Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

July 30, 1998

Conditional Approval #281
August 1998

Ms. Joan M. Fagan, Esq.
Assistant General Counsel
Firstar Corporation
Law Department
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

RE: Application by Firstar Bank Milwaukee, National Association, Milwaukee, Wisconsin, for Approval to Acquire Cargill Leasing Corporation as an Operating Subsidiary
Application Number 98-CE-08-020.

Dear Ms. Fagan,

This is in response to your application dated June 17, 1998, by which Firstar Bank Milwaukee, National Association ("Bank") requests approval pursuant to 12 C.F.R. § 5.34(e)(1)(i)(B) to acquire Cargill Leasing Corporation ("CLC") and CLC's direct and indirect interests in various limited partnerships and limited liability companies. CLC and its interests engage in equipment financing and leasing, and other activities incident to equipment leasing. Based on the information and representations provided by the Bank, and for the reasons given below, the application is approved, subject to the conditions set forth herein.

I. BACKGROUND

Your letter requests the OCC's approval of the Bank's proposal to acquire CLC, one of two proposed operating subsidiaries, from Cargill, Inc. ("Cargill"). The Bank also plans to acquire another leasing subsidiary, Cargill Equipment Corporation ("CEC"), from Cargill pursuant to the provisions of 12 C.F.R. § 5.34(e)(4).

CLC's activities are limited to the leasing of personal property and activities incidental thereto, and making loans.[1] You state that CLC will have no walk-in business, and almost no personal

[1] *See* 12 C.F.R. §§ 5.34(e)(2)(ii)(B) and 5.34(e)(2)(ii)(F).

contact with customers at its locations. CLC operates a nationwide business by telephone, mail, and outside sales calls, with only occasional, isolated visits to CLC offices by customers.[2]

CLC's current locations are 6000 Clearwater Drive, Minnetonka, Minnesota (headquarters); 1652 Greenview Drive, S.W., Rochester, Minnesota; and 2398 East Camelback Road, Phoenix, Arizona. None of these locations is a main office or branch of the Bank. Within three or four months of the acquisition, the Bank intends to move CLC's headquarters to another location in the Twin Cities area. The location has not been determined, but it will not be the main or branch office of the Bank or any other Bank subsidiary of Firstar.

Subsidiaries and Other Equity Investments

CLC has ownership interests in several other equipment leasing/equipment finance companies. Two subsidiaries are related to an asset securitization which CLC entered into in 1996: Cargill Lease Receivables Corp., CLC's wholly-owned subsidiary, was organized to be the managing member and 1% owner of Cargill Lease Receivables LLC, which is 99% owned by CLC.

CLC is also the majority owner in seven limited partnerships ("LPs") and limited liability companies ("LLCs"): Greenwich McGinty, LP; Capital Associates, LP; MLC Group, LLC; Relational Funding, LLC; Varilease, LLC; Summit Financial, LLC; and Cargill Relational, LLC. Third-party equipment lessors are the minority owners and managing partners or members in these majority-owned LPs and LLCs (the "LP/LLC Subs"). All of these LPS and LLCs engage in acquiring, owning, operating, managing, selling, and leasing equipment.

CLC has one investment with other lessors in which it is a minority owner: CLC is a 37.25% limited partner in Centron/GATX Limited Partnership II (the "Centron LP"), a Minnesota limited partnership. The partnership agreement limits Centron LP's business to acquiring, owning, operating, managing, selling, and leasing equipment owned by the partnership. Moreover, you have informed us that the partnership is now winding down its business because the periods for which the equipment was leased have expired and the equipment is being remarketed, which will be the last partnership activity. The Bank will divest this investment in the unlikely event that Centron LP were to engage in activities not permissible for a national bank.[3]

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[2] There are no branching issues raised in the Bank's application, because CLC's locations will not be open to public access (a necessary part of the three-part branching test). *See First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 136-37 (1969).

