposal, and after accounting for the proposed divestiture, BB&T would remain the 17th largest insured depository organization in the United States, with total consolidated assets of approximately \$110.7 billion. In Tennessee, BB&T would become the seventh largest depository organization, controlling deposits of approximately \$1.8 billion, which represent approximately 1.9 percent of the total amount of deposits of insured depository institutions in the state (“state deposits”). BB&T would remain the third largest depository organization in North Carolina, controlling deposits of approximately \$23.7 billion, which represent approximately 12.9 percent of state deposits. In Georgia, BB&T would remain the fifth largest depository organization, controlling deposits of approximately \$6.6 billion, which represent approximately 4.5 percent of state deposits.

#### *INTERSTATE ANALYSIS*

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the home state of such bank holding company if certain conditions are met. For purposes of the BHC Act, the home state of BB&T is North Carolina,<sup>3</sup> and First Citizens is located in Tennessee, North Carolina, and Georgia.<sup>4</sup>

Based on a review of all the facts of record, including a review of relevant state statutes, the Board finds that the

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1. 12 U.S.C. §1842.

2. Asset and nationwide ranking data are as of March 31, 2006. Statewide deposit and ranking data are as of June 30, 2005, and reflect merger activity through May 11, 2006. 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)).

conditions for an interstate acquisition enumerated in section 3(d) of the BHC Act are met in this case.<sup>5</sup> 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 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.<sup>6</sup>

BB&T and First Citizens compete directly in six banking markets in Tennessee, North Carolina, and Georgia.<sup>7</sup> The Board has reviewed carefully the competitive effects of the proposal in each of these banking markets in light of all the facts of record. In particular, the Board has considered the number of competitors that would remain in the markets, the relative shares of total deposits in depository institutions in the markets (“market deposits”) controlled by BB&T and First Citizens,<sup>8</sup> 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”),<sup>9</sup> other characteristics of the markets, and commitments made by BB&T to divest a branch.

5. 12 U.S.C. §§ 1842(d)(1)(A)–(B) and 1842(d)(2)(A)–(B). BB&T is adequately capitalized and adequately managed, as defined by applicable law. First Citizens Bank, Home Bank–Maryville, and Home Bank–Ducktown have been in existence and operated for the minimum period of time required by applicable state laws (three years). On consummation of the proposal, BB&T 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 Tennessee, North Carolina, and Georgia respectively. 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(e)(1).

7. These banking markets are described in Appendix A.

8. Deposit and market share data are as of June 30, 2005, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386, 387 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743, 744 (1984). 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, 55 (1991).

9. Under the DOJ Guidelines, a market is considered unconcentrated if the post-merger HHI is under 1000, moderately concentrated if the post-merger 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

### A. Banking Market With Divestiture

In the Blue Ridge area, Georgia-Tennessee banking market (“Blue Ridge Market”), BB&T is the second largest depository organization, controlling deposits of \$103.7 million, which represent 22.1 percent of market deposits. First Citizens is the third largest depository organization in the market, with four branches that control deposits of \$63.7 million, which represent 13.6 percent of market deposits. To reduce the potential adverse effects on competition in the Blue Ridge Market, BB&T has committed to divest one branch with at least \$29 million in deposits to an out-of-market banking organization.<sup>10</sup> On consummation of the proposed merger and after accounting for the proposed divestiture, BB&T would remain the second largest depository institution in the market, controlling deposits of approximately \$138.3 million, representing 29.5 percent of market deposits. The HHI would increase 235 points to 3297.

In reviewing the competitive effects of the proposal in the Blue Ridge Market, the Board also has considered carefully whether other factors mitigate the competitive effects of the proposal. The number and strength of factors necessary to mitigate the competitive effects of a proposal depend on the size of the increase in, and resulting level of, concentration in the market.<sup>11</sup>

Several factors indicate that the proposal is not likely to have a significantly adverse competitive effect in the Blue Ridge Market. After consummation of the proposal and the proposed divestiture to an out-of-market competitor, seven insured depository institutions would continue to operate in the market.<sup>12</sup> In addition, the Blue Ridge Market has been attractive for entry, as indicated by the de novo entry of three commercial banking organizations in the past four years, and appears likely to remain attractive for entry. For

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. BB&T has committed that it will execute, before consummation of the proposed merger, a sales agreement with an out-of-market banking organization. BB&T also has committed to complete the divestiture within 180 days after consummation of the proposed merger. In addition, BB&T has committed that, if it is unsuccessful in completing the proposed divestiture within such time period, it will transfer the unsold branch to an independent trustee who will be instructed to sell the branch to an alternate purchaser or purchasers in accordance with the terms of this order and without regard to price. Both the trustee and any alternate purchaser must be deemed acceptable by the Board. See *BankAmerica Corporation*, 78 *Federal Reserve Bulletin* 338 (1992); *United New Mexico Financial Corporation*, 77 *Federal Reserve Bulletin* 484 (1991).

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

12. The market also has one credit union that operates two street-level branches, and its membership is open to all residents in the market.

example, Fannin County, Georgia, has more than twice the amount of deposits compared to the median nonmetropolitan county in the state.<sup>13</sup> The rate of population growth of Fannin County, moreover, is twice the rate for similar nonmetropolitan counties in Georgia.

## B. Banking Markets Without Divestitures

Consummation of the proposal without divestitures would be consistent with Board precedent and within the thresholds of the DOJ Guidelines in the other five banking markets where BB&T and First Citizens' subsidiary banks compete directly.<sup>14</sup> After consummation, four of the banking markets would remain moderately concentrated<sup>15</sup> and one banking market would remain highly concentrated,<sup>16</sup> as measured by the HHI. In each of the five banking markets, the increase in market concentration would be small, and numerous competitors would remain.

## C. Views of Other Agencies and Conclusion on Competitive Considerations

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

Based on all the facts of record, the Board concludes that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of resources in the six banking markets where BB&T and First Citizens compete directly or in any other relevant banking market. Accordingly, 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 and other supervisory information received from the federal

and state supervisors of the organizations involved, publicly reported and other financial information, information provided by BB&T, and public comments received on the proposal.<sup>17</sup>

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

The Board has considered carefully the proposal under the financial factors. BB&T, all its subsidiary banks, and all the subsidiary banks of First Citizens are well capitalized and would remain so on consummation of the proposal. Based on its review of these factors, the Board finds that BB&T has sufficient financial resources to effect the proposal. The proposed transaction is structured as a partial share exchange and partial cash purchase.

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 BB&T, First Citizens, 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, including anti-money-laundering laws. BB&T, First Citizens, and their subsidiary depository institutions are considered to be well managed. The Board also has considered BB&T's plans for implementing the proposal, including the 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

13. Fannin County comprises 95.5 percent of the Blue Ridge Market by population.

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

15. The moderately concentrated markets are the Athens, Cleveland, Knoxville, and Sevierville banking markets, all in Tennessee.

16. The Cherokee and Clay counties banking market in North Carolina would remain highly concentrated.

17. A commenter reiterated the concern it expressed in BB&T's proposal to acquire Main Street Banks, Inc. ("Main Street Proposal") about BB&T's relationships with unaffiliated pawn shops and other nontraditional providers of financial services, without presenting any new material facts or alleging any violations of law. In approving the Main Street Proposal, the Board considered the commenter's concern and recently reviewed BB&T's relationships with nontraditional providers of financial services. *BB&T Corporation*, 92 *Federal Reserve Bulletin* C116, n.15 (2006). As noted in the Main Street Order, the activities of the consumer finance businesses identified by the commenter are permissible, and the businesses are licensed by the states where they operate.

