

January 19, 2001

Dear

This letter responds to your letter request, which was submitted on behalf of *****, a Pennsylvania state-chartered bank (the ABank@), for an interpretive letter from the Pennsylvania Department of Banking (the ADepartment@) concluding that the Bank may provide general, individualized financial advice and financial planning services to its commercial and retail customers.

Please be advised that it is the position of the Department that the Bank may provide general, individualized financial advice and financial planning services, including assisting Bank customers in selecting and working with investment advisers and other securities professionals, provided that the Bank does not act as an investment adviser for a fee, unless the Bank registers under the Investment Advisor Act of 1940, and subject to the conditions, limitations and requirements set forth in this letter.

Background:

In summary, the Bank proposes to make the services of unaffiliated investment advisers that are registered with the Securities and Exchange Commission (ASEC@) under the Investment Advisers Act of 1940 (Aregistered investment advisers@) available to commercial and retail customers of the Bank (Acustomers@). As stated in your letter, the Bank would enter into a written agreement with a customer pursuant to which the Bank would provide general, individualized financial advice and financial planning services to the customer and, in addition, refer the customer to an investment adviser.¹

You represented that if the Bank finds an investment adviser or other appropriate securities professional, the Bank will earn a fee from the customer or the adviser as permitted by law and would

¹ Examples of activities proposed to be performed by the Bank include: assisting the customer in evaluating the customer's financial condition, assets, income and expenses; helping the customer prepare preliminary financial plans; identifying those types of financial service products that might be suitable for the customer's identified financial goals; finding, at the direction of the customer, one or more appropriate investment advisers or other sources of investment or securities advice or services when such services or products are not available from the Bank; assisting the customer in selecting an investment adviser; assisting the customer in the customer's selection of asset allocation models and investment options made available by an investment adviser or other securities professional; coordinating and facilitating communications between the customer and any investment adviser or other securities professionals; and assisting the customer in using any investment advice in the context of the customer's overall financial planning.

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make all appropriate disclosures, including, but not limited to, any required under the Interagency Statement on the Retail Sales of Non-Depository Products (February 15, 1994) 7 *Fed. Banking L. Rep.* (CCH) & 70-101, the privacy regulations adopted under the Gramm-Leach-Bliley Act of 1999, or other applicable law and regulations.

Furthermore, you represented on behalf of the Bank that:

1. The Bank would obtain assurances from any investment advisers or securities professionals that they would comply with all applicable customer privacy laws and regulations.
2. Under the proposed arrangement, the investment adviser or securities professional found by the Bank will contract directly with the Bank's customer.
3. The Bank will not act in a fiduciary capacity, nor would the Bank become responsible to the customer for the giving of investment advice or for any advice given by the investment adviser.
4. The Bank would not, under any circumstances, take responsibility for custody of any customer's investment securities, and under no circumstances would the Bank assume investment discretion nor would the Bank have any authority to direct or select investments.
5. Any purchases or sales of non-Bank investment products would be conducted directly by the customer or the investment adviser or other securities professional and not by the Bank.
6. The Bank's agreement with its customer would confirm that the Bank is not responsible for giving investment advice or for the advice provided by third parties and that the Bank is not responsible for managing any investments or purchasing or selling non-bank products. The Bank will not act as an investment adviser and will not engage in trust activities.

Legal Analysis:

In considering the Bank's proposal, the Department considered whether such activities can be conducted by the Bank as incidental powers under section 315(i) of Pennsylvania's Banking Code, 7 P.S. ' 315(i).

The Department notes that, subsequent to your letter, the Pennsylvania General Assembly enacted Act 89 of 2000, which significantly amended certain provisions of the Banking Code to provide Pennsylvania state-chartered banks parity with national banks, federal thrifts and state-chartered institutions in other states as authorized by the Federal Deposit Insurance Corporation, subject to a limited written notice requirement. *See* Section 4 of Act 89 of 2000 (to be codified at 7

P.S. ' 201(c)).

As a result of the recent amendments to section 201(c) of the Banking Code, the Bank also may rely on federal banking laws, regulations, and interpretations issued by the federal banking regulators for authority to conduct the proposed activity.

Federal Banking Law Interpretations:

In an interpretive letter dated January 27, 1999, the Office of the Comptroller (AOCC@) held that a national bank without fiduciary powers could enter into arrangements with registered investment advisers and participate in referral arrangements whereby the national bank would receive finder's fees for providing referrals to such investment advisers. *See* OCC Interpretive Letter No. 850 (January 27, 1999).

The referral arrangement proposal addressed in the OCC letter is similar to the Bank's proposal submitted to the Department. In the opinion issued by the OCC, the national bank is not authorized to act as an investment adviser or retain investment discretion over customer assets. National banks entering into the referral arrangement would not act in a fiduciary capacity and, accordingly, would not generally be required to have fiduciary powers. Referring national banks would not negotiate with customers, act as co-advisers, enter into partnerships or joint ventures with the registered investment advisers or otherwise have any control over the registered investment advisers or the services the investment advisers provide. *See Id.*

The OCC held that a national bank that engages in a referral arrangement with a registered investment adviser may maintain more active involvement in supporting and monitoring their customers' investment advisory arrangements with the registered investment advisers. Accordingly, a national bank may refer customers to the registered investment adviser and provide ongoing customer-related administrative, record keeping, and other non-advisory services on behalf of the registered investment adviser for those bank customers who enter into investment management arrangements with the investment adviser. National banks can receive additional fees based upon the nature and the extent of the national bank's services. *See Id.*

The OCC has determined that national banks are permitted to engage in financial planning activities under 12 U.S.C. ' 24(Seventh) as an incidental power. *See* Unpublished OCC Interpretive Letter (October 15, 1987).² Furthermore, the finder function has been recognized by the OCC as a

²Citing OCC Interpretive Letter No. 85-51 (July 30, 1985), *Fed. Banking L. Rep.* (CCH) p. 86,482; OCC Interpretive Letter No. 367 (August 19, 1986), *Fed. Banking L. Rep.* (CCH) p. 85,537; and Letter of July 17, 1986, to a national bank signed by Judith A. Walter, Senior Deputy Comptroller for National Operations, LASD Precedent File A12 U.S.C. ' 24(Seventh).

permissible banking activity that includes, without limitation, identifying potential parties, making inquiries as to interest, introducing or arranging meetings of interested parties, and otherwise bringing parties together for a transaction that the parties themselves negotiate and consummate. 12 C.F.R. § 7.1002(b). See OCC Interpretive Letter No. 850 (January 27, 1999). The OCC held that the payment of a reasonable finder's or referral fee in connection with the marketing of trust services is appropriate provided the fee is disclosed to bank customers. *Id.*

Federal Banking Regulations:

According to the regulations promulgated by the OCC at 12 C.F.R. § 9.101, the term "fiduciary capacity" is defined to include "investment adviser," if the bank receives a fee for its investment advice. See 12 C.F.R. § 9.101(a). In other words, if the bank is providing investment advice for a fee, then it is acting in a fiduciary capacity. See *Id.* However, the regulations promulgated by the OCC at subsection 9.101(b) provide that the following activities generally do not entail providing investment advice for a fee:

- (i) Financial advisory and counseling activities, including strategic planning of a financial nature...and providing market economic information to customers in general;
- (ii) Client-directed investment activities (*i.e.*, the bank has no investment discretion) where the investment advice and research may be made available to the client, but the fee does not depend on the provision of investment advice;
- * * *
- (ix) Investment advisory activities authorized by the OCC under 12 U.S.C. 24 (Seventh) as incidental to the business of banking.

12 C.F.R. § 9.101(b)(2)(i)(ii) and (ix). Accordingly, it appears that a national bank may engage in financial advisory activities and conduct client-directed investment advisory activities that have been deemed to be an incidental power by the OCC under 12 U.S.C. § 24(Seventh) even though the national bank has not obtained fiduciary powers under section 92(a) of the National Bank Act.

Conclusion:

It is the position of the Department that the Bank may engage in activities that do not constitute providing investment advice for a fee, including assisting Bank customers in selecting and working with investment advisers and other securities professionals, as an incidental power pursuant to section 315(i) of the Pennsylvania Banking Code, 7 P.S. § 315(i), subject to the representations, conditions and requirements as set forth in this letter. In addition, the Bank may engage in a referral arrangement with a

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registered investment adviser as set forth in the OCC interpretive letter number 850, pursuant to sections 201(c) and 315(i) of the Banking Code, 7 P.S. ' 201(c)(i) and 315(i). Please be advised that the Bank is subject to any conditions, requirements or limitations imposed upon national banks that engage in a referral arrangement with registered investment advisers proposed by the Bank consistent with section 201(c)(i). In particular, the Bank may not act as an investment adviser for a fee without having fiduciary powers, unless the Bank registers under the Investment Advisor Act of 1940 and complies with other applicable federal and state laws.

The Bank is urged to exercise careful business and legal judgment in determining whether the activities it proposed to conduct constitute acting as an investment adviser for a fee. In particular, the Bank should review any specific activities that the Bank proposes to provide to Bank customers with Bank counsel to determine if such activities constitute providing investment advice for a fee. In addition, to the extent the Bank determines to monitor investments for Bank customers, the Department strongly recommends that the Bank independently assess the accuracy of the information provided by the registered investment adviser to the Bank and determine whether such information is supported by documentation. The Bank should disclose on any statements that it may issue to Bank customers pertaining to investments made through such investment advisers the extent to which the Bank assesses the accuracy of the individualized information provided by a registered investment adviser to the Bank customer. Additionally, the Bank should fully assess both the Bank's reputation and litigation risk with respect to all referrals made to any registered investment adviser involved in the proposed activity.

Please also be advised that the Department will consider your letter dated October 31, 2000 to be the notice required under section 201(e) of the Banking Code, 7 P.S. ' 201(e), for purposes of conducting the specific activities proposed by the Bank in the October 31, 2000 letter since the Department received your request prior to the enactment of the amendments to the Banking Code. If the Bank proposes to expand or revise the activities set forth in the October 21, 2000 letter, the Bank must file a new notice with the Department under section 201(c). As indicated above, the Bank should review each specific proposed activity with Bank counsel to determine whether such activity constitutes providing investment advice for a fee.

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 has been authorized by the appropriate Department personnel and constitutes a duly authorized statement of the Department's position regarding the issues discussed herein. This letter may not be relied upon or construed as constituting legal advice.

Please feel free to contact me if you have any additional questions.

Very truly yours,

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Laurie S. Kennedy
Deputy Chief Counsel