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Comptroller of the Currency  
Administrator of National Banks

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Washington, D.C.

**CRA Decision #89**  
**March 1999**

**DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY  
ON THE APPLICATIONS OF  
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,  
SAN FRANCISCO, CALIFORNIA,  
BANK OF AMERICA TEXAS, NATIONAL ASSOCIATION,  
DALLAS, TEXAS, AND  
NATIONSBANK, NATIONAL ASSOCIATION, CHARLOTTE, NORTH CAROLINA**

**February 19, 1999**

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**I. INTRODUCTION**

These applications are part of the process of combining the banking operations of the subsidiary banks of the recently formed BankAmerica Corporation.<sup>1</sup> In these applications, the branch banking operations in two states in which there is overlap -- New Mexico and Texas -- will be combined.<sup>2</sup>

On November 25, 1998, Bank of America National Trust and Savings Association ("BANTSA"), San Francisco, California, and NationsBank, National Association, Charlotte, North Carolina ("NationsBank"), filed applications with the Office of the Comptroller of the Currency ("OCC") that would result in BANTSA's branches in New Mexico becoming branches of NationsBank. Both BANTSA and NationsBank currently operate branches in New Mexico.<sup>3</sup>

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<sup>1</sup> NationsBank Corporation, Charlotte, North Carolina, merged with the former BankAmerica Corporation, San Francisco, California, with the resulting holding company taking the name BankAmerica Corporation. See *Order approving the Merger of NationsBank Corporation and BankAmerica Corporation*, 84 Fed. Res. Bull. 858 (August 17, 1998).

<sup>2</sup> A separate application for the merger of Bank of America National Trust and Savings Association and NationsBank, N.A., filed on December 28, 1998, will combine the remainder of the two banks' branch operations in other states.

<sup>3</sup> These branches in New Mexico resulted from earlier transactions. See *Applications to Merge Five Affiliated Banks into Bank of America National Trust and Savings Association* (OCC Corporate Decision No. 96-67, November

The banks propose to effect the reorganization of the New Mexico branches through a series of steps:

- (1) BANTSA will establish an interim national bank, Interim Bank of America (NM), National Association, with its main office in Santa Fe, New Mexico, (“New Mexico Interim”) as a subsidiary of BANTSA.
- (2) BANTSA will contribute all its New Mexico assets (including its New Mexico branches) to New Mexico Interim, and New Mexico Interim will assume all of BANTSA’s New Mexico liabilities (the “New Mexico Branch Transfer”).
- (3) BANTSA will dividend all the stock of New Mexico Interim to its immediate parent holding company, NB Holdings Corporation (“NB Holdings”).
- (4) New Mexico Interim will merge with and into NationsBank, under NationsBank’s charter and title, under 12 U.S.C. § 215a, with NationsBank retaining the former BANTSA branches under 12 U.S.C. § 36(b) (the “New Mexico Merger”).

These transactions will occur in sequence at substantially the same time.<sup>4</sup>

Also on November 25, 1998, NationsBank and Bank of America Texas, National Association, Dallas, Texas, (“Bank of America Texas”) applied to the OCC for approval to merge Bank of America Texas with and into NationsBank, under NationsBank’s charter and title, under 12 U.S.C. § 215a, with NationsBank retaining Bank of America Texas’ main office and branches under 12 U.S.C. § 36(b) (the “Texas Merger”).

## **II. LEGAL AUTHORITY FOR THE TRANSACTIONS**

### **A. Formation of New Mexico Interim.**

The National Bank Act authorizes the chartering of national banks.<sup>5</sup> OCC regulations set out special requirements and procedures for chartering a national bank that is an “interim bank” -- *i.e.*, a national bank that does not operate independently but exists solely as a vehicle for a business combination.<sup>6</sup> The transaction for which New Mexico Interim is being established (the

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29, 1996); Decision on the Application to Merge Boatmen’s National Bank of Arkansas, Little Rock, Arkansas, and Twenty-Five Other Affiliated Banks with NationsBank, N.A. (OCC Corporate Decision No. 97-75, August 7, 1997). In addition, BANTSA had other branches in New Mexico that were divested to an unaffiliated bank in December 1998. The divested branches are not involved in the proposed transaction.

<sup>4</sup> The effect of the proposed transactions is the same as if NationsBank had acquired the New Mexico branches directly from BANTSA in a purchase and assumption transaction. Such a direct purchase and assumption transaction would have been permissible; and NationsBank’s acquisition of the additional branches in New Mexico would have been authorized under 12 U.S.C. § 36(c). The banks believe the proposed structure is more tax-efficient.

<sup>5</sup> See, *e.g.*, 12 U.S.C. §§ 21, 26 & 27.

<sup>6</sup> See 12 C.F.R. § 5.33(e)(4). A “business combination” includes the assumption of deposit liabilities and mergers between affiliated national banks. 12 C.F.R. § 5.33(d)(1) & (d)(2). In addition, interim federally-chartered

transfer of branches from BANTSA to NationsBank by means of the New Mexico Branch Transfer and the New Mexico Merger) constitutes a business combination. The requirements of section 5.33, with respect to interim banks, as well as those in 12 U.S.C. §§ 21, 26 and 27 for chartering a new bank, are satisfied. The establishment of New Mexico Interim is authorized.

New Mexico Interim will be initially established as a subsidiary of BANTSA. New Mexico Interim will consist solely of existing business of BANTSA; it is being formed to facilitate the business reorganization with NationsBank; and New Mexico Interim will be a subsidiary of BANTSA for only a moment in time before it is transferred to NB Holdings and merged into NationsBank. BANTSA's establishment and ownership of New Mexico Interim is authorized under 12 U.S.C. § 24(Seventh) and 12 C.F.R. § 5.34.

Accordingly, the formation of New Mexico Interim is authorized.

**B. Transfer of New Mexico branches from BANTSA to New Mexico Interim.**

Immediately after the formation of New Mexico Interim, New Mexico Interim will assume by contribution the assets and liabilities associated with the New Mexico branches of BANTSA, including the branches themselves. National banks have long been authorized to purchase bank-permissible assets and assume bank-permissible liabilities from other institutions, including assuming the deposit liabilities from other depository institutions, as part of their general banking powers under 12 U.S.C. § 24(Seventh).<sup>7</sup> Such purchase and assumption transactions are commonplace in the banking industry. In addition, as a result of the transaction, New Mexico Interim will obtain the New Mexico branch locations of BANTSA. A national bank may establish branches at any point within the state in which the national bank is situated, if such establishment is authorized for state banks by state law. 12 U.S.C. § 36(c). New Mexico permits statewide branching by New Mexico state-chartered banks. N.M. Stat. Ann. §§ 58-5-2, 58-5-3. Thus, New Mexico Interim's retention of the branches is authorized under section 36(c).

Accordingly, the transfer of the New Mexico branches from BANTSA to New Mexico Interim is authorized.

**C. Dividend of stock in New Mexico Interim.**

Immediately after the New Mexico Branch Transfer, all of the shares of New Mexico Interim will be dividended from BANTSA to NB Holdings. The purpose of the dividend is to cause New Mexico Interim and NationsBank to be direct subsidiaries of the same entity, NB

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depository institutions that are chartered by the appropriate federal banking agency and will not open for business, such as New Mexico Interim, are FDIC-insured upon issuance of the institution's charter by the agency. See 12 U.S.C. § 1815(a)(2).

<sup>7</sup> See, e.g., *City National Bank of Huron v. Fuller*, 52 F.2d 870, 872-73 (8th Cir. 1931); *In re Cleveland Savings Society*, 192 N.E.2d 518, 523-24 (Ohio Com. Pl. 1961). See also 12 U.S.C. § 1828(c)(3) (purchase and assumption transactions included among transactions requiring review under the Bank Merger Act).

Holdings, prior to their merger. Dividends in kind are permissible for national banks under 12 C.F.R. § 5.66, subject to OCC approval.

**D. The Merger of New Mexico Interim and Bank of America Texas into NationsBank.**

Immediately after the dividend of the shares of New Mexico Interim from BANTSA to NB Holdings, New Mexico Interim and Bank of America Texas will be merged into NationsBank. NationsBank currently operates branches in both New Mexico and Texas. Thus, this merger is a merger between an existing interstate national bank and other national banks in states in which the interstate bank already has branches. Such mergers may be authorized under 12 U.S.C. § 215a, and the resulting bank may retain the offices of the banks as branches under 12 U.S.C. § 36(b)(2), if the transaction involves the acquisition of branches. If the resulting bank has fiduciary powers, as NationsBank does here, it is authorized to exercise them at all its branches in all the states in which it operates, and it succeeds to the fiduciary powers and appointments of the merging banks. The OCC previously has considered such applications under section 215a on numerous occasions. The Riegle-Neal Act did not change existing authority under section 215a. This merger does not raise new issues, but only the application of established precedent for applying section 215a to interstate national banks. Only a summary of the analysis will be presented here; earlier OCC decisions should be consulted for a more complete discussion.

**1. New Mexico Interim and Bank of America Texas may be merged into NationsBank under 12 U.S.C. § 215a.**

The general authority and procedures for national banks to merge with other national banks, or with state banks, is contained in section 3 of the National Bank Consolidation and Merger Act, 12 U.S.C. § 215a. Section 215a authorizes mergers between national banks “located within the same State.” In many prior decisions, the OCC has applied section 215a in the context of a merger with an existing interstate national bank and concluded that a national bank with its main office and branch offices in more than one state is “located” in each such state, for the purpose of mergers with other banks in that state under section 215a.<sup>8</sup> Here, NationsBank has branches in Texas, and so it is located in Texas for purposes of the merger with Bank of America Texas. And NationsBank has branches in New Mexico, and so it is located in New Mexico for purposes of the merger with New Mexico Interim. The merger is authorized under section 215a.

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<sup>8</sup> See, e.g., Decision on the Application to Merge NationsBank of Texas, N.A., Dallas, Texas, into NationsBank, N.A., Charlotte, North Carolina (OCC Corporate Decision No. 98-19, April 2, 1998) (Part II-A-1) (pages 6-8) (“*OCC Texas Merger Decision*”); Decision on the Applications of Bank Midwest of Kansas, N.A., and Bank Midwest, N.A. (OCC Corporate Decision No. 95-05, February 16, 1995), *reprinted in* Fed. Banking L. Rep. (CCH) ¶ 90,474 (“*OCC Bank Midwest Decision*”); other OCC decisions cited in the *OCC Texas Merger Decision*. In litigation challenging the *OCC Texas Merger Decision*, the federal district court agreed with the OCC’s position that the merger was authorized under 12 U.S.C. § 215a and that such mergers continue to be authorized after the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (“the Riegle-Neal Act”) and independently of that Act. See *Ghiglieri v. NationsBank of Texas, N.A.*, No. 3:97-CV-2897-P, 1998 U.S. Dist. LEXIS 6637 (N.D. Texas filed May 6, 1998) (memorandum opinion and order denying preliminary and permanent injunction).

**2. NationsBank may retain the offices of the three merging banks under section 36(b)(2).**

NationsBank has also requested OCC approval for the bank resulting from the merger (referred to in this subsection as "NationsBank-Resulting" or "the Resulting Bank" to distinguish it from NationsBank prior to the merger) to retain the main offices and branches of New Mexico Interim in New Mexico and Bank of America Texas in Texas and the branches of NationsBank as branches of the Resulting Bank after the merger. Branch retention following a merger under section 215a is covered by 12 U.S.C. § 36(b)(2). Applying the various provisions of section 36(b)(2) to the groups of branches involved in this merger, we find that NationsBank-Resulting is legally authorized to retain all the offices as branches.

**a. The Resulting Bank may retain and operate the main offices and branches of New Mexico Interim and Bank of America Texas under subsection 36(b)(2)(A).**

Different paragraphs in section 36(b)(2) apply different rules for branch retention to the target bank and the lead bank in a merger. Paragraph (C) addresses the resulting bank's authority to retain the branches of the bank under whose charter the merger is effected, *i.e.*, the lead bank. Paragraph (A) addresses the resulting bank's authority to retain the branches and main offices of the other banks in the merger or consolidation, *i.e.*, target banks. In this merger, the banks are combining under the charter of NationsBank, and so New Mexico Interim and Bank of America are the target banks and NationsBank is the lead bank.

NationsBank-Resulting is authorized to retain the main offices and branches of New Mexico Interim and Bank of America Texas under section 36(b)(2)(A). Under that provision, the resulting bank may retain the branches and the main office of the target bank as branches if the resulting bank could establish them as new branches of the resulting bank under section 36(c). For branching purposes under section 36(c), a national bank is "situated" in any state in which it has a branch or main office and may establish branches in each such state in the same manner as in-state national banks.<sup>9</sup> In applying the branch retention provisions of section 36(b)(2)(A) in the context of mergers involving interstate banks, it is therefore necessary to determine in which state(s) the resulting bank is situated. The OCC previously concluded that the resulting bank is properly treated as situated in all of the states in which the participating banks were situated in order to then apply the section 36(c) standard, using each state's law for the branches in that state. This necessarily follows from the courts' holdings regarding section 36(c) and the fact that section 36(b)(2)(A) refers to section 36(c).<sup>10</sup>

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<sup>9</sup> See *Seattle Trust & Savings Bank v. Bank of California, N.A.*, 492 F.2d 48, 51 (9th Cir. 1974), *cert. denied*, 419 U.S. 844 (1974) (an interstate national bank is "situated" in each state in which it has offices for purposes of establishing additional branches under section 36(c)). See also *Ghiglieri v. Sun World, N.A.*, 117 F.3d 309, 315-16 (5th Cir. 1997) ("*Sun World*") (same, agreeing with *Seattle Trust*).

<sup>10</sup> See, *e.g.*, *OCC Texas Merger Decision* (Part II-A-2-a) (pages 9-10); *OCC Bank Midwest Decision* (Part II-C-2-a). See also *Ghiglieri v. NationsBank of Texas, N.A.*, *supra* note 8, slip op. at p. 7

Accordingly, here, NationsBank (and also NationsBank-Resulting) is situated in New Mexico and Texas (as well as in all the other states in which NationsBank has branches) for purposes of section 36(b)(2). New Mexico permits statewide branching. N.M. Stat. Ann. §§ 58-5-2, 58-5-3. Thus, a national bank situated in New Mexico, such as NationsBank, could establish branches at all the locations of New Mexico Interim's main office and branches under section 36(c). Therefore, NationsBank-Resulting may retain and operate the main office and branches of New Mexico Interim in New Mexico as branches under section 36(b)(2)(A).<sup>11</sup> Similarly, Texas permits the resulting bank in an in-state merger involving Texas state banks to retain and operate branches that were part of a bank participating in the merger. Tex. Fin. Code § 32.301(c). In addition, Texas also permits its state banks to branch statewide within Texas. Tex. Fin. Code § 32.203(a). Thus, a national bank situated in Texas, such as NationsBank, could establish branches at all the locations of Bank of America Texas' main office and branches under section 36(c). Therefore, NationsBank-Resulting may retain and operate the main office and branches of Bank of America Texas in Texas as branches under section 36(b)(2)(A).<sup>12</sup>

**b. The Resulting Bank may retain and operate the branches of NationsBank under subsection 36(b)(2)(C).**

In this merger, NationsBank is the acquiring or lead bank. Section 36(b)(2)(C) authorizes the national bank resulting from a merger to retain and operate as a branch any branch the lead bank had prior to the merger, unless a state bank resulting from a merger would be prohibited by state law from retaining as a branch an identically situated office of a state bank. In prior merger decisions involving interstate national banks, both before and after the Riegle-Neal Act, the OCC has addressed the interpretation of section 36(b)(2)(C) with respect to lead banks that have offices in more than one state.<sup>13</sup>

We determined that the resulting national bank is situated in each state in which it operates for purposes of applying section 36(b)(2)(C). In this way, the three related subsections of section 36 -- subsections 36(c), 36(b)(2)(A), and 36(b)(2)(C) -- will be interpreted consistently. And, just as with respect to the state law incorporated in subsections 36(b)(2)(A) and 36(c), the state law incorporated into subsection 36(b)(2)(C) is -- for each state in which the lead bank has branches -- that state's law for the retention of branches by a lead state bank in a merger within that state. The state bank parity comparison used in applying paragraph (C) is a comparison, within each state, to the state law for that state's banks. Thus, the power of the resulting bank to retain the lead bank's branches in each state is determined by reference to that state's laws for in-state bank mergers.

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<sup>11</sup> See also 12 U.S.C. § 1831u(d)(2).

<sup>12</sup> The authority of NationsBank to establish additional branches in Texas under 36(c) was specifically upheld in *Sun World*, and to acquire additional branches in Texas by merger under section 36(b)(2) was specifically upheld in *Ghiglieri v. NationsBank of Texas, N.A.*

<sup>13</sup> See, e.g., *OCC Texas Merger Decision* (Part II-A-2-b); *OCC Bank Midwest Decision* (Part II-C-2-b).