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”).<sup>18</sup> 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.<sup>19</sup>

The Board has considered carefully all the facts of record, including evaluations of the CRA performance records of BB&T’s and First Citizens’ subsidiary banks, data reported by BB&T under the Home Mortgage Disclosure Act (“HMDA”),<sup>20</sup> other information provided by BB&T, confidential supervisory information, and public comment received on the proposal. A commenter opposed the proposal and alleged, based on 2005 HMDA data reported by BB&T for its assessment areas in North Carolina, that BB&T engaged in discriminatory treatment of minority individuals in its home mortgage lending.<sup>21</sup>

#### A. CRA Performance Evaluations

is 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.<sup>22</sup>

BB&T’s largest subsidiary bank, as measured by total deposits, is Branch Banking and Trust Company, also in

Winston-Salem, North Carolina.<sup>23</sup> The bank received an “outstanding” rating by the Federal Deposit Insurance Corporation (“FDIC”) at its most recent CRA performance evaluation, as of December 20, 2004. BB&T’s remaining subsidiary banks all received “satisfactory” ratings at their most recent CRA evaluations.<sup>24</sup> In addition, each of First Citizens’ subsidiary banks received “satisfactory” ratings at its most recent CRA performance evaluation by the FDIC or the Office of Thrift Supervision.<sup>25</sup> BB&T has represented that its CRA and consumer compliance programs would be implemented at the operations acquired from First Citizens after the merger of Branch Banking and Trust Company and First Citizens’ subsidiary banks.

#### B. HMDA and Fair Lending Record

The Board has considered carefully the lending record of BB&T’s subsidiary banks and nonbank mortgage lenders in light of public comment about their record of lending to minorities. The commenter asserted, based on 2005 HMDA data, that BB&T made higher-cost loans<sup>26</sup> in North Carolina more frequently to African Americans and Hispanics than to nonminorities.<sup>27</sup> The Board notes that these data are preliminary and will not be finalized for analysis until fall 2006.

Although the preliminary 2005 HMDA data for BB&T’s subsidiary banks and nonbank mortgage lenders indicate that a greater percentage of higher priced loans were made to African-American or Hispanic borrowers relative to nonminority borrowers, HMDA data provide an insufficient basis by themselves on which to conclude whether BB&T or its subsidiaries are excluding or imposing higher costs on any racial or ethnic group on a prohibited basis.<sup>28</sup> HMDA data alone, even with the recent addition of pricing information, provide only limited information about the covered loans.<sup>29</sup> HMDA data, therefore, provide

23. As of December 31, 2005, Branch Banking and Trust Company accounted for approximately 67.1 percent of the total domestic deposits of BB&T’s four subsidiary banks.

24. Appendix C lists the most recent CRA ratings of BB&T’s other subsidiary banks.

25. Home Bank-Ducktown was a savings association until its conversion to a state nonmember bank on December 30, 2004.

26. Beginning January 1, 2004, the HMDA data required to be reported by lenders were expanded to include pricing information for loans on which the annual percentage rate (APR) exceeds the yield for U.S. Treasury securities of comparable maturity 3 or more percentage points for first-lien mortgages and 5 or more percentage points for second-lien mortgages (12 C.F.R. 203.4).

27. The comments have been forwarded to the FDIC, the primary regulator for BB&T’s subsidiary banks, for its consideration in the context of evaluating the banks for compliance with the fair lending laws and regulations.

28. The Board reviewed 2004 and preliminary 2005 HMDA data reported by BB&T’s subsidiaries, including data for North Carolina.

29. The data, for example, do not account for the possibility that an institution’s outreach efforts may attract a larger proportion of marginally qualified applicants than other institutions attract and do not provide a basis for an independent assessment of whether an applicant who was denied credit was, in fact, creditworthy. In addition, credit history problems, excessive debt levels relative to income, and high loan amounts relative to the value of the real estate collateral (reasons

18. 12 U.S.C. § 2901 et seq.; 12 U.S.C. § 1842(e)(2).

19. 12 U.S.C. § 2903.

20. 12 U.S.C. § 2801 et seq.

21. The commenter, without presenting any new material facts or alleging any violations of law, also reiterated its comments in the Main Street Proposal about (1) referrals of loan applicants by BB&T’s subsidiary banks to Lendmark Financial Services, a nonbank subsidiary of BB&T that primarily engages in subprime mortgage lending, and (2) BB&T’s acquisition under section 4(k) of the BHC Act of I&SB Financial, Ltd., a nonbanking company that purchases automobile loan portfolios. The Board hereby reaffirms and adopts the facts and conclusions detailed in the Main Street Order related to such comments. See Main Street Order at n.23 and n.28 (2006).

22. See *Interagency Questions and Answers Regarding Community Reinvestment*, 66 *Federal Register* 36,620 at 36,640 (2001).

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

Examiners found no substantive violations of applicable fair lending laws during the fair lending reviews they conducted in conjunction with the most recent CRA performance evaluations of BB&T's subsidiary banks.<sup>30</sup> In addition, the record indicates that BB&T has taken steps to ensure compliance with fair lending and other consumer protection laws. BB&T employs an internal second-review process for home loan applications that would otherwise be denied and analyzes its HMDA data periodically. Furthermore, BB&T monitors its compliance with fair lending laws by analyzing disparities in its rates of lending for select products and markets and by conducting a more extensive internal comparative file review when merited. Finally, BB&T provides fair lending training to its lending personnel, including training to help ensure that loan originators consistently disseminate credit-assistance information to applicants.

The Board also has considered the HMDA data in light of other information, including the CRA performance records of each of BB&T's subsidiary banks. Based on all the facts of record, the Board concludes that BB&T's established efforts and record demonstrate that BB&T is active in helping to meet the credit needs of its entire communities.

### C. Conclusion on CRA Performance Records

The Board has considered carefully all the facts of record, including reports of examination of the CRA records of the institutions involved, information provided by BB&T, comments received on the proposal, and confidential supervisory information. BB&T represented that the proposed transaction would provide First Citizens' customers with expanded products and services. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant depository institutions are consistent with approval.<sup>31</sup>

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most frequently cited for a credit denial or higher credit cost) are not available from HMDA data.

30. See Main Street Order.

31. A commenter requested that the Board hold a public hearing or meeting on the proposal. Section 3 of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authority for any of the banks to be acquired makes a timely written recommendation of denial of the application. The Board has not received such a recommendation from any supervisory authority. Under its rules, the Board also may, in its discretion, hold a public meeting or hearing on an application to acquire a bank if a meeting or hearing is necessary or appropriate to clarify factual issues related to the application and to provide an opportunity for testimony (12 CFR 225.16(e)). The Board has considered carefully the commenter's request in light of all the facts of record. In the Board's view, the commenter had ample opportunity to submit comments on the proposal and, in fact, submitted written comments that the Board has considered carefully in acting on the proposal. The request fails to

### CONCLUSION

Based on the foregoing and all facts of record, the Board has determined that the application should be, and hereby is, approved. In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act. The Board's approval is specifically conditioned on compliance by BB&T with the conditions imposed in this order and the commitments made to the Board in connection with the application, including the divestiture commitment discussed above. 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 15th calendar day after the effective date of this order, or later than three months after the effective date of this order, unless such period is extended for good cause by the Board or the Federal Reserve Bank of Richmond, acting pursuant to delegated authority.

