



**Office of Thrift Supervision**

Department of the Treasury

Chief Counsel

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6251

July 1, 1998

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**Re: Interstate Pre-Need Funeral Trust Services and Fiduciary Activities**

Dear [ ]:

This responds to your letters, dated November 14, 1997 and April 30, 1998, submitted on behalf of [ ] (“Parent Holding Company”) and [ ] (“Financial Services Holding Company”) (collectively, the “Companies”) in connection with their application to charter and acquire [ ], Indiana (“Association”) and, pursuant to § 5(n) of the Home Owners’ Loan Act (“HOLA”),<sup>1</sup> for the Association to exercise full fiduciary powers as permitted for state fiduciaries under Indiana law.<sup>2</sup>

Specifically, you seek confirmation that, so long as the Association’s activities are consistent with the description in your letter, (1) the Association will not be deemed “located” for trust purposes in any state other than Indiana; and (2) certain state laws that purport to bar the Association from conducting specified marketing and liaison activities incidental to its exercise of fiduciary powers are preempted by federal law.

In brief, for the reasons discussed below, the Office of Thrift Supervision (“OTS”) concludes that: (1) for trust purposes, the Association will not be deemed

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<sup>1</sup> 12 U.S.C.A. § 1464(n) (West Supp. 1998).

<sup>2</sup> [ ]

located in a state where its only trust-related activities are marketing its trust services and performing certain specified liaison functions; and (2) federal law would preempt state laws that prohibit or restrict an out-of-state federal thrift from engaging in these activities in the state.

## **I. Background**

### **A. Factual Background**

According to your letter, the Parent Holding Company is engaged in various aspects of the funeral business. The Association will be a wholly-owned subsidiary of the Financial Services Holding Company, which in turn is one of four direct subsidiaries of the Parent Holding Company. Another of the Parent Holding Company's direct subsidiaries is a [ ]. The Financial Services Holding Company currently operates a subsidiary that provides insurance policies for the purpose of funding funeral costs prior to the need for a funeral. The Parent Holding Company and the Financial Services Holding Company intend to utilize the trust powers of the Association to provide another form of pre-need funeral payment, the establishment of a funeral expense trust account ("pre-need funeral trust account"). The Association's home (and only) office will be located in [ ], Indiana, and there are no plans to operate any other offices or branches at this time.

You indicate that all fifty states have laws that provide for pre-need funeral trust accounts. You note that, under these laws, establishment of a pre-need funeral trust account typically involves payment by an individual of a lump sum to a funeral director who must, upon receipt of the payment, deposit all or a portion of the payment in a trust account with a financial institution. At the time the funds are deposited in the pre-need funeral trust account, the funeral director or the purchaser of the funeral services selects one or more investment options consistent with applicable state law.<sup>3</sup> Such an arrangement is reflected in the sample Master Trust Agreement that the Companies submitted with their application.<sup>4</sup>

You represent that, generally, under state law, the financial institution holding the trust account is responsible for the investment and administration of trust funds and that many states limit the types of vehicles in which a trustee can invest trust funds. You further represent that the funeral director generally cannot

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<sup>3</sup> Your letter indicates that the agreements between the customer and the funeral director will provide that the contract and the underlying fiduciary relationship will be governed by the law of the state in which the funeral director is located. You represent that the funeral director and the Association will comply fully with applicable state law, except as discussed, *infra* at 8-11.

<sup>4</sup> See, e.g., §§ 5.01 and 5.02 of the Sample Master Trust Agreement.

access the trust funds until the death of the grantor, and then generally only upon providing appropriate proof that all services and related merchandise contracted for have been delivered. You indicate that most states require the funeral director to return to the purchaser (or the decedent's estate or designee) any trust funds left over after the funeral director is paid.<sup>5</sup>

According to your letter, upon approval of the Companies' application to charter and acquire the Association and to exercise trust powers in Indiana, the Association intends to offer pre-need funeral trust services on a nationwide basis. The performance of the trust services will be at the Association's home office in Indiana. In conducting its trust operations, the Association intends to enter into contracts with individual, unaffiliated funeral directors to perform certain marketing and liaison services outside of Indiana. The Association may compensate a funeral director for the services the director and its employees render.

