

New OTS Guidance on Paying Fees for the Referral of Trust Business

On February 20, 2008, the OTS rescinded its previous guidance on paying finders' or referral fees for the referral of trust business and issued a new Thrift Bulletin covering this subject. Thrift Bulletin 76-1a, the new bulletin, rescinded Thrift Bulletin 76-1 (September 5, 2000). Associations that are registered investment advisers are reminded of the requirement to comply with SEC regulation 17.C.F.R. 275.206(4)-3.

The new Thrift Bulletin reaffirms the position of the OTS that savings associations may pay referral fees to persons or entities that refer trust business to them.

The new Thrift Bulletin addresses consumer disclosure requirements and overall referral fee program requirements. These requirements are separately discussed below.

THE NEW THRIFT BULLETIN MAY REQUIRE IMMEDIATE ACTION ON THE PART OF YOUR INSTITUTION.

Required Disclosures:

Trust account customers¹ as to whose accounts a referral fee may be paid should receive a referral fee disclosure from the association *prior* to payment of a referral fee. The new guidance applies to these new trust customers or accounts immediately. For existing trust account customers whose accounts generate an on-going referral fee payment, the association should make a good faith effort to meet the oversight and disclosure conditions with regard to those accounts if the on-going payments will be affected by a new or revised referral fee program.

Referral fee disclosures must be written, and contain the following minimum information:

- Name of the referring party and association;
- Nature of the relationship (including any affiliation) between the referring party and the association;
- Terms of the referral arrangements, including compensation paid or to be paid to the referring party;
- Statement that the referral fee will not result in any increased charge to the customer;
- Statement that only the association will provide fiduciary services;
- Extent of any support services the referring party will perform (e.g., performing administrative and recordkeeping functions, transmitting documents, obtaining signatures, distributing brochures, performing market research).

¹ Persons or entities under applicable state law that are entitled to receive trust account statements or plan sponsors, in the case of employee benefit accounts.

Although the earlier guidance required that associations obtain and maintain a dated acknowledgement of receipt of the required written disclosure, signed by the customer, the new guidance is silent regarding such a requirement. However, best practices suggest that the institution will need to be able to document that it did, in fact, provide such disclosure in order to respond to regulatory or other challenges.

Referral Fee Program Requirements:

In TB-76-1a, the OTS, while not imposing arbitrary limits on the size of referral fees paid (or making any reference to the duration of such payments), makes clear that it will assess the impact of referral fee payments on a trust department's income and the association's overall financial condition. The earlier guidance contained in TB76-1 cited an OTS general counsel opinion that concluded that paying a referring party 20% of fees earned on a trust account over a ten year period was reasonable based upon the particular facts and circumstances present in the specific referral fee program discussed in that opinion. The new guidance is silent as to what may be reasonable, although the new guidance does cite the earlier opinion as authority for paying referral fees.

Institutions should be mindful of the need to provide a rational explanation as to the reasonability of the referral fees given the position of the OTS.

Other referral fee program requirements include the following:

- Written referral agreement that includes (i) description of support services the referring will perform for the association, if any; (ii) statement that those services will be performed consistent with the association's instructions and in accordance with applicable law; (iii) the compensation to be paid to the referring party.
- Referral fee program must be approved by the association's board of directors, and reviewed annually by senior management.
- Fees must be reasonable under the circumstances, and don't result in the customer paying any additional amount for trust services.
- Customers must receive the required written fee referral fee disclosure.
- When covered accounts are closed, fee arrangements are terminated.
- Fee arrangements with affiliates or subsidiaries comply with statutory and regulatory restrictions on affiliate transactions.
- Fee arrangements for employee benefit plans subject to ERISA do not violate any ERISA provisions (particularly as addressed in Section 406 of ERISA—Prohibited Transactions).
- The institution must maintain a copy of the master referral fee agreement and referral fee disclosure.

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