

(717) 787-1471

March 28, 2000

Dear :

This letter responds to the two letters that you wrote to the Pennsylvania Department of Banking (“Department”) on behalf of your client, **[redacted]** (“Bank”), in which you requested that the Department approve Bank’s request to operate a messenger service branch. For the reasons stated below, the Department hereby approves, as a matter of legal theory, the ability of a Pennsylvania state-chartered bank:

- i) to establish and operate a messenger service branch to pick up from, and deliver to, specific customers, at locations such as homes or offices, items relating to transactions between the bank and those customers including, but not limited to, deposits, withdrawals and checks; and
- ii) to use the good faith excess capacity of its messenger service branch to provide messenger services to pick up from, and deliver to, current customers of the bank, documents of a banking, financial, accounting or similar nature which do not relate to transactions between the bank and those customers or to pick up from, and deliver to, customers who would not otherwise be customers of the bank, documents of a banking, financial, accounting or similar nature which do not relate to transactions between the bank and such customers.

Please note that this letter only addresses the ability of a Pennsylvania state-chartered bank to engage in messenger service branch activity as a matter of legal theory. Since a messenger service branch would be a branch of a Pennsylvania state chartered bank, Bank must file a branch application with, and receive the approval of, the Department, prior to establishing and operating a messenger service branch.

I. BACKGROUND

The first letter you wrote to the Department on behalf of Bank on November 24, 1999 was addressed to Joseph A. Moretz, Manager, Corporate Applications Division (“Letter #1”). Letter #1

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states that Bank proposes to provide messenger services to Bank's business customers and the general public and provides a lengthy analysis of the incidental powers of national banks and analogous powers of bank holding companies. You also argue in Letter #1 that, "[s]imilar to the federal regulators' authority, Department is authorized under Section 315(i) to approve the activities of Pennsylvania chartered banks that are 'incidental to the conduct of banking business.'" *Id.* at 5. You cite 7 P.S. § 315(i) and the comments thereto as well as 7 P.S. § 103 and provide a copy of the federal regulation (12 C.F.R. § 7.1012) which authorizes national banks to operate messenger service branches. *See generally* Letter #1.

The second letter you wrote to the Department on behalf of Bank on December 22, 1999 was addressed to the undersigned. In addition to providing more detail to arguments made in Letter #1, including a reference to Pennsylvania Attorney General Opinion No. 76-33,¹ Letter #2 defines the types of messenger services Bank proposes to provide. First, you state that Bank is authorized to provide messenger/courier services for itself without being in violation of the Department's messenger service regulation found at 10 Pa.Code § 21.11 *et seq.* Letter #2 at 4. Second, you state that:

Bank intends to use the proposed messenger/courier services to serve Bank's own customers for the purpose of transporting items relevant to Bank's transactions with its customers; for instance, items constituting deposits, withdrawals or payments of loan proceeds. Bank intends to apply to Department for approval of a branch facility and to designate a Bank employee to act as messenger/courier for the branch. The messenger/courier service would be used to pick up from, and deliver to, specific customers at locations, such as homes or offices, items involving branching transactions between Bank and its customers. In this regard, Bank will comply with all Department and FDIC branch application policies, procedures and standards, including limiting the operation of the branch to the geographic locations legally permitted for a permanent branch, publishing notice of the proposed service area, maintaining an operations log, complying with all applicable bonds and/or insurance policies and performing all requisite security measures.

Id. Third, you state that:

¹ *See also Pennsylvania Bankers Association v. Secretary of Banking*, 392 A.2d 1319, 1324 (Pa. 1978) (explicitly agreeing with Attorney General Opinion Number 76-33).

Bank also proposes to provide messenger/courier services to the general public, including other financial institutions. The items Bank proposes to transport may include, among others, any of the following: checks, commercial papers, documents, written instruments, audit and accounting media, business records, insurance binders and policies, deeds, trusts and wills. Bank acknowledges that this expanded activity has not expressly been approved by the Department, the OCC or the Board. However, it is our view that this activity **can** be authorized at the Department's discretion as an incidental power to the conduct of banking business pursuant to Sections 103 and 315 of the Banking Code and thus would enable Bank to remain competitive with national banks and bank holding companies. Accordingly, we believe Department should approve Bank's request to perform messenger/courier services for Bank's customers and the general public through a branch facility.

Id. (emphasis in original). Letter #2 also indicates that Bank does not intend to transport items such as, "food, flowers or blood. Rather, Bank anticipates its messenger/courier services will transport items similar to those envisioned by the Board in its order relating to courier services (items with a critical time schedule, provided such items are small in bulk, light in weight, and require only ordinary security measures)." *Id.* at 5-6. Finally, Letter #2 makes general reference to the enactment of the Gramm-Leach-Bliley Act, Public Law 106-102 (November 12, 1999) ("GLBA") and states that, "the financial services industry is destined to become even more competitive." *Id.* at 5. However, in a telephone conversation with the undersigned, you stated that the GLBA does not directly relate to the issue of messenger/courier services.

II. ANALYSIS

A. *Establishing and Operating a Messenger Service Branch to Pick up From, and Deliver to, Specific Customers, at Locations Such as Homes or Offices, Items Relating to Transactions Between the Bank and Those Customers, Including, but not Limited to, Deposits, Withdrawals and Checks*

Bank seeks to establish and operate a messenger service branch to pick up from, and deliver to, specific customers, at locations such as homes or offices, items relating to transactions between the bank and those customers.² Letter #1 at 1, 2, and 3; Letter #2 at 3 and 4. Section 102(h) of the Banking

² Since Bank proposes to establish and operate a messenger service branch, the Department's messenger service regulations at 10 Pa.Code § 21.11 *et seq.* would not apply to and, therefore, would not limit, Bank's proposed messenger service activities. *Accord* August 18, 1998 Letter of Staff Counsel David Bleicken at 2 (stating that a Pennsylvania state-chartered

Code of 1965 defines a branch as:

an office, or other place of business, other than the principal place of business, of an institution for the transaction of any business of the institution, except any of the following conducted or maintained with the approval of the department:

- (i) a temporary agency,
- (ii) a school at which deposits are accepted by an officer, employe or agent of the institution,
- (iii) an office used solely for internal operations of the institution to which the public is not admitted for the conduct of banking business,
- (iv) an automated teller machine,
- (v) a loan production office, or
- (vi) any other office which the department may determine by rule or regulation.

