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

August 8, 1996

[redacted]

Re: Interstate Trust Activities

Dear [redacted]:

This responds to your inquiry submitted on behalf of [redacted] (the "Company") concerning interstate trust activities. The Company is interested in acquiring [redacted] ("Target Institution"), and transferring the assets and liabilities to a newly-formed institution to be known as [redacted] (the "Association"). Specifically, you have asked: (i) whether the Association will be deemed "located," as that term is used in the federal trust laws, in states where it markets its trust services and where it performs certain activities incidental to serving as a testamentary trustee or trustee holding real estate, but performs no other trust activities; and (ii) whether federal law preempts specific state laws that would prohibit or restrict the Association from engaging in those marketing and other incidental activities.

In brief, the Office of Thrift Supervision ("OTS") concludes that: (i) for trust purposes, the Association will not be deemed located in a state where its only trust-related activities are marketing its trust services and performing the specified incidental duties pursuant to its appointment as testamentary trustee or trustee holding real estate; and (ii) federal law would preempt state laws that prohibit or restrict an out-of-state federal thrift from engaging in these activities in the state.

I. Background

A. Factual Background

The Company is a provider of financial services. The Company owns broker-dealer subsidiaries. [redacted] ("Affiliates"). The Company also currently owns a state-chartered trust company, [redacted] ("Trust Company"), licensed to provide trust and other fiduciary services in [redacted] ("State A"). You have told us that the Trust Company currently solicits trust business in a majority of states. The Trust Company also serves customers domiciled outside of State A in several ways. For example, the Trust Company currently holds real estate as trustee in at least one other state, in accordance with applicable state law, and believes it may be able to hold real estate under the laws of many other states, although it is just beginning to expand this aspect of its trust business. The Trust Company also acts as an inter vivos or testamentary trustee in a majority of states, in accordance with applicable state law.

The Company plans to acquire the Target Institution and establish the Association. The Company has filed an application with OTS to authorize the Association to exercise the full range of fiduciary powers available to corporate fiduciaries in State A. The Company intends to use the Affiliates and the Affiliates' employees ("account executives") to solicit customers nationwide for the Association's trust services, in the manner described below. You also have informed us that the Association would like to act as a testamentary trustee and hold real estate in trust for customers domiciled in all the states where it solicits its trust services, in the manner described below.

Marketing Activities

You have represented that the marketing activities of the Association through its Affiliates in states other than State A would typically consist of: (i) distributing materials and advising customers of the availability of, and describing, the Association's fiduciary services; (ii) answering prospective customer's questions concerning the nature of fiduciary services; (iii) assisting prospective customers in completing forms used by the Association's trust department; (iv) forwarding forms and funds received from customers to the Association's home office; and (v) obtaining information from customers for the Association's home office, such as type of assets, amount of assets and cost basis of assets.

Liaison Services

Once a trust account is established, a trust officer will be assigned to the account. The trust officer will be an employee of the Association and will be located in State A. The trust officer will be the primary contact for the grantor and the beneficiaries of the trust. The Association will send out periodic trust statements and tax forms directly to its customers from State A. The Affiliates may provide administrative support services for the Association with respect to its trust accounts by acting as a liaison between the trust officer and the grantor and beneficiaries. This may involve: (i) answering ministerial questions and providing information regarding the trust account to the client; (ii) forwarding requests for distribution and requests for changes in the investment objectives of the trust account to the Association in State A; and (iii) forwarding forms and funds received from customers who wish to add funds or engage in other transactions affecting their trust accounts.

Thus, the Affiliates' role in the trust operations will be strictly limited to soliciting customers for the Association's trust services and providing liaison services in support of the Association's trust services.

Holding Real Property

You have described the Association's intended operating method for holding real property in trust in states other than State A as follows: (i) the trust account will be accepted in State A; (ii) all decisions regarding disposition of the real estate will be made in State A; (iii) communications with the grantor and beneficiaries will be from the Association in State A; (iv) property tax bills will be sent to the Association in State A and the Association will mail out payment from State A; (v) property and casualty insurance bills will be sent to the Association in State A and the Association will mail out payment from State A; (vi) decisions regarding whether to use local counsel, and if so which counsel to use, will be made in State A; (vii) if the property is rental or commercial, a local independent contractor or rental agent will be used, and the decision as to which contractor or agent to use will be made by the Association in State A; (viii) the deed to the property identifying the Association as trustee must be recorded in the state where the property is located and will be recorded by local counsel or a local title insurance company; and (ix) inspections, repairs, preventive maintenance and other functions necessary to maintain the property will be performed in the state in which the property is located. The Association anticipates that the property maintenance functions will be done by the grantor, if mentally competent, or by an independent contractor hired by the Association.

