Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Conditional Approval #242
June 1997

May 7, 1997

Mr. John Baker
Senior Counsel
BankBoston, N.A.
Post Office Box 2016
Boston, Massachusetts 02106

Re: Notification that an Existing Operating Subsidiary Intends to Perform a New Activity
Application Control Number: 97-ML-08-0009

Dear Mr. Baker:

This is in response to your notification, filed on behalf of BankBoston, N.A. (the "Bank"), that an existing operating subsidiary of the Bank, BancBoston Insurance Agency ("BBIA"), intends to perform a new activity by acquiring an interest in a joint venture. BBIA intends to acquire a non-controlling 50% equity interest in BancBoston Executive Benefits, LLC, a Delaware limited liability company (the "LLC"). The LLC will be jointly owned and controlled by BBIA and WJL, Inc. ("WJL") and will do business as an insurance agency or broker, including acting as agent in the sale of disability and life insurance. Under the LLC's operating agreement ("Operating Agreement"), BBIA and WJL each have one representative on the LLC's Management Committee. Although a simple majority of the Management Committee has the authority under the Operating Agreement to make management decisions for the LLC, including decisions regarding new business ventures and new business strategies, unanimous approval by the Management Committee is effectively required as the LLC has only two members.

For the reasons discussed below, the Office of the Comptroller of the Currency ("OCC") hereby approves BBIA's acquisition of an interest in the LLC, in the manner and as described herein.

Structure of the LLC

The LLC will be established under Delaware law with an initial capitalization of $200. BBIA and WJL will each initially invest $100 in the LLC and will each hold a 50 percent ownership and voting interest in the LLC. The LLC will serve as agent in the marketing of insurance products, with its principal place of business in Sheffield, Massachusetts, and will act in

accordance with the requirements contained in the operating subsidiary approval letters sent by the OCC to the Bank on October 25, 1996 and November 8, 1996. The conduct of the business and affairs of the LLC will be governed by the Operating Agreement between BBIA and WJL. Under the terms of the Operating Agreement: (i) BBIA and WJL are each managers of the LLC; (ii) the business of the LLC will be serving as agent in the marketing of insurance products and, consistent with Delaware law, in no event will the LLC grant policies of insurance or assume or underwrite insurance risks, and each of the LLC's members agree the LLC will not engage in a new activity that is not legally permissible under applicable banking regulations; (iii) the limitations of the LLC's permissible business activities cannot be amended except upon agreement by both BBIA and WJL; and (iv) no manager and no member will be liable to third parties for the LLC's debts except to the extent of such member's capital account, its share of any assets and undistributed profits of the LLC, its obligation to make other payments expressly provided for in the Operating Agreement, and the amount of any distributions wrongfully distributed to the member. In addition, BBIA will have a right of first refusal to purchase any interest in the LLC offered for sale to any third party at the same terms as offered to or by the third party, subject to regulatory approval.[1] Because there are only two members in the LLC, unanimous approval is required for essentially all business decisions, including the admission of additional members to the LLC.

Discussion

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. The enterprise might be a limited partnership, a corporation, or a limited liability company.[2] In recent interpretive letters, the OCC concluded that national banks are legally permitted to make a non-controlling investment in a limited liability company provided four criteria or standards are met. *See* Corporate Decision 97-13 (February 24, 1997); Interpretive Letter No. 692 (November 1, 1995), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 81,007, and No. 694 (Dec. 13, 1995), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 81,009.[3] These standards, which have been distilled from our previous decisions in the area of permissible non-controlling investments for national banks and their subsidiaries, are: (1) the activities of the entity or 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 or entity from engaging in activities that do not meet the foregoing

---

[1] *See* 12 C.F.R. § 5.34.

[2] *See also* 12 C.F.R. § 5.36(b). National banks are permitted to make various types of equity investments pursuant to 12 U.S.C. § 24(Seventh) and other statutes.

