Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

August 14, 1998

Conditional Approval #285
September 1998

Julius L. Loeser
Vice President and Senior Counsel
Wells Fargo Bank, N.A.
333 South Grand Avenue, Suite 1040
Los Angeles, CA 90071

Re: Application of Wells Fargo Bank, N.A., San Francisco, California, to Acquire Non-Controlling Interest in Limited Liability Company Through an Existing Operating Subsidiary
Application Control No. 98-ML-08-009

Dear Mr. Loeser:

This is in response to the application by Wells Fargo Bank, N.A., San Francisco, CA (the Bank) to perform new activities in its operating subsidiary, Wells Fargo Cash Centers, Inc. (the Subsidiary). We conclude that, subject to the conditions discussed below, the Bank may proceed with its plan for the Subsidiary to make a non-controlling investment in a Nevada limited liability company that would originate and support automated teller machines to serve casino customers.

Bank's Proposal

As described in your correspondences and telephone conversations with OCC staff, the Subsidiary, a Nevada corporation, currently owns automated teller machines (ATMs) located in casinos in Nevada. The Subsidiary would purchase a non-controlling 50 percent interest in the common units of InnoVisions, L.L.C. (the LLC),[1] in exchange for its casino-based ATMs and its contracts for support and service of the ATMs,[2] an initial $1,000,000 working capital line of credit and cash management services, and a license of vending machine product design specifications. The remaining 50 percent interest in the common units of the LLC would be held by Mr. Payroll Corporation Nevada, Inc. (MPCNI), a Texas corporation and subsidiary of Mr.

[1] The LLC would also issue a class of redeemable cumulative preferred units of which the Subsidiary will be the sole holder. The preferred units would carry no voting rights.

[2] In those casinos in which the Bank currently has ATMs, the Bank is the exclusive provider of ATM services. Therefore, with the establishment of the LLC, the LLC would become the exclusive provider of ATM services in those casinos.

Payroll Corporation (MPC). In exchange for MPCNI's interest, MPC would transfer royalty-free licenses of its intellectual property rights in its patented technology used in operation of its check cashing machines.

The LLC would be organized as a Nevada limited liability company. The LLC would develop, market, and support automated machines (the Machines) primarily in casinos. The Machines would (i) dispense cash through ATM and credit card cash advances, (ii) dispense cash through automated check cashing, (iii) allow customers to purchase tickets for shows and other events at the casino, (iv) allow customers to purchase vouchers and gift certificates for restaurants and other attractions at the casino, (v) dispense promotional and advertising materials, and (vi) provide both video and audio instructional, promotional, and advertising messages. When required by Regulation E, 12 C.F.R. § 205, the Machines will dispense a receipt which complies with Regulation E.

The Machines would be owned by the LLC and would bear the LLC's name and logo. The Machines would use software, owned by and licensed from MPC, both to cash checks and for security purposes.[3] Check cashing services would be available to everyone, and the Machines would accept any check to be cashed. Once the individual has inserted his check into the Machine, the Machine would take a digital picture of the check. An employee of MPC, located at an off-site location, would review the digital picture of the check and make a decision whether to cash the check. The LLC will charge a fee of one to three percent per check cashed, based on risk. MPC will bear the risk of loss should a check be wrongly cashed.

The Subsidiary, the Bank, MPCNI, and MPC would enter into an Operating Agreement which would give the members full authority to manage and control the business and affairs of the LLC. The LLC would be managed by a board of five directors, consisting of two persons designated by the Bank, two persons designated by MPC, and the chief executive officer of the LLC. The proposed Operating Agreement would provide that: (1) the LLC's purpose is to engage in activities which "are permissible for national banks"; (2) the LLC must receive OCC consent for new activities to be performed by the LLC; and (3) the LLC may not expand into new product offerings without approval of 80 percent of its directors. Other key decisions, including disposition of all or substantially all of the LLC's assets, any merger involving the LLC, the dissolution of the LLC, and the admission of additional members would also require approval of 80 percent of the directors. All other decisions regarding the operations of the LLC would be made by a majority of the directors.

[3] For security in check cashing transactions, the Machines would utilize an advanced biometrics system that reads and recognizes human faces. At a customer's initial use of a Machine, the customer would supply his social security number and answer several identifying questions over a phone, which is attached to the Machine. The Machine would then scan the customer's face. On subsequent visits to a Machine, the customer would be allowed to use the Machine only after being identified by a facial scan. For individuals using the Machines to access a bank account, a card and PIN number would still be required.

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(d)(1), notified the OCC of its intent to perform new activities in the Subsidiary.

Your letter raised the issue of the authority of a national bank to make an indirect, non-controlling investment in a limited liability company. The OCC has in a variety of circumstances concluded that it is lawful for a national bank to make a non-controlling investment in an entity or enterprise, such as a limited liability company, provided four criteria or standards are met.[4] 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;

(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.

Applying these four standards to the facts presented, I conclude, as discussed below, that the Bank's proposal satisfies these standards.

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 National Bank Act, in relevant part, provides that national banks 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. ...

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[4] 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; Interpretive Letter No. 705 (October 25, 1995), reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. ¶ 81-020.

12 U.S.C. § 24(Seventh).

The proposed activities of the LLC are legally permissible under 12 U.S.C. § 24 (Seventh) as part of, or incidental to, the business of banking. It is clear that a national bank may participate in and operate an ATM network.[5] Furthermore, the LLC may dispense, through these Machines, event tickets, vouchers, and gift certificates. In Interpretive Letter No. 718 (March 14, 1996), reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-033, we approved this activity. The letter opined that banks, in dispensing these media of payment, are essentially performing a bill payment function by transferring funds from the cardholder's account to a merchant's account. The transfer of funds from one account to another is a fundamental part of the business of banking.[6] Therefore, the LLC may dispense event tickets, vouchers, and gift certificates through its Machines.

The remaining activities proposed by the LLC have been held to be part of or incidental to the business of banking. Specifically, check cashing is one of the banking functions included in the "business of banking."[7] National banks have also been permitted to include statement "stuffers" -- promotional and advertising materials about non-banking products -- in customers' statements.[8] Accordingly, the LLC may use electronic means to cash checks, to dispense promotional and advertising materials, and to provide video and audio instructional, promotional, and advertising materials.

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 LLC'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 LLC.

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[5] See, e.g., Interpretive Letter No. 705 (October 25, 1995), reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-020 (operation of ATMs authorized by § 24(Seventh)); Letter of Robert B. Serino, Deputy Chief Counsel (November 9, 1992) (unpublished) ("Serino Letter"); Oklahoma ex rel. State Banking Board v. Bank of Oklahoma, 409 F. Supp. 71, 90 (N.D. Okla. 1975). Here, the Subsidiary currently owns the casino-based ATMs, and will contribute these ATMs to the LLC.

[6] See, e.g., id.; Serino Letter, supra.

[7] See 12 U.S.C. § 24(Seventh) ("discounting and negotiation of promissory notes, drafts, bills of exchange, and other evidences of debt ..."); see also United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 326-27 (1963) (identifying those activities that constitute the business of banking to include "the management of the checking account system ...").

[8] See, e.g., Interpretive Letter No. 622 (April 9, 1993), reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,504; Interpretive Letter No. 316, reprinted in [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,486; see also Independent Bankers Ass'n of Amer. v. Smith 534 F.2d 921, cert. den. 97 S.Ct. 166 (1976).

Several provisions in the proposed Operating Agreement are designed to satisfy the requirement that the Subsidiary will participate as an owner of the LLC only so long as the LLC's activities remain part of, or incidental to, the business of banking. The Agreement explicitly provides that the LLC's purposes are limited to those that are "permissible for national banks." Operating Agreement, § 2.6. Any decision to change the purposes by expanding the product offerings of the LLC would require the approval of four of the five directors, id. at § 6.3B(iii), and the Bank represents that the two directors which it appoints would vote to oppose any activity not permitted a national bank. Furthermore, the LLC will seek the approval of the OCC to engage in new activities. Id. at § 2.6. As a result, the Bank, through the Subsidiary, would be able on an on-going basis to prevent the LLC from engaging in new activities that are not part of, or incidental to, the business of banking. Thus, with respect to the LLC, this standard is met.

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, investors in a Nevada 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. Nev. Rev. Stat. § 86.371 (1995). Additionally, the Operating Agreement specifically provides that "[n]o member shall be personally liable for any debt, obligation, or liabilities of the Company, whether that liability or obligation arises in contract, tort, or otherwise." Operating Agreement, § 5.1.

Thus, the Bank's loss exposure for the liabilities of the LLC will be limited by statute and 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 20-50 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).

As proposed, the Bank will have a non-controlling 50 percent ownership interest in the LLC 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.[9] Thus the Bank's loss from an accounting perspective would be limited to the amount invested in the LLC, and the Bank will not have any open-ended liability for the obligations of the LLC.

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 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.[10]

This requirement is met in this case. The Bank, through the Subsidiary, is currently providing the Bank's ATM services in the same locations. The initial customers of the LLC would be those casino customers who currently use the Bank's ATM services. Participation in the LLC provides the Bank with an opportunity to provide these customers with improved service capabilities using the technology which MPC has developed. This will allow the Bank to furnish customers with new and improved services in a more cost effective manner. Further, the investment by the Bank contributes to customer convenience by provding a cashless method of purchasing such items as even tickets and gift certificates.

The fact that the Bank will be a 50 percent owner of the LLC with MPC is evidence of its intention to remain actively involved in this business. Far from making a mere passive financial investment, the Bank will contribute its existing casino-based ATMs, as well as its contracts for support and service of the ATMs. Overall, the establishment of the LLC is not unrelated to this Bank's business and would be convenient and useful to it in carrying out its banking business. Therefore, the fourth standard is satisfied.

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[9] OCC's Chief Accountant has concluded that the Bank's investment in the LLC 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.

[10] 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; Interpretive Letter No. 421 (March 14, 1988), reprinted in [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,645; Interpretive Letter No. 380 (December 29, 1986), reprinted in [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,604 n.8.

For these reasons, we believe the proposed investment is convenient and useful to the Bank in conducting its banking business.

Conclusion

Based upon the information and representations you have provided, and for the reasons discussed above, we conclude that Wells Fargo Bank, N.A., may acquire and hold through the Subsidiary, a non-controlling 50 percent interest in the LLC. This conclusion is conditioned upon Wells Fargo's compliance through the Subsidiary with the following conditions:

(1) The LLC 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 LLC that are inconsistent with condition number one, and will withdraw from the LLC 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 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.

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

If you have any questions, please contact Richard Erb, Licensing Manager, at (202) 874-4610.

Sincerely,

/s/

Raymond Natter
Acting Chief Counsel