State of Washington
DEPARTMENT OF FINANCIAL INSTITUTIONS
DIVISION OF BANKS
P.O. Box 41200, Olympia, Washington 98504-1200

Joseph M. Vincent
DFI General Counsel
Ph: 360.902.0516
Fax: 360.704.7036
jvincent@dfi.wa.gov

ISGC – 2010 – 002 – DOB

August 26, 2010

[redacted]

RE: *Interpretation of RCW 30.04.010, RCW 30.04.020, and RCW 30.04.280*

Dear [redacted]:

The matter of your inquiry, dated August 9, 2010, has been referred to me for official response on behalf of the Division of Banks in my capacity as General Counsel for the Department of Financial Institutions.

You have inquired about the scope of the Washington Commercial Bank Act, at RCW 30.04.010 and RCW 30.04.280, as it may relate to the prospective marketing activities of your client, a registered broker/dealer. Specifically, you have sought confirmation from the Division of Banks that the prospective marketing activities of your broker/dealer client would not constitute "banking" within the meaning of RCW 30.04.010 and RCW 30.04.280.

RCW 30.04.010, as amended by 2010 c 88 §3 (effective March 17, 2010), declares in pertinent part, as follows:

> "Unless the context clearly requires otherwise, the definitions in this section apply throughout this title.
> . . . .
> (4) 'Banking' includes the soliciting, receiving or accepting of money or its equivalent on deposit as a regular business."

RCW 30.04.280 declares in pertinent part, as follows:

> "No person shall engage in banking except in compliance with and subject to the provisions of this title, unless it is a national bank or except insofar as it may be authorized so to do by the laws of this state relating to mutual savings banks or savings and loan associations."

At issue is whether your client, a registered broker/dealer, could be construed to be engaging in the *solicitation* of deposits in a manner that would constitute "banking" under RCW 30.04.010(4) and that would, in turn, be impermissible to your client as a non-depositary, pursuant to RCW 30.04.280.

As you have represented the proposed marketing activities, your client is a registered broker/dealer and a non-depositary subsidiary of a bank holding company under the Bank Holding Company Act of 1956, seeking to reach out to the public by mail and recommend that recipients of those communications use its national bank affiliate for their deposit needs. According to your representations, the prospective mailings would refer them to the national bank, and the national bank would then communicate with the potential depositors directly, describing its account products with the hope of initiating deposit relationships. As you have represented, your broker/dealer client and its individual financial advisors would not receive or accept deposits, or offer or negotiate any terms of deposit, and all communications about the specifics of deposit accounts would be between the affiliate national bank and the potential depositor. The broker/dealer and its financial advisors would not in any manner engage or hold themselves out as a bank or as engaging in the banking business.

For purposes of this interpretation, the Division of Banks has determined that the term "deposit" shall have the same meaning as ascribed to the term "deposit" in the Federal Deposit Insurance Act, at 12 U.S.C. §1813(l). Nowhere in the Washington Commercial Bank Act, Title 30 RCW, are the terms "solicit" or "solicitation" defined (if at all) in the context of deposits. Accordingly, in reliance upon your representations, we have made a review of the relevant federal legal authority on what constitutes a "solicitation" for a bank deposit as that term was intended in RCW 30.04.010(4).[1]

Based upon your representations, we have determined that the proposed conduct of your broker/dealer client and its financial advisors would not constitute soliciting, receiving or accepting deposits as a regular business, but would instead only be recommending the national bank affiliate in question as a provider of deposit accounts. Therefore, we have determined that your broker/dealer client would not, as represented, be engaged in "banking" within the meaning of RCW 30.04.010(4). Accordingly, your broker/dealer client's prospective conduct, as represented, would not be in violation of RCW 30.04.280.

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[1] The Rules of the Federal Deposit Insurance Corporation ("FDIC Rules"), at 12 C.F.R. §329.8(g), provide that any person or organization which solicits deposits for a bank shall be bound by applicable regulations governing advertising for deposits. *FDIC v. Sumner Financial Corp.*, 451 F.2d 898, 900 (5th Cir. - 1971); *FDIC v. Sumner Financial Corp.*, 376 F. Supp. 772, 773 (DC – Mid. Fla. 1974); *FDIC v. Sumner Financial Corp.*, 602 F.2d 670, 673 (5th Cir. 1979); See also *FDIC Advisory Opinion No. 87-2*, dated March 2, 1987. Although we could find no authority for the proposition that "soliciting" is synonymous with the conduct of a "deposit broker," it would seem the definition of "deposit broker" under the FDIC Rules is the most instructive authority in the absence of a definition under Title 30 RCW. The FDIC Rules, at 12 C.F.R. §337.6(a)(5)(i), a "deposit broker" is: "(A) Any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions, or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties; and (B) An agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan." However, as set forth in FDIC Rules, at 12 C.F.R. §337.6(a)(5)(ii)(I), a "deposit broker" does *not* include "[a]n agent or nominee whose primary purpose is not the placement of funds with depository institutions."[Emphasis added.] Moreover, we are persuaded from the reasoning in *FDIC Opinion of General Counsel, No. 93-30*, dated June 15, 1993, interpreting the definition of "deposit broker under Sections 29 and 29A of the Federal Deposit Insurance Act and the FDIC Rules, at 12 C.F.R. §337.6(a), that the conduct of your broker/dealer client, as represented, would not constitute either "deposit brokering" under applicable federal legal authority or "soliciting" under RCW 30.04.010(4). In the absence doing any more than as represented, your client would, therefore, not be engaged in "banking" in violation of RCW 30.04.280.

However, even though you asked for only an interpretation of RCW 30.04.010(4) and RCW 30.04.280, we need to point out that the provisions of RCW 30.04.020, as amended by 2010 c 88 §4,[2] are relevant to the anticipated activities of your broker/dealer client in dealing with Washington citizens. Based upon the requirements of RCW 30.04.020, your broker/dealer client will be permitted to communicate with Washington citizens in the manner represented by you, provided that your client authors its written communications to Washington citizens in a manner that does not confuse the public that it is a bank or engaged in the business of banking and further making clear that it is only national bank affiliate in question that is authorized to do so.

The general interpretation made in this letter is applicable to all Washington State-chartered commercial banks, similarly situated. However, we note that it is clear from a review of the relevant federal legal authority that decisions as to what constitutes "brokering" or "soliciting" in the context of deposits are to be made on a fact-specific, case-by-case basis. Therefore, this interpretation may be subject to change in the event of differing facts involving another institution or a change in applicable law. If you have any further questions, please do not hesitate to call upon Gloria McVey, Program Manager, Division of Banks, at (360) 902-8704 or gmcvey@dfi.wa.gov.

Yours very truly,

WASHINGTON STATE DEPARTMENT OF
FINANCIAL INSTITUTIONS

By: Joseph M. Vincent
Joseph M. Vincent
General Counsel

For Division of Banks

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[2] RCW 30.04.020, as amended by 2010 c 88 §4, declares in pertinent part:

(1) . . . Except as . . . authorized by this section or approved by the director, only a national bank, federal savings bank, a bank or trust company authorized by this title, savings bank under Title 32 RCW, bank holding company or financial holding company, a holding company authorized by this title or Title 32 RCW, or a foreign or alien corporation or other legal person authorized by this title to do so, shall:

(a) Use as a part of his or its name or other business designation, as a prominent syllable within a word comprising all or a portion of its name or other business designation, or in any manner as if connected with his or its business or place of business any of the following words or the plural thereof, to wit: "bank," "banking," "banker," "bancorporation," "bancorp," or "trust," or any foreign language designations thereof, including, by way of example, "banco" or "banque."

(b) Use any sign, logo, or marketing message, in any media, or use any letterhead, billhead, note, receipt, certificate, blank, form, or any written, printed, electronic or internet-based instrument or material representation whatsoever, directly or indirectly indicating that the business of such person is that of a bank or trust company.

(2) A foreign corporation or other foreign domiciled legal person, whose name contains the words "bank," "banker," "banking," "bancorporation," "bancorp," or "trust," or the foreign language equivalent thereof, or whose articles of incorporation empower it to engage in banking or to engage in a trust business, may not engage in banking or in a trust business in this state unless the corporation or other legal person (a) is expressly authorized to do so under this title, under federal law, or by the director, and (b) complies with all applicable requirements of Washington state law regarding foreign corporations and other foreign legal persons. 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 or engaging in a trust business. Nothing in this subsection shall prevent operations by an alien bank in compliance with chapter 30.42 RCW.

. . . .

(4) Any individual or legal person, or director, officer or manager of such legal person, who knowingly violates any provision of this section shall be guilty of a gross misdemeanor.