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Comptroller of the Currency  
Administrator of National Banks

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Southern District  
500 North Akard Street, Suite 1600  
Dallas, TX 75201-3342

**Conditional Approval #612**  
**December 2003**

November 21, 2003

Beth Whitehead  
First Vice President and  
Associate General Counsel  
National Commerce Financial Corporation  
One Commerce Square  
Memphis, TN 38150

Re: Application by National Bank of Commerce to Acquire El Banco Branches from Flag Bank and to Acquire a Non-controlling Interest in Nuestra Tarjeta de Servicios: 2003-SE-02-0017 & 2003-SE-08-0029

Dear Ms. Whitehead:

This is to inform you that on November 21, 2003 the Office of the Comptroller of the Currency (OCC) approved the proposal to purchase the assets and assume the liabilities of the El Banco branches of Flag Bank by National Bank of Commerce, Memphis, TN (“NBC” or “Bank”). These branches are located in Norcross and Roswell, GA. OCC also conditionally approved NBC’s application to make a non-controlling investment in Nuestra Tarjeta de Servicios (NTS), the company operating the El Banco branches.

Purchase and Assumption of The El Banco Branches

NBC proposes to purchase and assume two branches, located in the Atlanta metropolitan area. These branches are currently being operated under the name “El Banco de Nuestra Comunidad, una division de Flag Bank,” and are managed for Flag Bank by Nuestra Tarjeta de Servicios Inc., Atlanta, GA (NTS).

In addition to acquiring these branches, National Commerce Bank Services, a subsidiary of NBC, intends to acquire a 19 percent non-controlling interest in NTS with the option to acquire

up to a 45 percent interest in it. After consummation of the branch purchase and investment, NTS will continue to operate these branches for NBC.

El Banco presently offers services to low- and moderate-income persons in the Latino community located in/near Norcross, GA and Roswell, GA. El Banco markets its services to individuals who do not have a relationship with a bank and who would benefit from access to a Spanish speaking staff. El Banco's services include check cashing, electronic demand deposit accounts, limited checking and savings accounts, money orders, bill payment, wire transfers, notary, Individual Tax Identification Number issuance, financial education, and access to the Internet through in-branch computers. El Banco also acts as a finder in providing phone cards, insurance products, and tax anticipation loans. To date, El Banco has not directly provided any type of credit products. El Banco presently has deposits of \$633,000 at the Norcross office and about \$1 million at the Roswell office.

NBC intends to offer limited credit products at the El Banco branches. The Bank has also represented that the prices of deposit and credit products at the El Banco branches will reflect the risks and costs incurred in providing services to customers. The Bank has represented that El Banco will offer a free checking product with direct deposit immediately upon consummation of its acquisition. In addition, the bank has represented that if an El Banco customer successfully maintains an El Banco account for six months, the customer would be eligible for lower-priced accounts at other NBC branches. Furthermore, the Bank expects that El Banco will increase its offerings of lower-priced products to customers in the future. Finally, the Bank has represented that it has no plans to have any products with fees and rate levels that would reach Home Ownership and Equity Protection Act triggers or any offering of consumer loans that would be considered "predatory."

The Bank intends to advertise El Banco services in Spanish. The Bank has represented that its advertising will conform with the Federal Trade Commission Act and will not mislead customers into believing that the services offered at El Banco are as affordable as the services provided at other branches of the Bank.

The OCC determined that the proposed branch purchase transaction is permissible under 12 USC 24(Seventh), the criteria of the Bank Merger Act (12 U.S.C. § 1828(c)), and applicable OCC regulations and policies. Among other matters, we reviewed the competitive effects of their transaction using our standard procedures for determining whether a business combination clearly has minimal or no adverse competitive effects. The OCC found that the proposed transaction satisfied its criteria for a business combination that clearly has no or minimal adverse competitive effects.

The OCC considered the financial and managerial resources of the banks, their future prospects, and the convenience and needs of the communities to be served. NBC is a strong

financial institution with \$22 billion in assets and \$1.5 billion in capital with 456 offices in seven states. NBC's acquisition of the El Banco branches will have no significant impact on NBC's condition. Prospective customers of El Banco are expected to have access to greater banking services than presently available at those branches. In addition, the Bank Merger Act requires the OCC to consider, "... the effectiveness of any insured depository institution involved in the proposed merger transaction in combating money laundering activities, including in overseas branches." (12 U.S.C. § 1828(c)(11).) We considered these factors and believe the approval of this transaction is consistent with statutory provisions.

