



Office of Thrift Supervision

Department of the Treasury

Chief Counsel

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

December 22, 1998

MEMORANDUM

FOR: []
[], Northeast Region

FROM: Carolyn J. Buck
Chief Counsel *Carolyn J. Buck*

SUBJECT: Massachusetts Electronic Branch Restrictions

This responds to the Northeast Region's inquiry regarding whether certain provisions of Massachusetts law that purport to restrict the establishment and operation of electronic branches, including automated teller machines ("ATMs"), apply to federal savings associations. These restrictions would require financial institutions to comply with state approval requirements prior to owning, operating, using, or sharing electronic branches and to pay an annual assessment for each electronic branch.

At the outset, please accept our apologies for the delay in responding to your inquiry. As we have been considering your request, we have also been in the process of finalizing a new rule on electronic operations. Since we had responded to a similar inquiry regarding preemption of Iowa and Wyoming ATM restrictions earlier this year,¹ we wanted to be able to address your question in light of the new rule. That rule was recently published on November 30, 1998, and will become effective January 1, 1999.²

The conclusion and much of the analysis in the July 1 Opinion apply to your inquiry, which we also consider in light of the new rule. Thus, the discussion in this memorandum is abbreviated and we refer you to the July 1 Opinion and the Electronic

¹ See OTS Op. Chief Counsel (July 1, 1998) ("July 1 Opinion"). For your convenience, a copy of the July 1 Opinion is attached hereto.

² See Electronic Operations, 63 Fed. Reg. 65,673 (November 30, 1998).

Operations rule for further elaboration. In brief, we conclude that, by reason of federal preemption, the state law provisions discussed herein cannot interfere with a federal savings association's ability to operate uniformly across state lines.

I. Background

A. Circumstances Prompting Inquiry

The Region advises that several federal savings associations have received notices from the Massachusetts Commissioner of Banks (the "Commissioner") purporting to require compliance with various provisions of Chapter 167B of the General Laws of the Commonwealth of Massachusetts ("Chapter 167B"),³ "Electronic Branches and Electronic Fund Transfers," which govern the ownership, use, and sharing of electronic branches by financial institutions in Massachusetts. These provisions restrict ATMs and other "electronic branches."⁴

The Region has provided information showing that the Commissioner views Chapter 167B as "a registration and consumer protection statute which is a valid exercise of the Commonwealth's police powers which is designed to protect the public health, safety and welfare" and which applies to federal savings associations "notwithstanding the alleged preemptive effect of 12 CFR §545.2."⁵ While in the past the Commissioner acknowledged that some of these requirements applied only to state banks,⁶ more recently the Commissioner has indicated that "federally-chartered thrift institutions are subject to applicable registration, consumer protection and assessment

³ Mass. Ann. Laws ch. 167B (Law Co-op. 1997 & Supp. 1998).

⁴ "Electronic branch" includes an ATM or cash dispensing machine, but excludes "a teller machine or similar device located on the premises of and operated solely by an employee of a financial institution or a point-of-sale terminal." Mass. Ann. Laws ch. 167B, § 1 (Law Co-op. 1997).

⁵ Mass. Commissioner Op. 97-072 (August 22, 1997) at 1 (Letter from Thomas J. Curry, Commissioner, to []). We note that this Commissioner opinion cites a 1983 determination by the Board of Governors of the Federal Reserve System concluding that certain provisions of Chapter 167B are not preempted by the federal Electronic Funds Transfer Act ("EFTA"), 15 U.S.C.A. § 1693 *et seq.* (West 1982 & Supp. 1998), or Regulation E, 12 C.F.R. Part 205 (1998). 48 Fed. Reg. 43,671 (September 26, 1983). This authority is inapposite, however, because, as discussed below, the basis for OTS's determination that the state law provisions are preempted as applied to federal savings associations is the Home Owners' Loan Act ("HOLA"), 12 U.S.C.A. § 1461 *et seq.* (West Supp. 1998), and OTS regulations discussed herein, not the EFTA.

⁶ See footnote 21, *infra*.

provisions of [Chapter] 167B.”⁷ Moreover, the Commissioner has indicated that he “would seek to initiate affirmative litigation” against a federal savings association that does not comply with the requirements of Chapter 167B.⁸

The Region advises that at least two federal savings associations have received written notices from the Commissioner asserting that the institutions were not approved to share electronic branches in Massachusetts and that such activity, without prior Commissioner approval, violates Chapter 167B. The Commissioner sent copies of the electronic branch application to these associations to complete. The Commissioner also sent these associations assessment notices. The Region has, therefore, asked whether provisions of Chapter 167B that purport to require state approval and assessment of electronic branches, including ATMs, are preempted for federal savings associations.

B. State Law Provisions

1. State approval requirements

Most of the provisions of Chapter 167B that are the subject of your inquiry are state approval requirements.⁹ Section 3, ¶ 1 requires “financial institutions”¹⁰ to apply

⁷ Mass. Commissioner Op. 97-072 at 2, citing Mass. Dep. Commissioner Op. 96-089 (July 30, 1996) (Letter from Joseph A. Leonard, Deputy Commissioner of Banks and General Counsel, to [] Federal Savings Bank, FSB) and Mass. Dep. Commissioner Op. 95-112 (July 28, 1995) (Letter from Joseph A. Leonard, Jr. to [] Federal Savings Bank []).

⁸ Mass. Commissioner Op. 97-072 at 2.

⁹ OTS’s July 1 Opinion dealt with similar types of provisions (described in Part I.B.2. of that opinion).

¹⁰ “Financial institution” includes, at least for purposes of some provisions of Chapter 167B, OTS-chartered savings associations (those having their main office in Massachusetts as well as those having a main office outside of Massachusetts). Specifically, the term means “a bank, federal bank, federal credit union, foreign bank, out-of-state bank, out-of-state federal bank or any other person who (a) directly or indirectly holds an account belonging to a consumer, or (b) issues an access device and agrees with a consumer to provide electronic fund transfer services; provided, however, that said term shall mean a bank for the purposes of the first, second and third paragraphs of section three and for the purposes of section four.” Mass. Ann. Laws ch. 167B, § 1 (Law Co-op. 1997) (emphasis added). As discussed in Part II.A. below, the underlined language appears to exclude federal savings associations from the coverage of § 3, ¶¶ 1-3, and from § 4 of Chapter 167B, although the Commissioner still seeks to apply them to federal savings associations.

A “bank” is defined as an association or organization chartered under specific provisions of Massachusetts law. Mass. Ann. Laws ch. 167B, § 1 (Law Co-op. 1997). A “federal bank” is defined as “a national banking association, savings and loan association or savings bank which exists by authority of the United States, the main office of which is located in the commonwealth.” Id. An “out-of-state federal bank” is defined as “a national

for and obtain the Commissioner's approval to operate off-site electronic branches, i.e., electronic branches that are not at the financial institutions' offices.¹¹ Section 3, ¶7 prohibits a financial institution from purchasing, establishing, installing, operating, leasing, using, or sharing electronic branches with other financial institutions that do not comply with all applicable requirements of Chapter 167B and requires a financial institution to receive the Commissioner's certification of compliance before establishing such a relationship.¹²

Section 4 prescribes application and notice requirements for purchasing, leasing, installing, operating, using or sharing electronic branches.¹³ These include requirements to: (1) File an application with the Commissioner containing detailed information about proposed electronic branch operations, e.g., type of branch, site location, services to be performed, timing of crediting or debiting consumer's account, insurance arrangements, sharing arrangements including the identity of other participants and copies of the leasing agreement, security provisions, contracts and agreements relating to the operation and use of the electronic branch or between the financial institution and its customers, responsibility for losses.¹⁴ (2) Include a schedule of account service charges and fees and a schedule of charges assessed to financial institutions to use the electronic branch.¹⁵ (3) Provide notice and obtain the Commissioner's approval before terminating an electronic branch.

banking association, savings and loan association or savings bank which exists by the authority of the United States, the main office of which is located outside the commonwealth." Id.

¹¹ Mass. Ann. Laws ch. 167B, § 3 (Law Co-op. 1997). Section 3 of the Massachusetts statute does not contain numbered paragraphs. The paragraphs are numbered in this memorandum for ease of reference.

¹² We note that § 3 also authorizes the Commissioner to issue regulations mandating the shared use of electronic branches or equipment in an office of a financial institution to preserve a competitive environment and ensure fairness among financial institutions. We addressed a similar type of equal access requirement in the July 1 Opinion and determined it to be preempted. See July 1 Op. at Part I.B.4. (describing provision) and Parts II.B. & II.B.4. (setting forth preemption analysis). You have not inquired about and we express no opinion on the applicability to federal savings associations of other provisions of § 3, such as the requirement to ensure customer safety.

¹³ Mass. Ann. Laws ch. 167B, § 4 (Law Co-op. 1997).

¹⁴ If the applicant owns the electronic branch, information regarding costs and operating expenses also must be included in the application. The Commissioner is also authorized to require other information by rule or regulation.

¹⁵ The Commissioner must be notified on an annual basis of any changes to such schedules.

Section 5 prohibits financial institutions from investing in or contracting for the services of any organization that has not been approved by the Commissioner (including electronic branch and ATM activity services).¹⁶ To obtain approval, an institution must file an application with the Commissioner providing detailed information about the organization with which it wants to contract.¹⁷

2. Annual assessment requirement

Section 24 authorizes the Commissioner to make an annual assessment “equally against all electronic branches established and operated under the provisions of [Chapter 167B].”¹⁸ The Commissioner is required to set an assessment rate sufficient to produce revenue to reimburse the state for all costs and expenses incurred by the Division for the fiscal year in meeting the requirements imposed under Chapter 167B. These “costs and expenses” include the costs of examining financial institutions in their operation and use of electronic branches, and supervising the establishment and operation of electronic branches. Section 24 also specifically requires the owner or lessor of each electronic branch to pay the assessment.

3. Prohibition on establishment or use of electronic branches by financial institutions not having an office or place of business in Massachusetts

Chapter 167B, § 3, ¶ 8 restricts the ability of financial institutions whose main office is located in a state other than Massachusetts from establishing and using electronic branches in Massachusetts.¹⁹ This provision prohibits an “out-of-state financial institution”²⁰ from purchasing, establishing, installing, operating, leasing, using, or sharing electronic branches with other financial institutions unless two requirements are met. First, the laws of the state where the institution’s main office is located must authorize electronic branch activities under conditions no more restrictive

¹⁶ Mass. Ann. Laws ch. 167B, § 5 (Law Co-op. 1997 & Supp. 1998).

¹⁷ See also Mass. Regs. Code title 209, § 16.02 (1998) (“Bank Service Corporations”).

¹⁸ Mass. Ann. Laws ch. 167B, § 24 (Law Co-op. 1997). Mass. Commissioner Op. 97-072 at 1 indicates that the annual assessment fee is \$55 per terminal.

¹⁹ OTS’s July 1 Opinion dealt with similar types of provisions (described in Part I.B.1. of that opinion).

²⁰ See footnote 10, *supra*.

than those imposed in Chapter 167B. Second, the institution must obtain the Commissioner's approval prior to engaging in such activities.

II. Discussion

A. Inapplicability of Certain Provisions to Federal Savings Associations

Initially, we note that by its own terms, Chapter 167B appears to exclude federal savings associations from § 3, ¶ 1, and from § 4. As discussed in footnote 10, *supra*, these provisions apply to "financial institutions" and that term is defined to mean a "bank" for the purposes of these provisions. A "bank" is defined as an association or organization chartered by Massachusetts under specified provisions of Massachusetts law, or "any individuals, association, partnership or corporation incorporated or doing a banking business in the commonwealth, subject to the supervision of the commissioner." In other words, as used in those provisions, a "bank" could only be a Massachusetts-chartered or supervised entity. A federal savings association would be either a "federal bank" or an "out of state federal bank" (but not a "bank") depending upon whether the association's main office were located within or outside Massachusetts. Thus, Chapter 167B, by its terms, appears to make § 3, ¶1 and § 4 inapplicable to federal savings associations. Indeed, it appears that in the past, the Division has acknowledged that these provisions apply only to state chartered banks.²¹

Nonetheless, as discussed in Part I.A. above, the Commissioner currently appears to be taking a different position and has expressed an intent to enforce these provisions against federal savings associations. Accordingly, even though § 3, ¶ 1, and § 4 do not appear to apply to federal savings associations, we apply the preemption analysis to them.

We further note that, by their own terms, all the Massachusetts provisions restrictions on "electronic branches" arguably do not apply to federal savings associations because, under OTS regulations, a federal savings association's electronic

²¹ See Mass. Dep. Commissioner Op. 95-112 at 1 ("As defined in section 1 of said chapter 167B, the term 'financial institution' for the purposes of certain provisions of section 3 and the application process set out in section 4 applies only to state-chartered banks. The provisions of section 3 which only apply to state-chartered banks are contained in the first three paragraphs of that section, as referenced in section 1, and generally involve the Division's approval of and investment in ATMs by such banks."). See also Mass. Dep. Commissioner Op. 96-089 at 2 ("Approval of the ATM to be shared, but not approval of its establishment or the investments, is required to insure its compliance with the consumer protection measures incorporated in said chapter 167B by the Massachusetts Legislature.").

means and facilities, including ATMs, are not “branches.”²² The state’s categorization of a federal savings association’s electronic means or facilities as “branches” is not determinative, since federal law defines the term “branch” as applied to federal savings associations.²³ Nonetheless, because the Massachusetts statute defines certain electronic means and facilities to constitute branches and the Commissioner has notified federal savings associations that they must comply with the requirements, we address the preemption issue.

B. Preemption Analysis

The July 1 Opinion discusses general preemption principles and analyzes how these principles apply to particular state law provisions.²⁴ The discussion and analysis in the July 1 Opinion apply to your inquiry and now must also be considered in light of the new Electronic Operations rule.

In brief, the doctrine of federal preemption applies to three situations:

1. Congress expressly preempts state law.²⁵
2. Federal law occupies a particular field.²⁶ Federal courts, the OTS, and its predecessor, the Federal Home Loan Bank Board (“FHLBB”), have found that HOLA § 5(a)²⁷ and implementing regulations preempt state laws that purport to regulate the “activities or operations” of federal savings associations because Congress conferred on the FHLBB and OTS exclusive authority to regulate the operations of federal savings

²² 63 Fed. Reg. at 65,682 (to be codified at § 545.92); see also 12 C.F.R. § 545.92(a) (1998) (excluding “remote service units” from the definition of “branch office”).

²³ 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)).

²⁴ See generally, July 1 Op. at 5-14.

²⁵ Pacific Gas and Electric Co. v. State Energy Resources and Development Comm’n, 461 U.S. 190, 203-04 (1983); Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141, 152-53 (1982) (“de la Cuesta”).

²⁶ de la Cuesta, 458 U.S. at 153.