Therefore, under subsection 36(b)(2)(C), for each state, the resulting bank may retain the branches of the lead bank unless the state has expressly prohibited branch retention for identically situated offices in a merger between its state banks. With respect to NationsBank's branches in North Carolina, South Carolina, Georgia, Florida, Virginia, Maryland, the District of Columbia, Missouri, Kansas, Oklahoma, Illinois, Arkansas, Iowa, Tennessee, Texas, and New Mexico, there are no provisions in the laws of these jurisdictions that would prohibit a state-chartered bank, following a merger with another state bank in that state, from retaining its own similarly situated branches in the state. Indeed, all these jurisdictions permit banks to retain branches after an in-state merger. Therefore, NationsBank-Resulting may retain the branches of NationsBank under section 36(b)(2)(C).

**3. The Riegle-Neal Act did not displace sections 215a and 36(b). A merger between an interstate national bank and another bank in a state in which the interstate bank already has branches may occur under section 215a even after the Riegle-Neal Act.**

The authority for this merger is based on longstanding provisions governing national banks, 12 U.S.C. §§ 36(b), 36(c), & 215a. The Riegle-Neal Act did not change existing authority under sections 215a and 36(b). The Riegle-Neal Act created a new merger authority that allows mergers between banks with different home states. In some situations, such as here, a particular proposed merger could come within the scope of, and so be authorized under, either statute. In such situations, nothing in the Riegle-Neal Act requires or implies that it was intended to supersede section 215a. In particular, in the precise situation raised here -- *i.e.*, when an interstate national bank is merging with other national banks in one of the states in which *it already has branches* -- the statutory language, overall statutory structure, and legislative history of the Riegle-Neal Act clearly show that mergers under section 215a may continue to occur. Nothing in the new sections added in the Riegle-Neal Act (in particular the provision on exclusive authority for additional branches, 12 U.S.C. § 36(e)) conflicts with pre-existing authority under sections 215a and 36(b) in this context. The OCC previously addressed this question of the relationship of sections 215a and 36(b) to the Riegle-Neal Act in prior decisions, including most recently and in most detail, the *OCC Texas Merger Decision*.<sup>14</sup> The federal district court agreed with the OCC's analysis of the relationship of section 215a and the Riegle-Neal Act.<sup>15</sup>

Accordingly, the merger of New Mexico Interim and Bank of America Texas into NationsBank is authorized under section 215a. NationsBank may retain and operate the target banks' offices as additional branches in New Mexico and Texas under section 36(b)(2).<sup>16</sup>

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<sup>14</sup> See *OCC Texas Merger Decision* (Part II-A-3) (pages 11-17); other OCC decisions cited therein. Moreover, with respect to Texas, since this merger is an in-state merger under section 215a, Texas' purported opt-out statute does not affect the authority for the merger because a state's authority to opt-out under the Riegle-Neal Act extends only to opting out of interstate merger transactions effected under the Riegle-Neal Act.

<sup>15</sup> See *Ghiglieri v. NationsBank of Texas, N.A.*, *supra* note 8.

<sup>16</sup> There are three provisions in Texas law that purport to bar NationsBank from engaging in the merger and operating branches in Texas. However, since these state laws directly conflict with NationsBank's authority to engage

### **III. ADDITIONAL STATUTORY AND POLICY REVIEWS**

#### **A. The Bank Merger Act.**

The Bank Merger Act, 12 U.S.C. § 1828(c), requires the OCC's approval for any assumption of deposit liabilities from another insured bank to a national bank or a merger between insured banks where the resulting institution will be a national bank. Under the Act, the OCC generally may not approve a merger which would substantially lessen competition. In addition, the Act also requires the OCC to take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served. For the reasons stated below, we find the New Mexico Branch Transfer, the New Mexico Merger, and the Texas Merger may be approved under section 1828(c).

##### **1. Competitive analysis.**

Since all the banks involved in these transactions are already owned by the same bank holding company, the transactions will have no anticompetitive effects.

##### **2. Financial and managerial resources.**

The financial and managerial resources of NationsBank, BANTSA, and Bank of America Texas are presently satisfactory. NationsBank expects to achieve administrative efficiencies by operating the offices of BANTSA in New Mexico and Bank of America Texas in Texas as branches of NationsBank, thereby combining all branches in each state in one bank. The addition of these branches in New Mexico and Texas to NationsBank's existing branch operations there will not substantially affect NationsBank's financial and managerial resources. The future prospects of the institutions, individually and combined, are favorable. Thus, we find the financial and managerial resources factor is consistent with approval of these transactions.

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in this transaction under federal law, they are preempted under traditional federal law preemption standards regarding national banks. See, e.g., *Barnett Bank of Marion County, N.A.*, 517 U.S. 25, 31-34 (1996). These state laws were discussed in two earlier OCC decisions. See *OCC Texas Merger Decision* (Part II-B, pages 20-22); Decision on the Applications of Sun World, N.A., El Paso, Texas (OCC Corporate Decision No. 96-40, August 2, 1996) (the *OCC Sun World Relocation Decision*). Courts, in reviewing these decisions and finding the banks had authority to have branches in Texas, implicitly determined the Texas state laws could not apply to prohibit the branches. See *Sun World*, 117 F.3d at 315-16; *Ghiglieri v. NationsBank of Texas, N.A.* Similar questions regarding the preemption of state laws that prohibit out-of-state banks from having branches in the state or exercising fiduciary powers in the state have arisen with respect to other states. See, e.g., *OCC Bank Midwest Decision* (Part III) (Kansas); Decision on the Applications of Bank One Wisconsin Trust Company, N.A., and Bank One Trust Company, N.A. (OCC Corporate Decision No. 97-33, June 1, 1997) (Wisconsin).