All decisions regarding inspections, maintenance, repairs or similar functions regarding property will be made by the Association in State A and payment to third parties for these services will be made by the Association from State A. In some unusual circumstances, the Association may send an employee to the location of the property to inspect it or to ensure that proper actions are taken with respect to the property.

Serving as Testamentary Trustee

You have described the Association's intended operating method for acting as a testamentary trustee for testators domiciled in states other than State A as follows: (i) the trust account will be accepted by the Association in State A (the testator usually obtains prior approval of the Association that it will act as trustee); (ii) all decisions regarding investment of assets will be directed, supervised and managed by the Association in State A; (iii) distributions to beneficiaries will be decided by the Association in State A, and if approved, will be paid by the Association in State A and sent out by check or by wire; (iv) preparation of trust accounting and tax forms will be done by the Association in State A; (v) communications with beneficiaries will be from the Association in State A; (vi) the executor will transfer the trust assets to the Association in State A and the Association will work with the executor to ensure proper transfer; (vii) if required, periodic accountings will be mailed by the Association in State A to the probate court of the state of the testator's domicile;[1] and (viii) if required, local counsel will be hired by the Association to make appearances in the probate court of the state of the testator's domicile. You have informed us that the Company's current policy is generally not to accept personal property, other than stocks, bonds and other liquid securities, as trust assets.

You represent that with respect to all the activities described above, neither the Association nor its Affiliates will engage in any of the following outside of State A: execute or approve documents on behalf of the Association's trust department; accept or manage customer trust accounts; provide investment advice to customers;[2] exercise investment discretion over trust department

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[1] You have represented that such accountings seldom are required.

[2] Likewise, the Affiliates will not provide investment advice to the Association's trust department. The Association may execute specific brokerage transactions for individual accounts through Affiliates and its account executives. Such transactions will be subject to 12 U.S.C.A. § 1468 (West Supp. 1996), Sections 23A and 23B of the Federal Reserve Act, 12 U.S.C.A. §§ 371c and 371c-1 (West 1989), and 12 C.F.R. Part 550 (1996).

accounts: make decisions with respect to implementation of the Association's trust agreement; or establish a trust office.[3]

B. State Statutes At Issue

You have asked us to review statutes in five representative states that might prohibit or restrict the Association: as an out-of-state fiduciary, from engaging in the above described activities. You have inquired whether federal law would preempt these statutes.

The statutory provision you cite for the State of Louisiana provides that "[a] trustee must be . . . a bank or trust company organized under the laws of Louisiana or of the United States domiciled in this state . . . ."[4] The statutory provision you cite for the State of Oregon provides that a foreign institution "shall not hold real or personal property in trust in this state or act in a fiduciary capacity" except under special circumstances.[5] The statutory provision you cite for the State of Virginia provides that "no foreign corporation . . . shall do a . . . trust business in this Commonwealth."[6]

The statutory provision you cite for the State of Texas prohibits out-of-state trust companies from acting as a trustee or in any other fiduciary capacity in the state unless the foreign trust company's state permits Texas-chartered fiduciaries to act in such fiduciary capacity.[7] Authorized foreign fiduciaries must register in order to serve in a fiduciary capacity in Texas.[8] The Texas statute also provides that "[n]o foreign bank or trust company shall establish or maintain any branch office, agency office or other place of business within this state, or shall in any way solicit, directly or indirectly, any fiduciary business in this state . . . ."[9]

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[3] Of course, the Association could return to OTS at a later date and apply to exercise trust powers in additional states. Any such approval would not affect the ability of the Association to continue its marketing and other incidental activities in the remaining states.

[4] La. Rev. Stat. § 9:1783 (West 1996).

[5] Or. Rev. Stat. § 713.012 (1995). The special circumstances include "geographic reciprocity" in conjunction with other criteria.

[6] Va. Code Ann. § 6.1-5 (1995).

[7] Tex. Probate Code Ann. § 105A(a) (Vernon 1995).

