



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

**Conditional Approval #304
April 1999**

March 5, 1999

Mr. John S. Rudman
Vice President
Citibank, N.A.
425 Park Avenue
New York, New York 10043

Re Application by Citibank, N.A. to invest in three Limited Liability Companies through an existing operating subsidiary
Application Control No. 1998-WO-08-0028

Dear Mr. Rudman:

This is in response to the operating subsidiary application ("Application") submitted by Citibank, N.A., New York, New York ("Citibank" or "Bank"). Pursuant to Section 5.34(e)(1) of the regulations of the Comptroller of the Currency ("OCC"), 12 C.F. R. § 5.34(e)(1), Citibank proposes to indirectly own a membership interest in three limited liability companies, TransPoint, L.L.C. ("TransPoint"), TransPoint Technology & Services, L.L.C. ("Technology"), and TransPoint Accounting, L.L.C. ("Jointco") (collectively, the "LLCs") and thereby engage in electronic bill payment and presentment services over the Internet. Citibank will hold its interest in the LLCs through an existing, wholly owned operating subsidiary, Citicorp Electronic Commerce Inc. ("CECI"). For the reasons discussed below, the application is approved, subject to the conditions set forth herein.

A. Background

By agreements dated August 31, 1998, CECI and MSFDC (a joint venture between Microsoft Corporation ("Microsoft") and First Data Corporation ("First Data") (collectively, "Owner Companies") agreed to form a joint venture that will offer electronic bill payment and presentment services over the Internet. The agreements contemplate the creation of two new limited liability companies: (1) TransPoint; and (2) Technology (whose members will be CECI and MSFDC).¹

¹ The agreements also contemplate the formation of Jointco as a subsidiary of Technology and TransPoint, to be owned equally by both. Therefore, Jointco will be indirectly owned by Citibank, through CECI, by TransPoint and Technology.

Through TransPoint and Technology, Citibank and MSFDC will offer electronic bill payment and presentment services over the Internet.

TransPoint is expected to have title to consumer contracts, trademarks and certain other intangible assets. Technology will act as a subcontractor to TransPoint and will perform payment and information processing services on behalf of TransPoint. Jointco, which exists for tax and accounting convenience, will not perform any services other than accounting services. In addition, the LLCs will rely upon the services of the Owner Companies and third party vendors. Pursuant to the LLC Agreements, TransPoint, Technology, and Jointco will perform adequate due diligence of all vendors with which each such company will do business to ascertain any such vendor's compliance with FFIEC guidance with respect to Year 2000 related issues.²

CECI will have a 5 percent membership interest in TransPoint and a 25 percent membership interest in Technology. CECI will obtain its interest in TransPoint in exchange for a capital contribution. MSFDC will be a 95 percent member of TransPoint, contributing goodwill and biller contracts. Both members of Technology will make an initial capital contribution to Technology composed of cash, intellectual property or other specified property. Upon making such capital contributions, CECI will have an initial membership interest of 25 percent of Technology and MSFDC will have a 75 percent membership interest. Profits and losses for each LLC will be shared in proportion to the members' proportional interests in the particular LLC. Both TransPoint and Technology will be individually managed by a Board of Directors. In the case of TransPoint, each Owner Company will be entitled to designate one director. In the case of Technology, each Owner Company will name two directors to its Board.

TransPoint initially will engage in one activity that provides a service to consumers, enabling them to electronically pay bills that TransPoint presents electronically. This activity has two components. The first component, bill presentment, allows sellers and service providers, such as utilities, to effect Internet presentment of bills directly to a customer's desktop computer. The second component, bill payment services, involves a return payment on presented bills which can also be electronically made and includes both remittance and posting to bank accounts. More specifically, the service operates in the following manner. Bills that would have been rendered in print form are produced in an electronic form and sent to the TransPoint Service Center. The Service Center consolidates bills from a number of billers so that consumers may view all their bills in one Web site. Consumers may

