
Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

May 15, 2000

Interpretive Letter #890
June 2000

Re: Notice of Shareholders of [], of Intent to Acquire Non-Controlling, Minority
Interests in [*BHC*], [*City, State*]

Dear []:

This is in response to your letter of April 19, 2000, on behalf of the national bank shareholders of [], [*City, State*] (“ ”). [], [*City, State*] (“*BHC*”), a publicly-held bank holding company, has agreed to acquire []. As a result of the transaction, the national bank shareholders of [] will acquire shares of [*BHC*], with the largest national bank shareholder acquiring approximately 0.4% of [*BHC*]’s stock. We conclude that, subject to the conditions discussed below, the national bank shareholders of [] may acquire and hold a non-controlling interest in [*BHC*].

A. Proposal

As described in your correspondences and telephone conversations with OCC staff, [] is a [*State*] stock corporation owned by shareholders (“Shareholders”) that are national and Illinois state banks, federal and Illinois state savings associations, Illinois savings banks, financial institution holding companies, and an Illinois state credit union service organization.¹ [] operates an electronic funds transfer (“EFT”) system that permits customers of its Shareholders and of other non-Shareholder member financial institutions (1) to obtain cash from, make deposits in, and perform other banking transactions through automated teller machines (“ATMs”), and (2) to purchase goods and services from participating retailers that have established point-of-sale (“POS”) devices at their retail locations.

¹ The OCC issued a letter on November 9, 1992, concluding that the acquisition and ownership of [] stock in connection with the conversion of [] from an Illinois not-for-profit corporation to a [*State*] stock corporation would be permissible for national banks. Letter from Robert B. Serino, Deputy Chief Counsel (November 9, 1992) (unpublished) (“Serino Letter”).

[] has about 170 Shareholders, 32 of whom are national banks. Approximately 53 percent of [] stock is held by national banks. One national bank holds approximately 35 percent of [] stock; no other national bank owns more than 10 percent of [] stock. Upon consummation of the proposed purchase of [] by [**BHC**], [] Shareholders will receive shares of [**BHC**] representing 1.2% of [**BHC**]'s outstanding stock. The largest national bank Shareholder will receive and hold approximately 0.4% of [**BHC**]'s stock, and each of the other national bank Shareholders will receive and hold smaller percentages of [**BHC**]'s stock.²

[**BHC**] is a bank holding company which develops, operates, manages, and markets to retailers and financial institutions products and processing services for transactions conducted at electronic terminal devices, including ATMs and POS terminals.³ The activities of [**BHC**] are discussed in more detail in the following section.

B. Discussion

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. In interpretive letters, the OCC has concluded that national banks are legally permitted to make a non-controlling investment in an enterprise provided four criteria or standards are met. 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:⁴

- (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 (or otherwise authorized for a national bank);
- (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

² Because of the small interests being acquired by the Shareholders, no issues are raised under the Bank Holding Company Act. See 12 U.S.C. § 1841(a). Therefore, from the perspective of the participating national banks, the proposed transaction need only satisfy our standard, four-part test for non-controlling equity investments.

³ [**BHC**] has applied to the Federal Reserve Board to become a financial holding company. [**BHC**] has not requested to engage in any new activity in connection with its financial holding company application.

⁴ See Interpretive Letter No. 697, *reprinted in* [1995 - 1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,012 (Nov. 15, 1995); Interpretive Letter No. 694, *reprinted in* [1995 - 1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,009 (Dec. 13, 1995); Interpretive Letter No. 692, *reprinted in* [1995 - 1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,007 (Nov. 1, 1995).

not have open-ended liability for the obligations of the enterprise; and

- (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 proposed acquisition satisfies these four standards.

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 (or otherwise authorized for a national bank).*

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 business of banking.⁵ The activities of [**BHC**] consist of developing, operating, managing, and marketing to retailers and financial institutions products and processing services for transactions conducted at electronic terminal devices, including ATMs, POS terminals, and similar devices. These are permissible banking or correspondent services. Indeed, the OCC has already found that the activities in which [**BHC**] engages are permissible for national banks. Accordingly, this letter will only briefly describe the various activities in which [**BHC**] is engaged, with citations to OCC precedent for each activity. Please refer to the cited precedents for a more complete discussion of the legal authority for each activity.

- i. ATM Services. On behalf of a number of financial institutions, merchants, and retail ATM deployers, [**BHC**] drives and monitors ATMs and processes transactions generated at these ATMs,⁶ including providing telecommunications connections, systems, and access to other networks through gateways.⁷

[**BHC**] also owns and operates the [] EFT network. This network provides transaction switching, settlement, and reporting to a wide range of financial institutions, merchants, and retail ATM deployers nationwide.⁸ Transactions handled by the [] network

⁵ See, e.g., Interpretive Letter No. 380, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,604 n.8 (Dec. 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 (Nov. 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).

⁶ Interpretive Letter No. 854, *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-311 (Feb. 25, 1999); Interpretive Letter No. 381, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,605 (May 5, 1987).

⁷ Interpretive Letter No. 854, *supra*; Interpretive Letter No. 382, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,606 (May 5, 1987).

⁸ Serino Letter, *supra*.

include cash withdrawals, transfers between accounts, balance inquiries, loan payments, deposits, and purchases of alternative media such as scrip, tickets, and stamps.⁹

ii. POS Services. [**BHC**] provides data processing services in connection with on-line and off-line POS transaction requests.¹⁰

iii. Authorization Services. [**BHC**] provides authorization services on behalf of card issuers consisting of connections to receive transaction requests and authorize or deny those requests based upon inquiry to account records, periodically updated account balances or parameter instructions provided by the card issuer.¹¹

iv. Card production, issuance, and related functions. To support its ATM services, [**BHC**] orders from card manufacturers magnetically striped plastic cards that permit cardholders to access their accounts at financial institutions through an ATM. [**BHC**] also assigns card numbers, establishes cardholder records, embosses the card with the cardholder's name and card number, assigns a personal identification number and mails cards and verification notices to cardholders.¹²

v. Point of Banking ("POB") services. [**BHC**] also provides data processing services in connection with transactions originated at POB terminals.¹³

vi. Additional terminal services. [**BHC**] provides processing support to advanced interactive electronic terminals and touch screen video monitors connected to electronic terminals through which a wide range of account activity can be performed, such as purchasing or rolling over certificates of deposit, opening accounts, and obtaining rate information, account statements, or activity summaries. [**BHC**] also supports a variety of advanced functions at ATMs and POS terminals, including dispensing of alternative media such as money orders, travelers checks, postage, transportation tickets, tickets for events, and others.¹⁴

⁹ Interpretive Letter No. 854, *supra*; Conditional Approval No. 285 (Aug. 14, 1998); Interpretive Letter No. 718, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-303 (Mar. 14, 1996).

¹⁰ Interpretive Letter No 854, *supra*; Serino Letter, *supra*.

¹¹ *Id.*

¹² Interpretive Letter No. 854, *supra*; Interpretive Letter No. 705, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-020 (Oct. 25, 1995).

¹³ *See* notes 9 and 10, *supra*.

¹⁴ Interpretive Letter No. 854, *supra*; Conditional Approval No. 285, *supra*; Interpretive Letter No. 718, *supra*.

- vii. Telephone banking and bill payment. [**BHC**] provides processing services to financial institutions that enable their customers to use the telephone to obtain account information, transfer funds between accounts, or pay bills to pre-selected credit accounts, utilities, merchants, and others.¹⁵
- viii. Payment processing. [**BHC**] sells payment processing services to vendors.¹⁶
- ix. Check verification, authorization, and conversion. [**BHC**] provides check verification and check authorization services,¹⁷ as well as check conversion services whereby check transactions at the point of sale are converted to automated clearing house (“ACH”) debit transactions.¹⁸
- x. Terminal sale and leasing. [**BHC**] also sells and rents POS terminals to merchants and enters into related maintenance contracts with merchants regarding these terminals.¹⁹
- xi. Payroll processing. [**BHC**] sells payroll processing services to merchants.²⁰
- xii. ACH services. [**BHC**] provides ACH services for the processing of a variety of payments. Certain of the above-described applications also involve the origination or receipt of ACH transactions, including the ATM and POS settlement services, bill payment, check conversion, and payroll processing services.²¹
- xiii. Electronic data interchange (“EDI”). [**BHC**] provides a system through which merchants can transmit EDI with their trading partners over the Internet.²²

¹⁵ Interpretive Letter No. 854, *supra*; Conditional Approval No. 332 (Oct. 18, 1999); Conditional Approval No. 304 (Mar. 5, 1999).

¹⁶ Conditional Approval No. 289 (Oct. 2, 1998); Conditional Approval No. 282 (July 7, 1998); Interpretive Letter No. 731, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,048 (July 1, 1996).

¹⁷ Interpretive Letter No. 854, *supra*; Conditional Approval No. 287 (Sept. 4, 1998); Letter from John E. Shockey, Deputy Chief Counsel (June 7, 1976) (unpublished).

¹⁸ *See* Letter from Julie L. Williams, Chief Counsel (May 16, 1997) (unpublished) (“Williams Letter”) (national banks may originate ACH transactions for their customers).

¹⁹ Conditional Approval No. 269 (Jan. 13, 1998).

²⁰ Interpretive Letter No. 771, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-135 (Feb. 24, 1996); Interpretive Letter No. 653, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,601 (Dec. 22, 1994).

²¹ Interpretive Letter No. 854, *supra*; Williams Letter, *supra*.

²² Interpretive Letter No. 732, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-049 (May 10, 1996). *See also* Interpretive Letter No. 653, *supra* (informational interface between

xiv. Merchant web hosting services. [**BHC**] recently acquired a subsidiary that provides merchant web editing software. [**BHC**] intends to begin offering web hosting services for its merchant customers in the near future.²³

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.*

This is an obvious corollary of 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.

Minority shareholders in a corporation do not possess a veto power over corporate activities as a matter of corporate law. Thus, the national bank Shareholders lack the ability to restrict the activities of [**BHC**] to only those that are bank permissible. Nevertheless, subject to the short-term limitations prescribed in the securities laws applicable to the proposed transaction, the Shareholders have the option of selling their shares in [**BHC**]. The national bank Shareholders have represented that they will sell their shares in the event that [**BHC**] engages in activities that are not permitted for national banks.²⁴ 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. Normally, this is not a concern when a national bank invests in a corporation, for it is generally accepted that a corporation is an entity distinct from its shareholders, with its own separate rights and liabilities, provided proper corporate separateness is maintained.²⁵ This is the case here. The corporate veil of [**BHC**] will protect the national bank Shareholders from liability or loss associated with their ownership interests in [

insurance underwriters and insurance agents).

²³ Corporate Decision No. 2000-01 (Jan. 29, 2000) (approving acquisition of Virtual Cyber Systems, Inc.). The OCC has approved the provision of merchant web hosting services by national banks. Interpretive Letter No. 875, *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-369 (Oct. 31, 1999); Interpretive Letter No. 856, *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-313 (Mar. 5, 1999).

²⁴ *See, e.g.*, Interpretive Letter No. 854, *supra*.

²⁵ 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 25 (rev. perm. ed. 1990).

BHC].²⁶

b. Loss exposure from an accounting standpoint

In assessing a national 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. Under the equity method of accounting, unless the investor has extended a loan to the entity, guarantee any of its liabilities, or has other financial obligations, the investor's losses are generally limited to the amount of the investment shown on the investor's books.²⁷ The national bank Shareholders have represented that they will account for their ownership interests in [**BHC**] according to generally accepted accounting principles, which will satisfy the OCC's requirements in this regard.

Therefore, for both legal and accounting purposes, the national bank Shareholders' potential loss exposure arising from their respective investment in [**BHC**] should be limited to the amount of those investments. 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 that is not a 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."²⁸ 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.²⁹

The primary purpose of the existing [] is to enable customers of the Shareholders (and customers of other [] member depository institutions) to perform

²⁶ [**State**]. Code Ann. Tit. [], § [**State**] ([]).

²⁷ See generally Accounting Principles Board, Op. 18 ¶ 19 (1971).

²⁸ See *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972).

²⁹ See, e.g., Interpretive Letter No. 875, *supra*; Interpretive Letter No. 543, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,255 (Feb. 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 (Mar. 14, 1988); Interpretive Letter No. 380, *supra*.

banking and purchase transactions through ATMs and POS devices at retail locations. Indeed, any bank that did not make these services available to its customers in today's economy would be at a serious disadvantage. The proposed transaction will enable the Shareholders to exchange their ownership interests in [] for equity in a substantially larger EFT network operated by [*BHC*] for the same purpose. For example, through the combination of the [*BHC*] and [] networks, customers of the Shareholders will gain access to more than 48,000 additional ATMs and hundreds of thousands of POS terminals nationwide, as well as the broad range of financial institution and processing services described herein. Therefore, the investments by the national bank Shareholders in [*BHC*] will be "convenient and useful" to a core business of the national bank Shareholders, and not a passive or speculative activity. Accordingly, the fourth standard is satisfied.

C. Conclusion

Based upon the information and representations provided, and for the reasons discussed above, we conclude that the national bank Shareholders may acquire and hold non-controlling equity interests in [*BHC*], in the manner and as described herein, subject to the following conditions:

- (1) [*BHC*] will engage only in activities that are permissible for a national bank;
- (2) the national bank Shareholders will have veto power over any activities and major decisions of [*BHC*] that are inconsistent with condition (1) above, or will dispose of their interests in [*BHC*] in the event that it engages in an activity that is inconsistent with condition (1);
- (3) the national bank Shareholders will account for their investments in [*BHC*] under the equity or cost method of accounting; and,
- (4) [*BHC*] will be subject to OCC supervision and examination.

Please be advised that the conditions of this approval are deemed to be "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, and, as such, may be enforced in proceedings under applicable law.

If you have any questions, you may contact Attorney Steven Key in the Bank Activities and Structure Division at (202) 874-5300.

Sincerely,

-signed-

Julie L. Williams
First Senior Deputy Comptroller
and Chief Counsel

