Comptroller of the Currency
Administrator of National Banks

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

April 6, 2012

Conditional Approval #1031
May 2012

C. Andrew Gerlach, Esq.
Sullivan & Cromwell LLP
125 Broad Street
New York, New York 10004-2498

Re: Application by First Niagara Bank, National Association, Buffalo, New York to purchase certain assets and assume certain liabilities of HSBC Bank USA, National Association, McLean, Virginia
Application Control Number: 2011-NE-02-0026

Dear Mr. Gerlach:

The Office of the Comptroller of the Currency ("OCC") hereby conditionally approves the application by First Niagara Bank, National Association, Buffalo, New York ("FNB" or "Applicant"), to purchase certain assets and assume certain liabilities of HSBC Bank (USA), National Association, McLean, Virginia ("HSBC"). This approval is granted after a thorough evaluation of the application, other materials you have supplied, and other information available to the OCC, including commitments and representations made in the application and by Applicant's representatives during the application process. This approval is also subject to the condition set out herein.

Background

FNB filed an application with the OCC to purchase certain assets and assume deposits and certain other liabilities of HSBC ("P&A Transaction").[1] The P&A Transaction includes FNB's acquisition of certain branches; each branch subject to acquisition is located in either New York or Connecticut. FNB's main office is located in New York and it currently has branches located in both New York and Connecticut. The P&A Transaction would be entered pursuant to a Purchase Agreement between FNB and HSBC. Under the terms of the Purchase Agreement, FNB has the right to assign its rights to acquire certain groups of branches and the associated

[1]FNB published notice of the proposed transaction in The Washington Examiner and The Buffalo News. The OCC received two comment letters; the comments are addressed below.

assets, deposits and certain other liabilities to third-party purchasers. FNB has entered into third-party agreements to transfer certain branches.[2]

Discussion

A. Authority for the P&A Transaction

FNB applied to the OCC for approval to purchase certain assets and assume certain liabilities of HSBC. National banks have long been authorized to purchase assets and assume liabilities of other depository institutions under the authority of 12 U.S.C. § 24(Seventh).[3] As part of the P&A Transaction, FNB will acquire branches in New York and Connecticut. FNB is headquartered in New York and has branches in New York and Connecticut. The branch acquisitions are authorized under 12 U.S.C. § 36(c).[4] Consequently, FNB may acquire the assets and liabilities, including deposits, as proposed.[5]

B. Bank Merger Act

The P&A Transaction is subject to review under the Bank Merger Act.[6] Under the Bank Merger Act, the OCC may generally not approve a transaction that would have anti-competitive effects.[7] The Bank Merger Act also requires the OCC to consider the financial and managerial resources and future prospects of each institution involved, each institution's effectiveness in combating money laundering, and the convenience and needs of the community to be served.[8] The OCC

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[2] The third-party purchasers have either filed or are in the process of filing applications for required regulatory approvals. Included among the branches that are intended to transfer to a third party are 26 branches in the Buffalo, New York market that FNB and HSBC have committed to divest to a third party pursuant to a November 10, 2011, Letter of Agreement executed with the Department of Justice.

[3] *See, e.g., City National Bank of Huron v. Fuller*, 52 F.2d 870, 872 (8th Cir. 1931).

[4] Under 12 U.S.C. § 36(c) a national bank may establish and operate a branch in any state in which it is situated to the same extent as state banks in that state are affirmatively permitted to establish and operate a branch, subject to applicable intrastate branching laws as applied to national banks under section 36(c). As noted above, FNB already operates branches in New York and Connecticut, and so is situated in each state and may establish or acquire additional branches in each state.

[5] FNB will not acquire any separate legal entities in the P&A Transaction and also represents it will not acquire any non-conforming assets. If any assets that are not permitted for national banks are transferred to FNB, FNB represents it will divest itself of any such nonconforming or impermissible assets within two years of the consummation date of the P &A Transaction or within any other period of time that the OCC deems appropriate.

[6] This transaction is subject to the OCC's review under the Bank Merger Act because it involves the assumption of deposit liabilities. *See* 12 U.S.C. §1828(c)(2)(A). *See also* 12 C.F.R. §5.33(d)(2).

[7] *See* 12 U.S.C. §1828(c)(5).

[8] 12 U.S.C. §1828(c)(5) and (11).

must also consider the risk to the stability of the United States banking or financial system.[9] The OCC has reviewed the P&A Transaction and considered these factors, as well as applicable OCC regulations and policies, and finds them consistent with approval.

1. **Competitive Analysis**

There are thirteen relevant geographic markets for this transaction. In seven of these geographic markets HSBC and FNB do not both currently have retail banking offices and so are not direct competitors. For that reason, the proposed transaction will not alter concentration levels in these markets. In the remaining six markets, there is overlap in the retail banking operations of HSBC and FNB.[10] The OCC has evaluated each of these six markets using the Herfindahl-Hirschman Index ("HHI") test.[11] In five of the six markets where HSBC and FNB both have offices, the proposed transaction would not result in concentration levels above the HHI threshold. Thus, the structural analysis indicates that the transaction will not significantly reduce competition in these markets.

In the sixth market, the Buffalo market, the P&A transaction as proposed would exceed the HHI thresholds. As noted above, based on the potential for competition to be reduced in the Buffalo market, FNB and HSBC executed a Letter of Agreement with the Department of Justice on November 10, 2011, to divest 26 branches and associated deposits and customer relationships in this market.[12] In addition to these divestitures, several factors mitigating competitive effects are present in the Buffalo market. These factors include: the number of post-consummation competitors remaining in the Buffalo market; the size and economic strength of the competitors; several in-market financial companies having market shares in small business loan origination that are higher than their respective deposit market shares; several out-of-market financial companies making small business loans to borrowers in the Buffalo market; and economic factors demonstrating that the Buffalo market is attractive for entry. In this case, the proposed divestiture, along with the mitigating factors, appears to be sufficient to outweigh any adverse effect on competition in the Buffalo market. Based on the above, the OCC concludes that the

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[9] 12 U.S.C. §1828(c)(5) (as amended by section 604 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Dodd-Frank also added another provision to the Bank Merger Act that prevents, subject to certain exceptions, approval of a transaction between unaffiliated insured depository institutions if the resulting insured depository institution and its affiliates would, upon consummation of the transaction, control more than ten percent of the total amount of deposits of insured depository institutions in the United States. *See* 12 U.S.C. §1828(c)(13). FNB's nationwide share of deposits is well below the ten percent limit. *See* discussion under section B.4., *infra*. The nationwide deposit concentration limit in the Bank Merger Act is similar to the one adopted as part of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, which is not applicable here. *See* 12 U.S.C. §1831u(b)(2)(A).

[10] The markets are Albany, Buffalo, Rochester, Syracuse and Utica-Rome in New York State and Metro New York, which is a multistate market.

[11] *See* Comptroller's Licensing Manual, Business Combinations Booklet, page 13.

[12] The Department of Justice has indicated it believes the P&A Transaction will not have a significantly adverse effect on competition if the commitments outlined in the Letter of Agreement are fulfilled.

P&A Transaction will not have a significant anti-competitive effect on the Buffalo market or any other geographic market.

2. Financial and Managerial Resources

The financial and managerial resources of FNB and HSBC are presently satisfactory and the future prospects of the institutions are favorable. Both institutions are well capitalized and will remain so after the P&A Transaction. The P&A Transaction will strengthen FNB's strategic position in the upstate New York market. HSBC is retaining certain business lines in the relevant markets. The OCC also considered the effectiveness of efforts to combat money laundering and finds this factor consistent with approval.

3. Convenience and Needs

The proposed merger will not have an adverse impact on the convenience and needs of the communities to be served. The P&A Transaction will result in an expansion of FNB's branch network. HSBC customers will not lose access to products and services because FNB intends to continue to offer products and services currently provided by HSBC. Post-consummation of the P&A Transaction, FNB intends to consolidate certain branches considered redundant, *i.e.*, branches which are in close proximity to other branches. FNB has represented it will comply with all applicable branch closing requirements. Accordingly, we find the P&A Transaction's impact on the convenience and needs of the community consistent with approval.

4. Risk to the Stability of the U.S. Banking System

The OCC has looked to six factors when applying this standard: (1) whether the proposed transaction would result in a material increase in risks to financial system stability due to an increase in size of the combining firms; (2) whether the transaction would result in a reduction in the availability of substitute providers for the services offered by the combining firms; (3) whether the transaction would materially increase the extent of the interconnectedness of the financial system; (4) whether the transaction would materially increase the extent to which the combining firms contribute to the complexity of the financial system; (5) whether the transaction would materially increase the extent of cross-border activities of the combining firms; and (6) the relative degree of difficulty of resolving the combined firm.[13] Applying these standards, the

[13] *See* OCC decision approving the applications by Capital One, National Association, McLean, Virginia and Capital One Bank (USA), National Association, Glen Allen, Virginia to acquire certain assets and assume certain liabilities of HSBC Bank, Las Vegas, Nevada, OCC CRA Decision #___ (March 9, 2012); OCC decision approving the application by PNC Bank, National Association, Wilmington, Delaware to acquire by merger RBC Bank (USA), Raleigh, North Carolina, OCC Corporate Decision #____ (January 11, 2012). The Board of Governors of the Federal System (FRB) has applied similar factors when required to consider whether a particular transaction presents risk to the stability of the U.S. banking or financial system. *See, e.g.*, FRB Order approving applications by The PNC Financial Services Group, Inc. and PNC Bancorp, Inc. to acquire RBC Bank (USA), Raleigh, North Carolina (December 23, 2011).

OCC concludes that the proposed merger does not pose a risk to the United States banking or financial system.

Size

After consummation of the P&A Transaction, FNB's size will not pose a material increase in risks to the financial stability of the U.S. banking or financial system. FNB currently accounts for approximately 0.226 percent of total U.S. banking system assets; this will increase to approximately 0.275 percent post consummation. FNB has approximately 0.236 percent of total U.S. deposits; as a result of the P&A Transaction, the overall market share would increase to 0.369 percent.[14]

Substitutability

FNB offers business and consumer credit products and services. HSBC offers retail and small business banking products and services, including checking and savings accounts, certificates of deposits, residential mortgages, commercial loans, and consumer loans through the branches that FNB proposes to acquire. A number of substitute providers in these markets also offer these products and services, should FNB be unable to engage in these activities. In addition, HSBC will continue to offer these products and services in other markets as well. The P&A Transaction does not impact core clearing and settlement services for critical financial markets or a large-value payment system operator.

Interconnectedness

FNB does not currently, and after consummation of the P&A Transaction will not, engage in any business activities or participate in markets in a manner that, in the event of FNB's financial distress would cause significant risks to other institutions. In addition, FNB post consummation will not be dependent on uncommitted short-term or wholesale funding from other financial institutions. The P&A Transaction will not increase exposure to any single counterparty that is currently among the top three counterparties of FNB.

Complexity

FNB's activities consist primarily of traditional commercial banking activities, and after consummation of the P&A Transaction its activities will not present unique or substantial complexities. The P&A Transaction will not impact complex activities such as core clearing and settlement services for critical financial markets, which would complicate the resolution process by increasing the complexity, costs, or timeframes involved in a resolution. Thus, the P&A

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[14] As previously noted, the Bank Merger Act, subject to certain exceptions, prevents approval of transactions between unaffiliated insured depository institutions that result in control of more than ten percent of the total amount of deposits of insured depository institutions nationwide. *See* 12 U.S.C. §1828(c)(13). As represented by FNB, total deposits held by FNB after consummation of the P&A Transaction will be significantly below that threshold.

Transaction would not appear to materially increase the extent to which FNB contributes to the complexity of the financial system.

Cross-Border Activity

FNB does not have any foreign branches or operating subsidiaries and is not acquiring any foreign operations from HSBC. The P&A Transaction will have no impact on this factor.

Resolution or Financial Stability Factors in Combination

The size, operations, activities, and complexity of FNB after consummation of the P&A Transaction will not be fundamentally different than FNB's current operations. Its expansion as a result of the transaction does not alter the relative degree of difficulty of resolving FNB.

