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MEMO TO: Governance, Ethics, and Transparency Committee

F R O M: Michael J. Molina



Chair, Governance, Ethics, and Transparency Committee

SUBJECT: **TRANSMITTAL OF INFORMATIONAL DOCUMENT RELATING TO  
BANK OF AMERICA'S COMMITMENT TO PROVIDE MORTGAGES  
FOR NATIVE HAWAIIANS ON HAWAIIAN HOMELANDS** (GET-19)

The attached informational document pertains to Item 19 on your Committee's agenda.

CM:MHP:meetingmaterials:GET:transGET19:grs

Attachment

community because these data cover only a few categories of housing-related lending. HMDA data, moreover, provide only limited information about the covered loans.<sup>75</sup> HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution has not assisted adequately in meeting its community's credit needs or has engaged in illegal lending discrimination.

Because of the limitations of HMDA data, the Board has considered these data carefully in light of other information, including examination reports that provide an onsite evaluation of compliance by the subsidiary depository institutions of Bank of America and FleetBoston with fair lending laws. Examiners noted no fair lending issues or concerns in the CRA performance evaluations of the depository institutions controlled by Bank of America or FleetBoston.

The record also indicates that Bank of America has taken steps to ensure compliance with fair lending laws. Bank of America has instituted corporate-wide policies and procedures to help ensure compliance with all fair lending and other consumer protection laws and regulations. Bank of America's compliance program includes compliance file reviews, an anti-predatory-lending policy, fair lending policy and product guides, testing the integrity of HMDA data, and quality assurance. In addition, Bank of America's consumer real estate associates receive compliance training that includes courses in fair lending laws, ethics, privacy, information security, and HMDA. Bank of America stated that its compliance program would be implemented at Fleet Bank after consummation of the proposal.

The Board also has considered the HMDA data in light of the programs described above and the overall performance records of Bank of America's subsidiary banks under the CRA. These established efforts demonstrate that the banks are active in helping to meet the credit needs of their entire communities.<sup>76</sup>

## F. Branch Closings

Several commenters expressed concerns about the proposal's possible effect on branch closings.<sup>77</sup> The Board has

75. The data, for example, do not account for the possibility that an institution's outreach efforts may attract a larger proportion of marginally qualified applicants than other institutions attract and do not provide a basis for an independent assessment of whether an applicant who was denied credit was, in fact, creditworthy. Credit history problems and excessive debt levels relative to income (reasons most frequently cited for a credit denial) are not available from HMDA data.

76. One commenter alleged that Bank of America has a substantially higher rate of home mortgage foreclosures in neighborhoods with predominantly minority and LMI populations and, generally, that these areas have the fewest Bank of America branches. Bank of America represented that it has policies and procedures in place to work with customers to minimize foreclosures. As previously noted, the OCC did not find fair lending issues or concerns when it conducted its fair lending law reviews during the CRA evaluations of the subsidiary depository institutions of Bank of America.

77. Some commenters expressed concern that, if consummation of the proposal caused Bank of America to control more than 10 percent

carefully considered these comments on potential branch closings in light of all the facts of record. Bank of America has represented that any merger-related branch closings, relocations, or consolidations would be minimal because there is little geographic overlap with FleetBoston.<sup>78</sup> Bank of America also represented that no decision had been made on whether Bank of America's or FleetBoston's branch closure policy would be in effect after consummation of the proposed transaction. Under these policies, Bank of America and FleetBoston must review a number of factors before closing or consolidating a branch, including an assessment of the branch, the marketplace demographics, a profile of the community where the branch is located, and the effect on customers. The most recent CRA evaluations of BA Bank and Fleet Bank noted favorably the banks' records of opening and closing branches.<sup>79</sup>

The Board also has considered the fact that federal banking law provides a specific mechanism for addressing branch closings.<sup>80</sup> Federal law requires an insured depository institution to provide notice to the public and to the appropriate federal supervisory agency before closing a branch. In addition, the Board notes that the OCC, as the appropriate federal supervisor of BA Bank, will continue to review BA Bank's branch closing record in the course of conducting CRA performance evaluations.

## G. Other Concerns

Some commenters urged the Board not to approve the proposal until Bank of America meets certain "commitments" regarding its Hawaii lending programs and its goal for mortgage lending to Native Hawaiians on Hawaiian Home Lands that commenters alleged Bank of America

of the deposits of insured depository institutions in the United States. Bank of America would divest branches in LMI areas to comply with section 3(d) of the BHC Act.

78. One commenter alleged that Bank of America has closed bank branches in the absence of market overlap after previous bank mergers. The commenter expressed concern that branches in LMI areas would be closed after consummation of this proposal.

79. Examiners stated that, in general, BA Bank's record of opening and closing branches did not adversely affect the accessibility of delivery systems, particularly in LMI geographies. BA Bank closed three branches in middle-income geographies in the Los Angeles-Long Beach MSA during the evaluation period. Examiners reported, however, that service delivery systems in the Los Angeles-Long Beach MSA were accessible to geographies and individuals of all income levels. Examiners stated that branch openings and closings in the Charlotte MSA did not adversely affect the accessibility of the bank's delivery systems in general or in LMI areas. BA Bank closed one branch in a low-income census tract in the Charlotte MSA during the review period, but another BA Bank branch was located less than one mile away. BA Bank also closed two branches in low-income census tracts and one branch in a moderate-income census tract in the Miami MSA.

80. Section 42 of the FDI Act (12 U.S.C. § 1831r-1), as implemented by the Joint Policy Statement Regarding Branch Closings (64 *Federal Register* 34,844 (1999)), requires that a bank provide the public with at least 30-days notice and the appropriate federal supervisory agency with at least 90-days notice before the date of the proposed branch closing. The bank also is required to provide reasons and other supporting data for the closure, consistent with the institution's written policy for branch closings.

made in 1994 in connection with the acquisition of Liberty Bank, Honolulu, Hawaii, by Bank of America, FSB, a predecessor of BA Bank.<sup>81</sup> Commenters alleged that the "commitments" were reaffirmed in *NationsBank*,<sup>82</sup> and that they were conditions to the Board's approval in both orders.

In connection with the acquisition of Liberty Bank, Bank of America publicly announced its plans to engage in certain lending programs in Hawaii. Although Bank of America styled these initiatives as "commitments" in its public statements, it did not make them as commitments to the Board, and these plans were not conditions to the Board's approvals in *Liberty Bank* or *NationsBank*.<sup>83</sup> The Board views the enforceability of such third party pledges, commitments, or agreements as matters outside the CRA. As the Board explained in *NationsBank*, to gain approval of a proposal to acquire an insured depository institution an applicant must demonstrate a satisfactory record of performance under the CRA without reliance on plans or commitments for future action.<sup>84</sup> Moreover, the Board has consistently found that neither the CRA nor the federal banking agencies' CRA regulations require depository institutions to make pledges or enter into commitments or agreements with any organization.<sup>85</sup> Accordingly, in *Liberty Bank* and *NationsBank* and in this case as well, the Board has focused on the applicant's existing record of helping to meet the credit needs of its CRA assessment areas when reviewing a proposal under the convenience and needs factor of the BHC Act.<sup>86</sup>

As previously noted, many commenters criticized the terms of Bank of America's recently announced Community Development Initiative. Some criticized it for providing insufficient funding for loans, investments, or grants. Others requested that the Board not approve the proposal until Bank of America includes state-specific goals for certain loan products and programs or enters into specific

agreements with certain states or community organizations. As discussed above, the Board views the enforceability of such third-party pledges, initiatives, and agreements as matters outside the CRA. Instead, the Board focuses on the existing CRA performance record of an applicant and the programs that the applicant has in place to serve the credit needs of its CRA assessment areas at the time the Board reviews a proposal under the convenience and needs factor. The future activities of Bank of America's subsidiary depository institutions will be reviewed by the appropriate federal supervisors of those institutions in future CRA performance examinations, and the Board will consider that actual CRA performance record in future applications by Bank of America to acquire a depository institution.

#### H. Conclusion on Convenience and Needs Considerations

The Board recognizes that this proposal represents a significant expansion of Bank of America and its scope of activities. Accordingly, an important component of the Board's review of the proposal has been its consideration of the effects of the proposal on the convenience and needs of all communities served by Bank of America and FleetBoston.

In conducting its review, the Board has weighed the concerns expressed by commenters in light of all the facts of record, including the overall CRA records of the depository institutions of Bank of America and FleetBoston. A significant number of commenters have expressed support for the proposal based on the records of Bank of America and FleetBoston in helping to serve the banking needs, and in particular, the lending needs of their entire communities, including LMI areas. Other commenters have expressed concern about specific aspects of Bank of America's record of performance under the CRA in its current service areas and have expressed reservations about whether Bank of America and FleetBoston have been, and would be, responsive to the banking and credit needs of all their communities, especially in New England. The Board has carefully considered these concerns and weighed them against the overall CRA records of Bank of America and FleetBoston, reports of examinations of CRA performance, and information provided by Bank of America, including its responses to comments. The Board also considered information submitted by Bank of America and information from the OCC concerning BA Bank's performance under the CRA and compliance with fair lending laws since its last CRA performance evaluation.

As discussed in this order, all the facts of record demonstrate that the subsidiary depository institutions of Bank of America and FleetBoston have a record of meeting the credit needs of their communities. The Board expects the resulting organization to continue to help serve the banking needs of all its communities, including LMI neighborhoods.

Based on all the facts of record, and for reasons discussed above, the Board concludes that considerations

81. See *Liberty Bank* at 628.

82. See *NationsBank* at 876.

83. Some commenters misconstrued the Board's statements that the *Liberty Bank* and *NationsBank* orders were "specifically conditioned upon compliance with all of the commitments made by BankAmerica [or NationsBank] in connection with this application" as referencing commitments other than those that the applicants expressly made directly to the Board.

84. See *NationsBank* at 876; see also *Travelers Group Inc.*, 84 *Federal Reserve Bulletin* 985 (1998).

85. See, e.g., *Citigroup Inc.*, 88 *Federal Reserve Bulletin* 485 (2002); *Fifth Third Bancorp.*, 80 *Federal Reserve Bulletin* 838, 841 (1994).

86. The CRA performance records of Bank of America FSB, which had branches in Hawaii at the time of the *Liberty Bank* order and until eight months prior to the *NationsBank* order, were rated by its primary federal supervisor, the Office of Thrift Supervision, as "satisfactory" (*Liberty Bank*) and as "outstanding" overall and "satisfactory" in Hawaii (*NationsBank*). Bank of America's CRA assessment areas have not included Hawaii since 1998, after it sold all its branches in that state. Under the interagency CRA regulation, the appropriate federal supervisor evaluates a bank's CRA performance record in its delineated assessment areas, which generally include the census tracts where its main office, branches, and deposit-taking ATMs are located, and the surrounding census tracts where the bank has originated or purchased a substantial portion of its loans. See, e.g., 12 C.F.R. 228.41.