
Legal Developments: Fourth Quarter, 2008

ORDERS ISSUED UNDER BANK HOLDING COMPANY ACT

ORDERS ISSUED UNDER SECTION 3 OF THE BANK HOLDING COMPANY ACT

The PNC Financial Services Group, Inc. Pittsburgh, Pennsylvania

Order Approving the Merger of Bank Holding Companies

The PNC Financial Services Group, Inc. (“PNC”), a financial holding company within the meaning of the Bank Holding Company Act (“BHC Act”), has requested the Board’s approval under section 3 of the BHC Act¹ to acquire National City Corporation (“National City”) and thereby indirectly acquire National City’s subsidiary bank, National City Bank (“NC Bank”), both of Cleveland, Ohio.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (73 *Federal Register* 65,854 (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 the BHC Act.³

PNC, with total consolidated assets of approximately \$145.6 billion, is the 14th largest depository organization in the United States, controlling deposits of approximately \$84.6 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the United States.⁴ PNC controls two insured depository institutions that operate in nine states and the District of

Columbia.⁵ PNC is the 12th largest depository organization in Ohio, controlling deposits of approximately \$2.2 billion.⁶

National City, with total consolidated assets of approximately \$143.7 billion, is the 16th largest depository organization in the United States. NC Bank, its only depository institution, operates in nine states and controls deposits of approximately \$94.3 billion. National City is the largest depository organization in Ohio, controlling deposits of \$34.7 billion.

On consummation of this proposal, and after taking into account the proposed divestitures, PNC would become the eighth largest depository organization in the United States, with total consolidated assets of approximately \$288.5 billion. PNC would control total deposits of \$174.8 billion, representing less than 1 percent of the total amount of deposits of insured depository institutions in the United States. In Ohio, PNC would become the largest depository organization, controlling deposits of approximately \$36.9 billion, which represent approximately 17.4 percent of the total amount of deposits of insured depository institutions in the state.

FACTORS GOVERNING BOARD REVIEW OF THE TRANSACTION

The BHC Act enumerates the factors the Board must consider when reviewing the merger of bank holding companies or the acquisition of banks. These factors are the competitive effects of the proposal in the relevant geographic markets; the financial and managerial resources and future prospects of the companies and banks involved in the transaction; the convenience and needs of the communities to be served;⁷ the records of performance under the Community Reinvestment Act (“CRA”)⁸ of the insured depository institutions involved in the transaction;

1. 12 U.S.C. § 1842.

2. PNC also proposes to acquire Ohio National Corporation Trade Services, Cleveland, the agreement corporation subsidiary of National City under section 25 of the Federal Reserve Act (“FRA”) and the Board’s Regulation K, 12 U.S.C. §§ 601 et seq. and 12 CFR 211.5(g). In addition, PNC proposes to acquire the nonbanking subsidiaries of National City in accordance with section 4(k) of the BHC Act (12 U.S.C. § 1843(k)).

3. Ninety-four commenters expressed concerns about certain aspects of the proposal.

4. Asset, national deposit, and ranking data are as of September 30, 2008. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

5. PNC’s subsidiary insured depository institutions are PNC Bank, National Association (“PNC Bank”), Pittsburgh, Pennsylvania; and PNC Bank, Delaware, Wilmington, Delaware.

6. Statewide deposit and ranking data are as of June 30, 2008.

7. A majority of commenters expressed concern that the proposed acquisition would result in the loss of jobs. The effect of a proposed transaction on employment in a community is not among the factors that the Board is authorized to consider under the BHC Act, and the federal banking agencies, courts, and the Congress consistently have interpreted the convenience and needs factor to relate to the effect of a proposal on the availability and quality of banking services in the community. *See, e.g., Wells Fargo & Company*, 82 *Federal Reserve Bulletin* 445, 457 (1996).

8. 12 U.S.C. § 2901 et seq.

and the availability of information needed to determine and enforce compliance with the BHC Act.⁹ In cases involving interstate bank acquisitions, the Board also must consider the concentration of deposits nationwide and in certain individual states, as well as compliance with other provisions of section 3(d) of the BHC Act.¹⁰

INTERSTATE ANALYSIS

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the home state of such bank holding company if certain conditions are met. For purposes of the BHC Act, the home state of PNC is Pennsylvania,¹¹ and NC Bank is located in nine states.¹² 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.¹³ 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 Board has considered carefully the competitive effects of the proposal in light of all the facts of record. Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of an attempt to monopolize the business of banking in any relevant banking market. The BHC Act also prohibits the Board from approving a bank acquisition that

9. Some commenters urged the Board to deny the proposal because National City's board of directors allegedly breached its fiduciary duties in entering into the merger agreement with PNC and because the purchase price was inadequate and would harm the interests of National City's shareholders. These allegations are subject to litigation before a court of competent jurisdiction and are not within the discretion of the Board to resolve. See *Western Bancshares, Inc. v. Board of Governors*, 480 F.2d 749 (10th Cir. 1973). The Board also notes that approval of the National City shareholders is required to consummate the proposal.

10. 12 U.S.C. § 1843(d).

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

12. For purposes of section 3(d), the Board considers a bank to be located in the states in which the bank is chartered or headquartered or operates a branch. See 12 U.S.C. §§ 1841(o)(4)–(7) and 1842(d)(1)(A) and (d)(2)(B). NC Bank operates branches in Florida, Illinois, Indiana, Kentucky, Michigan, Missouri, Ohio, Pennsylvania, and Wisconsin.

13. 12 U.S.C. §§ 1842(d)(1)–(3). Applicant is adequately capitalized and adequately managed, as defined by applicable law. NC Bank has been in existence and operated for the minimum period of time required by applicable state laws. See 12 U.S.C. § 1842(d)(1)(B). On consummation of the proposal, applicant 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)). Applicant 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.

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 transaction in meeting the convenience and needs of the community served.¹⁴

PNC's subsidiary depository institutions and NC Bank directly compete in 10 banking markets, including markets in Florida, Kentucky, Ohio, and Pennsylvania. 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 and public comments on the proposal.¹⁵ In particular, the Board has considered the number of competitors that would remain in the banking markets, the relative shares of total deposits in depository institutions in the markets ("market deposits") controlled by PNC's insured depository institutions and NC Bank,¹⁶ 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"),¹⁷ and other characteristics of the markets. In addition, the Board has considered commitments made by PNC to the Board to reduce the potential that the proposal would have adverse effects on competition by divesting 61 NC Bank branches (the "divestiture branches"), which

14. 12 U.S.C. § 1842(c)(1).

15. Several commenters expressed general concerns about the competitive effects of this proposal and the effects it could have on consumer choices for banking services.

16. Deposit and market share data are as of June 30, 2008, adjusted to reflect mergers and acquisitions through November 4, 2008, and generally are based on calculations in which the deposits of thrift institutions are included at 50 percent. In recognition that thrift institutions have become, or have the potential to become, significant competitors of commercial banks, the Board regularly has included thrift institution deposits in the market concentration and market share calculations on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52, 55 (1991). In some markets noted in this order, the market concentration and market share are based on calculations in which the deposits of certain thrift institutions are weighted at 100 percent. The Board previously has indicated that it may consider the competitiveness of a thrift institution at a level greater than 50 percent of its deposits when appropriate if competition from the institution closely approximates competition from a commercial bank. See, e.g., *Banknorth Group, Inc.*, 75 *Federal Reserve Bulletin* 703 (1989). In evaluating when it is appropriate to increase the weighting of a thrift institution's deposits in a banking market, the Board considers whether the thrift institution serves as a significant source of commercial loans in the market and provides a broad range of consumer, mortgage, and other banking products. See, e.g., *The PNC Financial Services Group, Inc.*, 93 *Federal Reserve Bulletin* C65 (2007); *First Union Corporation*, 84 *Federal Reserve Bulletin* 489 (1998).

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

account for approximately \$4 billion in deposits, in five banking markets in Pennsylvania.

A. Banking Markets within Established Guidelines

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in five of the banking markets in which PNC's subsidiary depository institutions and NC Bank directly compete.¹⁸ On consummation of the proposal, one market would remain highly concentrated, two markets would remain moderately concentrated, and two would remain unconcentrated, as measured by the HHI. The change in HHI in the one highly concentrated market would be small and consistent with Board precedent and the thresholds in the DOJ Guidelines. In each of the banking markets, numerous competitors would remain.

B. Certain Banking Markets with Divestitures

After accounting for the branch divestitures, consummation of the merger would be consistent with Board precedent and the thresholds in the DOJ Guidelines in two banking markets in Pennsylvania: Franklin-Titusville-Oil City ("FTO") and Warren.¹⁹ Although both markets would remain highly concentrated, the HHI would not increase in either market. In addition, six competitors would remain in the FTO banking market, including a depository institution that would control 33 percent of market deposits. Although only four competitors would remain in the Warren banking market, one depository institution competitor of PNC would control 52 percent of market deposits.

C. Three Banking Markets Warranting Special Scrutiny

PNC's subsidiary depository institutions and NC Bank compete directly in three banking markets in Pennsylvania that warrant a detailed review: Pittsburgh, Erie, and Meadville. In each of these markets, all with proposed divestitures, the concentration levels on consummation of the proposal would exceed the threshold levels in the DOJ Guidelines or the resulting market share of PNC would exceed 35 percent.

For each of these markets, the Board has considered carefully whether other factors either mitigate the competitive effects of the proposal or indicate that the proposal would have a significantly adverse effect on competition in the market. The number and strength of factors necessary to mitigate the competitive effects of a proposal depend on the

size of the increase in and resulting level of concentration in a banking market.²⁰ In each of these markets, the Board has identified factors that indicate the proposal would not have a significantly adverse impact on competition, notwithstanding the post-consummation increase in the HHI and market share.

Among the factors reviewed, the Board has considered the competitive influence of community credit unions in these banking markets. Those credit unions offer a wide range of consumer products, operate street-level branches, and have membership open to almost all residents in the applicable market. The Board has concluded that the activities of such credit unions in the three markets exert competitive influence that mitigates, in part, the potential effects of the proposal.²¹

Pittsburgh. The structural effects of the proposal in the Pittsburgh banking market ("Pittsburgh Market") as measured by applying the HHI to the June 30, 2008, Summary of Deposit data ("SOD") would substantially exceed the DOJ Guidelines. According to those data, PNC operates the largest insured depository institution in the Pittsburgh Market,²² controlling approximately \$26 billion in deposits, which represents approximately 37 percent of market deposits. NC Bank operates the second largest insured depository institution in the Pittsburgh Market, controlling approximately \$11 billion in deposits, which represents approximately 16 percent of market deposits. After the proposed merger, PNC would remain the largest depository institution in the market, controlling deposits of approximately \$38 billion, representing approximately 53 percent of market deposits.²³

To reduce the potential adverse effects on competition in the Pittsburgh Market, PNC has proposed to divest 50 of NC Bank's branches that account for approximately \$3.5 billion in deposits. On consummation of the merger and after

20. See *Regions Financial Corp.*, 93 *Federal Reserve Bulletin* C16 (2007); *NationsBank Corporation*, 84 *Federal Reserve Bulletin* 129 (1998).

21. The Board previously has considered the competitiveness of certain active credit unions as a mitigating factor. See, e.g., *Wells Fargo & Company*, 95 *Federal Reserve Bulletin* B39; *The PNC Financial Services Group, Inc.*, 93 *Federal Reserve Bulletin* C65 (2007); *Regions Financial Corp.*, 93 *Federal Reserve Bulletin* C16 (2007); *Wachovia Corp.*, 92 *Federal Reserve Bulletin* C183 (2006).

22. The Pittsburgh Market is defined as the counties of Allegheny, Armstrong, Beaver, Butler, Fayette (except Point Marion Borough and Springhill Township), Greene, Lawrence, Washington, and Westmoreland.

23. These market concentration and market share calculations include the weighting of deposits controlled by five thrift institutions in the market at 100 percent. Two of these thrift institutions were considered to be active in the Pittsburgh commercial lending market as a result of having a ratio of commercial and industrial ("C&I") loans to assets of at least 5 percent. A third thrift institution had ratios of C&I loans to total loans of more than 10 percent, which is comparable to the national average for all commercial banks. The remaining two thrift institutions had C&I loan-to-asset ratios slightly below 5 percent and were deemed to be active commercial lenders based on discussions with personnel of the thrift institutions and commercial bank competitors in the Pittsburgh Market, who indicated that the thrift institutions were active participants in the market's commercial lending sector.

18. These banking markets and the effects of the proposal on their concentrations of banking resources are described in Appendix A.

19. These banking markets and the effects of the proposal on their concentrations of banking resources are described in Appendix B. The analysis of the effects of the proposal in these markets includes the weighting of deposits controlled by one thrift institution operating in both the markets at 100 percent. The thrift institution was deemed to be an active commercial lender based on lending data and discussions with personnel of the thrift institution and commercial bank competitors indicating that it was an active commercial lender in both markets.

accounting for the proposed divestiture, PNC would remain the largest depository institution in the market, controlling deposits of approximately \$34 billion, which represent approximately 48 percent of market deposits. The HHI would increase 752 points to 2640.

The proposal raises special concerns in the Pittsburgh Market because PNC, the largest institution in the banking market, proposes to merge with the market's second largest competitor and all other competitors in the market have significantly smaller market shares. The Board has previously recognized that merger proposals involving the largest depository institutions in markets structured like the Pittsburgh Market warrant close review due to the size of those institutions relative to other market competitors.²⁴ The Board, therefore, has carefully considered whether other factors indicate that the increase in market concentration, as measured by SOD data, overstates the potential competitive effects of the proposal in the market.

The Board has considered PNC's assertion that inclusion of certain deposits that were received and booked at PNC's head office in the Pittsburgh Market in calculations of market share indices for this transaction would distort the measures of the competitive effect of the proposal on the Pittsburgh Market. PNC has argued that, for purposes of evaluating the proposal's competitive effect in the Pittsburgh Market, the Board should exclude those deposits booked at PNC's head office that have no relation to the Pittsburgh Market. Approximately \$17 billion of the deposits at PNC's head office are government deposits, out-of-market escrow deposits, correspondent banking deposits, wholesale certificates of deposit and related accounts ("CDs"), broker-dealer trust accounts, and certain corporate deposits.

In conducting its competitive analysis in previous cases, the Board generally has not adjusted its market share calculations to exclude out-of-market deposits because all deposits are typically available to support lending and other banking activities at any location. The Board has adjusted the market deposits held by an applicant to exclude specific types of deposits only in limited situations, such as when evidence supported a finding that the excluded deposits were not legally available for use in that market and data were available to make comparable adjustments to the market shares for all other market participants.²⁵ The Board also has adjusted deposit data in the limited circumstance when there was strong evidence that a depository organization moved its national business-line deposits to a particular branch for business reasons unrelated to its efforts to compete in that market and did not use those deposits to enhance its competitive ability in that market or to manipu-

late SOD data used in competitive analyses by a federal supervisory agency.²⁶

PNC has stated that approximately \$10 billion in out-of-market deposits was assigned to PNC's head office for business reasons unrelated to its efforts to compete in the Pittsburgh Market. PNC has represented that these deposits were transferred because that office houses the "Intrader" accounting system, which is used to track PNC's wholesale CDs and broker-dealer trust accounts, both nationally and internationally. In addition, PNC has represented that the deposits maintained by the Intrader system are segregated from the deposit account system on which the head office generally operates. Furthermore, the head office systems are separate from the retail branch located in the same building, and the retail branch personnel cannot access the Intrader system.²⁷ PNC has represented that it placed the Intrader deposits in its head office for administrative convenience unrelated to PNC's efforts to compete in the Pittsburgh Market and that none of the account holders booked on Intrader are domiciled in the Pittsburgh Market.

PNC has also argued that other deposits associated with out-of-market customers should be excluded from PNC's head office deposits, including deposits that were generated from various municipalities and governments outside the Pittsburgh Market, that involve escrow accounts for mortgages and other transactions outside the market, or that represent correspondent banking accounts with institutions outside the market. PNC is limited by law, contract, or duration of relationship from using these deposits for any activity other than to support the deposit account.²⁸ Other deposits PNC asserted should be excluded are accounts from large corporations located outside the Pittsburgh Market.

There is no evidence in the record that PNC moved the deposits in question to the head office from another branch in an attempt to manipulate the SOD data used for competitive analyses by the appropriate federal supervisory agency. Although PNC holds approximately \$26 billion in deposits in the Pittsburgh Market based on SOD data, it holds loans in the Pittsburgh Market ("market loans") totaling approximately \$2 billion, which represents a loan-to-deposit ratio of 8.1 percent for PNC in the Pittsburgh Market. In contrast, PNC's ratio of market loans to deposits associated with customers in the Pittsburgh Market is 22.4 percent. In addition, PNC's total market loans have decreased 3 percent in the period since December 31, 2006, while its total deposits held at the Pittsburgh office have increased 29 percent. Furthermore, the market deposits of PNC associated

24. See *First Busey Corporation*, 93 *Federal Reserve Bulletin* C90, C91 (2007); *Firststar Corporation*, 87 *Federal Reserve Bulletin* 236, 238 (2001).

25. See *First Security Corp.*, 86 *Federal Reserve Bulletin* 122 (2000).

26. See *Bank of America Corporation*, 94 *Federal Reserve Bulletin* C81, C84-C85 (2008); *J.P. Morgan Chase & Co.*, 90 *Federal Reserve Bulletin* 352, 355 (2004).

27. The wholesale funds booked to PNC's head office support the entire multistate branch footprint of PNC and its national and international nonbank operational footprint.

28. See *First Security Corp.*, 86 *Federal Reserve Bulletin* 122, 126-127 (2000).

with out-of-market customers increased 41 percent during the same period while its market deposits associated with customers in the Pittsburgh Market increased 13 percent. These facts, and in particular the fact of the decrease in loan market share in comparison to a significant increase in the deposits held by the Pittsburgh head office from out-of-market customers, is consistent with the conclusion that the SOD deposit data significantly overstate PNC's competitive presence in the Pittsburgh Market.

The Board has also taken into consideration the fact that the next largest competitor (other than NC Bank) to PNC in the Pittsburgh Market has significantly more branches than PNC in the market but has average market deposits per branch of less than 17 percent of PNC's average market deposits per branch. The other commercial bank and thrift institution competitors of PNC that have at least half as many branches as PNC have average market deposits per branch of less than 14 percent of PNC's average market deposits per branch. PNC's high average market deposits per branch further supports the conclusion that the SOD deposit data significantly overstate PNC's competitive presence in the Pittsburgh Market.

Based on a careful review of these and all other facts of record, the Board concludes that the concentration level for PNC in the Pittsburgh Market, as measured by the HHI using SOD data without adjustment, overstates the competitive effect of the proposal in the Pittsburgh Market. If the \$17 billion in deposits discussed above with no relation to the Pittsburgh Market is excluded from the calculation of its market concentration, the market share held by PNC on consummation of the proposal would be approximately 38 percent, after accounting for the effects of the proposed divestitures. PNC would remain the largest insured depository institution in the market on consummation of the proposal, controlling adjusted market deposits of approximately \$21 billion. If PNC's proposed divestitures were purchased by the largest in-market institution, the resulting HHI would increase 529 points to 1835.

The Board also examined other mitigating factors in the Pittsburgh Market. A large number of commercial bank and thrift institution competitors (57) would remain in the market after consummation of the proposal, including two competitors that each have more than a 12 percent market share.²⁹ The proposed divestiture of 50 branches would significantly strengthen the competitive position of a banking organization operating in the Pittsburgh Market or bring a new, sizable competitor into the market. Furthermore, the record of recent entry into the Pittsburgh Market is evidence of its attractiveness for entry by out-of-market competitors. Six banking organizations have entered the market in the past four years.

29. The Board also has concluded that the activity of one community credit union in the market exerts sufficient competitive influence to mitigate, in part, the potential adverse competitive effects of the proposal. This active credit union controls approximately \$554 million of deposits in the market. Accounting for a 50 percent weighting of these deposits, PNC would control approximately 37 percent of market deposits, and the HHI would increase 522 points to 1813.

Based on a careful review of these and all other factors of record, the Board concludes that, with the proposed divestitures, appropriate adjustment, and consideration of other mitigating factors, consummation of the proposal would have no significantly adverse effects in the Pittsburgh Market.

Erie. In the Erie banking market ("Erie Market"),³⁰ PNC operates the largest depository institution in the market, controlling deposits of approximately \$820 million, which represent approximately 27 percent of market deposits. NC Bank operates the second largest depository institution in the market, controlling deposits of approximately \$459 million, which represent approximately 15 percent of market deposits. To reduce the potential for adverse effects on competition in the Erie Market, PNC Bank has proposed to divest six of NC Bank's branches that account for \$294.6 million in total deposits. On consummation of the merger and after accounting for the proposed divestitures, PNC would remain the largest depository institution in the market, controlling deposits of approximately \$985 million, which represent approximately 32 percent of market deposits. The HHI would increase 246 points to 2060.³¹

Several factors indicate that the increase in concentration in the Erie Market, as measured by the HHI and PNC's market share, overstates the potential competitive effects of the proposal in the market. After consummation of the proposal, eight other commercial bank and thrift institution competitors would remain in the market, including two other competitors with a significant presence in the market. The second and third largest depository institution organizations in the market would control approximately 24 percent and 12 percent of market deposits, respectively. The second largest depository organization would also control 22 branches, the largest branch network of any depository institution in the Erie Market.

In addition, the Board has evaluated the competitive influence of four active community credit unions in the Erie Market. These credit unions control approximately \$467 million in deposits in the market that, on a 50 percent weighted basis, represent approximately 7.14 percent of market deposits. Accounting for the revised weightings of these deposits, PNC would control approximately 30.1 percent of market deposits, and the HHI would increase 212 points to 1795.

In addition, the record of recent entry into the Erie Market is evidence of the market's attractiveness for entry. Two depository institutions have entered the market since 2004.

Based on a careful review of all the facts of record, and taking into account the proposed divestitures, the Board

30. The Erie Market is defined as Erie County.

31. This analysis includes the weighting of deposits controlled by one thrift institution in the market at 100 percent. The thrift institution was deemed to be an active commercial lender based on lending data and discussions with personnel of the thrift institution and other commercial banking competitors indicating that the thrift institution was an active commercial lending participant in the Erie Market.

concludes that consummation of the proposal would not substantially lessen competition in the Erie Market.

Meadville. In the Meadville banking market (“Meadville Market”),³² PNC operates the third largest depository institution in the market, controlling deposits of approximately \$113 million, which represent approximately 13 percent of market deposits. NC Bank operates the largest depository institution in the market, controlling deposits of approximately \$341 million, which represent approximately 40 percent of market deposits. To reduce the potential for adverse effects on competition in the Meadville Market, PNC has proposed to divest three of NC Bank’s branches that account for \$93.9 million in total deposits. On consummation of the merger and after accounting for the proposed divestiture, PNC would become the largest depository institution in the market, controlling deposits of approximately \$360 million, which represent approximately 43 percent of market deposits. The HHI would increase 130 points to 2498.³³

Several factors indicate that the increase in concentration in the Meadville Market, as measured by PNC’s market share, overstates the potential competitive effects of the proposal in the market. After consummation of the proposal, five other commercial banking and thrift institution competitors would remain in the market. The Board notes that there are other competitors with a significant presence in the market. The second and third largest depository institution organizations in the market would control approximately 16 percent and 14 percent of market deposits, respectively. Furthermore, a commercial bank competitor would have a larger number of branches in the Meadville Market than PNC, and four other institutions would have branch networks comparable to PNC’s network.

In addition, the Board has evaluated the competitive influence of one active community credit union in the market. This credit union controls approximately \$39 million in deposits in the market that, on a 50 percent weighted basis, represents approximately 2.3 percent of market deposits. Accounting for the revised weightings of these deposits, PNC would control 41.6 percent of market deposits, and the HHI would increase 124 points to 2390.

Based on a careful review of all the facts of record, and taking into account the proposed divestitures, the Board concludes that consummation of the proposal would not substantially lessen competition in the Meadville Market.

32. The Meadville Market is defined as Crawford County, excluding the city of Titusville.

33. This analysis includes the weighting of deposits controlled by one thrift institution in the market at 100 percent. The thrift institution is the same institution weighted at 100 percent in the Erie Market and the basis for weighting this institution’s deposits at 100 percent in the Meadville Market is the same as the basis in the Erie Market. See footnote 31 above.

D. View of Other Agencies and Conclusion on Competitive Considerations

The DOJ also has conducted a detailed review of the potential competitive effects of the proposal and has advised the Board that, in light of the proposed divestitures, consummation of the proposal would not likely have a significantly adverse effect on competition in any relevant banking market.³⁴ In addition, the appropriate banking agencies have been afforded an opportunity to comment and have not objected to the proposal.

Based on these and all other 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 resources in any relevant banking market. Accordingly, based on all the facts of record and subject to completion of the proposed divestitures, the Board has determined that competitive considerations are consistent with approval.

FINANCIAL, MANAGERIAL, AND SUPERVISORY CONSIDERATIONS

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and banks 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 PNC, and public comments received on the proposal.³⁵

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 considers capital adequacy to be especially important. The Board also evaluates the financial condition of the resulting

34. PNC has committed to the Board that it will comply with the divestiture agreement between the DOJ and PNC dated December 11, 2008.

35. Many commenters expressed concern that National City was not provided federal financial assistance to help it remain an independent organization while PNC is scheduled to receive federal funding under the Department of the Treasury’s Capital Purchase Program (“CPP”), which would help PNC finance the proposed transaction. As explained in more detail above, the Board has carefully considered all the facts of record in assessing the financial and managerial resources and future prospects of the companies involved.

organization at consummation, including its capital position, asset quality, earnings prospects, and the impact of the proposed funding of the transaction. In addition, the Board considers the ability of the organization to absorb the costs of the proposal and the plans for integrating operations after consummation.

The Board has carefully considered the financial resources of the organizations involved in the proposal in light of information provided by PNC and National City and supervisory information available to the Federal Reserve through its supervision of these companies and from the OCC, the primary supervisor of the depository institution subsidiaries of these organizations. The Board has considered that, although National City is well capitalized, it has experienced severe financial strains and liquidity pressures during the last year that have weakened its condition and stressed its operations. National City has had difficulty raising sufficient private capital to address these issues without a merger partner. PNC is well capitalized, would remain well capitalized after consummation of this proposal, and would provide operational and capital strength to National City. Consummation of this proposal would create a combined organization that can withstand the financial pressures in the present exigent market conditions and restore a strong provider of banking and other financial services in the markets served by National City. The proposed transaction is structured as a share exchange. Based on its review of the record, the Board finds that PNC has sufficient resources to effect the proposal.

The Board also has considered the managerial resources of the organizations involved in the proposed transaction. The Board has reviewed the examination records of PNC, its subsidiary depository institutions, and NC Bank and other nonbanking companies involved in the proposal. In addition, the Board has considered its supervisory experience and that of other relevant banking supervisory agencies, including the OCC, with the organizations and their records of compliance with applicable banking law and anti-money-laundering laws.³⁶

The Board also has considered carefully the future prospects of the organizations involved in the proposal. Moreover, the Board has considered information on PNC's plans to implement its risk-management policies, procedures, and controls at National City and how PNC would manage the integration of National City into PNC. The Board also considered PNC's extensive experience in acquiring bank holding companies and successfully integrating them into its organization.

PNC does not have a significant presence in many of the markets served by National City. In particular, PNC does not compete in the markets in Ohio and Indiana where National City has the majority of its operations. Consum-

mation of this proposal will benefit those markets by providing financial strength and stability to National City that will allow it to continue to provide banking services to households, businesses, and other customers. The proposed acquisition will also allow those NC Bank offices to provide additional services currently offered by PNC. The record indicates that PNC has the financial and managerial resources to serve as a source of strength to NC Bank and the other operations of National City.

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

CONVENIENCE AND NEEDS CONSIDERATIONS AND CRA PERFORMANCE

In acting on a proposal under section 3 of the BHC Act, the Board also must consider the effects of the proposal on the convenience and needs of the communities to be served and take into account the records of the relevant insured depository institutions under the CRA.³⁷ 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.³⁸

The Board has considered carefully all the facts of record, including reports of examination of the CRA performance records of the subsidiary banks of PNC and National City, data reported by PNC and National City under the Home Mortgage Disclosure Act ("HMDA"),³⁹ as well as other information provided by PNC, confidential supervisory information, and public comments received on the proposal. Several commenters expressed general concerns regarding the effect of the proposal on the amount of community development lending or investment and charitable donations in areas served by NC Bank.⁴⁰ Two com-

37. 12 U.S.C. § 1842(c)(2).

38. 12 U.S.C. § 2903.

39. 12 U.S.C. § 2801 et seq.

40. Two commenters also urged the Board to require or encourage PNC to enter into agreements to provide CRA loans, investments, and services to low-income communities or to require it to take certain actions in the future. A community group commenter generally supported National City's CRA record in Milwaukee but requested that PNC meet with the group to discuss CRA-related concerns. 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 are matters outside the CRA. *See, e.g., 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

36. Several commenters expressed concern over reports of large payments to be made to certain National City executives on the acquisition by PNC. As part of its review of financial factors, the Board has reviewed the proposed severance payments to be provided by PNC as well as the limitations imposed on those payments in connection with the request for funding under the CPP.

menters also expressed concern regarding the potential impact of branch closures. One commenter expressed concern that the proposal would inhibit small business lending in Michigan and Ohio.⁴¹ In addition, one commenter criticized PNC's and National City's records of home mortgage lending in LMI and minority communities in Ohio, PNC's home mortgage lending to minorities in Pittsburgh and Philadelphia, and National City's home mortgage lending to minorities in Cleveland.

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 PNC and National City. 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.⁴²

PNC's lead subsidiary insured depository institution, PNC Bank, received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of May 16, 2006 ("PNC 2006 Evaluation"). Both of PNC's other subsidiary insured depository institutions received an "outstanding" or "satisfactory" rating at their most recent CRA performance evaluations.⁴³ NC Bank received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of June 30, 2005 ("NC Bank 2005 Evaluation").⁴⁴

CRA Performance of PNC Bank. PNC Bank's 2006 Evaluation was discussed in the Board's order approving PNC's acquisition of Sterling Financial Corporation, Lancaster, Pennsylvania, in 2008.⁴⁵ Based on a review of the record in this case, the Board hereby reaffirms and adopts

the credit needs of its assessment areas at the time the Board reviews a proposal under the convenience and needs factor.

41. One commenter expressed concern that the proposal would have an adverse effect on loss mitigation efforts for assumed and outstanding subprime mortgage loans from NC Bank.

42. 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*, 66 *Federal Register* 36,620 at 36,640 (2001).

