

INTERPRETIVE LETTER NO. 98-9 (SEPTEMBER 8, 1998)

State banks may sell title insurance, subject to licensure by the Illinois Department of Financial Institutions.

The Office of Banks and Real Estate ("Agency") has been asked to determine whether Illinois state-chartered banks ("state banks") may become licensed by the Illinois Department of Financial Institutions ("DFI") to sell title insurance. Based on an analysis of relevant state and federal law, we conclude that state banks may be licensed to act as title insurance agents anywhere in Illinois.

TITLE INSURANCE ACT

The Title Insurance Act ("TIA") (215 ILCS 155/1 *et seq.*), which is administered by DFI, provides the regulatory framework for the title insurance business in Illinois. That law defines a title insurance agent as any person, firm, partnership, association, corporation or other legal entity registered by a title insurance company⁽¹⁾ and authorized by such company to "determine insurability of title [and] act as an escrow agent, solicit title insurance, collect premiums, issue title reports, binders or commitments to insure and policies in its behalf...." 215 ILCS 155/3(3). This language does not preclude an entity such as a state bank from being licensed by DFI to become a title insurance agent.

ILLINOIS BANKING ACT

Although the TIA provides the regulatory framework under which state banks would operate as title insurance agents, it is the Illinois Banking Act ("Act") (205 ILCS 5/1 *et seq.*) which ultimately gives state banks the authority to engage in such activity. The Act allows state banks to conduct a "general banking business." 205 ILCS 5/3. Courts have broadly interpreted that expression to include activities which are incidental and germane to carrying on a general banking business. Corbett v. Devon Bank, 299 N.E.2d 521, 529 (1973).

The Agency has issued criteria to decide whether an activity is incidental and germane to carrying on a general banking business. 38 Ill. Adm. Code 320. A major factor in that analysis is whether the activity is related to ordinary, traditional bank functions or is convenient or useful in connection with the performance of a state bank's established activities pursuant to its express powers under the Act. 38 Ill. Adm. Code 320.30. The Act expressly permits state banks to "loan money on...real estate security," a traditional banking activity. 205 ILCS 5/3. Section 5(24) of the Act authorizes state banks to "act as the agent for any fire, life, or *other insurance company*, authorized by the State of Illinois...." (emphasis added). 205 ILCS 5/5(24). In addition, the Agency has issued interpretive letters acknowledging state banks' authority to provide services to their customers that are useful in connection with the state banks' ability to make loans such as unemployment insurance, debt cancellation agreements, and Guaranteed Asset Protection Plans.⁽²⁾ Each of the services addressed in those interpretive letters has the dual purpose of conferring a benefit to the insured borrower and providing security to a lending bank in connection with an outstanding loan. Title insurance provides a similar benefit for mortgage loans since it serves to insure the borrower's equity in the property and the bank's interest in a mortgage loan. We therefore conclude that title insurance is convenient and useful in connection

with the performance of a state bank's established and traditional activities, and that a state bank may apply to DFI for proper licensure to sell title insurance in Illinois.

WILDCARD AUTHORITY

Additional authority permitting state banks to offer title insurance agency services is provided by subsections (11) and (25) of Section 5 of the Act (sometimes referred to as the "wildcard" provisions). 205 ILCS 5/5(11),(25). These provisions allow state banks to engage in the same activities, subject to the same limitations, as either national banks or insured savings associations.⁽³⁾ The ability to offer products and services comparable to those of savings associations was only recently made available to state banks by the addition of Section 5(25).

National Banks

Section 92 of the National Bank Act ("NBA") prohibits a national bank from acting as an insurance agent in places with more than 5,000 inhabitants. 12 U.S.C. 92. In 1986, the Office of the Comptroller of the Currency ("OCC") issued an interpretive letter that allowed a national bank to act as an agent for the sale of title insurance even in places with more than 5,000 inhabitants. OCC Staff Interpretive Letter 368 (July 11, 1986). The OCC came to this conclusion by determining that, in its opinion, title insurance "is a unique form of insurance...sufficiently unlike life, property, and casualty insurance to justify treating it differently from these forms of insurance for regulatory purposes." *Id.* However, in 1992 the federal Second Circuit Court of Appeals invalidated the OCC's decision by stating "Congress intended [Section 92] to apply to 'any...insurance company,' and a title insurance company surely is an insurance company." ALTA v. Clarke, 968 F.2d 150, 156 (1992).⁽⁴⁾ Therefore, at least one federal court has ruled that national banks may be licensed to sell title insurance, but only in places not exceeding 5,000 population.

Federal Savings Associations

Although national banks may be limited in where they may sell title insurance, federal savings associations do not have a similar geographic restriction. The Office of Thrift Supervision permits federal savings associations to act as title insurance agents through service corporations.⁽⁵⁾ 12 C.F.R. 559.4(f)(3). Using the new wildcard provision in Section 5(25) of the Act, state banks can therefore take advantage of this authority possessed by federal savings associations and provide title insurance through service corporations anywhere in Illinois.

If a state bank chooses to become licensed to sell title insurance through a service corporation, it must comply with all of the restrictions that apply to federal savings associations pursuant to 12 C.F.R. 559. Also, a state bank's investment in a bank service corporation would be subject to the provisions of the federal Bank Service Corporation Act ("BSCA"). 12 U.S.C. 1861 *et seq.* The BSCA provides that all of the stock of a bank service corporation must be owned by one or more insured banks that are all located in Illinois (except for multi-state activities that must receive prior approval from the Federal Reserve Board); that a state bank may not invest more than 10% of its unimpaired capital and unimpaired surplus in any bank service corporation (and not more than 5% of its total assets in bank service corporations); that the products or services offered by the bank service corporation can be offered only in Illinois (except for multi-state activities that must receive prior approval from the Federal Reserve Board); and that a bank service corporation

is subject to examination and regulation by the appropriate federal regulator of the principal investor in the bank service corporation.

Based on the Agency's conclusions that state banks are authorized to offer title insurance agency services (subject to licensure), such services may be offered directly by a state bank, through a subsidiary established pursuant to Section 5(12) of the Act, or through a service corporation as detailed above.

Pursuant to Section 24 of the Federal Deposit Insurance Act, a state bank is generally prohibited from making equity investments or engaging in activities as "principal" that are not permissible for a national bank. 12 U.S.C. 1831a; 12 C.F.R. 362. If a state bank wishes to become licensed to act as a title insurance agent, the bank presumably would not have to seek approval from the Federal Deposit Insurance Corporation ("FDIC") since it would be engaging in a business activity as an "agent" rather than as "principal." However, the state bank should contact the FDIC to confirm whether the bank must file an application with, and receive approval from, the FDIC prior to engaging in that activity.

FINANCIAL INSTITUTIONS INSURANCE SALES LAW

Finally, it should be noted that recent legislative changes regarding state banks selling insurance do not affect their ability to engage in the business of title insurance. The Financial Institutions Insurance Sales Law ("FIISL") gives state banks the ability to sell a variety of insurance products. 215 ILCS 5/1400 *et seq.* Although title insurance was specifically excluded from FIISL, that fact "shall not be deemed to preclude or otherwise limit regulation of [title] insurance pursuant to and to the extent otherwise provided by any other insurance law of this State." 215 ILCS 5/1402. FIISL therefore has no impact on a state bank's ability to seek proper licensure to become a title insurance agent.

We trust that this letter responds to your inquiries. Should you have any additional questions, please do not hesitate to contact us.

¹ A title insurance company is considered "any domestic company organized under the laws of this State for the purpose of conducting the business of guaranteeing or insuring titles to real [estate]." 215 ILCS 155/3(2).

² Agency Interpretive Letter 93-24 (November 29, 1993), Agency Interpretive Letter 94-11 (June 15, 1994), and Agency Interpretive Letter 94-13 (July 27, 1994) respectively.

Section 5 of the Act states:

³ A bank organized under this Act or subject hereto shall...have all the powers conferred by this Act and the following additional general corporate powers:

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(11) Notwithstanding any other provisions of this Act or any other law, to do any act and to own, possess, and carry as assets property of the character, including stock, that is at the time authorized or permitted to national banks by an Act of Congress, but subject always to the same

limitations and restrictions as are applicable to national banks by the pertinent federal law and subject to applicable provisions of the Financial Institutions Insurance Sales Law.

(25) Notwithstanding any other provisions of this Act or any other law, to offer any product or service that is at the time authorized or permitted to any insured savings association by applicable [law]. 205 ILCS 5/5.

⁴ In its decision, the court pointedly did not determine whether the title insurance agency business is incidental to banking pursuant to Section 24 of the NBA [12 U.S.C. 24.]. *Id.*, 158.

⁵ Service corporations are corporations organized under the laws of the state where a federal savings association's home office is located. They may only be owned by savings associations with home offices in that state and may only engage in certain activities. 12 C.F.R. 559.2...[\legal/work/4](#)