



Comptroller of the Currency
Administrator of National Banks

Licensing Department
250 E Street, S.W.
Washington, D.C. 20219

Conditional Approval #952
April 2010

March 26, 2010

John J. Gorman
Gary A. Lax
Luse Gorman Pomerenk & Schick, P.C.
5335 Wisconsin Avenue, N.W., Suite 780
Washington, D.C. 20015-2035

Re: Application by First Niagara Bank, Buffalo, New York, to convert from a federal savings bank to a national bank; and acquire by merger, Harleysville National Bank & Trust Company, Harleysville, Pennsylvania, and First Niagara Commercial Bank, Lockport, New York; and related applications and notices Control Nos.: 2009 NE 01 0017, 2010 NE 02 0001, and 2010 NE 02 0002

Dear Messrs. Gorman and Lax,

The Office of the Comptroller of the Currency (“OCC”) hereby approves the applications by First Niagara Bank, Buffalo, New York (“FNFSB” or “Applicant”), to convert from a federal savings bank to a national bank to be called “First Niagara Bank, National Association,” and to be headquartered in Buffalo, New York (“FNNA”); and to acquire by merger upon its conversion to a national bank charter, Harleysville National Bank & Trust Company, Harleysville, Pennsylvania (“HNB&TC”), and First Niagara Commercial Bank, Lockport, New York (“FNCB”) (the “Mergers”). The OCC also grants approval for FNNA to retain branches and subsidiaries and to exercise fiduciary powers as more fully explained below. These approvals are granted after a thorough evaluation of the applications, other materials you have supplied, and other information available to the OCC, including representations made in the application and by Applicant’s representatives during the application process.

I. Background

Following consummation of the acquisition by FNFSB’s company of HNB&TC’s holding company,¹ FNFSB proposes to convert to a national bank charter and acquire by merger FNCB

¹ First National Financial Group, Inc. (“FNFG”), the holding company of FNFSB, received approval on March 25, 2010, from the Federal Reserve Board (“FRB”) to acquire Harleysville National Corporation, the holding company of HNB&TC, and become a bank holding company. See Federal Reserve System, First Niagara Financial Group, Inc., Buffalo, New York, Order Approving Formation of a Bank Holding Company and Notice to Engage in Nonbanking Activities (March 25, 2010). Applicant expects to consummate the holding company acquisition, the

and HNB&TC. Consequently, at the time of the Mergers, HNB&TC will be affiliated with FNNA. FNNA is a subsidiary of FNFSB.² The deposits of each of the institutions are insured by the Federal Deposit Insurance Corporation (“FDIC”). FNFSB has branches in New York and Pennsylvania;³ HNB&TC has branches only in Pennsylvania; and FNNA has no branches. Applicant further seeks approval, following the conversion and Mergers, to retain its own main office and branches, and to retain as branches, the main office and branches of HNB&TC.⁴ FNFSB also seeks approval to exercise fiduciary powers following the conversion and Mergers and to retain several of its own subsidiaries and those of HNB&TC.⁵

II. Legal authority

A. Conversion to national bank charter

The conversion of FNFSB to a national bank is legally authorized under 12 C.F.R. § 5.24 of the OCC’s regulations and 12 C.F.R. § 552.2-7 of the regulations of the Office of Thrift Supervision (“OTS”).⁶ In deciding a conversion application, OCC regulations provide that the OCC takes into account whether the institution can operate safely and soundly as a national bank in compliance with applicable laws, regulations, and policies.⁷ The regulations further provide that an application may be denied if a significant supervisory, Community Reinvestment Act (“CRA”),⁸ or compliance concern exists with respect to the applicant; approval is inconsistent with applicable law, regulation, or policy; or the applicant fails to provide necessary information

conversion, and the Mergers on April 9, 2010, and, in any event, has represented that it will not consummate the Mergers prior to consummation of the holding company acquisition.

² Because FNNA is a state-chartered bank that meets the requirements of 12 U.S.C. § 1461(a)(5)(E), neither FNFSB or FNFG are considered to be a bank holding company for purposes of the Bank Holding Company Act.

³ FNFSB’s Pennsylvania branches were acquired last year from National City Bank, Cleveland, Ohio (“NatCity”).

⁴ FNNA does not seek to retain the main office of FNNA as a branch. FNFSB already has a branch at the site, 55 East Avenue, Lockport, New York, which FNNA is seeking to retain as a branch.

⁵ Notices of the proposed conversion and Mergers were published in the Philadelphia Inquirer, the Lockport Union Sun & Journal, and The Buffalo News on January 23, 2010, January 30, 2010, and February 17, 2010. The OCC did not receive any comments, but one comment was submitted to the FRB in connection with the holding company applications. This comment will be addressed subsequently.

⁶ This provision requires a converting federal savings bank that meets the conditions for expedited treatment under 12 C.F.R. § 516.5 to file a notice under 12 C.F.R. § 563.22(b)(1)(ii) with the OTS. FNFSB filed a notice with the OTS on December 18, 2009, and the notice was accepted by the OTS on December 21, 2009, and acknowledged by the OTS on December 24, 2009.

⁷ 12 C.F.R. § 5.24(d)(1).

