

FEDERAL RESERVE SYSTEM

Bank of America Corporation
Charlotte, North Carolina

Order Approving the Merger of Bank Holding Companies

Bank of America Corporation (“Bank of America”), 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 Act¹ to merge with MBNA Corporation (“MBNA”), Wilmington, Delaware, and acquire MBNA’s two subsidiary banks.² Bank of America also proposes to acquire MBNA’s Edge corporation, organized under section 25A of the Federal Reserve Act.³

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (70 Federal Register 44,650 (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 the BHC and Federal Reserve Acts.⁴

¹ 12 U.S.C. § 1842.

² Bank of America also has requested the Board’s approval to hold and exercise an option that allows Bank of America to purchase up to 19.9 percent of MBNA’s voting securities if certain events occur. This option would expire on consummation of the proposal by Bank of America to merge with MBNA. In addition, Bank of America proposes to acquire the nonbanking subsidiaries of MBNA in accordance with section 4(k) of the BHC Act (12 U.S.C. § 1843(k)).

³ 12 U.S.C. § 611 et seq.

⁴ Thirteen commenters expressed concerns on various aspects of the proposal.

Bank of America, with total consolidated assets of approximately \$1.3 trillion, is the second largest depository organization in the United States.⁵ Bank of America operates six depository institutions⁶ with branches in 29 states and the District of Columbia, and it engages nationwide in numerous permissible nonbanking activities.

MBNA, with total consolidated assets of approximately \$63 billion, operates two depository institutions, MBNA America Bank, National Association (“MBNA Bank”) and MBNA America (Delaware), N.A. (“MBNA Delaware Bank”), both of Wilmington, Delaware, with branches only in Delaware. MBNA is the 23rd largest depository organization in the United States. It also engages in a broad range of permissible nonbanking activities.

On consummation of the proposal, Bank of America would remain the second largest depository organization in the United States, with total consolidated assets of approximately \$1.3 trillion. The combined organization would operate under the name of Bank of America Corporation.

Interstate Analysis

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the bank holding company’s home state if certain conditions are

⁵ Asset and national ranking data are as of September 30, 2005, and reflect mergers and acquisitions as of December 1, 2005.

⁶ In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

met. For purposes of the BHC Act, the home state of Bank of America is North Carolina,⁷ and MBNA's subsidiary banks are located in Delaware.⁸

The Board may not approve an interstate proposal under section 3(d) if the applicant controls, or on consummation of the proposed transaction would control, more than 10 percent of the total amount of deposits of insured depository institutions in the United States (“nationwide deposit cap”). The nationwide deposit cap was added to section 3(d) when Congress broadly authorized interstate acquisitions by bank holding companies and banks in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (“Riegle-Neal Act”).⁹ The intended purpose of the nationwide deposit cap was to help guard against undue concentrations of economic power.¹⁰ Although the nationwide deposit cap prohibits interstate acquisitions by a company that controls deposits in excess of the cap, it does not prevent a company from exceeding the nationwide deposit cap through internal growth and effective competition for deposits or through acquisitions entirely within the home state of the acquirer.¹¹

⁷ See 12 U.S.C. § 1842(d). A bank holding company's home state is the state in which the total deposits of all banking subsidiaries of such company were the largest on July 1, 1966, or the date on which the company became a bank holding company, whichever is later.

⁸ For purposes of section 3(d) of the BHC Act, the Board considers a bank to be located in the states in which the bank is chartered or headquartered or operates a branch. See 12 U.S.C. §§ 1841(o)(4)-(7) and 1842(d)(1)(A) and (d)(2)(B).

⁹ Pub. L. No. 103-328, 108 Stat. 2338 (1994).

¹⁰ See S. Rep. No. 102-167 at 72 (1991).

¹¹ One commenter asserted that the nationwide deposit cap does not allow for internal growth above 10 percent of the total amount of deposits of insured depository institutions in the United States, and another commenter urged the Board to order Bank of America to reduce its share of nationwide deposits.

As required by section 3(d), the Board has carefully considered whether Bank of America controls, or on consummation of the proposed transaction would control, more than 10 percent of the total amount of deposits of insured depository institutions¹² in the United States. The Board calculated the percentage of total deposits of insured depository institutions in the United States and the total deposits that Bank of America controls, and on consummation of the proposal would control, in the same manner as described in the Board's order in 2004 approving Bank of America's acquisition of FleetBoston Financial Corporation ("BOA/Fleet Transaction").¹³

¹² The BHC Act adopts the definition of "insured depository institution" used in the Federal Deposit Insurance Act (12 U.S.C. § 1811 *et seq.*) ("FDI Act"). See 12 U.S.C. § 1841(n). The FDI Act contains an identical nationwide deposit cap applicable to bank-to-bank mergers and, consequently, many of the terms used in the nationwide deposit cap in the BHC Act refer to terms or definitions contained in the FDI Act. The FDI Act's definition of "insured depository institution" includes all banks (whether or not the institution is a bank for purposes of the BHC Act), savings banks, and savings associations that are insured by the Federal Deposit Insurance Corporation ("FDIC") and insured U.S. branches of foreign banks, as each of those terms is defined in the FDI Act. See 12 U.S.C. § 1813(c)(2).