By order of the Board of Governors, effective June 12, 2006.

Voting for this action: Chairman Bernanke and Governors Bies, Olson, Kohn, Warsh, and Kroszner.

ROBERT DEV. FRIERSON  
*Deputy Secretary of the Board*

### Appendix A

#### *BANKING MARKETS IN WHICH BB&T AND FIRST CITIZENS COMPETE DIRECTLY*

##### *Athens Area, Tennessee*

McMinn, Meigs, and Monroe counties and the town of Delano in Polk County.

##### *Cleveland Area, Tennessee*

Bradley County and the towns of Benton and Ocoee in Polk County.

##### *Knoxville Area, Tennessee*

Anderson, Knox, Loudon, Roane, and Union counties and the portion of Blount County northwest of Chilhowee

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

Mountain; the towns of Chestnut Hill, Dandridge, Dump-  
lin, Friends Station, Hodges, New Market, and Strawberry  
Plains in Jefferson County; the towns of Harriman and  
Oliver Springs in Morgan County; the towns of Seymour  
and Kodak in Sevier County; and the towns of Blaine,  
Buffalo Springs, Joppa, Lea Springs, and Powder Springs  
in Grainger County.

#### *Sevierville Area, Tennessee*

Sevier County, excluding the towns of Seymour and Kodak,  
and the portion of Blount County southeast of Chilhowee  
Mountain.

#### *Cherokee and Clay Counties, North Carolina*

Cherokee and Clay Counties.

#### *Blue Ridge Area, Georgia-Tennessee*

Fannin County in Georgia and the towns of Ducktown and  
Copperhill in Polk County, Tennessee.

## Appendix B

### *MARKET DATA FOR TENNESSEE AND NORTH CAROLINA BANKING MARKETS*

#### *Athens Area, Tennessee*

BB&T operates the second largest depository institution in  
the Athens area banking market, controlling deposits of  
\$175.1 million, which represent 14.4 percent of market  
deposits. First Citizens operates the 13th largest depository  
institution in the market, controlling deposits of approxi-  
mately \$13.9 million, which represent 1.1 percent of mar-  
ket deposits. After consummation of the proposal, BB&T  
would remain the second largest depository organization in  
the market, controlling deposits of approximately  
\$188.9 million, which represent approximately 15.6 per-  
cent of market deposits. The HHI would increase 33 points  
to 1398. Fourteen insured depository institutions would  
remain in the banking market.

#### *Cleveland Area, Tennessee*

BB&T operates the tenth largest depository institution in  
the Cleveland area banking market, controlling deposits of  
\$8.4 million, which represent less than 1 percent of market  
deposits. First Citizens operates the largest depository  
institution in the market, controlling deposits of approxi-  
mately \$318.8 million, which represent 23.8 percent of  
market deposits. After consummation of the proposal,

BB&T would become the largest depository organization in  
the market, controlling deposits of approximately  
\$327.2 million, which represent approximately 24.5 per-  
cent of market deposits. The HHI would increase 30 points  
to 1616. Eleven insured depository institutions would  
remain in the banking market.

#### *Knoxville Area, Tennessee*

BB&T operates the fourth largest depository institution in  
the Knoxville area banking market, controlling deposits of  
\$678.2 million, which represent 7.2 percent of market  
deposits. First Citizens operates the 18th largest depository  
institution in the market, controlling deposits of approxi-  
mately \$83.8 million, which represent less than 1 percent of  
market deposits. After consummation of the proposal,  
BB&T would remain the fourth largest depository organi-  
zation in the market, controlling deposits of approximately  
\$761.9 million, which represent approximately 8.1 percent  
of market deposits. The HHI would increase 13 points to  
1274. Thirty-three insured depository institutions would  
remain in the banking market.

#### *Sevierville Area, Tennessee*

BB&T operates the fifth largest depository institution in the  
Sevierville area banking market, controlling deposits of  
\$123.6 million, which represent 8.9 percent of market  
deposits. First Citizens operates the eighth largest depository  
institution in the market, controlling deposits of approxi-  
mately \$13.1 million, which represent less than  
1 percent of market deposits. After consummation of the  
proposal, BB&T would remain the fifth largest depository  
organization in the market, controlling deposits of approxi-  
mately \$136.7 million, which represent approximately  
9.9 percent of market deposits. The HHI would increase  
16 points to 1782. Ten insured depository institutions  
would remain in the banking market.

#### *Cherokee and Clay Counties, North Carolina*

BB&T operates the sixth largest depository institution in  
the Cherokee and Clay counties banking market, control-  
ling deposits of \$17.6 million, which represent 3.5 percent  
of market deposits. First Citizens operates the fifth largest  
depository institution in the market, controlling deposits of  
approximately \$25.1 million, which represent 5 percent of  
market deposits. After consummation of the proposal,  
BB&T would become the fifth largest depository organiza-  
tion in the market, controlling deposits of approximately  
\$42.7 million, which represent approximately 8.5 percent  
of market deposits. The HHI would increase 35 points to  
2956. Six insured depository institutions would remain in  
the banking market.

## Appendix C

## CRA PERFORMANCE EVALUATIONS OF BB&amp;T'S BANKS

Bank	CRA Rating	Date	Supervisor
1. Branch Banking and Trust Company, Winston-Salem, North Carolina	Outstanding	December 2004	FDIC
2. Branch Banking and Trust Company of South Carolina, Greenville, South Carolina	Satisfactory	December 2004	FDIC
3. Branch Banking and Trust Company of Virginia, Richmond, Virginia	Satisfactory	December 2004	FDIC
4. BB&T Bankcard Corporation, Columbus, Georgia	Satisfactory	May 2005	FDIC
5. Main Street Bank, Covington, Georgia	Satisfactory	December 2004	FDIC

## ORDERS ISSUED UNDER SECTION 4 OF THE BANK HOLDING COMPANY ACT

*Banco Latinoamericano de Exportaciones, S.A.**Panama City, Republic of Panama*

## Order Approving Notice to Engage in Nonbanking Activities

Banco Latinoamericano de Exportaciones, S.A. ("Bank"), a foreign banking organization subject to the Bank Holding Company Act ("BHC Act"),<sup>1</sup> has requested the Board's approval under sections 4(c)(8) and 4(j) of the BHC Act<sup>2</sup> and section 225.24 of the Board's Regulation Y<sup>3</sup> to act as a certification authority in connection with financial and nonfinancial transactions and engage in related data-processing activities. Bank proposes to engage in these activities by entering into an agreement with IdenTrust, Inc. ("IdenTrust"), New York, New York. The agreement will be assigned to a wholly owned, indirect subsidiary of the Bank currently in organization, Clavex, LLC ("Clavex").

Notice of the proposal, affording interested persons an opportunity to comment, has been published in the *Federal Register* (71 *Federal Register* 8858 (2006)). The time for filing comments has expired, and the Board has considered the notice and all comments received in light of the factors set forth in section 4 of the BHC Act.

Bank, with total consolidated assets of approximately \$3.2 billion, is the third largest bank in Panama. In the United States, Bank maintains an agency in New York,

New York, and has received approval to establish a representative office in Miami, Florida.

