

Illinois Corporate Fiduciary Act

Summary Conclusion: A state fiduciary law that purports to prohibit, restrict, or impose requirements upon a federal savings bank because its home office is not within the state conflicts with federal law and is therefore preempted. The association, however, must comply with those provisions of state fiduciary law that the HOLA or OTS regulations specifically apply to federal savings associations.

Date: October 28, 2004

Subjects: Home Owners' Loan Act/Savings Association Powers

P-2004-9



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 28, 2004

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Re: Illinois Corporate Fiduciary Act

Dear Mr. []:

This responds to your inquiry on behalf of [], a federal [] savings bank located in [], Florida (“Association”). You request the concurrence of the Office of Thrift Supervision (“OTS”) that by virtue of federal laws and regulations, the Association is not subject to certain provisions of Illinois law that purport to (1) impose qualification limitations or restrictions on foreign corporations to act as trustee, administrator, executive, or in another fiduciary capacity in Illinois, (2) impose application or registration requirements and fees, and (3) subject the Association to examination or supervision by Illinois banking officials. In brief, we conclude that the provisions of Illinois law about which you inquire do not apply to the Association by reason of federal preemption.

I. Background

A. The Association and its Proposed Activities

The Association has offices, or plans to open offices, in Florida, Virginia, New York, Texas, California, Illinois, and Indiana. The Association intends to open trust offices in credit unions located throughout the United States. You indicate that the Association intends to enter into contracts with one or more credit unions in Illinois. The trust offices, while serving the public as a whole, will primarily serve the members of the credit unions. You represent that the Association intends to conduct core trust activities at its offices in Illinois and will comply with those aspects of Illinois law applicable to the Association’s operations pursuant to Part 550 of OTS’s regulations.¹

¹ Fiduciary Powers of Savings Associations, 12 C.F.R. Part 550 (2004).

An attorney in your firm has represented that the Association contacted the Illinois Office of Banks and Real Estate (“IOBRE”) to inform it of the Association’s plans and was advised that an application to, and approval by, the IOBRE is required before any foreign corporation locates a trust office in Illinois. That attorney has further represented that various of the Association’s counsel, including yourself, have had discussions with representatives of the IOBRE who have advised that (1) the Association cannot obtain a certificate of authority or a certificate of reciprocity under the Illinois Corporate Fiduciary Act (“Illinois Act”) because Florida, the Association’s home state, does not allow for reciprocity with Illinois, (2) the Association therefore cannot locate a trust office in Illinois, and (3) IOBRE has not recognized federal preemption for a federal savings bank headquartered in a state that does not have reciprocity with Illinois, and any such federal savings bank that opens a trust office in Illinois is at risk of IOBRE enforcement.

You therefore ask the Office of Thrift Supervision (“OTS”) to confirm that the Illinois Act is preempted to the extent it purports to (1) impose qualification limitations or restrictions on the Association, as a foreign corporation, to act as trustee, executor, administrator, administrator to collect, guardian, or any other similar fiduciary capacity in Illinois, whether the appointment is by will, deed, court order, or otherwise, including the requirement to secure a certificate of authority or a certificate of reciprocity, (2) impose application or registration requirements and fees on the Association as a foreign corporation, or (c) empower the IOBRE Commissioner or his designee to examine, supervise, or exercise visitorial powers with respect to the Association.

B. The Illinois Corporate Fiduciary Act

The Illinois Corporate Fiduciary Act (“Illinois Act”)² requires foreign corporate fiduciaries and foreign corporations to secure a certificate of authority or a certificate of reciprocity in order to conduct trust or fiduciary activities in Illinois.³ The Illinois Act defines a foreign corporation to include, among others, “any federal savings and loan association or federal savings bank having its principal place of business in any state or territory of the United States of America, including the District of Columbia, other than the State of Illinois.”⁴ The Illinois Act defines a trust business to include advertising the ability to act as a fiduciary in Illinois, as well as undertaking to perform fiduciary duties.⁵

² 205 Ill. Comp. Stat. Ann. 620/1-1 *et seq.*

³ 205 Ill. Comp. Stat. Ann. 620/2-4; 4-1; 4-5; and 4A-5.

⁴ 205 Ill. Comp. Stat. Ann. 620/1-5.08(c). *See also* 620/4-1.

⁵ 205 Ill. Comp. Stat. Ann. 620/1-5.13.

To obtain a certificate of authority, a foreign corporation must (1) submit an application and a fee to the Commissioner of the IOBRE referencing the specific fiduciary capacities in which the foreign corporation proposes to act in Illinois and (2) furnish satisfactory evidence that it meets the requirements of the Illinois Act that pertain to foreign corporation eligibility.⁶ To be eligible to secure a certificate of reciprocity, the Illinois Act requires that a foreign corporation demonstrate that its home state allows Illinois trust companies to “act in a similar fiduciary capacity or capacities, as the case may be, upon conditions and qualifications which the Commissioner [of the IOBRE] finds are not unduly restrictive when compared to those imposed by the laws of Illinois.”⁷ The Illinois Act also empowers the Commissioner of the IOBRE to, among other things, “visit and examine every corporate fiduciary” in Illinois⁸ and to impose civil penalties for violations of any provision of the Illinois Act.⁹

You represent that Florida, the state where the Association’s home office is located, does not permit Illinois trust companies to conduct trust business in Florida.¹⁰ Thus, in the absence of reciprocity by Florida, the Illinois Act purports to prohibit the Association from conducting a trust business in Illinois.

II. Discussion

Section 5(n) of the Home Owners’ Loan Act (“HOLA”) expressly confers upon the Director of OTS the power to authorize a federal savings association to exercise trust powers and to act in any fiduciary capacity that the law of a state where the association is located permits state banks, trust companies, or other corporations to act as fiduciaries.¹¹ Section 5(n) sets forth numerous statutory requirements and prohibitions applicable to

⁶ 205 Ill. Comp. Stat. Ann. 620/4-5.

⁷ 205 Ill. Comp. Stat. Ann. 620/4-2. *See also*, 620/4A-5(a) concerning reciprocity.

⁸ 205 Ill. Comp. Stat. Ann. 620/5-2.

⁹ 205 Ill. Comp. Stat. Ann. 620/5-1.

¹⁰ You cite Fla. Stat. ch. 660 in support of your representation.

¹¹ Section 5(n)(1) of the HOLA , 12 U.S.C.A. § 1464(n)(1), provides, in pertinent part,

The Director [of OTS] may grant by special permit to a Federal savings association applying therefor the right to act as trustee, executor, administrator, guardian, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which compete with Federal savings associations are permitted to act under the laws of the State in which the Federal savings association is located.

federal savings associations exercising trust powers¹² and provides that federal savings associations shall meet the same requirements that state fiduciaries must meet with respect to surety, bond, oath, and affidavit requirements.¹³ HOLA thus adopts the state requirements with respect to these items and applies such requirements to federal savings associations. Finally, HOLA § 5(n)(2) provides that although a state banking authority may have access to the portions of OTS exam reports that relate to the trust department of a federal savings association, the state banking authority shall not have authority to examine the books, records, and assets of such associations.¹⁴ This is consistent with the HOLA § 5(a) grant of plenary authority to OTS to regulate all aspects of the operations of federal savings associations, including trust operations, and OTS's exclusive authority to examine federal savings associations.

The Director of OTS has promulgated extensive regulations governing the acquisition, exercise, and termination of fiduciary powers by savings associations.¹⁵ These regulations expressly provide that OTS "occupies the field of the regulation of the fiduciary activities of Federal savings associations" to give them "maximum flexibility to exercise their fiduciary powers in accordance with a uniform scheme of Federal regulation" and "without regard to State laws that purport to regulate or otherwise affect their fiduciary activities" except as provided in HOLA 5(n) and in OTS regulations.¹⁶ There are no geographic restrictions on the ability of a federal savings association to exercise trust powers. In fact, OTS regulations specifically provide that a federal savings association that has been granted trust powers by OTS may "conduct fiduciary activities

¹² See e.g., HOLA § 5(n)(2) (segregation of assets), (3) (prohibitions on receipt of checks, drafts, bills of exchange, and other items for collection), (7) (prohibition on certain loans), and (9), (10) (surrender and revocation of charter).

¹³ Section 5(n)(5) and (6) of the HOLA, 12 U.S.C.A. § 1464(n)(5) and (6), provide that if state law requires state fiduciaries to make surety deposits, execute bonds, take oaths, or make affidavits, then federal savings associations acting as fiduciaries in that state must do likewise.

¹⁴ 12 U.S.C.A. § 1464(n)(2).

¹⁵ 12 C.F.R. Part 550 (2004).

¹⁶ 12 C.F.R. § 550.136(a) (2004) provides in relevant part:

To enhance safety and soundness and to enable Federal savings associations to conduct their fiduciary activities in accordance with the best practices of thrift institutions in the United States (by efficiently delivering fiduciary services to the public free from regulatory burden), OTS occupies the field of the regulation of the fiduciary activities of Federal savings associations. In so doing, OTS intends to give Federal savings associations maximum flexibility to exercise their fiduciary powers in accordance with a uniform scheme of Federal regulation. Accordingly, Federal savings associations may exercise fiduciary powers as authorized under Federal law including [Part 550 of 12 C.F.R.], without regard to State laws that purport to regulate or otherwise affect their fiduciary activities, except to the extent provided in 12 U.S.C. 1464(n) (State laws regarding scope of fiduciary powers, access to examination reports regarding trust activities, deposits of securities, oaths and affidavits, and capital) or in paragraph (c) of [§ 550.136].

in any State,” subject only to OTS regulatory application and notice requirements, and may market fiduciary services to, and act as fiduciary for, customers located in any state.¹⁷ Moreover, OTS regulations expressly state that HOLA and OTS’s fiduciary regulations preempt state laws regarding registration and licensing, among others.¹⁸

Pursuant to the HOLA and OTS regulations, the Association applied to and received from OTS authority to exercise fiduciary powers.¹⁹ Such authorization means that the Association may act in any fiduciary capacity in which Illinois banks, trust companies, or other corporations that compete with federal savings associations, may act under the laws of Illinois.²⁰

Based on this statutory and regulatory framework, and on OTS’s approval of the Association’s application to exercise trust powers, we conclude that the Association may exercise its fiduciary powers in Illinois, notwithstanding provisions of the Illinois Act that purport to preclude, interfere with, or regulate the Association’s ability to exercise fiduciary powers in Illinois. The HOLA and OTS regulations preempt such provisions of the Illinois Act. This conclusion is consistent with prior precedents. OTS has previously opined, for example, that a state law that would require a federal savings association to obtain a state license to exercise trust powers, or that would otherwise prohibit or interfere with the exercise of trust powers by a federal savings association, conflicts with federal law and is therefore preempted.²¹ Nor is the Association subject to examination by the Commissioner. The Association also may market its fiduciary services in any state.²²

Federal law governs the authority of the Association to engage in a trust business and to act in a fiduciary capacity. Insofar as the Illinois Act purports to prohibit, restrict,

¹⁷ 12 C.F.R. § 550.130(a) and (b)(1) (2004) (emphasis added).

¹⁸ 12 C.F.R. § 550.136(b)(1) (2004).

¹⁹ OTS Order No. [].

²⁰ Under HOLA § 5(n), and OTS regulation § 550.135(a), the *scope* of a federal savings association’s permissible fiduciary powers is determined by reference to state law, but the *authority* to exercise those fiduciary powers is governed solely by federal law, namely, § 5(n) of the HOLA and OTS fiduciary regulations.

²¹ OTS Op. Chief Counsel (January 3, 2001); OTS Op. Chief Counsel (August 8, 1996); and OTS Op. Chief Counsel (June 13, 1994). *See also* OTS Op. Principal Dep. Chief Counsel (January 9, 1990) (annual state license fee preempted). The Association also may market its fiduciary services in any state.

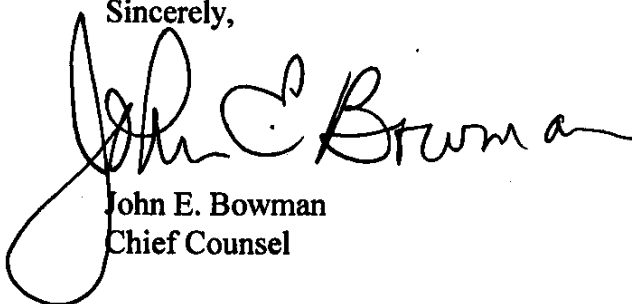
²² 12 C.F.R. § 550.130(b)(1) (2004). *See also*, OTS Op. Chief Counsel (June 21, 1996) (federal law preempts state laws that bar out-of-state corporations from marketing trust services).

or impose requirements upon the Association because its home office is not in Illinois, the Act "stands as an obstacle to the accomplishment of the objectives of Congress" to permit federal savings associations to exercise fiduciary powers on par with state fiduciaries. As such, those provisions of the Illinois Act conflict with federal law and are therefore preempted.²³ Of course, as discussed above, the Association must comply with those provisions of state fiduciary law that the HOLA or OTS regulations specifically apply to federal savings associations.

In reaching the foregoing conclusions, we have relied on the factual representations contained in the materials you submitted to us, as summarized herein. Our conclusions depend upon the accuracy and completeness of those representations. Any material change in facts from those set forth herein could result in different conclusions.

If you have further questions, please contact Vicki Hawkins-Jones, Special Counsel at (202) 906-7034.

Sincerely,

A handwritten signature in black ink, appearing to read "John E. Bowman". The signature is fluid and cursive, with a large loop at the end of the name.

John E. Bowman
Chief Counsel

cc: Regional Directors
Regional Counsel

²³ See e.g., *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).