RECENT DEVELOPMENTS

OCC INTERPRETS THE NATIONAL BANK ACT TO PERMIT BANKS TO OWN HOTELS AND WINDMILLS

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I. INTRODUCTION

The Office of the Comptroller of the Currency[1] (OCC) is the primary regulator of national banks. National banks are commercial banks that are chartered by the federal government instead of by a state.[2] Many in the banking industry consider the national bank charter to be the most desirable form of bank because of the charter's broad powers, including preemption of state laws.[3] These powers are not without limitation; Congress has restricted the powers of national banks in order to limit the economic risks banks face and to protect the economy.[4] A large and longstanding body of jurisprudence has interpreted the National Bank Act to restrict the business activities of national banks to activities closely related to the traditional banking powers specifically authorized by the Act, such as taking deposits

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1. *See* 12 U.S.C. §§ 1-14 (2000) (describing the structure and operations of the Office of the Comptroller of the Currency (OCC), which is a bureau within the Department of the Treasury); *see also* National Bank Act, 12 U.S.C. §§ 21-216d (2000) (outlining the statutory structure of national bank regulation).

2. *See* HOWELL E. JACKSON & EDWARD L. SYMONS, JR., REGULATION OF FINANCIAL INSTITUTIONS 38-39 (1999) (relating that Congress created the national bank charter during the Civil War in an effort to develop a national currency to replace and devalue state banknotes—which were state-chartered, bank-issued paper currencies used by the Union and the Confederacy—as well as to market federal bonds and create federal depositories to further the war effort).

3. *See* Robert C. Eager & C.F. Muckenfuss, III, *Federal Preemption and the Challenge to Maintain Balance in the Dual Banking System*, 8 N.C. BANKING INST. 21, 26 (2004) (theorizing that OCC's broad powers of federal preemption over state law give federal charters such an advantage over state-chartered banks—that must follow the laws of any state in which they operate—in today's interstate banking environment that it seems highly unlikely that any large, interstate banks with federal charters would convert their charters to state charters).

4. *See* JACKSON & SYMONS, *supra* note 2, at 117-22 (stating that "portfolio shaping rules" are the dominant regulatory restriction for banks and other depository institutions because of public concerns about financial intermediaries taking excessive risks, concerns about limiting the risks faced by the Federal Deposit Insurance Corporation and other federal deposit insurers, and concerns that excessive risk-taking by banks will lead to disruptions in the nation's money supply and payments system). Congress restricted banks' ownership of real estate to that necessary to transact its business because of numerous antebellum bank failures. *Id.* An additional public policy concern behind the National Bank Act's prohibitions on banks owning stocks or taking equity interests in commercial enterprises is to assure a high level of economic neutrality when banks lend to competing borrowers. *Id.*

and makings loans.[5] These traditional powers specifically listed in the National Bank Act, as well as closely related "incidental powers," comprise the "business of banking."[6]

National banks' traditional business activities previously have not included owning hotels or windmill electrical turbines.[7] Restrictions on the business activities of banks chartered by the U.S. government have existed since at least the 1780s.[8] The Civil War-era National Bank Act restricted the business activities of national banks to a few, express banking activities and a broader grant of "incidental powers": Those unenumerated powers necessary to the accommodation of the banks' business.[9]

OCC has faced numerous challenges to its administrative interpretations regarding the business activities provisions of the National Bank Act since the nineteenth century.[10] Most recently, three interpretive letters that

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5. *See* Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972) (holding that operating a travel agency was not closely related to the "business of banking" and thus was not a valid incidental power of national banks); *see also* OCC Interpretive Letter No. 1053 at 2 (Jan. 31, 2006), http://www.occ.treas.gov/interp/mar06/int1053.pdf (claiming that permitting banks to own hotels was in furtherance of the banks' banking operations).

6. 12 U.S.C. § 24(7) (2000) (listing the express powers of national banks as discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; receiving deposits; buying and selling exchange, coin, and bullion; loaning money on personal security; obtaining, issuing, and circulating notes; dealing in certain securities; and those incidental powers necessary for the bank to conduct its business); *see* JACKSON & SYMONS, *supra* note 2, at 127-31 (noting that there are three approaches regarding what incidental powers fall within the "business of banking," and that the courts have generally followed the so-called "middle view" that permissible incidental powers must be closely related to the Act's express powers).

7. *Cf., e.g.*, *Arnold Tours*, 472 F.2d at 432 (holding that operating a travel agency was not closely related to the expressly permitted business activities in the National Bank Act to be a permissible national bank business activity); Cockrill v. Abeles, 86 F. 505, 512 (8th Cir. 1898) (explaining that the National Bank Act's real estate power did not authorize a national bank to own a cotton mill).

8. JACKSON & SYMONS, *supra* note 2, at 33 (noting that the 1787 charter of the Bank of North America, an early federally-chartered bank, prohibited the bank from trading in merchandise and from owning more real property than was necessary for its place of business or for loan collateral).

9. *See* 12 U.S.C. §§ 24, 29 (2000) (listing the permissible business activities and real estate powers of national banks); *Arnold Tours*, 472 F.2d at 432 (holding that a bank activity is permissible as an "incidental power" under the National Bank Act if the activity 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); JACKSON & SYMONS, *supra* note 2, at 127-31 (identifying three interpretations of the term "business of banking"). These interpretations are: (1) the "narrow view," which limits banking powers to those specifically enumerated in the National Bank Act or other banking statutes; (2) the "broad view," which interprets the express powers of the Act as examples, arguing that the "business of banking" should be redefined as society's financial services needs change; and (3) the "middle ground view," which permits banks to perform an express power and not-expressly-prohibited activities that are within the principled scope of the expressly permitted banking activities. *Id.* The "middle ground view" theorizes that Congress chose not to expressly define the "business of banking" because deposit taking, credit granting, and credit exchange take myriad forms. *Id.* at 130.

10. 12 U.S.C. §§ 24, 29 (2000); *see* NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57 (1995) [hereinafter NationsBank v. VALIC] (upholding

permit certain national banks to own hotels or windmills have led to public outcry and have forced OCC to respond to scrutiny from private industry[11] and from the U.S. House of Representatives Subcommittee on Government Management, Finance, and Accountability.[12]

OCC First Senior Deputy Comptroller and Chief Counsel Julie L. Williams authored the three opinion letters.[13] These statutory interpretations in letter form are legislative in nature and receive *Chevron* deference even though they do not go through public notice and comment or formal rulemaking.[14] Copies of two of the three letters posted on the OCC's website have been redacted so that the names of the institutions in question are not included.[15] The *American Banker*, however, reported the names of the institutions.[16] The three institutions named were: PNC Bank in Pittsburgh, Pennsylvania; Bank of America in Charlotte, North Carolina; and Union Bank of California, based in San Francisco.[17]

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the OCC's interpretation of the National Bank Act to permit national banks to sell annuities); Merchants' Bank v. State Bank, 77 U.S. (10 Wall.) 604, 650-52 (1870) (holding that national banks may, as an incidental power, engage in the practice of certifying checks); Indep. Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638, 645-46 (D.C. Cir. 2000) (holding that an OCC interpretation permitting national banks to sell crop insurance was manifestly contrary to the National Bank Act under *Chevron* step one, and also unreasonable); *Arnold Tours*, 472 F.2d at 432 (claiming that OCC cannot interpret the National Bank Act to permit banks to own travel agencies as a "business of banking" activity).

11. *See* OCC Interpretive Letter No. 1053 (Jan. 31, 2006), http://www.occ.treas.gov/interp/mar06/int1053.pdf (dismissing concerns raised by Thomas M. Stevens, President of the National Association of Realtors, in a comment letter that thoroughly criticized OCC Interpretive Letters Nos. 1044, 1045, and 1048 as being invalid under the National Bank Act and inconsistent with OCC rules).

12. *See* Testimony of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, OCC, before the Subcommittee on Government Management, Finance, and Accountability (Sept. 27, 2006), *available at* http://www.occ.treas.gov/ftp/release/2006-105b.pdf .

13. OCC Interpretive Letter No. 1044 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1044.pdf; OCC Interpretive Letter No. 1045 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1045.pdf; OCC Interpretive Letter No. 1048 (Dec. 21, 2005), http://www.occ.treas.gov/interp/JAN06/int1048.pdf; *see* 12 U.S.C. § 29 (2000) (defining the power of national banks to own real estate).

14. *See* United States v. Mead Corp., 533 U.S. 218, 231 n.13 (2001) (holding that certain agencies, such as OCC, with a long tradition of pre-*Chevron* era deference to their interpretations receive *Chevron* deference for interpretations that do not go through notice and comment or formal rulemaking); *VALIC*, 513 U.S. at 256-57 (applying *Chevron* to an OCC interpretive letter).

15. *See* OCC Interpretive Letter No. 1044 (redacted); OCC Interpretive Letter No. 1045 (redacted); OCC Interpretive Letter No. 1048 (unredacted).

16. Barbara A. Rehm, *Firm, But Not Specific, On Banks in Real Estate*, AM. BANKER, Jan. 23, 2006, at 1, 3.

17. *Id.* at 3.

