State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS

P.O. Box 41200 · Olympia, Washington 98504-1200
Telephone (360) 902-8700 · TDD (360) 664-8126 · FAX (360) 586-5068 · http://www.dfi.wa.gov

Joseph M. Vincent, General Counsel
Direct: 360.902.0516
Mobile: 360.970.4699
E-Fax: 360.704.7036
Email: jvincent@dfi.wa.gov

ISGC-2006-012-DOB

November 22, 2006

[redacted]

RE: Direct Insurance Sales by State-Chartered Commercial Banks

Dear [redacted] :

You have sought confirmation from the Division of Banks of the Washington State Department of Financial Institutions ("DFI"), on behalf of [redacted] Bank ("Bank"), that Bank is not required to obtain specific approval to engage or participate in the sale of life and disability insurance-related products, even though DFI has indicated that it would like notice from Bank and any of its other chartered banks and savings banks of an intent to engage in such sales. Secondly, you have inquired about the enforceability (if at all) of certain other state law restrictions on insurance sales by Bank which have not been specifically repealed by the Washington State Legislature. And thirdly, you have made inquiry as to the permissibility of "referral fees" with respect to insurance sales activity as between Bank and a third-party insurance sales agent.

The Division of Banks has referred your inquiry to me for response.

1.0 Representations and Assumptions

1.1 Bank's Representations. Bank has obtained a corporate license from the Office of Insurance Commissioner ("OIC") for the sale of life and disability insurance. Sales will be made through an *affiliated*[1] agent, who will maintain an office in Bank's main branch, in downtown Spokane. Most, *but not necessarily all*, of the insurance referrals will be *commercial*, rather than consumer, accounts.

1.2 Our Assumptions. Because of the broad-sweeping nature of your inquiry, we have elected to treat it as if it were —

(a) A request by a state-chartered commercial bank under Title 30 RCW to invoke the powers of a mutual savings bank under Title 32 RCW with respect to insurance sales, pursuant to RCW 30.04.217;[2]

(b) A request to invoke the powers of a federal mutual savings bank with respect to insurance sales pursuant to RCW 32.08.142 and RCW 32.08.146, which may be invoked by authority of a finding from the Director of Banks under RCW 30.04.217;[3] and

(b) A request by a state-chartered commercial bank under Title 30 RCW to invoke the powers of a national bank and/or any other federally chartered bank with respect to insurance sales pursuant to RCW 30.04.215.[4]

2.0 Summary Interpretation

2.1 "Subsidiary" and "Affiliate" Activity. As we have previously indicated to you in writing, sales by a "subsidiary" or "affiliate" of Bank, or an independent, third-party licensed sales agent, are generally *exempt* from any geographic restrictions.[5]

2.2 Recognition of "Cross-Charter Parity" and "Federal Parity". With respect to the exercise by Bank of "cross-charter parity" and "federal parity," the Director of Banks has found and we conclude here, as follows:

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[1] Your use of the term "affiliated" is of concern, here, since, in regulatory parlance, this usually would mean that Bank and the insurance agency in question are under common control, e.g., being owned or controlled by a bank holding company.

[2] This is what the Division of Banks refers to in this Interpretive Letter as "cross-charter parity."

[3] This is what the Division of Banks means in this Interpretive Letter by the use of the term "federal parity."

[4] This is *also* what the Division of Banks means in this Interpretive Letter by the use of the term "federal parity."

[5] There are both FDIC rules and state insurance regulations addressing sharing of commissions or the making of "referral fees" with respect to insurance sales activity as between Bank and a third-party insurance sales agent. The federal and state regulations appear, in this instance, to be compatible with and complementary of each other. Both regulations impose restrictions on how and when "referral fees" may be made to Bank for "referrals," if Bank is *unlicensed*. Bank has obtained an OIC license, which might permit Bank to avoid the restrictions imposed by RCW 48.17.490 (although OIC, *and not DFI*, decides how this state law is interpreted and enforced). However, a relationship with a *non-affiliate* third-party sales agent of Bank, because it is a "person" acting "on behalf of Bank," will likely be subject Bank to *federal* banking regulations restricting the manner of and compensation for "referrals." Also, an "affiliate" of Bank, which would include any company under common control by the same entity (e.g., a holding company) "controlling" Bank, is subject to this same FDIC rule.

