Office of the Comptroller of the Currency

Washington, DC 20219

Interpretive Letter #1169
July 2020

June 30, 2020

Subject: Applicability of Section 10(m)(3) of the Home Owners' Loan Act to Covered Savings Associations

Dear **[ ]**:

This responds to your letter of June 24, 2020, in which you request confirmation that a Federal savings association that elects to operate as a covered savings association under section 5A of the Home Owners' Loan Act (HOLA) is exempt from section 10(m) of HOLA and, accordingly, would not be subject to any provision of section 10(m)(3)(B) in the event the covered savings association does not meet the qualified thrift lender requirements described in section 10(m).[1]

As further explained below, we continue to conclude that section 5A of HOLA functions as a statutory exemption from the qualified thrift lender requirements described in section 10(m) of that Act, and a covered savings association operating under section 5A is not subject to the provisions of section 10(m)(3), including the provisions of section 10(m)(3)(B).

I. BACKGROUND

Federal savings associations serve an important role in the financial system by providing "for the deposit of funds and for the extension of credit for homes and other goods and services."[2] HOLA requires that Federal savings associations maintain this focus by imposing operational and activities restrictions on savings associations that are not "qualified thrift lenders."[3] A savings association is a qualified thrift lender if it qualifies as a domestic building and loan association under section 7701(a)(19) of the Internal Revenue Code or if its investments in qualified thrift investments equal or exceed 65 percent of its portfolio assets and continue to equal or exceed 65 percent of its portfolio assets on a monthly average basis in 9 out of every 12

[1] 12 U.S.C. § 1464a; 12 U.S.C. § 1467a(m).
[2] 12 U.S.C. § 1464(a).
[3] 12 U.S.C. § 1467a(m).

months (collectively, the QTL test).[4] Section 10(m) of HOLA sets out the restrictions that apply to a savings association that fails to become or remain a qualified thrift lender. The restrictions include limitations on new investments, branching, and dividends, as well as regulatory penalties.[5]

In 2018, Congress provided additional flexibility to Federal savings associations to shape their business models in response to changes in the financial services landscape. Section 206 of the Economic Growth, Regulatory Relief, and Consumer Protection Act amended HOLA to add a new section 5A (12 U.S.C. § 1464a). Section 5A allows a Federal savings association with total consolidated assets of $20 billion or less, as reported to the OCC as of December 31, 2017, to elect to operate as a covered savings association.

Under section 5A, a covered savings association has the same rights and privileges as a national bank that has its main office situated in the same location as the home office of the covered savings association. A covered savings association is also subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply to such a national bank. However, a covered savings association retains its Federal savings association charter and continues to be treated as a Federal savings association for purposes of governance, including procedures and requirements for incorporation, charters and bylaws, boards of directors, shareholders, and distribution of dividends. A covered savings association is also treated as a Federal savings association for purposes of consolidation, merger, dissolution, conversion, conservatorship, and receivership, as well as for other purposes determined by OCC regulation.

The OCC is responsible for administering section 5A.[6] This responsibility includes interpreting the statute and issuing implementing rules, such as those that determine the purposes for which a covered savings association continues to be treated as a Federal savings association.[7] The OCC issued a final rule implementing section 5A on May 24, 2019.[8] The preamble to the final rule specifies that "a covered savings association operating under section 5A is not subject to, among other things, the penalties in 12 U.S.C. 1467a(m)(3) for failing to meet the QTL test."[9]

II. DISCUSSION

The text, purpose, and legislative history of section 5A support the OCC's previously-stated conclusion that a covered savings association is not subject to the qualified thrift lender provisions of section 10(m) of HOLA.[10]

As the OCC noted in the preamble to the proposed rule implementing section 5A, a key purpose of the statute is to allow Federal savings associations to adjust their business models

[4] 12 U.S.C. § 1467a(m)(1).
[5] 12 U.S.C. § 1467a(m)(3)(B).
[6] 12 U.S.C. § 1464a(f).
[7] 12 U.S.C. § 1464a(d)(3). *See also, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984) (holding that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer).
[8] 84 Fed. Reg. 23991 (May 24, 2019).
[9] *Id*. at 23997.
[10] *Id*.

