

Case No. 07-4260

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE FARM BANK, F.S.B.; GEORGE MEINBERG,
Plaintiffs-Appellants,

v.

JOHN B. REARDON, Superintendent of the Ohio Division of Financial
Institutions,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio

**PROOF BRIEF OF *AMICUS CURIAE*,
OFFICE OF THRIFT SUPERVISION,
IN SUPPORT OF APPELLANT STATE FARM BANK, F.S.B.,
AND FOR REVERSAL OF THE JUDGMENT**

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TABLE OF CONTENTS

Interest of Amicus Curiae	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
I. THE DISTRICT COURT ERRED IN REFUSING TO GRANT DEFERENCE TO THE OTS OPINION.....	9
A. The OTS Opinion Is a Careful, Well-Reasoned Interpretation By OTS of Its Regulations	9
B. The OTS Opinion is Entitled to Deference.....	17
II. THE DISTRICT COURT ERRED IN HOLDING THAT THE OTS OPINION WAS SUBJECT TO NOTICE AND COMMENT RULEMAKING PROCEDURES UNDER THE APA	23
CONCLUSION.....	27
CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases:

<u>Acs v. Detroit Edison Co.</u> , 444 F.3d 763 (6 th Cir. 2006)	17
<u>American Hosp. Ass'n v. Bowen</u> , 834 F.2d 1037 (D.C. Cir. 1987).....	23, 25
<u>Auer v. Robbins</u> , 519 U.S. 452 (1997)	6, 17
<u>Bank of America v. City & County of San Francisco</u> , 309 F.3d 551 (9 th Cir. 2002).....	18
<u>Bank One, Utah v. Guttau</u> , 190 F.3d 844 (8 th Cir. 1999), <u>cert. denied</u> , 529 U.S. 1087 (2000).....	20
<u>Barnett Bank of Marion Cty., N.A. v. Nelson</u> , 517 U.S. 25 (1996)	10
<u>Battle Creek Health Sys. v. Leavitt</u> , 498 F.3d 401 (6 th Cir. 2007).....	17
<u>Bibbo v. Dean Witter Reynolds, Inc.</u> , 151 F.3d 559 (6 th Cir. 1998).....	4
<u>Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.</u> , 467 U.S. 837 (1984)	17
<u>Conference of Fed. Sav. & Loan Ass'ns v. Stein</u> , 604 F.2d 1256 (9 th Cir. 1979), <u>aff'd</u> , 445 U.S. 921 (1980).....	3
<u>Conway v. Astoria Fin. Corp.</u> , 837 A.2d 30 (Del. Ch. 2003), <u>aff'd</u> , 840 A.2d 641 (Del. 2004).....	18

<u>Dismas Charities, Inc. v. U.S. Dep't of Justice,</u> 401 F.3d 666 (6 th Cir. 2005)	24, 25
<u>Environmental Defense v. Duke Energy Corp.,</u> 127 S. Ct. 1423 (2007).....	22
<u>Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,</u> 458 U.S. 141 (1982)	3, 4, 10
<u>First Nat'l Bank v. Sanders,</u> 946 F.2d 1185 (6 th Cir. 1991)	24
<u>Flagg v. Yonkers Sav. & Loan Ass'n,</u> 307 F. Supp. 2d 565 (S.D.N.Y. 2004), <u>aff'd</u> , 396 F.3d 178 (2d Cir.), <u>cert. denied</u> , 546 U.S. 817 (2005).....	18
<u>Glendale Fed. Sav. & Loan Ass'n v. Fox,</u> 459 F. Supp. 903 (C.D. Cal. 1978).....	3
<u>Guardian Fed. Sav. & Loan Ass'n v.</u> <u>Federal Sav. & Loan Ins. Corp.,</u> 589 F.2d 658 (D.C. Cir. 1978).....	23
<u>Humanoids Group v. Rogan,</u> 375 F.3d 301 (4 th Cir. 2004)	20
<u>Rosen v. Goetz,</u> 410 F.3d 919 (6 th Cir. 2005)	18
<u>Skidmore v. Swift & Co.,</u> 323 U.S. 134 (1944)	17
<u>Smallwood v. OTS,</u> 925 F.2d 894 (6 th Cir. 1991)	4
<u>SPGGC, LLC v. Ayotte,</u> 488 F.3d 525 (1 st Cir.), <u>petition for cert. filed</u> , ___ U.S.L.W. ___ (U.S. Dec. 11, 2007) (No. 07-797)	5, 7, 8, 17

<u>St. Francis Health Care Ctr. v. Shalala,</u> 205 F.3d 937 (6 th Cir. 2000).....	17, 18, 24
<u>State Farm Bank, F.S.B. v. Burke,</u> 445 F. Supp. 2d 207 (D. Conn. 2006)	7, 17, 18, 19, 20
<u>State of Ohio Dep't of Human Servs. v.</u> <u>U.S. Dep't of Health & Human Servs.,</u> 862 F.2d 1228 (6 th Cir. 1988).....	24
<u>Watters v. Wachovia Bank,</u> 127 S. Ct. 1559 (2007).....	4, 5, 16
<u>Wells Fargo Bank of Texas N.A. v. James,</u> 321 F.3d 488 (5 th Cir. 2003).....	20

Statutes:

5 U.S.C. § 553(b)(A)	23
12 U.S.C. § 1 <u>et. seq.</u>	5
12 U.S.C. § 1462a.....	1
12 U.S.C. § 1463(a)	1
12 U.S.C. § 1464.....	1, 3
12 U.S.C. § 1464(a).....	3, 10, 15
12 U.S.C. § 1464(d)(1)(A).....	12
12 U.S.C. § 1464(d)(7)(D).....	12
12 U.S.C. § 1813(u)(1)	12
12 U.S.C. § 1813(u)(4)	12

Rules and Regulations:

Fed. R. App. P. 29(a)	3
12 C.F.R. pts. 545, 555, 557, and 560	11
12 C.F.R. § 545.2.....	11, 18
12 C.F.R. § 559.2.....	21
12 C.F.R. § 559.3.....	21
12 C.F.R. § 560.2.....	18, 20

12 C.F.R. § 560.2(a)11, 19
12 C.F.R. § 560.2(b)11, 19
12 C.F.R. § 557.11(a)11
12 C.F.R. § 557.11(b)11
12 C.F.R. § 557.12(g)11
61 Fed. Reg. 50951 (Sept. 30, 1996).....21

Miscellaneous:

I Richard J. Pierce, Jr., Administrative Law Treatise
§ 6.1 (4th ed. 2002).....24

Interest of Amicus Curiae

The Office of Thrift Supervision (“OTS”) respectfully submits this *amicus curiae* brief in support of appellant State Farm Bank, F.S.B. (“State Farm Bank”). The Home Owners’ Loan Act (“HOLA”) provides that OTS, an office in the United States Department of the Treasury, has principal responsibility for regulating federally-chartered savings associations (“FSAs”) such as State Farm Bank. 12 U.S.C. §§ 1462a, 1463(a), and 1464. In exercising that authority, OTS has promulgated comprehensive regulations governing all aspects of the operations of FSAs, including their lending operations. The regulations specify, among other things, that in order to enable FSAs to conduct their operations in accordance with best practices and under a uniform scheme of federal regulation, OTS occupies the field of lending regulation for FSAs.

On October 25, 2004, the Chief Counsel of OTS issued a legal opinion letter (the “OTS Opinion”) to State Farm Bank interpreting the OTS regulations. The OTS Opinion concluded that, under the particular facts and circumstances presented by State Farm Bank to the agency, state licensing and registration requirements such as provisions of the Ohio Mortgage Broker Act and related state regulations at issue in this litigation do not

apply to exclusive agents performing specified marketing, solicitation and customer service activities for State Farm Bank.

In its decision granting summary judgment to the defendant state Superintendent, the district court held that the HOLA and regulations issued by OTS do not preempt the Ohio licensing and registration requirements as applied to State Farm Bank's agents. The court declined to give any deference to the OTS Opinion and found that OTS had failed to comply with the Administrative Procedure Act ("APA") notice-and-comment rulemaking procedures in issuing the opinion letter.

As the supervisor of FSAs, OTS has a strong interest in assuring that federally-chartered savings associations may engage in the business of banking to the full extent authorized by federal law. The Ohio state law and regulations at issue here interfere with the ability of State Farm Bank to market its mortgage products as authorized by federal law and, therefore, are preempted.¹

This appeal also raises significant issues concerning (i) the deference to be afforded an opinion letter issued by OTS interpreting its own regulations; and (ii) whether the APA prohibits OTS from issuing legal

¹ The principal brief submitted by State Farm Bank explains in detail how the Ohio requirements at issue burden and interfere with its operations in the state. See Brief of Plaintiffs-Appellants at pp. 9-10.

opinion letters interpreting OTS regulations when responding to inquiries from regulated entities for guidance, and instead requires that OTS issue regulations, after notice-and-comment rulemaking, when providing a legal interpretation of OTS regulations. These matters are all of great interest and concern to OTS, both for the present case and for the future.

OTS accordingly submits this brief pursuant to Fed. R. App. P. 29(a).

SUMMARY OF ARGUMENT

The Supreme Court has long recognized the plenary authority of OTS and its predecessor, the Federal Home Loan Bank Board, to regulate FSAs. As the Court has stated, “The broad language of § 5(a) [12 U.S.C. § 1464(a)] expresses no limits on the [OTS’s] authority to regulate the lending practices of federal savings and loans. As one court put it, ‘it would have been difficult for Congress to give the [OTS] a broader mandate.’” Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 161 (1982) (quoting Glendale Fed. Sav. & Loan Ass’n v. Fox, 459 F. Supp. 903, 910 (C.D. Cal. 1978)). Given this congressional mandate, federal courts have repeatedly recognized that federal law and OTS regulations occupy the field of regulation of federally chartered savings banks, preempting state law. Id. at 144-45; Conference of Fed. Sav. & Loan Ass’ns v. Stein, 604 F.2d 1256, 1260 (9th Cir. 1979), aff’d, 445 U.S. 921 (1980).

Second, even in the absence of field preemption, state law that conflicts with the HOLA and OTS regulations is preempted. Conflict preemption “arises when ‘compliance with both federal and state regulations is a physical impossibility’ . . . or when state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” de la Cuesta, *supra*, 458 U.S. at 153 (citations omitted); *see also* Bibbo v. Dean Witter Reynolds, Inc., 151 F.3d 559, 562-63 (6th Cir. 1998); Smallwood v. OTS, 925 F.2d 894, 897 (6th Cir. 1991).

There is no question that the Ohio laws at issue here could not be validly applied to the lending-related activities of State Farm Bank itself (or to any other federally chartered savings bank). The fundamental question is whether the well-established benefits of federal preemption afforded to FSAs are lost in this case solely because State Farm Bank chooses to market its mortgage products in Ohio not through its own corporate offices but through exclusive agents that are not only subject to its control, but also to regulation and examination by OTS. The answer is “no.”

In its recent decision in Watters v. Wachovia Bank, 127 S. Ct. 1559 (2007), the Court expressly rejected the concept that federal preemption extends only to a federally chartered bank itself. Although Watters involved the business activities of a national bank and its operating subsidiary under

the National Bank Act, 12 U.S.C. § 1 et. seq., the analytical framework used by the Court in that case also applies to the business activities of State Farm Bank and its exclusive agents under the HOLA and pertinent OTS regulations. In both instances, the analysis of whether state law impedes the federally permitted activities of a federally chartered bank must focus on the exercise of the bank's powers, not on its corporate structure. Id. at 1570.

Where state law conflicts with the exercise of FSA powers permitted under the HOLA and OTS regulations, the state law is preempted, regardless of whether the FSA conducts its business through its own corporate offices or through third party agents. See SPGGC, LLC v. Ayotte, 488 F.3d 525 (1st Cir.), petition for cert. filed, ___ U.S.L.W. ___ (U.S. Dec. 11, 2007) (No. 07-797).

The district court erred in its opinion below, first, because it failed to follow the analytical framework established by Watters. In fact, the court simply stated that the Court's decision was "inapposite to the instant matter because the [Watters] case concerned federal preemption of state law with respect to operating subsidiaries." D. Ct. Op. 21, Joint Appendix ("J.A.") _____. Moreover, rather than assess the actual impact of the Ohio state law on the operations of State Farm Bank and the bank's exercise of its federal banking powers, as Watters requires, the court instead summarily concluded

that the Ohio state law does not conflict with federal regulations simply because it does not “prohibit a federal thrift, or any of its employees or subsidiaries, from performing any of their functions” and “does not, in any way, limit State Farm Bank itself from engaging in mortgage brokering services.” D. Ct. Op. 20, J.A. ____). The district court’s analysis is inadequate and fatally flawed.

The district court further erred in failing to afford the OTS Opinion deference under Auer v. Robbins, 519 U.S. 452 (1997), and related cases. The OTS Opinion is an interpretation of OTS regulations applicable to the operations of State Farm Bank. It is neither plainly erroneous nor inconsistent with the regulations and, as such, merits judicial deference. Id. Lastly, the court erred in holding that the OTS Opinion did not constitute an interpretation by OTS of its regulations as applied to the particular set of facts presented to the agency by State Farm Bank, but rather a “legislative rule” of general application requiring notice-and-comment rulemaking under the APA.

In reaching these results, the district court’s decision stands alone and in stark contrast to the well-considered decisions of other courts that have addressed the authority of FSAs under OTS regulations to utilize agents to assist in the conduct of their business operations and the preemptive effect of

those regulations on state law. In State Farm Bank, F.S.B. v. Burke, 445 F. Supp. 2d 207 (D. Conn. 2006), State Farm Bank challenged Connecticut licensing and registration requirements similar to those at issue here. In ruling in favor of State Farm Bank, the court accorded the OTS Opinion “controlling weight.” Id. at 210, 215-20. Moreover, it rejected the state’s contention that the OTS Opinion should be afforded a lesser degree of deference because it was an informal opinion and not a regulation issued pursuant to APA rulemaking procedures. Id. at 214-16.

In Ayotte, supra, 488 F.3d 525, plaintiffs MetaBank, an FSA, and SPGGC, LLC (“Simon”), a mall operator that sold giftcards issued by MetaBank, claimed that conflict preemption prevented the state attorney general from enforcing a state consumer protection statute against Simon’s sale of the cards. MetaBank and Simon based their claim on the fact that the HOLA and OTS regulations authorize FSAs to offer the giftcards in question² and further authorize FSAs to sell the cards through third party agents such as Simon. Id. at 531. Undertaking the analysis required by Watters, the First Circuit found, first, that the HOLA and OTS regulations, as interpreted by OTS, allowed FSAs to offer the giftcards in question and, second, that the HOLA and OTS regulations, as further interpreted by OTS,

² The cards carried an expiration date and were subject to administrative fees that could reduce the redeemable value of the card. Id. at 528.

allowed FSAs to engage third parties to assist in the exercise of their national thrift powers, including the sale of giftcards.³ The court further found that the New Hampshire law, by prohibiting third party agents from selling the bank-issued giftcards, indirectly prohibited FSAs from exercising powers granted to them under HOLA and OTS regulations. The First Circuit continued:

Therefore, the enforcement of the New Hampshire [statute] against Simon for selling Metabank-issued giftcards would frustrate the purpose of the HOLA and the OTS regulations enacted thereunder in allowing national thrifts to sell . . . giftcards through third party agents, and as such, we find an “irreconcilable conflict” between them [citation omitted]. Thus, we conclude that the HOLA and OTS regulations preempt the New Hampshire [statute] as it is applied to Simon’s sale of the giftcards at issue here.

Id. at 536.

In this case, the district court was required, and failed, to undertake a similar analysis. As the interpretation of OTS regulations in the OTS Opinion establishes, under the particular facts presented here, OTS regulations authorize State Farm Bank to use its exclusive agents to market mortgage products. The Ohio state laws and regulations at issue impede State Farm Bank’s ability to do so and, as such, frustrate the purpose of the

³ In concluding that OTS regulations allow FSAs to engage third parties to assist in the marketing of giftcards, the court relied on the OTS Opinion as authority. Id. at 536.

HOLA and OTS regulations and are preempted. This Court should reverse the decision of the district court.

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO GRANT DEFERENCE TO THE OTS OPINION.

A. The OTS Opinion Is a Careful, Well-Reasoned Interpretation by OTS of Its Regulations

The OTS Opinion interprets the agency's regulations as applied to the particular facts of State Farm Bank's operations. The OTS Opinion opens with a description of State Farm Bank's business model and the bank's use of its agents to market its products and services. OTS Opinion ("OTS Op.") 2-4, J.A. _____. In particular, the OTS Opinion states that the agents are exclusive and, by the terms of their agreements with State Farm Bank, are prohibited from marketing products and services offered by entities other than State Farm Bank and its affiliates; and that they may direct potential customers and borrowers to State Farm Bank and assist them with customer service functions, but have no authority to evaluate applications, approve loans or make other substantive decisions for State Farm Bank or otherwise bind it. *Id.* at 2-3, J.A. _____. The OTS Opinion also details the education and training programs that each agent must complete, including in particular

training on federal compliance law. Id. at 3, J.A. _____. It further notes that State Farm Bank has represented that the bank conducts comprehensive compliance oversight of the agents and that the bank's internal audit committee periodically conducts reviews of the agents. Id.

After summarizing the state laws at issue, including state registration and licensing laws such as those of Ohio, the OTS Opinion turns to OTS's plenary authority over FSAs under the HOLA. As the OTS Opinion notes, in enacting the HOLA, Congress required OTS and its predecessor, the Federal Home Loan Bank Board, 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." OTS Op. 5-6, J.A. _____ (citing 12 U.S.C. § 1464(a)). "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." Id. at 6, J.A. _____ (citing de la Cuesta, 458 U.S. at 153; and Barnett Bank of Marion Cty., N.A. v. Nelson, 517 U.S. 25, 31 (1996)).

The OTS Opinion notes that, to implement the HOLA, OTS has promulgated extensive regulations governing the operations of FSAs, including their deposit and lending activities. Id., J.A. ____ (citing 12 C.F.R.

pts. 545, 555, 557, and 560). The regulations affirm the exclusive authority of OTS to regulate all aspects of the operation of FSAs. Id., J.A. ____ (citing 12 C.F.R. § 545.2).⁴ The regulations further make clear OTS's intent to give FSAs "maximum flexibility to exercise their deposit and lending powers in accordance with a uniform federal scheme of regulation that occupies the field of regulation for deposit and lending activities." Id., J.A. ____ (citing 12 C.F.R. §§ 557.11(b) and 560.2(a))⁵. OTS occupies the field of lending and deposit regulation of FSAs "to facilitate and enhance safe and sound operations 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." Id., J.A. ____ (citing 12 C.F.R. §§ 557.11(a) and 560.2(a)). Among the state laws expressly preempted are state licensing and registration requirements. Id. at 6-7, J.A. ____ (citing 12 C.F.R. §§ 557.12(g) and 560.2(b)).

⁴ 12 C.F.R. § 545.2 provides that:

The regulations in this part . . . are promulgated pursuant to the plenary and exclusive authority of the [OTS] to regulate all aspects of the operations of [FSAs], as set forth in section 5(a) of the [HOLA]. This exercise of the [OTS's] authority is preemptive of any state law purporting to address the subject of the operations of [an FSA].

⁵ The text of 12 C.F.R. § 560.2 relating to applicability of law to lending operations of FSAs is set forth in full in an Addendum to this brief.

The OTS Opinion reasons that the authority of FSAs to exercise their deposit and lending powers necessarily includes the power to market and solicit customers. Id. at 7, J.A. _____. Most importantly, a “state may not put operational restraints on [an FSA’s] ability to offer an authorized product or service by restricting the association’s ability to market its products and services and reach potential customers.” Id., J.A. _____.

The OTS Opinion next explains that OTS is authorized by statute to regulate and examine entities with which an FSA contracts. The Examination Parity Act provides that if a savings association

causes to be performed for itself, by contract or otherwise, any service authorized under [the HOLA] whether on or off its premises –

- (i) such performance shall be subject to regulation and examination by the [OTS] Director to the same extent as if such services were being performed by the savings association on its own premises.

Id. at 7-8, J.A. _____ (citing 12 U.S.C. § 1464(d)(7)(D)). The OTS Opinion also emphasizes that, in appropriate circumstances, OTS may initiate administrative enforcement proceedings against a third party or agent performing services for an FSA. Id. at 8, J.A. _____ (citing 12 U.S.C. §§ 1464(d)(1)(A) and 1813(u)(1) and (4)).

The OTS Opinion recognizes that, given the broad mandates provided by the HOLA and OTS regulations, FSAs “are free to decide how to

structure their operations and conduct their authorized banking-related activities, subject only to OTS's regulatory authority and the statutory mandate to operate safely and soundly in accordance with the best practices of thrift institutions in the United States." Id. at 8, J.A. _____. FSAs are authorized to conduct their authorized activities not only through operating subsidiaries, but through third parties. Id. 8-10, J.A. _____. As the OTS Opinion notes, both OTS and the Federal Home Loan Bank Board have recognized the authority of FSAs to contract with third parties to provide services such as check clearing, electronic data processing, and loan servicing functions. Id. at 10 & nn.34-36, J.A. _____. State Farm Bank's use of third party agents to provide marketing and customer assistance services is functionally no different. Id. at 10, J.A. _____.

The OTS Opinion further explains that the ability of FSAs to decide how they market their products and services is "not abrogated, nor should state license and registration requirements become applicable, merely because an [FSA] contracts with a third party to perform marketing, solicitation, and customer service activities. This is particularly true where, as here, the Agents are exclusive, are required to undergo training, and are subject to the [FSA's] supervision and control." Id. at 10, J.A. _____.

Having addressed and interpreted the applicable agency regulations as permitting State Farm Bank to use its exclusive agents to market the bank's products and services, the OTS Opinion turns to the impact of state licensing and registration requirements on State Farm Bank's conduct of its authorized activities. Id. at 11-14, J.A. _____. The OTS Opinion finds that, under the facts presented by State Farm Bank, the state requirements impermissibly interfere with and burden State Farm Bank's deposit and lending operations. In particular, the state laws at issue impose a variety of conflicting and diverse state requirements that undermine the ability of State Farm Bank to operate under a uniform set of federal laws and regulations. As the OTS Opinion also emphasizes, complying with diverse state requirements has had a significant impact on State Farm Bank's ability to exercise its lending and deposit powers. In some states, faced with the burdens of complying, State Farm Bank has chosen not to offer its products and services. Id. at 13, J.A. _____. This outcome, the OTS Opinion finds, is inconsistent with the HOLA's objective of permitting FSAs to exercise their lending powers under a uniform set of federal laws and regulations enabling federal thrifts to deliver low-cost credit to the public free from undue regulatory burden and duplication. Id. at 12, J.A. ____ (citation omitted).

For these reasons, under the facts presented by State Farm Bank to the agency, the OTS Opinion concludes that the state licensing and registration requirements at issue “interfere and conflict with the authority of [State Farm Bank] to exercise its deposit and lending powers The state requirements also thwart the congressional objective that OTS have exclusive responsibility for regulating the operations of [FSAs] ‘giving primary consideration of the best practices of thrift institutions in the United States.’” Id. at 11, J.A. ____ (citing 12 U.S.C. § 1464(a)). Because the state laws impede and frustrate State Farm Bank’s exercise of its authorized federal banking activities, they are preempted. Id. at 15, J.A. ____.

The OTS Opinion is explicitly grounded in the particular facts presented to the agency by State Farm Bank. Thus, it emphasizes that State Farm Bank’s agents (i) are exclusive and only market its products; (ii) receive training in both State Farm Bank’s products and federal compliance laws; and (iii) are subject to State Farm Bank’s supervision and control. Id. at 12, J.A. _____. The OTS Opinion further emphasizes that OTS, as the regulator of State Farm Bank, has the authority to examine, regulate, and, where appropriate, take enforcement action against State Farm Bank’s agents. OTS examination of the agents includes, among other things,

reviews of compliance with numerous federal laws and regulations designed to protect consumers. Id. at 13 & n.45 (citations omitted).

The OTS Opinion states that whether an FSA exercises sufficient control over its agent in particular circumstances is a factual question. Id. at 13, J.A. _____. Where an FSA does exercise sufficient control, the agent, like an operating subsidiary of an FSA, is subject to OTS regulation and supervision, and federal preemption of state licensing and registration requirements will apply to the agent, as it would apply to an operating subsidiary. Id., J.A. _____. In this case, based on its review of the facts, circumstances and representations of State Farm Bank and its counsel, the OTS Opinion explains, OTS is satisfied that State Farm Bank exercises sufficient control over its agents to establish a basis for preemption.

In sum, the OTS Opinion is a careful, well-reasoned interpretation of OTS regulations applied to a particular set of facts and circumstances. Moreover, although the OTS Opinion pre-dates the Watters decision, the preemption analysis in the OTS Opinion is fully consistent with the directive in Watters to focus on the exercise of a federally chartered bank's powers. See Watters, supra, 127 S. Ct. at 1570. Indeed, the Chief Counsel's conclusion that the state licensing and registration requirements interfere with State Farm Bank's exercise of its federal banking powers and frustrate

the purpose of OTS regulations is indisputably a sound and proper basis for his finding of preemption. See Ayotte, supra, 488 F.3d 525.

B. The OTS Opinion is Entitled to Deference.

The interpretation of OTS regulations in the OTS Opinion and the conclusion that state licensing and registration requirements are preempted are entitled to deference. An agency's interpretation of its regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" Robbins, 519 U.S. at 461 (citations omitted); Battle Creek Health Sys. v. Leavitt, 498 F.3d 401, 409 (6th Cir. 2007) ("[A]n agency's interpretation of a regulation must be given controlling weight unless it is 'plainly erroneous or inconsistent with the regulation.'" (citations omitted); St. Francis Health Care Ctr. v. Shalala, 205 F.3d 937, 943-44 (6th Cir. 2000); Burke, supra, 445 F. Supp. 2d at 210, 216-20.⁶

It is well-settled that the deference due to an agency's interpretation extends to interpretations expressed in, among other forms, opinion letters, amicus briefs, and agency manuals. See Acs v. Detroit Edison Co., 444 F.3d 763, 768-71 (6th Cir. 2006) (deferring to interpretation in agency opinion

⁶ As State Farm Bank notes in its principal brief, the district court confuses the deference due an agency's interpretation of its own regulations under Auer and related cases with the deference due an agency's interpretation of statutes under either Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); or Skidmore v. Swift & Co., 323 U.S. 134 (1944). See Brief of Plaintiffs-Appellants at pp. 32-33, n.5.

letter); Shalala, supra, 205 F.3d at 943-44 (deferring to agency interpretation in manual); Rosen v. Goetz, 410 F.3d 919, 927 (6th Cir. 2005) (deferring to interpretation in amicus brief and agency manual). In fact, courts have frequently accorded deference to interpretations in opinion letters issued by OTS and the other federal banking agencies. See, e.g., Bank of America v. City & County of San Francisco, 309 F.3d 551, 563 (9th Cir. 2002) (deferring to letters issued by the Office of the Comptroller of the Currency); Burke, supra, 445 F. Supp. 2d at 207, 216-20 (deferring to OTS Opinion); Flagg v. Yonkers Sav. & Loan Ass'n, 307 F. Supp. 2d 565, 576 (S.D.N.Y. 2004), aff'd, 396 F.3d 178 (2d Cir.), cert. denied, 546 U.S. 817 (2005) (deferring to OTS opinion letter interpreting agency regulations as preempting state law); Conway v. Astoria Fin. Corp., 837 A.2d 30, 39 (Del. Ch. 2003), aff'd, 840 A.2d 641 (Del. 2004) (deferring to OTS opinion letter).

Applying these well-established standards, the OTS Opinion is entitled to deference. The regulations issued by OTS establish the agency's intention to occupy the field with respect to the lending operations of FSAs and effect a broad preemption of state law. 12 C.F.R. §§ 545.2, 560.2. The regulations further specify that FSAs may extend credit as authorized under federal law without regard to state law "purporting to regulate or otherwise

affect” the credit activities of FSAs. 12 C.F.R. § 560.2(a). Moreover, state laws purporting to impose requirements relating to licensing and registration are among the state laws expressly preempted. 12 C.F.R. § 560.2(b)(1).

As the court rightly found in Burke, the interpretation of these regulations in the OTS Opinion is neither plainly erroneous nor inconsistent with the regulations. Indeed, the conclusion that state licensing and registration laws are preempted as to State Farm Bank’s agents is eminently reasonable and makes good sense in light of: (i) HOLA’s broad grant of regulatory authority to OTS to provide for the organization, operation, and regulation of FSAs; (ii) OTS regulations establishing the occupation of the field of the operations of FSAs; (iii) case law recognizing that OTS’s regulatory control over FSAs is pervasive and leaves no room for state regulatory control; (iv) the authority provided to OTS in the Examination Parity Act to regulate the agents of FSAs; and (v), in this particular case, the control that State Farm Bank exerts over its exclusive agents. See Burke, supra, at 219-20.

The opposite result reached by the district court in this case is without merit. Here, the court found that the OTS regulations at issue are “inconsistent” with the regulations. D. Ct. Op. at 30, 31, J.A. _____. The court’s finding rests primarily on the fact that the OTS regulations do not

expressly refer to “third-party contractors or exclusive agency agreements.”

Id. at 31, J.A. ____.

To the contrary, as the court rightly found in Burke, the fact that the OTS regulations do not address the precise issue in question – whether the regulations preempt state licensing and registration requirements as applied to an FSA’s exclusive agents – is precisely what makes the regulations, in the first instance, subject to agency interpretation. Burke, supra, 445 F. Supp. 2d at 217; see also, Humanoids Group v. Rogan, 375 F.3d 301 (4th Cir. 2004).

But the regulations’ silence on the precise issue does not then somehow make the interpretation in the OTS Opinion “inconsistent” with the regulations – not when the interpretation is entirely consistent with the HOLA, the occupation of the field of the regulation of the operations of FSAs in OTS regulations, OTS regulatory authority over not only State Farm Bank but also its agents, and the control exercised by State Farm Bank over its agents. Burke, supra, 445 F. Supp. 2d at 219-20; see also Bank One, Utah v. Guttau, 190 F.3d 844, 850 (8th Cir. 1999), cert. denied, 529 U.S. 1087 (2000); Wells Fargo Bank of Texas N.A. v. James, 321 F.3d 488, 490, 494-95 (5th Cir. 2003). Indeed, as OTS noted in 1996 when it issued the final rule adding 12 C.F.R. § 560.2, the agency “has consistently taken the

position that, with certain narrow exceptions, any state laws that purport to affect the lending operations of federal savings associations are preempted.”

Lending and Investment, 61 Fed. Reg. 50951, 50952 (Sept. 30, 1996).

In its opinion, the district court also found that the analogy in the OTS Opinion between an operating subsidiary of an FSA and State Farm Bank’s exclusive agents is inconsistent with existing regulations and “troublesome.” D. Ct. Op. 29, 31, J.A. _____. The district court arrived at this point only by misconstruing the OTS Opinion. The OTS Opinion does not suggest that an operating subsidiary and State Farm Bank’s exclusive agents have the same or similar forms of corporate organization or ownership structure. Rather, what the OTS Opinion suggests is that the control State Farm Bank exercises over its exclusive agents is analogous to or “like” the control an FSA exercises over an operating subsidiary. Thus, as provided in OTS regulations, no person or entity other than the FSA may exercise effective operating control over an operating subsidiary and an operating subsidiary may engage only in activities that are permissible for an FSA. See 12 C.F.R. §§ 559.2 and 559.3. Similarly, as the OTS Opinion notes, in this case State Farm Bank controls and reviews the activities the agents perform on behalf of the bank and no other entity exercises effective operating control over the activities of the agents on behalf of State Farm Bank. OTS Op. at 13, J.A.

_____. In addition, as with operating subsidiaries, the agents only engage in activities that are permissible for State Farm Bank. Furthermore, OTS has regulatory and enforcement authority over both State Farm Bank and its agents and, as the OTS Opinion notes, can regulate and supervise the relationship between them in a number of ways. Id. In short, the analogy is based on control – not on corporate organization or ownership structure – and, as the OTS Opinion explains, whether such control exists in particular circumstances is a factual question. Id. Here, the facts establish that level of control and support the analogy.⁷

The OTS Opinion is a careful, well-reasoned interpretation of OTS regulations. It is neither plainly erroneous nor inconsistent with the regulations at issue. The district court erred in failing to give it deference.

⁷ The district court opinion also cites a recent Supreme Court case in which the Court stated that “an isolated opinion of an agency official does not authorize a court to read a regulation inconsistently with its language.” D. Ct. Op. 33 (citing Environmental Defense v. Duke Energy Corp., 127 S. Ct. 1423, 1436 (2007) (declining to give deference to opinion of an agency official who was not a legal officer and that was inconsistent with the agency’s own prior regulatory interpretations)). In contrast to the opinion at issue in the case before the Court, the OTS Opinion was issued by the agency’s Chief Counsel and is entirely consistent with OTS regulations and with prior agency interpretations.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE OTS OPINION WAS SUBJECT TO NOTICE AND COMMENT RULEMAKING PROCEDURES UNDER THE APA.

The OTS Opinion is an interpretation of existing OTS regulations. It is not, as the district court concluded, a “substantive” or “legislative rule” that “adds a new requirement” or effects a “change in law.” D. Ct. Op. at 27, J.A. ____). Accordingly, OTS was not required to comply with notice and comment rulemaking procedures in issuing the OTS Opinion.

Section 553 of the APA requires agencies to provide notice of a proposed rulemaking and an opportunity for public comment prior to promulgating, amending or repealing a rule. Congress, however, crafted several important exceptions to these notice and comment requirements, determining that they should not apply, among other things,

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice

5 U.S.C. § 553(b)(A); see also American Hosp. Ass’n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987).

The courts have recognized that the exceptions to notice and comment rulemaking have a common theme in that they all “accommodate situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition and reduction in expense.” Id. at 1045 (quoting Guardian Fed.

Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp., 589 F.2d 658, 662 (D.C. Cir. 1978); see also, I Richard J. Pierce, Jr., Administrative Law Treatise § 6.1, at 305 (4th ed. 2002) (noting that notice and comment rulemaking under the APA is a resource-intensive procedure and that it would be impossible for any agency to use that process to address definitively every issue that arises in implementing a regulatory program).

Although as the district court rightly noted, the line between so-called legislative or substantive rules, on the one hand, and interpretive or interpretative rules or other statements that do not require rulemaking, on the other hand, is imprecise, the courts have established certain benchmarks that assist in identifying when notice and comment rulemaking is not required. Thus, a legislative rule has the force of law and creates new rights or obligations. State of Ohio Dep't of Human Servs. v. U.S. Dep't of Health & Human Servs., 862 F.2d 1228, 1234 (6th Cir. 1988). A legislative rule also generally effects a substantive change that is inconsistent with existing regulations. Shalala, 205 F.3d at 947.

In contrast, interpretive rules clarify or explain existing law or regulations and go to what the administrative officer thinks the statute or regulation means. Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 679 (6th Cir. 2005) (citing First Nat'l Bank v. Sanders, 946 F.2d 1185,

1188-89 (6th Cir. 1991)). The function of the interpretive rule exemption is to allow agencies to explain ambiguities in the statutes or regulations it administers without having to undertake cumbersome notice and comment proceedings. Bowen, supra, 834 F.2d at 1045. The interpretive exception further reflects the idea that public input will not help an agency make a determination of what the law already is. Dismas Charities, supra, 401 F.3d at 680.

Applying these standards, the OTS Opinion is clearly not a legislative or substantive rule. The OTS Opinion, quite simply, interprets existing OTS regulations and explains what the Chief Counsel of OTS thinks those regulations mean. As such, assuming that the OTS Opinion may properly be characterized as a “rule” of any sort, it falls squarely in the category of an interpretive rule. See Dismas Charities, supra, 401 F.3d 666 (holding that two memoranda, assuming that either may be categorized as a “rule,” qualify as interpretative rules).

The reasons offered by the district court for finding that the OTS Opinion constitutes a legislative or substantive rule requiring notice and comment rulemaking are without merit. The OTS Opinion does not change the law or OTS regulations, nor does it create new law, rights or obligations. The OTS Opinion explicitly relies upon existing law and regulations as the

basis for its analysis. Moreover, the finding that state licensing and registration requirements do not apply with respect to the agents of State Farm Bank is based on the particular facts and circumstances presented by State Farm Bank to OTS and described in the OTS Opinion.⁸

The courts and commentators recognize that the purpose of the APA exemption for interpretive rules and similar statements is to provide agencies with an efficient and effective method of addressing issues that arise in the course of implementing a regulatory program. OTS and the other federal banking agencies use these methods, including legal opinion letters, to address, with efficiency and specificity, a multitude of regulatory issues, including preemption.⁹ Requiring OTS and other federal banking agencies

⁸ In its opinion, the district court states that the OTS Opinion authorizes any FSA to use the structure proposed by State Farm Bank to make mortgages free from state consumer protection laws. D. Ct. Op. 27, J.A. _____. This is incorrect on at two counts. First, the OTS Opinion addresses state licensing and registration requirements; it does not address or consider whether state consumer protection laws are preempted.

Second, the OTS Opinion provides that any other FSA that wishes to use agents must consult with OTS; submit a business plan or proposal that provides in-depth information concerning the association's arrangements with its agents; and meet, at a minimum, specified conditions. OTS Op. at 15 and Appendix A, J.A. _____. Thus, the OTS Opinion provides the agency with the ability to consider any similar proposal presented by any other FSA on its particular facts.

⁹ OTS legal opinions are publicly available on the agency's website, www.ots.treas.gov (select category "legal opinions"); see also www.occ.treas.gov/interp/monthly.htm (opinions of the Office of the

to go through notice-and-comment rulemaking on each occasion that they interpret existing regulations or address an inquiry from a regulated entity based on a particular set of facts and circumstances would severely undercut the effectiveness of the agencies and the ability of federal banking regulators to respond to changes in the banking industry.

The OTS Opinion is an interpretation of existing regulations. It is not a legislative or substantive rule requiring notice and comment rulemaking.

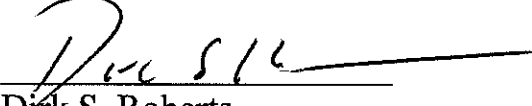
CONCLUSION

This Court should reverse the judgment of the court below.

Respectfully submitted,

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Comptroller of the Currency), www.federalreserve.gov/boarddocs/legalint (opinions of the Board of Governors of the Federal Reserve) and www.fdic.gov/regulations/laws/opinions (opinions of the Federal Deposit Insurance Corporation).

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

Pursuant to 6th Cir. R. 32(a), the undersigned counsel of record certifies that this Proof Brief of *Amicus Curiae*, Office of Thrift Supervision, complies with the type and volume limitations of Fed. R. App. P. 32(a)(7).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,676 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In making this certification, the undersigned has relied upon the word count of the word-processing system used to prepare this brief.
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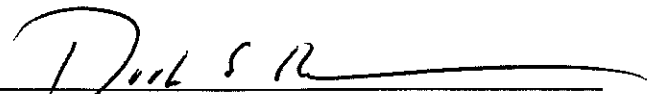
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I, one of the counsel for *Amicus Curiae*, Office of Thrift Supervision, hereby certify that I caused a copy of the Proof Brief of *Amicus Curiae*, to be served this 14th day of January, 2008, by U.S. Mail, postage prepaid, as follows:

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ADDENDUM

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Title 12: Banks and Banking

PART 560—LENDING AND INVESTMENT

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§ 560.2 Applicability of law.

(a) *Occupation of field.* Pursuant to sections 4(a) and 5(a) of the HOLA, 12 U.S.C. 1463(a), 1464(a), OTS is authorized to promulgate regulations that preempt state laws affecting 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.

(b) *Illustrative examples.* Except as provided in §560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:

- (1) Licensing, registration, filings, or reports by creditors;
- (2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements;
- (3) Loan-to-value ratios;
- (4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;
- (5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;
- (6) Escrow accounts, impound accounts, and similar accounts;
- (7) Security property, including leaseholds;
- (8) Access to and use of credit reports;
- (9) Disclosure and advertising, including laws requiring specific statements, information, or other content

to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Usury and interest rate ceilings to the extent provided in 12 U.S.C. 1735f-7a and part 590 of this chapter and 12 U.S.C. 1463(g) and §560.110 of this part; and

(13) Due-on-sale clauses to the extent provided in 12 U.S.C. 1701j-3 and part 591 of this chapter.

(c) *State laws that are not preempted.* State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

(1) Contract and commercial law;

(2) Real property law;

(3) Homestead laws specified in 12 U.S.C. 1462a(f);

(4) Tort law;

(5) Criminal law; and

(6) Any other law that OTS, upon review, finds:

(i) Furthers a vital state interest; and

(ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

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