



Office of Thrift Supervision
Department of the Treasury

Chief Counsel

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

September 2, 1997

MEMORANDUM

FOR: []

FROM: Carolyn J. Buck
Chief Counsel

SUBJECT: Applicability of Virgin Islands Banking Board Order and
Virgin Islands Licensing Statute to []

I. Introduction and Summary of Conclusions

This responds to two preemption inquiries you have raised regarding [], U.S. Virgin Islands ("Association"). The first inquiry is whether an April 18, 1996 order of the U.S. Virgin Islands Banking Board ("Order") applies to the Association. The Order (i) prohibits banks doing business in the Virgin Islands from charging against insurance settlement proceeds fees for the inspection of reconstructed properties securing mortgage loans, and (ii) requires the refund of all such inspection fees levied and collected since September 15, 1995. The second inquiry is whether the Association is subject to § 43(b) of Title 9 of the U.S. Virgin Islands Code¹ ("V.I. Code"), which requires banks doing business in the Virgin Islands to obtain annually a special license to do business there.

In brief, we conclude that the Order and the licensing requirement of § 43(b) of Title 9 of the V.I. Code are preempted with respect to the Association. We have observed on several occasions that federal law preempts state laws that purport to govern the operations of federal savings associations. Likewise, it is well established that state licensing requirements are preempted for federal savings associations. Accordingly, the Order and § 43(b) of Title 9 of the V.I. Code do not apply to the Association, and the Association need not comply with either.

¹ V.I. Code Ann., Title 9, § 43(b) (Michie 1982 and Supp. 1997).

II. Background

The Association is a federally chartered stock savings bank located in [], U.S. Virgin Islands. The Association has no branch offices and conducts all of its business out of its main office. The Association's primary business is the origination of 1-to-4 family residential mortgage loans, commercial loans, consumer loans, and the provision of deposit account services.

In September 1995, Hurricane Marilyn caused substantial damage in the Virgin Islands. Repair and reconstruction of damaged properties ensued, paid for in some instances with the proceeds of insurance settlements. The Association, like several other lending institutions in the Virgin Islands, required that repair work on homes securing mortgage loans originated by the Association be inspected and approved by an independent inspector before the Association released from escrow insurance proceeds to pay for the repairs. The Association, like other lenders, passed through to the borrowers the actual cost of the independent inspections of the repairs to the mortgaged properties. The inspection fees averaged about \$75 per inspection and 2 or 3 inspections were generally required. The Association paid interest on insurance proceeds while the funds were held in escrow.

The Virgin Islands Banking Board ("V.I. Board") subsequently became concerned about the practice of requiring borrowers to absorb the cost of the independent inspections. On April 18, 1996, the V.I. Board issued an Order barring banking institutions from charging inspection fees and requiring that all such fees paid since the hurricane be refunded. Specifically, the Order provides that "all banks doing business in the Territory are prohibited from charging inspection fees attendant to insurance settlement proceeds for the reconstruction of mortgaged properties, and . . . all banks which may have levied and collected inspection fees. subsequent to September 15, 1995, shall refund such monies to affected mortgagors no later than May 31, 1996," The Order states that the term "bank" means "all 'banks', 'foreign banks' and 'national banking associations'. . . , as well as all local banks."² The Order also states that it is issued pursuant to the authority of the V.I. Board provided in "Title 9, Section 61, Virgin Islands Code."³

² The quoted terms are defined in Title 9, Section 1, V. I. Code. See n. 26. *infra*.

³ Title 9 of the V.I. Code is titled "Banking." Section 61 of Title 9 is titled "Regulation and supervision of banks and foreign banks; insurance; penalty for violation; review."

By letters dated May 24, 1996, the OTS Regional Director advised the President of the Association and [redacted], Lieutenant Governor of the Virgin Islands and Chairman of the V.I. Board, that the Order adopted by the V.I. Board is “pre-empted by Federal law.” A press release from the Virgin Islands Lieutenant Governor’s Office dated March 7, 1997, indicated that the V.I. Board had voted to ask the Attorney General to file an action against the Association to enforce the Order.

