Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Conditional Approval #220
December 1996

December 2, 1996

Mark J. Welshimer, Esquire
Sullivan & Cromwell
125 Broad Street
New York, N.Y. 10004-2498

Re: Notices of Wells Fargo Bank, N.A., Michigan National Bank, First National Bank of Chicago, and Texas Commerce Bank of Intent to Establish an Operating Subsidiary Pursuant to 12 C.F.R. § 5.34 to Become a Member of Limited Liability Companies Operating a Stored Value System - Application Control Nos. 96-WO-08-0012, -0013, -0025, and -0026

Dear Mr. Welshimer:

This is in response to the operating subsidiary notices pursuant to 12 C.F.R. § 5.34[1], submitted on behalf of Wells Fargo Bank, N.A.("Wells Fargo"), Michigan National Bank ("MNB"), First National Bank of Chicago, and Texas Commerce Bank, N.A. (collectively, the "Banks"), to establish operating subsidiaries to acquire membership interests in two Delaware limited liability companies (the "LLCs" or the "Companies") that will operate a stored value card system known as "Mondex." Each of the operating subsidiaries will be wholly owned by its parent Bank and will engage in no activities other than holding membership interests in the Companies.

For the reasons discussed below, we approve, subject to certain conditions, the establishment of such operating subsidiaries by the Banks because we find that national banks may under 12 U.S.C. § 24(Seventh) engage in the business of developing and operating a stored value system. Please note that our response is solely directed to the question stated above. We do not address how other federal and state laws and regulations will or might apply to the Banks'

[1] The OCC recently amended its operating subsidiary rule , 12 C.F.R. 5.34, as part of general revision to Part 5 ("Rules, Policies and Procedures for Corporate Activities") under the OCC's Regulation Review Program. See 61 Fed. Reg. 60342 (November 27, 1996). However, the amended rule does not take effect until December 31, 1996. Accordingly, this application was decided under the current rule. 48 Fed. Reg. 48454 (October 19, 1983) as amended at 50 Fed. Reg. 1440 (January 11, 1985); 53 Fed. Reg. 18547 (May 24, 1988); and 55 Fed. Reg. 997 (January 11, 1990).

activities in connection with the Companies, or to the Companies's operations. Similarly, at this time, we do not address the important consumer protection and supervisory considerations that will arise when the Companies actually commence operations.[2]

Background

1. The Product

Mondex stored value is intended to serve as an electronic payments medium. The Mondex system will employ specially designed computer chips capable of storing and transferring the electronic stored value ("ESV") and other data in a secure manner. The computer chip and related software is referred to as a "Purse" and the devices containing a Purse are referred to as "Purse Carrier Devices"("PCDs"). The most common PCD will be plastic cards ("Mondex Cards") issued to individuals ("Consumers") by institutions licensed to do so ("Members"). Retailers licensed by Members to participate in the Mondex System will have special Purses referred to as "Retailer PCDs."

2. The Mondex Entities

Rights relating to the Mondex concept are held by a U.K. limited liability company, Mondex International Limited ("Mondex International") that has authority to license institutions in various countries to develop and operate Mondex in their respective countries.[3] Wells Fargo, AT&T Universal Bancorp Services, Inc. (AT&T Universal"),[4] NOVUS Services, Inc.

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[2] At this time, many significant details of the Mondex stored value system are still to be determined. However, as part of its active supervision of the Mondex system, the OCC will provide guidance to the Banks and the LLCs on the implementation of the stored value system operations. This guidance will address supervisory, compliance and consumer protections issues. See, e.g., OCC Bulletin 96-48 (September 10, 1996) on stored value systems. Among other things, the OCC will review the consumer disclosures provided by the Mondex system. The OCC will also develop supervisory procedures as the Mondex operations evolve.

[3] Mondex International Limited is currently owned by 17 major organizations (collectively, the "Global Founders"): Nat West; Midland Bank; The Hong Kong and Shanghai Banking Corporation Limited; Canadian Imperial Bank of Commerce; Royal Bank of Canada; Australia and New Zealand Banking Group Limited; Commonwealth Bank of Australia; National Australia Bank Limited; Westpac Banking Corporation (Australia); ANZ Banking Group Limited; Bank of New Zealand; Countrywide Banking Corporation Limited; the National Bank of New Zealand Limited; ASB Bank Limited; Westpac Banking Corp (New Zealand); Wells Fargo Bank; and AT&T Universal Card Services. National Australia Bank Limited ("NAB") is the parent of Michigan National Bank. Investing participants will have franchise rights to exploit Mondex in their respective geographical markets. MasterCard International, under a recent a letter of intent with the Global Founders, will acquire 51% of Mondex International; the Global Founders will own 49%.

[4] AT&T Universal manages the third largest credit card program in the United States with more than 18 million accounts.

("NOVUS"),[5] and NAB (collectively the "U.S. Founders") currently have the rights from Mondex International to operate the Mondex system in the United States.[6]

The U.S. Founders propose to establish two de novo Delaware limited liability companies that will implement the Mondex system in the United States: the LLCs. One LLC, Mondex USA Originator Limited Liability Company (the "OLLC"), will create, sell and redeem Mondex ESV in exchange for dollars. The other LLC, Mondex USA Services Limited Liability Company (the "SLLC"), will act as a licensing and servicing entity for the Mondex USA services. The U.S. Founders will own the equity in both LLCs in the following percentages: AT&T (10%), NOVUS (10%), MasterCard (10%), Wells Fargo Bank (30%), MNB (10%), Texas Commerce Bank N.A. (20%), and First National Bank of Chicago (10%).

3. Mondex Operations

The OLLC will perform the functions of creating and selling the ESV to Members in return for dollars and holding those dollars pending redemption of the ESV. The Banks commit that the OLLC will invest those dollars in U.S. government securities and, to the extent necessary to satisfy short-term liquidity needs, cash and certain cash equivalents.[7] The OLLC will also perform the function of purchasing the ESV at par when tendered by Members. Members, in

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[5] NOVUS Services, Inc. is a Delaware corporation that operates the NOVUS Card Network.

[6] However, in the near future the list of US Founders will change, through a series of transactions, to include the following firms: AT&T, NOVUS, MasterCard, Wells Fargo, MNB, Texas Commerce Bank N.A., and First National Bank of Chicago.

[7] The Banks also commit that the OLLC will develop and implement asset/liability management policies and procedures (the "ALM Policies") to ensure that it is able to purchase the ESV tendered by Members. The ALM Polices will address both the nature and maturities of the assets in which the OLLC may invest, considered in light of the fact that the OLLC is obligated to purchase its ESV upon demand by Members. The OLLC's ALM Policies will likely evolve over time as the OLLC develops experience concerning the level of daily sales and purchases of Mondex Dollars. The Banks anticipate that the OLLC's assets will be limited to (i) U.S. government securities (including agency securities supported by the full faith and credit of the U.S. government) that, during at least the early stages of the OLLC's operations, will be limited to short-term maturities, and (ii) in order to provide the short-term liquidity necessary to enable the OLLC to purchase Mondex Dollars upon the demand of Members, cash and certain cash equivalents (for example, interbank deposits and over-night repurchase agreements with respect to U.S. government securities). The Banks commit to using their best efforts to assure that the LLC's policies and standards on reserves and portfolio quality and liquidity will be consistent with safe and sound banking practices.

The Banks also anticipate that the OLLC will pledge the U.S. government securities (and other assets) purchased by it with the proceeds of the creation and sale of Mondex Dollars to secure the OLLC's obligation to purchase Mondex Dollars tendered by members upon demand. Such pledge will be effected by causing such U.S. government securities (and other securities constituting cash equivalents) to be held by a trust department of a commercial bank acting as collateral trustee for the benefit of holders of Mondex Dollars.

turn, will sell ESV to (and purchase the ESV from) Consumers and participating retailers in accord with their respective agreements.

The Banks commit that the OLLC, in conjunction with the SLLC, will implement a risk management system that will provide effective devices to control the risk of fraud and counterfeiting. Both LLCs will play important roles in the risk management system that will provide an important service to Member banks, helping them to control their risk exposures from the Mondex system.

The SLLC, as the licensing and servicing entity, will also perform all functions necessary to implement the Mondex USA system that are not performed by the OLLC. Thus, the SLLC will enter into licensing agreements with Members giving those Members the rights to issue Mondex Cards to Consumers and PCDs to retailers. SLLC will coordinate the purchase of necessary equipment from third party manufacturers. Finally, the SLLC will collect, assemble and evaluate transaction data generated by the Mondex system. The Banks commit that both the OLLC and SLLC will develop appropriate policies and procedures to ensure that consumer specific information is not used in a manner that violates the privacy of Consumers and that the Consumers will receive full disclosure of the uses that may be made of Consumer-specific information and the limitations on those uses.

As noted, Members will be the exclusive channel by which Consumers and retailers can purchase and redeem Mondex ESV. The Banks and AT&T Universal will be Members. Both depository and non-depository institutions are eligible to become Mondex Members. It is anticipated that the Member License Agreement will impose a restriction on each Member's maximum Mondex ESV exposure based upon appropriate financial standards.

Consumers and retailers that contract with a Member will receive a PCD used to receive and store ESV. Consumer PCDs will have the ability to transfer ESV to retailer PCDs and to other Consumer PCDs; retailer PCDs will, subject to certain limited exceptions, be able only to transfer ESV to a Member for redemption. Funds resulting from the redemption of ESV will be transferred to a linked depository account that may or may not be maintained at a Consumer's or retailer's related Mondex Member. Similarly, funds used to purchase ESV will normally be debited from the linked deposit account.

4. Material Terms of the LLC Agreements

As investors in the LLCs, the Banks' operating subsidiaries will enter into a LLC agreement for each LLC (the "LLC Agreements"). The LLC Agreements will describe the scope of business of each LLC, and will provide that in no case shall the LLC engage in any activity not permissible for a national bank. The LLC Agreement for the OLLC will provide that the LLC will invest the proceeds of the issuance of Mondex Dollars in accordance with the asset and liability management polices of the Company adopted by the Board.

Under Delaware law, unless provided otherwise in a LLC agreement, no member of a Delaware limited liability company is obligated for the debts, obligations and liabilities of the LLC, whether arising in contract, tort, or otherwise.[8] The LLC Agreements will contain provisions that confirm no investor in the LLCs will have liability for the debts, obligations, and liabilities of the LLCs.

The LLC Agreements will require Members of the applicable LLC to make contributions to capital or loans to such LLC to the extent provided in the "Annual Budget" thereof. Under each LLC Agreement, the LLC Board of Managers can also adopt an "Annual Budget" for the applicable LLC containing a "Material Financial Item." A "Material Financial Item" will be defined in each LLC Agreement to include a request for a contribution to capital or a loan to the LLC exceeding, in the aggregate, the pre-approved "Required Funding Amount" for such LLC for such fiscal year. However, the LLC Agreement for the SLLC will provide that notwithstanding any other provision of the LLC Agreement for the SLLC, no Member that is a national bank (or controlled by a national bank) will have a "Required Funding Amount" for any "Budget Period" [ ]. The LLC Agreement for the OLLC will provide that, notwithstanding any other provision of the LLC Agreement for the OLLC, no Member that is a national bank (or controlled by a national bank) will have a "Required Funding Amount" for any "Budget Period" [ ].

Finally, the LLC Agreements will contain express provisions to implement OCC Conditions 1.a. and 1.b. (set out at the end of this letter) acknowledging that the performance of the services provided by the LLCs to national banks, including the sale and redemption of ESV, is subject to regulation, supervision, and examination by the OCC; and that for purposes of 12 U.S.C. §§ 1813 and 1818, the LLCs are "institution affiliated parties" with respect to all national banks that invest in the LLCs.

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(c). Your letter raises the issue of the authority of a national bank to make indirectly a non-controlling investment in a limited liability company.[9] 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. The enterprise might be a limited partnership, a corporation, or in more recent examples, a limited liability company. In two recent interpretive letters, the OCC

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[8] Del. Code Ann. Tit. 6, Section 18-303(a) (1994).

[9] The OCC has previously approved indirect investments by national banks in limited liability companies through an operating subsidiary structure. See, e.g., OCC Conditional Approval Letter No. 219 (July, 15, 1996). Such investments are permissible if they meet the requirements for direct minority investments by national banks.

concluded that national banks are legally permitted to make a minority investment in an LLC provided four criteria or standards are met. See OCC Interpretive Letter No. 692, reprinted in [Current] Fed. Banking L. Rep. (CCH) ¶ 81,007 (November 1, 1995) and OCC Interpretive Letter No. 694, reprinted in [Current] Fed. Banking L. Rep. (CCH) ¶ 81,009 (December 13, 1995). 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. (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. We conclude, as discussed below, that the proposed indirect investment by national banks in the Mondex LLCs 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

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

12 U.S.C. § 24(Seventh).

The Supreme Court has held that the powers clause of 12 U.S.C. § 24(Seventh) is a broad grant of power to engage in the business of banking, including the enumerated powers and the business of banking as a whole. See NationsBank of North Carolina, N.A. v. Variable Life Annuity Co., 115 S.Ct. 810 (1995) ("VALIC"). Judicial cases reflect three general principles used to determine whether an activity is within the scope of the "business of banking": (1) is the activity functionally equivalent to or a logical outgrowth of a recognized banking activity; (2) would the activity respond to customer needs or otherwise benefit the bank or its customers; and (3) does the activity involve risks similar in nature to those already assumed by banks. See, e.g., Merchants' Bank v. State Bank, 77 U.S. 604, 648 (1871) (certification of checks has grown out of the business needs of the country and involves no greater risk than a bank giving a certificate of deposit); M&M Leasing Corp. v. Seattle First Nat. Bank, 563 F.2d 1377, 1382-83 (9th Cir. 1977), cert. denied, 436 U.S. 987 (1978) (personal property lease financing is "functionally interchangeable" with the express power to loan money on personal

property); American Insurance Association v. Clarke, 865 F.2d 278, 282 (D.C. Cir. 1988) (standby credits to insure municipal bonds is "functionally equivalent" to the issuance of a standby letter of credit)("AMBAC"). Further, as established by the Supreme Court in VALIC, national banks are authorized to engage in an activity if it is incidental to the performance of the five enumerated powers in section 24(Seventh) or if it is incidental to the performance of an activity that is part of the business of banking.

It is well established that a national bank may use electronic or data processing technology 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). 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).

Banks are the most important institutional participants in the nation's payments system. They deal with cash, issue, process, clear and settle checks and similar monetary instruments, administer credit card and debit card programs for consumers and merchants, and transfer funds electronically in a variety of situations and circumstances. Although the largest number of payment transactions in the United States continue to involve individual consumers utilizing currency and checks, most of the dollar value transferred in the economy on a regular basis is accomplished by electronic means among institutions.[10]

When the Mondex stored value card (and the system supporting it) is fully operational, it will become a new element of the nation's payment system by substituting ESV for cash and small checks in some consumer purchase transactions with retail merchants. Accordingly, national banks that participate in the Mondex program as owners or licensed users will be involving themselves in an additional facet of the payments system. For the reasons discussed below, the functions and activities of the Mondex LLCs are part of or incidental to the business of banking.

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[10] During the early 1990's, while most transactions involved currency (300 billion annually) and checks (60 billion annually), electronic payments accounted for "more than 80 percent of the total dollar value of all financial transactions." R. Miller and D. VanHoose, Modern Money and Banking 389-91 (3d ed. 1993). Most of this 80 percent of value moved electronically through the privately-owned and operated Clearing House Interbank Payment System ("CHIPS"), or through Fedwire, which is owned and operated by the Federal Reserve System. CHIPS links about 140 large depository institutions, and transmitted an average of roughly $1 trillion in payments every day. All depository institutions that hold reserves at the Federal Reserve have access to Fedwire, and this system made more individual funds transfers than CHIPS, although it accounted for a slightly-smaller dollar volume of $950 billion in payments per day, id. 390-91. For other similar discussions of the Nation's payment system, including the growing use of sophisticated technology and communications to support or substitute for the use of currency and checks, see, e.g., T. Mayer, J. Duesenberry, and R. Aliber, Money, Banking and the Economy, chs. 1, 6, 7, and 13 (5th ed. 1993); D. Friedman, Money and Banking, ch. 5, "Bank Operations and the Payments Mechanism" (2d ed. 1989), and R. Miller and D. VanHoose, id. 390.

a. Issuance and Redemption of Electronic Stored Value

As noted above, 12 U.S.C. § 24(Seventh) provides that national banks shall have the power to carry on the business of banking by, among other things, "obtaining, issuing and circulating notes." The issuance, circulation and redemption of notes was one of the principal reasons Congress established the national banking system. The National Currency Act of 1863, re-enacted as the National Bank Act a year later, was intended to provide a more stable currency in the form of bank notes backed by government bonds. See, e.g., R. Robertson, The Comptroller and Bank Supervision, chs. 2-3 (1995 rev. ed.); T. Mayer, J. Duesenberry, and R. Aliber, supra 86-88. Although that mode of operation became obsolete when the Federal Reserve System was created a half-century later, in 1913 -- Federal Reserve notes replaced bank notes as the Nation's currency -- this example nevertheless demonstrates that the issuance, circulation, and redemption of ESV contemplated by the Mondex program is intimately connected with core banking as originally conceived and currently conducted.[11] In other words, just as the automobile leasing program approved for national banks in M&M Leasing, supra, represented a new way of conducting the business of making secured loans, the issuance and redemption of stored value represents a new way of conducting one aspect of the payments business of banks: issuing and circulating notes.

Similarly, the clearing and settlement functions regarding ESV which will be performed by the Mondex LLCs involve activities that are similar to those already being performed by banks in connection with the large volume of transactions using checks, drafts, travelers checks, credit cards, debit cards, and electronic transfers of funds within and through the payments system. Thus, the ESV clearing and settlement functions are also part of the business of banking. As the OCC recently noted:

> When acting for merchants in the collection and settlement of stored value transactions, the LLC will be performing a recognized banking activity. The Supreme Court has established that 12 U.S.C. § 24(Seventh) permits a national bank to "do those acts and occupy those relations which are usual or necessary in making collections of commercial paper and other evidences of debt" for its customers. Miller v. King, 223 U.S. 505, 510 (1912) (finding that a national bank may collect a judgment for its customer, and may also sue the bank's attorney in order to recover misused proceeds of the judgment).

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[11] In 1994, Congress repealed the provisions in the National Bank Act dealing with the issuance of post notes by national banks (previously codified at 12 U.S.C. 101, et seq.) because they believed that those provisions were obsolete. H.R. Conf. Rep. No. 103-652, 103rd Cong., 2d Sess., reprinted in 1994 U.S. Code Cong. & Ad. News 2035. Thus, the repeal did not indicate a congressional intent to restrict national bank powers. Rather, more modern substitutes for currency, such as travelers checks, cashiers checks, and other bearer instruments issued or sold by banks, have developed as components of the payments system and as part of the business of banking.

OCC Interpretive Letter No. 737, to be published (August 19, 1996) (the collection, processing, and settlement of payments in a stored value system is part of the business of banking). See also, OCC Interpretive Letter No. 731, reprinted in [Current Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 81,048 (July 1, 1996) (national banks may enter into a contract with a public authority to operate on behalf of the authority an electronic toll collection system); OCC Interpretive Letter No. 732, reprinted in [Current Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 81,049 (May 10, 1996) (national banks may provide electronic data interchange services that, among other things, provide for payments by EFT); and OCC Interpretive Letter No. 419, reprinted in [1988-1989 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 85,643 (February 18, 1988) (national bank may provide a service that facilitates settlement and payment of health claims using EFT technology).[12]

The functional equivalence and logical outgrowth lines of analysis which the courts have applied to current banking functions in the process of reviewing new activities of national banks can be multi-dimensional -- the equivalence or outgrowth can involve both evolutionary advances in products and services as well as the integration of adjacent types of businesses that are useful to perform and deliver modern forms of banking and financial transactions. For example, in M&M Leasing, supra, the "new product" was a lease in substitution of a secured loan, the customer was a lessee rather than a borrower, the bank was an owner and lessor of a car rather than a lender, and yet in substance this amounted to an evolutionary expansion of the way in which the bank performed secured lending. By engaging in this activity, the bank was also becoming a participant in the personal property leasing industry, thereby integrating a new product delivery system into an existing functional line of business. It was reaching out to customers who preferred to lease a car rather than buy one, and accommodating them in this choice. In AMBAC, supra, the bank was not only offering a new product or service, municipal bond insurance, and thereby providing an advanced version of its traditional credit intermediation function, but it was also entering the adjacent business of municipal bond insurance.

The Mondex stored value system involves both advanced versions of well-recognized functions of the banking business, and integration into adjacent businesses that supply the technological expertise and resources for banks to engage in a segment of the payments business in a new way. Instead of banks dealing with regular cash or checks, as a traditional product or service, they will be issuing cards and loading them with ESV in substitution of cash and checks. The system will also clear and settle the ESV transactions. These aspects of the program represent an evolution of payments-related products and services traditionally offered by banks. The integration of adjacent businesses involves the utilization of electronic

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[12] The Federal Reserve Board has in approval orders under the Bank Holding Company Act determined that the development and operation of closed and open stored value card systems, including the provision of data processing and transmission services and electronic payment services relating thereto, are "so closely related to banking ... as to be a proper incident thereto". This is the statutory standard which that agency administers under the Act for holding company investments, 12 U.S.C. § 1843(c)(8). See Banc One Corporation, 79 Fed. Res. Bull. 1158 (Dec. 1993); The Bank of New York Company, Inc., 80 Fed. Res. Bull. 1107 (Dec. 1994).

means and equipment, and bank alliance with several technology firms, to deliver and support the new payment medium of electronic stored value.

Moreover, if the business is properly conducted in the manner described in the Banks' submissions and in conformance with the OCC conditions and the commitments made by the Banks and others, there is no reason why the LLCs' issuance of stored value, the clearing and settlement of ESV obligations, and the other support functions should present risks that are different from those banks are accustomed to handling. The ability of the OCC to examine and supervise both LLCs provides additional assurance on this factor, particularly in light of commitments made by the Banks.

b. Supporting Activities for Stored Value System

The Mondex SLLC will provide record keeping, data analysis, and other support services for the stored value system. This is also a function that is clearly part of the business of banking. See OCC Interpretive Letter No. 737, supra (since as part of its banking business and incidental thereto, a national bank may collect, transcribe, process, analyze, and store for itself and others, banking, financial, or related economic data, the bank may also engage in record keeping for stored value systems.) See also, OCC Interpretive Letter No. 653, reprinted in [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,601 (December 22, 1994) (national bank may maintain records when acting as an informational and payments interface between insurance underwriters and general insurance agents); OCC Interpretive Letter No. 346, reprinted in [1985-1987] Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 85,516 (July 31, 1985) (national banks may maintain records on commodities transactions).

In connection with these payments and record keeping functions, the SLLC will also provide system participants with certain hardware and software that will be used for the stored value functions. Our understanding is that the hardware and software provided can be used solely for stored value functions. If so, the provision of that hardware and software is, itself, part of the business of banking. OCC Interpretive Letter No. 345, reprinted in, [1985-1987] Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 85,515 (July 9, 1985).[13] See also, OCC Interpretive Letter No. 737, supra.

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[13] There the OCC said:

> When the hardware is such that it is not to be used for uses beyond the [bank services], it may well be considered literally an indistinguishable part of the [banking services]. Accordingly, a national bank's sale of such hardware is permissible as a part of the [service] permitted under 12 U.S.C. 24(7), just as the bank's sale of checkbooks to its customers is a permissible part of offering checking accounts.

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 of the first standard. It is not enough that the LLCs' activities are permissible at the time the bank acquires ownership; they must also remain permissible for as long as the bank retains an ownership interest.

Several provisions in the proposed LLC Agreements, copies of which were submitted to OCC, are designed to satisfy the requirement that national banks will participate as owners of the LLCs only so long as the Companies' activities remain permissible for national banks. Thus, both LLC Agreements provide that in no case shall the LLC engage in any activity not permissible for a national bank. These provisions are sufficient to ensure that the activities of the LLCs will remain permissible for the national bank owners so long as they are, directly or indirectly, involved in the enterprise.

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 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. Such is the case here.

As members of a Delaware limited liability company, the liability of each of the Banks for the debts, obligations or liabilities of the company will be limited under Delaware law to the amount of each such bank's capital investment in the company. The LLC Agreements contain provisions that confirm no investor in the LLCs will have liability for the debts, obligations, and liabilities of the LLCs. Moreover, the LLC Agreements will contain absolute limits on the amount of additional funds that the Banks can be compelled to invest in the LLCs.

In addition, the OCC's Chief Accountant has advised that the appropriate accounting treatment for a bank's non-controlling ownership share or investment in an LLC is to report it as an unconsolidated entity under the cost or equity method of accounting, depending upon the circumstances. Under either the cost or equity method, unless the bank has extended a loan to the entity, guaranteed any of its liabilities or has other financial obligations to the entity, losses are generally limited to the amount of the investment shown on the investor's books. See generally, APB Opinion No. 18 (1971).

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

Mondex will develop and operate a new addition to the payments system, a stored value card which will allow the substitution of ESV for cash and checks in small retail merchant payment transactions by consumers. As such, the Banks will be conducting some of their payments business through these LLC vehicles, and not passively generating dividend income from an investment. The owner Banks, as opposed to those which are solely licensed users, will be more substantially involved in the adoption and monitoring of policies, procedures, and services provided in support of the payments system. The LLC interests will not be generally available to the public for purchase, which is another indication that the national banks which decide to acquire and hold an interest will do so as an aspect of carrying on their banking business. This standard is accordingly satisfied.

Conclusion

Based upon the notice and other materials submitted by the Banks and the commitments and representations contained therein, and upon the Banks' compliance with the supervisory conditions set forth below, the OCC concludes that the Banks' proposed investment in the Mondex LLCs through the operating subsidiaries would satisfy the four standards which the OCC has generally applied to non-controlling, minority investments. Therefore, the Banks' operating subsidiary notification is approved subject to the following special conditions:

1. The LLC Agreements signed by the Banks' operating subsidiaries will provide that:

   a. the performance of the services provided by the LLCs to national banks, including the sale and redemption of ESV, is subject to regulation, supervision, and examination by the OCC[14];

   b. for purposes of 12 U.S.C. § § 1813 and 1818, the LLCs stipulate that they are "institution affiliated parties" with respect to all national banks that invest in a LLC; and

   c. the LLCs will notify the OCC and obtain the consent of the OCC before any material changes are made in the terms of the LLC Agreements

[14] In the future, the nature and scope of the LLCs' activities might be so substantially enhanced that the methodology the OCC uses to compute the assessments of the Banks and other national banks participating in the Mondex system will need to be adjusted to cover adequately the expense of supervising and examining the LLCs.

mentioned in the section of this letter entitled “Material Provisions of the Agreements.”

2. National banks investing in the LLCs will not account for their investment under the consolidated method of accounting.

3. A copy of this approval letter will be provided to all national banks proposing to invest in the LLCs.

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.

Sincerely,

/s/

Julie L. Williams
Chief Counsel