

**Date:** January 4, 1999.

**Summary Conclusion:** A provision of Connecticut law that requires an out-of-state bank to obtain approval of the Connecticut Banking Commissioner before opening a *de novo* “branch” (defined to include an office at which fiduciary or trust powers are exercised) is preempted for a federal savings association establishing agency offices to provide trust services in the state.

**Subject:** Home Owners’ Loan Act/Savings Association Powers.



Office of Thrift Supervision  
Department of the Treasury

P-99-1

Chief Counsel

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

January 4, 1999

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**RE: Preemption of State Branching Statute**

Dear [ ]:

This responds to your inquiry, on behalf of [ ] (the "Association"), regarding whether a provision of Connecticut law that requires an "out-of-state bank"<sup>1</sup> to apply for and obtain approval of the Connecticut Banking Commissioner (the "Commissioner") before opening a *de novo* branch<sup>2</sup> in Connecticut, is preempted for federal savings associations establishing agency offices providing trust services in the state. You also asked us to consider whether the phrasing of the Connecticut provision as a restriction on the establishment of offices providing trust services, rather than as a restriction on the trust services themselves, affects our analysis. In brief, we conclude that the Connecticut statutory provision in question is preempted by federal law.

<sup>1</sup> The term "out-of-state bank" includes a federal savings association that has its principal office outside of Connecticut. "'Out-of-state bank' means any institution that engages in the business of banking, but does not include a bank ...." Conn. Gen. Stat. § 36a-2(41), as amended by 1998 Conn. Acts 258, § 1. "'Bank' means a Connecticut bank or a federal bank." Conn. Gen. Stat. § 36a-2(4), as amended by 1998 Conn. Acts 258, § 1. "'Federal bank' means a national banking association, federal savings bank, or federal savings and loan association having its principal office in [Connecticut]." Conn. Gen. Stat. § 36a-2(25), as amended by 1998 Conn. Acts 258, § 1. Connecticut law does not define the term "principal office" as used in Conn. Gen. Stat. § 36a-2(25). OTS regulations define "principal office" to mean "the home office of a savings association established as such in conformity with the laws under which the savings association is organized." 12 C.F.R. § 561.39 (1998).

<sup>2</sup> "'Branch' means a domestic branch as defined in 12 USC Section 1813, as from time to time amended, except that 'branch' includes any branch bank, branch office, branch agency, additional office, or any branch place of business at which fiduciary or trust powers are exercised." Conn. Gen. Stat. § 36a-410(1), as amended by 1997 Conn. Acts 160, § 3.

## I. Background

The Association's home office is in [ ]. On [ ], the Office of Thrift Supervision ("OTS") Northeast Regional Office approved the Association's application to establish two agency offices in Connecticut solely to conduct fiduciary activities authorized under state law for competing fiduciaries in the state.<sup>3</sup> OTS authorized these trust offices to commence operations [ ]. The Association opened the offices in [ ].

The Commissioner sent the Association a [ ] letter asserting that, under Connecticut banking statutes, the Association must file an application with the State to establish its offices providing trust services in Connecticut. Since the Association's home office is in [ ], rather than Connecticut, the Commissioner's letter indicates that the Association is an "out-of-state bank." Since the Association's offices exercise fiduciary or trust powers, the Commissioner's letter further indicates that the offices are "branches."<sup>4</sup> You represent that you have spoken to an attorney at the Connecticut Department of Banking who confirmed that the Commissioner's position is that the application requirement is not preempted for federal savings associations.

## II. Discussion

In two lines of authority, OTS has addressed, and answered in the affirmative, substantially the same question you pose (i.e., whether federal law preempts a state law

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<sup>3</sup> OTS also granted the Association permission to establish agency offices in several other states at the same time. The Association will provide fiduciary services from these trust offices, not merely market such services. OTS's approval letter indicates that the Association must limit the activities of these agency trust offices to trust activities authorized for each individual state. See OTS Letter from Northeast Regional Director to Association Counsel ([ ]) at 2. You have represented that the Association's trust activities in Connecticut comply with this restriction and that the scope of the Association's trust activities will not exceed what Connecticut law authorizes for competing fiduciaries in the state.

<sup>4</sup> We note that, by its own terms, Conn. Gen. Stat. § 36a-412(a)(2) arguably does not apply to the establishment of an agency office providing trust services. The Connecticut provision applies to establishing a "branch." An "agency office" of a federal savings association is specifically excluded from the definition of a "branch office" under OTS regulations. See 12 C.F.R. § 545.92(a) (1998). The state's categorization of a federal savings association's office as a "branch" is not determinative, since federal law defines the term "branch" as applied to federal savings associations. Cf., Lending and Investment, 61 Fed. Reg. 50,951, 50,966 (September 30, 1996) (state's categorization of subject of state law as "property," "contract," "tort," or "commercial" is not determinative in applying preemption categories in OTS regulation § 560.2(c)). Nonetheless, because the Connecticut statute defines any office at which fiduciary or trust powers are exercised as a "branch" and the Commissioner has notified the Association that it must file an application, we address the preemption issue.

requiring a federal savings association to file an application with the state and receive state approval before establishing offices providing trust services). The first line of authority deals with the authority to provide trust services.<sup>5</sup> These opinions have reasoned that OTS is the exclusive regulator of federal savings associations, including their trust operations, under the Home Owners' Loan Act ("HOLA").<sup>6</sup> Pursuant to this authority, OTS has promulgated detailed trust regulations that establish procedures for federal savings associations to obtain and exercise fiduciary powers.<sup>7</sup> HOLA and OTS regulations establish OTS, rather than the States, as the entity that authorizes federal savings associations to conduct trust services. HOLA § 5(n)(1) expressly authorizes OTS to permit federal savings associations to exercise trust powers, as defined by the state law grant of powers to competing fiduciaries in the state where the federal savings association is located.<sup>8</sup> Any state law that would restrict the federal savings association's ability to exercise those same powers is preempted.<sup>9</sup>

The second line of authority deals with the authority to establish offices. Trust services are commonly provided through agency offices, such as the Association's trust offices in Connecticut and other states. OTS regulations provide procedures for OTS to approve the establishment of agency offices, including those providing trust services.<sup>10</sup> OTS places no geographic restrictions on the location of agency offices.<sup>11</sup>

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<sup>5</sup> See OTS Op. Chief Counsel (March 28, 1996) at 8; OTS Op. Acting Chief Counsel (June 13, 1994) at 8-10. See also Fiduciary Powers; Community Reinvestment Act, 62 Fed. Reg. 67,696, 67,699 (December 30, 1997) (and authorities cited therein).

<sup>6</sup> 12 U.S.C.A. §§ 1461-1468c (West Supp. 1998). HOLA § 5(a) grants OTS plenary authority to regulate all aspects of the operations of federal savings associations, including trust operations. 12 U.S.C.A. § 1464(a) (West Supp. 1998). While HOLA § 5(n)(2) indicates that state banking authorities may have access to the portions of OTS exam reports that relate to a federal savings association's trust operations in the state, OTS retains exclusive authority to conduct those examinations. 12 U.S.C.A. § 1464(n)(2) (West Supp. 1998).

<sup>7</sup> See 12 C.F.R. Part 550 (1998).

<sup>8</sup> 12 U.S.C.A. § 1464(n)(1) (West Supp. 1998). See also 12 C.F.R. § 550.20 (1998). OTS's approval letter references that the Association's application specified that the agency offices would conduct trust activities solely in accordance with HOLA § 5(n) and OTS's Part 550 regulations. See OTS Letter from Northeast Regional Director to Association Counsel ([ ] at 1.

<sup>9</sup> See 62 Fed. Reg. at 67,699 (and authorities cited therein).

<sup>10</sup> 12 C.F.R. § 545.96(b) (1998) ("Agency").

<sup>11</sup> See, e.g., OTS Op. Chief Counsel (March 28, 1996) at 5 & n.9 (and authorities cited therein); OTS Mem. Acting Chief Counsel (June 13, 1994) at 6; OTS Op. Chief Counsel (November 30, 1990) at 4-5.

OTS also approves the establishment of branch offices, including those providing trust services, and regulates branching by federal savings associations. 12 C.F.R. § 545.92 and Part 556 (1998). OTS's exercise of its

Under the Connecticut provision cited by the Commissioner, an out-of-state bank may only establish a *de novo* branch in Connecticut with the Commissioner's approval and where the laws of the "home state"<sup>12</sup> of the out-of-state bank authorize a bank to establish a *de novo* branch on terms no more restrictive than Connecticut law.<sup>13</sup> The requirement that a federal savings association must apply for and obtain approval from the State before establishing offices providing trust services conflicts with federal law.<sup>14</sup> As the two lines of authority discussed above establish, federal law requires a federal savings association to secure OTS approval, not state approval, before establishing offices providing trust services.<sup>15</sup> Thus, the Connecticut provision conflicts with, and is preempted by, federal law.

That the state law provision is phrased as a restriction on the establishment of an office, rather than as a restriction on the trust services themselves, does not affect our analysis. Either type of restriction is preempted to the extent a state may interpret such a restriction to prohibit a federal savings association from performing fiduciary activities authorized under state law for competing fiduciaries in that state.<sup>16</sup> This conclusion is consistent with a long line of OTS opinions that establishes that state statutes that purport to bar out-of-state federal savings associations from engaging in

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authority to regulate branching by federal savings associations is preemptive of any state law purporting to address the subject. 12 C.F.R. § 556.5(d) (1998).

<sup>12</sup> "Home state" means, "[w]ith respect to a federally-chartered bank, the state in which the main office of the bank is located." Conn. Gen. Stat. § 36a-410, as amended by 1997 Conn. Acts 160, § 3; Conn. Gen. Stat. § 36a-3, as amended by 1998 Conn. Acts 192 § 1.

<sup>13</sup> Conn. Gen. Stat. § 36a-412(a)(2), as amended by 1998 Conn. Acts 177, § 3.

<sup>14</sup> 12 C.F.R. Part 550, Subpart A (1998).

<sup>15</sup> The restriction that an out-of-state bank may not perform trust services in the state if the laws of the bank's home state are more restrictive than Connecticut's laws also conflicts with federal law. As noted above, federal law allows a federal savings association to exercise those trust powers that the state in which it is located grants to competing fiduciaries in that state.

<sup>16</sup> We note that OTS has previously concluded that both types of state law provisions are preempted where interpreted to prohibit a federal savings association that is not located in the state from conducting incidental, non-fiduciary activities, such as marketing trust services. See, e.g., OTS Op. Chief Counsel (July 1, 1998) at 5 and 10 (concluding, among other things, that a Connecticut statute restricting out-of-state corporations from exercising fiduciary powers is preempted to the extent the state provision purports to prohibit the non-fiduciary activity of marketing trust services and other incidental activities); OTS Op. Chief Counsel (June 21, 1996) at 4 and 6-9 (same as applied to New York statute); OTS Op. Chief Counsel (August 8, 1996) at 5 and 13-15 (concluding that a Texas statute prohibiting a foreign bank or trust company from establishing or maintaining a branch office, agency office or other place of business in Texas is preempted to the extent the state provision purports to prohibit the non-fiduciary activity of marketing of trust services and other incidental activities).

various authorized activities, restrict them from establishing offices, or require them to secure state approval, are preempted.<sup>17</sup>

In reaching the conclusions set forth herein, we have relied on the factual information and materials submitted to us, and provided by you in telephone conversations with staff. Our conclusions depend upon the accuracy and completeness of such information and 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 Richard Bennett, Counsel (Banking and Finance), at (202) 906-7409, if you have any further questions.

Very truly yours,



Carolyn J. Back  
Chief Counsel

cc: Regional Directors  
Regional Counsel

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<sup>17</sup> See OTS Op. Chief Counsel (July 1, 1998) at 9-10 (and authorities cited therein).