

## **Interpretive letter 2000-04 (June 6, 2000)**

**An Illinois state bank, state savings bank or state savings and loan association may exchange stock that it holds in an EFT network for stock in the corporation into which the network merged which entity was engaged in the same activities as the EFT network and which will be engaged in the same permissible activities after the merger.**

**Note: Unlike the normal practice of redacting all identifying information of the corporate entities, the names of the participants in the merger are mentioned in this letter because the merger is publicly known and to avoid misunderstanding by institutions presently holding stock in the EFT network.**

This is in response to your letter of April 19, 2000. You have sought written confirmation from the Office of Banks and Real Estate, (the "Agency") that state-chartered commercial banks, state-chartered savings bank and state-chartered savings and loan associations have the authority to exchange Cash Station Inc. common stock ("Cash Station") for the common stock of Concord EFS, Inc. ("Concord"). Cash Station and Concord have entered into an agreement whereby each share of Cash Station common stock will be converted into the right to receive shares of common stock issued by Concord. It is the Agency's position that the proposed exchange of Cash Station stock and the resulting minority equity investment in Concord are permissible for state-chartered savings banks and state-chartered savings and loan associations and for state-chartered commercial banks under both Section 3 and Section 5(11) of the Illinois Banking Act.<sup>1</sup> (the "Act")

### **Cash Station**

Your letter indicates that Cash Station is a Delaware corporation owned by shareholders comprised of state banks, state savings banks, state savings associations, federal savings associations, financial institution holding companies and an Illinois state credit union service organization. Cash Station operates an electronic funds transfer system ("EFT") that permits customers of shareholders and other customers of non-shareholder financial institutions to conduct banking transactions and point of sale transactions at retail locations.

### **Concord**

Concord is a bank holding company whose common stock is listed on the NASDAQ nation market system. Concord owns and operates a branded EFT network and processes transactions for numerous ATMs on a nationwide basis. In addition, Concord operates and services Point of Service terminals ("POS Terminals") and provides credit card, debit card and EBT gateway processing for both financial institution and merchant customers. Concord also provides numerous other services including authorization, settlement and funds transfer services, card production and issuance to financial institution customers, telephone banking and bill payment, payroll processing and ACH processing and payment services.

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<sup>1</sup> 205 ILCS 5/1 et. seq.

## Power of Illinois State Banks

Section 3 of the Act authorizes a state-chartered bank to conduct a general banking business.<sup>2</sup> The term “general banking business” has been interpreted to include activities, which are incidental and germane to carrying on a general banking business.<sup>3</sup> The Agency has previously taken the position that, subject to certain conditions, a minority equity investment that is incidental and germane to the business of banking is permitted.<sup>4</sup>

Pursuant to 38 Ill. Adm. Code, Section 320.20, the following factors are considered in determining whether an activity is incidental or germane to carrying on a general banking business:

1. Is the activity convenient or useful in connection with the performance of one of the
2. bank’s established activities pursuant to its express powers under the Illinois Banking act; Is the activity related to ordinary or traditional bank functions;
3. To what extent do other banks participate in this activity; and
4. Has the Board of Governors of the Federal Reserve found the activity appropriate for non-bank subsidiaries of a bank holding company.

The Agency concurs with your conclusion that each of the services to be offered by Concord, as described in your letter, are convenient and useful in connection with the performance of powers expressly authorized under the Act. These services are also related to ordinary traditional banking functions such as deposit taking and paying checks. Your letter indicates that state chartered banks are currently engaged in a number of these activities as members of the Cash Station EFT network. In addition, a review of OCC Interpretive letters indicates that national banks have received approval for each of these activities.<sup>5</sup> Lastly, the Board of Governors of the Federal Reserve has determined that each of the activities is appropriate for a subsidiary of a bank holding company.

Each of the requirements outlined in Agency Rule 320 have been satisfied. Therefore, it is the position of the Agency that Cash Station’s minority investment in Concord is part of the general business of banking.

Alternatively, Cash Station may rely upon the authority provided under Section 5(11) of the Act. That Section essentially allows state-chartered banks to do any act and to own, possess, and carry any asset permitted to national banks. The Office of the Comptroller of the Currency (the “OCC”) has recently concluded that national banks may make a minority equity investment in an electronic funds transfer network.<sup>6</sup>

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<sup>2</sup> 205 ILCS 5/3 (1998)

<sup>3</sup> Corbett v. Devon Bank, 299 N.E. 2d. 521, 529 (1973)

<sup>4</sup> Interpretive letter 96-6

<sup>5</sup> OCC Interpretive Letter No. 854 (February 25, 1999); OCC Interpretive Letter No. 718 ( March 14, 1996); OCC Conditional Approval No. 304 (March 5, 1999); OCC Conditional Approval No. 269 (January 13, 1998); OCC Interpretive Letter No. 771 (February 24, 1997); OCC Interpretive letter No. 732 (May 10, 1996); OCC Corporate Decision No 2000-01 (January 2, 2000; and OCC Interpretive Letter No. 875 (October 31, 1999)

<sup>6</sup> OCC Interpretive Letter No. 854 (February 25, 1999)

While state chartered banks may make a minority equity investment in the EFT network under both Section 3 and Section 5(11) of the Act, the investing banks must adhere to safe and sound banking practices when making that investment. Both the Agency and the OCC have previously conditioned the authority to make minority investments upon satisfaction of following four criteria:

1. The activity resulting from the minority investment must be limited to activities that are part of or incidental to the business of banking;
2. The investing bank must have the ability to prevent the investment enterprise from engaging in activities that would otherwise be prohibited;
3. The investing bank must have limited liability exposure; and
4. The investment must be convenient and useful to the bank in carrying out its general banking business.

This first criterion is similar to the requirements of Agency Rule 320, and has obviously been met. The second criterion requires the investing bank to be capable of preventing the investment enterprise from engaging in activities that are prohibited or in the alternative the bank must be able to withdraw its investment. Your letter indicates that the investing banks have the ability to withdraw their investment by sale of the equity securities. The Agency concurs with the position taken by the OCC that disposal of an equity interest by sale satisfies this second criterion. The third criterion provides that the investing bank's liability exposure must be limited. Since the proposed equity investment will be in corporate stock, the generally accepted principal of shareholder liability should apply. The last criterion requires that the proposed investment be convenient and useful to the investing bank and not a mere passive investment. This criterion is satisfied by the fact that customers of the shareholding banks will be able to conduct and perform banking and purchase transactions at a significantly larger number of ATM and POS devices.

### **Power of Illinois Savings Institutions**

An Illinois state chartered savings bank ("savings bank") or an Illinois state chartered savings and loan association ("savings association") that currently owns Cash Station common stock may exchange it for, and hold, common stock of Concord (resulting in a small minority equity investment) as part of the merger described in your letter. As described below, a savings bank may hold the stock because it may take any action that is incidental, convenient or useful to the accomplishment of powers afforded to a savings bank by the Savings Bank Act (SBA). Similarly, a savings association may hold the stock because an association has any power not prohibited by law which is reasonably incident to the express power conferred upon the association by the Illinois Savings and Loan Act of 1985. An additional source of authority for a savings bank or savings association to hold Concord common stock is the authority conferred by the SBA and the SLA respectively to act in parity with other depository institutions which would be permitted the investment.

### **Incidental Powers**

The incidental power provisions applicable to savings banks and savings associations are

similar and we believe have the same result. The Savings Bank Act (SBA) endows Illinois savings banks with "any power reasonably incidental, convenient or useful to the accomplishment of the powers conferred upon the savings bank by this [SBA] Act"<sup>7</sup> (hereinafter referred to as "incidental powers"). The Savings and Loan Act of 1985 (SLA) affords Illinois savings associations "any power not prohibited by law which is reasonably incidental to the accomplishment of the express powers conferred upon the association by this [SLA] Act."<sup>8</sup>

When considering whether an activity is within the scope of these incidental powers, the Agency addresses four factors:

1. Is the activity consistent with the purpose and function of a savings bank or savings association;
2. Does the activity facilitate the conduct of an activity authorized by the SBA or SLA;
3. Does the activity relate to the savings bank's or savings association's role as a financial intermediary; and
4. Does the activity enable the savings bank or savings association to remain competitive in the contemporary economy?

These factors may be given different weight depending on activity being considered and there may be circumstances under which not all factors must be answered in the affirmative. However, in every case, the Agency may restrict or prohibit activities to address safety and soundness concerns that it may have.

Based on the information in your letter, and pursuant to the incidental powers described above, a savings bank or savings association that currently owns Cash Station common stock may exchange for and hold common stock of Concord.

First, savings banks are intended to be a vital and geographically expansive system of financial institutions<sup>9</sup>. The ownership of Concord common stock permits savings banks to use modern technology to deliver services on both a local and global basis. The ownership of Concord common stock permits savings associations to use modern technology to deliver their services which is consistent with their purpose and function as modern, relevant thrift institutions.

Second, ownership of Concord stock by a savings bank is an efficient and convenient means to conduct authorized activities, namely: establishing, maintaining and operating electronic funds transfer terminals,<sup>10</sup> offering deposits accounts,<sup>11</sup> providing data processing services,<sup>12</sup> and providing home banking services.<sup>13</sup> Ownership of Concord stock by a savings association is an efficient and convenient means to conduct authorized activities, namely: establishing, maintaining and operating electronic funds transfer

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<sup>7</sup>2005 ILCS 205/1006(e).

<sup>8</sup>205 ILCS 105/1-8.

<sup>9</sup>205 ILCS 205/1002.

<sup>10</sup>Id. at 1008(a)(12).

<sup>11</sup>Id. at 1008(a) and 7002.

<sup>12</sup>Id. at 1008(a)(18).

<sup>13</sup>Id. at 1008(a)(19).

terminals,<sup>14</sup> offering deposits accounts,<sup>15</sup> providing data processing services,<sup>16</sup> and providing home banking services.<sup>17</sup>

Third, the activities in which Concord engages relates to the efficient flow of money and credit and thus relates to a savings bank's or savings association's role as a financial intermediary.

Fourth, ownership of Concord stock permits a savings bank or savings association to utilize electronic technology to deliver its services which is critical to remaining competitive.

A savings bank's or savings association's minority equity investment in Concord is, however, subject to four conditions:

1. The activity resulting from the minority investment must be limited to activities that are among or incidental to the powers granted by the relevant act (SBA or SLA);
2. The investment must be convenient and useful to the savings bank or savings association in carrying out its general business;
3. The savings bank or savings association must have limited liability exposure; and
4. The savings bank or savings association must be able to prevent the Concord from engaging in activities that would otherwise be prohibited or be able to withdraw its investment.

The first two conditions are satisfied as evidenced by the preceding discussion of incidental powers. The third condition regarding limited liability is also satisfied. The investment will be in corporate stock and the generally accepted principle of limited shareholder liability should apply. The fourth condition is also met; your letter states that an investing savings bank or savings association may withdraw its investment by sale of its shares stock.

### **Parity Authority**

The SBA provides parity authority for savings banks with respect to Illinois savings associations, federal associations and commercial banks. Section 1008(a)(25) grants savings banks the powers granted to Illinois savings associations under the SLA or to federal associations under federal law, subject to the regulations of the Commissioner.<sup>18</sup> Also the SBA permits savings banks to make any loan or investment or engage in any activity that an Illinois or federal association may make or engage in subject to the Commissioner's (and other limitations not relevant to your inquiry).<sup>19</sup> Finally, section 1008(a)(26) allows savings banks to offer any service or product which an Illinois state bank or national bank may offer, subject to the same

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<sup>14</sup>205 ILCS 105/1-6(m).

<sup>15</sup>Id. at 1-6(h), 1-9(a), 3-1, and 4-2.

<sup>16</sup>Id. at 1-6(c) and 1-8.

<sup>17</sup>Id. at 1-6(c) and 1-8.

<sup>18</sup>Id. at 1008(25).

<sup>19</sup>Id. at 6002(11).

limitations and restrictions applicable to the bank.<sup>20</sup> Thus, a savings bank may offer any bank service or product in any manner that a bank may.

Similarly, section 1-3(c) of the SLA grants Illinois state associations, subject to the Commissioner's regulations, all the powers possessed by an Illinois-based federal association under federal law.<sup>21</sup>

**Parity with Federal Associations.** Your letter states that federal associations may hold Concord common stock pursuant section 560.32 of Office of Thrift Supervision regulations pertaining to "pass-through" investments.<sup>22</sup> Also, in a subsequent conversation with OBRE staff, you stated that a senior OTS staff member agrees with your position on section 560.32. Our review of section 560.32, in light of the information in your letter, leads this agency to conclude also that that section would permit federal associations to hold Concord common stock. Therefore, the parity authority of sections 1008(a)(25) and 6002(11) of the SBA would allow savings bank to exchange for and hold common stock of Concord and the parity authority of section 1-3(c) of the SLA allows an Illinois savings association to exchange for and hold common stock of Concord.

**Parity with National Banks.** With regard to national banks, a May 15, 2000 letter of the Chief Counsel of the Office of the Comptroller of the Currency (OCC) concludes that national banks are permitted to exchange for and hold Concord common stock pursuant to the transaction described in your letter. In essence, the OCC letter finds that Concord is engaged in activities in which national banks may engage and that acquiring common stock of Concord is a reasonable and convenient manner to organize and perform those activities that is not otherwise prohibited by law. Therefore, pursuant to the parity authority provided in section 1008(a)(26) of the SBA, a savings bank may exchange for and hold common stock of Concord subject to the same conditions as national banks.

**Parity with Illinois State Banks.** Likewise, as explained above, because Illinois state banks may exchange for and hold Concord common stock by virtue of their incidental authority or their parity authority with national banks, therefore, a savings bank, under the authority of section 10008(a)(26) of the SBA, may exchange for and hold Concord's common stock.

For the reasons stated above, the Agency concludes that the proposed exchange of Cash Station shares and the resulting minority investment in Concord is permissible for Illinois state banks, state savings banks and state savings and loan associations. The proposed transaction will merely constitute a change of form in the investment for the current Cash Station shareholders.

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<sup>20</sup>Id. at 1008(a)(26).

<sup>21</sup>Id. at 1-3(c).

<sup>22</sup>12 C.F.R. 560.32.