(a) Bank may invoke "cross-charter parity" with respect to insurance sales pursuant to RCW 30.04.217;[6] and

(b) Bank may invoke "federal parity" with respect to insurance sales pursuant to RCW 30.04.215 and RCW 32.08.142.[7]

2.4 Governing Law Without Considering "Federal Parity" to Override Geographic Restriction. Under Title 30 RCW, Bank may *directly* act as an insurance agent for life and disability insurance products, provided that it is located in a city of *not more than five thousand inhabitants*. As a practical matter, this simply means that the branch in which Bank's insurance operations may be located cannot be situated in a city or town of more than five thousand inhabitants. However, according to applicable federal law, which Bank may invoke by means of "federal parity," Bank may still market to and make direct sales to consumers residing outside this restricted geographic area.[8]

2.5 Recognition of "Federal Parity" to Override Geographic Restriction. Even though, as indicated above, federal law regulating national banks generally imposes the same geographic restriction on national banks as Washington State law does for state-chartered commercial banks, we conclude, after through review and reflection, that Bank may, by means of "cross-charter parity" and "federal parity," invoke the powers of a *federal mutual savings bank* with respect to direct sales of *general* life and disability insurance products. In so doing, we conclude, after thorough review and reflection upon the statutes, rules, case law and interpretations affecting the *incidental powers* of federal mutual savings banks,[9] that Bank may engage directly as an insurance agent for consumer life and disability insurance products *without regard to any geographic restrictions*.

3.0 Analysis and Discussion

3.1 General Implications of Gramm-Leach-Bliley Act. RCW 30.04.127(2) declares that the —

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[6] The Director of Banks has elected to treat Bank's inquiry as an application for "cross-charter parity" pursuant to RCW 30.04.217. The Director of Banks has found that Bank may assume the powers of a mutual savings bank under Title 32 RCW with respect to insurance sales. The Director has made a contemporaneous finding that the exercise of such powers and authorities by Bank (1) serves the convenience and advantage of depositors, borrowers, and the general public and (2) maintains the fairness of competition and parity between Title 30 banks and Title 32 mutual savings banks.

[7] The Director of Banks has elected to treat Bank's inquiry as an application for "cross-charter parity" pursuant to RCW 30.04.215(3) and, in combination with each other, RCW 30.04.217, RCW 32.08.142 and RCW 32.08.146. The Director of Banks has found that Bank may assume the powers that a federal mutual savings bank had, either before or after July 27, 2003, with respect to insurance sales. The Director has made a contemporaneous finding that the exercise of such powers and authorities by Bank (1) serves the convenience and advantage of depositors and borrowers and (2) maintains the fairness of competition and parity between state-chartered commercial banks and savings banks, on the one hand, and federal savings banks or their successors under federal law, on the other hand.

[8] We also note, parenthetically, that because of Bank's ability to invoke "cross-charter parity" with the powers of a state-chartered savings bank under Title 32 RCW, Bank may *directly* act as an insurance agent for the purpose of writing fire insurance on property in which the bank has an insurable interest. Moreover, the Bank may do so on property located in both the city in which any of Bank's branches are situated and also in all of their immediate, contiguous suburbs. Accordingly, we conclude that, by means of "cross-charter parity," Bank may effectively market fire insurance on all of the mortgage loans it originates in its entire branch service area and surroundings.

[9] When using the term "federal mutual savings bank," as that term is used in RCW 30l.04.217, we also mean a "federal savings association."

> ". . . director may not authorize under this section and no bank or trust company may act as an insurance or travel agent unless otherwise authorized by state statute."

However, to the extent that this provision requires approval of the DFI Director, such approval is no longer required *per se*. The reason for this is attributable to the Gramm-Leach-Bliley Act of 1999, P.L. 106-102 ("GLBA"), which *generally* established a federally mandated framework that both allows and encourages the convergence of the banking, *insurance* and securities industries. Legal barriers that separated the industries have been dissolved or significantly modified at the national level, and several contrary provisions at the state level are preempted by federal law.

However, we caution that DFI still has plenary authority to determine what *insurance products* Bank may market when acting as an insurance agent pursuant to state insurance law. In addition, DFI has authority to restrict or prohibit the activities of Bank acting as an insurance agent, if such activities would materially and adversely impact *safety and soundness*. Finally, state law (including state "federal parity statutes) is still controlling, as discussed in detail below, where GLBA has *not* specifically preempted state law. For these reasons, then, the DFI requests of all of its chartered banks and savings banks that they provide the DFI with advance notice of an intent to engage in such sales.