A. OCC Interpretive Letter No. 1044: PNC Bank

OCC Interpretive Letter No. 1044 approved PNC Bank's plan to build a new building in Pittsburgh with twelve floors of office space, a five-floor hotel, and thirty-two condo units.[18] PNC's building would be the third building in its corporate headquarters complex.[19] The hotel portion of the proposed building would include 158 hotel rooms.[20] The total office space in the building would be 360,000 square feet, however, PNC would only occupy approximately 100,000 square feet.[21] OCC stated that PNC would only occupy "approximately 25% of the available office space," but that PNC anticipates that its occupancy of the office space may increase over time.[22] PNC believes that persons on bank-related business will occupy only 10% of the hotel rooms on a yearly basis, but that PNC may occupy a larger percentage of the room "during certain times throughout the year."[23] The bank also plans to use the hotel's conference facilities when it needs additional meeting space.[24]

B. OCC Interpretive Letter No. 1045: Bank of America

OCC Interpretive Letter No. 1045 approved Bank of America's plan to develop a 150-room Ritz-Carlton Hotel as part of the "premises" of Bank of America's new headquarters in Charlotte—a city that already has approximately 30,000 hotel rooms.[25] The bank would remain the sole owner of the real estate, would own all improvements, would hire an independent contractor to build the hotel, and would contract with a national hotel chain—Ritz-Carlton—to manage the hotel.[26] The bank estimates that it will use more than 50% of the occupied rooms of the hotel to lodge out-of-area bank employees, bank directors, selected vendors, shareholders, bank customers, and other visitors.[27] The letter states that, "[b]ased on the projection that the hotel would maintain 75% occupancy [on average], the bank would use more than 37.5% of the total rooms on an annual basis."[28]

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18. *Id.*
19. OCC Interpretive Letter No. 1044, at 1.
20. *Id.* at 2.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 2-3.
25. OCC Interpretive Letter No. 1045 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1045.pdf at 3-4; Rehm, *supra* note 16, at 3.
26. OCC Interpretative Letter No. 1045 at 1.
27. *Id.* at 2.
28. *Id.*

C. OCC Interpretive Letter No. 1048: Union Bank of California

OCC Interpretive Letter No. 1048 approved Union Bank's proposal to invest in a limited liability company (LLC) that plans to build wind turbine electrical generators.[29] As part of the investment plan, Union Bank would acquire approximately 70% of the equity interest in the LLC.[30] The remaining interest would be retained by the promoters and managing members of the LLC.[31] The bank would receive a portion of the LLC's profits.[32]

As part of the plan, the LLC would acquire either a leasehold interest or an easement in the underlying real estate on which the wind turbines would be built.[33] The bank's interest in the LLC would be held for the minimum ten year period required by the IRS to qualify the investment for Section 45 Tax Credits.[34] OCC Interpretive Letter No. 1048 also announces a new, "federal definition" of the term "real estate" that preempts state law.[35]

II. INTERPRETATION OF THE NATIONAL BANK ACT

OCC's recent letters unreasonably interpret the real estate powers of national banks. OCC's statutory interpretations should not be valid under *Chevron* step two because the letters' legal reasoning has no basis in the National Bank Act, ignores the weight of relevant case law on national banks' powers under the Act, and relies on dicta from cases on subjects far removed from the question of whether national banks may engage in the lodging or energy businesses.

One significant flaw in OCC's legal reasoning is that OCC's analyses focus solely on selected cases interpreting 12 U.S.C. § 29, the section of the National Bank Act that empowers national banks to hold real estate. OCC's letters ignore the jurisprudence of 12 U.S.C. § 24(7), the section of the National Bank Act that defines the "business of banking"—the express and incidental powers of national banks—as well as at least one case that interprets what is now § 29.[36] A plain reading of § 24(7) and § 29 shows that the two sections of the National Bank Act are interrelated because § 29 allows national banks to hold real estate "as shall be necessary for its

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29. OCC Interpretive Letter No. 1048 at 1 (Dec. 21, 2005), http://www.occ.treas.gov/interp/JAN06/int1048.pdf.
30. *Id.*
31. *Id.*
32. *Id.* at 2.
33. OCC Interpretive Letter No. 1048 at 2 (Dec. 21, 2005), http://www.occ.treas.gov/interp/JAN06/int1048.pdf.
34. *Id.*
35. *Id.* at 5.
36. *See* Cockrill v. Abeles, 86 F. 505, 512 (8th Cir. 1898) (holding that the National Bank Act's real estate power did not authorize a national bank to own a cotton mill).

accommodation in the transaction of its business"[37] and § 24(7) authorizes "all such incidental powers as shall be necessary to carry on the business of banking . . . ."[38]

The United States Supreme Court has held that a term like "business" must be accorded a uniform interpretation across a statute even if the express terms of the statute appear to give it a different meaning in one section of a statute than in another.[39] The original version of the National Bank Act used the terms "business of banking" and "business" interchangeably throughout the Act, giving the appearance of congressional intent to refer to the "business of banking" when referring to "business" in § 29(1).[40] It logically follows that the cases interpreting the terms "necessary to carry on the business of banking" in § 24(7)[41] also apply to the requirement that something be "necessary for its . . . accommodation in the transaction of its business" referred to in § 29(1), the latter of which relates to national bank real estate ownership.[42]

In essence, OCC has chosen to ignore that the "business" referred to in § 29 is the business of banking, even though the relevant language of both sections dates back to the original 1864 version of the National Bank Act (then known as the National Currency Parity Act).[43] Neither owning a hotel nor owning electricity-generating windmills are necessary to the accommodation of the business of banking. Statutory interpretations permitting national banks to own hotels and windmills are unreasonable because the National Bank Act—and the relatively large body of law interpreting the Act—do not provide any legal basis for a claim that the business of lodging or the business of energy are necessary to the transaction of the business of banking under the National Bank Act.

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37. 12 U.S.C. § 29(1) (2000).

38. 12 U.S.C. § 24(7) (2000).

39. *See* Gustafson v. Alloyd Co., 513 U.S. 561, 568-74 (1995) (stating that the Court has a duty to construe statutes, not isolated provisions, and holding that the term "prospectus" in the Securities Act of 1933 legally had a single meaning even though a reading of the statute, as well as SEC interpretations, indicated that "prospectus" had a different meaning in one section of the Securities Act than it did in another).

40. *See* National Currency Parity Act Ch. 106, §§ 3, 5, 8, 12, 14, 15, 16, 17, 24, 28(1), 29, 40, 13 Stat. 99, 100-01, 103-05, 107, 111 (1864) (using the terms "business" and "business of banking" interchangeably).

41. 12 U.S.C. § 24(7) (2000); *see* NationsBank v. VALIC, 513 U.S. 251, 256-57 (1995); Indep. Ins. Agents of Am., Inc., v. Hawke, 211 F.3d 638, 640 (D.C. Cir. 2000); Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972).

42. 12 U.S.C. § 29(1).

43. *Compare* National Currency Parity Act § 8, Ch. 106, 13 Stat. 99, 101 (1864) (presently codified as amended at 12 U.S.C. § 24(7)) ("All such powers as shall be necessary to carry on the business of banking . . . ."), *with* National Currency Parity Act Ch. 106 § 28(1), 13 Stat. at 107 (presently codified as amended at 12 U.S.C. § 29(1)) ("A national bank may purchase, hold, and convey real estate . . . as shall be necessary for its . . . accommodation in the transaction of its business.").

A. Standard of Agency Deference

Section 29 limits the real estate power of national banks to only four purposes: (1) such as shall be necessary for its accommodation in the transaction of its business; (2) such as shall be mortgaged to it in good faith by way of security for debts; (3) such as shall be conveyed for the satisfaction of debts; and (4) such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.[44] OCC rules permit banks to own premises for the temporary lodging of bank officers, employees, or customers in areas where suitable commercial lodging is not readily available.[45]

OCC receives *Chevron* deference for its interpretations of the National Bank Act in Interpretive Letters Nos. 1044, 1045, and 1048, even though the interpretations are from a letter that is neither the product of adjudication nor a result of notice and comment.[46] Under *Chevron* step one, the court examines whether the statutory language at issue clearly expresses Congress's intent. If the statute is silent or ambiguous, the court applies *Chevron* step two and defers to the agency's interpretation of the statute if it is reasonable and consistent with the statute's purpose.[47] An agency's interpretations of its ambiguous rules are accorded deference unless the interpretation is plainly erroneous or inconsistent with the regulation.[48]

The terms "business of banking" and "necessary" are ambiguous as used in the National Bank Act.[49] OCC's interpretations of the National Bank Act in OCC Interpretive Letters Nos. 1044, 1045, and 1048 must be considered "reasonable" under *Chevron* step two to be valid because they interpret these ambiguous terms.[50] Most cases interpreting the incidental

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44. 12 U.S.C. § 29.

45. 12 C.F.R. § 7.1000(a)(2)(v) (2006).

46. *See* United States v. Mead Corp., 533 U.S. 218, 231 n.13 (2001); *VALIC*, 513 U.S. at 256-57; *cf.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005) (holding that a court's prior judicial constructions of a statute under *Chevron* step one only trump an agency's construction otherwise entitled to *Chevron* deference if the prior court decisions hold that the statute is unambiguous and leaves no room for agency discretion). *But cf. Mead*, 533 U.S. at 231-34 (holding that interpretive letters generally do not receive *Chevron* deference, only *Skidmore v. Swift & Co.* persuasiveness deference); Christensen v. Harris County, 529 U.S. 576, 586-87 (2000). *See generally* Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944) (stating that agency interpretations receive deference if the court finds them persuasive).

47. Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984); *see VALIC*, 513 U.S. at 256-58, 258 n.2 (applying *Chevron* to defer to OCC's interpretation of the language of 12 U.S.C. § 24(7) authorizing the "sale of securities," and holding that § 24(7) did not prohibit the sale of annuities because OCC's determination was within the reasonable bounds of dealings in financial instruments).

48. *Christensen*, 529 U.S. at 588; Auer v. Robbins, 519 U.S. 452, 461 (1997).

49. *See* 12 U.S.C. §§ 24(7), 29(1) (2000) (using the terms "business of banking" and "business" without expressly defining those terms).

50. *See Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous with respect to

powers in § 24(7) of the National Bank Act are essentially *Chevron* step two cases—even if they predate *Chevron*—because the incidental powers definition in § 24(7) has been ambiguous since the Act's inception.[51]

OCC's interpretation of its rule on national bank ownership of lodging, 12 C.F.R. § 7.1000, should not receive *Chevron* deference because OCC's interpretation is likely inconsistent with the rule. The rule only allows a national bank to operate lodging if there are no suitable commercial alternatives in the area, such as in a sparsely-populated rural area.[52] OCC Interpretive Letters Nos. 1044 and 1045 are clearly inapposite to 12 C.F.R. § 7.1000 because cities such as Charlotte, North Carolina and Pittsburgh, Pennsylvania have suitable, existing commercial lodging.

B. The "Business of Banking"

The hotel and wind-energy business activities that OCC authorized are not reasonable interpretations of the National Bank Act because those business activities do not meet the standards for acceptable national bank incidental powers established in *Arnold Tours, Inc. v. Camp*;[53] *NationsBank v. VALIC*,[54] and other cases interpreting the "business of banking" under the National Bank Act. Under the *Arnold Tours* standard, a national bank's activity is authorized as an incidental power necessary to carry on the business of banking if the activity is convenient or useful in connection with performance of one of the bank's express powers under the National Bank Act; any activity for which this connection does not exist is not authorized.[55]

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the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *cf.* OCC Interpretive Letter No. 1044 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1044.pdf (interpreting the National Bank Act to permit a bank to own a hotel and develop condominiums and office space as part of its headquarters); OCC Interpretive Letter No. 1045 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1045.pdf (permitting a national bank to own a hotel as part of its headquarters); OCC Interpretive Letter No. 1048 (Dec. 21, 2005), http://www.occ.treas.gov/interp/JAN06/int1048.pdf (permitting a national bank to own a majority equity interest in an electricity-generating windmill farm).

51. *See VALIC*, 513 U.S. at 256-57 (permitting national banks to sell annuities); Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972) (holding that national banks may not operate travel agencies). Although the Supreme Court recently clarified in *Brand X*, 545 U.S. at 982-83, that agencies do not need to abide by court decisions under *Chevron* step one unless the court has found the statute at issue to be unambiguous, the *Brand X* case should not apply to OCC's interpretations. *Brand X* should not apply because most business of banking cases are inherently *Chevron* step two cases even if they predate *Chevron*.

52. *See* 12 C.F.R. § 7.1000(a)(2)(v) (2006) (permitting national banks to own lodgings for bank personnel in areas where suitable commercial alternatives are not available).

53. 472 F.2d 427 (1st Cir. 1972).

54. 513 U.S. 251 (1995).

55. *Arnold Tours*, 472 F.2d at 432; *accord* Wells Fargo Bank, N.A. v. Boutris, 419 F.3d 949, 960 (9th Cir. 2005); Indep. Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638, 640 (D.C. Cir. 2000); First Nat'l Bank v. Taylor, 907 F.2d 775, 778 (8th Cir. 1990); Sec. Indus. Ass'n v. Clarke, 885 F.2d 1034, 1044-45, 1047 (2d Cir. 1989); Ass'n of Bank Travel Bureaus, Inc.

Although numerous circuit courts of appeal have accepted the *Arnold Tours* standard to determine what business activities are permissible incidental powers under the National Bank Act,[56] the Supreme Court applied *Chevron* to OCC's interpretations of the Act.[57] The D.C. Circuit has concurrently applied both *Arnold Tours* and *Chevron* to OCC's interpretations of the Act.[58] The following four cases are those most relevant to the question of whether OCC can reasonably interpret § 29(1) to permit national banks to own hotels, or interpret § 24(7) and § 29 to permit national banks to own windmills.

1. Arnold Tours

In *Arnold Tours*, OCC interpreted the National Bank Act to permit national banks to operate full-scale travel agencies.[59] Travel agencies challenged OCC's letter of interpretation, asserting that OCC had exceeded its statutory authority under § 24(7) of the National Bank Act. The travel agencies argued that operating full-scale travel agencies was not an incidental power permitted under § 24(7).[60]

The court stated that the most reliable gauge of what encompasses the term "the business of banking" is the express powers of national banks as set out in the National Bank Act.[61] The court noted that past decisions had held that activities permissible under the "incidental powers" provision of

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v. Bd. of Governors, 568 F.2d 549, 552-53 (7th Cir. 1978); Ass'n of Data Processing Servs. v. Fed. Home Loan Bank Bd. (FHLBB), 568 F.2d 478, 485-87 (6th Cir. 1977).

56. *See* sources cited *supra* note 55. The impact of *Arnold Tours* and *VALIC* is not limited to interpretation of the National Bank Act and extends even to some non-bank financial institutions. For example, the National Credit Union Administration uses *Arnold Tours* and *VALIC* to define the limits of the incidental powers of federally-chartered credit unions. *See* Federal Credit Union Incidental Powers Activities, 66 Fed. Reg. 40,845, 40,845-59 (Aug. 21, 2001) (to be codified at 12 C.F.R. pt. 721) (using *Arnold Tours* and *VALIC* to determine the permissible incidental powers of federal credit unions, including the power to own real estate, even though federal credit unions are chartered under the Federal Credit Union Act, 12 U.S.C. §§ 1751-1791k (2000), and are not banks); *see also Ass'n of Bank Travel Bureaus*, 568 F.2d at 552-53 (applying *Arnold Tours* to Federal Reserve Board administrative interpretations); *Ass'n of Data Processing Servs.*, 568 F.2d at 485-87 (applying *Arnold Tours* to define the incidental powers of Federal Home Loan Banks chartered under the Federal Home Loan Bank Act of 1932, 12 U.S.C. §§ 1421-1449 (2000)).

57. In *VALIC*, 513 U.S. at 258-59 n.2, the Court stated:

> We expressly hold that the "business of banking" is not limited to the enumerated powers in § 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated. The exercise of the Comptroller's discretion, however, must be kept within reasonable bounds. Ventures distant from dealing in financial investment instruments—for example, operating a general travel agency—may exceed those bounds.

58. *See Indep. Ins. Agents*, 211 F.3d at 640 (holding that an OCC interpretation permitting national banks to sell crop insurance was not valid under *Chevron* or *Arnold Tours*).

59. 472 F.2d at 428.

60. *Id.* at 428, 431.

61. *Id.* at 431.

§ 24(7) were activities that were directly related to one or another of a national bank's express powers.[62] These prior decisions also demonstrated that an incidental power is authorized under § 24(7) if it is convenient and useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act.[63]

In analyzing whether operating a travel agency was an incidental power connected to the express powers of national banks, the court noted that there were instances where banks have provided regular customers with travel tickets or information as a good will service since at least 1865.[64] The court stated, however, that there is a fundamental difference between supplying customers with financial and informational services helpful to their travel plans and developing a clientele which looks to the bank not as a source of general financial advice and support, but as a travel management center whose business is unrelated to the business of banking.[65] Travel agency operation is therefore not a permissible incidental power under the National Bank Act.

2. NationsBank v. VALIC

In *NationsBank v. VALIC*, the Court noted that the business of banking is not limited to the enumerated powers in § 24(7), and that OCC therefore has discretion to authorize non-enumerated powers so long as they are reasonably within the bounds of financial instruments.[66] Operating a travel agency, for example, exceeds those bounds.[67] The sale of annuities, however, was not outside those bounds because annuities can be structured as securities and the National Bank Act permits national banks to deal in securities.[68]

3. Independent Insurance Agents v. Hawke

In *Independent Insurance Agents v. Hawke*, insurance trade associations challenged an OCC letter ruling allowing a national bank to serve as an agent for crop insurance.[69] OCC ruled that the sale of crop insurance was within the business of banking under 12 U.S.C. § 24(7) for three reasons: (1) crop insurance is similar to credit-related insurance that banks may offer because it is a "logical outgrowth" of the lending power, (2) crop insurance benefits farmers and banks by mitigating risk, and (3) the risks

62. *Id.*
63. *Id.* at 432.
64. *Id.* at 433-34.
65. *Id.* at 433.
66. 513 U.S. 251, 258-59 n.2 (1995).
67. *Id.*
68. *Id.* at 261-63; *see* 12 U.S.C. § 24(7) (2000) (permitting national banks to purchase securities on behalf of their customers but not for the institution's own investment).
69. 211 F.3d 638, 642 (D.C. Cir. 2000).

are similar to those already borne by banks under 12 U.S.C. § 92 or elsewhere.[70] OCC also ruled that, even if the sale of crop insurance was not within the business of banking, it was "incidental" to banking.[71]

The D.C. Circuit rejected OCC's interpretation.[72] The court held that the sale of crop insurance violated the National Bank Act because Congress had enacted 12 U.S.C. § 92—permitting banks to sell insurance in towns with a population less than 5,000—and enacting § 92 would not have been necessary had § 24(7) permitted banks to sell insurance.[73] Under the first step of *Chevron*, the court held that Congress did not permit the OCC to authorize the sale of crop insurance.[74] The court also held that even though the term "incidental" in § 24(7) was inherently ambiguous, it was not ambiguous within the meaning of *Chevron.*[75] The D.C. Circuit also stated that OCC's interpretation of § 24(7) was unreasonable because if the sale of crop insurance was "incidental" to banking under § 24(7), there would be no way of distinguishing crop insurance from other general forms of insurance.[76]

4. Cockrill v. Abeles

In *Cockrill v. Abeles*, a national bank had taken title to a cotton mill.[77] The bank established a corporation, Little Rock Cotton Mills, to operate the mill and hold it in trust for the bank.[78] The bank wholly owned Little Rock Cotton Mills and four of the bank's trustees became directors of the corporation.[79] After the bank went into receivership, the receiver took action to indemnify the trustees for the bank's losses involving the cotton mill. The receiver sought to indemnify the bank's trustees, arguing that the bank's ownership of the mill was not authorized under the bank's power to hold real estate necessary for the convenient transaction of its business.[80]

The court held that even though the bank directors had the power to take title to the mill if they thought that doing so was in the bank's best interest, it was not permissible for the bank to continue to hold the mill and operate it through an agent.[81] Although the court stated in dicta that the bank might

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70. *Id.*
71. *Id.*
72. *Id.* at 645.
73. *Id.*
74. *Id.* at 645-46.
75. *Id.* (invoking the doctrine of *expressio unius est exclusio alterius*).
76. *Id.* at 645.
77. 86 F. 505, 507 (8th Cir. 1898).
78. *Id.*
79. *Id.*
80. *Id.* at 510-11; *see* 12 U.S.C. § 29(1) (2000) (permitting national banks to own real estate as necessary for the transaction of the banks' business).
81. *Id.* at 511-12.

lease the mill to a third party to operate,[82] owning and operating the mill would impermissibly subject the bank to risks inherent in the milling business, rather than the banking business.[83] Even the most liberal view of the implied powers of national banks would not permit a national bank to engage in a non-banking business like manufacturing.[84]

The OCC interpretations of the National Bank Act permitting national banks to own hotels and windmills are closely analogous to cases like *Arnold Tours* and *Cockrill v. Abeles* because those cases also addressed situations where national banks engaged in lines of business that were far removed from traditional banking activities.

III. DISCUSSION OF OCC'S INTERPRETIVE LETTERS

OCC's interpretive letters permitting national banks to own hotels and windmills do not reasonably interpret the National Bank Act and are inconsistent with OCC rules. The interpretations ignore well-accepted jurisprudence interpreting the Nationabecause the hotell Bank Act's incidental powers provision, contradict the express language of at least one OCC rule, and misrepresent the holdings of several cases. Although OCC supplied lengthy justifications, discussed in detail below, nothing contained in those letters establishes a nexus between the banks' ownership of hotels and electrical generators and the specifically enumerated powers of national banks contained in 12 U.S.C. § 24(7).[85] Much of OCC's analyses of these issues focused on a "percentage occupation" test that has no basis in the National Bank Act or case law.[86] Neither the hotel business nor the windmill business involves financial instruments, as required by the

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82. *Id.* at 512.
83. *Id.*
84. *Id.*
85. Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972) (holding that a bank activity is permissible as an "incidental power" under the National Bank Act if the activity 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).
86. *See, e.g.*, Testimony of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, OCC, before the Subcommittee on Government Management, Finance, and Accountability, at 5-7 (Sept. 27, 2006), *available at* http://www.occ.treas.gov/ftp/release/2006-105b.pdf (claiming that the courts have looked to the percentage occupancy of the premises in conjunction with banking purposes, and listing as authority *Wirtz v. First National Bank & Trust Co.*, 365 F.2d 641 (10th Cir. 1966); *Wingert v. First National Bank*, 175 F. 739 (4th Cir. 1909); and *Perth Amboy National Bank v. Brodsky*, 207 F. Supp. 785 (S.D.N.Y. 19462)). *But see Wirtz*, 365 F.2d at 641 (finding the percentage occupancy of a complex by a national bank as a fact unrelated to court's holding on an employment law matter); *Wingert*, 175 F. at 741-42 (permitting a bank to lease five floors of a six floor building to third parties as office space, but not using or alluding to a percentage occupancy standard); *Brodsky*, 207 F. Supp. at 787-88 (rejecting the claim of a financially troubled national bank that it could break an otherwise valid lease under the theory that the lease was *ultra vires* under the National Bank Act).

Supreme Court in *VALIC*.[87] OCC's letters rely on archaic cases, none of which post-date *Chevron* or the First Circuit's 1972 opinion in *Arnold Tours* OCC principally relied on dicta from an 1878 case, *National Bank v. Matthews*,[88] and dicta from a 1902 case, *Brown v. Schleier*.[89]

A. OCC Interpretive Letter No. 1045: Bank of America

Bank of America's development and operation of a Ritz-Carlton hotel as part of its headquarters complex is not a permissible activity for a national bank under the National Bank Act. The project violates OCC rules and is not a valid incidental activity for a national bank because the hotel business has no connection to the express powers of national banks under the Act. OCC's interpretation is unreasonable based on prior judicial holdings regarding interpretations of the National Bank Act in *Arnold Tours*,[90] *VALIC*,[91] *Independent Insurance Agents v. Hawke*,[92] and *Cockrill v. Abeles*.[93]

1. OCC's Legal Argument in Interpretive Letter No. 1045

OCC's analysis in Interpretive Letter No. 1045[94] is flawed because it ignores most case law interpreting the National Bank Act, misinterprets OCC rules, and misconstrues several cases that interpret 12 U.S.C. § 29.[95] None of the cases OCC cited support its interpretation of the National Bank Act that a bank may own a hotel, even if the hotel has a high percentage occupation of bank customers, officers, or directors. OCC Interpretive Letter No. 1045 does not make any statement or finding that Bank of America's ownership of the hotel is necessary because alternative suitable commercial lodging is not readily available, as the OCC rules and the plain language of 12 U.S.C. § 29(1) require.[96] OCC relied on several cases,

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87. NationsBank v. VALIC, 513 U.S. 251, 258 n.2 (1995) (holding that the banking powers expressly enumerated in the National Bank Act are not exclusive, but that national banks' incidental business activities must be confined to dealing with financial instruments).

88. 98 U.S. 621 (1879).

89. 118 F. 981 (8th Cir. 1902).

90. 472 F.2d 427 (1st Cir. 1972).

91. 513 U.S. 251 (1995).

92. 211 F.3d 638, 640 (D.C. Cir. 2000).

93. 86 F. 505, 512 (8th Cir. 1898).

94. *See* OCC Interpretive Letter No. 1045 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1045.pdf (permitting a bank to build a hotel as part of its Charlotte, North Carolina headquarters complex); *see also* Rehm, *supra* note 16, at 3 (identifying the Charlotte, North Carolina bank as Bank of America).

95. *See, e.g.*, Nat'l Bank v. Matthews, 98 U.S. 621 (1878); Wirtz v. First Nat'l Bank & Trust Co., 365 F.2d 641 (10th Cir. 1966); Wingert v. First Nat'l Bank, 175 F. 739 (4th Cir. 1909), *appeal dismissed*, 223 U.S. 670 (1912); Brown v. Schleier, 118 F. 981 (8th Cir. 1902), *aff'd*, 194 U.S. 18 (1904).

