Authority of a Federal Savings Association to Perform Banking Activities through Agents Without Regard to State Licensing Requirements

Summary Conclusion: State licensing and registration requirements that do not apply to a federal savings association also do not apply to the association's agents when the agents perform marketing, solicitation, and customer service activities related to the association's deposit and loan products and services and other authorized banking powers.

Date: October 25, 2004

Subjects: Home Owners' Loan Act/Savings Association Powers

P-2004-7

P-2004-7

Office of Thrift Supervision
Department of the Treasury
John E. Bowman, Chief Counsel
1700 G Street, N.W., Washington, DC 20552 • (202) 906-6372

October 25, 2004

[ ]
[ ]
[ ]
[ ]

Re: Authority of a Federal Savings Association to Perform Banking Activities through Agents Without Regard to State Licensing Requirements

Dear Mr. [ ]:

This responds to your recent inquiry on behalf of [ ], a federal savings association ("Association") and a wholly-owned subsidiary of [ ] ("Affiliate"). The Association uses agents to perform certain marketing, solicitation, and customer service activities related to the Association's authorized deposit and loan products and services, and other authorized banking powers. The Association controls the agents' performance of activities on behalf of the Association. You ask whether such agents are subject to state licensing or registration laws by reason of performing such activities on behalf of, and as agents for, the Association.

In brief, we conclude that when the Association uses agents in the manner the Association has described to perform marketing, solicitation, and customer service activities related to the Association's deposit and loan products and services and other authorized banking powers, state licensing and registration requirements that do not apply to the Association also do not apply to the Association's agents solely because they perform those activities for the Association.

I. Background

A. The Association's Authorized Activities

The Association offers a variety of deposit and loan products and services on a nationwide basis. These include traditional thrift products and services, such as deposit accounts, various types of certificates of deposit,[1] checking accounts, money market accounts, health savings accounts, other transaction accounts, mortgage loans, proprietary credit and debit cards, car loans and leases, consumer and other loans, and servicing of benefit management accounts for insurance and annuity beneficiaries. The Association uses [ ] agents to market and solicit customers for the Association's deposit and loan products and services. The Association and the agents enter into contractual arrangements pursuant to which the agents ("Agents") are independent contractors and exclusive agents of the Association for purposes of activities relating to banking products and services.[2] The Agents are not employees of the Association or of the Affiliate.

The information you have provided indicates that the Agents display in their offices information and brochures relating to the Association's banking products and services. The Agents also mail marketing materials to the Affiliate's customers and other potential customers, and apprise them of the availability of the Association's products and services through telephone and personal contacts. The Agents thus assist the Association in creating customer awareness of the Association's products and services.

The Agents direct potential customers and borrowers to the Association, and may assist individuals in completing application forms and documentation for Association deposit and loan products and services. For example, if a customer expresses interest in a deposit or loan product, the Agent might supply the customer with an application form, assist the customer in completing the application, answer questions and, at the customer's request, transmit the completed application (and any check to be used to open an account) to the Association. The Agents thus perform various customer service functions.

You represent that the Agents do not open accounts, accept deposits or payments, cash checks, handle any deposit transfers or withdrawals, evaluate or review applications (except for completeness), approve loans, or make any other substantive decisions on

---

[1] The Association offers fixed rate, variable rate, and jumbo certificates of deposit. The Association does not offer callable certificates of deposit.

[2] The Agents are "exclusive" to the Association with respect to banking products and services in that the Agents do not perform activities related to banking products and services for any other entity, and no other entity controls the activities of the Agents with respect to the Association's banking products and services. [

]

behalf of the Association. Deposit accounts are not opened until the application and funds are received and accepted by the Association. Similarly, the Association makes the decisions on all loan applications and other transaction matters, prescribes the terms of loans, deposit products and other services, and accepts the deposit or approves the loan.

According to the materials you submitted, to be eligible to market the Association's products and services, an Agent must enter into an exclusive agreement with the Association and complete a required education and training program provided by the Association. The written agreement between the Association and each Agent sets forth the duties, obligations, and limitations of the parties, including provisions to the effect that: (i) the Agent is prohibited from selling financial products and insurance issued by entities other than the Association, the Affiliate, and affiliated entities of either; (ii) the Agent has no authority to bind, commit, or make decisions for the Association; (iii) the Agent may not accept cash or other deposits from customers, cash checks, disburse loan proceeds to customers, or collect or accept loan payments from customers; and (iv) the Agent is an independent contractor. The Association pays the Agents for their efforts based on transactions actually consummated by the Association.

You advise that the required education and training program that the Agents must complete pertains to the Association's products and services, as well as federal compliance laws. One purpose of the training is to ensure that the Agents are aware of, and that they apprise customers of, appropriate distinctions between federally-insured deposit products and other financial products that the Agents may offer. Another purpose of the training is to educate the Agents about applicable federal compliance laws.[3] In addition, you represent that the Association conducts comprehensive compliance oversight of the Agents, and that the Association's internal audit committee periodically conducts reviews of the Agents. No entity other than the Association controls the Agents' performance of activities for the Association.

You indicate that in several states where the Agents are conducting activities on behalf of the Association questions have arisen as to whether the Agents must comply with various state registration or licensing requirements for mortgage lenders, loan

---

[3] Federal compliance laws and regulations include, for example, the Truth in Savings Act, 12 U.S.C.A. § 4301 *et seq.* (West 2001 & Supp. 2004) and Regulation DD, 12 C.F.R. Part 230 (2004); the Truth in Lending Act, 15 U.S.C.A. § 1601 *et seq.* (West 1998 & Supp. 2004) and Regulation Z, 12 C.F.R. Part 226 (2004); the Equal Credit Opportunity Act, 15 U.S.C.A. § 1691 *et seq.* (West 1998 & Supp. 2004) and Regulation B, 12 C.F.R. Part 202 (2004); OTS regulations on Consumer Protection in Sales of Insurance, 12 C.F.R. Part 536 (2004); and OTS Nondiscrimination Requirements, 12 C.F.R. Part 528 (2004). *See also* Interagency Statement on Retail Sales of Nondeposit Investment Products (February 15, 1994), Appendix A to § 710 of the OTS Thrift Activities Handbook. We note that with respect to mortgage loans, the Association must ensure that its arrangements with the Agents comply with the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C.A. § 2601 *et seq.* (West 2001 & 2004 Supp.) and Regulation X, 24 C.F.R. Part 3500 (2004); we do not address that matter in this opinion.

brokers, broker-dealers, deposit brokers, agents, and the like.[4] Heretofore, the Association has dealt with this issue on a case-by-case, state-by-state, basis. The Association has engaged in lengthy discussions and written communications with numerous states. The Association has reached agreements with several states pursuant to which the states do not object to the Agents performing specified activities on behalf of the Association without complying with state licensing or registration requirements. Other states have taken the position that the Agents, even though acting on behalf of the Association, must comply with state mortgage broker or securities licensing and registration requirements (or both) when engaging in the activities described above. As a result, the Association has chosen not to market or offer certain of its products in particular states. In other instances, only after the Association had spent considerable time and effort in discussions with a state, did the state agree to grant the Agents an "exemption" from the state licensing or registration requirement or take a "no-action" position with respect to the requirement.

In some cases, to satisfy state officials, the Association has committed to be responsible for the mortgage loan brokerage activities of the Agents, including providing sufficient bonding and training, and to provide the state with all records that relate to the mortgage loan brokerage activities of the Agents. In still other cases, states have insisted on compliance with state licensing or registration requirements, and the Association, at considerable expense, has paid the license and registration fees so that the Agents can market the Association's products and services in those states.[5] Accordingly, you ask for a determination whether such state licensing and registration requirements are applicable when the Association chooses to use the Agents to perform marketing, solicitation, and customer service activities on behalf of the Association, or whether federal law preempts such state requirements.

B. Description of State Laws

You indicate that several different types of state registration and licensing laws are at issue. Several states purport to require licensing or registration as a precondition to the marketing or offering for sale of traditional banking products, such as certificates of deposit and mortgage loans. Thus, a state might require that anyone marketing or offering for sale certificates of deposit be registered with the state as a registered

---

[4] You advise us that more than 25 states have: (i) mortgage lender or broker licensing requirements, some of which include experience requirements, for offering or marketing first or second mortgages; (ii) registered representative requirements for offering or marketing certificates of deposit; or (iii) some combination of both requirements.

[5] The Association estimates that it pays approximately $[ ] million annually in state registration and licensing fees for the Agents.

representative, or possess a securities license.[6] For example, one state apparently interprets the term "security" to include certificates of deposit and generally requires that anyone marketing a security be a registered representative.[7] Other state laws purport to require a mortgage lender or mortgage broker license as a precondition to marketing first or second mortgages.[8] Still other state laws impose prior experience requirements for marketing first and second mortgages, in addition to licensing requirements.[9] Some of these state laws contain exclusions or exemptions that would apply to the Association (and its employees) if the Association were directly marketing or offering its deposit and loan products itself and not using the Agents.