In addition, by letter dated September 17, 1996, the Director, Virgin Islands Division of Banking and Insurance, Office of the Lieutenant Governor, notified the Association that it had not paid its 1996 and 1995 Special License fees as required by § 43(b) of Title 9 of the V.I. Code.⁴

III. Discussion

A. General Preemption Principles

The United States Supreme Court has recognized that the doctrine of federal preemption, which has its roots in the Supremacy Clause of the United States Constitution,⁵ applies to three situations. First, within constitutional limits, Congress may expressly preempt state law.⁶ Second, absent explicit preemption language, Congressional intent for federal preemption of state law may be inferred when federal law dominates or occupies a particular field.⁷ Third, even if federal law has not entirely occupied a particular field, state law is nullified to the extent that it actually conflicts with federal law.⁸ 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

⁴ The September 17, 1996 letter also noted the Association’s position that it was exempt from the special license fee and asked the Association “to submit copies of information from the Office of Thrift Supervision [OTS] advising you not to pay annual bank fees” The Association’s president responded by letter dated October 1, 1996, stating that OTS had instructed the Association that the fee should not be paid unless the Association first provided notice to the OTS of the Association’s intent to pay the fee. By letter dated February 27, 1997, the Division of Banking and Insurance acknowledged the October 1, 1996 letter, and reiterated the request for “a copy of OTS instructions.”

⁵ U.S. Const. Art. VI, cl. 2.

⁶ Pacific Gas and Electric Co. v. State Energy Resources and Development Comm., 461 U.S. 190, 203-04 (1983); Fidelity Federal Savings and Loan Assoc. v. de la Cuesta, 458 U.S. 141, 152-53 (1982).

⁷ de la Cuesta, 458 U.S. at 153.

⁸ Id.

accomplishment of the objectives of Congress.⁹ For preemption purposes, regulations promulgated by agencies of the United States (“federal regulations”) have no less preemptive effect than federal statutes.¹⁰

Pursuant to §§ 4(a) and 5(a) of the Home Owners’ Loan Act (“HOLA”),¹¹ 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.¹² Federal courts, the OTS, and its predecessor, the Federal Home Loan Bank Board (“FHLBB”), have found that § 5(a) of the HOLA, and implementing regulations of the OTS and FHLBB, preempt state laws¹³ that purport to regulate the “activities or operations” of federal savings associations because Congress conferred on the OTS (and, formerly, the FHLBB) exclusive authority to regulate the operations of federal savings associations.¹⁴ Federal courts, including the Supreme Court, have also found that the OTS and FHLBB regulations preempted state law where the state law in question was an obstacle to the achievement of the objectives of federal regulations.¹⁵

⁹ *Id.*, and cases cited therein: see also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

¹⁰ *de la Cuesta*, 458 U.S. at 153-54.

¹¹ 12 U.S.C.A. §§ 1463(a) and 1464(a) (West Supp. 1997).

¹² 12 C.F.R. § 545.2 (1997).

¹³ For purposes of the HOLA, the term “state” has the same meaning as that found at 12 U.S.C.A. § 1813 (West 1989). See 12 U.S.C.A. § 1462 (West Supp. 1997). Under § 1813(a)(3), the term “state” includes the Virgin Islands.

¹⁴ See, e.g., *Conference of Federal Savings and Loan Associations v. Stein*, 604 F.2d 1256, 1260 (9th Cir. 1979), aff’d mem., 445 U.S. 921 (1980) (“[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.”); *FHLBB v. Empie*, 628 F. Supp. 223, 225 (W.D. Okl. 1983), aff’d., 778 F.2d 1447 (10th Cir. 1985) (“Congress intended the HOLA to preempt all state regulation over federally-chartered savings and loan institutions.”); *People v. Coast Federal Savings and Loan Assn.*, 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, FHLBB Letter, October 20, 1983, 1983 FHLBB LEXIS 44; FHLBB Op. General Counsel, April 28, 1987, 1987 FHLBB LEXIS 181.

