Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Conditional Approval #276
June 1998

May 8, 1998

Mr. Michael E. Bleier
General Counsel
Mellon Bank, N.A.
One Mellon Bank Center
Pittsburgh, Pennsylvania 15258-0001

Re: Application by Mellon Bank, N.A., Pittsburgh, Pennsylvania, to establish a wholly-owned operating subsidiary to acquire and hold a 50% interest in a partnership engaged in title insurance agency, real estate appraisal, loan closing and other loan-related activities
Application Control Number: 98-NE-08-0010

Dear Mr. Bleier:

This responds to the application filed by Mellon Bank, N.A., Pittsburgh, Pennsylvania (the "Bank"), to establish an operating subsidiary (the "Subsidiary") to acquire and hold, as a general partner, a 50% interest in a limited liability general partnership (the "Joint Venture") engaged in title insurance agency, real estate appraisal, loan closing and other activities in connection with consumer purpose and commercial loans made by the Bank or the Bank's lending affiliates (the "Lenders").[1] The other general partner will be a wholly-owned subsidiary of a vendor (the "Vendor") that currently provides the services to be performed by the Joint Venture. The Joint Venture will be located in Homestead, Pennsylvania, a place of less than 5,000 (as measured by the 1990 census) in which the Bank operates a branch. Based upon the representations and commitments made by the Bank in writing and in subsequent telephone discussions, we have conditionally approved the Bank's application to establish the Subsidiary to engage in the proposed activities.

[1] Initially, the Joint Venture will provide the services for the Bank and its affiliates only. At some future time, the Joint Venture may market its services to unaffiliated lenders, including other banks, thrifts, credit unions, mortgage companies, and finance companies, much as the Bank provides certain other services to unaffiliated institutions as correspondent.

DESCRIPTION OF THE PROPOSAL

The Subsidiary will be a limited liability company wholly-owned by an existing operating subsidiary corporation (the "Intermediary Subsidiary") that is wholly-owned by the Bank. Vendor will create wholly-owned Partner, either a corporation or limited liability company. Partner and Subsidiary will enter into a joint venture agreement thereby creating the Joint Venture in which each holds a 50% ownership interest. The Joint Venture will be capitalized in cash equally by the Bank and the Vendor. It will hire its own employees who, in most cases, will not be employees of the Bank, its affiliates or the Vendor.

The management of the Joint Venture will be directed by a five-member management committee, with the Bank appointing three of the five members. However, in order to transact business, a quorum of three members must include at least one each appointed by the Bank and the Vendor. Moreover, unanimous approval will be required for policy decisions and for all contracts, transactions, and relationships that are or potentially may be significant. Since the Vendor will have effective veto power over the substantive decisions of the management committee, this is a noncontrolling investment by the Bank through its Subsidiary.

The Joint Venture will provide various services in connection with the origination of consumer purpose and commercial loans and lines of credit by the Lenders. Many of these loans will be secured by a mortgage, deed of trust or equivalent consensual security document on real estate owned by one or more of the obligors on the loan or line of credit (hereinafter referred to as the "Mortgage Loan(s)").[2] The services to be provided are: (1) appraisal management; (2) title insurance agent activities; (3) closing management; (4) flood insurance services; (5) credit reporting; (6) property inspections; (7) property preservation services; (8) loan document preparation; (9) providing census tract and related information with respect to certain properties; (10) portfolio audit; (11) real estate tax service.

Subject to state licensing requirements, particularly with respect to title insurance agency and appraisal activities, the Joint Venture will market and provide its services throughout the United States. It will offer its services only in states in which it can be licensed, if licenses or similar requirements are a prerequisite for conducting such services.

Pursuant to an agreement between the Lender and the Joint Venture, the Joint Venture will provide one or more of the services in connection with a loan for which an application has been made. In most cases, the Joint Venture will engage a qualified person or entity to perform the services as an independent contractor; some services may be provided by employees of the Joint Venture. Typically, the Joint Venture will subcontract work to a third-

[2] Some Mortgage Loans will be secured by a lien of first priority and will be used to finance the purchase of or refinance the collateral; others will be secured by subordinate liens on the collateral.

party.[3] Nevertheless, the Joint Venture will be contractually obligated to provide the Lender with the service that was ordered.

The Vendor has engaged in these activities for several years and has developed a network of competent service providers. It is anticipated that the Joint Venture will engage persons and entities from that network in connection with this proposal; the Joint Venture will also engage other service providers.

The Services

(1) Appraisal Management

Appraisals to determine the value of collateral are generally prepared when creditors make a Mortgage Loan. Federally regulated depository institutions must comply with the appraisal regulations and guidelines issued by their primary regulators. *See, e.g.*, the OCC's regulation at 12 C.F.R. Part 34, Subpart C; the Federal Reserve Board's regulation at 12 C.F.R. Part 225, Subpart G; and the Office of Thrift Supervision regulation at 12 C.F.R. Part 564. Absent a legal requirement to do so, prudent creditors will routinely take appropriate steps to determine the value of the property securing the loan when making a credit decision. The Joint Venture will provide typical appraisal services.

(2) Title Insurance Agency Activities

Creditors making Mortgage Loans, and obligors on such loans, will often obtain title insurance to protect their interests in the collateral. In some cases, creditors will not obtain title insurance but will want to know of liens, judgments and other clouds on the title of the collateral prior to making a credit decision. The Joint Venture will act as a title insurance agent only; in no event will it become obligated as a title insurer. Services typically available through title insurance agencies will be provided by the Joint Venture, and will conform to the conditions set forth in OCC Interpretive Letter No. 753, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-107 (November 4, 1996).[4]

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[3] Some of the individuals who perform title searches may be employees of the Joint Venture and, in some cases, a qualified Joint Venture employee may close a loan. Although it is possible that the Joint Venture may have its own employees perform some of the other services, there are currently no plans to do so.

[4] Where it is feasible for employees of the Joint Venture to be title abstractors, *e.g.*, in Allegheny County, Pennsylvania, such employees will perform the service at less cost to the borrower than by using a third-party service provider.

(3) Closing Management

When a creditor finds it inconvenient or impossible to close a loan at its office or using its employees, *e.g.*, to out-of- area obligors, or when special expertise or documents are required, creditors typically engage a closing agent to conduct the closing. Often title insurance agencies perform closing services as the functions may overlap, *e.g.*, recording of mortgages, UCC-1 financing statements and similar documents. The Joint Venture may advance recording fees as part of this service. In some cases, closing services include the disbursement of proceeds. When such closings occur, the Joint Venture will ensure disbursement will be made in compliance with the OCC's Interpretive Rulings regarding the origination and making of loans at banking and other than banking offices. Specifically, the closing of loans will occur either at a branch of the Bank or at the office of an unaffiliated entity, such as a lawyer's office or other location, that is not owned by the Bank or any of its affiliates. All underwriting of loans by the Bank or its affiliates will continue to be performed at the Bank or the affiliate premises as is currently the case.

(4) Flood Insurance

The National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. §§ 4001-4129) (collectively, the "FDPA") require federally insured depository institutions to obtain flood insurance in connection with Mortgage Loans in certain circumstances. While the Joint Venture will not act as a flood insurance underwriter, it will provide services to creditors who must comply with the FDPA requirements, such as determining if the real estate collateral is located within a flood hazard area and providing a flood certificate and borrower disclosure notice as contemplated by the Acts.

(5) Credit Reporting

The Joint Venture will provide Lenders with credit reports on consumers, (such reports will often qualify as "consumer reports" under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*), corporations, partnerships and other entities.

(6) Property Inspections

In connection with the collateral for Mortgage Loans, at the request of the Lender or the borrower, the Joint Venture will arrange for inspections to determine the condition of collateral securing Mortgage Loans. This will include inspections of commercial or construction loan collateral during the construction phase, inspections of real estate held as Other Real Estate Owned ("OREO"), as well as inspections of property that will secure a Mortgage Loan for which an application has been made. The Joint Venture will provide Lenders, borrowers and servicers with reports of such inspections, including damage reports and photographs. Where special expertise is warranted, such inspections will be carried out by

qualified third-party vendors and Joint Venture employees will not be engaged in such inspections.

(7) Property Preservation

On real estate the Lenders hold as OREO, the Joint Venture will arrange for the maintenance and preservation of the property, including winterization, lock change, board up, debris removal, lawn service, pool covering, and preparation for conveyance.

