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August 3, 1998

Interpretive Letter #839
November 1998
12 U.S.C. 36J

Dear [ ]:

This responds to your letter of May 22, 1998, inquiring whether a school banking program being considered by [ ] ("FNB"), [*City, State*], would constitute a branch. As explained below, I conclude that, as structured, the program would not result in the establishment of a branch by FNB.

FNB has had a vocational relationship with [ ] High School (" HS"), [*City, State*], for approximately fifteen years, providing numerous job opportunities to students. FNB and [ ]HS would like to extend this relationship through use of a school banking facility ("facility") on school premises staffed by students interested in banking. FNB would donate a small amount of money to defray the start up cost to the school. FNB would also train the tellers and conduct audits to ensure safety and soundness. The school plans to keep the facility open for one hour each school week to accept deposits (withdrawals are being considered for the future) from students. The program may eventually be extended to faculty as well, depending on demand and the success of the program. The School Business Manager would bring the deposits to FNB after the facility closes each day. The[ ] School District would assume responsibility for the funds until they are delivered to an FNB office or deposited in its night depository. [ ]HS would not have a contract with FNB and would have no obligation to maintain this relationship for any period of time.

The proposal is in many respects similar to a non-branch third party messenger service that facilitates the receipt of deposits between a national bank and depositors. The OCC has adopted an interpretive rule that provides guidance on when a messenger service will or will not be a branch of a national bank.[1] That rule states that messenger services established by third parties

[1] 12 C.F.R. § 7.1012.

are not bank branches.[2] While the rule sets out a test for determining when a messenger service is clearly established by a third party, and is not a branch, that test is a safe harbor.[3] Alternatively, what constitutes a non-branch third party messenger service is to be determined based on a review of the facts and circumstances concerning a given relationship.[4] Thus, in originally adopting this approach, the OCC explained:

> If a messenger service complies with all of the requirements set forth in (c)(2), the OCC will not consider the facility to be a branch. As stated, this test is not meant to be exclusive. Undoubtedly, there could be other factors that would cause a facility not to be considered a branch because it was not "established" by the national bank. Likewise, there may be facts and circumstances under which the failure to satisfy certain of the listed factors would not cause the facility to be considered as a branch of the bank.[5]

The factors set forth in the safe harbor test are:

> (I) a party other than the national bank owns the service and employs its personnel; and
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> (ii) the messenger service:
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> (A) makes its services available to the public including other depository institutions;
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> (B) retains discretion on who it will serve and where;
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> (C) maintains ultimate responsibility for scheduling, movement, and routing;
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> (D) does not operate under the name of the bank or represent that the bank is providing the service;
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> (E) assumes responsibility for items while in transit; and
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> (F) acts as agent for the customer while the items are in transit thus assuring that items intended for deposit will not be deemed to be deposited until delivered to the bank and that items representing withdrawals are deemed

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[2] Id. at § 7.1012(c)(2).

[3] Id.; see also 60 Fed. Reg. 11924, 11926 (March 3, 1995).

[4] Id.

[5] 58 Fed. Reg. 4070, 4072 (Jan. 13, 1993).

to be paid when given to the messenger service.[6]

Under the facts as presented, the program clearly comports with factors (I) and (ii)(B),(C),(D), and (E) as well as the agency, debit, and credit provisions in (ii)(F). FNB neither owns the service nor employs its "personnel." Rather, students serve as tellers after being trained by bank personnel and are supervised by school faculty members. Additionally, the School Business Manager will transport the money from the school to the bank and deposit it or place it in the bank's night depository. Moreover, since the facility is operated only during school hours and serves only persons associated with the school, it appears that the school, rather than the FNB, retains discretion on who it will serve and where, and maintains ultimate responsibility for its operations. Furthermore, given that only persons associated with the school will provide services to depositors, it is readily apparent that the school, not the bank, is providing the service. Finally, the deposit slip will indicate that the funds will not be credited to the individual accounts until the funds are received at bank premises and the amounts are verified. As stated, the school district will assume responsibility for any losses of funds prior to their delivery to the bank.

With respect to (ii)(A), even though the program would facilitate the receipt of deposits for only one bank, the school could terminate the program at anytime and enter into an arrangement with any other bank. Clearly under this arrangement, the school is not wedded to providing services on behalf of any particular bank. This portion of the arrangement is similar to provisions in an arrangement between a state university and a national bank by which the university facilitated certain banking transactions between its students and the national bank.[7] The OCC found these provisions persuasive in concluding that the arrangement satisfied the requirements currently found in section 7.1012(c)(2)(ii)(A). Accordingly, I conclude that the requirements of section 7.1012 (c)(2)(ii)(A) are satisfied in the instant case.

In addition to being conducted in accordance with the messenger service requirements, the arrangement must be conducted in accordance with safe and sound banking practices. The OCC has previously listed safety and soundness concerns that banks entering into arrangements with third parties should consider. Banks should make sure that costs are properly allocated; customer problems are resolved through the same manner and same process as the bank generally follows; and that the parties clarify their legal relationships. These various relationships and responsibilities must be clearly disclosed to the customer. In addition, parties to such arrangements should establish appropriate procedures for segregating and properly recording items and, when applicable, must establish appropriate procedures for identifying customers seeking withdrawals, certifying withdrawal transactions and establishing and enforcing appropriate withdrawal limitations. In addition, the parties should develop policies with respect to record keeping, reporting and disclosures to customers to assure that all legal and prudential requirements, including any laws regarding financial privacy, truth in savings and funds availability

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[6] 12 C.F.R. § 7.1012(c)(2).

[7] Letter from William P. Bowden, Jr., Chief Counsel (Oct. 5, 1993).

are satisfied. Finally, banks entering such arrangements should take steps to assure that account holders know that the service facility is an entity separate from the bank of deposit and that they will receive notice of any change in service.

In conclusion, if the program is conducted as discussed above, the program would not constitute the establishment of a branch at the school.

I trust this is responsive to your inquiry. Please call me at (212) 790-4010 if you have any questions regarding this matter.

Very truly yours,

/s/

Denver G. Edwards
Attorney