The proposed activities would be undertaken within the IdenTrust system in which IdenTrust serves as a central rulemaking and coordinating body for a global network of institutions that act as digital certification authorities. Certification authorities verify or authenticate the identity of customers conducting financial and nonfinancial transactions over the Internet and other "open" electronic networks. To provide these services, IdenTrust and its network of participating financial institutions use digital signatures created with encryption technology. These digital signatures uniquely identify participants in the IdenTrust system who send signed messages over electronic networks. Certification authorities issue digital certificates that certify that the digital signature is uniquely associated with a particular message sender so that the message recipient can be assured of the identity of its trading partner.

As a certification authority, Clavex would provide the technical systems and support necessary for banks to verify and authenticate the identity of customers conducting electronic transactions and to register digital certificates to customers. Clavex would provide these services to Bank as well as to other banks in Puerto Rico, Mexico, the Caribbean, Central America, and South America that enter into contracts with Clavex.<sup>4</sup> Bank, and any other banks to which Clavex may provide services, would be responsible for performing the due diligence on customers that request digital credentials, a role referred to as "registration authority." Bank and other registration authorities would register the digital certificates issued to their customers, and Clavex would maintain a database of all certificates issued through its registration authorities. Clavex would also provide registration authorities with the software and hardware required to use the IdenTrust system.

1. As a foreign bank operating an agency in the United States, Bank is subject to the BHC Act by operation of section 8(a) of the International Banking Act of 1978 (12 U.S.C. § 3106(a)).

2. 12 U.S.C. §§ 1843(c)(8) and 1843(j).

3. 12 C.F.R. 225.24.

4. These banks would also have to enter into agreements with IdenTrust to participate in the IdenTrust system.

The Board has previously determined by order or regulation that acting as a certification authority in connection with financial and nonfinancial transactions<sup>5</sup> and data processing<sup>6</sup> are activities closely related to banking for purposes of section 4(c)(8) of the BHC Act. The proposed activities are consistent with those that have been approved by the Board. In addition, Bank has committed to conduct these activities in accordance with the limitations set forth in Regulation Y and the Board's orders governing these activities.<sup>7</sup>

To approve the notice, the Board also must determine that the proposal 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.<sup>8</sup> As part of its evaluation of these factors, the Board considers the financial and managerial resources of the companies involved and the effect of the proposal on those resources.<sup>9</sup> The Board has considered, among other things, information provided by Bank, confidential reports of examination, other confidential supervisory information, and publicly reported financial and other information in assessing the financial and managerial strength of Bank.

In evaluating the financial factors of this proposal, the Board has considered a number of factors, including capital adequacy and earnings performance. Bank's capital ratios exceed the minimum levels that would be required by the Basel Capital Accord and are considered equivalent to the capital that would be required of a U.S. banking organization. Moreover, consummation of this proposal would not have a significant impact on the financial condition of Bank. Based on its review of the record, the Board finds that Bank has sufficient financial resources to effect the proposal.

In addition, the Board has carefully considered the managerial resources of Bank, the supervisory experiences of the relevant banking supervisory agencies with Bank, and Bank's record of compliance with applicable U.S. banking laws. The Board has also reviewed reports of examination from the appropriate supervisors of the U.S. operations of Bank that assessed its managerial resources. Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources of Bank are consistent with approval.

The Board has also considered carefully the competitive effects of the proposal in light of all the facts of record. Bank does not currently act as a certification authority. In addition, the Board notes that the IdenTrust system is structured so that its participants would remain free to compete with each other in providing certification authority and related services to customers. Based on all the facts of

record, the Board concludes that Bank's proposed activities are not likely to have any adverse competitive effects.

The Board expects that the proposed activities would result in benefits to the public by enhancing Bank's ability to serve its customers. The certification authority activity would facilitate customers' ability to conduct commercial transactions over the Internet and other "open" electronic networks. These customers will also benefit from the broader array of products and services Bank will be able to offer and from the ability to purchase such products and services on a regional basis.

The Board has determined that the conduct of the proposed nonbanking activities within the framework of Regulation Y and Board precedent is not likely to result in adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. Based on all the facts of record, the Board has concluded that consummation of the proposal can reasonably be expected to produce benefits that would outweigh any likely adverse effects. Accordingly, the Board has determined that the balance of the public benefits that it must consider under section 4(j)(2) of the BHC Act is consistent with approval.

Based on the foregoing, the Board has determined that the notice 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 Bank with the conditions imposed in this order and the commitments made to the Board in connection with the notice. The Board's approval is also subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c),<sup>10</sup> and to the Board's authority to require such modification or termination of the activities of Bank 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.

This transaction shall not be consummated later than three months after the effective date of this order unless such period is extended for good cause by the Board or the Federal Reserve Bank of New York, acting pursuant to delegated authority.

By order of the Board of Governors, effective June 8, 2006.

Voting for this action: Chairman Bernanke and Governors Bies, Olson, Kohn, Warsh, and Kroszner.

ROBERT DEV. FRIERSON  
Deputy Secretary of the Board

5. See *Bayerische Hypo- und Vereinsbank AG*, 86 *Federal Reserve Bulletin* 56 (2000) ("Bayerische Order").

6. 12 C.F.R. 225.28(b)(14).

7. See *Bayerische Order*.

8. 12 U.S.C. § 1843(j)(2)(A).

9. 12 C.F.R. 225.26.

10. 12 C.F.R. 225.7 and 225.25(c).



*Banco Santander Central Hispano, S.A.  
Madrid, Spain*

Order Approving the Acquisition of Shares  
of Savings Associations

Banco Santander Central Hispano, S.A. ("Santander"), a financial holding company within the meaning of the Bank Holding Company Act ("BHC Act"), has requested the Board's approval under sections 4(c)(8) and 4(j) of the BHC Act and section 225.24 of the Board's Regulation Y<sup>1</sup> to acquire up to 24.99 percent of the voting shares of Sovereign Bancorp, Inc. ("Sovereign") and to control Sovereign<sup>2</sup> and its subsidiary savings association, Sovereign Bank, both of Wyomissing, Pennsylvania, and Independence Community Bank Corp. ("Independence") and its subsidiary savings bank, Independence Community Bank ("Independence Bank"),<sup>3</sup> both of Brooklyn, New York. For purposes of the BHC Act, the Board finds that Santander would control Sovereign and, thus, Sovereign would become a nonbanking subsidiary of Santander<sup>4</sup>

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published in the *Federal Register* (70 *Federal Register* 74,816 (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 4 of the BHC Act.

Santander, with total consolidated assets equivalent to approximately \$939 billion, is the 19th largest banking organization in the world and the largest banking organization in Spain.<sup>5</sup> Santander engages in a broad range of banking and financial services worldwide through an extensive network of offices and subsidiaries. Santander, with total consolidated assets of approximately \$61 billion in the

United States, operates one U.S. subsidiary-insured depository institution in Puerto Rico only, Banco Santander Puerto Rico ("BSPR"), San Juan. BSPR controls \$5.6 billion in deposits, which represent less than 1 percent of total deposits in insured depository institutions in the United States ("total U.S. deposits").<sup>6</sup> Santander also operates branches in New York, New York, and Stamford, Connecticut, and an Edge corporation in Miami, Florida.<sup>7</sup>

Sovereign, with total consolidated assets of approximately \$64 billion, is the 28th largest depository organization in the United States.<sup>8</sup> Sovereign operates one insured depository institution, Sovereign Bank, with offices in Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island. Sovereign Bank controls approximately \$36 billion in deposits, which represents less than 1 percent of total U.S. deposits.

Independence, with total consolidated assets of approximately \$19 billion, is the 62nd largest depository organization in the United States. Independence operates one insured depository institution with offices in New York and New Jersey that controls deposits of approximately \$16 billion, which represent less than 1 percent of total U.S. deposits.

On consummation of the proposal, Santander would have total U.S. assets of approximately \$144 billion. Santander would control deposits of approximately \$58 billion, representing less than 1 percent of total U.S. deposits.

The Board previously has determined by regulation that the operation of a savings association by a bank holding company is closely related to banking for purposes of section 4(c)(8) of the BHC Act.<sup>9</sup> The Board requires that savings associations acquired by bank holding companies conform their direct and indirect activities to those permissible for bank holding companies under section 4 of the BHC Act. Santander and Sovereign have committed to conform all the activities of Sovereign Bank and Independence Bank to those permissible under section 4(c)(8) of the BHC Act and Regulation Y.<sup>10</sup>

In reviewing the proposal, the Board is required by section 4(j)(2)(A) of the BHC Act to determine that the proposed acquisition of Sovereign, Independence, and their subsidiary savings associations "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

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

2. Pursuant to its investment agreement with Sovereign, Santander would acquire 19.8 percent of Sovereign's common stock outstanding on the transaction closing date and would have the right to purchase additional shares not to exceed in the aggregate 24.99 percent of Sovereign common stock. Pursuant to sections 4(c)(8) and 4(j) of the BHC Act (12 U.S.C. §§ 1843(c)(8) and (j)) and section 225.24 of the Board's Regulation Y (12 CFR 225.24), Santander is required to obtain the Board's prior approval to acquire additional shares that would result in Santander controlling more than 24.99 percent of any class of Sovereign's voting shares.

3. Independence Bank is a state-chartered savings bank deemed to be a savings association under section 10(f) of the Home Owners' Loan Act and under the BHC Act. See 12 U.S.C. §§ 1467a(l) and 1841(j).

4. Immediately following Santander's acquisition of a controlling interest in Sovereign, Sovereign proposes to acquire all of Independence's voting shares. Santander's acquisition of an indirect controlling interest in Independence Bank is also subject to approval by the New York State Banking Department ("NYSBD"), and Sovereign's acquisition of Independence Bank is subject to approvals by the Office of Thrift Supervision ("OTS") and the NYSBD. Sovereign has reported its intent to merge Independence Bank into Sovereign Bank several months after acquiring Independence. That merger would be subject to approval by the OTS under the Bank Merger Act.

5. Asset data and rankings are as of December 31, 2004, and are based on the exchange rate then in effect.

6. Deposit data are as of June 30, 2005. In this context, the term "insured depository institution" includes insured commercial banks, savings associations, and savings banks.

7. Edge corporations are organized under section 25A of the Federal Reserve Act (12 U.S.C. § 611 et seq.).

8. Domestic asset and ranking data are as of December 31, 2005.

9. 12 CFR 225.28(b)(4)(ii).

10. Santander has committed that it will use its best efforts to cause Sovereign to, and Sovereign has committed that it will, conform its direct and indirect nonbanking activities and investments, including by divestiture if necessary, to the requirements of the BHC Act within two years of consummation of the proposal.

interests, or unsound banking practices.”<sup>11</sup> As part of its evaluation of a proposal under the public interest factors, the Board reviews the financial and managerial resources of the companies involved, as well as the effect of the proposal on competition in the relevant market and the public benefits of the proposal.<sup>12</sup> In acting on notices to acquire a savings association, the Board also reviews the records of performance of the relevant insured depository institutions under the Community Reinvestment Act (“CRA”).<sup>13</sup>

The Board has considered these factors in light of all the facts of record, including confidential supervisory and examination information, publicly reported financial and other information, and public comments submitted on the proposal.<sup>14</sup> The Board also has consulted with, and considered information provided by, the primary home-country supervisor of Santander and various federal and state supervisory agencies, including the Federal Deposit Insurance Corporation (“FDIC”), the OTS, the NYSBD, and the Securities and Exchange Commission (“SEC”).

### COMPETITIVE CONSIDERATIONS

As part of the Board’s consideration of the public interest factors under section 4 of the BHC Act, the Board has considered carefully the competitive effects of the proposal in light of all the facts of record. Sovereign and Independence control insured depository institutions that engage in retail operations in the Metro New York banking market (the “New York banking market”).<sup>15</sup> In the New York banking market, Santander operates only two uninsured branches that do not engage in retail banking operations. In weighing the competitive factors, the Board has also taken into account Sovereign’s proposal to acquire Independence. The Board has considered the number of competitors that would remain in the banking market; the relative share of total deposits in depository institutions in the market (“market deposits”) controlled by Sovereign and Independence;<sup>16</sup> 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”);<sup>17</sup> and other characteristics of the markets.

Consummation of the proposal would be consistent with Board precedent and the DOJ Guidelines in the New York banking market. After consummation, the New York banking market would remain moderately concentrated, as measured by the HHI, and numerous competitors would remain.<sup>18</sup>

Based on all the facts of record, the Board concludes that consummation of the proposal would not result in any significantly adverse effect on competition or on the concentration of banking resources in the New York banking market or in any other relevant banking market.

### FINANCIAL AND MANAGERIAL RESOURCES

In reviewing the proposal under section 4 of the BHC Act, the Board has carefully considered the financial and managerial resources of Santander, Sovereign, Independence, and their subsidiaries. The Board also has reviewed the effect the transaction would have on those resources in light of all the facts of record, including confidential reports of examination, other supervisory information from the primary federal and state supervisors of the organizations involved in the proposal, publicly reported and other financial information, information provided by Santander,

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institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift deposits in the calculation of market share on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991). Because control of the deposits of Sovereign Bank and Independence Bank would be acquired by a commercial banking organization, these deposits are included at 100 percent in the calculation of the post-consummation share of market deposits. See, e.g., *First Bank, Inc.*, 76 *Federal Reserve Bulletin* 669 (1990).

17. Under the DOJ Guidelines, 49 *Federal Register* 26,823 (1984), a market is considered unconcentrated if the post-merger HHI is under 1000, moderately concentrated if the post-merger HHI is between 1000 and 1800, and highly concentrated if the post-merger HHI is more than 1800. The Department of Justice has informed the Board that a bank merger or acquisition generally will not be challenged (in the absence of other factors indicating anticompetitive effects) unless the post-merger HHI is at least 1800 and the merger increases the HHI by more than 200 points. The Department of Justice has stated that the higher-than-normal HHI thresholds for screening bank mergers for anticompetitive effects implicitly recognize the competitive effects of limited-purpose lenders and other nondepository financial institutions.

18. Sovereign operates the 29th largest depository institution in the New York banking market, controlling deposits of \$6.5 billion, which represent less than 1 percent of market deposits. Independence operates the 20th largest depository institution in the New York banking market, controlling deposits of approximately \$10 billion, which represent less than 1 percent of market deposits. After consummation of the proposal, Santander would become the eighth largest depository organization in the market, controlling deposits of approximately \$17 billion, which represent approximately 2 percent of market deposits. The HHI would decrease 19 points to 1034. Two hundred and sixty-four bank and thrift institution competitors would remain in the market.

11. 12 U.S.C. § 1843(j)(2)(A).

12. See 12 C.F.R. 225.26; see, e.g., *BancOne Corporation*, 83 *Federal Reserve Bulletin* 602 (1997).

13. 12 U.S.C. § 2901 et seq.

14. The Board received comments objecting to the proposal from an investment advisor to a mutual fund family that controls 4.9 percent of Sovereign’s voting shares and from two other commenters. The commenters primarily expressed concern about the managerial resources of Santander or Sovereign, the financial resources of Sovereign, or the manner in which the proposal was developed.

15. The New York banking market includes Bronx, Dutchess, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster, and Westchester counties in New York; Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, Union, and Warren counties in New Jersey; Monroe and Pike counties in Pennsylvania; and Fairfield County and portions of Litchfield and New Haven counties in Connecticut.

16. Deposit and market share data are as of June 30, 2005 (adjusted to reflect mergers and acquisitions through April 26, 2006), and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board has previously indicated that thrift

and public comments received on the proposal.<sup>19</sup> The Board also has consulted with the Bank of Spain, which is responsible for the supervision and regulation of Spanish financial institutions.

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

The Board has carefully considered the financial resources of the organizations involved in the proposal. The capital levels of Santander would continue to exceed the minimum levels that would be required under the Basel Capital Accord and are considered to be equivalent to the capital levels that would be required of a U.S. banking organization. In addition, Sovereign, Independence, and their subsidiary savings associations and the U.S. subsidiary depository institution of Santander<sup>20</sup> are well capitalized and would remain so on consummation of the proposal. Based on its review of the record, the Board finds that Santander has sufficient financial resources to effect the proposal.<sup>21</sup> The proposed transaction is structured as a cash

purchase, and Santander will use available resources to fund the transaction.

The Board also has considered the managerial resources of the organizations involved and the proposed combined organization.<sup>22</sup> The Board has reviewed the examination records of Santander's U.S. operations and of Sovereign, Independence, and their subsidiary depository institutions, including assessments of their management, risk-management systems, and operations.<sup>23</sup> 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 laws and with anti-money-laundering laws.<sup>24</sup> Santander, Sovereign, Independence, and their subsidiary depository institutions are considered to be well managed. The Board also has considered Santander's plans for implementing the proposal, including the proposed management after consummation.<sup>25</sup>

19. Some commenters objected to the proposal because Sovereign's shareholders were not afforded an opportunity to vote on Santander's proposed investment in Sovereign, and they disagreed with Sovereign's decision to postpone its annual shareholder meeting. The commenters also alleged that Sovereign's board of directors breached its fiduciary duty by agreeing to the proposed transaction with Santander. These are matters of state law and may be raised before a court with the authority to provide commenters with adequate relief, if deemed appropriate. The Board also notes that the New York Stock Exchange ("NYSE") has determined that Sovereign's proposed issuance of shares to effect the transaction would not trigger NYSE's rules requiring shareholder approval of change of control transactions. The Board has consulted with the SEC about this matter. The Board has also consulted with the SEC about a commenter's allegations that Sovereign made false or misleading disclosures in statements filed with the SEC.

20. Santander BanCorp ("SBC"), San Juan, an intermediate bank holding company through which Santander holds BSPR, has restated financial statements for the years 2000–2004 after concluding that some transactions booked as mortgage loan purchases or sales during those years did not meet accounting requirements for treatment as sales. SBC also delayed issuing its annual report for 2005 pending its review of similar transactions executed in 2005. SBC has indicated that the restatements lower its cumulative net income by less than 1 percent during the covered period. The Board has considered the corrective actions Santander and SBC have taken with respect to this matter. The Board has broad supervisory authority under the banking laws to address these matters, if warranted, in the examination and supervisory process. The Board also has consulted with the SEC about this matter.

21. A commenter questioned whether Santander has sufficient financial resources to offer to purchase additional shares of Sovereign

if required to do so under Pennsylvania law. Pennsylvania corporate law generally affords dissenting shareholders a right to demand fair value for their shares when a person or a group of persons acting in concert acquires 20 percent or more of the voting shares of a registered corporation. See 15 Pa. Cons. Stat. §2541 et seq. The commenter requested that the Board delay action on the proposal pending the outcome of a lawsuit brought by a dissenting minority shareholder of Sovereign to enforce this demand right and other litigation related to the proposal. Santander represented that all lawsuits related to the proposed transaction have been dismissed. The Board also notes that certain recent amendments to a relevant Pennsylvania statutory provision appear to clarify that the proposal would not trigger the dissenting shareholders' right under Pennsylvania corporate law. See 15 Pa. Cons. Stat. § 2543(b)(2)(vii) (added by Senate Bill 595).

A commenter also objected to the pricing of the transactions. The price of a transaction or the consideration received by shareholders is not, by itself, within the limited statutory factors the Board may consider when reviewing an application under the BHC Act. See *Western Bancshares, Inc. v. Board of Governors*, 480 F.2d 749 (10th Cir. 1973).

22. The Board has previously determined that Santander is subject to comprehensive consolidated supervision by the Bank of Spain. See, e.g., *Banco Santander, S.A.*, 85 *Federal Reserve Bulletin* 441 (1999).

23. A commenter expressed concern about Santander's ability to share information for purposes of complying with applicable U.S. anti-money-laundering laws. The Board has reviewed confidential supervisory information on the policies, procedures, and practices of Santander's U.S. operations for complying with the Bank Secrecy Act and other U.S. anti-money-laundering laws. Further, the Board notes that Santander has committed to make available to the Board information on the operations of Santander and any of its affiliates that the Board deems necessary to determine and enforce compliance with applicable laws.

24. The commenter also expressed concern based on a news article discussing a fine imposed by the U.K. Financial Services Authority ("FSA") on Abbey National PLC ("Abbey"), London, United Kingdom, a foreign bank subsidiary of Santander. The Board notes that the activities of Santander and its affiliates in the United Kingdom are subject to the supervision of the FSA and the requirements of U.K. law. Santander has represented that the fine imposed by the FSA on Abbey was due to actions that occurred before Santander acquired Abbey.

25. A commenter expressed concern about Sovereign's relationships with unaffiliated pawn shops and other nontraditional providers of financial services. As a general matter, the activities of the consumer finance businesses identified by the commenter are permissible, and the businesses are licensed by the states where they operate. Santander represented that Sovereign does not focus on marketing credit services

Based on all the facts of record, the Board has concluded that the financial and managerial resources of the organizations involved in the proposal are consistent with approval under section 4 of the BHC Act.<sup>26</sup>

### CRA PERFORMANCE RECORDS

As previously noted, the Board considers the records of performance under the CRA of the relevant insured depository institutions when acting on a notice to acquire a savings association. 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 neighborhoods, in evaluating bank expansionary proposals.<sup>27</sup>

As provided in the CRA, the Board has evaluated the proposal 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.<sup>28</sup>

BSPR received an "outstanding" rating at its most recent CRA performance evaluation by the FDIC, as of August 9, 2005. Sovereign Bank received an "outstanding" rating at its most recent CRA performance evaluation by the OTS, as of March 11, 2005, and Independence Bank received a "satisfactory" rating at its most recent CRA performance evaluation by the FDIC, as of November 3, 2003. Santander has represented that Sovereign intends to implement Sovereign Bank's CRA program at Independence Bank.

Based on a review of the entire record, and for the reasons discussed above, the Board concludes that the CRA performance records of the relevant depository institutions are consistent with approval.

### OTHER CONSIDERATIONS

The Board also has carefully considered the lending record and data reported by Sovereign Bank and Independence

to such nontraditional providers and generally does not have extensive commercial loan relationships with such providers. Santander also has represented that Sovereign does not play any role in the lending practices, credit review, or other business practices of those firms.

26. A commenter expressed concern that Santander did not expressly state in its application that it would serve as a source of strength to Sovereign. The Board expects a bank holding company to serve as a source of financial and managerial strength to the insured depository institutions that it controls.

27. 12 U.S.C. § 2903.

28. See *Interagency Questions and Answers Regarding Community Reinvestment*, 66 *Federal Register* 36,620 at 36,640 (2001).

Bank under the Home Mortgage Disclosure Act ("HMDA")<sup>29</sup> in light of public comment about their record of lending to minorities. A commenter opposed the proposal and alleged, based on 2004 HMDA data, that those institutions engaged in discriminatory treatment of minority individuals in their home-mortgage lending operations.<sup>30</sup> The commenter asserted that Sovereign Bank and Independence Bank made higher-cost loans to African Americans and Hispanics more frequently than to nonminorities.<sup>31</sup> The commenter also alleged that Sovereign Bank and Independence Bank disproportionately denied applications for HMDA-reportable loans by African-American and Hispanic applicants. The Board has analyzed 2004 HMDA data reported by Sovereign Bank and Independence Bank in their primary assessment areas.<sup>32</sup>

Although the HMDA data might reflect certain disparities in the rates of loan applications, originations, denials, or pricing among members of different racial or ethnic groups in certain local areas, they provide an insufficient basis by themselves on which to conclude whether or not Sovereign Bank or Independence Bank is excluding or imposing higher credit costs on those groups on a prohibited basis. The Board recognizes that HMDA data alone, even with the recent addition of pricing information, provide only limited information about the covered loans.<sup>33</sup> 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.

The Board is nevertheless concerned when HMDA data for an institution indicate disparities in lending and believes

29. 12 U.S.C. § 2801 et seq.

30. The commenter also expressed concerns about Santander's acquisition of Island Finance Puerto Rico, Inc. ("Island Finance"), an entity engaged in subprime lending. As a general matter, the activities of the consumer finance business identified by the commenter are permissible, and the commenter did not provide evidence that Santander or Island Finance had originated, purchased, or securitized "predatory" loans or otherwise engaged in abusive lending practices.

31. Beginning January 1, 2004, the HMDA data required to be reported by lenders were expanded to include pricing information for loans on which the annual percentage rate (APR) exceeds the yield for U.S. Treasury securities of comparable maturity 3 or more percentage points for first-lien mortgages and 5 or more percentage points for second-lien mortgages (12 CFR 203.4).

32. The commenter also alleged that Sovereign Bank and Independence Bank engaged in discriminatory lending based on a review of the prices and numbers of loans extended to African-American and Hispanic borrowers as compared to nonminority borrowers in 2005. The commenter based this allegation on 2005 HMDA data derived from loan application registers that it obtained from the savings associations. These data are preliminary, and 2005 data for lenders in the aggregate are not yet available. See *Frequently Asked Questions About the New HMDA Data*, page 2 (April 3, 2006), available at [www.federalreserve.gov/boarddocs/press/bcreg/2006](http://www.federalreserve.gov/boarddocs/press/bcreg/2006).

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

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. 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 Sovereign Bank and Independence Bank with fair lending laws. In the fair lending reviews that were conducted in conjunction with the most recent CRA performance evaluations of Sovereign Bank and Independence Bank, examiners noted no substantive violations of applicable fair lending laws. The Board has also forwarded the comments to, and consulted with, the OTS and the FDIC about the fair-lending and consumer-protection compliance records of Sovereign Bank and Independence Bank respectively.

The record also indicates that Sovereign has taken steps to ensure compliance with fair lending and other consumer protection laws. Santander represented that Sovereign's consumer and mortgage lending units have second-review policies for loan applications that would otherwise be denied, and that Sovereign's compliance training program features online programs, including proficiency testing, and seminars taught by compliance staff or trade association employees. Santander has represented that Sovereign intends to implement its consumer compliance program at Independence Bank after consummation of the proposal.

The Board also has considered the HMDA data in light of other information, including the CRA performance records of Sovereign Bank and Independence Bank. These established efforts and records demonstrate that Sovereign and Independence are active in helping to meet the credit needs of their entire communities.

### *PUBLIC BENEFITS*

As part of its evaluation of the public interest factors under section 4 of the BHC Act, the Board also has reviewed carefully the public benefits and possible adverse effects of the proposal. The record indicates that consummation of the proposal would result in benefits to consumers and businesses currently served by Sovereign. They would be able to draw on Santander's global experience in retail banking and experience with Spanish-speaking customers, particularly as Sovereign expands in New York City, which has a large and increasing Hispanic population. In addition, it is expected that Santander's technological expertise will enhance Sovereign's ability to deliver existing and new banking products.

Based on all the facts of record, the Board concludes that consummation of the proposal can reasonably be expected to produce public benefits that would outweigh any likely adverse effects. Accordingly, the Board has determined that the balance of the public benefits under 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 notice should be, and hereby is, approved.<sup>34</sup> 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.<sup>35</sup> The Board's approval is specifically conditioned on compliance by Santander and Sovereign with the conditions imposed in this order and the commitments made to the Board in connection with the notice. The Board's approval also is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c),<sup>36</sup> 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 this action, these conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decisions herein and, as such, may be enforced in proceedings under applicable law. The acquisition shall not be consummated later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of New York, acting pursuant to delegated authority.

By order of the Board of Governors, effective May 25, 2006.

Voting for this action: Chairman Bernanke and Governors Bies, Olson, Kohn, Warsh, and Kroszner.

ROBERT DEV. FRIERSON  
*Deputy Secretary of the Board*

34. Two commenters requested that the Board hold a public hearing or meeting on the proposal. The Board's regulations provide for a hearing under section 4 of the BHC Act if there are disputed issues of material fact that cannot be resolved in some other manner (12 C.F.R. 225.25(a)(2)). Under its rules, the Board also may, in its discretion, hold a public meeting or hearing on an application if a meeting or hearing is necessary or appropriate to provide an opportunity for testimony (12 C.F.R. 262.3(i)(2)). The Board has considered carefully the commenters' requests in light of all the facts of record. In the Board's view, the commenters had ample opportunity to submit comments on the proposal and, in fact, submitted written comments that the Board has considered carefully in acting on the proposal. The requests fail to identify disputed issues of fact that are material to the Board's decision that would be clarified by a public meeting or hearing. Moreover, the commenters' requests fail to demonstrate why their written comments do not present their views adequately or why a meeting or hearing otherwise would be necessary or appropriate. For these reasons, and based on all the facts of record, the Board has determined that a public hearing or meeting is not required or warranted in this case. Accordingly, the requests for a public hearing or meeting on the proposal are denied.

35. A commenter expressed concern about the expansion of foreign banks in the United States. The Board notes that the International Banking Act of 1978 (12 U.S.C. § 3101 et seq.) and the BHC Act provide the general legal framework under which foreign banks may enter and conduct banking activities in the United States.

36. 12 C.F.R. 225.7 and 225.25(c).

## ORDERS ISSUED UNDER SECTIONS 3 AND 4 OF THE BANK HOLDING COMPANY ACT

### *M&P Community Bancshares, Inc., 401(k) Employee Stock Ownership Plan Newport, Arkansas*

#### Order Approving the Formation of a Bank Holding Company and Determination on a Financial Holding Company Election

M&P Community Bancshares, Inc., 401(k) Employee Stock Ownership Plan (“Applicant”) has requested the Board’s approval under section 3 of the Bank Holding Company Act (“BHC Act”)<sup>1</sup> to become a bank holding company by acquiring an additional 1.63 percent, for a total of 26.58 percent, of the voting shares of M&P Community Bancshares, Inc. (“M&P BHC”), Newport, a financial holding company within the meaning of the BHC Act, and to acquire control of Merchants & Planters Bank (“M&P Bank”), Newport, and Greers Ferry Lake State Bank (“GFLS Bank”), Heber Springs, all of Arkansas. Applicant also has filed an election to become a financial holding company pursuant to section 4(l) of the BHC Act and section 225.82 of the Board’s Regulation Y.<sup>2</sup>

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (71 *Federal Register* 933 (2006)). 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.