3.2 Restrictions on Direct Insurance Sales. You have inquired, in effect, whether certain geographic restrictions on direct insurance sales by Bank are any longer enforceable in the wake of GLBA. After exhaustive review and inquiry at the federal level, we conclude that such geographic restrictions (as explained in and qualified by this interpretive letter) are no longer operative with respect to the direct sale of life and disability insurance products.

3.2.1 Washington State Law. RCW 30.08.140(10) declares that a state-chartered commercial bank may act as an insurance agent, provided that "the bank [is] located in a city of not more than five thousand inhabitants."[10] But for the exercise of "cross-charter parity" and "federal parity" to the contrary,[11] this geographic restriction would be *enforceable* under Section 104 of GLBA[12] to the extent that it has not been repealed by the Washington State Legislature.

3.2.2 Limitation on Anti-Discrimination Protections of GLBA. Section 104 of GLBA[13] is a densely worded provision of federal law. The overall intent of Section 104 of GLBA is to permit direct sales of insurance by banks. Moreover, Section 104 of GLBA contains an important, general provision pre-empting state law that would *discriminate* against the ability

[10] Likewise, the Division of Bank's rule, WAC 208-512-350(1), which provides the same geographic restriction, would also be enforceable.

[11] See Subsection 3.2.3 below.

[12] 15 U.S.C. §6701.

[13] *Ibid*.

of banks to engage in direct insurance sales. However, Section 104 of GLBA specifically *exempts* from this federal "anti-discrimination" protection any state law restrictions on direct insurance sales that were in existence as of *September 3, 1998*.[14] The latest amendment of RCW 30.08.140, including subsection (10) thereof, was in 1996.[15] Therefore, it would appear that unless the Washington State Legislature amends RCW 30.08.140(10), this restriction would not be preempted by GLBA[16] and can only be disregarded if Bank may invoke "parity" with some federal banking statute, rule, case law and/or controlling interpretation that does not impose any special geographic restriction.

3.2.3 "Cross-Charter Parity" and "Federal Parity" Together Permit Direct Sales of Consumer Life and Disability Insurance Products without Geographic Restriction. Federal case law has long recognized the sale of insurance as conduct "closely related to banking."[17] We have concluded above that Bank may, without specific DFI approval, engage in powers related to insurance sales conferred upon a *federally chartered bank* doing business in Washington State as of July 27, 2003.[18] Secondly, we have concluded above that Bank may engage in powers related to insurance sales conferred upon a *federal mutual savings bank* both on or before July 27, 2003,[19] and after July 25, 2003.[20] While invoking the powers of a national bank do not avail Bank of authority it seeks, the exercise of the powers of a federal mutual savings bank will permit Bank to engage in direct sales of life and disability insurance products *without* geographic restriction. So that Bank and other DFI stakeholders similarly situated may properly understand the benefits (albeit, peculiarities) of "cross-charter parity" and "federal parity," we take this opportunity to thoroughly discuss the relative merits, with respect to insurance sales, of invoking the powers of federal mutual savings banks as opposed to national banks.

3.2.3.1 Invoking "National Bank Powers" Would Not Help Bank. The exercise of "federal parity" with the powers of a national bank will not aid Bank, because governing federal statute and rule, case law and federal regulatory interpretations applicable to *national banks* impose a geographic restriction identical to that set forth in RCW 30.08.140(10). The National Bank Act specifically prohibits direct insurance sales by a national bank in any

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[14] 15 U.S.C. §6701(d)(2)(C)(ii).

[15] 1996 Washington Session Laws, Ch. 2, §5.

[16] See Concluding Remarks at Section 5.0 below.

[17] *Alabama Assoc. of Insurance Agents v. Federal Reserve Board*, 558 F.2d 729 (5th Cir. 1977), cert. den. 435 U.S. 904 (1978). See also Washington State law, at RCW 30.04.215(1), which declares:

> "Notwithstanding any other provisions of law, in addition to all powers enumerated by this title, and those necessarily implied therefrom, a bank or trust company may engage in other business activities that have been determined by the board of governors of the federal reserve system or by the United States Congress to be closely related to the business of banking, as of July 27, 2003."

[18] RCW 30.04.215(3).

[19] RCW 30.04.217 and RCW 32.08.142.

[20] RCW 30.04.217 and RCW 32.08.146.

location in which the population exceeds 5,000 inhabitants.[21] Federal case law has interpreted 12 U.S.C § 92 so as to limit only the location of insurance sales offices in bank branches, not the location of insurance customers. Accordingly, so long as insurance offices are housed in bank branches in locations with populations no greater than 5,000 inhabitants, national banks may act as insurance agents without regard to location of their customers.[22] No authoritative interpretation, however, including the important holding in *Barnett Bank, N.A. v Nelson*,[23] has rendered unenforceable the basic geographic restriction with respect to insurance sales by national banks.

3.2.3.2 Federal Mutual Savings Banks and Expansive "Incidental Powers" under HOLA. The Home Owners' Loan Act of 1933 ("HOLA") is the federal law that specifies the powers of federal savings banks and federal savings and loan associations.[24] Traditionally, HOLA and companion rules of the Federal Home Loan Bank Board, the predecessor of the Office of Thrift Supervision ("OTS"), required that all insurance sales were to be made through subsidiary or affiliate service corporations. However, in a series of seminal interpretive letters in the 1990's, the OTS greatly expanded the "incidental powers" of federal mutual savings banks chartered under HOLA. One of the first of these interpretive letters to provide extensive legal reasoning about "incidental powers" under HOLA related to the authority of federal savings associations to provide postal services.[25] But more germane to our discussion, a milestone OTS Chief Counsel's Opinion, dated October 17, 1994, determined that "incidental powers" under HOLA included the authority of a federal mutual savings bank or federal savings association to make direct sale of credit life and disability insurance and fixed-rate annuities to its credit applicants.[26] Subsequently, on February 12, 1996, the OTS Chief Counsel also

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[21] The National Bank Act, at 12 U.S.C. § 92. In enacting GLBA, Congress specifically chose not to amend the National Bank Act, at 12 U.S.C. §92. Moreover, 12 U.S.C. §92 and the companion Regulations of the Office of Comptroller of the Currency ("OCC"), at 12 C.F.R. §7.1001, are consistent with the restrictions set forth in RCW 30.08.140(10). Thus, the exercise of *federal parity* (i.e., invoking the powers of a national bank) would not generally benefit Bank if it sought to engage in direct insurance sales to consumers without any geographic restrictions.

[22] See *NBD Bank, N.A. v Bennett*, 67 F.3d 629 (7th Cir. – Indiana, 1995); see also *Independent Ins. Agents of Am. v Ludwig*, 997 F.2d 958 (D.C. Cir., 1993). A national bank may rely upon *federal case law* interpreting 12 U.S.C. §92 to permit an insurance sales office in a bank branch situated in a town of no more than 5,000 inhabitants, while still permitting the national bank to make direct insurance sales to customers who reside *elsewhere*.

[23] See *Barnett Bank, N.A. v Nelson*, 517 US 25, 116 S Ct 1103, 134 L Ed 2d 237 (1996), on remand, 84 F.3d 1401 (11th Cir. – Fla., 1996). In *Barnett*, the U.S. Supreme Court held that a federal statute authorizing national banks to sell insurance in small towns (12 U.S.C. §92) pre-empted a Florida statute restricting bank insurance sales by affiliated national banks, since (1) under ordinary legal principals of federal pre-emption, intent of the federal statute was to grant authority to small town national banks to sell insurance regardless of state approval and (2) the federal statute specifically related to the business of insurance within meaning of the McCarran-Ferguson Act, at 15 U.S.C. § 1012. Nothing in the *Barnett* case itself would have invalidated any Washington State law imposing a geographic restriction on state-chartered commercial banks engaging in direct insurance sales to consumers. When Congress enacted GLBA three years later, Section 104 thereof [15 U.S.C. §6701] generally *preserved* state regulation of insurance under the McCarran-Ferguson Act, while also citing and incorporating the holding in the *Barnett* case so as to make clear that the National Bank Act pre-empts state law concerning the powers of national banks to engage in insurance sales. But since Section 104 of GLBA also limited its own anti-discrimination protections on direct insurance sales by banks only to restrictive state laws *effective after September 3, 1998*, GLBA also left it up to the states, consistent with the McCarran-Ferguson Act, to repeal geographic restrictions on direct insurance sales to consumers by insured state-chartered banks. The Washington State Legislature has not subsequently amended RCW 30.08.140(10) so as to effectively repeal the geographic restriction clause.

[24] 12 U.S.C. §§ 1461 et seq.

[25] OTS Op. Chief Counsel, Mar. 25, 1994. This seminal opinion, while related only to postal services, is perhaps the most erudite in its citation and analysis of U.S. Supreme Court and other federal appellate case law concerning the "incidental bank powers" doctrine.

[26] OTS Op. Chief Counsel, Oct. 17, 1994.

determined that a federal mutual savings bank or federal savings association could directly sell credit-related unemployment and single interest property insurance in connection with consumer loans.[27] These "incidental powers" under HOLA have been made generally known to all federal mutual savings banks and federal savings associations pursuant to OTS Regulatory Bulletin.[28] Therefore, we can, by invoking "federal parity" under RCW 30.04.215(3), RCW 30.04.217 and RCW 32.08.142, declare that Bank has the authority, at the very least, to engage in direct sales of credit life, disability and unemployment insurance, and also single interest property insurance, to its borrowers and *without regard to geographic restriction*, which is nowhere to be found in HOLA.

However, the issue is whether HOLA *presently* extends further to include direct sales of life and disability insurance when *not* specifically related to the payoff of credit originated by a federal savings association.[29] In this regard, DFI relies upon a crucial test fashioned by OTS itself for analyzing all or most "incidental powers" questions related to HOLA. In the Chief Counsel's Opinion dated October 17, 1994, the OTS set forth a four-prong test for determining whether "incidental powers" under HOLA extend to a particular activity, as follows:

(1) Purpose and Function. Is the activity consistent with the purpose and function Congress envisioned for federal savings associations, as evidenced in relevant banking statutes and their legislative history?

(2) Similarity to or Facilitation of Express HOLA Powers. Does the activity facilitate the conduct of an activity expressly authorized by Congress for federal savings associations, or is the activity similar to an activity that Congress has expressly authorized for federal savings associations?

(3) Fulfilling the Role of Financial Intermediary. Does the activity relate to the financial intermediary role that all federal savings associations were intended to play?

(4) Adapting to Modern Economic Circumstances. Is the activity necessary to enable federal savings associations to remain competitive and relevant in the modern economy, thereby permitting federal savings associations to fulfill the purposes for which they were created?

Applying this four-prong test to the present request by Bank, we are asking whether life and disability insurance may be sold directly by Bank without regard to whether it is in relation to a payoff of credit. While we do not believe that "incidental powers" under HOLA extend to the sale of insurance to consumers that are *not* otherwise depositors or borrowers of a federal

[27] OTS Op. Chief Counsel, Feb. 12, 1996.

[28] *See* OTS Regulatory Bulletin, *Powers of Federal Savings Associations*, March 1, 2002, pp. 12-13.

[29] We must ask this question in part because in 1996 the OTS Chief Counsel indicated, in reference to its reasoning in the October 17, 1994, opinion, that a federal savings association's "statutory authorization to make loans necessarily carries with it the authority to negotiate the terms and conditions of repayment of the loan, including terms and conditions that reduce the risk of default." *See again* OTS Op. Chief Counsel, Feb. 12, 1996, p. 2; *citing* OTS Op. Chief Counsel, Jan. 10, 1995, at pp. 5 and 7 (n. 16).

savings association, we do believe that the general four-prong test may be applied so as to find in HOLA, either before or after July 27, 2003, the "incidental power" to engage directly in the sale of life and disability insurance in general, provided that the same is made to loan applicants or existing depositors or borrowers. Accordingly, by reason of "federal parity" under either RCW 32.08.142 or RCW 32.08.146, coupled with the "cross-charter parity" provisions of RCW 30.04.217, we conclude that Bank may engage directly in the sale of life and disability insurance in general, provided that the same is made to depositors, loan applicants or existing borrowers.

First of all, Congress made many amendments to HOLA, beginning in the late 1970's, that greatly expanded the powers and modernized the functions of federal savings associations. As stated by the October 17, 1994, Chief Counsel's opinion, "Congress' objective was to enable federal savings associations to meet the needs of ordinary consumers 'across the board' in 'one-stop family financing centers.'"[30] It is fairly clear that the direct sale of general life and disability insurance to depositors and borrowers fulfills this Congressional purpose of creating a one-stop financial center for consumers. In making this judgment, DFI relies upon the opinion of OTS Chief Counsel and, in turn, important federal case law.[31] Accordingly, it is the opinion of DFI that Bank's proposed activity would meet the first prong of the OTS test.

Secondly, it is the opinion of the DFI that Bank's proposed activity meets the second prong of the OTS test to the extent that it would have a similarity to or otherwise facilitate express powers of a federal savings association. In making this judgment, DFI relies upon the opinion of OTS Chief Counsel and, in turn, important federal case law.[32] Three of the basic express powers of a federal savings association are the ability: (1) to make consumer loans; (2) to hold them as a portfolio investment or to otherwise purchase such loans originated by others; and (3) to service them with the prospect that they will be performing, even if borrowers incur death or disability. While credit life and disability coverage purports to guarantee a federal savings association's investment in the event of death or disability, *general* life and disability coverage is no less important as a positive underwriting indicator and as an indirect source of loan performance in the event of death or disability of, for example, the primary earning spouse. Moreover, general life and disability coverage, as opposed to credit life and disability insurance, provides more choice for consumers, thereby promoting the first prong of providing a one-stop consumer financial center.

Thirdly, it is the opinion of the DFI that Bank's proposed activity, even though undertaken only in its capacity as an insurance agent, would be clearly facilitating funds intermediation. Through the sale of third-party, general life and disability insurance, a federal savings association would be facilitating the pooling and investment of insurance premiums by third-party insurers, who, in turn, invest those funds in the financial marketplace pending the contingency of paying claims in the event of death or disability of insureds. Third-party

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[30] OTS Op. Chief Counsel, Oct. 17, 1994, p. 6, citing S. Rep. No. 368, 96th Cong., 1st Sess. 13 (1979), reprinted in 1980 U.S. Code Cong. & Admin. News 236, 248.

[31] See OTS Op. Chief Counsel, Mar. 25, 1994, p. 3, citing *Colorado National Bank v. Bedford*, 310 U.S. 41, 48-50 (1939).

[32] See OTS Op. Chief Counsel, Mar. 25, 1994, p. 3, citing *Wyman v. Wallace*, 201 U.S. 230, 243 (1906), *Miller v. King*, 223 U.S. 505, 511 (1912).

insurance policies (indemnity contracts) are historically a common form of funds intermediation. Accordingly, the Bank's proposed activity would meet the third prong of the OTS test of "incidental powers" under HOLA.

Fourthly, it is also the opinion of the DFI that Bank's proposed activity would allow a federal savings association to remain competitive and relevant in the modern economy. In the view of DFI, the fourth prong of the OTS test has also been met by Bank's proposed activity.[33] One of the purposes of GLBA was to promote industry competition and consumer choice in banking, insurance and securities through de-regulation and the ability of financial institutions to cross-market a wider range of financial products. Permitting a federal savings association to directly sell general life and disability coverage would certainly aid a federal savings association to remain competitive and relevant in a post-GLBA environment.

DFI believes that the direct sale of *general* life and disability insurance to Bank depositors, credit applicants and existing borrowers, having met all four prongs of the 1994 OTS test, is a permissible "incidental power" under HOLA existing prior to July 27, 2003, and that, accordingly, Bank has such "incidental power" by reason of "cross-charter parity" and "federal parity" under RCW 30.04.217 and RCW 32.08.142.[34]

3.3 Authority to *Indirectly* Engage in Insurance Sales. The limitations of RCW 30.08.140(10) and WAC 208-512-350(1) would also not be applicable to a third-party sales agent to which Bank makes "referrals." Indeed, even a *subsidiary* of Bank may, pursuant to Section 104 of GLBA, engage in sales of insurance subject to the GLBA restrictions and licensing and regulation by the Office of Insurance Commission ("OIC").[35] By way of information, an insurance sales subsidiary or affiliate of Bank, or a third-party independent agent acting "on behalf of" Bank, must comply with all regulations of the Federal Deposit Insurance Corporation ("FDIC") respecting consumer protection in the area of insurance sales,[36] unless state insurance law and regulation otherwise controls. This includes, without limitation:

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[33] See OTS Op. Chief Counsel, Mar. 25, 1994, p. 4, citing *Franklin National Bank v. New York*, 347 U.S. 373, 377 (1954), *First National Bank v. Hartford*, 273 U.S. 548, 559-560 (1927).