⁸ The CRA also requires that the OCC consider a conversion applicant’s record of compliance with CRA in deciding the application. 12 U.S.C. § 2903(a)(2) and 2902(3)(A); 12 C.F.R. § 25.29(a)(4). This will be discussed more fully subsequently in this decision.

that the OCC has requested.⁹ The regulations also provide that a conversion application may be denied if the conversion would permit the applicant to escape supervisory action by its current regulator.¹⁰ Finally, the regulations provide that a conversion of a federal savings bank to a national bank charter must not be in contravention of applicable federal law.¹¹

The OCC has conducted a thorough review of the conversion application in light of the factors set forth above and determined that the results of this review are consistent with approval of the conversion application. Following the conversion, FNNA is authorized to retain as its main office FNFSB's main office in Buffalo, New York.¹²

B. Acquisition by FNNA of FNFB by merger

Because FNNA and FNFB will each have their main office in New York State at the time of the merger, FNNA is authorized to acquire FNFB by merger pursuant to 12 U.S.C. § 215a, which governs mergers by national banks and state banks located within the same state. Section 215a(d) provides that where a merger involves a state bank, the merger may not be undertaken in contravention of state law. New York law affirmatively permits state banks to merge with national banks.¹³

Consequently, this merger is legally authorized under § 215a subject to the factors set forth in the Bank Merger Act ("BMA")¹⁴ and the banks' records of compliance with CRA,¹⁵ which are discussed subsequently in this decision.

C. Acquisition by FNNA of HNB&TC by merger

Mergers of insured banks with different home states are authorized under 12 U.S.C. § 1831u(a)(1), which was adopted as part of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal").¹⁶ As noted, the main office of FNFSB is located, and the main office of FNNA will be located, in Buffalo, New York; and the main office of

⁹ 12 C.F.R. §§ 5.24(d) and 5.13(b).

¹⁰ 12 C.F.R. § 5.24(d).

¹¹ 12 C.F.R. § 5.24(d)(2)(E). As stated, OTS regulations permit the direct conversion of a federal savings bank to a national bank. 12 C.F.R. § 552.2-7.

¹² FNFSB maintains a liquidation account under OTS regulations as a result of its mutual-to-stock conversion completed in 2002. Following the charter conversion, FNNA must continue to maintain the liquidation account. Comptroller's Licensing Manual, *Conversions*, p. 13 (April 2004).

¹³ N.Y. Banking Law § 600 (McKinney).

¹⁴ 12 U.S.C. § 1828(c)(5).

¹⁵ 12 U.S.C. §§ 2903(a)(2) and 2902(3)(E); 12 C.F.R. § 25.29(a)(3).

¹⁶ The "home state" of a national bank is the state where its main office is located. 12 U.S.C. § 1831u(g)(4)(A)(i).

HNB&TC is located in Harleysville, Pennsylvania. Riegle-Neal permitted a state to elect to prohibit such interstate transactions involving their home state banks if they did so between September 29, 1994, and May 31, 1997. Neither New York nor Pennsylvania exercised this opt-out authority.

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

First, the proposed merger satisfies state-imposed age requirements permitted by section 1831u(a)(5). Under that section, the OCC may not approve a merger under section 1831u(a)(1) “that would have the effect of permitting an out-of-State bank . . . to acquire a bank in a host state¹⁷ that has not been in existence for the minimum period of time, if any, specified in the statutory law of the host state.”¹⁸ The maximum age requirement, however, that a state is permitted to impose is five years.¹⁹ Pennsylvania imposes no age requirement.²⁰

Second, the proposed transaction satisfies the applicable Riegle-Neal filing requirements. A bank applying for an interstate transaction under section 1831u(a) must (1) “comply with the filing requirements of any host State of the bank which will result from such transaction” as long as the filing requirements do not discriminate against out-of-state banks and are similar in effect to filing requirements imposed by the host state on out-of-state nonbanking corporations doing business in the host state; and (2) submit a copy of the application to the state bank supervisor of the host state.²¹ Pennsylvania requires that the applicant notify the banking department of the proposed merger.²² Counsel for FNFSB has represented that a copy of the application was filed with the banking department on February 16, 2010, thus satisfying the federal and state requirements.²³ Consequently, the Riegle-Neal filing requirements are satisfied.

¹⁷ A “host state” is defined as a state, other than the home state of a bank, in which the bank seeks to establish and maintain a branch. 12 U.S.C. § 1831u(g)(5). Thus, Pennsylvania is the host state in this transaction.

¹⁸ 12 U.S.C. § 1831u(a)(5)(A).

¹⁹ 12 U.S.C. § 1831u(a)(5)(B).

²⁰ Pa. Stat. Ann. tit. 7, §§ 1602, 1603. At any rate, HNB&TC was established in 1909.

²¹ 12 U.S.C. § 1831u(b)(1).

²² Pa. Stat. Ann. § 1603(g)(i).

²³ Pennsylvania law also requires that the applicant submit notice of the OCC’s decision if it is a denial, or file the OCC’s decision if it is an approval. Pa. Stat. Ann. § 1603(g)(iii) and (iv). Counsel has represented that FNNA will comply with this requirement.

Third, the proposed merger does not raise issues with respect to the deposit concentration limits of the Riegle-Neal Act. Section 1831u(b)(2) places certain nationwide and statewide deposit concentration limits on interstate transactions. However, interstate transactions involving only affiliated banks are specifically exempt from these provisions.²⁴ Because FNNA and HNB&TC will be affiliated at the time of consummation of the merger, the Riegle-Neal deposit concentration limits are inapplicable to this transaction.

Fourth, the proposed transaction does not raise issues with respect to the special community reinvestment compliance provisions of the Riegle-Neal Act. In determining whether to approve an application for an interstate merger under section 1831u(a), the OCC must: (1) comply with its responsibilities under section 804 of the Community Reinvestment Act (CRA);²⁵ (2) take into account the CRA evaluations of any bank that would be an affiliate of the resulting bank; and (3) take into account the applicant bank's record of compliance with applicable state community reinvestment laws.²⁶ However, these provisions do not apply to transactions, such as this, between affiliated banks.²⁷ Thus, this Riegle-Neal Act provision is inapplicable. However, the CRA itself is applicable and will be discussed subsequently.

Fifth, the OCC may approve an application for an interstate merger transaction under section 1831u(a) only if each bank involved in the transaction is adequately capitalized as of the date the application is filed and the resulting bank will continue to be adequately capitalized and adequately managed upon consummation of the transaction.²⁸ The OCC finds that HNB&TC satisfies the capital requirement, and FNFSB and FNNA satisfy the capital and management requirements.