[3] In other recent letters, the OCC has permitted national banks to make a non-controlling investment in an enterprise other than an LLC, provided the investment satisfies these four standards. *See e.g.* Interpretive Letter No. 697 (November 15, 1995), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 81,012; Interpretive Letter No. 705 (October 25, 1995), *reprinted in* [Current] Fed. Banking L. Rep. ¶ 81,020.

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; and (4) the investment must be convenient or useful to the bank in carrying out its business and not a mere passive investment unrelated to that bank's banking business.

Based upon the facts presented, the Bank's proposal satisfies these four standards.

> *1. The activities of the entity or enterprise in which the investment is made must be limited to activities that are part of, or incidental to, the business of banking.*

The proposed activities of the LLC -- doing business as an insurance agency or broker, including acting as agent in the sale of disability and life insurance, as permitted under 12 U.S.C. § 92 -- are permissible banking activities. *See* OCC Interpretive Letter No. 753 (November 4, 1996), reprinted in [Current] Fed. Banking L. Rep. (CCH) ¶ 81-107 ("First Union Letter"). Accordingly, this first standard is satisfied.

> *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.*

As a corollary to the above, it is not sufficient that the LLC's activities are permissible at the time the bank initially purchases LLC shares; they must also remain permissible for as long as the bank retains an ownership interest in the LLC.

Under Delaware law, a limited liability company may engage in "any lawful business, purpose or activity with the exception of the business of granting policies of insurance, or assuming insurance risks or banking as defined in § 126 of Title 8." Del. Code Ann. tit. 18 § 106 (1994).[4] Here, the LLC Operating Agreement prohibits the LLC from engaging in any lines of business that is not permissible under applicable banking regulations. The Operating Agreement also provides that the limitations on the LLC's business activities cannot be amended except upon the approval of a simple majority of the LLC's Management Committee ("Majority in Interest"). Because there are only two members of the LLC's Management Committee (each with one vote), a Majority in Interest effectively requires unanimous approval. Since BBIA holds a 50 percent interest in the LLC, it will have the power to prevent the LLC from engaging in impermissible activities. Accordingly, this standard is satisfied.

---

[4] Banking is defined in § 126 of Title 8 of the Delaware Code as the "power of issuing bills, notes, or other evidences of debt for circulation as money, or the power of carrying on the business of receiving deposits of money." Del. Code Ann. tit. 8 § 126 (1994). In the course of its business activities the LLC will not engage in any of the foregoing activities.

3. The bank's loss exposure must be limited 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, especially 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. Such is the case here. As a legal matter, investors in a Delaware limited liability company will 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. Del. Code Ann. Tit. 18, § 303 (1994).[5] This limited liability feature is what differentiates limited liability companies both from general partnerships, where all partners are generally liable for the debts of the partnership, and from limited partnerships, which must have at least one general partner who is personally liable for the obligations of the partnership.[6]

Thus, the Bank's loss exposure for the liabilities of the LLC will be limited by statute and the Operating Agreement establishing the LLC.[7]

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 limited liability company is to report it as an unconsolidated entity under the equity method of accounting. Under this method, unless the bank has extended a loan to the entity, guaranteed any of its liabilities or has other financial obligations to the entity, losses are generally limited to the amount of the investment shown on the investor's books. *See generally,* Accounting Principles Board, Op. 18 § 19 (1971) (equity method of accounting for investments in common stock). Interpretive Letter 692, *supra*.

As proposed, the Bank, through its operating subsidiary, will have a 50 percent ownership interest in the LLC, and will jointly manage the LLC with WJL, Inc. The Bank believes that

---

[5] The Operating Agreement specifically provides at section 9.1 that ". . . the debts, obligations and liabilities of the [LLC] . . . shall be solely the debts, obligations and liabilities of the [LLC], and no Covered Person [which includes both BBIA and WJL, Inc.] shall be obligated personally for any such debt, obligation or liability of the [LLC] solely by reason of being a Covered Person."

[6] The necessity for at least one general partner reflects a policy that someone have personal liability. *See* section 1 of the Uniform Limited Partnership Act. However, this is frequently circumvented in states where a corporation (with limited liability under state corporate laws) can be the general partner.

