



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

**Conditional Approval #300
February 1999**

January 13, 1999

Scott A. Cammarn
Assistant General Counsel
NationsBank, National Association
NationsBank Corporate Center
Charlotte, North Carolina 28255

Re: Application by NationsBank, National Association to Establish an Operating Subsidiary to Make a Noncontrolling Investment in Marsico Capital Management, L.L.C.
Application Control Number: 98-ML-08-0022

Dear Mr. Cammarn:

This is in response to the application NationsBank, National Association, Charlotte, North Carolina ("Bank"), to acquire a wholly owned operating subsidiary, Marsico Management Holdings L.L.C. ("MMH"), for the purpose of acquiring a 50 percent, non-controlling equity interest in Marsico Capital Management, L.L.C. ("MCM").¹ MCM will engage in the business of providing investment advisory services. Based upon the representations and commitments made by the Bank in its application and notice, as described herein, we approve the Bank's acquisition of the operating subsidiary to engage in the proposed activity, subject to certain conditions as specified in this letter.

¹You have represented in your letter that MMH will be a wholly owned operating subsidiary of Bank, and will not engage in any activities, other than holding Bank's 50 percent interest in MCM, and receiving a portion of incentive distributions derived from two private limited partnerships. In addition, you note that the activities of MCM are permissible for an operating subsidiary of a national bank and that Bank has previously received approval to engage in these activities through an operating subsidiary. For these reasons you state that no notice to or approval by the OCC is required for Bank to acquire MCM. The OCC, however, views the act of acquiring a noncontrolling interest in an entity as an activity subject to review. Thus, a national bank that intends to acquire a noncontrolling interest in an entity through an operating subsidiary must submit an operating subsidiary application and a filing fee to the OCC in accordance with the procedures set forth at 12 C.F.R. § 5.34(e)(1)(i), even where the proposed activities of the entity qualify for the after-the fact notice or expedited review process.

I. Proposal

The Bank will acquire MMH for the purpose of acquiring and holding a 50 percent non-controlling ownership interest in MCM, a Delaware limited liability company. TFM Holdings, L.L.L.P. ("TFM"), an unaffiliated Colorado limited liability partnership, will own the remaining 50% of MCM. MCM is a registered investment adviser under the Investment Advisers Act of 1940. MCM will provide investment advisory services or sub-advisory services to various clients, including six mutual funds, three variable annuity products, and other accounts established by corporations, pension and profit sharing plans, charitable organizations, trusts and estates, and high net worth individuals. In addition, MCM provides certain administrative and management services as the management company for two domestic private limited partnerships and acts as the investment manager for an offshore private fund. On an aggregate basis, MCM has approximately \$2.5 billion under management as of September 30, 1998.

II. Analysis

A national bank may invest in an operating subsidiary if the parent bank owns more than 50 percent of the voting interest in the subsidiary, or if it controls the subsidiary and no other party controls more than 50 percent of the voting interest. 12 C.F.R. § 5.34(d). Since the Bank will own 100 percent of the voting stock of the MMH, this requirement is satisfied. National bank operating subsidiaries may engage in activities that are part of, or incidental to, the business of banking. In this case, MMH's activity will be the holding of a 50 percent equity investment in MCM.

According to the MCM Operating Agreement, the day-to-day affairs of MCM will be controlled and managed by a Board of six directors, three to be appointed by Bank and three to be appointed by TFM. Certain designated acts must receive the prior approval of all members. The Chairman of the six-member Board of MCM will be Mr. Thomas F. Marsico, owner of TFM. Ms. Barbara M. Japha, the current President of MCM will continue to serve as President of MCM. Ms. Japha and Mr. Marsico will be responsible for the day-to-day management of MCM, subject to the oversight of the Board. Additional officers will be appointed from time to time by Mr. Marsico. Therefore, the Bank and MMH will not control MCM. The Bank represents that neither Mr. Marsico nor Ms. Japha will serve as a director, officer, or employee of Bank.

A. Non-controlling Equity Investments

Ownership of a non-controlling equity investment is a permissible activity for a national bank or its operating subsidiary if the investment satisfies a four-part test, derived from OCC precedents. See *generally* Interpretive Letter No. 697, [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-012 (November 15, 1995). These 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 from the investment.
3. The bank's loss exposure must be limited, for both legal and accounting purposes, and the bank must not have open-ended liability for the obligations of the enterprise.
4. The investment must be convenient and useful to the bank in carrying out its banking business, and not a mere passive investment unrelated to that business.

As discussed below, the Bank's proposal satisfies all four of these requirements.