²⁷ 12 U.S.C.A. § 1464(a) (West Supp. 1998).

associations²⁸ and to establish a uniform regulatory scheme.²⁹ Moreover, OTS has affirmed through the rulemaking process its long-held position (and that of the FHLBB) that it totally occupies the field of the regulation of the operations of federal savings associations, including their deposit-taking and lending activities.³⁰

3. State law conflicts with federal law on one of two bases: (a) compliance with both federal and state laws is a physical impossibility, or (b) state law stands as an obstacle to the accomplishment of the objectives of Congress.³¹ The Supreme Court and other federal courts have found that FHLBB regulations preempted state law on the latter basis.³²

²⁸ See, e.g., Conference of Federal Savings and Loan Associations v. Stein, 604 F.2d 1256, 1260 (9th Cir. 1979) (“[T]he regulatory control of the [FHLBB] over federal savings and loan associations is so pervasive as to leave no room for state regulatory control The broad regulatory authority over the federal associations conferred upon the [FHLBB] by HOLA does wholly preempt the field of regulatory control over these associations.”), aff’d mem., 445 U.S. 921 (1980); FHLBB v. Empie, 628 F. Supp. 223, 225 (W.D. Okla. 1983) (“Congress intended the HOLA to preempt all state regulation over federally-chartered savings and loan institutions.”), aff’d, 778 F.2d 1447 (10th Cir. 1985); People v. Coast Federal Savings and Loan Ass’n, 98 F. Supp. 311, 316 (S.D. Cal. 1951) (“The FHLBB has adopted comprehensive rules and regulations governing the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.”). See also OTS Op. Chief Counsel, (January 18, 1996) (state reporting requirements preempted); OTS Op. Chief Counsel (October 11, 1991) (deposit taking); FHLBB Op. General Counsel (April 28, 1987) (lending and examination).

²⁹ See, e.g., de la Cuesta, 458 U.S. at 166 (“[T]he HOLA did not simply incorporate existing local loan practices. Rather, Congress delegated to the [FHLBB and now OTS] broad authority to establish and regulate ‘a uniform system of [savings and loan] institutions where there are not any now,’ and to ‘establish them with the force of the government behind them, with a national charter.’”) (quoting Home Owners’ Loan Act: Hearings on H.R. 4980 Before the House Comm. on Banking and Currency, 73d Cong. 15-17 (1933) (statement of Chariman Stevenson)); Conference of Federal Savings and Loan Associations v. Stein, 604 F.2d at 1258 (Prior to enactment of the HOLA, “the states had developed a hodgepodge of savings and loan laws and regulations, and Congress hoped that [the FHLBB and now OTS] rules would set an example for uniform and sound savings and loan regulation.”) (citation omitted).

³⁰ See 12 C.F.R. §§ 545.2 (Operations), 557.11(b) (Deposits) and 560.2(a) (Lending and Investment) (1998).

³¹ de la Cuesta, 458 U.S. at 153 and cases cited therein; see also Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Comm’r, 517 U.S. 25, 31-35 (1996); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

³² de la Cuesta, 458 U.S. at 156, 159 (preempting state limitation on due on sale practices that conflicted with FHLBB regulation); see also First Federal Savings and Loan Ass’n of Boston v. Greenwald, 591 F.2d 417, 425 (1st Cir. 1979) (preempting Massachusetts law requiring payment of interest on tax escrow account that conflicted with FHLBB regulation); Kupiec v. Republic Federal Savings and Loan Ass’n, 512 F.2d 147-50 (7th Cir. 1975) (preempting “common law” right to inspect and copy membership list that conflicted with FHLBB model by-law governing communication between members or depositors).

The area of electronic operations is rapidly changing as technological advances continually create new, and modify existing, means by which federal savings associations may provide services and interact with their customers. State and federal statutes and regulations affecting electronic operations, directly or peripherally, are also evolving. As indicated in the preamble to the Electronic Operations rule, OTS believes that it is particularly important to evaluate the interaction between state and federal regulation in this area on a case-by-case basis.³³

As further explained in that preamble, when evaluating preemption of a state law affecting a federal savings association's use of electronic means or facilities, OTS will focus first on the underlying activity affected by the state law. For example, if a state law affects a federal savings association's ability to take deposits or lend using electronic means and facilities, OTS will apply the preemption analysis set forth in Part 557 or Part 560 of OTS regulations for deposit or lending activities, respectively. In making a case-by-case evaluation, OTS will apply principles of preemption in this area consistently with its prior interpretations of OTS's authority under the HOLA.³⁴

The state law provisions in question restrict in various ways a federal savings association from performing functions through electronic means or facilities.³⁵ They are the types of restrictions that OTS has determined to be preempted in other contexts. Each of the state restrictions at issue has more than a merely incidental effect on federal savings associations' ability to provide financial services electronically and are contrary to the purposes of OTS's rule, as discussed below. The state statutes at issue here conflict with federal law in that they stand as obstacles to the accomplishment of federal objectives for the operations of federal savings associations.³⁶

³³ 63 Fed. Reg. at 65,681.

³⁴ See 12 C.F.R. §§ 545.2 (Operations), 557.11-557.13 (Deposits), and 560.2 (Lending and Investment) (1998).

³⁵ As discussed below, these activities include conducting operations such as deposit and lending activities, and establishing offices to conduct operations, without needing to get a state license, pay a state licensing fee, or submit to state examination.

³⁶ The July 1 Opinion reached similar conclusions about similar state laws using an "occupation of the field" analysis. That opinion relied in part upon 12 C.F.R. § 545.2 (1998), which reiterates the agency's plenary and exclusive authority over the operations of federal savings associations, including specifically the activities governed by Part 545 of OTS's regulations. See July 1 Op. at 8-9. Before the new Electronic Operations rule consolidated OTS's regulations on the electronic operations of both federally- and state-chartered savings associations for ease of reference, Part 545 contained regulations on certain electronic operations of federal savings associations. 12 C.F.R. §§ 545.138, 545.141, and 545.142 (1998). These regulations have been superseded and replaced by the new rule. However, the location of the regulations addressing the electronic operations of federal thrifts does not change their status as regulations adopted pursuant to OTS's plenary and

1. State approval requirements

The state law provisions that impose state approval requirements to conduct electronic branch operations, are preempted for the same reasons that OTS determined similar Iowa and Wyoming provisions to be preempted.³⁷ OTS regulations and opinions establish that state laws that purport to impose such requirements on federal savings associations in order to conduct business in a state are preempted.³⁸ Encompassed within each state's approval power would be the ability to require changes in the federal savings association's method of operation for that state and to deny a license for refusal to conform. But as OTS has previously stated, "[t]he power to license is the power to prohibit, and the states cannot prohibit what federal law has authorized."³⁹

Some of the provisions, *e.g.*, the detailed application requirements in § 4, also appear to be attempts by the state to monitor and examine federal savings associations. Such attempts are impermissible because, with rare exceptions not applicable here, only OTS has the authority to examine federal savings associations.⁴⁰

Further, § 5's prohibition against financial institutions investing in or contracting for the services of any organization that has not been approved by the Commissioner (including electronic branch and ATM activity services) impinges on the authority of federal savings associations to establish remote service units ("RSUs") under HOLA § 5(b)(1)(F).⁴¹ The restriction also impinges on the authority of federal savings associations under the Electronic Operations rule to use, or participate with others to use, electronic means or facilities to perform any function, or provide any product or

exclusive authority under HOLA §§ 4(a) and 5(a), 12 U.S.C.A. § 1463(a) and 1464(a) (West. Supp. 1998), to regulate the operations of federal savings associations. *See* 63 Fed. Reg. at 65,681 ("movement of the electronic operation provisions to a new part 555 does not indicate a substantive change").

³⁷ *See generally*, July 1 Op. at 10 and nn. 35-36 (and authorities cited therein).

³⁸ *See, e.g.*, OTS Op. Chief Counsel (September 2, 1997); OTS Mem. Chief Counsel (May 10, 1995); OTS Op. Sen. Dep. Chief Counsel (November 20, 1992); OTS Op. Prin. Dep. Chief Counsel (January 9, 1990); FHLBB Op. General Counsel (October 29, 1976). *See also* 12 C.F.R. §§ 545.2, 557.12(g), 560.2(b)(1) (1998).

³⁹ OTS Op. Chief Counsel (August 8, 1996) at 14; OTS Op. Chief Counsel (June 21, 1996) at 7.

⁴⁰ *See* July 1 Op. at 11 and nn. 38-39 (and authorities cited therein); OTS Op. Chief Counsel (January 18, 1996).

⁴¹ 12 U.S.C.A. § 1464(b)(1)(F) (West Supp. 1998).

service, as part of an authorized activity.⁴² Section 5's limitation on investing in and contracting with others restricts the ability of financial institutions to participate with others to provide electronic services, e.g., to contract with a regional or national servicer. Thus, the restriction conflicts with HOLA § 5(b)(1)(F) and OTS regulations and is preempted for federal savings associations.

2. Annual assessment requirement

The annual assessment requirement in § 24 is essentially a license fee. OTS has previously found such fees to be impermissible for the same reasons state licensing requirements are impermissible.⁴³ Such a fee conflicts with OTS's express regulatory policy of providing federal associations with maximum flexibility to exercise the authorities granted by the HOLA subject only to federal law and regulations.⁴⁴

3. Prohibition on establishment or use of electronic branches by financial institutions that do not have an office or place of business in the state

Section 3, ¶ 8, restricts the ability of a financial institution whose main office is located in another state from establishing and using electronic branches. It is preempted for the same reasons that OTS determined similar Iowa and Wyoming provisions to be preempted.⁴⁵ A long line of OTS opinions establishes that state statutes that purport to bar out-of-state federal savings associations from engaging in various authorized activities, including electronic operations, are preempted.⁴⁶

⁴² See 63 Fed. Reg. at 65,682 (to be codified at 12 C.F.R. § 555.200(a)). OTS's former regulations authorized federal savings associations to establish or use RSUs and participate with others in RSU operations, on an unrestricted geographic basis and to share RSUs controlled by others. See 12 C.F.R. § 545.141(b) and (f) (1998). In updating its electronic operations rule, OTS emphasized that all activities formerly authorized under the old rules continued to be authorized under the new rule. 63 Fed. Reg. at 65,674, 65,676.

⁴³ See July 1 Op. at 11-12 and nn. 41-42 (and authorities cited therein); OTS Op. Chief Counsel (September 2, 1997); OTS Mem. Chief Counsel (May 10, 1995).

⁴⁴ 12 C.F.R. §§ 557.11(b) and 560.2(a) (1998); 63 Fed. Reg. at 65,681; Implementation of New Powers; Limitation on Loans to One Borrower, 48 Fed. Reg. 23,632, 23,632 (May 23, 1983); OTS Op. Chief Counsel (January 9, 1990) (and authorities cited therein).

⁴⁵ See generally, July 1 Op. at 9-10.

⁴⁶ See id. and nn. 31-32 (and authorities cited therein); OTS Op. Dep. Chief Counsel (April 13, 1993) (state laws prohibiting lending by out-of-state institutions preempted); OTS Op. Chief Counsel (June 21, 1996) (state laws prohibiting marketing of trust services by out-of-state institutions preempted); OTS Op. Chief Counsel (August 8, 1996) (state laws prohibiting marketing of trust services and performance of other incidental activities by out-of-

For these reasons, the state law provisions discussed herein do not apply to federal savings associations that, by federal law, may operate under a uniform federal regulatory scheme. In reaching the conclusions set forth herein, we have relied on the factual information and materials submitted to us. 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 Evelyne Bonhomme, Counsel (Banking and Finance), at (202) 906-7052, or Richard Bennett, Counsel (Banking and Finance), at (202) 906-7409, if you have any further questions.

Attachment

cc: All Regional Directors
All Regional Counsel

state institutions preempted); OTS Op. Chief Counsel (November 30, 1990) (state laws prohibiting various agency office activities by out-of-state institutions preempted); 12 C.F.R. § 556.5 (1998) (subject to limitations and requirements specified in OTS regulations, federal savings associations may branch in any state or states and the exercise of this authority is preemptive of any state law purporting to address the subject of branching by a federal savings association).



Office of Thrift Supervision

Department of the Treasury

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

Chief Counsel

July 1, 1998

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RE: Preemption of State ATM Restrictions

Dear []:

This responds to your inquiry, on behalf of [], (the "Association"), regarding whether Iowa and Wyoming statutes and regulations that purport to restrict the establishment and operation of automated teller machines ("ATMs") on an interstate basis are preempted for federal savings associations.

In brief, we conclude that the state law provisions discussed herein do not apply to federal savings associations by reason of federal preemption.

I. Background

A. The Association's ATM Operations

The Association is a federal savings bank with its home office in []. You represent that the Association owns and operates ATMs at various locations nationwide, but has no branches or offices in Iowa or Wyoming. The Association's ATMs are installed in retail space rented from various landlords, frequently in shopping centers, shopping malls, or other public spaces. The ATMs are capable of performing a variety of account services, although they are mostly used to obtain cash.

You represent that the Association participates in, or is a member of, several ATM networks. The networks establish agreed upon conventions of electronic data formats, provide mechanisms for interchange of electronic data, and require membership agreements which assign duties and establish which institution bears the risk of loss at each stage of processing a transaction. The Association's customers may

access their accounts through ATMs owned and operated by the other financial institutions in the networks and customers of these other financial institutions may access their accounts through the Association's ATMs. The networks obviate the need for the Association to negotiate individual contracts with other financial institutions in the networks and enable the Association to allow customers of other institutions to access the cash dispensing feature of the Association's ATMs without subjecting the Association to significant financial risk.

You further represent that in certain states, including Wyoming, there are no networks or ATM sharing arrangements with significant operations in the state that allow participation by out-of-state institutions. As a result, out-of-state savings associations are limited in their ability to service their customers through ATMs and other electronic means and facilities in such states.

B. State Law Provisions

We have divided the state law provisions that are the subject of your inquiry into five categories discussed below.¹

1. Prohibitions on establishment or use of ATMs by financial institutions that do not have an office or place of business in the state

Iowa Code § 527.4(1) prohibits a "satellite terminal" (a term that includes an ATM²) from being established in the state except by a "financial institution"³ that: (1) has its principal place of business located in the state, (2) has a business location licensed in the state, or (3) has an office in the state and meets certain additional requirements. As noted above, the Association has no offices in Iowa. Thus, the

¹ Your March 24, 1998 letter specifically did not inquire about, and we do not address, state laws on transaction fees or the physical security of customers at ATM locations. In addition, while you inquired about other provisions of Iowa and Wyoming law and the laws of other states, in subsequent correspondences and telephone conversations we agreed to narrow the scope of your inquiry to the provisions discussed herein.

² A "satellite terminal means and includes" any machine or device that the financial institution and its customers use for transmission of electronic impulses in transactions which affect a customer asset account (e.g., checking and savings accounts, see Iowa Code § 527.2(6)), and are otherwise specifically permitted by applicable law. Iowa Code § 527.2(20). The definition includes machines or devices that are off the premises of a financial institution or, if it is available for use by customers of other financial institutions, on the premises of a financial institution. Id.

