Office of Thrift Supervision
Department of the Treasury
1700 G Street, N.W., Washington, D.C. 20552 • (202) 906-6000

June 21, 1996

Re: Interstate Marketing of Trust Services

Dear :

This responds to your inquiry submitted on behalf of (the "Association"), concerning whether: (i) the Association will be deemed to be "located," as that term is used in the federal trust laws, in states where it markets its trust services but has no trust office; and (ii) whether federal law preempts state laws that would prohibit or restrict the Association from marketing its trust services in those states.

In brief, we conclude that: (i) the Association is not located in those states where it merely markets its trust services in the manner described herein; and (ii) the state laws you describe that purport to prohibit or restrict an out-of-state federal thrift from advertising or marketing its trust services in the state are preempted.

I. Background

A. Factual Background

The Association, a federal savings bank, is a wholly-owned subsidiary of ("Parent"), which is, in turn, a wholly-owned subsidiary of ("Indirect Parent"). The Association has its home office in New Hampshire,

and branch offices in both New Hampshire and Connecticut. The Association also operates agency offices[1] in New Hampshire and Vermont. The Association previously has been authorized by the Office of Thrift Supervision ("OTS") to conduct trust business in New Hampshire and Connecticut through its branch offices and in Vermont through its agency offices. Parent and Indirect Parent and certain of their subsidiaries (collectively, "Association's Affiliates") operate offices from which they sell insurance in a number of states in which the Association does not presently have trust offices.

In correspondence and telephone conversations with OTS staff, you indicated that the Association proposes to market its trust services to prospective customers in states other than where the Association has trust offices. The Association is contemplating a variety of marketing and introductory activities such as: direct mail; telephone calls; informational seminars and personal visits to prospective clients.

The direct mail, telephone calls and personal visits would be conducted either by employees of the Association or by employees of the Association's Affiliates for the purpose of offering the Association's fiduciary services. The Association also anticipates organizing and conducting seminars at out-of-state locations (i.e., states where it does not have branch or agency offices through which it conducts fiduciary services) for the purpose of educating potential clients about the nature and variety of fiduciary services and products available from the Association. The seminars would be held at offices of the Association's Affiliates or at commercial meeting facilities (e.g., hotel meeting rooms) located near targeted communities.

The marketing activities of the Association in states other than where it has trust offices would be limited to: (i) advising prospective customers of the availability of the Association's fiduciary services; (ii) assisting prospective customers in identifying their needs for fiduciary services; (iii) discussing prospective customers' needs with the Association's trust department representatives; and (iv) assisting prospective customers in completing forms used by the Association's trust department.

The Association's employees would not act in a fiduciary capacity on behalf of a customer in those states in which the Association does not have a

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[1] An "agency office" is a limited purpose office of a federal thrift, and is not permitted to offer the full range of services available at a branch, such as certain deposit taking services. 12 C.F.R. § 545.96 (1995).

trust office. In such states, Association employees would not execute documents on behalf of the Association's trust department; would not provide investment advice to customers; would not exercise investment discretion over trust department accounts; and would not have the power to accept or approve new trust accounts

B. State Statutes At Issue

The Association has asked us to review statutes in four representative states, Vermont, California, New York and Ohio, that purport to prohibit or restrict the Association from marketing its trust services.

The statutory provisions you cite for the State of Vermont provide that any corporation that does not report to and is not under the supervision of the Vermont Commissioner of Banking, Insurance and Securities "shall not advertise . . . as a . . . trust company, or in any way . . . transact business as a . . . trust company . . ." in Vermont.[2] You represent that the Vermont Department of Banking, Insurance and Securities informed you that mail solicitation for trust business in Vermont by a federal savings bank that does not have an office in Vermont is barred by these provisions. You represent that the Vermont authorities also informed you that such solicitation by an out-of-state fiduciary violates section 15.01 of Vermont's corporate code, which prohibits foreign corporations from transacting business in Vermont without authorization from the Vermont Secretary of State.[3] The Vermont authorities have made this assertion despite the fact that on its face, section 15.01 exempts "soliciting or obtaining orders, whether by mail or through employees or agents or otherwise" from the definition of "transacting business" in the state of Vermont.[4] In response, the Association applied to OTS and received authorization to establish agency offices to conduct trust business in Vermont.

