Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

July 6, 2004

Interpretive Letter #996
July 2004
12 USC 24(7)

Lee R. Symcox
President
First Fidelity Bank, N.A.
P.O. Box 32282
Oklahoma City, OK 73123

Re: Request for Legal Opinion

Dear Mr. Symcox:

This letter is in response to your April 5, 2004, request for confirmation that First Fidelity Bank, N.A. ("Bank"), may lawfully acquire a non-controlling equity interest in MetaMarkets OK, LLC ("Company"), a Delaware limited liability company, for the purpose of making loans that qualify for the New Markets Tax Credits ("Tax Credits"). For the reasons set forth below, we conclude that the Bank is legally authorized to acquire and hold the interest in the Company, in the manner and as described herein.

A. Background

The Bank proposes to make an investment of approximately $19 million in the Company. The Company is a subsidiary of MetaFund Corporation ("MetaFund"), an Oklahoma not-for-profit corporation. Both the Company and MetaFund are Community Development Entities ("CDEs") for purposes of the New Markets Tax Credit program.[1] MetaFund, including the Company, has been awarded an allocation of Tax Credits. The Bank proposes to make its non-controlling equity investment in a preferred series of membership units of the Company in order to receive a share of the Tax Credits.[2]

[1] Under the New Markets Tax Credit program, once a CDE is awarded Tax Credit allocations, the CDE is authorized to allocate its given amount of Tax Credits to private equity investors in the CDE. *See* 26 U.S.C. § 45D and 26 C.F.R. § 1.45D-IT. For more information on the New Markets Tax Credit program, *see* http://www.cdfifund.gov/programs/nmtc/.

[2] The Bank currently has an investment in MetaFund of approximately $750,000. This investment was made pursuant to 12 C.F.R. Part 24. The Bank represents that at no time would its interests in the Company exceed 49 percent of the Company's outstanding membership units.

Per the Draft LLC Agreement ("LLC Agreement"),[3] the Company will issue multiple series of preferred membership units. LLC Agreement § 3.2(a). Any individual series of preferred membership units may be held by one or more investors. The capital raised by the subscription to each individual series of membership units will be segregated and maintained in a separate investment account ("Separate Account"), and the funds in each Separate Account will be used to make investments separate and apart from investments made with funds from any other investment account ("Separate Investments"). LLC Agreement §§ 2.6 and 3.2. All credits, debits, profits, and losses – including the Tax Credits – generated in a Separate Account by the Separate Investments will flow only to the member or members owning the related membership units. LLC Agreement § 3.2(b). If more capital is required for a series of preferred membership units, the Company's Manager, MetaFund, may issue additional preferred membership units, but only with the consent of the majority of holders of units in that series. LLC Agreement § 3.2(d).

The nature of each Separate Investment will be determined by the Manager in consultation with investors who owns the related membership units. LLC Agreement § 6.1.[4] According to the LLC Agreement, the Company's stated purpose is to raise capital for investment in and lending to small businesses located in low-income communities in the state of Oklahoma.

The Bank will acquire all of the Series B preferred membership units. The Subscription Agreement for the Series B preferred membership units will provide that capital raised by the Bank's subscription to the Series B units will be used to engage in only those activities permissible for national banks. In addition, the Bank, the Company, and MetaFund represent that the Separate Investments made with the funds raised by the Bank's subscription to the Series B units will be limited to national bank permissible activities, namely lending. The Bank has approximately $16 million in pending Tax Credits-qualifying loans that it would fund if it could claim the Tax Credits for these loans. The Manager, in consultation with the Bank, would use the capital raised by the Bank's subscription to the Series B preferred membership units to make these loans. The Bank would also service these loans.

B. Discussion

The OCC has traditionally recognized the authority of national banks to organize and perform any of their lawful activities in a reasonable and convenient manner not prohibited by law, including through associated corporate structures.[5] The recognition of such authority

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[3] The Bank and MetaFund represent that the Draft LLC Agreement will be executed in substantially the form as submitted with the Bank's legal opinion request.

