



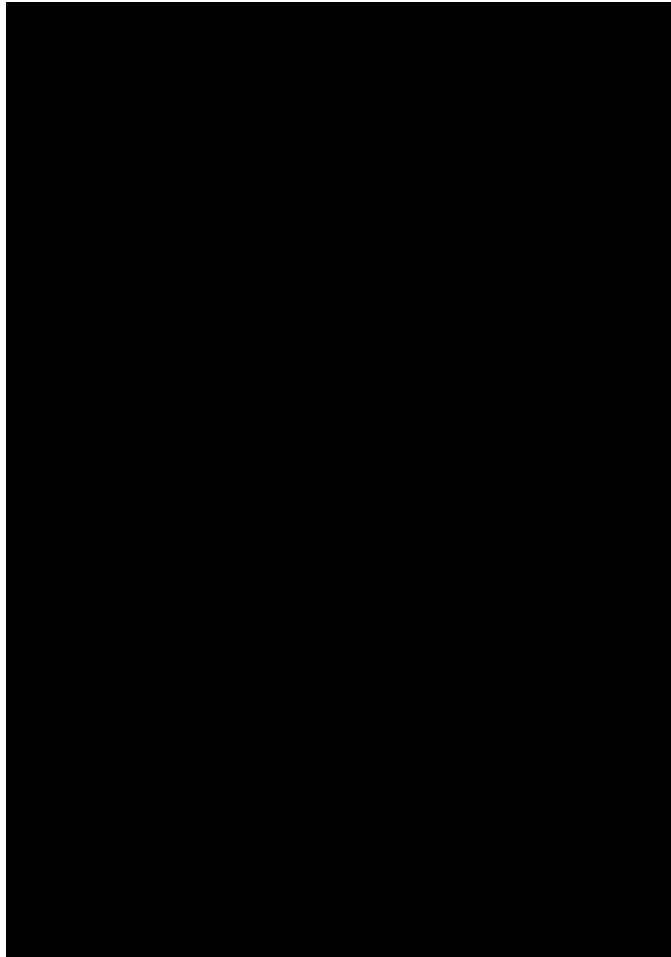
Office of Thrift Supervision

Department of the Treasury

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

John E. Bowman, Chief Counsel

March 7, 2006



Re: Preemption of Certain Lending-Related Provisions in the Code of Montgomery County, Maryland

Gentlemen:

This responds to your recent letter on behalf of your federal savings associations (“Associations”). Your letter requests a legal opinion on whether federal law preempts certain recent amendments to Chapter 27-12 of the Code of Montgomery County, Maryland (“Code”) that purport to prohibit certain lending practices for federal savings associations. In sum, we conclude that federal law preempts these provisions for federal

savings associations and their operating subsidiaries. Further, OTS is the only governmental entity with authority to examine for violations of and enforce any other provisions of that chapter that may be applicable to federal savings associations and their operating subsidiaries.

Preemption of Substantive Provisions

The provisions of the Code in question appear to prohibit making available a mortgage loan that: (1) includes the financing of single premium credit life insurance; (2) provides for excessive upfront points, excessive fees, or excessive prepayment penalties; or (3) provides compensation paid directly or indirectly to a person from any source. Code § 27-12(c)(2).

To the extent these provisions prohibit making mortgage loans containing one or more of the prescribed terms, OTS has repeatedly opined that such laws are preempted for federal savings associations and their operating subsidiaries. This office has previously addressed preemption of similar Georgia, New York, New Jersey, and New Mexico lending legislation. Indeed, these opinions specifically concluded that state laws that prohibit the financing of single premium credit life insurance or that restrict points, fees, and prepayment penalties or other forms of compensation are preempted.¹ This result stems from the Home Owners' Loan Act ("HOLA"),² as implemented by OTS's lending regulations, which together occupy the field of lending regulation for federal savings associations to the exclusion of state laws.³ Particularly relevant are OTS regulations preempting state laws purporting to impose requirements regarding: (1) the ability of creditors to require insurance or other credit enhancements; (2) the terms of credit; and (3) loan-related fees.⁴

The same preemption principles are equally applicable to the preemption of local laws⁵ and to preemption for federal savings association operating subsidiaries.⁶ Thus, the

¹ See, e.g., OTS Ops. Chief Counsel Jan. 21, 2003, Jan. 30, 2003, July 22, 2003, Sept. 2, 2003.

