Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

March 20, 1997

Interpretive Letter #778
May 1997
12 U.S.C. 24(7)

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Re: Participation in a Limited Liability Company by Treasury Bank, Ltd., Washington D.C.

Dear [ ]:

This is in response to your letters of March 3, 1997, December 13, 1996, November 25, 1996, and November 13, 1996, your legal opinions of February 18, 1997 and February 7, 1997, and subsequent telephone discussions,[1] concerning a proposal by Treasury Bank, Ltd., Washington D.C. (the "Bank") to make a non-controlling investment in Treasury Worldwide LLC, a limited liability company (the "LLC"), to be formed with [ ] (" "), an affiliated corporation wholly owned by [ ].[2] The Bank is organized under section 29-303 of the Corporate laws of the District of Columbia, and the Comptroller of the Currency is the primary federal regulator for district banks and retains authority to supervise their activities.[3] For the reasons given below, it is our opinion that this transaction is legally permissible in the manner and as described herein.

I. Background

[1] The OCC also received correspondence related to this proposal dated December 13, 1996 and October 17, 1996 directly from Treasury Bank, Ltd.

[2] Sections 23A and 23B of the Federal Reserve Act, 12 U.S.C. § § 371c and 371c-1, place restrictions on extensions of credit and other transactions between member banks and their affiliates. The LLC is not an "affiliate" of the Bank for purposes of Sections 23A and 23B since the statute excludes nonbank subsidiaries of member banks from the definition. 12 U.S.C. § 371c(b)(2)(A). The LLC is a nonbank "subsidiary" for purposes of Sections 23A and 23B because of the Bank's 49 percent ownership and voting interest in the LLC. *See* 12 U.S.C. § § 371c(b)(3), (b)(4) and (b)(6). To address any issues involving possible conflicts of interest, [ ] has represented that: (i) a majority of the Bank's Board of Directors will approve in advance the investment in the LLC, (ii) he will abstain from participating directly or indirectly in the voting, and (iii) he does not "control" the Bank for purposes of the Change in Bank Control Act, 12 U.S.C. § 1817(j) *et seq*.

[3] *See* section II, *infra*, for a discussion of laws applicable to a District of Columbia bank.

A. Proposed Activities of the LLC

The LLC desires to offer, as a service to customers, the placement of funds in foreign currency time deposits ("FCTDs") with foreign banks. The LLC will offer to purchase, as an agent, FCTDs issued by foreign banks in approximately 20 currencies. The LLC intends to market and sell the FCTD service through traditional means as well as through an interactive internet site that will be linked to the Bank's internet site.[4] The Bank also intends to offer the LLC's FCTD service to its customers through traditional means.

To obtain a FCTD, customers will complete an application to the LLC and provide at least $[ ] to the LLC's account at the Bank. Customers will receive from the LLC a "concise overview" of deposit insurance and/or other regulatory oversight of foreign depository institutions in each country where the LLC will offer to place FCTDs. Customers will also receive from the LLC a disclosure statement and a fee schedule.[5] Upon receipt of wire instructions, the Bank will remit a customer's funds to the foreign bank issuer. Funds will be aggregated and will be remitted to the foreign bank issuer together with the funds of other customers seeking a FCTD in the same country.[6] Once the funds are placed, customers will receive a certificate from the LLC detailing the terms and conditions of the FCTD.

The FCTDs will be held in a nominee account in the foreign bank, and they will be denominated in the local currency and payable at the office of the foreign bank. The FCTDs will not be deposits of the Bank and will not be guaranteed by either the Bank or the LLC. FCTDs will not be carried as liabilities on either the Bank's or the LLC's balance sheet. Instead, they will be liabilities of the foreign depository institution. FCTDs will not be insured by the Federal Deposit Insurance Corporation ("FDIC"). The LLC will not disclose the names of the customers to the foreign bank, but this information would be available to foreign regulatory authorities in such foreign jurisdictions under applicable law.

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[4] The Bank plans to design its internet site to offer both domestic products and FCTDs. Bank customers who are interested in FCTDs may, by activating an icon on the Bank's site, be transferred to the LLC Internet site where they will be able to place an order for a FCTD directly with the LLC. *See* note 22 and accompanying text, *infra*, for a discussion of disclosures and information packages that the LLC will provide to customers.