[4] In matters related to a Separate Investment requiring a vote, only the members holding a series of preferred membership units associated with the Separate Investment will have the right to vote. LLC Agreement § 8.4(a).

[5] *See, e.g.,* Interpretive Letter No. 943, *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-468 (July 24, 2002); Interpretive Letter No. 890, *reprinted in* [2000-2001 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-409 (May 15, 2000); Interpretive Letter No. 645, *reprinted in* [1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,554 (Apr. 29, 1994); Interpretive Letter No. 423, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,647 (Apr. 11, 1988);

provides a national bank with a significant degree of flexibility to organize its activities in a manner most efficient to the bank. Our precedent letters have authorized the national bank's participation in authorized activities through alternate corporate structures provided that two necessary attributes are present: (1) the entity in which the bank invests is engaged in bank permissible activities, and the bank is able to prevent the entity from engaging in other activities; and (2) the bank is shielded from unlimited liability for the acts of other investors.[6] OCC precedent on non-controlling investments have refined and expanded these attributes, concluding that national banks are legally permitted to make a non-controlling investment in an enterprise provided four standards (discussed below) are met.

1. The Bank's Proposed Investment in the Company Satisfies These Two Necessary Attributes

As described above, the LLC Agreement structures the Company as a series of independent Separate Accounts.[7] Each Separate Account will be funded and managed independently of the other Separate Accounts. The funds in each Separate Account will be used to make investments separate and apart from investments made with funds from any other Separate Account. The nature of investments made with funds from a Separate Account will be determined by the Manager in consultation with only the investor who owns the related membership units. All credits, debits, profits, and losses – including the Tax Credits – generated in a Separate Account will flow only to the member or members owning the related membership units. Therefore, as structured, each Separate Account is the functional equivalent of separate, independent business enterprise.[8]

In considering the separate nature of business enterprises, courts have reviewed a number of factors, including the commingling of funds between enterprises, the transfer of funds between enterprises, the sharing of profits and losses between enterprises, common control

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Interpretive Letter No. 289, *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,453 (May 15, 1984).

[6] *E.g.,* Interpretive Letter No. 645, *supra. See also* Interpretive Letter No. 423, *supra*; Interpretive Letter No. 289, *supra*.

[7] MetaFund has organized the Company in the manner described above – with discrete Separate Accounts each making its own Separate Investments – in order to make more efficient use of its administrative resources as Manager of the Company. MetaFund believes that this structure is more efficient and more workable than any alternative structure (such as the creation of multiple subsidiary limited liability companies).

[8] The organizational structure of the Company is permissible under Delaware state law. *See* De. Code. Ann. §§ 18-215(a) ("A limited liability company agreement may establish or provide for the establishment of 1 or more designated series of members … having separate rights, powers or duties … and any such series may have a separate business purpose or investment objective.") and 18-1101(b) ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."). Although MetaFund could accomplish the same results by structuring each Separate Account as a separate limited liability company, doing so is neither consistent with the concept of corporate flexibility nor necessary in order for the Bank's investment to be permissible.

between the enterprises, and one enterprise's guarantee of the liabilities of another enterprise.[9] The presence of one or more of these factors may result in the separateness of the enterprises being disregarded. Significantly, none of these factors is present here. The Bank's funds invested in the Company will be placed in a Separate Account, not to be commingled with other invested funds. The Bank will be the only investor to receive the returns – positive or negative – and the Tax Credits generated by its lending activities. Investors in other series of preferred membership units will have no interest in the returns and Tax Credits generated by the Bank's activities, and the Bank will have no interest in the returns and Tax Credits generated by the activities of the owners of the other series of preferred membership units. The Bank will have no influence or control over these other activities, just as other investors will have no influence or control over the Bank's activities. Finally, the Bank will not be responsible for liabilities arising in other Separate Accounts – the Bank's invested funds will not be transferred to other investors' accounts, and the Bank will not provide any guarantees.