7 P.S. § 102(h) (emphasis added). A messenger service branch would be an “office, or other place of business” as that phrase is used in the definition of a branch. *Id.* Noticeably absent from the definition of a branch is any requirement that it must be a structure affixed to real property. In reliance on this broad definition of a branch, the Department has already approved (both conceptually and actually) mobile branches of Pennsylvania state-chartered banks which operate on regular, public schedules. *See* May 23, 1996 letter of Staff Attorney (now Deputy Chief Counsel) Laurie Kennedy (enclosed). Therefore, the Department takes the position that the Banking Code of 1965 authorizes Pennsylvania state-chartered banks to establish and operate messenger service branches. *See also* 7 P.S. § 901 *et seq.* Unlike a mobile branch, a messenger service branch would not operate on a fixed, public schedule and would be able to provide messenger services for all of its customers on demand.

Insofar as Bank seeks to establish and operate a messenger service branch to pick up from, and

bank may establish and operate a mobile branch that could, in essence, provide messenger services to the bank’s customers without violating the prohibition of 10 Pa.Code § 21.11 *et seq.*)

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deliver to, specific customers, at locations such as homes or offices, items relating to transactions between the bank and those customers, including, but not limited to, deposits, withdrawals and checks, Bank would do so pursuant to its authority to establish and operate a branch. *Id.*

B. *Providing Messenger Services By Using the Good Faith Excess Capacity of a Messenger Service Branch to Pick Up From, and Deliver to, Current Customers of the Bank, Documents of a Banking, Financial, Accounting or Similar Nature Which Do Not Relate to Transactions Between the Bank and Those Customers or to Pick Up From, and Deliver to, Customers Who Would Not Otherwise Be Customers of the Bank, Documents of a Banking, Financial, Accounting or Similar Nature Which Do Not Relate to Transactions Between the Bank and Such Customers*

Bank also seeks to provide messenger services to the "general public", Letter #1 at 2, 5; Letter #2 at 3, 4, including other financial institutions, Letter #2 at 4. As an initial matter, the Department notes that there is no distinction between deposit or loan customers of a Pennsylvania state-chartered bank and customers who would only receive and pay for messenger services. If activities engaged in by a Pennsylvania state-chartered bank through its incidental powers are just as much the business of banking as accepting deposits or making loans, *City of Pittsburgh v. Allegheny Valley Bank of Pittsburgh*, 412 A.2d 1366, 1370 n. 10 (Pa. 1980), then the customers who receive and pay for services authorized by a bank's incidental powers are just as much customers of the bank as are deposit or loan customers. In addition, Pennsylvania state-chartered banks are open to the general public to do business. Therefore, rather than referring to Pennsylvania state-chartered banks as providing messenger services to the general public, the Department draws a distinction between messenger services which relate to transactions between a bank and its customers and messenger services which are provided either to current customers of a bank which do not relate to transactions between the bank and its customers or which are provided to people who otherwise would not be customers of the bank and which do not relate to transactions between the bank and such customers.

For the reasons stated below, a Pennsylvania state-chartered bank, pursuant to its incidental powers, 7 P.S. § 315(i), may use the good faith excess capacity of its messenger service branch to provide messenger services for its current customers for documents of a banking, financial, accounting or similar nature which do not relate to transactions between the bank and its customers or for people who otherwise would not be customers of the bank for documents of a banking, financial, accounting or similar nature which do not relate to transactions between the bank and such customers. For example, the messenger service branch of a Pennsylvania state-chartered bank may pick up checks, commercial papers, documents, written instruments, audit and accounting media, business records, insurance binders and policies, deeds, trusts and wills from a business that is either a current customer of the bank or from a business that is not otherwise a customer of the bank, and drive those items in a messenger service branch to another bank or to some other location. Similarly, a Pennsylvania state-chartered bank's messenger service branch may be called upon by a current customer or a person who would not otherwise be a customer of the bank to pick up the same kinds of documents and deliver them to that customer.

1. *Incidental Powers Test*

Under Pennsylvania law, the Department has broad authority to approve activities for Pennsylvania state-chartered banks to engage in pursuant to the banks' incidental powers. The Commonwealth Court has held that:

[i]t is the province of the Department, therefore, utilizing the broad and flexible criteria incorporated within the Banking Code, to determine what is, and what is not, permissible banking business. Activity so permitted is, by definition, "banking business" within the meaning of the Banking Code.

City of Pittsburgh v. Allegheny Valley Bank of Pittsburgh, 388 A.2d 1098 (Pa. Commw. Ct. 1978),³ *aff'd*, 412 A.2d 1366 (Pa. 1980). In affirming the Commonwealth Court in *Allegheny Valley Bank*, the Pennsylvania Supreme Court held that:

[L]ike the Commonwealth Court, we see no reason to distinguish "traditional" from "nontraditional" banking activities. Both are within the scope of the Banking Department's supervision, and so within the area preempted by the Legislature.

"Nontraditional" is a vague characterization, totally unidentified in any ordinance, regulation, or anywhere else. It appears to be the creation of the trial court. The designation of "nontraditional" banking functions is internally inconsistent. The mere labelling of some services the bank provides for its customers as "nontraditional"

³ In his dissent from the Commonwealth Court's opinion in *Allegheny Valley Bank*, Judge Crumlish went so far as to describe that court's holding as, "granting carte blanche to the Department in deciding what is and what is not a banking function." *Allegheny Valley Bank*, 388 A.2d at 1104. Although no government agency has "carte blanche" when making decisions, the flexibility required of the Department by 7 P.S. § 103(b) in interpreting the Banking Code of 1965 is broad.

