



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Conditional Approval #435
January 2001

December 18, 2000

Mr. Robert S. Shaw, Jr.
Executive Vice President and
Chief Financial Officer
Enterprise National Bank
P.O. Box 150
Memphis, Tennessee 38101

Re: Application of Enterprise National Bank, Memphis, Tennessee, to Acquire an Operating
Subsidiary to Provide Employee Outsourcing and Other Human Resources Services --
Application Control No. 2000-SE-08-058

Dear Mr. Shaw:

This is in response to the application filed by Enterprise National Bank, Memphis, Tennessee ("the Bank"), pursuant to 12 C.F.R. § 5.34 to establish an operating subsidiary that will purchase all of the assets of Select Systems, Inc., ("Select Systems"), a professional employment organization. Select Systems provides payroll processing, human resources administration, employee benefits administration, compliance administration, insurance-related administrative services, and safety and risk management services to small- and medium-sized businesses throughout the southern states. The acquisition of Select Services will enable the Bank to expand the products and services that it can provide to small business customers. For the reasons given below, we conclude that the activities of the proposed operating subsidiary are permissible, and approve the Bank's application.

I. Background

Select Systems is a Tennessee corporation with its principal places of business in Memphis, Tennessee and Selmer, Tennessee. The back office services of payroll processing, acquisition of

workers compensation and health insurance, safety and risk management, and human resources administration occur in Selmer. All other services are conducted currently through the Memphis office. Upon the consummation of the transaction, all services will be performed in the Memphis office and the Selmer office will be closed.

In the proposed transaction, the Bank will acquire all of the assets of Select Systems, including client contracts, furniture and equipment, rights to the name "Select Systems," and all personnel files, for cash. The Bank will transfer these assets to a wholly owned subsidiary that will perform the activities of Select Systems. The Memphis staff of Select Systems will become employees of the new subsidiary, and the Bank will hire additional personnel to perform the back room duties currently performed in Selmer, Tennessee. The Bank will obtain a full range of insurance to cover the activities of Select Systems, including workers compensation insurance, health insurance, general liability insurance, property insurance and employment practices insurance.

II. Analysis

National banks 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). The Bank's new subsidiary, Select Systems, will engage in well-recognized banking activities and provide services related thereto. The OCC has previously approved the acquisition of a professional employment organization as an operating subsidiary of a national bank. The activities approved in that application, which are very similar to those proposed in this transaction, were found to be legally permissible for national banks. Conditional Approval No. 384 (April 25, 2000).

1. Employee Leasing

Select Systems provides its services by acting as the co-employer of its customers' workers. By combining the employees of its clients, Select Systems is able to offer benefits and a higher level of expertise than smaller companies would typically be able to provide. The combined employee base will allow Select Systems to purchase benefits for its clients at a lower price than the clients could purchase them individually. This will help the clients hire qualified employees in a very tight labor market.

Select Systems is the employer of record for federal, state and local income tax purposes, although the client directs the day-to-day activities of the employees. This co-employer relationship subjects Select Systems to certain risks. For instance, clients must pay Select Systems fees sufficient to cover wages, benefits, and payroll taxes of employees working at that client's work site. If a client were to default on a payment or suddenly go out of business Select Systems, as the legal employer, would still be obligated to make these payments. Although Select Systems' contract with its clients requires clients to be responsible for workplace safety and other labor law requirements, as the legal employer, Select Systems could be exposed to liability for these matters.

Select Systems has engaged in employee leasing since 1995 and takes a number of measures to mitigate these risks. It carefully investigates potential clients, including performing a credit check and investigating any past history of EEO claims or labor law violations. It may require personal financial guarantees from business owners. Select Systems does not extend credit to its clients. It requires payment from clients prior to the release of payroll checks to employees, and those with poor credit ratings are required to pay with confirmed funds, such as a wire transfer or cashier's check. Select Systems requires clients to indemnify it for any employment practices violations at client work sites, and maintains its own employment practices liability insurance to cover any potential liability in this area, as well.

Under 12 U.S.C. § 24 (Seventh), national banks have the authority to enter into dual or shared employment arrangements that facilitate their permissible activities, and the OCC has approved such arrangements with both banking and nonbanking entities on many occasions. *See e.g.*, 12 C.F.R. § 7.3001; Corporate Decision No. 96-37, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-100 (July 18, 1996); Conditional Approval No. 208 (June 28, 1996); Interpretive Letter No. 406, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,630 (August 4, 1987). As discussed below, all of Select Systems' activities are legally permissible for national banks. Accordingly, the co-employment aspect of Select Systems' operations is also legally permissible.

2. Payroll Processing

Select Systems will provide payroll administration and payroll processing, including issuance of payroll checks, payment and reporting of federal, state and local payroll taxes, payment of federal and state unemployment taxes, W-2 preparation, and management of reports. The OCC has long recognized that providing payroll services to customers is incidental to the business of banking. Twelve C.F.R. § 7.1011 (national bank acting as payroll issuer) permits national banks to disburse to an employee of a bank customer payroll funds deposited with the bank by that customer. Twelve C.F.R. § 7.1019 authorizes a national bank to "perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver." The OCC has approved the offering of electronically based services, such as payroll services, as a permissible activity for national banks within their ability to offer electronic data processing services. Interpretive Letter No. 653, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,601 (December 22, 1994) (informational and payments interface).

A national bank may also provide billing services and accounts receivable services for itself and others, including providing the same through automated means. Interpretive Letter No. 419, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,640 (February 16, 1988). Finally, national banks have long been authorized to engage in data processing services that are related to funds transfer and cash management. *Id.*; Interpretive Letter No. 611, *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,449 (November 23, 1992).

3. Employee Benefits Administration and Management and Human Resources Administration

Select Systems will provide benefits to co-employees, including health care coverage, dental and vision coverage, a 401(k) retirement plan, an Internal Revenue Code Section 125 pre-tax plan, and a savings plan. Select Systems will also provide human resources administration for its clients, including employee file maintenance, personnel administration, forms, policy manuals, employee handbooks, telephone and on-site expertise, and other human resources management.

It is well established that national banks and their operating subsidiaries may establish and operate benefit plans for their employees as a logical and necessary outgrowth of the power to employ officers and other employees. *See* 12 C.F.R. § 7.2011 (compensation plans); Interpretive Letter No. 878, *reprinted in* [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-375 (December 22, 1999) (nonqualified employee deferred compensation plan).

The human resources administration services provided by Select Systems are incidental to and a part of the payroll processing and record keeping services, discussed earlier, and the employee benefits services also provided by Select Systems. These services are permissible for a national bank operating subsidiary when provided to customers in connection with, and as a part of, other permissible employee benefit related services. *See* Corporate Decision No. 98-51, (November 30, 1998).

4. Compliance Administration and Safety Risk Management

Select Systems will be responsible for employee compliance issues, including ERISA, Internal Revenue Service Section 125, COBRA administrative requirements with respect to health benefit plans, and Internal Revenue Service requirements with respect to payroll and withholding. The earlier discussion of the permissibility of human resources administrative and record keeping services is equally applicable to the compliance services provided by Select Systems. Compliance with applicable federal regulations is an inherent part of any payroll processing or employee benefits administration service. *See* Corporate Decision No. 98-13 (February 9, 1998) and Corporate Decision No. 98-51, *supra*.

5. Insurance-Related Administrative Services

Select Systems will provide workers' compensation insurance and group health insurance for its clients. Select Systems will not sell any insurance products to the clients, as agent.¹ Rather, it will purchase the workers' compensation and health insurance as policyholder. Select Systems will also provide a safety program designed to minimize on-the-job accidents and reduce expenses. Select Systems will assist with claims reporting and processing.

¹ Select Systems will be the policyholder for the workers compensation and health insurance products. Because Select Systems is an employer of record, it is purchasing insurance on its own employees, and it is well-established that national banks and their operating subsidiaries may purchase insurance for their business needs. *See* OCC Bulletin 2000-23 (July 20, 2000).

The OCC has determined that a wide range of insurance-related administrative services are authorized for a national bank or its operating subsidiary. It is well established that national banks may provide billing, collection and claims processing services as an activity incidental to the express authority to engage in processing payment instruments. *See* Interpretive Letter No. 712, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. ¶ 81,027 (February 29, 1996); Interpretive Letter No. 718, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,033 (March 14, 1996). Billing, collection and claims processing services may include collecting and processing insurance premiums and processing insurance claims. *See* Corporate Decision No. 98-13, *supra*. Handling medical and insurance data in connection with these activities is also authorized. *See* Conditional Approval No. 282 (July 31, 1998).

III. CONCLUSION

Based on the foregoing, the Bank's application to acquire Select Systems to provide the services described above is approved, subject to the condition that Select Systems at all times will have in force employment practices liability insurance to cover potential liability for workplace safety, employment law, and other liability in connection with the co-employees. Please be advised that the above condition of this approval shall be deemed to be a "condition 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(b)(1).

If you have any questions, please contact Louis Gittleman, Senior Bank Structure Analyst, Southeastern District, at (404) 588-4525, or Brenda Curry, Senior Counsel in the Southeastern District Office, at (404) 588-4520.

Sincerely,

-signed-

Steven J. Weiss
Deputy Comptroller for Licensing