



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Conditional Approval #313 July 1999

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION TO CHARTER CIBC NATIONAL BANK, MAITLAND, ORANGE COUNTY, FLORIDA JULY 9, 1999

I. DESCRIPTION OF THE PROPOSAL

On December 16, 1998, Canadian Imperial Bank of Commerce, Toronto, Ontario, Canada (“CIBC” or “Applicant”), filed an application with the Office of the Comptroller of the Currency (OCC) to charter a new full-service national bank. The proposed bank will be headquartered in Maitland, Orange County, Florida, which is in the Orlando metropolitan area, and will be titled CIBC National Bank (“Bank”).¹ The Bank has applied to the Federal Deposit Insurance Corporation (FDIC) for deposit insurance and will apply to become a member of the Federal Reserve System. Public comment letters were received from two parties regarding this application.²

CIBC is Canada’s largest bank with consolidated assets of C\$281.4 billion (US\$182.4 billion) as of October 31, 1998. With over 1,400 branches, it has been in continuous operation since 1867. In the United States, CIBC currently operates agencies in New York City, Atlanta, Los Angeles, and San Francisco, a limited state-chartered branch in Chicago, and a representative office in Houston. CIBC also engages in securities underwriting, dealing, and related activities under the CIBC World Markets umbrella through CIBC Oppenheimer, a limited-purpose “Section 20” subsidiary based in New York City. This proposal represents CIBC’s *de novo* entry into the United States with an FDIC-insured depository institution.

¹The organizers of the Bank are Brian Cassidy, David Cyr, Nora Brooks, Paul Dobson, and Christopher Greene, all of whom are employees of CIBC.

²The OCC received comment letters from Inner City Press, Bronx, New York, and Howard Greenspan, a private citizen from Ontario, Canada. Inner City Press’ comments are addressed in the “CRA Considerations” section of this Decision. Mr. Greenspan expressed general policy and supervisory concerns regarding standalone Internet banks. Many of this commenter’s concerns are not relevant in this case since the Bank will have a large physical presence, and issues relevant to supervision of the Internet aspects of this proposal are discussed herein.

The Bank will not have any traditional banking offices but will deliver products and services to its customers through a variety of electronic delivery channels.³ Customers will conduct banking transactions through automated teller machines (“ATMs”), through the Internet via a transactional Web site, and through the Bank’s toll free customer service line. As discussed further below, customers will be able to access all of these delivery channels at kiosks located on the premises of retail store partners. Each kiosk will house a dedicated phone line to the Bank’s call center and a computer with dedicated access to the Bank’s Web site. A Bank ATM will be placed on an external wall, or otherwise adjacent to the kiosk. The Bank plans to staff the kiosks with part time customer service representatives. These individuals will act as facilitators only and will not have the ability to accept deposits, approve loans, negotiate interest rates, or otherwise commit the Bank to banking transactions or activities.

The Bank’s main office will be situated in an office suite in Maitland, Florida. The office will include a “call center” reached by telephone or computer. The Bank will service all customers through electronic delivery channels, including through the kiosks. Telephone and Internet banking services will be available 7 days a week, 24 hours a day; kiosk availability will be a function of store hours. Bank staff will consist of a President/Chief Executive Officer, Chief Lending Officer, Chief Financial Officer, Chief Operations Officer whose responsibilities include the technology area, Chief Risk Officer whose responsibilities include compliance with CRA and other banking regulations, executive office staff, and customer service representatives.

The business strategy for the Bank is based upon an existing program offered by CIBC in Canada under the brand name President’s Choice Financial (“PCF”), on the Internet at www.preschoicefinancial.com. This is an exclusive arrangement with Loblaws Inc., a major Canadian grocery store chain. Under the PCF program, CIBC offers consumer loan and deposit products and services, including electronic bill payment, through aforementioned electronic delivery channels and through banking kiosks located in Loblaws grocery stores.⁴ PCF is branded under a name associated with Loblaws. The pricing strategy, which takes advantage of the program’s lower overhead structure, is no or low-fee products with above market deposit interest rates and below market average lending rates.

³This is the third charter proposal filed with the OCC for a national bank that will deliver products and services to customers primarily through electronic means. See Decisions of the Office of the Comptroller of the Currency on the Applications to Charter: CompuBank, National Association, Houston, Texas, Conditional Approval #253, August 20, 1997, <http://www.occ.treas.gov/interp/sep97/ca253.pdf>; and NextBank, National Association, San Francisco, California, Conditional Approval #312, May 8, 1999, <http://www.occ.treas.gov/interp/may99/ca312.pdf>.

⁴The PCF program was launched in Ottawa in February 1998 with four in-store banking kiosks. As of May 1999, there were 135 PCF kiosks operating nationwide. Loblaws has no ownership stake in, or operational responsibilities for, the PCF program.

The PCF program also offers a customer loyalty program where by executing various banking transactions, bank customers earn points that are redeemable for free groceries at Loblaws.

The proposed Bank's strategy is similar to the PCF Program. In this regard, CIBC has signed a definitive agreement with Winn Dixie Stores, a Jacksonville, Florida-based grocery store chain, to establish kiosks in its Florida stores under the brand name *Marketplace Bank*.⁵ The Bank will establish kiosks in the Orlando area and expand to other major metropolitan areas in the state such as Tampa, Jacksonville, and Greater South Florida, eventually spreading statewide and, perhaps, to other states. Under the *Marketplace Bank* brand, the proposed Bank will offer deposit and credit products and services to consumers. Deposit-related products and services include no fee checking and savings accounts earning above-market interest rates, certificates of deposit, electronic bill payment, and an ATM card. Loan products will be limited initially to unsecured consumer loans, but residential mortgages, secured consumer loans, and credit cards may be offered in the future. Credit line applications and new account applications will be made available at the kiosks and through the computer to existing and prospective customers.

