Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Conditional Approval #389
June 2000

May 19, 2000

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Re Application by Chase Manhattan Bank USA, N.A., Wilmington, Delaware, First Union National Bank, Charlotte, North Carolina, and Wells Fargo Bank, N.A., San Francisco, California to continue to invest in a limited liability company.
Application Control No. 2000-WO-08-0004

Dear Messrs. Bielawa, Andersen, and White:

This is in response to your application of February 29, 2000, and supplemented by letter of April 19, 2000, pursuant to section 5.34(e)(1) of the regulations of the Office of the Comptroller of the Currency (AOCC@), 12 C.F.R. ' 5.34(e)(1), proposing that several national banks (ABanks@)[1] be

[1] The national banks joining in this request are: Chase Manhattan Bank USA, N.A., Wilmington, Delaware; First Union National Bank, Charlotte, North Carolina; and Wells Fargo Bank, N.A., San Francisco, California.

approved to hold noncontrolling interests in a limited liability company (collectively, "Applications"). Currently, the Banks' operating subsidiaries own membership interests in a limited liability company, Spectrum EBP, LLC ("LLC"), which engages in electronic bill presentment services over the Internet.[2] The Banks wish to continue, through their operating subsidiaries, as noncontrolling investors in the LLC after the LLC expands its activities to include the electronic payment of bills, transfer of money, and related data processing for these services. For the reasons discussed below, the Applications are approved, subject to the conditions set forth herein.

A. Background

The LLC currently provides a Aswitch@ through which bank customers and others are able to receive bills electronically from a variety of sources. The LLC has developed standards for the electronic presentation of billing information, creating a biller file and biller directory, and entering into relationships and arrangements with a variety of entities in order to receive bills from billers and route bills to a large number of customers. In addition to acting as a switch, the LLC translates the billing information into electronic format.[3]

The LLC proposes to provide electronic payment services to complement its electronic bill presentment services. Specifically, the LLC intends to develop a complete payment system that will permit the payment of electronically presented bills and provide data processing related to those payments for the LLC participants who operate bill presentment Internet sites. The LLC also proposes to provide a payment service that would allow the customers of a participating customer service provider ("CSP") to make electronic payments that would not be linked to a presented bill. This service would allow customers of a participating customer service provider to pay another person without the presentation of a bill through the LLC and under circumstances where a debtor/creditor relationship does not exist.[4]

The proposed service would operate in the following manner. A customer provides payee information from her personal computer to her bank's computer banking site. The customer's CSP receives a payment request and payee information and forwards them to the LLC. The CSP receives the payment instruction and deducts the amount from the customer's transaction account. The LLC receives payee information and posts it to the payee directory. The LLC debits the payment amount to CSP through the LLC settlement system and forwards payment

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[2] The OCC approved the subsidiaries' investment in the LLC's current activities in Conditional Approval No. 332 (October 18, 1999) ("Spectrum Letter").

[3] For more detailed information concerning the current operations of the LLC, see the Spectrum Letter.

[4] The OCC expects that the LLC will modify and implement any existing risk management plan to identify the specific material risks associated with the added service; including monitoring the transaction flow for patterns of transactions that might indicate unauthorized use of CSP customer funds. The OCC will evaluate the adequacy of any risk management plan as part of its on-going supervision of the LLC.

instruction to the check printing facility to issue a check.[5] A check drawn on the LLC's account is then cut and mailed to the appropriate payee. In addition, the LLC's payment system will process and settle payment transactions.

Although the LLC will establish relationships with a number of CSPs, each CSP will have access only to that information related to its own customers. In connection with these services, the LLC may have access to personal customer information, including financial and account information. It is understood that the LLC will not share such customer information with any third parties except where the information is needed in order for the LLC to complete a transaction.[6]

B. 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.[7] In a variety of circumstances, the OCC has permitted national banks to own, either directly, or indirectly through an operating subsidiary, a noncontrolling interest in an enterprise.[8] The OCC has concluded that national banks are legally permitted to make a noncontrolling investment in a company provided four criteria or standards are met.[9] These standards, which have been distilled from our previous decisions in the area of permissible noncontrolling 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 (or otherwise authorized for a national bank).
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> (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.

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[5] Alternatively, the LLC may outsource its payment system, directory maintenance and check printing.

[6] The LLC may share customer information in response to a subpoena where required by a law or order of a court or arbitrator, or in connection with a lawful investigation or examination; and with the LLC's subcontractors, processors, auditors or other third parties that assist the LLC in fulfilling its contractual obligations to a CSP. In sharing with third parties, the LLC requires such third parties to abide by the confidentiality principles adopted by the LLC. The LLC will monitor compliance with the requirements in this statement through its internal audit program, will limit its employees' and others' access to information, will maintain and require subcontractors and others to maintain security standards and procedures intended to preclude unauthorized access to or disclosure of information.

[7] 12 C.F.R. § 5.34.

[8] *See, e.g.*, Conditional Approval Letter No. 219 (July, 15, 1996).

[9] *See* Interpretive Letter No. 692 (November 1, 1995); Interpretive Letter No. 694 (December 13, 1995).

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

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

We conclude, as discussed below, that the Banks' investment in the LLC will continue to satisfy these four criteria upon the LLC's expansion of activities.

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

The National Bank Act, in relevant part, provides that national banks shall have the power:

> [t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes . . . .

The Supreme Court has held that this powers clause of 12 U.S.C. ' 24(Seventh) is a broad grant of power to engage in the business of banking, which is not limited to the five enumerated powers. Further, national banks are authorized to engage in an activity if it is incidental to the performance of the enumerated powers in section 24(Seventh) *or* if it is incidental to the performance of an activity that is part of the business of banking.[10] Since national banks must be able to make use of modern technology in performing their business, the OCC=s Interpretive Ruling 7.1019 permits national banks to Aperform, provide, or deliver through electronic means and facilities any activity, function, product, or service that [they are] otherwise authorized to perform, provide, or deliver."[11]

The expansion of the LLC's activities to include electronic bill payment services is legally permissible. The OCC previously has concluded that such services are part of the business of banking.[12] This conclusion is supported by judicial and agency precedent. The Supreme Court has found that 12 U.S.C. § 24(Seventh) permits a national bank to "do those acts and occupy those relations which are usual or necessary in making collections of commercial paper and

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[10] *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 215 (1995).

[11] 12 C.F.R. § 7.1019.

[12] *See*, OCC Conditional Approval #304 (March 5, 1999) (Approval for Citibank N.A. to own indirectly a membership interest in three limited liability companies and thereby engage in electronic bill payment and presentment services over the Internet.)

other evidences of debt" for its customers.[13] Similarly, the courts have recognized that a "traditional banking function [is] collecting and remitting funds for other parties."[14] The OCC has also held that billing and collecting services are permissible for national banks, whether done conventionally or electronically.[15] In addition, the OCC has also determined that as part of an electronic collection or payment process, national banks may store and transmit information related to the underlying transactions such as electronic data interchange.[16] Finally, the transmission of the payment order or electronic funds transfer from the customer to the appropriate party (e.g., the biller's bank) and of remittance information from the customer to the biller is also legally permissible.[17]

Accordingly, the additional activities in which the LLC will engage are permissible for national banks. Thus, the first standard is satisfied.

2. The banks must be able to prevent the enterprise from engaging in activities that do not meet the foregoing standard, or be able to withdraw their investment

This is an obvious corollary to the first standard. It is not sufficient that the entity's activities are permissible at the time a bank initially acquires its interest; they must also remain permissible for as long as the bank retains an ownership interest.

As previously determined by the OCC in the Spectrum Letter, the limited liability company agreement ("Agreement")[18] under which the LLC was formed contains provisions to ensure that the LLC would engage only in activities that are permitted for national banks and their subsidiaries. In particular, the Agreement provides that the LLC will not engage in an activity which is impermissible for a national bank or an operating subsidiary thereof, that any member may withdraw if the member reasonably determines that the LLC is engaged or proposes to engage in activities that are not legally permissible for a national bank or a subsidiary thereof, and that, in the event the OCC determines that an activity is impermissible, the LLC will cease

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[13] *Miller v. King*, 223 U.S. 505, 510 (1912).

[14] *Corbett v. Devon*, 12 Ill. App.3d 559, 299 N.E.2d 521, 529 (App. Ct. 1st Cir. 1973).

[15] OCC interpretive Letter No. 712 (March 12, 1996) (permissibility of bank performing billing and collection services for medical service providers); Unpublished Letter from Peter Liebesman, Assistant Director, Legal Advisory Services Division (August 27, 1985) (permissibility of bank providing billing services); OCC Interpretive Letter No. 836 (March 12, 1996) (permissibility of bank's data processing and electronic data interchange system to assist in the billing and collection for medical services).

[16] OCC Interpretive Letter No. 836, *supra*; OCC interpretive Letter No. 732 (May 10, 1996); OCC Interpretive Letter No. 653 (December 22, 1995); OCC Interpretive Letter No. 419 (February, 16, 1988).

[17] *See*, OCC Conditional Approval No. 304, *supra*; OCC Interpretive Letter No. 653, *supra*.

[18] *See* Spectrum Letter.

to engage in that activity. The proposed expansion of activities by the LLC will not alter the terms of the Agreement.

Accordingly, the second standard is satisfied.

3. The banks' 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 should 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 bank's investment not expose it to unlimited liability.

With respect to the third standard, Banks' loss exposure will continue to be limited, and Banks do not, and will not, have open-ended liability for the obligations of the LLC. Banks' risk of loss will be limited by both the corporate veil of the operating subsidiary and by Delaware law. As a legal matter, investors in a Delaware limited liability company do 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. 6, § 18-303 (Michie Cum. Supp. 1996). In addition, the Agreement provides that: (i) no member of the LLC shall have the authority to bind the LLC; and (ii) the members of the LLC are not liable for the debts, obligations or liabilities of the LLC. Thus, the Banks' loss exposure for the liabilities of the LLC will continue to be limited by statute and by the 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 to 50 percent ownership share or investment in a corporate entity is to report it as an unconsolidated entity under the equity method of accounting. Banks each will continue to account for their investment in the LLC under the equity method of accounting. Under the equity method of accounting, unless the investor has extended a loan to the entity, guaranteed any of its liabilities, or has other financial obligations, the investor's losses are generally limited to the amount of the investment shown on the investor's books.[19] Thus, Banks' losses from an accounting perspective would continue to be limited to the amount invested in the LLC and Banks will not have any open-ended liability for the obligations of the LLC.

Therefore, for both legal and accounting purposes, the Banks' potential loss exposure arising from their respective investments in the LLC should continue to be limited to the amount of

[19] *See generally,* Accounting Principles Board, Op. 18 ¶ 19 (1971).

those investments. Since that exposure will continue to be quantifiable and controllable, the third standard is satisfied.

> *4. The investment must be convenient or useful to the bank in carrying out its business and not a mere passive investment unrelated to that bank's 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."[20] 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.[21]

In this instance, the proposed expansion of activities by the LLC is designed to complement the LLC's current bill presentment business by adding bill payment and other related services. Thus, the proposed expansion of the LLC's services, which will be available to the Banks' customers, further demonstrates that Banks' investment in the LLC is not a mere passive investment unrelated to Banks' banking business.

Accordingly, the fourth standard is satisfied.

C. Conclusion

Based upon a thorough review of the information you provided, including the representations and commitments made both in your letters and in the Board filing incorporated therein by reference, and for the reasons discussed above, we conclude that the Banks may continue to hold their noncontrolling equity investments in the LLC upon the LLC's expansion of its current activities, subject to the following conditions:

> (1) The LLC will engage only in activities that are permissible for a national bank;
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> (2) In the event that the LLC engages in an activity that is inconsistent with condition number one, Banks will withdraw from the LLC;
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> (3) the Banks account for their respective investments in the LLC under the equity method of accounting; and

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

[21] *See, e.g.*, Interpretive Letter No. 543 (February 13, 1991); Interpretive Letter No. 427 (May 9, 1988); Interpretive Letter No. 421 (March 14, 1988).

(4) The LLC will be subject to OCC supervision and examination, subject to the limitations and requirements of 12 U.S.C. § 1831v.

The conditions of this approval are Aconditions 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. As such, the conditions are enforceable under 12 U.S.C. ' 1818. If you have any questions, please contact Beverly Evans, Senior Licensing Analyst, Bank Organization and Structure, at 202-874-5060, or John Soboeiro, Senior Attorney, in the Bank Activities and Structure Division, at 202-874-5300.

Sincerely,

-signed-

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel