

Date: January 3, 2001

Authority to Exercise Trust Powers through an Agency Office

A Federal savings bank that has received approval from OTS pursuant to HOLA § 5(n) may exercise fiduciary powers in an agency office in Virginia, notwithstanding a Virginia statute that purports to prohibit the Federal savings bank from doing so. An interpretation of state law that would prohibit the Federal savings bank from exercising fiduciary powers granted by OTS conflicts with federal law and is preempted.

Subject: Home Owners' Loan Act/Savings Association Powers

P-2001-1



P-2001-1

Office of Thrift Supervision
Department of the Treasury

Chief Counsel

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

January 3, 2001

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Re: Authority to Exercise Trust Powers through an Agency Office

Dear []:

This responds to your inquiry on behalf of [](Association) concerning whether the Association may exercise fiduciary powers in an agency office located in Virginia, notwithstanding a Virginia statute that purportedly prohibits the Association from doing so. In brief, we conclude that Virginia law cannot prohibit the Association from exercising, in an agency office located in Virginia, fiduciary powers granted by the Office of Thrift Supervision (OTS).

I. Background

A. The Association's Trust Operations

The Association is a wholly owned subsidiary of [] which, in turn, is wholly owned by []. The Association currently exercises fiduciary powers in its home office in [].¹

[], the Association applied to OTS to exercise limited trust powers in Virginia and to offer trust and other fiduciary services through an agency office to be located in Virginia. Thereafter, OTS notified the Association that OTS did not object to the establishment of an agency office in Virginia and that the Association was

¹ OTS approved the Association's application to exercise fiduciary powers from its [] headquarters by letter dated []. The Association's fiduciary business is limited to acting as trustee for pre-need funeral trusts.

authorized to exercise trust and other fiduciary services, as outlined in its application, from an agency office in Virginia.²

Information submitted to OTS by you and by the Association indicates that the agency office will be located in [], Virginia, in space leased from an affiliate of the Association. One or more part-time employees will staff the Association's Virginia agency office.³ The Association will exercise pre-need funeral and cemetery, as well as cemetery endowment, trust powers from the Virginia agency office.

You indicate that in connection with the proposed establishment of a trust agency office in Virginia, the Association consulted with a representative of the Virginia State Corporation Commission (State Commission), who informed the Association that Virginia law does not permit the Association to do a trust business in Virginia. Specifically, the State Commission advised the Association that: Virginia law prohibits out-of-state savings associations from engaging in a trust business in Virginia; the Association, an out-of-state federal savings bank, does not come within any of the exceptions to the statutory prohibition; and, therefore, the Association would be subject to the prohibition.⁴ The State Commission also advised that the Association was outside the definition of "trust institution" as used in Virginia's recently enacted multistate trust law.⁵ After further discussions, the State Commission informed the Association that the State Commission's view on the matter had not changed.⁶

² See Letters to the Association from Ronald Karr, Regional Director, OTS Central Region, dated [], 2000 and [], 2000.

³ These employees will also be part-time employees of an affiliate of the Association.

⁴ Letter dated April 2, 1999 from [], State Commission, to [].

⁵ *Id.* Under the recently enacted Virginia Multistate Trust Institutions Act (Va. Code Ann. Title 6.1, Chap. 2, Art. 3.3 (Michie 1999)), an out-of-state trust institution may conduct a trust business in Virginia. However, § 6.1-32.32 of the statute defines a "trust institution" as "a bank or trust company chartered by a state bank supervisory agency or by the Office of the Comptroller of the Currency."

⁶ Letter dated August 17, 2000 from [], State Commission to [] ("It does not appear to me that the definition of trust institution includes a federal savings bank that has its head office in a state other than Virginia."). OTS staff also discussed with an official of the State Commission its position that Virginia law does not permit the Association to operate a trust business from an agency office located in Virginia.

