Office of Thrift Supervision
Department of the Treasury
Chief Counsel
1700 G Street, N.W., Washington, D.C. 20552 • (202) 906-6251

October 17, 1995

[redacted]

**Re: Authority of Federal Savings Associations to Provide Ministerial Support Services as Agent for a Trust Company**

Dear Ms. Muncy:

This responds to your letter submitted on behalf of [redacted] (the "Association"), regarding whether the Association may act as agent for an unaffiliated trust company (the "Trustee") for purposes of providing certain ministerial, non-discretionary support services without obtaining prior approval from the Office of Thrift Supervision ("OTS") to exercise trust powers.

In brief, we conclude that the Association has authority, pursuant to the incidental powers doctrine, to provide the proposed support services for the Trustee. The Association need not obtain trust powers approval from the OTS before providing these services.

## I. Background

The Trustee is a company authorized to engage in trust activities in [redacted]. The Trustee is the successor trustee of a portfolio of land trusts that hold title to property located in the Association's market area. The Trustee, however, does not maintain an office in the Association's market area and has asked the Association to act as the Trustee's agent to perform ministerial services in the administration of the local land trusts.

Under the proposed agreement between Association and the Trustee, at least one employee of the Association would be designated as an officer of the Trustee and, in that capacity, would provide ministerial, non-discretionary services under the direction of the Trustee. These services would consist of: (a) receiving certain documents (e.g., letters of direction and documents requiring the Trustee's signature,

such as mortgages, assignments of beneficial interest and leases) from customers of the Trustee; (b) transmitting documents received from customers to the Trustee; and (c) receiving executed documents from the Trustee, executing documents (but not trust agreements) at the written direction of the Trustee and returning the executed documents either to the customers or, at the direction of the customers, for recording or other appropriate actions. When acting on behalf of the Trustee, the Association's employee would be required to disclose that fact to customers and all documents executed by the Association's employee on behalf of the Trustee would be required to clearly indicate that such employee is acting for the Trustee.

The Association would receive a percentage of certain fees collected by the Trustee from its customers for the services rendered by the Association as the Trustee's agent.[1] The Trustee would indemnify the Association against losses incurred by the Association or its employee(s) that result from: (a) the Trustee's breach of its agreement with the Association; or (b) the performance by the Association or its employees in accordance with the terms of the agreement or as directed by the Trustee. The Association would indemnify the Trustee against losses incurred by the Trustee or its employees by reason of a breach of the agreement by the Association.

## II. Discussion

### A. Authority of the Association to Engage in Proposed Activities

Section 5(n) of the Home Owners' Loan Act ("HOLA"), authorizes the OTS Director to grant to a federal savings association the right to act as a trustee or in any other fiduciary capacity in which State banks, trust companies, and corporations that compete with federal associations are permitted to act under State law.[2] The activities proposed by the Association clearly fall within the scope of activities that could be authorized under section 5(n) of the HOLA. However, the Association does not wish to incur the expense required to obtain trust powers approval for the limited support services it proposes to perform. This raises the question whether there are other sources of authority that would permit the Association to perform the proposed activities.

---

[1] Fees charged for trust acceptance, holding record title, or trust termination would be retained in their entirety by the Trustee.

[2] See 12 U.S.C.A. § 1464(n) (West Supp. 1995).

Federal savings associations have long been viewed as having the authority, under the incidental powers doctrine, to perform a class of activities known as "correspondent services."[3] Generally, correspondent services are services that an institution provides to others that the institution is authorized to generate in-house for itself in the regular course of business.[4] Examples of typical correspondent services include check clearing, help with bill collections, participation in large loans, legal advice, help in building securities portfolios, counseling as to personnel policies, staff training, help in site selection, auditing, and the provision of electronic data processing.[5]

The support services the Association proposes to perform for the Trustee consist primarily of receiving, storing, transmitting and executing or obtaining execution of important legal documents. This is an activity that federal savings associations routinely perform in the course of conducting their own business when closing loans, acting as escrow agent or paying agent, providing safekeeping services, or acting as residential mortgage document custodians for third parties. When acting as mortgage document custodians, for example, savings associations routinely deliver documents to investors, release documents to sellers, and take custody of documents submitted by sellers.[6] The support services proposed by the Association are virtually indistinguishable.

We conclude, therefore, that the proposed support services are a form of correspondent services and thus are permissible under a long line of precedent recognizing that federal savings associations have incidental authority to provide such services.[7]

---

[3] See 48 Fed. Reg. 23032, 23035 (May 23, 1983); 47 Fed. Reg. 17468, 17469 (Apr. 23,1982); FHLBB letter by Long (January 13, 1984); and FHLBB Op. by Barnett (November 10, 1982).

[4] 47 Fed. Reg. at 17469. See also, FHLBB letter by Long, citing 48 Fed. Reg. at 23035.

