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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

**Conditional Approval #282**  
**August 1998**

July 31, 1998

Michael W. Briggs, Esq.  
Senior Counsel  
NationsBank Corporation  
NationsBank Corporate Center  
100 North Tryon Street  
Charlotte, North Carolina 28255

Re: Application to Establish an Operating Subsidiary to Invest in Electronic Health Services, L.L.C. -- Application Control No. 98-ML-08-0006

Dear Mr. Briggs:

This is in response to the application by NationsBank, N.A., Charlotte, North Carolina ("Bank"), to establish a wholly owned operating subsidiary, NationsBanc Health Services, Inc. ("Operating Subsidiary"), that will acquire a one-half, non-controlling equity interest in Electronic Health Services, L.L.C. ("EHS"). EHS engages in payment and information processing activities for the health care industry. Based upon the representations and commitments made by the Bank in writing and in telephone discussions, as described herein, we approve the Bank's plan to establish the operating subsidiary to engage in the proposed activity, subject to certain conditions as specified in this letter.

**I. Proposal**

The Bank believes that there is a need on the part of both consumers and medical care providers for financial and information processing services relating to health care. According to your information, there are thousands of medical insurance plans. At any given time, a physician may be providing services to patients covered by between 50 and 150 different plans. Each plan has its own standards and information requirements concerning, for example, what services are covered, procedures for submitting claims, and reimbursement schedules. It is a considerable administrative burden on physicians and clinics to try to keep track of what is covered or not covered for each patient. Mistakes in filing claims can cause problems for patients and delays for health care providers in receiving payment. Even in the absence of mistakes, you noted that insurers frequently do not provide sufficient detail to medical providers to enable them to identify which sums are being paid on behalf of which patients, and the corresponding dates of service, leaving it to the provider to make these determinations.

EHS was formed to address these needs. EHS is a Delaware limited liability company that, at present, is wholly owned by Andersen Consulting, L.L.P. (“Andersen”), and Andersen’s wholly owned subsidiary, Proquire, L.L.C. (“Proquire”). The Operating Subsidiary will be a Delaware corporation. It will acquire a 50-percent equity interest in EHS from Andersen and Proquire, pursuant to a Master Venture Agreement between the Bank and Andersen.<sup>1</sup> Thereafter, Andersen, Proquire, and the Operating Subsidiary will be Class A (*i.e.*, voting) Members of EHS.<sup>2</sup> EHS initially will be governed pursuant to an LLC Agreement between the Operating Subsidiary, Andersen, and Proquire, as discussed more fully below.

Initially, EHS will primarily serve independent practice associations or “IPAs,” which are groups of small private practices that band together to deal collectively with medical insurance carriers. However, as the business expands, EHS may market its services to clinics and individual providers of medical services, as well. The goal of EHS will be to serve as a single point of referral for all parties to a health care transaction, including patients, providers, and insurance carriers.

To this end, EHS will provide its clients with an integrated package of banking and information services. That is, EHS will make available to health care providers a package consisting of its own services plus a “menu” of banking services provided by the Bank, and customers will be able to choose the package of services that best suits their needs. They will be able to receive such banking services as financing of receivables, lockbox, ACH debit, payroll processing, credit card processing, and cash management. In addition, it is anticipated that EHS will offer to physicians and other health care employees the ability to take care of their personal banking needs through consumer banking services provided by the Bank.

Electronic data processing and data interchange facilities will be used to assist health care providers in communicating billing and payment-related information to insurance carriers responsible for providing medical benefits. In turn, insurers will determine how much of a patient’s bill is owed by the patient and how much is owed by the insurer, communicate this information to the provider, and maintain appropriate payment records. EHS will charge a per-patient rate for its services.

