

IN THE SUPREME COURT OF OHIO

WASHINGTON MUTUAL BANK, FKA
WASHINGTON MUTUAL BANK, FA,
n/k/a Federal Deposit Insurance Corporation,
Appellee,

v.

JACK K. BEATLEY, *et al.*,
Appellants.



Supreme Court Case No. 2008-1056

On Appeal from the
Franklin County Court of Appeals,
Tenth Appellate District

Court of Appeals
Case No. 06AP-1189

S.Ct.Prac.R. VI, Section 4

APPELLANTS' REPLY BRIEF

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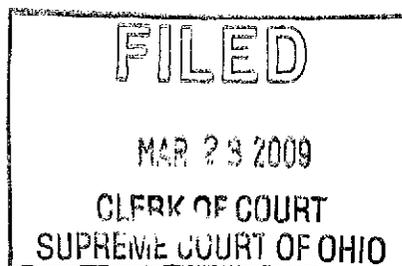
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ARGUMENT IN REPLY

Beatley moved the appeals court to certify a conflict upon the following issue: “Whether an unregistered foreign corporation has standing (legal capacity) to commence or maintain an appeal in an appellate court of this state?” (App. Rec. 171) The appeals court agreed that its reasoning set forth in the denial of Beatley’s motion to dismiss the appeal conflicted with the Ninth District’s decision in *Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc.*, Summit App. No. 23131, 2006-Ohio-5883. (App. Rec. 177) The appeals court certified the following question of law: “When a trial court dismisses a plaintiff’s action for lack of capacity to maintain an action, does R.C. 1703.29 prevent the plaintiff from appealing that decision?” (App. Rec. 177, and App. Rec. 179) This Court accepted the certified conflict on August 6, 2008. Washington Mutual Bank is referred to herein as “WAMU.”

I. **RESPONSE TO WAMU’S PROPOSITION OF LAW NO. 1 – WAMU ADMITTED IT WAS AN UNREGISTERED FOREIGN CORPORATION.**

R.C. 1703.29(A states:

(A) The failure of any corporation to obtain a license under sections 1703.01 to 1703.31, inclusive, of the Revised Code, does not affect the validity of any contract with such corporation, but **no foreign corporation which should have obtained such license shall maintain any action in any court until it has obtained such license.** Before any such corporation shall maintain such action on any cause of action arising at the time when it was not licensed to transact business in this state, it shall pay to the secretary of state a forfeiture of two hundred fifty dollars and file in his office the papers required by divisions (B) or (C) of this section, whichever is applicable.

R.C. 1703.29(A)(emphasis added)(Appdx. 39). This enactment by the General Assembly conditions a foreign corporation’s “right of action” to maintain any action **in any court** upon compliance with R.C. 1703.01 to .31, inclusive.

On page 9 of its merit brief, WAMU argues that R.C. 1703.29(A) does not expressly prohibit an appeal. However, WAMU acknowledges that R.C. 1703.29(A) contains a similar

door-closing provision as R.C. 1329.10(B), which bars the users of unregistered fictitious names from commencing or maintaining an action in any court in the unregistered name. Neither statute expressly states that the affected party shall not maintain an appeal. In *Buckeye Foods v. Bd. of Revision* (1997), 78 Ohio St.3d 459, this Court interpreted the phrase “any court” found within R.C. 1329.10(B) to necessarily include courts of appeal, as well as trial courts, thereby requiring dismissal of an appeal. See, *Buckeye Foods*, 78 Ohio St.3d at 461. This Court’s *Buckeye Foods* definition of “any court” applies equally to the sister statute of R.C. 1703.29(A). Therefore, WAMU’s argument that R.C. 1703.29(A), does not bar the commencement or maintenance of any action in the courts of appeal is devoid of merit.

The balance of WAMU’s initial argument focuses on the trial court’s motion to dismiss. WAMU’s argument is flawed in its premise. The issue and record before this Court involves the motion to dismiss filed in the court of appeals, not the motion to dismiss filed with the trial court. See, (App. Rec. 94; Supp. p. 240). WAMU’s confusion is noted at pages 9-12 of its merit brief as to why R.C. 1329.10(B) served as the basis for dismissal in the trial court action, but then later R.C. 1703.29 was invoked seeking dismissal of the court of appeals action. At the time the Complaint was filed in July of 2006, the poor operating practices of WAMU, the largest loan servicer in the country, had not yet been exposed. In fact, Washington Mutual Bank was not a generally recognized name within the State of Ohio. The body of WAMU’s Complaint was devoid of any allegation identifying Washington Mutual Bank, as its name appeared solely in the case caption. The note and mortgage attached as exhibits to the Complaint identified the holder/financial institution as Home Savings of America, F.A., and there was no assignment from that entity to WAMU. Since the body of the Complaint and the note and mortgage at issue made no reference to WAMU, and WAMU was neither registered nor licensed by the Ohio

Secretary of State, the Defendants Beatley and 64 W. Northwood Avenue, LLC (hereinafter “Beatley”) filed their motion to dismiss the Complaint. (Trial Ct. Rec. 60; Supp. 20).

At pages 4-5, of the October 4, 2006 trial court decision and entry, the trial court explained that WAMU had not responded to the motion to dismiss, and **more than 30 days had elapsed** since the filing of the motion to dismiss¹. (Trial Ct. Rec. 67; Appdx. 31). There was no dispute that Washington Mutual Bank was a fictitious name within the State of Ohio, as that definition of “fictitious name” is used in R.C. 1329.01(A)(2). Based upon the certificates of no record issued from the Ohio Secretary of State’s Office, the trial court applied R.C. 1329.10(B) together with this Court’s holding in *Buckeye Foods*, supra., and terminated the action. (Trial Ct. Rec. 67; Appdx. 31). It was from this decision that WAMU commenced its appeal².

Based upon newly discovered information³, that Washington Mutual Bank was an unregistered foreign corporation, Beatley moved to dismiss WAMU’s appeal pursuant to R.C. 1703.29(A) citing the holding of *Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc.*, Summit App. No. 23131, 2006-Ohio-5883. (App. Rec. 94; Supp. 240). Attached to the motion to dismiss was the affidavit of Debora Batta, Director of the Business Services Division of the Office of the Ohio Secretary of State; she explained that WAMU was not a domestic entity, and it maintained no registration with the Ohio Secretary of State. WAMU’s counsel admitted in briefing and at oral argument before the court of appeals, that WAMU was not registered with the Ohio Secretary of State.

WAMU’s rationale for not registering with the Ohio Secretary of State was based upon its conclusion that there was no penalty for its failure to register. WAMU’s counsel wrote, “as

¹ Local Rule required a response to the motion within 14 days of service.

² The trial court’s decision to dismiss pursuant to R.C. 1329.10 is not an issue before this court, as this appeal involves the motion to dismiss the appeal.

there are no consequences for not filing the notice [with the Ohio Secretary of State], Washington Mutual was not required to file a notice in order to file its complaint.” (App. Rec. 56, at p. 10; Supp. at p. 170). In other words, without a perceived penalty WAMU was free to ignore Ohio’s foreign corporation laws.

In light of WAMU’s continued representations that it would never register with the Ohio Secretary of State, Beatley filed a motion to dismiss the appeal based upon WAMU’s lack of capacity to appeal pursuant to R.C. 1703.29(A). (App. Rec. 94; Supp. 240). **It is axiomatic that a motion to dismiss filed within the court of appeals for “lack of capacity to appeal” is a matter of first impression for the court of appeals.** WAMU’s response to the motion to dismiss the appeal stated:

Washington Mutual has never claimed that it registered its names with the OSS [Ohio Secretary of State]. **There is no factual dispute.** Washington Mutual has explained in its appellate brief and reply brief (incorporated by reference) that as a federal bank / savings association, it is exempt from the registration requirements of the Ohio Secretary of State [“OSS”].

* * *

As **there is no factual dispute** as to whether Washington Mutual has registered its name with the OSS, the Affidavit [from the Director of Business Services for the Ohio Secretary of State indicating the lack of registration], is wholly unnecessary.

See, (App. Rec. 97 at p. 4; Supp. p. 255) (emphasis added). The court of appeals issued a procedural order that the motion to dismiss would be considered together with the merits of appeal. (App. Rec. 100). Thereafter, WAMU supplemented its briefing materials to include exhibits that demonstrated WAMU was a savings and loan chartered under the laws of the United States, the main office of which is located in the State of Nevada. See, (App. Rec. 129, Exhibits 1, 2 & 3, therein, attached hereto as Appendix Exhibits B, C, & D, Appdx. pp. 14-19).

WAMU’s merit brief clearly states the definition of a “foreign corporation” as including

³ WAMU’s counsel did not serve upon the defendants or their counsel a copy of the untimely

“a bank, savings bank, or savings and loan chartered under the laws of the United States, the main office of which is located in another state.” See, WAMU’s Merit Brief at p. 10, quoting R.C. 1703.01(B). Considering WAMU’s response to the motion to dismiss for lack of capacity to appeal, wherein it admitted that it had made no filings with the Ohio Secretary of State, together with its undisputed exhibits referenced above, that demonstrate that WAMU was a savings and loan chartered under the laws of the United States, the main office of which was located in the State of Nevada – WAMU admitted that it was an unregistered/unlicensed “foreign corporation” for purposes of R.C. Chapter 1703. In light of this admission, there is no basis for WAMU to now argue that there was no finding that it was an unregistered foreign corporation.

As to the motion to dismiss the appeal, WAMU is bound by the record made in the court of appeals; including its admissions, briefing, memorandum and exhibits filed in response to the motion to dismiss the appeal. The record demonstrates that there was no factual dispute that WAMU was an unregistered/unlicensed foreign corporation, and R.C. 1703.29(A) required dismissal of WAMU’s appeal. Rather than dismiss the appeal based upon WAMU’s admissions the court of appeals reversed⁴. WAMU’s first proposition of law is without merit in light of its admissions and exhibits which demonstrate its status as an unregistered foreign corporation.

II. RESPONSE TO WAMU’S PROPOSITION OF LAW NO. 2 – WAMU FAILS TO DISTINGUISH AN APPELLATE MOTION TO DISMISS FROM A TRIAL COURT MOTION TO DISMISS.

WAMU’s “waiver argument” and “judicial estoppel argument” were not certified as an

memorandum contra to the motion to dismiss which had been filed in the trial court.

⁴ The reversal was founded upon an alleged “procedural defect” that the trial court should have converted the motion to dismiss to a motion for summary judgment to consider the official public records of the Ohio Secretary of State. While in the trial court, no objection was made to the trial court’s consideration of those exhibits. On appeal, WAMU’s Appellant’s brief contained no assignment of error as to that “procedural defect.” See, (App. Rec. 56; Supp. p. 159). Notwithstanding WAMU’s admission that it made no filings with the Ohio Secretary of State the court of appeals reversed so that a hearing could be held to receive the certificates of no record which WAMU admits are correct.

issue to be briefed by this Court. Nonetheless, these arguments are without merit.

In the context of an appellate motion to dismiss, WAMU's trial court "waiver" argument is frivolous. WAMU contends that a challenge of a party's "capacity to appeal" must be raised in the trial court. Without the existence of an appeal there can be no challenge to the capacity to appeal. Motions to dismiss an appeal are not filed in a trial court.

In "support" of its waiver argument WAMU cites to *P.K. Springfield, Inc. v. Hogan* (1993), 86 Ohio App.3d 764; and *Dots Systems, Inc. v. Adams Robinson Enterprises, Inc.* (1990), 67 Ohio App.3d 475. WAMU's reliance is misplaced. These cases stand for the proposition that at the trial court level, R.C. 1703.29(A) operates as an affirmative defense ("lack of capacity to sue"). As an affirmative defense, the failure to raise R.C. 1703.29(A) as a defense to the Plaintiff's claims operates as a waiver **at the trial court level**. Stated differently, an appellant **may not for the first time attack the underlying trial court judgment** with a newly asserted defense based upon R.C. 1703.29(A), which was not raised timely before the trial court.

In each of these cases the trial court defendants attempted to defeat the respective trial court judgments rendered against them by raising R.C. 1703.29(A) as a new defense to the underlying judgment, as part of their appeal of the respective judgments. These cases cited by WAMU have no application to the challenge of a party's **lack of capacity to appeal**. These holdings would apply in this case **only if** a judgment had been rendered in favor of WAMU and against Beatley, upon the complaint and Beatley had not timely asserted the defense of "lack of capacity to sue" at the trial court level. In that hypothetical, Beatley could not attack a judgment with R.C. 1703.29(A) as part of a subsequent appeal by Beatley. The record demonstrates that the hypothetical did not occur in the case *sub judice*. In fact, the procedural posture of this case makes WAMU's "waiver" argument an impossibility. There could be no "waiver of the

defense” of lack of capacity to sue pursuant to R.C. 1703.29(A) because Beatley did not and was not required to file an answer to WAMU’s complaint. Again, the trial court granted the motion to dismiss. Waiver is neither factually nor legally applicable to this case.

Next, WAMU argues judicial estoppel. WAMU’s judicial estoppel argument was not raised by WAMU before the court of appeals, and is therefore waived for consideration by this court in its review of the record upon the motion to dismiss for lack of capacity to appeal.

As set forth in Part I, above, the real corporate form of WAMU was obscured by WAMU’s calculated efforts to “fly under the radar” with respect to its business activities within the State of Ohio. By not registering with the Ohio Secretary of State, WAMU was positioned to side-step state and local taxing authorities, as well as zoning enforcement officers’ attempts to remedy zoning issues that plague vacant and foreclosed structures. WAMU has long enjoyed use of Ohio’s courts without the reciprocal and attendant obligation to subject itself to service of process within the State of Ohio.

WAMU’s judicial estoppel argument fails to describe the three elements that must be present to apply the doctrine of judicial estoppel. In *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, this Court subscribed to the view that “[t]he doctrine [of judicial estoppel] applies only when a party shows that his opponent: (1) took a contrary position; (2) **under oath in a prior proceeding**; and (3) the prior position was accepted by the court.” See, *Temesi*, 2007-Ohio-6442, at ¶25 (quoting *Griffith v. Wal-Mart Stores, Inc.* (C.A.6, 1998), 135 F.3d 376, 380) (emphasis added); see also, *Smith v. Dillard Dept. Stores, Inc.* (2000), 139 Ohio App.3d 525, 533. The record in the proceeding below is devoid of a prior statement made under oath with respect to the issue upon which WAMU now seeks to apply the doctrine of judicial estoppel. Therefore, WAMU’s judicial estoppel argument must fail, as a matter of law.

Beyond WAMU's failure to demonstrate each of the three elements necessary to establish judicial estoppel, other factors and conditions that are present in this case weigh against any imposition of a doctrine based upon estoppel. Beatley tendered the motion to dismiss in the trial court and the subsequent motion to dismiss the appeal based upon the best information available at the time those motions were filed. Each was based upon WAMU's lack of legal capacity. In the trial court it was WAMU's lack of capacity to sue. In the court of appeals, it was WAMU's lack of capacity to maintain an appeal. Beatley's positions were similar not contrary.

Estoppel by judgment does not operate when new facts arise that demonstrate a new basis for the claims and defenses of the parties. Section 712 of 2 Freeman on Judgments (5th Ed., E. Tuttle 1925) explains the general principle related to changed conditions and the law that prevent a judgment from operating as an estoppel. Therein it is written:

The estoppel of a judgment extends only to the facts as they were at the time the judgment was rendered, and to the legal rights and relations of the parties as fixed by the facts so determined; and, when new facts intervene before the second suit, furnishing a new basis for the claims and defenses of the parties, respectively, the issues are no longer the same, and consequently the former judgment cannot be pleaded in bar.

See, 2 Freeman on Judgments (5th Ed.), Section 712, (quotations omitted). The motion to dismiss the appeal was based upon information that was discovered about WAMU's status as a foreign corporation which was admitted by WAMU after the filing of the appeal. Again, neither Beatley nor the trial court had any information as to Washington Mutual Bank's corporate status as a foreign corporation prior to the trial court's preparation and execution of the final judgment. See, (Trial Ct. Rec. 67, pp. 4-5; Supp. 44; and footnote 3, above). WAMU's filings with the court of appeals including its briefs and exhibits served as admissions that it was a savings and loan association, chartered under the laws of the United States with its headquarters in the State of Nevada. See, (App. Rec. 97 at p. 4; Supp. p. 255; and App. Rec. 129, Exhibits 1, 2 & 3, therein,

attached hereto as Appendix Exhibits B, C, and D, Appdx. pp. 14-19). Based upon the admissions of WAMU, R.C. 1703.29(A) provided an independent basis to move for dismissal of the appeal. Judicial estoppel does not apply to changed conditions.

For the foregoing reasons this Court must disregard WAMU's second proposition of law which is based upon waiver and judicial estoppel.

III. RESPONSE TO WAMU'S PROPOSITION OF LAW NO. 3 – WAMU'S ARGUMENT IS INAPPOSITE TO THE STATUTORY PROHIBITION SET FORTH IN R.C. 1703.29(A).

WAMU's argument acknowledges that the "right" to commence or maintain an appeal from the trial court to the court appeals arises pursuant to R.C. 2505.03. Thus, the right to appeal to the courts of appeal is a statutory right of appeal. WAMU then references various types of appeals that may be brought pursuant to R.C. 2505.03, including orders or judgments that: pertain to standing, affect a substantive right, or determine a party's right to intervene. These references by WAMU do not address an unregistered foreign corporation's capacity to appeal. Further, these additional issues cited by WAMU were not certified for briefing by this Court.

While WAMU recognizes the General Assembly's ability to create the statutory right of appeal, it ignores the General Assembly's ability to limit and/or otherwise condition the exercise of that statutory right. In *Village of Euclid v. Camp Wise Assn.* (1921), 102 Ohio St. 207, 131 N.E. 849, this court wrote: "[i]f the legislature had the power to create, it had the power to destroy, and the power to destroy includes the power to burden or regulate or to impose conditions or restrictions as its judgment shall dictate." *Village of Euclid*, 102 Ohio St. at 210. In the context of the right to commence or maintain an action in any court (including the court of appeals), R.C. 1703.29(A) expressly conditions a foreign corporation's exercise of the statutory right of appeal upon its registration/licensing with the Ohio Secretary of State. None of the authorities cited by WAMU in its brief stand for the proposition that a foreign corporation

without a license from the Ohio Secretary of State can commence or maintain an appeal.

WAMU points to the decision of *National Crime Reporting, Inc. v. McCord & Akamine, LLP*, 177 Ohio App. 551, 2008-Ohio-3950, for the proposition that a trial court errs in dismissing an action with prejudice for a violation of R.C. 1703.29. That case is distinguishable from the case at bar for the following reasons. First, National Crime Reporting, Inc., obtained a license from the Ohio Secretary of State prior to the commencement and maintenance of its appeal. Therefore, unlike WAMU, National Crime Reporting, Inc., did not lack capacity to undertake its appeal. Second, unlike this case, the trial court decision in National Crime Reporting, Inc., was based upon summary judgment – Civ.R. 56. A discretionary appeal to this Court is being sought in *National Crime Reporting, Inc.*, due to the fact that the court of appeals in its judgment wrote that summary judgment was properly rendered in favor of the defendants and the trial court should enter a new judgment of dismissal without prejudice. See, *National Crime Reporting, Inc.*, 2008-Ohio-3950, at ¶¶6 and 13. That conclusion is a legal impossibility. The Ohio Rules of Civil Procedure provide that Civ.R. 56 determinations are **judgments**. As a judgment, summary judgment is with prejudice, as a matter of law. A judgment of dismissal, is no judgment at all. Dismissals are governed by Civ.R. 41, not Civ.R. 56.

WAMU's citation to *L&W Supply Co. v. Constr. One, Inc.*, (Mar. 31, 200), Hancock App. no. 5-99-55, unreported, 2000 WL 348990, is also distinguishable from the case at bar since the lack of capacity to appeal was neither raised, nor addressed by that appellate court. *L&W Supply Co.*, also disregards the finality of summary judgment, as that case relies upon the pre-civil rule case of *Cero Realty Corp. v. American Mfrs. Mut. Ins. Co.* (1960), 171 Ohio St. 82 which establishes standards as to whether or not a case is decided upon the merits, so as to invoke res judicata. After the adoption of the Civil Rules this Court stated that the decision in

Cero Realty Corp. should be re-examined in light of the adoption of the Civil Rules. See, *Chadwick v. Barba Lou, Inc.* (1982), 69 Ohio St.2d, 222, 228-230. Within the past six months this Court deviated from *Cero Realty Corp.*'s holding – that a matter is decided upon the merits only when the substance of the matter is decided. In *U.S. Bank Natl. Assn. v. Gullotta*, 120 Ohio St.3d 399, 2008-Ohio-6268, at ¶25, this Court recognized that the Civil Rules determine whether the termination of an action is with or without prejudice. WAMU's citations have no bearing upon the issue of capacity to appeal presently before the Court.

In Section D of WAMU's third proposition of law, WAMU argues that depriving the foreign corporation of capacity to appeal, deprives it of an opportunity to demonstrate that R.C. 1703.29(A) is not applicable to the then appellant. WAMU's contrived argument parallels its argument set forth in WAMU's fourth proposition of law. Therefore, in response Beatley incorporates his argument set forth in part IV, below, as if fully rewritten herein.

While WAMU argues against "punishment" for its failure to register, policy is set by the General Assembly. Since the General Assembly may condition a foreign corporation's exercise of a statutory right of appeal, WAMU's third proposition of law is without merit.

IV. RESPONSE TO WAMU'S PROPOSITION OF LAW NO. 4 – WAMU'S ARGUMENT DISREGARDS APPELLATE PRACTICE AND PROCEDURE RELATED TO A MOTION TO DISMISS AN APPEAL.

Contrary to WAMU's misguided inference, **the resolution of the issue before this Court does not deprive any party from filing a notice of appeal**, rather the issue is whether or not R.C. 1703.29(A) can operate to terminate an appeal which has been taken.

WAMU's argument disregards fundamental appellate practice and procedure. The procedural mechanism to terminate an appeal that has been improperly commenced or maintained by an unlicensed foreign corporation is the filing of a motion to dismiss the appeal

for lack of capacity to appeal pursuant to R.C. 1703.29(A). As with any motion to dismiss an appeal filed in the court of appeals or this Court, the appellant is afforded an opportunity to respond and be heard upon the motion to dismiss. At that juncture the appellant can demonstrate, if applicable, that: (1) it is not required to obtain a license/register, or (2) that it maintains a license/registration which was obtained prior to the commencement of the appeal. Thereafter, the court of appeals determines whether or not the appellant lacks legal capacity to commence or maintain the appeal. Since the lack of capacity to appeal is an issue for the court of appeals, that issue will necessarily be decided by the court of appeals, if and when it is raised before the court of appeals. If the court of appeals grants the motion to dismiss the appeal, that decision may be further appealed to this Court as allowed by law. Then perhaps, subject to the potential filing and consideration of a subsequent motion to dismiss in this Court, if applicable.

For these reasons, the capacity to appeal is first determined by the court of appeals when and if that issue is presented to the court of appeals. Therefore, contrary to WAMU's argument, an appellant who is in violation of R.C. 1703.29(A) receives due consideration of the pertinent issues relating to its capacity to commence or maintain an appeal. If the court of appeals determines that an appellant is exempt and/or has otherwise complied with the provisions of R.C. Chapter 1703 then R.C. 1703.29(A) would not serve as a bar to the commencement or maintenance of the appeal. However, if the bar of R.C. 1703.29(A) was applicable, then the court of appeals would be duty bound to dismiss the appeal pursuant to R.C. 1703.29(A).

WAMU's final argument set forth in part B of its proposition of law 4, pertains to R.C. 1329.10 which is not before this Court as an issue to be considered. Based upon this Court's holding in *Buckeye Foods*, supra., which supports Beatley's propositions of law, no further argument is required upon this issue.

V. RESPONSE TO WAMU’S PROPOSITION OF LAW NO. 5 – THE HOME OWNER’S LOAN ACT (“HOLA”) 12 U.S.C. 1461, ET SEQ., AND 12 C.F.R. 560.2 DO NOT PRE-EMPT R.C. 1703.03 OR R.C. 1703.29.

WAMU’s fifth proposition of law, as well as part A(3) of its fourth proposition of law improperly argue that R.C. 1703.03 is preempted by the Home Owner’s Loan Act (“HOLA”), 12 U.S.C. 1461, et seq., and 12 C.F.R. 560.2, when applied to a federal savings and loan. While this issue was not set for briefing by this Court, WAMU nonetheless devoted 13 of its 31 pages of its merit brief argument to an allegation of federal preemption. Relying on its defective conclusion, WAMU also argues that only the notice requirements of R.C. 1703.031 were applicable to it, even though WAMU also refused to comply with R.C. 1703.031. However, R.C. 1703.031 is only available to a foreign corporation if preemption precludes registration with the Ohio Secretary of State under R.C. 1703.03. As explained in the remainder of this brief there is no federal preemption of R.C. 1703.03 in the context of a federally chartered savings and loan. Thus, R.C. 1703.03 continues to apply to WAMU, and R.C. 1703.031 has no application.

Preemption under 12 C.F.R. 560.2 does not apply to R.C. Chapter 1703 for the following reasons:

1. The principles of federalism do not support preemption in this case.
2. 12 C.F.R. 560.2 only applies to state lending laws – not commercial laws of general application.
3. The Office of Thrift Supervision (“OTS”) has already determined that federal preemption does not exist with regard to a state’s foreign corporation law which requires the registration of an agent of a federal savings association with the a state’s secretary of state; such a requirement only incidentally impacts the federal association, is ministerial in nature, and falls within the commercial law exception of 12 C.F.R. 560.2(c)(1).

