

OFFICE OF THRIFT SUPERVISION

APPROVAL OF APPLICATION FOR PERMISSION TO ORGANIZE A FEDERAL SAVINGS BANK

Order No.: 2004-46
Date: October 12, 2004
OTS No. 17977

First National Bank Holding Company, Scottsdale, Arizona (Holding Company), has applied to the Office of Thrift Supervision (OTS), pursuant to section 5(e) of the Home Owners' Loan Act (HOLA), and 12 C.F.R. § 552.2-1, to organize First Capital Bank of New Mexico, Albuquerque, New Mexico (Savings Bank), as a federal savings bank. The Savings Bank has provided notice to OTS to conduct a transactional web site for electronic operations pursuant to 12 C.F.R. Part 555 (collectively, the Applications). The Savings Bank will be a member of the Savings Association Insurance Fund.

The Proposed Transaction

The Holding Company proposes to establish and operate a *de novo* savings association, the Savings Bank. The Savings Bank intends to engage in deposit taking, mortgage lending, and certain other activities. A loan production office located in Albuquerque, New Mexico, presently operated by one of the Holding Company's national bank subsidiaries will be transferred to the Savings Bank. In addition, a mortgage lending operation, the Rapid Asset Purchase Program (RAPP), presently operated by one of the Holding Company's national bank subsidiaries, will be transferred to the Savings Bank, but will remain located in Scottsdale, Arizona. The Savings Bank will utilize certain of the services and operations of its affiliated national banks to perform certain of the Savings Bank's operations. Initial capital for the Savings Bank will be \$8 million, less organizational expenses.

Permission to Organize Application

The HOLA provides that OTS may grant a federal savings bank charter only: (i) to persons of good character and responsibility; (ii) if, in OTS' judgment, a necessity exists for such association in the community to be served; (iii) if there is a reasonable probability for the association's usefulness and success; and (iv) if the association can be established without undue injury to properly conducted existing local thrift and home financing institutions. OTS regulations implementing the HOLA include the same standards, with the additional requirement that OTS consider whether the association will promote credit for housing consistent with the safe and sound operation of a federal savings association.

In addition, the OTS regulation regarding the establishment of *de novo* federal savings banks (Regulation) sets forth standards that the OTS considers in granting a *de novo* federal charter. The Regulation sets forth standards and requirements regarding: (i) initial capitalization of the federal savings bank; (ii) the submission of a business plan (including submission of a Community Reinvestment Act (CRA) statement); and (iii) the residence and composition of the savings bank's board of directors.

Further, 12 C.F.R. § 563e.29(b) provides that an applicant for a federal thrift charter must submit with its application a description of how it will meet its CRA objectives. OTS is required to take this description into account when considering the application and may deny or condition approval on CRA grounds.

With respect to character and responsibility, a review of the backgrounds of the officers and directors of the Holding Company and the Savings Bank revealed no adverse information and that the officers and directors of the Savings Bank have the requisite experience to operate a savings association. Thus, OTS concludes that this approval criterion is satisfied.

As for the necessity for the Savings Bank in the community and undue injury to properly conducted existing local thrift and home financing institutions, the Savings Bank will continue and expand the business of the loan production office and seek to continue and to expand the RAPP throughout the United States. In addition, the Savings Bank will commence deposit taking, consumer lending and commercial lending from its Albuquerque office. The Albuquerque Metropolitan Statistical Area (MSA) has experienced steady population, deposit, and economic growth in the recent years and is expected to continue to grow. Based on this information, OTS concludes that there is a necessity in the community for the Savings Bank.

With respect to undue injury to properly conducted existing local thrift and home financing institutions, the Savings Bank will provide home financing in the local market, but its home financing business will not constitute a significant portion of the market during its business plan period. The Savings Bank's projected level of deposits will not constitute a significant percentage of the Albuquerque MSA deposits. Therefore, OTS concludes that the Savings Bank will not cause undue injury to properly conducted existing local thrift and home financing institutions.