³ A "financial institution" includes a savings and loan association incorporated under state or federal law. Iowa Code § 527.2(9).

Association does not meet any of the requirements of Iowa Code § 527.4(1) to establish ATMs in Iowa.

Wyo. Stat. § 13-1-502(a) provides that a financial institution⁴ that has a place of business in the state may use “remote electronic terminals”⁵ in the conduct of its banking business. Wyoming state officials responsible for administering this law appear to interpret Wyo. Stat. 13-1-502(a) to mean that financial institutions that do not have a place of business in the state may only use remote electronic terminals in the state if they have an agreement with a Wyoming financial institution to share the use of a remote electronic terminal.⁶

2. State application, approval, registration, examination, and fee requirements

Iowa Code § 527.5(3) requires a financial institution controlling a satellite terminal to file an “informational statement” setting forth various detailed information regarding its ATM operations.⁷ Iowa Code § 527.5(7) provides that the state

⁴ A “financial institution” includes a “savings and loan association . . . chartered or organized under the laws of any state or of the United States.” Wyo. Stat. § 13-1-501(a)(ii).

⁵ A “remote electronic terminal” generally means an electronic device, including an ATM, that a “Wyoming financial institution or its customers may use to carry out electronic banking business, including the initiation of electronic transfers of money.” Wyo. Stat. § 13-1-501(a)(iv). A “Wyoming financial institution” includes a federally chartered or state-chartered savings and loan association having a place of business in Wyoming. Wyo. Stat. § 13-1-501(a)(i). The electronic transfer of money means “any transfer of money, other than a transaction initiated by a check, draft or other similar instrument, that is initiated through a remote electronic terminal for the purpose of ordering, instructing or authorizing a financial institution to debit or credit an account.” Wyo. Stat. § 13-1-501(a)(iii).

⁶ See State of Wyoming Department of Audit, Division of Banking publication, Remote Electronic Banking Facilities Use-Sharing Agreement Requirements (November 18, 1997) at 1 (“A person who owns remote electronic terminals (automated teller machines or cash dispensing machines) and who is not doing business as a Wyoming financial institution must secure a use-sharing agreement with a Wyoming financial institution.”)

Arguably, the Wyoming law could be read to allow the Association to operate and use ATMs in Wyoming even though it is not a “Wyoming financial institution.” Wyo. Stat. § 13-1-502(a) could be read simply as an affirmative grant of authority to financial institutions having a place of business in Wyoming to use electronic terminals. On its face, it does not purport to deny other financial institutions opportunities to use remote electronic terminals. Nor does Wyo. Stat. § 13-1-502(g), which governs use-sharing arrangements, indicate that such arrangements are the exclusive vehicle by which financial institutions that are not “Wyoming financial institutions” may use remote electronic terminals. This alternative interpretation, however, is clearly contrary to the interpretation given Wyoming law by the Wyoming Department of Audit and we therefore address the preemption issue.

⁷ This information includes the following: (1) the financial institution’s name and address; (2) the location of the satellite terminal; (3) a schedule of charges; (4) an agreement with the state administrator (*i.e.*, the state

administrator may approve or disapprove the informational statement based on any applicable law or rule. If approved, the administrator notifies the filer and operation of the satellite terminal may then commence immediately. If disapproved, the administrator notifies the filer of the grounds for disapproval within 30 days of the filing and operations are prohibited.⁸ Iowa regulations establish time limits for a financial institution to establish a satellite terminal once approval is received and requires a financial institution to give notice before discontinuing operations of a satellite terminal.⁹

Iowa law and regulations set the requirements for central routing units to be approved, in writing, and examined by the state administrator.¹⁰ The examinations require central routing units to confirm and certify that financial institutions and their data processing centers comply with applicable state requirements, such as transmitting transaction data in a manner that conforms to the central routing unit's electronic communication format standards and obtaining approval from the central routing unit before transmitting transaction data using new terminal types, new vendors, or hardware or software upgrades.¹¹

Wyo. Stat. § 13-1-502(j) provides that any person operating a remote electronic terminal must register it with the state banking commissioner and pay \$25 per year for each terminal. Wyo. Stat. § 13-1-502(g) provides that financial institutions that do not have a place of business in Wyoming may share use of remote electronic terminals with

superintendent of savings and loan associations, see Iowa Code § 527.2(2)) to comply with applicable state requirements; (5) a copy of a written agreement between the financial institution controlling the satellite terminal and the person controlling the physical location at which the satellite terminal is placed specifying all the terms and conditions; and (6) a statement or copy of any agreement between the controlling financial institution and a "data processing center" or "central routing unit" (as those terms are defined in Iowa Code §§ 527.2) by which transactions at the terminal will be received (unless the data processing center or central routing unit is operated by, or solely on behalf of, the controlling financial institution).

⁸ If no approval or disapproval notification is given within 30 days of filing, operation of the satellite terminal may commence when the 30 day period expires. Iowa Code § 527.5(7).

⁹ Specifically, Iowa Administrative Code § 187-10.5(527) provides that a financial institution that fails to establish a satellite terminal within 60 days of approval (or 90 days of filing if no notice is given), must reapply, and requires a financial institution to provide written notice to the administrator and central routing unit at least 15 business days before discontinuing service.

¹⁰ See Iowa Code § 527.9 and Iowa Administrative Code §§ 187-10.3(527) and 187-10.4(527).

¹¹ Iowa Administrative Code § 187-10.4(527), paragraph 10.4(3)(a). Other provisions on central routing units govern: (1) information to be included in an application, (2) procedures for incomplete applications, approval or disapproval of applications, and notice, (3) standards for accepting and routing transactions, (4) the composition of central routing units' boards of directors, and (5) compliance examinations by the administrator.

Wyoming financial institutions, but only with the approval of the banking commissioner.

3. ATM fee disclosure requirements

Wyo. Stat. § 13-1-502(g) provides that when Wyoming financial institutions share use of remote electronic terminals with other financial institutions, the consumer's transaction fee must be disclosed "visually by placard and by electronic display in such a manner as to allow a user to terminate or cancel the electronic transfer without incurring the transaction fee."

4. Requiring provision of access to ATMs on an equal basis to other financial institutions and their customers

Iowa Code § 527.5(2)(a) requires that financial institutions' satellite terminals be available for use on an equal basis by any other financial institution that has its principal place of business in the state and their customers holding administrator-approved access devices.¹²

5. Technical requirements for ATM operations

Iowa Code § 527.5(8) contains various technical requirements for processing of satellite terminal transactions. Specifically, satellite terminals must be directly connected to either a state-approved central routing unit or a data processing center that is directly connected to a state-approved central routing unit. Iowa Code § 527.5(8) further provides that if a satellite terminal is connected to a data processing center and the data processing center does not authorize or reject a transaction, the transaction generally must be immediately transmitted by the data processing center to a state-approved central routing unit.

II. Discussion

A. Preemption Principles

The doctrine of federal preemption, which has its roots in the Supremacy Clause of the United States Constitution,¹³ applies to three situations. First, the United States

¹² An "access device" is a card, code or other mechanism used by a customer to initiate a transaction through a satellite terminal to affect a customer asset account. Iowa Code § 527.2(1).

¹³ U.S. Const. art. VI, cl. 2.

Supreme Court has recognized that, within constitutional limits, Congress may expressly preempt state law.¹⁴ Second, absent explicit preemption language, congressional intent for federal preemption of state law may be inferred when federal law occupies a particular field.¹⁵ Third, even if federal law has not occupied a field, state law is nullified to the extent that it conflicts with federal law.¹⁶ Such conflict may arise when compliance with both federal and state laws is a physical impossibility or when state law stands as an obstacle to the accomplishment of the objectives of Congress.¹⁷ For preemption purposes, regulations promulgated by agencies of the United States have the same preemptive effect as federal statutes.¹⁸

Pursuant to §§ 4(a) and 5(a) of the Home Owners' Loan Act ("HOLA"),¹⁹ the Office of Thrift Supervision ("OTS") is authorized to provide for the safe and sound operation of federal savings associations and has exclusive and plenary authority to regulate all aspects of the operations of federal savings associations. Federal courts, the OTS, and its predecessor, the Federal Home Loan Bank Board ("FHLBB"), have found that § 5(a) of the HOLA, and implementing regulations of OTS and the FHLBB, preempt state laws that purport to regulate the "activities or operations" of federal savings associations because Congress conferred on the FHLBB and OTS exclusive authority to regulate the operations of federal savings associations.²⁰ Federal courts,

¹⁴ Pacific Gas and Electric Co. v. State Energy Resources and Development Comm., 461 U.S. 190, 203-04 (1983) ("Pacific Gas"); Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141, 152-53 (1982) ("de la Cuesta").

¹⁵ de la Cuesta, 458 U.S. at 153.

¹⁶ Id.

¹⁷ Id. and cases cited therein; see also Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

¹⁸ de la Cuesta, 458 U.S. at 153-54.

¹⁹ 12 U.S.C.A. §§ 1463(a) and 1464(a) (West Supp. 1998).

²⁰ See, e.g., Conference of Federal Savings and Loan Associations v. Stein, 604 F. 2d 1256, 1260 (9th Cir. 1979) ("[T]he regulatory control of the [FHLBB] over federal savings and loan associations is so pervasive as to leave no room for state regulatory control The broad regulatory authority over the federal associations conferred upon the [FHLBB] by HOLA does wholly preempt the field of regulatory control over these associations."), aff'd mem., 445 U.S. 921 (1980); FHLBB v. Empie, 628 F. Supp. 223, 225 (W.D. Okla. 1983) ("Congress intended the HOLA to preempt all state regulation over federally-chartered savings and loan institutions."), aff'd, 778 F.2d 1447 (10th Cir. 1985); People v. Coast Federal Savings and Loan Ass'n, 98 F. Supp. 311, 316 (S.D. Cal. 1951) ("The FHLBB has adopted comprehensive rules and regulations governing the powers and operations of every Federal savings and loan association from its cradle to its corporate grave."). See also OTS Op. Chief Counsel, (January 18, 1996) (state reporting requirements preempted); OTS Op. Chief Counsel (October 11, 1991) (deposit taking); FHLBB Op. General Counsel (April 28, 1987) (lending and examination).

including the Supreme Court, also have found that FHLBB regulations preempted state law where the law in question was an obstacle to the achievement of the objectives of federal regulations.²¹

OTS has affirmed through the rulemaking process its long-held position (and that of the FHLBB) that it totally occupies the field of the regulation of the operations of federal savings associations, including their deposit-taking and lending activities. Section 545.2 of OTS's regulations, originally adopted by the FHLBB in 1983 to implement the HOLA, states that OTS regulations at Part 545 ("Operations") are promulgated pursuant to the "plenary and exclusive authority of the [OTS] to regulate all aspects of the operations of Federal savings associations" and that the agency's exercise of such authority is "preemptive of any state law purporting to address the subject of the operations of a Federal savings association."²²

Courts have consistently ruled that when the federal government preempts by "occupying the field," no state law can operate in the area.²³ Similarly, OTS and the FHLBB have consistently opined that the federal regulatory scheme "occupies the field" of regulation affecting the operations of federal thrifts.²⁴

Section 5(b)(1)(F) of the HOLA²⁵ authorizes federal savings associations to establish remote service units, including ATMs, for the purpose of crediting or debiting accounts, crediting loan payments, and the disposition of financial transactions "as provided in regulations prescribed by the [OTS] Director." OTS regulations governing operations of federal savings associations specifically permit associations to establish

²¹ de la Cuesta, 458 U.S. at 156, 159 (preempting state limitation on due on sale practices that conflicted with FHLBB regulation); see also First Federal Savings and Loan Ass'n of Boston v. Greenwald, 591 F. 2d 417, 425 (1st Cir. 1979) (preempting Massachusetts law requiring payment of interest on tax escrow account that conflicted with FHLBB regulation); Kupiec v. Republic Federal Savings and Loan Ass'n, 512 F.2d 147-50 (7th Cir. 1975) (preempting "common law" right to inspect and copy membership list that conflicted with FHLBB model by-law governing communication between members or depositors).

²² 12 C.F.R. § 545.2 (1998).

²³ de la Cuesta, 458 U.S. at 141; Pacific Gas, 461 U.S. at 203-04.

²⁴ See, e.g., OTS Op. Acting Chief Counsel, Oct. 17, 1994 (lending); FHLBB Op. General Counsel (April 28, 1987) (lending and examination); OTS Op Chief Counsel (October 11, 1991) (deposit taking); and OTS Op. Chief Counsel (November 17, 1993) (branching), and cases cited therein.

²⁵ 12 U.S.C.A. § 1464(b)(1)(F) (West Supp. 1998).

and use ATMs, and to participate with other institutions in such operations on an unrestricted geographic basis.²⁶

Similarly, in the areas of the deposit activities and the lending activities of federal savings associations, OTS's regulations at Parts 557 (Deposits) and 560 (Lending and Investment) establish a comprehensive regulatory scheme and reflect the agency's traditional position that it occupies the regulation of those fields. This position is expressly reiterated in OTS regulations.²⁷

B. Application of Preemption Principles

The five categories of state law provisions discussed above are preempted for federal savings associations. While some of the reasons for preemption are specific to one or more particular categories, one reason – occupation of the field – applies equally to all five categories.

As discussed in Part II.A. above, OTS has occupied the field of regulation of the operations of federal savings associations generally, including electronic operations. Federal savings associations are chartered by OTS and derive their powers from the HOLA and from their federally-approved charters.²⁸ All five categories of state law provisions are preempted under OTS regulation § 545.2 because the state provisions impermissibly affect the operations of federal savings associations. Sections 545.138, 545.141, and 545.142 are the regulations OTS has issued to govern the electronic operations of federal savings associations. All of these state restrictions are, in essence, impermissible mechanisms designed to add an additional layer of regulation and to control the ability of federal savings associations to conduct operations in those states and deny federal savings associations flexibility.

The state application, approval, registration, examination, and fee requirements illustrate the analysis. These state requirements are preempted because the HOLA and OTS regulations (including the RSU regulation), set forth the conditions under which federal savings associations may engage in ATM operations. HOLA and OTS regulations authorize federal savings associations to engage in such operations,

²⁶ 12 C.F.R. § 545.141 (1998) (the "RSU regulation"). This regulation incorporates the requirements of the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C.A. § 1693 *et seq.*, and its implementing Regulation E, 12 C.F.R. Part 205. 12 C.F.R. § 545.141(b) (1998).

²⁷ See 12 C.F.R. §§ 557.11(b) and 560.2(a) (1998).

²⁸ See OTS Chief Counsel (January 9, 1990).

including establishing ATMs and participating with others in such operations, free from this category of state law requirements. A state may not impinge upon a federal savings association's authority by requiring state approvals as a condition to exercising such authority.

