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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

**Interpretive Letter #856**  
**March 1999**  
**12 USC 24(7)**

March 5, 1999

William W. Templeton  
Senior Counsel  
Legal Department  
Fleet Financial Group  
50 Kennedy Plaza  
Providence, RI 02903

Dear Mr. Templeton:

This responds to your request for an opinion on whether a national bank may offer certain connected Internet services and payments services to its small business banking customers pursuant to the authority in 12 U.S.C. § 24(Seventh) of the National Bank Act. Specifically, Fleet National Bank (the "Bank") wishes to offer a package of services that will include enabling its small business banking customers ("Retailers") to establish a retail sales presence on the Internet. Based upon the information and representations provided, I conclude that the proposed activity, as described in detail below, is permissible for a national bank.

#### BACKGROUND

The Bank proposes to offer its small business customers a package of electronic services (hereafter referred to as the "Product") that bundles traditional merchant credit card banking services with the software, hardware and technical support necessary for a small business to have its own retail web site that is able to accept credit card payments in a secure environment.<sup>1</sup> The package also includes monthly reports relating to activity on a Retailer's web site.

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<sup>1</sup> A retail enabled web site will be able to accept credit card purchases on-line. This service will allow Retailers to create and maintain a web site that can also use the Bank's secure payments service. Bank is currently offering a web site credit card enabling service as a stand-alone service to retailers with web sites either established or in development. This particular product offering has, thus far, generally been directed at larger companies with their own established web sites.

To purchase the Product, a Retailer must: (i) already be, or qualify to be, a credit card merchant customer of the Bank, and (ii) have, or establish, a business checking account with the Bank. The Bank will provide authorization and processing services for credit card payments received through a Retailer's web site and will deposit the proceeds in the Retailer's checking account with the Bank.

In exchange for a one-time set up fee,<sup>2</sup> a Retailer is assigned a unique Internet web site address,<sup>3</sup> which the Bank registers with the major Internet search engines. The web site address can either include or not a reference to the Bank's URL, (e.g., "http://www.Bank.com/yourbusinessname" or http://www.yourbusinessname) depending upon the Retailer's choice.<sup>4</sup>

The Retailer's web site resides on Internet servers that are controlled by the Bank but not connected to any of the Bank's mainframe accounting or internal systems processing servers. The Retailer also is given access to the web site's "storebuilder wizard"-- a menu-driven software that enables the Retailer to build a catalog of product descriptions, pricing, delivery information and order forms. The Retailer works independently to build the web site to its satisfaction subject only to the limitation that the site cannot list more than 500 products. The product database (representing the Retailer's online catalog) is maintained and stored on the Bank's server.

Once the Retailer has established a business checking account, obtained credit underwriting approval to be a credit card merchant customer, and completed construction of the web site, the site is activated so that potential retail customers can access the site. After activation, the Bank

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<sup>2</sup> Bank will charge a one time set up fee and a monthly maintenance fee for the Product. The web site Product (with related system support) is not available as a separate product offering and cannot be purchased without the entire package of associated banking products and services, such as the checking account and merchant credit card relationship. Although the Product will generate revenues from several sources, the Bank expects that the revenues from the associated traditional bank products will greatly exceed those relating only to the web site services.

<sup>3</sup> This address will be a Universal Resource Locator ("URL").

<sup>4</sup> The use of part of the Bank's name in the Retailer's URL could under some circumstances create a risk that the public will identify the Bank with the web site of its Retailer customers. However, that risk is mitigated here by the Bank's commitment to take all appropriate measures to limit its reputation risk associated with the Retailer's web site. Once activated, the Retailer's web site "store" will not carry any indication that it is carried on the Bank's servers or supported by Bank, aside from the URL that may be used by some Retailers (and the concomitant URL registration information that is publicly available). No Bank logo or any other reference to the Bank will appear within a Retailer's web site store, except as may be necessary to effect the payments processing component. Bank will also limit its reputation risk by reserving the right to prohibit offensive or indecent material from hosted sites.

This retail web hosting activity does not carry the same risks of bank customer confusion that can arise when a bank links its retail web site to sites of third parties so that bank customers are transported from a bank site to a non-bank site, e.g., a bank sponsored "virtual or Internet mall." *Compare*, OCC Conditional Approval No. 221, *supra*. However, these risks could arise if the Bank began to link its retail banking web site to the Retailer sites it hosts. Bank has not indicated any intention to do this and, thus, we do not address it here.

provides ongoing maintenance and support of the web site's host servers and monthly reports on empirical data such as site "hits" and transaction volume.

The Bank servers maintain all the data associated with the web site, including product descriptions, images, and pricing.<sup>5</sup> The Bank also provides functions<sup>6</sup> by which customers of a Retailer select products, communicate their selection to the Retailer, and pay for products. Payments are made through a credit card, for which the Bank provides the payment authorization and processing.<sup>7</sup>

The Bank's retail web site hosting service also, via the Internet, provides an electronic communications pathway between the Retailer and its potential customers through which product orders and payment information flow. When a visitor to a Retailer's site submits a potential purchase order, the Bank captures and processes the necessary payments-related information and forwards an electronic message to the Retailer with the associated product and shipping order information. The Retailer is also able to electronically confirm payment authorization before shipping any goods.<sup>8</sup> Payment proceeds are deposited into the Retailer's business checking account with the Bank.

To maintain the site, the Retailer pays the Bank a monthly maintenance fee for the web site. In addition, all credit card purchases made through the site are assessed a credit card processing fee as a percentage of the amount, called a "merchant discount." The business checking account carries a fee as well. The Retailers will be cross-marketed other Bank products and banking services tailored to small business in an attempt to win other aspects of their retail banking business.

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<sup>5</sup> Each Retailer is responsible to maintain and update the store and product information contained on their web site.

<sup>6</sup> The ordering function is a web page that lists all products selected by the visitor to the site. The paying function page allows the visitor to enter their credit card number, address, and shipping location in association with their potential purchase. These functions are applications that provide temporary storage of information relating to items selected for purchase as well as necessary payment and shipping information. Upon purchase authorization by the visitor, the application requests credit authorization and provides notification to the buyer and Retailer when authorization is received so the purchase may be completed if the parties elect to do so.

<sup>7</sup> Traditional merchant banking services are those services that enable retailers to collect the funds from credit card payments for goods and services sold. Once a retailer is approved through the credit underwriting process, the merchant bank provides the retailer with a card-accepting device for authorizing and recording credit card transactions. The merchant bank then provides services to clear and settle the credit card payments to the retailer, depositing funds collected in the retailer's account.

<sup>8</sup> The Bank also provides sales tax calculations for the Retailer using information on the product sold, the merchandise receiving location, and the identified state in which the Retailer operates. When constructing their web sites, the Retailers are responsible to identify the product codes and to identify their state of operation. In their agreement with the Bank, the Retailers acknowledge that they are responsible for the accuracy, collection, and submission of all appropriate and applicable sales taxes.

OCC recognizes that the proposed activity exposes the Bank to risks associated with accepting retail credit card payments on the Internet and conducting the activities necessary to clear and settle the payments received. The risks associated with credit underwriting, payment authorization, and processing are the same risks that banks already assume when providing merchant credit card processing services for business customers.<sup>9</sup> The risks associated with accepting and authorizing payments through the Retailer's website are identical to those already assumed when the Bank enables an established website to receive credit card orders. These risks include maintaining the accessibility, integrity, and confidentiality of the information systems necessary to complete the retail transactions through the website.<sup>10</sup> To the extent that the Bank contracts with other service providers, notably technology firms, to provide any of the necessary products and services to offer the Product to small business customers, the Bank will manage its indirect risk exposure to the activities of the service providers. Accordingly, the Bank has the necessary skills and expertise to effectively manage the risks.

## DISCUSSION

The Product offered by the Bank to Retailers has three component services: retail web site hosting, retail payments processing, and business checking accounts. As each of these components is part of the business of banking, the Product is part of the business of banking and, thus, permissible for national banks under 12 U.S.C. § 24(Seventh).<sup>11</sup>

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<sup>9</sup> As with other merchant credit card customers, applicants for the proposed product will be subject to a credit underwriting review by the Bank's merchant credit card division.

<sup>10</sup> Through an addendum to its merchant credit card agreement with its customers, the Bank will limit its legal liability for security breaches and systems failures.

<sup>11</sup> Assuming arguendo that the retail web hosting service was not part of the business of banking, an alternative grounds for permitting the activity would be that the Bank's web hosting activity is incidental to two traditional banking services: merchant credit card processing and business checking account services. The Bank has provided information indicating that provision of the web hosting service will significantly enhance the utility and desirability of these established banking services to the Bank's retail merchant customers and to allow the Bank to meet competition from non-banking firms that provide a similar package of services. See, e.g., OCC Conditional Approval No. 221, *supra*, and OCC Interpretive Letter No. 742, *supra*, (national banks providing home banking services via the internet may also provide internet access service to the banking customers as a product incidental to Internet home banking). Further, information provided by the Bank establishes that the anticipated level of revenue from the Bank's retail web site hosting component relative to the revenue from the associated business deposit account and merchant processing services would likely meet the subordination requirement for non-banking services incidental to banking services. OCC has said an incidental product may not dominate its connected banking service, but that where the gross profits generated by an incidental product provided in a package with a banking service do not exceed thirty percent of the total gross profits from the entire service package, the sale of the incidental product meets the subordination requirement. OCC Conditional Approval No. 221, (Dec. 4, 1996); OCC Interpretive Letter No. 754, reprinted in [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,118 (November 6, 1996) (national bank operating subsidiary may sell general purpose computer hardware to other financial institutions as part of larger product or service when necessary, convenient, and useful to bank permissible activities). However, it is unnecessary to address that issue here because we conclude that the Bank's web site hosting activity is part of, rather than incidental to, the business of banking, and thus is not subject to scope limitations that apply to some incidental activities.

Retail web site hosting, as proposed by the Bank, is a form of finder activity authorized for national banks. The OCC has long recognized the finder function as a permissible banking activity that includes, "without limitation, identifying potential parties, making inquiries as to interest, introducing or arranging meetings of interested parties, and otherwise bringing parties together for transactions that the parties themselves negotiate and consummate." 61 Fed. Reg. 4863 (Feb. 9, 1996) (codified at 12 C.F.R. 7.1002(b)).<sup>12</sup> Finder activities are part of the business of banking. OCC Interpretive Letter No. 824, *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-273 (February 27, 1998); OCC Corporate Decision No. 97-60 (July 1, 1997); and OCC Conditional Approval Letter No. 221, *supra*.<sup>13</sup>

The OCC has also recognized that banks may use new technology to conduct the finder activity. We have said:

The means that national banks use to act as finders for their customers have evolved due to technological advancements. Where banks once performed this service for their customers via newsletters and personal contacts, they presently conduct the activity with computer technology.

*Id.* See also, OCC Interpretive Letter No. 516, *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,220 (July 12, 1990) (national banks may provide electronic

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<sup>12</sup> 12 CFR § 7.1002 provides in its entirety:

- (a) General. A national bank may act as a finder in bringing together a buyer and seller.
- (b) Qualification. Acting as a finder includes, without limitation, identifying potential parties, making inquiries as to interest, introducing or arranging meetings of interested parties, and otherwise bringing parties together for transactions that they themselves negotiate and consummate. Acting as a finder does not include activities that would characterize the bank as a broker under applicable federal law.
- (c) Advertisement and fee. Unless otherwise prohibited, a national bank may advertise the availability of, and accept a fee for, the services provided pursuant to this section.

Earlier OCC decisions regarding finder activities cite 12 CFR § 7.7200. OCC interpretive rulings at 12 CFR Part 7 were revised and renumbered effective April 1, 1996. Interpretive ruling § 7.1002 (1996) replaced former interpretive ruling § 7.7200. The Bank has committed that its finder activities will be conducted in accordance with the provisions of 12 C.F.R. 7.1002.

<sup>13</sup> See also, Letter from J.T. Watson, Deputy Comptroller of the Currency, February 26, 1969 (unpublished); Letter from John M. Miller, July 26, 1977 (unpublished); Letter from Paul Allan Schott, Chief Counsel, May 9, 1988 (unpublished); Letter from Elizabeth Corey, May 18, 1989 (unpublished); OCC Interpretive Letter No. 238, *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,402 (Feb. 9, 1982); OCC Interpretive Letter No. 472, *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,008 (Mar. 2 1989); Letter from Lee Walzer, Attorney, Securities, Investments and Fiduciary Practices Division, August 24, 1992 (unpublished); and OCC Interpretive Letter No. 741, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-105 (Aug. 19, 1996); and OCC Conditional Approval No. 220 (October 2, 1996). Cf. *Norwest Bank v. Sween Corp.*, 118 F.3d 1255 (8<sup>th</sup> Cir. 1997).

communications channels for persons participating in securities transactions) and Letter from Julie L. Williams, Chief Counsel, October 2, 1996 (unpublished) (national bank as finder could use electronic means to facilitate contacts between third party providers and potential buyers).

