



Legal Developments: First Quarter, 2011

Orders Issued under Bank Holding Company Act

Orders Issued under Section 3 of the Bank Holding Company Act

First Niagara Financial Group, Inc.
Buffalo, New York

Order Approving the Acquisition of a Bank Holding Company

First Niagara Financial Group, Inc. (“FNF Group”) and FNFG Merger Sub, Inc. (“FNFG”), a wholly owned subsidiary of FNF Group, both of Buffalo, New York, have requested the Board's approval under section 3 of the Bank Holding Company Act (“BHC Act”)¹ to acquire NewAlliance Bancshares, Inc. (“NewAlliance”) and its subsidiary bank, NewAlliance Bank, both of New Haven, Connecticut.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (75 *Federal Register* 68608 (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.

FNF Group, with total consolidated assets of approximately \$21.1 billion, controls FN Bank, which operates in Pennsylvania and New York. FN Bank is the 10th largest insured depository institution in Pennsylvania, controlling deposits of approximately \$6.9 billion, which represent 2.4 percent of the total amount of deposits of insured depository institutions in that state.³

NewAlliance, with total consolidated assets of \$9 billion, controls NewAlliance Bank, which operates in Connecticut and Massachusetts. NewAlliance Bank is the 6th largest insured depository institution in Connecticut and 67th largest insured depository institution in Massachusetts, controlling deposits of \$4.9 billion and \$380 million, respectively.

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 com-

¹ 12 U.S.C. §1842.

² Specifically, FNF Group has requested approval for FNFG to merge with NewAlliance, with NewAlliance as the surviving entity. After the merger, FNF Group would merge NewAlliance Bank with and into First Niagara Bank, National Association (“FN Bank”), a wholly owned subsidiary of FNF Group. FN Bank has filed an application with the Office of the Comptroller of the Currency pursuant to the Bank Merger Act (12 U.S.C. §1828(c)) to merge with NewAlliance Bank.

³ Deposit data are as of June 30, 2010. In this context, insured depository institutions include commercial banks, savings associations, and savings banks. For the reasons discussed later in this order, Pennsylvania is the home state of FNF Group under the BHC Act.

pany's home state if certain conditions are met. For purposes of the BHC Act, the home state of FNF Group is Pennsylvania,⁴ and NewAlliance is located in Connecticut and Massachusetts.⁵ Based on a review of all the facts of record, including relevant state statutes, the Board finds that the conditions for an interstate acquisition enumerated in section 3(d) of the BHC Act are met in this case.⁶

Competitive Considerations

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

FNF Group and NewAlliance compete directly in the Metropolitan New York banking market (“Metro New York banking market”).⁸ 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 Metro New York banking market (“market deposits”) that they would control,⁹ 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”),¹⁰ and other characteristics of the market.

⁴ 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)).

⁵ 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) and 1842(d)(1)(A) and 1842(d)(2)(B)).

⁶ 12 U.S.C. §§ 1842(d)(1)(A)–(B) and 1842(d)(2)–(3). FNF Group is adequately capitalized and adequately managed, as defined by applicable law. NewAlliance 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, FNF Group 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)). FNF Group also would control less than 30 percent of, and less than the applicable state deposit cap for, the total amount of deposits in insured depository institutions in the relevant states (12 U.S.C. § 1842(d)(2)(B)–(D)). All other requirements of section 3(d) of the BHC Act would be met on consummation of the proposal.

⁷ 12 U.S.C. § 1842(c)(1).

⁸ Formally designated the Metropolitan New York–New Jersey–Connecticut–Pennsylvania banking market, the market is defined as Bronx, Dutchess, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster, and Westchester counties, New York; Bergen, Essex, Hudson, Hunterdon, Middlesex, Mercer, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, Union, and Warren counties, New Jersey; Monroe and Pike counties, Pennsylvania; and Fairfield County, Bridgewater, Canaan, Cornwall, Kent, New Milford, North Canaan, Roxbury, Salisbury, Sharon, Warren, and Washington townships, including the cities of Cornwall Bridge, Falls Village, Lakeville, Marble Dale, New Preston, Salisbury, and Washington Depot in Litchfield County, and Ansonia, Beacon Falls, Derby, Milford, Oxford, and Seymour townships in New Haven County, all in Connecticut.

⁹ Deposit and market share data are based on data reported by insured depository institutions in the summary of deposits data as of June 30, 2010, 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).

¹⁰ 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

Consummation of the proposal would be 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 unconcentrated, as measured by the HHI, and numerous competitors would remain in the banking market.¹¹

The DOJ has advised the Board that consummation of the proposal is not likely to have a significantly adverse competitive effect in the Metro New York banking market. The 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, Managerial, and Other Supervisory Considerations

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and banks involved in the proposal and certain other supervisory factors.¹² The Board has carefully considered these factors in light of all the facts of record, including supervisory and examination information received from the relevant federal and state supervisors of the organizations involved in the proposal and other available financial information, including information provided by FNF Group.

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

The Board has considered carefully the proposal under the financial factors. FNF Group, NewAlliance, and their subsidiary depository institutions are well capitalized and would remain so on consummation of the proposal. The proposed transaction is structured as a partial share exchange and a partial cash purchase of shares. FNF Group will use existing resources to fund the cash purchase of shares.¹³ Based on its review of the record, the Board also finds that FNF Group has sufficient financial resources to effect the proposal.

The Board also has considered the managerial resources of the organizations involved and of the proposed combined organization. The Board has reviewed the examination records of FNF Group, NewAlliance, and their subsidiary depository institutions, including assess-

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

¹¹ FNF Group operates the 207th largest depository organization in the market, controlling deposits of approximately \$91 million, which represent less than 1 percent of market deposits. NewAlliance controls \$339 million in deposits, which represents less than 1 percent of market deposits. After consummation, FNF Group would become the 109th largest depository organization in the market, controlling deposits of approximately \$430 million, which represent less than 1 percent of market deposits. The HHI would remain unchanged for the Metro New York banking market.

¹² 12 U.S.C. § 1842(c)(2) and (3).

¹³ FNF Group has issued almost \$1 billion in common equity since late 2008.

ments of their management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences and those of the other relevant bank supervisory agencies with the organizations and their records of compliance with applicable banking law, including anti-money-laundering laws. FNF Group and its subsidiary depository institution are considered to be well managed. The Board also has considered FNF Group's plans for implementing the proposal, including the proposed management after consummation of the proposal.

Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources and future prospects of the organizations involved in the proposal are consistent with approval, as are the other supervisory factors under the BHC Act.¹⁴

Convenience and Needs and CRA Performance Considerations

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

The CRA requires the federal financial supervisory agencies to encourage insured depository institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation, and requires the appropriate federal financial supervisory agency to take into account a relevant depository institution's record of meeting the credit needs of its entire community, including low- and moderate-income ("LMI") neighborhoods, in evaluating bank expansionary proposals.

The Board has considered carefully all the facts of record, including reports of examination of the CRA performance records of the subsidiary banks of FNF Group and NewAlliance, data reported by FNF Group and NewAlliance under the Home Mortgage Disclosure Act ("HMDA"),¹⁶ other information provided by FNF Group, confidential supervisory information, and public comments received on the proposal. The Board received several comments expressing concern that the acquisition would reduce the availability of credit to LMI individuals, small businesses, and home buyers in New Haven. Commenters also expressed concerns about FN Bank's overall CRA record and its lending record to minorities.

A. CRA Performance Evaluation

As provided in the CRA, the Board evaluates the record of performance of an institution in light of examinations by the appropriate federal supervisors of the CRA performance records of the relevant institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process because it repre-

¹⁴ A commenter expressed concern about the level of compensation and severance paid to NewAlliance management and its board of directors. Compensation paid in the past to officials of an institution being acquired is not a factor related to the financial resources of the applicant, which is the focus of the standards of review under the BHC Act. The Board has reviewed the financial resources of the applicant in light of the financial condition of NewAlliance. The Board also reviewed the severance proposal in the context of the financial condition of NewAlliance and the Board's guidance on incentive compensation. As noted above, FNF Group has sufficient resources to complete the transaction as proposed and will remain well capitalized after consummation of the proposal. Moreover, the interests of NewAlliance management and its board have been disclosed to the shareholders of both NewAlliance and FNF Group.

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

¹⁶ 12 U.S.C. § 2801 et seq.

sents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.¹⁷

FN Bank received a “satisfactory” rating under the CRA at its most recent performance evaluation by the Office of Thrift Supervision (“OTS”),¹⁸ as of March 12, 2007 (“2007 Evaluation”).¹⁹ The Federal Deposit Insurance Corporation rated NewAlliance Bank “outstanding” after its most recent CRA evaluation, as of December 8, 2008. FNF Group has represented that, after the acquisition of NewAlliance Bank, the combined organization will offer an expanded range of additional middle-market lending products and enhanced cash-management services, including in the communities served by NewAlliance Bank.²⁰

CRA Performance of FN Bank. In the 2007 Evaluation, examiners considered FN Bank’s overall lending performance to be acceptable. Examiners reported that the bank’s distribution of HMDA-reportable mortgage loans among areas of different income levels was reasonable, and they commended FN Bank for using flexible and innovative mortgage loan programs to help make credit available to LMI individuals and businesses within its assessment areas. In addition, examiners reported that the bank’s practice of extending loans to businesses with gross annual revenues \$1 million or less, as well as making loans in small dollar amounts, was excellent throughout its assessment areas. Examiners also noted in the 2007 Evaluation that FN Bank’s level of community development lending was very good.

During the evaluation period, FN Bank made more than 5,000 small business loans²¹ totaling \$830.4 million and was one of the largest Small Business Administration lenders in western New York. FN Bank’s community development lending during the evaluation period totaled approximately \$151 million. Since the 2007 Evaluation, FN Bank has maintained a reasonable level of home mortgage, small business, and community development lending. In 2009, the bank originated more than 4,200 HMDA-reportable home mortgage loans totaling approximately \$618.4 million and more than 3,100 small business loans totaling \$449.3 million throughout its assessment areas. FNF Group has stated that FN Bank extended more than \$506 million in community development loans, originated \$89 million in multifamily loans, and extended more than \$1 billion in small business loans since 2007. To complement its community development and multifamily lending activities, FN Bank is an active participant with the Federal Home Loan Bank of New York in providing grant funding to nonprofit housing agencies that develop affordable housing. FN Bank also has

¹⁷ See *Interagency Questions and Answers Regarding Community Reinvestment*, 75 *Federal Register* 11642 at 11665 (2010).

¹⁸ FN Bank was a federal savings bank that converted to a national bank on April 9, 2010.

¹⁹ The evaluation period in the 2007 Evaluation was 2004–2006. One commenter asserted that FNF Group’s previous acquisitions had resulted in a decline in the CRA performance of the acquired depository institutions, specifically citing a decline in the Albany-Schenectady-Troy, New York Metropolitan Statistical Area. FNF Group entered the Albany-Schenectady-Troy market with two acquisitions in 2004 and 2005. The Board notes that the evaluation period covered FNF Group’s initial entry into the Albany-Schenectady-Troy market and that FN Bank would not have had sufficient time to implement its programs in the area before the examination. The 2007 Evaluation notes that the acquisitions greatly expanded FN Bank’s operations, resulting in significant changes to the bank’s business profile.

²⁰ One commenter requested that FN Bank set forth a definitive plan to ensure that it would continue to serve the credit needs of the communities served by NewAlliance. FNF Group has stated that it does not plan any reduction in products or services available to NewAlliance’s communities. FN Bank also has set forth an enhanced CRA plan for the combined organization. The Board consistently has stated that neither the CRA nor the federal banking agencies’ CRA regulations require depository institutions to make pledges or enter into commitments or agreements with any organization and that the enforceability of any such third-party pledges, initiatives, and agreements are matters outside the CRA. See *Bank of America Corporation*, 90 *Federal Reserve Bulletin* 217, 232–33 (2004). Instead, the Board focuses on the existing CRA performance record of an applicant and the programs that an applicant has in place to serve the credit needs of its assessment areas at the time the Board reviews a proposal under the convenience and needs factor.

²¹ In this context, “small business loans” are loans with original amounts of \$1 million or less that are secured by nonfarm, nonresidential properties or are commercial and industrial loans to borrowers in the United States.

provided funding for 29 affordable housing projects throughout its assessment areas, totaling \$6.6 million, to build more than 600 units of affordable housing. FN Bank is a qualified participant for programs conducted by the Pennsylvania Housing Finance Agency and has tripled its volume in federal and state mortgage programs (such as Federal Housing Administration, Veterans Affairs, and New York and Pennsylvania Housing Finance Agency programs) by increasing its percentage of loans originated under such programs from 6.4 percent of total loans in 2007 to more than 19 percent in 2009.

In the 2007 Evaluation, examiners reported that FN Bank consistently demonstrated strong performance under the investment test, noting that its performance was outstanding in the majority of its assessment areas.²² FN Bank represents that it began participating in low-income-housing tax programs in 2010 and has committed \$25 million toward such programs. The bank invested in a nonprofit organization that promotes housing growth in economically challenged areas as well as apartments that qualify for low-income-housing tax credits.

Examiners commended FN Bank's service performance throughout its assessment areas in the 2007 Evaluation. Examiners reported that the bank's retail delivery systems were generally good and that its distribution of branches among geographies of different income levels was adequate.²³ Examiners also commended FN Bank for its community development services, which typically responded to the needs of the communities served by the bank throughout its assessment areas.

CRA Performance of NewAlliance Bank. As noted, NewAlliance Bank received an overall "outstanding" rating in its 2008 Evaluation ("NewAlliance 2008 Evaluation").²⁴ Under the lending test, NewAlliance Bank received a "high satisfactory" rating, and the examiners reported that the bank's distribution of loans among borrowers of different income levels showed excellent responsiveness to the credit needs of LMI borrowers and small businesses. They reported that the bank's overall lending levels reflected good responsiveness to its assessment areas' credit needs.

Examiners reported that NewAlliance Bank was a leader in making community development loans. During the evaluation period, the bank originated 70 community development loans totaling \$102.2 million. Examiners noted that the quality and quantity of such lending reflected a high degree of responsiveness to the economic development, affordable housing, and community service needs of the assessment areas.

NewAlliance Bank received an "outstanding" rating under the investment test in the NewAlliance 2008 Evaluation. Examiners commended NewAlliance Bank's leadership role in providing a significant level of qualified community development investments and grants throughout its assessment areas. Examiners also commended the bank's extensive use of innovative investments to support community development initiatives.

In the NewAlliance 2008 Evaluation, the bank received an "outstanding" rating under the service test. Examiners found that NewAlliance Bank's services were accessible to all portions of the assessment areas and that the bank provided good access to banking services for LMI communities. Examiners also reported that the bank's employees, officers, and

²² One commenter expressed concern about FN Bank's amount of charitable donations. FN Bank represented that it has a record of providing significant corporate philanthropic donations in all the communities it serves. The Board notes that neither the CRA nor the agencies' implementing rules require institutions to engage in charitable giving.

²³ Since the evaluation period, FN Bank added five branches to LMI census tracts.

²⁴ The evaluation period in the NewAlliance 2008 Evaluation was 2005–2008.

directors have been active in providing community development services to community organizations and individuals and in providing financial education to area residents and businesses.

B. HMDA and Fair Lending Record

The Board also has considered the lending data reported under HMDA²⁵ for 2007, 2008, and 2009 by, and the fair lending records of, FN Bank and NewAlliance Bank in light of a public comment on the proposal. One commenter alleged, based on 2008 and 2009 HMDA data, that FN Bank's lending to African American borrowers lagged behind the lending records of other lenders in several of the assessment areas served by the bank. The commenter also criticized the lending by NewAlliance Bank to African Americans and Hispanics in certain assessment areas.

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 FN Bank and NewAlliance Bank are excluding or imposing higher costs on any group on a prohibited basis. The Board recognizes that HMDA data alone, even with the recent addition of pricing information, provide only limited information about the covered loans.²⁶ 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.

Accordingly, the Board has taken into account other information, including examination reports that provide on-site evaluations of compliance with fair lending laws by FNF Group, NewAlliance, and their subsidiaries. In addition, the Board has considered information provided by FNF Group about its compliance-risk-management systems.

The Board previously has reviewed FNF Group's record and concluded that it has taken steps to ensure compliance with fair lending and other consumer protection laws and regulations.²⁷ The Board found that FNF Group had policies and procedures to help ensure compliance with all fair lending and consumer protection laws applicable to its lending activities, and those policies and procedures will apply to the combined institution on consummation of the proposal. FNF Group's compliance program includes annual training of lending personnel, regular fair lending analyses, and oversight and monitoring of consumer lending functions. FNF Group represented to the Board that it performs quarterly loan file assessments to monitor compliance with lending laws and regulations. In addition, mortgage loan applications slated for denial undergo a second review to ensure complete and careful treatment of loan applicants and to prevent discriminatory lending practices. FN Bank also implemented a formal complaint-resolution process managed by the bank's vice president for customer relations.

²⁵ The Board has reviewed the HMDA and CRA data reported by FN Bank and NewAlliance Bank. Each bank's lending in its combined assessment areas, its headquarters' assessment area (the Buffalo, New York Metropolitan Statistical Area for FN Bank and the New Haven, Connecticut Metropolitan Statistical Area for NewAlliance Bank), as well as assessment areas of interest to the commenters, were reviewed.

²⁶ 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.

²⁷ *First Niagara Financial Group, Inc.*, 96 *Federal Reserve Bulletin* B7 (2010).

Based on a review of the entire record and for the reasons discussed above, including the consultations with the appropriate supervisors, the Board has concluded that considerations relating to convenience and needs and the CRA performance records of FN Bank and NewAlliance Bank are consistent with approval of the proposal.²⁸

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the application under section 3 of the BHC Act should be, and hereby is, approved.²⁹ In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act. The Board's approval is specifically conditioned on compliance by FNF Group with all the conditions imposed in this order and all the commitments made to the Board in connection with the application and on the receipt of all other required regulatory approvals for the proposal. These conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The 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, effective March 31, 2011.

Voting for this action: Chairman Bernanke, Vice Chair Yellen, and Governors Duke, Tarullo, and Raskin. Absent and not voting: Governor Warsh.

Robert deV. Frierson
Deputy Secretary of the Board

The Goldman Sachs Group, Inc.
New York, New York

Order Approving Retention of Shares of a Bank

The Goldman Sachs Group, Inc. (“Goldman”), a financial holding company within the meaning of the Bank Holding Company Act (“BHC Act”), has requested the Board’s

²⁸ Some commenters expressed concern that the proposed acquisition would result in a loss of jobs. The effect of a proposed transaction on employment in a community is not among the factors that the Board is authorized to consider under the BHC Act, and the federal banking agencies, courts, and the Congress consistently have interpreted the convenience and needs factor to relate to the effect of a proposal on the availability and quality of banking services in a community. *See, e.g., Wells Fargo & Company*, 82 *Federal Reserve Bulletin* 445, 457 (1996).

²⁹ Some commenters also requested that the Board hold a public meeting or hearing on the proposal. Section 3(b) of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authorities for the bank to be acquired make a timely written recommendation of denial of the application (12 CFR 225.16(e)). The Board has not received such a recommendation from the appropriate supervisory authorities. Under its regulations, the Board also may, in its discretion, hold a public meeting or hearing on an application to acquire a bank if a meeting or hearing is necessary or appropriate to clarify factual issues related to the application and to provide an opportunity for testimony (12 CFR 262.3(e) and 262.25(d)). The Board has considered carefully the commenters' requests in light of all the facts of record. In the Board's view, the commenters have had ample opportunity to submit views and, in fact, submitted written comments that the Board has considered carefully in acting on the proposal. The requests fail to identify disputed issues of fact that are material to the Board's decision that would be clarified by a public meeting or hearing. For these reasons, and based on all the facts of record, the Board has determined that a public meeting or hearing is not required or warranted in this case. Accordingly, the requests for a public meeting or hearing on the proposal are denied.

approval under section 3 of the BHC Act¹ to retain 9.8 percent of the outstanding common stock of Avenue Financial Holdings, Inc. (“Avenue”) and thereby indirectly retain voting shares of Avenue Bank, both of Nashville, Tennessee.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (74 *Federal Register* 48,970 (2009)). The time for filing comments has expired, and the Board has considered the proposal and all comments received in light of the factors set forth in section 3 of the BHC Act.³

Goldman, with total consolidated assets of approximately \$911 billion, engages in investment and commercial banking, securities underwriting and dealing, asset management, trading, and other activities both in the United States and overseas. Goldman controls Goldman Sachs Bank USA (“GS Bank”), New York, New York, a state member bank that operates branches in New York and Salt Lake City, Utah. GS Bank has total assets of approximately \$89 billion and controls deposits of approximately \$32 billion.⁴ Avenue Bank, with total assets of approximately \$589 million, controls deposits of \$480 million and operates only in Tennessee.⁵

Noncontrolling Investment

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

¹ 12 U.S.C. § 1842.

² Avenue Bank’s predecessor was Planters Bank of Tennessee, Maury City, Tennessee. Avenue was formed in 2006, acquired the bank in 2007, changed its name to Avenue Bank, and moved its headquarters to Nashville. Goldman holds the shares of Avenue through an indirect subsidiary, Goldman Sachs Investment Partners Master Fund, L.P., a Cayman Islands limited partnership. The fund acquired the shares in Avenue’s private equity offering as a passive investment.

³ A commenter noted that the Board waived public notice of Goldman’s application to become a bank holding company in September 2008. The Board’s order approving the application explains the basis for this waiver. *The Goldman Sachs Group, Inc.*, 94 *Federal Reserve Bulletin* C101 (2008) (“*Goldman Order*”).

⁴ Asset and deposit data are as of December 31, 2010.

⁵ In acting on Goldman’s application to become a bank holding company, the Board determined that emergency conditions existed that justified the Board’s expeditious action. *Goldman Order*, C101. In light of those emergency conditions and Goldman’s status as a minority investor in Avenue, Goldman was permitted to file a retroactive application to retain the Avenue shares.

⁶ Although the acquisition of less than a controlling interest in a bank or bank holding company is not a normal acquisition for a bank holding company, the requirement in section 3(a)(3) of the BHC Act that the Board’s approval be obtained before a bank holding company acquires more than 5 percent of the voting shares of a bank suggests that Congress contemplated the acquisition by bank holding companies of between 5 percent and 25 percent of the voting shares of banks. See 12 U.S.C. § 1842(a)(3). On this basis, the Board previously has approved the acquisition by a bank holding company of less than a controlling interest in a bank or bank holding company. See, e.g., *Penn Bancshares, Inc.*, 92 *Federal Reserve Bulletin* C37 (2006) (acquisition of up to 24.89 percent of the voting shares of a bank holding company); *S&T Bancorp Inc.*, 91 *Federal Reserve Bulletin* 74 (2005) (acquisition of up to 24.9 percent of 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).

⁷ These commitments are set forth in the appendix.

ments also include certain restrictions on the business relationships of Goldman with Avenue.

Based on these considerations and all the other facts of record, the Board has concluded that Goldman would not acquire control of, or have the ability to exercise a controlling influence over, Avenue through the proposed retention of Avenue voting shares. The Board notes that the BHC Act requires Goldman to file an application and receive the Board's approval before the company could directly or indirectly acquire additional shares of Avenue or attempt to exercise a controlling influence over Avenue.⁸

Competitive Considerations

The Board has considered carefully the competitive effects of the proposal in light of all the facts of the record. Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market. The BHC Act also prohibits the Board from approving a bank acquisition that would substantially lessen competition in any relevant banking market, unless the Board finds that the anticompetitive effects of the proposal are clearly outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.⁹

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

Financial, Managerial, and Supervisory Considerations

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

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

The Board has carefully considered the financial factors of the proposal. Goldman, GS Bank, Avenue, and Avenue Bank are well capitalized. Goldman acquired its ownership

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

⁹ 12 U.S.C. §1842(c)(1).

interest in Avenue before becoming a bank holding company and used existing cash resources to effect the acquisition.

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

On April 16, 2010, the Securities and Exchange Commission (“SEC”) brought a civil action against Goldman and one of its vice presidents for allegedly defrauding investors by misstating and omitting key facts about a collateralized debt obligation (“CDO”) transaction it marketed in 2007, before becoming a bank holding company in September 2008. The CDO transaction involved subprime mortgages, and the marketing occurred as the U.S. housing market was beginning to decline. On July 14, 2010, Goldman settled the action with the SEC. As part of the settlement, Goldman acknowledged that its CDO marketing materials contained incomplete information. Goldman agreed to a settlement penalty of \$550 million and to certain undertakings with respect to its business practices for the offering of residential mortgage-backed securities that were designed to ensure that written marketing materials for such offerings are not misleading and do not contain any material misstatement.¹⁰

The Board has reviewed the SEC action and settlement and actions taken by Goldman to improve its risk-management processes. In May 2010, Goldman announced the creation of a “Business Standards Committee” to conduct an overall review of the firm’s business standards. In January 2011, the committee concluded an eight-month review of Goldman’s business standards and issued a report of its findings and recommended reforms, including reforms designed to improve the transparency of communication and disclosure with regard to Goldman’s risk-management structure, culture, and processes. As part of its ongoing supervision of Goldman’s implementation of risk-management and regulatory compliance systems since becoming a bank holding company, the Board will continue to assess Goldman’s implementation and maintenance of the committee’s recommendations and its business standards and risk-management practices.¹¹ In addition, the Board will continue to review Goldman’s risk-management controls and processes for monitoring investments in other banking organizations and for complying with all regulatory requirements associated with such investments.

Based on all the facts of record, the Board has concluded that the financial and managerial resources and future prospects of Goldman, Avenue, and their subsidiaries are consistent with approval of this application, as are the other supervisory factors the Board must consider under section 3 of the BHC Act.

Convenience and Needs Considerations

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

¹⁰ *Sec. and Exch. Comm’n v. Goldman, Sachs & Co.*, 10-CV-3229 (BSJ) (S.D.N.Y. 2010). The total penalty included \$250 million in restitution to investors and \$300 million in penalties to the SEC.

¹¹ In connection with the continuous supervision of Goldman’s regulatory compliance systems, Board staff is also monitoring all new developments in certain ongoing investigations by several state authorities regarding Goldman’s participation in municipal bond markets.

Community Reinvestment Act (“CRA”).¹² The CRA requires the federal financial supervisory agencies to encourage insured depository institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation, and requires the appropriate federal financial supervisory agency to take into account a relevant depository institution's record of meeting the credit needs of its entire community, including low- and moderate-income (“LMI”) neighborhoods, in evaluating banking proposals.¹³

The Board has considered carefully all the facts of record, including the reports of examination of the CRA performance records of Goldman's subsidiary insured depository institution and Avenue Bank, data reported by Goldman and Avenue Bank under the Home Mortgage Disclosure Act (“HMDA”),¹⁴ as well as other information provided by Goldman, confidential supervisory information, and public comment received on the proposal. A commenter expressed concern about Goldman's involvement in subprime lending, including the activities of Litton Loan Servicing L.P. (“Litton”), a loan servicing subsidiary of GS Bank. The commenter also alleged, based on HMDA data, that Avenue Bank had engaged in disparate treatment of minority individuals in home mortgage lending.

A. CRA Performance Evaluations

As provided in the CRA, the Board has considered the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance record of Goldman's insured depository institution. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.¹⁵

GS Bank was formed in November 2008 through the merger of Goldman's existing Utah industrial bank into its New York limited-purpose trust company, with the surviving organization doing business as Goldman Sachs Bank USA. GS Bank has not been evaluated under the CRA by the Federal Reserve Bank of New York; however, its industrial bank predecessor with the same name received a CRA composite rating of “satisfactory” at its most recent CRA performance evaluation by the Federal Deposit Insurance Corporation (“FDIC”), as of June 16, 2008. Avenue Bank received an “outstanding” rating at its most recent CRA performance evaluation by the FDIC, as of June 29, 2010.

B. HMDA and Compliance with Fair Lending and Other Consumer Protection Laws

The Board has carefully considered the fair lending records and HMDA data of Goldman and Avenue in light of public comments received on the proposal. The commenter alleged, based on 2008 HMDA data, that Avenue Bank in the Nashville Metropolitan Statistical Area (“MSA”) made a disproportionately small number of prime-rate loans to African American borrowers seeking home mortgage refinancing loans. The Board's analysis of the lending-related allegations included a review of 2008 and 2009 HMDA data reported by Avenue Bank, which originates prime residential mortgage loans, and of the bank's 2008 and 2009 HMDA lending data in its combined CRA assessment areas.¹⁶

¹² 12 U.S.C. §§2901–2908; 12 U.S.C. §1842(c)(2).

¹³ 12 U.S.C. §2903.

¹⁴ 12 U.S.C. §§2801–2810.

¹⁵ See *Interagency Questions and Answers Regarding Community Reinvestment*, 75 *Federal Register* 11642 at 11665 (2010).

¹⁶ The bank's 2008 combined CRA assessment areas consisted of portions of the Davidson and Williamson counties in the Nashville MSA, Chester County in the Jackson, Tennessee MSA, and Crockett County, a non-MSA Tennessee county.

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 Avenue Bank is excluding or imposing higher costs on any racial or ethnic group on a prohibited basis. The Board recognizes that HMDA data alone, even with the recent addition of pricing information, provide only limited information about the covered loans.¹⁷ HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution has engaged in illegal lending discrimination.

The Board is nevertheless concerned when HMDA data for an institution indicate disparities in lending and believes that all 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 should conduct mortgage lending operations that are free of 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 Avenue's subsidiary insured depository institution with fair lending laws. The Board also has consulted with the FDIC, Avenue Bank's primary federal supervisor. In addition, the Board has considered information provided by Avenue about its compliance risk-management systems.

The record of this application, including confidential supervisory information, indicates that Avenue Bank has taken steps to ensure compliance with fair lending and other consumer protection laws and regulations. Avenue Bank's loan policies include a comprehensive fair lending policy that prohibits Avenue Bank and its employees from engaging in discriminatory lending practices. The bank's lending employees are required to participate in training that includes compliance with fair lending laws and other applicable laws and regulations for accepting, underwriting, and processing consumer credit applications. Avenue Bank's credit committee reviews monthly a summary of every consumer loan application for adherence to fair lending requirements. Additionally, Avenue Bank hires an independent party to perform fair lending compliance reviews.

The commenter also expressed concern about the subprime lending practices of Goldman and Litton.¹⁸ Litton services subprime loans originated by third parties but does not originate or purchase any residential mortgage loans. It also has no role in the lending practices of the residential mortgage originators.¹⁹ Goldman has represented that Litton conducts quality control testing to ensure compliance with its internal policies and procedures, as

¹⁷ The data, for example, do not account for the possibility that an institution's outreach efforts may attract a larger proportion of marginally qualified applicants than other institutions attract and do not provide a basis for an independent assessment of whether an applicant who was denied credit was, in fact, creditworthy. In addition, credit history problems, excessive debt levels relative to income, and high loan amounts relative to the value of the real estate collateral (reasons most frequently cited for a credit denial or higher credit cost) are not available from HMDA data.

¹⁸ The commenter also expressed concern about Goldman's involvement in residential mortgage securitization. Goldman has represented that it does not currently make warehouse loans to originators of nontraditional mortgages, originate nontraditional mortgages, or purchase them from originators for purposes of securitization. Goldman also represented that it does not refer customers to any subprime mortgage lender.

¹⁹ The commenter expressed concern about subprime loans originated by Fremont Investment and Loan ("Fremont") that the commenter has alleged were acquired by Litton. Fremont was a subprime lender whose parent, Fremont General, filed for bankruptcy in 2008. Litton acquired the servicing rights for loans originated by Fremont but did not acquire ownership of the loans and was not involved in originating them.

well as the applicable consumer protection laws and regulations, and reports the results to Goldman monthly. In addition, Goldman's internal audit function monitors compliance by Litton and other subsidiaries with applicable consumer protection laws.

The Federal Reserve is conducting an in-depth review of practices at Litton and other large mortgage servicers, including a review of internal controls and processes related to all aspects of servicer operations. The Federal Reserve has supervisory authority over bank holding companies and their nonbank subsidiaries and may take supervisory or other actions in connection with those reviews, as the Board determines to be appropriate. In addition, as part of its supervisory process, the Board will continue to monitor the operations of Litton as well as other Goldman subsidiaries to ensure that their processes and procedures comply with applicable consumer protection laws and regulations.

C. Conclusion on Convenience and Needs and CRA Performance

The Board has carefully considered all the facts of record, including evaluations of the CRA performance records of GS Bank and Avenue Bank, information provided by Goldman and Avenue Bank, comments received on the proposal, and confidential supervisory information. Based on a review of the entire record, including the noncontrolling nature of the investment, the Board concludes that considerations relating to the convenience and needs factor and the CRA performance records of the relevant insured depository institutions are consistent with approval.

Conclusion

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

By order of the Board of Governors, effective March 11, 2011.

Voting for this action: Chairman Bernanke, Vice Chair Yellen, and Governors Duke, Tarullo, and Raskin. Absent and not voting: Governor Warsh.

Robert deV. Frierson
Deputy Secretary of the Board

²⁰ 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 those authorities. Under its rules, the Board also may, in its discretion, hold a public meeting or hearing on an application to acquire a bank if necessary or appropriate to clarify material factual issues related to the application and to provide an opportunity for testimony (12 CFR 225.16(e), 262.25(d)). The Board has considered carefully the 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

Passivity Commitments

The Goldman Sachs Group, Inc. (“Goldman Sachs”), New York, New York, and its subsidiaries and affiliates (collectively, the “Goldman Sachs Group”), will not, without the prior approval of the Board or its staff, directly or indirectly:

1. Exercise or attempt to exercise a controlling influence over the management or policies of Avenue Financial Holdings Inc. (“Avenue Financial”), Nashville, Tennessee, or any of its subsidiaries;
2. Have or seek to have more than one representative of the Goldman Sachs Group serve on the board of directors of Avenue Financial or any of its subsidiaries;
3. Permit any representative of the Goldman Sachs Group who serves on the board of directors of Avenue Financial or any of its subsidiaries to serve (i) as the chairman of the board of directors of Avenue Financial or any of its subsidiaries, (ii) as the chairman of any committee of the board of directors of Avenue Financial or any of its subsidiaries, (iii) as a member of any committee of the board of directors of Avenue Financial or any of its subsidiaries if the Goldman Sachs Group representative occupies more than 25 percent of the seats on the committee, or (iv) as a member of any committee of the board of directors of Avenue Financial or any of its subsidiaries with the authority to act on behalf of the full board of directors between formal meetings;
4. Have or seek to have any employee or representative of the Goldman Sachs Group serve as an officer, agent, or employee of Avenue Financial or any of its subsidiaries;
5. Take any action that would cause Avenue Financial or any of its subsidiaries to become a subsidiary of Goldman Sachs;
6. Own, control, or hold with power to vote securities that (when aggregated with securities that the officers and directors of the Goldman Sachs Group own, control, or hold with power to vote) represent 25 percent or more of any class of voting securities of Avenue Financial or any of its subsidiaries;
7. Own or control equity interests that would result in the combined voting and nonvoting equity interests of the Goldman Sachs Group and its officers and directors to equal or exceed 25 percent of the total equity capital of Avenue Financial or any of its subsidiaries, except that, if the Goldman Sachs Group and its officers and directors own, hold, or have the power to vote less than 15 percent of the outstanding shares of any class of voting securities of Avenue Financial, the Goldman Sachs Group and its officers and directors may own or control equity interests greater than 25 percent, but in no case more than 33.3 percent, of the total equity capital of Avenue Financial or any of its subsidiaries;
8. Propose a director or slate of directors in opposition to a nominee or slate of nominees proposed by the management or board of directors of Avenue Financial or any of its subsidiaries;
9. Enter into any agreement with Avenue Financial or any of its subsidiaries that substantially limits the discretion of Avenue Financial's management over major policies and decisions, including, but not limited to, policies or decisions about employing and compensating executive officers; engaging in new business lines; raising additional debt or equity capital; merging or consolidating with another firm; or acquiring, selling, leasing, transferring, or disposing of material assets, subsidiaries, or other entities;
10. Solicit or participate in soliciting proxies with respect to any matter presented to the shareholders of Avenue Financial or any of its subsidiaries;
11. Dispose or threaten to dispose (explicitly or implicitly) of equity interests of Avenue Financial or any of its subsidiaries in any manner as a condition or inducement of specific action or non-action by Avenue Financial or any of its subsidiaries; or
12. Enter into any other banking or nonbanking transactions with Avenue Financial or any of its subsidiaries, except that the Goldman Sachs Group may establish and main-

tain deposit accounts with Avenue Financial, provided that the aggregate balance of all such deposit accounts does not exceed \$500,000 and that the accounts are maintained on substantially the same terms as those prevailing for comparable accounts of persons unaffiliated with Avenue Financial.

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

Goldman Sachs understands that these commitments constitute conditions imposed in writing in connection with the Board’s findings and decisions in Goldman Sachs’s application to retain 9.8 percent of the outstanding common stock of Avenue Financial, pursuant to section 3(a)(3) of the BHC Act, and, as such, may be enforced in proceedings under applicable law. Goldman Sachs further understands that it generally must file an application and receive prior approval of the Board, pursuant to section 3(a)(3) of the BHC Act, for any subsequent acquisition of control of voting shares of Avenue Financial that would result in Goldman Sachs, directly or indirectly, owning or controlling additional voting shares in excess of 9.8 percent of the outstanding common shares of Avenue Financial.

Order Issued under Sections 3 and 4 of the Bank Holding Company Act

Chuo Mitsui Trust Holdings, Inc.
Tokyo, Japan

Order Approving the Acquisition of a Bank Holding Company and Notice to Engage in Nonbanking Activities

Chuo Mitsui Trust Holdings, Inc. (“CMTH”), a corporation organized under the laws of Japan, has requested the Board’s approval under section 3 of the Bank Holding Company Act (“BHC Act”)¹ to become a bank holding company by acquiring The Sumitomo Trust & Banking Co., Ltd. (“STB”), Osaka, Japan, a bank organized under the laws of Japan and a bank holding company under the BHC Act, thereby indirectly acquiring Sumitomo Trust and Banking Co. (U.S.A.) (“STBUS”), Hoboken, New Jersey, a wholly owned subsidiary of STB. In addition, CMTH has requested the Board’s approval under sections 4(c)(8) and 4(j) of the BHC Act and section 225.28 of the Board’s Regulation Y² to retain a CMTH subsidiary and to acquire nonbanking companies of STB and thereby engage in certain permissible nonbanking activities.³

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (75 *Federal Register* 80501 (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 sections 3 and 4 of the BHC Act.

¹ 12 U.S.C. §1842.

² 12 U.S.C. §§1843(c)(8) and 1843(j); 12 CFR 225.28.

³ These nonbanking activities are providing financial and investment advisory activities, in accordance with section 225.28(b)(6) of the Board’s Regulation Y (12 CFR 225.28(b)(6)). Specifically, CMTH has requested approval (i) to retain indirect control of all the voting and equity interests of Chuo Mitsui Investments, Inc. (“CMI”), New York, New York, and (ii) to acquire indirect control of (a) approximately 99 percent of the voting and equity interests of Nikko AM Americas Holding Co., Inc. (“NAHC”), New York, New York, a wholly owned subsidiary of Nikko Asset Management Co., Ltd., Tokyo, of which STB directly owns approximately 99 percent of the voting and equity interests, and (b) approximately 99 percent of the voting and equity interests of Nikko Asset Management Americas, Inc., New York, New York, a wholly owned subsidiary of NAHC (together with NAHC, the “Nikko U.S. Entities”). STB has previously received approval to control the Nikko U.S. Entities and thereby engage in investment advisory activities in the United States. Letter dated September 29, 2009, from Natasha Kosoff, Staff Director, Federal Reserve Bank of New York, to William J. Sweet, Esq.

The transaction will be effected through an exchange of shares (“Share Exchange”) after which CMTH will become the sole shareholder of STB and the indirect shareholder of all the outstanding shares of common stock of STBUSA. Upon consummation of the Share Exchange, CMTH will change its name to Sumitomo Mitsui Trust Holdings, Inc.⁴

CMTH, with total consolidated assets of \$161.1 billion, is the sixth largest banking group in Japan.⁵ Through its subsidiaries, CMTH primarily engages in trust and banking businesses and other financial services in Japan and conducts certain asset management operations in the United States, the United Kingdom, and Hong Kong SAR. The Chuo Mitsui Trust and Banking Company, Limited, Tokyo (“CMTB”), a wholly owned subsidiary of CMTH, accounts for a substantial majority of CMTH's assets. CMTB maintains a representative office in New York, New York,⁶ but has no other U.S. banking operations.

STB, with total consolidated assets of \$245.6 billion, is a registered bank holding company that primarily engages in trust and banking businesses and other financial services in Japan and conducts commercial banking, asset management or custodial operations in the United States, the United Kingdom, the People's Republic of China, Hong Kong SAR, Singapore, and Luxembourg. STBUSA, with total assets of \$1.3 billion, is a state-chartered bank in New Jersey that is insured by the Federal Deposit Insurance Corporation. STBUSA offers custodial and securities lending services primarily for Japanese institutional investors and their overseas branches and affiliates.

Competitive Considerations

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

In addition to operating STBUSA, STB engages in banking operations in the United States through a branch in New York, New York. CMTH does not currently control a U.S. insured depository institution. Based on all the facts of record, the Board concludes that consummation of the proposal would not have any significantly adverse effects on competition and that the competitive factors are consistent with approval.

Financial, Managerial, and Other Supervisory Considerations

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and banks involved in the proposal and certain other supervisory factors.⁸ The Board also reviews the financial and managerial resources of the organizations involved in a proposal under section 4 of the BHC Act.⁹ The

⁴ As a result of the Share Exchange, three Japanese trust banks, STB, CMTB, and Chuo Mitsui Asset Trust and Banking Company, Limited, will be wholly owned subsidiaries of CMTH. CMTH and STB intend that these three banks will be merged on April 1, 2012, with STB as the surviving entity. The combined subsidiary will be renamed Sumitomo Mitsui Trust Bank, Limited.

⁵ Data are as of December 31, 2010, unless otherwise noted.

⁶ See *The Chuo Mitsui Trust & Banking Co., Ltd.*, 86 *Federal Reserve Bulletin* 702 (2000).

⁷ 12 U.S.C. § 1842(c)(1).

⁸ 12 U.S.C. § 1842(c)(2) and (3).

⁹ 12 CFR 225.26(b).

Board has carefully considered these factors in light of all the facts of record, including supervisory and examination information received from the relevant federal and state supervisors of the organizations involved, and publicly reported and other available information, including information provided by CMTH. The Board also has consulted with the Japanese Financial Services Agency (“FSA”), the agency with primary responsibility for the supervision and regulation of Japanese banking organizations, including CMTH and STB.¹⁰

In evaluating financial factors in proposals involving bank holding companies, the Board reviews the financial condition of the applicants and the target depository institutions. In assessing financial resources, the Board consistently has considered capital adequacy to be especially important. The Board also evaluates the financial condition of the pro forma organization, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction.

The Board has carefully considered the proposal under the financial factors. The capital levels of CMTH exceed the minimum levels that would be required under the Basel Capital Accord and are considered to be equivalent to the capital levels that would be required of a U.S. banking organization. In addition, STBUSA is well capitalized and would remain so on consummation. Based on its review of the record, the Board also finds that CMTH has sufficient financial resources to effect the proposal. As noted, the proposed transaction is structured as a share exchange.

The Board also has considered the managerial resources of the organizations involved and the proposed combined organization. The Board has reviewed the examination records of STBUSA, including assessments of its management, risk-management systems, and operations. As noted, the Board has also consulted with the FSA. In addition, the Board has considered its supervisory experiences and those of the other relevant bank supervisory agencies with the organizations and their records of compliance with applicable banking law, including anti-money-laundering laws.

Based on all the facts of record, the Board has concluded that considerations relating to the managerial resources and future prospects of the organizations involved are consistent with approval.

Section 3 of the BHC Act also provides that the Board may not approve an application involving a foreign bank unless the bank is subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in the bank’s home country.¹¹ The Board has determined that other banks in Japan were subject to home-country supervision on a consolidated basis.¹² STB is supervised by the FSA on substantially the same terms and conditions as those other Japanese banks. Based on all the facts of record, the

¹⁰ The FSA approved CMTH’s application to acquire STB on March 1, 2011.

¹¹ 12 U.S.C. § 1842(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 regulation. See 12 CFR 211.24(c)(1).

¹² See, e.g., *Mizuho Financial Group, Inc.*, 89 *Federal Reserve Bulletin* 181 (2003); *Mitsubishi Tokyo Financial Group, Inc.*, 87 *Federal Reserve Bulletin* 349 (2001); *Sumitomo Bank Ltd.*, 83 *Federal Reserve Bulletin* 54 (1997); and *Sumitomo Bank Ltd.*, 82 *Federal Reserve Bulletin* 369 (1996).

Board has determined that STB is subject to comprehensive supervision on a consolidated basis by its home-country supervisor.¹³

In evaluating this proposal, the Board also considered whether CMTH 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.¹⁴ As noted, the FSA is the supervisor of Japanese banking organizations, including holding companies such as CMTH.¹⁵ As such, the FSA may conduct inspections of CMTH and its subsidiaries and require CMTH to submit reports about its operations on a consolidated basis. The FSA also may review transactions between CMTH and its subsidiaries and has authority to require CMTH to take measures necessary to ensure the safety and soundness of the CMTH organization. Based on all the facts of record, the Board has determined that CMTH is subject to comprehensive supervision on a consolidated basis by its appropriate home-country authorities for purposes of this application.¹⁶

Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources and future prospects of the organizations involved in the proposal are consistent with approval, as are the other supervisory factors under the BHC Act.¹⁷

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board is required to consider the effects of the proposal on the convenience and needs of the communities to be served,¹⁸ including, where applicable, the records of performance of the relevant insured depository institutions under the Community Reinvestment Act (“CRA”).¹⁹ STBUSA is a special-pur-

¹³ The Board also has previously found that CMTH's subsidiary Japanese bank is subject to comprehensive supervision on a consolidated basis by its home-country supervisor. See *The Chuo Mitsui Trust & Banking Co., Ltd.*, 86 *Federal Reserve Bulletin* 702 (2000).

¹⁴ *China Investment Corporation*, 96 *Federal Reserve Bulletin* B31 (2010).

¹⁵ See, e.g., *Mitsubishi UFJ Financial Group, Inc.*, 95 *Federal Reserve Bulletin* B34 (2009); *Mitsubishi Tokyo Financial Group, Inc.*, 87 *Federal Reserve Bulletin* 349 (2001).

¹⁶ 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 CMTH operates and has communicated with relevant government authorities concerning access to information. In addition, CMTH 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 and other applicable federal law. CMTH also has committed to cooperate with the Board to obtain any waivers or exemptions that may be necessary to enable its affiliates to make any such information available to the Board. In light of these commitments, the Board has concluded that CMTH has provided adequate assurances of access to any appropriate information the Board may request.

¹⁷ A commenter asserted that both CMTH and STB have been involved in the subprime and predatory lending industries in the United States and that the proposal could increase such activities in the combined organization. Neither CMTH nor STB engages in any retail lending activities in the United States (including subprime lending). Although both Japanese banking organizations incurred losses before 2009 on subprime-related investments, current financial reports show that both CMTH and STB significantly reduced their holdings in these investments.

The commenter also made several allegations that are outside the limited statutory factors that the Board is authorized to consider when reviewing an application under the BHC Act. See, e.g., *The Royal Bank of Scotland Group plc*, 90 *Federal Reserve Bulletin* 87, 88 n.16 (2004); *The Royal Bank of Scotland Group plc*, 89 *Federal Reserve Bulletin* 386, 389 n.26 (2003); *Western Bancshares, Inc. v. Board of Governors*, 480 F.2d 749 (10th Cir. 1973).

¹⁸ 12 U.S.C. § 1842(c)(2).

¹⁹ 12 U.S.C. § 2901 et seq.

pose bank exempt from performance evaluations under the CRA.²⁰ Upon consummation of the proposal, STBUSA would continue to operate as a special-purpose bank and provide global custody and securities lending services as part of a larger organization. Based on a review of the entire record, the Board has concluded that convenience and needs considerations are consistent with approval of the proposal.

Nonbanking Activities

CMTH also has filed a notice under sections 4(c)(8) and 4(j) of the BHC Act to retain its ownership interest in CMI, to indirectly acquire the Nikko U.S. Entities, and to engage in nonbanking activities that are permissible for bank holding companies.²¹ The Board has previously determined by regulation that the financial and investment advisory activities for which CMTH has requested approval are closely related to banking for purposes of section 4(c)(8) of the BHC Act.²² As part of its evaluation of the public interest factors under section 4(j) of the BHC Act, the Board also must determine that the operations of CMI and the Nikko U.S. Entities “can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.”²³

The Board has considered the competitive effects of CMTH's proposed retention of CMI and acquisition of STB's nonbanking subsidiaries and activities in light of all the facts of record. CMI and STB both engage in financial and investment advisory services in the United States. The geographic market for financial and investment advisory services in the United States is regional or national in scope, with numerous competitors. CMI and the Nikko U.S. Entities compete directly only to a limited extent. Moreover, it is expected that CMI will be liquidated in the third quarter of 2011. As a result, the Board finds that consummation of the proposal would have a minimal effect on competition for these services.

In addition, the Board has reviewed the public benefits of the proposed acquisition. Consummation of the proposal would strengthen the organization and would result in benefits to current and future customers of the U.S. nonbanking operations. For the reasons discussed above, and based on the entire record, the Board has determined that the conduct of the proposed nonbanking activities within the framework of Regulation Y and Board precedent is not likely to result in significantly adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.

Based on all the facts of record, the Board has concluded that consummation of the proposal can reasonably be expected to produce public benefits that would outweigh any likely adverse effects. Accordingly, the Board has determined that the balance of the public benefits under the standard of section 4(j)(2) of the BHC Act is consistent with approval.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the application and notice 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 con-

²⁰ 12 CFR 345.11(c)(3).

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

²² 12 CFR 225.28(b)(6).

²³ 12 U.S.C. § 1843(j)(2)(A).

sider under the BHC Act. The Board's approval is specifically conditioned on compliance by CMTH with all the commitments made to the Board in connection with the application and notice and on the receipt of all other required regulatory approvals for the proposal. The Board's approval of the proposed nonbanking activities is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c),²⁴ and to the Board's authority to require such modification or termination of the activities of a bank holding company or any of its subsidiaries as the Board finds necessary to ensure compliance with, and to prevent evasion of, the provisions of the BHC Act and the Board's regulations and orders issued thereunder. These conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

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

By order of the Board of Governors, effective March 15, 2011.

Voting for this action: Chairman Bernanke, Vice Chair Yellen, and Governors Duke, Tarullo, and Raskin. Absent and not voting: Governor Warsh.

Robert deV. Frierson
Deputy Secretary of the Board

²⁴ 12 CFR 225.7 and 225.25(c).