
Legal Developments: Second Quarter, 2009

ORDERS ISSUED UNDER BANK HOLDING COMPANY ACT

ORDERS ISSUED UNDER SECTION 3 OF THE BANK HOLDING COMPANY ACT

Allied Irish Banks, p.l.c.
Dublin, Ireland

M&T Bank Corporation
Buffalo, New York

First Empire State Holding Company
Buffalo, New York

Manufacturers and Traders Trust Company
Buffalo, New York

Order Approving the Acquisition of a Bank Holding Company, Merger of Banks, and Establishment of Branches

Allied Irish Banks, p.l.c. (“Allied Irish”) and its subsidiary, M&T Bank Corporation (“M&T”), bank holding companies within the meaning of the Bank Holding Company Act (“BHC Act”), and First Empire State Holding Company (“First Empire”)¹ (collectively, “Applicants”) have requested the Board’s approval under section 3 of the BHC Act² to acquire Provident Bankshares Corporation (“Provident”) and thereby indirectly acquire Provident’s subsidiary bank, Provident Bank of Maryland (“Provident Bank”), both of Baltimore, Maryland. In addition, M&T’s subsidiary state member bank, Manufacturers and Traders Trust Company (“M&T Bank”), Buffalo, has requested the Board’s approval under section 18(c) of the Federal Deposit Insurance Act³ (“Bank Merger Act”) to merge with Provident Bank, with M&T Bank as the surviving entity. M&T

Bank also has applied under section 9 of the Federal Reserve Act to establish and operate branches at the main office and branches of Provident Bank.⁴

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (74 *Federal Register* 5656 (2009)). 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 Act.

Allied Irish, with total consolidated assets equivalent to approximately \$244 billion, is the second largest depository organization in Ireland and provides a full range of banking, financial, and related services primarily in Ireland, the United Kingdom, and the United States.⁵ Allied Irish operates a branch in New York and through M&T controls two subsidiary banks, M&T Bank and M&T Bank, National Association, Oakfield, New York, which operate in seven states and the District of Columbia.⁶ M&T, with total consolidated assets of \$64.8 billion, is the 23rd largest depository organization in the United States, controlling \$38.4 billion in deposits. M&T is the fifth largest depository organization in Maryland, controlling deposits of approximately \$7.4 billion.

Provident has total consolidated assets of approximately \$6.6 billion, and Provident Bank, Provident’s only subsidiary insured depository institution,⁷ operates in Maryland, Pennsylvania, Virginia, and the District of Columbia. Provident is the eighth largest depository organization in Maryland, controlling deposits of approximately \$3.85 billion.

On consummation of the proposal, M&T would become the 21st largest depository organization in the United States, with total consolidated assets of approximately \$71.4 billion. M&T would control deposits of approximately \$43.2 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the United States. In Maryland, M&T would become the second largest depository organization, controlling deposits of approximately \$11.3 billion, which repre-

4. 12 U.S.C. § 321.

5. Asset and nationwide deposit-ranking data are as of December 31, 2008. Statewide deposit and ranking data are as of June 30, 2008, and reflect merger activity through April 16, 2009.

6. M&T Bank operates in Delaware, Maryland, New Jersey, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia. Top of Form M&T Bank, National Association, operates only in New York.

7. For purposes of this order, insured depository institutions include commercial banks, savings banks, and savings associations.

1. First Empire also has applied to become a bank holding company in connection with this application. First Empire is a newly formed, wholly owned subsidiary of M&T. M&T proposes to merge Provident into First Empire, with First Empire as the survivor.

2. 12 U.S.C. § 1842.

3. 12 U.S.C. § 1828(c).

sent approximately 12 percent of the total amount of deposits of insured depository institutions in the state.

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 M&T is New York,⁸ and Provident is located in Maryland, Pennsylvania, Virginia, and the District of Columbia.⁹

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

The BHC Act and the Bank Merger Act prohibit 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. Both statutes also prohibit 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

Applicants and Provident have subsidiary depository institutions that compete directly in three banking markets: Washington, DC-Maryland-Virginia-West Virginia; Baltimore, Maryland-Pennsylvania; and Annapolis, Maryland. The Board has reviewed carefully the competitive effects of the proposal in each of these banking markets in light of all the facts of record. In particular, the Board has considered the number of competitors that would remain in the bank-

8. 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.

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

10. 12 U.S.C. §§ 1842(d)(1)(A)-(B) and 1842(d)(2)-(3). Applicants are adequately capitalized and adequately managed, as defined by applicable law. Provident Bank has been in existence and operated for the minimum period of time required by Maryland law and for more than five years. See 12 U.S.C. § 1842(d)(1)(B)(i)-(ii). On consummation of the proposal, Applicants would control less than 10 percent of the total amount of deposits of insured depository institutions in the United States (12 U.S.C. § 1842(d)(2)(A)). Applicants also would control less than 30 percent of, and less than the applicable state deposit cap for, the total amount of deposits in insured depository institutions in the relevant states (12 U.S.C. §§ 1842(d)(2)(B)-(D)). 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) and 12 U.S.C. § 1828(c)(5).

ing markets, the relative shares of total deposits in depository institutions in the markets ("market deposits") controlled by Applicants' subsidiary depository institutions and by Provident Bank,¹² the concentration levels of market deposits and the increase in those levels as measured by the Herfindahl-Hirschman Index ("HHI") under the Department of Justice Merger Guidelines ("DOJ Guidelines"),¹³ 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 all three banking markets.¹⁴ On consummation of the proposal, each of the three markets would remain moderately concentrated, as measured by the HHI, and the change in the HHI would be less than 200 points in each market. In addition, numerous competitors would remain in all three banking markets.

The DOJ has conducted a detailed review of the potential competitive effects of the proposal and has advised the Board that consummation of the transaction 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 any of the three banking markets where the subsidiary depository institutions of Applicants and Provident compete directly or in any other relevant banking market. Accordingly, the Board has determined that competitive considerations are consistent with approval.

FINANCIAL, MANAGERIAL, AND SUPERVISORY CONSIDERATIONS

Section 3 of the BHC Act and the Bank Merger Act require the Board to consider the financial and managerial re-

12. Deposit and market share data are as of June 30, 2008, adjusted to reflect mergers and acquisitions through March 30, 2009, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386, 387 (1989); *Provident Corporation*, 70 *Federal Reserve Bulletin* 743, 744 (1984). Thus, the Board regularly has included thrift institution deposits in the market share calculation on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52, 55 (1991).

13. 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.

14. Those banking markets and the effects of the proposal on their concentrations of banking resources are described in the appendix.

sources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has considered these factors carefully in light of all the facts of record, including confidential supervisory and examination information from the U.S. banking supervisors of the institutions involved, and publicly reported and other financial information, including information provided by Applicants. The Board also has consulted with the Irish Financial Services Regulatory Authority (“Financial Regulator”), the agency with primary responsibility for the supervision and regulation of Irish banks, including Allied Irish.¹⁵

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

The Board has carefully considered the financial resources of the organizations involved in the proposal. The capital levels of Allied Irish would continue to exceed the minimum levels that would be required under the Basel Capital Accord and are considered to be equivalent to the capital levels that would be required of a U.S. banking organization.¹⁶ In addition, M&T, Provident, and the subsidiary depository institutions involved are well capitalized and would remain so on consummation. Based on its review of the record, the Board finds that Applicants have sufficient financial resources to effect the proposal. The proposed transaction is structured as a share exchange.

15. The Central Bank of Ireland was restructured and renamed as the Central Bank and Financial Services Authority of Ireland (“CBFSAI”) in 2003. The Financial Regulator is an autonomous entity within the CBFSAI and has responsibility for financial sector regulation and consumer protection.

16. The Irish government has announced a plan, subject to certain approvals, to invest up to \$4.9 billion in Allied Irish in exchange for noncumulative preference shares plus warrants. The minister for finance would have the right to appoint 25 percent of the board of directors of Allied Irish and would have 25 percent of total ordinary voting rights for change of control proposals and board appointments. The recapitalization program will be funded from the National Pensions Reserve Fund (“Fund”), which is an asset of the Irish government and appears on the government’s balance sheet. The Fund is controlled and managed by the National Pensions Reserve Fund Commission, which is a government agency and performs its functions through another government agency, the National Treasury Management Agency. Because the investment in Allied Irish is being made and managed by the Irish government, and not through a government-owned or government-controlled company, approval is not required under section 3 of the BHC Act for the government’s indirect investment in M&T or Provident.

The Board also has considered the managerial resources of the organizations involved. The Board has reviewed the examination records of Applicants, Provident, 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 other relevant banking supervisory agencies, including the Federal Deposit Insurance Corporation (“FDIC”), with the organizations and their records of compliance with applicable banking law and with anti-money-laundering laws. 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.¹⁷

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.¹⁸ As noted, the Financial Regulator is the primary supervisor of Irish banks, including Allied Irish. The Board previously has determined that Allied Irish is subject to comprehensive supervision on a consolidated basis by its home-country supervisor.¹⁹ Based on this finding and all the facts of record, the Board has concluded that Allied Irish continues

17. Section 3 of the BHC Act also 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 (12 U.S.C. § 1842(c)(3)(A)). The Board has reviewed the restrictions on disclosure in the relevant jurisdictions in which Allied Irish operates and has communicated with relevant government authorities concerning access to information. In addition, Allied Irish has committed that, to the extent not prohibited by applicable law, it will 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 International Banking Act, and other applicable federal laws. Allied Irish also has committed to cooperate with the Board to obtain any waivers or exemptions that may be necessary to enable its affiliates to make such information available to the Board. Based on all the facts of record, the Board has concluded that Allied Irish has provided adequate assurances of access to any appropriate information the Board may request.

18. 12 U.S.C. § 1843(c)(3)(B). As provided in Regulation Y, the Board determines whether a foreign bank is subject to consolidated home-country supervision under the standards set forth in Regulation K. 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).

