

RESCINDED

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This document and any attachments are superseded by TB 76-1a.



Handbook: Trust Activities
Subject: Conflicts of Interest

Section: 700

Paying Finders' Or Referral Fees For The Referral Of Trust Business

Summary: This bulletin provides guidance on how savings institutions should structure its referral fee arrangement for trust accounts. It generally follows OTS Chief Counsel's Opinion P-98-14 (December 21, 1998) (Payment of Finders' Fees for Referral of Trust Business).

For Further Information Contact: Your OTS Regional Office, or Judith McCormick or Larry Musher, Trust Specialists, Washington, DC, (202) 906-5636 or 6465.

The primary fiduciary duty of a savings association in handling trust accounts is that of undivided loyalty to its trust customers. The paying of referral fees could raise self-dealing or other conflict of interest issues. The guidelines expressed in this bulletin are intended to assist saving associations in complying with their fiduciary duty of loyalty to their customers when institutions pay referral fees. An OTS opinion previously concluded that an institution may pay referral fees to persons and entities that refer trust business to the institution, subject to certain conditions.¹ One of those conditions, that the fee be reasonable under the circumstances, should be reviewed on a case-by-case basis. The prior OTS opinion concluded, among other things, that paying a referring party 20% of all fees earned on an account over a ten-year period was reasonable based on the facts and circumstances present in the specific referral fee program discussed in the opinion. While those terms were considered reasonable in that instance, other fee arrangements may also be considered reasonable. The OTS will not arbitrarily impose limitations on the percent of the trust account fee that may constitute a referral or the length of time a savings association may pay a continuing referral fee. Depending on how the referral fee arrangement is structured, however, the savings association should be aware that it might

¹ OTS Chief Counsel Opinion P-98-14 (December 21, 1998) (Payment of Finders' Fees for Referral of Trust Business).

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threaten its own financial condition by paying ongoing referral fees that exceed the institution's income from its trust accounts.

Savings associations with an existing referral fee program should make a good faith effort to meet the disclosure and acknowledgment conditions established in this thrift bulletin in regards to current trust account customers. Referral fee programs for new trust account customers, which include successor trust accounts and new referral fee programs should meet the conditions established in this thrift bulletin effective immediately.

A savings association paying fees to affiliated or non-affiliated persons or entities that refer trust business to the institution should structure its referral fee agreement to meet the following conditions:

- The referral fee should be reasonable under the circumstances and should not result in a trust customer paying any additional amounts for trust services;
- There should be a written referral agreement between the savings association and the person or entity making the referral. Such agreement should: 1) describe any activities that the referring party will engage in on behalf of the savings association or trust account and the compensation to be received by the referring party; 2) contain a statement that the referring party will perform solicitation activities and any supporting services rendered to the pertinent accounts in a manner consistent with the instructions of the savings association and the appropriate provisions of law; 3) contain a requirement that the referring party provide to the prospective customer a current copy of a written disclosure statement prepared by the savings association as described below. The savings association should maintain a copy of this agreement in its records;
- A written disclosure document should be prepared by the savings association and given to prospective customers by the referring party that contains: 1) the name of the referring party and the savings association; 2) the nature of the relationship, including any affiliation, between the referring party and the savings association; 3) a statement indicating that only

² The term "trust account customer" is defined for purposes of this thrift bulletin only as those persons or entities under applicable state law that are entitled to receive trust account statements or for employee benefit accounts it is defined as the plan sponsor.

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the savings association will provide fiduciary services; 4) the extent of any support services the referring party will perform;³ 5) the terms of the referral arrangement, including a description of the compensation paid or to be paid to the referring party; and 6) a statement indicating that the referral fee will not result in any increased charges to the customer.

- The savings association should obtain a dated acknowledgement of receipt of the written disclosure document signed by the trust account customer. The savings association should maintain this signed documentation in its records;
- Savings associations registered as investment advisers should comply with any restrictions placed upon the payment of referral fees in accordance with applicable Securities and Exchange Commission and/or state securities regulations;⁴
- For referral fee relationships involving employee benefit plans subject to the Employee Retirement Income Security Act of 1974 (ERISA), the savings association should obtain an opinion of counsel that the fee arrangement does not violate any provisions of ERISA; and
- For referral fee relationships involving affiliates, the savings association should ensure that it complies with the restrictions on transactions with affiliates or subsidiaries.⁵



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³ Examples of permissible support services are detailed in OCC Interpretive Letter #607 (August 24, 1992).

⁴ 17 C.F.R. §275.206(4)-3 (Cash payments for Client Solicitations) generally prohibits an investment adviser registered under the Investment Advisers Act from paying a cash fee, directly or indirectly, to a third party (a “solicitor”) with respect to solicitation activities for the adviser unless the arrangement complies with a number of conditions. Savings associations registered as an investment adviser in one or more states must review and comply with any state securities laws applicable to the payment of referral fees.

⁵ Certain types of transactions with affiliates are subject to the restrictions set forth at 12 U.S.C.A. §1468 and the OTS’s transactions with affiliates regulation at 12 C.F.R. §§563.41-42. Specifically, §563.42(a)(2) covers referral fee arrangements. This regulation requires, among other things, that such transactions are to be on terms and under circumstances that are substantially the same, or at least as favorable to the savings association or its subsidiary, as those prevailing at the time for comparable transactions with or involving nonaffiliated entities.