² Citibank represents that the LLCs internal data processing systems will be year 2000 ready within the time frames specified in OCC Advisory Letter 97-6 and other subsequent OCC issuances. The LLCs are performing due diligence to ensure that any and all third-party data processing service providers or purchased applications or systems it uses, including those provided by the Owner Companies, will be year 2000 compliant in accordance with OCC issuances. Further, the LLCs are conducting and will continue to conduct extensive testing on all external parties that interface with the LLCs, notably financial institutions and billers, to ensure they are year 2000 compliant. Moreover, pursuant to condition number four of this letter, the LLCs are subject to OCC supervision, examination, and regulation, including with respect to year 2000 readiness.

access their bills by visiting a single Web site which seamlessly lets them view bills produced from the Service Center. Consumers then review bills and schedule payments. Electronic remittance information is returned to the biller and payments are routed either directly to the biller or the biller's lockbox provider.

Citibank expects the LLCs to make their services available through a variety of channels including financial institutions' or other financial service providers' on-line banking programs and Internet gateways or portals such as the Microsoft Network (MSN) and Microsoft.com. The LLCs will also make their services available to consumers directly through their own Web site.³

Generally, for the bill presentment component, TransPoint will contract directly with billers. However, in some cases, TransPoint will enter into contracts with entities called biller service providers. These biller service providers will then act as subcontractors to TransPoint in the electronic bill presentment service. In both cases, the arrangement will take the form of a service agreement, which will contain contractual protections for TransPoint such as limits on liability and waivers of certain types of damages and warranties.

Although specific operational roles are not settled for the bill payment component, TransPoint will serve as an intermediary, subcontracting to third party vendors as necessary.⁴ If TransPoint receives funds in its own name, these funds will be held in a trust account pending payments settlement. TransPoint, however, expects that it will have no risk exposure in the clearing and settlement process for bill payment. TransPoint will use the ACH, or other such batch settlement to effect clearing and settlement, making payment to billers only after it has received final payment for funds from a consumer, or a consumer's financial services provider. Furthermore, TransPoint will have no contractual obligation to make any payment until it has received any required funds. Moreover, in the event any payment to a biller (whether accomplished via the ACH or other batch settlement) is

³ Under the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693, and Federal Reserve Board's implementing regulation, Regulation E (12 C.F.R. Part 205), TransPoint is required when dealing directly with consumers to provide a number of disclosures to consumers in writing, including error resolution procedures, fees and charges, change in terms notices, liabilities for unauthorized use, and service provider's liability. Citibank has represented that TransPoint will charge no fees to consumers for its services. In addition, Citibank has represented that TransPoint will provide any and all disclosures consistent with Regulation E to its direct consumers. Financial intermediaries will be responsible for providing such disclosure to those consumers who receive services indirectly from TransPoint. The Federal Reserve Board is in the process of amending Regulation E and issued an interim rule effective March 25, 1998, which authorizes electronic disclosure with consumer consent. The OCC expects that TransPoint will comply with the interim and final rules, including with respect to its plans to send EFTA disclosures to its direct consumers via electronic means.

⁴ The OCC expects that TransPoint will develop and implement a risk management plan that identifies all specific material risks and identifies mechanisms that it will use to manage and control those risks. The OCC will evaluate the adequacy of this risk management plan as part of its on-going supervision of the LLCs.

reversed for any reason, TransPoint's contract with the biller will permit TransPoint to initiate a debit entry to the biller's account.⁵

B. Analysis

A national bank may engage in activities that are part of or incidental to the business of banking by means of an operating subsidiary. 12 C.F.R. § 5.34. In a variety of circumstances, the OCC has permitted national banks to own, either directly, or indirectly through an operating subsidiary, a minority interest in an enterprise.⁶ The OCC has concluded that national banks are legally permitted to make a minority investment in a company provided four criteria or standards are met.⁷ These standards, which have been distilled from our previous decisions in the area of permissible minority investments for national banks and their subsidiaries, 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.*
- (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 its investment.*
- (3) 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.*

⁵ In connection with the services that it provides directly to customers or indirectly through financial intermediaries such as banks, TransPoint may have access to personal and private customer information, including financial and account information. In this regard, TransPoint has adopted a statement of Information Privacy Principles that governs the daily operations of the Internet bill presentment and payment service and the collection, retention, and use of personal and private customer information. Under the statement, TransPoint represents that it does not share such customer information with any third parties for any reason whatsoever, except to comply with appropriate legal and regulatory processes. Personal and private customer information will be maintained subject to established security, confidentiality, and accuracy standards intended to preclude unauthorized access or disclosure of customer information. TransPoint will require through contract that all business partners, including financial intermediaries that indirectly offer TransPoint's services to their customers, uphold the same standards for the protection and processing of personal and private customer information. Citibank represents that TransPoint will monitor compliance with the requirements in this statement through its internal audit program, will provide appropriate employee training and communication, and will take appropriate disciplinary measures to enforce the privacy commitments contained in the statement.

⁶ See, e.g., OCC Conditional Approval Letter No. 219 (July, 15, 1996).

⁷ See Interpretive Letter No. 692, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,007 (November 1, 1995), and OCC Interpretive Letter No. 694, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,009 (December 13, 1995).

(4) 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.

We conclude, as discussed below, that Bank's proposed acquisition of membership interests in LLCs satisfies these four criteria.

- 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*

OCC precedents on non-controlling ownership have recognized that the enterprise in which a national bank takes an equity interest must confine its activities to those that are part of, or incidental to, the business of banking. As described in greater detail above, Citibank represents that the LLCs will engage in electronic bill payment and presentment services over the Internet. These activities are part of the business of banking and permissible for national banks under 12 U.S.C. § 24 (Seventh).

Bill presentment involves the aggregation, storage, and transmission of billing information from businesses to their customers. It can be done in several ways.⁸ However, in this case, the LLCs will operate as an Internet-based consolidator of biller information so that customers of participating billers can obtain billing information from all their participating billing firms by accessing a single Web site. The LLCs will obtain charges and related information from billers and then provide an electronic system by which customers of billers can retrieve that information. The amount of information provided to customers of billers by the LLCs will vary and be determined largely by each participating biller. Some billers will elect to provide only summary information and payment execution, others may also provide bill details and other related information directly through the LLC and indirectly through hyperlinks from LLCs' Web site to the biller's Web site.

The OCC has found that electronic bill presentment is part of the business of banking.⁹ This conclusion is well supported by judicial and agency precedent. The Supreme Court has found that 12 U.S.C. §24(Seventh) permits a national bank to "do those acts and occupy those relations which are usual or necessary in making collections of commercial paper and other evidences of debt" for its customers.¹⁰ Similarly, the courts have recognized that "a traditional banking function [is]

⁸ See, e.g., Furst, Lang and Nolle "Technological Innovations in Banking and Payments," *OCC Quarterly Journal*, Vol. 17, No. 3 (Sept. 1998) at 27-28 and "Online bill presentment set to explode," *Online Banking Newsletter*, Vol. 2, Issue 32 (August 11, 1997).

⁹ See Conditional Approval No. 221 (Dec. 4, 1996) (national banks may establish and electronic gateway to support, among other things, electronic bill presentment).

¹⁰ *Miller v. King*, 223 U.S. 505, 510 (1912).

collecting and remitting funds for other parties.”¹¹ Thus, OCC has long held that billing and collecting services are permissible for national banks, whether done conventionally¹² or electronically.¹³ The OCC has also recognized that as part of an electronic collection or payments process, national banks may store and transmit information related to the underlying transactions such as electronic data interchange.¹⁴

The proposed bill payment function in this case involves not only the transmission of the payment order or electronic funds transfer from the customer to the appropriate party (e.g., the biller's bank) but also of the remittance information from the customer to the biller. Again there a number of different ways that this can be arranged.¹⁵ Clearly, the electronic transmission of payments orders with related information is part of the business of banking.¹⁶

Accordingly, the activities in which the LLCs will engage are part of the business of banking.¹⁷ Thus, 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 their investment*

¹¹ *Corbett v. Devon*, 12 Ill. App.3d 559, 299 N.E.2d 521, 529 (App. Ct. 1st Cir. 1973).

