



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

January 29, 2000

Corporate Decision #2000-01
February 2000

William E. Lucado
Senior Vice President
EFS National Bank
2525 Horizon Lake Drive
Suite 120
Memphis, Tennessee 38133

Re: Acquisition of Operating Subsidiary by EFS National Bank, Memphis, Tennessee
Application Control Number: 99-SE-08-0046

Dear Mr. Lucado:

This responds to the application submitted by the EFS National Bank, Memphis, Tennessee (“Bank”), pursuant to 12 C.F.R. § 5.34, to acquire Virtual Cyber Systems, Inc., an Arizona corporation (“VCS”), as a wholly-owned operating subsidiary. As discussed below, we approve the acquisition of VCS in light of certain commitments made by the Bank to the OCC.

I. Background

VCS is a software company which has developed “SiteMerger,” a web editing software package which allows users to make changes to web pages without knowledge of hyper-text mark-up language (HTML), the computer language typically used to develop web pages. The Bank proposes to acquire VCS as a contribution from its parent holding company, Concord EFS Inc. (“Concord”). Concord will acquire all issued and outstanding shares of VCS and, immediately upon acquisition, will contribute the shares to the Bank.

The Bank proposes to offer the SiteMerger software as part of a bundle of Internet based web hosting services provided to its merchant customers.¹ Further, the Bank will use VCS to assist in developing its

¹ The Bank specifically committed in its application that “unless specific approval is subsequently obtained, the SiteMerger software will not be sold outside of the ‘bundle’ of Internet based activities, or transaction processing activities, offered by the Bank.” Given this commitment, the Bank will only be selling the software when it is legitimately “incidental” to its web hosting or other Internet transaction processing activities. Should the Bank desire to sell the SiteMerger software more broadly, the Bank must, and has committed that it will, seek OCC

Internet-based services, to upgrade and support the SiteMerger software, and to develop new software products to be used by the Bank in connection with its transaction processing services.

II. Analysis

The OCC has permitted national banks to acquire companies, or an interest in companies, that engage in the production and sale of financial services software. This has been recognized as part of the business of banking where the software essentially performs a function or service that banks have traditionally performed through non-electronic means for their customers² or for other financial institutions.³ Moreover, the OCC has also found that a national bank can sell non-financial software, or acquire a company that produces such software, enabling bank customers to use or receive electronic-banking services from the bank. In these cases, the OCC has opined that the software is necessary to fully use or market the permissible banking services and, therefore, is either part of the service (if limited function) or incidental thereto (if full function). For example, in Conditional Approval No. 221 (December 4, 1996), the OCC found that providing full-function web browser software is a permissible incidental activity when a national bank is offering a home banking system based on web server technology using “Internet compatible” browser software. The fact that the customer might use the browser software for other non-banking purposes did not preclude the sale.⁴

approval.

² This would include software with banking, tax estimation, financial planning, and investment analysis components, and ancillary services related thereto. *See, e.g.*, Interpretive Letter No. 677, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625 (June 28, 1995), ruling that a national bank can engage in a joint venture to develop and distribute home banking and financial management software and data processing services to be distributed both through the bank and through retail outlets. The software discussed in that letter consisted essentially of home banking, tax estimation, financial planning, and investment analysis components, and ancillary services related thereto including the furnishing of checks and other financial forms for the use of customers. The OCC found that all of these types of activities or services had been approved for national banks and their subsidiaries and concluded that banks can provide those services to customers whether or not data processing equipment and programs are utilized. *See also* Interpretive Letter No. 756, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-120 (Nov. 5, 1996) (cash management software); Interpretive Letter No. 868 (Aug. 16, 1999) (national bank may invest in a company that develops and produces software that enables Internet-based payment transactions through cash equivalents, credit or debit card transactions; since the software program “perform activities commonly undertaken by banks directly for themselves, other financial institutions, or as part of servicing customers, or constitute the underlying software allowing banks in their customers to perform these financially related services.”).

³ National banks can sell software to other banks as a form of correspondent service if the software performs bank-related data processing functions. Interpretive Letter No. 449, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,673 (Aug. 29, 1988).

⁴ *See also* Interpretive Letter No. 516, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. ¶ 83,220 (July 12, 1990) (national bank that is providing customers with a permissible database service of information relating to financial instruments can also provide software that enables the customers to download and analyze the information); Interpretive Letter No. 419, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,463 (Feb. 2, 1988) (national bank that is providing customers with a permissible electronic transactional and

Assuming the SiteMerger software is a “full-function” software product which can be used for non-banking as well as banking functions, the Bank’s proposed acquisition of VCS satisfies the “incidental” software test. The Bank proposes to host commercially-enabled web sites for its merchant customers, an activity the OCC has found to be part of the business of banking.⁵ The Bank also proposes to provide the SiteMerger software to merchant customers that are receiving the web site hosting services. The software will enable merchant customers to edit hosted web pages without having to hire either the Bank or a third party to make such changes. The Bank asserts that many of its merchant customers lack the technical expertise to change their web pages because they are unfamiliar with HTML. The Bank further asserts that the costs of web page maintenance may well deter such merchants from using or buying the Bank’s web hosting services, but the availability of the software will remove the impediment. Moreover, the availability of the editing software will greatly enhance the value of the these services to the bank customers.⁶ The Bank has demonstrated the acquisition of VCS and the inclusion of the SiteMerger software in its bundle of web hosting services are necessary both for its merchant customers to fully utilize and for the Bank to effectively market the permissible web hosting services.

Full function products provided as an incidental part of a package of banking services cannot dominate the banking services being provided.⁷ The OCC has two alternative tests for determining when the sale of full-function products as part of a package of banking services is “incidental” to those services. The older OCC test is whether the cost of the full function product is less than 30% of the cost of the entire package.⁸ As an alternative to the cost test, a recent letter adopted a test based on the percentage of “gross profits” (sales less cost of goods sold) that is derived from the sale of the full-function product.⁹ The Bank is aware of this requirement and has expressly committed to conform to it.

information service can provide software that enables customers to participate in the system).

⁵ Interpretive Letter No. 856, *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-313 (Mar. 5, 1999).

⁶ Furthermore, by enabling bank customers to edit their own web sites rather than calling upon the Bank to do so, the Bank avoids potential liability that may arise if it were to make the changes itself. However, allowing customers to edit their own web sites does not limit the Bank’s liability exposure with regard to the security of its servers that maintain all the data associated with the web sites.

⁷ Interpretive Letter No. 737, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. ¶ 81-101 (August 19, 1996); Interpretive Letter No. 516, *supra*; Interpretive Letter No. 345, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. ¶ 77,799 (July 9, 1985).

⁸ Interpretive Letter No. 742, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. ¶ 81-106 (August 19, 1996).

⁹ Interpretive Letter No. 754, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. ¶ 81-120 (Nov. 6, 1996). Specifically, this letter held that where the gross profits generated by a full-function product provided in connection with a banking service do not exceed 30% of the total gross profits from that service, the sale of the full function product is incidental to the permitted banking service.

Thus, the Bank may acquire VCS and include the web editing software in its bundle of Internet based web hosting services. The web editing software is necessary to fully utilize and market the Bank's permissible web hosting services.

III. Conclusion

Based on the facts as described, the proposed activities are permissible activities for a national bank and its operating subsidiaries. In addition, the OCC finds that the proposal is not inconsistent with safe and sound banking practices or OCC policies and does not endanger the safety or soundness of the Bank. Accordingly, the Bank's application is approved.

This approval is granted based on a thorough review of all information available, including the representations and commitments made in the application and by Bank representatives. If you have any questions, please contact John W. Graetz, Licensing Expert (Financial Analysis), in Bank Organization and Structure at (202) 874-5060, or Steven Key, Attorney, Bank Activities and Structure at (202) 874-5300.

Sincerely,

/s/

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel