



Office of Thrift Supervision

Department of the Treasury

Chief Counsel

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

August 19, 1998

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Re: Commercial Escrow Accounts

Dear []:

This responds to your request regarding whether [] Federal Savings Bank, [] (“the Association”), may establish and maintain a commercial escrow account on behalf of its customer, [] (“Company”), a charter vacation airline/organizer. In brief, we conclude that the Association may establish a commercial escrow account for Company.

I. Background

You indicate that Company owns and operates a large fleet of passenger jets, and assembles comprehensive vacation packages. Company is based in [] and has a large local office in []. Company maintains a deposit account with the Association and has an escrow account with a national bank. Company has requested that Association open an account for Company to escrow funds representing deposits or down-payments on future vacations. You state that the average monthly balance of the escrow account is anticipated to be approximately \$150,000.

Information provided to the Association by Company reflects that the Department of Transportation (“DOT”) requires charter operators, in lieu of furnishing a security agreement, to enter into a Public Charter Depository Agreement with the air carrier and a depository institution. The agreement must provide that all payments made by charter participants to charter operators must be deposited with and maintained by the depository institution subject to applicable conditions.¹ A copy of the DOT’s

¹ See 14 C.F.R. § 380.34(b)(2) (1998).

Public Charter Information Packet (February 1993 edition), submitted with your request, includes a “Notice” which indicates that, based on advice from OTS, the DOT “generally [is] no longer able to accept savings and loan associations as repositories for escrow accounts, even though they are considered to be acceptable” under DOT’s public charter rules.² The Notice includes a reference to an old OTS policy statement which provided that a Federal savings association could not act generally as an agent for the public in handling escrows, but could handle escrows relating to its real estate loans and, to the extent reasonably incidental to accomplishing its express purposes, real estate transactions common to the savings association’s business.³

II. Discussion

Federal savings associations have long been permitted to provide escrow services in connection with real estate loans and real estate transactions. This authority was previously set forth in the OTS policy statement mentioned above,⁴ and in an OTS regulation.⁵ The policy statement was originally adopted by the OTS’s predecessor, the Federal Home Loan Bank Board (“FHLBB”), in 1959, before thrifts were authorized to engage in significant amounts of non-real estate lending.⁶ Today, Federal savings associations are authorized to engage in a variety of non-real estate lending, investment,

² The Notice indicates that OTS advised DOT staff that under the OTS regulations a Federal savings association could not act generally as an agent for the public in handling escrows. The DOT’s conclusion that it could “no longer accept” savings and loan associations suggests that the DOT had previously allowed savings and loans to act as depository institutions for charter operators’ escrow accounts.

³ The DOT statement references an early designation of the policy statement on escrow business that originally appeared at 12 C.F.R. § 555.2, and was re-designated as § 556.2 in 1989. 54 Fed. Reg. 49411 (November 30, 1989). The policy statement was subsequently removed on September 30, 1996. See infra text accompanying notes 8-9.

⁴ See 12 C.F.R. § 556.2 (1996) (“Power to engage in escrow business”).

⁵ See 12 C.F.R. § 545.32 (b)(6) (1996).

⁶ See 24 Fed. Reg. 9693 (December 4, 1959). When the HOLA was originally enacted in 1933, Congress indicated the principal purpose of Federal savings associations was to provide savings accounts and home financing for ordinary customers. See 12 U.S.C. 1464(a) (1976) and S. Rep. No. 368, 96th Cong., 1st Sess. 12 (1979). This narrow view of the role of Federal savings associations remained largely unchanged until the early 1980’s when Congress enacted two major pieces of banking reform legislation—the Depository Institutions Deregulation and Monetary Control Act of 1980 (“DIDMCA”), Pub. L. No. 96-221, 94 Stat. 132 (1980) and the Garn-St. Germain Depository Institutions Act of 1982 (“Garn St. Germain”), Pub. L. No. 97-320, 96 Stat. 1469 (1982). These changes allowed Federal savings associations to become more competitive with banks and other financial institutions.

and other activities. Section 5(c) of the Home Owners' Loan Act ("HOLA"), for example, now authorizes federal thrifts to make commercial, business and corporate loans, consumer loans, construction loans, credit card loans, and education loans, among others.⁷

In 1996, the OTS reviewed its lending and investment regulations to determine whether the regulations were current and consistent with the regulations of other banking agencies.⁸ The OTS removed the policy statement and the corresponding regulation, stating that the "authority to establish escrow accounts is subsumed within the authority of [F]ederal savings associations to make loans and does not need to be specifically identified in the CFR."⁹ The Association's proposed escrow activity, however, would not be related to a loan. We must therefore examine the scope of Federal savings associations' authority to establish escrow accounts that are not related to loans.

While the HOLA does not expressly authorize Federal savings associations to offer escrow accounts generally, or commercial escrow accounts in particular, the OTS and the FHLBB have long recognized that Federal savings associations possess powers that are incident to their express powers, as set forth in the HOLA. The four criteria commonly used by the OTS to identify activities that fall within the incidental powers of Federal savings associations are: (1) is the activity consistent with the purpose and function Congress envisioned for Federal savings associations; (2) is the activity similar to or does it facilitate the conduct of 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?¹⁰ The escrow activity proposed by the Association clearly meets all four of the incidental powers criteria.

⁷ 12 U.S.C.A. § 1464(c) (West 1998). See also 12 C.F.R. § 560.30 (1998).

⁸ 61 Fed. Reg. 50951, 50952 (September 30, 1996).

⁹ Id. at 50961. In connection with the removal of the regulation, the OTS stated that it believed the authority to establish escrow accounts for loans "properly falls within the scope of a federal savings association's statutory authority to originate loans pursuant to the HOLA, and . . . do[es] not need to be specifically identified or restricted in the CFR." Id. at 50954.

¹⁰ For a fuller explanation of the incidental powers test, see e.g., OTS Op. Acting Chief Counsel (March 25, 1994) at 7-8; OTS Op. Acting Chief Counsel (October 17, 1994) at 4-5.

First, consistent with Congress' intent, the Association will be able to better meet the needs of its business customer. Over the years, Congress has amended the HOLA to expand and broaden the powers of Federal savings associations while strengthening the safety and soundness framework within which these powers may be exercised.¹¹ Amendments during the 1980's and early 1990's authorized federal thrifts to provide new consumer oriented services, and enhanced the ability of thrifts to meet the needs of their business customers by granting or expanding investment authority for commercial loans, commercial paper, and nonresidential real estate loans, among others.¹² These amendments were intended to give Federal savings associations "flexibility . . . to improve the range of services [that] thrift institutions may provide to their customers."¹³ Further expanding the authority of Federal thrifts to act as retail-level financial service providers, Congress later authorized Federal thrifts to offer demand deposit accounts to commercial customers on the same basis as to individuals and non-profit corporations and enhanced consumer lending authority.¹⁴ The Association's escrow services will give Company, which is already the Association's customer, more convenient access to financial services that facilitate operation of the Company's travel business.

Second, the proposed activity of offering a commercial escrow account is similar to activities that Federal savings associations are expressly authorized to conduct. Section 5(b) of the HOLA authorizes a Federal savings association to raise funds through deposit, share, or other accounts, subject to the terms of its charter and regulations of the OTS Director.¹⁵ OTS regulations define the term "account" to include various types of deposit and share accounts.¹⁶ As discussed above, Federal

¹¹ For an overview of the various amendments, see OTS Op. Chief Counsel (March 25, 1994).

¹² See supra note 6.

¹³ S. Conf. Rep. No. 641, 97th Cong., 2nd Sess. 87 (1982). See also S. Rep. No. 536, 97th Cong., 2nd Sess. 1 (1982).

¹⁴ Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 282, § 301 (1989); Federal Deposit Insurance Corporation Improvement Act of 1991, Pub L. 102-242, 105 Stat. 2236, § 441 (1991).

¹⁵ 12 U.S.C.A. 1464(b)(1) (West 1998). See also 12 C.F.R. § 557.10 (1998) (stating that Federal savings associations may raise funds through accounts).

¹⁶ 12 C.F.R. § 561.2 (1998) defines account to include a savings account, demand account, certificate account, tax and loan account, note account, United States Treasury general account or United States Treasury time deposit-open account, whether in the form of a deposit or a share, held by an accountholder in a savings associations.

savings associations also are expressly authorized under section 5(c) of the HOLA to make loans, which includes the authority to establish escrow accounts. Moreover, we have previously recognized that Federal savings associations may act as escrow or paying agent, and provide safekeeping services and document custodian services for third parties.¹⁷

Third, the proposed activity will further the Association's role as a financial intermediary. The role of a financial intermediary involves facilitating the flow of money and credit among different parts of the economy, receiving and transmitting funds, and providing financial support for transactions.¹⁸ This is precisely the role that the Association will play when it escrows funds representing down-payments on vacations from customers of Company. The Association will be facilitating the transfer of funds from third parties to Company. These funds represent prepayments to Company for vacation goods and services provided by Company. We have previously observed that transfers of funds from consumers to service providers is critical to the flow of commerce and a fundamental part of the business of banking.¹⁹

Fourth, the proposed activity will enable the Association to remain competitive and will insure that it is not at a competitive disadvantage. Currently, Company keeps its escrow account at a national bank, but the Association would like to be able to offer Company this service itself. Consumers of financial services, including businesses and commercial entities, are becoming increasingly accustomed to the convenience of having multiple financial needs met by one institution or provider. Permitting Federal savings associations to offer commercial escrow accounts for their customers will help them retain their customer base and allow the Association to remain competitive with other financial institutions.

As the foregoing discussion demonstrates, the proposed activity meets all of the factors commonly considered in the incidental powers analysis. Accordingly, we

¹⁷ See e.g., OTS Op. Chief Counsel (October 17, 1995); OTS Op. Acting Chief Counsel (January 31, 1994); OTS Regulatory Handbook: Trust Activities, § 140, p. 83 (1992); We also note that Federal savings associations are authorized to issue letters of credit, 12 C.F.R. § 560.120, and to act as surety, 12 U.S.C.A. § 1464(b)(2) (West 1998).

¹⁸ See Auten v. United States National Bank, 174 U.S. 125, 143 (1899)("[t]he very object of banking is to aid the operation of the laws of commerce by serving as a channel for carrying money from place to place."); OTS Op. Acting Chief Counsel (October 17, 1994); OTS Op. Chief Counsel (August 29, 1996).

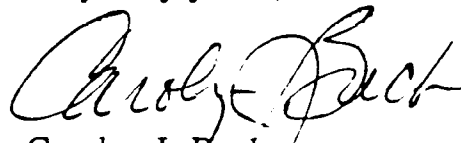
¹⁹ OTS Op. Chief Counsel (August 29, 1996), at 3 (concluding that a Federal thrift has incidental authority to market and sell prepaid telephone cards); OTS Op. Chief Counsel (March 25, 1994).

conclude that a Federal savings association may provide commercial escrow services under the incidental powers doctrine. The Association may establish an escrow account for Company for the deposit of funds representing down payments on future vacations by customers of Company. In view of the fact that the Association anticipates that the average monthly balance in the escrow account will exceed \$100,000, the Association must confer with the OTS [] Regional Office and comply with any conditions imposed by the Region with regard to protecting any uninsured portion of the funds in the escrow account. In addition, the Association must ensure that the activity is conducted in a safe and sound manner, and subject to any conditions that the OTS [] Region deems appropriate.

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

If you have any questions regarding the foregoing, please contact Raynette Gutrick, Attorney, Regulations and Legislation Division, at (202) 906-6265.

Very truly yours,


Carolyn J. Buck
Chief Counsel

cc: Regional Counsel
Regional Directors