(8) Loan Document Preparation

Upon being advised by a Lender of the terms of the loan, the Joint Venture will prepare and complete the necessary loan documents appropriate to close the loan. It is anticipated the Joint Venture will develop and maintain a data base of standardized and customized loan documents.

(9) Census Tract and Related Information

Creditors must have census tract data for their required Home Mortgage Disclosure Act ("HMDA") filings. The Joint Venture will provide to Lenders census tract, metropolitan statistical area, county code and state code information applicable to Mortgage Loans.

(10) Portfolio Audit

The Joint Venture will design or assist Lenders to design and execute an audit of their Mortgage Loan portfolio to assess compliance with the FDPA requirements.

(11) Real Estate Tax Service

In connection with the collateral for Mortgage Loans, the Joint Venture will provide complete real estate tax services, including, *e.g.*, procuring state and local tax bills, reporting such information to the servicers in time for establishing escrow accounts and paying tax bills, and data processing and administration services with respect to escrows, taxes, and delinquencies.

ANALYSIS

I. Structural: Investment by an Operating Subsidiary in a General Partnership

The OCC has traditionally recognized the authority of national banks to organize and perform any of their lawful activities in a reasonable and convenient manner not prohibited by law. A national bank may engage in activities that are part of or incidental to the business of banking under 12 U.S.C. § 24(Seventh) by means of an operating subsidiary. *See* 12 C.F.R. § 5.34(d)(1). Although a national bank cannot be a general partner under Merchants National Bank v. Wehrman, 202 U.S. 295 (1906), it is well established that a national bank has been

authorized, through its operating subsidiary, to do so. *See* OCC Conditional Approval No. 243 (May 9, 1997) (hereinafter, the "Chase Letter") (national bank to participate through one or more operating subsidiaries in joint ventures conducting residential mortgage lending services); OCC Interpretive Letter No. 423, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,647 (April 11, 1988) (national bank operating subsidiary authorized to act as managing general partner of a limited partnership); OCC Interpretive Letter No. 411, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,645 (January 20, 1988) (national bank operating subsidiary authorized to be a general partner in a partnership with a non-depository institution). Because of the structure of the proposed Joint Venture, the OCC considers the Subsidiary's participation to be a noncontrolling, minority interest. The Chase Letter set forth the following four requirements, which must be met, for a national bank operating subsidiary to have noncontrolling minority interests in various corporate structures, including general partnerships and joint ventures:

(1) The activities of the enterprise in which the investment is made must be limited to activities that are part of or incidental to the business of banking.

(2) The bank must be able to prevent the enterprise from engaging in activities that do not meet the foregoing standard, or be able to withdraw from the investment.

(3) The bank's loss exposure must be limited, as a legal and accounting matter, and the bank must not have open-ended liability for the obligations of the enterprise.

(4) The investment must be convenient and useful to the bank in carrying out its business and not a mere passive investment unrelated to the bank's banking business.

As discussed below, the Bank's proposal satisfies all four of these requirements.

(1) <u>The activities of the Joint Venture will be limited to activities that are part of or incidental to the business of banking.</u>

As will be explained further in Section II, the services to be provided by the Joint Venture are either expressly authorized, *e.g.*, under 12 U.S.C. §§ 29 and 92 and 12 C.F.R. Part 34, Subparts C and E, or considered to be part of or incidental to the business of banking as they are provided in connection with the making of Mortgage Loans, an activity expressly permitted by 12 U.S.C. §§ 24(Seventh) and 371. The joint venture agreement by which the Subsidiary and the Vendor's subsidiary are to be bound will clearly state that in no event will the Joint Venture engage in any activity that is not authorized or part of or incidental to the business of banking.

Accordingly, the first standard is met.

(2) The Bank and the Subsidiary will be able to prevent the Joint Venture from engaging in activities that do not meet the foregoing standard, or be able to withdraw from its investment.

The activities of an enterprise in which a national bank may invest must be part of or incidental to the business of banking both initially and for as long as the bank has an ownership interest. As noted in the Chase Letter, this requirement can be satisfied in different ways. In the present case, the constituent documents of the Joint Venture will limit its activities to those that are permitted for national banks, as described above. Moreover, with unanimous vote required to approve any new activity, the Bank will have effective veto power over the activities of the Joint Venture. Pursuant to the joint venture agreement, the Bank will appoint three of the five members of the management committee but a quorum of three members, including at least one each appointed by the Bank and the Vendor, is necessary to transact business.

