Libby - 4-8

This needs to go to the lawyer handling treasury -

Have lawyer talk to me after reviewing this matter -

Judge

defer to Treasury

-Libby-

I do not know who to send this to on the staff. I think this is old business —

Judge

Treasury → Brett

5-11-2001

TO: File

No response because only cc'ed and because agency matter

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Transmittal Cover Sheet

TO

Name:	**Mr. Paul O'Neill**	Name:	**Mr. Jeffrey Rush, Jr.**
Company:	U.S. Department of the Treasury	Company:	U.S. Department of Treasury
Fax No.:	202-622-6415	Fax No.:	202-622-2151
Phone No.:	202-622-2000	Phone No.:	202-622-1019
Name:	**Mr. Alberto Gonzalez, Esq.**	Name:	**Mr. John Hawke, Jr.**
Company:	The White House	Company:	Comptroller of the Currency
Fax No.:	202-456-6279	Fax No.:	202-874-4950
Phone No.:	202-456-2632	Phone No.:	202-874-4900

FROM Carlos E. Loumiet

File Number 21848.011100

Comments

Date April 20, 2001

Time

No. Pages Including this cover sheet

Please notify us immediately if not received properly at 305-579-0500.

1221 Brickell Avenue, Miami, Florida 33131 (305) 579-0500 Fax (305) 579-0717

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TRAURIG

Carlos E. Loumiet, Esq.
305-579-0726
Email: "loumietc@gtlaw.com"

April 20, 2001

BY FAX AND OVERNIGHT MAIL

The Honorable Paul H. O'Neill
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

The Honorable Jeffrey Rush, Jr.
Inspector General
U.S. Department of the Treasury
1500 Pennsylvania Avenue
Room 4436
Washington, D.C. 20220

Re: **Hamilton Bank, N.A., Miami Florida**

Dear Sirs:

I am writing to update my letter to you dated March 26, 2001 by bringing to your attention the latest highly questionable behavior by the Office of the Comptroller of the Currency ("OCC").

By way of background, on September 30, 2000, the OCC completed its latest examination of Hamilton. That examination found certain deficiencies.

Hamilton never received a full version of the OCC's Report of Examination, and the exit interview (where a bank's Board of Directors is told verbally of the results of the examination) occurred on December 14, 2000. The actual Report of Examination was received by Hamilton in mid-February. Towards the end of February, Hamilton's Board of Directors was invited to meet with the OCC in Washington, D.C. on March 28, 2001, to have the opportunity to respond to the Report and engage in a dialogue with the OCC concerning the Report.

The normal process when a Report of Examination finds matters that the OCC believes are of concern, is for the OCC to file a Notice of Charges, which commences an administrative proceeding. Often, this is accompanied (or followed shortly afterwards) by a draft Consent Order, which is then negotiated with management and the Board of Directors of the bank involved.

In situations where circumstances exist that "are likely to cause significant dissipation of the assets or earnings" of the bank, "are likely to weaken the condition of" the bank, or "otherwise prejudice the interests of" the bank, the OCC is allowed by law to issue a Temporary Cease and Desist Order in advance of conducting an administrative hearing. Logically, given our legal system's enormous respect for, and emphasis on, the right of a person or entity charged to be heard in some form of judicial or quasi-judicial proceeding before the Government intervenes, this Temporary Cease and Desist Order is intended for "emergency" situations.

From December 14, 2000 (the date of the exit interview) until March 28, 2001 – approximately 3½ months – the OCC did nothing concerning the Examination dated as of September 30, 2000. One can only surmise that the findings of that Examination were not deemed to be so much of an "emergency" as to warrant immediate action in the form of a Temporary Cease and Desist Order.

On the afternoon of March 28, 2001, the Board of Directors of Hamilton appeared at the OCC's offices in Washington, D.C. as scheduled. The meeting commenced with the OCC formally presenting the Report of Examination, followed by Hamilton's presentation of its response through a powerpoint presentation and the delivery of various written documents. In its response, Hamilton discussed how it was addressing each deficiency the OCC had noted.

Promptly after Hamilton completed its response, and without the first word of discussion regarding that response, the OCC presented a 27-page "Consent Order" containing over 200 different commands or restrictions (including subparts) which were to be imposed on the bank. The OCC gave a page-by-page explanation, which took some time. Upon conclusion of that explanation, Hamilton's Board of Directors was informed that none of the provisions of that proposed "Consent" Order was subject to change, and that the Board of Directors must either sign that "Consent" Order, or not, "as is", that same afternoon (or what little then remained of the afternoon).

In almost 24 years of practicing law in this country, I have never seen a regulatory agency present to a regulated entity or person – much less a company owned by the general public -- a document anywhere approximating the complexity of this proposed "Consent" Order, then advise that the document is non-negotiable and must be signed NOW.

When the Board of Directors of Hamilton, following the unanimous advice of the three law firms present (Arnold & Porter, Paul Hastings, and ourselves), declined to sign the "Consent" Order on the spot and without opportunity to reflect on its provisions, the OCC promptly served the Board with a Temporary Cease and Desist Order which contained essentially the same provisions as the "Consent" Order the Board had just declined to sign.

Needless to say, the Board of Directors left the OCC that afternoon feeling it had been sandbagged.

By proceeding as it did, the OCC made a complete mockery of the normal administrative process. Why bother to have "Consent" Orders at all – indeed, why not rename them, dropping the word "Consent" – if they are to be imposed in this "non-negotiable, sign-it-right-now, or-else-we-will-immediately-serve-you-with-a-Temporary-Cease-and-Desist-Order-containing-the-same-terms-anyway", fashion?

And why maintain the illusion that Temporary Cease and Desist Orders were intended for "emergency" situations, when the OCC can do nothing for 3½ months or longer after an

Examination is concluded, then serve such an Order based on that Examination whenever it desires, without bothering to follow the normal, non-emergency administrative process?

As concerns the content of the terms of the proposed "Consent" Order and of the Temporary Cease and Desist Order, there is one provision of both Orders that deserves to be singled out because of its potentially ominous implications for our citizenry.

For the first time in my experience, or that of any of the other lawyers involved in this case on behalf of Hamilton, a federal regulatory agency – the OCC -- has publicly issued a blacklist of persons and entities with whom a regulated entity – Hamilton – may not conduct business. It is important to remember that Consent Orders are public, as are, in most cases, Temporary Cease and Desist Orders.

