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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

February 25, 2000

**Conditional Approval #369  
April 2000**

Karen L. Garrett  
Senior Vice President and Associate General Counsel  
UMB Bank, National Association  
P.O. Box 419226  
Kansas City, Missouri 64141-6226

Re: UMB Bank, National Association, Kansas City, Missouri  
Application to Expand Activities in an Existing Operating Subsidiary  
Application Control No. 1999-MW-08-0035

Dear Ms. Garrett:

This is in response to the December 30, 1999 operating subsidiary application (“Application”) submitted on behalf of UMB Bank, National Association, Kansas City, Missouri (“Bank”), to the Office of the Comptroller of the Currency (“OCC”). The Bank proposes to expand the activities of a previously approved operating subsidiary by investing in an entity to be known as eScout.com LLC (“LLC”).<sup>1</sup> The LLC will support and facilitate electronic commerce. For the reasons discussed below, the Application is approved.<sup>2</sup> Please note that our response is based solely upon the description of the LLC’s activities contained in the Application and information provided in your discussions with our staff.

### ***Background***

As described in detail below, the LLC will engage in activities to support and facilitate electronic commerce. To that end, the LLC will host an Internet Web site focusing on the needs and interests of financial and commercial businesses within the Bank’s regional area, although a nationwide focus may

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<sup>1</sup> Previously, the OCC approved the formation of this operating subsidiary to engage in research and development activities in connection with the anticipated transfer of the Bank’s current Internet web site to the LLC.

<sup>2</sup> Initially the Bank will own more than fifty percent of the membership interests in the LLC, and the remainder of the membership interests would be owned by several additional investors. However, additional interests in the LLC are expected to be sold in the future via a public offering. For this reason, UMB has requested that the OCC also grant approval to retain a non-controlling interest in the LLC as well as approve the expansion of activities currently proposed.

later develop. The LLC will support and facilitate electronic commerce by and among a defined group of commercial entities (“Members”) and membership will be limited to financial or commercial businesses. Specifically, the LLC proposes to engage in the following activities in regard to its Members:

1. *Act as a finder, via Internet technology, to assist its Members in transacting business with each other and with other entities that have agreed to participate in the LLC web site.*

The LLC web site will provide Members and other third parties with information about goods and services sold by the Members.<sup>3</sup> The web site will also provide an electronic medium through which the Members can negotiate and transact commercial and financial business among themselves. Finally, the LLC web site will enable the parties to effect their invoicing, payments, and settlements for these transactions through the web site.

2. *Act as a finder to provide a “collective purchasing resource” in which the LLC will negotiate with selected vendors to establish terms for pricing, service, and delivery of goods and services that will be offered to all Members.*

The LLC will enter into agreements with vendors of goods and services needed by the Members. Under these agreements, the LLC will refer Members through the LLC web site to the vendors and the vendors will make preferred terms available to Members. Members will make purchases of goods and services directly from the vendors without any further involvement of the LLC, except with respect to facilitating payments for and documentation of transactions. The LLC will expressly disclaim any responsibility for the goods and services purchased from these vendors, will not in any capacity take title to the goods and services provided to Members, and will not act as agent or broker for any party.

3. *Act as a finder to serve as a central facility for aggregating buying/selling/financing and for other collaborative efforts among Members.*

The LLC web site will enable Members to compile and exchange information concerning their capabilities and needs. It will, thus, provide a medium through which Members can agree to engage in joint or collaborative business efforts. For example, small banks may communicate, negotiate, and agree to aggregate their lending capacities or to arrange loan participations or syndications so as to meet credit needs that exceed the lending limit of any single bank. Likewise, small manufacturers may

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<sup>3</sup> In connection with the services the LLC provides, Members may have access to personal information about other Members which are businesses. In this regard, the LLC has adopted a statement of policy concerning the treatment of personal Member information in the conduct of its business that recognizes Member expectations for privacy and provides standards for the use, collection, and retention of such information. The LLC's policy states that if personally identifiable Member information is provided to a third party, the LLC insists that the third party adheres to strict privacy guidelines that provide for keeping such information confidential. The LLC further represents that it maintains security standards and procedures intended to preclude unauthorized access to customer information. The LLC's privacy statement will be accessible via a link from its Web site.

agree to respond jointly to a request for proposals that may exceed the manufacturing capacity of any single firm.

