



Office of Thrift Supervision  
Department of the Treasury

1700 G Street, N.W., Washington, D.C. 20552 • (202) 906-6000

94-CC-13

June 13, 1994

[REDACTED]

Re: Proposed Trust Activities of a  
Federal Savings Association --  
Location, Branching and Preemption Issues

Dear [REDACTED]

This is in response to your letter of September 24, 1994, on behalf of [REDACTED] A Limited Partnership (the "Partnership") and [REDACTED] (the "Company"), a registered broker-dealer that is a wholly-owned subsidiary of the Partnership. Your letter seeks interpretative advice under Section 5(n) of the Home Owners Loan Act ("HOLA")<sup>1</sup> and under the Office of Thrift Supervision's ("OTS") regulations governing trust powers<sup>2</sup> in connection with the proposed acquisition of a federal savings association (the "Association") by the Partnership.

You have requested that the OTS confirm, based on the facts and representations made in your letter, that:

(i) the Association would be located for purposes of Section 5(n) of HOLA only in the home state of the Association and not in the various states in which the Company has offices;

(ii) the fiduciary powers of the Association would be determined under Section 5(n) of HOLA by reference to the powers of state-chartered fiduciaries located in the home state of the Association, rather than by reference to powers of fiduciaries located in other states in which the Company has offices;

1. 12 U.S.C. § 1464(n).

2. 12 C.F.R. Part 550 (1993).

(iii) the Company offices would not be deemed to be branch offices of the Association; and

(iv) any state laws purporting to require the Association to obtain a state license in order to serve as trustee or other fiduciary for accounts of customers of that state, or purporting to prohibit the Association from serving as trustee or other fiduciary for accounts of customers located in that state, would be preempted by HOLA and the Supremacy Clause of the United States Constitution.

On the basis of the facts presented and representations made in your letter, and subject to the caveats noted herein, we concur that the Association, for purposes of Section 5(n) of HOLA, would be "located" only in the the state where the Association has its home office, that the fiduciary powers of the Association would be determined by reference to the powers of state-chartered fiduciaries located in the home state of the Association, and that the Company offices would not be deemed to be branch offices of the Association. We would also generally concur that any state laws purporting to require the Association to obtain a state license in order to serve as trustee or other fiduciary for accounts of customers located in that state or otherwise prohibiting the Association from serving as trustee or other fiduciary for accounts of customers located in that state would be preempted by HOLA.

#### I. BACKGROUND

The Partnership is a Missouri limited partnership engaged through subsidiaries in the securities business as a registered broker-dealer, investment adviser, underwriter and dealer of securities, and distributor of mutual funds. The Partnership also engages in the sale of various insurance products. The Partnership's principal subsidiary is the Company. The Company provides investment products and services to customers through approximately 2,300 offices located throughout the United States.

The Company currently markets retirement plans and accounts and personal trust services of an unaffiliated trust company to its customers. Because the Company and its affiliated entities lack trust powers, however, its ability to provide fiduciary services is limited. By acquiring a federal savings association, the Partnership, through the Company, would be able to offer its customers complete trust

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3. You have indicated that the Association will not have any branch offices in states other than the state in which its home office is located.

services of an affiliated entity, including managed investment services to retirement plan accounts and personal trust services.

Your letter indicates that the Company would serve as the marketing agent for the Association's trust services and in this capacity would be responsible for all marketing costs, including sales compensation and marketing literature. The Company would collect fees from its customers for the services provided and would forward to the Association a portion of the fees for the Association's services.

Representatives at the Company's investment offices (who would be employees of the Company) would notify customers of the availability of the Association's trust services, assist in identifying the customer's need for trust services, participate with the customer in discussing the customer's needs with trust department representatives of the Association, and assist customers in filling out forms prepared by the Association's trust department. These representatives would refer trust customers to the Association's trust department for actual trust services and would not act in a fiduciary capacity on behalf of the Association or the customer.

Specifically, the Company representatives would not execute documents on behalf of the Association's trust department, would not provide investment advice to the Association's trust department or exercise investment discretion over trust department accounts, and would not have or exercise power to accept or approve new trust accounts on behalf of the Association. You also indicated that most customer communication with the Association's trust department would be via telephone or mail. Your letter also stated that seminars will be conducted at the offices of the Company by Company employees throughout the country for the purpose of instructing customers as to the various trust products and services available and that employees of the Association's trust department may visit the offices of the Company to meet with trust customers on occasion.

