

Legal Developments: Third Quarter, 2010

ORDERS ISSUED UNDER BANK HOLDING COMPANY ACT

ORDERS ISSUED UNDER SECTION 3 OF THE BANK HOLDING COMPANY ACT

China Investment Corporation Beijing, People's Republic of China

Order Approving Acquisition of an Interest in a Bank Holding Company

China Investment Corporation ("CIC"), Beijing, People's Republic of China, has requested the Board's approval under section 3 of the Bank Holding Company Act of 1956, as amended ("BHC Act"),¹ to acquire indirectly up to 10 percent of the voting shares of Morgan Stanley, New York, New York.

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (75 *Federal Register* 45628 (August 3, 2010)). The time for filing comments has expired, and the Board has considered the proposal and all comments received in light of the factors set forth in section 3 of the BHC Act.

CIC is a sovereign wealth fund organized by the Chinese government for the purpose of investing its foreign exchange reserves. CIC controls Central SAFE Investments Limited ("Huijin"), also of Beijing, a Chinese government-owned investment company organized to invest in Chinese financial institutions. Huijin owns controlling interests in three Chinese banks that operate banking offices in the United States: Bank of China, China Construction Bank, and Industrial and Commercial Bank of China, all also of Beijing.² Under the International Banking Act, any foreign bank that operates a branch, agency, or commercial lending company in the United States, and any company that controls the foreign bank, is subject to the BHC Act as if

the foreign bank or company were a bank holding company.³ As a result, CIC and Huijin are subject to the BHC Act as if they were bank holding companies⁴ and are required to obtain prior Board approval to make a direct or indirect investment in 5 percent or more of the voting shares of a bank holding company or U.S. bank.⁵

In December 2007, CIC, primarily through a wholly owned nonbank subsidiary, invested in units consisting of trust preferred securities of Morgan Stanley and a stock purchase agreement to acquire voting common stock of Morgan Stanley by August 2010, subject to certain conditions.⁶ In addition, CIC currently holds, through other subsidiaries, 2.49 percent of the voting common stock of Morgan Stanley. On consummation of the proposal, CIC would own and control up to 10 percent of Morgan Stanley's voting common stock. At the time of its initial investment in Morgan Stanley, CIC did not yet own the Chinese banks with U.S. branches and, therefore, was not subject to the BHC Act. In addition, Morgan Stanley, which became a bank holding company in September 2008, was not a bank holding company at the time it entered into the stock purchase agreement with CIC. Therefore, the transaction in 2007 between CIC and Morgan Stanley did not require review or approval by the Board. Because Morgan Stanley is now a bank holding company and CIC is now subject to the BHC Act as if it were a bank holding company as a result of its acquisition of Huijin, CIC must receive prior Board approval under section 3(a)(3) of the

3. 12 U.S.C. § 3106.

4. The Board previously provided certain exemptions to CIC and Huijin under section 4(c)(9) of the BHC Act, which authorizes the Board to grant to foreign companies exemptions 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. *See* 12 U.S.C. § 1843(c)(9). The exemptions provided to CIC and Huijin do not extend to Bank of China, China Construction Bank, Industrial and Commercial Bank of China, or any other Chinese banking subsidiary of CIC or Huijin that operates a branch or agency in the United States. *See* Board letter dated August 5, 2008, to H. Rodgin Cohen.

5. 12 U.S.C. § 1842(a)(3).

6. The agreement provided that the trust preferred securities would either be remarketed in order to raise the funds necessary for CIC to purchase Morgan Stanley's voting common stock or directly redeemed in exchange for common stock of Morgan Stanley. The securities were converted directly into voting common stock of Morgan Stanley on August 17, 2010, and the portion of such shares that would have caused CIC to own more than 4.99 percent of Morgan Stanley's voting shares were transferred into a custody account. The shares in the custody account will be released on Board approval of this application and the expiration of the 15-day waiting period.

1. 12 U.S.C. § 1842.

2. Bank of China operates two grandfathered insured federal branches in New York City and a limited federal branch in Los Angeles. Bank of China, in turn, controls a wholly owned subsidiary bank, Nanyang Commercial Bank, Limited, Hong Kong SAR, People's Republic of China, that operates a federal branch in San Francisco. China Construction Bank operates a state branch and a representative office, and Industrial and Commercial Bank of China operates a state branch, all in New York City.

BHC Act to own or control 5 percent or more of the voting shares of Morgan Stanley.⁷

Morgan Stanley, with total consolidated assets of approximately \$626 billion, engages in commercial and investment banking, securities underwriting and dealing, asset management, trading, and other activities both in the United States and abroad. Morgan Stanley controls Morgan Stanley Bank, National Association (“Morgan Bank”), Salt Lake City, Utah, which operates one branch in the state, with total consolidated assets of approximately \$66.2 billion and deposits of approximately \$54.1 billion. In addition, Morgan Stanley controls Morgan Stanley Private Bank, National Association (“MSPB”), Purchase, New York, with total consolidated assets of \$6.6 billion and deposits of \$5.8 billion.⁸

NONCONTROLLING INVESTMENT

CIC has stated that it does not propose to control or exercise a controlling influence over Morgan Stanley and that its indirect investment will be a passive investment.⁹ CIC has agreed to abide by certain commitments substantially similar to those on which the Board has previously relied in determining that an investing company would not be able to exercise a controlling influence over another bank holding company or bank for purposes of the BHC Act (“Passivity Commitments”). For example, CIC has committed not to exercise or attempt to exercise a controlling influence over the management or policies of Morgan Stanley; not to seek or accept more than one representative on the board of directors of Morgan Stanley; and not to have any other director, officer, employee, or agent interlocks with Morgan Stanley. The Passivity Commitments also include certain restrictions on the business relationships between CIC and Morgan Stanley.

Based on these considerations and all the other facts of record, the Board has concluded that CIC would not

acquire control of, or have the ability to exercise a controlling influence over, Morgan Stanley or any of its subsidiaries through the conversion of the trust preferred securities held by CIC in Morgan Stanley into voting common stock of Morgan Stanley. The Board notes that the BHC Act requires CIC to receive the Board’s approval before it directly or indirectly acquires additional shares of Morgan Stanley or attempts to exercise a controlling influence over Morgan Stanley or any of its subsidiaries.¹⁰

COMPETITIVE AND CONVENIENCE AND NEEDS CONSIDERATIONS

The Board has considered the competitive effects of the proposal in light of all the facts of the record. Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market. The BHC Act also prohibits the Board from approving a proposal that would substantially lessen competition in any relevant banking market, unless the anticompetitive effects of the proposal clearly are outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.¹¹

Several of the Chinese banks indirectly owned by CIC maintain branches that compete directly with a subsidiary bank of Morgan Stanley in the Metro New York banking market.¹² The Board has reviewed carefully the competitive effects of the proposal in the Metro New York banking market in light of all the facts of record. In particular, the Board has considered the number of competitors that remain in the banking market, the relative shares of total deposits in depository institutions in the market (“market deposits”) controlled by relevant institutions,¹³ and the concentration level of market deposits and the increase in the level as measured by the Herfindahl–Hirschman Index

7. 12 U.S.C. § 1842(a)(3).

8. In addition, Morgan Stanley holds a noncontrolling 9.9 percent interest in a bank holding company, Chinatrust Financial Holding Company, Ltd. (“Chinatrust”), Taipei, Taiwan, and a national bank, Herald National Bank (“Herald”), New York, New York. See *Morgan Stanley*, 95 *Federal Reserve Bulletin* B86 (2009), and *Morgan Stanley*, 95 *Federal Reserve Bulletin* B93 (2009).

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

10. 12 U.S.C. § 1842. See, e.g., *Emigrant Bancorp, Inc.*, 82 *Federal Reserve Bulletin* 555 (1996).

11. 12 U.S.C. § 1842(c)(1).

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

13. Call report, deposit, and market share data are based on data reported by insured depository institutions in the summary of deposits data as of June 30, 2009. The data are also based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group, Inc.*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift institution deposits in the market share calculation on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991).

(“HHI”) under the Department of Justice Bank Merger Competitive Review guidelines (“DOJ Bank Merger Guidelines”).¹⁴

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

The DOJ also has reviewed the matter and has advised the Board that it does not believe that CIC’s ownership interest in Morgan Stanley is likely to have a significant adverse effect on competition in any relevant banking market. The appropriate banking agencies have been afforded an opportunity to comment and have not objected to the application.