4. *Host or support web sites for Members to facilitate their distribution of products and services.*

Web site hosting services will be offered to financial institutions so as to enable them to facilitate distribution of financial products and services, including finder activities. Web site hosting will also be provided to non-financial Members of the LLC web site who agree to process payment transactions through the LLC web site. Hosting will not be offered to non-Members, except for non-Member financial institutions that are correspondents of the Bank.

5. *Develop and deploy web-based communications and payment systems and applications that facilitate financial settlement of, and accounting for, transactions that occur over the LLC system.*

The LLC will provide a web-based ordering process that will enable Members to make integrated purchases and payments from multiple vendors.<sup>4</sup> These payments and settlement systems will use the accounts and services of the Bank and other financial institutions. Settlements may use the ACH network, FedWire, and other payment systems. To permit this activity, the LLC may provide software, hardware, and training for the transmission and retention of payment, order, and transactional financial information by its Members and participants. The LLC may sell some of this hardware or software to Members.<sup>5</sup>

6. *Develop and deploy systems to track and store financial and transactional information involving LLC Members and others. Provide Members with access and secure electronic storage for financial information, economic and industry news and commentary, other information related to financial and banking aspects of their business, and incidental non-financial information.*

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<sup>4</sup> The service will be similar to “shopping cart” services provided by existing electronic commerce businesses.

<sup>5</sup> At this time, the Bank cannot describe specifically the hardware and software to be sold because most has not yet been developed or selected. However, the Bank has committed that any hardware and software sold by the LLC will be provided solely to enable Members to access and use the LLC web site and to permit various commercial or financial communications within the LLC web site such as transactions, billing, contracting, and payment. The LLC does not expect to sell any significant quantities of general-purpose hardware and software that can be used for purposes other than using the LLC web site. However, in no event will such sales generate net revenues or profits that will exceed 30% of the net revenues or net profits from the other aspects of the LLC’s operations. In fact, the actual amounts of such revenues or profits are expected to be much less. The LLC will provide Members with software to enable them to access and transact business within the LLC web site, and the LLC will charge Members a licensing fee for the use of this software. There is no current plan for the LLC to sell any hardware to Members such as modems or computers.

The LLC will provide its Members with services that enable them to access, store, and retrieve financial and transactional information including information relating to transactions conducted over or as a result of the LLC web site. The LLC will also provide Members with access to various information services through its web sites. The vast majority of the information services provided will relate to banking, financial or related economic matters. Thus, revenue from providing access, transmission, or storage of non-financial information will be negligible. However, the Bank asserts that processing of some non-financial information is necessary to attract Members to the LLC web site even though the web site will be primarily focused upon business and financial transactions.<sup>6</sup>

To the extent consistent with applicable law, the LLC will collect fees in the forms of rebates from vendors and Members who buy and sell goods and services to Members.<sup>7</sup> In addition, the LLC will charge fees for services rendered such as facilitating commercial financial transactions and software licensing fees.

### *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. For the reasons discussed in the first section below, the LLC's proposed activities are permissible for a national bank and, hence, for an operating subsidiary.

At some point in the future, the Bank's interest in the LLC may become non-controlling. The OCC has in a variety of circumstances concluded that it is lawful for a national bank to hold a non-controlling investment in an entity or enterprise, such as a limited liability company, provided four criteria or standards are met.<sup>8</sup> These standards, which have been distilled from our previous decisions in the area of permissible noncontrolling investments for national banks and their subsidiaries, are:

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<sup>6</sup> The information provided on the LLC web site would primarily be financial or financial related. For example, the web site would contain information on ways for Members to maximize their profitability, including economic aspects of conducting their business, management tools to improve efficiency, and discussion groups to exchange information among Members about business concerns and issues. The Bank believes that some non-financial information needs to be provided (such as links to top stories of the day in national or local news or matters of general community interest) to make the LLC web site more attractive and thereby enhance use of the site. The Bank asserts that Internet users expect to receive complete packages of information and while they may be primarily attracted to the LLC web site, rather than a competitor site, to transact business, they will also want access to local news and other non-financial information.

<sup>7</sup> Bank is aware that some laws applicable to the LLC (for example, the federal Real Estate Settlement Procedures Act) may limit the ability of the LLC to receive rebates for services rendered electronically or conventionally. Bank commits that the LLC will operate in conformance with applicable laws. Likewise, the LLC will not engage in any activities that would characterize it as a broker under applicable federal law.

<sup>8</sup> See e.g., Interpretive Letter No. 855, *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-312 (Mar. 1, 1999).

- (1) the activities of the entity or enterprise 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 which are impermissible for national banks 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 Bank's proposal 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.**

Our precedents on noncontrolling stock ownership have recognized that the enterprise in which the bank takes an equity interest must confine its activities to those that are part of or incidental to the conduct of the banking business.<sup>9</sup>

*Web Hosting Activities*

The core activities of the LLC will be hosting an Internet site to allow Members to transact business among themselves (Activity 1), hosting commercially enabled web sites for Members (Activity 4), and providing associated payments services for resultant transactions (Activity 5).

The OCC has found these electronic commerce services and related payment processing services to be part of the business of banking and, therefore, authorized for national banks under 12 U.S.C. § 24(Seventh).<sup>10</sup> We have previously determined that a national bank may provide a package of Internet-based services to commercial businesses that include hosting merchants' web sites on its server; providing an electronic communications pathway for product ordering and payment; maintaining merchants' data associated with the web sites on its server (*e.g.*, price information, product

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<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 (unpublished) (Nov. 9, 1992) (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).

<sup>10</sup> Interpretive Letter No. 875 (to be published) (October 31, 1999); Interpretive Letter No. 856, *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-313 (March 6, 1999).

descriptions, and images); providing reports on transactions and sales data; and processing resultant payments transactions. These activities are forms of finder activities authorized for national banks.<sup>11</sup>

The LLC also proposes to provide its Members with certain software and hardware that will enable them to access and use the LLC's web site. OCC has previously determined that a national bank engaged in permissible web site hosting activity may provide merchants with incidental software and hardware that is "necessary" to use or fully enjoy the permissible service and, thus, is either part of the service (if limited function) or incidental thereto (if full function).<sup>12</sup> While the Bank has not at this time been able to provide sufficient information for a final determination, the prospective activities of the LLC in distributing software and hardware as generally described appear consistent with OCC precedent.

Through the web site, the LLC will enable the Members to effect their payments and settlements for transactions that result from web site activities. The processing of payments resulting from orders received through a merchant's bank-hosted web site is clearly part of the business of banking.<sup>13</sup>

The LLC also proposes to provide its commercial web site hosting service to other financial institutions for resale to their commercial customers. The OCC has found that this qualifies as a permissible correspondent banking function. The OCC has long permitted national banks to offer correspondent services as part of the business of banking.<sup>14</sup> More specifically, the OCC has allowed national banks as a permissible correspondent activity to provide data processing and other computer-related services

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<sup>11</sup> See also Corporate Decision No. 97-60 (July 1, 1997) (national bank operating subsidiary maintaining and operating an Internet web site which provides information on pre-owned automobiles to potential buyers); Conditional Approval No. 221 (Dec. 4, 1996) (national bank making a minority investment in a company that provides an electronic "gateway" through which customers of bank will be able to obtain home banking and other financial services from their respective financial institutions through various electronic access devices); Interpretive Letter No. 611, *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,449 (Nov. 23, 1992) (national bank linking non-bank service providers to its communications platform of smart phone banking services).

<sup>12</sup> Interpretive Letter No. 875, *supra*, and Interpretive Letter No. 856, *supra*. See also Conditional Approval No. 221, *supra* (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).

<sup>13</sup> Interpretive Letter No. 875, *supra*, and Interpretive Letter No. 856, *supra*. See also Conditional Approval No. 289 (October 2, 1998) (national banks may acquire a minority interest in a firm that, among other things, provides accounts receivable processing and accounts payable processing); Conditional Approval No. 248 (national bank operating subsidiary may acquire a minority interest in an entity that provides merchant credit and debit card processing services), Conditional Approval No. 282 (July 7, 1998) (national bank may acquire an interest in a firm that would, among other things, engage in payments processing for health care firms); and Interpretive Letter No. 731, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,048 (July 1, 1996) (national banks as part of the business of banking may collect and process accounts in relating to an electronic toll collection system).

