



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

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August 5, 2008

MEMORANDUM

FOR: John E. Ryan, Regional Director, Southeast  
 Karen Bruton, Regional Counsel, Southeast

THROUGH: John E. Bowman, Deputy Director and Chief Counsel *JB*  
 Timothy T. Ward, Deputy Director, Examinations, Supervision, and Consumer Protection *TTW 8/5/08*

FROM: Deborah Dakin, Senior Deputy Chief Counsel *DD*  
 Vicki Hawkins-Jones, Special Counsel *VHJ*  
 Fred Phillips-Patrick, Director, Credit Risk *FPP*

SUBJECT: [ ] – Proposed Discount Program

We have reviewed the various materials forwarded to us by the Southeast Regional Counsel's Office pertaining to the proposal of [ ] (Association) to offer a discount card program for an integrated suite of services. The Southeast Region Supervisory staff has no supervisory objection to the Association's proposed activities, but has requested assistance with certain questions regarding the proposed program, including the permissibility of such a program.

**Description of the Proposed Program**

The Association has provided certain information, summarized herein. The Association proposes to provide the following services and products (collectively, the Discount Program) to its customers indirectly through a third-party vendor (Vendor):<sup>1</sup>

- Emergency roadside assistance
- Emergency travel reimbursement
- Assistance finding and negotiating with certified mechanics
- Credit card registration and notification service for lost/stolen credit cards
- Discounts on lodging and car rental
- Reward for information leading to the arrest and conviction of one who damages or steals a customer's car
- Ambulance expense reimbursement
- Access to a legal referral service network
- Reduced cost on certain auto maintenance and repair services, and travel-related services

<sup>1</sup> The third-party Vendor with which the Association plans to contract is [ ] which, in turn, would provide the services through a network of contract service providers.

The Vendor would provide the products and services to the Association's customers. Initially, the Discount Program would be offered to consumer loan customers in the Association's [ ] lending division ( ) for a projected fee of \$ [ ]. The Association would retain [ ]% of the fee for marketing the Discount Program, collecting applications, submitting them to the Vendor, and monitoring the Discount Program for customer service inquiries. The Vendor would issue customers a "discount card" that displays the logo of the Association's [ ] division. The Vendor would make the services available to the Association's customers through a network of service providers (Service Providers) with which the Vendor will have separate contracts.

As described by the Association, a customer's purchase of the Discount Program would be optional. Customers may pay the fee in cash at loan closing or the fee can be added to the principal balance of the customer's loan. The Association states that it will work with the Vendor to prepare marketing and promotional materials at the Association's expense for use in advertising, including on the [ ] division website and in loan production offices. If a customer elects to purchase the Discount Program, the customer will complete an application, and the Association will enroll the customer and forward the application to the Vendor.

The Association represents that it will make required disclosures; handle initial customer inquiries; monitor the Vendor and the Service Providers; handle customer service issues between its customers, the Vendor, and the Service Providers; and perform continuing due diligence on the Vendor. The Association states that not all of the products and services will be available in all states and the Association will confirm that none of the services will be considered insurance under state law.

The Association also has furnished a copy of a letter from its counsel suggesting that, based on the general description of the Discount Program provided by the Association to its counsel, and if conducted as described by the Association, the Discount Program appears to be within the incidental powers of the Association.<sup>2</sup>

The Southeast Region has asked for assistance with four questions regarding the proposed Discount Program.

***Question 1: Is the proposed Discount Program legally permissible under HOLA?***

Subject to any supervisory concerns, limitations, or restrictions, we confirm that the activities encompassed in the Discount Program are permissible activities for a federal savings association pursuant to its incidental powers. It has long been established that federal savings associations possess powers that are incidental to their express powers as set forth in the HOLA and OTS regulations. In determining whether an activity falls within the incidental powers of savings association, we have traditionally examined four factors, discussed below.

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<sup>2</sup> The Association's counsel's letter states, however, that he is "not offering an opinion on whether particular documents, contracts, disclosures or other materials are lawful or enforceable in any particular transaction." See letter dated October 17, 2007 from [ ], to [ ].

First, several of the products and services in the Discount Program would serve to facilitate the conduct of activities that are expressly authorized for federal savings associations. The Discount Program could facilitate the Association's lending operations. Section 5(c)(2)(D) of the HOLA expressly authorizes federal savings associations to make consumer loans for personal, family, or household purposes.<sup>3</sup> A customer who is seeking an automobile loan may be attracted to the Association because of the availability of the Discount Program and the numerous features relating to automobiles, such as roadside assistance, travel reimbursement, assistance finding and negotiating with certified mechanics, reduced costs for automobile maintenance and repairs, reward for theft of a vehicle, and the like. OTS regulations authorize federal savings associations to engage in leasing activities and, in particular, finance leasing.<sup>4</sup> Many of the foregoing products and services in the Discount Program likewise may be attractive to a customer seeking to lease, rather than purchase, an automobile. Consumer loans for personal and family purposes under HOLA 5(c)(2)(D) may include loans for travel and vacation, and potential borrowers for these types of loans may find the emergency travel reimbursement and discount lodging features of the Discount Program particularly attractive. Section 5(c)(1)(T) of the HOLA expressly authorizes federal savings associations to make credit card loans.<sup>5</sup> Customers may be attracted to the Association's Discount Program because of the availability of the credit card registration and notification services for lost or stolen credit cards. In sum, the Association's ability to provide customers access to the variety of products and services available through the Discount Program would serve to facilitate several types of expressly authorized lending and leasing activities.

Second, the proposed Discount Program and the activities and products involved therein directly relate to the financial intermediary role that federal savings associations were intended to play. The Association would be acting as an intermediary between a third party (the Vendor) and the Association's customers who, upon the customer's payment of a fee to the Association, would receive access to a menu of products and services, some at reduced rates. OTS has previously concluded that activities such as selling postage stamps and referring customers to an investment adviser for investment management services, for example, involve acting as a financial intermediary and, therefore, are permissible for federal savings associations.<sup>6</sup>

Third, the proposed activities are necessary to enable federal savings associations to remain competitive and relevant in the modern economy. In this regard, national banks are specifically authorized by regulation to act as finders, "bringing together interested parties to a transaction."<sup>7</sup> The OCC regulation specifies that this authority includes, among other things, the authority to

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<sup>3</sup> 12 U.S.C. § 1464(c)(2)(D) (West 2001). *See also*, 12 C.F.R. § 560.30 (2008).

<sup>4</sup> 12 C.F.R. §§ 560.41, 560.41(c), and 560.30 n.7 (2008).

<sup>5</sup> 12 U.S.C. § 1464(c)(1)(T) (West 2001). *See also* 12 C.F.R. §560.30 (2008).

<sup>6</sup> *See* OTS Op. Acting Chief Counsel (March 25, 1994) and OTS Op. Chief Counsel (May 5, 2000).

<sup>7</sup> Office of the Comptroller of the Currency (OCC) regulation 12 C.F.R. § 7.1002 (2008). The regulation specifies that it is part of the business of banking for a national bank to act as a finder. 12 C.F.R. 7.1002(a).

communicate information about providers of products and services; arrange for third-party providers to offer reduced rates to customers referred by the bank; provide administrative, clerical, and record keeping functions related to the bank's finder activities; convey between interested parties expressions of interest, bids, offers, orders and confirmations; and advertise the availability of, and receive a fee for providing, authorized finder services.<sup>8</sup> The OCC has concluded that a national bank may acquire operating subsidiaries that (i) operate and administer roadside assistance programs for its credit card customers as an incidental activity and for third parties as permissible finder activities, and (ii) provide credit card registration and notification services.<sup>9</sup> The Discount Program involves bringing together parties that may be interested in a transaction – customers and potential customers of the Association, and the Vendor, which provides or arranges for the provision of various products and services to the Association's customers. The Association would be acting as an intermediary or finder in exchange for a portion of the Discount Program fee paid by the customers. The ability to provide the proposed Discount Program would therefore serve to enable the Association to remain competitive and relevant.

Fourth, the proposed Discount Program is consistent with the purpose and function Congress envisioned for federal savings associations. Over the years, Congress has expanded the HOLA to modernize the roles of federal savings associations and to improve the flexibility and range of authorized services. The Discount Program would help the Association to better serve and expand its business with existing customers, as well as attract new customers, as discussed above. This is consistent with the mission of federal savings associations to "provide for . . . the extension of credit . . ." <sup>10</sup>

***Question 2: Does the proposed compensation scheme, whereby the Association would retain [ ] % of the program fee, present any significant regulatory concerns?***

From a strictly legal standpoint, we have not identified any significant regulatory concern with the proposed compensation scheme. We presume that compensation arrangements will be a matter of contract between the Association and the Vendor, and between the Vendor and the Service Providers. Any significant regulatory concerns of a non-legal nature, e.g., supervisory, or safety and soundness, may be communicated to the Association by the Southeast Region in a separate memorandum.

<sup>8</sup> 12 C.F.R. § 7.1002(b) and (d) (2008).

<sup>9</sup> OCC Conditional Approval No. 535 (June 21, 2002). See also OCC Conditional Approval # 368 (April 3, 2000) at n. 7 (a national bank may bring bank customers together with merchants that are willing to give a discount to bank customers) and OCC Corporate Decision # 2001-28 (September 21, 2001) (national banks and their operating subsidiaries may provide to customers vehicle accident management and maintenance management programs, a third-party fuel program, and license renewal and driver records programs, among other services).

<sup>10</sup> 12 U.S.C. § 1464(a) (West 2001).

***Question 3: Should the proposed suite of services be limited to only roadside assistance and credit notification services?***

Provided appropriate safeguards are in place,<sup>11</sup> there is no compelling legal reason to limit the services to roadside assistance and credit notification. Accordingly, the answer to this question turns on supervisory, as well as safety and soundness, considerations.

***Question 4: Should the Association be prohibited from providing its logo on the official discount card provided to customers?***

Displaying the Association's logo on the card presents the potential for confusion and possible exposure to liability. Section 12 of the HOLA<sup>12</sup> permits savings associations to advertise, and OTS regulation § 563.27 prohibits advertising, or the making of any representation, that is "inaccurate in any particular or which in any way misrepresents [an association's] services, contracts, investments, or financial condition."<sup>13</sup> If the Association intends to put its logo on the official discount card provided to customers, the Association should make it abundantly clear that a third party (*i.e.*, the Vendor and/or the Service Providers), not the Association, is actually providing the various products and services. In other words, the Association should ensure that there is no possibility that a customer would be confused and assume that the Association itself is providing the individual services and products, *i.e.*, emergency roadside service, discounts on lodging, car rental, travel services, and the like. Displaying the Association's logo on the discount card also might potentially subject the Association to claims of liability (even though such claims may be unfounded) for non-performance, negligent performance, and the actions or non-actions of the Vendor and the Service Providers. This is not to say that the Association should be prohibited from displaying its logo on the card; rather, the Association should be careful in doing so and should provide adequate disclosures, disclaimers, and the like, to obviate the likelihood of confusion, claims of misrepresentation, and potential liability.

**General Comments**

We have consulted with appropriate OTS Examinations, Supervision, and Consumer Protection personnel regarding this matter. In addition to the answers to the Southeast Region's specific questions above, we, in conjunction with Examinations, Supervision and Consumer Protection, offer the following suggestions/recommendations which the Region, in its discretion, may wish to mention in any supervisory "no objection" letter to the Association, or have the Association address before the Discount Program begins, or review during an examination, as the Region deems appropriate:

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<sup>11</sup> See "General Comments," *infra*.

<sup>12</sup> 12 U.S.C. § 1468a (West 2001).

<sup>13</sup> 12 C.F.R. § 653.27 (2008).

- The contracts between the Association and the Vendor, and between the Vendor and the Service Providers, as well as the advertising materials provided to customers and potential purchasers of the Discount Program, should make clear that the Association is not actually providing the products and services and that the Association accepts no liability or responsibility for the actions or omissions of the Vendor or Service Providers.
- On a periodic basis, the Association should provide the Southeast Region with information about the performance of the Discount Program.
- At least annually, or to the extent deemed necessary by the Southeast Region, the Association should submit additional information and discussion of: the Vendor; the Service Providers with which the Vendor proposes to contract; operating processes including, but not limited to, Vendor management, customer authentication, security mechanisms, internal controls, and internal audit plans; and evidence of the Association's due diligence with respect to the Vendor and the Service Providers.
- The Association should notify in writing the Vendor, any other potential vendors, and the Service Providers of OTS's examination and regulatory authority over them pursuant to the HOLA, including section 5(d) of the HOLA.<sup>14</sup> All contracts with the Vendor, any other vendors, and the Service Providers, related to the Discount Program should expressly reflect and acknowledge that the performance of services provided to or for the Association is subject to OTS's examination and regulatory authority.
- The Association should continually monitor the Discount Program to determine whether it is profitable.
- The Association should ensure that customers understand that participation in the Discount Program is optional and not a requirement to obtain a loan.
- The Association should ensure that proper staff training and internal controls over the Discount Program are maintained.
- The Association should notify the South Region ninety (90) days before implementing any significant deviations or changes from the Discount Program as proposed.

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

cc: Scott Polakoff  
 Tim Ward  
 Regional Directors  
 Regional Counsel

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<sup>14</sup> 12 U.S.C. § 1464(d) (West 2001 and 2008 West Supp.). In particular, HOLA § 5(d)(7)(D), 12 U.S.C. § 1464(d)(7)(D), provides that if a savings association causes any authorized service to be performed for itself, by contract or otherwise, "such performance shall be subject to regulation and examination by the Director to the same extent as if such services were being performed by the savings association . . ." Section 5(d)(7)(E) of the HOLA, 12 U.S.C. § 1464(d)(7)(E), authorizes the OTS Director to issue regulations and orders necessary for, among other things, the administration of the foregoing provision.