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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

January 29, 1999

**Corporate Decision #99-06**  
**February 1999**

Mr. E. Jay Finkel  
Porter, Wright, Morris & Arthur  
1667 K Street, N.W., Suite 1100  
Washington, D.C. 20006-1605

Re: The Huntington National Bank, Columbus, Ohio: Application for  
Additional Powers for Operating Subsidiary Engaged in the Conduct of  
Title Insurance Agency Activities  
Application Control No. 98-CE-08-035

Dear Mr. Finkel:

This responds to the application filed by The Huntington National Bank, Columbus, Ohio (“Bank”), pursuant to 12 C.F.R. § 5.34(b), requesting approval from the OCC for its operating subsidiary, Huntington Title Services, Inc., Monongah, West Virginia (“Subsidiary”), to engage in real estate closing and escrow activities, in addition to its existing title insurance agency activities.<sup>1</sup> The Subsidiary wishes to provide real estate closing and escrow services to the Bank and other lenders, primarily, and to utilize its excess capacity to offer the services occasionally to customers where no loan or title policy is present. Based upon the information provided and the reasons discussed below, the Bank’s application is approved.

**I. Proposal**

The Subsidiary proposes to provide real estate closing and escrow services to the Bank and other lenders, and on an occasional basis to other customers where no loan or title policy is present. Real estate closing and escrow services typically include receipt and assembly of real estate settlement and loan documents, obtaining signatures for such documents, receipt as escrow agent of loan funds, payoff of prior mortgages and liens, payment of prorated taxes and utility bills, disbursement of net loan proceeds to the seller, and recording of mortgage deeds and other documents. The Subsidiary will conduct its activities in compliance with applicable state laws and the provisions of the Real Estate Settlement Procedures Act.

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<sup>1</sup> The OCC approved the Bank’s establishment of the Subsidiary as a West Virginia operating subsidiary to engage in title insurance agency activities. Letter from Stephen A. Lybarger, Bank Organization and Structure (April 16, 1998).

Closing and escrow services by the Subsidiary with respect to loans by the Bank and subsidiaries and affiliates of the Bank will be provided either at the Bank's main office or an authorized branch location.

## II. Discussion

### A. Real estate closing and escrow services to loan and title policy customers are part of or incidental to the business of banking.

The National Bank Act provides that national banks shall have the power:

[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes . . .<sup>2</sup>

The Supreme Court has held that this clause is a broad grant of power to engage in the business of banking, including the five specifically recited powers, and the business of banking as a whole.<sup>3</sup> Many activities that are not included in the enumerated powers are also part of the business of banking. Judicial precedent reflects three general principles used to determine whether an activity is within the scope of the "business of banking": (1) is the activity functionally equivalent to or a logical outgrowth of a recognized banking activity; (2) would the activity respond to customer needs or otherwise benefit the bank or its customers; and (3) does the activity involve risks similar in nature to those already assumed by banks.<sup>4</sup> Finally, national banks may engage in activities that are part of, or incidental to, the business of banking by means of an operating subsidiary.<sup>5</sup>

Under this standard, national banks are authorized to provide real estate closing and escrow services to their loan or title policy customers as activities that are part of or incidental to the business of banking. The OCC has permitted national banks to handle escrow accounts and the

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<sup>2</sup> 12 U.S.C. § 24(Seventh).

<sup>3</sup> See *NationsBank of North Carolina, N.A. v. Variable Life Annuity Co.*, 513 U.S. 251(1995), 115 S. Ct. 810 (1995) ("VALIC").

<sup>4</sup> See, e.g., *Merchants Bank v. State Bank*, 77 U.S. 604 (1871); *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377 (9th Cir. 1977), cert. denied, 436 U.S. 956 (1978); *American Ins. Ass'n v. Clarke*, 865 F.2d 278 (2d Cir. 1988).

<sup>5</sup> 12 C.F.R. § 5.34(c) (1998).

closing of real estate transactions in connection with their own real estate loans.<sup>6</sup> The OCC has also permitted a national bank's operating subsidiary to engage in title insurance agency, real estate appraisal, loan closing, and tax escrow services in connection with loans made by the bank and by other affiliated and unaffiliated lenders.<sup>7</sup> Finally, the OCC has permitted a bank's title company subsidiary, as part of its responsibilities as title agent, to perform abstracting, closing and escrow services in connection with title policies it sells.<sup>8</sup>

The Bank's proposal is consistent with these OCC precedents and is functionally and operationally equivalent to activities undertaken by banks and their lending or title insurance subsidiaries in their ordinary course of business.<sup>9</sup> The real estate loan closing and escrow services respond to customers' needs and do not involve risks that are not already assumed by banks in their capacity as closing and escrow agents, financial intermediaries, custodians, and trustees. Accordingly, these activities are permissible.<sup>10</sup>

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<sup>6</sup> See OCC Corporate Decision No. 97-13 (February 24, 1997) (Decision by the Comptroller of the Currency to Approve Applications by TCF Financial Corp., Minneapolis, Minnesota, to Convert Federal Savings Banks Located in Minnesota, Michigan, Illinois, and Wisconsin and to Establish De Novo Banks in Ohio and Colorado and to Engage in Certain Related Transactions, p. 36); OCC Interpretive Letter by John E. Shockey, Deputy Chief Counsel (September 20, 1976).

<sup>7</sup> See, e.g., OCC Conditional Approval No. 276 (May 8, 1998) (Application by Mellon Bank, N.A., Pittsburgh, Pennsylvania, to establish a wholly-owned operating subsidiary to acquire and hold a 50 percent interest in a partnership engaged in title insurance agency, real estate appraisal, loan closing and other loan-related activities). See also, OCC Interpretive Letter No. 842, reprinted in [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-297 (September 28, 1998).