By being the sole subscriber to the Series B preferred membership units, the Bank's investment in the Company will satisfy both necessary attributes. The Bank's investment in the Series B preferred membership units will enable the Bank, through the Company, to engage in lending and loan servicing. Both activities are permissible for national banks[10] and, therefore, the separate, independent business enterprise in which the Bank will invest will engage in only bank permissible activities. As the sole subscriber to its membership units, the Bank will have sufficient control over its Separate Account to ensure that it engages in only bank permissible activities. While investors in other series may engage in activities that would not be permissible for national banks, these other investors would do so through their own separate business enterprises, *i.e.,* their own Separate Accounts.

Moreover, the Bank will be shielded from unlimited liability for the acts of other investors. Because there will be no other subscribers to the Series B preferred membership units, the Bank need not be concerned about the acts of other investors in its separate, independent business enterprise. More broadly, the LLC Agreement ensures that the Bank will not be responsible for liabilities arising in other Separate Accounts. To this end, the funds in the Bank's Separate Account will not be transferred to other investors' accounts, and the returns – positive or negative – generated by the Bank's separate, independent business enterprise will flow only to the Bank.

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[9] *See, e.g.*, *Sea-Land Services v. Pepper Source*, 941 F.2d 519, 520 (7th Cir. 1991); *Froemming v. Gate City Fed. Sav. & Loan Ass'n,* 822 F.2d 723 (8th Cir. 1987); *Krivo Industrial Supply Co. v. National Distillers & Chemical Corp.*, 483 F.2d 1098, 1103 (5th Cir. 1973), *reh'g denied*, 490 F.2d 916 (1974); *In re Sheridan,* 187 B.R. 611, 614 (N.D. Ill.), *aff'd* 57 F.3d 627 (7th Cir. 1995); *Campo v. 1st Nationwide Bank,* 857 F. Supp. 264, 271 (E.D.N.Y. 1994).

[10] 12 U.S.C. § 24(Seventh); 12 C.F.R. § 5.34(e)(5)(v)(C) and (D).

2. The Bank's Proposed Investment in the Company Satisfies the Four-Part Test for Non-Controlling Investments

National banks may make a non-controlling investment in an enterprise provided four standards, distilled from our previous decisions in the area of permissible non-controlling investments for national banks and their subsidiaries, are satisfied. Based upon the facts presented, the Bank's proposed acquisition satisfies these four standards.[11]

a. The activities of the enterprise in which the investment is made must be limited to activities that are part of, or incidental to, the business of banking (or otherwise authorized for a national bank).

This standard ensures that the "bank's participation [is] in an otherwise permissible activity."[12] As described in detail above, the Bank's investment in the Series B preferred membership units will enable the Bank to engage in lending and loan servicing. Both activities are permissible for national banks. Therefore, the first standard is satisfied.

b. The bank must be able to prevent the enterprise from engaging in activities that do not meet the foregoing standard, or be able to withdraw its investment.

This is an obvious corollary to the first standard. It is not sufficient that the entity's activities are permissible at the time a bank initially acquires its interest; they must also remain permissible for as long as the bank retains an ownership interest.

The Subscription Agreement for the Series B preferred membership units will provide that capital raised by the Bank's subscription to the Series B units will be used to engage in only those activities permissible for national banks. Furthermore, the Bank, the Company, and the Manager represent that the Bank's activities will be limited to national bank permissible activities, namely lending and loan servicing. In addition, should the capital raised by the Bank's subscription to the Series B units be used to engage activities that are not permissible for national banks, the LLC Agreement provides the means for the Bank to transfer its units. Therefore, the second standard is satisfied.

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[11] *See, e.g.,* Interpretive Letter No. 943, *supra*; Interpretive Letter No. 890, *supra*; Interpretive Letter No. 854, *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-311 (Feb. 25, 1999); Interpretive Letter No. 692, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,007 (Nov. 1, 1995).

[12] Letter from Robert B. Serino, Deputy Chief Counsel (Nov. 9, 1992) (unpublished). *Accord* Interpretive Letter No. 909, *reprinted in* [2000-2001 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-434 (May 2, 2001).

c. The bank's loss exposure must be limited, as a legal and accounting matter, and the bank must not have open-ended liability for the obligations of the enterprise.

(i) Loss exposure from a legal standpoint.

A primary concern of the OCC is that national banks should not be subject to undue risk. Where an investing bank will not control the operations of the entity in which the bank holds an interest, it is important that the national bank's investment not expose the bank to unlimited liability. As described above, the Company is structured as a series of separate, independent business enterprises, with no liability running across Separate Accounts. As a result, the Bank would not be exposed to unlimited liability. Moreover, as a legal matter, an investor in a Delaware limited liability company will not incur liability with respect to the liabilities or obligations of a limited liability company solely by reason of being a member or manager of the company.[13] The Bank's loss exposure for the liabilities of the Company will be limited to the amount of its investment.

(ii) Loss exposure from an economic standpoint.

In assessing a national bank's loss exposure as an accounting matter, the OCC has previously noted that the appropriate accounting treatment for a bank's minority investment in a corporate entity is to report it as an unconsolidated entity under the equity or cost method of accounting.[14] The Bank has represented that it will account for its ownership interest in the Bank according to the cost or equity method of accounting, which will satisfy the OCC's requirements in this regard.

Therefore, for both legal and accounting purposes, the Bank's potential loss exposure arising from its investment in the Company should be limited to the amount of its investment. Since that exposure will be quantifiable and controllable, the third standard is satisfied.

d. The investment must be convenient or useful to the bank in carrying out its business and not a mere passive investment unrelated to that bank's banking business.

A national bank's investment in an enterprise or entity must also satisfy the requirement that the investment have a beneficial connection to the bank's business, i.e., be convenient or useful to the investing bank's business activities, and not constitute a mere passive investment unrelated to that bank's banking business. Twelve U.S.C. § 24(Seventh) gives national banks incidental powers that are "necessary" to carry on the business of banking. "Necessary" has

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[13] *See* Del. Code Ann. Title 6, § 18-303 (2003).

[14] Interpretive Letter No. 970, *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,495 (Jun. 25, 2003).

been judicially construed to mean "convenient or useful."[15] OCC precedents on non-controlling investments by national banks have indicated that the investment must be convenient or useful to the bank in conducting that bank's business. The investment must benefit or facilitate that business and cannot be a mere passive or speculative investment.[16]

In this instance, the Bank's ownership of the Series B preferred membership units will be neither passive nor speculative, and this ownership interest will be convenient and useful for the Bank. Through its investment, the Bank will increase its lending to small businesses located in low-income communities in the state of Oklahoma. By conducting the lending through the Company, the Bank's loans will qualify for and the Bank will receive the Tax Credits. In addition, the Bank will service the loans. Accordingly, the fourth standard is satisfied.

C. Conclusion

Based upon the information and representations provided by the Bank, and for the reasons discussed above, it is my opinion that the Bank may make a non-controlling equity investment in the Company, subject to the following conditions:

(1) The Separate Account funded by the Series B preferred membership units shall engage only in activities that are permissible for a national bank;

(2) The Bank shall ensure that the activities of the Separate Account funded by the Series B preferred membership units are consistent with condition (1) above, and shall withdraw from the Company in the event that the Separate Account funded by the Series B preferred membership units engages in an activity that is inconsistent with condition (1).

(3) The Bank shall account for its investment in the Company under the equity or cost method of accounting; and

(4) The Company, to the extent of the Bank's investment, shall be subject to OCC supervision and examination subject to the limitations and requirements of 12 U.S.C. §§ 1820a and 1831v.

These conditions are conditions imposed in writing by the OCC in connection with this opinion letter stating that the Bank's investment in the Company is permissible under 12 U.S.C. § 24(Seventh). As such, these conditions may be enforced in proceedings under applicable law.

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[15] *Arnold Tours v. Camp*, 472 F.2d 427, 432 (1st Cir., 1972).

[16] *See, e.g.,* Interpretive Letter No. 970, *supra*; Interpretive Letter No. 875, *reprinted in* [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-369 (Oct. 31, 1999); Interpretive Letter No. 543, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,255 (Feb. 13, 1991).

If you have any questions, please contact Steven Key, Senior Attorney, Bank Activities and Structure Division, at (202) 874-5300.

Sincerely,

signed

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel