

FEDERAL RESERVE SYSTEM

Southern BancShares (N.C.), Inc.  
Mount Olive, North Carolina

Order Approving the Acquisition of Shares of a Bank Holding Company

Southern BancShares (N.C.), Inc. (“Southern”), a bank holding company within the meaning of the Bank Holding Company Act (“BHC Act”), has requested the Board’s approval under section 3 of the BHC Act<sup>1</sup> to increase its ownership interest to 9.9 percent of the voting shares of ECB Bancorp, Inc. (“ECB”) and thereby increase its indirect interest in ECB’s subsidiary bank, The East Carolina Bank (“East Carolina Bank”), both of Engelhard, North Carolina. Southern currently owns 4.9 percent of ECB’s voting shares.

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (73 Federal Register 78,359 (2008)). 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.

Southern, with total banking assets of approximately \$1.2 billion, controls one depository institution, Southern Bank and Trust Company (“Southern Bank”), Mount Olive, that operates only in North Carolina. Southern Bank is the 17<sup>th</sup> largest insured depository institution in North Carolina, controlling deposits of approximately \$1.01 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the state (“state deposits”).<sup>2</sup>

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<sup>1</sup> 12 U.S.C. § 1842.

<sup>2</sup> Asset data are as of June 30, 2008; statewide deposit and ranking data are also as of June 30, 2008, and reflect merger and acquisition activity through that date. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

East Carolina Bank, with total assets of approximately \$738 million, is the 33<sup>rd</sup> largest insured depository institution in North Carolina. The bank operates only in North Carolina and controls deposits of approximately \$588.9 million. If Southern were deemed to control ECB on consummation of the proposal,<sup>3</sup> Southern would become the seventh largest banking organization in North Carolina, controlling approximately \$1.6 billion in deposits, which would represent less than 1 percent of state deposits.

Southern has stated that it does not propose to control or exercise a controlling influence over ECB and that its indirect investment in East Carolina Bank would also be a passive investment. In this light, Southern has agreed to abide by certain commitments on which the Board has previously relied in determining that an investing bank holding company would not be able to exercise a controlling influence over another bank holding company or bank for purposes of the BHC Act (“Passivity Commitments”).<sup>4</sup> For example, Southern has committed not to exercise or attempt to exercise a controlling influence over the management or policies of ECB or any of its subsidiaries; not to have or seek to have any employee or representative of Southern or its affiliates serve as an officer, agent, or employee of ECB or any of its subsidiaries; and not to seek or accept representation on the board of directors of ECB or any of its

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<sup>3</sup> Although the acquisition of less than a controlling interest in a bank or bank holding company is not a normal acquisition for a bank holding company, the requirement in section 3(a)(3) of the BHC Act that the Board’s approval be obtained before a bank holding company acquires more than 5 percent of the voting shares of a bank suggests that Congress contemplated the acquisition by bank holding companies of between 5 and 25 percent of the voting shares of banks. See 12 U.S.C. § 1842(a)(3). On this basis, the Board previously has approved the acquisition by a bank holding company of less than a controlling interest in a bank or bank holding company. See, e.g., Penn Bancshares, Inc., 92 Federal Reserve Bulletin C37 (2006) (acquisition of up to 24.89 percent of the voting shares of a bank holding company); S&T Bancorp Inc., 91 Federal Reserve Bulletin 74 (2005) (acquisition of up to 24.9 percent of a bank holding company); Brookline Bancorp, MHC, 86 Federal Reserve Bulletin 52 (2000) (acquisition of up to 9.9 percent of the voting shares of a bank holding company).

<sup>4</sup> The commitments made by Southern are set forth in Appendix A.

subsidiaries. Southern has additionally committed not to enter into any agreement with ECB or any of its subsidiaries that substantially limits the discretion of ECB's management over major policies or decisions.

Based on these considerations and all the other facts of record, the Board has concluded that Southern would not acquire control of, or have the ability to exercise a controlling influence over, ECB or East Carolina Bank through the proposed acquisition of the ECB's voting shares. The Board notes that the BHC Act would require Southern to file an application and receive the Board's approval before the company could directly or indirectly acquire additional shares of ECB or attempt to exercise a controlling influence over ECB or East Carolina Bank.<sup>5</sup>

#### Competitive Considerations

The Board has considered carefully the competitive effects of the proposal in light of all the facts of record. 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>

Southern Bank and East Carolina Bank compete directly in six banking markets in North Carolina. The Board has reviewed carefully the competitive effects of the proposal in this banking market in light of all the facts of record. In particular, the Board has considered the number of competitors that would remain in the banking markets; the relative shares of total deposits in depository institutions in the markets

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<sup>5</sup> See, e.g., Emigrant Bancorp, Inc., 82 Federal Reserve Bulletin 555 (1996); First Community Bancshares, Inc., 77 Federal Reserve Bulletin 50 (1991).

<sup>6</sup> 12 U.S.C. § 1842(c)(1).

(“market deposits”) controlled by Southern Bank and East Carolina Bank;<sup>7</sup> the concentration level of market deposits and the increase in the level as measured by the Herfindahl-Hirschman Index (“HHI”) under the Department of Justice Merger Guidelines (“DOJ Guidelines”);<sup>8</sup> other characteristics of the market; and the Passivity Commitments made by Southern with respect to ECB and East Carolina Bank.

A. Banking Markets within Established Guidelines

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in five of the banking markets in which Southern Bank and East Carolina Bank directly compete.<sup>9</sup> On consummation of the proposal, four markets would remain highly concentrated, and one market would remain moderately concentrated, as measured by the HHI. The change in HHI in the four highly concentrated markets would be consistent with Board precedent and the thresholds in the DOJ Guidelines. In each of the five banking markets, a number of competitors would remain.

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<sup>7</sup> Deposit and market share data are as of June 30, 2008, 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). 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).

<sup>8</sup> 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 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.

<sup>9</sup> These banking markets and the effects of the proposal on their concentrations of banking resources are described in Appendix B.

B. Banking Market Warranting Special Scrutiny

Southern Bank and East Carolina Bank compete directly in one banking market in North Carolina that warrants a detailed review: the Washington County banking market.<sup>10</sup> In this banking market, the concentration levels on consummation of the proposal would exceed the threshold levels in the DOJ Guidelines. Southern Bank is the fifth largest depository institution in the market, controlling \$11.8 million in deposits, which represents 8.9 percent of market deposits. East Carolina Bank is the third largest depository institution in the market, controlling \$24.2 million in deposits, which represents 18.3 percent of market deposits. If considered a combined organization on consummation of the proposal, Southern Bank and East Carolina Bank would be the second largest depository organization in the Washington County banking market, controlling \$36 million in deposits, which would represent approximately 27.2 percent of market deposits. The proposal would exceed the DOJ Guidelines because the HHI for the Washington County banking market would increase 326 points to 2609.

The market indexes suggest that consummation of the proposal would raise competitive issues in the Washington County banking market. After careful analysis of the record, however, the Board has concluded that no significant reduction in competition is likely to result from Southern's proposed indirect investment in East Carolina Bank. Of particular significance in this case is the structure of the proposed investment and the commitments Southern has provided to the Board, which are designed to limit the ability of Southern to use its proposed investment to engage in any anticompetitive behavior.

The Board previously has noted that one company need not acquire control of another company to lessen competition between them substantially and has

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<sup>10</sup> The Washington County banking market includes Washington County, North Carolina.

recognized that a significant reduction in competition can result from the sharing of nonpublic financial information between two organizations that are not under common control. In each case, the Board analyzes the specific facts to determine whether the minority investment in a competitor would result in significant adverse competitive effects in a banking market.<sup>11</sup>

The Board has concluded, after careful analysis of the entire record, that no significant reduction in competition will likely result from Southern's proposed minority investment in ECB. As noted, Southern has committed not to exercise a controlling influence over ECB or East Carolina Bank and not to seek or accept representation on the board of directors of ECB or East Carolina Bank. Southern also has committed not to acquire or seek to acquire nonpublic financial information from ECB or East Carolina Bank. These commitments are designed to prevent anticompetitive behavior that otherwise might occur through either influencing the behavior of ECB or East Carolina Bank or the coordination of Southern's activities with those of ECB or East Carolina Bank. In addition, there are no legal, contractual, or statutory provisions that would otherwise allow Southern to have any access to financial information of ECB or East Carolina Bank beyond the information already available to it as a shareholder with a less than 5 percent interest. These limitations restrict Southern's access to confidential information that could enable it to engage in anticompetitive behavior in the Washington County banking market with respect to East Carolina Bank.

The Board also has considered additional facts indicating that the proposal is not likely to have a significantly adverse effect on competition in the Washington County banking market. In addition to Southern Bank and East Carolina

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<sup>11</sup> See, e.g., The Bank of Nova Scotia, 93 Federal Reserve Bulletin C136 (2007); Passumpsic Bancorp, 92 Federal Reserve Bulletin C175 (2006) ("Passumpsic"); BOK Financial Corp., 81 Federal Reserve Bulletin 1052, 1053-54 (1995); Sun Banks, Inc., 71 Federal Reserve Bulletin 243 (1985).