In this case, the blacklist consists of 33 named persons and entities. Bizarrely, the list includes the Consulates of the Republic of Panama, a friendly nation. No explanation is given in the Orders why Hamilton may not engage in business of any type with these 33 named persons and entities, or with any person or entity that "provides funding" to them. Hamilton does not know the reason for the blacklisting of these persons, nor, when it asked at the March 28, 2001 meeting, was any reason offered by the OCC.

Prior to the meeting in D.C., neither Hamilton not the persons and entities blacklisted by the OCC had any idea of the Government's impending action, nor were they (nor Hamilton) given any input into this process prior to their being publicly blacklisted. Today, overnight, not only can the blacklisted persons and entities no longer do any new business with Hamilton – who knows what economic consequences it may imply for some of those persons and entities, to have their banking relationship yanked suddenly, and without explanation, by Government fiat? – but, without their ever having any chance to address the situation, their names now appear as, essentially, undesirables, on a document issued by our Government.

It is not a stretch to suggest that other persons who may become aware of this blacklist may suspect that the OCC would not have listed these persons and entities in a document that would be publicly available unless the OCC had confidential government information indicating these persons and entities were engaged in some form of improper activity.

Perhaps the OCC's public blacklisting practice will spread to other federal agencies, so that, soon, the SEC, the IRS, the INS, the FTC, the FCC, the NRC, the FAA and many others will themselves start issuing publicly–available, unexplained blacklists of persons with whom their own regulated persons should not engage in business. Then, each day, each of us engaged in business in America, in addition to all of our other more mundane concerns, would have to worry about whether our name had appeared that day on a cryptic, publicly-available blacklist issued by a federal government agency.

To an Administration that purports to be concerned about civil liberties, including the right to privacy, as well as with defining proper limits on the exercise of governmental power, the behavior outlined in this letter and in my prior letter to you of March 26, 2001, has to be profoundly disturbing. I realize the natural reluctance to intrude (or even be perceived as intruding) in any way in the complex bank supervision and examination process, but, frankly, nothing that may have been turned up in that process in the context of any bank could justify the behavior reflected in this letter and in my prior letter.

Bluntly, this is not the type of conduct that Treasury should expect or accept from its agencies.

Again, I would appreciate the opportunity to meet with you or the appropriate persons at Treasury at your earliest convenience.

Very truly yours,

Carlos E. Loumiet

cc: John D. Hawke, Jr.
Comptroller of the Currency
Office of the Comptroller of the Currency
250 E Street, S.W.
Washington, D.C. 20219-0001

Alberto Gonzalez, Esq.
Assistant to the President of the United States
and White House Counsel
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20502

Brett?
Y N

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ATTORNEYS AT LAW
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Transmittal Cover Sheet

TO

Name: **Mr. Paul O'Neill**
Company: U.S. Department of the Treasury
Fax No.: 202-622-6415
Phone No.: 202-622-2000

Name: **Mr. Jeffrey Rush, Jr.**
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Fax No.: 202-456-6279
Phone No.: 202-456-2632

Name: **Mr. John Hawke, Jr.**
Company: Comptroller of the Currency
Fax No.: 202-874-4950
Phone No.: 202-874-4900

FROM Carlos E. Loumiet

File Number 21848.011100

Comments

Date March 26, 2001

Time

No. Pages Including this cover sheet 15

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1221 Brickell Avenue, Miami, Florida 33131 (305) 579-0500 Fax (305) 579-0717

GREENBERG
ATTORNEYS AT LAW
TRAURIG

Carlos E. Loumiet, Esq.
305-579-0726
Email: "loumietc@gtlaw.com"

March 26, 2001

BY FAX AND OVERNIGHT MAIL

The Honorable Paul H. O'Neill
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

The Honorable Jeffrey Rush, Jr.
Inspector General
U.S. Department of the Treasury
1500 Pennsylvania Avenue
Room 4436
Washington, D.C. 20220

Re: **The Office of the Comptroller of the Currency ("OCC") and Hamilton Bank, N.A., Miami, Florida**

Dear Messrs. O'Neill and Rush:

Our firm represents Hamilton Bank, N.A., Miami, Florida ("Hamilton").

In the course of a recent, extended investigation that we conducted on behalf of Hamilton's Audit Committee, we were made aware by multiple individuals related to Hamilton of incidents involving the staff of the OCC's Examination and Enforcement & Compliance divisions that we found highly unusual and disturbing.

After much deliberation, we believe the incidents mentioned below need to be brought to the attention of someone at a very senior level at the Department of the Treasury. We also believe that these incidents warrant a thorough, independent, unbiased investigation by the Office of Inspector General of the Department of the Treasury under the authority granted to it by the Inspector General Act of 1978, as amended.[1] Frankly, given the OCC's failure over the past three years to control the behavior of its own staff which examines and supervises Hamilton – comprising, in some cases mentioned in this letter, senior staff members – all as set forth below, we doubt that agency itself can fairly and thoroughly investigate these matters.

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[1] See 5 U.S.C. App. 3, §§ 2(1), 4(a)(5), 6(a)(2) and 8D(c). Please note that, on at least one occasion, the OCC has sought an investigation of itself by the Office of the Inspector General when there were charges of wrongdoing surrounding OCC action. See OCC Interpretive Letter, 1984 WL 164103 (Feb. 14, 1984). The incidents in this letter seem equally or more disturbing.

In this regard, we would appreciate the opportunity to discuss these matters with you (or whoever is the appropriate senior person at the Department of the Treasury) in person at your earliest convenience.

BACKGROUND

In 1988, the current management and principal shareholders of Hamilton acquired Alliance National Bank, Miami, Florida – a $15 million asset-size, insolvent institution subject to an OCC supervisory agreement and facing imminent closure – by injecting $1.7 million in capital into Hamilton.

In March 1997, Hamilton Bancorp, Inc. – Hamilton's holding company – successfully went public, raising $38 million in new capital. As of December 31, 2000, Hamilton had approximately $1.8 billion in assets, $1.6 billion in deposits, $124.6 million in shareholders' equity, nine branch offices, employed 260 individuals (a large percentage of them Hispanic) and was a vital part of the Miami-Dade County economy.[2]

Hamilton is now the largest bank in Florida (and perhaps in all of the United States) that is largely owned, and run, by U.S. citizens of Hispanic origin. The same management that acquired troubled Alliance National Bank in the succeeding 12-year period has led Hamilton's remarkable growth and development through 2001.

Until late 1997, Hamilton's relationship with the OCC appears to have been outstanding. In fact, the OCC strongly praised that management and congratulated it for its work. Since then, as the examples below demonstrate, that relationship has terribly deteriorated.

THE OCC's BEHAVIOR

The OCC itself has articulated the following standards of conduct for its national bank examiners:

> "As representatives of the OCC, the conduct of examiners during an examination must be professional. All members of the examining team will:
>
> - Ensure the confidentiality of records.
> - Conduct meetings and gather information efficiently to minimize disruption of the bank's operations.
> - Adhere to schedules for meetings and appointments, including providing updates to bank management during the examination.
> - Discuss needs for timely information.

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2 Despite the fact that Hamilton is not a traditional retail, consumer-oriented bank, management has been sensitive to the credit needs of the communities it serves: Hamilton's Community Reinvestment Act rating has never been lower than "Satisfactory."

- Give bankers the opportunity to explain the reasons for their actions.
- Be respectful of the opinions of bankers and locally based groups.
- Handle any conflicts in a tactful and professional manner."

OCC, Comptroller's Handbook, "Examination Planning and Control" booklet at 11 (July 1997) (emphasis added).

The OCC examiners' conduct described in this letter should be measured against these standards.

1. Questionable Statements by OCC Staff

We are told that over the past three years, OCC staff have made numerous questionable statements.

For example, in 1998 – towards the beginning of the events detailed in this letter, and with hindsight, perhaps a harbinger of what was to follow – an OCC examiner examining Hamilton made a number of problematic comments to officers and employees of Hamilton. By way of examples only, the examiner remarked to Hamilton's head of Compliance that she spoke English very well "for an Hispanic." He also told a clerical employee that he was there to see "if anyone else needed to be indicted." The examiner also stated to Hamilton's General Counsel that the examiner now resided in predominantly Anglo-American Broward County because he had been "kicked out" of his native Miami-Dade County, which over the last two decades has become predominantly Hispanic.

As another example, in April 1999, in connection with a criminal case in the United States District Court for the District of Puerto Rico, an OCC examiner (who also was then Hamilton's examiner) testified on behalf of the United States government as an "expert." He was accompanied at the trial by an OCC Enforcement and Compliance attorney who has been actively involved in investigating Hamilton for at least the past 2½ years. At the trial, the examiner publicly testified that Hamilton had failed to comply with federal law governing the handling of certain wire transfers through an offshore affiliate's correspondent account. The examiner's testimony was wrong, because the law that he cited that Hamilton allegedly violated was not in effect until several years after the wire transfers at issue took place.

The examiner's testimony resulted in a negative article in the Puerto Rican press about Hamilton. We are told that other than the testimony of the examiner, no other allegations or inferences were made in the trial, or have been made anywhere else, implicating Hamilton or any of its officers.

Also troubling is the fact that, we are told, the OCC Enforcement and Compliance attorney who accompanied the examiner in the Puerto Rico trial later denied to Hamilton's counsel that he had any knowledge whatsoever of the trial. He made this denial notwithstanding the fact that a photograph published side-by-side with the Puerto Rican article shows him standing next to the OCC examiner who testified. The photograph contains a caption that reads that the men are seen "during a break in the San Juan AIDS Institute trial."

2. Undermining the Role of the Ombudsman

The OCC's own guidelines with respect to its Ombudsman provide:

> "The OCC seeks to ensure that the supervisory process is administered in a fair and equitable manner. If a disagreement between examiners and the bank arises during the supervisory process, it is OCC policy to resolve the dispute fairly and expeditiously, in an informal, amicable manner. When such disagreements cannot be resolved through informal discussions, national banks should, and the examiner involved should specifically encourage the national bank to, seek further review of the OCC decisions or actions. The ombudsman position is outside the bank supervision area and reports directly to the Comptroller of the Currency. The ombudsman has the discretion to supersede any agency decision or action during the resolution of an appealable manner subject to an override by the Comptroller. National banks are encouraged to use the ombudsman."[3]

Comptroller's Handbook, "Bank Supervision Process" booklet, 1996 WL 652922, at *1 (Apr. 1996) (emphasis added).

On November 29, 2000, the Audit Committee of Hamilton met in Washington, D.C. with several members of the staff of the OCC. After several hours, the meeting was continued in executive session with only four directors of Hamilton and its holding company, and certain OCC staff, present.

At the meeting, the fact that Hamilton had just appealed the "Cofiec" matter (discussed on the next page) to the Ombudsman came up. The OCC representatives present stated that because the OCC senior staff were the same individuals that would provide consultation in any appeal to the Ombudsman, it really was "useless" for Hamilton to pursue recourse to the Ombudsman. They noted that the Ombudsman had to use the expertise in their offices to render an opinion in the areas of international banking, securities and accounting issues, among others, and that the Ombudsman therefore had to rely on the same resources and people that had already ruled against Hamilton, thus making intervention by the Ombudsman a total waste of everyone's time.

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[3] Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 ("Riegle Act") requires the OCC to establish an "independent" internal appellate process. See OCC, Independent Regulatory Appeals Process, 61 Fed. Reg. 7,042, at 7,042 (Feb. 23, 1996) (stating that Riegle Act "requires that the Federal banking agencies hear and decide appeals expeditiously . . . .") (citing 12 U.S.C. § 4806(b)).

As a practical matter, when Hamilton had sought access to the Ombudsman earlier in the year 2000 in connection with certain decisions, it was blocked by the filing of an OCC Notice of Charges, which rendered the matter non-appealable.[4] Since then, whenever matters have arisen which could be the subject of an appeal to the Ombudsman, they usually have been placed by the OCC under its ongoing secret Order of Investigation, discussed below, again rendering it non-appealable.[5]

3. Failure to Follow Law and Policy

Equally as troubling as the inappropriate statements by OCC staff and the OCC's emasculation of its own Ombudsman, but, frankly, not surprising in light of them, is the OCC's failure to adhere to settled law and policies in its dealings with Hamilton.

In this regard, the most recent example of this failure relates to the Enforcement and Compliance Division's March 20, 2001 decision to initiate civil money penalty proceedings against certain officers and directors of Hamilton arising out of the manner in which Hamilton filed on October 30, 2000 its Consolidated Report of Income and Condition for the period ending September 30, 2000 (the "Call Report").

