



Office of Thrift Supervision
Department of the Treasury

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

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94/CC-04

January 31, 1994

[REDACTED]

Re: Authority of federal savings associations to act as residential mortgage document custodians

Dear [REDACTED]

This responds to your inquiry submitted on behalf of [REDACTED] FSB, [REDACTED] (the "Association"), requesting confirmation that the Association has legal authority to act as document custodian of residential mortgage loan documents for third parties. You also request confirmation that the Association need not obtain approval to exercise trust powers to act as document custodian.

For the reasons set forth below, we conclude that the Association may act as residential mortgage document custodian for third parties and need not apply for and obtain authorization to perform trust services to engage in this activity.

I. Background

On July 1, 1993, the Association entered into an Amended and Restated Custodial Agreement ("Agreement") with a corporate investor ("Investor") and a corporate seller ("Seller"). The Investor purchased certain residential mortgage loans ("Loans") from the Seller. The Seller continues to service the Loans. Under the terms of the Agreement, the Association acts as "the custodian for and bailee of" the Investor, and as such, has taken possession of certain loan documents, including originals of the mortgage note, mortgage, assignment of mortgage, title insurance policy, and intervening assignments of the mortgage and the mortgage guaranty insurance policy.

The Association's obligations under the Agreement include:

(1) Delivering to the Investor a certificate stating that the Association possesses the above-cited documents and making certain representations about the facial validity of the documents;

- (2) Releasing documents to the Seller as needed from time to time to perform its servicing function;
- (3) Assuming custody of additional documents submitted to the Seller as servicer from time to time;
- (4) Informing the Investor of any defect in the loan files maintained by the Association; and
- (5) Maintaining, at the Association's expense, fidelity insurance, theft of documents insurance, forgery insurance and errors and omissions insurance, naming itself as the insured.

The Seller, as servicer, is responsible for paying the Association's fees for performing these custodial services.

You have represented that the contractual duties of the Association are essentially ministerial in nature, requiring little, if any, discretionary conduct and that the risk to the Association is nominal since insurance is required by the Agreement. You have also represented in phone conversations with staff that the Association may perform its custodial functions at sites other than where its retail offices or branches are located and may engage a nonaffiliated company on a subcontract basis to satisfy the Association's obligations under the Agreement.

II. Discussion

Section 5(c)(1)(B) of the Home Owners' Loan Act ("HOLA")¹ expressly authorizes federal savings associations to "invest in, sell and otherwise deal in" loans secured by residential real estate. Implementing regulations elaborate on this statutory authority by providing that federal savings associations may "originate, invest in, sell, purchase, service, participate, or otherwise deal in (including brokerage or warehousing)" residential mortgage loans.² Thus, federal savings associations are expressly authorized to, among other things, service mortgage loans.

The term "servicing," when used in connection with mortgage loans, is ordinarily deemed to encompass a variety of functions, including not only collecting and distributing mortgage loan payments, maintaining escrow accounts, and instituting foreclosure or other collection measures, but also maintaining mortgage document files in the manner proposed by the Association.

1. 12 U.S.C. § 1464(c)(1)(B) (Supp. IV 1992).

2. 12 C.F.R. § 545.32(a) (1993) (emphasis added).

3. See e.g., Federal Home Loan Mortgage Corporation, Seller & Servicer's Guide, § 6104.2 (Jan. 1, 1992).

We are not concerned by the fact that the Association here proposes to conduct only one aspect of the servicing function. Within the mortgage loan servicing industry, it is not uncommon for loan servicing to be broken into component parts that are contracted out to subservicers who are specialists at a particular aspect of loan servicing. Examples of responsibilities that are frequently subcontracted out include: (i) foreclosure and workout responsibilities; (ii) data processing responsibilities; and (iii) the function here under review -- the document custodial function. The regulatory authorization for federal savings associations to engage in loan servicing necessarily carries with it authorization to perform any or all of the constituent parts of this service.

Therefore, we conclude that the Association has express authority to provide the document custodial services described herein. The association need not obtain trust powers approval to exercise these powers. As is recognized in the OTS Regulatory Handbook: Trust Activities, "an association may provide escrow, safekeeping, custodian or similar type services . . . without having a trust department and/or regulatory authorization to perform trust services."⁵

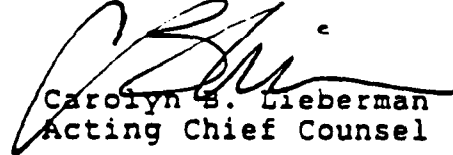
In reaching the foregoing conclusions, we have relied on the factual representations made in the materials you submitted to us and in subsequent discussions, as summarized herein. Our conclusions depend upon the accuracy and completeness of those facts. Any material difference in facts or circumstances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

4. We do not object to the Association's use of another company to perform the document custodial services on behalf of the Association so long as the company is qualified to provide these services and use of the company does not violate the Association's agreement with the parties to the transaction. Savings associations frequently use other companies to assist them in servicing loans for themselves and others. Nor do we object if the custodial services are performed by the Association or another company at a location other than an approved branch or agency office of the Association (since these are administrative, rather than retail services), provided the location is reasonably accessible to OTS's examiners.

5. § 140, p. 83 (1992).

If you have any further questions regarding this matter, please feel free to contact Dorene Rosenthal, Senior Attorney, at (202) 906-7268.

Very truly yours,



Carolyn B. Lieberman
Acting Chief Counsel

cc: Southeast Regional Director
Southeast Regional Counsel