



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

May 12, 2003

Interpretive Letter #966
June 2003
12 USC 29A
12 USC 24(7)

Re: Request by []

Dear []:

This letter responds to your request on behalf of [] (“*Sub*”), a wholly-owned subsidiary [] (“*Bank*”). [*Sub*] provides relocation-related services for corporate customers’ relocating employees. As part of these services, [*Sub*] wishes to acquire, for a short period of time, title to the relocating employees’ residential real estate. The Bank believes that [*Sub*] needs to acquire title in order to provide a package of relocation services that is competitive in the marketplace. For the reasons discussed below, and subject to the conditions below, we believe that [*Sub*] may permissibly acquire an interest in the residential real estate of relocating employees.

I. BACKGROUND

A. [*Sub*]’s Current Activities

[*Sub*]’s primary current activity is that of a finder – bringing together unaffiliated companies that provide relocation-related services, *i.e.*, movers, realtors, insurers, with its corporate customers and their relocating employees. [*Sub*] also makes advances to the relocating employees based on valuations of their homes provided by third party appraisals. Repayment of these loans is made through the sale proceeds of the homes and is guaranteed by the corporate customers.¹ The Bank charges corporate customers an overall fee for the package of relocation services, and the costs of services provided by third parties – such as movers and realtors – are the responsibility of the corporate customers.

¹ Prior to entering into an agreement with a potential corporate customer, [*Sub*] conducts a full evaluation (including credit risk rating) of the financial condition and prospects of the potential customer. [*Sub*] only contracts with those potential customers for which the evaluation leads [*Sub*] to believe it will be able to rely upon any future guarantees made by the potential customer.

The transfer of the residential real estate from the relocating employee to the ultimate purchaser occurs through a “deed-in-blank” process.² Once [Sub] and the relocating employee agree upon a sales price – based upon the third-party appraisals – the relocating employee signs a limited power of attorney and a deed-in-blank (which are held by [Sub]), receives the advance from [Sub], and moves away. On behalf of its corporate customer, [Sub] finds an unrelated third-party as realtor to list and market the property. Upon receipt of an acceptable offer, typically not less than 95% of the appraised value, [Sub] completes the sale on behalf of the departed employee per the power of attorney and the deed is transferred. The sales proceeds are used to repay the advance, with the relocating employee receiving any excess funds. If the actual sales price is less than the agreed upon sales price, the corporate customer reimburses [Sub] for the difference.

The Bank represents that approximately 70 percent of the real estate transfers involve [Sub]’s holding the deed-in-blank for less than two weeks. In the remaining transfers, [Sub] holds the deed-in-blank for some longer period of time. The Bank further represents that, during this period of time, [Sub] does not manage the real estate. Rather, on behalf of the corporate customer, [Sub] finds an unrelated, third-party real estate management company to manage the real estate.

B. [Sub]’s Proposal

For competitive reasons, [Sub] wants to start using a “two deed” process for real estate transfers. Under the two deed process, rather than sign a blank deed, the relocating employee would deed title to the real estate to [Sub]. [Sub] would hold title to the real estate until a purchaser could be located, and then would deed title to the purchaser. All other aspects of the two deed process are identical to the deed-in-blank process.

The Bank represents that [Sub]’s competition in the employee relocation industry has adopted the two deed real estate transfer process. The switch to the two deed transfer process was driven by the reliance of IRS Employment Tax offices on a 1997 Tax Court decision to deny favorable federal tax treatment to relocation home purchase transactions using the deed-in-blank process.³ In May 2001, the Employee Relocation Counsel – an association of employee relocation companies and professionals – recommended that its members adopt the two deed real

² In this process, the relocating employee signs a deed but the buyer’s signature remains open. When the property is sold and the transaction closes, the name of the eventual purchaser is inserted on the deed. Title to the property remains vested in the relocating employee’s name until the physical closing of the property with the eventual purchaser, at which time the purchaser becomes the title-holder. This process does not require [Sub] to take title to the property.

³ See *Amdahl Corp. v. Commissioner*, 108 T.C. 507 (1997). Prior to the *Amdahl* decision, the Internal Revenue Service (“IRS”) afforded favorable federal tax treatment to relocation home purchase transactions using the deed-in-blank process. Since the decision, several IRS Employment Tax offices have denied favorable tax treatment to deed-in-blank transactions, instead holding that all home relocation purchase expenses incurred by a corporation on behalf of its employee are taxable as income to the employee and subject to employment taxes. The two deed transfer process continues to receive favorable federal tax treatment.

estate transfer process.⁴ The Bank represents that **[Sub]**'s competitors have adopted the two deed process and that **[Sub]**, in order to remain competitive in the relocation services market, must make use of the two deed process.

II. Discussion

[Sub]'s current activities – acting as a finder and making loans – are part of the business of banking and were approved in an earlier letter.⁵ The Bank now indicates that **[Sub]** needs to take title to the residential real estate, as part of the two deed transfer process, in order to provide a competitive package of relocation services. The only issue in permitting **[Sub]** to acquire title to the residential real estate is based upon the restrictions of 12 U.S.C. § 29. We believe that **[Sub]** may permissibly acquire an interest in the residential real estate of relocating employees, sufficient to permit **[Sub]** to use the two deed transfer process, subject to the following conditions and restrictions:

- (1) **[Sub]** must use an unrelated third-party as nominee to acquire and hold legal title.
- (2) **[Sub]** must not make use of or enjoy the benefit of the property.
- (3) **[Sub]** must contract with an unrelated third party to manage the property.
- (4) **[Sub]** may not hold any property for longer than ninety days and must establish internal policies and procedures for the immediate disposition of properties when that time limit is reached.

Arguably, Section 29 is not implicated by the severely circumscribed interest **[Sub]** would acquire.⁶ However, for purposes of the following analysis only, we will assume that **[Sub]**'s interest is subject to the restrictions of Section 29.

Numerous OCC precedent and case law have confirmed that national banks may provide a variety of ancillary non-banking products and services to promote consumer use or demand for banking products.⁷ Indeed, the OCC has found that the acquisition of an interest in real estate

⁴ See http://www.relo-center.com/PDF_Files/ERC_TwoDeed_WhitePaper.pdf (report of the Employee Relocation Council).

⁵ Letter from Donelle H. Ward, Director for Analysis (December 20, 1990) (unpublished).

⁶ See Corporate Decision No. 2001-30 (October 10, 2001) (acquisition of an interest in real estate that does not encompass the full right to possess, use, and convey the property does not implicate Section 29).

⁷ For example, in Interpretive Letter No. 880 the OCC approved, as incidental to a package of permissible real estate investment advisory services, a national bank's taking part in the negotiation of Internal Revenue Code Section 1031 exchange transactions involving real estate. The letter found that such negotiation services were necessary for the bank to compete successfully with types of firms that offered a full range of real estate investment advisory services. The letter also found that the negotiating services constituted an extremely small part of the overall advisory services. Interpretive Letter No. 880, *reprinted in* [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-373 (Dec. 16, 1999). This proposition is also supported by case law. See *Clement Nat'l Bank v. Vermont*, 231 U.S. 120 (1913) (to promote use and demand of its banking service, national bank may compute, report, and pay tax levied on

may be incidental to a primary permissible transaction. In Interpretive Letter No. 770, the OCC confirmed that a national bank could acquire a leasehold interest in the real estate underlying a fuel facility, incidental to the acquisition of the facility for the purposes of leasing, if such leasehold interest is necessary to provide security for the lender's ability to repossess the facility and continue to use or sell the property in the event of default by the lessee. This position was predicated on the real property interests being, in fact, incidental to the primary transaction – the personal property lease.⁸

Here, several factors indicate that **[Sub]**'s acquisition of an interest in the residential real estate is incidental to the relocation services. First, the ability to acquire such interest is necessary to **[Sub]**'s ability to compete successfully with other relocation services providers. If **[Sub]** cannot perform the services in a manner that provides its corporate customers with favorable tax treatment, the Bank represents that **[Sub]** would be unable to compete in the relocation services marketplace.

Second, **[Sub]** need not advance any additional funds to acquire the interest in the residential real estate. **[Sub]** would continue to make an advance to the relocating employee, with that advance secured by the real estate and guaranteed by the employer. Therefore, there is no additional cost to **[Sub]** to acquire the interest under the two deed transfer process. Third, **[Sub]** will derive no additional revenue as a result of its acquisition of such an interest. **[Sub]** would continue to charge corporate customers an overall fee for the provision of services, but would not charge an additional fee for acquiring the interest in the residential real estate.

Fourth, once the residential real estate is sold to the ultimate purchaser, there would be no additional benefit or detriment to **[Sub]**. Sales proceeds would still be used first to repay the advance from **[Sub]**, with the corporate customer guaranteeing any shortfall. Any excess sales proceeds remaining would still flow to the relocating employee, and the costs of services provided by third parties – such as movers and realtors – would remain the responsibility of the corporate customers. Therefore, there is no additional financial upside or downside to **[Sub]**'s acquisition of such an interest.⁹

interest earned by bank customers on their deposits); *Miller v. King*, 223 U.S. 505 (1912) (to encourage use of bank's deposit services, national bank may institute lawsuit on behalf of customer to collect funds); *Corbett v. Devon Bank*, 299 N.E.2d 521 (Ill. App. 1973) (as means of promoting its banking business, national bank may sell state motor vehicle licenses).

⁸ Interpretive Letter No. 770, *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-134 (Feb. 10, 1997). *See also* 61 Fed. Reg. 66554, 66556 (Dec. 18, 1996) (reaffirming in the preamble that real estate leasing may be an incidental component of personal property leasing and that OCC would make this determination on a case-by-case basis).

⁹ In each case where **[Sub]** acquires an interest in a relocating employee's residential real estate, the contract between **[Sub]** and the corporate customer would require the corporate customer to maintain, at its own expense, a homeowner's insurance policy on the residential real estate. The contract between **[Sub]** and the corporate customer would further provide that the corporate customer will indemnify **[Sub]** for any liability that may arise out of **[Sub]**'s taking an interest in the property.

Fifth, as a result of the conditions and restrictions listed above, **[Sub]**'s interest in the residential real estate would be severely circumscribed. **[Sub]** must engage a nominee to hold legal title. **[Sub]** lacks the major elements of beneficial ownership: **[Sub]** must not make use of or enjoy the property, and it must not manage the property. **[Sub]** may only hold the indicia of ownership in the property for a short period of time and must have policies and procedures in place to dispose of the property when that time limit is reached. Indeed, **[Sub]**'s circumscribed interests would not be inconsistent with any of the purposes underlying the restrictions of Section 29.¹⁰ The Bank's funds, through **[Sub]**, would not be removed from the channels of commerce because the Bank would not advance any additional funds to acquire the indicia of ownership. There is no speculation in the value of the real estate because any sales proceeds remaining after the equity advance is repaid flow to the relocating employee. Finally, no significant amount of real estate will be accumulated and held by the Bank as the Bank would be required to dispose of each property within a short time period.

Therefore, for the reasons stated above and subject to the conditions and restrictions listed above, we believe that **[Sub]** may permissibly acquire an interest in the residential real estate of relocating employees incidental to the provision of its package of relocation services. If you have any questions, please contact Steven Key, Senior Attorney, at (202) 874-5300.

Sincerely,

-signed-

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

¹⁰ For example, the Supreme Court in *Union National Bank v. Matthews*, 98 U.S. 621, 626 (1878), stated that the three purposes underlying Section 29 were "to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain."