



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

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**Conditional Approval #361
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Re: Application by Bank One, N.A. and Mercantile Bank National Association to Expand Activities of a Limited Liability Company in which Each Holds Interests Through Existing Operating Subsidiaries
Application Control Nos. 2000-ML-08-0007 and 2000-CE-08-0003

Dear Messrs. Lipsitz and Rubin:

This is in response to the operating subsidiary application (“Application”) submitted by Bank One, N.A., Chicago, Illinois (“Bank One”), and Mercantile Bank National Association, St. Louis, Missouri (“Mercantile”) (collectively “Banks”), pursuant to 12 C.F. R. § 5.34(e). The Banks’ operating subsidiaries own membership interests in a limited liability company, Anexsys, LLC (“LLC”), which presently engages in various cash management, electronic payment, and data processing services.¹ The Banks now have applied to expand the activities of the LLC (and hence of their subsidiaries) to include

¹The OCC approved the subsidiaries’ investment in the LLC’s current activities in Conditional Approval No. 324 (Aug. 17, 1999). On January 1, 2000, the Banks adjusted their ownership percentages in Anexsys so that Bank One owns a 64% interest and Mercantile a 36% interest. Since Bank One owns more than 50%, Anexsys is now an operating subsidiary of that bank. 12 C.F.R. 5.34(d)(2). However, Anexsys remains a minority investment for Mercantile.

certain electronic finder, custodian, record keeping and financial agent services. For the reasons discussed below, the Application is approved, subject to the conditions set forth herein.

A. Background

The LLC seeks to expand the range of services that it can provide to governmental entities to include certain specified services that involve acting as finder, custodian, record keeper, or financial agent for governmental agencies. The LLC also proposes to provide other services that are incidental to these activities or that utilize excess capacity acquired in good faith. The services, described in detail below, are entitled: “SEEK”, “eNTRI”, “CyberTitle”, and Department of Health and Human Services Sporadic Phone Answering Services (“HHS Phone Services”).

1. SEEK

Pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (“PRWORA”), all states must develop and operate financial data match programs in cooperation with financial institutions to help locate assets that could be used to pay child support obligations. To meet this need, the LLC developed and is marketing SEEK, a financial and banking data match program that enables states to comply with the PRWORA. More specifically, the LLC will help manage the exchange of data between states and financial institutions and will process the data so as to match data on delinquent noncustodial parents to the asset accounts at financial institutions. Under the SEEK program, the LLC will also act as a clearinghouse for the financial data match of information among states and financial institutions. To that end, it will maintain a central case registry for participating states, control distribution of the registry to participating financial institutions, receive and consolidate matched account lists for financial institutions, and measure and report financial institution compliance. To support this activity, the LLC will also provide certain administrative support such as coordinating agreements between the participating state and financial institutions doing business with that state, and providing technical support for states and financial institutions to handle program information, status inquiries, and other customer service issues.²

2. eNTRI

eNTRI is an Internet-based electronic service that provides a catalog of government services available to the public. The LLC proposes to market this package of services (“eNTRI Services”) to state and federal government agencies; it includes developing a web site for the government agency that will allow the public, consumers, and other agencies to access and purchase services, information and forms, and products from that agency. As part of the eNTRI Services, the LLC may also host the web site, on its servers, for the government agency, or alternatively the agency may host the web site on its own

² The LLC also offers a version of SEEK known as “SEEK+”, which would enable a group of states, and financial institutions located therein, to contribute and have access to a consolidated child support enforcement case registry. The LLC would manage the consolidated registry and the exchange of related data files.

servers. The eNTRI Services also include the electronic storage and retrieval of the data set for the agency's web site, payment processing, and reporting.

3. *CyberTitle*

CyberTitle is another electronic service offered by the LLC to state governments. Using this service, states can process motor vehicle title applications and related payments, including sales tax payments, via the Internet. The CyberTitle service comprises data processing, information reporting, payments processing, and funds transfers activities. Specifically, CyberTitle facilitates the gathering, processing, transmitting, and analyzing of information relating to motor vehicle sales and related taxes and fees to support collection of government revenues. States using the CyberTitle service allow the input of title application data into the system via the Internet. The system transmits the filings to the Department of Motor Vehicles and the Department of Revenue for the relevant state. The service generates ACH debit transactions to move the sales tax and title fees from the consumer's bank account to the state's bank accounts. CyberTitle can also support credit or debit card transactions.

