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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

**Conditional Approval #255  
October 1997**

September 25, 1997

Ms. Susan F. Pape, Esq.  
Corporate Secretary's Office  
One First National Center  
1620 Dodge Street  
Omaha, Nebraska 68102-1596

Re: Application of First National Bank of Omaha, Omaha, NE ("the Bank") for an Existing Operating Subsidiary to Purchase a Non-Controlling Minority Interest in Data Processors International, Inc., a Merchant Processing Corporation  
Application Control Number 97-MW-08-0036

Dear Ms. Pape:

This is in response to your operating subsidiary notice ("Notice") submitted pursuant to 12 C.F.R. § 5.34(e) to permit SPC Inc., an existing operating subsidiary of First National Bank of Omaha, to purchase a non-controlling minority interest in Data Processors International, Inc. ("DPI" or "the Company") a merchant processing company. We have now completed our review and your notice is hereby approved, subject to the conditions set forth herein.

*A Background*

The Bank received OCC approval on December 30, 1992 to establish an operating subsidiary called SPC, Inc. ("SPC"). SPC was established to provide merchant and data processing services, market those services and provide equipment incidental to those activities to its customers. SPC has executed a Letter of Intent with DPI to purchase 500 shares of DPI's common stock equal to 40 percent of the outstanding shares.<sup>1</sup> The next largest shareholder owns 39.92 percent of DPI. Paragraph 3(a) of the Letter of Intent provides that SPC will have Board of Director representation commensurate with its stock ownership. Paragraph 3(c)

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<sup>1</sup> At closing of the transaction, SPC and the individual shareholders will enter into a Shareholders Agreement ("Agreement") setting forth the provisions of paragraph 3 of the Letter of Intent. These provisions will govern certain aspects of the relationship between the parties.

provides that SPC will have the right to purchase additional shares of common stock in DPI, based on certain timing requirements.<sup>2</sup> Further, Paragraph 3(b) provides “[t]he approval of SPC will be required prior to changes in the Executive Compensation Plan...declaration of dividends; [and] material changes in the business activities and strategic direction of [DPI].” Paragraph 3(e) of the Letter of Intent provides further that DPI will “only engage in the activities of merchant and data processing, marketing of these services and providing equipment incidental to activities to its customers and such other activities as are permissible for a national bank.”

The Nebraska Business Corporation Act provides that a two-thirds majority of the shareholders must agree to amend the articles of incorporation, adopt a plan of merger or share exchange, sell assets other than in the normal course of business, or dissolve the entity. NEB. REV. STAT. § 21-20, 118 (Cum. Supp. 1996), NEB. REV. STAT. § 21-20, 130 (Cum. Supp. 1996), NEB. REV. STAT. § 21-20, 136 (Cum. Supp. 1996), and NEB. REV. STAT. §21-20, 152 (Cum. Supp. 1996). Based on SPC’s proposed ownership interest in DPI, SPC’s vote would clearly be necessary to effect any of these changes under Nebraska law. However, SPC’s proposed ownership interest in DPI would not alone constitute the two-thirds vote needed to effect control over DPI.

DPI, located in Omaha, Nebraska, is an electronic payment processing company specializing in servicing the needs of the direct marketing community, including call centers, infomercials, and small catalogers.<sup>3</sup> The company primarily processes credit card transactions on behalf of merchants which accept credit cards as payment for goods and services utilizing a proprietary operating system. Revenues are generated through a combination of discount fees and transaction fees charged against a merchant’s monthly processing volumes. Today, SPC ranks

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<sup>2</sup> Paragraph 3(c) provides that at any time after three years from the closing of the transaction, SPC may, after nine months notice, acquire the shares owned by the individual shareholders for a price equal to the greater of (i) 10 times the after-tax earnings of the Company in the best 12 out of 24 consecutive months immediately prior to the notice or (ii) \$4,000,000 (for 100 percent of the Company) proportionately reduced for the ownership of the individual shareholders. In the event SPC exercises this option, at that point they will have control of the Company. However, paragraph 3(d) further provides that at any time after five years from closing of the transaction, if SPC has not purchased the shares owned by individual shareholders pursuant to paragraph 3(c), the individual shareholders may, upon nine months notice to SPC, acquire SPC’s shares for a price equal to the greater of (i) 10 times the after-tax earnings of the Company in the best 12 out of 24 consecutive months prior to the date of notice or (ii)\$4,000,000 (for 100 percent of the Company) proportionately reduced for the ownership of SPC.

<sup>3</sup> DPI is a Nebraska S corporation. Prior to closing the transaction, DPI will terminate its S election and will be taxed as a C corporation.

second in the industry with an 11 percent market share of the mail order/telephone order market. SPC expects to gain greater market share in the direct marketing merchant community with DPI's distribution channels. The Bank seeks to make this investment through SPC to increase its distribution channels and to provide customers with enhanced merchant processing services.