Accordingly, the second standard is met.

(3) The Bank's loss exposure must be limited, as a legal and accounting matter, and the Bank must not have open-ended liability for the obligations of the enterprise.

a. Loss from a legal standpoint

A primary concern of the OCC is that national banks should not be subjected to undue risk or unlimited liability. As a general matter of partnership law, a general partner has unlimited liability for the obligations of the partnership; this will apply to the Joint Venture. The OCC has permitted operating subsidiaries of national banks to enter into general partnerships that engage in bank-permissible activities when the corporate veil of the operating subsidiary corporation protects the bank from the potential open-ended exposure associated with a direct partnership investment. *See* the Chase Letter; OCC Interpretive Letter No. 289, *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85, 453 (May 15, 1984) (national bank's operating subsidiary permitted to act as general partner in banking-related venture); OCC Interpretive Letter No. 411, *supra*; OCC Interpretive Letter No. 517, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,228 (August 16, 1990) (restructuring of general partnership in OCC Interpretive Letter No. 411).

Such protection will be present with respect to the Joint Venture. Subsidiary will be a Pennsylvania limited liability company wholly-owned by the Intermediary Subsidiary that is a wholly-owned subsidiary of the Bank. Investors in a Pennsylvania limited liability company generally are not liable for the obligations of that entity.[5] The Joint Venture will be adequately

[5] *See* 15 PA. C.S.A. § 8922.

capitalized by the Bank, through the Subsidiary, and by the Vendor, through its own subsidiary. The Bank, the Subsidiary, the Intermediary Subsidiary, and the Joint Venture will at all times adhere to corporate, partnership, and other applicable formalities so that the Bank will maintain its corporate existence separate from the Joint Venture. The constituent documents will not provide for any liability on the Bank's part for the obligations of the Joint Venture. Nor will the Bank guarantee or otherwise assume any of the liabilities of the Joint Venture or the Subsidiary. Consequently, the Bank's loss exposure for the liabilities of the Joint Venture will be limited to its capital contribution to the Subsidiary.

b. Loss exposure from an accounting standpoint

The OCC has not objected to a bank utilizing the equity method of accounting in reporting an investment in an operating subsidiary on an unconsolidated basis when the ownership share or investment is between 20 and 50 percent. Under the equity method of accounting, unless the bank has extended a loan to the entity, guaranteed any of its liabilities or has other financial obligations to the entity, losses are generally limited to the amount of the investment shown on the investor's books. As noted above, the Bank, the Subsidiary, the Intermediary Subsidiary and the Joint Venture will adhere to all corporate formalities and the Bank will neither guarantee nor assume any liabilities of the Joint Venture or the Subsidiary. Consequently, the corporate veil so derived, and the use of the equity method of accounting, will protect the Bank from potentially open-ended exposure to the liabilities of the Joint Venture and the Subsidiary.

Accordingly, for both legal and accounting purposes, the Bank's potential loss exposure should be limited to the amount of its investment. Because the Bank will not have open-ended liability for the liabilities of the Joint Venture and the Subsidiary and its potential liability will be quantifiable and controllable, the third standard is met.

(4) The investment will be convenient and useful to the Bank in carrying out its business and not a mere passive investment unrelated to the Bank's banking business.

A national bank's investment in an enterprise or entity must also satisfy the requirement that the investment have a beneficial connection to the bank's business, *i.e.*, be convenient or useful to the investing bank's business activities, and not constitute a mere passive investment unrelated to that bank's banking business. Twelve U.S.C. § 24(Seventh) gives national banks incidental powers that are "necessary" to carry on the business of banking. "Necessary" has been judicially construed to mean "convenient or useful." *See* Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972) ("Arnold Tours").

The services are of the types routinely purchased or performed by the Lenders when engaged in the business of making Mortgage Loans and, as proposed to be conducted by the Joint Venture, will provide a useful and convenient source of these essential services that are

ancillary to extending credit secured by real estate. Conducting the services by means of the Joint Venture will enhance the Lenders' ability to offer their Mortgage Loans more efficiently and capably to the public from a one-stop source while generating additional revenues for the Lenders. For these reasons, the investment is convenient and useful to the Bank in carrying out its lending business and is not a mere passive investment.