¹³ See Bank of America Corporation, 90 Federal Reserve Bulletin 217, 219 (2004) ("BOA/Fleet Order"). The terms "United States" and "State" are not defined in the BHC Act. For the reasons explained in the BOA/Fleet Order, the Board believes that the term "United States" includes the 50 states, the District of Columbia, Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, the islands formerly referred to as the Trust Territory of the Pacific Islands, and any territory of the United States. All banks operating in those areas are eligible for FDIC deposit insurance and are subject to the jurisdiction of the FDIC in the same manner as other FDIC-insured banks. This definition is also consistent with the definition of "United States" contained in the Board's Regulation Y, which governs applications under section 3 of the BHC Act.

The Board used the deposit data reported by depository institutions to the FDIC and the Office of Thrift Supervision (“OTS”). Each insured bank in the United States must report data regarding its total deposits in accordance with the definition of “deposit” in the FDI Act on the institution’s Consolidated Report of Condition and Income (“Call Report”).¹⁴ Each insured savings association similarly must report its total deposits on the institution’s Thrift Financial Report (“TFR”). Deposit data for FDIC-insured U.S. branches of foreign banks and federal branches of foreign banks are obtained from the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (“RAL”). These data are reported on a quarterly basis to the FDIC and are publicly available.

The Call Report, TFR, and RAL represent the best and most complete data reported by all insured depository institutions in the United States.¹⁵ Consequently, the Board has relied on the data collected in these reports to calculate the total amount of deposits of insured depository institutions in the United States and the total amount of deposits held by Bank of America, both before and on consummation of the proposed transaction, for purposes of applying the nationwide deposit cap in this case. The line items for total domestic deposits on the Call Report, TFR, and RAL do not require reporting of the total amount of deposits as defined in section 3(*l*) of the FDI Act. Therefore, the Board has calculated Bank of America’s share of the total amount of deposits of insured depository institutions in the

¹⁴ Section 3(d) of the BHC Act also specifically adopts the definition of “deposit” in the FDI Act. 12 U.S.C. § 1842(d)(2)(E) (incorporating the definition of “deposit” at 12 U.S.C. § 1813(*l*)).

¹⁵ BOA/Fleet Order at 220.

United States using the items on the Call Reports, TFRs, and RALs, and the formulation described in the attached Appendix and the BOA/Fleet Order.¹⁶ This formulation, which the Board developed in consultation with staff of the FDIC, conforms the data on Call Reports, TFRs, and RALs as closely as possible to the statutory definition of deposits in the FDI and BHC Acts.¹⁷

Based on the latest Call Report, TFR, and RAL data available for all insured depository institutions, the total amount of deposits of insured depository institutions in the United States is approximately \$6.195 trillion. Also based on the latest Call Report, Bank of America (including all its insured depository institution affiliates) controls deposits of approximately

¹⁶ BOA/Fleet Order at 235. Several commenters questioned whether the proposed acquisition would violate the nationwide deposit cap, and one commenter suggested that the Board should rely on the Summary of Deposits (“SOD”) data collected annually by the FDIC or that the Board not follow the formulation used in the BOA/Fleet Transaction. As noted in the BOA/Fleet Order, SOD data disclose an institution’s deposits broken out by branch office. However, SOD data are not, and are not intended to be, an exact representation of deposits as defined in the FDI Act. Rather, these data are intended to provide a useful proxy for the size of each institution’s presence in various banking markets primarily for the purpose of conducting examinations and performing competitive analyses in local banking markets. Consequently, use of SOD data would require a variety of adjustments, most of which would be based on Call Report, TFR, and RAL data. Moreover, SOD data are collected only once a year at the end of the second quarter, which means that the most recent SOD data provide an estimation of deposits held by institutions almost six months ago. Call Report data, on the other hand, are collected each quarter, with the most recent data representing deposits as of September 30, 2005. Given the limitations of SOD data, the Board believes that Call Report, TFR, and RAL data provide a more complete and accurate representation of the amount of deposits held by the institutions involved in this transaction and by all insured depository institutions in the United States as of the date the Board has considered the proposal than SOD data provide.

¹⁷ BOA/Fleet Order at 220.

\$570.9 billion and MBNA (including all its insured depository institution affiliates) controls deposits of approximately \$28.1 billion. Bank of America, therefore, currently controls approximately 9.2 percent of total U.S. deposits. On consummation of the proposed transaction, Bank of America would control approximately 9.7 percent of the total amount of deposits of insured depository institutions in the United States.

Therefore, the Board finds that Bank of America does not now control, and on consummation of the proposed transaction would not control, an amount of deposits that would exceed the nationwide deposit cap.

Section 3(d) also prohibits the Board from approving a proposal if, on consummation, the applicant would control 30 percent or more of the total deposits of insured depository institutions in any state in which both the applicant and the organization to be acquired operate an insured depository institution, or such higher or lower percentage that is established by state law.¹⁸ This prohibition does not apply in this case because there are no states in which both Bank of America and MBNA operate insured depository institutions.

All other requirements of section 3(d) of the BHC Act also would be met on consummation of the proposal.¹⁹ Based on all the facts of record, the Board is permitted to approve the proposal under section 3(d) of the BHC Act.

¹⁸ 12 U.S.C. § 1842(d)(2)(B)-(D).

¹⁹ Bank of America is adequately capitalized and adequately managed as defined in the Riegle-Neal Act. 12 U.S.C. § 1842(d)(1)(A). MBNA's subsidiary banks have been in existence and operated for the minimum age requirements established by applicable state law. See 12 U.S.C. § 1842(d)(1)(B); see also Order of the Delaware State Bank Commissioner ("Delaware Commissioner") dated October 14, 2005. The other requirements in section 3(d) of the BHC Act also would be met on consummation of the proposal.