Bank, three other bank competitors, each with market shares of at least 15 percent, provide additional sources of banking services to the market. The Board also notes that the market includes one community credit union with broad membership criteria that include most of the residents in the market, offers a wide range of consumer banking products, and operates street-level branches with drive-up service lanes.<sup>12</sup>

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

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

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

### Financial, Managerial, and Supervisory Considerations

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

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<sup>12</sup> The Board previously has considered competition from certain active credit unions as a mitigating factor. See Passumpsic at C177; Capital City Group, Inc., 91 Federal Reserve Bulletin 418 (2005); F.N.B. Corporation, 90 Federal Reserve Bulletin 481 (2004); Gateway Bank & Trust Co., 90 Federal Reserve Bulletin 547 (2004). If Southern Bank and East Carolina Bank were considered as a combined organization on consummation of the proposal, the HHI for the Washington County banking market would increase 263 points to 2209 when the deposits of the credit union are weighted at 50 percent.

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

The Board has carefully considered the financial factors of the proposal. Southern and Southern Bank are well capitalized and would remain so on consummation of the proposal. Based on its review of the record, the Board also finds that Southern has sufficient financial resources to effect the proposal and that the financial resources of Southern and its subsidiaries would not be adversely affected by the proposal. The proposed transaction would be funded by a dividend from Southern Bank and by Southern's existing financial resources.

The Board also has considered the managerial resources of Southern, ECB, and their subsidiary banks. The Board has reviewed the examination records of these institutions, including assessments of their management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences and those of other relevant banking supervisory agencies with the organizations and their records of compliance with applicable banking law, including anti-money laundering laws. Southern, ECB, and their subsidiary banks 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 the organizations involved are consistent with approval, as are the other supervisory factors under the BHC Act.

### Convenience and Needs and CRA Performance Considerations

In acting on a proposal under section 3 of the BHC Act, the Board must consider the effects of the proposal on the convenience and needs of the communities to be served and take into account the records of the relevant depository institutions under the Community Reinvestment Act (“CRA”).<sup>13</sup> The Board has carefully considered the convenience and needs factor and the CRA performance records of Southern Bank and East Carolina Bank in light of all the facts of record. As provided in the CRA, the Board evaluates the record of performance of an institution in light of examinations by the appropriate federal supervisors of the CRA performance records of the relevant institutions.<sup>14</sup> Southern Bank received an “outstanding” rating and East Carolina Bank received a “satisfactory” rating at their most recent examinations for CRA performance by the Federal Deposit Insurance Corporation, as of February 28, 2006, and October 3, 2006, respectively. Based on a review of the entire record, the Board has concluded that considerations relating to convenience and needs considerations and the CRA performance records of Southern Bank and East Carolina Bank are consistent with approval of the proposal.

### Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the application under section 3 of the BHC Act 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 Southern 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

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<sup>13</sup> 12 U.S.C. § 2901 et seq.; 12 U.S.C. § 2903; 12 U.S.C. § 1842(c)(2).

<sup>14</sup> The Interagency Questions and Answers Regarding Community Reinvestment provide that a CRA examination is an important and often controlling factor in the consideration of an institution’s CRA record. See 74 Federal Register 498 at 527 (2009).

with its findings and decision herein and, as such, may be enforced in proceedings under applicable law.

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

By order of the Board of Governors,<sup>15</sup> effective March 9, 2009.

*(signed)*

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Robert deV. Frierson  
Deputy Secretary of the Board

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<sup>15</sup> Voting for this action: Chairman Bernanke, Vice Chairman Kohn, and Governors Warsh, Duke, and Tarullo.

## Appendix A

### Passivity Commitments

Southern BancShares (N.C.), Inc., Mount Olive, North Carolina (“Southern”), will not, without the prior approval of the Board or its staff, directly or indirectly:

1. Exercise or attempt to exercise a controlling influence over the management or policies of ECB Bancorp, Inc., Engelhard, North Carolina (“ECB”), or any of its subsidiaries, including The East Carolina Bank, Engelhard, North Carolina;
2. Seek or accept representation on the board of directors of ECB or any of its subsidiaries;
3. Have or seek to have any employee or representative of Southern and its affiliates (the “Southern Group”) serve as an officer, agent, or employee of ECB or any of its subsidiaries;
4. Take any action that would cause ECB or any of its subsidiaries to become a subsidiary of Southern;
5. Own, control, or hold with power to vote securities that (when aggregated with securities that the officers and directors of the Southern Group own, control, or hold with power to vote) represent 25 percent or more of any class of voting securities of ECB or any of its subsidiaries;
6. Own or control equity interests that would cause the combined voting and nonvoting equity interests of the Southern Group and its officers and directors to equal or exceed 25 percent of the total equity capital of ECB or any of its subsidiaries;
7. Propose a director or slate of directors in opposition to a nominee or slate of nominees proposed by the management or board of directors of ECB or any of its subsidiaries;
8. Enter into any agreement with ECB or any of its subsidiaries that substantially limits the discretion of ECB’s management over major policies and decisions, including, but not limited to, policies or decisions about employing and compensating executive officers; engaging in new business lines; raising additional debt or equity capital; merging or consolidating with another firm; or acquiring, selling, leasing, transferring, or disposing of material assets, subsidiaries, or other entities;
9. Solicit or participate in soliciting proxies with respect to any matter presented to the shareholders of ECB or any of its subsidiaries;

10. Dispose or threaten to dispose (explicitly or implicitly) of equity interests of ECB or any of its subsidiaries in any manner as a condition or inducement of specific action or non-action by ECB or any of its subsidiaries; or
11. Enter into any other banking or nonbanking transactions with ECB or any of its subsidiaries, except that the Southern Group may establish and maintain deposit accounts with The East Carolina Bank, provided that the aggregate balance of all such deposit accounts does not exceed \$500,000 and that the accounts are maintained on substantially the same terms as those prevailing for comparable accounts of persons unaffiliated with ECB.

The terms used in these commitments have the same meanings as set forth in the Bank Holding Company Act of 1956, as amended, and the Board's Regulation Y.

Appendix B

<b>Southern/ECB Banking Markets Consistent with Board Precedent and DOJ Guidelines</b>						
Data are as of June 30, 2008. All amounts of deposits are unweighted. All rankings, market deposit shares, and HHIs are based on thrift deposits weighted at 50 percent.						
<b>Beaufort County, North Carolina – Beaufort County.</b>						
	<b>Rank</b>	<b>Amount of Deposits</b>	<b>Market Deposit Shares (%)</b>	<b>Resulting HHI</b>	<b>Change in HHI</b>	<b>Remaining Number of Competitors</b>
<i>Southern Pre-Consummation</i>	4	\$58.8 mil.	8.5	2303	59	5
<i>ECB</i>	7	\$24.0 mil.	3.5			
<i>Southern Post-Consummation</i>	4	\$82.8 mil.	12.0			
<b>Dare, North Carolina – Dare, Hyde, and Tyrrell Counties.</b>						
	<b>Rank</b>	<b>Amount of Deposits</b>	<b>Market Deposit Shares (%)</b>	<b>Resulting HHI</b>	<b>Change in HHI</b>	<b>Remaining Number of Competitors</b>
<i>Southern Pre-Consummation</i>	7	\$27.9 mil.	2.4	2084	148	10
<i>ECB</i>	1	\$356.7 mil.	30.7			
<i>Southern Post-Consummation</i>	1	\$384.6 mil.	33.1			
<b>Greenville, North Carolina – Includes the Ranally Metro Area (“RMA”) and non-RMA portions of Pitt County.</b>						
	<b>Rank</b>	<b>Amount of Deposits</b>	<b>Market Deposit Shares (%)</b>	<b>Resulting HHI</b>	<b>Change in HHI</b>	<b>Remaining Number of Competitors</b>
<i>Southern Pre-Consummation</i>	6	\$111.5 mil.	6.7	1487	48	11
<i>ECB</i>	9	\$59.5 mil.	3.6			
<i>Southern Post-Consummation</i>	5	\$171.0 mil.	10.3			

<b>Martin County, North Carolina – Martin County.</b>						
	<b>Rank</b>	<b>Amount of Deposits</b>	<b>Market Deposit Shares (%)</b>	<b>Resulting HHI</b>	<b>Change in HHI</b>	<b>Remaining Number of Competitors</b>
<i>Southern Pre-Consummation</i>	3	\$25.6 mil.	8.4	2817	108	6
<i>ECB</i>	5	\$19.6 mil.	6.4			
<i>Southern Post-Consummation</i>	3	\$45.2 mil.	14.8			
<b>New Bern, North Carolina – Carteret County (excluding the Jacksonville RMA portion), Craven County, Pamlico County, and the eastern half of Jones County (excluding the Jacksonville RMA portion).</b>						
	<b>Rank</b>	<b>Amount of Deposits</b>	<b>Market Deposit Shares (%)</b>	<b>Resulting HHI</b>	<b>Change in HHI</b>	<b>Remaining Number of Competitors</b>
<i>Southern Pre-Consummation</i>	10	\$8.2 mil.	0.4	2223	1	11
<i>ECB</i>	9	\$29.9 mil.	1.3			
<i>Southern Post-Consummation</i>	9	\$38.2 mil.	1.7			