4. *HHS Sporadic Call Answering*

The LLC provides various cash management and data processing services to Bank One and Mercantile in connection with Bank One's appointment by the United States Department of the Treasury as the Treasury's financial agency for the electronic federal tax payment system ("EFTPS").³ In connection with its EFTPS services, the LLC operates a call-answering center. To meet its EFTPS obligations, the LLC must maintain equipment and staffing capabilities to handle specified maximum EFTPS call and transaction volumes.⁴ While the maximum call and transaction volumes occur only at certain times of the year, the nature and characteristics of the necessary equipment requires the LLC to maintain the maximum capacity at all times.

In February 1999, the Department of Health and Human Services, Office of the Inspector General ("HHS"), awarded the LLC a contract to provide periodic back-up call answering services for the HHS Hotline when call volume exceeds the HHS Hotline's ability to meet its response standards. In responding to the request for proposal, the LLC stated that it anticipated an overflow of no more than 400 calls per hour during peak times from the HHS Hotline, or approximately five percent of its call capacity.

B. *Analysis*

A national bank may engage in activities that are part of or incidental to the business of banking by means of an operating subsidiary. 12 C.F.R. § 5.34. For the reasons discussed in the first section

³ See Conditional Approval No. 324, *supra*.

⁴ The LLC's call center currently has capacity to handle approximately 8,000 calls per hour.

below, the LLC's proposed activities are permissible for a national bank and, hence, for an operating subsidiary.

With respect to Mercantile's minority interest in the LLC, the OCC has in a variety of circumstances concluded that it is lawful for a national bank to hold a non-controlling investment in an entity or enterprise, such as a limited liability company, provided four criteria or standards are met.⁵ These standards, which have been distilled from our previous decisions in the area of permissible minority investments for national banks and their subsidiaries, are:

- (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.*
- (2) *The bank must be able to prevent the enterprise from engaging in activities that do not meet the foregoing standard, or be able to withdraw its investment.*
- (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.*
- (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.*

We conclude, as discussed below, that Banks' proposed reorganization of membership interests in the LLC satisfies these four criteria.⁶

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*

OCC precedents on non-controlling ownership have recognized that the enterprise in which a national bank takes an equity interest must confine its activities to those that are part of, or incidental to, the business of banking. For the reasons below, each of the proposed activities meet this requirement.

a. *SEEK*

⁵ See e.g., Interpretive Letter No. 855, reprinted in [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-312 (Mar. 1, 1999).

⁶ The OCC will address the four-part test in this letter because Mercantile will continue to hold a minority interest. However, the Bank One investment is subject to the conventional operating subsidiary requirements under 12 C.F.R. 5.34. Because of this, some of the conditions imposed at the end of this letter will apply only to Mercantile and not to Bank One.

The core activity in the SEEK service is to correlate data on bank accounts to data on delinquent noncustodial parents. This type of data processing is part of the business of banking. National banks have long been permitted to collect, transcribe, process, analyze, and store “banking, financial or related economic data” for their customers as part of the business of banking. This is reflected in OCC interpretive rulings⁷ and interpretive letters.⁸

The core data in the SEEK service, relating to financial institution accounts, is clearly “banking, financial or related economic data,” as is the derivative or resultant data (the account matches for non-supporting parents).⁹ Thus, it is permissible for the bank to generate reports and provide other data

⁷ The OCC stated this in a prior version of its Interpretive Ruling on electronic banking activities. Specifically, the language of former 12 C.F.R. 7.3500 provided that “as part of its banking business and incidental thereto, a national bank may collect, transcribe, process, analyze, and store, for itself and others, banking, financial, or related economic data.” 39 Fed. Reg. 14192, 14195 (April 22, 1974). Later, this language was deleted from former 7.3500 because OCC was concerned that the specific examples of permissible activities in the ruling such as the marketing of excess time, by-products, and the processing of “banking, financial or related economic data” had led to confusion and misinterpretation. 47 Fed. Reg. at 46526, 46529 (Oct. 19, 1982). However, the preamble to the proposed simplifying rule stated that “the Office wishes to make clear that it does not intend to indicate any change in its position regarding the permissibility of data processing services.” *Id.* This same point was reiterated in the preamble to the final rule and in subsequent OCC letters. *See* 49 Fed Reg. 11157, 11158 (March 26, 1984); Conditional Approval No. 221 (Dec. 4, 1996); and Interpretive Letter No. 677, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625 (June 28, 1995).