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

In addition, considerations relating to the convenience and needs of the communities to be served, including the records of performance of the institutions involved under the Community Reinvestment Act (“CRA”),¹⁶ are consistent with approval of the application.¹⁷ Morgan Bank received an “outstanding” rating at its most recent CRA performance evaluation by the FDIC, as of January 30, 2006.¹⁸

14. Under the DOJ Bank Merger 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 would 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. Although the DOJ and the Federal Trade Commission recently issued revised Horizontal Merger Guidelines, the DOJ has confirmed that the DOJ Bank Merger Guidelines, which were issued in 1995, were not changed. Press Release, Department of Justice (August 19, 2010), available at www.justice.gov/opa/pr/2010/August/10-at-938.html.

15. The HHI would remain unchanged at 1315 in the Metro New York banking market, which has 272 insured depository institution competitors. The combined deposits of the relevant institutions in the Metro New York banking market represent less than 1 percent of market deposits.

16. 12 U.S.C. § 2901 et seq.; 12 U.S.C. § 2903; 12 U.S.C. § 1842(c)(2).

17. Bank of China has two grandfathered federal branches whose deposits are insured by the Federal Deposit Insurance Corporation (“FDIC”). The branches received a “satisfactory” rating at their most recent CRA performance evaluation by the FDIC, as of August 18, 2008.

18. Morgan Bank became a national bank on September 23, 2008, on its conversion from a Utah-chartered industrial bank. The 2006 evaluation was conducted before this conversion. MSPB became a national bank on July 1, 2010, on its conversion from a limited-purpose savings association not subject to the CRA. MSPB has not yet been evaluated under the CRA by the Office of the Comptroller of the Currency.

FINANCIAL, MANAGERIAL, AND OTHER SUPERVISORY CONSIDERATIONS

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal, and certain other supervisory factors. The Board has carefully considered these factors in light of all the facts of record, including confidential supervisory and examination information regarding Morgan Stanley and its depository institution subsidiaries, publicly reported and other financial information, and information provided by CIC. With respect to the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal, Morgan Stanley’s subsidiary banks currently are well capitalized and would remain so on consummation of this proposal. In addition, the Board has considered the financial, managerial, and future prospects of CIC in light of the fact that CIC is a government-owned investment company organized to invest the foreign exchange reserves of the government.

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.¹⁹

SUPERVISION OR REGULATION ON A CONSOLIDATED BASIS

In evaluating this application, the Board considered whether CIC is subject to comprehensive supervision or regulation on a consolidated basis by appropriate authorities in its home country. The system of comprehensive supervision or regulation may vary, depending on the nature of the acquiring company and the proposed investment. The Board believes that CIC may be found to be subject to an appropriate type and level of comprehensive regulation on a consolidated basis, given its unique nature and structure. CIC is an entity that is wholly owned by the government of China, was established to carry out the function of investing foreign exchange reserves, and is managed by officials who are selected by and report directly to the State Council of the People’s Republic of China (“State Council”), which is the highest executive body in the Chinese govern-

19. 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)). CIC 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. CIC also has committed to cooperate with the Board to obtain any waivers or exemptions that may be necessary to enable it or its affiliates to make such information available to the Board. Based on all facts of record, the Board has concluded that CIC has provided adequate assurances of access to any appropriate information the Board may request.

ment. The chairman and vice chairman of CIC are appointed directly by the State Council and all other officer and director positions must be approved by the State Council. Each of the following Chinese government agencies is entitled to a seat on CIC's board of directors: the Ministry of Finance, the People's Bank of China ("PBOC"), the National Development and Reform Commission, the Ministry of Commerce, and the State Administration of Foreign Exchange. In addition, the Ministry of Finance of the People's Republic of China supervises CIC's finances and accounting, and China's National Audit Office conducts periodic external audits of CIC. This oversight by the State Council and by a number of agencies of the Chinese government, including the Ministry of Finance and the PBOC, allows for review of the worldwide investment strategy and portfolio of CIC. On this basis, appropriate authorities in China would appear to have full access to and oversight of CIC and its activities.

In considering this issue, the Board has taken into account that the proposed investment in Morgan Stanley would be a minority, noncontrolling interest. CIC has represented that it has no intention to control or exercise a controlling interest over Morgan Stanley and, as noted, has provided the Board with Passivity Commitments that help ensure that CIC cannot exercise control or a controlling influence. In addition, business relationships between CIC and Morgan Stanley are limited by the Passivity Commitments.

Based on all the facts of record, the Board has determined that CIC is subject to comprehensive supervision on a consolidated basis by its appropriate home-country authorities for purposes of this application.²⁰

CONCLUSION

Based on the foregoing and all the facts of record, the Board has approved CIC's application to acquire up to 10 percent of the voting shares of Morgan Stanley pursuant to section 3(a)(3) of the BHC Act.²¹ 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 CIC with the conditions imposed in this order and the commitments made to the Board in connection with the application. For purposes of this action, the conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision herein and, as such, may be enforced in proceedings under applicable law.

20. Neither Huijin nor any of the three Chinese banks with U.S. banking operations that are controlled by Huijin will be a direct or indirect investor in Morgan Stanley. In evaluating a proposal by Huijin or any of the Chinese banks owned by Huijin to acquire an insured depository institution in the United States, the Board would evaluate whether that entity is subject to consolidated comprehensive home-country supervision.

21. The Board also has approved the indirect acquisition by CIC of Morgan's interests in Chinatrust and Herald.

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 the Federal Reserve Bank of New York, acting pursuant to delegated authority.

By order of the Board of Governors, August 31, 2010.

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

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Premier Commerce Bancorp, Inc. *Palos Hills, Illinois*

Order Approving the Formation of a Bank Holding Company

Premier Commerce Bancorp, Inc. ("Premier Commerce") has requested the Board's approval under section 3 of the Bank Holding Company Act ("BHC Act")¹ to become a bank holding company and to acquire all the voting shares of G.R. Bancorp, Ltd. ("GRB"), and thereby indirectly acquire GRB's subsidiary bank, The First National Bank of Grand Ridge ("Bank"),² both of Grand Ridge, Illinois.

Notice of the proposal, affording interested persons an opportunity to comment, has been published (*75 Federal Register* 8944-45 (2010)). The time for filing comments has expired, and the Board has considered the application and all comments received in light of the factors set forth in section 3 of the BHC Act.

Premier Commerce is a newly organized corporation formed for the purpose of acquiring control of GRB. Bank, with total assets of \$35.2 million, is the 545th largest insured depository institution in Illinois, controlling deposits of approximately \$28.4 million, which represent less than 1 percent of the total amount of deposits of insured depository institutions in the state.³

COMPETITIVE CONSIDERATIONS

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or that 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 proposal that would substantially lessen competition in any relevant banking market, unless the anticompetitive effects of the proposal are clearly outweighed in the public interest

1. 12 U.S.C. § 1842.

2. GRB owns 83.3 percent of the voting shares of Bank.

3. Asset and deposit data are as of December 31, 2009. Ranking data are as of June 30, 2009, and reflect merger activity through that date. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

by the probable effect of the proposal in meeting the convenience and needs of the community to be served.⁴

Premier Commerce does not currently control a depository institution. Based on all the facts of record, the Board has concluded that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of banking resources in any relevant banking market and that competitive considerations are consistent with approval.

FINANCIAL, MANAGERIAL, AND SUPERVISORY CONSIDERATIONS AND FUTURE PROSPECTS

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and the depository institutions involved in the proposal and certain other supervisory factors.⁵ The Board has considered those factors in light of all the facts of record, including supervisory and examination information received from the Office of the Comptroller of Currency (“OCC”), the primary federal supervisor of Bank, and publicly reported and other available financial information, including information provided by Premier Commerce. In addition, the Board has consulted with the OCC.

In evaluating financial factors in proposals involving newly formed small bank holding companies, the Board reviews the financial condition of both the applicant and the target depository institution. 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 on the transaction. In addition, for proposals involving small bank holding companies, the Board evaluates the institution’s compliance with the Board’s Small Bank Holding Company Policy Statement, including compliance with those measures that are used to assess capital adequacy and overall financial strength.⁶ In assessing financial factors, the Board consistently has considered capital adequacy to be especially important.

The Board has considered carefully the financial factors of the proposal. Bank currently is well capitalized and would remain so on consummation of the proposal, and Premier Commerce would be in compliance with relevant capital standards. The transaction will be structured as a cash purchase funded from proceeds of the issuance of new holding company stock. Based on its review of the financial considerations related to the proposal, the Board finds that Premier Commerce has sufficient financial resources to effect the acquisition and to comply with the Board’s Small Bank Holding Company Policy Statement.

The Board also has considered the managerial resources of the applicant, including the proposed management of the organization. The Board has reviewed the examination records of Bank, including assessments of its current management, risk-management systems, and operations. In

addition, the Board has considered the supervisory experience of the OCC with Bank, including its record of compliance with applicable banking laws and anti-money-laundering laws, and the proposed management officials and principal shareholders of Premier Commerce. The Board also has considered Premier Commerce’s plan for implementing the proposal, including the proposed management after consummation.

In addition, the Board has considered carefully the future prospects of Premier Commerce and Bank. Based on all the facts of record, the Board concludes that considerations relating to the financial and managerial resources and future prospects of the institutions involved in the proposal are consistent with approval, as are the other supervisory factors under the BHC Act.

CONVENIENCE AND NEEDS CONSIDERATIONS

In acting on proposals 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”).⁷ The Board has carefully considered all the facts of record, including evaluations of the CRA performance record of Bank, information provided by Premier Commerce, and public comment received on the proposal. Bank received a “satisfactory” rating at its most recent CRA performance evaluation by the OCC, as of March 31, 2008.

A commenter expressed concern that Bank would not adequately serve local credit needs after consummation of the proposal because few of the proposed directors have associations with the local community. Premier Commerce has stated that it intends to maintain Bank’s current location for the indefinite future and that it is contractually obligated to maintain Bank’s Grand Ridge office for at least five years. Premier Commerce also has represented that it expects to increase lending in the Grand Ridge community after acquiring Bank. In addition, Premier Commerce has represented that the proposal would benefit Bank’s customers by expanding the bank’s offerings to include internet banking, remote capture, and other technology-based products and services.

Based on a review of the entire record, the Board has concluded that convenience and needs considerations and the CRA performance record of Bank are consistent with approval of the proposal.

CONCLUSION

Based on the foregoing and all facts of record, the Board has determined that the application should be, and hereby is, approved. In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act and other

4. 12 U.S.C. § 1842(c)(1).

5. 12 U.S.C. § 1842(c)(2) and (3).

6. 12 CFR 225, Appendix C.

7. 12 U.S.C. § 2901 et seq.

applicable statutes. The Board's approval is specifically conditioned on compliance by Premier Commerce with the conditions in this order and all the commitments it made to the Board in connection with the application. For purposes of this action, the conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision herein and, as such, may be enforced in proceedings under applicable law.

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

By order of the Board of Governors, effective July 1, 2010.

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

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

The Toronto-Dominion Bank Toronto, Canada

Order Approving the Acquisition of a Bank Holding Company

The Toronto-Dominion Bank ("TD") and its subsidiary bank holding companies, TD US P & C Holdings ULC ("TD ULC"), Calgary, Canada, and TD Bank US Holding Company ("TD Bank US HC"), Portland, Maine (collectively, "Applicants"), have requested the Board's approval under section 3 of the Bank Holding Company Act ("BHC Act")¹ to acquire The South Financial Group, Inc. ("TSFG") and its subsidiary bank, Carolina First Bank ("Carolina First"), both of Greenville, South Carolina.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (75 *Federal Register* 30,406 (2010)). 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.

TD, with total consolidated assets equivalent to \$568 billion, is the second largest depository organization in Canada.³ TD operates a branch in New York City and an agency in Houston. Through TD Bank US HC, TD controls two subsidiary banks in the United States, TD Bank and TD

Bank USA, National Association ("TD Bank USA"), Portland, Maine. TD Bank US HC, with total consolidated assets of \$155 billion, is the 18th largest depository organization in the United States, controlling \$125 billion in deposits.⁴ Its subsidiary banks operate in 12 states and the District of Columbia.⁵ In Florida, the only state where a subsidiary depository institution of TD Bank US HC and TSFG both operate, TD Bank US HC is the 16th largest depository organization, controlling deposits of approximately \$4.4 billion.

TSFG has total consolidated assets of approximately \$12.4 billion, and its subsidiary bank operates in South Carolina, North Carolina, and Florida. TSFG is the 13th largest depository organization in South Carolina, controlling deposits of \$5.5 billion. In Florida, TSFG is the 20th largest depository organization, controlling deposits of \$3 billion.

On consummation of the proposal, TD Bank US HC would become the 17th largest depository organization in the United States, with total consolidated assets of approximately \$167 billion. TD Bank US HC would control deposits of approximately \$134.7 billion, which represent 1.7 percent of the total amount of deposits of insured depository institutions in the United States.⁶ In Florida, TD Bank US HC would become the 11th largest depository organization, controlling deposits of approximately \$7.4 billion, which represent approximately 1.8 percent of deposits of insured depository institutions in the state.

INTERSTATE ANALYSIS

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the bank holding company's home state if certain conditions are met. For purposes of the BHC Act, the home state of TD is New York,⁷ and TSFG is located in South Carolina, North Carolina, and Florida.⁸

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

4. Asset data and nationwide deposit ranking data are as of March 31, 2010, and statewide deposit and ranking data are as of June 30, 2009.

5. TD Bank operates in Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Vermont, Virginia, and the District of Columbia. TD Bank USA operates in Maine.

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

7. 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 (12 U.S.C. § 1841(o)(4)(C)).

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

1. 12 U.S.C. § 1842.

2. TD, TD ULC, and TD Bank US HC are all financial holding companies within the meaning of the BHC Act. TD filed an application with the Office of the Comptroller of the Currency ("OCC") on June 18, 2010, for approval under the Bank Merger Act (12 U.S.C. § 1828(c)) to merge Carolina First into TD's subsidiary bank, TD Bank, N.A., ("TD Bank"), Wilmington, Delaware.

3. Canadian asset and ranking data are as of April 30, 2010, and are based on the exchange rate as of that date.

the BHC Act are met in this case.⁹ In light of all the facts of record, the Board is permitted to approve the proposal under section 3(d) of the BHC Act.

COMPETITIVE CONSIDERATIONS

The BHC Act 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.¹⁰

Applicants and TSFG have subsidiary insured depository institutions that compete directly in five banking markets in Florida: Miami-Fort Lauderdale, Orlando, Palatka, St. Augustine, and West Palm Beach. The Board has reviewed carefully the competitive effects of the proposal in each of these banking markets in light of all the facts of record. In particular, the Board has considered the number of competitors that would remain in the banking markets, the relative shares of total deposits in depository institutions (“market deposits”) controlled by Applicants and TSFG in the markets,¹¹ the concentration levels of market deposits and the increases in those levels as measured by the Herfindahl–Hirschman Index (“HHI”) under the Department of Justice Merger Guidelines (“DOJ Guidelines”),¹² other characteristics of the markets, and commitments that TD has made to divest branches in the Palatka banking market.

9. 12 U.S.C. §§ 1842(d)(1)(A)–(B) and 1842(d)(2)–(3). TD is adequately capitalized and adequately managed, as defined by applicable law. TSFG’s subsidiary bank has been in existence and operated for the minimum period of time required by applicable state laws and for more than five years. *See* 12 U.S.C. § 1842(d)(1)(B)(i)–(ii). On consummation of the proposal, TD 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)). TD 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 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.

10. 12 U.S.C. § 1842(c)(1).

11. Deposit and market share data are based on data reported by insured depository institutions in the summary of deposits data as of June 30, 2009, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. *See, e.g., Midwest Financial Group, 75 Federal Reserve Bulletin* 386 (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).

12. 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 Depart-

A. Banking Market with Divestiture

Applicants and TSFG compete directly in one banking market, the Palatka banking market, that warrants a detailed review of competitive effects.¹³ TD Bank is the largest insured depository institution in the Palatka banking market, controlling deposits of approximately \$250.2 million, which represent approximately 34.3 percent of market deposits. Carolina First is the fourth largest depository institution in the market, controlling deposits of approximately \$92.7 million, which represent approximately 12.7 percent of market deposits. On consummation and without the proposed divestiture, the HHI in this market would increase 873 points, from 2071 to 2944, and the pro forma market share of the combined entity would be 47 percent.

To reduce the potential adverse effects on competition in the Palatka banking market, TD has committed to divest branches with no less than \$59 million in deposits, in the aggregate, to an out-of-market insured depository organization.¹⁴ On consummation of the proposed merger, and after accounting for the divestiture, TD would remain the largest depository institution in the market, controlling deposits of approximately \$283.9 million, which represent 38.9 percent of market deposits. The HHI would increase no more than 243 points to 2313.

