



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

November 30, 1998

**Corporate Decision #98-51
December 1998**

Grace Blunt, Esq.
Senior Vice President
Community National Bank
17 Pope Street
Hudson, Massachusetts

Re: Application by Community National Bank, Hudson, Massachusetts,
to establish an operating subsidiary to provide employee benefit and
compensation advice, and some incidental human resources
consulting and career counseling, to small business customers
Application Control No. 98-NE-08-0031

Dear Ms. Blunt:

This responds to the application filed by Community National Bank, Hudson, Massachusetts (“Bank”), to establish a wholly-owned operating subsidiary (“Subsidiary”) to provide employee benefit and compensation advisory services to small business customers in the local banking market. In addition, as a utilization of its excess advisory services capacity, the Subsidiary proposes to offer a small amount of ancillary human resources consulting and career counseling. The small business customers that the Bank expects to serve generally have fewer than 50 employees, and a number of them recently have solicited assistance in these areas. Based upon the information provided and the reasons discussed below, the Bank’s application is approved.

I. Proposal

The Bank has several employees who currently design and implement the Bank’s employee benefit and compensation program and engage in human resources consulting and career counseling functions for the Bank. You indicated that the Bank has banking relationships with small companies in its market area and has acquired a keen understanding of their business needs and the challenges facing them. One challenge is to deal with complicated employee benefit and compensation issues when the firm has no financial capacity to hire a full-time staff devoted to solving them.

The Subsidiary’s proposed employee benefit consulting services would include designing and implementing benefit plans and providing administrative and employee communication support services for the plans. Specifically, the administrative services would involve record-keeping

systems, relevant policies and procedures manuals, wage and salary programs, and job descriptions and performance reviews. The communication services would enable employees to understand and take advantage of their employer's benefits plans, policies, and procedures.

The Subsidiary would, on an as-needed basis, also provide human resources consulting and career counseling services as part of the package of services provided under the employee benefit and compensation plans. These services would include assessing clients' training and development needs, auditing management policies and procedures, and developing internal training programs to inform employees about the types of benefits that are available to them.¹ This aspect of the proposal would not comprise more than 10 percent of the total package of services being offered to customers.

Initially, several Bank employees will work on a part-time basis for the Subsidiary. As the market develops for its services, these employees will become full-time employees of the Subsidiary.

II. Discussion

A. Employee Benefit and Compensation Advisory Services for Small Business Customers are Part of the Business of Banking

The National Bank Act provides that national banks shall have the power:

[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes²

The Supreme Court has held that this clause is a broad grant of power to engage in the business of banking, including the five specifically recited powers, and the business of banking as a whole.³ Many activities that are not included in the enumerated powers are also part of the business of

¹ The Bank included employee benefit review and assessment, Family Leave Law Program Administration, State and Federal law compliance review as they relate to employee benefits, and design and implementation of employee relations and communication programs as part of the human resources proposal. The proposal also included insurance coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). COBRA coverage assures the temporary continuation of health benefits for a period of 18 months at full cost to a former employer. These services overlap with the services described in the employee benefit and compensation plan proposal and will not be considered independently.

² 12 U.S.C. § 24(Seventh).

³ See *NationsBank of North Carolina, N.A. v. Variable Life Annuity Co.*, 513 U.S. 251(1995), 115 S. Ct. 810 (1995) ("VALIC").

banking. Judicial precedent reflects three general principles used to determine whether an activity is within the scope of the “business of banking”: (1) is the activity functionally equivalent to or a logical outgrowth of a recognized banking activity; (2) would the activity respond to customer needs or otherwise benefit the bank or its customers; and (3) does the activity involve risks similar in nature to those already assumed by banks.⁴ Finally, national bank may engage in activities that are part of, or incidental to, the business of banking by means of an operating subsidiary.⁵

Under this standard, national banks are authorized to provide financial advice and counseling to their customers as activities that are part of or incidental to the business of banking.⁶ The OCC has held that national banks may offer employee benefit consulting services to corporations wishing to establish qualified benefit plans,⁷ and that health benefit counseling is a form of financial planning permissible for national banks and their subsidiaries.⁸

The Bank’s proposal is consistent with these OCC precedents because it is functionally and operationally similar to activities undertaken by banks or their trust departments, and the

⁴ See, e.g., *Merchants Bank v. State Bank*, 77 U.S. 604 (1871); *M & M Leasing Corp. v. Seattle First Nat’l Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *American Ins. Ass’n v. Clarke*, 865 F.2d 278 (2d Cir. 1988).

⁵ 12 C.F.R. § 5.34(c) (1996).

⁶ See 12 U.S.C. § 24(Seventh). The authority of national banks to provide financial advisory services has in certain previous OCC statements been based both on general banking authority pursuant to 12 U.S.C. § 24(Seventh) and on the authority to exercise fiduciary powers pursuant to 12 U.S.C. § 92a. See, e.g., Interpretive Letter No. 367, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,537 (August 19, 1986). Some letters, expressing the view of financial counseling as a traditional fiduciary function granted to those banks with trust powers, did not address whether banks without trust powers could provide financial advice solely as a banking or incidental power under 12 U.S.C. § 24(Seventh). See, e.g., Interpretive Letter No. 353, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,523 (July 30, 1985). However, the OCC has recently clarified that certain types of advisory activities, including financial advice and counseling, are banking or incidental to banking activities that can be conducted outside of a fiduciary relationship. See Interpretive Letter No. 769, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,133 (January 28, 1997).

⁷ See Letters from William B. Glidden, Assistant Director, Legal Advisory Services Division (October 6, 1987) (unpublished) (“Glidden Letters”). In the Glidden Letters, two national banks, one with trust powers, the other without trust powers, sought permission to offer employee benefit consulting services, including plan design, plan implementation, and administrative and employee communication services. In each instance, the OCC concluded that employee benefit consulting services were operationally and functionally related to trust services routinely provided by banks. See also 12 C.F.R. § 225.28(b)(9)(ii).

⁸ See OCC Corporate Decision No. 98-13 (February 9, 1998). In this Decision, Chief Counsel Williams authorized an operating subsidiary to provide medical insurance cost information, benefit consulting, premium collection and disbursement, and related services. The letter concluded that these activities are forms of financial planning because issues related to costs, benefits, co-payments, and deductibles of managed care versus fee-for-service plans, bear directly upon one’s budget and financial plans.

employee benefit and compensation services involve preparing and conveying financial information to the Bank's customers and their employees. Moreover, the employee benefit, administrative, and communication services in this proposal are a form of financial planning. They involve expenses common to almost every business enterprise. The cost of employee benefits, including the types of benefits offered, co-payments and deductibles, bear directly upon the Bank's customers' operating budgets and finances. Accordingly, these activities are permissible.⁹

B. The Bank May Utilize Its Staff's Excess Capacity to Provide Incidental Human Resources Consulting and Career Counseling Services to Customers

The Bank proposes to make career counseling and human resources advisory services available to small business customers. The OCC and the courts have held that national banks may use all of their resources and competencies to operate efficiently and to avoid economic waste. In *Brown v. Schlier*, the court articulated the excess capacity doctrine:

Nor do we perceive any reason why a national bank, when it purchases or leases property for the erection of a banking house, should be compelled to use it exclusively for banking purposes. If the land which [a national bank] purchases . . . for the accommodation of its business is very valuable, it should be accorded the same rights that belong to other landowners of improving it in a way that will yield the largest income, lessen its own rent, and render that part of its funds which are invested in realty most productive. There is nothing, we think, in the national bank act, when rightly construed, which precludes national banks, so long as they act in good faith, from pursuing the policy above outlined.¹⁰

The basic requirement is that the Bank's overall activities must be conducted in good faith for banking purposes.