[7] The Bank's potential liability may also include a revolving credit loan to the LLC.

the equity method of accounting is appropriate because it will not be able to control the LLC under the terms of the Operating Agreement without the support of WJL, Inc. Thus, the Bank's loss from an accounting perspective would be limited to the amount invested in the LLC as reflected on the Bank's books, and the Bank will not have any open-ended liability for the obligations of the LLC.

In addition, as noted above, Delaware law limits members' losses to their capital investment. The Bank will not have open-ended liability for the obligations of the LLC, so 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." *See* Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972). The provision in 12 U.S.C. § 24(Seventh) relating to the purchase of stock, derived from section 16 of the Glass-Steagall Act, was only intended to make it clear that section 16 did not authorize speculative investments in stock. *See* Interpretive Letter No. 697 (November 15, 1995), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 81,012. Therefore, a consistent thread running through our precedents concerning stock ownership is that it must be convenient or useful to the bank in conducting *that bank's* banking business. The investment must benefit or facilitate that business and cannot be a mere passive or speculative investment.

This investment will expand and enhance the Bank's existing business operations in several respects. The Bank will be able to attract new customers desiring the additional insurance products available through the LLC. The Bank currently sells conventional insurance products principally to the Bank's retail customer base. This investment will enable the Bank to offer additional types of insurance that may attract, as new customers, senior executive officer benefits plans, estate planning customers and corporate benefit plans. Those customers may also decide to purchase other related products and services from the Bank which will enhance the Bank's other banking business.

This investment also will enable the Bank to offer existing customers new insurance products and services that supplement the Bank's current lines of business. The Bank currently offers estate planning, financial planning and other products and services to high net worth individuals. As a result of the proposed transaction, the Bank will be able to offer these individuals a broader range of insurance products when the Bank identifies needs or the

individuals request those products and services. The Bank also provides multiple financial services to a wide variety of corporate customers and their employee benefit and senior executive benefit plans. Through the proposed transaction, the Bank will be able to offer those corporate customers new products and services that supplement other banking services and better meet the financial needs of those corporations and their employee benefit and senior executive benefit plans.

This investment also will enable the Bank to retain and attract customers who prefer to obtain a range of financial and insurance products and services from one source. By offering the proposed range of products to these customers, the Bank will be better able to compete effectively for this business with other providers who also offer a mix of financial and insurance products.

The President of BBIA, who is also Director-Insurance at the Bank, will participate in the management of the LLC by serving as its Chief Executive Officer and Chairperson of the LLC's Management Committee. That committee has the full, exclusive, and complete discretion to manage the business and affairs of the LLC. Accordingly, the Bank's investment in the LLC will benefit and facilitate existing business operations and is not a speculative or passive investment.

Conclusion

In sum, the Bank, through its existing operating subsidiary, is hereby approved to acquire a non-controlling interest in the LLC in the manner and as described herein, provided:

(1) the LLC will engage only in activities that are part of, or incidental to, the business of banking;

(2) the Bank will have veto power over any activities and major decisions of the joint venture that are inconsistent with condition number one, or will withdraw from the joint venture in the event it engages in an activity that is inconsistent with condition number one;

(3) the Bank will account for the investment in the joint venture under the equity method of accounting; and

(4) the joint venture 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.

The Bank, BBIA, and the LLC also should be mindful of the Interagency Statement on Retail Sales of Nondeposit Investment Products, dated February 15, 1994, which provides guidance to banks and their operating subsidiaries on the sale of retail nondeposit investment products, and should be familiar with the OCC's Advisory Letter, AL 96-8, dated October 8, 1996. The Advisory Letter provides guidance to national banks on insurance and annuity sales activities. The OCC expects the Bank and its operating subsidiaries to comply with the Advisory Letter and Interagency Statement, as well as applicable national banking laws, rules, and regulations.

Sincerely,

/s/

Julie L. Williams
Chief Counsel