Comptroller of the Currency
Administrator of National Banks

Southeastern District
Marquis One Tower, Suite 600
245 Peachtree Center Avenue, N.E.
Atlanta, Georgia 30303-1223

Office of the District Counsel
Voice (404) 588-4520
Facsimile (404) 588-4532

July 24, 2002

Interpretive Letter #943
September 2002
12 USC 24(7)

Dear **[ ]**:

This responds to your letter of April 12, 2002, as supplemented by your letter of May 7, 2002, requesting confirmation that **[ ]** (Bank), may lawfully acquire and hold a one-third non-controlling equity interest in **[ ]** (Company), a **[** *State* **]** limited liability company that will own and operate a single small airplane. For the reasons set forth below, the Bank may acquire and hold the interest in the Company, in the manner and as described herein.

A. Background

The Bank proposes to make a non-controlling investment in the Company, which will own and operate a plane that the Bank will use in its conduct of business. The two other owners also plan to utilize the aircraft for their own respective business and personal purposes. The plane will not be used for chartering purposes or to generate income unrelated to the usage of the owners themselves. The Bank has almost 50 offices spread across **[** *State1, State2* **]** and **[** *State3* **]**, and will use the plane to facilitate Bank management's air travel to these various offices. The Bank represents that since its offices are located in geographic areas served by small airports offering infrequent commercial flights, reliance upon commercial air-carriers has not been practical or convenient. Thus, this investment will provide the Bank with access to an airplane that will permit management to better serve the Bank's numerous offices spread across three states.

B. Analysis

A national bank may engage in activities that are part of or incidental to the business of banking. In a variety of circumstances, the OCC has permitted national banks to own, either

directly, or indirectly through an operating subsidiary, a non-controlling interest in an enterprise.[1] The OCC has concluded that national banks are legally permitted to make a non-controlling investment in a company provided four criteria or standards are met.[2] These standards, which have been distilled from our previous decisions in the area of permissible non-controlling investments for national banks and their subsidiaries, are:

(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 (or otherwise authorized for a national bank).

(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 its 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 or useful to the bank in carrying out its business and not a mere passive investment unrelated to that bank's banking business.

We conclude, as discussed below, that the Bank's investment in the Company will satisfy these four criteria.

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 (or otherwise authorized for a national bank).

The National Bank Act, in relevant part, 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 . . . .

The Supreme Court has held that this powers clause of 12 U.S.C. § 24(Seventh) is a broad grant of power to engage in the business of banking, which is not limited to the five enumerated powers. Further, national banks are authorized to engage in an activity if it is incidental to the

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[1] *See, e.g.*, Conditional Approval Letter No. 219 (July, 15, 1996).

[2] *See, e.g.*, Interpretive Letter No. 692, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,007 (Nov. 1, 1995); Interpretive Letter No. 694, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,005 (Dec. 13, 1995).

performance of the enumerated powers in section 24(Seventh) *or* if it is incidental to the performance of an activity that is part of the business of banking.[3]

The Company will own and operate a single airplane, the use of which will permit Bank management to better serve the Bank's numerous offices spread across three states. The Bank's ownership interest in and operation of an airplane for use in its business is legally permissible under 12 U.S.C. § 24(Seventh) as part of or incidental to the business of banking.

Its decision to be a one-third owner of the plane (through the Company) is based upon projected need and usage by the Bank. It requires access to an airplane, but not so much as to justify purchasing one outright. The other two owners will use the airplane for their proportionate share, to the mutual benefit of all three owners. The first standard is satisfied.

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 its investment.*

This is an obvious corollary to the first standard. It is not sufficient that the entity's activities are permissible at the time a bank initially acquires its interest; they must also remain permissible for as long as the bank retains an ownership interest.

The Bank has the ability and the intention to divest itself of its investment in the Company should the Company engage in any activities that are impermissible for a national bank. Article XIV of the proposed LLC Operating Agreement that you have submitted for our review stipulates that the Company shall be dissolved upon the direction of any LLC Member. This ability to divest and the stated intention to do so, if necessary, appear adequate to permit the Bank to withdraw its investment in the Company should the Company undertake impermissible activities. The second standard is thus satisfied.

