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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

September 4, 1998

**Interpretive Letter #837**  
**September 1998**  
**12 U.S.C. 24(11)**

Ms. Kathryn S. Bader  
Senior Vice President  
Mercantile Bank  
Mercantile Tower  
P.O. Box 524  
St. Louis, MO 63166-0524

Dear Ms. Bader:

This letter conveys the OCC's approval of the proposed investment by Mercantile Bank National Association (Bank) in Mercantile Bank Community Development Corporation (MCDC) pursuant to 12 U.S.C. § 24 (Eleventh) and 12 C.F.R. part 24 (Part 24). As discussed more fully below, MCDC will be a wholly owned community development corporation (CDC) subsidiary of the Bank that will primarily conduct activities that promote the public welfare.

### **I. Description of the Proposed Investment**

MCDC is currently a wholly owned subsidiary of Ameribanc, Inc., the parent holding company of the Bank. MCDC was formerly known as Mark Twain Bank Community Development Corporation, Inc. By virtue of the merger of Mark Twain Bank with the Bank, MCDC became a direct subsidiary of the Bank. In March 1998, all of the stock of MCDC was distributed from the Bank to Ameribanc, Inc. In connection with this proposal, the stock of MCDC will be contributed back to the Bank, and MCDC will again be a wholly owned, for-profit subsidiary of the Bank.

MCDC historically has invested directly (as a limited partner) in low-income housing real estate development project limited partnerships. MCDC's past investments have generated both federal and state low-income housing tax credits (LIHTCs), which were used to reduce the Bank's tax liability. In some cases, these projects also generated state historic rehabilitation tax credits. Through its successful involvement in these projects, MCDC personnel have gained expertise in federal and state tax credit projects and investments.

MCDC intends to continue to engage in its current LIHTC project investment activities. In addition, in order to capitalize on the investment experience and expertise of MCDC

personnel, the Bank proposes to create a new operating division within MCDC, to be called the Missouri Tax Credit Clearinghouse (Clearinghouse). The Clearinghouse will:

- *Act as a “finder,” by bringing together investors and tax credit developers.* The Clearinghouse intends to introduce potential buyers of tax credits to sellers, find appropriate tax credits or tax credit investments for such potential buyers, and help selected nonprofit corporations, which have been allocated contribution tax credits, find donors.
- *Act as a financial intermediary, buying and reselling certain types of transferable state tax credits.*<sup>1</sup> In certain circumstances, the Clearinghouse, in fulfilling its objective of facilitating community development tax credit assisted investments, may purchase transferable tax credits (separate from the investments or contributions that generated them) and later resell them to appropriate purchasers.
- *Act as advisor, providing financial, transactional, and tax planning advice to customers (i.e., investors and purchasers of tax credits) and potential customers to assist them in structuring, arranging, executing and managing tax credit related transactions.* Some advisor activities, such as advising potential customers about the types of tax credit programs available and assisting them in assessing their own tax management needs, would be related to the Clearinghouse’s finder and intermediary roles. The Clearinghouse, upon request and for a fee, also proposes to advise customers on compliance concerns related to the tax credits they have either purchased or received as a result of an investment, and assist customers in completing and filing all paperwork necessary to obtain ownership of the credit or investment or to maintain the viability of the credit.

MCDC proposes initially to provide the above services in connection with projects awarded credits under certain Missouri State Tax Credit Programs.<sup>2</sup> The programs fall within the following three categories:

- *Investment Credit Programs.* Investment tax credits are awarded to individuals or entities that make investments in qualifying projects. Although the investment may be

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<sup>1</sup> As indicated in the Bank’s written submission, some state tax credits can be transferred from one taxpayer to another once they have been awarded (“transferable” credits), while others, such as LIHTCs, can only be used by a taxpayer who retains an equity or ownership interest in the qualified project. In addition, some of the credits are fully earned at the time they are granted, while others, such as LIHTCs, are subject to “recapture” (partial or total cancellation) if certain ongoing compliance requirements, generally related to the underlying project, are not met.

<sup>2</sup> Eventually, MCDC may offer services to investors and developers in other states in which the Bank is located.

made prior to construction startup or during construction, the tax credit is not awarded until construction is complete and all statutory requirements have been met.