[5] The Bank anticipates that most of the customer orders for FCTDs will be placed through the mail, monitored telephone banks or through the Bank's internet site. The Bank and the LLC have represented that they will not be making recommendations to customers interested in purchasing a FCTD. However, in the event that the Bank or the LLC make recommendations to any person, they have both represented that they will comply with the suitability standards applicable to sales of government securities to institutional customers set forth in the interagency regulation on Government Securities Sales Practices at 12 C.F.R. § 13.4 (1997).

[6] Each customer will have the right to disaggregate his or her funds into a separate nominee account upon the payment by such customer of all fees charged by the foreign bank and the LLC for that service.

Customers will not be able to liquidate their FCTDs before the expiration of their terms, without incurring substantial penalties. Prior to the maturity date of the FCTD, the LLC will notify the affected customer(s). If the customer does not terminate the FCTD, it will be rolled over automatically by the LLC for a similar term at the then-prevailing interest rate being offered by the foreign bank for such deposits. If the customer decides not to renew the FCTD, the customer's principal and interest, less any applicable withholding taxes, will be converted to the currency of the original funds at the then prevailing currency exchange rate and will be remitted directly to the customer by the LLC.

B. Structure of the LLC

The LLC will be established under Delaware law with an initial capitalization of $[ ]. The Bank will initially invest $[ ] in the LLC and will hold a 49 percent ownership and voting interest in the LLC. The remaining 51 percent ownership and voting interest in the LLC will be held by [ ].[7] The LLC will have one office, which will be located in the same building as the Bank's main office, in Washington, D.C. The conduct of the business and affairs of the LLC will be governed by an operating agreement between the LLC and the Bank (the "Operating Agreement"). Under the terms of the Operating Agreement: (i) the Bank will be the sole "Corporate Manager" of the LLC; (ii) the business of the LLC will be the offering and placement of foreign currency time deposits, in no event would the LLC engage in any business that is not a part of the business of banking or incidental thereto, and the business of the LLC will at all times be consistent with the permitted business activities of a national bank; (iii) the limitations on the LLC's permissible business activities cannot be amended except upon the unanimous consent of all members; 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. In addition, the Bank 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.[8] Except for certain limited exceptions, including the limitation on permissible business activities mentioned above, the Operating Agreement can only be amended with the consent of members holding at least two thirds of the voting interest of the LLC.[9] Also, the consent of two-thirds of the members will be required to admit any additional members, therefore, the Bank's consent will be required.

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[7] It is anticipated that between 2% and 5% of the equity and voting interest in the LLC may be owned over time by employees and managers of the LLC. Such ownership will reduce the equity and voting interest of the Bank and [ ] on a *pro rata* basis. This will leave the Bank with a minimum of 46.67 percent voting interest.

[8] *See* 12 C.F.R. § 5.34.

[9] The Operating Agreement can be amended by the managers provided such amendment is: (I) solely for the purpose of clarification; (ii) for the purpose of substituting a member; (iii) merely an implementation of the terms of the operating agreement; or (iv) in the opinion of LLC counsel is necessary to satisfy requirements of the Internal Revenue Code or any federal or state securities laws or regulations.

The Operating Agreement provides that the business and affairs of the LLC will be overseen by a "Corporate Manager" and such other managers as the members of the LLC may designate from time to time. The Bank will be appointed the sole "Corporate Manager."[10] The consent of two-thirds of the members of the LLC will be required to admit a person as manager; therefore, the Bank's consent will be required. A majority vote of the managers will bind all the managers. The Operating Agreement also provides that managers will not have the authority to: (I) sell or otherwise dispose of all or substantially all of the assets of the LLC, (ii) merge the LLC into, or with, any other business entity, (iii) grant a security interest in any real property of the LLC, or enter into any real property lease agreements on behalf of the LLC, (iv) borrow money from, or on behalf of, the LLC; and (v) admit a person as manager or member of the LLC.

It is anticipated that the LLC will initially require a staff of five persons to conduct its business; they include (i) a managing director who will be the Bank's designee to manage the operations of the LLC, and who will report to the president of the Bank, (ii) a customer service representative responsible for customer inquiries and account openings, (iii) an account representative responsible for maintaining relationships and account management with non-US depository institutions, (iv) a data processor to maintain customer and account records, and (v) an administrative assistant. It is also anticipated that an additional customer service representative will be added to the staff for each $[ ] increase in placements. The managing director of the LLC will be a dual employee of both the LLC and the Bank. To the extent that the managing director devotes his or her time to the management of the LLC, he or she will be paid by the LLC. All other LLC staff will be employed by the LLC. It is intended that the Bank, as a member of the LLC, will share *pro rata* according to its interest in the LLC's profits and losses. However, losses would be limited to the amount of a member's capital contributions. The Bank will receive no fee for managing the LLC and would receive fees for services provided to the LLC on the same basis such fees will be received if such services were provided for any other Bank customer.

II. Applicable Law

As previously stated, the Bank is organized under section 29-303 of the Corporate laws of the District of Columbia. The Comptroller of the Currency is the primary federal regulator for district banks and retains authority to supervise their activities. *See* 12 U.S.C. § 1813(q) and D.C. Code Ann. § 29-103 (1996); *see also* D.C. Code Ann § 26-102(a) (1996). The OCC authorized the Bank to commence operations as a "bank of deposit" under the laws of the District of Columbia pursuant to section 26-103(b) of the District of Columbia Banking Law. *See* Decision on the Application of Treasury Bank, Application Control No. 86-NE-01-005

[10] The Operating Agreement will provide that the "Corporate Manager" could be removed as a manager by members holding a majority of the voting interest of the LLC but only for cause as determined by a final non-appealable order of the OCC or a court of competent jurisdiction.

(August 28, 1990) (unpublished); *see also* D.C. Code Ann. § 26-103(b) (prior to the Amendments Act).[11] [

] it is appropriate for the OCC to analyze this transaction based upon the laws applicable to national banks and OCC interpretations and precedents concerning bank powers.

[ ] the transaction must be permissible under the laws of the District of Columbia. For purposes of District of Columbia law we have relied on legal opinions provided by [ ]. These legal opinions provide that under District of Columbia law the Bank is permitted to invest in a foreign limited liability company engaged in the activities proposed for the LLC.

III. 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.[12] 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* Interpretive Letter No. 692 (November 1, 1995), *reprinted in* [Current]

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[11] Under the District of Columbia Regional Interstate Banking Act of 1985 Amendments Act of 1985, D.C. Law 6-107 (1985) ("Amendments Act"), the District of Columbia Council created the position of Superintendent of Banking and Financial Institutions ("D.C. Superintendent") with the power to regulate district banks "to the same extent that these institutions were regulated by the Comptroller of the Currency" prior to the effective date of the Amendments Act. Even after the enactment of the Amendments Act, the Comptroller retained significant supervisory authority over district banks including the ability to examine such banks, D.C. Code Ann. § 26-102(a), and the Comptroller is designated as the primary federal regulator of district banks under various federal statutes. These include the FDIC Act, 12 U.S.C. § 1813(q); the Bank Services Corporation Act, 12 U.S.C. § 1861(b); the Management Interlocks Act, 12 U.S.C. § 3206; the Bank Protection Act, 12 U.S.C. § 1881 and various provision of the Securities Exchange Act, 15 U.S.C. § 78b *et seq*., and the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq*. District banks are also subject to various provisions of federal law which have been incorporated into the D.C. Code, such as the legal lending limits of 12 U.S.C. § 84, the call report requirements of 12 U.S.C. § 161, and certain insider statutes at 12 U.S.C. §§ 375, 375a, and 376. D.C. Code Ann. § § 26-101, 26-103(b) and 26-109. District banks are also subject to the regulatory authority contained in the OCC Rules, Policies and Procedures for Corporate Activities at 12 C.F.R. Part 5, which indicates that a bank located in the District of Columbia operating under the OCC's supervision is included in the term "national bank." 12 C.F.R. § 5.3(j). Furthermore, these rules for corporate activities provide that "national banks" are permitted to make various types of equity investments pursuant to 12 U.S.C. § 24(Seventh) and other statutes. 12 C.F.R. § 5.36.

[12] *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.

Fed. Banking L. Rep. (CCH) ¶ 81,007, and No. 694 (Dec. 13, 1995), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 81,009.[13] *See also* Letter of Steven J. Weiss, Deputy Comptroller, Bank Organization and Structure (December 27, 1995 unpublished) ("Weiss Letter"). 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 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 -- placing deposits at foreign banks on behalf of customers on an agency basis and offering this service over the internet -- are legally permissible under 12 U.S.C. § 24 (Seventh) as part of, or incidental to, the business of banking.

As part of their traditional role as financial intermediaries, banks have broad powers to act as agent for their customers, and under this broad authority the OCC has permitted national banks to place deposits at other banks or thrifts on behalf of their customers. OCC Investment Securities Letter No. 32 (December 2, 1988), *reprinted in* [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,038. Similarly, a national bank may offer participation interests in certificates of deposit purchased as agent from a third party affiliated bank on behalf of a number of the national bank's depositors. OCC Interpretive Letter No. 385 (June 19, 1987), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,609.[14] National

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[13] 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.

[14] National banks are also currently authorized to purchase, on behalf of customers, foreign currency contracts, foreign currency options, and provide foreign exchange services. *See* OCC Interpretive Letter No. 414, *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,638 (authorizing national bank subsidiary to buy and sell foreign currency in the spot and forward markets and to buy and sell over the counter foreign currency options); Interpretive Letter No. 384, *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,608 (authorizing establishment of operating subsidiary to engage in buying and selling of

banks may also offer foreign currency deposits directly to their customers. Letter from Peter Liebesman, Assistant Director, LASD, March 21, 1989 (unpublished). Thus, a national bank may, as part of the business of banking, offer foreign currency deposits to its customers and place deposits at foreign banks on behalf of customers on an agency basis.

In addition, it is well established that a national bank may use electronic means to perform services expressly or incidentally authorized to national banks.[15] The OCC Interpretive Ruling setting forth this authority was recently revised, in recognition of the rapid advancement of technology, to authorize a national bank to "perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide or deliver." 61 Fed. Reg. 4849 (1996), codified at 12 C.F.R. § 7.1019.

Here, the LLC's proposal to purchase FCTDs on an agency basis is substantially similar to activities and services that the OCC has previously approved. Furthermore, the use of the internet to market and sell this product is consistent with previous OCC interpretive rulings. The proposed activities of the LLC are part of, or incidental to, the business of banking. 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 membership 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).[16] Here, the LLC Operating Agreement prohibits the LLC from engaging in any

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options in foreign currency and Eurodollar time deposits); Interpretive Letter No. 380, *reprinted in* [1988-89 Transfer Binder] Federal Banking L. Rep. (CCH) ¶ 85,604 (authorizing operating subsidiary to engage in, among other things, options trading involving foreign currencies, and futures contracts involving Eurodollars and foreign currencies).

[15] *See* OCC Interpretive Letter No. 677, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625 (June 28, 1995); OCC Interpretive Letter No. 284, *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,448 (Mar. 26, 1984), OCC Interpretive Letter No. 449, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,673 (Aug. 23, 1988).

[16] 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

line of businesses that is not permissible for a national bank or that is not a part of the business of banking or incidental thereto. The Operating Agreement also provides that the limitations on the LLC's business activities cannot be amended except upon the unanimous consent of all members. Therefore, since the Bank is a member of the LLC holding a 49 percent interest, it will have the power to prevent the LLC from engaging in impermissible activities. Accordingly, this standard is satisfied.

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).[17] 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.[18]

Thus, the Bank's loss exposure for the liabilities of the LLC will be limited by statute and the Operating 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 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

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any of the foregoing activities.

[17] The Operating Agreement specifically provides that "no . . . [m]ember or [m]anager shall be personally held accountable for any other debts, losses, claims, judgments or any of the liabilities of the [LLC] beyond the [m]ember's or [m]anager's capital contributions to the [LLC]."

[18] 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.

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 will have a 49 percent ownership interest in the LLC, and will be designated the sole "Corporate Manager" of the LLC. As "Corporate Manager," the Bank would oversee the day-to-day operations of the LLC. Control over the LLC will be vested with those members holding at least two-thirds of the voting interest in the LLC.[19] The Bank believes, and its independent auditors have opined, that the equity method of accounting is appropriate in this instance because even though the Bank will be appointed the sole "Corporate Manager," it will not be able to control the LLC under the terms of the Operating Agreement. 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.

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[19] As set forth in the Background section, the Operating Agreement provides that managers will not have the authority to: (I) sell or otherwise dispose of all or substantially all of the assets of the LLC, (ii) merge the LLC into, or with, any other business entity, (iii) grant a security interest in any real property of the LLC, or enter into any real property lease agreements on behalf of the LLC, (iv) borrow money from or on behalf of the LLC; and (v) admit a person as manager or member of the LLC.

Participation in the LLC will benefit the Bank and its electronic deposit-gathering business. The Bank's current business lines are focused on mortgage products - an emphasis that would leave it adversely exposed in an increasing interest rate environment. The Bank's recently revised strategic plan reflects an intention to diversify and seek fee income from fiduciary services and deposit broker activities. The Bank's management and its Board believe that the FCTDs will meet these needs and will provide the Bank with a needed extension of the Bank's product line.

In addition, the Bank has had success in the electronic deposit-gathering business. The Bank currently operates an interactive internet site and approximately [ ] of the Bank's depositors have become Bank customers through interaction on the internet. In fact, the Bank, with no retail branches, currently has depositors from more than [ ] states and several foreign countries. Bank management and its Board believe that the offering of additional products will enhance its internet site, and that the addition of interactive enhancements will create a "destination" internet site that will attract potential customers. Thus, the offering of the FCTDs will constitute a natural extension of the Bank's internet business.

The Bank's investment in the LLC is not a speculative or passive investment. The Bank's investment in the LLC is related to diversifying its business line pursuant to its revised strategic plan and is useful to it in carrying out its banking business. It will also expand and enhance its current delivery of services via the internet. Therefore, the fourth standard is satisfied.

IV. Other Issues

A. Securities Laws

The Bank and the LLC have represented that the FCTDs would not constitute securities under the federal securities laws and would not create a new security requiring registration under the Investment Company Act of 1940. Whether the FCTDs constitute "securities" within the meaning of the federal securities laws depends on whether the foreign issuer of the FCTD is subject to a comprehensive regulatory system that provides protections to customers comparable to those available to customers of U.S. banks. *See Marine Bank v. Weaver*, 455 U.S. 551 (1982); *Wolf v. Banco National de Mexico*, 739 F.2d 1458 (9th Cir. 1984); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985); *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir. 1987). *But see Gary Plastic Packaging v. Merrill Lynch Pierce*, 756 F.2d 230 (2d Cir. 1985). The Bank and the LLC should satisfy themselves that, in fact, the FCTD complies with case law and regulatory pronouncements on those questions and precedent. The OCC has previously concluded that, under the Glass-Steagall Act, national banks may aggregate their customers' deposits to purchase certificates of deposit from another bank. *See* Interpretive Letter No. 385 (June 19, 1987), *reprinted in* [1988 - 1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,609.

B. Deposit Broker Regulation

The Bank's proposal also raises the issue of whether the LLC would be deemed a "deposit broker" for purposes of the FDIC brokered deposits regulation. 12 C.F.R. § 337.6. This regulation provides that a party that places deposits with insured depository institutions is generally deemed to be a "deposit broker." 12 C.F.R. § 337.6(a)(5). A deposit broker must file a notice with the FDIC regarding its activities and must maintain certain records. 12 C.F.R. § 337.6(h). The regulation defines an insured depository institution as any bank, savings association, or branch of a foreign bank insured under the Federal Deposit Insurance Act. 12 C.F.R. § 337.6(a)(8). To the extent that a certificate of deposit is issued by a foreign office of a foreign bank and is only payable outside the United States, the foreign bank would not meet the definition of insured depository institution, and accordingly, the deposit broker regulation would not apply to the LLC.

C. Branching

No domestic branching issues are raised because the LLC's sole office will be located in the same building as the Bank's main office.[20] Moreover, the LLC is not a branch of the foreign bank even though customers' funds are being accepted by the LLC and deposited into the foreign bank. Rather, the LLC is merely acting as an intermediary agent and custodian for its customers in processing these foreign deposits and facilitating the wire transfer of these deposits between the Bank and the foreign bank issuer. The OCC has acknowledged the permissibility of a similar agency/custodian arrangement and stated that the national bank accepting customer funds was not a branch of the CD issuing bank. OCC Interpretive Letter No. 385, *supra*, (national bank may offer participation interests in a CD purchased as agent on behalf of a number of the bank's depositors).

D. Consumer Laws

The Truth in Savings Act ("TSA") applies to any advertisement made by any "depository institution or deposit broker relating to any demand or interest-bearing account offered by an insured depository institution which includes any reference to a specific rate of interest . . . ." 12 U.S.C. § 4302(a). The Federal Reserve Board has adopted regulations implementing the

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[20] In any event, the LLC will not receive deposits within the meaning of 12 U.S.C. § 36(j); rather, it will receive funds for placement in a non-depository custodial account at the Bank for the purpose of having the Bank wire these funds for deposit into an unaffiliated foreign bank. This transaction would be more properly characterized as the purchase of a service, similar to a simple wire transfer transaction, rather than the placing of a deposit with the LLC. *See* OCC Interpretive Letter No. 638, *reprinted in* [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,525 (Jan. 6, 1994) (arrangement in which banks provide information to customers about certificates of deposits offered by affiliate banks does not constitute branching). Moreover, the operations of an entity in which a national bank has a non-controlling, minority interest are not ordinarily attributed to the bank for branching purposes. *See* Interpretive Letter No. 711, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-026 (Feb. 23, 1996).

TSA known as Regulation DD. The applicable staff interpretation provides that "[a]ccounts held in an institution located outside the United States are not covered [by Regulation DD], even if held by a U.S. resident." 12 C.F.R. part 230, Appendix D, Supp.I, Section 230.1(c)(1)(1996). Thus, the provisions of Regulation DD are not applicable to FCTDs or to the LLC since they are issued by a foreign bank from an office located outside the United States and are payable only outside the United States. The Bank, however, has represented that the LLC will adopt the disclosure principles contained in Regulation DD.[21]

E. Interagency Statement on Retail Sales of Nondeposit Investment Products

On February 15, 1994, the OCC and the three other federal bank regulatory agencies issued the Interagency Statement on Retail Sales of Nondeposit Investment Products ("the Interagency Statement"). The Interagency Statement is applicable to the FCTDs and, among other things, it provides that banks, thrifts and affiliated third party brokers should ensure that retail customers are fully informed that nondeposit investment products: (i) are not insured by the FDIC; (ii) are not deposits or other obligations of the institution and are not guaranteed by the institution; and (iii) are subject to investment risks, including possible loss of the principal invested.

The LLC will provide potential customers with information packages that will disclose to customers the risks of FCTDs and each customer will sign an acknowledgment that he or she understands the risks associated with such an investment. These disclosures will explain that the FCTDs: (i) are not insured by the FDIC, (ii) are not deposits or other obligations of, or guaranteed by, the bank, (iii) involve investment risks, including possible loss of principal invested (and that this loss may result from adverse changes in currency exchange rates) and, (iv) lack liquidity during the term of the deposit. In addition, the LLC must ensure that its foreign CD program complies with other provisions of the Interagency Statement, including, advertising, setting and circumstances of sales activities, suitability and sales practices,

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[21] The LLC will be providing customers with the following additional information on a continually updated basis:

(1) The interest rates being offered in each foreign currency in which FCTDs can be placed.
(2) The term of each FCTD being offered.
(3) Indication of the applicable exchange rate.
(4) A concise overview of deposit insurance and/or other regulatory oversight concerning the soundness of foreign depository institutions in each country where FCTDs can be placed.
(5) Applicable withholding taxes, if any, on interest earned on FCTDs.
(6) A fee schedule.
(7) A disclosure statement.
(8) A list of terms and conditions.

qualifications, training and compensation of personnel, and compliance with applicable federal and state laws and regulations.[22]

V. Conclusion

In sum, it is our opinion that the Bank is legally permitted to purchase a non-controlling minority 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 LLC that is inconsistent with condition number one, or will withdraw from the LLC 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 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 James Vivenzio, Senior Attorney, Northeast District at (212) 790-4010.

Sincerely,

/s/

Julie L. Williams
Chief Counsel

[22] As noted earlier, the Bank plans to design its Internet site so that Bank customers who are interested in FCTDs may, by activating an icon on the Bank's site, be transferred to the LLC Internet site. The OCC believes there are a variety of possible ways to structure the Bank's Internet activities that would provide appropriate disclosures to the Bank's customers. The OCC will review the procedures that the Bank proposes to employ in order to ensure that appropriate disclosures are made.