



# *The Commonwealth of Massachusetts*

*Office of the Commissioner of Banks*

*One South Station*

*Boston, Massachusetts 02110*

MITT ROMNEY  
GOVERNOR

KERRY HEALEY  
LIEUTENANT GOVERNOR

STEVEN L. ANTONAKES  
COMMISSIONER OF BANKS

BETH LINDSTROM  
DIRECTOR  
OFFICE OF CONSUMER AFFAIRS AND  
BUSINESS REGULATION

August 24, 2005

Daniel R. Judson, Esq.  
Partner  
Morrison Mahoney LLP  
250 Summer Street  
Boston, MA 02210-1181

Dear Mr. Judson:

This letter is in response to your correspondence of June 30, 2005 to the Division of Banks (the "Division") on behalf of your client The Bank of New York ("BNY") relative to BNY's intention to offer certain courier services to commercial customers in the Commonwealth and whether such services would be considered by the Division to be permissible non-branching activities. This matter was also discussed in a meeting with you and certain members of the Division's staff on June 24, 2005.

According to your letter, BNY, a New York state chartered bank, does not own or operate any branch offices in the Commonwealth. BNY is interested in offering certain courier services to its commercial customers in the Commonwealth using an unaffiliated armored car service. The customers are existing customers of BNY that maintain deposit accounts in New York and have significant cash needs, such as large retailers.

The courier service would contract with the customer to pick up cash and checks at the customer's place of business in the Commonwealth and transport them to the courier's own service facility. The courier service would act as agent for the customer in transporting the cash and checks. The customer bears the entire risk of loss while the cash and checks are in transit from the customer's place of business to the service facility. In some instances, the courier service that transports the cash and checks from the customer's place of business is not the same courier service that operates the service facility.

Your letter further states that the courier service has no affiliation with BNY, does not provide services exclusively to BNY, and does not operate under or advertise using the name of BNY. When the courier service delivers items to its service facility, the courier service notifies BNY of the gross amount of cash and checks that the customer indicates is contained in the shipment. At the service facility, the courier service, pursuant to an agreement with BNY, counts and packages the cash and screens for counterfeit bills. The courier service scans the checks into electronic format at the service facility and delivers the check information to BNY electronically. In the case of cash, the deposit is considered

Daniel R. Judson, Esq.

Page 2

August 24, 2005

received by BNY when it is received at the service facility and the courier service informs BNY of the gross count of the cash items. At that time, the risk of loss passes to BNY, subject to indemnification by the courier service. In the case of checks, when the image file is sent from the service facility and received electronically by BNY at its offices, BNY processes the checks for collection and the funds are made available to the customer in accordance with applicable funds availability schedules.

After processing, the courier service delivers the cash to the local Federal Reserve Bank for deposit to BNY's account or at a branch of limited branch of BNY outside of Massachusetts. In some cases, cash is held temporarily at the service facility until it can be processed in the manner required by the local Federal Reserve Bank. Upon receipt of the processed cash, the local Federal Reserve Bank will credit BNY's account for the amount of cash received. The courier service indemnifies BNY for any loss of the cash while the cash is in transit.

Massachusetts General Laws chapter 167, §39C provides that an out-of-state bank, such as BNY, requires approval of the Division, in addition to satisfying other criteria, in order to establish and maintain a branch de novo in the Commonwealth. The question presented by your request is whether the proposed third party courier service to be utilized in the Commonwealth by BNY constitutes a branching activity so as to trigger the approval requirement under Massachusetts law. In reviewing this proposal, the Division also reviewed materials related to BNY's authority under New York law to provide the described services to its customers in the Commonwealth.

According to your correspondence, BNY's primary regulator, the New York Banking Department, issued an opinion letter on June 22, 2005 relative to the permissibility under New York law for BNY to engage in these proposed activities in Massachusetts, specifically, whether such activities would trigger a requirement to file an application in New York for approval of a branch (or limited branch). The New York Banking Department concluded in its June 22, 2005 letter that a branch or limited branch under New York law would not be required under the circumstances as described relative to the cash and check pick-up services. The June 22, 2005 letter also concluded that a branch was not required for the delivery of cash by the courier service to BNY's customers.

In reviewing the nature of branching activities proposed by an out-of-state bank such as BNY, the Division would initially review such activities as they would be construed for a bank chartered by the Commonwealth.

The Division's regulation at 209 CMR 47.07(3)(a)2.b., governing parity with federal and other state-chartered banks, permits a Massachusetts chartered bank to establish and/or provide access to messenger services for its customers. The regulation provides that a bank may establish and use a messenger service to transport items relevant to the bank's transactions with its customers without regard to branching limitations found in state and federal law, provided such service does not receive deposits, pay checks, or lend money. Additionally, a bank and its customers may use a messenger service to pick up from, and deliver to, customers items, including deposits, check payments, and loan money, without regard to any branching limitations in state and federal law, provided such service is established and operated by an independent third party. The Division has previously opined with respect to a Massachusetts chartered bank's proposed use of an independent third party messenger service indicating its agreement with the federal regulation at 12 CFR 7.1012 and application of the federal regulation

criteria used to determine whether a messenger service is established by a third party.<sup>1</sup>

The federal regulation, 12 CFR 7.1012 provides that a messenger service is clearly established by a third party if:

- (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) (a) The messenger service retains the discretion to determine in its own business judgment which customers and geographic areas it will serve; or (b) if the messenger service and the bank are under common ownership or control, the messenger service actually provides its services to the general public, including other depository institutions, and retains the discretion to determine in its own business judgment which customers and geographic areas it will serve;
- (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, although the bank may advertise that its customers may use one or more third party messenger services to transact business with the bank;
- (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.

In addition, the Division stated in Opinion 97-134 that the Division will consider other factors including whether the bank deems items intended for deposit not to be deposited until credited to the customer's account at an established bank office or other permissible nonbranch facility, or whether the bank deems items representing withdrawals to be paid when the items are given to the messenger service.

The Division also reviewed certain interpretive letters issued by the Office of the Comptroller of the Currency (the "OCC") with respect to independent messenger services, in particular, Interpretive Letter No. 639, dated January 14, 1994. This opinion determined that a national bank could contract with an independent third party courier service to pick up cash or checks from a customer and deliver them to an unaffiliated service bureau without such activity being considered a branch under federal law. The items were treated as deposited and were credited to a customer's account when they were received by the service bureau. The provisions of Interpretive Letter No. 639 were subsequently codified in the above referenced regulation of the OCC, 12 CFR 7.1012.

Upon review of the material presented in your correspondence and materials cited herein, it is the Division's opinion that the performance of the messenger service activities as described would not constitute a branching activity so as to trigger the requirement for a Massachusetts-chartered bank to file an application for approval to establish and maintain a branch. Accordingly, the Division would apply the

---

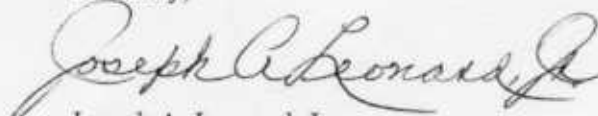
<sup>1</sup> See Division Opinion 97-134 dated September 9, 1997.

Daniel R. Judson, Esq.  
Page 4  
August 24, 2005

same interpretation when these activities are proposed to be performed in the Commonwealth by an out-of-state bank such as BNY and concludes that such activities may be performed as permissible non-branching activities without necessitating an approval for a branch de novo pursuant to Massachusetts General Laws, chapter 167, §39C.

The conclusions reached in this letter are based solely on the facts presented. Fact patterns which vary from that presented may result in a different position statement by the Division.

Sincerely,

A handwritten signature in cursive script, reading "Joseph A. Leonard, Jr.", written in dark ink.

Joseph A. Leonard, Jr.  
Deputy Commissioner of Banks  
and General Counsel