19. See, e.g., *Allied Irish Banks, p.l.c.*, 94 *Federal Reserve Bulletin* C11 (2007).

to be subject to comprehensive supervision on a consolidated basis by its home-country supervisor.

CONVENIENCE AND NEEDS CONSIDERATIONS

In acting on a proposal under section 3 of the BHC Act and the Bank Merger Act, the Board is required to consider the effects of the proposal on the convenience and needs of the communities to be served and to take into account the records of the relevant insured depository institutions under the Community Reinvestment Act (“CRA”).²⁰ 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.²¹

The Board has considered carefully all the facts of record, including evaluations of the CRA performance records of M&T Bank and Provident Bank, data reported by M&T under the Home Mortgage Disclosure Act (“HMDA”),²² other information provided by Applicants, confidential supervisory information, and a public comment received on the proposal. The commenter generally commended M&T Bank’s CRA performance record and commitment to community development, but the commenter recommended that M&T Bank strengthen its affordable home mortgage lending product, increase community development and multifamily loans in LMI census tracts, provide more community development loans to not-for-profit organizations, and increase the number of its branches in LMI neighborhoods.

A. CRA Performance Evaluations

As provided in the CRA, the Board has reviewed the convenience and needs factor in light of the evaluations by the appropriate federal supervisor of the CRA performance record of the relevant insured depository institution. 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.²³

M&T Bank received an “outstanding” rating at its most recent CRA performance evaluation by the Federal Reserve Bank of New York (“Reserve Bank”), as of May 12, 2008 (“2008 Evaluation”).²⁴ Provident Bank received a “satis-

factory” rating at its most recent CRA performance evaluation by the FDIC, as of July 2, 2007.²⁵

In addition to the overall “outstanding” rating that M&T Bank received in the 2008 Evaluation, the bank received separate overall “outstanding” or “satisfactory” ratings in all the states and multistate metropolitan areas reviewed.²⁶ Examiners reported that M&T Bank’s geographic distribution of loans was good. They also stated that the bank’s distribution of loans to borrowers reflected a good penetration among customers of different income levels and to businesses of different revenue sizes.²⁷ In addition, examiners noted that M&T Bank offered a Federal National Mortgage Association affordable mortgage product in all its assessment areas that had resulted in the origination of almost 1,000 mortgages totaling \$89 million during the evaluation period.

In the 2008 Evaluation, examiners characterized M&T Bank as a leader in making community development loans in its assessment areas, reporting that the bank made more than 455 community development loans totaling \$1.96 billion during the evaluation period.²⁸ Examiners noted that the bank’s community development lending volume generally exceeded similarly situated banks in the New York, Pennsylvania, and Maryland assessment areas.²⁹

In the 2008 Evaluation, examiners rated M&T Bank’s overall performance under the investment test as “outstanding.” Qualifying community development investments totaled more than \$246 million, representing an increase from its previous evaluation.

In addition, examiners concluded that the bank’s performance under the service test was “outstanding.” Examiners found that the bank’s retail delivery systems were readily accessible to all portions of its assessment areas.³⁰

recent CRA performance evaluation by the Office of the Comptroller of the Currency, as of May 26, 2006.

25. Examiners considered home mortgage loans, small business loans, and consumer loans originated during 2005 and 2006. The bank did not originate any small farm loans during the evaluation period.

26. Examiners considered HMDA-related and CRA-reportable small business loans that were originated between January 1, 2006, and December 31, 2007. Examiners also reviewed community development loans, investments, services, and activities pertaining to the service test for the same period.

27. The commenter criticized M&T Bank’s affordable mortgage product, alleging that it is less attractive than such products offered by other banks and that the bank does not have a sufficient number of loan officers who are familiar with New York City’s lower-income communities and the housing groups that serve those communities. M&T has represented that the mortgage division of M&T Bank has added full-time originators to its staff who specialize in lending to LMI borrowers to better serve its urban markets.

28. The commenter asserted that the bank should commit to make at least 50 percent of its community development loans to not-for-profit borrowers. The CRA does not require banks to provide any particular type of qualified community development loans to meet the credit needs of their communities.

29. These states received full-scope assessments during the 2008 Evaluation.

30. The commenter criticized the fact that M&T Bank’s branch network includes New York County (i.e., Manhattan) but excludes Bronx County, one of the area’s poorest counties. Examiners reviewed the bank’s activities in the New York-Northern New Jersey-Long

20. 12 U.S.C. § 1842(c)(2).

21. 12 U.S.C. § 2903.

22. 12 U.S.C. § 2801 et seq.

23. See *Interagency Questions and Answers Regarding Community Reinvestment*, 74 *Federal Register* 498 and 527 (2009).

24. M&T’s other bank subsidiary, Manufacturers and Traders Bank, National Association, received a “satisfactory” rating at its most

They reported that 20 percent of M&T Bank's branches were in LMI tracts and that 19 percent of the bank's ATMs were in LMI areas, which enhanced the bank's performance under the service test in those communities. Examiners also noted that M&T Bank's customers could use ATMs owned by institutions that had business relationships with the bank without paying a fee and that six of them were in LMI areas. In addition, examiners noted that M&T Bank is a leader in providing community development services throughout its assessment areas, including sponsoring and participating in a significant number of seminars and presentations relating to affordable mortgages, small business assistance, and other banking education. These types of events provided technical assistance and training to LMI individuals, community organizations, small businesses, and housing agencies.

B. Conclusion on Convenience and Needs and CRA Performance

The Board has considered carefully all the facts of record, including reports of examination of the CRA records of the institutions involved, information provided by Applicants, a public comment received on the proposal, and confidential supervisory information. Applicants represented that the proposal will result in increased credit availability and access to a broader range of financial services for customers of M&T Bank and Provident Bank. Based on a review

Island, NY-NJ-PA Multistate Metropolitan Area ("the Multistate Area") and concluded that the bank's retail delivery systems were reasonably accessible to significant portions of the bank's geographies and individuals of different income levels in the Multistate Area. Although the bank does not have any branches in Bronx County, the bank originated 22 HMDA-related loans and 17 small business loans in the county during 2007, representing 8.5 percent and 8.6 percent, respectively, of the bank's HMDA and small business loan volume in the five counties of New York City. In the Multistate Area, M&T Bank originated 132 community development loans totaling \$457 million and made 209 community development investments totaling \$29 million during 2006 and 2007.

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 insured depository institutions 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 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, the Bank Merger Act, the Federal Reserve Act, and the statutory factors it is required to consider when reviewing an application for retaining and operating branches. The Board's approval is specifically conditioned on compliance by Applicants with the conditions in this order and all the commitments made to the Board in connection with the proposal. For purposes of this proposal, 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.

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 Reserve Bank, acting pursuant to delegated authority.

By order of the Board of Governors, effective May 8, 2009.

Voting for this action: Chairman Bernanke, Vice Chairman Kohn, and Governors Warsh, Duke, and Tarullo.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Appendix

M&T AND PROVIDENT BANKING MARKETS CONSISTENT WITH BOARD PRECEDENT AND DOJ GUIDELINES

Bank	Rank	Amount of deposits (dollars)	Market deposit shares (percent)	Resulting HHI	Change in HHI	Remaining number of competitors
<i>Washington DC-MD-VA-WV — includes the Washington, D.C. Rationally Metropolitan Area (“RMA”), the non-RMA portions of the counties of Calvert, Charles, Frederick, Prince George’s, and St. Mary’s, Maryland, and Fauquier and Loudoun, Virginia; the cities of Alexandria, Fairfax, Falls Church, and Manassas, Virginia; and Jefferson County, West Virginia</i>						
M&T Pre-Consummation	10	2.04 bil.	1.9	1,259	3	91
Provident	14	1.14 bil.	.9	1,259	3	91
M&T Post-Consummation	8	3.18 bil.	2.8	1,259	3	91
<i>Baltimore MD-PA—includes the Baltimore, Maryland RMA, the non-RMA portions of the counties of Harford and Carroll, Maryland (excludes the Washington DC-MD-VA-WV RMA portion); and Baltimore, Maryland</i>						
M&T Pre-Consummation	2	5.2 bil.	12.5	1,430	185	73
Provident	5	3.1 bil.	7.4	1,430	185	73
M&T Post-Consummation	2	8.3 bil.	19.9	1,430	185	73
<i>Annapolis—includes the Annapolis, Maryland RMA</i>						
M&T Pre-Consummation	9	133 mil.	3.97	1,157	3	19
Provident	17	16 mil.	.48	1,157	3	19
M&T Post-Consummation	9	149 mil.	4.45	1,157	3	19

NOTE: Data are as of June 30, 2008. All amounts of deposits are un-weighted. All rankings, market deposit shares, and HHIs are based on thrift in-stitution deposits weighted at 50 percent.

*Morgan Stanley
New York, New York*

Order Approving the Acquisition of
Additional Shares of a Bank Holding
Company

Morgan Stanley (“Morgan”), New York, New York, 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

1. 12 U.S.C. § 1842.

acquire up to an additional 5.1 percent of the voting shares of Chinatrust Financial Holding Company, Ltd. (“Chinatrust”), Taipei, Taiwan,² and thereby increase its indirect interest up to 9.9 percent in Chinatrust Bank (U.S.A.)

2. Morgan proposes to acquire the additional voting shares of Chinatrust through open market transactions by the following subsidiaries: (1) MS Holdings, Inc., Morgan Stanley Private Equity Asia III, Inc., Morgan Stanley Private Equity Asia III, L.L.C., and MSPEA Holdings, Inc., all of Wilmington, Delaware; and (2) Morgan Stanley Private Equity Asia III, L.P., Morgan Stanley Private Equity Asia Employee Investors III, L.P., Morgan Stanley Private Equity Asia III Holdings (Cayman) Ltd., MSPEA Formosa Holdings (Cayman) Limited, and Morgan Stanley Formosa Holdings (Cayman) Limited, all of George Town, Grand Cayman, Cayman Islands.

(“Bank”), Torrance, California. Morgan has also filed a notice under section 4(c)(13) of the BHC Act³ and the Board’s Regulation K⁴ to increase its indirect interest in Chinatrust.⁵

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (73 *Federal Register* 76,653 (2008)). 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 sections 3 and 4 of the BHC Act.⁶

Morgan, with total consolidated assets of approximately \$626 billion, engages in commercial and investment banking, securities underwriting and dealing, asset management, trading, and other activities both in the United States and abroad. Morgan controls Morgan Stanley Bank, National Association (“Morgan Bank”), Salt Lake City, Utah, which operates one branch in the state, with total consolidated assets of approximately \$66.2 billion and deposits of approximately \$54.1 billion. In addition, Morgan controls Morgan Stanley Trust (“MS Trust”), Jersey City, New Jersey, a federal savings association, with total consolidated assets of \$6.6 billion and deposits of \$5.8 billion.⁷

Chinatrust, with total consolidated assets of \$53.9 billion, is the sixth largest depository organization in Taiwan.⁸ Chinatrust, through Chinatrust Bank, operates a state-licensed branch in New York, New York, a representative office in Los Angeles, California, and Bank.

Bank, with total consolidated assets of approximately \$2.4 billion, operates in four states⁹ and controls deposits of approximately \$2 billion.¹⁰

NONCONTROLLING INVESTMENT

Morgan has stated that it does not propose to control or exercise a controlling influence over Chinatrust and that its indirect investment in Chinatrust Bank would be a passive

investment.¹¹ In this light, Morgan has agreed to abide by certain commitments substantially similar to those on which the Board has previously relied in determining that an investing bank holding company would not be able to exercise a controlling influence over another bank holding company or bank for purposes of the BHC Act (“Passivity Commitments”).¹² For example, Morgan has committed not to exercise or attempt to exercise a controlling influence over the management or policies of Chinatrust or any of its subsidiaries; not to seek or accept more than one representative on the board of directors of Chinatrust (the same director may serve on the board of directors of Chinatrust Bank under conditions outlined in the Passivity Commitments); and not to have any other director, officer, employee, or agent interlocks with Chinatrust or any of its subsidiaries. The Passivity Commitments also include certain restrictions on the business relationships of Morgan with Chinatrust.

Based on these considerations and all the other facts of record, the Board has concluded that Morgan would not acquire control of, or have the ability to exercise a controlling influence over, Chinatrust, Chinatrust Bank, or Bank through the proposed acquisition of the Chinatrust voting shares. The Board notes that the BHC Act requires Morgan to file an application and receive the Board’s approval before it directly or indirectly acquires additional shares of Chinatrust or attempts to exercise a controlling influence over Chinatrust, Chinatrust Bank, or Bank.¹³

COMPETITIVE CONSIDERATIONS

The Board has considered carefully the competitive effects of the proposal in light of all the facts of the record. Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market. The BHC Act 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 clearly are outweighed in the public interest by the prob-

3. 12 U.S.C. § 1843(c)(13).

4. 12 CFR 211.

5. Chinatrust owns Bank indirectly through Chinatrust Commercial Bank, Ltd. (“Chinatrust Bank”), Taipei, and also engages in securities, insurance, venture-capital, and asset-management activities outside the United States.

6. Thirty-seven commenters expressed concerns about certain aspects of the proposal. Several commenters objected to the Board’s waiver of public notice of Morgan’s application last September to become a bank holding company. In its order approving that application and Morgan’s election to become a financial holding company, the Board explained its rationale for waiving the public comment period. *Morgan Stanley*, 94 *Federal Reserve Bulletin* C103 (2008) (“*Morgan FHC Order*”).

7. Asset and deposit data are as of March 31, 2009. Morgan also controls Morgan Stanley Trust, National Association (“MSTNA”), Wilmington, Delaware, a limited-purpose national bank that engages solely in trust or fiduciary activities and is exempt from the definition of “bank” under the BHC Act pursuant to section 2(c)(2)(D) of the BHC Act (12 U.S.C. § 1841(c)(2)(D)).

8. Taiwanese asset data are as of September 30, 2008, and ranking data are as of December 31, 2007.

9. Bank operates branches in California, New Jersey, New York, and Washington.

10. Asset and deposit data are as of March 31, 2009.

11. Although the acquisition of less than a controlling interest in a bank or bank holding company is not a normal acquisition for a bank holding company, the requirement in section 3(a)(3) of the BHC Act that the Board’s approval be obtained before a bank holding company acquires more than 5 percent of the voting shares of a bank suggests that Congress contemplated the acquisition by bank holding companies of between 5 percent and 25 percent of the voting shares of banks. See 12 U.S.C. § 1842(a)(3). On this basis, the Board previously has approved the acquisition by a bank holding company of less than a controlling interest in a bank or bank holding company. See, e.g., *Mitsubishi UFG Financial Group, Inc.*, 95 *Federal Reserve Bulletin* B34 (2009) (acquisition of up to 24.9 percent of the voting shares of a bank holding company); *Brookline Bancorp, MHC*, 86 *Federal Reserve Bulletin* 52 (2000) (acquisition of up to 9.9 percent of the voting shares of a bank holding company); *Mansura Bancshares, Inc.*, 79 *Federal Reserve Bulletin* 37 (1993) (acquisition of 9.7 percent of the voting shares of a bank holding company).

12. These commitments are set forth in the appendix.

13. 12 U.S.C. § 1842. See, e.g., *Emigrant Bancorp, Inc.*, 82 *Federal Reserve Bulletin* 555 (1996).

able effect of the proposal in meeting the convenience and needs of the community to be served.¹⁴

Morgan and Chinatrust 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 not have a significantly adverse effect on competition or on the concentration of banking resources in any relevant banking market and that competitive factors are consistent with approval of the proposal.

FINANCIAL, MANAGERIAL, AND OTHER 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 carefully considered these factors in light of all the facts of record, including confidential supervisory and examination information received from the relevant federal and state supervisors of the organizations involved, publicly reported and other financial information, information provided by Morgan, and public comment received on the proposal. Several commenters opposed the combination of commercial banking and investment banking in Morgan. Congress specifically has authorized the combination of commercial banking and investment banking for bank holding companies that meet certain requirements and elect to become financial holding companies.¹⁵ Morgan met those requirements when it elected to be a financial holding company and has continued to satisfy the criteria for financial holding company status.¹⁶

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 information, 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 effect of the transaction on the financial condition of the applicant, including its capital position, asset quality, earnings prospects, and the impact of the proposed funding of the transaction.¹⁷

The Board has carefully considered the financial factors of the proposal. Morgan, Morgan Bank, and MS Trust are well capitalized. Bank is also well capitalized, and the financial factors related to Chinatrust are consistent with approval. Based on its review of the record, the Board also

finds that Morgan has sufficient capital and other resources to effect the proposal. The proposed transaction is structured as a share purchase in the open market and would be funded from Morgan's available funds. The Board also notes that Morgan has recently raised a substantial amount of private capital.¹⁸

The Board also has considered the managerial resources of the organizations involved in the proposed transaction.¹⁹ The Board has reviewed the examination records of Morgan, Morgan's subsidiary depository institutions, Bank, and Chinatrust Bank's U.S. offices, including assessments of their management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences and those of the other relevant banking supervisory agencies with the organizations and their records of compliance with applicable banking law, including anti-money-laundering laws.

Based on all the facts of record, the Board has concluded that the financial and managerial resources and the future prospects of Morgan, its subsidiary depository institutions, and Bank are consistent with approval of this application, as are the other supervisory factors the Board must consider under section 3 of 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

18. The Board also considered public comments related to Morgan's financial condition. Commenters alleged that Morgan does not have the financial capacity to complete the acquisition of Chinatrust, noting that a credit rating agency had lowered Morgan's credit rating with a negative outlook. Several comments also referenced funding that Morgan received from the U.S. Department of the Treasury under the Troubled Asset Relief Program and Morgan's alleged use of those funds for purposes other than providing liquidity to the credit markets in the United States.

19. Several commenters expressed general concerns about Morgan's management, including allegations about Morgan's accounting practices, activities relating to auction-rate securities, an investigation on energy pricing by a Morgan affiliate, and allegations that a Morgan Stanley employee violated the Foreign Corrupt Practices Act. In approving Morgan's application under the BHC Act last September, the Board carefully considered the managerial resources of Morgan in light of all the facts of record, including confidential supervisory information and information provided by Morgan. See *Morgan FHC Order*, at C105. The Board also has communicated with relevant federal and state agencies with respect to the auction-rate securities activities and pricing investigation. The Board considered the August 2008 settlement between Morgan and the Attorney General of the state of New York and pending litigation involving these matters. As part of its ongoing supervision of Morgan, the Board monitors the status of government investigations, consults as needed with relevant regulatory authorities, and periodically reviews Morgan's potential liability from material litigation. In addition, Morgan announced that it has fired the employee who allegedly violated the Foreign Corrupt Practices Act, reported the activity to appropriate authorities, and will continue to investigate the matter.

14. 12 U.S.C. § 1842(c)(1).

15. See 12 U.S.C. § 1843(k); 12 U.S.C. § 1843(l).

16. *Morgan FHC Order*.

17. As previously noted, Morgan would acquire only up to 9.9 percent of Chinatrust. Under these circumstances, Morgan would not consolidate the financial statements of Chinatrust for regulatory purposes.

Act (“CRA”).²⁰ 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 expansionary proposals.²¹

The Board has considered carefully all the facts of record, including evaluations of the CRA performance records of Morgan’s and Chinatrust’s subsidiary banks, data reported by Morgan under the Home Mortgage Disclosure Act (“HMDA”),²² other information provided by Morgan, confidential supervisory information, and public comments. Commenters criticized Morgan’s record of lending in LMI communities and its CRA plan.²³ In addition, commenters alleged, based on HMDA data, that Morgan has engaged in disparate treatment of LMI and minority individuals in home mortgage lending. Some commenters expressed concern about the CRA performance record of Chinatrust Bank. Commenters also expressed concern over subprime lending by Morgan and by Saxon Mortgage, Inc. (“Saxon Mortgage”), a subsidiary Morgan acquired in 2006. Morgan represented that it currently does not directly or indirectly originate subprime loans, nor does it provide warehouse lending or custodian services for subprime lenders.

A. CRA Performance Evaluations

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.²⁴

Morgan Bank received an “outstanding” rating at its most recent CRA evaluation by the Federal Deposit Insurance Corporation (“FDIC”), as of January 30, 2006 (“2006 Evaluation”).²⁵ The Board considered Morgan Bank’s CRA performance record and discussed the 2006 Evaluation in the *Morgan FHC Order*. Based on a review of the record in this application, the Board hereby reaffirms and adopts the facts and findings concerning Morgan Bank’s CRA performance record. The Board also has considered information provided by Morgan about its CRA performance since the Board reviewed such matters in connection with the *Morgan FHC Order*.

Consistent with the CRA regulations adopted by the federal banking agencies, the FDIC evaluated Morgan Bank under the community development test as a wholesale bank.²⁶ In the 2006 Evaluation, examiners found Morgan Bank to be highly proactive with regard to assessing the needs of its community and providing extensive resources in addressing the resulting needs identified. Examiners reported that the bank extended, funded, and committed almost \$59 million in qualified community development loans and investments during the evaluation period.²⁷ Examiners also reported that bank personnel and affiliate staff provided more than 5,000 CRA qualified service hours to their respective communities.

Morgan Bank’s current CRA plan prioritizes meeting the community development needs of its assessment area, which includes Salt Lake County, part of the Salt Lake City, Utah, Metropolitan Statistical Area (“MSA”), as well as the needs of the adjoining counties to its assessment area and the rest of Utah and the contiguous states.²⁸ The bank’s CRA program is currently focused on community development activities that revitalize or stabilize LMI individuals and geographies. These activities include financing affordable housing construction and rehab financing; promoting economic development; targeting community services to LMI individuals; and using Morgan Bank’s financial exper-

20. 12 U.S.C. § 2901 et seq.; 12 U.S.C. § 2903; 12 U.S.C. § 1842(c)(2).

21. 12 U.S.C. § 2903.

22. 12 U.S.C. § 2801 et seq.

23. Two commenters also urged the Board to require Morgan to enter into agreements or to take certain future actions in connection with its community development activities. The Board consistently has stated that neither the CRA nor the federal banking agencies’ CRA regulations require depository institutions to make pledges or enter into commitments or agreements with any organization and that the enforceability of any such third-party pledges, initiatives, or agreements is outside the CRA. See, e.g., *The PNC Financial Services Group, Inc.*, 95 *Federal Reserve Bulletin* B1 (2009); *Wachovia Corporation*, 91 *Federal Reserve Bulletin* 77 (2005). 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 credit needs of its assessment areas at the time the Board reviews a proposal under the convenience and needs factor.

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

25. Morgan Bank converted to a national charter on September 23, 2008. MSTNA is not an insured depository institution, and MS Trust is not subject to the CRA pursuant to regulations issued by the Office of Thrift Supervision. See 12 CFR 563e.11(c)(2).

26. See 12 CFR 345.21(a)(2).

27. The 2006 Evaluation covered the period from March 11, 2003, through January 20, 2006.

28. Several commenters criticized Morgan and Morgan Bank’s records of home mortgage lending in LMI communities, indicated that the bank’s assessment area for purposes of CRA performance evaluation should be expanded to include the office locations of affiliates (such as Morgan’s broker-dealer offices), and alleged that Morgan has not provided a sufficient CRA plan for making credit and other banking services available to LMI communities in such an expanded assessment area. Under the CRA regulations, the assessment area for a wholesale or limited-purpose bank consists generally of one or more MSAs or Metropolitan Divisions, or one or more contiguous subdivisions in which the bank has its main office, branches, and deposit-taking ATMs. See 12 CFR 25.41; 12 CFR 228.41; 12 CFR 345.41. A bank’s CRA assessment area is not determined by the location of offices of affiliates. The Office of the Comptroller of the Currency (“OCC”), as the primary supervisor of Morgan Bank, will evaluate the bank’s qualification as a wholesale bank and its assessment area and CRA plan as part of its ongoing supervision of the bank.

tise to provide financial services activities. Morgan Bank's community development lending and investment activities have included direct lending to nonprofit affordable housing organizations; construction participation loans with retail banks; investments in loan consortia that manage and fund small business loans, multifamily rental housing, and financing and construction of community facilities; and direct investments in Small Business Investment Company venture-capital and various national community reinvestment funds.

Bank received a "needs to improve" rating at its most recent CRA evaluation by the FDIC, as of July 16, 2007 ("2007 Evaluation"). Some commenters raised concerns about this rating and Bank's CRA performance generally. Chinatrust has developed a corrective action plan to improve Bank's CRA performance and has been submitting quarterly reports to the FDIC. The Board has consulted with the FDIC about actions Chinatrust has taken to improve Bank's CRA performance since the 2007 Evaluation.

B. HMDA and Fair Lending Record

The Board has carefully considered the fair lending records and HMDA data of Morgan in light of public comments received on the proposal. Several commenters alleged, based on 2007 HMDA data, that Saxon Mortgage made a disproportionately larger number of high-cost loans to African American, Hispanic, and other minority borrowers than to nonminority borrowers. This issue was previously raised by a different commenter and considered by the Board in the application by Morgan to retain up to 9.9 percent of the voting shares of Herald National Bank, New York, New York.²⁹ The Board hereby reaffirms and adopts the facts and findings concerning Morgan Bank's HMDA and fair lending record made in the *Morgan Herald Order*.

The Board's consideration of HMDA-related comments included a review of 2007 HMDA data reported by Saxon Mortgage and Morgan Stanley Credit Corporation ("MSCC"). Morgan acquired Saxon Capital, Inc. ("Saxon Capital"), the parent of Saxon Mortgage, in 2006 and MSCC in 1997. Morgan now originates residential mortgage loans only through MSCC, which currently originates only prime mortgage loans. Morgan services mortgage loans through Saxon Capital, including subprime loans originated by Morgan and others.

Although the HMDA data might reflect certain disparities in the rates of loan applications, originations, denials, or pricing among members of different racial or ethnic groups in certain local areas, they provide an insufficient basis by themselves on which to conclude whether or not Morgan is excluding or imposing higher 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.³⁰ HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution has engaged in illegal lending discrimination.

The Board is nevertheless concerned when HMDA data for an institution indicate disparities in lending and believes that all lending institutions 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 or ethnicity. Moreover, the Board believes that all bank holding companies and their affiliates must conduct their mortgage lending operations without any abusive lending practices and in compliance with all consumer protection laws.

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 Morgan's subsidiary insured depository institutions with fair lending laws. The Board also has consulted with the FDIC and OCC, the former and current primary federal supervisors, respectively, of Morgan Bank. In addition, the Board has considered information provided by Morgan about its compliance risk-management systems.

As noted in the *Morgan Herald Order*, the record, including confidential supervisory information, indicates that Morgan has taken steps to ensure compliance with fair lending and other consumer protection laws and regulations.³¹ Morgan currently originates residential mortgage loans only through MSCC and services subprime loans only through Saxon Capital. Morgan represented that MSCC and Saxon Capital have policies and procedures to help ensure compliance with fair lending and other consumer protection laws and regulations. For example, MSCC uses an automated underwriting and loan-pricing system that substantially limits discretionary criteria and, before

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

31. Commenters expressed concern about Morgan's alleged warehouse financing to subprime lenders and securitization of subprime loans. Morgan represented that it does not provide warehouse lending or custodian services for subprime lenders. To the extent it provides servicing activities for subprime loans, Morgan asserted that it conducts due diligence to promote compliance with fair lending laws. Morgan also has asserted that, to the extent it underwrites securities for or participates in commercial loans to subprime lenders, Morgan has no role in the lending or credit review practices of those lenders. In addition, Morgan has represented that, to the extent it underwrites securities for subprime lenders, its due diligence procedures seek to ensure that mortgage pools supporting securitizations do not include loans subject to the Home Ownership and Equity Protection Act of 1994 or loans with predatory lending features. As noted above, the Board will continue to require all bank holding companies and their affiliates to conduct their lending operations without any abusive lending practices and in compliance with all applicable laws.

29. *Morgan Stanley*, 95 *Federal Reserve Bulletin* B93 (2009) ("*Morgan Herald Order*").

denying a loan application, MSCC makes reasonable efforts to gather additional information that could appropriately qualify an applicant. MSCC employees do not have override authority in pricing loans, and their compensation is not based on loan pricing. Morgan has represented that Saxon Capital clearly discloses fees to consumers and monitors fees to ensure compliance with applicable law. In addition, MSCC and Saxon Capital provide training in fair lending and consumer protection law to employees involved in originating and servicing loans and maintain complaint resolution systems. MSCC's fair lending compliance procedures include reviews of loan origination and pricing data that use statistical and comparative file analyses.

The Board also has considered the HMDA data in light of other information, including the CRA performance record of Morgan Bank. These established efforts and this record of performance demonstrate that Morgan Bank is active in helping to meet the credit needs of its entire community.

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 performance records of the institutions involved, information provided by Morgan, comments received on the proposal, and confidential supervisory information.³² Based on a review of the entire record, including the noncontrolling nature of the proposed investment in Chinatrust, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant insured depository institutions are consistent with approval.

CONCLUSION

Based on the foregoing and all the facts of record, the Board has determined that the application and notice³³

32. Commenters also alleged that Morgan has not taken sufficient action to prevent foreclosures. Morgan noted that through Saxon Capital, it modified approximately 12,875 mortgages in 2008 and that Saxon Capital has initiatives underway to increase its modification capacity in 2009. In addition to modifications, Saxon Capital has pursued other forms of home preservation and loss mitigation to avoid foreclosures where possible. Finally, Morgan indicated that Saxon Capital remains actively engaged in industry-wide efforts and other public and private partnerships to address the current foreclosure crisis, including Hope Now, the State Foreclosure Prevention Working Group, the Ohio Compact to Prevent Foreclosures, and the National Community Stabilization Trust.

33. Morgan proposes to acquire an indirect interest in Chinatrust's FHC-permissible nonbanking business pursuant to section 4(k) of the BHC Act. As noted above, Morgan proposes to acquire its indirect interest in Chinatrust's businesses that are not being acquired pursuant to section 3 or 4(k) of the BHC Act pursuant to section 4(c)(13) of the BHC Act and Regulation K. Because Morgan's investment in Chinatrust qualifies as a portfolio investment under section 211.8 of Regulation K (12 CFR 211.8(e)), Chinatrust's U.S. activities are permitted, provided that Chinatrust derives no more than 10 percent of its total revenues from activities in the United States (12 CFR 211.8(e)(1)(ii)(A)). Based on all the facts of record, the Board has

should be, and hereby are, approved.³⁴ 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.³⁵ The Board's approval is specifically conditioned on compliance by Morgan 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 acquisition of Chinatrust's voting shares 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 June 26, 2009.

Voting for this action: Chairman Bernanke and Governors Warsh, Duke, and Tarullo. Absent and not voting: Vice Chairman Kohn.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

determined that all factors required to be considered under the BHC Act and Regulation K are consistent with approval.

34. The Board also has approved the indirect acquisition of the interest in Chinatrust by Mitsubishi UFJ Financial Group, Inc. ("MUFG"), Tokyo, Japan. MUFG, a financial holding company within the meaning of the BHC Act, currently controls approximately 21 percent of the voting shares of Morgan Stanley. The Board notes that MUFG has provided no funding for Morgan's acquisition of the Chinatrust shares, and Morgan's acquisition of the Chinatrust shares would not alter the current structure of MUFG's investment in Morgan. In addition, MUFG's U.S. subsidiary banks remain well capitalized. The Board previously has determined that the foreign banks controlled by MUFG are subject to comprehensive supervision on a consolidated basis by their home-country supervisor, the Japanese Financial Services Agency ("FSA"). The Board has determined that these banks continue to be subject to comprehensive supervision on a consolidated basis by the FSA. The other statutory factors are consistent with approval.

35. 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 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) and 262.25(d)). 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.

Appendix

Passivity Commitments

Morgan Stanley (“Morgan”), New York, New York, and its subsidiaries (collectively, the “Morgan Stanley Group”) will not, without the prior approval of the Board or its staff, directly or indirectly:

1. Exercise or attempt to exercise a controlling influence over the management or policies of Chinatrust Financial Holding Company, Ltd., Taipei, Taiwan, Republic of China (“Chinatrust”) or any of its subsidiaries;
2. Have or seek to have any representative of the Morgan Stanley Group serve on the board of directors of any subsidiaries of Chinatrust, except that the single representative of Morgan Stanley Group who serves on the board of Chinatrust may also serve as a director of Chinatrust Commercial Bank, Ltd. (“CCB”) if all other outside directors of Chinatrust also serve on the board of directors of CCB;
3. Have or seek to have more than one representative of the Morgan Stanley Group serve on the board of directors of Chinatrust, and CCB under the terms of the prior commitment, or permit any representative of the Morgan Stanley Group who serves on the board of directors of Chinatrust and CCB to serve (i) as the chairman of the board of directors of Chinatrust or CCB, (ii) as the chairman of any committee of the board of directors of Chinatrust or CCB, or (iii) serve as a member of any committee of the board of directors of Chinatrust or CCB if such representative occupies more than 25 percent of the seats on the committee;
4. Have or seek to have any employee or representative of the Morgan Stanley Group serve as an officer, agent, or employee of Chinatrust or any of its subsidiaries;
5. Take any action that would cause Chinatrust or any of its subsidiaries to become a subsidiary of Morgan;
6. Own, control, or hold with power to vote securities that (when aggregated with securities that the officers and directors of the Morgan Stanley Group own, control, or hold with power to vote) represent 25 percent or more of any class of voting securities of Chinatrust or any of its subsidiaries;
7. Own or control equity interests that would result in the combined voting and nonvoting equity interests of the Morgan Stanley Group and its officers and directors to equal or exceed 25 percent of the total equity capital of Chinatrust or any of its subsidiaries;
8. Except in connection with the Morgan Stanley Group’s representation on the board of directors of Chinatrust or CCB (or efforts to continue such representation) consistent with paragraph 3 above, 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 Chinatrust or any of its subsidiaries;
9. Enter into any agreement with Chinatrust or any of its subsidiaries that substantially limits the discretion of Chinatrust’s management over major policies and decisions, including, but not limited to, policies or decisions about employing and compensating executive officers; engaging in new business lines; raising additional debt or equity capital; merging or consolidating with another firm; or acquiring, selling, leasing, transferring, or disposing of material assets, subsidiaries, or other entities;
10. Except in connection with the Morgan Stanley Group’s representation on the board of directors of Chinatrust or CCB (or efforts to continue such representation) consistent with paragraph 3 above, solicit or participate in soliciting proxies with respect to any matter presented to the shareholders of Chinatrust or any of its subsidiaries;
11. Dispose or threaten to dispose (explicitly or implicitly) of equity interests of Chinatrust or any of its subsidiaries in any manner as a condition or inducement of specific action or nonaction by Chinatrust or any of its subsidiaries; or
12. Enter into any other banking or nonbanking transactions with Chinatrust or any of its subsidiaries, except for transactions in the ordinary course of business that are non-exclusive (except to the extent any individual transaction may contain an exclusivity provision limited to that transaction) and are on terms and under circumstances that in good faith would be offered to, or would apply to, companies that are not affiliated with Morgan or Chinatrust, including, but not limited to, securities underwriting, brokerage and trading, mergers and acquisitions advisory services and investment management services, provided that the aggregate balance of all deposit accounts held by the Morgan Stanley Group at Chinatrust and its subsidiaries does not exceed 1 percent of the total deposits held at Chinatrust and its subsidiaries and that the aggregate amount of (i) gross revenues Morgan, on a consolidated basis, earns from its business relationships with Chinatrust and its subsidiaries does not exceed 0.5 percent of Morgan’s annual gross revenues, on a consolidated basis, and (ii) gross revenues Chinatrust, on a consolidated basis, earns from its business relationships with the Morgan Stanley Group does not exceed 0.5 percent of Chinatrust’s annual gross revenues, on a consolidated basis, in each case under (i) and (ii) as calculated based on the rolling average of the prior four quarters.

The terms used in these commitments have the same meanings as those set forth in the Bank Holding Company Act of 1956 (“BHC Act”), as amended, and the Board’s Regulation Y.

Morgan understands that these commitments constitute conditions imposed in writing in connection with the Board’s findings and decisions in Morgan’s application to acquire additional common shares up to 9.9 percent of the outstanding common shares of Chinatrust, pursuant to section 3(a)(3) of the BHC Act, and, as such, may be enforced in proceedings under applicable law. Morgan further understands that it generally must file an application and receive prior approval of the Board, pursuant to section 3(a)(3) of the BHC Act, for any subsequent acquisition of control of voting shares of Chinatrust that would result in Morgan, directly or indirectly, owning or controlling additional voting shares in excess of 9.9 percent of the outstanding common shares of Chinatrust.

*Morgan Stanley
New York, New York*

Order Approving Retention of Shares of a Bank

Morgan Stanley (“Morgan”), 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 retain up to 9.9 percent of the voting shares of Herald National Bank (“Herald”), both of New York, New York, a newly chartered national bank.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (73 *Federal Register* 66,246 (2008)). 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.³

Morgan, with total consolidated assets of approximately \$626 billion, engages in commercial and investment banking, securities underwriting and dealing, asset management, trading, and other activities in the United States and abroad. Morgan controls Morgan Stanley Bank, National Association (“Morgan Bank”), Salt Lake City, Utah, which operates one branch in the state, with total consolidated assets of approximately \$66.2 billion and deposits of approximately \$54.1 billion. In addition, Morgan controls Morgan Stanley Trust (“MS Trust”), Jersey City, New Jersey, a federal savings association, with total consolidated assets of \$6.6 billion and deposits of \$5.8 billion.⁴ Herald, which controls deposits of \$114.7 million, operates only in New York.⁵

1. 12 U.S.C. § 1842.

2. Herald began operations on November 24, 2008, as Heritage Bank, National Association, until it was renamed on January 2, 2009. Morgan holds the shares of Herald through two subsidiary hedge funds: Frontpoint Financial Services Fund, L.P. and Frontpoint Financial Horizons Fund, L.P., both of Greenwich, Connecticut. Morgan acquired the shares in Herald’s public offering as a passive fund investment. No shareholder of Herald controls more than 10 percent of the bank’s voting shares, although SCJ, Inc., Irvine, California, and the Carpenter Funds it controls, have received approval under section 3 of the BHC Act to acquire up to 18 percent of Herald’s voting shares.

3. A commenter objected to the Board’s waiver of public notice of Morgan’s application last September to become a bank holding company. In its order approving that application and Morgan’s election to become a financial holding company, the Board explained its rationale for waiving the public comment period. *Morgan Stanley*, 94 *Federal Reserve Bulletin* C103 (2008) (“*Morgan FHC Order*”).

4. Asset and deposit data are as of March 31, 2009. Morgan also controls Morgan Stanley Trust National Association (“MSTNA”), Wilmington, Delaware, a limited-purpose national bank that engages only in trust or fiduciary activities and is exempt from the definition of “bank” under the BHC Act pursuant to section 2(c)(2)(D) of the BHC Act (12 U.S.C. § 1841(c)(2)(D)).