With respect to the Community Reinvestment Act ("CRA"), the OCC takes into account the applicants' record of helping to meet the credit needs of their entire communities, including low- and moderate-income neighborhoods, when evaluating certain applications, including transactions subject to the Bank Merger Act.<sup>1</sup> The OCC's most recent CRA performance evaluation of NBC, dated December 31, 2001, rated its performance as "Outstanding." The FDIC's most recent performance evaluation of Flag Bank, as of May 13, 2002, rated its performance as "Satisfactory." The OCC's review revealed no evidence that the applicants' records of helping to meet the credit needs of their communities, including low- and moderate-income neighborhoods are less than satisfactory. In conclusion, the OCC found that the proposed branch acquisition satisfied all applicable statutory and policy factors.

As a reminder, the district office must be advised in writing in advance of the desired effective date for the purchase and assumption so that we may issue the necessary certification letter. The effective date must follow the applicable Department of Justice injunction period and any other required regulatory approval. The OCC will issue a letter certifying consummation of the transaction when we receive:

- 1) A Secretary's Certificate for Flag Bank, certifying that a majority of the board of directors approved.
- 2) An executed purchase and assumption agreement.

If the purchase and assumption is not consummated within one year from the approval date, the approval shall automatically terminate unless the OCC grants an extension of the time period.

#### Non-controlling Investment

This letter also provides response to your application for investment in an operating subsidiary filed as part of the purchase and assumption application described above. The Bank proposes

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

to expand the activities of its wholly owned operating subsidiary, National Commerce Bank Services, Inc., by making a non-controlling investment in NTS.

Based on a thorough review of all information available, including the representations and commitments made in the application and by the bank's representatives, the OCC conditionally approved the Bank's plan to participate, through this investment, in the operation of Nuestra Tarjeta de Servicios (NTS) to provide banking services to low- and moderate-income Latino customers. NBC proposes to acquire 19 percent ownership with an option to own up to 45 percent.

In a variety of circumstances, the OCC has permitted national banks to own, either directly or indirectly through an operating subsidiary, a non-controlling interest in an enterprise.<sup>2</sup> The OCC has concluded that national banks are legally permitted to make such a non-controlling investment provided four criteria or standards are met.<sup>3</sup> These standards 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 (or otherwise authorized for a national bank).
- (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 the Bank's investment in NTS will satisfy these four criteria.

*1. The activities of the enterprise in which the investment is made must be limited to activities that are part of, or incidental to, the business of banking (or otherwise authorized for a national bank).*

NBC proposes to make a non-controlling investment in a corporation engaged in developing and marketing financial services to the low- and moderate-income persons in the Latino community located in/near Norcross, GA and Roswell, GA. Services currently provided by NTS include check cashing, electronic demand deposit accounts, checking and savings accounts, money

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<sup>2</sup> See, e.g., Conditional Approval Letter No. 219 (July 15, 1996).

<sup>3</sup> See Interpretive Letter No. 692 (November 1, 1995); Interpretive Letter No. 694 (December 13, 1995).

orders, bill payment, financial education classes, and wire transfer services. These activities clearly are part of or incidental to the business of banking and permissible under the OCC's regulations.<sup>4</sup>

In addition, NTS also provides the following products and services: providing Tax Identification Numbers as an IRS acceptance agent; providing home phone connections and long distance telephone services; providing internet access; and providing insurance for accidental death and dismemberment. For the reasons and subject to the conditions stated in the OCC interpretative letters and regulations cited below, these activities are permissible for a national bank and, therefore, NBC may permissibly engage in these activities in the operating subsidiary.

National banks are authorized to provide tax planning and preparation services. National banks are also authorized to prepare tax returns for any type of customer so long as the bank does not act as an expert tax consultant.<sup>5</sup> NBC has represented that serving as a Certifying Acceptance Agent and facilitating the application process for obtaining tax identification numbers will be conducted consistent with the authorization to provide these tax planning and preparation services.

The OCC determined that the services offered at the El Banco branches are permissible for national banks. For example, NBC will make available to its customers home phone connections and long distance services, but the Bank will not offer these services directly. Instead, the Bank will act as finder so as to enable third parties to market home phone connections and long-distance services to Bank customers. OCC has permitted national banks to facilitate the sale of third-party telephone services as finder and as payments processor.<sup>6</sup> The Bank has committed it will conduct these finder activities for third-party telephone services in manner consistent with 12 C.F.R. § 7.1002. Accordingly, these services are permissible.

The Bank will also make bank-owned computers with Internet access available to its customers at branch offices without charge. The proposed free service is permissible as a promotional activity.<sup>7</sup> However, offering Internet services on shared computers that are available to the

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<sup>4</sup> See, 12 C.F.R. § 5.34(e)(5)(v).

<sup>5</sup> 12 U.S.C. (Seventh); 12 C.F.R. § 7.1008.

<sup>6</sup> 12 CFR 7.1002 (2003) and Interpretive Letter 718, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,033 (March 14, 1996).

<sup>7</sup> OCC precedent holds that a national bank, despite the prohibition against general merchandising, can offer the sale of promotional merchandise as an exercise of its authority to engage in advertising and promotional activities. See, e.g., Interpretive Letter 690, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,005 (October 2, 1995). However, OCC has said that when a bank "makes more than a nominal profit on the sales of merchandise, even when the merchandise is sold in conjunction with a bank service, the OCC will characterize those sales as impermissible general merchandising." OCC No-Objection Letter No. 88-8, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 84,048 (May 26, 1988). We think this line of precedent can be properly applied to the Bank's proposed branch office Internet service that will be offered at no charge.

public creates special risks.<sup>8</sup> The OCC expects the Bank to put in place appropriate controls to prevent inappropriate access to information, including confidential information of the computer users and bank customers. OCC also expects the bank to isolate these public-access computers from internal bank systems, and to have systems in place that will detect and prevent inappropriate communications to and from these computers.

NBC proposed that accidental death and dismemberment insurance will be provided by a third party to El Banco customers in the same manner that many national banks provide this insurance through club accounts. The insurance is currently offered through Mountain Life Insurance Company, but following the closing of the proposed transactions the coverage will be switched to Hartford Insurance, the same insurance company NBC already uses to provide these services to existing customers of NBC. National banks may provide this service to their customers provided that the bank is not acting as an insurance agent.<sup>9</sup>

Since each of the activities in which NBC has represented that it will engage in, through NTS, are permissible for a national bank, NBC's non-controlling investment in NTS also is permissible. Therefore, the first standard is met.

*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.*

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. NBC has represented that, through its agreement with NTS, NTS is limited to those activities permissible for a national bank. 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*

The OCC must consider potential risk exposure for a national bank in connection with this transaction. Where an investing bank will not control the operations of the entity in which the bank holds an interest, it is important that the national bank's investment not expose the bank to unlimited liability. The Bank's loss liability for NTS is limited to the amount of its investment.

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<sup>8</sup> For example, one retail firm that offered a similar service discovered that fraudsters had loaded "sniffer" or keystroke logging programs on the shared public computers that enabled the fraudsters to intercept user passwords and user login IDs that they could then use to engage in unauthorized transactions. The Bank should take reasonable steps to prevent this and also ensure that these public-access computers do not store confidential customer information in, for example, uncleared cache files.

<sup>9</sup> See Interpretive Letter No. 566 (December 2, 1991).

*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 less than 20 percent ownership share or investment in a corporate entity is to report it as an unconsolidated entity under the equity or cost method of accounting. The bank has represented that NBC will account for its 19 percent ownership interest in NTS according to the cost method of accounting. Under the cost method of accounting, NBC's financial statements will reflect its investment in NTS. If NBC's ownership of NTS rises to above 20 percent, it will need to consider the equity method of accounting.

Investments made by NTS are not consolidated with assets held by the Bank on the Bank's financial statement. Therefore, for both legal and accounting purposes, NBC's potential loss exposure arising from its investment in NTS should be limited to the amount of its investment. 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 business.*

NBC represents that its investment in NTS is convenient and useful to the bank's ability to offer banking products to the Latino community and to offer banking products to low- and moderate-income individuals. Based on this analysis, there is no legal impediment to the proposed non-controlling investment in NTS.

Accordingly, the OCC approved the non-controlling equity investment in NTS subject to the following conditions:

- (1) NTS will engage only in activities that are permissible for a national bank;
- (2) NBC will withdraw from the investment in the event that it engages in an activity that is inconsistent with condition (1);
- (3) NBC will account for its investment in the company under the cost or equity method of accounting; and,
- (4) NTS will be subject to OCC supervision and examination, subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act (12 U.S.C. § 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. § 1820a).

Please be advised that the conditions of this approval are deemed to be "condition(s) imposed in writing by the agency in connection with the granting of any application or other request"

Beth Whitehead  
November 18, 2003  
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within the meaning of 12 U.S.C. § 1818, and, as such, may be enforced in proceedings under 12 U.S.C. § 1818.

These approvals are granted based on a thorough review of all information available, including commitments and representations made in the application and the purchase and assumption agreement and those of your representatives.

These decisions, and the activities and communications by OCC employees in connection with the filing, do not constitute a contract, express or implied, or any other obligation binding upon the OCC, the U.S., any agency or entity of the U.S., or any officer or employee of the U.S., and do not affect the ability of the OCC to exercise its supervisory, regulatory and examination authorities under applicable law and regulations. The foregoing may not be waived or modified by any employee or agent of the OCC or the U.S.

If you have questions or comments please contact John O. Stein at 404-588-4550 or me at 214-720-7052.

Sincerely,

*/s/ Brenda E. McNeese*

Brenda E. McNeese  
Acting Licensing Manager