Office of Thrift Supervision
Department of the Treasury

1700 G Street, N.W., Washington, D.C. 20552 • (202) 906-6000

August 28, 1995

[redacted]

Re: Bank/Thrift Interaffiliate Arrangements

Dear [redacted]

This responds to your letter of March 14, 1995, submitted on behalf of [redacted] ("Holding Company"), requesting confirmation that the Holding Company's federal savings association subsidiaries may: (a) provide basic banking services to customers of the Holding Company's commercial banks; and (b) obtain basic banking services from those commercial banks for the savings associations' customers. You also request confirmation that no branching or other approval is required from the Office of Thrift Supervision ("OTS") before the savings associations and affiliated banks enter into the proposed servicing arrangements.

For the reasons explained below, we conclude, under the specific circumstances presented, that the savings associations have authority to enter into the proposed interaffiliate customer service arrangements and need not obtain prior approval by the OTS.

I. Background

The Holding Company owns [redacted] subsidiary banks, [redacted] of which are located in [redacted] ("State A") and one of which is located in [redacted] "State B"). The Holding Company recently acquired [redacted] federal savings association subsidiaries located in primarily in [redacted] ("State C"). However, one of the savings associations has a single branch in State A. [redacted]

The Holding Company's subsidiary banks have for a number of years provided basic banking services (i.e., deposits, withdrawals, check cashing and loan payments) on a reciprocal basis to each other's customers. The Holding Company wants to include its new savings association subsidiaries in this interaffiliate network. Because

there is a significant flow of commuter and commercial traffic among the different areas where the Holding Company's subsidiaries are located, expanding the interaffiliate network to include the newly-acquired savings associations is expected to enhance customer service and convenience.

The scope of permissible interaffiliate arrangements (and whether these arrangements constitute branching) has evolved in recent years. An October 1992 Chief Counsel opinion concluded that federal law and regulations do not prohibit savings associations from entering into interaffiliate arrangements with other savings associations. However, the opinion stated that OTS treated the establishment of such interaffiliate arrangements as tantamount to the establishment of new branches that required prior OTS approval.[1]

Around the same time, the Office of the Comptroller of the Currency ("OCC") issued an opinion concluding that national banks may obtain deposit, withdrawal, and loan payment services for their customers from affiliated national banks without being deemed to establish new branches.[2] More recently, a December 1994 OTS Chief Counsel opinion ("December 1994 Opinion") also concluded that federal savings associations may enter into interaffiliate banking arrangements with other federal savings associations without filing branching applications.[3]

Beyond the question of whether these arrangements constitute branching, there is the issue of what types of institutions are appropriate parties to such arrangements. The OCC issued an opinion stating that it would not object to an interaffiliate arrangement between the national bank subsidiaries of a bank holding company ("BHC") and its federal savings association subsidiary.[4] In that opinion, the OCC stated that "while this relationship is permissible from the standpoint of laws governing national banks, it also must be analyzed under laws governing federal savings associations. This letter expresses no opinion with respect to that issue."[5] Thus, while the OCC has approved bank/thrift interaffiliate arrangements from the bank's point of view, we must now determine if these arrangements are permissible from the thrift's point of view.

---

[1] OTS Op. Chief Counsel (October 10, 1992).

[2] OCC Interpretative Letter No. 610 (October 8, 1992).

[3] OTS Op. Chief Counsel (December 30, 1994).

[4] OCC Op. by Thompson (Oct. 18, 1993).

[5] Id. at n. 2.

II. Discussion

A. Authority Of A Federal Savings Association To Obtain Customer Services From An Affiliated Bank

Section 101 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("IBBEA")[6] generally authorizes interstate bank acquisitions by BHCs anywhere in the country, effective one year after its date of enactment on September 29, 1994.[7] IBBEA § 102 generally authorizes mergers of banks located in different states beginning on June 1, 1997, but only in states that have not "opted out" of the IBBEA.[8] IBBEA § 103 provides that national banks may generally establish de novo branches in states in which they do not currently operate, but only in states that expressly authorize such branching.[9]

The IBBEA also contains provisions expressly addressing interaffiliate customer service relationships involving banks. IBBEA § 101(d) amends § 18(r) of the Federal Deposit Insurance Act ("FDIA"),[10] effective September 29, 1995, to provide that:

> Any bank subsidiary of a bank holding company may receive deposits, renew time deposits, close loans, service loans, and receive payments on loans and other obligations as an agency for a depository institution affiliate.[11]

The FDIA defines the term "depository institution" to include, inter alia, savings associations.[12] Thus, the IBBEA expressly authorizes commercial banks to provide basic banking services to the customers of affiliated savings associations.

---

[6] Pub. L. No. 103-328 (September 9, 1994).

[7] 12 U.S.C.A. § 1842(d) (West Supp. 1995).

[8] 12 U.S.C.A. § 1831u (West Supp. 1995).

[9] 12 U.S.C.A. § 36(g) (West Supp. 1995).

[10] 12 U.S.C.A. § 1828(r)(1) (West Supp. 1995).

[11] See OTS Op. Chief Counsel (Dec. 30, 1994) for a discussion of the permissible scope of these services as reflected in the legislative history of the IBBEA. For example, the legislative history indicates that the term "receive deposits," as used in § 101(d), means accepting deposits for existing accounts and is not meant to include opening new accounts. H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. p. 49 (1994).

[12] 12 U.S.C.A. § 1813(c)(1) (West 1989).

In so doing, the IBBEA implicitly assumes that federal savings associations have legal authority to contract with commercial banks to obtain such services. This assumption is consistent with prior OTS precedent. For example, as already noted, the OTS's December 1994 Opinion concluded that savings associations have incidental authority to contract with affiliated savings associations to obtain basic banking services for their customers. Although this opinion did not discuss interaffiliate arrangements between savings associations and commercial banks, the grounds upon which the opinion concluded that federal savings associations may enter into interaffiliate arrangements did not depend on whether the counterparty to the arrangement was a thrift, as opposed to a bank. As noted there, "the statutory authority of federal savings associations to accept deposits, make loans, and provide other basic banking services . . . necessarily includes within it the power to contract with others to assist in providing those services -- subject, of course, to principles of safety and soundness."[13] Thus, so long as the service-providing party is an affiliated insured depository institution, savings associations have authority to contract to obtain basic banking services for their customers.

This conclusion is consistent with the longstanding policy of the OTS and its predecessor of allowing savings associations to contract with commercial banks, as well as other savings associations, to obtain correspondent services such as check clearing, bill collections, loan participations, investment advice, electronic data processing, and so forth.[14] Although the interaffiliate customer services envisioned here are not traditional correspondent services (because retail services will be provided by the affiliate directly to customers of the savings association), the distinction between retail services and "back office" services is not relevant to the underlying question of legal authority to contract for agency services. The retail nature of the services raises a branching question (which we have previously resolved), but not a question of legal authority.

Accordingly, we conclude that federal savings associations have legal authority to contract with affiliated depository institutions, including commercial banks, to obtain customer services of the type proposed by the Holding Company.

---

[13] OTS Op. Chief Counsel (Dec. 30, 1994), n. 2.

[14] 48 Fed. Reg. 23032, 23035 (May 23, 1983); 47 Fed. Reg. 17468, 17469 (Apr. 23, 1982); FHLBB Op. by Long, dated Jan. 13, 1984; and FHLBB Op. by Barnett, dated Nov. 10, 1982.

B. Authority Of A Federal Savings Association To Provide Customer Services To An Affiliated Bank

Section 101(d) of the IBBEA also specifically authorizes savings associations to receive deposits, renew time deposits, close loans, service loans, and receive payments on loans and other obligations on an agency basis for affiliated commercial banks. However, this authorization is circumscribed by conditions that are not in the authorization for banks. Specifically, § 101(d)(6) of the IBBEA, which will become effective on September 29, 1995, provides:

> An insured savings association which was an affiliate of a bank on July 1, 1994, may conduct activities as an agent on behalf of such bank in the same manner as an insured bank affiliate of such bank may act as agent for such bank under this subsection to the extent such activities are conducted only in --
>
> (A) any State in which --
>
> (i) the bank is not prohibited from operating a branch under any provision of Federal or State law; and
>
> (ii) the savings association maintained an office or branch and conducted business as of July 1, 1994; or
>
> (B) any State in which --
>
> (i) the bank is not expressly prohibited from operating a branch under a State law described in section 1831u(a)(2) of this title; and[15]

---

[15] 12 U.S.C. § 1831u(a)(2) provides as follows:

> [A] merger transaction may not be approved pursuant to paragraph (1) if the transaction involves a bank the home state of which has enacted a law after September 29, 1994, and before June 1, 1997, that --
>
> (i) applies equally to all out-of-State banks; and
>
> (ii) expressly prohibits merger transactions involving out-of-State banks.

(ii) the savings association maintained a main office and conducted business as of July 1, 1994.

Thus, the ability of a savings association to provide services to the customers of an affiliated bank under IBBEA § 101(d)(6) depends upon factors such as the federal and state branching laws that would apply if the affiliated bank were seeking to branch into the state where the savings association is located, the date on which the association began operating in that state, and the date on which the savings association affiliated with the bank in question. The ability of a savings association to provide services under § 101(d)(6) turns, in large part, on the branching laws of the state in which the savings association is located.

For these purposes, § 101(d)(6) divides states into three categories. The first category consists of states that have expressly opted out of the IBBEA § 102 (which authorizes interstate branching via mergers beginning June 1, 1997). IBBEA § 101(d)(6) does not authorize savings associations in opt out states to provide services to affiliated banks. The second category consists of states that have not opted out of the IBBEA § 102, but have laws that prohibit out-of-state banks from branching into the state. Section 101(d)(6) authorizes savings associations in these states to provide services to affiliated banks, provided the savings association's main office was located in the state as of July 1, 1994, and the savings association was affiliated with the bank as of July 1, 1994. The third category is comprised of states that have neither opted out of IBBEA § 102 nor have laws that prohibit out-of-state banks from branching into the state. Section 101(d)(6) authorizes savings associations in these states to provide services to affiliated banks, if the savings association maintained at least one retail office in the state as of July 1, 1994, the savings association was affiliated with the bank on July 1, 1994, and no provision of federal law prohibits the bank from branching into that state.[16]

In the present instance, the Holding Company's savings associations are (and were on July 1, 1994) located entirely in State C, except that one savings association has (and had on July 1, 1994) an additional branch in State A. The Holding Company's banks are located in States A and B. Based on conversations with regulatory officials in States A and C, we understand that neither state has opted out of IBBEA § 102, but that both states prohibit out-of-state banks from branching into

---

[16] See 12 U.S.C.A. § 36(g) (West Supp. 1995) (federal law governing branching by national banks); and 12 U.S.C.A. § 215a-1 (West Supp. 1995) (federal law governing branching by banks via merger acquisitions). Both provisions incorporate state law to some degree, while adding additional requirements.

them (either de novo or by merger). This circumstance falls within the second category described above -- which means that, under IBBEA § 101(d)(6), the Holding Company's savings associations could provide services to the customers of affiliated banks only out of branches located in the state where the savings associations maintained their main office as of July 1, 1994 (State C), and only if the savings associations and banks were affiliated as of July 1, 1994 (which they were not). Accordingly, the Holding Company's savings associations cannot provide services to the Holding Company's banks in reliance on IBBEA § 101(d)(6).

Thus, we must consider whether Congress intended for § 101(d)(6) to be the exclusive grounds under which savings associations can provide interaffiliate services to banks. The IBBEA is clear on this point. Section § 101(d)(4) expressly provides that nothing in the subsection -- including § 101(d)(6) -- shall be construed as affecting any other existing authority to enter into interaffiliate arrangements. In addition, the Conference Report accompanying the IBBEA states:

> The Conferees also intend to clarify, through the addition of a savings clause, that this section does not affect the authority of a depository institution to be an agent for a depository institution under any other provision of law, nor does it affect a determination under any other provision of law whether the agent should be considered to be a branch of the depository institution. The Conferees do not intend that new subsection 18(r) of the Federal Deposit Insurance Act affect the application of other provisions of law which permit agency relationships between affiliated depository institutions.[17]

Therefore, if an interaffiliate arrangement is authorized under "any other provision of law," the criteria in § 101(d)(6) need not be satisfied.

As noted above, the OTS's December 1994 Opinion concluded that federal savings associations have incidental authority to enter into customer service arrangements with affiliated savings associations. As explained above, this conclusion did not turn on the fact that the affiliated institutions happened to both be savings associations. Rather, the conclusion was based upon a recognition that "the statutory authority of federal savings associations [as set forth in the Home Owners' Loan Act] to accept deposits, make loans, and provide other basic banking services . . . necessarily includes within it the power to contract with others to assist in providing

---

[17] H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 49 (1994).

those services. . . ."[18] In other words, the authority to enter into interaffiliate arrangements is derived, via the incidental powers doctrine, from the Home Owners' Loan Act. Accordingly, there is an "other provision of law," within the meaning of IBBEA § 101(d)(4), pursuant to which federal savings associations may enter into interaffiliate arrangements with commercial banks.

Accordingly, we conclude that the Holding Company's savings associations have authority to enter into the proposed interaffiliate customer service arrangements with their commercial bank affiliates. When doing so, however, the savings associations must comply with the safety and soundness requirements referenced on pages 7 and 8 of OTS's December 1994 Opinion.

The conclusions presented in this letter are based on the facts described herein. Any material change in circumstances from those described herein could result in different conclusions. In particular, we note that the parties with whom the savings associations will be entering into interaffiliate relationships are in this case all insured depository institutions. We also note that the proposed interaffiliate relationship is not inconsistent with the public policy objectives that underlie the IBBEA. The Holding Company does not seek to use the more flexible branching powers of savings associations to enable its banks to engage in activities that would otherwise be prohibited. In this case, the Holding Company acquired [redacted] savings associations that have long been located in State C. Under current law, the Holding Company could have instead acquired banks chartered by State C, with the same end result. Thus, the Holding Company's subsidiary banks and thrifts will engage in activities that similarly situated banks in these states could also engage in under the IBBEA.

If you have any questions regarding the foregoing, please do not hesitate to contact Richard C. Blanks, Counsel (Banking and Finance), at (202) 906-7037.

Very truly yours,

Carolyn J. Buck
Chief Counsel

cc: All Regional Directors
All Regional Counsel

---

[18] OTS Op. Chief Counsel (Dec. 30, 1994), n. 2.