[8] Tex. Probate Code Ann. § 105A(b) (Vernon 1995).

[9] Tex. Probate Code Ann. § 105A(c) (Vernon 1995).

The statutory provision you cite for the State of Wisconsin prohibits out-of-state trust companies from acting in any fiduciary capacity in Wisconsin, unless the foreign trust corporation's home state permits Wisconsin-chartered fiduciaries to act in such fiduciary capacity.[10] The Wisconsin statute further provides that a foreign corporation authorized to act as a trustee in the state shall not "establish or maintain directly or indirectly any branch office or agency office in this state or shall in any way solicit directly or indirectly any business as executor or trustee therein."[11]

II. Discussion

The trust powers of federal thrifts are defined by section 5(n) of the Home Owners' Loan Act ("HOLA").[12] Section 5(n)(1) authorizes the Director of OTS to permit federal thrifts that meet the standards specified in section 5(n) to act in any fiduciary capacity that is permissible for corporate fiduciaries under the laws of the state where a thrift's trust business is "located" ("location state").[13] If a thrift is located in more than one state for purposes of section 5(n), then the scope of fiduciary services the thrift can provide from offices located in those states will vary depending upon the law of each location state.

Under this statutory scheme, the fact scenario you present raises two basic questions: (a) where will the Association be deemed located when engaging in the activities in question: and (b) does federal law preempt the laws of non-location states that purport to bar marketing and the performance of other incidental trust activities in those states?

A. Location

The term "located" is not defined by the HOLA. Thus, it falls to OTS, the federal agency charged with implementing HOLA section 5(n), to determine

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[10] Wis. Stat. Ann. § 223.12(1) (West 1996).

[11] Wis. Stat. Ann. § 223.12(3) (West 1996).

[12] 12 U.S.C.A. § 1464(n) (West Supp. 1996).

[13] See, e.g., OTS Op. Chief Counsel (June 21, 1996) ("June 1996 Op."); OTS Op. Chief Counsel (March 28, 1996) ("March 1996 Op."); OTS Op. Acting Chief Counsel (June 13, 1994) ("June 1994 Op."); OTS Op. Chief Counsel (December 24, 1992)("December 1992 Op.").

what types of trust activities are sufficient to cause a federal thrift to be deemed located in a state for purposes of section 5(n).

When opining in this area, the OTS has been mindful that, in analogous contexts (i.e., venue and most favored lender determinations under the National Bank Act), the Supreme Court has indicated that the term "located" should be interpreted flexibly so as to take account of modern developments in banking.[14] As the Supreme Court has noted, "there is no enduring rigidity about the word 'located'."[15] Noting that modern financial transactions frequently involve contacts with multiple states,[16] the Court indicated that the standards for determining location should not be so sensitive or subjective that an institution "could never be certain whether its contacts with residents of foreign states were sufficient to alter its location . . . ."[17] An overly broad interpretation of "location," the Court indicated, could "throw into confusion the complex system of modern interstate banking."[18]

The Supreme Court's concerns are also consistent with OTS's overarching statutory duty to regulate thrifts in a manner that furthers "the best practices of thrift institutions in the United States,"[19] and with the legislative history of HOLA section 5(n), which indicates that the federal thrift regulator "is expected by regulation to tailor permissible trust powers to those that enhance the ability of thrifts to offer complete financial services to the consumer."[20]

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[14] Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978), 311-312; Citizens & Southern National Bank v. Bougas, 434 U.S. 35, 44-45 (1977).

[15] Citizens & Southern National Bank, 434 U.S. at 44.

[16] Given the highly mobile nature of our society, a single trust can easily have contacts with multiple states. For example, with respect to a testamentary trust, a testator who resided in the State of V at his death and contributed real property located in State W and personal property located in State X, may appoint a trustee licensed and operating in State Y and provide in the trust agreement that the laws of State Z, his former residence, will govern the administration and construction of the trust.

[17] Marquette, 439 U.S. at 312.

[18] Id.

[19] 12 U.S.C.A. § 1464(a) (West Supp. 1996).

[20] S. Rep. No. 368, 96th Cong., 2d Sess. 13, reprinted in, 1980 U.S. Code Cong. & Admin. News 236, 248. We are aware that one of the objectives of HOLA section 5(n) is to preserve a measure of parity between federal thrifts and state fiduciaries in federal thrifts' location states. See S. Rep. No. 368, 96th Cong., 2d Sess. 13, reprinted in, 1980 U.S. Code Cong. & Admin. News 236, 248. See also St. Louis County National Bank v. Mercantile Trust Co., N.A., 548 F.2d 716.

Consistent with the foregoing, OTS has interpreted the term "located" as it appears in HOLA section 5(n) in a manner that is predictable, stable, and consistent with the nature of the modern banking business. The beginning point for prior OTS interpretations has been the implementing regulations, which "are based on the premise that a federal thrift will be deemed located . . . in each state where it operates a trust office."[21] We have indicated that a trust office can either be in the form of a brick and mortar trust office or, alternatively, a fiduciary presence within a state that is the functional equivalent of operating a brick and mortar trust office – a so-called de facto trust office.[22]

When assessing whether a thrift's trust-related activities in a state rise to the level of being characterized as a de facto trust office, we have indicated that we will focus on the nature of the thrift's contacts with the state, not their frequency.[23] Our objective has been to identify where the thrift is actually managing its trust accounts, i.e., entering into binding commitments, making discretionary decisions, and rendering advice. We have distinguished these core fiduciary functions from activities that are merely incidental to the exercise of trust powers.

For example, in our June 1996 Op., we concluded that marketing activities alone do not cause a thrift to be deemed located in a state for trust purposes.[24] Accordingly, the June 1996 Op. concluded that federal thrifts may market their duly authorized fiduciary services in any state, regardless of state

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720 (8th Cir. 1976), cert. denied, 433 U.S. 909 (1977); Blaney v. Florida National Bank, 357 F.2d 27, 30 (5th Cir. 1966). Congress implemented this objective by expressly subjecting federal thrifts to certain state law requirements applicable to corporate fiduciaries chartered by federal thrifts' location states. For example, a federal thrift must conform to the requirements of location states regarding scope of fiduciary powers, capital requirements, security deposits, and oaths. 12 U.S.C.A. § 1464(n)(1), (5), (6), and (8). Beyond this, however, Congress did not mandate that the trust operations of federal thrifts be tied to state law. Instead, as indicated above, OTS is directed to implement § 5(n) in a manner that enhances the ability of thrifts to meet consumers' trust needs and is consistent with "best practices." Although the OTS may elect to incorporate additional elements of state law if deemed appropriate to meet these objectives, it is not required to do so.

[21] June 1996 Op., at 5.

[22] Id.

[23] June 1996 Op., at 4-6.

[24] June 1996 Op., at 4-6.

laws that might attempt to bar marketing activities by foreign fiduciaries. The June 1996 Op. addressed mail and telephone solicitations. There we also reviewed a proposal to conduct informational seminars and to have employees of the association's trust department visit the offices of its affiliates to meet with trust customers to describe its trust services. We drew a distinction between these activities and other activities more closely associated with core conduct of a trust office, e.g., executing trust documents, approving new accounts, rendering investment advice, and making fiduciary decisions regarding investments and distributions.

This analytical approach to determining location under section 5(n) is consistent with the approach that the OTS has used to determine location under HOLA section 4(g) (most favored lender). We have previously noted that the term "located" as it appears in both provisions should be interpreted in a consistent manner.[25] This does not mean that an association is "located" for section 4(g) purposes in every state where it is "located" for section 5(n) purposes. For example, under section 4(g) we examine the substance of an association's lending activities in various states, whereas under section 5(n) we examine the substance of trust activities. Nevertheless, the mode of analysis employed under section 4(g) (where the body of precedent is more developed) at least provides a point of reference for analyses conducted under section 5(n).

When confronted with location questions under section 4(g) we have, in prior opinions, looked to case law interpreting a virtually identical most favored lender provision for national banks.[26] The seminal case in this area is Marquette Nat'l Bank v. First Omaha Service Corp.[27] There, the Supreme Court conducted a location analysis similar to that described above for HOLA section 5(n) to determine whether a national bank's credit card activities should be deemed to be located in Minnesota. The Court determined that the following activities were not of a type that would establish location in Minnesota: advertising the credit card; soliciting applications; soliciting participating merchants; remitting payments to merchants for goods purchased there; and sending periodic statements to and receiving payments mailed by cardholders living there.[28] Instead, the Court concluded that the national bank was located in Nebraska.

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[25] June 1994 Op., at 4-5; December 1992 Op., at 8-9.

[26] December 1992 Op., at 2-4.

[27] 439 U.S. 299 (1978).

[28] 439 U.S. at 311-12.

where, inter alia, the bank reviewed, approved and issued credit cards, accepted charges, disbursed funds, received payments, originated communications to card holders, and had its main and branch offices (i.e., lending offices).

The types of lending activities the Supreme Court found persuasive in establishing location for most favored lender purposes are analogous to the trust activities that the OTS has found significant in determining location for purposes of HOLA section 5(n).

With the foregoing as background, we will now turn to the specific questions raised by the Association. The Association proposes to engage in three principal types of activities outside its location state: (i) marketing; (ii) activities incident to serving as a testamentary trustee or trustee of real estate; and (iii) certain liaison activities. We will examine each in turn.

1. Marketing

The Association's proposed marketing activities are quite similar to those previously considered by the OTS. The only activity you propose not specifically addressed in our June 1996 Op. is collecting information that is required for trust applications from potential trust customers concerning the type, amount and cost basis of their assets. In our view, assisting customers in completing the Association's trust application forms is part of the marketing and solicitation process.

Neither the OTS nor the Supreme Court in Marquette has deemed marketing and solicitation to be indicative of location. As explained above, when determining where a thrift's trust business is located, we look to where it conducts those activities associated with core conduct of a trust office, e.g., executing trust documents, approving new accounts, rendering investment advice, and making fiduciary decisions regarding investments and distributions. If we were to adopt the view that a thrift is located wherever a potential customer happens to be situated when coming into contact with the Association's marketing materials or when filling out a trust application, the thrift's location would become unpredictable – a result the Supreme Court clearly sought to avoid in Marquette.[29]

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[29] 439 U.S. at 312.

Therefore, we conclude that the Association will not be deemed "located" in a state under HOLA section 5(n) by virtue of engaging in the types of marketing activities described herein.

2. Actions Incident to Serving as Testamentary Trustee or Trustee of Real Estate

The Association also wishes to serve as a testamentary trustee without regard to where the testator is domiciled upon death and to hold real estate in trust regardless where the real estate is situated. You represent that acting as a testamentary trustee and holding real estate are permissible activities for a State A corporate trustee.

You have indicated that acting as a testamentary trustee would not require the Association to perform any functions outside of State A, except perhaps filing an accounting with a probate court or making an appearance in probate court through local counsel. You have also told us that holding real estate outside of State A would not require the Association to perform any functions outside of State A, except to record title to the property through a local agent and to perform property management as previously described herein. The decisionmaking regarding the trusts would take place in State A. The Association will not execute trust documents, approve new accounts, provide investment advice or make decisions with respect to the maintenance and disposition of real or personal property outside of State A.[30]

On these facts, it is reasonable to conclude that the testamentary trusts and trusts holding real estate will genuinely be managed from State A and that the incidental activities proposed for other states do not rise to the level of operating a de facto trust office in those states. None of the incidental activities proposed by the Association are the type of discretionary acts found significant in our prior location determinations.

This conclusion is also consistent with Marquette. The types of lending activities the Supreme Court found persuasive in establishing location for most favored lender purposes are analogous to the trust activities that the Association

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[30] You have also indicated that the Association will not be performing any of these functions indirectly through its Affiliates, since the activities of the Affiliates will be strictly limited to soliciting customers for the Association's trust services and providing liaison services in support of the Association's trust services.

proposes to conduct exclusively in State A. Here, as in Marquette, accounts will be approved in offices in the location state, charges will be remitted to and funds disbursed from those offices, management decisions affecting the accounts will be made in those offices, all substantive communications from customers will be directed to personnel located in those offices, and all substantive communications to customers will be conducted by personnel located in those offices.