96. *See* 12 U.S.C. § 29(1) (2000) (requiring that a bank's ownership of realty be necessary to its business); 12 C.F.R. § 7.1000(a)(2)(v) (allowing investment in realty to be used as temporary lodging in areas where such lodging is not available).

discussed in detail below, that do not reasonably justify statutory interpretations of the National Bank Act to permit banks to operate hotels.

i. National Bank v. Matthews

OCC relied on dicta from *National Bank v. Matthews* stating that the purpose of the restriction on a national bank's power to own real estate is to keep the capital of banks from flowing in the channels of daily commerce, to deter banks from speculating in real estate, and to prevent the accumulation of large masses of property that would be held by the bank in mortmain.[97] OCC Interpretive Letter No. 1045 styles this dicta as a three-part weighing factors test.[98]

However, this section of the opinion is dicta because *Matthews* ruled on the ability of a national bank to foreclose on a mortgaged property.[99] The issue before the Court was whether a deed of trust[100] qualified as a mortgage within the meaning of what is now 12 U.S.C. § 29(2),[101] and therefore could be enforced for the benefit of a national bank.[102] The bank never had title to the property at issue, but could purchase it in a foreclosure sale under the deed of trust that the bank had acquired as part of a mortgage loan.[103]

The property's owner challenged the bank's right to foreclose on his property as *ultra vires* because of the National Bank Act's restriction on a bank's power to own real estate.[104] The Court stated that the purpose of the restriction on the real estate power was to keep the capital of banks from flowing in the channels of daily commerce, deter banks from speculating in real estate, and prevent the accumulation of large masses of property that would be held by the bank in mortmain, not to prohibit foreclosure on mortgages made in good faith.[105] The Court held that the deed of trust was equivalent to a direct mortgage and that the bank could take title to the property because a mortgage taken to secure a loan in the course of banking operations was not prohibited by the National Bank Act.[106]

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97. 98 U.S. at 626.
98. *See* OCC Interpretive Letter No. 1045 at 3.
99. 98 U.S. at 625-26.
100. BLACK'S LAW DICTIONARY 423 (7th ed. 1999) (defining a "deed of trust" as an arrangement that resembles a mortgage but involves conveying title to a trustee as security until repayment of the loan, thereby permitting bypass of judicial foreclosure).
101. *Compare* 12 U.S.C. § 29(2) (2000) (permitting national banks to make mortgages but making no reference to deeds of trust), *with* Nat'l Currency Parity Act, Ch. 106 § 28(2), 13 Stat. 99, 108 (1864) (remaining virtually unchanged since 1864).
102. *See Matthews*, 98 U.S. at 624 (holding that a deed of trust qualified as a "mortgage" within the meaning of the statutory provision now codified at 12 U.S.C. § 29(2)).
103. *See id.* at 625 (noting that the bank held neither legal or equitable title).
104. *See id.* at 626 (refusing to accept *ultra vires* as a valid defense).
105. *Id.*
106. *Id.* at 627-29.

Matthews does not provide a test for determining whether a power is permitted under § 29(1). The issue of whether a national bank can foreclose on mortgages under 12 U.S.C. § 29(2)[107] hinges on the definition of the term "mortgage," whereas the OCC interpretation that 12 U.S.C. § 29(1) permits the building and owning of hotels is an interpretation of the broader grant of power that a National Bank may own property "as shall be necessary for its accommodation in the transaction of its business."[108]

ii. Brown v. Schleier

OCC Interpretive Letter No. 1045 quotes the following passage from *Brown v. Schleier*:

> When an occasion arises for an investment in real property for either of the purposes specified in the statute [securing an eligible business location, to secure debts, or to prevent loss at court-ordered execution sales, *Brown*, 118 F. at 984,] the [N]ational [B]ank [A]ct permits banking associations to act as any prudent person would act in making an investment in real estate, and to exercise the same measure of judgment and discretion. The act ought not to be construed in such a way as to compel a national bank, when it acquires real property for a legitimate purposes, to deal with it otherwise than a prudent landowner would ordinarily deal with such property.[109]

Brown is a case regarding standing. In *Brown*, a bank leased real estate from a private third party, and then erected a building on the leased premises that it did not contemplate immediately using to accommodate the transaction of business, as required by the National Bank Act at that time.[110] After the bank went into receivership, the bank's private party receiver brought an action against the property's lessor, alleging that the bank's lease was in violation of the bank's charter and the National Bank Act, and arguing that the lessor was consequently jointly liable with the bank's directors for all damages that the bank's creditors had sustained in consequence of the lease's execution.[111] The court stated that there was

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107. *See* 12 U.S.C. § 29(2) (2000) (permitting national banks to grant mortgages).

108. 12 U.S.C. § 29(1). *See* Indep. Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638, 645-46 (D.C. Cir. 2000) (rejecting the OCC's argument that it can authorize any national bank incidental powers activity so long as the activity is a "logical outgrowth" of the express power granted in the National Bank Act because a logical outgrowth test would allow national banks to be able to incrementally expand their field of legally permissible business activities without congressional action).

109. OCC Interpretive Letter No. 1045 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1045.pdf (bracketed passage in original); s*ee* Brown v. Schleier, 118 F. 981, 984 (8th Cir. 1902), *aff'd*, 194 U.S. 18 (1904).

110. *See* 118 F. 981, 983 (8th Cir. 1902); *see also* Act of Feb. 25, 1927, Pub. L. No. 69-639, § 3, 44 Stat. 1224, 1227 (1927) (removing the term "immediate").

111. *Brown*, 118 F. at 983-84. In dicta, the court stated that the National Bank Act was framed with a view of preventing national banks from investing their funds in real property, except when it becomes necessary to do so for the purposes of securing an eligible business

nothing in the National Bank Act prohibiting a bank from making leases so long as the bank acts in good faith, especially when the lease had been made ten years prior to the filing of the action and the OCC had taken no enforcement action against the bank regarding the lease.[112] The court, however, denied the receiver relief on other grounds, holding that the receiver was a private party and that only OCC had standing to challenge the validity of the bank's actions.[113]

Brown v. Schleier's substantive holding does little to support OCC's conclusion that *Brown* authorizes Bank of America to build and operate a hotel as part of its headquarters because *Brown*'s holding was based on standing.[114] All of the statements in the case regarding property use are dicta.[115] Even if one accepts the premise that the National Bank Act does not prohibit a bank from leasing excess capacity, the *Brown* dicta does not indicate that the bank's real estate power is exempt from the necessity and "business of banking" restrictions of the National Bank Act.[116] The *Brown* decision's precedential value is its holding that the OCC—not a private receiver—had standing to challenge the validity of the bank's real estate activities after a bank had become insolvent.[117]

iii. Wirtz v. First National Bank and Trust Co.

Wirtz v. First National Bank and Trust Co. is not a case about banking powers; rather, the issue at bar was whether the Fair Labor Standards Act applied to engineers, electricians, carpenters, and painters who worked for

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location, securing debts, or preventing a loss at execution sales under judgments or decrees that have been rendered in their favor. *Id.* The court also stated that the National Bank Act does not preclude a national bank from leasing part of its home office or branches if the office or branch is located in a city where property values are high and not leasing excess capacity, even for non-banking activities, would be an imprudent business decision, so long as the bank acted in good faith. *Id.*

112. *Id.* at 983-86.

113. *Id.* at 987-88.

114. *Id. But see* OCC Interpretive Letter No. 1053 at 3 (Jan. 31, 2006), http://www.occ.treas.gov/interp/mar06/int1053.pdf (claiming that *Brown v. Schleier* is the leading case on leasing bank premises and that *Brown* does not require that bank premises only be developed on property long-held by the bank).

115. *See Brown*, 118 F. at 983-88 (basing the court's holding on standing even though the opinion includes an extensive policy discussion regarding national bank real estate ownership).

116. *See* 12 U.S.C. §§ 24(7), 29(1) (2000) (requiring that the incidental powers of national banks—whether regarding real estate or other banking activities—be "necessary" to the business of banking); *see also, e.g.*, Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972) (holding that a bank activity is permissible as an "incidental power" under the National Bank Act if the activity 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).

117. *See Brown*, 118 F. at 987-88. *But see* Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 494-95 (1998) (holding that the competitors of a depository institution have standing to challenge the statutory interpretations of that institution's regulator so long as the competitors have suffered a redressible injury-in-fact).

a real estate management company owned by a national bank.[118] Although the opinion notes that the bank, First National Bank and Trust Company, occupied 20.7% of the office complex managed by the bank-owned real estate management company, the bank's percentage occupancy was in no way related to the court's holding that the employees of the management company fell within the jurisdiction of the Fair Labor Standards Act.[119] *Wirtz* is a case about the applicability of federal labor laws; the bank's percentage occupancy is merely a fact recounted in the opinion that is unrelated to the holding.[120]

OCC Interpretive Letter No. 1045's responsive parenthetical explaining *Wirtz* as "recognizing bank's authority to occupy 20.7% of office complex and lease remaining space as excess premises"[121] is a misstatement because the *Wirtz* holding had nothing to do with percentage occupation. The *Wirtz* decision is confined to labor law and does not establish a rule on percentage occupation or even address percentage occupation as a legal issue.

iv. Wingert v. First National Bank

In *Wingert v. First National Bank*, a bank wanted to tear down its three-story building and replace it with a six-story building.[122] The bank used the first floor of the original building and leased the upper two floors to tenants.[123] The bank planned a similar arrangement for the new building, whereby the bank would use the first floor and lease the upper five floors to tenants.[124] OCC had written the bank a letter approving the new building,[125] relying on dicta from *Brown v. Schleier*.[126] Although one of the bank's directors brought suit challenging the new building's construction as a violation of the National Bank Act's real estate powers limitation, the court upheld the construction on the grounds that OCC's interpretation of its statue was a "common sense interpretation."[127] The *Wingert* holding does support the position that a bank may lease those parts

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118. *See* 365 F.2d 641, 642-43 (10th Cir. 1966).
119. *See id.* at 643-45 (stating in passing that the national bank occupied approximately 20% of the building, but not using the bank's percentage occupancy of the building in the opinion's legal reasoning on a labor law matter).
120. *See id.* (holding that the Fair Labor Standards Act applied to management personnel as well as ordinary workers, which is a legal issue wholly unrelated to a bank's percentage occupancy of a building).
121. OCC Interpretive Letter No. 1045 at 3 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1045.pdf.
122. *See* Wingert v. First Nat'l Bank, 175 F. 739, 740 (4th Cir. 1909).
123. *Id.*
124. *Id.*
125. *Id.* at 741.
126. *See id.* (relying on dicta in *Brown v. Schleier*, 118 F. 981, 983-84 (8th Cir. 1902)); *cf. supra* notes 109-17 and accompanying text.
127. *Wingert*, 175 F. at 741.

of its building that it does not use for banking business to third parties as office space. *Wingert*, however, does not address the ability of a national bank to own a hotel or establish a "percentage occupation" test.

v. 12 C.F.R. § 7.1000

OCC Interpretive Letter No. 1045 also attempts to justify Bank of America's Ritz-Carlton project as being permissible under the National Bank Act even though the letter conflicts with the express terms of an OCC rule.[128] OCC claims that the list of permitted real estate holdings listed in 12 C.F.R. § 7.1000(a)(2) is not exclusive.[129] Although the preamble to the proposed rule supports that position,[130] the rule itself does not state that the list is non-exclusive and does not permit banks to own lodgings except in areas where commercial lodgings are unavailable.[131] The preamble to the final rule also does not state that the list is non-exclusive and, even though OCC Interpretive Letter No. 1045 claims that the preamble to the final rule does say that the list is non-exclusive, OCC apparently abandoned the non-exclusivity statement when it promulgated the rule's final version.[132]

OCC's interpretation of 12 C.F.R. § 7.1000 likely will not receive deference because the rule is unambiguous.[133] The preamble to the proposed version of 12 C.F.R. § 7.1000 states that the permitted activities listed in that rule are not exclusive;[134] however, the rule itself is not ambiguous, and the preamble to the final rule did not state that the list was not exclusive.[135] While there may not be suitable commercial alternatives

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128. *See* Christensen v. Harris County, 529 U.S. 576, 588 (2000) (holding that an agency only receives *Auer v. Robbins* deference for interpretations of its ambiguous regulations); *see also* Auer v. Robbins, 519 U.S. 452, 461 (1997). *Compare* 12 C.F.R. § 7.1000(a)(2)(v) (2006) ("Property for the use of bank officers, employees, or customers, or for the temporary lodging of such persons in areas where suitable commercial lodging is not readily available, provided that the purchase and operation of the property qualifies as a deductible business expense for Federal tax purposes."), *with* OCC Interpretive Letter No. 1045 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1045.pdf (permitting the bank to own a hotel in downtown Charlotte; a major city with ample lodging alternatives).

129. *See* OCC Interpretive Letter No. 1045 at 2-3 n.2 (claiming that the list of permitted activities in 12 C.F.R. § 7.1000 is non-exclusive even though neither the rule itself nor the preamble to the final rule supports this proposition).

130. *See* Interpretive Rulings, 60 Fed. Reg. 11,924, 19,925 (proposed Mar. 3, 1995) (to be codified at 12 C.F.R. pts. 7 and 31) (proposing a non-exclusive list of real estate considered to be a bank premises for purposes of 12 U.S.C. § 29).

131. *See* 12 C.F.R. § 7.1000(a)(2)(v) (2006) (limiting national bank ownership of lodgings to circumstances that likely only occur in isolated, rural areas).

132. *Compare* Interpretive Rulings, 61 Fed. Reg. 4849, 4850 (Feb. 9, 1996) (to be codified at 12 C.F.R. pts. 7 and 31) (failing to state that the list of permissible activities is non-exclusive), *with* OCC Interpretive Letter No. 1045 at 2 n.2 (claiming, incorrectly, that the preamble to the final rule stated that the list of permissible activities was non-exclusive).

133. An agency's interpretations of its ambiguous rules are accorded deference unless the interpretation is plainly erroneous or inconsistent with the regulation. *See Christensen*, 529 U.S. at 588; *Auer*, 519 U.S. at 461.

134. *See* 60 Fed. Reg. 11,924, 19,925 (proposed Mar. 3, 1995).

135. *See* 61 Fed. Reg. 4849, 4850 (Feb. 9, 1996).

in rural, sparsely populated areas, Charlotte, North Carolina is a thriving metropolitan area with ample commercial lodging. Ownership of a Ritz-Carlton is plainly inconsistent with 12 C.F.R. § 7.1000 under these facts because Charlotte, North Carolina has over 30,000 hotel rooms.[136] Therefore, suitable commercial lodging alternatives to Bank of America's Ritz-Carlton exist locally.[137] Even if OCC's interpretation of 12 C.F.R. § 7.1000 as a non-exclusive list is accorded deference, Bank of America's building and owning a Ritz-Carlton in downtown Charlotte plainly conflicts with the rule.

2. Analysis of Letter No. 1045 Under Arnold Tours *and* VALIC

Although owning a hotel may be convenient and useful to Bank of America,[138] the hotel business is not necessary to the business of banking because offering lodging to the public is not related to the express powers of national banks in 12 U.S.C. § 24(7). Even though 12 U.S.C. § 29 codifies the national banks' real estate power, § 29(1) only authorizes banks to hold real estate as necessary to its business. Therefore § 29(1) implicates the business of banking defined in § 24(7). The "necessary" to business requirement of § 29 mirrors the "necessary" to business requirement of § 24(7) and the *Arnold Tours* standard.[139]

A national bank owning a hotel likely does not qualify as the business of banking under *Arnold Tours* because owning a hotel is not related to the business of making loans, taking deposits, buying and selling exchange, coin, or bullion, discounting promissory notes, or any other express power.[140] Owning and operating a hotel is much more similar to operating a travel agency than the business of banking. Travel agencies regularly

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136. *See* Rehm, *supra* note 16, at 3.

137. *Cf.* 12 C.F.R. § 7.1000(a)(2)(v) (2006).

138. *Cf.* Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972) ("[A] national bank's activity is authorized as an incidental power, 'necessary to carry on the business of banking,' within the meaning of 12 U.S.C. § 24, Seventh, if it 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.").

139. *See* Gustafson v. Alloyd Co., 513 U.S. 561, 568-74 (1995) (holding that the meaning of a term in a statute must be read to be consistent throughout even if a plain reading of a statute would appear to give it one meaning in certain provisions and another meaning in different provisions). *Compare* 12 U.S.C. § 24(7) (2000) ("To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking . . . ."), *and Arnold Tours*, 472 F.2d at 432 ("[A] national bank's activity is authorized as an incidental power, 'necessary to carry on the business of banking" . . . if it 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."), *with* 12 U.S.C. § 29(1) ("A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: First. Such as shall be necessary for its accommodation in the transaction of its business . . . .").

140. *See* 12 U.S.C. § 24(7) (2000).

make hotel reservations for their clients so that they will have lodging during their travels. Hotel customers do not look to the hotel to provide financial services, but rather look to the hotel as a source of lodging. Both a hotel and a travel agency engage in aspects of the travel business, but neither engage in the business of banking or the business of financial instruments.

Bank of America using the Ritz-Carlton hotel chain as its agent to operate the hotel does not make the bank's ownership of the hotel permissible if the bank's direct ownership or operation of the hotel itself is not permissible.[141] By simply owning the hotel, the bank exposes itself to the risks inherent to the hotel industry. A hotel building can be used for lodging, or possibly be converted to apartments or condos at additional expense, but is not suited for other purposes.

Only a few chains operate luxury hotels in the United States. Most would be hesitant to take over a struggling hotel because the hotel business depends on location to attract lodgers. Office space is a safer asset than a hotel because any type of business that requires an office may use it. Considering the shallow pool of potential tenants and the stigma that likely attaches to a struggling hotel location, the same policy reasons for prohibiting a bank from employing an agent to operate a mill held in trust would apply to a bank building a luxury hotel and leasing it to a hotel chain.[142]

B. Interpretive Letter No. 1044: PNC Bank

OCC Interpretive Letter No. 1044 approved PNC Bank's plan to build a new headquarters building in Pittsburgh with twelve floors of office space, a 158-room five-floor hotel, and thirty-two condo units.[143]

1. OCC's Legal Argument in Interpretive Letter No. 1044

OCC's justification in OCC Interpretive Letter No. 1044 for approving PNC's plan for expanding its headquarters is substantially similar to OCC's justification for approving Bank of America's Ritz-Carlton project as permissible under the National Bank Act in Interpretive Letter No. 1045. In Interpretive Letter No. 1044, OCC only cited three cases, *National Bank v. Matthews*, *Brown v. Schleier*, and *Perth Amboy National Bank v. Brodsky*.[144]

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141. *See* Cockrill v. Abeles, 86 F. 505, 511-12 (8th Cir. 1898) (holding that the National Bank Act did not permit a bank to own a cotton mill even though a separate business entity operated the mill).

