



**Office of Thrift Supervision**  
Department of the Treasury

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6000

November 17, 1998

[

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Dear [ ]:

This responds to your request for a legal opinion regarding whether state laws that require lenders to pay interest on escrow accounts for hazard insurance and real estate taxes are preempted by federal law for federal savings associations.

Due to limited resources and the large number of requests for legal opinions that we receive, we generally do not respond to opinion requests regarding matters that have been addressed in prior opinions. Accordingly, we have enclosed prior opinions of the Office of Thrift Supervision ("OTS") and its predecessor agency, the Federal Home Loan Bank Board ("FHLBB"), dated January 3, 1991, August 13, 1985, and September 24, 1984, that address and answer in the affirmative the issue you raise. The 1984 opinion was cited in Wisconsin League of Financial Institutions, Ltd. v. Galecki, 707 F. Supp. 401, 406 (W.D. Wis. 1989), which held that the FHLBB had expressly preempted state law in the area of mortgage escrow accounts. See also First Federal Savings and Loan Ass'n of Boston v. Greenwald, 591 F.2d 417 (1<sup>st</sup> Cir. 1979). We also refer you to OTS regulation 12 C.F.R. § 560.2(a) and (b)(6) (1998), which indicates that state laws purporting to impose requirements regarding escrow accounts are the type of state laws that are preempted for federal savings associations.

If you have any further questions, please feel free to contact Richard Bennett, Counsel (Banking and Finance), at 202-906-7409.

Very truly yours,

Vicki L. Hawkins-Jones  
Assistant Chief Counsel

Enclosures

cc: [ ], Regional Counsel  
[ ] Region



Office of Thrift Supervision  
Department of the Treasury

Harris Weinstein  
Chief Counsel

1700 G Street, N.W., Washington, D.C. 20552 • (202) 906-6404

January 3, 1991

[REDACTED]

Dear Mr. [REDACTED]

This responds to your letter inquiring whether a New York statute<sup>1</sup> purporting to regulate escrow accounts for mortgages originated by Federal savings associations is preempted by the regulations of the Office of Thrift Supervision ("OTS"). According to the provisions of the New York statute, Federal savings associations are: (1) required to pay interest on mortgage escrow accounts; (2) prohibited from charging fees on escrow accounts; and (3) required to provide the borrower with periodic written statements disclosing specified information about the status of the escrow account. For the reasons set forth below, we conclude that the New York statute is preempted insofar as it purports to regulate interest payments, service charges, and the disclosure of information on escrow accounts for mortgages between Federal savings associations and their borrowers.

Your letter informs us that your [REDACTED] firm represents [REDACTED] ("the Federal savings association"). According to your letter, the Federal savings association levies a flat \$5.00 service charge on some of its older mortgages. On more recent mortgages, the Federal savings association has contractually reserved the right to assess a fee for periodic searches of the tax records. On another portfolio of mortgages, your client assesses a charge of \$12.50 per year over a five year period to defray the cost of a tax servicing fee. Although the Federal savings association provides an annual, written disclosure about the status of its escrow accounts to all borrowers, these notices do not comply with all of the requirements of the New York statute.<sup>2</sup>

1. NY REAL PROP. TAX LAW § 953 (McKinney 1990).

2. The relevant portion of NY REAL PROP. TAX LAW § 953(6) (McKinney 1990) requires lenders, without charge, to provide each mortgagor an annual analysis of the escrow account. The analysis must state: (1) the interest earned; (2) the amount of taxes paid from the escrow account; and (3) the account

My Office has already sent you copies of two opinions<sup>3</sup> of the Office of General Counsel ("OGC") of the former Federal Home Loan Bank Board ("Bank Board"),<sup>4</sup> addressing whether Federal law preempts state laws purporting to regulate mortgage escrow accounts of Federal savings associations. Your letter seeks more formal guidance because prior OGC opinions did not specifically address some of the issues raised by the New York statute.

I. Preemption of State Laws Requiring Federal Savings Associations to Pay Interest on Mortgage Escrow Accounts

The two opinions we sent you held that: (1) in the absence of an express contractual provision to the contrary, Federal savings associations are not obligated to pay interest on mortgage escrow accounts; and (2) state laws purporting to require Federal savings associations to pay interest on such accounts are preempted. The September 24, 1984 and August 13, 1985 opinions relied upon three regulations that remain in effect,<sup>5</sup> and the OTS continues to adhere to these prior opinions.<sup>6</sup> The rationale of these opinions and prior decisions applies to the New York statute.

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(Footnote 2 continued from previous page)  
balances at the beginning and end of the period covered by the analysis. In addition, the statute requires the lender to furnish the borrower upon request, and without charge, the date(s) of the payment of taxes from the escrow account.

3. OGC Op. by Raiden (Sept. 24, 1984); OGC Op. by Raiden (Aug. 13, 1985).

4. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989) abolished the Bank Board and transferred its chartering, regulatory and supervisory functions to the OTS.

5. 12 C.F.R. § 545.1 (1990); 12 C.F.R. § 545.2 (1990); 12 C.F.R. § 545.32(b)(6) (1990). According to section 401(h)(2) of FIRREA, regulations of the former Bank Board remain in effect until they are "modified, terminated, set aside, or superseded in accordance with applicable law by the Director of the Office of Thrift Supervision." See Pub. L. No. 101-73, § 401(h)(2), 103 Stat. 183, 357 (1989), as codified at 12 U.S.C. § 1437(h)(2). The post-FIRREA version of these three regulations has been published at 54 Fed. Reg. 49,715 (November 30, 1989).

6. See also Wisconsin League of Financial Institutions, Ltd. v. Galecki, 707 F. Supp. 401 (W.D. Wis. 1989). This case held that WIS. STAT. ANN. § 138.052 (5)(a) (West 1988) is preempted by the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1464, and Bank Board regulations.

## II. State Prohibitions on Service Charges

Next, we address whether the provision of the New York statute purporting to prohibit Federal savings associations from charging a service fee on escrow accounts is preempted. No prior OGC opinion specifically addresses this issue. As explained below, we conclude that Federal law preempts state statutes purporting to prohibit Federal savings associations from collecting contractually-imposed service charges on mortgage escrow accounts from their borrowers. The same rationale that the September 24, 1984 and August 13, 1985 opinions applied to interest payments on mortgage escrow accounts is equally applicable to this situation.

Three regulations support the proposition that Federal law preempts state laws purporting to regulate the mortgage lending operations of Federal savings associations: sections 545.1, 545.2, and 545.32. Section 545.1 provides that a Federal savings association "may exercise all authority granted it by the [HOLA] whether or not implemented specifically by Office regulations, subject to the limitations and interpretations contained in this part." Section 545.2 states:

The regulations in this Part 545 are promulgated pursuant to the plenary and exclusive authority of the Office to regulate all aspects of the operations of Federal savings associations, as set forth in section 5(a) of the [HOLA]. This exercise of the Office's authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association.

12 C.F.R. § 545.2 (1990) (emphasis added).

Federal savings associations are authorized by section 545.32 to invest in residential real estate loans:

Pursuant to [12 U.S.C. § 1464(c)(1)(B)]  
. . . a Federal savings association may originate, invest in, sell, purchase, service, participate or otherwise deal in . . . loans made on the security of residential . . . real estate, or interests in such loans, subject to the limitations of this part.

12 C.F.R. § 545.32(a) (emphasis added). Additionally, section 545.32(b)(6) permits Federal savings associations to establish

escrow accounts to mortgages.<sup>7</sup> The preamble to section 545.32 states:

The former provisions, 12 C.F.R. § 545.8-3(b) (47 Fed. Reg. 36612 (1982)) specified in detail the limitations applicable to such accounts and largely restated the provisions of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. § 2601-2617) ("RESPA"). . . . In the final amendments the Board has decided to remove the substantive provisions pertaining to escrow accounts, allowing such matters to be governed by the loan contract, and in their place require a more detailed disclosure about the accounts. Of course, associations will remain subject to the requirements of RESPA in addition to the Board's regulations and, if consistent with that statute, may require escrow accounts to the extent agreed to in the loan contract.

