



Comptroller of the Currency
Administrator of National Banks

Washington, D.C.

**Conditional Approval #696
July 2005**

**DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY
ON THE APPLICATION OF
BROWN BROTHERS HARRIMAN TRUST COMPANY, LLC,
TO CONVERT TO A NATIONAL BANKING ASSOCIATION TO BE CALLED
BROWN BROTHERS HARRIMAN NATIONAL TRUST CO.**

June 9, 2005

I. INTRODUCTION

Brown Brothers Harriman Trust Company, LLC, New York, New York, (“BBHTC-NY”) a limited liability trust company organized under the laws of New York, applied to the Office of the Comptroller of the Currency (“OCC”) to convert to a national banking association to be called Brown Brothers Harriman National Trust Co. (“BBHNTC”), under 12 U.S.C. § 35 and 12 C.F.R. § 5.24. Along with the conversion, fiduciary powers are requested for BBHNTC under 12 U.S.C. § 92a, 12 C.F.R. Part 9, and 12 C.F.R. § 5.26. BBHTC-NY engages in a full range of fiduciary activities permitted under New York law. It does not accept deposits other than trust funds and is not insured by the Federal Deposit Insurance Corporation (“FDIC”). It is supervised by the State of New York Banking Department (“SNYBD”). BBHNTC similarly will engage in fiduciary activities to the fullest extent permitted under national banking laws; its operations will be limited to those of a trust company and activities related thereto; it will not accept deposits other than trust funds; and it will not be insured by the FDIC.

BBHTC-NY is wholly-owned by Brown Brothers Harriman & Co. (“BBH”), a New York partnership. After the conversion, BBHNTC will be wholly-owned by BBH, except for directors’ qualifying shares. BBH, a private bank founded in 1818, provides five principal categories of financial services: banking, including deposit-taking, with total assets of approximately \$2.2 billion, investment management, global custody, corporate finance, and brokerage. BBH is not a publicly-held company. It is not insured by the FDIC. BBH is authorized to conduct a commercial banking business in accordance with the provisions of

Article IV of the New York State Banking Law, New York Banking Law §§ 160 – 181, and is subject to regulation, supervision, and examination by the SNYBD. BBH is also licensed to conduct a commercial banking business by the Commonwealths of Massachusetts and Pennsylvania and is subject to supervision and examination by the banking supervisors of those states. It has been a member of the New York Stock Exchange since 1882. BBHTC-NY is not, and BBHNTC will not be, a “bank” for purposes of the Bank Holding Company Act, and so BBH is not a bank holding company.

BBHTC-NY owns four wholly-owned subsidiaries: (1) Brown Brothers Harriman Trust Company of Florida (“BBHTC-Florida”), a limited purpose trust company chartered under Florida law; (2) Brown Brothers Harriman Trust Company of Pennsylvania (“BBHTC-Pennsylvania”), a limited purpose trust company chartered under Pennsylvania law; (3) Brown Brothers Harriman Trust Company of Texas (“BBHTC-Texas”), a limited purpose trust company chartered under Texas law; and (4) Brown Brothers Harriman Trust Company (Cayman) Limited (“BBHTC-Cayman”), a limited purpose trust company chartered under Cayman Islands law. Before BBHTC-NY converts to a national charter, BBHTC-Cayman will be moved to become a subsidiary of BBH. The other three subsidiaries will become subsidiaries of the national trust company. Like BBHTC-NY, the other three state trust companies engage only in fiduciary activities and do not conduct any activity that is not permissible for a national bank.

In addition to its office in New York, BBHTC-NY currently operates a full service trust office in Charlotte, North Carolina, and a trust representative office in Boston, Massachusetts. After the conversion, BBHNTC will operate these offices as full service trust offices. It will also open full service trust offices in Chicago, Illinois, Philadelphia, Pennsylvania, and Palm Beach, Florida. The offices in Pennsylvania and Florida may share space and employees with the state trust company subsidiaries in those locations, consistent with 12 C.F.R. § 7.3001. BBHNTC may open additional trust offices or trust representative offices in other states in the future, as business considerations warrant.

BBHTC-NY is now a limited liability trust company under New York law. It was first organized in 1983. In April 2000, it converted to a limited liability trust company business entity pursuant to New York Banking Law § 102-a(3). Under New York law, trust companies may be formed and operated as limited liability trust companies.¹ Such trust companies are formed under, and operate in accordance with, New York’s limited liability company law and the state’s bank and trust company provisions, except that to the extent any provision of the limited liability company law is inconsistent with the bank and trust company laws, the provisions of the bank and trust company laws prevail. *See* New York Banking Law § 102-a(1). Existing trust companies may convert into limited liability trust companies under section 102-a(3). It is proposed in the application that, after the conversion to a national charter,

¹ *See generally* New York Banking Law §§ 102-a, 4001-b, 5050 & 6050. *See also* New York Banking Law § 2-b (definitions providing how the terms in the bank and trust company laws are applied to limited liability trust companies).

BBHNTC would continue to operate in a similar fashion, electing to follow the New York limited liability company law for its internal governance to the extent not inconsistent with applicable federal banking statutes and regulations or bank safety and soundness, under 12 C.F.R. § 7.2000.

II. DISCUSSION

A. Authority for the Conversion

State banks may convert to a national charter under 12 U.S.C. § 35. Section 35 provides in relevant part:

Any bank incorporated by special law of any State or of the United States or organized under the general laws of any State or of the United States and having an unimpaired capital sufficient to entitle it to become a national banking association under the provisions of the existing laws may, by the vote of the shareholders owning not less than fifty-one per centum of the capital stock of such bank or banking association, with the approval of the Comptroller of the Currency be converted into a national banking association, with a name that contains the word “national”: *Provided, however,* That said conversion shall not be in contravention of the State law.

Revised Statutes § 5154, 12 U.S.C. § 35.

Section 35 does not define “state bank.” The OCC has long interpreted the term to include non-deposit-taking state trust companies and approved conversions of such institutions under section 35.² We base this interpretation on the position, now codified in 12 C.F.R. § 5.24(b), of construing section 35 in parallel with the reciprocal transaction of a national bank converting into a state bank under 12 U.S.C. § 214a.³ For those transactions, section 214(a) defines “state bank” to include a trust company.⁴ Thus, a non-deposit-taking state trust company is within the scope of section 35.

BBHTC-NY also meets the other criteria in section 35. It has capital sufficient to meet the statutory requirement for a national bank. BBH, the sole shareholder, has approved the

² See, e.g., *Application to Convert UBS Trust Company, New York, New York* (Conditional Approval No. 504, December 7, 2001).

³ See, e.g., *Decision on the Application of CreditAmerica Savings Company to Convert to a National Bank* (OCC Corporate Decision No. 2001-17, June 28, 2001 (pages 4-5)).

⁴ See also 12 U.S.C. § 215b(1) (also defining “state bank” to include a trust company for statutes governing the merger or consolidation of state banks into national banks).

conversion. The conversion would not be in contravention of state law. New York permits New York state banks and trust companies to convert to a national charter.⁵

The new question presented by this application arises from the fact that BBHTC-NY is a limited liability trust company. Is a state bank or trust company that is organized as a limited liability company within the scope of section 35, or may only those state banks that are organized as corporations convert to a national charter?

We believe section 35 is not limited to state banks organized as corporations, but also includes state banks organized as limited liability companies. First, the language of the statute supports this result. In one phrase, it refers to banks “incorporated” by special law of a State. But then, in the phrase of more widespread application, it uses the more general term “organized” (“organized under the general laws of any State”). The use of the general term in the same statute where the limited term is also used suggests that “organized” is intended to mean something different than “incorporated.” Thus, it covers state banks that are organized under statutes providing for forms of business organization other than incorporation.

Second, section 35 does not refer to the resulting national bank as a corporation. It refers to the resulting entity as a “national banking association,” “banking association,” “national association,” “association,” or “bank.”

Third, more generally, the National Bank Act does not refer to national banks as corporations, or use terms such as incorporated. As in section 35, they are typically referred to as “national banking associations” or “associations.” One provision in the National Bank Act uses the term “body corporate.” The beginning of 12 U.S.C. § 24 reads –

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have the power -- . . .

. . . .

Revised Statutes § 5136, 12 U.S.C. § 24. This part of section 24 appears in the sequence of sections providing for the organization of *de novo* entities as national banking associations and does not apply to entities converting under section 35. It identifies the point in the organizing process at which the new entity has legal existence and can act at law (*e.g.*, entering contracts) in its own name. However, a state bank proposing to convert under section 35 already has legal existence, and so this identification point in section 24 is not relevant for a converting bank.⁶

⁵ New York Banking Law § 137(1).

⁶ This does not mean that national banking associations that result from conversion under section 35 lack the powers of national banks organized *de novo*, or that they are subject to a different regulatory regime.

Since the National Bank Act does not refer to national banks as corporations,⁷ there is no reason to read into section 35 a requirement that only state banks organized as corporations can convert to a national charter.

Therefore, we conclude that state banks and trust companies organized as limited liability companies may convert into national banking associations under section 35. Thus, BBHTC-NY may convert to a national charter.

B. The Resulting Bank’s Election to Follow State Limited Liability Company Law

BBHTC-NY currently is a New York state limited liability trust company. As such, it operates under New York’s limited liability company law and its bank and trust company law, except that when a provision of the limited liability company law is inconsistent with the bank and trust company laws, the bank and trust company law provisions govern. *See* New York Banking Law § 102-a(1). It is proposed that BBHNTC would continue to operate in a similar manner by electing, under 12 C.F.R. § 7.2000(b), to follow New York limited liability company law for its internal governance to the extent not inconsistent with applicable federal banking statutes and regulations or bank safety and soundness.

Section 7.2000(b) provides in relevant part:

Other sources of guidance. To the extent not inconsistent with applicable Federal banking statutes or regulations, or bank safety and soundness, a national bank may elect to follow the corporate governance procedures of the law of the state in which the main office of the bank is located,

12 C.F.R. § 7.2000(b). Section 7.2000(a) reiterates that a national bank’s corporate governance procedures must comply with applicable Federal banking statutes and regulations and safe and sound banking practices.

Section 7.2000 refers to “corporate governance procedures.” However, in using this term, the regulation is not intended to limit the state laws to which a national bank can look as sources for governance procedures only to state corporation laws. Rather, the term “corporate governance” is used to refer to those matters involving the operation and mechanics of the

Section 35 provides that banks resulting from conversion have the same powers and privileges and are subject to the same duties, liabilities, and regulations applicable to associations originally organized as national banking associations.

⁷ While some other statutes governing certain activities of national banks refer to them as corporations, such as the provisions governing consolidations and mergers, 12 U.S.C. §§ 215 and 215a, these statutes are not part of the National Bank Act.

bank's internal organization, including relations among the owner-investors, directors, and officers, as distinct from the bank's banking powers and activities and its relationships with customers and other third parties. Section 7.2000(b)'s two generic references to state law (the law of the state in which the bank's main office is located and the law of the state in which its holding company is incorporated), refer to state law in general, not specifically to state corporation law.⁸

BBHNTC proposes to follow New York limited liability company law. BBHNTC's main office will be in New York, and so this law is within the scope of section 7.2000(b). BBHNTC may elect to follow New York state limited liability company law for its internal governance, subject to the limits of section 7.2000(b).

To avoid misunderstanding, it is important to keep in mind that, when a national bank elects to follow state corporation law or state limited liability company law for its internal governance under section 7.2000(b), it does not thereby become a state corporation or a state limited liability company. It remains a national banking association, subject to all the banking laws and regulations and bank safety and soundness standards applicable to national banking associations. Thus, BBHNTC will be subject to all the banking laws and regulations applicable to national banking associations, bank safety and soundness standards, and OCC examination, supervision and enforcement, in the same manner and to the same extent as any other uninsured national trust bank.

BBHNTC's proposed election to follow state limited liability company law is the first time the OCC has been asked to review a national bank's use of state limited liability company law for the bank's internal governance. While we believe it is within the bank's authority under section 7.2000(b), it also raises certain issues that warrant close monitoring. The limited liability company ("LLC") is a very flexible form of business organization. The state laws authorizing their creation typically permit the company to adopt essential features in such a wide range that one LLC could have features that are similar to a corporation, while another is like a partnership.

Because of this flexibility, there is greater chance that a specific LLC feature a bank might wish to adopt could be inconsistent with federal banking statutes and regulations and bank safety and soundness. For example, LLC operating agreements can require unanimous or supermajority votes of the owners for a wide range of decisions; LLCs can operate in a manner in which all the owners participate in management; LLCs can require the agreement of all members before a new member invests in the LLC or an existing member transfers its interest to another person; and the existence of the LLC can terminate on the death or retirement of

⁸ Section 7.2000 also refers to the widely used Delaware General Corporation Law and the Model Business Corporation Act.

any member. But these or other LLC features may be inconsistent with federal banking laws or bank safety and soundness.⁹

Accordingly, the OCC will review any proposal to elect to follow state limited liability company law for internal governance under section 7.2000(b) very carefully. We have reviewed the proposed Articles of Association and Operating Agreement and the proposed By-Laws of BBHNTC and are satisfied they are consistent with section 7.2000(b)'s requirements.¹⁰ In order to ensure continued compliance with section 7.2000(b), the OCC is imposing conditions that prior OCC review will be required for any changes in BBHNTC's Articles of Association and Operating Agreement or its By-Laws that relate to the use of New York LLC law and any changes in BBHNTC's ownership (other than changes in directors' qualifying shares).

C. Other Matters Related to the Conversion

1. Fiduciary Powers

BBHNTC-NY is a trust company and exercises fiduciary powers, and after the conversion BBHNTC will do likewise. Thus, the conversion also includes an application for BBHNTC to exercise fiduciary powers under 12 U.S.C. § 92a. Under section 92a(a), the OCC may grant a national bank the right to act in the fiduciary capacities listed in the statute and in any other fiduciary capacities permitted to state banks and trust companies where the bank is located, when not in contravention of state law. See 12 U.S.C. § 92a(a).

A national bank's exercise of fiduciary powers in a state is deemed not in contravention of state law if the state permits its own state banks, trust companies, or other corporations that compete with national banks to exercise such powers. 12 U.S.C. § 92a(b). The OCC's regulations provide for the application of section 92a in a multi-state context. A national bank may act in a fiduciary capacity in any state. 12 C.F.R. § 9.7(a). From the states in which it acts in a fiduciary capacity, it may also serve customers in other states. 12 C.F.R. § 9.7(b).

⁹ See, e.g., 12 U.S.C. §§ 51a (majority vote of shareholders for issuance of preferred stock), 181 (two-thirds vote to go into liquidation), 215 & 215a (two-thirds vote for consolidation or merger), 71 & 71a (management of affairs by a board of directors numbering between 5 and 25), 52 (transfer of national bank shares), and 24(Second) (continuous succession until terminated under specific statutes). See also 12 C.F.R. Part 30, Appendix A, Interagency Guidelines Establishing Safety and Soundness Standards, Section II-A-1 (need for an organizational structure that establishes clear lines of authority and responsibility).

¹⁰ Moreover, BBHNTC will be wholly-owned, except for directors' qualifying shares, by BBH, and BBH also will have the right to vote the director's qualifying shares under a proxy consistent with 12 C.F.R. § 7.2005(b)(4). This fact serves to mitigate concerns about certain LLC features, such as those that permit a unanimous or supermajority vote requirement or those that permit all owners to participate in management. A proposal in which a bank with a number of shareholders proposed to elect to follow state LLC law for internal governance thus would need further assessment. Similarly, this application involves the conversion of an existing state limited liability trust company with an established method of operation and management.

When a bank acts in more than one state, then for purposes of determining the relevant state for section 92a purposes, a national bank is located in the state, with respect to each fiduciary relationship, in which the bank acts in a fiduciary capacity with respect to that relationship. 12 C.F.R. § 9.7(d). A bank “acts in a fiduciary capacity” 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, and if these activities take place in more than one state, then in the state the bank designates from among those states. *Id.*

BBHNTC proposes to act in the same range of fiduciary capacities that BBHTC-NY exercises now. BBHNTC will also operate trust offices in North Carolina, Massachusetts, Illinois, Pennsylvania, and Florida; and it may act in fiduciary capacity in those states as well as New York. Each of those states permits its own state banks or trust companies to act in a full range of fiduciary capacities,¹¹ and so national banks may do likewise in those states. In addition, under section 92a(i), the OCC may not grant fiduciary powers to a national bank unless the bank has at least the minimum capital required by state law for state banks and trust companies. BBHTC-NY’s capital exceeds the minimum required under New York law and the other states, and BBHNTC will continue to do so after the conversion. Accordingly, the OCC may grant fiduciary powers to BBHNTC, and BBHNTC may exercise fiduciary powers under 12 U.S.C. § 92a, continuing the fiduciary business and appointments of BBHTC-NY.¹²

2. Trust Company Subsidiaries

BBHTC-NY currently owns three state trust companies (BBHTC-Florida, BBHTC-Pennsylvania, and BBHTC-Texas) as subsidiaries. After the conversion, the three trust companies will be operating subsidiaries of BBHNTC. The OCC permits national banks to own and operate state trust companies as operating subsidiaries, provided the state trust companies do not engage in activities impermissible for national banks.¹³ The three trust

¹¹ New York Banking Law §§ 100 & 100-a; N.C. Gen. Stat. § 53-159; Mass. Gen. Laws Ann. ch. 167G, § 3; 205 ILCS §§ 620/2-1 & 620/2-2; 7 Pa. Stat. Ann. § 402; Fla. Stat. §§ 660.26 & 660.34.

¹² The national bank resulting from the conversion of a state bank continues the state bank’s fiduciary appointments without the need for formal re-appointment. *See, e.g., Poisson v. Williams*, 15 F.2d 582, 583 (E.D.N.C. 1926); *In re Barreiro’s Estate*, 13 P.2d 1017, 1024 (Cal. Dist. Ct. App. 1932); *Interdiction of Le Boeuf*, 47 So.2d 687, 689 (La. 1950); *New England Merchants National Bank of Boston v. Centenary Methodist Church*, 173 N.E.2d 294, 298-99 (Mass. 1961); *Citizens & Southern National Bank of South Carolina v. Conner*, 11 S.E.2d 271, 272 (S.C. 1940). This is a particular instance of the fundamental principle that the resulting national bank is a continuation of the existence and identity of the state bank. *See, e.g., Michigan Insurance Bank v. Eldred*, 143 U.S. 293, 300 (1892); *Metropolitan National Bank v. Claggett*, 141 U.S. 520, 527 (1891). *See generally* 10 Am. Jur. 2d §§ 202 & 203.

¹³ *See, e.g., Application of First Union National Bank to Acquire Certain Subsidiaries of Wheat First Butcher Singer, Inc.* (OCC Conditional Approval No. 270) (pages 5-6); *Decision on the Application to Merge Delaware Trust Company into CoreStates Bank, N.A.* (OCC Corporate Decision No. 96-44) (page 10, note 10).

companies here engage only in activities permissible for national banks. BBHNTC's ownership of the companies as operating subsidiaries is permissible.

3. Trust Offices

It is also proposed that, after the conversion, BBHNTC will operate trust offices in Charlotte, Boston, Chicago, Philadelphia, and Palm Beach. It may open trust offices in additional states in the future. A national bank, including a national bank limited to the activities of a trust company, may open trust offices or trust representative offices in any state, 12 C.F.R. § 9.7(c), may act in the full range of fiduciary capacities permitted under federal law in any state, 12 C.F.R. § 9.7(a), and may serve customers both in the states in which it has offices and in others, 12 C.F.R. § 9.7(b).¹⁴ Accordingly, BBHNTC's operation of trust offices in multiple states is permissible.

4. Directors' Qualifying Shares

Some of the members of BBHNTC-NY's board of directors are partners of BBH and some are not. BBHNTC's board of directors will have a similar composition. Each director of a national bank must own shares in the bank with an aggregate par value of at least \$1000 "or an equivalent interest, as determined by the Comptroller of the Currency, in any company which has control over such association within the meaning" of the Bank Holding Company Act. 12 U.S.C. § 72. *See also* 12 C.F.R. § 7.2005. The directors of BBHNTC who are not partners of BBH will own qualifying shares of BBHNTC. With respect to the directors who are BBH partners, it is proposed that their ownership of the partnership interest in BBH meets the requirements of section 72.

Under section 72, ownership of an "equivalent interest" in any company that controls the national banking association within the meaning of the Bank Holding Company Act fulfills the requirement. Under the Bank Holding Company Act, the term "company" includes a partnership. *See* 12 U.S.C. § 1841(b); 12 C.F.R. § 225.2(d)(1). While BBH is not a "bank holding company," it is a company that will control BBHNTC, since it will own all but the directors' qualifying shares. Each director's BBH partnership interest is valued at more than \$1000. Thus, we conclude that a director's ownership of the BBH partnership interest (either a general partnership interest or a limited partnership interest) meets the directors' qualifying shares requirement of section 72. *See also* 12 C.F.R. § 7.2005(b)(1)(iii).

5. Directors' Residency Waivers

Some of BBHNTC-NY's directors do not reside in New York. They work at its locations in other states or at the subsidiary trust companies. This will continue at BBHNTC.

¹⁴ *See also* OCC Interpretive Letter No. 872 (October 28, 1999); OCC Interpretive Letter No. 866 (October 8, 1999); OCC Interpretive Letter No. 695 (December 8, 1995).

Under 12 U.S.C. § 72, a majority of the board of directors of a national bank must reside in the state in which the bank is located or within 100 miles of the location of the office of the association, except that the OCC may waive the requirement of residency. Depending on the composition of BBHNTC's board from time to time, the residency requirement may not be met by a majority. In view of the wide geographic scope of BBHNTC's operations, it is reasonable to have directors who reside outside the geographic limits of section 72. In connection with the application, the OCC grants residency waivers for up to two-thirds of BBHNTC's board. The OCC will review requests for additional residency waivers if needed.¹⁵

D. Operational Requirements After the Conversion

1. Relationships with Affiliates

BBHTC-NY currently has extensive relationships with BBH and its other affiliates, and BBHNTC will continue such arrangements. Such arrangements are common when a trust company is part of a large financial services group. Many employees of BBHNTC will be employees of BBH as well. BBHNTC will lease its office space from BBH. BBHNTC will have a wide variety of services performed for it by BBH, including: investment research and advisory services, brokerage services, auditing services, custodial and safekeeping services, banking services, accounting and record-keeping services, fund administration, internet services, data processing, computer systems, and general administrative support services. These services, as well as the employee-sharing and leases, will be provided through service agreements similar to those currently in place between BBH and BBHTC-NY.¹⁶

The applicants represent that all these relationships will be conducted in a manner consistent with 12 U.S.C. §§ 371c and 371c-1 (transactions with affiliates) and 12 C.F.R. § 7.3001 (sharing of space and employees). In particular, the terms of the contracts, including the allocation of revenues and expenses among BBHNTC, its trust company subsidiaries, and BBH, will be consistent with such requirements. The OCC is imposing conditions to require BBHNTC's board of directors to monitor these relationships and facilitate compliance.

¹⁵ Arguably, a national trust bank is "located" for purposes of section 72 in each state in which it operates a trust office, just as a full-service national bank is located for section 72 purposes in each state in which it has a branch, *see* OCC Interpretive Letter No. 654 (December 19, 1994). And so, the residency requirement would be met if the director resides in a state in which BBHNTC has a trust office. *Cf. Decision on the Application to Merge Neuberger Berman Trust Company into Neuberger Berman National Trust Company* (OCC Corporate Decision No. 2001-29, September 28, 2001) (for purposes of mergers under 12 U.S.C. § 215a, a limited purpose national trust company is located in a state in which it operates a trust office, just as a full-service bank is located in a state in which it operates a branch). We need not resolve this question here, since waivers can be granted.

¹⁶ BBHTC-NY and BBH also use third-party vendors. BBHNTC will have a vendor management program to monitor the quality and adequacy of the services provided and to monitor the pricing of these services to ensure they are fairly priced compared to alternative services that may be available in the marketplace. This program will monitor both affiliated and third-party vendor contracts.

2. Regulatory Reporting

The allocation of revenues and expenses among BBHNTC, its trust company subsidiaries, and BBH raises issues regarding regulatory reporting, in addition to compliance with the affiliate transactions requirements. A national bank's Consolidated Report of Condition and Income ("Call Report") must accurately present the bank's financial condition. In order to do so, the bank's reported revenues and expenses must reflect actual revenues and expenses,¹⁷ so that it can be determined from the Call Report whether the bank is operating at a loss or profit. Thus, a bank and its holding company and other affiliates must not manipulate the allocation of revenues and expenses in order to either support the bank or withdraw funds from it. If adjustments are needed, they should be done in other ways, such as additional capital contributions or dividends. BBHNTC will be expected to show its revenues and expenses, and otherwise prepare its Call Reports, in compliance with 12 U.S.C. § 161 and in accordance with the instructions for preparing national bank Call Reports.

