



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

April 8, 1999

Conditional Approval #308
May 1999

Mr. E. Jay Finkel
Porter, Wright, Morris & Arthur
1667 K Street, N.W., Suite 1100
Washington, D.C. 20006-1605

Re: Application by Huntington National Bank, Columbus, Ohio - Acquisition of Joint Venture Membership Interest in Limited Liability Company Providing Title Insurance Agency Services
Application Control Number: 1999-CE-08-0009

Dear Mr. Finkel:

This is in response to the application filed by Huntington National Bank, Columbus, Ohio ("Bank"), requesting approval to acquire and hold, by means of its existing wholly-owned operating subsidiary, Huntington Insurance Agency Services, Inc. ("Subsidiary"), a 49 percent non-controlling interest in Mound and Fourth Title Agency, Ltd. ("LLC"), a joint venture formed as a for-profit Ohio limited liability company. For the reasons set forth below, the application is approved subject to the conditions set forth below.

Proposal

The current owners of the LLC are Old Republic Title Agency of Columbus, Inc., Columbus, Ohio ("ORTA"), which holds the majority interest, and Conestoga Holding Co., Columbus, Ohio ("CHC"), which holds the minority interest. The Subsidiary would acquire CHC's minority interest in the LLC.¹

The headquarters of the LLC will be located in Winchester, Ohio, a place in which the Bank has a branch office and the population of which place does not exceed five thousand inhabitants as of the last decennial census. The LLC will be licensed as a title insurance agency by the Ohio Department of

¹ The Bank will have the option under the LLC Agreement to purchase the interest of ORTA, and thereby could elect to become a 100 percent owner of the LLC. However, the Bank or Subsidiary do not presently intend to exercise that option or make any determination about exercising this option.

Insurance. The Subsidiary will not engage in the new activities requested in this approval unless and until the license has been obtained.

The LLC expects to offer both lender and owner title insurance policies as agent of title companies admitted to do business in the states offered. Title insurance agency services will be rendered by the LLC in connection with residential and commercial mortgage loans made by the Bank or its affiliates or by third party lenders, and also in cases where no loan is involved. Other services provided by the LLC will consist of residential and commercial title abstracting, closing, and escrow services, mostly in connection with loans made by the Bank, the Bank's affiliates, and other lenders.

Analysis

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. A national bank may engage in activities that are part of or incidental to the business of banking by means of an operating subsidiary. *See* 12 C.F.R. § 5.34(d)(1). Further, the OCC has permitted national banks to own, either directly or indirectly through an operating subsidiary, a non-controlling interest in an enterprise. The enterprise might be a limited partnership, a corporation, or a limited liability company.² In recent interpretive letters, the OCC has concluded that national banks are legally permitted to make a non-controlling investment in a limited liability company provided four criteria or standards are met.³ These standards, which have been distilled from our previous decisions in the area of permissible non-controlling investments for national banks and their subsidiaries, are:

- (1) the activities of the entity or 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 or entity 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; and

² *See also* 12 C.F.R. § 5.36(b). National banks are permitted to make various types of equity investments pursuant to 12 U.S.C. § 24(Seventh) and other statutes.

³ *See* Interpretive Letter No. 692, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,007 (November 1, 1995), and No. 694, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,009 (December 13, 1995). In other recent letters, the OCC has permitted national banks to make a non-controlling investment in an enterprise other than an LLC, provided the investment satisfies these four standards. *See, e.g.*, Interpretive Letter No. 697, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,012 (November 15, 1995); Interpretive Letter No. 705, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,020 (October 25, 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.

Based upon the facts presented, the Bank's proposal satisfies these four standards.

1. *The activities of the entity or enterprise in which the investment is made must be limited to activities that are part of, or incidental to, the business of banking.*

Our precedents on non-controlling ownership have recognized that the enterprise in which the bank holds an interest must confine its activities to those that are part of, or incidental to, the conduct of the banking business.⁴

The LLC will engage in several activities. It will act as agent in the sale of title insurance in connection with extensions of credit by itself, by any subsidiary or other affiliate, or by unaffiliated lenders, and in situations where title insurance is being sought without financing involved. Twelve U.S.C. § 92 authorizes a national bank located and doing business in a place having a population of less than 5,000 to act as the agent for fire, life, or any other insurance company. The LLC's permanent office will be located in a place of less than 5,000.

The Bank has represented that the insurance activities will be conducted in compliance with 12 U.S.C. § 92, Interpretive Letter No. 753, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,107 (November 4, 1996) (the "First Union Letter"), Advisory Letter 96-8 (insurance and annuity sales activities, October, 8, 1996), the Interagency Statement on Retail Sales of Nondeposit Products (February 15, 1994) (sale of nondeposit investment products), the anti-tying provisions of the Bank Holding Company Act (to the extent applicable), and the Real Estate Settlement Procedures Act.

The LLC will provide closing and escrow services, mostly in connection with loans made by the Bank, its affiliates, and third party lenders. The Bank has represented that the Subsidiary and the LLC will provide these services on the same terms and conditions as the OCC approved for another Bank subsidiary. *See* OCC Corporate Approval No. 99-06 (January 29, 1999) (The Huntington National Bank, Columbus, Ohio: Application for Additional Powers for Operating Subsidiary Engaged in the Conduct of Title Insurance Activities).

The LLC will also be engaging in residential and commercial title abstracting services, *i.e.*, the preparation of reports of chains of title drawn from public records, but without interpretation,

⁴ *See, e.g.*, Interpretive Letter No. 380, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,604 n.8 (December 29, 1986) (since a national bank can provide options clearing services to customers it can purchase stock in a corporation providing options clearing services); Letter from Robert B. Serino, Deputy Chief Counsel (November 9, 1992) (since the operation of an ATM network is "a fundamental part of the basic business of banking," an equity investment in a corporation operating such a network is permissible).

conclusions, or expressions of opinion as to the validity of title. These services will be provided in connection with loans made by the Bank or other lenders, and occasionally in cases where no loan is involved. The Bank has represented that it will engage in the title abstracting activities to the same extent and subject to the same terms and limitations as was approved in OCC Corporate Decision 98-26 (April 21, 1998) (title and abstracting activities).

Thus, we conclude that all the proposed activities to be conducted by the LLC are part of, or incidental to, the business of banking. Therefore, the first standard is met.

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.*

The activities of the enterprise in which a national bank may invest must be part of, or incidental to, the business of banking not only at the time the bank first acquires its ownership, but for as long as the bank has an ownership interest. This standard may be met if the Bank is able to exercise a veto power over the activities of the enterprise, or is able to dispose of its interest.⁵

The Bank has represented that the LLC Operating Agreement will be revised so that the LLC may only engage in activities that are “part of or incidental to the business of banking....” Furthermore, the consent of all members will be required before the LLC engages in any new activities. Finally, the Bank and the Subsidiary will be authorized to withdraw from the LLC upon notice to the other member. Therefore, 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 the national bank’s investment not expose it to unlimited liability.

As a legal matter, investors in an Ohio 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 company.⁶ The revised LLC Operating Agreement will not contain any clauses making the

⁵ See, e.g., Interpretive Letter No. 711, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-026 (February 3, 1996); Interpretive Letter No. 625, *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,507 (July 1, 1993).

⁶ See Ohio Rev. Code § 1705.48.

Bank liable for any obligations of the LLC, nor will the Bank guarantee or otherwise assume any liabilities of the LLC. Furthermore, the Bank cannot be obligated to make additional contributions of capital to the LLC or to be liable for the return of any part of the capital contribution of another member of the LLC. Additionally, the operating subsidiary structure itself inherently provides for limitations on liability. In this instance, all of the Bank's investment will be made through the Subsidiary. Thus, the Bank's loss exposure for the liabilities of the LLC will be limited solely to its capital contribution.

b. Loss exposure from an accounting standpoint

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 20-50 percent ownership share of investment in a limited liability company is to report it on an unconsolidated basis. Under the equity method of accounting, unless the bank has extended a loan to the entity, guaranteed any of its liabilities or has other financial obligations to the entity, losses are generally limited to the amount of the investment shown on the investor's books.⁷

The Bank will account for its investment in the LLC under the equity method of accounting. Thus, the Bank's loss from an accounting perspective will be limited to the amount invested in the LLC, and the Bank will not have any open-ended exposure to the liabilities of the LLC.

Therefore, for both legal and accounting purposes, the Bank's potential loss exposure relative to the LLC should be limited to the amount of its investment. Thus, the third standard is satisfied.

4. The investment must be convenient and 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 that is not an operating subsidiary of the bank 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."⁸ Our precedents on bank non-controlling investments have indicated that the investment must be convenient or useful to

⁷ See generally, Accounting Principles Board, Op. 18 § 19 (1971) (equity method of accounting for investments in common stock). Interpretive Letter No. 692, *supra*.

⁸ See *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972).

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.⁹

By purchasing the minority interest in the LLC, the Bank will be able to provide title insurance services to its Ohio customers that it otherwise cannot due to current Ohio legal restrictions. The investment will permit the Bank to offer Ohio customers the same services that are offered to its customers in other states and will enable it, together with its affiliates, to offer more complete real estate financing services. For these reasons, the investment is convenient and useful to the Bank in carrying out its business and is not a mere passive investment. Thus, the fourth standard is satisfied.

Conclusion

Based upon the information and representations you have provided, and for the reasons discussed above, we conclude that the Bank may, through the Subsidiary, acquire and hold a non-controlling minority interest in the LLC in the manner and as described herein, subject to the following conditions:

1. the LLC will engage only in activities that are part of, or incidental to, the business of banking;
2. the Bank will have veto power over any activities and major decisions of the LLC that are inconsistent with condition number one, or will withdraw from the LLC in the event it engages in an activity that is inconsistent with condition number one;
3. the Bank will account for its investment in the LLC under the equity method of accounting; and
4. the LLC 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 and, as such, may be enforced in proceedings under applicable law.

This approval is granted based on a thorough review of all information available, including the representations and commitments made in the application and by Bank representatives.

⁹ See, e.g., Interpretive Letter No. 697, *supra*; 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. 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); Interpretive Letter No. 380, *supra*.

If you have any further questions, you may contact Christina N. Trojan-Masnyk, Senior Attorney, at (312) 360-8805, or Travis Wilbert, Senior Corporate Analyst, at (312) 360-8866.

Sincerely,

/s/

Julie L. Williams
Chief Counsel