Consequently, the proposed merger transaction satisfies the applicable Riegle-Neal requirements and is legally permissible, subject to consideration of the BMA factors and the banks' records of compliance with CRA.

D. Bank Merger Act

Under the BMA, the OCC may not approve a merger that would have anti-competitive effects, and must also consider the financial and managerial resources and future prospects of the

²⁴ 12 U.S.C. § 1831u(b)(2)(E).

²⁵ 12 U.S.C. § 2903.

²⁶ 12 U.S.C. § 1831u(b)(3).

²⁷ *Id.* The expanded CRA requirement applies only where the resulting bank would have a branch or a bank affiliate in any state in which it had no branch or bank affiliate immediately prior to the transaction. In this case, FNNA, as the resulting bank, will have a bank affiliate in Pennsylvania -- HNB&TC -- immediately prior to the transaction. Consequently, the expanded CRA requirement does not apply to this transaction.

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

existing and resulting banks, and the convenience and needs of the community to be served.²⁹ The BMA also requires the OCC to take into consideration the effectiveness of each insured depository institution involved in the proposed transaction in combating money-laundering activities.³⁰

The OCC reviewed the proposed merger transactions under the criteria of the Bank Merger Act, 12 USC 1828(c), and applicable OCC regulations and policies. Because the parties to the Mergers will be owned by the same holding company at the time of the Mergers, we found that the Mergers would not have anticompetitive effects. In addition, the OCC considered the financial and managerial resources of the banks, their future prospects, the convenience and needs of the communities to be served, and their effectiveness of each insured depository institution involved in combating money laundering activities. We considered these factors and found them consistent with approval.

E. Community Reinvestment Act

1. Community Reinvestment Act

The CRA requires the OCC to take into account the records of the institutions proposing to engage in a merger in helping to meet the credit needs of the community, including low- and moderate-income (“LMI”) neighborhoods.³¹ Additionally, the OCC takes into account an applicant’s record of CRA performance in considering an application for an insured depository institution to convert to a national bank charter.³² The CRA Performance Evaluation (“PE”) of each institution involved in the transaction was reviewed, as well as other information available to the OCC as a result of its regulatory responsibilities. The review revealed that the records of the FNFSB and HNBT&C of helping to meet the credit needs of their communities are satisfactory.

a. First Niagara Bank

FNFSB’s latest PE, dated March 21, 2007, and issued by the OTS, assigned the bank a “Satisfactory” rating.³³ Among the major factors supporting the rating were: (i) an excellent level of qualified community development investments; (ii) a very good record of community development lending; (iii) a reasonable distribution of loans by geography and borrower income;

²⁹ See 12 U.S.C. § 1828(c)(5).

³⁰ See 12 U.S.C. § 1828(c)(11).

³¹ 12 U.S.C. §§ 2903(a)(2) and 2902(3)(E); 12 C.F.R. § 25.29(a)(3).

³² 12 C.F.R. § 25.29(a)(4).

³³ FNFSB was examined using OTS’s Large Institution examination procedures and received an “Outstanding” rating on the investment test and “High Satisfactory” on the lending and service tests. The evaluation period for the 2007 PE was 2004 to 2006. FNFB, a subsidiary of FNFSB, which is to be merged into FNFSB after the conversion, is exempt from the requirements of the CRA.

and (iv) a branch and delivery system that is readily accessible to all customers. No evidence of illegal or discriminatory lending practices was noted in the PE.

b. Harleystown National Bank and Trust Company

HNB&TC's latest PE, dated September 18, 2007, and issued by the OCC, assigned the bank a "Satisfactory" rating.³⁴ Among the major factors supporting the rating were: (i) excellent distribution of loans by borrower income; (ii) good level of community development investment and services that were responsive to the credit and community development needs in its assessment areas; (iii) good responsiveness to the credit needs of the assessment areas given the bank's size, resources, and strong level of competition; (iv) adequate distribution of loans by geography; and (v) a branch and delivery system that is accessible to geographies and individuals of different income levels. No evidence of illegal or discriminatory lending practices was noted in the PE.

2. Public Comment

The OCC did not receive any comment letters from the public on the conversion and bank merger applications, but did receive a copy of a letter to the FRB expressing concerns about the related bank holding company merger application. While the OCC did not receive the comment directly, we have carefully considered the concerns raised.

Mortgage Lending

Based on an analysis of 2008 HMDA data, the commenter expressed concerns about FNFSB's denial rates for conventional home purchase loans to African Americans in the Buffalo Metropolitan Statistical Area (MSA) and for refinance loans to African Americans and Latinos. Additionally, the commenter expressed concern regarding HNB&TC's denial rates for conventional home purchase loans to African Americans and Latinos in the Philadelphia MSA.³⁵

In addition to receiving CRA examinations, FNFSB and HNB&TC have been subject to ongoing fair lending supervisory oversight by the OTS and the OCC. Comprehensive OCC oversight will continue with respect to the merged entity.

³⁴ HNB&TC was examined using the Large Bank examination procedures and received a "High Satisfactory" on the lending, investment, and service tests. Due to changes in Office of Management and Budget boundaries and definitions, examiners analyzed Home Mortgage Disclosure Act reportable loans and small business loans in two distinct time periods: January 1, 2003 through December 31, 2003 and January 1, 2004 to December 31, 2006. The evaluation period for community development loans, investments, and services was April 5, 2004 through September 18, 2007.

³⁵ Denial and pricing disparities are of concern to the OCC and are evaluated in fair lending examinations. However, HMDA data alone are not adequate to provide a basis for concluding that a bank is engaged in lending discrimination or to indicate whether its level of lending is sufficient. HMDA data do not take into consideration borrower creditworthiness, housing prices, collateral values, credit scores, and other factors relevant to each credit decision, nor do they fully reflect the range of a bank's lending activities or efforts.