Competitive Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly. It also prohibits the Board from approving a proposal 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.²⁰ The Board has carefully considered the competitive effects of the proposal in light of all the facts of record, including public comments on the proposal.

Some commenters argued that the proposed merger would have adverse competitive effects. Many of these commenters expressed concern that large bank mergers in general, or the proposed merger of Bank of America and MBNA in particular, would have adverse effects on competition nationwide, especially among credit card issuers. Some commenters also contended that the proposed merger would result in higher fees and costs.

To determine the effect of a proposed transaction on competition, it is necessary to designate the area of effective competition between the parties, which the courts have held is decided by reference to the relevant “line of commerce” or product market and a geographic market. The Board and the courts have consistently recognized that the appropriate product market for analyzing the competitive effects of bank mergers and acquisitions is the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) offered by banking institutions.²¹ Several studies support

²⁰ 12 U.S.C. § 1842(c)(1).

²¹ See Chemical Banking Corporation, 82 Federal Reserve Bulletin 239 (1996) and the cases and studies cited therein. The Supreme Court has emphasized that

the conclusion that businesses and households continue to seek this cluster of services.²² Consistent with these precedents and studies, and on the basis of the facts of record in this case, the Board concludes that the cluster of banking products and services represents the appropriate product market for analyzing the competitive effects of this proposal.

In defining the relevant geographic market, the Board and the courts have consistently held that the geographic market for the cluster of banking products and services is local in nature. MBNA's subsidiary banks are located and hold deposits only in Delaware. Bank of America does not maintain branches or hold deposits in Delaware. Accordingly, Bank of America and MBNA do not compete directly in any relevant banking market as currently defined by the Board and the courts.

Although the Board believes that the cluster of services appropriately defines the market for analyzing competitive effects of bank acquisitions, the Board has also reviewed the competitive effects of this proposal based on an alternative approach that recognizes that the business of MBNA is focused narrowly on issuing credit cards. Even viewing competitive effects on this basis, however, the proposal is unlikely to have a significantly adverse

it is the cluster of products and services that, as a matter of trade reality, makes banking a distinct line of commerce. United States v. Philadelphia National Bank, 374 U.S. 321, 357 (1963); accord United States v. Connecticut National Bank, 418 U.S. 656 (1974); United States v. Phillipsburg National Bank, 399 U.S. 350 (1969).

²² Cole and Wolken, Financial Services Used by Small Businesses: Evidence from the 1993 National Survey of Small Business Finance, 81 Federal Reserve Bulletin 629 (1995); Elliehausen and Wolken, Banking Markets and the Use of Financial Services by Households, 78 Federal Reserve Bulletin 169 (1992); Elliehausen and Wolken, Banking Markets and the Use of Financial Services by Small- and Medium-Sized Businesses, 76 Federal Reserve Bulletin 726 (1990).

effect on competition. The Board notes that the submarket for credit card issuance is only moderately concentrated and would remain so after consummation of the proposal (whether evaluated by number of accounts, dollar balances outstanding, or dollar volume year-to-date). In addition, issuing credit cards is an activity that is conducted on a national or global scale, with relatively low barriers to entry and with numerous other large financial organizations providing these services.

The Department of Justice has conducted a detailed review of the competitive effects of the proposal and has advised the Board that consummation of the proposal would not likely have any significantly adverse effect on competition. 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 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.

Financial, Managerial, and Other Supervisory Factors

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. In reviewing these factors, the Board has considered, among other things, confidential reports of examination and other supervisory information from the primary federal supervisors of the organizations involved in the proposal. In addition, the Board has consulted with the relevant supervisory agencies, including the Office of the Comptroller of the Currency (“OCC”), the Securities and Exchange Commission (“SEC”), and the Delaware

Commissioner. The Board also has considered publicly available financial and other information on the organizations and their subsidiaries, all information on the proposal's financial and managerial aspects submitted by Bank of America and MBNA during the application process, and public comments received by the Board on the proposal.

The Board received several comments criticizing the financial and managerial resources of Bank of America, MBNA, or their respective subsidiaries.²³ Some commenters expressed concerns about the credit-card lending practices of Bank of America, MBNA, or the credit card industry in general.²⁴

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

²³ Commenters also expressed concerns about the following matters: (1) MBNA's legislative lobbying efforts; (2) the amount of Bank of America's and MBNA's political campaign contributions; and (3) past or potential job losses or outsourcing as a result of this or past mergers. These contentions and concerns 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).

²⁴ Several commenters alleged that Bank of America, MBNA, and generally the credit card industry engaged in "deceptive" credit-card lending practices through, among other practices, universal default clauses in credit card agreements, misleading advertising of interest rates, and confusing fee structures. Some of these commenters urged the Board to impose conditions requested by the commenters in light of the concerns expressed about the credit card industry. Based on consultations with the primary supervisor of the credit-card lending subsidiaries of Bank of America and MBNA, there does not appear to be any evidence of noncompliance with existing laws and regulations that would weigh against approval of the application.

operations. In this evaluation, the Board considers a variety of areas, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board has consistently 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.

Bank of America, MBNA, and their subsidiary banks are well capitalized and would remain so on consummation of the proposal.²⁵ Based on its review of the financial factors in this case, the Board finds that Bank of America has sufficient financial resources to effect the proposal. The proposed transaction is structured as a share exchange and partial cash purchase. Bank of America will use existing cash resources to fund the cash purchase of shares.

