Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

September 4, 1998

Conditional Approval #287
October 1998

Mr. John H. Huffstutler
Bank of America National Trust and Savings Association
Senior Vice President and Chief Regulatory Counsel
Bank of America Center
Box 37000
San Francisco, California 94137

Re: Application of Bank of America National Trust and Savings Association, San Francisco, California, to Acquire Non-Controlling Interest in a Limited Liability Company Through an Existing Operating Subsidiary
Application Control No. 98-ML-08-0015

Dear Mr. Huffstutler:

This is in response to the application by Bank of America National Trust and Savings Association, San Francisco, California, ("Bank") to expand the activities of BA Merchant Services, Inc. ("Subsidiary"), an existing operating subsidiary, and thereby make a non-controlling, minority investment in a Delaware limited liability company that would provide credit and debit card transaction processing services and check guaranty and verification services to casinos and other similar establishments (collectively, "casinos"). For the reasons set forth below, we conclude that these additional activities would be permissible for a national bank and its subsidiaries. Accordingly, the Bank's operating subsidiary application is approved, subject to the conditions set forth below.

Background

The Bank proposes to acquire and hold a non-controlling 21 percent interest in BMCF Gaming, LLC ("LLC"), a Delaware limited liability company. The LLC was previously formed under Delaware law by Global Cash Access, a Nevada corporation ("Global"), and First Data Financial Services, LLC, a Delaware company ("FDFS"). Pursuant to an agreement between the Subsidiary,[1] Global, and FDFS (collectively, "Members"), the Subsidiary will purchase a 21

[1] The Bank owns all outstanding shares of Class B common stock of the Subsidiary, which represents approximately 95% of the voting control and 67% of the economic interest in the Subsidiary. The Class A common stock of the Subsidiary, which constitutes the remainder of the voting and economic

percent interest in the LLC, in exchange for $35 million and its existing casino merchant processing business, including contracts and personal property. The Members will execute an Amended and Restated Limited Liability Company Agreement ("LLC Agreement") which will govern the operations and management of the LLC.

The LLC will provide merchant debit and credit card processing services, primarily as quasi-cash advance services, check verification and guaranty services, and related services to casinos.[2] Merchant processing generally involves verifying credit card authorizations at the time of purchase, processing card transactions, settlement of card transactions, and depositing funds in merchants' accounts. Quasi-cash products will permit cardholders, through electronic terminals, to obtain instruments which may be endorsed to receive cash from the casino's teller, enabling patrons to utilize credit or debit cards to obtain cash. Similarly, check verification services and check guaranty services, whereby the LLC will examine the credit risk presented and will promise to honor the check up to a certain amount, will enable patrons to utilize checks to obtain cash.

The LLC will be managed by a Management Committee comprised of five members: three designees of FDFS, one designee of Global, and one designee of the Subsidiary. Pursuant to the LLC Agreement, certain key decisions, including the entry by the LLC into any new business, any material change in the business strategy of the LLC, any reorganization of the LLC, or any significant acquisition by the LLC would require the approval of 94% of the Members. The Bank states that the LLC Agreement will provide that: (1) the LLC will not engage in any activities that are not permitted for national banks or entities in which national banks may invest; and (2) the Subsidiary will have the right to divest its interest in the LLC if the Subsidiary determines that the business of the LLC would make the Subsidiary's continued investment impermissible under applicable banking laws or regulations.

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. The Bank, pursuant to 12 C.F.R. § 5.34(e)(1), applied to expand the activities of the Subsidiary.

Your letter raises the issue of the authority of a national bank to make a non-controlling, minority investment in a limited liability company. The OCC has in a variety of circumstances concluded

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interest, is listed on the New York Stock Exchange.

[2] The Bank represents that the Subsidiary will endeavor to cause the LLC (1) to establish policies and procedures requiring compliance with privacy laws and regulations applicable to confidential customer information in the LLC's possession, including laws and regulations governing the sale of such information to, or use of such information by, third parties; and (2) to develop and implement external electronic data security measures designed to protect such information that are at least as stringent as comparable external electronic data security measures employed by the Bank.

that it is lawful for a national bank to make a non-controlling, minority investment in an entity or enterprise, such as a limited liability company, provided four criteria or standards are met.[3] 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:

(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.

Applying these four standards to the facts presented, we conclude, as discussed below, that the Bank's proposal satisfies these standards.

1. The activities of the entity or 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 non-controlling 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 business of banking.[4] The LLC will provide merchant credit and debit card processing services. It is clear that merchant processing activities are permissible for national banks, whether conducted directly or through operating subsidiaries, under 12 U.S.C. § 24(Seventh).[5] The LLC will also provide check guaranty and verification services. These activities are also permissible for a national bank under § 24(Seventh).[6] Therefore, this standard is satisfied.

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[3] *See, e.g.*, Interpretive Letter No. 778 (March 20, 1997), *reprinted in* [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-205; Interpretive Letter No. 732 (May 10, 1996), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-049; Interpretive Letter No. 705 (October 25, 1995), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. ¶ 81-020.

[4] *See e.g.*, Interpretive Letter No. 380 (December 29, 1986), *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,604 n.8 (since a national bank can provide options clearing services to customers, it can purchase stock in a corporation providing options clearing services).

[5] *See e.g.*, Interpretive Letter No. 689 (August 9, 1995), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-004.

[6] *See, e.g.*, Interpretive Letter No. 705, *supra*.

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. The activities of the enterprise in which a national bank may invest must be part of or incidental to the business of banking not only at the time the bank first acquires its ownership, but for as long as the bank has an ownership interest.

Several provisions in the LLC 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 permissible. Section 2.3 of the Agreement provides that the LLC will not engage in any activities that are not permitted for national banks or entities in which national banks may invest. Furthermore, the entry of the LLC into any new business, any material change in the business strategy of the LLC, any reorganization of the LLC, or any significant acquisition will require the approval of the Subsidiary so long as the Subsidiary owns a seven percent or greater interest in the LLC. Finally, the Subsidiary has the right, pursuant to Section 10.8 of the Contribution and Option Agreement, to divest its investment in the LLC in the event the Subsidiary determines that the business of the LLC would make the continued ownership of the LLC by the Subsidiary impermissible. Therefore, this standard is met.

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 (1998).

Section 6.1 of the LLC Agreement provides that "no Member, as a Member, shall be liable for the debts, obligations or liabilities of the [LLC], including under a judgment, decree or order of a court." Additionally, the operating subsidiary structure itself inherently provides some limitations on liability. In this instance, all of the Bank's investments will be made through the Subsidiary. Thus, the Bank's loss exposure for the liabilities of the LLC will be limited.

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.[7]

As proposed, the Subsidiary will have a 21% interest in the LLC. The Subsidiary believes, and its accountants have advised, that the appropriate accounting treatment for the Bank's investment is the equity method.[8] 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(Seventh) gives national banks incidental powers that are "necessary" to carry on the business of banking. "Necessary" has been judicially construed to mean "convenient or useful."[9] 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.

The Subsidiary's investment in the LLC will enhance the Subsidiary's market penetration and earnings in the merchant processing business. Currently, FDFS has a significant market share in this area. The LLC, by combining FDFS's market presence with the Subsidiary and Global's technology and processing capabilities in providing merchant processing services, will provide the opportunity for the Subsidiary to leverage FDFS's market share and expertise in order to quickly develop its investments in the merchant processing businesses. Further, the LLC's provision of check guaranty and verification services will offer customers an alternative method of obtaining cash. By providing customers an array of services to obtain cash, the LLC will complement and enhance its investments in the merchant processing businesses. For these reasons, the Subsidiary's investment in the LLC is convenient and useful to the Bank in carrying out its business and is not a mere passive investment. Thus, the fourth standard is satisfied.

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[7] *See generally* Accounting Principles Board, Op. 18 § 19 (1971) (equity method of accounting for investments in common stock).

[8] OCC's Chief Accountant has concluded that the Bank's investment in the LLC should be recorded as "Investments in unconsolidated subsidiaries and associated companies" on the Bank's Consolidated Reports of Condition and Income ("Call Reports"). Such classification is consistent with the Call Report Instructions. *See* Instructions to Schedule RC- M, item 8.b.

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

Conclusion

Based upon the information and representations you have provided, and for the reasons discussed above, we conclude that Bank of America National Trust and Savings Association, San Francisco, California, may acquire and hold through BA Merchant Services, Inc., a non-controlling 21 percent interest in the LLC. Our approval is conditioned upon the Bank's compliance through the Subsidiary with the following conditions:

(1) The LLC will engage only in activities that are part of or incidental to the business of banking;

(2) The Bank, through the Subsidiary, will have veto power over any activities and major decisions of the LLC that are inconsistent with condition number one, or will withdraw from the LLC in the event it engages in an activity that is inconsistent with condition number one;

(3) The Bank will account for the investment 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.

This approval is granted based on a thorough review of all information available, including the representations and commitments made in the application and by the Bank's representatives.

If you have any questions, please contact Cindy Hausch-Booth, Financial Analyst, at (202) 874-5060.

Sincerely,

/s/

Raymond Natter
Acting Chief Counsel