⁸ *See* Conditional Approval No. 339 (Nov. 16, 1999) (data processing relating to digital certificates); Interpretive Letter No. 516, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,220 (July 12, 1990) (information concerning financial instruments, financial markets, economic information and news and related equipment and software allowing analysis of the information). *See also* Letter from John Shockey (Dec. 17, 1975) (unpublished) (economic analysis and forecasts, including data on stock and bond prices); Letter from Gail Pohn (Nov. 19, 1975) (unpublished) (processing claims accounts, billings, and financial reports for banks, retailers, insurance agents and doctors); Interpretive Letter No. 346, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,516 (July 31, 1985) (providing electronic information and transaction services in connection with commodities trading); Unpublished letter from William Glidden (dated Feb. 16, 1988) (development and operation of data processing system linking health care providers, insurers, patients, and their banks). The “business of banking” also includes providing electronic information and transaction services relating to investments in financial instruments. Interpretive Letter No. 346, *supra* (commodities trading) and Interpretive Letter No. 516, *supra* (securities trading).

⁹ Interpretive Letter No. 854, *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-311 (Feb. 25, 1999) (national bank can maintain a check verification service involving the maintenance of a database with the status of 80 million checking accounts). *See also* Conditional Approval No. 287 (Sept. 4, 1998) and Letter from John Shockey (June 7, 1976) (unpublished). The proposed activity also requires LLC to process information that arguably is not “banking, financial, or economic related,” *i.e.*, list of non-support cases. However, even assuming *arguendo* that this is not “eligible” information, its processing is permissible as “banking, financial, or related economic data processing” because the processing is done to compile a derivative product that is clearly “banking information” – a list of banking accounts associated with non-support cases. In other words, the processing seeks banking, financial or economic correlations or relationships within the non-banking data. This is part of the business of banking. The nature of the entry data being processed is not solely determinative of permissibility; the resultant product must also be considered. In that sense, this “correlation or distillation” processing activity that involves some “non-banking” data is different from the incidental processing of non-banking data discussed in the paragraph immediately below. *Cf.* Interpretive Letter No. 345, *reprinted in* [1986-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 77,799 (July 9, 1986) (suggesting that one should distinguish incidental non-banking products from other

processing services with respect to the derivative data (the match lists) such as acting as a clearinghouse for the financial data match information among states and financial institutions.¹⁰

The LLC will also provide certain ancillary services that will support and enhance this core financial data match activity: maintaining a central case registry, measuring and reporting financial institution compliance, coordinating agreements among states and financial institutions, and providing technical support for states and financial institutions to handle program information and other issues. These are incidental to the core permissible data processing activities. OCC has found that a national bank may, under its incidental powers, process data that is not “banking, financial, or economic related” where such processing is provided as part of the larger product or service that is within the business banking and the additional processing is “an integral part of the overall service the [bank] will market ... and ... is very minor in relation to the overall operation.”¹¹

b. eNTRI

The OCC has found many of the activities involved in the eNTRI Services and related payment processing services to be part of, or incidental to, the business of banking and, therefore, authorized for a national banks under 12 U.S.C. § 24(Seventh). We have previously determined that a national bank may provide a “package” of Internet-based services which includes hosting merchants’ web sites on its server; providing an electronic pathway for product ordering and payment; maintaining merchants’ data associated with the web sites on its server; providing reports on transactions, web site “hits,” and sales data; and payment processing.¹² The LLC proposes to provide all of these previously approved activities for government agencies.

In our previous decisions, we concluded that hosting of commercial web sites, providing an electronic communications pathway for product ordering and payment, and electronically storing and retrieving

products that, although arguably distinct from a connected banking product, really are so closely tied to that banking product such that the banking product cannot be provided without it. In the latter, the “other” product is effectively merged with and part of the banking product and, hence, becomes part of the business of banking). Here the processing of “non-banking” entry data is part of the business of banking (and not merely incidental thereto) because it will produce or derive banking or financial information.

¹⁰ OCC has long held that the business of banking includes the distribution of data, generation of reports, and keeping of records related to data derived from or aggregating banking or financial data. Interpretive Letter No. 653, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,601 (Dec. 22, 1994). *See also* Interpretive Letter No. 854, *supra* (national bank may maintain a database of the debit card fraud information including a central database of fraud information to support investigative efforts and fraud monitoring and reporting).

¹¹ Interpretive Letter No. 653, *supra*. *Cf.* Interpretive Letter No. 836, *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-290 (March 12, 1996) (processing of non-financial data found to be permissible when provided as a small part of the larger financial data processing service).

¹² Interpretive Letter No. 856, *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-313 (Mar. 5, 1999).

the data set for a merchant's web site are forms of finder activities authorized for national banks.¹³ By providing the eNTRI Services, the LLC will bring potential consumers and suppliers of government services and goods together for a transaction that the parties themselves negotiate and consummate. To that end, the LLC will provide potential consumers with information about the government agency's services and goods. Accordingly, we conclude that the components of the LLC's proposed eNTRI Services that involve hosting of web sites for government agencies and electronic storage and retrieval of the data set for the agency's web site are permissible finders activities authorized for national banks pursuant to 12 U.S.C. § 24(Seventh).¹⁴

The processing of payments resulting from orders received through an agency's web site is also clearly part of the business of banking.¹⁵ Additionally, we have previously concluded that the provision of monthly reports on empirical data relating to hosted site activities such as site "hits" and transaction volume, to the extent these reports involve the processing and transmittal of information relating to specific payment transactions the bank handles for the merchant, is part of the payment processing function and not a separate service.¹⁶ Finally, we have found that a bank can, as part of its web site hosting services, provide the merchants with more general information and reports relative to their web sites.¹⁷ As discussed, national banks may collect, transcribe, process, analyze, and store for itself and

¹³ See also Corporate Decision No. 97-60 (July 1, 1997) (national bank operating subsidiary maintaining and operating an Internet web site which provides information in pre-owned automobiles to potential buyers); OCC Conditional Approval No. 221, *supra* (national bank making a minority investment in a company that provides an electronic "gateway" through which customers of bank will be able to obtain home banking and other financial services from their respective financial institutions through various electronic access devices).

¹⁴ In the finder analysis, no distinction should be drawn between bringing together with a government agency those who wish to *purchase* goods or services from that agency and those who wish to *consume* goods or services from that agency. The latter, most likely individuals seeking forms, benefits, or other information from the agency, are not "buyers" in the traditional sense; however, as taxpayers, they are essentially buying information or other goods or services for which their taxes have paid. As such, they qualify as legitimate subjects for finder activities by national banks. See Corporate Decision No. 98-13 (Feb. 9, 1998) (national bank operating subsidiary, acting as finder, could bring together individuals who wished to enroll in government-sponsored health insurance program with appropriate government agency).

¹⁵ Conditional Approval No. 289 (October 2, 1998) (national banks may acquire a minority interest in a firm that, among other things, provides accounts receivable processing and accounts payable processing); Conditional Approval No. 248 (national bank operating subsidiary may acquire a minority interest in an entity that provides merchant credit and debit card processing services); Interpretive Letter No. 731, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,048 (July 1, 1996) (national banks as part of the banking business may collect and process accounts relating to an electronic toll collection system).

¹⁶ Interpretive Letter No. 731, *supra*; OCC Interpretive Letter No. 732, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,049 (May 10, 1996) (design, development, marketing, and maintenance of a network for electronic funds transfer and electronic data interchange permissible for national bank).

¹⁷ Interpretive Letter No. 653, *supra* (national bank acting as finder for insurance could also keep financial and other records relating to the client agency sales, receipts, and disbursements); OCC Interpretive Letter No. 741, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-105 (Aug. 19, 1996) (national bank acting as finder for automobile dealers may also maintain a comprehensive system that allows dealers to track information on customers referred and to generate market statistics such as buying trends and cycles).

others banking, financial, or related economic data. Here, the LLC proposes to provide similar types of information and reports to the agencies as part of its eNTRI Services. Accordingly, the payment processing and reporting activities of the LLC are approved.