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.¹⁵ In this market, the anticompetitive effects of this proposal are mitigated by several factors. On consummation of the proposal and the proposed divestiture to an out-of-market insured depository institution, five other insured depository institutions would continue to operate in the market.

ment 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.

13. The Palatka banking market is defined as Putnam County and the Hastings area of St. Johns County, Florida.

14. TD has committed that, before consummation of the proposed merger, it will execute an agreement for the proposed divestiture in the Palatka banking market with a purchaser that the Board determines to be competitively suitable. TD also has committed to complete the divestiture within 180 days after consummation of the proposed merger. In addition, TD has committed that, if it is unsuccessful in completing the proposed divestiture within such time period, it will transfer the unsold branches to an independent trustee who will be instructed to sell the branches to an alternate purchaser or purchasers in accordance with the terms of this order and without regard to price. The trust agreement, trustee, and any alternate purchaser must be deemed acceptable by the Board. *See BankAmerica Corporation, 78 Federal Reserve Bulletin* 338 (1992); *United New Mexico Financial Corporation, 77 Federal Reserve Bulletin* 484 (1991).

15. 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.

In addition, the Board notes that three community credit unions also exert a competitive influence in the Palatka banking market.¹⁶ These credit unions offer a wide range of consumer products, operate street-level branches, and have membership open to almost all the residents in the market. The Board concludes that their activities in this banking market exert sufficient competitive influence that mitigate, in part, the potential competitive effects of the proposal.¹⁷

B. Banking Markets without Divestiture

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in the four remaining banking markets in which TD's subsidiary depository institutions and Carolina First directly compete.¹⁸ On consummation of the proposal, three markets would remain moderately concentrated, and one would remain unconcentrated, as measured by the HHI. The change in the HHI measure of concentration in each of the banking markets would be small, however, and numerous competitors would remain in each market.

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

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

FINANCIAL, MANAGERIAL, AND SUPERVISORY CONSIDERATIONS

Section 3 of the BHC Act 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

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

17. If credit unions are factored into the market calculations on a 50 percent weighted basis, TD would control approximately 35 percent of market deposits on consummation of the proposal, and the HHI would increase 196 points to 1920.

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

has carefully considered these factors in light of all the facts of record, including confidential supervisory and examination information from the U.S. banking supervisors of the institutions involved and publicly reported and other financial information, including substantial information provided by Applicants. The Board also has consulted with the Office of the Superintendent of Financial Institutions ("OSFI"), the agency with primary responsibility for the supervision and regulation of Canadian banks, including TD.

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 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 combined organization at consummation, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

The Board has considered carefully the financial resources of the organizations involved in the proposal in light of information provided by Applicants and supervisory information on these organizations available to the Federal Reserve, including information from the Federal Deposit Insurance Corporation ("FDIC"), the primary federal supervisor of Carolina First. The capital levels of TD 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. TD also plans to raise an additional \$240 million in capital before consummation that will be downstreamed to its U.S. operations. In addition, the subsidiary depository institutions of TD involved in the proposal are well capitalized and would remain so on consummation. The proposed transaction is structured as a partial share exchange and a partial cash purchase of shares. Applicants will use existing resources to fund the cash purchase of shares.¹⁹ Based on its review of the record, the Board finds that Applicants have sufficient financial resources to effect the proposal.

The Board also has considered the managerial resources of the organizations involved. The Board has reviewed the examination records of Applicants, TSFG, and their subsidiary depository institutions, including assessments of their management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences and those of other relevant banking supervisory

19. On May 18, 2010, TD entered into a Securities Purchase Agreement with the U.S. Department of the Treasury ("Treasury") under which TD will purchase from Treasury all the issued and outstanding shares of TSFG's preferred stock and the related warrant issued in connection with the Treasury's Capital Purchase Program on December 5, 2008.

agencies, including the OCC and the FDIC, with the organizations and their records of compliance with applicable banking law and with anti-money-laundering laws.

The Board also has considered carefully the future prospects of the organizations involved in the proposal in light of the financial and managerial strength that Applicants will bring to the operations of TSFG. The Board notes that TSFG and Carolina First have recently experienced financial and managerial difficulties and are operating under formal supervisory actions by the Federal Reserve Bank of Richmond and the FDIC. Consummation of this proposal would create a combined organization that would serve as a strong provider of banking and other financial services in the markets served by Carolina First. Moreover, the Board has considered Applicants' plans for implementing the acquisition and managing the integration of TSFG into the TD organization and the proposed management after consummation.²⁰ The Board also has considered Applicants' experience with acquiring banking organizations and successfully integrating them into the TD organization.

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.²¹

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.²² As noted, the

OSFI is the primary supervisor of Canadian banks, including TD. The Board previously has determined that TD is subject to comprehensive supervision on a consolidated basis by its home-country supervisor.²³ Based on this finding and all the facts of record, the Board has concluded that TD 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 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").²⁴ The CRA requires the federal financial supervisory agencies to encourage insured depository institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation, and requires the appropriate federal financial supervisory agency to take into account a relevant depository institution's record of meeting the credit needs of its entire community, including low- and moderate-income ("LMI") neighborhoods, in evaluating expansionary proposals.²⁵

The Board has considered carefully all the facts of record, including reports of examination of the CRA performance records of TD's subsidiary insured depository institutions and Carolina First, data reported by TD under the Home Mortgage Disclosure Act ("HMDA"),²⁶ other information provided by TD, confidential supervisory information, and public comment received on the proposal. A commenter alleged, based on 2009 HMDA data, that TD has engaged in disparate treatment of minority individuals in home mortgage lending.

A. CRA Performance Evaluations

As provided in the CRA, the Board has considered the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institu-

20. The Board received a comment expressing concern about a lawsuit that has been filed by certain shareholders of TSFG concerning the price that TD has offered for TSFG shares. These allegations are subject to litigation before a court of competent jurisdiction and are not within the discretion of the Board to resolve. *Western Bancshares, Inc. v. Board of Governors*, 480 F.2d 749 (10th Cir. 1973).

21. 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 TD operates and has communicated with relevant government authorities concerning access to information. In addition, TD 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. TD 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. Based on all facts of record, the Board has concluded that TD has provided adequate assurances of access to any appropriate information the Board may request.

22. 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).

23. See *The Toronto-Dominion Bank*, 94 *Federal Reserve Bulletin* C51 (2008); 92 *Federal Reserve Bulletin* C100 (2006); and 91 *Federal Reserve Bulletin* 277 (2005).

24. 12 U.S.C. § 2901 et seq.; 12 U.S.C. § 1842(c)(2).

25. 12 U.S.C. § 2903. The commenter also criticized TD Bank for acquiring assets and liabilities of failed insured depository institutions in FDIC resolution transactions, because those transactions provided no public comment period to submit comments on the bank's CRA performance record. The Board notes that the transactions were processed under emergency review procedures specifically authorized by statute. Moreover, in connection with this proposal, the commenter provided public information about the possible locations of bank's future branches.

26. 12 U.S.C. § 2801 et seq.

tions. 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.²⁷

TD Bank received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of December 8, 2008.²⁸ Carolina First received an "outstanding" rating at its most recent CRA performance evaluation by the FDIC, as of September 5, 2006. After the merger with TD Bank, Carolina First's operations will adopt the CRA program of TD Bank, as modified to address issues specific to the markets served by Carolina First.

B. HMDA and Fair Lending Record

The Board has carefully considered the fair lending records and HMDA data of TD in light of public comment received on the proposal. A commenter alleged that, based on 2009 HMDA data, TD has denied the home mortgage loan applications of African American, Hispanic, and Native American borrowers more frequently than those of nonminority applicants.²⁹ The commenter also alleged that TD made higher-cost mortgage loans disproportionately to African American borrowers than to nonminority borrowers.

Although the HMDA data might reflect certain disparities in the rates of loan applications, originations, denials, or pricing among members of different racial or ethnic groups in certain local areas, they provide an insufficient basis by themselves on which to conclude whether or not TD is excluding any racial or ethnic group on a prohibited basis. The Board recognizes that HMDA data alone, even with the recent addition of pricing information, provide only limited information about the covered loans.³⁰ HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution has engaged in illegal lending discrimination.

The Board is nevertheless concerned when HMDA data for an institution indicate disparities in lending and believes that all lending institutions are obligated to ensure that their

lending practices are based on criteria that ensure not only safe and sound lending but also equal access to credit by creditworthy applicants regardless of their race or ethnicity. Moreover, the Board believes that all bank holding companies and their affiliates must conduct their mortgage lending operations without any abusive lending practices and in compliance with all consumer protection laws.

Because of the limitations of HMDA data, the Board has considered these data carefully and taken into account other information, including examination reports that provide on-site evaluations of compliance by TD's subsidiary insured depository institutions with fair lending laws. The Board also has consulted with the OCC, the primary federal supervisor of TD's subsidiary banks. In addition, the Board has considered information provided by TD about its compliance risk-management systems.

The record of this application, including confidential supervisory information, indicates that TD has taken steps to ensure compliance with fair lending and other consumer protection laws and regulations. TD also represents that its subsidiary banks have such compliance policies and procedures in place. Specifically, TD Bank maintains a fair lending compliance program that includes a second-review process to identify and prevent any discriminatory practices and a process for resolving fair lending complaints. TD Bank provides annual fair lending training for all employees and compliance personnel involved in any respect with mortgage and consumer lending activities and conducts periodic internal audits of its fair lending and consumer protection programs, which also are subject to periodic review by the OCC. TD has stated that Carolina First's operations would be integrated into TD's existing fair lending and consumer protection compliance programs after consummation of the proposal.

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

C. Conclusion on Convenience and Needs and CRA Performance

The Board has considered carefully all the facts of record, including the evaluation of the CRA performance records of TD Bank and TD Bank USA, information provided by TD, comments received on the proposal, and confidential supervisory information. TD represented that it would offer a broader array of banking products and services to the customers serviced by Carolina First. In addition, consummation of the proposal would allow the combined organization to continue to provide credit and other financial services in support of the convenience and needs of the communities served by Carolina First. Based on a review of the entire record, the Board concludes that considerations relating to the convenience and needs factor and the

27. See *Interagency Questions and Answers Regarding Community Reinvestment*, 75 *Federal Register* 11642 at 11665 (2010).

28. TD's other bank subsidiary, TD Bank USA, received a "satisfactory" rating at its most recent CRA performance evaluation by the OCC, as of December 8, 2008.

29. The Board reviewed HMDA data for 2009 for TD Bank in its combined assessment area and in its statewide assessment areas for Maine, Massachusetts, New Hampshire, New Jersey, and Pennsylvania.

30. The data, for example, do not account for the possibility that an institution's outreach efforts may attract a larger proportion of marginally qualified applicants than other institutions attract and do not provide a basis for an independent assessment of whether an applicant who was denied credit was, in fact, creditworthy. In addition, credit history problems, excessive debt levels relative to income, and high loan amounts relative to the value of the real estate collateral (reasons most frequently cited for a credit denial or higher credit cost) are not available from HMDA data.

CRA performance records of the relevant insured depository institutions are consistent with approval of the transaction.

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. 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 Applicants with the conditions in this order and all the commitments made to the Board in connection with the proposal.³¹ For purposes of this transaction, these commit-

ments 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 New York, acting pursuant to delegated authority.

By order of the Board of Governors, effective July 22, 2010.

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

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

31. 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 a supervisory authority. Under its rules, the Board also may, in its discretion, hold a public meeting or hearing on an application to acquire a bank if necessary or appropriate to clarify material factual issues related to the application and to provide an opportunity for testimony (12 CFR 225.16(e), 262.3(e), and 262.25(d)). The Board has considered carefully the

commenter’s request in light of all the facts of record. As noted, the commenter had ample opportunity to submit its views and, in fact, submitted written comments that the Board has considered carefully in acting on the proposal. The commenter’s request fails to demonstrate why written comments do not present its views adequately or why a meeting or hearing otherwise would be necessary or appropriate. For these reasons, and based on all the facts of record, the Board has determined that a public meeting or hearing is not required or warranted in this case. Accordingly, the request for a public meeting or hearing on the proposal is denied.

Appendix

TD AND TSFG BANKING MARKETS IN FLORIDA CONSISTENT WITH BOARD PRECEDENT AND DOJ GUIDELINES

Bank	Rank	Amount of deposits (dollars)	Market deposit shares (percent)	Resulting HHI	Change in HHI	Remaining number of competitors
<i>Miami-Fort Lauderdale—Broward and Miami-Dade counties</i>						
TD Bank US HC Pre-Consummation ...	28	495.7 mil.	.5	753	1	102
TSFG	33	398.5 mil.	.4	753	1	102
TD Bank US HC Post-Consummation ..	22	894.2 mil.	.8	753	1	102
<i>Orlando—Orange, Osceola, and Seminole counties; the western half of Volusia County; and the towns of Clermont and Groveland in Lake County</i>						
TD Bank US HC Pre-Consummation ...	20	266.6 mil.	.8	1,199	1	49
TSFG	15	335.1 mil.	1.0	1,199	1	49
TD Bank US HC Post-Consummation ..	10	601.7 mil.	1.8	1,199	1	49

Appendix—Continued

TD AND TSFG BANKING MARKETS IN FLORIDA 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>St. Augustine—St. Johns County, excluding the towns of Fruit Cove, Ponte Vedra, Ponte Vedra Beach, Jacksonville, Switzerland, and Hastings</i>						
TD Bank US HC Pre-Consummation ...	4	105.5 mil.	6.2	1,266	36	14
TSFG	11	49.2 mil.	2.9	1,266	36	14
TD Bank US HC Post-Consummation ..	4	154.7 mil.	9.1	1,266	36	14
<i>West Palm Beach—Palm Beach County, east of Loxahatchee; and the towns of Indiantown and Hobe Sound in Martin County</i>						
TD Bank US HC Pre-Consummation ...	10	843.1 mil.	2.3	1,100	2	58
TSFG	29	164.7 mil.	.5	1,100	2	58
TD Bank US HC Post-Consummation ..	8	1.0 bil.	2.8	1,100	2	58

NOTE: Deposit data are as of June 30, 2009. Deposit amounts are un-weighted. Rankings, market deposit shares, and HHIs are based on thrift institution deposits weighted at 50 percent.

ORDER ISSUED UNDER BANK MERGER ACT

*Metcalf Bank
Lee’s Summit, Missouri*

Order Approving the Acquisition and Establishment of Branches

Metcalf Bank,¹ a state member bank, has requested the Board’s approval under section 18(c) of the Federal Deposit Insurance Act² (“Bank Merger Act”) to acquire certain assets and assume certain liabilities of four branches of The First National Bank of Olathe (“FNB Olathe”), Olathe, Kansas (“Kansas Branches”).³ In addition, Metcalf Bank has applied under section 9 of the Federal Reserve Act (“FRA”) to establish and operate branches at the locations of the Kansas Branches.⁴

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published in local publications in accordance with the Bank Merger Act and the Board’s Rules of Procedure.⁵ As required by the Bank Merger Act, a report on the competitive effects of the merger was requested from the United States Attorney General, and a copy of the request was provided to the Federal Deposit Insurance Corporation (“FDIC”). 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 Bank Merger Act.⁶

Central, the parent bank holding company of Metcalf Bank, has total assets of approximately \$9.1 billion and operates 13 banks in Missouri, Kansas, Oklahoma, and Illinois.⁷ Metcalf Bank, with total assets of \$990 million, operates in Missouri and Kansas. In Missouri, Central is the fourth largest depository organization, controlling deposits of approximately \$5.8 billion, which represent 4.7 percent of the total amount of deposits of depository organizations

1. Metcalf Bank is a subsidiary of First National Bancor, Inc. (“FNB”), also of Lee’s Summit, which in turn is a subsidiary of Central Banccompany (“Central”), Jefferson City, Missouri. FNB and Central are bank holding companies.

2. 12 U.S.C. § 1828(c).

3. The Kansas Branches are located at 7800 College Boulevard and 7960 West 135th Street, both in Overland Park, and 15100 West 67th Street and 6114 Nieman Road, both in Shawnee, all in Kansas.

4. 12 U.S.C. § 321.

5. 12 CFR 262.3(b).

6. Although no comments were received in connection with this application, the Board received comments on Metcalf Bank’s record of meeting the convenience and needs of its community in connection with an application by Central to acquire Overland Bancorp, Inc. (“Overland”) and thereby indirectly acquire Bank of Belton, both of Belton, Missouri. The Board has not acted on that application. The comments regarding Metcalf Bank that were received in connection with the Overland application have also been considered in connection with this proposal.

7. Asset data are as of June 30, 2010.

in the state (“state deposits”).⁸ In Kansas, Central is the 38th largest depository organization, controlling deposits of approximately \$307.6 million. The Kansas Branches control deposits of \$234.1 million. On consummation, Central would become the 21st largest depository organization in Kansas, controlling deposits of approximately \$541.7 million, which represent less than 1 percent of state deposits.

INTERSTATE ANALYSIS

Section 102 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (“Riegle-Neal Act”) authorizes a bank to merge with another bank under certain conditions unless, before June 1, 1997, the home state of one of the banks involved in the transaction adopted a law expressly prohibiting merger transactions involving out-of-state banks.⁹ For purposes of the Riegle-Neal Act, the home state of Metcalf Bank is Missouri, and the home state of FNB Olathe is Kansas.¹⁰ Metcalf Bank has provided a copy of its Bank Merger Act application to the relevant state agency and has complied with state law. The proposal also complies with all other requirements of the Riegle-Neal Act.¹¹ Accordingly, the Riegle-Neal Act authorizes the proposed interstate branch acquisitions.

COMPETITIVE CONSIDERATIONS

The Bank Merger 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 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 are clearly outweighed in the public interest by its probable effect in meeting the convenience and needs of the community to be served.¹²

Metcalf Bank and the Kansas Branches compete directly in the Kansas City, Missouri banking market (“Kansas City

banking market”).¹³ The Board has reviewed carefully the competitive effects of the proposal in this banking market in light of all the facts of record, including the number of competitors that would remain and the relative shares of total deposits in insured depository institutions in the Kansas City banking market (“market deposits”) that they would control,¹⁴ the concentration level of market deposits and the increase in that level, as measured by the Herfindahl–Hirschman Index (“HHI”) and the Department of Justice Bank Merger Competitive Review guidelines (“DOJ Bank Merger Guidelines”),¹⁵ and other characteristics of the markets.

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Bank Merger Guidelines in the Kansas City banking market. On consummation, the banking market would remain unconcentrated, as measured by the HHI, and numerous competitors would remain in the banking market.¹⁶

The DOJ has advised the Board that consummation of the proposal is not likely to have a significant adverse competitive effect in the Kansas City banking market. The

13. Central operates two banks in the Kansas City banking market: Metcalf Bank and First Central Bank, Warrensburg, Missouri. The Kansas City banking market encompasses Cass, Clay, Jackson, Platte, and Ray counties, Missouri; the towns of Trimble and Holt in Clinton County, Missouri; the towns of Chilhowee, Holden, and Kingsville in Johnson County, Missouri; and Johnson, Leavenworth, and Wyandotte counties, Kansas.

14. Deposit and market share data are based on data reported by insured depository institutions in the summary of deposits data as of June 30, 2009, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386 (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).

15. Under the DOJ Bank Merger 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 would 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. Although the DOJ and the Federal Trade Commission recently issued revised Horizontal Merger Guidelines, the DOJ has confirmed that the DOJ Bank Merger Guidelines, which were issued in 1995, were not changed. Press Release, Department of Justice (August 19, 2010), available at www.justice.gov/opa/pr/2010/August/10-at-938.html.

16. Central operates the 11th largest depository organization in the market, controlling deposits of approximately \$837 million, which represent 2.3 percent of market deposits. Metcalf Bank accounts for \$786.8 million of Central’s deposits in this market. The Kansas Branches control \$234.1 million in deposits, which represents less than 1 percent of market deposits. After consummation, Central would become the 10th largest depository organization in the market, controlling deposits of approximately \$1.1 billion, which represent 3 percent of market deposits. On consummation of the proposal, the HHI would decrease 1 point to 559 for the Kansas City banking market, and 109 depository organizations would remain in the market.

8. Deposit data and state rankings are as of June 30, 2009.

9. 12 U.S.C. § 1831u.

10. See 12 U.S.C. § 1831u(a)(4) and (g)(4).

11. See 12 U.S.C. § 1831u. Metcalf Bank is adequately capitalized and adequately managed, as defined in the Riegle-Neal Act. The Missouri Division of Finance has indicated that this transaction would comply with applicable Missouri law and on June 22, 2010, indicated that it would be in a position to act favorably on Metcalf Bank’s application to establish branches at the locations of the Kansas Branches. There is no filing requirement with Kansas’s Office of the State Banking Commissioner when an out-of-state bank acquires a Kansas branch. See Special Kansas Banking Order 1997-2. On consummation of the proposal, Metcalf Bank and its affiliated insured depository institutions would control less than 10 percent of the total amount of deposits in insured depository institutions in the United States and less than 30 percent of the total amount of deposits in insured depository institutions in Kansas. The term “insured depository institutions” includes insured commercial banks, savings banks, and savings associations. All other requirements of section 102 of the Riegle-Neal Act would also be met on consummation of the proposal.

12. 12 U.S.C. § 1828(c)(5).

Board also has received no objection to the proposal from any federal banking agency.

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 considerations are consistent with approval.

FINANCIAL AND MANAGERIAL RESOURCES AND FUTURE PROSPECTS

In reviewing the proposal under the Bank Merger Act, the Board has also carefully considered the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has considered these factors in light of all the facts of record, including confidential reports of examination, other supervisory information from the primary federal and state supervisors of the organizations involved in the proposal, publicly reported and other financial information, and information provided by Metcalf Bank.

In evaluating financial factors in expansion proposals by banking organizations, the Board considers a variety of measures, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the financial condition of the combined organization at consummation, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

Metcalf Bank is well capitalized and would remain so on consummation of the proposal. Central, Metcalf Bank's parent holding company, also would remain well capitalized on consummation of the proposal. Based on its review of the record in this case, the Board finds that Metcalf Bank has sufficient financial resources to effect the proposal. As noted, the proposed transaction is structured as an asset purchase and assumption of liabilities. Central will use its existing resources to contribute approximately \$25 million to Metcalf Bank to fund the transaction.

The Board also has considered the managerial resources of Metcalf Bank and reviewed the examination records of the bank, including assessments of its management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences with the relevant organizations and the organizations' records of compliance with applicable banking law, including anti-money-laundering laws. The Board also has considered Metcalf Bank's plans for implementing the proposal, including the proposed management of the Kansas Branches after consummation.

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

in the proposal are consistent with approval under the Bank Merger Act.

CONVENIENCE AND NEEDS CONSIDERATIONS

In acting on the proposal, the Board also must consider its effects on the convenience and needs of the communities to be served and take into account the records of the relevant insured depository institutions under the Community Reinvestment Act ("CRA").¹⁷ The CRA requires the federal financial supervisory agencies to encourage insured depository institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation, and requires the appropriate federal financial supervisory agency to take into account an institution's record of meeting the credit needs of its entire community, including low- and moderate-income ("LMI") neighborhoods, in evaluating bank expansionary proposals.¹⁸

The Board has considered carefully all the facts of record, including evaluations of the CRA performance records of Metcalf Bank, data reported by Metcalf Bank under the Home Mortgage Disclosure Act ("HMDA")¹⁹ and the CRA, other information provided by the bank, confidential supervisory information, and public comment. Two commenters asserted that Metcalf Bank had not adequately served the credit and investment needs of its LMI communities. Based on the bank's record of lending to small businesses and small farms and the HMDA data reported by the bank in 2008, the commenters contended that Metcalf Bank's percentage of loans in low-income census tracts was not commensurate with the percentage of such tracts in the bank's assessment area and that Metcalf Bank had made an insufficient number of residential, small business, and small farm loans to low-income borrowers. The commenters also expressed concern that Metcalf Bank did not have a sufficient branch presence in low-income census tracts.²⁰ In addition, the commenters alleged that Metcalf Bank had not served the credit needs of African Americans and had engaged in disparate treatment of African Americans in its mortgage lending activities.

A. CRA Performance Evaluation

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

17. 12 U.S.C. § 2901 et seq.

18. 12 U.S.C. § 2903.

19. 12 U.S.C. § 2801 et seq.

20. None of the Kansas Branches is in an LMI or minority census tract.

mance under the CRA by its appropriate federal supervisor.²¹ Metcalf Bank received a “satisfactory” rating at its most recent CRA examination by the Federal Reserve Bank of Kansas City, as of April 13, 2009 (“2009 Examination”). FNB Olathe also received a “satisfactory” rating at its most recent CRA examination by the Office of the Comptroller of the Currency, as of July 6, 2009.

In the 2009 Examination, Metcalf Bank received a “high satisfactory” rating on its lending test and a “low satisfactory” rating on its investment and service tests.²² Examiners noted that the bank’s primary lending focus was commercial loans, which represented approximately 80 percent of its total loan portfolio.²³ They found that Metcalf Bank’s lending activity during the evaluation period reflected good responsiveness to the credit needs of its community.²⁴ Examiners determined that the overall geographic distribution of the bank’s HMDA loans reflected an adequate penetration throughout all geographies of the assessment area, including LMI tracts, in light of the economic and demographic aspects of the assessment area and in comparison to the aggregate of lenders’ lending data.²⁵ Examiners noted a number of factors that reasonably limited Metcalf Bank’s ability to increase its mortgage lending market share in the LMI geographies, including the small percentage of LMI tracts in the bank’s assessment area, the lack of affordable housing in the LMI census tracts, the distance of the bank’s branches from LMI tracts, and the strong competition in Jackson County, Missouri, from numerous other institutions. In addition, examiners noted factors in LMI census tracts that contributed to lower demand in the bank’s assessment area for mortgage and related home loans in those areas, including a low percentage of owner-occupied units, a high percentage of rental units, a large concentration of families below the poverty line, and high unemployment rates.

In the 2009 Examination, examiners considered the geographic distribution of Metcalf Bank’s small business

loans,²⁶ which represent the largest percentage of the bank’s lending activity, to be good and found that the distribution compared favorably with other lenders in the assessment area. The examiners found that the bank’s ability to make small business loans in low-income tracts was limited, in part, because of the low percentage of businesses in those tracts and competition from other institutions.

In addition, examiners found that Metcalf Bank made a high level of qualified community development loans during the evaluation period, including loans targeted to affordable housing and community development projects to help revitalize and stabilize LMI areas. For example, Metcalf Bank made loans to a community development corporation that focuses on LMI neighborhood revitalization and improvements in housing availability in LMI areas through home repair and rehabilitation. Metcalf Bank’s community development lending during the evaluation period totaled approximately \$13.5 million. Examiners also determined that Metcalf Bank’s level of community development investments during the evaluation period was adequate. They noted that the bank made many charitable contributions, the majority of which were to organizations that sponsor community services primarily for LMI individuals or support affordable housing projects.

Under the service test, examiners found that the bank’s delivery systems were accessible to geographies and individuals of different income levels. Examiners noted that Metcalf Bank’s current branch network, which includes 19 branches in its assessment area, resulted from the merger of three subsidiary banks of Central in 2008. Metcalf Bank also acquired a failed savings bank in 2009. Ten percent of the bank’s branches were in moderate-income tracts, and the bank had no branches in low-income tracts.²⁷ Examiners noted that, although none of the pre-merger banks had branches in the central area of Kansas City, where the substantial majority of LMI census tracts were located, each bank had a long history of serving the banking needs of its respective communities. They also found that the hours of operations and services offered by Metcalf Bank’s branches did not vary in a way that inconvenienced portions of the assessment area, particularly in LMI geographies or for LMI individuals. In addition, examiners noted favorably the bank’s community development service activities with organizations that focused primarily on affordable housing and economic development.

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 Interagency Questions and Answers Regarding Community Reinvestment, 75 *Federal Register* 11,642 at 11,665 (2010).

22. The CRA evaluation for Metcalf Bank includes the record of three of Central’s subsidiary banks that merged in 2008: Metcalf Bank, Overland Park, Kansas; First National Bank of Missouri (“FNB Missouri”), also in Lee’s Summit; and First Kansas Bank and Trust Company (“First Kansas Bank”), Gardner, Kansas. On April 24, 2008, FNB Missouri merged with Metcalf Bank, and on June 21, 2008, First Kansas Bank merged with Metcalf Bank. On April 18, 2009, Metcalf Bank acquired American Sterling Bank, Sugar Creek, Missouri, a failed federal savings bank, from the FDIC as receiver.

23. Metcalf Bank originated less than 1 percent of total HMDA loans originated by all financial institutions in its assessment area.

24. The evaluation period for Metcalf Bank was from October 18, 2006, to December 31, 2008; for FNB Missouri from February 24, 2003, to December 31, 2008; and for First Kansas Bank from December 18, 2007, to December 31, 2008.

25. The lending data of the aggregate of lenders represent the cumulative lending for all financial institutions that reported HMDA data in a particular market.

26. In this context, “small business loans” are business loans that have an original amount of \$1 million or less.

27. The commenters also requested that the Board require Metcalf Bank to open at least one branch in an LMI or minority census tract. 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. See, e.g., *The PNC Financial Services Group, Inc.*, 94 *Federal Reserve Bulletin* C38 (2008); *Wachovia Corporation*, 91 *Federal Reserve Bulletin* 77 (2005). The Board focuses on the existing CRA and fair lending performance and compliance records of an applicant and the programs that an applicant has in place to serve the credit needs of its assessment area at the time the Board reviews a proposal under the convenience and needs factor.

B. HMDA Data, Fair Lending Records, and Other Issues

The Board has carefully considered the HMDA data and fair lending records of Metcalf Bank, including those data and records for the institutions that merged to form the bank in 2008, in light of public comments. Commenters alleged, based on 2008 HMDA data, disparate treatment of African Americans by Metcalf Bank involving home mortgage loan originations.²⁸ The Board's consideration of HMDA-related comments included a review of 2007, 2008, and preliminary 2009 HMDA data reported by Metcalf Bank and the institutions that merged into the bank.

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 Metcalf Bank is excluding 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.²⁹ 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 Metcalf Bank and the CRA performance record of Metcalf Bank discussed above. In particular, examiners did not find any evidence that Metcalf Bank engaged in illegal discrimination or in any other illegal credit practices. Examiners noted that Metcalf Bank's ability to originate HMDA loans to minority communities in its assessment area was limited by the demographics of minority census tracts³⁰ (particularly in Jackson County), including the relatively low

availability of owner-occupied housing, the high number of rental and vacant properties, and the downturn in the economy.

The record indicates that Metcalf Bank has taken steps and developed programs to ensure compliance with all fair lending and other consumer protection laws and regulations. Metcalf Bank has an internal audit program, including comprehensive fair lending reviews on a continuing basis, to ensure that all applicants are treated fairly and consistently under prudent underwriting standards and industry guidelines. Additionally, Metcalf Bank has a designated compliance officer dedicated to ensuring the bank's fair lending compliance. Metcalf Bank's compliance officer, together with its management, completes an annual compliance risk assessment and participates in compliance monitoring projects, including a project to monitor bank compliance with fair lending. Metcalf Bank hires an independent party to perform the fair lending compliance project.

Since the last examinations of Metcalf Bank, the bank has continued to make efforts to reach and serve the needs of the minority and LMI communities in its assessment area. The bank has enhanced its marketing efforts by increasing its advertising on public transportation and in local publications focused on serving minorities; investing more than \$700,000 in targeted mortgage-backed securities in which all mortgages in the pool are to LMI individuals in the bank's assessment area; and donating funds to support a small-dollar loan program/payday loan alternative initiative, which provides an alternative source of short-term lending, primarily to LMI individuals.

C. Conclusion on Convenience and Needs Considerations

The Board has considered carefully the CRA performance, HMDA data, and fair lending records of Metcalf Bank in light of all public comments received. The Board also has considered carefully all facts of record, including the CRA performance evaluations of the institutions involved, confidential supervisory information, and information provided by Metcalf Bank on the actions and programs it has implemented to meet the credit needs of all its communities. As noted above, Metcalf Bank is the result of a recent merger of three relatively small affiliated banks and a failed savings bank. Based on the locations and sizes of the individual institutions before the merger and the established efforts by Metcalf Bank since the merger, the Board believes that, on balance, the current record of performance of Metcalf Bank in meeting the convenience and needs of its communities is consistent with approval of this proposal. The Board also notes that the proposal would provide customers of the Kansas Branches with a broader array of products and services, including expanded options for loans and additional branch locations.

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

28. The commenters also expressed concern that Metcalf Bank received only a few applications from African Americans, noting that the percentage of their residential mortgage loan applications was significantly less than the population of African Americans within the bank's assessment area.

29. 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.

30. For purposes of this HMDA analysis, a minority census tract is a census tract with a minority population of 51 percent or more.

the CRA performance records of the relevant depository institutions are consistent with approval.

The changes at Metcalf Bank, however, also reflect an opportunity for Metcalf Bank to continue to improve its lending and outreach efforts to residents in LMI communities and minority borrowers in its entire assessment area. Metcalf Bank has outlined several initiatives designed to enable the bank to increase its lending to minority and LMI communities. The bank plans to expand further its specialized advertising to minority and LMI applicants; increase the number of minority and LMI loan applicants by developing more effective systems to track and measure its success in obtaining loan applications from those applicants; and increase community outreach efforts by partnering with organizations that have close ties to minority populations. The Federal Reserve System will continue to monitor and evaluate the lending performance of Metcalf Bank as part of the supervisory process, including assessments of its performance in subsequent examinations.

OTHER CONSIDERATIONS

Metcalf Bank also has applied under section 9 of the FRA to establish and operate branches at the locations of the Kansas Branches. The Board has assessed the factors it is required to consider when reviewing an application under section 9 of the FRA and finds those factors to be consistent with approval.³¹

CONCLUSION

Based on the foregoing and all facts of record, the Board has determined that the applications should be, and hereby are, approved. In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the Bank Merger Act and the FRA. The Board's approval is specifically conditioned on compliance by Metcalf Bank with the conditions imposed in this order, the commitments made to the Board in connection with the applications, and receipt of all other regulatory approvals. For purposes of this action, the conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision herein and, as such, may be enforced in proceedings under applicable law.

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

By order of the Board of Governors, effective September 2, 2010.

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

*Governor Kohn voted before his departure from the Board on September 1, 2010.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

ORDER ISSUED UNDER INTERNATIONAL BANKING ACT

*Banco Davivienda, S.A.
Bogotá Columbia*

Order Approving Establishment of a Branch

Banco Davivienda, S.A. ("Bank"), Bogotá Colombia, 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 Miami, Florida, through the conversion of its wholly owned subsidiary, Bancafé International ("Bancafé"), a corporation organized under section 25A of the Federal Reserve Act (Edge Act corporation).² 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 Miami (*The Miami Herald*, February 10, 2010). The time for filing comments has expired, and the Board has considered all comments received.

Bank, with total consolidated assets of approximately \$12.8 billion,³ is the third largest bank in Colombia by asset size. Sociedades Bolivar S.A. ("Bolivar"), a company whose shares are publicly traded in Colombia, effectively controls Bank through the direct or indirect ownership of more than 62 percent of Bank's outstanding voting shares.⁴ Another group of Colombian companies, collectively known as the "Cusezar Group," owns directly and indirectly approximately 19.1 percent of Bank's total voting shares outstanding. No other shareholder or group of shareholders controls more than 10 percent of Bank's outstanding shares. Bank engages in commercial and retail banking services, and it engages in fund administration, trust, and

1. 12 U.S.C. § 3105(d).

2. 12 U.S.C. § 611 et seq.

3. Unless otherwise indicated, data are as of December 31, 2009.

4. Bolivar owns 9.94 percent of Bank's outstanding shares directly and is the parent company of the bank's largest direct shareholders, Inversiones Financieras Bolivar, S.A.S. and Inversora Anagrama, S.A.S., each of which owns 17.29 percent of Bank's outstanding shares, as well as other direct and indirect shareholders within the Bolivar group of companies. The Fundación Universidad Externado de Colombia, a nonprofit foundation that operates the Universidad Externado de Colombia, an institution of higher education located in Bogotá is the ultimate parent company of Bolivar, owning 26 percent of Bolivar's shares.

31. 12 U.S.C. § 322; 12 CFR 208.6(b).

securities brokerage services through its subsidiaries. In addition, Bank has operations in the United States through Bancafé and in Panama through a wholly owned bank, Bancafé Panama S.A., Panama City.⁵ Bank and its parent companies are qualifying foreign banking organizations under Regulation K.⁶

Bank proposes to establish the branch as a means of continuing and expanding the international banking business currently conducted by Bancafé. Bank intends to use the branch to provide products and services currently offered by Bancafé to a larger customer base. In particular, Bank believes that the proposed branch will enhance its ability to serve the banking needs of the Colombian community in the Miami area and to service international business associated with Colombia. After the establishment of the branch and the transfer of the existing business of Bancafé to the branch, Bancafé would voluntarily liquidate.⁷

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.⁸ The Board may also take into account additional standards as set forth in the IBA and Regulation K.⁹

The IBA includes a limited exception to the general requirement 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 an application by such foreign bank, provided (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. In deciding whether to exercise its discretion to approve an application under this exception, the Board shall also consider whether the foreign bank has adopted and implemented procedures to combat money laundering.¹¹ 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.¹²

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 Colombia, that those banks' home-country authorities were working to establish arrangements for the consolidated supervision of the banks.¹³ Bank is supervised by the Colombian Superintendency of Finance ("Superintendency") on substantially the same terms and conditions as those other banks.

The Colombian government has taken a number of significant steps to combat money laundering. Colombia has enacted legislation to prevent money laundering and has established a regulatory infrastructure to assist in this effort. Colombia has established a Financial Information and Analysis Unit in the Ministry of Finance, which is responsible for gathering and centralizing information from public and private entities in Colombia, as well as analyzing such information. In addition, the Superintendency has issued circulars that require financial institutions to establish systems for the prevention of money laundering.

Colombia participates in international fora that address the issues of asset forfeiture and the prevention of money laundering. Colombia is a party to the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the "Convention"), and the United States has certified that Colombia has taken adequate measures to achieve full compliance with the goals and objectives of the Convention. Colombia also has signed the U.N. Convention against Transnational Organized Crime and is a member of the Organization of American States Inter-American Drug Abuse Control Commission Experts Group to Control Money Laundering. Colombia is not a member of the Financial Action Task Force ("FATF"), although Bank has taken into account FATF's recommendations in developing manuals, internal procedures, and training courses.

Bank has taken measures to ensure compliance with Colombian law and regulations, including implementing policies and procedures related to "know-your-customer" practices, suspicious transaction reporting, record keeping, and employee training.¹⁴ An internal central compliance unit monitors Bank's adherence to these policies and

5. Bank acquired both Bancafé and Bancafé Panama S.A. as part of its acquisition of Granbanco S.A., Bogotá in 2007.

6. 12 CFR 211.23(a).

7. 12 CFR 211.7.

8. 12 U.S.C. § 3105(d)(2); 12 CFR 211.24(c)(1). In assessing this standard, the Board considers, among other factors, the extent to which the home-country supervisors (i) ensure 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. These are indicia of comprehensive, consolidated supervision. 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)(B).

12. *Id.*

13. *Bancolombia S.A.*, 89 *Federal Reserve Bulletin* 234 (2003); *Banco de Bogotá S.A.*, 87 *Federal Reserve Bulletin* 552 (2001).

14. Compliance is mandatory for all offices of the bank, its affiliates, and representative offices.

procedures. In addition, Colombia enacted laws in 2000 and 2006 that provide for the detection, prevention, investigation, and punishment of terrorist financing activities. Further, the Superintendency's predecessor organization issued regulations in 2002 that emphasized financial institutions' obligation to adopt all necessary and effective control mechanisms to avoid being used as a conduit for financing terrorism.

Based on all the facts of record, the Board has determined that Bank's home-country authorities are actively working to establish arrangements for the consolidated supervision of Bank and that considerations relating to the steps taken by Bank and its home country to combat money laundering are consistent with approval under this exemption.

The Board has also taken into account the additional standards set forth in section 7 of the IBA and Regulation K.¹⁵ The Superintendency has no objection to the establishment of the proposed branch.

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

With respect to access to information about Bank's operations, the Board has reviewed the restrictions on disclosure in relevant jurisdictions in which Bank operates

and has communicated with relevant government authorities 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, the Superintendency 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, the Board has 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, Bank's application to establish a branch is hereby approved. 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 Bank to terminate any of its direct or indirect activities in the United States. Approval of this application also is specifically conditioned on Bank's compliance with the conditions imposed in this order and the commitments made to the Board in connection with this application.¹⁶

By order of the Board of Governors, effective September 7, 2010.

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

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

15. See 12 U.S.C. § 3105(d)(3)-(4); 12 CFR 211.24(c)(2). These standards include (i) whether the bank's home-country supervisor has consented to the establishment of the office; (ii) the financial and managerial resources of the bank; (iii) 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; (iv) whether the appropriate supervisors in the home country may share information on the bank's operations with the Board; (v) whether the bank and its U.S. affiliates are in compliance with U.S. law; (vi) the needs of the community; and (vii) the bank's record of operation.

16. The Board's authority to approve the branch 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 Bank's Florida office in accordance with any terms or conditions that it may impose.