

Legal Developments: Fourth Quarter, 2005

ORDERS ISSUED UNDER BANK HOLDING COMPANY ACT

Orders Issued Under Section 3 of the Bank Holding Company Act

*ABC Bancorp
Moultrie, Georgia*

Order Approving the Merger of Bank Holding Companies

ABC Bancorp (“ABC”), 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 First National Banc, Inc. (“FNB”), St. Marys, Georgia, and acquire its subsidiary banks, First National Bank (“First National-Georgia”), also of St. Marys, and First National Bank (“First National-Florida”), Orange Park, Florida.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (70 *Federal Register* 50,348 (2005)). The time for filing comments has expired, and the Board has considered the application and all comments received in light of the factors set forth in section 3 of the BHC Act.

ABC, with total consolidated assets of approximately \$1.3 billion, operates subsidiary insured depository institutions in Alabama, Georgia, and Florida. In Georgia, ABC is the 15th largest depository organization, controlling deposits of approximately \$722.4 million, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the state (“state deposits”).³ In Florida, ABC is the 186th largest depository organization, controlling deposits of approximately \$108.9 million, which represent less than 1 percent of state deposits in Florida.

FNB, with total consolidated assets of approximately \$269.5 million, operates subsidiary depository institutions

in Georgia and Florida. In Georgia, FNB is the 132nd largest depository organization, controlling deposits of approximately \$118.9 million. In Florida, FNB is the 227th largest depository organization, controlling deposits of approximately \$68.4 million.

On consummation of the proposal, ABC would have consolidated assets of approximately \$1.5 billion. In Georgia, ABC would become the 13th largest depository organization, controlling deposits of approximately \$841.3 million, which represent less than 1 percent of state deposits. In Florida, ABC would become the 131st largest depository organization controlling deposits of approximately \$177.3 million, which represent less than 1 percent of state deposits.

Interstate Analysis

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the home state of such bank holding company if certain conditions are met. For purposes of the BHC Act, the home state of ABC is Georgia,⁴ and FNB is located in Georgia and Florida.⁵

Based on a review of the facts of record, including a review of relevant state statutes, the Board finds that all conditions for an interstate acquisition enumerated in section 3(d) of the BHC Act are met in this case.⁶ In light of all the facts of record, the Board is permitted to approve the proposal under section 3(d) of the BHC Act.

4. A bank holding company’s home state is the state in which the total deposits of all subsidiary banks of the company were the largest on 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)).

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

6. 12 U.S.C. §§ 1842(d)(1)(A)–(B) and 1842(d)(2)(A)–(B). ABC is adequately capitalized and adequately managed, as defined by applicable law. First National-Florida has been in existence and operated for at least the minimum period of time required by applicable state law (three years). On consummation of the proposal, ABC would control less than 10 percent of the total amount of deposits of insured depository institutions in the United States and less than 30 percent of the total amount of deposits of insured depository institutions in Florida. All other requirements of section 3(d) of the BHC Act would be met on consummation of the proposal.

1. 12 U.S.C. § 1842.

2. Immediately after the merger of FNB into ABC, First National-Georgia will be merged into The First Bank of Brunswick (“Bank of Brunswick”), Brunswick, Georgia, a subsidiary bank of ABC. The proposed merger by Bank of Brunswick is subject to approval by the Federal Deposit Insurance Corporation (“FDIC”) under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. § 1828(c)).

3. Asset, deposit, and ranking data are as of June 30, 2005, and reflect merger activity as of November 15, 2005.

Competitive Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market. The BHC Act also prohibits the Board from approving a proposed bank acquisition that would substantially lessen competition in any relevant banking market unless the Board finds that the anticompetitive effects of the proposal clearly are outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.⁷

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

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 supervisors of the organizations involved in the proposal, publicly reported and other financial information, information provided by ABC, and public comments received on the proposal.

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

Based on its review of these factors, the Board finds that ABC has sufficient financial resources to effect the proposal. The proposed transaction is structured as a partial share exchange and partial cash purchase. ABC will fund the cash component of the consideration with existing working capital. ABC, each of ABC's subsidiary banks,

and FNB are well capitalized and would remain so on consummation of the proposal.⁸

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 ABC, FNB, 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. ABC and its subsidiary depository institutions are considered to be well managed. The Board also has considered ABC's plans for implementing the proposal, including the proposed management after consummation.⁹

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

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board 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").¹⁰ The CRA requires the federal financial

8. First National-Georgia is not currently well capitalized, but as noted, ABC intends to merge that bank into Bank of Brunswick on consummation of the proposal. Bank of Brunswick would be well capitalized after consummation of that bank merger, and the Board has considered ABC's plans for the operation of the resulting bank and has consulted with the federal and state regulators responsible for supervising Bank of Brunswick.

9. A commenter asserted that ABC has exercised a controlling influence over FNB or its subsidiary banks without receiving the prior approval of the Board as required under the BHC Act. The Board has considered these comments in light of the Agreement and Plan of Merger ("Merger Agreement") between ABC and FNB, and other information provided by ABC about its relationship with FNB. ABC has confirmed to the Board that, despite certain provisions of the Merger Agreement, it has limited and will limit its relationships with FNB before consummation of the proposal in the following ways: no officers, directors, or agents of ABC have served or will serve as directors or management officials of FNB or its subsidiary banks; ABC has not installed, and will not require installation of, any of its policies and procedures (including but not limited to ABC's credit policy) at First National or its subsidiary banks; ABC has not made and will not make credit or underwriting decisions with respect to any loan applications made to First National or its subsidiary banks; and ABC has not exercised and will not otherwise exercise a controlling influence over the management or policies of FNB or its subsidiary banks. ABC has confirmed that, although one of its employees attended meetings of the boards of directors of FNB and its subsidiary banks as an observer before the filing of the application, no directors, officers, or agents of ABC will attend such board meetings before consummation of the proposal.

10. 12 U.S.C. § 2901 et seq.

7. 12 U.S.C. § 1842(c)(1).

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.¹¹

The Board has considered carefully all the facts of record, including evaluations of the CRA performance records of the subsidiary banks of ABC and FNB, data reported by ABC and FNB under the Home Mortgage Disclosure Act ("HMDA"),¹² other information provided by ABC, confidential supervisory information, and public comment received on the proposal. A commenter opposed the proposal and alleged, based on data reported under HMDA, that ABC engaged in discriminatory treatment of minority individuals in its home mortgage lending operations.

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process, because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.¹³

ABC's 12 subsidiary banks each received a rating of "satisfactory" or better at its most recent CRA performance evaluation.¹⁴ FNB's subsidiary banks, First National-Georgia and First National-Florida, received "satisfactory" ratings at their most recent evaluations by the Office of the Comptroller of the Currency ("OCC"), as of March 8, 2005, and June 10, 2002, respectively. After consummation of the proposal, ABC will generally implement its current CRA policies, procedures, and programs at the banks acquired from FNB.

B. HMDA and Fair Lending Record

The Board has carefully considered the lending records and HMDA data of ABC and FNB in light of public comment about their respective records of lending to minorities. A commenter alleged, based on 2004 HMDA

data, that ABC disproportionately denied applications for HMDA-reportable loans by Hispanic applicants. The commenter also asserted that ABC made higher-cost loans to African Americans and Hispanics more frequently than to nonminorities.¹⁵ The Board reviewed HMDA data for 2003 and 2004 reported by each subsidiary bank of ABC in its assessment areas.¹⁶

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 are insufficient by themselves to conclude whether or not ABC is excluding any racial or ethnic group 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.¹⁷ 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 credit-worthy 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 ABC and FNB with fair lending laws. In the fair lending reviews that were conducted in conjunction with the most recent CRA evaluations of the subsidiary depository institutions of ABC and FNB, examiners noted no substantive violations of applicable fair lending laws.

The record also indicates that ABC has taken steps to ensure compliance with fair lending and other consumer protection laws.¹⁸ ABC represented that it currently

15. 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 5 percentage points for second-lien mortgages (12 CFR 203.4).

16. Only six of ABC's twelve subsidiary banks originated HMDA-reportable loans: Bank of Brunswick; Southland Bank, Dothan, Alabama; Tri-County Bank, Trenton, Florida; Heritage Community Bank, Quitman, Georgia; Citizens Bank-Wakulla, Crawfordville, Florida; and First National Bank of South Georgia ("South Georgia Bank"), Albany, Georgia.

17. The data, for example, do not account for the possibility that an institution's outreach efforts may attract a larger proportion of marginally qualified applicants than other institutions attract and do not provide a basis for an independent assessment of whether an applicant who was denied credit was, in fact, creditworthy. 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.

18. A commenter questioned the completeness of information provided by ABC about its policies and procedures for ensuring compliance with fair lending laws. After the commenter expressed this

11. 12 U.S.C. § 2903.

12. 12 U.S.C. § 2801 et seq.

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

14. The appendix lists the most recent CRA performance ratings of ABC's subsidiary banks.

conducts quarterly compliance reviews of each bank's loans, along with annual fair lending reviews involving comparative-file analyses. ABC also stated that it maintains a second-review program for its residential lending. In addition, ABC requires all its employees to participate annually in fair lending and CRA compliance training. ABC has indicated that it will institute its current fair lending policies and procedures at the banks acquired from FNB.

The Board also has considered the HMDA data in light of other information, including ABC's CRA lending programs and the overall performance records of the subsidiary banks of ABC and FNB under the CRA.¹⁹ These established efforts demonstrate that the institutions are active in helping to meet the credit needs of their entire communities.

C. Conclusion on Convenience and Needs and CRA Performance

The Board has carefully considered all the facts of record, including reports of examination of the CRA records of the institutions involved, information provided by ABC, comments received on the proposal, and confidential supervisory information. The Board notes that the proposal would expand the banking products and services available to customers of FNB. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant depository institutions are consistent with approval.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the application should be, and hereby is, approved. In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act.²⁰ The Board's approval is specifically conditioned on compliance by ABC 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 cause by the Board or the Federal Reserve Bank of Atlanta, acting pursuant to delegated authority.

By order of the Board of Governors, effective November 30, 2005.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

concern, the Board received additional information from ABC about its fair lending compliance program.

19. A commenter asserted that the absence of any denied, withdrawn, or incomplete applications in the 2004 HMDA data reported by South Georgia Bank demonstrated the bank's violation of HMDA or the Equal Credit Opportunity Act. Commenter provided no evidence that the HMDA data are, in fact, inaccurate. The OCC, as the primary federal supervisor of South Georgia Bank, is responsible for evaluating the bank's compliance with HMDA and fair lending laws. The Board has consulted with the OCC about South Georgia Bank's record of compliance with these laws.

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

Appendix

CRA Ratings of ABC's Subsidiary Banks

| Bank | CRA Rating | Date | Supervisor |
|--|--------------|----------------|------------|
| Southland Bank, Dothan, Alabama | Satisfactory | June 2002 | FDIC |
| American Banking Company, Moultrie, Georgia | Satisfactory | June 2003 | FDIC |
| Citizens Security Bank, Tifton, Georgia | Satisfactory | March 2003 | FDIC |
| The First Bank of Brunswick, Brunswick, Georgia | Satisfactory | February 2004 | FDIC |
| First National Bank of South Georgia, Albany, Georgia | Satisfactory | November 1999 | OCC |
| Heritage Community Bank, Quitman, Georgia | Satisfactory | October 2003 | FDIC |
| Cairo Banking Company, Cairo, Georgia | Satisfactory | May 2003 | FDIC |
| Merchants and Farmers Bank, Donalsonville, Georgia | Satisfactory | November 2002 | FDIC |
| Citizens Bank-Wakulla, Crawfordville, Florida | Outstanding | September 1999 | FDIC |
| Tri-County Bank, Trenton, Florida | Satisfactory | April 2005 | FDIC |
| Central Bank & Trust, Cordele, Georgia | Satisfactory | November 2002 | FDIC |
| Bank of Thomas County, Thomasville, Georgia | Satisfactory | October 2004 | FDIC |

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

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.

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.

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.

Interstate Analysis

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

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 consumma-

tion 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

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 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,

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(g)(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.

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(e)(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 these 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.

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)(L) (incorporating the definition of "deposit" at 12 U.S.C. § 1813(f)).

15. *BOA/Fleet Order* at 220.

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 examina-

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 \$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.

tions 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/First Order* at 220.

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 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

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 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).

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 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 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

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.

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

reviewed the 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.

The Board also considered the existing compliance systems and internal audit programs at Bank of America and its subsidiary depository institutions and significant non-banking 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 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.

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

federal deposit insurance funds or the financial system in general. The commenter also expressed concerns about 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 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.

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

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 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 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

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

31. 12 U.S.C. §2901 et seq.

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.

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.

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.

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 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 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, 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 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

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.

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.

44. Bank of America also has provided grants to nonprofit organizations, such as ACCION and the New Mexico Community Development Loan Fund, that originate microlans 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.

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

48. See 12 CFR 25.25.

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 Columbia, 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

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 credit-

worthy 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 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

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 5 percentage points for second-lien mortgages (12 CFR 203.4).

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

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 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

Foreign Activities

Bank of America proposes to acquire MBNA's Edge corporation, organized under section 25A of the Federal Reserve

Act⁵⁴ 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, approved⁵⁵

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

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(c)). 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.

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

52. Section 42 of the FDIA 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.

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.

The proposal 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 by the Federal Reserve Bank of Richmond, acting pursuant to delegated authority.

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

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

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Appendix

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.

Bank of Montreal Montreal, Canada

Order Approving the Merger of Bank Holding Companies

Bank of Montreal ("BMO") and its U.S. subsidiaries, Harris Financial Corp. ("HFC") and Harris Bankcorp, Inc. ("Harris"), both of Chicago, Illinois (collectively, "Applicants"), each financial holding companies within the meaning of the Bank Holding Company Act ("BHC Act"), have requested the Board's approval under section 3 of the BHC Act to acquire Edville Bankcorp, Inc. ("Edville") and its subsidiary bank, Villa Park Trust & Savings Bank ("Villa Park Bank"), both of Villa Park, Illinois.¹

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (70 *Federal Register* 51,065 (2005)). The time for filing comments has expired, and the Board has considered the application and all comments received in light of the factors set forth in section 3 of the BHC Act.

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.*

1. 12 U.S.C. §1842. Pursuant to the merger agreement, Harris will form Omaha Acquisition Corporation ("Omaha"), Wilmington, Delaware, a wholly owned subsidiary of Harris, to merge with and into Edville. Immediately after this merger, Omaha would merge with and into Harris (with Harris as the survivor), and Harris would directly acquire Villa Park Bank.

BMO, with total consolidated assets of approximately \$237.4 billion, is the fifth largest banking organization in Canada.² BMO is the 32nd largest depository organization in the United States, controlling deposits of \$26 billion through its four U.S. depository institutions with branches in Arizona, California, Florida, Illinois, Indiana, and Washington.³ In Illinois, BMO operates the third largest depository organization through two subsidiary depository institutions, Harris National Association (“Harris N.A.”),⁴ Chicago, and NLSB, Plainfield, both of Illinois.⁵ BMO controls deposits of approximately \$22.1 billion, which represent 8 percent of the total amount of deposits of insured depository institutions in the state (“state deposits”).⁶

Edville, with total consolidated assets of approximately \$286.6 million, operates one depository institution, Villa Park Bank, with branches only in Illinois.⁷ Villa Park Bank is the 138th largest insured depository institution in Illinois, controlling deposits of approximately \$240.5 million.

On consummation of the proposal, BMO would have consolidated assets of approximately \$237.7 billion and would control deposits of \$26.2 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the United States. BMO would continue to operate the third largest depository organization in Illinois, controlling deposits of approximately \$22.3 billion, which represent 8 percent of state deposits.

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.⁸

Harris N.A. and Villa Park Bank compete directly in the Chicago banking market in Illinois.⁹ The Board has carefully reviewed the competitive effects of the proposal in this banking market in light of all the facts of record, including the number of competitors that would remain in the market, the relative shares of total deposits in depository institutions in the market (“market deposits”) controlled by Harris N.A. and Villa Park Bank,¹⁰ 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”),¹¹ and other characteristics of the markets.

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in the Chicago banking market. After consummation, the Chicago banking market would remain unconcentrated, as measured by the HHI. In this market, the increase in concentration would be small and numerous competitors would remain.¹²

The Department of Justice also has reviewed the anticipated competitive effects of the proposal and advised the

8. 12 U.S.C. § 1842(c)(1).

9. The Chicago banking market is defined as Cook, Du Page, and Lake Counties, all in Illinois. NLSB does not compete in the Chicago banking market.

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

11. 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 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.

12. After the proposed acquisition, the HHI would increase 3 points, to 756. BMO operates the third largest depository institution in the market, controlling deposits of \$18.5 billion, which represent 10 percent of market deposits. Edville operates the 71st largest depository institution in the market, controlling deposits of approximately \$241.5 million, which represent less than 1 percent of market deposits. After the proposed acquisition, BMO would continue to operate the third largest depository institution in the market, controlling deposits of approximately \$18.7 billion, which represent approximately 10 percent of market deposits. One hundred and eighty-seven depository institutions would remain in the banking market.

2. Asset data are as of July 31, 2005, and Canadian ranking data are as of December 31, 2004. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

3. Deposit and U.S. and state ranking data are as of March 31, 2005.

4. On May 27, 2005, Applicants reorganized and consolidated 26 of their 30 subsidiary banks, including their lead bank, Harris Trust and Savings Bank (“HTSB”), Chicago, into Harris N.A. BMO also operates a limited-charter national bank, Harris Central National Association, Roselle, Illinois, which provides cash-disbursement services only.

5. BMO operates two other depository institutions, Harris Bank National Association, Scottsdale, Arizona, and Mercantile National Bank of Indiana, Hammond, Indiana.

6. The operations of Harris N.A. and NLSB in Illinois were considered collectively to determine BMO’s state rankings and percentage of deposits. Harris N.A. controls deposits of approximately \$21.3 billion and NLSB controls deposits of \$883 million.

7. Asset data are as of September 30, 2005. Edville is currently engaged in a limited number of real estate management and investment activities that are not permissible for a bank holding company. Applicants have committed to conform these investments and activities to the requirements of the BHC Act, including by divestiture if necessary, within two years of consummating the proposal.

Board that consummation of the proposal would not likely have a significant adverse effect on competition in any relevant banking market. In addition, the appropriate banking agencies have been afforded an opportunity to comment and have not objected to the proposal.

Based on all the facts of record, the Board concludes that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of resources in the Chicago banking market in which Harris N.A. and Villa Park Bank directly compete or in any other relevant banking market. Accordingly, based on all the facts of record, the Board has determined that competitive considerations are consistent with approval.

Financial, Managerial, and Supervisory Considerations

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has considered these factors in light of all the facts of record, including confidential reports of examination, other supervisory information from the various U.S. banking supervisors of the organizations involved in the proposal, publicly reported and other financial information, information provided by the Applicants, and public comment on the proposal.¹³ The Board also has consulted with the Canadian Office of the Superintendent of Financial Institutions (“OSFI”), which is responsible for the supervision and regulation of Canadian banks.

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

Based on its review of these factors, the Board finds that Applicants have sufficient financial resources to effect the

13. A commenter criticized ITTSB’s managerial resources based on its decision to have a lending relationship with an unaffiliated, non-traditional provider of financial services, a rent-to-own company. As a general matter, these types of businesses are licensed by the states where they operate and are subject to applicable state law. Applicants stated that HTSB’s business relationship with this provider is limited to serving as an administrative agent and extending credit consistent with applicable legal requirements. Applicants also represented that they do not play any role in the business decisions, leasing, or credit practices of the borrower. In addition, the loan document executed by the borrower to ITTSB contains representations, warranties, and covenants that the borrower obtains and maintains all necessary licenses to conduct its operations and complies with state law.

proposal. Applicants will use existing resources to effect the proposal as a cash purchase. Applicants and their subsidiary depository institutions are well capitalized and would remain so on consummation of the proposal.

The Board also has considered the managerial resources of the organizations involved and the proposed combined organization. The Board has reviewed the examination records of Applicants, Edville, and their subsidiary depository institutions, 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. Applicants, Edville, and their subsidiary depository institutions are considered to be well managed. The Board also has considered Applicants’ 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 approval, as are the other supervisory factors under the BHC Act.

Section 3 of the BHC Act also provides that the Board may not approve an application involving a foreign bank unless the bank is subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in the bank’s home country.¹⁴ As noted, the home country supervisor of BMO is the OSFI.

In approving applications under the BHC Act and the International Banking Act (“IBA”),¹⁵ the Board previously has determined that BMO was subject to home country supervision on a consolidated basis by the OSFI.¹⁶ Based on this finding and all the facts of record, the Board has concluded that BMO continues to be subject to comprehensive supervision on a consolidated basis by its home country supervisor.

In addition, section 3 of the BHC Act requires the Board to determine that an applicant has provided adequate assurances that it will make available to the Board such information on its operations and activities and those of its affiliates that the Board deems appropriate to determine and

14. 12 U.S.C. § 1842(e)(3)(B). Under Regulation Y, the Board uses the standards enumerated in Regulation K to determine whether a foreign bank is subject to consolidated home country supervision. See 12 CFR 225.13(a)(4). Regulation K provides that a foreign bank will be considered subject to comprehensive supervision or regulation on a consolidated basis if the Board determines that the bank is supervised or regulated in such a manner that its home country supervisor receives sufficient information on the worldwide operations of the bank, including its relationship with any affiliates, to assess the bank’s overall financial condition and its compliance with laws and regulations. See 12 CFR 211.24(c)(1).

15. 12 U.S.C. § 3101 et seq.

16. See, e.g., *Bank of Montreal/Merwante Bancorp, Inc.*, as noted in Federal Reserve Release, H.2, no. 51, p. 4 (December 14, 2004); *Bank of Montreal/New Lemax Holding Company*, as noted in Federal Reserve Release, H.2, no. 19, p. 2 (May 4, 2004); *Bank of Montreal/Lakeland Financial Corp.*, as noted in Federal Reserve Release, H.2, no. 2, p. 2 (January 10, 2004); *Bank of Montreal*, 80 *Federal Reserve Bulletin* 925 (1994).

enforce compliance with the BHC Act.¹⁷ The Board has reviewed the restrictions on disclosure in the relevant jurisdictions in which BMO operates and has communicated with relevant government authorities concerning access to information. In addition, BMO previously has committed to make available to the Board such information on its operations and those of its affiliates that the Board deems necessary to determine and enforce compliance with the BHC Act, the IBA, and other applicable federal laws. BMO also previously has committed to cooperate with the Board to obtain any waivers or exemptions that may be necessary to enable BMO and its affiliates to make such information available to the Board. In light of these commitments, the Board concludes that BMO has provided adequate assurances of access to any appropriate information the Board may request. Based on these and all other facts of record, the Board has concluded that the supervisory factors it is required to consider are consistent with approval.

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board 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”).¹⁸ 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.¹⁹

The Board has considered carefully all the facts of record, including reports of examination of the CRA performance records of the subsidiary banks of Applicants and Edville, data reported by Applicants under the Home Mortgage Disclosure Act (“HMDA”),²⁰ other information provided by Applicants, confidential supervisory information, and public comment received on the proposal. A commenter alleged, based on 2004 HMDA data, that HTSB has engaged in discriminatory treatment of minority individuals in its home mortgage operations.

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by

the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution’s most recent CRA performance evaluation is a particularly important consideration in the applications process, because it represents a detailed, on-site evaluation of the institution’s overall record of performance under the CRA by its appropriate federal supervisor.²¹

Applicants’ newly reorganized lead bank, Harris N.A., has not yet been examined under the CRA by the Office of the Comptroller of the Currency (“OCC”). Before the consolidation and restructuring of Applicants’ subsidiary banks in May 2005, HTSB was Applicants’ lead bank, and it accounted for approximately 65 percent of the assets and 55 percent of the deposits of Harris, the direct parent of all Applicants’ insured depository institutions. HTSB received an “outstanding” rating at its most recent CRA performance evaluation by the Federal Reserve Bank of Chicago, as of April 29, 2002. Each of the other 25 subsidiary banks that later formed Harris N.A. received a “satisfactory” rating at its most recent CRA performance evaluation. Applicants’ four remaining banks each received a rating of “satisfactory” or better at its most recent CRA performance evaluation.

Villa Park Bank received a “satisfactory” rating at its most recent CRA performance evaluation by the Federal Reserve Bank of Chicago, as of September 17, 2001. Applicants have represented that they will institute their CRA policies, procedures, and programs at Villa Park Bank on consummation of the proposal.

B. HMDA and Fair Lending Record

The Board has carefully considered Applicants’ lending record and HMDA data in light of public comment received on the proposal. The commenter alleged, based on 2004 HMDA data, that HTSB denied the home mortgage and refinance applications of African-American and Hispanic borrowers more frequently than those of nonminority applicants in the Chicago Metropolitan Statistical Area (“Chicago MSA”). The commenter also alleged that HTSB made higher-cost loans more frequently to African-American and Hispanic borrowers than to nonminority borrowers.²² The Board reviewed HTSB’s HMDA data for 2004 in the Chicago MSA, which included the bank’s assessment area.