According to the OCC, Hamilton allegedly failed to include allocated transfer risk reserves ("ATRRs") for a certain international exposure (referred to as the Cofiec exposure) in the Call Report, in contravention of the examination staff's directives.

We understand this is what actually happened. On October 26, 2000, only four days before the filing deadline for the Call Report, Hamilton's examiner advised Hamilton in a six-line e-mail that he had "surfaced" Hamilton's concerns "regarding Cofiec with OCC senior management", and cryptically wrote that an "ATRR event" was present with respect to the Cofiec exposure. No further explanation for the examiner's determination was provided.

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4 See OCC, Independent Regulatory Appeals Process, 61 Fed. Reg. 7,042, at 7,046 (Feb. 23, 1996)

5 On December 12, 2000 – curiously, only two weeks after the meeting described in the text where Hamilton's directors were told by senior OCC representatives that appealing to the Ombudsman was useless and a waste of everyone's time – the Ombudsman, who had previously demonstrated a willingness to review decisions by OCC examiners which Hamilton found questionable, wrote to Hamilton's Board of Directors. He expressed concern that Hamilton's efforts to engage him "in the supervisory decision making process" had "become an impediment" and "possess[ed] the potential of serving as a wedge which could impair the OCC's efforts to effectively supervise Hamilton Bank." Therefore, he instructed that "during the time that the [B]ank operates under formal enforcement actions with the OCC," all appeals should go to other senior officials at the OCC. In other words, the OCC's sole "impartial" appellate decision-maker was indefinitely "recusing" himself, and would no longer be available to Hamilton. Not only is this profoundly disturbing from a due process perspective, but to our knowledge, this discriminates against Hamilton by distinguishing it from other national banks. Obviously, it also contradicts the statement from the Comptroller's Handbook on the preceding page.

The next day, in view of the examiner's brief, unexplained edict (which Hamilton did not believe to be consistent with ATRR requirements), a bank officer explained to the OCC that Hamilton intended to file an appeal with respect to this determination. On October 30, 2000, prior to the deadline for filing the Call Report, Hamilton faxed and sent by overnight mail a letter to the OCC memorializing that appeal. In filing the appeal, it was Hamilton's express understanding that under the OCC's appeal procedures, all actions would be stayed pending a determination of the appeal.

The OCC's appeal procedures specifically provide – under the heading "Effect of Filing of Appeal" – that,

> "[a]s a general rule, the filing of an appeal concerning an appealable matter with either the national bank's immediate supervisory office or with the Ombudsman serves to stay all agency decisions and actions until the appeal is resolved. * * * In the appropriate circumstances . . . the ombudsman or appropriate OCC official may put the disputed agency decision or action into effect while the appeal is still pending."

OCC, Independent Regulatory Appeals Process, 61 Fed. Reg. 7,042, at 7,046 (Feb. 23, 1996) (emphasis added).

The OCC took none of the actions expressly required of it under its own guidelines in connection with the appeal.[6] In fact, the OCC has never acknowledged the appeal and, indeed, denied the existence of the appeal (see discussion at page 9 below).

Rather, the OCC's response to Hamilton Bank's appeal filed in good faith was to: (1) issue on November 2, 2000 so-called fifteen day letters advising Hamilton's officers and directors that the OCC was considering the assessment of civil money penalties against them arising out of the filing of the Call Report; and (2) notify on March 20, 2001 Hamilton's outside counsel that the OCC was proceeding with the assessment of civil money penalties.[7]

At no time did the OCC warn Hamilton that the filing of the Call Report in good faith with an appeal submitted regarding the examiner's position could result in sanctions against Hamilton or its officers and directors.

There are other examples of the OCC's failure to follow settled law and policy in respect of Hamilton. For instance, on January 22, 2001 – almost one and a half years after an alleged lending limit violation had been cited by the OCC on other legal grounds, which

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6 See OCC, Independent Regulatory Appeals Process, 61 Fed. Reg. at 7,046.

7 We note that retaliatory action against a national bank or its officers or directors for availing themselves of the appeal process is prohibited by the Riegle Act and the published OCC guidelines on the appeals process. See OCC, Independent Regulatory Appeals Process, 61 Fed. Reg. at 7,042 (stating Riegle Act requires "that appropriate safeguard exist for protecting the appellant from retaliation by Federal banking agency examiners.") (citing 12 U.S.C. § 4806(b)).

had been refuted in writing by Hamilton's regulatory counsel – the OCC sent a letter to the Board of Directors of Hamilton regarding the putative application of the national bank lending limits in 12 U.S.C. § 84, as implemented by 12 C.F.R. Part 32 of the OCC's rules, to a US$7 million placement made by Hamilton with a "class B" offshore bank.

For many years, as a matter of law, the OCC has generally excluded the placement of deposits with other "banks" from the national bank lending limits of Section 84 and 12 C.F.R. Part 32. In this unique case, the OCC concluded – the applicable statute and regulation not having changed, without citing any legal authority, and for the first time that we know of by <u>any</u> regulator or court in this country – that because the offshore bank could not engage in a banking business in its own home country, it was not a "bank."

Shortly before, the OCC had issued a public advisory throughout the United States that the "class B" bank involved – which was identified and thus embarrassed by name – had been illegally engaging in the banking business in the United States. We are told the reasoning was that the "class B" bank had accepted the placement from Hamilton through its correspondent account at Hamilton, then ordered Hamilton to transfer the proceeds to another party's account in Hamilton.[8]

Thousands of banks in the United States have been engaged for years in correspondent banking with offshore, "class B" entities, unsuspecting that, all along, they have not been dealing with a "bank." Equally true, on a daily basis thousands of foreign banks receive credits to their accounts at their correspondent banks in the U.S., and order transfers from those accounts, without, to our knowledge, any bank regulator having previously suggested that this constitutes the illegal conduct of banking here.

There is no apparent reason why this particular situation should have been treated differently from all others.

4. <u>The DSI Incident</u>

In late May 1999, in response to a subpoena issued by Hamilton Bank in a lawsuit in which the Bank had been sued by Development Specialists, Inc. ("DSI"), plaintiff DSI sought an order from the Court that was hearing the lawsuit to prevent DSI from having to produce to Hamilton a copy of an anonymous letter containing allegations against Hamilton and its executive officers.

It appears that the anonymous letter was sent by an unknown party to the OCC eight months earlier, in late September 1998, with a carbon copy to DSI's counsel. In support of its protective order, DSI's counsel produced to the Court a letter signed by the OCC, dated March 19, 1999 and addressed to DSI's counsel, which clearly stated the OCC's preference that the anonymous letter not be divulged to Hamilton:

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[8] This advisory, of course, surprised and hurt the foreign correspondent bank of Hamilton's, which operates in a similar fashion correspondent bank accounts at other banks in the U.S. as well without ever having been criticized by any regulator for doing so.

> "[t]he OCC believes it would be appropriate for DSI to submit the anonymous letter, with an accompanying motion, under seal, to the United States District Court for the Southern District of Florida, requesting the Court to conduct an in camera inspection of the anonymous letter and to issue a ruling whether DSI must produce the anonymous letter to Hamilton."

It bears noting again that Hamilton then had no inkling of the existence of this anonymous letter, already six months old. Likewise, Hamilton also did not know of the communications between the OCC and DSI to DSI's counsel until the OCC's March 1999 letter was produced in Court in response to Hamilton's motion.

Frankly, the OCC letter is notable in two respects: (1) it evidences the OCC's voluntary involvement in a private commercial dispute between two sophisticated business entities (DSI and Hamilton), without the knowledge of Hamilton, and against Hamilton's interests; and (2) the OCC letter stated to a third party, DSI's counsel, that the "OCC also believes that there is a possibility that disclosure of the anonymous letter to Hamilton could result in destruction or concealment of evidence from the OCC."

Respectfully, we have not been pointed to any instance where Hamilton has ever concealed or destroyed evidence from the OCC.

The Court denied the plaintiff's motion and ordered DSI's counsel to produce to Hamilton: (1) the anonymous letter; and (2) all communications of plaintiff's counsel with the OCC. It was only then – in late May 1999 – that Hamilton learned of the anonymous letter and its contents, and that the OCC earlier in 1999 had subpoenaed copies of all of the files of DSI's counsel in connection with the DSI litigation, without ever bothering to discuss the matter with Hamilton.

In the Summer of 2000, Hamilton learned that the OCC had received a second anonymous letter. To date, this letter has not been shared with Hamilton.

By contrast to the OCC's behavior, the staff of the Federal Reserve Bank of Atlanta requested information on the DSI case from Hamilton and then sat down with Bank management to discuss the issues. This was done in an open and constructive dialogue between Hamilton and the Federal Reserve Bank staff.

5. <u>Lack of Forthrightness</u>

We are told that in 1998 an OCC examiner engaged in a pattern of making duplicative requests after the requested information had already been produced. In one particularly egregious incident that took place in early October 1998, we are informed that he advised Hamilton's Controller that he could not find certain voluminous documents (already furnished to him by Hamilton), and that as a result "people in Washington" were "upset" and "concerned" that Hamilton was not "cooperating" and was not "providing complete information that has been requested of Hamilton by the OCC." Later, on October 14, 1998, the examiner wrote a follow-up letter to the same (already worried) Controller that the information had never been provided, but that he nevertheless had prepared a spreadsheet which was a compilation of information provided by Hamilton which was believed to be "incomplete and possibly inaccurate," but qualifying that he took "no responsibility for it." The examiner also wrote: "It is the bank's responsibility to ensure the accuracy and completeness of information." Most troubling is that this letter was delivered to the Controller immediately before the examiner verbally admitted to her that he had not looked through the many boxes containing Hamilton documents that were provided to him in response to his information requests, and also admitted that the information he was looking for could very well be in those boxes. As part of this admission, the examiner went on to say that he may have lost the relevant documents when he took vacation during the examination.

Another recent example of a lack of forthrightness is the following: we are told that shortly before the Consent Order that ended the Notice of Charges against Hamilton was signed last Fall, the OCC expanded the same Order of Investigation to include matters covered by the Notice of Charges. When Hamilton signed the Consent Order, management and its Washington regulatory counsel believed, according to OCC representations made to that counsel, that all matters related to the Notice of Charges were being settled and terminated. However, shortly after Hamilton signed the Consent Order, to the surprise of Hamilton and that counsel, the OCC attorney simply resumed noticing Hamilton management and employees for additional deposition-like interviews in connection with matters directly related to that Notice of Charges.

Most recently, during the November 29, 2000 meeting of the Audit Committee of Hamilton held at the OCC's Washington, D.C. offices and referred to at page 4 above, the senior OCC staff present took the position that no appeal had ever been received from Hamilton in connection with the Cofiec exposure (described on pages 5 and 6 above). Specifically, the OCC representatives stated that the word "appeal" did not appear anywhere in the letter submitted by Hamilton to the OCC regarding that determination. This statement is simply wrong. Hamilton's October 30, 2000 letter expressly states, "[t]his is to notify you that we are formally appealing this directive," and uses the word "appeal" in two of its other paragraphs.[9]

6. Prejudicial Nature of the Examination Process

It appears that throughout 1998, 1999, 2000 and this year, the OCC has been using examiners to conduct ongoing investigations of Hamilton. This has resulted in examiners wearing two hats – an "investigator" hat, as well as their usual and customary "examiner" hat – for over three years.

9 On the same date, Hamilton sent the OCC Ombudsman a letter informing him of the appeal. That led to the Ombudsman's letter of December 12, 2000, "recusing" himself from further matters involving Hamilton. See footnote 5 above.

Frankly, it is difficult to imagine how examiners can be used to investigate alleged wrongdoing on an ongoing basis over that protracted a period of time, yet at the same time maintain the type of objectivity and impartiality that is necessary for their purported examination role of fairly evaluating Hamilton.[10]

The OCC examiners' dual role with respect to Hamilton appears to have begun after the Fall of 1997 when – unbeknownst to Hamilton – the Enforcement and Compliance Division of the OCC issued an Order of Investigation into the conduct of Hamilton's affairs. Hamilton knew nothing about the existence of the Order of Investigation until October 1998 – approximately one year later. Through almost all of 1998 and since then, Hamilton has been subjected to a series of continuous OCC "examinations" which appear largely to have overlapped investigations pursuant to the Order.[11]

When Hamilton first learned that the OCC had initiated the Order of Investigation, Hamilton understood that the scope of the investigation related to: (1) the so-called Puerto Rico matter; and (2) two former Bank directors who had been indicted for matters unrelated to Hamilton. The Puerto Rico matter, as described at page 3 above, had nothing directly to do with Hamilton. The matter relating to the two former Bank directors centered on their indictment on alleged United States customs and income tax laws violations in connection with a food importing business. While the food importing business was a customer of Hamilton, the charges in the indictment had nothing whatsoever to do with Hamilton or those two directors' performance at Hamilton. Based on several statements made by OCC representatives to Hamilton officers, it appears that the OCC from the outset presumed that Hamilton was involved in the conduct of two of its former directors. Rather than approaching Hamilton management and discussing the matter constructively with them before investigating, the OCC staff, once again, investigated first, and asked questions later.

As to the Order of Investigation, as noted below, its scope appears to have simply mushroomed since its adoption to continuously encompass a panoply of new, unrelated matters.

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10 We are aware that the OCC at times uses its examinations as part of its investigations, but as detailed in this letter, in this instance any line between the two seems to have been largely blurred, calling into question the fundamental fairness of the examination process itself.

11 Under applicable OCC rules, the Order of Investigation is confidential and secret. As such, to this day, Hamilton management has only been permitted by OCC Enforcement and Compliance Division staff to view it briefly during deposition-like interviews. As noted in the text below, this Order appears to be permanent and ever-expanding, with no boundaries. Unfortunately, the OCC's regulations on investigations contain few restrictions on the OCC itself for the conduct of the same. For example, there are no time limitations for the investigations, so they can continue indefinitely at the discretion of the OCC "investigators" involved, and the OCC itself may "[u]pon application and for good cause shown" modify the Order at any time. 12 C.F.R. § 19.182. Of course, since by definition the Order is secret, so is the decision to modify it, rendering the "good cause" standard objectively unverifiable. In this instance, all of this has led to a Kafkaesque, perpetual, ever-metamorphosing investigation, pursuant to an Order of Investigation that changes mysteriously from time to time, but always remains secret.

Another example of the OCC's unusual behavior arose just before the end of Hamilton's third fiscal quarter for 1998. Hamilton on a calendar quarter basis must submit call reports to the OCC, and its publicly-traded holding company must issue to the market its 10-Q report under SEC rules. On the afternoon of September 29, 1998 – tellingly, the day before the end of Hamilton's third fiscal quarter for 1998 – Hamilton management suddenly received a letter from the OCC directing Hamilton's Board of Directors in less than 24 hours to charge off certain international assets and address several matters related to reserve requirements on certain assets and details on exposures sold, so that they would be "addressed in Hamilton Bank's third quarter reports." The letter also required Hamilton to provide a written response from the Board to the OCC within 72 hours confirming that the actions required to be done in 24 hours had been complied with. There was no explanation offered for the highly-unusual emergency nature of this intervention.[12]

We also find troublesome the scope of certain examinations (*i.e.*, duration and frequency of examinations, mingling of safety and soundness examinations versus Bank Secrecy Act ("BSA")/Anti-Money Laundering ("AML") examinations).

For example, during the Summer of 1998, the OCC advised Hamilton that it would also conduct a BSA/AML examination during its 1998 safety and soundness examination. However, when the safety and soundness 1998 examination was completed, the OCC advised Hamilton that it would continue the BSA/AML examination. During the course of the BSA/AML exam, OCC examination staff asked for Bank documents dating as far back as 1990. Hundreds of documents and information requests not possibly relevant to BSA/AML were also requested. Nevertheless, Hamilton complied with all of the requests.

The BSA/AML exam was not completed until February 2000. After nearly <u>two years</u> of continuous BSA/AML investigation, we understand that the OCC found no violations of law.

Another BSA/AML examination then began on August 28, 2000 – only five months <u>after</u> the previous BSA/AML examination, which had lasted close to two years.

A recent example again illustrates the OCC's seemingly-endless investigation of Hamilton, and its proclivity to leap to unfavorable conclusions. On February 23, 2001 – presumably after the gelatinous, ever-present Order of Investigation had again been amended "upon application and for good cause shown" to include this new matter – the OCC subpoenaed documents related to a loan made on December 28, 2000 – less than two months before – to Golden Vision Financial Corp., a British Virgin Islands company that was formed for the purpose of acquiring OREO properties from Central American-based financial institutions. The subpoena was issued based on an examiner's review of the

12 On October 2, 1998, the Corporate Secretary of Hamilton responded to the OCC, stating that Hamilton had been unable to convene the Board of Directors on less than 24 hours' notice because certain directors were outside of the country, and proposing a full response to the OCC's September 29th letter later in October.

Golden Vision loan file, which was then in the hands of Hamilton's auditors and didn't include documents that the examiner felt were appropriate.

In seeking the information, the examiner spoke to only one Hamilton employee involved, and that employee was not able to point the examiner to the documents he was looking for. Rather than asking Hamilton management for a copy of those documents – which were sitting in El Salvador at the offices of Hamilton's attorneys – the examiner ordered that the loan be written off as of December 30, 2000. The OCC, again under its Order of Investigation, then promptly subpoenaed the documents while simultaneously noticing seven Hamilton representatives for deposition-like sworn interviews. These took place Thursday, March 8th and Monday, March 12th.

I must note that the OCC's continuous investigations/examinations (and interrogations) have created a climate of personal fear and insecurity at Hamilton, shared by directors, officers and employees at many different levels.

7. Disregard of The Secura Group's Report on Risk Management

In the Spring of 1999, Hamilton management retained The Secura Group, one of the nation's premier financial institution consulting firms, to conduct an independent risk management assessment on behalf of Hamilton. The November 1, 1999 assessment concluded that Hamilton "evidences a number of positive indicia of sound risk management," including a "knowledgeable, informed and active Board of Directors and senior management team" and "clear recognition and understanding by the Board of Directors and senior management of Hamilton's risks, particularly the credit and transfer risks which are most significant to Hamilton."

OCC examination staff completely ignored The Secura Group's report, which they reviewed, when shortly thereafter evaluating the exact same issues.

8. Recurring Failure or Delay by OCC Staff in Responding to Bank Queries and Concerns

We were also told of multiple instances where the OCC has failed to respond, or delayed unusually in responding, to questions raised by Hamilton management.

For example, in connection with the same Puerto Rican matter already discussed, when Bank management through telephone calls and correspondence attempted to raise its concerns with senior OCC staff as to the examiner's harmful (and incorrect) public testimony, the OCC declined to meet with management to discuss the matter.

Another instance centers on the OCC's application of its allocated transfer risk reserves ("ATRRs") to certain of Hamilton's loans. On April 6, 1999, the OCC sent a letter to the Board of Directors of Hamilton regarding ATRRs. On April 14, 1999, Hamilton management responded, attaching a copy of a transfer and political risk insurance policy Hamilton had acquired and expressly seeking OCC "guidance" and "a prompt response" from the OCC on the applicability of ATRRs in light of the presence of the insurance and certain other circumstances. The OCC never responded to this letter – either verbally or in writing. On September 30, 1999, Hamilton sent another letter attaching a copy of Hamilton's transfer and political risk insurance policy and again querying whether ATRRs should apply. On October 20, 1999, the OCC finally responded to management's initial April 14, 1999 letter regarding whether ATRRs should apply, but did not provide an explanation other than perfunctory conclusions. The OCC had waited six months to respond to Hamilton's initial query, without ever providing a reasoned answer.

In connection with an OCC directive regarding a special limit imposed on Hamilton's emerging market exposures, on December 28, 1999, Hamilton sent a three-page letter to the OCC attaching its draft Asset Quality Plan. Hamilton's letter solicited the OCC's comments as to whether it could consider a list of 27 countries as non-emerging, and therefore not subject to this limitation on emerging market exposures. The OCC did not respond. Hamilton management subsequently inquired of one of the OCC's on-site examiners on the status of the December 28, 1999 letter, and the examiner promised a response. The examiner never provided a response. It wasn't until January 2001 – 13 months after the initial inquiry – that an OCC analyst verbally stated to Hamilton management that the OCC would not object to the list of countries contained in the 13-month old letter, but qualified that she would not provide the no-objection response in writing.

CONCLUSION

It is our understanding that none of the endless investigations/examinations/interrogations by the OCC has revealed any serious wrongdoing by anyone at Hamilton. Yet, they continue without any end in sight.

Taken together, and viewed with any objectivity, the incidents raised in this letter provoke profound concerns about: (1) biased and unprincipled OCC supervision, investigation and examination; (2) multiple failures to follow OCC rules, guidelines and applicable law; (3) retaliatory actions against directors and officers of Hamilton for using the OCC's appeal process; (4) a lack of forthrightness and transparency at the OCC; (5) disregard for the rights of Hamilton, its officers, directors and shareholders; (6) bank examination by innuendo and under a permanent presumption of guilt; and (7) harassment.

Perhaps most troublesome is that, given the involvement of even senior level OCC representatives in some of the incidents cited above, the behavior cannot be dismissed as attributable to isolated, lower-level, OCC staff, and the question must be asked: what kind of a culture has been allowed to develop within the relevant divisions of the OCC?

We do not mean to suggest that over the past three years Hamilton has handled situations correctly in every instance, or that some, or much, of the OCC's criticism of Hamilton has not been appropriate. And, there may well be explanations available at the OCC for some of the incidents discussed above of which we are not aware. However, it would seem difficult to justify much of the conduct detailed above either on the basis of what Hamilton itself may have done wrong, or what objective the OCC individuals involved may have had in mind. After all, in terms of respect for the rule of law, the federal government must set a positive example for its citizenry, and, from a civil liberties perspective, few things are more frightening than an agency of the federal government with the philosophy that the end justifies the means.

We have deliberately omitted names in this letter, but we are prepared to provide them at your request. We have also deliberately omitted other troubling OCC behavior which we prefer not to put down in writing in this letter, but would be prepared to discuss with you in person.

Also, please rest assured that we have verified every statement in this letter with the pertinent individuals at or representing Hamilton, and reviewed every document mentioned, before sending this letter to you.

On a personal basis, in almost 24 years of practicing and teaching banking law, I have never written a letter like this to an administrative agency. On the other hand, neither have I ever before come across behavior like this by regulators anywhere in the United States.

We look forward to hearing from you at your earliest convenience.

Very truly yours,

Carlos E. Loumiet

cc: John D. Hawke, Jr.
Comptroller of the Currency
Office of the Comptroller of the Currency
250 E Street, S.W.
Washington, D.C. 20219-0001

Alberto Gonzalez, Esq.
Assistant to the President of the United States
and White House Counsel
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20502

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED:

NAME OF CORRESPONDENT: Carlos E. Loumiet

SUBJECT: **Hamilton Bank**

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE M/D/YR	DISPOSITION TYPE RESP	C D	COMPLETED M/D/YR
	CUGONZ	A			C	
ACTION COMMENTS:						
	Brett	A				/ /
ACTION COMMENTS:						
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ACTION COMMENTS:						
			/ /			/ /
ACTION COMMENTS:						

COMMENTS:

ADDITIONAL CORRESPONDENTS: **MEDIA:**

GREENBERG

ATTORNEYS AT LAW

TRAURIG

Carlos E. Loumiet, Esq.
305-579-0726
Email: "loumietc@gtlaw.com"

April 20, 2001

BY FAX AND OVERNIGHT MAIL

The Honorable Paul H. O'Neill
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

The Honorable Jeffrey Rush, Jr.
Inspector General
U.S. Department of the Treasury
1500 Pennsylvania Avenue
Room 4436
Washington, D.C. 20220

Re: **Hamilton Bank, N.A., Miami Florida**

Dear Sirs:

I am writing to update my letter to you dated March 26, 2001 by bringing to your attention the latest highly questionable behavior by the Office of the Comptroller of the Currency ("OCC").

By way of background, on September 30, 2000, the OCC completed its latest examination of Hamilton. That examination found certain deficiencies.

Hamilton never received a full version of the OCC's Report of Examination, and the exit interview (where a bank's Board of Directors is told verbally of the results of the examination) occurred on December 14, 2000. The actual Report of Examination was received by Hamilton in mid-February. Towards the end of February, Hamilton's Board of Directors was invited to meet with the OCC in Washington, D.C. on March 28, 2001, to have the opportunity to respond to the Report and engage in a dialogue with the OCC concerning the Report.

The normal process when a Report of Examination finds matters that the OCC believes are of concern, is for the OCC to file a Notice of Charges, which commences an administrative proceeding. Often, this is accompanied (or followed shortly afterwards) by a draft Consent Order, which is then negotiated with management and the Board of Directors of the bank involved.

In situations where circumstances exist that "are likely to cause significant dissipation of the assets or earnings" of the bank, "are likely to weaken the condition of" the bank, or "otherwise prejudice the interests of" the bank, the OCC is allowed by law to issue a Temporary Cease and Desist Order in advance of conducting an administrative hearing. Logically, given our legal system's enormous respect for, and emphasis on, the right of a person or entity charged to be heard in some form of judicial or quasi-judicial proceeding before the Government intervenes, this Temporary Cease and Desist Order is intended for "emergency" situations.

From December 14, 2000 (the date of the exit interview) until March 28, 2001 – approximately 3½ months – the OCC did <u>nothing</u> concerning the Examination dated as of September 30, 2000. One can only surmise that the findings of that Examination were not deemed to be so much of an "emergency" as to warrant immediate action in the form of a Temporary Cease and Desist Order.

On the afternoon of March 28, 2001, the Board of Directors of Hamilton appeared at the OCC's offices in Washington, D.C. as scheduled. The meeting commenced with the OCC formally presenting the Report of Examination, followed by Hamilton's presentation of its response through a powerpoint presentation and the delivery of various written documents. In its response, Hamilton discussed how it was addressing each deficiency the OCC had noted.

Promptly after Hamilton completed its response, and without the first word of discussion regarding that response, the OCC presented a 27-page "Consent Order" containing over 200 different commands or restrictions (including subparts) which were to be imposed on the bank. The OCC gave a page-by-page explanation, which took some time. Upon conclusion of that explanation, Hamilton's Board of Directors was informed that none of the provisions of that proposed "Consent" Order was subject to change, and that the Board of Directors must either sign that "Consent" Order, or not, "as is", that same afternoon (or what little then remained of the afternoon).

In almost 24 years of practicing law in this country, I have never seen a regulatory agency present to a regulated entity or person – much less a company owned by the general public -- a document anywhere approximating the complexity of this proposed "Consent" Order, then advise that the document is non-negotiable and must be signed NOW.

When the Board of Directors of Hamilton, following the unanimous advice of the three law firms present (Arnold & Porter, Paul Hastings, and ourselves), declined to sign the "Consent" Order on the spot and without opportunity to reflect on its provisions, the OCC promptly served the Board with a Temporary Cease and Desist Order which contained essentially the same provisions as the "Consent" Order the Board had just declined to sign.

Needless to say, the Board of Directors left the OCC that afternoon feeling it had been sandbagged.

By proceeding as it did, the OCC made a complete mockery of the normal administrative process. Why bother to have "Consent" Orders at all – indeed, why not rename them, dropping the word "Consent" -- if they are to be imposed in this "non-negotiable, sign-it-right-now, or-else-we-will-immediately-serve-you-with-a-Temporary-Cease-and-Desist-Order-containing-the-same-terms-anyway", fashion?

And why maintain the illusion that Temporary Cease and Desist Orders were intended for "emergency" situations, when the OCC can do nothing for 3½ months or longer after an

Examination is concluded, then serve such an Order based on that Examination whenever it desires, without bothering to follow the normal, non-emergency administrative process?

As concerns the content of the terms of the proposed "Consent" Order and of the Temporary Cease and Desist Order, there is one provision of both Orders that deserves to be singled out because of its potentially ominous implications for our citizenry.

For the first time in my experience, or that of any of the other lawyers involved in this case on behalf of Hamilton, a federal regulatory agency – the OCC -- has publicly issued a blacklist of persons and entities with whom a regulated entity – Hamilton – may not conduct business. It is important to remember that Consent Orders are public, as are, in most cases, Temporary Cease and Desist Orders.

In this case, the blacklist consists of 33 named persons and entities. Bizarrely, the list includes the Consulates of the Republic of Panama, a friendly nation. No explanation is given in the Orders why Hamilton may not engage in business of any type with these 33 named persons and entities, or with any person or entity that "provides funding" to them. Hamilton does not know the reason for the blacklisting of these persons, nor, when it asked at the March 28, 2001 meeting, was any reason offered by the OCC.

Prior to the meeting in D.C., neither Hamilton not the persons and entities blacklisted by the OCC had any idea of the Government's impending action, nor were they (nor Hamilton) given any input into this process prior to their being publicly blacklisted. Today, overnight, not only can the blacklisted persons and entities no longer do any new business with Hamilton – who knows what economic consequences it may imply for some of those persons and entities, to have their banking relationship yanked suddenly, and without explanation, by Government fiat? – but, without their ever having any chance to address the situation, their names now appear as, essentially, undesirables, on a document issued by our Government.

It is not a stretch to suggest that other persons who may become aware of this blacklist may suspect that the OCC would not have listed these persons and entities in a document that would be publicly available unless the OCC had confidential government information indicating these persons and entities were engaged in some form of improper activity.

Perhaps the OCC's public blacklisting practice will spread to other federal agencies, so that, soon, the SEC, the IRS, the INS, the FTC, the FCC, the NRC, the FAA and many others will themselves start issuing publicly–available, unexplained blacklists of persons with whom their own regulated persons should not engage in business. Then, each day, each of us engaged in business in America, in addition to all of our other more mundane concerns, would have to worry about whether our name had appeared that day on a cryptic, publicly-available blacklist issued by a federal government agency.

To an Administration that purports to be concerned about civil liberties, including the right to privacy, as well as with defining proper limits on the exercise of governmental power, the behavior outlined in this letter and in my prior letter to you of March 26, 2001, has to be profoundly disturbing. I realize the natural reluctance to intrude (or even be perceived as intruding) in any way in the complex bank supervision and examination process, but, frankly, nothing that may have been turned up in that process in the context of any bank could justify the behavior reflected in this letter and in my prior letter.

Bluntly, this is not the type of conduct that Treasury should expect or accept from its agencies.

Again, I would appreciate the opportunity to meet with you or the appropriate persons at Treasury at your earliest convenience.

Very truly yours,

Carlos E. Loumiet

cc: John D. Hawke, Jr.
Comptroller of the Currency
Office of the Comptroller of the Currency
250 E Street, S.W.
Washington, D.C. 20219-0001

Alberto Gonzalez, Esq.
Assistant to the President of the United States
and White House Counsel
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20502