Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Conditional Appproval #265
December 1997

December 29, 1997

Mr. Steven Alan Bennett
Banc One Corporation
Senior Vice President and General Counsel
100 East Broad Street
Columbus, Ohio 43271-0158

Re: Application of Bank One, N.A., to Acquire an Operating Subsidiary that holds (1) a 50 Percent Interest in a Limited Liability Company Engaging in Credit and Debit Card Transaction Processing Services to Merchant Businesses, and (2) less than a 5 Percent Interest in a Limited Partnership Engaging in Targeted and Customized Marketing to Holders of the Members' Credit Cards.
Application Control Number: 97-ML-08-0032

Dear Mr. Bennett:

This is in response to your November 17, 1997, application on behalf of Bank One, N.A., Columbus, Ohio ("the Bank"), to acquire an operating subsidiary that holds a 50 percent interest in a limited liability company ("LLC") engaging in merchant processing and a less-than 5 percent investment in a limited partnership ("Limited Partnership"). The LLC provides credit and debit card transaction processing services to merchant businesses, including commercial and deposit loan customers of the Bank and other subsidiaries of Banc One Corporation. The Limited Partnership is engaged in the business of analyzing purchase patterns of credit card customers of the participating limited partners in connection with targeted and customized marketing.

For the reasons given below, we conclude the activities proposed of the operating subsidiary, including the investments in the LLC and the Limited Partnership, are permissible for national banks and their operating subsidiaries and are consistent with prior OCC opinions. Accordingly, the Bank may acquire the operating subsidiary and hold, through that operating subsidiary, a 50 percent interest in the LLC, and a less than 5 percent interest in the Limited Partnership and the Limited Partnership's general partner, to engage in the proposed activities subject to the conditions set forth herein.

A. BACKGROUND

The Bank proposes to acquire Banc One POS ("BOP"), as a wholly-owned subsidiary, by purchasing at book value all outstanding shares of BOP.[1] BOP conducts merchant processing business and certain incidental activities through the LLC, which is a Delaware limited liability company, and the Limited Partnership, which is a Delaware limited partnership.

The LLC has two members, Card Establishment Services, Inc. ("CES") and BOP (collectively "the Members"). CES is a wholly-owned subsidiary of First Data Corporation. The LLC is similar to other joint ventures in which CES participates with other U.S. banks through its "Merchant Bank Alliance" program. The Members each currently have a 50 percent interest in the LLC, and are its sole members. The primary goal of the LLC is to provide credit and debit card processing products and services to merchants, including commercial loan and deposit customers of the Bank. The LLC has entered into a long-term processing arrangement with CES under which CES provides back office data processing services for the LLC, and BOP conducts all of its merchant transaction card processing business through the LLC.

The LLC is managed by a Management Committee comprised of four managers. BOP and CES each have the right to designate two managers to the Management Committee. Key decisions, including any disposition of more than $10,000 of the LLC's assets, any merger or consolidation involving the LLC, any borrowing by the LLC in an amount greater than $25,000, the liquidation, dissolution, or termination of the LLC, the admission of additional members, require the unanimous consent of all Members. All other decisions regarding the operations of the LLC are made by a majority of the Management Committee.

The LLC Agreement provides that: (1) the LLC's purposes are limited to those "consistent with the powers of national banks"; (2) the LLC is granted only those powers which are "necessary and convenient" to effect such purposes; and, (3) the LLC's purposes may not be changed without the unanimous approval of the Management Committee.

BOP, along with other financial institutions, is a limited partner in the Limited Partnership. The Limited Partnership has one general partner, U$A Value Exchange Corporation ("U$A Corp."), in which each limited partner has an equity interest. BOP currently owns less than a 5 percent interest of the Limited Partnership and U$A Corp. The Limited Partnership is engaged in the business of analyzing purchase patterns of credit card customers of the participating limited partners in connection with "statement stuffer" marketing.

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[1] BOP, a bank service corporation, is currently owned jointly by the Bank and eleven other bank subsidiaries of Banc One Corporation, with the Bank holding approximately 33% of the outstanding shares.

The Partnership is organized pursuant to a Limited Partnership Agreement. Under the terms of the Limited Partnership Agreement, (1) the Limited Partnership's activities are limited to those that are part of, or incidental to, the business of banking, (2) the Limited Partnership is subject to examination by the Office of the Comptroller of the Currency ("OCC"), and (3) the liability of the limited partners is limited to their respective capital investments.

B. DISCUSSION

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(d)(1). To qualify as an operating subsidiary, the parent bank must own at least 50 percent of the voting stock of the corporation. 12 C.F.R. § 5.34(d)(2). Whether conducted directly or through operating subsidiaries, merchant processing activities are part of, or incidental to, the business of banking under 12 U.S.C. § 24(Seventh). *See, e.g.*, Conditional Approval Letter No. 248 (June 27, 1997); Interpretive Letter No. 689 (August 9, 1995), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-004; Banking Bulletin 92-24, Merchant Processing (May 5, 1992). Therefore, the Bank may acquire BOP as an operating subsidiary pursuant to 12 C.F.R. § 5.34.