With respect to the probability of the Savings Bank's usefulness and success, OTS reviewed the Savings Bank's financial condition, business plan, proposed capital levels, and the competence of proposed management. The review revealed no negative information on the Savings Bank's proposed directors and officers. To ensure the independence of the Savings Bank's board of directors and the Savings Bank's loan committee, OTS is imposing a condition addressing the composition of the board and the loan committee. The condition reflects concerns about captive boards of directors. Such concerns are particularly significant here, because of the extensive relations proposed between the Savings Bank and its affiliates. Also, to help ensure the adequacy of accounting records and reporting, the Savings Bank will be required to hire, prior to opening, a full time accounting manager and have that person located in Albuquerque. Also, to help ensure the proper recording of assets of the RAPP, approval of the Applications is conditioned on the Savings Bank submitting a legal opinion on the "true sale" of the mortgages acquired and

sold in the program. Furthermore, OTS is imposing a condition of approval requiring the Savings Bank to submit a comprehensive compliance program for the Regional Director's approval and to submit certain status reports that detail the implementation of the compliance management program and fair lending programs and the results of the Savings Bank's compliance monitoring efforts. These conditions will help ensure that the Savings Bank is operated safely and soundly and in compliance with applicable laws. With respect to capital, the Savings Bank plans to be well capitalized throughout the first three years of operations. OTS concludes that the Savings Bank will have capital sufficient for its proposed level of operations. OTS concludes that the Savings Bank's business plan is acceptable. Based on the above, OTS concludes probability of the Savings Bank's usefulness and success is consistent with approval, provided that the Savings Bank complies with the conditions set forth herein.

With respect to the provision of credit for housing in a safe and sound manner, the Savings Bank will extend credit for housing through mortgage originations at its office and through the RAPP. The origination of mortgages by the Savings Bank will enable the Savings Bank to satisfy the qualified thrift lender test. OTS' review of the RAPP and loan production office noted adequate procedures and controls, provided that the Savings Bank complies with the conditions set forth herein. Based on the above, OTS concludes that the Savings Bank will provide credit for housing in a safe and sound manner.

OTS regulations require that a majority of a *de novo* association's board of directors be "representative" of the state in which the association is located. OTS regulations also require that a *de novo* association's board of directors be diversified and composed of individuals with varied business and professional experience. Based on the residency and experience of the Savings Bank's proposed directors, OTS concludes that the Savings Bank's proposed board of directors meets these criteria. Further, the regulations provide that, except in the case of a *de novo* association that is wholly owned by a holding company such as the Holding Company, no more than one-third of a *de novo* association's board of directors may be in closely related businesses. This standard is not applicable to the Savings Bank, because it will be wholly owned by the Holding Company. OTS regulations also require a *de novo* association to have a minimum capitalization of at least \$2 million. The Savings Bank will have sufficient capital to meet this requirement.

OTS reviewed the Savings Bank's plan for CRA compliance, and has concluded that the plan is acceptable. OTS received no comments objecting to the application on CRA grounds. Accordingly, OTS concludes that there is no basis for objection to the holding company application based on the CRA.

Electronic Operations

The Holding Company filed a notice under Part 555 Electronic Operations on behalf of the proposed Savings Bank to conduct operations via a transactional Internet web site. OTS has noted no significant concerns about the proposed web site.

Conclusion

OTS has considered the Applications under the standards set forth in 12 U.S.C. §§ 1464(e), and 12 C.F.R. §§ 543.3 and 552.2-1(b), and under the CRA, 12 U.S.C. §§ 2901, *et seq.*, and the OTS regulations thereunder, 12 C.F.R. Part 563e. OTS finds that the Applications satisfy the applicable approval standards, provided that the following conditions are complied with in a manner satisfactory to the West Regional Director, or his designee (Regional Director). Accordingly, the Applications are hereby approved, and the Savings Bank's proposed acquisitions of the loan production office and RAPP operations from its affiliate are hereby approved, subject to the following conditions:

1. The Holding Company and the Savings Bank must receive all required regulatory approvals prior to consummation of the proposed transaction with copies of all such approvals provided to the Regional Director;
2. The proposed transaction must be consummated within 120 calendar days from the date of this Order;
3. On the business day prior to the date of consummation of the proposed transaction, the chief financial officers of the Holding Company and the Savings Bank must certify in writing to the Regional Director that no material adverse changes have occurred with respect to the financial condition or operation of the Holding Company and the Savings Bank, respectively, as disclosed in the Applications. If additional information having a material adverse bearing on any feature of the Applications is brought to the attention of the Holding Company, the Savings Bank, or OTS since the date of the financial statements submitted with the Applications, the transaction must not be consummated unless the information is presented to the Regional Director, and the Regional Director provides written non-objection to consummation of the transaction;
4. The Holding Company and the Savings Bank must, within 5 calendar days after the effective date of the proposed transaction, provide a reconciliation of the Savings Bank's capital to the Regional Director and must advise the Regional Director in writing: (a) of the effective date of the proposed transaction and of the Savings Bank's insurance of accounts; and (b) that the transaction was consummated in accordance with all applicable laws and regulations, the Applications and this Order;
5. The Savings Bank must submit independent audit reports to the Regional Director for its first three fiscal years. These reports must be in compliance with the audit rules set forth at 12 C.F.R. § 562.4;
6. The Savings Bank must operate within the parameters of its 3-year business plan submitted in the Applications. The Savings Bank must submit any proposed major deviations or material changes from the plan (including those initiated by the

Holding Company or changes pertaining to any subprime lending activity) for the prior written non-objection of the Regional Director. The request for change must be submitted a minimum of 60 calendar days before the desired implementation date with a copy sent to the FDIC Regional Office;

7. For three years following commencement of operations, the Savings Bank must submit to the Regional Director, within 45 calendar days after the end of each calendar quarter, a business plan variance report detailing the Savings Bank's compliance with the business plan and an explanation of any material deviations;
8. At least 40 percent of the Savings Bank's board of directors must be individuals who are not officers or employees of the Holding Company or affiliates thereof, or who have not otherwise been determined by the Regional Director to lack sufficient independence, and at least one member of the Savings Bank's board of directors must be an individual who is not an officer, director or employee of the Holding Company or any affiliate, and who is not an officer or employee of the Savings Bank, and who has not otherwise been determined by the Regional Director to lack sufficient independence. At least 50 percent of the loan committee established by the Savings Bank must be individuals who are not officers or employees of the Holding Company or any affiliates, or who have otherwise been determined by the Regional Director to lack sufficient independence. If compliance with this condition involves the selection of additional directors or officers, such individuals must receive the prior written non-objection of the Regional Director;
9. Prior to opening for business, the Savings Bank must employ a full-time financial/accounting manager, such as a Controller, who shall be based in the Savings Bank's New Mexico office and is qualified to oversee the Savings Bank's accounting function and the preparation of OTS Thrift Financial Reports. Such individual must receive the prior written non-objection of the Regional Director;
10. Prior to opening for business, the Savings Bank must finalize detailed policies and procedures for all major areas of operations, including those submitted in draft form with the Applications, and submit them to the Regional Director along with a resolution of its board of directors evidencing its review and approval of such policies and procedures;
11. Within 90 calendar days after opening for business, the Savings Bank must provide a revised "true sale" legal opinion in a form acceptable to the Regional Director, or his designee, that conclusively addresses whether the transactions in the RAPP constitute true purchase and sale transactions of the Savings Bank;
12. Any proposed material changes in the Service Exchange Agreement or new contracts or agreements pertaining to transactions with affiliates not yet submitted to the OTS for review must be provided to the Regional Director at least 30 days prior to execution and must receive written non-objection prior to implementation.

This review is required until at least the completion of the Savings Bank's first full examination cycle, but in no case beyond 18 months after opening for business;

13. Prior to opening for business, the Savings Bank must implement a compliance management program that includes, at a minimum, the following components: (i) the assignment of specific compliance responsibilities to individuals who are knowledgeable and experienced in administering consumer protection, nondiscrimination, and other compliance laws administered by OTS; (ii) regular and comprehensive self-assessment reviews to ensure compliance on a day-to-day basis; (iii) periodic compliance audits; (iv) comprehensive training for all affected staff; (v) an ongoing system for assuring compliance with federal fair lending statutes and regulations, and for handling consumer inquiries or complaints; and (vi) appropriate written policies and procedures;
14. No later than 30 days after the end of each calendar quarter, the Savings Bank must submit a status report, in a form acceptable to the Regional Director, that details the implementation of its compliance management program and fair lending programs and the results of its compliance monitoring efforts as required by the compliance management program. This quarterly report is required until at least the completion of the Savings Bank's first full examination cycle, but in no case beyond 18 months after opening for business; and
15. No later than 30 days after the end of each calendar quarter, the Savings Bank must submit a status report, in a form acceptable to the Regional Director, that details: (i) the results of its various lending programs and initiatives; (ii) its level of lending to low- and moderate-income individuals, to low- and moderate-income communities, and to small businesses. This quarterly report is required until at least the completion of the Savings Bank's first CRA examination cycle, but in no case beyond 18 months after opening for business.

The Regional Director may, for good cause, extend any time period set forth herein for up to 120 calendar days.

By order of the Director of the Office of Thrift Supervision, or his designee, effective

October 12, 2004.



Scott M. Albinson
Managing Director
Office of Examinations, Supervision,
and Consumer Protection