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Bank Merger Involves Detailed Process, Careful Preparation

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Of the DLW

The merger of MBNA Corp. into Bank of America Corp., completed Jan. 1, has been a process of high impact and drama in Delaware that has many worried about job losses and was certainly a factor when the state's lawmakers managed to change the banking tax structure in scarcely more than an hour.

But before the speedy tax change and the early February announcement that Bank of America would indeed keep its credit card bank charter in Delaware, the merger had to be approved by Delaware's bank commissioner, Robert A. Glen.

In a "findings and decision" statement entered on Oct. 14, Glen approved the merger after a Sept. 27 hearing.

To handle the approval, Bank of America hired Washington, D.C., law firm Willkie Farr & Gallagher, which in turn hired the Delaware Counsel Group of Wilmington as

local counsel. DCG is a roughly 2-year-old transactional firm that works in corporate and commercial law.

Timothy R. McTaggart, a partner in Willkie Farr's corporate and financial service department, was lead counsel in the case, a natural choice given he was Delaware's banking commissioner from 1994 to 1998.

McTaggart said he chose Delaware

Counsel Group to assist with the approval because he had worked with the firm on three or four significant projects.

"They've done excellent work for clients who had very demanding deadlines," he said.

DCG is also a majority woman-owned firm, and as such meets diversity commitments large corporations may have, the firm

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said in a press release.

Heather D. Jefferson, a DCG partner, said fellow partner James C. Strum handled the process because his background in litigation made him a good choice for the assignment. The hearing was like a mini-trial, with all the necessary preparation compressed into a couple of weeks.

"Jim [Strum] did all types of litigation in Chancery," Jefferson said.

Strum and DCG had to prepare the witnesses as well as assist the company with its application.

"We worked closely with Bank of America's in-house counsel," Jefferson said.

"We helped them with the factors that are considered particularly relevant to those who live in Delaware," Strum added.

McTaggart said he worked with a variety of Bank of America and MBNA personnel to prepare the application and get ready for the hearing.

"There was a variety of questions so you drew upon a team of in-house professionals, including, of course, the legal department, and others from government relations, public policy, the community development side, and others with expertise on the financial and managerial side," he said.

Much of the application is available to the public in Dover, Jefferson said. Some sections are kept confidential because they contain sensitive information.

According to Chapter 20 of Title 5 of the Delaware Code, to obtain approval for such a deal the entities must submit articles of merger, consolidation or conversion to the Department of State. Slightly before this submission, those seeking the approval must post a notice of their intentions and an announcement of the public hearing in publications reaching every county affected by the proposed deal. In this case, notices were published in the *News Journal* and the *Delaware State News*.

The companies must pay fees associated with the application. At the hearing, according to section 2006 of the code, the commissioner has to consider: "(1) Whether the name of the surviving, new or converted association, or federal savings and loan association is likely to mislead the public; (2) Whether the consolidation, merger or conversion is made for legitimate purposes; (3) Whether the interests of the shareholders or creditors are adequately protected; (4) Whether the surviving, new or converted association meets all the requirements of this chapter and violates none of its prohibitions."

During the hearing, according to the transcript, McTaggart laid out the terms of the merger for Glen, after Strum had moved to admit him pro hac vice.

"Upon consummation of the merger MBNA shareholders will receive 0.5009 shares of Bank America common stock, and 4.125 dollars in cash for each share of MBNA common stock. Based on the share price of Bank of America at the close of business on June 28, 2005, the transaction is valued at \$27.50 per MBNA share and at approximately \$35 billion in total," McTaggart said, according to the transcript.

McTaggart also explained that Bank of America obtained stock options to purchase up to 19.9 percent of the common stock of MBNA were a third party to obtain "control of or a significant equity interest in" MBNA.

The companies then offered testimony from Henry Fulton, leader of card services for

The Delaware Banker's Association and the Delaware State Chamber of Commerce also went on record as supporting the merger.

Bank of America, and Bruce L. Hammonds, president and CEO of MBNA, as to why the proposed deal met the conditions set out in the code.

"What I think is most interesting is that MBNA made pretty clear that they themselves were looking at job cuts," Jefferson said, referring to part of Hammonds' testimony

"We had gone from an industry that had double-digit growth through the nineties to an industry that was only growing at two or three percent. And so one of the things we had to decide was that we were going to have to reduce people," Hammonds said in the transcript.

"We were going to have to do that by ourselves as a stand-alone company. By combining with Bank of America, now we have the opportunity to put two companies together and those job losses will be over two companies, and also offer people who are losing jobs an opportunity to go with the entire Bank of America enterprise. So while we do not yet today know exactly where those job losses would be, I think there may be less job loss in Delaware as a result of the merger than there would have been had MBNA been a stand-alone company."

The commissioner also heard from

Raymond Blondin, director of market development for the Delaware Economic Development Office, who "spoke in support of the application, focusing on the contribution that MBNA has made in Delaware, as well as the Bank of America's strong record of fair, responsible and ethical business activities," the commissioner's decision said.

According to McTaggart, DEDO is always involved in such matters.

"There are various relationships that individuals at the bank have with DEDO, and I have with DEDO, and there were conversations in which we briefed them on the transaction," he said.

The Delaware Banker's Association and the Delaware State Chamber of Commerce also went on record as supporting the merger. Although no one from those organizations testified, they wrote letters stating their positions that were entered as exhibits during the hearing, the transcript shows.

A number of those opposed to the merger testified at the hearing. As Commissioner Glen said in his decision, Rashmi Rangan of the Delaware Community Reinvestment Council Inc., "expressed concern about Bank of America's management, lending practices and community contributions," among other things.

Rangan, along with the Community Reinvestment Association of North Carolina — Bank of America has its headquarters there — sought a "cooperative agreement" that would lay out binding terms of reinvestment ahead of time, the transcript shows.

Also appearing in opposition were Ted Keller of the Citizens Coalition for Tax Reform, who said his group was concerned about the impact on employment and tax revenue, and John Flaherty of Common Cause of Delaware, who spoke about community contributions and hiring practices, Glen's decision said.

After summarizing the written record and the hearing, the commissioner laid out findings of fact in support of his approval of the merger. He found that all fees had been paid, the application was in order, and that the companies had sufficiently addressed concerns about the economic and community impact of the deal.

"The information in the Record indicated that following the Merger, Bank of America would control less than 30 percent of the total amount of insured depository institutions in Delaware," Glen wrote. "Even if the amount of deposits ... would exceed this 30 percent threshold, I conclude that approval of the application will serve the convenience and needs of the public of this State, pursuant to Section 843(b) of Title 5 of the Delaware Code." •