Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

April 18, 2006

The Honorable Henry A. Waxman
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Waxman:

Thank you for allowing me the opportunity to address your concerns, expressed in your letter of March 21, 2006, regarding three recent interpretive letters issued by the OCC. I would like to assure you that the letters to which you refer do not enable national banks to get into the real estate investment or development business.[1] Moreover, we fully appreciate the constraints the Gramm-Leach-Bliley Act ("GLBA") placed on the ability of national banks' financial subsidiaries to conduct such activities. Finally, because of the substantial limitations on the ability of national banks to deal in real estate, these particular interpretations do not undermine the fundamental separation of banking and commerce that distinguishes our nation's banking system.

You are absolutely correct that the national banking laws prohibit national banks from purchasing, holding, and conveying real estate except in certain specific circumstances. The statutory authority of national banks to invest in real estate, both before and since GLBA was enacted, has been and continues to be subject to very substantial limitations and constraints. This limited authority does, however, enable national banks to take direct and indirect interests in real estate in connection with conducting their own banking business. Over the past century, the courts and the OCC have interpreted this limited authority to permit—or prohibit—particular types of activities, based on particular facts. This limited authority, tied to a bank's own banking operations, is vastly different from engaging in the real estate development business. It is also vastly different from the widespread and speculative equity investing and unsound commercial lending that you noted in the report by the Federal Deposit Insurance Corporation on the causes of the savings and loan crisis of the 1980's ("FDIC Report").[2]

The letters that prompted your inquiry deal only with limited situations where holding an interest in real estate is permissible for national banks. The letters dealing with permissible "bank

[1] Nor do they have anything to do with national banks engaging in the real estate brokerage business.

[2] Division of Research and Statistics, Federal Deposit Insurance Corporation, "The Savings and Loan Crisis and Its Relationship to Banking," *History of the Eighties/Lessons for the Future* (Chapter 4) (Dec. 1997).

premises"[3] are based upon decades-old judicial precedent and OCC interpretations that expressly recognize that a national bank may hold and develop property used in connection with its own operations and lease or sell the portion of the premises that the bank does not use. This authority is subject to substantial limitations that clearly distinguish such situations from the high-risk projects that you noted in the FDIC Report. Unlike the projects described in that report, the national banks here were subject to the requirement that the development must not be speculative or motivated by realizing a gain on appreciation of the real estate property value. In each letter, based on specific information provided by each bank, we concluded that the bank demonstrated that the proposed bank premises development was justified by a legitimate and good faith business need for accommodation of the bank's business activities. Thus, the bank premises letters do not lay a foundation for national banks' engaging in the real estate development (or brokerage) business. Nor do they breach the separation of banking and commerce.

The third interpretive letter,[4] which involves financing a wind energy project, is also based on precedents recognizing that in certain circumstances a bank may hold a limited interest in a borrowing entity or its assets as an integral component of a financing arrangement. The restrictions and limitations in this letter make clear that our approval is premised on the bank's interest being structured so as to preserve its economic substance as a loan, rather than an equity investment. In particular, unlike a traditional controlling equity investment, the bank (1) may not participate in the operation of the business receiving the bank's financing; (2) may not realize any gain on the appreciation of the value of its interest in the business or assets held by the business; and (3) must provide in the project agreement many of the same terms, conditions, and covenants typically found in lending and lease financing transactions to protect its interests.

Let me also make clear that the reason the OCC permitted this financing transaction to be structured as an equity investment was to allow the bank to capture tax benefits that were enacted to promote the flow of capital to alternative sources of energy. For similar reasons—that is, to capture tax benefits that Congress has authorized to promote certain types of projects—the OCC has long permitted national banks to provide financing that takes the form of equity, *e.g.*, to finance low-income housing, the renovation of historic buildings, and other types of community development projects. These transactions have proven to be low risk, and like the alternative energy financing here, provide an important source of capital to projects that Congress, by providing tax credits in connection with such investments, has affirmatively sought to promote.

In all three of these letters, the OCC supervisors of the banks involved concluded that—unlike the high-risk projects described in the FDIC Report—the activities proposed were consistent with the safe and sound operations of the banks. Going forward, the OCC will continue to monitor these activities to ensure that they are conducted in a safe and sound manner.

The OCC takes very seriously its commitment to the protection of the federal deposit insurance system. I assure you that the OCC will not allow national banks to engage in the type of real estate and equity investment activities that proved so disastrous for the thrift industry in the

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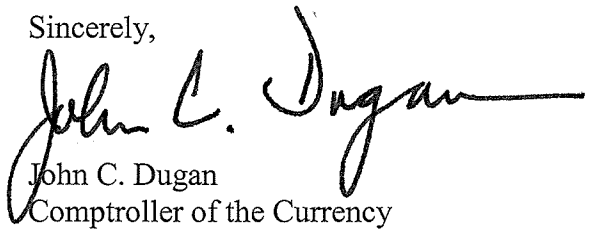
[3] Interpretive Letters Nos. 1044 and 1045 (both issued Dec. 5, 2005).

[4] Interpretive Letter No. 1048 (Dec. 21, 2005)

1980's, or to engage in the real estate investment and development business in contravention of long-recognized principles of separation of banking and commerce. I recognize the very limited nature of the authority provided to national banks in this area and will abide fully by such limits.

Sincerely,



John C. Dugan
Comptroller of the Currency