Accordingly, we conclude that the Association will not be deemed to be located outside of State A simply because it serves as a testamentary trustee for a testator who resided outside State A at death or holds real estate as trustee outside State A, provided the activities conducted outside of State A are limited in accordance with the Association's representations as set forth herein.[31]

3. Liaison Services

You have also indicated that, once a trust relationship is established, the Affiliates and their account executives will provide administrative services for the Association's trust department by acting as a liaison between grantors and beneficiaries and trust officers, in the manner described above. Consistent with the analysis set forth above, these functions are of an incidental, purely ministerial nature and thus do not establish location. We nevertheless believe it would be inadvisable for the Affiliates to relay orally any discretionary advice from the trustee. Our concern is not the simple act of relaying the advice (which is purely ministerial), but rather the danger that the Affiliate may be drawn into the role of adviser during the give and take of such conversations. Subject to this precautionary qualification, the Association will not be deemed to be located in a state for trust purposes by virtue of the Affiliates performing the liaison services described herein.

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[31] In American Trust Company v. South Carolina State Board of Bank Control, 381 F. Supp. 313 (D.S.C. 1974), the court held that a South Carolina statute prohibiting national banks domiciled in North Carolina (and other North Carolina fiduciaries) from serving as testamentary trustees for South Carolina citizens did not violate the commerce clause of the U.S. Constitution. The court's conclusion was based largely on its interpretation of the statement in the National Bank Act that national banks may exercise trust powers "when not in contravention of state or local law," which the court read to include South Carolina law. 12 U.S.C.A. § 92a (West 1989). The Office of the Comptroller of the Currency has criticized and refused to follow the court's interpretation. OCC Interpretive Letter No. 695, at 16-17 (December 8, 1995). In any event, the quoted language that was the basis of the court's decision was removed from HOLA section 5(n) by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. Pub. L. 101-73, Aug. 9, 1989; 103 Stat. 183, 297. As indicated above, federal thrifts are authorized to act in any fiduciary capacity permissible for corporate fiduciaries of their location state. "Non-location" states play no role in defining the scope of a federal thrift's fiduciary powers.

Accordingly, the OTS concludes that the Association will not be located in a state, within the meaning of HOLA section 5(n), merely because it engages in some or all of the marketing, liaison, and other incidental activities described herein.

B. Preemption

You also ask whether federal law preempts the application to federal thrifts of several state statutes you have cited that prohibit out-of-state corporations from marketing or from performing other incidental trust activities in that state.

In our June 1996 Op. we concluded, and here reaffirm for the reasons stated in that opinion, that "non-location" states may not prevent federal thrifts from marketing their duly authorized trust services.[32] Thus, the only new preemption question raised by your inquiry concerns state laws that purport to prohibit the above-described incidental in-state activities by out-of-state federal thrifts that are managing testamentary trusts or real estate they hold in trust.

It is well established that the authority of a federal thrift to engage in the trust business is solely a matter of federal law, governed by HOLA section 5(n). This provision determines when and where federal thrifts may engage in trust activities. Under section 5(n), the OTS is authorized to issue a special permit to a federal thrift to engage in the trust business, provided, inter alia, the thrift meets certain standards drawn from the laws of the state in which the trust powers will be exercised, i.e., the location state. For example, location state law determines: (i) the scope of permissible trust powers; (ii) minimum capital requirements; and (iii) the amount of securities that must be deposited with the state.[33]

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[32] June 1996 Op., at 6-9.

[33] The securities deposit provision that appears in HOLA section 5(n)(5) refers variously to the deposit requirement of the state "involved" and the state where the thrift is "acting in a fiduciary capacity." 12 U.S.C.A. § 1464(n)(5) (West Supp. 1996). The OTS and its predecessor have always interpreted paragraph (n)(5) as referring back to the federal thrift's state of location. See 12 C.F.R. § 550.4 (1996); and December 1992 Op., at 11-13. The reference in paragraph (n)(5) to the state where a thrift is "acting in a fiduciary capacity" ties back into the requirement in (n)(1) that a thrift restrict its "fiduciary capacities" to those permissible in its location state. This interpretation is also consistent with OTS's objective of establishing a workable, internally consistent regulatory scheme under HOLA § 5(n).

Thus, we have previously opined that any law in a federal thrift's location state that purports to require it to obtain a license from the state before exercising trust powers is preempted.[34] In that context, we noted that:

> [w]here [in section 5(n)] Congress intended to incorporate certain substantive standards from state law, Congress clearly spelled out what those requirements were. 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 statute. To subject OTS's authority to state review would, in fact, render the authority granted by the statute largely illusory.[35]

Numerous other opinions have reached similar conclusions under similar circumstances. For example, we have concluded that the states have no right to require federal thrifts to obtain a license to engage in lending activities authorized by the HOLA or in money order activities authorized by OTS regulations.[36] The power to license is the power to prohibit, and the states cannot prohibit what federal law has authorized.

This principle -- that a state may not impede federally authorized activities -- applies with equal force to "non-location" states that attempt to erect access barriers to the incidental trust activities of out-of-state federal thrifts. As is explained in detail in Part II.A. of this opinion, under the HOLA scheme no special permit is required before a federal thrift engages in incidental trust activities outside its location state. These activities are conducted under the auspices of the location state permit issued by OTS, pursuant to a federal regulatory program devised by OTS in accordance with its "best practices"

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[34] June 1994 Op. See also, OTS Op. Principal Deputy Chief Counsel -- Legal (Jan. 9, 1990) (imposition of annual license fee by a state authority is preempted). The OCC has taken the position that state securities licensing requirements are preempted as applied to national bank trust activities. OCC IL No. 628, 1993 OCC Ltr. LEXIS 35 (July 19, 1993).

[35] June 1994 Op., at 10 (citations omitted). The OCC reached a similar conclusion regarding its authority to grant national banks the power to engage in the trust business. OCC IL No. 695 (December 8, 1995), at 12.

[36] OTS Op. by Solomon (December 14, 1994) (state statute requiring license to enter into the money order business does not apply to federal thrifts); and OTS Op. Chief Counsel (November 30, 1990) (state statutes restricting the lending operations of out-of-state federal thrifts and requiring them to obtain state mortgage banker licenses are preempted).

mandate[37] and Congress' directive to implement section 5(n) in a manner that enhances the ability of thrifts to provide effective trust services to consumers.[38]

The states have no power to augment or impede this federal licensing scheme. The role of location states in the licensing process is limited to contributing those state law standards expressly incorporated by HOLA section 5(n). Non-location states are assigned no role. Any location or non-location state that attempts to circumvent this federal licensing scheme by requiring federal thrifts to meet standards other than those specified by section 5(n) or by prohibiting federal thrifts from engaging in trust activities authorized by a permit issued under section 5(n) acts in direct conflict with the HOLA. It is well established that state laws that conflict with federal law are preempted.[39] The states have no power to prohibit activities authorized by the HOLA.

The particular state laws you have identified would prohibit federal thrifts from engaging in trust activities authorized under section 5(n) and, if allowed to stand, would effectively transfer licensing authority from OTS to the states. Therefore, the laws of Texas and Wisconsin that purport to prohibit marketing and advertising of trust services by out-of-state fiduciaries are preempted. In addition, the statutes you have cited for Louisiana, Virginia and Oregon that would prohibit the Association, an out-of-state fiduciary, from performing the incidental activities described herein pursuant to its appointment as a testamentary trustee or trustee of a trust holding real estate are preempted. Likewise, the reciprocity statutes of Texas and Wisconsin are preempted to the extent that they would prohibit the Association from engaging in these incidental activities in the state or would require registration with the state.

In reaching the foregoing conclusions, the OTS has relied upon the factual representations made in the material you submitted to us and in subsequent discussions, as summarized herein. Our conclusions depend upon the accuracy

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[37] 12 U.S.C.A. § 1464(a) (West Supp. 1996).

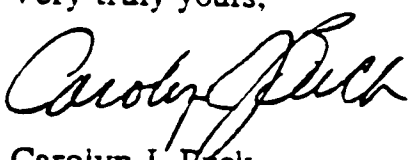
[38] S. Rep. No. 368, 96th Cong., 2d Sess. 13, reprinted in, 1980 U.S. Code Cong. & Admin. News 236, 248.

[39] See, e.g., Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); Pacific Gas and Electric Co. v. State Energy Resources Conversation and Development Com., 461 U.S. 190, 203-04 (1983); Fidelity Federal Savings and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982). For a detailed analysis of federal preemption theories, see, e.g., June 1994 Op., at 8-9; and OTS Op. Principal Deputy Chief Counsel - Legal, at 2-4 (January 9, 1990).

and completeness of those facts. Any material difference in facts or circumstances from those described herein could result in different conclusions.

If you have any questions regarding these matters, please feel free to contact Dorene Rosenthal, Counsel (Banking and Finance) (202) 906-7268.

Very truly yours,



Carolyn J. Buck
Chief Counsel

cc: All Regional Directors
All Regional Counsel