



Office of Thrift Supervision
Department of the Treasury

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

July 18, 1994

94/CC-16

[REDACTED]

RE: Application of the Real Estate Settlement Procedures Act and the Fair Credit Reporting Act to operating subsidiaries as defined in 12 C.F.R. § 545.81

Dear Mr. [REDACTED]

This responds to your inquiry regarding whether [REDACTED] (the "Association") and its operating subsidiary should be viewed as a single entity for purposes of compliance with certain provisions of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 et seq., and the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq.

In particular, you ask whether the "controlled business arrangement" requirements of the RESPA, 12 U.S.C. §§ 2602(7) and 2607(c)(4), would apply to real estate settlement service referrals made by the Association to its operating subsidiary. Although the RESPA permits such referrals, it imposes certain requirements and prohibitions regarding disclosure, compensation, and mandatory use of the affiliate's services. You also ask whether customer credit information exchanged between the Association and its operating subsidiary would be subject to the FCRA, which imposes a variety of disclosure and other regulatory requirements on users and providers of consumer credit reports.

As you point out, if the Association and its operating subsidiary are viewed as a single entity, referrals and exchanges of information between them would not be subject to the foregoing provisions of the RESPA and the FCRA. You suggest that the OTS operating subsidiary regulation may provide a basis for reaching this conclusion.

In relevant part, the operating subsidiary regulation provides as follows:

Unless otherwise provided by statute, regulation, or policies of the OTS . . . , the parent association and its operating subsidiary shall generally be consolidated

and treated as a unit for purposes of applying appropriate statutory and regulatory requirements and limitations.¹

The introductory phrase in the foregoing provision is important. The OTS treats federal savings associations and their operating subsidiaries as a unit for purpose of determining compliance with federal law only when the federal law in question permits this treatment. Although the OTS regulation reflects a policy judgment that federal savings associations and their operating subsidiaries should be treated as a unit whenever possible, the regulation itself does not override or "preempt" any federal statutes and regulations that may require savings associations and their operating subsidiaries to be viewed as distinct entities. The general consolidation policy of the regulation must yield whenever this approach would be inconsistent with or otherwise frustrate the purposes of other applicable federal law.

Thus, the answer to your question ultimately turns on an interpretation of the RESPA and the FCRA. Your question can be restated as follows: were the above-described provisions of the RESPA and FCRA intended to apply to transactions between companies bound together in the unique relationship of operating subsidiary and parent savings association?² Although OTS regulations provide factual data relevant to this question (by defining the nature of the relationship between operating subsidiaries and their parents), the answer ultimately turns on careful analysis of the meaning of the relevant RESPA and FCRA provisions and the policy objectives those provisions were intended to achieve.

The OTS does not have primary interpretive jurisdiction over the RESPA and FCRA. The Department of Housing and Urban Development ("HUD") is statutorily authorized to prescribe regulations and issue interpretations implementing the RESPA. 12 U.S.C. § 2617. The HUD has issued regulations implementing the RESPA's controlled business arrangement provisions and has specified procedures for requesting interpretations of RESPA. See

¹ 12 C.F.R. § 545.81(e).


² Operating subsidiaries differ from traditional subsidiaries in several important respects. First, their activities are restricted exclusively to those that a federal savings association may engage in directly. Second, voting control and effective operating control of operating subsidiaries must be maintained at all times by their parent savings association. 12 C.F.R. § 545.81(b). For these reasons, operating subsidiaries have traditionally been viewed by the OTS as mere operating departments or divisions of their parent savings association. 57 Fed. Reg. 48942, 48945 (Oct. 29, 1992).

24 C.F.R. §§ 3500.15 and 3500.4(c), respectively. Similarly, the Federal Trade Commission ("FTC") is authorized to carry out the general administration of the FCRA and has issued interpretations of and commentary on the FCRA.³ See 16 C.F.R. §§ 1.71 - 1.73, 600.1 - 600.2 and Appendix. The FTC has also issued regulations providing for requests for staff interpretations of the FCRA. 16 C.F.R. § 1.72.

Accordingly, you would need to pursue your inquiry regarding the RESPA with the Director, RESPA Enforcement, HUD, Room 5241, 451 7th Street, S.W., Washington, D.C. 20410-8000, and your inquiry regarding the FCRA with the Division of Credit Practices, Bureau of Consumer Protection, FTC, Washington, D.C. 20580. If you would like OTS' support in seeking these interpretations, please let us know.

If you have any further questions regarding this matter, please feel free to contact Ellen Sazzman, Counsel (Banking and Finance), at (202) 906-7133.

Very truly yours,



Carolyn B. Lieberman
Acting Chief Counsel

cc: Regional Director
Regional Counsel
Northeast Region

³ We note, however, that authority to interpret the FCRA with respect to banks, thrifts, and certain other entities would change under amendments to the FCRA that are currently pending in the Congress. See H.R. 1015, 103d Cong., 2d Sess. § 118 (1994); S. 783, 103d Cong., 2d Sess. § 113(b) (1994). These amendments, which are virtually identical, would vest in the Federal Reserve Board authority to interpret the FCRA as it applies to banks, thrifts, and certain other entities covered by the administrative enforcement provisions of the FCRA. See 15 U.S.C. § 1681s.