**Comptroller of the Currency**
**Administrator of National Banks**

Washington, DC 20219

# Conditional Approval #301
# February 1999

January 15, 1999

Ms. Rebecca L. Simmons
Sullivan & Cromwell
125 Broad Street
New York, New York 10004

Re Bank of America NT & SA and Citibank, N.A. application to invest in a Limited Liability Company through existing operating subsidiaries
Application Control Nos. 1999-WO-08-0001, 1999-WO-08-0003

Dear Ms. Simmons:

This is in response to the operating subsidiary application ("Application") submitted on behalf of Bank of America National Trust and Savings Association, San Francisco, California and Citibank, N.A., New York, New York (collectively, the"Applicant Banks"). Each of these banks proposes to own a membership interest in a limited liability company ("LLC") through existing, wholly owned operating subsidiaries[1] to engage in research and development activities in connection with the anticipated establishment of an identity certification service.[2] For the reasons discussed below, the application is approved, subject to the conditions set forth herein. Please note that our response is based solely upon the description of current LLC activities contained in the Application.[3]

[1] Bank of America Interactive Services Holdings, Inc. and Citibank Strategic Technology, Inc. will each own 12.3457% of LLC.

[2] The other banks that currently intend to invest in the LLC simultaneously with the Applicant Banks are ABN AMRO N.V., Bankers Trust Company, Barclays Bank PLC, Bayerische Hypo-und Verinsbank AG, The Chase Manhattan Bank, and Deutsche Bank AG. In addition, CertCo, Inc., a Delaware corporation, will invest in the LLC.

[3] The Applicant Banks have represented that the LLC will not issue digital identity certificates to, verify digital identity certificates for, or otherwise provide services to third parties who are not investors in the LLC until it receives all necessary regulatory approvals, including the filing of a subsequent application pursuant to 12 C.F.R. § 5.34, for the new activity.

*A. Background*

As noted previously, the LLC will engage in research and development activities in connection with a proposed establishment of an identity certification service for commerce over open networks, including the Internet, based initially on digital signature (public key infrastructure) technology. The LLC will engage personnel to supervise and conduct the research and development activities, purchase related systems and technologies, develop marketing and branding materials and strategies, conduct pilot tests involving members of the Company, and other related activities. Investing in the LLC is a precondition to the participation by the Applicant banks in the establishment of the proposed identity certification business. The Applicant Banks represent that any business developed as a result of the research and developmental activity of the LLC will be limited to businesses that are part of, or incidental to, the business of banking.

*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. 12 C.F.R. § 5.34. In a variety of circumstances, the OCC has permitted national banks to own, either directly, or indirectly through an operating subsidiary, a minority interest in an enterprise.[4] The OCC has concluded that national banks are legally permitted to make a minority investment in a company provided four criteria or standards are met.[5] These standards, which have been distilled from our previous decisions in the area of permissible minority 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*.
>
> (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*.
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> (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*.

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

[5] *See* Interpretive Letter No. 692, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,007 (November 1, 1995), and OCC Interpretive Letter No. 694, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,009 (December 13, 1995).

We conclude, as discussed below, that the Applicant Banks' proposed acquisition of membership interests in LLC satisfies these four criteria.

*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. The Applicant Banks represent that the LLC will engage in research and development necessary to the establishment of identity certification services that would be permissible for national banks.[6] Integral to OCC approvals of permissible activities is the approval of the research and development necessary to engage in those activities.[7] Accordingly, the activities in which the LLC will engage are part of, or incidental to, the business of banking. 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.

The LLC Agreement ("Agreement") under which the LLC is to be formed contains provisions to ensure that the LLC will engage only in activities that are permitted for national banks and the subsidiaries. In particular, the Agreement provides: "The [LLC] shall not directly or indirectly carry on any activity that would prohibit a New York State Chartered bank, a national bank, a member bank of the Federal Reserve System or a Founding Bank Member

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[6] For example, the Applicants state that certain of the activities in which the LLC will engage will relate to identity certification services similar to those approved by the OCC in Conditional Approval 267 (January 12, 1991) (Application by Zions First National Bank, Salt Lake City, Utah, to establish an operating subsidiary that will act as a certification authority and repository for digital certificates used to verify digital signatures).

[7] *See, e.g.* Letter of August 11, 1975, concerning First National City Bank, New York, New York (bank may develop patentable inventions and rights through research regarding electronic equipment used in its operations); Interpretive Letter 677, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625 (June 28, 1995) (banks, through operating subsidiary to engage, through a joint venture, in the development and distribution of home banking and financial management software); Interpretive Letter 756, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,120 **(** (November 5, 1996) (bank hold may hold a minority interest in a limited liability company to engage in the development, distribution and maintenance of computer software for cash management application).

from being a Member [of the LLC]. In addition, the Agreement permits a member to withdraw if the LLC engages in any impermissible activity.

Accordingly, the second standard is satisfied.

*3. The Banks' loss exposure must be limited, as a legal and accounting matter, and the Banks 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.

In the present case, the Banks' risk of loss will be limited by both the corporate veil of the operating subsidiaries 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).[8] Thus, the Banks' loss exposure for the liabilities of LLC will be limited by statute and by the Agreement establishing 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 less than 20 percent ownership share or investment in a corporate entity is to report it as an unconsolidated entity under the equity or cost method of accounting. The Applicant Banks have advised that the accounting treatment for their investment in the LLC (through the operating subsidiaries) is under the cost method of accounting. Under the cost method of accounting, losses recognized by the investor will not exceed the amount of the investment (including extensions of credit or guarantees, if any) shown on the investor's books.

Accordingly, for legal and accounting purposes, the Banks' potential loss exposure should be limited to the amount of the investment. Since that exposure will be quantifiable and controllable, the third standard is satisfied.

[8] In addition, the Agreement establishing LLC specifically provides that none of the members shall be personally liable for any debts, obligations or liabilities of 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 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".[9] 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.[10]

In this instance, the Applicant Banks' investment in the LLC will permit the Banks to begin the process necessary to engage in the digital identity certification business, which is intended to be conducted as a part of each Bank's banking business as a service to the customers of each Bank. Thus, the investment is not a mere passive investment unrelated to either Bank's banking business.

Accordingly, the fourth standard is satisfied.

*C. Conclusion*

Based upon the information and representations you have provided, and for the reasons discussed above, we conclude that the Applicant Banks may invest in LLC, and that the application is approved subject to the conditions:

1. LLC may engage only in activities that are part of, or incidental to, the business of banking;

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

[10] *See, e.g.*, Interpretive Letter No. 543, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,255 (February 13, 1991); Interpretive Letter No. 427, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,651 (May 9, 1988); Interpretive Letter No. 421, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,645 (March 14, 1988).

2. The Banks, through their respective operating subsidiaries, will have veto power over any activities of LLC that are inconsistent with Condition 1, or will withdraw from LLC in the event it engages in an activity inconsistent with Condition 1.

3. the Applicant Banks will account for their investment in the LLC under the equity or cost method of accounting; and

4. LLC will be subject to OCC supervision, regulation, and examination.

Please be advised that all 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.[11]

If you have any questions regarding this decision, please contact John W. Graetz, Licensing Expert (Financial Analyst), in Bank Organization and Structure at (202) 874-5060, or Kristina Whittaker, Assistant Director, Bank Activities and Structure at (202) 874-5300.

Sincerely,

/s/

Julie L. Williams
Chief Counsel

[11] Applicants understand that OCC's approval of this application on research and development in no way binds the agency to approve any subsequent applications for activities that might arise from the research and development activities.