

OFFICE OF THRIFT SUPERVISION

APPROVAL OF APPLICATIONS FOR PERMISSION TO ORGANIZE A FEDERAL SAVINGS BANK AND TRUST POWERS

Order No.: 2006-21

Date: May 16, 2006

Re: OTS No. 18012

Emigrant Bancorp, Inc., New York, New York (BHC), New York Private Bank & Trust Corporation, New York, New York (Parent) and certain members of the Paul Milstein family (collectively, Organizers) have applied to the Office of Thrift Supervision (OTS), pursuant to § 5(e) of the Home Owners' Loan Act (HOLA) and 12 C.F.R. § 552.2-1, for permission to organize New York Private Bank & Trust, FSB, Wilmington, Delaware (Savings Bank). In connection with the permission to organize application, the Savings Bank has requested a waiver of the geographic board composition requirement in 12 C.F.R. § 543.3(d)(1). In addition, the Savings Bank has applied, pursuant to § 5(n) of the HOLA and 12 C.F.R. Part 550, to exercise certain trust powers as described in the application. Collectively, the foregoing filings are referred to herein as the Applications.

The Proposed Transaction

In the proposed transaction, the Organizers will organize the Savings Bank as a federally chartered, Deposit Insurance Fund (DIF)-insured, stock savings bank. The Savings Bank will operate as a "special purpose" trust-only federal savings bank. The BHC, a registered bank holding company, will capitalize the Savings Bank with an initial cash infusion of \$5 million.

Permission to Organize Application

The HOLA provides that OTS may grant a federal savings association 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 of 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, OTS regulations regarding the establishment of de novo federal savings associations set forth standards OTS considers in granting a de novo federal charter, regarding: (i) initial capitalization of a federal association; and (ii) the residence and composition of an association's board of directors.

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

OTS has conducted background checks of the Organizers and of the proposed directors and senior officers of the Savings Bank and has reviewed the relevant information submitted in the application. OTS has not completed its background checks on three proposed senior officers of the Savings Bank. In order to ensure that they have the requisite character and responsibility, OTS is imposing condition 16. The proposed senior fiduciary officers possess extensive business and professional experience and the proposed board of directors possesses experience in various business endeavors. Based on the relevant information, OTS concludes that the character and responsibility of the Organizers and the proposed directors and senior executive officers of the Savings Bank are consistent with approval of the application, subject to the Savings Bank's compliance with condition 16.

The Savings Bank will engage solely in trust activities. The application indicates that the trust services and products to be provided by the Savings Bank will satisfy a growing demand for specialized trust products and services by high net worth individuals and families. Although the Savings Bank will conduct fiduciary activities solely in Delaware, the Savings Bank will serve customers throughout the United States. Based on the foregoing, OTS concludes that there is a necessity in the community for the Savings Bank.

With respect to undue injury to local thrift and home financing institutions, the Savings Bank's target market will be high net worth individuals and families throughout the country. OTS received no comments opposing the application in response to the public notice. The Savings Bank will not be soliciting deposits from the public, and therefore, the Savings Bank will have little, if any, impact on local thrift and home financing institutions in any geographic areas where the Savings Bank's customers may be located. Thus, OTS concludes that this approval criterion is satisfied.

With respect to the probability of the Savings Bank's usefulness and success, the Savings Bank will be well-capitalized and the Savings Bank's business plan is reasonable. The Savings Bank's proposed officers have considerable experience. In addition, approval of the application will be subject to a number of conditions designed to help ensure that there is a reasonable probability of the Savings Bank's usefulness and success. Conditions 5-7, 11, 12, 14 and 19 below are designed to help ensure compliance with the business plan included in the application, that changes to or from that plan would not be detrimental to the Savings Bank, that the Savings Bank will operate pursuant to appropriate policies and procedures, and that OTS is able to effectively monitor the Savings Bank's progress and activities. OTS is imposing conditions 10, 13 and 15 below to ensure compliance with regulatory provisions and policies concerning related persons or affiliated entities. Also, OTS is imposing conditions 8 and 17 below to enable OTS to confirm that the Savings Bank will be operated properly and by qualified personnel.

We are also imposing condition 9 below, relating to the composition of the Savings Bank's board of directors, because the Savings Bank will share certain management officials with the BHC, and the Savings Bank may market services through affiliates. This condition reflects agency concerns about captive boards in the context of holding company structures where the savings association is likely to have transactions with its affiliates and is designed to help ensure that the Savings Bank's probability of usefulness and success is consistent with approval.

Based on the foregoing analysis, OTS concludes that the probability of the Savings Bank's usefulness and success is consistent with approval, subject to the imposition of the conditions, which are intended to help ensure the probability of the Savings Bank's usefulness and success.

The Savings Bank will not directly extend credit for housing, but would indirectly extend credit for housing by purchasing mortgage-backed securities or similar investments that satisfy the Qualified Thrift Lender (QTL) test. OTS regulations do not require that an application for a federal charter be denied if the proposed association does not intend to engage directly in home lending, but requires OTS to consider, among other things, whether the association will perform a role of providing credit for housing in a safe and sound manner. OTS concludes that this approval criterion has been satisfied.

The OTS CRA regulations establish an exception from the CRA for special purpose savings associations.¹ The Savings Bank is being organized for the limited purpose of exercising trust powers. The Savings Bank will not solicit deposits from the general public. The Savings Bank will not directly extend credit to the public in the ordinary course of business. Thus, the Savings Bank will satisfy the requirements for the CRA exception. Based on the conclusion that the Savings Bank will be exempt from the CRA, OTS concludes that the CRA standard set forth in 12 C.F.R. § 563e.29(b) is not applicable to the proposed transaction.

The Savings Bank intends to adopt a federal charter and bylaws that conform to the model charter and bylaws for a federal stock savings association. The Savings Bank will have an initial capitalization that exceeds the minimum regulatory requirement.

OTS Regulations require that a majority of a de novo savings association's board of directors be "representative" of the state in which the association is located, and that the OTS generally will consider a director to be "representative" of the state if such director resides, works, or maintains a place of business in the state or, as applicable, in the Metropolitan Statistical Area (MSA), Primary MSA or Consolidated MSA in which the association is located.² The Regulations also require that a de novo savings association's board of directors be made up of persons with varied backgrounds.³

The Savings Bank has requested a waiver of the geographic composition requirement in 12 C.F.R. § 543.3(d)(1) because a majority of the Savings Bank's proposed directors do not meet this requirement. The OTS may waive the applicability of any regulation for good cause, to the extent

¹ 12 C.F.R. § 563e.11(c) (2006).

² 12 C.F.R. § 543.3(d)(2) (2006).

³ 12 C.F.R. § 543.3(d)(1) (2006).

permitted by statute.⁴ The regulatory requirements under section 543.3(d) are not set forth in any statute. The Regulation was intended to help ensure that the directors of de novo savings associations would be familiar with and have contacts in the local community to be served by the institution. Here, the Savings Bank will provide trust services to clients throughout the United States. The proposed directors of the Savings Bank have extensive banking and trust experience. Therefore, based on the backgrounds of the proposed directors and the national scope of the Savings Bank's proposed business, OTS has concluded that there is good cause to grant a waiver of the geographical board composition requirements under 12 C.F.R. § 543.3(d)(1).

With respect to the section 543.3(d)(2) requirement that a de novo federal association's board of directors be diversified and composed of individuals with varied business and professional experience, OTS concludes that the Savings Bank's directors have sufficiently varied business and professional experience. With respect to the requirement that no more than one-third of the de novo federal association's directors be in related businesses, because the Savings Bank will be a wholly owned subsidiary of the BHC, a holding company that has substantial independent economic substance, there is no limitation on the percentage of the Savings Bank's board members who may be in closely related businesses.

Accordingly, OTS concludes that the proposed composition of the board of directors of the Savings Bank and the BHC complies with 12 C.F.R. § 543.3(d), subject to OTS granting the waiver request.

Trust Application

The Savings Bank has filed an application for approval to conduct personal trust services, including acting as executor and administrator, trustee, guardian, conservator, investment advisor, investment management and agent for individuals. In reviewing a trust application, OTS must consider: (i) the financial condition of the applicant; (ii) the capital of the applicant and whether it is sufficient under the circumstances; (iii) the applicant's overall performance; (iv) the fiduciary powers proposed to be exercised; (v) the proposed supervision of the fiduciary powers; (vi) the availability of legal counsel; (vii) the needs of the community to be served; and (viii) any other factors OTS considers proper.⁵

With respect to the first three criteria, the Savings Bank will be well-capitalized. The Savings Bank's plan regarding the provision of trust services is reasonable, and therefore, OTS concludes that the first three criteria have been satisfied. As for the fourth criterion, the fiduciary services to be offered, the BHC has provided a legal opinion from counsel concluding that Delaware law authorizes the proposed trust activities for Delaware-chartered trust companies. As for the Savings Bank's plans for the supervision of fiduciary activities, the Savings Bank will be staffed by experienced trust management. However, the Savings Bank expects to outsource certain operation or administrative duties to affiliates. OTS is imposing condition 18 below to enable OTS to ensure that the Savings Bank will retain overall supervision of fiduciary activities. With respect to availability of legal counsel, the Savings Bank will obtain outside counsel. With

⁴ 12 C.F.R. § 500.30(a) (2006).

⁵ 12 C.F.R. § 550.100 (2006).

respect to the needs of the community to be served, for the reasons discussed above, OTS concludes that there is a need for the trust services in question in the Savings Bank's proposed nationwide market. Accordingly, OTS concludes that the standards for approval of the trust application have been satisfied.

Conclusion

OTS concludes that the Applications satisfy the applicable approval standards, provided the following conditions are complied with in a manner satisfactory to the Northeast Regional Director, or his designee (Regional Director). Accordingly, the Applications are hereby approved, subject to the following conditions:

1. The Savings Bank must receive all required regulatory approvals, and submit copies of all such approvals to the Regional Director, prior to consummation of the proposed transaction;
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 consummation of the proposed transaction, the chief financial officers of the Savings Bank, the BHC, and the Parent 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 Savings Bank, the BHC, or the Parent, 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 Savings Bank, the BHC, the Parent 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 Savings Bank must, within 5 calendar days after the effective date of the proposed transaction: (a) advise the Regional Director in writing of the effective date of the transaction and of the Savings Bank's insurance of accounts; (b) advise the Regional Director in writing that the transaction was consummated in accordance with all applicable laws and regulations, the Applications, and this Order; and (c) provide a reconciliation of the Savings Bank's capital to the Regional Director;
5. The Savings Bank must submit independent audit reports to the Regional Director for its first three fiscal years of operations. 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 three-year business plan. The Savings Bank must submit for the prior, written non-objection of the Regional Director, any proposed major deviations or material changes from the plan (including conducting any activities through operating subsidiaries). The request for change must be submitted no later than 60 calendar days prior to 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 deviations;
8. For two years following commencement of operations, the Savings Bank must receive the prior written non-objection of the Regional Director for any proposed new directors or senior executive officers or any significant change in responsibilities of any senior executive officer;
9. At least 40 percent of the Savings Bank's board of directors must be individuals who are not officers or employees of the Parent or its affiliates and 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 Parent or its affiliates and who is not an officer or employee of the Savings Bank, and has not otherwise been determined by the Regional Director to lack sufficient independence. At least 50 percent of any audit, investment and trust committee established by the Savings Bank must be directors who are not officers or employees of the Savings Bank, the Parent or its affiliates and have not otherwise been determined by the Regional Director to lack sufficient independence;
10. During the first eighteen months of operations, any contracts or agreements pertaining to transactions with affiliates, not yet submitted to OTS for review, must be provided to the Regional Director at least 30 calendar days prior to execution and receive his written non-objection prior to implementation;
11. For two years following commencement of operations, within 30 calendar days after each calendar quarter, the Savings Bank must submit to the Regional Director quarterly activity reports on the number and type of trust accounts serviced, the total asset values of these accounts, and the minutes of the meetings of the Savings Bank's trust committee;
12. Prior to engaging in any business activity other than that authorized pursuant to section 5(n) of the HOLA, the Savings Bank must apply to OTS and receive approval of its application to engage in such business activity. OTS will consider any such application under the standards required of a new federal thrift charter, which are set forth at section 5(e) of the HOLA and OTS regulations thereunder, and under the Community Reinvestment Act and OTS regulations thereunder at 12 C.F.R. § 563e.29. Any such application may be subject to the public notice and comment procedures set forth at 12 C.F.R. Part 516, Subparts B and C;
13. The Parent, its affiliates, and the Savings Bank must comply with the anti-tying restrictions of 12 U.S.C. § 1464(q) and 1467a(n) and must develop written procedures to effect such compliance. The procedures must disclose any proposed bundling arrangements and must be submitted for review and non-objection of the Regional Director at least 30 calendar days prior to the commencement of the cross-marketing activity;

14. Prior to commencement of operations, the Savings Bank must submit a plan designating staff responsibilities and management oversight of financial condition monitoring, financial and regulatory reporting, liquidity, market sensitivity and QTL compliance;
15. Prior to offering any affiliate products other than those identified in the business plan, the Savings Bank must submit details and disclosures of the proposed product offering for the review and non-objection of the Regional Director at least 30 calendar days prior to commencement of such activity;
16. The proposed President and Senior Trust Officer, Chief Investment Officer, and Corporate Secretary of the Savings Bank, will not be considered permanent until the completion of the background checks;
17. The Savings Bank must comply with all applicable state and federal securities laws relating to any requirements for registration as an investment advisor, and submit evidence of such compliance acceptable to the Regional Director;
18. Prior to engaging in any fiduciary activity, the Savings Bank must develop and submit to the Regional Office for review a functioning oversight program, consisting of a comprehensive audit program, a compliance management program, and a risk management program. The audit program must be fully implemented prior to the commencement of operations. The compliance management program must be fully implemented within 90 days of commencement of operations. The risk management program must be fully implemented within 180 days of commencement of operations.
 - a. The audit program should address auditor qualifications, audit scope and method, committee involvement, reporting, and the process for effectuating corrective action.
 - b. The compliance management program should ensure compliance with applicable laws, regulations, and sound fiduciary principles. It should include, at a minimum: (a) the assignment of specific compliance responsibilities to experienced staff; (b) training for affected staff; (c) routine self-evaluations; (d) periodic compliance audits; and (e) appropriate written policies and procedures.
 - c. The risk management program should establish criteria to identify, measure, monitor, and control risks within the fiduciary activities; and
19. The final tax allocation agreement must be submitted to the Regional Director for his review and non-objection prior to consummating the transaction.

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 May 16, 2006.

A handwritten signature in black ink, appearing to read "Scott M. Albinson", written over a horizontal line.

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