



**Office of Thrift Supervision**  
Department of the Treasury

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6372

**P-2006-1**

John E. Bowma  
Chief Counsel

March 6, 2006

**Re: Permissibility of a Federal Savings Association Engaging in Precious Metal Transactions on Behalf of Customers**

Dear :

This responds to your inquiry regarding certain services proposed to be offered by (Association), a federal savings association. The Association proposes to offer customers the ability to buy and sell investment metals, such as gold, silver, platinum, and palladium (Precious Metals) and certificates issued by third parties for such metals (Certificates). The Association also would provide custody services for customers in connection with the purchase and sale of Precious Metals. You seek confirmation from the Office of Thrift Supervision (OTS) that the Association may engage in these proposed activities. For the reasons discussed below, we conclude that the Association may engage in the proposed activities pursuant to the incidental powers doctrine, provided (i) the activities are conducted in a manner consistent with safety and soundness, and (ii) the Association does not purchase, hold, or engage in transactions in Precious Metals or Certificates for speculative purposes.

**Background**

You have provided the following information. The Association's home office and all of its branch offices are located in . The Association also provides various banking products and services, and nondeposit products, through several branchless delivery channels including a call center, the Internet, direct mail, and national ATM networks. As of September 30, 2005, the Association had total assets of approximately \$ and total deposits of approximately \$

The Association proposes to offer its customers the ability to buy and sell Precious Metals and Certificates through the Association. The Association would provide custody services for customers in connection with these purchases and sales. The Association would act as a financial intermediary to help facilitate the purchase and sale of Precious Metals and Certificates

between the Association's customers and third-party dealers. Specifically, the Association would purchase or sell Precious Metals and Certificates only upon the order of, and on behalf of, a customer. The Association would not speculate or otherwise carry "material" positions in any Precious Metals or Certificates, except as noted below. You indicate that any position taken by the Association in any Precious Metals or Certificates would "only be incurred for the facilitation of customer transactions and will be controlled and monitored" by the Association's Asset Liability Committee (ALCO) in accordance with the Association's Asset Liability Management Policy (ALM Policy). The ALM Policy provides, with respect to "Metals Dealing" that the Association's overnight exposure limit, across all metals, is \$ \_\_\_\_\_, and the Association's intra-day exposure limit is \$ \_\_\_\_\_. The ALM Policy also sets exposure limits of \$ \_\_\_\_\_ for each of the four specified metals.

A customer could purchase Precious Metals on an allocated (segregated) or unallocated basis. If a customer elected not to take possession of Precious Metals purchased through the Association, the Association could agree to act as custodian for the customer. The Association would provide custody services utilizing a sub-custody relationship with \_\_\_\_\_, or other sub-custodians approved by the Association's ALCO. The Association represents that its relationship with these third-party sub-custodians would not impede OTS's access to data or information needed to supervise the Association or adversely affect the safety and soundness of the Association's operations.

For customer purchases made on an allocated basis, the customer would take title to specific coins or bars, which would be placed in the sub-custodian's storage facility. The Association would charge a customer a fee for this service. The fee would be larger than the fee the sub-custodian charges the Association. For purchases made on an unallocated basis, the customer would take title to Precious Metals deposited in a metal account, and no specific coins or bars would be designated to such customer.

Subject to review of creditworthiness, the Association would be willing to lend to a customer an amount up to \_\_\_\_\_ percent ( \_\_\_\_\_%) of the market value of the Precious Metals or Certificate acquired by such customer and held in custody by the Association. Such loan would be collateralized by the Precious Metals or Certificate acquired by the customer. Margin calls would be made by the Association if the value of the collateral subsequently falls and the loan-to-value ratio for the loan becomes \_\_\_\_\_ percent ( \_\_\_\_\_%) or more. In the event of a margin call, the Association would liquidate the Precious Metals or Certificate and use the proceeds to pay off the loan amount.

A customer could close a Precious Metals account by (i) requesting delivery of the Precious Metals, (ii) requesting that they be made available for collection by the customer, or (iii) requesting that the Association facilitate the sale of the Precious Metals to a third party on the customer's behalf. In addition, a customer could request that the Association purchase the Precious Metals, in which case the Association would promptly sell the Precious Metals to an unrelated third party. The sale would be pursuant to a commitment the Association entered contemporaneously with its purchase of the Precious Metals.

Certificates sold by the Association would be issued by third parties, such as \_\_\_\_\_, or other entity approved by the Association. The Certificates would represent that the issuer holds custody in specified metals on behalf of the purchaser(s). A customer could close a Certificate account by (i) requesting that the Precious Metals representing the Certificate be made available for collection; (ii) selling a Certificate to a third party dealer approved by the issuer of the Certificate; (iii) asking the Association to facilitate the sale of a Certificate to an unrelated third party; or (iv) requesting that the Association purchase the Certificate.

You have also provided information about product specifics and customer disclosures, including (a) disclosures that Precious Metals are not insured by the FDIC and are not a guaranteed deposit, and (b) disclosures concerning investment risks and volatility; collection and delivery of Precious Metals; lost Certificates; sub-custodian relationships; selection criteria for sub-custodians; and the third-party issuers of Certificates, among other things.<sup>1</sup>

### Discussion

The Home Owners' Loan Act (HOLA),<sup>2</sup> which sets forth the express powers of federal savings associations, does not specifically authorize federal savings associations to buy and sell precious metals or certificates for precious metals. In fact, prior to 1993, OTS regulations generally prohibited federal savings associations from engaging in transactions involving gold or gold-related instruments or securities.<sup>3</sup> OTS removed the prohibition in 1993 as obsolete, but cautioned that OTS would continue to consider speculative transactions in gold as an unsafe or unsound activity.<sup>4</sup> Several years later, OTS also removed a regulatory prohibition on investment in gold-related obligations.<sup>5</sup> The removal of these prohibitions evidenced OTS's intent to permit, or at least to consider proposals by, federal savings associations to engage in transactions involving gold, as long as the transactions are not speculative. This same rationale can be applied to other precious metals as well.

<sup>1</sup> Your letter referenced numerous exhibits, copies of which you also provided, including a memorandum dated November 10, 2005 from the Association's counsel to you. We are relying on the information and representations contained in all of these materials for purposes of this interpretive opinion.

<sup>2</sup> 12 U.S.C.A. § 1461 *et seq.* (West 2001 & West Supp. 2005).

<sup>3</sup> See 12 C.F.R. § 545.79 (1992).

<sup>4</sup> See 58 Fed. Reg. 4308, 4312 (January 14, 1993). See also 57 Fed. Reg. 40350, 40352 (September 3, 1992) (proposed rule). The preamble to the proposed rule indicated that the prohibition was obsolete in light of unspecified statutory changes that had occurred in 1974. In the same 1993 rulemaking, OTS also removed as obsolete policy statements at 12 C.F.R. §§ 571.10 and 571.17 (1992) that had limited, respectively, gold and gold-related transactions by state-chartered savings associations, and payments in gold or its equivalent by savings associations. 58 Fed. Reg. at 4314.

<sup>5</sup> See 61 Fed. Reg. 50951, 50960, 50971 (October 30, 1996) removing 12 C.F.R. §545.72(c). See also 61 Fed. Reg. 1162, 1169 (January 17, 1996) (proposed rule).