Upon consummation of the conversion of FNFSB and merger of HNB&TC with and into FNFSB, HNB&TC's operations will be integrated into FNFSB's fair lending processes and procedures. FNFG, FNFSB's parent company, represented in connection with the holding company merger application that FNFSB's fair lending program consists of fair lending policies, fair lending analysis, oversight and monitoring, and mandatory, annual training for bank employees involved in the lending process. FNFSB's fair lending policy is reviewed, updated and approved by the Risk Committee of the Board of Directors on an annual basis. FNFG represented that FNFSB engages in ongoing monitoring of its HMDA data and reviews loan files to ensure that its lending and pricing decisions comply with fair lending laws and regulations.

Through branch and bank acquisitions, FNFSB continues to expand its assessment area into urban and LMI areas. FNFG represented that FNFSB employs a dedicated CRA Mortgage Consultant in each of its major markets. FNFSB represented that it anticipates hiring a CRA Mortgage Consultant for its new assessment area who will conduct outreach to LMI households. Further, FNFSB anticipates that it will offer government-assisted affordable mortgage products targeted to LMI borrowers in its new markets.³⁶

3. Conclusion

In sum, our review of the record of the applications, including the materials submitted with the applications, the public comment, responses to the public comment, representations of the applicant, and our review of supervisory materials, has not revealed any information inconsistent with approval.

F. Retention of branches by FNNA following consummation of the conversion and Mergers

Upon consummation of the conversion of FNFSB to a national bank charter, and the mergers of FNNA, HNB&TC and FNFB, FNNA proposes to retain as its main office the current main office of FNFSB in Buffalo, New York, and to retain as branches FNFSB's branches in New York and Pennsylvania, as well as the main office and branches of HNB&TC, all of which are located in Pennsylvania.

1. Retention of branches following the charter conversion

Following the conversion, FNNA, with its main office in New York, is authorized to retain all of the branches that FNFSB currently operates in New York State. Title 12 U.S.C. § 36(c) permits a national bank to operate branches at any point within the state in which it is situated if a state bank is authorized by the statutory law of the state to operate such branches under similar circumstances. New York's intrastate branching law permits banks to operate branches, other than in home office protected communities, if they can be operated safely and soundly, and in such manner as to maintain public confidence in the business and protect the public interest and

³⁶ The commenter's request that the FRB conduct a public hearing was not granted.

the interest of depositors, creditors, and shareholders.³⁷ New York's intrastate branching law also requires consideration of the bank's record of performance under state community reinvestment laws.³⁸

New York's intrastate branching law also provides that "in no event shall a branch be *opened and occupied*"³⁹ in cities and villages with a population of 50,000 or less in which is located the main office of a bank that has no bank affiliates.⁴⁰ We conclude that the statutory language, which applies only where a branch is to be opened, and not where an existing, functioning branch is to be retained following a merger or conversion, does not prevent the bank from retaining its branches in any home office protected communities.⁴¹

Consequently, following the conversion, and upon consideration of applicable law as set forth above, the OCC authorizes FNNA to retain all of FNFSB's branches in New York State.

2. Retention of branches following the merger with HNB&TC

Upon consummation of the merger of FNNA and HNB&TC, the OCC authorizes FNNA to retain its main office as its main office, and to retain as branches its New York branches, the Pennsylvania branches that it acquired last year from NatCity, and HNB&TC's main office and branches. The Riegle-Neal Act provides that, subject to the approval of the OCC, following an interstate merger, the resulting bank may retain and operate, as a main office or a branch, any office that any bank involved in an interstate merger transaction was operating as a main office or a branch immediately before the merger transaction.⁴² Consequently, upon consummation of this merger, FNNA is authorized to retain FNNA's own main office as its main office, and retain and operate as branches its own New York branches and the main office and branches of HNB&TC.

The OCC also authorizes FNNA to retain the branches FNFSB operates in Pennsylvania after acquiring branches from NatCity. Following a Riegle-Neal transaction, the resulting bank may establish branches anywhere that any of the banks that were party to the merger could have

³⁷ N.Y. Banking Law § 29 (referring to the general standards set forth in § 10).

³⁸ N.Y. Banking Law §§ 29 and 28-b.

³⁹ Emphasis added.

⁴⁰ N.Y. Banking Law § 105.

⁴¹ Moreover, we note that in 2006, the OCC employed this same reasoning and interpreted the New York statute to permit a national bank to operate as a branch in a home office protected community the main office of a federal savings bank that the bank had acquired in a merger. *See* OCC Corporate Decision No. 2006-07 (July 27, 2006). *See also* Letter to George J. German by Megan Prendergast, Associate Attorney, New York State Banking Department (July 24, 2006). Finally, Applicant represents that Rosanne Notaro, Deputy Counsel, New York State Banking Department, reaffirmed this interpretation in a communication with counsel on March 24, 2010.

⁴² 12 U.S.C. § 1831u(d)(1).

established branches.⁴³ Consequently, FNNA retains the branching rights held by HNB&TC in Pennsylvania. As previously noted, the intrastate branching rights of a national bank are subject to section 36(c) and state intrastate branching law incorporated therein; consequently, HNB&TC could have established additional branches in Pennsylvania subject to state intrastate branching law, and FNNA succeeds to those rights. Pennsylvania permits full intrastate branching, subject to consideration by the regulator of safety and soundness, the public interest, convenience and needs of depositors and other customers, and improvement and expansion of bank products and services.⁴⁴ Consequently, upon consideration of applicable law, the OCC authorizes FNNA to retain as branches the branches that FNFSB operates in Pennsylvania following the acquisition of branches from NatCity.⁴⁵

G Retention of Subsidiaries and Investments

FNFSB has a number of subsidiaries that FNNA seeks to retain following the conversion and merger. Except as noted, the application indicates these subsidiaries engage in activities permissible for 1) operating subsidiaries under 12 U.S.C. § 24(Seventh) and 12 C.F.R. § 5.34; and 2) financial subsidiaries under 12 U.S.C. § 24a and 12 C.F.R. § 5.39. For the reasons discussed below, and except as noted, these subsidiaries may be retained by FNNA. The following discusses the subsidiaries.

