Office of Thrift Supervision
Department of the Treasury
1700 G Street, N.W., Washington, D.C. 20552 • (202) 906-6000

December 14, 1994

[redacted]

RE: Loan Procurement Fees

Dear [redacted]

This responds to your requests for interpretive guidance regarding 12 C.F.R. 563.40(a), which prohibits savings associations from paying loan procurement fees to affiliated persons. Your requests were made on behalf of both parties to a contractual dispute regarding the appropriateness of certain fees charged by [redacted] (the "Mortgage Broker"), to [redacted] (the "Association"). You do not ask us to evaluate the particular facts and circumstances of the dispute between the parties, but rather to provide general interpretive guidance regarding § 563.40(a), so that the legal standards applicable to the dealings between the parties to the dispute will be clearer.

In particular, you ask whether the OTS final decision in In re Simpson, OTS Order No. 92-123, Final Decision and Order (Nov. 18, 1992), order affirmed, Simpson v. OTS, 1994 U.S. App. LEXIS 17365 (9th Cir. 1994), rehearing denied, August 30, 1994 (Simpson), overruled or modified a Federal Home Loan Bank Board ("FHLBB") opinion issued May 22, 1987, interpreting the scope of 12 C.F.R. § 563.40(a). For reasons set forth below, we conclude that Simpson did not overrule or modify the FHLBB opinion. Accordingly, you may continue to rely on this opinion.

Background

The Mortgage Broker previously requested written confirmation that it could rely on a former FHLBB opinion interpreting 12 C.F.R. § 563.40(a). See FHLBB Op. by Williams, May 22, 1987, n. 10. There, the FHLBB concluded that reasonable fees paid to affiliated persons in connection with loans recommended to the institution "for actual services performed (e.g., origination and servicing)" were permissible under 12 C.F.R. § 563.40(a), whereas finders fees were not. By letter dated October 7, 1994, the OTS confirmed that the FHLBB opinion continues to be valid and binding precedent.

On October 17, 1994, the Association submitted a follow-up letter requesting clarification regarding whether the OTS final decision in Simpson overruled or modified the cited FHLBB opinion. The Association notes that the cited FHLBB opinion states that fees for "actual services performed" do not violate 12 C.F.R. § 563.40(a). By contrast, the Simpson decision states that all procurement fees -- earned or unearned -- are prohibited. By letters dated November 14 and 23, 1994, the Mortgage Broker provided supplementary information in response to the issues raised by the Association's request.

Discussion

Section 563.40(a) provides:

> No affiliated person of a savings association may receive, directly or indirectly, from such association, any subsidiary thereof, or any other source, any fee or other compensation of any kind in connection with the procurement of any loan from such association or subsidiary thereof.

In interpreting the scope of this provision, the FHLBB distinguished between finders fees or other compensation received in return for loan solicitation and referrals, and reasonable payments for other types of services actually rendered in connection with the origination of loans. The FHLBB opined that the former are prohibited by the regulation,[1] while the latter are permitted.[2]

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[1] FHLBB Op. by Williams, May 22, 1987; FHLBB Op. by Williams, July 9, 1986; FHLBB Op. by Miskovsky, Sept. 10, 1979; FHLBB Op. by Goldberg, Jan. 3, 1977; and FHLBB Op. by Taubert, Nov. 28, 1975.

[2] FHLBB Op. by Williams, May 22, 1987 (loan origination and servicing fees are not prohibited by 12 C.F.R. § 563.40(a)); and FHLBB Op. by Williams, Nov. 19, 1986 (real estate brokerage fees and commissions are not prohibited by 12 C.F.R. § 563.40(a)).

This distinction is consistent with § 563.40, which is divided into two paragraphs. Paragraph (a) applies exclusively to the payment of loan procurement fees (i.e., fees for finding loan applicants) to affiliated persons. These types of fees are absolutely prohibited, even in situations where an affiliated person performs actual services by investing time and money in the search for loan applicants. Paragraph (b) applies to fees paid for loan origination services (such as title examinations, appraisals, credit reports, drawing of papers, loan closings, and other services necessary and incident to loan origination). Referral fees for loan origination services are also prohibited. However, fees for loan origination services actually performed are not.[3]

In Simpson, the former president and chairman of the board of a savings association used his influence to procure a loan from the savings association on behalf of a third party, in exchange for the third party's agreement to purchase assets held by the president.[4] In response to the president's assertion that § 563.40(a) permits compensation for goods or facilities actually furnished, the OTS Director held that § 563.40(a) "bars affiliated persons from receiving any fee or other compensation -- earned or unearned -- in connection with the procurement of a loan."[5]

The Simpson decision only addressed consideration received in exchange for procurement of a loan to an institution and restated the FHLBB position that § 563.40(a) prohibits all such fees. Simpson did not address or limit loan origination fees. Accordingly, the Simpson decision is not inconsistent with FHLBB opinions permitting reasonable fees for loan origination services actually rendered by affiliated persons. Thus, you may continue to rely on these opinions, including FHLBB Op. by Williams, May 22, 1987, n. 10.

We are aware that the prohibition on payments to affiliated persons for loan solicitation services actually rendered effectively prevents mortgage brokers that are affiliated persons from doing business with affiliated savings associations on a profitable basis. As part of the regulatory review mandated by § 303 of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160 (1994), the OTS

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[3] See 41 Fed. Reg. 35812, 35818 (Aug. 24, 1976); 40 Fed. Reg. 43832, 43838-39 (Sept. 23, 1975).

[4] See also In re Lopez, OTS Order No. 94-23 (May 17, 1994) at 24 (involving similar conduct by affiliated persons), appeal docketed No. 94-1449 (D.C. Cir. July 15, 1994).

[5] Simpson, at 27, n. 26, citing United States v. Grissom, 814 F.2d 577, 579-580 (10th Cir. 1987).

may re-evaluate § 563.40(a). In its present form, however, § 563.40(a) contains no exception for loan solicitation services actually performed. Thus, any portion of the Mortgage Banker's fee that is attributable to loan solicitation services (as opposed to loan origination services) is prohibited.

If you have further questions, please feel free to contact, Karen Osterloh, Counsel (Banking and Finance), at (202) 906-6639.

Very truly yours,

Karen Solomon
Deputy Chief Counsel

cc: Regional Director
Regional Counsel
Central Region