



Office of Thrift Supervision
Department of the Treasury

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

May 11, 1998

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Re: Request for Opinion

Dear []:

This responds to your request for a legal opinion, submitted on behalf of [] (“Association”), a federal savings bank that engages primarily in mortgage lending in [] and, to a lesser extent, in New York state. You ask the Office of Thrift Supervision (“OTS”) to concur with your conclusion that federal law preempts application to the Association of an anti-pass through provision of New York state tax law that bars mortgage lenders from passing on to mortgagors a special mortgage recording tax.¹ You indicate that the Association is currently paying the mortgage recording tax on the loans it records in New York state and that there is no pending threat of state or private action to enforce the anti-pass through tax provision.

In order to conserve limited government resources, we ordinarily do not provide legal opinions on questions (1) that have already been addressed by statute, regulations, court decisions, or prior opinions of this office, or (2) that do not raise a significant issue of law or policy. See OTS Customer Service Plan for Interpretive Opinions (copy enclosed). The essence of the issue you raise has been specifically addressed by a court decision and has been generally addressed by at least one prior OTS legal opinion.

¹ You indicate that New York law subjects residential mortgage loans to at least three recording taxes, an initial tax of 50 cents per \$100 of principal value, and two supplemental taxes of an additional 25 cents per \$100 of principal value each. N.Y. Tax Law §§ 253.1, 253.1-a(a), and 253.2(a) (Consol. 1998). One of the supplemental recording taxes of 25 cents per \$100 of principal value must be paid by the lender and may not be passed through, either directly or indirectly, to the borrower. N.Y. Tax Law § 253.1-a(a) (Consol. 1998). Section 253.1-a(a) contains certain exceptions to the payment requirements, none of which apply to the Association.

As your letter indicates, a New York state court has held that federal law preempts application of the anti-pass through tax provision to a federal savings association. In Dime Savings Bank of New York, FSB v. New York,² the Supreme Court of New York, Appellate Division, Second Department, specifically held that an OTS regulation preempted application of the New York anti-pass through tax provision to federal savings associations.³

In addition, an OTS legal opinion issued September 2, 1997 (“Opinion”) concluded that federal law preempts an administrative order of the Virgin Islands Banking Board that prohibited banks doing business in the U.S. Virgin Islands from passing through to customers the costs of inspecting repairs to hurricane-damaged properties rebuilt with insurance proceeds.⁴ The Opinion found that the administrative order constituted an impermissible attempt to regulate a federal savings association’s lending activities. The analytical foundation of this Opinion provides another basis for the conclusion reached by the court in the Dime case regarding the inapplicability to federal savings associations of the state law in question.

Finally, we refer you to OTS regulations at 12 C.F.R. §§ 545.2 and 560.2 (1997), which set forth the scope of preemption of state law with respect to the operations and lending activities of federal savings associations.

OTS opinions and regulations constitute valid precedents and may be relied on by the Association in conducting its lending operations in New York state. Should you

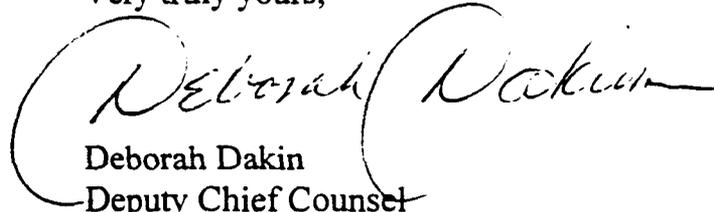
² 579 N.Y.S.2d 679 (N.Y. App. Div. 1992).

³ The OTS regulation, 12 C.F.R. § 545.32(b)(5) (1992), authorized a federal savings association to require the borrower “to pay necessary initial charges connected with making a loan, including the actual costs of title examination, appraisal, credit report, survey, drawing of papers, loan closing, and other necessary incidental services and costs.” The Dime court found that the phrase “other necessary incidental services and costs” encompassed payment of the mortgage recording tax. 579 N.Y.S.2d at 681-82. The OTS removed § 545.32(b)(5) as part of its recent amendments to its lending and investment regulations. However, the preamble to the final lending and investment rule explicitly states that “by removing [§ 545.32(b)(5)], OTS does not intend any narrowing of federal thrifts’ authority to conduct these activities. . . .” 61 FR 50,954 (September 30, 1996).

⁴ OTS Chief Counsel Memorandum Opinion (September 2, 1997). The insurance proceeds were paid to repair properties damaged by Hurricane Marilyn in September, 1995. The Opinion observed that the inspection requirement was designed to protect the savings association’s interest in the collateral securing its loan and, therefore, was an integral part of the association’s lending program. Id. at 6. The Opinion further noted that the decision to pass the costs of the inspections on to borrowers was a matter to be determined by the parties involved, namely the association and its borrowers, and that a blanket prohibition on such practice directly affected the association’s lending operations. Id. at 8.

have any further questions concerning this matter, please feel free to contact Timothy P. Leary, Counsel (Banking & Finance) at (202) 906-7170.

Very truly yours,


Deborah Dakin
Deputy Chief Counsel

Enclosure

cc: Timothy P. Leary