

UNITED STATES OF AMERICA  
DEPARTMENT OF THE TREASURY  
COMPTROLLER OF THE CURRENCY

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**In the Matter of:** ) AA-CE-09-76  
Bank USA, National Association )  
Phoenix, Arizona )

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**CONSENT ORDER**

**WHEREAS**, the Comptroller of the Currency of the United States of America (“Comptroller”), through his National Bank Examiner, has examined Bank USA, National Association, Phoenix, Arizona (“Bank”), and his findings are contained in the Report of Examination dated as of April 30, 2009 (“ROE”);

**WHEREAS**, in the interests of cooperation, the Bank, by and through its duly elected and acting Board of Directors (“Board”), has executed a Stipulation and Consent to the Issuance of a Consent Order (“Stipulation and Consent”), dated 9/18/2009, that is accepted by the Comptroller. By this Stipulation and Consent, which is incorporated by reference herein, the Bank, without admitting or denying any wrongdoing, has consented to the issuance of this Consent Order (“Order”) by the Comptroller; and

**NOW, THEREFORE**, the Comptroller, acting by and through his designated representative and by virtue of the authority conferred by 12 U.S.C. § 1818(b), hereby orders that:

ARTICLE I

CAPITAL PLAN AND HIGHER MINIMUMS

(1) By September 30, 2009, the Bank shall achieve and thereafter maintain the following minimum capital levels (as defined in 12 C.F.R. Part 3):

- (a) Tier 1 capital at least equal to seven percent ( 7 %) of adjusted total assets;

- (b) Tier 1 risk-based capital at least equal to eight percent ( 8 %) of risk-weighted assets; and
- (c) Total risk-based capital at least equal to ten percent (10%) of risk-weighted assets.<sup>1</sup>

(2) The requirement in this Order to meet and maintain a specific capital level means that the Bank may not be deemed to be “well capitalized” for purposes of 12 U.S.C. § 1831o and 12 C.F.R. Part 6 pursuant to 12 C.F.R. § 6.4(b)(1)(iv).

(3) By September 30, 2009, the Board shall develop a Capital Plan. The Capital Plan shall include:

- (a) specific plans for the maintenance of capital that may in no event be less than the requirements of paragraph (1) of this Article;
- (b) projections for capital based upon a detailed analysis of the Bank's assets, liabilities, earnings, fixed assets, and off-balance sheet assets and activities;
- (c) projections of the sources and timing of additional capital and/or projections of the methods and timing of reducing assets to meet and maintain the requirements of paragraph (1) of this Article;
- (d) identification of the primary source(s) from which the Bank will strengthen its capital structure to meet and maintain the requirements of paragraph (1) of this Article; and

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<sup>1</sup> Adjusted total assets is defined in 12 C.F.R. § 3.2(a) as the average total asset figure used for Call Report purposes minus end-of-quarter intangible assets.

(e) contingency plans that identify alternative source(s) from which the Bank will strengthen its capital structure should the primary source(s) under (d) above not be available.

(4) Within three (3) business days of completion, the Capital Plan shall be submitted to the Assistant Deputy Comptroller for review and prior written determination of no supervisory objection. Upon receiving a determination of no supervisory objection from the Assistant Deputy Comptroller, the Board shall immediately implement and ensure Bank adherence to the Capital Plan.

(5) The Board shall review and update the Capital Plan on an annual basis, or more frequently if necessary. Prior to adoption by the Board, any subsequent amendments or revisions to the Capital Plan shall be submitted to the Assistant Deputy Comptroller for review and prior written determination of no supervisory objection. Upon receiving a determination of no supervisory objection from the Assistant Deputy Comptroller, the Board shall immediately implement and ensure Bank adherence to the Capital Plan, as amended or revised.

(6) The Bank shall not declare any dividend without the prior written determination of no supervisory objection from the Assistant Deputy Comptroller.