The remaining issue presented by your notice concerns the authority of a national bank to hold--indirectly through an operating subsidiary--a non-controlling interest in enterprises such as the LLC and the Limited Partnership. A number of recent OCC Letters have analyzed the authority of national banks, either directly or through their subsidiaries, to own a non-controlling interest in a limited liability company. *E.g.*, Conditional Approval Letter No. 248, *supra;* Interpretive Letter No. 694 (December 13, 1995), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-009; Interpretive Letter No. 692 (November 1, 1995), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-007. These letters each concluded that the ownership of such an interest is permissible provided four standards, drawn from OCC precedents, are satisfied.[2] They are:

(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;

(2) The bank must be able to prevent the entity or enterprise from engaging in activities that do not meet the foregoing standard, or be able to withdraw from 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,

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[2] *See also* 12 C.F.R. § 5.36(b). National banks are permitted to make various types of equity investments pursuant to § 12 U.S.C. 24(Seventh) and other statutes.

(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.

In addition, the OCC has also permitted national banks to make a non-controlling investment in an enterprise other than an LLC, provided the investment satisfies these four standards. *See e.g.*, Conditional Approval Letter No. 200 (April 12, 1996); Interpretive Letter No. 732, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-049 (May 10, 1996); Interpretive Letter No. 697 (November 15, 1995), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-012; Interpretive Letter No. 705 (October 25, 1995), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. ¶ 81-020. Each of these four factors is discussed below and applied to your proposal.

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. *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); Letter of Robert B. Serino, Deputy Chief Counsel (November 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).

The LLC will provide merchant credit and debit card processing services. Such activities are part of, or incidental to, the business of banking under 12 U.S.C. § 24(Seventh).[3] *See, e.g.*, Conditional Approval Letter No. 248, *supra*; Interpretive Letter No. 689, *supra*; Interpretive Letter No. 720 (January 26, 1996), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-035; Banking Bulletin 92-24, *supra*. Thus, with respect to the LLC, this standard is satisfied.

The Limited Partnership is engaged in analyzing customer information to determine potential needs and including brochures in statements about the availability of nonbanking products from vendors. Such activities are part of, or incidental to, the business of banking. *See, e.g.*, Conditional Approval Letter No. 200, s*upra*; Interpretive Letter No. 316 (December 28, 1984), *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85-486. With respect to the Limited Partnership, this standard is satisfied.

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[3] Merchant card processing services generally involves verifying credit card authorizations at the time of purchase, processing card transactions, settlement of card transactions, and depositing funds in merchants' accounts.

BOP also owns an equity interest in U$A Corp., the Limited Partnership's general partner. U$A Corp. is engaged in the same marketing activities as the Limited Partnership. Therefore, with respect to U$A Corp., this standard is also satisfied.

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 ("the Agreement") are designed to satisfy the requirement that BOP 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 Agreement provides explicitly that the LLC's purposes are limited to those that are "consistent with the powers of national banks." The LLC is granted only those powers "necessary and convenient" to effect any of the purposes for which it was formed. Furthermore, any decision to change the purposes of the LLC will require the unanimous consent of all members of the Management Committee. As a result, the Bank, through its operating subsidiary, will be able on an on-going basis to prevent the LLC from engaging in new activities that are not part of, or incidental to, the business of banking. Thus, with respect to the LLC, this standard is met.

Similarly, the Limited Partnership Agreement contains provisions designed to ensure that the Limited Partnership engages only in activities that are part of, or incidental to, the business of banking. The Limited Partnership Agreement provides that activities are limited to those that are part of, or incidental to, the business of banking. As a result, the Bank, through its operating subsidiary, will be able to ensure that BOP is not participating in any impermissible activities. Furthermore, the Bank represents that BOP will withdraw from the Limited Partnership and U$A Corp. should the Limited Partnership engage in any activities not part of, or incidental to, the business of banking. Thus, with respect to the Limited Partnership and U$A Corp., this 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 do 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 (1994).[4] Thus, the Bank's loss exposure for the liability of the LLC is limited by statute and by the Agreement establishing the LLC.

Similarly, limited partners in a Delaware limited partnership do not incur liability with respect to the liabilities or obligations of the limited partnership solely by reason of being a limited partner. Del. Code Ann. Tit. 6 § 17-303 (1994).[5] Therefore, the Bank's loss exposure for the liability of the Limited Partnership is limited by statute and by the Limited Partnership Agreement.

Further, the Bank will be protected from liability for the debts of U$A Corp. by the "corporate veil." 1 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 25 (perm. Ed. Rev. vol. 1990). Both the Bank and U$A Corp. are separate corporations, with their own capital, directors, and officers. Thus, the Bank's loss exposure for the liability of U$A Corp. is 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. *See generally* Accounting Principles Board, Op. 18 § 19 (1971) (equity method of accounting for investments in common stock). *See also* Interpretive Letter 692, *supra*.

As proposed, the Bank will have a 50 percent ownership interest in the LLC through BOP. The Bank believes that the appropriate accounting treatment for the Bank's investment is the equity method.[6] Thus the Bank's loss from an accounting perspective would be limited to the

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[4] Section 6.1 of the LLC Agreement provides that "[n]o member shall be liable for the debts, obligations or liability of [the LLC], including under judgment, decree or order of a court."

[5] The Limited Partnership Agreement provides that the liability of limited partners is limited to their respective capital investments.

[6] 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.

amount invested in the LLC and the Bank will not have any open-ended liability for the obligations of the LLC. In addition, as noted above, Delaware law limits members' losses to their capital investment. Therefore, with respect to the LLC, the third standard is satisfied.

Similarly, the Bank believes that the appropriate accounting treatment for the investment in the Limited Partnership and U$A Corp. is the equity method. Under this method, losses recognized by the Bank will not exceed the amount of the investment. As noted above, under Delaware law limited partners do not incur liability with respect to the limited partnership solely by reason of being a limited partner. And the corporate veil will protect the Bank from liability for the debts of U$A Corp. Thus, with respect to the Limited Partnership and U$A Corp., 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 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 useful." *See Arnold Tours, Inc. v. Camp,* 472 F.2d 427,432 (1st Cir. 1972). Section 24(Seventh) does not authorize national banks to engage in speculative, investment banking activities with respect to stock. *See* Interpretive Letter No. 697, *supra*. Therefore, a consistent thread running through our precedents concerning stock ownership is that it must be convenient or useful to *that bank's* banking business. The investment must benefit or facilitate that business and cannot be a mere passive or speculative investment. *See e.g.,* Conditional Approval Letter #248, *supra*; Conditional Approval Letter No. 200, *supra*; Interpretive Letter No. 543 (February 13, 1991), *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83-225.

Acquiring and holding (through BOP) a non-controlling interest in the LLC will benefit the Bank in carrying out its business. Because First Data Corporation is a leading provider of merchant processing services worldwide, its participation in this joint venture will help ensure the investment in technology needed to offer the Bank's customers state-of-art merchant products and services. Furthermore, in addition to enhancing the Bank's existing merchant processing business, the opportunity to cross-sell other bank products§ will also be convenient and useful to the Bank in carrying out its other banking business. Thus, the investment is "necessary" to the Bank's ability to carry out its banking business efficiently and capably and to compete effectively in the merchant processing services market.

Similarly, the Bank's ownership of an equity interest in U$A Corp. is also permissible. National banks have participated in membership corporations, such as U$A Corp. and the

Limited Partnership, since at least 1966. *See* Conditional Approval Letter No. 200, *supra*; Interpretive Letter No. 697, *supra*; Letter of Acting Comptroller William Camp (November 18, 1966) (ownership in non-profit corporation that acts as clearinghouse for credit card transactions of member banks).

The Bank's participation in the Limited Partnership and equity ownership in U$A Corp. is consistent with such principles. The equity interest is held to facilitate the Bank's participation with other financial institutions in a permissible activity. Ownership of the U$A Corp. stock is limited to the invested parties. The stock ownership gives the Bank certain rights to participate in the affairs of U$A Corp. The ownership of the stock presents pass through benefits to customers of the participating institutions by providing them with information on the availability of products and services in which they might be interested.

For these reasons, the Bank's investments in the LLC, Limited Partnership, and U$A Corp. are convenient and useful to the Bank in carrying out its business and are not mere passive investments. Thus, the fourth standard is satisfied.

D. CONCLUSION

Based upon the information and representations you have provided, and for the reasons discussed above, we conclude that Bank One, N.A., may acquire and hold through BOP, a 50 percent interest in the LLC and a less than 5 percent interest in the Limited Partnership and U$A Corp. Our conclusion is conditioned upon Bank One's compliance through BOP with the following conditions:

(1) The LLC, the Limited Partnership, and U$A Corp. will engage only in activities that are part of, or incidental to, the business of banking;

(2) The Bank, through BOP, will have veto power over any activities and major decisions of the LLC that are inconsistent with condition number one, and will withdraw from the Limited Partnership and U$A Corp. in the event it engages in an activity that is inconsistent with condition number one;

(3) The Bank, through BOP, will account for the investments in the LLC, the Limited Partnership, and U$A Corp. under the equity method of accounting; and,

(4) BOP, the LLC, the Limited Partnership, and U$A Corp. 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 by the Bank's representatives.

If you have any questions, please contact Richard Erb, Licensing Manager, at (202) 874-4610.

Sincerely,

/s/

Julie L. Williams
Chief Counsel