The Bank will use credit scoring to make the credit decisions, and customers will be able to draw down from the approved credit line through the Bank's ATMs. The Bank has not yet determined whether it will originate its own credit card receivables or refer its customers to a third-party credit card lender under a co-branding strategy. The Bank may originate its own mortgages in the future, but it will initially provide its customers with a direct hyperlink from the Bank's transactional Web site to an online mortgage broker, www.iOwn.com.⁶ Through iOwn.com Web pages available within the Bank's Web site, customers will be able to compare rates and apply online to over twenty major mortgage lenders. The site will also offer other tools and advice suitable for mortgage loan

⁵Winn Dixie also has stores in Georgia, North Carolina, Alabama, Louisiana, Arkansas, and Texas; however, CIBC has not yet contracted for kiosk locations in those states.

The *Marketplace Bank* program is a joint marketing arrangement between Winn Dixie and the Bank. One tradename used by Winn Dixie is *The Marketplace*. While Winn Dixie will have no ownership stake in, or operational responsibilities for, the Bank or the *Marketplace Bank* program, the Bank has selected a brand name that is directly associated with the host retailer, Winn Dixie, and will be using retail space shared with Winn Dixie. To reduce the risk of customer confusion, the OCC believes it is especially important that the Bank comply with the requirements of 12 C.F.R. 7.3001 (sharing space and employees), including ensuring that it and the host retailer are conspicuously, accurately, and separately identified. In addition, because the Bank will be conducting specific banking operations through kiosks located on the premises of, and under brand names associated with, its retail store partners, the Bank has developed a contingency plan to identify, manage, and control the unique financial, operational, and legal risks from this arrangement.

⁶CIBC has an minority ownership stake in iOwn.com, formerly known as HomeShark.com.

applicants.⁷ In addition to loan products, in the future the Bank may offer services such as discount securities brokerage, annuities and insurance products, and IRA accounts.⁸

Although there are no plans to offer a customer loyalty program with Winn Dixie initially, marketing promotions will be in conjunction with the retail store partner. The proposed Bank primarily plans to target in-store customers who have a penchant to do their banking remotely. The Bank believes that such customers will likely be younger, more educated, technology-savvy individuals who are trusting of technology and comfortable with ATM use for banking needs. However, the Bank also believes that its offering of no or low-fee banking products will appeal to low- and moderate-income consumers, including those who may have limited transportation means.

The Bank will perform some key operational functions internally while contracting with third-party service providers for the provision of other functions. Bank staff, in conjunction with CIBC parent company personnel, will perform business and strategic planning, marketing, investment, funds management, cashier function, loan underwriting, operations support, legal, internal audit, and regulatory compliance functions. The Bank will likely outsource to a third-party or affiliated service provider for telephone customer service, the Internet banking platform, item processing, core data processing, bill payment services, delinquent loan collection, card and check production, and statement issuance.

The *Marketplace Bank* program is the first of other potential similar ventures in the United States for the proposed Bank. In the future, the Bank may enter into contracts with other retailers to establish other kiosk-based banking programs in their stores, branded for their particular store.⁹

⁷When establishing such Web links, the OCC expects that the Bank will take reasonable steps to clearly distinguish between products and services that are offered by the Bank and those offered by CIBC affiliates or a third party. Bank customers should be able to identify when they are dealing with the Bank and when they are not. For example, a third party may have different standards than the Bank with respect to security, privacy, etc. for information provided over the Internet. Internet technology provides multiple methods to provide such clarity to potential customers. Examples include simple text and dialogue boxes. See also "Technology Risk Management: PC Banking," OCC Bulletin 98-38, p. 17 (August 24, 1998); <http://www.occ.treas.gov/bullst98.htm>.

⁸The Bank represents that any such activities would be conducted in accordance with OCC regulations, interpretations, and application requirements as appropriate.

⁹In the event that an individual should open a deposit account under more than one banking program offered by the Bank under the brand name of different retailers, the accounts will be consolidated for purposes of FDIC deposit insurance. See 12 U.S.C. Sections 1813(m), 1817(i), and 1821(a). Insured deposit limits are determined in accordance with regulations prescribed by the FDIC at 12 C.F.R. Part 330. The OCC expects that the Bank's policies and procedures will comply with guidance issued by the OCC and the Federal Financial Institutions Examination Council (FFIEC) with respect to the naming of branches and other banking facilities, OCC Bulletin 98-22, May 12, 1998.

II. LICENSING FACTORS

A. Policy Considerations

Under its Corporate Activities regulations (12 C.F.R. 5.20), the OCC considers whether the proposed bank: (A) has organizers who are aware of, and understand, national banking laws and regulations; (B) has competent management, including the board of directors, with ability and experience relevant to the types of services to be provided; (C) has capitalization that is sufficient to support the projected volume and type of business; (D) can reasonably be expected to achieve and maintain profitability; and (E) will be operated in a safe and sound manner.

In evaluating this charter proposal, the OCC performed a thorough assessment of the applicant and the proposed operating plan. This included meetings with the proposed organizers, officers, and directors; discussions with Canadian and U.S. banking supervisors; investigation and review of CIBC's past business and banking practices; review of CIBC's existing operations; and evaluation of its proposed information system architecture and approach to security and controls. We also conducted a detailed financial and business plan analysis using regulatory and rating agency data and research.

