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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

December 20, 2000

**Conditional Approval #436  
January 2001**

David H. Baris, Esq.  
Kennedy, Baris & Lundy, L.L.P.  
Suite P-15  
4701 Sangamore Road  
Bethesda, Maryland 20816

Dear Mr. Baris:

This is in response to the non-controlling investment proposal (“Proposal”) submitted by Hemisphere National Bank, Miami, Florida (the “Bank”) pursuant to 12 CFR § 5.36. The Bank proposes to directly own a 30% minority interest in a Florida corporation, ImportCard.com (the “Company”).<sup>1</sup> For the reasons discussed below, the Proposal is approved, subject to the conditions set forth herein.

*A. Background*

The primary activity of the Company will be to facilitate trade financing between U.S. exporters and Latin American importers. To that end, the Company will arrange for, but not fund, financing of Latin American importers’ purchase of goods from the U.S.<sup>2</sup> The financing will be arranged without recourse to the exporters through the Bank and other funding banks.<sup>3</sup>

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<sup>1</sup> The Company will be a Florida corporation. It is contemplated that IFX, an Internet service provider listed on NASDAQ with significant presence in Latin America, or some of its shareholders will hold a 30 percent interest in the Company. Accredited investors in the Bank will hold an additional 30 percent. Finally, Daniel Schwartz, CEO of the Bank and an accredited investor, will own 10 percent of the Company.

<sup>2</sup> Initially, the Company will focus on importing businesses based in Latin America. However, later in the development of the Company’s business, the Company may focus on import businesses in other parts of the world. Since the Company will engage in business with entities located outside the United States, OCC expects that the Company will review compliance issues regarding host country laws and will comply with host country laws and regulations.

<sup>3</sup> The Bank will engage in an independent evaluation of whether to fund potential credits referred to the Bank by the Company. This evaluation will be based upon the Bank’s credit standards, procedures,

The Company will do this by establishing a web site<sup>4</sup> that will serve as a means by which it can communicate with exporters, importers, and others.<sup>5</sup> To support referred potential credits, the Company will provide, through its Internet site, a prescreening process for the credits including an analysis of the creditworthiness of the borrower. This prescreening analysis will be supplemented by physical delivery of documents relating to the creditworthiness of the borrower. The Company will also obtain credit insurance for the import financings.<sup>6</sup> Finally, the Company will act as escrow and paying agent when the exporter and importer request the service.

When fully operational, the Company will have its own staff independent of the Bank; no bank employees will be involved in the daily operations of the Company. Initially, Daniel Schwartz (currently serving as the CEO of the Bank) will be the Chairman and CEO of the Company and Tony Alonso (currently President and Chairman of the Board of the Bank) will be President. Following the hiring of management for the Company, Mr. Schwartz will serve as Outside Chairman of the Board and a member of the Executive Committee, and Mr. Alonso will serve as Director. Accordingly, operation and management of the Company should not unduly distract bank officers or disrupt the operation and management of the Bank.

The Bank has not yet negotiated the operating agreement that will govern the operation of the Company<sup>7</sup>, but it has represented that the operating agreement will include a provision limiting the activities of the Company to those that are part of, or incidental to the business of banking. Further, the Bank has represented that it will have an effective veto over any activities of the Company that are not permissible for a national bank.

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and policies. During the first year, the Bank expects to finance loans not in excess of \$50 million in trade financing guaranteed by Export-Import Bank, including financing extended as a result of referrals from the Company. During the second year, the Bank anticipates that it will fund not in excess of \$70 million in such trade financing.

<sup>4</sup> The Company will enter into a service agreement with Eras JV under which Eras JV will provide the Company software and advisory services for the Company's web site. The Company's contract with Eras JV should stipulate that these services are subject to OCC supervision and examination. The Bank will provide OCC with a copy of the service agreement to review before it is signed. The Bank represented that it has retained a consultant to develop its Internet banking policies and procedures, to be consistent with the OCC's guidance on Internet banking, and will do the same for the Company. The consultant will also review the Bank's and the Company's vendor service agreements to ensure that the agreements conform with the FFIEC's guidance on "Risk Management of Outsourced Technology Services" and OCC's related Advisory Letter 2000-12. In the future, if services will be provided to the Company, directly or indirectly, by another vendor, domestic or foreign, the Bank will notify the OCC in advance of the service contract being signed.