⁹ The Federal Reserve has similarly authorized bank holding companies and their subsidiaries to provide employee benefit consulting services, including plan design, plan implementation, administrative services, and communication services. See *Centerre Bancorporation*, 73 Fed. Res. Bull. 365 (1988); *Commonwealth Bancshares Corp.*, 73 Fed. Res. Bull. 158 (1987); *Centerre Bancorporation*, 73 Fed. Res. Bull. 136 (1987); *Bank Vermont Corp.*, 72 Fed. Res. Bull. 337 (1986); *Norstar Bancorp, Inc.*, 72 Fed. Res. Bull. 656 (1986); *Norstar Bancorp, Inc.*, 71 Fed. Res. Bull. 656 (1985). The Federal Reserve authorized these activities after determining that they are "closely related to banking." The Federal Reserve's "closely related to banking" analysis is similar to the OCC's incidental to the business of banking analysis. See *National Courier Ass'n v. Board of Governors of the Federal Reserve System*, 516 F.2d 1229 (D.C. Cir. 1975); *Alabama Ass'n of Ins. Agents v. Board of Governors of the Federal Reserve System*, 533 F.2d 224 (5th Cir. 1976); *Association of Data Processing Service Org. v. Board of Governors of the Federal Reserve System*, 745 F.2d 677 (D.C. Cir. 1984). In each of these cases, the court analogized the "closely related to banking" provision in Regulation Y, 12 C.F.R. § 225.28(b)(9), to the incidental powers clause of 12 U.S.C. § 24(Seventh).

¹⁰ 118 F. 981, 984 (8th Cir. 1902), *aff'd*, 194 U.S. 18 (1904).

Although the excess capacity doctrine was used initially in real estate,¹¹ its principles have been applied in other circumstances where banks have obtained or developed in-house services, equipment or personnel in good faith and needed to make efficient use of the excess capacity. For example, excess capacity has been applied to Internet access,¹² software production and distribution,¹³ long line communication,¹⁴ and electronic security systems,¹⁵ acquired printing equipment,¹⁶ mail sorting machines,¹⁷ and messenger services.¹⁸

The excess capacity doctrine is applicable to your circumstances as well. Several Bank employees currently provide career counseling and human resources advisory services to the Bank. Allowing the Bank through the Subsidiary to make these services available to some of its small businesses customers will enable the institution to maximize the use of its personnel resources and expertise that have been developed in-house for its own use. The same employees who perform these activities for the Bank will use their excess time to work for the Subsidiary.

Moreover, the Subsidiary will provide human resources and career advice and counseling only in connection with the employee benefit package, and the Bank has represented that the human resources consulting and career counseling will not exceed 10 percent of the cost of the package of services discussed in the proposal. This limitation, coupled with the Bank's familiarity with its customers' operational and financial needs and resources, should mean that the Bank will not be exposed to unnecessary risks.

C. Conclusion

¹¹ See *Wingert v. First Nat. Bank*, 175 F. 739 (4th Cir. 1909); *Perth Amboy Nat. Bank v. Brodsky*, 207 F. Supp. 785, 788 (S.D.N.Y. 1962); and Unpublished letter from Comptroller James J. Saxon dated February 16, 1965.

¹² Interpretive Letter No. 742, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-106 (Aug. 19, 1996).

¹³ See Interpretive Letter No. 677, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625 (June 28, 1995).

¹⁴ Unpublished letter from William Glidden (June 6, 1986).

¹⁵ Unpublished letter from Stephen Brown (December 20, 1989).

¹⁶ Interpretive Letter No. 811 (December 12, 1997); Unpublished letter from Mary Wheat (April 7, 1988).

¹⁷ Unpublished letter from Peter Liebesman (December 13, 1983).

¹⁸ Unpublished letter from William Glidden (July 11, 1989).

Based upon the forgoing facts and analysis, and the commitments and representations made by the Bank, the Bank's application to establish the Subsidiary to provide human resources consulting and career counseling services in conjunction with a main focus on employee benefit and compensation advisory services is hereby approved.

Sincerely,

/s/

Raymond Natter
Acting Chief Counsel