

**INTERPRETIVE LETTER 93-4 (FEBRUARY 24, 1993)**

**State bank's appointment of out-of-state banks as agents to issue and pay certificates of deposit does not constitute establishment of branches.**

We are in receipt of your letter dated \* in which you requested an opinion from the Office of the Commissioner of Banks and Trust Companies ("Commissioner") concerning the proposed appointments by \* (the "Bank") of agents located in New York and Michigan to issue and pay Certificates of Deposits.

You have informed us that the Bank proposes to enter into agreements with \* Bank and \* Trust Company whereby \* would appoint \* Bank and \* Trust Company as its agents to perform ministerial functions in connection with the preparation, authentication, delivery and settlement of \*'s negotiable certificates of deposit in denominations of not less than \$100,000 ("CD's"). \* Bank is an affiliated party of \*, and \* Trust Company is an independent third party that serves as CD agent for \* Bank, which does not maintain an office in New York. By appointing \* Bank and \* Trust Company as its agents, \* could make same day, physical delivery of CD's to its customers in Michigan and New York. This arrangement would allow \* to effectively compete in the national CD market for customers who participate in this market and who generally insist on same day delivery.

As proposed in your letter, \* would negotiate the terms of the CD's by telephone and would make all discretionary decisions at its offices in Illinois. \* would then instruct its agents to physically issue the CD's, and its agents would credit all funds received as payment to the account of \* or would wire transfer the proceeds to \*. \* Bank would then either prepare blank forms in its possession and authenticate and physically deliver the CD's to \*'s Michigan customers or, if directed, it would issue the CD's in "book entry" form. \* Trust Company, pursuant to instructions received via an existing network between it and \* Bank, would perform the same functions and physically deliver the CD's to \*'s New York customers. Upon the maturity of a CD, the appropriate agent would make cash payments using funds provided by \* or held for its account. \* would not maintain any offices, officers, employees or other physical presence in Michigan or New York.

The Commissioner has no objection to the proposed appointments by \* of \* Bank and \* Trust Company as its agents, provided that the functions of the agents are limited to those set forth above. The Commissioner is of the opinion that Illinois' branching restrictions contained in Section 5(15) of the Illinois Banking Act, 205 ILCS 5/5(15)(1992), are not applicable to the proposed arrangement.

Illinois law contemplates that certain functions germane to the business of banking will be performed not by a bank, but rather by unaffiliated entities at locations which are not subject to the branching restrictions imposed on that bank. For example, state-chartered banks are authorized to appoint agents, to define their duties, and to fix their

compensation pursuant to Section 5(4) of the Illinois Banking Act. 205 ILCS 5/5(4)(1992). State banks also have the authority to contract to have "bank services" performed on their behalf or on behalf of their subsidiaries or affiliates, provided they notify the Commissioner of the existence of such service relationships pursuant to Section 48 of the Illinois Banking Act. 205 ILCS 5/48(2.5)(1992). As used in Section 48, bank services include services that are clerical in nature. Therefore, \* has the authority to appoint \* Bank and \* Trust Company as its agents to perform clerical, ministerial functions, without rendering these agents as branches of \*.

In Illinois, a "branch" is defined as "any place of business at which deposits are received, checks paid, or loans made..." 205 ILCS 5/2 (1993). Illinois law does not authorize state banks to establish or maintain branches in other states. See 205 ILCS 5/5(15) (1993). However, the Commissioner, various courts and the Office of the Comptroller of the Currency ("OCC") have determined that not all facilities which act as conduits between a bank and its customers in facilitating deposit account transactions are considered to be branches. See, e.g., Commissioner's Interpretive Letter (September 13, 1991) (armored car company that is not established by bank and contracts with bank and customer is not a branch); Independent Bankers Association of New York State v. Marine Midland Bank, N.A., 757 F.2d 453 (2d Cir. 1985), cert. denied, 476 U.S. 1186 (1986)(hereinafter cited as "Wegmans") (ATM not owned or established by bank is not a branch); OCC Interpretive Letter No. 610 (October 8, 1992) available in The Banking Library, OCC Database (December, 1992)(affiliated national banks in Illinois may provide accommodation services to customers without being considered branches of the customers' bank).

In the Wegmans case, supra, the Second Circuit Court of Appeals determined that a shared ATM operated by and located in a grocery store was not a branch. The court found that although an ATM is a place where deposits are received and checks are paid, it is not a branch unless it is owned or leased by the bank. Without this requirement, the definition of the term branch would "be broad enough to include almost any means of communicating instructions to a bank..." Wegmans, 757 F.2d at 462. We find that the reasoning in Wegmans applies with equal force to the instant case. \* does not own or control \* Bank or \* Trust Company or have a proprietary interest in either of these entities. Both are independent entities that control their own customer access and operations. The customers do not view these entities as belonging to \*. Like a shared ATM, their functions as agents are to facilitate communications between \* and its customers. But for the peculiarities of the national CD market, which often require same day delivery of paper certificates, customers could complete their transactions by telephone without the use of an agent, with the physical delivery of the CD's subsequently made through the mail. Therefore, since \* Bank and \* Trust Company have not been established by \*, their appointment by \* to perform the limited functions set forth above does not constitute the establishment of branches.

The Commissioner's position with respect to the proposed arrangement among \*, \* Bank and \* Trust Company is consistent with the position of the OCC in two analogous situations. In 1979, the OCC reviewed an arrangement in which a national bank's customers were permitted to make deposits to their accounts by delivering checks to an

out-of-state savings and loan association. OCC Interpretive Letter No. 127, [1979-82 Transfer Binder] Fed. Banking L. Rep. (CCH) par. 85,208 (Oct. 18, 1979). Although the OCC refused to definitively approve or disapprove the arrangement, it did not require the bank to cease the activity. Id. The OCC reasoned that the savings and loan association was not established or maintained by the national bank, and therefore a conclusion that it is a branch of the national bank was not mandated. More recently, the OCC reviewed an arrangement in which bank customers were granted loans in the amount of anticipated tax refunds and obtained the proceeds at the premises of an affiliated finance company. OCC Interpretive Letter No. 582, 6 Fed. Banking L. Rep. (CCH) par. 83,403 (April 24, 1992). Although the OCC did not reach a definitive resolution as to whether the arrangement constituted branch banking, it did determine that "substantial reasons exist to conclude that federal branching law is not implicated...." Id. Accordingly, the OCC did not require the bank to discontinue that arrangement.

Moreover, the OCC has recognized the ability of financial institutions to enter into accommodation or correspondent banking relationships as a necessary component of an efficient banking system and one which is well recognized within the banking industry. E.g., OCC Interpretive Letter No. 610, supra; OCC Interpretive Letter No. 582, supra. These relationships are commonplace among both affiliated and unaffiliated institutions. OCC Interpretive Letter No. 582. Often these relationships have "branch-like qualities." Id. The proposed arrangement among \*, \* Bank, and \* Trust Company may well be characterized as such relationships.

In reaching the conclusion set forth in this letter, we take note that the Commissioner for the Financial Institutions Bureau for the State of Michigan has issued a no-objection letter to \* Bank in connection with its appointment of \* Trust Company as its CD agent. Letter from Gary K. Mielock, Deputy Commissioner, Michigan Department of Commerce (June 12, 1987). The Michigan Commissioner also determined that the appointment did not result in impermissible branching. In addition, the New York Banking Department has determined that the proposed appointment of \* Trust Company as a CD agent does not conflict with New York law. New York banks are authorized to act as agents to issue the CD's by Section 131 of the New York Banking Law. New York Banking Law Sec. 131 (McKinney 1990).

In conclusion, the Commissioner is of the opinion that the appointment by \* of \* Bank and \* Trust Company as its agents to issue and pay CD's in Michigan and New York does not constitute the establishment of branches. This position is predicated on the facts as presented to us and set forth above. The Commissioner reserves the right to withdraw this position if the manner of conducting the CD transactions is materially different from the manner stated in your letter.