



Legal Developments: Third Quarter, 2012

Orders Issued Under Bank Holding Company Act

Order Issued Under Section 3 of the Bank Holding Company Act

Old National Bancorp
Evansville, Indiana

Order Approving Acquisition of a Bank Holding Company
FRB Order No. 2012-9 (August 30, 2012)

Old National Bancorp (“ONB”), Evansville, Indiana, has requested the Board’s approval under section 3 of the Bank Holding Company Act (“BHC Act”) ¹ to acquire Indiana Community Bancorp (“ICB”) and thereby indirectly acquire its subsidiary bank, Indiana Bank and Trust Company (“IBTC”), both of Columbus, Indiana. Immediately following the proposed acquisition, IBTC would be merged into ONB’s subsidiary bank, Old National Bank (“ONBK”), Evansville.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (77 *Federal Register* 33460 (2012)). 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.

ONB, with total consolidated assets of approximately \$8.6 billion, is the 113th largest insured depository organization in the United States, controlling approximately \$6.7 billion in deposits.³ ONBK, ONB’s only insured subsidiary depository institution, operates in Illinois, Indiana, Kentucky, and Ohio.⁴ ONBK is the fourth largest depository institution in Indiana, controlling deposits of approximately \$4.6 billion, which represent approximately 4.7 percent of the total amount of deposits of insured depository institutions in that state.⁵

ICB, with total consolidated assets of approximately \$968 million, controls IBTC, which operates only in Indiana. IBTC is the 25th largest insured depository institution in Indiana, controlling approximately \$860 million in deposits. On consummation of this proposal, ONB would remain the fourth largest insured depository organization in Indiana, controlling deposits of approximately \$5.6 billion, which represent approximately 5.6 percent of the total amount of deposits of insured depository institutions in the state.

¹ 12 U.S.C. §1842.

² The merger of IBTC into ONBK is subject to approval by the Office of the Comptroller of the Currency under the Bank Merger Act.

³ National deposit, asset, and ranking data are as of March 31, 2012, and are updated to reflect mergers through that date. In this context, insured depository institutions include commercial banks, savings associations, and savings banks.

⁴ ONB owns all of the capital stock of ONBK.

⁵ State deposit, asset, and ranking data are as of June 30, 2011.

Competitive Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market. The BHC Act also prohibits the Board from approving a proposal that would substantially lessen competition in any relevant banking market unless the anticompetitive effects of the proposal are clearly outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.⁶

ONB and ICB have subsidiary depository institutions that compete directly in the Louisville, Kentucky banking market and in the Indiana banking markets of Indianapolis and Seymour.⁷ The Board has reviewed the competitive effects of the proposal in 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 in the markets (“market deposits”) controlled by ONB and ICB,⁸ the concentration levels of market deposits and the increase in those levels as measured by the Herfindahl-Hirschman Index (“HHI”) under the Department of Justice Merger Guidelines (“DOJ Guidelines”),⁹ and other characteristics of the markets.

A. Banking Markets within Established Guidelines

Consummation of the proposal would be consistent with Board precedent and within the DOJ Guidelines in the Indianapolis¹⁰ and Louisville¹¹ banking markets. On consummation of the proposal, both markets would remain moderately concentrated, as measured by the HHI, and a number of competitors would remain in each banking market.¹²

⁶ 12 U.S.C. § 1842(c)(1).

⁷ The Louisville banking market encompasses Salem, Indiana, where ITBC has a branch. ITBC has operations only in Indiana.

⁸ Deposit and market share data are as of June 30, 2011, updated to reflect mergers through June 4, 2012, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. *See, e.g., Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift deposits in the market share calculation on a 50 percent weighted basis. *See, e.g., First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991).

⁹ Under the DOJ Guidelines, a market is considered 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 by more than 200 points. Although the DOJ and the Federal Trade Commission issued revised Horizontal Merger Guidelines in 2010, the DOJ has confirmed that its guidelines for bank mergers or acquisitions, 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.

¹⁰ The Indianapolis banking market is defined as Boone, Hamilton, Hancock, Hendricks, Johnson, Marion, Morgan, and Shelby Counties, Indiana; and Green Township in Madison County, Indiana.

¹¹ The Louisville banking market is defined as Bullitt, Henry, Jefferson, Meade, Nelson, Oldham, Shelby, and Spencer Counties, Kentucky; the Bedford census county division in Trimble County, Kentucky; the Fort Knox and West Point census county divisions and the cities of Vine Grove and Radcliff in Hardin County, Kentucky; the city of Irvington in Breckinridge County, Kentucky; Clark, Floyd, Harrison, and Washington Counties, Indiana; and Crawford County, Indiana (excluding Patoka Township). Although the Louisville market is located primarily in Kentucky, it also includes Salem, Indiana, where IBTC operates a branch and competes directly with ONBK.

¹² In the Indianapolis banking market, ONBK would remain the tenth largest depository institution, controlling deposits of \$738.3 million, representing approximately 2.4 percent of market deposits. The HHI would increase by 1 point to 1409, and 42 other competitors would remain in the market. In the Louisville banking market,

B. Banking Market Exceeding Established Guidelines

ONB and ICB compete directly in the Seymour banking market.¹³ This market warrants a detailed review of the competitive effects of the proposal because the concentration level on consummation would exceed the threshold levels in the DOJ Guidelines.

ONBK is the seventh largest of ten insured depository institutions in the Seymour banking market, controlling deposits of approximately \$29.8 million, which represent approximately 4 percent of market deposits. IBTC is the second largest insured depository institution in the market, controlling deposits of approximately \$190.6 million, which represent approximately 25.5 percent of market deposits. On consummation, ONB would become the largest insured depository organization in the market. The HHI would increase by 203 points to 2107, and the pro forma market share of the combined entity would be approximately 29.5 percent.

After consummation of the proposal, eight other commercial bank competitors would remain, some with a significant presence in the market. The second largest bank competitor in the market would control 27.6 percent of market deposits, and four other bank competitors in the market each would control between 5 percent and 17 percent of market deposits.

In addition, one active community credit union in the Seymour banking market, Centra Credit Union, offers a wide range of consumer products, operates street-level branches, and has broad membership criteria that include most of the market's residents.¹⁴ Accordingly, the Board has concluded that the activities of this credit union exert a competitive influence that mitigates, in part, the potential effects of the proposal.

Centra Credit Union controls approximately \$18.3 million in deposits in the market that, on a 50 percent weighted basis, represents approximately 2.4 percent of market deposits. After inclusion of these deposits, ONB would control approximately 28.8 percent of market deposits, and the HHI would increase by 193 points to 2103, an increase that is within DOJ Guidelines.

C. View of Other Agencies and Conclusion on Competitive Considerations

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

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

ONBK would become the 24th largest depository institution, controlling deposits of approximately \$136.8 million, representing less than 1 percent of market deposits. The HHI would remain unchanged at 972, and 44 other competitors would remain in the market.

¹³ The Seymour banking market is defined as Jackson County, Indiana.

¹⁴ The Board previously has considered competition from certain active credit unions as a mitigating factor. See, e.g., *The PNC Financial Services Group, Inc.*, 93 *Federal Reserve Bulletin* C65 (2007); *Regions Financial Corporation*, 93 *Federal Reserve Bulletin* C16 (2007); *Wachovia Corporation*, 92 *Federal Reserve Bulletin* C183 (2006); and *F.N.B. Corporation*, 90 *Federal Reserve Bulletin* 481 (2004).

Other Section 3(c) Considerations

Section 3(c) of the BHC Act requires the Board to take into consideration a number of other factors in acting on bank acquisition applications. Those factors include the financial and managerial resources (including consideration of the competence, experience, and integrity of the officers, directors, and principal shareholders) and future prospects of the company and banks concerned; the effectiveness of the company in combatting money laundering; the convenience and needs of the community to be served; and the extent to which the proposal would result in greater or more concentrated risks to the stability of the United States banking or financial system. The Board has considered all these factors and, as described below, has determined that they are consistent with approval of the application. The review was conducted in light of all the facts of record, including supervisory and examination information from various U.S. banking supervisors of the institutions involved, publicly reported and other financial information, and information provided by ONB.

A. Financial, Managerial, and Other Supervisory Considerations

In evaluating financial factors in expansionary proposals by banking organizations, the Board reviews the financial condition of the organizations involved on both a parent-only and consolidated basis, as well as the financial condition of the subsidiary 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. The Board evaluates the financial condition of the combined organization, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction. The Board also considers the ability of the organization to absorb the costs of the proposal and the proposed integration of the operations of the institutions. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important.

The Board has considered the financial factors of the proposal. ONB and ONBK are well capitalized and would remain so on consummation of the proposed acquisition. The proposed transaction is a bank holding company merger, structured as a share exchange. Asset quality and earnings prospects are consistent with approval, and ONB appears to have adequate resources to absorb the costs of the proposal and the proposed integration of the institutions' operations. Based on its review of the record, the Board finds that ONB 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 ONB, ONBK, ICB, and IBTC, including assessments of their management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences and those of other relevant bank supervisory agencies with the organizations and their records of compliance with applicable banking and anti-money-laundering laws. The Board also has considered ONB's plans for implementing the proposal, including the proposed management after consummation of the proposal. In addition, the Board has considered the future prospects of the organizations involved in the proposal in light of the financial and managerial resources and the proposed business plan.

ONB and ONBK each are considered to be well managed. ONB would implement its risk-management policies, procedures, and controls at the combined organization. In addition, ONB's management has the experience and resources to ensure that the combined organization operates in a safe and sound manner. Furthermore, ONB has demonstrated a

record of successfully integrating other banking organizations into its operations and risk-management systems after acquisitions.

On June 4, 2012, ONBK entered into a Stipulation and Consent to the Issuance of a Consent Order (the “Consent Order”) with the Office of the Comptroller of the Currency (“OCC”) relating to deficiencies in ONBK’s overall program for Bank Secrecy Act/anti-money-laundering (“BSA/AML”) compliance. The Consent Order requires ONBK to, among other things, take the following actions: develop and implement a comprehensive BSA action plan, including an effective institution-wide BSA risk-assessment program that accurately identifies BSA/AML risks; ensure that ONBK management reviews, updates, and implements its risk-based processes to obtain and analyze appropriate customer due diligence information to monitor for and investigate suspicious activity; ensure adherence to a written program of internal controls for appropriate identification, analysis, and monitoring of transactions with greater than normal risk; maintain an effective BSA independent testing function; ensure and maintain sufficient personnel with requisite expertise and skills; and ensure adherence to a comprehensive BSA/AML training program.

ONBK’s BSA/AML program deficiencies were identified by the OCC in early 2011. Since that time, ONBK has devoted significant time and resources toward improving its BSA/AML program and has made substantial progress towards fully addressing program weaknesses. Major advancements to correct the deficiencies include the following steps: the purchase and installation of a new transaction-monitoring system; an enhanced BSA Risk Assessment for all ONBK activities and products; strengthening of ONBK’s core BSA/AML management teams by hiring employees experienced in those areas; enhancements to customer due diligence processes; and enhancement and supplementation of the BSA/AML expertise, staffing, and methodologies within ONBK’s Internal Audit function. ONBK expects to complete its corrective actions in the third quarter of 2012.

The Board has consulted with the OCC, the responsible federal banking agency for ONBK, concerning this proposal. The OCC has confirmed that ONBK has taken corrective actions to address the matters described in the Consent Order. The OCC also has confirmed that the weaknesses identified related to policies and procedures and that there was no evidence of money laundering or other unlawful activities at ONBK. The OCC supports the proposal and does not believe that the acquisition will detract the bank from fully addressing its remaining BSA weaknesses in a timely manner. Furthermore, ONB has committed to the Board that it will fully address and resolve all BSA/AML weaknesses and violations identified in the Consent Order and that until such time as they have been fully addressed, ONB will provide quarterly progress reports to the Federal Reserve Bank of St. Louis.

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 are consistent with approval.

B. Convenience and Needs 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 community to be served and take into account the records of the relevant depository institutions under the Community Reinvestment Act (“CRA”).¹⁵ The CRA requires federal financial supervisory agencies to encourage insured depository institutions to help meet the credit needs of the local commu-

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

nities in which they operate, consistent with their safe and sound operation,¹⁶ and requires the appropriate federal financial supervisory agency to take into account a relevant depository institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, in evaluating bank expansionary proposals.¹⁷

The Board has considered the convenience and needs factor and the CRA performance records of ONBK and IBTC in light of all the facts of record. As provided in the CRA, the Board evaluates the record of performance of an institution in light of examinations by the appropriate federal supervisors of the CRA performance records of the relevant institutions.¹⁸ ONBK received a "satisfactory" rating at its most recent CRA performance evaluation by the OCC, as of June 30, 2008, and IBTC received a "satisfactory" rating at its most recent CRA performance evaluation by the Federal Reserve Bank of St. Louis, as of August 4, 2008.

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

C. Financial Stability

The Board has also considered information relevant to the risks to the stability of the United States banking or financial system. The proposed investment represents a *de minimis* transaction for financial stability purposes, and the proposed transaction would not materially increase the interconnectedness or complexity of ONB. The Board, therefore, concludes that financial stability considerations in this proposal are consistent with approval.

Based on all the facts of record, including those described above, the Board has determined that all the factors it must consider under section 3(c) of the BHC Act 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 ONB with all the conditions imposed in this order and the commitments made to the Board in connection with the application, including receipt of all required 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 proposal may not be consummated before the fifteenth calendar day after the effective date of this Order, or later than three months thereafter, unless such period is extended for good cause by the Board or the Federal Reserve Bank of St. Louis, acting pursuant to delegated authority.

¹⁶ 12 U.S.C. § 2901(b).

¹⁷ 12 U.S.C. § 2903.

¹⁸ The Interagency Questions and Answers Regarding Community Reinvestment provide that 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. *75 Federal Register* 11642 at 11665 (2010).

By order of the Board of Governors, effective August 30, 2012.

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

Margaret McCloskey Shanks
Associate Secretary of the Board

Order Issued Under Section 4 of the Bank Holding Company Act

BB&T Corporation

Winston-Salem, North Carolina

Order Approving the Acquisition of a Savings Association
FRB Order No. 2012-8 (July 31, 2012)

BB&T Corporation (“BB&T”), a financial holding company within the meaning of the Bank Holding Company Act (“BHC Act”), has requested the Board’s approval under sections 4(c)(8) and 4(j) of the BHC Act and section 225.24 of the Board’s Regulation Y¹ to acquire all the voting shares of BankAtlantic, a subsidiary federal savings association of BankAtlantic Bancorp, Inc. (“BA Bancorp”), a savings and loan holding company, both of Fort Lauderdale, Florida.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published in the *Federal Register* (77 *Federal Register* 1072 (January 9, 2012)) and the time for filing comments has expired. The Board has considered all comments received on the proposal.³

BB&T, with total consolidated assets of approximately \$174.8 billion, is the 18th largest depository organization in the United States, as measured by asset size.⁴ BB&T is the eighth largest depository organization in the United States, as measured by deposits, and controls deposits of approximately \$142.4 billion, which represent approximately 1.58 percent of the total amount of deposits of insured depository institutions in the United States. BB&T controls two insured depository institutions, Branch Bank and BB&T Financial,

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

² Immediately following the proposed acquisition, BankAtlantic would be merged into BB&T’s lead subsidiary bank, Branch Banking and Trust Company (“Branch Bank”) (total assets of \$168.9 billion), also of Winston-Salem. That merger proposal is subject to approval by the Federal Deposit Insurance Corporation (“FDIC”) under the Bank Merger Act and by the North Carolina Banking Commission (“State”) under state law. The State approved the merger on March 14, 2012, and the FDIC approved the merger on July 16, 2012, conditioned on the Federal Reserve’s approval of this notice.

³ During the application process, BB&T restructured its original proposal, which would have resulted in BA Bancorp retaining its obligation to pay its Trust Preferred Securities (“TPS”) holders. TPS holders objected to this proposal, contending that (a) the manner in which the proposal was structured was illegal; (b) the proposed transaction violated BA Bancorp’s obligations to its creditors and exposed BA Bancorp, BankAtlantic, and BB&T to litigation; (c) the proposed transaction would be inconsistent with sound prudential regulation; and (d) the proposed compensation structure would permit insiders to exploit the banking system and evade prudential regulation. The first three of these comments uniquely related to the original proposal and are no longer relevant in light of the restructured proposal. The comment on compensation as well as objections (b) and (c) were also formally withdrawn after the restructured proposal was submitted.

⁴ National deposit, asset, and ranking data are as of December 31, 2011, and include mergers through that date. In this context, insured depository institutions include commercial banks, savings associations, and savings banks.

F.S.B. (“FSB”), Columbus, Georgia.⁵ Branch Bank operates branches in Alabama, Florida, Georgia, Indiana, Kentucky, Maryland, North Carolina, South Carolina, Tennessee, Texas, Virginia, West Virginia, and the District of Columbia. In Florida, Branch Bank is the fifth largest depository institution, controlling deposits of approximately \$12.6 billion.⁶

BA Bancorp, with total consolidated assets of \$3.8 billion, controls BankAtlantic, which operates only in Florida.⁷ BankAtlantic is the 17th largest depository institution in Florida, controlling deposits of approximately \$3.5 billion.

On consummation of the proposal, BB&T would become the 17th largest depository organization in the United States, with total consolidated assets of approximately \$178.6 billion. BB&T would control deposits of approximately \$145.9 billion, which represent 1.63 percent of the total amount of deposits of insured depository institutions in the United States.

Interstate and Deposit Cap Analyses

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1601 (2010) (“Dodd-Frank Act”), amended section 4 of the BHC Act to prohibit the Board from approving an application by a bank holding company to acquire an insured depository institution, including a savings association, if the home state of the insured depository institution is a state other than the home state of the bank holding company, and the applicant controls or would control more than 10 percent of the total amount of deposits of insured depository institutions in the United States (“nationwide deposit cap”).⁸ The nationwide deposit cap was intended to help guard against undue concentrations of economic power.⁹ For purposes of the BHC Act, the home state of BB&T is North Carolina, and the home state of BankAtlantic is Florida.¹⁰

Based on the latest available data reported by all insured depository institutions in the United States, the total amount of deposits of insured depository institutions is \$8.9 trillion.¹¹ On consummation of the proposed transaction, BB&T would control approximately 1.63 percent of the total amount of deposits in insured depository institutions in the

⁵ Branch Bank is BB&T’s largest subsidiary depository institution, as measured by both assets and deposits. FSB, a federal savings bank, offers, primarily through the Internet, credit card and merchant services, consumer and commercial outdoor equipment loans, marine and recreational vehicle loans, retail auto loans, and prepaid card products.

⁶ State deposit, asset, and ranking data are as of June 30, 2011.

⁷ BA Bancorp, in turn, is controlled by BFC Financial Corporation, Inc., a publicly traded savings and loan holding company.

⁸ Dodd-Frank Act § 623(b), codified at 12 U.S.C. § 1843(i)(8). For a detailed discussion of the nationwide deposit cap, see *Bank of America Corporation/LaSalle*, (order dated Sept. 14, 2007), 93 *Federal Reserve Bulletin* C109, C109-C110 (3rd Quar. 2007); *Bank of America Corporation/Fleet*, (order dated Mar. 8, 2004), 90 *Federal Reserve Bulletin* 217, 219-220 (Spring 2004) (“Fleet Order”).

⁹ See Fleet Order at 219.

¹⁰ 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). For a federal savings association, the home state is the state in which the home office of the savings association is located. 12 U.S.C. § 1841(o)(4)(E).

¹¹ Deposit data are calculated based on reports filed by insured depository institutions and are as of December 31, 2011. Each bank insured by the FDIC in the United States must report data regarding its total deposits in accordance with the definition of “deposit” under the Federal Deposit Insurance Act, 12 U.S.C. § 1813 (l), on the institution’s Consolidated Report of Condition and Income. Each insured savings association similarly must report its total deposits on the institution’s Thrift Financial Report. Deposit data for FDIC-insured U.S. branches of foreign banks and federal branches of foreign banks are obtained from the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks. These data are reported quarterly to the FDIC and are publicly available.

United States. Accordingly, in light of all the facts of record, the Board is not prohibited from approving the proposal under section 4(j) of the BHC Act.

Factors Governing Board Review of the Transaction

The Board previously has determined by regulation that the operation of a savings association by a bank holding company is closely related to banking for purposes of section 4(c)(8) of the BHC Act.¹² The Board requires that savings associations acquired by bank holding companies or financial holding companies conform their direct and indirect activities to those permissible for bank holding companies under section 4(c)(8) of the Act.¹³ BB&T has committed that all the activities of BankAtlantic will conform to those activities that are permissible under section 4 of the BHC Act and Regulation Y within the act's two-year conformance period after the acquisition.

Section 4(j)(2)(A) of the BHC Act requires the Board to consider whether the proposed acquisition of BankAtlantic "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, unsound banking practices, or risk to the stability of the United States banking or financial system."¹⁴ As part of its evaluation of those factors, the Board reviews the financial and managerial resources of the companies involved, the effect of the proposal on competition in the relevant markets, the risk to the stability of the United States banking or financial system, and the public benefits of the proposal.¹⁵ In acting on a notice to acquire a savings association, the Board also reviews the records of performance of the relevant insured depository institutions under the Community Reinvestment Act ("CRA").¹⁶

Competitive Considerations

As part of the Board's consideration of the factors under section 4 of the BHC Act, the Board has considered the competitive effects of BB&T's acquisition of BankAtlantic in light of all the facts of record. BB&T and BankAtlantic compete directly in three banking markets, all in Florida: Fort Pierce Metropolitan Statistical Area ("Fort Pierce"), Miami-Fort Lauderdale-Pompano Metropolitan Statistical Area ("Miami-Fort Lauderdale-Pompano"), and West Palm Beach Metropolitan Statistical Area ("West Palm Beach").¹⁷ The Board has reviewed 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 markets, the relative shares of total deposits in

¹² 12 CFR 225.28(b)(4)(ii).

¹³ A savings association operated by a bank holding company may engage only in activities that are permissible for bank holding companies under section 4(c)(8) of the BHC Act. 12 CFR 225.28(b)(4)(ii).

¹⁴ 12 U.S.C. §1843(j)(2)(A). Section 604(e) of the Dodd-Frank Act added "risk to the stability of the United States banking or financial system" to the list of possible adverse effects.

¹⁵ See 12 CFR 225.26; see, e.g., *Bank of America Corporation/Countrywide*, (order dated June 5, 2008), 94 *Federal Reserve Bulletin* C81 (2nd Quar. 2008); *Wachovia Corporation*, (order dated Sept. 29, 2006), 92 *Federal Reserve Bulletin* C138 (3rd Quar. 2006); *BancOne Corporation*, (order dated May 14, 1997), 83 *Federal Reserve Bulletin* 602 (1997).