(7) If the OCC determines, in its sole judgment, that the Bank has failed to meet the minimum capital levels established in paragraph (1) of this Article, has failed to submit an acceptable Capital Plan as required by paragraph (3) of this Article, or has failed to implement or adhere to a Capital Plan for which the OCC has taken no supervisory objection pursuant to paragraphs (4) or (5) of this Article, then, within thirty (30) days of receiving written notice from the OCC of such fact, the Board shall develop and shall submit to the OCC for its review and

prior written determination of no supervisory objection a Disposition Plan, which shall detail the Board's proposal to sell or merge the Bank, or liquidate the Bank under 12 U.S.C. § 181.

(8) In the event that the Disposition Plan submitted by the Board outlines a sale or merger of the Bank, the Disposition Plan, at a minimum, shall address the steps that will be taken and the associated timeline to ensure that a definitive agreement for the sale or merger is executed not later than ninety (90) days after the receipt of the Assistant Deputy Comptroller's written determination of no supervisory objection to the Disposition Plan. If the Disposition Plan outlines a liquidation of the Bank, the Disposition Plan shall detail the actions and steps necessary to accomplish the liquidation in conformance with 12 U.S.C. §§ 181 and 182, and the dates by which each step of the liquidation shall be completed, including the date by which the Bank will terminate the national bank charter. In the event of liquidation, the Bank shall hold a shareholder vote pursuant to 12 U.S.C. § 181, and commence liquidation, within thirty (30) days of receiving the Assistant Deputy Comptroller's written determination of no supervisory objection to the Disposition Plan.

(9) After the OCC has advised the Bank in writing that it does not take supervisory objection to the Disposition Plan, the Board shall immediately implement, and shall thereafter ensure adherence to, the terms of the Disposition Plan. Failure to submit a timely, acceptable Disposition Plan, or failure to implement and adhere to the Disposition Plan after the Board obtains a written determination of no supervisory objection from the Assistant Deputy Comptroller, may be deemed a violation of this Order, in the exercise of the OCC's sole discretion.

## ARTICLE II

### ALLOWANCE FOR LOAN AND LEASE LOSSES

(1) Beginning with the September 30, 2009 Consolidated Report of Condition and Income (“Call Report”) and for all Call Reports filed thereafter, the Board shall revise, implement, and thereafter ensure Bank adherence to written policies and procedures for maintaining an adequate Allowance for Loan and Lease Losses (“ALLL”) in accordance with generally accepted accounting principles. The revised ALLL policies and procedures shall be consistent with the guidance set forth in the Federal Financial Institutions Examination Council’s “Interagency Policy Statement on the Allowance for Loan and Lease Losses” dated December 13, 2006 (OCC Bulletin 2006-47), and shall include procedures for:

- (a) determining whether a loan is impaired and measuring the amount of impairment, consistent with FASB Statement of Financial Accounting Standards No. 114, Accounting by Creditors for Impairment of a Loan;
- (b) recognizing losses on impaired loans in a timely manner;
- (c) supporting FAS 114 impairment reserve allocations on collateral dependent loans by detailing:
  - (i) how the fair value of the collateral was determined, including the use of appraisals, valuation assumptions, and calculations;
  - (ii) the timing and reliability of the appraisal or other valuation; and
  - (iii) the supporting rationale for adjustments to appraised value, if any;
- (d) further segmenting the loan portfolio and estimating loss on groups of loans, consistent with FASB Statement of Financial Accounting Standards No. 5, Accounting for Contingencies to add the following homogeneous

pools with similar risk characteristics:

- (i) land loans by type;
  - (ii) construction loans by type;
  - (iii) purchased loans by type and origination source;
  - (iv) retail loans by type; and
  - (v) retail loans by risk component;
- (e) applying consistent qualitative factor or adjustments to similar loan types when establishing reserve rates;
- (f) determining ALLL allocation for unimpaired criticized and classified assets;
- (g) estimating the inherent loss in unfunded loan commitments;
- (h) validating the ALLL methodology; and
- (i) summarizing and documenting, for the Board's review and approval, the amount to be reported in the Call Reports for the ALLL. Any deficiency in the ALLL shall be remedied in the quarter it is discovered, prior to the filing of the Call Reports, through additional provision expense.

(2) Within three (3) business days of completion, a copy of the revised ALLL policy and procedures shall be submitted to the Assistant Deputy Comptroller.

### ARTICLE III

#### LIQUIDITY RISK MANAGEMENT

(1) Within sixty (60) days, the Board shall revise its liquidity policy to establish appropriate risk limits to include:

- (a) minimum levels of short-term liquid assets;

- (b) minimum levels of unused Federal Home Loan Bank (“FHLB”) borrowing capacity;
- (c) minimum levels of unused Federal Reserve Bank Discount Window borrowing capacity;
- (d) minimum levels of unused Federal Funds sold borrowing capacity;
- (e) maximum levels of wholesale funds outstanding;
- (f) liability concentration limits;
- (g) total and net overnight funding volume; and
- (h) maximum liability maturity by time interval.

(2) Within sixty (60) days, the Board shall develop a plan to implement the revised liquidity policy. The plan shall include a reasonable timeline with quarterly benchmarks that demonstrate progress towards compliance with the risk limits established in paragraph (1) of this Article.

(3) Within three (3) business days of completion, a copy of the revised liquidity policy and liquidity implementation plan shall be submitted to the Assistant Deputy Comptroller for review and prior written determination of no supervisory objection. Upon receiving a determination of no supervisory objection from the Assistant Deputy Comptroller, the Board shall immediately implement and ensure Bank adherence to the revised liquidity policy and liquidity implementation plan.

(4) Within sixty (60) days, the Board shall develop, implement, and thereafter ensure Bank adherence to a revised comprehensive Contingency Funding Plan consistent with the guidelines set forth in Liquidity booklet, L-L, of the Comptroller’s Handbook, and any future updates to these guidelines. The plan shall address ways to improve the Bank’s liquidity position

and maintain adequate sources of stable funding given the Bank's anticipated liquidity and funding needs. At a minimum, the plan must include:

- (a) projections addressing funding needs when the holding company and all affiliates are unable to be a source of liquidity;
  - (b) assumptions regarding the availability of funds from the Federal Reserve Discount Window, Federal Home Loan Bank advances, and Federal Funds purchased; and
  - (c) documented support for key Contingency Funding Plan assumptions.
- (5) Within three (3) business days of completion, a copy of the Contingency Funding Plan shall be submitted to the Assistant Deputy Comptroller.

#### ARTICLE IV

##### INDEPENDENT LOAN REVIEW

(1) Within ninety (90) days, the Board shall employ or designate a sufficiently experienced and qualified person(s) or firm to ensure the timely and independent identification of problem loans and leases.

(2) Within ninety (90) days, the Board shall establish and ensure Bank adherence to an effective, independent and on-going loan review system to review, at least semi-annually, the Bank's loan and lease portfolios to assure the timely identification and categorization of problem credits. The system shall provide for a written report to be filed with the Board after each review and shall use a loan and lease grading system consistent with the guidelines set forth in "Rating Credit Risk" and "Allowance for Loan and Lease Losses" booklets of the Comptroller's Handbook. Such reports shall include, at a minimum, conclusions regarding:



- (a) the overall quality of the loan and lease portfolios;
- (b) the identification, type, rating, and amount of problem loans and leases;
- (c) credit and collateral documentation exceptions;
- (d) the identification and status of credit related violations of law, rule or regulation; and
- (e) loans and leases not in conformance with the Bank's lending and leasing policies, and exceptions to the Bank's lending and leasing policies.

(3) The Board shall evaluate the report(s) it receives pursuant to paragraph (2) of this Article and shall ensure that immediate, adequate, and continuing remedial action, if appropriate, is taken upon all findings noted in the report(s).

(4) A copy of the reports submitted to the Board, as well as documentation of the action taken by the Bank to collect or strengthen assets identified as problem credits, shall be preserved in the Bank.