The Company offices will not receive deposits from the public or make loans on behalf of the federal savings association, although you indicated that in the future

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4. Any transactions between the Association and its affiliates, including the Company, will be subject to the transactions with affiliate restrictions set forth in 12 U.S.C. § 1468 and the CTS's transactions with affiliates regulations, 12 C.F.R. §§ 563.41 and 563.42 (1993). You have not asked and we have not addressed herein any potential transactions with affiliates issues raised by your proposed transaction.

employees of the Company might solicit deposits and loans for the Association.<sup>5</sup> In addition, the Company will forward to the Association for deposit certain small amounts of uninvested cash that periodically accumulate in IRA accounts of customers of the Company.

## II. DISCUSSION

### A. Location and Branching

Section 5(n) of HOLA<sup>6</sup> authorizes federal savings associations to act as fiduciaries. Section 5(n) provides that:

The Director may 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.

Thus, Section 5(n) of HOLA authorizes the OTS to permit federal savings associations to engage in trust and other fiduciary operations in any state where they are "located," provided (i) competitors of federal savings associations in that state are allowed to engage in such operations; and (ii) such operations are conducted by federal associations in conformity with the substantive limitations of that state's laws governing competitors of federal associations. A federal savings association's fiduciary operations must also be conducted in accordance with Section 5(n) of HOLA and the OTS' implementing regulations in 12 C.F.R. Part 550.

Although there is no case law specifically discussing the meaning of the term "located" as it appears in Section 5(n) of HOLA, the OTS has previously opined (the "Trust

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5. For purposes of this opinion, we have not taken into account the possibility that employees of the Company may in the future solicit loans and deposits for the Association because this is a contingent possibility and the exact scope and nature of these activities are not addressed in your request. Thus, the conclusions set forth herein are based on the assumption that Company employees activities will be limited to solicitation and referral of customers for the Association's trust department.

6. 12 U.S.C. § 1464(n).

7. 12 U.S.C. § 1464(n)(1).

Opinion") that for purposes of Section 5(n), federal associations should, at a minimum, be deemed to be "located" in the state where their home office is located and in any states where they have branch offices. In that opinion, the OTS noted that there is case law which interprets the meaning of the term "located" for purposes of the "most favored lender doctrine" under the national banking laws, 12 U.S.C. § 85, and that by analogy, this body of precedent is applicable to Section 4(g) of HOLA, the provision granting "most favored lender status" to savings associations.<sup>11</sup> The opinion further noted that there was nothing in HOLA to suggest that the term "located" as it appears in Section 5(n) was intended to have a different meaning than the term as it appears in Section 4(g) of HOLA. Therefore, the OTS's position is that the term "located" as it appears in Sections 4(g) and 5(n) should generally be interpreted on a consistent basis.

The OTS's regulations define a branch office of a federal savings association to be any "office other than its home office, agency office, data processing or administrative office, or a remote service unit" and further provide that "[e]xcept as provided by this [regulation], any business of a Federal savings association may be transacted at a branch office."<sup>12</sup> The OTS and the Federal Home Loan Bank Board

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8. Op. C.C. (Dec. 24, 1992) at 9 (analyzing application of the most favored lender and trust powers provisions of HOLA to savings associations with interstate operations). That opinion, however, expressly left open the possibility that some level of activity short of branch offices might suffice to establish location. Id. at 9 (footnote 26).

9. See, e.g., Marquette National Bank of Minneapolis v. First Omaha Service Corp., 439 U.S. 299 (1978).

10. 12 U.S.C. § 1463(g).

11. In the Trust Opinion, the OTS noted that the legislative history of Section 4(g) of HOLA indicates that Congress intended that savings associations be granted the same "most favored" lending status enjoyed by national banks under 12 U.S.C. § 85, even though there are slight variations in the wording of the two statutes. Op. C.C. (Dec. 24, 1992) at 3-4. See also, Gavey Properties/762 v. First Financial Savings and Loan Ass'n, 845 F.2d 819, 821 (5th Cir. 1988); accord, Greenwood Trust Company v. Commonwealth of Massachusetts, 971 F.2d 818 (1st Cir. 1992), cert. denied 113 S.Ct. 974 (1993) (following Gavey Properties in interpreting 12 U.S.C. § 1831d).

12. 12 C.F.R. § 545.92(a) (1993).

("FHLBB"), the predecessor agency to the OTS, have previously analyzed the issue of what constitutes a branch office. In an opinion addressing whether a "school partnership program" that involved a student-run "bank" on the school premises that accepted deposits (and an application to open an account) from students that were forwarded to an office of the savings association, the OTS concluded that the student "banks" were not branches of the savings association.<sup>13</sup> The OTS noted that "[t]he activities that constitute a branch office of a savings association are not set forth in any of the statutes or regulations administered by the OTS" but also noted that "[b]ranch offices of federal associations generally offer a full range of services in permanent offices managed by association employees."<sup>14</sup>

Similarly, the FHLBB previously opined that the practice of savings associations of dispatching deposit originators to meet with prospective accountholders at a convenient location or prospective accountholders' homes to open accounts and or pick up a check for the initial deposit was not the operation of a branch.<sup>15</sup> The FHLBB also determined that the use of a courier company solely to pick up deposits of a savings association's larger customers was not the operation of a branch.

Finally, in a case that is analogous to the current proposal, the FHLBB opined that a savings association's proposal to contract with a major retail store to act as a "finder" in introducing customers to time deposits and money market deposit accounts of the savings association by distributing promotional materials and forwarding initial deposits to the savings association did not constitute the opening of a branch office.<sup>16</sup> The FHLBB stated that it reached this conclusion because "the Finder's activities will be limited to distributing promotional materials, assisting potential customers in completing applications, forms and signature cards and receiving initial deposits for forwarding to the [savings association] and because the Time Deposits and MMDAs will not be issued or opened by the Finder or at the Finder's stores...."<sup>17</sup> The FHLBB also noted that the

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13. Op. C.C. (November 20, 1992).

14. Id. at 2-3.

15. FHLBB Op. G.C. (November 20, 1986).

16. FHLBB Op. G.C. (Nov. 20, 1986).

17. FHLBB Op. G.C. (November 21, 1983).

18. Id. at 2.

deposits or accounts would only be established by the savings association after receipt of the application form, signature card and initial deposit.

As noted above in Section I, the Company offices would not be owned or operated by the Association, would not be staffed by Association personnel and would not engage in any activities other than solicitation of trust business on behalf of the Association.<sup>19</sup> It is contemplated that the Company would serve as a marketing agent for the Association. As you noted, Company employees would act in a role similar to that of a "finder" that is discussed in the November 21, 1983 FHLBB opinion. In your discussion of the proposal, you specifically note that Company representatives would not execute documents on behalf of the Association's trust department, would not provide investment advice to the trust department or exercise investment discretion over trust department accounts, and would not have or exercise power to accept or approve new trust accounts on behalf of the Association.

Based on these facts, it is our view that the Company offices should not be deemed to be branches of the Association and that the Association should not be deemed to be located in those states where the Company's offices are located on the basis that these offices are branches of the Association. As noted above, however, in its opinion of December 24, 1992, the OTS left open the possibility that some level of activity short of branch offices might suffice to establish location for purposes of Section 5(n) of HOLA. You have not asked, and we do not here address, the broader issue of what minimal level of contact or activity is sufficient to establish location for purposes of Section 5(n) except as it relates to your specific factual situation.<sup>20</sup>

Based on the facts set forth in your correspondence, however, it is our view that the Association would not be located for purposes of Section 5(n) in any state other than the state where its home office is located. Our conclusion is based primarily on the facts that (i) the Company, while an affiliate of the Association, is engaged in a separate and distinct business operation and does not exist primarily to serve as an agent of the Association, (ii) the activities conducted in the Company offices to solicit trust business will, with limited exceptions, be conducted by Company

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19. The Association would be a "sister" affiliate of the Company in that they would both be controlled by the Partnership.

20. Thus, we leave open the issue of whether some level of activity short of branch offices might suffice to establish location for purposes of Section 5(n) of HOLA.

employees, (iii) the trust operations to be conducted by the Association and the Association's employees engaged in these activities will be located at the Association's offices and not at the Company's offices, and (iv) the Company's offices will not be offering the primary range of services that a federal savings association may offer to its customers. Given the limited nature of the activities proposed to be engaged in by the Company and the relationship between the Company and the Association, it is our view that there is an insufficient nexus to conclude that the Association is "located" in those states where the Company has offices for purposes of Section 5(n) of HOLA.

As noted above, Section 5(n) of HOLA requires that a federal savings association conduct its trust operations in conformity with the substantive limitations of the laws of the state where the federal savings association is located. As we have concluded that the Association to be acquired by the Partnership will be located only in its home state for purposes of Section 5(n) of HOLA, we also concur with your view that the fiduciary powers of the Association would be determined by reference to the powers of state-chartered fiduciaries located in the Association's home state rather than by reference to the powers of states where the Company has offices.