- *Contribution Credit Programs.* Contribution tax credits are awarded when a contribution is made to a qualifying project or entity. The effect of contribution tax credits is to reduce the overall after-tax cost of charitable contributions to the contributing donors.
- *Business Incentive Credit Programs.* Business incentive tax credits are tax credits conferred by the State in recognition of a taxpayer's operation of its business in certain statutorily favored locations or activities. For example, credits are offered to operators of businesses in economically depressed enterprise zones and businesses engaged in environmental remediation.

## **II. Discussion**

### **A. Public Welfare Purpose**

MCDC will be a CDC that will engage in two types of activities. First, it will make investments designed primarily to promote the public welfare in various types of tax credit projects, including those designed to provide low-income housing. Second, it will offer services intended to facilitate other investors' making investments designed primarily to promote the public welfare in such tax credit projects.

The National Bank Act authorizes national banks to make investments "designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families (such as by providing housing, services, or jobs)."<sup>3</sup>

As implemented by the OCC in Part 24, an investment is "designed primarily to promote the public welfare" if it "primarily [benefits] low- and moderate-income individuals, low- and moderate-income areas or other areas targeted for redevelopment . . . by providing . . . affordable housing . . . [e]quity or debt financing for small businesses . . . [a]rea revitalization or stabilization; or . . . [o]ther activities, services, or facilities that primarily promote the public welfare."<sup>4</sup>

Part 24 permits a national bank to invest in a CDC—which is defined as "a corporation established by one or more insured financial institutions, or by insured financial institutions

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<sup>3</sup> 12 U.S.C. § 24 (Eleventh).

<sup>4</sup> 12 CFR 24.3(a). In effect, Part 24 defines the statutory phrase "designed primarily to promote the public welfare" by reference to the persons or areas the investment benefits and the type of activity the investment supports.

and other investors, to make one or more investments that meet [Part 24's criteria for public welfare investments].”<sup>5</sup>

Neither the statute nor Part 24 specifically defines the portion of a bank's investment that must satisfy the criteria for public welfare investments; however, the statute provides that such an investment must be designed “primarily to promote the public welfare.” Thus, the meaning of the term “primarily” is raised by the Bank's investment proposal, particularly because the Bank has represented that a significant portion, but not necessarily all, of MCDC's activities, over time, will satisfy the requirements of Part 24. Neither the statute or its legislative history, nor Part 24, addresses the meaning of the term, “primarily.”

Under standard principles of statutory construction, if a term is not defined in the statute or its legislative history, the term should be interpreted in accordance with its “ordinary and contemporary meaning.”<sup>6</sup> The ordinary and contemporary meaning of “primarily” is “principally” or “chiefly.”<sup>7</sup> Clearly, if a majority of a CDC's activities qualify as activities that promote the public welfare under Part 24, the investment in the CDC would qualify under the “primarily to promote the public welfare” standard.

This “majority” standard is consistent with the meaning assigned to the word “primary” in other contexts where the term is used in connection with the community development investment activities of national banks.<sup>8</sup> For example, under the interagency regulations implementing the Community Reinvestment Act (“CRA”), the OCC assesses the record of national banks in making “qualified investments,” which are defined as those that have community development as their “primary purpose.”<sup>9</sup> The phrase “primary purpose” is not defined in the CRA regulations, but the federal financial supervisory agencies have stated

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<sup>5</sup> 12 C.F.R. § 24.2(c).

<sup>6</sup> See Norman J. Singer, *Sutherland Statutory Construction* (“Sutherland”) § 47.28.

<sup>7</sup> See *Webster's II New College Dictionary* (1995).

<sup>8</sup> In other contexts, as well, courts have concluded that phrases such as “primary” and “primarily” connote at least a majority. See, e.g., *Donovan v. Bereuter's, Inc.*, 704 F.2d 1034, 1036 (8th Cir. 1983); *Deltide Fishing & Rental Tools, Inc. v. U.S.*, 279 F. Supp. 661, 670 (E.D. La. 1968).

In other cases, some courts have determined that the term “primarily” does not necessarily mean more than 50 percent. These cases have held that an activity may be considered a primary activity if it is the largest of several activities conducted by an entity. Roughly speaking, this case law adopts a “plurality” standard rather than a “majority” standard. See *Gragg v. Cayuga Indep. Sch. Dist.*, 539 S.W.2d 861, 869 (Tex. 1976); *Indus. Refrigeration & Equip. Co. v. State Tax Comm'n*, 408 P.2d 937, 940 (Ore. 1965).

<sup>9</sup> 12 CFR 25.12(s).

generally that the phrase would commonly be understood to mean that the “main purpose” of the investment activity is community development.<sup>10</sup>

As indicated in written and oral representations by the Bank, a significant portion of the activities of MCDC will benefit low- and moderate-income individuals or areas, or other areas targeted for redevelopment. Indeed, the Bank has represented that all of MCDC’s current investment portfolio consists of investments in LIHTC projects, benefitting low-income individuals. The Bank anticipates that future direct equity investments at the project level, whether to be held for the account of MCDC or the Bank, or to be syndicated out to interested parties, will be in projects that qualify for LIHTCs or in other tax credit programs designed to benefit low- and moderate-income individuals or areas, or other areas targeted for redevelopment. The Bank and MCDC will analyze each investment for compliance with the requirements of Part 24. To the extent that an investment does not qualify under Part 24, such investment will be categorized as non-qualifying. The Bank represents that the level of non-qualifying investments will be monitored to ensure that a majority of MCDC’s investments will be public welfare investments.

In addition to making investments for its own account, the Bank will also engage in providing services that will help other investors find suitable state tax credit investments. The Bank represents that the Clearinghouse’s additional activities as “finder,” financial intermediary, and advisor to investors and purchasers of tax credits (described above), will primarily benefit low- and moderate-income individuals or areas, or areas targeted for redevelopment in two ways. First, the Clearinghouse activities will directly increase the initial investment in tax credit-supported activities and investments by raising awareness of the programs among potential investors or contributors and by helping to bring investors together with appropriate projects or activities in which to invest or contribute. Second, the Clearinghouse will act as a market-maker, creating an efficient secondary market in tax credits, thereby promoting additional investments designed primarily to promote the public welfare. According to the Bank, in the

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<sup>10</sup> See OCC Interpretive Letter No. 702 (February 13, 1996). For purposes of the CRA regulation, the federal financial supervisory agencies also have proposed an interpretation of the phrase “primary purpose” under which an investment could qualify under either a simplified threshold test or an alternative approach for finding the requisite primary community development purpose. The threshold test essentially adopts the “majority” standard: if a majority of the dollars or beneficiaries of the activity are related to one or more of the community development purposes listed in the regulation, then the activity will be considered to possess the requisite primary purpose of community development.

Under the alternative approach to the threshold test, an activity could be considered to have a primary community development purpose even if the measurable portion of any benefit bestowed or dollars applied to the community development purpose is less than a majority of the entire activity’s benefits or dollar value, so long as (1) the express, bona fide intent of the activity is primarily one or more of the enumerated community development purposes; (2) the activity is specifically structured to achieve the expressed community development purpose; and (3) the activity accomplishes or is reasonably certain to accomplish the community development purpose. See Community Reinvestment Act: Interagency Questions and Answers Regarding Community Reinvestment, 62 Fed. Reg. 52,105, 52,108-09 (Oct. 6, 1997) (Proposed Q&A 7 addressing 12 C.F.R. §§ \_\_.12(i) and 563e.12(h)).

past, many of the state tax credit programs have been underutilized. The Clearinghouse will increase usage of these programs and thereby increase investment in the underlying community development related projects and causes.

As with the equity investments made by MCDC, the Bank represents that all Clearinghouse activities will be monitored to ensure that a majority of such activities help to promote the public welfare as defined in 12 C.F.R. § 24.3(a).<sup>11</sup> Therefore, regardless of the relative weight of the two types of activities of MCDC (i.e., direct investments and Clearinghouse services), a majority of the *total* activities of MCDC will have a public welfare purpose, as that is described in 12 U.S.C. § 24 (Eleventh) and Part 24. Thus, the OCC has determined that the Bank's investment in MCDC is an investment designed primarily to promote the public welfare.<sup>12</sup>

### **B. Other requirements of 12 C.F.R. § 24.3**

Section 24.3 also requires that a bank be able to demonstrate that it is not reasonably practicable to obtain other private market financing for the proposed investment, the extent to which the investment benefits communities otherwise served by the bank, and that there is community support for or participation in the investment.<sup>13</sup>

In support of its showing that it is not reasonably practical to obtain other private market financing for the proposed investment, the Bank indicates, because the investment is in an ongoing enterprise, the success of which is dependent upon the specific expertise and knowledge of the Bank, MCDC, and their respective employees, the appropriate investor is the Bank. Further, there is no other private entity (a clearinghouse) currently in existence in the Bank's market area. In addition, as mentioned above, many of the underlying public welfare projects supported by state tax credit programs, which MCDC seeks to promote, have been consistently underutilized, evidencing the failure of the private capital market in the area.

MCDC, with its Clearinghouse, is intended to benefit the communities served by the Bank. The Bank's submission states that there is no present intention to serve communities outside of the markets served by the Bank or its affiliates.

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<sup>11</sup> Further, the Bank represents that it will monitor MCDC's purchases of tax credits to ensure that all purchased tax credits that do not arise out of projects, investments, or contributions that promote the public welfare, within the meaning of Part 24, when combined with non-qualifying investments, will be less than a majority of MCDC's total investments and credits.

<sup>12</sup> Since a majority of the investments and activities of MCDC will meet the Part 24 standard, the OCC is not making a determination at this time if other standards could be used to determine whether an investment meets the Part 24 requirements. *See, e.g., supra* note 10.

<sup>13</sup> 12 C.F.R. § 24.3(b)-(d).

Non-bank community support of the Bank's proposed investment in and startup of MCDC and Clearinghouse operations has, to this point, been very encouraging. The Clearinghouse concept has been discussed with local governments, community groups and civic leaders in most of the major markets to be served by the Bank and its affiliates. The Bank provided the OCC with a list of entities that have specifically indicated their support. Further, to the best of the Bank's knowledge, non-bank community groups, local governmental authorities and civic leaders in the affected communities have supported all the projects in which MCDC has invested to date. And, each of the projects underlying the tax credit investments of MCDC demonstrates community support from the State of Missouri in its approval as a tax credit project.

### **C. Investment limitations**

A bank's public welfare activities under 12 U.S.C. § 24 (Eleventh) are subject to certain percentage of capital limitations. Specifically, a bank's aggregate outstanding public welfare investments may not exceed five percent of its capital and surplus, unless the bank is at least adequately capitalized and the OCC determines, by written approval of a proposed investment, that a higher amount (up to ten percent) will pose no significant risk to the deposit insurance fund.

The Bank's aggregate Part 24 investments, after its proposed MCDC investment, will represent 1.57 percent of the Bank's capital and surplus. However, the Bank expects to increase the amount of its investment in MCDC in the future. The Bank has requested the OCC to approve in advance the Bank's investment of additional capital in MCDC, up to an amount that will not exceed, when aggregated with the Bank's other Part 24 investments, 10 percent of the Bank's capital and surplus.

To support its request for an increased Part 24 investment limit, the Bank represents that, historically, MCDC has generated after-tax profits. In addition, all equity investments at the project level are made by the CDC as limited partner, limited liability member, or on a limited liability basis, thereby capping any potential liabilities at the amount of the investment.

The OCC hereby approves the Bank's proposed initial investment in MCDC. Further, the OCC finds that an aggregate investment limit of up to 10 percent will pose no significant risk to the deposit insurance fund.<sup>14</sup> Based on this finding, the OCC approves, in advance, an increase in the amount of the Bank's aggregate investments under Part 24 through future investments in MCDC to an amount not to exceed 10 percent of the Bank's capital and surplus.

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<sup>14</sup> The OCC bases its determination on (1) the Bank's capitalization; (2) its CRA rating; (3) its CAMELS rating; and (4) the fact that the Bank is not under any enforcement orders.

### **III. Conclusion**

Based on the foregoing facts and analysis, and the representations made by the Bank in connection with the Bank's request for approval, we conclude that the Bank may invest in MCDC as an investment designed primarily to promote the public welfare, and may increase its investment in MCDC up to an amount which, when aggregated with all of the Bank's Part 24 investments, will at no time exceed 10 percent of the Bank's capital and surplus. Accordingly, this request for approval is granted.

If requested by the OCC, the Bank will provide reports concerning its investment in MCDC and MCDC's financial status, activities, and accomplishments. Copies of all reports submitted to the Community Development Division are to be forwarded to the Deputy Comptroller for Large Bank Supervision.

The opinions set forth in this letter are based on the information and representations provided to us by the Bank. Any substantial change in the nature or purpose of the Bank's investment, or in the purposes and activities of MCDC could result in a different opinion being rendered concerning the conformance of the Bank's investment with 12 U.S.C. § 24 (Eleventh) and 12 C.F.R. part 24.

If you have any further questions, please feel free to contact me at (202) 874-5200.

Sincerely,

/s/

Raymond Natter  
Acting Chief Counsel