The data transmission and exchange services will afford all parties to a health care transaction the ability to access information such as insurance status and coverage; payment records;

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<sup>1</sup> Currently, Andersen has a 98-percent equity interest in EHS, and Proquire owns 2 percent. The Operating Subsidiary will acquire a 49-percent equity interest from Andersen, and 1 percent from Proquire. It is anticipated that additional equity investors may be admitted to EHS in the future. Such future members, however, would join subject to the LLC Agreement executed between the Operating Subsidiary, Andersen, and Proquire. Therefore, this would not affect the voting rights of the current Members. See pages 6-7, *infra*.

<sup>2</sup> Initially, there will be no Class B, or nonvoting, Members.

patient data and history; and medical data that is necessary to substantiate and evaluate medical claims.<sup>3</sup>

Health care providers and insurers will utilize these services to perform or track transactions such as case management, member verification, referrals to other physicians, managed care claims analysis, insurance claim processing, and payment transfers. For example, EHS data support will assist medical providers in applying insurance payments to the proper patients. It is anticipated that patients will also have the ability to access the system to check on the status of insurance payments.

In limited circumstances, EHS may lease or sell computer hardware to clinics<sup>4</sup> to enable them to connect with the system, but computer hardware sales will not be a regular component of EHS's business. Similarly, EHS will license software from independent vendors and integrate the purchased software into the various packages of data transmission services offered to its clients, but it will not engage in regular sales or development of software. Any hardware or software sales, leases, or licenses will be on an occasional, accommodation basis, and only if necessary to enable clients to use EHS services. You represented that any such sales would constitute only an insignificant portion of total revenue.

EHS will conduct its data transmission activities over a closed, proprietary network. This network will have a data warehouse that will store insurance claims data, including medical information relating to diagnosis and treatment and medical services provided, which is needed to evaluate medical insurance claims. Physicians who are members of an IPA will be able to use the Internet to access patient data maintained by EHS to verify that a particular patient is a

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<sup>3</sup> The Bank has made several representations concerning protection of the privacy of patient health, financial, and other confidential personal information ("Confidential Information") transmitted via EHS systems. First, employees of the Bank and the Operating Subsidiary will not have access to Confidential Information collected and stored by EHS, except that certain Bank or Operating Subsidiary employees will provide services to EHS. In all such cases, the services will be provided under contract and will be governed by express confidentiality provisions. Second, Confidential Information acquired by EHS through the provision of its services to health care providers will not be transmitted through the data processing systems of the Bank or the Operating Subsidiary, except where the transmission of such information is integral to the provision of banking services. Express contractual provisions regarding confidentiality, access, and security will govern these activities. Third, EHS will have in place adequate systems to protect the privacy and security of Confidential Information transmitted via EHS systems. The EHS system is being designed to feature limited access, therefore, EHS clients will have access only to accounts, data, and information relating to their specific business operations. Individual employee access will be provided only upon specific requests submitted by EHS clients. Security features such as user identification numbers and restricted access levels are planned. Internet access will be restricted via the use of digital certificates. Finally, EHS will develop internal guidelines for the treatment of Confidential Information. You also noted that, as a transmitter of Medicare payments, EHS will be subject to the privacy regulations of the federal Health Care Financing Administration. See generally 42 C.F.R. Parts 401, 405.

<sup>4</sup> Physician members of IPAs will be responsible for providing their own computer hardware to access the network.

member of an insurance plan, as well as to make referrals to other physicians and be able to track those referrals. Such Internet access will be via a secured server.<sup>5</sup>

## **II. Analysis**

A national bank may invest in an operating subsidiary if the parent bank owns more than 50 percent of the voting interest in the subsidiary, or if it controls the subsidiary and no other party controls more than 50 percent of the voting interest. 12 C.F.R. § 5.34(d). Since the Bank will own 100 percent of the voting stock of the Operating Subsidiary, this requirement is satisfied.

National bank operating subsidiaries may engage in activities that are part of, or incidental to, the business of banking. *Id.* In this case, the Operating Subsidiary's activity will be the holding of a 50-percent equity investment in EHS. According to the governing agreements, EHS will be governed by a five-member board of managers. The Operating Subsidiary and Andersen will each have the right to designate two managers, while the fifth member will be chosen by mutual agreement of the Bank and Andersen. The fifth manager must be a person "not otherwise affiliated with the Bank or Andersen." Therefore, the Bank and the Operating Subsidiary will not control EHS.

### A. Non-controlling Equity Investments

Ownership of a non-controlling equity investment is a permissible activity for a national bank or its operating subsidiary if the investment satisfies a four-part test, derived from OCC precedents. *See generally* Interpretive Letter No. 697, [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-012 (November 15, 1995). These are:

1. 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.

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<sup>5</sup> The OCC recently released OCC Bulletin 98-3 (Feb. 4, 1998), a supervisory issuance on national bank technology management. It provides guidance on how national banks should identify, measure, monitor, and control risks associated with the use of technology. The Bank represented that EHS will incorporate this and any subsequent OCC technology guidance into its risk management planning and management efforts as appropriate. The Bank also represented that it will perform due diligence on the operations of EHS to ensure that any third-party data processing servicers, internally developed systems, or purchased applications or systems from software vendors will be Year 2000 compliant. The Bank will also monitor on an ongoing basis the Year 2000 compliance efforts of EHS, through its participation in the management of EHS via the Operating Subsidiary. In the event that EHS selects a servicer or vendor that is not Year 2000 compliant, the Bank will take steps to ensure that EHS ensures that the servicer or vendor has a Year 2000 compliance plan, and the financial and personnel capacity to complete its Year 2000 conversion project within the time frames outlined in OCC Advisory Letter No. 97-6, or other subsequent OCC Year 2000 guidance.

2. 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 from the investment.
3. The bank's loss exposure must be limited, for both legal and accounting purposes, and the bank must not have open-ended liability for the obligations of the enterprise.
4. The investment must be convenient and useful to the bank in carrying out its banking business, and not a mere passive investment unrelated to that business.

As discussed below, the Bank's proposal satisfies all four of these requirements.

*1. 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.*

The OCC has long recognized that the transmission and handling of medical and health insurance data in connection with activities such as funds transfers, billing services, or claims processing, is an activity that is incidental to the business of banking. Thus, all of the activities in which EHS will engage have been previously approved by the OCC for national banks or their operating subsidiaries.

As long as ten years ago, the OCC approved national bank participation in a limited partnership whose activities were very similar to those of EHS. Interpretive Letter No. 419, *reprinted in* [1988-1989] Transfer Binder Fed. Banking L. Rep. (CCH) ¶ 85-643 (February 16, 1988). The purpose of the limited partnership in that case was to "develop a data processing system linking health care providers, health care insurers, health care recipients, and their respective depository institutions." The system, known as EXCLAIM, would "transmit claims eligibility information, receive and transmit information for claims entry and payment, [and] operate a data base." A notable feature of this system was that it included the transmission of treatment information by health care providers to health insurance carriers, used by the carriers in processing the insurance claims, a feature that will also be included in the EHS system. In fact, the activities of EXCLAIM went beyond those in which EHS proposes to engage, since they included the development and licensing of software necessary for clients to participate in the system. EHS, as noted above, intends only to acquire software from unrelated vendors.

Another very similar precedent was the OCC's approval of a national bank's non-controlling investment in a company that would:

use automated data processing and electronic data interchange facilities to assist hospitals and physicians . . . in communicating billing and payment-related

information, including abbreviated diagnosis and treatment information, to entities responsible for providing medical benefits (government agencies, health maintenance organizations, and insurance carriers) . . . determining how much of the patient's bill is owed by the patient and how much is owed by the Payer, billing the Payer and the patient as appropriate, and facilitating payment by the patient and the patient's provider. . . .

This company would also “store, process, and retrieve documents and information needed to substantiate the medical claims being submitted . . . .” Letter of Julie L. Williams, Chief Counsel, March 12, 1996 (to be published).<sup>6</sup>

Accordingly, the activities in which EHS will engage are permissible for national banks or their operating subsidiaries, and the first standard is satisfied.

*2. 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 from the investment.*

The activities of an enterprise in which a national bank invests must be part of, or incidental to, the business of banking both initially and for as long as the bank has an ownership interest. Therefore, the OCC requires that the investing bank must be able to either prevent the enterprise from engaging in impermissible activities, or withdraw its investment.

In the present case, section 2.8 of the LLC Agreement provides that for so long as a national bank or an operating subsidiary thereof is a member of EHS, EHS shall engage only in activities that are part of, or incidental to, the business of banking, and shall be subject to full regulation, supervision, and examination by the OCC. In addition, section 7.4 of that Agreement gives any Class A Member of EHS (which includes the Operating Subsidiary) the right to veto any prospective activity of EHS that is impermissible under applicable law for such Member to engage in through EHS, including activities that are impermissible for

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<sup>6</sup> There are many other OCC precedents relating to health care or health insurance support services. See, e.g., Corp. Dec. No. 98-13 (Feb. 9, 1998) (operating subsidiary whose activities included providing medical insurance cost information and benefits counseling); Interpretive Letter No. 712 *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-027 (Feb. 29, 1996) (factoring of medical receivables, including filing of related insurance claims); unpublished letter of Horace Sneed, Senior Attorney (Dec. 6, 1993) (completing and submitting insurance claims on behalf of medical care providers). In addition, the Federal Reserve Board has found the operation of a medical payments network, including the processing and transmission of medical and coverage data, to be a permissible activity for bank holding companies. *Banc One Corporation*, 80 Fed. Res. Bull. 139 (1994). Bank holding companies, of course, are governed by a different statute than national banks. Nevertheless, the standards of “incidental to the business of banking” under 12 U.S.C. § 24(Seventh) and “so closely related to banking or managing or controlling banks as to be a proper incident thereto” under section 4(c)(8) of the Bank Holding Company Act are very similar.

national banks. Moreover, the governing agreements give Members the right to withdraw from membership in EHS.<sup>7</sup>

Accordingly, the second standard is met.

*3. The bank's loss exposure must be limited for both legal and accounting purposes, and the bank must not have open-ended liability for the obligations of the enterprise.*

a. Loss exposure from a legal standpoint

A primary concern of the OCC is that national banks should not be subjected 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 a national bank's investment not expose it to unlimited liability.

In the present case, the Bank's risk of loss will be limited by both the corporate veil of the Operating Subsidiary and by Delaware law, which provides that the liability of a member of a Delaware limited liability company for the company's debts, obligations, or other liabilities is limited to the amount of the member's capital investment in the company, unless otherwise provided in the company's governing agreements.<sup>8</sup> Del. Code. Ann. tit. 6, § 18-303 (Michie Cum. Supp. 1996). No such provisions are contained in the governing agreements. Section 2.9 of the LLC Agreement provides that Members shall not have any personal liability for obligations of EHS. In addition, section 6.9 of that Agreement requires a super-majority vote of Class A Members for, among other things, additional capital contributions. A super-majority vote is defined as a number of Class A Members holding at least 66-2/3 percent of the aggregate percentage interests held by Class A Members. Since Andersen and Proquire together will hold only a 50 percent interest, no additional capital contributions could be required without the consent of the Operating Subsidiary.

b. Loss exposure from an accounting standpoint

In assessing a bank's loss exposure for accounting purposes, the OCC has previously noted that the appropriate accounting treatment for a bank's 20-50 percent ownership share of investment in an entity is to report it as an unconsolidated entity under the equity method of

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<sup>7</sup> Briefly, during the first four years after the Operating Subsidiary becomes a Member of EHS, a Member may transfer its equity interest to another Member. If the other Member declines to buy out the offeror Member, EHS may be liquidated. After four years, a Member may sell its interest in EHS to any person not deemed to be a competitor of another Member. In addition to the above, a Member may transfer its interest to one or more of its affiliates at any time.

<sup>8</sup> In addition, a member may have liability to return certain distributions made to it when a limited liability company becomes insolvent. *Id.*

accounting.<sup>9</sup> Under this method, unless the bank has guaranteed any of the liabilities of the entity or has assumed other financial obligations of the entity, losses are generally limited to the amount of the investment, including loans and other advances shown on the investor's books. See *generally*, Accounting Principles Board, Op. 18 § 19 (1971) (equity method of accounting for investments in common stock).

The Bank, through the Operating Subsidiary, will have a 50 percent ownership interest in EHS. You have represented that the Bank intends to treat this investment as an unconsolidated investment under the equity method of accounting, consistent with prior OCC approvals. Therefore, for both legal and accounting purposes, the Bank's potential loss exposure should be limited to the amount of its investment. Since that exposure will be quantifiable and controllable, the third standard is satisfied.

*4. The investment must be convenient and useful to the bank in carrying out its banking business, and not a mere passive investment unrelated to that business.*

Twelve U.S.C. § 24(Seventh) gives national banks incidental powers that are "necessary" to carry on the business of banking. "Necessary" has been judicially construed to mean "convenient or useful." *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972). The provision in 12 U.S.C. § 24(Seventh) relating to the purchase of stock, derived from section 16 of the Glass-Steagall Act, was intended to make it clear that section 16 did not authorize speculative investments in stock. Therefore, a national bank's investment in an enterprise or entity must also satisfy the requirement that it have a beneficial connection to the bank's business, *i.e.*, be convenient or useful to the investing bank's business activities, not a mere passive investment unrelated to the institution's banking business.

This requirement is satisfied here. As mentioned earlier, EHS will offer its customers various Bank-provided banking services such as financing of receivables, lockbox, ACH debit, payroll processing, credit card processing, and cash management. EHS will thus provide the Bank with an additional venue in which to offer financial and financially related products and services, enhancing the Bank's revenue opportunities. Although the Bank could perform directly the activities in which EHS will engage, investing in EHS will enable the Bank to take advantage of EHS's expertise in this area. Moreover, the Bank will be able to offer its customers in the health care industry a convenient and affordable package of banking products and services and data processing services, allowing customers to address both their financial and medical data processing needs. The Bank believes that customers, especially smaller

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<sup>9</sup> See Interpretive Letter No. 692, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-007 (Nov. 1, 1995), which discusses in more detail the appropriate accounting treatment for a national bank's minority investment in a limited liability company.

businesses, will find this attractive, since they are under intense cost control pressures and need to make constant technological investments to remain competitive.

For these reasons, the Bank's investment in EHS, through the Operating Subsidiary, will be convenient and useful to the Bank in carrying out its business, and will not be a mere passive investment. Thus, the fourth standard is satisfied.

### **III. Conclusion**

Based upon the information that you have provided, and for the reasons set forth above, the OCC finds that the Bank may hold, through the Operating Subsidiary, a 50 percent, non-controlling equity interest in EHS. Accordingly, the Bank's application is hereby approved, subject to the following conditions:

1. EHS will engage only in activities that are part of, or incidental to, the business of banking.
2. The Bank, through the Operating Subsidiary, will have effective veto power over any activities or major decisions of EHS that are inconsistent with Condition 1, or will withdraw from EHS in the event it engages in an activity inconsistent with Condition 1.
3. The Bank will account for its investment in EHS under the equity method of accounting.
4. EHS will be subject to OCC supervision, regulation, and examination.

Please be advised that the conditions of this approval are deemed to be "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.

If you have any further questions, you may contact Richard Erb, Licensing Manager, Bank Organization and Structure Division, at (202) 874-5060, or Christopher C. Manthey, Senior Attorney, Bank Activities and Structure Division, at (202) 874-5300.

Sincerely,

/s/

Raymond Natter  
Acting Chief Counsel