### **3. Convenience and needs.**

The Resulting Bank will help to meet the convenience and needs of the communities to be served. NationsBank will continue to serve the same areas in North Carolina and its other states, including New Mexico and Texas. It will add additional branches and serve additional areas in New Mexico and Texas as it adds the offices of BANTSA/New Mexico Interim and Bank of America Texas. There will be no reductions in products or services as a result of the transactions. The combined bank will continue to offer a full line of banking products and services. The transactions will permit the Resulting Bank to better serve its customers and at a lower cost. The combined resources, including capital and reserves, of the currently separate banks will provide a more substantial capital cushion for unexpected losses as well as provide business customers with a higher legal lending limit.

Because the combining banks have overlapping branch systems in New Mexico and Texas, the Resulting Bank expects to close or consolidate 122 branch offices throughout Texas and New Mexico, 26 of which are located in low-to-moderate income areas.<sup>17</sup> The OCC noted that during the public comment period for the BankAmerica Corporation and NationsBank Corporation merger application, the Federal Reserve Board received several comments by individuals and community organizations expressing concerns regarding the closing of branches in low- and moderate-income ("LMI") areas.<sup>18</sup> While the most recent Community Reinvestment Act (CRA) Public Evaluations of the banks disclosed no concerns with respect to branch closing policies or procedures,<sup>19</sup> the OCC investigated the impact of the planned 26 branch closings or consolidations in LMI areas. The OCC determined that the number of branch closings in LMI areas was not disproportionate with the number of closings in middle- and upper-income areas in Texas and New Mexico. In Texas, after 24 branches located in LMI areas are closed or consolidated, the aggregate level of branches located in LMI areas as a percent of total branches in Texas for both banks will increase from 26% to 28%. In New Mexico, after a total of 6 branches located in LMI areas are closed, consolidated or divested, the aggregate level of branches located in LMI areas as a percentage of total branches for both banks will remain at 22%.

In addition, as part of its ongoing business plans, NationsBank continually evaluates its branch system, including branches acquired in transactions and, as a part of the normal course of business, may close redundant or unprofitable branches. Any such later closures will be made in

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<sup>17</sup> In addition, in order to address competitive concerns with the NationsBank Corporation and BankAmerica Corporation merger, BANTSA divested 17 of its 39 branches in New Mexico in December 1998.

<sup>18</sup> See *Order approving the Merger of NationsBank Corporation and BankAmerica Corporation*, 84 Fed. Res. Bull. 858, 875-76 (August 17, 1998).

<sup>19</sup> During 1998, the OCC examiners reviewed NationsBank's branch opening and closing policy and adherence to that policy in several geographies. That review determined that NationsBank's opening and closing policy was comprehensive and that NationsBank's delivery system is reasonably accessible to substantially all portions of the bank's assessment areas reviewed by the OCC.

accordance with applicable statutes and regulations, including notification of customers of the branches, and will consider the needs of the community affected.

Accordingly, we believe the impact of the transactions on the convenience and needs of the communities to be served is consistent with approval of these transactions.

**B. The Community Reinvestment Act.**

The CRA requires the OCC to take into account the applicant's record of helping to meet the credit needs of its entire community, including LMI neighborhoods, when evaluating certain applications.<sup>20</sup> The types of applications that are subject to review under the CRA include purchase and assumption transactions and mergers.<sup>21</sup> The OCC considers the CRA performance evaluation of each depository institution involved in the transaction. Under the CRA regulation, the OCC evaluates performance using criteria relative to the bank's lending, investments, and services. In these evaluations, the OCC considers the institution's capacity and constraints, including the size and financial condition of the bank and its subsidiaries.

NationsBank received an Outstanding CRA rating in September 1995. Subsequent to that rating, the bank has acquired several other banks, each of which has a Satisfactory or better CRA rating. The OCC is currently conducting a CRA examination of NationsBank and therefore, has not yet issued a Public Evaluation or assigned a new performance rating. BANTSA received an Outstanding CRA rating in March of 1998.<sup>22</sup> Bank of America Texas received an Outstanding CRA rating in April 1997.

Although the OCC did not receive directly any letters commenting on the transactions, the OCC investigated the concerns relating to the banks activities in Texas and New Mexico that were raised in letters and testimony received by the Federal Reserve Board in connection with the holding company merger application. The concerns expressed in the letters and testimony and the results of the OCC's investigation into those concerns are discussed below. In summary, our investigation and analysis of the issues raised indicated no basis for denying or conditioning the approval of these applications.

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<sup>20</sup> 12 U.S.C. § 2903.

<sup>21</sup> 12 C.F.R. 25.29(a)(3).

<sup>22</sup> In the same Performance Evaluation, BANTSA received a Satisfactory CRA rating for the State of New Mexico.

## **1. Bank of America's CRA Commitment.**

In connection with the holding company merger, BankAmerica Corporation announced a 10-year, \$350 billion community reinvestment and development commitment. Many commenters were concerned that the commitment did not specify the extent, if any, to which the commitment would benefit Texas or New Mexico. Without specifying where the investments are to be made, the commenters believed it would be difficult for the local communities to gauge whether the commitment was being met.

The OCC confirmed with BankAmerica Corporation that the commitment includes investments and lending to be made in Texas and New Mexico. The OCC also confirmed that, in July 1998, NationsBank Corporation informed the Texas Department of Banking that the combined company intends to open a Community Development Lending Office in Dallas and would continue to meet with Texas-based community organizations to assess evolving community needs. The corporation also told the Texas Department of Banking that the combined company's philanthropic activities and its community development investment and lending in Texas following the holding company merger would equal, if not exceed, the sum of the activities of NationsBank Corporation and BankAmerica Corporation as separate companies.

BankAmerica Corporation represented to the OCC that it will provide public reports on its progress in meeting the goals of the \$350 billion commitment. The reports will be detailed by product, geographic, and demographic distribution on a national, state and local basis. State and local reports will be provided to affected communities by bank management (including the Community Development Banking Group).<sup>23</sup> National results will be made available locally upon request. BankAmerica Corporation has committed to provide the OCC with copies of every national, state, and local report produced during the life of the commitment.