You represent that the marketing activities that will be performed outside Indiana by the funeral directors on behalf of the Association will typically consist of (i) assisting prospective customers in identifying their need for pre-need funeral trust services, including advising customers of the availability of the Association's pre-need funeral trust accounts; (ii) providing customers with materials describing such accounts and answering questions regarding such accounts; (iii) assisting prospective customers in completing forms, including trust agreements, used by the Association's trust department to establish a pre-need funeral trust account; and (iv) forwarding forms and funds received from prospective customers to the Association's home office in [            ], Indiana. In materials submitted in support of the Companies' application, you specify that the Association does not intend to ask the funeral directors to undertake any marketing activities that would conflict with applicable state law regulating the activities of funeral directors.<sup>6</sup>

Once a trust account is established, you state that the funeral directors will also provide certain liaison services to grantors and beneficiaries outside Indiana. You indicate that these liaison services will typically consist of: (i) answering routine questions and providing information regarding the trust account to the customer; (ii) sending to the Association at its home office in Indiana customer requests for distributions and requests for changes in the investment objectives of the trust accounts; and (iii) forwarding to the Association at its home office in Indiana forms and funds from customers who wish to add funds or engage in other transactions affecting their trust accounts. According to your letter, the Association will perform certain liaison services from its home office in Indiana, namely

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<sup>5</sup> See § 3.03 of the Sample Master Trust Agreement.

<sup>6</sup> See January 16, 1998 Response to Request for Additional Information at 20.

(i) distributing periodic statements and tax forms to customers and (ii) serving as the primary contact for the grantor and beneficiaries.

You indicate that with respect to customers who reside outside of Indiana, the Association will perform the following fiduciary functions at or from its home office in [            ], Indiana: (i) executing trust agreements forwarded by funeral directors, thereby accepting the pre-need funeral trust accounts in Indiana; (ii) directing, supervising, and managing investment of the trust account's assets, consistent with the state law governing the trust account; (iii) making appropriate distributions to trust beneficiaries and pay such distributions by check or wire; (iv) preparing trust accounting and tax forms; (v) communicating with trust grantors and beneficiaries; (vi) accepting transfers of trust assets from other fiduciaries; (vii) mailing periodic accountings from Indiana to state regulatory agencies responsible for overseeing the operation of pre-need funeral trust accounts; and (viii) contacting state and federal administrators of Medicaid and Supplemental Security Income programs, or other government agencies, on behalf of customers requesting favorable treatment of their pre-need funeral trusts under public assistance programs.

You represent that with respect to all of the activities described above, neither the Association nor any funeral director representing the Association will engage in any of the following activities outside Indiana: executing or approving on behalf of the Association documents related to a pre-need funeral trust account; accepting or managing any customer pre-need funeral trust account; providing investment advice to pre-need funeral trust customers; exercising investment discretion over pre-need funeral trust accounts; making decisions with respect to implementation of the Association's pre-need funeral trust account agreement; or establishing a trust office (although this representation does not preclude the Association from applying in the future to exercise fiduciary powers through trust offices in states other than Indiana).

## **B. State Statutes at Issue**

You have inquired about the applicability to the Association's proposed activities of statutes from three states that purport to limit what types of institutions may serve as trustee of a pre-need funeral trust account in those states. For example, the provision of Georgia law that you cite provides that only "depositories" may receive, hold or manage funds paid pursuant to a pre-need funeral service contract without a license.<sup>7</sup> The term "depository" is defined by the

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<sup>7</sup> Ga. Code § 43-18-93 (1997).

Georgia statute as “any state bank, savings bank, national bank, trust company, or federal savings and loan association *located in and doing business in this state.*”<sup>8</sup>

You also cite an Illinois statute governing pre-need funeral services that requires that all sales proceeds from pre-need funeral services agreements or contracts to be placed in trust, and further specifies that the trust must be maintained “in a trust account established in a bank, savings and loan association, savings bank, or credit union *authorized to do business in Illinois* in which accounts are insured by an agency of the federal government.”<sup>9</sup> The third statute you cite is a Missouri statute governing funeral contracts that provides that the trustee of a pre-need funeral trust account “shall be a state or federally chartered financial institution *authorized to exercise trust powers in Missouri.*”<sup>10</sup>

By letter dated April 30, 1998, you requested that we also address whether federal law preempts statutes from three other states. You submitted statutes from Connecticut, Michigan, and Kansas that deal with the general topic of what types of entities may provide fiduciary services in those states, not the more limited subject of pre-need funeral trust accounts.

The Connecticut statutory provision you cite provides that “no corporation, other than a bank or out-of-state bank that maintains in this state a branch” shall have or exercise the power to act in a fiduciary capacity.<sup>11</sup> The Michigan statutory provision you cite lists the types of entities that may act as a fiduciary in Michigan; that list does not include out-of-state federal savings associations or out-of-state federal savings banks.<sup>12</sup>

Finally, the statutory provision you cite for Kansas provides that an out-of-state federal savings bank may act as a fiduciary in Kansas only if the federal savings bank’s location state permits out-of-state federal savings banks to act “in a like fiduciary capacity . . . under similar conditions.”<sup>13</sup> You note that the Indiana

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<sup>8</sup> Ga. Code § 43-18-92(3) (1997) (emphasis added).

<sup>9</sup> 225 Ill. Comp. Stat. 45/1 and 45/2(b) (West 1997) (emphasis added).

<sup>10</sup> Mo. Rev. Stat. § 436.031(1) (West Supp. 1996) (emphasis added).

<sup>11</sup> Conn. Gen. Stat. § 36a-380(a) (1998).

<sup>12</sup> Mich. Comp. Laws § 487.351 (West 1998).

<sup>13</sup> Kan. Stat. Ann. § 59-1701(a)(4) (1996).

statute governing pre-need funeral trust accounts does not offer reciprocity to out-of-state fiduciaries to act as trustee of pre-need funeral trust accounts.<sup>14</sup>

## II. Discussion

The trust powers of federal thrifts are defined by § 5(n) of the HOLA.<sup>15</sup> Section 5(n)(1) authorizes the Director of OTS to permit federal thrifts that meet the standards specified in § 5(n) to act in any fiduciary capacity that is permissible for corporate fiduciaries under the laws of the state where a thrift's trust business is "located" ("location state").<sup>16</sup> If a thrift is located in more than one state for purposes of § 5(n), then the scope of fiduciary services the thrift may provide from offices located in those states will vary depending upon the law of each location state.

Your letters pose two inquiries: (1) whether the Association, if conducting the marketing and liaison activities herein described, will be "located" for trust purposes only in Indiana; and (2) whether federal law preempts the application to the Association of state statutes that bar out-of-state institutions from performing those activities when serving as trustee of pre-need funeral trust accounts or when exercising authorized fiduciary powers. With regard to your second inquiry, you have asked us to review three state statutes specifically governing pre-need funeral trust accounts and three state statutes governing more generally who may act as a fiduciary or in a fiduciary capacity in those states.

### A. Location

Your first inquiry is where the Association will be "located" for trust purposes if its activities and the activities of the funeral directors with whom the Association contracts are consistent with those described above. The term "located" is not defined in the HOLA. Therefore, the OTS, the agency charged with implementing HOLA § 5(n), has addressed on several occasions what types of trust activities are sufficient to cause a federal thrift to be "located" in a particular state for trust purposes.

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<sup>14</sup> Ind. Code § 30-2-9-1(b) (West 1998).

<sup>15</sup> 12 U.S.C.A. § 1464(n) (West Supp. 1998).

<sup>16</sup> See, e.g., OTS Op. Chief Counsel (August 8, 1996) ("August 1996 Opinion"); OTS Op. Chief Counsel (June 21, 1996 ("June 1996 Opinion"); OTS Op. Chief Counsel (March 28, 1996); OTS Op. Acting Chief Counsel (June 13, 1994) ("June 1994 Opinion"); OTS Op. Chief Counsel (December 24, 1992).

The OTS regulations implementing HOLA § 5(n) are “based on the premise that a federal thrift will be deemed located . . . in each state where it operates a trust office.”<sup>17</sup> We have indicated that the key to determining whether a thrift’s trust-related activities in a state amount to operating a trust office is the nature of the thrift’s activities in that state.<sup>18</sup> Our objective has been to identify where the thrift is actually managing its trust accounts, *e.g.*, entering into binding commitments, executing trust documents, making discretionary decisions, and rendering advice.<sup>19</sup> We have distinguished these “core” fiduciary functions from activities that are merely incidental to the exercise of trust powers.

For instance, in prior opinions we have determined that marketing and liaison activities alone do not cause a thrift to be located in a state for trust purposes.<sup>20</sup> In fact, in the August 1996 Opinion, we found that a federal thrift that merely performed marketing and liaison services outside its home state would not be “located” in the state where those activities were performed.<sup>21</sup> The marketing and liaison services set out in your letter are substantially similar to those discussed in the August 1996 Opinion.

In your letter, you specifically represent that neither the Association nor any funeral director representing the Association will conduct any of the following activities outside Indiana: execute or approve on behalf of the Association documents related to a pre-need funeral trust account; accept or manage any pre-need funeral trust account; provide investment advice to pre-need funeral trust customers; exercise investment discretion over pre-need funeral trust accounts; make decisions regarding the implementation of the Association’s pre-need funeral trust account agreement; or establish a trust office. So long as the Association conducts core trust activities exclusively in Indiana, it will be “located” for trust purposes only in Indiana.

**We caution that the Association should be particularly mindful of where it actually “accepts” trust accounts or “executes” trust agreements.<sup>22</sup> We have**

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<sup>17</sup> June 1996 Opinion at 5. See 12 C.F.R. Part 550 (1998).

<sup>18</sup> August 1996 Opinion at 8; June 1996 Opinion at 4-6.

<sup>19</sup> August 1996 Opinion at 10.

<sup>20</sup> August 1996 Opinion at 10-13 (marketing trust services and performing incidental liaison services); June 1996 Opinion at 4-6 (marketing trust services).

<sup>21</sup> August 1996 Opinion at 10-13.

<sup>22</sup> [     ]

identified accepting trust accounts and entering into binding commitments as the sort of “core” trust activities that can affect a thrift’s “location.” In the situation that you propose, purchasers of pre-need funeral services will contract both with the provider of those services (*i.e.*, the funeral director) and with the Association for a pre-need funeral trust account by executing one document.<sup>23</sup> As such, it is possible that the distinction between assisting customers in filling out forms or accepting funds for deposit (which will take place in the states where the funeral directors are located) and legal “acceptance” of the trust account (which will take place in Indiana when the Association executes the trust agreement) is blurred.

We discussed this concern and you represented that the Association would take steps to eliminate potential customer confusion on this issue, such as ensuring that the trust document clearly indicates that the account is not accepted until it is executed by the Association. **So long as the Association recognizes the distinction between “assisting customers in filling out forms or accepting funds for deposit” and “acceptance of trust accounts,” and ensures that the customer appreciates that distinction, we conclude that the Association will be “located” for trust purposes only in Indiana.**

## **B. Preemption**

Your next inquiry is whether federal law preempts the application to the Association’s proposed activities of state statutes that bar out-of-state institutions from serving as trustee of a pre-need funeral trust account in that state. You also inquire about the applicability of state statutes that generally bar out-of-state fiduciaries from exercising fiduciary powers or acting as a fiduciary in that state.

### **1. State Pre-Need Funeral Services Trust Laws**

As in our August 1996 and June 1996 Opinions, we reaffirm that a “non-location” state may not prevent federal thrifts from marketing their duly authorized trust services in that state.<sup>24</sup> The authority of a federal thrift to engage in the trust business is solely a matter of federal law, governed by HOLA § 5(n). Thus, we have previously opined that laws of “non-location” states that attempt to erect

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<sup>23</sup> [ ]

<sup>24</sup> August 1996 Opinion at 13; June 1996 Opinion at 6-9.



access barriers to the incidental trust activities, such as marketing and liaison services, of out-of-state federal thrifts are preempted.<sup>25</sup> That principle is equally applicable to the state laws about which you inquire.

You represent that neither the Association nor the funeral directors will perform any fiduciary activities outside of Indiana. The only activities that you identify that will take place outside of Indiana are the incidental marketing and liaison services detailed above. As such, the Association will not be acting as a fiduciary in any state other than Indiana, and to the extent that non-location state law limits what types of entities can act as trustee of a pre-need funeral trust account, that state law would not prevent the Association from performing incidental marketing and liaison services through the funeral directors.<sup>26</sup>

The three pre-need funeral services statutes that you have submitted, from Georgia, Illinois, and Missouri, all contain restrictions that purport to prevent the Association from serving as trustee of pre-need funeral trust accounts established in those states, and consequently from performing the incidental activities detailed above. A non-location state that purports to prohibit federal thrifts from engaging in trust activities authorized by the OTS pursuant to HOLA § 5(n) acts in direct conflict with federal law. The states have no power to prohibit activities authorized for federal savings associations by the HOLA. To the extent that the statutes you cite would prohibit what federal law allows the Association to do, the state statutes are preempted.

Two of the states, Georgia and Missouri, restrict who may serve as trustee of a pre-need funeral trust account established in those states. The other statutory provision you cite, § 45/2(b) of Chapter 225 of the Illinois Code, does not expressly restrict who can act as a trustee of a pre-need funeral trust account in Illinois, but rather provides that “[a] trust established under this Act must be maintained: (1) in a trust account established in a . . . savings and loan association . . . authorized to do business in Illinois in which accounts are insured by an agency of the federal government.”<sup>27</sup> The statutory language is thus aimed at the trust, not the funeral

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<sup>25</sup> August 1996 Opinion at 14; June 1996 Opinion at 7-9. See also June 1994 Opinion at 9-10.

<sup>26</sup> We also note that state laws governing pre-need funeral services often contain limitations on the trustee that are specifically designed to protect the trust funds and their beneficiaries. For example, the Georgia statute that you cite specifically places limits on what the trustee can do with trust fund earnings (Ga. Code § 43-18-96); the fees that the seller of the pre-need funeral services can charge (Ga. Code § 43-18-97); the circumstances under which the trust funds are to be paid out after the death of the beneficiary (Ga. Code § 43-18-98(a)); and disposition of any funds remaining after the funeral director is paid (Ga. Code § 43-18-98(c)). You represent that both the funeral directors and the Association will comply with these types of state restrictions. As such, our conclusions herein will not interfere with the states’ ability to regulate funeral directors and the provision of funeral services.

<sup>27</sup> 225 Ill. Comp. Stat. 45/2(b).

director or the trustee. Nevertheless, notwithstanding the semantics of the statute, the effect of this provision is to bar an out-of-state thrift from conducting in Illinois activities incidental to the legitimate exercise of fiduciary powers authorized by HOLA § 5(n). It is this effect, not necessarily the specific wording of the statute, that results in the preemption of this specific provision of the Illinois statute.<sup>28</sup>

As such, based on the narrow fact situation that you present, we conclude that a state may not prohibit an out-of-state federal savings bank from marketing its trust services and performing certain liaison functions incidental to its exercise of fiduciary powers in that state when the federal savings association is serving as trustee of a pre-need funeral trust account.

## **2. State General Fiduciary Laws**

You have also asked us to review three additional state statutes, from Connecticut, Michigan, and Kansas. Those statutes generally address who may provide fiduciary services or act as a fiduciary in those states. You request that we conclude that federal law preempts the application of these laws to the Association's proposed activities.

In both our June 1996 and August 1996 Opinions, we found that federal law preempted similar state statutes that purported to bar out-of-state fiduciaries from performing incidental marketing and liaison activities nearly identical to those described in your letter.<sup>29</sup> As with the laws reviewed in those prior Opinions, the state laws you have identified would prohibit a federal thrift from engaging in trust activities that are authorized under HOLA § 5(n). For the reasons set forth in the June 1996 and August 1996 Opinions, we conclude that federal law preempts the provisions of the Connecticut, Michigan, and Kansas statutes that you have cited, to the extent that those statutes purport to bar an out-of-state federal thrift from performing the incidental trust activities described herein.

In reaching the foregoing conclusions, we have relied upon the factual representations made in the application materials you submitted to us and in subsequent discussions, as summarized herein. Our conclusions depend on the accuracy and completeness of those facts. Any material difference in facts or circumstances from those described herein could result in different conclusions.

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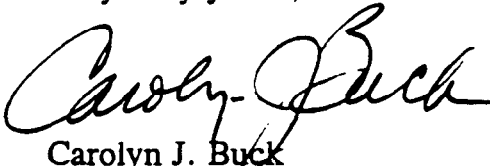
<sup>28</sup> We emphasize that we are not preempting the application of the Georgia, Illinois, and Missouri pre-need funeral statutes to the funeral directors themselves. We do not intend that our preemption determination affect the power of these states to regulate the activities of funeral directors. Our narrow preemption determination in this case seeks only to preserve the ability of federal thrifts to exercise the trust powers granted under § 5(n) of the HOLA.

<sup>29</sup> August 1996 Opinion at 15; June 1996 Opinion at 8-9.

Moreover, the Association must adhere to any conditions in the approval order that may implicate issues relevant to the conclusions herein.

If you have any questions regarding these matters, please feel free to contact Timothy P. Leary, Counsel (Banking & Finance), (202) 906-7170 or Dorene Rosenthal, Counsel (Banking & Finance), (202) 906-7268.

Very truly yours,



Carolyn J. Buck  
Chief Counsel

cc: All Regional Directors  
All Regional Counsel