¹⁵ *de la Cuesta*, 458 U.S. at 156, 159 (preempting California limitation on due-on-sale practices that conflicted with FHLBB regulation governing due-on-sale clauses); see also *First Federal Savings and Loan Assn. 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 governing payment of interest on escrow accounts); *Kupiec v. Republic Federal Savings And Loan Assn.*, 512 F.2d 147, 150-52 (7th Cir. 1975) (preempting “common

The OTS and the FHLBB have repeatedly opined that state laws or rules that purport to regulate the lending practices of federal savings associations are preempted by federal law.¹⁶ Several courts have also recognized this principle.¹⁷ The OTS has also affirmed through the rulemaking process its long-held position that it totally occupies the field of lending regulation for federal savings associations. The OTS's Lending and Investment regulations, found at 12 C.F.R. Part 560, specifically reflect this intent.¹⁸

B. The Order

The Order purports to prohibit banks doing business in the Virgin Islands from charging fees from insurance settlements for the inspection of reconstructed properties securing mortgages and requires the refund of all such fees collected since September 15, 1995. The Association required independent inspections of repairs to hurricane damaged properties before releasing insurance settlement proceeds to pay for the reconstruction and passed through to borrowers the actual cost of the inspections. We conclude that the Order is preempted by the exercise of OTS's plenary and exclusive authority to regulate and to occupy the field of the operations of federal savings associations as evidenced in OTS regulations at 12 C.F.R. Parts 545 (Operations) and 560 (Lending and Investment) generally, and §§ 545.2 and 560.2(a) in particular.

Section 545.2 of OTS's regulations makes clear that OTS's promulgation of regulations regarding federal savings association operations (Part 545) pursuant to OTS's authority under § 5(a) of the HOLA "is preemptive of any state law purporting to address the subject of the operations of a Federal savings association." Similarly, OTS's occupation of the field of lending regulation for federal savings associations as set forth in § 560.2(a) derives from OTS's authority, pursuant to §§ 4(a) and 5(a) of the HOLA,

to promulgate regulations that preempt state laws affecting the

law" right to inspect and copy membership list that conflicted with FHLBB model by-law governing communication between members or depositors of an association.)

¹⁶ 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).

¹⁷ See, e.g., de la Cuesta, 458 U.S. at 159, 161; Empie, 778 F.2d at 1447; Greenwald, 591 F.2d at 425; Coast Federal, 98 F. Supp. at 316.

¹⁸ 12 C.F.R. § 560.2(a) (1997) ("OTS hereby occupies the entire field of lending regulation for federal savings associations.").

operations of savings associations affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA.¹⁹

Moreover, § 560.2(b)(7) of the OTS regulations specifically preempts state laws that purport to impose requirements regarding security property.²⁰

The Association's decisions to require the independent inspections of the repairs to properties that secure its mortgage loans and to pass on the actual cost of the inspections to the borrowers on the underlying mortgage loans, are an integral part of the Association's mortgage lending operations. The inspections are designed to ensure that the repairs to, or reconstruction of, the mortgaged properties -- properties that represent the Association's collateral security for the mortgage loans -- are performed in accordance with applicable building code requirements before payment for the work is made. The inspections thus protect the Association's interest in the collateral securing its mortgage loans, and thus, the Association's investment in the loans.²¹ The Order constitutes an improper attempt to intrude upon the Association's operations and is preempted.

Requiring inspections or repairs before releasing payment therefor is a sound lending practice borne of hard experience. The OTS Southeast Region indicates that after other natural disasters, such as Hurricane Andrew's recent assault on South Florida, some lenders released insurance proceeds to builders and contractors for work that was never completed, or was of such poor quality that it failed to meet applicable building codes. As a result, both lenders and borrowers suffered unnecessary losses and delays. Thus, the Association's business decision to require inspections of repair work on homes securing mortgage loans made by the Association is reasonable and prudent in view of the Association's investments in the underlying loans.

¹⁹ 12 C.F.R. § 560.2(a) (1997).

²⁰ 12 C.F.R. § 560.2(b)(7).

²¹ The inspections also benefit borrowers by ensuring that the repair or reconstruction work on their homes is done properly.

Moreover, the passing of inspection fees through to borrowers does not result in any profit to the Association. An independent inspector performs the inspection and the actual amount of the inspection fee is “charged” to a borrower on purely a pass-through basis. The Association merely charges the borrower for the actual cost of the inspection and the Association, in turn, forwards the fee to the inspector. The Association does not include any additional charges in the inspection fee.

In light of all these factors, requiring inspections before the release of insurance proceeds is not only a safe and sound banking practice, it is also in the borrowing public’s best interest. It facilitates the restoration of mortgaged property, thereby protecting the Association’s interest in the underlying mortgage, and permits borrowers to have rebuilt homes that are properly constructed and in compliance with applicable building codes.²²

Although state laws regarding inspections and inspection fees are not among the illustrative examples in 12 C.F.R. § 560.2(b) of the types of state laws that are preempted as a result of OTS’s occupation of the field of the lending operations of federal savings associations, the regulation makes clear that the list is not all inclusive. Nor are state laws regarding inspections and inspection fees included on the list in §560.2(c) of the types of state law that are not preempted. Moreover, it appears to us that such laws do not meet the requirements of § 560.2(c)(6), which allows state law to stand if it (i) furthers a vital state interest; and (ii) has only an incidental effect on lending operations or is not otherwise contrary to the purposes of the lending regulation, including encouraging associations to provide low-cost credit to the public without undue regulatory burden and giving them maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation.

Even if it could be argued that the Order furthers a vital state interest, the Order clearly has more than an “incidental” effect on the Association’s lending operations. The Order has a direct impact on a practice of the Association that is specifically designed to protect the collateral securing its mortgage loans. This impediment to protecting the collateral securing loans, in our view, exceeds an “incidental” effect on lending operations. Given our conclusion that the inspections, and their attendant fees, are an integral part of the Association’s lending operations, we find that the Order reflects an attempt to regulate the Association’s lending operations and the

²² We note that the application of insurance proceeds to rebuild hurricane damaged properties (rather than to pay off the existing mortgage loan) benefits both borrowers and a local community still suffering from the effects of the hurricane.

relationships, contractual or otherwise, between the Association and its borrowers. It is, therefore, the type of law that is preempted pursuant to 12 C.F.R. § 560.2(a).

The decision to require inspections of repaired properties before releasing the insurance proceeds to pay for the repair work is an integral part of the Association's operations. Similarly, the decision to pass those fees through to the borrowers is a matter to be determined by the parties involved, namely the Association and its borrowers, and any attempt by the Virgin Islands to insert itself between the Association and its borrowers through a blanket prohibition against that practice directly affects the Association's lending operations. Given the benefit that accrues to the borrowers as a result of the inspection requirement, the decision to pass the cost of providing this service through to the borrowers is reasonable.

Under a long line of OTS, FHLBB, and court precedent, any state law that purports to restrict the operations of a federal savings association is preempted by federal law. The Order purports to prohibit the Association from charging inspection fees attendant to insurance settlement proceeds and to require refunds to mortgagors of fees charged for past inspections. The Order is an impermissible interference in the field of the operations of the Association, a field that federal law and regulation occupy totally.²³ Accordingly, federal law preempts the Order and the Association need not comply with it.²⁴

C. The Statute

Section 43(b) of Title 9 of the V.I. Code requires any "bank" doing business in the Virgin Islands to obtain annually a "special license" from the Virgin Islands government to do business during the succeeding calendar year by paying a fee ranging

²³ Even in the case of a state law deemed applicable to a federal savings association, enforcement jurisdiction for alleged violations appears to rest solely with OTS. See OTS Mem. Chief Counsel (May 10, 1995) at 5 (citing Stein, 604 F.2d 1256 (9th Cir. 1979), aff'd mem., 445 U.S. 921 (1980)).

²⁴ Whether the Association continues to pass inspection fees on to borrowers, or restructures the process, such as by requiring the borrower to obtain an acceptable certificate of inspection and leaving the issue of payment to the borrower (and possibly engendering delays in the rebuilding process) is a business decision within the discretion of the Association's management. This memorandum merely concludes that the Association need not comply with the Order's bar on "charging" inspection fees and requiring refunds of inspection fees.

from \$50,000 to \$100,000.²⁵ Section 1 of Title 9 defines the term "bank" so as to include Federal savings associations.²⁶

As previously indicated, by letter dated September 17, 1996, the Office of the Virgin Islands Lieutenant Governor, Director, Division of Banking and Insurance, notified the Association that it had not paid its license fee required by § 43(b) of Title 9 of the V.I. Code for 1995 and 1996. The letter noted that the Association maintained that it was exempt from the payment of such fees, and asked for copies of written information from OTS stating that position.

It is well established that federal law and regulation preempt state laws or rules that purport to impose licensing requirements, including the payment of a license fee, on federal savings associations in order to conduct business in a state.²⁷ A state licensing requirement is preempted under § 545.2 because it is a law that purports to address the operations of a federal savings association. In addition, the OTS recently reaffirmed through the rulemaking process its long-held, traditional position that federal regulation preempts state licensing requirements. Section 560.2 of the OTS's Lending and Investment regulations lists "licensing and registration requirements" as an illustrative example of the type of state laws that are preempted because federal law and regulation completely occupy the field of lending regulation for federal savings

²⁵ Section 43(b) of Title 9 provides, in pertinent part:

(b) Every bank, national banking association, or foreign bank doing business in the Virgin Islands shall obtain, on or before the 30th day of each calendar year, a special license to do business in the Virgin Islands during the succeeding calendar year, upon payment of the corresponding fees, as follows:

(1) Banks with a paid-in capital or debentures and reserve fund aggregating to \$500,000 shall pay the sum of \$50,000.

(2) Banks with a paid-in capital and reserve fund aggregating over \$500,000 shall pay the sum of \$100,000.

(3) All other banks, national banking associations, and foreign banks \$100,000.

²⁶ Under § 1 of Title 9, "bank" means "a domestic stock or mutual corporation with sufficient capital, authorized by law to receive deposits of money or securities, to open credits and accounts current and savings accounts, to make loans, to discount drafts, notes or other negotiable paper, to purchase and sell drafts, to trade in gold and silver, and in general to engage in all kinds of banking transactions; but does not mean a national banking association." A "national banking association" is defined by that section as a "bank incorporated and organized under the National Bank Act . . . and laws amendatory thereof or supplementary thereto."

²⁷ OTS Mem. Chief Counsel (May 10, 1995); OTS Op. by Williams (November 20, 1992); OTS Op. Chief Counsel (November 30, 1990); OTS Op. by Katz, Sr. Deputy Chief Counsel (January 9, 1990); FHLBB Op. General Counsel (October 29, 1976).

associations.²⁸ There is thus ample support for the conclusion here that federal law preempts the license requirement of § 43(b) of Title 9 of the V.I. Code.

Our prior discussions of this issue have recognized that § 5(h) of HOLA permits state or local taxation of federal savings associations under certain nondiscriminatory circumstances.²⁹ A key issue, then, is whether the “special license” fee required by § 43(b) of Title 9 of the V.I. Code is a permissible tax within the scope of § 5(h) of the HOLA or an impermissible license fee.³⁰ As noted in an OTS Opinion dated January 9, 1990 (“January 1990 Opinion”),³¹ which involved the same statute that is the subject of this inquiry, the distinction between licensing and taxation, and between license fees and ordinary taxes, is dependent upon the purpose of such exaction and the power by which it is imposed. The January 1990 Opinion further noted that, in general, license fees are exacted under the police power for regulatory purposes, and taxes are exacted under the exacting power for revenue purposes.³²

We conclude that the “special license fee” required by § 43(b) of Title 9 of the V.I. Code is not a permissible tax within the scope of § 5(h) of the HOLA, but rather, an impermissible license fee. First, an analysis of case law that discusses the distinction between a “license fee” and a “tax” supports this conclusion. In National Cable Television Assn., Inc. v. U.S.,³³ the Supreme Court noted that a fee, unlike a tax:

is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public

²⁸ 12 C.F.R. § 560.2(b)(1) (1997).

²⁹ Specifically, § 5(h) of the HOLA, 12 U.S.C. § 1464(h), provides:

No State, county, municipal, or local taxing authority may impose any tax on Federal savings association or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

³⁰ Although it does not appear that the Virgin Islands Board contends that the special license fee is a tax under § 5(h) of the HOLA, this memorandum nevertheless analyzes whether the fee required by § 43(b) of Title 9 of the V.I. Code could be considered a tax permissible under § 5(h) of the HOLA.

³¹ OTS Op. by Katz, Sr. Deputy Chief Counsel (January 9, 1990).

³² January 1990 Opinion at 9.

³³ 415 U.S. 336 (1974).

agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.³⁴

Several other courts have adopted the approach of the Supreme Court in National Cable Television, including the First Circuit (in an opinion by then Circuit Court Judge Breyer) in San Juan Cellular Telephone Co. v. Public Service Comm. of Puerto Rico.³⁵

The payment required by § 43(b) of Title 9 of the V. I. Code is very similar to the definition of “fee” advanced by the Supreme Court in National Cable Television and the First Circuit in San Juan Cellular. The payment is incident to an organization’s voluntary request to a public agency for permission to do business as a bank. The payment is not required from the public at large to be used for the general welfare; rather, it is assessed against only a small segment of the population, namely “banks, national banking associations [and] foreign banks,” and bestows a benefit on that specific class of corporations, namely the permission to do business as a bank, not shared by the general public. The payment is imposed by an agency, in this case the Division of Banking and Insurance, upon those institutions subject to its regulation.³⁶

Second, Title 9 of the V.I. Code is entitled “Banking.” Title 9 sets out the legal and regulatory framework for the operation of certain banking institutions in the U.S. Virgin Islands. We note that there is no provision in Title 33 of the V.I. Code, entitled “Taxation and Finance,” that purports to levy a tax specifically on banks or financial institutions. Although we have noted in the past that the title of a particular statutory section is not dispositive as to the nature of the fee in question,³⁷ it is a factor that may be taken into account in an analysis of whether a payment is a “fee” or a “tax.” Here,

³⁴ Id. at 340-41; see also Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 223-24 (1989).

³⁵ 967 F.2d 683, 684-86 (1st Cir. 1992) (“The classic ‘tax’ is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. The classic ‘regulatory fee’ is imposed by an agency upon those subject to its regulation.” (citations omitted)). See also, Chicago and North Western Transportation Co. v. Webster County Board of Supervisors, 71 F.3d 265, 267 (8th Cir. 1995); Wright v. McLain, 835 F.2d 143, 144-45 (6th Cir. 1987); Bidart Bros. v. California Apple Comm., 73 F.3d 925 (9th Cir. 1996) (applying San Juan Cellular); Brock v. WMATA, 796 F.2d 481 (D.C. Cir. 1986).

³⁶ The January 1990 Opinion also stated that a determination regarding the purpose of a payment can be discerned by analyzing the legislative history of the state law in question. We have been unable to locate any legislative history of § 43(b) of Title 9 of the V.I. Code that addresses the issue. In a letter dated January 16, 1990, the Association’s then counsel, in response to the January 1990 Opinion, wrote that the legislative history of § 43(b) was “very sketchy and general and offers no insight on the issue of whether the fee is intended to be a ‘license’ fee or a ‘tax.’”

³⁷ Id. at 10.

the presence of § 43(b) in the Virgin Islands banking code, rather than the tax code, is buttressed by other information indicating that the fee required by § 43(b) is, in fact, a license fee and not a tax.

Section 43(b) is contained in Chapter 3 of Title 9 of the V.I. Code, entitled “Organization and Management of Banks,” thereby suggesting that the authority exercised under that chapter is derived from the state’s regulatory authority, not its authority to tax. Finally, § 43(b) of Title 9 of the V.I. Code refers quite clearly to a “special license,” and contains no language that suggests the license fee is in the nature of a “tax.”

We therefore find that the payment required by § 43(b) of Title 9 of the V.I. Code is a license fee and not a tax within the scope of § 5(h) of the HOLA. In accordance with the well-settled principle that federal law preempts state licensing requirements with respect to federal savings associations, we conclude that federal law preempts § 43(b) of Title 9 of the V.I. Code. The Association, therefore, need not obtain the special license or pay the license fee required by § 43(b) of Title 9 of the V.I. Code.

IV. Conclusion

Based on the foregoing discussion, we conclude that both the Order and § 43(b) of Title 9 of the V.I. Code are preempted by federal law. These conclusions are consistent with an extensive body of regulatory and case law regarding state restrictions on the mortgage lending activities of federal savings associations and state attempts to impose licensing requirements, including payment of a licensing fee, on federal savings associations.

Our conclusions are based upon the factual materials submitted to us. Material differences in the facts or circumstances described herein could result in different conclusions.

We trust that this is responsive to your inquiry. Please feel free to contact Tim Leary, Counsel (Banking & Finance) at (202) 906-7170 or Evelyne Bonhomme, Counsel (Banking & Finance) at (202) 906-7052 if you have any further questions.

cc: Regional Directors
Regional Counsel