Organizers and Management

The OCC's analysis concluded that the organizers and proposed management and directorate are knowledgeable of, and understand, national banking laws and regulations and safe and sound operations. The individuals are all existing officers and employees of CIBC either in Toronto or at its New York City-based subsidiary CIBC World Markets. Based upon our review of their backgrounds, the management and directorate for the proposed Bank possess experience relevant to the proposed products and services. This conclusion incorporates the fact that CIBC is a large, sophisticated, well-managed organization with substantial Internet banking and in-store banking operations in Canada.

Capital Considerations

Proposed capital is sufficient to support the projected volume and type of business. CIBC plans to provide initial capital to the Bank of \$425.0 million in cash. Based upon the Bank's growth and earnings projections, the projected capital should ensure that the Bank's Tier 1 leverage ratio will exceed eight percent throughout the first three years of operations.¹⁰ To maintain this ratio and to otherwise ensure "well capitalized" status under the FDIC's Prompt Corrective Action guidelines, CIBC represents that it will make

¹⁰See 12 C.F.R. part 3 for the definition of Tier 1 capital and the leverage ratio.

subsequent injections to the Bank if necessary.¹¹ Further, as outlined below, the OCC has imposed a condition requiring the Bank to maintain this level of capital in the event that earnings or growth differ from the projections presented in the charter application.

CIBC, the parent company, should have the requisite financial capacity and access to the capital markets to provide capital support to the Bank. As of the last fiscal year-end, October 31, 1998, shareholders' equity was approximately US\$7.2 billion. As a percentage of risk weighted assets, the respective Tier 1 Capital and Total Capital ratios were 7.7 percent and 10.8 percent, which is in excess of the threshold set by Canada's Office of the Superintendent of Financial Institutions for a "well capitalized" financial institution. According to public reports, asset quality appeared very good at year-end with problem loans representing less than one percent of total loans. Net income for the year was US\$721 million, which represents a return on assets of about 0.5 percent and return on equity of 10 percent. Earnings in 1998 were adversely impacted by trading losses resulting from the turmoil in the global capital markets and from the higher overhead structure of Oppenheimer, a 1998 acquisition. Moody's Investor Service maintains a high quality rating of Aa3 for CIBC's long-term deposits and long-term debt.¹²

Earnings Considerations

The financial projections show the Bank becoming profitable within three years using realistic growth, income, and expense assumptions. It is reasonable to expect that the proposed Bank can achieve and maintain profitability in line with these projections. Through its strategy of using both in-store kiosks and Internet access, the Bank should be able to earn a higher net interest margin than existing Internet-only financial institutions.¹³ These Internet financial institutions are pursuing a strategy of offering deposit interest rates well above market averages to attract deposit customers. On the other hand, the proposed Bank plans to pursue a marketing strategy of low fees and convenient access, leveraging its joint marketing arrangement with a retailer and physical presence in terms of in-store staff, dedicated terminals, and proprietary ATMs at the kiosks. In addition, the Bank will underwrite some of its own loans, unsecured consumer loans initially, to earn interest income. Other costs for the proposed Bank fall between those of its Internet and traditional

¹¹See also Section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o), as added by Section 131 of the Federal Deposit Insurance Corporate Improvement Act of 1991.

¹²Moody's Investors Service, Global Credit Research, March 1999. Bonds that are rated Aa are judged to be of high quality by all standards. Together with the Aaa group, they comprise what are generally known as high grade bonds. Aa bonds are rated lower than the best bonds because margins of protection may not be as large as in Aaa securities.

¹³The five Internet-only financial institutions are Net.B@nk, F.S.B., Security First Network Bank, F.S.B., Telebank, F.S.B., CompuBank, N.A., and First Internet Bank of Indiana. All of these financial institutions are currently less than three years old.

“brick and mortar” competitors. The in-store kiosks will likely result in a higher cost structure than Internet-only banks which have no physical presence for customers. However, according to recent statistics, the cost of opening an in-store banking facility is one-fifth the cost of opening a traditional branch.¹⁴ Further, an often cited study concluded that the average cost of completing a banking transaction through a telephone call center, ATM, or the Internet is \$0.54, \$0.27, and \$0.01, respectively, compared to \$1.07 for a traditional branch.¹⁵

The costs of the proposed Bank’s kiosk structure may even be less than past studies have indicated, because the nature of in-store facilities has changed over time. Some newer in-store facilities include self-service zones comprised of telephones, computer terminals, video screens, and/or ATMs; and information areas where customers can learn about new products, services, and delivery technologies.¹⁶ The proposed Bank’s kiosks, and the ones operated by CIBC’s PCF unit, are a direct reflection of this trend.

There are reasonable prospects that the Bank will attract its proposed customer base. The market for in-store banking continues to grow and evolve. The number of staffed in-store banking facilities has grown at a 30 percent average annual rate over the last 5 years to 7,110 such facilities at year-end 1998. Three years after opening, the average in-store banking facility has deposits and loans of approximately \$9 million and \$3 million, respectively, with some banks experiencing significantly better results.¹⁷

The Bank has decided to begin its operations in Florida, in part, because of its favorable demographics. By population and other measures, Florida is one of the fastest growing states in the nation. Total deposits in FDIC-insured financial institutions in Florida grew at an average annual rate of about three percent over the last five years, and totaled \$210.3 billion as of June 30, 1998.¹⁸ These and other factors make Florida an attractive location for this proposed low fee, convenience banking proposal. Furthermore, consumers are already displaying a strong desire for Internet banking services. One recent study concluded that total U.S. online banking households almost doubled during 1998 to

¹⁴See “Special Report Series: Retail Delivery Systems,” Bank Technology News, December 1997.

¹⁵See “Consumer Demand for Internet Banking,” Booz Allen & Hamilton, July 1996, III-5F.

¹⁶See also “Location, Location, Design!,” Bank Marketing, February 1998, pp. 34-39; “The Supermarket Branch Revisited,” ABA Banking Journal, October 1997, pp. 24-28; “Beyond In-Store Banking at Star Bank,” Journal of Retail Banking Services, Volume XX, No. 4, Winter 1998, pp. 19-25; and “Don’t Write Off In-Store Bank Branches Just Yet,” American Banker, October 8, 1998, p. 6.

¹⁷Source: International Banking Technologies, a First Data Company.

¹⁸See “Sheshunoff, the Branches of Florida,” Sheshunoff Information Services, 1999, III. 8.

8 million and projected that they will nearly triple to 25 million by year-end 2001.¹⁹ The Bank has conducted extensive marketing research in support of this proposal.

Safety and Soundness Considerations

The OCC is satisfied that the Bank will be operated in a safe and sound manner. Based upon preliminary review, CIBC management has established a good foundation of personnel, policies, and controls which will be adopted by the Bank. The OCC will confirm this during the preopening examination. Particular focus areas include technology risk management, Year 2000 compliance, and customer privacy.²⁰

As part of the operating plan submitted to the OCC, the proposed Bank has outlined the proposed information systems architecture. This includes a description of the system and discussion of the technologies used and key elements for the security controls, internal controls, and audit procedures. Based upon our review of the plans, the OCC is satisfied with the plans to date, but will undertake further review during the organizational phase of the Bank. Prior to receiving final charter approval, we are requiring the Bank to submit the final information system and operations architecture plans for the OCC's review and approval. In addition, before implementation, the Bank's computer system must successfully undergo a comprehensive security review by an objective and qualified source, including adequacy of protection against unauthorized external access. Going forward, the Bank will be expected to adhere to current and future OCC issuances on technology risk management.²¹

The proposed Bank has represented that its internal systems are Year 2000 compliant and that it is performing sufficient due diligence and testing to ensure that third-party data processing services or purchased applications and systems from software vendors will also be Year 2000 compliant. The Bank believes that it is in compliance with all OCC and

¹⁹As reported by First Security Van Kasper, "Banking on the Internet," May 17, 1999.

²⁰At the preopening examination, the OCC will review the Bank's policies, procedures, and controls for ensuring customer privacy and compliance with consumer protection laws and regulations. This review will include confirmation that adequate policies have been implemented in these areas. The OCC also expects that the Bank's policies and procedures will comply with guidance issued by the OCC and the FFIEC with respect to customer privacy, consumer protection, and electronic banking, including OCC Bulletin 98-31 (FFIEC Guidance on Electronic Financial Services and Consumer Compliance) and OCC Bulletin 98-38 (Technology Risk Management: PC Banking), and the Bank will carefully consider OCC Advisory Letter 99-3 (Fair Credit Reporting Act), <http://www.occ.treas.gov/bullst98.htm> and <http://www.occ.treas.gov/ftp/advisory/99%2D3.txt>, respectively.

²¹See "Technology Risk Management: PC Banking," OCC Bulletin 98-38 (August 24, 1998), <http://www.occ.treas.gov/bullst98.htm>.

FFIEC guidelines and timeframes for Year 2000 project management. This will be confirmed at the preopening examination.²²

CIBC has developed and implemented a privacy policy.²³ The existing policy, which the Bank will implement, informs the customer what information is being collected, why it is being collected, how it is being used, and with whom it is shared. The Bank will provide a direct link to its privacy policy from the home page of its Web site and from all Web pages where the system is collecting customer data, and it will make the policy available at its kiosks. The policy states that the Bank collects confidential customer data to determine whether it can offer credit. The Bank does not share confidential customer information with third parties, including the retail store partner, except under limited circumstances. One such circumstance includes sharing with a service provider when it is a necessary step in completing a customer transaction. In those cases, the Bank will ensure that the service provider's privacy policies are at least as stringent as the Bank's and the information is subject to a confidentiality provision in the contract. The only other circumstances are reporting to credit bureaus, responding to a judicial subpoena, or as otherwise required by applicable law. The Bank will otherwise obtain the customer's consent before sharing his or her name with a third party, and it provides the customer with the opportunity to "opt-out" of the Bank's sharing of customer information with affiliates for the purpose of cross-selling other financial products and services. CIBC represents that the Bank and affiliates will maintain internal controls, including technological firewalls, to preclude unauthorized access to or disclosure of customer information. In addition, CIBC represents that management will be integrally involved in policy development and planning in this area and that the Bank will develop and implement processes, including audit, to ensure employee understanding and adherence to its stated policy.

Finally, the Applicant represents that the Bank will not indicate in any of its marketing efforts or materials that the OCC has approved or endorsed the security, functionality, or effectiveness of the Bank's products or services.

The OCC believes that the Bank has a reasonable chance for success and can be adequately supervised using established safety and soundness and bank information system examination procedures. Before the Bank receives its final charter approval, the OCC will conduct a

²²See "Year 2000 and Systems Integration Considerations in Corporate Application Decisions," OCC Advisory Letter 98-1 (January 20, 1998), <http://www.occ.treas.gov/advlst98.htm>, and OCC Advisory Letter 99-5 (May 3, 1999), <http://www.occ.treas.gov/advlst99.htm>.

²³The OCC has issued guidance for national banks on examples of effective practices for informing customers over the Internet about bank policies for the collection and use of personal information. The guidance discusses examples of effective practices for the development of bank privacy policies and measures for ensuring adherence to those policies. See "Guidance to National Banks on Web Site Privacy Statements," OCC Advisory Letter 99-6, May 4, 1999, <http://www.occ.treas.gov/advlst99.htm>.

thorough preopening examination of the Bank, including its information systems environment, Year 2000 compliance status, policies, procedures, controls, and compliance with all standard and special preopening requirements and conditions.²⁴

B. Legal Considerations

1. Chartering authority

The OCC charters a national bank under the authority of the National Bank Act of 1864, as amended, 12 U.S.C. 1 *et seq.*, and 12 C.F.R. 5.20. The OCC has conducted a thorough review of this application in light of the factors set forth in these statutory and regulatory provisions regarding the chartering of de novo banks and has determined that there is no impediment under applicable law and regulations to granting this preliminary charter approval.²⁵

2. Kiosks and ATMs as proposed by the bank are not branches

The Applicant proposes that the Bank will provide service to customers at ATMs and at kiosks to be established in supermarkets or other retail stores. As proposed by the Bank, the kiosks would be about 300 square feet in size. They will be walled on three sides and open out to the shopping area of the store on the fourth side. The ATMs and kiosks will provide unrestricted access at all hours that the store is open. Inside each kiosk is a personal computer terminal connected to the Bank's Internet web site, and a telephone by which Bank customers and prospective customers can contact the Bank's call center with specific questions. The ATM will be installed in one of the walls of the kiosk, or otherwise be adjacent to the kiosk, and will face out toward the store.²⁶

²⁴The Bank's operating plan, including any future additions or revisions, will provide the context for the supervisory review during the preopening examination. Major deviations from the operating plan or changes in the composition of the board of directors, ownership, or executive officers that the OCC has not approved may result in withdrawal of preliminary conditional approval.

²⁵With regard to chartering a national bank, the National Bank Act requires that: articles of association and an organization certificate must be drafted and filed with the OCC, 12 U.S.C. 21-23; the required amount of capital must be paid in, 12 U.S.C. 53; certain requirements relating to directors must be satisfied, 12 U.S.C. 71-73; and the OCC must be notified when these things have been accomplished, 12 U.S.C. 26. As is typical with new charter proposals, these requirements will be satisfied after the OCC grants preliminary approval.

We note that the bank also must obtain deposit insurance from the FDIC and the establishment of the bank by CIBC also must be approved by the Federal Reserve Board under the Bank Holding Company Act. The bank filed its application for deposit insurance with the FDIC on April 12, 1999, and has represented that it will soon file its holding company application with the Federal Reserve Board.

²⁶These ATMs will be available during the supermarket's hours of operation for routine ATM transactions involving accounts at the Bank as well as accounts at other depository institutions; transactions involving accounts at other depository institutions, however, will not include the making of deposits.

Some of the kiosks also will be staffed part of the time²⁷ by customer representatives of the Bank who will perform only ministerial functions. Customer representatives will answer questions about Bank products and services, direct customers to the telephone to contact the call center for further information about Bank products and services, assist customers in filling out deposit forms and loan applications at the computer terminal,²⁸ and verify identification and income of new customers²⁹ under specific Bank-prescribed review and verification standards.

Customer representatives will not handle any cash, checks, or other cash substitutes and, thus, will have no role in effecting deposit, withdrawal or loan disbursement transactions between the Bank and the customer. Rather, these functions can occur only at ATM machines whether at kiosk locations or freestanding.³⁰ Moreover, customer representatives will have no ability to approve, reject, or modify an application, render advice, negotiate interest rates or otherwise commit the Bank to any customer banking transactions or activities. Rather, approval functions will be performed by computer off-site applying underwriting and approval standards developed at the Bank's main office.³¹ The lending decision will then be communicated to the customer representative and, if the loan is approved, the customer representative will provide the borrower with a bank card.³² Accordingly, based on these facts, we conclude that the kiosks are not branches and, consequently, the OCC need not approve each kiosk site under 12 U.S.C. 36 or apply the standards for branch approval set forth in that statute.

²⁷The Applicant states that customer service representatives will be on-site during peak store hours as determined by each store's customer traffic pattern. Thus, the hours that a particular kiosk is staffed may vary from store to store and even from day to day at a given store.

²⁸All information needed to open deposit accounts and apply for loans offered by the Bank at the kiosk will be entered into the personal computer. The only written material that will be generated at the kiosk in connection with products and services offered by the Bank will be a signature card, which the customer representative will send to the main office of the Bank. If the Bank makes available products, such as credit cards, issued by a third party, written applications may be required.

²⁹As described, customer representatives will need to verify identity and income only of new customers. Consequently, an existing customer may open a deposit account or apply for a loan offered by the Bank through the customer's home PC or at the PC at the kiosk without the need for any involvement by the customer representative and even at those times when the kiosk is unstaffed.

³⁰The amount that can be withdrawn from ATMs will be subject to daily withdrawal limitations.

³¹The main office will house various bank managerial and nonmanagerial functions. Among other managerial functions, credit solicitation and administration policies and standards will be developed.

³²The customer will select a PIN number using an activation device available at the kiosk. Under the proposal, decisions on smaller loans likely will be made on the day of application.

Title 12 U.S.C. 36(j) provides:

The term ‘branch’ as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent. The term ‘branch,’ as used in this section does not include an automated teller machine or a remote service unit.³³

The question that arises is whether any activity undertaken at a kiosk should cause the kiosk to be considered to be a branch. In essence, the activities at issue are these: applying for a loan; providing the information necessary to open a deposit account; and using an ATM to make deposits into, or withdrawals from, a deposit account or to draw against a loan account.³⁴

The OCC has long recognized that the ministerial acts of providing information about loan products to customers and assisting them in applying for loans at bank locations is not the making of a loan. Thus, these activities do not cause that location to be a branch within the meaning of section 36.³⁵ Likewise, the OCC has recognized that the ministerial acts of providing information about deposit accounts to customers and assisting them in completing application forms and related documents to open a deposit account at a bank location is not the receipt of deposits. Thus, these activities do not cause that location to be a branch within the meaning of section 36.³⁶ In addition, the OCC has determined that the combination of these ministerial functions at the same site does not cause that site to be a branch within the meaning of section 36.³⁷

³³The statutory definition is codified in OCC regulations at 12 C.F.R. 5.30(d)(1). The Supreme Court has long held that the definition of “branch” is a federal definition not dependent on state law. *First National Bank of Plant City v. Dickinson*, 396 U.S. 122, 133-135 (1969).

³⁴The reference to “checks paid” in the section 36(j) listing of branch functions has long been construed as referring to the payment of withdrawals. *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 944 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976) (“*Smith*”).

³⁵*E.g. Independent Bankers Association of America v. Heimann*, 627 F.2d 486, 487 (D.C. Cir. 1980); Interpretive Letter No. 634, *reprinted in* [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) 83,518 (July 23, 1993); Interpretive Letter No. 721, *reprinted in* [1995-96 Transfer Binder] (CCH) 81,036 (March 6, 1996). These offices are generally referred to by the OCC as loan production offices (LPOs). *See also* 12 C.F.R. 7.1003-7.1005.

³⁶Interpretive Letter No. 638, *reprinted in* [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) 83,525 (January 6, 1994); Interpretive Letter No. 691, *reprinted in* [1995-96 Transfer Binder] (CCH) 81-006 (September 25, 1995). These offices have been referred to by the OCC as deposit production offices (DPOs).

³⁷*Id.*

ATMs are not branches by virtue of the 1996 statutory change excluding ATMs from the definition of “branch” for purposes of section 36.³⁸ Prior to 1996, court decisions held that ATMs were branches and were subject to restrictions and OCC approval under section 36.³⁹ But, in 1996, Congress passed legislation explicitly amending the section 36 definition of “branch” to exclude ATMs and remote service units (“RSUs”).⁴⁰ As subsequently clarified by the OCC, ATMs and RSUs, within the meaning of this exclusion, are defined as “automated, unstaffed facilities that engage in one or more” of the section 36 branching functions.⁴¹ In creating this exclusion, the intention of Congress was clear. As the Senate Report states:

Section 205 clarified that an ‘ATM’ or ‘remote service unit’ is not considered a ‘branch’ for purposes of federal bank branching laws and is therefore not subject to prior approval requirements or geographic restrictions.⁴²

Consequently, even though one or more of the three branching functions set forth in section 36 -- receiving deposits, paying withdrawals, and disbursing loan proceeds⁴³ -- may be undertaken at an ATM, such a facility is not considered to be a branch subject to section 36 limitations and OCC approval requirements.

Moreover, even considering the ATMs at the kiosks in combination with the personal computer and the telephone, the facilities would still come within the exclusion from branching for ATMs and RSUs since the kiosks would continue to be “automated, unstaffed facilities.” Thus, the question arises whether the part-time presence of a bank employee engaged only in ministerial functions and not engaged in any branching function at the kiosk⁴⁴ could cause these facilities to be considered branches.

³⁸Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. 104-208, sec. 2205(a), 110 Stat. 3009-3405 (September 30, 1996).

³⁹*E.g. Smith.*

⁴⁰*Supra* at n. 38.

⁴¹Interpretive Letter No. 772, *reprinted in* [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) 81-136 (March 6, 1997); Interpretive Letter No. 838, *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. 81-293 (April 15, 1998).

⁴²S. Rep. 104-185, 104th Cong., 2d Sess., 24 (December 14, 1995).

⁴³These three functions have been referred to by the Supreme Court as the “core functions” for determining branch status under section 36. *Clarke v. Security Industries Association*, 479 U.S. 409 (1987).

⁴⁴As discussed, the bank employee will not handle cash, checks or other cash substitutes and, thus, can not effectuate any of the three statutory branching functions -- the receipt of deposits, payment of withdrawals, or disbursement of loan proceeds.

The presence of an ATM outside the kiosk and a bank employee inside the kiosk to perform the ministerial functions of explaining bank products and services to customers and potential customers, assisting customers to input application information into the PC, and checking identities and verifying income of new customers could not transform the ATM into a branch. In this regard, we note that the ATM will be available to bank customers and noncustomers alike whether or not a bank employee is present at the kiosk. Moreover, even when present at the kiosk, the bank employee can not operate the ATM on behalf of a customer. In this respect, the ATM is no different than any other stand-alone ATM. As long as a bank employee can not operate the ATM on behalf of a customer -- and, in fact, need not even be present -- it should not matter whether the nearest bank employee is 20 feet away from the ATM or 200 feet away from the ATM. Under the facts presented, the limited ministerial activities of the bank employee simply can not be attributed to the ATM; conversely, the services provided by the ATM, operated solely by the customer, can not be attributed to the bank employee.

Consequently, the OCC concludes that the operation by the Bank of the kiosks does not cause the kiosks to be branches within the meaning of 12 U.S.C. 36 and does not implicate the branching restrictions and approval requirements set forth in that section.⁴⁵

3. Jurisdiction over vendors

As discussed, the Bank has indicated in its application that certain functions of its internal operations will be contracted out to various vendors. The process of subcontracting activities which the bank would otherwise perform for itself implicates the requirements of the Bank Service Company Act, 12 U.S.C. 1861 *et seq* ("BSCA"). In particular, 12 U.S.C. 1867(c) states, in part, that

[n]otwithstanding subsection (a) of this section, whenever a bank that is regularly examined by an appropriate Federal banking agency, or any subsidiary or affiliate of such a bank that is subject to examination by that agency, causes to be performed for itself, by contract or otherwise, any services authorized under this chapter, whether on or off its premises - (1) such performance shall be subject to regulation and examination by such agency to the same extent as if such services were being performed by the bank itself on its own premises

⁴⁵This conclusion is consistent with a determination made last year involving an ATM located at a national bank's loan production office/deposit production office (LPO/DPO) facility. Interpretive Letter No. 843, *reprinted in* [Current Transfer Binder] Banking L. Rep. (CCH) 81-298 (September 29, 1998) (combination LPO, DPO and ATM is not a branch where ATM can be used by depositors of the bank and of other banks, is physically separate from the LPO/DPO, cannot be accessed from the LPO/DPO, and bank employee will not operate the ATM on behalf of a customer). The issue of whether an LPO/DPO facility with an adjacent ATM is considered to be a branch is currently being heard by the United States District Court for Colorado. *First National Bank of McCook, Nebraska, v. Fulkerson*, No. 98-D-1024 (D. Col. filed May 7, 1998).

Pursuant to this statute, services performed for the Bank by contract or otherwise, will be subject to the examination and regulation of the OCC. The Bank has represented that it will notify potential vendors, in writing, of the OCC's examination and regulatory jurisdiction should they contract with the Bank. This understanding regarding OCC jurisdiction will be included in all vendor contracts. Accordingly, subcontracting functions to a vendor will not frustrate the OCC's ability to regulate all aspects of the Bank that could affect its safe and sound operations.⁴⁶

C. Community Reinvestment Act Considerations

Under the Community Reinvestment Act ("CRA") and its implementing regulations, the OCC must take into account a proposed insured national bank's description of how it will meet its CRA objectives. (See 12 U.S.C. 2902(3) and 2903(a)(2) and 12 C.F.R. 25.29(b)). The Bank's operating plan includes such a description. The Bank will be treated as a large bank for CRA purposes and, as such, its CRA performance will be evaluated under the lending, investment and service tests set forth at 12 C.F.R. 25.22 through 25.24.⁴⁷ Because it will be evaluated as a large bank under CRA, the Bank will collect and report the data required under 12 C.F.R. 25.42.

The Bank plans to help meet the credit needs of its assessment area(s) through its lending activities, qualified investments and available services. As discussed previously, the Bank will provide its lending and other products and services to individuals through the establishment of kiosks located in grocery stores equipped with deposit-taking ATMs, computer terminals connected to the Bank's Internet Web site and telephone connections to the Bank's representatives. In addition, the Bank's Internet Web site and toll-free customer service telephone line may be accessed by existing customers to obtain Bank products and services from any location, at any time. The Bank plans to offer unsecured consumer loans to individuals of all income levels in its assessment area(s) and will also purchase home mortgages originated in its assessment area(s). The Bank will provide services such as no-fee deposit and checking accounts and the deposit-taking ATMs will be available for use by the public, including persons who are not account holders of the Bank. The Bank plans to

⁴⁶Elements of the services to be provided to the Bank may be performed by third party vendors through CIBC. These services will constitute activities pursuant to the BSCA. To the extent that third party vendors perform these services for the Bank through CIBC, the third party vendors will be subject to federal banking regulation and examination to the same extent as if such services were being performed by the Bank itself. Similarly, to the extent that CIBC itself performs services for the Bank, those services will be subject to the BSCA. The Bank also has represented that all vendors that it uses will be incorporated in the United States. In the event that, at some point in the future, it may consider using a foreign vendor, including a Canadian vendor, whether or not affiliated with the Bank, it has represented that it will first notify and consult with the OCC to assure that the OCC's jurisdiction over the vendor is not impaired.

⁴⁷However, the Bank's operating plan notes that in the future the Bank may develop a CRA strategic plan and seek regulatory approval of such plan from the OCC.

pay higher than market interest rates on deposits and will charge lower than market interest rates on loans. The Bank will also support community initiatives by, among other things, making investments in local housing programs and expects to engage in community lending programs in its assessment area(s) such as participating in a consortium of lenders to create a small business investment pool.

As set forth in 12 C.F.R. 25.41(c)(2), the Bank must delineate assessment areas that “include geographies in which the bank has its main office, its branches, and its deposit-taking ATMs, as well as the surrounding geographies in which the bank has originated or purchased a substantial portion of its loans” The Bank’s main office will be located in Maitland, Florida, which is in the Orlando area. While the Bank will not have any branches, it plans to place deposit-taking ATMs at its banking kiosks initially in the Orlando, Florida area. As such, the Bank’s plan to designate the Orlando MSA as its initial assessment area is appropriate. The Bank is also planning to place deposit-taking ATMs at banking kiosks to be located in other areas in Florida as well as other states and will designate additional assessment areas as required by such expansion.

The OCC received two CRA-related comments from the same commenter after the close of the comment period regarding this Application. The commenter expressed concern that the proposed Bank would not comply with the letter and spirit of CRA and that the Bank’s assessment area should not be limited to the Orlando MSA because it would not be consistent with the Bank’s plans to operate on a nationwide basis via the Internet. For the reasons stated above, the OCC has determined that the delineation of the Bank’s initial assessment area is in accordance with the CRA regulations. To the extent that the Bank’s operations change in the future, its appropriate assessment area will be reevaluated.

The commenter also noted that new Internet-based banks have difficulty serving the credit needs of low- and moderate-income individuals because these individuals are generally less likely to own computers or otherwise have access to the Internet. As noted above, while the Bank does plan to have Internet operations, the Bank will also be providing many physical locations within its assessment area(s) where any member of the public can access its services and products. Further, the Bank will also be providing a toll-free customer service telephone line to permit customers to have telephone access to the Bank’s services and products.

Based upon the foregoing, the OCC believes that the Bank’s plan for meeting its CRA objectives is consistent with preliminary approval of this charter application.

III. PREOPENING REQUIREMENTS AND SUPERVISORY CONDITIONS

In all cases, following review of a new bank charter application, the OCC decides whether to grant preliminary approval, preliminary conditional approval, or disapproval to the request. Preliminary approval indicates permission to proceed with the organization of the

bank according to the plan set forth in the application. The organizational steps of a new national bank generally include hiring management and staff, establishing premises, purchasing computers and other equipment, selecting vendors, developing and implementing policies, procedures, and controls, and raising capital. Preliminary approval is not an assurance, however, that the OCC will grant a new national bank charter. Once the OCC grants preliminary approval to a charter proposal, the organizing group must satisfy certain procedural requirements, and in some cases special requirements, before the OCC will grant final charter approval. In addition, the OCC sometimes imposes conditions that will remain in place after the bank opens.

In response to this proposal, the OCC grants preliminary conditional approval subject to several preopening requirements and on-going conditions. These supplement the procedural requirements for a new national bank referenced in the transmittal letter to the Bank's spokesperson. The preopening requirements provide a framework for steps that the proposed Bank must successfully complete before the OCC can render a decision on final charter approval. The on-going conditions primarily establish certain checks and safeguards to ensure that the Bank, once open, will maintain adequate capital and operate in an overall safe and sound manner. The capital condition expires after the Bank's third year of operations. The OCC will monitor the Bank's future actions and performance through the normal supervisory process.

In addition to the procedural requirements for all new national banks, the following requirements must be satisfied before the OCC will grant final charter approval:

1. The Bank's initial Tier 1 capital, net of any and all organizational and preopening expenses, must be no less than \$422.9 million.
2. The Bank must submit to the OCC for review and approval a complete description of the Bank's final proposed information system architecture. This should include a schematic drawing and discussion of the following items: vendors; due diligence performed on the third-party vendors; vendor contracts; system and data security mechanisms; internal controls; and internal audit plans.
3. The Bank must have performed an independent security review and test of its Internet bank platform. The Bank must have this review performed regardless of whether the platform is operated in-house or by one or more third-party service providers. This review must be conducted by an objective, qualified internal or external source ("Reviewer"). The scope must cover adequacy of protection against unauthorized external access including individual penetration attempts, computer viruses, denial of service, and other forms of electronic access. In addition, the review must assess the adequacy of internal security. By written report, the Reviewer must confirm that the security measures, including the firewall, have been satisfactorily implemented and tested. The report must critique the effectiveness of

security policies and controls and confirm, with reasonable certainty, that unauthorized internal or external data and network access or access attempts are detected and recorded. As part of its decision to grant final charter approval, the OCC will consider the results of the report as well as any subsequent actions by the Bank or service provider to implement any recommendations or to remedy any noted security or control deficiencies.

4. The Bank must develop and implement a comprehensive Year 2000 project management program in compliance with OCC and FFIEC interagency guidelines and timeframes.
5. The Bank must develop and implement a bank-wide disaster recovery contingency plan pursuant to OCC and FFIEC interagency guidelines.
6. The Bank must implement an independent internal audit function that is appropriate to its size and the scope of its activities. The internal audit function should be supervised and staffed by individuals with sufficient technology and credit card expertise to identify the risks inherent in the Bank's operations and to assess the effectiveness of internal controls.

Final approval will be subject to the following conditions:

1. During its first three years of operations, the Bank shall at all times maintain a ratio of Tier 1 capital to adjusted total assets, as defined in 12 C.F.R. 3.2, in an amount that is equal to or greater than 8.0 percent.
2. The Bank must notify all potential vendors in writing of the OCC's examination and regulatory authority under 12 U.S.C. 1867(c). All final vendor contracts must stipulate that the performance of services provided by the vendors to the Bank is subject to the OCC's examination and regulatory authority.

The above listed conditions of this approval shall be 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(b)(1).

V. CONCLUSION

The charter proposal satisfies the applicable statutory requirements of the National Bank Act and the policy standards of the OCC, as set forth in 12 C.F.R. 5.20. For the reasons set forth above, including the representations and commitments made by the Applicant, it is my conclusion that this proposed national bank has a reasonable likelihood of success. Accordingly, the application is preliminarily approved, subject to the requirements and conditions outlined in this Decision Document and the transmittal letter.

If you have questions regarding this decision, please contact John W. Graetz, Licensing Expert (Financial Analyst), in Bank Organization and Structure at (202) 874-5060.

/s/
Julie L. Williams
Chief Counsel

07-09-99
Date

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