¹⁶ 12 U.S.C. § 2901 *et seq.* In assessing the merger proposal of BankAtlantic into Branch Bank under the Bank Merger Act, the FDIC is required to take into consideration the same factors that are reviewed by the Board under the BHC Act, including the effects of the acquisition on financial stability and on the convenience and needs of the community to be served. 12 U.S.C. § 1828(c)(5).

¹⁷ Fort Pierce is defined as St. Lucie County and Martin County (excluding the towns of Indiantown and Hobe Sound). Miami-Fort Lauderdale-Pompano is defined as Broward and Miami-Dade Counties. West Palm Beach is defined as Palm Beach County east of Loxahatchee and the towns of Indiantown and Hobe Sound in Martin County.

depository institutions in the markets (“market deposits”) controlled by BB&T and BankAtlantic, the concentration levels of market deposits as measured by the Herfindahl-Hirschman Index (“HHI”) under the Department of Justice Merger Guidelines (“DOJ Guidelines”),¹⁸ and other characteristics of the markets.

Consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Guidelines in each of the three banking markets. On consummation of the proposal, one market would remain unconcentrated, and two markets would remain moderately concentrated, all as measured by the HHI. The changes in the HHI’s measure of concentration would be minimal, and numerous competitors would remain in all three banking markets.¹⁹

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

Based on all the facts of record, the Board concludes that consummation of the proposed transaction would not have a significantly adverse effect on competition or on the concentration of resources in any relevant banking market and is consistent with approval.

Financial and Managerial Resources

The Board has considered the financial and managerial resources of BB&T, its subsidiaries, and BankAtlantic and the effect of the transaction on those resources, in light of confidential reports of examination, other supervisory information from the primary federal supervisor of the organizations involved in the proposal, publicly reported and other financial information, information provided by BB&T and BankAtlantic, and other relevant information. The Board also consulted with the FDIC, the primary federal supervisor of BB&T’s lead subsidiary depository institution, Branch Bank, and the Office of the Comptroller of the Currency (“OCC”), the primary federal supervisor of BankAtlantic and FSB.

In evaluating financial resources in expansionary proposals by banking organizations, the Board reviews the financial condition of the organizations involved on both a parent-only and consolidated basis, as well as the financial condition of the subsidiary insured depository institutions and the organizations’ significant nonbanking operations. In this

¹⁸ Under the DOJ Guidelines, a market is considered unconcentrated if the post-merger HHI is under 1000, moderately concentrated if the post-merger HHI is between 1000 and 1800, and highly concentrated if the post-merger HHI exceeds 1800. The Department of Justice (“DOJ”) has informed the Board that a bank merger or acquisition generally will not be challenged (in the absence of other factors indicating anticompetitive effects) unless the post-merger HHI is at least 1800 and the merger increases the HHI by more than 200 points. The DOJ has stated that the higher-than-normal HHI thresholds for screening bank mergers and acquisitions for anticompetitive effects implicitly recognize the competitive effects of limited-purpose and other nondepository financial entities. Although the DOJ and the Federal Trade Commission recently issued revised Horizontal Merger Guidelines, the DOJ has confirmed that its guidelines for bank mergers or acquisitions, 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.

¹⁹ The HHI would decrease in each market as follows: 18 points to 1013 in Fort Pierce, 3 points to 703 in Miami-Fort Lauderdale-Pompano, and 11 points to 1009 in West Palm Beach. Those decreases result from a pre-merger weighting of BankAtlantic’s market deposits at 50 percent and a post-merger weighting at 100 percent. See *Norwest Corporation*, 78 *Federal Reserve Bulletin* 452 (1992); *First Banks, Inc.*, 76 *Federal Reserve Bulletin* 669 (1990) (deposits of thrifts are included in pre-merger market share calculations on a 50 percent weighted basis but included at 100 percent in the calculation of pro forma market share because the deposits would be acquired by a commercial banking organization). The resulting pro forma shares of BB&T’s market deposits would be as follows: 4.9 percent in Fort Pierce, 4.0 percent in Miami-Fort Lauderdale-Pompano, and 4.5 percent in West Palm Beach.

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 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 also considers the ability of the organization to absorb the costs of the proposal and the proposed integration of the operations of the institutions.

The Board has considered the financial factors of the proposal. BB&T's regulatory capital ratios are well above the minimums required of well-capitalized bank holding companies and would remain so on consummation of the proposal. BB&T's subsidiary depository institutions are well capitalized and would remain so after consummation. BB&T would acquire approximately \$2.1 billion in loans and assume approximately \$3.3 billion in deposits from BankAtlantic, as well as approximately \$285 million in outstanding TPS. The transaction would be funded with available cash on hand, and there are no plans to raise additional capital or issue any debt obligations in connection with the transaction. Asset quality and earnings prospects also are consistent with approval.

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 BB&T, its subsidiary insured depository institutions, and BankAtlantic, including assessments of their management expertise, internal controls, risk management systems, and operations. In addition, the Board has considered its supervisory experiences and those of other relevant financial supervisory agencies with the organizations and the organizations' records of compliance with applicable banking laws and with anti-money-laundering laws. The Board has also considered the comments it received on the proposal.

BB&T and its subsidiary depository institutions are considered to be well managed. BB&T would implement its risk-management policies, procedures, and controls at the combined organization, which are regarded as satisfactory. In addition, BB&T's management has the experience and resources to ensure the successful integration of the two organizations and the safe and sound operation of the combined organization.²⁰

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

Convenience and Needs Considerations

As noted, the Board reviews the records of performance under the CRA of the relevant insured depository institutions when acting on a notice to acquire any insured depository institution, including a savings association.²¹ 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,²² 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

²⁰ Two commenters referenced an SEC lawsuit alleging that the chairman of BA Bancorp had engaged in a pattern of misleading BA Bancorp's investors through selective and untimely disclosures with respect to problem loans. The individuals named in the lawsuit will not be associated with BB&T or BankAtlantic after consummation of the proposed transaction.

²¹ 12 U.S.C. § 2901 *et seq.*

²² 12 U.S.C. § 2901(b).

community, including low and moderate income (“LMI”) neighborhoods, in evaluating bank expansionary proposals.²³

The Board has considered all the facts of record, including reports of examination of the CRA performance records of BB&T’s subsidiary insured depository institutions and of BankAtlantic, data reported by BB&T and BankAtlantic under the CRA and the Home Mortgage Disclosure Act (“HMDA”),²⁴ other information provided by BB&T, and confidential supervisory information. The Board has also considered the public comments received on the proposal regarding the depository institutions’ CRA, fair lending, and HMDA performance.

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the proposal in light of the examinations by the appropriate federal supervisors of the CRA performance records of the insured depository institutions involved in the proposal. 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.²⁵

Branch Bank received an overall “Satisfactory” rating at its most recent CRA performance evaluation by the FDIC, as of January 22, 2008. The Public Evaluation (“PE”) for that examination gave Branch Bank ratings of “High Satisfactory” for the Lending Test and “Outstanding” for the Investment and Service Tests. Substantive violations of the Equal Credit Opportunity Act and the Fair Housing Act were noted and resulted in Branch Bank’s overall CRA rating being lowered from “Outstanding” to “Satisfactory.” The Board consulted with the FDIC on BB&T’s fair lending record regarding the progress made by Branch Bank’s management to address these matters and to correct its fair lending policies and procedures and fee structure to help ensure compliance with the fair lending laws.²⁶

FSB is headquartered in Columbus, Georgia, with operations concentrated in the credit card and merchant services division in Wilson, North Carolina.²⁷ Rather than operate traditional brick and mortar branches, the bank operates on a branchless platform, distributing its products through the Internet, direct mail, and telemarketing calls. FSB’s business model includes various business lines and operating subsidiaries that offer a variety of products and services.²⁸ FSB received a “Satisfactory” rating at its most recent CRA

²³ 12 U.S.C. § 2903.

