State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS

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ISGC – 2004 – 008 - OGC

November 5, 2004

[redacted]

[redacted]

Dear [redacted]

Your inquiry on behalf of your New York-chartered bank client ("Bank") has been referred to me for response in my capacity as Legal Counsel for the Washington State Department of Financial Institutions ("DFI").

1.0 Representations

You have made the following representations, upon which the DFI relies in making this response:

- The Bank will not have a physical presence in any other state other than its home state of New York.
- The Bank would like to offer a secured discretionary line of credit product (the "Line") in amounts ranging from $75,000 to $10,000,000.
- The contracts will state that they are governed by New York law. Advances under the Line would be secured by marketable securities (generally stock) held by one of the Bank's subsidiaries, a registered broker dealer (the "Broker-Dealer").
- The borrower would be required to maintain a certain level of collateral coverage. In the event the collateral value falls below a specified level, the borrower would be required to deliver additional collateral or reduce outstanding advanced. In the event that borrower does not take these actions, the Bank would have the right to sell the collateral.
- The proceeds of the Line and subsequent advances could be used for any purpose, including the purchase of margin securities.
- The advances would bear interest, payable monthly, based on the Bank's alternate base rate (the higher of the Bank's prime rate or the Federal Funds rate plus 1/2%), calculated on a basis of 360-day year for the actual days elapsed and not compounded.

- A default rate would apply but there would be no prepayment penalties, rate charges, or other fees associated with advances on the Line.
- Advances would be payable upon demand. Advances may be deposited in borrower's account at the Bank or transferred to its Broker-Dealer account or to another bank.
- The Line would be offered to clients of the Bank, clients of introducing brokers who maintain custody accounts with the Broker-Dealer and clients of one of the Bank's other subsidiaries, a registered investment advisor ("Investment Advisor").
- Qualifying borrowers would be individuals who are U.S. citizens or residents, and partnerships, limited liability companies, limited partnerships, corporations, and grantor trusts guaranteed by individuals that are principals of each entity.
- The Line would be marketed to clients of the Bank's Private Client Services Division by face to face, by mail or by telephone or through Financial Advisors, to clients of the Broker-Dealer by approved introducing brokers, and to clients of the Financial Advisor by independent financial consultants who utilize the Financial Advisor's products.
- The financial consultants are financial planners, certified public accountants, broker-dealers, and investment advisors.
- The financial advisors may assist in the application process. The financial advisors, financial consultants and introducing brokers are located throughout the United States. They would not receive any compensation in the marketing of the Line.
- The Broker-Dealer will be compensated by the Bank for managing and monitoring the collateral through a revenue sharing arrangement.

2.0 Questions

You have asked the following questions relative to the representations made above:

2.1 Is there any law in Washington that would prohibit or restrict the Bank from carrying out its planned activities as described above?

2.2 Are there any applicable restrictions or requirements regarding plain language, disclosure, usury or limitations on remedies?

2.3 Would a financial advisor and/or his firm be required to be licensed in its jurisdiction to make client referrals to the Bank?

2.4 Is the Bank required to be licensed to offer the Line to persons and non-persons in Washington?

3.0 Limited Interpretation

It is outside the scope of the DFI's authority to opine on any and every law, restriction, requirement or limitation of remedies in the State of Washington germane to Questions 2.1 through 2.4, inclusive, as set forth above. Moreover, your representations, and questions may raise issues under Securities Act of Washington, chapter 21.20 RCW, concerning whether the Line may constitutes a "security," broker-dealer licensure,

margin requirements, suitability, and other possible issues. Please note that your letter does not comply with WAC 460-16A-020, which outlines the procedure for requesting a no-action or interpretative opinion regarding securities law. Therefore, this letter does not purport to address any issues regarding securities law. You may wish to consult with a private securities attorney or properly request an no-action letter about potential securities law issues prior to offering the Line in Washington.

With those limitations and provisos in mind, then, we note preliminarily that Bank does ***not*** intend to open a branch or have employees located in, or otherwise maintain a presence in the State of Washington. Based on your representations, then, DFI makes the following ***limited*** determinations:

3.1 No "Alien Bank" Limited Authorization Required. Bank will ***not*** be required to comply with the Washington Alien Bank Act, at Title 30, Chapter 42, Revised Code of Washington (RCW Chapter 30.42).

3.2 Bank Not Required To Be Chartered or Authorized by Either the DFI or the Secretary of State Merely for Originating Loans Without a Branch or Employees. The Washington Commercial Bank Act, at RCW 30.04.020, restricts a foreign corporation, whose name contains the words "Bank," "Banker," "Banking" or "Trust," or whose articles of incorporation empower it to engage in banking or to engage in a trust business, from engaging in such business without specific authorization under state law, federal law, or from the DFI.

However, as set forth in RCW 30.04.020(2):

> "If an activity would ***not*** constitute 'transacting business' within the meaning of RCW 23B.15.010(1) or chapter 23B.18 RCW, then the activity shall ***not*** constitute banking . . . ."

Furthermore, the Washington Business Corporations Act, at RCW 23B.15.010, provides, in pertinent part, as follows:

> "(1) Unless it is otherwise authorized to transact business pursuant to a state or federal statute, a foreign corporation may not transact business in this state until it obtains a certificate of authority from the secretary of state.
> . . .
> (2) The following activities, among others, do not constitute transacting business within the meaning of subsection (1) of this section:
> . . .
> (g) Making loans or creating or acquiring evidences of

> debt, mortgages, or liens on real or personal property, or recording same . . . "

Therefore, we confirm that Washington State will not impose any restrictions under RCW Titles 23B, 30 or 32 on Bank simply for originating or accepting loans in its own name that are made to Washington State residents.

Notwithstanding the above, we caution that the entire Washington Business Corporations Act (RCW Title 23B) should be read, in context, to determine whether there are other grounds for obtaining authorization for the Bank to do business as a foreign corporation in Washington State. Since the Secretary of State, and not the DFI, governs RCW Title 23B, we caution your clients to look elsewhere for advice as to general authority to do business in Washington State as a foreign corporation.

3.3 Bank Exempt from Washington Consumer Loan Act. The Washington Consumer Loan Act (RCW Chapter 31.04) regulates the activities of ***mortgage lenders*** that seek a license under the Act for the purpose of charging interest rates higher than general state usury laws (RCW 31.04.005). Pursuant to RCW 31.04.025, the Washington Consumer Loan Act —

> " . . . shall ***not*** apply to any person doing business under and as permitted by ***any law of*** this state or of ***the United States*** relating to banks, savings banks, trust companies, savings and loan or building and loan associations, or credit unions, ... "

[Emphasis added.]

You have informed the DFI in your letter that Bank is FDIC-insured and a member of the Federal Reserve. As such, Bank does business, in some degree, under and as permitted by federal laws and regulations with respect to banks and/or savings banks. Therefore, Bank itself is ***exempt*** from the requirements of the Washington Consumer Loan Act.

3.4 General State Usury Law. Presumptively, credit to be extended pursuant to the Line is for personal, family or household purposes. However, to the extent accorded by 12 USC 1831d, federal law may preempt subsection (1) of RCW 19.52.020. Your client should, therefore, consider both of these statutes when making decisions regarding pricing of the Line.

3.5 Consumer Protection. Since we have presumed that credit to be extended pursuant to the Line is for personal, family or household purposes, it follows that your client must obey all applicable federal consumer protection laws affecting lending practices, including the Truth in Lending Act, (hereinafter,

"TILA") and Equal Credit Opportunity Act, (hereinafter, "ECOA"). While the standards of conduct under TILA and ECOA may preempt state law to the contrary, nothing in TILA or ECOA prevents the State of Washington from enforcing those laws through state action. While such enforcement as to your client is not within the purview of the DFI, it is within the jurisdiction of the Consumer Protection Division of the Office of the Attorney General (hereinafter, "AGO"). In addition, the AGO has independent jurisdiction to enforce the Washington Consumer Protection Act (RCW 19.86.010 et seq.), which prescribes the remedies for unfair and deceptive acts and practices. Your client is obliged to become familiar with the Washington Consumer Protection Act.

4.0 Concluding Remarks

Based on the information we have supplied above, you should proceed with caution. You may also wish to address specific securities law issues you may have with the Securities and Exchange Commission, or with the Washington State Securities Division by following the procedures for such a request in WAC 460-16A-020.

The statutory standards for making the determinations in this letter are uniformly applicable for any out-of-state commercial bank or savings bank similarly situated, seeking to conduct the activity sought to be undertaken by Bank as stated above. However, institutions other than Bank are advised that each applicant's relevant facts and circumstances may be different; and such relevant facts, as applied to the governing law, may result in the DFI reaching a conclusion different than the one made herein.

Should you have any immediate questions, please do not hesitate to call upon me at either (360) 902-0516 or (206) 956-3229.

Sincerely,

WASHINGTON STATE DEPARTMENT OF
FINANCIAL INSTITUTIONS

By: SENT WITHOUT SIGNATURE TO VOID DELAY

Joseph M. Vincent
Legal Counsel

Cc: David Kroeger, Director, Division of Banks
Michael Stevenson, Director, Division of Securities
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