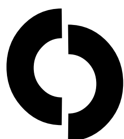

Comptroller of the Currency
Administrator of National Banks

Large Bank Licensing, MS 7-13
250 E Street, S.W.
Washington, D.C. 20219

Conditional Approval #900
May 2009

April 23, 2009

Ms. Radhi Thayu
Assistant General Counsel
Bank of America Corporation
NY 1-100-18-07
One Bryant Park
New York, NY 10036

Re: Applications by Countrywide Bank, FSB to convert to a national bank charter and by Bank of America, National Association, to acquire by merger the national bank that results from the conversion of Countrywide FSB.
Application Control Numbers: 2009-ML-01-0003; 2009-ML-02-0003

Dear Ms. Thayu:

The Office of the Comptroller of the Currency ("OCC") hereby grants conditional approval to the conversion and merger applications described below, for the reasons and subject to the requirements set forth herein. This conditional approval is granted after a thorough review of the application, other materials you have supplied, and other information available to the OCC, including commitments and representations made in the application and by the applicants' representatives during the application process. This approval is also subject to the conditions set out herein.

I. INTRODUCTION

On February 17, 2009, Countrywide Bank, FSB, Centennial, Colorado ("Countrywide" or "Countrywide FSB"), filed an application to convert to a national bank charter to be titled Countrywide Bank, National Association ("BANA-Colorado"), also with its main office in Centennial, Colorado. On the same day, Bank of America, National Association, Charlotte, North Carolina ("BANA") filed an application to acquire BANA-Colorado by merger. Deposits of Countrywide and BANA are insured by the Federal Deposit Insurance Corporation ("FDIC"), and each is a wholly-owned indirect subsidiary of Bank of America Corporation, Charlotte,

North Carolina ("BAC").[1] Likewise, BANA-Colorado will be FDIC insured and an indirect, wholly-owned subsidiary of BAC. BANA has branches in 32 states including Texas and Virginia. Countrywide has branches in two states, Texas and Virginia, but does not seek to retain those branches following the conversion.[2] Pursuant to the merger application, BANA seeks to retain its own main office and branches and also seeks to retain Countrywide's main office in Colorado as a branch.[3] Following consummation of the proposed transactions, BANA also seeks to retain several subsidiaries of Countrywide.[4]

Notice of the proposed transactions was published in Charlotte, North Carolina, and Denver, Colorado. The OCC received no comment letters as a result of the public comment period; however, the Division of Banking of the Colorado Department of Regulatory Agencies ("Division of Banking" and "Division of Banking letter") sent a letter to the OCC upon receiving a copy of the applications from the applicants.

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[1] BAC is a bank holding company for purposes of the Bank Holding Company Act and a financial holding company under the Gramm-Leach-Bliley Act.

[2] BANA filed applications with the OCC to establish its own branches at the sites of the Countrywide branches in Texas and Virginia and these branches were approved by the OCC in March. Letters by Stephen A. Lybarger, Large Bank Licensing Lead Expert, to Wade Hampton, Bank of America (March 9, 2009).

[3] BANA currently has no branches in Colorado.

[4] The OCC originally approved what is now Countrywide FSB to engage in banking under the Code of the District of Columbia under the name "Treasury Bank" in August 1990 and the Bank opened shortly thereafter with its main office in Washington, D.C. Following its acquisition by Countrywide Credit Industries, Inc., Treasury Bank converted to a national bank charter in 2001, changed its name to "Effinity Bank, National Association" and relocated its main office to Virginia. The name was subsequently changed to "Treasury Bank, National Association" later in 2001 and changed again to Countrywide Bank, National Association in 2005. On March 12, 2007, Countrywide converted from a national bank charter to a federal savings bank charter with the approval of the Office of Thrift Supervision ("OTS") and changed its name to Countrywide Bank, FSB. On July 1, 2008, Countrywide FSB, along with its various affiliates, was acquired by BAC. On December 24, 2008, pursuant to OTS procedures and requirements, Countrywide FSB filed an application with the OTS to establish a branch office in Centennial, Colorado, relocate its home office from Virginia to the branch office site in Colorado, and retain its former Virginia home office as a branch. Letter from Jerry A. Hager, Executive Vice President, Deputy General Counsel, Countrywide Bank FSB, to Applications Manager, OTS West Region (December 24, 2008). The application was approved by the OTS on February 2, 2009. Letter from Steven M. Gregovich, Assistant Regional Director, OTS West Region (February 2, 2009). Countrywide FSB then relocated its home office to Centennial, Colorado, on February 4, 2009. Counsel for the applicant has represented that Countrywide FSB engages in providing products and services at the Colorado main office that are the same as the products and services it engaged in at its prior home office in Virginia.

II. LEGAL AUTHORITY

A. Conversion of Countrywide

Countrywide may convert to a national bank charter. Regulations of both the OCC and the OTS permit the direct conversion of a federal savings bank into a national bank.[5] In deciding a conversion application, OCC regulations provide that the OCC takes into account whether the institution can operate safely and soundly as a national bank in compliance with applicable laws, regulations, and policies.[6] The regulations further provide that an application may be denied if a significant supervisory, Community Reinvestment Act ("CRA"),[7] or compliance concern exists with the applicant; approval is inconsistent with applicable law, regulation, or policy; or the applicant fails to provide necessary information that the OCC has requested.[8] Finally, the regulations provide that a conversion application may be denied if the conversion would permit the applicant to escape supervisory action by its current regulator.[9]

The OCC has conducted a thorough review of the conversion application in light of the factors set forth above and determined that the results of this review are consistent with approval of the conversion application.[10]

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[5] 12 C.F.R. § 5.24; 12 C.F.R. § 552.2-7. The OCC has approved many such conversions. *See, e.g.,* Decision of the Applications by TCF Financial Corp. to convert Federal Savings Banks Located in Minnesota, Michigan, Illinois, and Wisconsin into National Banks (OCC Corporate Decision No. 97-113, February 24, 1997).

Section 5.24(d)(2)(ii)(E) of the OCC's regulations provides that the conversion of a federal savings bank must not be in contravention of federal law. Sections 552.2-7 and 563.22(b)(1)(ii) of the OTS regulations require either the filing of a notice or application to the OTS. Countrywide filed a conversion application with the OTS on February 17, 2009, noting that the conversion was the first step of a two-step process with the second step being the merger of Countrywide into BANA. Letter from Mr. Hager to Applications Manager, OTS West Region (February 17, 2009). The OTS approved the conversion application on March 25, 2009. Letter from Mr. Gregovich to Mr. Hager (March 25, 2009. You have advised the OCC that BAC has consulted with Federal Reserve Board staff under the Bank Holding Company Act with respect to Countrywide's conversion to a bank charter and been advised that no filing with the FRB was required because the converted bank would exist only for a moment in time.

[6] 12 C.F.R. § 5.24(d)(1).

[7] The CRA itself also requires that the OCC must consider a conversion applicant's record of compliance with CRA in deciding the application. 12 U.S.C. § 2903(a)(2) and 2902(3)(A); 12 C.F.R. § 25.29(a)(4). Consideration of Countrywide's record of compliance with CRA will be discussed subsequently.

[8] 12 C.F.R. §§ 5.24(d) and 5.13(b).

[9] 12 C.F.R. § 5.24(d). The conversion raises no issues regarding branching since BANA-Colorado will retain no branches following the conversion. Moreover, no issues regarding retention of nonconforming assets or activities arise since none have been identified. Retention by BANA and BANA-Colorado of Countrywide subsidiaries will be discussed subsequently.

[10] Applicant has requested waivers from the residency requirements imposed on board members of a national bank under 12 U.S.C. § 72. Since BANA-Colorado will exist for only a moment before its merger into BANA, the OCC hereby grants the requested waivers.

B. Merger of BANA-Colorado into BANA

Mergers of insured banks with different home states are authorized under 12 U.S.C. § 1831u(a)(1), which was adopted as part of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (the "Riegle-Neal Act").[11]

1. Compliance with Riegle-Neal Act requirements

An application to engage in an interstate transaction under 12 U.S.C. § 1831u is also subject to certain requirements and conditions set forth in the Riegle-Neal Act. These conditions are compliance with state-imposed age minimums, if any, which cannot exceed five years; compliance with certain state filing requirements; compliance with certain deposit concentration limits; community reinvestment compliance; and adequacy of capital and management skills. The following discusses these requirements.[12]

a. Age requirements

The proposed merger satisfies state-imposed age requirements permitted by § 1831u(a)(5). Under that section, the OCC may not approve a merger under section 1831u(a)(1) "that would have the effect of permitting an out-of-State bank . . . to acquire a bank in a host state[13] that has not been *in existence* for the minimum period of time, if any, specified in the statutory law of the host state."[14] The maximum age requirement, however, that a state is permitted to impose is five years.[15] Colorado imposes a five-year age requirement.[16]

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[11] The "home state" of a national bank is the state where its main office is located; the "home state" of a state bank is the state by which it was chartered. 12 U.S.C. § 1831u(g)(4)(A)(i), (ii). Riegle-Neal permitted a state to elect to prohibit such interstate transactions involving their home state banks if they did so between September 29, 1994, and May 31, 1997. Neither North Carolina nor Colorado exercised this opt-out authority.

[12] Because interstate mergers of federal savings banks and national banks are not covered by the Riegle-Neal Act, or may raise branch retention issues, federal savings banks seeking to enter into merger transactions have converted first into national banks to bring them within the scope of Riegle-Neal prior to the merger or to take advantage of certain branch retention rights provided by 12 U.S.C. § 1464(i)(5). The OCC has consistently approved such transactions. *See, e.g.,* Conditional Approval 823 (September 21, 2007) (conversion of MidAmerica Bank, FSB, Clarendon, Illinois, prior to merger into National City Bank, Cleveland, Ohio); CRA Decision 139 (April 20, 2007) (conversion of Capital One F.S.B., McLean, Virginia, prior to its merger with Capital One, National Association, New Orleans, Louisiana); Corporate Decision 2006-08 (August 3, 2006) (conversion of Citibank, Federal Savings Bank, Reston, Virginia, and Citibank(West) FSB, San Francisco, California, prior to their merger with Citibank, National Association, Las Vegas, Nevada); Corporate Decision 2004-09 (May 18, 2004) (conversion of First Security Federal Savings Bank, Chicago, Illinois, with interstate branches, prior to merger with MB Financial Bank, N.A., Chicago, Illinois); Corporate Decision 2000-03 (March 8, 2000) (conversion of Family Bank FSB, Haverhill, Massachusetts, with interstate branches, prior to merger with First Massachusetts Bank, N.A., Worcestor, Massachusetts); Corporate Decision 99-34 (October 1, 1999) (conversion of Bank of America, FSB, Salt Lake City, Utah, prior to merger with Bank of America, National Association, Charlotte, North Carolina).

[13] A "host state" is defined as a state, other than the home state of a bank in which the bank seeks to establish and maintain a branch. 12 U.S.C. § 1831u(g)(5).

[14] 12 U.S.C. § 1831u(a)(5)(A) (emphasis added).

[15] 12 U.S.C. § 1831u(a)(5)(B).

As previously discussed, Countrywide FSB was originally authorized to engage in banking in 1990 and has been either a national bank or a federal savings bank since 2001, well more than five years. Nothing in the Riegle-Neal Act requires that the amount of time that a bank has existed, and thus its age, is altered by a bank's relocation from one state to another.[17]

Countrywide's existence as a federal savings bank for about two years beginning in 2007 also does not affect Countrywide's age. For purposes of the Riegle-Neal Act, including the age requirement, "bank" is defined to include "any former savings association."[18] "Savings association," for these purposes, includes "any Federal savings association."[19] As stated, at the time of the consummation of the merger, Countrywide will have been in existence as a bank and as a "former federal savings bank" since 1990 and, thus, complies with the five-year age requirement imposed by Colorado law consistent with the Riegle-Neal.[20]

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[16] Colo. Rev. Stat. Ann. §§ 11-104-201(2)(West 2003 & Supp. 2007-2008).

[17] *Id.* at § 1831u(a)(5)(A). *See also TeamBank, N.A. v. Missouri,* 279 F.3d 614 (8th Cir. 2002) (giving deference to and upholding OCC determination that bank that had relocated into state of Missouri less than five years earlier satisfied Missouri five-year age requirement on grounds, among others, that Riegle-Neal requirement measured age of bank for these purposes based on the amount of time that it was in "existence").

[18] 12 U.S.C. § 1813(a)(1)(B).

[19] *Id.* at § 1813(b)(1)(A).

[20] Moreover, Colorado statutes imposing an age requirement, even if they were controlling on whether to calculate the age of a bank based on a period of time other than the length of the bank's "existence," do not link the state's five-year age requirement to the amount of time that a target institution has been located in Colorado. In adopting interstate banking and branching, the Colorado legislature declared:

> The general assembly further finds and declares that . . . interstate branching through the acquisition of a branch of an insured financial institution without the acquisition of such financial institution that has been in operation for at least five years at the time of acquisition is expressly prohibited.

Colo. Rev. Stat. Ann. at § 11-104-201(2).

Moreover, this state statute applies the age requirement to both federal savings banks and national banks. For purposes of this statute, "financial institution" means any bank or federal savings bank, *id.* at §11-101-401(36), and "bank" includes national banks and state banks. *Id.* at § 11-101-401(5). It could hardly be argued that an institution that was in existence for the past 19 years as a national bank, District of Columbia bank or federal savings bank, and for the past eight years as a national bank or federal savings bank does not meet the five-year age requirement.

Colorado law also provides:

> An out-of-state bank holding company may not acquire control of, or acquire all or substantially all of the assets of, a Colorado depository institution having its principal place of business in Colorado unless such depository institution has been in operation for at least five years as the time of the acquisition of control.

Id. at § 11-104-202(2). The term "depository institution" is not defined for purposes of this provision, though "depository institution" is defined elsewhere in the banking code to include a legal entity chartered under the laws of the United States to receive deposits and which is supervised or examined by an agency of the United States. *Id.* at § 11-71-102(b)(3)(a)(1) and (5). Moreover, under applicable federal law, "depository institution" includes banks

b. Filing requirements

The proposed transaction meets the applicable Riegle-Neal Act filing requirements. A bank applying for an interstate transaction under section 1831u(a) must (1) "comply with the filing requirements of any host State of the bank which will result from such transaction" as long as the filing requirements do not discriminate against out-of-state banks and are similar in effect to filing requirements imposed by the host state on out-of-state nonbanking corporations doing business in the host state; and (2) submit a copy of the application to the state bank supervisor of the host state.[21]

BANA has represented that it has provided a copy of the application to the Colorado Division of Banking. Consequently, this aspect of the filing requirements is satisfied.[22]

The Colorado interstate bank merger statute, however, also requires an out-of-state bank, before acquiring a Colorado bank in a merger, to obtain a certificate from the Banking Board certifying that the acquisition complies with state law.[23] Some of the information required to be provided to the Colorado department may be consistent with the filing requirement provision of the Riegle-Neal Act. However, this statute includes authority for the state banking board to approve or deny an application, a role not provided for under the Riegle-Neal Act. Such feature is substantially different from the qualifying to do business process for nonbanking corporations.[24]

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and federal savings banks. 12 U.S.C. § 1813(c)(1), (a)(1), and (b)(1)(A). At any rate, as will be discussed subsequently, nothing in this state statute prohibits a bank from acquiring, through a merger, a depository institution that is at least five years old, which is already owned by the same bank holding company as the acquiring bank and which has its main office in Colorado.

[21] 12 U.S.C. § 1831u(b)(1).

[22] The Colorado statute also requires the filing of a copy of the application with the banking board. Colo. Stat. Ann. § 11-104-202(9).

[23] The statute provides:

> No bank or bank holding company may conduct interstate branching in Colorado, or acquire control, directly or indirectly, of any Colorado financial institution without first obtaining a certificate from the banking board certifying that such branch or acquisition complies with the provisions of this article . . . . If the banking board refuses to issue a certificate . . . , such refusal and the reasons therefore shall be submitted pursuant to subsection (9) of this section to the appropriate federal regulatory agency with advisory comments. The banking board shall act on any application or notice filed pursuant to subsection (9) of this section and shall issue or refuse to issue the certificate required by this subsection within ninety days after the filing of any such application.

Id. at § 11-104-203(10). For purposes of this provision, a "Colorado financial institution" includes a state bank, national bank, or federal savings bank with its principal place of business in Colorado. *Id.* at § 11-101-401(5), (15), and (36).

[24] In contrast to the certification requirement applicable to banks, Colorado law provides that a "foreign entity" shall not transact business or conduct activities in Colorado until a "statement of foreign entity authority" is filed with the secretary of state. *Id.* at § 7-90-801. For these purposes, a "foreign entity" is defined to include a "foreign corporation . . . or any other organization or association that is formed under a statute or common law of a

To the extent that the Colorado statute imposes filing requirements beyond those permitted by the Riegle-Neal Act, such additional requirements are not applicable to the proposed merger. To the extent that the Colorado statute is interpreted and administered consistently with Riegle-Neal, it applies, and BANA must comply to that extent.

While not acknowledging that the Colorado Banking Board had jurisdiction to approve the proposed merger and retention of the former main office of BANA-Colorado as a branch, BANA did submit a filing to Colorado seeking certification.[25] Consequently, we conclude that BANA has complied with Colorado's filing requirements to the extent that they are permissible under the Riegle-Neal Act.[26]

c. Deposit concentration limits

The proposed merger does not raise issues with respect to the deposit concentration limits of the Riegle-Neal Act. Section 1831u(b)(2) places certain nationwide and statewide deposit concentration limits on interstate transactions. However, interstate transactions involving only affiliated banks are specifically exempt from these provisions.[27] As discussed, BANA and BANA-Colorado are affiliates; thus, the Riegle-Neal deposit concentration limits are inapplicable to this transaction.[28]

d. Expanded community reinvestment compliance

The proposed interstate transaction also does not raise issues with respect to the special community reinvestment compliance provisions of the Riegle-Neal Act. In determining whether to approve an application for an interstate merger under section 1831u(a), the OCC must (1)

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jurisdiction other than this state . . ." and "foreign corporation" means "an entity formed under the law of a jurisdiction other than this state that is functionally equivalent to a domestic corporation." *Id.* at § 7-90-102(22) and (23). A "statement of foreign entity authority" to be filed with the secretary of state must state the entity's true and assumed names; the jurisdiction under the law of which it was formed; the form of the entity; its principal office address; the name and address of its registered agent; and the date it commenced or expects to commence business activities in the state. *Id.* at § 7-90-803. The statute further provides that a foreign entity is authorized to transact business or conduct activities in Colorado "from the effective date of its statement of foreign entity authority . . . ." *Id.* at 7-90-805.

[25] For a more complete discussion of the extent to which state filing requirements do not apply in a Riegle-Neal transaction because they exceed the limitations imposed on such filing requirements by the Riegle-Neal Act, *see* OCC Corporate Decision 96-29, pp. 11-15 (May 20, 1996); OCC Corporate Decision 97-43, pp. 3-4 (June 12, 1997) (specifically addressing the Colorado filing statute).

[26] The Banking Board denied BANA's request for certification. Letter by Fred J. Joseph, Acting State Bank Commissioner, Colorado Division of Banking, to Radhi Thayu, Assistant General Counsel, Bank of America (April 16, 2009) ("Banking Board Letter"). This denial will be discussed subsequently.

[27] 12 U.S.C. § 1831u(b)(2)(E).

[28] Even if one viewed this transaction as a merger between a national bank and a federal savings bank, the deposit cap still would not apply since the deposit cap applies only to mergers under the Riegle-Neal Act, which does not govern mergers between banks and federal savings banks.

comply with its responsibilities under section 804 of the CRA;[29] (2) take into account the CRA evaluations of any bank that would be an affiliate of the resulting bank; and (3) take into account the applicant bank's record of compliance with applicable state community reinvestment laws.[30] However, these provisions do not apply to transactions, such as this, between affiliated banks.[31] Thus, this Riegle-Neal Act provision is inapplicable. However, the CRA itself is applicable and will be addressed subsequently.

e. Capital and management

The proposal must satisfy the adequacy of capital and management skills requirements in the Riegle-Neal Act.[32] The OCC may approve an application for an interstate merger transaction under § 1831u(a) only if each bank involved in the transaction is adequately capitalized as of the date the application is filed and the resulting bank will continue to be adequately capitalized and adequately managed upon consummation of the transaction.[33] The OCC has determined that these standards are satisfied.

2. Bank Merger Act and Community Reinvestment Act Compliance

In addition to compliance with the Riegle-Neal Act, a proposed merger also must be evaluated under the standards set for in the Bank Merger Act, [34] and the Community Reinvestment Act.[35]

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[29] 12 U.S.C. § 2903.

[30] 12 U.S.C. § 1831u(b)(3).

[31] *Id.* Expanded CRA does not apply where the resulting bank, BANA in this case, would have a branch or a bank affiliate in any state in which it had no branch or bank affiliate immediately prior to the transaction. In this case, expanded CRA does not apply because BANA and BANA-Colorado are affiliates prior to the merger.

[32] 12 U.S.C. § 1831u(b)(4).

[33] 12 U.S.C. § 1831u(b)(4). The term "adequately capitalized" for these purposes has the same meaning as used with respect to prompt corrective action. 12 U.S.C. § 1831u(g)(1).

[34] 12 U.S.C. § 1828(c)(2)(A).

[35] 12 U.S.C. §§ 2902(3)(E) and 2903(a)(2) and 12 C.F.R. § 25.29(a)(3).

a. Bank Merger Act

The OCC reviewed the proposed merger under the criteria of the Bank Merger Act[36] and applicable OCC regulations and policies. Among other matters, we found that the proposed mergers would not have any anticompetitive effects. The OCC considered the financial and managerial resources of the banks, their future prospects, and the convenience and needs of the communities to be served. In addition, the Bank Merger Act requires the OCC to consider ". . . the effectiveness of any insured depository institution involved in the proposed merger transaction in combating money laundering activities, including in overseas branches."[37] We considered these factors and found them consistent with approval under the statutory provisions.

b. Community Reinvestment Act

The CRA requires the OCC to take into account the applicants' record of helping to meet the credit needs of the community, including low- and moderate-income ("LMI") neighborhoods, when evaluating certain applications, including conversions and merger transactions that are subject to the Bank Merger Act.[38] The OCC considers the CRA performance evaluation of each institution involved in the transaction.

In the February 12, 2008 Performance Evaluation ("PE"), issued by the OTS, Countrywide FSB received an overall "needs to improve" CRA rating. As reflected in its PE, Countrywide FSB's performance under the lending, investment and service tests was consistent with an overall rating of "satisfactory." However, the rating was lowered to "needs to improve" because the most recent comprehensive examination indicated evidence of discriminatory credit practices on a prohibited basis. Countrywide FSB and BAC have represented that Countrywide is taking the actions committed to the OTS related to the fair lending matters that resulted in a CRA rating downgrade. In October 2008, BAC entered into a settlement agreement with eleven state Attorney Generals ("AGs") who were pursuing legal action against Countrywide Financial Corporation and its subsidiaries, including Countrywide FSB, because of alleged deceptive lending practices and violations of state consumer laws. BAC's settlement with the state AGs, requires, among other things, making appropriate modifications to subprime and option ARM loans underwritten by Countrywide Financial Corporation's subsidiaries and a commitment to improving lending practices at Countrywide entities. The merger of Countrywide FSB into BANA does not diminish the obligations undertaken by BAC pursuant to the settlement with the state AGs.

Because Countrywide FSB will cease to exist upon completion of the merger, and BANA intends to put in place its existing CRA policies, procedures and practices, at all former

[36] 12 U.S.C. § 1828(c).

[37] 12 U.S.C. § 1828(c)(11).

[38] 12 U.S.C. § 2903; 12 C.F.R. § 25.29.

Countrywide FSB business locations, approval of the conversion and merger applications is not inconsistent with the requirements under CRA.

In the December 31, 2006 PE, issued by the OCC, BANA received an overall "outstanding" CRA rating. As reflected in its PE, BANA also received an "outstanding" rating on its lending, investment and service tests. The OCC's review of BANA's overall record, and other information available to the OCC as a result of its regulatory responsibilities, revealed no evidence that BANA is not meeting the credit needs of its communities, including LMI neighborhoods. BANA's CRA programs for meeting the credit needs of the communities, including LMI neighborhoods, of the resulting bank will remain in place. In addition, BANA has the experience and expertise to fully address the credit practices at Countrywide that led to the "needs to improve" CRA rating and the state AGs' allegations concerning deceptive lending at Countrywide.

C. Retention of main offices and branches

Upon consummation of the merger, BANA proposes to retain its own main office and branches and to retain the main office of BANA-Colorado in Centennial, Colorado as a branch of BANA.[39] The Riegle-Neal Act provides that, subject to the approval of the OCC, following an interstate merger, the resulting bank may "retain and operate, as a main office or a branch, any office that any bank involved in an interstate merger transaction was operating as a main office or a branch immediately before the merger transaction."[40] Consequently, upon consummation of the mergers, BANA may retain its own main office and branches and designate the main office of BANA-Colorado as a branch.

As noted, the Colorado Banking Board on April 16, 2009, denied BANA's application for certification of the transaction as proposed.[41] In a separate letter to the OCC, however, the Banking Board stated that "the Colorado State Banking Board and the Colorado Division of Banking have no objection to the conversion and subsequent merger of Countrywide Bank, a Federal Savings Bank into Bank of America, National Association, so long as the transaction is approved without establishing an interstate branch bank in Colorado."[42] As discussed, however, once an interstate merger transaction is determined to satisfy the requirements of the Riegle-Neal Act, retention of the main offices and branches of the merging parties is permissible with the approval of the appropriate federal regulator.

Moreover, as stated, while the Riegle-Neal Act permits states to require compliance with certain filing requirements, it does not give state regulators authority to approve or disapprove interstate

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[39] Applicant represents that the branch site at the location of the former main office in Colorado will provide lending and deposit services to customers including opening deposit accounts, receiving deposits by check, applying for mortgage loans, meeting with loan officers, and receipt of loan repayments.

[40] 12 U.S.C. § 1831u(d)(1).

[41] *See, supra,* n.26.

[42] Letter by Mr. Fred F. Joseph, Acting Colorado State Bank Commissioner, to Stephen Lybarger, Large Bank Licensing Lead Expert, OCC (April 16, 2009).

merger transactions between banks, including, as in the present case, where both parties to the merger are national banks. Nevertheless, while the state regulator has no authority to approve or disapprove branch retention by national banks following Riegle-Neal mergers, the OCC has considered the Colorado Banking Board's views in making its determination.[43]

In denying certification, the Banking Board stated:

> [BANA's] application to operate the Centennial Colorado facility as an interstate branch of BANA does not comply with the requirements of 11-104-202. . . . Specifically, the Banking Board found that neither Countrywide Bank, a Federal Savings Bank (CWFSB) or its anticipated successor Countrywide Bank, National Association (CWBNA) are functional depository financial institutions with a principal place of business in Colorado; and that the operations of CWFSB/CWBNA are not principally conducted in Colorado.[44]

The Board's position appears to be grounded on paragraph (2) of § 11-104-202, which provides:

> An out-of-state bank holding company may not acquire control of, or acquire all or substantially all of the assets of, a Colorado depository institution having its principal place of business in Colorado unless such depository institution has been in operation for at least five years at the time of the acquisition of control.

Colorado's argument appears to be that unless an out-of-state holding company acquires a depository institution that meets age requirements and has its principal place of business in Colorado, the out-of-state holding company cannot acquire a bank in Colorado and, thus, branch into Colorado. This argument fails for several reasons. First, what is proposed is not the acquisition by a bank holding company of a depository institution. The bank holding company, Bank America Corporation, already owns the depository institution, Countrywide FSB, and Countrywide FSB is already located in Colorado.[45] Second, the transaction is an acquisition by a bank, BANA, which does not appear to be covered by this provision. Third, the Riegle-Neal Act applies to mergers between national banks with main offices in different states and is not dependent on the location of the merging banks' principal places of business.[46]

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[43] Colorado law does state that "if the banking board refuses to issue a certificate . . ., such refusal and the reasons therefor shall be submitted . . . to the appropriate federal regulatory agency with advisory comments." Colo. Rev. Stat. Ann. § 11-104-202((10).

[44] Banking Board Letter.

[45] As previously noted, "Colorado depository institution" is not defined for these purposes, but based on other definitions of the term "depository institution" in both Colorado banking law and federal law, the term could be read to include national banks and federal savings banks. *See, supra,* n. 20.

[46] 12 U.S.C. § 1831u(a)(1) and (g)(4). Colorado law does not appear to define the "principal place of business" of a bank. Rather, the law defines the term "operations are principally conducted" as "the state where the largest percentage of the aggregate deposits of all bank subsidiaries of the bank holding company are held." Colo. Stat. Ann. § 11-101-401(48). At any rate, even if this definition were applied to the merging banks themselves, the state where a national bank holds the largest percentage of its deposits is irrelevant for purposes of interstate mergers under the Riegle-Neal Act.

Rather, the one provision in the Colorado interstate banking and branching statutes that clearly addresses retention of branches by out-of-state banks as a result of interstate acquisitions states only that branches cannot be retained "without the acquisition of [the] financial institution." [47] In fact, in this transaction, BANA is acquiring an entire financial institution. [48]

D. Retention of subsidiaries

Following the conversion of Countrywide into BANA-Colorado, and BANA-Colorado's merger into BANA, BANA will retain ReconTrust Company, National Association, an uninsured, nondepository national bank with trust powers headquartered in Thousand Oaks, California ("Recon NA"). Recon NA is currently a subsidiary of Countrywide. A national bank may own a subsidiary national bank that engages in activities limited to trust powers.[49]

To the extent that Colorado's argument under § 11-104-202 questions the activities of Countrywide FSB in Colorado and the permissibility of the relocation of the home office of Countrywide FSB from Virginia into Colorado, the OTS has made that determination and the OCC has no jurisdiction over relocations of federal savings banks. We note, however, that the applicant has represented that the Colorado home office of the Countrywide FSB is engaging in providing the same products and services as provided at its former home office in Virginia.

[47] Colo. Stat. Ann § 11-104-201(2). *See, supra,* n. 20. For these purposes, "financial institution" includes national banks and federal savings banks, among others. *Id.* at § 11-101-401(5), (36).

[48] The Division of Banking letter filed by the Colorado Division of Banking in response to its receipt of a copy of the applications from the applicants stated that "de novo branching in Colorado is expressly prohibited." While this is true with respect to interstate de novo branching, BANA's application does not involve interstate de novo branching. Under Riegle-Neal, a de novo branch is a branch that (i) is originally established by the national bank as a branch; and (ii) does not become a branch of such bank as a result of – (I) the acquisition by the bank of an insured depository institution; or (II) the conversion, merger, or consolidation of any such institution . . . ." 12 U.S.C. § 36(g)(3)(A). While "depository institution" in this context is not expressly defined, section 36(g), including the definition of "de novo branch" is identical to 12 U.S.C. § 1828(d)(4), which governs interstate de novo branching by state nonmember banks. Because § 1828(d)(4), which was adopted simultaneously with § 36(g), is codified as part of Chapter 16 of Title 12, it takes on the definition of "insured depository institution" found in § 1813(c)(2), which includes national banks and federal savings associations. Consequently, a branch acquired by a national bank through a merger with another bank, or a merger with or conversion of a federal savings bank, is not within the definition of a "de novo branch" as set forth in § 36(g)(3)(A) or § 1828(d)(4)(C). Moreover, such a facility would not appear to be a de novo branch under Colorado law, which tracks the definitions of "de novo branch" found in § 36(g) and § 1824(d)(4). Colo. Stat. Ann. at § 11-101-401(28). Rather, the acquisition by BANA of a branch in Colorado arises from a merger of two national banks under the Riegle-Neal Act, not from the establishment of a de novo branch in Colorado by BANA.

[49] *See, e.g.,* OCC Conditional Approval 687 (August 25, 2005) ("Conditional Approval 687"). This approval addressed the acquisition by PNC Bank, National Association ("PNC") of assets and liabilities of Riggs Bank National Association ("Riggs"). The approval noted that among the assets that PNC would acquire were Riggs's shares in Riggs Bank National Trust Company ("Riggs NTC"), a national bank limited to trust powers that was an operating subsidiary of Riggs. The approval stated that national banks are permitted to own limited purpose trust companies as operating subsidiaries that engage only in activities permissible for national banks. We note that Recon Trust already is a national bank and, thus, can engage only in activities permissible for national banks.

We note also that Conditional Approval 687 stated that OCC regulations require a filing for a change in control

Upon BANA's acquisition of Countrywide by merger, Recon Trust Company ("Recon") will briefly become an operating subsidiary of BANA. We note BANA has represented that about a month after consummation of its acquisition of Countrywide, Recon will merge into Recon NA and cease to exist. This merger was approved by the OCC on April 15, 2009.[50]

BANA also is authorized to retain CWB Community Assets, Inc. ("CBW") under 12 C.F.R. Part 24. CBW is a community development corporation, which holds all of Countrywide's CRA investments, primarily low income tax credit partnership interests. CBW also operates a grant program for CRA lending.

III. Section 1818 conditions

These approvals are subject to the following conditions:

1. Prior to consummation of the conversion, as approved, BANA shall execute an operating agreement ("Operating Agreement") with the OCC. The Operating Agreement shall provide, among other requirements, that not later than 30 days after consummation of the conversion, the Bank shall enter into an agreement, acceptable to the OCC, with its direct and indirect holding companies, Bank America Corporation, NB Holdings Corporation, BAC North America Holding Corporation, and BANA Holding Corporation (the "Holding Companies"), pursuant to which the Holding Companies agree to indemnify BANA for losses and related expenditures, as specified, that may be incurred directly or indirectly by BANA or any of its subsidiaries, including, but not limited to Recon NA, arising from the acquisition, directly or indirectly, of specified assets or interests in specified assets, or any activity assumed by BANA or any of its subsidiaries, including Recon NA, with respect to such assets or interests in such assets.

2. The Board of Directors shall assure that the Operating Agreement is fully adopted, timely implemented, and adhered to thereafter.

These conditions of approval are conditions "imposed in writing by a Federal Agency in connection with any action on any application, notice or other request" within the meaning of 12 U.S.C. § 1818. As such, the conditions are enforceable under 12 U.S.C. § 1818.

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of a limited purpose national trust bank. 12 C.F.R. § 5.50(b). However, the regulation exempts a transaction that is subject to review under the Bank Merger Act. *Id.* at § 5.50(c)((2)(iii). Because the merger of Countrywide, the parent of Recon NA, into BANA is subject to the Bank Merger Act, no change in control filing is required.

[50] Countrywide also represents that it owns two dormant companies, CB Securities Holdings I, Inc., and CB Securities Holdings II, Inc., both Delaware corporations formed in connection with an anticipated transaction that was never consummated. Countrywide represents that neither of these companies engages in any activities or holds any assets and liabilities. If BANA intends to activate one or both of these entities, BANA should notify the OCC and follow the appropriate procedures under 12 C.F.R. § 5.34.

IV. Conclusion

For the reasons set forth above, and subject to the commitments and representations made in the applications and by representatives of the applicants, the section 1818 conditions set forth above, and subject to the receipt by the applicants of all other applicable regulatory approvals, nonobjections and waivers, the OCC approves the following:

- the conversion of Countrywide FSB to a national bank;
- the waiver of the residency requirement under 12 U.S.C. § 72 as applied to a majority of directors of BANA-Colorado;
- the merger of BANA-Colorado into BANA;
- the retention by BANA of its main office and branches following consummation of the merger of Countrywide into BANA and the retention of the main office of BANA-Colorado in Centennial, Colorado, as a branch of BANA; and
- the retention of subsidiaries as previously described.

You have six months to consummate the conversions and mergers from the date of this decision. The conditional approval will automatically terminate unless the OCC grants an extension of the time period. The OCC generally is opposed to granting extensions, except under extenuating circumstances and expects the conversions and mergers to occur as soon as possible.

This approval, and the activities and communications by OCC employees in connection with these filings, do not constitute a contract, express or implied, or any other obligation binding upon the OCC, the United States, any agency or entity of the United States, or any officer or employee of the United States, and do not affect the ability of the OCC to exercise its supervisory, regulatory, and examination authorities under applicable law and regulations. Our conditional approval is based on Countrywide's and BANA's representation, submission, and information available to the OCC as of this date. The OCC may modify, suspend, or rescind this approval if a material change in the information on which the OCC relied occurs prior to the date of the transactions to which this decision pertains. The foregoing may not be waived or modified by any employee or agent of the OCC or the United States.

In the event of questions, I may be contacted by e-mail, Stephen.Lybarger@occ.treas.gov or at (202) 874-5294. Please include the application control numbers in all correspondence.

Sincerely,

signed

Stephen A. Lybarger
Large Bank Licensing Lead Expert