



OCC ADVISORY LETTER

Comptroller of the Currency
Administrator of National Banks

Subject: Avoiding Predatory and Abusive Lending
Practices in Brokered and Purchased Loans

TO: Chief Executive Officers of All National Banks and National Bank Operating
Subsidiaries, Department and Division Heads, and All Examining Personnel

INTRODUCTION AND PURPOSE

The Office of the Comptroller of the Currency (OCC) has taken a variety of steps to guard against national banks becoming involved in predatory and abusive lending practices.¹ One dimension of the OCC's concern in this area relates to the need for national banks to exercise appropriate diligence when they make or purchase loans that are originated through mortgage brokers or other intermediaries. National banks should have in place procedures and standards adequate to ensure that their broker arrangements and loan purchases do not present unwarranted risks.

Accordingly, the OCC is issuing this advisory letter to alert national banks and their operating subsidiaries (collectively referred to as national banks) to the risks they may confront if they make loans through brokers or obtain loans through purchase transactions that contain terms or reflect practices that may be characterized as abusive or "predatory." Such loans present significant legal, reputation, and other risks, in addition to the heightened credit risk assumed in cases where the borrower lacks the ability to repay the loan without resorting to liquidation of the collateral. This guidance applies to (1) traditional broker transactions in which a mortgage broker refers an application to the bank and the loan is closed in the bank's name; (2) "table funded" loans that are closed in the name of a third party, but in which the bank provides the loan funds and immediately acquires the loan; and (3) loan purchase transactions where the loan is initially made and funded by a third party who subsequently sells the loan to the bank (whether or not the bank performs or participates in the underwriting of the loan).² Although the specific nature and degree of the risks presented may vary among these different categories of transactions, the general principle of this guidance — that banks must maintain strong and appropriate controls over all loan origination and purchase functions, including loan sourcing, processing, underwriting, and closing — pertains to them all.

¹ See, e.g., OCC Advisory Letter 2003-2 (Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices), February 21, 2003 (OCC Guidelines to Guard Against Predatory Lending); OCC Advisory Letter 2002-3 (Guidance on Unfair or Deceptive Acts or Practices), March 22, 2002; OCC Bulletin 2001-6 (Expanded Guidance for Subprime Lending Programs), January 31, 2001; OCC Advisory Letter 2000-11 (Title Loan Programs), November 27, 2000; OCC Advisory Letter 2000-10 (Payday Lending), November 27, 2000; OCC Advisory Letter 2000-7 (Abusive Lending Practices), July 25, 2000.

² This guidance is applicable both where the bank intends to hold the brokered or purchased loan in its portfolio and where it intends to resell the loan or pool it for securitization.

The OCC expects that national banks will take affirmative steps to address the risks of these transactions through, among other things, appropriate due diligence, mortgage broker agreements, and ongoing monitoring of their third-party relationships. This advisory letter provides specific recommendations for accomplishing these objectives.

National banks that fail to address these risks may be subject to supervisory and other actions by the OCC. Moreover, the OCC will take such actions as may be appropriate to address misconduct by mortgage brokers and other third parties that deal with national banks, and will work closely with agencies having primary enforcement authority over such third parties to combat predatory lending practices.

BACKGROUND

Recent reports indicate that a majority of all home mortgages, and approximately 50 percent of subprime loans, are originated through mortgage brokers.³ Similarly, a large proportion of mortgages are sold by the initial creditor to loan purchasers in secondary market transactions.⁴

These arrangements serve legitimate needs of the parties involved, and the public interest, in a wide variety of ways. The greater number and diversity of participants in the mortgage market enhances competition, allows for the more flexible and efficient performance of origination services and allocation of credit risk, and provides borrowers with greater convenience and access to credit, particularly in areas that are traditionally underserved.

At the same time, however, these arrangements may present risks for participating parties, including the risk that they will become implicated in predatory lending practices. Such practices — in addition to causing great harm to borrowers — may expose participants to significant legal liability and reputation risk, and subject the ultimate lender to the high credit risk of lending to a borrower who lacks the ability to repay the loan without resorting to collateral.

Federal laws and regulations that govern mortgage and other lending transactions do not contain a comprehensive definition of “predatory” or “abusive” lending practices. However, the OCC believes that a fundamental characteristic of predatory lending is the provision of credit to borrowers who simply cannot afford the credit on the terms being offered. Typically, such credit is underwritten predominantly on the basis of the liquidation value of the collateral, without regard to the borrower’s ability to service and repay the loan according to its terms, absent resorting to that collateral. When a loan has been made based on the foreclosure value of the collateral, rather than on a determination that the borrower has the capacity to make the scheduled payments in accordance with the terms of the loan, the lender is effectively relying on its ability to seize the borrower’s equity in the collateral to satisfy the obligation (including accrued interest) and to recover the typically high fees associated with such credits. As a result, such credits experience foreclosure rates higher than the norm.

³ See United States Department of the Treasury and United States Department of Housing and Urban Development, *Curbing Predatory Home Mortgage Lending: A Joint Report* (June 2000) (Treasury-HUD Joint Report), at 38, available at [<http://www.treas.gov/press/releases/reports/treasrpt.pdf>]. For a general discussion of characteristics of “subprime” lending, see OCC Bulletin 2001-6 (Expanded Guidance for Subprime Lending Programs), January 31, 2001; OCC Bulletin 99-15 (Subprime Lending: Risks and Rewards), April 5, 1999; and OCC Bulletin 1999-10 (Interagency Guidance on Subprime Lending), March 3, 1999.

⁴ See Treasury-HUD Joint Report at 39-44.

Predatory loans often include features that are designed to strip away or reduce borrowers' equity in the collateral for the loan, and thus enhance the likelihood of foreclosure. The mechanisms by which this "equity stripping" may occur are various, and include lending without regard to repayment ability, "loan flipping" (refinancings that occur in circumstances that result in little or no economic benefit to the borrower, with the objective of generating additional loan points, loan fees, prepayment penalties, and fees from financing the sale of credit-related products), and "fee packing" (including in the loan principal amount such costs as points, mortgage broker fees, prepayment penalties on a prior loan, and charges for related products such as credit insurance). The potential for abuse is exacerbated when these fees and other charges far exceed those that would reflect the true costs and risks of the transaction, or are assessed and included in the loan principal without the borrower's informed consent. Finally, predatory lending may often involve fraudulent, deceptive, or high-pressure sales tactics, particularly against older borrowers, or persons who are, or are perceived to be, less financially sophisticated or otherwise vulnerable to abusive practices (for example, persons with limited access to mainstream sources of credit).⁵

RISKS OF PREDATORY BROKERED AND PURCHASED LOANS

Credit Risk

As noted above, a departure from fundamental principles of loan underwriting — lending without a determination that a borrower can reasonably be expected to repay the loan from resources other than the collateral security for the loan, and relying instead on the foreclosure value of the borrower's collateral — generally forms the basis of abusive lending. Such transactions are not consistent with established lending standards⁶ and raise fundamental safety and soundness issues. A loan made without regard to the borrower's ability to service and repay the loan in accordance with its terms, without resorting to collateral, presents significant safety and soundness concerns, and making or purchasing such loans on a regular basis is inconsistent with safe and sound banking practices. Such loans may pose both a higher risk of default and a higher potential loss exposure at default.

Studies of predatory lending have indicated that national banks and other federally supervised depository institutions generally are not engaged in this sort of unsafe and unsound — and abusive — lending practice. By contrast, because of the less intensive supervision of mortgage brokers and other intermediaries, as well as other factors (such as the fact that they do not intend to take on the ultimate credit risk of the loan), there is a particular risk that such intermediaries will be tempted to engage in abusive practices such as lending without regard to repayment ability. Thus, mortgage broker and loan purchase transactions may present a heightened risk that supervised institutions will acquire loans that are made without a reasonable expectation that the borrower will be able to repay the loan as structured. Moreover, this credit risk would be increased in circumstances where the loan decision relies on an appraisal that has inflated the true value of the collateral, which may be more likely where the third party, who does not bear the ultimate credit risk, selects the appraiser.⁷

Legal Risk

Predatory and abusive loans originated through brokers or by third-party lenders also present a wide range of heightened legal risks for national banks, and could subject them to both supervisory action and civil liability. For example, borrowers victimized by oppressive loan

⁵ See generally OCC Guidelines to Guard Against Predatory Lending.

⁶ See 12 CFR 34, D. See also 12 CFR 30, Appendix A.

⁷ See generally 12 CFR 34, C.

terms or other unscrupulous conduct of a mortgage broker or loan originator may have remedies against the ultimate creditor under common law theories of fraud or unconscionability.

In addition, predatory loans originated through mortgage brokers, or purchased from third-party lenders, may subject national banks to liability or supervisory action under a wide range of federal consumer protection laws. For example, in typical mortgage broker transactions, the loan will be closed in the name of the bank as the initial creditor, and thus, the bank generally will have direct liability for any violations of law committed in connection with the loan. In addition, the bank could be liable under agency, “common enterprise,” or other theories for violations committed by the broker, and may be jointly and severally liable with the broker—for example, under the Real Estate Settlement Procedures Act (RESPA)—for violations it is deemed to commit in conjunction with the broker. Even in table-funded or purchase transactions, a bank may have liability for violations of law as a successor or assignee of the original creditor.

