

INTERPRETIVE LETTER 94-025 (DECEMBER 1, 1994)

State bank may establish a deposit courier service provided it complies with the requirements for a branch, or customers may use an independent third party to provide the service.

By your letter dated *, you have asked the Commissioner of Banks and Trust Companies ("Commissioner") for its opinion concerning a number of proposed "deposit courier" activities by * ("Bank"). Based on your inquiry, the Commissioner's response is limited to issues relating to the establishment and operation of a messenger service to transport items for deposit. For the reasons set forth below, the Commissioner would permit the Bank to offer a courier service to its customers that is established and maintained by a third party and that delivers the customer deposits to a back-room office located in Illinois. The Bank may also use Bank employees for this service, if it files the appropriate branch applications and notices and receives the appropriate approvals.

You have asked us the following five questions in connection with the proposed "deposit courier" services:

1. Whether an employee of the Bank may retrieve deposits from a customer;
2. Whether an independent contractor may retrieve deposits from a customer;
3. Whether retrieved deposits may be delivered to the Bank's Operations Center located in Illinois for processing in lieu of a branch facility;
4. Whether the Bank may charge a fee for the courier service, especially if the Bank employees are used rather than independent contractors;
5. Whether the deposit is deemed delivered upon receipt by the courier or may the Bank and customer settle that question and apportion the risk by contract.

The issue of whether banks are authorized to provide messenger services for their customers has generated a number of precedents. The Commissioner has issued three interpretive letters on the subject: Interpretive Letter 85-1 (January 16, 1985) (State bank may arrange independent messenger service for customers, but may not set routes or process billings which include charges imposed by the bank for arranging the service); Interpretive Letter 88-5 (September 30, 1988) (State bank may not operate messenger service for bank's customers that utilizes bank's employees); and Interpretive Letter 91-23 (September 13, 1991) (National bank contract with armored car service to count cash, currency and food stamps at armored car company's processing center for bank customers is not a violation of state branching restrictions if deposits are credited when received by bank). The Commissioner has also issued two additional interpretive letters on related issues: 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) and Interpretive Letter 93-032 (December 22, 1993)(Illinois Banking Act does not prohibit establishment of mobile branches, but applicable branch applications and notices may be required for each change in location; mobile ATMs are permitted). The Office of the Comptroller of the Currency ("OCC") also has issued an interpretive ruling ("OCC Ruling") that it revised in 1993 to address the use of messenger services by national banks. 12 C.F.R. ' 7.7490.

The Commissioner and the OCC have consistently found that if a bank establishes the courier service, and the service performs a core banking function, then the bank must comply with the applicable branching requirements. For example, in Interpretive Letter 88-5 supra, the Commissioner determined that a bank could not use its own employees as couriers to pick up deposits from customers, even though the employees would not be compensated separately and the deposits would not be credited to the customers' accounts until received at the bank's premises. If bank employees are used, then the service is established by the bank. See also Interpretive Letter 93-4, supra. Under Section 2 of the Illinois Banking Act, 205 ILCS 5/2 (1992), a branch is defined as " any place of business of a bank at which deposits are received, checks paid, or loans made, but shall not include any place at which only records thereof are made, posted or kept...." If the messenger service is established by the bank and is performing any of the above functions, it is a branch. Although Illinois neither restricts the number of intrastate branches that a bank may establish, nor prohibits banks from establishing mobile branches, pursuant to Interpretive Letter 93-032 supra, the bank may be required to submit an application and notice each time the service moves to a new location. Such a requirement would limit the use of a messenger service established by the bank for the purpose of picking up customer deposits. If a third party establishes the messenger service and deposits are not posted to the customers' accounts until the deposits are delivered to the bank, the messenger service is not a branch, even if the messenger service sorts deposits at its own offices. Interpretive Letter 91-23, supra.

The OCC has taken a similar position in its interpretive ruling. The OCC Ruling provides that "[A] national bank and its customers may use a messenger service to pick up from, and deliver to, customers items which relate to branching functions...provided the messenger service is established and operated by a third party." 12 C.F.R. ' 7.7490. The OCC has adopted a safe harbor for determining if the service is established by a third party. A messenger service is established by a third party if it a) is owned by a party other than the bank, b) makes its services available to the general public, c) determines which customers and areas it will serve, d) is responsible for scheduling, movement and routing, e) does not operate under the name of the bank, f) does not advertise that the bank is providing the service, although the bank may advertise that its customers may use the messenger service, g) assumes responsibility for the items during transit and maintains adequate insurance coverage for the potential risks involved, and h) enters into contracts with the customers which provides that the messenger service is acting as agent for the customer and that items are deposited when delivered to the bank and paid to the customers when delivered to the messenger service. The OCC permits a national bank to defray all or a part of the costs to the customer for using the third party messenger, but

the payment of expenses may cover only the costs associated with each transaction. Finally, the OCC permits a national bank to establish and operate a messenger service to transport items that involve branching functions if the bank receives approval to establish the proposed branch in accordance with the OCC's procedures.

Applying the precedents discussed above, we reach the following conclusions to your inquiry:

1. An employee of the Bank may retrieve deposits from customers. If an employee does so, the Bank will be deemed to be establishing and operating a messenger service. Since deposits are involved, the service will be treated as a branch. Therefore, the Bank must comply with applicable safety and security standards, and the appropriate applications and notices will have to be filed and approvals obtained.
2. An independent contractor may retrieve deposits from a customer. We have assumed that the use of the term "independent contractor" indicates an independent party that is not subject to the control or direction of the Bank. If the arrangement with the independent contractor is within the safe harbor established by the OCC Ruling, the Commissioner would not deem the service to involve branching. If the arrangement does not satisfy the safe harbor, the Commissioner will have to make a determination on the specific facts and circumstance as to whether a messenger service is independent or is operating as a branch.
3. The retrieved deposits may be delivered to the Bank's Operation Center for processing, which is located in Illinois, in lieu of a branch facility. For purposes of this letter, we have assumed that the Bank established and operates the Operation Center. Although the term "branch" does not include a place where records of deposits are made, posted, or kept, if the independent contractor delivers the retrieved deposits to the Operation Center that is owned and operated by the Bank, then that is where deposits are received. Under Section 2 of the Illinois Banking Act, the Operation Center would be deemed a branch and subject to the application and notice requirements for a branch. If, however, the Bank can establish to the Commissioner's satisfaction that the deposits are not received until they are physically transferred to the Bank or another branch facility, then the Operation Center will not be deemed a branch.
4. The Bank may defray all or a part of the costs incurred in transporting the items if an independent contractor is used, provided that only costs associated with each transaction are covered by the Bank. Although the Commissioner found, in Interpretive Letter 85-1 supra, that the bank could not process billings which included charges imposed by the bank for arranging the service, we are hereby adopting the position stated in the OCC Ruling. In the event the Bank uses employees to provide the service, it may charge a reasonable fee for the service, just as it does for any other service that it performs.
5. If the Bank uses an independent contractor to provide the messenger service in accordance with the safe harbor outlined in the OCC Ruling, the deposit will not be deemed received until it is transferred to the Bank. If the Bank provides the courier

services by using its own employees, the deposit will be received when it is given to the courier. If the Bank uses its own employees, they are in effect acting as a branch facility. In either case, the risk may not be apportioned between the Bank and the customer by contract.