

July 31, 2003

**NOTICE OF PROPOSED RULEMAKING REGARDING 12 CFR PARTS 7 AND 34  
BANK ACTIVITIES AND OPERATIONS; REAL ESTATE LENDING ACTIVITIES**

**--Questions and Answers--**

***What action is the OCC taking today?***

The OCC is issuing a notice of proposed rulemaking that would amend parts 7 and 34 of its regulations to add provisions clarifying the applicability of state law to national banks (NPRM). These provisions would identify types of state laws that are preempted, as well as types of state laws that generally are not preempted, in the context of national bank lending, deposit-taking, and other operations.

***Why is the OCC taking this action now?***

In recent years, the OCC has received numerous inquiries concerning the applicability of state law to national banks, and the extent to which state law applies to a national bank's exercise of powers authorized by federal law has been the subject of litigation in different contexts. The number and variety of these questions reflect a need for clarification of the circumstances when state laws or regulations apply to activities and operations of national banks.

Without further clarification, national banks, particularly those with customers in multiple states, face uncertain compliance risks, and substantial additional compliance burdens and expense that materially impact their ability to offer particular products and services. A recent inquiry by National City Bank, N.A. and related entities concerning the Georgia Fair Lending Act, GA Code Ann. §§ 7-6A-1 *et seq.* (GFLA), illustrates the impact that state laws can have on a national bank's lending activities. Our analysis of the issues raised by National City as discussed in the NPRM and in the response to the bank that is simultaneously being published in the *Federal Register*, underscores the need for clarity and more predictability in our regulations concerning the extent to which state laws apply to national banks' real estate lending activities as well as other aspects of national bank activities.

***Does preemption of state laws in the area of real estate lending with respect to national banks mean that this type of lending will be unregulated for national banks and that consumers entering into real estate loans with national banks will not be protected?***

Preemption of state laws governing national banks' real estate lending certainly does not mean that such lending would be unregulated. On the contrary, national banks' real estate lending is highly regulated under federal standards and subject to comprehensive supervision. In addition to the many standards that apply to national banks under various federal laws, the OCC recently issued comprehensive supervisory standards to address predatory and abusive lending practices, OCC Advisory Letter 2003-2, *Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices* and OCC Advisory Letter 2003-3, *Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans*.

Moreover, the NPRM would add an explicit safety and soundness-based anti-predatory lending standard to the general statement of authority concerning lending. As proposed, the regulation states that a national bank shall not make a loan subject to 12 CFR part 34 based predominantly on the foreclosure value of the borrower's collateral, without regard to the borrower's repayment ability, including current and expected income, current obligations, employment status, and other relevant financial resources. This new standard and the preexisting standard that prohibits unfair and deceptive acts or practices under the FTC Act (which the OCC enforces), plus the multitude of other existing federal laws such as the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), and the Equal Credit Opportunity Act (ECOA), ensure that national banks are subject to consistent and uniform federal standards, administered and enforced by the OCC, that provide strong and extensive customer protections and appropriate safety and soundness-based criteria for their real estate lending activities.

***Does preemption of state laws in the area of non-real estate lending with respect to national banks mean that consumers entering into non-real estate loans will not be protected?***

The NPRM regarding part 7 non-real estate lending contains the same safety and soundness-based anti-predatory lending standard included in the amendments to part 34. Non-real estate lending is also subject to section 5 of the FTC Act, which makes unlawful unfair and deceptive acts or practices. Together, this new prudential standard and the preexisting standard under the FTC Act, plus federal laws such as the Truth-in-Lending Act, ensure that national banks are subject to consistent and uniform federal standards, administered and enforced by the OCC, that provide strong and extensive customer protections and appropriate safety and soundness-based criteria for their lending activities. The NPRM invites interested parties to suggest other general standards that would be appropriate to apply to national bank lending activities that would further these objectives.

***How does the OCC supervise national banks to ensure that they are not engaging in predatory or abusive lending practices?***

Through a network of approximately 1,800 examiners located throughout the U.S., we monitor conditions and trends in individual banks and groups of banks. Our supervisory activities hone in on the highest risks as identified by our sophisticated surveillance tools and subject matter experts.

As part of our ongoing supervision of national banks, examiners look at bank policies and procedures. These policies and procedures are reviewed to evaluate if they adequately address the particular risks that the bank may face, given the nature and scope of its business. Depending on the nature of that business, we would expect bank policies and controls to reflect the considerations we have identified in our two advisories on how national banks should avoid becoming involved in predatory lending practices.

Our Customer Assistance Group in Houston, Texas (CAG) plays an important role in helping to identify potentially unfair and deceptive practices. In addition to providing immediate assistance

to consumers, the CAG collates and disseminates complaint data that help point our field examiners toward banks, activities, and products that require further investigation.

We obtain additional valuable insight and surveillance from community and consumer groups, internal and external auditors, other federal, state and local authorities, and competing banks.

Thus, national banks' compliance with applicable laws is subject to comprehensive – and in the case of the largest national banks, *continuous* – supervision. Where violations of law are found, we take appropriate enforcement action to remedy the problem and to address consumer harm. Illustrative of this is the precedent-setting action taken by the OCC in 2000 against a national bank found to have engaged in a pattern of deceptive practices in connection with that bank's marketing of subprime credit cards. The OCC ordered the bank to pay more than \$300 million in restitution to consumers who had been harmed by these practices.

### ***What types of state laws will be preempted under the NPRM?***

The proposal sets out examples of the types of state statutes that the OCC or the courts have concluded would be preempted in the areas of real estate lending, other lending and deposit taking. For lending, they include licensing laws, laws that address the terms of credit, permissible rates of interest, escrow accounts, and disclosure and advertising. For deposit-taking (in addition to laws dealing with disclosure requirements and licensing and registration requirements), they include laws that address abandoned and dormant accounts, checking accounts, and funds availability. These lists are not intended to be exhaustive – other types of state laws that materially affect the exercise of national banks' lending and deposit-taking powers, including laws that wholly or partially obstruct or condition a national bank's exercise of federally-granted powers, may be identified and will be addressed on a case-by-case basis.

In addition, with regard to bank operations, the NPRM states that except where made applicable by federal law, state laws that obstruct, in whole or in part, a national bank's exercise of powers granted under federal law do not apply to national banks. This provision applies to any national bank power or aspect of a national bank's powers that is not covered by another OCC regulation specifically addressing the applicability of state law.

### ***What types of state laws will NOT be preempted under the NPRM?***

The NPRM also sets out examples of the types of state laws that are not preempted and would be applicable to national banks to the extent that they do not materially affect the real estate lending, other lending, deposit-taking, or other activities of national banks or are otherwise consistent with national banks' federal authority to engage in these activities. They include laws that generally pertain to contracts, debt collection, acquisition and transfer of property, taxation, zoning, crimes, torts, and, for real estate lending, homestead rights. In addition, any other law that the OCC determines to interfere to only an insignificant extent with national banks' lending, deposit-taking, or other activities, or is otherwise consistent with national banks' authority to engage in these activities would not be preempted under the NPRM. In general, these would be laws that do not attempt to regulate the manner or content of national banks' lending, deposit-taking, or other activities, but that instead form the legal infrastructure that surrounds and

supports the conduct of the bank's business. In general, these types of state laws promote national banks' ability to conduct business, rather than obstruct national banks' exercise of their powers granted under federal law.

***Is the OCC occupying the field with regard to national banks' real estate lending activities?***

Part 34 of our rules implements 12 U.S.C. 371, which provides a broad grant of authority to national banks to engage in real estate lending. The only qualification in the statute is that these federal powers are subject “to section 1828(o) of this title [which requires the adoption of uniform federal safety and soundness standards governing real estate lending] and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.”

As originally enacted, section 371 contained a limited grant of authority to national banks to engage in real estate lending. Over the years, Congress broadened section 371, giving the OCC the wide-ranging regulatory authority it has today. While we believe the history of section 371 indicates that Congress left open the possibility that the OCC would occupy the field of national bank real estate lending through regulation, the OCC has not exercised the full authority inherent in section 371 in the NPRM. The NPRM invites comment on whether our regulation should state expressly that federal law occupies the entire field of real estate lending.

***Will the proposed changes to parts 7 and 34 of the OCC regulations apply to operating subsidiaries of national banks?***

In accordance with our regulation set out in 12 CFR 7.4006, the rules governing national bank deposit-taking, lending, and other authorized activities apply equally to national bank operating subsidiaries. Therefore, the proposed amendments to parts 7 and 34 will have equal application to operating subsidiaries of national banks.