

July 31, 2003

**Preemption Determination and Order Concerning
the Georgia Fair Lending Act**

Questions and Answers

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

The OCC is issuing a Determination and Order that preempts the Georgia Fair Lending Act (GFLA). This action is being taken in response to a request by National City Bank, N.A., National City Bank of Indiana, N.A., and their operating subsidiaries for a determination of whether the Georgia law applies to them. Our Determination and Order provides a detailed analysis of how several statutes and regulations already preempt much of the state law, and then discusses how the remaining provisions conflict with national banks' power to make real estate loans under 12 U.S.C. § 371. As a result of our Order and Determination, the GFLA does not apply to national banks and their operating subsidiaries making loans in Georgia.

We also are issuing simultaneously with the publication of this Determination and Order a notice of proposed rulemaking in which we invite comments on proposed amendments to our rules that would clarify the extent to which state law applies to national bank deposit-taking, lending, and other authorized activities.

- ***Does the Determination and Order apply to national banks and their operating subsidiaries in addition to the National City entities that submitted the request?***

Yes. Because our conclusions rest on an analysis of the legal effects of the GFLA under Constitutional preemption principles, they would not differ with respect to any other national bank or operating subsidiary engaged in real estate lending activities in Georgia.

- ***What protections do consumers have against predatory lending by national banks in Georgia?***

As an initial matter, it is important to note that there is no evidence of predatory lending by national banks or their operating subsidiaries, in Georgia or elsewhere. This point recently was confirmed by nearly two dozen state Attorneys General in a brief they filed in litigation concerning an OTS rulemaking. In that brief, the Attorneys General stated, "Based on consumer complaints received, as well as investigations and enforcement actions undertaken by the Attorneys General, predatory lending abuses are largely confined to the subprime mortgage lending market and to non-depository institutions. Almost all of the leading subprime lenders are mortgage companies and finance companies, not banks or direct bank subsidiaries."

Preemption of the Georgia law does not mean that the lending practices of national banks in Georgia will be unregulated. There are a wide variety of federal protections that apply, including the Homeowners Equity Protection Act of 1994 (HOEPA), the Fair Housing Act, and the Equal Credit Opportunity Act. The OCC also will evaluate whether lending practices involve unfair or deceptive acts or practices in violation of the Federal Trade Commission Act. In addition, the OCC has issued two advisory letters concerning predatory and abusive practices in originating or purchasing loans.

In the notice of proposed rulemaking that accompanies the GFLA Determination and Order, we are inviting comments on a federal safety and soundness-based anti-predatory lending standard that would prohibit national banks from making loans based predominantly on the foreclosure value of the borrower's collateral, without regard to the borrower's repayment ability. If that standard is adopted in final, it will provide a uniform standard applicable throughout the nation.

- ***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.

- ***If no national bank is engaging in predatory lending, why does the OCC object to the application of state laws that may serve as an added deterrent while imposing little or no costs on national banks?***

Whether a state law is preempted does not depend on the merits of the law. Rather, the state law will be preempted if it conflicts with the federal law. In the case of the GFLA, the state is attempting to condition the exercise of national bank powers on compliance with various restrictions. These restrictions have significant adverse consequences for national banks that lend in Georgia, including --

- Disrupting the secondary market for loans;
- Imposing a set of restrictions unique to one state, adding to the burden on a lender conducting a multi-state lending business;
- Introducing new standards for subprime lending that are untested, sometimes vague, often complex, and, in many cases, different from established and well-understood federal requirements; and
- Exposing lenders to potentially significant liability arising from violating the statute.

The GFLA interferes with national banks' ability to exercise permissible federal powers, and, therefore, is preempted, notwithstanding its laudable objectives.

- ***Is the OCC preempting all state laws governing real estate lending?***

National City asked us to review only one state's law, the GFLA. A conclusion that federal law occupies the field of real estate lending regulation would have implications beyond the applicability of the Georgia law. For that reason, we believe it is appropriate to consider the question of whether federal law "occupies the field" of real estate lending in a rulemaking. Contemporaneously with the issuance of this Determination and Order, therefore, we are initiating a rulemaking that addresses that issue.

- ***Why did the OCC respond to National City's request by issuing a Determination and Order instead of an opinion letter?***

Section 371 states that national banks may make real estate loans subject to "such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." While we could have offered our opinion on the extent to which federal law preempts state law, we believe that it is appropriate for us to exercise the statutory authority to issue an order and in so doing provide the greater certainty to national banks that an order offers. Unlike opinion letters, an order has the force and effect of law.

- ***What types of state and local laws apply to national bank real estate lending after the OCC's order?***

That is the subject of the rulemaking published today, where we are seeking comment on proposed amendments to our real estate lending rules to clarify what types of state laws apply. As discussed in that rulemaking, courts have identified certain types of state laws – such as those pertaining to contracts, torts, debt collection, acquisition and transfer of real property, taxation, and zoning – as within the states’ purview. These laws do not regulate the manner or content of national banks’ real estate lending, but instead form the legal infrastructure that surrounds and supports the conduct of that business. They promote national banks’ ability to conduct business, rather than obstruct, national banks’ exercise of powers granted under federal law.

- ***Was the OCC’s consideration of the National City request influenced by the fact that the OTS already has preempted the GFLA?***

It is not surprising that the Office of Thrift Supervision (OTS) reached a similar conclusion for federal thrifts, given the similarity between the powers of federal thrifts and national banks and the purposes for which the two types of federal charters were created. However, our decision was based on a review of applicable law governing national bank powers. As noted in our order, many of the GFLA provisions already are preempted by existing statutes or regulations. The remaining provisions obstruct national banks’ exercise of power granted by federal law to make real estate loans.

We note that the OTS action does have a direct bearing on national banks located in Georgia. Under 12 U.S.C. § 85, a national bank may charge interest at the rate allowed for the most favored state lender under the laws of the state where the bank is located. The OTS has previously determined that the GFLA does not apply to Federal savings associations. By virtue of the parity provision in the GFLA, that law also would not apply to a Georgia state savings association. Thus, for purposes of section 85, a Georgia state savings association is the most favored lender with respect to the types of loans covered by the GFLA, and, accordingly, a national bank located in Georgia is similarly not subject to limits on the rate of interest it may charge for loans within the scope of the GFLA.

- ***Has the OCC received requests to preempt other state or local predatory lending laws? If not, would you entertain requests concerning other laws?***

We have not received any other request in connection with another state’s or municipality’s predatory lending laws. National banks are free to seek our views concerning the application of other predatory lending laws to their lending operations.