"without the additional burden and expense of changing charters."[11] This purpose is accomplished by allowing a covered savings association to retain its Federal savings association charter, while having the powers and responsibilities of a national bank. The retention of the Federal savings association charter eliminates the burden and expense of converting—at both the savings association and holding company levels—that would otherwise attend operating as a national bank.

To ensure that retention of the charter would not be misinterpreted to limit the authority of a covered savings association to operate as a national bank, section 5A explicitly states: "Notwithstanding any other provision of law, and except as otherwise provided in this section, a covered savings association shall…have the same rights and privileges as a national bank…."[12] As the OCC explained in the preamble to the final rule, a covered savings association is not able to exercise the rights and privileges conferred on it under section 5A while simultaneously being subject to the limitations of the QTL test.[13] The QTL test is a key difference between the rights and privileges of a Federal savings association and a national bank. Federal savings associations are required to comply with the QTL test set forth in section 10(m) of HOLA. There are no authorizations, terms, or conditions that require national banks to maintain status as qualified thrift lenders or that limit their activities or asset composition. If a covered savings association were subject to the QTL test, it would not "have the same rights and privileges as a national bank" within the meaning of section 5A.

The text of section 5A acknowledges that section 5A will have the effect of overriding some provisions of law that would otherwise apply to Federal savings associations, such as the QTL test. By using the term "notwithstanding any other provision of law" in section 5A(c) to grant covered savings associations the same rights and privileges as national banks, Congress explicitly chose to grant the rights and privileges, and apply the restrictions and penalties, of national banks to covered savings association, rather than the rights, privileges, restrictions, and penalties of savings associations. In this regard, section 5A operates as a statutory exemption for covered savings associations from the QTL test.[14]

This conclusion is consistent with legislative discussions of the purpose of an earlier, but related, version of section 5A. The House of Representatives passed H.R. 1426, the Federal Savings Association Charter Flexibility Act of 2017, in January 2018. The report accompanying the House Financial Services Committee's consideration of the bill noted that Federal savings associations historically enjoyed benefits not accorded national banks, but that, in exchange for these benefits, Federal savings associations were subject to statutory commercial lending limits and restrictions under the QTL test.[15] The committee's report noted, "Unlike federal savings associations, national banks enjoy the ability to engage in a wider range of lending activities because they are not required to focus on a particular area of lending and investment, and do not have specific asset-type lending constraints." The report notes approvingly that the proposal

[11] 83 Fed. Reg. 47102 (September 18, 2018). See also H.R. Rep. No. 115-530 (2018) at 2 ("Under current law, the only option for federal savings associations that want to offer products and services outside of these HOLA restrictions is to expend human and financial resources to convert to a national bank charter.").
[12] 12 U.S.C. § 1464a(b).
[13] 84 Fed. Reg. 23997.
[14] The OCC is not, by this statement, making a determination under section 10(m)(2) of HOLA.
[15] H.R. Rep. No. 115-530 (2018).

upon which the bill was based would give Federal savings associations "the ability to exceed the commercial and consumer loan limits that apply under HOLA."

Simply stated, a covered savings association is not a savings association subject to the provisions of section 10(m)(3) of HOLA, including the provisions of subparagraph (B) of section 10(m)(3).[16]

III. CONCLUSION

Based on the foregoing, the OCC continues to conclude that section 5A provides covered savings associations a statutory exemption from the QTL test, and, thus, a covered savings association operating under section 5A of HOLA is not subject to the provisions of section 10(m)(3) of that Act, including the provisions of section 10(m)(3)(B).

Sincerely,

/s/

Jonathan V. Gould
Senior Deputy Comptroller and Chief Counsel

[16] Although covered savings associations are not subject to section 10(m)(3)(B) of HOLA, they are subject to section 5A of that Act and, as a result, are subject to the same restrictions on activities and branching as national banks (except as expressly provided in section 5A and 12 CFR part 101).