1. Operating subsidiaries retained following conversion

Operating subsidiaries conduct activities that are permissible for a national bank to engage in directly and conduct those activities pursuant to the same authorization, terms, and conditions that apply to the conduct of those activities by their parent bank.⁴⁶ Each of the entities discussed

⁴³ 12 U.S.C. § 1831u(d)(1). *See also* § 36(d).

⁴⁴ Pa. Stat. Ann. § 904 (referring to the general standards set forth in § 103).

⁴⁵ FNNA also may retain these branches because, following its acquisition of HNB&TC branches, FNNA is situated in Pennsylvania for purposes of 12 U.S.C. § 36(c), and can rely on that state's intrastate branching law to retain its Pennsylvania branches. *See Seattle Trust & Savings Bank v. Bank of California, N.A.*, 492 F.2d 48, 51 (9th Cir.), *cert., denied*, 419 U.S. 844 (1974) (California bank with grandfathered branches in Washington State is situated in Washington State for purposes of § 36(c)). In addition, HNB&TC has one branch in Warrington, Pennsylvania, that has been approved by the OCC, but has not yet opened. FNNA retains the right to open this branch provided the opening occurs prior to the expiration of the OCC's approval of this branch.

Applicant also has sought confirmation that four drive-up facilities (two in Pennsylvania and two in New York) should be considered to be extensions of branches and not separate branches needing separate branch authorization. Based on information provided by the Applicant, and a consideration of the factors identified in case law and set forth in the Comptroller's Licensing Manual, *Branches and Relocations* (October 2009), we concur that the facilities do not require separate branch authorization. *See Jackson v. First National Bank of Valdosta*, 246 F. Supp. 134 (M.D. Ga. 1965), *North Davis Bank v. First National Bank of Layton*, 457 F.2d 320 (10th Cir. 1972); *Driscoll v. Northwestern National Bank of St. Paul*, 349 F. Supp. 245 (D. Minn. 1972), 484 F.2d 173 (8th Cir. 1973); *Commonwealth of Virginia v. Farmers and Merchants National Bank*, 380 F. Supp. 568 (N.D. Va. 1974).

⁴⁶ 12 U.S.C. § 24(Seventh) and 12 C.F.R. § 5.34(e)(1) and (3).

below is engaged in activities listed in 12 C.F.R. § 5.34(e)(5)(v); is wholly-owned by FNFSB, except as noted; and Applicant has represented that FNFSB does and, upon consummation of the conversion, FNNA will: 1) have the ability to control the management and operations of the subsidiary by holding voting interests sufficient to select the number of directors needed to control the subsidiary's board and to select and terminate senior management; 2) hold more than 50 percent of the voting, or equivalent, interests in the subsidiary; and 3) consolidate each subsidiary's financial statements with those of FNNA under Generally Accepted Accounting Principles ("GAAP").⁴⁷ Additionally, Applicant has represented that the activities conducted will be conducted in accordance with OCC policies contained in guidance issued by the OCC regarding the activity.⁴⁸ The following addresses the activities of each operating subsidiary:

Based on the Applicant's representations, as set forth above, the OCC authorizes FNNA to retain the following as operating subsidiaries following the charter conversion:

- First Niagara Portfolio Management, Inc. ("FNPM"). This subsidiary holds investment securities, comprising United States government, agency and Treasury obligations, that are permissible for a national bank to hold under 12 C.F.R. § 1.3(a). Consequently, FNNA may retain FNPM as an operating subsidiary pursuant to 12 C.F.R. § 1.3(a) and 12 C.F.R. § 5.34(e)(5)(v)(A).
- First Niagara Funding Inc. ("FNFI") and First Niagara REIT Holding Company Inc. ("FNREIT"). FNFI holds commercial mortgage loans, residential mortgage loans, home equity mortgage loans, consumer loans and commercial business loans. It qualifies as a real estate investment trust under New York law. FNREIT's sole activity is to serve as the holding company for FNFI. The types of assets held by directly by FNFI, and indirectly by FNREIT, are permissible for a national bank and its operating subsidiaries under 12 U.S.C. § 24(Seventh). Consequently, FNNA may retain FNFI and FNREIT as operating subsidiaries pursuant to 12 C.F.R. § 5.34(e)(5)(v)(A), (C) and (D).
- Premium Payment Plan, LLP ("PPP") and First Niagara Associates, Inc. ("FNA"). PPP is a limited partnership engaged in insurance premium financing. FNA holds a 65% ownership interest in PPP and is the general partner.⁴⁹ Lending is a permissible activity for national banks and their operating subsidiaries under 12 U.S.C. § 24(Seventh). Consequently, FNNA may retain PPP and FNA as operating subsidiaries of FNNA pursuant to 12 C.F.R. § 5.34(e)(5)(v)(C).
- First Niagara Realty, Inc. ("FNR"). This subsidiary holds real estate foreclosed upon by its parent. National banks and their operating subsidiaries are permitted to hold such real

⁴⁷ 12 C.F.R. § 5.34(e)(5)(i).

⁴⁸ 12 C.F.R. § 5.34(e)(5)(i)(B).

⁴⁹ The remaining 35% is held by an unaffiliated party. With respect to PPP, an LLP, in conformance with 12 C.F.R. § 5.34(e)(5)(i)(A)(3)(ii), Applicant has represented that the limited partners do not have authority to bind the partnership solely in their capacity as limited partners.

estate for a period of up to five years subject to divestiture.⁵⁰ The divestiture period may be extended by the OCC for no more than an additional five years. 12 U.S.C. § 29(Second, Third and Fourth). Consequently, FNNA may retain FNR as an operating subsidiary pursuant to 12 C.F.R. § 5.34(e)(5)(v)(A).

- First Niagara Leasing, Inc. (“FNL”). This subsidiary originates and holds small commercial equipment leases. This activity is permissible for national banks and their operating subsidiaries under 12 C.F.R. Part 23 and Applicant’s counsel has represented that these leases comply with the requirements of that Part. Consequently, FNNA may retain FNL as an operating subsidiary of a national bank under 12 C.F.R. § 5.34(e)(5)(v)(M).⁵¹

2. Financial subsidiaries retained following conversion

Financial subsidiaries may engage only in activities that are financial in nature or incidental to a financial activity, except as explicitly prohibited by statute,⁵² or engage in activities permitted for national banks to engage in directly and subject to the same terms and conditions that govern the conduct and activities by national banks.⁵³ Applicant has provided the certifications and notices required by 12 C.F.R. § 5.39(i)(2)(i) through (vi) to enable FNNA, following the conversion and Mergers, to retain as financial subsidiaries the two subsidiaries of FNFSB discussed below.

First Niagara Risk Management, Inc. (“FNRM”) is a licensed insurance agent selling business and personal insurance, surety bonds, life, disability, and long-term care coverage. This is a permissible activity for a national bank financial subsidiary.⁵⁴ In addition, FNRM provides employee benefit administration, consulting, and actuarial services limited to defined benefit pension and post-retirement plans; third-party workers’ compensation administration services; claims investigation and adjusting services; and risk management services. Each of these activities has been determined to be permissible for national banks or financial subsidiaries.⁵⁵

⁵⁰ Where a depository institution that holds such real estate converts to a national bank, the divestiture period begins on the date of consummation of the conversion.

⁵¹ FNFB also currently is a subsidiary of FNFSB but, as previously discussed, would be merged into FNNA simultaneously with the conversion of FNFSB to a national bank charter.

⁵² 12 U.S.C. § 24a(a)(2)(A)(i) and (B); 12 C.F.R. § 5.39(e)(1) and (f).

⁵³ 12 U.S.C. § 24a(2)(A)(ii); 12 C.F.R. § 5.39(e)(2)

⁵⁴ 12 C.F.R. § 5.39(e)(1)(ii).

⁵⁵ With respect to employee benefits administration, *see* 12 C.F.R. § 5.34(e)(5)(v)(FF) (benefits administration); OCC Conditional Approval No. 384 (April 25, 2000) (employee benefits consulting and administrative services); OCC Unpublished Interpretive Letter (October 6, 1987)(employees benefits administration, consulting, and actuarial services specifically to ensure adequate funding of defined benefit plans). With respect to workers’ compensation administration, *see* Conditional Approval No. 384 (April 25, 2000). With respect to claims investigation and adjusting services, *see* 2002 Fed. Res. Interp. Ltr. Lexis 5 (July 10, 2002) (adjusting insurance claims and investigating the veracity of claims are encompassed within the insurance activities authorized by 12 U.S.C. § 1843(k)(4)(B) and thus may be conducted by a financial holding company and a financial subsidiary).

Applicant also represents that FNRM provides risk management services, which Applicant describes as primarily including review of customers' operations, premises, assets, financial information and appetite for risk; making recommendations for appropriate insurance protection; reviewing such recommendations with the customer; and then seeking coverage from various insurance carriers that FNRM represents. Such activities have been recognized by the OCC and the FRB as part of an insurance agency's activities and, thus are permissible to be performed by a national bank financial subsidiary that acts as an insurance agent.⁵⁶

First Niagara Securities, Inc. ("FNSI") is a licensed insurance agency selling term life insurance. As stated, this is a permissible activity for a national bank financial subsidiary.⁵⁷ In addition, FNSI enters into arrangements with third parties to provide wealth management and insurance services at branches of FNFSB. These arrangements will continue following the consummation of the conversion and Mergers, and are permissible for national banks. Applicant has represented that in providing such services through third parties at FNNA branches it will continue to comply with the Interagency Statement on Retail Sales of Nondeposit Investment Products issued by the FRB, FDIC, OTS and OCC on February 15, 1994, and will comply with 12 C.F.R. Part 14, governing retail sales practices, solicitations, advertising, or offers of any insurance product or annuity by a national bank, an operating subsidiary of a national bank, or any other person that is engaged in such activities at an office of the bank or on behalf of the bank.⁵⁸

3. Subsidiaries acquired in merger with HNB&TC

FNNA also will acquire and retain operating and financial subsidiaries as a result of its merger with HNB&TC. These subsidiaries engage in permissible activities for an operating subsidiary or financial subsidiary, as appropriate.⁵⁹ In addition, the representations that Applicant has made with respect to its own operating subsidiaries, as discussed previously, also apply to operating

⁵⁶ See OCC Interpretive Letter No. 967, p. 2, n. 2 (June 6, 2003), citing 2002 Fed. Res. Interp. Ltr. Lexis 5 (July 10, 2002). Among other things, the OCC letter cites insurance agency risk management services as including assessing the risk borne by a client seeking insurance, identifying the client's exposure to loss, and negotiating insurance coverage, deductibles, and premiums for an insurance client. The cited FRB approval determined that the activities are encompassed within the insurance activities that may be conducted by a financial holding company if the services are provided by an insurance agent or broker in connection with its other insurance sales activities, involve managing insurable risks, are advisory in nature, and do not allow the financial holding company to control, or perform operations of, the persons to which the services are provided.

⁵⁷ 12 C.F.R. § 5.39(e)(i)(ii).

⁵⁸ 12 C.F.R. § 14.10. FNFSB is currently subject to similar insurance regulations of the OTS, which are codified at 12 C.F.R. Part 536.