Accordingly, the fourth standard is met.

A final condition relating to structure is that the Joint Venture will be subject to OCC supervision, regulation and examination. The joint venture agreement provides for such OCC oversight and, thus, this condition is also met.

II. Operational: The Activities of the Joint Venture Are Legally Permissible

A. Activities Expressly Authorized or Approved

As noted above, the making of Mortgage Loans is expressly authorized by 12 U.S.C. §§ 24(Seventh) and 371. In addition, some of the services to be provided by the Joint Venture are also expressly authorized, *e.g.*, the sale of general insurance as agent from a place the population of which is less than 5,000 is permitted by 12 U.S.C. § 92;[6] the acquisition, holding and managing real property as OREO are permitted by 12 U.S.C. § 29 and 12 C.F.R. Part 34, Subpart E; and real estate appraisal services are permitted by 12 C.F.R. Part 34, Subpart C.[7] The Bank has already obtained the approval of the OCC, under 12 U.S.C. § 92, to expand the activities of an existing operating subsidiary to engage in certain general insurance agency activities in a place of less than 5,000.[8] The Bank also has long had several existing operating subsidiaries that are authorized to acquire, hold and manage OREO under 12 U.S.C. § 29, and will also operate the Joint Venture in compliance with the applicable

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[6] *See also* Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996), and OCC Interpretive Letter No. 753, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-107 (November 4, 1996) (national bank insurance agency in a place of 5,000 may operate in the same manner as other licensed insurance agencies located in such a place).

[7] *See also* OCC Interpretive Letter No. 467, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,691 (January 24, 1989) (national bank operating subsidiary to offer real estate appraisal services for the bank and other financial institutions); and 12 C.F.R. § 5.34(e)(3)(ii)(G), which affords expedited approval treatment for an operating subsidiary to engage in real estate appraisal activities.

[8] *See* Letter of November 13, 1996, from Julie L. Williams, Chief Counsel, to Michael E. Bleier (ACN 96-NE-08-0013). The Joint Venture will be operated in compliance with 12 U.S.C. § 92 and the general principles for national banks that are outlined in OCC Interpretive Letter No. 753 and the Bank's approval letter. As noted above, the Joint Venture will be located in Homestead, Pennsylvania, a place of less than 5,000 in which the Bank operates a branch.

regulations governing OREO. Property preservation, *i.e.*, maintenance, activities are governed by 12 C.F.R. § 34.86(b)(1).

Other services have been authorized by prior OCC precedent, *e.g.*, flood insurance, credit reporting, property inspections, and closing management activities. *See* OCC Corporate Decision No. 97-79 (July 11, 1997) (national bank operating subsidiary authorized to determine whether flood insurance is required on residential and commercial real property); Unpublished Interpretive Letter from Deputy Chief Counsel (May 18, 1976) (listing ownership of credit bureau among the various activities permissible for operating subsidiaries of national banks under the former Interpretive Ruling 7.7376(b)); Letter from Comptroller C.T. Conover, dated March 29, 1985, *reprinted in* 4 OCC Quarterly Journal Vol. 2, p. 48, Appendix, n. 3 (June 1985) (listing ownership of credit bureau among permissible activities once codified at 12 C.F.R. § 7.10, which was replaced by 7.7376; the current version appears at 12 C.F.R. § 5.34); OCC Interpretive Letter No. 806, *reprinted in* [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-253 (October 17, 1997) (facts included property inspections in conjunction with net leases of real estate to Muslims who cannot obtain traditional mortgages); OCC Interpretive Letter No. 776, *reprinted in* [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-203 (March 18, 1997) (referring to closing loans among the essential activities associated with the lending function); Unpublished Letter from Chief National Bank Examiner F.H. Ellis (August 9, 1971) (property inspections and loan closings among activities conducted by national banks in conjunction with lending). When the Joint Venture's closing management services will include the disbursement of loan proceeds, the disbursement will be made either in a Bank office or branch, or in the office of an unaffiliated third party such as an attorney. This will assure compliance with OCC's Interpretive Rulings regarding the origination and making of loans at banking and other than banking offices. *See* 12 C.F.R. §§ 7.1003, 7.1004, and 7.1005.

Accordingly, the Joint Venture may conduct the following services under express authority and prior precedent: title insurance agency activities; real estate appraisal activities; closing management; flood insurance services; credit reporting; property inspections; and property preservation in conjunction with OREO.

B. Activities Not Yet Expressly Approved

The remaining services are generally permissible under the National Bank Act because these activities are part of, or incidental to, the business of banking. As described with respect to each of the services, each is part of the business of banking because the activity (1) is functionally equivalent to or a logical outgrowth of a recognized banking activity; (2) responds to customer needs or otherwise benefits the bank or its customers; and (3) involves risks similar in nature to those already assumed by banks. Even if an activity were not part of the business of banking, it would be permissible as an activity incidental to banking, particularly to a national bank's express power to make loans, because it optimizes the use of the Bank's credit-related capacities.

In NationsBank of North Carolina, N.A. v. Variable Life Annuity Co., 513 U.S. 251 (1995) ("VALIC"), the Supreme Court expressly held that the "business of banking" is not limited to the enumerated powers in 12 U.S.C. § 24(Seventh), but encompasses more broadly activities that are part of the business of banking. VALIC at 258, n.2. The VALIC decision further established that banks may engage in activities that are incidental to the enumerated powers as well as the broader "business of banking."

Prior to VALIC, the standard that was often considered in determining whether an activity was incidental to banking was the one advanced by the First Circuit Court of Appeals in Arnold Tours. The Arnold Tours standard defined an incidental power as one that is "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its ***express*** powers under the National Bank Act." Arnold Tours at 432 (emphasis added). Even prior to VALIC, the Arnold Tours formula represented the narrow interpretation of the "incidental powers" provision of the National Bank Act. OCC Interpretive Letter No. 494, *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,038 (December 20, 1989). The VALIC decision, however, has established that the Arnold Tours formula provides that an incidental power includes one that is convenient or useful to an activity that is part of the business of banking even if that activity is not one of the activities expressly enumerated at 12 U.S.C. § 24(Seventh).

In determining whether each of these activities--loan document preparation, census tract information, loan portfolio audit, real estate tax service--is permissible in the Bank's particular case, we will discuss both part of and incidental to the business of banking analyses.

Loan Document Preparation

Clearly, the preparation of loan-related documents is an integral part of the lending function and a logical outgrowth of that function. Both banks and customers benefit by the preparation of documents that describe the rights and duties of the creditor and the borrower. Moreover, banks have long been preparing such documents and assuming the risks of inaccuracy or deficiencies associated with such preparation. The ability of a bank to prepare loan documents also facilitates the lending function and, thus, is incidental thereto. Loan document preparation, accordingly, is legally permissible.

Census Tract and Related Information

Since HMDA was enacted in 1975, banks have prepared the required HMDA filings. HMDA reports include census tract, metropolitan statistical area, state code and county code information applicable to the collateral for certain Mortgage Loans. The identification of these factors with respect to the real estate is an activity that is the logical outgrowth of the lending function and convenient and useful to a bank's compliance with the statutory requirements. Because the purpose of the HMDA is to serve the housing needs of the communities in which banks are located, the ability of a bank to comply with the filing requirements also benefits

bank customers. The Joint Venture will be assuming the same risks of inaccurate data entry that banks have assumed for many years. Finally, by providing this service through the Joint Venture to the Lenders, the Bank will optimize its competency in this area and enhance the efficiency and quality of content of the flood insurance services also to be provided. Accordingly, the provision of census tract and related information is both part of and incidental to the Bank's lending function.

Loan Portfolio Audit -- Flood Insurance Requirements

In order to comply with the FDPA, creditors may need to audit their loan or loan servicing portfolios. Loan portfolio audit is, therefore, a logical outgrowth as well as convenient and useful to the making of loans to which the FDPA may apply. Borrowers, too, can benefit because an effective audit of a bank's portfolios will help assure that borrowers receive the insurance protections should a flood occur. The Joint Venture will be assuming the same risks as the Bank, which is already subject to the requirements of the FDPA. Because the Bank has developed expertise in this area, it can optimize the activity by providing it to Lenders through the Joint Venture. The Bank will also enhance the delivery of the flood insurance services to be provided. The proposed service, therefore, is part of and incidental to the Bank's lending function.

Real Estate Tax Service

National banks have long been permitted to service the loans that they make and servicing frequently entails the assurance that local real estate taxes are paid on time, particularly when such loans involve tax and insurance escrow accounts.[9] Such tax service is an integral part of or a logical outgrowth of the lending function. It is also of benefit to the borrowers as it relieves them of the tasks of paying such regular tax and insurance obligations in a lump sum. Moreover, the secondary mortgage market typically requires the establishment of escrow accounts.[10] The Joint Venture will be assuming the same risks that banks have long assumed with respect to this activity. By providing this service through the Joint Venture, the Bank optimizes its competency and enhances its lending and servicing operations. The real estate tax activity, therefore, is part of and incidental to the Bank's lending and servicing function.[11]

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[9] The administration of such escrow accounts in connection with consumer purpose mortgage loans is extensively regulated by the Real Estate Settlement Procedures Act (the "RESPA"), 12 U.S.C. § 2601 *et seq*.

[10] The secondary mortgage loan market is generally considered to have made residential mortgage financing more readily available to borrowers throughout the United States.

[11] It should be noted that the Joint Venture's real estate tax service will not include giving tax advice. OCC Interpretive Ruling 7.1008, 12 C.F.R. § 7.1008, indicates that although a national bank may prepare tax returns for customers, it may not serve as an expert tax consultant.

Finally, should the Lenders act as loan brokers or correspondents to originate loans on behalf of or for sale to other creditors, the Joint Venture enables the Lenders to package the services more efficiently for the potential investor.

In sum, the services proposed for the Joint Venture are either expressly authorized, approved previously, or part of or incidental to the business of banking and, therefore, are legally permissible for national banks and their operating subsidiaries.

III. Real Estate Settlement Procedures Act: Tying Restrictions

Some of the proposed services qualify as "settlement services" under the RESPA and, as such, the referral of the services among the Lenders and the Joint Venture are subject to the restrictions relating to "Affiliated Business Arrangements," as defined in the RESPA. The Bank has represented that the Lenders and the Joint Venture will comply with all applicable requirements of the RESPA with respect to the operation of the Joint Venture, including the Affiliated Business Arrangement rules. Specifically, neither the Lenders nor the Joint Venture will require a consumer to purchase settlement services from the Joint Venture as a condition of obtaining a loan from the Lenders, unless expressly authorized by the RESPA.[12] In addition, the Bank has represented that consumers will be provided with an Affiliated Business Arrangement notice in the circumstances required by the RESPA. The Joint Venture will observe and abide by the RESPA's rules regarding the payment of a thing of value within the Affiliated Business Arrangement setting. The Lenders and the Joint Venture will also comply with the anti-tying restrictions found in the Bank Holding Company Act, 12 U.S.C. § 1972, to the extent applicable.

IV. Conclusion

Based upon the foregoing facts and analysis, and the representations and commitments made by the Bank in connection with the Bank's request, we have concluded that the Bank may establish the Subsidiary to hold a 50% interest in the proposed Joint Venture to provide the services to the Lenders, and to other unaffiliated creditors, in the manner described in this letter, provided:

> (1) The Subsidiary and the Joint Venture will engage only in activities that are part of, or incidental to, the business of banking;
>
> (2) The Bank, through the Subsidiary, will have effective veto power over any activities or major decisions of the Joint Venture that are inconsistent with

[12] For example, the RESPA allows a creditor to require the borrower to utilize the services of an appraiser to represent the creditor's interests even if the creditor and the appraiser are in an Affiliated Business Arrangement.

condition (1), or will withdraw from the Joint Venture in the event it engages in an activity inconsistent with condition (1);

(3) The Bank will account for its minority investment in the Joint Venture under the equity method of accounting;

(4) The Joint Venture will be subject to OCC supervision, regulation and examination; and

(5) The Joint Venture will take care to make sure that it and the Lenders it is servicing comply with all applicable RESPA requirements.

Accordingly, this application is approved subject to the above conditions. Please be advised that the conditions of this approval are deemed to be "conditions 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 and, as such, may be enforced in proceedings under applicable law.

If you have any further questions, you may contact Madonna K. Starr, Senior Counsel, in the Northeastern District (212) 790-4010.

Sincerely,

/s/

Raymond Natter
Acting Chief Counsel