II. Discussion

A. Statutory and Regulatory Framework

1. OTS Possesses Plenary Authority Over Federal Savings Associations and Their Operations

In enacting the Home Owners' Loan Act ("HOLA"),[10] Congress required OTS and its predecessor, the Federal Home Loan Bank Board ("FHLBB"), to organize and charter "thrift institutions for the deposit of funds and for the extension of credit for homes and other goods and services," and to provide for the organization, incorporation, examination, operation, and regulation of federal savings associations "giving primary

---

[6] For instance, you advise that several states, including Georgia (Ga. Code Ann. § 10-5-3), Idaho (Idaho Code § 30-1406), Maine (Me. Rev. Sat. Ann. tit. 32, § 10301(1)), North Carolina (N.C. Gen. Stat. § 78A-36(a)), and Ohio (Ohio Rev. Code Ann. §§ 1707.14 and 1707.16), require that an Agent marketing certificates of deposit be a registered representative, and that Hawaii (Haw. Rev. Stat. § 485-14), Mississippi (Miss. Code Ann. § 75-71-301), and Wyoming (Wyo. Stat. Ann. § 17-4-103) impose a similar requirement for marketing jumbo certificates of deposit. You advise that in Vermont (Vt. Stat. Ann. tit. 9, § 4213(a)) and West Virginia (W. Va. Code § 32-2-201(a)), marketing certificates of deposit requires a Series 63 license or registered representative status.

[7] You advise that this has been the long-standing position of the State of Illinois.

[8] You advise that some type of mortgage broker license is required by several states, including Connecticut (Conn. Gen. Stat. Ann. §§ 36a-486 and 36a-511), the District of Columbia (D.C. Code Ann. § 26-1103), Florida (Fla. Stat. § 494.0033), Georgia (Ga. Code Ann. § 7-1-1002), Maryland (Md. Code Ann. § 11-504), Michigan (Mich. Comp. Laws. Ann. §§ 445.1652 and 493.52), New Hampshire (N.H. Rev. Stat. Ann. §§ 397-A:3 and 398-A:1-a), North Carolina (N.C. Gen. Stat. § 53-243.02), Ohio (Ohio Rev. Code Ann. § 1322.02), Pennsylvania (63 P.S. § 456.303 and 7 P.S. § 6603), Virginia (Va. Code Ann. § 6.1-410), and Washington (Wash. Rev. Code § 19.146.200).

[9] For example, Connecticut (Conn, Gen. Stat. Ann. §§ 36a-488 and 36a-513), Maryland (Md. Code Ann. § 11-506(b)), and Ohio (Ohio Rev. Code Ann. § 1322.03(A)(4)) each have an express three-year prior mortgage experience requirement.

[10] 12 U.S.C.A. § 1461 *et seq.* (West 2001 & Supp. 2004).

consideration of the best practices of thrift institutions in the United States."[11] The comprehensiveness of the HOLA language demonstrates that Congress intended the federal scheme to be exclusive, leaving no room for state regulation, conflicting or complementary.[12]

Sections 5(b) and 5(c) of the HOLA authorize federal savings associations to offer deposit and other accounts, and to make a variety of loans and investments.[13] To implement these and other provisions of the HOLA, OTS has promulgated extensive regulations governing federal savings association operations, including deposit and lending activities.[14] OTS's long-standing regulation on federal preemption in the area of federal savings association operations, § 545.2, affirms "the plenary and exclusive authority of [OTS] to regulate all aspects of the operations of Federal savings associations."[15] OTS has made clear in its deposit and lending regulations its intent to give federal savings associations maximum flexibility to exercise their deposit and lending powers in accordance with a uniform federal scheme of regulation that occupies the field of regulation for deposit and lending activities.[16] OTS regulations also make clear that OTS occupies the fields of lending regulation and deposit regulation of federal savings associations to facilitate and enhance safe and sound operations and to enable federal savings associations to conduct their operations in accordance with best practices by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden.[17]

It is well established that federal savings associations may exercise their authorized deposit and lending powers without regard to state laws that purport to regulate or otherwise affect those powers,[18] including state licensing and registration

---

[11] Section 5(a) of the HOLA, 12 U.S.C.A. § 1464(a) (West 2001).

[12] *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) *("de la Cuesta")*; *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996).

[13] 12 U.S.C.A. § 1464(b) and (c) (West 2001 & Supp. 2004).

[14] *See e.g.,* 12 C.F.R. Parts 545 (Federal Savings Associations-Operations), 555 (Electronic Operations), 557 (Deposits), and 560 (Lending and Investment) (2004).

[15] 12 C.F.R. § 545.2 (2004). This regulation originally was promulgated in 1983 by OTS's predecessor agency, the FHLBB. *See* 48 Fed. Reg. 23032, 23058 (May 23, 1983).

[16] 12 C.F.R. §§ 557.11(b) and 560.2(a) (2004).

[17] 12 C.F.R. §§ 557.11(a) and 560.2(a) (2004).

[18] *See* 12 C.F.R. §§ 557.11(b) and 560.2(a) (2004). *See also* 12 C.F.R. § 545.2 (2004) (OTS's exercise of its authority to promulgate regulations "is preemptive of any state law purporting to address the subject of the operations of a Federal savings association").

requirements. [19] Thus, for example, federal savings associations are not subject to state licensing and registration requirements pertaining to mortgage and consumer lending, deposit taking, and other banking activities.[20]

Inherent in the authority of federal savings associations to exercise their deposit and lending powers and to conduct deposit, lending, and other banking activities is the authority to advertise, market, and solicit customers, and to make the public aware of the banking products and services associations offer. The authority to conduct deposit and lending activities, and to offer banking products and services, is accompanied by the power to advertise, market, and solicit customers for such products and services. Federal savings associations also have the authority to choose the vehicles they will use to market their products and reach potential customers. A grant of authority to offer deposit and loan products and services without the corresponding authority to market and solicit potential consumers for those products and services would render the grant of authority meaningless. Such marketing and solicitation are subject to regulation by OTS.[21] A state may not put operational restraints on a federal savings association's ability to offer an authorized product or service by restricting the association's ability to market its products and services and reach potential customers.

2. OTS Possesses Statutory Authority to Regulate and Examine Third Parties, Including Agents

Consistent with OTS's exclusive authority to supervise, regulate, and examine the operations of federal savings associations, OTS also is authorized by statute to regulate and examine entities with which a federal savings association contracts. Thus, OTS has authority under the HOLA to regulate the Agents the Association uses to perform marketing, solicitation, and customer service activities. The Examination Parity Act, codified as § 5(d)(7) of the HOLA,[22] provides that if a savings association

> causes to be performed for itself, by contract or otherwise, any service authorized under [the HOLA] . . . whether on or off its premises –
>
> (i) such performance shall be subject to regulation and examination

---

[19] 12 C.F.R. §§ 557.12(g) and 560.2(b)(1) (2004).

[20] *See* OTS Op. Chief Counsel (July 26, 1999) and opinions cited therein at notes 37 and 38.

[21] *See e.g.*, OTS regulations 12 C.F.R. § 563.27 (advertising) and 12 C.F.R. Part 528 (nondiscrimination requirements in lending and other services, advertising, applications, etc.).

[22] The Examination Parity and Year 2000 Readiness for Financial Institutions Act, Pub. L. 105-164, 112 Stat. 32, 33-35 (March 20, 1998), codified at 12 U.S.C.A. § 1464(d)(7), added § 5(d)(7) to the HOLA.

> by the [OTS] Director to the same extent as if such services were being performed by the savings association on its own premises. . . .[23]

Further, § 5(d)(7)(E) of the HOLA[24] specifically authorizes the OTS Director to issue regulations and orders, including enforcement orders issued pursuant to § 8 of the Federal Deposit Insurance Act ("FDIA")),[25] as may be necessary to enable the Director to administer and carry out the purposes of the paragraph. These provisions make clear that OTS has the authority to examine, regulate, and take enforcement action against any entity, including the Agents, with which a federal savings association contracts to perform activities authorized by the HOLA.

Another source of authority for OTS to examine third parties is § 5(d)(1)(A) of the HOLA.[26] This provision gives OTS the authority to enforce § 8 of the FDIA. Section 8 of the FDIA authorizes OTS to take enforcement action against savings associations and "institution-affiliated parties" that OTS believes may be engaging in unsafe and unsound thrift practices. As defined in the FDIA, the term "institution-affiliated party" includes an agent for an insured depository institution, and an independent contractor that "knowingly or recklessly participates in . . . any violation of any law or regulation; . . . [or] any unsafe or unsound practice" that is likely to cause significant loss or adverse effect to a thrift.[27] Therefore, in appropriate circumstances, § 8 of the FDIA may provide OTS jurisdiction to take an administrative enforcement action against a third party or agent.

B. The Structure of Federal Savings Association Operations, Including Use of Subsidiaries, Third Parties, and Agents, is Subject to OTS Oversight and Regulation

Given the broad mandates provided by the HOLA and OTS regulations, federal savings associations are free to decide how to structure their operations and conduct their authorized banking-related activities, subject only to OTS's regulatory authority and the statutory mandate to operate safely and soundly in accordance with the best practices of thrift institutions in the United States. OTS regulations permit federal savings

---

[23] 12 U.S.C.A. §1464(d)(7)(D) (West 2001 & Supp. 2004).

[24] 12 U.S.C.A. § 1464(d)(7)(E) (West Supp. 2004).

[25] 12 U.S.C.A. § 1818 (West 2001 & Supp. 2004).

[26] 12 U.S.C.A. § 1464(d)(1)(A) (West Supp. 2004).

[27] 12 U.S.C.A. § 1813(u)(1) and (4) (West 2001 & Supp. 2004).

associations to conduct activities in subsidiaries.[28] A federal savings association's decision to conduct a particular activity in an operating subsidiary, for example, is an integral part of the association's structural operations, which OTS has exclusive authority to govern and regulate. Federal savings associations thus own and control their operating subsidiaries, and the subsidiaries' activities are strictly limited to those activities that are authorized for the association.[29]

OTS regulations provide that state laws apply to operating subsidiaries of federal savings associations only to the extent state laws apply to the parent federal savings association.[30] This reflects OTS's long-held view that because an operating subsidiary may only engage in activities permissible for its parent federal savings association and must be controlled and majority owned by the association, an operating subsidiary is the equivalent of a department or division of the parent federal savings association for regulatory and reporting purposes.[31] Thus, because state licensing and registration requirements do not apply to federal savings associations when they are conducting lending and deposit activities,[32] OTS has concluded that such state licensing and registration requirements also do not apply to the operating subsidiary.[33] This is in large part due to the control the association has over the operating subsidiary and the OTS-imposed operational restrictions that are on the operating subsidiary. Accordingly, when a federal savings association chooses to conduct authorized deposit and lending activities through an operating subsidiary, the operating subsidiary need not comply with state licensing and registration requirements that do not apply to the association.

It is beyond question that federal savings associations are authorized to contract with third parties to perform a variety of authorized activities for the association. As

---

[28] 12 C.F.R. Part 559 (2004).

[29] 12 C.F.R. §§ 559.2 and 559.3 (2004). To qualify as an operating subsidiary of a federal savings association, the association must own, directly or indirectly, more than 50% of the voting shares of the entity; no other person or entity may exercise effective operating control of the entity; and the entity may only engage in activities that are permissible for a federal savings association.

[30] 12 C.F.R. § 559.3(n) (2004).

[31] *See* Preamble to Final Rule: "Federal Savings Associations: Operating Subsidiaries and Service Corporations," 57 Fed. Reg. 48942, 48945 (Oct. 29, 1992), and Preamble to Final Rule: "Subsidiaries and Equity Investments," 61 Fed. Reg. 66561, 66563 (Dec. 18, 1996). *See also* OTS Op. Acting Chief Counsel (October 17, 1994) at 3.

[32] 12 C.F.R. §§ 557.12(g) (deposits) and 560.2(b)(1) (lending) (2004). *See also*, OTS Op. Sr. Dep. Chief Counsel (November 20, 1992) (mortgage banking registration and licensing).

[33] *See e.g.*, OTS Ops. Chief Counsel (July 26, 1999 and July 29, 1999) (state mortgage lender licensing and registration requirements); OTS Op. Chief Counsel (August 19, 1997) (state lender license, net worth, bonding, and other requirements); and OTS Op. Acting Chief Counsel (October 17, 1994) (state license and registration requirements for consumer lending and mortgage banking).

discussed above, Congress explicitly recognized in the Examination Parity Act the ability of federal savings associations to contract with third parties. Both OTS and its predecessor, the FHLBB, have long recognized the authority of federal savings associations to contract with third parties to obtain correspondent services such as check clearing, bill collections, loan participations, investment advice, electronic data processing, and back office functions.[34] Similarly, federal savings associations have the authority to contract out to third parties loan servicing functions.[35] OTS long ago concluded that the authority to accept deposits, make loans, and provide other basic banking services necessarily includes the power to contract with others to obtain assistance in providing those services.[36] Marketing, solicitation, and providing customer assistance are functionally no different than many of the services described above. Indeed, with respect to customer assistance, the Association's use of Agents is akin to outsourcing the function of a customer service representative.

Federal savings associations have the ability to decide how they market and solicit their banking products and services, subject to OTS's regulatory oversight.[37] This principle is not abrogated, nor should state license and registration requirements become applicable, merely because an association contracts with a third party to perform marketing, solicitation, and customer service activities. This is particularly true where, as here, the Agents are exclusive, are required to undergo training, and are subject to the Association's supervision and control. The Association is therefore free to use its Affiliate's network of agents as an effective and efficient means of marketing the Association's products and services. Moreover, the Association's use of the Agents in these circumstances may result in greater credit distribution channels, which in turn, has the potential to lower the cost of credit.

---

[34] *See* 48 Fed. Reg. at 23035; 47 Fed. Reg. 17468, 17469 (Apr. 23, 1982); FHLBB Op. by Long (January 13, 1984); FHLBB Op. by Barnett (November 10, 1982). *See also* FHLBB Op. by Williams (December 3, 1985) (savings associations may contract with vendors for certain core and optional systems, programs, and services); FHLBB Op. by Raiden (February 7, 1985) (savings associations may contract for discount brokerage services); OTS Op. Chief Counsel (December 30, 1994) at n. 2 (citing *U. S. v. Citizens & Southern Nat'l. Bank*, 422 U.S. 86, 114 (1975)).

[35] *See e.g.*, OTS Op. Acting Chief Counsel (January 31, 1994) at n.4 (indicating permissibility of association using another company to perform document custodial functions and noting that savings associations "frequently use other companies to assist them in servicing loans for themselves and others").

