

Date: July 26, 1999.

Summary Conclusion: Licensing and approval requirements of Maryland and Connecticut mortgage lender laws are preempted for an operating subsidiary of a federal savings association just as they would be preempted for the association if it were directly engaged in the same lending activities. Thus, when the operating subsidiary makes first and second mortgage loans secured by residential real estate in those states, the state licensing and approval requirements are preempted.

Subject: Home Owners' Loan Act/Savings Association Powers.



Office of Thrift Supervision

Department of the Treasury

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6251

P-99-7

Chief Counsel

July 26, 1999

[

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Re: Preemption of State Mortgage Lender Licensing Requirements

Dear []:

This responds to your inquiries to the Office of Thrift Supervision (“OTS”) on behalf of [] (“Association”), a federally chartered savings bank, and its [] state-chartered wholly-owned operating subsidiary, [] (“Operating Subsidiary”). You ask whether federal law preempts the application of certain licensing and approval requirements of Maryland and Connecticut law to Operating Subsidiary when it engages in making first and second mortgage loans secured by residential real estate in those states.

In brief, consistent with prior precedents, we conclude that federal law preempts the licensing and approval requirements of the Maryland and Connecticut laws with respect to Operating Subsidiary to the same extent as it would if the Association were directly engaging in the lending activities in question.

I. Background

The Association maintains its principal office in [] and does not have branches that accept deposits in Maryland or Connecticut. Until [], Operating Subsidiary, then known as [], a [] state-chartered corporation (“State Savings Bank Subsidiary”), was a wholly-owned subsidiary of [] (“State Savings Bank”), a [] state-chartered savings bank. State Savings Bank Subsidiary had been in the mortgage

lending business for several years, operated offices in Maryland and Connecticut, and held licenses to act as a mortgage lender issued by those states.

On [], 1997, State Savings Bank merged into the Association. As a result of the merger, State Savings Bank Subsidiary became a wholly-owned operating subsidiary of the Association and took its present name. Operating Subsidiary continues to operate offices in Maryland and Connecticut that previously were established by State Savings Bank Subsidiary, and continues to engage in making first and second mortgage loans to Maryland and Connecticut residents secured by residential real estate located in those states.¹

You indicate that shortly after the merger, Operating Subsidiary received Mortgage Lender License Renewal and Registration forms addressed to State Savings Bank Subsidiary from the Maryland Department of Labor, Licensing and Regulation, Division of Financial Regulation (“MD Division”) and from the Connecticut Department of Banking (“CT DoB”). The Association notified the MD Division and the CT DoB that Operating Subsidiary had become the Association’s wholly-owned subsidiary and that, as an operating subsidiary of a federally-chartered savings bank, Operating Subsidiary was no longer subject to state licensing requirements. The MD Division responded that Operating Subsidiary, regardless of its change in status, must comply with the state’s licensing requirements to continue to engage in the business of lending in Maryland.² The CT DoB responded that its position is that Operating Subsidiary must comply with the state’s licensing and approval requirements.³

¹ Based on the facts set out in your requests, we assume for purposes of this opinion that Operating Subsidiary complies with OTS’s defining criteria for operating subsidiaries pursuant to 12 C.F.R. §§ 559.2 and 559.3 (1999).

² See [] and [] letters from [], Maryland Department of Labor, Licensing and Regulation, to [], expressing the view that compliance with the state’s licensing requirements is not an obstacle to a federal thrift or its operating subsidiary engaging in lending activities under federal law, that federal and state statutes are not in irreconcilable conflict, and that OTS acted beyond its statutory authority in its attempt to preempt state laws pursuant to 12 C.F.R. Part 559 with respect to state-chartered operating subsidiaries of federal thrifts.

³ See [] letter from [], CT DoB, to []. The letter states: “[n]otwithstanding the OTS’s claim of preemption based upon its regulations, it is the position of this department that [Operating Subsidiary] is required to comply with [the licensure requirements of] Sections 36a-486, 36a-511”

Maryland Mortgage Lender Law

The provisions of the Maryland Mortgage Lender Law (“MD Licensing Law”) you have provided to us require each entity subject to its terms to obtain a separate license to act as a mortgage lender for each location at which it does business in Maryland.⁴ An applicant for a mortgage lender license must submit an application, as well as application, license, and renewal fees, and post surety bonds for each office at which it seeks to conduct business.⁵ A first-time applicant is subject to a background check.⁶ A licensee must maintain books and business records required by the state Commissioner of Financial Regulation and make them available to the MD Division for review.⁷ A licensee is subject to examination by the Division.⁸

The MD Licensing Law exempts from its licensing requirements, *inter alia*, specified state- and federally-chartered financial institutions.⁹ The MD Licensing Law also exempts subsidiaries and affiliates of, among others: (1) any Maryland- or federally-chartered bank, trust company, savings bank, savings and loan association, or credit union that maintains its principal office in Maryland; (2) any out-of-state bank having a branch that accepts deposits in Maryland; or (3) any federally-chartered savings association or savings bank that has a branch that accepts deposits in Maryland.¹⁰ The Association does not maintain its principal office in Maryland or operate any branches that accept deposits in Maryland; therefore, Operating Subsidiary does not fall within these exemptions. The MD Licensing Law also exempts employees of licensed or exempt entities, so long as the employees act within the scope of their employment.¹¹

⁴ Md. Code Ann., Financial Institutions, Title 11. Consumer Credit, Subtitle 5. Maryland Mortgage Lender Law §§ 11-504 and 505 (1998).