¹² OCC Interpretive Letter No. 712, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 81-027 (February 29, 1996) (billing and collection services for medical service providers); Unpublished Letter from Peter Liebesman, Assistant Director, Legal Advisory Services Division (August 27, 1985) (billing services).

¹³ OCC Interpretive Letter No. 836, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 81-290 (March 12, 1996) (data processing and electronic data interchange system to assist in the billing and collection for medical services); OCC Interpretive Letter No. 731, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 81-048 (July 1, 1996)(operation of electronic toll collection system).

¹⁴ OCC Interpretive Letter No. 836, *supra*; OCC Interpretive Letter No. 732, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 81-049 (May 10, 1996); OCC Interpretive Letter No. 653, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 83,601 (Dec. 22, 1994); OCC Interpretive Letter No. 419, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 85,643 (Feb. 16, 1988).

¹⁵ *See, e.g., Electronic Bill Payment/Presentation Business Practices: Draft for Public Comment*, Bill Payment Council, November 12, 1998 (<http://www.nacha.org/billpay>).

¹⁶ *See, e.g.,* OCC Interpretive Letter No. 653, *supra*.

¹⁷ Citibank represents and undertakes that the activities of the operating subsidiary will be conducted in accordance with OCC policies. In addition, each of the Agreements specifies that TransPoint, Technology, and Jointco will be subject to the examination, supervision, and regulation of the OCC.

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 limited liability company agreements ("Agreements") under which LLCs are to be formed contain provisions to ensure that LLCs will engage only in activities that are permitted for national banks and their subsidiaries. In particular, the Agreements provide that their respective LLC will not engage in an activity which is impermissible for a national bank or an operating subsidiary thereof. Moreover, in the event the OCC determines that an activity is impermissible, each LLC will have 30 days to cease engaging in the activity, modify the activity to comply with the OCC's determination, or determine to continue to engage in the activity. In the event the last option is selected, CECI has represented that it will withdraw from each LLC.

Accordingly, the second standard is satisfied.

3. *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*

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 bank's investment not expose it to unlimited liability.

With respect to the third standard, Citibank's loss exposure is limited, and CECI does not have open-ended liability for the obligations of the LLCs. Bank's risk of loss will be limited by both the corporate veil of the operating subsidiary and by Delaware law. As a legal matter, investors in a Delaware limited liability company do not incur liability with respect to the liabilities or obligations of the limited liability company solely by reason of being a member or manager of the limited liability company. Del. Code Ann. Tit. 6, § 18-303 (Michie Cum. Supp. 1996).¹⁸ In addition, the Agreements provide that: (i) no member of LLCs shall have the authority to bind an LLC of which it is a member; and (ii) the members of LLCs are not liable for the debts, obligations or liabilities of an LLC of which it is a member. Thus, the Bank's loss exposure for the liabilities of the LLCs will be limited by statute and by the Agreements establishing LLCs.

b. *Loss exposure from an accounting standpoint*

¹⁸ In addition, the Agreements establishing LLCs specifically provide that none of the members shall be personally liable for any debts, obligations or liabilities of LLCs.

In assessing a bank's loss exposure as an accounting matter, the OCC has previously noted that the appropriate accounting treatment for a bank's less than 20 percent ownership share or investment in a corporate entity is to report it as an unconsolidated entity under the equity or cost method of accounting. The Bank has advised the OCC that the accounting treatment for its 5 percent investment in TransPoint (through CECI) is under the cost method of accounting. Under the cost method of accounting, losses recognized by the investor will not exceed the amount of the investment (including extensions of credit or guarantees, if any) shown on the investor's books.

Additionally, the OCC has previously noted that the appropriate accounting treatment for a bank's 20 to 50 percent investment in a company is to report it as an unconsolidated entity under the equity method of accounting. Bank will account for its 25 percent investment in Technology (through CECI) under the equity method of accounting. Under the equity method of accounting, unless the bank has guaranteed any of the liabilities of the entity or has other financial obligations to the entity, losses are generally limited to the amount of the investment, including loans and other advances shown on the investor's books. Thus, Bank's loss, through CECI, from an accounting perspective would be limited to the amount invested in Technology and Bank will not have any open-ended liability for the obligations of Technology.

Accordingly, for legal and accounting purposes, the Bank's potential loss exposure, through CECI, should be limited to the amount of CECI's investment in the LLCs. Since that exposure will be quantifiable and controllable, the third standard is satisfied.

4. *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 been judicially construed to mean "convenient or useful."¹⁹ Our precedents on bank non-controlling investments 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.²⁰

¹⁹ See *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972).

²⁰ See, *e.g.*, Interpretive Letter No. 543, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,255 (February 13, 1991); Interpretive Letter No. 427, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L.

In this instance, the proposed share ownership by Citibank is not merely evidence of a passive relationship, but is rather the result of the strategic business relationship created between Citibank and Owner Companies as evidenced by the organization of the LLCs. Citibank and Owner Companies plan to develop a fully-integrated electronic bill payment and presentment system to be offered to businesses, banks, and other customers. The ownership interests to be held by Citibank in the LLCs provide the method of involving Citibank in the provision of the bill payment and related services contemplated by this application, and of compensating Citibank for what it brings to the LLCs. In addition, the Bank's investment in the LLCs will be convenient and useful to Citibank in allowing it to provide additional services to its customers, as well as to gain additional expertise in the provision of banking services over the Internet, in general, and electronic bill payment and presentment, in particular. Thus, the investment is not a mere passive investment unrelated to Bank's banking business.

Accordingly, the fourth standard is satisfied.

C. Conclusion

Based upon the information and representations you have provided, and for the reasons discussed above, we conclude that the Bank may invest in the LLCs,²¹ and that the application are approved subject to the conditions:

1. The LLCs may engage only in activities that are part of, or incidental to, the business of banking;
2. The Bank, through CECI, will have veto power over any activities of the LLCs that are inconsistent with Condition 1, or will withdraw from the LLCs in the event they engage in an activity inconsistent with Condition 1.

Rep. (CCH) ¶ 85,651 (May 9, 1988); Interpretive Letter No. 421, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,645 (March 14, 1988).

²¹ While not currently incorporated in the service, the joint venture plans to add two additional activities. One activity would allow businesses to present bills to other businesses. A second activity would allow consumers to use the service to pay any bill, even bills not initially presented through the service. Citibank seeks authority to retain its investment in the venture upon its commencement of these activities. However, the OCC currently does not have sufficient information on these activities to determine whether to approve such activities. Accordingly, this letter considers only the pending application by Citibank to make minority investments in LLCs as they are currently structured. The OCC will consider any additional activities pursuant to 12 C.F. R. § 5.34 when all of the facts and circumstances surrounding them are provided by Citibank.

3. The Bank will account for their investment in the LLCs under the equity or cost method of accounting; and
4. The LLCs will be subject to OCC supervision, regulation, and examination.²²

The conditions of this approval are “condition[s] 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. As such, the conditions are enforceable under 12 U.S.C. § 1818.

If you have any questions regarding this decision, please contact John W. Graetz, Licensing Expert (Financial Analyst), in Bank Organization and Structure at (202) 874-5060, or John Soboeiro, Senior Attorney, Bank Activities and Structure at (202) 874-5300.

Sincerely,

/s/

Julie L. Williams
Chief Counsel

²² Elements of the services to be provided by the LLCs will be performed by the Owner Companies. These services will constitute activities pursuant to the Bank Service Company Act. (12 U.S.C. § 1861 *et seq.* (“BSCA”)). To the extent that Owner Companies perform these services for banks through the LLCs, Owner Companies would be subject to federal banking regulation and examination to the same extent as if such services were being performed by banks themselves. *See* BSCA § 1867(c).