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 are insufficient by them-

17. See 12 U.S.C. § 1842(c)(3)(A).

18. 12 U.S.C. § 2901 et seq.

19. 12 U.S.C. § 2903.

20. 12 U.S.C. § 2801 et seq.

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

22. 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 percentage points for first-lien mortgages and 5 percentage points for second-lien mortgages (12 CFR 203.4).

selves to conclude whether or not HTSB is excluding any racial or ethnic group 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.²³ 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 institutions of Applicants with fair lending laws. In the fair lending review conducted in conjunction with the 2002 CRA Evaluation, examiners noted no substantive violations of applicable fair lending laws by HTSB. In addition, the Board has consulted with the OCC, the primary federal supervisor of Harris N.A., HTSB's successor institution.

The record also indicates that Applicants have taken steps to ensure compliance with fair lending laws and other consumer protection laws. Applicants have centralized the compliance functions performed by their Corporate Compliance Department ("CCD") and CRA Office, which have responsibility for planning, administering, monitoring, and reviewing the organization's responsibilities under the fair lending and consumer protection laws on a corporate-wide basis. In addition, Applicants' Corporate Audit Department periodically conducts a separate fair lending audit to ensure compliance with Applicants' policies and procedures. The CCD and CRA Office have implemented uniform fair lending policies, procedures, and training programs at Applicants' subsidiary depository institutions. The CCD also conducts annual reviews of the banks for their fair lending and consumer protection compliance monitoring, which includes a fair lending comparative file review. Any notable exceptions or deviations discovered during a review are reported, investigated, and addressed at the appropriate managerial levels. The CCD's last comparative file review covered 2004 HMDA-reportable refinance transactions and was completed in September 2005. Applicants represented that the exceptions identified in this review were investigated, that no fair lending issues were found, and that the results of this review were disseminated

23. 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.

to senior management. Applicants intend to institute their centralized compliance structure and implement their fair lending policies and procedures at Villa Park Bank after the merger.

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

Conclusion on CRA Performance Records

The Board has carefully considered all the facts of record, including reports of examination of the CRA records of the institutions involved, information provided by Applicants, 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 Edville's customers, including access to expanded branch and ATM networks. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant depository institutions are consistent with approval.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the application should be, and hereby is, approved.²⁴ 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.²⁵ The Board's approval is specifically

24. 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 requests in light of all the facts of record. In the Board's view, the public has had ample opportunity to submit comments on the proposal and, in fact, the commenter has submitted written comments that the Board has considered carefully in acting on the proposal. The commenter's request fails to demonstrate why its written comments do not 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.

25. The commenter also requested that the Board extend the comment period and delay action on the proposal. As previously noted, the

conditioned on compliance by Applicants 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 cause by the Board or the Federal Reserve Bank of Chicago, acting pursuant to delegated authority.

By order of the Board of Governors, effective November 10, 2005.

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

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Cathay General Bancorp
Los Angeles, California

Order Approving the Acquisition of a Bank

Cathay General Bancorp ("Cathay"), 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 to acquire up to 100 percent of the outstanding shares of Great Eastern Bank, New York, New York.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (70 *Federal Register* 54,555 (2005)). The time for filing comments has expired, and the Board has considered the application and all comments received in light of the factors set forth in section 3 of the BHC Act.

Board has accumulated a significant record in this case, including reports of examination, confidential supervisory information, public reports and information, and public comment. In the Board's view, the commenter has had ample opportunity to submit its views and, in fact, has provided multiple 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 neither an extension of the comment period nor further delay in considering the proposal is necessary.

1. 12 U.S.C. § 1842.

2. Cathay entered into agreements with certain shareholders of Great Eastern Bank under which Cathay was granted the option to acquire 41 percent of the bank's outstanding common shares ("option shares"), subject to receipt of regulatory approval and certain other restrictions. Cathay may attempt to acquire additional shares of Great Eastern Bank directly from other shareholders or, if possible, to enter into a definitive merger agreement with Great Eastern Bank.

Cathay, with total consolidated assets of approximately \$6 billion, operates one depository institution, Cathay Bank, also in Los Angeles, with branches in California, Massachusetts, New York, Washington, and Texas. Cathay Bank is the 116th largest insured depository institution in New York State, controlling deposits of approximately \$213 million, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the state ("state deposits").³

Great Eastern Bank is the 97th largest insured depository institution in New York, controlling deposits of approximately \$278 million, representing less than 1 percent of the total amount of state deposits. On consummation of the proposal, Cathay would become the 73rd largest depository organization in New York, controlling deposits of approximately \$491 million, which represent less than 1 percent of state deposits.

Great Eastern Bank's management opposes the proposal and has submitted comments to the Board urging denial on several grounds. The Board previously has stated that, in evaluating acquisition proposals, it must apply the criteria in the BHC Act in the same manner to all proposals, regardless of whether they are supported or opposed by the management of the institutions to be acquired.⁴ Section 3(c) of the BHC Act requires the Board to review each application in light of certain factors specified in the BHC Act. These factors require consideration of the effects of the proposal on competition, the financial and managerial resources and future prospects of the companies and depository institutions concerned, and the convenience and needs of the communities to be served.⁵

In considering these factors, the Board is mindful of the potential adverse effects that contested acquisitions might have on the financial and managerial resources of the company to be acquired and the acquiring organization. In addition, the Board takes into account the potential for adverse effects that a prolonged contest may have on the safe and sound operation of the institutions involved. The Board has long held that, if the statutory criteria are met, withholding approval based on other factors, such as whether the proposal is acceptable to the management of the organization to be acquired, would be outside the limits of the Board's discretion under the BHC Act.⁶

3. Asset, deposit, and ranking data are as of June 30, 2005. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

4. See *Central Pacific Financial Corp.*, 90 *Federal Reserve Bulletin* 93, 94 (2004) ("Central Pacific"); *North Fork Bancorporation, Inc.*, 86 *Federal Reserve Bulletin* 767, 768 (2000) ("North Fork"); *The Bank of New York Company, Inc.*, 74 *Federal Reserve Bulletin* 257, 259 (1988) ("BONY").

5. In addition, the Board is required by section 3(c) of the BHC Act to disapprove a proposal if the Board does not have adequate assurances that it can obtain information on the activities or operations of the company and its affiliates, or in the case of a foreign bank, if such bank is not subject to comprehensive supervision on a consolidated basis. See 12 U.S.C. § 1842(c).

6. See *Central Pacific; FleetBoston Financial Corporation*, 86 *Federal Reserve Bulletin* 751, 752 (2000); *North Fork*; *BONY*.

As explained below, the Board has carefully considered the statutory criteria in light of all the comments and information provided by Great Eastern Bank and the responses submitted by Cathay.⁷ The Board also has carefully considered all other information available, including information accumulated in the application process, supervisory information of the Board and other agencies, relevant examination reports, and other public comments. In considering the statutory factors, particularly the effect of the proposal on the financial and managerial resources of Cathay, the Board has received detailed financial information, including the terms and cost of the proposal and the resources that Cathay proposes to devote to the transaction.

After reviewing the proposal in light of the requirements of the BHC Act, and for the reasons explained below, the Board has determined to approve the application subject to the conditions established herein by the Board. The Board's decision is conditioned on the requirement that Cathay's offer not differ in any material aspect from the terms that it has provided to the Board. Accordingly, if Cathay amends or alters the terms of the offer as described by Cathay to the Board or is unable to complete all aspects of its proposal, it must consult with the Board to determine whether the difference is material to the Board's analysis and conclusions regarding the statutory factors and, therefore, would require a modification to this order, a new application, or further proceedings before the Board.

In reviewing this proposal, the Board has taken into account the potential for adverse effects on the financial and managerial resources of the companies involved if there is prolonged delay in consummation of the proposal. As discussed below, the Board has followed its standard practice of requiring that consummation of the proposal be completed within three months from the date of this order. If the transaction is not concluded within this period, the Board will review carefully any requests by Cathay to extend the consummation period and would expect to grant an extension only if the Board is satisfied that the statutory factors continue to be met.

7. Great Eastern Bank contends that, by entering into option agreements with stockholders of Great Eastern Bank, Cathay violated section 3(a) of the BHC Act, which prohibits a bank holding company from taking any action that would cause a bank to become a subsidiary of a bank holding company or from acquiring direct or indirect ownership or control of 5 percent of the voting shares of a bank without the prior approval of the Board. Another commenter also objected to the fact that Cathay had notified the option grantors of its intent to acquire the options before receiving regulatory approval. Under the option agreements, Cathay does not own or have power to vote the option shares and may not actually purchase or vote the shares until it has received regulatory approval.

Under the Board's regulations, a company that enters into an agreement pursuant to which the rights of a holder of voting securities of a bank are restricted in any manner is presumed to control those securities. The presumption does not apply, however, when the agreement relates to restrictions on transferability and continues only for the time necessary to obtain approval from the appropriate federal supervisory authority with respect to acquisition by the company of the securities (12 CFR 225.31(d)(ii)). The Board has reviewed the option agreements and concluded that Cathay's proposal meets those requirements.

The Board's decision and conclusions on this proposal are limited to the application of the statutory factors set out in the BHC Act. The Board expresses no view or recommendation on whether this transaction is in the best interests of the shareholders or whether this or any other proposed acquisition involving Great Eastern Bank should be accepted by the management or shareholders of Great Eastern Bank.

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 Cathay is California,⁸ and Great Eastern Bank is located in New York.⁹

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

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.¹¹

8. 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)).

9. 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)).

10. 12 U.S.C. §§ 1842(d)(1)(A)-(B), 1842(d)(2)(A)-(B). Cathay is adequately capitalized and adequately managed, as defined by applicable law. Cathay's proposed acquisition of Great Eastern satisfies the minimum age requirement imposed by New York law. On consummation of the proposal, Cathay Bank would control less than 10 percent of the total amount of deposits of insured depository institutions in the United States and less than 30 percent of the total amount of deposits of insured depository institutions in New York. All other requirements of section 3(d) of the BHC Act would be met on consummation of the proposal.

11. 12 U.S.C. § 1842(c)(1).

Cathay and Great Eastern Bank compete directly in the Metro New York banking market.¹² The Board has reviewed carefully the competitive effects of the proposal in this banking market in light of all the facts of record, including the number of competitors that would remain in the market, the relative shares of total deposits in depository institutions in the market (“market deposits”) controlled by Cathay Bank and Great Eastern Bank,¹³ 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”),¹⁴ and other characteristics of the market.

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in the Metro New York banking market. On consummation, the Metro New York banking market would remain unconcentrated, as measured by the HHI, and the increase in concentration would be small.¹⁵ Numerous competitors would remain in the market.

The Department of Justice also has reviewed the competitive effects of the proposal and advised the Board that consummation of the proposal likely would not 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 banking market in which Cathay and Great Eastern Bank directly compete or in any other relevant banking market. Accordingly, based on all the facts of record, the Board has determined that competitive considerations are consistent with approval.

Financial, Managerial, and Supervisory Considerations

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

In evaluating financial factors in expansion proposals by banking organizations, the Board reviews the financial condition of the organizations involved on both a parent-only and consolidated basis, as well as the financial condition of the subsidiary banks and significant nonbanking operations. In this evaluation, the Board considers a variety of measures, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board expects banking organizations contemplating expansion to maintain strong capital levels substantially in excess of the minimum levels specified by the Board’s Capital Adequacy Guidelines. Strong capital is particularly important in proposals that involve higher transaction costs or risks, such as proposals that are contested. 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.

Cathay, Cathay Bank, and Great Eastern Bank are all well capitalized and would remain so on consummation of the proposal. Based on its review of the record, the Board also believes that Cathay has sufficient financial resources to effect the proposal. Cathay has described the terms and costs of its proposal. Cathay proposes to acquire the shares of Great Eastern Bank with cash and shares of Cathay’s common stock.

The Board also has considered the managerial resources of Cathay and Cathay Bank and the proposed combined bank. The Board has reviewed the examination records of Cathay, Cathay Bank, and Great Eastern Bank, including

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

13. Deposit and market share data are as of June 30, 2005, based on ownership of depository institutions as of November 30, 2005, and reflect calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift deposits in the market share calculation on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991).

14. 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 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.

15. Cathay operates the 133rd largest depository institution in the Metro New York market, controlling deposits of \$213 million, which represent less than 1 percent of market deposits. Great Eastern Bank is the 118th largest depository institution in the market, controlling deposits of approximately \$278 million, which represent less than 1 percent of market deposits. After the proposed acquisition, Cathay would operate the 81st largest depository institution in the market, controlling deposits of approximately \$491 million, which represent less than 1 percent of market deposits. Two hundred and fifty-eight depository institutions would remain in the banking market. The HHI would remain unchanged at 1069.

assessments of their management, risk-management systems, and operations.¹⁶ 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. Cathay, Cathay Bank, and Great Eastern Bank are all considered to be well managed.¹⁷

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

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board also must consider the effects of the proposal on the convenience and needs of the communities to be served and take into account the records of the relevant insured depository institutions under the Community Reinvestment Act (“CRA”).¹⁸ 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.¹⁹

The Board has considered carefully all the facts of record, including the CRA performance evaluations of Cathay Bank and Great Eastern Bank, data reported by Cathay Bank and Great Eastern Bank under the Home Mortgage Disclosure Act (“HMDA”)²⁰ in 2003 and 2004, small business lending data reported under the CRA, other information provided by Cathay, confidential supervisory

information, and public comment received on the proposal. A commenter criticized Cathay’s record of small business lending and the organization’s performance under the services test portion of its CRA evaluation.

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution’s most recent CRA performance evaluation is a particularly important consideration in the applications process, because it represents a detailed, on-site evaluation of the institution’s overall record of performance under the CRA by its appropriate federal supervisor.²¹

Cathay Bank received a “satisfactory” rating at its most recent CRA evaluation by the FDIC, as of February 23, 2004 (“2004 CRA Evaluation”). Great Eastern Bank received an overall rating of “satisfactory” at its most recent CRA performance evaluation by the Federal Reserve Bank of New York, as of April 7, 2004. In the fair lending reviews of Cathay Bank and Great Eastern Bank conducted in conjunction with their most recent CRA evaluations, examiners noted no substantive violations of applicable fair lending laws by either bank. Cathay has indicated that, after the merger of Great Eastern Bank into Cathay Bank, it would evaluate the practices for CRA-related lending programs of Cathay Bank and Great Eastern Bank and incorporate the most effective practices into its CRA program for the combined institution.

Cathay Bank. In the 2004 CRA Evaluation, Cathay Bank was rated “high satisfactory” under the lending test.²² Examiners reported that Cathay Bank’s lending levels demonstrated good responsiveness to the credit needs of the bank’s assessment areas. Examiners found that the distribution of Cathay Bank’s loans by income level of geography was good and that the bank’s distribution of borrowers reflected good penetration among retail customers of different income levels and business customers of different sizes. The examiners also noted that the bank exhibited an overall good record of serving the credit needs of the most economically disadvantaged areas of the assessment areas. In addition, examiners stated that Cathay Bank was a leader in community development lending, with \$201 million in community development loans during the review period. Examiners noted that the bank’s small

16. A commenter expressed concern about Cathay’s managerial record in light of a recent memorandum of understanding (“MOU”) with the Federal Deposit Insurance Corporation (“FDIC”) requiring Cathay Bank to correct deficiencies in its compliance with the Bank Secrecy Act. The FDIC terminated the MOU in September 2005 after determining that Cathay Bank had achieved substantial compliance with its terms. The Board has reviewed the managerial factors in this case in light of the MOU and the steps taken by Cathay to address those issues.

17. Great Eastern Bank alleged that Cathay has violated the Securities Act of 1933 because, under the option agreements, Cathay is offering to exchange its shares for shares of Great Eastern Bank in an unregistered transaction. In addition, Great Eastern Bank alleges that Cathay violated federal securities laws in connection with the proposed exchange of shares of Cathay’s common stock for Great Eastern Bank shares. The SEC, rather than the Board, has jurisdiction to investigate and adjudicate any violations of federal securities laws. The Board has consulted with the SEC regarding these matters and expects that Cathay will effect this transaction in a manner that complies with federal securities laws.

18. 12 U.S.C. § 2901 et seq.

19. 12 U.S.C. § 2903.

20. 12 U.S.C. § 2801 et seq.

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

22. Examiners evaluated Cathay Bank’s CRA performance in the bank’s three assessment areas in California and in its assessment areas in New York and Texas. The substantial majority of the bank’s loans were in the Los Angeles and San Francisco assessment areas. The evaluation period for the lending and service tests was January 1, 2002, through December 31, 2003. The evaluation period for the investment test was January 22, 2001, through February 23, 2004.

business loans exceeded the aggregate market data²³ and that 59.6 percent of the bank's total number of loans was in amounts of less than \$250,000.²⁴ Examiners commended the bank's use of innovative and flexible lending programs to serve the credit needs of its assessment area.

Cathay Bank received an overall "outstanding" rating under the investment test in the 2004 CRA Evaluation. Examiners reported that Cathay Bank's qualified investments, which totaled more than \$50 million during the evaluation period, demonstrated excellent responsiveness to the credit and community economic development needs of the bank's assessment areas. In addition, examiners commended the bank's use of complex investments to support community development initiatives, particularly affordable housing projects.

In the 2004 CRA Evaluation, Cathay Bank received a "needs to improve" rating under the service test.²⁵ Examiners noted, however, that Cathay Bank's delivery systems for services were reasonably accessible to all geographies, including LMI areas, and to individuals of different income levels. Examiners reported that Cathay Bank provided a limited level of community development services. Cathay has represented that since the bank's last CRA evaluation, Cathay Bank has increased its participation in community development programs, such as providing financial literacy training and participating in seminars for small business owners. Cathay Bank Foundation reports that during 2005, it has donated a total of \$225,000 to nonprofit organizations for CRA-related activities. To increase Cathay's outreach to all communities, more than 65 percent of the funds granted by the foundation went to nonprofit organizations serving minority and disadvantaged communities other than Asian-American communities. In addition, Cathay has made contributions during 2005 to sponsor CRA-related events in California and New York, including events marketed to non-Asian communities.

Great Eastern Bank. As noted, Great Eastern Bank received an overall "satisfactory" rating at its April 2003 evaluation.²⁶ Examiners reported that the bank's overall record of lending to borrowers of different income levels, including LMI individuals, and businesses of different sizes was outstanding in light of the demographics of the bank's assessment area.²⁷ Examiners particularly com-

mended the bank's level of consumer lending to LMI borrowers. Examiners noted that the bank's overall geographic distribution of loans was satisfactory given the demographics of the bank's assessment area. In addition, examiners reported that the bank's community development activities in its assessment areas included a line of credit to a nonprofit community development corporation, an investment in a community development credit union that served primarily LMI individuals, and financial contributions to organizations that provided services to LMI individuals and neighborhoods.

B. Conclusion on CRA Performance Records

The Board has carefully considered all the facts of record, including reports of examination of the CRA records of the institutions involved, information provided by Cathay, comments received on the proposal, and confidential supervisory information. The Board notes that the proposal would expand the banking products and services available to customers of Great Eastern Bank. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant depository institutions are consistent with approval.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the application should be, and hereby is, approved.²⁸ In reaching its conclusion, the Board

approved but not accepted. The commenter provided no evidence that the bank's limited home mortgage lending activity violated any laws or that its HMDA data were inaccurate. Great Eastern Bank generally makes home mortgage loans to its business customers on an accommodation basis and, accordingly, would not necessarily be expected to have loans in those categories that concerned the commenter. Because the bank made a limited number of HMDA-reportable loans during the evaluation period, HMDA-related lending was not included in the examiners' analysis of Great Eastern Bank's overall CRA performance.

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

23. For purposes of the evaluation, "small business loans" are loans that have original amounts of \$1 million or less and are either secured by nonfarm or nonresidential real estate or are classified as commercial and industrial loans.

24. A commenter expressed concern that Cathay Bank provided few small business loans in certain counties. Although the Board has recognized that banks can help to serve the banking needs of communities by making certain products or services available, the CRA does not require an institution to provide any specific types of products or services, including small business loans in certain amounts.

25. A commenter expressed concern about Cathay's CRA performance record based on the "needs to improve" rating under the service test.

26. The evaluation period was March 13, 2001, through April 6, 2003.

27. The commenter also expressed concern that Great Eastern Bank's 2004 HMDA data were "homogenous" and showed approved and originated loans but no loans that were denied, withdrawn, or

has considered all the facts of record in light of the factors that it is required to consider under the BHC Act.²⁹ The Board's approval is specifically conditioned on compliance by Cathay with the conditions imposed in this order and the commitments made to the Board in connection with the application. In particular, in the event of any material change in the transaction, such as a material change in the price, financing, terms, conditions, or structure of the transaction, or an inability to complete all the aspects of the transaction as proposed, Cathay must consult with the Board to determine whether the change is consistent with the Board's action in this case, or whether further Board action is necessary. The Board reserves the right in the event of significant changes in the proposal to require a new application from Cathay. 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.

In previous cases, the Board has recognized that a prolonged contest for ownership of a banking institution might result in adverse effects on the financial and managerial resources of the organizations or other factors. The BHC Act does not provide a specific time period for consummation of a transaction. Generally, however, the Board requires consummation of an approved transaction within three months from the date of the Board's order to ensure that there are no substantial changes in an applicant's or target's condition or other factors that might require the Board to reconsider its approval.

In this case, although prolonged delay may have a negative impact on Cathay and Great Eastern Bank, a short delay should not affect the financial or managerial resources of either organization or other factors so severely as to warrant denial of the proposal. Accordingly, the Board has followed its standard practice and requires that the transaction be consummated within three months after the effective date of this order unless that period is extended by the Board. If Cathay requests an extension of time to consummate the proposal, the Board will examine carefully all relevant circumstances, and the impact of any extension on those resources and on the other statutory factors that the Board must consider under the BHC Act.

hearing. For these reasons, and based on all the facts of record, the Board has determined that a public meeting or hearing is not required or warranted in this case. Accordingly, the request for a public meeting or hearing on the proposal is denied.

29. The commenter also requested that the Board 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 public comment. As also noted, the commenter had ample opportunity to submit its views and, in fact, provided 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 extension of the comment period or denial of the proposal on the basis of the comments discussed above or on informational insufficiency is unwarranted.

The Board may require Cathay to provide supplemental information if necessary to evaluate the managerial and financial resources of Cathay and Great Eastern Bank or other factors at the time any extension is requested. The Board would extend the consummation period only if it is satisfied that the statutory factors continue to be met.

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.

By order of the Board of Governors, effective December 13, 2005.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Hudson Valley Holding Corp.
Yonkers, New York

Order Approving the Acquisition of a Bank

Hudson Valley Holding Corp. ("Hudson Valley") has requested the Board's approval under section 3 of the Bank Holding Company Act ("BHC Act") to acquire New York National Bank ("NYNB"), Bronx, New York. Hudson Valley operates one subsidiary insured depository institution, Hudson Valley Bank, also in Yonkers.²

Notice of the proposal, affording interested persons an opportunity to comment, has been published in the *Federal Register* (70 *Federal Register* 22,314 (2005)).³ 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.

Hudson Valley, with total consolidated assets of approximately \$1.9 billion, is the 41st largest depository organization in New York, controlling deposits of approximately \$1.4 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the state ("state deposits"). NYNB, with total consolidated assets of approximately \$133 million, is the 156th largest insured depository institution in New York, controlling deposits of approximately \$118 million. On consummation of the proposal, Hudson Valley would become the 40th largest depository organization in New York, controlling

1. 12 U.S.C. § 1842.

2. Hudson Valley proposes to convert NYNB to a state-chartered bank and to operate it as a separate subsidiary. NYNB would be merged with and into an interim national bank, NYNB Bank, N.A., and immediately thereafter the interim national bank would be converted to NYNB Bank, a bank chartered by the state of New York. Applications for these transactions were filed with the Office of the Comptroller of the Currency ("OCC") and the New York State Banking Department.

3. 12 CFR 262.3(b).

deposits of approximately \$1.5 billion, which represent less than 1 percent of state deposits.⁴

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. 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 its probable effect in meeting the convenience and needs of the community to be served.⁵

Hudson Valley and NYNB compete directly in the Metro New York banking market.⁶ The Board has reviewed carefully the competitive effects of the proposal in this banking market in light of all the facts of record.⁷ In particular, the Board has considered the number of competitors that would remain in the market, the relative shares of total deposits of depository institutions in the market (“market deposits”) controlled by Hudson Valley and NYNB,⁸ the concentration level of market deposits and the increase in this level as measured by the Herfindahl-Hirschman Index (“HHI”) under the Department of Justice Merger Guidelines (“DOJ Guidelines”),⁹ and other characteristics of the market.

4. Asset data are as of March 31, 2005. Deposit data and state rankings are as of June 30, 2005, and are adjusted to reflect mergers and acquisitions completed through December 5, 2005.

5. 12 U.S.C. § 1842(c)(1).

6. The Metro 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, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, Union, and Warren counties and portions of Mercer County in New Jersey; Pike County in Pennsylvania; and Fairfield County and portions of Litchfield and New Haven counties in Connecticut.

7. Hudson Valley has 19 branches, including two branches in Bronx County. NYNB has six branches, including its main office in Bronx County.

8. Deposit and market share data are as of June 30, 2005, are adjusted to reflect subsequent mergers and acquisitions through December 5, 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 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift deposits in the market share calculation on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991).

9. Under the DOJ Guidelines, a market is considered 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 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.

Consummation of the proposal would be consistent with Board precedent and the DOJ Guidelines in the Metro New York banking market, and numerous competitors would remain in the market.¹⁰ The Department of Justice also has reviewed the anticipated competitive effects of the proposal and advised the Board that consummation 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 Metro New York banking market or in any other relevant banking market and that competitive considerations are consistent with approval.

Financial, Managerial, and Supervisory Considerations

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and banks involved in the proposal and certain other supervisory factors. The Board has 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 banking supervisors of the organizations involved, publicly reported and other financial information, information provided by Hudson Valley, and public comment received on the proposal.

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

Based on its review of these factors, the Board finds that Hudson Valley has sufficient financial resources to effect the proposal. The transaction will be funded by a divi-

10. Hudson Valley operates the 45th largest depository institution in the market, controlling deposits of approximately \$1.4 billion, which represent less than 1 percent of market deposits. NYNB operates the 174th largest depository institution in the market, controlling deposits of approximately \$118 million. After the proposed acquisition, Hudson Valley would operate the 43rd largest depository institution in the market, controlling deposits of approximately \$1.5 billion, which represent less than 1 percent of the market. The HHI would remain unchanged at 1069. Two hundred and fifty-eight depository institutions would remain in the banking market after consummation of this proposal.

dend from Hudson Valley Bank to Hudson Valley. Hudson Valley and its subsidiary bank are well capitalized and would remain so on consummation of this proposal.

The Board also has considered the managerial resources of Hudson Valley, Hudson Valley Bank, and NYNB and the effect of the proposal on these resources. The Board has reviewed the examination records of Hudson Valley and its subsidiary banks and NYNB, 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. Hudson Valley and its subsidiary depository institution are considered to be well managed. The Board also has considered Hudson Valley's plans for implementing the proposal, including the proposed management after consummation.

After careful consideration of all the facts of record, the Board has determined that Hudson Valley's managerial resources, including its risk management, are consistent with approval. In reaching this conclusion, the Board considered the existing compliance and internal audit programs at Hudson Valley and Hudson Valley Bank and the assessment of these systems and programs by the relevant federal and state supervisory agencies. The Board also has consulted with the Federal Deposit Insurance Corporation ("FDIC"), the primary federal regulator of Hudson Valley Bank, and the bank's state regulator. In addition, the Board has considered information provided by Hudson Valley on enhancements it has made and is currently making to its systems and programs as part of an ongoing review, including development, implementation, and maintenance of effective compliance policies and programs.¹¹

Based on all the facts of record, including a review of the public comments received and information provided by Hudson Valley and by the primary federal and state regulators of the organizations involved, the Board concludes that considerations relating to the financial and managerial resources and future prospects of Hudson Valley, Hudson Valley Bank, and NYNB are consistent with approval, as are the other supervisory factors under the BHC Act.

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board also must consider the effects of the proposal on the convenience and needs of the communities to be served and take into account the records of the relevant insured depository institutions under the Community Reinvestment Act ("CRA").¹² 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.¹³

The Board has considered carefully all the facts of record, including the CRA performance evaluation records of Hudson Valley Bank and NYNB, data reported by Hudson Valley Bank and NYNB in 2004 under the Home Mortgage Disclosure Act ("HMDA"),¹⁴ small business lending data reported by the banks under the CRA, other information provided by Hudson Valley, confidential supervisory information, and public comment received on the proposal. A commenter criticized Hudson Valley Bank's record of small business lending, alleging that it disproportionately lent to businesses in middle- and upper-income census tracts and did not provide enough loans to businesses in LMI census tracts.¹⁵ Specifically, the commenter alleged that Hudson Valley Bank's business plan focused on affluent customers and that the bank made few home mortgage loans and small business loans in LMI or predominantly minority communities. The commenter also asserted, based on data reported under HMDA, that Hudson Valley Bank has engaged in discriminatory treatment of minority individuals in its home mortgage operations.

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process, because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.¹⁶

Hudson Valley Bank received a "satisfactory" rating at its most recent CRA performance evaluation by the FDIC, as of December 1, 2004.¹⁷ NYNB received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of June 30, 1997. Hudson Valley plans to implement the CRA policies, programs, and procedures of Hudson Valley Bank at NYNB after consummation of this proposal.

13. 12 U.S.C. § 2903.

14. 12 U.S.C. § 2801 et seq.

15. The commenter also alleged that Hudson Valley Bank's low loan-to-deposit ratio suggested that the bank sought deposits from, but did not adequately lend to, LMI areas in the Bronx. Hudson Valley Bank noted that as of May 31, 2005, the loan-to-deposit ratio for its Bronx branches was higher than the bank's overall loan-to-deposit ratio.

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

17. The evaluation period was January 22, 2002, through December 1, 2004.

11. A commenter urged the Board to deny the application, because Hudson Valley disclosed in filings with the Securities and Exchange Commission that the FDIC had found deficiencies in Hudson Valley Bank's consumer compliance program.

12. 12 U.S.C. § 2901 et seq.

B. CRA Performance of Hudson Valley Bank and NYNB

Hudson Valley Bank. As noted above, Hudson Valley Bank received an overall “satisfactory” rating at its most recent CRA performance evaluation. Although Hudson Valley Bank received a rating of “needs to improve” under the investment test, the bank received a rating of “high satisfactory” under the lending test. In addition, the FDIC stated that it gave greater weight to small business lending in evaluating the bank’s overall lending record because small business loans constituted such a large percentage of its loan portfolio.¹⁸ The examiners concluded that the bank’s record of lending, in light of the product lines offered by the bank, reflected good distribution among customers of different income levels and that the bank had been a leader in originating community development loans in the assessment area.¹⁹

Hudson Valley Bank is one of the leading small business lenders in LMI census tracts in its assessment area.²⁰ Small business loans represented more than 85 percent of the number and dollar amount of the bank’s total loans originated in its assessment area in 2003. The examiners noted that Hudson Valley Bank’s small business lending (by total number and dollar amount as a percentage of total loans) in LMI census tracts in its assessment area approximated the volume for the aggregate of all lenders (“aggregate lenders”).²¹

In their review of 2003 HMDA data, examiners found that although the bank’s residential mortgage loans in LMI areas in its assessment area compared unfavorably with the distribution by the aggregate lenders, the bank’s distribution of such loans to borrowers of different income levels was adequate.²² They also noted that the bank’s percentage of home purchase loans to LMI borrowers approximated or exceeded the percentage for the aggregate lenders.²³

18. For purposes of this analysis, small business loans included business loans with an original amount of \$1 million or less.

19. Although the Board has recognized that depository institutions help to serve the banking needs of communities by making a variety of products and services available, neither the CRA nor the federal banking agencies’ CRA regulations require an institution to provide any specific types of products or services in its assessment areas.

20. The examiners also noted that the aggregate data for small business loans in this area included several large credit card banks that recorded each advance drawn on their cards as an individual small business loan, which might have overstated their activity in the assessment area.

21. The lending data of the aggregate of lenders represent the cumulative lending for all financial institutions that have reported HMDA data in a particular area. In 2004, Hudson Valley Bank’s total dollar value and originations for small business lending in LMI census tracts in its assessment area approximated or exceeded the aggregate lenders’ performance.

22. Examiners noted that the bank’s opportunities to make residential loans in LMI areas were limited by a low percentage of owner-occupied units in the assessment area and by a low median income that was substantially less than the median value of residential properties.

23. In 2004, Hudson Valley Bank received 91 mortgage applications, which resulted in 42 mortgage loans in its assessment area.

Examiners also commended Hudson Valley Bank for its role as a leader in providing community development loans in its assessment area. As of September 30, 2004, its outstanding community development loans and commitments totaled \$32.9 million. Examiners noted that the majority of the bank’s community development lending supported social services programs for economically disadvantaged residents in the assessment area.

The bank received an overall rating of “high satisfactory” under the service test. The examiners found that Hudson Valley Bank provided a commendable level of support to its community. The evaluation noted that the bank’s retail banking services were reasonably available to all segments of the assessment area through online banking, an ATM network, and extended branch hours. The examiners also commended Hudson Valley Bank for providing a relatively high level of community development services.

NYNB. As previously noted, NYNB received an “outstanding” rating at its most recent CRA performance evaluation. Examiners found that NYNB’s overall lending activity demonstrated responsiveness to the credit needs of its assessment area. NYNB provides banking services to an area that is significantly underserved by other banking institutions. Examiners reported that the bank’s level of qualified community development investments in its assessment area was good relative to the size and capacity of the institution. The examiners also noted that the bank’s investments and community development services had increased credit availability in the assessment area.

C. HMDA and Fair Lending Record

The Board has considered carefully Hudson Valley Bank’s lending record and HMDA data in light of public comment about its record of lending to minorities. The commenter expressed concern, based on 2004 HMDA data, that Hudson Valley Bank disproportionately excluded or denied applications by African-American and Hispanic applicants for HMDA-reportable loans. In support of this assertion, the commenter also referenced Hudson Valley Bank’s low number of home mortgage applications from and originations to African-American and Hispanic applicants. The Board reviewed the HMDA data for 2004 reported by Hudson Valley Bank in its assessment area, which is part of the Metro New York banking market.

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 are insufficient by themselves to conclude whether or not Hudson Valley Bank is excluding any racial or ethnic group, or imposing higher credit costs on these groups, on a prohibited basis. The Board recognizes that HMDA data alone, even with the recent addition of pricing information,²⁴ provide only im-

24. Beginning January 1, 2004, the HMDA data required to be reported by lenders were expanded to include pricing information for

ited information about the covered loans.²⁵ 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 credit-worthy applicants regardless of their race. Because of the limitations of HMDA data, the Board has considered these data carefully in light of other information, including examination reports that provide an on-site evaluation of compliance by Hudson Valley Bank with fair lending laws and the CRA performance records of Hudson Valley Bank and NYNB that are detailed above. In the fair lending review conducted in conjunction with its CRA evaluation, examiners noted no substantive violations of applicable fair lending laws by Hudson Valley Bank. The Board has also consulted with the primary banking supervisors of Hudson Valley Bank and NYNB about this proposal and the compliance records of the banks since their last examinations.

The record also indicates that Hudson Valley Bank has taken steps to help ensure compliance with fair lending laws and other consumer protection laws. Hudson Valley Bank has implemented comprehensive operating procedures and quality control measures to confirm that appropriate consumer compliance policies and procedures are followed. The bank has implemented increased compliance training for staff, including semiannual updates on relevant issues for all employees, and annual updates for all personnel whose responsibilities include providing information about the Bank's loan products and services. In addition, the bank has established a system for compliance monitoring by senior management and the board of directors.

The Board also has considered the HMDA data in light of other information, including the overall CRA performance record of Hudson Valley Bank and NYNB. These efforts demonstrate that the institutions are active in meeting the convenience and needs of their communities and that their records of performance are consistent with approval of this proposal.

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 5 percentage points for second-lien mortgages (12 C.F.R. 203.4).

25. 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.

D. Conclusion on Convenience and Needs and CRA Performance

The Board has carefully considered all the facts of record, including reports of examination of the CRA performance records of the institutions involved, comments received on the proposal, information provided by Hudson Valley, and confidential supervisory information. The Board notes that the proposal would provide customers of the combined entity with access to a broader array of products and services in expanded service areas, including trust services, internet banking, and telephone banking service. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant depository institutions are consistent with approval.

Conclusion

Based on the foregoing and all facts of record, the Board has determined that the application should be, and hereby is, approved.²⁶ 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.²⁷ The Board's

26. The commenter requested that the Board hold a public meeting or hearing on the proposal. Section 3 of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authority for the bank to be acquired makes a timely written recommendation of denial of the application. The Board has not received such a recommendation from the appropriate supervisory authorities. Under its 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 C.F.R. 225.16(c)). The Board has considered carefully the commenter's request in light of all the facts of record. In the Board's view, the commenter had ample opportunity to submit its views and, in fact, submitted written comments that have been considered carefully by the Board in acting on the proposal. 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 meeting or hearing is not required or warranted in this case. Accordingly, the request for a public meeting or hearing on the proposal is denied.

27. The 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 public comment. As also noted, the commenter has had ample opportunity to submit its views and, in fact, has provided substantial written submissions that the Board has considered carefully in acting on the proposal. 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 further delay in considering the proposal, extension of the comment period, or denial of the proposal on the grounds discussed above or on the basis of informational insufficiency is not warranted.

approval is specifically conditioned on compliance by Hudson Valley with the conditions imposed in this order and the commitments made to the Board in connection with the application. For purposes of this transaction, the conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The proposed transaction may not be consummated before the 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 New York, acting pursuant to delegated authority.

By order of the Board of Governors, effective December 6, 2005.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

NBT Bancorp Inc.
Norwich, New York

Order Approving the Merger of Bank Holding Companies

NBT Bancorp Inc. ("NBT"), a bank holding company within the meaning of the Bank Holding Company Act ("BHC Act"), has requested the Board's approval under section 3 of the BHC Act¹ to merge with CNB Bancorp, Inc. ("CNB"), and thereby acquire its subsidiary bank, City National Bank and Trust Company ("City National Bank"), both of Gloversville, New York.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (70 *Federal Register* 48,953 (2005)). The time for filing comments has expired, and the Board has considered the application and all comments received in light of the factors set forth in section 3 of the BHC Act.

NBT, with total consolidated assets of approximately \$4.4 billion, operates one depository institution, NBT Bank, with branches in New York and Pennsylvania. NBT Bank is the 28th largest depository institution in New York, controlling deposits of approximately \$2.4 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the state ("state deposits").³

1. 12 U.S.C. § 1842.

2. NBT's only subsidiary bank, NBT Bank, National Association ("NBT Bank"), also of Norwich, has filed an application with the Office of the Comptroller of the Currency ("OCC") to merge City National Bank into NBT Bank under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. § 1828(c)).

3. Deposit, ranking, and asset data are as of June 30, 2005. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

CNB, with total consolidated assets of approximately \$419 million, operates one insured depository institution, City National Bank. The bank is the 85th largest insured depository institution in New York, controlling deposits of approximately \$344 million. On consummation of the proposal, NBT would become the 25th largest depository organization in New York, controlling deposits of approximately \$2.7 billion, which represent less than 1 percent of state deposits.

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.⁴

NBT and CNB compete directly in the Albany banking market in New York.⁵ The Board has reviewed carefully the competitive effects of the proposal in this banking market in light of all the facts of record, including the number of competitors that would remain in the market, the relative shares of total deposits in depository institutions in the Albany market ("market deposits") controlled by NBT Bank and City National Bank,⁶ 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"),⁷ and other characteristics of the market.

4. 12 U.S.C. § 1842(c)(1).

5. The Albany banking market is defined as Albany, Columbia, Fulton, Greene, Hamilton, Montgomery, Rensselaer, Saratoga, Schoenectady, Schoharie, Warren, and Washington counties in New York.

6. 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 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift deposits in the market share calculation on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991).

7. Under the DOJ Guidelines, 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 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.

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in the Albany market. On consummation, the Albany banking market would remain moderately concentrated, as measured by the HHI. The increase in concentration would be small and numerous competitors would remain in the market.⁸

The Department of Justice also has reviewed the anticipated competitive effects of the proposal and advised the Board that consummation of the proposal would not likely have a 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 Albany banking market or in any other relevant banking market. Accordingly, based on all the facts of record, the Board has determined that competitive considerations are consistent with approval.

Financial, Managerial, and Supervisory Considerations

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

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

8. NBT operates the ninth largest depository institution in the Albany banking market, controlling deposits of approximately \$579.9 million, which represent approximately 2.6 percent of market deposits. CNB is the twelfth largest depository institution in the market, controlling deposits of approximately \$343.7 million, which represent approximately 1.5 percent of market deposits. On consummation, NBT would operate the eighth largest depository institution in the market, controlling deposits of approximately \$923.6 million, which represent approximately 4.1 percent of market deposits. The HHI would increase 28 points, to 1745.

NBT and NBT Bank are well capitalized and would remain so on consummation of the proposal. Based on its review of the record, the Board believes that NBT has sufficient financial resources to effect the proposal. The proposed transaction is structured as a share exchange and cash purchase. NBT will issue trust preferred securities to fund the cash portion of the transaction.

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 NBT, CNB, 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. NBT, CNB, and their subsidiary depository institutions are considered to be well managed. The Board also has considered NBT'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 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").⁹ 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 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.¹⁰

The Board has considered carefully all the facts of record, including the CRA performance evaluation records of NBT Bank and City National Bank, data reported by these banks in 2003 and 2004 under the Home Mortgage Disclosure Act ("HMDA"),¹¹ other information provided by NBT, confidential supervisory information, and public comment received on the proposal. A commenter alleged, based on 2003 and 2004 HMDA data, that NBT Bank and City National Bank had low levels of home mortgage lending to, and engaged in disparate treatment of, minority borrowers in their home mortgage operations. In addition,

9. 12 U.S.C. § 2901 et seq.

10. 12 U.S.C. § 2903.

11. 12 U.S.C. § 2801 et seq.

the commenter expressed concern about NBT Bank's rating under the service test in its most recent CRA performance evaluation.

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process, because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.¹²

NBT Bank received an "outstanding" rating at its most recent CRA evaluation by the OCC, as of July 6, 2004 ("2004 CRA Evaluation").¹³ City National Bank received a "satisfactory" rating at its most recent CRA performance evaluation by the OCC, as of January 27, 2003.¹⁴ After consummation of the proposed series of transactions, NBT will direct the resulting institution to adopt the community development program, including products, services, outreach, and initiatives, that is currently in place at NBT Bank.

In its 2004 CRA Evaluation, NBT Bank received an overall "outstanding" rating under the lending test. Examiners reported that NBT Bank's lending levels reflected excellent responsiveness to the credit needs of its communities. Furthermore, examiners noted that NBT Bank's distribution of loans showed a good penetration among geographies and customers of different income levels and among businesses of different revenue sizes.

Examiners commended NBT Bank's lending activity in the New York assessment areas and noted that its overall geographic distribution of loans was good. In NBT Bank's New York assessment areas where examiners conducted a full-scope review, they noted that the bank's percentage of home purchase loans in moderate-income geographies generally exceeded the percentage of owner-occupied housing units in these geographies.¹⁵ Moreover, the market share

for home purchase loans made to LMI borrowers exceeded NBT Bank's overall market share for all home purchase loans. Examiners also took into consideration programs offered by NBT Bank to address the credit needs of LMI individuals and geographies. These programs included a partnership with the State of New York Mortgage Agency to increase home ownership opportunities for LMI households through subsidized loans and closing-cost assistance.¹⁶ Examiners noted that NBT Bank also had partnerships with a number of nonprofit agencies through which it offered an affordable housing mortgage product to LMI individuals and participated in the Federal Home Loan Bank of New York's First Home Club program that aided low-income borrowers. The First Home Club program provides down payment and closing cost assistance to participating low-income borrowers by providing matching funds to augment participants' savings.

The 2004 CRA Evaluation also found that the bank demonstrated an excellent overall record of serving the credit needs of small businesses. Examiners concluded that the overall geographic distribution of small loans to businesses and farms was good, particularly in the bank's Albany Assessment Area.

Examiners commended NBT Bank for its level of community development lending throughout its assessment areas in the 2004 CRA Evaluation. During the evaluation period, NBT Bank originated 19 community development loans totaling \$25.7 million in New York and Pennsylvania, the majority of which supported affordable housing initiatives.

NBT Bank received an overall "outstanding" rating under the investment test in the 2004 CRA Evaluation, reflecting what examiners reported as an "excellent" level of qualified investments in various assessment areas. The bank's qualified investments in New York during the evaluation period totaled approximately \$19.8 million.

NBT Bank received a "low satisfactory" rating in the 2004 CRA Evaluation under the service test overall and in its New York assessment areas. In Pennsylvania, NBT Bank was rated "high satisfactory" under the service test. Examiners reported that the bank's branches in its assessment areas were reasonably accessible to individuals and geographies of different income levels. Examiners also reported that NBT Bank's hours and services offered in its assessment areas were good and that the bank offered services that provided easy access to funds for low-income people who received government assistance at its branches.¹⁷ Examiners commended NBT Bank for support-

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

13. Examiners evaluated NBT Bank's CRA performance in its 11 assessment areas in New York and Pennsylvania. In determining NBT Bank's overall rating, examiners gave the greatest weight to the bank's performance in the assessment areas in New York. The evaluation period for home mortgage and small business loans was January 1, 2001, through December 31, 2002. The evaluation period for community development loans and the investment and service tests was September 17, 2001, through July 6, 2004.

14. The evaluation period for City National Bank's CRA performance was January 1, 2000, through December 31, 2002. A commenter alleged that City National Bank's CRA examination was dated, but this comment referred to the bank's 1999 CRA examination.

15. These areas included the Albany region, consisting of Montgomery, Saratoga, Schoharie, and Schenectady counties, and the

northern portion of Albany County ("Albany Assessment Area"), and the Southern Tier Region, consisting of Chenango, Delaware, and Otsego counties, and portions of Madison, Greene, and Ulster counties, all in New York.

16. NBT Bank originated almost \$1.6 million in loans to LMI borrowers through the agency's programs during the evaluation period.

17. The commenter requested that the Board require NBT to file branch closing information as part of this proposal. The Board notes that federal banking law provides a specific mechanism for addressing branch closings. Federal law requires an insured depository institution to provide notice to the public and to the appropriate federal super-

ing community development services throughout its assessment areas that promoted or facilitated affordable housing, services, and economic development in LMI areas and for LMI individuals.

B. HMDA and Fair Lending Record

The Board has considered carefully NBT Bank's and City National Bank's lending records and HMDA data in light of public comment about their records of lending to minorities. A commenter expressed concern, based on 2004 HMDA data, that NBT Bank disproportionately denied applications for HMDA-reportable loans by African-American and Hispanic applicants. The commenter also expressed concern that the 2003 and 2004 HMDA data indicated that NBT Bank and City National Bank made few home purchase loans to minority applicants and that the banks received few applications from minority individuals. Based on the 2004 HMDA data, the commenter also criticized NBT Bank for making higher-cost mortgage loans.¹⁸ The Board reviewed the HMDA data for 2003 and 2004 reported by NBT Bank and City National Bank in the Albany–Schenectady–Troy Metropolitan Statistical Area.¹⁹

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 to conclude whether or not NBT Bank or City National Bank is excluding any racial or ethnic group 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.²⁰

visory agency before closing a branch. Section 42 of the Federal Deposit Insurance Act (12 U.S.C. § 1831r-1), as implemented by the *Joint Policy Statement Regarding Branch Closings* (64 *Federal Register* 34,844 (1999)), requires that a bank provide the public with at least a 30-day notice and the appropriate federal supervisory agency and customers of the branch 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. In addition, the Board notes that the OCC, as the appropriate federal supervisor of NBT Bank, will continue to review its branch closing record in the course of conducting CRA performance evaluations.

18. 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 5 percentage points for second-lien mortgages (12 C.F.R. 203.4). NBT Bank stated that some of its HMDA-reported loans are higher-priced loans because they are for the purchase of manufactured housing and represented that these loans generally have a higher credit risk and are secured by collateral that decreases in value. The bank also stated that a loan's administrative cost might cause it to be priced differently.

19. The Albany–Schenectady–Troy Metropolitan Statistical Area is defined as Albany, Saratoga, Schenectady, Schoharie, and Rensselaer counties in New York.

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

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 credit-worthy 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 NBT Bank and City National Bank with fair lending laws. In the fair lending reviews of NBT Bank and City National Bank conducted in conjunction with their most recent CRA evaluations, examiners noted no substantive violations of applicable fair lending laws by either bank.

The record also indicates that NBT has taken steps to help ensure compliance with fair lending laws and other consumer protection laws. NBT represented that it performs significant monitoring of compliance in its mortgage lending operations through a wide variety of audit and review methods, including file reviews, statistical analyses, and exception reviews. One such review method at NBT Bank is a "second-look" program for all residential mortgage loan applications initially scheduled for denial. Under this program, a manager or other supervisory officer reviews such applications to ensure that they were properly evaluated and to determine whether the applicants qualify for another loan product offered by NBT Bank. Furthermore, NBT Bank primarily offers conventional mortgage products such as those offered by government-sponsored enterprises that conform to secondary-market underwriting guidelines. NBT Bank's mortgage program includes risk-priced procedures consistent with these guidelines and it uses automated software for underwriting and pricing mortgage loans. In addition, NBT Bank stated that it will conduct a quarterly review of the overall distribution of its mortgage loan applications and originations, including the distribution of lending to minority individuals, in the Albany Assessment Area for a period of at least two years after consummation of the proposal.

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

ally 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.

C. Conclusion on Convenience and Needs and CRA Performance Records

The Board has carefully considered all the facts of record, including reports of evaluation of the CRA performance records of the institutions involved, HMDA data reported by NBT Bank and City National Bank, information provided by NBT, 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 City National Bank, including access to expanded branch and ATM networks. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant depository institutions are consistent with approval.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the application should be, and hereby is, approved. In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act.²¹ The Board's approval is specifically conditioned on compliance by NBT 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 cause by the Board or the Federal Reserve Bank of New York, acting pursuant to delegated authority.

21. 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 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 requests 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 commenter's request fails to demonstrate why 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.

By order of the Board of Governors, effective December 14, 2005.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

New York Community Bancorp, Inc.
Westbury, New York

Order Approving the Merger of Bank Holding Companies

New York Community Bancorp, Inc. ("NYCB"), a bank holding company within the meaning of the Bank Holding Company Act ("BHC Act"), has requested the Board's approval pursuant to section 3 of the BHC Act¹ to merge with Long Island Financial Corp. ("LIFC"), and thereby acquire its subsidiary bank, Long Island Commercial Bank ("LICB"), both of Islandia, New York.

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (70 *Federal Register* 55,858 (2005)). The time for filing comments has expired, and the Board has considered the application and all comments received in light of the factors set forth in section 3 of the BHC Act.

NYCB, with total consolidated assets of approximately \$25 billion, operates two depository institutions, New York Community Bank ("NY Community Bank"), with branches in New Jersey and New York, and New York Commercial Bank ("NY Commercial Bank"),² both of Flushing, New York.³ NYCB is the 11th largest depository organization in New York, controlling deposits of approximately \$11.2 billion, which represent less than 2 percent of the total amount of deposits of insured depository institutions in the state ("state deposits").

LIFC, with total consolidated assets of approximately \$532 million, operates one depository institution, LICB, with branches only in New York. LIFC is the 80th largest insured depository institution in New York, controlling deposits of approximately \$420 million.

On consummation of the proposal, NYCB would have consolidated assets of approximately \$25.5 billion. NYCB would remain the 11th largest depository organization in New York, controlling deposits of approximately \$11.6 billion, which represent less than 2 percent of state deposits.

1. 12 U.S.C. § 1842.

2. NY Commercial Bank, a wholly owned subsidiary of NY Community Bank, is a limited-purpose bank that only accepts municipal deposits.

3. Asset data are as of September 30, 2005, and statewide deposit and ranking data are as of June 30, 2005. Data reflect subsequent merger activity through December 13, 2005. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

Competitive Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposed bank acquisition that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market. In addition, section 3 prohibits the Board from approving a proposed bank acquisition that would substantially lessen competition in any relevant banking market unless the anticompetitive effects of the proposal are clearly outweighed in the public interest by its probable effect in meeting the convenience and needs of the community to be served.⁴

NYCB and LIFC compete directly in the Metro New York banking market (New York banking market).⁵ The Board has carefully reviewed 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 market, the relative shares of total deposits in depository institutions in the market (“market deposits”) controlled by NYCB and LIFC,⁶ 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”),⁷ and other characteristics of the market.

Consummation of the proposal would be consistent with Board precedent and the DOJ Guidelines in the New York banking market. After consummation of the proposal, the New York banking market would remain moderately con-

centrated, as measured by the HHI, and numerous competitors would remain in the market.⁸

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

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 banking market where NYCB and LIFC compete or in any other relevant banking market. Accordingly, based on all the facts of record, the Board has determined that competitive considerations are consistent with approval.

Financial, Managerial, and Supervisory Considerations

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has considered these factors in light of all the facts of record, including confidential reports of examination, other supervisory information from the primary federal and state supervisors of the organizations involved in the proposal, publicly reported and other financial information, information provided by NYCB, and public comment on the proposal.⁹

In evaluating financial factors in expansion proposals by banking organizations, the Board reviews the financial condition of the organizations involved on both a parent-only and consolidated basis, as well as the financial condition of the subsidiary banks and significant nonbanking operations. In this evaluation, the Board considers a variety of measures, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the

4. 12 U.S.C. § 1842(c)(1).

5. The Metro 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, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, Union, and Warren counties and portions of Mercer County in New Jersey; Pike County in Pennsylvania; and Fairfield County and portions of Litchfield and New Haven counties in Connecticut.

6. Deposit and market share data are as of June 30, 2005 (adjusted to reflect mergers and acquisitions through December 13, 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 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift deposits in the market share calculation on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991).

7. Under the DOJ Guidelines, a market is considered unconcentrated if the post-merger HHI is less than 1000, moderately concentrated if the post-merger HHI is between 1000 and 1800, and highly concentrated if the post-merger HHI is more than 1800. The Department of Justice (“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 for anticompetitive effects implicitly recognize the competitive effects of limited-purpose lenders and other nondepository financial entities.

8. After the proposed acquisition, the HHI would remain unchanged at 1069. NYCB operates the tenth largest depository institution in the market, controlling deposits of approximately \$11.8 billion, which represent less than 2 percent of market deposits. LIFC operates the 94th largest depository institution in the market, controlling deposits of approximately \$420 million, which represent less than 1 percent of market deposits. After the proposed acquisition, NYCB would continue to operate the tenth largest depository institution in the market, controlling deposits of approximately \$12.2 billion, which represent less than 2 percent of market deposits. Two hundred and eighty-two depository institutions would remain in the banking market.

9. A commenter criticized LIFC for having lending relationships with several check-cashing businesses. As a general matter, these types of businesses are licensed by the states where they operate and are regulated by state law. LIFC has entered into lending or other limited banking relationships with these companies but does not play any role in their lending and business practices or credit-review processes. LIFC represented that it conducts a due diligence review before commencing a banking relationship with any check casher.

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.

NYCB, LIFC, and their subsidiary depository institutions are well capitalized, and the resulting organization and its subsidiary banks would remain so on consummation of the proposal. The proposed transaction is structured as a share exchange. Based on its review of the record in this case, the Board believes that NYCB has sufficient financial resources to effect the proposal.

The Board also has considered the managerial resources of the organizations involved and the proposed combined organization. The Board has reviewed the examination records of NYCB, LIFC, and their subsidiary depository institutions, 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. Moreover, the Board consulted with the Federal Deposit Insurance Corporation ("FDIC"), the primary federal banking supervisor of NYCB's and LIFC's subsidiary banks. The Board also has considered NYCB's plans for implementing the proposal, including the proposed management after consummation. NYCB, LIFC, and their 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 the organizations involved in the proposal are consistent with approval, as are the 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 a 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").¹⁰ The CRA requires the federal financial supervisory agencies to encourage financial institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation, and requires the appropriate federal financial supervisory agency to take into account an institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, in evaluating depository institutions' expansionary proposals.¹¹

10. 12 U.S.C. § 2901 et seq.

11. 12 U.S.C. § 2903.

The Board has considered carefully all the facts of record, including reports of examination of the CRA performance records of the subsidiary depository institutions of NYCB and LIFC, data reported by NYCB under the Home Mortgage Disclosure Act ("HMDA"),¹² other information provided by NYCB, confidential supervisory information, and public comment received on the proposal. A commenter opposing the proposal asserted, based on 2004 HMDA data, that NYCB has engaged in discriminatory treatment of minority individuals in its home mortgage operations.¹³

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the insured depository institutions of both organizations. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process, because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.¹⁴

NY Community Bank received a "satisfactory" rating at its most recent performance evaluation from the FDIC, as of March 25, 2002.¹⁵ LICB received a "satisfactory" rating at its most recent CRA performance evaluation by the FDIC, as of March 15, 2004. NYCB has represented that it does not plan to implement major changes to programs for managing community reinvestment activities at LICB, which already has CRA programs similar to those of NYCB.

B. HMDA Data and Fair Lending Record

The Board has carefully considered NY Community Bank's lending record and HMDA data in light of public comment about its record of lending to minorities. The commenter expressed concern, based on 2004 HMDA data, that NY Community Bank denied or excluded the home mortgage and refinance applications of African-American and Hispanic borrowers more frequently than those of

12. 12 U.S.C. § 2801 et seq.

13. The commenter also alleged that NYCB lends to "shumlords." NYCB represented that NY Community Bank's primary lending focus is its multifamily loan program, which concentrates on loans for rent-controlled and rent-stabilized residential buildings in New York City. NYCB further stated that it engages in extensive due diligence in its lending to residential landlords, including conducting inspections of properties, assessing the real estate management experience of landlord/borrowers, and requiring remediation of building code violations. In addition, NYCB represented that it conducts inspections of the properties during the term of the mortgage loans.

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

15. NY Commercial Bank is a special-purpose bank not subject to the CRA. See 12 CFR 345.11(c)(3).

nonminority applicants in the New York, New York Metropolitan Statistical Area (“MSA”); the Nassau-Suffolk, New York MSA; and the Edison, New Jersey MSA.¹⁶ The Board reviewed the HMDA data for 2004 reported by NY Community Bank in its assessment area.¹⁷

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 are insufficient by themselves to support a conclusion on whether or not NY Community Bank is excluding any racial or ethnic group 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.¹⁸ 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 NY Community Bank with fair lending laws. In the fair lending review conducted in conjunction with the bank’s CRA evaluation in 2002, examiners noted no violations of the substantive provisions of applicable fair lending laws. In addition, the Board has consulted with the FDIC, the primary federal supervisor of NY Community Bank, about the bank’s record of compliance with fair lending laws and other consumer protection laws.

The record also indicates that NYCB has taken steps designed to ensure compliance with fair lending laws and

other consumer protection laws. NYCB represented that it has implemented fair lending policies, procedures, and training programs at NY Community Bank and that all lending department personnel at the bank are required to take annual compliance training. NYCB further represented that the bank’s fair lending policies and procedures are designed to help ensure that loan officers price loans uniformly, illegally discriminatory loan products are avoided, and current and proposed lending activities and customer complaints are reviewed. NY Community Bank conducts independent audits of its lending activities, and audit results are provided to its Audit Committee of the Board of Directors, Compliance Department, and Legal Department. The bank also analyzes HMDA Loan Application Register data to help assess its lending activities for compliance with the CRA.

NYCB has represented that LICB maintains similar policies and programs designed to ensure compliance with applicable fair lending and consumer protection laws and that NYCB does not intend to make significant changes to LICB’s policies and programs.

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

C. Conclusion on Convenience and Needs and CRA Performance Records

The Board has carefully considered all the facts of record, including reports of examination of the CRA records of the institutions involved, information provided by NYCB, 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 LIFC’s customers, including access to expanded branch and ATM networks. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant depository institutions are consistent with approval.

Conclusion

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

16. In 2004 the Nassau-Suffolk MSA was renamed the Nassau-Suffolk, New York Metropolitan Division by the Office of Management and Budget (“OMB”), and the New York, New York MSA is now encompassed within the New York-White Plains-Wayne, New York-New Jersey Metropolitan Division. The OMB also delineated the Edison, New Jersey Metropolitan Division. See OMB Bulletin No. 05-02 (2004).

17. The Board reviewed 2004 HMDA data reported by NY Community Bank in portions of the following Metropolitan Divisions that comprise the bank’s assessment area: (1) Nassau-Suffolk, New York; (2) New York-White Plains-Wayne, New York-New Jersey; and (3) Newark-Union, New Jersey-Pennsylvania. The Edison, New Jersey Metropolitan Division is not within the bank’s assessment area.

18. 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.

19. The commenter also requested that the present proposal be consolidated with a separate application under the BHC Act that NYCB may file in connection with another acquisition that it recently announced. This potential application would be considered by the Board separately from the NYCB/LIFC proposal pursuant to standard procedures under section 3 of the BHC Act and Regulation Y.

conclusion, the Board has considered all the facts of record in light of the factors it is required to consider under the BHC Act and other applicable statutes.²⁰ The Board's approval is specifically conditioned on compliance by NYCB with the conditions in this order and all the commitments made to the Board in connection with the proposal. For purposes of this action, the commitments and conditions are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The proposed transaction shall 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 by the Federal Reserve Bank of New York, acting pursuant to delegated authority.

By order of the Board of Governors, effective December 14, 2005.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Penn Bancshares, Inc.
Pennsville, New Jersey

Order Approving Acquisition of Shares of a Bank Holding Company

Penn Bancshares, Inc. ("Penn"), a bank holding company within the meaning of the Bank Holding Company Act ("BHC Act"), has requested the Board's approval under section 3 of the BHC Act¹ to acquire up to 24.89 percent of

the voting shares of Harvest Community Bank ("HCB"), also of Pennsville.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (70 *Federal Register* 56,899 (2005)). The time for filing comments has expired, and the Board has considered the proposal and all comments received in light of the factors set forth in section 3 of the BHC Act.

Penn, with total consolidated assets of approximately \$164.7 million, is the 102nd largest depository organization in New Jersey, controlling deposits of approximately \$150.5 million, which represent less than 1 percent of total deposits of insured depository institutions³ in the state ("state deposits").⁴ HCB, with assets of approximately \$141.1 million, is the 110th largest depository organization in New Jersey, controlling approximately \$120.9 million in deposits. If Penn were deemed to control HCB on consummation of the proposal, Penn would become the 74th largest depository organization in New Jersey, controlling approximately \$271.4 million in deposits, which represent less than 1 percent of state deposits.

The Board received approximately 73 comments on the proposal. Comments were submitted by HCB and government officials, private organizations, and individuals, including HCB and Penn shareholders and customers. Many commenters objected to the proposal on the grounds that the investment could create uncertainty about the future independence of HCB or result in Penn acquiring control of HCB and potentially harming its future prospects. A number of commenters also expressed concern that the proposal could have an adverse effect on competition and on the convenience and needs of the communities that HCB serves. The Board has considered these comments carefully in light of the factors that the Board must consider under section 3 of the BHC Act.

The Board previously has stated that the acquisition of less than a controlling interest in a bank or bank holding company is not a normal acquisition for a bank holding company.⁵ The requirement in section 3(a)(3) of the BHC Act, however, 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 percent and 25 percent of the voting shares of

20. The 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 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 commenter's request fails to demonstrate why 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.

1. 12 U.S.C. § 1842.

2. Penn and its officers and directors currently own 4.98 percent of HCB's voting shares. Penn proposes to acquire the additional voting shares in negotiated purchases from shareholders and through open market purchases.

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

4. Asset data are as of September 30, 2005. Deposit and ranking data are as of June 30, 2005, and reflect merger activity through December 14, 2005.

5. See, e.g., *C-B-G, Inc.*, 91 *Federal Reserve Bulletin* 421 (2005) ("*C-B-G*"); *S&T Bancorp Inc.*, 91 *Federal Reserve Bulletin* 74 (2005) ("*S&T Bancorp*"); *Brookline Bancorp. MHC*, 86 *Federal Reserve Bulletin* 52 (2000) ("*Brookline*"); *North Fork Bancorporation, Inc.*, 81 *Federal Reserve Bulletin* 734 (1995); *First Piedmont Corp.*, 59 *Federal Reserve Bulletin* 456, 457 (1973).

banks.⁶ 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.⁷

Penn has stated that the acquisition is intended as a passive investment and that it does not propose to control or exercise a controlling influence over HCB. Penn has agreed to abide by certain commitments previously relied on by the Board in determining that an investing bank holding company would not be able to exercise a controlling influence over another bank holding company or bank for purposes of the BHC Act.⁸ For example, Penn has committed not to exercise or attempt to exercise a controlling influence over the management or policies of HCB or any of its subsidiaries; not to seek or accept representation on the board of directors of HCB or any of its subsidiaries; and not to have any director, officer, employee, or agent interlocks with HCB or any of its subsidiaries. Penn also has committed not to attempt to influence the dividend policies, loan decisions, or operations of HCB or any of its subsidiaries. Moreover, the BHC Act prohibits Penn from acquiring shares of HCB in excess of the amount considered in this proposal or attempting to exercise a controlling influence over HCB without the Board's prior approval.⁹

The Board has adequate supervisory authority to monitor compliance by Penn with its commitments and can take enforcement action against Penn if it violates any of the commitments.¹⁰ The Board also has authority to initiate a control proceeding¹¹ against Penn if facts presented later indicate that Penn or any of its subsidiaries or affiliates, in fact, controls HCB for purposes of the BHC Act.¹² Based

on these considerations and all the other facts of record, the Board has concluded that Penn would not acquire control of, or have the ability to exercise a controlling influence over, HCB through the proposed acquisition of voting shares.

Financial, Managerial, and Supervisory Considerations

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has considered these factors in light of all the facts of record, including confidential reports of examination, other supervisory information from the primary federal supervisors of the organizations involved in the proposal, publicly reported and other financial information, information provided by the applicant, and public comments received.¹³

In evaluating financial factors in expansion proposals by banking organizations, the Board reviews the financial condition of the organizations involved on both a parent-only and consolidated basis, as well as the financial condition of the subsidiary banks and significant nonbanking operations. In this evaluation, the Board considers a variety of measures, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. When applicable, the Board also evaluates the financial condition of the combined organization on consummation, including its capital position, asset quality, earnings prospects, and the impact of the proposed funding of the transaction.¹⁴

Penn and its subsidiary bank, The Pennsville National Bank ("PNB"), Pennsville, are well capitalized and would remain so on consummation of the proposal. Based on its review of the record, the Board believes that Penn has sufficient financial resources to effect the proposal. The proposed transaction would be funded from Penn's general corporate resources.

6. See 12 U.S.C. § 1842(a)(3).

7. See, e.g., *C-B-G* (acquisition of up to 24.35 percent of the voting shares of a bank holding company); *S&T Bancorp* (acquisition of up to 24.9 percent of the voting shares of a bank holding company); *Brookline* (acquisition of up to 9.9 percent of the voting shares of a bank holding company).

8. See, e.g., *C-B-G*; *S&T Bancorp*; *Emigrant Bancorp, Inc.*, 82 *Federal Reserve Bulletin* 555 (1996); *First Community Bancshares, Inc.*, 77 *Federal Reserve Bulletin* 50 (1991). Penn's commitments are set forth in the appendix.

9. HCB claimed that Penn and the president, a director, and an officer of Penn, as well as an HCB shareholder who is a business associate of Penn's president, have already acted together to acquire more than 5 percent of the shares of HCB without prior approval of the Board, as required under section 3 of the BHC Act. The Board has reviewed information provided by Penn and HCB and confidential supervisory information regarding the current ownership of both organizations, including information about the ownership of HCB's shares by individuals associated with Penn, in light of the Board's rules and precedent for aggregating shares held by a company and persons associated with the company. The record does not support a finding that Penn, its president, the director and the officer of Penn, and the HCB shareholder have acted together to acquire more than 5 percent of the voting shares of HCB in violation of the BHC Act.

10. See 12 U.S.C. § 1818(b)(1).

11. See 12 U.S.C. § 1841(a)(2)(C).

12. HCB asserted that despite Penn's commitments, Penn would control HCB after consummation of the proposal and thereby potentially harm the future prospects of HCB. As noted, the Board believes that the facts of record, including the commitments made in this case, do not support this conclusion and that the Board has adequate supervisory authority to monitor and enforce Penn's compliance with its commitments.

13. HCB claimed that Penn is in violation of state law because Penn has not yet filed an application with, and received approval from, the New Jersey Department of Banking and Insurance ("Banking Department") under the New Jersey banking statutes. Penn has represented that it plans to file an application with the Banking Department after the proposal is approved by the Board. The Federal Reserve provided notice of the application filed with the Board to the Banking Department, as required under section 3 of the BHC Act, and the Board has consulted with the department. The Banking Department has not filed any comments with the Board about this proposal. As in other proposed transactions that might be subject to approval from multiple banking supervisory agencies, an applicant must obtain all required regulatory approvals in accordance with applicable law. The Board's approval of this proposal is conditioned on Penn obtaining any approval required by New Jersey law.

14. As previously noted, the current proposal provides that Penn would acquire only up to 24.89 percent of HCB's voting shares and would not be considered to control HCB. Under these circumstances, the financial statements of Penn and HCB would not be consolidated.

The Board also has considered the managerial resources of the organizations involved.¹⁵ The Board has reviewed the examination records of Penn, PNB, and HCB, 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 laws. Penn, PNB, and HCB are considered to be well managed.

Several commenters contended that Penn's investment could cause confusion among HCB's shareholders, customers, and employees about the continued independence of HCB and could compromise HCB's ability to retain employees. As noted above, Penn has committed that it will not attempt to influence HCB's operations, personnel decisions, pricing of services, activities, or dividend, loan, or credit policies; or to exercise a controlling influence over HCB. The Board believes that these and the other commitments made by Penn clarify that the company will maintain a passive role as an investor in HCB and that the operation of HCB will continue to be the responsibility of HCB's management. No evidence has been presented to show that the purchase of shares of HCB on the open market by Penn would adversely affect the financial condition of HCB or Penn.

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

Competitive Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposed bank acquisition that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market. Section 3 also prohibits the Board from approving a proposed bank acquisition that would substantially lessen competition¹⁶ in any relevant banking market unless the Board finds that the anticompetitive effects of the

proposal clearly are outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.¹⁷

The Board previously has stated that one company need not acquire control of another company to lessen competition between them substantially.¹⁸ The Board has found that noncontrolling interests in directly competing depository institutions may raise serious questions under the BHC Act and has stated that the specific facts of each case will determine whether the minority investment in a company would be anticompetitive.¹⁹

HCB contends that the relevant geographic market for reviewing this transaction is Salem County, New Jersey, and not the Philadelphia banking market ("Philadelphia Market").²⁰ HCB asserts that Salem County is the relevant market because of the county's population and economic demographics and because all of Penn's and HCB's offices and the vast majority of their customer bases are, according to HCB, in Salem County. In reviewing this contention, the Board has considered a number of factors to identify the economically integrated market that represents the appropriate local geographic banking market for purposes of analyzing the competitive effects of this proposal.

The Board has reviewed the geographic proximity of the Philadelphia Market's population centers and the worker commuting data from the 2000 census, which indicated that more than 35 percent of the labor force residing in Salem County commuted to work elsewhere in the Philadelphia Market. In addition, several large banks without a branch in Salem County, but with branches elsewhere in the Philadelphia Market, advertise in the local telephone directory and through radio, television, and newspapers that serve the county. Moreover, small-business lending data submitted by depository institutions in 2004 under the Community Reinvestment Act ("CRA") regulations²¹ of the federal supervisory agencies indicated that approximately 25 percent of the total number of small business loans made to businesses in Salem County were made by depository institutions without a branch in the county but with branches elsewhere in the Philadelphia Market. Based on these facts and other information, the Board reaffirms that Salem County should be included in the Philadelphia Market and that the Philadelphia Market is the appropriate local geographic banking market for purposes of analyzing the competitive effects of this proposal.

15. IICB alleged that Penn owns more than 5 percent of IICB's voting shares and asserted that Penn is, therefore, in violation of federal securities laws and regulations requiring Penn to file certain reports. As previously noted, the record does not support a finding that Penn has acquired more than 5 percent of the voting shares of IICB. Moreover, the Federal Deposit Insurance Corporation ("FDIC"), rather than the Board, is the appropriate agency to investigate and adjudicate any violations of federal securities laws and regulations pertaining to the securities of state nonmember banks such as HCB. See 12 CFR Part 335. The Board has consulted with the FDIC, which is investigating IICB's assertion in light of the relevant laws and regulations. The Board believes the FDIC has adequate supervisory authority to monitor and enforce Penn's compliance with those laws and regulations.

16. Several commenters expressed concern that consummation of the proposal would provide Penn with the ability to exert control over HCB, with a resulting adverse effect on competition.

17. See 12 U.S.C. § 1842(c)(1).

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

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

20. The Philadelphia Market is the Philadelphia/South Jersey banking market and is defined as Burlington, Camden, Cumberland, Gloucester, and Salem counties, all in New Jersey; and Bucks, Chester, Delaware, Montgomery, and Philadelphia counties, all in Pennsylvania.

21. See, e.g., 12 CFR 228 et seq.

If PNB and HCB were viewed as a combined organization, consummation of the proposal would be consistent with Board precedent and the Department of Justice Merger Guidelines²² in the Philadelphia Market. The market would remain moderately concentrated as measured by the HHI, and numerous competitors would remain in the market.²³

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

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

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 CRA.²⁴ 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 an institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, in evaluating bank expansionary proposals.²⁵

The Board has considered carefully the entire record, including Penn's commitments not to control HCB or its operations and policies, the federal agencies' evaluations of the CRA performance records of PNB and HCB, data reported by PNB and HCB under the Home Mortgage Disclosure Act ("HMDA"),²⁶ other information provided by Penn, confidential supervisory information, and public comment received on the proposal.²⁷ Several commenters generally criticized PNB's level of service to its community, including the bank's level of community and small business lending. One commenter specifically criticized PNB's record of lending to small businesses owned by minorities.

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process, because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.²⁸

PNB received a "satisfactory" rating at its most recent CRA performance evaluation by the Office of the Comptroller of the Currency, as of October 27, 2003 ("2003 Evaluation"). HCB also received a "satisfactory" rating at its most recent CRA performance evaluation by the FDIC, as of January 11, 2002.

In the 2003 Evaluation, examiners found that PNB exceeded the standards for satisfactory performance for lending in its assessment area and demonstrated a good record of lending to small businesses. Examiners reported

22. Under the revised Department of Justice Merger Guidelines, 49 *Federal Register* 26,823 (June 29, 1984), a market is considered moderately concentrated if the post-merger HHI is between 1000 and 1800 and highly concentrated if the post-merger HHI is more than 1800. The Department of Justice has informed the Board that a bank merger or acquisition generally will not be challenged (in the absence of other factors indicating anticompetitive effects) unless the post-merger HHI is at least 1800 and the merger increases the HHI more than 200 points. The Department of Justice has stated that the higher-than-normal thresholds for an increase in the HHI when screening bank mergers and acquisitions for anticompetitive effects implicitly recognize the competitive effects of limited-purpose and other non-depository financial entities.

23. Penn is the 53rd largest depository organization in the Philadelphia Market, controlling \$150.5 million in deposits, which represents less than 1 percent of the total deposits in depository institutions in the market ("market deposits"). IICB is the 61st largest depository institution in the market, controlling \$120.9 million in deposits. If considered a combined banking organization on consummation of the proposal, Penn and IICB would be the 39th largest depository institution in the Philadelphia Market, controlling \$271.4 million in deposits, which would represent less than 1 percent of market deposits. The HHI for the Philadelphia Market would remain unchanged at 1043. One hundred and thirty-two depository institutions would remain in the market.

Market deposit data are as of June 30, 2005, and reflect mergers and acquisitions through December 14, 2005. Market share data are based on calculations that include the deposits of thrift institutions at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386, 387 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743, 744 (1984). Thus, the Board regularly has included thrift deposits in the calculation of market share on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52, 55 (1991).

24. 12 U.S.C. § 2901 et seq.

25. 12 U.S.C. § 2903.

26. 12 U.S.C. § 2801 et seq.

27. Several commenters expressed concern about PNB's branching policies and possible branch closures, reductions in service, and job losses after consummation of the proposal and generally objected to the transaction because PNB would implement its policies and procedures at IICB. As previously noted, Penn has agreed to a set of passivity commitments that prevent it from, among other things, attempting to influence the policies and business decisions of HCB, including the credit decisions of HCB and the locations or operations of HCB's branches. The effect of a proposed acquisition on employment in a community is not among the factors included in the BHC Act. See *Wells Fargo & Company*, 82 *Federal Reserve Bulletin* 445, 457 (1996).

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

that PNB ranked second out of 243 peer lenders in originating home mortgage loans and that the bank's commercial loan portfolio was substantially composed of loans to small businesses. Examiners also noted no evidence of illegal discrimination or other illegal credit practices.

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

Conclusion

Based on the foregoing and all other facts of record, the Board has determined that the application should be, and hereby is, approved.²⁹ In reaching this conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act and other applicable statutes.³⁰ The Board's approval is specifically conditioned on compliance by Penn with the conditions imposed in this order and all the commitments made to the Board in connection with the application, including the commitments discussed in this order, and receipt of all required regulatory approvals. The conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The acquisition of HCB's voting shares shall not be consummated before the 15th calendar day after the effective date of this order, or later than three months

29. IICB requested that the Board hold a public meeting or hearing on the proposal. Section 3 of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authority for the bank to be acquired makes a timely written recommendation of denial of the application. The Board has not received such a recommendation from the appropriate supervisory authority. Under its regulations, the Board also may, in its discretion, hold a public meeting or hearing on an application to acquire a bank if 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 IICB's request in light of all the facts of record. In the Board's view, IICB has had ample opportunity to submit its views, and in fact, submitted written comments that the Board has considered carefully in acting on the proposal. IICB's request fails to demonstrate why 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 meeting or hearing is not required or warranted in this case. Accordingly, the request for a public meeting or hearing on the proposal is denied.

30. IICB also requested that the Board delay action on the application until the Banking Department has evaluated 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 public comment. 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 further delay in considering the proposal is not necessary.

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 Philadelphia, acting pursuant to delegated authority.

By order of the Board of Governors, effective December 19, 2005.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Appendix

In connection with its application to acquire up to 24.89 percent of HCB, Penn commits that it will not, directly or indirectly:

- (1) exercise or attempt to exercise a controlling influence over the management or policies of HCB or any of its subsidiaries;
- (2) seek or accept representation on the board of directors of HCB or any of its subsidiaries;
- (3) serve, have, or seek to have any representative serve as an officer, agent, or employee of HCB or any of its subsidiaries;
- (4) take any action that would cause HCB or any of its subsidiaries to become a subsidiary of Penn or any of its subsidiaries;
- (5) acquire or retain shares that would cause the combined interests of Penn and its subsidiaries, and their respective officers, directors, and affiliates, to equal or exceed 25 percent of the outstanding voting shares of HCB or any of its subsidiaries;
- (6) propose a director or slate of directors in opposition to a nominee or slate of nominees proposed by the management or board of directors of HCB or any of its subsidiaries;
- (7) solicit or participate in soliciting proxies with respect to any matter presented to the shareholders of HCB or any of its subsidiaries;
- (8) attempt to influence the dividend policies or practices of HCB or any of its subsidiaries;
- (9) attempt to influence the investment, loan, or credit decisions or policies; pricing of services; personnel decisions; operations activities (including the location of any offices or branches or their hours of operation, etc.); or any similar activities or decisions of HCB or any of its subsidiaries;
- (10) dispose or threaten to dispose of shares of HCB or any of its subsidiaries in any manner as a condition of specific action or nonaction by HCB or any of its subsidiaries; or
- (11) enter into any other banking or nonbanking transactions with HCB or any of its subsidiaries, except that Penn may establish and maintain deposit accounts with depository institution subsidiaries of

HCB, provided that the aggregate balance of all such accounts does not exceed \$500,000 and that the accounts are maintained on substantially the same terms as those prevailing for comparable accounts of persons unaffiliated with HCB or any of its subsidiaries.

*Sky Financial Group, Inc.
Bowling Green, Ohio*

Order Approving the Acquisition of a Bank

Sky Financial Group, Inc. (“Sky”), a bank holding company within the meaning of the Bank Holding Company Act (“BHC Act”), has requested the Board’s approval under section 3 of the BHC Act¹ to acquire Falls Bank, Stow, Ohio, a state-chartered savings bank.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (70 *Federal Register* 48,548 (2005)). The time for filing comments has expired, and the Board has considered the application and all comments received in light of the factors set forth in section 3 of the BHC Act.

Sky, with total consolidated assets of approximately \$15.2 billion, controls Sky Bank,³ Salineville, Ohio, with branches in Ohio, Indiana, Michigan, Pennsylvania, and West Virginia. Sky is the eighth largest depository organization in Ohio, controlling deposits of approximately \$8 billion, which represent 4 percent of the total amount of deposits of insured depository institutions in the state (“state deposits”).⁴

Falls Bank is the 189th largest insured depository institution in Ohio, controlling deposits of approximately \$53.8 million, representing less than 1 percent of state deposits. On consummation of the proposal, Sky would remain the eighth largest depository organization in Ohio, controlling deposits of approximately \$8.1 billion, which represent 4 percent of state deposits.

1. 12 U.S.C. § 1842.

2. Sky also has requested the Board’s approval under section 3 of the BHC Act to acquire Falls Interim Savings Bank, Bowling Green, Ohio, a subsidiary formed by Sky that will merge with Falls Bank (with Falls Bank as the surviving entity) after receiving regulatory approval from the Federal Deposit Insurance Corporation (“FDIC”) and the Ohio Division of Financial Institutions. In a separate application that is not subject to this order, Falls Bank has requested the Board’s approval to become a state member bank, subsequently merge with Sky Bank (with Falls Bank as the surviving entity), and operate Sky Bank’s offices as branches of Falls Bank pursuant to section 9 of the Federal Reserve Act and section 18(e) of the Federal Deposit Insurance Act. Sky intends to change the name of Falls Bank to Sky Bank and move its headquarters to Salineville, Ohio.

3. Sky also controls Sky Trust, National Association, Pepper Pike, Ohio (“Sky Trust”), a limited-purpose bank that provides only trust services.

4. Deposit, asset, and ranking data are as of June 30, 2005, and reflect merger and acquisition activity as of October 27, 2005. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

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.⁵

Sky and Falls Bank compete directly in the Akron banking market in Ohio.⁶ The Board has reviewed carefully the competitive effects of the proposal in this banking market in light of all the facts of record, including the number of competitors that would remain in the market, the relative shares of total deposits in depository institutions in the market (“market deposits”) controlled by Sky and Falls Bank,⁷ 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”),⁸ and other characteristics of the market.

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in the Akron banking market. After consum-

5. 12 U.S.C. § 1842(c)(1).

6. The Akron banking market is defined as Summit County, excluding the cities of Macedonia, Twinsburg, and Hudson and the townships of Sagamore Hills, Northfield Center, Twinsburg, Richfield, and Boston; Portage County, excluding the cities of Aurora, Streetsboro, and Mantua and the townships of Hiram, Nelson, Shalersville, Freedom, and Windham; the townships of Sharon, Homer, Harrisville, Westfield, Guilford, and Wadsworth in Medina County; the townships of Lawrence and Lake in Stark County; and the townships of Milton and Chippewa in Wayne County, all in Ohio.

7. Market deposit and share data are as of June 30, 2005, and reflect merger acquisition activity as of October 27, 2005. The market share data also are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Because the deposits of Falls Bank are being acquired by a commercial banking organization, they are included at 100 percent in the calculation of Sky’s post-consummation share of market deposits. See *Norwest Corporation*, 78 *Federal Reserve Bulletin* 452 (1992); *First Banks, Inc.*, 76 *Federal Reserve Bulletin* 669 (1990).

8. 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.

mation, there would be no increase in the HHI, and 24 competitors would remain in the banking market.⁹

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

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 Akron banking market or in any other relevant banking market. Accordingly, based on all the facts of record, the Board has determined that competitive considerations are consistent with approval.

Financial, Managerial, and Supervisory Considerations

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

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

Based on its review of these factors, the Board finds that Sky has sufficient financial resources to effect the proposal. The proposed transaction is structured as a share exchange and cash purchase. Sky will use existing resources to fund the cash portion of the transaction. Sky and its subsidiary

depository institutions are well capitalized and would remain so on consummation of the proposal.

The Board also has considered the managerial resources of the organizations involved and the proposed combined organization. The Board has reviewed the examination records of Sky and its subsidiary banks and Falls Bank, 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. Sky and its subsidiary depository institutions and Falls Bank are considered to be well managed. The Board also has considered Sky'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 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").¹⁰ 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.¹¹

The Board has considered carefully all the facts of record, including the CRA performance evaluation records of Sky Bank and Falls Bank, data reported by Sky Bank in 2004 under the Home Mortgage Disclosure Act ("HMDA"),¹² small-business lending data reported under the CRA,¹³ other information provided by Sky, confidential supervisory information, and public comment received on the proposal. A commenter criticized Sky's record of small

10. 12 U.S.C. § 2901 et seq.

11. 12 U.S.C. § 2903.

12. 12 U.S.C. § 2801 et seq.

13. Under the Board's CRA regulations, state member banks (other than small banks) are subject to reporting requirements for loans with original amounts of \$1 million or less ("small business loans") for each geography in which the bank originated or purchased a small business loan. Banks must report the aggregate number and amount of small business loans in specified origination amount categories and the aggregate number and amount of small business loans to businesses with gross annual revenues of \$1 million or less ("small businesses") (12 CFR 228.42).

9. Sky operates the tenth largest depository institution in the Akron market, controlling deposits of approximately \$173 million, which represent approximately 2.1 percent of market deposits. Falls Bank is the 21st largest depository institution in the market, controlling deposits of approximately \$26.9 million, which represent less than 1 percent of market deposits. On consummation, Sky would operate the ninth largest depository institution in the market, controlling weighted deposits of approximately \$226.7 million, which represent approximately 2.7 percent of market deposits. The HHI would decrease 6 points, to 1348.

business lending, alleging that it disproportionately lent to businesses in middle- and upper-income census tracts and did not provide enough loans to businesses in the LMI census tracts. The commenter also alleged, based on 2004 HMDA data, that Sky had low levels of home mortgage lending to minority borrowers and engaged in disparate treatment of minority individuals in its home mortgage operations.

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process, because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor¹⁴

Sky Bank received a "satisfactory" rating at its most recent CRA evaluation by the Federal Reserve Bank of Cleveland ("Reserve Bank"), as of October 14, 2003 ("2003 CRA Evaluation").¹⁵ Falls Bank also received a "satisfactory" rating at its most recent CRA performance evaluation by the FDIC, as of June 1, 2001.¹⁶ After consummation of the proposed series of transactions, Sky will implement in the resulting institution the community development strategy, including products, services, outreach, and initiatives, that is currently in place at Sky Bank.

In its 2003 CRA Evaluation, Sky Bank received a "high satisfactory" rating under the lending test. Examiners reported that the majority of Sky's lending was inside its assessment areas and that Sky Bank's lending levels reflected good responsiveness to the credit needs of its communities.¹⁷ Furthermore, examiners noted that Sky

Bank's distribution of loans showed a good penetration among geographies and customers of different income levels and among businesses of different revenue sizes.

In the Ohio and the Steubenville–Weirton MSA assessment areas, examiners concluded that Sky Bank's lending activity was good, and they commended the overall geographic distribution of the bank's loans. Examiners noted that Sky Bank's lower levels of HMDA-reportable lending in low-income census tracts was offset by the bank's strong lending levels in moderate-income census tracts. Examiners also took into consideration programs offered by Sky Bank in evaluating Sky's flexible lending practices to address the credit needs of LMI individuals and geographies. These programs included a partnership with the Federal Home Loan Bank of Cincinnati to increase home ownership opportunities and the supply of affordable housing, partnerships with four Metropolitan Housing Authorities to originate loans using conversions of the U.S. Department of Housing and Urban Development's section 8 rental subsidies into mortgage payments, and partnerships with Fannie Mae and others to develop the GoodStart Mortgage Program, which focuses on LMI and underserved minority borrowers. The GoodStart Mortgage Program provides 100 percent financing and a more competitive rate and fee structure than the Federal Housing Administration loan program¹⁸

With respect to Sky Bank's small-business lending performance, the 2003 CRA Evaluation found that the bank demonstrated an adequate overall record of serving the credit needs of small businesses. Although the percentage of small business loans¹⁹ made by the bank in LMI census tracts in some parts of its primary assessment areas was less than the percentage of the aggregate of all lenders ("aggregate lenders"), it exceeded that of the aggregate lenders in other parts of its primary assessment areas.²⁰ For example, in Sky Bank's multistate Steubenville–Weirton MSA assessment area, although Sky Bank's percentage of small business lending in low-income census tracts was less than that of the aggregate lenders, Sky Bank's percent-

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

15. Examiners evaluated Sky Bank's CRA performance in its 17 assessment areas in Ohio, Pennsylvania, Michigan, and Indiana and in one assessment area that included a part of the Steubenville–Weirton Metropolitan Statistical Area ("MSA") that covers portions of Ohio and West Virginia. The substantial majority of the bank's deposits, loans, and branches were in Ohio. In determining Sky Bank's overall rating, examiners gave the greatest weight to the bank's performance in the Steubenville–Weirton MSA and the bank's other assessment areas in Ohio, particularly the Toledo and Youngstown–Warren MSAs. The evaluation period for home mortgage loans and small business loans was January 1, 2001, through December 31, 2002. The evaluation period for community development loans and the investment and services tests was August 7, 2000, through October 14, 2003. Sky Trust, a special-purpose bank, is not subject to the CRA (12 CFR 225.11(3)).

16. The evaluation period for Falls Bank's CRA performance was from July 1, 1999, through January 24, 2001. Falls Bank's CRA performance was evaluated according to the FDIC's small-bank performance standards (12 CFR 345.26).

17. The commenter noted that Sky originated mortgages in various states outside its assessment areas in 2004. HMDA data from 2004

indicate that the majority of Sky's HMDA-reportable loans were generated in its assessment areas. Sky has represented that it does not actively lend outside its five core states of Ohio, Pennsylvania, Michigan, West Virginia, and Indiana, and that the loans made outside those states are generally for non-owner-occupied or multifamily housing properties.

18. During the evaluation period, Sky provided more than \$41 million in financing to LMI households in the GoodStart Mortgage Program.

19. In this context, "small business loans" are loans that have original amounts of \$1 million or less and are either secured by nonfarm nonresidential properties or are classified as commercial and industrial loans. The commenter criticized Sky Bank's record of small business lending in LMI census tracts outside the bank's assessment areas in Indiana and West Virginia, as well as its lending in Illinois and New York, both states where the bank has no assessment areas. Sky Bank asserted that only a very small portion of the small business loans it closed in 2004 were outside the five core states in its assessment areas.

20. The lending data of the aggregate lenders represent the cumulative lending for all financial institutions subject to reporting requirements in a particular area.

age of small business loans in moderate-income census tracts exceeded the percentage for the aggregate lenders. In the Youngstown–Warren MSA, examiners found the geographic distribution of the bank’s small business loans to be “excellent,” with its percentage of small business lending in LMI geographies exceeding the percentage for the aggregate lenders.²¹

The Board has also considered additional information about Sky Bank’s small-business lending performance since the 2003 CRA Evaluation. The 2004 CRA data reported by Sky Bank indicated that the percentage of the bank’s total dollar amount of small business loans to businesses in LMI census tracts in Ohio was generally comparable to the percentage for the aggregate lenders. Furthermore, Sky represented that Sky Bank was recognized each fiscal year by the Small Business Administration (“SBA”) from 2000 to 2004 as a “top five” lender on the basis of the number of loans made to small businesses in the SBA’s northern Ohio district. Sky also represented that it participates in economic development programs in Toledo and Youngstown, two cities that have a significant concentration of LMI census tracts, and that it conducts various outreach efforts to small businesses in LMI areas, including advertising its small business products in media that focus on minority-owned and emerging businesses and holding meetings about its small business products with small business owners in an LMI area of Cleveland.²²

In the 2003 CRA Evaluation, examiners commended Sky Bank for having an “excellent” level of community development lending throughout its assessment areas, particularly in Ohio. During the evaluation period, Sky Bank originated 70 community development loans totaling \$81.8 million, the majority of which supported affordable housing initiatives.

Sky Bank received an overall “high satisfactory” rating under the investment test in the 2003 CRA Evaluation, reflecting what examiners reported as an “excellent” level of qualified investments in various assessment areas. For example, examiners found the bank’s investment performance in Ohio to be “outstanding” based on the bank’s qualified investments in the state that totaled approximately \$29.4 million.

Sky Bank also received an overall “high satisfactory” rating under the service test in the 2003 CRA Evaluation. Examiners reported that Sky Bank’s retail delivery systems were accessible to essentially all portions of its assessment areas and that the bank’s new branches improved accessibility in LMI geographies in the Youngstown–Warren and

Pittsburgh MSAs. Examiners also commended the bank for providing a relatively high percentage of community development services throughout its assessment areas that promoted or facilitated affordable housing, services, and economic development in LMI areas and for LMI individuals.

B. HMDA and Fair Lending Record

The Board has considered carefully Sky’s lending record and HMDA data in light of public comment about its record of lending to minorities. The commenter expressed concern, based on 2004 HMDA data, that Sky disproportionately excluded or denied applications by African-American and Hispanic applicants for HMDA-reportable loans. The commenter also expressed concern that the 2004 HMDA data indicated that Sky made higher-cost loans to African Americans more frequently than nonminorities in its overall business and in Ohio in particular.²³ The Board reviewed the HMDA data for 2004 reported by Sky Bank in its assessment areas on a statewide basis in Ohio, Pennsylvania, Michigan, West Virginia, and Indiana.

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 are insufficient by themselves to conclude whether or not Sky Bank is excluding any racial or ethnic group 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.²⁴ 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 Sky Bank with fair lending laws.

21. Although the bank’s small business lending in LMI census tracts in its assessment area in the Toledo MSA was less than that of the aggregate lenders, examiners noted competitive factors affecting the bank’s performance and considered it to be adequate.

22. The commenter criticized Sky Bank’s level of small business lending in LMI census tracts in its assessment areas in Indiana and West Virginia in 2004. The 2003 CRA Evaluation indicated that the bank’s overall small business lending record was adequate. The Reserve Bank will continue to evaluate Sky Bank’s lending activities in future CRA performance evaluations, including its small business lending activities.

23. 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 percentage points for first-lien mortgages and 5 percentage points for second-lien mortgages (12 C.F.R. 203.4).

24. 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.

In the fair lending review conducted in conjunction with the 2003 CRA Evaluation, examiners noted no substantive violations of applicable fair lending laws by Sky Bank. As the primary federal supervisor of Sky Bank, the Board will continue to carefully examine the bank's compliance with fair lending and other consumer protection laws.

The record also indicates that Sky has taken steps to ensure compliance with fair lending laws and other consumer protection laws. Sky represented that it undertakes significant monitoring of compliance in its mortgage lending operations using a wide variety of audit and review mechanisms, including file reviews, statistical analyses, and exception reviews. Furthermore, Sky Bank's mortgage products are conventional, conforming products such as those offered by government-sponsored enterprises that conform to secondary-market underwriting guidelines. Sky Bank's mortgage program offers risk-priced procedures consistent with these guidelines, and it uses automated software for underwriting and pricing mortgage loans. The bank does not offer any nonprime or "Alt-A" mortgage loan products other than those offered through programs of government-sponsored enterprises.

The Board also notes that Sky has typically acquired rural community banks and has only recently entered into certain urban areas with significant minority populations. Sky has undertaken initiatives since entering those markets to enhance its outreach and loan distribution to minorities in urban areas. These initiatives have included hiring community mortgage originators and community development officers, marketing in local minority-focused media, and developing Spanish-language marketing materials.

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

Conclusion on CRA Performance Records

The Board has carefully considered all the facts of record, including reports of evaluation of the CRA performance records of the institutions involved, information provided by Sky, 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 Falls Bank, including access to expanded branch and ATM networks. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant depository institutions are consistent with approval.

Conclusion

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

has considered all the facts of record in light of the factors that it is required to consider under the BHC Act.²⁵ The Board's approval is specifically conditioned on compliance by Sky 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 cause by the Board or the Reserve Bank, acting pursuant to delegated authority.

By order of the Board of Governors, effective November 14, 2005.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

*Treetops Acquisition Group LP,
Treetops Acquisition Group Ltd.,
Treetops Acquisition Group II LP,
Treetops Acquisition Group II Ltd.
All in Grand Cayman, Cayman Islands*

*Edgar M. Bronfman IDB Trusts A through G
Quebec, Canada*

*Cam-Discount, Ltd.
Grand Cayman, Cayman Islands*

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

25. 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 requests in light of all the facts of record. In the Board's view, the public has had ample opportunity to submit comments on the proposal and, in fact, the commenter has submitted written comments that the Board has considered carefully in acting on the proposal. The commenter's request fails to demonstrate why its written comments do not 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.

Treetops Acquisition Group LP (“Treetops LP”), Treetops Acquisition Group Ltd. (“Treetops Ltd.”), Treetops Acquisition Group II LP (“Treetops II LP”), Treetops Acquisition Group II Ltd. (“Treetops II Ltd.”), Edgar M. Bronfman IDB Trusts A through G (“EMB IDB Trusts”), and Cam-Discount, Ltd. (“Cam-Discount”) (collectively, “Applicants”) have requested the Board’s approval under section 3 of the Bank Holding Company Act¹ (“BHC Act”) to become bank holding companies, acquire up to 51 percent of the voting shares of Israel Discount Bank Ltd., Tel Aviv, Israel (“IDB”),² a foreign bank that is a bank holding company within the meaning of the BHC Act, and acquire control of Israel Discount Bank of New York (“IDBNY”), New York, New York.³

Notice of the proposal, affording interested persons an opportunity to comment, has been published (70 *Federal Register* 20,373 (2005)). The time for filing comments has expired, and the Board has considered the applications and all comments received in light of the factors set forth in section 3 of the BHC Act. IDB, with total consolidated assets of approximately \$33 billion, is the third largest banking organization in Israel. IDBNY is the 79th largest depository organization in the United States, with total U.S. assets of \$8.7 billion. It controls approximately \$3.5 billion in deposits, which represents less than 1 percent of the total amount of deposits of insured depository institutions in the United States.⁴

In considering the factors required to be reviewed under the BHC Act in this case, the Board has had extensive consultations with the New York State Banking Department (“NYSBD”) and the Federal Deposit Insurance Corporation (“FDIC”), the primary supervisors of IDBNY, about this proposal and the financial and managerial

resources, risk-management systems, and compliance efforts and programs of IDBNY, including those involving Bank Secrecy Act/anti-money-laundering (“BSA/AML”) compliance. The Board also has consulted with the Israeli Supervisor of Banks regarding the structure, financing, and timing of the proposal. The Board has taken account of the fact that this proposal represents the privatization of a foreign bank after an extensive bidding process conducted by a foreign government. The Board has also considered the time schedule imposed on this transaction by the privatization process in Israel and by the purchase contract between the state of Israel and Applicants, which contemplates completion of the privatization during 2005.

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 carefully these factors in light of all the facts of record, including confidential reports of examination, other supervisory information received from the international, federal, and state banking supervisors of the organizations involved, publicly reported and other financial information, and information provided by the Applicants.

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

IDBNY is well capitalized and would remain so on consummation of the proposal, and the capital levels of IDB would continue to exceed the minimum levels that would be required under the Basel Capital Accord. Furthermore, IDB’s capital levels are considered equivalent to the capital levels that would be required of a U.S. banking organization and would remain so after consummation of this proposal. The proposed transaction would be funded from cash and promissory notes, and Applicants have sufficient resources to effect the transaction as proposed. In addition, Applicants have represented that they were formed solely to hold this investment in IDB and that they will not engage in activities other than holding the shares of IDB.

The Board also has considered the managerial resources of IDB and IDBNY and the effect of the proposal on these resources. In reviewing the proposal, the Board has assembled and considered a broad and detailed record that includes the supervisory experience of the other relevant banking supervisory agencies with the organizations and their records of compliance with applicable banking laws. In particular, the Board has reviewed the assessments of

1. 12 U.S.C. § 1842.

2. The state of Israel currently owns 57 percent of the voting shares of IDB through M.I. Holdings; the remaining outstanding shares are publicly traded on the Tel Aviv Stock Exchange. In 2004, M.I. Holdings established a formal bidding process for privatizing a portion of its ownership interest in IDB. Treetops I.P. and Treetops II LP were the successful bidders in the privatization process and on February 1, 2005, the state of Israel entered into an agreement with the Applicants to sell 26 percent of the shares of IDB to the Applicants and to grant the Applicants an option to acquire an additional 25 percent of IDB’s shares. Treetops LP and Treetops II LP would own 60 percent and 40 percent, respectively, of the Applicants’ proposed total investment in IDB. Treetops Ltd. and Treetops II Ltd. are general partners of Treetops LP and Treetops II LP, respectively. The seven EMB IDB Trusts each owns 6.45 percent of the limited partnership interests of Treetops I.P. and owns the same percentage of the voting shares of Treetops Ltd. Cam-Discount is the only shareholder of Treetops II Ltd. As a result, on consummation of the proposal, Treetops I.P., Treetops II LP, Treetops Ltd., Treetops II Ltd., Cam-Discount, and the EMB IDB Trusts would all be considered to control IDB. Each of the Applicants would be a qualifying foreign banking organization under Regulation K. See 12 CFR 211.23.

3. IDB is a foreign bank within the meaning of the International Bank Act (“IBA”) (12 U.S.C. § 3101(7)). IDB indirectly holds all the shares of IDBNY through a wholly owned subsidiary bank holding company, Discount Bancorp, Inc., Wilmington, Delaware.

4. Worldwide asset and ranking data are as of December 31, 2004. U.S. asset and deposit data are as of September 30, 2004, and national ranking is as of June 30, 2004. The data and rankings are adjusted to reflect exchange rates then in effect.

the organizations' management and risk-management systems by the FDIC and the NYSBD, the primary regulators of IDB. In addition, the Board has reviewed confidential supervisory information on the anti-money-laundering programs at IDB and IDB. In addition, the Board has reviewed confidential supervisory information on the anti-money-laundering programs at IDB and IDB, including the assessment of those programs by the relevant federal supervisory agencies, state banking agencies, and the Bank of Israel.⁵

The Board has also considered that, on December 16, 2005, IDB entered into consent cease and desist orders issued by the NYSBD and the FDIC that obligate it to remedy deficiencies in compliance, internal controls, and risk-management practices, including deficiencies with respect to BSA/AML compliance. The orders require IDB to establish enhanced due diligence with respect to customer accounts, institute new policies and procedures to ensure compliance with BSA/AML requirements, undertake a detailed review of existing customer accounts to determine whether any should be closed, and review customer account information on an annual basis. IDB must also submit to the regulators a plan designed to ensure compliance with the terms of the consent orders. In addition, IDB has entered into a settlement and cooperation agreement with the New York County District Attorney ("NYCDA") relating to these deficiencies. This agreement obligates IDB to comply fully with the consent orders issued by the FDIC and the NYSBD. In connection with these actions, the various authorities have indicated that IDB may also be subject to money penalties of up to \$25 million.⁶

The Board has reviewed the proposals by IDB and IDB to address these matters. The Board also has considered the plans and abilities of Applicants to address these matters and has relied on commitments made by Applicants and IDB to cause IDB to correct deficiencies identified by any state or federal regulator, and to work to ensure that IDB will in the future remain in compliance with U.S. laws and regulations. As noted, the Board also has consulted with the NYSBD and the FDIC about the proposed transaction, and neither agency objected to the proposal.

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

Section 3 of the BHC Act also provides that the Board may not approve an application involving a foreign bank

unless the bank is "subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in the bank's home country."⁷ The Supervisor of Banks, who heads the Banking Supervision Unit of the Bank of Israel, is the primary regulator of Israeli banks, including IDB. The Board has previously determined in an application under the BHC Act involving Bank Hapoalim B.M., Tel Aviv, that Bank Hapoalim was subject to comprehensive consolidated supervision by the Supervisor of Banks.⁸ In this case, the Board has determined that IDB is supervised on substantially the same terms and conditions as Bank Hapoalim. Based on all the facts of record, the Board has concluded that IDB is subject to comprehensive supervision and regulation on a consolidated basis by its home country supervisor.⁹

In addition, section 3 of the BHC Act requires the Board to determine that an applicant has provided adequate assurances that it will make available to the Board such information on its operations and activities and those of its affiliates that the Board deems appropriate to determine and enforce compliance with the BHC Act.¹⁰ The Board has reviewed the restrictions on disclosure in the relevant jurisdictions in which the Applicants and IDB operate and has communicated with relevant government authorities concerning access to information. In addition, the Applicants have committed to make available to the Board such information on the operations of IDB and its affiliates that the Board deems necessary to determine and enforce compliance with the BHC Act, the IBA, and other applicable federal law. The Applicants also have committed to cooperate with the Board to obtain any waivers or exemptions that may be necessary to enable IDB and its affiliates to make such information available to the Board. In light of the Board's review of the restrictions on disclosure and these commitments, the Board concludes that the Applicants have provided adequate assurances of access to any appropriate information the Board may request. Based on these and all other facts of record, the Board has concluded that the supervisory factors it is required to consider are consistent with approval.

5. The Board notes that Israel has substantially modified and strengthened its legal framework to combat money laundering since 2001, thereby addressing deficiencies that had been noted previously by the Financial Action Task Force, an intergovernmental body that develops and promotes policies to combat money laundering. In 2004, the Israeli Parliament adopted additional legislation to enhance Israel's ability to combat terrorist financing and to cooperate with other countries on such matters.

6. The various authorities that may assess the penalties are the NYSBD, the FDIC, the NYCDA, and the U.S. Department of the Treasury's Financial Crimes Enforcement Network.

7. 12 U.S.C. § 1842(c)(3)(B). Under Regulation Y, the Board uses the standards enumerated in Regulation K to determine whether a foreign bank is subject to consolidated home country supervision. See 12 CFR 225.13(a)(4). Regulation K provides that a foreign bank will be considered subject to comprehensive supervision or regulation on a consolidated basis if the Board determines that the bank is supervised or regulated in such a manner that its home country supervisor receives sufficient information on the worldwide operations of the bank, including its relationship with any affiliates, to assess the bank's overall financial condition and its compliance with laws and regulations. See 12 CFR 211.24(c)(1).

8. See *Bank Hapoalim B.M.*, 87 *Federal Reserve Bulletin* 327 (2001).

9. As a condition of approving the acquisition of IDB, Israeli law requires Applicants to obtain prior approval for any changes in the holding company structure and prohibits the holding companies from conducting activities other than holding the shares of IDB.

10. See 12 U.S.C. § 1842(c)(3)(A).

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. Section 3 also prohibits the Board from approving a proposed bank acquisition that would substantially lessen competition in any relevant banking market unless the Board finds that the anticompetitive effects of the proposal are clearly outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.¹¹

This proposal involves only the formation of new bank holding companies. Applicants are all newly organized entities that do not control any depository institutions in the United States. Accordingly, the Board concludes, based on all the facts of record, that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of banking resources in any relevant banking market and that competitive considerations are consistent with approval.

Convenience and Needs Considerations

In acting on this proposal, the Board also is required to consider the effects of the transaction 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").¹² 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.¹³

The Board has considered carefully the convenience and needs factor and the CRA performance record of IDBNY in light of all the facts of record. As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisor of the CRA performance record of IDBNY. IDBNY received an "outstanding" rating at its most recent CRA performance evaluation by the FDIC, as of December 1, 2004. Applicants have indicated that after consummation of the proposal, they expect to continue the CRA and lending programs at IDBNY and, as appropriate, to consider expanding the lending activities and broadening the range of deposit and other customer services of the bank to provide additional services to the community that IDBNY serves.

Based on these and all the facts of record, the Board concludes that considerations relating to the convenience

and needs factor, including the CRA performance record of IDBNY, are consistent with approval.

Conclusion

Based on the foregoing and all facts of record, the Board has determined that the applications should be, and hereby are, approved. 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 the Applicants with the conditions imposed in this order; the commitments made to the Board in connection with the applications, including commitments made by IDB; and receipt of all other regulatory approvals, including approvals by the NYSBD and the Israeli Supervisor of Banks. 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 decision 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 New York, acting pursuant to delegated authority.

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

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Zions Bancorporation Salt Lake City, Utah

Order Approving the Acquisition of a Bank Holding Company

Zions Bancorporation ("Zions"), 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 acquire Amegy Bancorporation, Inc. ("Amegy") and its subsidiary bank, Amegy Bank, National Association ("Amegy Bank"), both of Houston, Texas.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published

11. 12 U.S.C. § 1842(c)(1).

12. 12 U.S.C. § 2901 et seq.

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

1. 12 U.S.C. § 1842.

2. Zions also would acquire Amegy Holding Delaware, Inc., Wilmington, Delaware, a bank holding company through which Amegy owns Amegy Bank. Zions intends to operate Amegy Bank as a subsidiary bank after consummation of the proposal.

(70 *Federal Register* 53,361 (2005)). The time for filing comments has expired, and the Board has considered the application and all comments received in light of the factors set forth in section 3 of the BHC Act.

Zions, with total consolidated assets of approximately \$32.9 billion, is the 44th largest depository organization in the United States, controlling deposits of approximately \$24.8 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the United States.³ Zions operates subsidiary depository institutions in Utah, California, Washington, Arizona, Nevada, New Mexico, and Oregon and engages in numerous nonbanking activities that are permissible under the BHC Act.

Amegy, with total consolidated assets of approximately \$7.7 billion, is the 11th largest depository organization in Texas, controlling deposits of approximately \$5.1 billion.⁴ On consummation of the proposal, Zions would become the 38th largest depository organization in the United States, with total consolidated assets of approximately \$41.7 billion, and would control deposits of approximately \$29.8 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the United States.

Interstate Analysis

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

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

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

Competitive Considerations

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

Zions and Amegy do not compete directly in any relevant banking market.⁸ 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.⁹

institutions in the United States and less than 30 percent of the total amount of deposits of insured depository institutions in Texas. All other requirements of section 3(d) of the BHC Act would be met on consummation of the proposal.

8. 12 U.S.C. §1842(c)(1). One commenter asserted that the competitive factors the Board must consider should weigh against approval because consummation of the proposed transaction would not have demonstrable procompetitive effects. The applicable standard in section 3(c)(1) of the BHC Act bars the Board from approving a proposal that would result in or would further a monopoly and permits the Board to approve a proposal with substantial anticompetitive effects only if such effects are clearly outweighed by certain beneficial effects. Contrary to commenter's claim, section 3(c)(1) of the BHC Act does not make evidence of procompetitive effects a necessary condition for approval. As noted, because Zions and Amegy do not compete directly in the Houston, Texas banking market or in any other banking market, the proposal would not result in a monopoly or have a significant adverse effect on competition in any relevant market.

9. One commenter asserted that the Board should take into account the likely competitive effects of the proposal on credit unions. Even if the deposits of credit unions were expressly included in the analysis of competitive effects of this proposal, Zions currently is not located in the Houston, Texas banking market and, therefore, the proposal would not increase the concentration level of market deposits. Contrary to the assertion of the commenter, the Board does not view the initial entry of a competitor through an acquisition as per se anticompetitive.

Moreover, the Board has expressly factored credit unions into analyses of bank acquisition proposals only when the facts of record with respect to the specific proposal demonstrate that credit unions offer bank-like products to a broad segment of a geographic market. *Wells Fargo*, 86 *Federal Reserve Bulletin* 832, 834 (2000); *WestStar Bank*, 84 *Federal Reserve Bulletin* 294, 296 (1998). In reviewing the competitive effects of a proposal, the Board takes into consideration, among other factors, the concentration level of market deposits and the increase in this level as measured by the Herfindahl-Hirschman Index under the Department of Justice Merger Guidelines ("DOJ Guidelines"), 49 *Federal Register* 26,823 (1984). The Department of Justice has stated that the higher-than-normal thresholds it uses for measuring market concentration for screening bank mergers for anticompetitive effects under the DOJ Guidelines implicitly recognize the competitive effects of limited-purpose lenders, including credit unions.

3. Asset, deposit, and national ranking data are as of June 30, 2005. Asset and national ranking data are based on total assets reported by bank holding companies on Consolidated Financial Statements for Bank Holding Companies and by thrift institutions on Thrift Financial Reports. Deposit data reflect the total of the deposits reported by each organization's insured depository institutions in their Consolidated Reports of Condition and Income or Thrift Financial Reports.

4. State ranking is based on deposits, and deposit data are as of June 30, 2005. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

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

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

7. 12 U.S.C. §§1842(d)(1)(A)-(B) and 1842(d)(2)(A)-(B). Zions is adequately capitalized and adequately managed, as defined by applicable law. Amegy Bank has been in existence and operated for the minimum period of time required by applicable state law (five years). On consummation of the proposal, Zions would control less than 10 percent of the total amount of deposits of insured depository

Financial, Managerial, and Supervisory Considerations

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

In evaluating financial factors in expansion proposals by banking organizations, the Board reviews the financial condition of the organizations involved on both a parent-only and consolidated basis, as well as the financial condition of the subsidiary banks and significant nonbanking operations. In this evaluation, the Board considers a variety of measures, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the financial condition of the combined organization at consummation, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.¹⁰

Based on its review of these factors, the Board finds that Zions has sufficient financial resources to effect the proposal. The proposed transaction is structured as a partial share exchange and partial cash purchase. Zions will fund the cash component of the consideration with proceeds from the issuance of subordinated debt securities. Zions and each of its subsidiary banks and Amegy Bank are well capitalized and would remain so on consummation of the proposal.¹¹

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 Zions, Amegy, and their subsidiary banks, including assessments of their management, risk-

management systems, and operations.¹² 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. Zions, Amegy, and their subsidiary depository institutions are considered to be well managed. The Board also has considered Zions's plans for implementing the proposal, including the proposed management after consummation.

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

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board 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").¹³ 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.¹⁴

The Board has considered carefully all the facts of record, including evaluations of the CRA performance records of the subsidiary banks of Zions and Amegy, data reported by Zions and Amegy under the Home Mortgage Disclosure Act ("HMDA"),¹⁵ other information provided by Zions, confidential supervisory information, and public comment received on the proposal. A commenter opposed the proposal and alleged, based on data reported under HMDA, that Zions and Amegy engaged in discriminatory treatment of minority individuals in their respective home mortgage lending operations.

See, e.g., J.P. Morgan Chase & Co., 90 Federal Reserve Bulletin 352, 354 n. 16 (2004).

10. Two commenters questioned whether Zions would realize its projected cost savings from the proposal, and one of these commenters also asserted that the transaction could increase interest-rate risk for the companies involved and would be unlikely to generate cross-marketing efficiencies. The Board has evaluated the financial effects of this proposal under the assumption that no cost savings would be realized. In addition, as noted, the Board has considered a wide range of information in considering the financial resources and future prospects of the institutions involved in the proposal.

11. A commenter objected to the levels of compensation provided by employment agreements between Zions and six executive officers of Amegy. The Board notes that information about these agreements was provided to Amegy shareholders before the October 11 special meeting at which the Amegy shareholders approved the organization's acquisition by Zions. As noted, Zions and Amegy would remain well capitalized on consummation of the proposal.

12. A commenter criticized Zions's relationships with an unaffiliated pawnshop and other unaffiliated nontraditional providers of financial services. As a general matter, these businesses are licensed by the states where they operate and are subject to applicable state law. Zions stated that neither it nor Amegy focuses on marketing credit services to such nontraditional providers except as part of broader marketing to small businesses generally. Zions represented that neither it nor Amegy plays any role in the lending practices or credit-review processes of such firms.

13. 12 U.S.C. § 2901 et seq.

14. 12 U.S.C. § 2903.

15. 12 U.S.C. § 2801 et seq.

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process, because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor¹⁶

Zions's largest subsidiary bank, as measured by total deposits, is California Bank & Trust ("CB&T"), San Diego, California.¹⁷ The bank received an "outstanding" rating at its most recent CRA performance evaluation by the Federal Deposit Insurance Corporation ("FDIC"), as of January 3, 2005. Zions's other subsidiary banks all received either "outstanding" or "satisfactory" ratings at their most recent CRA performance evaluations.¹⁸ Amegy Bank received an "outstanding" rating at its most recent CRA performance evaluation by the Office of the Comptroller of the Currency ("OCC"), as of May 5, 2003.¹⁹ Zions has represented that it intends to maintain Amegy Bank's CRA program on consummation of the proposal.

CRA Performance of Zions. As noted above, CB&T received an overall "outstanding" rating for CRA performance in the FDIC's most recent CRA performance evaluation.²⁰ CB&T was rated "outstanding" under each of the lending, investment, and service tests.

Examiners reported that the distribution of CB&T's loans by income level of geography was good and that CB&T's mortgage lending demonstrated good distribution to LMI borrowers. In addition, they stated that CB&T had an excellent record of lending to small businesses.²¹ They also stated that CB&T was a leader in community development lending, with more than \$232 million in community development loans during the review period. Examiners commended the bank's use of innovative and flexible lending programs to serve the credit needs of its assessment areas.

Examiners reported that CB&T's qualified investments, grants, and donations, which totaled more than \$77 million, demonstrated excellent responsiveness to the credit and community economic development needs of the bank's assessment areas. In addition, they commended CB&T's leadership role in providing community development services and noted that CB&T's service delivery systems were accessible to all geographies, including LMI areas, and to individuals of different income levels.

CRA Performance of Amegy. As noted above, Amegy Bank received an overall "outstanding" rating for CRA performance in its most recent CRA performance evaluation by the OCC.²² Amegy Bank received "outstanding" ratings under the lending and investment tests and a "high satisfactory" rating under the service test.

Examiners reported that Amegy Bank's overall lending performance was excellent. They found that the distribution of the bank's loans by income level of geography was good and that its mortgage lending demonstrated adequate distribution to LMI borrowers. In addition, examiners stated that Amegy Bank's distribution of loans to small businesses was good and that its community development lending, which totaled more than \$84 million, demonstrated excellent responsiveness to the credit and community development needs of the bank's assessment area. Examiners also commended Amegy Bank for its excellent level of qualified investments, which totaled more than \$14 million during the evaluation period, and extensive use of innovative and complex investments. Examiners stated the bank made extensive use of innovative and flexible lending practices that supported small businesses and affordable housing.

Examiners noted that Amegy Bank's service delivery systems were accessible to all geographies and to individuals of different income levels. They characterized the bank's community development services as excellent and reported that the services primarily addressed identified needs for affordable housing, economic development, and community services.

B. HMDA and Fair Lending Record

The Board has carefully considered the lending records and HMDA data of Zions and Amegy in light of public comment about their respective records of lending to minorities. A commenter alleged, based on 2004 HMDA data, that Zions and Amegy disproportionately denied applications by African-American and Hispanic applicants for HMDA-reportable loans. The commenter also asserted that Zions made higher-cost loans to African Americans

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

17. As of June 30, 2005, CB&T accounted for 32.9 percent of the total deposits of Zions's six subsidiary insured depository institutions.

18. The appendix lists the most recent CRA ratings of Zions's other subsidiary banks.

19. At the time of the evaluation, Amegy Bank was named Southwest Bank of Texas, National Association.

20. The evaluation period for the lending test was January 1, 2002, through September 30, 2004, except for community development loans. The evaluation period for community development loans and for the investment and service tests was September 17, 2001, through January 3, 2005. At the time of the evaluation, CB&T had six assessment areas in California, one of which received a full-scope review.

21. For purposes of the evaluations discussed in this order, small businesses are businesses with gross annual revenues of \$1 million or less.

22. The evaluation period for the lending test was January 1, 1999, through December 31, 2002, except for community development loans. The evaluation period for community development loans and for the investment and service tests was May 10, 1999, through May 5, 2003. At the time of the evaluation, the bank had one assessment area that encompassed the greater Houston metropolitan area.

and Hispanics more frequently than Zions did to non-minorities.²³ The Board reviewed the HMDA data for 2003 and 2004 reported by each subsidiary bank of Zions and by Amegy Bank in their assessment areas.²⁴

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 are insufficient by themselves to conclude whether or not Zions or Amegy is excluding any racial or ethnic group 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.²⁵ 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 credit-worthy 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 Zions and Amegy with fair lending laws. In the fair lending reviews conducted in conjunction with the most recent CRA evaluations of the subsidiary depository institutions of Zions and Amegy, examiners noted no substantive violations of applicable fair lending laws.

The record also indicates that Zions has taken steps to ensure compliance with fair lending laws and other consumer protection laws. Zions represented that it conducts regular compliance reviews of each business unit and that its fair lending reviews include statistical analyses of comparable files by loan product. Zions also stated that it maintains a second-review program for residential and small business lending. Zions has indicated that Amegy

will adopt Zions's current fair lending policies and procedures.

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

C. Conclusion on Convenience and Needs and CRA Performance

The Board has carefully considered all the facts of record, including reports of examination of the CRA records of the institutions involved, information provided by Zions, comments received on the proposal, and confidential supervisory information. In addition, Zions has represented that the proposal would expand the availability and array of banking products and services to the customers of Amegy.²⁶ Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant depository institutions are consistent with approval.

Conclusion

Based on the foregoing and all facts of record, the Board has determined that the application should be, and hereby is, approved.²⁷ In reaching its conclusion, the Board has

23. 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 percentage points for first-lien mortgages and 5 percentage points for second-lien mortgages (12 CFR 203.4).

24. One Zions subsidiary, The Commerce Bank of Washington, National Association, Seattle, Washington, did not originate or purchase any HMDA-reportable loans in 2003 or 2004. In addition, The Commerce Bank of Oregon, Portland, Oregon, another Zions subsidiary, is a *de novo* bank established on October 31, 2005.

25. 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.

26. A commenter asserted that Zions did not provide sufficient information for the Board to conclude that considerations related to the convenience and needs of the community are consistent with approval of the proposal. As noted, however, the Board's consideration of this factor was based on a review of a broad range of information in addition to information provided by Zions, including the CRA performance records of the institutions involved in the proposal, HMDA data reported by Zions and Amegy, and confidential supervisory information.

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

considered all the facts of record in light of the factors that it is required to consider under the BHC Act.²⁸ The Board's approval is specifically conditioned on compliance by Zions 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

28. The commenter also requested that the Board 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 public comment. In the Board's view, for the reasons discussed above, the commenter has had ample opportunity to submit its views, and in fact, has provided 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 extension of the comment period, or denial of the proposal on the basis of the comments discussed above or on informational insufficiency, is not warranted.

Appendix

CRA Performance Ratings of Zions's Other Subsidiary Banks¹

| Bank | CRA Rating | Date | Supervisor |
|--|--------------|---------------|------------|
| Zions First National Bank, Salt Lake City, Utah | Outstanding | December 2003 | OCC |
| The Commerce Bank of Washington, National Association, Seattle, Washington | Satisfactory | April 2004 | OCC |
| National Bank of Arizona, Tucson, Arizona | Satisfactory | October 2003 | OCC |
| Nevada State Bank, Las Vegas, Nevada | Outstanding | July 2004 | FDIC |
| Vectra Bank Colorado, National Association, Farmington, New Mexico | Outstanding | November 2001 | OCC |

1. Zions's subsidiary bank, The Commerce Bank of Oregon ("CBO"), Portland, Oregon, is a de novo bank established on October 31, 2005. CBO was established to purchase and assume the assets and liabilities of First Consumers

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 San Francisco, acting pursuant to delegated authority.

By order of the Board of Governors, effective November 18, 2005.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Orders Issued Under Section 4 of the Bank Holding Company Act

Deutsche Bank AG
Frankfurt, Germany

Order Approving Notice to Engage in Activities Complementary to a Financial Activity

Deutsche Bank AG ("Deutsche Bank"), a foreign bank that is a financial holding company ("FHC") for purposes of the Bank Holding Company Act ("BHC Act"), and its wholly owned U.S. subsidiary Taunus Corporation ("Taunus," and collectively with Deutsche Bank, "Notificants"), also an FHC, have requested the Board's approval

under section 4 of the BHC Act¹ and the Board's Regulation Y² to engage in physical commodity trading in the United States. Deutsche Bank currently conducts physical commodity trading outside the United States.³

Regulation Y authorizes bank holding companies ("BHCs") to engage as principal in derivative contracts based on financial and nonfinancial assets ("Commodity Derivatives"). Under Regulation Y, a BHC may conduct Commodity Derivatives activities subject to certain restrictions that are designed to limit the BHC's activity to

1. 12 U.S.C. § 1843.

2. 12 CFR Part 225.

3. Deutsche Bank will enter into physical commodity trades in the United States either directly or indirectly through Notificants' non-banking subsidiary, DB Energy Trading, L.L.C., New York, New York.

trading and investing in financial instruments rather than dealing directly in physical nonfinancial commodities.⁴ Under these restrictions, a BHC generally is not allowed to take or make delivery of nonfinancial commodities underlying Commodity Derivatives. In addition, BHCs generally are not permitted to purchase or sell nonfinancial commodities in the spot market.

The BHC Act, as amended by the Gramm–Leach–Bliley Act (“GLB Act”), permits a BHC to engage in activities that the Board had determined were closely related to banking, by regulation or order, prior to November 12, 1999.⁵ The BHC Act permits an FHC to engage in a broad range of activities that are defined in the statute to be financial in nature.⁶ Moreover, the BHC Act allows FHCs to engage in any activity that the Board determines, in consultation with the Secretary of the Treasury, to be financial in nature or incidental to a financial activity.⁷

In addition, the BHC Act permits FHCs to engage in any activity that the Board (in its sole discretion) determines is complementary to a financial activity and does not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally.⁸ This authority is intended to allow the Board to permit FHCs to engage, on a limited basis, in an activity that appears to be commercial rather than financial in nature but that is meaningfully connected to a financial activity in a manner that complements the financial activity.⁹ The BHC Act provides that any FHC seeking to engage in a complementary activity must obtain the Board’s prior approval under section 4(j) of the BHC Act.¹⁰

Notificants regularly engage as principals in BHC-permissible Commodity Derivatives based on a variety of commodities and plan to expand those activities to include physical commodity transactions in the United States. Notificants have, therefore, requested that the Board permit them to engage in physical commodity trading activities in the United States involving commodities such as natural gas, crude oil, and emissions allowances,¹¹ and to take and

make delivery of physical commodities to settle BHC-permissible Commodity Derivatives in which they currently engage (“Commodity Trading Activities”). The Board previously has determined that Commodity Trading Activities involving a particular commodity complement the financial activity of engaging regularly as principal in BHC-permissible Commodity Derivatives based on that commodity.¹² In light of the foregoing and all other facts of record, the Board believes that Commodity Trading Activities are complementary to the Commodity Derivatives activities of Notificants.

To authorize Notificants to engage in Commodity Trading Activities as a complementary activity under the GLB Act, the Board also must determine that the activities do not pose a substantial risk to the safety or soundness of depository institutions or the U.S. financial system generally.¹³ In addition, the Board must determine that the performance of Commodity Trading Activities by Notificants “can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.”¹⁴

Approval of the proposal would likely benefit Notificants’ customers by enhancing Notificants’ ability to provide efficiently a full range of commodity-related services. Approving Commodity Trading Activities for Notificants also would enable them to improve their understanding of physical commodity and commodity derivatives markets and their ability to serve as an effective competitor in those markets.

The Board has evaluated the financial resources of the Notificants and their subsidiaries. Deutsche Bank’s capital levels exceed the minimum levels that would be required under the Basel Capital Accord and are considered equivalent to the capital levels that would be required of a U.S. banking organization.

The Board also has evaluated the managerial resources of Notificants and their subsidiaries, including their management expertise, internal controls, and risk-management systems. The Board notes that on October 12, 2005, Deutsche Bank’s subsidiary bank, Deutsche Bank Trust Company Americas (“DBTCA”), New York, New York, a

4. Commodity Derivatives permissible for BHCs under Regulation Y are hereinafter referred to as “BHC-permissible Commodity Derivatives.”

5. 12 U.S.C. § 1843(c)(8).

6. The Board determined by regulation before November 12, 1999, that engaging as principal in Commodity Derivatives, subject to certain restrictions, was closely related to banking. Accordingly, engaging as principal in BHC-permissible Commodity Derivatives is a financial activity for purposes of the BHC Act. See 12 U.S.C. § 1843(k)(4)(1’).

7. 12 U.S.C. § 1843(k)(1)(A).

8. 12 U.S.C. § 1843(k)(1)(B).

9. See 145 Cong. Rec. H11529 (daily ed. Nov. 4, 1999) (Statement of Chairman Leach) (“It is expected that complementary activities would not be significant relative to the overall financial activities of the organization.”).

10. 12 U.S.C. § 1843(j).

11. An emission allowance is an intangible right to emit certain pollutants during a given year or any year thereafter that is granted by the U.S. Environmental Protection Agency or comparable foreign regulatory authority to an entity, such as a power plant or other industrial concern, affected by environmental regulation aimed at reducing emission of pollutants. An allowance can be bought, sold, or

exchanged by individuals, brokers, corporations, or government entities that establish an account at the relevant governmental authority. Emissions allowances are stored and tracked on the records of the relevant government authority. Accordingly, there are no transportation, environmental, storage, or insurance risks associated with ownership of emissions allowances.

12. *JPMorgan Chase & Co.*, 92 *Federal Reserve Bulletin* C57 (2006) (Order dated November 18, 2005); *Barclays Bank PLC*, 90 *Federal Reserve Bulletin* 511 (2004); *UBS AG*, 90 *Federal Reserve Bulletin* 215 (2004); and *Citigroup Inc.*, 89 *Federal Reserve Bulletin* 508 (2003). For example, Commodity Trading Activities involving all types of crude oil would be complementary to engaging regularly as principal in BHC-permissible Commodity Derivatives based on Brent crude oil.

13. 12 U.S.C. § 1843(k)(1)(B).

14. 12 U.S.C. § 1843(j)(2)(A).

state member bank, entered into a written agreement (the "Written Agreement") with the Board and the New York State Banking Department pursuant to section 8 of the Federal Deposit Insurance Act¹⁵ to address deficiencies in its anti-money-laundering programs.¹⁶ In reviewing this proposal, the Board has considered the enhancements DBTCA has already made and is currently making to its systems and programs to ensure compliance with anti-money-laundering laws and the Written Agreement. The Board will continue to monitor DBTCA's ongoing actions to develop, implement, and maintain effective compliance systems and programs and to meet the requirements of the Written Agreement. Furthermore, the proposed Commodity Trading Activities will not be conducted by DBTCA or its management and commencement of the proposed activities should not impede Deutsche Bank's efforts to address the weaknesses at DBTCA.

In reviewing Notificants' managerial expertise and internal control framework with respect to the proposed Commodity Trading Activities, the Board notes that Notificants have established and maintained policies for monitoring, measuring, and controlling the credit, market, settlement, reputational, legal, and operational risks involved in their Commodity Trading Activities. These policies address key areas, such as counterparty-credit risk, value-at-risk methodology, and internal limits with respect to commodity trading, new business and new product approvals, and identification of transactions that require higher levels of internal approval. The policies also describe critical internal control elements, such as reporting lines, and the frequency and scope of internal audits of Commodity Trading Activities. Notificants have integrated the risk management of Commodity Trading Activities into their overall risk-management framework. Based on the above and all the facts of record, the Board believes that Notificants have the managerial expertise and internal control framework to manage adequately the risks of taking and making delivery of physical commodities as proposed.

As a condition of this order, to limit the potential safety and soundness risks of Commodity Trading Activities, the market value of commodities held by Notificants as a result of Commodity Trading Activities must not exceed 5 percent of Deutsche Bank's consolidated tier 1 capital (as calculated under its home country standard).¹⁷ Notificants also must notify the Federal Reserve Bank of New York if the market value of commodities held by Notificants as a result of their Commodity Trading Activities exceeds 4 percent of Deutsche Bank's tier 1 capital.

In addition, Notificants may take and make delivery only of physical commodities for which derivative con-

tracts have been authorized for trading on a U.S. futures exchange by the Commodity Futures Trading Commission ("CFTC") (unless specifically excluded by the Board) or that have been specifically approved by the Board.¹⁸ This requirement is designed to prevent Notificants from becoming involved in dealing in finished goods and other items, such as real estate, that lack the fungibility and liquidity of exchange-traded commodities.

To minimize the exposure of Notificants to additional risks, including storage, transportation, legal, and environmental risks, Notificants would not be authorized (i) to own, operate, or invest in facilities for the extraction, transportation, storage, or distribution of commodities; or (ii) to process, refine, store, or otherwise alter commodities in the United States. In conducting their Commodity Trading Activities, Notificants have committed to use appropriate storage and transportation facilities owned and operated by third parties.¹⁹

Notificants and their Commodity Trading Activities also remain subject to the general securities, commodities, and energy laws and the rules and regulations (including the antifraud and antimanipulation rules and regulations) of the Securities and Exchange Commission, the CFTC, and the Federal Energy Regulatory Commission.

Permitting Notificants to engage in the limited amount and types of Commodity Trading Activities described above, on the terms described in this order, would not appear to pose a substantial risk to Notificants, depository institutions, or the U.S. financial system generally. Through their existing authority to engage in Commodity Derivatives, Notificants already may incur the price risk associated with commodities. Permitting Notificants to buy and sell commodities in the spot market or physically settle Commodity Derivatives would not appear to increase significantly their potential exposure to commodity-price risk.

For these reasons, and based on Notificants' policies and procedures for monitoring and controlling the risks of Commodity Trading Activities, the Board concludes that consummation of the proposal does not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally and can reasonably be expected to produce benefits to the public that outweigh any potential adverse effects.

18. The particular commodity derivative contract that Notificants take to physical settlement need not be exchange traded, but (in the absence of specific Board approval) futures or options on futures on the commodity underlying the derivative contract must have been authorized for exchange trading by the CFTC.

The CFTC publishes annually a list of the CFTC-authorized commodity contracts. See Commodity Futures Trading Commission, *FY 2004 Annual Report to Congress* 109. With respect to granularity, the Board intends this requirement to permit Commodity Trading Activities involving all types of a listed commodity. For example, Commodity Trading Activities involving any type of coal or coal derivative contract would be permitted, even though the CFTC has authorized only Central Appalachian coal.

19. Approving Commodity Trading Activities as a complementary activity, subject to limits and conditions, would not in any way restrict the existing authority of Notificants to deal in foreign exchange, precious metals, or any other bank-eligible commodity.

15. 12 U.S.C. §1818.

16. See Board of Governors of the Federal Reserve System (2005), "Deutsche Bank Trust Company Americas," press release, October 14, www.federalreserve.gov/newsevents.htm.

17. Notificants would be required to include in this 5 percent limit the market value of any commodities they hold as a result of a failure of reasonable efforts to avoid taking delivery under section 225.28(b)(8)(ii)(B) of Regulation Y (12 CFR 225.28(b)(8)(ii)(B)).

Based on all the facts of record, including the representations and commitments made to the Board by Notificants in connection with the notice, and subject to the terms and conditions set forth in this order, the Board has determined that the notice should be, and hereby is, approved. The Board's determination is subject to all the conditions set forth in Regulation Y, including those in section 225.7,²⁰ and to the Board's authority to require modification or termination of the activities of a BHC or any of its subsidiaries as the Board finds necessary to ensure compliance with, or to prevent evasion of, the provisions and purposes of the BHC Act and the Board's regulations and orders issued thereunder. The Board's decision is specifically conditioned on compliance with all the commitments made to the Board in connection with the notice, including the commitments and conditions discussed in this order. The commitments and conditions relied on in reaching this decision shall be 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.

By order of the Board of Governors, effective December 19, 2005.

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

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

JPMorgan Chase & Co.
New York, New York

Order Approving Notice to Engage in Activities
Complementary to a Financial Activity

JPMorgan Chase & Co. ("JPM Chase"), a financial holding company ("FHC") within the meaning of the Bank Holding Company Act ("BHC Act"), has requested the Board's approval under section 4 of the BHC Act¹ and the Board's Regulation Y (12 CFR Part 225) to trade in physical commodities.

Regulation Y authorizes bank holding companies ("BHCs") to engage as principal in derivative contracts based on financial and nonfinancial assets ("Commodity Derivatives"). Under Regulation Y, a BHC may conduct Commodity Derivatives activities subject to certain restrictions that are designed to limit the BHC's activity to trading and investing in financial instruments rather than dealing directly in physical nonfinancial commodities.² Under these restrictions, a BHC generally is not allowed to take or make delivery of nonfinancial commodities under-

lying Commodity Derivatives. In addition, BHCs generally are not permitted to purchase or sell nonfinancial commodities in the spot market.

The BHC Act, as amended by the Gramm-Leach-Bliley Act ("GLB Act"), permits a BHC to engage in activities that the Board had determined were closely related to banking, by regulation or order, prior to November 12, 1999.³ The BHC Act permits an FHC to engage in a broad range of activities that are defined in the statute to be financial in nature.⁴ Moreover, the BHC Act allows FHCs to engage in any activity that the Board determines, in consultation with the Secretary of the Treasury, to be financial in nature or incidental to a financial activity.⁵

In addition, the BHC Act permits FHCs to engage in any activity that the Board (in its sole discretion) determines is complementary to a financial activity and does not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally.⁶ This authority is intended to allow the Board to permit FHCs to engage, on a limited basis, in an activity that appears to be commercial rather than financial in nature but that is meaningfully connected to a financial activity such that it complements the financial activity.⁷ The BHC Act provides that any FHC seeking to engage in a complementary activity must obtain the Board's prior approval under section 4(j) of the BHC Act.⁸

Through its indirect subsidiary, JPMorgan Ventures Energy Corporation ("JPMVEC"), JPM Chase engages as principal in BHC-permissible Commodity Derivatives and plans to expand those activities to include physical commodity transactions, with a principal focus on energy-related commodities. JPM Chase has, therefore, requested that the Board permit it to engage in physical commodity trading activities, including physical transactions in energy-related commodities, such as natural gas, crude oil, and emissions allowances,⁹ and to take and make delivery of

3. 12 U.S.C. § 1843(c)(8).

4. The Board determined by regulation before November 12, 1999, that engaging as principal in Commodity Derivatives, subject to certain restrictions, was closely related to banking. Accordingly, engaging as principal in BHC-permissible Commodity Derivatives is a financial activity for purposes of the BHC Act. See 12 U.S.C. § 1843(k)(4)(I).

5. 12 U.S.C. § 1843(k)(1)(A).

6. 12 U.S.C. § 1843(k)(1)(B).

7. See 145 Cong. Rec. H11529 (daily ed. Nov. 4, 1999) (Statement of Chairman Leach) ("It is expected that complementary activities would not be significant relative to the overall financial activities of the organization.").

8. 12 U.S.C. § 1843(j).

9. An emission allowance is an intangible right to emit certain pollutants during a given year or any year thereafter that is granted by the U.S. Environmental Protection Agency or comparable foreign regulatory authority to an entity, such as a power plant or other industrial concern, affected by environmental regulation aimed at reducing emission of pollutants. An allowance can be bought, sold, or exchanged by individuals, brokers, corporations, or government entities that establish an account at the relevant governmental authority. Emissions allowances are stored and tracked on the records of the relevant government authority. Accordingly, there are no transportation, environmental, storage, or insurance risks associated with ownership of emissions allowances.

20. 12 CFR 225.7.

1. 12 U.S.C. § 1843.

2. Commodity Derivatives permissible for BHCs under Regulation Y are hereinafter referred to as "BHC-permissible Commodity Derivatives."

physical commodities to settle BHC-permissible Commodity Derivatives in which JPM Chase currently engages (“Commodity Trading Activities”). The Board previously has determined that Commodity Trading Activities involving a particular commodity complement the financial activity of engaging regularly as principal in BHC-permissible Commodity Derivatives based on that commodity.¹⁰ In light of the foregoing and all other facts of record, the Board believes that the Commodity Trading Activities are complementary to the Commodity Derivatives activities of JPM Chase.

To authorize JPM Chase to engage in Commodity Trading Activities as a complementary activity under the GLB Act, the Board also must determine that the activities do not pose a substantial risk to the safety or soundness of depository institutions or the U.S. financial system generally.¹¹ In addition, the Board must determine that the performance of Commodity Trading Activities by JPM Chase “can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.”¹²

Approval of the proposal likely would benefit JPM Chase’s customers by enhancing the company’s ability to provide efficiently a full range of commodity-related services. Approving Commodity Trading Activities for JPM Chase also would enable the company to improve its understanding of physical commodity and commodity derivatives markets and its ability to serve as an effective competitor in those markets.

JPM Chase has established and maintains policies for monitoring, measuring, and controlling the credit, market, settlement, reputational, legal, and operational risks involved in its Commodity Trading Activities. These policies address key areas, such as counterparty-credit risk, value-at-risk methodology, and internal limits with respect to commodity trading, new business and new product approvals, and identification of transactions that require higher levels of internal approval. The policies also describe critical internal control elements, such as reporting lines, and the frequency and scope of internal audits of Commodity Trading Activities. Based on the above and all the facts of record, the Board believes that JPM Chase has the managerial expertise and internal control framework to manage adequately the risks of taking and making delivery of physical commodities as proposed.

As a condition of this order, to limit the potential safety and soundness risks of Commodity Trading Activities, the market value of commodities held by JPM Chase as a

result of Commodity Trading Activities must not exceed 5 percent of JPM Chase’s consolidated tier 1 capital.¹³ JPM Chase also must notify the Federal Reserve Bank of New York if the market value of commodities held by JPM Chase as a result of its Commodity Trading Activities exceeds 4 percent of its tier 1 capital.

In addition, JPM Chase may take and make delivery only of physical commodities for which derivative contracts have been authorized for trading on a U.S. futures exchange by the Commodity Futures Trading Commission (“CFTC”) (unless specifically excluded by the Board) or that have been specifically approved by the Board.¹⁴ This requirement is designed to prevent JPM Chase from becoming involved in dealing in finished goods and other items, such as real estate, that lack the fungibility and liquidity of exchange-traded commodities.

To minimize the exposure of JPM Chase to additional risks, including storage risk, transportation risk, and legal and environmental risks, JPM Chase would not be authorized (i) to own, operate, or invest in facilities for the extraction, transportation, storage, or distribution of commodities; or (ii) to process, refine, or otherwise alter commodities. In conducting its Commodity Trading Activities, JPM Chase has committed to use appropriate storage and transportation facilities owned and operated by third parties.¹⁵

JPM Chase and its Commodity Trading Activities also remain subject to the general securities, commodities, and energy laws and the rules and regulations (including the antifraud and antimanipulation rules and regulations) of the Securities and Exchange Commission, the CFTC, and the Federal Energy Regulatory Commission.

Permitting JPM Chase to engage in the limited amount and types of Commodity Trading Activities described above, on the terms described in this order, would not appear to pose a substantial risk to JPM Chase, depository institutions, or the U.S. financial system generally. Through its existing authority to engage in Commodity Derivatives, JPM Chase already may incur the price risk associated with commodities. Permitting JPM Chase to buy and sell

13. JPM Chase would be required to include in this 5 percent limit the market value of any commodities held by JPM Chase as a result of a failure of its reasonable efforts to avoid taking delivery under section 225.28(b)(8)(ii)(B) of Regulation Y.

14. The particular commodity derivative contract that JPM Chase takes to physical settlement need not be exchange traded, but (in the absence of specific Board approval) futures or options on futures on the commodity underlying the derivative contract must have been authorized for exchange trading by the CFTC.

The CFTC publishes annually a list of the CFTC-authorized commodity contracts. See Commodity Futures Trading Commission, *FY 2004 Annual Report to Congress* 109. With respect to granularity, the Board intends this requirement to permit Commodity Trading Activities involving all types of a listed commodity. For example, Commodity Trading Activities involving any type of coal or coal derivative contract would be permitted, even though the CFTC has authorized only Central Appalachian coal.

15. Approving Commodity Trading Activities as a complementary activity, subject to limits and conditions, would not in any way restrict the existing authority of JPM Chase to deal in foreign exchange, precious metals, or any other bank-eligible commodity.

10. *Barclays Bank, PLC*, 90 *Federal Reserve Bulletin* 511 (2004); *UBS AG*, 90 *Federal Reserve Bulletin* 215 (2004); and *Citigroup Inc.*, 89 *Federal Reserve Bulletin* 508 (2003). For example, Commodity Trading Activities involving all types of crude oil would be complementary to engaging regularly as principal in BHC-permissible Commodity Derivatives based on Brent crude oil.

11. 12 U.S.C. § 1843(k)(1)(B).

12. 12 U.S.C. § 1843(j)(2)(A).

commodities in the spot market or physically settle Commodity Derivatives would not appear to increase significantly the organization's potential exposure to commodity-price risk.

For these reasons, and based on JPM Chase's policies and procedures for monitoring and controlling the risks of Commodity Trading Activities, the Board concludes that consummation of the proposal does not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally and can reasonably be expected to produce benefits to the public that outweigh any potential adverse effects.

Based on all the facts of record, including the representations and commitments made to the Board by JPM Chase in connection with the notice, and subject to the terms and conditions set forth in this order, the Board has determined that the notice should be, and hereby is, approved. The Board's determination is subject to all the conditions set forth in Regulation Y, including those in section 225.7 (12 CFR 225.7), and to the Board's authority to require modification or termination of the activities of a BHC or any of its subsidiaries as the Board finds necessary to ensure compliance with, or to prevent evasion of, the provisions and purposes of the BHC Act and the Board's regulations and orders issued thereunder. The Board's decision is specifically conditioned on compliance with all the commitments made to the Board in connection with the notice, including the commitments and conditions discussed in this order. The commitments and conditions relied on in reaching this decision shall be 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.

By order of the Board of Governors, effective November 18, 2005.

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

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

ORDERS ISSUED UNDER INTERNATIONAL BANKING ACT

*Bank of the Federated States of Micronesia
Kolonias, Pohnpei
Federated States of Micronesia*

Order Approving Establishment of a Branch

The Bank of the Federated States of Micronesia ("Bank"), Kolonias, Pohnpei, Federated States of Micronesia ("Micronesia"), a foreign bank within the meaning of the International Banking Act ("IBA"), has applied under section 7(d) of the IBA (12 U.S.C. § 3105(d)) to establish a branch in Honolulu, Hawaii. The Foreign Bank Super-

vision Enhancement Act of 1991, which amended the IBA, provides that a foreign bank must obtain the approval of the Board to establish a branch in the United States.

Notice of the application, affording interested persons an opportunity to comment, has been published in a newspaper of general circulation in Honolulu, Hawaii (*The Honolulu Star-Bulletin*, November 4, 2005). The time for filing comments has expired, and all comments have been considered.

Bank, with total assets of \$78 million, is the only commercial bank incorporated in Micronesia.¹ The state and national governments or governmental agencies of Micronesia control 80 percent of Bank's shares.² Bank provides a variety of banking services to retail and corporate customers through branches in each of the four states comprising Micronesia (Kosrae, Pohnpei, Chuuk, and Yap). The proposed branch would be Bank's first office outside Micronesia.³ Bank is a qualifying foreign banking organization under Regulation K (12 CFR 211.23(b)).

The primary reason for establishing the proposed branch is to provide Bank with access to check-clearing and wire-transfer services in the United States that are currently provided by the bank's U.S. correspondent bank. The branch would also coordinate safekeeping and other services related to access to the U.S. payments system. In addition, Bank anticipates that the branch may engage in other permissible activities in the future.

Under the IBA and Regulation K, in acting on an application by a foreign bank to establish a branch, the Board must consider whether the foreign bank:

- (1) engages directly in the business of banking outside of the United States;
- (2) has furnished to the Board the information it needs to assess the application adequately; and
- (3) is subject to comprehensive supervision on a consolidated basis by its home country supervisor (12 U.S.C. § 3105(d)(2); 12 CFR 211.24(c)(1)).⁴ The

1. Asset data are as of September 30, 2005.

2. No other shareholder owns or controls more than 5 percent of Bank's shares.

3. Bank also has a license for a loan production office in Saipan, the Northern Mariana Islands; however, it does not currently have an office in Saipan.

4. In assessing this standard, the Board considers, among other factors, the extent to which the home country supervisors:

- (i) ensure that the bank has adequate procedures for monitoring and controlling its activities worldwide;
- (ii) obtain information on the condition of the bank and its subsidiaries and offices through regular examination reports, audit reports, or otherwise;
- (iii) obtain information on the dealings with and relationship between the bank and its affiliates, both foreign and domestic;
- (iv) receive from the bank financial reports that are consolidated on a worldwide basis or comparable information that permits analysis of the bank's financial condition on a worldwide consolidated basis;
- (v) evaluate prudential standards, such as capital adequacy and risk asset exposure, on a worldwide basis. These are indicia of comprehensive, consolidated supervision. No single factor is essential, and other elements may inform the Board's determination.

Board also may consider additional standards set forth in the IBA and Regulation K (12 U.S.C. §3105(d)(3)–(4); 12 CFR 211.24(c)(2)–(3)).

As noted above, Bank engages directly in the business of banking outside the United States. Bank also has provided the Board with information necessary to assess the application through submissions that address the relevant issues.

With respect to supervision by home country authorities, Bank is subject to supervision and regulation by the Federated States of Micronesia Banking Board (“FSMBB”). In addition, Bank is subject to all U.S. banking and banking-related laws by treaty and is supervised by the Federal Deposit Insurance Corporation (“FDIC”) pursuant to those laws. On October 1, 1982, the governments of the United States and Micronesia concluded a Compact of Free Association (the “Compact”).⁵ Under section 221 of the Compact, the United States is obligated to make available to Bank the FDIC’s programs and services, and under section 231, they are provided in accordance with a Federal Programs and Services Agreement between the governments of the United States and Micronesia (the “Agreement”), that became effective simultaneously with the Compact.⁶

The Agreement provides that “[a]s an ongoing FDIC-insured and FDIC-supervised bank, the Bank and its management are and shall continue to be subject to existing and future U.S. banking and banking-related laws, rules and regulations relating to supervision, regulatory, and resolution and receivership matters. . . .” Accordingly, Bank is supervised by the FDIC on a consolidated basis. Bank is subject to on-site examination by both the FSMBB and FDIC and is audited annually in accordance with U.S. auditing standards.⁷ Based on all the facts of record, and in light of the Agreement, which designates the FDIC as a supervisor of Bank, it has been determined that Bank is subject to comprehensive supervision on a consolidated basis by the appropriate authorities in its home country for purposes of the IBA.

The additional standards set forth in section 7 of the IBA and Regulation K (*see* 12 U.S.C. §3105(d)(3)–(4); 12 CFR 211.24(c)(2)–(3)) have also been taken into account. The FSMBB and FDIC have no objection to the establishment of the proposed branch.

As noted, Bank is subject to all U.S. banking laws and regulations, including those related to capital adequacy and anti-money-laundering, and Bank’s compliance with those laws and regulations is monitored and enforced by the FDIC. Bank is considered well capitalized, and managerial and other financial resources of Bank are considered con-

sistent with approval. The activities of the proposed branch would initially be limited to processing transactions for Bank’s head office and customers. Bank appears to have the experience and capacity to support the proposed branch. Bank has also established controls and procedures for the proposed branch to ensure compliance with U.S. law and for its operations in general.

With respect to access to information about Bank’s operations, the restrictions on disclosure in relevant jurisdictions in which Bank operates have been reviewed, and relevant government authorities have been communicated with regarding access to information. Bank has committed to make available to the Board such information on the operations of Bank and any of its affiliates that the Board deems necessary to determine and enforce compliance with the IBA, the Bank Holding Company Act, and other applicable federal law. To the extent that the provision of such information to the Board may be prohibited by law or otherwise, Bank has committed to cooperate with the Board to obtain any necessary consents or waivers that might be required from third parties for disclosure of such information. In addition, the FDIC is permitted to share information on Bank’s operations with other supervisors, including the Board. In light of these commitments and other facts of record, and subject to the condition described below, it has been determined that Bank has provided adequate assurances of access to any necessary information that the Board may request.

Based on the foregoing and all the facts of record, Bank’s application to establish a branch is hereby approved by the Director of the Division of Banking Supervision and Regulation, with the concurrence of the General Counsel, pursuant to authority delegated by the Board. Should any restrictions on access to information on the operations or activities of Bank and its affiliates subsequently interfere with the Board’s ability to obtain information to determine and enforce compliance by Bank or its affiliates with applicable federal statutes, the Board may require termination of any of Bank’s direct or indirect activities in the United States. Approval of the application also is specifically conditioned on compliance by Bank with the conditions imposed in this order and the commitments made to the Board in connection with this application.⁸ For purposes of this action, these commitments and conditions are deemed to be conditions imposed by the Board in writing in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

By order, approved pursuant to authority delegated by the Board, effective December 23, 2005.

JENNIFER J. JOHNSON
Secretary of the Board

5. In the United States, the Compact was approved by Public Law 99–239 of January 14, 1986, as amended (48 U.S.C. §1901 et seq.) and became effective on November 3, 1986. *See Presidential Proclamation 5564 of November 3, 1986, 51 Federal Register 40,399 (1986).*

6. Article XI of the Agreement governs the provision of FDIC services and related programs.

7. FSMBB cooperates with the FDIC by participating in examinations and sharing information.

8. The Board’s authority to approve the establishment of the proposed branch parallels the continuing authority of the state of Hawaii to license offices of a foreign bank. The Board’s approval of this application does not supplant the authority of the state of Hawaii to license the proposed office of Bank in accordance with any terms or conditions that it may impose.

*Deutsche Genossenschafts-Hypothekenbank AG
Hamburg, Germany*

Order Approving Establishment of a Representative
Office

Deutsche Genossenschafts-Hypothekenbank AG (“Bank”), Hamburg, Germany, a foreign bank within the meaning of the International Banking Act (“IBA”), has applied under section 10(a) of the IBA (12 U.S.C. § 3107(a)) to establish a representative office in New York, New York. The Foreign Bank Supervision Enhancement Act of 1991, which amended the IBA, provides that a foreign bank must obtain the approval of the Board to establish a representative office in the United States.

Notice of the application, affording interested persons an opportunity to submit comments, has been published in a newspaper of general circulation in New York, New York (*The New York Times*, July 8, 2005). The time for filing comments has expired, and all comments have been considered.

Bank, with total consolidated assets of approximately \$93 billion,¹ is the third largest mortgage bank in Germany and is primarily engaged in commercial real estate financing. Outside Germany, Bank operates representative offices in Paris, London, and Amsterdam. Bank’s proposed New York office would be its first office in the United States. Bank is a subsidiary of Deutsche Zentral-Genossenschaftsbank AG, Frankfurt, Germany (“DZ Bank”), one of two regional central banks for the German cooperative financial sector. DZ Bank engages in banking operations in the United States through its branch in New York, New York, and also engages in nonbanking activities in the United States through a number of subsidiaries. DZ Bank owns 5.1 percent of Bank directly and 62.6 percent of Bank indirectly through a wholly owned subsidiary, VR-Immobilien AG (“VR Immo”).²

The proposed representative office would market Bank’s real estate loans to existing and potential customers in the United States. Bank would also seek syndication opportunities through the proposed office.

Under the IBA and Regulation K, in acting on an application by a foreign bank to establish a representative office, the Board shall take into account whether:

- (1) the foreign bank has furnished to the Board the information it needs to assess the application adequately;
- (2) the foreign bank and any foreign bank parent engages directly in the business of banking outside the United States; and
- (3) the foreign bank and any foreign bank parent is subject to comprehensive supervision on a con-

solidated basis by its home country supervisor (12 U.S.C. § 3107(a)(2); 12 CFR 211.24(d)(2)).³ The Board also may take into account additional standards set forth in the IBA and Regulation K (12 U.S.C. § 3105(d)(3)–(4); 12 CFR 211.24(c)(2)).

As noted above, Bank engages directly in the business of banking outside the United States. Bank also has provided the Board with information necessary to assess the application through submissions that address the relevant issues.

With respect to supervision by home country authorities, the Board previously determined that DZ Bank’s predecessor, Deutsche-Genossenschaftsbank AG, was subject to comprehensive consolidated supervision in connection with the application of its foreign bank subsidiary, Deutsche VerkehrsBank, to establish a representative office in the United States.⁴ In addition, the Board has determined in connection with applications involving other mortgage banks in Germany that those banks were subject to supervision on a consolidated basis by their primary home country supervisor, Germany’s Federal Agency for the Supervision of Financial Services (“BaFin”).⁵ Bank is supervised by BaFin on substantially the same terms and conditions as those other banks. Based on all the facts of record, it has been determined that Bank is, and DZ Bank continues to be, subject to comprehensive supervision and regulation on a consolidated basis by its home country supervisor.

The additional standards set forth in section 7 of the IBA and Regulation K (*see* 12 U.S.C. § 3105(d)(3)–(4); 12 CFR 211.24(c)(2)) have also been taken into account. BaFin has no objection to the establishment of the proposed representative office.

With respect to the financial and managerial resources of Bank, consideration of Bank’s record of operations in its

3. In assessing the supervision standard, the Board considers, among other factors, the extent to which the home country supervisors:

- (i) ensure that the bank has adequate procedures for monitoring and controlling its activities worldwide;
- (ii) obtain information on the condition of the bank and its subsidiaries and offices through regular examination reports, audit reports, or otherwise;
- (iii) obtain information on the dealings with and relationship between the bank and its affiliates, both foreign and domestic;
- (iv) receive from the bank financial reports that are consolidated on a worldwide basis or comparable information that permits analysis of the bank’s financial condition on a worldwide consolidated basis;
- (v) evaluate prudential standards, such as capital adequacy and risk asset exposure, on a worldwide basis.

These are indicia of comprehensive, consolidated supervision. No single factor is essential, and other elements may inform the Board’s determination.

4. *See Deutsche VerkehrsBank*, 85 *Federal Reserve Bulletin* 588 (1999). That finding was affirmed in connection with DZ Bank’s 2004 election to be treated as a financial holding company.

5. *See, e.g., Hypothekenbank in Essen AG*, 90 *Federal Reserve Bulletin* 402 (2004); *Allgemeine HypothekenBank Rheinbaden AG*, 88 *Federal Reserve Bulletin* 196 (2002); *DePfa Bank AG*, 87 *Federal Reserve Bulletin* 710 (2001); and *Deutsche Hyp Deutsche Hypothekenbank Frankfurt-Hamburg AG*, 86 *Federal Reserve Bulletin* 658 (2000).

1. Unless otherwise indicated, data are as of June 30, 2005.

2. The remaining shares of DZ Bank are owned by four cooperative holding companies that own the shares in trust for VR Immo. Local credit cooperatives hold the ownership interests in these four companies.

home country, its overall financial resources, and its standing with its home country supervisor, indicate that financial and managerial factors are consistent with approval of the proposed representative office. Bank appears to have the experience and capacity to support the proposed representative office and has established controls and procedures for the proposed representative office to ensure compliance with U.S. law, as well as controls and procedures for its worldwide operations generally.

Germany is a member of the Financial Action Task Force and subscribes to its recommendations regarding measures to combat money laundering and international terrorism. In accordance with these recommendations, Germany has enacted laws and created legislative and regulatory standards to deter money laundering, terrorist financing, and other illicit activities. Money laundering is a criminal offense in Germany, and credit institutions are required to establish internal policies, procedures, and systems for the detection and prevention of money laundering throughout their worldwide operations. Bank has policies and procedures to comply with these laws and regulations that are monitored by governmental entities responsible for anti-money-laundering compliance.

With respect to access to information on Bank's operations, the restrictions on disclosure in relevant jurisdictions in which Bank operates have been reviewed, and relevant government authorities have been communicated with regarding access to information. Bank and its parent companies have committed to make available to the Board such information on the operations of Bank and any of its affiliates that the Board deems necessary to determine and enforce compliance with the IBA, the Bank Holding Company Act of 1956, as amended, and other applicable federal law. To the extent that the provision of such information to the Board may be prohibited by law or otherwise, Bank has committed to cooperate with the Board to obtain any necessary consents or waivers that might be required from third parties for disclosure of such information. In addition, subject to certain conditions, BaFin may share information on Bank's operations with other supervisors, including the Board. In light of these commitments and other facts of record, and subject to the condition described below, it has been determined that Bank has provided adequate assurances of access to any necessary information that the Board may request.

Based on the foregoing and all the facts of record, Bank's application to establish a representative office is hereby approved.⁶ Should any restrictions on access to information on the operations or activities of Bank or its affiliates subsequently interfere with the Board's ability to obtain information to determine and enforce compliance by Bank or its affiliates with applicable federal statutes, the Board may require or recommend termination of any of Bank's direct or indirect activities in the United States. Approval of this application also is specifically conditioned

6. Approved by the Director of the Division of Banking Supervision and Regulation, with the concurrence of the General Counsel, pursuant to authority delegated by the Board.

on compliance by Bank with the conditions imposed in this order and the commitments made to the Board in connection with this application.⁷ For purposes of this action, these commitments and conditions are deemed to be conditions imposed by the Board in writing in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

By order, approved pursuant to authority delegated by the Board, effective October 25, 2005.

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Lloyds TSB Offshore Limited
St. Helier, Jersey

Order Approving Establishment of a Representative Office

Lloyds TSB Offshore Limited ("Bank"), St. Helier, Jersey, a foreign bank within the meaning of the International Banking Act ("IBA"), has applied under section 10(a) of the IBA (12 U.S.C. § 3107(a)) to establish a representative office in Miami, Florida. The Foreign Bank Supervision Enhancement Act of 1991, which amended the IBA, provides that a foreign bank must obtain the approval of the Board to establish a representative office in the United States.

Notice of the application, affording interested persons an opportunity to submit comments, has been published in a newspaper of general circulation in Miami, Florida (*The Miami Herald*, March 21, 2005). The time for filing comments has expired, and all comments have been considered.

Bank, with total consolidated assets of approximately \$12 billion,¹ is one of the largest banks in Jersey. Bank provides a range of financial services to corporate and retail clients and is authorized to provide such services to residents of Jersey.² Outside Jersey, Bank operates branches in Guernsey and the Isle of Man and a representative office in Hong Kong. The proposed representative office would be Bank's first office in the United States. Bank is an indirect wholly owned subsidiary of Lloyds TSB Bank, plc ("Lloyds UK"), London, England.³ Lloyds UK is the principal wholly owned bank subsidiary of

7. The Board's authority to approve the establishment of the proposed representative office parallels the continuing authority of the state of New York to license offices of a foreign bank. The Board's approval of this application does not supplant the authority of the state of New York to license the proposed office of Bank in accordance with any terms or conditions that it may impose.

1. Unless otherwise indicated, data are as of June 30, 2005.

2. Bank does not operate under an "offshore banking license," as that term is defined in section 312(a)(4)(A) of the USA PATRIOT Act of 2001 (31 U.S.C. § 5318(i)(4)(A)).

3. Lloyds UK holds its interest in Bank through two other wholly owned subsidiaries, Lloyds TSB Offshore Holdings Limited, a Jersey company, and Lloyds Bank Subsidiaries Limited, a U.K. company.

Lloyds TSB Group plc, also of London (“Lloyds Group”), which is Bank’s ultimate parent.⁴ Through its offices and subsidiaries, Lloyds UK offers banking services in a number of countries worldwide. In the United States, Lloyds UK operates a branch in New York, New York, and an agency in Miami, Florida, and owns several U.S. subsidiaries that engage in nonbanking activities.

The proposed representative office would act as a liaison between Bank and its existing and potential customers in the United States. The office’s activities would include soliciting new business, providing information to customers concerning their accounts with Bank, and maintaining client data and records.

Under the IBA and Regulation K, in acting on an application by a foreign bank to establish a representative office, the Board shall take into account whether (1) the foreign bank has furnished the information the Board needs to assess the application adequately; (2) the foreign bank and any foreign bank parent engage directly in the business of banking outside of the United States; and (3) the foreign bank and any foreign bank parent are subject to comprehensive supervision on a consolidated basis by their home country supervisors (12 U.S.C. §3107(a)(2); 12 CFR 211.24(d)(2)).⁵ The Board also may take into account additional standards set forth in the IBA and Regulation K (12 U.S.C. §3105(d)(3)–(4); 12 CFR 211.24(c)(2)). The Board will consider that the supervision standard has been met if it determines that the applicant bank is subject to a supervisory framework that is consistent with the activities of the proposed representative office, taking into account the nature of such activities.⁶ This is a lesser standard than the comprehensive, consolidated supervision standard applicable to proposals to establish branch or agency offices of a foreign bank. The Board considers the lesser standard sufficient for approval of representative office

applications, because representative offices may not engage in banking activities (12 CFR 211.24(d)(2)). This application has been considered under the lesser standard.

As noted above, Bank and Lloyds UK engage directly in the business of banking outside the United States. Bank also has provided the Board with information necessary to assess the application through submissions that address the relevant issues.

The Jersey Financial Services Commission (“Jersey FSC”) is the primary regulatory and supervisory authority for Jersey banks and, as such, is the home country supervisor of Bank.⁷ Jersey FSC policy permits only banking groups of “international stature and reputation” that it has determined to be subject to satisfactory consolidated supervision by the supervisory body of the group’s country of origin to establish banks in Jersey. The Jersey FSC performs on-site inspections and off-site monitoring of all Jersey banks, including monitoring the work of external auditors. The Jersey FSC uses on-site reviews to focus on the adequacy of policies and procedures designed to combat money laundering and the bank’s management of information systems and internal procedures to determine whether the bank is adequately managing its principal risks. The frequency of on-site reviews depends on the bank’s risk profile, but all Jersey banks, including Bank, are inspected at least once every two years.

Off-site supervision consists primarily of the review of periodic financial reports submitted by Bank, including quarterly prudential returns, large exposure reports, suspicious transaction reports, and annual financial statements. External auditors are required to confirm that returns have been prepared in accordance with reporting instructions issued by the Jersey FSC. In addition, Bank’s internal auditors conduct periodic risk-based audits of Bank’s business activities.

Jersey law authorizes the Jersey FSC to conduct investigations, to request and receive information from any bank and its domestic and foreign affiliates, and to impose conditions on licensees and revoke licenses, and provides penalties for violations of the law.

Based on all the facts of record, it has been determined that Bank is subject to a supervisory framework that is consistent with the activities of the proposed representative office, taking into account the nature of such activities.

With respect to supervision of Lloyds UK by home country authorities, the Board previously has determined, in connection with other applications involving banks in the United Kingdom, that those banks were subject to home country supervision on a consolidated basis.⁸ Lloyds UK is supervised by the Financial Services Authority (“FSA”) on substantially the same terms and conditions as

4. No shareholder holds more than 5 percent of Lloyds Group’s shares.

5. In assessing the supervision standard, the Board considers, among other factors, the extent to which the home country supervisors:

- (i) ensure that the bank has adequate procedures for monitoring and controlling its activities worldwide;
- (ii) obtain information on the condition of the bank and its subsidiaries and offices through regular examination reports, audit reports, or otherwise;
- (iii) obtain information on the dealings with and relationship between the bank and its affiliates, both foreign and domestic;
- (iv) receive from the bank financial reports that are consolidated on a worldwide basis or comparable information that permits analysis of the bank’s financial condition on a worldwide consolidated basis;
- (v) evaluate prudential standards, such as capital adequacy and risk asset exposure, on a worldwide basis. These are indicia of comprehensive, consolidated supervision. No single factor is essential, and other elements may inform the Board’s determination.

6. See, e.g., *Jamaica National Building Society*, 88 *Federal Reserve Bulletin* 59 (2002); *RHEINHYP Rheinische Hypothekenbank AG*, 87 *Federal Reserve Bulletin* 558 (2001); see also *Promstroybank of Russia*, 82 *Federal Reserve Bulletin* 599 (1996); *Komerční Banka, a.s.*, 82 *Federal Reserve Bulletin* 597 (1996); *Commercial Bank “Ion Tiriac,” S.A.*, 82 *Federal Reserve Bulletin* 592 (1996).

7. The Jersey FSC is responsible for the direct oversight of Bank. The U.K. Financial Services Authority, as the supervisor of Lloyds UK and its subsidiaries, consults with the Jersey FSC about supervision of Bank.

8. See *Barclays plc*, 91 *Federal Reserve Bulletin* 48 (2005); *HBOS Treasury Services plc*, 90 *Federal Reserve Bulletin* 103 (2004); *The Royal Bank of Scotland Group*, 90 *Federal Reserve Bulletin* 87 (2004).

those other banks. Based on all the facts of record, it has been determined that Lloyds UK is subject to comprehensive supervision and regulation on a consolidated basis by its home country supervisor.

The additional standards set forth in section 7 of the IBA and Regulation K (*see* 12 U.S.C. § 3105(d)(3)–(4); 12 CFR 211.24(c)(2)) have also been taken into account. The FSA and the Jersey FSC have no objection to the establishment of the proposed representative office.

With respect to the financial and managerial resources of Bank, taking into consideration Bank's record of operations in its home country, its overall financial resources, and its standing with its home country supervisor, financial and managerial factors are consistent with approval of the proposed representative office. Bank appears to have the experience and capacity to support the proposed representative office and has established controls and procedures for the proposed representative office to ensure compliance with U.S. law, as well as controls and procedures for its worldwide operations generally.

Jersey is a member of the Offshore Group of Banking Supervisors, which is an observer organization to the Financial Action Task Force ("FATF"), and subscribes to the FATF's recommendations regarding measures to combat money laundering and international terrorism. In accordance with these recommendations, Jersey has enacted laws and created legislative and regulatory standards to deter money laundering, terrorist financing, and other illicit activities. Money laundering is a criminal offense in Jersey, and financial services businesses are required to establish internal policies, procedures, and systems for the detection and prevention of money laundering. Bank has policies and procedures to comply with these laws and regulations, and these policies and procedures are monitored by the Jersey FSC.

With respect to access to information on Bank's operations, the restrictions on disclosure in relevant jurisdictions in which Bank operates have been reviewed, and relevant government authorities have been communicated with regarding access to information. Bank and Lloyds Group have committed to make available to the Board such information on the operations of Bank and any of its affiliates that the Board deems necessary to determine and enforce compliance with the IBA, the Bank Holding Company Act of 1956, as amended, and other applicable federal law. To the extent that the provision of such information

to the Board may be prohibited by law or otherwise, Bank and Lloyds Group have committed to cooperate with the Board to obtain any necessary consents or waivers that might be required from third parties for disclosure of such information. In addition, subject to certain conditions, the Jersey FSC may share information on Bank's operations with other supervisors, including the Board. In light of these commitments and other facts of record, and subject to the condition described below, it has been determined that Bank and Lloyds Group have provided adequate assurances of access to any necessary information that the Board may request.

Based on the foregoing and all the facts of record, Bank's application to establish a representative office is hereby approved.⁹ Should any restrictions on access to information on the operations or activities of Bank or its affiliates subsequently interfere with the Board's ability to obtain information to determine and enforce compliance by Bank or its affiliates with applicable federal statutes, the Board may require termination of any of Bank's direct or indirect activities in the United States. Approval of this application also is specifically conditioned on compliance by Bank and Lloyds Group with the conditions imposed in this order and the commitments made to the Board in connection with this application.¹⁰ For purposes of this action, these commitments and conditions are deemed to be conditions imposed by the Board in writing in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

By order, approved pursuant to authority delegated by the Board, effective November 1, 2005.

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

9. Approved by the Director of the Division of Banking Supervision and Regulation, with the concurrence of the General Counsel, pursuant to authority delegated by the Board.

10. The Board's authority to approve the establishment of the proposed representative office parallels the continuing authority of the state of Florida to license offices of a foreign bank. The Board's approval of this application does not supplant the authority of the state of Florida or its agent, the Florida Department of Financial Services ("Department"), to license the proposed office of Bank in accordance with any terms or conditions that the Department may impose.