## **2. Local Participation in Decision-Making Process.**

Many commenters expressed concern that the holding company merger would result in a loss of local decision-making and local input regarding CRA decisions. Commenters were supportive of BANTSA's local advisory groups or boards and expressed concerns about the potential loss of such groups.

BankAmerica Corporation represented to the OCC that it will use substantially the same process used by the former NationsBank Corporation's subsidiary banks to seek community input in establishing internal local goals for community development lending and investment. The Community Development Banking Group has associates in 40 cities, including cities in Texas and

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<sup>23</sup> The Community Development Banking Group will be used by BankAmerica Corporation to oversee the community development and lending needs of the entire franchise.

New Mexico, with primary responsibility for community outreach. The group works with community leaders to identify local credit and investment needs, and then works with the appropriate bank unit to help meet those needs. Further, as stated previously, the Resulting Bank will provide detailed local reporting of its progress in implementing the \$350 billion commitment. However, BankAmerica Corporation has not yet determined whether the local advisory groups used by BANTSA will be maintained or expanded.

### **3. Rural Economic Development and Other Credit Needs of Rural Communities.**

Several commenters expressed concerns with respect to the Resulting Bank's commitment to rural economic development and other credit needs of rural communities. Commenters specifically questioned whether the Resulting Bank will maintain and expand BANTSA's Rural 2000 Program<sup>24</sup> and BANTSA's Community Development Bank ("BACDB") into Texas and New Mexico.

While the latest CRA performance evaluations of NationsBank and BANTSA disclosed no concerns with respect to rural economic development and other credit needs of rural communities, in connection with these applications and in response to comments, the OCC requested BankAmerica Corporation to provide more specific information regarding its plans to address rural economic development and other credit needs of rural communities in Texas and New Mexico. BankAmerica Corporation represented that it is committed to meeting the needs of rural communities throughout its franchise, will take a lead role in promoting lending opportunities that stimulate affordable housing, job creation, and economic opportunity in rural areas, including those in Texas and New Mexico, and that the Rural 2000 Program will continue to be a key focus of the Resulting Bank's Community Development Banking Group. BankAmerica Corporation informed the OCC that the Resulting Bank will maintain BANTSA's Rural 2000 program and will expand the program to markets throughout its franchise, including Texas and New Mexico. With respect to BACDB, BankAmerica Corporation indicated that it is committed to continue to operate BACDB as a separate entity.<sup>25</sup>

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<sup>24</sup> The Rural 2000 Program is a BANTSA program that management implemented in the third quarter of 1997. It is designed to help address the financial service needs of rural communities, including access to credit and the revitalization and stabilization of smaller towns. During 1999, the program will identify specific initiatives for the various rural markets, including markets in Texas and New Mexico.

<sup>25</sup> During 1999, BankAmerica Corporation intends to consolidate Community Development Lending (the former NationsBank Corporation's division that conducts similar services) into BACDB.

#### **4. Home Lending to Minorities in Texas.**

Several commenters raised concerns with respect to NationsBank's and BANTSA's record of lending to LMI minority persons in Texas, including the level of denials to those minorities.<sup>26</sup> Some comments stated that 86% of NationsBank's single family home loans were originated to whites.

In considering the comments about NationsBank<sup>27</sup> and Bank of America's<sup>28</sup> lending record to minorities and LMI borrowers in Texas, the OCC reviewed 1997 Home Mortgage Disclosure Act (HMDA) data for Texas and found that the data disclosed no information that would be inconsistent with approval of this application. As detailed below, NationsBank and Bank of America's origination rates to LMI borrowers were comparable to or exceeded the rates experienced by all lenders. The OCC also determined that NationsBank's level of home purchase loan dollars to whites was consistent with all lenders in Texas. The 1997 HMDA data indicate that 70% of NationsBank's home purchase loan dollars went to white borrowers. For all lenders in Texas, 73% of home purchase loan dollars went to white borrowers.<sup>29</sup>

The OCC also determined that NationsBank's denial rates to blacks and Hispanics for home purchase loans were lower than the rates for all lenders in Texas. According to the 1997 HMDA data, NationsBank's denial rates for home purchase loans were 18% for whites; 42% for blacks; and 34% for Hispanics. The denial rates for home purchase loans for all lenders were 31% for whites; 51% for blacks; and 48% for Hispanics. Bank of America's denial rates to whites, blacks and Hispanics for home purchase loans were higher when compared to all lenders in Texas. Bank of America's denial rates for home purchase loans were 40% for whites; 55% for blacks; and 41% for Hispanics.

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<sup>26</sup> Several commenters in Texas also raised issues regarding BANTSA's Manufactured Housing Unit. The commenters alleged that BANTSA "steered" minority borrowers to this product which has unfavorable terms compared to conventional home purchase loans. The OCC was unable to investigate this issue inasmuch as the Manufactured Housing Unit was part of Bank of America Federal Savings Bank, a bank that the OCC has no authority to examine. However, the OCC confirmed with BankAmerica Corporation that the Manufactured Housing Unit has been sold to Greenpoint Credit Corporation. BankAmerica Corporation represented to the OCC that it has no plans at this time to develop or purchase a manufactured housing finance business of its own.

<sup>27</sup> The OCC's HMDA analyses of NationsBank include data on NationsBanc Mortgage Corporation, a subsidiary of NationsBank.

<sup>28</sup> The OCC's HMDA analyses of Bank of America's activities in Texas includes data on both Bank of America, Federal Savings Bank, and Bank of America Texas since the former BankAmerica Corporation transferred the origination of residential purchase money and refinanced mortgage lending to its savings bank in 1997. Using only Bank of America Texas data would not present an accurate picture of Bank of America's overall lending efforts in Texas. The 1997 HMDA data for Bank of America Texas, without considering the savings bank's activities, reflects denial rates for whites, blacks, and Hispanics of 50%, 81%, and 66%, respectively. The primary HMDA reportable transactions that Bank of America Texas reported in 1997 were for the purpose of home improvements.

