

P-98-14



**Office of Thrift Supervision**  
Department of the Treasury

*Chief Counsel*

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6251

December 21, 1998

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**Re: Payment of Finders' Fees for Referral of Trust Business**

Dear [ ]:

This responds to your letter, submitted on behalf of [ ], Illinois ("Association"), requesting that the Office of Thrift Supervision ("OTS") confirm your conclusion that the Association may pay finders' fees for the referral of trust business to the Association.

In brief, we conclude that the Association may pay fees to persons and entities that refer trust business to the Association, subject to the conditions set forth herein.

**Background**

On [ ], the Association was authorized by the OTS to exercise full trust powers in Illinois. As part of the marketing plan for its trust operation, the Association intends to establish relationships with parties that are in a position to refer trust business to the Association and to pay those parties for the referrals. You state that examples of parties with whom the Association intends to establish relationships include attorneys, accountants, insurance brokers, realtors, other financial institutions, investment advisers, existing customers of the Association, and other individuals

familiar with the Association.<sup>1</sup> The activities to be performed by these parties will be limited to making the referral and, in some cases, facilitating the transfer of documents between the trust customer and the Association once an account is established. The referring parties will not perform any fiduciary activities.

You indicate that the Association is currently contemplating three possible arrangements for the payment of finders' fees. One arrangement would be payment of a flat fee per referral, with the fee varying based on the type of trust account that resulted from the referral. The second possible arrangement would be to pay parties who refer investment management business to the Association a decreasing percentage of the fees generated by the resulting trust account for some specified period of time (e.g., 20% of first-year fees and 10% of second-year fees). The third possible arrangement would be payment through a points system, in which the party making the referral would be awarded a certain amount of points for business generated as the result of the referral, which could be redeemed by the recipient for cash or prizes, such as tickets to local sporting events and discounts on bank products or services. The number of points awarded to a referring party would vary based on the type of trust account that resulted from the referral.

You represent that the proposed finders' fee arrangements will not result in any increased charges to trust customers. Rather, the Association will pay the finders' fees out of profits generated by its trust department. You also represent that the Association will price its trust services consistent with prevailing market rates. With regard to applicable state law, you indicate that your review of Illinois law has uncovered no express prohibition against an Illinois-chartered fiduciary paying finders' fees for referrals of trust business. Moreover, you indicate that you have been informally advised by an attorney for the Illinois Commissioner of Banks and Real Estate that the Commissioner generally takes the position that finders' fees for referrals of trust business are not prohibited by Illinois law, so long as the referred customers are aware that such fees are being paid.

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<sup>1</sup> You have informed us that the Association does not anticipate that any of the potential referring parties will be affiliates of the Association. Any transactions between the Association and its affiliates would be subject to the transactions with affiliates restrictions set forth at 12 U.S.C. § 1468 and the OTS's transactions with affiliates regulations set forth at 12 C.F.R. §§ 563.41-563.43 (1998). In addition, your letter briefly mentions the Association's intentions regarding establishing an incentive compensation program for employees and compensation for a trust business development officer. You have not asked us to opine on, or provided sufficient information that would enable us to opine on, the permissibility of these arrangements and we express no opinion about them.

## Discussion

To date, the OTS has not addressed the specific question you raise.<sup>2</sup> However, a review of OTS opinions on other issues and precedent from the Office of the Comptroller of the Currency (“OCC”) leads us to conclude that a federal savings association may pay a finders’ fee for the referral of trust business.

In a 1994 opinion discussing a branching issue, the OTS mentioned in passing a finders’ fee arrangement where a federal savings association shared commissions earned from its trust operations with an affiliated broker-dealer who served as a marketing agent for the association’s trust services.<sup>3</sup> Furthermore, OTS regulations impliedly recognize that a federal savings association may pay a finder’s fee to brokers and employees who introduce a depositor to the association.<sup>4</sup>

In authorizing federal savings associations to exercise fiduciary powers, Congress expressly intended to give federal savings associations “the ability to offer trust services on the same basis as national banks.”<sup>5</sup> In 1987, the OCC expressly approved payment of finders’ fees by a national bank for the referral of trust business by other financial institutions.<sup>6</sup> The OCC has reiterated and refined this position in several subsequent opinions.<sup>7</sup>

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<sup>2</sup> OTS Op. Acting Chief Counsel (June 13, 1994); see also FHLBB Op. Deputy Director, Policy and Projects Division (November 21, 1983) (a savings association may contract with a major retail chain store to act as a “finder” in introducing customers to deposit accounts of the association and receive a fee therefor). The November 21, 1983 opinion was subsequently withdrawn because the association did not conduct the activity as initially represented. See FHLBB Letter Gen. Counsel (January 25, 1984).

<sup>3</sup> OTS Op. Acting Chief Counsel (June 13, 1994) at 3, 7.

<sup>4</sup> 12 C.F.R. § 561.16(b) (1998). Cf. 12 C.F.R. § 550.180 (1998) (a federal savings association may “purchase services related to the exercise of fiduciary powers from another association or other entity under a written agreement.”)

