



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

June 25, 2003

Corporate Decision 2003-9
July 2003

David W. Barton, Esq.
Bodman, Longley & Dahling, L.L.P.
P. O. Box 405
Cheboygan, Michigan 49721

Re: First National Bank of Norway, Norway, Michigan —
Establishment of an Operating Subsidiary, Application Control No. 2003-CE-08-006
Establishment of a Branch, Application Control No. 2003-CE-05-0072

Dear Mr. Barton:

This is in response to the applications by your client, First National Bank of Norway, Norway, Michigan (“Bank”), to establish a messenger service¹ as both a wholly-owned operating subsidiary and a branch of the Bank. In addition to traditional messenger service activities, the subsidiary would provide similar services for other financial institutions not affiliated with the Bank, as well as for non-financial institutions having no deposit relationship with the Bank. As discussed below, we conclude that all of the proposed activities are legally permissible and the applications may be approved.

FACTS

The Bank is a community bank whose main office is located in Norway, Dickinson County, in the Upper Peninsula of Michigan. It has one branch in nearby Iron Mountain, Michigan, as well as five ATMs. The Bank regularly transports cash, checks, and other financial items between its offices, and its ATMs need to be resupplied with cash at least weekly. The Bank has concluded that it is appropriate to have an armored car service perform these duties.

However, there is currently no company providing armored car service in the Bank’s market area on a regular basis. The nearest commercial service is located in Green Bay, Wisconsin, approximately 100 miles away. Although this firm provides occasional service to the Bank’s area, because of the distance, it is prohibitively expensive for most financial institutions and other businesses in the Bank’s area to use this service regularly. In addition, this company has

¹ OCC regulations define a “messenger service” as “any service, such as a courier service or armored car service, used by a national bank and its customers to pick up from, and deliver to, specific customers at locations such as their homes or offices, items relating to transactions between the bank and those customers.” 12 C.F.R. § 7.1012(a). The Bank plans to use an armored car to provide the messenger services described herein. Accordingly, this letter will use the terms “messenger service” and “armored car service” interchangeably.

indicated to the Bank that it is not interested in providing regular service to the Bank's area. Therefore, the Bank has concluded that it must provide armored car service itself.

To do this, it proposes to establish an operating subsidiary entitled U.P. Couriers ("UPC"). For its principal office, UPC will lease space in the Bank's main office in Norway. It will have its own employees but certain executive officers of the Bank will also serve as executive officers of UPC. Current plans are to acquire one armored van and provide armored car service in the Bank's home county of Dickinson as well as the nearby counties of Menominee and Delta in Michigan's Upper Peninsula. In the future, it might expand to other Upper Peninsula counties, as well.

Although the principal purpose of UPC will be to serve the Bank and its deposit customers, the Bank believes that in order to be financially viable, it will be necessary for UPC to serve other customers, as well. Other financial institutions in the area have transportation needs similar to those of the Bank. In addition, various businesses, especially retailers, have a need for the transport of cash and checks to and from their depository institutions. You stated that the Bank has received unsolicited expressions of interest from several large retailers, smaller local merchants, and others, in using the Bank's proposed armored car service. Some of these businesses are deposit customers of the Bank, while others are customers of other institutions.

Accordingly, it is proposed that UPC's activities will fall into four categories:

1. Transportation of cash, checks, and other financial items between the Bank's main office, branch, and ATMs.
2. Pick up and delivery of cash, checks, and other financial items for retailers and other business customers of the Bank in connection with deposits, withdrawals, and other financial transactions between the Bank and such customers.
3. Pick up and delivery of cash, checks, and other financial items for other financial institutions not affiliated with the Bank.
4. Pick up and delivery of cash, checks, and other financial items for non-financial institution businesses having no deposit relationship with the Bank.

The Bank expects that the first two categories, consisting of services for the Bank and its deposit customers, will make up about 50 percent of UPC's business. The other two categories will account for approximately 25 percent each. The Bank represents that, in all cases, UPC will charge a reasonable fee for its services. It will assume responsibility for items during transit and will maintain adequate insurance covering thefts, employee infidelity, and other losses. At all times, UPC will act pursuant to a written agreement with customers establishing the parties' respective rights and responsibilities in connection with the transit of the items.

LEGAL ANALYSIS

A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC, or otherwise under other statutory authority. 12 C.F.R. § 5.34(e)(1). As discussed below, UPC's proposed activities are part of, or incidental to, the business of banking within the meaning of 12 U.S.C. § 24(Seventh), and therefore they are legally permissible to conduct in an operating subsidiary. In addition, the establishment of a messenger service branch is legally permissible.

1. Transportation of cash, checks, and other financial items between facilities of the Bank.

The first category of activities consists of services for the Bank's internal needs. This includes transporting cash, checks, and other financial items between the Bank's main office and its branch, as well as restocking its ATMs with cash and retrieving any deposited items from them.

It has long been recognized that a national bank may establish and operate a messenger service (which includes an armored car service) to transport items that are relevant to the bank's transactions with its customers. 12 C.F.R. § 7.1012(b). The items that will be carried here will be "relevant to the bank's transactions with its customers" because they will either facilitate the processing of past customer transactions or facilitate future transactions. It is also well-established that an operating subsidiary may provide services to or for its parent bank.² The first activity category fits within this authority, since it consists of services that facilitate the internal operations of the Bank. Accordingly, the first category of activities is legally permissible.

2. Pick up and delivery of cash, checks, and other financial items for retailers and other deposit customers of the Bank.

This category of activities includes the pickup of deposits at a Bank customer's location for delivery to the Bank, as well as the delivery of withdrawals from the Bank to a Bank customer's location. The receipt of deposits and payment of withdrawals are core banking activities that, if not performed at the main office of a national bank, must be carried on at a branch. 12 U.S.C. § 36. A national bank may establish a messenger service to transport items relevant to branching transactions with its customers, provided the bank obtains approval to establish a branch to provide such service. 12 C.F.R. § 7.1012(d). Even though these services will be provided by an operating subsidiary, the messenger service will still be considered a branch of the Bank when serving these customers. *See* 12 C.F.R. § 5.34(e)(3). Therefore, for this category of activities to be permissible, the OCC must be able to approve the establishment of a branch by the Bank. The Bank has filed an appropriate application with the OCC, pursuant to 12 C.F.R. § 5.30.

Under the McFadden Act, a national bank may establish and operate a *de novo* branch at any point within the state in which the national bank is situated, if a state-chartered bank would be

² This qualifies for after-the-fact notice if other requirements are satisfied. 12 C.F.R. § 5.34(e)(5)(v)(B).

expressly authorized by state statutory law to establish and operate a branch at the same location. 12 U.S.C. § 36(c).³ Michigan law imposes no geographic limitations on intrastate branching and specifically authorizes mobile branches for state banks. Mich. Stat. Ann. § 23.710(13711) (Lexis Cum. Supp. 2000). Michigan law also provides that the receipt of deposits by a messenger service or the delivery by a messenger service of items representing deposit account withdrawals or loan proceeds is not the establishment of a branch, whether or not it is owned or operated by the bank. Mich. Stat. Ann. § 23.602(112) (Lexis 1999). Since a state bank could lawfully conduct a messenger service offering the pickup and delivery of deposits and withdrawals for customers in the same area in which UPC will operate, the Bank may legally establish the proposed branch.⁴

3. Pick up and delivery of cash, checks, and other financial items for other financial institutions not affiliated with the Bank.

This category will involve essentially the same types of activities that will be performed for the Bank under the first category above, except that the customers will be other financial institutions. In other words, this group of activities will constitute correspondent services.

There is a long tradition in banking for banks to provide services for other depository institutions under the rubric of “correspondent services.” The Supreme Court has recognized the existence of this tradition, although noting that a fixed, clear definition of “correspondent services” has not developed in either law or banking custom. However, in general, the Court determined that correspondent services are services provided by one financial institution to another that reflect and incorporate the unique nature of the banking business. *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 114-15 (1975).

It cannot be doubted that activities such as the transportation of cash, checks, and other financial documents between offices of a financial institution, delivery of cash to supply a financial institution’s ATMs, the retrieval of deposited items from such ATMs, and other similar functions that would be performed by UPC for other financial institutions satisfy that definition. In fact, providing courier services between financial institutions is so well-recognized as a correspondent service that it qualifies for after-the-fact notice under the OCC’s operating subsidiary regulation. 12 C.F.R. § 5.34(e)(5)(v)(E). Moreover, OCC regulations expressly recognize that it is part of the business of banking for a national bank to offer as a correspondent service for another financial institution any service that the bank can perform for itself. 12 C.F.R. § 7.5007. As noted above, the Bank will be performing these same services for itself, through UPC. Therefore, this category of activities is legally permissible.