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does not alter the reality that the bank is rendering banking services **authorized by the bank's charter and approved by the Secretary of Banking under the Banking Code. See 7 P.S. §§ 315(e), 103 (1967).** Were it otherwise, would not the bank's activity be ultra vires? What is labelled "nontraditional" are banking services producing banking revenues and earnings which are reflected in the bank share tax, already taxed and paid to the Commonwealth.

Allegheny Valley Bank, 412 A.2d at 1370 n. 10 (emphasis added).⁴ Thus, any activity that a Pennsylvania state-chartered bank may engage in pursuant to its incidental powers⁵ must be i) authorized by the bank's charter⁶ and ii) approved by the Secretary of Banking^{7 8 9} under the Banking

⁴ Although subsequent legislation has made Pennsylvania state-chartered banks subject to local taxation in first class cities and the Pennsylvania General Assembly thereby overruled the holding in *Allegheny Valley Bank* to that extent, *see City of Philadelphia v. Clement & Muller, Inc.*, 715 A.2d 397 (Pa. 1998), neither the Pennsylvania General Assembly nor the Pennsylvania Supreme Court have disturbed the Pennsylvania Supreme Court's holding in *Allegheny Valley Bank* insofar as it relates to the authority of the Department to decide on what activities a Pennsylvania state-chartered bank may engage in pursuant to its incidental powers.

⁵ The incidental powers of Pennsylvania state-chartered banks were formerly codified at Section 315(e) of the Banking Code of 1965, 7 P.S. § 315(e), until they were recodified at Section 315(i) in 1988. Act of December 21, 1988, P.L. 1416, No. 173, § 3.

⁶ A bank's "charter" is what is formally known as its articles of incorporation. See 7 P.S. §§ 102(c), 201, 1004 and 1501-1508.

⁷ The Department disagrees with your assertion in Letter #2 that Pennsylvania state-chartered banks have the authority to interpret what activities they may engage in pursuant to their incidental powers. Letter #2 at 1. Under the Pennsylvania Supreme Court's holding in *Allegheny Valley Bank*, the Secretary of Banking must approve activities in order for them to be engaged in by Pennsylvania state-chartered banks pursuant to their incidental powers. In addition, the Department disagrees with your assertion in Letter #2 that the phrase "business of banking" is to be strictly construed and that other activities engaged in pursuant to the incidental powers of a bank are, "not part of the 'business of banking'". *Id.* As the Pennsylvania Supreme Court's holding in *Allegheny Valley Bank* makes clear, any activity engaged in by a Pennsylvania state-chartered bank pursuant to its incidental powers that is authorized by the bank's articles of incorporation and approved by the Secretary of Banking is part of the banking business.

⁸ How a Pennsylvania state-chartered bank receives the approval of the Secretary of Banking to engage in an activity through its incidental powers depends upon the circumstances. In the present case, Bank's proposal involves a branch banking issue, so submitting a formal

Code of 1965 pursuant to Sections 103 and 315(i) of the Banking Code of 1965.

2. *Application of Incidental Powers Test to Bank's Proposal*

(a) *Bank's Articles of Incorporation*

The third article of Bank's articles of incorporation states:

[t]he purposes for which the institution is incorporated are to receive deposits, make loans, and transact generally any and all business permitted to a banking institution, as defined in the Banking Code of 1965, as amended, and under any present or future laws of the Commonwealth of Pennsylvania.

Bank's articles of incorporation (approved by the Department on November 6, 1990; emphasis in original). This provision certainly includes within its scope activities engaged in pursuant to Bank's incidental powers such as messenger service activity.

(b) *Approval by the Secretary*

The Secretary of Banking must approve a Pennsylvania state-chartered bank's incidental powers

branch application is the appropriate method of receiving the approval of the Secretary of Banking. However, such a formal process would not be necessary in other situations. For example, it appears that the Commonwealth Court (and presumably the Pennsylvania Supreme Court) in *Allegheny Valley Bank* inferred that the Secretary of Banking approved of the activity engaged in by Pennsylvania state-chartered banks through their incidental powers by citing to the extensive authority of the Department to supervise banks and, specifically, to the requirement that Pennsylvania state-chartered banks provide the Department with an annual report pursuant to Section 403 of the Department of Banking Code, 71 P.S. § 733-403. *See Allegheny Valley Bank*, 388 A.2d at 1103. The Department strongly recommends that banks under the Department's jurisdiction seek the prior approval of the Department before engaging in activities on the basis of their incidental powers since, if the Department does not approve of an activity, it may order a bank to cease and desist from engaging in that activity. If no formal application process is appropriate under the circumstances, a letter from the Department stating its approval of an activity to be engaged in pursuant to a bank's incidental powers would be sufficient.

⁹ Although the Supreme Court referred to banks obtaining the approval of the Secretary of Banking, approval granted by a Deputy Secretary or other Department personnel who is duly authorized by the Secretary of Banking to grant such approval would be sufficient. *See* 71 P.S. § 66; *accord Siemon's Lakeview Manor Estate v. Department of Public Welfare*, 703 A.2d 551 (Pa. Commw. Ct. 1997), *alloc. denied*, 727 A.2d 134 (Pa. 1998).

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activity pursuant to Sections 315(i) and 103 of the Banking Code of 1965, 7 P.S. §§ 315(i), 103.

(i) Section 315(i) of the Banking Code of 1965

Section 315(i) of the Banking Code of 1965 states:

[a]n institution shall have, subject to the limitations and restrictions
contained in this act:

* * * *

(i) Incidental powers--all powers incidental to the conduct of banking
business.

7 P.S. § 315(i). The official comment that accompanies the incidental powers provision clearly indicates that the incidental powers provision of the Banking Code of 1965 is to be interpreted broadly. As the pertinent part of the comment states:

[s]ubsection (e) [currently section (i)] covers all powers incidental to the conduct of banking business subject, of course, to all other provisions of this act. This supplies what was left to implication in the prior Code. The provision covers a wide range and variety of activities in which institutions engage as part of the conduct of their banking business and is intended to cover other activities in which institutions may engage in the future. The variety of such activities appears from the following examples which are merely illustrative and not definitive: the sale of data processing services; the conduct of a travel department; payroll accounting; and the rental of conference rooms for real estate settlements and other business transactions.

Comment-Banking Law Commission (Comment-1965) for Section 315(e) (currently section 315(i)). This is a broad grant of authority to Pennsylvania state-chartered banks. In fact, it is so broad that the Department takes the position that the incidental powers of a Pennsylvania state-chartered bank are broader in some ways, and therefore may encompass more activities than, the incidental powers of a national bank codified at 12 U.S.C. § 24(Seventh). For instance, a national bank may not operate a travel agency or department pursuant to its incidental powers, *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972), *accord* Banking Circular No. 108 (June 1, 1978), while a Pennsylvania state-chartered bank may. *Allegheny Valley Bank*, 412 A.2d 1366 (Pa. 1980), *accord* Comment-Banking Law Commission (Comment-1965) to Section 315(e) of the Banking Code of 1965 (currently section 315(i)). Therefore, the Department takes the position that the incidental powers of a Pennsylvania state-chartered bank are broad enough to include (subject to the discussion below of Section 103 of the Banking Code of 1965) using the good faith excess capacity of its messenger service branch to provide messenger services to its current customers for documents of a banking, financial, accounting or similar nature which do not relate to transactions between the bank and its customers or to people who

otherwise would not be customers of the bank for documents of a banking, financial, accounting or similar nature which do not relate to transactions between the bank and such customers.

(ii) Section 103 of the Banking Code of 1965

Section 103 of the Banking Code of 1965, 7 P.S. § 103 ("Section 103"), states the Pennsylvania General Assembly's purposes in enacting the Banking Code of 1965 and the standards to be observed by the Department when dealing with the Banking Code of 1965. Section 103(a) is flexible and broad. As the official comment states:

[c]lauses (v) through (ix) of subsection (a) recognize that after satisfying the imperatives of safety and soundness there still remains a broad area in which the policies for banking legislation and regulation may create a progressive rather than a restrictive atmosphere. The premises underlying such policies recognized by this act are that contemporary banking faces, and should have the opportunity fairly to meet, a high degree of competition not only from other banks but also, in virtually all principal functions, from a large number and variety of other financial organizations; that banking should have the leeway to adapt itself to changing and expanding requirements of the community in order that it may make its proper contribution to economic progress; that, within the confines of appropriate restrictions to protect depositors and the public, the private business judgment of management should be free to guide the development of banking institutions; and that banking legislation should not be overly-detailed but should permit supervisory authorities to shape regulation, within statutory standards and guidelines, in order to meet changes in banking and economic conditions without repeated, detailed legislative amendment.

Comment--Banking Law Commission (Comment -1965) to Section 103(a) (emphasis added). As the official comment makes clear, the Banking Code of 1965 is a flexible statute designed to enable the Department to keep Pennsylvania state-chartered banks competitive with virtually all kinds of financial organizations.

Section 103(b) states:

[t]he purposes of this act stated in subsection (a) of this section shall constitute standards to be observed by the department in the exercise of its discretionary powers under this act, in the promulgation of rules and regulations, in the examination and supervision of institutions subject to this act and in all matters of construction and application of this act required for any determination or action of the department.

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7 P.S. § 103(b). Thus, in determining whether Bank's request to provide messenger services through a messenger service branch for current customers which do not relate to transactions between Bank and its customers or for people who would not otherwise be customers of Bank and which do not relate to transactions between Bank and such customers, the Department must apply the standards in Section 103(a). *See also* 71 P.S. § 733-202. The Department will address each provision of Section 103(a) *seriatim* as they relate to Bank's request.¹⁰

- 7 P.S. § 103(a)(i): *the safe and sound conduct of the business of institutions subject to this act*

It is of paramount importance that the Department is able to conclude from a branch application that Bank is capable of providing the messenger services it proposes to offer in a safe and sound manner. This consideration must be fully addressed by Bank in a branch application if it chooses to seek permission to establish and operate a messenger service branch.

There is evidence that Pennsylvania state-chartered banks have owned and operated armored cars to deliver valuables to their customers during the twentieth century. *See Pennsylvania Company v. Philadelphia Electric Company*, 200 A. 18 (Pa. 1938). The Department also notes that Pennsylvania state-chartered banks are authorized by statute to handle and safeguard a whole host of items including: money on deposit, 7 P.S. § 302; papers and other personal property left in safe deposit boxes, 7 P.S. § 202(b); leases, 7 P.S. § 304; participations, 7 P.S. § 305; investment securities, 7 P.S. § 307; shares of stock, 7 P.S. § 311(b), (d); acceptances with respect to the import or export of goods, domestic shipment of goods or the storage of readily marketable staples, 7 P.S. § 308; all documents related to a loan of almost any kind, 7 P.S. §§ 303, 309, 310, 316, 317, 319, 322; letters of credit, 7 P.S. § 315(a); coin and bullion, 7 P.S. § 315(d); and municipal and mortgage-related securities, 7 P.S. § 315(e). Clearly, banks are sophisticated corporations that are fully capable of handling and safeguarding an almost limitless array of items.

Indeed, banks are capable of safeguarding valuable items anywhere. For example, Pennsylvania state-chartered banks may, upon application and approval from the Department, operate a mobile branch. Thus, the Department has already determined that banks are capable of managing the risks and liabilities that are associated with safeguarding valuables, documents and other items while being transported in a motor vehicle.

In light of the foregoing, the Department concludes that the Pennsylvania General Assembly

¹⁰ In addition to addressing that part of Bank's request which relies on Bank's incidental powers, the following analysis of Section 103 will generally address Bank's overall request.

fully expects and intends that Pennsylvania state-chartered banks are capable of safeguarding valuables, documents and other items under any circumstances in a safe and sound manner, including when those valuables, documents and other items are being moved by a motor vehicle. Of course, Bank would need to demonstrate its particular ability and its specific plans to operate a messenger service branch in a safe and sound manner in a messenger service branch application.