#### B. Federal Preemption

Relying on the Supremacy Clause of the United States Constitution,<sup>21</sup> the courts have enunciated three grounds pursuant to which state law can be preempted by federal law. First, Congress, acting within constitutional limits, may expressly provide that state laws on a particular subject are preempted. Second, a Congressional intent to preempt state law in a particular area entirely may be inferred where the scheme of federal regulation is so comprehensive as to lead to the inference that Congress left no room for state

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21. The doctrine of federal preemption of state law originates with the Supremacy Clause of the the United States which provides in pertinent part as follows:

"This constitution, and the Laws of the United States which shall be made in pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."  
U.S. Const. Art. VI, cl. 2.

22. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-204 (1983).

regulation.<sup>23</sup> Third, even where federal law has not completely displaced state law in a particular area, state law is preempted to the extent that it actually conflicts with federal law.<sup>24</sup> The Supreme Court has also recognized in de la Cuesta that regulations promulgated pursuant to federal law may preempt state law with the same effect as a federal statute.

Section 5(n)(1) of HOLA expressly provides that the OTS has the authority to issue a special permit to federal savings associations to exercise trust powers.<sup>25</sup> Although that section references state law for purposes of determining the scope of the federal savings association's authority to act as a fiduciary,<sup>27</sup> nothing in that section or any other part of Section 5(n) requires, or permits, any action on the part of any state regulator.<sup>28</sup> Therefore, any state

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23. Id.; Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985).

24. Pacific Gas & Elec. Co. at 204; Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-153 (1982).

25. de la Cuesta, at 153-154.

26. The OTS also derives from Section 5(a) of HOLA plenary authority to regulate all aspects of the operations of federal savings associations. The OTS has consistently asserted that it has this plenary authority under HOLA and that state laws attempting to limit or condition the powers granted to federal savings associations under HOLA are preempted. See, e.g., 56 Fed. Reg. 67236, 67237 (April 9, 1991) (Proposed rule on branching by federal savings associations).

27. Section 5(n)(1), in effect, prohibits the OTS from granting greater trust powers to a federal savings association than is afforded to state banks, trust companies or other corporations that compete with the federal savings association in the state where it is located.

28. Section 5(n)(2) provides that the state banking regulator may have access to reports of examination made by the OTS insofar as the reports relate to the trust department, but explicitly states that "nothing in this subsection shall be construed as authorizing such State banking authority to examine the books, records, and assets of such associations."

requirement to license or prohibit the performance of such trust powers would conflict with the express authority of the OTS and would be preempted.<sup>9</sup>

In expressly granting authority for the OTS to approve trust powers for federal savings associations, Congress was clear that no further action on the part of state authorities is necessary. Where Congress intended to incorporate certain substantive standards from state law, Congress clearly spelled out what those requirements were.<sup>10</sup> Thus, it follows that Congress, if it desired to subject the OTS's authority to state action, would have also made this requirement part of the statutory framework. To subject the OTS's authority to state review would, in fact, render the authority granted by the statute largely illusory. Therefore, we concur with your view that any state law or regulation that purports to require the licensing of federal savings associations to exercise trust powers would conflict with Section 5(n) of HOLA and would be preempted by federal law.

In reaching the foregoing conclusions, we have relied upon the factual representations contained in the materials presented to us. The positions set forth herein therefore depend upon the accuracy and completeness of those representations. Moreover, any change in circumstances from those set forth in your submissions could result in conclusions different from those expressed herein.

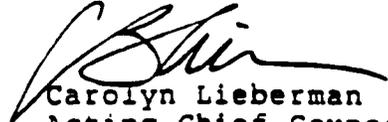
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29. See, Op. C.C. (January 9, 1990) (imposition of annual license fee by a state authority is preempted because it attempts to regulate the operations of a federal savings association). The Office of the Comptroller of the Currency ("OCC") has also taken the position that state licensing requirements are preempted as applied to national bank trust activities. See, OCC Letter dated July 19, 1993 by Ellen Broadman.

30. See, e.g., 12 U.S.C. § 1464(n)(1) and 12 C.F.R. § 550.1(k) (scope of trust powers of federal savings association determined by reference to law of state in which association is located); 12 U.S.C. § 1464(n)(8) and 12 C.F.R. § 550.2(b)(1) and (c)(1) (withholding OTS permit to conduct trust powers if federal savings association has less capital than amount required under state law for state-chartered fiduciaries); 12 U.S.C. § 1464(n)(2) (granting state banking authorities limited access to OTS examination reports).

If you have any questions regarding the foregoing,  
please contact James H. Underwood, Special Counsel, at (202)  
906-7354.

Sincerely,



Carolyn Lieberman  
Acting Chief Counsel