<sup>5</sup> The Company also expects that it will facilitate the availability of the financing product through third party B2B (business to business) Internet portals and that it will market its services through a variety of vehicles with the assistance of IFX. Bank commits that such activities will be in compliance with existing and future OCC guidance with respect to these activities.

<sup>6</sup> The Bank expects that most of this insurance will be provided by the Export-Import Bank.

<sup>7</sup> The Bank will provide OCC with a copy of the operating agreement to review before it is signed.

*B. Analysis*

The OCC has traditionally recognized the authority of national banks to organize and perform any of their lawful activities in a reasonable and convenient manner not prohibited by law. In interpretive letters, the OCC has concluded that national banks are legally permitted to make a non-controlling investment in an enterprise provided four criteria or standards are met. These standards, which have been distilled from our previous decisions in the area of permissible non-controlling investments for national banks and their subsidiaries, are:<sup>8</sup>

- (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 (or otherwise authorized for a national bank);
- (2) the bank must be able to prevent the enterprise or entity 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; and
- (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.

Based upon the facts presented, the proposed acquisition satisfies these four standards.

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 (or otherwise authorized for a national bank).*

Our precedents on non-controlling ownership have recognized that the enterprise in which the bank holds an interest must confine its activities to those that are part of, or incidental to, the business of banking.<sup>9</sup> Each of the proposed activities of the Company is part of the business of banking and, therefore, permissible for national banks under 12 U.S.C. § 24(Seventh). National

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<sup>8</sup> See Interpretive Letter No. 890, *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-409 (May 15, 2000); Interpretive Letter No. 697, *reprinted in* [1995 - 1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,012 (Nov. 15, 1995); Interpretive Letter No. 694, *reprinted in* [1995 - 1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,009 (Dec. 13, 1995); Interpretive Letter No. 692, *reprinted in* [1995 - 1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,007 (Nov. 1, 1995).

<sup>9</sup> See, e.g., Interpretive Letter No. 380, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,604 n.8 (Dec. 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 (Nov. 9, 1992) (unpublished) (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).

banks may, as part of their banking business, assist customers with obtaining financing.<sup>10</sup> National banks may also obtain credit insurance.<sup>11</sup> As part of its financial advice and counseling function, a national bank may provide a prescreening process that includes an analysis of the creditworthiness of borrowers and delivery of underlying documents.<sup>12</sup> National banks may provide escrow services<sup>13</sup> and act as a paying agent.<sup>14</sup> Finally, the Bank may establish a web site to communicate with and provide these services to exporters and importers. It is well established that a national bank may use electronic means to perform services expressly or incidentally authorized to national banks.<sup>15</sup>

2. *The bank must be able to prevent the enterprise or entity 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 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 Bank represents that, and the OCC expects that, the Operating Agreement will include limitations on the Company's activities, limiting its activities to those that are part of, or incidental to, the business of banking. Moreover, the Bank represents and the OCC expects that, under the Operating Agreement, the Bank will have the authority to prevent the Company from engaging in any activities that are not permissible for a

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<sup>10</sup> See, e.g., Interpretive Letter No. 463, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,687 (December 27, 1988) (subsidiary may assist bank customers in obtaining financing); Interpretive Letter No. 271, *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,435 (September 21, 1983) (national banks have traditionally arranged financing transactions); Letter from Gail W. Pohn, Director, Bank Organization and Structure Division (November 3, 1975) (unpublished) (usual and recognized function of a bank to finance a credit as a lender or arrange for the entire credit to be extended by another financial institution).

<sup>11</sup> See, e.g., Interpretive Letter No. 38, *reprinted in* [1978-1978 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,113 (April 25, 1978).

<sup>12</sup> See, e.g., Letter from David Barris, Regional Counsel (April 7, 1982) (unpublished) (financial counseling includes provision of credit analysis); Letter from Richard V. Fitzgerald, Director, Legal Advisory Services Division (April 5, 1978) (unpublished) (supplying financial information and analysis is part of a bank's financial advice and counseling role).

<sup>13</sup> See, e.g., Conditional Approval No. 267 (January 12, 1998) (electronic encryption key escrow services are part of the business of banking); Letter from Thomas G. DeShazo, Deputy Comptroller of the Currency (May 6, 1968) (unpublished) (national banks may provide escrow services).

<sup>14</sup> See, e.g., Interpretive Letter No. 752, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-117 (September 26, 1996) (acting as paying agent is traditional banking activity); Letter from James J. Saxon, Comptroller of the Currency (July 22, 1965) (unpublished) (same).

<sup>15</sup> "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." 61 Fed. Reg. 4849 (1996) codified at 12 C.F.R. § 7.1019. See also Interpretive Letter No. 742, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-106 (June 28, 1995); Interpretive Letter No. 449, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,673 (Aug. 23, 1988).

national bank. Therefore the second standard is satisfied.

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. *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 the 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 it is generally accepted that a corporation is an entity distinct from its shareholders, with its own separate rights and liabilities, provided proper corporate separateness is maintained.<sup>16</sup> This is the case here. The corporate veil of the Company will protect the Bank from liability or loss associated with its ownership interest in the Company.<sup>17</sup>

- b. *Loss exposure from an accounting standpoint*

In assessing a national bank's loss exposure as an accounting matter, the OCC has previously noted that the appropriate accounting treatment for a bank's 20- to 50-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. Under the equity method of accounting, unless the investor has extended a loan to the entity, guarantee any of its liabilities, or has other financial obligations, the investor's losses are generally limited to the amount of the investment shown on the investor's books.<sup>18</sup> The Bank represents that it will account for its ownership interests in the Company under the equity method of accounting.

Therefore, for both legal and accounting purposes, the Bank's potential loss exposure arising from its investment in the Company should be limited to the amount of the investment. 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 that is not a subsidiary of the bank 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

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<sup>16</sup> 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 25 (rev. perm. ed. 1990).

<sup>17</sup> Fla. Stat. Ann. § 607.0622 (West 1999).

<sup>18</sup> *See generally* Accounting Principles Board, Op. 18 ¶ 19 (1971).

useful.”<sup>19</sup> 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.<sup>20</sup>

The Bank’s investment meets this requirement. The Bank’s investment in the Company is an integral part of the Bank’s export financing business plan. The Bank has successfully booked over \$60 million of short-term loans to finance the export of goods to Latin America over the past two years. By investing in the Company, the Bank will be extending the breadth and extent of its export financing product by allowing it to reach a broader customer base and offering through the Company other services related to the financing of export transactions. Because the investment is useful to the further development of the Bank’s export financing business, the fourth standard is satisfied.

### C. *Conclusion*

Based upon the information and representations provided, and for the reasons discussed above, we conclude that the Bank may acquire and hold a non-controlling equity interest in the Company, in the manner and as described herein, subject to the following conditions:

- (1) the Company will engage only in activities that are permissible for a national bank;
- (2) the Bank will have veto power over any activities and major decisions of the Company that are inconsistent with condition (1) above, or will dispose of its interest in the Company in the event that it engages in an activity that is inconsistent with condition (1);
- (3) the Bank will account for its investment in the Company under the equity method of accounting; and,
- (4) the Company will be subject to OCC supervision and examination, subject to the limitations and requirements of 12 U.S.C. § 1831v.

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<sup>19</sup> See *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972).

<sup>20</sup> See, e.g., Interpretive Letter No. 875, *supra*; Interpretive Letter No. 543, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,255 (Feb. 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 (Mar. 14, 1988); Interpretive Letter No. 380, *supra*.

Please be advised that the conditions of this approval are deemed to be “condition(s) 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, and, as such, may be enforced in proceedings under applicable law.

If you have any questions, please contact Steven Key, Senior Attorney, Bank Activities and Structure at 202-874-5300, or Robert Sihler, Senior Licensing Analyst, Licensing Department at 202-874-5060.

Sincerely,

**-signed-**

Julie L. Williams  
First Senior Deputy Comptroller  
and Chief Counsel

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