Clearly, one of the Product's most significant functions for the Retailers is to provide potential customers, via the Internet, with information about the Retailers' goods and services. The OCC has concluded that "[p]roviding information [to prospective buyers about the products or services of prospective sellers] is one of the fundamental activities of a finder," and that as part of the finder function national banks may "make inquiries as to interest, arrange a meeting of the interested parties, and provide information pertinent to the meeting of the buyer and seller." OCC Interpretive Letter No. 653, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,601 (Dec. 22, 1994). The function of finder involves the "conveying of information about available products or services to potential markets for them..." OCC Interpretive Letter No. 741, *supra*. See also, OCC Corporate Decision 98-13 (February 9, 1998) (national bank finder, as a benefits counselor, could provide potential buyers with information on benefits programs available); OCC Interpretive Letter No. 824, *supra*, (banks participating in a finder program would provide brochures, leaflets, and other literature informing customers on the availability of products and services from the potential seller); OCC Interpretive Letter No. 630, *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,513 (May 11, 1993) (finder banks may distribute informational brochures); OCC Interpretive Letter No. 593, *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,418 (July 1, 1992) (finder banks providing information on third party brokerage services); and Letter from Julie L. Williams, Chief Counsel, October 2, 1996 (unpublished) (national bank as part of finder function could provide marketing materials and information about third party service providers to potential buyers).

Maintaining or providing an Internet web site for Retailers is one device that national banks may use as finders to provide or make available information to potential buyers. Thus, in Corporate Decision 97-60, *supra*, the OCC found that a national bank conducting finder activities to support sales of pre-owned automobiles could maintain and operate an Internet web site which provided information to potential buyers on the vehicles offered.<sup>14</sup>

It also follows that to perform its finder function of providing information, a national bank must store and retrieve the information to be provided. Thus, in OCC Interpretive Letter No. 741, *supra*, the OCC found that under the finder authority, a national bank could operate a call center facility which provided access to bank-maintained database on new or used vehicles offered for sale. A similar finding is also implicit in OCC Corporate Decision No. 97-60, *supra*. Thus, it is permissible for the Bank, when hosting an Internet web site as a finder, to store and retrieve

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<sup>14</sup> Accordingly, we also find that the Bank may, as part of its finder service, register a Retailer's web site with search engines. This is merely an additional device to serve the finder function of making information available to potential buyers.

electronically on its servers the data set for the Retailer's on-line catalog as part of the finder function.

There is no need to analyze whether the data set storage and retrieval functions in this case are "incidental" to the permissible finder activity because, for the reasons discussed, the data functions are actually part of the finder service, not a separate product or service. The OCC has distinguished incidental products, which support business of banking activities, from products like the data set functions here that, although arguably distinct from a related banking product, really are so closely connected to the banking product that the banking product cannot be provided without it. In other words, the other product is effectively merged with and becomes part of the banking product and, hence, becomes itself part of the business of banking. OCC has said:

In analyzing the extent to which national banks may provide hardware and software, the OCC has distinguished between general purpose items, which can be used for purposes beyond banking services, and limited purpose items, which can be used solely for banking services. Limited purpose hardware is considered an indistinguishable part of banking services and, thus, part of the business of banking.

OCC Interpretive Letter No. 754, *supra*. See also OCC Interpretive Letter No. 737, *reprinted in* (1996-1997 Transfer Binder) Fed. Banking L. Rep. (CCH) ¶ 81,101 (August 19, 1996)(where a national bank was providing a closed stored value system to an institutional customer, the bank could as part of that service also provide system participants with certain hardware and software to be used for the stored value functions; the equipment was not viewed as a separate product or service) and OCC Interpretive Letter No. 345, *reprinted in*, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,515 (July 9, 1986).<sup>15</sup>

Another significant finder function is to bring together potential buyers and sellers. The OCC has found that one approach to this communication function is for the finder bank to provide an electronic medium to support communications between potential buyers and sellers so they can arrange their transactions. Thus, in OCC Conditional Approval No. 221, *supra*, the OCC found that, as part of the finder function, a national bank could provide hypertext links between the bank's retail banking web site and the web sites of third parties interested in selling products or services to the bank's customers. We said: "By providing links to third party vendors' web sites, the [LLC] merely introduces two parties who then engage in a transaction." See also, OCC Interpretive Letter No. 611, *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep.

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<sup>15</sup> The OCC said:

When the hardware is such that it is not to be used for uses beyond the [bank services], it may well be considered literally an indistinguishable part of the [banking services]. Accordingly, a national bank's sale of such hardware is permissible as a part of the [service] permitted under 12 U.S.C. § 24(Seventh), just as the bank's sale of checkbooks to its customers is a permissible part of offering checking accounts.

(CCH) ¶ 83,449 (Nov. 23, 1992) (national bank linking non-bank service providers to its communications platform of smart phone banking services was within its authority as a finder “in bringing together a buyer and seller”) and Letter from Julie L. Williams, Chief Counsel, October 2, 1996 (unpublished). For this reason, the Bank may communicate to its Retailers the offers to buy that result from their Bank hosted web sites as part of its Product.

Finally, by hosting the web site, the Bank does not become involved in the negotiations of the parties and thereby exceed its proper role as finder, *i.e.*, merely bringing parties together for a transaction that the parties themselves negotiate and consummate. The courts are likely to view retail web sites as inviting potential buyers to make an offer to the seller to buy the goods advertised on the site. Thus, in this case, the Retailers would retain the ability to reject a potential Internet buyer’s offer of any potential purchases that might arise from the web site hosted by the Bank. *See, generally*, W. A. Effross, “The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code,” 34 *San Diego L. Rev.* 1263 (1997) at 1329-1331.

Accordingly, the retail web site hosting component to the Bank’s Product is part of the business of banking and, thus, permissible for national banks. We now turn to several other aspects of the Product.

As noted, the Bank will provide Retailers with access to software that will enable the Retailers to design their web sites and software that enables the Retailer to build a catalog of product descriptions, pricing, delivery information and order forms. This is permissible. OCC has found a national bank can provide access to software that will enable bank customers to use or receive electronic banking services from the bank such as a specialized payment service or informational services. The software is “necessary” to use or fully enjoy the permissible service and, thus, is either part of the service (if limited function) or incidental thereto (if full function). Thus, in Conditional Approval No. 221, *supra*, the OCC found that providing full-function web browser software is a permissible incidental activity when a national bank is offering a home banking system based on web server technology using “Internet compatible” browser software. The fact that the customer might use the browser software for other non-banking purposes did not preclude the sale.<sup>16</sup>

The Bank will also process payments resulting from orders received from a Retailer’s web site. Clearly, payments processing and handling of accounts receivable is part of the business of banking. OCC Conditional Approval No. 289 (October 2, 1998) (national banks may acquire a minority interest in a firm that, among other things, provides accounts receivable processing and

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<sup>16</sup> *See also*, OCC Interpretive Letter No. 516, *supra* (national bank that is providing customers with a permissible database service of information relating to financial instruments can also provide software that enables the customers to download and analyze the information) and OCC Interpretive Letter No. 419, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,463 (Feb. 2, 1988) (national bank that is providing customers with a permissible electronic transactional and information service can provide software that enables customers to participate in the system).



accounts payable processing); OCC Conditional Approval No. 282 (July 7, 1998) (national bank may acquire an interest in a firm that would, among other things, engage in payments processing for the health care firms); and OCC Interpretive Letter No. 731, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,048 (July 1, 1996) (national banks as part of the banking business may collect and process accounts in relating to an electronic toll collection system).

The Bank will provide its Retailers with monthly reports on empirical data such as site “hits” and transaction volume arising from their web sites, including number and types of products sold. To the extent that these reports involve the processing and transmittal of information relating to specific payment transactions the Bank handles for the Retailer, it is part of the payment processing function and not a separate service.<sup>17</sup> OCC Interpretive Letter No. 731, *supra* and OCC Interpretive Letter No. 732, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,049 (May 10, 1996) (design, development, marketing, and maintenance of a network for electronic funds transfer and electronic data interchange permissible for a national bank). Cf. Letter from Julie L. Williams, Chief Counsel, October 2, 1996 (unpublished) (national bank acting as finder could maintain a database of transactions resulting from its finder activities was “integral” to the finder function).

As for the more general information and reports, the OCC has long held that as part of the business of banking, national banks may collect, transcribe, process, analyze, and store for itself and others banking, financial, or related economic related data. The general reports will involve the processing of banking, financial, or related economic data and, thus, are part of the business of banking.

An earlier version of 12 C.F.R. § 7.1019 stated that “as part of its banking business and incidental thereto, a national bank may collect, transcribe, process, analyze, and store for itself and others, banking, financial, or related economic data.”<sup>18</sup> Although in its 1984 revision of the ruling, the OCC deleted this statement because it believed that “specific examples [of permissible electronic activities] are inappropriate given the imprecision of terms and rapid pace of change in the data processing industry, the “analytical framework” embodied in the ruling remained the same.<sup>19</sup> There was no intent to narrow or restrict the substantive effect of the rule.<sup>20</sup>

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<sup>17</sup> Under its agreements with its Retailers, the Bank will have an obligation to maintain the confidentiality of the transaction specific data, e.g., that relating to specific purchases by customers of a Retailer, that the Bank will acquire by offering the Package.

<sup>18</sup> Interpretive Ruling 7.3500, 39 Fed. Reg. 14195 (Apr. 22, 1974).

<sup>19</sup> 49 Fed. Reg. 11157 (Mar. 26, 1984).

<sup>20</sup> OCC Interpretive Letter No. 677, *reprinted in*, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625 (June 28, 1995). *See also*, OCC Interpretive Letter No. 737, *supra* (national bank may provide transaction and information processing services to support an electronic stored value system); OCC Interpretive Letter No. 653, *supra* (national bank may act as an informational and payments interface between insurance underwriters and general insurance agents); and OCC Interpretive Letter No. 346, *reprinted in* (1985-1987 Transfer Binder) Fed. Banking L.

Thus, OCC has concluded that national banks may keep financial and other records of its customer's sales and disbursements arising from finder banking services provided by the bank. See OCC Interpretive Letter No. 653, *supra* (national bank acting as a finder for insurance could also keep financial and other records relating to the client agency sales, receipts and disbursements). See also, OCC Interpretive Letter No. 741, *supra* (national bank acting as finder for automobile dealers may also maintain a comprehensive system that allows dealers to track information on customers referred and to generate market statistics such as buying trends and cycles).<sup>21</sup>

Finally, as part of the Product, the Bank will calculate the sales taxes owed by its Retailers on their Internet sales. This activity is incidental to the retail web hosting and payments processing services and is thus permissible. In *Clement Nat'l Bank*,<sup>22</sup> the Supreme Court held that a national bank, incidental to its deposit services, could compute, report, and pay the state tax levied upon the interest earned by bank customers on their deposits.

## CONCLUSION

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Rep. (CCH) ¶ 85,516 (July 31, 1985) (national banks may maintain records on commodities transactions).

Case authority strongly supports the OCC precedent. In *Ass'n of Data Processing v. Board of Governors*, 745 F.2d 677 (D.C. Cir. 1984), the D.C. Circuit Court of Appeals upheld a Federal Reserve Board finding that data processing and database services were closely related to banking (and thus a proper activity for bank holding companies) if the "data to be processed ... are financial, banking or economic...." In reaching this conclusion the court said: "The record of this proceeding amply demonstrates, if any demonstration is needed, that banks regularly develop and process for their customers large amounts of banking, financial and economic data, and that they do so (and will presumably continue to do so) through the most advanced technological means." 745 F.2d at 689. Moreover, the court indicated that "economic data" would include: "agricultural matters, retail sales matters, housing matters, corporate profits matters, and anything of value in banking and financial decisions." 745 F.2d at 691.

<sup>21</sup> In *National Retailers Corp. v. Valley Nat'l Bank*, 411 F. Supp. 308 (D. Ariz 1976), *aff'd*, 604 F.2d 32 (9th Cir. 1979), a national bank was held not to have the authority to offer a data processing service to retailers involving the collection and compilation of information relating to their retail sales that had been collected by a special cash register. The district court held that no express provision of the National Bank Act authorized national banks to publicly market a retail information service ("RIS") and concluded that, since the RIS was not within the enumerated powers, the determining issue was whether the RIS was within the bank's "incidental powers." 411 F. Supp. at 313. Thus, by implication, the court held that the "business of banking" includes only the enumerated powers. This position has since been superceded by the Supreme Court's ruling in *NationsBank v. Variable Life Annuity Co.*, 513 U.S. 251 (1995), that the "business of banking" is not limited to the enumerated powers. The *National Retailers* court failed to consider that non-enumerated informational services can come within the "business of banking" and specifically that the processing of banking, financial and related economic data is part of the business of banking. *Ass'n of Data Processing, supra*. In light of these defects, the holding of *National Retailers* is not entitled to much weight. Moreover, it is distinguishable from the Bank's proposed retail data reporting services that are to be offered in connection with its finder services which, for the reasons discussed above, are clearly part of the business of banking.

<sup>22</sup> *Clement Nat'l Bank v. Vermont*, 231 U.S. 120 (1913).

Based upon the foregoing facts and analysis, and the representations made by the Bank in connection with its request, I conclude that the proposed activity is permissible for a national bank.

Sincerely,

/s/

Julie L. Williams  
Chief Counsel