The Board also has considered the managerial resources of Bank of America, MBNA, and the combined organization. In evaluating the managerial resources of a banking organization in an expansion proposal, the Board considers assessments of an organization's risk management—that is, the ability of the organization's board of directors and senior management to identify, measure, monitor, and control risk across all business and corporate lines in the organization—to be especially important.²⁶ The Board has reviewed the

²⁵ Some commenters alleged that the compensation for MBNA's senior management under severance agreements or other compensation agreements is excessive. The Board notes that the severance and compensation agreements have been disclosed to shareholders and that Bank of America would remain well capitalized on consummation.

²⁶ See Revisions to Bank Holding Company Rating System, 69 Federal Register 70,444 (2004). One commenter questioned whether the combined organization would present special risks to the federal deposit insurance funds or the financial system in general. The commenter also expressed concerns about

examination records of Bank of America, MBNA, and the subsidiary depository institutions of each organization, 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.²⁷ Bank of America, MBNA, and their subsidiary depository institutions are considered to be well managed.

In addition, the Board reviewed Bank of America's plans for implementing the proposal, including the proposed management and operation of the combined organization's credit card activities after consummation. The Board considered Bank of America's record of successfully integrating acquired institutions and credit card businesses into its existing operations.

Bank of America's financial resources, risk management, and future prospects. These concerns were based entirely on public information about Bank of America's investments in China and its credit card lending to small businesses, and on the commenter's perception of the combined institution's possible exposure to interest-rate and credit risks and risks in general. As noted, the Board has reviewed publicly available information as well as confidential supervisory information in assessing the financial and managerial resources of Bank of America, MBNA, and the proposed combined organization.

²⁷ Some commenters expressed concern about press reports regarding the loss and theft of some of Bank of America's customer data and contended that greater risks to customer data would exist on consummation of the proposal. Bank of America's and MBNA have policies and procedures in place to address the sharing and safeguarding of customer information. Other commenters alleged that Bank of America's lead bank, Bank of America, N.A. ("BA Bank"), Charlotte, North Carolina, has violated California labor law by charging fees to individuals without accounts at BA Bank who cash paychecks issued by Bank of America's payroll customers. The litigation about this matter is still pending. The Board will continue to monitor this issue and consult with the OCC, the primary federal supervisor of BA Bank.

The Board also considered the existing compliance systems and internal audit programs at Bank of America and its subsidiary depository institutions and significant nonbanking subsidiaries, and the assessments of these systems and programs by the relevant federal supervisory agencies. The Board consulted with the OCC, the primary federal regulator of Bank of America's and MBNA's subsidiary depository institutions.²⁸ The Board also considered confidential supervisory information and consulted with the SEC about Bank of America's nonbanking securities activities. Moreover, the Board considered information provided by Bank of America on enhancements the organization has made to its compliance systems and programs as part of an ongoing review, development, implementation, and maintenance of effective risk-management policies and programs for its operations.²⁹ After careful

²⁸ The Board received comments asserting that Bank of America lacks sufficient policies and procedures and other resources to prevent money laundering based, in part, on reports that BA Bank and other subsidiaries of Bank of America held accounts for certain international leaders or their families. As part of its review of managerial factors, the Board reviewed confidential supervisory information on the policies, procedures, and practices of Bank of America and its subsidiary banks to comply with the Bank Secrecy Act and consulted with the OCC.

²⁹ Some commenters asserted that the Board should deny Bank of America's application based on press reports of various investigations or litigation regarding certain past tax planning, mutual fund, and structured-finance transactions with certain domestic and international corporate entities. The Board has consulted with the SEC on these matters and notes that the SEC has generally concluded its investigations into the mutual fund matters. The Board also has reviewed Bank of America's compliance with the Written Agreement with the Federal Reserve Bank of Richmond concerning the organization's mutual fund-related activities. In addition, Bank of America has settled most matters involving structured-finance transactions and revised its policies regarding such transactions. The Board will continue to monitor developments on the tax-planning-vehicle investigations, which involve matters beyond the

consideration of all the facts of record, the Board has determined that Bank of America's managerial resources, including its risk-management systems, are consistent with approval.

Based on these and all the facts of record, including a review of all the comments received, the Board concludes that considerations relating to the financial and managerial resources and future prospects of Bank of America, MBNA, and their respective subsidiaries are consistent with approval of the proposal.³⁰ The Board also finds that the other supervisory factors that it must consider under section 3 of the BHC Act are consistent with approval.

jurisdiction of the Board. Importantly, Bank of America has taken actions to enhance corporate governance capabilities, improve its monitoring of mutual fund operations, and provide more stringent disclosure requirements for structured-finance clients.

³⁰ Several commenters reiterated the concerns they expressed in comments on the BOA/Fleet Transaction about Bank of America's relations with unaffiliated third parties engaged in subprime lending, check cashing, automobile-title lending, and operating pawnshops. They asserted that Bank of America performed inadequate due diligence to screen for "predatory" loans, and some commenters urged Bank of America to adopt particular factors or methods for such screening. Several commenters also criticized Bank of America for its investment in OwnIt Mortgage ("OwnIt"), formerly Oakmont Mortgage Company, Woodland Hills, California. Bank of America represented that its investment in OwnIt is a passive, noncontrolling investment. As a general matter, the activities of the consumer finance businesses identified by the commenters are permissible, and the businesses are licensed by the states where they operate. See BOA/Fleet Order 217, at 223 n.29 (2004). Moreover, none of these commenters provided evidence that Bank of America had originated, purchased, or securitized "predatory" loans or otherwise engaged in abusive lending practices. Bank of America provides warehouse lines-of-credit to subprime lenders and other consumer finance companies, and purchases subprime mortgage loans from unaffiliated lenders and securitizes pools of subprime mortgage loans. Bank of America has policies and procedures to help

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”).³¹ The CRA requires the federal financial supervisory agencies to encourage financial institutions to help meet the credit needs of local communities in which they operate, consistent with their safe and sound operation, and it requires the appropriate federal financial supervisory agency to take into account an institution’s record of meeting the credit needs of its entire community, including low- and moderate-income (“LMI”) neighborhoods, in evaluating bank expansionary proposals. The Board has carefully considered the convenience and needs factor and the CRA performance records of the subsidiary depository institutions of Bank of America and MBNA, including public comments on the effect the proposal would have on the communities to be served by the resulting organization.