The legal risks of originating or purchasing predatory loans include the following:

- *TILA and RESPA*. Mortgage lending activities are generally subject to the disclosure requirements and substantive protections of the Truth in Lending Act (TILA) and RESPA. Under TILA, the failure to provide timely and accurate disclosures of the cost of mortgage credit may result in mandatory administrative reimbursement of excess finance charges; statutory damages and other civil liability; and the borrower’s right to rescind the entire transaction. TILA provides that actions generally may be brought against assignees if the violation for which the action is brought is apparent on the face of the disclosure statement.⁸ Thus, for example, if a mortgage broker prepares a TILA disclosure statement on behalf of a national bank, and that disclosure understates the finance charge (for example, by failing to reflect the broker’s fee accurately), the bank would be subject to a restitution order, civil liability, and potential rescission of the loan. Violating RESPA’s ban on kickbacks and certain other types of payments and charges would expose the bank to extensive civil liability (three times the amount of the charge for the settlement service in question) and criminal sanctions. Thus, if a broker engages in fee-splitting or gives or accepts referral fees in violation of these provisions, and is found to be acting as agent for or in conjunction with a national bank, the bank may be subject to these legal risks.
- *HOEPA*. High-cost mortgage loans originated through brokers or by third-party lenders must comply with the substantive protections and disclosure requirements set forth in the Home Ownership and Equity Protection Act (HOEPA). Among other things, HOEPA prohibits creditors from engaging in a pattern or practice of making certain high-cost loans based on the homeowner’s equity without regard to repayment ability. HOEPA’s substantive protections also restrict many of the other loan terms and structures often cited in discussions of predatory lending practices, including refinancings that may constitute loan flipping; payments to home improvement contractors; balloon payments; prepayment penalties; and negative amortization. Civil liability for HOEPA violations may include restitution of *all* the finance charges and fees paid by the consumer. HOEPA provides that assignees are subject to all claims and defenses that could be brought against the original creditor, unless the assignee can demonstrate “that a reasonable person exercising ordinary due diligence, could not determine, based on the documentation required by [TILA], the itemization of the amount financed, and other disclosure of disbursements,” that the mortgage was covered by HOEPA.⁹

⁸ 15 USC 1641(a) and (e).

⁹ 15 USC 1641(d).

- *Fair Lending Laws.* Predatory lending practices also can raise fair lending concerns. Predatory lenders often target identifiable groups of consumers that are (or are perceived to be) less financially sophisticated, currently have less access to mainstream lenders, or are otherwise vulnerable to abusive practices. If this targeting is based on age, race, national origin, gender, or other prohibited bases under the law, the abusive practices may represent violations of the Equal Credit Opportunity Act (ECOA) or the Fair Housing Act. Even if such targeting has been performed directly by a mortgage broker in soliciting applications, the creditor making the loan could nevertheless be subjected to civil lawsuits and government enforcement actions. ECOA also provides for successor liability by defining the term “creditor” to include “any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.”¹⁰
- *FTC Act.* Finally, predatory loans may involve violations of the Federal Trade Commission Act (FTC Act), which makes unlawful “unfair or deceptive acts or practices.” Practices involving fraud, misleading conduct, or material omissions of information concerning costs, risks, or other terms and conditions may violate the prohibition against deception. Under relevant precedents, this prohibition is violated by representations, omissions, acts, or practices that are material and are likely to mislead a *reasonable consumer in the audience targeted by the advertisement or other practice*. Loans with unconscionable terms may also involve violations of the prohibition against unfair acts or practices. Evidence of practices such as loan flipping, equity stripping, or the refinancing of loans made under governmental or nonprofit programs with terms favorable to the borrower may be indicative of unfair or deceptive practices that violate the FTC Act.¹¹ Violations of the FTC Act would subject a national bank or its operating subsidiary to supervisory action by the OCC.

In addition to raising the foregoing issues under federal consumer protection laws, abusive loans also may be inconsistent with various safety and soundness regulations and guidelines.¹²

Other Risks

Predatory lending also has generated concern and criticism because of the harm that abusive loans may cause for families and communities, and because such loans are perceived as inconsistent with national policies, including the goals of fair access to credit, community development, and the promotion of stable homeownership by the broadest spectrum of America. For these reasons, predatory lending creates the risk that a bank will be perceived unfavorably in its community, in the marketplace, and by the general public. Even though the abusive practices in question may have been perpetrated by a third party, the bank that makes or purchases the loans may be tarnished, and seen as an institution that does not consistently treat its customers fairly. When a mortgage loan has been underwritten without regard to the borrower’s ability to repay the loan absent resorting to collateral, the institution holding the loan at the time of foreclosure thus may face significant reputation risk (as well as credit risk).

Lending practices that violate the fair lending laws, the FTC Act, the consumer protections in HOEPA, or TILA’s rescission provisions, or that evidence other illegal credit practices, also may adversely affect an institution’s rating under the Community Reinvestment Act (CRA).¹³

¹⁰ 15 USC 1691a(e). See 12 CFR 202.2(l).

¹¹ See OCC Guidelines to Guard Against Predatory Lending, at 4-6.

¹² See, e.g., 12 CFR 30, Appendix A, and 12 CFR 34, C and D.

¹³ See 12 CFR 25.28(c). See also Interagency Questions and Answers Regarding Community Reinvestment, Q&A _____.28(c)-1, 66 *Fed.Reg.* 36620, 36640 (July 12, 2001). A bank that engages in a pattern or practice of extending

Because CRA performance must be considered in connection with various applications for depository facilities, including branch applications and bank merger transactions, predatory lending may impede a bank's strategic plans to expand its operations or to combine with another organization.

Safety and soundness concerns may also arise where lending practices effectively foreclose access to a secondary market. Government-sponsored enterprises (GSEs) active in the secondary market for mortgage loans have taken a number of affirmative steps to reduce the possibility that they will purchase abusive loans. These steps include a refusal to purchase loans with certain terms, and plans to cease business with lenders whose practices are inconsistent with the GSE's principles against predatory lending. Thus, a bank making or obtaining loans reflecting predatory terms may run the risk of losing an important source of liquidity for its mortgage portfolio or general funding for its operations. Moreover, the bank could be forced to keep in its portfolio loans it had expected to sell, thereby exposing it to greater default risk and risk of loss. Similarly, banks may be required to repurchase predatory loans that they may have sold to third parties, under the terms of the applicable purchase and sale agreement, and may have limited legal or practical ability to require the broker or originator through which it acquired the loan to do the same.

RECOMMENDED PRACTICES

National banks should take affirmative steps to mitigate the risks of acquiring predatory and abusive loans through broker or purchase transactions. A bank's policies and procedures relating to brokered and purchased loans should be adequate to ensure that the loans it obtains comport with the bank's general lending and other policies applicable to loans that the bank makes directly, and with applicable safety and soundness standards and consumer protection laws.

Prior OCC guidance on third-party relationships sets out measures national banks should employ to implement effective risk management processes.¹⁴ In addition to implementing this prior guidance, national banks should take the following specific steps to address the risks of obtaining predatory loans in broker or purchase transactions:

credit without assessing the borrower's ability to repay the loan — in addition to violating HOEPA in some circumstances — is not helping to meet the credit needs of the community consistent with safe and sound operations, and has acted contrary to the OCC's safety and soundness regulatory guidelines. See 12 CFR 30, Appendix A. Such an activity or practice also may adversely affect the OCC's evaluation of the bank's CRA performance. See OCC Guidelines to Guard Against Predatory Lending.

¹⁴ See OCC Advisory Letter 2000-9 (Third-Party Risk), August 29, 2000 (recommendations for vendor management programs) and OCC Advisory Letter 2001-47 (Third-Party Relationships: Risk Management Principles), November 1, 2001 (recommendations for third-party risk management process, including risk assessment and strategic planning, due diligence in selecting third-party providers, and contracting and oversight issues). See generally OCC Advisory Letter 2002-3 (Guidance on Unfair or Deceptive Acts or Practices), March 22, 2002; OCC Bulletin 2001-6 (Expanded Guidance for Subprime Lending Programs), January 31, 2001; OCC Bulletin 99-15 (Subprime Lending: Risks and Rewards), April 5, 1999; OCC Bulletin 99-10 (Interagency Guidance on Subprime Lending), March 3, 1999; and OCC Banking Circular 181 (REV) (Purchases of Loans in Whole or in Part-Participations), August 2, 1984. See also United States Department of Housing and Urban Development, *Mortgagee Letter 2002-21 (Due Diligence in Acquiring Loans)*, September 26, 2002.

Establishment of Policies and Procedures

National banks should have clear procedures for entering into and continuing relationships with third-party mortgage loan brokers and originators, and standards that delineate underwriting and appraisal requirements¹⁵ and unacceptable characteristics for brokered and purchased loans.¹⁶ These policies should also delineate, if applicable, the circumstances under which the bank will make through a broker, or acquire in a purchase transaction, loans with features that have been associated with abusive lending practices.¹⁷ As appropriate, bank policies should address specific matters such as:

- Frequent, sequential refinancings;
- Refinancings of special subsidized mortgages that contain terms favorable to the borrower;
- Single-premium credit life insurance or similar products;
- Negative amortization;
- Balloon payments in short-term transactions;
- Prepayment penalties that are not limited to the early years of a loan;
- Financing points, fees, penalties, and other charges;
- Interest rate increases upon default;
- Mandatory arbitration clauses; and
- Acquisition of loans subject to HOEPA.¹⁸

In addition, policies should address the maximum points and other charges that may be imposed on brokered and purchased loans, as well as the use of overages and yield-spread premiums as compensation vehicles. In the case of brokered loans, these policies should address total compensation to the broker and the lender, and establish limits on broker compensation. The OCC notes that some national lenders have already implemented these types of limits. Banks also should have policies to help ensure that interest rates and other pricing terms for brokered and purchased loans reasonably reflect the costs and risks of making such loans.

¹⁵ See generally 12 CFR 30, Appendix A, and 12 CFR 34, C and D.

