



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

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Re Application by Chase Manhattan Bank USA, N.A., Wilmington, Delaware, First Union National Bank, Charlotte, North Carolina, and Wells Fargo Bank, San Francisco, California to invest in a limited liability company through *de novo* and existing operating subsidiaries.
Application Control No. 1999-WO-08-014

Dear Messrs. Semmelman, Andersen, and White:

This is in response to the operating subsidiary application submitted by Chase Manhattan Bank USA, N.A., Wilmington, Delaware ("Chase"), First Union National Bank, Charlotte, North Carolina ("First Union"), and Wells Fargo Bank, San Francisco, California ("Wells") (collectively "Banks"). Pursuant to Section 5.34(e)(1) of the regulations of the Office of the Comptroller of the Currency ("OCC"), 12 C.F.R. § 5.34(e)(1), Banks propose to indirectly own membership interests in a limited liability company, Spectrum EBP, L.L.C. ("Spectrum") and thereby engage in electronic bill presentment services over the Internet. In addition, Chase and Wells also are applying to establish *de novo* operating subsidiaries which will acquire and

hold their respective non-controlling minority interests in Spectrum (collectively, "Applications").¹ For the reasons discussed below, the Applications are approved, subject to the conditions set forth herein.

A. *Background*

In a letter of intent signed on March 26, 1999, as subsequently amended, and a public announcement dated June 23, 1999, Banks agreed to form a joint venture that will offer electronic bill presentment services over the Internet. This arrangement contemplates the creation of a limited liability company, Spectrum, to facilitate electronic bill presentment services across bank participants. Participating banks will make equal capital investment in Spectrum and each will be represented on Spectrum's Board of Managers.

Spectrum intends to develop a "switch" through which bank customers and others will be able to receive bills electronically from a variety of sources. Spectrum will develop standards for the electronic presentation of billing information, create a biller file and biller directory, and enter into relationships and arrangements with a variety of entities in order to receive bills from billers and route bills to a large number of customers.

In general, Spectrum will contract with participating banks. In turn, banks will establish relationships with biller service providers ("BSPs") and customer service providers ("CSPs"). The BSPs may be companies generating bills for goods or services rendered, or may be companies collecting and aggregating information from billers, including financial institutions. In some cases, the BSPs may be affiliates of participating banks. In addition to delivering bills from outside BSPs, banks and their affiliates will submit certain bills through Spectrum.² CSPs, companies that aggregate bills to deliver to retail customers, may be bank affiliates or independent businesses. Spectrum will ultimately deliver billing information from the BSPs through CSPs. In turn, the CSPs will convey the electronic billing information to Internet websites accessible to the ultimate recipient of the bill. In general, customers will access their bills at websites of financial institutions that have relationships with the CSPs.³

¹ Chase Manhattan Bank USA, N.A., and Wells Fargo Bank will hold their respective interests in Spectrum through two wholly owned *de novo* subsidiaries, Chase EBP Member, Inc. and Wells Fargo Bill Presentment Venture Member, LLC. First Union National Bank will hold its interest in Spectrum through an existing wholly owned subsidiary, First Union Commercial Corporation.

² For those customers that have relationships with more than one Spectrum bank participant, banks will use Spectrum to route bills between banks. For example, a Chase Mortgage bill can be transmitted electronically to a customer with a bill payment relationship with First Union. On the other hand, if the Chase Mortgage Customer has a bill payment relationship with Chase, Spectrum will not transmit the bill.

³ Spectrum may convey bills to some customers through the websites of Internet portals or related businesses, rather than those of financial institutions. Note that Spectrum will convey summary information only. If

In addition to acting as the switch, Spectrum will translate the billing information into electronic format. Spectrum will provide summary billing information only, with detailed information residing with the biller or BSP. Although Spectrum will establish relationships with a number of CSPs, each CSP would have access only to that information that related to their own customers.⁴ In general, the relationship between Spectrum and the CSPs would be invisible to the customers of the CSPs.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

a customer needs detailed information about a bill, the customer will follow the instructions for contacting the biller provided through the bill payment website.

⁴ In connection with the services that it provides, Spectrum may have access to personal customer information, including financial and account information. Banks have represented that Spectrum will operate a closed network so that those participants having access to the Spectrum will use dedicated lines to connect to Spectrum's Internet servers. There will be no access to the Internet from within Spectrum's network. Internet access will be employed between CSPs and their customers, and digital certificates will be used to verify that the server is the appropriate server. Should Spectrum decide to change this procedure, appropriate authentication controls similar to these used by Banks to process their own proprietary data will be developed and installed by Spectrum. In addition, Spectrum will adopt a Statement of Policy on the Privacy of Personally Identifiable Customer Information that governs the operations of the Internet bill presentment service and the collection, retention, and use of personal customer information. Under the statement, Spectrum represents that it does not share such customer information with any third parties except: where the information is needed in order for Spectrum to complete a transaction initiated by or to complete an obligation to a BSP or CSP customer; in response to a subpoena, where required by law or an order of a court or an arbitrator, or in connection with a lawful investigation or examination; and with Spectrum's subcontractors, processors, auditors or other third parties that assist the Spectrum in fulfilling its contractual obligations to a BSP or CSP, but in such event the Company requires such third parties to abide by the confidentiality principles set forth in this statement. Spectrum will advise its employees, subcontractors, processors and auditors of the privacy principles adopted by Spectrum. Spectrum will require subcontractors, processors, auditors or other third parties to take appropriate measures to enforce the privacy responsibilities contained in its Statement of Policy. Spectrum will monitor compliance with the requirements in this statement through its internal audit program, will limit its employees' and others' access to information, will maintain and require subcontractors and others to maintain security standards and procedures intended to preclude unauthorized access to or disclosure of information.

⁵ The OCC expects that Spectrum 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 Spectrum.

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

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.*
- (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 Banks' proposed acquisition of membership interests in Spectrum 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, Banks represent that Spectrum will engage in electronic bill presentment services over the Internet. This activity is 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, Spectrum will collect billing information from BSPs, put the information into electronic format, and make the summary billing information available in an electronic format to CSPs for ultimate distribution to their

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).

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).

respective customers. Customers of the CSPs would access the Internet web site of the CSP, and be able to review their billing information.

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] 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

Accordingly, the activities in which Spectrum will engage are part of or incidental to the business of banking. 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*

⁹ See: Conditional Approval No. 304 (March 5, 1999) (national banks may invest in an LLC that will offer electronic bill presentment and payment services); Conditional Approval No. 221 (Dec. 4, 1996) (national banks may establish an electronic gateway to support, among other things, electronic bill presentment).

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

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).

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 agreement ("Agreement") under which Spectrum is to be formed contains provisions to ensure that Spectrum will engage only in activities that are permitted for national banks and their subsidiaries. In particular, the Agreement provides that Spectrum will not engage in an activity which is impermissible for a national bank or an operating subsidiary thereof. The Agreement also permits any member to withdraw if the member reasonably determines that Spectrum is engaged or proposes to engage in activities that are not legally permissible for a national bank or a subsidiary thereof. Moreover, in the event the OCC determines that an activity is impermissible, Spectrum will cease to engage in that activity. Spectrum also will obtain OCC approval, to the extent required, prior to the formation of any subsidiary or the commencement of any new activity.¹⁵ Finally, the Agreement provides that the provisions of the Agreement limiting the activities to those permissible for a national bank or subsidiary may not be amended without the unanimous consent of the members.

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, Banks' loss exposure is limited, and Banks do not have open-ended liability for the obligations of Spectrum. Banks' 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). In addition, the Agreement provides that: (i) no member of Spectrum shall have the authority to bind Spectrum; and (ii) the members of Spectrum are not liable for the debts, obligations or liabilities of Spectrum. Thus,

¹⁵ Banks represent that the agreement establishing Spectrum will specifically acknowledge that the business and operations of Spectrum will be subject to the examination, supervision, and regulation of the OCC.

the Banks' loss exposure for the liabilities of Spectrum will be limited by statute and by the Agreement establishing Spectrum.

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 to 50 percent investment in a company is to report it as an unconsolidated entity under the equity method of accounting. Banks each will account for their investments in Spectrum 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, Banks' losses from an accounting perspective would be limited to the amount invested in Spectrum and Banks will not have any open-ended liability for the obligations of Spectrum.

Accordingly, for legal and accounting purposes, the Banks' potential loss exposure should be limited to the amount of their investment in Spectrum. 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."¹⁶ 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.¹⁷

¹⁶ See *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972).

¹⁷ 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. 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).

In this instance, the proposed share ownership by Banks is not merely evidence of a passive relationship, but is rather the result of the strategic business relationship created between Banks, as evidenced by the organization of Spectrum. Banks plan to develop the bill presentment business, enhancing the products and services the Banks offer to their customers, and facilitating and enhancing the role the Banks intend to play in electronic commerce. Banks plan for Spectrum to develop a fully-integrated electronic bill presentment system through which Banks and their affiliates will participate. Thus, the investment is not a mere passive investment unrelated to Banks' 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 Chase and Wells may establish their operating subsidiaries, each of the three Banks may hold, through their operating subsidiaries, noncontrolling interests in Spectrum,¹⁸ and that the Applications are approved subject to the following conditions:

1. Spectrum may engage only in activities that are part of, or incidental to, the business of banking;
2. The Banks will have veto power over any activities of Spectrum that are inconsistent with Condition 1, or will withdraw from Spectrum in the event they engage in an activity inconsistent with Condition 1.
3. The Banks will account for their investment in Spectrum under the equity method of accounting; and
4. Spectrum will be subject to OCC supervision, regulation, and examination.

The conditions of this approval are "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. As such, the conditions are enforceable under 12 U.S.C. § 1818.

¹⁸ While not currently incorporated in the service, the Banks plan to add additional activities to those proposed for Spectrum. These activities could include electronic bill payment services and developing settlement services in connection therewith. The OCC currently does not have sufficient information on these activities to determine whether to approve them. Accordingly, this letter considers only the pending application by Banks to make minority investments in Spectrum as it is 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 Banks.

If you have any questions regarding this decision, please contact Beverly Evans, Senior Licensing 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
First Senior Deputy Comptroller and Chief Counsel