<sup>14</sup> See, e.g., Interpretive Letter No. 811, *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-259 (Dec. 18, 1997) (permitting national bank to offer printing services to other financial institutions as correspondent service); Corporate Decision No. 97-79 (July 11, 1997) (federal flood hazard determinations).

to other financial institutions.<sup>15</sup> Accordingly, we have permitted national banks to offer wholesale commercial web site hosting to other financial institutions.<sup>16</sup>

Finally, through its web site, the LLC will provide its Members with a forum in which to explore and negotiate agreements on collaborative business operations (Activity 3). The OCC has long recognized the finder function as a permissible banking activity that includes, “without limitations, identifying potential parties, making inquiries as to interest, introducing or arranging meetings of interested parties, and otherwise bringing parties together for transactions that the parties themselves negotiate and consummate.”<sup>17</sup> As part of the finder function national banks may “make inquiries as to interest, arrange a meeting of the interested parties, and provide information pertinent to the meeting of the buyer and seller.”<sup>18</sup> The role of finder is not limited solely to arranging purchases and sales of products and services. National banks as finders can also assist parties in arranging business transactions such as mergers and joint ventures.<sup>19</sup> Here, the LLC will operate to bring parties together to enable them to negotiate and arrange potential joint marketing and joint venture agreements to support cooperative commercial and financial efforts.

### *Information Services*

The LLC proposes to provide its Members with certain information services, some related to web site-based transactions and others of a more general nature (Activity 6). National banks have long been permitted to collect, transcribe, process, analyze, and store “banking, financial or related economic data” for their customers as part of the business of banking. This is reflected in OCC interpretive rulings<sup>20</sup> and interpretive letters.<sup>21</sup>

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<sup>15</sup> See Interpretive Letter No. 516, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,220 (July 12, 1990) (authorizing national bank to provide other financial institutions with electronic “gateways” to communicate and receive financial information and to conduct transactions); Interpretive Letter No. 346, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,516 (July 31, 1985) (bank operating subsidiary may provide electronic information and transaction services and linkage for financial settlement services).

<sup>16</sup> Interpretive Letter No. 875, *supra*.

<sup>17</sup> 61 Fed. Reg. 4863 (Feb. 9, 1996) (codified at 12 C.F.R. § 7.1002(b)).

<sup>18</sup> Interpretive Letter No. 653, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,601 (Dec. 22, 1994).

<sup>19</sup> *Norwest Bank, N.A. v. Sween Corp.*, 118 F.2d 1255 (8<sup>th</sup> Cir. 1997).

<sup>20</sup> The OCC stated this in a prior version of its Interpretive Ruling on electronic banking activities. Specifically, the language of former 12 C.F.R. 7.3500 provided that “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.” 39 Fed. Reg. 14192, 14195 (April 22, 1974). Later, this language was deleted from former 7.3500 because the OCC was concerned that the specific examples of permissible activities in the ruling such as the marketing of excess time, by-products, and the processing of “banking, financial or related economic data” had led to confusion and misinterpretation. 47 Fed. Reg. 42526, 46529 (Oct. 19, 1982). However, the preamble to the proposed simplifying rule stated that “the Office wishes to make clear that it does not intend to indicate any change in its

With respect to the web site and transactional information, the OCC has found that a national bank offering commercially enabled web sites may also provide merchants with reports on empirical data such as site “hits” and transaction volume arising from their web sites, including number and types of products sold. We have concluded that to the extent those reports involve the processing and transmittal of information relating to specific payment transactions the bank handles for the merchant, it is part of the payment processing function and not a separate service.<sup>22</sup> Finally, we have concluded that the bank could, as part of its proposed web site hosting services, provide the merchants with more general information and reports relative to their web sites.<sup>23</sup>

Apart from the web site transactions, the LLC will also provide members with access to information services focusing on banking, financial, or related economic matters that will assist its members in their business in commercial ventures. This is clearly permissible under OCC precedent.<sup>24</sup>

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position regarding the permissibility of data processing services.” *Id.* This same point was reiterated in the preamble to the final rule and in subsequent OCC letters. *See* 49 Fed Reg. 11157, 11158 (March 26, 1984); Conditional Approval No. 221, *supra*; and Interpretive Letter No. 677, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625 (June 28, 1995).