¹⁶ Guidelines developed by GSEs active in the secondary market for mortgage loans may provide a useful reference or starting point for national banks in establishing or enhancing their policies and procedures in this area. See, e.g., Freddie Mac, "Protecting Borrowers from Predatory Lending Practices," (1997; revised 2002), available at [http://www.freddiemac.com/corporate/affordhouse/predlend/apl_fact.html]; Fannie Mae, "Fannie Mae Chairman Announces New Loan Guidelines to Combat Predatory Lending Practices," News Release (April 11, 2000), available at [<http://www.fanniemae.com/newsreleases/2000/0710.jhtml>]. See generally Freddie Mac, *Discover Gold Through Quality: Wholesale Originations Best Practices* (June 1999; supplemented April 2000), available at [<http://www.freddiemac.com/dgtq>]. Banks may wish to familiarize themselves with these guidelines in order to understand clearly the characteristics of loans that are not acceptable to these GSEs. National banks purchasing mortgage-backed securities of issuers other than these GSEs should make reasonable efforts to determine whether such issuers use standards (e.g., like the standards of those GSEs) to prevent the inclusion of loans with predatory characteristics in their mortgage pools. Appropriate due diligence to reduce risks in such "private label" transactions would include both a review of the issuer's efforts to avoid predatory loans and, to the extent such information is available, the general reputation of the issuer and the originator(s) of the loans.

¹⁷ Policies in this area also should ensure adequate documentation of the borrower's ability to service the debt, including verification of income and obligations, consistent with 12 CFR 30, Appendix A, and other applicable law. In addition, as appropriate, policies should address the use of multiple borrowers to satisfy debt-service coverage ratios to protect against reliance on the income of third-party guarantors or other obligors whose relationship to the borrower or to the collateral suggests that they may not, in fact, be relied upon to repay the loan, as structured, if necessary, to prevent default or foreclosure. Finally, policies in this area should also address debt-to-income and loan-to-value ratios to mitigate the risk of lending without regard to ability to repay.

¹⁸ HOEPA imposes specific disclosure requirements and substantive restrictions on closed-end loans secured by a consumer's principal dwelling, other than a reverse mortgage or a loan to finance the acquisition or initial construction of the home, that are high-cost because they exceed specified federal statutory and regulatory interest rate and fee thresholds. See 15 USC 1639 and 12 CFR 226.32.

Finally, bank policies and procedures should reflect and support the need for strong and appropriate controls over all mortgage origination functions, including loan sourcing, appraisals and other aspects of loan processing, underwriting determinations, and loan closings. These controls will vary, of course, with the risks presented by different types of transactions. In developing policies and procedures, institutions should carefully consider the strengths, capabilities, and incentives of the third parties with whom they may be doing business. In mortgage broker transactions, for example, banks may well determine that it is appropriate to restrict brokers to loan sourcing functions, and to require and ensure that processing functions, underwriting determinations, and loan closings be conducted independently. Similarly, for loan purchase transactions, bank policies should establish clear standards relating to the degree of the bank's involvement in the underwriting decision, and appropriate controls will vary in accordance with this involvement. If a national bank has not made the initial underwriting decision, it should take the steps necessary and appropriate to determine that such loans have been underwritten consistently with the bank's policies.

Due Diligence

National banks also should perform thorough due diligence, including background checks, before entering into relationships with mortgage brokers or third-party originators. These efforts should include a review of the third party's:

- General competence;
- Business practices and operations, including potential conflicts of interest;
- Reputation;
- Financial capacity and condition;
- Internal controls; and
- Record of compliance with applicable licensing, consumer protection, and other laws.

In addition, these reviews should include an assessment of any litigation, enforcement actions, or pattern of consumer complaints. The due diligence process should also include a risk assessment and plans to address identified risks. Based on this due diligence, national banks should develop approved lists of brokers and originators with whom the bank may transact business.

Broker and Originator Agreements

National banks should have written agreements with third-party brokers and originators that specifically and clearly address the rights and responsibilities of each party. Risks identified in the due diligence process should be addressed in these agreements, and, if such risks cannot be adequately mitigated, the agreement should not be consummated.

In addition, agreements with brokers and originators should specifically address the bank's lending policies with regard to loan features such as those described above, and should contain the third party's express agreement to abide by those policies. Brokers and originators also should specifically agree (1) to comply with all applicable laws, including safety and soundness regulatory standards applicable to national banks and laws prohibiting lending discrimination and unfair or deceptive practices, and (2) to make best efforts to ensure that the loans offered to borrowers are consistent with their needs, objectives, and financial situation. The institution should reserve the right not to make or purchase, and to put back to the broker or originator, any loans failing to comply with these standards.

Agreements also should protect banks against risk by:

- Ensuring that no inappropriate compensation incentives exist to induce brokers or originators to treat borrowers in a discriminatory manner, or otherwise unfairly;
- Providing for indemnification to the bank upon breach of the agreement;
- Enabling banks to exit the arrangement through clear termination rights and procedures; and
- Providing for the bank's (and the OCC's) ability to access all records of the third party necessary to enforce and ensure compliance with the agreement and to audit the third party's operations.

In addition, agreements should stipulate clear minimum performance standards and service levels.

If necessary, existing agreements with brokers and originators should be revised to conform to the above requirements.

Individual Loan Review (Quality Control Review)

National banks should verify that brokers and originators have established policies and procedures sufficient to ensure that loans to be originated or purchased by the bank will comply with applicable laws and the bank's policies. In appropriate circumstances — for example, at the outset of the third-party relationship, or after a particular risk has been identified — banks should conduct an appropriate documentation review to confirm that transactions comply with the bank's policies and legal requirements. As a general matter, banks should also periodically perform such a documentation review on a random sampling of broker and purchase transactions. Where banks do not reunderwrite each loan, this file sampling should be adequate to ensure that loans are being underwritten consistently with the bank's policies.¹⁹ Loan reviews also should be sufficient to protect against potential fraud in these transactions.

In addition, with respect to brokered loans, the bank should have in place a process for review of written agreements between the borrower and the broker to ensure that the agreements conspicuously disclose the fees to be paid to the broker for its services, contain a specific request for such broker services at that fee, and include a signed and dated acknowledgment of receipt by the consumer before the broker commences services. The bank should also retain copies of this documentation.

Monitoring and Management Information Systems

Mortgage lenders need effective management information systems to monitor the performance of brokers and originators from whom they acquire loans. Institutions should be able to carefully monitor, track, and evaluate a third party's compliance with the terms of its contract, including minimum performance standards and service levels. National banks should follow OCC guidance, as applicable, on monitoring the financial condition, operations, and internal controls of third-party brokers and originators with whom they establish relationships.²⁰ They also should carefully monitor such third parties' record of compliance with applicable laws and bank policies.

¹⁹ See OCC Banking Circular 181 (REV) (Purchases of Loans in Whole or in Part-Participations), August 2, 1984, at 4.

²⁰ See OCC Advisory Letter 2001-47 (Third-Party Relationships: Risk Management Principles), November 1, 2001, at 13.

In addition to such general monitoring, national banks should adopt criteria and procedures for additional targeted reviews, as appropriate, of brokers or originators whose loans exhibit unacceptable default, foreclosure, or complaint rates; broker fees that significantly exceed market rates or that do not comply with bank policies; potential violations of law or bank policies; or other risks.²¹ Targeted reviews may also be appropriate for brokers or originators whose concentrations suggest that borrowers may have been targeted on the basis of age, race, national origin, or gender. Management information systems must be adequate to identify brokers or originators whose loans show these risk characteristics.

Corrective Action

When brokers or originators are found to have violated bank policies, applicable laws, or the provisions of their agreements, other than on a clearly isolated and inadvertent basis, institutions should take prompt and appropriate corrective action, including modification of loan terms and termination of the relationship with the third party in question.

CONCLUSION

National banks may confront risks when they obtain loans through brokers or through purchase transactions that contain or reflect abusive lending practices. This advisory letter summarizes those risks and conveys the expectation of the OCC that national banks will take affirmative steps to avoid them. Failure to do so could raise serious supervisory concerns, and could result in supervisory or other actions directed against national banks, their operating subsidiaries, and the third-party brokers and originators involved in the transactions.

For further information concerning the matters discussed in this advisory letter, please contact the Community and Consumer Law Division at (202) 874-5750, the Compliance Division at (202) 874-4428, or the appropriate supervisory office.

David Hamaker
Deputy Comptroller for Compliance

²¹ Documentation reviews may indicate problems such as: (1) an absence of signatures or dates on documents, or missing documents, or evidence that signatures were made on blank documents or were forged; (2) significant variations between the preliminary disclosures required to be provided to customers under TILA or RESPA and the final charges appearing on closing documents; (3) fees that appear to be duplicative, or otherwise unearned and unwarranted; or (4) materially misleading statements or omissions with respect to the costs, benefits, risks, and burdens of the transaction or some aspect thereof.

**OCC ADVISORIES TO NATIONAL BANKS REGARDING
PREDATORY AND ABUSIVE LENDING PRACTICES AND
NOTICE OF REQUEST FOR PREEMPTION DETERMINATION OR ORDER**

--Questions and Answers--

General

What actions is the OCC taking today?

The OCC is issuing two advisory letters containing guidelines to assist national bank efforts to prevent predatory and abusive lending practices in connection with direct loan originations and with broker and third-party originations. It is also publishing a request for preemption determination of a state anti-predatory lending law.

- **Description of the advisory letters**

Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices
(OCC Advisory Letter 2003-2)

This advisory letter sets forth the OCC's supervisory guidance on lending practices that have been called "predatory" or "abusive." Any lending practices that take unfair advantage of borrowers or that have a detrimental impact on communities conflict with the high standards of conduct the OCC expects national banks to observe. Engaging in lending practices that are predatory also subjects banks to legal and supervisory risks.

