Opinion no: O-95-4 Redacted version

November 22, 1995

"A"

Re: The Exchange/Electronic Data Systems Corporation Proposed Joint Venture

Dear "A":

I am writing to you in response to your request on behalf of The Exchange, an electronic funds transfer ("EFT") network in the northwest United States, to seek confirmation that Washington chartered commercial banks, trust companies, savings banks, savings and loan associations and credit unions have the authority to participate in a joint venture with Electronic Data Systems Corporation ("EDS") described below. For the reasons stated below, I find that participation in this joint venture is permissible for Washington commercial banks, trust companies, savings banks, savings and loan associations and credit unions. This opinion is given subject to the following:

1. That there are no material changes in the facts you presented and that you will advise me promptly if such a change occurs.

2. With respect to the Washington credit unions:

(a) federal law is not changed to further restrict the activities of state chartered credit unions; and

(b) until such time, 12 C.F.R. § 741.9(a)(3) is complied with to the extent applicable.

STATEMENT OF FACTS

You have presented the following facts to me:

The Exchange System Limited Partnership is a limited partnership established under Washington state law whose limited partners ("Owners") are 31 depository institutions, including several Washington chartered depository financial institutions. These state chartered institutions and their respective ownership interests in The Exchange are shown on Exhibit A. The general partner of The Exchange System Limited Partnership is a non profit corporation, The Exchange (corporation), also established under Washington state law. The members of The Exchange (corporation) are the depository institution limited partners of The Exchange System Limited Partnership. The Exchange System Limited Partnership and The Exchange (corporation) are referred to in this letter collectively as "The Exchange."

The Exchange currently is one of a number of the entities that provides automated teller machine ("ATM") and point of sale ("POS") and related services to depository institutions located primarily in the states of Washington, Oregon, Idaho, Alaska, and the Canadian provinces of British Columbia, Alberta, Manitoba and Saskatchewan.1 The Exchange operates a "switch" for ATM and POS transactions. That is, The Exchange receives information concerning a transaction to be effected by a holder of an ATM or debit card (bearing one of The Exchange's marks) at an ATM or POS terminal (that also bears one of The Exchange's marks) and transmits that information to the depository institution maintaining that cardholder's account. 2 Certain transaction information is transmitted by The Exchange to other ATM/POS networks (rather than directly to the depository institution maintaining the card holder's account) pursuant to so called "gateway" agreements between The Exchange and these other networks. 3 The Exchange then transmits back the authorization (or denial of authorization) for the transaction it has received from the card holder's depository institution. This entire process generally takes place in less than three seconds. The Exchange reports certain data about the transactions it processes to its Owners and members. The Exchange also provides the following ATM/POS related services to those of its Owners and members that choose to contract with The Exchange for such services. The Exchange provides to interested Owners and members, primarily through contractors, ATM maintenance services (e.g., ATM cleaning and repair, replenishment of cash, receipts and deposit envelopes). The Exchange also provides to interested Owners and members, through its relationships with suppliers, the plastic cards that these Owners and

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1 In addition to providing these services to the Owners, The Exchange also provides these services pursuant to services contracts to over 300 other depository institutions, which are referred to as "members" of The Exchange. The services provided to members are in all respects, including the prices charged for such services, identical to the services provided to the Owners; the only distinctions between Owners and members are the Owners' rights with respect to corporate governance and distributions of profit. Any insured (or deposit guaranteed) depository institution that is located in the states of Alaska, Idaho, Oregon or Washington, or the Canadian province of British Columbia, is eligible to become a member of The Exchange. Insured (and deposit guaranteed depository institutions located elsewhere may petition to become a member of The Exchange.

2 In most cases, The Exchange receives this information from a third party, such as the depository institution that owns the terminal or another third party data processor serving that depository institution. The Exchange, however, interfaces directly with approximately 10% of the ATM/POS terminals bearing an Exchange mark. Interfacing directly with the terminal is known as "driving" the terminal.

3 The Exchange also has gateway agreements with the major credit card systems, such as the Visa and MasterCard systems.

members issue to their customers. Finally, The Exchange also provides to interested Owners and members, again through its relationships with various suppliers, ATM/POS terminal supplies, such as ATM/POS signage and banners, ATM/POS receipts, ATM/POS ribbons, ATM/POS audit tapes and ATM/POS ink rolls.

The Joint Venture with EDS. It is proposed that the business of The Exchange will in essence be assumed by a joint venture between the Owners of The Exchange and EDS, the data processing company headquartered in Plano, Texas (the "Joint Venture"). As part of the Joint Venture, a new limited partnership will be formed under Washington state law (the "Joint Venture Partnership"). The Owners of The Exchange will acquire, in the aggregate, 50% of the limited partnership interests in the Joint Venture Partnership. EDS will acquire the remaining 50% of the limited partnership interests in the Joint Venture Partnership. The general partners of the Joint Venture Partnership will be The Exchange (corporation) (the "Exchange General Partner"), currently the general partner of The Exchange System Limited Partnership, and a wholly owned subsidiary of EDS (the "EDS General Partner"). Upon creation of the Joint Venture, The Exchange System Limited Partnership will be dissolved. Each depository institution that will own an interest in the Joint Venture will own its interest either directly or through a subsidiary of the depository institution.

