



Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

**Conditional Approval #338
December 1999**

November 10, 1999

Bruce Moland, Esq.
Vice President and Assistant General Counsel
Law Department, Wells Fargo & Company
Norwest Center
Sixth Street & Marquette Avenue
Minneapolis, Minnesota 55479

Re: Application of Wells Fargo Bank, N.A., San Francisco, California,
to Acquire Norwest Mortgage, Inc., as an Operating Subsidiary
Application Control Numbers: 99-ML-08-0016 & 99-ML-12-0412

Dear Mr. Moland:

This responds to the application of Wells Fargo Bank, N.A. (the "Bank") to engage in mortgage banking, loan closing, escrow, appraisal, property inspection, and related activities through the acquisition of Norwest Mortgage, Inc. ("NMI") and the subsidiaries and interests in joint ventures owned by NMI. For the reasons set forth below, the Office of the Comptroller of the Currency ("OCC") approves the Bank's application, subject to the conditions below.

BACKGROUND

NMI is engaged in mortgage banking and related activities on a nationwide basis. It conducts business directly and through its subsidiaries (the "other subsidiaries"). It also participates in a number of joint ventures with other parties. NMI is currently an indirect subsidiary of Wells Fargo & Company ("Wells Fargo"). The Bank is also an indirect subsidiary of Wells Fargo. Thus, this transaction is only an internal reorganization of existing business activities within the company. The transaction will be in the form of a contribution of the common stock of NMI to the Bank, thereby making NMI an operating subsidiary of the Bank.

NMI and the other subsidiaries engage in the following activities: (1) *Mortgage banking*. NMI and the other subsidiaries originate, arrange, make, hold, purchase, sell, warehouse, and service mortgage loans. (2) *Mortgage loan securitization*. Some of the other subsidiaries are

engaged, either directly or through grantor trusts, in the authorization, issuance, and delivery of instruments and obligations representing interests in pools of mortgage loans, including pass-through certificates, agency certificates, collateralized mortgage obligations, interests in real estate mortgage investment conduits, bonds, other evidences of ownership interests or indebtedness, or similar forms of instruments. (3) *Other activities.* NMI and its subsidiaries also engage in other activities related to the mortgage business, including real estate loan closing, escrow services, real and personal property appraisal,¹ appraisal management,² property inspection, real estate tax verification and payment for lenders and servicers, and real estate mortgage foreclosure (including foreclosing on, managing, maintaining, and disposing of OREO property). These activities are performed for loans originated or serviced by the Bank, NMI and its subsidiaries, other affiliates, the joint ventures, or unaffiliated lenders.³

In addition, NMI, either directly or through two of its other subsidiaries, also has entered into a number of joint venture arrangements that are engaged solely in mortgage banking activities. These joint ventures generally take the form of a limited liability company, although some have been formed as general partnerships or limited partnerships in which the NMI participant is the general partner. The joint ventures are engaged only in mortgage banking. In all of the joint ventures, the NMI participant holds a 50% interest. In most of the joint ventures, there is one other participant, also holding a 50% interest. In some of them, there are two other participants, one holding a 45% interest and the other a 5% interest. It is anticipated that NMI will continue to enter additional similar joint ventures in the future and that such future ventures will be 50/50 ventures and be organized as limited liability companies.

The other participants in these joint ventures are established real estate brokers engaged in the residential real estate mortgage brokerage business and established residential homebuilders. The activities conducted by the joint ventures include origination, processing, servicing, and sale of residential mortgage loans.

Each joint venture is controlled by an Operating Committee. In the 50/50 joint ventures, 50% of the Operating Committee members represent the NMI participant, and 50% of the members represent the other participant. In the 50/45/5 joint ventures, the Operating Committee consists of five members, two from the NMI participant, two from the 45% other participant, and one from the 5% other participant. The joint venture agreements recite that the purpose of the joint venture is to engage in mortgage banking. Major decisions of the Operating Committee, including a decision to enter a new business, require unanimous consent.

¹ Personal property appraisal is limited to matters in connection with real property and real estate loans, *e.g.*, fixtures that are classified as personal property under applicable law.

² Appraisal management refers to overseeing and managing third-party appraisers hired to perform appraisals for NMI, its subsidiaries, and joint ventures.

³ Some of NMI's other current subsidiaries engaged in various activities, including title insurance agency activities, will be transferred out of NMI and retained by the holding company or a non-bank affiliate prior to the contribution of NMI's stock to the Bank.

Since NMI has been a holding company subsidiary, the existing joint venture agreements also include a limitation that the joint venture may not engage in activities that are not permissible for a bank holding company under the Bank Holding Company Act. Future joint venture agreements will provide that the activities will be limited to those permissible for national banks and their operating subsidiaries.

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 under 12 U.S.C. § 24(Seventh), as well as other activities permitted for national banks and their subsidiaries under other statutory authority, by means of an operating subsidiary. See 12 C.F.R. § 5.34(d)(1). Similarly, the OCC has permitted national banks to own, either directly or indirectly through a subsidiary, a non-controlling interest in an enterprise as a means of performing lawful activities. The Bank's application here involves both of these methods of operation.

A. Activities Performed by NMI and its Subsidiaries.

NMI and its subsidiaries engage in a wide range of mortgage banking, securitization, and related activities, as listed above. All of these activities are permissible for national banks and their operating subsidiaries.

National bank powers are primarily based on the bank powers clause of 12 U.S.C. § 24(Seventh), although some activities are granted under other specific statutory authority. See, e.g., 12 U.S.C. § 371 (real estate lending). The Supreme Court has held that the bank powers clause is a broad grant of power to engage in the business of banking, including the five specifically recited powers and the business of banking as a whole, as well as activities that are incidental thereto. Many activities that are not included in the enumerated powers are also part of the business of banking.⁴

Under this standard, the activities of NMI and its subsidiaries are permissible. The mortgage banking activities -- originating, arranging, making, holding, purchasing, selling, warehousing, and servicing mortgage loans -- are authorized under 12 U.S.C. §§ 24(Seventh) & 371.⁵ National banks may also sell mortgage loans by means of securitizing them and so may arrange, issue, and deliver mortgage related instruments and obligations.⁶ Finally, the OCC also

⁴ See *NationsBank of North Carolina, N.A. v. Variable Life Annuity Co.*, 513 U.S. 251, 258 (1995). See also *M&M Leasing Corp. v Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); OCC Interpretive Letter No. 494 (December 20, 1989).

⁵ See also 12 C.F.R. § 5.34(e)(2)(ii)(L); 12 C.F.R. Part 34; OCC Conditional Approval No. 264 (December 29, 1997); OCC Conditional Approval No. 243 (May 9, 1997).

⁶ See, e.g., *Securities Industry Ass'n v. Clarke*, 885 F.2d 1034 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); OCC Conditional Approval No. 309 (April 12, 1999); OCC Interpretive Letter No. 418 (February 17, 1988).

has previously determined that the other activities conducted by NMI and its subsidiaries are permissible for national banks and their operating subsidiaries: real estate loan closing and escrow services,⁷ property appraisal and appraisal management,⁸ property inspection,⁹ real estate tax verification and payment for lenders and servicers,¹⁰ and real estate mortgage foreclosure (including foreclosing on, managing, maintaining, and disposing of OREO property).¹¹

Accordingly, the activities performed by NMI and its subsidiaries are permissible for a national bank, and the Bank may acquire NMI.

B. The Joint Ventures.

NMI, either directly or through two of its subsidiaries, also participates in a number of joint ventures that are engaged solely in mortgage banking activities. The joint ventures are generally limited liability companies, although some are general partnerships or limited partnerships in which the NMI participant is the general partner. The OCC has permitted national banks to own, directly or indirectly through an operating subsidiary, a non-controlling interest in an enterprise. The enterprise might be a corporation, limited liability company (LLC), general partnership, limited partnership, or other similar entity. In a number of letters, the OCC concluded that national banks are legally permitted to make a non-controlling investment in a LLC, provided the investment meets four criteria or standards, set out below.¹² The OCC used similar criteria or standards in reviewing the permissibility of a national bank's operating subsidiary serving as a general partner.¹³ In essence, by satisfying these four standards, the Bank can use any of the proposed structures used by NMI for joint ventures. Applying the four criteria to the joint ventures of NMI and its subsidiaries, we find that the NMI participation interests in these joint ventures are permissible for a national bank or its operating subsidiary.

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.

⁷ See, e.g., OCC Corporate Decision No. 99-33 (September 28, 1999); OCC Conditional Approval No. 276 (May 8, 1998).

⁸ See, e.g., 12 C.F.R. § 5.34(e)(3)(ii)(G); OCC Conditional Approval No. 276 (May 8, 1998); OCC Interpretive letter No. 467 (January 24, 1989).

⁹ See, e.g., OCC Conditional Approval No. 276 (May 8, 1998).

¹⁰ *Id.*

¹¹ See, e.g., 12 U.S.C. § 29; 12 C.F.R. § 5.34(e)(2)(ii)(A); 12 C.F.R. Part 34, Subpart E; OCC Conditional Approval No. 276 (May 8, 1998).

¹² See, e.g., OCC Conditional Approval No. 243 (May 9, 1997); other OCC precedents cited therein.

¹³ *Id.*

First, 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. Our precedents on non-controlling ownership interests have recognized that the enterprise in which the bank takes an equity interest must confine its activities to those that are part of or incidental to the business of banking.¹⁴ The joint ventures in which NMI or its subsidiaries participate, or will participate in the future, engage only in mortgage banking. As discussed above, mortgage banking activities are part of or incidental to the business of banking under 12 U.S.C. § 24(Seventh) and 371, and indeed, NMI and its subsidiaries engage in these activities directly. Accordingly, 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 its investment.

Second, 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 initially purchases its ownership interest, but also for as long as the bank has an ownership interest. This standard may be met in different ways: the joint venture documents could limit the activities of the joint venture to those that are permissible for national banks, the joint venture documents' governing provisions could provide the national bank participant with an effective veto over activities of the entity, or the national bank participant could be able to withdraw its investment easily.

In the joint ventures in which NMI or its subsidiaries participate, the joint venture agreements specifically provide that the joint venture's business will be engaging in mortgage banking. In addition, the governing provisions provide that major decisions, including a decision to enter a new business, require unanimous consent of the Operating Committee. Thus, the Bank, through the NMI participant, will be able to prevent the joint venture from entering a business not permissible for a national bank joint venture. Accordingly, the second standard is satisfied.¹⁵

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

¹⁴ See, e.g., OCC Conditional Approval No. 243 (May 9, 1997) (national bank operating subsidiary holding non-controlling LLC interests, limited or general partnership interests, stock, or other interests in joint ventures engaged in mortgage banking); OCC Interpretive Letter No. 423 (April 11, 1988) (national bank operating subsidiary authorized to act as managing general partner of a limited partnership investing in real estate mortgage-related assets); OCC Interpretive Letter No. 380 (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).

¹⁵ Moreover, the existing joint venture agreements, entered when NMI was a subsidiary of the holding company, also include a limitation that the joint venture may not engage in activities that are not permissible for a bank holding company under the Bank Holding Company Act. With respect to the business of the joint ventures, *i.e.*, mortgage banking, the mortgage banking activities permissible under the Bank Holding Company Act are similar to, and no more expansive than, the activities permissible for national banks. Future joint venture agreements will provide that the activities will be limited to those permissible for national banks and their operating subsidiaries.

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 bank's investment not expose it to unlimited liability. This concern is addressed when a national bank invests in a corporation, since shareholders are not liable for the debts of the corporation, provided proper corporate separateness is maintained. This concern is similarly addressed when a national bank holds an interest in a LLC or limited partnership, since investors in a LLC or limited partnership generally will not incur liability with respect to the liabilities or obligations of the LLC or limited partnership under applicable law.

Hence, national banks are permitted, directly or indirectly through operating subsidiaries, to become limited partners in partnerships and to invest in LLCs engaging in activities permissible for national banks. But a national bank is not permitted to be a general partner directly due to the potential unlimited liability for the acts of other partners within the scope of the partnership.¹⁶ However, the OCC has long permitted operating subsidiaries of national banks to enter into general partnerships that engage in bank-permissible activities because the corporate veil of the subsidiary corporation protects the bank from the potentially open-ended exposure associated with a direct general partnership investment.¹⁷

With respect to the NMI joint ventures, first, all the joint venture interests will be held by NMI or its subsidiaries, not by the Bank directly. The Bank, NMI, and NMI subsidiaries have represented that they will at all times adhere to corporate formalities and maintain their separate corporate existence so that, under principles of corporate law, the parent companies (the Bank or NMI respectively) will not be liable. Thus, the Bank is insulated from unlimited liability. Second, many of the joint ventures are structured as LLCs. For those joint ventures, applicable LLC law will further protect NMI and the Bank from liability.¹⁸ Moreover, the joint venture agreements will not contain any clauses making the Bank liable for any obligations of the joint ventures.

b. Loss exposure from an accounting standpoint

The Bank will consolidate the results of NMI and NMI's subsidiaries (which will be Bank operating subsidiaries) with parent company results in accordance with generally accepted accounting principles. However, the non-controlling 50% investments held by NMI and two of its subsidiaries are, in turn, reported as unconsolidated entities under the equity method of accounting. The OCC has previously noted that the appropriate accounting treatment for a non-controlling 20-50 percent ownership interest is to report it on an unconsolidated basis. Under the

¹⁶ See *Merchants National Bank v. Wehrmann*, 202 U.S. 295 (1906).

¹⁷ See, e.g., OCC Interpretive Letter No. 381 (May 5, 1987) (general partnership with partners other than depository institutions); OCC Interpretive Letter No. 346 (July 31, 1985) (same); OCC Interpretive Letter No. 289 (May 15, 1984) (partnership with other banks).

¹⁸ The joint ventures that are LLCs are formed under Delaware law, and in the future it is anticipated that future joint ventures will be LLCs. As a legal matter, investors in a Delaware limited liability company will 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. See Del. Code Ann. tit. 6, § 18-303.

equity method of accounting, unless the investor 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. Thus, the OCC has not objected to a bank utilizing the equity method of accounting in reporting its operating subsidiaries' non-controlling 20-50 percent investments in joint ventures.

Accordingly, for both legal and accounting purposes, the Bank's potential loss exposure relative to the joint ventures should be limited. The Bank will not have open-ended liability for the liabilities of the joint ventures, and NMI's and the Bank's accounting loss exposure with respect to the joint ventures is limited, quantifiable, and controllable. The third standard is met.

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.

Finally, 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. Under 12 U.S.C. § 24(Seventh), national banks are granted 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

Here, the Bank, through NMI and NMI's subsidiaries, will be engaged in mortgage banking itself. Participation in the mortgage banking joint ventures extends the marketing reach of the Bank's mortgage banking activities through relationships with the co-venturers and their customers and potential customers. Such exposure increases NMI's opportunities to originate mortgage loans. Participation in the joint ventures, therefore, enhances the Bank's ability to offer mortgage banking services, to attract a broader customer base, to expand its business, and to compete more effectively. For these reasons, the proposed investment is convenient and useful to the Bank in carrying out its business and is not a mere passive investment. Accordingly, the fourth standard is satisfied.

C. Other Matters

Capital. The contribution of the stock of NMI to the Bank constitutes a material noncash contribution to capital surplus. Such contributions are permissible, and the Bank may include the value as an increase in capital for regulatory and supervisory purposes, provided the shareholders

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

²⁰ See, *e.g.*, OCC Interpretive Letter No. 697 (November 15, 1995); OCC Interpretive Letter No. 543 (February 13, 1991); OCC Interpretive Letter No. 427 (May 9, 1988); Interpretive Letter No. 421 (March 14, 1988).

have approved the transaction and the OCC has approved the transaction under 12 C.F.R. § 5.46. In connection with the contribution of stock, the Bank has requested OCC approval for an increase in permanent capital under 12 C.F.R. § 5.46.

Offices. NMI and its subsidiaries engage in mortgage banking activities, including lending, on a nationwide basis and operate offices in many states. The joint ventures in which NMI and its subsidiaries participate also operate offices in many states. These offices will be operated as loan production offices in compliance with 12 C.F.R. §§ 7.1003, 7.1004 & 7.1005. Specifically, loan proceeds will not be disbursed directly at the offices but at third party locations, such as escrow or title companies. Loan approvals will be made at either licensed branch locations of the Bank or at backroom loan approval offices to which customers do not have access. Thus, the offices will not be “branches” of the Bank within the meaning of 12 U.S.C. § 36, and so they will not be subject to the geographic limits of section 36.²¹

RESPA. Some of the activities involved qualify as settlement services under the Real Estate Settlement Procedures Act (RESPA). The Bank has represented that NMI, its subsidiaries, and the joint ventures comply, and will continue to comply, with all applicable requirements of the RESPA. The Bank and its affiliates will also comply with the anti-tying restrictions found in the Bank Holding Company Act, 12 U.S.C. § 1972, to the extent applicable.

CONCLUSION

Based upon the information and representations you have provided, and for the reasons discussed in this letter, we conclude that the Bank’s acquisition of NMI as an operating subsidiary (including the indirect acquisition of NMI’s subsidiaries and joint venture participation interests) is legally permissible, and it is hereby conditionally approved. We also approve the Bank’s application for a material noncash contribution to capital surplus under 12 C.F.R. § 5.46.²²

The Bank, through NMI, may participate without further notification to the OCC in the joint ventures that NMI currently participates in, and in other similar ventures to conduct mortgage banking activities using the structures described in your application and discussed herein, subject to the following conditions:

1. the joint ventures will engage only in activities that are part of, or incidental to, the business of banking;

²¹ In addition, with respect to the offices of the joint ventures, they would also not be considered branches of the Bank because they are not established by the Bank, but by the joint venture. See, e.g., OCC Conditional Approval No. 243 (May 9, 1997); OCC Interpretive Letter No. 711 (February 23, 1996).

²² Shareholders should approve the material noncash contribution by majority vote. In proceeding with the proposed transaction, please refer to the Comptroller’s Corporate Manual, Capital and Dividends Booklet, for complete instructions. Please notify the OCC after you have completed the change and complied with applicable legal requirements (see Notices - Noncash Capital Contribution to Surplus in the Comptroller’s Corporate Manual). Upon receipt of your notification, the OCC will authorize the change. The change in capital should be completed within one year of the date of this letter.

2. the Bank will have veto power over any activities and major decisions of the joint ventures that are inconsistent with condition (1) above, or will withdraw from a joint venture in the event it engages in an activity inconsistent with condition (1);
3. the Bank will account for the investment in the joint ventures under the equity method of accounting; and
4. the joint ventures 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.

Sincerely,

/s/

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel