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

MEMORANDUM

May 5, 1995

TO: [redacted]

FROM: Carolyn J. Buck
Chief Counsel

SUBJECT: Authority of Federal savings associations to provide trust services in states in which they do not maintain a home or branch office

By memoranda dated April 10 and April 21, 1995, you have asked whether [redacted] (the "Savings Bank") would be permitted to acquire and hold as an operating subsidiary a trust company located in State A (the "Company") and continue to conduct trust and fiduciary activities through the Company's State A offices. In addition, you have asked whether State A law would govern the scope of the Company's trust activities.

For the reasons set forth below, we conclude that the Savings Bank may conduct trust activities in State A through the Company to the extent authorized by state law for competing State A -chartered banks and other in-state companies providing trust services. We also conclude that State A law would govern the scope of such services.

I. Facts

The Savings Bank proposes to acquire from the Federal Deposit Insurance Corporation all of the stock of the Company, a State A -based corporation formerly owned by a failed savings association. We understand that the Savings Bank has its home office in State B and currently has no branches or other offices in State A . The Company would be operated by the Savings Bank as a separate corporation under the OTS's operating subsidiary regulation.[1]

We have been advised that the Company currently acts primarily as custodian for the assets of certain employee

[1] 12 C.F.R. § 545.81 (1994).

benefit-related trust funds. The Company collects dividends, income and principal payments on the funds, settles trades on trust-related securities and other assets as directed by unaffiliated ERISA-qualified investment managers, and provides transaction statements to beneficiaries. The Savings Bank proposes that the Company would continue to perform these trust and fiduciary activities in State A, where the Company's offices are located. The Savings Bank has filed with your office an application pursuant to the OTS's federal trust powers regulation (the "trust regulation")[2] to engage in trust activities through the Company. The Company would continue to act primarily as custodian and would not render any investment advice to beneficiaries.

II. Discussion

Generally, all Federal laws, regulations and policies applicable to the operations of the parent Federal savings association apply equally to the operations of its operating subsidiary.[3]

Section 5(n) of the HOLA[4] authorizes the OTS to permit Federal savings associations to exercise trust powers to the extent permitted to competing entities in the same state. Section 5(n)(1) specifically provides:

> The Director may grant by special permit to a Federal savings association applying therefor the right to act as trustee, executor, administrator, guardian, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which compete with Federal savings associations are permitted to act under the laws of the State in which the Federal savings association is located.[5]

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[2] 12 C.F.R. Part 550 (1994).

[3] 12 C.F.R. § 545.81(e) (1994). See also 57 F.R. 48946 (Oct. 29, 1992) (preamble to final operating subsidiary regulation).

[4] 12 U.S.C. § 1464(n).

[5] 12 U.S.C. § 1464(n)(1). In addition, the trust regulation provides that a Federal association's trust activities must be "authorized for State-chartered corporate fiduciaries by the laws of each State in which the Federal savings association has offices from which it will offer fiduciary services." 12 C.F.R. § 550.2(c)(2) (1994).

In two previous opinions the OTS concluded that this provision authorizes the OTS to permit Federal savings associations to engage in trust and other fiduciary activities in any state where they are "located," provided (i) competitors of Federal associations in that state are allowed to engage in such operations; and (ii) such operations are conducted by Federal associations in conformity with the laws of that state.[6] We now have before us two questions: whether a Federal association with its office in one state may perform trust activities in another state, and, if so, whether trust activities are subject to the laws of the state in which the association's offices are located or to those of the state in which the trust activities are performed.

A. Trust Activities

There is no case law specifically addressing when a Federal savings association may engage in trust activities under section 5(n) of the HOLA. The OTS has previously opined that Federal associations may engage in trust activities in the states in which their home office and branch offices are located.[7] Our opinions have expressly left open the possibility that a Federal savings association may perform trust services in a state without establishing a home or branch office in such state.[8]

In the absence of controlling precedent, there are three sources of law that guide our construction of section 5(n) -- the express language of the statute, the legislative history, and the policy underlying the statute. In this instance, each source supports the conclusion that a Federal association may conduct trust activities in a particular state, regardless of whether the Federal association maintains a home or branch office in such state.

First, section 5(n)(1) of the HOLA, by its terms, provides that the OTS may permit Federal savings associations to engage in the same trust activities as competing business entities doing business in the same state. Section 5(n) includes several other provisions designed to ensure that trust operations of Federal

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[6] Op. Acting C.C. (June 13, 1994) and Op. C.C. (Dec. 24, 1992) (respectively, the "1994 Opinion" and "1992 Opinion").

[7] 1992 Opinion, at 9; 1994 Opinion, at 5.

[8] 1992 Opinion, at 9 (footnote 26); 1994 Opinion, at 5 (footnote 8).

associations are conducted comparably to those of competing entities.[9]

Second, the legislative history states that section 5(n) gives Federal associations the ability to offer trust services on the same basis as national banks. The purpose of section 5(n) was "to enhance the ability of thrifts to offer complete financial services to the consumer."[10] There is no suggestion in the legislative history of the DIDMCA that section 5(n) was intended to limit the types of offices through which Federal associations could provide trust services, or that, in order for a Federal association to do so it must also have a branch office in that state or offer more than trust services in that state.

Third, the policy underlying section 5(n) is to align the trust powers of Federal savings associations with state entities exercising comparable authority. The language of section 5(n) makes clear that the trust operations of a Federal association should be subject to the same limitations applicable to other trust companies in the state. In this case, the Savings Bank's plan to maintain a separate corporate entity within the state to run the trust operations satisfies the statutory requirement. We are aware of no safety and soundness or other practical reason to interpret section 5(n) to permit Federal associations to engage in trust activities only in states in which a Federal association's home office or branch offices are located. The mere presence of a branch office in a particular state does not ensure that a trust operation is conducted appropriately, and it would make little sense to interpret the statute to require an association to open a branch in a state as a prerequisite to conducting trust operations in that state.[11]

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[9] See 12 U.S.C. §§ 1464(n)(2), 1464(n)(5), and 1464(n)(8).

[10] S. Rep. No. 368, 96th Cong., 2d Sess. 13 (1980). Section 5(n) was added to the HOLA by the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"). Pub. L. No. 96-221, 94 Stat. 132.

[11] In the 1992 Opinion, in which we concluded that a Federal savings association may offer trust services in states in which either a home or branch office is located, we applied the definition of "located" in section 4(g) of the HOLA, 12 U.S.C. § 1463(g), to section 5(n). Our opinion today, that a Federal savings association has "located" its trust services in the state in which the trust services are performed, is not intended to express a view on the meaning of "located" in section 4(g). We do not address whether our construction of section 5(n) may expand the constraints of section 4(g).

B. Applicable State Law

With respect to your question regarding whether State B law or State A law would govern the trust activities of the Company, it is our view, based on the purposes of section 5(n) discussed above, that State A law would be the applicable reference. Where a Federal savings association performs trust services in a particular state, section 5(n) requires that it be on the same terms as other trust service providers in that state. The trust regulation contemplates this conclusion by providing, in relevant part, that Federal savings associations must submit a legal opinion certifying that proposed trust powers are "authorized for State-chartered corporate fiduciaries by the laws of each State in which the Federal savings association has offices from which it will offer fiduciary services."[12]

Conclusion

Thus, in our opinion, the Savings Bank may conduct trust activities in State A, provided that its trust activities are limited to those in which competing State A -chartered entities may engage.[13]

If you have any questions regarding the foregoing, please contact Kevin A. Corcoran, Assistant Chief Counsel for Business Transactions, at (202) 906-6962.

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[12] 12 C.F.R. § 550.2(c)(2) (1994).

[13] This conclusion conforms to the 1994 Opinion, in which we determined that a Federal association that performed its trust activities in one state (also its home state) was "located" in that state under section 5(n), even though an affiliate intended to solicit trust business for the Federal association in other states. The site of the trust activities was one of the principal facts supporting the 1994 opinion, and it is similarly a critical factor here.

We are not concluding that a Federal association is "located" in a state for purposes of HOLA § 5(n) merely because it has customers in the state, or markets its services in the state. In the 1994 Opinion, we concluded that a Federal association was not located in a state where an affiliate merely would market the association's trust services. In Marquette National Bank of Minneapolis v. First Omaha Service Corp., 439 U.S. 299 (1978), cited in the 1992 Opinion, the Supreme Court, interpreting 12 U.S.C. § 85 (which is similar to HOLA § 4(g)), concluded that the issuance of credit cards to residents of a state did not cause a national bank to be located in such state.