## B. Discussion

A national bank may engage in activities that are part of or incidental to the business of banking by means of an operating subsidiary. 12 C.F.R. § 5.34(d)(1). Your application raises the issue of the authority of a national bank to make indirectly, through an operating subsidiary, a non-controlling minority investment in a corporation. A recent OCC interpretive letter extensively analyzed the authority of national banks under 12 U.S.C.

§ 24(Seventh) to own stock, and reviewed OCC precedents on the ownership of stock in amounts less than that required for an operating subsidiary, i.e., non-controlling stock investments. See Interpretive Letter No. 732, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. ¶ 81-049 (May 10, 1996).<sup>4</sup> That letter concluded that ownership of a non-controlling interest in a corporation is permissible provided four standards, drawn from OCC precedents, are satisfied.<sup>5</sup> They 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. (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 factors is discussed below and applied to your proposal.

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<sup>4</sup> In addition, the OCC has permitted national banks to own, directly or indirectly through an operating subsidiary, a non-controlling, minority interest in an enterprise. The enterprise might be a corporation, a limited liability company, partnership, limited partnership or other similar entity. See *e.g.*, Interpretive Letter No. 697, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. ¶ 81-012 (November 15, 1995) (national bank's operating subsidiary to hold 25 percent interest and serve as general partner in a partnership to own a trust company). See also Letter of Steven J. Weiss, Deputy Comptroller, Bank Organization and Structure (December 27, 1995 unpublished).

<sup>5</sup> 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.

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.*

Our precedents on controlling or non-controlling stock ownership have recognized that the enterprise in which the bank takes an equity interest must confine its activities to those that are part of, or incidental to, the business of banking. 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); Interpretive Letter No. 645, *reprinted in* [1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,554 (April 29, 1994) (national bank can take a controlling interest in a LLC to originate and service residential real estate mortgage loans); Interpretive Letter No. 423, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,647 (April 11, 1988) (national bank operating subsidiary authorized to act as managing general partner of a limited partnership investing in real estate mortgage-related assets); Interpretive Letter No. 668, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,616 (October 14, 1994) (national bank permitted 50 percent ownership of LLC which acquires and services mortgage loans); Interpretive Letter No. 694 *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-009 (December 13, 1995) (national bank permitted to take non-controlling, minority interest in a LLC that purchases secured home improvement loans and resells them in the secondary market); Interpretive Letter No. 711, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-026 (February 23, 1996) (national bank to take minority equity interest in mortgage banking company).

DPI will provide merchant credit card processing services through electronic means in servicing the needs of the direct marketing merchant community. It is clear that merchant processing services are permissible for national banks under 12 U.S.C. § 24(Seventh). See, e.g., Interpretive Letter No. 689 [Current] Fed. Banking L. Rep. (CCH) ¶ 81-004 (August 9, 1995); Interpretive Letter No. 720 *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 81,035 (January 26, 1996); Banking Bulletin 92-94, Merchant Processing (May 5, 1992). It is also well established that a national bank may use electronic means to perform services expressly or incidentally authorized to national banks. See OCC Interpretive Letter No. 677, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625 (June 28, 1995); OCC Interpretive Letter No. 284, *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,448 (March 28, 1984); and OCC Interpretive Letter No. 449, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,673 (August 23, 1988). As noted in the recently revised OCC Interpretive Ruling recognizing this authority, a national bank may “perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform,

provide or deliver.” See 12 C.F.R. § 7.1019 (1996). Moreover, paragraph 3(e) of the Letter of Intent expressly provides that “[DPI] shall only engage in the activities of merchant and data processing, marketing of these services and providing equipment incidental to its customers and such other activities as are permissible for a national bank.” Therefore this 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. The activities of the enterprise in which the national bank may invest must be part of, or incidental to, the business of banking not only at the time the bank first acquires its ownership, but for as long as the bank has an ownership interest. However, minority shareholders in a corporation do not possess a veto power over corporate activities as a matter of corporate law. One way to assure continuing compliance with the first standard is for the corporation’s articles of incorporation or bylaws to limit its activities to those that are permissible for national banks. See, e.g., Letters from Peter Liebesman, Assistant Director, Legal Advisory Services Division (January 26, 1981 and January 4, 1983).

Several provisions of the Letter of Intent, which you have represented will be incorporated into the Shareholders Agreement, provide avenues for the Bank to ensure that while it has an investment in DPI, the company’s activities will remain permissible. First, paragraph 3(e) of the Letter of Intent limits DPI’s activities to merchant and data processing and other related activities permissible for national banks. Second, paragraph 3(b) of the Letter of Intent expressly states “[t]he approval of SPC will be required prior to...material changes in the business activities and strategic direction of [DPI].” Third, paragraph 3(a) of the Letter of Intent states that the Shareholders Agreement will provide for “Board representation for SPC commensurate with its stock ownership.” Thus, SPC will have the right to vote on matters affecting DPI and based on its stock ownership, SPC will have a one-third voting share. Under Nebraska law, SPC’s vote will be needed to effectuate major business decisions of DPI. Although you have represented that the Bank does not foresee the expansion of DPI’s current line of business beyond merchant processing, in the event DPI chooses to expand its activities, SPC’s approval would be necessary. These provisions assure that the company will not engage in any activity that is not permissible for a corporation having a national bank as a shareholder. Thus, the Bank will effectively be able to prevent DPI from engaging in any impermissible activity as long as it continues to own shares in it through SPC. Thus, the second standard is satisfied.

3. *The bank’s loss exposure must be limited 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 national bank's investment not expose it to unlimited liability. Normally, this is not a concern when a national bank invests in a corporation, for shareholders are not liable for the debts of the corporation, provided proper corporate separateness is maintained. 1 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 25 (perm. ed. rev. vol. 1990).

In the present case, SPC's risk of loss will be limited to the purchase price of the common stock detailed in paragraph 1 of the Letter of Intent which also expressly provides that "SPC, as a shareholder, shall not be personally liable for the acts and debts of [DPI]." Furthermore, the Nebraska Business Corporation Act contains similar limited liability provisions. NEB. REV. STAT. § 21-2041 (Cum. Supp. 1996).

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 an entity 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 of 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, through SPC, will have a 40 percent ownership interest in DPI. Thus, the equity method of accounting should be used to reflect this investment.

Therefore, for both legal and accounting purposes, the Bank's potential loss exposure should be limited to the amount of its investment by statute and any constituent documents and agreements executed by the parties. Since that exposure will 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." *See Arnold Tours, Inc., v. Camp*, 472 F. 2d 427, 432 (1st Cir. 1972). The provision in 12 U.S.C.

§ 24(Seventh) relating to the purchase of stock, derived from section 16 of the Glass-Steagall Act, was only intended to make it clear that section 16 did not authorize speculative investments in stock. See Interpretive Letter No. 697, *supra*. Therefore, a consistent thread running through our precedents concerning stock ownership is that it must be convenient or useful to the bank in conducting *that bank's* banking business. The investment must benefit or facilitate that business and cannot be a mere passive or speculative investment. See, e.g., Interpretive Letter No. 543, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,225 (February 13, 1991) (national bank authorized to acquire nominal stockholding for membership in corporation of primary dealers in government securities); Interpretive Letter No. 427, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,651 (May 9, 1988) (national bank permitted to buy Farmer Mac stock in nominal amounts); Interpretive Letter No. 421, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,645 (March 14, 1988) (national bank permitted to invest in the Government Securities Clearing Corporation).

This requirement is met here. As set forth in the “*Background*” section, the Bank is using its indirect investment in DPI to increase its distribution channels and to provide SPC’s customers with enhanced merchant processing products. SPC, wholly-owned by the Bank, presently ranks second in the industry with an 11 percent market share of the mail order/telephone order market. Through the combined efforts of the two companies, SPC believes it can gain greater market share. SPC’s investment in DPI fits well within SPC’s overall strategic plan. SPC’s investment in DPI will not change the nature of its business activities. Rather, it will provide SPC with greater access to a segment of the merchant processing industry. DPI offers its expertise in electronic payment processing to specific niches in the direct marketing community including: call centers, infomercials and small catalogers which typically have been a market segment SPC has not had the product or industry expertise to pursue. Mail order, phone order and electronic commerce merchants have unique payment processing requirements. These unique needs increase the demand for the secure and innovative processing solutions offered by DPI. DPI’s services include: authorization processing, settlement processing, payment management services, charge back and retrieval processing, reporting, and special billing services. DPI’s capabilities in “payment management services” (installment and continuity programs and deferred billing) and “reporting” are services that SPC does not have the expertise to currently offer. Thus, DPI’s capabilities in these areas will allow the Bank to attract a segment of the mail order/telephone order market which SPC has not been able to capture to date.

For these reasons, the Bank’s investment in DPI, through SPC, is convenient and useful to the Bank in carrying out its business and is not a mere passive investment. Thus, the fourth standard is satisfied.

### C. *Conclusion*

On the basis of the representations specified in your notification letter and other submitted materials, the OCC finds that the Bank may, through its operating subsidiary, SPC, indirectly hold a non-controlling minority (i.e., 40 percent) interest in DPI, and the notification is approved subject to the following conditions:

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

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.

Please be advised that all conditions of this approval are "conditions imposed in writing by the agency in connection with the granting of an application or other request" within the meaning of 12 U.S.C. § 1818.

Sincerely,

/s/

Julie L. Williams  
Chief Counsel