



P-2006-3

Office of Thrift Supervision
Department of the Treasury

John E. Bowman, Chief Counsel

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6372

June 9, 2006

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Re: Preemption of State Gift Card Restrictions

Dear []:

This responds to your recent letter on behalf of [] [] (the “Association”). Your letter asks us for a legal opinion on whether a federal savings association must comply with five types of state law restrictions on gift cards. In sum, we conclude that federal law preempts these restrictions for federal savings associations and their operating subsidiaries.

Background

You represent that the Association offers “open loop” gift cards, which means that the cards’ acceptance is not limited to particular retailers. Customers can buy the gift cards using a Visa or MasterCard credit or debit card through Internet web sites the Association operates.¹ The cards are accepted where signature-based – as opposed to Personal Identification Number (“PIN”) based – Visa or MasterCard debit cards are accepted. The gift cards do not have PINs. They cannot be used for cash withdrawals or cash advances at Automated Teller Machines (“ATMs”) or elsewhere.²

¹ You indicate that, in the future, customers may be able to buy them at the Association’s branches and fund the cards through a transfer or withdrawal from an existing deposit account at the Association.

² You indicate that the gift cards are offered through two programs, which only differ in minor respects not relevant to our analysis. The cards offered through one program (1) are accepted where signature-based *MasterCard* debit cards are accepted and (2) are only available to customers who already hold a Visa or MasterCard credit or debit card *issued by the Association* and can only be purchased using those cards. In contrast, the cards offered through the other program (1) are accepted where signature-based *Visa* debit cards are accepted and (2) can be purchased using any Visa or MasterCard credit or debit card even if not issued by the Association.

The gift cards are “non-reloadable,” which means that value cannot be added to them after purchase. Rather, they are sold in various denominations between \$25 and \$500. The cards come with certain fees such as a fee for the initial sale, a card shipping fee, a monthly service fee, a fee for receiving the remaining funds on the card via check, and a replacement fee for a card that is lost or stolen. The cards also have an expiration date.

You make several additional representations about protections the Association affords to the customer. The fees and expiration date, as well as the other rules, restrictions, and terms of the gift cards, including privacy rights, are clearly and prominently disclosed. The fees and expiration date are part of the terms and conditions that the purchaser must accept before completing the purchase on the Association’s web site. Copies of the disclosures are also delivered with the cards. The expiration date is on the front of the card. A notice about fees, along with the web site address and toll-free number for fee and transaction information, is on the back of the card. The Association provides balance and transaction history information to the customer free of charge through both a website and a toll-free telephone number. Depending on the merchant, the card holder may be able to pay for a purchase using the card for partial payment with the remainder paid using another means. The Association relieves the customer of any unauthorized merchant charges if the card is lost or stolen as long as the customer reports the loss or theft immediately. The Association also maintains procedures for resolving errors and disputes.

You further describe the many safeguards the Association has in place to ensure that the Association complies with all Bank Secrecy Act requirements. The Association maintains records reflecting the identities of the purchasers and, if the customer is purchasing the gift card for another person, the identity of the intended recipient. The Association only accepts U.S. addresses as billing or mailing addresses. If the value of the gift card is below a certain threshold, the Association will mail it to the purchaser’s address or the recipient’s address; if the value is above the threshold, the Association will only mail it to the purchaser’s address.³ Further, the cards are not sold through third party outlets.

You ask about preemption of five types of state laws, citing examples of each:

³ The Association’s safeguards vary somewhat depending on which gift card program is involved. For one program (1) the threshold is \$100 and (2) as part of the sales transaction, the Association gathers, among other information, the buyer’s name, address, date of birth, and social security number, and takes steps to verify the identity of the buyer in compliance with the Association’s customer identification program (“CIP”) and checks the buyer’s name against relevant Office of Foreign Assets Control (“OFAC”) and related lists. For the other program (1) the threshold is \$200 and (2) the Association already has sufficient information on the identity of the buyer because the cards are only sold to existing Association cardholders so no further CIP review is done on the buyer at the time of purchase, although the buyer is subject to an OFAC check. For both programs, if the gift card is bought for another person, the Association gathers the recipient’s name, address, and home telephone number, and checks the recipient’s name against the relevant OFAC and related lists.

1. Licensing requirements for those who issue or sell gift cards;⁴
2. Disclosure requirements such as on fees and expiration dates;⁵
3. Fee restrictions such as on issuance fees, inactivity fees, maintenance fees, and redemption fees;⁶
4. Expiration date restrictions such as requiring the cards to remain valid for a minimum number of years or in perpetuity;⁷ and
5. Requirements to allow the cardholder to redeem the card for cash, such as where the card balance drops below a certain value or for a guaranteed percentage of the card's face value.⁸

Some of these state laws are part of broader state laws on unfair or deceptive acts or practices or abandoned property. Others are separate state laws governing gift cards, gift certificates, and other types of devices.

Discussion

Authority to Issue Gift Cards

While your question asks about preemption, we preface our response by confirming that federal savings associations and their operating subsidiaries⁹ may issue the types of gift cards about which you inquire. Several legal bases support this conclusion.

First, issuance of gift cards falls within a federal savings association's funds transfer service authority. OTS regulation § 545.17 authorizes federal savings

⁴ Michigan Sale of Checks Act, Mich. Comp. L. § 487.903.

⁵ Ariz. Rev. Stat. § 44-7402(1); Cal. Civ. Code § 1749.45(a); Official Code Ga. § 10-1-393(b)(33)(A); 33 Me. Rev. Stat. § 1953.1(G-1); Md. Comm. L. § 14-1320(b)-(d) (effective July 1, 2006); Mass. Gen. L. ch. 200A, § 5D; N.Y. Gen. Bus L. § 396-i(2-a) and (3); and 8 Vt. Stat. §§ 2702 & 2705.

⁶ Iowa Code § 556.9(2); N.H. Rev. Stat. § 358-A:2(XIII); N.Y. Gen. Bus. L. § 396-i(5)(b); R.I. Gen. L. § 6-13-12; and 8 Vt. Stat. § 2703(a).

⁷ Conn. Gen. Stat. § 42-460(a); 33 Me. Rev. Stat. § 1953.1(G-1); Mass. Gen. L. ch. 200A, § 5D; N.H. Rev. Stat. § 358-A:2(XIII); R.I. Gen. L. § 6-13-12; and 8 Vt. Stat. § 2702.

⁸ Mass. Gen. L. ch. 200A, § 5D; R.I. Gen. L. § 6-13-12; and 8 Vt. Stat. § 2704.

⁹ After notifying OTS in accordance with 12 C.F.R. § 559.11, a federal savings association operating subsidiary may engage in any activity that a federal savings association may conduct directly. 12 C.F.R. § 559.3(e)(1) (2006).

associations to engage in funds transfer services.¹⁰ Specifically, the regulation allows a federal savings association to transfer customers' funds from any account of the customer (including a line of credit) at the association or at another financial intermediary to third parties or other accounts of the customer on the customer's order or authorization using any mechanism or device. The regulation further stipulates that federal savings associations may charge a fee for this service and that the transfer may occur by any means conforming to applicable law and established commercial practices. While the regulation cites cashier's checks as an example of a permitted funds transfer mechanism, OTS's Electronic Operations rule allows federal savings associations to engage in any authorized activity through electronic means that they may conduct through more traditional delivery mechanisms.¹¹

Here, the Association transfers funds from a customer's "account"¹² when the customer purchases the gift card. That account is either a deposit account accessed through a Visa or MasterCard debit card or a line of credit accessed through a Visa or MasterCard credit card.¹³ When the customer uses the gift card to make purchases, the Association transfers funds to third parties upon the customer's order, using the electronic mechanism of the gift card accessing a payment network.

Second, issuance of gift cards is subsumed within deposit-related powers. Section 5(b) of the Home Owners' Loan Act ("HOLA") authorizes federal savings associations, subject to the terms of its charter and OTS regulations, to raise funds through deposit, share or other accounts and issue passbooks, certificates, or other evidence of accounts.¹⁴ OTS's Deposits rule is consistent with the statutory language.¹⁵

Here, the gift card functions much like a deposit account. The customer's purchase of the gift card operates like depositing money into an account. The customer's

¹⁰ 12 C.F.R. § 545.17 (2006). The United States Court of Appeals for the Ninth Circuit has ruled that a similar activity, operating automated teller machines ("ATMs"), is a funds transfer service under this OTS regulation. *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 560-61 (9th Cir. 2002).

¹¹ 63 Fed. Reg. 65,673, 65,675 (Nov. 30, 1998) (quoting 12 C.F.R. § 555.200(a)).

¹² OTS regulation § 561.2 defines "account" to include a savings or demand account. 12 C.F.R. § 561.2 (2006). The definition of "account" in § 561.2 applies to § 545.17. *See* 12 C.F.R. § 561.1 (2006).

¹³ As noted above, for one of the gift card programs, the Association must issue the Visa or MasterCard debit or credit card used to buy the gift card. For the other program, any financial institution may issue the Visa or MasterCard debit or credit card used to buy the gift card.

¹⁴ 12 U.S.C.A. § 1464(b)(1) (West 2001).

¹⁵ 12 C.F.R. § 557.10 (2006).

use of the gift card operates like withdrawing money from an account using an access device such as a typical debit card. The Association retains the funds gift card purchasers provide in exchange for the gift cards in an omnibus account for the benefit of all gift cardholders.¹⁶

Third, issuance of gift cards is an incidental power of federal savings associations. OTS has previously concluded that under the incidental powers doctrine, a federal savings association may market and sell another type of stored value card – prepaid telephone cards – as agent for a telephone company.¹⁷ The traditional four-part incidental powers test applied to prepaid telephone cards applies equally to the issuance of gift cards. One, the activity relates to the financial intermediary role that federal savings associations were intended to play as discussed above. Two, the activity is similar to, if not part of, expressly authorized activities, such as funds transfer services and deposit-related services as also discussed above.¹⁸ Issuing gift cards facilitates customers’ ability to pay bills and expenses, just as issuing traveler’s checks and credit cards, two authorized activities for federal savings associations, facilitate paying bills and expenses.¹⁹ Three, offering gift cards is consistent with Congress’s intent that federal savings associations meet the needs of consumers in convenient “one-stop family financial centers.”²⁰ Four, it is an activity necessary to enable federal savings association to remain competitive and relevant in the modern economy. The Office of the Comptroller of the Currency, for example, has authorized similar activities for national banks and their operating subsidiaries.²¹

¹⁶ Section 557.10 states that 12 C.F.R. pts. 204 (Regulation D, “Reserve Requirements of Depository Institutions”) and 230 (Regulation DD, “Truth In Savings”) apply to “deposit activities.” This opinion, however, does not address whether gift cards are subject to those regulations. For guidance on the application of Regulations D and DD to electronic banking, *see* OTS Compliance Handbook section 370 and the FFIEC Interagency Guidance on Electronic Financial Services and Consumer Compliance contained therein, *available at* <http://www.ots.treas.gov/docs/4/48710.pdf>.

¹⁷ OTS Op. Chief Counsel Aug. 29, 1996.

¹⁸ The activity also bears some similarities to secured credit card lending. The customer’s purchase of the gift card could be likened to the security a customer provides for a secured credit card. The customer’s use of the gift card could be likened to drawing on a line of credit. Since gift cards are not underwritten the way credit cards are underwritten, they are available to customers who would not qualify for a credit card and can serve as a substitute for a credit card in many circumstances.

¹⁹ FHLBB Op. Gen. Couns., Nov. 24, 1965 (traveler’s checks); FHLBB Ops. Dep. Ch. Couns., Mar. 16, 1988 and Feb. 1, 1982 (same); 12 U.S.C. § 1464(c)(1)(T) (West 2001) (credit cards); and 12 C.F.R. §§ 560.3 and 560.30 (2006) (same).

²⁰ S. Rep. No. 96-368, at 13 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 236, 248.