The Exchange will contribute all of its marks, customer contracts, marketing agreements and related goodwill to the Joint Venture Partnership. The Exchange also will transfer almost all of its operating assets, such as hardware, software, office equipment and other fixed assets, to EDS, which will utilize these assets to provide services to the Joint Venture Partnership pursuant to the service bureau agreement discussed below. Those few operating assets not transferred to EDS will be contributed to the Joint Venture Partnership. EDS will contribute to the Joint Venture Partnership certain marks, as well as its ATM/POS processing contracts (and related goodwill) for its customers located in the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, New Mexico, Oregon, Nevada, Utah, Washington and Wyoming.4 (EDS also will agree that its division primarily responsible for its EFT transaction processing business will not under certain specified circumstances provide EFT transaction processing services to depository institutions located in these geographic areas, or the Canadian provinces of Alberta, British Columbia, Manitoba and Saskatchewan, except through the Joint Venture Partnership.) The assets to be contributed to the Joint Venture will be valued at fair market value, as determined in accordance with procedures mutually agreed to by The Exchange and EDS.5

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4 Except for one ATM in the lobby of the headquarters of The Exchange currently owned by The Exchange which will be transferred to EDS, there will be no change in the ownership of ATM or POS terminals as a result of the Joint Venture. It is not contemplated that the Joint Venture Partnership will own or lease any such terminals.

5 Certain computers recently purchased by The Exchange will be valued at book value and will be paid for by EDS in cash.

The services to be provided by the Joint Venture Partnership to its depository institution customers will be provided through EDS pursuant to a service bureau agreement between EDS and the Joint Venture Partnership (the "Service Bureau Agreement"). Under the Service Bureau Agreement, for example, EDS will be responsible for providing, in accordance with mutually agreed upon performance standards,6 all of the technology, facilities, supplies, backup centers and personnel necessary for the Joint Venture Partnership to service its customers.7 EDS will primary utilize The Exchange's existing processing center in Bellevue, Washington, which as discussed above will be contributed by The Exchange to EDS in connection with the formation of the Joint Venture.8 Further, the headquarters of the Joint Venture will remain in Bellevue. Virtually all of the former employees of The Exchange will be offered employment by EDS and will either report to the Joint Venture or to EDS.

Under the Service Bureau Agreement, EDS will be paid an amount equal to the costs incurred by EDS in providing these services to the Joint Venture Partnership, subject to certain caps. The non EDS limited partners of the Joint Venture Partnership (the "Exchange Partners") will have the right to require a review by outside auditors of EDS' charges relative to the "cost based" standards prescribed in the Service Bureau Agreement. EDS will be liable to the Exchange Partners in the event the outside auditors determine that EDS' charges to the Joint Venture Partnership exceed these cost based standards.

The general partners of the Joint Venture Partnership will exercise their responsibilities through a Joint Venture Partnership management board. The management board will consist of ten members appointed by the Exchange General Partner (the "Exchange Board Members") and up to ten members appointed by the EDS General Partner (the "EDS Board Members"). Notwithstanding the number of board members appointed by the Exchange General Partner or the EDS General Partner, the Exchange Board Members and the EDS Board Members will each collectively have one half of the voting power of the management board. The Chief Executive Officer of the Joint Venture Partnership will

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6 Specified remedies will be available to the Joint Venture Partnership in the event these performance standards are not met.

7 The Joint Venture Partnership will not have its own employees. EDS will offer employment to all of the employees of The Exchange, and these employees will be encouraged to become employees of EDS.

8 EDS' existing processing centers and The Exchange's current back
up center will serve as back
up centers with respect to the services to be provided by EDS under the Service Bureau Agreement.

be selected by the Exchange Board Members and approved by the EDS Board Members. For most matters to be determined by the management board, approval of 76% or more of the voting power of the board will be required. Each Exchange Board Member will have for these matters 5% of the voting power of the management board. Accordingly, more than half of thevotes of the Exchange Board Members (along with the votes of the EDS Board Members) will be required in connection with these matters. This is substantially the same as The Exchange board's current majority vote requirement, except that under the Joint Venture, the EDS Board Members (as well as the Exchange Board Members) will be able to veto actions of the Joint Venture Partnership. In addition, only the Exchange Board Members will vote on matters relating to the Service Bureau Agreement.

Certain matters will require 84% of the voting power of the board (i.e., the EDS Board Member's voting power and two thirds of the voting power of the Exchange Board Members). For these matters, rather than 5% voting power for each Exchange Board Member, the 50% of the management board's voting power allocated to the Exchange Board Members will be divided among the Exchange Board Members in proportion to their respective partnership interests in the Joint Venture Partnership. Examples of matters requiring such a supermajority vote include matters relating to pricing, business plans and new products and services (discussed in more detail below), advertising plans, Joint Venture Partnership management, office location, data center location, major lawsuits and capital calls (also discussed in more detail below).

Finally, certain decisions, such as the admission of a new partner, termination of the Joint Venture (except as indicated below), or amendments to the articles, bylaws or partnership agreement of the Joint Venture Partnership, will require a vote of 84% of the partnership interests.

Upon formation of the Joint Venture, The Exchange System Limited Partnership will dissolve and the limited partners will get equivalent limited partnership interests in the Joint Venture Partnership. The Owners of The Exchange will not be required to make any additional financial contribution in connection with the acquisition of the Joint Venture Partnership interests.