²⁴ 12 U.S.C. §2801 *et seq.*

²⁵ See *Interagency Questions and Answers Regarding Community Reinvestment*, 66 *Federal Register* 11,642 at 11,665 (2010).

²⁶ One commenter requested that the BB&T acquisition be conditionally approved, asserting that a “Satisfactory” rating for a bank as large as BB&T was unacceptable and that the largest retail banks should all have “Outstanding” ratings for CRA performance. This commenter also criticized Branch Bank for its failure to maintain a consistent “Outstanding” CRA rating. The commenter cited the fair lending violations that were reported in the PE for BB&T’s 2008 examination, noted above, and BankAtlantic’s CRA performance as reasons why a conditional approval would be appropriate.

²⁷ The bank was chartered on April 1, 2008, when BB&T Bankcards Corporation converted from a special-purpose state bank to an FDIC-insured federal savings bank.

²⁸ At the time of the CRA evaluation, the business lines and operating subsidiaries that contributed to the thrift’s CRA performance were BB&T Bankcards (“Bankcards”), Sheffield Financial (“Sheffield”), and Liberty Mortgage Corporation (“LMC”). Bankcards issued credit card products to consumer, corporate, and small business clients and was the FSB’s largest business line. Sheffield, a nationwide specialty installment lender, financed consumer and small business purchases of small-ticket outdoor equipment. LMC offered a variety of home purchase and refinance products, including FHA and VA loans, that were originated nationwide through a network of mortgage originators. Residential mortgage loans accounted for less than 1 percent of FSB’s loan portfolio. Due to a change in FSB’s business model, LMC ceased operations on July 31, 2010.

examination conducted by the Office of Thrift Supervision (“OTS), as of January 3, 2011. The bank was rated “Satisfactory” overall, with ratings of “Low Satisfactory” for the Lending Test, “Outstanding” for the Investment Test, and “High Satisfactory” for the Service Test.²⁹

BankAtlantic received a “Needs to Improve” CRA rating at its most recent CRA examination conducted by the OTS, as of May 24, 2010. The OTS examination noted violations of the Federal Trade Commission Act discovered during the thrift’s consumer compliance examination that involved an automated overdraft protection program.

BB&T reported that it has reviewed BankAtlantic’s policies and procedures, monitoring reports, training delivery and frequency, and compliance reports. BB&T has directed its compliance staff to work with both Branch Bank and BankAtlantic employees to ensure that BankAtlantic’s overdraft practices comply with the FDIC’s guidance on overdraft protection programs.³⁰ BB&T has committed that after consummation of the proposed merger, it will address any deficiencies in BankAtlantic’s CRA performance by implementing BB&T’s existing policies and procedures at the combined organization. Those policies and procedures are considered satisfactory. To that end, BB&T plans to build on BankAtlantic’s existing CRA efforts and programs, including identifying the housing, small business, and community development needs of each assessment area; reviewing community action plans; and interviewing local community-based organization leaders to discuss the needs of the communities.

B. HMDA Analysis

In its evaluation, the Board has considered the records of BB&T and BankAtlantic in complying with fair lending and other consumer protection laws. The Board has reviewed HMDA data reported by Branch Bank and BankAtlantic. A commenter opposed the proposal by alleging, based on 2010 HMDA data reported by Branch Bank and BankAtlantic, that both institutions engaged in discriminatory treatment of minority individuals in their home mortgage lending. The commenter also alleged that Branch Bank and BankAtlantic denied the home mortgage loan applications of minority borrowers more frequently than those of nonminority applicants in certain metropolitan statistical areas (“MSAs”).³¹

The HMDA data indicate that in 2010 Branch Bank somewhat lagged the aggregate in the percentage of applications received from African Americans and Hispanics and from minority census tracts but was consistent with the aggregate with respect to the percentage of applications it received from LMI census tracts and LMI individuals. The percentage of Branch Bank’s loan originations was largely consistent with the aggregate with respect to its loans in LMI census tracts and to LMI individuals, but the bank lagged the aggregate with respect to its loans to African Americans and Hispanics and in minority census tracts.

In the Port St. Lucie MSA, an area cited by the commenter, Branch Bank received and originated very few applications from African Americans and Hispanics in 2010. The Board notes that Branch Bank currently has four branches in the Port St. Lucie MSA and

²⁹ These ratings represented FSB’s first CRA examination, and the review period was April 1, 2008, the date the bank commenced operations, through December 31, 2009.

³⁰ Branch Bank, which will survive the merger with BankAtlantic, is a state nonmember bank supervised by the FDIC.

³¹ The Board reviewed 2008, 2009, 2010, and preliminary 2011 HMDA data for Branch Bank in its combined assessment areas; in Florida, Georgia, North Carolina, and Virginia (the states with the majority of the bank’s branching network); and in all areas identified by the commenter. The Board also reviewed BankAtlantic’s 2008, 2009, 2010, and preliminary 2011 HMDA data in the MSAs cited in the comments, as well as BankAtlantic’s HMDA lending throughout its combined assessment areas.

entered the market only recently, in August 2009, when BB&T acquired Colonial Bank, Montgomery, Alabama, in a failed-bank transaction with the FDIC.

In 2011, HMDA loan applications from African Americans and Hispanics in Branch Bank's combined assessment areas increased slightly from 2010. The Board notes that, although the percentage of Branch Bank's originations to African Americans in 2011 remained the same as in 2010, the percentage of its loan originations to Hispanics increased slightly. In addition, Branch Bank's HMDA loan originations in minority census tracts, in LMI census tracts, and to LMI individuals remained steady or increased in 2011.

The Board's review of Branch Bank's denial disparity rates to African American or Hispanic applicants relative to white applicants (denial disparity ratios or "DDR's") in its combined assessment areas, the State of North Carolina (the bank's home state), the Winston-Salem MSA (the bank's headquarters), the State of Florida, and the MSAs identified by the commenter, indicates that the DDRs were largely consistent with, or more favorable than, those of the aggregate in 2010.

Regarding BankAtlantic, in 2010 the thrift's lending significantly exceeded the aggregate's lending with respect to the percentage of its loans to African Americans and Hispanics, in minority and LMI census tracts, and to LMI individuals. In 2010, BankAtlantic's DDRs for African Americans were more favorable than those of the aggregate in all of the thrift's combined assessment areas, as well as in the areas of interest to the commenter. For Hispanics, the thrift's DDRs were consistent with the aggregate in all of the thrift's combined assessment areas, as well as in the two MSAs cited by the commenter. In 2011, the DDRs for African American and Hispanic borrowers largely mirrored the thrift's performance in 2010.

The Board is 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. 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, HMDA data alone do not provide a sufficient basis on which to conclude whether Branch Bank or BankAtlantic has excluded or imposed higher costs on any group on a prohibited basis. The Board recognizes that HMDA data alone, even with the recent addition of pricing information, provide only limited information about the covered loans.³² 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.

Because of the limitations of HMDA data, the Board's consideration of those data has taken into account other information, including examination reports that provide on-site evaluations of compliance with fair lending and other consumer protection laws and regulations by BB&T and its lending affiliates. The Board has also considered information provided by BB&T about its compliance risk-management systems and has consulted with the FDIC, the primary federal supervisor of Branch Bank, and the OCC, the primary federal supervisor of BB&T's subsidiary federal savings bank and BankAtlantic.

³² 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 (the reasons most frequently cited for a credit denial or higher credit cost) are not available from HMDA data.

