Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Conditional Approval #336
December 1999

November 2, 1999

Mr. Larry P. Cole
First Tennessee National Corporation
165 Madison Avenue
Memphis, TN 38103

Re: Application of First Tennessee Bank, N.A., Memphis, Tennessee, to participate in a limited partnership providing credit reporting services
Application Control No. 99-SE-08-0039

Dear Mr. Cole:

This responds to the application by First Tennessee Bank, N.A.("Bank"), to participate, through an operating subsidiary and a limited liability company, in a limited partnership ("LP") providing credit reporting services. For the reasons set forth, the Office of the Comptroller of the Currency ("OCC") approves the Bank's application to conduct the proposed activities in the manner described, subject to the conditions given below.

Background

As described in your letter, the Bank's wholly-owned operating subsidiary, FT Real Estate Information Mortgage Solutions, Inc. ("Subsidiary"), will make a direct cash investment of $173,250 in the LP in exchange for a 39.6 percent interest. An unaffiliated credit reporting company referred to here as the business partner ("BP") will have a 59.4 percent interest in the LP in exchange for the contribution of management expertise and servicing capabilities and a cash investment of $173,250.

The LP will be managed by a general partner, a Delaware limited liability company ("LLC"), that will have a 1.0 percent ownership interest in the LP. The Bank will make a direct investment of $1,750.00 in the LLC in exchange for a 40 percent ownership interest. The BP will make an investment of $1,750.00 in the LLC in exchange for a 60 percent ownership interest.

The LP will provide credit reporting services in connection with the origination of loans. Initially, the LP will only provide services to the Bank, its subsidiaries and affiliates. Eventually, the LP may market its services to non-affiliated financial institutions. The LP will be licensed or registered as a credit reporting agency in every jurisdiction where such licensing or registration is required.

Analysis

The OCC has traditionally recognized the authority of national banks to organize and perform any of their lawful activities in a reasonable and convenient manner not prohibited by law. A national bank may engage in activities that are part of or incidental to the business of banking under 12 U.S.C. § 24(Seventh) by means of an operating subsidiary. 12 C.F.R. § 5.34(d)(1).[1] Further, 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. In recent interpretive letters, the OCC has concluded that national banks are legally permitted to make a non-controlling investment in an enterprise, provided that four criteria or standards are met.[2] 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 enterprise in which the investment is made must be limited to activities that are part of, or incidental to, the business of banking;

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

(3) the bank's loss exposure must be limited, as a legal and accounting matter, and the bank must not have open-ended liability for the obligations of the enterprise; and

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

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

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[1] *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.

[2] *See* Interpretive Letter No. 705, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,020 (October 25, 1995), permitting national banks to make a non-controlling investment in a limited partnership. Earlier OCC letters permitted national banks to make non-controlling investments in limited liability companies and other enterprises. *See* Interpretive Letter No. 692, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,007 (November 1, 1995); Interpretive Letter No. 694, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,009 (December 13, 1995); and Interpretive Letter No. 697, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,012 (November 15, 1995).

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

OCC precedents have recognized that the enterprise in which a national bank takes an equity interest must confine its activities to those that are part of or incidental to the business of banking.[3] In *NationsBank of North Carolina, N.A. v. Variable Life Annuity Co.*, 513 U.S. 251 (1995) ("*VALIC*"), the Supreme Court held that the "business of banking" is not limited to the enumerated powers in 12 U.S.C. § 24(Seventh), but rather broadly encompasses activities that are part of the business of banking. *Id.* at 258. The Court further established that banks may engage in activities that are incidental to the enumerated powers as well as the broader "business of banking."

National banks have long been permitted to provide credit reporting services in connection with the origination of loans. Incidental to this authority, national banks and their subsidiaries may hold an ownership interest in a credit reporting agency. Conditional Approval No. 276 (May 8, 1998); *see also* Letter from Comptroller C.T. Conover, dated March 29, 1985, *reprinted in* 4 OCC Quarterly Journal Vol. 2, p. 48, Appendix, n.3 (June 1985) (listing ownership of credit bureau among permissible activities once codified at 12 C.F.R. § 7.10, which was replaced by § 7.7376; the current version appears at 12 C.F.R. § 5.34).

The credit reporting services to be provided by the LP are thus part of or incidental to the business of banking.[4] The activities of the Subsidiary and the LLC will be limited to investing either directly or indirectly in the LP.

Therefore, the first standard is met.

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[3] *See, e.g.*, Interpretive Letter No. 380, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,604 n.8 (December 29, 1986) (since a national bank can provide options clearing services to customers, it can purchase stock in a corporation providing options clearing services); Letter from Robert B. Serino, Deputy Chief Counsel (November 9, 1992) (since the operation of an ATM network is "a fundamental part of the basic business of banking," an equity investment in a corporation operating such a network is permissible).

[4] The services proposed to be provided by the LP will qualify as "settlement services" under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* ("RESPA"). As such, the referral of services among the Bank and its affiliates, the Subsidiary and the LP are subject to the restrictions relating to "Affiliated Business Arrangements" as defined in RESPA. The Bank has represented that the Bank, the Subsidiary and the LP will comply with all applicable requirements of RESPA, including the Affiliated Business Arrangement rules. Specifically, neither the Bank nor the LP will require a consumer to purchase settlement services from the LP as a condition of obtaining a loan from the Bank, unless expressly authorized by RESPA. In addition, the Bank has represented that consumers will be provided with an Affiliated Business Arrangement notice in the circumstances required by RESPA. The LP will observe and abide by RESPA's rules regarding the payment of a thing of value within the Affiliated Business Arrangement setting. The Bank and the LP will also comply with the anti-tying restrictions found in the Bank Holding Company Act, 12 U.S.C. § 1972, to the extent applicable.

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.

The activities of an enterprise in which a national bank may invest must be part of or incidental to the business of banking not only at the time the bank initially acquires its ownership, but they must remain so for as long as the bank has an ownership interest. This standard may be met if the bank is able to exercise a veto or is able to dispose of its interest.[5] This ensures the bank will not become involved in activities that are not part of, or incidental to, the business of banking.

You have represented that safeguards will be in place with respect to the Subsidiary, the LLC, and the LP to ensure that they only conduct activities permissible for national banks or their operating subsidiaries. The contractual agreements between the Subsidiary and the BP, including the Operating Agreement, will provide, in substance, that: (i) the activities of the LP will be limited to activities that are part of, or incidental to, the business of banking; (ii) neither the LP, nor any subsidiary that it may create or acquire, will engage in any new activities that are not legally permissible for an entity having a national bank, or one of its operating subsidiaries, as a shareholder; (iii) the LP will be managed by a general partner, the LLC, and the contractual agreements between the Bank and the BP, including the Operating Agreement, will provide that the Bank and the BP will have equal representation in the management and control of the LLC; and (iv) supermajority provisions of the Operating Agreement will give the Bank, through its ownership of the Subsidiary, a veto power over certain major corporate actions, including changes in senior management, any merger or sale of the LP, all credit decisions, and any attempt by the LP to engage in activities that are not part of, or incidental to, the business of banking.

Similar contractual agreements between the Bank and the BP will limit the activities of the LLC to activities that are part of or incidental to the business of banking. The agreements also submit the LP to the jurisdiction, supervision, and examining authority of the OCC.

By these means, the Bank will be able to ensure that the Subsidiary, the LLC and the LP only conduct activities that are part of or incidental to the business of banking.

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.

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[5] *See, e.g.*, Interpretive Letter No. 711, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-026 (February 23, 1996); Interpretive Letter No. 625, *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,507 (July 1, 1993).

a. Loss exposure from a legal standpoint.

A primary concern of the OCC is that national banks 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.

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. Del. Code Ann. Title 6, § 18-303 (West 1998). Moreover, the LLC's Operating Agreement will provide that no member will be bound by or liable for any expense, liability, or obligation of the LLC, except to the extent of the member's interest in the LLC.

As a general matter of partnership law, a general partner has unlimited liability for the obligations of a partnership. A general partner in a limited partnership has the same unlimited liability. Del. Code Ann. Title 6, § 17-403(b) (West 1974, 1998). The OCC has permitted operating subsidiaries of national banks to enter into general partnerships that engage in bank-permissible activities when the corporate veil of the operating subsidiary corporation protects the bank from the potential open-ended exposure associated with a direct partnership investment. Conditional Approval No. 276, *supra*; Interpretive Letter No. 517, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,228 (Feb. 23, 1996); Interpretive Letter No. 289, *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,453 (May 15, 1984). Similar legal safeguards exist where a limited liability company in which a bank has an interest acquires a general partnership interest in a limited partnership that will engage in bank-permissible interests.

In your letter, you represented that the Bank, the Subsidiary, the LLC and the LP will at all times adhere to applicable formalities to ensure that the Bank will maintain its separate corporate existence from the Subsidiary, the LLC and the LP. All relevant operating documents will provide that the Bank will have no liability for the obligations of the Subsidiary, the LLC and the LP. Consequently, adequate legal safeguards exist for the LLC -- in which the Bank will have a minority interest -- to hold a general partnership interest in the LP.

National banks are permitted, directly or indirectly through operating subsidiaries, to become limited partners in partnerships engaging in activities permissible for national banks.[6]

Delaware law limits the liability of a limited partner in a limited partnership. Del. Code Ann. Title 6, § 17-303 (1998). The LP's Operating Agreement will provide that no investor will be bound by, or liable for, any expense, liability, or obligation of the LP, except to the extent of the investor's interest in the LP. The Subsidiary's only interest in the LP will be its 39.6 percent share of the limited partnership. Therefore, the Subsidiary may hold a limited partnership interest in the LP as the latter will engage only in activities permissible for national banks.

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[6]Interpretive Letter No. 617, *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83, 457 (Mar. 4, 1993) (national bank may purchase limited partnership units in a partnership which will be formed and licensed as a Small Business Investment Company).

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 an investment through an operating subsidiary or in a limited liability company is to report it on an unconsolidated basis. Under the equity method of accounting, 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 No. 692, *supra*.

You have represented that the Bank will use the equity method of accounting in reporting both its investment in the LLC and the Subsidiary's investment in the LP on an unconsolidated basis. The Bank will neither guarantee nor assume any liabilities for the Subsidiary, the LLC or the LP. Therefore, the equity method of accounting will limit the Bank's liability. For both legal and accounting purposes, the Bank's potential loss exposure should be limited to the amount of its investment. Because the Bank will not have open-ended liability and its potential liability will be quantifiable and controllable, the third standard is satisfied.

4. The investment must be convenient and useful to the bank in carrying out its business and not a mere passive investment unrelated to the 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 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."[7] Our precedents on bank non-controlling investments have indicated that the

investment must be convenient or useful to the bank in conducting that bank's business. The investment must benefit or facilitate that business and cannot be a mere passive or speculative investment.[8]

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

[8] *See, e.g.*, Interpretive Letter No. 697, *supra*; Interpretive Letter No. 543, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,255 (February 13, 1991); Interpretive Letter No. 427, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,651 (May 9, 1988); Interpretive Letter No. 421, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,645 (March 14, 1988); Interpretive Letter No. 380, *supra.*

The participation by the Bank and its Subsidiary in the LP will benefit both the Bank and its customers. You have represented that LP will provide credit reporting services of the type routinely purchased or performed by national banks engaged in the business of making both consumer and commercial loans. The investment in the LP will result in reduced risk and increased profit opportunities. The LP will provide a more efficient means of obtaining credit bureau reports on a nationwide basis. Therefore, the LP will enhance the Bank's ability to offer loans to the public while generating additional revenues for the Bank.

Accordingly, the fourth standard is satisfied.

Conclusion

Based upon the information and representations you have provided, and for the reasons discussed above, it is our opinion that the Bank may (1) through the Subsidiary, acquire and hold a non-controlling interest in the LP; and (2) acquire and hold a non-controlling interest in the LLC, subject to the following conditions:

1. The Subsidiary, the LLC and the LP will engage only in activities that are part of, or incidental to, the business of banking;

2. The Bank, either directly or indirectly, will have veto power over any activities and major decisions of the Subsidiary, the LLC and the LP that are inconsistent with condition (1), or it, or the relevant entity in which it is directly or indirectly invested, will withdraw from the Subsidiary, the LLC and the LP in the event they engage in an activity that is inconsistent with condition (1);

3. The Bank will account for its investments in the Subsidiary, the LLC and the LP under the equity method of accounting; and

4. The Subsidiary, the LLC and the LP 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 and, as such, may be enforced in proceedings under applicable law.

This approval is granted based on a thorough review of all information available, including the representations and commitments made in the application and by Bank representatives.

If you have any further questions, you may contact Louis Gittleman, Senior Bank Structure Analyst at (404) 588-4525 or Kenneth Gartlir, Senior Attorney, at (404) 588-4520.

Sincerely,

/s/

Julie Williams
First Senior Deputy Comptroller and Chief Counsel