48 Fed. Reg. 23,032, 23,039 (May 23, 1983) (emphasis added).

The September 24, 1984 and August 13, 1985 opinions interpreted the preamble as indicating the Board's intention that escrow accounts be governed by the loan contract between the Federal savings association and its borrowers, subject only to the restrictions of Federal statutes and regulations. Accordingly, these two opinions conclude that the former Bank Board "did not intend to subject this area of the operations of [F]ederal associations to state regulation."

The foregoing authorities confirm that escrow accounts on mortgage loans are among the operations of Federal savings associations that are governed solely by Federal law. Thus, Federal savings associations may impose a service charge on escrow accounts, notwithstanding any contrary provision of state law, provided that such service charges are disclosed to the borrowers pursuant to the requirements of Federal law.

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7. Section 545.32(b)(6), which was added in 1984, states:

A Federal savings association may require that all or any part of the estimated annual taxes, assessments, insurance premiums, and other charges on any loan be paid in advance to the Federal savings association, in addition to interest and principal payments on the loan, to enable the Federal savings association to pay such charges as they become due, consistent with the [RESPA].

See 49 Fed. Reg. 43,040, 43,044 (Oct. 26, 1984).

### III. Disclosure Requirements

The previous discussion also demonstrates that the escrow accounts established for mortgages originated by Federal savings associations are subject solely to the disclosure requirements imposed by the RESPA, OTS regulations, and other sources of Federal law. State disclosure laws are generally not applicable to the mortgage lending operations of Federal savings associations.<sup>8</sup> Another passage from the preamble to section 545 more fully explains the disclosure requirements for escrow accounts that the regulation imposes on Federal savings associations:

If the loan contract requires escrow accounts, the association must disclose this fact. It must also disclose the purpose served by the accounts ( i.e., what the funds are used for), how the amount of the escrow payment is determined, and the rights of the association in the event that the borrower fails to make the escrow payments (i.e., the right to deduct the amounts from the monthly payment). The Board believes that the provision of this information will adequately apprise the applicant of the amount and types of payments that must be held in escrow. In light of this disclosure and the provisions of RESPA, the Board believes that the existing provisions on escrow accounts are no longer necessary and for that reason has deleted them.

48 Fed. Reg. 23032, 23039 (May 23, 1983).

Accordingly, we conclude that the three provisions of New

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8. This approach is consistent with prior OGC opinions which concluded that Federal law preempts state laws purporting to impose disclosure requirements on the lending operations of Federal savings associations. For example, an OGC opinion dated April 28, 1987 held that a New York regulation purporting to impose disclosure requirements and advertising rules on mortgage lenders and brokers was preempted. See OGC Op. by Quillian (April 28, 1987). An OGC opinion of November 12, 1985 held that a Massachusetts law imposing disclosure requirements on Adjustable Rate Mortgages ("ARM") was preempted. See OGC Op. by Raiden (Nov. 12, 1985). On May 30, 1984, the OGC issued a memorandum concluding that Federal law preempted a state law purporting to require Federal savings associations to disclose contractual provisions that prohibited borrowers from encumbering the collateral property with junior liens. See OGC Memo by Long (May 30, 1984).

York state law raised in your letter of June 21, 1990 are not applicable to Federal savings associations because they have been preempted by Federal law.

I trust that this letter satisfies your inquiry. If you have any further questions, please contact Richard A. Katz, Attorney, Regulations and Legislation Division, at 202-906-7037.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harris Weinstein".

Harris Weinstein  
Chief Counsel

Federal Home Loan Bank Board



1700 G Street, N.W.  
Washington, D.C. 20562  
Federal Home Loan Bank System  
Federal Home Loan Mortgage Corporation  
Federal Savings and Loan Insurance Corporation

NORMAN H. FAIDEN  
GENERAL COUNSEL

August 13, 1985

Dear

This is in response to your letter regarding the scope of federal preemption as it pertains to the payment of interest on escrow accounts by federal associations, subsidiaries of such associations and purchasers of mortgages in the secondary market.

You have asked this Office to address the issue of Federal preemption in light of New York State law requiring the payment of interest on escrow accounts. Due to staff shortages, the large number of requests we receive for legal opinions concerning federal preemption of state law, and the complexity of this area of legal precedent, it is currently the policy of this Office of the Bank Board not to provide written opinions as to specific state laws except in exceptional circumstances. It is also customary for a person making a request for a legal opinion to provide this Office with analysis of the applicable statutes or regulations, and proposed conclusions of law which this Office will then confirm or state its reasons for reaching a different result.

With regard to your specific questions regarding the scope of federal preemption however, we will respond without reference to a particular state law.

As you are aware, until May 26, 1983, a regulation of the Board governing the operations of Federal association's provided that "[u]nless obligated by contract, a Federal association shall have no obligation, other than under this paragraph (c), to pay interest on escrow accounts." 12 C.F.R. § 545.8-3(c)(3) (1983). In deleting this provision, the Board explained that it had



decided to remove the substantive provisions pertaining to escrow accounts, allowing such matters to be governed by the loan contract, and in their place require a more detailed disclosure about accounts. Of course, associations will remain subject to the requirements of RESPA [the Real Estate Settlement Procedures Act of 1974] in addition to the Board's regulations and, if consistent with that statute, may require escrow accounts to the extent agreed to in the loan contract.

48 Fed. Reg. 23,032, 23,039 (1983).

In October of 1984, the Board added § 545.32(b)(6) to clarify federal associations' continued authority to require escrow accounts. 12 C.F.R. § 545.32(b)(6) (1985). See also 49 Fed. Reg. 43,040, 43,044 (1984).

It is the opinion of this Office that the Board expressly intended by substituting disclosure requirements for substantive requirements (other than the general statement of authority contained in § 545.32(b)(6)), that the payment of interest on escrow accounts by federal associations be governed by the loan contract, subject only to federal statutes and regulations. It did not intend to subject this area of the operations of federal associations to state regulation.

This intention is generally stated in Board regulation § 545.1 which provides that "[a] Federal association may exercise all authority granted it by the Home Owner's Loan Act of 1933 . . . and its charter and bylaws, whether or not implemented specifically by Bank Board regulation," 12 C.F.R. § 545.1 (1985), and in Board regulation § 545.2, which provides that the exercise in part 545 of the Board's "plenary and exclusive authority . . . to regulate all aspects of the operations of Federal associations . . . is preemptive of any state law purporting to address the subject of the operations of a Federal association," id. § 545.2. See also 48 Fed. Reg. 23,032, 23,032-33 (1983) (discussing §§ 545.1, 545.2).

Therefore, if a federal association agrees to pay interest on an escrow account as part of the negotiated contract with the borrower the continued payment of such interest would be subject only to federal statutes and regulations. It is our opinion that state laws or regulations which would impose upon federal associations obligations to pay interest on escrow accounts other than those provided for in their loan contracts are preempted because such laws and regulations stand as "an obstacle to the accomplishment and execution of the full purposes and objectives" of the Board's regulations. Fidelity

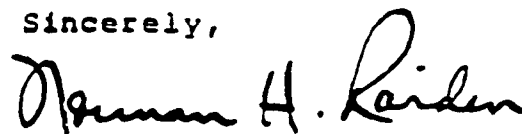
Federal Savings and Loan Association v. De La Cuesta, 458 U.S. 141, 156 (1982) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

Similarly, where a contract is silent as to whether a federal association will pay interest on an escrow account, it is our opinion that it was the Board's intention that federal associations would not be subject to state laws or regulations which would impose further obligations to pay interest on escrow accounts because such laws and regulations would likewise stand as an "an obstacle to the accomplishment and execution of the full purposes and objectives" of the Board's regulations. Fidelity, supra. It is our opinion that such preemption would exist regardless of whether the loans in question are sold by the federal association to a third party, are being serviced by a third party, or whether the escrow deposits are held at a federal association while the loans have been sold in the secondary market.