The partnership agreement of the Joint Venture Partnership will provide that the limited partners will not be liable for the debts or obligations of the Joint Venture Partnership. Although the Joint Venture Partnership will have the right to make capital calls on the limited partners, the Exchange Partners will be subject in this regard to an aggregate maximum of $6 million. Each of the Exchange Partners will be subject to an individual maximum capital call limit equal to its pro rata share of this $6 million aggregate

maximum. This is comparable to the capital call limitation that applies today to the Owners under The Exchange partnership agreement. At no time will any Exchange Partner's aggregate investment in the Joint Venture Partnership, including any potential capital calls to which that Exchange Partner could be subject, exceed 5% of its capital.

It is contemplated that, at least initially, the Joint Venture Partnership will engage in the same activities as those of The Exchange detailed above. As has been and is the case with The Exchange, the Joint Venture Partnership inevitably will over time explore the feasibility of offering new EFT and related products and services. It is anticipated that the Joint Venture Partnership would establish one or more advisory committees to study any possible new product or service, and to provide recommendations to the Joint Venture Partnership's board. As discussed above, a supermajority vote of 84% of the voting power of the board would be required to approve any such new product or service. For example, if the EDS Board Members, which will have 50% ofthe voting power of the board, propose a new product or service, more than 2/3 of the voting power of the Exchange Board Members, which hold the remaining 50% of the voting power, also must be voted in favor of the new product or service.

Although it is impossible to predict at this time what new products or services may in the future be considered by the Joint Venture Partnership, the partnership agreement of the Joint Venture Partnership will provide that the partnership will only engage in activities that have been approved for each of the types of depository institutions constituting the Exchange Partners, including national banks. The partnership agreement will further provide that any such new product or service will be provided in full compliance with all requirements applicable to the product or service, including for example requirements imposed by the OCC in connection with its approval of national banks to offer the product or service.

If notwithstanding the foregoing the Joint Venture Partnership were to determine to engage in an activity that is not permissible for one or more of the Exchange Partners, the partnership agreement will provide a mechanism for these Exchange Partners to withdraw from the Joint Venture Partnership, prior to the commencement by the Joint Venture Partnership of the activity in question. The interests of the withdrawing Exchange Partner(s) would be purchased by certain or all of the remaining Exchange Partners at fair market value with the proceeds provided to the withdrawing Exchange Partner(s).9 A withdrawing Exchange Partner will be permitted to receive from the Joint Venture Partnership, as a member rather than an owner, the (permissible for the Exchange Partner) services provided by the Joint Venture Partnership on the same terms and conditions as Exchange Partners.

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9 If an Exchange Partner withdraws for other reasons, that withdrawing Exchange Partner would receive a nominal amount for its interests.

The Joint Venture will be for a ten year term, with two ten year renewals unless either EDS or the Exchange Partners provides notice to the contrary at the end of the eighth year of a term. Either EDS or the Exchange Partners may terminate the Joint Venture early if it fails to meet certain specified financial objectives. Moreover, the Exchange Partners may terminate either the Service Bureau Agreement or the Joint Venture if EDS defaults under the Service Bureau Agreement. Provisions have been agreed to concerning the respective rights of the Exchange Partners and EDS regarding software, trade and service marks, contracts, staff, facilities space, processing services, fees and the like to assure that disruption to the Exchange Partners (and EDS) is minimized in the event of any such termination.

The partnership agreement of the Joint Venture Partnership will recognize that the partnership will be subject to the examination, supervision and regulation of the banking regulators with jurisdiction over the Exchange Partners, including this Department. Under the interagency EDP examination policy, EDS currently also is subject to examination by the federal banking regulators. We have recently reached an agreement with the Exchange to pay the examination fees charged the Division of Banks and Division of Credit Unions to Exchange members for examination of the Exchange. We assume that the Joint Venture will continue to pay such fees to these Divisions.

The Exchange believes that the Joint Venture will enable the Exchange Partners and the hundreds of other depository institutions that will receive services from the Joint Venture to achieve maximum benefit from a relationship with EDS. EDS' participation through an ownership interest in the Joint Venture Partnership, rather than for example as merely a third party provider of services to The Exchange, will provide a strong incentive for EDS to contribute its expertise, experience and resources to the benefit of the Exchange Partners and the other depository institution members of the Joint Venture Partnership. Through the "at cost" Service Bureau Agreement, the Exchange Partners and depository institutions that will receive services from the Joint Venture will benefit from the economies of scale that will result from the Joint Venture. Moreover, unlike The Exchange currently, the Joint Venture Partnership will not incur capital expenditures for hardware, which will be provided by EDS and development expenses for new technology will be shared. The Exchange employees will have greater career opportunities at the larger EDS. Finally, while enjoying all of these benefits, the Exchange Partners should, given their effective veto right and the other elements of the structure of the Joint Venture described above, retain effective control of the Joint Venture.

ANALYSIS

A. Authority of Washington Chartered Commercial Banks to Participate in Joint Venture
The analysis regarding commercial banks is similar to that with respect to other Washington chartered financial institutions and I will rely on parts of this analysis to support my conclusions with respect to those other institutions. Therefore, this part of the analysis is fairly lengthy.

Title 30 which governs Washington state chartered commercial banks does not specifically grant authority to such institutions to invest in the Joint Venture. However, a Washington chartered commercial bank has the following powers among others:

- all powers "necessary or convenient to effect its purposes" (RCW 30.08.140(13)
- "implied" powers (see RCW 30.04.215(1) and (3)
- the powers of a federally chartered bank as of August 31, 1994 (RCW 30.04.215(3)
- powers "closely related to the business of banking" as determined by the Federal Reserve System and Congress as of December 31, 1993 (RCW 30.04.215(1)

I find each of these powers provides authorization for Washington chartered commercial banks to invest in and participate in the Joint Venture10

1. Necessary or Convenient Powers and Implied Powers

A state chartered commercial bank has all powers "necessary or convenient to effect its purposes" (RCW 30.08.140(13) and implied powers (see RCW 30.04.215(1) and (3). While there is no direct Washington authority construing these powers with respect to Washington chartered commercial banks, the federal courts have construed similar language with respect to national banks, which in addition to specific enumerated powers, also have "all incidental powers as shall be necessary to carry on the business of banking". 12 USC §24. The federal courts have broadly construed this power and have recognized that the incidental powers clause is the basis for national banks offering new banking services. As the Moth Circuit states:

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10 Trust companies, in addition to trust powers, have the same powers as commercial banks. RCW 30.08.150(1). Therefore, trust companies have the same power as commercial banks to engage in the joint venture.

> . . . we believe the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking.

M & M Leasing Corp. v. Seattle First National Bank, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 463 U.S. 956 (1978). Further, the federal courts have given great deference to the administrator charged with supervision of these banks. *e.g. NationsBank v. Variable Annuity Life Ins. Co.* U.S. _, 115 S. Ct. 810 (1995). I believe the Washington courts would similarly interpret RCW 30.08.140(13), and RCW 30.04.215(1) and (3), and give deference to my construction of a Washington chartered commercial bank's powers. See RCW 30.04.030.

The proposed activities of the Joint Venture Limited Partnership involve the electronic transfer of funds. Such functions are central to the financial institution business of today and tomorrow. Over the last two decades, electronic signals are taking the place of paper for effecting the movement of money and this trend will undoubtedly continue11 . It involves obvious efficiencies of resources and convenience to customers. If banks are to survive in the 21st century, they must be encouraged to participate in activities which involve the electronic movement of funds. Further, they must be able to develop and offer new electronic financial products which involves a substantial cost. The sharing of this cost across a wider base by utilizing the large resources of EDS advances this purpose and places less of their capital at risk. This benefit is also achieved by removing the cost of the computer hardware from the venture and giving the venture the benefits of the economies of scale in its operations.

The desirability of encouraging financial institutions to participate in activities of this nature are reflected in the recent changes to the Washington Satellite Facilities Act, RCW Chap. 30.43. Prior to its amendment in 1994, the statute generally authorized Washington chartered institutions to offer "cash machine" services to share those services between different types of financial institutions in and out of the state. However, this grant of authority was subject to several restrictions. For example, for a Washington institution to offer services for an out-of-state institution's customers, there had to be reciprocity with that other state. *See e.g.* former RCW 30.43.045. The 1994 amendments repealed all of these detailed provisions and replaced them in their entirety with the following which is now the sole provision in the act:

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11 See e.g. the recent amendments to Article 4 of the Uniform Commercial Code which recognize the trend towards the "paperless" clearing of checks commonly called "check truncation". RCW 62A.4-110 (electronic presentment).

> The legislature finds that the establishment and operation of off premises electronic facilities, inside and outside the state of Washington, and the participation by financial institutions in arrangements for sharing of such facilities, facilitates the delivery of financial services to the citizens of the state of Washington. The term "off premises electronic facilities" includes without limitation, automated teller machines, cash dispensing machines, point sale terminals and merchant operated terminals. [Emphasis added.]

RCW 30.43.005. Based both on the language and my personal involvement in the amendment process, I find that the purpose of the change was to further enable and encourage, without the prior restrictions, the development of electronic funds transfer activities by Washington chartered financial institutions. I find that approval of this activity by commercial banks (and as stated below by Washington chartered savings banks, savings and loan associations and credit unions) advances this legislative goal.

The Satellite Facilities Act provides additional authority. Under prior RCW 30.43.030, commercial banks were expressly authorized to share electronic facilities with other commercial banks, savings banks, savings and loan associations and credit unions. As noted above, my reading of the changes to the Act were to liberalize any authority in the prior act. Therefore, I find that sharing is authorized by the Satellite Facilities Act. Also, RCW 30.04.215.(4) states that any bank permitted activity (other than taking deposits), may be performed by a corporation (or another entity if approved by me) which is owned in whole or in part by a bank. I find this authority applicable. I approve the use of a limited partnership in this case because, like a corporation, the limited partnership (as discussed elsewhere in this letter) shields the bank from unlimited liability.

Based on the foregoing, I find that the Joint Venture is permissible for Washington commercial banks pursuant to their authority to exercise necessary or convenient powers and implied powers.

2. Authority of National Banks to Enter into Joint Venture

A state chartered commercial bank has the powers of a federally chartered bank as of August 31, 1994. RCW 30.04.215(3). As recognized in the enclosed October 25, 1995 lever of the Office of the Comptroller of the Currency ("OCC"), which is the regulator of national banks, there is ample authority to conclude that National Banks had the authority to invest in the joint venture on August 31, 1994. The OCC is the administrator of national banks. It has in a variety of contexts permitted national banks to participate in

partnerships as limited partners and, through operating subsidiaries, as general partners.12 These

approvals have, in many cases, involved partnerships in which nonbanks also are partners.13

Indeed, in connection with The Exchange's proposal several years ago to enter into a partnership with certain nonbanking medical insurance companies to provide EFT related services, the OCC determined that the proposal was permissible for the national bank Owners of The Exchange because their liability would be limited, and the activities to be engaged in by the partnership were permissible for national banks.14 See OCC Interpretive Letter No. 419 (February 16, 1988) ("1988 Exchange Approval Letter"). The OCC explained in the 1988 Exchange Approval Letter that a national bank's direct participation as a limited partner in The Exchange Limited Partnership, and the bank's indirect participation through the nonprofit membership corporation, The Exchange (corporation), which is the general partner of The Exchange Limited Partnership, are permissible because in both situations the bank's liability is limited.

The OCC's analysis in the 1988 Exchange Approval Letter is directly applicable to the proposed Joint Venture with EDS. Under Washington state law, just as the liability of the Owners of The Exchange today is limited to their investment in The Exchange, the liability of the Exchange Partners with respect to the Joint Venture Partnership will be so limited. ROW 25.10.190. Further, just as the OCC recognized in the 1988 Exchange Approval Letter that a national bank may act as a general partner through a corporation because the corporation shields the bank from liability in excess of the bank's investment, under Washington state law, The Exchange (corporation) so limits the liability of its members. Faith Mission v. Christian Evangelical Church, 55 WA2d 364, 347 P.2d 1059(1960); Meikle v. Wenatchee North Central Fruit

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12 See e.g., OCC Interpretive Letter No.289 (May 15, 1984) (national banks may act as limited partners and, through operating subsidiaries, as general partners); and OCC approvals cited in the following footnote.

13 See e.g., OCC Interpretive Letter No. 381 (May 5, 1987) (national bank operating subsidiary may participate in general partnership with, among other general partners, an Automated Data Processing, Inc. subsidiary and a Southland Corporation subsidiary); OCC Interpretive Letter No.516 (July 12, 1990) (national bank operating subsidiary may participate as general partner with four other general partners that are subsidiaries or affiliates of investment banking securities firms); Letter of Vernon E. Fasbender, Director for Analysis, December 6, 1990 (unpublished) (national bank operating subsidiary may participate in general partnership with subsidiary of International Business Machines); OCC Interpretive Letter No.622 (April 9, 1993) (national bank operating subsidiary may participate in general partnership with Dean Witter subsidiary); OCC Interpretive Letter No.625 (July 1, 1993) (national bank operating subsidiary may participate in general partnership with Liberty Mutual Insurance Company subsidiary).

14 That partnership, called “EXCLAIM,” is no longer in existence.

Distributors, 129 Wash. 619, 225 P. 819 (1924). The Washington Limited Partnership Act under which tile Joint Venture Partnership will be formed specifically recognizes that tile limited

partners of a partnership also may be owners of a general partner of that partnership. RCW 25.10.190(2)(a).15

The OCC has issued a number of interpretive letters permitting national banks, either on their own or through partnerships with other depository institutions or non depository institution entities16, to provide the types of ATM and POS and related services contemplated for She Joint Venture. Each of the activities in which The Exchange currency engages, and in which the Joint Venture Partnership will at least initially engage, has been approved for national banks.17 For example, in OCC Interpretive Letter No. 289 (May 15, 1984),the OCC permitted a national bank operating subsidiary to enter into a joint venture to establish a shared ATM network which would provide EFT services and related data processing. See also Letter of Robert B. Serino, Deputy Chief Counsel, November 9, 1992 (unpublished) (national banks may operate an ATM/POS network); Letter of Carol Eve Robbins, Senior Attorney, February 23, 1994 (unpublished) (national banks may purchase stock of for profit corporation successor of merger of two EFT networks); and OCC Interpretive Letter No. 381 (May 5, 1987) (national bank operating subsidiary authorized to become general partner in a partnership that would provide computer processing and related services, telecommunications links

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15 The OCC has determined that national banks are authorized to own interests in a nonprofit corporation, such as The Exchange (corporation), where, as discussed above, the interests are not being acquired for speculative purposes and the investment is intended to facilitate an otherwise permissible activity. See, e.g., OCC Interpretive Letter No.664 (May 2,1995); Letter of Robert B. Serino, Deputy Chief Counsel, November 9,1992 (unpublished); OCC Interpretive Letter No.554 (May 7,1990); 1988 Exchange Approval Letter.

16 OCC Interpretive Letter No.381, OCC Interpretive Letter No.346 and the Letter of Vernon E. Fasbender discussed below, for example, each involve an operating subsidiary of a national bank participating in a general partnership with one or more subsidiaries of non depository institutions.

17 while it is possible that the Joint Venture Partnership may determine in the future to engage in new activities, as indicated above, the Joint Venture Partnership will engage in such additional activities only to the extent that they have been approved for national barks, and in accordance with all applicable requirements. Moreover, in the event that notwithstanding the foregoing the Joint venture Partnership determines to engage in an activity that is not permissible for those Exchange Partners that are national banks, those Exchange Partners will be afforded the opportunity to sell their ownership in the Joint venture prior to the start of the new activity in question. A similar rule applies to state chartered institutions.

and other support services for an ATM network). The OCC also has expressly determined that operating a central electronic switch to support ATM networks (OCC Interpretive Letter No. 382 (May 5, 1987)) and providing electronic gateway services (OCC Interpretive Letter No. 346 (July

31, 1985)) are permissible activities for national banks. Additional ATM network support services considered and approved by the OCC include issuance of ATM cards and terminal servicing and maintenance. See OCC No-Objection Letter No. 87-11 (November 30, 1987).18

Based on the foregoing, including the OCC's October 25, 1995 letter approving national banks' participation in the Joint Venture, I find that participation in the Joint Venture is permissible for Washington commercial banks on the grounds that it is within the powers of a federally chartered bank as of August 31, 1994.

3. Powers Closely Related to the Business of Banking

State chartered commercial banks have the powers "closely related to the business of banking" as determined by the Federal Reserve System and Congress as of December 31, 1993. RCW 30.04.215(1). It is well settled that investment in a joint venture that engages in EFT activities is "closely related to the business of banking" (e.g. *Bank One et al*, 81 Fed. Res. Bull. 492 (1995); *The Bank of New York et al*, 80 Fed. Res. Bull. 1107 (1994); *Sovran Financial Corporation*, 72 Fed. Res. Bull. 347 (1986) and therefore such investment is permissible for Washington commercial banks.

B. Washington Chartered Savings Banks

Washington chartered savings banks have the following powers:

- implied powers (RCW 32.08.142)
- the power to invest as specified in RCW Chapter 32.20 and "not otherwise" (RCW 32.20.020 enacted 1955)(there is no express power to invest in EDS/Exchange
- "notwithstanding" other law, a savings bank has the powers and authorities of a federally chartered savings bank (RCW 32.08.142 and 146) (last amended in 1994). However, to exercise powers that a federal savings bank acquired after July 28, 1985 requires my approval

18 In addition to these OCC precedents directly applicable to or services, the OCC also has permitted national banks more generally to utilize data processing equipment and technology to perform for itself and others all services that are expressly or incidentally authorized f or net tonal banks. See 12 C.F.R. § 7.3500. Under this interpretive ruling, the OCC has permitted national banks to sell computer software and related hardware to other financial institutions in various contexts. See Letter of Vernon E. Fasbender, Director for Analysis, December 6, 1990 (unpublished) and letters cited therein.

For the same reasons applicable to commercial banks, the implied powers of a Washington chartered savings bank would include participation in the EDS/Exchange Joint Venture.

Additionally, the former RCW 30.43.040 from the Satellite Facilities Act expressly authorized sharing of facilities and ownership by a savings bank (and by Washington savings and loan and credit unions) of an entity through which such sharing takes place. As previously discussed with respect to commercial banks, the repeal of this section from the Act did not restrict but rather expanded the authority of Washington chartered financial institutions in this area.

Further, as discussed below, participation in the Joint Venture is permissible for federal savings banks, and therefore, is permissible for state savings banks under RCW32.08.142 and 146.

Authority of Federally Chartered Savings Associations to Participate in Joint Venture - Federal savings banks, like federal savings and loan associations are regulated by the Office of Thrift Administration ("OTS"). In connection with The Exchange's "Exclaim" joint venture discussed above, the OTS' predecessor, the Federal Home Loan Bank Board (the "FHLBB") determined that the joint venture was permissible for the federal savings association Owners of The Exchange because federal savings associations may invest in limited partnerships that engage solely in activities permissible for federal savings associations. See Letter of Jack D. Smith, Deputy General Counsel, dated August 1, 1988 (the"FHLBB 1988 Exchange Approval Letter").19 The FHLBB 1988 Exchange Approval Letter also recognized the involvement of federal savings associations as general partner in The Exchange through the associations' membership in The Exchange (corporation), a nonprofit corporation.20

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19 See also Memorandum re Regulation of Community Development Investments, 93/CS 09 (October 15, 1993) (permissible investment in limited partnership); Memorandum 79a, Office of Examinations and Supervision, FHLBB, re Indirect Investments in Limited Partnerships (June 10,1986).

20 See also Op. Chief Counsel (November 23,1992) and references cited therein (Both OCC and FHLBB permit investment in for profit, as well as nonprofit, corporations where the predominant purpose of the investment is to facilitate participation in an otherwise permissible activity and not for speculative investment in stock).

As discussed above, the structure proposed for the Joint Venture is virtually identical to that approved by the FHLBB in the FHLBB 1988 Exchange Approval Letter. As in the FHLBB 1988 Exchange Approval Letter, The Exchange's Owners will participate directly in the Joint Venture Partnership as limited partners, and indirectly through a nonprofit membership corporation

general partner, The Exchange (corporation). As in the FHLBB 1988 Exchange Approval Letter, one or more other partners will be a nondepository institution (medical insurance companies in the FHLBB 1988 Exchange Approval Letter and EDS in the Joint Venture).21

As noted above, just as the liability of the Owners of The Exchange today is limited to their investment in The Exchange, the liability of the Exchange Partners with respect to the Joint Venture Partnership will be so limited. Further, as also noted above, (1) the Exchange Partners' liability arising from their interests in the general partner, The Exchange (corporation) the Exchange Partners' will be limited to their investment and (2) the Washington Limited Partnership Act under which the Joint Venture Partnership will be formed specifically recognizes that the limited partners of a partnership also may be owners of a general partner of that partnership.

Generally, in determining whether a particular investment in an entity is permissible for federal savings associations, the OTS has considered the following factors: (1) whether the activities of the entity are limited to activities that the investing federal savings association could engage in directly; (2) whether the services provided by the entity are of a type that are rendered more effective or efficient when several institutions join together; (3) whether ownership of the entity is limited to users of the services provided by the entity; (4) whether there are transfer and redemption restrictions that make it unlikely that the federal savings association investor could ever resell its interests in the entity at a significant gain; and (5) whether the amount of the proposed investment, at the time the investment is made, is no greater than reasonably necessary to meet the legitimate capital needs of the entity and is roughly proportionate to the investment made by other similarly situated participating institutions. See, Op. OTS Chief Counsel, November 23, 1992 (the "Chief Counsel Letter") and citations therein.

The activities that are contemplated, at least initially, for the Joint Venture Partnership are permissible for federal savings associations. As indicated above, it is anticipated that the initial activities of the Joint Venture Partnership will be the same as those activities in which The Exchange currently engages as described above. The OTS' remote service unit

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21 As discussed above, the Office of the Comptroller of the Currency ("OCC") also has long recognized that a national bank may participate as a limited partner, and an operating subsidiary of a national bank may participate as a general partner, in a partnership in which nonbanks also are partners.

("RSU") regulation (which defines RSUs to include ATM and POS terminals) specifically authorizes federal savings associations to engage in and participate with others in ATM/POS operations.22 The OTS has determined that federal savings associations may establish, participate in and operate an ATM/POS network, including operating a 'switch" that ties together all the ATMs in the network. Chief Counsel Letter. See also, Letter of Angelo Vigna, Regional

Director, April 13, 1994 (federally chartered savings association may under the incidental powers doctrine invest in for-profit corporation to be formed from the merger of two EFT systems.23

The OTS also previously has recognized that the EFT services which the Joint Venture will provide are of a type that are rendered more effectively or efficiently when several institutions join together. 12 C.F.R. § 545.141(b); Chief Counsel Letter. Indeed, as indicated above, the economies of scale that will result from the Joint Venture is one of the principal motivations for creating the Joint Venture.

Each of the Exchange Partners will be required to utilize the services of the Joint Venture. The fact that depository institutions could obtain services from the Joint Venture Partnership without becoming an Exchange Partner has not been considered a disqualifying factor since ownership interests in the Joint Venture carry other important advantages, such as the ability to influence the management of the Joint Venture Partnership. Chief Counsel Letter.

As indicated above, if an Exchange Partner unilaterally determines to withdraw from the Joint Venture, it will be required to sell its interests in the Joint Venture to certain or all of the remaining Exchange Partners. Unless the decision to withdraw from the Joint Venture resulted from a determination of the Joint Venture Partnership to engage in an activity impermissible for the withdrawing Exchange Partner, the withdrawing Exchange Partner would receive only a nominal amount for its interests. Accordingly, except in the context of a decision by the Joint Venture Partnership to engage in an activity impermissible for the Exchange Partner, the Exchange Partner could not unilaterally determine to sell its interests in the Joint Venture at a significant gain.

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22 12 C.F.R. § 545.141.

23 In addition to these OTS precedents directly applicable to EFT services, the OTS also has permitted federal savings associations more generally to engage in any permissible activity or service by using data processing equipment or technology, and to provide data processing and data transmission services to other depository institutions. 12 C FR. § 545.138. See also Memorandum re Participation by Federal Savings Associations in Data Processing Offices, 93/CS-12 (December 13, 1993).

Finally, as indicated above, The Exchange Owners will not be required to make any additional financial contribution in connection with the acquisition of their interests in the Joint Venture. Moreover, the extent to which the Joint Venture Partnership can make a capital call on an Exchange Partner will be the same as The Exchange's current authority to make a capital call on that Exchange Partner. Accordingly, the amount of a federal savings association's potential investment in the Joint Venture will not exceed its existing financial contribution and

commitment to The Exchange. Moreover, the amount of any investment by a federal savings association in the Joint Venture will, at the time the investment is made, be no greater than reasonably necessary to meet the legitimate capital needs of the Joint Venture, and will be roughly proportionate to the investment made by other similarly situated Exchange Partners.

You have informed me that The Exchange has met with the OTS staff regarding the authority of federal associations to enter into the Joint Venture, that a written request for written confirmation from the OTS of the authority of federal savings associations to enter into the Joint Venture has been made, and that you anticipate that such OTS written confirmation will be shortly forthcoming. For the foregoing reasons, assuming this OTS written confirmation is provided, I conclude that federal savings associations have the authority to participate in the Joint Venture.

Findings With Respect to Making this Investment

I must make certain findings for a Washington savings bank to exercise the powers of a federal savings association acquired after July 28, 1985. Much of the authority of federal associations to engage in this type of investment is after this date and therefore, there is a question whether the federal associations had this authority prior to July 28, 1985. Assuming for purposes of discussion, that they did not, I must reach the following findings:

- that exercising this power will serve the convenience and advantage of depositors and borrowers; and

- it will maintain the fairness or competition and parity between state chartered savings banks and federal savings banks.

RCW 32.08.146.

For similar reasons as those discussed with respect to commercial banks, I find that both requirements are met. As I previously noted, offering electronic funds transfer services is central to the financial institution industry today and a critical service for the customers of such institutions. The importance of these services is highlighted by the changes to the Satellite Facilities Act discussed above. Further participation in the Joint Venture is

important to Washington chartered savings banks because of the economies of scale that will be achieved, and the savings in capital expenditures for equipment and research and development. Further, the authority of federal savings associations to engage in this business makes it a competitive necessity for their state chartered counterparts to have this authority.

Based on the foregoing, I find that participation in the Joint Venture is permissible for

Washington savings banks.

C. Washington Chartered Savings and Loan Associations

Washington chartered savings and loan associations ("S&Ls") have the following authority among others:

- all “incidental powers” as may be necessary to carry out its business (RCW 33.12.010(25)
- “notwithstanding” any other law, all powers of a federal association as of December31, 1993 (RCW33.12.012)

For similar reasons to those stated with respect to Washington chartered commercial banks and savings banks, I find that investment in the Venture is within the incidental powers of a Washington chartered S&L. I also note the discussion above of former RCW 30.43.040 which is equally applicable to Washington S&Ls.

The discussion of the powers of federal savings associations with respect to state savings banks is equally applicable to Washington savings and loans except that since most of the authority predates December 31, 1993, I find that federal savings associations had such powers as of that date and no further findings are necessary. Therefore, I hold that Washington chartered S&Ls have the authority to enter in the EDS/Exchange Joint Venture.

Based on the foregoing I find that Washington chartered S&Ls have the authority to participate in the Joint Venture.

D. Washington Chartered Credit Unions

Washington chartered credit unions are governed by RCW Chap. 31.12 and have the following powers among others:

- those incidental powers "as are necessary or requisite to enable it to carry on effectively the business for which it is incorporated (RCW 31.12.125)

- authority to invest in an "organization" whose ownership or membership is "confined primarily" to credit unions and whose purpose is to service the credit union industry (a "CUSO") (RCW 31.12.425(h);

- the powers of a federal credit union (RCW 31.12.136).

- authority to invest in "other investments" authorized by the Director (RCW 31.12.425(j)

1. Incidental Powers

For similar reasons to those stated with respect to Washington chartered commercial banks, savings banks, and S&Ls, I find that investment in the Joint Venture is within the incidental powers of a Washington chartered credit union. Again, I particularly note the discussion above concerning former RCW 30.43.040 which is equally applicable to Washington credit unions. The ability of Washington credit unions to participate in the EDS/Joint Venture is particularly important if they are to be able to continue as an active and dynamic alternative to other forms of financial institutions. Credit union size and resources are generally more limited than other financial institutions. Therefore their ability to develop and offer on their own electronic services is also limited. It is only by participating in an organization like the Joint Venture that they can be fully competitive in offering these services to their members.24

2. CUSOs

You have informed me that a majority of the customers of The Exchange today are credit unions and that at least initially, a majority of the customers of the joint venture will be credit unions (although they will not represent a majority of the volume). While the word "primarily" is not defined in RCW 31.12.425(h), an organization whose credit union customers comprise the majority may be said to be an organization whose membership is primarily credit unions and whose purpose is to service the credit union industry for purposes of RCW 31.12.425(h). However, it does no appear that membership or ownership of the Joint Venture Partnership is so"confined" by its organic documents. Accordingly, the Joint Venture Partnership would not meet the test for a CUSO under RCW 31.12.425(h).

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24 For these same reasons, I find that the current investment of the Washington credit unions in The Exchange is permitted to the extent there is any question.

3. Power of Federal Credit Unions.

RCW 31.12.136 grants Washington credit unions the powers of a federal credit union. You have advised me that there are outstanding issues regarding whether a federal credit union may become an owner of the Joint Venture. Therefore, until this is resolved in favor of ownership, RCW 31.12.136 does not provide clear authority for Washington chartered credit unions to

invest in the Joint Venture.25

4. Other Investments Approved by Me.

RCW 31.12.425(j) permits a Washington credit union to invest in "other investments" authorized by me. I do not believe it is necessary to rely on this authority to enable Washington credit unions to participate in the joint venture since there are other grounds for finding such authorization. However, in case there is any question, you have asked that I treat your request for an opinion as a joint application by the Washington credit union owners of The Exchange for authority under WAC Chap. 419-36 to participate in the Joint Venture.

As discussed above, there are questions about the authority of federal credit unions to invest in the Joint Venture. Therefore, any application would have to be based on WAC 419-050 which covers investment practices not previously permitted to any credit union. This section requires that to grant the application, I must find that (1) the proposed investment is consistent with Washington law and (2) it would be a sound and prudent practice for the applicant credit union.

As discussed above, such an investment was expressly permitted under the prior version of the Satellite Facilities Act and in my opinion, the changes to that Act do nothing to undermine this conclusion. As also noted above, participation in the Joint Venture is necessary for the competitive health of credit unions, it will save capital investment and does not require any

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25 As you have indicated, current federal law does not prohibit the states from authorizing powers to state chartered credit unions that are prohibited to federal credit unions. Although there is legislation pending before Congress which would impose some restrictions on the powers of state chartered credit unions, S. 883, until such legislation is passed, I do not believe it is appropriate to place Washington credit unions at a competitive disadvantage. Participation in such a joint venture is important to their ability to compete with other financial institutions. I do note, however, that under federal law, a state credit union that makes an investment that is impermissible for a federal credit union (to the extent that investment is permissible under applicable state law) must set aside special reserves. 12 CUR. § 741.9(a)(3).

further capital investment above that which was invested in The Exchange (and to which the credit union's liability is limited). Therefore, I find it would be prudent practice for the state credit unions to invest in the Joint Venture.

I trust this opinion has been responsive to your inquiry. If you have any questions, please contact me.

Very truly yours,

John L. Bley
Director