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 on non-controlling ownership 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. It is well-established that investment advisory and related services to mutual funds, institutional investors, and other individuals are permissible for national banks under 12 U.S.C. § 24(Seventh).² See e.g., 12 C.F.R. § 5.34(e)(2)(ii)(I) and 3(ii)(D); OCC Interpretive Letter No. 648 (May 4, 1994) (authorizing Mellon Bank's acquisition of The Dreyfus Corporation). The OCC also has approved LLCs engaging in investment advisory and related activities. See e.g., Conditional Approval No. 284 (Aug. 14, 1998) (*de novo* LLC to engage in certain investment advisory services); Conditional Approval No. 270 (Jan. 21, 1998) (non-controlling interest in LLC engaged in certain investment advisory activities). Accordingly, the activities in which MCM will engage are permissible for national banks and their operating subsidiaries,³ and the Bank satisfies the first standard for permissible non-controlling investments.

²The Bank represents that MCM does not now and will not following the proposed acquisition sponsor or organize mutual funds. Further, the Bank represents that MCM does not engage in the underwriting, distribution, or public sale of mutual fund shares. These services are provided by third-party distributors not affiliated with the Bank or MCM.

³The Bank represents, and we concur, that the proposed activities are permissible under the Glass-Steagall Act.

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 from the investment.

The activities of an enterprise in which a national bank invests must be part of, or incidental to, the business of banking both initially and for as long as the bank has an ownership interest. Therefore, the OCC requires that the investing bank must be able to either prevent the enterprise from engaging in impermissible activities, or withdraw its investment.

In the present case, Bank, TFM, and MCM have each committed that, so long as Bank is a member of MCM, that MCM shall engage in no activity that is not permissible for a national bank under the National Bank Act.

Accordingly, the second standard is met.

3. The bank's loss exposure must be limited for both legal and accounting purposes, 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.

In the present case, the Bank's 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).⁴ Thus, the Bank's loss exposure for the liabilities of MCM will be limited by statute and by the agreement establishing MCM.

b. Loss exposure from an accounting standpoint

In assessing a bank's loss exposure for accounting purposes, 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

⁴Section 12.1 of the agreement establishing MCM specifically provides that none of the members shall be personally liable for any debts, obligations or liabilities of MCM.

accounting.⁵ Under this method, unless the bank has guaranteed any of the liabilities of the entity or has assumed 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).

The Bank, through MMH, will have a 50 percent ownership interest in MCM. You have represented that the Bank intends to treat this investment as an unconsolidated investment under the equity method of accounting, consistent with prior OCC approvals.

Therefore, for both legal and accounting purposes, the Bank's potential loss exposure should be limited to the amount of its investment. Since that exposure 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 banking business, and not a mere passive investment unrelated to that 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." *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 intended to make it clear that section 16 did not authorize speculative investments in stock. Therefore, a national bank's investment in an enterprise or entity must also satisfy the requirement that it have a beneficial connection to the bank's business, *i.e.*, be convenient or useful to the investing bank's business activities, not a mere passive investment unrelated to the institution's banking business.

This requirement is satisfied here. Bank's investment in MCM will expand significantly the Bank's investment advisory activities, and augment the Bank's existing mutual fund and investment advisory products and services available to its customers. In addition, Bank believes that its relationship with Mr. Marsico will facilitate new fund marketing efforts and enhance the marketing of fund products and advisory services by Bank's parent holding company. For these reasons, the Bank's investment in MCM, through MMH, will be convenient and useful to the Bank in carrying out its business, and will not be a mere passive investment. Thus, the fourth standard is satisfied.

⁵See Interpretive Letter No. 692, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-007 (Nov. 1, 1995), which discusses in more detail the appropriate accounting treatment for a national bank's minority investment in a limited liability company.

III. Conclusion

Based upon the information that you have provided, and for the reasons set forth above, the OCC finds that the Bank may continue to hold, through MMH, a 50 percent, non-controlling equity interest in MCM. Accordingly, the OCC approves the Bank's acquisition of the operating subsidiary to engage in the proposed activity, subject to the following conditions:

1. MCM will engage only in activities that are part of, or incidental to, the business of banking.
2. The Bank, through the MMH, will have veto power over any activities of MCM that are inconsistent with Condition 1, or will withdraw from MCM in the event it engages in an activity inconsistent with Condition 1.
3. The Bank will account for its investment in MCM under the equity method of accounting.
4. MCM 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.

If you have any further questions, you may contact Richard Erb, Licensing Manager, at (202) 874-5060 or John Soboeiro, Senior Attorney, at (202) 874-5300.

Sincerely,

/s/

Julie L. Williams
Chief Counsel