Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

July 31, 2003

Statement of Comptroller of the Currency John D. Hawke, Jr. Regarding National City Preemption Determination And Order

Today, I have issued a preemption Determination and Order in response to a request from National City Bank, National City Bank of Indiana, and their operating subsidiaries, National City Mortgage Company and First Franklin Financial Company (collectively, "National City") concerning the applicability of the Georgia Fair Lending Act ("GFLA"). For the reasons explained in the Determination and Order, the provisions of the GFLA affecting national banks' real estate lending are preempted by Federal law. Therefore, the Determination and Order provides that the GFLA does not apply to National City or to any other national bank or national bank operating subsidiary that engages in real estate lending activities in Georgia.

The doctrine of preemption of state law attempting to regulate federally chartered banks is based on Constitutional principles that have been recognized from the earliest decades of this Nation. In 1819, in the landmark case of *McCulloch v. Maryland*, the Supreme Court held that under the Supremacy Clause of the U.S. Constitution, states "have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations" of an entity created under federal law. The entity involved was a bank chartered under federal law, the Second Bank of the United States. Since the creation of the national banking system in 1863, courts have applied principles of federal preemption in connection with many aspects of national banks' operations, and the rule is well-established that the exercise by federally-chartered national banks of their federally-authorized powers is ordinarily not subject to state law.

We apply the same principles today to reach the conclusions set forth in the Determination and Order concerning the applicability of the GFLA to national banks and their operating subsidiaries engaged in real estate lending in Georgia. This does not mean, however, that customers of those banks and bank subsidiaries become more exposed to predatory lending practices than before. I have made clear on a number of occasions that predatory and abusive lending practices have absolutely no place in the national banking system, and I am glad to say that evidence that national banks are engaged in any such practices is virtually non-existent.

The OCC has no evidence that national banks are engaged in predatory and abusive lending practices to any discernable degree. I have met with consumers who have been the victims of predatory lending practices, and the consistent pattern I hear is that the lender at issue was a finance company or a loan broker, not a national bank or its subsidiaries. This observation is consistent with an extensive study of predatory lending conducted recently by HUD and the Treasury Department, which found that abuses were less likely to occur in lending by banks that are subject to extensive oversight and regulation. Even a large group of state Attorneys General has similarly gone on record to say that information available to them does not show that banks and their subsidiaries are engaged in predatory lending practices. All of these authorities agree that these abusive practices have been perpetrated by non-bank finance companies and loan brokers.

This does not lead, however, to the conclusion suggested by some that the OCC should have no objection to state predatory lending laws, such as the GFLA, being made applicable to national banks. There are clearly burdens and unintended consequences that spring from the overbroad reach of these laws. Laws such as the GFLA apply to loans with rates of interest and other features typical of risk-based pricing of subprime loans. These laws generally prohibit certain mortgage loan terms and impose extra compliance obligations when other loan terms and conditions are present. They introduce new standards for subprime lending that are untested, sometimes vague, often complex, and, in many cases, different from established and well-understood Federal requirements. They also create new potential liabilities and penalties for any lender that missteps in its efforts to comply with those new standards and restrictions.

As a practical matter, these laws materially increase a bank's costs and compliance risks in connection with subprime lending to the point that banks have and will conclude that they simply are unable to effectively cover these increased costs and risks. Accordingly, a growing body of evidence indicates that in response to such laws, banks are likely to reduce their product offerings to avoid subprime mortgage lending, in order to concentrate on making loans for which they can receive acceptable compensation for the risks they undertake. The practical result of these laws, therefore, is to obstruct, or for practical purposes, prevent, national banks and their subsidiaries from making certain types of real estate loans, which causes an overall reduction in credit available to subprime borrowers. This means that non-predatory, risk-priced credit will become more limited, or unavailable, to creditworthy subprime borrowers.

The OCC's approach to predatory lending, embodied in the recent anti-predatory lending standards discussed in the Determination and Order and implemented through the OCC's comprehensive supervision of national banks, minimizes the potential for harm from predatory or abusive lending without reducing the credit available to subprime borrowers. The OCC's supervisory approach, implemented by trained examiners reviewing on-site the lending activities of national banks, and using robust powers to issue cease-and-desist orders against unsafe, unsound, unfair or deceptive practices, allows for this type of consideration. By focusing on the lending practices of individual institutions, rather than subjecting the entire banking system to the burdens, impediments and inconsistencies of overbroad state and local legislation, our approach reduces the likelihood of predatory lending without affecting the availability of credit to subprime borrowers.