²¹ *See* 12 C.F.R. §§ 5.34(e)(v)(Y) and 7.5002(a)(3) (2006); *accord* OCC Conditional Approval No. 658, Oct. 13, 2004. *See also* OCC Conditional Approval No. 220, Dec. 2, 1996 (national banks may acquire membership interests in limited liability corporations that operate open stored value card systems); OCC Interpretive Letter No. 855,

Federal Preemption

Turning to federal preemption, as OTS has explained in prior opinions, the doctrine of federal preemption has its roots in the Supremacy Clause of the United States Constitution²² and applies to three situations. First, the United States Supreme Court has recognized that, within constitutional limits, Congress may expressly preempt state law.²³ Second, absent explicit preemption language, congressional intent for federal preemption of state law may be inferred when federal law occupies a particular field.²⁴ Third, even if federal law has not occupied a field, state law is nullified to the extent that it conflicts with federal law.²⁵ 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.²⁶ For preemption purposes, regulations promulgated by agencies of the United States have the same preemptive effect as federal statutes.²⁷ The same preemption principles are equally applicable to federal savings association operating subsidiaries.²⁸

Under §§ 4(a) and 5(a) of the Home Owners' Loan Act ("HOLA"),²⁹ 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, OTS, and its predecessor, the Federal Home Loan Bank Board ("FHLBB"), have all 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

Mar. 1, 1999 (same); OCC Conditional Approval No. 568, Dec. 31, 2002 (national bank operating subsidiary may invest in a joint venture that will develop and market a stored value system); and OCC Advisory Letter No. 2004-6, May 6, 2004 (national banks may offer payroll cards and other pre-paid payment services).

²² U.S. Const. art. VI, cl. 2.

²³ *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 Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982) ("*de la Cuesta*").

²⁴ *de la Cuesta*, 458 U.S. at 153.

²⁵ *Id.*

²⁶ *Id.* and cases cited therein; *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

²⁷ *de la Cuesta*, 458 U.S. at 153-54.

²⁸ 12 C.F.R. § 559.3(n)(1) (2006). *See, e.g.*, OTS Op. Chief Counsel, July 26, 1999 and authorities cited therein.

²⁹ 12 U.S.C.A. §§ 1463(a) and 1464(a) (West 2001).

conferred on the FHLBB and OTS exclusive authority to regulate the operations of federal savings associations.³⁰ Federal courts, 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.³¹

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's Operations rule at Part 545 is 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."³²

Courts have consistently ruled that when the federal government preempts by "occupying the field," no state law can operate in the area.³³ Similarly, OTS and the FHLBB have consistently opined that the federal regulatory scheme "occupies the field" of regulation affecting the operations of federal thrifts.³⁴ Indeed, OTS has specifically

³⁰ See, e.g., *Conference of Federal Savings and Loan Ass'ns 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 Jan. 18, 1996 (state reporting requirements preempted); OTS Op. Chief Counsel Oct. 11, 1991 (deposit taking); FHLBB Op. General Counsel Apr. 28, 1987 (lending and examination).

³¹ *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).

³² 12 C.F.R. § 545.2 (2006).

³³ *de la Cuesta*, 458 U.S. at 141; *Pacific Gas*, 461 U.S. at 203-04.

³⁴ See, e.g., OTS Op. Acting Chief Counsel Oct. 17, 1994 (lending); FHLBB Op. General Counsel Apr. 28, 1987 (lending and examination); OTS Op. Chief Counsel Oct. 11, 1991 (deposit taking); and OTS Op. Chief Counsel Nov. 17, 1993 (branching), and cases cited therein.

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

concluded that state laws that purport to regulate activities authorized by OTS's fund transfer services regulation in § 545.17 are expressly preempted by OTS regulation § 545.2.³⁵

All five categories of state law provisions governing gift cards that you inquire about are preempted for federal savings associations. OTS has occupied the field of regulation of the operations of federal savings associations generally, including electronic operations and deposit-taking activities. Federal savings associations are chartered by OTS and derive their powers from the HOLA and from their federally-approved charters.³⁶

While none of OTS's legal opinions on preemption have dealt with the type of gift cards in question here, one has dealt with funds transfer services and several have dealt with electronic means and facilities such as ATMs and ATM access devices.³⁷ These opinions have already addressed many of the same types of state restrictions that are the subject of your inquiry. We follow the same analysis here as in those prior opinions in concluding that HOLA and OTS regulations preempt the state restrictions in question.

All five categories of state law provisions are preempted under OTS regulation § 545.2 because the state restrictions impermissibly affect the 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 licensing requirements illustrate the analysis. States may not impinge upon a federal savings association's authority to conduct any authorized activity by requiring state approvals as a condition to exercising such authority. 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."³⁸ Licensing requirements are among the types

and reflect the agency's traditional position that it occupies the regulation of those fields. This position is expressly reiterated in OTS regulations. *See* 12 C.F.R. §§ 557.11(b) and 560.2(a) (2006).

³⁵ OTS Op. Dep. Chief Counsel Dec. 14, 1994, at 3 n.4.

³⁶ *See* OTS Op. Chief Counsel Jan. 9, 1990.

³⁷ *See* OTS Op. Dep. Chief Counsel Dec. 14, 1994; OTS Ops. Chief Counsel July 1, 1998, Nov. 22, 1999, and Dec. 7, 1999; and OTS Mem. Chief Counsel Dec. 22, 1998.

³⁸ *See, e.g.*, OTS Mem. Chief Counsel Dec. 22, 1998, at 10 and OTS Op. Chief Counsel July 1, 1998, at 10 and authorities cited therein.

of state laws that are specifically preempted for federal savings associations.³⁹ Indeed, OTS has previously concluded that state licensing requirements to conduct fund transfer services authorized under § 545.17 are expressly preempted by § 545.2.⁴⁰

State gift card disclosure requirements also illustrate the analysis. OTS and the FHLBB have 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.⁴¹ It is well established that state laws that purport to impose disclosure requirements, including disclosure of fees, on federal savings associations are preempted.⁴²

Fee restrictions are also among the types of state laws that are specifically preempted for federal savings associations.⁴³ Since issuing gift cards is a funds transfer service, the state fee restrictions are in direct conflict with OTS regulation § 545.17, which allows federal savings associations to charge a fee for such services. Indeed, the United States Court of Appeals for the Ninth Circuit has ruled that HOLA and OTS regulations preempt local ordinances prohibiting fees for funds transfer services. While that case involved a fee for a different funds transfer service (ATM fees for non-customers), the court reasoned that operating ATMs is a funds transfer service under OTS regulation § 545.17 and that regulation expressly authorizes federal savings associations to charge a fee for such services. Further, OTS regulation § 545.2 preempts the field of regulation of the operations federal savings associations, including funds transfer services. Thus, the court concluded that HOLA and OTS regulations preempt local ordinances limiting ATM fees.⁴⁴ The state restrictions on fees for gift card funds

³⁹ See, e.g., OTS Mem. Chief Counsel Dec. 22, 1998, at 10-11 and OTS Op. Chief Counsel July 1, 1998, at 10-12 and authorities cited therein. To the extent that issuing gift cards is a deposit-related activity, OTS’s preemption regulation at 12 C.F.R. § 557.12(g) (2006) (preemption of state laws governing licensing or registration requirements) would apply directly.

⁴⁰ OTS Op. Dep. Chief Counsel Dec. 14, 1994.

⁴¹ FHLBB Op. Acting Deputy General Counsel May 7, 1986, at 3. See also OTS Op. Chief Counsel July 1, 1998, at 9 n.30 and FHLBB Op. General Counsel Apr. 28, 1987, at 4-5.

⁴² See, e.g., OTS Op. Chief Counsel July 19, 1998 (ATM fee disclosures) and authorities cited therein. To the extent that issuing gift cards is a deposit-related activity, OTS’s preemption regulation at 12 C.F.R. § 557.12(c) (2006) (preemption of state laws governing disclosure requirements) would directly apply, in addition to § 545.2.

⁴³ See, e.g., OTS Ops. Chief Counsel Nov. 22, 1999, at 3-14 (ATM fees) and Dec. 7, 1999 (same) and authorities cited therein. To the extent that issuing gift cards is a deposit-related activity, OTS’s preemption regulation at 12 C.F.R. § 557.12(f) (2006) (preemption of state laws governing service charges and fees) would directly apply, in addition to § 545.2.

⁴⁴ *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 560-61 (9th Cir. 2002).

transfer services would likewise be preempted.⁴⁵ State imposed expiration date restrictions and requirements for redemption of the gift cards for cash at the cardholder's request are also preempted.⁴⁶

Preemption of these state law provisions does not create a regulatory vacuum. OTS conducts regular examinations of thrifts for safety and soundness and compliance with established consumer protections. OTS expects the Association to ensure that customers receive all pertinent information about the cards such as how they work, fees, and expiration dates. Federal savings associations issuing gift cards are subject to a host of federal requirements and consumer protections. Among them are:⁴⁷

1. OTS's Funds Transfer Services rule, which requires the activity to conform to applicable laws and established commercial practices;⁴⁸
2. OTS's Electronic Operations rule, which requires numerous precautions including, identifying, assessing and mitigating risk, implementing security measures, and complying with security device requirements in 12 C.F.R. part 568;⁴⁹
3. OTS's Advertising rule, which prohibits savings associations from using any advertising or promotional material or making any representation that is inaccurate in any particular or that in any way misrepresents the services offered;⁵⁰

⁴⁵ See, e.g., OTS Op. Chief Counsel July 8, 1992 (preemption of state prohibition on dormancy charges on inactive deposit accounts); FHLBB Op. Dep. General Counsel Oct. 9, 1986 (same).

⁴⁶ To the extent that issuing gift cards is a deposit-related activity, OTS's preemption regulation at 12 C.F.R. § 557.12(b) (2006) (preemption of state laws governing abandoned and dormant accounts) would directly apply, in addition to § 545.2.

⁴⁷ Your letter comments specifically on whether regulations of the Board of Governors of the Federal Reserve ("Federal Reserve") and the Federal Deposit Insurance Corporation ("FDIC") should apply to gift cards. This opinion does not address whether the Electronic Funds Transfer Act ("EFTA") and Federal Reserve Regulation E, or the Federal Deposit Insurance Act, 12 U.S.C. § 1813(l) (West 2001) and the FDIC's Deposit Insurance Coverage rule, 12 C.F.R. pt. 330 (2006), apply to gift cards. As your letter notes, the Federal Reserve and FDIC have issued guidance. See, e.g., 71 Fed. Reg. 1473, 1475 (Jan. 10, 2006) and 70 Fed. Reg. 45571, 45576, 45578 (Aug. 8, 2005). As your letter also notes, OTS Compliance Activities Handbook section 370 and the Interagency Guidance on Electronic Financial Services and Consumer Compliance republished therein contain additional guidance on the application of Regulation E and a wide array of other consumer protection regulations to electronic technologies including stored value cards. See www.ots.treas.gov/docs/4/48709.pdf.

⁴⁸ 12 C.F.R. § 545.17 (2006).

⁴⁹ 12 C.F.R. § 555.210 (2006).

⁵⁰ 12 C.F.R. § 563.27 (2006).

4. OTS's Nondiscrimination rule, which prohibits discrimination not just in lending but in other services as well;⁵¹
5. Section 5 of the Federal Trade Commission Act, which prohibits, among other things, unfair or deceptive acts or practices in or affecting commerce;⁵² and
6. The Bank Secrecy Act and implementing regulations.⁵³

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. If you have further questions, please contact Richard Bennett, Counsel, at (202) 906-7409.

Sincerely,

/s/

John E. Bowman

cc: Regional Directors
Regional Counsel

⁵¹ 12 C.F.R. pt. 528 (2006).

⁵² 15 U.S.C.A. § 45 (West 1997). OTS may take enforcement action against a savings association for violating § 5 under § 8 of the Federal Deposit Insurance Act. OTS Op. Chief Counsel Oct. 25, 2004 at 10 n.37. The Federal Trade Commission has recently highlighted the need for gift card issuers to provide consumers clear and conspicuous disclosures, particularly of fees and expiration dates. *See* Letter from FTC Chairman to Hon. Joe Barton, Feb. 14, 2006.

⁵³ 12 U.S.C.A. 1818, 1829b, and 1951-1959 (West 2001 & Supp. 2005); 31 U.S.C.A. 5311 *et seq.* (West 2003 & Supp. 2005); 12 C.F.R. §§ 563.177 and 563.180 (2006); 31 C.F.R. pt. 103 (2005).