The advisory letter advises national banks and their operating subsidiaries to take appropriate steps to ensure that they do not become involved in predatory lending. These steps include adopting policies and procedures to ensure that an appropriate determination has been made that a borrower has the capacity to make scheduled payments to service and repay the loan. A loan to a consumer that has been based on the foreclosure value of the collateral rather than on the borrower's ability to repay the loan without resort to the collateral, is fundamentally a predatory loan, and is inconsistent with safe and sound banking practices.

National banks also are advised to adopt policies and procedures to specify whether and under what circumstances they will make loans involving features that have been associated with abusive lending practices, such as frequent, sequential loan refinancings; refinancings of special subsidized mortgages that contain terms favorable to the borrower; balloon payments; prepayment penalties that are not limited to the early years of the loan; interest rate increases upon default; the financing of points and fees; single premium credit life insurance; and mandatory arbitration clauses. Such policies should be adequate to avoid the risk that a transaction could be deemed to involve unfair or deceptive practices. The advisory notes that the OCC has authority to enforce the Federal Trade Commission Act's (FTC Act) prohibition against unfair and deceptive practices, and explains that many predatory practices, such as "loan

flipping” and “equity stripping,” may be unfair or deceptive. The OCC will take supervisory action as appropriate to address such violations of law.

The OCC’s guidance also advises national banks to adopt policies and procedures that reflect the degree of care that is appropriate to the risk of a transaction. In some circumstances, this could include consideration of how the loan meets the borrower’s particular financial circumstances and needs. In addition, to promote credit access, national banks are encouraged to adopt procedures that provide for reporting of good credit histories to the major credit reporting agencies. Finally, the advisory notes that national banks should perform loan documentation reviews to ensure that loans comply with applicable laws and the bank’s policies in this area.

Significantly, the advisory notes that engaging in predatory lending practices also may adversely affect the OCC’s evaluation of a national bank’s CRA performance. For example, if a bank engages in “loan flipping” or “equity stripping” that violates the FTC Act, such practices have an adverse effect on the bank’s CRA evaluation. In addition, if a national bank makes loans without regard to the borrower’s ability to repay the loan, it has engaged in a practice that is inconsistent with helping to meet the credit needs of the community and has not complied with the OCC’s safety and soundness regulatory guidelines. Such a practice also may have an adverse effect on the bank’s CRA evaluation.

Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans
(Advisory Letter 2003-3)

National banks and their operating subsidiaries also can face significant risks when they make loans using brokers or purchase loans from third parties and such loans contain abusive features or reflect predatory lending practices.

This advisory letter states that national banks should take affirmative steps to address the risk that they may acquire predatory loans through broker and loan purchase transactions. Among other things, the advisory states that national banks should have clear procedures for entering into broker and third party originator relationships that delineate any unacceptable characteristics for loans the bank will acquire. As with loan origination policies, national banks should have policies for brokered and purchased loans that address such matters as: loans that are the result of frequent, sequential refinancings; loans that refinance special subsidized mortgages that contain terms favorable to the borrower; loans involving negative amortization, balloon payments and prepayment penalties that are not limited to the early years of the loan; loans that provide for interest rate increases upon default; loans that finance points and fees, including single premium credit life insurance; and loans with mandatory arbitration clauses.

The advisory states that national banks should perform appropriate due diligence before entering into a business arrangement with a broker or third-party loan originator, including conducting background checks on compliance with applicable licensing and consumer protection laws and reviewing litigation, enforcement actions, and consumer complaints against the third party. Based on this due diligence, the advisory recommends that national banks develop approved lists of brokers and originators with whom it will do business.

In addition, the advisory states that national banks should have written agreements with third parties that require brokers to abide by bank policies in this area, applicable law, and to make best efforts to ensure that loans offered to borrowers are consistent with the borrower's needs, objectives, and financial situation. The advisory also notes that Fannie Mae and Freddie Mac have adopted screening procedures to prevent predatory loans from being included in loan pools they purchase for securitization. If national banks obtain mortgage-backed securities from other sources, such as "private label" issuers, they should make reasonable efforts to review the issuer's reputation and the actions taken by the issuer to prevent predatory loans from being included in its pools.

To address another significant risk of consumer abuse involving fraud, national banks are advised to obtain and review written agreements between the borrower and the broker to ensure that the agreement clearly discloses the services the broker will provide and the fees to be paid to the broker, contains a specific request by the borrower for the specified services at that fee, and includes a signed and dated acknowledgement of receipt by the borrower of such agreement prior to performance of the broker's services.

National banks should monitor broker and third-party loan originators for compliance with these policies. When brokers or originators are found to have violated bank policies or applicable laws, banks should take appropriate corrective action, including modification of loan terms and termination of the business arrangement with the third party.

- **Description of the request for preemption determination**

We also expect to publish shortly in the *Federal Register* notice of a request we have received from National City Bank, N.A., National City Bank of Indiana, N.A., and their operating subsidiaries, National City Mortgage Company and First Franklin Mortgage Company, for a determination or order that the Georgia Fair Lending Act (GFLA) does not apply to the banks or their operating subsidiaries. Our *Federal Register* notice describes the statute that governs national banks' real estate lending activities, 12 U.S.C. § 371, the OCC's implementing regulations at 12 C.F.R. Part 34, and, in general, the Constitutional standards that govern our preemption analysis. We will also publish, as an appendix to the notice, the text of National City's request, which discusses in detail why the bank believes that the GFLA is preempted. Our notice will solicit public comment for a period of 30 days after publication.

Why are you releasing your supervisory guidance to national banks about predatory lending on the same day that you publish notice of the preemption request you have received from National City?

We think that it is important to state our views on predatory lending and the receipt of the preemption request provides a timely opportunity to do that. We also recognize that the question of whether or not State anti-predatory lending laws apply to national banks raises related questions about the standards that will apply to national banks if those laws do not apply to national banks. The comprehensive supervisory guidance we have issued today is responsive to such questions. The supervisory guidance contained in the OCC's advisory letters is the strongest statement by any Federal banking regulator to date that predatory and abusive lending

practices are unacceptable in the banks we supervise. Our release of the advisory letters now, as we take up National City's preemption request with respect to the Georgia Fair Lending Act (GFLA), confirms that – whatever our conclusion on the preemption question – the OCC will apply uniform standards nationwide to deter and, if appropriate, to remedy practices that are unsafe or unsound or that take unfair advantage of national banks' borrowers or have a detrimental effect upon their communities.

About the Advisory Letters

Will the OCC examine national banks and their operating subsidiaries to ensure that they have adopted the policies and procedures described in the Advisory Letters?

We expect that national banks and their operating subsidiaries will adopt such policies and procedures as are appropriate to the nature and scope of their operations. As a general matter, if we determine that an institution does not have adequate procedures in place suitable to address the risks it may face, we will advise the bank to take corrective action to address the matter. For example, if an examiner determines that a bank does not have procedures to ensure that loans it originates or purchases will be made based on a determination of the borrower's ability to repay the loan without resort to the collateral the bank will be directed to adopt such procedures. The examiner may further review whether the absence of those procedures has caused the bank to engage in any unsafe and unsound or abusive lending practices for which supervisory action will be necessary.

National banks and their operating subsidiaries are subject to regular examination as part of our comprehensive supervision of those entities. As the advisory letters note, a number of federal laws such as the Home Ownership and Equity Protection Act (HOEPA) and the Fair Housing Act may be implicated by predatory or abusive lending practices and our supervision includes a review for compliance with these laws. In addition, the OCC has a separate department whose function is to receive, review, and respond to consumer complaints against national banks or their subsidiaries.

If the OCC learns -- through its supervision of a bank or through its review of consumer complaints against a bank -- that the bank has engaged in practices that may be abusive, the OCC will appropriate supervisory action if it concludes that the practices are unfair or deceptive under the FTC Act, otherwise unlawful, or inconsistent with safety and soundness standards. Such supervisory action can include enforcement actions that require the bank to provide compensation to affected borrowers. A bank that has strong and effective policies and controls to prevent these practices will mitigate the risks of engaging in unsafe and unsound or unlawful conduct.

Why did you issue supervisory guidance rather than a regulation?

Supervisory guidance is a flexible way to address the number, variety, and complexity of issues that fall under the general category of "predatory lending," without cutting off fair access to

credit to low- and moderate-income borrowers. The advisory letters set out uniform and comprehensive standards to assist national banks in avoiding practices that are predatory or abusive, or from acquiring loans that contain reflect such practices. The advisory letters also state the OCC's intention to review evidence that a national bank or its operating subsidiary has engaged in an abusive lending practice under the unfair and deceptive practices standards of the FTC Act. The OCC believes that broad supervisory guidance and application of the FTC Act standards is a particularly appropriate way to ensure that abusive lending practices are not occurring in the national banking system because such determinations are inherently fact specific. The OCC does not have evidence to suggest that national banks are originating predatory loans or that proscriptive regulations are needed at this time to address such conduct. The advisory letters make sufficiently clear that predatory lending practices will not be tolerated within the national banking system.

About the Preemption Notice

How does National City's preemption request differ from other, similar requests that the OCC has received and published for comment?

The National City covers a different subject matter than other preemption questions that national banks have raised over the last several years. National City's request pertains primarily to the effect of the GFLA on the bank's exercise of its real estate lending powers. These powers are governed by the Federal statute that authorizes national banks to engage in real estate lending, 12 U.S.C. § 371, and by Part 34 of the OCC's regulations. Other recent preemption requests have included, for example, requests for opinions with respect to the applicability, under certain provisions of the Gramm-Leach-Bliley Act (GLBA), of State insurance sales laws to national banks insurance sales, solicitation, and cross-marketing activities. National banks and the OCC have also been involved in litigation over the applicability of State restrictions on fees (such as ATM convenience fees, and so-called "on us" check cashing fees) to national banks.

The National City request also differs procedurally from others that we have seen recently. National City is asking the OCC for a "determination or order" that provisions of the GFLA are preempted. The national bank real estate lending statute – 12 U.S.C. § 371 – specifically authorizes the OCC to issue an order with respect to the conditions that apply to national bank real estate lending. Unlike our legal opinions, which simply express the OCC's views about whether a Federal court is likely to find that a particular State law is preempted, an order would have the binding force and effect of law.

Given that 12 U.S.C. § 371 authorizes the OCC to set conditions on national banks' real estate lending activities, will the determination or order you issue to National City contain conditions on that bank's ability to engage in real estate lending? Will the conditions include the standards set forth in the advisories you've issued today?

The authority expressly granted to the OCC by section 371 enables us to address the conditions

that do apply to national bank real estate lending activities, as well as the conditions that do not apply. Our determination or order in the National City matter will address whether various provisions of the GFLA apply to condition the bank's real estate lending activities because that is the issue the bank has presented to us. Whether it is appropriate, or necessary, to specify affirmative conditions that apply as a matter Federal law will depend on our evaluation of the merits of this matter, which will not conclude until after the public comment period has closed.

Why are you reviewing the Georgia Fair Lending Act now when the Georgia legislature is considering amendments that would substantially revise that law?

In its letter to us, which is published as an appendix to our *Federal Register* notice, National City has represented that the proposed amendments to the Georgia statute would not affect many of the provisions that it argues are preempted. We will, of course, conduct our own review of the Georgia law, including any amendments that may be enacted, as part of our preemption analysis.

If you conclude that the GFLA is preempted, will that same conclusion apply to anti-predatory lending statutes in other states, such as New York?

Whatever conclusions the OCC reaches with respect to the Georgia law will apply only to the Georgia law. The provisions of other States' laws would need to be analyzed and evaluated separately.

National City's request asserts that 12 U.S.C. § 371 "occupies the field" of real estate lending. If that's true, doesn't this mean that all state and local anti-predatory lending laws would be preempted?

As is described in our *Federal Register* notice, National City has argued that § 371, together with the relevant provisions of Part 34 of the OCC's regulations, evidence a presumption that State law does not apply to the real estate lending activities of national banks and their operating subsidiaries unless the OCC determines, pursuant to its regulations, that a particular State law is not preempted. National City argues, in effect, that the statute and regulations leave no room for State regulation of real estate lending by national banks or their operating subsidiaries – that the statute and regulations together occupy that field.

Even if we conclude that National City's analysis in this respect is correct, our regulations require us to review the specifics of any State law that a bank may argue is preempted. Our regulations, at 12 C.F.R. § 34.4(a), contain a list of five types of State law limitations that do not apply to real estate loans made by national banks or their operating subsidiaries. The same rules, at § 34.4(b), say that the OCC will apply "recognized principles of Federal preemption" in considering whether other types of State laws – those not enumerated in the list at § 34.4(a) – apply. For purposes of issuing a determination or order under § 371, we will analyze whether a particular provision of the GFLA falls within the list of types of laws already expressly preempted under our regulation. If a provision of the GFLA does not fall within that list, we will apply "recognized principles of Federal preemption" to determine whether the provision applies. In either case, our conclusion will depend on the content of the particular State law, so that broad

generalizations about the applicability of all State anti-predatory lending laws would not be appropriate.

National City's request pertains to the bank itself and to two mortgage banking operating subsidiaries of the bank. If the Georgia law is preempted, what sorts of protections will consumers have who borrow from the mortgage banking subsidiaries?

Unless Federal law requires otherwise, the mortgage banking subsidiaries are subject to the same laws that apply to their parent bank. Thus, the consumer protections that apply in the case of the parent bank -- including the anti-predatory lending standards in the Home Ownership and Equity Protection Act and the OCC's advisories -- apply to all loans made by the mortgage banking subsidiaries. Moreover, these subsidiaries are subject to the OCC's supervision and regulation. As a result, their lending operations are examined by the OCC, and the OCC has the same broad range of enforcement tools available to address violations of law by the subsidiaries as we have in dealing with the parent bank.

The OTS has recently issued an opinion indicating that provisions of the GFLA are preempted with respect to Federal savings associations. How will your analysis differ from the OTS's?

National banks and Federal thrifts are Federal instrumentalities with comparable charters. In many cases, both types of entities are governed by similar Federal laws. There are, however, differences between the statutory powers given to the two types of entities. We will, of course, be looking specifically at the powers granted to national banks under the national banking laws and regulations, whereas OTS's analysis was based on provisions of the Home Owners' Loan Act and Federal thrift regulations.

[BILLING CODE 4813-33-P]

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket No. 03-04]

Notice of Request for Preemption Determination or Order

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is publishing for comment a request by National City Bank, N.A., National City Bank of Indiana, N.A., and their operating subsidiaries, National City Mortgage Company and First Franklin Financial Company (referred to collectively in this notice as National City) for a determination or order under 12 U.S.C. 24(Seventh), 12 U.S.C. 371 and the OCC's implementing regulations, that the Georgia Fair Lending Act does not apply to National City. The purpose of this notice is to afford interested persons and affected parties an opportunity to submit comments before the OCC issues any determination or order responding to this request.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]

ADDRESSES: Please direct your comments to: Office of the Comptroller of the Currency, 250 E Street, SW, Public Information Room, Mailstop 1-5, Attention: Docket No. 03-04, Washington, DC 20219, fax number (202) 874-4448, or Internet address: regs.comments@occ.treas.gov. Due to delays in paper mail delivery in the Washington area,

commenters are encouraged to submit their comments by fax or e-mail. Comments may be inspected and photocopied at the OCC's Public Reference Room, 250 E Street, SW, Washington, DC 20219. You can make an appointment to inspect or photocopy the comments by calling (202)874-5043.

FOR FURTHER INFORMATION CONTACT: Michele Meyer, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090.

SUPPLEMENTARY INFORMATION: The Georgia Fair Lending Act (GFLA)¹ became effective October 1, 2002. The GFLA restricts the ability of creditors or servicers to charge certain fees and engage in certain practices for three categories of loans defined by the GFLA: "home loans," "covered home loans," and "high-cost home loans." The characterization of a loan within each of these categories depends on the annual percentage rate and the amount of points and fees charged.² All "home loans" are subject to certain restrictions on the terms of credit and loan-related fees, including prohibitions on the financing of credit insurance, debt cancellation coverage or suspension coverage, and limitations on late fees and payoff statement fees.

In addition to the restrictions on "home loans," "covered home loans" are subject to restrictions on the number of times a loan may be refinanced and the circumstances in which a refinancing may occur. For example, the GFLA prohibits a creditor from refinancing an existing home loan that is less than five years old with a "covered home loan" that does not provide a reasonable "tangible net benefit" to the borrower considering all the circumstances.

¹ The GFLA is to be codified as GA Code. Ann. §§ 7-6A-1 *et seq.*

² *See* GFLA § 7-6A-2.

“High-cost home loans” are subject to the restrictions on “home loans” and “covered home loans,” as well as numerous disclosure requirements and restrictions on the terms of credit and loan-related fees. Creditors must disclose to borrowers that the loan is high-cost, and borrowers must attend loan counseling before the creditor may make the loan. In addition, the GFLA prohibits pre-payment penalties, balloon payments, negative amortization, increases in the interest rates after default, advance payments from loan proceeds, fees to modify, renew, extend, amend or defer a payment, and accelerating payments at the creditor’s or servicer’s sole discretion.

National City requests the OCC to issue a determination or order that 12 U.S.C. 24(Seventh), 12 U.S.C. 371 and their implementing regulations preempt the GFLA. A copy of the request appears as an Appendix to this notice. We will publish any final determination or order responding to National City’s request in the Federal Register.

Regardless of the ultimate conclusion reached regarding preemption of the GFLA or any other similar state or local law, abusive and predatory lending practices that take unfair advantage of borrowers, or have a detrimental effect on communities, may violate a number of federal laws, and do conflict with the high standards by which the OCC expects national banks to conduct their operations. Accordingly, concurrent with issuance of this Notice of Request for Preemption Determination or Order, the OCC is issuing two Advisory Letters. Advisory Letter 2003-2, “Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices,” February 21, 2003, and Advisory Letter 2003-3, “Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans,” February 21, 2003. Together these two

Advisory Letters set forth standards that should assure that national banks are not directly involved, or indirectly associated with, predatory or abusive lending practices.

Issues Presented by National City's Request

National City has the asked the OCC to determine that 12 U.S.C. 24(Seventh) and 371 preempt the GFLA. This request requires determining whether “Congress, in enacting the Federal Statute, intend[ed] to exercise its constitutionally delegated authority to set aside the laws of a State.” Barnett Bank of Marion County, N.A. v. Nelson, et al.³

Central to the issues raised by National City is 12 U.S.C. 371, which vests in the OCC comprehensive authority to regulate and restrict the real estate lending activities of national banks. Section 371 provides:

[a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

The exercise of the powers granted by section 371 is not conditioned on compliance with any state requirement.⁴ Notably, the exercise of powers under that section is subject only to such rules and regulations as the Comptroller may prescribe.

In Barnett, the Supreme Court analyzed a similarly structured statute, 12 U.S.C. 92 and the extent to which section 92 leaves room for state regulation of the activities the statute

³ 517 U.S. 25, 30 (1996).