[3] In a June 16, 1998, telephone conversation with you and Mr. Gil Southwell, also of Firstar Corp., we were informed that Mr. Jeff Lew, Executive Vice President of Cargill Financial Services Corp. (a 100% owned subsidiary of Cargill, Inc.) verbally committed that, if Centron LP did not repurchase the Bank's 37.25% interest in the event that Centron engages in impermissible activities, Cargill Financial Services would purchase the interest. This commitment will be included in the stock acquisition agreement between Firstar Corp. and Centron LP.

Finally, CLC owns a 23% interest in Systems Design Advantage, LLC ("SDA"), which is 77% owned by the managing member, Systems Design Advantage, Inc., a third party unrelated to CLC. The Bank concedes that some of SDA, LLC's activities may not be permissible for a national bank because it buys, refurbishes, and remarkets off-lease equipment from non-bank related lessors. The Bank has committed to divest this investment as soon as practicable, but in no event more than two years after its acquisition of CLC.

II. DISCUSSION

A. Qualification As An Operating Subsidiary

A national bank may engage in activities which are part of or incidental to the business of banking by means of an operating subsidiary.[4] In general, in order to qualify as an operating subsidiary, the parent bank must own more than 50 percent of the voting interest of the subsidiary or the parent bank must control the subsidiary and no other party can control more than 50 percent of the voting interest of the subsidiary.[5] Since CLC will be a wholly-owned subsidiary of the Bank, it will qualify as an operating subsidiary of the Bank.

B. National Bank Express and Incidental Powers (12 U.S.C. § 24(Seventh))

Your letter states that the Bank has committed to divest CLC's 23% interest in SDA, LLC (described above), because it engages in purchasing, refurbishing, and remarketing off-lease equipment from non-bank related lessors, activities not previously deemed permissible for national banks. The Bank will divest this interest within two years after its acquisition of CLC.[6]

Your application raises the issue of the Bank's authority to hold, through CLC, a non-controlling interest in Centron LP, a limited partnership that engages in personal property leasing activities (in addition to CLC's previously mentioned majority interests in several leasing companies). Several recent OCC Interpretive Letters have addressed the authority of national banks, either directly or through their subsidiaries, to own a non-controlling interest in an enterprise. The enterprise may take different forms, including a limited partnership, a corporation, or a limited liability company.[7]

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[4] *See* 12 C.F.R. § 5.34(d)(1).

[5] *See* 12 C.F.R. § 5.34(d)(2).

[6] *See, e.g.*, OCC Conditional Approval No. 259 (October 31, 1997) (allowing two years for divestiture of nonconforming investment).

[7] *See, e.g.* Interpretive Letters No. 732, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-049 (May 10, 1996) and No. 692, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-007 (November 1, 1995).

These letters each concluded that the ownership of such an interest is permissible provided that four standards, drawn from OCC precedent, are satisfied. 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 enterprise 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 and useful to the bank in carrying out its business and not a mere passive investment unrelated to *that bank's* banking business.

Each of these factors is discussed below and applied to the Bank's 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 minority, 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.[8]

It is clear that the proposed activities of Centron LP — personal property leasing and financing activities — are permissible for national banks and their subsidiaries. The LP's sole activities are the origination and servicing of equipment leases and the remarketing of any resulting off-lease equipment, all of which are permitted national bank activities.[9] Therefore, the first standard is 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.

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

[9] 12 U.S.C. § 24(Seventh); 12 U.S.C. § 24(Tenth); and 12 C.F.R. § 5.34(e)(2)(ii)(B). *See also, M&M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382-83 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); OCC Corporate Decision No. 97-54, 1997 OCC Ltr. Lexis 58 (June 26, 1997).

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. This standard may be met if the bank is able to exercise a veto power over the activities of the enterprise, or is able to dispose of its interest.[10] This ensures that the bank will not become involved in activities which are not part of, or incidental to, the business of banking.

CLC owns 37.25% of Centron LP. As noted above, the partnership agreement limits the Centron LP's business to acquiring, owning, operating, managing, selling, and leasing equipment owned by the partnership, all permissible bank activities.[11] Further, as noted above, the Bank commits to divest CLC's partnership interest in Centron LP in the event that Centron LP engages in impermissible activities.

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.

The Bank's loss exposure is legally limited, both because the LLC and LP subsidiary interests will be held by CLC, which will have the liability limitations inherent in these legal entities, and because the subsidiaries are limited partnerships and limited liability companies under the laws of their chartering states, all of which limit CLC's liability for subsidiary debts to the extent of its investment. Centron LP is a Minnesota limited partnership, and under the Revised Minnesota Uniform Limited Partnership Act, CLC will not be liable for the general liabilities of Centron LP beyond the extent of its investment in the LP.[12]

b. Loss exposure from an accounting standpoint

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[10] *See, e.g.*, Interpretive Letter No. 711, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-026 (February 3, 1996); Interpretive Letter No. 625, *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,507 (July 1, 1993).

[11] *See, e.g.*, Interpretive Letter No. 567, *reprinted in* [1991-1992 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,337 (October 29, 1991).

[12] *See* Minn. Stat. Ann. § 322A.26 (West 1997).

In assessing a bank's loss exposure as an accounting matter, the OCC has previously noted that the appropriate accounting treatment for a minority investment of 20-50 percent 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.[13]

From an accounting standpoint, the loss exposure of the Bank will also be limited. The Bank's indirect interest in Centron LP will be accounted for on the books of CLC under the equity method of accounting, so that losses recognized by the investor will not exceed the amount of its investment.

Therefore, for both legal and accounting purposes, the Bank's potential loss exposure relative to the LP should be limited to the amount of its investment. Since that exposure is quantifiable and controllable, the third standard is satisfied.

4. The investment must be convenient and useful to the bank in carrying out its business and not 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."[14] 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.[15]

The investment in Centron LP will be convenient and useful to CLC in carrying out its business and not a mere passive investment. According to your letter, this investment, along with CLC's majority investments noted above, permits CLC to participate in leasing transactions with other lessors, which contribute experience, expertise, and resources to CLC's subsidiaries (including Centron LP) and provides CLC an opportunity to limit the resources it commits to any one entity, thus diversifying its risk. You state that two major benefits of this partnership arrangement are risk mitigation and outsourcing of certain business functions, such as origination, servicing, and equipment remarketing, which reduces CLC's fixed operating costs.
Thus, the fourth standard is satisfied.

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[13] *See generally*, Accounting Principles Board, Op. 18 § 19 (1971) (equity method of accounting for investments in common stock) and Interpretive Letter No. 692, *supra.*

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

[15] *See, e.g.*, Interpretive Letter No. 543, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,255 (February 13, 1991) and Interpretive Letter No. 421, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,645 (March 14, 1988).

III. CONCLUSION

Based upon the information and representations you have provided, and for the reasons outlined above, and assuming that CLC divests its interest in SDA, LLC, within two years as planned, we conclude that the Bank may acquire CLC and hold, through CLC, a noncontrolling interest in Centron LP, provided:

1. CLC and its subsidiaries and interests (including Centron LP) will engage only in activities that are part of, or incidental to, the business of banking;

2. The Bank, through CLC, will have veto power over any activities and major decisions of CLC and its subsidiaries that are inconsistent with condition number one, or will withdraw from CLC or any subsidiary in the event that they engage in activities that are inconsistent with condition number one;

3. The Bank, through CLC, will account for its investment in Centron LP under the equity method of accounting; and

4. Centron LP and its subsidiaries 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 Carolina Ledesma, NBE, at (312) 360-8867 or Giovanna Cavallo, Attorney, at (312) 360-8805.

Sincerely,

/s/

Raymond Natter
Acting Chief Counsel