In addition, as this Office has frequently observed, federal savings associations possess incidental powers to engage in certain activities that, while not expressly authorized in the HOLA, are incident to those express powers.<sup>6</sup> The factors OTS considers in determining whether an association possesses incidental power to engage in an activity are: (1) Does the activity relate to the financial intermediary role federal savings associations were intended to play; (2) Is the activity similar to, or does it facilitate the conduct of, an expressly authorized activity; (3) Is the activity consistent with the purpose and function Congress envisioned for federal savings associations; and (4) Is the activity necessary to enable federal savings associations to remain competitive in the modern economy? The relative weight given to any one factor may vary, depending upon the circumstances.<sup>7</sup> Based on our analysis under these four factors of the Association's proposed activities of buying and selling Precious Metals and Certificates on behalf of its customers, and providing custodial services in connection therewith, we conclude that the Association has incidental authority to engage in such activities.

*1. Does the Activity Relate to the Financial Intermediary Role that Federal Savings Associations were Intended to Play?*

In conducting the proposed activities, the Association would be acting as a financial intermediary between its customers and dealers of Precious Metals and Certificates. When a customer requests that the Association purchase, on behalf of the customer, Precious Metals or Certificates, the Association will be acting as a conduit and facilitating the completion of a financial transaction, namely, receiving and transferring Precious Metals and Certificates therefor from one party to another. Similarly, when a customer requests that the Association sell, on behalf of the customer, Precious Metals or Certificates therefor, the Association will be performing the same intermediary function. The Association's role would be to assist and facilitate the transfer of Precious Metals and Certificates from dealers to customers in the case of a purchase, and from customers to dealers in the case of a sale. The Association would thus facilitate, by serving as a channel for, the movement of Precious Metals and Certificates between dealers and purchasers. Similarly, the Association's provision of custodial services for customers with respect to Precious Metals and Certificates is a financial intermediary function, because it is another step in the chain of transfer from a dealer to a customer or vice versa.

*2. Is the Activity Similar to, or Does it Facilitate the Conduct of, an Expressly Authorized Activity?*

We have previously concluded that federal savings associations may provide custodial and similar services, such as escrow, safekeeping, and document custodian services.<sup>8</sup> In addition, federal savings associations may provide currency exchange services because these

<sup>6</sup> See e.g., OTS Op. Chief Counsel (May 5, 2000); OTS Op. Dep. Chief Counsel (April 3, 2000); OTS Op. Chief Counsel (August 29, 1996); OTS Op. Chief Counsel (August 11, 1995); OTS Op. Chief Counsel (October 17, 1994); and OTS Op. Chief Counsel (March 25, 1994).

<sup>7</sup> OTS Op. Chief Counsel (March 25, 1994) at 8.

<sup>8</sup> See e.g., OTS Op. Chief Counsel (January 31, 1994) and 61 Fed. Reg. 50,951, 50,961 (September 30, 1996).

services facilitate deposit taking.<sup>9</sup> The proposed services will facilitate both the expressly authorized activities of deposit taking and lending. Deposit customers of the Association will have access to another important financial service. The proposed activities may include, in certain instances, some degree of lending to customers, *i.e.*, the Association would lend up to % of the market value of the precious Metals acquired by a customer and held in custody by the Association, and the loan would be collateralized by the Precious Metals. In other words, the customer's purchase of the Precious Metals would be partially financed by the Association. Lending is an expressly authorized activity under section 5(c) of the HOLA.<sup>10</sup>

*3. Is the Activity Consistent with the Purpose and Function Congress Envisioned for Federal Savings Associations?*

As evidenced by various amendments to the HOLA increasing the scope of federal savings association powers in the 1980s and 1990s, Congress has expanded and modernized the role of federal savings associations and strengthened the safety and soundness framework in which they operate. Congress intended to give federal savings associations the flexibility to expand the range of services they provide to their customers and to enable federal savings associations to offer complete financial services.<sup>11</sup> Allowing federal savings associations to engage in the proposed activities of purchasing and selling, for their customers, Precious Metals and Certificates would, in our view, be consistent with the role Congress envisioned for savings associations as full service financial centers. Enhancement of customer convenience and services is consistent with the Congressional intent that federal savings associations provide comprehensive, consumer oriented financial services. The proposed activities are important components of meeting the financial needs of customers.