⁴ Subsequent Federal legislation may provide, however, that national banks shall conduct certain activities subject to state law standards. For example, national banks conduct insurance sales, solicitation, and cross-marketing activities subject to certain types of state restrictions expressly set out in the Gramm-Leach-Bliley Act. *See* 15 U.S.C. 6701(d)(2)(B). There is no similar Federal legislation subjecting national banks' real estate lending activities to state law standards.

authorizes. There, the Supreme Court stated that:

[section 92's] language suggests a broad, not a limited, permission. That language says, without relevant qualification, that national banks “may . . . act as the agent” for insurance sales. 12 U.S.C. § 92. It specifically refers to “rules and regulations” that will govern such sales, while citing as their source not state law, but the federal Comptroller of the Currency.⁵

The Court concluded that “where Congress has not expressly conditioned the grant of ‘power’ upon a grant of state permission, the Court has ordinarily found that no such condition applies.”⁶

The Congressional delegation to the Comptroller of authority under section 371 mentions only conditions imposed by the OCC for national banks pursuant to section 1828(o) and “such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.” It makes no mention of conditions imposed by state law. Citing the judicial maxim of statutory interpretation expressio unius est exclusio alterius (“mention of one thing implies exclusion of another”), National City contends that this plain language evidences a Congressional intent to permit only the OCC to impose conditions on national bank real estate lending regulation, leaving no room for state involvement.

The legislative history of section 371 lends support to this construction. National banks’ real estate lending activities have consistently been subject to comprehensive Federal regulation ever since the authority to lend on the security of real estate was first granted to them in the Federal Reserve Act of 1913. For many years, national banks’ real estate lending authority was governed by the express terms of section 371. As originally enacted in 1913, section 371

⁵ Barnett, 517 U.S. at 32.

contained a limited grant of authority to national banks to lend on the security of “improved and unencumbered farm land, situated within its Federal reserve district.”⁷ In addition to the geographic limits inherent in this authorization, the Federal Reserve Act also imposed limits on the term and amount of each loan as well as an aggregate lending limit. Over the years, section 371 was repeatedly amended to broaden the types of real estate loans national banks were permitted to make, to expand geographic limits, and to modify loan term limits and per-loan and aggregate lending limits. In 1982, Congress removed these “rigid statutory limitations”⁸ in favor of a broad provision authorizing national banks to “make, arrange, purchase, or sell loans or extensions of credit secured by liens on interest in real estate, subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency by order, rule, or regulation.”⁹ The purpose of the 1982 amendment was “to provide national banks with the ability to engage in more creative and flexible financing, and to become stronger participants in the home financing market.”¹⁰ In 1991, Congress removed the term “rule” from this phrase¹¹ and enacted an additional requirement, codified at 12 U.S.C. 1828(o), that national banks (and other insured depository institutions) conduct real estate lending pursuant to “uniform standards” adopted at the Federal level by regulation of the OCC and the other Federal banking agencies.¹² Thus, the history of national banks’ real estate lending activities under section 371 is one of extensive Congressional involvement gradually giving way to a streamlined approach in which

⁶ *Id.* at 34.

⁷ Federal Reserve Act, ch. 6, § 24, 38 Stat. 251, 273 (1913).

⁸ S. Rep. No. 97-536, at 27 (1982).

⁹ Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97-320, § 403, 96 Stat. 1469, 1510-11 (1982).

¹⁰ S. Rep. No. 97-536, at 27 (1982).

¹¹ This language was changed without explanation.

¹² Section 304 of the Federal Deposit Insurance Corporation Improvement Act, 12 U.S.C. 1828(o). These standards governing national banks’ real estate lending are set forth in Subpart D of part 34.

Congress has delegated broad authority to the Comptroller.¹³ It may therefore be argued that section 371 evidences an intent for the OCC to occupy the field of regulation of national banks' real estate lending except, of course, where Congress in other legislation has made them subject to additional requirements, e.g. the Truth in Lending Act.¹⁴

The OCC has implemented section 371 in regulations set forth at 12 CFR part 34. Subpart A of part 34, by its terms, applies to both national banks and their operating subsidiaries.¹⁵ Twelve CFR 34.3 establishes the general rule that a national bank and its operating subsidiaries may engage in real estate lending subject only to the "terms, conditions, and limitations prescribed by the Comptroller of the Currency by regulation or order." Twelve CFR 34.4(a) expressly provides that five types of state law limitations are not applicable to real estate loans made by national banks and their operating subsidiaries:

- (a) Specific preemption. A national bank may make real estate loans under 12 U.S.C. 371 and § 34.3 without regard to State law limitations concerning:
- (1) The amount of a loan in relation to the appraised value of the real estate;
 - (2) The schedule for the repayment of principal and interest;
 - (3) The term to maturity of the loan;
 - (4) The aggregate amount of funds that may be loaned upon the security of real estate;
- and
- (5) The covenants and restrictions that must be contained in a lease to qualify the

¹³ We note that in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1946), the Supreme Court considered a statute that had been similarly revised to delegate exclusive authority under it to the Secretary of Agriculture. Even though the statutory revision in question in *Rice* authorized the Secretary "to cooperate with State officials," the Supreme Court found the revision evidence that Congress acted "so unequivocally as to make clear that it intends no regulation except its own." *Id.* at 236.

¹⁴ 15 U.S.C. 1601 et seq.

leasehold as acceptable security for a real estate loan.

It would appear that a number of GFLA provisions fall within the scope of § 34.4(a). For example, National City argues that a number of GFLA prohibitions, including those on balloon payments, negative amortization, advance payments from the loan proceeds and acceleration at the creditor's or servicer's discretion, are state law limitations concerning the "schedule for the repayment of principal and interest" and are therefore preempted by § 34.4(a)(2).

Twelve CFR 34.4(b) states:

The OCC will apply recognized principles of Federal preemption in considering whether State laws apply to other aspects of real estate lending by national banks.¹⁶

It may be argued that the structure of section 371 and § 34.3, together with the express preemption delineated in § 34.4(a), evidence a presumption that state law does not apply to the real estate lending activities of national banks and their operating subsidiaries unless the OCC determines under § 34.4(b) that a particular state law is not preempted. In other words, in "considering whether state laws apply" for purposes of issuing an order under section 371, the OCC could either issue an order confirming that the law is not applicable or providing that it will be applicable after applying the "recognized principles of preemption" referred to in § 34.4(b). Thus, in effect, National City argues that section 371 authorizes the OCC to "occupy the field" of real estate lending regulation for national banks, and that, through its regulations, including § 34.4(a) and (b), the OCC has done so.

Thus, in order to implement § 34.4(b) to determine whether any of the GFLA provisions not otherwise preempted under § 34.4(a) apply to National City, the OCC examines whether the

¹⁵ See 12 CFR 34.1(b).

state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁷ In the present context, the OCC must examine the effect that the state law provisions have on a national bank’s exercise of the federally authorized power to engage in real estate lending granted by Federal statutes, including 12 U.S.C. 371.¹⁸ As set out in detail in its request, National City asserts that various GFLA provisions place impermissible limits on the exercise of national banks’ real estate lending powers under 12 U.S.C. 371 and place impermissible limits on the exercise of national banks’ authority to lend money generally under 12 U.S.C. 24(Seventh) and to charge fees for lending products or services.¹⁹

National City accordingly requests the OCC to issue a determination or an order under 12 U.S.C. 24(Seventh) and 12 U.S.C. 371 that the identified provisions of the GFLA do not apply to National City.

¹⁶ See 12 CFR 24.4(b).

¹⁷ Barnett, 517 U.S. at 31, quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

¹⁸ As explained below, National City also argues that a number of GFLA provisions impair the bank’s ability to exercise its general lending authority under 12 U.S.C. 24(Seventh).

¹⁹ The OCC’s regulation at 12 C.F.R. 7.4002 reaffirms this ability to charge a fee for a bank’s services.

Request for Comments

The OCC solicits comment on the issues raised by the National City request.

Dated: _____, 2003

John D. Hawke, Jr.

Comptroller of the Currency.

Appendix – National City’s Request

February 11, 2003

Julie L. Williams

First Senior Deputy Comptroller of the Currency and Chief Counsel

Office of the Comptroller of the Currency

250 E. Street, SW

Washington, DC 20219

Re: Request for Preemption Determination or Order

Dear Ms. Williams:

On behalf of National City Bank, National City Bank of Indiana and its operating subsidiaries First Franklin Financial Corporation and National City Mortgage Co. we hereby request the Office of the Comptroller of the Currency (“OCC”) to issue a preemption determination or Order under 12 USC § 371 that the Georgia Fair Lending Act (“GFLA”) is preempted by federal law and regulations, specifically 12 USC §§ 24 (Seventh), 371 and 484 and 12 CFR §§ 34.1(b), 34.3, 34.4, 7.4002 and 7.4006 as it relates to a national bank and its operating subsidiaries in the exercise of their federally granted real estate lending powers.

I. Background

A. The Requesting Parties

National City Bank and National City Bank of Indiana both are national banks, chartered, regulated, and supervised by the OCC. National City Mortgage Co. and First Franklin Financial Corporation are wholly owned operating subsidiaries of National City Bank of Indiana and are similarly regulated and supervised by the OCC.

National City Bank originates in its own name and funds home equity loans and lines of credit on a nationwide basis. National City Mortgage Co. originates in its own name and funds first and second mortgage loans throughout the United States for the purpose of financing and refinancing the acquisition and construction of real property consisting of one to four family residential dwellings. First Franklin Financial Corporation originates in its own name and funds first and second mortgage loans that enable borrowers to acquire and refinance one to four family residential real property. In this request, National City Bank, National City Mortgage Co. and First Franklin Financial Corporation are collectively referred to as “National City.” National City receives loan applications from third party mortgage brokers, and those mortgage brokers perform many services resulting in the origination of the loans and lines of credit by National City in its own name.

B. The Georgia Fair Lending Act

The GFLA became effective on October 1, 2002. In the enactment of GFLA the Georgia Legislature was attempting to address abuses it perceived in the marketplace that disadvantaged persons who may have impaired credit or were unfamiliar with real estate lending procedures and terms. There may be a legitimate state purpose for regulation of lending practices which are otherwise unsupervised. However, that purpose has no applicability to national banks and their operating subsidiaries, which are subject to comprehensive regulation and supervision by the OCC as required by federal law.

GFLA restricts national banks and their operating subsidiaries’ ability to originate mortgage loans in the state of Georgia, set interest rates, fees and credit terms, establish disclosures and utilize the services of third party mortgage brokers in the origination process.

GFLA applies to all consumer-purpose loans and lines of credit secured by borrower-occupied one to four family residential property within the conforming loan limit set by FNMA for a single-family dwelling except reverse mortgages, bridge loans and loans which are also secured by personal property (“Home Loan”). Certain of GFLA’s restrictions apply to all Home Loans. Other limitations apply to one or both of the two sub-categories of Home Loans created by GFLA as it was originally enacted: Covered Home Loans and High Cost Home Loans. Whether a Home Loan fits into these categories depends on the loan’s interest rate and fees and charges. The fees and charges which cause a Home Loan to be categorized as a Covered Home Loan or High Cost Home Loan include the fees paid to a third party mortgage broker.

GFLA establishes specific and burdensome limitations on mortgage–secured loans and lines of credit that significantly interfere with National City’s ability to make these loans. All Home Loans are subject to restrictions on the terms of credit and certain loan related fees, including the prohibition of financing of credit insurance, debt cancellation and suspension coverage, and limiting late charges and prohibiting payoff and release fees. If the loan or line of credit is a Covered Home Loan which refinances a Home Loan which was closed within the previous five years, National City is restricted from originating it unless the refinanced transaction meets standards established by GFLA. If the loan or line of credit is a High Cost Home Loan, GFLA does not permit National City to originate it unless the borrower has received advance counseling with respect to the advisability of the transaction from a third party nonprofit organization. GFLA regulates National City’s ability to determine the borrower’s ability to repay the High Cost Home Loan. GFLA restricts, and in some cases prohibits, the imposition by National City of certain credit terms or servicing fees on High Cost Home Loans,

including: prepayment penalties, balloon payments, advance loan payments, acceleration in the lender's discretion, negative amortization, post-default interest and fees to modify, renew, amend or extend the loan or defer a payment. Any High Cost Home Loan must contain a specific disclosure that it is subject to special rules, including purchaser and assignee liability, under GFLA. Finally, GFLA imposes pre-foreclosure requirements.

GFLA currently creates strict assignee liability for all subsequent holders of a home loan. GFLA provides a private right of action for borrowers against lenders, mortgage brokers, assignees and servicers for injunctive and declaratory relief as well as actual damages, including incidental and consequential damages, statutory damages equal to forfeiture of all interest or twice the interest paid, punitive damages, attorneys' fees and costs. In addition, the Georgia Attorney General, district attorneys, the Commissioner of Banking and Finance and, with respect to the insurance provisions, the Commissioner of Insurance has the jurisdiction to enforce GFLA through their general state regulatory powers and civil process. Criminal penalties are also available.

The uncapped investor liability caused Standard & Poors, Moody's Investor Services and Fitch Ratings to cease rating any security that includes GFLA-governed loans. As of February 4, 2003 Fitch Ratings declined to rate Georgia Home Loans in RMBS pools. Fitch ratings also announced that it was considering the impact of further state and local predatory lending legislation on its ability to rate transactions. As a result, the GFLA impairs National City's ability to securitize or sell their loans on the secondary market.

In light of the recent pronouncements by the securities rating agencies, the Georgia Legislature is considering amendments to GFLA which could limit or eliminate liability for

assignees and purchasers, remove the category of Covered Loans and make other substantive changes to the law. These proposed changes, if enacted, will reduce the number of loans categorized as High Cost Home Loans and might provide limited safe harbors for refinancings. However, the proposed amendments would not affect the restrictions on loan fees and terms for Home Loans and High Cost Home Loans and the preconditions for originating a High Cost Home Loan. One proposal would also restrict the refinancing of any Home Loan originated in the previous five years unless the refinancing meets GFLA's standards. Therefore, the proposed amendments do not obviate National City or any other national banking organization's need for a preemption determination.

C. Impact of GFLA on National City's Real Estate Lending in Georgia

The effect of GFLA is to limit National City's ability to originate and to establish the terms of credit on residential real estate loans and lines of credit, including loans or lines of credit submitted by a third party mortgage broker. GFLA has significantly impaired National City's ability to originate residential real estate loans in Georgia.

In addition to preventing National City from exercising its fundamental powers to engage in residential real estate transactions and to incorporate credit terms that National City feels may be necessary to lend in a safe and sound manner, GFLA has also adversely affected the investor market for Georgia loans. The restrictions imposed by GFLA have lead the Government Sponsored Enterprises ("GSE's") to limit the loans they will purchase from National City and other originators, and Standard and Poors, Fitch Ratings and Moody's Investor Service have publicly stated they will not allow a GFLA governed loan in a rated structured financial transaction. This is another example of how the GFLA adversely affects National City's ability

to sell or securitize loans.²⁰

II. Reasons Supporting the Requested Preemption of GFLA

A. GFLA Is Preempted by Paramount Federal Law

National banks and their operating subsidiaries have broad authority to originate and establish the terms and conditions of mortgage loans, subject only to the paramount regulations and orders established by the Office of the Comptroller of the Currency (“OCC”).

Federal law may preempt state law (1) where Congress has expressly preempted state law, (2) where Congress has occupied the field the state seeks to regulate, and (3) where state law actually conflicts with federal law. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300 (1988). In applying the test put forth by the United States Supreme Court in Barnett Bank, N.A. v. Nelson, 517 U.S. 25 (1996), 134 L. Ed.2d 237 to the facts here it is clear that Congress provided national banks with a broad grant of powers under 12 USC § 24 (Seventh) and a specifically broad grant of powers for real estate lending pursuant to 12 USC § 371. This grant of power to permit real estate lending is the exact activity which GFLA restricts. The State’s prohibitions under GFLA “stand as an obstacle to the accomplishment” of one of the federal statute’s purposes, Hines v. Davidowitz, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941).

Twelve USC § 371 occupies the field of mortgage lending subject only to such regulations and orders as are adopted by the OCC. The Supreme Court has recognized that state law generally should not limit powers granted by Congress --

In using the word “powers,” the statute chooses a legal concept that, in the context of national bank legislation, has a history. That history is one of interpreting grants of

²⁰ We note that other states and localities have passed similar restrictions that also adversely affect National City’s

both enumerated and incidental “powers” to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law. *Barnet Bank v. Nelson*, 517 U.S. 25 at 32 (1996). See also *Bank One v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999).

The Supreme Court has held that federal law preempts not only state laws that purport to prohibit a national bank from engaging in an activity permissible under federal law but also state laws that condition the exercise by a national bank of a federally authorized activity.

[W]here Congress has not expressly conditioned the grant of ‘power’ upon a grant of state permission, the Court has ordinarily found that no such condition applies.

In *Franklin Nat. Bank*, the Court made this point explicit. It held that Congress did not intend to subject national banks’ power to local restrictions because the federal power-granting statute there in question contained ‘no indication that Congress [so] intended...as it has done *by express language* in several other instances.’ *Barnett*, 517 U.S. at 34 (citations omitted; emphasis in original).

As was the case in Barnett, Congress placed no restrictions in 12 USC § 371 on the ability to conduct real estate lending activities other than by rules and/or regulations as may be promulgated by the OCC. The OCC has done so by promulgating 12 CFR § 34, which by its terms reserves no right to the states to regulate in the area of real estate lending by a national bank or its operating subsidiary. National City is of the opinion as supported by the Supreme Court’s decision in Barnett that the federal statute governing the power of a national bank to lend

creates a scheme of federal law and regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.

Therefore, a conflict between GFLA and federal law need not be complete in order for federal law to have preemptive effect. If, as here, the state law (GFLA) places limits on an unrestricted grant of authority under federal law, the state law (GFLA) is preempted.

B. The Preemption Analysis Applicable to National Banks Applies with Equal Force to National Bank Operating Subsidiaries

In section 121 of the Gramm Leach Bliley Act (“GLBA”), Congress expressly acknowledged that national banks may own subsidiaries that engage “solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks.” 12 USC § 24 a(g)(3).

Consistent with section 121, the OCC regulations state that “[a]n operating subsidiary conducts activities authorized under [12 C.F.R. § 5.34] pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank. 12 C.F.R. § 5.34(e)(3); See also 12 CFR § 7.4006.

National City’s operating subsidiaries are conducting mortgage lending and servicing activities as permitted for a national bank pursuant to 12 U.S.C. § 24(Seventh), 12 U.S.C. § 371, and 12 C.F.R. § 5.34(e)(5)(v). As such, they are subject to federal law and States do not have the right to limit the powers over a national bank or its operating subsidiaries in the conduct of these real estate lending activities, except where such authority is specifically granted by *federal* law, which is not the case here. Like the Bank, the operating subsidiaries are examined on a

continuous basis by OCC examiners specifically assigned to, and in most cases physically present at, the facilities of the Banks and their operating subsidiaries.