Accordingly, the OCC finds the P&A Transaction to be consistent with the requirements of, and relevant considerations under, the Bank Merger Act.

C. Community Reinvestment Act

The Community Reinvestment Act ("CRA") requires the OCC to take into account the records of the institutions' performance in helping to meet the credit needs of their communities, including low- and moderate-income ("LMI") neighborhoods, when evaluating applications under the Bank Merger Act.[15] The OCC considered the CRA public "Performance Evaluation" ("PE") of each institution involved in this transaction.

1. FNB

FNB's most recent PE, dated March 12, 2007, and issued by the Office of Thrift Supervision ("OTS") before FNB's April 9, 2010, conversion to a national bank, assigned the bank an overall "Satisfactory" rating.[16] Among the major factors supporting the rating were: (i) an overall excellent performance under the investment test; (ii) a very good record of community development lending in its assessment areas ("AAs"); (iii) an excellent level of small business lending throughout its AAs; (iv) a reasonable distribution of loans based on borrower income; (v) an overall adequate loan volume in LMI geographies; and (vi) delivery systems that are accessible to customers in all portions of its AA. No evidence of discriminatory or other illegal credit practices was noted in the PE.

[15] 12 U.S.C. §§ 2903(a)(2) and 2902(3)(E); 12 CFR § 25.29(a)(3).

[16] FNB, prior to its conversion, was examined by the OTS as a large institution under the lending, investment, and service tests. The bank received an "Outstanding" rating on the investment test and a "High Satisfactory" rating on both the lending and service tests. The evaluation period for the 2007 PE was 2004 through 2006.

2. HSBC

HSBC's most recent PE, dated October 5, 2009, and issued by the OCC, assigned the bank an "Outstanding" rating.[17] Among the major factors supporting the rating were: (i) excellent lending activity in the bank's full-scope AAs; (ii) an excellent distribution of loans among geographies of different income levels and a good distribution of loans among borrowers of different income levels; (iii) an excellent level of current and prior period community development investments responsive to the needs of its AAs; (iv) leadership in providing community development services responsive to AA needs; (v) leadership in investing in Low Income Housing Tax Credits ("LIHTCs"); and (vi) a branch and delivery system that is accessible to geographies and individuals of different income levels. No evidence of discriminatory or other illegal credit practices was noted in the PE.

3. Public Comment

The OCC received two letters from the public commenting on this Application. One commenter was concerned that FNB would decrease the availability of branches in or around Putnam County. FNB has advised it currently has no plans to close branches in Putnam County, or in any of the surrounding counties of Westchester, Orange or Duchess in New York. The other commenter focused primarily on FNB's performance within the Rochester, New York Metropolitan Statistical Area ("Rochester MSA") and within Monroe County, where the City of Rochester is located. This commenter's concerns are addressed below.

a. Mortgage Lending

The commenter noted that FNB has increased its mortgage lending in the Rochester MSA since its 2007 CRA examination (based on their own internal analysis of mortgage lending between 2008 and 2010). However, the commenter alleged that FNB's distribution of mortgage loans among the Rochester area's underserved communities continues to lag behind the average for all financial institutions.

In FNB's 2007 CRA PE, FNB's level of home lending within the Rochester AA was considered reasonable. The PE found the overall geographic distribution of home mortgage loans reportable under the Home Mortgage Disclosure Act ("HMDA")[18] to be marginally adequate; however, the report also noted that FNB made 12 multifamily housing loans, totaling $3.2 million, in the LMI geographies in the AA. Residential mortgage lending to borrowers of different incomes in the Rochester MSA reflected an adequate level of performance.

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[17] HSBC was examined by the OCC as a large bank under the lending, investment, and service tests. The bank received "Outstanding" ratings on the lending and investment tests and a "High Satisfactory" rating on the service test. The evaluation period for the 2009 PE was generally 2006 through 2009.

[18] 12 U.S.C.§ 2801 *et seq.*

FNB asserts that the commenter did not consider two significant mitigating factors that were noted in the PE with respect to FNB's low lending levels. First, although FNB operated a total of 15 branches within the Rochester MSA in 2007, one-third of these were opened between 2004 and 2006, with the first and only branch in the City of Rochester opening in 2006. Second, FNB faced significant competition in the AA from non-depository lenders, resulting in it having an overall low market share of home purchase and refinance mortgage loans in the Rochester community.[19] FNB represents that since 2004, it has originated over 90 percent, in the aggregate, of its HMDA-reportable loans within its AAs.

FNB observed that the commenter's analysis showed that in 2009 and 2010 it has substantially increased its lending within the Rochester MSA and has slowly increased its lending in most underserved categories at rates higher than in the MSA as a whole. The analysis also demonstrated that FNB increased its home purchase lending between 2008 and 2009, while lending by all financial institutions was declining, which led to a substantially increased market share for FNB in the Rochester MSA.

FNB represents that, as it continues to build its presence in Rochester, both in terms of size and longevity, it will have a greater opportunity to increase lending to LMI individuals and geographies, including minority communities. FNB indicates that its expanded presence in the Rochester area, dedicated resources, and partnerships with not-for-profit agencies and financial intermediaries, will allow it to adopt a more robust offering of affordable housing products, including loans under Federal and state mortgage programs, such as FHA, VA, and SONYMA, and participating in the Federal Home Loan Bank of New York's First Home Club.

b. Small Business Lending

The commenter also noted that FNB is a key player in providing access to credit for area businesses. Because access to small business loans and Small Business Administration-backed lending is critical to the economic recovery of Rochester and low- and moderate-income census tracts of Monroe county, the commenter urged FNB to continue to provide small business loans in the Rochester area upon completion of the P&A transaction.

The 2007 PE found that FNB had an excellent level of small business lending throughout its AAs. The PE also noted a satisfactory level of performance with regard to its origination of small business loans, with excellent penetration within moderate-income geographies, in the Rochester MSA. The PE observed that FNB competed against significantly larger institutions with well-established business lending departments. The PE stated that almost 70 percent of FNB's small business loans in the Rochester MSA were made to businesses with annual revenues of $1 million or less.

FNB represents that it is introducing a new Small Business Bank position in 2012 across its entire footprint, which will focus solely on businesses with less than $2 million in gross revenue.

[19] The PE notes that FNB ranked fifth in home mortgage lending among depository institutions; furthermore, only six other depository institutions were among the top 20 lenders in this category.

FNB also expects that the increased neighborhood presence resulting from the new HSBC branches and the experienced employees in those branches, many of whom FNB intends to retain, as well as offering innovative and flexible lending options, such as those available in connection with the Small Business Administration and the New York Business Development Corporation programs, will help FNB to achieve increased small business lending activity.

c. Branches in the Rochester MSA

The commenter noted that FNB has only one branch in the City of Rochester, located in the central business district, while HSBC has seven city branches, five of which are outside the central business district. The commenter observed that FNB's downtown branch is less than one block away from HSBC's Main Street branch. With regard to the HSBC city neighborhood branches, the commenter urged FNB to retain all five of them and to continue to offer a full range of services in those branches. In particular, the commenter advocated that FNB retain the HSBC branch on Chili Avenue in the southwestern part of the city and the Joseph Avenue Branch in the northeast section of the city.

FNB has advised that it has no plans to consolidate or close the HSBC branches on Chili Avenue, Lyell Avenue, or University Avenue. It plans to assign its rights to the branch on Mount Hope Road to KeyBank, N.A., subject to regulatory approval. Finally, FNB intends to consolidate the Joseph Avenue branch into the Lyell Avenue branch, which is located approximately 1.6 miles from the Joseph Avenue branch.

FNB represents that its plans for branch distribution in all of its markets are consistent with its overall business objectives. FNB considered various factors in determining whether to consolidate branches, including the number of customers served, continued service availability in the community, proximity to neighboring HSBC and FNB branches, and the level of service available at the receiving branch.

FNB represents that, despite its decision to consolidate the Joseph Avenue branch, continued availability of banking services to customers is a paramount concern to FNB. It remains committed to working with members of the community to assure that essential financial services are provided. FNB intends to continue discussions with the commenter, as well as other interested community organizations, to ensure that the banking needs of members of the community affected by the consolidation of the Joseph Avenue branch are addressed. In addition, FNB offers alternative delivery systems, including online banking and bill pay, telephone banking, and direct deposit of payroll, government, and other payments that the Joseph Avenue customers may find helpful.

d. Community Development Concerns

The commenter urged FNB to increase its investments in the Rochester MSA as it increases its deposit base in the MSA. The commenter identified several community development investment opportunities for FNB to consider.

Preliminarily, the CRA does not require banks to enter into commitments or agreements with any organization.[20] Moreover, the CRA does not require a bank to engage in any particular type of lending, investment, or service. CRA performance for large banks is based on an overall assessment under the lending, investment, and service tests.[21]

Nonetheless, FNB has represented that it is committed to community reinvestment and economic development activity in all of the communities it serves in the Rochester area and strives for continued improvement in all areas of its business. FNB represents that it has consistently participated in community development initiatives and seeks to collaborate with area not-for-profit agencies and financial institutions. In an effort to provide credit access to LMI communities, FNB represents that it offers a variety of flexible and innovative credit products designed to fulfill community and economic development needs. For example, FNB represents that it is an active member of the Federal Home Loan Bank of New York, and that it will continue to make available to the Rochester community the Federal Home Loan Bank Community Investment Programs, including the Affordable Housing Program ("AHP") and the First Home Club. Over the past five years, FNB has received approval for over 15 grants totaling $3.7 million for major housing developments within the Rochester MSA for projects exceeding $56 million. In addition, 40 percent of its 2011 AHP submissions were from the Rochester market, totaling over $5 million in possible grant funding for housing projects for low-income families, senior citizens, and individuals with developmental disabilities. FNB represents that it is also involved in a variety of CRA-related investments, including LIHTC initiatives, and anticipates investing approximately $20 million per year bank-wide over a five-year period toward these and other similar projects.

4. Conclusion

In summary, our review of the P&A Transaction and submitted materials, the public comments and FNB's response, FNB's representations, and supervisory materials, has not revealed any information inconsistent with approval.

D. Section 1818 condition

This approval is subject to the following condition:

1. FNB shall comply with the requirements of the November 10, 2011, Letter of Agreement executed with the Department of Justice.

This condition of approval is a condition "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 condition is enforceable under 12 U.S.C. §1818.

[20] Question and Answer § __.29(b)-2, 75 Fed. Reg. 11,642, 11,666 (Mar. 11, 2010)

[21] 12 C.F.R. §§ 25.21 to 25.24.

In OCC Conditional Approval #952 (March 26, 2010) (approving, among other things, FNB's conversion to a national banking association) the OCC also imposed 12 U.S.C. §1818 conditions. Those conditions, to the extent still applicable, remain in full force and effect.

E. Consummation

Please refer to the Business Combination booklet for steps to complete the P&A Transaction. As a reminder, the Northeastern District Licensing Office must be advised in writing in advance of the desired effective date for the P&A Transaction's consummation. The consummation date may not be less than 15 calendar days after the date of this conditional approval. If you have not already done so, please ensure that you have submitted evidence of the following prior to the desired consummation date:

- FNB must ensure that all other required regulatory approvals, non-objections, or waivers have been received.
- An executed purchase and assumption agreement.

If the P&A Transaction has not been consummated within one year from the date of this conditional approval, the approval will automatically terminate unless the OCC grants an extension of the time period.

This conditional 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. These approvals are based on the Applicants' representations, submissions, and information available to the OCC as of this date. The OCC may modify, suspend or rescind these approvals if a material change in the information on which the OCC relied occurs prior to the date of the transactions to which these approvals pertain. 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 these applications. We would appreciate your response so we may improve our service. If you have questions regarding this letter, please contact Senior Licensing Analyst Sandya Reddy at (212)790-4055. Please reference the application control number in any correspondence.

Sincerely,

signed

Stephen Lybarger
Deputy Comptroller for Licensing