

Opinion No. 01-04

Sarah Shirley, Assistant General Counsel

May 30, 2001

An out-of-state, federal savings bank with trust powers may engage in fiduciary activities in this state with respect to perpetual care cemetery trusts and prepaid funeral benefit trusts created under Texas law if the bank establishes a physical Texas presence through a branch or representative trust office.

By letter dated January 5, 2001, you ask the Department of Banking (the "Department") to grant [****] Bank (the "Bank") a "variance" from Health & Safety Code §[712.021\(a\)](#) and Finance Code §[154.253](#), which require the trustee of a perpetual care cemetery trust to be located in Texas and a trustee of a prepaid funeral benefit trust to have its main office or a branch in Texas, respectively.

Summary of Opinion

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Background

In your letter, you advise the Department that a Texas perpetual care cemetery corporation has approached you "to see if the Bank could assist his company in setting up a perpetual care trust." Apparently, the corporation wishes to transfer its perpetual care cemetery trust funds from the current trustee to the Bank. You have provided additional details about the proposed trust activities during our several telephone conversations. Although your letter mentions only activities as trustee of a perpetual care cemetery trust, you advise that the Bank also wishes to serve as the trustee of prepaid funeral benefit trusts. You also advise that the Bank has its principal office in [City], [State], and does not currently have an office in Texas.

Analysis

In our opinion, an out-of-state, federal savings bank with trust powers may engage in fiduciary activities in this state without qualification in

all but a few circumstances. With respect to acting as a fiduciary for prepaid funeral benefits and perpetual care trust funds under Texas law, fiduciary relationships that would not exist but for Texas law, an out-of-state federal savings bank may only do so if it establishes a physical Texas presence through a branch or representative trust office.¹

Health & Safety Code §[712.021\(a\)](#), pertaining to perpetual care trust funds, requires a corporation that operates a perpetual care cemetery in Texas to have a trust fund established with a trust company or bank with trust powers that is located in this state. Health & Safety Code §[712.028](#) requires that the cemetery corporation "deposit" specific amounts collected from the sale of perpetual care property into the trust fund, and §[712.029](#) establishes requirements pertaining to the timing of and accounting for "deposits."

Finance Code §[154.253](#) requires that money paid or collected on prepaid funeral benefits contracts be "deposited" into either an insured, interest bearing account with a financial institution that has its main office or a branch in Texas, or in trust with a financial institution that has its main office or a branch located in this state and is authorized to act as a fiduciary in Texas.

Health & Safety Code §[712.021\(a\)](#) and Finance Code §[154.253](#) are not banking statutes. In the context of these statutes, the word "deposit" is not used in the same manner as in banking statutes because the term includes a contribution to a trust, which is not a "deposit" transaction. Finance Code §[154.253](#) permits either a deposit account or a trust account, and refers to both forms of account as "deposits." Similarly, we believe the terms "located," "main office," and "branch" are not used in the same manner as in banking statutes when referring to trust accounts, but simply require that the funds be received by the fiduciary institution in Texas subject to Texas law. A physical Texas location, such as a branch or representative trust office, will therefore satisfy the requirements of Health & Safety Code §§[712.021](#), [712.028](#), and [712.029](#), and Finance Code §[154.253](#). We believe this interpretation accomplishes the purposes for which the office location requirements were enacted - to ensure that Texas-based perpetual care trust funds and prepaid funeral benefit trust funds are received and receipted for in Texas and are subject to and dealt with in accordance with Texas law.

Accordingly, the Bank may act as trustee of perpetual care cemetery trust funds or prepaid funeral benefit trust funds in Texas if it establishes a branch or representative office in this state to engage in

prepaid funeral benefits and perpetual care cemetery-related fiduciary activities, and complies with applicable provisions of Texas law and the Department's rules. Certain Texas laws impose minimal requirements. Specifically, the Bank must register with the Texas Secretary of State, pursuant to Finance Code §[201.102](#), and, if establishing a representative trust office, must comply with the requirements of [Finance Code §[187.202](#)].

Once the required registrations have been completed with the Secretary of State and the Savings and Loan Commissioner, any Texas perpetual care cemetery corporation or prepaid funeral benefits contract seller that desires to use the Bank as trustee should contact Ms. Sheila Armstrong of the Department's Special Audits Division for specific instructions regarding how to proceed with the deposit or transfer of trust funds, inasmuch as the requirements vary somewhat depending upon whether the funds in question are prepaid funeral benefits funds or perpetual care funds. In either event, the Department will require that the Bank, prior to receiving any of these trust funds, execute and return to the Department an acknowledgment affirming its agreement to, among other things, receive and provide a receipt for trust funds at its Texas branch or representative trust office, and comply with and be bound in all respects by the requirements of Health & Safety Code Chapter 712 and Finance Code Chapter 154 applicable to fiduciaries, specifically including those pertaining to the protection of perpetual care cemetery funds and prepaid funeral benefits funds.

§201.102. Registration to Do Business.

An out-of-state financial institution must file an application for registration with the secretary of state, before operating a branch or other office in this state, by complying with the law of this state relating to foreign corporations doing business in this state, notwithstanding a provision in that law that purports to limit or prohibit its applicability to financial institutions.[6](#)

§187.202. Registration of Representative Trust Office.

(a) Except as provided by Subsection (e) with respect to a credit union, a savings association, or a savings bank, an out-of-state trust institution that does not maintain a branch or trust office in this state and that desires to establish or acquire and maintain a representative trust office shall:

(1) file a notice on a form prescribed by the banking commissioner, setting forth:

(A) the name of the out-of-state trust institution;

(B) the location of the proposed office; and

(C) satisfactory evidence that the notificant is a trust institution;

(2) pay the filing fee, if any, prescribed by law; and

(3) submit a copy of the resolution adopted by the board authorizing the representative trust office and a copy of the trust institution's registration filed with the secretary of state pursuant to Section [201.102](#).

(b) The notificant may commence business at the representative trust office on the 31st day after the date the banking commissioner receives the notice unless the banking commissioner specifies an earlier or later date.

(c) The 30-day period of review may be extended by the banking commissioner on a determination that the written notice raises issues that require additional information or additional time for analysis. If the period of review is extended, the out-of-state trust institution may

establish the representative trust office only on prior written approval by the banking commissioner.

(d) The banking commissioner may deny approval of the representative trust office if the banking commissioner finds that the notificant lacks sufficient financial resources to undertake the proposed expansion without adversely affecting its safety or soundness or that the proposed office would be contrary to the public interests. In acting on the notice, the banking commissioner shall consider the views of the appropriate supervisory agencies.

(e) A credit union, savings association, or savings bank that does not maintain a branch in this state and desires to establish or acquire and maintain a representative trust office shall comply with this section, except that the notice required by Subsection (a) must be filed with, and the duties and responsibilities of the banking commissioner under Subsections (b)-(d) shall be performed by:

(1) the Texas credit union commissioner, with respect to a credit union; or

(2) the Texas savings and loan commissioner, with respect to a savings association or savings bank.

(f) An out-of-state trust institution that fails to register as required by this section is subject to Subchapter C, Chapter 185