⁵ Md. Code Ann. §§ 11-506 to 11-511 (1998). The fee for each license is \$500-\$1,000. The renewal fee for each license is \$1,000. The surety bond amount ranges from \$15,000 to \$75,000.

⁶ Md. Code Ann. § 11-509 (1998).

⁷ Md. Code Ann. § 11-513 (1998).

⁸ Md. Code Ann. §§ 11-515 to 11-518 (1998).

⁹ Md. Code Ann. § 11-502(b)(1) (1998) (specifying the covered financial institutions as any “bank, trust company, savings bank, savings and loan association, or credit union incorporated under the laws of [Maryland] or the United States or any other state bank having a branch in [Maryland].”)

¹⁰ Md. Code Ann. § 11-502(b)(11) and (c) (1998).

¹¹ Md. Code Ann. § 11-502(b)(13) (1998).

Connecticut Mortgage Lenders and Brokers Law

The provisions of Connecticut law that you cite require a person or entity engaging in the first mortgage loan business as a mortgage lender or broker to obtain a license for each location at which it intends to conduct business in the state (“CT Licensing Law”).¹² An applicant for a mortgage lender or broker license must submit detailed background information and pay a fee.¹³ An applicant must post a surety bond each time it seeks or renews a license.¹⁴ A licensee must maintain books and records concerning its business as required by the state Banking Commissioner and make them available for examination by the CT DoB.¹⁵ A person wishing to engage in the secondary mortgage loan business must obtain a separate license.¹⁶ The fee, recordkeeping, and examination requirements for secondary mortgage lending licenses are similar to those for first mortgage lending licenses.¹⁷

The CT Licensing Law exempts from its mortgage lending licensing requirements any bank, out of state bank, Connecticut credit union, federal credit union, or out-of-state credit union, but specifically provides that subsidiaries of such institutions are not exempt.¹⁸ Operating Subsidiary does not appear to fall within the language of any of these exemptions. In addition, the CT Licensing Law requires a non-bank subsidiary of a banking corporation to obtain the state Banking Commissioner’s approval to establish an office in the state to engage in “banking business,” which is defined to include “lending money.”¹⁹

¹² Conn. Gen. Stat., Title 36a (Banking Law), Chapter 668 (Nondepository Financial Institutions), Part I. (Mortgage Lenders and Brokers) § 36a-486 (1999). Conn. Gen. Stat., Title 36a, Chapter 664 (General Statement and Definitions) § 36a-2 (44) (1999) defines the term “person” to include “an individual, company . . . or any other legal entity. . . .”

¹³ Conn. Gen. Stat. §§ 36a- 488 and 36a-491 (1999). The annual fee for a mortgage lender license and a mortgage broker license, respectively, is \$400 and \$200.

¹⁴ Conn. Gen. Stat. § 36a-492 (1999). The required surety bond is \$40,000.

¹⁵ Conn. Gen. Stat. § 36a-493 (1999).

¹⁶ Conn. Gen. Stat. § 36a-511 (1999).

¹⁷ Conn. Gen. Stat. §§ 36a-512 to 36a-524 (1999).

¹⁸ Conn. Gen. Stat. §§ 36a-487 (first mortgage lending) and 36a-512 (second mortgage lending) (1999).

¹⁹ Conn. Gen. Stat. § 36a-425 (1999). Section 36a-425(b) defines the term “banking business” to include lending money and any other activity that the Commissioner determines is incident to banking. The Commissioner’s [] letter states that mortgage lending is considered to be banking business.

II. Discussion

A. Preemption Principles Applicable to Federal Savings Associations

1. Generally

The doctrine of federal preemption, rooted in the Supremacy Clause of the United States Constitution,²⁰ applies in three situations: (1) Congress may expressly preempt state law;²¹ (2) congressional intent for federal preemption of state law may be inferred when federal law dominates or occupies a particular field;²² and (3) state law is nullified to the extent that it conflicts with federal law, that is, when compliance with both state and federal law or regulations is a physical impossibility, or when compliance with state law stands as an obstacle to the accomplishment of the objectives of Congress.²³ Federal regulations have no less preemptive effect than federal statutes.²⁴

As we have observed on numerous occasions,²⁵ sections 4(a) and 5(a) of the Home Owners' Loan Act ("HOLA")²⁶ authorize OTS (and formerly its predecessor, the Federal Home Loan Bank Board ("FHLBB")), to provide for the safe and sound operation of federal savings associations, and grant OTS exclusive and plenary

²⁰ U.S. Constitution, Article VI, cl. 2.

²¹ Pacific Gas and Electric Co. v. State Energy Resources and Development Comm'n, 461 U.S. 190, 203-04 (1983); Fidelity Federal Savings and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982).

²² de la Cuesta, 458 U.S. at 153. See also Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31 (1996) ("A federal statute, for example, may create a scheme of federal regulation 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" (citations omitted)).

²³ Barnett Bank, 517 U.S. at 31-37 and cases cited therein; de la Cuesta, 458 U.S. at 153-156, 159 and cases cited therein. See also Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); First Federal Savings and Loan Ass'n of Boston v. Greenwald, 591 F.2d 417, 425 (1st Cir. 1979) (preempting Massachusetts law requiring payment of interest on tax escrow account that conflicted with a regulation of OTS's predecessor agency, the Federal Home Loan Bank Board ("FHLBB")); Kupiec v. Republic Federal Savings and Loan Ass'n, 512 F.2d 147-50 (7th Cir. 1975) (preempting state common law right to inspect and copy membership list that conflicted with FHLBB model by-law governing communication between members or depositors).

²⁴ de la Cuesta, 458 U.S. at 153-54.

²⁵ See, e.g., OTS Op. Chief Counsel (July 1, 1998); OTS Mem. Chief Counsel (September 2, 1997); OTS Op. Chief Counsel (October 11, 1991).

²⁶ 12 U.S.C.A. §§ 1463(a) and 1464(a) (West Supp. 1999).

authority to regulate all aspects of federal savings association operations. Federal courts have consistently found that the HOLA and its implementing regulations preempt state laws that purport to regulate the “activities or operations” of federal savings associations²⁷ or that conflict with federal thrift regulations.²⁸ In particular, the Supreme Court has recognized that the mortgage lending practices of a savings association are “a critical aspect of its ‘operations,’ over which the [FHLBB, now OTS] unquestionably has jurisdiction.”²⁹

Federal lending laws and regulations are intended to “occupy the entire field” of lending regulation for federal savings associations, leaving no room for state regulation. By its regulations, OTS has expressly occupied the entire field of federal savings association operations (§ 545.2)³⁰ specifically including lending activities (§ 560.2).³¹ Section 545.2 expressly states that the OTS’s promulgation of regulations regarding federal savings association operations (Part 545) pursuant to section 5(a) of the HOLA “is preemptive of any state law purporting to address the subject of the operations of a Federal savings association.”³² Section 560.2(a) expressly reflects OTS’s intent to “occup[y] the entire field of lending regulation for federal savings associations . . .” so as to accord federal savings associations “maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation.”³³

²⁷ See, e.g., de la Cuesta, 458 U.S. at 160-161 (referencing Congress’s explicit delegation of jurisdiction over the operation of federal savings associations to OTS’s predecessor); Conference of Federal Savings and Loan Associations v. Stein, 604 F.2d 1256, 1260 (9th Cir. 1979) (“[T]he regulatory control of the [FHLBB] over federal savings and loan associations is so pervasive as to leave no room for state regulatory control The broad regulatory authority over the federal associations conferred upon the FHLBB by HOLA does wholly preempt the field of regulatory control over these associations.”), aff’d mem., 445 U.S. 921 (1980); FHLBB v. Empie, 628 F. Supp. 223, 225 (W.D. Okl. 1983) (“Congress intended the HOLA to preempt all state regulation over federally-chartered savings and loan institutions.”), aff’d, 778 F.2d 1447 (10th Cir. 1985); People v. Coast Federal Savings and Loan Ass’n, 98 F. Supp. 311, 316 (S.D. Cal. 1951) (“The [FHLBB] has adopted comprehensive rules and regulations governing the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.”).

²⁸ See cases cited in OTS Op. Chief Counsel (July 1, 1998) at 7, n. 21, and OTS Mem. Chief Counsel (September 2, 1997) at 4, n. 15.

²⁹ de la Cuesta, 458 U.S. at 167, quoted with approval in First Gibraltar Bank, FSB v. Morales, 19 F.3d 1032, 1050-51 (5th Cir. 1994). See also Smallwood v. OTS, 925 F.2d 894, 898 (6th Cir. 1991).

³⁰ 12 C.F.R. § 545.2 (1999).

³¹ 12 C.F.R. § 560.2 (1999).

³² 12 C.F.R. § 545.2 (1999).

³³ 12 C.F.R. § 560.2(a) (1999).

2. Licensing and Approval Requirements

It is well-established that state laws purporting to impose licensing, registration, and approval requirements on federal savings associations as a condition of engaging in lending activities are preempted by federal law. OTS regulation § 560.2 specifically provides that federal savings associations may extend credit as authorized under federal law without regard to state laws purporting to regulate their credit activities and that state laws imposing licensing and registration requirements on federal savings associations are preempted.³⁴ Such state requirements conflict with the objectives of federal lending regulation and serve as obstacles to the HOLA's comprehensive scheme to enable federal thrifts to originate loans under a single set of uniform federal laws and regulations, free from undue state regulatory burden.³⁵

In promulgating § 560.2, OTS set forth an express policy objective of flexibility in the lending operations of federal thrifts to maximize efficiencies and limit potential liabilities. A state law imposing a licensing scheme on federal thrifts stands as an obstacle to achieving these federal goals of enhancing an association's operational flexibility and safety and soundness. Section 560.2(b)(1) therefore expressly provides that state laws purporting to impose requirements regarding "licensing [and] registration" are preempted for federal savings associations.

