



**Corporate Decision #2013-06
November 2013**

October 11, 2013

C. Andrew Gerlach, Esq.
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004

Re: Application to establish an operating subsidiary by First Niagara Bank, National Association, Buffalo, New York
OCC Control Number: 2013-NE-Subs & Equities-135543

Dear Mr. Gerlach:

The Office of the Comptroller of the Currency (“OCC”) hereby approves the application filed by First Niagara Bank, National Association (“Bank”) on September 10, 2013, to establish a wholly-owned operating subsidiary, First Niagara Business Trust (the “New REIT”). New REIT will be formed as a business trust, a form of a statutory trust, under the laws of the State of Maryland and in connection with the Bank’s plans to restructure existing real estate investment trust (“REIT”) activities. This approval is based on a thorough review of all information available, including the representations and commitments made in the application and by the Bank’s representatives.

The Bank represents that the proposed restructuring may enable the Bank to realize certain tax benefits, lower the cost of capital, and improve financial and operating results. Use of the proposed operating subsidiary may facilitate the raising of Tier 1 and Tier 2 capital for the Bank, consistent with final Basel III¹ capital rules and related OCC interpretations.²

The activities of the proposed subsidiary are clearly permissible. The New REIT will hold and manage participation interests in certain Bank assets, primarily residential and commercial real estate loans in several states, and may purchase similar assets in the future. The Bank will service those participation interests and provide administrative and recordkeeping services. The

¹“Basel III” refers to agreements reached by the Basel Committee on Banking Supervision. The text of the agreements may be read at <http://www.bis.org/publ/bcbs189.htm>. The most recent issuance concerning implementation of Basel III may be found at 78 Fed. Reg. 62018-62291 (October 11, 2013).

²This approval letter is directed solely to the eligibility of the operating subsidiary and the permissibility of proposed operating subsidiary activities. The OCC is not opining on the applicability of Basel III capital rules or related OCC interpretations.

OCC has previously permitted an operating subsidiary to hold participation interests of its parent bank.³ This activity is a permissible activity for a national bank and its operating subsidiaries, which may also, among other things, hold and manage assets permissibly acquired by the Bank, including investment assets and property acquired by the Bank through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted and purchasing, selling, servicing, and warehousing loans or other extensions of credit, or interests therein.⁴

Thus, the New REIT's activities and purpose clearly qualify it as an operating subsidiary of the Bank. The ownership structure is also consistent with its status as an operating subsidiary. Under the OCC's regulations, an operating subsidiary in which a national bank may invest includes a corporation or other entity "if the parent bank owns more than 50 percent of the voting (or similar type of controlling) interest of the operating subsidiary; or the parent bank otherwise controls the operating subsidiary and no other party controls more than 50 percent of the voting (or similar type of controlling) interest in the operating subsidiary."⁵ The Bank will directly control 100 percent of the voting securities of the New REIT.

The New REIT, which is a Maryland business trust, also may qualify as an operating subsidiary. As the OCC has noted, national banks may invest in business trusts, which have characteristics of corporations such as limited liability, as operating subsidiaries, which increases the flexibility that national banks have to structure their operations.⁶ Maryland statutory trusts of the type known as business trusts may acquire, hold, manage and control any interest in real or personal property, and engage in any lawful business or activities for profit. These trusts provide limitations on personal liability to the beneficial owners as is provided to shareholders of private for-profit corporations, and also to the trustee except with respect to the trust itself or a beneficial owner. Maryland business trusts may merge or consolidate with or into another statutory trust or other business entities, and other types of business entity may convert to a Maryland business trust.⁷ Moreover, the Bank, through its prospective role as holder of 100 percent of the equity interest of New REIT will appoint all of the trustees of New REIT and will thereby control the management and operations of New REIT.⁸ Other than employees of the Bank who will hold preferred shares of New REIT that will have no voting rights other than those required by law, no other party will hold any voting or similar type interest in New REIT.⁹ Further, New REIT will be consolidated with the Bank under Generally Accepted Accounting Principles.¹⁰

³ See, for example, OCC Corporate Decision No. 2004-16 (September 10, 2004).

⁴ 12 C.F.R. § 5.34(e)(5)(v)(A) and (D).

⁵ 12 C.F.R. § 5.34(e)(2).

⁶ See, for example, OCC Conditional Approval Letter No. 895 (March 31, 2009).

⁷ Md. Corporations and Associations Code Ann. §§ 12-201, 12-402, 12-601, and 12-1001.

⁸ 12 C.F.R. § 5.34(e)(2)(i)(A).

⁹ Id. at § 5.34(e)(2)(i)(B).

¹⁰ Id. at § 5.34(e)(2)(i)(C). The Bank has represented that the activities of New REIT will be limited to those described in 12 C.F.R. § 5.34(e)(5)(v)(A) and (D).

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 Bank'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.

If you have any questions, please contact me at (212) 790-4055 or by email at sandya.reddy@occ.treas.gov. In any correspondence regarding this application, please reference the above application control number.

Sincerely,

Sandya Reddy

Sandya Reddy
Acting Director for District Licensing