5. In acting on Morgan’s application last September, the Board determined that emergency conditions existed at the time that justified the Board’s expeditious action on the proposal. *Morgan FHC Order*. When Morgan’s application was approved on September 21, 2008, Herald was well advanced in its preparations to commence operations. In light of the emergency conditions when the Board approved Morgan’s application, the timing of Herald’s plans to commence

NONCONTROLLING INVESTMENT

Morgan has stated that it does not intend to control or exercise a controlling influence over Herald and that its investment in Herald is a passive investment.⁶ In this light, Morgan has agreed to abide by certain commitments substantially similar to those on which the Board has previously relied in determining that an investing bank holding company would not be able to exercise a controlling influence over another bank holding company or bank for purposes of the BHC Act (“Passivity Commitments”).⁷ For example, Morgan has committed not to exercise or attempt to exercise a controlling influence over the management or policies of Herald or any of its subsidiaries; not to seek or accept more than one representative on the board of directors of Herald; and not to have any other officer, employee, or agent interlocks with Herald or any of its subsidiaries. The Passivity Commitments also include certain restrictions on the business relationships of Morgan with Herald.

Based on these considerations and all the other facts of record, the Board has concluded that Morgan has not acquired control of, nor has the ability to exercise a controlling influence over, Herald through the acquisition of the bank’s voting shares. The Board notes that the BHC Act requires Morgan to file an application and receive the Board’s approval before it directly or indirectly acquires additional shares of Herald or attempts to exercise a controlling influence over Herald.⁸

COMPETITIVE CONSIDERATIONS

The Board has considered carefully the competitive effects of the proposal in light of all the facts of the record. Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market. The BHC Act also

operations, and Morgan’s status as a minority investor in Herald, Morgan has been permitted to retroactively file an application to retain the Herald shares.

6. Although the acquisition of less than a controlling interest in a bank or bank holding company is not a normal acquisition for a bank holding company, the requirement in section 3(a)(3) of the BHC Act that the Board’s approval be obtained before a bank holding company acquires more than 5 percent of the voting shares of a bank suggests that Congress contemplated the acquisition by bank holding companies of between 5 percent and 25 percent of the voting shares of banks. See 12 U.S.C. § 1842(a)(3). On this basis, the Board previously has approved the acquisition by a bank holding company of less than a controlling interest in a bank or bank holding company. See, e.g., *Mitsubishi UFG Financial Group*, 95 *Federal Reserve Bulletin* B34 (2009) (acquisition of up to 24.9 percent of the voting shares of a bank holding company); *Brookline Bancorp, MHC*, 86 *Federal Reserve Bulletin* 52 (2000) (acquisition of up to 9.9 percent of the voting shares of a bank holding company); *Mansura Bancshares, Inc.*, 79 *Federal Reserve Bulletin* 37 (1993) (acquisition of 9.7 percent of the voting shares of a bank holding company).

7. These commitments are set forth in the appendix.

8. 12 U.S.C. § 1842. See, e.g., *Emigrant Bancorp, Inc.*, 82 *Federal Reserve Bulletin* 555 (1996).

prohibits the Board from approving a 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.⁹

The Board has previously stated that one company need not acquire control of another company to lessen competition between them substantially.¹⁰ 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.¹¹

Morgan and Herald compete directly in the Metro New York banking market.¹² The Board has reviewed carefully the competitive effects of the proposal in the Metro New York banking market in light of all the facts of the record. In particular, the Board has considered the number of competitors that remain in the banking market, the relative shares of total deposits in depository institutions in the market (“market deposits”) controlled by Morgan and Herald,¹³ and the concentration level of market deposits and the increase in the level as measured by the Herfindahl–Hirschman Index (“HHI”) under the Department of Justice Merger Guidelines (“DOJ Guidelines”).¹⁴

9. 12 U.S.C. § 1842(c)(1).

10. See, e.g., *SunTrust Banks, Inc.*, 76 *Federal Reserve Bulletin* 542 (1990).

11. See, e.g., *BOK Financial Corp.*, 81 *Federal Reserve Bulletin* 1052 (1995).

12. 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, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, Union, and Warren counties and the northern portions of Mercer County in New Jersey; Monroe and Pike counties in Pennsylvania; and Fairfield County and portions of Litchfield and New Haven counties in Connecticut.

13. Except for deposit data for Herald, which are based on its March 31, 2009, call report, deposit and market share data are based on data reported by insured depository institutions in the summary of deposits data as of June 30, 2008. The data are also 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, Inc.*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift institution 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

Consummation of the acquisition was consistent with Board precedent and within the thresholds in the DOJ Guidelines in the Metro New York banking market. On consummation, the banking market remained moderately concentrated, and numerous competitors remained in the market.¹⁵

The DOJ also has reviewed the matter and has advised the Board that it does not believe that Morgan’s ownership interest in Herald is likely to have a significant 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 application.

Based on all the facts of record, the Board has concluded that approval of Morgan’s application would not have a significantly adverse effect on competition or on the concentration of resources in any relevant banking market. Accordingly, the Board has determined 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 and certain other supervisory factors. The Board has carefully considered these factors in light of all the facts of record, including confidential supervisory and examination information received from the relevant federal and state supervisors of the organizations involved, publicly reported and other financial information, information provided by Morgan, and public comments received on the application.

In evaluating the 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 information, 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 applicant, including its capital position, asset quality, earnings prospects, and the impact of the proposed funding of the transaction.

The Board has carefully considered the financial factors in this case. Morgan, its subsidiary depository institutions, and Herald are well capitalized. Based on its review of the record, the Board also finds that Morgan had sufficient capital and other resources to effect the acquisition. The

implicitly recognize the competitive effects of limited-purpose and other nondepository financial entities.

15. Taking into account the deposits of Mitsubishi UFJ Financial Group, Inc. (“MUFG”), Tokyo, Japan, which controls approximately 21 percent of Morgan, the HHI would remain unchanged at 1357, with 284 insured depository institutions competing in the Metro New York banking market. The combined deposits of MUFG, Morgan, and Herald represent less than 1 percent of market deposits.

transaction was structured as a cash purchase using Morgan's existing resources.

The Board also has considered the managerial resources of the organizations involved.¹⁶ The Board has reviewed the examination records of Morgan and its 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 U.S. banking operations of Morgan and their records of compliance with applicable banking law, including anti-money-laundering laws.

Based on all the facts of record, the Board has concluded that the financial and managerial resources and the future prospects of Morgan, Herald, and their subsidiaries are consistent with approval of this application, as are the other supervisory factors the Board must consider under section 3 of 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").¹⁷ The CRA requires the federal financial supervisory agencies to encourage insured depository institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation, and requires the appropriate federal financial supervisory agency to take into account a relevant depository institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, in evaluating expansionary proposals.¹⁸

The Board has considered carefully all the facts of record, including reports of examination of the CRA performance records of Morgan's subsidiary insured depository institutions, data reported by Morgan under the Home Mortgage Disclosure Act ("HMDA"),¹⁹ as well as other information provided by Morgan, confidential supervisory information, and public comment received on the proposal. A commenter alleged, based on HMDA data, that Morgan has engaged in disparate treatment of minority individuals in home mortgage lending. The commenter also expressed concern over subprime lending by Morgan and by Saxon

Mortgage, Inc. ("Saxon Mortgage"), a subsidiary Morgan acquired in 2006. Morgan represented that it currently does not directly or indirectly originate subprime loans and that it has no plans to engage in such lending.

A. CRA Performance Evaluations

As provided in the CRA, the Board has considered 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 Morgan. 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.²⁰

Morgan Bank received an "outstanding" rating at its most recent CRA performance evaluation by the Federal Deposit Insurance Corporation ("FDIC"), as of January 30, 2006.²¹ Herald has not yet been evaluated under the CRA by the Office of the Comptroller of the Currency ("OCC").

B. HMDA and Fair Lending Record

The Board has carefully considered the fair lending records and HMDA data of Morgan in light of public comments received on the application. Those comments alleged, based on 2007 HMDA data, that in certain metropolitan statistical areas (MSAs), Saxon Mortgage disproportionately made higher-cost loans to African American and Hispanic borrowers than to nonminority borrowers.²² The Board's consideration of HMDA-related comments included a review of 2007 HMDA data reported by Saxon Mortgage and Morgan Stanley Credit Corporation ("MSCC"). Morgan acquired Saxon Capital, Inc. ("Saxon Capital"), the parent of Saxon Mortgage, in 2006 and MSCC in 1997. Morgan now originates residential mortgage loans only through MSCC, which currently originates only prime mortgage loans. Morgan services mortgage loans through Saxon Capital, including subprime loans originated by Morgan and others.

16. A commenter expressed concern about Morgan's role in the auction-rate securities market. The Board considered the August 2008 settlement between Morgan and the Attorney General of the state of New York and pending litigation involving these matters. As part of its ongoing supervision of Morgan, the Board monitors the status of government investigations, consults as needed with relevant regulatory authorities, and periodically reviews Morgan's potential liability from material litigation.

17. 12 U.S.C. § 2901 et seq.; 12 U.S.C. § 2903; 12 U.S.C. § 1842(c)(2).

18. 12 U.S.C. § 2903.

19. 12 U.S.C. § 2801 et seq.

20. The Interagency Questions and Answers Regarding Community Reinvestment provide that a CRA examination is an important and often controlling factor in the consideration of an institution's CRA record. See *Interagency Questions and Answers Regarding Community Reinvestment*, 74 *Federal Register* 498 at 527 (2009).

21. Morgan Bank became a national bank on September 23, 2008, on its conversion from a Utah-chartered industrial bank. The 2006 evaluation was conducted before this conversion. MSTNA is not an insured depository institution, and MS Trust is a limited-purpose savings association not subject to the CRA. See 12 CFR 563e.11(c)(2).

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 exceeds the yield for U.S. Treasury securities of comparable maturity 3 or more percentage points for first-lien mortgages and 5 or more percentage points for second-lien mortgages (12 CFR 203.4).

Although the HMDA data might reflect certain disparities in the rates of loan applications, originations, denials, or pricing among members of different racial or ethnic groups in certain local areas, they provide an insufficient basis by themselves on which to conclude whether or not Morgan is excluding or imposing higher 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.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 lending institutions 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 or ethnicity. Moreover, the Board believes that all bank holding companies and their affiliates must conduct their mortgage lending operations without any abusive lending practices and in compliance with all consumer protection law.

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 Morgan's subsidiary insured depository institutions with fair lending laws. The Board also has consulted with the FDIC and OCC, Morgan Bank's former and current primary federal supervisors, respectively. In addition, the Board has considered information provided by Morgan about its compliance risk-management systems.

The record of this application, including confidential supervisory information, indicates that Morgan has taken steps to ensure compliance with fair lending and other consumer protection laws and regulations.²⁴ As noted,

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.

24. A commenter expressed concern about Morgan's alleged warehouse financing to subprime lenders and securitization of subprime loans. Morgan represented that it does not provide warehouse lending or custodian services for subprime lenders. To the extent it provides servicing activities for subprime loans, Morgan asserted that it conducts due diligence to promote compliance with fair lending laws. Morgan also has asserted that, to the extent it underwrites securities for or participates in commercial loans to subprime lenders, Morgan has no role in the lending or credit review practices of those lenders. In addition, Morgan has represented that, to the extent it underwrites securities for subprime lenders, its due diligence procedures seek to ensure that mortgage pools supporting securitizations do not include loans subject to the Home Ownership and Equity Protection Act of 1994 or loans with predatory lending features. As noted above, the Board will continue to require all bank holding companies and their

Morgan currently originates residential mortgage loans only through MSCC and services subprime loans only through Saxon Capital. Morgan represented that MSCC and Saxon Capital have policies and procedures to help ensure compliance with fair lending and other consumer protection laws and regulations. For example, MSCC uses an automated underwriting and loan-pricing system that substantially limits discretionary criteria and, before denying a loan application, MSCC makes reasonable efforts to gather additional information that could appropriately qualify an applicant. MSCC employees do not have override authority in pricing loans, and their compensation is not based on loan pricing. Morgan has represented that Saxon Capital clearly discloses fees to consumers and monitors fees to ensure compliance with applicable law. In addition, MSCC and Saxon Capital provide training in fair lending and consumer protection law to employees involved in originating and servicing loans and maintain complaint resolution systems. MSCC's fair lending compliance procedures include reviews of loan origination and pricing data that use statistical and comparative file analyses.

C. Conclusion on Convenience and Needs and CRA Performance

The Board has carefully considered all the facts of record, including the evaluation of the CRA performance record of Morgan Bank, information provided by Morgan, comments received on the proposal, and confidential supervisory information. Morgan represented that its investment in Herald has helped provide consumers with additional choices for meeting their banking needs. Based on a review of the entire record, including the noncontrolling nature of the investment, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant insured depository institutions are consistent with approval of the transaction.

CONCLUSION

Based on the foregoing and all the facts of record, the Board has determined that the application should be, and hereby is, approved.²⁵ In reaching its conclusion, the Board has considered all the facts of record in light of the factors

affiliates to conduct their lending operations without any abusive lending practices and in compliance with all applicable laws.

25. The Board also has approved the retention of the indirect interest in Herald held by MUFU. MUFU, a financial holding company within the meaning of the BHC Act, currently controls approximately 21 percent of the voting shares of Morgan Stanley. The Board notes that MUFU provided no funding for Morgan's acquisition of the Herald shares, and Morgan's retention of those shares would not alter the current structure of MUFU's investment in Morgan. In addition, MUFU's U.S. subsidiary banks remain well capitalized. The Board previously has determined that the foreign banks controlled by MUFU are subject to comprehensive supervision on a consolidated basis by their home-country supervisor, the Japanese Financial Services Agency ("FSA"). The Board has determined that these banks continue to be subject to comprehensive supervision on a consolidated basis by the

that it is required to consider under the BHC Act and other applicable statutes.²⁶ The Board's approval is specifically conditioned on compliance by Morgan with the conditions imposed in this order and the commitments made to the Board in connection with the application.²⁷ 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.

By order of the Board of Governors, effective June 26, 2009.

Voting for this action: Chairman Bernanke and Governors Warsh, Duke, and Tarullo. Absent and not voting: Vice Chairman Kohn.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Appendix

PASSIVITY COMMITMENTS

Morgan Stanley ("Morgan"), New York, New York, and its subsidiaries (collectively, "the Morgan Stanley Group"),

FSA. All other factors are consistent with approval of MUFG's retention of its indirect interest in Herald.

26. A commenter requested an extension of the comment period on the application. Notice of the application was published in the *Federal Register* on November 7, 2008. Newspaper notices were published on October 31 and November 4 in the appropriate newspapers of record, and the comment period ended on December 4, 2008. Accordingly, interested persons had approximately 34 days to submit views. This period provided sufficient time to the commenter to prepare and submit its comments and, as noted above, the commenter provided a written submission, which the Board considered carefully in acting on the application. The Board also has accumulated a significant record in this case, including reports of examination, confidential supervisory information and public reports and information, in addition to public comments. Moreover, the Board is required under applicable law and its regulations to act on applications submitted under the BHC Act within specified time periods. Based on 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 no extension of the comment period is necessary.

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 written recommendation of denial of the application. The Board has not received such a recommendation from the OCC. 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 material factual issues related to the application and to provide an opportunity for testimony (12 CFR 225.16(e) and 262.25(d)). The Board has considered carefully the commenter's request in light of all the facts of record. As noted, 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 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 public meeting or hearing on the application is denied.

will not, without the prior approval of the Board or its staff, directly or indirectly

1. Exercise or attempt to exercise a controlling influence over the management or policies of Herald National Bank ("Herald"), New York, New York, or any of its subsidiaries;
2. Have or seek to have any representative of the Morgan Stanley Group serve on the board of directors of any subsidiary of Herald;
3. Have or seek to have more than one representative of the Morgan Stanley Group serve on the board of directors of Herald or permit any representative of the Morgan Stanley Group who serves on the board of directors of Herald to serve as (i) the chairman of the board of directors of Herald, (ii) the chairman of any committee of the board of directors of Herald, or (iii) a member of any committee of the board of directors of Herald if such representative occupies more than 25 percent of the seats on the committee;
4. Have or seek to have any employee or representative of Morgan Stanley Group serve as an officer, agent, or employee of Herald or any of its subsidiaries;
5. Take any action that would cause Herald or any of its subsidiaries to become a subsidiary of Morgan;
6. Own, control, or hold with power to vote securities that (when aggregated with securities that the officers and directors of the Morgan Stanley Group own, control, or hold with power to vote) represent 25 percent or more of any class of voting securities of Herald or any of its subsidiaries;
7. Own or control equity interests that would cause the combined voting and nonvoting equity interests of the Morgan Stanley Group and its officers and directors to equal or exceed 25 percent of the total equity capital of Herald or any of its subsidiaries;
8. Except in connection with the Morgan Stanley Group's representation on the board of directors of Herald consistent with paragraph 3 above, 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 Herald or any of its subsidiaries;
9. Enter into any agreement with Herald or any of its subsidiaries that substantially limits the discretion of Herald's management over major policies and decisions, including, but not limited to, policies or decisions about employing and compensating executive officers; engaging in new business lines; raising additional debt or equity capital; merging or consolidating with another firm; or acquiring, selling, leasing, transferring, or disposing of material assets, subsidiaries, or other entities;
10. Except in connection with the Morgan Stanley Group's representation on the board of directors of Herald consistent with paragraph 3 above, solicit or participate in soliciting proxies with respect to any matter presented to the shareholders of Herald or any of its subsidiaries;
11. Dispose or threaten to dispose (explicitly or implicitly) of equity interests of Herald or any of its subsidiaries in any manner as a condition or inducement of specific action or non-action by Herald or any of its subsidiaries; or
12. Enter into any banking or nonbanking transactions with Herald or any of its subsidiaries, except that
 - (a) The Morgan Stanley Group may establish and maintain deposit accounts with Herald; *provided*, that the aggregate balance of all such deposit

accounts does not exceed \$500,000 and that the accounts are maintained on substantially the same terms as those prevailing for comparable accounts of persons unaffiliated with Herald; and

- (b) The Morgan Stanley Group and Herald may sell loan participations to each other, provided that (i) the Morgan Stanley Group and Herald each are free to enter into similar transactions with other parties; (ii) the Morgan Stanley Group and Herald each use its own underwriting criteria to evaluate potential participations; (iii) any and all loan participation transactions between the Morgan Stanley Group and Herald are at market terms and on an arm's-length basis; (iv) the aggregate balance of all such loan participations purchased by Herald from the Morgan Stanley Group does not exceed the dollar amount equal to 5 percent of Herald's total loans and leases, net of unearned income; and (v) the aggregate balance of any such loan participations sold by Herald to the Morgan Stanley Group does not exceed the dollar amount equal to 5 percent of Herald's total loans and leases, net of unearned income.

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

Morgan understands that these commitments constitute conditions imposed in writing in connection with the Board's findings and decision on Morgan's application to retain up to 9.9 percent of the voting shares of Herald, pursuant to 12 U.S.C. § 1842, and, as such, may be enforced in proceedings under applicable law.

ORDER ISSUED UNDER INTERNATIONAL BANKING ACT

*Standard Chartered Bank
London, England*

Order Approving Establishment of a Representative Office

Standard Chartered Bank ("Bank"), London, England, a foreign bank within the meaning of the International Banking Act ("IBA"), has applied under section 10(a) of the IBA¹ to establish a representative office in Houston, Texas. 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 comment, has been published in a newspaper of general circulation in Houston (*Houston Chronicle*, January 16, 2009). The time for filing comments has expired, and all comments received have been considered.

1. 12 U.S.C. § 3107(a).

Bank, with total consolidated assets of approximately \$435 billion,² is the ninth largest bank in the United Kingdom by asset size.³ Bank engages in a broad range of consumer banking and wholesale banking activities through numerous offices and subsidiaries located throughout the world. In the United States, Bank operates state-licensed branches in Pasadena, California, and New York, New York, and representative offices in San Diego and San Francisco, California; Miami, Florida; Atlanta, Georgia; and Jersey City and Newark, New Jersey. Bank also owns two Edge corporation subsidiaries (Standard Chartered Overseas Investment Inc. and Standard Chartered Bank International (Americas) Limited ("SCBI")) and an agreement corporation subsidiary, Standard Chartered International (USA) Ltd. Bank is wholly owned by Standard Chartered Holdings Limited,⁴ which is wholly owned by Standard Chartered PLC ("Standard Chartered"), both of London, England. Standard Chartered and its subsidiaries offer international banking and financial services in over 50 countries and territories worldwide.⁵

The proposed representative office would serve as a liaison between Bank and its customers.⁶ The office would also solicit new business for Bank's wholesale banking products and services from potential customers in the United States and serve as a point of contact for clients and prospective clients of such business in Texas and Latin America, with an initial focus on clients in the energy sector.⁷

In acting on an application under the IBA and Regulation K by a foreign bank to establish a representative office, the Board shall take into account whether the foreign bank directly engages in the business of banking outside of the United States and whether the foreign bank has furnished to the Board the information it needs to assess the application adequately.⁸ The Board shall also take into account whether the foreign bank is subject to comprehensive supervision on a consolidated basis by its home-country supervisor.⁹

2. Unless otherwise indicated, data are as of December 31, 2008.

3. Ranking data are as of December 31, 2007.

4. Standard Chartered Holdings Limited's only activity is holding 100 percent of the shares of Bank.

5. As of March 2, 2009, Temasek Holdings (Private) Limited ("Temasek"), Singapore, held 18.81 percent of the voting rights of Standard Chartered. Temasek does not have representation on the board of directors of Standard Chartered.

6. A representative office may engage in representational and administrative functions in connection with the banking activities of the foreign bank, including soliciting new business for the foreign bank, conducting research, acting as a liaison between the foreign bank's head office and customers in the United States, performing preliminary and servicing steps in connection with lending, and performing back-office functions. A representative office may not contract for any deposit or deposit-like liability, lend money, or engage in any other banking activity (12 CFR 211.24(d)(1)).

7. Any transactions resulting from the activities of the representative office will be conducted with Bank's branch in New York.

8. 12 U.S.C. § 3107(a)(2).

9. *Id.*; 12 CFR 211.24(d)(2). In assessing the supervision standard, the Board considers, among other indicia of comprehensive, consolidated supervision, the extent to which the home-country supervisors (i) ensure that the bank has adequate procedures for monitoring and

The Board also considers additional standards set forth in the IBA and Regulation K.¹⁰

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 has determined, in connection with applications involving other banks in the United Kingdom, that those banks were subject to home-country supervision on a consolidated basis by the Financial Services Authority ("FSA"), the primary regulator of commercial banks in the United Kingdom.¹¹ Bank is supervised by the FSA on substantially the same terms and conditions as those other banks. Based on all the factors of record, including the above information, it has been determined that Bank is subject to comprehensive supervision on a consolidated basis by its home-country supervisor.

The additional standards set forth in section 7 of the IBA and Regulation K have also been taken into account.¹² The FSA has no objection to the proposed representative office.

With respect to the financial and managerial resources of Bank, taking into consideration its record of operation in its home country, its overall financial resources, and its standing with its home-country supervisor, financial and managerial factors are consistent with approval. 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.¹³

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 the 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; and (v) evaluate prudential standards, such as capital adequacy and risk asset exposure, on a worldwide basis. No single factor is essential, and other elements may inform the Board's determination.

10. See 12 U.S.C. § 3105(d)(3)–(4); 12 CFR 211.24(c)(2). These standards include (1) whether the bank's home-country supervisor has consented to the establishment of the office; the financial and managerial resources of the bank; (2) whether the bank has procedures to combat money laundering, whether there is a legal regime in place in the home country to address money laundering, and whether the home country is participating in multilateral efforts to combat money laundering; (3) whether the appropriate supervisors in the home country may share information on the bank's operations with the Board; and (4) whether the bank and its U.S. affiliates are in compliance with U.S. law; the needs of the community; and the bank's record of operation.

11. See, e.g., *Barclays plc*, 91 *Federal Reserve Bulletin* 48 (2005); *HBOS Treasury Services plc*, 90 *Federal Reserve Bulletin* 103 (2004); *The Royal Bank of Scotland Group*, 89 *Federal Reserve Bulletin* 386 (2003).

12. See *supra* note 9.

13. On August 3, 2007, American Express Bank International, now SCBI, came under a Cease and Desist Order from the Board and entered into a Deferred Prosecution Agreement with the U.S. Department of Justice for persistent deficiencies in its anti-money-laundering

The United Kingdom is a member of the Financial Action Task Force and subscribes to its recommendations on measures to combat money laundering. In accordance with these recommendations, the United Kingdom 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 the United Kingdom, 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 governmental authorities have been communicated with regarding access to information. Bank and Standard Chartered 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 Standard Chartered 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, FSA 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 conditions described below, it has been determined that Bank and Standard Chartered provided adequate assurances of access to any necessary information that the Board may request.

On the basis of the foregoing and all the facts of record, and subject to commitments made by Bank and Standard Chartered to the Board, as well as the terms and conditions set forth in this order, Bank's application to establish the representative office is hereby approved.¹⁴ Should any restrictions on access to information regarding 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 this application also is specifically conditioned on compliance by Bank and Standard Chartered with the conditions imposed in this order

program. Separately, AEBL, now Standard Chartered International (USA) Ltd., and the New York State Banking Department entered into a Written Agreement for the same matters. SCBI and Standard Chartered International (USA) Ltd. are providing periodic reports required in their respective enforcement actions and are making satisfactory progress in addressing the deficiencies.

14. Approved by the Director of Banking Supervision and Regulation, with the concurrence of the General Counsel, pursuant to authority delegated by the Board. See 12 CFR 265.7(d)(12).

and the commitments made to the Board in connection with this application.¹⁵ For purposes of this action, the commitments and conditions are deemed to be conditions imposed in writing by the Board in connection with its finding and decision and may be enforced in proceedings under 12 U.S.C. § 1818 against Bank and its affiliates.

By order, approved pursuant to authority delegated by the Board, effective May 7, 2009.

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

FINAL ENFORCEMENT DECISION ISSUED BY THE BOARD

IN THE MATTER OF

*Francesco Rusciano,
Former Institution-Affiliated Party of*

*UBS AG,
Zurich, Switzerland*

Docket Nos. 09-007-I-E, 09-007-I-CMP

Determination on Request for Private Hearing

BACKGROUND

This is an enforcement proceeding brought by the Board of Governors of the Federal Reserve System (the “Board”) against Francesco Rusciano pursuant to the Federal Deposit Insurance Act (the “FDI Act”). Rusciano traded foreign exchange and debt instruments for the account of UBS AG. In a Notice of Intent to Prohibit and Notice of Assessment of a Civil Money Penalty (the “Notice”) issued on January 23, 2009, the Board alleged that Rusciano manipulated UBS’s trade recordation systems by falsifying information about actual transactions and entering fictitious trades in order to conceal mounting losses in his trading book. The Notice seeks civil money penalties and an order of prohibition against the Respondent.

In accordance with section 8(u)(2) of the FDI Act, 12 U.S.C. § 1818(u)(2), the Notice advised the Respondent that any hearing held in this matter would be public, unless the Board determines that an open hearing would be contrary to the public interest. The Notice informed Respondent that he could submit a statement detailing any reasons why the hearing should not be public. Respondent duly filed a motion with the Board seeking a private hearing in this matter. Board Enforcement Counsel opposed the motion.

15. The Board’s authority to approve the establishment of the proposed representative office parallels the continuing authority of the state of Texas to license offices of a foreign bank. The Board’s approval of this application does not supplant the authority of the state of Texas or its agent, the Texas Department of Banking, to license the proposed representative office of Bank in accordance with any terms or conditions that it may impose.

In a brief and conclusory pleading, Respondent asserted that disclosure of the allegations in the Notice would “damage [Respondent’s] reputation and good name” and that it would “not be possible to undo the damage” if Respondent is vindicated. Respondent also noted that he has not been affiliated with a Board-supervised institution since 2006, so that public disclosure “is unnecessary to protect the public interest.”

DISCUSSION

The enforcement provisions of the Federal Deposit Insurance Act provide that all administrative hearings must be public unless the Board, in its discretion, determines that a public hearing would be “contrary to the public interest.” The Board’s regulations echo this requirement (12 CFR 263.33(a)). In two cases in 1999, the Board set forth the standard by which requests for private hearings would be determined. Specifically, the Board ruled that

Before the Board exercises its discretion to close a hearing, there should be a substantial basis for concluding that the case reflects unusual circumstances that overcome the presumption in favor of open hearings. In general, in light of the congressional requirement that the proceeding be open unless “contrary to the public interest,” those circumstances should involve serious safety and soundness concerns flowing from a public hearing. . . . [A] party seeking a closed hearing should be required to demonstrate how the effects of this proceeding differ so significantly from those involving other banks in terms of the *public* interest as to warrant special treatment.

In the Matter of Incus Co., Ltd., 85 *Federal Reserve Bulletin* 284, 285 (1999); *In the Matter of Fonkenell*, 85 *Federal Reserve Bulletin* 353 (1999) (same).

The reasons given by Respondent here for closing the hearing to the public do not establish that an open hearing would be contrary to the public interest. The Board has previously rejected the argument that reputational concerns of the respondent or third parties justify closing a hearing to the public. See *In the Matter of Zbinden*, 80 *Federal Reserve Bulletin* 360 (1994); *Fonkenell*, 85 *Federal Reserve Bulletin* at 354; *Incus*, 85 *Federal Reserve Bulletin* at 285. Similarly, the fact that Respondent is not currently employed by a Federal Reserve-regulated institution does not mean that a public hearing is “*contrary* to the public interest.” (12 U.S.C. § 1818(u)(2) (emphasis added)). Accordingly, these arguments fail to meet the standard required by the Board to close a hearing to the public.

Accordingly, Respondent’s request for a private hearing is denied.

By order of the Board of Governors, this 1st day of April, 2009.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

ROBERT DE V. FRIERSON
Deputy Secretary of the Board