43. PNC Bank, Delaware received an "outstanding" rating at its most recent evaluation by the Federal Reserve Bank of Cleveland, as of February 4, 2008.

44. One commenter expressed concern that NC Bank's 2005 Evaluation excluded the Pittsburgh Metropolitan Statistical Area ("MSA"). The commenter also criticized the length of time since the most recent exam and requested that the OCC conduct a targeted CRA exam for the Pittsburgh MSA. At the time of the 2005 Evaluation, NC Bank had a minimal presence in Pennsylvania, consisting of a single branch in Philadelphia. An affiliated but separate institution, National City Bank of Pennsylvania, Pittsburgh, held a significant market share in the state. The two institutions merged in 2006, providing NC Bank with much of its share of market deposits in Pennsylvania.

45. See *The PNC Financial Services Group, Inc.*, 94 *Federal Reserve Bulletin* C38 (2008) ("PNC-Sterling Order").

the facts and findings detailed in that order concerning PNC Bank's CRA performance record. PNC also provided the Board with additional information about its CRA performance since the Board last reviewed such matters in the *PNC-Sterling Order*. In addition, the Board has consulted with the OCC with respect to PNC Bank's CRA performance since the *PNC-Sterling Order* and has reviewed information provided by PNC regarding its CRA-related activities since that order.

In addition to PNC Bank's overall "outstanding" rating in the PNC 2006 Evaluation,⁴⁶ the bank received an overall "outstanding" rating in Pennsylvania and in the Cincinnati Metropolitan Area ("MA"). Examiners reported that PNC Bank's overall lending performance was good, as reflected by the bank's loan volume and loan distribution by geography and borrower income, and that its performance in the Pittsburgh and Cincinnati assessment areas was excellent. They further noted that PNC Bank's level of community development lending in Pennsylvania and in the Cincinnati MA was excellent and had a positive impact on the bank's overall performance under the lending test.

Examiners reported that the bank's distribution of small loans to businesses was excellent in Pennsylvania.⁴⁷ They noted that the bank's market share of small loans to businesses in LMI areas exceeded the bank's overall market share of loans across its Pennsylvania assessment areas in each year of the evaluation period. In Pennsylvania, examiners also noted that PNC Bank placed significant community development lending emphasis on economic revitalization and affordable housing. Since the PNC 2006 Evaluation, PNC Bank has continued its high level of CRA lending activity by making more than \$230 million in community development loans in its assessment areas in 2006 and 2007.

In the PNC 2006 Evaluation, examiners also commended PNC Bank's overall level of qualified investments and concluded that the bank's performance under the investment test was "high satisfactory" in the Pennsylvania assessment area and was "outstanding" in the Cincinnati MA. They noted that the bank's level of qualifying investments represented excellent responsiveness to the needs of the Cincinnati MA community, particularly in relation to affordable housing. Since the 2006 Evaluation, PNC Bank has continued to make a significant amount of CRA-qualified investments in community development projects. In 2006 and 2007, PNC Bank made more than 160 investments totaling approximately \$370 million.

Examiners also concluded that the bank's delivery systems overall were accessible to its customers. In the

46. The PNC 2006 Evaluation focused on PNC Bank's performance in assessment areas throughout Pennsylvania and New Jersey and in the Philadelphia-Camden-Wilmington, PA-NJ-DE-MD Multi-state Metropolitan Area, which together represented approximately 83 percent of the bank's deposits. The evaluation periods for different aspects of PNC Bank's CRA performance ranged from January 1, 2002, to April 30, 2006.

47. "Small loans to businesses" are loans with original amounts of \$1 million or less that are either secured by nonfarm, nonresidential properties or classified as commercial and industrial loans.

Pennsylvania assessment area, examiners rated PNC Bank's performance under the service test as "outstanding" and reported that the bank's performance in the Pittsburgh assessment area was excellent for both retail banking services and community development services. PNC represented that there have been no material changes to its CRA programs since the 2006 evaluation.

CRA Performance of NC Bank. The NC Bank 2005 Evaluation was discussed in the Board's order approving National City's acquisition of Mid America Bank fsb, Clarendon Hills, Illinois, in 2007.⁴⁸ Based on a review of the record in this case, the Board hereby reaffirms and adopts the facts and findings detailed in that order concerning NC Bank's CRA performance record.

In addition to the overall "outstanding" rating that NC Bank received in its 2005 evaluation, the bank received separate overall "outstanding" or "satisfactory" ratings for its CRA performance in each of the states reviewed. Examiners reported that the bank's distribution of HMDA loans to borrowers of different income levels was excellent. Examiners also stated that the bank's record of community development lending and qualified community development investments demonstrated excellent responsiveness to community credit and investment needs.

Examiners rated NC Bank's performance under the investment test as "outstanding" or "high satisfactory" in most of the states reviewed.⁴⁹ They reported that the bank's investments demonstrated excellent responsiveness to the needs of the community. Examiners concluded that NC Bank's retail banking services generally were accessible to geographies and individuals with different income levels. They also reported that the bank generally provided a high level of community development services.

B. Branch Closings

Two commenters expressed general concern that the proposal, or the eventual merger of PNC Bank and NC Bank after consummation of the proposal, would lead to branch closures and adversely affect banking services in LMI areas. PNC has stated that it has not made any decisions regarding potential branch closures but that any closures would not take place until PNC merges PNC Bank and NC Bank at some point after consummation of the proposal. PNC also stated that it intends to continue to serve LMI communities through its branch network.

In addition, PNC has stated that, on consummation of the proposal, it expects to implement its current branch closing policy at NC Bank. PNC's branch closing policy requires the bank to make every effort to minimize the customer impact in the local market and to provide a

reasonable alternative to acquire similar services. The policy requires that, before a final decision is made to close a branch, management will consult with members of the community in an effort to minimize the impact of the branch closing.

The Board also has considered that federal banking law provides a specific mechanism for addressing branch closings.⁵⁰ Federal law requires an insured depository institution to provide notice to the public and to the appropriate federal supervisory agency before closing a branch and to adopt a policy regarding branch closures.⁵¹

In the most recent CRA performance examinations, examiners found that the banks' records of opening or closing branches had not adversely affected the accessibility of delivery systems, particularly in LMI areas and to LMI individuals. In addition, the Board notes that the OCC will continue to review the branch closing record of PNC Bank and NC Bank in the course of conducting CRA performance evaluations.

C. HMDA and Fair Lending Record

In light of the public comments received on the proposal, the Board has considered carefully the compliance records of PNC and National City with fair lending and other consumer protection laws in its evaluation of the public interest factors. Two commenters alleged, based on HMDA data, that PNC and National City denied the home mortgage loan applications of African American and Hispanic borrowers more frequently than those of nonminority applicants in certain MSAs. A commenter also alleged, based on 2007 HMDA data, that NC Bank made disproportionately higher-cost loans to African American and Hispanic borrowers than to nonminority borrowers.⁵² One commenter also alleged that PNC extended a disproportionately small

48. See *National City Corporation*, 93 *Federal Reserve Bulletin* C127 (2007).

49. Two commenters expressed concern about the impact of the proposal on charitable donations made by NC Bank. PNC represented that it plans to surpass NC Bank's 2008 goal for charitable donations across all markets. The Board notes that neither the CRA nor the agencies' implementing rules require institutions to engage in charitable donations.

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

51. One commenter requested the Federal Reserve to hold hearings under the FDI Act before any branch in a LMI area is closed. The FDI Act provides that, in cases where an interstate bank proposes to close a branch in an LMI area, an individual from the area where such branch is located may request a meeting between the bank's primary federal regulator and community leaders. Such requests must be made to the bank's primary federal regulator after notice of a branch closure has been made to its customers. As noted above, PNC has not made any decisions regarding potential branch closures, which makes such a request premature. In addition, any such requests for a hearing with regard to branch closures by either PNC Bank or NC Bank must be made to the OCC, the primary federal regulator of both banks. The Board has forwarded the commenter's letter to the OCC for consideration.

52. Beginning January 1, 2004, the HMDA data required to be reported by lenders were expanded to include pricing information for loans on which the annual percentage rate (APR) exceeds the yield for U.S. Treasury securities of comparable maturity 3 or more percentage

percentage of loans to African Americans in Pittsburgh when compared to the percentage of African American households in that area.

The Board's analysis of the lending-related concerns included a review of HMDA data reported by PNC Bank and NC Bank and their lending affiliates.⁵³ Although the HMDA data might reflect certain disparities in the rates of loan applications, originations, and denials among members of different racial or ethnic groups in certain local areas, or in the pricing of loans to such groups, they provide an insufficient basis by themselves on which to conclude whether or not PNC Bank or NC Bank has excluded or imposed higher costs on any 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.⁵⁴ 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.

In carefully reviewing the concerns about the organizations' lending activities, the Board has taken into account other information, including examination reports that provide on-site evaluations of compliance with fair lending and other consumer protection laws and regulations by PNC Bank, NC Bank, and their lending affiliates. The Board also has consulted with the OCC, the primary federal supervisor of both PNC Bank and NC Bank. In addition, the Board has considered information provided by PNC, including its plans for managing the consumer compliance operations of PNC Bank and NC Bank after consummation of the proposal.

The record, including confidential supervisory information, indicates that PNC has implemented many processes to help ensure compliance with all consumer protection laws and regulations. PNC's compliance program includes

employee training; review by senior management of credit decisions, pricing, and marketing; and fair lending policies and procedures to help ensure compliance with consumer protection laws. PNC's fair-lending compliance program that includes a second-review process to identify any discriminatory practices with respect to the company's home mortgage lending. In addition, PNC has a process for resolving fair lending complaints and conducts periodic internal audits of its fair lending program. PNC requires its employees to complete fair-lending training sessions. PNC has stated that NC Bank operations will be integrated into PNC's existing fair-lending and consumer-protection compliance programs after consummation of the proposal.⁵⁵

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

D. 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 performance records of the institutions involved, information provided by PNC, comments received on the proposal, and confidential supervisory information. PNC represented that the proposal would result in greater convenience for customers of PNC and National City through expanded delivery channels and a broader range of products and services. In addition, the Board previously noted the severe financial strains and liquidity pressures that National City has been experiencing, which are likely to adversely affect services to its customers. In light of these circumstances, the Board recognizes that the proposed merger would allow the combined organization to continue to provide banking and other financial services in support of the convenience and needs of the communities currently served by both organizations. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant insured depository institutions are consistent with approval of the proposal.

AGREEMENT CORPORATION

As noted, PNC also has provided notice under section 25 of the FRA and the Board's Regulation K to acquire the agreement corporation subsidiary of National City. The

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

53. The Board reviewed HMDA data for 2006 and 2007 for PNC Bank in the Pittsburgh assessment area and the Cincinnati and Philadelphia MSAs; for NC Bank in the Cincinnati, Cleveland, and Pittsburgh MSAs; and for both PNC Bank and NC Bank in Pennsylvania and Ohio.

54. 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.

55. One commenter reiterated concerns regarding alleged disparate pricing of subprime loans originated by a former National City subsidiary, First Franklin, that the commenter made in connection with National City Corporation's application to acquire Provident Bank. The Board considered those comments when it approved that proposal. See *National City Corporation*, 90 *Federal Reserve Bulletin* 382, 384 (2004). National City sold First Franklin to Merrill Lynch & Co., Inc. in 2006.

Board concludes that all factors required to be considered under the FRA and the Board’s Regulation K are consistent with approval.

CONCLUSION

Based on the foregoing, the Board has determined that the applications under section 3 of the BHC Act and section 25 of the FRA should be, and hereby are, approved.⁵⁶ In reaching its conclusion, the Board considered all the facts of record in light of the factors that the Board is required to consider under the BHC Act, the FRA, and other applicable statutes.⁵⁷ The Board’s approval is specifically conditioned

on compliance by PNC with the conditions imposed in this order and all the commitments made to the Board in connection with the proposal. These conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The acquisition of National City may not be consummated before the 15th calendar day, or later than three months, after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Cleveland, acting pursuant to delegated authority.

By order of the Board of Governors, effective December 15, 2008.

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

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

56. A number of commenters requested an extension of the comment period or delayed action on the proposal, and one commenter has requested Board review of a decision under authority delegated by the Board that denied his request for an extension of the comment period. See letter dated November 26, 2008, from Robert deV. Frierson, Deputy Secretary of the Board, to the Honorable Dennis J. Kucinich. As previously noted, notice of the proposal was published in the *Federal Register* on November 5, 2008. Newspaper notices were published on October 30 and November 3 in the appropriate newspapers of record, and the comment period ended on December 2. Accordingly, interested persons had approximately 33 days to submit their views. This period provided sufficient time for commenters to prepare and submit their comments and, as noted above, many commenters have provided written submissions, all of which the Board has considered carefully in acting on the proposal. 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 neither an extension of the comment period nor further delay in considering the proposal is necessary.

57. A number of 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 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), 262.25(d)). The Board has considered carefully the commenters’ requests in light of all the facts of record. As noted, 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 A

PNC AND NATIONAL CITY BANKING MARKETS CONSISTENT WITH BOARD PRECEDENT AND DOJ GUIDELINES WITHOUT DIVESTITURES

Bank	Rank	Amount of deposits (dollars)	Market deposit shares (percent)	Resulting HHI	Change in HHI	Remaining number of competitors
FLORIDA BANKING MARKET						
<i>Indian River County</i>						
PNC Pre-Consummation	14	30.9 mil.	.9	1,753	18	17
National City	3	361.2 mil.	10.1	1,753	18	17
PNC Post-Consummation	2	392.1 mil.	11.0	1,753	18	17
<i>Naples Area—Collier County, excluding the town of Immokalee</i>						
PNC Pre-Consummation	34	15.5 mil.	.2	993	0	43
National City ¹	42	0 mil.	.0	993	0	43
PNC Post-Consummation	34	15.50 mil.	.2	993	0	43

Appendix A—Continued

PNC AND NATIONAL CITY BANKING MARKETS CONSISTENT WITH BOARD PRECEDENT AND DOJ GUIDELINES WITHOUT DIVESTITURES—Continued

Bank	Rank	Amount of deposits (dollars)	Market deposit shares (percent)	Resulting HHI	Change in HHI	Remaining number of competitors
KENTUCKY BANKING MARKET						
<i>Lexington—Bourbon, Clark, Fayette, Jessamine, Nicholas, Powell, Scott, and Woodford counties</i>						
PNC Pre-Consummation	15	123.7 mil.	1.6	848	27	35
National City	4	670.2 mil.	8.5	848	27	35
PNC Post-Consummation	4	793.9 mil.	10.1	848	27	35
<i>Louisville, Kentucky—Indiana—Bullitt, Henry, Jefferson, Meade, Nelson, Oldham, Shelby, and Spencer counties, the Bedford census county division in Trimble County, the West Point census county division and the cities of Vine Grove and Radcliff in Hardin County, and the city of Irvington in Breckinridge County, all in Kentucky; Clark, Floyd, Harrison, and Washington counties, and Crawford County, excluding Patoka township, all in Indiana</i>						
PNC Pre-Consummation	3	2.2 bil.	10.1	1,239	378	53
National City	1	4.0 bil.	18.8	1,239	378	53
PNC Post-Consummation	1	6.2 bil.	28.8	1,239	378	53
<i>Cincinnati, Ohio—Indiana—Kentucky—Brown, Butler, Clermont, Hamilton, and Warren counties in Ohio; Dearborn County in Indiana; Boone, Bracken, Campbell, Gallatin, Grant, Kenton, and Pendleton counties, and the New Liberty and Owenton census county divisions in Owen County, all in Kentucky</i>						
PNC Pre-Consummation	4	2.4 bil.	4.4	2,421	48	82
National City	3	2.9 bil.	5.5	2,421	48	82
PNC Post-Consummation	3	5.3 bil.	9.9	2,421	48	82

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

1. National City established a branch in the Naples Area banking market in late 2007. As of June 30, 2008, no deposits had been recorded.

Appendix B

PNC AND NATIONAL CITY BANKING MARKETS IN PENNSYLVANIA CONSISTENT WITH BOARD PRECEDENT AND DOJ GUIDELINES AFTER DIVESTITURES

Bank	Rank	Amount of deposits (dollars)	Market deposit shares (percent)	Resulting HHI	Change in HHI	Remaining number of competitors
<i>Franklin—Titusville—Oil City—Venango County and the city of Titusville in Crawford County</i>						
Pre-Divestiture						
PNC Pre-Consummation	7	40.8 mil.	4.5	2,319	254	8
National City	2	250.8 mil.	27.9	2,319	254	8
PNC Post-Consummation	1	291.6 mil.	32.5	2,319	254	8
Post-Divestiture						
PNC Post-Consummation	2	199.2 mil.	22.2	1,863	-202	9
Branches Divested to	3	92.4 mil.	10.3	1,863	-202	9
Out-of-Market Purchaser		(1 branch)				
<i>Warren—Warren County</i>						
Pre-Divestiture						
PNC Pre-Consummation	3	92.5 mil.	13.7	4,766	871	4
National City	2	216.3 mil.	31.9	4,766	871	4
PNC Post-Consummation	2	308.8 mil.	45.6	4,766	871	4
Post-Divestiture						
PNC Post-Consummation	2	188.4 mil.	27.8	3,779	-117	5
Branches Divested to	3	120.5 mil.	17.8	3,779	-117	5
Out-of-Market Purchaser		(1 branch)				

NOTE: Data are as of June 30, 2008. All amounts of deposits are unweighted. All rankings, market deposit shares, and HHIs are based on thrift institution deposits weighted at 50 percent, except for one thrift institution operating in both markets for which deposits are weighted at 100 percent.

ORDERS ISSUED UNDER SECTION 4 OF THE BANK HOLDING COMPANY ACT

*Bank of America Corporation
Charlotte, North Carolina*

Order Approving the Acquisition of a Savings Association and an Industrial Loan Company

Bank of America Corporation (“Bank of America”), a financial holding company within the meaning of the Bank Holding Company Act (“BHC Act”), has requested the Board’s approval under sections 4(c)(8) and 4(j) of the BHC Act and section 225.24 of the Board’s Regulation Y¹ to acquire Merrill Lynch & Company, Inc. (“Merrill”), and thereby indirectly acquire Merrill’s subsidiary savings association, Merrill Lynch Bank & Trust Co., FSB (“ML Bank”), both of New York, New York. In addition, Bank of

America has requested the Board’s approval to acquire Merrill Lynch Bank USA (“ML USA”), Salt Lake City, Utah, and thereby engage in operating an industrial loan company.² Bank of America also has filed notice to acquire Merrill Lynch Yatirim Bank A.S., Istanbul, Turkey, pursuant to section 4(c)(13) of the BHC Act and the Board’s Regulation K.³

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published in the *Federal Register* (73 *Federal Register* 61,130 (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 4 of the BHC Act.

Bank of America, with total consolidated assets of \$1.8 trillion, is the largest depository organization in the United States, as measured by deposits, and controls deposits of approximately \$774.2 billion, which represent approximately 10.8 percent of the total amount of deposits of

2. 12 CFR 225.28(b)(4)(i).

3. 12 U.S.C. § 1843(c)(13); see 12 CFR 211.9(f). Bank of America also proposes to acquire Merrill’s other subsidiaries in accordance with sections 4(c)(13) or 4(k) of the BHC Act (12 U.S.C. §§ 1843(c)(13) and (k)).

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

insured depository institutions in the United States.⁴ Bank of America controls six insured depository institutions⁵ that operate in thirty-one states and the District of Columbia.

Merrill has total consolidated assets of approximately \$875 billion and controls deposits of approximately \$77.8 billion, which represent approximately 1.1 percent of the total amount of deposits of insured depository institutions in the United States. ML Bank and ML USA operate in nine states.

On consummation of the proposal, Bank of America would remain the largest depository organization in the United States, with total consolidated assets of approximately \$2.7 trillion. Bank of America would control deposits of approximately \$852 billion, representing approximately 11.9 percent of the total amount of deposits of insured depository institutions in the United States.⁶

FACTORS GOVERNING BOARD REVIEW OF THE PROPOSAL

The Board previously has determined by regulation that the operation of a savings association and an industrial loan company by a bank holding company are activities closely related to banking for purposes of section 4(c)(8) of the BHC Act.⁷ The Board requires that savings associations, industrial loan companies, and any other entities acquired by bank holding companies or financial holding companies conform their direct and indirect activities to the requirements for permissible activities under section 4 of the BHC

Act and Regulation Y.⁸ Bank of America has certified that Merrill is substantially engaged in activities that are financial in nature, incidental to a financial activity, or otherwise permissible for a financial holding company under section 4(c) of the BHC Act.⁹ Bank of America has committed that it will conform, terminate, or divest, within two years of the acquisition of Merrill, all the activities and investments of Merrill that are not permissible for a bank holding company under section 4(c) of the BHC Act.¹⁰

To approve the proposal, section 4(j)(2)(A) of the BHC Act requires the Board to determine that the proposed acquisition of ML Bank and ML USA “can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.”¹¹ As part of its evaluation under these public interest factors, the Board reviews the financial and managerial resources of the companies involved, the effect of the proposal on competition in the relevant markets, and the public benefits of the proposal.¹² In acting on a notice to acquire a savings association or an insured industrial loan company, the Board also reviews the records of performance of the relevant insured depository institutions under the Community Reinvestment Act (“CRA”).¹³

COMPETITIVE CONSIDERATIONS

The Board has considered carefully the competitive effects of Bank of America’s acquisition of Merrill, including the acquisition of ML Bank and ML USA, in light of all the facts of record. Bank of America and Merrill have subsidiary insured depository institutions that compete directly in 11 banking markets in California, Massachusetts, Nevada, New York, and Oregon.¹⁴ The Board has reviewed care-

4. Asset and nationwide deposit-ranking data are as of June 30, 2008. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

5. Bank of America, National Association (“BANA”), Charlotte, North Carolina, is Bank of America’s largest subsidiary depository institution, as measured by both assets and deposits.

6. The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (“Riegle-Neal Act”) provides that the Board may not approve an application for the interstate acquisition of a bank if consummation of the acquisition would result in the applicant controlling more than 10 percent of the total amount of deposits of insured depository institutions in the United States. Pub. L. 103–328 (1994), codified at 12 U.S.C. § 1842(d). ML Bank is chartered as a federal savings bank under the Home Owners’ Loan Act and, therefore, is exempt from the definition of “bank” (12 U.S.C. § 1461 et seq.; 12 U.S.C. § 1841(c)(2)(B)). ML USA operates as an industrial loan company and also is exempt from the definition of “bank” under the BHC Act. See 12 U.S.C. § 1841(c)(2)(H). As a result, ML Bank and ML USA are not “banks” for purposes of the BHC Act and its nationwide deposit cap. Accordingly, the Riegle-Neal Act’s prohibition against approving proposals that would result in the applicant exceeding the nationwide deposit cap does not apply to the proposed acquisition of Merrill, ML Bank, and ML USA. After consummation of the proposal, however, the calculation of Bank of America’s total deposits would include the deposits of ML Bank and ML USA for purposes of calculating compliance with the nationwide deposit cap prohibition in connection with any subsequent application by Bank of America to acquire a bank pursuant to section 3 of the BHC Act or by one of its subsidiary banks to merge with an unaffiliated bank pursuant to the Bank Merger Act (12 U.S.C. § 1828(c)).

7. 12 CFR 225.28(b)(1), (2), (4), (5), (6), (7), and (12).

8. A savings association operated by a bank holding company may engage only in activities that are permissible for bank holding companies under section 4(c)(8) of the BHC Act (12 CFR 225.28(b)(4) and 225.86(a)).

9. A company is substantially engaged in activities permissible for a financial holding company if at least 85 percent of the company’s consolidated total annual gross revenue is derived from, and at least 85 percent of the company’s consolidated total assets is attributable to, the conduct of activities permissible for a financial holding company 12 CFR 225.85(a)(3)(ii).

10. 12 CFR 225.85(a)(3).

11. 12 U.S.C. § 1843(j)(2)(A).

12. See 12 CFR 225.26. See, e.g., *Wachovia Corporation*, 92 *Federal Reserve Bulletin* C183 (2006); *Banc One Corporation*, 83 *Federal Reserve Bulletin* 602 (1997).

13. 12 U.S.C. § 2901 et seq.

14. ML Bank operates 54 branches in California, Connecticut, Massachusetts, Nevada, New Jersey, New York, Oregon, and Pennsylvania and offers a full range of banking products and services to its customers. ML USA operates three branches in New Jersey, New York, and Utah. ML USA accepts money market deposit accounts, transaction accounts, and certificates of deposit. It also makes loans and

fully the competitive effects of the proposal in all markets in light of all the facts of record. In particular, the Board has considered the number of competitors that would remain in the markets, the relative shares of total deposits in depository institutions in each market (“market deposits”) controlled by Bank of America and Merrill,¹⁵ 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”),¹⁶ 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 the banking markets in which the insured depository institutions of Bank of America and Merrill directly compete.¹⁷ On consummation of the proposal, two of the banking markets would remain unconcentrated and eight would remain moderately concentrated. One banking market would continue to be highly concentrated but with no increase in the HHI. In each of the 11 banking markets, numerous competitors would remain.

The DOJ also reviewed 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 or in any relevant market. The appropriate federal supervisory agencies also have been afforded an opportunity to comment and have not objected to the proposal.

serves as a transfer agent, subaccountant, registrar, and fiscal agent for nonproprietary money market funds and mutual funds.

15. Deposit and market share data are as of June 30, 2008, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. *See, e.g., Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386, 387 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743, 744 (1984). 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). In the market share calculations in this case, the Board weighted the deposits of ML Bank at 50 percent on a pre-acquisition basis and at 100 percent on a post-acquisition basis to reflect the resulting control of such deposits by a commercial banking organization. ML USA offers only limited services and its offices are not open to the public. The Board, therefore, excluded the deposits of ML USA on a pre-acquisition basis and weighted them at 100 percent on a post-acquisition basis to reflect the resulting control of such deposits by a commercial banking organization.

16. Under the DOJ Guidelines, a market is considered unconcentrated if the post-acquisition HHI is under 1000, moderately concentrated if the post-acquisition HHI is between 1000 and 1800, and highly concentrated if the post-acquisition 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-acquisition HHI is at least 1800 and the acquisition 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.

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

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

FINANCIAL AND MANAGERIAL RESOURCES

In reviewing the proposal under section 4 of the BHC Act, the Board has considered carefully the financial and managerial resources of Bank of America, Merrill, and their subsidiary insured depository institutions and the effect of the transaction on those resources. This review was conducted in light of all the facts of record, including confidential reports of examination, other supervisory information from the primary federal and state supervisors of the organizations involved in the proposal, and publicly reported and other financial information, including information provided by Bank of America. The Board also has consulted with the Office of Thrift Supervision (“OTS”) and Federal Deposit Insurance Corporation (“FDIC”), the primary federal supervisors of Merrill’s subsidiary insured depository institutions.

In evaluating financial resources in expansionary proposals by banking organizations, the Board reviews the financial condition of the organizations involved on both a parent-only and consolidated basis, as well as the financial condition of the subsidiary insured depository institutions and the organizations’ 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 combined organization at consummation, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction. In addition, the Board considers the ability of the organization to absorb the costs of the proposal and the plans for integrating operations after consummation.

The Board has considered carefully the financial factors of the proposal. Bank of America and its subsidiary depository institutions are well capitalized and would remain so on consummation of the proposal. ML Bank and ML USA also are well capitalized and would remain so after consummation of the proposal. Based on its review of the record, including all of the considerations noted above, the Board finds that Bank of America has sufficient financial resources to effect the proposal.¹⁸

The Board also has considered the managerial resources of the organizations involved and the proposed combined organization. The Board has reviewed the examination records of Bank of America and its subsidiary depository

18. The proposed transaction is structured as a share exchange and would not increase the debt-service requirements of the combined company.

institutions, and ML Bank and ML USA, 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 federal supervisory agencies with the organizations and their records of compliance with applicable banking laws and with anti-money-laundering laws. The Board also has considered carefully Bank of America's plans for implementing the proposal, including its proposed risk-management systems after consummation. Bank of America plans to implement enhanced risk-management policies, procedures, and controls at the combined organization and is devoting significant financial and other resources to address all aspects of the post-acquisition integration process. The Board also has considered Bank of America's record of successfully integrating large organizations into its operations and risk-management systems after acquisitions.

Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources of the organizations involved in the proposal are consistent with approval under section 4 of the BHC Act.

RECORDS OF PERFORMANCE UNDER THE CRA

As noted previously, the Board reviews the records of performance under the CRA of the relevant insured depository institutions when acting on a notice to acquire an insured depository institution, including a savings association or industrial loan company. 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 the relevant depository institution's record of meeting the credit needs of its entire community, including low- and moderate-income ("LMI") neighborhoods, in evaluating bank expansionary proposals.¹⁹

As provided in the CRA, the Board has evaluated the proposal in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the application 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

Bank of America's lead bank, BANA, received an "outstanding" rating at its most recent CRA performance evaluation by the Office of the Comptroller of the Currency, as of December 31, 2006.²¹ All other insured depository

institutions of Bank of America were rated "outstanding" or "satisfactory" at their most recent CRA performance evaluations.

ML USA received an "outstanding" rating at its most recent CRA performance evaluation by the FDIC, as of January 10, 2006.²² ML Bank has not yet received a CRA rating because before its conversion to a savings association on August 5, 2006, it was a trust company and thus not subject to the CRA. Bank of America has represented that it will institute the community development and community investment policies of BANA at ML Bank to strengthen the bank's CRA policies, and to help meet the credit needs of the communities it serves.

Based on a review of the entire record, and for the reasons discussed above, the Board has concluded that considerations relating to the CRA performance records of the relevant insured depository institutions are consistent with approval of the proposal.

PUBLIC BENEFITS

As part of its evaluation of the public interest factors under section 4 of the BHC Act, the Board has reviewed carefully the public benefits and possible adverse effects of the proposal. The record indicates that consummation of the proposal would result in benefits to consumers currently served by ML Bank and ML USA by providing them access to additional banking and nonbanking products and services from Bank of America. Bank of America has represented that it would grant customers of ML Bank and ML USA access to BANA's ATM network and branches on the same terms and conditions as BANA customers. As noted, Bank of America also would implement enhanced risk-management systems at the combined organization.

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

Bank of America also has provided notice under section 4(c)(13) of the BHC Act and the Board's Regulation K to acquire Merrill Lynch Yatirim Bank A.S. The Board concludes that all factors required to be considered under the BHC Act and the Board's Regulation K are consistent with approval.

19. 12 U.S.C. § 2903.

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

21. The period for the BANA evaluation was January 1, 2004, through December 31, 2006.

22. The period for the ML USA evaluation was April 1, 2003, through December 31, 2005.

CONCLUSION

Based on the foregoing and all the facts of record, including reports of examination of the institutions involved, information provided by Bank of America, and confidential supervisory information, the Board has determined that the proposal should be, and hereby is, approved. In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act. The Board's approval is specifically conditioned on compliance by Bank of America with the conditions imposed in this order and all the commitments made to the Board in connection with the proposal. The Board's approval also is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c),²³ and to the Board's authority to require such modification or termination of the activities of the bank holding company or any of its subsidiaries as the Board

finds necessary to ensure compliance with, and to prevent evasion of, the provisions of the BHC Act and the Board's regulations and orders issued thereunder. For purposes of this action, these conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decisions herein and, as such, may be enforced in proceedings under applicable law.

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

By order of the Board of Governors, effective November 26, 2008.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

23. 12 CFR 225.7 and 225.25(c).

Appendix

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
CALIFORNIA BANKING MARKETS						
<i>Los Angeles—the Los Angeles Ranally Metropolitan Area and the cities of Acton in Los Angeles County and Rosamond in Kern County</i>						
Bank of America Pre-Consummation ...	1	58.8 bil.	19.8	824	16	198
Merrill	40	1.4 bil.	.3	824	16	198
Bank of America Post-Consummation ..	1	60.3 bil.	20.3	824	16	198
<i>Napa—the Napa Ranally Metropolitan Area and the cities of Calistoga and St. Helena in Napa County</i>						
Bank of America Pre-Consummation ...	2	423.8 mil.	16.0	1,127	27	18
Merrill	16	32.8 mil.	.6	1,127	27	18
Bank of America Post-Consummation ..	2	456.7 mil.	17.2	1,127	27	18
<i>Palm Springs—Cathedral City—Palm Desert—the Palm Springs—Cathedral City—Palm Desert and Indio—Coachella Ranally Metropolitan Areas and the cities of Joshua Tree, Twentynine Palms, and Yucca Valley in San Bernardino County</i>						
Bank of America Pre-Consummation ...	1	1.2 bil.	19.1	936	9	26
Merrill	23	18.9 mil.	.2	936	9	26
Bank of America Post-Consummation ..	1	1.2 bil.	19.3	936	9	26

Appendix—Continued

BANKING MARKETS CONSISTENT WITH BOARD PRECEDENT AND DOJ GUIDELINES—Continued

Bank	Rank	Amount of deposits (dollars)	Market deposit shares (percent)	Resulting HHI	Change in HHI	Remaining number of competitors
<i>San Diego—the San Diego Ranally Metropolitan Area and the cities of Camp Pendleton and Pine Valley in San Diego County</i>						
Bank of America Pre-Consummation ...	1	7.9 bil.	17.3	1,090	34	70
Merrill	17	633.6 mil.	.7	1,090	34	70
Bank of America Post-Consummation ..	1	8.5 bil.	18.6	1,090	34	70
<i>San Francisco—Oakland—San Jose—the San Francisco—Oakland—San Jose Ranally Metropolitan Area, and the cities of Byron in Contra Costa County, Hollister and San Juan Bautista in San Bonito County, Pescadero in San Mateo County and Point Reyes Station in Marsh County</i>						
Bank of America Pre-Consummation ...	1	56.8 bil.	25.3	1,497	85	115
Merrill	12	5.1 bil.	1.1	1,497	85	115
Bank of America Post-Consummation ..	1	61.9 bil.	27.3	1,497	85	115
<i>Santa Barbara—the Santa Barbara Ranally Metropolitan Area</i>						
Bank of America Pre-Consummation ...	2	648.8 mil.	10.4	1,423	18	18
Merrill	13	162.2 mil.	1.3	1,423	18	18
Bank of America Post-Consummation ..	2	811 mil.	12.8	1,423	18	18
<i>Santa Rosa—the Santa Rosa Ranally Metropolitan Area and the city of Cloverdale in Sonoma County</i>						
Bank of America Pre-Consummation ...	2	845.6 mil.	12.9	1,003	16	21
Merrill	16	62.7 mil.	.5	1,003	16	21
Bank of America Post-Consummation ..	2	908.4 mil.	13.8	1,003	16	21
MASSACHUSETTS BANKING MARKET						
<i>Boston—the Boston Ranally Metropolitan Area and the towns of Amherst, Antrim, Atkinson, Bennington, Brookline, Chester, Danville, Deering, Derry, Dublin, East Hamstead, Fitzwilliam, Francestown, Fremont, Greenfield, Greenville, Hampstead, Hancock, Hollis, Hudson, Jaffrey, Kingston, Litchfield, Lyndeboro, Mason, Merrimac, Milford, Mont Vernon, Nashua City, New Ipswich, Newton, Pelham, Peterborough, Plaistow, Raymond, Rindge, Salem, Sandown, Seabrook, Sharon, South Hampton, South Nashua, Temple, Wilton, and Windham in New Hampshire</i>						
Bank of America Pre-Consummation ...	1	29.6 bil.	22.0	1,202	7	159
Merrill	67	314.2 mil.	.1	1,202	7	159
Bank of America Post-Consummation ..	1	29.9 bil.	22.2	1,202	7	159

Appendix—Continued

BANKING MARKETS CONSISTENT WITH BOARD PRECEDENT AND DOJ GUIDELINES—Continued

Bank	Rank	Amount of deposits (dollars)	Market deposit shares (percent)	Resulting HHI	Change in HHI	Remaining number of competitors
NEVADA BANKING MARKET						
<i>Las Vegas—the Las Vegas Ranally Metropolitan Area</i>						
Bank of America Pre-Consummation ...	3	6.8 bil.	4.2	3,635	-1	47
Merrill	27	99.9 mil.	.0	3,635	-1	47
Bank of America Post-Consummation ..	3	6.9 bil.	4.2	3,635	-1	47
NEW YORK BANKING MARKET						
<i>Metropolitan New York—New Jersey—Pennsylvania—Connecticut—Bronx, Dutchess, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster, and Westchester counties in New York; Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, Union, and Warren counties in New Jersey; Monroe and Pike counties in Pennsylvania; and Fairfield County and portions of Litchfield and New Haven counties in Connecticut</i>						
Bank of America Pre-Consummation ...	2	67.2 bil.	8.5	1,278	8	301
Merrill	17	12.2 bil.	.8	1,278	8	301
Bank of America Post-Consummation ..	2	79.4 bil.	10.0	1,278	8	301
OREGON BANKING MARKET						
<i>Portland—the Portland Ranally Metropolitan Area; the cities of Banks, Molalla, Mount Angel, North Plains, Saint Helens, Scappoose, Vernonia, and Woodburn in Oregon; and the city of Yacolt in Washington</i>						
Bank of America Pre-Consummation ...	2	4.8 bil.	17.5	1,304	0	44
Merrill	42	0	.0	1,304	0	44
Bank of America Post-Consummation ..	2	4.8 bil.	17.5	1,304	0	44

NOTE: All rankings, market deposit shares, and HHIs are based on thrift institution deposits weighted at 50 percent, except for the savings association deposits of Merrill, which are weighted at 50 percent before consummation of the proposal and 100 percent after consummation. The deposits of ML Bank US

were excluded on a pre-acquisition basis and weighted at 100 percent on a post-acquisition basis. The effects of these modifications on the post-consummation market shares and HHIs are more evident in some markets than in others.

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

*American Express Company
New York, New York*

*American Express Travel Related Services
Company, Inc.
New York, New York*

Order Approving Formation of Bank Holding Companies and Notice to Engage in Certain Nonbanking Activities

American Express Company (“AMEX”) and American Express Travel Related Services Company, Inc. (“AMEX Travel”) (collectively, “Applicants”) have requested the Board’s approval under section 3 of the Bank Holding Company Act (“BHC Act”)¹ to become bank holding companies on conversion of American Express Centurion Bank (“AMEX Bank”), Salt Lake City, Utah, to a bank.² AMEX Bank currently operates as an industrial loan company and is exempt from the definition of “bank” under the BHC Act.³ Applicants have also filed with the Board elections to become financial holding companies on consummation of the proposal pursuant to sections 4(k) and (l) of the BHC Act and section 225.82 of the Board’s Regulation Y.⁴

In addition, as part of their proposal to become bank holding companies, AMEX and AMEX Travel have requested the Board’s approval under sections 4(c)(8) and 4(j) of the BHC Act and section 225.24 of the Board’s Regulation Y⁵ to retain their voting shares of American Express Bank, FSB, Salt Lake City (“AMEX Thrift”), a federal savings association.⁶ AMEX has also provided notice of its proposal to retain its foreign bank subsidiaries under section 4(c)(13) of the BHC Act.⁷

Section 3(b)(1) of the BHC Act requires that the Board provide notice of an application under section 3 to the appropriate federal or state supervisory authority for the banks to be acquired and provide the supervisor a period of time (normally 30 days) within which to submit views and recommendations on the proposal.⁸ Section 4(i)(4) of the BHC Act imposes a similar requirement with respect to a notice to acquire a savings association.⁹ The BHC Act also

authorizes the Board to reduce or eliminate these notice periods under certain circumstances.¹⁰

In light of the unusual and exigent circumstances affecting the financial markets, and all other facts and circumstances, the Board has determined that emergency conditions exist that justify expeditious action on this proposal in accordance with the provisions of the BHC Act and the Board’s regulations.¹¹ The Board has provided notice to the primary federal and state supervisors of AMEX Bank, the Federal Deposit Insurance Corporation (“FDIC”) and Commissioner of the Utah Department of Financial Institutions; to the primary federal supervisor of AMEX Thrift, the Office of Thrift Supervision (“OTS”); and to the Department of Justice (“DOJ”). Those agencies have indicated that they have no objection to approval of the proposal. For the same reasons, and in light of the fact that this transaction represents the conversion of an existing subsidiary of Applicants from one form of a depository institution to another, the Board has also waived public notice of this proposal.¹²

AMEX, with total consolidated assets of approximately \$127 billion, provides charge and credit payment-card products and travel-related services and engages in other activities both in the United States and abroad.¹³ AMEX Bank has total consolidated assets of approximately \$25.3 billion and controls deposits of approximately \$7.2 billion. It engages primarily in financing and lending activities and taking deposits of the type that are permissible for an industrial loan company under the exception in section 2(c)(2)(H) of the BHC Act. AMEX Thrift has total consolidated assets of approximately \$25 billion and controls deposits of approximately \$7.2 billion. AMEX Thrift engages primarily in credit card lending activities.

FACTORS GOVERNING BOARD REVIEW OF TRANSACTION

The BHC Act sets forth the factors that the Board must consider when reviewing the formation of a bank holding company or the acquisition of a bank. These factors are the competitive effects of the proposal in the relevant geographic markets; the financial and managerial resources and future prospects of the companies and banks involved in the proposal; the convenience and needs of the community to be served, including the records of performance under the Community Reinvestment Act¹⁴ (“CRA”) of the insured depository institutions involved in the transaction; and the availability of information needed to determine and enforce compliance with the BHC Act and other applicable federal banking laws.¹⁵

1. 12 U.S.C. § 1842.

2. AMEX Bank is a direct subsidiary of AMEX Travel and an indirect subsidiary of AMEX.

3. 12 U.S.C. § 1841(c)(2)(H).

4. 12 U.S.C. §§ 1843(k) and (l); 12 CFR 225.82.

5. 12 U.S.C. §§ 1843(c)(8) and (j); 12 CFR 225.24.

6. AMEX Thrift is a direct subsidiary of AMEX Travel and an indirect subsidiary of AMEX.

7. 12 U.S.C. § 1843(c)(13).

8. 12 U.S.C. § 1842(b)(1); 12 CFR 225.15(b).

9. 12 U.S.C. § 1843(i)(4).

10. 12 U.S.C. §§ 1842(b)(1) and 1843(i)(4).

11. *Id.*; 12 CFR 225.16(b)(3), 225.16(g)(2), 225.25(d), and 262.3(l).

12. 12 CFR 225.16(b)(3), 225.16(g)(2), 225.25(d), and 262.3(l).

13. Asset data for AMEX are as of September 30, 2008, and asset and deposit data for AMEX Bank and AMEX Thrift are as of June 30, 2008.

14. 12 U.S.C. § 2901 et seq.

15. In cases involving interstate bank acquisitions by bank holding companies, the Board also must consider the concentration of deposits

An acquisition of a savings association requires Board approval under sections 4(c)(8) and 4(j) of the BHC Act.¹⁶ The Board previously has determined by regulation that the operation of a savings association is closely related to banking for purposes of section 4(c)(8) of the BHC Act.¹⁷ The Board also must determine that the operation of AMEX Thrift by Applicants “can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.”¹⁸

COMPETITIVE CONSIDERATIONS

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly. The BHC Act also prohibits the Board from approving a proposed bank acquisition that would substantially lessen competition in any relevant banking market unless the 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.¹⁹ In addition, the Board must consider the competitive effects of a proposal to acquire a savings association under the public benefits factor of section 4(j) of the BHC Act.

The proposal involves the conversion of an existing, wholly owned industrial loan company subsidiary of Applicants into a bank, with no resulting change in the ownership of Applicants, AMEX Bank, or AMEX Thrift. In addition, Applicants do not propose to acquire any additional depository institution as part of this proposal. Based on all the facts of record, the Board concludes that consummation of the proposal would not result in any significantly adverse effects on competition or on the concentration of banking resources in any relevant banking market and that the 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 banks involved in the proposal and certain other supervisory factors.²⁰ The Board also reviews the financial and managerial resources of the organizations involved in the proposal under section 4 of the BHC Act.

in the nation and relevant individual states, as well as compliance with the other provisions of section 3(d) of the BHC Act. Because the proposed transaction does not involve an interstate bank acquisition by a bank holding company, the provisions of section 3(d) of the BHC Act do not apply in this case.

16. 12 U.S.C. §§ 1843(c)(8) and 1843(j); *See* 12 U.S.C. § 1843(i).

17. 12 CFR 225.28(b)(4)(ii).

18. 12 U.S.C. § 1843(j)(2)(A).

19. 12 U.S.C. § 1842(c)(1).

20. 12 U.S.C. § 1842(c)(2) and (3).

The Board has carefully considered these factors in light of all the facts of record, including supervisory and examination information received from the relevant federal and state supervisors of the organizations involved in the proposal and other available financial information, including information provided by AMEX and AMEX Travel. In addition, the Board has consulted with the primary federal and state supervisors of Applicants, AMEX Bank, and AMEX Thrift.

The Board consistently has considered capital adequacy to be an especially important aspect in analyzing financial factors. AMEX and AMEX Travel are adequately capitalized and all the AMEX entities that are subject to regulatory capital requirements currently exceed the relevant requirements. In addition, AMEX Bank and AMEX Thrift are currently well capitalized under applicable federal guidelines. AMEX Bank and AMEX Thrift also would be well capitalized on a pro forma basis on consummation of the proposal. Other financial factors are consistent with approval.

In addition, the Board has carefully considered the managerial resources of AMEX and AMEX Travel in light of all the facts of record, including confidential supervisory and examination information and information provided by Applicants. The Board has considered the supervisory experience of the relevant federal and state supervisory agencies of Applicants and their insured depository institutions with the organizations and institutions and their records of compliance with applicable banking law and anti-money-laundering laws.²¹

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

CONVENIENCE AND NEEDS AND CRA PERFORMANCE CONSIDERATIONS

In acting on a proposal under section 3 of the BHC Act, the Board must consider the effects of the proposal on the convenience and needs of the communities to be served and to take into account the records of the relevant depository institutions under the CRA.²² The Board must also review the records of performance under the CRA of the relevant insured depository institutions when acting on a notice

21. A former subsidiary of Applicants was subject to a cease and desist order and concurrent civil money penalties related to Bank Secrecy Act violations issued by the Board on August 3, 2007. AMEX Travel was subject to related civil money penalties issued by the Financial Crimes Enforcement Network. The subsidiary at which the violations occurred, and against which the cease and desist order was applied, American Express Bank International, was sold by Applicants in late 2007. In reviewing the statutory factors, the Board has consulted with the relevant federal and state supervisors about the compliance by Applicants and their subsidiary depository institutions with anti-money-laundering laws.

22. 12 U.S.C. § 2903.

under section 4 of the BHC Act to acquire voting securities of an insured savings association.²³

The Board has carefully considered the convenience and needs factor and the CRA performance records of the subsidiary depository institutions of the Applicants in light of all the facts of record. As provided in the CRA, the Board evaluates the record of performance of an institution in light of examinations by the appropriate federal supervisors of the CRA performance records of the relevant institutions. 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

AMEX Bank received an "outstanding" rating under the CRA at its most recent performance evaluation by the FDIC as of January 9, 2006 (the "FDIC Examination"). Consistent with the CRA regulations adopted by the federal banking agencies, AMEX Bank was evaluated under the community development test as a limited-purpose institution.²⁵ The FDIC Examination indicated that AMEX Bank originated and funded new community development loans totaling \$6.04 million during the examination period (January 28, 2003, through January 9, 2006) and had more than \$3 million in community development loan commitments. The FDIC Examination also determined that AMEX Bank provided an outstanding level of community development investments. Applicants have represented that the conversion of AMEX Bank to a bank for purposes of the BHC Act will enhance its ability to meet the convenience and needs of its communities by permitting the bank to offer a wider array of deposit products.

AMEX Thrift received an "outstanding" rating under the CRA at its most recent performance evaluation by the OTS, as of October 12, 2006 (the "OTS Examination"). AMEX Thrift also was evaluated under the community development test as a limited-purpose institution. The OTS Examination indicated that AMEX Thrift originated and funded new community development loans totaling \$16.0 million during the examination period (March 1, 2004, through September 30, 2006), and that it provided more than \$118.8 million in qualifying community development investments.

Based on a review of the entire record, and for the reasons discussed above, the Board has concluded that considerations relating to convenience and needs considerations and the CRA performance records of AMEX Bank and AMEX Thrift are consistent with approval of the proposal.

NONBANKING ACTIVITIES AND FINANCIAL HOLDING COMPANY DECLARATIONS

Applicants engage in a wide range of nonbanking activities that have been determined to be financial in nature or incidental to a financial activity pursuant to section 4(k) of the BHC Act.²⁶ These activities include, among other things, extending credit and servicing loans, engaging in activities related to extending credit, issuing and selling consumer-type payment instruments, providing data processing services, and operating travel agencies.²⁷

Applicants also have filed a notice under sections 4(c)(8) and 4(j) of the BHC Act to retain their ownership interest in AMEX Thrift and thereby operate a savings association. As part of its evaluation of the public interest factors under section 4(j) of the BHC Act, the Board also must determine that the acquisition of the nonbank subsidiary and the performance of the proposed nonbanking activities by Applicants can reasonably be expected to produce benefits to the public that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.²⁸

The record indicates that consummation of the proposal would create a stronger and more diversified financial services organization and would provide the current and future customers of AMEX, AMEX Travel, and AMEX Thrift with expanded financial products and services. For the reasons discussed above, and based on the entire record, the Board has determined that the conduct of the proposed nonbanking activities within the framework of Regulation Y and Board precedent is not likely to result in significantly adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. Moreover, based on all the facts of record, the Board has concluded that consummation of the proposal can reasonably be expected to produce public benefits that would outweigh any likely adverse effects. Accordingly, the Board has determined that the balance of the public benefits under the standard of section 4(j)(2) of the BHC Act is consistent with approval.

As noted, Applicants have filed elections to become financial holding companies pursuant to sections 4(k) and (l) of the BHC Act and section 225.82 of the Board's Regulation Y. Applicants have certified that AMEX Bank and AMEX Thrift are well capitalized and well managed and have provided all the information required under Regulation Y. Based on all the facts of record, the Board has determined that these elections to become financial holding companies will become effective on consummation of the proposal if, on that date, AMEX Bank and AMEX

23. See, e.g., *North Fork Bancorporation, Inc.*, 86 *Federal Reserve Bulletin* 767 (2000).

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 64 *Federal Register* 23,641 (1999).

25. See, e.g., 12 CFR 228.21(a)(2).

26. See 12 U.S.C. § 1843(k).

27. See 12 U.S.C. § 1843(k)(4)(A) and (F); 12 CFR 225.28(b)(1), (2), and (13). Financial holding companies may engage, in the United States and abroad, in travel agency services in connection with financial services offered by the financial holding company or others (12 U.S.C. § 1843(k)(4)(G); 12 CFR 225.86(b)(2)).

28. See 12 U.S.C. § 1843(j)(2)(A).

Thrift remain well capitalized and well managed and each institution has a rating of at least “satisfactory” at its most recent performance evaluation under the CRA.

Section 4 of the BHC Act by its terms also provides any company that becomes a bank holding company two years within which to conform its existing nonbanking investments and activities to the section’s requirements, with the possibility of three one-year extensions.²⁹ Applicants must conform to the BHC Act any impermissible nonfinancial activities and investments that they currently conduct or hold, directly or indirectly, within the time requirements of the act.

AMEX also has provided notice of its proposal to retain its foreign bank subsidiaries under section 4(c)(13) of the BHC Act. Based on the record, the Board has no objection to the retention of such subsidiaries.

CONCLUSION

Based on the foregoing and all the facts of record, the Board has determined that the applications under section 3 and the notices under section 4 of the BHC Act 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 the Board is required to consider under the BHC Act. The Board’s approval is specifically conditioned on compliance by Applicants with the conditions imposed in this order and all the commitments made to the Board in connection with the applications and notices. The Board’s approval of the nonbanking aspects of the proposal also is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c),³⁰ and to the Board’s authority to require such modification or termination of the activities of a bank holding company or any of its subsidiaries as the Board finds necessary to ensure compliance with, and to prevent evasion of, the provisions of the BHC Act and the Board’s regulations and orders issued thereunder. 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 does not involve the acquisition, merger, or consolidation of a bank. On this basis and after consultation with the DOJ, the Board has determined that the post-consummation period in section 11 of the BHC Act does not apply to consummation of the conversion of AMEX Bank.³¹ Accordingly, the transaction may be consummated immediately but not later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of New York, acting pursuant to delegated authority.

By order of the Board of Governors, effective November 10, 2008.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Caja de Ahorros y Monte de Piedad de Madrid
Madrid, Spain

Caja Madrid Cibeles S.A.
Madrid, Spain

CM Florida Holdings, Inc.
Coral Gables, Florida

Order Approving the Acquisition of a Bank Holding Company

Caja de Ahorros y Monte de Piedad de Madrid (“Caja Madrid”), Madrid, Spain, a foreign banking organization subject to the Bank Holding Company Act (“BHC Act”),¹ and its subsidiary holding companies, Caja Madrid Cibeles S.A. (“CMC”), also of Madrid, and CM Florida Holdings, Inc. (“CM Florida”), Coral Gables, Florida (collectively, “Applicants”), have requested the Board’s approval under section 3 of the BHC Act² to acquire 83 percent of the voting securities of City National Bancshares, Inc. (“CNB”) and thereby acquire control of its subsidiary bank, City National Bank of Florida (“CN Bank”), both of Miami, Florida. Caja Madrid is treated as a financial holding company within the meaning of the BHC Act. CMC and CM Florida (jointly, “FHC electors”) have also filed with the Board elections to become financial holding companies on consummation of the proposal pursuant to section 4(k) and (l) of the BHC Act and section 225.82 of the Board’s Regulation Y.³

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (73 *Federal Register* 30,942 (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 the BHC Act.

1. Caja Madrid operates an agency in the United States and is, therefore, subject to the BHC Act (12 U.S.C. § 3106(a)).

2. 12 U.S.C. § 1842.

3. See 12 U.S.C. § 1843(k) and (l); 12 CFR 225.82. FHC electors have certified that CN Bank is well capitalized and well managed and have provided all the information required under Regulation Y. Based on all the facts of record, the Board has determined that these elections to become financial holding companies will become effective on consummation of the proposal if, on that date, CN Bank remains well capitalized and well managed and has a rating of at least “satisfactory” at its most recent performance evaluation under the Community Reinvestment Act (“CRA”) (12 U.S.C. § 2901 et seq.).

29. See 12 U.S.C. § 1843(a)(2).

30. 12 CFR 225.7 and 225.25(c).

31. 12 U.S.C. § 1849(b)(1).

Caja Madrid, with total consolidated assets equivalent to \$269 billion, is the fourth largest depository organization in Spain.⁴ Caja Madrid operates an agency in Miami.

CNB has total consolidated assets of approximately \$2.8 billion, and CN Bank operates only in Florida. CNB is the 21st largest depository organization in Florida, controlling deposits of \$2.1 billion.⁵

COMPETITIVE CONSIDERATIONS

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 bank acquisition that would substantially lessen competition in any relevant banking market, unless the anticompetitive effects of the proposal are clearly outweighed in the public interest by its probable effect in meeting the convenience and needs of the community to be served.⁶

Caja Madrid does not control a U.S. depository institution, and the proposal would not result in an expansion of CNB's operations. Based on all the facts of record, the Board concludes that consummation of the proposal would have no significantly adverse effect on competition or on the concentration of resources in any relevant banking market. Accordingly, the Board has determined that competitive considerations are consistent with approval.

FINANCIAL, MANAGERIAL, AND SUPERVISORY CONSIDERATIONS

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has considered these factors carefully in light of all the facts of record, including confidential supervisory and examination information from the various 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 Bank of Spain, the agency with primary responsibility for the supervision and regulation of Spanish banks, including Caja Madrid.

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

4. Spanish asset and ranking data are as of June 30, 2008, and are based on the exchange rate as of that date.

5. Statewide deposit and ranking data are as of June 30, 2007, and reflect merger activity through October 10, 2008.

6. 12 U.S.C. § 1842(c)(1).

The Board has carefully considered the financial resources of the organizations involved in the proposal. The capital levels of Caja Madrid continue to exceed the minimum levels that would be required under the Basel Capital Accord and are considered to be equivalent to the capital levels that would be required of a U.S. banking organization. In addition, CNB and CN Bank 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 cash purchase of shares. Applicants will use existing resources to fund the purchase.

The Board also has considered the managerial resources of the organizations involved. The Board has reviewed the examination records of Applicants, CNB, and CNB's subsidiary depository institution, 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 Office of the Comptroller of the Currency ("OCC"), with the organizations and their records of compliance with applicable banking law and with anti-money laundering laws. Applicants and CNB are considered to be well managed. The Board also has considered Applicants' plans for implementing the proposal, including the proposed management after consummation.

Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources and future prospects of the organizations involved in the proposal are consistent with approval, as are the other supervisory factors.⁷

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.⁸ As noted, the Bank

7. 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 Caja Madrid operates and has communicated with relevant government authorities concerning access to information. In addition, Caja Madrid previously has committed that, to the extent not prohibited by applicable law, it will make available to the Board such information on the operations 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. Caja Madrid also previously 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. In light of these commitments, the Board has concluded that Caja Madrid has provided adequate assurances of access to any appropriate information the Board may request.

8. 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

of Spain is the primary supervisor of Spanish banks, including Caja Madrid. The Board previously has determined that Caja Madrid is subject to comprehensive supervision on a consolidated basis by its home-country supervisor.⁹ Based on this finding and all the facts of record, the Board has concluded that Caja Madrid continues 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, 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 CRA.¹⁰ The CRA requires the federal financial supervisory agencies to encourage insured depository institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation, and requires the appropriate federal financial supervisory agency to take into account a relevant depository institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, in evaluating bank expansionary proposals.¹¹

The Board has considered carefully all the facts of record, including evaluations of the CRA performance records of CN Bank, data reported by CNB under the Home Mortgage Disclosure Act ("HMDA"),¹² other information provided by Applicants, confidential supervisory information, and a public comment received on the proposal. The commenter alleged, based on HMDA data reported in 2006, that CN Bank had engaged in disparate treatment of minority individuals in home mortgage lending.

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.¹³

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).

9. See *Caja de Ahorros y Monte de Piedad de Madrid*, 87 *Federal Reserve Bulletin* 785 (2001).

10. 12 U.S.C. § 1842 (c)(2).

11. 12 U.S.C. § 2903.

12. 12 U.S.C. § 2801 et seq.

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

CN Bank received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of April 6, 2006.¹⁴ Applicants have represented that they do not intend to make changes to CN Bank's CRA program on consummation.

B. HMDA and Fair Lending Record

The Board has carefully considered the fair lending record and HMDA data of CN Bank in light of the public comment received on the proposal. The commenter alleged, based on HMDA data, that CN Bank denied a disproportionate percentage of loan applications from African Americans in the Metropolitan Statistical Areas ("MSAs") that include Miami and Ft. Lauderdale. The Board focused its analysis on the 2006 and 2007 HMDA data reported by CN Bank.¹⁵

Although the HMDA data might reflect certain disparities in the rates of loan applications, originations, and denials 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 CN Bank is excluding or imposing higher costs on any 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.¹⁶ 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. 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 with fair lending laws by CN Bank. The Board also has consulted with the OCC about the fair lending compliance record of CN Bank.

14. With the exception of community development loans, the evaluation period was January 1, 2002, through December 31, 2005, for the lending test. The evaluation period for community development loans, the investment test, and the service test was January 6, 2003, through April 6, 2006.

15. The Board reviewed HMDA data from the Miami and Ft. Lauderdale MSAs, as well as from CN Bank's entire CRA assessment area.

16. 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.

The record of this application, including confidential supervisory information, indicates that CN Bank has taken steps to ensure compliance with fair lending and other consumer protection laws. CN Bank's compliance program includes self-assessments, fair lending internal audits, and ongoing fair lending training for its employees. Applicants have stated that they do not intend to change CN Bank's fair lending programs.

The Board also has considered the HMDA data in light of other information, including the overall performance record of CN Bank under the CRA. These established efforts and record of performance demonstrate that CN 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 considered carefully all the facts of record, including reports of examination of the CRA record of the institution involved, information provided by Applicants, comment received on the proposal, and confidential supervisory information. The proposal will result in increased credit availability and access to a broader range of financial services for customers of CN Bank. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance record of the relevant insured depository institution are consistent with approval of the proposal.

CONCLUSION

Based on the foregoing, and in light of all the facts of record, the Board has determined that the application should be, and hereby is, approved.¹⁷ In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act and other applicable statutes. The Board's approval is specifically conditioned on compliance by

17. The commenter requested that the Board hold a public meeting or hearing on the proposal. Section 3 of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authority for the bank to be acquired makes a 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), 262.25(d)). The Board has considered carefully the commenter's request in light of all the facts of record. In the Board's view, the commenter had ample opportunity to submit its views and, in fact, submitted written comments that the Board has considered carefully in acting on the proposal. The commenter's request fails to demonstrate why written comments do not present its views adequately or why a meeting or hearing otherwise would be necessary or appropriate. For these reasons, and based on all the facts of record, the Board has determined that a public meeting or hearing is not required or warranted in this case. Accordingly, the request for a public meeting or hearing on the proposal is denied.

Applicants with the conditions in this order and all the commitments made to the Board in connection with the proposal. For purposes of this transaction, these commitments and conditions are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The proposal may not be consummated before the 15th calendar day after the effective date of this order, or later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Atlanta, acting pursuant to delegated authority.

By order of the Board of Governors, effective October 16, 2008.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

CIT Group Inc.
New York, New York

Order Approving Formation of a Bank Holding Company and Notice to Engage in Certain Nonbanking Activities

CIT Group Inc. ("CIT Group") has requested the Board's approval under section 3 of the Bank Holding Company Act ("BHC Act")¹ to become a bank holding company on conversion of CIT Bank, Salt Lake City, Utah, to a state bank. CIT Bank currently operates as an industrial loan company that is exempt from the definition of "bank" under the BHC Act.² CIT Group has also requested the Board's approval pursuant to sections 4(c)(8) and 4(j) of the BHC Act³ to retain nonbanking subsidiaries that engage in certain activities that are permissible for bank holding companies under the Board's Regulation Y, including credit extension, loan servicing, and related activities; leasing; financial and investment advisory services; private placement services; certain investment transactions as principal; and credit-related insurance agency and underwriting activities.⁴ In addition, CIT Group has provided notice of its proposal to retain its foreign subsidiaries under section 4(c)(13) of the BHC Act.⁵

Section 3(b)(1) of the BHC Act requires that the Board provide notice of an application under section 3 to the appropriate federal or state supervisory authority for the bank to be acquired and provide the supervisor a period of time (normally 30 days) within which to submit views and

1. 12 U.S.C. § 1842.

2. 12 U.S.C. § 1841(c)(2)(H).

3. 12 U.S.C. §§ 1843(c)(8) and 1843(j).

4. See 12 CFR 225.28(b)(1)–(3), (6), (8), and (11).

5. 12 U.S.C. § 1843(c)(13).

recommendations on the proposal.⁶ The BHC Act also authorizes the Board to reduce or eliminate this notice period under certain circumstances.⁷

In light of the unusual and exigent circumstances affecting the financial markets, and all other facts and circumstances, the Board has determined that emergency conditions exist that justify expeditious action on this proposal in accordance with the provisions of the BHC Act and the Board's regulations.⁸ The Board has provided notice to the primary federal and state supervisors of CIT Bank, the Federal Deposit Insurance Corporation ("FDIC") and Commissioner of the Utah Department of Financial Institutions and to the Department of Justice ("DOJ"). Those agencies have indicated that they have no objection to the approval of the proposal. For the same reasons, and in light of the fact that this transaction represents the conversion of an existing subsidiary of the CIT Group from one form of a depository institution to another, the Board has also waived public notice of this proposal.⁹

CIT, with total consolidated assets of approximately \$80.8 billion, provides a variety of commercial financing and leasing products and services.¹⁰ CIT Bank has total consolidated assets of approximately \$3.1 billion and controls deposits of approximately \$2.3 billion. CIT Bank engages primarily in financing and lending activities and in taking deposits of the type that are permissible for an industrial loan company under the exception in section 2(c)(2)(H) of the BHC Act.

FACTORS GOVERNING BOARD REVIEW OF TRANSACTION

The BHC Act sets forth the factors that the Board must consider when reviewing the formation of a bank holding company or the acquisition of a bank. These factors are the competitive effects of the proposal in the relevant geographic markets; the financial and managerial resources and future prospects of the companies and banks involved in the proposal; the convenience and needs of the community to be served, including the records of performance under the Community Reinvestment Act¹¹ ("CRA") of the insured depository institutions involved in the transaction; and the availability of information needed to determine and enforce compliance with the BHC Act and other applicable federal banking laws.¹²

6. 12 U.S.C. § 1842(b)(1); 12 CFR 225.15(b).

7. 12 U.S.C. § 1842(b)(1).

8. 12 U.S.C. § 1842(b)(1); 12 CFR 225.16(b)(3), 225.16(g)(2), and 262.3(f).

9. *Id.*

10. Asset data for CIT Group and asset and deposit data for CIT Bank are as of September 30, 2008.

11. 12 U.S.C. § 2901 et seq.

12. In cases involving interstate bank acquisitions by bank holding companies, the Board also must consider the concentration of deposits in the nation and relevant individual states, as well as compliance with the other provisions of section 3(d) of the BHC Act. Because the proposed transaction does not involve an interstate bank acquisition by a bank holding company, the provisions of section 3(d) of the BHC Act do not apply in this case.

COMPETITIVE CONSIDERATIONS

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly. The BHC Act also prohibits the Board from approving a proposed bank acquisition that would substantially lessen competition in any relevant banking market unless the 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.¹³

The proposal involves the conversion of an existing, wholly owned industrial loan company subsidiary of CIT Group into a bank with no resulting change in the ownership of CIT Group or CIT Bank. In addition, CIT Group does not propose to acquire any additional depository institution as part of this proposal. Based on all the facts of record, the Board concludes that consummation of the proposal would not result in any significantly adverse effects on competition or on the concentration of banking resources in any relevant banking market and that the 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 banks involved in the proposal and certain other supervisory factors.¹⁴ The Board has carefully considered these factors in light of all facts of record, including supervisory and examination information received from the relevant federal and state supervisors of the organizations involved in the proposal and other available financial information, including information provided by CIT Group. In addition, the Board has consulted with the primary federal and state supervisors of CIT Group and CIT Bank.

The Board consistently has considered capital adequacy to be an especially important aspect in analyzing financial factors. CIT Group has converted debt and raised a material amount of capital from third parties. CIT Group is adequately capitalized and as a result of its successful efforts to raise additional capital, will be well capitalized prior to consummation. In addition, CIT Bank is currently well capitalized under applicable federal guidelines, and it will remain well capitalized on a pro forma basis on consummation of the proposal. Other financial factors are consistent with approval.

In addition, the Board has carefully considered the managerial resources of CIT Group and CIT Bank in light of all the facts of record, including confidential supervisory and examination information and information provided by CIT Group. The Board has considered the supervisory experience of the relevant federal and state supervisory

13. 12 U.S.C. § 1842(c)(1).

14. 12 U.S.C. § 1842(c)(2) and (3).

agencies of CIT Group and its insured depository institution with the organization and institution and their records of compliance with applicable banking law and anti-money-laundering laws. The Board has engaged in discussions with the FDIC regarding its views on management processes and risk-management systems at both CIT Group and CIT Bank. In addition, the Board has carefully considered information from CIT Group about the organization's business strategy and the actions it is taking and proposing to take to strengthen the organization's risk-management systems, as well as its business plans for the bank. The Board also has consulted with the FDIC about these plans and actions to strengthen CIT Group's risk-management systems.

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

CONVENIENCE AND NEEDS AND CRA PERFORMANCE CONSIDERATIONS

In acting on a proposal under section 3 of the BHC Act, the Board must consider the effects of the proposal on the convenience and needs of the communities to be served and to take into account the records of the relevant depository institutions under the CRA.¹⁵

The Board has carefully considered the convenience and needs factor and the CRA performance records of CIT Bank in light of all the facts of record. As provided in the CRA, the Board evaluates the record of performance of an institution in light of examinations by the appropriate federal supervisors of the CRA performance records of the relevant institutions.¹⁶

CIT Bank received a "satisfactory" rating under the CRA at its most recent performance evaluation by the FDIC, as of October 28, 2002. Consistent with the CRA regulations adopted by the federal banking agencies, CIT Bank was evaluated under the community development test as a limited purpose institution.¹⁷ CIT Group has represented that the conversion of CIT Bank to a bank for purposes of the BHC Act will enhance the ability of the bank to meet the convenience and needs of its community and customers nationwide by permitting the bank to offer a wider array of deposit products.

The Board has engaged in discussions about CIT Bank's CRA and consumer compliance performance with the FDIC, which is the primary federal supervisor for CIT Bank and examines the bank for its CRA performance. In particular, the Board has considered information collected by the FDIC since its last evaluation. In addition, the Board

has reviewed information from CIT Bank about the actions it proposes to take with respect to its consumer lending activities and has consulted with the FDIC about these proposed actions. Importantly, the Board has also considered the FDIC's most current review of the CRA performance and compliance activities of the bank and the FDIC's views on this application.

Based on a review of the entire record and for the reasons discussed above, including the consultations with the FDIC, the Board has concluded that considerations relating to convenience and needs and the CRA performance record of CIT Bank are consistent with approval of the proposal.

NONBANKING ACTIVITIES

As noted, CIT Group also has filed a notice under sections 4(c)(8) and 4(j) of the BHC Act to engage in certain lending, leasing, advisory, securities, investment, and insurance activities that are permissible for bank holding companies through its nonbanking subsidiaries. The Board has determined by regulation that such activities are permissible for a bank holding company under Regulation Y,¹⁸ and CIT Group has committed to conduct these activities in accordance with the limitations set forth in Regulation Y and the Board's orders governing these activities.

To approve this notice, the Board must also determine that the performance of the proposed activities by CIT Group "can reasonably be expected to produce benefits to the public . . . that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices."¹⁹ As part of its evaluation of these factors, the Board has considered the financial and managerial resources of CIT Group and its subsidiaries and the effect of the proposed transaction on their resources. For the reasons noted above, and based on all the facts of record, the Board has concluded that financial and managerial considerations are consistent with approval of the notice.

In addition, the Board must consider the competitive effects of a proposal to engage in nonbanking activities under the public benefits factor of section 4(j) of the BHC Act. The proposal involves the retention of CIT Group's existing nonbank subsidiaries, and CIT Group would not acquire any additional nonbank subsidiaries as part of this proposal. Accordingly, the Board concludes that consummation of the proposal would not result in any significantly adverse effects on competition in any relevant market.

CIT Group is a leading provider of factoring services in the United States and a leading lender in the Small Business Administration's 7a programs. The proposal would benefit the public by strengthening CIT Group's ability to offer its nonbanking products and services to customers nationwide.

The Board concludes that the conduct of the proposed nonbanking activities within the framework of Regula-

15. 12 U.S.C. § 2903; 12 U.S.C. § 1842(c)(2).

16. 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 64 *Federal Register* 23,641 (1999).

17. See, e.g., 12 CFR 228.21(a)(2).

18. 12 CFR 225.28(b)(1)-(3), (6), (8), and (11).

19. See 12 U.S.C. § 1843(j)(2)(A).

tion Y and Board precedent can reasonably be expected to produce public benefits that would outweigh any likely adverse effects. Accordingly, based on all the facts of record, the Board has determined that the balance of the public benefits factor under section 4(j)(2) of the BHC Act is consistent with approval.

CIT Group engages in a small amount of activities that may not conform to the requirements of the BHC Act. Section 4 of the BHC Act by its terms also provides any company that becomes a bank holding company two years within which to conform its existing nonbanking investments and activities to the section's requirements, with the possibility of three one-year extensions.²⁰ CIT Group must conform any impermissible nonfinancial activities and investments that it currently conducts or holds, directly or indirectly, to the requirements of the BHC Act within the time periods provided by the act.

CIT Group also has provided notice of its proposal to retain its foreign bank subsidiaries under section 4(c)(13) of the BHC Act. Based on the record, the Board has no objection to the retention of such subsidiaries.

CONCLUSION

Based on the foregoing and all the facts of record, the Board has determined that the application under section 3 and notices under section 4 of the BHC Act should be, and hereby are, approved.²¹ In reaching its conclusion, the Board has considered all the facts of record in light of the factors that the Board is required to consider under the BHC Act. The Board's approval is specifically conditioned on compliance by CIT Group with all the conditions imposed in this order and all the commitments made to the Board in connection with the application and notices. The Board's approval of the nonbanking aspects of the proposal also is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c),²² and to the Board's authority to require such modification or

termination of the activities of a bank holding company or any of its subsidiaries as the Board finds necessary to ensure compliance with, and to prevent evasion of, the provisions of the BHC Act and the Board's regulations and orders issued thereunder. These conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The proposal does not involve the acquisition, merger, or consolidation of a bank. On this basis and after consultation with the DOJ, the Board has determined that the post-consummation period in section 11 of the BHC Act does not apply to consummation of the conversion of CIT Bank.²³ Accordingly, the transaction may be consummated immediately but not later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of New York, acting pursuant to delegated authority.

By order of the Board of Governors, effective December 22, 2008.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

GMAC LLC

IB Finance Holding Company, LLC *Detroit, Michigan*

Order Approving Formation of Bank Holding Companies and Notice to Engage in Certain Nonbanking Activities

GMAC LLC and IB Finance Holding Company, LLC ("IBFHC") (collectively, "GMAC" or "Applicants") have requested the Board's approval under section 3 of the Bank Holding Company Act ("BHC Act")¹ to become bank holding companies on conversion of GMAC Bank, Midvale, Utah, to a commercial bank.² GMAC Bank currently operates as an industrial loan company and is exempt from the definition of "bank" under the BHC Act.³ GMAC has also requested the Board's approval pursuant to sections 4(c)(8) and 4(j) of the BHC Act⁴ to retain its nonbanking subsidiaries that engage in certain activities that are permissible for bank holding companies under the Board's Regulation Y, including certain credit extension,

20. See 12 U.S.C. § 1843(a)(2).

21. A commenter requested that the Board hold a public meeting or hearing on the proposal. Section 3(b) of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authorities for the bank to be acquired make a timely written recommendation of denial of the application. The Board has not received such a recommendation from the appropriate supervisory authorities. The Board's regulations provide for a hearing under section 4 of the BHC Act if there are disputed issues of material fact that cannot be resolved in some other manner (12 CFR 225.25(a)(2)). Under its regulations, the Board also may, in its discretion, hold a public meeting or hearing on an application to acquire a bank if a meeting or hearing is necessary or appropriate to clarify factual issues related to the application and to provide an opportunity for testimony (12 CFR 225.16(e)). The Board has considered carefully the commenter's request in light of all the facts of record. The request fails to identify disputed issues of fact that are material to the Board's decision that would be clarified by a public meeting or hearing. For these reasons, and based on all the facts of record, the Board has determined that a public meeting or hearing is not required or warranted in this case. Accordingly, the request for a public meeting or hearing on the proposal is denied.

22. 12 CFR 225.7 and 225.25(c).

23. 12 U.S.C. § 1849(b)(1).

1. 12 U.S.C. § 1842.

2. GMAC Bank is a direct subsidiary of IBFHC and an indirect subsidiary of GMAC LLC.

3. 12 U.S.C. § 1841(c)(2)(H).

4. 12 U.S.C. §§ 1843(c)(8) and (j).

loan servicing, leasing, and related activities.⁵ GMAC has also provided notice to retain its foreign subsidiaries under section 4(c)(13) of the BHC Act.⁶

Section 3(b)(1) of the BHC Act requires that the Board provide notice of an application under section 3 to the appropriate federal or state supervisory authority for the banks to be acquired and provide the supervisor with a period of time (normally 30 days) within which to submit views and recommendations on the proposal.⁷ The BHC Act also authorizes the Board to reduce or eliminate these notice periods under certain circumstances.⁸

In light of the unusual and exigent circumstances affecting the financial markets, and all other facts and circumstances, the Board has determined that emergency conditions exist that justify expeditious action on this proposal in accordance with the provisions of the BHC Act and the Board's regulations.⁹ The Board has provided notice to the primary federal and state supervisors of GMAC Bank, the Federal Deposit Insurance Corporation ("FDIC") and the Commissioner of the Utah Department of Financial Institutions ("UDFI"), and to the Department of Justice ("DOJ"). Those agencies have indicated that they have no objection to approval of the proposal. For the same reasons, and in light of the fact that this transaction involves the conversion of an existing subsidiary of Applicants from one form of a depository institution to another and the retention of Applicants' existing nonbanking subsidiaries, the Board has also waived public notice of this proposal.¹⁰

GMAC, with total consolidated assets of approximately \$211.3 billion, engages in automotive financing, commercial financing, mortgage financing, insurance, and other activities both in the United States and abroad.¹¹ GMAC Bank has total consolidated assets of approximately \$33 billion and controls deposits of approximately \$17 billion. GMAC Bank engages primarily in lending and other financing activities and taking deposits of the type that are permissible for an industrial loan company under the exception in section 2(c)(2)(H) of the BHC Act.

FACTORS GOVERNING BOARD REVIEW OF THE PROPOSED BANK HOLDING COMPANIES

The BHC Act sets forth the factors the Board must consider when reviewing the formation of a bank holding company or the acquisition of a bank. These factors are the competitive effects of the proposal in the relevant geographic markets; the financial and managerial resources and future prospects of the companies and banks involved in the proposal; the convenience and needs of the community to be served, including the records of performance under the

Community Reinvestment Act ("CRA")¹² of the insured depository institutions involved in the transaction; and the availability of information needed to determine and enforce compliance with the BHC Act and other applicable federal banking laws.¹³

In addition, this application presents a number of unique issues. In particular, GMAC has a long historical relationship with General Motors Corporation ("GM"). Since founding GMAC, GM has held a significant ownership position in GMAC, and GMAC has been the primary source of financing to customers and dealerships seeking to purchase or lease GM vehicles. GMAC proposes to continue to provide funding to customers and dealerships to enable them to acquire and lease vehicles from GM, though as noted below, GMAC proposes to diversify its activities and has modified in significant ways its agreement with GM to provide customer and dealership financing. Although GM owns a significant portion of GMAC, a group of entities controlled by or affiliated with a private investment firm, Cerberus Capital Management, L.P. ("Cerberus"), currently owns a majority of the shares of GMAC. Neither GM nor Cerberus is able to comply with the nonbanking activities restrictions in the BHC Act. Consequently, neither may retain a controlling interest in GMAC, within the meaning of the BHC Act, if this application is approved.

In reviewing the factors under the BHC Act, including the issues noted above, the Board has considered all the facts and circumstances. This review has included the record regarding the financial and managerial resources of GMAC and GMAC Bank, their future prospects, and the effects of this proposal on the convenience and needs of the communities served by these entities. Among other things, the Board has considered the business plans of GMAC's management to diversify the activities of GMAC and its plans for GMAC Bank; the successful efforts of management of GMAC to raise capital; the experience of senior management of GMAC in other organizations that are regulated as bank holding companies; the steps taken by the management of GMAC and GMAC Bank to address concerns raised by the bank's supervisors and to prepare to operate within the framework established by the BHC Act; and the public benefits that would accrue from approval of this proposal, including those resulting from the operation of GMAC as a regulated entity. The Board has also considered the steps taken by the Department of the Treasury to provide assistance to GM and thereby help ensure the viability of a major business partner of GMAC and GMAC Bank. In addition, the Board has had extensive consultations with the FDIC, the primary federal supervisor

5. 12 CFR 225.28(b)(1)–(3).

6. 12 U.S.C. § 1843(c)(13).

7. 12 U.S.C. § 1842(b)(1); 12 CFR 225.15(b).

8. 12 U.S.C. § 1842(b)(1).

9. 12 U.S.C. § 1842(b)(1); 12 CFR 225.16(b)(3), 225.16(g)(2), and 262.3(l).

10. 12 CFR 225.16(b)(3), 225.16(g)(2), and 262.3(l).

11. Asset and deposit data for GMAC and GMAC Bank are as of September 30, 2008.

12. 12 U.S.C. § 2901 et seq.

13. In cases involving interstate bank acquisitions by bank holding companies, the Board also must consider the concentration of deposits in the nation and relevant individual states, as well as compliance with the other provisions of section 3(d) of the BHC Act. Because the proposed transaction does not involve an interstate bank acquisition by a bank holding company, the provisions of section 3(d) of the BHC Act do not apply in this case.

of GMAC Bank, and has consulted with the UDFI, the chartering authority and state supervisor for GMAC Bank.

The Board has also carefully considered the plans and commitments made by GM and Cerberus promptly to conform their respective ownership interests in GMAC to the requirements of the BHC Act. To address concerns that GM could control GMAC and GMAC Bank for purposes of the BHC Act, GM has committed to the Board that before consummation of the proposal, GM will reduce its ownership interest in GMAC to less than 10 percent of the voting and total equity interest of GMAC. GM's remaining equity interest in GMAC will be transferred to a trust that has a trustee acceptable to the Board and the Department of the Treasury, who will be entirely independent of GM and have sole discretion to vote and dispose of the GMAC equity interests.¹⁴ The trustee must dispose of the equity interests held in the trust within three years of the trust's creation. In addition, GM has made commitments to the Board that are similar to those the Board previously has relied on to ensure that a company could not exercise a controlling influence over a bank or bank holding company.¹⁵ Until the trust fully divests the shares, the limitations of sections 23A and 23B of the Federal Reserve Act will apply to GM and GMAC Bank as if they were affiliates.¹⁶ GMAC has committed to amend its existing agreements with GM to remove any restrictions on GMAC's ability to engage in transactions with unrelated third parties and to ensure that GMAC has complete discretion to set the terms of its financing arrangements.

To ensure that Cerberus's holdings in GMAC are consistent with the Board's precedent on noncontrolling investments in banks and bank holding companies, each Cerberus fund that holds interests in GMAC will distribute its equity interests in the company to its respective investors. As a result of this distribution, the aggregate direct and indirect investments controlled by Cerberus and its related parties would not exceed 14.9 percent of the voting shares or 33 percent of the total equity of GMAC LLC. The investors that receive shares in the distribution from the Cerberus funds are each sophisticated investors and are independent of Cerberus and independent of each other. No investor would, after this distribution, own, hold, or control 5 percent or more of the voting shares or 7.5 percent of the total equity of GMAC LLC. Cerberus has made a number of commitments previously found by the Board to be helpful in limiting the ability of an investor to exercise a controlling interest over a banking organization. In addition, Cerberus employees and consultants would cease providing services to, or otherwise functioning as dual employees of, GMAC, and neither Cerberus nor any affiliated entity will

have any advisory relationships with GMAC or any investor regarding the vote or sale of shares or the management or policies of GMAC or GMAC Bank.¹⁷

Based on the entire record, and for the reasons explained more fully below, the Board has determined that the proposal meets the requirements of the BHC Act and, consequently, has approved 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 banks involved in the proposal and certain other supervisory factors.¹⁸ The Board also reviews the financial and managerial resources of the organization involved in the proposal under section 4 of the BHC Act. The Board has carefully considered these factors in light of all the facts of record, including supervisory and examination information received from the relevant federal and state supervisors of the organizations involved in the proposal and other available financial information, including information provided by Applicants. In addition, the Board has consulted with the primary federal and state supervisors of GMAC Bank.

In analyzing financial factors, the Board consistently has considered capital adequacy to be an especially important aspect. The Board has considered GMAC's successful efforts to raise additional capital and that, as a result, GMAC will be well capitalized on completion of the proposal, as well as commitments GMAC has made to maintain its capital at a high level for a specified time period. In addition, GMAC Bank is currently well capitalized under applicable federal guidelines. GMAC Bank also would be well capitalized on a pro forma basis on consummation of the proposal. The Board has consulted with the FDIC, the primary federal supervisor of GMAC Bank, about the adequacy of the bank's capital for its current and pro forma operations and the future prospects of GMAC Bank in light of its business plans. Moreover, as noted above, the Board has considered that the Department of the Treasury has taken a number of steps including providing credit to GM, which for some time will continue to be a major business partner of GMAC, in order to help stabilize GM and improve its viability.

In addition, the Board has considered carefully the managerial resources of Applicants in light of all the facts of record, including confidential supervisory and examination information and information provided by the Applicants. The Board has considered the supervisory experience of the relevant federal and state supervisory agencies with

14. The trust agreement and trustee must be acceptable to the Board.

15. In rare and unusual situations when warranted by the public interest, the Board previously has used the device of a trust as an interim measure to facilitate the sales of shares to conform with the requirements of the BHC Act. See Board Letter to Stuart M. Plevin, Esq. dated June 26, 2000.

16. 12 U.S.C. §§ 371c and 371c-1.

17. A commenter opposed approval of the application because, in the commenter's view, approval would breach the separation between banking and commerce in the BHC Act. As discussed above, GM and Cerberus have restructured their respective ownership interests to be consistent with the BHC Act limitations on banking and commerce and with the Board's policies and precedent on noncontrolling investments in banks and bank holding companies.

18. 12 U.S.C. § 1842(c)(2) and (3).

Applicants and GMAC Bank and their records of compliance with applicable banking law and anti-money-laundering laws. The Board also has considered the experience of management of GMAC, both at GMAC and more broadly in managing a regulated entity subject to the requirements applicable to bank holding companies. The Board has consulted the FDIC regarding its views on management processes and risk-management systems at both GMAC and GMAC Bank. In addition, the Board has carefully considered information from GMAC about the organization's business strategy, as well as its business plans for the holding company and bank, and the actions it is taking and proposing to take to strengthen the organization's risk-management infrastructure and to diversify its customer base and sources of income. The Board also has consulted with the FDIC about these plans and actions to strengthen GMAC and GMAC Bank's risk-management infrastructure and diversify its business operations.

The Board also has considered carefully the future prospects of GMAC and GMAC Bank, including their business plans, in light of all the facts and circumstances, and the actions they already have taken and plan to take to strengthen their financial condition and management systems and to diversify their business operations. As noted, the Board also has considered the actions taken by the Department of the Treasury to provide financial assistance to stabilize GM, which would benefit GMAC and GMAC Bank while they remain an important provider of financing for vehicles manufactured by GM.

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

COMPETITIVE CONSIDERATIONS

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly. The BHC Act also prohibits the Board from approving a proposed bank acquisition that would substantially lessen competition in any relevant banking market unless the 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.¹⁹

The proposal involves the conversion of an existing, wholly owned industrial loan company subsidiary of Applicants into a bank with no resulting change in the ownership of GMAC Bank. Applicants do not propose to acquire any additional depository institution as part of this proposal. Based on all the facts of record, the Board concludes that consummation of the proposal would not result in any significantly adverse effects on competition or on the concentration of banking resources in any relevant banking

market and that the competitive factors are consistent with approval of the proposal.

CONVENIENCE AND NEEDS AND CRA PERFORMANCE CONSIDERATIONS

In acting on a proposal under section 3 of the BHC Act, the Board must consider the effects of the proposal on the convenience and needs of the communities to be served and take into account the records of the relevant depository institutions under the CRA.²⁰

The Board has carefully considered the convenience and needs factor and the CRA performance records of GMAC Bank in light of all the facts of record. As provided in the CRA, the Board evaluates the record of performance of an institution in light of examinations by the appropriate federal supervisors of the CRA performance records of the relevant institutions.²¹

GMAC Bank received an "outstanding" rating under the CRA at its most recent performance evaluation by the FDIC, as of February 27, 2006 (the "FDIC Examination"). Consistent with the CRA regulations adopted by the federal banking agencies, GMAC Bank was evaluated under the community development test as a limited purpose institution.²² Applicants have represented that the conversion of GMAC Bank to a bank for purposes of the BHC Act will enhance the ability of the bank to meet the convenience and needs of its communities by permitting the bank to offer a wider array of deposit products and strengthening the bank's ability to continue to serve as a significant source of automobile financing, including for vehicles from companies other than GM.

The Board has engaged in extensive consultation with the FDIC about GMAC Bank's CRA and consumer compliance performance since its last evaluation. In addition, the Board has received information from GMAC Bank about the actions it will take with respect to its consumer lending activities on conversion of the industrial loan company to a bank and has consulted with the FDIC about these proposed actions.

Based on a review of the entire record, and for the reasons discussed above, the Board has concluded that considerations relating to convenience and needs considerations and the CRA performance record of GMAC Bank are consistent with approval of the proposal.

NONBANKING ACTIVITIES

As noted, GMAC also has filed a notice under sections 4(c)(8) and 4(j) of the BHC Act to engage in certain credit extension and servicing, leasing, and related activities that are permissible for a bank holding company

19. 12 U.S.C. § 1842(c)(1).

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

21. 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 64 *Federal Register* 23,641 (1999).

22. See, e.g., 12 CFR 228.21(a)(2).

directly and through its nonbanking subsidiaries.²³ GMAC has committed to conduct these activities in accordance with the limitations set forth in Regulation Y and the Board's orders governing these activities.

To approve this notice, the Board must also determine that the performance of the proposed activities by GMAC "can reasonably be expected to produce benefits to the public . . . that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices."²⁴ As part of its evaluation of these factors, the Board has considered the financial and managerial resources of GMAC and its subsidiaries and the effect of the proposed transaction on their resources. For the reasons noted above, and based on all the facts of record, the Board has concluded that financial and managerial considerations are consistent with approval of the notice.

In addition, the Board must consider the competitive effects of a proposal to engage in nonbanking activities under the public benefits factor of section 4(j) of the BHC Act. The proposal involves the retention of GMAC's existing nonbanking subsidiaries, and GMAC would not acquire any additional nonbanking subsidiaries as part of this proposal. Accordingly, the Board concludes that consummation of the proposal would not result in any significantly adverse effects on competition in any relevant market.

GMAC is one of the nation's largest automotive finance companies. The proposal would benefit the public by strengthening GMAC's ability to fund the purchases of vehicles manufactured by GM and other companies and by helping to normalize the credit markets for such purchases.

The Board concludes that the conduct of the proposed nonbanking activities within the framework of Regulation Y and Board precedent can reasonably be expected to produce public benefits that would outweigh any likely adverse effects. Accordingly, based on all the facts of record, the Board has determined that the balance of the public benefits factor under section 4(j)(2) of the BHC Act is consistent with approval.

GMAC engages in a small amount of activities that may not conform to the requirements of the BHC Act. Section 4 of the BHC Act by its terms also provides any company that becomes a bank holding company two years within which to conform its existing nonbanking investments and activities to the section's requirements, with the possibility of three one-year extensions.²⁵ GMAC must conform to the BHC Act any impermissible nonfinancial activities and investments that they currently conduct or hold, directly or indirectly, within the time requirements of the act.

GMAC also has provided notice of its proposal to retain its foreign subsidiaries under section 4(c)(13) of the BHC Act. Based on the record, the Board has no objection to the retention of such subsidiaries.

CONCLUSION

Based on the foregoing, the Board has determined that the application under section 3 and the notices under section 4 of the BHC Act should be, and hereby are, approved.²⁶ In reaching its conclusion, the Board has considered all the facts of record in light of the factors that the Board is required to consider under the BHC Act. The Board's approval is specifically conditioned on compliance by Applicants and GMAC's shareholders with the conditions imposed in this order and all the commitments they made to the Board in connection with the application and notices. The Board's approval of the nonbanking aspects of the proposal also is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c),²⁷ and to the Board's authority to require such modification or termination of the activities of a bank holding company or any of its subsidiaries as the Board finds necessary to ensure compliance with, and to prevent evasion of, the provisions of the BHC Act and the Board's regulations and orders issued thereunder. 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 does not involve the acquisition, merger, or consolidation of a bank. On this basis and after consultation with the DOJ, the Board has determined that the post-consummation period in section 11 of the BHC Act does not apply to the consummation of the conversion of GMAC Bank.²⁸ Accordingly, the transaction may be consummated immediately but may not be consummated later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Richmond, acting pursuant to delegated authority.

By order of the Board of Governors, effective December 24, 2008.

26. A commenter requested that the Board hold a public meeting or hearing on the proposal. Section 3(b) of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authority for the bank to be acquired makes a timely written recommendation of denial of the application. The Board has not received such a recommendation from the appropriate supervisory authorities. The Board's regulations provide for a hearing under section 4 of the BHC Act if there are disputed issues of material fact that cannot be resolved in some other manner (12 CFR 225.25(a)(2)). Under its regulations, the Board also may, in its discretion, hold a public meeting or hearing on an application to acquire a bank if a meeting or hearing is necessary or appropriate to clarify factual issues related to the application and to provide an opportunity for testimony (12 CFR 225.16(e)). The Board has considered carefully the commenter's request in light of all the facts of record. The request fails to identify disputed issues of fact that are material to the Board's decision that would be clarified by a public meeting or hearing. For these reasons, and based on all the facts of record, the Board has determined that a public meeting or hearing is not required or warranted in this case. Accordingly, the request for a public meeting or hearing on the proposal is denied.

27. 12 CFR 225.7 and 225.25(c).

28. 12 U.S.C. § 1849(b)(1).

23. 12 CFR 225.28(b)(1)-(3).

24. See 12 U.S.C. § 1843(j)(2)(A).

25. See 12 U.S.C. § 1843(a)(2).

Voting for this action: Chairman Bernanke, Vice Chairman Kohn, and Governors Warsh, and Kroszner. Voting against this action: Governor Duke.

JENNIFER J. JOHNSON
Secretary of the Board

Mitsubishi UFJ Financial Group, Inc.
Tokyo, Japan

**Order Approving Acquisition of Interests in a
Bank Holding Company and Certain
Nonbanking Subsidiaries**

Mitsubishi UFJ Financial Group, Inc. (“MUFG”), a foreign banking organization that is a financial holding company¹ for purposes of the Bank Holding Company Act (“BHC Act”), has requested the Board’s approval under section 3 of the BHC Act² to acquire up to 24.9 percent of the voting shares of Morgan Stanley (“Morgan”), New York, New York, and thereby indirectly acquire an interest in Morgan’s subsidiary bank, Morgan Stanley Bank, National Association, Salt Lake City, Utah. In addition, MUFG has requested the Board’s approval under sections 4(c)(8) and (4)(j) of the BHC Act to acquire an indirect interest in Morgan’s subsidiary savings association, Morgan Stanley Trust, Jersey City, New Jersey, and Morgan’s subsidiary trust company, Morgan Stanley Trust National Association, Wilmington, Delaware.³ MUFG also has provided notice of its proposal to acquire an indirect interest in the foreign bank subsidiaries of Morgan under section 4(c)(13) of the BHC Act.⁴

Section 3(b)(1) of the BHC Act requires that the Board provide notice of an application under section 3 to the appropriate federal or state supervisory authority for the banks to be acquired and provide the supervisor a period of time (normally 30 days) within which to submit views and recommendations on the proposal.⁵ Section 4(i)(4) of the

BHC Act imposes a similar requirement with respect to a notice to acquire a savings association.⁶ In light of the unusual and exigent circumstances affecting the financial markets and all other facts and circumstances, and in accordance with the provisions of the BHC Act and the Board’s regulations, the Board has shortened to 10 days the notice and comment period to the primary regulators of the banks and savings associations involved in, and waived public notice of, this proposal.⁷ The Board has contacted the primary federal supervisors of the insured depository institutions and the Department of Justice; those agencies have indicated they have no objection to consummation of the proposal.

Based on all the facts of record, the Board has concluded that all the factors it must consider in acting on the application and notices are consistent with approval. The application and notices are hereby approved by the Board for the reasons set forth in the Board’s Statement, which will be released at a later date.

The Board’s approval is specifically conditioned on compliance by MUFG with all the commitments made in connection with the proposal and on the receipt, in a form acceptable to the Board, of commitments by MUFG that it will not exercise a controlling influence over Morgan. This approval also is subject to all the conditions set forth in Regulation Y and to the Board’s authority to require such modification or termination of the nonbanking activities of a bank holding company or any of its subsidiaries as the Board finds necessary to ensure compliance with, and to prevent evasion of, the provisions of the BHC Act and the Board’s regulations and orders issued thereunder. 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 acquisition may not be consummated before the fifth calendar day after the effective date of this order, or later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of San Francisco, acting pursuant to delegated authority.

By order of the Board of Governors, effective October 6, 2008.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

1. The elections by MUFG, The Bank of Tokyo-Mitsubishi UFJ, Ltd., and Mitsubishi UFJ Trust and Banking Corporation, all of Tokyo, and UnionBanCal Corporation, San Francisco, California, to become financial holding companies pursuant to sections 4(k) and (l) of the BHC Act and sections 225.82(b)(1) and 225.91(b)(1) of Regulation Y became effective as of October 6, 2008. See Board letter to Donald J. Toumey, Esq., dated October 6, 2008.

2. 12 U.S.C. § 1842. See 12 CFR 225.15.

3. 12 U.S.C. §§ 1843(c)(8) and (j). See 12 CFR 225.24. The Board previously has determined by regulation that the operation of a savings association and a trust company by a bank holding company is closely related to banking for purposes of section 4(c)(8) of the BHC Act (12 CFR 225.28(b)(4)(ii) and (5)).

4. 12 U.S.C. § 1843(c)(13).

5. 12 U.S.C. § 1842(b)(1); 12 CFR 225.15(b).

6. 12 U.S.C. § 1843(i)(4).

7. 12 U.S.C. §§ 1842(b)(1) and 1843(i)(4); 12 CFR 225.16(b)(3), 225.16(g)(2), 225.25(d), and 262.3(l).

*Mitsubishi UFJ Financial Group, Inc.
Tokyo, Japan*

Statement by the Board of Governors of the
Federal Reserve System Regarding the
Application and Notices by Mitsubishi UFJ
Financial Group, Inc., to Acquire Interests in
a Bank Holding Company and Certain
Nonbanking Subsidiaries

By Order dated October 6, 2008, the Board approved the application of Mitsubishi UFJ Financial Group, Inc. (“MUFG”), a foreign banking organization that is a financial holding company¹ for purposes of the Bank Holding Company Act (“BHC Act”), under section 3 of the BHC Act² to acquire up to 24.9 percent of the voting shares of Morgan Stanley (“Morgan”), New York, New York, and thereby indirectly acquire an interest in Morgan’s subsidiary bank, Morgan Stanley Bank, National Association (“MS Bank”), Salt Lake City, Utah.³ In addition, the Board approved MUFG’s notice under sections 4(c)(8) and (4)(j) of the BHC Act to acquire an indirect interest in Morgan’s subsidiary savings association, Morgan Stanley Trust (“MST”), Jersey City, New Jersey, and Morgan’s subsidiary trust company, Morgan Stanley Trust National Association (“MSTNA”), Wilmington, Delaware.⁴ The Board also approved MUFG’s notice of its proposal to acquire an indirect interest in the foreign bank subsidiaries of Morgan under section 4(c)(13) of the BHC Act.⁵ The Board hereby issues this Statement regarding its approval Order.

In light of the unusual and exigent circumstances affecting the financial markets, and all other facts and circumstances, the Board has determined that emergency conditions exist that justify expeditious action on this proposal.⁶ The Board has provided notice to the Office of the Comptroller of the Currency (“OCC”) and the Office of Thrift Supervision (“OTS”), the primary federal supervisors of MS Bank and MST, respectively, and to the Department of

Justice (“DOJ”); those agencies have indicated that they have no objection to the consummation of the proposal.⁷ For the same reasons, and in light of the fact that this transaction represents a minority, noncontrolling investment in Morgan and its subsidiary depository institutions, the Board has waived public notice of the proposal.⁸

MUFG, with total consolidated assets of approximately \$1.7 trillion as of December 31, 2007, is the largest banking organization in Japan. MUFG owns The Bank of Tokyo-Mitsubishi UFJ, Ltd. (“BTMU”) and Mitsubishi UFJ Trust and Banking Corporation (“MUTB”), both of Tokyo. BTMU operates branches, agencies, and representative offices in several states.⁹ It also controls Bank of Tokyo-Mitsubishi UFJ Trust Company (“BTMUT”), New York, New York, and UnionBanCal Corporation and its subsidiary bank, Union Bank of California, N.A. (“Union Bank”), both of San Francisco. MUTB operates a branch in New York, New York, and controls Mitsubishi UFJ Trust & Banking Corporation (U.S.A.) (“MUTB USA”), New York, New York. MUFG controls deposits of approximately \$42 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the United States.¹⁰

Morgan, with total consolidated assets of approximately \$1.0 trillion, engages in investment banking, securities underwriting and dealing, asset management, trading, and other activities both in and outside the United States.¹¹ Its principal subsidiaries include Morgan Stanley & Co., Incorporated, New York, New York, a broker-dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.). Through MS Bank and MST, Morgan controls deposits of approximately \$34.8 billion, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the United States.¹² If MUFG were deemed to control Morgan, MUFG would become the

1. The elections by MUFG, The Bank of Tokyo-Mitsubishi UFJ, Ltd., and Mitsubishi UFJ Trust and Banking Corporation, all of Tokyo, and UnionBanCal Corporation, San Francisco, California, to become financial holding companies pursuant to sections 4(k) and (l) of the BHC Act and sections 225.82(b)(1) and 225.91(b)(1) of Regulation Y became effective as of October 6, 2008. See Board letter to Donald J. Toumey, Esq., dated October 6, 2008.

2. 12 U.S.C. § 1842. See 12 CFR 225.15.

3. As a result of acquiring Morgan’s voting shares, MUFG would acquire an indirect interest in Morgan Stanley Capital Management LLC and Morgan Stanley Domestic Holdings, Inc., both financial holding companies of New York, New York.

4. 12 U.S.C. § 1843(c)(8) and (j). See 12 CFR 225.24. The Board previously has determined by regulation that the operation of a savings association and a trust company by a bank holding company is closely related to banking for purposes of section 4(c)(8) of the BHC Act (12 CFR 225.28(b)(4)(ii) and (5)).

5. 12 U.S.C. § 1843(c)(13).

6. See 12 U.S.C. §§ 1842(b)(1) and 1843(i)(4).

7. Section 3(b)(1) of the BHC Act requires that the Board provide notice of an application under section 3 to the appropriate federal or state supervisory authority for the bank to be acquired and provide the supervisor a period of time (normally 30 days) within which to submit views or recommendations on the proposal. Section 4(i)(4) of the BHC Act imposes a similar requirement with respect to a notice to acquire a savings association. Sections 3(b)(1) and 4(i)(4) also permit the Board to shorten or waive this notice period in certain circumstances (12 U.S.C. §§ 1842(b)(1) and 1843(i)(4); 12 CFR 225.16(g)(2)).

8. 12 CFR 225.16(b)(3), 225.25(d), and 262.3(l).

9. BTMU operates branches in California, Illinois, New York, Oregon, and Washington; agencies in Georgia and Texas; and has representative offices in the District of Columbia, Kentucky, Minnesota, New Jersey, and Texas.

10. Deposit data for MUFG’s subsidiary banks are as of June 30, 2008.

11. Asset data for Morgan are as of May 31, 2008, and asset and deposit data for MS Bank and MST are as of June 30, 2008.

12. In this context, the “United States” includes any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, and the Virgin Islands. Also in this context, depository institutions include commercial banks, savings banks, and savings associations.

14th largest depository organization in the United States, with total consolidated assets of approximately \$2.7 trillion, and would control deposits of approximately \$76.6 billion.

NONCONTROLLING INVESTMENT

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 to obtain the Board's approval before a bank holding company acquires more than 5 percent of the voting shares of a bank suggests that Congress contemplated acquisitions by bank holding companies of between 5 percent and 25 percent of the voting shares of banks.¹³ 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.¹⁴

MUFG has stated that it does not propose to control or exercise a controlling influence over Morgan and that its indirect investment in Morgan's subsidiary depository institutions would also be a passive investment. MUFG has provided certain commitments that are similar to commitments previously relied on by the Board in determining that an investing bank holding company would not be able to exercise a controlling influence over another bank holding company for purposes of the BHC Act. For example, MUFG has committed not to exercise or attempt to exercise a controlling influence over the management or policies of Morgan or any of its subsidiaries and committed not to have more than one representative serve on the board of directors of Morgan or its subsidiaries.¹⁵ The commitments also include certain restrictions on the business relationships of MUFG with Morgan.

Based on these considerations and all the other facts of record, the Board has concluded that MUFG would not acquire control of, or have the ability to exercise a controlling influence over, Morgan or its subsidiary depository institutions through the proposed acquisition of Morgan's voting shares. The Board notes that the BHC Act would require MUFG to file an application and receive the Board's approval before it could directly or indirectly acquire additional shares of Morgan or attempt to exercise a controlling influence over Morgan.¹⁶

13. See 12 U.S.C. § 1842(a)(3).

14. See, e.g., *The Bank of Nova Scotia*, 93 *Federal Reserve Bulletin* C136 (2007); *Passumpsic Bancorp*, 92 *Federal Reserve Bulletin* C175 (2006); *Brookline Bancorp, MHC*, 86 *Federal Reserve Bulletin* 52 (2000).

15. Consistent with the Board's policy statement on equity investments in banks and bank holding companies, MUFG proposes also to have a representative serve as an observer at meetings of Morgan's board of directors. See *Policy Statement on Equity Investments in Banks and Bank Holding Companies* (September 22, 2008) (www.federalreserve.gov/newsevents/press/bcreg/20080922c.htm).

16. See, e.g., *Emigrant Bancorp, Inc.*, 82 *Federal Reserve Bulletin* 555 (1996); *First Community Bancshares, Inc.*, 77 *Federal Reserve Bulletin* 50 (1991).

COMPETITIVE CONSIDERATIONS

The Board has carefully considered the competitive effects of the proposal in light of all the facts of record. Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of 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 probable effect of the proposal in meeting the convenience and needs of the community to be served.¹⁷ Under the public benefits factor of section 4 of the BHC Act, the Board also considers the competitive effects of a proposal to acquire a savings association.

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

The subsidiary insured depository institutions of MUFG and MST compete directly in the Metropolitan New York-New Jersey-Pennsylvania-Connecticut ("Metro New York") banking market.²⁰ 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 record. In particular, the Board has considered the number of competitors that would remain in the banking market, the relative shares of total deposits in depository institutions in the market ("market deposits") controlled by MUFG and Morgan,²¹ and the concentration level of market deposits and the increase in that level as measured by the Herfindahl-Hirschman Index ("HHI") under the

17. 12 U.S.C. § 1842(c)(1).

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

19. See, e.g., *BOK Financial Corp.*, 81 *Federal Reserve Bulletin* 1052, 1053-54 (1995).

20. The Metro New York banking market includes Bronx, Dutchess, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster, and Westchester counties in New York; Bergen, Essex, Hudson, Hunterdon, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, Union, and Warren counties and 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.

21. Deposit and market share data are based on data reported by insured depository institutions in the summary of deposits data as of June 30, 2007, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift 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).

Department of Justice Merger Guidelines (“DOJ Guidelines”).²² Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in the Metro New York banking market. On consummation, the Metro New York banking market would remain moderately concentrated, and numerous competitors would remain in the market.²³

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

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 resources in any relevant banking market. Accordingly, the Board has determined 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 also reviews financial and managerial resources of the organizations involved in a proposal under section 4 of the BHC Act.²⁴ The Board has carefully considered these factors in light of all the facts of record, including confidential supervisory and examination information from the various U.S. banking supervisors of the institutions involved, publicly reported and other financial information, and information provided by MUFG. In addition, the Board has consulted with the Japanese Financial Services Agency (“FSA”), the agency with primary responsibility for the supervision and regulation of Japanese banking organizations, including MUFG.

In evaluating the financial resources in expansion proposals by banking organizations, the Board reviews the financial condition of the organizations involved both on a

parent-only and on a consolidated basis, as well as the financial condition of the subsidiary insured depository institutions and significant nonbanking operations. In this evaluation, the Board considers a variety of 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 pro forma organization, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

The Board has carefully considered the financial resources of the organizations involved in the proposal. The capital levels of MUFG exceed the minimum levels that would be required under the Basel Capital Accord and are therefore considered to be equivalent to the capital levels that would be required of a U.S. banking organization. In addition, the subsidiary depository institutions involved in the proposal are well capitalized and would remain so on consummation. Based on its review of the record, the Board finds that MUFG has sufficient financial resources to effect the proposal.

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

Based on all the facts of record, the Board has concluded that considerations relating to the managerial resources and future prospects of the organizations involved are consistent with approval. 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.²⁵ As noted, the FSA is the primary supervisor of Japanese banking organizations. The Board previously has determined that BTMU and MUTB are subject to comprehensive supervision on a consolidated basis by their home-country supervisor.²⁶ In that determination, the Board took

22. 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.

23. On consummation, the HHI would remain unchanged at 1146, and 265 insured depository institution competitors would remain in the Metro New York banking market. The deposits of MUFG and Morgan, on a combined basis, would represent less than 1 percent of market deposits.

24. 12 CFR 225.26(b).

25. 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).

26. See *Mitsubishi Tokyo Financial Group, Inc.*, 87 *Federal Reserve Bulletin* 349 (2001). At that time, BTMU was named The Bank of Tokyo-Mitsubishi, Ltd. and MUTB was named The Mitsubishi Trust and Banking Corporation.

into account the FSA's supervisory authority with respect to MUFG (operating at that time as Mitsubishi Tokyo Financial Group, Inc.) and its nonbanking subsidiaries.²⁷ Based on this finding and all the facts of record, the Board has concluded that BTMU and MUTB continue to be subject to comprehensive supervision on a consolidated basis by their home-country supervisor.

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.²⁸

CONVENIENCE AND NEEDS AND CRA PERFORMANCE 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").²⁹ In addition, the Board must review the records of performance under the CRA of the relevant insured depository institutions when acting on a notice under section 4 of the BHC Act to acquire voting securities of an insured savings association.³⁰

As provided in the CRA, the Board has evaluated the proposal in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.³¹

27. *Id.*

28. 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 the applicant operates and has communicated with relevant government authorities concerning access to information. In addition, MUFG previously has committed that, to the extent not prohibited by applicable law, it will make available to the Board such information on the operations 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 law. MUFG also previously 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. In light of these commitments, the Board has concluded that MUFG has provided adequate assurances of access to any appropriate information the Board may request.

29. 12 U.S.C. § 2901 et seq.; 12 U.S.C. § 1842(c)(2).

30. *See, e.g., North Fork Bancorporation, Inc.*, 86 *Federal Reserve Bulletin* 767 (2000).

31. *See Interagency Questions and Answers Regarding Community Reinvestment*, 66 *Federal Register* 36,620 at 36,640 (2001); 72 *Federal Register* 37,922 at 37,951 (2007).

MUFG's subsidiary banks each received "outstanding" or "satisfactory" ratings, and MS Bank received an "outstanding" rating, at their most recent evaluations for CRA performance by the OCC or the Federal Deposit Insurance Corporation ("FDIC").³² Consistent with the CRA regulations adopted by the federal banking agencies, BTMUT, MUTB USA, and MS Bank were evaluated under the community development test as wholesale banks.³³

Based on all the facts of record, the Board has concluded that considerations relating to convenience and needs of the communities to be served and the CRA performance records of the relevant depository institutions are consistent with approval of the proposal.

NONBANKING ACTIVITIES

As noted above, MUFG has filed a notice under sections 4(c)(8) and 4(j) of the BHC Act for its proposed indirect investment in MST and MSTNA, which are engaged in activities that the Board has determined by regulation are so closely related to banking as to be a proper incident thereto for purposes of section 4(c)(8) of the BHC Act.³⁴ To approve this notice, the Board must also determine that the proposed acquisition of MST and MSTNA "can reasonably be expected to produce benefits to the public that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices."³⁵

As part of its evaluation of the public interest factors under section 4 of the BHC Act, the Board has reviewed carefully the public benefits and possible adverse effects of the proposal. The record indicates that consummation of the proposal would result in benefits to customers currently served by Morgan. MUFG's investment in Morgan, and thus indirectly in MST and MSTNA, would strengthen Morgan's capital position and allow Morgan to better serve its customers. For the reasons discussed above and based on the entire record, the Board has determined that the conduct of the proposed nonbanking activities within the framework of Regulation Y and Board precedent is not likely to result in adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.

Based on all the facts of record, the Board concludes that consummation of the proposal can reasonably be expected to produce public benefits that would outweigh any likely

32. The most recent CRA performance evaluation of Union Bank, the largest of MUFG's subsidiary banks, by the OCC was as of October 2005. The most recent CRA performance evaluations of BTMUT ("outstanding") and MUTB USA ("satisfactory") by the FDIC were as of September 2007 and December 2006, respectively. MS Bank received an "outstanding" rating under the CRA at its most recent performance evaluation by the FDIC, as of January 2006. MSTNA is not an insured depository institution, and MST is not subject to the CRA pursuant to regulations issued by the OTS. *See* 12 CFR 563e.11(c)(2).

33. *See, e.g.*, 12 CFR 228.21(a)(2).

34. *See* 12 CFR 225.28(b)(4)(ii) and (5).

35. *See* 12 U.S.C. § 1843(j)(2)(A).

adverse effects. Accordingly, the Board has determined that the balance of the public benefits under section 4(j)(2) of the BHC Act is consistent with approval.

MUFG also provided notice of its proposal to acquire an indirect interest in the foreign bank subsidiaries of Morgan under section 4(c)(13) of the BHC Act. Based on the record, the Board has no objection to the acquisition of such interest.³⁶

CONCLUSION

Based on the foregoing and all the facts of record, the Board has determined that the application and notices 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. As noted in the Board's Order approving MUFG's proposal, the Board's approval is specifically conditioned on compliance by MUFG with all the commitments made to the Board in connection with MUFG's application and notices. The Board's approval of the nonbanking aspects of the proposal is also subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c),³⁷ and to the Board's authority to require such modification or termination of the activities of MUFG or any of its subsidiaries as the Board finds necessary to ensure compliance with, and to prevent evasion of, the provisions of the BHC Act and the Board's regulations and orders issued thereunder. For purposes of this action, the conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decisions and, as such, may be enforced in proceedings under applicable law.

October 7, 2008

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Wells Fargo & Company San Francisco, California

Order Approving the Acquisition of a Bank Holding Company

Wells Fargo & Company ("Wells Fargo"), a financial holding company within the meaning of the Bank Holding Company Act ("BHC Act"), has requested the Board's approval under section 3 of the BHC Act to acquire

Wachovia Corporation ("Wachovia"),¹ Charlotte, North Carolina, and thereby indirectly acquire Wachovia's subsidiary banks, Wachovia Bank, National Association ("Wachovia Bank"), Charlotte, and Wachovia Bank of Delaware, National Association, Wilmington, Delaware.² In addition, Wells Fargo has requested the Board's approval under section 4 of the BHC Act³ to acquire the nonbanking subsidiaries of Wachovia, including Wachovia's two subsidiary savings associations.⁴ Wells Fargo also proposes to acquire the agreement corporation and Edge Act subsidiaries and the foreign operations of Wachovia pursuant to sections 25 and 25A of the Federal Reserve Act and the Board's Regulation K.⁵

Section 3(b)(1) of the BHC Act requires that the Board provide notice of an application under section 3 to the appropriate federal or state supervisory authority for the banks to be acquired and provide the supervisor a period of time (normally 30 days) within which to submit views and recommendations on the proposal.⁶ Section 4(i)(4) of the BHC Act imposes a similar requirement with respect to a notice to acquire a savings association.⁷ In light of the unusual and exigent circumstances affecting the financial markets, the weakened financial condition of Wachovia, and all other facts and circumstances, the Board has shortened to 10 days the notice period to the primary regulators of the banks and savings associations involved in, and waived public notice of, this proposal, in accordance with the provisions of the BHC Act and the Board's regulations.⁸ The Board has contacted the primary federal supervisors of the insured depository institutions and the Department of Justice; those agencies have indicated that they have no objection to the approval of the proposal.

1. 12 U.S.C. § 1842.

2. Wells Fargo initially would acquire shares of newly issued voting preferred securities of Wachovia, representing approximately 39.9 percent of aggregate voting securities. After shareholder approval, a wholly owned subsidiary of Wells Fargo would merge with and into Wachovia, with Wachovia surviving the merger and becoming a wholly owned subsidiary of Wells Fargo. Wells Fargo also seeks the Board's approval pursuant to section 3 of the BHC Act to acquire Wachovia's indirect ownership of 5.7 percent of the voting shares of United Bancshares, Inc. ("United") and thereby indirectly acquire voting shares of United's subsidiary bank, United Bank of Philadelphia, both of Philadelphia, Pennsylvania.

3. 12 U.S.C. § 1843.

4. Wachovia's two savings associations are Wachovia Mortgage, F.S.B., North Las Vegas, Nevada, and Wachovia Bank, F.S.B., Houston, Texas. Wells Fargo also proposes to acquire all of Wachovia's other nonbanking subsidiaries pursuant to section 4 of the BHC Act, including (but not limited to) Wachovia Bank's insured credit card subsidiary, Wachovia Card Services, National Association, Atlanta, Georgia, and its nondepository trust company, Delaware Trust Company, National Association, Wilmington, Delaware. See 12 U.S.C. § 1843. Both of these Wachovia Bank subsidiaries engage only in limited operations and, therefore, are not banks for purposes of the BHC Act. See 12 U.S.C. § 1841(c)(2)(D) and (F).

5. 12 U.S.C. §§ 601 et seq. and 611 et seq.; 12 CFR Part 211.

6. 12 U.S.C. § 1842(b)(1); 12 CFR 225.25(b).

7. 12 U.S.C. § 1843(i)(4).

8. 12 U.S.C. §§ 1842(b)(1) and 1843(i)(4); 12 CFR 225.16(b)(3), 225.16(g)(2), 225.25(d), and 262.3(l).

36. Morgan became subject to the BHC Act on September 21, 2008, and as a new bank holding company has a two-year period, with the possibility of three one-year extensions, to conform its existing nonbanking investments and activities to the requirements of section 4 of the BHC Act (12 U.S.C. § 1842(a)(2)). MUFG, as a financial holding company, may acquire more than 5 percent of the voting shares of a company, such as Morgan, that is substantially engaged in financial activities subject to a two-year divestiture period (12 CFR 225.85(a)(3)).

37. 12 CFR 225.7 and 225.25(c).

The Board has carefully considered the statutory factors in light of all the facts of record, including confidential examination and other supervisory information, publicly reported and additional financial information, the supervisory experiences of the Board and the other federal supervisors of the organizations and institutions involved in the proposal, information provided by Wells Fargo and Wachovia, and comments received on the proposal. Based on all the facts of record, the Board has concluded that all the factors the Board must consider in acting on the application and notices are consistent with approval. The application and notices are hereby approved by the Board for the reasons set forth in the Board's Statement, which will be released at a later date.

The Board's approval is specifically conditioned on compliance by Wells Fargo with all the commitments made in connection with the proposal, including the commitments and conditions discussed in the forthcoming Statement. This approval also is subject to all the conditions set forth in Regulation Y and to the Board's authority to require such modification or termination of the nonbanking activities of a bank holding company or any of its subsidiaries as the Board finds necessary to ensure compliance with, and to prevent evasion of, the provisions of the BHC Act and the Board's regulations and orders issued thereunder. 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 proposed bank-related acquisitions may not be consummated before the fifth calendar day after the effective date of this order, and the proposal may not be consummated later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of San Francisco, acting pursuant to delegated authority.⁹

By order of the Board, effective October 12, 2008.

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

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Wells Fargo & Company San Francisco, California

Statement by the Board of Governors of the Federal Reserve System Regarding the Application and Notices by Wells Fargo & Company to Acquire Wachovia Corporation and Wachovia's Subsidiary Banks and Nonbanking Companies

By order dated October 12, 2008, the Board approved the application of Wells Fargo & Company ("Wells Fargo"), a financial holding company within the meaning of the Bank

Holding Company Act ("BHC Act"), under section 3 of the BHC Act,¹ to acquire Wachovia Corporation ("Wachovia"),² Charlotte, North Carolina, and thereby indirectly acquire Wachovia's subsidiary banks, Wachovia Bank, National Association ("Wachovia Bank"), Charlotte, and Wachovia Bank of Delaware, National Association, Wilmington, Delaware.³ In addition, the Board approved Wells Fargo's notice under section 4 of the BHC Act⁴ to acquire all the nonbanking subsidiaries of Wachovia, including Wachovia's two subsidiary savings associations, Wachovia Mortgage, F.S.B., North Las Vegas, Nevada, and Wachovia Bank, F.S.B., Houston, Texas.⁵ The Board also approved Wells Fargo's notice to acquire the agreement corporation and Edge Act subsidiaries and the foreign operations of Wachovia pursuant to sections 25 and 25A of the Federal Reserve Act ("FRA") and the Board's Regulation K.⁶ The Board hereby issues this statement regarding the approval order.

In light of the unusual and exigent circumstances affecting the financial markets, the weakened financial condition of Wachovia, and all other facts and circumstances, the Board determined in its order that emergency conditions existed that justified expeditious action on this proposal.⁷ The Secretary of the Treasury (in consultation with the President) determined, on the recommendation of the Federal Deposit Insurance Corporation ("FDIC") and the Board (both by a vote of 5 members), that compliance by the FDIC with the least-cost provisions of the Federal Deposit Insurance Act ("FDI Act") with respect to Wachovia could likely result in serious adverse effects on economic conditions or financial stability. The proposed acquisition of Wachovia by Wells Fargo as currently structured would avoid those adverse effects without reliance on assistance by the FDIC. The Board provided notice of this

1. 12 U.S.C. § 1842.

2. Wells Fargo initially would acquire shares of newly issued voting preferred securities of Wachovia, representing approximately 39.9 percent of aggregate voting securities. After shareholder approval, a wholly owned subsidiary of Wells Fargo would merge with and into Wachovia, with Wachovia surviving the merger and becoming a wholly owned subsidiary of Wells Fargo.

3. The Board also approved the acquisition by Wells Fargo of Wachovia's indirect ownership of 5.7 percent of the voting shares of United Bancshares, Inc. ("United") and thereby the indirect acquisition of voting shares of United's subsidiary bank, United Bank of Philadelphia, both of Philadelphia, Pennsylvania.

4. 12 U.S.C. § 1843.

5. Wells Fargo proposes to acquire Wachovia's other nonbanking subsidiaries that are engaged in financial activities in accordance with section 4(k)(4)(A)–(H) and section 225.86 of the Board's Regulation Y (12 U.S.C. § 1843(k)(4)(A)–(H); 12 CFR 225.86(a)–(d) and 225.170–177). In addition, Wells Fargo proposes to acquire Wachovia's nonbanking subsidiary that is engaged in certain physical commodity trading activities as an activity that is complementary to a financial activity under section 4(k)(1)(B) of the BHC Act ("Complementary Activity"). See Board letter to Elizabeth T. Davy, April 13, 2006. Wells Fargo also received authority to engage in such physical trading activities as a Complementary Activity. See Board letter to John Shrewsbury, April 10, 2008. Wachovia also has other nonbanking subsidiaries that do not require Board approval, in accordance with section 225.22 of Regulation Y (12 CFR 225.22).

6. 12 U.S.C. §§ 601 et seq. and 611 et seq.; 12 CFR Part 211.

7. See 12 U.S.C. §§ 1842(b)(1) and 1843(i)(4). A commenter objecting to the proposal asserted that expeditious action was not warranted.

9. 12 U.S.C. § 1849(b)(1); 12 CFR 225.16(h)(2).

proposal to the Office of the Comptroller of the Currency (“OCC”) and the Office of Thrift Supervision (“OTS”), the primary federal supervisors of Wachovia’s subsidiary banks and savings associations, in accordance with the requirements of sections 3 and 4 of the BHC Act and the Board’s Regulation Y governing emergencies that require expeditious action. The Board also provided notice of this proposal to the Department of Justice (“DOJ”). Those agencies have indicated that they have no objection to approval of the proposal.⁸ For the same reasons, and in accordance with the provisions of the Board’s regulations, the Board waived public notice of this proposal.⁹

Wells Fargo, with total consolidated assets of approximately \$609.1 billion, is the fifth largest depository organization in the United States.¹⁰ Wells Fargo controls nine insured depository institutions that operate in twenty-three states.

Wachovia, with total consolidated assets of approximately \$812.4 billion, is the third largest depository organization in the United States. Wachovia controls five insured depository institutions that operate in twenty-one states and the District of Columbia. On consummation of this proposal, Wells Fargo would become the second largest depository organization in the United States, with total consolidated assets of approximately \$1.37 trillion.

FACTORS GOVERNING BOARD REVIEW OF THE TRANSACTION

The BHC Act sets forth the factors that the Board must consider when reviewing the acquisition of banks. For direct or indirect acquisitions of banks under section 3 of the BHC Act, these factors are the requirements for interstate bank acquisitions; the competitive effects of the proposal in the relevant geographic markets; the financial and managerial resources and future prospects of the companies and banks involved in the proposal; the convenience and needs of the communities to be served; the records of performance under the Community Reinvestment Act¹¹ (“CRA”) of the insured depository institutions involved in the transaction; and the availability of information needed to determine and enforce compliance with the BHC Act and other applicable federal banking laws.¹²

8. Section 3(b)(1) of the BHC Act requires that the Board provide notice of an application under section 3 to the appropriate federal or state supervisory authority for the bank to be acquired and provide the supervisor a period of time (normally 30 days) within which to submit views or recommendations on the proposal. Section 4(i)(4) of the BHC Act imposes a similar requirement with respect to a notice to acquire a savings association. Sections 3(b)(1) and 4(i)(4) also permit the Board to shorten or waive this notice period in certain circumstances (12 U.S.C. §§ 1842(b)(1) and 1843(i)(4); 12 CFR 225.16(g)).

9. *Id.*; 12 CFR 225.16(b)(3), 225.25(d), and 262.3(l).

10. Asset, national deposit, and ranking data are as of June 30, 2008. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

11. 12 U.S.C. § 2901 et seq.

12. The Board received comments from Citigroup Inc. (“Citigroup”), New York, New York, objecting to the proposal, which the Board carefully considered. Among other things, Citigroup contends

that Wells Fargo’s agreement to acquire Wachovia violated Wachovia’s prior agreement to negotiate exclusively with Citigroup on an acquisition agreement and improperly interfered with plans by the FDIC to provide assistance pursuant to section 13(c) of the FDI Act for Citigroup’s proposed acquisition of some or all of Wachovia (12 U.S.C. § 1823(c)). These allegations are the subject of litigation between Citigroup, Wells Fargo, and Wachovia. The litigation is before a court of competent jurisdiction, and the matters at issue in the litigation are not within the discretion of the Board to resolve. *See Western Bancshares, Inc. v. Board of Governors*, 480 F.2d 749 (10th Cir. 1973) (“*Western*”). As explained in more detail above, as part of its review of this proposal, the Board has carefully considered all of the facts of record in assessing the financial and managerial resources and future prospects of the companies involved.

INTERSTATE AND DEPOSIT CAP 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 Wells Fargo is Minnesota,¹⁶ and the banks to be acquired are located in 21 states and the District of Columbia.¹⁷

The Board may not approve an interstate proposal under section 3(d) of the BHC Act if the applicant (including all its insured depository institution affiliates) controls, or on consummation of the proposal would control, more than 10 percent of the total amount of deposits of insured depository institutions in the United States (“nationwide deposit cap”). The nationwide deposit cap was added to section 3(d) when Congress broadly authorized interstate acquisitions by bank holding companies and banks in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.¹⁸ Although the nationwide deposit cap prohibits its interstate acquisitions by a company that controls depos-

13. 12 U.S.C. §§ 1843(i), 1843(c)(8), and 1843(j).

14. 12 CFR 225.28(b)(4)(ii).

15. 12 U.S.C. § 1843(j)(2)(A).

16. *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.

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

18. Pub. L. No. 103–328, 108 Stat. 2338 (1994). The nationwide deposit cap was intended to help guard against undue concentrations of economic power. *See* S. Rep. No. 102–167 at 72 (1991).

its in excess of the cap, it does not prevent a company from exceeding the nationwide deposit cap through internal growth and effective competition for deposits or through acquisitions entirely within the home state of the acquirer.

As required by section 3(d), the Board has carefully considered whether Wells Fargo controls, or on consummation of the proposed transaction would control, more than 10 percent of the total amount of deposits of insured depository institutions¹⁹ in the United States. In analyzing this matter, the Board calculated the percentage of total deposits of insured depository institutions in the United States and the total deposits that Wells Fargo controls, and on consummation of the proposal would control, based on the definition of “deposit” in the FDI Act,²⁰ the latest available deposit data collected in reports filed by all insured depository institutions (data as of June 30, 2008),²¹ deposit information available from the companies involved in this transaction, other information available to the Board, and the methods and adjustments used by the FDIC to compute total deposits. These calculations have been made using the methodology described in the Board’s order in 2004 approving Bank of America Corporation’s acquisition of FleetBoston Financial Corporation²² and take into account the use of revised Call Report and Thrift Financial Report forms, which became effective for calendar year 2008.²³ In light of the turmoil in the financial markets since June 30, 2008, the Board also analyzed more recent adjusted deposit data from Wells Fargo and Wachovia and other sources of deposit data.

Based on data as of June 30, 2008, which represent the latest adjusted deposit data available from all insured depository institutions, the total amount of deposits of

insured depository institutions in the United States was approximately \$7.195 trillion. The data indicate that, on June 30, 2008, Wells Fargo controlled deposits of approximately \$298.2 billion, and Wachovia controlled deposits of approximately \$429.6 billion. As of that date, the combined firm would have controlled approximately 10.116 percent of the total amount of deposits of insured depository institutions in the United States on consummation of the proposal.

Wells Fargo and Wachovia provided data on their respective adjusted deposit totals as of September 30, 2008. These data indicate that, on a combined basis, Wells Fargo would control approximately \$731.1 billion in deposits on consummation of the proposal. Deposit amounts for other insured depository organizations are not available because institutions are not required to file Call Reports for the third quarter until the end of October, and such data will not be available for review until later in November.

The prohibition in the BHC Act, by its terms, applies if “upon consummation of the acquisition (emphasis added)” the applicant would control more than 10 percent of the total amount of deposits of insured depository institutions in the United States. While the June 30, 2008, deposit data are the most recent data currently available on a uniform basis, the Board believes that other evidence indicates that the June 30, 2008, data do not reflect the current situation nor would those data accurately reflect the deposit ratio at the time required by the statute, which is the time of consummation of the acquisition.

Other data sources indicate, for example, that the total amount of deposits in the United States has significantly increased since June 30, 2008. Deposit data collected by the Federal Reserve in its survey of domestically chartered commercial banks and reported on the Board’s H.8 Release (Assets and Liabilities of Commercial Banks) for September 2008 indicate that total deposits of insured commercial banks in the United States increased approximately 3.9 percent during the third quarter of 2008. Estimated nationwide deposit growth in excess of 3 percent is corroborated by other deposit data sources.²⁴ If total deposits reported on June 30, 2008, are adjusted to account for this level of growth, the combined deposits of Wells Fargo and Wachovia as of September 30, 2008, would be below 10 percent of nationwide deposits. Indeed, Wells Fargo’s percentage of total nationwide deposits would be less than 10 percent if adjusted deposits for all insured depository institutions in the United States grew by at least 1.62 percent since June 30, 2008, which would result in a total amount of adjusted deposits all for insured depository institutions of at least \$7.311 trillion. Based on all the information available to the Board, the Board concluded that the combined organization would not control an amount of deposits that would exceed the nationwide deposit cap on consummation of the proposal. To ensure compliance with the deposit limits on acquisitions, Wells

19. The BHC Act adopts the definition of “insured depository institution” used in the FDI Act. See 12 U.S.C. § 1841(n). The FDI Act’s definition of “insured depository institution” includes all banks (whether or not the institution is a bank for purposes of the BHC Act), savings banks, and savings associations that are insured by the FDIC, and insured U.S. branches of foreign banks, as each of those terms is defined in the FDI Act. See 12 U.S.C. § 1813(c)(2).

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

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

22. *Bank of America Corporation*, 90 *Federal Reserve Bulletin* 217, 219 (2004); see also *Bank of America Corporation*, 93 *Federal Reserve Bulletin* C109 (2007) (order approving the acquisition of ABN AMRO North America Holding Company); *Bank of America Corporation*, 92 *Federal Reserve Bulletin* C5 (2006) (order approving merger with MBNA Corporation).

23. The revisions to the Call Report and Thrift Financial Report that were introduced in 2007 have simplified the adjusted deposit-cap calculation for depository organizations. The methodology for computing the amount of deposits held by institutions for purposes of calculating the nationwide deposit cap is outlined in Appendix A.

24. Deposit data collected from commercial banks on the FR 2900 (Report of Transaction Accounts, Other Deposits and Vault Cash) show a similar trend.

Fargo has committed that, on consummation, the combined organization would not exceed the nationwide deposit cap based on the data reported by all depository institutions as of September 30, 2008. This commitment includes a commitment that Wells Fargo will reduce its deposits by any amount that exceeds the nationwide deposit cap based on Call Report data as of September 30, 2008, by no later than December 31, 2008.²⁵

Section 3(d) also prohibits the Board from approving a proposal if, on consummation, the applicant would control 30 percent or more of the total deposits of insured depository institutions in any state in which both the applicant and the organization to be acquired operate an insured depository institution, or the applicable percentage of state deposits established by state law ("state deposit cap").²⁶ On consummation of the proposal, Wells Fargo would control less than 30 percent of, and less than any applicable state deposit cap for, the total amount of deposits of insured depository institutions in the relevant states.

All other requirements of section 3(d) of the BHC Act also would be met on consummation of the proposal.²⁷ Based on all the facts of record, the Board is permitted to approve the proposal under section 3(d) of the BHC Act.

COMPETITIVE CONSIDERATIONS

The Board has considered carefully the competitive effects of the proposal in light of all the facts of record. Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of an attempt to monopolize the business of banking in any relevant banking market. The BHC Act also prohibits the Board from approving a bank acquisition that would substantially lessen competition in any relevant banking market, unless the anticompetitive effects of the proposal are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.²⁸ In addition, the Board must consider the competitive effects of a proposal to acquire a savings association under the public benefits factor of section 4(j) of the BHC Act.

25. Institutions reporting quarterly deposit data may find it necessary to make adjustments after the due date of the quarterly report. Accordingly, for purposes of this commitment, Wells Fargo and the Board will evaluate the third quarter 2008 deposit data on November 30, 2008, by which time reporting institutions should have completed any necessary adjustments.

26. 12 U.S.C. § 1842(d)(2)(B)–(D). Wells Fargo and Wachovia both operate insured depository institutions in Arizona, California, Colorado, Illinois, Nevada, and Texas.

27. Wells Fargo is adequately capitalized and adequately managed as required under section 3(d) (12 U.S.C. § 1842 (d)(1)(A)). The subsidiary banks of Wachovia have been in existence and operated for the minimum period of time required by applicable state law. See 12 U.S.C. § 1842(d)(1)(B). Wachovia Bank's subsidiary insured credit card company, Wachovia Card Services, National Association, Atlanta, Georgia, was established in 2007 but engages only in limited operations and, therefore, is not a bank for purposes of the BHC Act. See 12 U.S.C. § 1841(c)(2)(D). The other requirements in section 3(d) of the BHC Act also would be met on consummation of the proposal.

28. 12 U.S.C. § 1842(c)(1).

Wells Fargo's and Wachovia's subsidiary depository institutions directly compete in 49 banking markets, including markets in Arizona, California, Colorado, Illinois, Nevada, and Texas. The Board has reviewed carefully the competitive effects of the proposal in each of those 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 banking markets, the relative shares of total deposits in depository institutions in the markets ("market deposits") controlled by Wells Fargo and Wachovia,²⁹ 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"),³⁰ and other characteristics of the markets. In addition, the Board has considered commitments made by Wells Fargo to the Board to reduce the potential that the proposal would have adverse effects on competition by divesting six branches (the "divestiture branches"), which account for approximately \$1.46 billion of deposits,³¹ in six banking markets ("the divestiture markets").³² Wells Fargo has proposed to transfer all the divestiture branches to out-of-market competitors.

29. Deposit and market share data are as of June 30, 2007, adjusted to reflect mergers and acquisitions through October 3, 2008, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386, 387 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743, 744 (1984). 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). In this case, the savings association deposits of Wachovia are weighted at 100 percent both before and after consummation of the proposal because the savings associations are, and on consummation would continue to be, controlled by a bank holding company.

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

31. Wells Fargo proposes to divest five Wachovia branches with approximately \$1.33 billion of deposits in California and one Wachovia branch with approximately \$127 million of deposits in Colorado.

32. Wells Fargo has committed that, not later than 60 days after consummating the proposed acquisition, it will execute an agreement for the proposed divestitures in each divestiture market with a purchaser that the Board determines to be competitively suitable. Wells Fargo also has committed to divest total deposits in each divestiture market of at least the amount specified in the commitment and discussed in this order and to complete divestitures within 180 days of consummation of the proposal. In addition, Wells Fargo has committed that, if it is unsuccessful in completing the proposed divestiture within this time period, it will transfer the unsold branches to an independent trustee that will be instructed to sell such branches to an alternate purchaser or purchasers, without regard to price. Both the trustee and any alternate purchaser must be acceptable to the

A. Banking Markets within Established Guidelines

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in 37 of the banking markets in which Wells Fargo's and Wachovia's subsidiary depository institutions directly compete.³³ On consummation of the proposal, two of these banking markets would remain unconcentrated, twenty-seven banking markets would be moderately concentrated, and eight banking markets would be highly concentrated, as measured by the HHI. The change in HHI in the eight highly concentrated markets would be small or otherwise within the DOJ Guidelines. In each of the 37 banking markets, numerous competitors would remain on consummation of the proposal.

B. Certain Banking Markets with Divestitures

After accounting for the branch divestitures, consummation of the merger would be consistent with Board precedent and the thresholds in the DOJ Guidelines in five banking markets.³⁴ In three of these markets, Wells Fargo proposes to divest all branches to be acquired from Wachovia and, therefore, the levels of concentration as measured by the HHI would not increase on consummation of the merger and the proposed divestitures.³⁵ In two markets, the HHI would be consistent with Board precedent and thresholds in the DOJ Guidelines on consummation of the merger and the proposed divestitures.³⁶ After accounting for the proposed divestitures, four banking markets would be moderately concentrated, and one banking market would be highly concentrated on consummation. In addition, numerous competitors would remain in each of the five banking markets.

C. Seven Banking Markets Warranting Special Scrutiny

Wells Fargo and Wachovia compete directly in seven banking markets that warrant a detailed review: Cottonwood, Arizona; Hanford, Hemet, Oroville, Placerville, and Santa Cruz, all in California; and Grand Junction, Colorado. In each of these markets, including one with proposed divestitures and six without proposed divestitures, the concentration levels on consummation of the proposal would exceed the threshold levels in the DOJ Guidelines or the resulting market share of Wells Fargo would exceed 35 percent.

Board. See *Regions Financial Corp.*, 93 *Federal Reserve Bulletin* C16 (2007); *BankAmerica Corp.*, 78 *Federal Reserve Bulletin* 338 (1992); *United New Mexico Financial Corp.*, 77 *Federal Reserve Bulletin* 484 (1991).

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

34. The effects of the proposal on the concentrations of banking resources in these markets are described in Appendix C.

35. The three markets are Davis and Grass Valley, both in California, and Fremont County in Colorado.

36. The two markets are Monterey-Seaside-Marina and Sonora, both in California.

For each of these markets, the Board has considered carefully whether other factors either mitigate the competitive effects of the proposal or indicate that the proposal would have a significantly adverse effect on competition in the market. The number and strength of factors necessary to mitigate the competitive effects of a proposal depend on the size of the increase in, and resulting level of, concentration in a banking market.³⁷ In each of these markets, the Board has identified factors that indicate the proposal would not have a significantly adverse impact on competition, despite the post-consummation increases in the HHI and market shares.

Among the factors reviewed, the Board has considered the competitive influence of community credit unions in these banking markets. In each of the markets, certain credit unions offer a wide range of consumer products, operate street-level branches, and have membership open to almost all residents in the applicable market. The Board has concluded that the activities of such credit unions in each of these markets exert competitive influence that mitigates, in part, the potential effects of the proposal.³⁸

BANKING MARKET IN ARIZONA

Cottonwood. In the Cottonwood banking market,³⁹ Wells Fargo is the second largest depository organization, controlling deposits of approximately \$172.8 million, which represent approximately 15.3 percent of market deposits. Wachovia is the fifth largest depository organization in the market, controlling deposits of approximately \$129 million, which represent approximately 11.4 percent of market deposits. On consummation of the merger, Wells Fargo would remain the second largest depository organization in the market, controlling deposits of approximately \$301.8 million, which represent approximately 26.6 percent of market deposits. The HHI would increase 347 points to 2305.

Several factors indicate that the increase in concentration in the Cottonwood banking market, as measured by the HHI and Wells Fargo's market share, overstates the potential competitive effects of the proposal in the market. After consummation of the proposal, nine other commercial banking and thrift institution competitors would remain in the market. The Board notes that there are other competitors with a significant presence in the market. The largest depository organization in the market would control

37. See *Regions Financial Corp.*, 93 *Federal Reserve Bulletin* C16 (2007); *NationsBank Corporation*, 84 *Federal Reserve Bulletin* 129 (1998).

38. The Board previously has considered the competitiveness of certain active credit unions as a mitigating factor. See, e.g., *The PNC Financial Services Group, Inc.*, 93 *Federal Reserve Bulletin* C65 (2007); *Regions Financial Corp.*, 93 *Federal Reserve Bulletin* C16 (2007); *Wachovia Corp.*, 92 *Federal Reserve Bulletin* C183 (2006); *F.N.B. Corporation*, 90 *Federal Reserve Bulletin* 481 (2004).

39. The Cottonwood banking market in Arizona is defined as the northeastern corner of Yavapai County and includes the towns of Camp Verde and Clarkdale and the cities of Cottonwood, Sedona, and West Sedona.

34.8 percent of market deposits, and two other bank competitors each would control more than 12 percent of market deposits.

The Board also has evaluated the competitive influence of one active community credit union in the market. This credit union controls approximately \$88.3 million of deposits in the market, which, on a 50 percent weighted basis, represents approximately 3.8 percent of market deposits. After accounting for these credit union deposits, Wells Fargo on consummation of the proposal would control approximately 25.6 percent of market deposits, and the HHI would increase 322 points to 2149.⁴⁰

In addition, the record of recent entry into the Cottonwood banking market evidences the market's attractiveness for entry. The Board notes that five depository institutions have entered the market de novo since 2004. Other factors indicate that the market remains attractive for entry. From 2004 to 2007, the annualized population growth for the county in which the Cottonwood market is located exceeded the average annualized population growth for non-metropolitan counties in Arizona.

BANKING MARKETS IN CALIFORNIA

Hanford. In the Hanford banking market,⁴¹ Wells Fargo is the fourth largest depository organization, controlling deposits of approximately \$148.3 million, which represent approximately 17.4 percent of market deposits. Wachovia is the third largest depository organization in the market, controlling deposits of approximately \$159.9 million, which represent approximately 18.7 percent of market deposits. On consummation of the merger, Wells Fargo would become the largest depository organization in the market, controlling deposits of approximately \$308.2 million, which represent 36.1 percent of market deposits. The HHI would increase 650 points to 2045.

Several factors indicate that the proposal would not have significantly adverse competitive effects in the Hanford banking market. After consummation of the proposal, ten other commercial banking competitors would remain, including two other competitors with a significant presence in the market. The second and third largest depository organizations would control market deposits of more than 20 percent and 12 percent, respectively.

The Board also has evaluated the competitive influence of three active community credit unions in the market. These credit unions control approximately \$200.6 million of deposits in the market, which, on a 50 percent weighted basis, represents approximately 10.5 percent of market deposits. After accounting for these credit union deposits, Wells Fargo on consummation of the proposal would

40. With the deposits of this credit union weighted at 50 percent, Wells Fargo would be the second largest depository organization in the market, with approximately 14.7 percent of market deposits, and Wachovia would be the fifth largest depository organization in the market, controlling approximately 11 percent of market deposits.

41. The Hanford banking market in California is defined as Kings County and the city of Riverdale in Fresno County.

control approximately 32.3 percent of market deposits, and the HHI would increase 521 points to 1675.⁴²

Hemet. In the Hemet banking market,⁴³ Wells Fargo is the sixth largest depository organization, controlling approximately \$124.4 million of deposits, which represents approximately 7.2 percent of market deposits. Wachovia is the largest depository organization in the market, controlling deposits of \$391.6 million, which represent 22.6 percent of market deposits. On consummation of the proposal, Wells Fargo would become the largest depository organization in the market, controlling deposits of approximately \$516 million, which represent approximately 29.8 percent of market deposits. The HHI would increase 324 points to 1809.

Several factors indicate that the proposal would not have a significantly adverse effect on competition in the Hemet banking market. After consummation of the proposal, 12 other commercial banking and thrift institution competitors would remain in the market. Three of those remaining competitors would each control more than 10 percent of market deposits.

In addition, the Board has concluded that the activities of two community credit unions in the market exert a sufficient competitive influence to mitigate, in part, the potential adverse competitive effects of the proposal. These active credit unions control approximately \$186.3 million of deposits in the market, which, on a 50 percent weighted basis, represents approximately 5.1 percent of market deposits. After accounting for those credit union deposits, Wells Fargo would control approximately 28.2 percent of market deposits on consummation of the proposal, and the HHI would increase 292 points to 1644.⁴⁴

Oroville. In the Oroville banking market,⁴⁵ Wells Fargo is the sixth largest depository organization, controlling deposits of approximately \$49.1 million, which represent approximately 7.3 percent of market deposits. Wachovia is the largest depository organization in the market, controlling deposits of approximately \$144.9 million, which represent approximately 21.6 percent of market deposits. On consummation of the proposal, Wells Fargo would become the largest depository organization in the market, controlling deposits of approximately \$194 million, which represent 29 percent of market deposits. The HHI would increase 317 points to 1854.

42. With the deposits of these credit unions weighted at 50 percent, Wells Fargo would be the fourth largest depository organization in the market, with approximately 15.5 percent of market deposits, and Wachovia would be the third largest depository organization in the market, controlling approximately 16.8 percent of market deposits.

43. The Hemet banking market in California is defined as the Hemet Ranally Metro Area.

44. With the deposits of these credit unions weighted at 50 percent, Wells Fargo would be the sixth largest depository organization in the market, with approximately 6.8 percent of market deposits, and Wachovia would be the largest depository organization in the market, controlling approximately 21.4 percent of market deposits.

45. The Oroville banking market in California is defined as the southern portion of Butte County, excluding the city of Chico but including the towns of Gridley and Oroville.

Several factors indicate that the increase in concentration in the Oroville banking market, as measured by the HHI and Wells Fargo's market share, overstates the potential competitive effects of the proposal in the market. After consummation of the proposal, seven other commercial banking competitors would remain in the market. The Board notes that there are other competitors with a significant presence in the market. The second largest depository organization in the market would control approximately 21.6 percent of market deposits, and two other bank competitors each would control more than 10 percent of market deposits.

The Board also has evaluated the competitive influence of two active community credit unions in the market. These credit unions control approximately \$37.5 million of deposits in the market, which, on a 50 percent weighted basis, represents approximately 2.7 percent of market deposits. After accounting for these credit union deposits, Wells Fargo on consummation of the proposal would control approximately 28.2 percent of market deposits, and the HHI would increase 300 points to 1759.⁴⁶

Placerville. In the Placerville banking market,⁴⁷ Wells Fargo is the third largest depository organization, controlling deposits of approximately \$137.6 million, which represent approximately 15.7 percent of market deposits. Wachovia is the largest depository organization in the market, controlling deposits of approximately \$220.3 million, which represent approximately 25.1 percent of market deposits. On consummation of the proposal, Wells Fargo would become the largest depository organization in the market, controlling deposits of approximately \$357.9 million, which represent approximately 40.7 percent of market deposits. The HHI would increase 784 points to 2403.

Several factors indicate that the proposal would not have a significantly adverse effect on competition in the Placerville banking market. After consummation of the proposal, seven other commercial banking and thrift institution competitors would remain in the market. The Board notes that there are other competitors with a significant presence in the market, including two bank competitors that each would control more than 12 percent of the market deposits.

The Board also has evaluated the competitive influence of five active community credit unions in the market. These credit unions control approximately \$277.2 million of deposits in the market, which, on a 50 percent weighted

basis, represents approximately 13.1 percent of market deposits. After accounting for these credit union deposits, Wells Fargo on consummation of the proposal would control approximately 33.8 percent of market deposits, and the HHI would increase 538 points to 1738.⁴⁸

Santa Cruz. In the Santa Cruz banking market,⁴⁹ Wells Fargo is the second largest depository organization, controlling deposits of approximately \$653.9 million, which represent approximately 19.1 percent of market deposits. Wachovia is the largest depository organization in the market, controlling deposits of approximately \$912 million, which represent approximately 26.6 percent of market deposits. To reduce the potential for adverse effects on competition in the Santa Cruz banking market, Wells Fargo has proposed to divest one of Wachovia's branches, with deposits of \$285.2 million, to an out-of-market depository organization. On consummation of the proposal and after accounting for the proposed divestiture, Wells Fargo would become the largest depository organization in the market, controlling deposits of approximately \$1.28 billion, which represent 37.4 percent of market deposits. The HHI would increase 394 points to 2103.

Several factors indicate that the proposal would not have significantly adverse competitive effects in the Santa Cruz banking market. After consummation of the proposal, 12 other commercial banking competitors would remain in the market. The Board notes that there are other competitors with a significant presence in the market, including three bank competitors that would each control more than 10 percent of the market.

The Board also has evaluated the competitive influence of three active community credit unions in the market. These credit unions control approximately \$511 million of deposits in the market, which, on a 50 percent weighted basis, represents approximately 6.9 percent of market deposits. After accounting for these credit union deposits and for the branch divestiture, Wells Fargo on consummation of the proposal would control approximately 34.8 percent of market deposits, and the HHI would increase 341 points to 1855.⁵⁰

In addition, the record of recent entry into the Santa Cruz banking market evidences the market's attractiveness for

46. With the deposits of these credit unions weighted at 50 percent, Wells Fargo would be the sixth largest depository organization in the market, with approximately 7.1 percent of market deposits, and Wachovia would be the largest largest depository organization in the market, controlling approximately 21.1 percent of market deposits.

47. The Placerville banking market in California is defined as western El Dorado County outside of the Sacramento banking market, including the cities of Diamond Springs, Georgetown, Placerville, and Pollock Pines.

48. With the deposits of these credit unions weighted at 50 percent, Wells Fargo would be the third largest depository organization in the market, with approximately 13 percent of market deposits, and Wachovia would be the largest depository organization in the market, controlling approximately 20.8 percent of market deposits.

49. The Santa Cruz banking market in California is defined as the Santa Cruz Ranally Metro Area.

50. With the deposits of these credit unions weighted at 50 percent, Wells Fargo would be the second largest depository organization in the market, with approximately 17.8 percent of market deposits, and Wachovia would be the largest depository organization in the market, controlling approximately 24.8 percent of market deposits.

entry. The Board notes that two depository institutions have entered the market de novo since 2004.

BANKING MARKET IN COLORADO

Grand Junction. In the Grand Junction banking market,⁵¹ Wells Fargo is the largest depository organization, controlling deposits of approximately \$500.9 million, which represent approximately 23.7 percent of market deposits. Wachovia operates the second largest depository organization in the market, controlling deposits of approximately \$291.8 million, which represent approximately 13.8 percent of market deposits. On consummation of the proposal, Wells Fargo would remain the largest depository institution in the market, controlling deposits of approximately \$792.7 million, which represent 37.5 percent of market deposits. The HHI would increase 653 points to 1877.

Several factors indicate that the increase in concentration in the Grand Junction banking market, as measured by the HHI and Wells Fargo's market share, overstates the potential competitive effects of the proposal in the market. After consummation of the proposal, 13 other commercial bank competitors would remain in the market.

The Board also has evaluated the competitive influence of two active community credit unions in the market. These credit unions control approximately \$83.6 million in deposits in the market, which, on a 50 percent weighted basis, represents approximately 1.9 percent of market deposits. After accounting for these credit union deposits, Wells Fargo on consummation of proposal would control approximately 36.7 percent of market deposits, and the HHI would increase 628 points to 1808.⁵²

In addition, the record of recent entry into the Grand Junction banking market evidences the market's attractiveness for entry. The Board notes that two depository institutions have entered the market de novo since 2004. Other factors indicate that the market remains attractive for entry. From 2004 to 2007, the market's annualized population growth exceeded the average annualized population growth for metropolitan counties in Colorado.

D. Views of Other Agencies and Conclusion on Competitive Considerations

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

Accordingly, 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 resources in any relevant banking market and that competitive considerations are consistent with approval.

FINANCIAL, MANAGERIAL, AND SUPERVISORY CONSIDERATIONS

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and banks involved in the proposal and certain other supervisory factors. The Board also reviews the financial and managerial resources of the organizations involved in the proposal under section 4 of the BHC Act. 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 Wells Fargo and Wachovia, and public comments received on the proposal.⁵³

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 considers capital adequacy to be especially important. The Board also evaluates the financial condition of the resulting 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 proposal under the financial factors.⁵⁴ The proposed transaction is structured as a share exchange. The subsidiary depository institutions of Wells Fargo and Wachovia are well capitalized and would remain so on consummation of this proposal. Wells Fargo is well capitalized and has announced that it intends to raise additional capital. In light of its capital-raising efforts, Wells Fargo would remain well capitalized after consummation of this proposal. The Board has also considered the other financial factors noted above

53. Citigroup contends that its acquisition of Wachovia ultimately would be less costly to the federal government than an acquisition by Wells Fargo. In addition, Citigroup claims that Wells Fargo's acquisition of Wachovia would discourage companies from future involvement in a proposal which, like Citigroup's proposed acquisition of Wachovia, involves FDIC assistance. These comments were weighed in the Board's consideration of the financial and managerial resources of the companies involved in the transaction to the extent they relate to those factors. *See Western*.

54. Citigroup asserted that Wells Fargo's financial condition could be adversely affected if a recent IRS ruling that provided banks accelerated tax relief on certain built-in loan losses is invalidated. In analyzing the financial factors in this proposal, the Board has reviewed carefully information regarding the impact of the ruling on Wells Fargo's overall financial condition.

51. The Grand Junction banking market in Colorado is defined as Mesa County.

52. With the deposits of these credit unions weighted at 50 percent, Wells Fargo would be the largest depository organization in the market, with approximately 23.2 percent of market deposits, and Wachovia would be the second largest depository organization in the market, controlling approximately 13.5 percent of market deposits.

in light of information provided by Wells Fargo and Wachovia and supervisory information available to the Federal Reserve through its supervision of these companies and from the primary supervisors of the depository institution subsidiaries of these companies. Based on its review of the record, the Board finds that Wells Fargo has sufficient resources to effect the proposal.

The Board also has considered the managerial resources of the organizations involved in the proposed transaction. The Board has reviewed the examination records of Wells Fargo and Wachovia, their respective subsidiary depository institutions, and other nonbanking companies involved in the proposal. In addition, the Board has considered its supervisory experience and that of other relevant supervisory agencies, including the OCC and the OTS, with the organizations and their records of compliance with applicable banking law and anti-money-laundering laws.

The Board also has considered the future prospects of the organizations involved in the proposal. As part of this evaluation, the Board considered information regarding how Wells Fargo would manage the integration of Wachovia into Wells Fargo.⁵⁵ The Board also considered Wells Fargo's extensive experience in acquiring bank holding companies and successfully integrating them into its organization. Moreover, as noted above, the Board found that expeditious approval of the proposal was warranted in light of the weakened condition of Wachovia and the turmoil in the financial markets. The record indicates that Wells Fargo has the financial and managerial resources to serve as a source of strength to Wachovia and its subsidiary depository institutions.

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

CONVENIENCE AND NEEDS AND CRA PERFORMANCE CONSIDERATIONS

In acting on a proposal under section 3 of the BHC Act, the Board must consider the effects of the proposal on the convenience and needs of the communities to be served and take into account the records of the relevant depository institutions under the CRA.⁵⁶ The Board also must review the records of performance under the CRA of the relevant insured depository institutions when acting on a notice

55. Citigroup also questioned, in light of the risk profile of Wachovia's assets and the absence of FDIC assistance to the transaction, whether Wells Fargo possesses sufficient financial and managerial resources. The Board has considered carefully this comment in light of information received about Wachovia's asset portfolio from the relevant supervisors of Wachovia's subsidiary banks, other supervisory information, and information received from Wells Fargo, including information about due-diligence reviews performed by Wells Fargo with respect to Wachovia's asset portfolio.

56. 12 U.S.C. § 2901 et seq.; 12 U.S.C. § 1842(c)(2).

under section 4 of the BHC Act to acquire voting securities of an insured savings association.⁵⁷

The Board has carefully considered the convenience and needs factor and the CRA performance records of the subsidiary depository institutions of Wells Fargo and Wachovia. The Board has considered carefully all the facts of record, including the evaluations of the CRA performance records of the subsidiary depository institutions of Wells Fargo and Wachovia, data reported by Wells Fargo and Wachovia under the Home Mortgage Disclosure Act ("HMDA"),⁵⁸ other information provided by Wells Fargo, confidential supervisory information, and comments received on the proposal.⁵⁹

As provided in the CRA, the Board evaluates the record of performance of an institution in light of examinations by the appropriate federal supervisors of the CRA performance records of the relevant institutions. 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.⁶⁰

Wells Fargo's lead subsidiary insured depository institution, Wells Fargo Bank, National Association, Sioux Falls, South Dakota, received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of September 30, 2004. Each of Wells Fargo's other subsidiary insured depository institutions received an "outstanding" or "satisfactory" rating at its most recent CRA performance evaluation.⁶¹

Wachovia's lead subsidiary insured depository institution, Wachovia Bank, received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of June 30, 2006. Wachovia's other subsidiary insured depository institutions also received "outstanding" ratings at their most recent CRA performance evaluations.⁶²

The Board also considered the fair lending records of, and the 2007 lending data reported under HMDA by, Wells Fargo and Wachovia in light of comment received on the proposal.⁶³ Although the HMDA data might reflect certain

57. See, e.g., *North Fork Bancorporation, Inc.*, 86 *Federal Reserve Bulletin* 767 (2000).

58. 12 U.S.C. § 2801 et seq.

59. A commenter expressed concern about certain subprime lending activities of Wells Fargo.

60. 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 64 *Federal Register* 23,641 (1999).

61. Appendix D provides the most recent CRA ratings of those institutions.

62. Wachovia Bank of Delaware, National Association, was last evaluated by the OCC as of June 30, 2006. Wachovia Bank, F.S.B., and Wachovia Mortgage, F.S.B., formerly known as World Savings Bank, F.S.B. (Texas) and World Savings Bank, F.S.B., respectively, were last evaluated by the OTS as of August 15, 2005. Wachovia Card Services, National Association, was established in January 2007, and has not yet been evaluated for CRA performance.

63. A commenter also asserted that Wachovia made a disproportionately larger percentage of higher-cost loans to Hispanic borrowers than to nonminority borrowers. In addition, the commenter referred to news

disparities in the rates of loan applications, originations, denials, or pricing among members of different racial or ethnic groups in certain local areas, the data provide an insufficient basis by themselves on which to conclude whether or not Wells Fargo or Wachovia has excluded or imposed higher costs on any group on a prohibited basis. The Board recognizes that HMDA data alone, even with the recent addition of pricing information,⁶⁴ provide only limited information about the covered loans.⁶⁵ HMDA data, therefore, provide an inadequate basis, absent other information, for concluding that an institution has engaged in illegal lending discrimination.

Accordingly, the Board has taken into account other information, including examination reports by the primary federal supervisors of the organizations' subsidiary institutions that provide on-site evaluations of compliance with fair lending laws by institutions, and has consulted with those supervisors. The record, including confidential supervisory information, also indicates that Wells Fargo has taken steps to ensure compliance with fair lending and other consumer protection laws and regulations, by establishing corporate policies and procedures and implementing audits of compliance management oversight. In addition, Wells Fargo employees involved in the lending process receive fair lending training, and Wells Fargo maintains second-review procedures for home mortgage lending.

Based on a review of the entire record, and for the reasons discussed above, the Board has concluded 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.

PUBLIC BENEFITS

As noted above, Wells Fargo has filed a notice under sections 4(c)(8) and 4(j) of the BHC Act for its proposed indirect acquisitions of Wachovia Mortgage, F.S.B. and

reports that the city of Baltimore filed litigation against Wells Fargo asserting that certain subsidiaries of Wells Fargo had engaged in predatory lending in predominantly African American areas of Baltimore. The litigation is before a court of competent jurisdiction, and the Board and the OCC will continue to monitor its progress and to review Wells Fargo's compliance with fair lending and other consumer protection laws and regulations in future examinations.

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

65. 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.

Wachovia Bank, F.S.B. As part of its evaluation of the public interest factors under section 4 of the BHC Act, the Board has reviewed carefully the public benefits and possible adverse effects of the proposal. The record indicates that consummation of the proposal would benefit consumers currently served by Wachovia's subsidiary savings associations by providing them access to additional banking and nonbanking products and services of Wells Fargo. As noted, the proposal would also strengthen Wachovia and all its subsidiary depository institutions.

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

As noted, Wells Fargo also has provided notice under sections 25 and 25A of the FRA and the Board's Regulation K to acquire the agreement corporation and Edge Act subsidiaries and the foreign operations of Wachovia. The Board concludes that all factors required to be considered under the FRA and the Board's Regulation K are consistent with approval.

CONCLUSION

Based on the foregoing, the Board determined in its order of October 12 that the application and notices should be approved.⁶⁶ In reaching its conclusion, the Board considered all the facts of record in light of the factors that the

66. 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 appropriate supervisory authorities. The Board's regulations provide for a hearing on a notice filed under section 4 of the BHC Act if there are disputed issues of material fact that cannot be resolved in some other manner (12 CFR 225.25(a)(2)). 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), 262.25(d)). The Board has considered carefully the commenter's requests in light of all the facts of record. The commenter's request fails to demonstrate why its written comments do not present its views adequately or why a meeting or hearing otherwise would be necessary or appropriate. In addition, in light of the unusual and exigent circumstances affecting the financial markets, the weakened financial condition of Wachovia, and all other facts and circumstances, the Board waived public notice of this proposal. For these reasons, and based on all the facts of record, the Board has determined that a public meeting or hearing was not required or warranted in this case, and the request for a public meeting or hearing on the proposal is accordingly denied.

Board is required to consider under the BHC Act. As noted in the Board’s order, the Board’s approval is specifically conditioned on compliance by Wells Fargo with all the commitments made to the Board in connection with the application and notices, including the commitments and conditions discussed in this order. The Board’s approval of the nonbanking aspects of the proposal also is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c),⁶⁷ and to the Board’s authority to require such modification or termination of the activities of a bank holding company or any of its subsidiaries as the

Board finds necessary to ensure compliance with, and to prevent evasion of, the provisions of the BHC Act and the Board’s regulations and orders issued thereunder. 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.

OCTOBER 21, 2008

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

67. 12 CFR 225.7 and 225.25(c).

Appendix A

COMPUTATION OF THE AMOUNT OF DEPOSITS HELD BY INSTITUTIONS USING THE REVISED CALL REPORT AND THRIFT FINANCIAL REPORT FORMS

Insured Banks without Foreign Deposits

The amount of deposits held by insured banks without foreign deposits using the revised Call Report was computed by adding the “Total deposit liabilities before exclusions (gross) as defined in Section 3(I) of the FDI Act and FDIC regulations,” reported on Schedule RC-O, and the “Interest accrued and unpaid on deposits in domestic offices,” reported on Schedule RC-G.

Section 3(I) of the FDI Act and FDIC regulations,” reported on Schedule RC-O, and adding the “Interest accrued and unpaid on deposits in domestic offices,” reported on Schedule RC-G.

Insured Banks with Foreign Deposits

The amount of deposits held by insured banks with foreign deposits using the revised Call Report was computed by subtracting “Total foreign deposits” from the “Total deposit liabilities before exclusions (gross) as defined in

Insured Savings Associations

The amount of deposits held by insured savings associations using the revised Thrift Financial Report was computed by subtracting “Total foreign deposits” from the “Total deposit liabilities before exclusions (gross) as defined in Section 3(I) of the FDI Act and FDIC regulations,” reported on Schedule DI, and adding the “Accrued Interest Payable—Deposits,” reported on Schedule SC.

Appendix B

WELLS FARGO AND WACHOVIA BANKING MARKETS CONSISTENT WITH BOARD PRECEDENT AND DOJ GUIDELINES WITHOUT DIVESTITURES

Market	Increase in HHI	Pro Forma HHI	Pro Forma market share	Pro Forma rank
ARIZONA BANKING MARKETS				
Phoenix	164	1,874	23.9	2
Prescott	395	1,708	28.7	1
Tucson	261	1,767	26.5	1
CALIFORNIA BANKING MARKETS				
Chico	344	1,702	26.2	1
Fresno	185	1,322	20.1	2
Hesperia–Apple Valley–Victorville	265	1,607	23.7	1
Lake County	183	1,732	27.1	1
Los Angeles	107	957	16.3	2
Modesto	275	1,215	23.5	1
Napa	493	1,593	31.7	1

Appendix B—Continued

WELLS FARGO AND WACHOVIA BANKING MARKETS CONSISTENT WITH BOARD PRECEDENT AND DOJ GUIDELINES WITHOUT DIVESTITURES—Continued

Market	Increase in HHI	Pro Forma HHI	Pro Forma market share	Pro Forma rank
Oxnard–Thousand Oaks–Ventura	361	1,607	27.2	1
Palm Springs–Cathedral City	219	1,148	21.1	1
Riverside–San Bernardino	70	1,541	15	2
Sacramento	414	1,550	30.8	1
Salinas	239	1,722	22.3	2
San Diego	198	1,265	22.8	1
San Francisco–Oakland–San Jose	236	1,681	28.3	1
Santa Barbara	149	1,672	17.4	2
Santa Maria	264	1,702	24.5	2
Santa Rosa	179	1,168	19.7	1
Stockton	209	1,229	21.2	1
Temecula	307	1,538	25.3	1
COLORADO BANKING MARKETS				
Colorado Springs	388	1,193	29.2	1
Denver–Boulder	324	1,185	28	1
Fort Collins–Loveland	88	1,428	15.2	2
Pueblo	571	1,797	34.1	1
Weld County	46	1,959	12.6	2
ILLINOIS BANKING MARKET				
Chicago	0	775	0.6	25
NEVADA BANKING MARKETS				
Las Vegas	16	3,547	5.6	3
Reno	69	2,697	17.4	2
TEXAS BANKING MARKETS				
Amarillo	60	2,725	12.9	2
Austin	157	1,152	20.5	1
Beaumont–Port Arthur	234	1,701	23.9	2
Dallas	19	1,591	6.4	4
Fort Worth	6	5,894	4.5	3
Houston	100	1,806	14.3	2
San Antonio	28	2,243	8.3	4

NOTE: Data are as of June 30, 2007, adjusted to reflect merger and acquisitions through October 3, 2008. All rankings, market deposit shares, and HHIs are based on thrift institution deposits weighted at 50 percent, except for the savings association deposits of Wachovia, which are weighted at 100 percent both before and after consummation of the proposal. These savings associations are, and on consummation will continue to be, controlled by a bank holding company.

For purposes of this appendix, the definitions of the banking markets in Arizona, California, and Nevada may be found on the website of the Federal

Reserve Bank of San Francisco, www.frbsf.org/publications/banking/market/marketdef.pdf; in Colorado on the website of the Federal Reserve Bank of Kansas City, www.kansascityfed.org/home/subwebnav.cfm?level=3&theID=9638&SubWeb=2; and in Texas on the website for the Federal Reserve Bank of Dallas, dallasfed.org/banking/apps/mkdef.html.

The Chicago, Illinois banking market is defined as Cook, Du Page, and Lake counties in Illinois.

Appendix C

WELLS FARGO AND WACHOVIA BANKING MARKETS CONSISTENT WITH BOARD PRECEDENT AND DOJ GUIDELINES AFTER DIVESTITURES

Market	Change in HHI	Pro Forma HHI	Pro Forma market share	Pro Forma rank
CALIFORNIA BANKING MARKETS				
Davis	0	1,852	18.3	3
Grass Valley	0	1,558	13.9	5
Monterey–Seaside–Marina	147	1,595	26.6	1
Sonora	-222	1,685	30.9	1
COLORADO BANKING MARKET				
Fremont County	0	1,726	15.3	4

NOTE: Data are as of June 30, 2007, adjusted to reflect merger and acquisitions through October 3, 2008. All rankings, market deposit shares, and HHIs are based on thrift institution deposits weighted at 50 percent, except for the savings association deposits of Wachovia, which are weighted at 100 percent both before and after consummation of the proposal. These savings associations are, and on consummation will continue to be, controlled by a bank holding company.

For purposes of this appendix, the definitions of the banking markets in California may be found on the website of the Federal Reserve Bank of San Francisco, www.frbsf.org/publications/banking/market/marketdef.pdf.

The Fremont County, Colorado banking market is defined as Fremont County.

Appendix D

MOST RECENT CRA RATINGS OF WELLS FARGO'S SUBSIDIARIES

Subsidiary bank	CRA rating	Date	Supervisor
Wells Fargo Bank Northwest, National Association, Ogden, Utah	Satisfactory	December 2005	OCC
Wells Fargo HSBC Trade Bank, National Association, San Francisco, California	Outstanding	June 2006	OCC
Wells Fargo Financial National Bank, Las Vegas, Nevada	Outstanding	June 2006	OCC
Wells Fargo Financial Bank, Sioux Falls, South Dakota	Outstanding	March 2005	FDIC
Shoshone First Bank, Cody, Wyoming	Outstanding	February 2003	FRB
Sheridan State Bank, Sheridan, Wyoming	Satisfactory	February 2008	FRB
First State Bank of Pinedale, Pinedale, Wyoming	Satisfactory	August 2007	FRB
Jackson State Bank and Trust, Jackson, Wyoming	Satisfactory	July 2006	FRB

ORDERS ISSUED UNDER INTERNATIONAL BANKING ACT

Banco Espírito Santo de Investimento, S.A. Lisbon, Portugal

Order Approving Establishment of a Branch

Banco Espírito Santo de Investimento, S.A. (“Bank”), Lisbon, Portugal, a foreign bank within the meaning of the International Banking Act (“IBA”), has applied under section 7(d) of the IBA¹ to establish a branch in New York, New York. The Foreign Bank Supervision Enhancement Act of 1991, which amended the IBA, provides that a foreign bank must obtain the approval of the Board to establish a branch in the United States.

Notice of the application, affording interested persons an opportunity to comment, has been published in a newspaper of general circulation in New York, New York (*The New York Post*, October 18, 2007). The time for filing comments has expired, and the Board has considered all comments received.

Bank is a wholly owned subsidiary of Banco Espírito Santo, S.A. (“BES”), also in Lisbon, and an indirect subsidiary of Crédit Agricole S.A. (“Credit Agricole”), Paris, France. Bank provides investment banking and advisory services, including project finance, corporate restructuring, securities trading and brokerage, and securities underwriting and distribution. Outside Portugal, Bank operates branches in Spain and the United Kingdom, subsidiaries in Brazil and Ireland, and a joint venture in Poland. Bank would be a qualifying foreign banking organization under Regulation K.²

BES, with consolidated assets of \$115 billion,³ is the third largest banking group in Portugal and provides banking services to retail and corporate customers through more than 700 branches in Portugal. In the United States, BES operates a branch in New York City and controls Espírito Santo Bank, Miami, Florida. Credit Agricole provides a wide range of banking and financial services to retail and corporate customers around the world and is the largest banking group in France, with assets of approximately \$2.3 trillion.

The proposed branch would facilitate transactions in the United States, Canada, and Latin America for Bank’s clients by offering advisory and other services for project finance, leveraged financing, and structured commodity finance and by providing asset and derivatives trading.

Under the IBA and Regulation K, in acting on an application by a foreign bank to establish a branch, the Board must consider whether the foreign bank (1) engages directly in the business of banking outside of the United States; (2) has furnished to the Board the information it

needs to assess the application adequately; and (3) is subject to comprehensive supervision on a consolidated basis by its home-country supervisors.⁴ The Board also considers additional standards as set forth in the IBA and Regulation K.⁵

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

With respect to supervision by home-country authorities in connection with applications involving other banks in Portugal, including BES, the Federal Reserve previously has determined that those banks were subject to comprehensive supervision on a consolidated basis by their home-country supervisor, Banco de Portugal.⁶ Bank is, and BES remains, supervised by Banco de Portugal on substantially the same terms and conditions. The Federal Reserve also has previously determined that Credit Agricole is subject to comprehensive supervision on a consolidated basis by its home-country supervisor, the Commission Bancaire.⁷ Credit Agricole also remains supervised by the Commission Bancaire on substantially the same terms and conditions. Based on all the facts of record, it has been determined that Bank, BES, and Credit Agricole are each subject to comprehensive supervision on a consolidated basis by their respective home-country supervisors.

The additional standards set forth in section 7 of the IBA and Regulation K have also been taken into account.⁸

4. 12 U.S.C. §§ 3105(d)(2); 12 CFR 211.24. In assessing this 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 controlling its activities worldwide; (ii) obtain information on the condition of the bank and its subsidiaries and offices through regular examination reports, audit reports, or otherwise; (iii) obtain information on the dealings with and relationship between the bank and its affiliates, both foreign and domestic; (iv) receive from the bank financial reports that are consolidated on a worldwide basis or comparable information that permits analysis of the bank’s financial condition on a worldwide consolidated basis; 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.

5. 12 U.S.C. §§ 3105(d)(3)–(4); 12 CFR 211.24(c)(2)–(3).

6. See *Banco Santander Totta, S.A.*, 93 *Federal Reserve Bulletin* C71 (2007); *Caixa Económica Montepio Geral*, 86 *Federal Reserve Bulletin* 700 (2000); *Banco Comercial Português, S.A.*, 86 *Federal Reserve Bulletin* 613 (2000); *Banco Espírito Santo, S.A., et al.*, 86 *Federal Reserve Bulletin* 418 (2000).

7. See *Fédération Nationale du Crédit Agricole*, 92 *Federal Reserve Bulletin* C159 (2006).

8. The additional standards set forth in section 7 of the IBA and Regulation K include the following (1) whether the bank’s home-country supervisor has consented to the establishment of the branch; the financial and managerial resources of the bank; (2) whether the appropriate supervisors in the home country may share information on the bank’s operations with the Board; (3) whether the bank and its home country have adopted and implemented policies and procedures to address and combat money laundering; 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.

1. 12 U.S.C. § 3105(d).

2. 12 CFR 211.23(a).

3. Asset and ranking data are as of June 30, 2008.

Banco de Portugal has no objection to the establishment of the proposed branch.

Portugal's risk-based capital standards are consistent with those established by the Basel Capital Accord ("Accord"). Bank's capital is in excess of the minimum levels that would be required by the Accord and is considered equivalent to capital that would be required of a U.S. banking organization. Managerial and other financial resources of Bank are consistent with approval, and Bank appears to have the experience and capacity to support the proposed branch. In addition, Bank has established controls and procedures for the proposed branch to ensure compliance with U.S. law and for its operations in general.

Portugal is a member of the Financial Action Task Force ("FATF") and subscribes to its recommendations on measures to combat money laundering. In accordance with these recommendations, Portugal has enacted laws and developed regulatory standards to deter money laundering. Money laundering is a criminal offense in Portugal, and Portuguese financial institutions are required to establish internal policies, procedures, and systems for the detection and prevention of money laundering and terrorist financing throughout their worldwide operations. Bank has policies and procedures to comply with these laws and regulations that are monitored by governmental entities responsible for anti-money-laundering compliance.

With respect to access to information on Bank's operations, the restrictions on disclosure in relevant jurisdictions in which Bank operates have been reviewed and relevant government authorities have been contacted regarding access to information. Bank and its parent companies have committed to make available to the Board such information on the operations of Bank and any of its affiliates that the Board deems necessary to determine and enforce compliance with the IBA, the Bank Holding Company Act, 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 its parent companies 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, Banco de Portugal 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 has provided adequate assurances of access to any necessary information that the Board may request.

Based on the foregoing and all the facts of record, Bank's application to establish a branch in New York, New York, is hereby approved.⁹ Should any restrictions on access to information on the operations or activities of Bank and its affiliates subsequently interfere with the Board's ability to obtain information to determine and enforce compliance by Bank or its affiliates with applicable

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

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 with the commitments made in connection with this application and with the conditions in this order.¹⁰ For purposes of this action, 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 12 U.S.C. § 1818 and other applicable law.

By order, approved pursuant to authority delegated by the Board, effective November 5, 2008.

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

China Construction Bank Corporation Beijing, People's Republic of China

Order Approving Establishment of a Branch

China Construction Bank Corporation ("CCB"), Beijing, People's Republic of China, a foreign bank within the meaning of the International Banking Act ("IBA"), has applied under section 7(d) of the IBA¹ to establish a branch in New York, New York. The Foreign Bank Supervision Enhancement Act of 1991, which amended the IBA, provides that a foreign bank must obtain the approval of the Board to establish a branch in the United States.

Notice of the application, affording interested persons an opportunity to comment, has been published in a newspaper of general circulation in New York, New York (*The New York Post*, March 12, 2008). The time for filing comments has expired, and the Board has considered all comments received.

CCB, with total assets of approximately \$1.1 trillion, is the second largest bank in China.² The government of China owns approximately 57.0 percent of CCB's shares.³

10. The Board's authority to approve the establishment of the proposed branch parallels the continuing authority of the state of New York to license branches of a foreign bank. The Board's approval of this application does not supplant the authority of the state of New York or its agent, the New York State Banking Department ("Department"), to license the proposed branch of Bank in accordance with any terms or conditions that the Department may impose.

1. 12 U.S.C. § 3105(d).

2. Asset and ranking data are as of September 30, 2008.

3. Central SAFE Investments Limited (also known as "Huijin") directly and indirectly owns approximately 57.0 percent of CCB's shares. Huijin is currently owned directly by the government of China and was formed to assist in the restructuring of major Chinese banks. The government transferred shares of several Chinese banks, including CCB, to Huijin at the time of the recapitalization and restructuring of these banks between 2004 and 2006. Huijin also owns a majority interest in Bank of China Limited, which operates three branches in the United States, and, together with the Chinese Ministry of Finance, it owns a majority interest in Industrial and Commercial Bank of China Limited ("ICBC"), which operates a branch in New York. The government of China intends to transfer the ownership of Huijin to

Bank of America Corporation⁴ and Temasek Holdings, a sovereign wealth fund owned by the government of Singapore, own 19.1 and 5.7 percent, respectively, of the shares of CCB. No other shareholder owns more than 5 percent of CCB's shares.⁵

CCB engages primarily in corporate and retail banking and treasury operations throughout China, including Hong Kong and Macau. Outside China, CCB operates branches in Singapore, Japan, South Africa, Korea, and Germany and representative offices in the United Kingdom and Australia. In the United States, CCB operates a representative office in New York.⁶ CCB would meet the requirements for a qualifying foreign banking organization under Regulation K.⁷

The proposed New York branch would engage in wholesale deposit-taking, lending, trade finance, and other banking services.

Under the IBA and Regulation K, in acting on an application by a foreign bank to establish a branch, the Board must consider whether (1) the foreign bank engages directly in the business of banking outside the United States; (2) has furnished to the Board the information it needs to assess the application adequately; and (3) is subject to comprehensive supervision on a consolidated basis by its home-country supervisors.⁸ The Board also

considers additional standards as set forth in the IBA and Regulation K.⁹

The IBA includes a limited exception to the general standard relating to comprehensive, consolidated supervision.¹⁰ This exception provides that, if the Board is unable to find that a foreign bank seeking to establish a branch, agency, or commercial lending company is subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in its home country, the Board may nevertheless approve the application provided that (i) the appropriate authorities in the home country of the foreign bank are actively working to establish arrangements for the consolidated supervision of such bank; and (ii) all other factors are consistent with approval.¹¹ In deciding whether to exercise its discretion to approve an application under authority of this exception, the Board must also consider whether the foreign bank has adopted and implemented procedures to combat money laundering.¹² The Board also may take into account whether the home country of the foreign bank is developing a legal regime to address money laundering or is participating in multilateral efforts to combat money laundering.¹³ This is the standard applied by the Board in this case.

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

Based on all the facts of record, the Board has determined that CCB's home-country supervisory authority is actively working to establish arrangements for the consolidated supervision of the bank and that considerations relating to the steps taken by CCB and its home jurisdiction to combat money laundering are consistent with approval under this standard. The China Banking Regulatory Commission ("CBRC") is the principal supervisory authority of CCB, including its foreign subsidiaries and affiliates, for all matters other than laws with respect to anti-money laundering.¹⁴ The CBRC has the authority to license banks, regulate their activities and approve expansion, both domestically and abroad. It supervises and regulates CCB, including its subsidiaries and foreign operations, through a com-

China Investment Corporation ("CIC"), an investment fund that is also wholly owned by the government of China. Both CIC and Huijin are non-operating companies that hold investments on behalf of the government of China. Neither CIC nor Huijin engages directly in commercial or financial activities.

Under the IBA, any company that owns a foreign bank with a branch in the United States is subject to the Bank Holding Company Act ("BHC Act") as if it were a bank holding company. As a result of the ownership by Huijin of Bank of China Limited and ICBC, Huijin is subject to the BHC Act. On the transfer of Huijin to CIC, CIC would also become subject to the BHC Act.

The Board has provided certain exemptions to CIC and Huijin under section 4(c)(9) of the BHC Act (12 U.S.C. § 1843(c)(9)), which authorizes the Board to grant exemptions to foreign companies from the nonbanking restrictions of the BHC Act where the exemptions would not be substantially at variance with the purposes of the act and would be in the public interest. The exemptions provided to CIC and Huijin would not extend to CCB or any other Chinese banking subsidiary of CIC or Huijin that operates a branch or agency in the United States. See Board letter to H. Rodgin Cohen, dated August 5, 2008.

4. Under the Board's Regulation K, Bank of America Corporation is required to seek the Board's approval to retain its investment in CCB once CCB establishes a branch in the United States.

5. HKSCC Nominees Limited holds 10.8 percent of the shares of CCB as the registered nominee of several shareholders that each owns less than 5 percent of the shares of CCB.

6. CCB represents that the New York representative office would be closed when the branch is established.

7. 12 CFR 211.23(a).

8. 12 U.S.C. § 3105(d)(2); 12 CFR 211.24. In assessing this 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 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 informa-

tion on the dealings with and relationship between the bank and its affiliates, both foreign and domestic; (iv) receive from the bank financial reports that are consolidated on a worldwide basis or comparable information that permits analysis of the bank's financial condition on a worldwide consolidated basis; 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.

9. 12 U.S.C. § 3105(d)(3)-(4); 12 CFR 211.24(c)(2)-(3).

10. 12 U.S.C. § 3105(d)(6).

11. 12 U.S.C. § 3105(d)(6)(A).

12. 12 U.S.C. § 3105(d)(6)(B).

13. *Id.*

14. Before April 2003, the People's Bank of China ("PBOC") acted as both China's central bank and primary banking supervisor, including anti-money-laundering matters. In April 2003, the CBRC was established as the primary banking supervisor and assumed the majority of the PBOC's regulatory functions. The PBOC maintained its roles as China's central bank and primary supervisor for anti-money-laundering matters.

ination of targeted on-site examinations and continuous consolidated off-site monitoring. Since its establishment in 2003, the CBRC has enhanced existing supervisory programs and developed new policies and procedures designed to create a framework for the consolidated supervision of banks in China.

On-site examinations by the CBRC cover, among other things, the major areas of operation: corporate governance and senior management responsibilities; capital adequacy; asset structure and asset quality (including the structure and quality of loans); off-balance-sheet activities; earnings; liquidity; liability structure and funding sources; expansionary plans; internal controls (including accounting control and administrative systems); legal compliance; accounting supervision and internal auditing (including accounting control and administrative systems); and any other areas deemed necessary by the CBRC.

Off-site monitoring is conducted through the review of required annual, semiannual, quarterly, or monthly reports on, among other things, asset quality, capital adequacy, liquidity, risk management, corporate governance, affiliate transactions, and internal controls.

CCB is required to be audited annually by an accounting firm approved by the PBOC, and the results are shared with the CBRC and the PBOC. The scope of the required audit includes a review of CCB's financial statements, asset quality, and internal controls. The CBRC may order a special audit at any time. In addition, in connection with its listings on the Shanghai and Hong Kong stock exchanges, CCB is required to have external audits conducted under both International Financial Reporting Standards and generally accepted accounting practices under Chinese law. CCB is required to publish its financial statements annually. CCB conducts internal audits of its offices and operations, including its overseas operations, generally based on an annual schedule. The internal audit results are shared with the CBRC, the PBOC, and the external auditors of CCB. The proposed branch would be subject to internal audits.

Chinese laws impose various prudential limitations on banks, including limits on transactions with affiliates and large exposures. The CBRC is authorized to require any bank to provide information and to impose sanctions for failure to comply. The CBRC also has the power to apply administrative penalties, including warnings, fines, and removal from office, for violations of applicable laws and rules. Criminal violations are transferred to the judicial authorities for investigation and prosecution.

In recent years, the Chinese government has enhanced its anti-money-laundering regime. In 2005, the Chinese government took initial steps to adopt an anti-money-laundering law, the PRC Anti-Money Laundering Law ("AML Law"). The AML Law and two related rules, the Rules for Anti-Money Laundering by Financial Institutions ("AML Rules") and the Administrative Rules for the Reporting of Large Value and Suspicious Transactions by Financial Institutions ("LVT/STR Rules") were enacted in October 2006 and December 2006, respectively. The AML Law and AML Rules became effective on January 1, 2007,

and the LVT/STR Rules became effective on March 1, 2007. Together, the law and related rules establish a regulatory infrastructure to assist China's anti-money-laundering effort.

An Anti-Money Laundering Bureau ("AML Bureau") was established within the PBOC in 2003.¹⁵ The AML Bureau coordinates anti-money-laundering efforts at the PBOC and among other agencies. The AML Bureau also supervised the creation of the China Anti-Money Laundering Monitoring and Analysis Center ("AML Center") in September 2004. The AML Center collects, monitors, analyzes, and disseminates suspicious transaction reports and large-value transaction reports. The AML Center sends suspicious transaction reports to the AML Bureau for further investigation. The PBOC issued additional rules in June 2007 providing clarification on reporting suspicious transactions to the AML Center and on customer due diligence and recordkeeping.

China participates in international fora that address the prevention of money laundering and terrorist financing. China is a member of the Financial Action Task Force ("FATF")¹⁶ and is a party to the 1988 U.N. Convention Against the Illicit Traffic of Narcotics and Psychotropic Substances, the U.N. Convention Against Transnational Organized Crime, the U.N. Convention Against Corruption, and the U.N. International Convention for the Suppression of the Financing of Terrorism.

As noted, the PBOC is China's primary supervisor for anti-money-laundering matters. Like the CBRC, the PBOC supervises and regulates CCB through a combination of on-site examinations and off-site monitoring. On-site examinations focus on CCB's compliance with anti-money-laundering laws and rules, including the AML Law, AML Rules, and LVT/STR Rules. Off-site monitoring is conducted through the review of periodic reports. In performing its responsibilities, the PBOC may require any bank to provide information and can impose administrative penalties for violations of applicable laws and rules.

CCB has policies and procedures to comply with Chinese laws and rules regarding anti-money laundering. CCB represents that it has taken additional steps on its own initiative to combat money laundering and other illegal activities. CCB states that it has implemented measures consistent with the recommendations of the FATF and that it has put in place policies, procedures, and controls to ensure ongoing compliance with all statutory and regulatory requirements, including designating anti-money-laundering compliance personnel and conducting routine employee training at all CCB branches. CCB's compliance with anti-money-laundering requirements is monitored by the PBOC and by CCB's internal and external auditors.

The Board also has taken into account the additional standards set forth in section 7 of the IBA and Regula-

15. The AML Bureau conducts administrative investigations and handles violations of AML Rules. Money laundering cases are referred to the Ministry of Public Security, China's main law enforcement body, for investigation and prosecution.

16. China became a member of FATF in June 2007.

tion K.¹⁷ The CBRC has no objection to CCB's establishment of the proposed branch.

The Board has also considered carefully the financial and managerial factors in this case. China has adopted risk-based capital standards that are consistent with those established by the Basel Capital Accord ("Accord"). CCB's capital is in excess of the minimum levels that would be required by the Accord and is considered equivalent to capital that would be required of a U.S. banking organization. Managerial and other financial resources of CCB are consistent with approval, and CCB appears to have the experience and capacity to support the proposed branch. In addition, CCB has established controls and procedures for the proposed branch to ensure compliance with U.S. law. In particular, CCB has stated that it will apply strict anti-money-laundering policies and procedures at the branch consistent with U.S. law and regulation and will establish an internal control system at the branch consistent with U.S. requirements to ensure compliance with those policies and procedures.

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

On the basis of all the facts of record, and subject to the commitments made by CCB, as well as the terms and conditions set forth in this order, CCB's application to establish a branch is hereby approved. Should any restrictions on access to information on the operations or activities of CCB and its affiliates subsequently interfere with the Board's ability to obtain information to determine and enforce compliance by CCB or its affiliates with applicable federal statutes, the Board may require termination of any of CCB's direct or indirect activities in the United States. Approval of this application also is specifically conditioned on compliance by CCB with the commitments made in

17. See 12 U.S.C. § 3105(d)(3)-(4); 12 CFR 211.24(c)(2). The additional standards set forth in section 7 of the IBA and Regulation K include the following (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 appropriate supervisors in the home country may share information on the bank's operations with the Board; and (3) whether the bank and its U.S. affiliates are in compliance with U.S. law; the needs of the community; the bank's record of operation.

connection with this application and with the conditions in this order.¹⁸ The commitments and conditions referred to above are conditions imposed in writing by Board in connection with this decision and may be enforced in proceedings under 12 U.S.C. § 1818 against CCB and its affiliates.

By order of the Board of Governors, effective December 8, 2008.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Corpbanca Santiago, Chile

Order Approving Establishment of a Branch

Corpbanca ("Bank"), Santiago, Chile, a foreign bank within the meaning of the International Banking Act ("IBA"), has applied under section 7(d) of the IBA¹ to establish a federal branch in New York, New York. The Foreign Bank Supervision Enhancement Act of 1991, which amended the IBA, provides that a foreign bank must obtain the approval of the Board to establish a branch in the United States.

Notice of the application, affording interested persons an opportunity to comment, has been published in a newspaper of general circulation in New York, New York (*New York Post*, July 11, 2007). The time for filing comments has expired, and all comments received have been considered.

Bank, with total consolidated assets of approximately \$9.7 billion, is the fifth largest bank in Chile.² Corp Group Banking S.A., Santiago, owns approximately 49.6 percent of Bank's shares.³ Two other entities, Compañía Inmobiliaria y de Inversiones Saga S.A. ("Saga") and Inversiones Mineras del Cantabrico S.A., directly own approximately 9.2 percent and 6.6 percent of Bank's shares, respectively.

18. The Board's authority to approve the establishment of the proposed branch parallels the continuing authority of the state of New York to license offices of a foreign bank. The Board's approval of this application does not supplant the authority of the state of New York or its agent, the New York State Banking Department ("Department"), to license the proposed office of CCB in accordance with any terms or conditions that the Department may impose.

1. 12 U.S.C. § 3105(d).

2. Asset and ranking data are as of June 30, 2008.

3. Silver Star Securities Ltd. ("Silverstar"), Tortola, British Virgin Islands, indirectly controls all the shares of Corp Group Banking S.A. through two levels of intermediate holding companies. Mr. Alvaro Saieh Bendeck, a citizen of Chile, and his family indirectly own all the shares of Silverstar. Mr. Saieh Bendeck, his wife, and their five children each hold their Silverstar shares through a personal holding company (collectively, "Personal Holding Companies").

The remaining shares of Bank are held by the public. No other shareholder owns more than 5 percent of Bank's shares.

Bank provides a variety of banking services to retail and corporate customers. Bank's subsidiaries engage in insurance brokerage, securities brokerage, mutual fund management, financial advisory services, and legal advisory services. Bank, Silverstar, and the Personal Holding Companies would be qualifying foreign banking organizations under Regulation K.⁴

The proposed New York branch would be Bank's only office outside Chile. It would engage in a wholesale banking business, with a focus on trade finance, lending, and banking services for high-net-worth individuals.

Under the IBA and Regulation K, in acting on an application by a foreign bank to establish a branch, the Board must consider whether the foreign bank (1) engages directly in the business of banking outside of the United States; (2) has furnished to the Board the information it needs to assess the application adequately; and (3) is subject to comprehensive supervision on a consolidated basis by its home-country supervisor.⁵ The Board also considers additional standards set forth in the IBA and Regulation K.⁶ 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 Chile, that those banks were subject to comprehensive supervision on a consolidated basis by the Superintendencia de Bancos e Instituciones Financieras ("SBIF"), Bank's primary home-country supervisor.⁷ Bank is supervised by the SBIF on substantially the same terms and conditions as those other banks. Based on all the facts of record, it has been

determined that Bank is subject to comprehensive supervision on a consolidated basis by its home-country supervisor.⁸

The additional standards set forth in section 7 of the IBA and Regulation K also have been taken into account.⁹ The SBIF has no objection to the establishment of the proposed branch.

Chile's risk-based capital standards are consistent with those established by the Basel Capital Accord. Bank's capital is in excess of the minimum levels that would be required by the Basel Capital Accord and is considered equivalent to capital that would be required of a U.S. banking organization. Managerial and other financial resources of Bank are consistent with approval, and Bank appears to have the experience and capacity to support the proposed branch. In addition, Bank has established controls and procedures for the proposed branch to ensure compliance with U.S. law, as well as controls and procedures for its worldwide operations generally.

Chile is a member of GAFISUD (Financial Action Task Force of South America), which is an associate member of the Financial Action Task Force. Chile has enacted laws and created legislative and regulatory standards to deter money laundering. Money laundering is a criminal offense in Chile, and financial 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. Bank's compliance with applicable laws and regulations is monitored by the SBIF and Bank's internal and external auditors.

With respect to access to information about Bank's operations, the restrictions on disclosure in relevant jurisdictions in which Bank operates have been reviewed and relevant government authorities have been communicated with regarding access to information. Bank, Silverstar, and the Personal Holding Companies have committed to make available to the Board such information on the operations of Bank and any of its affiliates that the Board deems

4. 12 CFR 211.23(a).

5. 12 U.S.C. § 3105(d)(2); 12 CFR 211.24. In assessing this 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 controlling its activities worldwide; (ii) obtain information on the condition of the bank and its subsidiaries and offices through regular examination reports, audit reports, or otherwise; (iii) obtain information on the dealings with and relationship between the bank and its affiliates, both foreign and domestic; (iv) receive from the bank financial reports that are consolidated on a worldwide basis or comparable information that permits analysis of the bank's financial condition on a worldwide consolidated basis; 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.

6. 12 U.S.C. § 3105(d)(3)–(4); 12 CFR 211.24(c)(2)–(3).

7. See *Banco del Estado de Chile*, 91 *Federal Reserve Bulletin* 442 (2005); *Banco de Chile*, 90 *Federal Reserve Bulletin* 550 (2004); and *Banco de Credito e Inversiones S.A.*, 85 *Federal Reserve Bulletin* 446 (1999). See also, *Banco de Chile*, 80 *Federal Reserve Bulletin* 179 (1994).

8. In reaching this conclusion, the oversight of Bank's parent holding companies has been considered. Bank's parent holding companies are required to provide financial and other relevant information to the SBIF on a regular basis. The SBIF has authority to limit transactions by Bank with its affiliates and can exercise direct supervision over all the subsidiaries of Bank. In addition, the Chilean General Banking Law and the Chilean Corporations Law contain restrictions on transactions with related parties. All the companies controlled by Mr. Saieh Bendeck are considered to be related parties of Bank.

9. See 12 U.S.C. § 3105(d)(3)–(4); 12 CFR 211.24(c)(2)–(3). 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.

necessary to determine and enforce compliance with the IBA, the Bank Holding Company Act, and other applicable federal law. To the extent that the provision of such information to the Board may be prohibited by law or otherwise, Bank, Silverstar, and the Personal Holding Companies have committed to cooperate with the Board to obtain any necessary consents or waivers that might be required from third parties for disclosure of such information. In addition, subject to certain conditions, the SBIF may share information on Bank's operations with other supervisors, including the Board. In light of these commitments and other facts of record, and subject to the condition described below, it has been determined that Bank has provided adequate assurances of access to any necessary information that the Board may request.

Based on the foregoing and all the facts of record, Bank's application to establish the proposed branch is hereby approved.¹⁰ Should any restrictions on access to information on the operations or activities of Bank and its affiliates subsequently interfere with the Board's ability to obtain information to determine and enforce compliance by Bank or its affiliates with applicable federal statutes, the Board may require termination of any of Bank's direct or indirect activities in the United States, or in the case of any such operation licensed by the Office of the Comptroller of the Currency ("OCC"), recommend termination of such operation. Approval of this application also is specifically conditioned on compliance by Bank, Silverstar, and the Personal Holding Companies with the commitments made to the Board in connection with this application and with the conditions in this order.¹¹ These commitments and conditions are deemed to be conditions imposed in writing by the Board in connection with this decision and, as such, may be enforced in proceedings under applicable law against Bank and its affiliates.

By order, approved pursuant to authority delegated by the Board, effective October 22, 2008.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

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

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

Monte de Piedad y Caja de Ahorros San Fernando de Huelva, Jerez y Sevilla Seville, Spain

Order Approving Establishment of a Representative Office

Monte de Piedad y Caja de Ahorros San Fernando de Huelva, Jerez y Sevilla ("Bank"), Seville, Spain, 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 Miami, Florida. The Foreign Bank Supervision Enhancement Act of 1991, which amended the IBA, provides that a foreign bank must obtain the approval of the Board to establish a representative office in the United States.

Notice of the application, affording interested persons an opportunity to comment, has been published in a newspaper of general circulation in Miami (*Miami Herald*, July 25, 2008). The time for filing comments has expired, and all comments received have been considered.

Bank, a savings bank with total consolidated assets of approximately \$43.6 billion,² is the 15th largest bank in Spain.³ Bank provides retail banking services through its branch network in Spain and provides corporate banking services to Spanish and foreign corporations. Bank also provides investment services primarily to its retail banking customers and distributes insurance products. Bank currently does not have any offices outside Spain. The proposed representative office would promote and market Bank's products and services, provide support to Spanish companies with respect to their U.S. activities, identify investment projects that could be financed from Spain, and perform other typical representative office functions.⁴

1. 12 U.S.C. § 3107(a).

2. Asset data are as of June 30, 2008.

3. Bank has no shareholders. Bank's operations are controlled and governed by a general assembly and a board of directors. The membership of the 320-member general assembly includes representatives of the municipalities in which Bank operates (approximately 22 percent); Bank's depositors (approximately 27 percent); representatives designated by the regional parliament of the Autonomous Community of Andalusia (15 percent); and Bank's employees (15 percent). Bank's board of directors is composed of 40 members, proportionally representing the entities constituting the general assembly.

4. 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

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 engages directly in the business of banking outside the United States and has furnished to the Board the information it needs to assess the application adequately.⁵ 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.⁶ The Board also considers additional standards set forth in the IBA and Regulation K.⁷

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 Spain, that those banks were subject to comprehensive supervision on a consolidated basis by their home-country supervisor, the Bank of Spain.⁸ Bank is supervised by the Bank of Spain on substantially the same terms and conditions as those other banks. Based on all the facts of record, it has been determined that Bank is 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 also have been taken into account.⁹ With

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)).

5. 12 U.S.C. § 3107(a)(2).

6. *Id.*; 12 CFR 211.24(d)(2). In assessing this standard, the Board considers, among other factors, the extent to which the home-country supervisors (i) ensure that the bank has adequate procedures for monitoring and controlling its activities worldwide; (ii) obtain information on the condition of the bank and its subsidiaries and offices through regular examination reports, audit reports, or otherwise; (iii) obtain information on the dealings with and relationship between the bank and its affiliates, both foreign and domestic; (iv) receive from the bank financial reports that are consolidated on a worldwide basis or comparable information that permits analysis of the bank's financial condition on a worldwide consolidated basis; and (v) evaluate prudential standards, such as capital adequacy and risk exposure on a worldwide basis. These are indicia of comprehensive, consolidated supervision. No single factor is essential, and other elements may inform the Board's determination.

7. 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.

8. See *Caja de Ahorros del Mediterráneo*, 92 *Federal Reserve Bulletin* C133 (2006); *Caja de Ahorros de Galicia, Caixa Galicia*, 92 *Federal Reserve Bulletin* C132 (2006); *Banco Popular Español S.A.*, 92 *Federal Reserve Bulletin* C130 (2006).

9. See *supra* note 7.

respect to the financial and managerial resources of Bank, taking into consideration its record of operations in its home country, its overall financial resources, and its standing with its home-country supervisor, financial and managerial factors are considered consistent with approval. Bank appears to have the experience and capacity to support the proposed representative office. In addition, Bank has established controls and procedures for the proposed representative office to ensure compliance with U.S. law and for its operations generally. The Bank of Spain has no objection to the establishment of the proposed office.

Spain is a member of the Financial Action Task Force and subscribes to its recommendations on measures to combat money laundering and international terrorism. In accordance with those recommendations, Spain 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 Spain, and Bank is subject to laws that require it to establish internal policies, procedures, and systems for the detection and prevention of money laundering throughout its 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 about Bank's operations, the restrictions on disclosure in relevant jurisdictions in which Bank operates have been reviewed and the relevant government authorities have been communicated with regarding access to information. Bank has committed to make available to the Board such information on the operations of Bank and any of its affiliates that the Board deems necessary to determine and enforce compliance with the IBA, the Bank Holding Company Act of 1956, as amended, and other applicable federal law. To the extent that the provision of such information to the Board may be prohibited by law or otherwise, Bank has committed to cooperate with the Board to obtain any necessary consents or waivers that might be required from third parties for disclosure of such information. In light of these commitments and other facts of record, and subject to the condition described below, it has been determined that Bank has provided adequate assurances of access to any necessary information that the Board may request.

On the basis of the foregoing and all the facts of record, and subject to the commitments made by Bank to the Board, as well as the terms and conditions set forth in this order, Bank's application to establish a representative office in Miami, Florida, is hereby approved.¹⁰ 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 termina-

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

tion 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 with the commitments made in connection with this application and with the conditions in this order.¹¹ The commitments and conditions referred to above are conditions imposed in writing by the Board in connection with this decision and may be enforced in proceedings under applicable law against Bank and its affiliates.

By order, approved pursuant to authority delegated by the Board, effective December 19, 2008.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

FINAL ENFORCEMENT DECISION ISSUED BY THE BOARD

IN THE MATTER OF

Kelly M. Dulaney, A former Institution-Affiliated Party of Fifth Third Bank, Grand Rapids, Michigan, Respondent.

Docket Nos. 08-008-B-I, 08-008-E-I

FINAL DECISION

This is an administrative proceeding pursuant to the Federal Deposit Insurance Act ("the FDI Act") in which the Board Enforcement Counsel seeks to prohibit the Respondent, Kelly M. Dulaney ("Respondent"), from further participation in the affairs of any financial institution and to require her to pay restitution based on actions she took while employed at Fifth Third Bank, Grand Rapids, Michigan (the "Bank").

Upon review of the administrative record, the Board issues this Final Decision adopting the Recommended Decision ("Recommended Decision") of Administrative Law Judge C. Richard Miserendino (the "ALJ"), and orders the issuance of the attached Order of Prohibition and to Cease and Desist.

I. STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

Under the FDI Act and the Board's regulations, the ALJ is responsible for conducting proceedings on a notice of charges relating to a proposed order requiring payment of

restitution or prohibition from banking (12 U.S.C. §§ 1818(b), 1818(e)(4)). The ALJ issues a recommended decision that is referred to the Board together with any exceptions to those recommendations filed by the parties. The Board makes the final findings of fact, conclusions of law, and determination whether to issue the requested orders (12 CFR 263.38).

The FDI Act sets forth the substantive basis upon which a federal banking agency may issue against a bank official or employee an order of prohibition from further participation in banking. To issue such an order, the Board must make each of three findings (1) that the respondent engaged in identified *misconduct*, including a violation of law or regulation, an unsafe or unsound practice, or a breach of fiduciary duty; (2) that the conduct had a specified *effect*, including financial loss to the institution or gain to the respondent; and (3) that the respondent's conduct involved either personal dishonesty or a willful or continuing disregard for the safety or soundness of the institution (12 U.S.C. § 1818(e)(1)(A)-(C)).

The FDI Act also spells out the requirements for an order requiring restitution, which is a type of cease-and-desist order under the Act. Specifically, a cease-and-desist order may be imposed when the agency has reasonable cause to believe that the respondent has engaged or is about to engage in an unsafe or unsound practice in conducting the business of a depository institution, or that the respondent has violated or is about to violate a law, rule, or regulation or condition imposed in writing by the agency (12 U.S.C. § 1818(b)(1)). Such an order may require the respondent to make restitution if the respondent was "unjustly enriched" in connection with the violation or practice, or the violation or practice involved "reckless disregard" of the law or applicable regulations or a prior agency order (12 U.S.C. § 1818(b)(6)(A)).

An enforcement proceeding is initiated by filing and serving on the respondent a notice of charges setting forth the basis for relief and the relief sought. Under the Board's regulations, the respondent must file an answer within 20 days of service of the notice (12 CFR 263.19(a)). Failure to file an answer constitutes a waiver of the respondent's right to contest the allegations in the notice, and a final order may be entered unless good cause is shown for failure to file a timely answer (12 CFR 263.19(c)(1)).

B. Procedural History

On April 11, 2008, the Board issued a Notice of Intent to Prohibit and Notice of Charges and of Hearing ("Notice") that sought an order of prohibition against Respondent based on her conduct while employed at the Bank and an order requiring her to make restitution to the Bank. Enforcement Counsel sent the Notice to Respondent by Federal Express and by certified mail on the date of issuance, but both copies were returned stating that Respondent had moved and left no forwarding address. At the direction of Enforcement Counsel, a licensed process server personally served the Notice on Respondent on June 4,

11. The Board's authority to approve the establishment of the proposed representative office parallels the continuing authority of the State of Florida to license offices of a foreign bank. The Board's approval of this application does not supplant the authority of the State of Florida or its agent, the Florida Office of Financial Regulation, to license the proposed representative office of Bank in accordance with any terms or conditions that it may impose.

2008. The Notice directed Respondent to file a written answer within 20 days of the date of service of the Notice in accordance with 12 CFR 263.19, and warned that failure to do so would constitute a waiver of her right to appear and contest the allegations. Nonetheless, Respondent failed to file an answer within the 20-day period or thereafter.

On July 11, 2008, Enforcement Counsel filed a Motion for Entry of an Order of Default against Respondent. On July 28, 2008, the ALJ issued an Order to Show Cause, providing Respondent until August 18, 2008, to show cause why a timely answer to the Notice was not filed and why a default judgment granting the relief requested in the Notice should not be entered against Respondent. The Order was delivered by overnight delivery to Respondent's address. To date, Respondent has not filed any reply to the Order to Show Cause or answered the Notice.

C. Respondent's Actions

The Notice alleges that Respondent was employed as a customer service manager at the Port Orange, Florida, branch location of the Bank and its predecessors from no later than April 2004 through August 2006, when she resigned from the Bank. Her responsibilities included maintaining relationships with customers, creating certain accounting entries, and reconciling the Bank's cash items account. The cash items account was a general ledger account where "rejected items," such as deposit tickets with incorrect account numbers, were sent for reconciliation. Respondent had complete control over the cash items account until shortly before she resigned.

By virtue of her responsibilities, Respondent was able to falsify Bank debit and credit tickets and customer checks to make unauthorized withdrawals from the certificate of deposit ("CD") accounts of three of the Bank's customers, using the proceeds for her own purposes. She concealed her activity by making unauthorized transfers between the CD accounts of the customers and the general ledger account. When one of the Bank's customers sought to roll over a matured CD into a new CD, Respondent provided the customer with a CD account receipt and subsequently requested that the CD be purged from the Bank's records in order to conceal her activity.

Respondent's actions were discovered when that customer asked the Bank about the status of his CD accounts and learned that one account had no remaining funds and the other CD account had been purged. Respondent resigned several months before the customer's inquiry and before the Bank's discovery of her defalcation. The Bank restored its customer's accounts with interest for the amounts defalcated by Respondent. As a result of these actions, the Bank's total loss was approximately \$203,923.

II. DISCUSSION

The Board's Rules of Practice and Procedure set forth the requirements of an answer and the consequences of a failure to file an answer to a Notice. Under the Rules, failure to file a timely answer "constitutes a waiver of

[a respondent's] right to appear and contest the allegations in the notice" (12 CFR 263.19(c)). If the ALJ finds that no good cause has been shown for the failure to file, the judge "shall file . . . a recommended decision containing the findings and the relief sought in the notice." *Id.* An order based on a failure to file a timely answer is deemed to be issued by consent. *Id.*

In this case, Respondent failed to file an answer to the Notice despite notice to her of the consequences of such failure, and also failed to respond to the ALJ's Order to Show Cause. Respondent's failure to file an answer constitutes a default.

Respondent's default requires the Board to consider the allegations in the Notice as uncontested. The allegations in the Notice, described above, meet all the criteria for entry of an order of prohibition under 12 U.S.C. § 1818(e). It was a breach of fiduciary duty, unsafe and unsound practice, and violation of law, for Respondent to falsify Bank debit and credit tickets and customer checks to make unauthorized withdrawals from the CD accounts of the Bank's customers and to manipulate the Bank's systems and records to conceal her actions. Respondent's actions resulted in loss to the Bank and financial gain to the Respondent, in that the Respondent used the proceeds for her own purposes and the Bank was forced to repay its customer for the amounts defalcated by Respondent. Finally, such actions also exhibit personal dishonesty and willful or continuing disregard for the safety and soundness of the Bank.

For the same reasons, the allegations in the Notice meet all the criteria for the entry of an order requiring restitution. Respondent engaged in unsafe or unsound practices and violations of law when she falsified Bank debit and credit tickets and customer checks to make unauthorized withdrawals from the CD accounts of the Bank's customers and manipulated the Bank's systems and records to conceal her actions, and she was unjustly enriched by her actions in that she used the proceeds of her defalcation for her own purposes. Respondent's unsafe or unsound practices and violations of law also involved a reckless disregard for the law.

Accordingly, the requirements for an order of prohibition and for an order for restitution have been met and the Board hereby issues such an order.

CONCLUSION

For these reasons, the Board orders the issuance of the attached Order of Prohibition and Order to Cease and Desist.

By Order of the Board of Governors, this 15th day of December, 2008.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

ORDER OF PROHIBITION AND TO CEASE AND DESIST

Whereas, pursuant to sections 8(b) and 8(e) of the Federal Deposit Insurance Act, as amended, (the “FDI Act”) (12 U.S.C. § 1818(b) and (e)), the Board of Governors of the Federal Reserve System (“the Board”) is of the opinion, for the reasons set forth in the accompanying Final Decision, that a final Order of Prohibition and to Cease and Desist should issue against KELLY M. DULANEY (“Dulaney”), a former employee and institution-affiliated party, as defined in Section 3(u) of the FDI Act (12 U.S.C. § 1813(u)), of Fifth Third Bank, Grand Rapids, Michigan (the “Bank”).

NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to section 8(e) of the FDI Act, 12 U.S.C. § 1818(e), that:

1. In the absence of prior written approval by the Board, and by any other federal financial institution regulatory agency where necessary pursuant to section 8(e)(7)(B) of the FDI Act (12 U.S.C. § 1818(e)(7)(B)), Dulaney is hereby prohibited:
 - (a) from participating in any manner in the conduct of the affairs of any institution or agency specified in section 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A)), including, but not limited to, any insured depository institution, any insured depository institution holding company or any U.S. branch or agency of a foreign banking organization;
 - (b) from soliciting, procuring, transferring, attempting to transfer, voting or attempting to vote any proxy, consent or authorization with respect to any voting rights in any institution described in subsection 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A));

- (c) from violating any voting agreement previously approved by any federal banking agency; or
 - (d) from voting for a director, or from serving or acting as an institution-affiliated party as defined in section 3(u) of the FDI Act (12 U.S.C. § 1813(u)), such as an officer, director, or employee in any institution described in section 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A)).
2. (a) Dulaney shall make restitution to the Bank in the sum of \$203,923 for its loss as a result of Dulaney’s violations of law and unsafe or unsound practices;
 - (b) the restitution shall be remitted in full, payable to the “Board of Governors of the Federal Reserve System” and forwarded to Jennifer J. Johnson, Secretary of the Board, Board of Governors of the Federal Reserve System, Washington, DC 20551, who shall make remittance of the same to the Bank.
 3. Any violation of this Order shall separately subject Dulaney to appropriate civil or criminal penalties or both under section 8 of the FDI Act (12 U.S.C. § 1818).
 4. This Order, and each and every provision hereof, is and shall remain fully effective and enforceable until expressly stayed, modified, terminated, or suspended in writing by the Board.

This Order is effective upon service on the Respondent.

By Order of the Board of Governors, this 15th day of December, 2008.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

ROBERT DEV. FRIERSON
Deputy Secretary of the Board