- 7 P.S. § 103(a)(ii): *the conservation of their assets*

Along with safety and soundness, the Department must be satisfied that, in operating a messenger service branch, a Pennsylvania state-chartered bank would satisfactorily conserve its assets. For instance, the Department must determine that operating a messenger service branch would not be a drain on the assets of a Pennsylvania state-chartered bank. In addition, the Department must be assured that a Pennsylvania state-chartered bank's assets are sufficiently shielded from the risks and liabilities that accompany moving valuables, documents and other items in a motor vehicle. Presumably, adequate security measures as well as insurance and bonding would provide sufficient assurances that the assets of a Pennsylvania state-chartered bank would be protected. In a messenger service branch application, Bank must prove that its assets would be adequately conserved if the Department grants approval for Bank to operate a messenger service branch.

- 7 P.S. § 103(a)(iii): *the maintenance of public confidence in them*

Given the vital role banks and other depository institutions play in Pennsylvania's economy, public confidence in them is essential. As the Pennsylvania Supreme Court has noted, "[t]he Great Depression is a stark reminder that the economic fate of our Commonwealth is tied to the soundness and progress of its banking institutions." *Allegheny Valley Bank*, 412 A.2d at 1369-70. Bank must demonstrate in a branch application that it will establish and operate a messenger service branch in such a way that public confidence in it and all banks will be maintained.

- 7 P.S. § 103(a)(iv): *the protection of the interests of their depositors, creditors and shareholders and of the interest of the public in the soundness and preservation of the banking system*

Although this provision surely overlaps to a degree with the other provisions of Section 103(a) addressed above, the Department must be satisfied that the interests of Bank's depositors, creditors and shareholders would be protected if Bank is granted approval to engage in establishing and operating a messenger service branch. Although Letters #1 and #2 address some of the benefits Bank believes will arise from establishing and operating a messenger service branch, Bank must also address in its application any possible threats to depositors, creditors and shareholders which could arise from Bank engaging in such activity and how it plans to protect its depositors, creditors and shareholders from such threats.

Similarly, Bank must demonstrate that the public's interest in the soundness and preservation

of the banking system will not be jeopardized by Bank providing messenger services. Bank's analysis should include, but not be limited to, considerations of any actual harm which may afflict the soundness and preservation of Pennsylvania's banking system as well as the public's perception of the banking system in light of Bank providing messenger services in the manner proposed by Bank.

- 7 P.S. § 103(a)(v): *the opportunity for institutions subject to this act to remain competitive with each other, with financial organizations existing under other laws of this Commonwealth, and with banking and financial organizations existing under the laws of other states, the United States and foreign countries*

The Pennsylvania General Assembly clearly intends that Pennsylvania state-chartered banks should have every advantage possible to remain competitive with a wide variety of banks and other financial organizations situated anywhere in the world. Inherent in the notion of competition is that Pennsylvania state-chartered banks may take the lead and offer services that some of their competitors are not yet authorized to provide. Thus, the fact that a national bank is not yet authorized to provide a service to its customers does not mean that Pennsylvania state-chartered banks are similarly prohibited.

National Banks

As you pointed out in Letter #1, national banks are authorized by regulation 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).

In addition, the Department's research indicates that the OCC does not object to national banks providing messenger services to other banks on an excess capacity basis. No Objection Letter No. 89-04 (July 11, 1989) authored by William B. Glidden, Assistant Director Legal Advisory Services Division, Office of the Comptroller of the Currency. The national bank in question was solicited by other banks, "to utilize excess capacity in the Bank's Transportation Services to provide messenger services to [clearinghouse] banks in order to facilitate these banks' own banking business." *Id.* The OCC took no objection to a national bank using the excess capacity of its messenger service to provide messenger services to other banks in order to transport checks, payment instruments, and other financial documents in order to facilitate the processing and clearing of those items. *Id.*

Other State-Chartered Banks

Section 103(a)(v) specifically recognizes that Pennsylvania state-chartered banks are in competition with banks chartered under the laws of other states.¹¹ The Department has surveyed the

¹¹ Section 103(a)(v) expressly refers to, "the opportunity for institutions subject to this act to remain competitive with banking and financial organizations existing under the laws of

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laws of the fifty states which relate to the ability of state chartered banks to provide messenger services.¹² Although it does not appear that any state statute, regulation or other source of law

other states" 7 P.S. § 103(a)(v).

¹² The undersigned has researched the statutes, regulations, case law, legislation, attorney general opinions and other sources of law and information for the fifty states. References to providing messenger, courier, or armored car services in any way were found in the following states: Alaska (3 Alaska Admin. Code 02.185(g); 3 Alaska Admin. Code 02.145(a)(6)); Arkansas (Ark. Stat. Ann. § 23-47-101(a)(15)); California (10 California Code of Regulations 10.114(a)(2)); 10 California Code of Regulations 10.6001(c)(2); Connecticut (Public Act No. 99-158) (amendment to Section 36a-250 of general statutes); Florida (Fla. Stat. § 658.26(5); Florida Administrative Code 3C-105.409); Georgia (Ga. Comp. R. & Regs. r. 80-1-15-.03); Idaho (reference in press release to state chartered bank providing a courier service; 1996 Ida. Tax LEXIS 162); Indiana (Burns Ind. Code Ann. § 28-2-13-7); Kansas (Attorney General Opinion No. 81-157, 1981 Kan. AG LEXIS 132); Kentucky (Office of Attorney General Opinion 89-48, 1989 Ky. AG LEXIS 48; Office of Attorney General Opinion 82-249, 1982 Ky. AG LEXIS 387; *see also* (possibly) Office of Attorney General Opinion 69-180 (cited in notes to Kentucky Revised Statutes § 287.180 but not reviewed by the undersigned); Louisiana (suggestions in case law that state-chartered banks operate courier/messenger services; *see Cameron State Bank v. American Employers' Insurance Co.*, 401 So. 2d 1090 (La.Ct. App. 1981); *Redden v. John Doe and the Millers Casualty Insurance Co. of Texas*, 357 So. 2d 632 (La. Ct. App. 1978); *Watson v. Hartford Accident & Indemnity Co.*, 339 So. 2d 480 (La. Ct. App. 1976); Maine (9-B Maine Revised Statutes § 131.6-A); Maryland (Financial Institutions Article § 5-504 (parity) and §5-505 (armored car

services; repealed)); Massachusetts (209 Code of Massachusetts Regulations 47.07(3)2); Michigan (Michigan Statutes Annotated §§ 23.710(5)(x), 23.710(151)(35)); Mississippi (possible reference in Attorney General Opinion; see Mississippi Attorney General Opinion dated August 10, 1982, 1982 Miss. AG LEXIS 266); Montana (Montana Administrative Rules 8.80.106(1)(b)(xi)); New Jersey (N.J. Stat. § 17:9A-25.5.A(3)) New Mexico (Attorney General Opinion No. 75-52, 1975 N.M. AG LEXIS 51); New York (3 NYCRR § 14.3(d)(5)); North Carolina (4 North Carolina Administrative Code 3C.1801); Ohio (Ohio Revised Code Annotated 1101.01(C)(1)); Texas (Texas Finance Code § 31.002(a)(8)(E); 7 Texas Administrative Code § 3.91(a)); Virginia (Virginia Code Annotated § 6.1-41.1; see also *Johnson v. Central Fidelity Bank*, 1988 Va. Cir. LEXIS 269); West Virginia (W. Va. Code § 31A-8-12a); Wyoming (Attorney General Opinion 78-05, 1978 Wyo. AG LEXIS 39).

specifically authorizes the state chartered banks of other states to provide messenger services to the general public, the state banking regulators in other states may currently, or could in the future, permit the state-chartered banks under their jurisdiction to engage in such activities by exercising their lawful discretion. In fact, the Department has been informally advised by the state banking regulator of a state bordering Pennsylvania that it would not object to its own state-chartered banks providing messenger services to the general public, although it has not yet received a request from a bank to engage in such activity. And of course, state legislatures could always amend their statutes to expressly authorize their state-chartered banks to provide messenger services to the general public.

In light of the fact that state-chartered banks located in a state bordering Pennsylvania may have the authority to provide messenger services to the general public, and in light of the possibility that state-chartered banks located in other states may have similar authority, the Department is satisfied that the issue of competitiveness with other state-chartered banks is sufficiently relevant for consideration with respect to Bank's proposal to operate a messenger service.

Bank Holding Companies

You cite to regulations and precedents concerning bank holding companies ("BHC" or "BHCs") in Letters #1 and #2. This is wholly appropriate since Section 103(a)(v) clearly contemplates that Pennsylvania state-chartered banks are in competition with, "banking and financial organizations existing under the laws of . . . the United States . . ." 7 P.S. § 103(a)(v). BHCs fall well within these parameters as do the new financial holding companies ("FHC" or "FHCs") created by the GLBA.

As you point out in Letters #1 and #2, BHCs and their subsidiaries are currently authorized to provide courier services for their own internal operations, 12 C.F.R. § 225.22(b)(v), as well as to banks and the general public. 12 C.F.R. § 225.28(b)(10); *National Courier Association v. Board of Governors of the Federal Reserve System*, 516 F.2d 1229 (D.C. Cir. 1975).

In addition, the Department's research indicates that the Board of Governors of the Federal Reserve System ("Board") has held that a BHC or its subsidiary may provide armored car services to the public for a wide variety of items. *See* Order of the Board of Governors of the Federal Reserve System ("Board") effective June 18, 1990 ("June 18, 1990 Order"), 76 Fed. Res. Bull. 676 (1990).¹³ The

¹³ The June 18, 1990 Order approved providing the following services to the general public as closely related to banking or managing or controlling banks: i) fully-insured transportation of cash, negotiable instruments, securities, and valuables; collecting currency and checks from commercial customers and nonbank financial institutions and transporting and depositing these collections at financial institutions; and delivering cash, negotiable instruments, securities, and valuables to commercial customers and nonbank financial institutions; ii) providing related services such as interbank transfers, coin wrapping, change delivery, mail delivery, and payroll check cashing; and iii) providing incidental courier services as permitted under section 225.25(b)(10) of Regulation Y.

Board ultimately denied the application in question because the proposal would have violated Sections 23A and 23B of the Federal Reserve Act. Order of the Board effective February 10, 1993, 79 Fed. Res. Bull. 352 (1993) (“1993 Order”). However, in denying the application, the Board stated that:

[t]his denial does not affect the Board’s prior ruling in this case that armored car services are closely related to banking and permissible for bank holding companies, and is without prejudice to the filing of a new proposal by this (or any other) applicant to establish a record based on substantial evidence from which a favorable determination could be made with respect to the conduct of this activity under the “proper incident” test, as well as the resolution of all other issues relevant to a particular proposal.

Id. at 14.¹⁴

Financial Holding Companies

Finally, there may be some authority for the new FHCs to engage in messenger service activities. New Section 4(k) of the BHC Act grants the Board broad authority to permit FHCs to engage

¹⁴ It is unclear whether the Board would still permit a BHC to engage in armored car activity. Section 102 of the GLBA limits BHCs to activities determined by the Board, “by regulation or order under this paragraph as of the day before the date of enactment of the Gramm-Leach-Bliley Act, to be so closely related to banking as to be a proper incident thereto (subject to such terms and conditions contained in such regulation or order, unless modified by the Board);” Section 102(a) of the GLBA. The Board has only determined that providing armored car services is closely related to banking or managing or controlling banks and not that it is a proper incident thereto. For this reason, BHCs may or may not be currently authorized to engage in armored car service activities. However, the June 18, 1990 Order is a strong indication of the recent trend in financial organizations seeking to provide messenger or armored car services.

in any activity which the Board determines, by regulation or order:

- (A) to be financial in nature or incidental to such financial activity; or
- (B) is complementary to a financial activity and does not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally.