The Association, however, does not want to establish agency offices with fiduciary powers in every state where it intends to market its trust services. Therefore, before expanding its marketing operations further, the Association has asked OTS to opine on whether Vermont's statutes, and similar statutes in other states, such as California, New York and Ohio, that purport to prohibit or

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[2] Vt. Stat. Ann., tit. 8, §§ 5(c) and 558 (Supp. 1995).

[3] See Vt. Stat. Ann., tit. 11A, § 15.01.

[4] Id., at § 15.01(c)(6).

restrict the advertising of trust services by out-of-state fiduciaries are preempted by federal law.

The statutory provision you cite for the State of California provides that no out-of-state corporations, other than national banks with a home or branch office in the state and out-of-state banks authorized to conduct a trust business in this state, "shall have or exercise the powers of a trust company nor directly or indirectly transact or conduct in this state a trust business as defined [by state law]."[5] The statutory provision you cite for the State of New York prohibits out-of-state trust companies from acting in any fiduciary capacity in New York, unless the trust company's home state permits New York-chartered fiduciaries to act in such fiduciary capacity.[6] The statutory provisions you cite for the State of Ohio impose filing and licensing requirements on out-of-state fiduciaries "desiring to do a trust business" in Ohio.[7]

One could argue that, with the exception of the Vermont statute, none of these statutes apply to the Association's proposed marketing proposal because marketing or advertising trust services does not constitute "conducting" a trust business. However, OTS recognizes that state regulators might interpret their statutes as prohibiting even the advertising of trust services.

II. Discussion

A. Location

The trust powers of federal thrifts are defined by section 5(n) of the Home Owners' Loan Act ("HOLA").[8] Section 5(n)(1) authorizes the Director of OTS to permit federal thrifts that meet the standards specified in section 5(n) to exercise trust powers. However, the scope of trust powers the Director may authorize is tied to state law by section 5(n). The Director may not authorize a federal thrift to act in any fiduciary capacity that is impermissible for corporate fiduciaries under the laws of the state where a thrift's trust business is "located"

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5 Cal Fin. Code § 1503 (West Supp. 1996).

6 N.Y. Banking Law § 131(3) (McKinney Supp. 1996).

7 Ohio Rev. Code Ann. §§ 1109.17 and .18 (Baldwin 1993).

8 12 U.S.C.A. § 1464(n) (West Supp. 1996).

("location state").[9] If a federal 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 in those states will vary depending upon the law of each state.[10]

Thus, to determine the scope of trust services a federal thrift may offer, it is first necessary to determine where the thrift is "located" for purposes of section 5(n). You request confirmation that the activities the Association proposes to undertake in various states where it has no trust office will not cause it to be deemed located in those states for purposes of section 5(n).

Earlier this year, OTS opined that an institution will be deemed to be located for trust purposes in those states where it has offices through which it provides trust services ("March 1996 Op.").[11] This conclusion was based on the plain language of the regulations implementing section 5(n), which indicate that a federal thrift's trust powers must be "authorized for state-chartered fiduciaries by the laws of each state in which the Federal savings association has offices from which it will offer fiduciary services."[12] Thus, OTS's regulations are based on the premise that a federal thrift will be located, for trust purposes, in each state where it operates a trust office.

In the past, we have looked at the nature of activities performed in a state to determine whether an association should be deemed to be operating an actual or de facto trust office in that state. For example, in an opinion issued in 1994, OTS indicated that the offices of a broker-dealer affiliate of an institution through which the institution marketed its trust services would not be deemed to be offices of the institution for trust purposes ("June 1994 Op.").[13] This conclusion was based primarily on the fact that the activities in question were

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

[10] March 1996 Op.

[11] March 1996 Op. The Office of the Comptroller of the Currency ("OCC"), which interprets a virtually identical trust powers provision for national banks, has reached a similar conclusion. OCC Interpretive Letter No. 695, at 13-14 (December 8, 1995) ("OCC December 1995 Op.").

[12] 12 C.F.R. § 550.2(c)(2) (1995); March 1996 Op., at 6.

[13] June 1994 Op.

limited to marketing. No fiduciary activities were actually conducted in the states in question.

The Association's proposed activities are very similar to those OTS considered in the June 1994 Op. The June 1994 Op. addressed mail and telephone solicitations. There we also reviewed a proposal to conduct informational seminars and to have employees of the institution's trust department visit the offices of its affiliates to meet with trust customers to describe its trust services.[14] These are the same basic marketing activities that the Association proposes to engage in. The only perceptible difference is that, in the June 1994 Op., the inquiring institution indicated that visits by its employees to the states in question would be "occasional." Here, the Association does not specify the frequency of this activity. For purposes of our analysis, however, what matters is the nature of the activities undertaken, not their frequency or volume, or whether they are conducted by employees of the Association or those of its affiliates.

Here, as in the June 1994 Op., the Association represents that neither its employees nor those of its affiliates will engage in any fiduciary activity in the states where it merely markets its trust services and has no trust offices. No documents will be executed on behalf of the Association in those states, no investment advice will be provided, no investments will be made, and no new trust accounts will be approved.

Therefore, based on the same reasoning reflected in our June 1994 Op. and our March 1996 Op., we conclude that the Association will not be "located" in the states where it merely markets its trust services as described herein.

B. Preemption

Your second question is whether federal law preempts the application to federal thrifts of state statutes that bar out-of-state corporations from marketing trust services.

In our June 1994 Op., we concluded that the authority of a federal thrift to engage in trust business is controlled exclusively by section 5(n) and, therefore, any law in a federal thrift's location state that purports to require it to

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[14] June 1994 Op., at 8-10.

obtain a license from the state before exercising trust powers is preempted.[15] As the June 1994 Op. noted:

> [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.[16]

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.[17] The power to license is the power to prohibit, and the states cannot prohibit what federal law has authorized.

You have asked us to confirm that this reasoning also applies to laws such as those in Vermont,[18] California, New York and Ohio that purport to prohibit marketing and advertising of trust services by out-of-state fiduciaries. We believe it does.

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[15] 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).

[16] 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 December 1995 Op., at 12.

[17] 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).

[18] Because the Association has established an agency office in Vermont from which it engages in fiduciary activities, the Association apparently is no longer deemed by Vermont to be subject to its statutory prohibition on marketing by out-of-state fiduciaries. The Association nevertheless asks us to address the preemption status of the Vermont statute because it serves as an example of the types of prohibitions it may encounter in other states where it operates no trust offices.

The Supreme Court has recognized that marketing is an integral and essential component of a federal depository's ability to exercise an authorized power. In Franklin Nat'l Bank v. New York,[19] a case involving whether a national bank could use the term "savings" in its advertising, in contravention of New York law, the Court said:

> [m]odern competition for business finds advertising one of the most usual and useful weapons. We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business. It would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it.[20]

The same logic can be applied to the powers of federal savings associations. There is no affirmative indication of a congressional intent to restrict interstate marketing of thrift trust powers.[21]

As noted above, section 5(n) alone defines the circumstances under which federal thrifts may engage in the trust business. Provided a thrift meets the requirements of section 5(n), the OTS is authorized to issue a special permit granting that thrift the right to exercise trust powers in its location state or states. Nothing in section 5(n) or the state law requirements incorporated by section 5(n) confines the marketing of authorized trust powers to the location state or authorizes "non-location" states to impose marketing restrictions on the trust activities of federal thrifts. Indeed, section 5(n) accords no role to the laws of "non-location" states. Accordingly, any attempt by a "non-location" state to bar the Association's proposed marketing of its duly authorized trust powers would

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19 347 U.S. 373 (1954).

20 347 U.S. at 377-78.

21 The HOLA explicitly authorizes OTS to regulate advertising by federal savings associations. 12 U.S.C.A. § 1468a (West Supp. 1996). OTS's regulations provide that savings associations may not use advertising which is inaccurate or which misrepresents its services, contracts, investments or financial condition, but imposes no further restrictions. 12 C.F.R. § 563.27 (1995). It is customary for federal thrifts to advertise their services without reference to state boundaries.

be inconsistent with section 5(n).[22] It is well established that state laws that conflict with federal law are preempted.[23]

In reaching the foregoing conclusions, we have relied upon the factual representations made in the materials you submitted to us and in subsequent discussions, as summarized herein. Our conclusions depend upon the accuracy 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), at (202) 906-7268.

Very truly yours,

Carolyn J. Buck
Chief Counsel

cc: All Regional Directors
All Regional Counsel

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[22] You have not asked, and we do not address, the extent (if any) to which location state laws that restrict marketing by fiduciaries apply to federal thrifts.

[23] See, e.g., Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); Pacific Gas and Electric Co., 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 (Jan. 9, 1990).