Date: November 22, 1999.

Summary Conclusion: Federal law preempts a Santa Monica, California municipal ordinance (Ordinance) that purports to prohibit a financial institution from charging a fee to a customer for accessing an automated teller machine (ATM) of that financial institution with an access device not issued by that financial institution. The Ordinance is preempted for federal savings associations because federal law occupies the field of ATM service fees charged by federal savings associations and because the Ordinance conflicts with federal law.

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

Office of Thrift Supervision
Department of the Treasury
Chief Counsel
1700 G Street, N.W., Washington, DC 20552 • (202) 906-6251

November 22, 1999

Ann E. Lederer, General Counsel
First Federal Bank of California, FSB
401 Wilshire Boulevard
Santa Monica, California 90401

Re: Preemption of Local ATM Fee Restrictions

Dear Ms. Lederer:

This responds to your inquiry on behalf of First Federal Bank of California, FSB, Santa Monica, California ("Association"), regarding a Santa Monica municipal ordinance ("Ordinance")[1] that purports to prohibit a financial institution from charging a fee to a customer for accessing an automated teller machine ("ATM") of that financial institution with an access device not issued by that financial institution. You ask whether federal law preempts the Ordinance for federal savings associations. In brief, we conclude that the Ordinance does not apply to the Association or other federal savings associations by reason of federal preemption.

I. Background

A. The Association's ATM Operations

The Association is a federally chartered savings bank with $3.65 billion in assets headquartered in Santa Monica, California. You represent that the Association owns and operates ATMs at various locations, including several located within the City of Santa Monica. You represent that users may perform a variety of account services and other services at the ATMs, and that the ATMs are used most frequently to obtain cash.

Users of the Association's ATMs include individuals who do not have deposit or other accounts with the Association ("nonclients"). You state that, as is typical in the industry, the Association charges nonclients an access fee for using its ATMs. The

[1] Santa Monica Municipal Code § 4.32.040 (1999).

access fee ranges from $1.00 to $1.50 per transaction. You represent that the Association does not charge its own clients for using its ATMs. You further represent that, under certain circumstances, the Association does not charge its clients for using another financial institution's ATMs.[2] You state that, depending on a client's account balance, the Association will absorb a number of these fees each month.

You represent that the Association spends approximately $50,000 to install and establish an ATM, and that once an ATM is operating, the average annual maintenance cost is approximately $28,500 for an off-site ATM. You represent that the $1.00 to $1.50 access fee the Association charges nonclients for using the Association's ATMs helps to defray the Association's cost of purchasing and maintaining its ATMs for the convenience of its clients and its nonclients.

B. The Ordinance

On October 12, 1999, the Santa Monica City Council passed the Ordinance by a vote of four to three. The Ordinance provides that "[a] financial institution may not impose a fee of any kind on a user for accessing an ATM of that financial institution located in the City of Santa Monica with an access device not issued by that financial institution." On its face, the Ordinance only applies to fees a financial institution charges to nonclients. A "financial institution" is defined in the Ordinance as "[a]ny bank, savings association, savings bank, credit union, or industrial loan company." The Ordinance does not impose a similar prohibition on non-financial institution ATM owners or operators.

The Ordinance provides that "any person" injured by a violation of the prohibition may enforce the Ordinance's provisions by means of a civil action, and that a financial institution may be liable for damages, in no case less than $250, and reasonable attorneys' fees. Under the Ordinance, if a financial institution has engaged in a pattern of willful violations, it may be subject to punitive damages of up to $5,000 per violation. Any injured person, the City Attorney, the District Attorney, and "any person or entity which will fairly and adequately represent the interests of the protected class," may bring an injunctive action against a financial institution that violates the Ordinance or engages in any pattern or practice in violation of the Ordinance. The

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[2] When a nonclient uses one financial institution's ATM to access an account maintained at another financial institution, or to borrow money on a credit card issued by another financial institution, the nonclient may be assessed two fees: one by his own financial institution and one by the financial institution that operates the ATM.

Ordinance became effective on November 11, 1999. You ask whether the Ordinance is preempted for a federal savings association, such as the Association.[3]

II. Discussion

A. Preemption Principles

The doctrine of federal preemption, which has its roots in the Supremacy Clause of the United States Constitution,[4] applies to three situations. First, the United States Supreme Court has recognized that, within constitutional limits, Congress may expressly preempt state law.[5] Second, absent explicit preemption language, congressional intent for federal preemption of state law may be inferred when federal law occupies a particular field.[6] Third, even if federal law has not occupied a field, "state law is nullified to the extent that it actually conflicts with federal law."[7] Such conflict may arise when "compliance with both federal and state laws is a physical impossibility" or when state law "stands as an obstacle to the accomplishment of the objectives of Congress."[8] The Supreme Court has recognized that for federal preemption purposes, regulations promulgated by agencies of the United States have the same preemptive effect as federal statutes.[9]

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[3] The term "federal savings association" includes federal savings banks chartered by the Director of the Office of Thrift Supervision ("OTS"). 12 U.S.C.A. § 1462(5) (West Supp. 1999).

[4] U.S. Const. Art. VI, cl. 2.

[5] Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm., 461 U.S. 190, 203-04 (1983); Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141, 152-53 (1982).

[6] de la Cuesta, 458 U.S. at 153, quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("[T]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.")

[7] de la Cuesta, 458 U.S. at 153.

[8] de la Cuesta, 458 U.S. at 153, quoting Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) and Hines v. Davidowitz, 312 U.S. 52, 67 (1941). See also Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

[9] de la Cuesta, 458 U.S. at 153-54.

B. Relevant Statutory and Regulatory Provisions

Pursuant to §§ 4(a) and 5(a) of the Home Owners' Loan Act ("HOLA"),[10] the Office of Thrift Supervision ("OTS") is authorized to provide for the safe and sound operation of federal savings associations and has exclusive and plenary authority to regulate all aspects of the operations of federal savings associations. Federal courts, OTS, and its predecessor, the Federal Home Loan Bank Board ("FHLBB"), have found that § 5(a) of the HOLA, and implementing regulations of OTS and the FHLBB, preempt state laws that purport to regulate the "activities or operations" of federal savings associations because Congress conferred on the FHLBB and OTS exclusive authority to regulate the operations of federal savings associations.[11] Federal courts, including the United States Supreme Court in a case presenting a fact pattern similar to the one at issue here, also have found that FHLBB regulations preempted state law where the law in question was an obstacle to the achievement of the objectives of, and therefore conflicted with, federal regulations.[12]

Under HOLA §§ 4(a) and 5(a), OTS has plenary and exclusive authority to regulate the operations of federal savings associations. Pursuant to that authority, OTS,

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[10] 12 U.S.C.A. §§ 1463(a) and 1464(a) (West Supp. 1999).

[11] See, e.g., 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. Okla. 1983) ("Congress intended the HOLA to preempt all state regulation over federally-chartered savings and loan institutions."), aff'd on other grounds (conflict), 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."). See also OTS Op. Chief Counsel, (January 18, 1996) (state reporting requirements preempted); OTS Op. Chief Counsel (October 11, 1991) (deposit taking); FHLBB Op. General Counsel (April 28, 1987) (lending and examination).

[12] de la Cuesta, 458 U.S. at 156, 159 (preempting state limitation on due on sale practices that conflicted with FHLBB regulation); FHLBB v. Empie, 778 F.2d 1447, 1453-54 (10th Cir. 1985) (preempting state limitation on use of word "bank" in advertising that conflicted with FHLBB regulation); 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 FHLBB regulation); Kupiec v. Republic Federal Savings and Loan Ass'n, 512 F.2d 147-50 (7th Cir. 1975) (preempting "common law" right to inspect and copy membership list that conflicted with FHLBB model by-law governing communication between members or depositors); FSLIC v. Kidwell, 716 F. Supp. 1315 (N.D. Cal. 1989), vacated in part on other grounds, 937 F.2d 612 (9th Cir. 1991) (preempting state laws of negligence and waste that conflicted with FHLBB lending and preemption regulations).

after providing notice and an opportunity to comment, promulgated regulations governing the deposit-related activities of federal savings associations.[13]

Section 557.11(b) of OTS's deposit regulations provides that in order to facilitate the safe and sound operations of federal savings associations and other purposes of the HOLA "without undue regulatory duplication and burden," OTS totally occupies the field of the regulation of the deposit-related activities of federal savings associations.[14] The regulation does not limit deposit-related activities to those pertaining to an institution's own deposits. Section 557.11(b) further provides that OTS intends "to give federal savings associations maximum flexibility to exercise deposit-related powers according to a uniform federal scheme of regulation."[15] Accordingly, a federal savings association may exercise its federally authorized deposit-related powers "without regard to state laws purporting to regulate or otherwise effect deposit activities, except to the extent provided in § 557.13."[16] Section 557.12 of OTS's deposit regulations specifies that, as a result of OTS's total occupation of the field, OTS will find preempted state laws that purport to impose requirements governing, among other things, "service charges and fees."[17]

Similarly, after providing notice and an opportunity to comment, OTS adopted regulations governing the loan-related activities of federal savings associations.[18] Section 560.2(a), which parallels § 557.11 for loan-related activities, states that "OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation."[19] Section 560.2(b) sets out illustrative examples of the types of state laws that are preempted by

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[13] 12 C.F.R. Part 557 (1999) (Deposits); 62 Fed. Reg. 54759 (October 22, 1997).

[14] 12 C.F.R. § 557.11(b) (1999). OTS also reached the same conclusion concerning OTS's occupation of the field of the regulation of deposit-related activities in an October 11, 1991 Chief Counsel's opinion. OTS Op. Chief Counsel (October 11, 1991). The October 11, 1991 Chief Counsel's opinion, which was issued before OTS's promulgation in 1997 of the current deposit regulations, was based on OTS's prior deposit regulations in effect in 1991. See 12 C.F.R. §§ 545.2 and .11 (1991).

[15] 12 C.F.R. § 557.11(b) (1999).

[16] Id. Section 557.13 sets out the types of state laws that generally are not preempted by federal law.

[17] 12 C.F.R. § 557.12(f) (1999). Section 557.12 sets forth several other types of state laws that generally are preempted.

[18] 12 C.F.R. Part 560 (1999) (Lending).

[19] 12 C.F.R. § 560.2(a) (1999).

OTS's lending regulations, including laws concerning loan-related fees and laws concerning disbursements and repayments.[20]

OTS adopted the deposit regulations in 1997 and the lending regulations in 1996. Prior to that time, the deposit regulations and lending regulations were found in Part 545. OTS's preemption authority was set out in 12 C.F.R. § 545.2. Section 545.2 remains in effect, and provides that Part 545 (entitled "Operations") was adopted pursuant to OTS's "plenary and exclusive authority to regulate all aspects of the operations of Federal savings associations, as set forth in [HOLA § 5(a)]."[21] Section 545.2 further provides that OTS's exercise of that authority "is preemptive of any state law purporting to address the subject of the operations of a Federal savings association."[22]

When OTS moved the deposit regulations out of Part 545, current §§ 557.11–.13 were adopted to make clear that OTS's authority to preempt state laws purporting to affect the deposit-related activities of federal savings associations was not affected by the relocation of the regulations.[23] Section 560.2 of the OTS's lending regulations was adopted for this same reason.[24]

Section 5(b)(1)(F) of the HOLA[25] authorizes federal savings associations to establish remote service units, including ATMs, "for the purpose of crediting or debiting savings or demand accounts, debiting such accounts, crediting payments on loans, and the disposition of related financial transactions, as provided in regulations prescribed by the [OTS] Director." The statute does not limit the authority to conduct

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[20] 12 C.F.R. §§ 560.2(b)(5) and (11) (1999). Section 560.2(c), like § 557.13 of the deposit regulations, sets out the types of state laws that generally are not preempted by federal law.

[21] 12 C.F.R. § 545.2 (1999).

[22] Id.

[23] See 62 Fed. Reg. 15626, 15630 (April 2, 1997); 62 Fed. Reg. 54759, 54761 (October 22, 1997).

[24] See 61 Fed. Reg. 50951, 50965 (September 30, 1996).

[25] 12 U.S.C.A. § 1464(b)(1)(F) (West Supp. 1999). Congress added § 5(b)(1)(F) to the HOLA as part of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, §§ 304, 307, 94 Stat. 132, 146-47 (1980). According to the Senate Report accompanying the bill, Congress enacted § 5(b)(1)(F) in response to a judicial decision invalidating a determination of the FHLBB that a federal savings association could allow consumers to make savings deposits and withdrawals from off-premises remote electronic service units. The Senate Report noted that "[i]n view of their development and consumer acceptance, the committee believes . . . [remote service unit] programs should be statutorily authorized." S. Rep. No. 96-368 at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 236, 245-46.

electronic operations only to those transactions pertaining to an institution's own deposits or loans. Moreover, the statute expressly authorizes the OTS Director to regulate the electronic operations of federal savings associations. Pursuant to that authority, after providing notice and an opportunity to comment, OTS promulgated regulations governing the electronic operations of federal savings associations.[26]

Section 555.200(a) of the OTS's electronic operations regulations explicitly authorizes a federal savings association to use electronic means, including ATMs, to perform any function, or provide any product or service, as part of an authorized activity.[27] Sections 5(b) and (c) of the HOLA specifically authorize federal savings associations to conduct deposit-related and loan-related activities. Accordingly, a federal savings association may conduct deposit-related and loan-related activities through electronic means.

As indicated above, nonclients use the Association's ATMs to obtain cash. The withdrawal of money from a deposit account, including an account not maintained at the Association, is a deposit-related activity within the meaning of 12 C.F.R. § 557.11. The regulation does not limit deposit-related activities to an institution's own depositors. The Association therefore is specifically authorized to conduct this activity, and to do so through electronic means.

Nonclients can also use the Association's ATMs to borrow money on their credit cards, a type of consumer loan. Although the Association may not be making the loan, allowing a nonclient to borrow money by using an Association's ATM is a loan-related activity within the meaning of § 560.2. The regulation does not limit loan-related activities to an institution's own borrowers. The Association therefore is specifically authorized to conduct this activity, and to do so through electronic means.

Finally, in the preamble to the electronic operations regulations, OTS stated that, when reviewing state laws affecting electronic operations, "OTS will apply principles of preemption consistently with its prior interpretations of OTS's authority under HOLA."[28] As an example, the preamble cited the preemption provisions of OTS's deposit and lending regulations.[29] The preamble also noted that the area of electronic

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[26] 12 C.F.R. Part 555 (1999) (Electronic Operations); 63 Fed. Reg. 65673 (November 30, 1998).

[27] 12 C.F.R. § 555.200(a) (1999).

[28] 63 Fed. Reg. 65673, 65681 (November 30, 1998).

[29] Id.; see 12 C.F.R. §§ 557.11-13 and 560.2 (1999).

operations, as well as the state and federal regulation of electronic operations, is rapidly evolving. As a result, the preamble expressed OTS's intent to address the interaction between state and federal regulation in this area on a case-by-case basis.[30]

C. Application of Preemption Principles

You present the question whether federal law preempts the Ordinance, which purports to prohibit the Association from charging an access or user fee when a nonclient accesses an account maintained at another institution by using one of the Association's ATMs. Although OTS has not yet opined on this specific issue, we have previously considered whether state law restrictions on the ATM operations of a federal savings associations are preempted by federal law.

In two recent legal opinions, OTS concluded that state law restrictions and requirements pertaining to the establishment, advertising, disclosure requirements, and regulation of a federal savings association's ATM operations were preempted by federal law.[31] In the July 1998 Opinion, OTS relied on § 545.2 and OTS's former electronic operations regulations,[32] as well as federal case law,[33] to find that the state laws were preempted because OTS totally occupies the field of the regulation of the operations of federal savings associations. The July 1998 Opinion concluded that because OTS occupies the field, any state restrictions imposed in addition to OTS's requirements for the operation of an ATM were preempted.

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[30] 63 Fed. Reg. 65673, 65681 (November 30, 1998).

[31] OTS Op. Chief Counsel (July 1, 1998) ("July 1998 Opinion") (Federal law preempts for federal savings associations Iowa and Wyoming laws that: (1) prohibit establishment of an ATM by any entity unless it has an office or place of business in the state; (2) require state approval, payment of a registration fee, and consent to state regulatory oversight to establish an ATM; (3) require disclosure of the transaction fee in a way that enables the customer to cancel the transaction without incurring a fee; (4) require that ATMs be made available for use on an equal basis by another financial institution that has an office or place of business in the state; and (5) impose various technical requirements for processing satellite terminal transactions); OTS Mem. Chief Counsel (December 22, 1998) ("December 1998 Memorandum") (Federal law preempts for federal savings associations Massachusetts laws that: (1) require state approval and payment of an annual assessment to establish an ATM; and (2) prohibit an out-of-state institution from establishing an ATM unless the institution's home state allows such operations for Massachusetts financial institutions and the institution obtains state approval).

[32] 12 C.F.R. §§ 545.138, 545.141–42 (1998). These sections, which formerly governed the electronic operations of a federal savings association, were removed on November 30, 1998 when OTS adopted the new electronic operations regulations.

[33] July 1998 Opinion at 7-9, citing, among other authorities, de la Cuesta, 458 U.S. at 153, 156, 159 and Pacific Gas, 461 U.S. at 203-04.

In the December 1998 Memorandum, OTS based its preemption finding on the newly issued electronic operations regulations (Part 555), which, as discussed above, were adopted pursuant to OTS's exclusive authority under HOLA §§ 4(a) and 5(a) to regulate the operations of federal savings associations, as well as OTS's specific authority under HOLA § 5(b)(1)(F) to regulate the operation of remote service units, including ATMs, by federal savings associations. The December 1998 Memorandum found that OTS regulations set out the requirements applicable to a federal savings association engaging in electronic operations, including operating an ATM. The December 1998 Memorandum also concluded that the state restrictions and requirements conflicted with federal law in that the state laws stood as obstacles to the accomplishment of federal objectives in the operations of federal savings associations, including the objective of allowing federal savings associations to operate under a uniform federal scheme.[34]

We apply to the Ordinance the same legal analysis employed in the July 1998 Opinion and the December 1998 Memorandum, and we conclude that the Ordinance is preempted. To the extent that the Ordinance purports to ban a federal savings association from charging ATM access fees to nonclients who use the Association's ATMs, the Ordinance if preempted because (1) federal law occupies this field; and (2) the Ordinance conflicts with federal law.

1. Federal Law Totally Occupies the Field of ATM Service Fees Charged by Federal Savings Associations

As noted above, in the preamble to the electronic operations regulations, OTS stated that when evaluating preemption of a state law affecting a federal savings association's use of electronic means or facilities, OTS will focus first on the underlying activity affected by the state law.[35] The Ordinance is directed specifically at financial institutions and purports to limit the fees institutions may charge nonclient ATM users who access accounts or conduct transactions with other institutions. The Ordinance therefore affects the Association's ability to participate in or facilitate the deposit-related activity of allowing a nonclient having an account at another institution to access that account using an ATM established and operated by the Association. The

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[34] The December 1998 Memorandum also relied on de la Cuesta, 458 U.S. at 154-56, which preempted a state law that conflicted with a FHLBB regulation.

[35] 63 Fed. Reg. 65673, 65681 (November 30, 1998). For example, when reviewing a state ATM lighting requirement, OTS found that the requirement, which was narrowly tailored to further the state's legitimate interest in the physical and personal safety of ATM users, had only an incidental effect on the ability of a federal savings association to provide financial services electronically or to protect the association's security or funds. OTS Op. Chief Counsel (January 15, 1999) at 2.

Ordinance also affects the Association's ability to participate in the loan-related activity of allowing nonclients to borrow money on their credit cards using an ATM established and operated by the Association.

As noted in the July 1998 Opinion and in the preamble to the electronic operations regulations, to the extent a federal savings association performs deposit-related functions through ATMs, these functions are governed by OTS's regulations on deposits.[36] Likewise, to the extent a federal savings association performs loan-related functions through ATMs, these functions are governed by OTS's regulations on lending.

Sections 5(b)(1)(A), (b)(1)(F) and (c) of the HOLA and OTS regulations specifically authorize the Association to conduct deposit-related and loan-related activities through ATMs. A federal savings association, like any commercial enterprise, is a for-profit business and should not be compelled by local government fiat to provide its services to nonclients or the general public for free.

Moreover, the cost of establishing and maintaining an ATM is substantial. You have indicated that start-up costs for an ATM approximate $50,000, and that the annual maintenance cost for an off-site ATM is approximately $28,500.[37] The Association's decision to charge nonclients for using the Association's ATMs is a business decision designed to help defray the costs of providing ATM services.

OTS has made clear its intention to occupy the field of regulation of a federal savings association's deposit-related and loan-related activities, including those conducted through electronic means. OTS has not banned or restricted ATM access fees. To the contrary, as noted above, to the extent a federal savings association performs deposit-related functions through ATMs, these functions are governed by OTS's regulations on deposits, which specifically occupy the field and preempt any state law restrictions on service charges and fees.[38] To the extent a federal savings association performs loan-related functions through ATMs, these functions are governed by OTS's regulations on lending, which also specifically occupy the field and

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[36] July 1998 Opinion at 9; 63 Fed. Reg. 65673, 65681 (November 30, 1998).

[37] Notably, the maintenance cost for the Association's off-site ATMs, those most likely to be used by nonclients, is significantly higher than for in-branch ATMs, which you represent is approximately $10,000 annually.

[38] 12 C.F.R. § 557.12(f) (1999).

preempt any state law restrictions on loan-related charges and fees, including servicing charges.[39]

A federal savings association therefore is free to charge access fees for the ATM services it provides to nonclients. Because the Ordinance imposes requirements on the conditions under which the Association can allow nonclients to use its ATMs to access accounts held at, or borrow money from, another financial institution, and the access fees that the Association can charge for that service, we conclude, based on the plain language of the regulation and prior precedents, that federal law preempts the Ordinance.

The fact that the Association's access fees apply to nonclients does not change our conclusion. Section 5(b)(1)(F) of the HOLA specifically authorizes federal savings associations to establish ATMs for the purpose of crediting or debiting accounts "and the disposition of related financial transactions."[40] Allowing a nonclient to access a deposit or credit account, even one held at another institution, is clearly "related" to the disposition of a transaction crediting or debiting that account; in fact, it is the first step in the transaction. There is no language in the statute restricting a federal savings association's authority to credit or debit accounts to only those deposit and credit accounts maintained at that association. As a result, the Association may conduct such a transaction "as provided in regulations prescribed by the [OTS] Director,"[41] which likewise do not limit a federal savings association's authority to credit or debit accounts through an ATM to only its own deposit or credit accounts.

OTS regulations specifically authorize the Association to exercise deposit-related and loan-related powers according to a "uniform federal scheme of regulation"[42] and preempt state laws that purport to impose requirements on the service charges and fees the Association may charge when exercising its deposit-related and loan-related powers.[43] Allowing a nonclient to access an account maintained at another institution or borrow money from another institution is "related" to the exercise of the

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[39] 12 C.F.R. § 560.2(b)(5) (1999).

[40] 12 U.S.C.A. § 5(b)(1)(F) (West Supp. 1999).

[41] Id.

[42] 12 C.F.R. § 557.11(b) (1999); 12 C.F.R. § 560.2(a) (1999).

[43] 12 C.F.R. § 557.12(f) (1999); 12 C.F.R. § 560.2(b)(5) (1999).

Association's deposit-taking and lending authority, and any state imposition on that exercise would be preempted by federal law.[44]

2. The Ordinance is Preempted Because It Conflicts with Federal Law

Under the doctrine of federal preemption, when state law conflicts with federal law, federal law prevails.[45] As noted above, state law conflicts with federal law when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of federal law."[46] Here, federal law preempts the Ordinance because it interferes with the objective of the federal regulations in the area of ATM service charges.

Indeed, the facts here are strikingly similar to the facts before the United States Supreme Court in Fidelity Federal Savings and Loan Assn. v. de la Cuesta.[47] In de la Cuesta, federal regulations allowed (but did not require) federal savings associations to include enforceable due-on-sale clauses in loan instruments, while California law limited the ability of lenders to include such clauses.[48] Because the state law restricted what federal law permitted, the Court found that the state law was "an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal regulation, and thus conflicted with OTS regulations and was preempted.[49]

Here, federal regulations not only do not bar the Association from charging ATM access fees, the regulations specifically preempt state restrictions on the Association's authority to charge deposit-related and loan-related service charges and fees. The Ordinance, by contrast, bans such charges completely as to nonclients of the

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[44] In fact, financial institutions routinely perform banking functions for nonclients and charge a fee for doing so. Cashing third-party checks and selling money orders are examples of such transactions. By allowing a nonclient to access an account held at another institution or initiate a borrowing transaction with another institution through using one of the Association's ATMs, the Association is performing a similar service for a nonclient. Cf. 12 C.F.R. § 545.17 (1999) (federal savings association may charge fee for transferring money from a customer's account, whether held at the federal savings association or another financial intermediary, to a third party or other accounts of the customer).

[45] See discussion, supra at 3.

[46] de la Cuesta, 458 U.S. at 156, quoting Hines v. Davidowitz, 312 U.S. at 67.

[47] 458 U.S. 141 (1982).

[48] de la Cuesta, 458 U.S. at 154-55.

[49] Id. at 156, quoting Hines v. Davidowitz, 312 U.S. at 67..

Association and other financial institutions. Because the Ordinance restricts what federal regulations allow, the Ordinance is an obstacle to the accomplishment of the full purposes and objectives of OTS's regulations. The Ordinance conflicts with OTS regulations and thus is preempted by federal law.

Moreover, even if OTS's deposit regulations did not specifically preempt service charges and fees on deposit-related activities, and the Ordinance is evaluated under the standards in § 557.13(b), which sets forth the types of state laws that generally are not preempted, we still conclude that the Ordinance is preempted. Under § 557.13(b), if OTS finds that a state law furthers a vital state interest, the law will not be preempted so long as it only incidentally affects a thrift's deposit-related activities or is not contrary to one of the purposes expressed in § 557.11 underlying OTS's total occupation of the field of the regulation of a federal savings association's deposit-related activities.[50] The purposes expressed in § 557.11 underlying OTS's total occupation of the field are to facilitate the safe and sound operations of federal savings associations; to enable federal savings associations to operate according to the best thrift institutions practices in the United States; and to further other purposes of HOLA.[51]

The City of Santa Monica claims that the Ordinance furthers Santa Monica's interest in safeguarding the general welfare and protecting its consumers. Even if protection from ATM access fees could be characterized as a vital state interest, the Ordinance affects the Association's deposit-related and loan-related activities in more than an incidental manner. The Ordinance has a direct impact on the Association's deposit-related activity of allowing nonclients to access accounts and the loan-related activity of allowing nonclients to initiate borrowing transactions through using the Association's ATMs. A federal savings association's authority to conduct deposit-related and loan-related activities, specifically granted by the HOLA, is fundamental to its operation as a financial institution. Direct restrictions on a federal savings association's exercise of its basic authority to participate in deposit-related and loan-related activities are not "incidental."

In addition, the Ordinance is aimed only at ATMs owned and operated by financial institutions; it does not apply to all consumers of ATMs or to ATMs operated by non-financial institutions. It is unclear what vital state interest is served by a state

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[50] Under OTS's lending regulation, this analysis (and conclusion) also applies to state laws that further a vital interest but impermissibly affect the lending operations of a federal savings association. 12 C.F.R. § 560.2(c) (1999).

[51] 12 C.F.R. § 557.11(a) (1999).

regulatory scheme that discriminates against financial institutions in favor of nonfinancial institutions, such as convenience stores and casinos, that operate ATMs.[52] We can divine no reason why such discrimination promotes the general welfare and protects consumers. Finally, allowing a locality to prohibit a federal savings association from charging deposit-related and loan-related fees would violate OTS's stated objective of enabling federal savings associations to conduct their operations in accordance with a uniform federal scheme reflecting "the best practices of thrift institutions in the United States."[53]

This last point is particularly fatal to the Ordinance. As noted in § 557.11(a)(2) of the deposit regulations and § 560.2 of the lending regulations, one of the purposes of OTS's total occupation of the field of the regulation of a federal savings association's deposit-related and loan-related activities is to enable federal savings associations to operate according to the best practices of thrift institutions in the United States. Although OTS's prior preemption precedent in this area has dealt with state laws, disparate municipal laws pose an even greater threat to the objective of allowing federal savings association to conduct their operations according to a uniform federal scheme. Varying laws in different states and localities would directly threaten a federal savings association's ability to operate with the stability and certainty provided by uniform federal standards.

A federal savings association that is subjected to different standards of ATM operations in different cities and counties within the same state, as well as varying standards in different states, would have to vary its ATM practices from one city, county, or state to another. This result is inimical to the notion of a uniform federal scheme. OTS recently cited similar concerns in a Chief Counsel's Opinion preempting a California statute that, as applied, potentially subjected a federal savings association to shifting standards of acceptable lending practices in various counties within California and in different states.[54]

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[52] In this regard, you indicate that the access fees charged by nonfinancial institution ATM owners and operators often exceed the $1.00 to $1.50 that financial institutions generally charge.

[53] 12 U.S.C.A. § 1464(a) (West Supp. 1999); 12 C.F.R. § 557.11(a)(2) (1999). See also 12 C.F.R. § 560.2(a) (1999).

[54] OTS Op. Chief Counsel (March 10, 1999) at 16-17.

In a legal opinion supporting the Ordinance, the Santa Monica City Attorney's Office argues that the federal Electronic Funds Transfer Act ("EFTA")[55] preserves the state's authority to regulate ATM fees. The EFTA regulates certain aspects of the relationship between consumers and financial institutions concerning electronic funds transfers, including ATM transactions.[56] The EFTA does not regulate the operations of federal savings associations generally.

Section 1693q of the EFTA addresses the interplay between the EFTA and state law. In pertinent part, that section provides:

> This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, except to the extent that those laws are inconsistent with the provisions *of this subchapter*, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.[57]

The City Attorney's Office asserts that because the EFTA is silent in the area of ATM fees, the Ordinance is consistent with the EFTA, and thus preserved under § 1693q.

This argument was specifically rejected in a recent decision of the United States Court of Appeals for the Eighth Circuit in Bank One, Utah v. Guttau.[58] In Bank One, Utah, the state of Iowa argued that state restrictions on ATMs were permitted under § 1693q of the EFTA. The Eighth Circuit disagreed, noting that § 1693q is "specifically limited to the provisions of the [EFTA], and grants the states no additional authority to regulate national banks."[59] The court found that the Iowa restrictions were preempted because they impaired a national bank's authority under the National Bank

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[55] 15 U.S.C.A. §§ 1693–1693r (West 1998). Congress enacted the EFTA in 1978 to "provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective of this subchapter, however, is the provision of individual consumer rights." 15 U.S.C.A. § 1693(b) (West 1998).

[56] 15 U.S.C.A. § 1693a(6) (West 1998).

[57] 15 U.S.C.A. § 1693q (West 1998) (emphasis added).

[58] Bank One, Utah v. Guttau, No. 98-3166, slip op. at 9 (8th Cir. September 22, 1999).

[59] Id.

Act to operate ATMs. Because preemption of the Iowa law was based on authority conferred by the National Bank Act, not the EFTA, the court found § 1693q of the EFTA inapplicable.[60]

The Eighth Circuit's ruling on this issue would apply with equal force to an OTS preemption determination based on HOLA's specific grant to federal savings associations of the authority to establish and operate ATMs. Here, we find preemption based on the specific authority in HOLA § 5(b)(1)(F) to regulate the ATM operations of federal savings associations, not the EFTA, and § 1693q of the EFTA is thus inapplicable.[61] Whether the Ordinance is consistent with the EFTA is immaterial to our determination that the Ordinance is inconsistent with the HOLA and OTS regulations.

In reaching the conclusions set forth herein, we have relied on the factual information and materials submitted to us in writing and in subsequent telephone conversations. Our conclusions depend on the accuracy and completeness of that

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[60] Id.; see also First Federal Savings and Loan Ass'n of Boston v. Greenwald, 591 F.2d 417, 426 (1st Cir. 1979) (provision in Real Estate Settlement Procedures Act ("RESPA") that "[t]his chapter does not annul, alter or affect, or exempt any person [from] the laws of any State with respect to settlement practices," related solely to the preemptive effect of RESPA and did not extend to state law that conflicted with a FHLBB regulation promulgated pursuant to HOLA); FHLBB Op. General Counsel (January 30, 1980) (provision in FHLBB regulation implementing Depository Institutions Deregulation and Monetary Control Act ("DIDMCA") that "nothing in this section preempts limitations on prepayment charges . . ." did not apply to determination that another FHLBB regulation allowing prepayment penalties preempted contrary state law because the FHLBB's preemptive authority for federal savings associations flowed from HOLA, not DIDMCA).

[61] We note that the Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102 (November 12, 1999) ("GLBA") contains a provision amending the EFTA. Specifically, Title VII of the GLBA contains a provision requiring ATM operators to provide notice to ATM customers that the operator will impose a fee for providing the requested service, and the amount of the fee. The ATM operator may provide the required notice by posting a sign in a conspicuous location near the ATM, including the information on the ATM screen, or including the information on a paper notice issued by the machine before the customer is irrevocably committed to completing the transaction. The ATM operator may not charge an access fee unless it gives the required notice and the customer elects to continue the transaction. The GLBA also requires the Comptroller General to study the feasibility of the notice requirements and the requirement that the customer agree to the fee prior to consummating a transaction.

These amendments do not change our conclusion that the EFTA does not limit the extent to which the HOLA and OTS regulations preempt state law. In fact, the amendments to the EFTA support our determination that the Ordinance is preempted by federal law. Rather than banning access fees, as the Ordinance does, the amendments to the EFTA specifically authorize an ATM operator to impose an access fee if the ATM operator provides notice of the fee and the customer elects to continue the transaction. In other words, Congress' action is consistent with OTS's position and contrary to the Ordinance. Thus, even in its most recent amendments to the EFTA, Congress did not change the authority of a federal savings association under the HOLA to charge access fees.

information and those materials. Any material differences in the facts or circumstances submitted to us and described herein could result in different conclusions.

We trust that this is responsive to your inquiry. 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 if you have any further questions.

Very truly yours,

Carolyn J. Buck
Chief Counsel

cc. All Regional Directors
All Regional Counsel