Section 103(a) of the GLBA adding new subsection (k)(1) to Section 4 of the BHC Act. The GLBA then goes on to state:

- (4) Activities that are financial in nature:--For purposes of this subsection, the following activities shall be considered to be financial in nature:
 - (A) Lending, exchanging, transferring, investing for others, or safeguarding money or securities.

Section 103(a) of the GLBA adding new subsection (k)(4) to Section 4 of the BHC Act (emphasis added). If “exchanging, transferring” or “safeguarding” money or securities does not provide explicit authority to operate a messenger service, then it could be reasonably argued that operating a messenger service is incidental or complementary to such a financial activity.

In addition, new subsection (k)(5) of Section 4 of the BHC Act states:

- (A) In general.--The Board shall, by regulation or order, define, consistent with the purposes of this Act, the activities described in subparagraph (B) as financial in nature, and the extent to which such activities are financial in nature or incidental to a financial activity.
- (B) Activities.--The activities described in this subparagraph are as follows:
 - (i) Lending, exchanging, transferring, investing for others, or safeguarding financial assets other than money or securities.
 - (ii) Providing any device or other instrumentality for transferring money or other financial assets.
 - (iii) Arranging, effecting, or facilitating financial transactions for the account of third parties.

Section 103(a) of the GLBA adding new Section (k)(5) to Section 4 of the BHC Act (emphasis added). The highlighted language above may provide the Board with additional latitude to determine that providing a messenger service is a permissible activity for an FHC.

Of course, any conclusions drawn about the GLBA are premature in advance of action by the

Board in promulgating final regulations or issuing orders.¹⁵ However, it is fair to say that the GLBA indicates on its face that Congress intends that the scope of activities to be engaged in by the new FHCs is broad.

Based on the foregoing, the Department recognizes that the modern trend in banking has moved in favor of expanding the ability of banks, bank holding companies, the subsidiaries of bank holding companies, and possibly financial holding companies to provide messenger services of varying kinds to virtually anybody.

In a branch application to the Department, Bank must address the competition aspects of its proposal to establish a messenger service branch.

- 7 P.S. § 103(a)(vi): *the opportunity for institutions subject to this act to serve effectively the convenience and needs of their depositors, borrowers and other customers, to participate in and promote the economic progress of Pennsylvania and the United States and to improve and expand their services and facilities for those purposes*

Bank must provide a detailed explanation of how it plans to establish and operate a messenger service branch, including the benefits the messenger service branch would have for its depositors, borrowers and other customers. In addition, Bank may elect to address how its proposal would generally benefit the economic progress of Pennsylvania and the United States.

- 7 P.S. § 103(a)(vii): *the opportunity for the management of institutions to exercise their business judgment, subject to the provisions of this act, in conducting the affairs of their institutions, to the extent compatible with, and subject to, the purposes recited in the preceding clauses of this subsection (a)*

Bank must demonstrate in an application that it has exercised its business judgment wisely in coming to the conclusion that it wishes to establish and operate a messenger service branch. Bank should prove that its board of directors has weighed the risks and benefits involved in its proposal and

¹⁵ The Board has recently published an interim rule amending Regulation Y to implement the GLBA. *See* 65 Fed. Reg. 14433. Even if the Board does not initially promulgate regulations or issue orders that deal with messenger service activities of FHCs, that does not mean that the Board could not do so in the future pursuant to the GLBA.

that its decision to seek to establish and operate a messenger service branch is a reasonable one.

- 7 P.S. § 103(a)(viii): *a delegation to the department of adequate rule-making power and administrative discretion, subject to the provisions of this act and to the purposes stated in this subsection (a), in order that the supervision and regulation of institutions subject to this act may be flexible and readily responsive to changes in economic conditions and to changes in banking and fiduciary practices*

The Department's authority to approve Bank's proposal is not in doubt. *See Allegheny Valley Bank*, 412 A.2d at 1370 n. 10. In addition, the Department is satisfied that the developments in messenger and armored car services cited above, as well as the enactment of the GLBA, all militate in favor of finding that modern banking trends have shifted toward banks providing messenger services of varying kinds to virtually anybody. Bank must address these issues in its branch application.

- 7 P.S. § 103(a)(ix): *simplification and modernization of the law governing banking and governing the exercise of fiduciary and other representative powers by corporations*

As noted above, the Department is satisfied that the modern banking trend is in favor of banks providing messenger services to virtually anybody. How Bank's proposal may relate to the simplification of the law governing banking is unclear. Bank may elect to address these issues in its branch application.

- 7 P.S. § 103(a)(x): *authorization of institutions to participate fully in interstate banking and branching and to be competitive with interstate banking organizations based in other states*

As already mentioned above in the discussion of Section 103(a)(v), the Pennsylvania General Assembly clearly intends that Pennsylvania state-chartered banks are in competition with banks chartered by the other states. A relatively new aspect of this competition is the ability of state-chartered banks to establish branches of various kinds in neighboring and other states. *See 7 P.S. §§ 102(hh), 904(b)*. Since the state banking regulator of a state bordering Pennsylvania has informally advised the Department that it would not object to its own state-chartered banks providing messenger services to the general public, and because the state banking regulators in other states may currently, or could in the future, permit the state-chartered banks under their jurisdiction to engage in providing messenger services to the extent discussed in this letter, the Department is satisfied that the issue of remaining competitive with interstate banking organizations based in other states is sufficiently relevant that Bank must address it in a branch application.

(iii) *Good Faith Excess Capacity*

The Department has previously recognized that Pennsylvania state chartered banks may use the good faith excess capacity of their property pursuant to their incidental powers found at 7 P.S. § 315(i). National banks have a similar power. *See* Interpretive Letter No. 811 of Julie L. Williams, Chief Counsel, Office of the Comptroller of the Currency (December 12, 1997). The good faith excess capacity doctrine has developed in banking law to protect banks from the economic waste that would result from the underutilization of their property. *Id.* Although the incidental powers analysis that applies to Pennsylvania state-chartered banks is different from the incidental powers analysis applied to national banks,¹⁶ the Department recognizes the wisdom of allowing Pennsylvania state-chartered banks to fully utilize their property to engage in the “banking business”, 7 P.S. § 315(i), in a manner that complies with Section 103.