Although the HMDA data suggest that there may be opportunities for Branch Bank to improve its outreach and mortgage lending to African Americans and Hispanics and in minority communities, the HMDA data, absent other information, are not evidence of discrimination. Branch Bank is subject to continuous supervision by its supervisory agencies, and it has undergone a number of reviews for compliance with consumer protection and fair lending laws, regulations, and statutes since its 2008 CRA evaluation. Such reviews incorporate additional data beyond the HMDA data reported annually and include reviews of loan files, the articulated policies and procedures of the institution, and assessments of the bank's actual practices. The fair lending reviews include assessments of Branch Bank's underwriting, pricing, and advertising and marketing programs, and examiners have found no evidence of discouragement or discrimination on any prohibited basis. Further, the Board has reviewed Branch Bank's compliance programs and conferred with the FDIC. The Board concludes that Branch Bank's mortgage lending operations and compliance programs are sufficient to ensure compliance with fair lending and other consumer protection laws. In addition, the Board notes that this proposal is designed to round out Branch Bank's presence in certain markets and finds that the bank is well positioned to take advantage of the opportunities presented to enhance its mortgage lending efforts with respect to traditionally underserved racial and ethnic market segments.

The Board has considered all the facts of record, including the CRA performance records of the institutions involved, information provided by BB&T, comments received on the proposal and responses to those comments, and confidential supervisory information. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that convenience and needs considerations, including the CRA performance records of the relevant insured depository institutions, are consistent with approval of the proposal. Moreover, the adoption of BB&T's policies and procedures into BankAtlantic's operations is likely to help improve overall CRA compliance.

Financial Stability

The Dodd-Frank Act added "risk to the stability of the United States banking or financial system" to the list of possible adverse effects that the Board must weigh against any expected public benefits in considering proposals under section 4(j) of the BHC Act.³³

Financial Stability Standard

In reviewing proposals under section 4 of the BHC Act, the Board expects that it will generally find a significant adverse effect if the failure of the resulting firm, or its inability to conduct regular-course-of-business transactions, would likely impair financial intermediation or financial market functioning so as to inflict material damage on the broader economy. That kind of damage could occur in a number of ways, including seriously compromising the ability of other financial institutions to conduct regular-course-of-business transactions or seriously disrupting the provision of credit or other financial services.

To assess the likelihood that failure of the resulting firm may inflict material damage on the broader economy, the Board will consider a variety of metrics that capture the systemic "footprint" of the merged firm and will also consider the incremental effect of the transaction on the systemic footprint of the acquiring firm. These metrics would include measures of the size of the resulting firm; availability of substitute providers for any critical products

³³ Dodd-Frank Act, § 604(e), codified at 12 U.S.C. § 1843(j)(2)(A). Other provisions of the Dodd-Frank Act impose a similar requirement that the Board consider or weigh the risks to financial stability posed by a merger, acquisition, or expansion proposal by a financial institution. See sections 163, 173, and 604(d) and (f) of the Dodd-Frank Act.

and services offered by the resulting firm; interconnectedness of the resulting firm with the banking or financial system; the extent to which the resulting firm contributes to the complexity of the financial system; and the extent of the cross-border activities of the resulting firm.³⁴ These categories are not exhaustive, and additional categories could inform the Board's decision.³⁵ In addition to these quantitative measures, the Board will consider qualitative factors, such as the opaqueness and complexity of an institution's internal organization, that are indicative of the relative degree of difficulty of resolving the resulting firm. A financial institution that can be resolved in an orderly manner is less likely to inflict material damage to the broader economy.³⁶

Analysis of the Financial Stability Impact of this Proposal

In this case, the Board has evaluated the foregoing metrics to determine whether the proposal presents a significant risk to the stability of the U.S. banking or financial system. The Board also has considered the relative degree of difficulty of resolving the resulting firm. The Board reviewed publicly available data, data compiled through the supervisory process, and data obtained through information requests to the institutions involved in the proposal, as well as qualitative information.

This transaction would increase BB&T's systemic footprint by only a negligible amount and, therefore, would not raise financial stability concerns. BB&T would control 1.4 percent of the total U.S. deposits after the transaction, placing it well within the 10 percent limitation on total U.S. deposits. The proposed transaction would increase the firm's size and degree of interconnectedness with other financial institutions, and contribute to complexity of the financial system, by an insignificant amount. Furthermore, neither BB&T nor BankAtlantic has market shares that are sufficiently large to suggest they are major providers of any critical financial services. Consequently, the acquisition does not raise concerns about a potential lack of substitute providers for such services.

In addition, the structure and operation of the combined organization would be centered on a conventional commercial banking business. In the event of distress, the resolution process would be handled in a predictable manner by relevant authorities. The combined firm would not exhibit a high degree of organizational or legal complexity and would have limited engagement in cross-border activities, further suggesting that resolution of the combined organization in the event of its failure would not involve a level of cost, time, or difficulty that would jeopardize the stability of the USFS.

Based on these and all the other facts of record, the Board has determined that considerations relating to financial stability are consistent with approval.

³⁴ A large value of a metric for any one category may suggest that distress at the resulting firm is likely to result in material damage to the broader economy. Many of the metrics considered by the Board measure an institution's activities relative to the U.S. financial system ("USFS"). For example, the pro forma asset size of the resulting firm is expressed in terms of the resulting firm's pro forma assets as a share of total assets of the USFS. For this purpose, the USFS comprises all U.S. financial institutions used in computing total liabilities for the purposes of calculating the limitation on liabilities of a financial company required under section 622 of the Dodd-Frank Act and includes U.S.-based bank and nonbank affiliates of foreign banking organizations. In connection with its supervision of nonbank financial institutions that the Financial Stability Oversight Council determines could pose a threat to the financial stability of the United States, the Board may require financial and other reporting by these institutions, which would increase the pool of available data for financial stability analyses. See sections 113 and 151 of the Dodd-Frank Act, codified at 12 U.S.C. §§ 5323 and 5341, respectively.

³⁵ The metrics for the resulting entity are not, by themselves, determinative. The Board will take into account all factors that are relevant to a transaction, some of which may not be captured by the metrics.

³⁶ For further discussion of the financial stability standard, see *Capital One Financial Corporation*, FRB Order No. 2012-2 (Feb. 14, 2012).

Public Benefits

As noted, the Board is required to consider whether the proposed acquisition of BankAtlantic “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, unsound banking practices, or risk to the stability of the United States banking or financial system.”³⁷

The Board has reviewed the above criteria in light of the record in this case. Overall, the record indicates that consummation of the proposal would result in additional benefits to consumers currently served by BankAtlantic. The proposal would allow BB&T to expand the range of financial products and services available to existing customers of BankAtlantic. After the acquisition, BankAtlantic customers would benefit from Branch Bank’s higher legal lending limit, an expanded range of commercial and consumer loan products, a full range of cash management services, a wider variety of mortgage loan products, and access to Branch Bank’s corporate, personal, and employee benefit trust services, insurance, and investment services. In addition, BankAtlantic customers would have access to Branch Bank’s branch locations and ATM network throughout Florida and the Southeastern United States. BB&T has committed to correct BankAtlantic’s deficiencies with respect to overdrafts in customer accounts and to improve BankAtlantic’s processes, procedures, and practices for compliance with the CRA. The proposal would provide the opportunity for significant operational efficiencies for the combined organization, and BB&T expects to realize significant cost savings from consolidating systems, platforms, and corporate staff functions.

Based on all the facts of record, including the commitments and conditions noted in this case, 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 proposal should be, and hereby is, approved.³⁸ 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 BB&T with the conditions imposed in this order and the commitments made to the Board in connection with the notice. The Board’s approval also is subject to all the conditions set forth in

³⁷ 12 U.S.C. § 1843(j)(2)(A).

³⁸ A commenter requested that the Board hold a public hearing on the proposal. The Board’s regulations provide for a hearing on a notice filed under section 4 of the BHC Act if there are disputed issues of material fact that cannot be resolved in some other manner. 12 CFR 225.25(a)(2). Under its rules, the Board also may, in its discretion, hold a public hearing if appropriate to allow interested persons an opportunity to provide relevant testimony when written comments would not adequately present their views. The Board has considered the commenter’s request in light of all the facts of record. In the Board’s view, commenters have had ample opportunity to submit comments on the proposal and, in fact, submitted written comments that the Board has considered in acting on the proposal. The commenter’s request does not identify disputed issues of fact that are material to the Board’s decision and that would be clarified by a public hearing. In addition, the request does not demonstrate why the written comments do not present the commenter’s views adequately or why a hearing otherwise would be necessary or appropriate. For these reasons, and based on all the facts of record, the Board has determined that a public hearing is not required or warranted in this case. Accordingly, the request for a public hearing on the proposal is denied.

Regulation Y, including those in sections 225.7 and 225.25(c),³⁹ 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. For purposes of this action, these conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision herein and, as such, may be enforced in proceedings under applicable law.

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

By order of the Board of Governors, effective July 31, 2012.

Voting for this action: Chairman Bernanke, Vice Chair Yellen, and Governors Duke, Tarullo, Raskin, Stein, and Powell.

Robert deV. Frierson
Deputy Secretary of the Board

Order Issued Under Bank Merger Act

Five Star Bank
Warsaw, New York

Order Approving the Acquisition of Branches
FRB Order No. 2012-7 (July 27, 2012)

Five Star Bank ("Five Star"), Warsaw, New York,¹ a state member bank, has applied under section 18(c) of the Federal Deposit Insurance Act² ("Bank Merger Act") to acquire four branches of HSBC Bank USA, National Association ("HSBC"), McLean, Virginia ("New York Branches"), that First Niagara Bank, National Association ("First Niagara"), Buffalo, New York, contracted to purchase from HSBC.³ Five Star also has applied under section 9 of the Federal Reserve Act⁴ ("FRA") to establish branches at the four branch locations.⁵

Notice of the proposal, affording interested persons an opportunity to submit comments, has been given in accordance with the Bank Merger Act and the Board's Rules of Procedure.⁶ 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 that request was provided to the Federal Deposit Insurance Corporation ("FDIC"). The time for filing comments has expired, and the Board has considered the applications and all comments received in light of the factors set forth in the Bank Merger Act and the FRA.

³⁹ 12 CFR 225.7 and 225.25(c).

¹ Five Star is a subsidiary of Financial Institutions, Inc., also of Warsaw, a financial holding company.

² 12 U.S.C. § 1828(c).

³ First Niagara acquired the right to purchase the New York Branches as part of its proposal to acquire 195 HSBC branches in New York and Connecticut. The Office of the Comptroller of the Currency ("OCC") approved First Niagara's proposal on April 19, 2012.

⁴ 12 U.S.C. § 321.

⁵ Those locations are listed in the appendix.

⁶ 12 CFR 262.3(b).

Five Star is the 40th largest insured depository institution in New York, controlling deposits of approximately \$2.2 billion, which represent less than 1 percent of the total amount of deposits in insured depository institutions in New York (“state deposits”).⁷ Five Star proposes to acquire \$217 million in total deposits from First Niagara, representing less than 1 percent of state deposits. On consummation of the proposal, Five Star would become the 37th largest insured depository institution in New York, controlling deposits of \$2.4 billion, representing less than 1 percent of state deposits.

Competitive Considerations

The Bank Merger Act prohibits the Board from approving an application if the proposal would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking.⁸ The Bank Merger Act also prohibits the Board from approving a proposal that would substantially lessen competition or tend to create a monopoly in any relevant market, unless the Board finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effects of the transaction in meeting the convenience and needs of communities to be served.⁹

Five Star and the New York Branches compete directly in the New York banking markets of Elmira-Corning and Rochester.¹⁰ The Board has reviewed the competitive effects of the proposal in those banking markets in light of all the facts of record. In particular, the Board has considered the number of competitors that would remain in the banking markets, the relative share of the total deposits in insured depository institutions in the market (“market deposits”) that Five Star would control,¹¹ the concentration levels of market deposits and the increase in those levels as measured by the Herfindahl-Hirschman Index (“HHI”) under the Department of Justice Bank Merger Competitive Review guidelines (“DOJ Bank Merger Guidelines”),¹² and other characteristics of the markets.

⁷ Data are as of June 30, 2011, and reflect the acquisition by Five Star of four other First Niagara branches on June 22, 2012. In this context, insured depository institutions include insured commercial banks, savings banks, and savings associations.

⁸ 12 U.S.C. § 1828(c)(5)(A).

⁹ 12 U.S.C. § 1828(c)(5)(B).

¹⁰ The Elmira-Corning banking market is defined as Chemung County; Cayuga, Dix, Montour, Orange, Reading, and Tyrone townships in Schuyler County; and Addison, Bath, Bradford, Cameron, Campbell, Caton, Corning, Erwin, Hornby, Jasper, Lindley, Rathbone, Thurston, Troupsburg, Tuscarora, Urbana, and Woodhulla townships in Steuben County, all in New York.

The Rochester banking market is defined as Genesee, Livingston, Monroe, Ontario, Seneca, Wayne, and Yates Counties; Alfred, Allen, Almond, Andover, Angelica, Birdsall, Burns, Granger, Grove, Hume, Independence, and West Almond townships in Allegany County; Albion, Barre, Carlton, Clarendon, Gaines, Kendall, and Murray townships in Orleans County; Avoca, Canisteo, Cohocton, Dansville, Fremont, Greenwood, Hartsville, Hornellsville, Howard, Prattsburg, Pulteney, Wayland, Wayne, West Union, and Wheeler townships in Steuben County; and Castile, Covington, Gainesville, Genesee Falls, Middlebury, Perry, Pike, and Warsaw townships in Wyoming County, all in New York.

¹¹ In the Rochester banking market, deposit and market share data are based on data reported by insured depository institutions in the summary of deposits data as of June 30, 2011, and are based on calculations in which the deposits of thrift institutions are included at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. *See, e.g., Midwest Financial Group, 75 Federal Reserve Bulletin 386 (1989); National City Corporation, 70 Federal Reserve Bulletin 743 (1984)*. Thus, the Board regularly has included thrift deposits in the market share calculation on a 50 percent weighted basis. *See, e.g., First Hawaiian, Inc., 77 Federal Reserve Bulletin 52 (1991)*. No savings associations operate in the Elmira-Corning banking market.

¹² 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 by more than 200 points. Although the DOJ and the Federal Trade Commission have issued revised Horizontal Merger

In the Rochester banking market, consummation of the proposal would be consistent with Board precedent and within the thresholds in the DOJ Bank Merger Guidelines. On consummation of the proposal, the Rochester banking market would remain unconcentrated, as measured by the HHI, and numerous competitors would remain in the banking market.¹³

Five Star is the fifth largest insured depository institution in the Elmira-Corning banking market, controlling deposits of approximately \$191 million, which represent approximately 11 percent of market deposits.¹⁴ HSBC is the fourth largest insured depository institution in the market, controlling deposits of approximately \$246 million, which represent approximately 14.1 percent of market deposits. Five Star proposes to acquire \$173 million of those deposits, representing 9.9 percent of market deposits.¹⁵ On consummation of the proposal, Five Star would become the second largest depository institution in the Elmira-Corning banking market, controlling deposits of approximately \$364 million, which would represent 21.8 percent of market deposits. The HHI would increase 324 points, from 2188 to 2512.

The Board has considered whether other factors either mitigate the competitive effects of the proposal or indicate that the proposal would not have a significantly adverse effect on competition in the market.¹⁶ In this market, there are several such factors. On consummation, eight other insured depository institutions, including three institutions that each control more than 10 percent of market deposits, would continue to operate in the market, including the market's largest competitor, Chemung Canal Trust Company, with 35.9 percent of market deposits.

Additionally, nine credit unions operate branches in the market. One credit union, First Heritage Federal Credit Union ("First Heritage"), exerts a significant competitive influence in the Elmira-Corning banking market.¹⁷ First Heritage offers a wide range of consumer products, operates street-level branches, and has membership open to almost all the residents in the market. First Heritage's activities in this banking market exert a sufficiently competitive influence to mitigate, in part, the potential competitive effects of the proposal. When First Heritage's deposits are considered on a 50 percent weighted basis, Five Star would control approximately 20 percent of the market deposits on consummation of the proposal, and the HHI would increase 267 points, from 1924 to 2191.

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.

¹³ In the Rochester banking market, Five Star operates the seventh largest insured depository institution, controlling deposits of approximately \$1.2 billion, which represent 7 percent of market deposits. The branch Five Star proposes to acquire currently controls \$61 million in deposits, but Five Star would acquire only \$44 million of the branch's deposits. After consummation, Five Star would remain the seventh largest insured depository institution in the market, controlling deposits of approximately \$1.3 billion, which represent 8.1 percent of market deposits. The HHI would decrease by 6 points, from 1079 to 1073, due to First Niagara's large presence in that banking market. On consummation of the proposal, 24 competitors would remain in the market.

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, 2011, and reflect the acquisition by Community Bank, N.A., DeWitt, New York, of an HSBC branch in the Elmira-Corning banking market.

¹⁵ The proposed acquisition contemplates HSBC retaining \$73 million in deposits. HSBC would not retain an office in the Elmira-Corning market, and those deposits would be transferred out of the market.

¹⁶ 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. See *NationsBank Corp.*, 84 *Federal Reserve Bulletin* 129 (1998).

¹⁷ The Board previously has considered competition from certain active credit unions as a mitigating factor. See, e.g., *The Toronto-Dominion Bank*, 96 *Federal Reserve Bulletin* B36 (2010); *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).

The Elmira-Corning banking market has other characteristics that also tend to mitigate potentially adverse competitive effects. Over the three year period ending in 2010, income in the market has grown faster than the state and national averages for metropolitan statistical areas and nonmetropolitan counties. The Elmira-Corning banking market also has experienced de novo entry in the last five years.

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

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

Financial, Managerial, and Other Supervisory Factors

In reviewing this proposal under the Bank Merger Act and the FRA, the Board has considered the financial and managerial resources and future prospects of the institutions involved and the organization's nonbanking operations. In its evaluation, the Board considers a variety of information, including capital adequacy, asset quality, and earnings performance. The Board 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 also considers the ability of the organization to absorb the cost of the proposal and the proposed integration of the operations of the institutions. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important.

Five Star is well capitalized and would remain so on consummation of the proposal. The proposed transaction is structured as a cash purchase of assets, and Five Star will fund the purchase from existing resources. The proposal would not negatively affect asset quality, and future prospects are considered consistent with approval. Based on its review of the record, the Board finds that the organization has sufficient financial resources to effect the proposal.

The Board also has considered the managerial resources of Five Star and reviewed the examination records of Five Star, including assessments of its management, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences and Five Star's records of compliance with applicable banking and anti-money-laundering laws. The Board also has considered Five Star's plans for implementing the proposal. Five Star is considered to be well managed and its board of directors and senior management have significant community banking experience. Five Star would operate the acquired branches under its existing policies and procedures, which are considered to be adequate.

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

Convenience and Needs Considerations

The Bank Merger Act also requires the Board to consider the convenience and needs of the communities to be served and to take into account the records of the relevant depository institutions under the Community Reinvestment Act (“CRA”).¹⁸ The CRA requires the federal financial supervisory agencies to encourage financial institutions to 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 acquisition proposals. Accordingly, the Board has considered the convenience and needs factor and the CRA performance records of Five Star and HSBC in light of all the facts of record.

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution’s most recent CRA performance evaluation is a particularly important consideration in the applications process because it represents a detailed on-site evaluation of the institution’s overall record of performance under the CRA by its appropriate federal supervisor.¹⁹

Five Star received an overall rating of “outstanding” at its most recent CRA performance examination by the Federal Reserve Bank of New York, as of August 2011. Examiners noted that 9 branches, representing 18 percent of Five Star’s 49 existing branches, were in LMI areas. Examiners determined that this distribution of branches compared favorably with the percentage of the population in the bank’s assessment area residing in LMI tracts (6 percent). As a result of this proposal, Five Star would operate 53 branches, of which 11 branches, or 20 percent, will be in LMI areas. Further, three of the branches will be in areas that are not currently part of Five Star’s assessment area, and one of the three branches will be in an LMI area. HSBC received an overall rating of “outstanding” at its most recent CRA performance examination by the OCC, as of October 2009.

This proposal would result in customers of the four branches continuing to have access to banking services in their immediate communities. In three instances, existing Five Star branches will be consolidated with three New York Branches, and those consolidations will occur within the same census tract. In two of the consolidations, the distance between the branches involved is less than one mile. In the remaining consolidation, the branches are within 1.2 miles of each other.²⁰

Based on all the facts of record and for the reasons discussed above, the Board concludes that considerations relating to convenience and needs, including the CRA performance records of the relevant depository institutions, are consistent with approval of the proposal.

¹⁸ 12 U.S.C. § 2901 *et seq.*

¹⁹ See *Interagency Questions and Answers Regarding Community Reinvestment*, 75 *Federal Register* 11,642 at 11,665 (2010).

²⁰ The Board has considered that federal banking law provides a specific mechanism for addressing branch closings. Section 42 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831r-1, as implemented by the Joint Policy Statement Regarding Branch Closings (64 *Federal Register* 34,844 (1999)), requires that a bank provide the public with at least 30 days’ notice, and the appropriate federal supervisory agency and customers of the branch with at least 90 days’ notice, before the date of the proposed branch closings. The bank also is required to provide reasons and other supporting data for the closure, consistent with the institution’s written policy for branch closings. Five Star has complied with those requirements.

Financial Stability

The Board has considered information relevant to risk to the stability of the United States banking or financial system. The proposed acquisition represents a *de minimis* transaction for financial stability purposes, and the proposed transaction would not materially increase the interconnectedness or complexity of Five Star. The Board, therefore, concludes that financial stability considerations in this proposal are consistent with approval.

Establishment of Branches

As noted, Five Star has applied under section 9 of the FRA to establish branches at the locations of the New York Branches, and the Board has considered the factors it is required to consider when reviewing an application under that section.²¹ Specifically, the Board has considered Five Star's financial condition, management, capital, actions in meeting the convenience and needs of the communities to be served, CRA performance, and investment in bank premises. For the reasons discussed in this order, the Board finds those factors to be consistent with approval.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the applications should be, and hereby are, approved. In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the Bank Merger Act and the FRA. Approval of the applications is specifically conditioned on compliance by Five Star with all the commitments made in connection with this proposal and the conditions set forth in this order. The commitments and conditions are deemed to be conditions imposed in writing by the Board and, as such, may be enforced in proceedings under applicable law.

Acquisition of the branches may not be consummated before the fifteenth 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 27, 2012.

Voting for this action: Chairman Bernanke, Vice Chair Yellen, and Governors Duke, Tarullo, Raskin, Stein, and Powell.

Robert deV. Frierson
Deputy Secretary of the Board

Appendix

New York Branches to Be Acquired

1. 150 Lake Street, Elmira 14901
2. 309 S. Main Street, Horseheads 14845
3. 217 Prescott Avenue, Elmira Heights 14903
4. 102 N. Main Street, Albion 14411

²¹ See 12 U.S.C. §322; 12 CFR 208.6.