



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

March 19, 1999

**Conditional Approval #307
April 1999**

John D. Wright
Vice President and Assistant General Counsel
Wells Fargo Bank, N.A.
633 Folsom Street, 7th Fl.
MAC 0149-077
San Francisco, CA 94107

Re: Application of Wells Fargo Bank, N.A., San Francisco, California, to Perform New Activities Through an Existing Operating Subsidiary
Application Control No. 98-ML-08-0001

Dear Mr. Wright:

This is in response to the application filed by Wells Fargo Bank, N.A., San Francisco, CA ("Bank"), to perform new activities in its operating subsidiary, Wells Fargo Cash Centers, Inc. ("Subsidiary"). Subject to the conditions discussed below, we approve the expansion of the Subsidiary's activities to include holding a minority investment in a corporation that will sell and lease check cashing machines to third parties.

Bank's Proposal

As described in your correspondences and telephone conversations with OCC staff, the Subsidiary previously owned a non-controlling 50 percent interest in InnoVisions, L.L.C. ("InnoVisions"). The other 50 percent interest was owned by Mr. Payroll Corporation ("Mr. Payroll"), then a wholly-owned subsidiary of Cash America International, Inc. InnoVisions originated and operated automated teller machines in casinos. The Bank's investment in InnoVisions was previously approved in Conditional Approval No. 285 (August 14, 1998).

Pursuant to a subsequent agreement between the Bank and Cash America International, InnoVisions and Mr. Payroll were restructured. To accomplish this, InnoVisions was dissolved and the assets of the joint venture were returned *pro rata* to the Subsidiary and Mr. Payroll. The Subsidiary then contributed to Mr. Payroll, in exchange for newly issued shares representing 45 percent of the voting

shares of Mr. Payroll, the assets returned from InnoVisions and \$21 million in cash. As a result, the Subsidiary owns an interest in the successor to InnoVisions, *i.e.*, Mr. Payroll.¹

As successor to InnoVisions, Mr. Payroll continues to conduct the activities approved for InnoVisions. Additionally Mr. Payroll desires to sell and lease check cashing machines (“Machines”) to third parties. The Machines are equipped with Mr. Payroll’s proprietary check cashing software, the same software used in InnoVisions’ automated teller machines. The software makes check cashing services available to everyone and accepts any check to be cashed. Once an individual has inserted his check to be cashed, the Machine takes a digital picture of the check. An employee of Mr. Payroll, located at an off-site location, reviews the digital picture of the check and makes the decision whether to cash the check. The Machines have no functionality beyond providing check cashing services. Currently, Mr. Payroll operates 81 Machines in 16 states that it has sold or leased.²

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. The Bank, pursuant to 12 C.F.R. § 5.34(e)(1), requests the OCC’s approval for Mr. Payroll to engage in the sale and leasing of check cashing machines.

The application raises the issue of the authority of a national bank to make an indirect, minority investment in a corporation. The OCC has in a variety of circumstances concluded that it is lawful for a national bank to own, indirectly through an operating subsidiary, a minority interest in an entity or enterprise, such as a corporation, provided four criteria or standards are met.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 must be limited to activities that are part of, or incidental to, the business of banking;

¹ Cash America International owns a 45 percent equity interest in Mr. Payroll. The senior management of Mr. Payroll owns the remaining ten percent equity interest.

² For security in check cashing transactions, the software utilizes an advanced biometrics system that reads and recognizes human faces. At a customer’s initial use, the customer supplies his social security number and answers several identifying questions over a phone, which is attached to the Machine. The Machine then scans the customer’s face. On subsequent visits to a Machine, the customer is allowed to use the Machine only after being identified by a facial scan.

³ See *e.g.*, Interpretive Letter No. 778 (March 20, 1997), reprinted in [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-205; Interpretive Letter No. 732 (May 10, 1996), reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-049.

- (2) the bank must be able to prevent the enterprise from engaging in activities which are impermissible for national banks 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.

Each of these four factors is discussed below and applied to your application.

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.

The proposed activities are legally permissible under 12 U.S.C. § 24(Seventh) as part of the business of banking. Besides those already approved, Mr. Payroll's only additional activity will be the provision of check cashing services through the sale and lease of the Machines. Check cashing is one of the banking functions included in the "business of banking."⁴ In order to provide these services, Mr. Payroll sells and leases the Machines to third parties. However, the fact that Mr. Payroll may market its check cashing services in a slightly different way than conventional bank cash services are marketed does not derogate from the fact that the essence of these activities is the cashing of checks.

The Machines are essential devices to the delivery of the check cashing services and consist of two parts, Mr. Payroll's proprietary software and the hardware. It is Mr. Payroll's proprietary software which enables the Machines to provide the check cashing services. OCC has found that a national bank can provide software that will enable users to receive or employ electronic banking services from the bank.⁵ In this case, the software is necessary to use or fully take advantage of the check cashing services and, because it is of limited function, is an integral part of the check cashing service.⁶ Similarly,

⁴ See 12 U.S.C. § 24(Seventh) ("discounting and negotiation of promissory notes, drafts, bills of exchange, and other evidences of debt..."); see also Letter from Frank Maguire, Acting Senior Deputy Comptroller, October 16, 1992 (unpublished).

⁵ See Conditional Approval No. 221 (December 4, 1996) (providing full-function web browser software is permissible incidental activity when a national bank is offering a home banking system based on web server technology using "Internet compatible" browser software).