C. National Bank Real Estate Powers and Part 34 of the Comptroller's Regulations

The National Bank Act's underlying objective is to create a uniformly regulated national banking system. The National Bank Act is a comprehensive statute which governs not only the internal workings of national banks, but also their powers, and virtually all aspects of their regulation is the exclusive responsibility of the OCC. See OCC Unpublished Interpretive Letter dated September 5, 1989 (holding that a Wisconsin statute imposing notification filing and fee requirements on lenders making certain consumer loans was preempted for national banks); OCC Advisory Letter 2002-9. In section 24 (Seventh) of the National Bank Act, 12 USC § 24(Seventh) Congress granted national banks the power to exercise, "by its board of directors or duly authorized officers or agents, ...all such incidental powers as shall be necessary to carry out the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; ...[and] by loaning money on personal security;..." Congress further specifically authorized national banks to engage in real estate lending beginning with the Act of September 7, 1916. From 1916 to 1982, in the statutory predecessors to the present 12 USC § 371, Congress gradually broadened the scope of national bank authority to make real estate loans, culminating in the enactment of the Garn-St. Germain Depository Institutions Act of 1982 (Garn-St. Germain"). Prior to Garn-St. Germain, 12 USC § 371 contained specific provisions establishing maximum loan to value ratios, amortization requirements, maximum loan maturity and aggregate limits on the amount of real estate loans a national bank could make or purchase. In Garn-St. Germain, Congress removed these

limitations entirely, and gave national banks unlimited power to engage in real estate lending subject only to the regulations and orders established by the OCC. Thus, the history of national bank power to engage in real estate lending demonstrates Congressional intent to occupy the field, and to replace Congressional control over the terms of national banks' real estate lending with a complete delegation of control to the OCC as the ultimate arbiter of the national bank's exercise of those powers. Further, section 371 is an illustration of the familiar maxim of statutory construction: *expressio unius est exclusio alterius*; in that the specificity of the grant of authority to engage in real estate lending leaves no room for state law or regulation.

Currently, section 371 provides as follows:

Authorization to make real estate loans; orders, rules and regulations of Comptroller of the Currency. Any national banking association may make, arrange, purchase or sell loans or extension of credit secured by liens on interests in real estate, subject to section 18(o) of the Federal Deposit Insurance Act [12 USCS §1828(o)] and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.²¹

The OCC fully implemented the authority granted by Garn-St. Germain in 1983 by amending or removing the interpretive rulings regarding real estate lending that had their origins in earlier versions of 12 USC § 371 and promulgated Part 34, which comprehensively defines real estate lending by national banks. Part 34 recognizes that the forms and terms of national

²¹12 USC § 1828(o) authorized the OCC to establish uniform regulations for real estate secured extensions of credit. In adopting such regulations, the OCC is required to consider: the risk posed to the deposit insurance funds by real estate lending; the need for safe and sound operation of the insured institutions; and the availability of credit. The OCC is authorized to permit differing standards among the types of real estate-secured loans, as warranted by federal law, the risk to the federal deposit insurance fund, and based on considerations of institutional safety and soundness. Thus, Congress has instructed the OCC to exercise its supervisory authority over real estate lending in support of

bank lending must be determined by the management of national banks themselves, to enable the banks to have the necessary flexibility to respond to market conditions. OCC regulatory authority insures that national banks do so prudently and in a safe and sound manner. Part 34 also clarifies the scope of federal preemption of state laws that could impact real estate lending activities by national banks.

The pertinent regulations provide:

§ 34.3 General rule.

A national bank may make, arrange, purchase or sell loans or extensions of credit, or interests therein, that are secured by liens on, or interests in, real estate, subject to terms, conditions, and limitations prescribed by the Comptroller of the Currency by regulation or order.

§ 34.4 Applicability of State law.

(a) Specific preemption. National banks may make real estate loans under 12 U.S.C. 371 and § 34.3 without regard to state law limitations concerning:

- (1) The amount of a loan in relation to the appraisal value of the real estate;
- (2) The schedule for the repayment of principal and interest;
- (3) The term to maturity of the loan;
- (4) The aggregate amount of funds that may be loaned upon the security of real estate; and
- (5) The covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

mandates found in federal law alone.

(b) General standards. The OCC will apply recognized principles of Federal preemption in considering whether State laws apply to other real estate lending activities of national banks.

The provisions of GFLA which fall within the scope of 12 CFR § 34.4(a)'s specific state law preemptions fall without need for further analysis. Other provisions of GFLA can be analyzed under 12 CFR § 34.4(b). OCC regulations specifically provide that the provisions of 12 CFR § 34.4 are applicable to both national banks and their operating subsidiaries. See 12 CFR § 34.1(b).

1. Provisions of GFLA Which are Preempted under 12 CFR § 34.4(a)

Taken together, the provisions of 12 CFR § 34.4(a)(1)-(4) which remove any limits on loan to value ratios, amortization requirements, maturity requirements and aggregate loan limits preempt state laws which impair a national bank or its operating subsidiary's ability to make any real estate-secured loan. Three aspects of GFLA run afoul of this preemption; the restrictions on a national bank's ability to refinance certain Home Loans made in the previous five years; the prohibition on making a High Cost Home Loan unless the borrower has first received counseling from a third party regarding the advisability of the transaction; and the prohibition on making a High Cost Home Loan unless the borrower meets GFLA's standards as to his or her ability to repay the loan. These restrictions not only impair National City's ability to determine the aggregate amount of loans it will originate in Georgia, they also impact loan to value ratios, amortization requirements and determination of loan maturity.

GFLA's prohibition of balloon payments, negative amortization and advance payments from the loan proceeds are specifically preempted under 12 CFR § 34.4(a)(2), and 12 CFR §

34.4(a)(3) preempts GFLA's prohibition of a loan term that prevents the lender from accelerating a High Cost Home Loan in the exercise of its discretion. See OCC Unpublished Interpretive Letter dated December 8, 1983 (preempting a Massachusetts law restricting balloon and demand payment terms) and OCC Unpublished Interpretive Letter dated May 9, 1988 (national banks are not required to amortize real estate loans and contrary state laws are preempted). The OCC has also held that all state law disclosure requirements for real estate secured loans are preempted. See OCC Unpublished Interpretive Letter dated March 30, 1988.

2. Provisions of GFLA Which Are Preempted Under 12 CFR

§ 34.4(b)

The five areas delineated in 12 CFR § 34.4(a) are not the exclusive areas where federal law preempts state laws affecting national bank real estate lending activities. 61 FR 11294 (March 20, 1996)..Those provisions of the GFLA that are not already preempted under 12 CFR § 34.4(a) are preempted under 12 CFR § 34.4(b) either because they are inconsistent with the comprehensive authority granted to the OCC under section 371 to regulate the real estate lending activities of national banks or applying the conflict analysis in Barnett. With regard to the latter analysis, the provisions of GFLA which prohibit the financing of credit insurance, debt cancellation or suspension coverage, limit late payment charges and prohibit payoff and release fees for Home Loans and restrict or prohibit prepayment penalties, post-default interest and fees for modification, extension or deferral of payments for High Cost Home Loans would seem to “stand as an obstacle to the accomplishment” of one of the federal statute’s purpose – that being the authorization to make real estate loans subject only to such restrictions and regulations as the OCC may prescribe. See Barnett 517 U.S. 25, at 31; and 12 U.S.C. § 1828(o). These provisions

are an impermissible attempt by the state of Georgia to condition the exercise of national bank lending powers which are authorized by federal law. Bank of America, National Trust & Sav. Asso. v. Lima, 103 F. Supp. 916 (D. Mass. 1952). GFLA's compliance provisions include the potential threat of litigation including uncapped damages and the application of the foreclosure provisions. These aspects of GFLA not only have more than an incidental chilling affect on the operations of national banks and their operating subsidiaries, but the compliance scheme, which includes enforcement by state regulators, directly conflicts with the exclusive grant of visitorial power to the OCC in 12 USC § 484. See OCC Advisory Letter 2002-9.

D. Preemption of GFLA's Restrictions on the Use of Mortgage Brokers in the Loan Origination Process

12 USC § 24 (Seventh) and 12 CFR § 7.1004 permit a national bank to use third party services in the organization process; this is restricted by the limitations contained in GFLA as a whole and through its impact on broker compensation.

Section 24(Seventh) specifically authorizes national banks to make loans. Section 24(Seventh) also authorizes national banks to engage in the more general "business of banking" and activities incidental thereto. The Supreme Court has expressly held that the "business of banking" is not limited to the enumerated powers in section 24(Seventh) and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated. See NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Corp., 513 U.S. 251, 258, n.2 (1995). An activity will be deemed "incidental" to the business of banking if it is "convenient or useful in connection with the performance of" a power authorized under federal law. Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972).

The authority of national banks under section 24(Seventh) permits a national bank to use the services of agents and other third parties in connection with a bank's lending business. Federal banking regulations specifically provide that a national bank may "use the services of, and compensate persons not employed by, the bank for originating loans". 12 C.F.R. § 7.1004(a). Likewise, the regulations permit national banks to utilize the services of third parties to disburse loan proceeds. 12 C.F.R. § 7.1003(b). These agents may undertake these activities at sites that are neither the main office nor a branch office of the bank provided the requirements of those regulations are satisfied. 12 C.F.R. §§ 7.1003(b), 7.1004(b). This authority applies equally to an operating subsidiary of a national bank. 12 C.F.R. §7.1004(b).

Therefore, the provisions of GFLA which have the effect of denying national banks and their operating subsidiaries from being able to use third party mortgage brokers and compensating them for the services they provide as permitted by federal law must be preempted.

For the foregoing reasons, National City requests that the OCC issue a determination, and/or an order pursuant to 12 USC § 371, that GFLA is preempted as it applies to a national bank and its operating subsidiaries, and further restate the long held position of the OCC with respect to the permitted use of third parties to facilitate the making of real estate loans in Georgia and elsewhere.

Very truly yours,

Thomas A. Plant

TAP/gs