3. Independent Audit Committee

BBHNTC's Audit Committee will report to BBHNTC's Board of Directors and will not report to the BBH Audit Committee. The BBHNTC Audit Committee will have the power to decide any disagreements between management and the audit department (the BBH audit department conducts the internal audit for BBHNTC). BBHNTC will provide copies of the audit report for BBHNTC to the BBH Audit Committee for informational purposes only.

In addition, the OCC is imposing a condition requiring BBHNTC to have an audit committee of outside directors who are independent of management, based on the considerations set forth in 12 C.F.R. Part 363. Part 363 applies to insured depository institutions. BBHNTC will not be insured, but the OCC believes an independent audit committee is a prudent supervisory requirement to help ensure the accuracy of reports and the bank's general compliance,¹⁸ especially in view of the fact that, in the absence of requiring an independent audit committee as a condition of the approval, neither the bank nor its parent, BBH, would be subject to an independent audit committee requirement.¹⁹

¹⁷ See generally, Comptroller's Handbook, Related Organizations (August 2004) (pages 46-47).

¹⁸ The OCC and the other banking agencies have an established policy of encouraging institutions that are not covered by Part 363 to have audit committees composed of outside directors. See FFIEC Interagency Policy Statement on External Auditing Programs of Banks and Savings Associations (OCC Bulletin 99-37, October 7, 1999).

¹⁹ BBHNTC is also required to have a fiduciary audit committee under 12 C.F.R. § 9.9. The same committee can serve as the independent audit committee and the fiduciary audit committee, provided the committee meets the requirements for both.

4. Internal Audit Manager and Compliance Officer

The internal audit function at BBHTC-NY is performed as part of BBH's overall internal audit. This will continue at BBHNTC. The results of the internal audit pertaining to BBHNTC will be reported to BBHNTC's board. The OCC is imposing a condition requiring that the internal audit function at BBHNTC be supervised by an officer that is a full time employee of BBHNTC who understands the function and has no responsibility for operating the system of internal control.²⁰ While BBHNTC will be relying on the internal audit department of BBH for internal audit coverage, the designation of a full-time BBHNTC employee as Internal Audit Manager will ensure that the internal audit outsourcing arrangement is administered and managed by an individual that is accountable to BBHNTC's Board of Directors, as well as to the OCC.

The OCC also is imposing a condition requiring that BBHNTC have a "compliance officer" that is a full time employee of BBHNTC who will be responsible for overseeing the bank's compliance with national banking laws and regulations and safety and soundness standards. The compliance officer must have sufficient expertise with banking laws, regulations, and safety and soundness standards.

BBHNTC also will have a BSA Compliance Officer. BBHTC-NY currently follows BBH's Anti-Money Laundering Program, "Know Your Customer" Policy, and Suspicious Activity Reporting Policy. Upon conversion, BBHNTC will separately create its own program and policy based on these models. The compliance officer and the BSA Compliance Officer may be the same person.

IV. CONCLUSION AND APPROVAL

For the reasons set forth above, including the representations and commitments of the applicant, the OCC finds that BBHTC-NY may convert into a national banking association under 12 U.S.C. § 35 and may be granted fiduciary powers under 12 U.S.C. § 92a. The OCC also does not object to BBHNTC's election to follow the New York Limited Liability Company Act for its internal governance pursuant to, and subject to the limits of, 12 C.F.R. § 7.2000. The OCC also has determined the grant of directors' residency waivers is appropriate. Accordingly, the applications to convert, for fiduciary powers, and for directors' residency waivers for up to two-thirds of the Board are approved, subject to the requirements and conditions below.²¹

²⁰ For general guidance on the internal audit function, see the FFIEC Interagency Policy Statement on Internal Audit and Internal Audit Outsourcing (OCC Bulletin 2003-12, March 17, 2003).

²¹ 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

Pre-Conversion Requirements. The conversion may not be consummated until the following requirements are met:

- A. BBHTC-NY must no longer have an ownership interest in BBHTC-Cayman.
- B. BBHTC-NY's Tier 1 capital, net of all pre-conversion expenses and balance sheet adjustments (such as those reflecting the elimination of BBHTC-Cayman), must be at least \$8.5 million at the time of conversion.
- C. BBHTC-NY must submit to the New England Field Office for review, and prior written determination of no supervisory objection, a complete description of the information systems and operations architecture as well as the information systems risk assessment and management plan for BBHNTC. The description should include a schematic drawing and discussion of the following items:

Vendor due diligence and contracts; electronic banking security mechanisms and policies; information systems personnel; internal controls; audit plans; and operating policies and procedures, including, but not limited to, vendor management, weblinking, customer authentication and verification, and business resumption contingency plans.

- D. BBHTC-NY must have performed an independent security review and test of the electronic banking platform for BBHNTC. It must have this review performed regardless of whether the platform is operated in-house or by one or more third-party service providers. If the bank outsources the technology platform, it can rely on testing performed for the service provider to the extent that it satisfies the scope and requirements listed herein. The review must be conducted by an objective, qualified independent reviewer ("Reviewer"). The scope should cover:

- All access points, including the Internet, Intranet, or remote access.
- The adequacy of physical and logical protection against unauthorized access including individual penetration attempts, computer viruses, denial of service, and other forms of electronic access.

By written report, the Reviewer must confirm that the security measures, including the firewall, have been satisfactorily implemented and tested.

regulations. The foregoing may not be waived or modified by any employee or agent of the OCC or the United States.

- E. BBHNTC-NY must have a security program in place that complies with the *Interagency Guidelines Establishing Standards for Safeguarding Customer Information* in 12 C.F.R. Part 30, Appendix B.

Conditions. After the conversion, BBHNTC will be subject to the following conditions:²²

1. At all times, BBHNTC shall maintain minimum Tier 1 capital in an amount at least equal to the greater of (a) \$8.5 million on an overall consolidated basis and \$5 million for BBHNTC alone on an adjusted basis,²³ or (b) such other higher amount as may be required by the OCC pursuant to the exercise of its regulatory authority under 12 C.F.R. Part 3.²⁴
2. At all times, BBHNTC shall maintain liquid assets in an amount at least equal to the greater of (a) \$2 million or (b) sixty (60) days operating expenses, excluding expenses that are directly related to revenues (*i.e.*, fees paid to a contractor for a service that are a percent of the revenue received by BBHNTC for the service).²⁵
3. If, at any time, BBHNTC's Tier 1 capital or its liquid assets fall below the minimum levels required above, BBHNTC shall be deemed "undercapitalized,"

²² These conditions include the conditions discussed above related to the election to follow state limited liability company law for internal governance under 12 C.F.R. § 7.2000 and to relationships between BBHNTC and BBH. They also include a number of conditions the OCC generally imposes on national banking associations limited to the operations of a trust company that are not subsidiaries of an insured depository institution or of a bank holding company.

²³ For purposes of determining compliance with the requirement of \$5 million in Tier 1 capital for BBHNTC alone on an adjusted basis, BBHNTC shall deduct from its Tier 1 capital the higher of: (a) the capital that the state regulatory authorities require be maintained at the subsidiary state trust companies or (b) the aggregate amount of BBHNTC's outstanding equity investment, including retained earnings, in the subsidiary trust companies. The treatment of the subsidiary trust companies' equity is for purposes of calculating Tier 1 capital for this condition only, and is not intended to affect BBHNTC's financial reporting on its Call Reports.

²⁴ BBHNTC is required to maintain adequate capital and liquidity as set forth in OCC Bulletin 2000-26 (September 28, 2000). If BBHNTC's trust assets increase significantly through future acquisitions, growth, or otherwise, or if BBHNTC assumes additional risk, the OCC may require BBHNTC to hold additional capital. In addition, in the future if any of the subsidiary trust companies is merged into BBHNTC, then the OCC will re-evaluate the required level of Tier 1 capital for BBHNTC in its review of the merger.

²⁵ The term "liquid assets" means (a) cash and cash equivalents, (b) deposits at insured depository institutions, and (c) investment securities eligible for investment by national banks under 12 C.F.R. Part 1 and valued at the lower of cost or market value. But liquid assets do not include any assets encumbered or pledged by lien, right of setoff, preference, or otherwise, or any other asset pledged as security in any transaction with any party.

and BBHNTC and BBH shall take such corrective measures as the OCC may direct from among the provisions applicable to undercapitalized depository institutions under 12 U.S.C. § 1831o(e) and 12 C.F.R. Part 6. For purposes of this requirement, an action “necessary to carry out the purpose of this section” under section 1831o(e)(5) shall include restoration of BBHNTC’s Tier 1 capital and/or liquid assets to the required minimum levels, and any other action deemed advisable by the OCC to address BBHNTC’s Tier 1 capital or liquid asset deficiency or the safety and soundness of its operations.

4. BBHNTC shall provide written notification to the New England Field Office within one (1) day after becoming aware that any of its state trust company subsidiaries requires additional capital or liquidity or that the state regulator for the trust company is or may be commencing an enforcement action against the trust company or any of its officers or directors who also serve as an officer or director of BBHNTC. BBHNTC may provide additional capital or liquidity to a subsidiary trust company only after submitting a written request to the New England Field Office and receiving written determination of no supervisory objection.
5. Within five (5) days after the date of the conversion, BBHNTC and BBH shall submit a proposed Capital Assurances and Liquidity Maintenance Agreement (“CALMA”) to the New England Field Office for its review. The CALMA shall provide that BBHNTC will maintain its Tier 1 capital and liquid assets at least at the minimum levels required in this approval, that BBHNTC will promptly notify and make demand on BBH for financial support needed to maintain BBHNTC’s minimum required levels, and that BBH will promptly provide such financial support. Not later than three (3) days after receiving written notice that the OCC does not object to the proposed CALMA, BBHNTC and BBH shall execute the CALMA, and shall provide the OCC with copies of the fully executed CALMA and the resolutions adopted by BBHNTC and BBH evidencing their respective approvals and authorizations to enter into and be bound by the CALMA. BBHNTC shall take all actions to exercise its rights and to enforce the terms of the CALMA, if and when necessary, by making a written demand or request on BBH. Within one (1) day following BBHNTC’s demand or request to BBH for compliance with the CALMA, BBHNTC shall provide the OCC with a copy of such written demand or request.
6. BBHNTC must maintain on file on its premises current financial information on BBH (*i.e.*, audited financial reports and quarterly financial statements). The financial information must be provided to the New England Field Office once it becomes available.

7. BBHNTC (a) shall give the New England Field Office at least sixty (60) days prior written notice of its intent to significantly deviate or change from the business plan and operations described in the conversion application and (b) shall obtain the OCC's written determination of no objection before it engages in any significant deviation or change from its business plan or operations.²⁶ The OCC may impose additional conditions it deems appropriate in a written determination of no objection to BBHNTC's notice.
8. BBHNTC (a) shall give the New England Field Office at least sixty (60) days prior written notice of its intent to amend its Articles of Association and Operating Agreement or its By-Laws in any manner related to the election to follow New York limited liability company law for its internal governance and (b) shall obtain the OCC's written determination of no objection before it makes any such amendment.
9. Except with respect to directors' qualifying shares, BBHNTC or BBH (a) shall give the New England Field Office at least sixty (60) days prior written notice before BBHNTC issues shares to any new owner, or before BBH transfers any shares of BBHNTC to another person, and (b) shall obtain the OCC's written determination of no objection before any such share issuance or transfer is made.
10. BBHNTC shall establish and maintain an Audit Committee that is independent of management based on the considerations set forth in 12 C.F.R. § 363. BBHNTC shall establish and maintain a Fiduciary Audit Committee consistent with the requirements of 12 C.F.R. § 9.9(c). One committee may serve both functions, provided it meets the requirements of both.
11. BBHNTC shall maintain an internal audit function appropriate for its size and the scope of its activities that satisfies applicable OCC guidance on internal audit. BBHNTC shall designate an officer to oversee and manage the internal audit function for BBHNTC's operations. This officer must be a full-time employee of BBHNTC, understand the internal audit function, and have no responsibility for operating the system of internal control.
12. BBHNTC shall designate an officer who is a full-time employee of BBHNTC with sufficient expertise to oversee BBHNTC's compliance with banking laws and regulations and safety and soundness standards.

²⁶ If such deviation is the subject of an application filed with the OCC, the OCC does not require any further notice to the supervisory office.

13. All transactions between BBHNTC and any affiliates or insiders shall be conducted subject to the applicable provisions of 12 U.S.C. §§ 371c and 371c-1, 12 C.F.R. Part 223, and other applicable federal law. Any services performed by affiliates for BBHNTC and its subsidiaries and payments to said affiliates by BBHNTC or its subsidiaries, or any services performed by BBHNTC for its affiliates, shall be rendered pursuant to contracts that comply with federal law and regulation, reflect safe and sound practices, and are on terms and at costs that are similar to, or at least as favorable to BBHNTC as, those that would prevail in transactions between BBHNTC and independent third parties for comparable services.
14. The Board of Directors of BBHNTC shall establish policies and procedures for contracts and transactions with affiliates and insiders to assure that BBHNTC's interests are independently assessed and appropriately protected when BBH, any other affiliate, any partner or employee of BBH or another affiliate, or any bank insider provides services to or engages in transactions with BBHNTC. Thereafter, the Board of Directors shall periodically and at least annually review the service agreements, leases, employee-sharing agreements, and any other transactions with affiliates and insiders, including in particular any cost allocation or fee-sharing provisions, to ensure that they comply with the established policies and procedures, and review the policies and procedures to ensure that they continue to provide the foregoing assurance.
15. Within thirty (30) days from the date of the conversion, the Board shall review all agreements with BBH, other affiliates, and insiders existing on the date of the conversion, to determine whether each agreement complies with the foregoing standards. The Board shall document its review and conclusions. Within forty-five (45) days from the date of the conversion, if any agreements are found to be noncompliant, such agreements shall be amended to comply with the foregoing standards.
16. BBHNTC must notify all potential vendors, both third-party and affiliated, in writing of the OCC's examination and regulatory authority under 12 U.S.C. § 1867(c), and in the case of affiliated vendors under 12 U.S.C. § 481. All final vendor contracts must stipulate that the performance of services provided by the vendors to BBHNTC is subject to the OCC's examination and regulatory authority. The provisions of 12 C.F.R. Part 9 would be applicable to any fiduciary activities contracted out to vendors.
17. BBHNTC shall implement a program to ensure the risks and issues associated with third party outsourcing are appropriately addressed as outlined in OCC Bulletin 2001-47 (Third Party Relationships). The program shall properly address credit risk, reputation risk, compliance risk, and transaction risk as

discussed in the guidance. This will include proper controls to make certain the contracted services do not permit third parties to implement product programs that are not under the proper control of the bank and within its business plan. The program should be updated regularly and reviewed annually by the board of directors.

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

If BBHNTC determines that an exception or modification of any provision in these conditions, or an extension of any timeframe in these conditions, is necessary, it may submit a written request for relief to the Director for Licensing for the Northeastern District Office. The request shall include the reasons why BBHNTC cannot comply with the provision, reasons why relief from the provision is appropriate, and any supporting documentation.

/s/

6/9/05

Daniel P. Stipano
Acting Chief Counsel

Date

Application Control Numbers:

2003-NE-01-0007

2003-NE-12-0110