



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

February 24, 2005

Interpretive Letter #1023
March 2005
12 USC 24(7)

Subject: Messenger Service

Dear []:

This is in response to your letter of November 15, 2004. You requested a legal opinion confirming that it would be permissible for [] (“Bank”) to engage in certain activities in connection with independent messenger or courier services. As discussed below, I agree that the proposed activities are legally permissible.

Proposal

According to your letter,¹ certain of the Bank’s customers desire to send their items for deposit to the Bank via third-party couriers that would be hired by the customer pursuant to a written agreement between the customer and the courier. You represent that these couriers would be bona fide independent contractors who would provide similar services to other customers. In providing these services, the courier would be the agent of the customer not the Bank, and the customer would have the ultimate decision-making authority with regard to the relationship.

The Bank proposes to offer the following services in connection with such couriers:

1. Manage the request for proposal (“RFP”) process when customers need to hire a courier, which would help customers obtain needed services at competitive prices. The Bank would subsequently issue a report that reviews and ranks the RFP responses and provides recommendations regarding which courier or couriers might best meet the customer’s needs.
2. Assist the customer in setting up the services of both newly hired and existing couriers to coordinate the delivery of deposit-related materials to the Bank from the customer’s location. The Bank will assist the customer in best meeting deposit delivery needs by recommending service modifications as the customer’s circumstances change.

¹ This opinion also reflects supplemental information that was obtained in telephone conversations with you on January 14, 2005, and February 1, 2005.

3. Assist the customer in monitoring the continuing performance of the third party couriers by ranking performance according to specific criteria such as timeliness of pick up and delivery. The Bank will issue periodic reports on this to the customer.
4. Assist the customer in tracking service-related problems and establish ongoing communication with the customer and the courier to help resolve any service-related issues. The customer will have the final decision-making authority on how to resolve any matter.

In short, the Bank would perform administrative services to manage the relationship with independent couriers on behalf of customers. These activities will be referred to as the “Proposed Services.” The Proposed Services initially would be offered only in one geographic area but, if successful, would be expanded to other areas later. The Bank will offer these services directly rather than through an operating subsidiary, and will charge a fee for these services.

Legal Analysis

The OCC has not previously had occasion to consider the activities that you propose. However, we find that they are both part of the business of banking and incidental to banking under 12 U.S.C. § 24(Seventh).

1. Business of Banking Analysis

Under 12 U.S.C. § 24(Seventh), national banks have the power to engage in certain enumerated powers as well as the general “business of banking.”² Based on the case law, the OCC uses three general tests to determine whether an activity is within the scope of the business of banking. They are: 1) whether the activity is functionally equivalent to or a logical outgrowth of a recognized banking activity; 2) whether the activity responds to customer needs or otherwise benefits the bank or its customers; or 3) whether the activity involves risks similar in nature to those already assumed by banks.³ It is not necessary for all of the tests be satisfied to find that an activity is part of the business of banking.⁴

Here, the Proposed Services will be functionally equivalent to or a logical outgrowth of existing banking activities. National banks are authorized to operate their own courier or messenger services and may also contract with independent courier services to transport banking-related

² *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (“VALIC”).

³ See, e.g., *Merchants’ Bank v. State Bank*, 77 U.S. 604 (1871); *American Insurance Assn. v. Clarke*, 865 F.2d 278 (2d Cir. 1988); *M & M Leasing Corp. v. Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); Interpretive Letter No. 880, Dec. 16, 1999; Corporate Decision No. 99-02, Dec. 11, 1998; Interpretive Letter No. 845, Oct. 20, 1998.

⁴ Interpretive Letter No. 953, Dec. 4, 2002.

items for customers.⁵ The Bank does both of these things at various places in which it operates. As a result, it has acquired a core competency in messenger or courier service operation and in managing relationships with third party messenger services. It would be a natural outgrowth of the Bank's own courier service activities to make this expertise available to customers who contract with courier services.

The OCC has recognized that advisory and consulting services are an appropriate way for banks to exercise their core competencies:

[W]e find that where a bank would be permitted as part of the business of banking to provide a service and related expertise to an entity, the bank should also be permitted, as part of the business of banking, to employ that expertise to provide advice to that entity as to how the entity can perform the service for itself.⁶

Thus, national banks are authorized to provide a wide range of advisory and consulting services to their customers to take advantage of competencies that they have developed for their own use.⁷ The Proposed Services are similar to such previously authorized activities.

In addition, you represent that various customers have requested the Bank to provide the Proposed Services, so this proposal would respond to customer needs. It would also benefit customers. Since the Bank undoubtedly has greater expertise in courier services than most depositors, these customers would benefit from having a knowledgeable party provide advice and administrative services on these matters.

As for the third test, the risk exposures of providing advice on an activity are somewhat different from providing the actual service but would certainly be no greater and can be properly limited and controlled.

2. Incidental to Banking Analysis

National banks have the power under 12 U.S.C. § 24(Seventh) to engage not only in the business of banking, but in activities that are incidental to banking. While we conclude that the Proposed Services are permissible because they are part of the business of banking, if not justified on that basis, they would also be permissible as incidental to banking.

⁵ 12 C.F.R. § 7.1012; cf. *National Courier Ass'n v. Board of Governors of Federal Reserve System*, 516 F.2d 1229 (D.C. Cir. 1975) (finding that operating a courier service for the transportation of banking-related items is "closely related to banking" for purposes of the Bank Holding Company Act).

⁶ Interpretive Letter No. 928, Dec. 24, 2001.

⁷ See, e.g., 12 C.F.R. § 5.34(e)(2)(ii)(I) (serving as investment advisor for individuals, businesses, and governmental entities); 12 C.F.R. § 5.34(e)(2)(ii)(J) (tax planning and preparation services); Corporate Decision No. 2002-2, Jan. 9, 2002 (employee compensation, benefit, and general human resources advisory and administrative services); Interpretive Letter No. 238, Feb. 9, 1982 (financial consulting and advisory services, including performing research for prospective transactions).

Incidental powers are those that are “convenient” or “useful” to either the enumerated powers under 12 U.S.C. § 24(Seventh) or the broader business of banking.⁸ Similar to the business of banking analysis, the OCC examines three factors derived from case law when evaluating whether an activity may be considered incidental to banking. Activities are incidental to banking if they: 1) facilitate the operations of the bank as a business enterprise; 2) enhance the efficiency and quality of the content or delivery of banking services or products; or 3) optimize the use and value of a bank’s facilities and competencies, or enable the bank to avoid economic waste.⁹ It is not necessary for all tests to be met in order to find an activity to be incidental to banking.

Here, at least two of the tests are satisfied. The Proposed Services clearly will enhance the efficiency and quality of the delivery of the Bank’s deposit services. Receiving deposits is one of the express powers enumerated in section 24(7). The Proposed Services will make it easier and more convenient for customers to use these services.

In addition, they will optimize the use and value of the Bank’s facilities and competencies. As discussed earlier, the Bank has staff devoted to managing the Bank’s own courier services as well as its relationships with third party providers of such services. Making the Proposed Services available to customers will optimize the use of this staff and enable the Bank to make greater use of the competencies that it has developed in this area. Therefore, the Proposed Services are incidental to banking within the meaning of 12 U.S.C. § 24(Seventh).

3. Branching

Although the messenger services would perform core banking functions (*e.g.*, transporting deposits and withdrawals), the Bank would not be engaged in branching activities. OCC regulations provide that a messenger service that picks up and delivers to national banks and their customers items that relate to branching functions will not be considered a branch under 12 U.S.C. § 36 provided that the messenger service is established and operated by a third party. A

messenger service is clearly established by a third party if several listed factors are satisfied.¹⁰ These factors are:

- (i) A party other than the national bank owns or rents the messenger service and its facilities and employs the persons who provide the service;
- (ii) The messenger service retains the discretion to determine in its own business judgment which customers and geographic areas it will serve;

⁸ *VALIC*, *supra* note 2; *see Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972).

⁹ *See, e.g.*, OCC precedents cited in note 3, *supra*.

¹⁰ 12 C.F.R. § 7.1012(c).

- (iii) The messenger service maintains ultimate responsibility for scheduling, movement, and routing;
- (iv) The messenger service does not operate under the name of the bank, and the bank and the messenger service do not advertise, or otherwise represent, that the bank itself is providing the service . . . ;
- (v) The messenger service assumes responsibility for the items during transit and for maintaining adequate insurance covering thefts, employee fidelity, and other in-transit losses; and
- (vi) The messenger service acts as the agent for the customer when the items are in transit. The bank deems items intended for deposit to be deposited when credited to the customer's account at the bank's main office, one of its branches, or another permissible facility, such as a back office facility that is not a branch. The bank deems items representing withdrawals to be paid when the items are given to the messenger service.

You represent that all of these factors will be satisfied. You also represent that the messenger services will be hired by customers, not the Bank, and that customers will have all decision-making authority concerning their relationships with the messenger services. Accordingly, it is clear that the messenger services will be operated by independent third parties and will not be branches of the Bank. It is also clear that the Proposed Services, themselves, are not branching activities.¹¹ Accordingly, based upon your representations, your proposal does not raise any branching issues.

Conclusion

For the reasons discussed above, we find that the Proposed Services are permissible. Therefore, the Bank may provide these services.

As we stated in footnote 17 of Interpretive Letter No. 928, *supra* note 6, an advising bank would potentially be liable if it failed to render competent advice. Accordingly, we would expect such banks to take suitable steps to control that risk, such as keeping adequate records of the advice rendered, obtaining appropriate insurance coverage, and employing a competent staff. Banks providing advisory services should be careful to define clearly in their engagement letters or agreements the scope of advice to be rendered and the bank's liability for that advice. Finally, when acting in an advisory or consulting capacity, a bank should not actually engage in a management role or exercise any form of operating control over the advisee. You have already represented that the Bank will act in a purely advisory role and that all decisions regarding courier services will be made by the customers.

¹¹ See 12 U.S.C. § 36(j).

Our conclusion is based upon the representations made in your letter and in telephone conversations with you. A material change in the facts might require a different conclusion.

I trust that this has been responsive to your inquiry. If you have any questions, please contact me at (202) 874-5300.

Sincerely,

/s/ Christopher C. Manthey

Christopher C. Manthey
Special Counsel
Bank Activities & Structure Division