The LLC also proposes to develop web sites for government agencies as part of the eNTRI Services. Recently we approved the development of web sites for merchants as part of an Internet merchant hosting services package.¹⁸ Specifically, OCC approved the web site development as incidental to the other Internet services where the ability to develop the web sites for participating merchants as part of the overall services was critical to the successful marketing of the package and the development was only a minor part of the entire Internet package offered.

Here, the development of web sites is needed to successfully market the eNTRI Services. Other providers of similar Internet services for government agencies included web site development in their package of services.¹⁹ Without the web development component, the LLC will be at a competitive disadvantage relative to other providers of Internet commerce services to government agencies. Additionally, the web site development feature is only a minor part of the entire package offered by the LLC (on average gross profits from web site develop will be less than 30% of the gross profits of the entire eNTRI package).²⁰ Under these circumstances, we find the web site development services to be incidental to the other eNTRI Services, and therefore authorized.

c. *CyberTitle*

¹⁸ See Interpretive Letter No. 875 (Oct. 31, 1999) (to be published), available at <http://www.occ.treas.gov/interp/jan00/int875.pdf>.

¹⁹ See Richard W. Walker, *Government Agencies Use EC Web Technologies' ecBuyer Electronic Commerce Software*, Gov't Computer News, September 20, 1999, p. 45; Frank Tiboni, *HCFA Updates Web Site*, Gov't Computer News, August 23, 1999, p. 6; J.B. Miles, *A Variation of Online-Auction Model Would Pay Off for Agencies*, Gov't Computer News, August 16, 1999, p. 46; J.B. Miles, *Online Malls Are Fast, Secure and Right at Your Desk*, Gov't Computer News, March 23, 1998, p. 79.

²⁰ Full function products provided as an incidental part of a package of banking services cannot dominate the banking services being provided. See Interpretive Letter No. 737, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-101 (Aug. 19, 1996); Interpretive Letter No. 516, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,220 (July 12, 1990); Letter from Michael J. O'Keefe, District Counsel, Midwestern District (July 13, 1987) (unpublished); Interpretive Letter No. 345, *supra*. The OCC has two alternative tests for determining when sale of full function products as part of a package of banking services is sufficiently subordinate to those banking services. The older OCC test is whether the cost of the full function product is less than 30% of the cost of the entire package. Interpretive Letter No. 742, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-106 (Aug. 19, 1996). As an alternative to the cost test, a more recent letter adopted a test based on the percentage of "gross profits" (sales less cost of goods sold) that is derived from the sale of the hardware). Interpretive Letter No. 754, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-120 (Nov. 6, 1996). Specifically, this letter held that where the gross profits generated by a full function product provided in connection with a banking service do not exceed thirty percent of the total gross profits from that service, the sale of the full function product is incidental to the permitted banking service.

In the CyberTitle service the LLC will be acting as a financial agent for state governments in connection with their governmental licensing and taxation functions regarding motor vehicles. Clearly, this is part of the business of banking. 12 U.S.C. § 90. Thus, in *Corbett v. Devon*, 12 Ill. App.3d 559, 299 N.E.2d 521 (App. Ct. 1st Cir. 1973), a court found that national banks' participation in Illinois' program for motor vehicle license validation and renewal and the distribution of license plates, remitting fees to the state was not ultra vires. The court stated that the national banks were "assisting in the performance of a public service, a large part of which is intimately connected with the ordinary and traditional banking function of collecting and remitting funds for other parties." *Corbett*, 299 N.E.2d at 529. National banks may, of course, use modern technology in serving as a government fiscal agents.²¹

Moreover, the electronic processing and transmitting the data relating to title applications and associated payments is part of the business of banking. Processing and transmitting information relating to commercial, retail, or governmental transactions associated with payments is permissible because it involves "banking, financial, or related economic data."²²

d. HHS Phone Service

The OCC and the courts have long held that if a national bank acquires excess capacity in good faith to meet the needs of the bank or its customers, the bank may use the excess capacity profitably even though the specific activities involving the excess capacity are not themselves part of the business of banking. This doctrine has been applied to excess capacity in real estate,²³ electronic facilities,²⁴ and non-electronic facilities.²⁵ The excess capacity doctrine recognizes that a bank acquiring an asset in

²¹ Interpretive letter No. 731, *supra* (national banks may operate an electronic toll collection system on a half of a state authority).

²² See Interpretive Letter No. 856, *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-313 (Mar. 5, 1999) (processing of information relating to Internet generated retail sales and associated payments); Interpretive Letter No. 836, *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-290 (Mar. 12, 1996) (national bank may provide electronic billing and account receivables processing including processing of information related to underline claims); Conditional Approval No. 220 (Dec. 2, 1996) (collection, processing, and settlement with associated recordkeeping and data analysis for stored value transactions); Interpretive Letter No. 732, *supra* (network for electronic data interchange permissible for a national bank). See also Conditional Approval No. 332 (October 18, 1999) and Conditional Approval No. 304 (March 5, 1999) (national banks may provide electronic bill presentment and payment services including the processing, storage, and transmittal of information relating to underlying transactions).

²³ See *Brown v. Schleier*, 118 F. 981, 984 (8th Cir. 1902), *aff'd* 194 U.S. 18 (1904); *Wingert v. First N.B.*, 175 F. 739 (4th Cir. 1909); *Perth Amboy N.B. v. Brodsky*, 207 F. Supp. 785, 788 (S.D.N.Y.1962); Letter from James J. Saxon, Comptroller of the Currency (February 16, 1965) (unpublished).

²⁴ Interpretive Letter No. 742, *supra*; Interpretive Letter No. 677, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625 (June 28, 1995) (excess capacity in software production and distribution); 12 C.F.R. § 7.1019 (1999).

²⁵ Interpretive Letter No. 811, *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-259 (December 18, 1997) (excess capacity in acquired printing company).

good faith to conduct its banking business should, under its incidental powers, be permitted to make full economic use of the acquired property if use of the property for only banking purposes would leave the property underutilized. The underlying rationale is avoidance of economic waste.

In its excess capacity letters, the OCC recognizes that good faith excess capacity can arise for any one of several reasons. One of the most common situations is where a bank has fluctuating need for capacity because it engages in batch processing of transactions or because the demand for the underlying services fluctuates so that the bank must have capacity to meet peak period demand, but consequently has periods when the capacity is underutilized.²⁶ Here, the LLC proposes in good faith to use a portion of its excess capacity to provide back-up call answering for the HHS Hotline. As described above, the LLC's EFTPS obligations dictated that the LLC acquire sufficient capacity to handle specified maximum call and transaction volumes, even though the maximum volumes only occur at certain times throughout the year. Given the nature and characteristics of the necessary technology and the nature of its service demand, it would simply be extremely difficult and cost prohibitive for the LLC to divest the excess capacity during those times when EFTPS call and transaction volumes are not at a maximum only to reacquire the capacity when needed. Therefore, since the LLC retains the excess call answering capacity in good faith, it follows that the LLC may make full economic use of its excess capacity, including providing back-up call answering for the HHS Hotline.

Accordingly, the activities in which the LLC will engage are part of, or incidental to, the business of banking. Thus, the first standard is satisfied.

2. The banks must be able to prevent the enterprise from engaging in activities that do not meet the foregoing standard, or be able to withdraw their investment

This is an obvious corollary to 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.

The limited liability company operating agreement ("Agreement"), under which the LLC is formed, contains provisions to ensure that the LLC will engage only in activities that are permitted for national banks and their subsidiaries. In particular, the Agreement provides that the LLC may engage only in activities that are legally permissible for a national bank. The Agreement further provides that with the unanimous approval of the members, the business of the LLC may be expended or revised; provided,

²⁶ As noted in the preamble to the first OCC Interpretive Rule recognizing the excess capacity doctrine for technological activities, "banks must have the data processing capacity (equipment and manpower) to handle peak volumes within narrow time limits and..., accordingly, the equipment and personnel may be underutilized at certain times." 39 Fed. Reg. 14192, 14193 (April 22, 1974). *See also* Letter from Donald Melbye (August 4, 1978) (unpublished). The Federal Reserve Board, in considering amendments to its regulation on data processing activities of bank holding companies similarly observed: "The record of this proceeding shows that data processors that process time-sensitive data must maintain sufficient capacity to meet peak demand.... Excess capacity necessarily results from these requirements, and the sale of excess capacity is necessary to reduce costs and remain competitive." 47 Fed. Reg. 37368 (Aug. 26, 1982).

that any member which is a national bank shall have the authority to veto or withdraw from the company in the event the LLC engages in activities that are otherwise not permissible for national banks. Moreover, the Agreement itself provides that it can only be amended with the unanimous written consent of the members.

Accordingly, 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 a bank's investment not expose it to unlimited liability. With respect to the third standard, Mercantile's loss exposure is limited, and Mercantile does not have open-ended liability for the obligations of the LLC. Mercantile's risk of loss will be limited by both the corporate veil of the operating subsidiary and by Illinois law. As a legal matter, investors in a Illinois limited liability company do not incur liability with respect to the liabilities or obligations of the limited liability company solely by reason of being a member or manager of the limited liability company. Ill. Ann. Stat. ch. 805, para. 10-10a (Smith-Hurd 1996). This law provides that the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort or otherwise, are solely the debts, obligations, and liabilities of the limited liability company unless the articles of organization of the limited liability company provide otherwise and the member has consented in writing to be so liable. The Agreement organizing the LLC contains no such provision. Thus, the Mercantile's loss exposure for the liabilities of the LLC will be limited by statute and by the Agreement establishing the LLC.

- b. *Loss exposure from an accounting standpoint*

In assessing a bank's loss exposure as an accounting matter, the OCC has previously noted that the appropriate accounting treatment for a bank's 20-50 percent ownership share or investment in a corporate entity is to report it as an unconsolidated entity under the equity method of accounting. Mercantile has advised the OCC that the accounting treatment for its investment in the LLC is under the equity method of accounting. Under the equity method of accounting, unless either bank has guaranteed any of the liabilities of the entity or has other financial obligations to the entity, losses are generally limited to the amount of the investment, including loans and other advances shown on the investor's books. Thus, Mercantile's losses from an accounting perspective would be limited to the amount invested by its operating subsidiaries in the LLC and Banks will not have any open-ended liability for the obligations of the LLC.

Accordingly, for legal and accounting purposes, the Mercantile's potential loss exposure, through its operating subsidiary, should be limited to the amount of Mercantile's indirect investment in the LLC. 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 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."²⁷ 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.²⁸

In this instance, the proposed share ownership by Banks is not evidence of a passive relationship, but is rather an effective and useful tool for allowing the Banks to carry out their responsibilities as financial and fiscal agent of the federal and local governments in connection with the activities described above. Through the LLC, Banks will attempt to penetrate emerging markets in the provision of cash management, electronic payment, and financial information processing to governmental entities. In particular, the LLC's back office support for services for the described services will allow Banks to compete for services for government agencies. Entering these markets will enhance and diversify Bank's respective revenue opportunities. In addition, the investment in the LLC will be convenient and useful to Banks in allowing them to provide additional services to their retail customers, as well as helping Mercantile to gain additional expertise in the provision of electronic banking services, in general, and electronic payment and data processing, in particular. Thus, the investment is not a mere passive investment unrelated to Mercantile's banking business.

Accordingly, the fourth standard is satisfied.

C. Conclusion

Based on the facts as described, the proposed activities are permissible activities for a national bank and its operating subsidiaries. In addition, the OCC finds that the proposal is not inconsistent with safe and sound banking practices or OCC policies and does not endanger the safety and soundness of the Banks. Accordingly, the Application submitted by Bank One is approved. This approval is granted based on a thorough review of all information available, including the representations and commitments made in the Application and by the Banks' representatives.

²⁷ See *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972).

²⁸ See, e.g., Interpretive Letter No. 543, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,255 (February 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 (March 14, 1988).

Moreover, based on the facts as described and for the reasons discussed above, we approve the expansion of activities in Mercantile's operating subsidiary to include holding a non-controlling interest in the LLC, subject to the following conditions:

- (1) The LLC will engage only in activities that are part of, or incidental to, the business of banking;
- (2) The LLC Operating Agreement will limit the LLC's activities to those permissible for national banks;
- (3) Mercantile will account for the investments in the LLC under the equity method of accounting; and,
- (4) The LLC will be subject to OCC supervision, regulation, and examination.

Please be advised that the conditions of this approval are deemed to be "conditions imposed in writing by the agency in connection with the granting of any application or other request" within the meaning of 12 U.S.C. § 1818.

If you have any questions, please contact Licensing Expert John W. Graetz or Senior Corporate Analyst Cindy Hausch-Booth at (202) 874-5060 or Attorney Steven Key at (202) 874-5300.

Sincerely,

/s/

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel