Office of Thrift Supervision
Department of the Treasury
Chief Counsel
1700 G Street, N.W., Washington, D.C. 20552 • (202) 906-6251

December 22, 1995

[redacted]

RE: Investment in an Electronic Funds Transfer Network

Dear [redacted]

This responds to your request submitted on behalf of an electronic funds transfer ("EFT") network owned by [redacted] ("Existing EFT Corporation") and various federal savings associations that currently hold limited partnership shares in the Existing EFT Corporation. You request confirmation that the associations may, in effect, exchange their limited partnership shares in the Existing EFT Corporation for limited partnership shares in [redacted] ("New EFT Corporation"), without such shares being deemed to constitute investments in an operating subsidiary or service corporation.

The OTS has previously opined that federal savings associations have authority under the incidental powers doctrine to invest in corporations that engage exclusively in activities that federal savings associations may conduct directly, without being required to comply with the statutory and regulatory service corporation and operating subsidiary requirements. Investments in so-called "joint-user corporations" fall within this line of authority. An investment is generally deemed to be an investment in a joint-user corporation when its predominant purpose is to facilitate participation in an activity for which the joint participation of several users is required, rather than to engage in speculative activity through stock investment.[1] The OTS has developed five criteria for testing whether a proposed investment meets the foregoing standard.[2] The proposed investment in the New EFT Corporation raises an issue under only one of these criteria.

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[1] See OTS Op. Chief Counsel, Sept. 15, 1995, at p. 3, and the authorities cited there.

[2] Id. at pp. 3-4.

In the past, the OTS has indicated that the ownership of joint-user corporations should generally be restricted to users of the services provided by the corporation. In this transaction, the New EFT Corporation will be structured as a joint venture[3] in which half of the limited partnership shares will be owned by the institutions that use the EFT system, while the other half will be owned by a data processing company that will be responsible for maintaining and operating the system. In addition, the New EFT Corporation will have two general partners, one controlled by system users and one controlled by the data processing company. You indicate that the owners/users of the Existing EFT Corporation have concluded that the proposed joint venture will be advantageous to them due to the expertise and resources that the data processing company will bring to the EFT system.

The primary purpose for restricting ownership of joint-user corporations to users is to ensure that control of the corporation remains with those who use the services of the corporation, rather than persons with speculative profit motives.[4] To address this concern, you propose to incorporate a number of safeguards into the structure of New EFT Corporation, including the following:

- The general partners will exercise their responsibilities through a management board composed of board members appointed by each general partner. Notwithstanding the number of board members appointed by each general partner, each class of board members will collectively have one-half of the voting power of the management board. Most management decisions will require a 76% vote of the management board. Some decisions, such as those related to pricing, business plan, and new products and services will require an 84% vote.

- Only board members appointed by the user's general partner will vote on matters relating to the service agreement between the users and the New EFT Corporation.

- The Chief Executive Officer of the New EFT Corporation will be selected by the user's board members, subject to approval by the data processing company's board members.

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[3] Use of a joint venture structure is not unprecedented. See Federal Home Loan Bank Board Op. Deputy General Counsel Smith, August 1, 1988.

[4] OTS Op. Chief Counsel, Sept. 15, 1995, at p. 5.

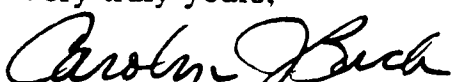
Given these restrictions, we are satisfied that the users of the system will retain sufficient control to ensure that the New EFT Corporation operates in a manner that gives priority to the needs of users, rather than speculative profit motives.[5]

Accordingly, we conclude that the investments of federal savings associations in the New EFT Corporation may properly be characterized as investments in a joint-user corporation. The New EFT Corporation will, of course, be subject to requirements imposed on the EFT systems of federal savings associations by 12 C.F.R. §§ 545.141 and 545.138 (1995), including requirements regarding privacy of account data and OTS examinations, and to OTS policy statements regarding data processing services.[6] In this regard, we note that the service agreement between the New EFT Corporation and federal savings associations must contain the examination authorization provision set forth in OTS Thrift Bulletin 46.

In reaching the foregoing conclusions, we have relied on the factual representations contained in the materials you submitted to us. Any change in facts from those set forth by you could result in different conclusions. In addition, this opinion is issued in reliance upon your representation that the New EFT Corporation will provide a copy of this letter to each federal savings association that invests in the New EFT Corporation, whether as a part of the formation of the New EFT Corporation or thereafter, prior to the association's commitment to invest.

If you have any questions regarding this response, please feel free to contact Susan Miles, Senior Attorney, at (202) 906-6798.

Very truly yours,



Carolyn J. Buck
Chief Counsel

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[5] The Office of the Comptroller of the Currency ("OCC") reached the same conclusion regarding national bank participation in the New EFT Corporation. OCC letter to Robert G. Ballen dated October 25, 1995. The OCC concluded, as we do, that sufficient safeguards exist to prevent the data processing company from controlling the New EFT Corporation.

[6] See e.g., Thrift Bulletin ("TB") 59 (Interagency Supervisory Statement on EFT Switches and Network Services); TB 44 (Interagency Statement on EDP Service Contracts); TB 46 (Contracting for Data Processing Services or Systems); TB 11 (Supervisory Policy on Large-scale Integrated Financial Software Systems); and Regulatory Bulletin 21 (Servicing Contracts).