With regard to your specific questions regarding the application of Federal preemption to loans originated by a wholly-owned subsidiary of a federal association, the Board has not taken a position as to whether § 545.2 applies to service corporations. It should be noted, that the Board in adopting § 545.2 referred to "federal associations" and did not include service corporations in the regulatory language. 12 C.F.R. § 545.2 (1985). See also 48 Fed. Reg., supra. Therefore, while we are unable to give you more specific response to your questions, I believe the language of § 545.2 which refers to "Federal associations" should be used as a guide to the Board's intended scope of Federal preemption.

Please let me know if I may be of further assistance.

Sincerely,



Norman H. Raiden  
General Counsel

Federal Home Loan Bank Board



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1700 G Street, N.W.  
Washington, D.C. 20562  
Federal Home Loan Bank System  
Federal Home Loan Mortgage Corporation  
Federal Savings and Loan Insurance Corporation

NORMAN H. RAIDEN  
GENERAL COUNSEL

September 24, 1984

Dear

This responds to your April 12, 1984, letter requesting the opinion of the Office of General Counsel concerning the federal preemption of state laws which would require federal associations to pay interest on escrow accounts. In particular, you have called our attention to an example of such a law recently enacted in the State of Maine. For the reasons stated below, this office is of the opinion that such laws are preempted.

Until May 26, 1983, a regulation of the Federal Home Loan Bank Board (Board) governing the operations of federal associations provided that "[u]nless obligated by contract, a Federal association shall have no obligation, other than under this paragraph (c), to pay interest on escrow accounts." 12 C.F.R. § 545.8-3(c)(3) (1983); see also First Federal Savings and Loan Association of Boston v. Greenwald, 591 F.2d 417, 425-26 (1st Cir. 1979) (holding that a predecessor regulation preempted a conflicting Massachusetts statute). In deleting this provision, the Board explained that it had

decided to remove the substantive provisions pertaining to escrow accounts, allowing such matters to be governed by the loan contract, and in their place require a more detailed disclosure about the accounts. Of course, associations will remain subject to the requirements of RESPA [the Real Estate Settlement Procedures Act of 1974] in addition to the Board's regulations and, if consistent with that statute, may require escrow accounts to the extent agreed to in the loan contract.

48 Fed. Reg. 23032, 23039 (1983) (Board regulation 545.33(f)(3) contains the new escrow account disclosure requirements).

Thus, the Board expressly intended, by substituting disclosure requirements for substantive requirements, that the payment of interest on escrow accounts by federal associations be governed by the loan contract, subject only to federal statutes and regulations. It did not intend to subject this area of the operations of federal associations to state regulation.

This intention is generally stated in Board regulation 545.1, which provides that "[a] Federal association may exercise all authority granted it by the Home Owner's Loan Act of 1933 . . . and its charter and bylaws, whether or not implemented specifically by Bank Board regulation," 12 C.F.R. § 545.1 (1984), and in Board regulation 545.2, which provides that the exercise in part 545 of the Board's "plenary and exclusive authority . . . to regulate all aspects of the operations of Federal associations . . . is preemptive of any state law purporting to address the subject of the operations of a Federal association," *id.* § 545.2. See also 48 Fed. Reg. 23032, 23032-33 (1983) (discussing §§ 545.1, 545.2).

Therefore, this office is of the opinion that state laws or regulations which would impose upon federal associations obligations to pay interest on escrow accounts other than those provided for in their loan contracts are preempted because such laws and regulations stand as "'an obstacle to the accomplishment and execution of the full purposes and objectives.'" of the Board's regulations. Fidelity Federal Savings & Loan Association v. De La Cuesta, 458 U.S. 141, 156 (1982) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

Very truly yours,



Norman H. Raiden  
General Counsel