<sup>8</sup> See Letter from Julie L. Williams, Chief Counsel (April 1, 1998) (unpublished).

<sup>9</sup> The Federal Reserve has similarly authorized bank holding companies and their subsidiaries to provide real estate settlement services. 12 C.F.R. § 225.28(b)(2)(viii). The Federal Reserve authorized these activities after determining that they are "closely related to banking." The Federal Reserve's "closely related to banking" analysis is similar to the OCC's incidental to the business of banking analysis. See *National Courier Ass'n v. Board of Governors of the Federal Reserve System*, 516 F.2d 1229 (D.C. Cir. 1975); *Alabama Ass'n of Ins. Agents v. Board of Governors of the Federal Reserve System*, 533 F.2d 224 (5th Cir. 1976); *Association of Data Processing Service Org. v. Board of Governors of the Federal Reserve System*, 745 F.2d 677 (D.C. Cir. 1984). In each of these cases, the court analogized the "closely related to banking" provision in Regulation Y, 12 C.F.R. § 225.28(b), to the incidental powers clause of 12 U.S.C. § 24(Seventh).

<sup>10</sup> Due to the manner in which these activities are being conducted, there are also no branching concerns pursuant to 12 C.F.R. § 36(j). Closing and escrow services performed by the Subsidiary with respect to loans by the Bank, by its mortgage company subsidiary or other Bank subsidiaries, which may cause those offices to engage in branching activities, will be provided only at the Bank's main office or authorized branch locations.

**B. The Subsidiary may utilize its staff's excess capacity to provide incidental real estate closing and escrow services for customers where no loan or title policy is involved.**

The Subsidiary proposes to make its real estate closing and escrow services available to the general public. The OCC and the courts have held that national banks may use all of their resources and competencies to operate efficiently and to avoid economic waste. In *Brown v. Schlier*, the court articulated the excess capacity doctrine:

Nor do we perceive any reason why a national bank, when it purchases or leases property for the erection of a banking house, should be compelled to use it exclusively for banking purposes. If the land which [a national bank] purchases . . . for the accommodation of its business is very valuable, it should be accorded the same rights that belong to other landowners of improving it in a way that will yield the largest income, lessen its own rent, and render that part of its funds which are invested in realty most productive. There is nothing, we think, in the national bank act, when rightly construed, which precludes national banks, so long as they act in good faith, from pursuing the policy above outlined.<sup>11</sup>

The basic requirement is that the Bank's overall activities must be conducted in good faith for banking purposes.

Although the excess capacity doctrine was used initially in real estate,<sup>12</sup> its principles have been applied in other circumstances where banks have obtained or developed in-house services, equipment or personnel in good faith and desired to make efficient use of the excess capacity. For example, excess capacity has been applied to Internet access,<sup>13</sup> software production and distribution,<sup>14</sup> long line communication,<sup>15</sup> electronic security systems,<sup>16</sup> acquired printing

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<sup>11</sup> 118 F. 981, 984 (8th Cir. 1902), *aff'd*, 194 U.S. 18 (1904).

<sup>12</sup> See *Wingert v. First Nat. Bank*, 175 F. 739 (4th Cir. 1909); *Perth Amboy Nat. Bank v. Brodsky*, 207 F. Supp. 785, 788 (S.D.N.Y. 1962); and Unpublished letter from Comptroller James J. Saxon dated February 16, 1965.

<sup>13</sup> Interpretive Letter No. 742, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-106 (Aug. 19, 1996).

<sup>14</sup> See Interpretive Letter No. 677, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625 (June 28, 1995).

<sup>15</sup> Unpublished letter from William Glidden (June 6, 1986).

<sup>16</sup> Unpublished letter from Stephen Brown (December 20, 1989).

equipment,<sup>17</sup> mail sorting machines,<sup>18</sup> and messenger services.<sup>19</sup> Also, more recently, the OCC approved the use of the excess capacity doctrine for general appraisal services,<sup>20</sup> and for human resources consulting and career counseling.<sup>21</sup>

The Bank represents and has committed to the fact that less than ten percent of the Subsidiary's real estate closing and escrow services will be provided to customers who are neither borrowing money nor purchasing title insurance. The Subsidiary does not plan to target such persons as potential customers. Moreover, the services will be provided using existing personnel resources and expertise. These factors demonstrate that the excess capacity has been developed and will be utilized in good faith and that the Subsidiary will not be exposed to unnecessary risk. Therefore, the Subsidiary may offer its excess capacity to those customers who request real estate closing and escrow services even though there is no loan or title policy present.

### **III. Conclusion**

Based upon the foregoing facts, analysis, and limitations the Bank's application to engage in real estate closing and escrow services at its existing subsidiary, Huntington Title Services, Inc., is hereby approved.

Sincerely yours,

/s/

Julie L. Williams  
Chief Counsel

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<sup>17</sup> Interpretive Letter No. 811, *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-259 (December 12, 1997); Unpublished letter from Mary Wheat (April 7, 1988).

<sup>18</sup> Unpublished letter from Peter Liebesman (December 13, 1983).

<sup>19</sup> Unpublished letter from William Glidden (July 11, 1989).

<sup>20</sup> *See* OCC Corporate Decision No. 98-25 (April 1, 1998).

<sup>21</sup> *See* OCC Corporate Decision No. 98-51 (November 30, 1998).