## ARTICLE V

### DIRECTORS AND SENIOR EXECUTIVE OFFICERS

- (1) The Board shall immediately take action to add, at a minimum, one new director.
- (2) Within ninety (90) days, the Board shall appoint a capable full-time president and a capable full-time chief credit officer, each of whom shall be vested with sufficient executive authority to fulfill the duties and responsibilities of the position and ensure the safe and sound operation of the Bank.

(3) Prior to appointing any new director or any new senior executive officer, the Bank must provide the Assistant Deputy Comptroller with written notice as required by 12 C.F.R. § 5.51 (notice forms and instructions are in the “Changes in Directors and Senior Executive Officers” and “Background Investigations” booklets of the Comptroller’s Licensing Manual).

(4) The Assistant Deputy Comptroller shall have the power to disapprove the appointments of the proposed new director and any new senior executive officer. However, the lack of disapproval of such individual shall not constitute an approval or endorsement of the proposed director and senior executive officers.

## ARTICLE VI

### APPRAISALS AND EVALUATIONS OF REAL PROPERTY

(1) Within thirty (30) days, the Board shall engage the services of an independent, professionally certified or licensed appraiser(s) to provide a written or updated appraisal, in accordance with 12 C.F.R. Part 34, for each parcel of real property that represents primary collateral behind any extension of credit where it is needed to bring the Bank into conformity with the provisions of 12 C.F.R. Part 34 or where it is included in any list provided to management of loans lacking current appraisals. All such appraisals shall be completed within sixty (60) days.

(2) Within thirty (30) days, the Board shall appoint or engage a qualified independent individual to provide a written or updated evaluation, in accordance with 12 C.F.R. Part 34, for each parcel of real property that represents primary collateral behind any extension of credit where it is needed to bring the Bank into conformity with the provisions of 12 C.F.R. Part 34 or

where it is included in any list provided to management of loans lacking current evaluations. All such evaluations shall be completed within sixty (60) days.

(3) Within ninety (90) days, the Board shall require and the Bank shall develop, implement, and adhere to an independent review and analysis process to ensure that appraisals conform to appraisal standards and regulations. The appraisal review and analysis process shall ensure that appraisals are:

- (a) performed in accordance with 12 C.F.R. Part 34;
- (b) consistent with guidance in OCC Bulletin 2005-6, "Appraisal Regulations and the Interagency Statement on Independent Appraisal and Evaluation Functions: Frequently Asked Questions" (March 22, 2005); and
- (c) consistent with OCC Advisory Letter 2003-9, "Independent Appraisal and Evaluation Function" (October 28, 2003).

(4) Written documentation supporting each appraisal review and analysis shall be retained in the loan file, along with the appraisal.

## ARTICLE VII

### INVESTMENT POLICY

(1) Within sixty (60) days, the Board shall revise, implement, and thereafter ensure Bank adherence to the Bank's investment policy. The revised policy shall include:

- (a) concentration limits on investment holdings by obligor, geography, security type, business sector, and credit rating;
- (b) limitations on the maximum amount of unrealized loss that may be incurred before taking action to limit losses; and

(c) requirements for pricing of securities independent of the advisor that identifies, researches, or recommends purchase of the securities.

(2) Within three (3) business days of completion, a copy of the revised investment policy shall be submitted to the Assistant Deputy Comptroller.

## ARTICLE VIII

### CONCENTRATIONS

(1) Within thirty (30) days, the Board shall revise its loan policy to establish limits on the Bank's maximum exposure to individual and related obligors.

(2) Within three (3) business days of completion, a copy of the limits established pursuant to paragraph (1) of this Article shall be submitted to the Assistant Deputy Comptroller for review and prior written determination of no supervisory objection. Upon receiving a determination of no supervisory objection from the Assistant Deputy Comptroller, the Board shall immediately implement and ensure Bank adherence to the revised loan policy.

## ARTICLE IX

### CRITICIZED ASSETS

(1) The Bank shall take immediate and continuing action to protect its interest in those assets criticized in the ROE, in any subsequent Report of Examination, by internal or external loan review, by Bank management, or in any list provided to Bank management by the National Bank Examiners during any examination.

