



Office of Thrift Supervision

Department of the Treasury

John E. Bowman, Deputy Director and Chief Counsel

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

February 20, 2008

Natalie Abrams, Esq.
Associate General Counsel
Standard & Poor's
55 Water Street-35th floor
New York, NY 10041

Re: Ratings of Structured Finance Transactions

Dear Ms. Abrams:

Thank you for taking the time to discuss issues of interest with my staff on January 22, 2008, involving Standard & Poor's rating of structured finance transactions that include loans originated by federal savings associations or their operating subsidiaries in states with predatory lending laws. As the applicable federal supervisory agency of these entities, the Office of Thrift Supervision (OTS) is able to authoritatively address the federal preemption principles that apply.

In enacting the Home Owners' Loan Act ("HOLA"),¹ Congress required the Federal Home Loan Bank Board, and now the OTS (as the successor agency), 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."² 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.³ 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.⁴ The broad preemptive scope of

¹ 12 U.S.C.A. § 1461 *et seq.* (West 2001).

² HOLA § 5(a); 12 U.S.C.A. § 1464(a) (West 2001).

³ 12 C.F.R. § 560.2(a) (2007).

⁴ The full text of OTS regulation 560.2(a) (2007) reads:

HOLA and OTS's regulations was reaffirmed most recently in Silvas v. E*Trade Mortgage Corp., 2008 U.S. App. LEXIS 1944 (9th Cir. 2008).

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.⁵ 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. Further, state laws purporting to regulate the activities of a federal savings associations' operating subsidiary are preempted to the same extent such laws are preempted for the federal savings association itself.⁶

In OTS regulation 560.2(b), OTS described with specificity the scope of its occupation of the field of lending regulation by providing a nonexclusive, illustrative list of the types of state laws encompassed within the preemption. The preempted state laws include many of the types of provisions found in state and local predatory lending laws. For example, generally 12 C.F.R. § 560.2(b)(4) preempts state laws on terms of credit, § 560.2(b)(5) preempts 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. In promulgating its regulations, OTS explained that when analyzing the preemption of state laws under § 560.2, the first step is to determine whether the type of law in question is listed in § 560.2(b).⁷ If so, the analysis will end there; the law is preempted.⁸

Standard & Poor's has recognized that OTS issued several legal opinions applying HOLA and OTS's preemption regulations to conclude that the provisions of various state

the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA. To enhance safety and soundness 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), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or § 560.110 of this part. For purposes of this section, "state law" includes any state statute, regulation, ruling, order or judicial decision.

⁵ *Id.*

⁶ 12 C.F.R. § 559.3(n)(1) (2007).

⁷ Lending and Investment: Final Rule, 61 Fed. Reg. 50951, 50966 (September 30, 1996).

⁸ *Id.*

predatory lending laws (Georgia, New York, New Jersey, and New Mexico) are preempted for federal savings associations and their operating subsidiaries.⁹ However, to the extent that other jurisdictions have similar predatory lending laws, the same preemption finding would apply based on the application of the same statutory and regulatory provisions, and applying the same prior precedents.

OTS addressed the particular state predatory lending laws it did based on the timing of incoming opinion requests from federal savings associations. As explained in OTS's Customer Service Plan for External Interpretive Opinions, "In order to conserve resources and help keep OTS assessments low, we ordinarily will not provide substantive written responses to questions that ... have already been answered by regulation, statute, court cases, or prior agency opinions."¹⁰ Because OTS already addressed several state predatory lending laws in agency opinions, it has not seen fit to issue additional, largely duplicative opinions addressing substantially similar laws of other jurisdictions. As reflected in the OTS opinion addressing the New Mexico predatory lending law, only an abbreviated analysis was necessary because the same reasons for preemption OTS had stated in prior opinions applied.¹¹ OTS continues to provide oral guidance to regulated institutions about the application of state predatory lending laws and may issue further legal opinions in this area should the need arise.

We trust that this letter will be of assistance to you. For further questions, please contact Richard Bennett, Senior Compliance Counsel at 202-906-7409 or Deborah Dakin, Senior Deputy Chief Counsel at 202-906-6445.

Sincerely,

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John E. Bowman

cc: Deborah Dakin
Richard Bennett

⁹ See, e.g., Standard & Poor's Announces Position on OTS Preemption Pronouncements, November 25, 2003 (citing OTS Ops. Chief Counsel January 21, 2003 (Georgia Fair Lending Act), January 30, 2003 (New York Predatory Lending Law), July 22, 2003 (New Jersey Predatory Lending Act), and September 2, 2003 (New Mexico Home Loan Protection Act)). These OTS Chief Counsel Opinions are available on OTS's web site at www.ots.treas.gov/resultsort.cfm?catNumber=283&dl=58&edit=1. See also OTS Op. Chief Counsel March 7, 2006 (Code of Montgomery County Maryland), available at www.ots.treas.gov/docs/5/56217.pdf.

¹⁰ OTS Customer Service Plan, External Interpretive Opinions, April 2000, available at www.ots.treas.gov/docs/4/48784.html.

¹¹ OTS Op. Chief Counsel, September 2, 2003, at 2.