*4. Is the Activity Necessary to Enable Federal Savings Associations to Remain Competitive in the Modern Economy?*

One aspect of this factor is whether a federal savings association needs to engage in an activity to keep pace with its competitors. Federal savings associations compete with national banks, state banks, and other financial service providers. National banks are authorized to buy and sell coin and bullion.<sup>12</sup> This authority has been interpreted to permit national banks to deal in gold, silver, palladium, platinum, and copper.<sup>13</sup> National banks may also issue certificates

<sup>9</sup> OTS Op. Chief Counsel (August 11, 1995).

<sup>10</sup> 12 U.S.C.A. § 1464(c) (West 2001 and West Supp. 2005).

<sup>11</sup> See *e.g.*, the discussion of the legislative history of the HOLA in OTS Op. Chief Counsel (March 25, 1994) and in OTS Op. Chief Counsel (August 11, 1995).

<sup>12</sup> National Bank Act, 12 U.S.C. § 24 (Seventh) (West 2001).

<sup>13</sup> See *e.g.*, OCC Interpretive Letter No. 553 (May 2, 1991) (gold, silver, and platinum); OCC Interpretive Letter No. 683 (July 28, 1995) (palladium); and OCC Interpretive Letter No. 693 (November 14, 1995) (copper).

evidencing the sale of coin and bullion.<sup>14</sup> You represent that certain state laws permit state banks to buy, sell, and deal in Precious Metals.<sup>15</sup> The proposed activities would allow the Association to compete with national banks and others that already provide such services to their customers. If the Association cannot meet its customers' Precious Metals needs, those customers will go elsewhere, and the Association's competitive position will be adversely affected. The proposed services will enable the Association to remain competitive in the modern economy.

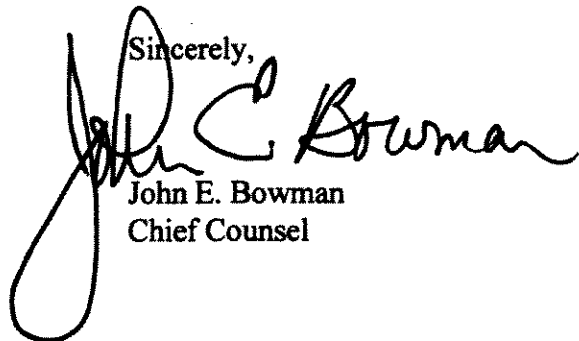
### Conclusion

We conclude that the Association has incidental authority to conduct the proposed activities with respect to Precious Metals and Certificates. Accordingly, the Association may engage in the proposed activities, provided it does so in a safe and sound manner. Based on the information, representations, and documentation provided by the Association and its counsel, I have been advised by our Supervision staff that it does not have safety and soundness concerns with the activities as proposed. The OTS Southeast Region examiners will review these activities concurrent with their examination duties.

In reaching the foregoing conclusions, we have relied upon the factual information, representations, and documentation you have provided to us in writing and in discussions with OTS staff. Our conclusions depend upon the accuracy and completeness of such information, documentation, and representations. Any material differences may result in different conclusions. In particular, our conclusions are conditioned upon your representation that the Association will not purchase Precious Metals other than as described herein, and that the Association will not hold Precious Metals for speculative purposes or engage in speculative transactions involving Precious Metals and Certificates.

If you have any questions regarding this matter, please contact Vicki Hawkins-Jones, Special Counsel, at (202) 906-7034.

Sincerely,

A handwritten signature in black ink, appearing to read "John E. Bowman". The signature is written in a cursive style with a large, looping initial "J".

John E. Bowman  
Chief Counsel

cc: Regional Directors  
Regional Counsel

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<sup>14</sup> See OCC Banking Circular BC-58 (1981).

<sup>15</sup> In support of this representation, you cite section 96 of the New York Banking Law.