



Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

**Conditional Approval #536
July 2002**

June 21, 2002

Mr. Patrick S. Antrim
Assistant General Counsel
Bank of America, National Association
Bank of America Plaza
101 South Tryon Street
Charlotte, North Carolina 28255

Dear Mr. Antrim:

This is in response to the application, dated March 20, 2002, by the Bank of America, National Association, Charlotte, North Carolina, (the "Bank") to the Office of the Comptroller of the Currency ("OCC") for approval to establish an operating subsidiary, and your subsequent correspondence dated April 8 and April 12, 2002. The Bank proposes to establish an operating subsidiary to facilitate an additional funding source for the Bank's mortgage business. The Application is approved, subject to the representations and conditions discussed below.

Proposal

The Bank conducts an extensive mortgage business throughout the United States. The Bank currently funds some of this mortgage business through a real estate investment trust (the "REIT"). The REIT is wholly-owned, through an intermediate operating subsidiary ("REIT Holdings"), and operated in the United States by the Bank. The REIT's assets consist solely of residential mortgages acquired from, and originated by, the Bank. All of the REIT's funding currently is supplied by the Bank and various subsidiaries of the Bank.

The Bank has identified a third-party investor (the "Investor") interested in providing funds that can be used to provide additional funding for the REIT. The Investor is a subsidiary of a foreign banking company, headquartered in the United Kingdom and supervised and regulated by the Financial Services Authority. The Bank represents that it is satisfied the Investor is investing for its own account and not on behalf of a customer. The funding would be provided through a complex structure, including the operating subsidiary that is the subject

of this Application, as described below. The overall purpose of the transaction is to permit the Bank to raise funds cost efficiently and to diversify the Bank's funding sources. The Bank represents there is no off-balance sheet purpose to the transaction, since all entities involved in which the Bank holds an interest are fully consolidated into the Bank for financial reporting.

The Bank has applied to establish an operating subsidiary, Spruce Bay Limited ("Spruce Bay"), to be formed under the laws of the Cayman Islands and with its registered office at the offices of a corporate services company in Grand Cayman. Spruce Bay will be registered as an "Exempted Company" and will conduct no business activities in the Cayman Islands. The sole purpose of Spruce Bay will be to invest in a Delaware general partnership, Blue Spruce Investments, G.P. ("Blue Spruce"). Blue Spruce will be formed initially by two limited liability companies that are wholly-owned by a wholly-owned operating subsidiary of the Bank. Blue Spruce's sole purpose will be to invest in nonvoting shares issued by the REIT. The REIT will use the funds to acquire additional mortgage assets from the Bank.

Spruce Bay will have three classes of shares. The Bank will subscribe to 100% of the Ordinary Shares for a nominal amount and to 100% of the Class B Preferred Shares for an initial investment of approximately \$70 million. The Investor will subscribe for 100% of the Class A Preferred Shares for approximately \$700 million.

The transaction has an intended maturity of five years. At that time, Spruce Bay will redeem both the Class A Preferred Shares and the Class B Preferred Shares at a pre-determined price set at the beginning of the transaction. The funds required for redemption will come from the sale of Spruce Bay's interest in Blue Spruce to Blue Spruce's parent (a subsidiary of the Bank) or otherwise from the Bank. Spruce Bay's sole activity will be to issue the three classes of stock and invest in Blue Spruce in the United States. It is a single transaction fixed at the outset. It will engage in no other business operations, either in the Cayman Islands or elsewhere. Because of certain tax and business considerations of the Investor, some of Spruce Bay's corporate affairs (*e.g.*, mailing address, board residency, and board meetings) will be conducted in the United Kingdom.

During the transaction's intended five-year life, the Bank's Ordinary Shares will hold 5% of the vote in the company, and the Investor's Class A Preferred Shares will hold 95% of the vote. However, any person holding 5% of the vote -- *i.e.*, either the Bank or the Investor - - can call for the Class A Preferred Shares and the Class B Preferred Shares to be redeemed at any time and for any reason. Thus, either the Bank or the Investor can end the financing transaction at any time and thus end Spruce Bay's only business activity. The Bank has the ability to eliminate the other owner; and the Investor similarly has the right to have its shares redeemed, leaving the Bank as the 100% owner. As a consequence, the Bank believes it has, for all practical purposes, the capability of controlling Spruce Bay, and that, from a prudential accounting standpoint, the structure warrants consolidation of Spruce Bay with the Bank, and that US GAAP permits such consolidation. The Bank will consolidate Spruce Bay fully into its own books, and the Class A Preferred Shares will be recorded as a third-party liability.

Spruce Bay's books and records will be located at the facilities of the Bank or one of its operating subsidiaries in the United States. If any stock ledger, minute book, or similar record is required to be maintained in the Cayman Islands or the United Kingdom, a duplicate will be maintained in the United States.

Spruce Bay will be subject to examination, supervision, and regulation by the OCC. Spruce Bay will maintain a resident agent in the United States. The Application and this approval letter will be permanently maintained in Spruce Bay's minutes. The Bank will furnish an annual certification to the OCC examiner-in-charge, on a schedule acceptable to the OCC, that during the prior twelve months Spruce Bay confined its activities to those described in this Application. Such certification will be given by an officer of the Bank or a parent holding company of the Bank familiar with the activities of the Spruce Bay.