(2) The Board shall ensure that the Bank continues to develop and adhere to a written workout plans designed to eliminate the basis of criticism of assets criticized in the ROE, in any subsequent Report of Examination, by any internal or external loan review, by Bank

management, or in any list provided to Bank management by the National Bank Examiners during any examination as "doubtful," "substandard," or "special mention." The written workout plans shall include, at a minimum:

- (a) an identification of the expected sources of repayment;
- (b) the realizable value of supporting collateral and the position of the Bank's lien on such collateral where applicable;
- (c) an analysis of current and satisfactory credit information, including cash flow analysis where loans are to be repaid from operations; and
- (d) the proposed action to eliminate the basis of criticism and the time frame for its accomplishment.

(3) The Board, or a designated committee, shall conduct a review, on at least a quarterly basis, to determine:

- (a) the status of each criticized asset or criticized portion thereof that equals or exceeds five hundred thousand dollars (\$500,000);
- (b) management's adherence to the written workout plan adopted pursuant to this Article;
- (c) the status and effectiveness of the written workout plan; and
- (d) the need to revise the written workout plan or take alternative action.

## ARTICLE X

### PROGRESS REPORTING

(1) The Board shall submit monthly progress reports to the Assistant Deputy Comptroller. These reports shall set forth in detail:

- (a) actions taken to comply with each Article of the Order;
- (b) results of those actions; and
- (c) a description of the additional actions needed, if any, to achieve full compliance with each Article of this Order.

(2) The progress reports shall also include any actions initiated by the Board and the Bank pursuant to the criticisms and comments in the Report of Examination or in any future Report of Examination.

(3) The first progress report shall be submitted for the period ending September 30, 2009 and will be due within thirty (30) days of that date. Thereafter, progress reports will be due within thirty (30) days after the month end.

## ARTICLE XI

### CLOSING

(1) Although the Board is by this Order required to submit certain proposed actions and programs for the review or prior written determination of no supervisory objection of the Assistant Deputy Comptroller, the Board has the ultimate responsibility for proper and sound management of the Bank.

(2) It is expressly and clearly understood that if, at any time, the Comptroller deems it appropriate in fulfilling the responsibilities placed upon it by the several laws of the United States of America to undertake any action affecting the Bank, nothing in this Order shall in any way inhibit, estop, bar or otherwise prevent the Comptroller from so doing.

(3) Any time limitations imposed by this Order shall begin to run from the effective date of this Order. Such time limitations may be extended in writing by the Assistant Deputy Comptroller for good cause upon written application by the Board.

(4) The provisions of this Order are effective upon issuance of this Order by the Comptroller, through his authorized representative whose hand appears below, and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Order shall have been amended, suspended, waived, or terminated in writing by the Comptroller.

(5) In each instance in this Order in which the Board is required to ensure adherence to, and undertake to perform certain obligations of the Bank, it is intended to mean that the Board shall:

- (a) authorize and adopt such actions on behalf of the Bank as may be necessary for the Bank to perform its obligations and undertakings under the terms of this Order;
- (b) require the timely reporting by Bank management of such actions directed by the Board to be taken under the terms of this Order;
- (c) follow-up on any non-compliance with such actions in a timely and appropriate manner; and
- (d) require corrective action be taken in a timely manner of any non-compliance with such actions.

(6) This Order is intended to be, and shall be construed to be, a final order issued pursuant to 12 U.S.C. § 1818(b), and expressly does not form, and may not be construed to form, a contract binding on the Comptroller or the United States.

(7) The terms of this Order, including this paragraph, are not subject to amendment or modification by any extraneous expression, prior agreements or prior arrangements between the parties, whether oral or written.

IT IS SO ORDERED, this 18th day of September, 2009.