Furthermore, licensing and registration requirements are among the types of state laws that are specifically preempted for federal savings associations because federal law and regulation completely occupy the field for federal savings associations.²⁹ To the extent federal savings associations perform deposit and deposit-related functions through ATMs, these functions are governed by OTS's regulations on deposits.³⁰

Discussed below are additional reasons each category of state law provisions is preempted.

1. Prohibitions on establishment or use of ATMs by financial institutions that do not have an office or place of business in the state

The state law provisions that prohibit financial institutions that do not have an office or place of business in the state from establishing or using ATMs are preempted for federal savings associations because they may conduct their electronic operations without geographical restrictions. A long line of OTS opinions establishes that state statutes that purport to bar out-of-state federal savings associations from engaging in various authorized activities are preempted.³¹ OTS has specifically opined, with regard

²⁹ 12 C.F.R. § 557.12(g) (1998). OTS recently restated its long-standing position that it occupies the field of the regulation of deposits and that certain state laws regulating deposit activities are preempted for federal savings associations. 62 Fed. Reg. at 54,761-762 (preamble to Deposits rule).

³⁰ 12 C.F.R. Part 557 (1998).

Another category illustrating the analysis is state ATM fee disclosure requirements. OTS has previously stated that the disclosure of the terms of accounts "is part of the exclusive authority of the [agency] to regulate" to which occupation of the field applies. FHLBB Op. Acting Deputy General Counsel (May 7, 1986) at 3. See also FHLBB Op. General Counsel (April 28, 1987) at 4-5 (FHLBB regulations occupy the field with respect to disclosure and advertising of residential mortgage loans). Federal regulations administered by other federal agencies may also apply to federal savings associations. E.g., 12 C.F.R. Part 205 (1998) (Regulation E).

³¹ See OTS Op. Dep. Chief Counsel (April 13, 1993) (state laws prohibiting lending by out-of-state institutions preempted); OTS Op. Chief Counsel (June 21, 1996) (state laws prohibiting marketing of trust services by out-of-state institutions preempted); OTS Op. Chief Counsel (August 8, 1996) (state laws prohibiting marketing of trust services and performance of other incidental activities by out-of-state institutions preempted); and OTS Op. Chief Counsel (November 30, 1990) (state laws prohibiting various agency office activities by out-of-state institutions

to electronic operations, that federal savings associations may own and operate mobile ATM facilities (e.g., ATMs in vans), or participate with other financial institutions in mobile ATM operations, on an unlimited geographic basis.³²

The Office of the Comptroller of the Currency (“OCC”) recently reached a similar conclusion with respect to a Connecticut statute that purported to prohibit national banks not having a main office or branch in the state from establishing or owning ATMs.³³ The OCC concluded that the state law was preempted because it conflicted with the geographically unrestricted authority of national banks to establish and operate ATMs under section 24(Seventh) of the National Bank Act.³⁴

2. State application, approval, registration, examination, and fee requirements

The state law provisions that impose state application, approval, registration, examination, and fee requirements to conduct ATM operations are preempted. It is well established that state laws that purport to impose licensing or registration requirements, including the payment of a license or registration fee, on federal savings associations in order to conduct business in a state are preempted.³⁵ As OTS has previously stated, “[t]he power to license is the power to prohibit, and the states cannot prohibit what federal law has authorized.”³⁶

preempted). See also 54 Fed. Reg. 50,613 (December 8, 1989) (removing geographical restrictions on agency offices to enable federal savings associations to operate more efficiently and to compete more effectively).

³² OTS Mem. Dep. Chief Counsel (May 16, 1994) at 8 (The RSU regulation “does not require that RSUs be affixed to a building or other structure or remain in a fixed location.”); FHLBB Mem. General Counsel (May 31, 1984).

³³ OCC Interpretive Letter No. 821 (February 17, 1998).

³⁴ 12 U.S.C.A. § 24(Seventh) (West Supp. 1998).

³⁵ See, e.g., OTS Op. Chief Counsel (September 2, 1997); OTS Mem. Chief Counsel (May 10, 1995); OTS Op. Sen. Dep. Chief Counsel (November 20, 1992); OTS Op. Prin. Dep. Chief Counsel (January 9, 1990); FHLBB Op. General Counsel (October 29, 1976). See also OTS Op. Acting Chief Counsel (June 13, 1994) (state trust license requirement preempted); OTS Op. Dep. Chief Counsel (December 14, 1994) (state statute requiring license to enter the money order business preempted); and OTS Op. Chief Counsel (November 30, 1990) (state restriction on lending operations of out-of-state federal thrifts and requirement to obtain state mortgage banker licenses preempted).

³⁶ OTS Op. Chief Counsel (June 21, 1996) at 7; OTS Op. Chief Counsel (August 8, 1996) at 14.

While your inquiry concerns ATMs rather than electronic devices used for lending such as automated loan machines (“ALMs”), to the extent that the state requirements apply to the Association’s lending operations, the requirements are also preempted by OTS regulation 12 C.F.R. § 560.2(b)(1) (1998). This regulation specifically

In addition, some of the application and approval requirements appear to be impermissible attempts by the states to monitor and examine federal savings associations. In particular, in Iowa, state-approved central routing units must “confirm and certify” financial institutions to be performing in accordance with state requirements law.³⁷ While the Iowa regulation is ambiguous, the reference to a confirmation process appears, on its face, to suggest a form of examination of federal savings associations by state-approved central routing units. Only OTS, however, has the authority to examine federal savings associations.³⁸ States generally have no authority to monitor, examine, or inquire into the operations of a federal savings associations.³⁹

The OCC has reached a similar conclusion with respect to a Colorado statute that purported to: (1) subject national banks to state banking board rules, regulations, and orders governing the operations of ATMs, (2) require advance notice of any intended use or establishment of an ATM, and (3) give state regulators implied authority to “halt, prevent, or terminate” the use of an ATM. The OCC concluded that the statute was preempted because the state requirements, in effect, gave the state “visitorial powers over national banks, at least with respect to ATMs.”⁴⁰ The OCC noted that unless otherwise expressly provided by federal law, the OCC has the sole visitorial and enforcement authority over national banks.

Wyoming’s attempt to impose an annual fee for each ATM terminal is in the nature of a license fee, which we have previously found impermissible for the same reasons a state licensing requirement is impermissible.⁴¹ Such a fee conflicts with

preempts state laws purporting to impose requirements regarding licensing, registration, filings, or reports by creditors. See 61 Fed. Reg. 50,951, 50,965-967 (September 30, 1996) (preamble to Lending Rule).

³⁷ Iowa Administrative Code § 187-10.4(527).

³⁸ Under section 5(a) of the HOLA, OTS is authorized to “provide for the . . . examination, operation, and regulation” of federal savings associations. 12 U.S.C.A. § 1464(a) (West Supp. 1998).

³⁹ See, e.g., OTS Op. Chief Counsel (January 18, 1996). The HOLA provides a narrow exception regarding the trust operations of federal savings associations. HOLA § 5(n)(2) permits a state banking authority access to association exam reports to the extent they relate to the association’s trust department, but specifically provides that a state banking authority is not authorized to examine the books, records, and assets of an association. In addition, the OTS and its predecessor have permitted states to review records of or obtain reports from savings associations in very limited circumstances, such as where necessary for purposes of state escheat laws or tax collection. See, e.g., FHLBB Op. Deputy General Counsel (May 24, 1984) (escheat laws); OTS Op. Chief Counsel (May 10, 1995) (tax).

⁴⁰ OCC Interpretive Letter No. 789 (June 27, 1998).

⁴¹ See, e.g., OTS Op. Chief Counsel (September 2, 1997); OTS Mem. Chief Counsel (May 10, 1995).

OTS's express regulatory policy of providing federal associations with maximum flexibility to exercise the authorities granted by the HOLA subject only to federal law and regulations.⁴²

3. ATM fee disclosure requirements

The Wyoming state law provision that imposes ATM fee disclosure requirements (Wyo. Stat. § 13-1-502(g)) is preempted. Disclosure requirements are among the types of state laws that are specifically preempted under OTS regulations.⁴³ It is well established under OTS opinions that state laws that purport to impose disclosure requirements, including disclosure of fees, on federal savings associations in order to conduct business in a state, are preempted.⁴⁴

In addition, the state disclosure requirement directly conflicts with federal law requirements applicable to federal savings associations. OTS regulation § 545.141(b) incorporates regulations of the Board of Governors of the Federal Reserve implementing the EFTA requiring that the amount of a transaction fee for use of an "electronic terminal" (a term that includes an ATM⁴⁵) be "disclosed on a receipt and displayed on or at the terminal."⁴⁶ The preamble to this Federal Reserve rule clarified that displaying the fee "on or at the terminal" means "either on a sign posted at the terminal or on the terminal screen itself."⁴⁷ In contrast, the Wyoming law purports to require federal savings associations to disclose the fee visually by placard and by electronic display.

The OCC recently reached a similar conclusion in a matter involving a Colorado statute that purported to prohibit national banks from disclosing their name and logo on

⁴² OTS Op. Chief Counsel (January 9, 1990) at 8.

⁴³ 12 C.F.R. §§ 557.12(c) (Deposits) and 560.2(b)(9) (Lending) (1998). See also 12 C.F.R. § 545.2 (1998).

⁴⁴ See, e.g., OTS Mem. Chief Counsel (May 10, 1995) (mortgage lending disclosures); FHLBB Op. General Counsel (April 28, 1987) (same); FHLBB Op. General Counsel (November 12, 1985) (adjustable rate mortgage lending disclosures); FHLBB Mem. Deputy General Counsel (May 30, 1984) (second mortgage lending disclosures); OTS Op. Chief Counsel (January 3, 1991) (escrow account disclosures); OTS Op. Deputy Chief Counsel (October 18, 1994) (disclosure of credit reports); FHLBB Op. Acting Deputy General Counsel (May 7, 1986) (deposit account disclosures); FHLBB Op. General Counsel (November 13, 1985) (same).

⁴⁵ 12 C.F.R. § 205.2(h) (1998).

⁴⁶ 12 C.F.R. § 205.9(a)(1) (1998) (emphasis added).

⁴⁷ 61 Fed. Reg. 19,662, 19,665 (May 2, 1996) (emphasis added).

their off-site ATMs unless the names of all other banks whose customers may use the ATM are displayed with “equal prominence.”⁴⁸ The OCC concluded that this advertising restriction posed a significant burden on a national bank’s right to engage in the business of banking by means of an ATM as authorized by the National Bank Act and was preempted.⁴⁹

4. Requiring provision of access to ATMs on an equal basis to other financial institutions and their customers

The Iowa state law provision that requires financial institutions to provide access to ATMs on an equal basis to other financial institutions and their customers (Iowa Code § 527.5(2)(a)) is preempted. State restrictions on the way in which funds may be deposited or withdrawn from checking and savings accounts, and the terms on which funds are available, are among the types of state laws that are specifically preempted for federal savings associations.⁵⁰ These are precisely the types of restriction the Iowa provision imposes.

In addition, the state requirement may conflict with federal law requirements applicable to federal savings associations. While federal savings associations must comply with applicable federal requirements,⁵¹ there is no federal requirement that ATM services be made available to other financial institutions and their customers. Indeed, for states to mandate such access, would impede federal savings associations choosing to offer access to their ATMs only to their own customers, financial institutions in the same ATM networks, and those financial institutions’ customers.⁵²

⁴⁸ OCC Interpretive Letter No. 789 (June 27, 1997).

⁴⁹ The OCC reasoned that because of the large number of banks that would have to be listed, as a practical matter, the law required a national bank to remove its name or logo from its own off-premises ATMs. *Id.*

⁵⁰ *See* 12 C.F.R. §§ 557.12(b) (checking accounts), (d) (funds availability), and (e) (savings account orders of withdrawal) (1998). *See also* FHLBB Op. Acting Deputy General Counsel (May 7, 1986) (Illinois law requiring all financial institutions to offer a Basic Checking Account to any person 65 years or older who requests such an account was preempted for federal savings associations).

⁵¹ *See* the RSU regulation.

⁵² Federal savings association may believe such limits help ensure secure operations, support safe and sound practices, or assist in satisfying Know Your Customer requirements.

OTS has noted that federal savings associations generally have discretion in opening and maintaining savings accounts, so long as non-discrimination laws are observed. *See* 59 Fed. Reg. 61,247, 61,253 (November 30, 1994) (in mutual-to-stock conversions “federal associations have the authority to open and close deposit accounts, including those accounts of non-local depositors, provided they do not violate applicable laws

The OCC has reached similar conclusions. As discussed above, the OCC determined that a Colorado law that purported to require national banks to display, on their off-site ATMs, the names of all other banks whose customers may use the ATM with "equal prominence" was preempted as burdensome.⁵³

5. Technical requirements for ATM operations

The Iowa state law provision that imposes various technical requirements for processing ATM transactions (Iowa Code § 527.8) is preempted. The requirement that ATMs be connected to state-approved central routing units represents an impermissible attempt to regulate the operations of a federal savings associations, namely, the ability to transmit data and to contract with service providers. While OTS's RSU regulation and data-processing services regulation⁵⁴ require federal savings associations to meet various requirements, they do not subject federal savings associations to state requirements for using state-approved central routing units to conduct their electronic operations.⁵⁵

In reaching the conclusions set forth herein, we have relied on the factual information and materials submitted to us. 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.

that prohibit discrimination on the basis of age, race, sex, ethnic background, religion or any other impermissible category.")

⁵³ OCC Interpretive Letter No. 789 (June 27, 1998). In another opinion not involving preemption, the OCC has concluded that there is no statutory or regulatory requirement that a national bank accept all deposits that are proffered to it or open accounts for all who request them. OCC Interpretive Letter (May 5, 1996) (Unpublished letter available on LEXIS). The OCC noted safety and soundness concerns that could arise if national banks were required to comply with such a state requirement. The OCC reasoned:

If, for example, a bank were required to establish checking accounts for all who requested them, the bank might find itself unable to limit the risks it could incur in the collection and clearance of checks. Therefore, the bank must exercise its business judgment in determining whether to accept a deposit or permit the establishment of a checking account. Among the factors which the bank must consider in its determination is the maintenance of a safe and sound banking institution. *Id.*

⁵⁴ See 12 C.F.R. § 545.138 (1998).

⁵⁵ See *supra* note 36 and OTS regulation § 560.2(b)(10).

We trust that this is responsive to your inquiry. Please feel free to contact Richard Bennett, Counsel (Banking and Finance), at (202) 906-7409, or Vicki Hawkins-Jones, Assistant Chief Counsel, at (202) 906-7034, if you have any further questions.

Very truly yours,

A handwritten signature in cursive script that reads "Carolyn J. Buck". The signature is written in black ink and is positioned above the printed name and title.

Carolyn J. Buck
Chief Counsel

cc: All Regional Directors
All Regional Counsel