[5] United States v. Citizens & Southern National Bank, 422 U.S. 86, 115 (1975).

[6] OTS Op. Acting Chief Counsel (January 31, 1994).

[7] The fact that the proposed services will be performed for a trust company rather than for another depository institution does not preclude such services from being considered correspondent services. Federal savings associations long have been permitted to provide correspondent services to non-depository institution financial intermediaries. See 47 Fed. Reg. at 17469; cf. OCC Interpretive Letter No. 137, Fed. Banking L. Rep. at ¶ 85,12 at 77,326. Moreover, the fact that the proposed services will bring the Association into contact with the customers of the trust company also does not preclude the services from being considered correspondent services. Although delivery of retail banking services as agent for a third party would not constitute correspondent services, OTS Chief Counsel Opinion (August 28, 1995), at 4, some correspondent services (such as bill collections) clearly do involve direct ministerial contact with customers.

Even if we were to analyze the proposed activities anew, however, we would conclude that they are permissible. Last year the OTS announced a four-part test for assessing what activities fall within the incidental powers of federal savings associations.[8] In brief, the incidental powers analysis requires an examination of the following questions: (1) is the activity consistent with the purpose and function Congress envisioned for federal savings associations; (2) is the activity similar to an expressly authorized activity; (3) does the activity relate to the financial intermediary role that federal savings associations were intended to play; and (4) is the activity necessary to enable federal savings associations to remain competitive and relevant in the modern economy?[9]

The services proposed by the Association meet these criteria. First, the support services will give customers of the Trustee more convenient access to the financial services needed to operate their trusts. Enhancement of customer convenience and services is consistent with Congress' intent that federal savings associations serve as "one-stop" consumer oriented financial institutions.[10] Second, as is pointed out above, the proposed activities are essentially the same as activities federal savings associations are already authorized to conduct. Third, the proposed activities will indirectly support funds intermediation by facilitating the conduct of financial transactions. Fourth, the Association has represented that many financial institutions in [redacted] including some of the Association's competitors, currently provide ministerial support services for trust companies. Permitting federal savings associations to engage in such activities will thus prevent them from being at a competitive disadvantage. Thus, our current incidental powers analysis supports the conclusion that federal savings associations may provide ministerial support services for trust companies.

### B. Application to Exercise Trust Powers

You also ask whether the Association must submit a trust application before it can provide support services to the Trustee. Because the authority to engage in the proposed activities is derived from a source other than section 5(n) of the HOLA, no trust powers approval is required. This is consistent with past OTS policy.

---

[8] See OTS Op. Acting Chief Counsel (Mar. 25, 1994), and OTS Op. Acting Chief Counsel (October 17, 1994). These opinions contain a complete explanation of the new incidental powers analysis.

[9] OTS Op. Acting Chief Counsel (October 17, 1994) at 4-5; and OTS Op. Acting Chief Counsel (March 25, 1994) at 7-8.

[10] OTS Op. Acting Chief Counsel (October 17, 1994), at 9-10.

The OTS distinguishes between activities that place significant discretionary fiduciary responsibilities on federal savings associations and those that do not. The OTS requires a federal savings association to maintain a trust department and receive regulatory approval to exercise trust powers before engaging in activities that require active discretionary trust management responsibilities. On the other hand, a trust department and trust powers are not required for a federal savings association to perform limited duties and responsibilities such as escrow, safekeeping, or custodian services, even though the performance of such duties requires a degree of care and trust.[11] The authority to engage in these basic banking activities is derived from the incidental powers doctrine, not section 5(n) of the HOLA.[12] The activities proposed to be performed by the Association as agent for the Trustee are limited in nature and are similar to non-discretionary services performed by escrow agents and document custodians. Performance of the proposed activities by the Association will not require the Association to exercise discretion or to make substantive decisions regarding the trusts. Accordingly, the Association need not apply for trust powers before engaging in the proposed activities.[13]

In reaching the foregoing conclusions, we have relied upon the representations made in your letter. Our conclusions depend upon the accuracy and completeness of those facts. Any material change in circumstances, such as expanding of the scope of the Association's activities to include activities that are more discretionary in nature, might result in different conclusions.

If you have any questions regarding these matters, please feel free to contact John Flannery, Attorney, at (202) 906-7293.

Very truly yours,

Carolyn J. Buck
Chief Counsel

---

[11] See OTS Regulatory Handbook: Trust Activities, § 140, p. 83 (1992).

[12] Id.

[13] We note that the Office of the [redacted] Commissioner of Banks and Trust Companies has informed you that a state-chartered agent of a trust company that performs the proposed non-discretionary services under the direction of the trust company would not be required to obtain a Certificate of Authority pursuant to the state Corporate Fiduciary Act in order to conduct those activities. Letter from [redacted] to [redacted] (Mar. 16, 1995).