Applicant is an employee stock ownership plan (“ESOP”) organized under section 4975(e)(7) of the Internal Revenue Service Code.<sup>3</sup> Applicant has an underlying trust that is organized on behalf of the employees of M&P BHC, M&P Bank, and GFLS Bank and invests in the shares of M&P BHC.

M&P BHC, with total consolidated assets of approximately \$199 million, is the 50th largest depository organization in Arkansas, controlling deposits of approximately \$170 million.<sup>4</sup> M&P BHC operates two subsidiary depository institutions with branches only in Arkansas, M&P Bank and GFLS Bank, and several nonbanking subsidiaries.<sup>5</sup>

1. 12 U.S.C. § 1842.

2. 12 U.S.C. § 1843(l); 12 C.F.R. 225.82(f).

3. 26 U.S.C. § 4975(e)(7).

4. State deposit data are as of June 30, 2005, and ranking data reflect mergers consummated before April 26, 2006. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

5. Applicant proposes to acquire indirectly the shares of the nonbanking subsidiaries of M&P BHC in accordance with section 4(k) of the BHC Act and the post-transaction notice procedures in section

### 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.<sup>6</sup>

Applicant does not currently control any depository institution, and the proposal would not result in an expansion of M&P BHC. 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 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 and state banking supervisors of the organizations involved, financial and other information provided by Applicant, and public comment on the proposal.<sup>7</sup>

In evaluating financial factors in BHC Act proposals involving an ESOP, the Board reviews the financial condition of the ESOP as well as the related bank holding company and its subsidiaries. The Board considers a variety of measures in this evaluation, including the financial obligations and cash flow of the ESOP, and the capital

225.87 of Regulation Y (12 U.S.C. § 1843(k); 12 C.F.R. 225.87).

6. 12 U.S.C. § 1842(e)(1).

7. One commenter, a minority shareholder of M&P BHC (“Commenter”), alleged that M&P BHC’s management has engaged in self-dealing and breached its fiduciary duties. In particular, Commenter questioned the valuation of M&P BHC stock in connection with certain stock transactions involving the company’s management officials and has filed a shareholder derivative suit involving these allegations in an Arkansas court against M&P BHC’s board of directors. Management has denied any wrongdoing or breach of fiduciary duty in the pending lawsuit, and the matter is currently under review in the appropriate legal forum. The Board does not have authority to resolve this dispute. See *Western Bancshares, Inc. v. Board of Governors*, 480 F.2d 749 (10th Cir. 1973). Moreover, action on this proposal would not interfere with the court’s ability to resolve the pending litigation.

adequacy, asset quality, and earnings performance of the banking organization. In assessing financial factors, the Board has considered capital adequacy to be especially important. The Board also evaluates the financial effects of the proposed transaction on the condition of the organization, including the organization's capital position, earnings prospects, and the impact of the proposed funding of the transaction. M&P BHC and each of its subsidiary depository institutions are well capitalized and would remain so on consummation of the proposal. Based on its review of the record, the Board finds that Applicant has sufficient financial resources to effect the proposal and that the financial resources of M&P BHC and its subsidiaries would not be adversely affected by the proposal. The proposed transaction is structured as a cash purchase.

The Board also has considered the managerial resources of the organizations involved. The Board has reviewed the examination records of M&P BHC and its subsidiary depository institutions, including assessments of their management, risk-management systems, and operations. The Board notes that the three trustees of Applicant's underlying trust are outside directors of M&P BHC. In addition, the Board has considered its supervisory experiences and those of the other relevant banking supervisory agencies with the organization and its record of compliance with applicable banking law. M&P BHC and its subsidiary depository institutions are considered to be well managed.

Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources and future prospects of Applicant and the institutions involved are consistent with approval, as are the other supervisory factors under the BHC Act.<sup>8</sup>

### 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

8. Commenter expressed concern about the managerial resources of M&P BHC. In addition to the stock valuation and fiduciary duty concerns discussed above, Commenter asserted that M&P BHC's management may have acquired shares of the company through Applicant in a manner that would have required applications to the Board for prior approval under the BHC Act. The Board has considered this allegation in the context of all the facts of record regarding the management of M&P BHC, and it has reviewed information provided by both Commenter and Applicant, as well as confidential supervisory information about the ownership and transfer of M&P BHC shares. The record does not support a finding that Applicant previously acquired more than 24.9 percent of M&P BHC in violation of the BHC Act. Commenter also asserted that the organization's management mishandled a relationship with a delinquent business-loan customer. The Board has reviewed confidential examination reports about this lending relationship. In addition, the Board forwarded these comments to, and consulted with, both the Federal Deposit Insurance Corporation ("FDIC") and the Arkansas State Bank Department, the primary supervisors of M&P BHC's subsidiary depository institutions, about Commenter's allegations concerning the management of M&P BHC and its operation of the subsidiary depository institutions. As noted above, M&P BHC and its subsidiary depository institutions are considered to be well managed.

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").<sup>9</sup> M&P Bank, M&P BHC's lead bank, received an overall "satisfactory" rating at its most recent CRA performance evaluation by the FDIC, as of October 2002. GFLS Bank also received a "satisfactory" rating at its most recent CRA performance evaluation by the FDIC, as of August 2002.

The Board has carefully considered all the facts of record, including reports of examination of the CRA records of the institutions involved and confidential supervisory information. Based on all the facts of record, the Board concludes that the considerations relating to the convenience and needs of the community to be served and the CRA performance records of the relevant depository institutions are consistent with approval.

### FINANCIAL HOLDING COMPANY DECLARATION

As noted, Applicant has also filed with the Board an election to become a financial holding company pursuant to section 4(l) of the BHC Act and section 225.82 of Regulation Y. Applicant has certified that all depository institutions controlled by M&P BHC are well capitalized and well managed and will remain so on consummation of the proposal. Applicant has also provided all the information requested under Regulation Y.

The Board has reviewed the examination rating received by each insured depository institution controlled by M&P BHC under the CRA and other relevant examinations and information. Based on all the facts of record, the Board has determined that the election to become a financial holding company will become effective on Applicant's consummation of the proposed share acquisition.

### CONCLUSION

Based on the foregoing and all facts of record, the Board has determined that the application should be, and hereby is, approved. In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act and other applicable statutes. The Board's approval is specifically conditioned on compliance by Applicant 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 15th calendar day after the effective date of this order, or later than three months after the effective date of this order, unless such period is extended for good

9. 12 U.S.C. § 2901 et seq.; 12 U.S.C. § 1842(c)(2).

cause by the Board or the Federal Reserve Bank of St. Louis, acting pursuant to delegated authority.

By order of the Board of Governors, effective May 23, 2006.

Voting for this action: Chairman Bernanke and Governors Olson, Kohn, Warsh, and Kroszner. Absent and not voting: Governor Bies.

ROBERT DEV. FRIERSON  
*Deputy Secretary of the Board*