[36] *See* OTS Op. Chief Counsel (August 28, 1995) at 4 (savings associations have authority to contract with affiliated insured depository institution to obtain basic banking services for their customers) and OTS Op. Chief Counsel (December 30, 1994) at n.2 ("The statutory authority of federal savings associations to accept deposits, make loans, and provide other basic banking services . . . necessarily includes within it the power to contract with others to assist in providing those services – subject, of course, to principles of safety and soundness.").

[37] *See e.g.*, 12. C.F.R. § 563.27 (2004), OTS's regulation on advertising by savings associations. Pursuant to § 8 of the Federal Deposit Insurance Act, 12 U.S.C.A. § 1818, OTS also may take enforcement action against a savings association for violating § 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45 (West 1997 & Supp. 2004), which prohibits unfair and deceptive practices in or affecting commerce.

C. Impermissible State Interference with Performance of Authorized Activities

The state licensing and registration requirements about which you inquire interfere and conflict with the authority of the Association to exercise its deposit and lending powers by limiting the Association's ability to market its products and services in the manner it chooses, here, by using the Agents. The state requirements also thwart the congressional objective that OTS have exclusive responsibility for regulating the operations of federal savings associations "giving primary consideration of the best practices of thrift institutions in the United States."[38] To the extent a state law purports to regulate the way in which a federal savings association can perform its authorized activities, the state law is an impermissible interference with association powers and with OTS's regulatory authority.

As stated above, federal savings associations have the freedom to make business decisions about the manner in which they will conduct their operations. This includes decisions as to how to market and offer the association's products and services, and how to best facilitate customer access to, and applications for, such products and services. An association's decision as to how to conduct its operations and market its products and services should not result in the association being subjected to a hodgepodge of state requirements. An association should not be hamstrung in the exercise of its authorized powers merely because it chooses to market its products and services using agents whose activities the association closely monitors and controls.

Thus, a state may not interfere with the marketing and sale of a traditional banking product, such as a certificate of deposit ("CD"), by defining or construing a CD as a security or imposing registration requirements on the marketing and sale of CDs. Under OTS regulations, a federally insured CD is not a "security" and the regulation excludes from the definition of security "an account or deposit insured by the Federal Deposit Insurance Corporation."[39] OTS's exclusion of federally-insured CDs from the term "security" is consistent with the federal securities laws as interpreted by the Supreme Court.[40] OTS regulates the marketing, sale, and issuance of CDs by federal savings

---

[38] 12 U.S.C.A. § 1464(a).

[39] 12 C.F.R. § 561.44 (2004).

[40] *See Marine Bank v. Weaver*, 455 U.S. 551, 557-59 (1982); Securities Act of 1933, 15 U.S.C.A. § 77b (West 1997), and the Securities Exchange Act of 1934, 15 U.S.C.A. § 78c (West 1997) ("'34 Act"). *See also*, § 206 of the Gramm-Leach-Bliley Act ("GLBA"), Pub. L. 106-102, § 206, 113 Stat. 1338, 1393 (November 12, 1999), which provides that "a deposit account, savings account, certificate of deposit, or other deposit instrument issued by a bank" is an "identified banking product" for purposes of certain sections of the '34 Act, and §§ 201 and 202 of GLBA, which amended the '34 Act to exclude from the definitions of "broker" and "dealer" banks that buy, sell, or effect transactions in "identified banking products."

associations. There is no need for duplicate state regulation and, in fact, such duplicative regulation would conflict with the HOLA and OTS regulations.

Subjecting the Association, through its Agents, to state licensing and registration requirements impermissibly interferes with and burdens the Association's deposit and lending operations. Such requirements are tantamount to the state attempting to assume regulatory authority over federal savings association operations. As noted above, various states have differing requirements. Subjecting a federally chartered savings association to such myriad requirements and burdens merely because it markets its products through agents is inconsistent with, and contrary to, the notion of a federal charter. This is particularly true where, as here, the Association's Agents (i) are exclusive, and market only the Association's banking products and services, (ii) receive training in the Association's products and in compliance laws, and (iii) are subject to the Association's control. We note that the authority of national banks to make loans has been found to include the authority to use agents to market the bank's loan products and that the agents therefore need not comply with a state licensing requirement.[41]

Subjecting federal savings associations that use agents to the burdens of complying with a "hodgepodge of conflicting and overlapping state lending requirements" undermines the federal objective of permitting federal savings associations to exercise their lending powers "under a single set of uniform federal laws and regulations. This [uniformity] furthers both the 'best practices' and safety and soundness objectives of the HOLA by enabling federal thrifts to deliver low-cost credit to the public free from undue regulatory duplication and burden."[42] Having to ascertain and comply with diverse state requirements in order to perform authorized banking activities through the Agents has had a significant impact on the Association's ability to exercise its lending and deposit powers. As previously indicated, the Association heretofore has had to review, and then follow from year to year, the lending laws and securities laws of numerous states to keep abreast of any changes and to engage in numerous discussions with officials in several states, merely because the Association chooses to use the Agents, whom it controls, to perform advertising, solicitation, and customer service functions.

---

[41] *See* 66 Fed. Reg. 28593, 28594 – 28596 (May 23, 2001), Letter dated May 18, 2001, from First Sr. Dep. Comptroller and Chief Counsel, Office of the Comptroller of the Currency, to National City Bank and Huntington National Bank. The letter concluded that the authority of national banks to make loans includes the authority to use agents, therefore, federal law preempts conflicting state law.

[42] Preamble to OTS Final Rule: "Lending and Investment," 61 Fed. Reg. 50951, 50965 (Sept. 30, 1996).

The time and expense associated with that type of continuing review and discussion, and the costs associated with registering and licensing the Agents in numerous states, are impermissibly burdensome.[43] Moreover, the fact that the Association has chosen not to offer its products and services in some states due to the burdensomeness of the state requirements demonstrates that the state requirements are having an impermissible impact on the Association's deposit and lending operations. Obviously, the Association would not be subject to these burdens if it performed the marketing, solicitation, and customer service activities itself. In our view, the Association should not be subject to these burdens merely because the Association chooses to use the Agents to assist in the marketing of its products and services.

As noted above, the Association controls and reviews the activities the Agents perform on behalf of the Association, and no other entity exercises effective operating control over the Agents' activities on behalf of the Association.[44] Where an association exercises sufficient control over an agent's performance of authorized banking activities, the agent, like an operating subsidiary of a federal savings association, will be subject to OTS regulation and supervision, and federal preemption of state license and registration requirements applies to the agent, just as it would apply to an operating subsidiary. Whether a federal savings association exercises sufficient control over its agent in particular circumstances will be a factual question. Based on our review of the facts, circumstances, and representations of the Association and its counsel in the instant matter, we are satisfied that the Association exerts sufficient control over the Agents. As also noted above, based on authority deriving from two statutory provisions, OTS has the authority to examine, regulate, and take enforcement action against, the Agents. An examination of the Agents by OTS would include, among other things, review of compliance with numerous federal laws and regulations that are designed to protect consumers.[45]

In addition to the regulatory and enforcement authority OTS has over the Association and the Agents, OTS can indirectly regulate and supervise the relationship between the Association and the Agents in a variety of ways. For example, OTS can, if it chooses, require the Association to (i) obtain OTS approval before entering into or

---

[43] As noted earlier, the Association pays approximately $[ ] million annually in state license and registration fees.

[44] *Cf.* 12 C.F.R. § 559.3(c)(1) (2004) (ownership and control requirements for an operating subsidiary of a federal savings association).

[45] Such federal laws include each of the laws and regulations listed in note 3, *supra*, as well as OTS's Advertising regulation at 12 C.F.R. § 563.27 (2004); the Fair Housing Act, 42 U.S.C.A. § 3601 *et seq.* (West 2003 & Supp. 2004) and its regulations at 24 C.F.R. Part 100 *et seq.*; and RESPA and Regulation X. We again note that the Association also must ensure that its arrangements with the Agents comply with RESPA.

renewing contractual agreements with the Agents including, in OTS's discretion, approval of specific contract language; (ii) provide the Agents with specific training (over and above that currently provided by the Association) in the Association's products and services, compliance issues, and other areas before the Agents engage in marketing and solicitation activities on behalf of the Association; (iii) obtain periodic reports from the Agents pertaining to their performance of activities on behalf of the Association; and (iv) limit or terminate its relationship with one or more Agents.

Finally, we note that the state licensing and registration requirements would fail even under the standards applicable to state laws that generally are not preempted by federal law and regulations. Under OTS lending regulation § 560.2(c), certain types of state laws are not preempted "to the extent they only incidentally affect the lending operations of Federal savings associations" and are consistent with the purposes of the regulation. Other laws are not preempted if OTS, upon review, finds that the law furthers a vital state interest and either "has only an incidental effect on lending operations" or is not otherwise contrary to the purposes expressed in the regulation. OTS's deposit regulation at § 557.13 sets forth similar standards for deposit-related activities. As discussed above, the types of state licensing and registration requirements at issue here have more than an incidental impact on the Association's lending and deposit activities.

III. Conclusion

We have concluded that as the Association is authorized under the HOLA to engage in taking deposits and making loans, the Association is free to choose how it will market its products, including through the Agents. We have reviewed the relationship between the Association and its Agents, including training, oversight, and supervision. Based on our review, we are satisfied that the Association exercises sufficient supervision control over the Agents to warrant a finding that the state licensing and registration requirements do not apply when the Agents perform marketing, solicitation, and customer assistance activities on behalf of the Association for the Association's banking products and services. The state law requirements at issue frustrate the Association's ability to exercise its deposit taking and lending authority by limiting the Association's use of the Agents as marketing channels. The state laws would operate so as to indirectly apply state licensing or registration requirements to the Association as a precondition to exercising powers granted under federal law.[46] Such state laws are inconsistent with the

[46] It should be noted that we are not here addressing, and we express no opinion with respect to, the use of agents to offer (i) products that are not traditional banking products or services, (ii) insurance products, or (iii) products or services that are functionally regulated by another federal regulator. In addition, we are not suggesting that an agent that performs banking or other activities for entities other than federal savings associations would not have to comply with state licensing and registration requirements. In other words, if there is an independent basis for requiring such registration, the agent would not be exempt from the registration requirement merely because the agent performs similar activities for a federal savings association.

authority of the Association to exercise its deposit and lending powers and with the OTS's exclusive regulatory authority. Such laws therefore do not apply to the Association or its Agents.

Our conclusions herein are based on the particular facts and circumstances described above. Other federal savings associations that wish to use agents to assist in marketing the association's banking products and services must first (1) consult with their appropriate OTS Regional Office and (2) submit a business plan or proposal that provides in-depth information about how the arrangement with the agents will be structured and carried out. In addition, an association must comply, at a minimum, with the conditions set forth in Appendix A, attached hereto, in connection with any arrangement with agents.[47]

In reaching the foregoing conclusions, we have relied on the factual statements and representations made in the materials you submitted to us and in subsequent conversations with OTS staff, as summarized herein. Our conclusions necessarily depend on the accuracy and completeness of those facts. Any material difference in facts or circumstances from those described herein could result in different conclusions.

We trust that this is responsive to your inquiry. If you have further questions, please contact Vicki Hawkins-Jones, Special Counsel, at (202) 906-7034, or Deborah Dakin, Senior Deputy Chief Counsel, at (202) 906-6445.

Sincerely,

John E. Bowman
Chief Counsel

cc: Regional Directors
Regional Counsel

[47] The conditions set forth in Appendix A were developed in conjunction with OTS Policy Offices and, therefore, reflect legal, supervisory, and safety and soundness concerns.

APPENDIX A - CONDITIONS

Other federal savings associations that wish to use agents to perform marketing, solicitation, customer service, or other activities related to the association's authorized banking products or services must comply with the following conditions:

- The association and the agent must enter into a written agreement that (1) sets forth the rights, duties, and obligations of each, including those with respect to training; (2) describes the nature of the relationship between the two parties; (3) expressly sets forth the association's right to monitor and review the activities the agent performs for the association; and (4) expressly sets forth OTS's statutory authority to regulate and examine and take an enforcement action against the agent with respect to the activities it performs for the association, and the agent's acknowledgment of OTS's authority;

- The association must establish a system that provides the agent with in-depth training about the association's products and services, as well as applicable law. Such training should be designed to insure that agents will be adequately educated about the association's products and services, the distinctions between insured and non-insured products, and relevant law (*e.g.,* truth in lending, truth in savings, real estate settlement procedures, equal credit opportunity, fair lending, etc.) that may apply to the agents' marketing, solicitation, and customer service activities. Such training must be provided *before* an agent commences marketing or other service activities on behalf of the association; thereafter, the association will review and update the training material on an annual basis and ensure that each agent receives training as needed. Training records must be available for review by OTS examiners;

- The association must adopt a detailed compliance program to ensure adequate monitoring, supervision, and control over the agent and the activities the agent performs on behalf of the association. The compliance program must be reviewed by the association's board of directors and senior management on an annual basis and must include:

    - The designation of a compliance officer dedicated to the development, implementation, and management of the association's compliance program. This person will have responsibility for the oversight of the agents that perform marketing, solicitation, customer service, or other activities related to the association's authorized banking products or services;

- An annual review of the compliance program conducted under the auspices of the compliance officer to determine if the agents are operating in compliance with the association's established policies and procedures regarding the marketing, solicitation, customer service, or other activities related to the association's authorized banking products or services;

- An annual internal or external audit review of the compliance program, including a review of the training component;

- Compliance and audit reports, together with evidence of appropriate actions to address findings, to be provided to the association's board of directors;

- A system for tracking and resolving consumer complaints in a timely manner. An annual report regarding consumer complaints and their resolution shall be provided to the association's board of directors;

- A review and approval process for all customer disclosures, advertising, and other promotional material; and

- Any other requirements or conditions that the association's OTS Regional Office deems appropriate for that particular institution.

Moreover, the written agreement between the federal savings association and its agent shall specify that the association, as well as the agent, is subject to control and supervision by the appropriate OTS Regional Office or OTS Headquarters. This control and supervision includes, but is not limited to, the ability to require that:

- The association obtain OTS's approval (or non-objection) before entering into a contractual arrangement with the agent, including the right to approve specific contractual language;

- The association and/or the agent submit periodic reports to OTS; and

- The association modify or terminate its relationship with the agent.