<sup>21</sup> *See* Conditional Approval No. 339 (Nov. 16, 1999) (data processing relating to digital certificates); Letter from Gail Pohn (Nov. 19, 1975) (unpublished) (processing claims accounts, billings, and financial reports for banks, retailers, insurance agents and doctors); Interpretive Letter No. 346, *supra* (providing electronic information and transaction services in connection with commodities trading); Letter from William Glidden (Feb. 16, 1988) (unpublished) (development and operation of data processing system linking health care providers, insurers, patients, and their banks). The “business of banking” also includes providing electronic information and transaction services relating to investments in financial instruments. Interpretive Letter No. 346, *supra* (commodities trading) and Interpretive Letter No. 516, *supra* (securities trading).

<sup>22</sup> Interpretive Letter No. 875, *supra*, and Interpretive Letter No. 856, *supra*. *See also* Interpretive Letter No. 731, *supra* and Interpretive Letter No. 732, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,049 (May 10, 1996) (design, development, marketing, and maintenance of a network for electronic funds transfer and electronic data interchange permissible for a national bank). *Cf.* Letter from Julie L. Williams, Chief Counsel, October 2, 1996 (unpublished) (“Williams Letter”) (national bank acting as finder could maintain a database of transactions resulting from its finder activities that was “integral” to the finder function).

<sup>23</sup> Interpretive Letter No. 875, *supra*, and Interpretive Letter No. 856, *supra*. *See also* Interpretive Letter No. 653, *supra* (national bank acting as a finder for insurance could also keep financial and other records relating to the client agency sales, receipts and disbursements); Interpretive Letter No. 741, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-105 (Aug. 19, 1996) (national bank acting as finder for automobile dealers may also maintain a comprehensive system that allows dealers to track information on customers referred and to generate market statistics such as buying trends and cycles).

<sup>24</sup> Interpretive Letter No. 516, *supra* (information concerning financial instruments, financial markets, economic information and news and related equipment and software allowing analysis of the information). *See also* Letter from John Shockey (Dec. 17, 1975) (unpublished) (economic analysis and forecasts, including data on stock and bond prices).

Finally, the LLC will also provide access to a limited amount of non-financial information that the Bank asserts is necessary in order to attract members to the LLC's web site.<sup>25</sup> National banks may provide limited amounts of non-financial information to their customers to enhance marketability or use of a banking service.<sup>26</sup>

### *Collective Purchasing Resource*

The LLC proposes to offer to its Members through the LLC web site the opportunity to obtain non-financial goods and services from third parties on advantageous terms (Activity 2). The OCC has recently concluded that, if properly conducted, this is a permissible activity for national banks. In the *AeroBank* Decision,<sup>27</sup> the bank proposed to build an electronic commerce Web page with hyperlinks to third party Web sites offering a wide variety of financial and non-financial products and services considered useful to small businesses. The OCC found that in offering these hyperlinks, the bank was acting in a finder capacity, thus bringing together buyers and sellers of products and services.<sup>28</sup> In this

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<sup>25</sup> "An e-portal is more than just a function-specific informational or transactional site. It is a destination or a community where customers and partners can interact. That is what Yahoo is in the consumer space." N. Natraj, "Banks Need an E-Portal Approach to Small Business," *The American Banker* (November 29, 1999).

<sup>26</sup> Williams Letter, *supra* (a national bank may invest in the company that will form a membership based organization that will act as a finder in locating and contracting with third party service providers for, among other things, incidental non-financial information services).

<sup>27</sup> Decision of the OCC on the Application to Charter AeroBank.com, N.A. , Conditional Approval No. 347 (January 29, 2000) ("*AeroBank* Decision"), available at <http://www.occ.treas.gov/interp/jan00/ca347.pdf>.

<sup>28</sup> Previously, the OCC had found that national banks may, as part of the finder authority (*see* 12 C.F.R. § 7.1002), establish hyperlinks between the bank's retail web site and the web sites of third parties. *See* Conditional Approval No. 221, *supra* (national banks, in the exercise of their finder authority, may establish hyperlinks between their home pages and the Internet pages of third party providers so that bank customers will be able to access those non-bank web sites from the bank site) and Interpretive Letter No. 875, *supra* (national banks may operate a "virtual mall," *i.e.*, a bank-hosted set of web pages with a collection of links to third party web sites organized as to product type and available to bank customers so that bank customers can shop for a range of financial and non-financial products and services via links to sites of third party vendors and merchants can electronically confirm payment authorization before shipping goods).

In our prior decisions, the OCC has indicated that it expects that banks offering such links will take reasonable steps to clearly distinguish between products and services that are offered by the bank and those offered by a third party or bank affiliate. Such banks should ensure that their customers should be able to identify when they are dealing with the bank and when they are not, and the bank should indicate that it does not provide, endorse, or guarantee any of the products or services available through the third-party web sites. The application of these expectations to the LLC web site will depend largely upon two factors: first, how closely the LLC site is associated with the Bank and, second, the ease with which Bank customers can distinguish between the Bank's web site and the LLC's site. *Compare* Interpretive Letter No. 875, *supra*, with *AeroBank* Decision, *supra*. The OCC will work with the Bank and the LLC as these aspects of this venture develop.

context, we found that the bank could also negotiate arrangements with the linked third party Web sites whereby the third-parties will offer reduced rates to Bank customers for products and services.<sup>29</sup>

**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 to the first standard. It is not sufficient that the enterprise's activities are permissible at the time of the Bank's initial investment. They must also remain permissible for as long as the Bank retains a membership interest in the enterprise.

One way to assure continuing compliance with the first standard is for the limited liability company's operating agreement to limit its activities to those that are permissible for national banks.<sup>30</sup> Several provisions of the Draft LLC Operating Agreement ("Operating Agreement") are designed to satisfy the requirement that the Subsidiary will participate as an owner of the LLC only so long as the LLC's activities remain part of, or incidental to, the business of banking. The Operating Agreement provides that the LLC "shall not participate in, nor shall the Board approve or permit, any business activity, ownership or transaction other than those that are permissible business, activities, holdings and

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<sup>29</sup> See *AeroBank* Decision, *supra*. Interpretive Ruling 7.1002, 12 C.F.R. § 7.1002, provides that a national bank's role as a finder includes, "without limitation, identifying potential parties, making inquiries as to interest, introducing or arranging meetings of interested parties, and otherwise bringing parties together for a transaction that the parties themselves negotiate and consummate." The plain language of the Interpretive Ruling supports the LLC's negotiating arrangements with linked merchants to provide reduced rates to LLC customers. One aspect of "making inquiries as to interest" includes inquiring whether a merchant would be willing to provide a discount for LLC customers. Moreover, the LLC, in "otherwise bringing parties together," may reasonably choose to bring together with LLC customers only those merchants who are willing to provide a discount. In other words, one part of making inquiries and bringing parties together is negotiating with merchants as to the terms of compensation for the finder. A reduced rate to be offered to LLC customers can be a form of compensation for the LLC because it will help attract customers to the LLC's services or web site. *Cf.* Letter from Lee Walzer, Attorney, Securities, Investments & Fiduciary Practices Division (August 24, 1992) (unpublished) (bank may negotiate with merchant for finder's fee).

Nor does negotiating arrangements with the linked merchants to provide reduced rates to LLC customers cause the LLC to become involved in the negotiations of the parties and thereby exceed its proper role as finder. The LLC's negotiations with a merchant and the merchant's negotiations with potential buyers are temporally discrete events. The LLC's negotiations with a merchant are completed well before the commencement of any merchant-buyer negotiations. The customer is not a party to these discussions. Indeed, a bank's role as finder stops with the commencement of negotiations between the merchant and buyer. As such, the LLC does not participate in the negotiations between the parties or the consummation of the transaction between the parties. Thus, the offering of a discount is a permissible activity. See Williams Letter, *supra* (national bank may invest in the company that will form a membership based organization that will act as a finder in locating and contracting with third party service providers for financial services and products as well as other products and services for its members to be provided at a discount.) See also Interpretive letter No. 678, *reprinted in* [1994-1995 transfer Binder] Fed. Banking L. Rep. (CCH) 83,626 (July 6, 1995) (national bank may market a consumer access/discount card that would provide consumers with access to variety of financial and non-financial goods and services at a discount rate).

<sup>30</sup> See, e.g., Interpretive Letter No. 732, *supra*.

operations of entities owned or controlled by a national banking association and for which any approval or notification required by applicable law or regulation has been obtained and given.” Operating Agreement, § 4.2. The Operating Agreement further provides that if “an activity, product, service, or asset or other aspect of the [LLC] causes, or is likely to cause, [the Bank] to be in violation of applicable laws or regulations, then the [LLC] shall promptly discontinue the prohibited or impermissible activity or operation and dispose of any prohibited or impermissible assets or property and take such steps as may be necessary or property to discontinue and avoid any further such violation.”<sup>31</sup> *Id.* 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 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. As a legal matter, investors in a Delaware limited liability company will 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 (1993). Thus, the Bank's loss exposure for the liabilities of the LLC will be limited by statute.

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<sup>31</sup> This discussion is based on the current draft of the Operating Agreement. It is anticipated that the Operating Agreement will change if the Bank's interest becomes non-controlling. However, the Bank has represented that these provisions will not be substantively changed.

*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 20-50 percent ownership share of investment in a limited liability company is to report it as an unconsolidated entity under the equity method of accounting. Under this method, unless the bank has guaranteed any of the liabilities of the entity or has other financial obligations to the entity, losses are generally limited to the amount of the investment, including loans and other advances shown on the investor's books.<sup>32</sup>

As proposed, additional interests in the LCC may be sold in the future via a public offering. Should sufficient interests be sold, then the Bank may have a 50 percent or less interest in the LLC. In such cases, if the Bank's interest in the LCC is non-controlling, the Bank believes, and its accountants have advised, that the appropriate accounting treatment for the Bank's investment is the equity method. Thus the Bank's loss from an accounting perspective would be limited to the amount invested in the LLC, and the Bank will not have any open-ended liability for the obligations of the LLC.

Therefore, 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 an operating subsidiary of the bank must also satisfy the requirement that the investment have a beneficial connection to that bank's business, *i.e.*, it must be convenient or useful to the investing bank's business activities and not constitute a mere passive investment unrelated to the bank's banking business. Twelve U.S.C. § 24 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."<sup>33</sup> Therefore, a consistent thread running through our precedents concerning stock ownership is that it must be convenient or useful to the bank in conducting that bank's banking business. The investment must benefit or facilitate that business and cannot be a mere passive or speculative investment.

This requirement is met in this case. The LLC is designed and intended to accomplish two primary business purposes for the Bank. First, through the LLC, the Bank will provide a variety of new services to its small and mid-sized customers. These services, including the aggregation of the buying power of and information available to the small and mid-sized customers, will enable these customers to conduct business in a more profitable manner, thus allowing them to compete effectively against larger businesses. Second, the LLC will generate traditional banking business for the Bank, including ACH, wire transfers, and other payment functions.

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<sup>32</sup> See generally Accounting Principles Board, Op. 18 § 19 (1971) (equity method of accounting for investments in common stock).

<sup>33</sup> *Arnold Tours Inc. v. Camp*, 472 F. 2d 427, 432 (1st Cir. 1972).

Accordingly, the investment in the LLC is convenient and useful to the Bank in carrying out its business and is not a mere passive investment unrelated to the Bank's banking business. The fourth standard is met.

### ***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 and soundness of the Bank. Accordingly, the 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.

In the future, if the Bank's interest in the LLC becomes non-controlling, then it is our opinion that the Bank will be legally permitted to retain a non-controlling interest in the LLC in the manner and as described herein, provided:<sup>34</sup>

- (1) The LLC will engage only in activities that are part of, or incidental to, the business of banking;
- (2) The LLC Operating Agreement will limit the LLC's activities to those permissible for national banks;
- (3) The Bank will account for the investments in the LLC under the equity method of accounting; and,
- (4) The LLC 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 questions, please contact John W. Graetz, Licensing Expert/Financial Analyst, in Bank Organization and Structure at (202) 874-5060.

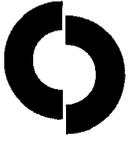
Sincerely,

/s/

Julie L. Williams  
First Senior Deputy Comptroller and Chief Counsel

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<sup>34</sup> By operation of law, the first, second, and fourth conditions are applicable to operating subsidiaries. *See* 12 C.F.R. part 5.34.



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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219