<sup>29</sup> According Census Bureau data, white persons make up 61% of the state population.

For the entire state of Texas, the OCC's analysis indicated that NationsBank<sup>30</sup> originated 18% of its HMDA reportable loans to LMI borrowers. That percentage is not considered significantly different from the percentage originated by all lenders in Texas of 21%. With respect to Bank of America's activities in Texas, 40% of the HMDA reportable loans were originated to LMI borrowers. That percentage is significantly higher than the percentage originated to LMI borrowers by all lenders in Texas.

Commenters also raised specific concerns with respect to NationsBank and Bank of America's record of lending to inner city census tracts in Dallas, San Antonio, Austin and Beaumont/Port Arthur. Accordingly, the OCC analyzed 1997 HMDA data for information about lending to LMI census tracts in these Metropolitan Statistical Areas (MSA). Again, the OCC found no information that would be inconsistent with approval of this application.

- Dallas

In the Dallas MSA, using 1997 HMDA data, NationsBank originated 13% of its HMDA reportable loans in LMI census tracts while Bank of America originated 18% of its HMDA reportable loans in LMI census tracts. All lenders in the market originated 14% of their loans in LMI areas. With respect to denial rates, NationsBank denied 37% of HMDA reportable applications to LMI census tract while Bank of America denied nearly 36%. The denial rate for all lenders was 31%.

- San Antonio

In the San Antonio MSA, using 1997 HMDA data, NationsBank originated 22% of its HMDA reportable loans in LMI census tracts and Bank of America originated 37% of its HMDA reportable loans in LMI census tracts. All lenders in the market originated 15% of their loans in LMI areas. With respect to denial rates, NationsBank denied 42% of HMDA reportable applications to LMI census tract and Bank of America denied 41%. These rates were higher than the 35% rate for all lenders.

- Austin

In the Austin MSA, using 1997 HMDA data, NationsBank originated 20% of its HMDA reportable loans in LMI census tracts while Bank of America originated 23% of its HMDA reportable loans in LMI census tracts. All lenders in the market originated 15% of their loans in LMI areas. With respect to denial rates, NationsBank denied 35% of HMDA reportable applications to LMI census tract while Bank of America denied 32%. The denial rate for all lenders was 33%.

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<sup>30</sup> In this one instance, the OCC's HMDA analysis did not include NationsBanc Mortgage Corporation data. NationsBanc Mortgage Corporation's HMDA reported rate of lending to LMI borrowers was 8% but not deemed reliable since the HMDA data showed 62% of its loans unassigned to any income level.

- Beaumont/Port Arthur

In the Beaumont/Port Arthur MSA, using 1997 HMDA data, NationsBank originated 11% of its HMDA reportable loans in LMI census tracts while Bank of America originated 13% of its HMDA reportable loans in LMI census tracts. All lenders in the market originated 14% of their loans in LMI areas. With respect to denial rates, NationsBank denied 30% of HMDA reportable applications to LMI census tract while Bank of America denied 15%. The denial rate for all lenders was 25%.

- San Marcos

Commenters also raised concerns that the merger would have a harmful effect on the community of San Marcos, Texas, because the separate banks already had high denial rates to minorities and offered a small percentage of loans to LMI people in that community. The comments stated that 70% of the population of San Marcos is low or moderate income.

The Census Bureau data used by the OCC indicated that 51% of the families in San Marcos were LMI families. The OCC's analysis of the 1997 HMDA data for this community indicated that the denial rates for NationsBank and Bank of America, Federal Savings Bank were lower than the market.<sup>31</sup> NationsBank had a denial rate of 50% for minorities and 16% for whites. Bank of America, Federal Savings Bank had a denial rate of 50% for minorities and 53% for whites. The denial rate for all lenders in San Marcos was 62% for minorities and 35% for whites. The OCC also reviewed loans to LMI borrowers in San Marcos and found that NationsBank received 39% of its HMDA reportable applications from LMI borrowers while Bank of America, Federal Savings Bank received 81% of its HMDA reportable applications from LMI borrowers. In the San Marcos, using 1997 HMDA data, NationsBank originated 19% of its HMDA reportable loans to LMI borrowers<sup>32</sup> and Bank of America originated 87% of its HMDA reportable loans to LMI borrowers. All lenders in the market originated 25% of their loans to LMI borrowers.

As stated above, the OCC did identify, in some cases, higher than average denial disparity ratios for NationsBank and Bank of America during its analysis of HMDA information. HMDA data provides information about a bank's mortgage lending activity that is useful, as preliminary information, to highlight potential lending discrimination problems. However, it is important to note that HMDA data alone are inadequate to provide a basis for concluding that a bank is engaged in lending discrimination. Nonetheless, denial disparity ratios are of concern to the OCC and are routinely evaluated in fair lending examinations. However, the latest CRA Evaluations of NationsBank, BANTSA, and Bank of America Texas disclosed no concerns regarding disparate treatment in lending to minorities. Further, the most recent fair lending examinations of the

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<sup>31</sup> Since neither NationsBanc Mortgage Corporation nor Bank of America Texas received at least 2 applications in San Marcos, no analysis was performed on their applications.

<sup>32</sup> Although NationsBank received three applications from low-income applicants, it did not originate any loans to low-income borrowers in 1997.

BANTSA and NationsBank did not identify any fair lending concerns. As customary, we will review the Resulting Bank's denial rates during our next fair lending examination.

**5. NationsBank Referral Program Between Bank and Affiliated Subsidiaries.**

Several commenters expressed concerns with respect to NationsBank's practice of referring applicants to NationsCredit, EquiCredit, and NationsBanc Mortgage Corporation. The OCC previously addressed these concerns in its September 1998 decision on the application to merge Barnett Bank, National Association, Jacksonville, Florida, and Community Bank of the Islands, Sanibel, Florida, with and into NationsBank, National Association, Charlotte, North Carolina.<sup>33</sup> At the time, NationsBank represented that it had suspended all referral programs between affiliates and would not reimplement the referral programs until after it determines the programs are in full compliance with all applicable fair lending and consumer protection laws. The OCC confirmed that the status of the referral program is unchanged since the issuance of the *OCC NationsBank/Barnett Decision*.

**6. NationsBank's Low-Cost Checking Account Availability.**

Commenters alleged that, although NationsBank provides a low-cost checking account product, information on the product is not provided in brochures or other marketing information. BankAmerica Corporation confirmed that while it no longer actively markets the "NationsBank Economy Checking" product, it now actively markets a different low-cost product, the "NationsBank Express Account." However, the OCC notes that although not actively marketed, "NationsBank Economy Checking" product account is described in the bank's "Personal Schedule of Fees" and in its "Community Investment" brochure.<sup>34</sup>

**7. Small Business Lending and NationsBank's and BANTSA's Use of Credit Scoring Models.**

Several commenters expressed concern that NationsBank and BANTSA used credit scoring models for small business loans. The commenters expressed concerns that the use of credit scoring models adversely affects small business owners, particularly minority owners, and small businesses located in LMI areas.

The OCC confirmed with BankAmerica Corporation that its banks use credit scoring models as one component for underwriting small business loans. BankAmerica Corporation indicated it believes credit scoring is a non-discriminatory method of evaluating credit applications

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<sup>33</sup> See Decision on the Applications to Merge Barnett Bank, N.A., and Community Bank of the Islands, with and into NationsBank, N.A. (OCC Corporate Decision No. 98-44, September 18, 1998) ("*OCC NationsBank/Barnett Decision*").

<sup>34</sup> The terms of, and differences in, each account are described in these brochures. The Express Account is designed for those who do most of their banking at ATMs, by personal computer or by telephone. The Economy Account is designed for those who write only a few checks each month.



that reduces the potential for personal bias in the credit approval process. BankAmerica Corporation also stated that its use of credit scoring improved access to credit by nontraditional customers who otherwise might be denied credit under judgmental underwriting standards alone.<sup>35</sup>

Although OCC examiners did not review any small business credit scoring models in the fair lending exams of NationsBank, BANTSA and Bank of America Texas, the review of other credit scoring models disclosed nothing discriminatory in their use or in the criteria used to develop the models.

Commenters also raised concerns about the volume of small business lending, particularly in southern Dallas.<sup>36</sup> The OCC's analysis of 1997 CRA data for the Dallas MSA indicated that NationsBank made 907 small business loans totaling over \$89 million, and that Bank of America Texas made 1,616 small business loans, also totaling over \$89 million. Both ranked in the top 10 small business lenders in the market in terms of numbers of loans. We found that NationsBank's and Bank of America Texas' small business lending to LMI census tracts was favorable. NationsBank's reportable small business loans in LMI census tracts represented 34% of its total reportable small business loans. Bank of America Texas' CRA reportable small business loans in LMI census tracts represented 30% of its total reportable small business loans. All lenders' reportable small business loans in LMI census tracts represented 31% of total reportable small business loans.

Based on the OCC's investigation, we find that approval of the proposed transactions is consistent with the Community Reinvestment Act.<sup>37</sup>

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<sup>35</sup> BankAmerica Corporation indicated that for some small business products and some applicant qualifications, credit scoring is not used or is used in concert with a judgmental loan underwriting process. According to information received from the company, the criteria for determining whether to use credit scoring includes factors such as collateral, loan-to-value ratio, term of loan and ability to repay.

<sup>36</sup> The commenter referred to "southern Dallas" but did not specifically delineate that area. Accordingly, for purposes of its analysis, the OCC reviewed the banks' reported data in the Dallas MSA LMI census tracts noting that the majority of those tracts are located on the south side of Dallas.

<sup>37</sup> A number of commenters expressed concerns to the Federal Reserve Board regarding the number of possible job losses in Texas and New Mexico resulting from the holding company merger. While this is not a factor that the OCC considers when evaluating mergers, the OCC asked BankAmerica Corporation to provide more detailed information regarding the impact of job reductions in Texas and New Mexico. Our review of the company's plans indicate that there will be job reductions in Texas and New Mexico. BankAmerica Corporation, however, stated that any reductions will be achieved primarily through normal attrition or by not filling existing vacancies. BankAmerica Corporation further stated that the planned job reductions will be offset by its decision to continue to operate, and likely expand, the regional operations centers in Dallas and Houston, and its planned employment growth in the Albuquerque-Rio Rancho BankCard/Direct Banking Call Center.

#### IV. CONCLUSION AND APPROVAL

For the reasons set forth above, including the representations and commitments of the applicants, we find that (1) the formation of New Mexico Interim as an interim bank and a subsidiary of BANTSA, (2) the transfer of New Mexico assets (including branches), and assumption of New Mexico liabilities, from BANTSA to New Mexico Interim, (3) the dividend of the shares of New Mexico Interim from BANTSA to NB Holdings, and (4) the merger of New Mexico Interim and Bank of America Texas with and into NationsBank, with NationsBank retaining and operating additional branches in New Mexico and Texas are all legally authorized. The transactions also meet other statutory and regulatory criteria for approval. Accordingly, these applications are hereby approved.

        /s/          
Julie L. Williams  
Chief Counsel

        02-19-99          
Date

Application Control Numbers: 98-ML-02-0040 & 98-ML-02-0041