A. THE PRINCIPLES OF FEDERALISM DO NOT SUPPORT PREEMPTION IN THIS CASE.

This Court in *Pinchot v. Charter One Bank, F.S.B.*, 99 Ohio St.3d 390, 2003-Ohio-4122, explained – “when the examined federal law contains an express preemption clause, as is the

case with Section 560.2, the question of state-law displacement depends in the first instance not upon any presumption but upon the text of that clause.” *Pinchot*, 99 Ohio St.3d 390, 394, 2003-Ohio-4122, at ¶ 33. Whether or not HOLA, and 12 C.F.R. 560.2, preempt state law **is a question of law**. *Id.* at ¶39 (citing *Washington Mut. Bank, F.A. v. Superior Court of Los Angeles Cty.* (2002), 95 Cal.App.4th 606, 612, 115 Cal.Rptr.2d 765).

It is the burden of the party claiming preemption to prove that Congress intended to preempt state law. See *Gregory v. Ashcroft* (1991), 501 U.S. 452, 111 S.Ct. 2395. Strict construction “is designed to protect the states against unintended federal encroachment on their traditional authority.” *Pinchot*, 99 Ohio St.3d 390, ¶33. Traditional state authority includes the ability of the states to administer their own judicial systems “an important aspect of a state’s sovereignty.” *Virginia v. Browner* (C.A. 4, 1996), 80 F.3d 869, 880; see also *Colonial Pipeline v. Morgan* (C.A. 6, 2007), 474 F.3d 211, 222. The States possess “great latitude to establish the structure and jurisdiction of their own courts.” *Johnson v. Fankell* (1997), 520 U.S. 911, 919; *Tumey v. Ohio* (1926), 273 U.S. 510, 534. ‘The states, in providing their own jurisdictional tribunals, have a right to limit, control, and restrict their judicial functions, and jurisdiction according to their own mere pleasure.’ *Home Owners' Loan Corp. v. Sherwin*⁵ (1938), 59 Ohio App. 567, 570, 18 N.E.2d 992, 993 (quoting *Mitchell v. Great Works Milling & Mfg. Co.* (C.C. Me, 1843), 17 Fed.Cas. 496, 499,).

Analysis of preemption under the Supremacy Clause “start[s] with the assumption that the historic police powers of the States [are] not to be superseded by Federal Act unless that [is] the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S.

⁵ *Home Owner's Loan Corp.*, held in 1938, a federal savings and loan was not included in the R.C. 1703.01 definition of “foreign corporation;” thus a federal savings and loan might institute an action, even in the absence of compliance with R.C. Chapter 1703. However, effective May 21, 1997, Ohio’s definition of foreign corporation now includes a federal savings and loan.

218, 230, 67 S.Ct. 1146, 1152; see also *Charvat v. Telelytics, LLC*, Franklin App. No. 05AP-1279, 2006-Ohio-4623, ¶¶23-24. The provisions of R.C. Chapter 1703, are part of the general laws of the Ohio which serve the constitutional rights of its citizenry. See, *St. Clair v. Cox* (1882), 106 U.S. 350, 353-55, 1 S.Ct. 354, 27 L.Ed. 222; *Lafayette Ins. Co. v. French* (1855), 59 U.S. 404; and *Connecticut Mut. Life Ins. Co. v. Spratley* (1899), 172 U.S. 602, 619-621, 19 S.Ct. 308. Strictly construing the text of 12 C.F.R. 560.2, which only preempts state **lending regulations**, the principles of federalism weigh against preemption of Ohio's general laws applicable to foreign corporations.

B. THIS COURT HAS PREVIOUSLY HELD THAT 12 C.F.R. 560.2 ONLY PREEMPTS STATE LAWS THAT ARE STATE LENDING REGULATIONS.

The issue now argued by WAMU, whether or not 12 C.F.R. 560.2 preempts Ohio's non-lending regulations/general laws, has already been answered in the negative by this Court. In *Pinchot*, this Court held that the preemptive effects of 12 C.F.R. 560.2 could only be applied to Ohio's laws which purport to regulate lending or credit activities. *Pinchot*, 99 Ohio St.3d at 397, 2003-Ohio-4122 at ¶46; see also *Hussey-Head v. World Savings & Loan Assn.* (2003), 111 Cal.App.4th 773, 4 Cal.Rptr.3d 171; *Fenning v. Glenfed, Inc.* (1995), 40 Cal.App.4th 1285, 47 Cal.Rptr.2d 715; *Seigel v. American Savings & Loan Ass'n* (1989), 210 Cal.App.3d 953, 258 Cal.Rptr. 746. This Court stated that 12 C.F.R. 560.2 is "embedded with the functional boundaries of lending and credit-related activity." *Pinchot*, 99 Ohio St.3d at 397, 2003-Ohio-4122 at ¶46. This Court's position is also supported by the concurring opinion of Justice O'Connor, in *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta* (1992), 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664, wherein she wrote:

[T]he authority of [OTS] to pre-empt state laws is not limitless. Although Congress delegated broad power to [OTS] it is clear that HOLA does not permit [OTS] to pre-empt the application of all state and local laws to such institutions.

Nothing in the Court's opinion should be read to the contrary. . . **Nothing** in the language of § 5(a) of HOLA, which empowers [OTS] to “provide for the organization, incorporation, examination, operation, and regulation” of federally chartered savings and loans, **remotely suggests that Congress intended** to permit the [OTS] **to displace local laws**, such as tax statutes and zoning ordinances, **not directly related to savings and loan practices**. Accordingly, in my view, nothing in the Court's opinion should be read to the contrary.

de la Cuesta, 458 U.S. at 171-172. (emphasis added). Thus, “in order to fall within the preemptive scope of Section 560.2, the state law in question must at least bear a concrete, logical, or substantial relation to some aspect or function of lending.” *Pinchot*, 99 Ohio St.3d at 400, 2006-Ohio-4122 at ¶46.

R.C. Chapter 1703 applies to foreign corporations, not simply creditors. Its provisions do not seek to regulate lending or the extension of credit in Ohio. This Chapter does not fall within the ambit of having a “concrete, logical, or substantial relation to some aspect or function of lending;” thus, its provisions are not subject to preemption by HOLA or § 560.2. *Id.* Instead, Title 11 of the Ohio Revised Code codifies Ohio's lending and credit regulatory and supervisory laws. As a matter of law this Court must conclude that R.C. Chapter 1703 does not impose limits on a federal thrift's ability to conduct lending activities in Ohio. Therefore, the holding in *Pinchot*, demonstrates that R.C. Chapter 1703, including R.C. 1703.03 and .29(A), is not preempted by 12 C.F.R. 560.2.

C. THE OFFICE OF THRIFT SUPERVISION (“OTS”) HAS ALREADY DETERMINED THAT FEDERAL PREEMPTION DOES NOT EXIST WITH REGARD TO A STATE'S FOREIGN CORPORATION LAW WHICH REQUIRES THE REGISTRATION OF AN AGENT OF A FEDERAL SAVINGS ASSOCIATION WITH THE A STATE'S SECRETARY OF STATE; SUCH A REQUIREMENT ONLY INCIDENTALLY IMPACTS THE FEDERAL ASSOCIATION, IS MINISTERIAL IN NATURE, AND FALLS WITHIN THE COMMERCIAL LAW EXCEPTION OF 12 C.F.R. 560.2(c)(1).

WAMU misleads this Court when it argues that the rules adopted by the Office of Thrift Supervision (“OTS”), including 12 C.F.R. 560.2 preempt Ohio's foreign corporation registration requirements. If fact, OTS has made the opposite conclusion. WAMU makes reference to

several OTS opinion letters in its brief at pages 29 thru 33. However, there is nothing in the record which demonstrates that these opinion letters underwent the “notice and comment” requirements of the Federal Administrative Procedure Act; as such they are not authority for this Court. See, *State Farm Bank, F.S.B. v. Reardon* (S.D. Ohio 2007), 512 F.Supp. 2d 1107; see also, *Christenson v. Harris Cty.* (2000), 529 U.S. 576, 587, 120 S.Ct. 1655 (holding opinion letters from administrative agencies “lack the force of law”). Regardless, each of the OTS Opinion Letters cited by WAMU relate to state laws that address lending and credit activities of federal savings associations and deal with “licensing, registration filings or reports **by creditors.**” See, 12 C.F.R. 560.2(b)(1). However, R.C. Chapter 1703 does not target “creditors” or lending activities. Therefore, each of the OTS opinion letters are distinguishable.

WAMU’s most glaring omission is its failure disclose to this Court OTS’s real opinion on the subject which appears in Rules & Regs. Final Rule 550.135; Fed. Register Dec. 12, 2002 – Vol. 67, Number 239, pgs 76293-76304. Unlike the opinion letters, Final Rule 550.135 is codified as a federal regulation at 12 C.F.R. 550.135 having the force of law. Within its analysis of preemption of state laws that attempt to regulate a federal savings and loan’s “fiduciary activities,” OTS wrote in 12 C.F.R. 550.135:

To clarify OTS’s views on preemption of state law in the context of fiduciary activities, **OTS has included language similar to that found in the lending and deposit-taking regulations that discuss preemption.** See 12 CFR 557.11-.13 and **560.2.**

* * *

Section 550.135 of the final rule tracks § 560.2 of the lending regulations.

* * *

For example under this approach [preemption analysis of a state law] **Federal law would not preempt a provision in a state corporation code requiring an out-of-state corporation doing business in that state to appoint a state resident or**

official as the corporation's agent for service of process purposes. The law is not including in the list of illustrative examples in paragraph (b) [illustrative examples of preempted state laws]. The law does, however, affect a thrift's fiduciary activities, so a presumption of preemption arises. This presumption can by (sic) reversed if the law fits within the confines of paragraph (c) [state laws that are not preempted].

In our view, a service of process statute falls within the exception in subparagraph (c)(1) for commercial laws. Moreover, a requirement that an out-of-state thrift appoint a resident or official for purposes of service of process **would only incidentally impact** the fiduciary activities of a **Federal savings association.** Furthermore, finding such a state law applicable to a Federal savings association is consistent with the purposes of the preemption regulation. The preemption regulation is intended to allow Federal savings associations to exercise fiduciary powers in accordance with a uniform Federal scheme. **Appointing a state resident or official to receive service of process is largely ministerial** and should not affect a Federal savings association's ability to offer fiduciary services free of overlapping, varying state regulation. **Accordingly, the state law would not be preempted.**

See, OTS Rules & Regs. Final Rule 550.135; Fed. Register Dec. 12, 2002 – Vol. 67,

Number 239, pgs 76293-76304, at pp. 76296-76297 (emphasis added), attached hereto – Appdx.

p. 2.

The provisions of 12 C.F.R. 560.2 state in pertinent part:

(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.

* * *

OTS hereby occupies the entire **field of lending regulation** for federal savings associations.

* * *

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,**

* * *

(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**;

(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;

* * *

(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.

See, 12 C.F.R. 560.2 (emphasis added). In light of the fact that in 2002, OTS based the adoption of 12 C.F.R. 550.135, upon the same preemption framework and analysis afforded under the existing provisions of 12 C.F.R. 560.2, its example in 2002 would apply with equal weight to 12 C.F.R. 560.2. Therefore, R.C. 1703.03 is not preempted by 12 C.F.R. 560.2 since it: (1) falls within the commercial law exception found within 12 C.F.R. 560.2(c)(1); (2) it only incidentally impacts the lending activities of the federal savings association; and (3) its requirement is ministerial. Pursuant to the express example provided by OTS – WAMU’s argument for preemption predicated upon 12 C.F.R. 560.2 is wholly devoid of merit. See also, *Gibson v. World Savings and Loan Ass’n* (2002), 103 Cal. App. 4th 1291, 1302 (holding that a state statute regulating all businesses and having only an incidental effect on lending activities is not preempted).

WAMU’s citations to *Watters v. Wachovia Bank, N.A.* (2007), -- U.S. --, 127 S.Ct. 1559; *Ass’n of Banks in Insurance v. Duryee* (C.A. 6, 2001), 270 F.3d 397; *Charter One Bank v. Tutin*, 8th Dist. No. 88081, 2007-Ohio-99, as authority is misplaced. These cases involve the National

Bank Act, not HOLA. Preemption under the National Bank Act, appears at 12 C.F.R. 34.4. That CFR section expressly excludes from preemption, the licensing/registration for service of process as may be required under state law. In *Watters*, The United States Supreme Court in *Watters* stated: “Federally chartered banks **are subject to state laws of general application** in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA [National Bank Act].” *Watters* , 127 S.Ct. at 1567 (emphasis added).

In its brief WAMU made a reference to an interstate commerce exception, to R.C. 1703.03. The court in *Contel Credit Corp. v. Tiger, Inc.* (1987), 36 Ohio App.3d 71, opined:

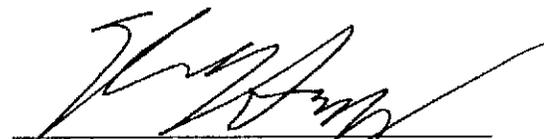
The loaning of money by a foreign corporation engaged in that business to a corporation in Ohio is not a matter of interstate commerce, and the foreign corporation, if not licensed to do business in Ohio pursuant to R.C. 1703.03, lacks standing to maintain a cause of action on its contract in any Ohio court. (R.C. 1703.29, applied.)

Contel Credit Corp., 36 Ohio App.3d 71, syllabus ¶ 2. Therefore the exemption is inapplicable.

For all of the foregoing reasons, there is no merit to WAMU’s fifth proposition of law.

Appellants respectfully request that their three propositions of law be accepted by this Court since WAMU failed to refute them in the body of WAMU’s merit brief.

Respectfully submitted,



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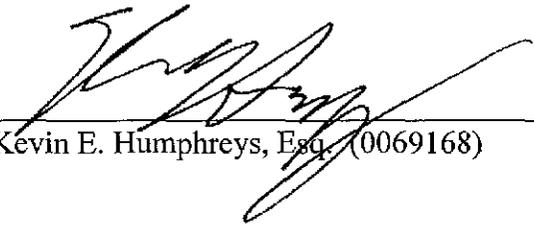
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Appellants' Reply Brief together with its Appendix was deposited with the U.S. Postal Service for delivery via prepaid first class mail upon all parties entitled to service as identified below this 23rd day of March, 2009:

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APPELLANTS' REPLY BRIEF APPENDIX

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Rules and Regulations

Federal Register

Vol. 67, No. 239

Thursday, December 12, 2002

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 506, 550, and 551

[No. 2002-57]

RIN 1550-AB49

Recordkeeping and Confirmation Requirements for Securities Transactions; Fiduciary Powers of Savings Associations

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is issuing a final rule specifying the recordkeeping and confirmation requirements for savings associations that effect securities transactions. Under a rule issued by the Securities and Exchange Commission (SEC), savings associations may perform certain broker-dealer activities without registering with the SEC. Today's final rule affords savings association customers the same protections and disclosures provided to bank customers; ensures that examiners will be able to evaluate a savings association's compliance with securities laws and to assess whether savings associations effect securities transactions safely and soundly; and provides savings associations with formal guidance for effecting securities transactions. It does not modify savings associations' authority to effect these transactions.

OTS also is amending its regulations governing the fiduciary powers of Federal savings associations. The final rule codifies a series of OTS legal opinions regarding fiduciary powers. The final rule also streamlines application procedures, clarifies when a Federal savings association may act in a fiduciary capacity without obtaining fiduciary powers from OTS, clarifies the

scope of Federal preemption of state law in the fiduciary area, and makes other minor or technical changes to OTS's fiduciary powers regulations.

EFFECTIVE DATE: January 1, 2003.

FOR FURTHER INFORMATION CONTACT: Judith McCormick, Trust Specialist, (202) 906-5636, Supervision Policy Division, Office of Supervision; or Timothy P. Leary, Counsel (Banking & Finance), (202) 906-7170, Regulations and Legislation Division, or Kevin Corcoran, Assistant Chief Counsel, (202) 906-6962, Business Transactions Division, Office of the Chief Counsel, Office of Thrift Supervision, 1700 G Street, NW., Washington DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background

On June 11, 2002, OTS published a notice of proposed rulemaking seeking comment on regulations setting out recordkeeping and confirmation requirements for savings associations that effect securities transactions and on amendments to OTS's regulations governing the fiduciary powers of Federal savings associations. 67 FR 39886 (June 11, 2002). Four commenters, two trade groups and two Federal savings associations that conduct fiduciary activities, responded to the proposal. The commenters generally supported the proposal. Unless specifically discussed below, the proposed rules are adopted without change.

A. Recordkeeping and Confirmation Requirements for Securities Transactions

Until recently, savings associations could not effect securities transactions for customers directly unless they registered with the SEC as a broker-dealer. Under an interim final rule issued by the SEC, savings associations are now treated as banks under the definitions of "broker" and "dealer" in sections 3(a)(4) and (a)(5) of the Securities Exchange Act of 1934 (Exchange Act). 66 FR 27760 (May 18, 2001).¹ As a result, a savings association

¹ The SEC extended until May 12, 2003 the savings association exception from the definition of "broker" under the Exchange Act, and extended until February 10, 2003 the savings association exception from the definition of "dealer" under the Exchange Act. SEC Release Nos. 34-45751 (October 30, 2002) and 34-45897 (May 8, 2002); *see also* SEC Release No. 34-44570 (July 18, 2001). On October 31, 2002, the SEC issued a proposed rule exempting

may now perform certain broker-dealer activities without registering with the SEC as broker-dealers.

The OCC, Federal Deposit Insurance Corporation (FDIC), and Federal Reserve Board (FRB) regulations include recordkeeping and confirmation requirements for securities transactions effected by banks. The proposed OTS rule was intended to afford savings association customers the same protections and disclosures provided to bank customers; to ensure that examiners will be able to evaluate a savings association's compliance with securities laws and to assess whether savings associations effect securities transactions safely and soundly; and to provide savings associations with formal guidance for effecting securities transactions.

Two commenters made specific suggestions regarding the proposed recordkeeping and confirmation requirements for securities transactions. We discuss those comments below.

1. Need for Regulations

Before passage of the the Gramm-Leach-Bliley Act (GLBA), the terms "broker" and "dealer" in the Securities Exchange Act of 1934 did not include a bank. As a result, banks could engage in securities transactions without registering as a broker or a dealer with the SEC. In Title II of GLBA, Congress replaced this general exception with eleven functional exceptions covering specified bank securities activities. Pending issuance of a final rule implementing the Title II exceptions, the SEC has extended banks a blanket exception from the definitions of "broker" and "dealer." The SEC has stated it will treat savings associations as banks for purposes of the eleven exceptions, and has included savings associations in the extended blanket exception.

One commenter, a Federal savings association, questioned the need for recordkeeping and confirmation requirements. Once the SEC issues a

banks from the definition of "dealer" when performing certain *de minimis* riskless principal transactions, defining certain terms used in the bank exceptions to dealer registration, and exempting banks from the definitions of "broker" and "dealer" when engaging in securities lending transactions with a qualified investor. 67 FR 64495 (November 5, 2002). Because savings associations are treated as banks they are covered by this proposed rule as well.

final rule, the commenter notes, the eleven GLBA exceptions will be much narrower in scope than the pre-GLBA blanket exception. Accordingly, the commenter predicts that the vast majority of bank and thrift securities transactions will no longer be excepted.

As a result, the commenter believes that banks and thrifts will have to register as a broker or dealer (which is not practical given the capital requirements to do so) or contract with a registered broker or dealer in order to continue to engage or participate in most current security transactions. Since these security transactions would be subject to SEC recordkeeping and confirmation requirements, rather than banking agency rules, the commenter argued that the new OTS recordkeeping and confirmation rules will have a very limited application, and urged OTS not to issue a final rule.

OTS believes that many, if not all, of the securities transactions that savings associations currently conduct will continue to fit within the Title II exceptions. For instance, savings associations already effect securities transactions as fiduciaries, effect safekeeping and custody transactions, conduct sweep activities, and enter into networking arrangements. See 15 U.S.C. 78c(a)(4)(B)(i), (ii), (v), and (viii). Given this, OTS believes that recordkeeping and confirmation requirements are necessary to afford savings association customers the same protections and disclosures provided to bank customers, to ensure that examiners will be able to evaluate a savings association's compliance with securities laws and assess whether savings associations effect securities transactions safely and soundly, and to provide savings associations with formal guidance for effecting securities transactions.²

2. Section 551.140—Securities Trading Policies and Procedures

Proposed § 551.140 required a savings association that effects securities transactions to maintain and follow written policies and procedures addressing several areas of operation.³

² At the request of OTS trust examiners, many Federal savings associations with trust departments have been keeping records similar to those required by the final recordkeeping and confirmation rules.

³ Under the proposed rule, the association's policies and procedures must assign responsibility for the supervision of officers and employees engaged in various aspects of the trading process; provide for the fair and equitable allocation of securities and prices to accounts when the savings association receives orders for the same security at approximately the same time and it places orders individually or in combination; provide for the crossing of buy and sell orders on a fair and equitable basis; and require certain officers and employees to make quarterly reports containing

One commenter, a trade association, questioned the need for significant new policies and procedures in the absence of an SEC final rule implementing the Title II exceptions. Until the SEC acts, this commenter argued, it is unclear whether the Federal banking agencies will have to revise applicable banking and savings association regulations, including the proposed recordkeeping and confirmation requirements for savings associations. The commenter asked that OTS be mindful of requiring savings associations to put in place significant policies and procedures that shortly might have to be substantially revised.

While we appreciate the commenter's concern, the creation and implementation of written securities trading policies and procedures is critical, especially during the period until the SEC promulgates its final rules implementing all of the Title II exceptions.⁴ Absent such a requirement, a savings association, alone among financial institutions, could act as a broker-dealer without having written trading policies and procedures in place. In our view, this state of affairs is untenable. Accordingly, the final rule requires savings associations to develop and maintain written policies and procedures for securities trading.

B. Fiduciary Activities of Federal Savings Associations

OTS also proposed amendments to 12 CFR part 550, which governs the fiduciary activities of Federal savings associations. The proposal codified a series of OTS legal opinions regarding the fiduciary powers of Federal savings associations and was consistent with the Office of the Comptroller's (OCC) recent codification of a similar series of legal opinions regarding the fiduciary powers of national banks.⁵ The proposal also streamlined application procedures, clarified when a Federal savings association may act in a fiduciary capacity without obtaining fiduciary powers from OTS, and made other minor or technical changes.

1. Section 550.60—What Other Definitions Apply to This Part?

OTS proposed amending § 550.60 to include a definition of the term "activities ancillary to your fiduciary business." The proposal codified OTS legal opinions that concluded that a

specific information on personal securities transactions.

⁴ As noted, the SEC has just issued a proposed rule implementing certain limited bank exceptions from the definition of "dealer." 67 FR 64465 (November 5, 2002).

⁵ See 66 FR 34792 (July 2, 2001).

Federal savings association is not "located" in a state for purposes of section 5(n) of the Home Owners' Loan Act (HOLA)⁶ when the association conducts in that state activities that are ancillary to the association's fiduciary business.

The proposal defined "activities ancillary to your fiduciary business" to include advertising, marketing, or soliciting fiduciary business, contacting existing or potential customers, answering questions and providing information to customers related to their accounts, acting as liaison between you and your customer (for example, forwarding requests for distribution, changes in investment objectives, forms, or funds received from the customer), and inspecting or maintaining custody of fiduciary assets or holding title to real property. One commenter suggested adding the phrase " * * * or services similar in nature to those listed above" at the end of the definition to provide Federal savings associations more flexibility.

The OCC's corresponding definition includes language indicating that the list of ancillary activities in the definition is illustrative and not comprehensive. 12 CFR 9.2 (definition of "trust representative office"). The OCC definition further notes that "[o]ther activities may also be 'ancillary activities' for purposes of this definition." To provide flexibility, we have added language similar to that found in the OCC definition.⁷

2. Section 550.70—Must I Obtain OTS Approval or File a Notice Before I Exercise Fiduciary Powers?

Proposed § 550.70 required a Federal savings association to obtain prior approval from OTS before conducting fiduciary activities that are "materially different" from the activities that OTS has previously approved for the association. The final rule clarifies that

⁶ 12 U.S.C. 1464(n) (2001). Under that section, OTS may authorize a Federal savings association: [T]o act as trustee, executor, administrator, guardian, or in any other fiduciary capacity in which State banks, trust companies, or other corporations that compete with Federal savings associations are permitted to act under the laws of the State in which the Federal savings association is located. (emphasis added). Thus, under HOLA, the scope of a Federal savings association's fiduciary powers is expressly tied to the laws of the state in which the Federal savings association is "located."

⁷ Distinguishing between key fiduciary activities and ancillary activities in § 550.60 assists in determining where the Federal savings association is acting in a fiduciary capacity for purposes of section 5(n) of the HOLA. The classification as ancillary does not affect the importance of those activities or change in any way an association's fiduciary duty with respect to those activities. See 66 FR 34792, 34793, n.2.

a Federal savings association engages in "materially different" activities when, among other things, it acts under fiduciary powers that it has held but not exercised for five or more years.

The purpose of the "materially different" standard was to identify those situations where a complete OTS review is necessary to ensure that proposed operations are consistent with the association's experience, resources, and expertise. If a Federal savings association wishes to commence fiduciary activities under powers it has held but not exercised for more than five years, its ability to conduct fiduciary operations could have changed since that time. Accordingly, under § 550.70, the association must submit a new trust application to allow OTS to review its current expertise and resources.

We have also revised § 550.70 to make clear that OTS must approve the exercise of fiduciary powers by a Federal savings association. If, for instance, a Federal thrift without fiduciary powers merges with a state institution with fiduciary powers, a resulting Federal savings association would have to obtain OTS approval before exercising fiduciary powers.

3. Section 550.135(b)—What State Laws Apply to My Operations?

Proposed § 550.135(b) provided that, except for those state laws specifically mentioned in section 5(n) of the HOLA, "[s]tate laws that purport to regulate any other aspect of your fiduciary activities do not apply to your fiduciary operations." One commenter has asked that we clarify what types of state laws "purport to regulate" a Federal thrift's fiduciary operations. As one example, the commenter asks whether state securities laws requiring investment adviser licensing of a Federal savings association or its employees are applicable state laws.

To clarify OTS's views on preemption of state law in the context of fiduciary activities, OTS has included language similar to that found in the lending and deposit-taking regulations that discuss preemption. See 12 CFR 557.11–13 and 560.2. Fiduciary activities, like lending and deposit-taking, are authorized by section 5 of the HOLA. Section 5 authorizes OTS, "under such regulations as [it] may prescribe * * * to provide for the * * * operation and regulation of * * * Federal savings associations * * * giving primary consideration of the best practices of thrift institutions in the United States." 12 U.S.C. 1464(a) (2001).

OTS intends that, except with regard to those specific state laws identified in

section 5(n) of the HOLA (scope of fiduciary powers, investment in state trust companies, access to examination reports regarding trust activities, deposit of securities, oaths and affidavits, and capital), a determination whether Federal law preempts state law will follow the same analysis set out in the lending and deposit-taking regulations.

OTS has moved proposed § 550.135(b) into a separate section, § 550.136, entitled "To what extent do State laws apply to my fiduciary operations?" Proposed § 550.135(a) is now § 550.135 of the final rule, with the new title "How do I determine which State's laws apply to my fiduciary operations?"

Section 550.136 of the final rule tracks § 560.2 of the lending regulations. Section 550.136(a) includes a general statement regarding Federal preemption of state law under HOLA. Paragraph (a) makes clear that, to enhance safety and soundness and to enable Federal savings associations to conduct their fiduciary activities in accordance with the best practices of thrift institutions in the United States (by efficiently delivering fiduciary services to the public free from undue regulatory duplication and burden), OTS occupies the field of the regulation of the fiduciary activities of Federal savings associations.

In so doing, OTS intends to give Federal savings associations maximum flexibility to exercise their fiduciary powers in accordance with a uniform scheme of Federal regulation. Federal savings associations may exercise fiduciary powers as authorized under HOLA and OTS regulations, without regard to state laws that purport to regulate or otherwise affect their fiduciary activities, except to the extent provided in 12 U.S.C. 1464(n) (state laws regarding scope of fiduciary powers, investments in state trust companies, access to examination reports regarding trust activities, deposits of securities, oaths and affidavits, and capital) or as provided in paragraph (c), discussed below. Paragraph (a) also clarifies that for purposes of § 550.136, "state law" includes any state statute, regulation, ruling, order, or judicial decision.

Paragraph (b) then lists illustrative examples of the types of state laws that are preempted. That list includes state registration and licensing laws, state recordkeeping requirements, state advertising and marketing laws, state laws affecting the ability of a Federal savings association acting in a fiduciary capacity to maintain an action or proceeding in state court, and state laws regarding fiduciary-related fees. These examples are drawn from prior OTS opinion letters and inquiries that OTS

has received from thrifts that conduct fiduciary activities.⁹

Finally, paragraph (c) specifies that certain state laws generally are not preempted.⁹ The list of those laws is the same as in § 560.2(c) (contract and commercial law, real property law, tort law, and criminal law), with the addition of state probate law.¹⁰ Generally, Federal law will not preempt these laws to the extent the state law only incidentally affects the fiduciary operations of Federal savings associations or is otherwise consistent with the purposes of the preemption regulation. The final rule provides that OTS may decline to preempt state laws other than those listed in the above categories if the law furthers a vital state interest and either has only an incidental effect on the association's fiduciary operations or is not otherwise contrary to the purposes of the preemption regulation.

When confronted with interpretive questions under § 550.136, we anticipate that courts will, in accordance with well established principles of regulatory construction, look to the regulatory history of § 550.136 for guidance. The purpose of paragraph (c) is to preserve the traditional infrastructure of basic state laws that undergird commercial transactions, not to open the door to state regulation of a Federal savings association's fiduciary activities.

When analyzing the status of state laws under § 550.136, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects fiduciary activities. If it does, then, in accordance with paragraph (a), the presumption

⁹ See, e.g., OTS Op. Chief Counsel (January 3, 2001) (preempting state restriction on out-of-state Federal savings association conducting fiduciary activities in an agency office); OTS Op. Chief Counsel (July 1, 1998) (preempting state restrictions on who may act as trustee of a pre-need funeral trust); OTS Op. Chief Counsel (August 8, 1998) (preempting state marketing restrictions); OTS Op. Chief Counsel (June 21, 1996) (preempting state marketing restrictions); OTS Op. Chief Counsel (March 28, 1996) (preempting state licensing requirement); OTS Op. Acting Chief Counsel (June 13, 1994) (preempting state licensing requirement).

¹⁰ In clarifying the scope of Federal preemption of state law in the fiduciary area, OTS does not intend to supplant areas in which state law has long governed the duties of a fiduciary, such as state principal and income laws and state "prudent man" or "prudent investor" laws.

¹¹ Acting as an executor is a classic fiduciary activity. 12 CFR 550.30(b). Moreover, institutions acting as executors have always been subject to state laws governing the administration of estates. OTS has no intention of changing this in the final rule.

arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.

For example, under this approach Federal law would not preempt a provision in a state corporation code requiring an out-of-state corporation doing business in that state to appoint a state resident or official as the corporation's agent for service of process purposes. The law is not included in the list of illustrative examples in paragraph (b). The law does, however, affect a thrift's fiduciary activities, so a presumption of preemption arises. This presumption can be reversed if the law fits within the confines of paragraph (c).

In our view, a service of process statute falls within the exception in subparagraph (c)(1) for commercial laws. Moreover, a requirement that an out-of-state thrift appoint a resident or official for purposes of service of process would only incidentally impact the fiduciary activities of a Federal savings association. Furthermore, finding such a state law applicable to a Federal savings association is consistent with the purposes of the preemption regulation. The preemption regulation is intended to allow Federal savings associations to exercise fiduciary powers in accordance with a uniform Federal scheme. Appointing a state resident or official to receive service of process is largely ministerial and should not affect a Federal savings association's ability to offer fiduciary services free of overlapping, varying state regulation. Accordingly, the state law would not be preempted.

As questions arise, OTS will issue interpretive guidance consistent with the foregoing. While recognizing that no regulation can anticipate and expressly resolve all questions, we believe § 550.136 provides thrifts with substantially more guidance than was previously available. This should enable thrifts to plan and operate their fiduciary activities more efficiently. From time to time, OTS will review, update, and modify § 550.136 to ensure that it reflects new developments and promotes "best practices" and safety and soundness.

II. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) requires Federal agencies to prepare a final regulatory flexibility analysis with a final rule that was subject to notice and comment

unless the agency certifies that the rule will not have a significant impact on a substantial number of small entities.

Most of the changes to part 550 merely codify existing OTS regulatory interpretations regarding the scope of fiduciary powers, multi-state operations, and the impact of Federal law. To the extent that the final rule modifies existing requirements of part 550, the final rule will reduce burden by eliminating application requirements under certain circumstances, by substituting notices for applications in other circumstances, by providing greater flexibility regarding the collateralization of deposits of fiduciary funds, and by clarifying the scope of Federal preemption of state laws in the fiduciary area. The final rule also clarifies the scope of activities that are exempt from part 550 under section 5(l) of the HOLA. While the final rule eliminates § 550.580(c), which exempts Federal savings associations that act as trustees of fiduciary accounts that involve no active fiduciary duties, OTS is not aware of any small Federal savings associations that rely on that provision. Accordingly, OTS certifies to the Chief Counsel of Advocacy of the Small Business Administration that the final changes to part 550 will not have a significant economic impact on a substantial number of small entities.

In the proposal, OTS published an initial regulatory flexibility analysis for part 551. OTS includes here a final regulatory flexibility analysis for part 551.

Because the recordkeeping and confirmation requirements are new for savings associations, OTS cannot determine whether the addition of part 551 will have a significant impact on a substantial number of small entities. However, we have consulted supporting statements filed by the OCC for substantially identical requirements in connection with a 1999 submission under the Paperwork Reduction Act. Because savings associations are now considered "banks" for purposes of the broker-dealer registration requirements and because OTS has modeled the final rule on the OCC's recordkeeping and confirmation rules, OTS believes that the OCC's estimated annual paperwork cost of complying with the regulations provides a reasonable starting point for OTS's analysis of the cost to small business entities to comply with the proposed rule. These estimates are discussed under section B—Requirements of the proposed rule.

A description of the reasons why OTS is issuing this final rule, and a statement of the objectives of, and legal basis for, proposed part 551 are included in the

supplementary material above. OTS did not receive any comments on its initial regulatory flexibility analysis for part 551.

A. Small Entities to Which the Proposed Rule Would Apply

Part 551 applies to savings associations that effect securities transactions for customers. OTS calculates that as of October 21, 2002, it regulates approximately 982 savings associations. Of these savings associations approximately 529 savings associations hold assets under \$150 million. Small depository institutions are generally defined, for RFA purposes, as those with assets under \$150 million.

In all likelihood, however, this number substantially overstates the number of small savings associations that will be effected by the final rule. No savings associations are currently registered with the SEC as broker-dealers, although some provide such services to their customers through arrangements with a third party broker-dealer. Because the new SEC rule permitting savings associations to perform broker-dealer activities without registering is so recent, OTS has no information concerning how many of its savings associations, large or small, have commenced or are contemplating commencing these operations.

B. Requirements of the Final Rule

As set out in detail in the regulatory text, the final rule requires savings associations to retain records of securities transactions, send confirmation of the transactions to customers, settle securities transactions within certain timeframes, and establish and maintain specific written policies and procedures regarding securities transactions.

Subpart A of the final rule establishes the minimum recordkeeping requirements for savings associations concerning securities transactions with their customers. This provision requires that the savings association maintain essential records necessary to track securities transactions. This type of recordkeeping is a usual and customary process for a savings association. Consequently, most savings associations should be partially or fully prepared to meet the recordkeeping requirements. While we believe that this requirement should not impose significant burdens, savings associations may incur additional personnel (managerial, computer, and support staff), data storage, and other costs to the extent that existing resources are insufficient.

Subpart B establishes requirements for confirmation notices and subpart C

addresses the timing of settlement for securities transactions. To the extent that existing practices and available resources are insufficient, savings associations may need the assistance of legal and securities professionals and other personnel (managerial, computer, and support staff) to ensure that notices meet the content requirements and are provided within the time frames set forth in the regulation, and to ensure that securities transactions close within the times specified in the rule.

Finally, subpart D requires the savings association to establish and follow various policies and procedures to govern securities transactions. Savings associations commonly develop and implement policies and procedures in many of the areas addressed by the final rule (for example, the assignment of responsibility for the oversight of personnel). Accordingly, most savings associations should be partially prepared to meet these requirements. However, the development of policies and procedures on matters specific to securities transactions may require the assistance of legal and securities professionals. Compliance with these policies and procedures may require additional personnel, training, and other costs.

Based on OCC estimates, OTS calculates that this rule will impose at least \$264 in additional costs on small savings associations that begin to effect securities transactions on behalf of customers.¹¹ The development of policies and procedures, however, may require the assistance of legal or securities professionals that were not included in the OCC's estimate. Accordingly, OTS has included additional costs of \$305 to \$403 to reflect the efforts of these professionals.¹² Accordingly, OTS estimates that the total cost of complying with this rule will be \$569 to \$667 per small institution. OTS notes that these costs will drop in subsequent years because thrifts will not be required to develop, and will only be required to update, policies and

¹¹ OCC estimated that banks would incur 11 hours of additional burden in their first year and an additional 4 hours thereafter. It further estimated that 80 percent of the burden would be clerical at a cost of \$20 per hour and that 20 percent of the burden would be managerial at \$40 per hour. Thus, the average annual cost of each hour is \$24.

¹² The average billing rate for a partner in a United States law firm with less than nine lawyers is \$183 per hour. The average billing rate for an associate in such a firm is \$139 per hour. 1999 Survey of Law Firm Economics, Altman Weil Pensa Publications, Inc., reported at www.lawyers.com. Using OCC's estimate that the rule imposes a maximum of 2.2 managerial burden hours, OTS estimates that these costs will be between \$305 and \$403.

procedures on effecting securities transactions.

C. Significant Alternatives

Section 604(a)(5) requires OTS to describe the steps it has taken to minimize the significant economic impact on small entities consistent with the objectives of the statute and regulations. OTS solicited comment on other alternatives that would minimize the burden on small savings associations that effect securities transactions, including whether any modifications or exemptions from the rules for small savings associations would be appropriate. OTS received no comments.

As noted in the proposal, OTS considered recommending, rather than requiring, recordkeeping and confirmation provisions regarding securities transactions conducted by savings associations, but decided that such an approach was inappropriate. The SEC and the other Federal banking regulators have created a regulatory scheme designed to protect investors through adequate disclosure of information and to discourage and detect fraudulent securities practices through prudent recordkeeping requirements. OTS believes that similar provisions are necessary to bring the savings association industry into conformity with the standards of the securities and banking industries for effecting securities transactions.

OTS, however, has attempted to minimize the economic impact of the final rule on savings associations, including small savings associations, while still achieving the overall objectives of the regulation. OTS has included several exemptions to the rule that may be available to small savings associations. For example, § 551.20(b)(1) exempts savings associations from certain recordkeeping and policy and procedure requirements if the institution conducts fewer than 500 securities transactions for customers (excluding transactions in government securities). Similarly, § 551.20(b)(2) exempts savings associations who conduct fewer than 500 government securities transactions from certain recordkeeping requirements. OTS believes that many small associations will take advantage of these exemptions.

Moreover, OTS continues to have the ability under 12 CFR 500.30(a) to waive any recordkeeping or confirmation requirements upon a finding of good cause. This provision permits OTS to minimize any significant economic impact of a provision on a specific institution on a case-by-case basis.

Finally, OTS has included a substantial amount of flexibility in the final rule. For example, a savings association may maintain required records in any manner, form, or format that it deems appropriate. Further, the rules would specifically permit the use of electronic storage media and the provision of notices through electronic means. See §§ 551.60 and 551.110. In addition, several provisions permit a savings association, through the agreement with the customer, to modify the requirements of the part.

D. Other Matters

There are no Federal rules or statutes that duplicate, overlap, or conflict with the proposed rule. However, as noted above, the SEC and the other banking regulators have adopted substantially similar recordkeeping and confirmation requirements for broker-dealers and other depository institutions.

III. Paperwork Reduction Act

OTS in the proposal solicited specific comment on the paperwork collection requirements in the proposed rule. No commenters included any comments or suggestions regarding paperwork.

The information collection requirements contained in the final rule are virtually identical to those included in the proposed rule on these subjects published in June 2002. The burden on respondents remains unchanged from those in the proposal, which OMB approved in July 2002. See OMB Nos. 1550-0109 (July 15, 2002; expires July 31, 2005) and 1550-0037 (July 22, 2002; expires July 31, 2005). Respondents/recordkeepers are not required to respond to any collection of information unless it displays a currently valid OMB control number.

IV. Unfunded Mandates Act

OTS has determined that the final rule will not result in expenditures by state, local, or tribal governments or by the private sector of \$100 million or more. Accordingly, a budgetary impact statement is not required under section 202 of the Unfunded Mandates Act.

V. Effective Date

Under the Administrative Procedure Act, an agency must publish a rule at least 30 days before its effective date. 5 U.S.C. 553(d). The agency may, however, waive this 30-day delayed publication requirement if the rule relieves a restriction (5 U.S.C. 553(d)(1)) or for good cause (5 U.S.C. 553(d)(3)).

OTS waives the 30-day requirement for the amendments to its fiduciary powers regulations because the rule imposes no new burden and relieves a

restriction, specifically the restriction against a Federal savings association exercising fiduciary powers in a new state without OTS's approval.

With regard to the recordkeeping and confirmation rules, OTS waives the 30-day delayed effective provision for good cause. OTS finds good cause for making the recordkeeping and confirmation rules effective at the beginning of the next quarter because the new rules will fill a current gap in the rules applicable to securities transactions of securities transactions.

Moreover, as noted in section I(A)(1), n. 2, above, at the request of OTS trust examiners, many Federal savings associations with trust departments have been keeping records similar to those required by the final recordkeeping and confirmation rules. For those securities transactions conducted by a savings association outside the trust department, keeping records and sending confirmations are standard industry practice in the securities business, so a savings association should already be following these, or similar, requirements simply as a matter of sound business practices. Accordingly, savings associations should not need the benefit of the full 30-day delayed effective date in order to have enough time to comply with the rule. As a result, the final rule will be effective January 1, 2003.

VI. Executive Order 12866

OTS has determined that the final rule does not constitute a "significant regulatory action" for purposes of Executive Order 12866.

VII. Federalism

Executive Order 13132 imposes certain requirements on an agency when formulating and implementing policies that may have federalism implications or taking action that preempts state law. In accordance with those requirements, OTS has consulted with the Conference of State Bank Supervisors, the National Association of Attorneys General, and

the American Council of State Savings Supervisors.

List of Subjects

12 CFR Part 506

Reporting and recordkeeping requirements.

12 CFR Part 550

Accounting, Reporting and recordkeeping requirements, Savings associations, Trusts and trustees.

12 CFR Part 551

Reporting and recordkeeping requirements, Savings associations, Securities, Trusts and trustees.

Accordingly, OTS amends chapter V, title 12, Code of Federal Regulations as set forth below:

PART 506—INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT

1. The authority citation for part 506 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

2. Amend § 506.1(b) by adding in numerical order, the following entry to read as follows:

§ 506.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) Display.

12 CFR part or section where identified and described	Current OMB control No.
* * * * *	* * * * *
Part 551	1550-0109
* * * * *	* * * * *

PART 550—[AMENDED]

3. The authority citation for part 550 continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464.

4. Section 550.20 is revised to read as follows:

§ 550.20 What are fiduciary powers?

Fiduciary powers are the authority that OTS permits you to exercise under 12 U.S.C. 1464(n).

5. Section 550.60 is amended by adding definitions of the phrases "activities ancillary to your fiduciary business" and "fiduciary activities" in alphabetical order, to read as follows:

§ 550.60 What other definitions apply to this part?

Activities ancillary to your fiduciary business include advertising, marketing, or soliciting fiduciary business, contacting existing or potential customers, answering questions and providing information to customers related to their accounts, acting as liaison between you and your customer (for example, forwarding requests for distribution, changes in investment objectives, forms, or funds received from the customer), and inspecting or maintaining custody of fiduciary assets or holding title to real property. This list is illustrative and not comprehensive. Other activities may also be "ancillary activities" for purposes of this definition.

* * * * *

Fiduciary activities include accepting a fiduciary appointment, executing fiduciary-related documents, providing investment advice for a fee regarding fiduciary assets, or making discretionary decisions regarding investment or distribution of assets.

6. Section 550.70 is revised to read as follows:

§ 550.70 Must I obtain OTS approval or file a notice before I exercise fiduciary powers?

You should refer to the following chart to determine if you must obtain OTS approval or file a notice with OTS before you exercise fiduciary powers. This chart does not apply to activities that are exempt under subpart E of this part.

If you will conduct . . .	Then . . .
(a) Fiduciary activities for the first time and OTS has not previously approved an application that you submitted under this part.	You must obtain prior approval from OTS under §§ 550.80 through 550.120 before you conduct the activities.
(b) Fiduciary activities that are materially different from the activities that OTS has previously approved for you, including fiduciary activities that OTS has previously approved for you have not exercised for at least five years.	You must obtain prior approval from OTS under §§ 550.80 through 550.120 before you conduct the activities.
(c) Fiduciary activities that are not materially different from the activities that OTS has previously approved for you.	You must file a written notice described at § 550.126 if you commence the activities in a new State. You do not need to file a written notice if you commence the activities at a new location in a State where you already conduct these activities.
(d) Activities that are ancillary to your fiduciary business	You do not have to obtain prior OTS approval or file a that are notice with OTS. . .

7. Section 550.125 is added to subpart A to read as follows:

§ 550.125 How do I file the notice under § 550.70(c)?

(a) If you are required to file a notice under § 550.70(c), within ten days after you commence the fiduciary activities in a new State, you must file a written notice that identifies each new State in which you conduct or will conduct fiduciary activities, describe the fiduciary activities that you conduct or will conduct in each new State, and provide sufficient information supporting a conclusion that the activities are permissible in the State.

(b) You must file the notice with the appropriate OTS Regional Office at the address in § 516.40(a) of this chapter.

8. Section 550.130 is revised to read as follows:

§ 550.130 How may I conduct multi-state operations?

(a) *Conducting fiduciary activities in more than one State.* You may conduct fiduciary activities in any State, subject to the application and notice requirements in subpart A of this part.

(b) *Serving customers in more than one State.* When you conduct fiduciary activities in a State:

(1) You may market your fiduciary services to, and act as a fiduciary for, customers located in any State, may act as a fiduciary for relationships that include property located in other States, and may act as a testamentary trustee for a testator located in other States.

(2) You may establish or utilize an office in any State to perform activities that are ancillary to your fiduciary business.

9. Section 550.135 is added to read as follows:

§ 550.135 How do I determine which State's laws apply to my operations?

(a) The State laws that apply to you by virtue of 12 U.S.C. 1464(n) are the laws of the States in which you conduct fiduciary activities. For each individual State, you may conduct fiduciary activities in the capacity of trustee, executor, administrator, guardian, or in any other fiduciary capacity the State permits for its State banks, trust companies, or other corporations that compete with Federal savings associations in the State.

(b) For each fiduciary relationship, the State referred to in 12 U.S.C. 1464(n) is the State in which you conduct fiduciary activities for that relationship.

10. Section 550.136 is added to read as follows:

§ 550.136 To what extent do State laws apply to my fiduciary operations?

(a) *Occupation of field.* To enhance safety and soundness and to enable Federal savings associations to conduct their fiduciary activities in accordance with the best practices of thrift institutions in the United States (by efficiently delivering fiduciary services to the public free from undue regulatory duplication and burden), OTS occupies the field of the regulation of the fiduciary activities of Federal savings associations. In so doing, OTS intends to give Federal savings associations maximum flexibility to exercise their fiduciary powers in accordance with a uniform scheme of Federal regulation. Accordingly, Federal savings associations may exercise fiduciary powers as authorized under Federal law, including this part, without regard to State laws that purport to regulate or otherwise affect their fiduciary activities, except to the extent provided in 12 U.S.C. 1464(n) (State laws regarding scope of fiduciary powers, investments in state trust companies, access to examination reports regarding trust activities, deposits of securities, oaths and affidavits, and capital) or in paragraph (c) of this section. For purposes of this section, "State law" includes any State statute, regulation, ruling, order, or judicial decision.

(b) *Illustrative examples.* Examples of State laws that are preempted by the HOLA and this section include those regarding:

- (1) Registration and licensing;
- (2) Recordkeeping;
- (3) Advertising and marketing;
- (4) The ability of a federal savings association conducting fiduciary activities to maintain an action or proceeding in State court; and
- (5) Fiduciary-related fees.

(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 fiduciary 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) Tort law;
- (4) Criminal law;
- (5) Probate 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 fiduciary operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

11. Section 550.310 is amended by removing the first sentence and adding two new sentences in its place to read as follows:

§ 550.310 What if the FDIC does not insure the deposits?

If the FDIC does not insure the entire amount of a self deposit, you must set aside collateral as security. If the FDIC does not insure the entire amount of an affiliate deposit, you or your affiliate must set aside collateral as security.
 * * *

12. Section 550.580 is amended by revising the section heading and the introductory text and by removing paragraph (c) to read as follows:

§ 550.580 When may I conduct fiduciary activities without obtaining OTS approval?

Subject to the requirements of this subpart E, you do not need OTS approval under subpart B if you conduct fiduciary activities in the following fiduciary capacities:
 * * * * *

13. The section heading and introductory text of § 550.600 are revised to read as follows:

§ 550.600 How may funds be invested when I act in an exempt fiduciary capacity?

If you act in an exempt fiduciary capacity under § 550.580, the funds of the fiduciary account may be invested only in the following:
 * * * * *

14. A new part 551 is added as follows:

PART 551—RECORDKEEPING AND CONFIRMATION REQUIREMENTS FOR SECURITIES TRANSACTIONS

- Sec.
- 551.10 What does this part do?
 551.20 Must I comply with this part?
 551.30 What requirements apply to all transactions?
 551.40 What definitions apply to this part?
- Subpart A—Recordkeeping Requirements**
- 551.50 What records must I maintain for securities transactions?
 551.60 How must I maintain my records?
- Subpart B—Content and Timing of Notice**
- 551.70 What type of notice must I provide when I effect a securities transaction for a customer?
 551.80 How do I provide a registered broker-dealer confirmation?
 551.90 How do I provide a written notice?
 551.100 What are the alternate notice requirements?
 551.110 May I provide a notice electronically?
 551.120 May I charge a fee for a notice?

Subpart C—Settlement of Securities Transactions

551.130 When must I settle a securities transaction?

Subpart D—Securities Trading Policies and Procedures

551.140 What policies and procedures must I maintain and follow for securities transactions?

551.150 How do my officers and employees file reports of personal securities trading transactions?

Authority: 12 U.S.C. 1462a, 1463, 1464.

§ 551.10 What does this part do?

This part establishes recordkeeping and confirmation requirements that apply when a savings association ("you") effects certain securities transactions for customers.

§ 551.20 Must I comply with this part?

(a) *General.* Except as provided under paragraph (b) of this section, you must comply with this part when:

(1) You effect a securities transaction for a customer.

(2) You effect a transaction in government securities.

(3) You effect a transaction in municipal securities and are not registered as a municipal securities dealer with the SEC.

(4) You effect a securities transaction as fiduciary. If you are a Federal savings association, you also must comply with 12 CFR part 550 when you effect such a transaction. If you are a State savings association, you must comply with applicable law when you effect such a transaction.

(b) *Exceptions—*(1) *Small number of transactions.* You are not required to comply with § 551.50(b) through (d) (recordkeeping) and § 551.140(a) through (c) (policies and procedures), if you effected an average of fewer than 500 securities transactions per year for customers over the three prior calendar years. You may exclude transactions in government securities when you calculate this average.

(2) *Government securities.* If you effect fewer than 500 government securities brokerage transactions per year, you are not required to comply with § 551.50 (recordkeeping) for those transactions. This exception does not apply to government securities dealer transactions. See 17 CFR 404.4(a).

(3) *Municipal securities.* If you are registered with the SEC as a "municipal securities dealer," as defined in 15 U.S.C. 78c(a)(30) (see 15 U.S.C. 78c-4), you are not required to comply with this part when you conduct municipal securities transactions. ¶

(4) *Foreign branches.* You are not required to comply with this part when

you conduct a transaction at your foreign branch.

(5) *Transactions by registered broker-dealers.* You are not required to comply with this part for securities transactions effected by a registered broker-dealer, if the registered broker-dealer directly provides the customer with a confirmation. These transactions include a transaction effected by your employee who also acts as an employee of a registered broker-dealer ("dual employee").

§ 551.30 What requirements apply to all transactions?

You must effect all transactions, including transactions excepted under § 551.20, in a safe and sound manner. You must maintain effective systems of records and controls regarding your customers' securities transactions. These systems must clearly and accurately reflect all appropriate information and provide an adequate basis for an audit.

§ 551.40 What definitions apply to this part?

Asset-backed security means a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period. *Asset-backed security* includes any rights or other assets designed to ensure the servicing or timely distribution of proceeds to the security holders.

Common or collective investment fund means any fund established under 12 CFR 550.260(b) or 12 CFR 9.18.

Completion of the transaction means:

(1) If the customer purchases a security through or from you, except as provided in paragraph (2) of this definition, the time the customer pays you any part of the purchase price. If payment is made by a bookkeeping entry, the time you make the bookkeeping entry for any part of the purchase price.

(2) If the customer purchases a security through or from you and pays for the security before you request payment or notify the customer that payment is due, the time you deliver the security to or into the account of the customer.

(3) If the customer sells a security through or to you, except as provided in paragraph (4) of this definition, the time the customer delivers the security to you. If you have custody of the security at the time of sale, the time you transfer the security from the customer's account.

(4) If the customer sells a security through or to you and delivers the

security to you before you request delivery or notify the customer that delivery is due, the time you pay the customer or pay into the customer's account.

Customer means a person or account, including an agency, trust, estate, guardianship, or other fiduciary account for which you effect a securities transaction. *Customer* does not include a broker or dealer, or you when you act as a broker or dealer; act as a fiduciary with investment discretion over an account; are a trustee that acts as the shareholder of record for the purchase or sale of securities; or are the issuer of securities that are the subject of the transaction.

Debt security means any security, such as a bond, debenture, note, or any other similar instrument that evidences a liability of the issuer (including any security of this type that is convertible into stock or a similar security). *Debt security* also includes a fractional or participation interest in these debt securities. *Debt security* does not include securities issued by an investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1, *et seq.*

Government security means:

(1) A security that is a direct obligation of, or an obligation that is guaranteed as to principal and interest by, the United States;

(2) A security that is issued or guaranteed by a corporation in which the United States has a direct or indirect interest if the Secretary of the Treasury has designated the security for exemption as necessary or appropriate in the public interest or for the protection of investors;

(3) A security issued or guaranteed as to principal and interest by a corporation if a statute specifically designates, by name, the corporation's securities as exempt securities within the meaning of the laws administered by the SEC; or

(4) Any put, call, straddle, option, or privilege on a government security described in this definition, other than a put, call, straddle, option, or privilege:

(i) That is traded on one or more national securities exchanges; or

(ii) For which quotations are disseminated through an automated quotation system operated by a registered securities association.

Investment discretion means the same as under 12 CFR 550.40(a).

Investment company plan means any plan under which:

(1) A customer purchases securities issued by an open-end investment company or unit investment trust registered under the Investment

Company Act of 1940, making the payments directly to, or made payable to, the registered investment company, or the principal underwriter, custodian, trustee, or other designated agent of the registered investment company; or

(2) A customer sells securities issued by an open-end investment company or unit investment trust registered under the Investment Company Act of 1940 under:

(i) An individual retirement or individual pension plan qualified under the Internal Revenue Code; or

(ii) A contractual or systematic agreement under which the customer purchases at the applicable public offering price, or redeems at the applicable redemption price, securities in specified amounts (calculated in security units or dollars) at specified time intervals, and stating the commissions or charges (or the means of calculating them) that the customer will pay in connection with the purchase.

Municipal security means:

(1) A security that is a direct obligation of, or an obligation guaranteed as to principal or interest by, a State or any political subdivision, or any agency or instrumentality of a State or any political subdivision.

(2) A security that is a direct obligation of, or an obligation guaranteed as to principal or interest by, any municipal corporate instrumentality of one or more States; or

(3) A security that is an industrial development bond, the interest on which is excludable from gross income under section 103(a) of the Code (26 U.S.C. 103(a)).

Periodic plan means a written document that authorizes you to act as agent to purchase or sell for a customer a specific security or securities (other than securities issued by an open end investment company or unit investment trust registered under the Investment Company Act of 1940). The written document must authorize you to purchase or sell in specific amounts (calculated in security units or dollars) or to the extent of dividends and funds available, at specific time intervals, and must set forth the commission or charges to be paid by the customer or the manner of calculating them.

SEC means the Securities and Exchange Commission.

Security means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust

certificate, and any put, call, straddle, option, or privilege on any security or group or index of securities (including any interest therein or based on the value thereof), or, in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing. **Security** does not include currency; any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of less than nine months, exclusive of days of grace, or any renewal thereof, the maturity of which is likewise limited; a deposit or share account in a Federal or State chartered depository institution; a loan participation; a letter of credit or other form of bank indebtedness incurred in the ordinary course of business; units of a collective investment fund; interests in a variable amount (master) note of a borrower of prime credit; U.S. Savings Bonds; or any other instrument OTS determines does not constitute a security for purposes of this part.

Sweep account means any prearranged, automatic transfer or sweep of funds above a certain dollar level from a deposit account to purchase a security or securities, or any prearranged, automatic redemption or sale of a security or securities when a deposit account drops below a certain level with the proceeds being transferred into a deposit account.

Subpart A—Recordkeeping Requirements

§ 551.50 What records must I maintain for securities transactions?

If you effect securities transactions for customers, you must maintain all of the following records for at least three years:

(a) **Chronological records.** You must maintain an itemized daily record of each purchase and sale of securities in chronological order, including:

(1) The account or customer name for which you effected each transaction;

(2) The name and amount of the securities;

(3) The unit and aggregate purchase or sale price;

(4) The trade date; and

(5) The name or other designation of the registered broker-dealer or other person from whom you purchased the securities or to whom you sold the securities.

(b) **Account records.** You must maintain account records for each customer reflecting:

(1) Purchases and sales of securities;

(2) Receipts and deliveries of securities;

(3) Receipts and disbursements of cash; and

(4) Other debits and credits pertaining to transactions in securities.

(c) **Memorandum (order ticket).** You must make and keep current a memorandum (order ticket) of each order or any other instruction given or received for the purchase or sale of securities (whether executed or not), including:

(1) The account or customer name for which you effected each transaction;

(2) Whether the transaction was a market order, limit order, or subject to special instructions;

(3) The time the trader received the order;

(4) The time the trader placed the order with the registered broker-dealer, or if there was no registered broker-dealer, the time the trader executed or cancelled the order;

(5) The price at which the trader executed the order;

(6) The name of the registered broker-dealer you used.

(d) **Record of registered broker-dealers.** You must maintain a record of all registered broker-dealers that you selected to effect securities transactions and the amount of commissions that you paid or allocated to each registered broker-dealer during each calendar year.

(e) **Notices.** You must maintain a copy of the written notice required under subpart B of this part.

§ 551.60 How must I maintain my records?

(a) You may maintain the records required under § 551.50 in any manner, form, or format that you deem appropriate. However, your records must clearly and accurately reflect the required information and provide an adequate basis for an audit of the information.

(b) You, or the person that maintains and preserves records on your behalf, must:

(1) Arrange and index the records in a way that permits easy location, access, and retrieval of a particular record;

(2) Separately store, for the time required for preservation of the original record, a duplicate copy of the record on any medium allowed by this section;

(3) Provide promptly any of the following that OTS examiners or your directors may request:

(i) A legible, true, and complete copy of the record in the medium and format in which it is stored;

(ii) A legible, true, and complete printout of the record; and

(iii) Means to access, view, and print the records.

(4) In the case of records on electronic storage media, you, or the person that

maintains and preserves records for you, must establish procedures:

- (i) To maintain, preserve, and reasonably safeguard the records from loss, alteration, or destruction;
- (ii) To limit access to the records to properly authorized personnel, your directors, and OTS examiners; and
- (iii) To reasonably ensure that any reproduction of a non-electronic original record on electronic storage media is complete, true, and legible when retrieved.

(c) You may contract with third party service providers to maintain the records.

Subpart B—Content and Timing of Notice

§ 551.70 What type of notice must I provide when I effect a securities transaction for a customer?

If you effect a securities transaction for a customer, you must give or send the customer the registered broker-dealer confirmation described at § 551.80, or the written notice described at § 551.90. For certain types of transactions, you may elect to provide the alternate notices described in § 551.100.

§ 551.80 How do I provide a registered broker-dealer confirmation?

(a) If you elect to satisfy § 551.70 by providing the customer with a registered broker-dealer confirmation, you must provide the confirmation by having the registered broker-dealer send the confirmation directly to the customer or by sending a copy of the registered

broker-dealer's confirmation to the customer within one business day after you receive it.

(b) If you have received or will receive remuneration from any source, including the customer, in connection with the transaction, you must provide a statement of the source and amount of the remuneration in addition to the registered broker-dealer confirmation described in paragraph (a) of this section.

§ 551.90 How do I provide a written notice?

If you elect to satisfy § 551.70 by providing the customer a written notice, you must give or send the written notice at or before the completion of the securities transaction. You must include all of the following information in a written notice:

- (a) Your name and the customer's name.
- (b) The capacity in which you acted (for example, as agent).
- (c) The date and time of execution of the securities transaction (or a statement that you will furnish this information within a reasonable time after the customer's written request), and the identity, price, and number of shares or units (or principal amount in the case of debt securities) of the security the customer purchased or sold.
- (d) The name of the person from whom you purchased or to whom you sold the security, or a statement that you will furnish this information within a reasonable time after the customer's written request.

(e) The amount of any remuneration that you have received or will receive from the customer in connection with the transaction unless the remuneration paid by the customer is determined under a written agreement, other than on a transaction basis.

(f) The source and amount of any other remuneration you have received or will receive in connection with the transaction. If, in the case of a purchase, you were not participating in a distribution, or in the case of a sale, were not participating in a tender offer, the written notice may state whether you have or will receive any other remuneration and state that you will furnish the source and amount of the other remuneration within a reasonable time after the customer's written request.

(g) That you are not a member of the Securities Investor Protection Corporation, if that is the case. This does not apply to a transaction in shares of a registered open-end investment company or unit investment trust if the customer sends funds or securities directly to, or receives funds or securities directly from, the registered open-end investment company or unit investment trust, its transfer agent, its custodian, or a designated broker or dealer who sends the customer either a confirmation or the written notice in this section.

(h) Additional disclosures. You must provide all of the additional disclosures described in the following chart for transactions involving certain debt securities:

If you effect a transaction involving . . .	You must provide the following additional information in your written notice . . .
(1) A debt security subject to redemption before maturity.	A statement that the issuer may redeem the debt security in whole or in part before maturity, that the redemption could affect the represented yield, and that additional redemption information is available upon request.
(2) A debt security that you effected exclusively on the basis of a dollar price.	(i) The dollar price at which you effected the transaction; and (ii) The yield to maturity calculated from the dollar price. You do not have to disclose the yield to maturity if: (A) The issuer may extend the maturity date of the security with a variable interest rate; or (B) The security is an asset-backed security that represents an interest in, or is secured by, a pool of receivables or other financial assets that are subject continuously to prepayment.
(3) A debt security that you effected on basis of yield.	(i) The yield at which the transaction, including the percentage amount and its characterization (e.g., current yield, yield to maturity, or yield to call). If you effected the transaction at yield to call, you must indicate the type of call, the call date, and the call price; (ii) The dollar price calculated from that yield; and (iii) The yield to maturity and the represented yield, if you effected the transaction on a basis other than yield to maturity and the yield to maturity is lower than the represented yield. You are not required to disclose this information if: (A) The issuer may extend the maturity date of the security with a variable interest rate; or (B) The security is an asset-backed security that represents an interest in, or is secured by, a pool of receivables or other financial assets that are subject continuously to prepayment.
(4) A debt security that is an asset-backed security that represents an interest in, or is secured by, a pool of receivables or other financial assets that are subject continuously to prepayment.	(i) A statement that the actual yield of the asset-backed security may vary according to the rate at which the underlying receivables or other financial assets are prepaid; and (ii) A statement that you will furnish information concerning the factors that affect yield (including at a minimum estimated yield, weighted average life, and the prepayment assumptions underlying yield) upon the customer's written request.

If you effect a transaction involving . . .	You must provide the following additional information in your written notice . . .
(5) A debt security, other than a government security.	A statement that the security is unrated by a nationally recognized statistical rating organization, if that is the case.

§ 551.100 What are the alternate notice requirements?
 You may elect to satisfy § 551.70 by providing the alternate notices described in the following chart for certain types of transactions.

If you effect a securities transaction . . .	Then you may elect to . . .
(a) For or with the account of a customer under a periodic plan, sweep account, or investment company plan.	Give or send to the customer within five business days after the end of each quarterly period a written statement disclosing: (1) Each purchase and redemption that you effected for or with, and each dividend or distribution that you credited to or reinvested for, the customer's account during the period; (2) The date of each transaction; (3) The identity, number, and price of any securities that the customer purchased or redeemed in each transaction; (4) The total number of shares of the securities in the customer's account; (5) Any remuneration that you received or will receive in connection with the transaction; and (6) That you will give or send the registered broker-dealer confirmation described in § 551.80 or the written notice described in § 551.90 within a reasonable time after the customer's written request.
(b) For or with the account of a customer in shares of an open-ended management company registered under the Investment Company Act of 1940 that holds itself out as a money market fund and attempts to maintain a stable net asset value per share.	Give or send to the customer the written statement described at paragraph (a) of this section on a monthly basis. You may not use the alternate notice, however, if you deduct sales loads upon the purchase or redemption of shares in the money market fund.
(c) For an account for which you do not exercise investment discretion, and for which you and the customer have agreed in writing to an arrangement concerning the time and content of the written notice.	Give or send to the customer a written notice at the agreed-upon time and with the agreed-upon content, and include a statement that you will furnish the registered broker-dealer confirmation described in § 551.80 or the written notice described in § 551.90 within a reasonable time after the customer's written request.
(d) For an account for which you exercise investment discretion other than in an agency capacity, excluding common or collective investment funds.	Give or send the registered broker-dealer confirmation described in § 551.80 or the written notice described in § 551.90 within a reasonable time after a written request by the person with the power to terminate the account or, if there is no such person, any person holding a vested beneficial interest in the account.
(e) For an account in which you exercise investment discretion in an agency capacity.	Give or send each customer a written itemized statement specifying the funds and securities in your custody or possession and all debits, credits, and transactions in the customer's account. You must provide this information to the customer not less than once every three months. You must give or send the registered broker-dealer confirmation described in § 551.80 or the written notice described in § 551.90 within a reasonable time after a customer's written request.
(f) For a common or collective investment fund . . .	(1) Give or send to a customer who invests in the fund a copy of the annual financial report of the fund, or (2) Notify the customer that a copy of the report is available and that you will furnish the report within a reasonable time after a written request by a person to whom a regular periodic accounting would ordinarily be rendered with respect to each participating account.

§ 551.110 May I provide a notice electronically?
 You may provide any written notice required under this subpart B electronically. If a customer has a facsimile machine, you may send the notice by facsimile transmission. You may use other electronic communications if:
 (a) The parties agree to use electronic instead of hard copy notices;
 (b) The parties are able to print or download the notice;

(c) Your electronic communications system cannot automatically delete the electronic notice; and
 (d) Both parties are able to receive electronic messages.
§ 551.120 May I charge a fee for a notice?
 You may not charge a fee for providing a notice required under this subpart B, except that you may charge a reasonable fee for the notices provided under §§ 551.100(a), (d), and (e).

Subpart C—Settlement of Securities Transactions
§ 551.130 When must I settle a securities transaction?
 (a) You may not effect or enter into a contract for the purchase or sale of a security that provides for payment of funds and delivery of securities later than the latest of:
 (1) The third business day after the date of the contract. This deadline is no later than the fourth business day after

the contract for contracts involving the sale for cash of securities that are priced after 4:30 p.m. Eastern Standard Time on the date the securities are priced and are sold by an issuer to an underwriter under a firm commitment underwritten offering registered under the Securities Act of 1933, 15 U.S.C. 77a, *et seq.*, or are sold by you to an initial purchaser participating in the offering;

(2) Such other time as the SEC specifies by rule (*see* SEC Rule 15c6-1, 17 CFR 240.15c6-1); or

(3) Such time as the parties expressly agree at the time of the transaction. The parties to a contract are deemed to have expressly agreed to an alternate date for payment of funds and delivery of securities at the time of the transaction for a contract for the sale for cash of securities under a firm commitment offering, if the managing underwriter and the issuer have agreed to the date for all securities sold under the offering and the parties to the contract have not expressly agreed to another date for payment of funds and delivery of securities at the time of the transaction.

(b) The deadlines in paragraph (a) of this section do not apply to the purchase or sale of limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association.

Subpart D—Securities Trading Policies and Procedures

§ 551.140 What policies and procedures must I maintain and follow for securities transactions?

If you effect securities transactions for customers, you must maintain and follow policies and procedures that meet all of the following requirements:

(a) Your policies and procedures must assign responsibility for the supervision of all officers or employees who:

(1) Transmit orders to, or place orders with, registered broker-dealers;

(2) Execute transactions in securities for customers; or

(3) Process orders for notice or settlement purposes, or perform other back office functions for securities transactions that you effect for customers. Policies and procedures for personnel described in this paragraph (a)(3) must provide supervision and reporting lines that are separate from supervision and reporting lines for personnel described in paragraphs (a)(1) and (2) of this section.

(b) Your policies and procedures must provide for the fair and equitable allocation of securities and prices to accounts when you receive orders for

the same security at approximately the same time and you place the orders for execution either individually or in combination.

(c) Your policies and procedures must provide for securities transactions in which you act as agent for the buyer and seller (crossing of buy and sell orders) on a fair and equitable basis to the parties to the transaction, where permissible under applicable law.

(d) Your policies and procedures must require your officers and employees to file the personal securities trading reports described at § 551.150, if the officer or employee:

(1) Makes investment recommendations or decisions for the accounts of customers;

(2) Participates in the determination of these recommendations or decisions; or

(3) In connection with their duties, obtains information concerning which securities you intend to purchase, sell, or recommend for purchase or sale.

§ 551.150 How do my officers and employees file reports of personal securities trading transactions?

An officer or employee described in § 551.140(d) must report all personal transactions in securities made by or on behalf of the officer or employee if he or she has a beneficial interest in the security.

(a) *Contents and filing of report.* The officer or employee must file the report with you within ten business days after the end of each calendar quarter. The report must include the following information:

(1) The date of each transaction, the title and number of shares, the interest rate and maturity date (if applicable), and the principal amount of each security involved.

(2) The nature of each transaction (*i.e.*, purchase, sale, or other type of acquisition or disposition).

(3) The price at which each transaction was effected.

(4) The name of the broker, dealer, or other intermediary effecting the transaction.

(5) The date the officer or employee submitted the report.

(b) *Report not required for certain transactions.* Your officer or employee is not required to report a transaction if:

(1) He or she has no direct or indirect influence or control over the account for which the transaction was effected or over the securities held in that account;

(2) The transaction was in shares issued by an open-end investment company registered under the Investment Company Act of 1940;

(3) The transaction was in direct obligations of the government of the United States;

(4) The transaction was in bankers' acceptances, bank certificates of deposit, commercial paper or high quality short term debt instruments, including repurchase agreements; or

(5) The officer or employee had an aggregate amount of purchases and sales of \$10,000 or less during the calendar quarter.

(c) *Alternate report.* When you act as an investment adviser to an investment company registered under the Investment Company Act of 1940, an officer or employee that is an "access person" may fulfill his or her reporting requirements under this section by filing with you the "access person" personal securities trading report required by SEC Rule 17j-1(d), 17 CFR 270.17j-1(d).

Dated: December 2, 2002.

By the Office of Thrift Supervision.

James E. Gilleran,
Director.

[FR Doc. 02-31005 Filed 12-11-02; 8:45 am]
BILLING CODE 6720-01-P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 560, 590 and 591

[No. 2002-59]

RIN 1550-AB51

Alternative Mortgage Transaction Parity Act; Preemption Delay of Effective Date

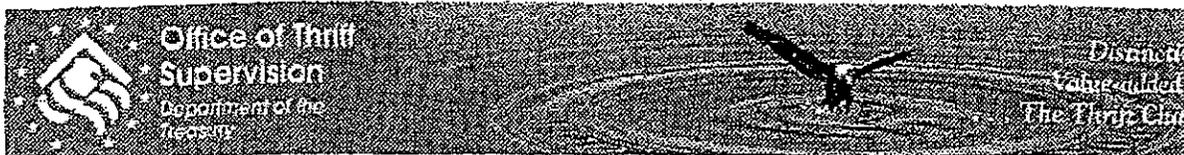
AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule; delay of effective date.

SUMMARY: The Alternative Mortgage Transaction Parity Act (AMTPA) authorizes state chartered housing creditors to make, purchase, and enforce alternative mortgage transactions without regard to any state constitution, law, or regulation. To rely on AMTPA, certain state chartered housing creditors must comply with regulations issued by the Office of Thrift Supervision (OTS). OTS recently revised its rule identifying the OTS regulations that apply under AMTPA. This document delays the effective date of that revised rule. **EFFECTIVE DATE:** This amendment modifies the effective date of the final rule published September 26, 2002 at 67 FR 60542. The effective date of the revision to 12 CFR 560.220 is delayed until July 1, 2003. The effective date of

APPENDIX EXHIBIT B

FOLLOWS THIS PAGE



News & Events	About OTS	DATA & RESEARCH	Supervision	TFR	Applications	Consumer & Community
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Home > Data & Research > Corporate Directories > Institution Directory Database

Washington Mutual Bank DETAILS

Effective March 31, 2006 all savings associations are insured by the Deposit Insurance Fund (DIF). Charter type descriptions reflect the prior insurance fund.

Docket	Region	Name/Location Telephone	Mailing Address
08551	West	Washington Mutual Bank 2273 North Green Valley Pkwy, Ste. 14 Henderson, NV 89014-0000 206-461-2000	1201 Third Ave Seattle, WA 98101-0000
Charter Type Assets (\$000)	Cycle	Officer/Title	Fax
DIF-Ins Fed Stk \$ 311,053,133	200706	Kerry Killinger CEO	206-461-5739

Enter Keywords

[\[privacy policy\]](#)
[\[search\]](#)
[\[help\]](#)
[\[home\]](#)

APPENDIX EXHIBIT C

FOLLOWS THIS PAGE



Office of Thrift Supervision
Department of the Treasury

*Distinctive, Flexible,
Value-added Supervision
The Thrift Charter at OTS*

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Updated: Wednesday, October 24, 2007 at 8:00 AM

Effective March 31, 2006 all savings associations are insured by the Deposit Insurance Fund (DIF). Charter type descriptions reflect the prior insurance fund.

Docket/Region	Name/Location Telephone	Officer/Title Mailing Address	Charter Type Assets (\$000)
1. <u>08551</u> West	Washington Mutual Bank 2273 North Green Valley Pkwy, Ste. 14 Henderson, NV 89014-0000 206-461-2000	Kerry Killinger CEO 1201 Third Ave Seattle, WA 98101-0000	DIF-Ins Fed Stk \$ 311,053,133

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APPENDIX EXHIBIT D

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Your Bank at a Glance

Washington Mutual Bank (FDIC Cert: 32633)

is a Savings Association and has been FDIC insured since December 27, 1988.

It was established on December 27, 1988.

Its main office (headquarters) is located at:

Arch Plaza Financial Center
Henderson, Nevada 89014
County of Clark

Washington Mutual Bank's reported (or primary) website. <http://www.wamu.com:80/>

The primary regulator is [Office of Thrift Supervision \(OTS\)](#).

For consumer assistance regarding an issue with this institution, please contact the OTS directly.

Check to locate Branches [Offices](#) by state.

Last financial information available about Washington Mutual Bank.

[Historical profile of Washington Mutual Bank](#)

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