

*Quarterly
Journal*

INTERPRETATIONS—
OCTOBER 1 TO DECEMBER 31, 2003

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Interpretive Letters

975—October 14, 2003

12 USC 24(7)

Dear []:

This letter responds to your request for a legal opinion regarding the authority of [] (“bank”), to dispose of old coin and cash found in several of the bank’s office vaults. Your request indicates that some of the coins may be “rare,” that is, their numismatic value exceeds their face or metallic value. The bank wishes to dispose of, and receive fair market value for, the found coin and cash. For the reasons discussed below, we believe that the bank may dispose of the found coins for their fair market value.

Discussion

Your request represents that the facts are as follows. The bank has discovered old coin and cash found in several of the bank’s office vaults. This coin and cash has been in the bank’s vaults for years, but the bank does not know when or why it acquired the coin and cash. A number of the coins are likely “rare” coins—i.e., they have a numismatic value beyond their face or metallic value—though they likely were not “rare” coins at the time the bank acquired them. To the best of your knowledge, the coins were not acquired for speculative purposes. The bank now wishes to dispose of the found coins, including the “rare” coins, for their fair market value.

Twelve USC 24(Seventh) expressly authorizes national banks to buy and sell coins. In pertinent part the statute states that a national bank may “carry on the business of banking” by, for example, “buying and selling exchange, coin, and bullion.” Banking Circular No. 58 (Rev.) (November 11, 1981) (“circular”) sets forth general guidelines that apply to national banks’ coins and bullion activities. The circular makes it clear that banks may not speculate by purchasing coins, such as “rare” coins, the value of which is based upon such factors as rarity, age, condition, a mistake in the minting or other intangible factors.

Here, the bank is not engaging in the impermissible speculation addressed by the circular. Rather, the bank has simply found some old coins in its vaults. Several of the coins, in their years in dormancy, have acquired a value beyond their face or metallic value. Yet the bank, to the best of its knowledge, acquired these coins in the normal course of its banking business. Because the bank did not acquire the coins with the intent to speculate in “rare” coins, the bank should now be permitted to dispose of the coins at their fair market value.

This situation is analogous to a national bank that has acquired and used real estate for bank premises and now wishes to dispose of that property at fair market value. National banks have express statutory authority to acquire real estate for use as bank premises. 12 USC 29(First).

The OCC has long taken the position that, once a bank ceases to use premises to engage in the business of banking and must dispose of the property, the bank may dispose of premises for fair market value, even if that value exceeds the price the bank originally paid for the property.¹ In the present situation, the bank has discovered coins in its vaults that, while originally acquired pursuant to the “coin and bullion” authority in section 24(Seventh), have acquired numismatic value. As national banks are permitted to dispose of bank premises even in cases where the premises have appreciated in value, so should the bank be permitted to dispose of the “rare” coins even though the coins have acquired numismatic value.

If you have any questions, please feel free to contact me at (202) 874–5300.

Steven V. Key
Senior Attorney
Bank Activities and Structure Division

¹ See letter from J.T. Watson, deputy comptroller (February 7, 1974) (unpublished). Cf. letter from John D. Gwin, deputy comptroller (August 10, 1972) (bank may sell other real estate owned (“OREO”) at fair market value). Indeed, from a supervisory perspective, disposal of former bank premises at a less than fair market value may adversely impact a bank’s safety and soundness. While disposal of the found coins for face or metallic value may not adversely impact the bank’s safety and soundness, disposal of the coins for fair market value most certainly will enhance the bank’s position.

976—October 15, 2003**12 USC 24(7)****12 CFR 4**

Re: Request for Opinion

Dear []:

I am writing in response to your request, dated September 10, 2003, for a legal opinion addressing the contractual relationship between *[Bank, City and State]* (“bank”) and your clients, [], a *[State]* corporation ([]), and []’s principals (“principals”) bank. Your request comes as the parties attempt to resolve a dispute concerning the profits earned by [] and disbursed, pursuant to an agreement between the parties, to the bank. We understand that for the last year, the bank and [] have been pursuing voluntary mediation to resolve the dispute. Such mediation efforts are still ongoing. At the same time, the parties have been preparing for binding arbitration, as required by the agreement. We understand that the parties have agreed upon a three-arbitrator panel to hear the dispute, likely sometime in January 2004.

We addressed the permissibility of the bank’s activities in Interpretive Letter No. 956 (“IL 956”).¹ In IL 956, we concluded that the bank’s lending arrangement with [] constituted a permissible shared appreciation mortgage pursuant to 12 CFR 7.1006; that the lenders’ covenants imposed by the bank constituted permissible prudential measures designed to protect the bank’s interests; and that the nature and amount of the bank’s compensation to [] are consistent with Office of the Comptroller of the Currency (OCC) precedent.

Your letter requests that we now consider the information you have submitted and employ []’s characterization of the facts underlying IL 956 to reconsider and to opine anew on the nature of the relationship between the bank and []. The information you have presented does not differ fundamentally in key respects from the information on which our previous opinion was based, thus we decline to reconsider our previous opinion. That opinion relied on facts represented to us by the bank. In contractual disputes between a national bank and a third party, the OCC typically does not assume the role of fact finder. Instead, this role would best be taken on by a decision-making body—a mediator, an arbitration panel, or a court—with expertise in weighing different factual characterizations.

There are two additional matters that I should note. In an earlier telephone conversation with the OCC you raised the possibility of seeking depositions from various OCC employees. The OCC will not permit the deposition of any current OCC employees in this matter. As the facts

¹ Reprinted in [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–481 (January 31, 2003).

are essentially undisputed, testimony from any OCC employee would be in the form of an expert opinion. The OCC does not provide expert opinions for private parties except in rare cases under circumstances not present here.

Second, as to former OCC employees, the OCC must grant permission to former OCC employees before they may disclose information obtained in the course of their OCC employment. Your letter cites three former OCC employees as experts. Given the geographic scope of their OCC service, there may be an issue as to whether these individuals furnished fact information resulting from their OCC employment. In this regard, all requests for OCC information from past and present OCC employees must comply with 12 CFR part 4.

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

977—October 24, 2003

12 USC 30A

Ms. Beth Whitehead
Associate Counsel
National Commerce Financial Corporation
One Commerce Square
Memphis, TN 38150

Dear Ms. Whitehead:

This is in response to your letter seeking the Office of the Comptroller of the Currency's (OCC's) concurrence in your opinion that the operation by National Bank of Commerce ("NBC") of certain NBC branches located in Wal-Mart stores under the trade name "Wal-Mart Money Center by National Bank of Commerce" ("the trade name"), would be consistent with the Interagency Statement on Branch Names ("the interagency statement").¹ Our response addresses solely that issue. As we understand it, all of the branches to be operated under the trade name are currently operated in the Wal-Mart stores as branches of NBC under the NBC name.

The interagency statement permits depository institutions to operate branches under a trade name provided that the institution takes reasonable steps to ensure that customers will not become confused and believe that different facilities of the same institution are separate institutions or that deposits in different facilities are separately insured by the Federal Deposit Insurance Corporation (FDIC). The interagency statement provides a non-exclusive list of steps that depository institutions may take to avoid customer confusion.

Your request represents that NBC will take the following steps to avoid customer confusion:

- 1) Branch personnel will be employees of NBC and will not be dual employees of Wal-Mart.
- 2) Branch personnel will be trained to counsel customers on FDIC insurance issues (including aggregation issues), in the event that a customer holds an account at an existing NBC branch. Branch personnel will be trained to call customers' attention to the fact that the branch is a division of NBC.
- 3) The name "Wal-Mart Money Center, a division of National Bank of Commerce," will appear in all legal documents. The signature card for deposit accounts also will contain the following language, in bold, immediately above the customer's signature: "The undersigned hereby acknowledge that they understand that Wal-Mart Money Center is a division of National

¹ 4 Fed. Banking L. Rep. (CCH) para. 45-511A. The interagency statement was issued by the OCC, the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision on May 1, 1998.

Bank of Commerce (“NBC”), and that Wal-Mart Money Center accounts and other NBC accounts are not separately insured by the FDIC.” Marketing materials will use the trade name.

- 4) The Wal-Mart Money Center Internet site will be established and operated solely by National Bank of Commerce for the benefit and use of the customers of the Wal-Mart Money Center branches of NBC. Those customers may also access their accounts through National Bank of Commerce’s Web site, NBC.com. Customers will not be able to access their accounts through Wal-Mart’s Web site, Wal-Mart.com.
- 5) All documentation, including Internet screens, will be subject to the prior approval of either the National Commerce Financial Corporation Legal or Compliance Departments to ensure that the customers are given full and conspicuous disclosure that they are doing business with National Bank of Commerce and to ensure compliance with the interagency statement.
- 6) All NBC branch personnel will be trained to answer questions regarding the relationship between the customer and NBC. All Wal-Mart personnel will be trained to refer all banking questions to the branch personnel.
- 7) A customer notification will be provided to all existing branch customers thirty days prior to the name change. For customers who open new accounts within the thirty-day period, the notice will be provided to them at the time of account opening. The notification will include a question-and-answer brochure that will explicitly state that “you will continue to bank with National Bank of Commerce” and that “Wal-Mart Money Center, by National Bank of Commerce” continues to be part of National Bank of Commerce and is not a separate institution for purposes of FDIC insurance coverage.

Based on your representations with respect to the steps that NBC will take to mitigate any customer confusion that may arise as a result of the use of the trade name for certain NBC branches located in Wal-Mart stores, I conclude that the use of the trade name by NBC would be consistent with the Interagency Statement on Branch Names.

I hope that this is responsive to your inquiry.

Eric Thompson
Director
Bank Activities and Structure