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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

**Corporate Decision #99-33**  
**October 1999**

September 28, 1999

Ms. Beth Whitehead  
Vice President & Associate Counsel  
National Bank of Commerce  
One Commerce Square  
Memphis, Tennessee 38150

Re: National Bank of Commerce, Memphis, Tennessee: Application for  
Additional Powers for Operating Subsidiary Engaged in the Conduct of  
Title Insurance Agency Activities and  
Application for Establishment of a Branch  
Application Control No. 99-SE-08-0036 and  
Application Control No. 99-SE-05-0131

Dear Ms. Whitehead:

This responds to two applications filed by National Bank of Commerce, Memphis, Tennessee (“Bank”). The Bank’s first application, filed pursuant to 12 C.F.R. § 5.34(b), requests approval from the OCC for its operating subsidiary, American Title and Escrow Company (“Subsidiary”), to engage in real estate closing and escrow activities, in addition to its existing title insurance agency activities. The Subsidiary wishes to provide real estate closing and escrow services to the Bank and other lenders, primarily, and to utilize its excess capacity to offer the services occasionally to customers where no loan or title policy is present. Based upon the information provided and the reasons discussed below, the Bank’s application for its Subsidiary to engage in real estate closing and escrow activities, in addition to its existing title insurance agency activities, is approved.

The Bank’s second application, filed pursuant to 12 U.S.C. § 36(c) and 12 C.F.R. § 5.30, requests approval to establish a branch at the Subsidiary’s office in Mt. Juliet, Tennessee. For the reasons discussed below, the Bank’s branch application is also approved.

## **Proposal**

On July 7, 1999, the OCC approved an application for the Bank to acquire First Bank & Trust, Mt. Juliet, Tennessee (“FB&T”), pursuant to 12 U.S.C. § 215a.<sup>1</sup> In conjunction with the merger application, the Bank requested approval to retain a Subsidiary of FB&T as an operating subsidiary of the Bank. Although the Subsidiary of FB&T engaged in the sale of title insurance as agent in towns of greater than 5,000 and provided real estate closing and escrow services, the Bank’s request for approval to retain the Subsidiary was limited to retention of the title insurance activities performed by the subsidiary. The OCC approved the Bank’s request to hold the Subsidiary as a non-conforming asset on the representation that, within two years following consummation of the merger, the Bank will (1) divest its ownership of the Subsidiary, (2) bring the Subsidiary’s activities into conformance with 12 U.S.C. § 92 and the *First Union letter*,<sup>2</sup> or (3) demonstrate to the OCC that the Subsidiary’s activities comply with all then applicable federal and state laws and regulations.

On August 5, 1999, the Bank requested approval for the Subsidiary to provide real estate closing and escrow services in addition to its existing title insurance agency activities. Additionally, on August 26, 1999, the Bank filed an application to establish a branch at the Subsidiary’s office in Mt. Juliet, Tennessee.

The Bank represents that the Subsidiary’s real estate closing and escrow services will be primarily provided to the Bank and other lenders. Less than 10 percent of its real estate closing and escrow services will be provided to owners of real estate where no affiliate loan is present. The Subsidiary will not target such persons as potential customers. Moreover, these services will be provided with existing personnel, resources, and expertise. The Subsidiary will conduct its activities in compliance with applicable state laws and the provisions of the Real Estate Settlement Procedures Act.

## **Discussion**

### **A. Real estate closing and escrow services to loan and title policy customers are part of or incidental to the business of banking.**

The National Bank Act provides that national banks shall have the power:

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<sup>1</sup>. Letter from Southeastern District Licensing Manager John Stein (July 7, 1999).

<sup>2</sup>. Interpretive Letter No. 753, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81-107 (Nov. 4, 1996) (the “*First Union letter*”) (extensive legal interpretation on the scope of insurance sales activities permissible for national banks under 12 U.S.C. § 92).

[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes . . .<sup>3</sup>

The Supreme Court has held that this 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.<sup>4</sup> Many activities that are not included in the enumerated powers are also part of the business of banking. Judicial precedent reflects three general principles used to determine whether an activity is within the scope of the “business of banking”: (1) is the activity functionally equivalent to or a logical outgrowth of a recognized banking activity; (2) would the activity respond to customer needs or otherwise benefit the bank or its customers; and (3) does the activity involve risks similar in nature to those already assumed by banks.<sup>5</sup> Finally, national banks may engage in activities that are part of, or incidental to, the business of banking by means of an operating subsidiary.<sup>6</sup>

Under this standard, national banks are authorized to provide real estate closing and escrow services to their loan or title policy customers as activities that are part of or incidental to the business of banking. The OCC has permitted national banks to handle escrow accounts and the closing of real estate transactions in connection with their own real estate loans.<sup>7</sup> The OCC has also permitted a national bank’s operating subsidiary to engage in real estate appraisal, loan closing, and tax escrow services in

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

<sup>4</sup>. *See NationsBank of North Carolina, N.A. v. Variable Life Annuity Co.*, 513 U.S. 251 (1995), 115 S. Ct. 810 (1995) (“VALIC”).

<sup>5</sup>. *See, e.g., Merchants Bank v. State Bank*, 77 U.S. 604 (1871); *M & M Leasing Corp. v. Seattle First Nat’l Bank*, 563 F.2d 1377 (9<sup>th</sup> Cir. 1977), *cert. denied*, 436 U. S. 956 (1978); *American Ins. Ass’n v. Clarke*, 865 F. 2d 278 (2d Cir. 1988).

<sup>6</sup>. 12 C.F.R. § 5.34 (c) (1998).

<sup>7</sup>. *See* OCC Corporate Decision No. 97-13 (February 24, 1997) (Decision by the Comptroller of the Currency to Approve Applications by TCF Financial Corp., Minneapolis, Minnesota, to Convert Federal Savings Banks Located in Minnesota, Michigan, Illinois, and Wisconsin and to Establish De Novo Banks in Ohio and Colorado and to Engage in Certain Related Transactions, p. 36); OCC Interpretive Letter by John E. Shockey, Deputy Chief Counsel (September 20, 1976).

connection with loans made by the bank and by other affiliated and unaffiliated lenders.<sup>8</sup> Finally, the OCC has permitted a bank's title company subsidiary, as part of its responsibilities as a title agent under 12 U.S.C. § 92, to perform abstracting, closing and escrow services in connection with title policies it sells.<sup>9</sup>

The Bank's proposal is consistent with these OCC precedents and is functionally and operationally equivalent to activities undertaken by banks and their lending subsidiaries in their ordinary course of business, and banks or their subsidiaries that engage in title insurance activities under 12 U.S.C. § 92.<sup>10</sup> The real estate loan closing and escrow services respond to customers' needs and do not involve risks that are not already assumed by banks in their capacity as closing and escrow agents, financial intermediaries, custodians, and trustees. Accordingly, these activities are permissible.<sup>11</sup> Because some of the activities to be engaged in by the Subsidiary are banking functions that must be performed at a branch location, *see* 12 U.S.C. §36(j); 12 C.F.R. §§5.30 and 7.1003, the Bank has filed a branch application.

**B. The Subsidiary may utilize its staff's excess capacity to provide incidental real estate closing and escrow services for customers where no loan or title policy is involved.**

The Subsidiary proposes to make its real estate closing and escrow services available to the general public. The OCC and the courts have held that national banks may use all of their resources and

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<sup>8</sup>. *See, e.g.*, OCC Conditional Approval No. 276 (May 8, 1998) (Application by Mellon Bank, N.A., Pittsburgh, Pennsylvania, to establish a wholly-owned operating subsidiary to acquire and hold a 50 percent interest in a partnership engaged in title insurance agency, real estate appraisal, loan closing and other loan-related activities). *See also*, OCC Interpretive Letter No. 842, *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-297 (September 28, 1998).

<sup>9</sup>. *See* Letter from Julie L. Williams, Chief Counsel (April 1, 1998) (unpublished).

<sup>10</sup>. The Federal Reserve has similarly authorized bank holding companies and their subsidiaries to provide real estate settlement services. 12 C.F.R. § 225.28(b)(2)(viii). The Federal Reserve authorized these activities after determining that they are "closely related to banking." The Federal Reserve's "closely related to banking" analysis is similar to the OCC's incidental to the business of banking analysis. *See National Courier Ass'n v. Board of Governors of the Federal Reserve System*, 516 F.2d 1229 (D.C. Cir. 1975) ; *Alabama Ass'n of Ins. Agents v. Board of Governors of the Federal Reserve System*, 533 F.2d 224 (5<sup>th</sup> Cir. 1976); *Association of Data Processing Service Org. v. Board of Governors of the Federal Reserve System*, 745 F.2d 677 (D.C. Cir. 1984). In each of these cases, the court analogized the "closely related to banking" provision in Regulation Y, 12 C.F.R. § 225.28(b), to the incidental powers clause of 12 U.S.C. § 24 (Seventh).

<sup>11</sup>. *See* OCC Corporate Decision No. 99-06 (January 29, 1999).

competencies to operate efficiently and to avoid economic waste. In *Brown v. Schlier*, the court articulated the excess capacity doctrine:

Nor do we perceive any reason why a national bank, when it purchases or leases property for the erection of a banking house, should be compelled to use it exclusively for banking purposes. If the land which [a national bank] purchases . . . for the accommodation of its business is very valuable, it should be accorded the same rights that belong to other landowners of improving it in a way that will yield the largest income, lessen its own rent, and render that part of its funds which are invested in realty most productive. There is nothing, we think, in the national bank act, when rightly construed, which precludes national banks, so long as they act in good faith, from pursuing the policy above outlined.<sup>12</sup>

The basic requirement is that the bank's overall activities must be conducted in good faith for banking purposes.

Although the excess capacity doctrine was used initially in real estate,<sup>13</sup> its principles have been applied in other circumstances where banks have obtained or developed in-house services, equipment or personnel in good faith and desired to make efficient use of the excess capacity. For example, excess capacity has been applied to Internet access,<sup>14</sup> software production and distribution,<sup>15</sup> long line

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<sup>12</sup>. 118 F. 981, 984 (8<sup>th</sup> Cir. 1902), *aff'd*, 194 U.S. 18 (1904).

<sup>13</sup>. See *Wingert v. First Nat. Bank*, 175 F. 739 (4<sup>th</sup> Cir. 1909); *Perth Amboy Nat. Bank v. Brodsky*, 207 F. Supp. 785, 788 (S.D.N.Y. 1962); and Unpublished letter from Comptroller James J. Saxon dated February 16, 1965.

<sup>14</sup>. Interpretive Letter No. 742, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81-106 (Aug. 19, 1996).

communication,<sup>16</sup> electronic security systems,<sup>17</sup> acquired printing equipment,<sup>18</sup> mail sorting machines,<sup>19</sup> and messenger services.<sup>20</sup> Also, more recently, the OCC approved the use of the excess capacity doctrine for general appraisal services,<sup>21</sup> and for human resources consulting and career counseling.<sup>22</sup>

The Bank represents and has committed to the fact that less than ten percent of the Subsidiary's real estate closing and escrow services will be provided to customers who are neither borrowing money nor purchasing title insurance. The Subsidiary does not plan to target such persons as potential customers. Moreover, the services will be provided using existing personnel resources and expertise. These factors demonstrate that the excess capacity has been developed and will be utilized in good faith and that the Subsidiary will not be exposed to unnecessary risk. Therefore, the Subsidiary may offer its excess capacity to those customers who request real estate closing and escrow services even though there is no loan or title policy present.

**C. The Bank May Operate the Subsidiary's Office in Mt. Juliet, Tennessee, as a Branch under 12 U.S.C. (§36(c)).**

Title 12 U.S.C. §36 (c) provides:

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15. *See* Interpretive Letter No. 677, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625 (June 28, 1995).

16. Unpublished letter from William Glidden (June 6, 1986).

17. Unpublished letter from Stephen Brown (December 20, 1989).

18. Interpretive Letter No. 811, *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-259 (December 12, 1997); Unpublished letter from Mary Wheat (April 7, 1988).

19. Unpublished letter from Peter Liebesman (December 13, 1983).

20. Unpublished letter from William Glidden (July 11, 1989).

21. *See* OCC Corporate Decision No. 98-25 (April 1, 1998).

22. *See* OCC Corporate Decision No. 98-51 (November 30, 1998).

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to restrictions as to location imposed by the law of the State on State banks.

Some of the activities performed by the Subsidiary with respect to loans by the Bank or subsidiaries of the Bank will be branching activities pursuant to 12 U.S.C. § 36(j) and 12 C.F.R. §§ 5.30 and 7.1003. Such activities must be provided only at the Bank's main office or authorized branch locations. Since these activities will be provided at the Subsidiary's office in Mt. Juliet, Tennessee, the Bank filed an application to establish a branch at that location. Tennessee law imposes no geographical limits on branching by state banks. *See* Tenn. Code Ann. § 45-2-614(a) (LEXIS 1998 Supp.). Consequently, there are no geographical limits to be incorporated by 12 U.S.C. § 36(c) and applied to a national bank branching in Tennessee. Thus, the Bank may establish and operate a branch at the Subsidiary's office in Mt. Juliet, Tennessee.

In considering an application for a branch, the OCC is required to consider an applicant's record of compliance with the Community Reinvestment Act (CRA).<sup>23</sup> A review of the record in connection with this application and other information available to the OCC as a result of its regulatory responsibilities revealed no indication that the applicant's record of helping to meet the credit needs of its community, including low and moderate income neighborhoods, is not at least satisfactory. The applicant has included Mt. Juliet, Tennessee in its assessment area. Consequently the applicant's record of compliance with CRA is consistent with approval of the branch application.

## **Conclusion**

Based upon the foregoing facts, analysis, and limitations, the Bank's application to engage in real estate closing and escrow services through its previously approved subsidiary, American Title and Escrow Company, is hereby approved. Additionally, the Bank's application to establish a branch at the Subsidiary's office in Mt. Juliet, Tennessee, is also hereby approved. The Bank must advise the Southeastern District Office in writing in advance of the desired opening date, so that the OCC may issue the necessary branch authorization letter. The branch approval will automatically terminate if the branch is not opened within 18 months from this date, unless the OCC grants an extension.

Sincerely Yours,

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<sup>23</sup>. *See* 12 U.S.C. § 2903(2); 12 C.F.R. § 25.29(a)(1).

/s/

Julie L. Williams  
First Senior Deputy Comptroller and Chief Counsel