



---

Comptroller of the Currency  
Administrator of National Banks

---

Washington, DC 20219

October 10, 2001

**Corporate Decision #2001-30  
November 2001**

Richard J. McCullen  
Senior Vice President & Counsel  
Bank One, N.A.  
OH1-0152  
100 East Broad Street  
Columbus, OH 43271-0152

Re: Operating Subsidiary Application of American National Bank and Trust  
Company of Chicago, Chicago, Illinois  
Application Control No. 2001-ML-08-0013

Dear Mr. McCullen:

This is in response to your August 30, 2001, letter on behalf of American National Bank and Trust Company of Chicago, Chicago, Illinois (“Bank”). Pursuant to 12 C.F.R. § 5.34, the Bank proposes to expand the activities of an existing operating subsidiary, Bank One Exchange Corporation (“Operating Subsidiary”). For the reasons given below, we conclude that the proposed expanded activity of the operating subsidiary is permissible and approve the Bank’s application.

The Operating Subsidiary currently provides its customers with “like-kind” exchange services pursuant to section 1031 of the Internal Revenue Code, 26 U.S.C. § 1031. The Bank proposes that the Operating Subsidiary expand its services to include acting as an exchange accommodation titleholder (“EAT”) – through limited liability corporation subsidiaries – for reverse like-kind exchanges. Reverse like-kind exchanges permit taxpayers to identify and “acquire” the replacement properties before disposing of relinquished properties.

Your letter represents that, as an EAT, the Operating Subsidiary’s role in a reverse like-kind exchange will be minimal. At the request of a customer and after conducting a full evaluation (including credit risk rating) of the financial condition and prospects of the customer, the Operating Subsidiary will create a single-member limited liability company (“LLC”) of which it will be the sole member. The LLC will then use funds provided by the customer to acquire “qualified indicia of ownership” in the replacement property.<sup>1</sup>

---

<sup>1</sup> See I.R.S. Revenue Procedure 2000-37 (October 2, 2000). In the event that the customer borrows the funds that it provides to the Operating Subsidiary, the Bank represents that neither the Operating Subsidiary nor the LLC will have contractual liability on the loan. The Bank further represents

The LLC will hold qualified indicia of ownership in the replacement property until its customer can arrange for the sale of the relinquished property – a period not to exceed 185 days.<sup>2</sup> When the customer is prepared to sell the relinquished property, (1) the customer will transfer the relinquished property to the third party purchaser and (2) the Operating Subsidiary will transfer its ownership interest in LLC to the customer, who will become the sole member of the LLC. Proceeds from the sale of the relinquished property flow first to the Operating Subsidiary to cover any remaining expenses of facilitating the exchange and then to the customer.<sup>3</sup>

The Operating Subsidiary's role as an EAT is purely as an intermediary. At the request of a customer, the LLC will take funds provided by its customer, exchange those funds for qualified indicia of ownership in the replacement property, and hold that interest – on behalf of the customer – until the customer can arrange the sale of the relinquished property. In this sense, the LLC's role is, functionally, akin to that of a custodian. The LLC shares in neither the risks nor the rewards of the reverse like-kind exchange. Contractual transfer obligations and risks will remain with the customer, and the Operating Subsidiary (through the LLC) will be compensated solely by a fee from its customer. As such, acting as an EAT closely resembles the safekeeping and custodial functions<sup>4</sup> national banks and their operating subsidiaries have traditionally performed for their customers.

The qualified indicia of ownership that the LLC will acquire in the replacement property will be a form of ownership less than full legal title, *i.e.*, the LLC will never have ownership encompassing the right to possess, use, or convey the property. For example, the LLC may acquire a contractual right to purchase the replacement property, and the customer will exercise this contractual right when it becomes the sole member of the LLC. The OCC has held that the acquisition by a national bank of a contractual right to purchase real property – provided the bank does not exercise the right – is not an interest in real estate. *See* Interpretive Letter No. 603, *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,437 (Aug. 31, 1992). Therefore, 12 U.S.C. § 29 is not implicated by the Bank's proposal.<sup>5</sup>

---

that neither the Operating Subsidiary nor the LLC will directly borrow funds for the acquisition of the replacement property.

<sup>2</sup> *See* Revenue Procedure 2000-37, *supra*.

<sup>3</sup> The agreement entered into between the Operating Subsidiary and its customer will contain contractual guarantees and indemnities by the customer. The Bank represents that, should the proceeds from the sale of the relinquished property be insufficient to cover remaining expenses, the customer would be required by the agreement to provide additional funds to the Operating Subsidiary to cover such expenses.

<sup>4</sup> Conditional Approval No. 479 (July 27, 2001), and citations therein (safekeeping functions of national banks are long-established and extensively recognized); Conditional Approval No. 267 (January 12, 1998); Letter from Thomas G. DeShazo, Deputy Comptroller of the Currency (June 10, 1974) (national bank may provide safekeeping services for state lottery tickets and materials).

<sup>5</sup> The LLC's ability to acquire the right to purchase the replacement property, but not to exercise that right, is analogous to national banks' authority to acquire and hold, but not exercise, equity warrants

Based on the foregoing, the Bank's application to expand the activities of the Operating Subsidiary is approved. This approval, and the activities and communications by OCC employees in connection with the filing, do not constitute a bilateral contract, express or implied, or any other obligation binding upon the OCC, the U.S., any agency or entity of the U.S., or an officer or employee of the U.S., and do not affect the ability of the OCC to exercise its supervisory, regulatory, and examination authorities under applicable law and regulations. The foregoing may not be waived or modified by any employee or agent of the OCC or the U.S.

In the event of questions, please contact Richard T. Erb, Licensing Manager, Large Bank Licensing, at (202) 874-5060 or by email: [largebanks@occ.treas.gov](mailto:largebanks@occ.treas.gov).

Sincerely,

**-signed-**

Julie L. Williams,  
First Senior Deputy Comptroller and Chief Counsel

---

as consideration for a loan. *See* 12 C.F.R. § 7.1006. Equity warrants represent a contractual right to purchase prescribed amounts of equity in the issuers.