B. The Virginia Statutes

The State Commission cites § 6.1-5 of the Code of Virginia to support its position that Virginia law does not permit the Association to do a trust business in Virginia. Section 6.1-5 currently provides, in pertinent part:

No person, co-partnership or corporation, except corporations duly chartered and already conducting the banking business or trust business in this Commonwealth under the authority of the laws of the Commonwealth or the United States, or which shall hereafter be incorporated under the laws of this Commonwealth or authorized to do business in the Commonwealth under the banking laws of the United States, and except banks which may be authorized . . . to establish and operate one or more branches in this Commonwealth . . . and except trust institutions which may be authorized to establish and operate one or more trust offices in the Commonwealth . . . shall engage in the banking business or trust business in this Commonwealth, and no foreign corporation . . . shall do a banking or trust business in this Commonwealth.

. . .

Nothing in this section shall be construed to prevent banks or trust companies organized in this Commonwealth and chartered under the laws of the United States from transacting business in Virginia.⁷

The State Commission reads § 6.1-5 of the Code of Virginia as prohibiting the Association from operating a trust business through an agency office located in Virginia.

Another Virginia statute also may be relevant to your inquiry. The Virginia Savings and Loan Trust Powers Act of 1984 authorizes Virginia state savings and loans to exercise fiduciary powers.⁸ A provision in that statute, § 6.1-195.80.D, states that

⁷ Va. Code Ann. Title 6.1, Chap. 2 (Virginia Banking Act), § 6.1-5 (Michie 1999) (emphasis added). Arguably, this statute can be read in a manner that would not preclude the Association from exercising trust powers at a Virginia agency office by determining that § 5(n) of the Home Owners' Loan Act (12 U.S.C. § 1464(n)), which authorizes fiduciary powers federal savings associations, is a banking law of the United States.

⁸ Va. Code Ann. Title 6.1, Chap. 3.2 (Michie 1999).

“[a]ll federal savings and loan associations and federal savings banks, which have been, or hereafter may be, permitted by law to act in any fiduciary capacity, shall have the rights, powers, and immunities conferred by this chapter to the extent permitted by federal law.”⁹ The State Commission apparently does not view this provision as authorizing a federal savings association that has its home office outside of Virginia to exercise trust powers through an agency office in Virginia.¹⁰

II. Discussion

Section 5(n) of the Home Owners’ Loan Act (HOLA), authorizes the OTS Director to:

grant by special permit to a Federal savings association applying therefor the right to act as trustee, executor, administrator, guardian, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which compete with Federal savings associations are permitted to act under the laws of the State in which the Federal savings association is located.¹¹

OTS also has promulgated, after notice and comment, extensive regulations at 12 C.F.R. Part 550 governing the acquisition and exercise of fiduciary powers by federal savings associations.¹² These regulations set out a process by which a federal savings association may apply for fiduciary powers and OTS may authorize a federal savings association to exercise fiduciary powers.¹³

As noted earlier, OTS has approved the Association’s application to exercise specified trust powers through an agency office in Virginia. Pursuant to HOLA § 5(n), this OTS approval means that the Association may act in any fiduciary capacity in which

⁹ Va. Code Ann. § 6.1-195.80.D (Michie 1999).

¹⁰ OTS staff discussed both of the Virginia statutory provisions—§ 6.1-5 and § 6.1-195.80.D—with staff of the State Commission. The State Commission does not read these provisions as allowing the Association, which has its home office in a state other than Virginia, to exercise trust powers in a Virginia agency office.

¹¹ 12 U.S.C.A. § 1464(n) (West 1989 and 2000 Supp.)

¹² 12 C.F.R. Part 550 (2000).

¹³ See, in particular, 12 C.F.R. § 550.10; §§ 550.70–550.120 (Obtaining Fiduciary Powers); and §§ 550.130–550.480 (Exercising Fiduciary Powers).

Virginia banks, trust companies, or other corporations that compete with federal savings associations, may act under the laws of Virginia.¹⁴

Based on HOLA § 5(n), OTS's trust regulations at Part 550, and OTS's approval of the Association's application to exercise trust powers from an agency office located in Virginia, we conclude that the Association may exercise OTS-authorized trust powers in Virginia, notwithstanding Virginia law's purported prohibition. Prior OTS legal opinions also support this conclusion.

Specifically, in a Chief Counsel's opinion issued March 28, 1996 (March 1996 Opinion), OTS concluded that pursuant to § 5(n), OTS may authorize a federal savings association to exercise trust powers in any state that allows state banks, trust companies, or other corporations to act as fiduciaries.¹⁵ The March 1996 Opinion further concluded that an office of a federal savings association that provides trust services alone is sufficient to establish "location" under HOLA § 5(n) and that nothing in § 5(n) precluded a federal savings association from being located in more than one state for trust purposes. Finally, the March 1996 Opinion concluded that a federal savings association may provide trust services through an agency office.¹⁶

Here, OTS has granted the Association authority to exercise trust powers in Virginia. As such, the Association may act in Virginia in any fiduciary capacity in which Virginia law allows state-chartered fiduciaries to act. We note that OTS examination, supervision, and reporting requirements for the exercise of trust powers from an agency office are the same as when such powers are exercised from a home or branch office of a federal savings association.

The authority of a federal thrift to engage in a trust business is governed by federal law. A Virginia law, such as § 6.1-5, that prohibits, or is interpreted to prohibit, the Association from exercising OTS-authorized trust powers stands as an obstacle to the accomplishment of Congress's objective to allow federal savings associations to exercise fiduciary powers on par with state fiduciaries. As a result, such

¹⁴ The Association's counsel opined in a letter dated [], 2000 to the OTS Central Region Office that the limited fiduciary powers for which the Association sought approval from OTS are authorized for state-chartered corporate fiduciaries under Virginia law. Under HOLA § 5(n), the scope of a federal savings association's permissible fiduciary activities depends on state law. The authority to actually exercise trust powers and activities incidental to trust powers is governed solely by federal law. *See, e.g.*, OTS Op. Chief Counsel (July 1, 1998) at 8; OTS Op. Chief Counsel (August 8, 1996) at 13; OTS Op. Chief Counsel (June 21, 1996) at 6 (discussing Virginia law, among others); OTS Op. Acting Chief Counsel (June 13, 1994) at 10.

¹⁵ OTS Op. Chief Counsel (March 28, 1996).

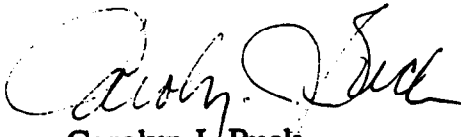
¹⁶ *Id.* at 3-7.

a law conflicts with federal law.¹⁷ We therefore conclude that § 6.1-5 of the Virginia Code, as interpreted and applied by the State Commission to prevent the Association from exercising fiduciary powers through an agency office in Virginia, conflicts with, and is preempted by, federal law.

In reaching the foregoing conclusions, we have relied on the factual representations made in the material you submitted to us and in subsequent discussions with OTS staff. Our conclusions depend on the accuracy and completeness of those facts. Any material difference in facts or circumstances from those described herein could result in different conclusions.

If you any have questions regarding these matters, please feel free to contact Timothy P. Leary, Counsel (Banking & Finance), at (202) 906-7170 or Vicki Hawkins-Jones, Assistant Chief Counsel, at (202) 906-7034.

Very truly yours,



Carolyn J. Buck
Chief Counsel

cc: All Regional Directors
All Regional Counsel

¹⁷ One instance in which federal law preempts state law is when state law conflicts with federal law. Fidelity Federal Savings and Loan Assoc. v. de la Cuesta, 458 U.S. 141, 153 (1982). A conflict arises when, inter alia, state law "stands as an obstacle to the accomplishment of the objectives of Congress." Id., quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941).