In the present context, the good faith excess capacity of a Pennsylvania state-chartered bank’s messenger service branch would be that portion of a messenger service branch’s capacity which is not used to transport items that relate to transactions between the bank and its customers. A Pennsylvania state chartered bank, pursuant to its incidental powers, 7 P.S. § 315(i), may use the good faith excess capacity of its messenger service branch in order to provide messenger services for its current customers for documents of a banking, financial, accounting or similar nature which do not relate to transactions between the bank and its customers or for people who otherwise would not be customers of the bank for documents of a banking, financial, accounting or similar nature which do not relate to transactions

¹⁶ For instance, the incidental powers analysis used in the good faith excess capacity analysis for national banks states that the bank property may be used for non-banking purposes. “The excess capacity doctrine recognizes that a bank acquiring an asset in good faith to conduct its banking business should, under its incidental powers, be permitted to make full economic use of the acquired property *if use of the property for purely banking purposes* would leave the property underutilized.” OCC Interpretive Letter No. 811 at 3 (emphasis added). However, as discussed above, the incidental powers analysis used for Pennsylvania state-chartered banks does not draw such a distinction and any business lawfully engaged in by a Pennsylvania state-chartered bank pursuant to its incidental powers constitutes the banking business. *See Allegheny Valley Bank*, 412 A.2d at 1370 n. 10.

between the bank and such customers.

By “good faith excess capacity,” the Department means that a Pennsylvania state-chartered bank has reasonably acquired the excess capacity of its messenger service branch to meet the projected needs of the bank in providing messenger services to pick up from, and deliver to, specific customers, at locations such as homes or offices, items relating to transactions between the bank and those customers, including, but not limited to, deposits, withdrawals and checks. A Pennsylvania state-chartered bank may not artificially create excess capacity in its messenger service branch in order to provide messenger services for its current customers for documents of a banking, financial, accounting or similar nature which do not relate to transactions between the bank and its customers or for people who otherwise would not be customers of the bank for documents of a banking, financial, accounting or similar nature which do not relate to transactions between the bank and such customers.

Conclusion on Incidental Powers

The Department takes the position that, as a matter of legal theory, a Pennsylvania state-chartered bank may use the good faith excess capacity of its messenger service branch to provide messenger services for its current customers for documents of a banking, financial, accounting or similar nature which do not relate to transactions between the bank and its customers or for people who otherwise would not be customers of the bank for documents of a banking, financial, accounting or similar nature which do not relate to transactions between the bank and such customers pursuant to the bank’s incidental powers found at 7 P.S. § 315(i).

A Pennsylvania state-chartered bank may transport money in its messenger service branch which relates to transactions between the bank and its customers. For instance, a Pennsylvania state-chartered bank may pick up deposits from, or deliver withdrawals to, its customers by using its messenger service branch. However, the Department does not intend the phrase, “documents of a banking, financial, accounting or similar nature,” as it is used in this letter, to include within its scope receiving money for deposit or transmission. *See* 7 P.S. § 105.

- *Other Considerations*

The Department reserves the right to address any and all relevant issues in considering a branch application submitted by Bank to establish and operate a messenger service branch and is not limited to the issues identified above in the discussion of Section 103(a).

III. APPROVAL

Based on the foregoing, the Department hereby approves as a matter of legal theory that a Pennsylvania state-chartered bank, pursuant to its authority to establish and operate a branch, 7 P.S. §§ 102(h), 901 *et seq.*, may establish and operate a messenger service branch to pick up from, and deliver to, specific customers, at locations such as homes or offices, items relating to transactions between the

bank and those customers, including, but not limited to, deposits, withdrawals and checks. The Department also hereby approves as a matter of legal theory that a Pennsylvania state-chartered bank, pursuant to its incidental powers, 7 P.S. § 315(i), may use the good faith excess capacity of its messenger service branch to pick up from, and deliver to, current customers of the bank, documents of a banking, financial, accounting or similar nature which do not relate to transactions between the bank and those customers or to pick up from, and deliver to, customers who would not otherwise be customers of the bank, documents of a banking, financial, accounting or similar nature, which do not relate to transactions between the bank and such customers.

The kinds of items which a specific Pennsylvania state-chartered bank may transport with its messenger service branch will be determined during the branch application process depending on the ability of the applicant bank to prove to the Department that the bank has the ability to transport the items in question consistent with Section 103(a) and other relevant considerations.

IV. BRANCH APPLICATION

Unlike a mobile branch, a messenger service branch would not be required to operate on a regular, public schedule. In addition to the considerations outlined above or raised in a standard branch application, the Department would also initially require the following kinds of matters to be resolved to its reasonable satisfaction prior to granting approval of a messenger service branch application:

- i) security of the vehicle at all times (i.e. when in storage, when being loaded and unloaded, and when serving all of its customers);
- ii) insurance in case of robbery or accident;
- iii) applicable and appropriate bonds;
- iv) approval of other Commonwealth agencies that may regulate some aspect of the operations of a messenger service branch (e.g. as a common carrier);
- v) approval of any federal agency that may be necessary, such as the Federal Deposit Insurance Corporation; and
- vi) such other concerns as the Department may discover or determine based on the contents of the pending application or other sources of information.

I have enclosed with this letter a detailed list of requirements that a Pennsylvania state-chartered bank must meet when it submits a messenger service branch application to the Department. As mentioned

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above, the Department reserves the right to inquire into any matter which it deems relevant to a messenger service branch application.

The Department's analysis is based upon the facts as stated in this letter. Any change in the facts could result in an amendment or reversal of the Department's position. This letter states the Department's position regarding the issues discussed herein and may not be relied upon or construed as constituting legal advice.

In addition to the Department's precedent letter concerning mobile branches, I have also enclosed a branch application for you to forward to Bank. Please do not hesitate to contact me if you have any comments or questions.

Sincerely,

David H. Bleicken
Deputy Chief Counsel

Enclosures

cc: James B. Kauffman, Jr.
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