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 exposure from a legal standpoint.

A primary concern of the OCC is that national banks should not be subjected to undue risk. Where an investing bank will not control the operations of the entity in which the bank holds an interest, it is important that the national bank's investment not expose it to unlimited liability.

The Company is a **[** *State* **]** limited liability company. As a legal matter, investors in a **[** *State* **]** limited liability company do not incur liability with respect to the liabilities of obligations of the limited liability company solely by reason of being a member or manager of the company.[4] Furthermore, the proposed LLC Operating Agreement includes a provision stating that the members of the Company shall have no liability or obligation for any debts,

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[3] *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 215 (1995).

[4] *See* **[** *State* **]** Code Ann. § **[** **]**.

liabilities, or obligations of the Company beyond the members' respective capital contributions or obligations to make a capital contribution, except as expressly required by the agreement or applicable law. *See* Agreement at Article XIX.

Thus, the Bank's loss exposure for the liabilities of the Company will be limited.

b. Loss exposure from an accounting standpoint.

In assessing a bank's loss exposure as an accounting matter, the OCC has previously noted that the appropriate accounting treatment for a bank's minority investment in a corporate entity is to report it as an unconsolidated entity under the equity or cost method of accounting. You have represented that the Bank will account for its ownership interest in the Company according to the equity method of accounting. Under the equity method of accounting, unless the Bank has guaranteed any of the liabilities of the entity or has other financial obligations to the entity, losses are generally limited to the amount of the investment, including loans and other advances shown on the investor's books.

Therefore, for both legal and accounting purposes, the Bank's potential loss exposure arising from its investment in the Company should be limited to the amount of its investment. Since that exposure will be quantifiable and controllable, the third standard is satisfied.

4. The investment must be convenient or useful to the bank in carrying out its business and not a mere passive investment unrelated to that 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."[5] Our precedents on bank non-controlling investments have indicated that the investment must be convenient or useful to the bank in conducting *that bank's* business. The investment must benefit or facilitate that business and cannot be a mere passive or speculative investment.[6]

In this instance, the Bank's ownership interest in the Company is neither passive nor speculative, and this ownership interest will be convenient and useful for the Bank. The Bank has almost 50 offices spread across **[** *State1, State2* **]** and **[** *State3* **]**. As a result of its investment in the Company, the Bank will have access to an airplane to facilitate Bank management's air travel to these various offices. The Bank represents that since its offices are located in geographic areas served by small airports offering infrequent commercial flights,

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[5] *See Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972).

[6] *See, e.g.*, Interpretive Letter No. 543, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,255 (Feb. 13, 1991); Interpretive Letter No. 427, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,651 (May 9, 1988); Interpretive Letter No. 421, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,645 (Mar. 14, 1988).

reliance upon commercial air-carriers is neither practical nor convenient. Access to the aircraft owned and operated by the Company will permit the Bank's management to better serve the Bank's numerous offices spread across three states. Thus, the investment is not a mere passive investment unrelated to the Bank's banking business.

Accordingly, the fourth standard is satisfied.

C. Conclusion

Based upon a thorough review of the information you provided, including the representations and commitments made in your letters, and for the reasons discussed above, it is my opinion that the Bank may acquire a non-controlling equity investment in the Company, subject to the following conditions:

(1) The Company will engage only in activities that are permissible for a national bank;

(2) In the event that the Company engages in an activity that is inconsistent with condition number one, the Bank will divest its interest in the Company in accord with the Bank's letter of May 7, 2002;

(3) The Bank will account for its investment in the Company under the equity method of accounting; and

(4) The Company will be subject to OCC supervision and examination, subject to the limitations and requirements of 12 U.S.C. §§ 1820a and 1831v.

These conditions are conditions imposed in writing by the OCC in connection with this opinion letter stating that the Bank's investment in the Company is permissible under 12 U.S.C. § 24(Seventh). As such, these conditions may be enforced in proceedings under applicable law.

If you have any questions, please contact Counsel June Hinson Allen at (404) 588-4520.

Sincerely,

-signed-

Brenda Curry
District Counsel