

REQUEST LETTER

07-010

June 26, 2007

NAME
COMPANY
ADDRESS

Dear TP REP NAME (Auditing Division – Voluntary Disclosure Program)

On our client's behalf we are requesting that you review the following information and issues addressed herein. Our client is a calendar year taxpayer, who has not been contacted by your department on or any other agency on your behalf; is currently not undergoing nor have they been notified that they have been identified or selected for an audit by your department or by the Multistate Tax Commission; however, one of our client's entities, the Bank, has filed Utah corporate income tax returns in the past.

While not necessarily qualifying for a traditional voluntary disclosure agreement ("VDA"), many states have alternative arrangements for companies who have previously filed in their state. These arrangements are sometimes referred as a voluntary filing arrangement ("VFA"). Our client is seeking a VFA for the Bank and VDA's for sub 1 and the LLC, as described in detail below and in the Attachment hereto, if it determined that one or more of these entities had nexus in Utah. Neither the company nor its subsidiary entities are currently registered for any Utah taxes.

Under recently enacted FIN 48 accounting rules, SEC registrants, among others, must report potential income tax exposure issues on their financial statements. One of the areas of potential exposure is having nexus in a state where the business is not currently filing income/franchise tax returns. When deemed appropriate, one way of dealing with this and other related issues (*such as measurement; the concept of "effective settlement"; and the need for FIN 48 internal control processes, as mandated by Sarbanes-Oxley (SOX) Section 404*) is to pursue VDAs with the affected states.

As part of our client's attempt to comply with the requirements of FIN 48, they first engaged COMPANY to perform a Nexus Study, to determine if they had nexus creating activities in approximately 20 states. Once it was determined that it was likely that the Bank and possibly one or more members of its group had nexus in one or more of these states, the client requested that COMPANY contact the affected state departments of revenue, regarding a request that the department enter into a VFA or VDA with our client and/or receive clarification from the department, regarding whether or not our client [a nondomiciliary financial institution ("Bank"); their 100% owned subsidiary ("Sub 1"); and/or their LLC, a dual member limited liability company, taxed as a partnership ("LLC")] is, in fact, subject to income and/or franchise tax in your state.

In exchange for our client coming forward on a voluntary basis, if it is determined that either the Bank, Sub 1 and/or LLC are subject to your state's income and/or franchise tax, we are requesting that the lookback period be limited to the fewest number of years permissible under your statutes or internal VDA or VFA guidelines; and that all penalties of any kind be waived. In exchange our client will agree to file income and/or franchise tax returns for the current year and for the lookback period and pay interest at the statutory rate on the tax liability related to those tax years.

In addition, if it is determined that the Bank, Sub 1 and/or LLC do not have income and/or franchise tax nexus in your state and are, therefore, not subject to said taxes, we are requesting that based on facts contained in this letter and the attachment thereto (*Summary of bank's Subsidiary (Sub 1) and LLC's Formation and Activities*, to be known as the "Attachment") and, if necessary, the completion of your state's nexus questionnaire or other documentation, you provide a written ruling or other binding document that states that based on the facts as presented, the Bank, Sub 1 and/or the LLC do not have nexus and are not subject to your state's income and/or franchise tax.

Our client is requesting this ruling for two primary purposes. The first relates again to FIN 48 and the requirement to record potential state income tax liabilities. Being uncertain of whether or not a company has nexus in a state, could mean it may have to increase its reserve for a potential income and/or franchise tax liability, for which it may not actually have a liability. Thus, knowing whether or not our client actually does have a liability is critical for them, in order for them to comply with the requirements of FIN 48.

The second purpose is that receiving a ruling that establishes that the Bank, Sub 1 and/or LLC do not have nexus in a particular state for income and/or franchise tax purposes would be to potentially allow them to not have to book a tax liability for financial statement purposes would be to potentially allow them to not have to book a tax liability for financial statement purposes under FIN 48 and should provide, assuming the facts presented to your department are materially and adequately disclosed, them with protection against future assertions of liability by your department related to potential prior year tax liabilities. Further, unless there is a material change in the facts or in your state's tax law, rules, regulations, rulings or court cases, the ruling being sought should also provide our client with a relatively high level of assurance that your department will not attempt to assert a tax liability against them related to their current and/or future years.

Based on the facts that were identified and the conclusions researched, as a result of the Nexus Study performed on behalf of our client by COMPANY, it is our belief that while the Bank may have nexus in your state, it is unclear whether either Sub 1 or the LLC has nexus for income or franchise tax purposes in your state. We seek confirmation of these conclusions. In addition, regardless of what your determination is, in order to document your determinations for FIN 48 and financial statement purposes, we are requesting an

explanation of your determination, including citations of the statutes, rules, regulations, rulings and/or court cases you relied on to make your determinations.

It is our understanding that the Bank began business and began filing corporate income tax returns in your state in 1998 and discontinued filing tax returns in your state in 1999 because they either had an office or had one or more employees located in your state and either the office was closed or our client no longer had an employee located in your state. Once the Bank no longer had an office or employee(s) located in your state, they believed that they were no longer required to file tax returns in your state. Neither Sub 1 nor the LLC, both formed in 2001, have ever filed income tax returns in Utah.

It was not until COMPANY conducted the Nexus Study on our client's behalf that they were advised that the activities of their representatives, as discussed in the Attachment, might be sufficient to be considered to be nexus creating activities in some states.

As a result, our client has engaged us to pursue either a VDA or VFA with your department, in order to minimize their exposure to tax liabilities, interest and penalties. To that end we are requesting that you review the facts contained in this letter and the Attachment and, if you determine that the Bank, Sub 1 and/or the LLC have nexus in Utah (*based on the facts contained in the Attachment*) that you permit, in exchange for coming forward on a voluntary basis and even though the Bank filed returns in 1998 and 1999; the Bank, Sub 1 and/or other LLC to enter into a VFA or VDA, as applicable, with your department for the tax years between 2003 and the current year and that all prior year income tax liability be forgiven, along with any potentially applicable penalties.

To summarize our request, we are requesting that based on the various activities of the Bank, Sub 1 and the LLC you:

1. Determine whether or not the Bank has nexus in your state, including citations to statutes, rules, regulations, rulings or court cases that support your finding.
2. If the Bank has nexus in your state, permit the Bank to enter into a VFA to file Utah Corporation Income or Franchise Tax Returns and pay tax for calendar years 2004 through 2006, plus the current year; and that you agree to waive all penalties related to these returns and agree to not require our client to file tax returns for any tax years prior to those specified in the VFA.
3. Determine whether the LLC and/or Sub 1 have nexus in your state [*as explained in the Attachment for the LLC based on its limited activities and for Sub 1 as the 99% corporate partner of LLC*], including citations to statutes, rules, regulations, rulings or court cases that support your finding.
4. If you determine that the LLC and/or sub 1 have nexus in your state, permit the LLC and/or Sub 1 to enter into a voluntary disclosure agreement to file either the appropriate Utah Partnership and/or Utah corporation Franchise or Income Tax Returns, respectively, and pay the tax for calendar years 2004 through 2006, plus the current year; and that you agree to waive all penalties related to these returns and agree to not require our client to file tax returns for any tax years prior to those specified in the VDA.

5. If you determine that (*based on the facts contained in the Attachment*) that the Bank, Sub 1 and/or LLC do not have income tax nexus in your state, please provide a written ruling or other binding document that states that based on the facts as presented, stating that the Bank, Sub 1 and/or the LLC do not have nexus and are not subject to your state's income tax.
6. Similarly to #5 above, if you determine that it is uncertain whether or not the Bank, Sub 1 and/or LLC have nexus in your state, our client may be willing to consider filing returns on a prospective basis, in exchange for your agreement to decide any uncertainty as to potential nexus during those prior years in their favor.
7. In addition, please advise us of the availability or requirement of our client to file a combined or consolidated return in your state. If combined or consolidated filing is permitted, but not required, our client requests that it be granted the option of electing to file a Utah corporation combined or consolidated tax return, should they choose to do so.
8. Our client activities in Utah are limited to those performed by non-employee agents or representatives; therefore our client is not requesting voluntary disclosure for any other types of taxes, as they believe they are only potentially liable for corporate income taxes.
9. For years after 1999, our client has neither withheld nor collected any types of taxes.

Estimate of Income Tax Liability for 2004 through 2006

The Utah income tax liability, which is based on the filing of separate returns, excluding interest and penalty, is estimated to be:

<u>Entity</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>
Bank	\$xxx	\$xxx	\$xxx
Sub 1	\$xx,xxx	\$xx,xxx	\$xx,xxx
LLC	LLC is taxed as a partnership—income is flowed through to the Bank and Sub 1.		

The information necessary to estimate our client's tax liability for years prior to 2004 is not available at this time, however, given that operations in Utah have not varied significantly from year-to-year, the magnitude of the liability should be similar to estimated liabilities for 2004 through 2006.

Please review the above request and the Attachment and contact me by return mail, at the email address or the phone number listed above, so we can discuss next steps related to the VFA, VDA and/or ruling requests.

Sincerely,

NAME
Tax Executive

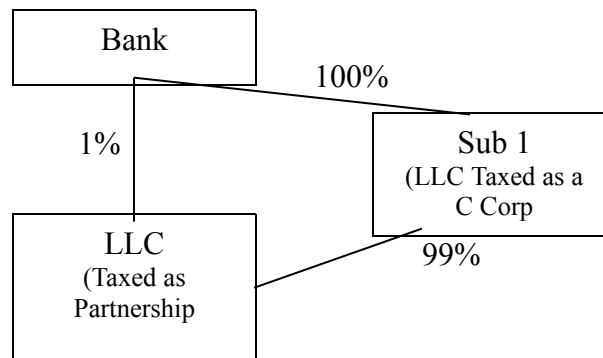
Enclosure

Attachment to Request Letter
SUMMARY OF BANK'S SUBSIDIARY (SUB 1)
AND LLC'S FORMATION AND ACTIVITIES

Ownership Structure and Formation of Entities

1. The bank owns 100% of Sub 1, an LLC taxed as a C corporation, and 1% of LLC, an LLC taxed as a partnership. Sub 1 owns 99% of LLC. All entities are calendar year taxpayers.
2. Sub 1 was formed under the laws of the State of Delaware in 2001. Sub 1 is registered to transact business and is commercially domiciled in a Midwest state other than the state where the Bank is commercially domiciled.
3. The LLC was formed under the laws of the State of Delaware in 2001. LLC is registered to transact business and is commercially domiciled in a Midwest state other than the state where the Bank is commercially domiciled.

BANK, SUB 1 AND LLC ORGANIZATIONAL STRUCTURE



Operational Background

4. The following is a general description of the out-of-state activities of the Bank. The bank utilizes over 30 independent "Relationship Managers" (RMs), located in at least 15 states, to identify, coordinate and generate loan originations from approximately 1,000 independent mortgage brokers ("Brokers"), located throughout the United States. These RMs and their brokers represent only the Bank and not Sub 1 or the LLC.
5. The Bank pays the RMs a commission based on loans brought to them by the RMs that were generated by the Brokers. Most of the RMs are independent contractors of the Bank and are paid by the Bank solely on a commission basis. Independent contractor RM commissions are reported annually by the Bank on Forms 1099. The Brokers are not paid by the bank or the RMs.

They receive their compensation from fees paid by the customers or so-called “yield spread premiums”.

6. Independent title companies in the various states close loans on the Bank’s documents, per the Bank’s instructions. All loans are reviewed and approved by Bank personnel in the Bank’s home state prior to closing. All loans documents are reviewed by the Bank’s quality control personnel before the loan is funded. All loans held by the Bank and the LLC are serviced by the Bank in the Bank’s home state.
7. For the first 30 to 60 days all out-of-state loans are owned by the Bank and are recorded on the books of the Bank, as loans available for sale. Once it is determined which out-of-state loans will be held, rather than sold, they are contributed to LLC and held by LLC. These so-called qualifying out-of-state loans, in the form of loan participations, are all contributed to the LLC. 1% of loan participation interests are contributed directly by the Bank to Sub 1, which then contributes them to LLC. LLC does not sell any of its loan participations. All loan participation interests contributed to and held by LLC are serviced, for an industry-standard arm’s length fee determined by both parties, by the Bank.
8. Foreclosures are managed by foreclosure specialists in the Bank’s loss mitigation department in the Bank’s home state. The Bank handles sales of all nonperforming loans. For the loans held by the LLC the Bank either sells the mortgage or the property with the loss booked on LLC’s books quarterly. Thus, following a foreclosure, the Bank may on rare occasions own real property in a particular state until said property is disposed of. Neither Sub 1 nor the LLC own or rent property outside of Indiana or Illinois.
9. The Bank’s business purpose for this structure is so that through the segregation of certain real estate and investment operations into a separate partnership, LLC the Bank may achieve several business advantages. These advantages include but are not limited to: 1) potential source of new capital; 2) reduced interest rate exposure without detrimental effect to the loan and investment portfolio mix; 3) segregation of liability risk; 4) REMIC Election, Securitization of loans and/or Private Placement of REMIC Certificates Backed by Loans as Collateral; and 5) lower effective state tax rate. A more detailed explanation of these business purposes is available upon request.

Accounting and Loan Administration

10. Intercompany fees including rent expense, management fees, and loan servicing fees are being recorded between the Bank and LLC. Separate general ledgers are being generated for LLC, Sub 1 (LLC’s 99% owner) and the Bank only (LLC’s 1% owner). These general ledgers reflect the appropriate proportionate share of investment in subsidiary. There is no

payable/receivable between Bank and LLC at year end, as this is settled through capital contributions on a monthly basis. Monthly general ledgers are printed for LLC and reflect LLC's equity.

11. All of LLC's loans are segregated on separate-entity ledgers. The general ledger transfers loans and payments between LLC and the Bank. Once a month there is a true-up of funds due to and from LLC, Sub 1 and the Bank. These amounts, which represent income, expenses and contributions of capital, are treated as either contributions to or returns of capital.

Management and Intercompany Transaction of the Bank, Sub 1 and LLC

12. LLC member board meetings are held annually. Separate meeting minutes are kept. LLC has its own Investment Policy, which includes Consumer Home Equity and Residential First Mortgage loan Participations, as acceptable investment instruments.
13. LLC and Sub 1 each have one part-time employee located in their respective Midwest states of commercial domicile. LLC and Sub 1 both pay rent for office space in the Bank's headquarters building. The LLC pays management fees to both the Bank and Sub 1. Sub 1 pays a management fee to the Bank. A securities portfolio was added to LLC in 2006, which includes bonds and U.S. agencies. In 2007 mortgage backed securities were added to the portfolio held by the LLC. The LLC's expenses for the year ended December 31, 2005, were approximately \$550,000.
14. Advisory Services Agreements between the Bank and Sub 1 and LLC cover the following services:
 - Accounting Assistance, Insurance, Financial Statement Preparation, Other Financial Services, Legal, Personnel and Salary Administration, Regulatory Compliance, and Tax Return Preparation.
15. The fee paid to the Bank for these services by Sub 1 and LLC is based on a percentage of their respective gross assets as of January 1 of each year.
16. A sublease and License Agreement states that there is identified space, an office at the headquarters of the Bank, for which LLC and Sub 1 pay annual rent expense of \$3,000 and \$12,000, respectfully.

- End of Attachment to Request Letter -

RESPONSE LETTER

July 30, 2008

NAME

COMPANY

ADDRESS

Re: Private Letter Ruling Request 07-010
Activities of a non-domiciliary bank and related parties with respect to Utah
nexus

Dear Ms. NAME:

We have received your letter requesting a ruling as to whether your client's activities as a non-domiciliary financial institution create nexus for Utah corporation franchise and income tax purposes and if so, whether Utah is willing to enter into a voluntary filing and disclosure agreement based on the facts and circumstances represented in your letter.

I apologized for the delay in responding to your request. Due to some personnel and transition issues, we have run into a backlog for our Rulings.

The facts outlined in your letter include the following:

1. The banking parent company ("the Bank") holds interests in two limited liability companies. The first limited liability company has elected to be taxed as a corporation at the federal level and will be referred to as "Subsidiary." The second limited liability company has elected to be treated as a partnership at the federal level and will be referred to as "LLC." (The elections are also effective for purposes of Utah income taxes.)
2. The Bank owns 100% of Subsidiary and 1% of LLC. Subsidiary owns the remaining 99 % of LLC, thus leaving the Bank with 100% effective control and ownership of both Subsidiary and LLC.
3. The Bank utilizes more than 30 independent relationship managers ("RM's") to generate loan originations from independent mortgage brokers throughout the United States. The Bank pays a commission to the RM's based on loans brought to them through the independent mortgage brokers.
4. Independent title companies in various states close loans on the Bank's documents per the Bank's instructions. Loan review and approval is performed by bank personnel in its home state prior to closing.
5. The Bank holds loans for 30 to 60 days after closing. Loans are either sold to third parties or transferred to LLC and Subsidiary as loan participations.

6. Foreclosures are handled by foreclosure specialists in the Bank's loss mitigation department. Following a foreclosure, the Bank may on rare occasions own real property in a particular state until the property is disposed of.

You requested a response with regard to nine items on page three of your letter. Our response to each of the nine items is presented below:

- 1. Determine whether or not the Bank has nexus in your state including citations to statutes, rules, regulations, rulings or court cases that support your finding.**

The Utah Corporation Franchise Tax imposes a tax on the Utah taxable income of a foreign or domestic corporation "for the privilege of exercising its corporate franchise or for the privilege of doing business in the state." Utah Code Ann. §59-7-104. The Utah Corporation Income Tax imposes a tax "on the Utah taxable income derived from sources within this state other than income for any period that the corporation is required to include in its tax base under Section 59-7-104." Utah Code Ann. §59-7-201.

The bank utilizes RM's, "most of whom are independent agents,"¹ to identify, coordinate and generate loan originations from mortgage brokers. These RM's and their brokers represent the Bank. The mortgage loans closed in Utah are on properties located in Utah. These Utah activities are directed toward the Utah real estate market and are significantly associated with the Bank's ability to establish and maintain a market for its mortgage loans in Utah. It is clear that these activities, if conducted by employees of the Bank, would constitute nexus. In *Scripto v. Carson*, 362 U.S. 207 (1960), a sales tax case, the Supreme Court held that the fact that Scripto used independent contractors to solicit sales, rather than its own employees, was without constitutional significance. The presence and activities of those independent contractors was sufficient to provide nexus for Scripto. We believe the same conclusion is warranted here. See, also, *Tyler Pipe Industries v. Washington Dep't of Revenue*, 483 U.S. 232 (1987). We find the Bank through the activities described in your letter has established nexus with Utah and is taxable under either UCA 59-7-104 (Utah corporation franchise tax) or UCA 59-7-201 (Utah corporation income tax).²

Utah has adopted Utah Administrative Rule R865-6F-32, which provides guidance on the allocation and apportionment of income from financial institutions. Pursuant to that rule, Utah receipts, for purposes of the sales factor, include interest income and loan servicing fees from loans secured by real property if the real property is located in Utah. Rule R865-6F-32(3)(d)(i) and (k). Furthermore, the rule provides that that the factors of all members of the unitary group must be included in the apportionment formula. R. 865-

¹ We do not believe the result would be different even if all of the Relationship Managers were independent contractors.

² While Public Law 86-272 limits a state's jurisdiction to impose its corporate income/franchise tax on a business that makes sales of tangible personal property to businesses whose instate activities exceed the mere solicitation of orders, it does not limit state taxing authority over business enterprises that engage in business activity other than the sale of tangible personal property, such as the banking enterprise described in your letter.

6F-32(2)(d). As noted below, we believe the Bank and Subsidiary are both members of a unitary group and must file a combined report.

Further, the Tax Commission issued an advisory opinion on November 27, 2001 that is public information, identified as Advisory Opinion number 01-013 (copy attached) addressing the nexus issue with respect to out of state banks making loans to customers within Utah. The reasoning of that opinion is equally applicable here.

- 2. If the bank has nexus in your state, permit the bank to enter into a “Voluntary Disclosure Agreement” (VDA) to file Utah Corporation Income or Franchise Tax Returns and pay tax for calendar years 2004 through 2006 plus the current year; and that you agree to waive all penalties related to these returns and agree to not require our client to file tax returns for any tax years prior to those specified in the VFA.**

The Tax Commission agrees to allow the Bank to enter into a Utah Voluntary Disclosure Agreement using the look back period requested in the above paragraph.

- 3. Determine whether the LLC and/or Sub 1 have nexus in Utah [as explained in the Attachment for the LLC based on its limited activities and for Sub 1 as the 99% corporate partner of LLC], including citations to statutes, rules, regulations, rulings or court cases that support your finding.**

The activities of the LLC taxed as a partnership, both income and loss and its factors, flow up through and are considered activities of Subsidiary and the Bank. (See Utah Administrative Rule R865-6F-8(10)(e)).