142. *See id.* at 512 (stating that cotton mill ownership had impermissibly exposed the insolvent national bank to the risks of the milling industry).

143. *See* OCC Interpretive Letter No. 1044 at 2 (Dec. 5, 2005) http://www.occ.treas.gov/interp/dec05/int1044.pdf; Rehm, *supra* note 16, at 3.

144. *See* Nat'l Bank v. Matthews, 98 U.S. 621 (1878); Brown v. Schleier, 118 F. 981 (8th Cir. 1902), *aff'd*, 194 U.S. 18 (1904); Perth Amboy Nat'l Bank v. Brodsky, 207 F.

Perth Amboy National Bank v. Brodsky is a district court case from 1962 involving a bank that sued the landlord of its headquarters building to void the lease as *ultra vires* under the National Bank Act.[145] In 1954, the bank entered into a sale-and-lease-back arrangement with the landlord, in which the bank sold its headquarters to the landlord and leased it back to the bank.[146] Moving for summary judgment, the bank argued that the court should void its lease because the lease was so unfair that the bank must not have acted in good faith when making the lease, and that the leased premises were larger than what was actually necessary for the reasonable accommodation of the bank's business.[147] The district court followed the *Brown v. Schleier* dicta and denied summary judgment to the bank because the *Brown* dicta interpreted 12 U.S.C. § 29 to allow a national bank to lease larger premises than necessary and because the issue of good faith was an issue of material fact for the jury to decide at trial.[148]

OCC cited *Brodsky* as support for its position that "the courts have recognized that it is appropriate for a bank to maximize the utility of its banking premises."[149] OCC's citation to *Brodsky* does not include the name of the court, but OCC's reliance on a district court case from 1962 is misplaced because the facts of *Brodsky* were very different from the PNC hotel ownership situation. First, *Brodsky* involved the bank's lease for premises to be used for banking business, not for commercial lodging. Second, the bank was suing its landlord to attempt to withdraw from an otherwise valid lease by arguing that the lease was *ultra vires*. Although the *ultra vires* doctrine was well accepted in the ninteenth century, courts in the twentieth century were generally suspicious of business entities that, as in *Brodsky*, argued that they should be able to withdraw from otherwise valid contracts that they had entered into by claiming that the contract was *ultra vires*.[150] Third, the only part of *Brodsky* that supports OCC's position that the courts have recognized the appropriateness of banks to maximize the utility of its banking premises is the district court's reliance on the dicta from *Brown v. Schleier*.

Supp. 785 (S.D.N.Y. 1962).

145. *See Brodsky*, 207 F. Supp. at 786 (noting that the bank attempted to avoid liability for the unexpired term of the lease).

146. *Id.*

147. *Id.*

148. *Id.* at 787-88.

149. OCC Interpretive Letter No. 1044 at 3 (Dec. 5, 2005) http://www.occ.treas.gov/interp/dec05/int1044.pdf.

150. *See generally* ROBERT W. HAMILTON, THE LAW OF CORPORATIONS IN A NUTSHELL 97-98 (2000) (noting that the 1950 and later Model Business Corporations Acts did not permit corporate property transfers to be invalidated even if they were *ultra vires*).

None of the cases that OCC cites in Interpretive Letter No. 1044 involve a bank operating a hotel or otherwise engaging in the business of lodging. Although *Brown v. Schleier* and *Brodsky* support the contention that a bank may lease office space in its building, these cases do not support the contention that a bank may own a hotel and contract with a national hotel chain to manage that hotel for it. As in OCC Interpretive Letter No. 1045, OCC Interpretive Letter No. 1044 falls well short of reasonably interpreting the National Bank Act.

2. Analysis of Letter No. 1044 Under Arnold Tours *and* VALIC

The hotel that PNC plans to add to its headquarters should not be permissible under the National Bank Act and OCC rules. Under the *Arnold Tours* and *VALIC* standards discussed in Part II.A of this Article, *supra*, the PNC hotel is not permissible for the same reasons that Bank of America's Ritz-Carlton is not permissible: The business of hotels is not related to the express powers of national banks or to financial instruments. Therefore, the hotel business is not a permitted incidental power under the National Bank Act.

In addition, PNC believes that persons on bank-related business will occupy only 10% of the hotel rooms on a yearly basis, but that PNC may occupy a larger percentage of the rooms during certain times throughout the year. This percentage is substantially lower than the 37.5% bank-related occupancy that Bank of America speculates that its Ritz-Carlton will have. OCC's acceptance of only 10% occupancy under its "percentage occupancy" test makes OCC's application of this so-called test appear to be arbitrary and capricious. If only 10% occupancy is acceptable, what percentage would be too low?

The percentage occupancy issue is likely moot, however, because—even if "percentage occupancy" is a valid inquiry—percentage occupancy should not permit a bank to enter lines of business that would otherwise not be permissible under the National Bank Act.

C. OCC Interpretive Letter No. 1048: Union Bank of California

OCC Interpretive Letter No. 1048 impermissibly authorized Union Bank of California in San Francisco to finance and acquire a 70% equity interest in an LLC that will establish an electrical wind-turbine farm to generate electricity. Although OCC justified the financing of the project under the lending power of national banks under § 24(7)[151] as well as the ability of banks to hold real estate under § 29,[152] OCC Interpretive Letter No. 1048 is

151. *See* 12 U.S.C. § 24(7) (2000) (permitting national banks to make loans).
152. *See* 12 U.S.C. § 29 (2000) (permitting national banks to own real estate necessary to the transaction of its business).

devoid of references to the jurisprudence of § 24(7).[153] OCC's interpretation in this letter is not reasonable because owning windmills is not necessary to the business of banking or related to any of the express powers of national banks. Permitting national banks to own electricity generating windmills also subjects banks to the economic perils of the energy market, which is contrary to public policy.

1. OCC's Legal Argument in Interpretive Letter No. 1048

OCC's justification for its approval of Union Bank's investment in the energy industry primarily cites other OCC letters as precedent.[154] OCC Interpretive Letter No. 1048's analysis of 12 U.S.C. § 24(7) is devoid of any reference to cases such as *Arnold Tours* or *VALIC*.[155] The only sources of law that OCC cites in the section of the letter analyzing § 24(7) are prior interpretive and rulings letters,[156] and the 1879 case *National Bank v. Matthews*.[157] A later OCC interpretive letter[158] and OCC testimony before Congress[159] claimed another case, *M&M Leasing Corp. v. Seattle First National Bank*,[160] as authority. *M&M Leasing Corp.* permits national banks to lease personal property under the lending power enumerated in the National Bank Act if the lease is the functional equivalent of a loan, but does not address whether a bank may own real estate or enter the energy business.[161]

Although OCC justified the bank's acquisition of an equity interest in the windmill farm under the lending power, styling equity ownership as permissible under a bank's powers to make loans is not reasonable because debt and equity ownership are fundamentally different. A bank's business involves assuming a debt to its depositors by accepting their deposits and

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153. *See* OCC Interpretive Letter No. 1048 (Dec. 21, 2005), http://www.occ.treas.gov/interp/JAN06/int1048.pdf; *see also*, *e.g.*, NationsBank v. VALIC, 513 U.S. 251, 258-59 n.2 (1995); Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972); *cf.* M&M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377, 1383-85 (9th Cir. 1977) (authorizing a bank to lease personal property to customers under the lending power so long as the leases did not impose significant financial risks and were the functional equivalent of a loan).

154. *See* OCC Interpretive Letter No. 1048 at 4 nn.4-5 (citing OCC Interpretive Letter dated Nov. 4, 1994, OCC Interpretive Letter No. 867 (*reprinted on* June 1, 1999), and OCC Interpretive Letter No. 966 (May 12, 2003)).

155. *See* OCC Interpretive Letter No. 1048 at 2-3.

156. *See id.*; *see also* Corporate Decision No. 99-07 (May 26, 1999); Corporate Decision No. 98-17 (Mar. 23, 1998); Unpublished OCC Interpretive Letter from Horace G. Sneed, OCC Senior Attorney (Nov. 4, 1994).

157. 98 U.S. 621 (1879).

158. *See* OCC Interpretive Letter No. 1053, at 7 (Jan. 31, 2006), http://www.occ.treas.gov/interp/mar06/int1053.pdf.

159. Testimony of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, OCC, before the Subcomm. on Gov't Mgmt., Finance, and Accountability, at 9 (Sept. 27, 2006), *available at* http://www.occ.treas.gov/ftp/release/2006-105b.pdf.

160. 563 F.2d 1377 (9th Cir. 1977).

161. *See id.* at 1382-85.

selling loan products in which the borrower assumes a debt to the bank. Equity interests are ownership interests, not loans. Following the logic of OCC Interpretive Letter No. 1048, OCC could justify national banks investing in almost any sort of business venture as long as the bank could have alternatively offered a loan rather than purchased an equity investment.

OCC's analysis of 12 U.S.C. § 29 in Interpretive Letter No. 1048 only cites to one case—namely, the dicta in *Union National Bank v. Matthews* where the Supreme Court outlined three policy reasons behind § 29's restrictions on banks owning real estate.[162] OCC again styled the dicta as a weighing factor test even though these "factors" are not related to the holding of the case.[163]

OCC Interpretive Letter No. 1048 also contains a discussion of California state law from which OCC concludes that it can use federal preemption to set aside California's definition of the term "real estate" and replace it with a "federal definition" that had not previously existed.[164] The fact that OCC focused more of the legal analysis of this letter on federal preemption of the definition of "real estate" then on justifying this arrangement under the National Bank Act is notable because this allowed OCC to make a more convincing argument for preempting state law than for justifying the reasonableness of its statutory interpretation.

2. Analysis of Letter No. 1048 Under Arnold Tours *and* VALIC

The Union Bank of California windmill farm situation is very similar to the mill-ownership situation in *Cockrill v. Abeles*.[165] The wind energy project uses wind turbines to generate electricity to be sold through long-term contracts.[166] The bank will finance the project and acquire approximately 70% of the equity in the LLC that will operate the windmills and receive a portion of the LLC's profits (if any).[167]

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162. *See* Nat'l Bank v. Matthew*s*, 98 U.S. 621, 626 (1878) (claiming—without any citations to legislative history—that Congress's three policy reasons behind the restriction on national bank real estate ownership were: (1) keeping the banks' capital flowing in the daily channels of commerce; (2) deterring banks from embarking in unsafe and unsound real-estate speculation; and (3) preventing, banks from holding property in mortmain); OCC Interpretive Letter No. 1048 at 5 (Dec. 21, 2005), http://www.occ.treas.gov/interp/JAN06/int1048.pdf (reiterating the same policy reasons).

163. OCC Interpretive Letter No. 1048 at 5; *see Matthews*, 98 U.S. at 626.

164. *See* OCC Interpretive Letter No. 1048 at 5 (discussing the problems of employing various state definitions of "real estate" for the purposes of § 29).

165. *See* 86 F. 505, 512 (8th Cir. 1898) (denying national banks the power to engage in the milling business on public policy grounds).

166. OCC Interpretive Letter No. 1048 at 1.

167. *See id.* at 1-2 (delineating that the bank will be paid income provided by the project's revenues and section 45 Tax Credits).

Essentially, Union Bank is making an investment in windmills. These windmills generate electrical power. Although the windmills are called "turbines," they operate in exactly the same manner as a windmill: Wind turns the structure's rotors to generate mechanical energy to be used in manufacturing. In this instance, the manufacturing process converts mechanical energy into electrical energy.

Although OCC justifies Union Bank's financing of this project under the lending power,[168] Union Bank is making an investment. The bank is acquiring a 70% equity interest in the company in exchange for its money and will receive profits, not interest. The bank, therefore, possesses an equity interest in the company and qualifies as an owner, not a lender, because a lender would have a debt owed by the company. Even though this owner versus lender bifurcation would be muddied if the bank received repayment of principle with interest rather than a percentage of the profits (if any), the simple fact that the bank receives equity—not debt—likely violates the restrictions on the lending power in § 24(7) of the National Bank Act in and of itself because this "loan" is not a loan in fact.[169] The equity interest is not collateral to secure the loan; the equity interest is outright ownership.[170]

Although the OCC letter states that the bank's ownership in the windmills will be limited to ten years and that the bank will be "repaid" at regular intervals with part of the LLC's profits, the bank will be tied to the LLC through majority ownership and the ability of the bank to recoup its capital investment masquerading as a "loan" depends on the business climate in the energy industry years from now. As the bank's interest is equity, not debt, if the LLC fails, the bank likely will lose its investment because the bank does not have liquidation priority over the LLC's creditors in a bankruptcy.[171] Even prior to bankruptcy, LLC investments, like limited partnership investments, are typically illiquid (although the available facts do not indicate the degree of liquidity of Union Bank's investment)—a fact that would also likely impair the bank's ability to recoup its investment if there is a downturn in the energy industry. In short, the investment is unsafe and unsound for a national bank and the OCC should not permit it because of the risks such investments pose.[172]

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168. *See* 12 U.S.C. § 24(7) (2000) (listing lending as an express power of national banks).

169. *Cf.* SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946) (defining most passive allocations of money for profit as investment contracts—not loans—especially if the investment includes an equity ownership interest).

170. *Cf.* 12 C.F.R. §§ 32.2(k), 34.3(a) (2006) (defining the lending power and delineating when a national bank may secure a loan with real estate).

171. *See* 11 U.S.C. § 726(a) (2000) (giving a debtor's equity owners a bankruptcy liquidation priority subordinate to all creditors).

172. *See* JACKSON & SYMONS, *supra* note 2, at 117-22 (discussing how portfolio-shaping

The differences between the businesses of electricity-generating windmills and cotton-generating mills are slight when compared to a bank's business. Neither qualifies as necessary to the business of banking under the *Arnold Tours* standard because operating a cotton mill or electrical plant is not related to any of the express powers of national banks under 12 U.S.C. § 24(7). Neither qualifies as the business of banking under the *VALIC* standard because the businesses of cotton manufacturing and electricity generation do not involve financial instruments except as used in general commerce. Nearly all forms of business associations have securities to represent debt or equity in the company. Holding that issuing securities to raise capital qualifies as the business of banking would allow national banks to conduct all manners of business unrelated to banking.

Like the bank in *Cockrill*, Union Bank will own majority control in the business association operating the impermissible business. Also like in *Cockrill*, the business association is engaged in manufacturing. The fact that the Union Bank project's LLC will generate electrical energy, rather than processed cotton, is immaterial because neither the cotton nor energy industries are related to the express powers of national banks. The fact that the LLC will own the wind turbines, rather than hold them in trust for the bank as the mill corporation did in *Cockrill*, is immaterial because the bank will have indirect ownership of the turbines through its 70% equity interest in the LLC.

The wind turbine project will expose the bank to the dangers inherent in the energy industry. The Enron scandal demonstrated that the energy industry is volatile and that vast sums of book capital in energy companies can vanish in a short time. In fact, Enron even owned a wind energy operation similar to the one that OCC permitted Union Bank to own.[173] The same policy reasons used to justify the prohibition of a bank operating a mill in *Cockrill* apply to the Union Bank wind turbine project because electricity-generating windmills are no more related to the business of banking than a cotton mill and pose at least as many risks to the bank.

IV. CONCLUSION

Hotel and energy business activities are not permissible national bank activities. The National Bank Act places strict limits on a national bank's ability to own real estate and engage in business activities usually reserved for general commerce. These restrictions are intended to protect the banking system and—by extension—the public's savings and the economy

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rules prohibit unsafe and unsound bank investments).

173. *See* Claudia H. Deutsch, *Investors are Tilting Toward Windmills; G.E. Sees Much to Like in Alternative Energy*, N.Y. TIMES, Feb 15, 2006, at C8 (stating that General Electric purchased Enron's windmill operation after Enron's collapse).

at large. There is no basis in the National Bank Act or the numerous cases interpreting the Act for a statutory interpretation permitting banks to enter the lodging business or the energy business, even on a limited basis.

By permitting national banks to enter the lodging and energy industries, OCC has gone far beyond what Congress intended when it adopted what is now 12 U.S.C. § 29 during the Civil War. OCC's interpretive letters ignore virtually all cases interpreting the National Bank Act and instead rely on dicta from archaic opinions unrelated to hotels or windmills. The three OCC Interpretive Letters conspicuously omit all modern statutory interpretation cases involving the National Bank Act, such as the *Arnold Tours* or *VALIC* lines of cases.

These three letters demonstrate the pitfalls of extending *Chevron* deference in judicial review to legislative interpretations that do not undergo notice and comment proceedings. OCC can issue suspect statutory interpretations using this interpretive letter procedure, knowing that the chances of a judicial challenge are low because few members of the public read the letters. Even those who read the letters know that successfully challenging an OCC interpretive letter will be difficult and costly because OCC receives *Chevron* deference. Administrative procedures such as OCC's interpretive letters that receive *Chevron* deference without public notice and comment breed suspect administrative interpretations—that border on being arbitrary and capricious—because the agency knows that the chances of judicial review are lower than in notice and comment rulemaking.

OCC's Interpretive Letters Nos. 1044, 1045, and 1048 permit national banks to engage in activates beyond those that Congress intended and beyond what the courts have held are permissible interpretations of the National Bank Act. OCC's Interpretive Letters Nos. 1044, 1045, and 1048 are not reasonable interpretations of the National Bank Act, and therefore should not be valid under *Chevron* step two.