[34] DFI has gone to great lengths, however, to obtain an indication of whether OTS would expressly and affirmatively opine on this matter if asked to do so by what OTS would deem a real party in interest, such as an actual federal savings association or a trade group representing federal savings associations. DFI elicited the help of general counsel for the Conference of State Banking Supervisors to directly discuss this matter with OTS General Counsel, John Bowman, who informally (but favorably) indicated that, if *formally* asked, OTS would expressly opine that "incidental powers" under HOLA extend not only to credit life and disability insurance, but to general life and disability insurance to be sold to depositors, credit applicants and existing borrowers. This indication is supported by direct, informal conversations that Joseph M. Vincent, DFI's General Counsel, had with OTS Western Regional Counsel, who confirmed that OTS believes DFI has: (1) the authority, in the interpretation of its "cross-charter parity" and "federal parity" statutes, to determine what "incidental powers" state-chartered banks and savings banks would have when invoking the powers of a federal savings association; and (2) the propriety to itself interpret HOLA, using applicable OTS Opinions of Chief Counsel, statements of Congressional intent, and a compendium of federal case law on "incidental bank powers." We conclude, therefore, that if such "incidental powers" under HOLA must be treated as if they came into being *after* July 27, 2003, then, as applied to Bank, they nevertheless (1) serve the convenience and advantage of depositors and borrowers and (2) maintain the fairness of competition and parity between state-chartered commercial banks and savings banks, on the one hand, and federal savings banks or their successors under federal law, on the other hand. Though we believe unnecessary, Bank would also be entitled to invoke "cross-charter parity" and "federal parity" under RCW 30.04.217 and RCW 32.08.146.

[35] The same would hold true for an *indirect* affiliate of Bank (i.e., an independent subsidiary of a *holding company* of Bank, if any).

[36] *Consumer Protection in Sales of Insurance*, 12 C.F.R. Part 343 [which are identical to OCC regulations (12 C.F.R. Part 14), OTS regulations (12 C.F.R. Part 536), and FRB regulations (12 C.F.R. Part 208, Subpart H)].

- A general rule concerning the "segregation" of activities when insurance sales are conducted by a subsidiary, affiliate or third-party agent at Bank's main office or its branches and restrictions on "referral fees";[37]

- The FDIC prohibition against anti-coercion and anti-tying;[38] and

- The FDIC requirement that all insurance sales personnel must be subject to licensing and regulation by the OIC.[39]

As we have indicated above, insurance sales by a subsidiary, "affiliate," or person "acting on behalf" of Bank are still subject to extensive licensing and regulation by the OIC, independent of FDIC regulations. The FDIC's rule, at 12 C.F.R. §343.50(b), permits the one-time payment of a nominal "referral fee." We caution in passing, however, that this federal regulation does not preempt state law or regulation administered by the OIC and is, therefore, subject to override by the Washington State Legislature and the OIC.

RCW 48.17.490, which is administered and enforced by the OIC, sets forth detailed restrictions on when and how compensation may be made by an OIC-licensed insurance professional to a non-licensed person.[40] Upon our own review of RCW 48.17.490, in conjunction with the FDIC's rule, at 12 C.F.R. §343.50(b), we believe that the two regulations

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[37] The FDIC requires, at 12 C.F.R. §343.50, as follows:

> (a) General rule. A bank must, to the extent practicable, keep the area where the bank conducts transactions involving insurance products or annuities physically segregated from areas where retail deposits are routinely accepted from the general public, identify the areas where insurance product or annuity sales activities occur, and clearly delineate and distinguish those areas from the areas where the bank's retail deposit-taking activities occur.
> (b) Referrals. Any person who accepts deposits from the public in an area where such transactions are routinely conducted in the bank may refer a consumer who seeks to purchase an insurance product or annuity to a qualified person who sells that product only if the person making the referral receives no more than a one-time, nominal fee of a fixed dollar amount for each referral that does not depend on whether the referral results in a transaction.

With respect to whether subsection (b) of 12 C.F.R. §343.50 is enforceable, as against state law and regulation restricting or prohibiting referral fees to unlicensed persons, see Section 4.0 of this Interpretive Letter.

[38] 12 C.F.R. §343.30(a).

[39] The FDIC, at 12 C.F.R. §343.60, declares:

> A bank may not permit any person to sell or offer for sale any insurance product or annuity in any part of its office or on its behalf, unless the person is at all times appropriately qualified and licensed under applicable State insurance licensing standards with regard to the specific products being sold or recommended.

[40] RCW 48.17.490 declares:

> (1) No agent, general agent, solicitor, or broker shall compensate or offer to compensate in any manner any person other than an agent, general agent, solicitor, or broker, licensed in this or any other state or province, for procuring or in any manner helping to procure applications for or to place insurance in this state. This provision shall not prohibit the payment of compensation not contingent upon volume of business transacted, in the form of salaries to the regular employees of such agent, general agent, solicitor or broker, or the payment for services furnished by an unlicensed person who does not participate in the transaction of insurance in any way requiring licensing as an agent, solicitor, broker, or adjuster and who is not compensated on any basis dependent upon a sale of insurance being made.
> (2) No such licensee shall be promised or allowed any compensation on account of the procuring of applications for or the placing of kinds of insurance which he himself is not then licensed to procure or place.
> (3) The commissioner shall suspend or revoke the licenses of all licensees participating in any violation of this section.

may be read so as to be compatible and complementary. However, we caution again that, since GLBA *re-affirmed* state regulation of insurance sales, 12 C.F.R. §343.50(b) is not ultimately controlling of whether federal and state requirements are compatible and complementary. Rather the OIC's interpretation and enforcement of RCW 48.17.490 will be controlling with respect to the activities of any "referrals" by Bank.[41]

3.4 Bank Will Be Subject to FDIC Restriction on "Referrals" Even If Licensed. A relationship with a *non-affiliate* third-party sales agent of Bank, because it is a "person" acting "on behalf of Bank,"[42] will likely subject Bank to the FDIC's rule regarding restrictions on *consumer* "referrals." Certainly, an "affiliate" of Bank, which includes any company controlled by an entity which also controls Bank (e.g., a bank holding company), is subject to this same FDIC rule with respect to *consumer* "referrals."[43] This FDIC restriction does not apply to *commercial* "referrals."

3.5 Anti-Tying Rule Is Still Applicable. Nothing we have said in this interpretive letter negates or modifies in any way the obligation of Bank to refrain from any tying behavior. Bank must avoid making the sale of any insurance product a condition of a customer's deposit or loan agreement.[44]

4.0 Concluding Remarks

The interpretation made above is generally applicable to all state-chartered commercial banks, similarly situated, and, as applicable, state-chartered savings banks. However, to the extent that this interpretive letter addresses issues in a general manner and not the specific circumstances of persons other than Bank, it may not be applicable to particular issues of concern to other state-chartered commercial banks and savings banks.

In addition, this interpretive letter addresses only the specific questions raised by Bank and does not express any opinion or interpretation of law or regulation with respect to insurance law and regulation in general. Accordingly, Bank is advised to look to the OIC for an interpretation of the Washington Insurance Code, Title 48 RCW, and applicable OIC regulations to be found generally at Title 248 WAC. In addition, Bank is advised to seek the advice of independent legal counsel with respect to the opinions and conclusions set forth in this interpretive letter.

Should you have any questions, please do not hesitate to call upon the Division of Banks at (360) 902-8704.

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[41] DFI does not administer the Washington Insurance Code, Title 48 RCW. Therefore, you are advised to consult with the OIC concerning the regulatory responsibilities of an insurance sales licensee.

[42] *See* FDIC definitional rule, at 12 C.F.R. §343.20. Indeed, one does not have to be an "affiliate" under 12 C.F.R. §343.20 for the restrictions of 12 C.F.R. §343.50(b) to apply. *See also* Footnote 11 above for text of 12 C.F.R. §343.50(b).

[43] *See* definition of "affiliate" at 12 C.F.R. §343.20.

[44] *See again,* 12 C.F.R. §343.30(a).

Yours very truly,

WASHINGTON STATE DEPARTMENT
OF FINANCIAL INSTITUTIONS

By:
Joseph M. Vincent
DFI General Counsel

For Division of Banks

Cc: Brad Williamson, Director of Banks

Michael C. Abe, Program Manager – Examinations
Division of Banks