The Bank has further represented that there are no provisions of Cayman Islands law which would prevent OCC examiners from having full access to Spruce Bay's books and records maintained in the United States. If there should be records in the Cayman Islands that are not maintained or duplicated in the United States, there is no law, regulation, or policy of the Cayman Islands Government which would shield such documents from the OCC, and the Bank and Spruce Bay consent to OCC access to any such records.

Analysis and Conclusion

The activities of the proposed subsidiary are clearly permissible. National banks may borrow funds to support their lending operations and may use operating subsidiaries as vehicles for such borrowings. National banks accept deposits and otherwise borrow funds directly from foreign sources, and so may use operating subsidiaries as vehicles to structure such fund-raising in a manner advantageous to the bank and the investor. Spruce Bay will be incorporated under Cayman Islands' law and some of its corporate affairs will occur in the United Kingdom. But its sole asset will be an interest in a United States partnership (Blue Spruce), and its sole purpose and business is to be an intermediary in raising funds for the Bank to use in its domestic mortgage business. Spruce Bay is part of the structure for a fixed transaction between the Investor and the Bank. It will have no on-going business operations either inside or outside the United States, and so it will not be engaged in business outside the United States.

Thus, Spruce Bay's activities and purpose clearly qualify it as an operating subsidiary of the Bank. The ownership structure is also consistent with its status as an operating subsidiary. Under the OCC's regulations, an operating subsidiary in which a national bank may invest includes a corporation or other entity "if the parent bank owns more than 50 percent of the voting (*or similar type of controlling*) interest of the operating subsidiary; or the parent bank otherwise controls the operating subsidiary and no other party controls more than 50 percent of the voting (*or similar type of controlling*) interest in the operating

subsidiary.” 12 C.F.R. § 5.34(e)(2) (emphasis added). The Bank will hold 5% of the ordinary vote of the company, and the Investor will hold 95%. However, the Bank has the right to require Spruce Bay to redeem the Investor’s shares, thus making the Bank the 100% owner. This gives the Bank control over whether the other 95% can be voted at all. Moreover, Spruce Bay will be established for one purpose only -- the five-year financing transaction -- and it engages in no other business. The Bank’s right to require redemption of the Class A Preferred Shares means that it controls whether the only activity of Spruce Bay will continue or not. We believe that, in the specific circumstances of Spruce Bay, this gives the Bank more than 50 percent of the “similar type of controlling interest” of Spruce Bay for purposes of section 5.34(e)(2). This type of interest (the ability to cause other shareholders to be redeemed and to become the sole owner) may not be a sufficient “controlling interest” to meet the requirements of section 5.34 in the case of a subsidiary that engaged in an ongoing business.

Thus, we believe the Bank is legally authorized to establish Spruce Bay as an operating subsidiary under 12 U.S.C. § 24(Seventh) and 12 C.F.R. § 5.34 subject to OCC examination, supervision, and regulation to the same extent as the Bank’s other operating subsidiaries.

Based upon a thorough review of the information and representations contained in your letters, we conclude that the Bank may establish Spruce Bay, subject to the following conditions:

- (1) Spruce Bay will engage only in those activities specifically described in the Application, and in accordance with the representations made in the Application.
- (2) The books and records of Spruce Bay will be located at facilities of the Bank or one of its subsidiaries in the United States, provided that Spruce Bay may maintain those items in the Cayman Islands or United Kingdom as are required to be maintained in those jurisdictions under applicable law. The Bank and Spruce Bay will maintain duplicate copies of any such items required to be maintained in the Cayman Islands or the United Kingdom at facilities of the Bank or one of its subsidiaries in the United States. The Bank and Spruce Bay will ensure prompt OCC access to all books and records.
- (3) The Bank and Spruce Bay acknowledge and consent that Spruce Bay will be subject to OCC examination, supervision, and regulation.
- (4) If any impediments should arise to satisfactory OCC access to Spruce Bay’s books and records, or to OCC examination, supervision and regulation of Spruce Bay, the OCC may direct the Bank to cease operations through Spruce Bay, and the Bank shall do so within the time period specified by the OCC.

(5) If the Bank plans to establish or acquire additional subsidiaries in the future to engage in activities similar to Spruce Bay involving funds from foreign sources, the Bank will file an application with the OCC under 12 C.F.R. § 5.34, notwithstanding the provisions of section 5.34(e)(5)(vi).

The conditions of this approval are 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. As such, the conditions are enforceable under 12 U.S.C. § 1818.

This approval, and the activities and communications by OCC employees in connection with the filing, do not constitute a contract, express or implied, or any other obligation binding upon the OCC, the United States, any agency or entity of the United States, or an officer or employee of the United States, and do not affect the ability of the OCC to exercise its supervisory, regulatory, and examination authorities under applicable law and regulations. The foregoing may not be waived or modified by any employee or agent of the OCC or the United States.

In the event of questions, please contact Richard T. Erb, Licensing Manager, at (202) 874-5060 or by email: largebanks@occ.treas.gov.

Sincerely,

-signed-

Steven J. Weiss
Deputy Comptroller for Licensing

ACN# 2002 ML 08 0012