² 12 U.S.C.A. § 1461 *et seq.* (West 2001 & Supp. 2005).

³ See 12 C.F.R. § 560.2(a) (2005).

⁴ See 12 C.F.R. § 560.2(b)(2), (4) and (5) (2005).

⁵ See OTS Ops. Chief Counsel Nov. 22, 1999 and Dec. 7, 1999. Accord OTS Op. Chief Counsel Mar. 10, 1999 at 16-17.

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

provisions of the Code in question are preempted for federal savings associations and their operating subsidiaries for the same reasons OTS has stated in its prior opinions.

In enacting the HOLA, Congress required the Federal Home Loan Bank Board (“FHLBB”), and now the OTS, to provide for the organization, incorporation, examination, operation, and regulation of federal savings associations “giving primary consideration of the best practices of thrift institutions in the United States.”⁷ Consistent with this language, OTS has made clear in its lending regulations its intent to carry out this congressional objective by giving federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation.⁸ That uniform federal scheme occupies the field of regulation for lending activities. 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.⁹

OTS occupies the field of the regulation of the operations of federal savings associations, including their lending operations, to enhance safety and soundness and 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.¹⁰ Under 12 C.F.R. § 560.2(a), federal savings associations may extend credit as authorized under federal law without regard to non-federal laws purporting to regulate or otherwise affect their credit activities. As described above, the provisions of the Code impose a number of specific restrictions and requirements on home lending. These provisions would regulate areas specifically covered by § 560.2 and therefore do not apply to federal savings associations’ home lending.

Also, the cited provisions of the Code would thwart the more general congressional objective that OTS shall 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.”¹¹ Congress gave OTS, not the States or local governments, the task of determining the best practices for federal savings associations.

⁷ HOLA § 5(a); 12 U.S.C. § 1464(a).

⁸ 12 C.F.R. § 560.2(a) (2005).

⁹ See *Fidelity Federal Savings and Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996).

¹⁰ 12 C.F.R. § 560.2(a) (2005).

¹¹ 12 U.S.C. § 1464(a).

Further, Congress intended for federal savings associations to exercise their lending powers “under a single set of uniform federal laws and regulations. This [uniformity] furthers both the Congressional ‘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.”¹²

The cited provisions of the Code, by establishing special rules for lending transactions in Montgomery County, stand as obstacles to the achievement of these Congressional objectives. If Montgomery County can exercise jurisdiction over (1) the ability of creditors to require insurance or other credit enhancements, (2) the terms of credit, and (3) loan-related fees, then countless other local governments throughout the United States could do so as well, usurping Federal authority to establish uniform rules based on the best thrift practices and creating confusion over the regulatory requirements applicable to federal savings associations.¹³ In short, for the terms and conditions of loans, the important principle of uniform Federal regulation of federal savings associations would be lost.

Preemption of these provisions of the Code does not create a regulatory vacuum. Indeed, OTS conducts regular examinations of thrift lending operations for safety and soundness and compliance with established consumer protections. Federal savings associations must comply with the requirements of federal law, including restrictions on abusive practices such as those in the Home Ownership Equity Protection Act (“HOEPA”) and its implementing regulations.¹⁴ If OTS’s review indicates a violation of federal consumer laws or regulations occurred, OTS brings the violation to the institution’s attention and requires the institution to take appropriate corrective action. Further, OTS maintains a toll-free consumer hotline to respond to consumer questions and complaints. OTS seeks to assure that the thrift appropriately responds to the consumer’s concern.

Exclusive Examination and Enforcement Authority

¹² 61 Fed. Reg. 50,951, 50,965 (Sept. 30, 1996) (Final Rule: Lending and Investment).

¹³ In addition to confusion over which law is applicable, there is also the prospect of confusion over the specific requirements of state and local laws. For example, the Code does not define “excessive.” Further, on its face, the provision regarding compensation paid directly or indirectly to a person from any source would appear so overbroad as to prohibit any lender or mortgage broker from receiving any compensation whatsoever for rendering services.

¹⁴ 15 U.S.C. § 1639, 12 C.F.R. pt. 226, subpart E (2005).

This opinion does not address other provisions of Chapter 27-12. However, to the extent that those provisions may be applicable to federal savings associations or their operating subsidiaries, Montgomery County may not take action against these entities. OTS has comprehensive and exclusive authority to enforce laws against federal savings associations and their operating subsidiaries. Accordingly, these entities would not be subject to the procedures for investigation and enforcement by Montgomery County under the provisions in § 27-7 of the Code.¹⁵

In this regard, we would point out that the HOLA expressly authorizes OTS to “provide for the ... examination, operation, and regulation” of federal savings associations.¹⁶ Likewise, the Federal Deposit Insurance Act grants OTS comprehensive authority to take enforcement action against federal savings associations and their operating subsidiaries.¹⁷ It is well established that these grants of authority are exclusive to OTS.

Most notably, the Ninth Circuit Court of Appeals, in a ruling affirmed by the United States Supreme Court, concluded that only the OTS’s predecessor agency, the FHLBB, could enforce a state anti-discrimination law over federal savings associations. The court reasoned that “the regulatory control of the [FHLBB] over federal savings and loan associations is so pervasive as to leave no room for state regulatory control.”¹⁸ Accordingly, the court concluded that the state law and regulation providing for monitoring, enforcement, and discrimination complaint resolution by a state agency was preempted for federal savings associations. While it did not reach the issue of whether the substantive nondiscrimination requirements of that state law were preempted for federal savings associations, it concluded, “If state-conferred rights are to be enforced against the federal associations by any regulatory body (a question we do not reach), enforcement must be by the [FHLBB].”¹⁹ A long line of legal opinions of the OTS and

¹⁵ We note that the Montgomery County Human Rights Commission has not been certified by the U.S. Department of Housing and Urban Development (“HUD”) as an agency that enforces a law that provides substantive rights, procedures, remedies and judicial review provisions that are substantially equivalent to those provided in the federal Fair Housing Act. See <http://www.hud.gov/offices/fheo/partners/FHAP/agencies.cfm>. See also sections 810(f) and 817 of the Fair Housing Act, 42 U.S.C. 3601(f) and 3616 and HUD’s implementing regulations at 24 C.F.R. pt. 115 (2005)

¹⁶ 12 U.S.C. § 1464(a).

¹⁷ 12 U.S.C. § 1818.

¹⁸ Conference of Federal Savings and Loan Ass’ns v. Stein, 604 F.2d 1256, 1260 (9th Cir. 1979), aff’d mem., 445 U.S. 921 (1980).

¹⁹ Id.

the FHLBB stretching back at least three decades have reached the same conclusion with regard to OTS's exclusive examination and enforcement authority.²⁰

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

Sincerely,

/s/

John E. Bowman
Chief Counsel

cc: Regional Directors
Regional Counsel

²⁰ See FHLBB Op. Gen. Counsel (Jan. 26, 1979) at 4, FHLBB Op. Gen. Counsel (July 9, 1985) at 7-8; OTS Mem. Chief Counsel (May 10, 1995) at 5; OTS Op. Chief Counsel (Jan. 18, 1996); OTS Op. Chief Counsel (July 1, 1998) at 11; OTS Op. Chief Counsel (Jan. 15, 1999) at 3. The HOLA and OTS and FHLBB opinions provide narrow exceptions regarding the trust operations of federal savings associations and state escheat laws or tax collection. 12 U.S.C. § 1464(n)(2); FHLBB Op. Deputy Gen. Counsel (May 24, 1984); OTS Op. Chief Counsel (May 10, 1995). None of these exceptions applies here.