In response to the Board’s request for public comment on this proposal, several commenters submitted comments that expressed concern about the lending records of Bank of America or MBNA, recommended approval only if subject to conditions suggested by the commenter, or opposed the proposal. Some commenters who opposed the proposal alleged that Bank of America has not addressed the diversity and community reinvestment needs of California

ensure that the subprime loans it purchases and securitizes are in compliance with applicable state and federal consumer protection laws.

³¹ 12 U.S.C. § 2901 et seq.

communities.³² A commenter who neither supported nor opposed the proposal expressed concern that the acquisition of MBNA could negatively affect Delaware's LMI residents if MBNA's current CRA programs were altered.³³ In addition, some commenters expressed concern, based on data submitted under the Home Mortgage Disclosure Act ("HMDA"),³⁴ that Bank of America and MBNA engaged in disparate treatment of minority individuals in home mortgage lending.

Bank of America stated that it would work to combine the community development and community investment activities of the two

³² These commenters reiterated allegations made during the BOA/Fleet Transaction that Bank of America has not been responsive to California community groups and has failed to work with local government in addressing California's unique and diverse needs, particularly in San Diego. The commenters also criticized BA Bank for not providing adequate banking services or products to LMI residents in California.

³³ Several commenters criticized Bank of America's performance under its previous community reinvestment pledges, urged the Board to require Bank of America to provide specific pledges or plans, or asked the Board to condition its approval on a commitment by Bank of America to improve its CRA record. The Board views the enforceability of such third-party pledges, initiatives, and agreements as matters outside the CRA. The Board has consistently explained that an applicant must demonstrate a satisfactory record of performance under the CRA without reliance on plans or commitments for future action. Moreover, the Board has consistently found that neither the CRA nor the federal banking agencies' CRA regulations require depository institutions to make pledges or enter into commitments or agreements with any organization. See BOA/Fleet Order at 232-33. Instead, the Board focuses on the existing CRA performance record of an applicant and the programs that an applicant has in place to serve the needs of its CRA assessment areas at the time the Board reviews a proposal under the convenience and needs factor.

³⁴ 12 U.S.C. § 2801 et seq.

institutions to strengthen and meet the banking needs of its communities and that it has no current plans to discontinue any products or services of MBNA.³⁵

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the appropriate federal supervisors' examinations of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.³⁶

Bank of America's lead bank, BA Bank, received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of December 31, 2001 ("2001 Evaluation").³⁷ MBNA's lead bank, MBNA Bank, also received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of April 4, 2005. All other subsidiary banks of Bank of America and MBNA subject to the CRA received "satisfactory" ratings at their most recent CRA performance evaluations by the OCC.³⁸

³⁵ Bank of America represented that it is evaluating the products and services currently offered by MBNA and that no decisions have been made about the aspects of Bank of America's community development program in Delaware.

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

³⁷ The evaluation period for the 2001 Evaluation was January 1, 2000, through December 31, 2001.

³⁸ Bank of America, National Association (USA), Phoenix, Arizona, received a "satisfactory" rating, as of December 31, 2001; MBNA Delaware Bank received a "satisfactory" rating, as of April 7, 2003.

CRA Performance of BA Bank. The 2001 Evaluation of BA Bank was discussed in the BOA/Fleet Order.³⁹ Based on a review of the record in this case, the Board hereby reaffirms and adopts the facts and findings detailed in that order concerning BA Bank's CRA performance record. Bank of America provided the Board with additional information about its CRA performance since its 2001 Evaluation and the BOA/Fleet Order. The Board also consulted with the OCC with respect to BA Bank's CRA performance since the 2001 Evaluation.⁴⁰

In the 2001 Evaluation, examiners commended BA Bank's overall lending performance, which they described as demonstrating excellent or good lending-test results in all its rating areas. Examiners reported that the distribution of HMDA-reportable mortgage loans among areas of different income levels was good, and they commended BA Bank for developing mortgage loan programs with flexible underwriting standards, such as its Neighborhood Advantage programs, which assisted in meeting the credit needs of BA Bank's assessment areas.⁴¹ Examiners also reported that the bank's small business lending was excellent or good in the majority of its rating areas, and

³⁹ See BOA/Fleet Order at 225-229.

⁴⁰ One commenter forwarded a number of consumer complaints regarding BA Bank that had been filed with various regulators. The Board has consulted with, and forwarded these letters to, the OCC's consumer complaint function.

⁴¹ Some commenters criticized Bank of America's record of serving the credit needs of LMI residents in the San Diego area. In the 2001 Evaluation, BA Bank received an "outstanding" rating under the lending test in its California assessment areas. Bank of America represented that it has consistently increased lending and investment in San Diego each year since the evaluation. For example, Bank of America represented that its overall amount of CRA lending and investment in San Diego totaled \$271.6 million in 2001 and had increased to \$322.1 million by the end of 2003.

they commended the distribution of small business loans among businesses of different sizes in several of BA Bank's assessment areas.⁴² In addition, examiners noted in the 2001 Evaluation that BA Bank's level of community development lending was excellent.

Since the 2001 Evaluation and the BOA/Fleet Order, BA Bank has maintained a substantial level of home mortgage, small business, and community development lending. The bank originated more than 395,000 HMDA-reportable home mortgage loans totaling more than \$102 billion throughout its assessment areas in 2004. Bank of America reported that more than 103,000 of those loans totaling more than \$10.6 billion were originated to LMI individuals through Bank of America's various affordable mortgage products, such as loans requiring no or low down payments, as well as FHA and VA products.⁴³ From October 1, 2003, through September 30, 2004, BA Bank was recognized by the SBA as the leading small business lender in the country, based on its origination of almost 13,000 SBA loans totaling more than \$451 million. Bank of America represented that BA Bank's total community development lending reached approximately \$2.3 billion in 2004.

In the 2001 Evaluation, examiners reported that BA Bank consistently demonstrated strong investment-test performance, noting that its performance was excellent or good in the majority of its assessment areas. During the evaluation period, BA Bank funded more than 17,000 housing units

⁴² In this context, "small business loans" are loans with original amounts of \$1 million or less that are secured by nonfarm, nonresidential properties or are commercial and industrial loans to U.S. addresses.

⁴³ In June 2003, Bank of America began a new nationwide loan program to support the construction of 15,000 new affordable housing units within three years.

for LMI families through its community development investments throughout its assessment areas.⁴⁴ Examiners commended BA Bank for taking a leadership role in developing and participating in complex investments that involved multiple participants and both public and private funding.

Since the 2001 Evaluation, BA Bank has continued its strong community-development investment activity in its assessment areas. Bank of America represented that BA Bank made more than \$1 billion in qualifying investments in 2004 and that BA Bank's subsidiary community development corporation had helped develop more than 6,000 housing units in LMI census tracts or for LMI individuals since 2002.

Examiners commended BA Bank's service performance throughout its assessment areas in the 2001 Evaluation.⁴⁵ They reported that the bank's retail delivery systems were generally good and that the bank's distribution of branches among geographies of different income levels was adequate.⁴⁶

Examiners also commended BA Bank for its community development services,

⁴⁴ Bank of America also has provided grants to nonprofit organizations, such as ACCION and the New Mexico Community Development Loan Fund, that originate microloans in amounts as low as \$500 and promote SBA programs.

⁴⁵ Some commenters asserted that Bank of America should augment its array of banking services to LMI customers in California and specifically criticized Bank of America for not providing certain deposit products designed for LMI customers that were recommended by California community groups. Although the Board has recognized that banks can help to serve the banking needs of communities by making certain products or services available on certain terms or at certain rates, the CRA neither requires an institution to provide any specific types of products or services nor prescribes their costs to the consumer.

⁴⁶ Some commenters alleged that Bank of America does not maintain banking centers in LMI communities in the San Diego area. Bank of America noted that 28 of its 74 banking centers in the San Diego area (38 percent) were in LMI census tracts, as of September 2005.

which typically responded to the needs of the communities served by the bank throughout its assessment areas.

CRA Performance of MBNA Bank. As noted, MBNA Bank received an overall “outstanding” rating in its April 2005 evaluation.⁴⁷ MBNA Bank engages primarily in credit card operations and is designated as a limited purpose bank for purposes of evaluating its CRA performance. As such, it is evaluated under the community development test, and examiners may consider the bank’s community development investments, loans, and services nationwide rather than only in the bank’s assessment area.⁴⁸

Examiners reported that during the evaluation period, MBNA Bank had a level of qualified community development investments commensurate with its size, financial capacity, and available opportunities. During the evaluation period, MBNA made financial commitments totaling \$454.6 million for qualified investments and community development loans. In addition, examiners reported that MBNA Bank provided \$48.9 million in qualified grants that benefited more than 360 community development organizations and programs and contributed an additional \$58.3 million to nonprofit agencies providing consumer credit counseling throughout the United States.

Examiners commended MBNA Bank’s responsiveness to the credit needs of its assessment area. They reported that MBNA Bank was highly responsive to the credit needs of LMI individuals and communities and offered many affordable housing programs for LMI individuals and families. Examiners noted that MBNA Bank substantially met the affordable housing

⁴⁷ The evaluation period was from January 1, 2002, through December 31, 2004.

⁴⁸ See 12 CFR 25.25.

needs of its assessment area through both qualified investments and community development loans. In addition, examiners commended the bank's commitment to enhancing educational opportunities for disadvantaged students from LMI families. They also reported that MBNA Bank was very responsive to small-business financing needs in the assessment area.

B. HMDA Data and Fair Lending Record

The Board has carefully considered the lending record and HMDA data of Bank of America and MBNA in light of public comments received on the proposal. One commenter alleged, based on 2004 HMDA data, that Bank of America denied the home mortgage loan applications of African-American and Hispanic borrowers more frequently than those of nonminority applicants in various states, the District of Colombia, and Metropolitan Statistical Areas ("MSAs"). Another commenter alleged that, based on 2003 HMDA data, MBNA denied home mortgage loan applications from African Americans and Hispanics more frequently than applications from nonminorities in certain markets. The commenters also alleged that Bank of America, MBNA, and their subsidiaries made higher-cost loans more frequently to African-American and Hispanic borrowers than to nonminority borrowers.⁴⁹ The Board reviewed the 2003 and 2004 HMDA data reported by Bank of America, MBNA, and their subsidiary banks.⁵⁰

⁴⁹ 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 by 3 percentage points for first-lien mortgages and by 5 percentage points for second-lien mortgages. 12 CFR 203.4.

⁵⁰ These data were analyzed to reflect the BOA/Fleet Transaction. The Board reviewed HMDA-reportable loan originations for various MSAs individually, as

Although the HMDA data might reflect certain disparities in the rates of loan applications, originations, denials, or pricing among members of different racial groups in certain local areas, they provide an insufficient basis by themselves on which to conclude whether or not Bank of America or MBNA is excluding or imposing higher credit costs on any racial or ethnic group on a prohibited basis. The Board recognizes that HMDA data alone, even with the recent addition of pricing information, provide only limited information about the covered loans.⁵¹ 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 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 the subsidiary depository and lending institutions of Bank of America and

well as for the metropolitan portions of BA Bank's and MBNA's assessment areas statewide.

⁵¹ 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.

MBNA with fair lending laws. Examiners noted no substantive violations of applicable fair lending laws in the examinations of the depository institutions controlled by Bank of America or MBNA. In addition, the Board has consulted with the OCC, the primary federal supervisor of Bank of America's and MBNA's subsidiary banks.

The record also indicates that Bank of America and MBNA have taken steps to ensure compliance with fair lending and consumer protection laws. Bank of America and MBNA have corporate-wide policies and procedures to help ensure compliance with all fair lending and other consumer protection laws and regulations. Bank of America's and MBNA's compliance programs include fair-lending policy and product guides, compliance file reviews, testing of their HMDA data's integrity, and other quality-assurance measures. In addition, Bank of America and MBNA represented that their consumer real estate associates receive and will continue to receive compliance training that includes courses in fair lending laws, privacy laws, information security, HMDA reporting, and ethics. Furthermore, Bank of America's fair-lending monitoring program has been significantly expanded in the area of pricing review and analysis to accommodate recent HMDA changes concerning the reporting of loan pricing. Bank of America also has undertaken an extensive analysis to interpret and respond to HMDA pricing results. Bank of America has stated that its fair lending policies will continue to apply to current Bank of America operations and that it will review any modifications of MBNA's operations that might be required after consummation of the proposal.

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

C. Branch Closings

Several commenters expressed concerns about the proposal's possible effect on branch closings. The Board has carefully considered these comments in light of all the facts of record. Bank of America has represented that it is not planning any merger-related branch closings and that any such closings, relocations, or consolidations would be minimal because there is no geographic overlap with MBNA. Bank of America's branch closure policy entails a review of many factors before any closing or consolidation of a branch, including an assessment of the branch, the marketplace demographics, a profile of the community where the branch is located, and the effect on customers. The most recent CRA evaluation of BA Bank noted favorably the bank's record of opening and closing branches.

The Board also has considered the fact that federal banking law provides a specific mechanism for addressing branch closings.⁵² Federal law requires an insured depository institution to provide notice to the public and to

⁵² Section 42 of the FDI Act (12 U.S.C. § 1831r-1), as implemented by the Joint Policy Statement Regarding Branch Closings (64 Federal Register 34,844 (1999)), requires a bank to provide the public with at least a 30-day notice and the appropriate federal banking agency with at least a 90-day notice before the date of the proposed branch closing. The bank also is required to provide reasons and other supporting data for the closure, consistent with the institution's written policy for branch closings.

the appropriate federal supervisory agency before closing a branch. In addition, the Board notes that the OCC, as the appropriate federal supervisor of BA Bank, will continue to review the bank's branch closing record in the course of conducting CRA performance evaluations.

D. Conclusion on Convenience and Needs Considerations

The Board has carefully considered all the facts of record, including reports of evaluation of the CRA performance records of the institutions involved, information provided by Bank of America and MBNA, 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 MBNA, including access to almost 6,000 Bank of America banking centers. Based on a review of the entire record, and for reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor, including the CRA performance records of the relevant depository institutions, are consistent with approval of the proposal.⁵³

⁵³ One commenter reiterated comments he made in connection with the BOA/Fleet Transaction, urging the Board not to approve the proposal until Bank of America meets certain "commitments" regarding its lending programs in Hawaii and its goal for mortgage lending to Native Hawaiians on Hawaiian Home Lands. See BOA/Fleet Order at 232-33. As noted in that order, Bank of America's publicly announced plans to engage in certain lending programs in Hawaii were not commitments to the Board, and these plans were not conditions to the Board's approvals in earlier applications by Bank of America or its predecessors. See id. As also previously noted, the Board views the enforceability of such third-party pledges, initiatives, and agreements as matters outside the CRA. Bank of America has represented that since the BOA/Fleet Transaction, Bank of America's loans and investments in Hawaii that qualify under its understanding with the State of Hawaii Department of Hawaiian Home Lands have increased from approximately \$70 million to more than \$99 million.

Foreign Activities

Bank of America proposes to acquire MBNA's Edge corporation, organized under section 25A of the Federal Reserve Act.⁵⁴ The Board concludes that all the factors required to be considered under the Federal Reserve Act and the Board's Regulation K are consistent with approval of the proposal.

Conclusion

Based on the foregoing, and in light of all the facts of record, the Board has determined that the application and notice should be, and hereby are, approved.⁵⁵

⁵⁴ Bank of America intends to acquire MBNA's foreign operations under section 4(c)(13) of the BHC Act and section 25 of the Federal Reserve Act (12 U.S.C. § 601 *et seq.*) pursuant to the general consent procedure of section 211.9 of Regulation K (12 CFR 211.9(b)).

⁵⁵ Several commenters 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 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 necessary or appropriate to clarify factual issues related to the application and to provide an opportunity for testimony. 12 CFR 225.16(e). The Board has considered carefully the commenters' requests in light of all the facts of record. In the Board's view, the commenters had ample opportunity to submit their views and, in fact, submitted written comments that the Board has considered carefully in acting on the proposal. The commenters' requests fail to demonstrate why 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 meeting or hearing is not required or warranted in this case. Accordingly, the requests for a public meeting or hearing on the proposal are denied.

In reaching its conclusion, the Board has considered all the facts of record in light of the factors that is required to consider under the BHC Act and other applicable statutes.⁵⁶ The Board's approval is specifically conditioned on compliance by Bank of America with the conditions in this order and all the commitments made to the Board in connection with the proposal. For purposes of this transaction, these commitments and conditions are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.⁵⁷

The proposal may not be consummated before the fifteenth calendar day after the effective date of this order, or later than three months after

⁵⁶ One commenter also requested that the Board delay action or extend the comment period on the proposal. As previously noted, the Board has accumulated a significant record in this case, including reports of examination, confidential supervisory information, public reports and information, and considerable public comment. As also noted, the commenters had ample opportunity to submit their views and provided substantial written submissions that the Board has considered carefully in acting on the proposal. Moreover, the BHC Act and Regulation Y require the Board to act on proposals submitted under those provisions within certain time periods. Based on a review of all the facts of record, the Board has concluded that the record in this case is sufficient to warrant action at this time and that a further delay in considering the proposal, extension of the comment period, or a denial of the proposal on the grounds discussed above or on the basis of informational insufficiency is not warranted.

⁵⁷ One commenter reiterated his request from the BOA/Fleet Transaction that certain Federal Reserve System staff and Board members recuse themselves from consideration of the application, or alternatively, that the application be dismissed because of the commenter's allegations of conflicts of interests between Federal Reserve System staff and Bank of America. See BOA/Fleet Order at 234 n.89. For the reasons stated in the BOA/Fleet Order, the Board concludes that no conflicts of interests exist that would require recusal from consideration or dismissal of this proposal. See id.

the effective date of this order unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Richmond, acting pursuant to delegated authority.

By order of the Board of Governors,⁵⁸ effective December 15, 2005.

(signed)

Robert deV. Frierson
Deputy Secretary of the Board

⁵⁸ Voting for this action: Chairman Greenspan, Vice Chairman Ferguson, and Governors Bies, Olson, and Kohn.

APPENDIX

Calculation of the Nationwide Deposit Cap

For purposes of applying the nationwide deposit cap, the total amount of deposits held by insured banks in the United States was computed by first calculating the sum of total deposits in domestic offices as reported on Schedule RC of the Call Report, interest accrued and unpaid on deposits in domestic offices as reported on Schedule RC-G of the Call Report, and the following items reported on Schedule RC-O of the Call Report: unposted credits, uninvested trust funds, deposits in insured branches in Puerto Rico and U.S. territories and possessions, unamortized discounts on deposits, the amount by which demand deposits would be increased if the reporting institution's reciprocal demand balances with foreign banks and foreign offices of other U.S. banks that were reported on a net basis had been reported on a gross basis, amount of assets netted against demand deposits, amount of assets netted against time and savings deposits, demand deposits of consolidated subsidiaries, time and savings deposits of consolidated subsidiaries, and interest accrued and unpaid on deposits of consolidated subsidiaries. From that sum, subtract the amount of unpaid debits and unamortized premiums.

The total amount of deposits held by insured U.S. branches of foreign banks was computed by first calculating the sum of the following items reported on Schedule O of the RAL: total demand deposits in the branch, total time and savings deposits in the branch, interest accrued and unpaid on deposits in the branch, unposted credits, demand deposits of majority-owned depository subsidiaries and wholly owned nondepository subsidiaries, time and savings deposits of majority-owned depository subsidiaries and wholly owned

nondepository subsidiaries, interest accrued and unpaid on deposits of majority-owned depository subsidiaries and wholly owned nondepository subsidiaries, the amount by which demand deposits would be increased if the reporting institution's reciprocal demand balances with foreign banks and foreign offices of other U.S. banks that were reported on a net basis had been reported on a gross basis, amount of assets netted against demand deposits, amount of assets netted against time and savings deposits, demand deposits of consolidated subsidiaries, and time and savings deposits of consolidated subsidiaries. From that sum, subtract the amount of unpaid debits.

The total amount of deposits held by insured savings associations in the United States was computed by taking the sum of total deposits in domestic offices reported on Schedule SC of the TFR, deposits held in escrow and accrued interest payable-deposits, both as reported on Schedule SC of the TFR, plus the following items reported on Schedule SI of the TFR: time and savings deposits of consolidated subsidiaries, outstanding checks drawn against Federal Home Loan Banks and Federal Reserve Banks, demand deposits of consolidated subsidiaries, assets netted against demand deposits, and assets netted against time and savings deposits.

Because insured banks and savings associations that are subsidiaries of other insured banks and savings associations have been consolidated into their parent institutions for reporting purposes, the individual data for subsidiary insured depository institutions have not been added in order to avoid double counting deposits held by these institutions.