Subsidiary will effectively be treated as having nexus in Utah because it is a member of a unitary group that has nexus in Utah. For reasons set out in our response to Question 7, we believe the Bank and Subsidiary are members of a unitary group and must file a combined return. Utah Administrative Rule R865-6F-32(15)(b) essentially employs the ‘Finnegan’ approach with respect to the sales and receipts factor and, therefore, if any financial institution member of a unitary group has nexus in Utah, the sales and receipts from each financial institution are attributable to Utah to the extent provided under the attribution rules of the above Utah administrative rule. Therefore, for purposes of attributing sales to the Utah sales numerator of the receipts factor, it is not necessary to make a Utah nexus determination with respect to each of the members of the unitary group so long as at least one entity within the unitary group has Utah nexus.

- 4. If you determine that the LLC and/or sub 1 have nexus in your state, permit the LLC and/or sub 1 to enter into a voluntary disclosure agreement to file either the appropriate Utah Partnership and/or Utah corporation Franchise or Income Tax Returns, respectively, and pay the tax for calendar years 2004 through 2006, plus the current year; and that you agree to waive all penalties related to these returns and agree to not require our client to file tax returns for any tax years prior to those specified in the VDA.**

The Tax Commission is willing to enter into a voluntary disclosure agreement allowing the Bank and Subsidiary to file Utah corporation franchise tax returns on a combined unitary basis for years 2004 through 2006 and beyond and to waive all penalties associated with earlier years. The Tax Commission is willing to forgive tax due, if any, from pre-2004 years in exchange for the above returns and the Bank's agreement to file prospectively, assuming no significant change in facts or Utah statutes/case law determinations affecting current taxation policies.

- 5. If you determine that (based on the facts contained in the Attachment) that the Bank, Sub 1 and/or LLC do not have income tax nexus in your state, please provide a written ruling or other binding document that states that based on the facts as presented, stating that the Bank, Sub 1 and/or the LLC do not have nexus and are not subject to your state's income tax.**

Since we have determined that the Bank and Subsidiary have nexus in Utah, and that LLC's income and factors flow through pro rata to the Bank and Subsidiary, this question is moot.

- 6. Similarly to #5 above, if you determine that it is uncertain whether or not the Bank, Sub 1 and/or LLC have nexus in your state, our client may be willing to consider filing returns on a prospective basis, in exchange for your agreement to decide any uncertainty as to potential nexus during those prior years in their favor.**

Since we have determined that the Bank and Subsidiary have nexus in Utah, and that LLC's income and factors flow through pro rata to the Bank and Subsidiary, this question is moot

- 7. In addition, please advise us of the availability or requirement of our client to file a combined or consolidated return in your state. If combined or consolidated filing is permitted, but not required, our client requests that it be granted the option of electing to file a Utah corporation combined or consolidated tax return should they choose to do so.**

Based on the information provided, it appears that the activities of the Bank, Subsidiary and LLC are interrelated, and integrated and therefore would meet the Utah definition of a unitary business. Utah's unitary requirements are found in Utah Code Ann. §59-7-101(28)(a), which provides as follows:

- (28)(a) "Unitary group" means a group of corporations that:
- (i) are related through common ownership; and
 - (ii) by a preponderance of the evidence as determined by a court of competent jurisdiction or the commission, are economically interdependent with one another as demonstrated by the

following

factors:

- (A) centralized management;
- (B) functional integration; and
- (C) economies of scale.

From the facts presented, we conclude that the Bank and Subsidiary are members of a unitary group. Therefore, the Bank and Subsidiary are required to file a Utah combined water's edge report under UCA § 59-7-402. The income of LLC, and its apportionment factors, will flow through pro rata to the Bank and Subsidiary on the combined return. (The Bank does have the option to file a worldwide combined report under UCA §59-7-403. That election, once made, may only be revoked with the consent of the commission.)

8. Our client activities in Utah are limited to those performed by non-employee agents or representatives; therefore our client is not requesting voluntary disclosure for any other types of taxes, as they believe they are only potentially liable for corporate income taxes.

Pursuant to your request, the voluntary disclosure agreement will be limited to corporate income and franchise tax.

9. For years after 1999, our client has neither withheld nor collected any types of taxes.

Our agreement to enter into a voluntary disclosure agreement is based, in part, on your representation that neither the Bank, Subsidiary, nor LLC withheld or collected any types of taxes.

On receipt of this letter, please contact AGENCY REP by telephone at ###-###-####, by e-mail at EMAIL ADDRESS, or by mail at ADDRESS, to formalize the voluntary disclosure agreement.

For the Commission,

Marc B. Johnson
Commissioner

07-010
MBJ/cms