Moreover, OTS and the FHLBB have repeatedly opined that state laws that purport to regulate lending activities of federal savings associations are preempted.³⁶ In

³⁴ 12 C.F.R. § 560.2(a) and (b) (1999). See also the preamble to OTS's final rule on lending and investment, which discusses the rationale and legal basis for OTS's authority to preempt by regulation. 61 Fed. Reg. 50951, 50965-67 (September 30, 1996).

³⁵ See de la Cuesta, 458 U.S. at 156; Conference of Federal Savings and Loan Associations v. Stein, 604 F.2d at 1258 (Prior to enactment of the HOLA, "the states had developed a hodgepodge of savings and loan laws and regulations and Congress hoped the [FHLBB, now OTS] rules would set an example for uniform and sound savings and loan regulation." (citation omitted); OTS Mem. Chief Counsel (October 11, 1991); OTS Op. Chief Counsel (November 30, 1990).

³⁶ See OTS Op. Chief Counsel (July 1, 1998); OTS Mem. Chief Counsel (May 10, 1995); FHLBB Op. by Quillian (April 28, 1987); FHLBB Op. by Raiden (November 12, 1985); FHLBB Op. by Raiden (August 13, 1985). Federal courts have also recognized this principle. See, e.g., de la Cuesta, 458 U.S. at 159, 161 ("[t]he broad language of § 5(a) expresses no limits on the [FHLBB's, now OTS's] authority to regulate the lending practices of federal savings and loans"); Empie, 778 F.2d at 1447; First Federal Savings & Loan Ass'n of Boston v. Greenwald, 591 F.2d 417, 425 (1st Cir. 1979); Coast Federal, 98 F. Supp. at 316. The OTS has also taken the position that where a state attempts to impose local requirements on federal associations, such imposition stands as an obstacle to the comprehensive regulatory scheme established under the HOLA and conflicts with federal law. See OTS Op. Chief Counsel (July 1, 1998) at 7, n. 21, and OTS Mem. Chief Counsel (September 2, 1997) at 4, n. 15.

particular, state laws that impose license, registration, and approval requirements on federal savings associations as a condition of doing business in a state are preempted.³⁷ The MD and CT Licensing Laws thus clearly would not apply to a federal savings association. As OTS has previously stated, “[t]he power to license is the power to prohibit, and states cannot prohibit what federal law has authorized.”³⁸

B. Application of Preemption Principles to Operating Subsidiaries

In both its regulations and opinions, OTS has consistently indicated that state laws purporting to regulate the activities of a federal savings association’s operating subsidiary³⁹ are preempted by federal law to the same extent such laws are preempted for the federal savings association itself.⁴⁰ Pursuant to OTS’s statutory authority under sections 4(a) and 5(a) of the HOLA to regulate all aspects of the operations of federal savings associations, OTS duly promulgated its subordinate organizations regulations, after notice and full opportunity to comment.⁴¹ The subordinate organizations regulations specifically permit federal savings associations to use subsidiaries to conduct certain of their operations. A federal savings association’s decision to conduct a particular activity in a subsidiary is an integral part of that association’s structural operations, which as discussed above, OTS has exclusive authority to govern.

³⁷ See, e.g., OTS Op. Chief Counsel (September 2, 1997); OTS Mem. Chief Counsel (May 10, 1995); OTS Op. Sen. Dep. Chief Counsel (November 20, 1992); OTS Op. Prin. Dep. Chief Counsel (January 9, 1990); FHLBB Op. General Counsel (October 29, 1976). See also OTS Op. Acting Chief Counsel (June 13, 1994) (state trust license requirement preempted); OTS Op. Dep. Chief Counsel (December 14, 1994) (state statute requiring license to enter the money order business preempted); and OTS Op. Chief Counsel (November 30, 1990) (state restriction on lending operations of out-of-state federal thrifts and requirement to obtain state mortgage banker licenses preempted).

³⁸ OTS Op. Chief Counsel (June 21, 1996) at 7; OTS Op. Chief Counsel (August 8, 1996) at 14. See also OTS Op. Chief Counsel (July 1, 1998) (state provisions imposing application, approval, registration, examination, and fee requirements to conduct ATM operations preempted).

³⁹ The term “operating subsidiary” is defined at 12 C.F.R. §§ 559.2 and 559.3 (1999).

⁴⁰ See 12 C.F.R. Part 559 (1999) (“Subordinate Organizations”); OTS Op. Chief Counsel (August 17, 1997); OTS Op. Chief Counsel (October 17, 1994); Preamble discussion to Final Rule: Subsidiaries and Equity Investments (which included 12 C.F.R. Part 559), 61 Fed. Reg. 66,561, 66,563-79 (December 18, 1996); and Preamble discussion to OTS’s original operating subsidiaries regulation, Final Rule: Federal Savings Associations: Operating Subsidiaries and Service Corporations, 57 Fed. Reg. 48,942, 48,948 (October 29, 1992), codified at 12 C.F.R. § 545.81(e) (1993).

