



Office of Thrift Supervision  
Department of the Treasury

P-2008-3

John E. Bowman  
Deputy Director and Chief Counsel

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

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Re: Authority of Federal Savings Associations to Accept Public Deposits

Dear [ ]:

This responds to your inquiry whether a provision of New York banking law applies to [ ] (“Association”), a federal savings association whose home office is located in [ ], New York. According to your letter, the Association is interested in “generating deposit funding from public entities, which are located outside of the state of New York.” You inquire whether the proposed activity is permissible in light of a provision of New York banking law (the “NY Provision”) that provides “[n]o savings bank shall accept any deposit for credit to any municipal corporation.”<sup>1</sup> Specifically, you ask (1) whether “Federal law authorizing a federal savings association to act as surety for public deposits preempt[s] the deposit related restrictions” in the NY Provision, and (2) can the Association “lawfully accept public unit deposits and/or deposits from municipal organizations?” In brief, we conclude that the NY Provision would not apply to the Association by reason of federal preemption, and the Association may accept public deposits and deposits from municipal organizations.

#### Discussion

The Association, a savings association chartered by the Office of Thrift Supervision (OTS), is subject to federal banking laws, including principally the Home Owners’ Loan Act (HOLA),<sup>2</sup> and OTS regulations implementing the HOLA.<sup>3</sup> Section 5(b)(1)(A) of the HOLA authorizes a federal savings association, subject to the terms of its charter and regulations of the Director of OTS, to “(i) raise funds through such deposit, share, or other accounts, including demand deposit accounts . . . ; and (ii) issue passbooks, certificates, or other evidence of accounts.”<sup>4</sup> This

<sup>1</sup> N. Y. Banking Law, Article 6, Section 237.2., NY CLS Banking § 237 (LexisNexis 2008).

<sup>2</sup> 12 U.S.C. §§ 1461 *et seq.* (West 2001 and West Supp. 2008).

<sup>3</sup> 12 C.F.R. Parts 500 to 591 (2008).

<sup>4</sup> 12 U.S.C. § 1464(b)(1)(A) (West 2001).

broad statutory grant of authority does not include any restriction on the power to accept deposits from states, municipalities, local governments, or public entities. OTS regulations recognize the authority of federal savings associations, including federal savings banks,<sup>5</sup> to accept state and local government funds for deposit. Section 545.16 provides “[a] Federal savings association that is a deposit association may give bond or security for deposit in it of public moneys or investment in it by a governmental unit if required to do so by state law, either as an alternative condition or otherwise, regardless of the amount required.”<sup>6</sup> Thus, the authority of federal savings associations to accept public deposits is clear under both the HOLA and OTS regulation. To the extent the NY Provision purports to prohibit a federal savings association or federal savings bank from accepting public deposits from municipal corporations,<sup>7</sup> the NY Provision would not apply to the Association.

The NY Provision is inapplicable to the Association because the Provision conflicts with the HOLA and OTS regulations, which together occupy the field of deposit-related regulations for federal savings associations to the exclusion of state law. In sections 4(a) and 5(a) of the HOLA, Congress gave OTS exclusive and plenary authority to regulate all aspects of the operations of federal savings associations, giving primary consideration of the “best practices” of thrift institutions, and to encourage safe and sound lending.<sup>8</sup> As noted above, section 5(b) of the HOLA specifically authorizes OTS to promulgate regulations governing deposit operations and related powers. The comprehensive language of the HOLA evidences Congress’s intent that such federal regulation be pervasive and exclusive, leaving no room for state regulation.<sup>9</sup>

OTS regulations implementing the HOLA carry out these congressional objectives. Federal regulations have the same preemptive effect as federal statutes.<sup>10</sup> OTS regulation section 545.2 expressly states that OTS’s exercise of its “plenary and exclusive authority to regulate all aspects of the operations of Federal savings association” under section 5(a) of the HOLA “is preemptive of any state law purporting to address the subject of the operations of a Federal savings

<sup>5</sup> The term “federal savings association” includes federal savings banks chartered by the OTS. 12 U.S.C. § 1462(5) (West 2001).

<sup>6</sup> 12 C.F.R. § 545.16(b) (2008). For purposes of this regulation, “state law” includes “actions by a governmental body which has a charter adopted under the constitution of the state with provisions respecting deposits of public money of that body.” 12 C.F. R. § 545.16(a).

<sup>7</sup> Your letter does not address the scope or coverage of the NY Provision, and it is not entirely clear whether the NY Provision is intended to apply to federally-chartered savings banks.

<sup>8</sup> 12 U.S.C. §§ 1463(a), 1464(a) (West 2001). These sections authorize the OTS Director to provide for the organization, incorporation, safe and sound operation, examination, and regulation of federal savings associations.

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

<sup>10</sup> *de la Cuesta*, 458 U.S. at 153; *Silvas v. E\*Trade Mortgage Corp.*, 514 F.3d 1001, 1005 (9<sup>th</sup> Cir. 2008).

association.”<sup>11</sup> In authorizing federal savings associations to give surety for public deposits, section 545.16 implicitly recognizes the authority to accept such deposits. Moreover, OTS has expressly “occup[ie]d the entire field of federal savings associations’ deposit-related regulations” so as to afford associations “maximum flexibility to exercise deposit-related powers according to a uniform federal scheme of regulation.”<sup>12</sup> This uniform federal scheme of regulation for deposit operations permits federal savings associations to “exercise deposit-related powers as authorized under federal law, . . . without regard to state laws purporting to regulate or otherwise affect deposit activities, except to the extent provided in § 557.13.”<sup>13</sup>

The Supreme Court and numerous federal courts have recognized that the HOLA and implementing regulations of the OTS and its predecessor, the Federal Home Loan Bank Board (FHLBB), preempt state law where such regulations “occupy the field” or where state law conflicts, directly or indirectly, with federal regulations, including where the state law is an obstacle to the achievement of the objectives of federal regulations.<sup>14</sup> Similarly, OTS and its predecessor, the FHLBB, have found that the HOLA and OTS and FHLBB regulations preempt state laws that purport to regulate the activities and operations of federal savings associations.<sup>15</sup>

Accordingly, federal law -- the HOLA and OTS regulations -- governs the authority of the Association to accept deposits from public entities, including public fund deposits from municipal corporations. To the extent the NY Provision may be directed at federally-chartered

<sup>11</sup> 12 C.F.R. § 545.2 (2008).

<sup>12</sup> 12 U.S.C. § 557.11(b) (2008). *See generally* OTS deposit regulations at 12 C.F.R. §§ 557.1 – 557.20 (2008).

<sup>13</sup> 12 C.F.R. § 557.11(b). The only types of state laws generally not preempted with respect to the deposit-related activities of federal savings associations are specified in OTS regulation § 557.13, namely, contract and commercial law; tort law; criminal law; and a law that furthers a vital state interest and either only incidentally affects deposit activities or is not contrary to the purposes of OTS regulations.

<sup>14</sup> *See de la Cuesta*, 451 U.S. at 156, 159 (preempting state limit on due-on-sale clauses that conflicted with FHLBB regulation); *Silvas v. E\*Trade Mortgage Corp.*, 514 F.3d at 1008 (affirming lower court dismissal of action based on OTS’s preemption of entire field of lending regulation); *SPGGC, LLC v. Ayotte*, 488 F.3d 525 (1<sup>st</sup> Cir. 2007) (court found preemption based on “irreconcilable conflict” between state restrictions on gift cards and HOLA and OTS regulations); *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 560-61 (9<sup>th</sup> Cir. 2002) (HOLA and OTS deposit, lending, and electronic operations regulations occupy those fields and preempt local ATM ordinances); *First FS&LA of Boston v. Greenwald*, 591 F.2d 417, 425 (1<sup>st</sup> Cir. 1979) (preempting state requirement to pay interest on escrow accounts that conflicted with FHLBB regulation); *Conference of Fed. Sav. & Loan Ass’ns v. Stein*, 604 F.2d 1256, 1260 (9<sup>th</sup> Cir. 1979) (FHLBB’s regulation of federal savings 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*, 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 (10<sup>th</sup> Cir. 1985). *See also*, *State Farm Bank, FSB v. Reardon*, No. 07-4260, 2008 WL 3876196 (6<sup>th</sup> Cir. Aug. 22, 2008) (OTS lending regulation preempts state law that directly impacts federal savings association lending activities), and *State Farm Bank, FSB v. Burke*, 445 F. Supp. 2d 207 (D. Conn. 2006).

<sup>15</sup> *See* OTS Op. Chief Counsel (Nov. 22, 1999) (deposits, electronic operations, and lending); OTS Op. Chief Counsel (Oct. 11, 1991) (deposit taking); FHLBB Op. Gen. Counsel (April 28, 1987) (lending and investment).

savings banks, it would constitute an improper attempt to regulate an area specifically reserved to OTS by the HOLA and OTS regulations and, therefore, would not apply to the Association. The Association, therefore, may accept public and municipal deposits.

In reaching the foregoing conclusions, we have relied on the factual representations contained in your submission to us. 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.

We trust this is responsive to your inquiry. If you have further questions, please contact Vicki Hawkins-Jones, Special Counsel, at (202) 906-7034.

Sincerely,

/s/

John E. Bowman  
Deputy Director and Chief Counsel

cc: Regional Directors  
Regional Counsel