

## **INTERPRETIVE LETTER 95-11 (OCTOBER 27, 1995)**

**An Illinois trust company may deal with trust owned farm real estate as trustee or may engage in farm real estate management and brokerage in an agency capacity according to Illinois law.**

We are writing in response to your request on behalf of your client, to provide a formal interpretation on whether the exercise of farm management and brokerage activities in an agency capacity is a function and activity that may be performed by an Illinois trust company under Illinois law. It is the position of the Commissioner of Banks and Trust Companies ("Commissioner") that an Illinois trust company may deal with trust owned farm real estate pursuant to a trust instrument or may engage in farm real estate management and brokerage in an agency capacity according to Illinois law, subject to the terms and limitations contained in this letter.

The Commissioner has the power to specify the powers of corporate fiduciaries generally or of a particular corporate fiduciary and may limit such powers pursuant to Section 1-6 of the Corporate Fiduciary Act ("Corporate Fiduciary Act"), 205 ILCS 620/1-6 (1994). This interpretive letter re-states the Commissioner's long-standing position allowing farm brokerage activities and is issued pursuant to Section 1-6 of the Corporate Fiduciary Act.

### **Trust and Trustees Act**

The Trust and Trustees Act ("Trustees Act"), 760 ILCS 5 (1994), sets forth certain powers granted to each trustee in Illinois and specifically grants trustees the power "[t]o sell, contract to sell and grant options to purchase any part or all of the trust estate at public or private sale, for cash or on credit, and to exchange any or all of the trust assets for other property," 760 ILCS 5/4.01 (1994). In addition, Section 4.21 of the Trustees Act, grants trustees the specific power to manage farm property.

Sec. 4.21. To plant and harvest crops; to breed, raise, purchase and sell livestock; to lease land, equipment or livestock for cash or on shares, to purchase and sell, exchange or otherwise acquire or dispose of farm equipment and farm produce of all kinds; to make improvements, construct, repair, or demolish and remove any buildings, structures or fences, to engage agents, managers and employees and delegate powers to them, to engage in drainage and conservation programs; to terrace, clear, ditch, and drain lands and install irrigation systems; to replace improvements and equipment; to fertilize and improve the soil; to engage in growing, improvement, and sale of trees and other forest crops; to participate or decline to participate in governmental agricultural or land programs; and to perform such acts as the trustee deems appropriate, using such methods as are commonly employed by other farm owners in the community in which the farm property is located. 760 ILCS 5/4.21 (1994).

It is clear from Section 4.21, that trustees have the express authority to conduct farm management and to directly deal in trust farm real estate. Farm management is a long standing and recognized fiduciary activity permissible for trustees and in particular corporate fiduciaries. See Scott, *The Law of Trusts*, Fourth Edition, Section 188.5 (A trustee who is directed to manage a farm can properly incur expenses reasonably necessary for carrying on the farm.) In addition to the above authority for trustees to engage in farm real estate management activities, a trustee takes legal title to property held in trust. The legal title holder is allowed to sell property it owns and is exempt from licensure under the Real Estate License Act of 1983, 225 ILCS 455 (1994) ("Real Estate License Act"). Specifically, Section 6 states:

The requirement for holding a license under this Act shall not apply to:

(1) any person...who as owner...shall perform any of the acts described in...this Act with reference to property owned or leased by them...where such acts are performed in the regular course of or as an incident to the management, sale or other disposition of such property... 225 ILCS 455/6 (1994).

Pursuant to the above, a trustee has the express power to engage in farm real estate sales for property held in trust. The Commissioner is also of the opinion that farm real estate sales is a natural extension of farm management services and is permissible for trustees pursuant to Section 4.01 of the Trustees Act.

### Agency Capacity

The issue that now must be addressed is if a trust company may engage in such activities in an agency capacity. As stated above, the Commissioner's Office has allowed farm real estate management and brokerage activities to be conducted by a trust company in an agency capacity, and farm management in an agency capacity has long been recognized as a fiduciary activity permissible for a trust company. Therefore, the remainder of this letter will focus on brokerage activities. While this has been the Commissioner's policy since 1990, further analysis will help clarify the Commissioner's opinion. An agency resembles trusteeship in that it is a fiduciary relation and may involve the management of property for another. Section 2 of the Illinois Banking Act, 205 ILCS 5/2 (1994), defines fiduciary as "trustee, **agent**, executor, administrator, committee, guardian for a minor or for person under legal disability, receiver, trustee in bankruptcy, assignee for creditors, or any holder of similar position of trust" (emphasis added). Section 1-5.12 of the Corporate Fiduciary Act, defines fiduciary as "trustee, executor, administrator, receiver, guardian, assignee for the benefit of creditors, or any holder of a similar position of trust." The Commissioner's Office is of the opinion that an agent holds a "similar position of trust" to come under the definition of fiduciary in the Corporate Fiduciary Act. [Note: the Commissioner's Office is not of the opinion that every principal/agent relationship requires the agent to be certificated by this Agency as a corporate fiduciary. Specifically, for purposes of the Corporate Fiduciary Act, a person does not engage in the trust

business, thus requiring a certificate of authority from this Agency by, "receiving rents and proceeds of sale as a licensed real estate broker on behalf of the principal." 205 ILCS 620/2-4.5(5).]

While an agency represents a fiduciary relationship, the important point of difference from a trusteeship is that an agent is ordinarily not the owner of property for the benefit of the principal, while a trustee always holds the title to property for the beneficiary. However, it is common for an agent, pursuant to an agreement, to sell property for the principal. As a general corporation organized pursuant to the Business Corporation Act of 1983, 805 ILCS 5 (1994), a trust company has the general corporate powers granted under that Act. One such power is to sell and otherwise deal with real estate. See 805 ILCS 5/3.10(d) and (e) (1994). A business corporation, the form under which a trust company is organized, may apply for and receive a real estate broker or salesperson's license pursuant to the Real Estate License Act . Therefore, an Illinois trust company, as a business corporation organized under the Business Corporation Act, has the authority to obtain the necessary license to act in a farm real estate brokerage capacity.

While it is the Commissioner's Office's opinion that farm real estate brokerage in an agency capacity is a permissible activity for a trust company, a trust company may not exercise all the powers granted to general business corporations. The Commissioner may limit such powers on the basis of safety and soundness pursuant to Section 1-6 of the Corporate Fiduciary Act. The Commissioner finds no such basis to prohibit brokerage activities if they are conducted pursuant to the limitations set out below.

### Limitations

The exercise of farm real estate brokerage in an agency capacity, will be subject to the following guidelines and standards which are essential to ensure that the activity is conducted in a manner that does not jeopardize the safety, soundness and financial condition of the corporate fiduciary.

#### I. Board Authorization

The trust company's board of directors must adopt a resolution confirming the trust company's desire to engage in farm real estate brokerage activities and authorizing the submission of an application to obtain all necessary licenses from the Illinois Commissioner of Savings and Residential Finance, the state agency directed to administer the provisions of the Real Estate License Act.

#### II. Regulatory Compliance

The farm real estate brokerage activities of the trust company must at all times be conducted in compliance with applicable regulations, requirements and standards promulgated and administered by the Commissioner of Savings and Residential Finance and of the Commissioner of Banks and Trust Companies.

### III. Policies and Procedures

The board of directors of the trust company must assure that reasonable and appropriate policies and procedures related to the trust company's farm real estate brokerage activities are adopted. Such policies and procedures should address topics including, but not limited to, the following:

- (A) disclosures to customers concerning the relationship between the trust company's farm management services and farm real estate brokerage services;
- (B) establishment of fees and provisions for fee waivers;
- (C) recognition, analysis and resolution of environmental issues or problems;
- (D) standards and requirements regarding appraisals;
- (E) establishment of guidelines addressing conflicts of interest; and
- (F) administration of such items as insurance, deeds, title insurance policies, title opinions and abstracts of title.

### IV. Personnel

The trust company should maintain a minimum of two licensed real estate brokers or sales persons on its staff at all times.

### V. Fidelity Insurance

The trust company must acquire and maintain appropriate fidelity insurance or bonds as necessary.

### VI. Ownership of Real Estate

In connection with its real estate brokerage activities, the trust company must refrain from acquiring or owning real estate for its own account except premises upon which it conducts its trust company business. Ownership of real estate must be only as legal title holder for the benefit of another party as a trust asset.

### Federal Regulation

For trust company subsidiaries of bank holding companies subject to Federal Reserve Board regulation, as you propose to structure your client's trust company, Section 225.25 of Regulation Y, 12 C.F.R. Section 225.25 - List of Permissible Nonbanking Activities, lists the activities that are so closely related to banking or managing or controlling banks as to be a proper incident thereto and may be engaged in by a bank holding company or a subsidiary thereof. Subsection (3) - Trust Company functions - states that "performing

functions or activities that may be performed by a trust company (including activities of a fiduciary, agency, or custodial nature), in the manner authorized by federal or state law..." are authorized nonbanking activities.

As stated above, we conclude that a trust company may deal in trust owned farm real estate as trustee or may engage in farm management and act as a farm real estate broker in an agency capacity for existing or prospective customers as authorized by Illinois state law. Therefore, we conclude that the conduct of farm management and farm real estate brokerage in an agency capacity is a permissible nonbanking activity in accordance with 12 C.F.R. Section 225.25(a)(3). This letter does not address conducting farm real estate brokerage outside the trust company context. The limitations in Regulation Y may prohibit nonbanking (and nontrust company) bank holding company subsidiaries from engaging in farm real estate brokerage activities.

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### Summary

It is the position of the Illinois Commissioner of Banks and Trust Companies that an Illinois trust company may deal with trust owned farm real estate as trustee or engage in farm real estate management and brokerage in an agency capacity according to Illinois law in accordance with the terms and conditions as set forth in this letter.