⁴¹ See Final Rule: Subsidiaries and Equity Investments, 61 Fed. Reg. 66,561 (December 18, 1996); Notice of proposed rulemaking: Subsidiaries and Equity Investments, 61 Fed. Reg. 29,976 (June 13, 1996); Final Rule: Operating Subsidiaries and Service Corporations, 57 Fed. Reg. 48, 942 (October 29, 1992); Notice of proposed rulemaking: Operating Subsidiaries and Service Corporations, 57 Fed. Reg. 12,226 (April 9, 1992).

With respect to preemption, § 559.3(n)(1) of OTS's subordinate organizations regulations explicitly provides: "State law applies to operating subsidiaries only to the extent it applies to you [federal savings association]." ⁴² This has been OTS's position since 1992, when OTS originally promulgated its operating subsidiaries regulation. ⁴³ The principle was reaffirmed in 1996 when OTS revised its regulations on subordinate organizations, 12 C.F.R. Part 559. ⁴⁴

The preamble to the current subordinate organizations regulations at Part 559 explains that an operating subsidiary "may only engage in activities permissible for its parent federal savings association and must be controlled by the investing savings association -- [therefore it] is treated as the equivalent of a department of the parent thrift for regulatory and reporting purposes." ⁴⁵ Indeed, among the reasons OTS

⁴² 12 C.F.R. § 559.3(n)(1) (1999).

⁴³ 57 Fed. Reg. 48,942 (October 29, 1992). At that time, the rule provided:

(e) *Applicability of laws and regulations.* Unless otherwise provided by statute, regulation or policies of the OTS, all provisions of Federal laws, regulations and policies of the OTS applicable to the operations of a Federal savings association shall apply in the same manner and to the same extent to the operations of its operating subsidiaries, and the parent association and its operating subsidiary shall generally be consolidated and treated as a unit for the purpose of applying statutory and regulatory requirements and limitations.

...

(g) *Examination and Supervision.* Each operating subsidiary shall be subject to examination and supervision by the OTS in the same manner and to the same extent as its parent Federal association. If, upon examination, the OTS ascertains that the subsidiary has been created or is operated in violation of law, regulation or OTS policy . . . the OTS shall direct the federal association to take appropriate remedial action . . .

12 C.F.R. § 545.81(e), (g) (1993). The preamble to the 1992 regulation specifically noted that "state laws that [may] apply to the activities of an operating subsidiary will be preempted to the same extent as when the activities are conducted directly by a Federal savings association." 57 Fed. Reg. at 48,946. The preamble also stated that "establishment of an operating subsidiary is within the incidental powers of a Federal savings association under the seminal test of incidental powers expressed in Arnold Tours v. Camp, 472 F.2d 427 (1st Cir. 1972)." 57 Fed. Reg. at 48,943.

⁴⁴ Final Rule: Subsidiaries and Equity Investments, 61 Fed. Reg. 66, 561 (December 18, 1996).

⁴⁵ 61 Fed. Reg. 66,561, 66,563 (December 18, 1996). The specific requirements regarding a federal savings association's control of the operating subsidiary are set forth in 12 C.F.R. § 559.3(c)(1) and include the requirement that the federal savings association own, directly or indirectly, more than 50 percent of the voting shares of the operating subsidiary. The limitation on the permissible activities of an operating subsidiary are set forth in 12 C.F.R. § 559.3(e)(1).

authorized federal savings associations to establish operating subsidiaries was to allow an institution to maintain control over an activity, and to structure its operations to maximize efficiencies.⁴⁶ Therefore, a federal savings association's decision to conduct an authorized activity through an operating subsidiary is a legitimate business decision concerning the structure of the association's operations.⁴⁷

OTS opinions also have articulated the principle that state law applies to operating subsidiaries only to the extent state law applies to the parent federal savings association. In 1994, OTS concluded that state lender licensing, registration, bonding, net worth, and other requirements did not apply to an operating subsidiary engaged in mortgage and consumer lending.⁴⁸ The opinion observed that because a federal savings association's authority to invest its assets in its operating subsidiaries is unlimited, the success or failure of an operating subsidiary can have a significant impact on its parent savings association.⁴⁹ The opinion also noted that because of the symbiotic relationship between federal savings associations and their operating subsidiaries, OTS cannot fulfill its statutory mandates unless it regulates operating subsidiaries in the same manner and to the same extent as it regulates their parent institutions.⁵⁰ The opinion concluded that

⁴⁶ In proposing the 1992 rule, the OTS stated “[u]se of an operating subsidiary also enhances a Federal savings association’s ability to structure its operations to maximize efficiency and cost-savings.” Proposed Rule: Federal Savings Associations: Operating Subsidiaries and Service Corporations, 57 Fed. Reg. 12,226, 12,227 (April 9, 1992). The OTS has required federal savings associations to conduct some activities through operating subsidiaries for safety and soundness reasons. See OTS Op. Chief Counsel (January 10, 1995) at 7.

⁴⁷ Under the OTS regulatory scheme, OTS has retained full examination and enforcement powers with respect to operating subsidiaries to ensure that those entities comply with OTS regulatory requirements. Federal savings associations and their operating subsidiaries are generally consolidated and treated as a unit for statutory and regulatory purposes. 12 C.F.R. § 559.3 (1999). See also 12 U.S.C.A. § 1464(d)(7)(West Supp. 1999) (subsidiaries owned in whole or in part by a savings association are subject to examination and regulation by the Director of OTS to the same extent as that savings association).

⁴⁸ OTS Op. Chief Counsel (October 17, 1994), addressing Arizona and Maine statutes. See also OTS Op. Chief Counsel (May 5, 1995) at 2 (citing § 545.81(e) for the principle that all federal laws, regulations and policies applicable to the operations of the parent federal savings association are equally applicable to the operations of the operating subsidiary).

⁴⁹ October 17, 1994 Opinion at 4.

⁵⁰ October 17, 1994 Opinion at 4. The opinion reiterated OTS’s HOLA § 5(a) authority to promulgate comprehensive regulations governing every aspect of federal savings association operations “from their corporate cradle to their corporate grave,” citing Conference of Federal Savings & Loan Associations v. Stein, 604 F.2d at 1260 and Rettig v. Arlington Heights Federal Savings & Loan Ass’n, 405 F. Supp. 819 (N.D. Ill. 1975). The opinion also reaffirmed that the federal government may preempt the application of state law to state corporations when doing so furthers a valid federal objective. October 17, 1994 Opinion at 5, n. 17 (citing Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); and Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)).

OTS “occup[ies] the field of operating subsidiary regulation to the same extent as the OTS occupies the field of federal savings association regulation . . .” and therefore state licensing and registration requirements do not apply to an operating subsidiary engaged in mortgage and consumer lending.⁵¹

More recently, in 1997 OTS addressed whether federal law preempted the application of a New Jersey licensing statute to a federal savings bank’s operating subsidiaries engaged in residential mortgage lending.⁵² Consistent with the reasoning in the 1994 Opinion, OTS concluded that because the New Jersey statute’s licensing requirements would not apply to a federal savings association due to the preemptive federal regulatory scheme, those requirements also would not apply to its operating subsidiaries pursuant to § 559.3(n).

The principle that state law applies to operating subsidiaries only to the extent it applies to federal thrifts represents a proper exercise of OTS’s plenary, exclusive authority under sections 4 and 5 of the HOLA to regulate the operations of federal savings associations.⁵³ As the Supreme Court has acknowledged, “[t]he broad language of § 5(a) expresses no limits on the [FHLBB’s, now OTS’s] authority to regulate the lending practices of federal savings and loans.”⁵⁴ OTS’s plenary regulatory authority over the operations of federal savings association necessarily encompasses broad authority over their operating subsidiaries to ensure that such entities are operated so as to maintain the viability of the parent thrift institutions and the solvency of the federal deposit insurance system.⁵⁵ To accomplish these statutory objectives, OTS has determined to apply its regulations and policies to operating subsidiaries in the same

⁵¹ *Id.* at 5 and opinions cited therein at n.15. As these opinions make clear, OTS has occupied the field of lending regulation so as to prevent the imposition of multiple, duplicative, or conflicting state requirements that can restrict, or add unnecessary costs, to the operations of federal savings associations.

⁵² OTS Op. Chief Counsel (August 19, 1997).

⁵³ We note that since 1996, OTS has been required to submit its final rules, including the Part 559 subordinate organizations regulations, for congressional review before those regulations can take effect pursuant to 5 U.S.C.A. § 801 (West Supp. 1999), enacted as part of the Contract with America Advancement Act of 1996, Pub. L. 104-121, 104th Cong. (March 29, 1996).

⁵⁴ *de la Cuesta*, 458 U.S. at 161. The Court went on to state that “[i]t would be difficult for Congress to give the Bank Board a broader mandate.” *Id.* (citations omitted).

⁵⁵ The Federal Deposit Insurance Act (FDIA), 12 U.S.C.A. § 1828(m) (West Supp. 1999), also mandates that the parent thrift “shall conduct the activities of the subsidiary in accordance with regulations and orders of the Director of the Office of Thrift Supervision.” See also H.R. No. 101-54(I), at 338 (“The Director of the Office of Thrift Supervision is given rulemaking authority over subsidiaries’ activities.”).

manner and to the same extent as to their parent federal associations. OTS's position regarding the preemption of state law with respect to operating subsidiaries is rationally based and entitled to deference.⁵⁶

C. Preemption of MD and CT Licensing Requirements for Operating Subsidiary Engaged in Mortgage Lending

Turning to the state statutes at issue here, we conclude that the licensing and approval requirements of the MD and CT Licensing Laws do not apply to lending activities in Association's wholly-owned Operating Subsidiary by reason of federal preemption.⁵⁷ As discussed above, the MD and CT Licensing Laws would not apply to a federal savings association. By virtue of OTS regulation § 559.3(n), which expressly applies to operating subsidiaries the same preemption principles that apply to federal thrifts, the MD and CT Licensing Laws also do not apply to Operating Subsidiary, a wholly-owned subsidiary of Association.

The MD and CT Licensing Laws impose burdensome obligations on federal thrifts and their operating subsidiaries that conflict with the objectives of federal lending regulation⁵⁸ and that represent obstacles to the HOLA's comprehensive scheme to enable federal thrifts to lend under a single set of uniform federal laws and regulations, free from undue state regulatory burden.⁵⁹ To the extent the MD and CT Licensing Laws purport to impose licensing and approval schemes on federal savings association operating subsidiaries, the laws stand as obstacles to achieving, and

⁵⁶ See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984); First Gibraltar Bank, FSB v. Morales, 19 F.3d at 1040, 1052 and cases cited therein. See also U.S. v. Hagggar Apparel Co., 119 S.Ct. 1392 (U.S. April 21, 1999) at 1399-1400. Holding that an agency's regulatory interpretation was entitled to judicial deference, Hagggar noted "that Congress need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect." Id. Hagggar reasoned that if "the agency's statutory interpretation 'fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give [that] judgment controlling weight,' " citing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995).

⁵⁷ Although the MD Licensing Law specifically exempts, *inter alia*, federal savings associations from its licensing requirements, those institutions would be exempt from such state requirements based on federal preemption principles even in the absence of the Maryland statutory exemption.

⁵⁸ See OTS Op. Chief Counsel (October 11, 1991) at 10; OTS Op. Chief Counsel (November 30, 1990) at 5; OTS Op. Chief Counsel (January 9, 1990) at 6-8.

⁵⁹ See de la Cuesta, 458 U.S. at 256; Conference of Federal Savings and Loan Associations v. Stein, 604 F.2d at 1258; OTS Mem. Chief Counsel (October 11, 1991); OTS Op. Chief Counsel (November 30, 1990).

therefore conflict with, the federal goals of enhancing a thrift's operational flexibility and safety and soundness.⁶⁰

Our conclusion that the MD and CT Licensing Laws are preempted for Association's wholly-owned Operating Subsidiary also is consistent with the Supreme Court's views on the preemptive effect of federal authorization outside the banking context. In Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977), the Supreme Court invalidated a Virginia statute that sought to distinguish between nonresident owners of federally licensed vessels and state residents with respect to fishing rights in Virginia waters. The Supreme Court held that insofar as certain Virginia statutes subjected federally licensed vessels owned by nonresidents or aliens to fishing restrictions different from those applicable to Virginia residents and American citizens, the state statutes were preempted by the federal Enrollment and Licensing Act and the Supremacy Clause. The Supreme Court quoted from Gibbons v. Ogden, where the Court had previously pointed out that "a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is in the terms of the license."⁶¹ Accordingly, once a federal license for fishery was granted to a vessel, the state of Virginia had no right to look behind that license in an effort to use the structure of that vessel's ownership as an excuse for limiting the rights transferred by the federal license.

As discussed above, the HOLA authorizes OTS to regulate all aspects of the organization and operations of federal savings associations. Based on this broad plenary authority, the issuance of a federal thrift charter by OTS essentially grants federal savings associations permission akin to a federal license to engage in a wide range of lending activities, and to structure those activities consistent with safety and soundness, without interference from state laws. OTS's duly promulgated regulations also specifically authorize federal savings associations to structure their lending activities through establishment of operating subsidiaries. Consistent with Douglas, states do not have the authority to look behind a federal grant of authority, such as a federal savings association's charter, in an attempt to either impose state structural

⁶⁰ We note that recently a Maryland court, finding that federal regulations applicable to a federal savings association also applied to its operating subsidiary, concluded that state loan fee restrictions were preempted for a federal savings association's operating subsidiary where the loan fees were otherwise permissible under OTS regulations. Chaires v. Chevy Chase Bank, F.S.B., No. CAL 97-18995 (Circuit Court for Prince George's County, Maryland, October 14, 1998).

⁶¹ 9 Wheat. 1, 213-214 (1824).

requirements on the association or to limit rights granted by that federal charter with respect to how the association chooses to structure its activities.

Parallel to the scenario in Douglas, the MD and CT Licensing Laws purport to impose a burdensome array of licensing, application, fee, and bond requirements on operating subsidiaries of federal savings associations that engage in mortgage lending activities while not imposing those same requirements on many state-chartered entities engaging in mortgage lending.⁶² The MD and CT Licensing Laws effectively attempt to look behind the federal savings association's license to conduct mortgage lending activities and limit the association's federally granted authority to structure its activities through operating subsidiaries. These state laws improperly attempt to inhibit federal savings associations from making legitimate business decisions concerning the most efficient way to conduct and structure their lending operations consistent with their federal charter and safety and soundness. The MD and CT Licensing Laws not only unlawfully restrict federal savings associations from exercising their federal grant of rights to engage in mortgage lending activities but also preferentially allow certain other entities to conduct the same lending activities without restriction. For all these reasons, the MD and CT Licensing Laws must be preempted with respect to Association's wholly-owned Operating Subsidiary.⁶³

Our conclusion that the MD and CT Licensing Laws are preempted in the particular situation described in your inquiry is consistent with OTS's exercise of its

⁶² For example, the MD Licensing Law does not apply to any state-chartered bank, savings bank, or savings and loan association. Md. Code Ann. § 11-502(b) (1998). The MD Licensing Law also does not apply to subsidiaries of any bank, trust company, savings bank, or savings and loan association incorporated or chartered under MD law or the United States that maintains its principal office in the state; to subsidiaries of any out of state bank that has a branch that accepts deposits in the state; or to any institution incorporated under federal law as a savings association or savings bank that does not maintain its principal office in this State but has a branch that accepts deposits in this State. Md. Code Ann. § 11-502(b)(1) and (c) (1998). The CT Licensing Law does not apply to any bank or out-of-state bank, provided subsidiaries of such institutions are not exempt from licensure. Conn. Gen. Stat. §§ 36a-487(1) (first mortgage lending) and 36a-512 (second mortgage lending) (1998).

⁶³ Cf. Schneidewind et al. v. ANR Pipeline Co., et al., 485 U.S. 293 (1988). In that case, subsidiaries of a Delaware corporation that owned and operated an interstate natural gas pipeline system transporting gas for resale to gas distribution centers in Michigan and other states, challenged a Michigan statute that required those subsidiaries to obtain approval of the Michigan Public Service Commission ("MPSC") before issuing long-term securities. The companies were natural gas companies within the meaning of the federal Natural Gas Act of 1938 and were subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). The Supreme Court held that even though FERC was not expressly authorized to regulate natural gas companies' issuance of securities, the MPSC regulation impinged on a field that the federal regulatory scheme had occupied to the exclusion of state law and therefore was preempted. See also Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

plenary and exclusive authority to regulate and occupy the field of operations of federal associations and their operating subsidiaries as evidenced in long-standing OTS regulations and as consistently interpreted in OTS opinions.⁶⁴ As discussed above, OTS clearly has statutory authority to promulgate regulations governing the operations and structure of federal savings associations including regulations authorizing federal savings associations to structure their operations through operating subsidiaries. Those regulations were properly promulgated, rationally based, and are entitled to deference.⁶⁵ State laws inconsistent with those regulations must fall under the Supremacy Clause.⁶⁶

In reaching the foregoing conclusions, we have relied upon the factual representations contained in the materials you submitted to us, as set forth in the background discussion above. Our conclusions depend upon the accuracy and completeness of those representations. Any material change in facts from those set forth herein could result in different conclusions.

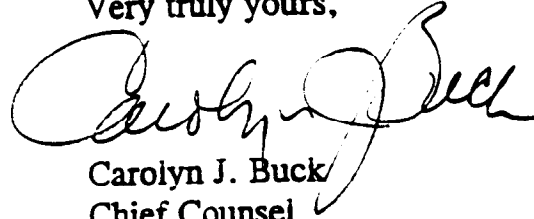
⁶⁴ OTS does not view the matter of preemption of state law lightly. In this regard, we note that OTS generally does not preempt the following types of state laws to the extent they only incidentally affect the lending operations of federal savings associations or are otherwise consistent with (or not contrary to) the purposes of OTS's lending regulations: contract, commercial, tort, real estate, criminal, and any other law that OTS finds furthers a vital state interest. 12 C.F.R. § 560.2 (1999). Moreover, banking is a highly regulated industry and there exists a panoply of federal laws and regulations that protect various consumer-borrower interests with respect to, for example, disclosure, equal credit opportunity, fair lending, and fair credit reporting. *See, e.g.*, the Truth in Lending Act, 15 U.S.C.A. § 1601 *et seq.* (West 1999) and its implementing regulations (Regulation Z), 12 C.F.R. Part 226 (1999); the Real Estate Settlement Procedures Act, 12 U.S.C.A. § 2601 *et seq.* (West 1989 & Supp. 1999) and 24 C.F.R. Part 3500 (1999); the Equal Credit Opportunity Act, 15 U.S.C.A. § 1691 *et seq.* (West 1999) and Regulation B, 12 C.F.R. Part 202 (1999); the Home Mortgage Disclosure Act, 12 U.S.C.A. § 2801 *et seq.* (West 1989 & Supp. 1999) and Regulation C, 12 C.F.R. Part 203 (1999); and the Fair Housing Act, 42 U.S.C.A. § 3601 *et seq.* (West 1995 & Supp. 1999) and 24 C.F.R. Part 100 (1998).

⁶⁵ First Gibraltar Bank, FSB v. Morales, 19 F.3d at 1040.

⁶⁶ Douglas, 431 U.S. at 287.

If you have any questions regarding the foregoing, please contact Ellen Sazzman, Counsel (Banking and Finance), at (202) 906-7133 or Vicki Hawkins-Jones, Assistant Chief Counsel, at (202) 906-7034.

Very truly yours,



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cc: Regional Directors
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