/s/

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Blake J. Paulson  
Assistant Deputy Comptroller  
Midsize Bank Supervision



**UNITED STATES OF AMERICA  
DEPARTMENT OF THE TREASURY  
COMPTROLLER OF THE CURRENCY**

<b>In the Matter of:</b>	)	AA-CE-09-76
Bank USA, National Association	)	
Phoenix, Arizona	)	

**STIPULATION AND CONSENT TO THE ISSUANCE  
OF A CONSENT ORDER**

The Comptroller of the Currency of the United States of America (“Comptroller”) intends to initiate cease and desist proceedings against Bank USA, National Association, Phoenix, Arizona (“Bank”) pursuant to 12 U.S.C. § 1818(b) through the issuance of a Notice of Charges for unsafe and unsound banking practices relating to capital, liquidity risk management, concentrations, problem loan identification, and supervision of the Bank.

The Bank, in the interest of compliance and cooperation, consents to the issuance of a Consent Order, dated 9/18/2009 (“Order”);

In consideration of the above premises, the Comptroller, through his authorized representative, and the Bank, through its duly elected and acting Board of Directors, hereby stipulate and agree to the following:

**ARTICLE I**

**JURISDICTION**

(1) The Bank is a national banking association chartered and examined by the Comptroller pursuant to the National Bank Act of 1864, as amended, 12 U.S.C. § 1 *et seq.*

(2) The Comptroller is “the appropriate Federal banking agency” regarding the Bank, pursuant to 12 U.S.C. §§ 1813(q) and 1818(b).

(3) The Bank is an “insured depository institution” within the meaning of 12 U.S.C. § 1818(b)(1).

(4) Upon the issuance of this Order:

- (a) the Bank will not be an “eligible bank” pursuant to 12 C.F.R. § 5.3 (g)(4) for the purposes of 12 C.F.R. Part 5 regarding rules, policies, and procedures for corporate activities, unless otherwise informed in writing by the OCC;
- (b) the Bank will be subject to the limitation of 12 C.F.R. § 5.51(c)(6)(ii) for the purposes of 12 C.F.R. § 5.51 requiring OCC approval of a change in directors and senior executive officers, unless otherwise informed in writing by the OCC; and
- (c) the Bank will be subject to the limitation on golden parachute and indemnification payments provided by 12 C.F.R. § 359.1(f)(1)(ii)(C) and 12 C.F.R. § 5.51(c)(6)(ii), unless otherwise informed in writing by the OCC.

## ARTICLE II

### AGREEMENT

(1) The Bank, without admitting or denying any wrongdoing, hereby consents and agrees to the issuance of the Order by the Comptroller.

(2) The Bank further agrees that said Order shall be deemed an “order issued with the consent of the depository institution” as defined in 12 U.S.C. § 1818(h)(2), and consents and agrees that said Order shall become effective upon its issuance and shall be fully enforceable by the Comptroller under the provisions of 12 U.S.C. § 1818(i). Notwithstanding the absence of

mutuality of obligation, or of consideration, or of a contract, the Comptroller may enforce any of the commitments or obligations herein undertaken by the Bank under his supervisory powers, including 12 U.S.C. § 1818(i), and not as a matter of contract law. The Bank expressly acknowledges that neither the Bank nor the Comptroller has any intention to enter into a contract.

(3) The Bank also expressly acknowledges that no officer or employee of the Comptroller has statutory or other authority to bind the United States, the U.S. Treasury Department, the Comptroller, or any other federal bank regulatory agency or entity, or any officer or employee of any of those entities to a contract affecting the Comptroller's exercise of his supervisory responsibilities.

### ARTICLE III

#### WAIVERS

- (1) The Bank, by signing this Stipulation and Consent, hereby waives:
- (a) the issuance of a Notice of Charges pursuant to 12 U.S.C. § 1818(b);
  - (b) any and all procedural rights available in connection with the issuance of the Order;
  - (c) all rights to a hearing and a final agency decision pursuant to 12 U.S.C. § 1818(i), 12 C.F.R. Part 19;
  - (d) all rights to seek any type of administrative or judicial review of the Order; and
  - (e) any and all rights to challenge or contest the validity of the Order.