³ This statute also provides that a national bank establishing a branch outside of its main office location must have the amount of capital and surplus that state-chartered banks would be required to have under state law in order to establish such a branch. The Bank has represented in its branch application that it satisfies this requirement.

⁴ UPC will be a branch of the Bank when performing these services despite the fact that a messenger service is not a branch under state law, for the definition of “branch” in the McFadden Act is a federal one. *First Nat’l Bank in Plant City v. Dickinson*, 396 U.S. 122, 133 (1969).

4. Pick up and delivery of cash, checks, and other financial items for non-financial institution businesses having no deposit relationship with the Bank.

The last category of activities would entail providing the same types of services that we have been discussing to non-financial businesses, such as retailers, local merchants, or other entities that are not currently deposit customers of the Bank. This could include such things as transportation of cash, checks, and other financial items between facilities of the business, such as from one store to another, as well as between the business and its depository institution. Some large retailers have their own ATMs in their stores, so this category also could include the transportation of cash from the merchant's depository institution to a store location for restocking of a merchant-owned ATM. The Bank does not propose to transport any non-financially-related material, or to engage in a general delivery business. In each case, UPC's customer would be the relevant commercial business. The OCC has not previously approved providing such services for businesses that are not depositors of the bank.

Under the National Bank Act, national banks have the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; [and] by loaning money on personal security" 12 U.S.C. § 24(Seventh). The Supreme Court has held that this authority is a broad grant of power to engage in the business of banking including, but not limited to, the enumerated powers and the business of banking as a whole. *NationsBank v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995).

Judicial cases affirming OCC interpretations of this authority over the years have established that an activity is within the scope of the "business of banking" if the activity: 1) is functionally equivalent to or a logical outgrowth of a traditional banking activity;⁵ 2) would respond to customer needs or otherwise benefit the bank or its customers; and 3) involves risks similar to those already assumed by banks. *See, e.g., Merchant Bank v. State Bank*, 77 U.S. 604 (1871); *American Insurance Association v. Clarke*, 865 F.2d 278, 282 (2d Cir. 1988); *M&M Leasing Corporation v. Seattle First National Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). In our opinion, providing the services described above to customers who are not depositors of the Bank satisfies these tests.

First, this category of activities is functionally equivalent to or a logical outgrowth of a traditional banking activity because it consists of the same activities as those in the first three categories, which have long been permissible for national banks. Instead of picking up cash and checks from Bank depositors and bringing them to the Bank, the messenger service will pick up cash and checks from nondepositors and take them to another financial institution. Instead of transporting cash and checks from the main office of a financial institution to a branch of the financial institution, it will transport such items between two retail stores. Instead of transporting cash to restock the Bank's ATMs, it will transport cash to restock ATMs owned by merchants.

⁵ In *Independent Ins. Agents of America, Inc. v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000), the court expressed the view that the "logical outgrowth" rationale needed to be kept within reasonable bounds but endorsed the "functional equivalent" component of the test.

In short, the activities are the same, only the customers will be different. Since this category of activities is functionally equivalent, indeed, identical, to the first three categories, and those categories are part of the business of banking, the first component of the test is satisfied.

The Bank represents that it has received many unsolicited expressions of interest from local businesses that would like to take advantage of the proposed armored car service. As previously noted, there is a lack of viable commercial alternatives in the area. Moreover, the Bank believes that it must be able to serve these types of customers in order for the messenger service to be financially viable. Thus, both the Bank and the customers will benefit if this category of services can be offered, and so the second component of the test is satisfied.

Finally, serving non-depositor customers will involve risks similar to those already being assumed by the Bank in connection with the other categories of activities. The same safety, loss-in-transit, employee fidelity, insurance, and other risk management issues are present in all four categories, and they do not change from one group of customers to another. The Bank has provided evidence that it will manage those risks through insurance and other appropriate measures. Accordingly, the third component of the test is satisfied, and providing financially-related armored car service to businesses that are not depositors of the Bank is part of the business of banking within the meaning of 12 U.S.C. § 24(Seventh).

Even if it is not deemed to be part of the business of banking, this category of activities is incidental to the business of banking. National banks are authorized to engage in an activity if it is incidental to one of the activities enumerated in section 24(7) or if it is incidental to the performance of an activity that is part of the business of banking. *NationsBank v. Variable Annuity Life Insurance Co.*, 513 U.S. at 253. Incidental activities are activities that are permissible for national banks, not because they are part of the powers expressly authorized for banks or part of the “business of banking,” but because they are “convenient” or “useful” to those activities. *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 431-32 (1972). To state it another way, the incidental powers of national banks are not limited to activities deemed essential to the exercise of enumerated powers but are activities closely related to banking and useful in carrying out the business of banking. *Bank of America v. City of San Francisco*, 309 F.3d 551, 562 (9th Cir. 2002).

Judicial decisions have identified several categories of activities that may be considered incidental to banking. The one that is of most interest here is activities that optimize the use and value of a bank’s facilities and competencies, or enable the bank to avoid economic waste in its banking franchise. This includes what has come to be called the “excess capacity doctrine,” which permits national banks to engage in nonbanking activities or serve nonbanking customers when necessary to obtain full utilization of equipment, facilities, or competencies that have been legitimately acquired for banking purposes. Although this concept originally developed in the context of leasing out excess space in bank premises, it has since been applied in many other areas. See, e.g., 12 C.F.R. § 7.5004 (electronic excess capacity); Interpretive Letter No. 888, reprinted in [2000-2001 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-407 (March 14, 2000) (excess capacity in electronic imaging system); Interpretive Letter No. 811, reprinted in [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-259 (December 12, 1997)

(printing equipment); Interpretive Letter No. 677, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625 (June 28, 1995) (software production and distribution). The excess capacity doctrine has even been applied to a messenger service serving other banks. No-Objection Letter No. 89-4, *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,061 (July 11, 1989).

As we have seen, the Bank is acquiring equipment, *i.e.*, the armored van, for legitimate banking activities. Such activities will make up the great majority of UPC's business, as the Bank expects that only about 25 percent of such business will be derived from serving non-depositors. The Bank also represents that it must be able to serve non-depositors in order for the armored car service to be financially viable. The Bank will make a significant investment in the armored van and the necessary employees, as well as in UPC's capitalization. If the Bank is not permitted to optimize the use of these facilities by serving non-depositor customers, these assets will be underutilized, resulting in significant economic waste. Moreover, the Bank will acquire only one van, the irreducible minimum needed to provide any messenger service at all. To the extent that excess capacity will be acquired, it is unavoidable. Under these circumstances, providing armored car service to non-depositors of the Bank to utilize available excess capacity is an activity that is incidental to banking under 12 U.S.C. § 24(Seventh).

CONCLUSION

For the reasons discussed above, all of the proposed activities of UPC are legally permissible. In addition, it is legally permissible for the Bank to establish UPC as a branch. Accordingly, based upon a thorough review of all information available, including the representations and commitments made in the applications and by the Bank's representatives, the OCC has approved your applications. This letter also serves as authorization for the Bank to establish a messenger service branch (branch No. 124885A) at 501 West U. S. 2 (P. O. Box 218), Norway, Michigan 49870 to serve the area described herein.

If the messenger service branch is not opened within 18 months from this approval date, the approval automatically terminates unless the OCC grants an extension. Within 10 days after opening, the Bank should notify Senior Licensing Analyst Carolina Ledesma in our Central District Office of the branch's opening date, so that we may complete our records. Please reference the application control number in your letter. If, at some time in the future, the Bank intends to close the branch (*i.e.*, cease operating the messenger service), it must submit a 90-day advance notice of proposed branch closing to the OCC pursuant to 12 U.S.C. § 1831r-1. Following the closing of the branch, a final closing notice should be submitted to this Office.

This approval, and the activities and communications by OCC employees in connection with this filing, do not constitute a contract, express or implied, or any other obligation binding upon the OCC, the U. S., any agency or entity of the U. S., or any officer or employee of the U. S., and do not affect the ability of the OCC to exercise its supervisory, regulatory, and examination authorities under applicable law and regulations. The foregoing may not be waived or modified by any employee or agent of the OCC or the U. S.

If you have any questions, please contact Carolina Ledesma at (312) 360-8850. A separate letter is enclosed requesting your feedback on how we handled your application. We would appreciate your response so we may improve our service.

Sincerely,

/s/ Julie L. Williams

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel