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June 21, 2002

Regulation Comments  
Chief Counsel's Office  
Office of Thrift Supervision  
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Washington, D.C. 20552

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Attention Docket No.: 2002-17

This is in response to the Notice of Proposed Rulemaking regarding the Alternative Mortgage Transaction Parity Act (the "Act") that was published by the Office of Thrift Supervision (the "OTS") in the April 25, 2002, *Federal Register*. On June 21, 2000, MidFirst Bank, OTS docket 14191, responded to the OTS Responsible Alternative Mortgage Lending Advanced Notice of Proposed Rulemaking dated April 5, 2000; MidFirst's June 21, 2000, letter is incorporated herein by reference. MidFirst appreciates the opportunity to comment and supports efforts to resolve the predatory lending issue.

For reference, the Act created the following lending authority structures:

- The National Credit Union Administration extended all lending authorities granted federal credit unions to all state credit unions.
- The OCC extended only ARM authorities granted national banks to state banks.
- The OTS extended prepayment fee, late fee, and ARM authorities granted federal savings associations to state savings associations and other state housing creditors.

#### **Federal Preemption and Powers of Federal Savings Associations**

Regardless of the proposed rule being adopted, the broad federal lending preemption afforded federal savings associations by the OTS will not be altered or impaired. The Parity Act was adopted by Congress in 1982 to assist state housing creditors in expanding demand for their home loan products in response to a unique economic environment – namely home loan interest rates at

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historically high levels<sup>1</sup>. The Act<sup>2</sup> in no way affects the lending authorities of federal savings associations or the federal preemption available to federal savings associations - "parity" was created by expanding the lending authorities of state chartered housing creditors to match the authorities of federal entities rather than vice versa. This is an important factual element in understanding that the rule as proposed in the Notice of Rulemaking cannot erode or impair federal preemption and the authorities relating to federal savings association lending. Since the Act and implementing regulation did not modify the lending powers of federal savings associations in 1982, any subsequent change to the regulation cannot modify the lending powers of federal savings associations.

### **Regulatory Oversight**

The Act did not establish a regulatory structure by which all lenders operating under either the OCC, the NCUA, or the OTS parity regulations would be subject to oversight by the agency implementing the regulation. In particular, state housing creditors utilizing the OTS regulation are not subject to regulatory oversight by the OTS. As a federal savings association, MidFirst does not object to state housing creditors having similar lending authorities provided those authorities are enforced in a manner similar to the oversight of federal savings associations' lending activities as provided by the OTS.

### **Problems in Identifying Predatory Loans**

Alternative mortgage transactions should not be deemed predatory per se. While prepayment fees, late fees, and ARM terms have been associated with some predatory loans, these characteristics alone offer no basis for a predatory designation. As a result, and without specific evidence to the contrary, it is erroneous to conclude that alternative mortgage transactions are predatory or that a lender offering loan terms contemplated by the Act and implementing regulation is necessarily a predatory lender.

Regardless of whether the proposed rule is ultimately adopted, it is important for the OTS and other federal regulators to unequivocally state that loan terms such as prepayment fees and late fees are not predatory of themselves; only after a review of all facts associated with a particular loan can a predatory determination be made. Prepayment fees, late fees, and ARM terms also provide flexibility in product terms so the borrower benefits from a product that is more suitable to his particular needs - for example, a borrower may be willing to accept note terms that include a prepayment fee in order to receive a lower interest rate and lower monthly payment. It would not benefit the public to label such loan characteristics as predatory when in fact many borrowers benefit from added flexibility these loan terms offer.

This parallels concerns with the Federal Reserve Board's recent proposed rulemaking relating to the Home Mortgage Disclosure Act (HMDA) requiring expanded loan level public disclosures<sup>3</sup>. Individual loan terms and even a given grouping of loan terms will not consistently allow accurate and efficient identification of all predatory loans.

<sup>1</sup> The Findings and Purpose of Congress as stated in 12 USC Sec. 3801 specifically state: "The Congress hereby finds that (1) increasingly volatile and dynamic changes in interest rates have seriously impaired the ability of housing creditors to provide consumers with fixed-term, fixed-rate credit. . ."

<sup>2</sup> Including the Act's language, its spirit, its intent, explanatory information, and the OTS regulation.

<sup>3</sup> The Federal Reserve published both a Final Rule (67 FR 7221) and a Proposed Rule (67 FR 7252) relating to the Home Mortgage Disclosure Act in the February 15, 2002, *Federal Register*. The Federal Reserve published a second final HMDA rule on June 21, 2002.

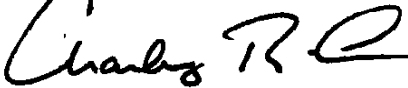
### **Operating Subsidiaries of Federal Savings Associations**

MidFirst requests that the OTS reaffirm the federal powers and preemption afforded operating subsidiaries of federal savings associations. Such operating subsidiaries are incorporated by the individual states rather than the federal government thereby creating the potential that operating subsidiaries would meet the definition of "state housing creditor" subject to the "applicable regulations" in proposed 12 CFR 560.220. This would conflict with OTS's well established intention relating to both the federal preemption and the extension of federal savings association powers as clearly outlined in 12 CFR 559.3(e), (h), and (n)<sup>4</sup>. Most recently the OTS affirmed in a January 10, 2002, Office of Chief Counsel Opinion<sup>5</sup> that operating subsidiaries of savings associations may engage in any activity permissible for the federal savings association. MidFirst opines that it is not OTS's intent to restrict the applicability of federal preemption of operating subsidiaries. MidFirst opposes any rule that directly or indirectly restricts the federal preemption afforded operating subsidiaries of federal savings associations.

### **State Chartered Savings Associations**

MidFirst opines that the Parity rules should continue to apply to loans made by state savings associations regardless of the rule's applicability to any other state chartered entity. State and federal savings associations pursue similar strategies within a similar corporate and regulatory structure; as a result, it is reasonable to conclude that lending authorities should be similar for both state and federal associations. Additionally, state savings associations incur OTS assessments as do federal savings associations; as a result, the costs and benefits of extending the OTS Parity rules to state thrifts is commensurate with the benefit and costs of federal associations.

Sincerely,



Charles R. Lee  
Vice President and  
Director of Bank Administration  
MidFirst Bank

<sup>4</sup> The OTS adopted 12 CFR 559, including the subparts referenced above, as published in the *Federal Register* of December 18, 1996, 61 FR 66561 following a public comment period initiated with a Notice of Proposed Rulemaking published by the OTS in the *Federal Register* of June 13, 1996, 61 FR 29976. Specifically, on page 61 FR 66563 of the Final Rule, OTS states: "The regulation sets forth OTS's longstanding position that state law is preempted for operating subsidiaries to the same extent as it is for the parent savings association."

<sup>5</sup> Opinion by Carolyn J. Buck, OTS Chief Counsel regarding the Authority of an Operating Subsidiary of a Federal Savings Association to Conduct Fiduciary Activities. Refer to [www.ots.treas.gov/hola01.html](http://www.ots.treas.gov/hola01.html).