<sup>5</sup> S. Rep. No. 96-368 at 13 (1980), reprinted in 1980 U.S.C.C.A.N. 248.

<sup>6</sup> OCC Trust Interpretive Letter # 78, Deputy Comptroller for Trust and Compliance (March 4, 1987) (referrals from financial institutions).

<sup>7</sup> See, e.g., OCC Interpretive Letter # 504 (May 18, 1990) (referrals from financial institutions and other parties); OCC Trust Interpretation # 249 (May 23, 1990) (referrals from state-chartered bank); OCC Interpretive Letter # 607 (August 24, 1992) (referrals from financial institutions and other parties). It was not until the 1992 Letter that the OCC invoked the authority of 12 C.F.R. § 7.7200 (now § 7.1002), which allows national banks to act as finders and accept a fee for doing so, to support its conclusion that national banks can pay finders’ fees for the referral of trust business, which was reached in 1987.

As your letter notes, the OCC has imposed various conditions on the payment of finders' fees for the referral of trust business. Those conditions include: (1) the fee must be reasonable under the circumstances;<sup>8</sup> (2) the fact that the person making the referral will receive a finders' fee must be fully disclosed to the prospective customer; (3) the party making the referral must ensure that prospective customers are aware that the institution alone will perform the fiduciary activities;<sup>9</sup> (4) the party making the referral must fully disclose to the prospective customer the extent of any support services to be performed by the referring party; (5) an ongoing fee-paying arrangement with respect to a particular account must terminate when the account is closed (or in any event continue for no longer than ten years), so long as the relationship does not create an inference of joint control under applicable state law;<sup>10</sup> and (6) for trust services provided to employment benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), the institution must ensure that the fee arrangement does not violate any provision of ERISA.<sup>11</sup> After reviewing each of these conditions, we believe that they represent appropriate limitations on the proposed activity. Accordingly, in paying fees for the referral of trust business, the Association would be subject to those conditions. The fee-payment program should be run fairly, equitably and free of conflicts of interest.

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<sup>8</sup> We note that in Interpretive Letter # 607 (August 24, 1992), the OCC found that payment to a finder of 20 percent of all fees earned on an account for five years, and payment of 10 percent of such fees for an additional five years, was "reasonable." Moreover, as the OCC has observed, excessively high fees or fee arrangements that continue over a period of years could create an appearance of profit-sharing, which in turn could lead to an inference that the party making the referral has the ability to direct or control the activities of the Association. OCC Interpretive Letter # 504 at 4-5. At least one of the possible fee-paying arrangements described in your letter has the potential to continue over a period of time. In this regard, we note that the OCC, applying state law, has determined that an ongoing fee relationship for up to ten years did not create an inference of joint control. *Id.* As such, any ongoing fee arrangements the Association enters into may continue no longer than ten years, or until the account is closed, whichever occurs sooner, so long as the relationship does not create an inference of joint control under applicable state law.

<sup>9</sup> As the OCC has observed, the finder should not have a fiduciary relationship with customers or be parties to the referred accounts either as co-trustees or co-agents. No finder should be authorized to make any representations or engage in negotiations on behalf of the Association, and all promotional materials should clearly state that the only services being provided will be those provided by the Association. OCC Interpretive Letter # 504 at 5.

<sup>10</sup> See n.8, *supra*.

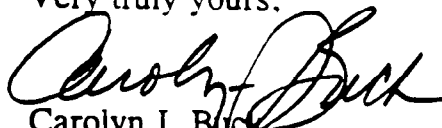
<sup>11</sup> See OCC Interpretive Letter # 607 at 16-17; OCC Interpretive Letter # 504 at 5-7.

The OCC has also detailed the types of activities a finder may perform with respect to accounts that are created as a result of a referral.<sup>12</sup> You have informed us that, other than making the referral itself, the only activity contemplated for the referring party is the occasional facilitation of document transmittal between the trust customer and the Association. These activities are within the permissible activities of a finder. So long as the Association operates its fee-payment program as set out in your letter and consistent with the conditions and limitations set forth herein, we conclude that the Association may pay finders' fees for the referral of trust business.

In reaching the foregoing conclusions, we have relied on the factual representations made in the material you submitted to us and in subsequent telephone conversations, as summarized herein. Our conclusions depend on the accuracy and completeness of those facts. Any material difference in facts of circumstances from those described herein could result in different conclusions.

If you have any questions regarding this matter, please feel free to contact Timothy P. Leary, Counsel (Banking & Finance), at (202) 906-7170.

Very truly yours,



Carolyn J. Buck  
Chief Counsel

cc. Regional Directors  
Regional Counsel

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<sup>12</sup> OCC Interpretive Letter # 607 at 9-16. Examples of permissible activities are: performing administrative and record-keeping functions, transmitting documents, obtaining customer signatures, scheduling sales calls, performing market research, distributing brochures, and conducting seminars.