

**Preemption of New York Predatory Lending Law**

**Summary Conclusion:** Federal law preempts application of various provisions of the New York Predatory Lending Law to federal savings associations and their operating subsidiaries.

**Date:** January 30, 2003

**Subjects:** Home Owners' Loan Act/Savings Association Powers

P-2003-2

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**Office of Thrift Supervision**

Department of the Treasury

*Chief Counsel*

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

January 30, 2003

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Re: Preemption of New York Predatory Lending Law

Dear [ ]:

This responds to your recent letter on behalf of

(“Association”), a federal savings association.

In your letter, you ask the Office of Thrift Supervision (“OTS”) to confirm that federal law preempts the application to the Association of the recently enacted New York Predatory Lending Law (“NY law”).<sup>1</sup> We conclude that NY law provisions purporting to regulate the terms of credit, loan-related fees, disclosure and advertising, and mortgage origination, refinancing, and servicing are preempted by federal law from applying to federal savings associations.<sup>2</sup>

**Background**

The NY law imposes requirements on “high-cost home loans,” including such loans made by federal savings associations.<sup>3</sup> High-cost home loans are subject to certain requirements on the terms of credit, loan-related fees, disclosure and advertising, and

<sup>1</sup> The NY law is codified as N.Y. Banking Law § 6-l, N.Y. Gen. Bus. Law § 771-a, and N.Y. Real Prop. Acts. Law § 1302. The NY law takes effect April 2003.

<sup>2</sup> The same conclusion would apply to preemption for federal savings association operating subsidiaries. OTS has consistently indicated that state laws purporting to regulate the activities of a federal savings association’s operating subsidiary are preempted by federal law to the same extent such laws are preempted for the federal savings association itself. See 12 C.F.R. § 559.3(n)(1) (2002); OTS Op. Chief Counsel (January 21, 2003); OTS Op. Chief Counsel (July 26, 1999) (and authorities cited therein).

<sup>3</sup> A “high-cost home loan” is a mortgage loan (including a home equity loan, but excluding a reverse mortgage) to a natural person secured by a one- to four-family owner-occupied principal dwelling located in New York, where the principal amount does not exceed the lesser of \$300,000 (or the Fannie Mae conforming loan limit which is \$322,700 for 2003 for a single-family dwelling), and which exceeds specified annual percentage rate or point/fee thresholds. N.Y. Banking Law § 6-l(1)(d)-(h). The NY law purports to apply to federal savings associations. N.Y. Banking Law §§ 6-l(1)(i) and 590(1)(e).

mortgage origination, refinancing, and servicing. Requirements concerning the terms of credit and loan-related fees include prohibiting call provisions, balloon payments, negative amortization, default interest rates, modification or deferral fees, and single premium insurance financing, as well as limiting advance payments and the financing of points and fees.<sup>4</sup> Requirements concerning disclosure and advertising include mandating a disclosure at application concerning financial counseling, a pre-closing disclosure which, among other things, warns about possible foreclosure and home loss in the event of default and encourages shopping and credit counseling, and a legend on the mortgage instrument identifying the loan as high-cost, as well as prohibiting the encouragement of default.<sup>5</sup> Requirements concerning mortgage origination, refinancing, and servicing include limiting the circumstances in which a refinancing may occur, prohibiting lending without regard to repayment ability, prohibiting the payment of referral fees to mortgage brokers, restricting payments to home improvement contractors from loan proceeds, and mandating reporting of payment history to a consumer credit bureau.<sup>6</sup>

The NY law also contains a multifaceted compliance scheme. The NY law grants authorization to the NY Attorney General, the NY Superintendent of Banks, or any party to a high-cost home loan to enforce the law through litigation.<sup>7</sup> Remedies available include actual and statutory damages, attorneys' fees, injunctive and declaratory relief, for intentional violations voiding of loan agreements and borrower recoupment of payments made, and rescission of the loan transaction without time limitation.<sup>8</sup> Further, the NY law uses state foreclosure law as an additional tool to compel compliance with the predatory lending law. The NY law makes a violation of the predatory lending law a foreclosure defense and requires a lender to affirmatively prove compliance with the NY law as a prerequisite to obtain the entry of judgment in a foreclosure action.<sup>9</sup>

## Discussion

The NY law provisions discussed above, which purport to regulate the terms of credit, loan-related fees, disclosure and advertising, and mortgage origination, refinancing, and servicing are preempted by federal law from applying to federal savings

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<sup>4</sup> N.Y. Banking Law § 6-1(2)(a)-(f), (h), (m), and (q).

<sup>5</sup> N.Y. Banking Law §§ 6-1(2)(l)(i)-(ii) and (o) and 6-1(2-a)(a).

<sup>6</sup> N.Y. Banking Law §§ 6-1(2)(i)-(k), (n), and (p) and 6-1(2-a)(b).

<sup>7</sup> N.Y. Banking Law § 6-1(5)-(6).

<sup>8</sup> N.Y. Banking Law § 6-1(7)-(12).

<sup>9</sup> N.Y. Real Prop. Acts. Law § 1302.

associations.<sup>10</sup> In enacting the Home Owners' Loan Act ("HOLA"),<sup>11</sup> 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."<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

OTS occupies the field 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.<sup>15</sup> Under OTS regulation 560.2(a), federal savings associations may extend credit as authorized under federal law without regard to state laws purporting to regulate or otherwise affect their credit activities. As described above, the NY law imposes a number of specific restrictions and requirements on home loans. The NY law would regulate areas covered by regulation 560.2 and therefore does not apply to federal savings associations' home lending.

OTS has described with specificity the scope of its occupation of the field of lending regulation by noting the types of state laws encompassed within the preemption. They include many of the types of provisions found in the NY law. For example, 12 C.F.R. § 560.2(b)(4) preempts state laws on terms of credit, § 560.2(b)(5) preempts

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<sup>10</sup> As per a January 16, 2003 telephone discussion between you and OTS staff, however, this opinion does not address the restriction on mandatory arbitration clauses in N.Y. Banking Law § 6-l(2)(g). Nor does it address the responsibilities of home improvement contractors under N.Y. Gen. Bus. Law § 771-a, since the Association is not a home improvement contractor.

<sup>11</sup> 12 U.S.C.A. § 1461 *et seq.* (West 2001).

<sup>12</sup> HOLA § 5(a); 12 U.S.C.A. § 1464(a) (West 2001).

<sup>13</sup> 12 C.F.R. § 560.2(a) (2002).

<sup>14</sup> 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). OTS regulations preempt the field of lending regulation for federal savings associations whether or not OTS adopts a regulation governing the precise subject of the state law. *Lopez v. World Savings and Loan Ass'n*, No. A095666, 2003 WL 152956 (Cal. App. 1 Dist. Jan. 23, 2003).

<sup>15</sup> 12 C.F.R. § 560.2(a) (2002).

state laws on loan-related fees, § 560.2(b)(9) preempts state laws on disclosure and advertising, and § 560.2(b)(10) preempts state laws on processing, origination, servicing, sale, purchase, investment, and participation in mortgages. This conclusion is further supported by numerous opinions of OTS, and its predecessor, the FHLBB.<sup>16</sup>

The NY law would thwart the more general 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.”<sup>17</sup> Congress gave OTS, not the States, the task of determining the best practices for thrift institutions and creating nationally uniform rules. OTS conducts regular examinations of thrift lending operations for safety and soundness and compliance with established consumer protections. OTS also 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. If OTS’s review indicates a violation of federal consumer laws or regulations occurred, OTS may require the institution to take appropriate corrective action.

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”), the Real Estate Settlement Procedures Act (“RESPA”), and their implementing regulations.<sup>18</sup> Subjecting federal savings associations to the burdens of complying with a “hodgepodge of conflicting and overlapping state lending requirements” would undermine 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.”<sup>19</sup>

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<sup>16</sup> See, e.g., OTS Op. Chief Counsel (January 21, 2003) (preemption of state predatory lending law); OTS Op. Counsels (Banking and Finance) (May 16, 2001) (preemption of state law on terms of credit); FHLBB Op. Gen. Counsel (February 1, 1982) (same); OTS Ops. Chief Counsel, (December 14, 2001, April 21, 2000, and March 10, 1999) (preemption of state law on loan-related fees); OTS Op. Chief Counsel (December 24, 1996) (preemption of state law on loan-related fees and disclosures); OTS Mem. Dep. Chief Counsel (May 10, 1995) (preemption of state law on disclosures).

<sup>17</sup> 12 U.S.C.A. § 1464(a) (West 2001).

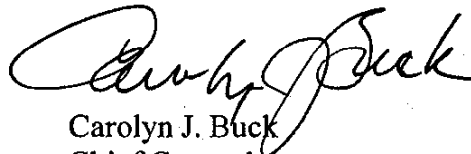
<sup>18</sup> See 15 U.S.C.A. § 1639 (WESTLAW 2002) (HOEPA); 12 C.F.R. pt. 226, subpart E (2002) (HOEPA regulations); 12 U.S.C.A. § 2601 *et seq.* (WESTLAW 2002) (RESPA); 24 C.F.R. pt. 3500 (2002) (RESPA regulations).

<sup>19</sup> 61 Fed. Reg. 50,951, 50,965 (Sept. 30, 1996) (Final Rule: Lending and Investment).

You also ask whether the NY law's multifaceted compliance scheme, including the potential threat of litigation and application of the foreclosure provisions, is preempted for federal savings associations. The NY law's compliance scheme could not be applied to federal savings associations in a manner that would compel them to comply with the preempted provisions, including intrusive lending restrictions. Such a result would have more than an incidental affect on the lending operations of federal savings associations and would run contrary to HOLA's purpose of allowing federal savings association to exercise their lending powers in accordance with a uniform federal scheme.<sup>20</sup>

We trust that this responsive to your inquiry. If you have further questions, please contact Richard Bennett, Counsel (Banking and Finance), at (202) 906-7409.

Sincerely,



Carolyn J. Buck  
Chief Counsel

cc: Regional Directors  
Regional Counsel

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<sup>20</sup> See 12 C.F.R. § 560.2(a) (2002). Real property laws are not preempted to the extent that they only incidentally affect the lending operations of federal savings associations or are consistent with HOLA's purposes. See 12 C.F.R. § 560.2(c) and (c)(2) (2002). The NY law's foreclosure provisions, however, would not appear to fit that description since they would be used to compel compliance with the lending restrictions in the NY law.