⁶ See Interpretive Letter No. 516 (July 12, 1990), reprinted in [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,220 (national bank that is providing customers with a permissible database service can provide software that enables customers to download and analyze the information); Letter of Peter Lieberman, Assistant Director, LASD (Dec. 13, 1985) (unpublished) (marketing and licensing of software to bank's cash management customers permissible part of bank's provision of cash management services).

because the hardware necessary to operate the software can only be used for check cashing services, it may be considered literally an indistinguishable part of the services.⁷ As such, the provision of the hardware and software, working together as Machines, is to be considered part of the permissible provision of check cashing services and, hence, part of the business of banking. Therefore, the 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.

This is an obvious corollary to the first standard. It is not sufficient that the enterprise's activities are permissible at the time of the Subsidiary's initial investment. They must also remain permissible for as long as the Subsidiary retains a membership interest in the enterprise.

The Bank has represented that several provisions of the Bylaws and Shareholders' Agreement will contain provisions limiting Mr. Payroll's activities to those that are part of, or incidental to, the business of banking. First, the Shareholders' Agreement will provide that Mr. Payroll may engage in only those activities permissible for a national bank. Second, the Shareholders' Agreement will also provide that Mr. Payroll may engage in new activities only with the approval of 80 percent of the equity holders. As a result, the Bank, through the Subsidiary, will hold a veto over new activities that are not permissible for a national bank. Third, the Subsidiary will have the right to designate two of the five directors of Mr. Payroll. Under the Bylaws of Mr. Payroll, as amended, a vote of at least four of the five directors will be required to amend or waive any provision of the Shareholders' Agreement. Taken together these provisions assure that Mr. Payroll will not engage in any activity that is not permissible for a national bank. Therefore, 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 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 national bank's investment not expose it to unlimited liability. As a legal matter, stockholders of a Texas corporation do not incur liability for either the obligations or the liabilities of the corporation solely through their stock ownership. See Texas Business Corporation Act, Art. 2.21 (1998). In addition, the Bank's interest in the Mr. Payroll will be owned through the Subsidiary. Therefore, the Bank will also be insulated from any potential liability for the acts of Mr. Payroll through

⁷ See Interpretive Letter No. 737 (August 19, 1996), reprinted in [1996-1997 Transfer Binder] Fed. Banking L. Rep. ¶ 81-101; Interpretive Letter No. 345 (July 9, 1985), reprinted in [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,515.

the “corporate veil” of the Subsidiary. See 1 William M. Fletcher, Fletcher Cyclopaedia of the Law of Private Corporations 25 (perm. ed. rev. vol. 1990). Thus, the Bank's loss exposure for the liabilities of Mr. Payroll will be limited.

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 of 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 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. See generally Accounting Principles Board, Op. 18 § 19 (1971) (equity method of accounting for investments in common stock).

The Bank has a 45 percent ownership interest in Mr. Payroll through the Subsidiary. The Bank believes, and its accountants have advised, that the appropriate accounting treatment for the Bank's investment is the equity method.⁸ Thus the Bank's loss from an accounting perspective would be limited to the amount invested in Mr. Payroll, and the Bank will not have any open-ended liability for the obligations of Mr. Payroll.

The Bank's loss exposure is limited, as a legal and accounting matter. Therefore, 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 that is not an operating subsidiary of the bank must also satisfy the requirement that the investment have a beneficial connection to that bank's business, i.e., it must be convenient or useful to the investing bank's business activities and not constitute a mere passive investment unrelated to the 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

⁸ OCC's Chief Accountant has concluded that the Bank's investment should be recorded as "Investments in unconsolidated subsidiaries and associated companies" on the Bank's Consolidated Reports of Condition and Income ("Call Reports"). Such classification is consistent with the Call Report Instructions. See Instructions to Schedule RC- M, item 8.b.

Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972). Therefore, the investment must benefit or facilitate that business and cannot be a mere passive or speculative investment.⁹

This requirement is met in this case. The investment in Mr. Payroll provides the Bank with the opportunity to expand the outreach of its check cashing services, while spreading the cost of such expansion over a larger customer base. Mr. Payroll's existing deployment of Machines has shown that the Machines provide an attractive option for people who otherwise would have to use a more expensive service or travel to an office of a bank to cash the check. Further, the use of advanced technology to identify persons by the use of faceprints has enormous potential benefit to the Bank in its ongoing efforts to reduce fraud losses, especially check fraud losses.

The fact that the Bank is a 45 percent owner of Mr. Payroll is evidence of its intention to remain actively involved in this business. Far from making a mere passive financial investment, the Bank contributed its prior interest in InnoVisions, which included casino-based ATMs. Overall, the investment in Mr. Payroll is not unrelated to the Bank's business and would be convenient and useful to it in carrying out its banking business. Therefore, the fourth standard is satisfied.

Conclusion

Based upon the information and representations you have provided, and for the reasons discussed above, we approve the expansion of the Subsidiary's activities to include holding a non-controlling 45 percent interest in a corporation, Mr. Payroll, that will sell and lease check cashing machines, subject to the following conditions:

- (1) Mr. Payroll will engage only in activities that are part of, or incidental to, the business of banking;
- (2) The Bank, through the Subsidiary, will have veto power over any activities and major decisions of the Mr. Payroll that are inconsistent with condition number one, or will withdraw from the Mr. Payroll in the event it engages in an activity that is inconsistent with condition number one;
- (3) The Bank, through the Subsidiary, will account for the investments in Mr. Payroll under the equity method of accounting; and,
- (4) Mr. Payroll will be subject to OCC supervision, regulation, and examination.

⁹ See, e.g., Interpretive Letter No. 697 (November 15, 1995), reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-012; Interpretive Letter No. 543 (February 13, 1991), reprinted in [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,255; Interpretive Letter No. 427 (May 9, 1988), reprinted in [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,651.

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.

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 Bank’s representatives.

If you have any questions, please contact Richard Erb, Licensing Manager, at (202) 874-5060.

Sincerely,

/s/

Julie L. Williams
Chief Counsel