⁵⁹ The financial subsidiaries are insurance agencies that sell universal life, term, group automobile, and home insurance, including insurance through employee benefit plans. The financial and operating subsidiaries also provide investment consulting, fiduciary services, business development, succession and estate planning, and internal payroll and benefits processing. HNB&TC also holds a number of dormant subsidiaries, which hold only de minimis assets and liabilities. Applicant has represented that it expects to dissolve these subsidiaries within six months following consummation of the conversion and Mergers.

subsidiaries being acquired in the merger with HNBT&C. Finally, as discussed previously, FNNA will meet the requirements to hold financial subsidiaries.

4. Other subsidiaries and investments

FNFSB holds, and the OCC authorizes FNNA to continue to hold First Niagara Centre, Inc. (“FNC”), which holds bank premises, an activity permitted for national banks and subsidiaries of national banks, by statute and regulation;⁶⁰ and investments in small business investment companies (“SBICs”), structured as limited liability partnerships.⁶¹

FNFSB also owns a 50 percent interest in TSB Real Property Inc., a joint venture that develops commercial real estate. Because this activity is not permissible for a national bank, Applicant has represented that FNNA will divest its interest in this subsidiary within two years from the date of the conversion.

H. Exercise of fiduciary powers

FNFSB currently provides trust services and the OCC grants Applicant’s request, under 12 U.S.C. § 92a, to exercise full fiduciary powers following the charter conversion.⁶²

Title 12 U.S.C. § 92a provides:

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefore, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.⁶³

⁶⁰ 12 U.S.C. § 371d and 12 C.F.R. § 5.37(d). Counsel has represented that a relatively small portion of the premises is leased to third parties. It has long been recognized that national banks may lease excess space held as bank premises to third parties. *See Brown v. Shleier*, 118 F. 981, 984 (8th Cir. 1902), *aff’d* 194 U.S. 18 (1904).

⁶¹ National banks are permitted to make investments in SBICs under 12 C.F.R. § 7.1015 in an aggregate amount of up to 5 percent of the bank’s capital and surplus. *See* 15 U.S.C. § 682(b). FNNA’s investment will be within the statutory limitations.

⁶² 12 C.F.R. § 5.26 (e)(1)(iii). As proposed, FNNA would exercise fiduciary powers in New York and Pennsylvania. Counsel has represented that the fiduciary powers do not violate 12 C.F.R. Part 9, N.Y. Banking Law § 100, and Pa. Stat. Ann. § 401. In addition, the OCC has determined, as required by § 92a(i), that the capital and surplus of FNNA will be not less than the capital and surplus required by state law of state banks, trust companies, and other corporations exercising comparable fiduciary powers.

⁶³ 12 U.S.C. § 92a(a).

For these purposes, a national bank is considered to be “located” with respect to each fiduciary relationship in the state in which the bank acts in a fiduciary capacity for that relationship. A national bank acts in a fiduciary capacity for a relationship in the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets.⁶⁴

OCC regulations adopted under 12 U.S.C. § 92a provide that a national bank may act in a fiduciary capacity in any state. In doing so, it may engage in any of the eight fiduciary capacities listed in 12 U.S.C. § 92a(a), unless the state prohibits its own fiduciaries from acting in that capacity⁶⁵ and, in addition, it may act in any other fiduciary capacity permitted by the state for its own state fiduciaries.⁶⁶ While acting in a fiduciary capacity in one state, it may market its fiduciary services to, and act as a fiduciary for, customers located in any state and it may act as fiduciary for relationships that include property located in other states through trust offices and trust representative offices that it may establish in any state.⁶⁷

III. Section 1818 conditions

These approvals are subject to the following conditions:

- 1) FNNA’s Board of Directors and Management shall take all steps necessary to ensure that the commitments set forth in a letter dated March 24, 2010, by John R. Koelmel, President and Chief Executive Officer, First Niagara, to Blake J. Paulson, Assistant Deputy Comptroller, are fully adopted, timely implemented, and adhered to thereafter.
- 2) Within 30 days of the consummation of the conversion of FNFSB to a national bank charter, the Board and Management of FNNA shall submit a Capital Plan for FNNA to the OCC for review, and, upon receiving from the OCC written supervisory nonobjection to the Capital Plan, shall thereafter timely adopt, implement, and adhere to the Capital Plan.
- 3) FNNA shall not significantly deviate or undertake any significant deviation, as defined in, and during the time frame specified in, the Attachment to this Decision letter, without first submitting a written request, which includes the information specified in the Attachment, to the OCC seeking the OCC’s prior written supervisor nonobjection to any such significant deviation and receiving such prior written supervisory nonobjection.

⁶⁴ 12 C.F.R. § 9.7(d).

⁶⁵ 12 C.F.R. § 9.7(a)(1).

⁶⁶ 12 C.F.R. § 9.7(a)(2).

⁶⁷ 12 C.F.R. § 9.7(b) and (c).

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

IV. FFIEC policy statement

The OCC has considered whether approval of the conversion of FNFSB would be consistent with the Statement on Regulatory Conversions (“Statement”) issued by the Federal Financial Institutions Examination Council (“FFIEC”).⁶⁸ The Statement describes the circumstances in which a conversion request should not be entertained by a chartering authority. With respect to those circumstances in which it is appropriate for a prospective chartering authority to entertain a conversion request, the Statement provides that the chartering authority should consult with the existing regulator about any pending or outstanding supervisory matters, downgrades, or enforcement actions; consult with the FDIC or FRB under certain circumstances; conduct a pre-conversion examination; factor proposed ratings and enforcement actions into its examination planning process; fully assess the appropriateness of current or in-process rating downgrades after completion of the examination; and maintain any corrective program that the existing regulator has in place.

The OCC has determined that consideration of FNFSB’s application is consistent with the Statement. The OCC also has consulted with the OTS, reviewed and taken into consideration the examination findings and ratings assessed by the OTS, conducted a pre-conversion examination, and taken action to incorporate any concerns that the OTS has with FNFSB in formulating the OCC’s supervisory program with respect to FNNA.⁶⁹ Finally, even though not required, the OCC has consulted with the FRB about this application.

V. Consummation requirements

Please refer to the *Conversion* and *Business Combination* booklets for steps to complete the conversion and merger.

These conditional approvals are granted based on our understanding that other applicable regulatory approvals, nonobjections or waivers with respect to the proposed transactions will have been received prior to the conversion and mergers, as appropriate, and that the mergers of FNFB and HNBT&C will occur upon the conversion of FNFSB to a national bank.

As a reminder, the Northeastern District Licensing Office must be advised in writing 10 days in advance of the desired effective date for the conversion and merger so that the OCC may issue the necessary conversion authorization and merger certification letters.

⁶⁸ See Attachment to Press Release, FFIEC Issues Statement on Regulatory Conversions (July 1, 2009), available at <http://www.ffiec.gov/press/pr070109.htm>.

⁶⁹ As previously noted, OCC regulations provide that the OCC may deny a conversion application when conversion would permit the applicant to escape supervisory action by its current regulator. 12 C.F.R. § 5.24(d)(1).

The OCC will include branch authorizations, as appropriate, in the letters authorizing the conversion and certifying the consummation of the mergers. With respect to the conversion application, you are reminded that the following items must be satisfactorily addressed on or before the effective date of the conversion of FNFSB:

1. The converting institution must ensure that all other required regulatory approvals, non-objections, or waivers have been received.
2. The converting institution must notify the OCC if the facts described in the filing materially change at any time prior to consummation of the conversion.
3. Upon completion of all steps required to convert to a national banking association, the converted bank must submit the "Conversion Completion Certification" (enclosed) certifying that all of the steps required to convert FNFSB to a national banking association have been completed.

When the institution has satisfactorily completed all of the above steps, the OCC will issue a "Conversion Completion Acknowledgment" officially authorizing the institution to commence business as a national banking association. We will provide the charter certificate under separate cover.

With respect to the mergers, please ensure that you have submitted the following prior to your desired consummation date:

1. Applicant must ensure that all other required regulatory approvals, nonobjections, or waivers have been received.
2. A Secretary's Certificate for each institution certifying that a majority of each bank's board of directors approved the applicable merger.
3. Executed merger agreements with the Amended Articles of Association for FNNA, the resulting bank, attached.
4. A Secretary's Certificate from each institution certifying that the shareholder approvals have been obtained.

VI. Conclusion

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

- 1) the conversion of FNFSB to a national bank, FNNA, with its main office in Buffalo, New York;

- 2) the merger of FNCB into FNNA;
- 3) the merger of HNB&TC into FNNA;
- 4) the retention by FNNA, following the merger with HNB&TC, of FNNA's main office as its main office, and the retention of the former New York and Pennsylvania branches of FNFSB and the main office and branches of HNB&TC as branches of FNNA;
- 5) the retention by FNNA of the subsidiaries and investments as described in this Decision, provided that FNNA must divest TSB Real Property Inc. within two years of consummation of the Mergers; and
- 6) FNNA's exercise of fiduciary powers.

If the conversion and merger transactions have not been consummated within six months from the approval date, the approvals will automatically terminate unless the OCC grants an extension of the time period.

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

A separate letter is enclosed requesting your feedback on how we handled your applications. We would appreciate your response. If you have questions regarding this letter, please contact Licensing Analyst Wai-Fan Chang, at (212) 790-4055. Please reference the application control number in any correspondence.

Sincerely,

Lawrence E. Beard

Lawrence E. Beard
Deputy Comptroller for Licensing

Enclosures: Attachment – Significant Deviation Requirement
Conversion Completion Certificate
Minimum Policies and Procedures

SIGNIFICANT DEVIATION REQUIREMENT

- (1) For three years from the date of conversion to a national bank, First Niagara National Association (“FNNA”) shall not significantly deviate from the products, services, asset composition and size, funding sources, structure, and markets of FNNA that existed immediately after conversion to a national charter and consummation of its acquisitions by merger of Harleystown National Bank and Trust Company and First Niagara Commercial Bank (FNNA’s “Initial Business”) without first obtaining the OCC’s prior written determination of no supervisory objection to such significant deviation.
- (2) Any request to the OCC for prior written determination of no supervisory objection to a significant deviation shall be in writing and include: (a) an assessment of the adequacy of FNNA’s management, staffing levels, organizational structure, financial condition, capital adequacy, funding sources, management information systems, internal controls, and written policies and procedures with respect to the proposed significant deviation and (b) the FNNA’s evaluation of its capability to identify, measure, monitor, and control the risks associated with the proposed significant deviation.
- (3) For purposes of this Significant Deviation Requirement, the phrase “significantly deviate” and “significant deviation” shall be construed in light of the guidance provided in Appendix G (Significant Deviations After Opening) of the “Charters” booklet of the *Comptroller’s Licensing Manual* (February 2009), and shall include, but not be limited to, the following:
 - (a) any change in the products and services offered, the funding sources used, the composition of funding, and the geographic or product markets served compared to FNNA’s Initial Business.
 - (b) an increase in FNNA’s asset size, total loan portfolio, or borrowed funds that exceeds proforma projections submitted with the application by more than 5%.
 - (c) any change in FNNA’s personnel, policies, procedures, or operations, including any change in operations resulting from changes in external factors, that may have a material adverse impact on FNNA’s operations or financial performance.
- (4) Deviations in FNNA’s financial performance during the transition period, or infusions of capital in FNNA, shall not, by themselves, be significant deviations for purposes of clauses (1) through (3) above.
- (5) The requirement that FNNA obtain the OCC’s prior written determination of no supervisory objection to a significant deviation does not apply to transactions for which FNNA is required by statute or regulation to seek formal prior written OCC approval or nonobjection.